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## A Tale of Two Bills: A Four-Factor Consideration of Pennsylvania's Legislative Response to Judicial Legitimacy Concerns

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# A Tale of Two Bills: A Four-Factor Consideration of Pennsylvania’s Legislative Response to Judicial Legitimacy Concerns

*Emily Peffer\**

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## I. INTRODUCTION

“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>1</sup>

This article examines Pennsylvania’s present judicial selection method and two proposed amendments to Pennsylvania’s Constitution that would change the method of selecting the state’s appellate judiciary.<sup>2</sup> These two changes to appellate judicial selection and their impact on judicial legitimacy are explored against the backdrop of existing scholarly work and a recent controversial decision from the Supreme Court of Pennsylvania. The issues that arise surrounding judicial selection methods are not new to legal scholarship.<sup>3</sup> In fact, the best method of judicial selection has been discussed since the first, independent, state court systems were established in the United States.<sup>4</sup> Pennsylvania’s position in this ongoing conversation is unique due to the length of time that Pennsylvania’s appellate judiciary has existed and the various selection methods that have been adopted and disavowed.<sup>5</sup>

Even where the selection process is not specifically at issue, legitimacy issues can arise regarding perceived un-judicial behavior, and those perceptions can trigger renewed discussions about changing a state’s method of judicial selection.<sup>6</sup> In Pennsylvania, the current renewal of such discussion is especially noticeable because the public’s perception has been impacted by a recent, controversial Pennsylvania Supreme Court decision.<sup>7</sup>

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1. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS’N 2010).

2. See H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019) (House Bill 111); H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019) (House Bill 196).

3. See, e.g., Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 74–75 (2007); J. Christopher Heagarty, *Selection of State Appellate Judges: Judicial Campaigns and Voters’ Experience: Public Opinion and an Elected Judiciary: New Avenues for Reform*, 39 WILLAMETTE L. REV. 1287, 1288 (2003); Diane M. Johnsen, *Building a Bench: A Close Look at State Appellate Courts Constructed by the Respective Methods of Judicial Selection*, 53 SAN DIEGO L. REV. 829, 832–33 (2016); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 38 (1995).

4. See Heagarty, *supra* note 3, at 1288.

5. Sandra Schultz Newman & Daniel Mark Isaacs, *Historical Overview of the Judicial Selection Process in the United States: Is the Electoral System in Pennsylvania Unjustified?*, 49 VILL. L. REV. 1, 6–7 (2004).

6. See, e.g., *Republican Party v. White*, 536 U.S. 765 (2002) (triggering renewed discussion regarding political speech of judges); *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. 2018) (concerning unconstitutional gerrymandering and reinvigorating conversations about judges’ political motivation).

7. See *League of Women Voters*, 175 A.3d 282; Mike Folmer, *Judicial Activism by Pa. Supreme Court on New Congressional Maps*, YORK DAILY REC. (Feb. 26, 2018, 11:26 AM),

Although many judges and Justices have “strong political connections,” there is generally an expectation that the judiciary be independent and fair.<sup>8</sup> These qualities create a reputation of legitimacy and are not typically expected of the more political branches of our government.<sup>9</sup> Where a judicial decision contradicts the public perception of legitimacy, there is a response.<sup>10</sup> This response can come in the form of public outcry in the media, as well as through legislative action.<sup>11</sup>

This article will address the public’s recent outcry following a controversial 2018 Pennsylvania Supreme Court decision and Pennsylvania’s legislative response; both of which, unfortunately, appear to indicate a lack of faith in the judiciary.<sup>12</sup> Part II articulates the history of the Unified Judicial System of Pennsylvania. Part II.A then explains the current method of appellate judicial selection: state-wide partisan elections. Parts II.B and II.C next examine two proposed amendments to the state Constitution that are currently dueling to become the new method by which Pennsylvania selects its appellate judiciary. Part III of this article proposes four factors, based on guidance from both judicial opinions and scholarly articles, that, if met, should foster the public’s perception of legitimacy for the bench. Part III continues on to test the impact of the proposed amendments through the lenses of these four factors to determine whether the amendments would generate more or less faith in the judiciary.

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<https://www.ydr.com/story/opinion/columnists/2018/02/26/judicial-activism-pa-supreme-court-new-congressional-maps/373036002>; Paul Muschick, *Pennsylvania Gerrymandering Case Shows Need for Merit Selection of Appellate Judges*, THE MORNING CALL (Feb. 21, 2018, 8:00 AM), <https://www.mcall.com/opinion/mc-opi-pa-gerrymandering-supreme-court-merit-selection-muschick-20180220-story.html>.

8. Raymond J. McKoski, *The Political Activities of Judges: Historical, Constitutional, and Self-Preservation Perspectives*, 80 U. PITT. L. REV. 245, 298 (2018) (“Judges are experts in politics. Many have a history of political activity before assuming the bench and many have ‘strong political connections.’ . . . The reality is that judges are frequently politically inclined.”).

9. See Neal Devins & Nicole Mansker, *The Judiciary and the Popular Will: Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 456 (2010); Johnsen, *supra* note 3, at 831.

10. See, e.g., *Merit Selection System*, PENNSYLVANIANS FOR MOD. CTS., <https://www.pmc.org/merit-selection-reform.html> (last visited Nov. 2, 2019); Mary Beth Schluckebier, *We Should Keep Partisan Politics Out of Pennsylvania’s Judicial Elections*, WHYY (Nov. 7, 2017), <https://whyy.org/articles/keep-partisan-politics-pennsylvanias-judicial-selection/>.

11. See Muschick, *supra* note 7; Schluckebier, *supra* note 10.

12. See *League of Women Voters*, 175 A.3d 282; Folmer, *supra* note 7; Marc Levy, *GOP Eyes Shakeup of Pennsylvania’s Democratic-Majority Court*, ASSOCIATED PRESS NEWS (Jan. 18, 2020), <https://apnews.com/0fc8dbdf1f455e7d457ab6d2c5ce413d>.

## II. BACKGROUND

Pennsylvania has experienced variations of both appointed and elected appellate judiciary methods.<sup>13</sup> Since 1968, Pennsylvania follows a partisan election selection method, with a “yes/no” retention election.<sup>14</sup> However, Pennsylvania’s judiciary has taken several decades to reach its current selection method.<sup>15</sup> About three centuries ago, in 1722, the Supreme Court of Pennsylvania was established by the Judiciary Act.<sup>16</sup> The creation of the Supreme Court, along with the Court of Common Pleas in Philadelphia, Bucks, and Chester Counties, set the stage for the later creation of Pennsylvania’s Unified Judicial System.<sup>17</sup> In 1895, the General Assembly established the Superior Court.<sup>18</sup> The initial purpose of the Superior Court was to ease the workload of the Supreme Court and establish statewide judicial districts.<sup>19</sup> In 1968, nearly 250 years after the initial establishment of the Supreme Court of Pennsylvania, the state Constitution was amended to create the Commonwealth Court and reorganize the state’s lower court system.<sup>20</sup> This amendment established Pennsylvania’s Unified Judicial System as we know it today.<sup>21</sup> Since its establishment, Pennsylvania’s judicial structure—specifically the process by which judges and Justices become a part of that structure—has become the topic of substantial scholarly discussion.<sup>22</sup> But, conversations focused on politics in the selection of a state’s appellate judiciary and concerns regarding judicial legitimacy are by no means exclusive to Pennsylvania.<sup>23</sup>

Before analyzing Pennsylvania’s current selection method or any proposed changes to this method, one must understand how the various selection methods that may be adopted function in practice.

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13. Newman & Isaacs, *supra* note 5, at 6–8; *see also* *Judicial Selection in Pennsylvania*, BALLOTPEDIA, [https://ballotpedia.org/Judicial\\_selection\\_in\\_Pennsylvania](https://ballotpedia.org/Judicial_selection_in_Pennsylvania) (last visited Nov. 2, 2019).

14. *Judicial Selection in Pennsylvania*, *supra* note 13; Newman & Isaacs, *supra* note 5, at 8–9.

15. *See* *History*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/learn/history> (last visited Nov. 2, 2019).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *See id.*

22. *See, e.g.*, Newman & Isaacs, *supra* note 5.

23. *See, e.g.*, *Legislative Assaults on State Courts – 2019*, BRENNAN CTR. FOR JUST. (Jan. 24, 2020), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2019>; Kevin Townsend, *A Supreme Court Impeachment Fight That’s Already Under Way*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/politics/archive/2018/10/impeachment-west-virginias-supreme-court/574495/>.

There are two general selection methods: appointment and election.<sup>24</sup> Each have their own sub-methods for selection.<sup>25</sup> Additionally, unless the judge or Justice is serving a life tenure, a method of re-selection must be chosen.<sup>26</sup> The pros and cons of both initial selection and re-selection methods have been highly discussed;<sup>27</sup> the following is a brief summary of these methods.

