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THE OTHER COSTS OF JUDICIAL ELECTIONS

*Penny J. White**

INTRODUCTION

The landscape of judicial elections has changed dramatically over the last two decades as a result of Supreme Court precedent and lower court litigation focusing on the First Amendment rights¹ of candidates for judicial office,² special interest groups, labor unions, and corporations.³ What was once a rather boring, decorous affair—in which candidates talked about their practice prowess, public service, and military backgrounds—judicial campaigns have become virtually indistinguishable from campaigns for other political offices. Freed from the restraints of judicial ethics codes, it now is commonplace for candidates for judicial office to taut personal views on a host of social issues and to respond to questionnaires that ask them to identify with a particular Supreme Court justice or to announce their position on capital punishment, abortion, gun control, or other hot-button issues.

Television advertising, previously foreign to state judicial campaigns, has become the norm.⁴ Millions of dollars are spent each election cycle on advertisements that promote candidates' personal views

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1. The cases that have followed and largely expanded upon the decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) are of two kinds. First, many courts have ruled upon lawsuits seeking to enjoin the enforcement of judicial campaign speech and conduct provisions. Secondly, many courts and administrative bodies have ruled upon First Amendment defenses raised by judges and judicial candidates alleged to have violated similar ethics provisions. See Penny J. White, “*The Good, The Bad, and the [Very, Very] Ugly*,” and (its Postscript) “*A Fistful of Dollars*,” 38 U. RICH. L. REV. 615, 653–62 (2004).

2. *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002).

3. *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 692–93 (D.C. Cir. 2010) (noting that “because of the Supreme Court’s recent decision in *Citizens United v. FEC*, the analysis is straightforward. There the Court held that the government has no anti-corruption interest in limiting independent expenditures . . .”).

4. Scott Greytak et al., *TV Ads May Influence Judges Long After Election Day*, in *THE NEW POLS. OF JUD. ELECTIONS 2013–14: BANKROLLING THE BENCH* (2015), <http://newpoliticsreport.org/report/2013-14/chapter-3/tv-ads-may-influence-judges-long-after-election-day/>; see also James Sample et al., *TV Ads Continue to Dominate Supreme Court Races*, in *THE NEW POLS. OF*

on social issues.⁵ These advertisements are funded by organizations and interest groups—some identifiable by name, others veiled in ambiguous slogans⁶—that support candidates based upon their perceived political ideologies.⁷ It is not unusual for candidates or their supporters to spend ten times the amount of the annual judicial salary to elect the candidate to the judicial position.⁸

Experienced jurists are targeted often based on a single unpopular or controversial decision. Additionally, by extrapolating from past decisions, ads attack judges projecting how they may rule on future cases that raise matters of social interest.⁹ Candidates whose political ideologies mirror those of deep-pocket special interest groups are sometimes recruited to run against incumbents with the hope that their personal political ideology will carry over to their judicial decision-making. These challengers may receive direct campaign contributions or may be aided less directly, but nonetheless powerfully, by advertising that links the candidate with particular points of view held by the interest group. And while there certainly is no spoken quid pro quo between the financier and the candidate, it often happens that the candidate, once elected, does not disappoint her benefactor.

In the face of this distasteful milieu, public confidence in the judiciary wanes. Any hope that the judiciary will be viewed and appreciated as a unique governmental institution that is untethered from money and uninfluenced by politics is at best diminished, and at worst, lost. Although studies and surveys consistently confirm this negative impact, and scholars address the issue regularly, neither the studies nor the scholarship seem to induce change.¹⁰ Many states continue to

JUD. ELECTIONS 2006 (2006), http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf.

5. See generally *The New Politics of Judicial Elections*, JUSTICE AT STAKE, http://www.justiceatstake.org/resources/the_new_politics_of_judicial_elections.cfm.

6. For example, the organization funded by Don Blankenship, then President of Massey Energy, which resulted in Brent Benjamin being elected to the West Virginia Supreme Court was named “For the Sake of the Kids,” ostensibly because the organization’s campaign ads attacked an incumbent justice for the release of a defendant in a child abuse case.

7. Greytak et al., *supra* note 4, at 6, 26–27.

8. See generally *The New Politics of Judicial Elections*, *supra* note 5.

9. Three judges in Iowa were removed in 2010 following a 2009 decision allowing same-sex marriage under the Iowa Constitution. The issue would not receive federal constitutional scrutiny by the United States Supreme Court until 2015. Compare *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015), with *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009). See *infra* note 24 and accompanying text.

10. See Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections* 6–11, BRENNAN CENTER FOR JUSTICE (2010), <http://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf>; John Feerick et al., *Judicial Elections Report*, COMM’N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS 11–16 (2004), <http://www.nycourts.gov/reports/JudicialElectionsReport.pdf>; Benjamin Woodson, *The Two Opposing*

subject state court judges to some form of public election or, alternatively, to legislative branch oversight.

