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LIMITED TERM MERIT APPOINTMENTS: A PROPOSAL TO REFORM JUDICIAL SELECTION

J. DAVID ROWE†

INTRODUCTION

*We must remember that we have to make judges out of men, and that by being made judges their prejudices are not diminished and their intelligence is not increased.*¹

As lawyer Robert Ingersoll noted more than 100 years ago, some problems are inherent to the judicial system, such as personal prejudices.² Although these inherent problems cannot by their very nature be eliminated, they can and should be minimized. Selecting judges by popular election, however, is an ill-suited means of achieving this goal. This article identifies the three basic elements of the judiciary in a republican form of government, and illustrates how popularly electing judges is incompatible with each of these elements. This article also proposes a system of limited term merit appointments that will better enable our government to select judges who will be independent, impartial and competent.

The summer of 1964 was undoubtedly memorable for former Chief Justice Nelson S. Corn of the Oklahoma Supreme Court. He was convicted of federal income tax evasion and sent to prison that fateful summer.³ Justice Corn's downfall began in 1956 with a \$150,000 bribe he received from Selected Investments Corporation in return for a favorable opinion in a tax case then pending before the Oklahoma Supreme Court.⁴ Justice Corn originally claimed the payment was for

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1. Robert G. Ingersoll, Speech in Washington, D.C. (Oct. 22, 1883).

2. Robert G. Ingersoll, Speech in Washington, D.C. (Oct. 22, 1883). Ingersoll's message is that even election to the bench does not diminish innate human characteristics.

3. Orrin W. Johnson & Laura J. Urbis, *Judicial Selection in Texas: A Gathering Storm*, 23 TEX. TECH L. REV. 525, 529 (1992) (citing *A Ghost Returns*, THE DAILY OKLAHOMAN, Mar. 23, 1965, § 1, at 13).

4. *Id.* (citing *A Ghost Returns*, THE DAILY OKLAHOMAN, Mar. 23, 1965, § 1, at 13); *see also* Selected Inv. Corp. v. Oklahoma Tax Comm'n, 309 P.2d 267 (Okla. 1957) (holding incorporated trust fund and separate corporation established to manage the assets of the trust fund are separate entities, and thus assessing income tax against the managing corporation for the trust fund income was improper).

campaign expenses, but when Selected Investments Corporation filed for bankruptcy, the true nature of the payment was revealed.⁵

After Justice Corn resigned and was incarcerated, he gave a detailed statement admitting the payment was a bribe and implicating others.⁶ "The statement, according to a legislator who read it, told a story 'so sordid, sickening and discouraging, its contents must be revealed for the good of us all.'" ⁷ The series of investigations conducted during the Selected Investments Corporation bankruptcy revealed that under the guise of campaign contributions, bribery had tainted Oklahoma Supreme Court decisions for as long as thirty years.⁸

Within fourteen months, three Oklahoma Supreme Court justices were disgraced.⁹ Two were convicted and imprisoned, and a third was removed from office after impeachment for corruption and bribery.¹⁰ A fourth justice, who died before the charges were resolved, was accused of undue interest in a case in which bribery was admitted.¹¹ Admittedly, these are extreme examples of how elected judges can be overcome by the temptation which accompanies campaign contributions, but these are not isolated events.

In 1983, for example, the Texas Supreme Court was deadlocked in a decision involving the alleged mismanagement of mineral leases by

5. *Id.* at 529-30 (citing *Johnson v. Johnson*, 424 P.2d 414, 416 (Okla. 1967); *A Ghost Returns*, THE DAILY OKLAHOMAN, Mar. 23, 1965, § 1, at 13)).

6. *Id.* at 530 (citing *Johnson v. Johnson*, 424 P.2d 414, 416 (Okla. 1967) (quoting *A Ghost Returns*, THE DAILY OKLAHOMAN, Mar. 23, 1965, § 1, at 13)).

7. *Id.*

8. *Id.*; see also *Johnson v. Johnson*, 424 P.2d 414, 416 (Okla. 1967). In *Johnson*, the Oklahoma Supreme Court explained:

Nelson S. Corn was first elected to this Court in 1934 and served continuously until January of 1959. He then became a supernumerary justice until his resignation in July of 1964. At that time he entered a plea of nolo contendere to a federal charge of filing false income tax returns and was sentenced upon such plea. On December 9, 1964, while serving his sentence, he made a statement under oath setting out the details of his dishonesty. From this statement, and from other evidence before us, it appears that during the first term of office he made a bargain with an Oklahoma City attorney that in return for payment of campaign expenses he would vote as the attorney directed "as a sixth man" in any case where there were already five votes in favor of an opinion. The attorney created a campaign fund for him and gave him money from time to time after Corn had voted as he directed. In later years, it is apparent, the agreement to vote only in cases where a majority was already in favor of the opinion was disregarded and Corn voted as the attorney desired in any case where he was requested to do so. Corn also stated that in certain cases (arising after the decision in this case in 1954) he had received large bribes for favorable opinions and that he had given part of a bribe to two former justices of this Court, one of whom has now been impeached, and the other of whom has resigned both from this office and from the Bar.

Id. at 416.

9. *Johnson & Urbis*, *supra* note 3, at 530.

10. *Id.* at 530-31.

11. *Id.* at 531.