First, an appellate judicial election may be partisan or non-partisan.<sup>28</sup> Pennsylvania currently follows a partisan election process.<sup>29</sup> In a partisan election system, judicial candidates run under a party label;<sup>30</sup> in a non-partisan selection system, candidates place their names on a ballot without any party label.<sup>31</sup> In both of these systems, as is the case with most election processes, campaign finance can become an issue.<sup>32</sup> In Pennsylvania specifically, concern and even litigation have stemmed from the appearance of impropriety; notably where, after a judge is elected, an entity, who previously contributed financially to a judicial campaign, becomes involved in a case before that judge.<sup>33</sup> The appearance of impropriety that may arise from campaign contributions also exists where an elected judge or Justice has previously held a position of authority, such as District Attorney, which later impacts their ability to decide the case before them.<sup>34</sup> Issues may also arise where the public perceives that elected judges and Justices make judicial decisions to satisfy the public that elected them or those who contributed to the judge or Justices' campaign.<sup>35</sup>

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24. *Judicial Selection in the States*, BALLOTPEDIA, [https://ballotpedia.org/Judicial\\_selection\\_in\\_the\\_states](https://ballotpedia.org/Judicial_selection_in_the_states) (last visited Feb. 10, 2020).

25. *Id.*

26. *Id.*

27. Devins & Mansker, *supra* note 9, at 462. *See generally* Johnsen, *supra* note 3.

28. *Judicial Selection in the States*, *supra* note 24.

29. PA. CONST. art. V, § 13(a) (amended 1979).

30. Devins & Mansker, *supra* note 9, at 462.

31. *Id.*

32. *Id.* at 467–68; *see also* Ann A. Scott Timmer, *The Influence of Re-Selection on Independent Decision Making in State Supreme Courts*, 82 L. & CONTEMP. PROB. 27, 44 (2019).

33. *See* Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 254 (3d Cir. 2013); *see also* Devins & Mansker, *supra* note 9, at 495 (alterations in original) (quoting Justice Kennedy's explanation that "[w]e weren't talking about [money in judicial elections] [thirty] years ago because we didn't have money in [judicial] elections. Money in elections presents us with a tremendous challenge . . ."); *Merit Selection System*, *supra* note 10 (importantly, the homepage of this site sports the slogan "Merit not Money").

34. *See, e.g.*, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (addressing the appearance of impropriety requiring recusal where a state supreme court Justice was, in a previous capacity, involved in administering death penalty orders that were later on appeal before that Justice).

35. *See* Johnsen, *supra* note 3, at 837 (explaining that a judge or Justice can be tarnished by even the perception that they "may be influenced by campaign donors who helped put them on the bench"); *see also* Timmer, *supra* note 32, at 44.

Under the umbrella of appointment, there are essentially two methods by which a state's appellate judge or Justice is appointed.<sup>36</sup> A judge may be appointed by a gubernatorial (legislative) appointment process or under a merit plan.<sup>37</sup> Under a gubernatorial appointment system, "the governor or legislature selects the [judge or] justice . . . ."<sup>38</sup> Under a merit-based system, a judge or Justice is appointed based on consideration and recommendation by a board or committee.<sup>39</sup> Because of this process, enlisting an independent committee or commission to select judicial candidates, some believe merit selection systems provide a shield from financial or political influence.<sup>40</sup> Once selected, the judge generally faces a retention election in which there are no other candidates; rather, voters are asked whether they wish to retain that judge.<sup>41</sup> Appointment systems, however, raise their own issues regarding potential pressure placed on a judge to remain loyal to the appointing entity rather than to the people, the law, or their independent beliefs when making influential decisions.<sup>42</sup>

Additionally, although this article will not specifically analyze the impact of re-selection method, re-selection has been explored as a potential solution to calm public discontent with the judiciary.<sup>43</sup> When it comes to re-selection, there may be a partisan election, non-partisan election, retention election, appointment, or term of service for life or until mandatory retirement age<sup>44</sup>—though the latter is only used by a notable minority of states.<sup>45</sup> The methods employed for retention or selection of the judiciary vary vastly from state to state and even between different levels of courts within one

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36. *Judicial Selection in the States*, *supra* note 24.

37. *Id.*

38. Devins & Mansker, *supra* note 9, at 462.

39. *Id.*

40. Johnsen, *supra* note 3, at 837.

41. *Id.*

42. See Johnsen, *supra* note 3, at 840 (articulating potential disadvantages to diverse groups and concern "that merit selection tends to reinforce elitist, majoritarian, and establishment decision-making"); Timmer, *supra* note 32, at 29 (explaining the shifts in public perception including the theory that an elected judiciary "derive[] their authority from the people would be more independent-minded than hand-picked friends of governors or jurists subject to the beck and call of the legislature"); *Id.* at 45 (drawing attention to the behind the scenes politics involved in appointment process and including a state Justice's own observation that "[t]here are more politics in the appointment process"); Schluckebier, *supra* note 10, (noting that merit selection would not eliminate politics but it would move them out of the public's direct attention).

43. See generally Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61 (2017) (discussing the impact of retention method on judicial behavior and the potential repercussions on public perception of the legitimacy of the judiciary).

44. *Id.* at 72–73.

45. *Id.* at 73.

state. However, each method of selection or retention shares the same goal: to produce legitimacy on the bench and faith in the judiciary. In this way, each method addresses certain goals for the judiciary that are important not only in Pennsylvania, but also nationally.<sup>46</sup>

A. *Pennsylvania's Current Judicial Selection Method for State-Wide Appellate Courts: Traditional Partisan Elections*

Orientation to Pennsylvania's current selection method for its appellate judiciary and the state's political climate are vital prior to any discussion of the proposed changes that the majority of this article will explore.<sup>47</sup> It would be naïve to think that a conversation about a change to judicial selection started without some unease stemming from a lack of faith in judicial independence.<sup>48</sup> There are a number of manifestations of such unease, both in Pennsylvania and across the United States; in Pennsylvania, a 2018 Pennsylvania Supreme Court decision, *League of Women Voters of Pennsylvania v. Commonwealth*, appears to have rejuvenated discussions regarding judicial reform for Pennsylvania's appellate courts.<sup>49</sup> *League of Women Voters of Pennsylvania* concerned the constitutionality of Pennsylvania's congressional districts drawn following the 2011 census.<sup>50</sup> In this case, the Supreme Court of Pennsylvania determined that the challenged map was unconstitutionally gerrymandered, seven years after it was drawn.<sup>51</sup> Following its decision in *League of Women Voters of Pennsylvania*, the Supreme Court of Pennsylvania has come under scrutiny by the public, the state legislature, and lobbyists claiming that the decision was politically motivated.<sup>52</sup> Additionally, there has been renewed concern, from both

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46. Colquitt, *supra* note 3, at 74 (“[Judicial selection systems] should possess (at least) three principle features: it should adhere to democratic ideals; it should maintain as much independence as reasonably possible; and it should enjoy public acceptance and support.”).

47. See generally Schluckebier, *supra* note 10; Mark Scolforo, *House Panel Advances Changes in Pennsylvania Judge Elections*, ASSOCIATED PRESS NEWS (Apr. 30, 2019), <https://apnews.com/6eb05e080fc6417692ed59e2fe952794> (illustrating rivaling partisan support for House Bill 111 and House Bill 196).

48. Lindquist, *supra* note 43, at 63.

49. See *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. 2018).

50. *Id.* at 284.

51. *Id.*

52. See Folmer, *supra* note 7; Levy, *supra* note 12; Muschick, *supra* note 7. Some groups even called for the impeachment of some Pennsylvania Justices, though, to no avail. See Sam Levine, *Pennsylvania Supreme Court Chief Scolds His Own Party for Trying to Impeach Justices*, HUFFPOST (Mar. 22, 2018, 4:31 PM), [https://www.huffpost.com/entry/pennsylvania-supreme-court-impeachment\\_n\\_5ab3ff9ee4b054d118e0e964](https://www.huffpost.com/entry/pennsylvania-supreme-court-impeachment_n_5ab3ff9ee4b054d118e0e964). However, many Justices of West Virginia's Supreme Court were not so fortunate when recently confronted with the repercussions of their less than judicial actions. See Townsend, *supra* note 23.