In addition to the argument that citizens want to elect their judges, maintaining the status quo is the safe alternative for states in light of consistent Supreme Court precedent holding firm on the dictates of the First Amendment in the “political speech” (albeit *judicial* candidate political speech) arena. Although the Supreme Court has acknowledged the negative aspects of judicial elections,¹¹ the Court has declined to consider judicial elections differently than elections for legislative and executive branch positions. The Court has upheld the right of judicial candidates to speak their views, the right of voters to hear their views, and the right of outside groups—including corporations and unions—to fund electioneering communications promoting those views.¹²

While the distastefulness of judicial elections has not led the Court to differentiate between the rules that apply in judicial and other elections, the Court has recognized that once the candidate becomes a judge, different values are implicated. In *Caperton v. A.T. Massey Co.*,¹³ the Court received its first taste of the bitter combination of the *White* and *Citizens United* decisions. In *Caperton*, the issue was not the right to speak, hear, or spend in the political arena, but rather the impact of those rights in the courtroom as evidenced by the behavior of the judge on the bench.¹⁴ The aftermath of the First Amendment victories in *White* and *Citizens United* was the untoward circumstance of a judge deciding a case involving his largest supporter.¹⁵ Justice Kennedy, author of the majority opinion in *Caperton*, embraced judicial disqualification as an antidote to the harms occasioned by an unyielding First Amendment.¹⁶ While the First Amendment would not tolerate restrictions on political speech and campaign expenditures, states could articulate standards of judicial conduct that advance the states’ interest in assuring “citizen’s respect for judgments [which] depends in turn upon the issuing court’s absolute probity.”¹⁷ Even the

Effects of Judicial Elections on Legitimacy Perceptions, ST. POL. & POL’Y Q. 24, 24–26 (2016), <https://doi.org/10.1177/1532440016647410>.

11. See *White*, 536 U.S. at 803–04, 806 (Ginsburg, J. dissenting).

12. *Id.* at 781–83; *Citizens United*, 558 U.S. at 342. Other courts have expanded the rationale underlying corporate expenditures to special interest groups, allowing them to spend unlimited funds on electioneering communications as well. See, e.g., *SpeechNow.org*, 599 F.3d at 693, 698.

13. 556 U.S. 868, 889 (2009).

14. *Id.* at 884–85.

15. *Id.* at 872.

16. *Id.* at 887–89.

17. Justice Kennedy first previewed his support for robust recusal provisions as a means of countering the influence of money on the courts in *White*. 536 U.S. at 793 (Kennedy, J., concur-

Caperton dissent endorsed the freedom of states to adopt broad recusal rules.¹⁸

Thus, the negative impact of dark money on judicial elections is recognized but tolerated due to the significant First Amendment rights of candidates, voters, and corporations. Additionally, the potential negative impact of dark money on judicial behavior is acknowledged but neutralized by the rights of the states to enforce rigid recusal provisions.

This Article first suggests that the costs of judicial elections extend far beyond the millions of dollars spent on judicial campaigns and the concomitant diminished respect for the integrity of our justice system and permeate the system to its core. Judicial elections cause the justice system to be less productive and less efficient. As a result of judicial elections, members of the judiciary are less experienced and less likely to be guided by precedent and by the fundamental principle of *stare decisis*. Thus, judicial elections may produce a judiciary that is unable to fulfill the purpose envisioned for America's courts.

Second, this Article argues that ingrained within our constitutional framework is a mechanism for addressing these problems: a renewed commitment to fundamental due process. If, in reality, we are committed to the principle that "justice must satisfy the appearance of justice,"¹⁹ the due process rights of citizens who bring their disputes to the courts for resolution must be as essential as the First Amendment rights of those who seek public office and those who spend money to put them there.

ring). *See also Citizens United*, 558 U.S. at 359 (noting that the connection between a contributor and candidate could not be eliminated by banning or curbing political speech, but reiterating that states could require judicial disqualification).

18. *See Caperton*, 556 U.S. at 893 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting). Before state courts were prompted to revisit their judicial recusal procedures, most state court recusal rules shared common elements as well as common flaws. They were geared toward discouraging recusal and were largely unfeasible and unworkable. In most states, the initial decision of whether to recuse was made by the judge whose recusal was sought. More often than not, the judge decided the issue orally on the record and was not required to enter a written order. If a written order was entered, it generally contained only the judge's ruling, without analysis or explanation. The refusal to recuse was not appealable until after the case was determined on the merits. Since *Caperton*, and perhaps in reaction to concern that *Caperton* would cause an avalanche of recusal motions, many states have modified and arguably strengthened their recusal provisions, requiring the counsel seeking recusal to file a written motion supported by specific affidavit, and the judge making the finding to file written findings of fact and conclusions of law. *See, e.g.*, Tenn. Sup. Ct. R. 10B, § 1.01. Some states require that the recusal motion be heard by a different judge and most states now allow an interlocutory appeal if the motion is denied. *Id.* § 2.01.

19. *In re Murchison*, 349 U.S. 133, 136 (1955); *Offutt v. United States*, 348 U.S. 11, 14 (1954).

II. THE OTHER COSTS OF JUDICIAL ELECTIONS

A. Inefficiency

At the most basic level, judicial elections require judges to campaign to retain their judicial posts. Judicial campaigns distract judges from the duties of their office. As a judicial candidate, a judge must employ, and may have to learn, a skillset that is much different than what they use on the bench. Depending on the size of the jurisdiction and the seriousness of the opposition, judges may be required to make public appearances, deliver stump speeches, and ride in holiday parades. Even in small jurisdictions or states in which appellate judges run in district-wide rather than state-wide elections, the number of public events that judges feel compelled to attend during election season is staggering. These range from civic club lunches to sponsored “debates,” which further blur the distinction between judicial candidates and other candidates for public office.