Clinton Manges, a wealthy, well-known South Texas rancher.¹² Manges lost in the lower court, which removed him as manager of the leases and awarded the plaintiff \$382,000 in actual damages and \$500,000 in punitive damages.¹³ On appeal, one Texas Supreme Court justice recused himself because of his prior involvement in an unrelated suit against Manges.¹⁴ A second justice, Robertson, initially recused himself because he had recently accepted \$100,000 from Manges in campaign contributions.¹⁵

The remaining seven justices were split 4-3 in favor of reversing the lower court's ruling,¹⁶ so "Chief Justice Pope announced that the court would affirm the lower court's holding since the five vote requirement to reverse the opinion had not been met."¹⁷ In response to Pope's announcement, "Robertson quickly voted in favor of Manges [and the] next day, an opinion was released which permitted Manges to remain as manager of the mineral leases and eliminated the \$500,000 in exemplary damages."¹⁸ The Texas Supreme Court subsequently withdrew its opinion,¹⁹ but "Justice Robertson's actions . . . illustrate the inherently adverse position in which a judge may be placed" in an elective system.²⁰

These sordid stories sharply illustrate just some of the reasons why popularly electing judges is an ill-conceived method of selecting a judiciary that is independent, impartial and competent. This article argues that popularly electing judges is incompatible with the three basic elements of the judiciary in a republican form of government, and proposes an alternative — limited term merit appointments — which avoids the problems associated with an electoral system.

12. Ken Case, *Blind Justice*, TEX. MONTHLY, May 1987, at 136, 195-96.

13. *Id.* at 195.

14. Justice Barrow declined to participate because he was personally involved in a lawsuit with Manges over a statement made by Barrow during Barrow's election campaign. *Id.* at 196.

15. Johnson & Urbis, *supra* note 3, at 535 (citing Ken Case, *Blind Justice*, TEX. MONTHLY, May 1987, at 196).

16. *Id.*

17. *Id.*; see TEX. CONST. art. V, § 2 (requiring at least five votes of the Texas Supreme Court to reverse a lower court ruling).

18. Johnson & Urbis, *supra* note 3, at 535.

19. See *Manges v. Guerra*, 673 S.W.2d 180, 181 (Tex. 1984) (withdrawing the earlier opinion and replacing it with one in which the court reversed the lower court's ruling that removed Manges from managing the leases, but affirmed the award of actual and punitive damages).

20. Johnson & Urbis, *supra* note 3, at 536.

I. ELECTING JUDGES IS INCOMPATIBLE WITH THE BASIC ELEMENTS OF THE JUDICIARY IN A REPUBLICAN FORM OF GOVERNMENT

A. *The Basic Elements of the Judiciary in a Republican Form of Government*

The three basic elements required of an independent judiciary in a republican form of government are: (1) the freedom to exercise independent judicial review; (2) the ability to render impartial decisions; and (3) competent, well-qualified judges. Each of these elements is considered in turn.

1. Independent Judicial Review

For years, constitutional scholars struggled with the idea of having the judiciary independent from the popular will of the sovereign people. The controversy fueling this struggle is revealed in the debate over the legitimacy of judicial review, alternatively referred to as the "Counter-Majoritarian Objection"²¹ or the "Counter-Majoritarian Difficulty."²² Whatever its name, the concept refers to:

A Supreme Court decision that strikes down a statute on grounds of its unconstitutionality [which] effectively casts a virtually unchallengeable veto against the acts of elected officials, despite the fact that the Court's members have not themselves been elected to do so nor have been authorized by the Constitution to do so. By thwarting the will of the prevailing majority it exercises an essentially anomalous role in a democracy.²³

Since this country's inception, scholars have questioned the validity of making the judiciary independent of the people. One commentator, in an early newspaper account of Chief Justice Marshall's decision in *Marbury v. Madison*,²⁴ thoughtfully questioned "whether there is any analogy between what is called the *independence of the judges* in England and the *independence of the judges* in America — and whether making the former independent of the *king* justifies making the latter independent of the people."²⁵

Despite the philosophical persuasiveness of the argument that democratic forms of government are inconsistent with the exercise of judi-

21. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 6 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION].

22. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

23. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 21, at 6 (footnote omitted) (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986)).

24. 5 U.S. (1 Cranch) 137 (1803).

25. Johnny C. Burriss, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, OKLA. CITY U. L. REV. 585, 636 (1987) (footnote omitted) (quoting AURORA GEN. ADVERTISER (Philadelphia), Mar. 31, 1803, at 2) (emphasis in original).

cial review, America's political and jurisprudential history have long embraced the idea:

Even a cursory glance at the historical and legal materials will reveal that the exercise of judicial review by the Court was widely noticed and virtually nowhere objected to in the press sympathetic to either party. In the very midst of the generation that ratified the Constitution, Marshall's exercise of the power of judicial review was explicitly and universally taken as appropriate. Moreover, the Federalist Papers, available legal precedent, action by the First Congress and all the other conventional sources of legal argument conclusively establish that such review is an integral part of the constitutional structure, was intended to be so, and has been confirmed as such countless times.²⁶

Although accurate, this explanation begs the question: "How?" How can a democratic system of government readily embrace the concept of judicial review in light of our notion of popular sovereignty?

The answer lies in the fact that American democracy is not true democracy. Instead of subjecting themselves to absolute majority rule, the founders of this country established a form of government that protects individual liberties from being trammled by the will of the majority.²⁷ Congress, even when backed by overwhelming popular approval of the electorate, has no power to enact certain laws; we the people declined to vest Congress with certain powers because they feared the potential for abuse.²⁸

As a safeguard against congressional violation of the Constitution, the framers vested the judiciary with the power of judicial review. Philosophically, judicial review is inconsistent with true democracy, but our system of government, as established by the will of the people through the Constitution, is not a true democracy. Therefore, judicial

26. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 21, at 7 (footnote omitted). The quoted passage relies on several authorities (in Bobbitt's text).