Democrat and Republican lawmakers, regarding the role of the Court in resolving inherently political issues such as election districts.<sup>53</sup>

To be clear, *League of Women Voters of Pennsylvania* did not initiate conversations in Pennsylvania regarding the ideological and political independence of the judiciary.<sup>54</sup> In fact, Pennsylvania's General Assembly has previously proposed amendments to the state constitution to alter the method of appellate judicial selection.<sup>55</sup> Nonetheless, following *League of Women Voters of Pennsylvania*, the Republican majority of Pennsylvania's General Assembly has demonstrated renewed motivation in advocacy to reassess Pennsylvania's appellate judicial selection process.<sup>56</sup> Proposed changes to the selection method may make it easier to select, not a more politically independent, but rather a more "diverse" appellate bench.<sup>57</sup> In addition to perceived issues of political independence, organizations and scholars have called for changes to Pennsylvania's appellate selection method due to the highly impactful role of campaign finance in state judicial elections.<sup>58</sup>

Pennsylvania currently uses a partisan election process to select its appellate judiciary, and all levels of the judiciary.<sup>59</sup> Under this process, the judicial candidates run in a primary election under a party label, typically Republican or Democrat.<sup>60</sup> The public vote in partisan primaries and the candidate from each party with the highest votes wins the nomination and represents that party in the

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53. See Folmer, *supra* note 7 (opinion piece by Republican Senator Mike Folmer of Lebanon, Pennsylvania discussing the *League of Women Voters*' case and related concerns regarding the appellate bench); Muschick, *supra* note 7 (detailing the bipartisan support of House Bill 111 in an effort to secure a "fair, impartial and qualified judiciary").

54. See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903 (2016) (evaluating issue of state supreme court Justice's failure to recuse); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 254 (3d Cir. 2013) (discussing partiality of decisionmaker in arbitration context); H.R. 111, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

55. Pa. H.R. 111.

56. According to some, the motivation behind the General Assembly's renewed efforts to alter Pennsylvania's appellate judicial selection method is the "loss" that the Republican majority suffered in the Pennsylvania Supreme Court's decision in *League of Women Voters*. See John Baer, *The Legislature Is Again Courting Changes for Pa. Courts*, PHILA. INQUIRER (May 14, 2019, 4:19 PM), <https://www.inquirer.com/opinion/john-baer-courts-reform-diamond-legislature-20190514.html>; see also Levy, *supra* note 12; Scolforo, *supra* note 47.

57. Baer, *supra* note 56 (explaining that at least one major articulated motivator for House Bill 196 is to create a more "diverse" bench).

58. See, e.g., Devins & Mansker, *supra* note 9, at 495 n.33 (alterations in original) (quoting Justice Kennedy's explanation that "[w]e weren't talking about [money in judicial elections] [thirty] years ago because we didn't have money in [judicial] elections. Money in elections presents us with a tremendous challenge . . ."); Lindquist, *supra* note 43, at 66; *Merit Selection System*, *supra* note 10.

59. *Judicial Selection in Pennsylvania*, *supra* note 13.

60. *Partisan Election of Judges*, BALLOTPEdia, [https://ballotpedia.org/Partisan\\_election\\_of\\_judges](https://ballotpedia.org/Partisan_election_of_judges) (last visited Nov. 2, 2019).

general election.<sup>61</sup> The public then votes in the general election for their desired judge or Justice.<sup>62</sup> The judicial candidate with the highest number of votes wins and serves a ten year term.<sup>63</sup>

After ten years, Pennsylvania's appellate judges and Justices must survive a "yes/no" retention election.<sup>64</sup> By this process, the public votes either "yes" or "no" for a judge or Justice to serve another ten year term in their respective position.<sup>65</sup> As occurs with most election campaign processes, there is a large, arguably problematic, amount of spending in Pennsylvania's judicial elections.<sup>66</sup> However, campaign spending and political speech of judicial candidates are limited and regulated by judicial rules of conduct and court decisions.<sup>67</sup>

Concerns about judicial advocacy, specifically following *League of Women Voters of Pennsylvania*, have manifested in the form of two proposed amendments to the Pennsylvania Constitution: House Bill 111 and House Bill 196.<sup>68</sup> These proposed amendments would, respectively, create a merit-based appointment system and substantially revise the process of partisan-judicial elections for the appellate judiciary.<sup>69</sup> Because it is the "task [of] a good judicial selection system . . . not simply to fill vacancies, but to select the best candidates for judicial positions,"<sup>70</sup> the question is whether these competing bills would actually be a step toward producing the "best" judiciary or whether they are pure political posturing.

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61. *Id.*

62. *Id.*

63. *Judicial Selection in Pennsylvania*, *supra* note 13.

64. *Id.*

65. *Id.* Although, the impact of judicial retention methods exceeds the scope of this article, there are emerging studies that the retention method may have a significant impact on the decisions and behavior of the bench. See Lindquist, *supra* note 43, at 108.

66. Lindquist, *supra* note 43, at 64; Baer, *supra* note 56; Schluckebier, *supra* note 10.

67. Lindquist, *supra* note 43, at 64; see *Republican Party v. White*, 536 U.S. 765 (2002); see also MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2010) (the judiciary should avoid actual or the appearance of impropriety).

68. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

69. Pa. H.R. 111; Pa. H.R. 196. The process to amend Pennsylvania's Constitution requires that the resolution pass both houses, in two consecutive sessions. Benjamin Pontz, *Two for the Price of One: Pair of Proposed Amendments to State Constitution Head to Pa. House*, WITF (June 29, 2020, 5:00 AM), <https://papost.org/2020/06/29/two-for-the-price-of-one-pair-of-proposed-amendments-to-state-constitution-head-to-pa-house/>. The amendment must next be publicly advertised in newspapers in every county. *Id.* Ultimately, to be adopted, it must succeed in a public vote to adopt that amendment. *Id.*

70. Colquitt, *supra* note 3, at 74.

*B. Proposed Changes to Appellate Judicial Selection in House Bill 111: Merit-Based Appointment*

During the 2019–2020 Session, the Pennsylvania House of Representatives considered House Bill 111 for a second time.<sup>71</sup> This legislation would require an amendment to the state Constitution, specifically to certain Sections in Article V of Pennsylvania’s Constitution, and would establish a merit-based appointment system for selecting the appellate judiciary.<sup>72</sup> Notably, it does not appear that House Bill 111 proposed any changes to the retention-election system currently practiced for Pennsylvania’s state-wide appellate courts.<sup>73</sup> Although numerous changes would be made if this Bill were to result in an amendment to Pennsylvania’s constitution, the three most significant are: (1) the division of the state into three regional districts;<sup>74</sup> (2) the creation of the Appellate Court Nominating Commission;<sup>75</sup> and (3) the modification of the procedure for filling vacancies on the appellate bench.<sup>76</sup>

*1. Redistricting: Amended Section 11*

First, House Bill 111 would amend Article V Section 11. This amended section would authorize the General Assembly to establish, by law, three districts from which the appellate judiciary would then be selected.<sup>77</sup> Amended Section 11, would begin with a provision articulating that each judge and Justice of the appellate judiciary “shall provide every resident of this Commonwealth with approximately equal representation on a court.”<sup>78</sup> It further authorizes the General Assembly to establish an Eastern, Middle, and Western judicial district from which the appellate judiciary shall be

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71. The General Assembly previously considered a version of House Bill 111 during the 2017–2018 Regular session that would have made similar changes to appellate judicial selection by amending the state constitution. H.R. 111, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017). As of the submission of this article for publication, House Bill 111 failed to receive the necessary support in the House of Representatives during the 2019–2020 Regular Session and has died in chambers. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); *Pennsylvania House Bill 111*, LEGISCAN, <https://legiscan.com/PA/bill/HB111/2019> (last visited Jan. 2, 2021). By contrast, and as will be discussed further, House Bill 196 has received the necessary support during the 2019–2020 Regular Session to be considered again in the upcoming session.

72. *Id.*

73. PA. CONST. art. V, § 15(b) (amended 2016).

74. Pa. H.R. 111, § 11(b)(1).

75. Pa. H.R. 111, § 14.

76. Pa. H.R. 111, § 13(b.1).

77. Pa. H.R. 111, § 11(b)(1).

78. Pa. H.R. 111, § 11(a).

selected.<sup>79</sup> Section 11(b)(1) consists of three subsections which establish the number of judges and Justices from each state-wide appellate court, the Supreme, Superior, and Commonwealth, to be selected from these three judicial districts.<sup>80</sup> Subsection I establishes the state-wide distribution of the Pennsylvania's seven Supreme Court Justices.<sup>81</sup> This subsection provides that two Justices will be selected from each district; the seventh Justice will then be "selected on a Statewide basis" and may be "a resident of any of the judicial districts."<sup>82</sup> Subsection II describes the distribution of the fifteen Superior Court judges.<sup>83</sup> It requires that five judges be selected from each of the three proposed judicial districts.<sup>84</sup> Subsection III explains that the three of the nine Commonwealth Court judges will be selected from each judicial district.<sup>85</sup>

The general provision applicable to the drawing of judicial districts—that the "number and boundaries of judicial districts shall be changed by the General Assembly only *with the advice and consent of the Supreme Court*"—does not apply to amended Section 11.<sup>86</sup> Instead, amended Section 11 states that "[t]he number of Judges and Justices . . . from each judicial district shall provide every resident of this Commonwealth with approximately equal representation on a court. Each judicial district shall be composed of compact and contiguous territory as nearly equal in population as practicable."<sup>87</sup> These requirements look nearly identical to the General Assembly's requirements for drawing Congressional districts.<sup>88</sup> Section 11(c), further empowers the General Assembly to establish the qualifications for appointment to the appellate judiciary.<sup>89</sup> Amended Section 11 deviates from the current, statewide, election process for the appellate judiciary by vesting in the General Assembly the power to create districts from which the appellate judiciary is to be selected.