Before hitting the campaign trail, judges have to prepare for the campaign. In addition to preparing relevant canned remarks, judicial candidates must consider how they will respond to questions they are asked on the campaign trail. Since *White*, judges can no longer legitimately repeat the once-familiar excuse for declining to answer: “I am sorry, but my code of ethics prohibits me from answering.” Additionally, a judge cannot decide whether and how to respond to campaign questions in the moment. Rather, the judge must determine in advance how she wants to run her campaign. She may need to study judicial ethics opinions or consult with state judicial ethics boards, election advisors, or judicial mentors. In serious situations, a judge may be prompted to seek a formal or informal ethics opinion. And even with the best preparation, questions will still be posed that the judge is uncertain how to answer.

When a judge is preparing a campaign talk, considering potential ethical issues, or simply traveling to a campaign event, the judge is off the bench and away from the task of judging. Whether or not they contribute to the campaign coffers, the public pays for the judge’s campaign with the loss of the judge’s time on the bench. In the best-case scenario, judges become judges by day and politicians by night; in the all too frequent worst-case scenario, the judges’ campaign activities take precedence, causing dockets to stall and cases to linger until after the election is decided.²⁰ Realistically, not all campaign activity

20. See *infra* note 23 and accompanying text. As one example, the five justices on the Tennessee Supreme Court wrote, on average, 7.5–8 opinions each per year in the 9 years preceding the 2014 election, and an average of 6 opinions for the year of, and following, the 2014 election.

can occur after court adjourns for the day. Even the most conscientious public-service oriented judge fields inquiries during the day, attends campaign luncheons, and adjourns court early or cancels something on her docket to make an event. Simply put, incumbent judges have to work to keep their seat while being paid their judicial salary.

Even when a judge manages to be in the office or on the bench during election season, the judge is necessarily distracted. This is particularly true when the judge is the subject of unfair opposition campaigning and attack ads. The judge may be concerned about the negative campaign's impact on her family; in extreme cases, the judge may fear that the portrait painted of her may spark extreme reactions or even violence.²¹

B. Lack of Productivity

When an incumbent trial or appellate judge is on the campaign trail and away from the bench, individual efficiency will likely decline. Additionally, when an appellate judge is forced to campaign, the entire appellate court's productivity will be affected. The appellate judge may fall behind in drafting opinions or reviewing the drafts of others, or may refrain from deciding certain cases, knowing that the vote could be used by the opposition candidate.²² Appellate judges may

21. Examples range from name-calling and bullying to encouraging voters to visit judges' homes and call their personal cell phones. See Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CENTER FOR JUSTICE (2015) http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (including examples of attacks on Justice Lloyd Karmier, Illinois; Justice Louis Butler, Tennessee; Justice Janet Stumbo, Kentucky; and Justice Bridget McCormack, Michigan). As Justice Sandra Day O'Connor has stated, "[c]riticism is fine; retaliation and intimidation are not." Sandra Day O'Connor, *A Fair, Impartial and Independent Judiciary*, NAT'L VOTER, Feb. 2008, at 8.

22. Generally, the circumstances that cause significant delay in the issuance of an appellate court opinion are unknown unless a sitting judge chooses to comment. For example, Justice Donald Corbin of the Arkansas Supreme Court, whose term ended on December 31, 2015, revealed in an interview that the Arkansas Supreme Court had voted to strike down a state law ban on same-sex marriage in a case they heard on November 20, 2014. But rather than issue the ruling, the court held the decision for several months, awaiting the United States Supreme Court's decision in *Obergefell v. Hodges*. *Ex-justice: State Supreme Court Vote to Strike Ban on Gay Marriage, Held Ruling*, ARK. NEWS, Nov. 11, 2015, <http://www.arkansasnews.com/news/arkansas/ex-justice-state-supreme-court-voted-strike-ban-gay-marriage-held-ruling>. In other circumstances the reason for delay may be unknown, but looking at the delay in relation to other events may be telling. For example, a same-sex couple who filed for divorce in Texas on February 10, 2010, were not definitively divorced until June 19, 2015, when the Texas Supreme Court finally affirmed the trial court and intermediate appellate court's orders, and after one member of the couple had died. *State v. Naylor*, 466 S.W.3d 783 (Tex. 2015), *aff'g* 330 S.W.3d 434 (Tex. Ct. App. 2011); see Billy Corriher & Eric Lesh, *Marriage Equality Cases Languish Before Elected Judges*, L.A. TIMES, June 1, 2015, <http://www.latimes.com/opinion/op-ed/la-oe-corriher-lesh-gay-marriage-lawsuits-20150601-story.html>. The lower court granted the divorce in court on Febru-

innocently delay issuing opinions in order to give their colleague more time for review, or may strategically delay issuing opinions in controversial or publicized cases.²³

When an appellate judge is being challenged, the appellate court may delay issuing decisions until after the election for reasons that are less offensive than strategic delay. For example, in close cases and cases raising novel legal issues, the appellate panel may want to assure that the decision is reached by judges who will continue to serve. Additionally, the panel may have been divided on the outcome of the case and may anticipate that the division will clear if a new judge is elected. Additionally, in a significant case, the presiding judge may prefer that a decision be reached by judges who remain on the bench after the election. The potential for having a significant case decided by a judge who was defeated in an election is particularly acute when more than one appellate judge is on the ballot at the same time.²⁴

ary 10, 2010, and denied an intervention motion filed by the state the following day. The denial of the motion was finalized by the trial court in a written order entered on March 31, 2010. The Texas Court of Appeals affirmed the trial court's order on January 7, 2011, and the state appealed to the Texas Supreme Court. Oral argument was heard by the Texas Supreme Court on November 5, 2013, but a decision was not rendered until nineteen and a half months later, on June 19, 2015. *State v. Naylor*, 466 S.W.3d 783 (Tex. 2015). Between oral argument and the issuance of the decision, on November 4, 2014, three of the justices, who ultimately sided with the majority in affirming the trial and appellate courts, ran for and were re-elected to their seats.