27. In recognition of the fact that individual states have the authority to suppress individual rights, the Fourteenth Amendment was passed as a check on the power of the majority. See *Fullilove v. Klutznick*, 448 U.S. 448, 508-10 (1980) (Powell, J., concurring in part and dissenting in part).

28. For example, the framers were wary of the king's ability to confiscate houses for the quartering of his troops. Thus, no such power was granted to the federal government under the U.S. Constitution. The Third Amendment was later added to ensure the federal government did not have this power. See U.S. CONST. amend. III (forbidding the government from quartering troops). The Bill of Rights contains many other examples. See, e.g., *id.* amend. IV (prohibiting warrantless searches and seizures); *id.* amend. V (prohibiting the government from taking private property for public use without just compensation); *id.* amend. VIII (prohibiting the government from inflicting cruel and unusual punishments). See generally, Roger Pilon, *Freedom, Responsibility, and Our Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 516 (1993) (noting restraints placed on the federal government by the founding fathers "made it clear that ours was to be an extremely limited government").

review is not inconsistent with our form of government; it is a necessary component.²⁹

A corollary to the notion that judicial review is necessary to a republican form of government is the premise that the judiciary must be independent of the popular will of the majority. If not, the courts and legislature will coalesce. Judge John Roll of the Arizona Court of Appeals explains:

The Constitutional Congress designed the legislative and executive branches to be responsive to the needs and the demands of the populace. The judiciary was obviously designed with different objectives. The federal judiciary was sculpted so as to achieve independence, stability, and removal from the day-to-day pressures of politics. Alexander Hamilton wrote: "The complete independence of the courts of justice is peculiarly essential in a limited [C]onstitution."³⁰

Although Judge Roll was writing about the federal judiciary, his comments apply to state courts as well, given the fact that states generally operate under the same tripartite republican system.

The danger of having no independent judicial review is that if a legislature enacts an unconstitutional law at the behest of the popular will of the majority, a court similarly subjected to the popular will of the majority has no incentive to overturn the unconstitutional law by exercising judicial review.³¹ Without an independent judiciary, the republican form of government has no mechanism to preserve highly valued individual liberties from being trampled by the majority.³²

29. See BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 21, at 9 (maintaining judicial review preserves the operation of democratic representation by upholding the limits of majoritarianism in the Constitution). See also PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 190-91 (1982) (stating one function of judicial review is to maintain the checks and balances of the political branches of government).

30. John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 856 (1990) (quoting THE FEDERALIST, No. 78, at 5244 (Alexander Hamilton) (J. Cooke ed. 1961)).

31. See *id.* at 856-57. "Chief Justice Norman Krivosha of the Nebraska Supreme Court emphasized that contested elections and the judiciary are incompatible because . . . judges should decide cases based upon the law and not based on the will of the people." *Id.*

32. See BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 21, at 9 (stating judicial review preserves the legitimacy of the Constitution); Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 3 (1992) ("Robert Bork declares that only unelected, unaccountable and unrepresentative judges can prevent voters from destroying the republic and basic freedoms.") (citing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5 (1990)); Roll, *supra* note 30, at 857 (analogizing "the role of judges to that of a referee at a basketball game and ponder[ing] the resulting chaos [if] the fans [were] permitted to vote on each call the referee makes"). But see Linde, *supra*, at 4 (arguing that because judges make law, people are entitled to elect them); Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection in Flor-*

Some might argue the need for independent judicial review at the state level is unnecessary because minority groups, unprotected by state courts, can seek federal protection. The problem with this argument, however, is three-fold. First, federal courts can only grant protection to minorities when individual liberties are protected by the United States Constitution. Many individual liberties are unprotected by the United States Constitution. The only remedy for individuals under these circumstances is for a state court judge to exercise political independence and protect their human rights. Second, even when federal jurisdiction is invoked, it may take years for an individual suffering at the hands of a recalcitrant state to be granted protection by a federal court decree. Finally, minorities suffering at the hands of the majority are entitled to as many layers of protection as possible. The addition of an independent state judiciary would serve as a much needed and welcomed arrow in an otherwise empty quiver.

2. Impartial Decisions

Because our society is based upon the operation of law (as opposed to force), citizens must have confidence in their judiciary; otherwise, the law appears unjust, and citizens are less likely to obey it.³³ Because of this fundamental principle, the judiciary must maintain its appearance as an impartial tribunal deciding questions of law on objective factors rather than arbitrary or political considerations.

According to John Hill, former Chief Justice of the Texas Supreme Court, when citizens begin to doubt the ability of the judiciary to render impartial decisions, they perceive that justice is no longer being carried out.³⁴ When this happens, says Judge Hill, the "system is shaken at its very core."³⁵ Another prominent Texas leader, State Senator Kent Caperton, Chairman of the Committee on the Judiciary, has characterized impartiality as the "very heart and soul" of the judiciary.³⁶

The American Bar Association (ABA) also recognizes the need to maintain an independent judiciary. Both the 1972 *Code of Judicial Conduct* and the revised 1990 *Model Code of Judicial Conduct* are

ida, 43 FLA. L. REV. 529, 543 (1991) (arguing that because judges make law they should be held accountable to the people at the ballot box).