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79. Pa. H.R. 111, § 11(b)(1).

80. See Pa. H.R. 111, § 11(b)(1)(i)–(iii).

81. Pa. H.R. 111, § 11(b)(1)(i).

82. *Id.*

83. Pa. H.R. 111, § 11(b)(1)(ii).

84. *Id.*

85. Pa. H.R. 111, § 11(b)(1)(iii).

86. Compare PA. CONST. art. V, § 11 (1968) (emphasis added), with Pa. H.R. 111, § 11(a).

87. Pa. H.R. 111, § 11(a).

88. PA. CONST. art. II, § 16 (amended 1968) (requiring that legislative districts "shall be composed of compact and contiguous territory as nearly equal in population as practicable").

89. Pa. H.R. 111, § 11(c).

## 2. *Establishing the Committee: Amended Section 14*

Amended Section 14 establishes the Appellate Court Nominating Commission (ACNC).<sup>90</sup> The ACNC, is to be “an independent board within the Executive Department” consisting of thirteen members.<sup>91</sup> The thirteen members of the ACNC are appointed by the Governor (five appointees), the Senate majority leader (two appointees), the Senate minority leader (two appointees), the House of Representatives majority leader (two appointees), and the House of Representatives minority leader (two appointees).<sup>92</sup> The first ACNC members will serve staggered terms; however, following this first appointment, the ACNC members will serve four year terms.<sup>93</sup> The members must be at least eighteen years old, be a resident of Pennsylvania for at least one year prior to their appointment, and maintain residency for the duration of their term.<sup>94</sup> Members of the ACNC may not hold political office, hold an elected or appointed position, or be an employee of the state during their term.<sup>95</sup> Members are not to be compensated for their service, but they may receive reimbursement for expenses incurred in the course of their official duties.<sup>96</sup>

Amended Section 14 also establishes the procedure by which the ACNC will generate its list of judicial nominees.<sup>97</sup> The ACNC is to solicit applications and publicly announce that it is receiving applications from those interested in being considered.<sup>98</sup> The General Assembly is responsible for establishing a timeline for solicitation of applications and the procedure by which the ACNC is to evaluate potential nominees.<sup>99</sup> The ACNC then selects five of the most qualified applicants to be submitted to the Governor for consideration.<sup>100</sup> When making this selection, the ACNC “*may consider* that the appellate courts reflect the racial, ethnic, gender and other diversity” of Pennsylvania.<sup>101</sup> The nominees submitted to the Governor by the ACNC must meet the following criteria: be a Pennsylvania resident for at least one year prior to submission of application, meet the

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90. Pa. H.R. 111, § 14.

91. Pa. H.R. 111, § 14(d)–(d)(1).

92. Pa. H.R. 111, § 14(d)(1)(i)–(v).

93. Pa. H.R. 111, § 14(d)(2).

94. *Id.*

95. Pa. H.R. 111, § 14(d)(3).

96. Pa. H.R. 111, § 14(d)(5).

97. Pa. H.R. 111, § 14(h).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

residency requirements set forth in 11(c), be a licensed member of the Bar of the Supreme Court in good standing, and have “either practiced law or been in a law-related occupation” for at least ten years at the time of selection.<sup>102</sup> In addition to these criteria, the General Assembly may establish additional nomination procedures for the ACNC and additional qualifications required for applicants to be eligible for nomination.<sup>103</sup> Section 14 is perhaps the most noticeable change to the selection process because it creates the ACNC which would have the responsibility, rather than the people, to select the appellate judiciary.

### 3. *Filling Vacancies: Amended Section 13*

Amended Section 13 establishes the process by which a vacancy on the Supreme, Superior, or Commonwealth Court shall be filled.<sup>104</sup> This section requires that vacancies be filled by appointment based on a nomination by the Governor to the Senate.<sup>105</sup> The Governor is to make his nomination from the list of five nominees provided to him from the ACNC.<sup>106</sup> This section also establishes a timeline and two-thirds majority requirement by which the Senate may approve the Governor’s nomination. If two-thirds of the Senate fails to act upon a nomination that was properly made by the Governor under this section, then the nominee will “take office as if the appointment had been consented to by the Senate.”<sup>107</sup> Additionally, if the Senate rejects the Governor’s nomination, he has the opportunity to make a substitute nomination, from the ACNC list, two additional times.<sup>108</sup> If the Governor’s nomination is rejected three times, then the ACNC is empowered to appoint any other individual on their list.<sup>109</sup> Under this scenario, the ACNC’s appointee “take[s] office upon notification of the appointment by the commission and neither the Governor nor the Senate” plays any further role in the appointment process for that vacancy.<sup>110</sup>

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102. Pa. H.R. 111, § 14(h)(1)–(4).

103. Pa. H.R. 111, § 14(i).

104. Pa. H.R. 111, § 13(b.1)(1).

105. Pa. H.R. 111, § 13(b.1)(1).

106. *Id.*

107. *Id.*

108. Pa. H.R. 111, § 13(b.1)(2).

109. *Id.*

110. *Id.*

C. *Proposed Changes to Appellate Judicial Selection in House Bill 196: Partisan Election from “Regional Appellate Court Districts”*

House Bill 196 will, like its counterpart House Bill 111, require an amendment to Pennsylvania’s Constitution.<sup>111</sup> However, this bill does not change the mechanism of judicial selection; the Pennsylvania appellate judiciary would still be elected in partisan elections.<sup>112</sup> Instead, House Bill 196 would make two notable changes to the Pennsylvania Constitution—again, largely in Section 11—that would alter the organization of partisan judicial elections.<sup>113</sup> Under House Bill 196, judicial elections would be conducted in thirty-one newly created regional districts, each providing “approximately equal representation,” as drawn by the General Assembly.<sup>114</sup>

Under House Bill 196, the seven state Supreme Court Justices would “be elected from seven judicial districts which shall be established by law,”<sup>115</sup> and the fifteen Superior Court judges would be “elected from judicial districts which shall be established by law,”<sup>116</sup> as would the nine Commonwealth Court judges.<sup>117</sup> While the drawing of election districts is not technically a new job for the General Assembly, it is new in the context of state appellate judicial districts.<sup>118</sup> House Bill 196 would amend Section V of the state Constitution to require that the number of judges and Justices “elected from each judicial district shall provide every resident of the Commonwealth with approximately equal representation on a court.”<sup>119</sup>

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111. See H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

112. *Id.* As of submission of this article for publication, House Bill 196 has received the necessary support during the 2019–2020 Regular Session to be considered again in the upcoming session by the General Assembly. *Pennsylvania House Bill 196*, LEGISCAN, <https://legiscan.com/PA/bill/HB196/2019> (last visited Jan. 2, 2021).

113. See Pa. H.R. 196.

114. Compare Pa. H.R. 196, § 11(a), with PA. CONST. art. V, § 11 (1968). See also Baer, *supra* note 56 (“[T]he notion that judges are representative is a fairly new development. I always ask why. And usually it’s part of a movement to form a more politically responsive judiciary, . . . part of the new politics of judicial elections.”) (quoting Charles Gehy, an Indiana University Law professor).