23. Regardless of whether it is for valid or strategic reasons, delay is problematic. Two fairly recent state court examples stand out. In 1998, Hugh Caperton sued Massey Energy Company in West Virginia. In August 2002, after a seven-week trial, the jury awarded Caperton \$50 million. *Caperton v. A.T. Massey Coal Co.*, No. 98-C-192, 2005 WL 5679073, at *5 (W. Va. Cir. Ct. Nov. 12, 2009); *History of the Case*, JUSTICE AT STAKE (Jan. 22, 2018), http://www.justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/history-of-the-case/. While the case was on appeal, Don Blankenship, the chief executive officer of Massey, through organizations, spent \$3 million in support of Brent Benjamin, a candidate for West Virginia's high court. Five years later, in 2007, after refusing to recuse himself, Justice Benjamin voted to reverse the jury verdict. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008), *rev'd and remanded*, 556 U.S. 868 (2009). The decision not to recuse was reversed by the United States Supreme Court in 2009 and the case was returned to the West Virginia courts. *Caperton*, 556 U.S. at 872. In a case with even higher stakes, the Illinois Supreme Court delayed an appeal for a similar amount of time following a trial court verdict in a class action in which \$1.05 billion in damages was awarded against State Farm Mutual Automobile Insurance Company. *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 97-L-114, 1999 WL 955543, at *1 (Ill. Cir. Ct. Oct. 8, 1999). Although oral argument was held in the Illinois Supreme Court in May 2003, the court did not rule until August 2005, after a newly-elected justice who received over \$1 million in campaign funds from donors aligned with State Farm had joined the court. The trial court verdict was reversed and the United States Supreme Court denied a petition for certiorari. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, *cert. denied*, 547 U.S. 1003 (2006).

24. In 2009, the Iowa Supreme Court, in a unanimous decision, established the right to same-sex marriage under the Iowa Constitution. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). This decision set off a campaign to unseat three of the seven justices facing a retention election the following year. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, NOV. 4, 2010, at A1. The three justices were targeted by conservative interest groups, many from

C. *Inexperience*

1. *Trial Judge Learning Curve*

Stated simply, judging is a learned rather than an innate skill. How judging is learned and what exactly is involved is hard to pinpoint, but Justice Cardozo characterized judging as acquired knowledge, noting that a judge learns “from experience and study and reflection.”²⁵ Judging is not “staked out for [the judge] upon a chart. [The judge] must learn for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art.”²⁶ A judge must honor restrictions “established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.”²⁷ While others disagree and espouse more of a “realist” attitude about judging,²⁸ for purposes of this discussion, what is most important is not specific models of jurisprudence, but rather an acceptance of the proposition that our justice system is premised upon the idea that judges make decisions based upon knowledge and application of the law—not merely based on personal choice.²⁹

Having been a “baby judge” myself (the phrase used to refer to new members of the judiciary), I have experienced first-hand the transition from lawyer to trial judge, from trial judge to intermediate appellate judge, and from intermediate appellate judge to supreme court justice. Additionally, as a state court judicial educator for the last twenty-five

outside of the state, who collectively raised money to oust the judges. When Chief Justice Marsha Ternus, Justice David Baker, and Justice Michael Streit were defeated in their retention elections, one commentator expressed that “a combined three decades of experience . . . ended in a single day.” Sharyn Jackson, *Iowa Gay Marriage Ruling a Turning Point for Justices*, USA TODAY, Apr. 2, 2014, <https://www.usatoday.com/story/news/nation/2014/04/02/iowa-gay-marriage-ruling-a-turning-point-for-justices/7237453/>. Similarly, Tennessee Senate Speaker Ron Ramsey, joined by “Tennesseans for Judicial Accountability,” led a politically-motivated campaign to unseat three of the five justices of the Tennessee Supreme Court facing a retention election in 2014. Alan Blinder, *Conservatives See Potential in Tennessee Judicial Race*, N.Y. TIMES, Aug. 6, 2014, at A10. Chief Justice Wade, Justice Connie Clark, and Justice Sharon Lee narrowly retained their seats. Brian Haas, *Tennesseans Vote to Retain Supreme Court Justices*, TENNESSEAN, Aug. 7, 2014, <https://www.tennessean.com/story/news/politics/2014/08/07/tennesseans-vote-retain-supreme-court-justices/13756359>.

25. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921). Justice Cardozo describes the judge as legislating “between gaps,” filling in the “open spaces in the law.” *Id.* at 69.

26. *Id.* at 113–14.

27. *Id.* at 114.