33. See Roll, *supra* note 30, at 850 (reporting Arizona State Bar President Browning believes a judiciary responsive to the will of the people is dangerous "because it turns the concept of justice over to mobs." (quoted in J. Rawlinson, *Judges' Appointment Urged*, ARIZ. DAILY STAR, Apr. 11, 1972, at 1B, col. 1)).

34. See John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 341 (1988) (stating campaign contributions create the appearance of a quid pro quo system of justice, causing people to lose confidence in the judiciary) (citing William Murchison, *Lead Our Courts Out of Temptation*, TEX. LAW., May 30, 1988, at 26).

35. *Id.* at 343.

36. *New Evidence Emphasizes Judicial Reform Necessary*, AUSTIN AMERICAN-STATESMAN, Nov. 5, 1987, at A10 (quoting Texas State Senator Kent Caperton).

replete with rules designed to achieve this end.³⁷ The *Code of Judicial Conduct*, for example, states that “[a]n independent and honorable judiciary is indispensable to justice in our society,”³⁸ and requires judges to conduct themselves “at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”³⁹ Indeed, the ABA’s explicit purpose in promulgating the *Code of Judicial Conduct* was to exhort judges to “participate in establishing, maintaining, and enforcing . . . high standards of conduct so that the integrity and independence of the judiciary may be preserved.”⁴⁰

3. Competent, Well-Qualified Judges

Because a democratic system of government requires the judiciary to exercise independent judicial review⁴¹ and render impartial decisions,⁴² judges must be competent and well-qualified. Justice Cardozo believed there is no guarantee of justice except for the personality of the judge.⁴³ Indeed, the single “most important element of any judicial establishment is the caliber of its personnel.”⁴⁴

Actually, this third element is not so much a separate requirement as it is a condition precedent to the first two elements. That is, if judges are not competent, they are less able to exercise independent judicial review and render impartial decisions because “[t]he law as administered cannot be better than the judge who expounds it.”⁴⁵ Perhaps this notion explains why “[e]veryone agrees that one should select judges based on merit.”⁴⁶

B. Electing Judges Is Incompatible with the Three Basic Elements of the Judiciary

The system of electing judges is incompatible with each of the three basic elements outlined above. It undermines the ability of the judiciary to exercise independent judicial review, it shatters both the actual and apparent independence of the judiciary, and it is incompatible with the need for competent, well-qualified judges on the bench.

37. See J. David Rowe, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 TEX. L. REV. 597, 620 (1995) (collecting a sample of the ABA's model rules which emphasize judicial impartiality).

38. CODE OF JUDICIAL CONDUCT Canon 1 (1986).

39. *Id.* at Canon 2(A).

40. *Id.* at Canon 1.

41. See *supra* part I(A)(1).

42. See *supra* part I(A)(2).

43. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 16-17 (1921).

44. McClellan, *supra* note 32, at 529.

45. *Id.* (quoting A. VANDERBILT, *THE CHALLENGE OF LAW REFORM* 11 (1955)).

46. *Id.* at 541.

1. Independent Judicial Review

As previously discussed, courts must be able to exercise independent judicial review in order to preserve the rights of the minority as against the tyranny of the majority.⁴⁷ In *Chisom v. Roemer*,⁴⁸ the United States Supreme Court stated, “[I]deally public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment.”⁴⁹

Popularly elected judges, however, often cannot afford to disregard or defy public sentiment because if they do, they may suffer defeat in the next election. Indeed, the very purpose of electing judges in the first place is to make them accountable to the will of the people. Such accountability is, on its face, incompatible with the requirement that judges exercise independent judicial review.

If judges are held accountable for controversial decisions by the electorate, they will almost inevitably concede to the will of the majority on unpopular issues involving minority rights and sensitive constitutional issues.⁵⁰ For example, consider whether an elected judge sitting in East Texas could strike down as unconstitutional an overwhelmingly popular anti-gay rights bill. She could not because she knows that “unsatisfactory judicial decisions can lead to punishment at the polls.”⁵¹ In fact, she not only fears the possibility, but “can expect those persons or groups [who oppose her rulings] to work against the judge’s reelection.”⁵²

Former President William Howard Taft perhaps best captured the essence of this argument when he vetoed Congress’s first joint resolution admitting Arizona as a state. President Taft vetoed the resolution because the new state’s constitution included a provision allowing for the recall of judges by popular vote. Explaining his veto in a letter to the United States House of Representatives, President Taft stated:

This provision of the Arizona Constitution, in its application to county and State Judges, [sic] seems to me so pernicious in its effect, so destructive of the independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore to be so injurious to the cause of free government, that I must disapprove a constitution containing it.⁵³

47. See *supra* notes 28-30 and accompanying text.

48. 501 U.S. 380 (1991).

49. *Id.* at 400 (citing as correct language from *League of United Latin Am. Citizens v. Clements*, 914 F.2d 620, 622 (5th Cir. 1990), *rev'd sub nom.* *Houston Lawyers Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991)).

50. McClellan, *supra* note 32, at 543.

51. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 89 (1986) (special issue).

52. *Id.* (emphasis added).