115. Pa. H.R. 196, § 2(b).

116. Pa. H.R. 196, § 3. Importantly, the current fifteen judge Superior Court could be reduced or increased under amended Section 3 which states only that there “shall not be less than seven judges . . .” *Id.*

117. Pa. H.R. 196, § 4. There is no promise under House Bill 196 that the Commonwealth Court will continue to consist of nine judges; the only requirement is that this court “consist of the number of judges” and that those “number of judges” be elected from judicial districts established by law. *Id.*

118. See PA. CONST. art. V, §§ 2–4 (1968) (articulating that the appellate courts are to be “statewide”).

119. Pa. H.R. 196, § 11(a).

One judge or Justice would be elected from each district.<sup>120</sup> Additionally, this proposed amendment imparts on the General Assembly the responsibility of drawing judicial districts that are “composed of compact and contiguous territory as nearly equal in population as practicable” and articulates that “no county, city, incorporated town, borough, township or ward may be divided” unless “absolutely necessary.”<sup>121</sup>

Under House Bill 196, the creation of the judicial districts from which the Justices of the Supreme Court and the judges of the Superior and Commonwealth Court would be elected is the duty of the Pennsylvania General Assembly.<sup>122</sup> This is not the extent of the General Assembly’s powers under House Bill 196’s proposed Section 11(b).<sup>123</sup> It would also be up to the General Assembly to: establish a transition into an appellate judiciary elected from judicial districts; determine what effect districts will have on retention and reelection; organize the order of each districts’ election for each court; and “realign[] the appellate judicial districts based on the Federal decennial census . . . .”<sup>124</sup> Notably, subsection (c) of House Bill 196’s proposed Section 11 states: “*Except as provided under subsection (b) . . . , the number and boundaries of all other judicial districts shall be established by the General Assembly by law, with the advice and consent of the Supreme Court.*”<sup>125</sup>

House Bill 111 and House Bill 196 represent rivaling public calls for judicial legitimacy.<sup>126</sup> One represents the belief that removing judicial selection from the inherently political process of elections and placing it into the hands of a committee, hand selected by an elected Governor, will produce a more independent judiciary.<sup>127</sup> The other would allegedly produce a more representative bench than already produced by a state-wide election by dividing the state into districts by which individuals in each district would elect only one state Supreme Court Justice, one Superior Court judge, and one Commonwealth Court judge.<sup>128</sup> Importantly, House Bill 196 would

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120. *Id.*

121. *Id.* (closely resembling the Pennsylvania Constitution’s requirements for drawing Congressional districts but excepting the judicial districts drawn under Section 11(b) from receiving the advice and consent of the Pennsylvania Supreme Court).

122. Pa. H.R. 196, § 11(b)(1).

123. *See* Pa. H.R. 196, § 11(b).

124. Pa. H.R. 196, § 11(b)(2)–(5).

125. Pa. H.R. 196, § 11(c) (emphasis added). Significantly, this amendment eliminates the General Assembly’s previously required receipt of advice and consent from the Pennsylvania Supreme Court when creating the new, regional electoral districts.

126. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); Pa. H.R. 196.

127. Pa. H.R. 111.

128. Pa. H.R. 196.

only change the way in which judicial selection would be conducted, it does not change the manner in which these elections would occur.<sup>129</sup> House Bill 196 would still allow for partisan elections, with which the public is familiar.<sup>130</sup> Thus, it is unsurprising that House Bill 196 is progressing more quickly and with stronger support from the General Assembly than House Bill 111, in its current or prior formulation, has progressed.<sup>131</sup> The subsequent sections set forth four factors to consider when considering the impact that these proposed methods may have on the legitimacy of Pennsylvania's appellate bench.

### III. PROPOSED RULE: FOUR FACTORS TO DETERMINE A "BEST" SELECTION METHOD

The ideal judiciary results from the ideal selection method. This sounds simple—use the best selection method, get the best judges. If only things were so simple.<sup>132</sup> There are countless articles discussing elected versus appointed judicial selection and the unique judicial selection procedures of each state, which indicate selecting the ideal judiciary is far from a simple task.<sup>133</sup> In reality, this article posits that the goal of any selection method should be to maintain the legitimacy of the bench and instill faith in the judicial process. Accordingly, the "best" selection must promote public perception of legitimacy on the bench.<sup>134</sup> The relationship between the judiciary and the public is a cyclical relationship.<sup>135</sup> If the public

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129. *Id.*

130. *Id.*

131. Compare Pa. H.R. 111 (reforming state-wide, partisan election system to regional, merit-based appointment), with Pa. H.R. 196 (reforming state-wide, partisan election system to regional, partisan elections). An alternative rationale for the progression of House Bill 196 is its partisan support from the Republican legislators that currently hold a majority of seats in the state House of Representatives and Senate. *Pennsylvania General Assembly*, BALLOTPEdia, [https://ballotpedia.org/Pennsylvania\\_General\\_Assembly](https://ballotpedia.org/Pennsylvania_General_Assembly) (last visited, Jan. 2, 2021).

132. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010) (addressing the difficulties in quantifying a "best" selection method and applying three measures of judicial quality: productivity, citations, and independence to compare appointed and elected methods); Johnsen, *supra* note 3, at 831 ("The qualities of a good judge are easy to name but sometimes difficult to discern and almost always impossible to quantify: intelligence, integrity, fairness, diligence, experience, judgement, perspective, compassion.").

133. See, e.g., Choi et al., *supra* note 132; Johnsen, *supra* note 3, at 846 (analyzing diversity, or lack thereof, of state judiciary based on judicial selection method). See generally Colquitt, *supra* note 3 (addressing the importance of selecting a competent and effective judicial selection commission and the difficulties that accompany a failure to do otherwise).

134. Lindquist, *supra* note 43, at 67–68.

135. *Id.* at 66.

lacks faith in the judiciary, then the judiciary loses its credibility.<sup>136</sup> And when the judiciary lacks credibility, the law and the public suffer.<sup>137</sup>

Certain general qualifications and qualities are desired in and expected from the appellate judiciary.<sup>138</sup> Judges are expected to decide cases based on law, not emotions.<sup>139</sup> The public desires judges who follow the policy goals and purposes of the law as articulated by the legislature, not those who act on impulse.<sup>140</sup> Judges are expected not to be so influenced by a whim or personal passion that they overrule important precedent.<sup>141</sup> Judges who strive for consistency and predictability of the law, while realizing that, in certain circumstances, justice and fundamental rights require expedited action that only the court can provide, are desirable.<sup>142</sup> The ideal appellate judiciary is made up of judges with certain characteristics so that these goals may be achieved.<sup>143</sup> Thus, it is equally important when determining what judicial selection method is “best” that the General Assembly and the public do not act out of passion or a reactive impulse.<sup>144</sup>

It is first necessary to determine what the ideal judiciary looks like, then consider which of the various selection methods will have the greatest potential to meet the goal of producing a judiciary that the public finds legitimate and credible. To best analyze what it takes to produce a judiciary in which the public has faith,<sup>145</sup> this article articulates a four-factor test by which judicial selection methods may be analyzed for their potential to produce the public perception of legitimacy. These four categories include: (1)

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136. *Id.* at 67.

137. *Id.*; see also Maggie Jo Buchanan & Abbey Meller, *Brett Kavanaugh: A Representation of Damaged U.S. Judiciary*, CTR. FOR AM. PROGRESS (Oct. 1, 2019, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2019/10/01/475181/brett-kavanaugh-representation-damaged-u-s-judiciary/>.

138. Colquitt, *supra* note 3, at 78 (noting that democratic ideals, independence, and public support are vital to any judicial nomination); Newman & Isaacs, *supra* note 5, at 1 (“[T]he effective functioning of the dispute resolution process in our society requires an independent and accountable judiciary.”); Lindquist, *supra* note 43, at 62, 67.

139. See Lindquist, *supra* note 43, at 62, 67.

140. *Id.* at 67.

141. *Id.*

142. *Id.*

143. See Colquitt, *supra* note 3, at 77–78 (positing that the goals of democratic ideals of political independence and public support may be served through judicial nomination); Newman & Isaacs, *supra* note 5, 10–11, 13–14 (considering the weight placed on accountability or independence depending on favored selection method).

144. Scolforo, *supra* note 47 (illustrating the potential political motivation behind House Bill 111 and 196).

145. See generally Devins & Mansker, *supra* note 9 (addressing the importance of public opinion and public support of a judiciary regardless of selection method).

demographic diversity, (2) communicative competency, (3) ideological independence, and (4) education and experience.

### A. *Demographic Diversity*

Demographic diversity requires consideration of certain socioeconomic qualities of the judge-to-be, including, but not limited to, their education, residency status, experience in the legal practice, and years admitted to the Pennsylvania bar.<sup>146</sup> Also in this category are certain personal qualities such as race, gender, identity, ethnicity, age, and religion.<sup>147</sup> The qualities listed here are by no means an exhaustive collection of those that make judges diverse. This factor contains certain quantifiable traits by which the public is able to perceive the otherwise often isolated judiciary.<sup>148</sup> The purpose of this factor is to bring into consideration the fact that the general public and legal community seek not only a qualified judiciary, but also one with which they can identify.<sup>149</sup> The public and the legal community want to be able to see a judiciary that looks like them, or at the very least does not all look the same, as well as one that is educated, experienced, and well-versed in the legal atmosphere in which they practice.<sup>150</sup>

### B. *Communicative Competency*

Communicative competency includes attributes such as an ability to be collegial with those of differing opinions, general communication skills, and willingness to cooperate with others.<sup>151</sup> Simply put, it is important for judges and Justices, especially those at the appellate level, to communicate with each other effectively so that

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146. Johnsen, *supra* note 3, at 833 (introducing the broad range of objectively diverse attributes that a bench should possess).