28. JEROME FRANK, *COURTS ON TRIAL* 401, 403 (1950).

29. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in *JUDGES ON JUDGING* 95, 96 (David O’Brien ed., 5th ed. 2017).

years, I have witnessed, assisted, and mentored hundreds of others in their journey to acquiring the aspired status of a learned judge.

The transition from bar to bench is cumbersome and difficult. Lawyers moving from practice to the bench have to shift from advocate to neutral arbiter. They must assume the passive role of sitting and watching the trial unfold rather than orchestrating and directing the action. For trial lawyers, this adjustment may be particularly difficult in cases in which the parties are not ably represented. As Judge Marvin E. Frankel has observed, the “adversary system poses a threat to neutrality.”³⁰ Judges who disagree with an advocate’s trial strategy or are pained by counsel’s ineptitude may find sitting passively by and “calling balls and strikes” almost unbearable. The gap between the active role played by the trial lawyer and the passive role of a trial judge is great indeed. New trial judges have to learn to allow the parties to try their cases, and to hold their tongue lest they make a statement that interferes with the jury’s province of finding the facts.

Equally dramatic is the shift from manipulating rules of evidence and procedure to applying them fairly, equally, and hopefully as written. A trial lawyer is accustomed to making alternative evidentiary objections, hoping the judge will select a reason and sustain the objections. But as a trial judge, the former lawyer must analyze each objection under the applicable rule.³¹

Lawyers who leave transactional practices or the government arena to take the bench may face an even steeper learning curve as they familiarize themselves with trial procedure, docket control, and jury management. The learning curve is also steep for judges who have specialized in their practice. This is particularly true in rural areas, where judges sit in general jurisdiction courts, often without the aid of judicial clerks, handling both civil and criminal dockets. Rarely will a judge be prepared adequately in all areas of the law and often a judge will have no exposure whatsoever to certain common legal disputes. This occurrence is encountered quite frequently because of the tendency of prosecutors to become judges, leaving them ill-equipped to deal with a whole range of commercial disputes, family law matters, and general civil litigation.

30. Marvin E. Frankel, *The Adversary Judge: The Experience of the Trial Judge*, in *JUDGES ON JUDGING* (David O’Brien ed., 5th ed. 2017).

31. Trial judges seem to crave more training on the Rules of Evidence than any other subject matter. The National Judicial College, for example, the nation’s largest provider of judicial education programs for state-court judges, offers various evidence programs each year for state court judges, including Evidence in a Courtroom Setting, Advanced Evidence, Scientific Evidence, and many online courses on evidentiary topics as well. *THE NATIONAL JUDICIAL COLLEGE 2018 COURSE CALENDAR*, <http://www.judges.org/2018courses/> (last visited Jan. 8, 2018).

Like any new employee, a new judge must adjust to the skills required by the job, earning her salary while learning how to do the job. The more frequently the members of the judiciary change, the more often new judges engage in on-the-job training. During this training period, delay is common because of the new judge's lack of confidence or uncertainty in applying the law. A trial judge that is not prepared to render a decision³² may take cases under advisement, despite the common admonition by veteran judges not to do so. The judge may be in one of the many jurisdictions that does not fund judicial clerks for general jurisdiction judges. Without judicial clerks and with a mounting docket, the trial judge may be unable to acquire the necessary chambers time to deliberate and reach a decision—leaving the parties in a state of uncertainty. Conversely, the new judge may adhere to colleagues' admonitions to rule from the bench, but may do so by relying on her gut. When the trial judge rules from the hip, she may err, prompting an appeal, or may fail to make the requisite findings, necessitating a remand after appeal.³³

2. *Appellate Judge Learning Curve*

If the transition from lawyer to trial judge is difficult, then the transition from trial judge to appellate judge seems, at times, unmanageable. Although the move from an intermediate appellate court to a state court of last resort may seem like a small step in comparison, that move also involves a complex transition in which the role of the judge is altered dramatically. The vast majority of states' intermediate appellate courts are obliged to hear all appeals as of right and, in doing so, may correct legal error. Conversely, most state courts of last resort control their docket by exercising discretionary review in lim-

32. Most commentators agree that delay in rendering a decision not only harms the litigants, but also decreases the quality of justice in individual cases and the overall respect for the justice system. See Hans Zeisel, Jr. et al., *DELAY IN THE COURT* (2d ed. 1978). Nonetheless, decisional delay persists as one of the most common criticisms of the American justice system as well as one of the most common grounds for judicial discipline. See NAT'L CTR. FOR STATE COURTS, *JUDICIAL CONDUCT REPORTER* 1 (Winter 2010) (collecting cases from numerous jurisdictions).

33. Appellate courts are unable to rule when a trial judge has failed to make factual findings as required by law. 9C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2571, 219 (3d ed. 2005) (noting that specific findings by trial court facilitate appellate review); see *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 101–02 (2d Cir. 2008) (noting an appellate court's ability to “mine the record for facts,” but remanding to require the trial judge to make factual determinations); *In re Picht*, 403 B.R. 707, 713–14 (B.A.P. 10th Cir. 2009) (recognizing that parties are better able to determine whether to appeal when a trial court fulfills its fact-finding function because “[m]any a well-written decision has quelled an appeal”); *F & M Mktg. Servs., Inc. v. Christenberry Trucking and Farm, Inc.*, No. E2015-00266-COA-R3-CV, 2015 WL 6122872, at *3 (Tenn. Ct. App. Oct. 19, 2015) (illustrating the problem when trial judges are either unaware or unwilling to meet their obligations).

ited circumstances, such as when a lower court overturns a state statute or interprets the state constitution. The role of state courts of last resort *is not* to correct all legal error, but rather to address important issues of law, secure uniformity of decision where conflicts exist, and exercise supervisory authority. Accepting this jurisdictional limitation may, in and of itself, prove challenging for the new member of the court.³⁴ But despite the steepness of each of these learning curves, the most demanding transition by far is for those who rise directly from practice to a seat on a state supreme court.