53. H.R. Doc. No. 106, 62d Cong., 1st Sess., Pt. 4, 3964 (1911) (statement of Former President William H. Taft).

Or, as former Arizona State Bar President Browning testified, "Judges shouldn't be responsible to the people. It's a dangerous idea because it turns the concept of justice over to mobs."⁵⁴

As a concrete example of Browning's fear, consider the following statistic: In Alabama, where elected judges are allowed to override a jury's recommendation for sentencing, trial judges override jury recommendations of life imprisonment almost 10 times as often as they override jury recommendations for the death penalty.⁵⁵ Why? Because elected judges are forced to respond to "a political climate in which judges who covet higher office — or who merely wish to remain judges — must constantly profess their fealty to the death penalty."⁵⁶

2. Impartial Decisions

a. *In General*

The judiciary's actual and apparent ability to render impartial decisions is greatly undermined by judicial elections. Transforming a judge into a politician threatens the actual and apparent ability of the judge to render impartial decisions. People are expected to hold judges in esteem, and respect the official's ability to render impartial decisions. But when voters watch judges campaign shamelessly for a seat on the bench, the dual roles of politician and impartial judge are incompatible.

As early as 1906, "Roscoe Pound told the [ABA] that 'compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.'"⁵⁷ According to Judge John Hill, this is true in Texas. Judge Hill argues the history of partisan elections demonstrates that the judiciary is not independent,⁵⁸ and the loss of public confidence in the integrity of the courts is a major problem.⁵⁹ Since 1950, in fact, no less than five Chief Justices of the Texas Supreme Court have publicly recognized the integrity of Texas courts is undermined by the involvement of judges in partisan politics.⁶⁰

54. Roll, *supra* note 30, at 850; *see supra* text accompanying note 31-33.

55. *Harris v. Alabama*, 115 S. Ct. 1031, 1036 (1995) (citing "ostensibly surprising statistics" that in Alabama, "there have been only 5 cases in which the judge rejected an advisory verdict of death, compared to 47 instances where the judge imposed a death sentence over a jury recommendation of life").

56. *Id.* at 1039 (Stevens, J., dissenting).

57. Roll, *supra* note 30, at 842 (citing *The Causes of Popular Dissatisfaction With The Administration of Justice*, 46 J. AM. JUDICATURE SOC'Y 55, 66 (1962) (reprinting Roscoe Pound's address from the 1906 ABA Annual Convention)).

58. Hill, *supra* note 34, at 340.

59. *Id.* at 339.

60. *Id.* at 344.

b. *Campaign Contributions*

Candidates for an elected seat on the bench generally solicit campaign contributions to win elections.⁶¹ Forcing judges to solicit campaign contributions undermines judicial integrity because it (1) fosters corruption; (2) allows contributors to legally buy access to the bench; and (3) creates the appearance of impropriety even where judges are able to maintain their independence and impartiality.

The resulting corruption fostered by judicial campaign contributions is obvious. In the now infamous *Pennzoil v. Texaco*⁶² case, for example:

Texaco representatives contributed campaign funds totaling \$72,700 to seven justices [of the Texas Supreme Court] while an appeal in the \$11 billion Pennzoil lawsuit against Texaco was pending before the court. Pennzoil lawyers countered, contributing \$315,000 to their campaigns. Further, four justices who received contributions from the parties did not even face re-election.⁶³

Proponents of electing judges maintain campaign contributions which come from both sides of the bar, as in the *Pennzoil* case, guarantee impartiality since both sides have the same opportunity to influence. This argument, however, ignores two very real problems. First, in many cases, litigants and counsel do not have the necessary resources to match an opponent's contributions. Second, a system that encourages campaign contributions from litigants appearing before a court has the appearance of impropriety regardless of the actual amount of influence.

Indeed, even judges who want to maintain their impartiality in the face of obvious attempts at buying their influence may find it difficult to do so. Some judges deny they are influenced by campaign contributions, while others are beginning to admit how difficult it is to remain unbiased when a large contributor has a pending suit.⁶⁴ Indeed, this pressure is undoubtedly one of the primary reasons a lawyer contributes to a judge's campaign.

Even when a candidate is attempting to remain above reproach, campaign workers may be working contrary to this goal. After losing his 1986 election, former Judge Grodin of the California Supreme Court learned one of his campaign workers informed lawyers Grodin

61. See Hill, *supra* note 34, at 341 (noting the high correlation between campaign contributions and winning elections); Johnson & Urbis, *supra* note 3, at 545-46 (noting high correlation between campaign donations and election victories).

62. *Texaco v. Pennzoil*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

63. McClellan, *supra* note 32, at 555 (footnotes omitted).

64. Johnson & Urbis, *supra* note 3, at 550-51 (citing Robert Elder Jr. & Diane Burch, *Records Refute Campbell Pledge*, TEX. LAW., Oct. 26, 1987, at 12).

would remember after the election who contributed and who did not.⁶⁵

The high correlation between campaign spending and winning elections⁶⁶ allows the rich and powerful to buy undue influence simply by funding the campaigns of persons they want on the bench. Empirical data demonstrates only a small number of attorneys are responsible for the lion's share of campaign contributions,⁶⁷ which means that only a tiny fraction of the population is controlling the composition of the judiciary.

Consider, for example, the November 1994 race for the Texas Fourth Court of Appeals. Although the voters in the Fourth Court's district were supporting Republicans by large margins in other races,⁶⁸ "five plaintiffs' firms provided the financial muscle that kept [the court] from going Republican."⁶⁹ This so-called "Gang of Five" was successful in their uphill battle against the Republican ground swell by helping the Fourth Court's "Democratic candidates raise four times as much money as their Republican opponents."⁷⁰

A second factor compounding this problem is that most judges initially reach the bench through gubernatorial appointments rather than popular elections.⁷¹ Thus, the composition of the bench is actually controlled by a combination of the governor's office and those attorneys rich enough to contribute to the incumbent's re-election campaign.⁷²

An equally important danger inherent in campaign contributions is the appearance of impropriety. As long as judges solicit and accept campaign contributions from attorneys and litigants appearing before them, the appearance of impropriety cannot be eliminated.⁷³ Even when campaign contributions do not affect a judge's decision, the per-

65. Linde, *supra* note 32, at 11.

66. *See supra* note 61 and accompanying text.