147. Although diversity is consistently desired, many legal scholars have found conflicting or inconclusive evidence that a certain selection method will produce diversity on the bench. See, e.g., Lindquist, *supra* note 43, at 77–78, 80.

148. See Harry T. Edwards, *Required Reading; Judicial Isolation*, N.Y. TIMES (July 16, 1984), <https://www.nytimes.com/1984/07/16/us/required-reading-judicial-isolation.html> (describing, from the perspective of a judge on the United States Court of Appeals for the District of Columbia, the isolation that accompanies the judiciary).

149. See generally Devins & Mansker, *supra* note 9.

150. See generally Johnsen, *supra* note 3.

151. See Melissa M. Berry et al., *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 350–53 (2008) (discussing the importance of majority in presenting a cohesive bench); see also Edwards, *supra* note 148.

they produce durable and consistent opinions.<sup>152</sup> In order to create opinions with the highest precedential value, it is best to have as many Justices in the majority as possible.<sup>153</sup> This requires a great deal of communication and sometimes compromise, but the integrity of the law and trust in the Court require no less.<sup>154</sup> Being a judge can be an isolating career, and the public and legal community benefit from a judiciary that can overcome this while maintaining its duty to uphold the law.<sup>155</sup>

### C. *Ideological Independence*

Ideological independence is not as easily explained in concrete qualities as the other factors. Rather, ideological independence is largely a quality constructed by the public's desire for impartial, accountable, and protective judges and Justices.<sup>156</sup> Ideological independence is quite possibly the most important factor of this test; however, it is the hardest to identify in a judge prior to selection.<sup>157</sup> Rather, this quality is seen through practice and continued dedication to decide controversies, even those which may upset the public, based on an impartial process that is grounded in and faithful to the law.<sup>158</sup> It is a true test of a judge or Justices' reputation if she can publish a decision on a hotly contested, and possibly divisive, issue and maintain a reputation of impartiality and legitimacy in the eye of the public.

### D. *Education and Experience*

The ideal judicial candidate should have a certain degree of experience or accomplishment that may come from their education or

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152. See Berry et al., *supra* note 151, at 350–53 (explaining that the goals of certainty and predictability are not supported where a judge or Justice's concurrence is motivated to create a disproportionate influence; instead, a "true majority" is preferable).

153. *Id.* at 300 ("Conflicts created by concurrences and pluralities in court decisions may be the epitome of confusion in law and lower court interpretation.").

154. *Id.* at 350–53; see also Edwards, *supra* note 148.

155. See Edwards, *supra* note 148.

156. See, e.g., Newman & Isaacs, *supra* note 5, at 4 (expressing that no matter the selection method, the goal is to create a judiciary that is independent from political interference, accountable to the public, and concerned with protecting individual's rights).

157. Devins & Mansker, *supra* note 9, at 473 (addressing the conflict that arises between the human desire to be liked and supported with the presumed need of an independent judiciary); Johnsen, *supra* note 3, at 837 ("At the very least, the perception of [a judge] is tarnished when the public believes judges may be influenced by campaign donors who helped put them on the bench.").

158. See generally Devins & Mansker, *supra* note 9.

professional experiences after obtaining their law degree.<sup>159</sup> The degree of experience may vary and may come from a number of paths that the candidate has chosen to pursue. This experience could be from years as a judge at the trial court level or expertise in a particular area or industry of legal practice.<sup>160</sup> It could similarly originate from a unique or notable educational environment or a professional experience that occurred prior to obtaining a law degree.<sup>161</sup>

#### IV. APPLICATION: FOUR FACTORS, TWO BILLS, ONE “BEST” METHOD[?]

Each factor in this test is designed to address the goal of legitimacy on the bench and to consider whether the legislative response to alleged politicization of the judiciary may do more harm than good in addressing this goal.<sup>162</sup> In the following two sections, these four factors are applied to the proposed methods of judicial selection to consider whether they may be successful in generating a public perception of judicial legitimacy. The goal in doing so is to identify the strongest and weakest attributes of each proposed selection method and to determine if these proposed amendments fall short of generating legitimacy by serving a particular political agenda.

##### A. *House Bill 111*

As previously explained, House Bill 111 proposes a state constitutional amendment that would change the selection method from state-wide partisan elections to a merit-based appointment process for the selection of Pennsylvania’s Superior, Commonwealth, and Supreme Courts.<sup>163</sup> House Bill 111 is a reincarnation of a 2017–2018 Bill proposing the same amendment to change the selection

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159. Johnsen, *supra* note 3, at 833–34 (indicating that in addition to diversity and other non-quantifiable qualities, there are “objective credentials such as judicial clerkships and attendance at ranked universities and law schools” that support a desirable and broad collection of perspectives on the bench).

160. *Id.* at 833.

161. An analysis of the rank of the institution from which a candidate obtained her legal education is of minimal importance in order to avoid crafting an elitist bench or a bench that values educational institution over diversity or experience or quality of the judge. *Cf.* Johnsen, *supra* note 3, at 840–42 (indicating concern that appointment “tends to reinforce elitist, majoritarian, and establishment decision-making” by disadvantaging “women, minorities, and those with non-traditional legal backgrounds”).

162. *See* Devins & Mansker, *supra* note 9, at 475–76 (addressing the innate fact that state appellate courts are more exposed to politics than lower courts, especially when selected under a popular election method); *see also* Levy, *supra* note 12 (calling regional judicial districts a “scheme to Gerrymander the courts”).

163. H.R. 111, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

method for Pennsylvania's three appellate courts.<sup>164</sup> Although House Bill 111 had previously died for want of support, this renewed, bi-partisan effort to restore public perception of legitimacy in Pennsylvania's appellate courts initially showed potential to bring about a new result.<sup>165</sup> Nonetheless, this resuscitated House Bill 111 similarly died in chambers during the 2019–2020 Regular Session for failure to garner necessary support in the House.<sup>166</sup> House Bill 111 did not progress for further consideration despite the belief, shared by many legal scholars and advocacy groups,<sup>167</sup> that the appointment method is superior to elections insofar as it pertains to producing public feelings of legitimacy in the judiciary.<sup>168</sup> Despite the death of House Bill 111, the following four-factor examination provides insight into the impact that the potential, or future, adoption of a merit-based appointment method may have on the public's perception of legitimacy in Pennsylvania's appellate judiciary.

First, demographic diversity, under the merit-based appointment method, is entirely at the hands of the ACNC.<sup>169</sup> The ACNC has complete discretion, with some small legislative limitations for things like residency and prior employment, to nominate candidates.<sup>170</sup> With this discretion comes great responsibility, and the public and legal community are essentially putting their faith in the hands of a middleman (or woman) to select candidates who are not only diverse in education and experience, but also diverse in terms of race, gender, sexual orientation, physical ability, and religion.<sup>171</sup> While it would be nice to assume that the ACNC would always consider demographic diversity when selecting a candidate to nominate, that assumption is not entirely supported by the experience

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164. H.R. 111, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017), 2017 Bill Text PA H.B. 111 (LEXIS).

165. See *League of Women Voters v. Commonwealth*, 175 A.3d 282, 294 (Pa. 2018); Folmer, *supra* note 7; Muschick, *supra* note 7.

166. *Pennsylvania House Bill 111*, *supra* note 71.

167. See generally Colquitt, *supra* note 3, at 74 (expressing the ideal nominating commission and support for appointed judiciary); *Merit Selection System*, *supra* note 10 (strongly supporting a merit-based appointment system of judicial selection).

168. Although this article will not explore them further, there are two reasons that come to mind as to why House Bill 111, and other efforts to shift to judicial selection by appointment, have continued to lack momentum in Pennsylvania: (i) a fear of too drastic a change that may result from abandoning judicial selection by election and (ii) lack of support from the Republican majority of Pennsylvania's General Assembly.

169. H.R. 111, 2019 Gen. Assemb., Reg. Sess. § 14(h) (Pa. 2019) (Under H.B. 111, the ACNC “*may consider* that the appellate courts reflect the racial, ethnic, gender and other diversity . . .”) (emphasis added).

170. See *id.*

171. See Johnsen, *supra* note 3, at 833–34.

of other states that have made the switch to nominating committees.<sup>172</sup>

Next, communicative competency may not be facially addressed under merit-based appointment.<sup>173</sup> However, because the members of the ACNC would be both members of the legal community and public, there is an opportunity to select candidates who have a reputation for collegiality and a willingness to communicate.<sup>174</sup> This factor could be well addressed by the ACNC in interviews and in considering applications for nomination. For purposes of this conversation, it may be assumed that the ACNC would properly place value on these qualities; meaning, at least in theory, that communicative competency would be well accounted for when the ACNC is selecting candidates.