The new appellate judge enters an existing group of judges. She is not only a novice at her job, she is also an outsider. The existing members of the court, or the section or panel, have developed personal and professional relationships with one another. Not only do the judges know one another's positions on recurrent legal issues, they know one another's staff, clerks, and family. They likely know on which issues their colleagues can bend and on which issues they will stand firm.

Even when the new appellate judge remains abreast of the state's appellate case law, the new judge cannot appreciate the personal or professional dynamics between the judges. The new judge has not heard the debates in the deliberation room, nor read drafts in which the opinions were hammered out. For at least the first few months, the new appellate judge is an alien in a new world.

Even if the new appellate judge was previously a trial judge, she must learn a new skillset when she moves to the appellate bench. She now must shift from being decisive to being a consensus-builder. The appellate judge's task is to "persuade, not pontificate."³⁵ Additionally, applying the limitations of appellate review can be tricky and even frustrating. Accepting the facts as found, as well as resisting the urge to reassess them, demands discipline. Acceding to the very limited role that intermediate appellate judges play in the vast majority of cases takes effort, particularly when the new appellate judge has served previously only as an advocate or as a finder of fact in non-jury

34. Trial lawyers, trial judges, and even intermediate appellate judges who have ascended to the highest state court immediately face the limitations on that court's jurisdiction. Because most state courts of last resort exercise discretion in determining which cases to hear, these courts are not so-called "error-correction" courts. Although the impact of a particular decision may correct an error of a lower court, because of the limitations on jurisdiction, the courts of last resort do not concern themselves with the vast number of legal errors made by trial and appellate judges. Even in cases in which the state's procedural, statutory, or constitutional rules give the state's highest court the discretion to hear a case, the grant of review remains subject to a vote of the members.

35. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186 (1992).

matters. Learning that an appellate judge must only confirm the trial judge's application of the law and must leave in place erroneous applications when they are deemed harmless may leave the novice appellate judge feeling more like a robot than an integral part of the institution of justice.

Individual judicial tasks may also be difficult for new judges. Many lawyers rarely write, and even those who do are accustomed to writing in an advocate's voice. Lawyers who become judges must learn to write in a different voice to different audiences. The veteran appellate judges may mentor and help, but they will also scrutinize the new judge's work individually and through their judicial clerks, taking extra time to study drafts, review citations, and test the new judge's logic. In addition to the extra time and resources that this takes, the dynamic may impact the new judge's confidence as well as her future interactions and relationships with her colleagues.

Finally, the new judge's experience on the appellate bench will be impacted by the very nature of appellate courts. Appellate courts hear and decide cases in panels, or *en banc*, primarily because of the underlying belief that the quality of the decision improves when members of a multi-judge panel share their insights, combine their resources, and collaborate on the decision. But finding one's place within the group may prove challenging to the new judge. As noted, existing members of the court will have existing relationships. Moreover, they may have opposed the new judge's election, particularly if the new judge replaced a former colleague. The incumbent judges may have drawn conclusions about their new colleague based on the tone and content of the campaign. The new member may enter the fold having been prejudged by her colleagues in a way that hampers the development of trust, confidence, and collegiality. If the new judge has displaced a colleague, conflict may be inevitable and even extreme.³⁶ When the campaign was hard-fought, the new judge may be facing ethics complaints that interfere with the transition from candidate to appellate judge.³⁷ When the judge is elected to the body that also supervises the judicial ethics proceedings, the subsequent proceedings may be extremely sensitive and awkward.³⁸

36. Wis. Judicial Comm'n v. Prosser, 817 N.W.2d 830, 832 (Wis. 2012).

37. Wis. Judicial Comm'n v. Gableman, 784 N.W.2d 605, 631 (Wis. 2010).

38. *Id.*

D. Lack of Adherence to Precedent and Lack of Respect for the Principle of Stare Decisis

Because state courts handle the vast majority of legal disputes in the country—some ninety-seven percent of cases—they play an influential role in shaping and stabilizing citizens’ lives and commercial interests. A state court’s interpretation of state constitutions, statutes, and the development of the common law is essential to enable citizens and businesses to conform their conduct to the law. In fact, the common law process has been deemed the “core element in state court decision-making.”³⁹ Because state courts adjudicate the vast majority of disputes, certainty and adherence to precedent is critical to individuals and institutions alike. Courts must interpret common law in a way that promotes stability and allows individuals and corporations to predict impact. Therefore, the application of the principle of stare decisis and adherence to precedent is essential.⁴⁰

Adherence to precedent is the central feature of our adversarial system. “[T]he virtues of the doctrine [of stare decisis] encompass efficiency, stability, reliability, and predictability, legitimacy and the appearance of impartiality, non-capriciousness, and consistency. Stare decisis is also recognized as supplying some guarantee of substantive equality.”⁴¹ When courts frequently reverse course or strike down legislation, the decisions always have the potential to destabilize the economy and to disrupt family life.