67. Hill, *supra* note 34, at 341.

68. *See* Mark Ballard & Amy Boardman, *5 Firms Swung 4th Court Races: Their Money Halted GOP Tide*, TEX. LAW., Mar. 20, 1995, at 1 (reporting "[s]ix of the nine district court races in San Antonio and three of the five county commissioners' show-downs went to the GOP, giving Republicans majorities on those courts for the first time."). *Id.* at 28.

69. *Id.* at 1.

70. *Id.*

71. Samuel Issacharoff, *The Texas Judiciary and the Voting Rights Act: Background and Options 4* (1989) (unpublished manuscript on file with the author) (reporting 55% of courts of appeal judges and 64% of district court judges in Texas are appointed to office prior to first standing for election).

72. *See* Linde, *supra* note 32, at 10 (quoting Donald W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991)) (arguing campaign contributions give attorneys an opportunity to influence the outcome of judicial elections).

73. McClellan, *supra* note 32, at 555-56.

ception of improper influence persists⁷⁴ in cases such as *Manges* and *Pennzoil*.

3. Competent, Well-Qualified Judges

As previously discussed, one of the basic elements of an independent judiciary is to have well-qualified judges serving on the bench. Popularly electing judges, however, is incompatible with this requirement because voters often lack sufficient information to elect well-qualified judges.

Most studies reveal voter apathy with respect to judicial elections.⁷⁵ For example, a 1976 Texas voter survey reflected that eighty-five percent of the voters were unable to name a single judicial candidate.⁷⁶ A 1954 New York City voter survey taken immediately after an election indicated eighty-one percent of the voters could not name a single judicial candidate for whom they voted.⁷⁷ Yet another study showed that:

[E]ven when an intense campaign battle was being fought for the Wisconsin Supreme Court in 1964-65, only 46% of the electorate knew that the judges were elected in Wisconsin; only 30% knew which of two candidates was an incumbent; and only 9% could remember anything substantive about the state Supreme Court election that was held a few months before the survey.⁷⁸

So on what do voters base their decisions? "With lack of knowledge about judicial candidates and their qualifications, voters' decisions are derived from other determinants such as incumbency, the judicial candidate's name, ballot position, and political party label."⁷⁹

74. See Hill, *supra* note 34, at 342 (lamenting the growing belief among Texas citizens that the state's legal system no longer dispenses even-handed justice); see also Johnson & Urbis, *supra* note 3, at 539 (arguing that at the very least large contributions from attorneys who have pending or future litigation before a court create an appearance of an attempt to exert undue influence); Roll, *supra* note 30, at 859 (arguing even if judges remain impartial after having received campaign contributions, the public is unlikely to be convinced).

75. See Champagne, *supra* note 51, at 93 ("[M]ost studies show a lack of knowledge by the voters."); see also Linde, *supra* note 32, at 13 (observing that voters rarely know what appellate judges do, or who the incumbent is when the ballot does not say); Roll, *supra* note 30, at 860 ("Contested judicial elections are often characterized by a lack of public interest and knowledge.").

76. Roll, *supra* note 30, at 860 (citing Shultz, *The Judges and the System*, ARIZ. B.J., Oct. 1978, at 26).

77. *Id.* (citing *How Much Do Voters Know or Care About Judicial Candidates?*, 38 J. AM. JUDICATURE SOC'Y 141 (1955)); see also Champagne, *supra* note 51, at 93 (reporting the same survey revealed "[h]ardly anyone could recall the name of the chief justice of New York's highest court, a respected jurist who was endorsed by both the Democratic and Republican parties"); *id.* ("Most voters [in the '54 New York survey] admitted that they either did not pay attention to judicial elections or simply voted party label.").

78. Champagne, *supra* note 51, at 93.

79. Johnson & Urbis, *supra* note 3, at 544-45 (footnotes omitted).

Other relevant factors include "good looks,"⁸⁰ the ability to raise money,⁸¹ and the campaign skills of the candidate.⁸²

Judge Richard Neely of West Virginia is a typical example. Judge Neely, the grandson of a long-time governor and senator, announced his candidacy for the United States Senate when he believed an entrenched incumbent was retiring.⁸³ Neely began to raise funds, but his support evaporated when the incumbent filed for re-election.⁸⁴ Neely recounts:

I decided it was better to be a winning state supreme court justice than a losing United States senator, so I took my small organization and the statewide name recognition I had bought with the campaign contributions into a lower stakes game which I could win. I outspent my opponents ten to one and won the primary election for judge by 35,000 votes and the general election by 54,000. The outcome had nothing to do with my legal ability, but with inherited name recognition, the enthusiasm and charm of youth, and money — most of it either mine or my father's.⁸⁵

The name factor cannot be underestimated. In Florida, a lawyer named MacKenzie with no courtroom experience defeated an acclaimed incumbent judge named Dellapa, despite a critical newspaper article appearing only one month before the election which criticized MacKenzie's lack of experience and recent bout with alcoholism.⁸⁶ Apparently, however, the all-American name and media exposure (albeit negative) were enough to persuade the electorate to vote for him.⁸⁷ Moreover, in 1990, Washington voters replaced incumbent Chief Justice Keith Callow with a lawyer named Charles Johnson, who had the fortunate coincidence of sharing his name with a local television news anchor.⁸⁸

In 1976, Texas voters elected Don Yarbrough to the Texas Supreme Court despite the fact he was involved in numerous law suits and was the subject of a disbarment proceeding.⁸⁹ Don Yarbrough was likely confused with a well-known gubernatorial candidate by the name of Yarborough, or perhaps with long-time Texas Senator Ralph Yarbrough.⁹⁰ "At any rate, Don Yarbrough won the election, displacing a

80. Roll, *supra* note 30, at 850 (quoting the President of the Arizona State Bar).

81. *Id.*

82. Champagne, *supra* note 51, at 91.

83. RICHARD NEELY, HOW COURTS GOVERN AMERICA 35 (1981).

84. *Id.*

85. *Id.*

86. McClellan, *supra* note 32, at 556.

87. *Id.* at 556-57.