Further, as to ideological independence, it has been proffered that such independence is secured by the diluted politics of an appointment selection system.<sup>175</sup> By contrast, these back-room politics—to create the ACNC, for the Governor to select a specific nominee, and for the Senate to actually approve that nomination—may further separate the public from the judiciary.<sup>176</sup> Although the ACNC could virtually eliminate issues of election finance, it may not be as effective at eliminating political influence as is argued.<sup>177</sup> One can easily imagine a scenario in which a member of the ACNC is selected because of a relationship or reputation of supporting a certain ideological agenda; or, where the Senate refuses to confirm the Governor's selected candidate based on diverging political or personal beliefs. In such circumstances, the political games that exist in an election would still exist, but now, rather than in plain view for public consideration prior to election, the politics would be removed from the public's plain view. It is this "behind-the-scenes" politics which could raise even deeper problems of ideological independence

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172. *Id.* at 840–41; see also *Judicial Selection in the States*, *supra* note 24 (illustrating that twenty-eight states select state supreme court Justices through some form of appointment).

173. See Pa. H.R. 111, § 14(h) (remaining silent about specific communicative skills that nominees must have).

174. See *id.* (indicating through silence that ACNC has discretion to consider communicative competency and other factors when selecting candidates).

175. See, e.g., Colquitt, *supra* note 3, at 90; Schluckebier, *supra* note 10; *Merit Selection System*, *supra* note 10.

176. See Johnsen, *supra* note 3, at 841–42 (indicating that politics and elitist concerns still exist despite the less public manifestations where there is an appointment rather than election method); Muschick, *supra* note 7.

177. See Muschick, *supra* note 7.

than are presently perceived to exist in Pennsylvania's partisan election process.<sup>178</sup>

Nonetheless, moving politics out of the direct public attention could at least have the potential to reduce the perception that a judge is acting as an arm for a certain political agenda, which may lessen the bite of allegations of judicial advocacy. There are a number of states that have adopted merit-based appointment systems with great success.<sup>179</sup> Not to mention the fact that the United States Supreme Court is selected through appointment, albeit a different appointment method.<sup>180</sup> So, even though there is the potential that merit-based appointment would only reduce politically motivated decisions by way of appearance, there is support for the idea that appointed judges are more ideologically independent since they are not as interested in appealing to a Republican or Democrat voter populous.<sup>181</sup> Moreover, there is not much support to the idea that, under merit-based appointment, a given judge would fall subject to the whim of a single political figure, such as the governor, because subsequent retention remains in the hands of the public though a "yes/no" election.<sup>182</sup>

Finally, as to education and experience, the application process for candidates will allow the ACNC to filter out or more carefully consider those applicants whose past experiences could spark concern as to independence, such as prior political or governmental positions.<sup>183</sup> The fact that the ACNC acts as a middleman (or woman) is extremely helpful when it comes to considering a candidate's education and experience. It is particularly helpful in eliminating the ethical issues that stem from a reputational mudslinging campaign or those that may arise if any troublesome relationships arise after election.<sup>184</sup>

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178. See, e.g., Colquitt, *supra* note 3, at 109 ("Making [judicial] selection invisible . . . muffles conflict, avoids widespread competition, and strengthens the hands of political elites."); McKoski, *supra* note 8, at 289–90 (explaining that judicial transparency is preferred over a potentially problematic "ignorance is bliss" theory of judicial ethics which provides those with semi-private access to judges an advantage of those less with less judicial connections); Timmer, *supra* note 32, at 45 (articulating that "[a]lmost all the political weight is behind the scenes in the appointment selection process").

179. *Judicial Selection in the States*, *supra* note 24 (as of the submission of this article twenty-eight states select state supreme court Justices through either merit plan or gubernatorial appointment).

180. BARRY J. McMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE (2020).

181. Johnsen, *supra* note 3, at 837 (articulating the perspective that elected judges may feel obliged to appease or be improperly influenced by their campaign donors).

182. *Id.* at 838 (explaining that the governor's role in the appointment process is mitigated by the vetting process of independent nominating commission).

183. *Id.* at 839.

184. *Id.* at 837.

Inevitably, the ACNC would not entirely eliminate any and all future allegations of less than ethical judicial conduct. Nonetheless, the ACNC, through its interview and consideration of potential nominees, could act as a filter to reduce the number of claims of impropriety that impact the public's perception of judicial legitimacy.<sup>185</sup> If used wisely, the interview process has the potential to uncover any existing relationships or prior occupations that could give rise to calls to recuse or allegations of impropriety. It would be the individuals who make up the ACNC that ultimately impact the ability for a judiciary to meet some or all of the factors that would lead to the ideal bench.<sup>186</sup> Accordingly, the efficacy of merit-based selection in selecting an appellate judiciary that the public perceives as legitimate is dependent on the ability of the General Assembly and Governor to work together and select an effective ACNC. Perhaps, this dependence explains Pennsylvania's two recent and unsuccessful attempts to change to merit-based selection method.<sup>187</sup>

### B. *House Bill 196*

The amendment proposed by House Bill 196 is designed to create a judiciary that represents individual regions across the state.<sup>188</sup> The idea is that, when each region comes together on the bench, the ideological and demographic diversity seen across Pennsylvania would, likewise, be represented on the bench.<sup>189</sup> Support for 196 necessitates a belief that the judiciary should be representative of the people and their regional ideologies.

When it comes to demographic diversity, one would think that House Bill 196, with its goal of "equal representation" and local elections, flawlessly fulfills this factor.<sup>190</sup> However, as with any judicial selection method, a supposed strength should be thoroughly considered in order to determine whether, in practice, the method would live up to expectations. Lawmakers supporting House Bill 196, who are generally Republican, argue that judicial districts will "add a

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185. See H.R. 111, 2019 Gen. Assemb., Reg. Sess. § 14(h) (Pa. 2019).

186. See Colquitt, *supra* note 3, at 86 (discussing the goals for and importance of the makeup of a nominating commission).

187. See H.R. 111 (Pa. 2019); H.R. 111 (Pa. 2017).

188. See generally H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); Baer, *supra* note 56.

189. Baer, *supra* note 56.

190. *Id.* (quoting primary sponsor of H.B. 196, Rep. Russ Diamond, explaining that the goal of regional districts is "diversity of judicial opinion").

mix of regional representation to the high courts.”<sup>191</sup> By contrast, those in opposition of House Bill 196, generally Democratic lawmakers, claim that the amendment effectuated by House Bill 196 is retaliation based on the Pennsylvania Supreme Court’s controversial decision, *League of Women Voters of Pennsylvania*, in 2018.<sup>192</sup> Although the political motivation behind House Bill 196 is more overt than House Bill 111, in this apparent battle to reform Pennsylvania’s appellate judiciary, there remains substantial support for the proposal based on the demographic diversity that smaller regional districts could generate.<sup>193</sup>

Primary sponsor for House Bill 196, Representative Russ Diamond of Lancaster, claims that the amendment would bring demographic and racial diversity to the courts.<sup>194</sup> The rationale used is that smaller, regional races provide a greater opportunity to elect candidates who might otherwise get lost in state-wide elections.<sup>195</sup> The idea is that the judges elected from these regions would better represent the various ideological, experiential, and racial groups that exist in different parts of the state.<sup>196</sup> One reason for the support of House Bill 196, apart from the alleged judicial advocacy perceived in *League of Women Voters of Pennsylvania*, is the idea that appellate courts with state-wide jurisdiction should represent the entire state, not just the population centers of Philadelphia and Pittsburgh.<sup>197</sup> Although the motives of Republican lawmakers sponsoring this bill may be less than altruistic, as there are a minority of judges and Justices identifying as politically Republican on Pennsylvania’s appellate bench, there is legitimacy to the argument that public support for the judiciary may be more attainable

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191. Stephen Caruso, *How Pa.’s Supreme Court Moved Left, and What It Means for the GOP*, PHILA. TRIB. (Nov. 1, 2019), [https://www.phillytrib.com/news/state\\_and\\_region/how-pa-s-supreme-court-moved-left-and-what-it/article\\_2d0bb4cf-2be1-5ab6-9a7f-f60ee242e3a3.html](https://www.phillytrib.com/news/state_and_region/how-pa-s-supreme-court-moved-left-and-what-it/article_2d0bb4cf-2be1-5ab6-9a7f-f60ee242e3a3.html).

192. See Baer, *supra* note 56 (“[O]ne might wonder if [House Bill 196] is real reform—or old-fashioned retaliation for the 2018 judicial smackdown of the GOP legislature.”).

193. Levy, *supra* note 12 (indicating the largely partisan support from a majority of Pennsylvania’s House of Representatives which have now passed House Bill 196 onto the state Senate for consideration).