Studies establish that stare decisis and precedent are more important to judges who have a judicial mindset. A judicial mindset is defined as the quality of thinking about a legal issue from a neutral, detached, and unbiased point of view.⁴² The mindset of judging is acquired over time, and some who come to the bench to promote an ideological agenda never accomplish nor desire that mindset. Thus, new judges—those who have not yet acquired the mindset of judging—are less likely to adhere to precedent or to honor the principles of stare decisis. Moreover, unlike novice judges, experienced judges have been shown to be more constrained by the principles of stare decisis even in situations in which they would prefer a different hold-

39. Judith S. Kaye, *State Court at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, in *JUDGES ON JUDGING* 334, 335 (David O’Brien ed., 5th ed. 2017).

40. *Id.*

41. Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 274 (2001).

42. See Stefanie Lindquist, *Stare Decisis as Reciprocity Norm*, in *WHAT’S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT* 186 (Charles Geyh ed., 2011).

ing.⁴³ Experienced judges do so, in part, because of established relationships with their colleagues on the bench and a desire to maintain a collegial environment.⁴⁴ A judge's motivation to maintain relationships and to promote collegiality is influenced greatly by the length of the term as well as the judge's tenure on the bench.⁴⁵

A study of courts in Alabama, New Jersey, and Florida identified an "opportunistic overruling hypothesis" that indicates courts overturn precedent more frequently when the bench has changed.⁴⁶ In addition to more regularly overturning precedent, studies show that courts with frequent change in composition may overturn precedent more quickly than courts with more steady membership.⁴⁷ Thus, "[t]o the extent that one values strong adherence to precedent, institutional structures that favor that result include judicial appointments with longer tenure lengths and a smaller court."⁴⁸

Two related group dynamic phenomena may impact the novice judge's lack of respect for precedent. The so-called "longevity effect" impacts the degree of cooperation that members of a group will display.⁴⁹ When most members of a group anticipate that they will be making joint decisions for a substantial period of time, that recognition impacts their behavior, leading them toward cooperation and away from conflict.⁵⁰ This cooperation benefit becomes discounted when members anticipate that their relationships will be less lengthy or when change is anticipated.⁵¹ Additionally, studies demonstrate that appellate courts and individual judges are influenced by a so-called "panel effect."⁵² Studies of federal appellate judges have found that decisions of appellate judges are influenced not only by the individual judge's opinion, but also by the preferences of the judge's panel

43. *Id.* at 175–76, 186.

44. *Id.* at 186.

45. *Id.* at 177 (indicating that judges with shorter terms, or those nearing retirement, tend to rule more sporadically).

46. Stefanie A. Lindquist & Kevin Pybas, *State Supreme Court Decisions to Overrule Precedent, 1965-1996*, 20 *THE JUST. SYS. J.* 17 (1998).

47. *Id.* at 32–33 (noting that "since 1965, the Alabama Supreme Court has overturned 62.7 percent of its overruled decisions within 10 years of their being decided." No systematic study has been undertaken to determine whether there is a more benign justification for this quick turnaround, such as correcting drafting errors.).

48. See Lindquist, *supra* note 42, at 187.

49. *Id.* at 177.

50. *Id.*

51. *Id.*

52. The studies consider the panel effect on federal appellate judges who, unlike most of their state counterparts, have life tenure. No studies determining whether that distinction would eliminate or reduce the panel effect on state appellate judges have been completed.

colleagues.⁵³ While the panel effect phenomenon is not clearly understood, studies indicate clearly that “panel effects do not result from a dynamic wholly internal to the three judges hearing a case, but are influenced by the environment in the circuit as a whole as well.”⁵⁴ Thus,

Bargaining and compromise on the part of the majority judges is more likely to occur when the panel minority is aligned with the circuit court as a whole. Moreover, a minority judge is likely to stand her ground and refuse to go along with the majority’s preference when she is more closely aligned with the circuit than with the majority.⁵⁵

As appellate judges change, appellate courts change. Frequent change in the composition of the appellate judiciary results in a less efficient, less productive, and less experienced appellate court. Recurrent change at the appellate level can also produce a court whose members lack respect for precedent and discount the importance of the principles of stare decisis.

III. THE GREATEST COST: THE LOSS OF THE DUE PROCESS GUARANTEE OF A FAIR TRIAL IN A FAIR TRIBUNAL

Inefficiency. Lack of productivity. Inexperience. Lack of respect for precedent and the principles of stare decisis. These are some of the serious, yet rarely discussed, costs of judicial elections. Should discussion of these costs inform our general concerns about the negative impact of judicial elections? Might these issues be integrated into the framework that surrounds our discussion of judicial election reform? Does the fact that judicial elections also result in less efficient, less productive, less experienced, less predictable, and less stable courts enhance the likelihood that judicial elections themselves violate due process? I have suggested an affirmative answer to these questions, arguing that these costs must be added to the formula used to evaluate whether judicial elections themselves violate due process of law.⁵⁶

At its core, due process embraces a fair trial in a fair tribunal.⁵⁷ The common thread joining century-old precedents that address the pa-

53. Pauline T. Kim, *Deliberation and Strategy on the United States Court of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PENN. L. REV. 1319 (2009).