88. Linde, *supra* note 32, at 13.

89. Hill, *supra* note 34, at 351.

90. *Id.*

well respected jurist; later he would end his political days in a Texas state prison."⁹¹

More recently, Texas voters "swept Judge Charles Campbell off the court, despite his credentials as a conservative former prosecutor with 12 years on the bench, and elected an obscure lawyer named Stephen Mansfield, who had been caught rampantly lying about his background."⁹² Mansfield lied about his previous political experience, his criminal law experience, and even his birthplace, but the voters elected him despite the fact "[t]hese and other lies had been exposed in the press before the election."⁹³ Apparently, the voters only cared "that Mansfield was a Republican non-incumbent who had vowed to uphold more death sentences."⁹⁴

Making matters worse, the judicial candidates themselves know about — and even take advantage of — the electorate's willy-nilly voting tendencies. Mansfield's success has spawned a "rash of candidates who decided to gamble the \$3,000 filing fee on the chance that voters will elect them to a \$94,686-a-year job guaranteed for six years."⁹⁵

As a result of the hodge-podge manner in which the electorate chooses among judicial candidates, the most qualified judges are often not selected. In 1913, former President William Howard Taft recognized this shortcoming in a speech before the ABA, proclaiming the system of electing judges to be a failure because voters could elect a non-qualified candidate who merely campaigned aggressively.⁹⁶ Moreover, beginning as early as the 1920's, the leaders of the State Bar of Texas likewise voiced concerns regarding the quality of elected judges.⁹⁷

Former Texas Supreme Court Chief Justice John Hill believes these early leaders' concerns were valid. According to Judge Hill, the history of electing judges in Texas demonstrates voters do not always

91. *Id.* (footnote omitted).

92. Stuart Taylor, Jr., *Closing Argument: The Judicial Politics of Death: Candidates for the Bench Have Found that it Pays to Be Tough on Capital Crime, Sometimes Even Imposing a Death Sentence When a Jury Recommends Life*, TEX. LAW., Nov. 6, 1995, at 12. Mansfield was later publicly reprimanded by the State Bar of Texas for lying during his campaign. Robert Elder, Jr., *Mansfield's in the Clear — At Least Until 2000: Reprimand Behind Him, He's Untouchable by Conduct Commission*, TEX. LAW., July 24, 1995, at 6.

93. Taylor, *supra* note 92, at 12.

94. *Id.*

95. Robert Elder, Jr., *Cranky Report Fogs Good Idea: Combine the State High Courts*, TEX. LAW., Jan. 15, 1996, at 5.

96. Roll, *supra* note 30, at 842 (citing William H. Taft, *The Selection and Tenure of Judges*, 1913 REP. A.B.A. 418, 422-23).

97. Hill, *supra* note 34, at 348 (citing A.H. McKnight, *Selection of Candidates For Judicial Office*, 3 TEX. L. REV. 66 (1924)); A. H. McKnight, *How Shall Our Judges Be Selected*, 6 TEX. L. REV. 470 (1928).

elect the most qualified candidates.⁹⁸ Indeed, says Judge Hill, the less qualified candidate is likely to win:

The qualities that make a good judge are different from the qualities that make a good politician, and it is by no means always the case that the two sets of qualities exist in the same person. When they do not, the chances are that in the primary election the less capable judicial candidates will be nominated.⁹⁹

Other commentators argue the most highly qualified lawyers are discouraged from serving on the bench because they dislike the politics of an elected judiciary.¹⁰⁰ Whatever the explanation, the result is that elections allow for, and may even encourage, voters to elect non-qualified judges to the bench.

II. LIMITED TERM APPOINTMENTS AVOID THE PITFALLS OF POPULARLY ELECTING JUDGES

A. *A Proposal for Limited Term Merit Appointments*

Judges should be appointed for limited terms based on merit. The limited term merit appointment system avoids the pitfalls of popularly electing judges. States should form judicial appointment selection committees responsible for identifying and screening qualified applicants. Ideally, these selection committees would be an arm of each state's bar and would include judges and attorneys. The committees could be established by either the state's highest court, the state's executive, or its legislature. Each selection committee would be responsible for presenting a short list of qualified candidates to the state's executive, who would in turn appoint one of the candidates to fill each judicial vacancy. The state's senate would then vote to confirm each appointment.¹⁰¹ Once confirmed, judges would serve a limited term of no more than twenty years.¹⁰²

98. Hill, *supra* note 34, at 340.

99. *Id.* at 349; *see also* McClellan, *supra* note 32, at 557 (noting some critics argue the characteristics of a good judge often preclude the individual's ability to be a good politician); Roll, *supra* note 30, at 862 (arguing contested elections can lead to the defeat of competent judges, or prevent the election of good judges who are poor campaigners).