194. See Caruso, *supra* note 191; Scolforo, *supra* note 47.

195. See Caruso, *supra* note 191; Scolforo, *supra* note 47.

196. See Caruso, *supra* note 191; Scolforo, *supra* note 47.

197. Caruso, *supra* note 191; see also Levy, *supra* note 12 (indicating that, of the five democratic Pennsylvania Supreme Court Justices, one is a Philadelphia native and four are Pittsburgh natives); Schluckebier, *supra* note 10 (indicating an unprecedented \$15.8 million was spent on Pennsylvania’s last Supreme Court election campaigns).

if the court looks like and thinks like Pennsylvania's diverse citizenry.<sup>198</sup>

On its face, House Bill 196 does not appear to account for communicative competency. Rather, there may be difficulty when those elected from the various districts come together since voters statewide have not come together to select the bench.<sup>199</sup> There is the potential that it will be the loudest voice from each district that is elected. With loud voices and, importantly, loud voices from areas that have previously not felt heard, these voices may try to make an impact without considering the long-term consequences.<sup>200</sup> It can be said this is a necessary evil in the pursuit of a more representative bench. Nonetheless, that pursuit inherently requires one to believe that the judiciary *should* be representative. It is important to recognize however that, to legitimize the bench, the people want a bench that can communicate and decide cases based on precedent despite varying political objectives.<sup>201</sup> The public and the bar find more value in cases that are decided by the bench as a whole, not segmented decisions.<sup>202</sup> Thus, it is difficult to reconcile how dividing the state into thirty-one judicial districts will provide a more unified bench.

House Bill 196 also runs into trouble when considering ideological independence. Pennsylvania's appellate bench has the potential to lose some legitimacy in the eyes of the legal community and statewide public due to the divisive effect of regional districts.<sup>203</sup> There are always arguments that the courts should not act as the legislature,<sup>204</sup> but House Bill 196 may have the effect of treating the

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198. See Johnsen, *supra* note 3, at 833–34 (“Diverse perspectives, knowledge and life experience promote a more robust exchange among the members of an appellate panel. . . . [D]iversity also enhances and widens public respect for the courts.”).

199. See H.R. 196, 2019 Gen. Assemb., Reg. Sess. § 11(a) (Pa. 2019).

200. See Newman & Isaacs, *supra* note 5, at 15 (“Voters are said to be influenced by factors having nothing to do with a candidate’s ability to perform the duties of a qualified justice or judge, such as: party affiliation, name recognition, geographical location and ethnicity.”).

201. Berry et al., *supra* note 151, at 311 (“[J]udicial institutions should be guided by precedent in order to foster a rule of law.”).

202. *Id.* at 313–14.

203. In fact, in early 2020, at least one county bar association in Pennsylvania has petitioned to the state legislature in opposition of the impact that House Bill 196 could have on the independence and legitimacy of the appellate judiciary. See E-mail from Lori E. McMaster, Ass’n Pres., Allegheny Cnty. Bar Ass’n, to Hon. John Disanto, Chair, Senate State Gov’t Comm. (Mar. 5, 2020). *But see* Russ Diamond, *The Case for Regional Appellate Court Districts in Support of House Bill 196: A 50-Year Review of Individuals Serving on Pennsylvania’s Supreme, Superior, and Commonwealth Courts*, PA. HOUSE REPUBLICAN CAUCUS, <http://www.repdiamond.com/Display/SiteFiles/171/OtherDocuments/Misc/HouseBill196andtheCaseforRegionalAppellateCourtDistricts.pdf> (last visited Sept. 20, 2020).

204. See McKoski, *supra* note 8, at 309 (discussing legislation that followed an Iowa Supreme Court decision which would reduce Justices’ salaries to the General Assembly salary:

judiciary as a legislative vehicle. Under House Bill 196, district maps would be drawn and partisan elections would occur just as it is done to select the General Assembly.<sup>205</sup> The only difference would be the role of the judiciary; i.e., interpreting laws rather than creating them.<sup>206</sup> The appellate judiciary, under House Bill 196, has the potential to become a second legislative body that is equally, if not more, concerned about reelection than the General Assembly based on the role of the judiciary in interpreting and resolving controversial legal issues. Accordingly, House Bill 196 may amplify, not remedy, issues of perceived impropriety where the public questions a judges' ability to fairly determine a controversial issue for fear of a decision negatively affecting their position.<sup>207</sup>

In July 2020, the Pennsylvania House and Senate officially signed off in support of House Bill 196.<sup>208</sup> This is a major step toward changing the process by which Pennsylvania's appellate courts are selected.<sup>209</sup> While this support has caught the public's attention, and despite some concern about the proposed changes, it will be a waiting game to see whether House Bill 196 maintains support from the legislature for a second consecutive term.<sup>210</sup> Based on the above analysis of House Bill 196, a plan to create regional judicial districts has the potential to create a political and ideological divide that ultimately would not serve the statewide audience that the appellate courts are intended to represent. Likewise, House Bill 111 has its flaws under the above four-factor scrutiny and could be viewed as a pendulum swing away from Pennsylvania's current method of partisan judicial elections.

Accordingly, as this four-factor consideration has indicated, perhaps there is no perfect judicial selection method, and what is "best" changes depending on the public's perception of judicial legitimacy at a given time. That being said, this analysis also illustrates that any change to judicial selection must not be made in haste or pursuant to a political agenda. These two legislative proposals, House Bill 111 and House Bill 196, are legislative responses to feelings of

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"[I]f the Supreme Court wants to act like legislators they need to start getting paid like legislators.").

205. See H.R. 196, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

206. See *id.*

207. See, e.g., McKoski, *supra* note 8, at 308 (illustrating state legislative attempts to interfere with judicial selection and function following court decisions that are unpopular with the legislature); Newman & Isaacs, *supra* note 5, at 15 (expressing concern that "justices and judges will feel obligated to the political leaders who select them and those who contribute to their campaign funds").

208. See *Pennsylvania House Bill 196*, *supra* note 112.

209. See *id.*

210. Levy, *supra* note 12.

public unrest. Ultimately, it will become the responsibility of the public to carefully consider whether these major changes to the selection of Pennsylvania's appellate judiciary would actually allow them to perceive the judiciary as more legitimate.

## V. CONCLUSION

Despite what appears to be a sense of renewed urgency from the public, the bar, and the General Assembly, to achieve judicial fairness and improve perceptions of judicial legitimacy, it is important that the legislature does not act solely out of passion or politics when it comes to judicial reform. Just as an impulsive judiciary is undesirable, so too is an impulsive legislature. The state should take measured steps to achieve the four, largely universal, expectations of the judiciary discussed above. The judicial branch does not exist in a bubble. As the political climate in Pennsylvania, and the United States as a whole, continues to polarize, judges are impacted. This impact is not fully realized, however, until the public believes there is an issue and loses faith in the legitimacy of the judicial system. In the wake of recent decisions made by the Supreme Court of Pennsylvania, specifically *League of Women Voters of Pennsylvania*, the Pennsylvania legislature appears to have realized a lack of support and faith in the judiciary from some members of the public as evidenced by these dueling proposals to revise Pennsylvania's method of judicial selection.<sup>211</sup> Perhaps ironically unique to states like Pennsylvania that conduct state-wide elections to select their appellate judiciary, the same public that takes issue with decisions like *League of Women Voters of Pennsylvania* or alleges judicial advocacy is the very public that has chosen the bench.<sup>212</sup> Likewise, it is the responsibility of the public, if these proposed amendments or similar legislation continue to progress, to become educated and vote for the adoption or rejection of state constitutional amendments.<sup>213</sup> Accordingly, the legal community and

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211. *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. 2018); see Folmer, *supra* note 7; see also Muschick, *supra* note 7.

212. Lindquist, *supra* note 43, at 68.

213. As of October 2020, House Bill 196 has gained substantially more legislative momentum than House Bill 111, which died in chambers while under consideration by the Pennsylvania House of Representatives. Compare *Pennsylvania House Bill 196*, *supra* note 112, with *Pennsylvania House Bill 111*, *supra* note 71. In order to adopt House Bill 196, or make any amendment to the Pennsylvania Constitution, the Bill must maintain this momentum for another, consecutive, legislative session and then be affirmed by a majority public vote. See Pontz, *supra* note 69; see also John Finnerty, *State Senate OKs Possible Constitution Changes*, DAILY ITEM (July 16, 2020), [https://www.dailyitem.com/news/state-senate-oks-possible-constitution-changes/article\\_46c39b56-9c8c-540d-ab7c-94e12ac7ba0b.html](https://www.dailyitem.com/news/state-senate-oks-possible-constitution-changes/article_46c39b56-9c8c-540d-ab7c-94e12ac7ba0b.html).

the public should hope and expect that Pennsylvania's Legislature carefully crafts proposed amendments and, if the time comes, that the public thoroughly consider whether a particular change to judicial selection method will truly further their faith in the legitimacy and trustworthiness of the appellate bench.