54. *Id.* at 1375 (noting that clearly “both minority and majority judges on ideologically mixed panels differ in their voting behavior depending upon how the preferences of the circuit as a whole are aligned relative to the panel members”).

55. *Id.* at 1369.

56. Penny J. White, *A Matter of Perspective*, 3 FIRST AMEND. L. REV. 5 (2004); Penny J. White, *Musings on White*, 38 U. RICH. L. REV. 626 (2004).

57. When the former Solicitor General began his oral argument in *Caperton* with the quote “[d]ue process requires a fair trial in a fair tribunal,” it provoked an immediate question by

rameters of the due process guarantee is that a fair trial in a fair tribunal embraces more than fundamental procedural safeguards. In addition to the basic right to notice and a hearing, a fair trial in a fair tribunal requires a fair and neutral arbiter and decisional integrity.⁵⁸

For example, judges who take bribes violate due process because implicit in the concept of due process is the notion that a fair tribunal is presided over by a fair arbiter. But due process demands more than a non-corrupt judge—it demands a competent judge. This aspect of due process accounts for the removal of judges from office who are mentally incompetent as well as the restrictions on non-lawyers serving as judges.⁵⁹ Due process also requires the timely administration of justice as evidenced by constitutional and statutory guarantees to a speedy trial.⁶⁰ Even in the civil context, there is general adherence to the notion that “justice too long delayed is justice denied.” Our justice system values efficiency not just for efficiency’s sake, but based on an understanding that disputes must be resolved promptly to enable parties to proceed and the system to retain its legitimacy.

IV. CONCLUSION

The cases that have brought about the existing landscape for judicial elections share a common, singular focus—the rights secured by the First Amendment. Although the cases have been brought by different categories of litigants—candidates for judicial office, voters, party leaders, and corporate spenders—each litigant has stood on ei-

Justice Scalia. “Who says?” Justice Scalia asked. However, Olson’s statement was undergirded by century-old precedent. Transcript of Oral Argument at 3, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22).

58. *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997).

59. Twenty-eight states prohibit a non-lawyer judge from trying a defendant for an offense punishable by a period of incarceration. Petition for Writ of Certiorari, *Davis v. State*, 2016 WL 4010822, at *57a–67a (No. 16-123) (Appendix I); *see, e.g., State v. Mitchell*, 596 S.W.2d 779, 788 (Tenn. 1980) (holding that the right to counsel becomes “as sounding brass, or a tinkling cymbal” if there is not a “concomitant right to a trial before a qualified judge”); *State v. Dunkerley*, 365 A.2d 131, 132 (Vt. 1976) (holding that “defendant has a right to representation by a legally qualified attorney [and that] to require a lesser standard of judicial authority would be to defeat that constitutional purpose”); *Gordon v. Justice Court*, 525 P.2d 72, 79 (Ca. 1974) (holding that “due process demands that henceforth a defendant charged with an offense carrying a possible jail sentence must be provided with an attorney judge to preside over the proceedings”). Fourteen others allow non-lawyer judges to try the defendant facing incarceration initially, but only if there is a right to a trial de novo by a law-trained judge. Petition for Writ of Certiorari, *Davis v. State*, 2016 WL 4010822, at *57a–67a (No. 16-123) (Appendix I). But eight states have allowed non-law judges to try defendants facing incarceration without a de novo review by a law-trained judge. *Id.* (listing Arizona, Colorado, Montana, Nevada, New York, South Carolina, Texas, and Wyoming as fitting into this category).

60. U.S. CONST. amend. VI; 18 U.S.C. § 3161 (2012); *Kloper v. North Carolina*, 386 U.S. 213 (1967).

ther the right to speak, hear, or spend. As a result, we generally have viewed the problems occasioned by dark money in judicial elections through the perspective of a singular lens—the lens of the ubiquitous First Amendment. In so doing, we have neglected adherence to a constitutional principle of equal importance—the right to due process of law. Even accepting the First Amendment rights of judicial candidates, citizens, parties, and corporations, we still must determine how those free speech rights are to be reconciled when they conflict with other constitutional rights. Are free speech rights to be treated as rights that dominate all others? Or must they too yield when in conflict with the equally compelling right of litigants to a fair trial in a fair tribunal? If, as Justice O’Connor lamented in *White*, “the very practice of electing judges undermines [the compelling state] interest” in having “an actual and perceived . . . impartial judiciary,”⁶¹ then perhaps (as Justice Scalia offered in jest), “the practice of electing judges is itself a violation of due process.”⁶²

If we are committed to the Constitution’s guarantee of due process of law, it is time to address the elephant in the room. Judicial elections produce a justice system that is impacted by dark money, influenced by politics, and undermined by special interests. Judicial elections have other costs that compromise fairness and encourage disrespect for the courts—inefficiency, lack of productivity, inexperience, and diminished respect for precedent. Given these costs of judicial elections, the lurking question remains the same: how do we reconcile the present-day system of selecting judges with the fundamental promise of due process of law?

61. *Republican Party of Minn. v. White*, 536 U.S. 765, 788–89 (2002) (O’Connor, J., concurring) (describing judges in elections as having a “personal stake” in the outcome of cases and as being motivated to “favor donors” and noting that judges must be aware that certain rulings will hurt their reelection efforts).

62. *Id.* at 782.