100. Johnson & Urbis, *supra* note 3, at 542 (reporting Chief Justice John Hill of the Texas Supreme Court, considered by many at the time as the most qualified member of the court, resigned to pursue a non-elective judicial system); *see also* Hill, *supra* note 34, at 339 (explaining Hill resigned from the bench to participate in judicial reform).

101. This proposal is very similar to the Missouri Plan, *cf.* Roll, *supra* note 30, at 843-44 (describing the Missouri Plan), and the Texas Plan, *cf.* Hill, *supra* note 34, at 354, app. A (describing the Texas Plan).

102. Twenty years is long enough for a judge to gain experience and become a highly qualified jurist, but it is not too long for a state to suffer under a bad judge. The twenty-year limit could be adjusted as needed.

B. Limited Term Merit Appointments Preserve the Fundamental Elements of the Judiciary in a Republican Form of Government

Limited term merit appointments preserve the fundamental elements of the judiciary in a republican form of government. Independent judicial review is preserved because there is no opportunity for the electorate to retaliate against the appointee at the ballot box. Moreover, if a particular judge rendered decisions based on the popular will of the majority, instead of the rule of law, a judge's term would likely expire before any permanent damage occurred.

Similarly, the judiciary's ability to render impartial decisions is maintained because judges are not transformed into politicians asking voters for support and making campaign promises that compromise the independence of the judiciary. Perhaps most significantly, the problem of campaign contributions is removed from the process. Judges would no longer solicit campaign contributions, nor would attorneys or litigants be allowed to buy influence by contributing to a judge's campaign fund.

Finally, apathetic voters would no longer elect judges without proper qualifications. The selection committee would be charged with thoroughly screening applicants. If the committee failed, both the governor and the senate would act as fail-safes to make sure a loose cannon is not installed on the bench.

C. Addressing Counter Arguments

1. Taking Away the *Right to Vote*

Proponents of popularly electing judges may complain that appointing judges removes the right to select judges from the electorate. The validity of this argument, however, is questionable. First, whether there is a guaranteed right to elect judges is uncertain. Moreover, even if such a right exists, the potential harms previously discussed more than justify infringement on this right. Second, the electorate currently has little voice in the composition of the judiciary: Most judges are initially appointed;¹⁰³ there is a high correlation between incumbency and winning elections, because holding a seat on the bench "confer[s] the benefits of incumbency for subsequent elections;"¹⁰⁴ and election outcomes are heavily influenced by only a tiny fraction of the population. Thus, in reality, popularly electing judges fails to preserve any right an electorate may have.

103. See Issacharoff, *supra* note 71, at 4.

104. See *id.* at 5 (implying one of the benefits of incumbency is the ability to win future elections).

2. Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act¹⁰⁵ requires certain states¹⁰⁶ to receive administrative or judicial approval of all proposed changes to their voting laws or practices.¹⁰⁷ To receive pre-clearance, a state must demonstrate its proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority group]."¹⁰⁸ Thus, an argument may be made that a switch from popularly electing judges to a limited term merit system violates Section 5 of the Voting Rights Act.

However, appointing judges does not violate Section 5. Race is clearly not a motivating factor for changing the law, and states will have no difficulty proving this fact. Opponents will argue, however, the change may have a discriminatory effect under the retrogression test established in *Beer v. United States*.¹⁰⁹

In *Beer*, the Supreme Court held a proposed change should be pre-cleared if it has the effect of increasing minority voting strength.¹¹⁰ The Supreme Court later refined the retrogression test in *Lockhart v. United States*,¹¹¹ where the Court held a change in voting practices should be pre-cleared as long as it preserves existing minority voting strength.¹¹² Because appointing judges prevents minorities from voting in elections in which they were previously allowed to vote, opponents may argue this system violates the *Beer* retrogression standard.

The *Beer* retrogression standard, however, is inapplicable to a limited term merit system, which prohibits both minorities and non-minorities from voting. Thus, under a plain reading of the statute, the statute does not affect an individual's right to vote *on account of race*. Since the terms of the statute itself are clearly not violated, the *Beer* retrogression test becomes an unnecessary aid in interpreting the statute. Even if the *Beer* retrogression test is applied, the limited term merit system does not violate Section 5 of the Voting Rights Act.

Although appointing judges prevents minorities from voting, it does not dilute minority voting strength as compared with non-minority

105. 42 U.S.C. § 1973c (1988).

106. States and political subdivisions with a history of discriminatory voting practices are covered under Section 5. See 42 U.S.C. § 1973b(b) (1988) (outlining the two-fold coverage criteria). Texas is included under Section 5. See 28 C.F.R. § 51 app. (1995) (listing the covered states).

107. See 28 C.F.R. § 51.13 (1994) (providing examples of voting practices under Section 5).

108. 42 U.S.C. § 1973c (1988).

109. 425 U.S. 130 (1976).

110. *Id.* at 141. The baseline against which a new voting practice is compared has not been clearly established by the Supreme Court. This is a major criticism of the retrogression test, but a discussion of this issue is beyond the scope of this article.

111. 460 U.S. 125 (1983).

112. *Id.* at 133-36.

voting strength. That is, since both minorities and non-minorities are prevented from voting, minorities do not suffer disproportionately under the proposed system. In short, appointing judges does not violate Section 5 of the Voting Rights Act because a limited term merit system would have the same effect on minorities as non-minorities.

CONCLUSION

Electing judges by a popular vote is incompatible with our system of government. Our republican heritage demands that: (1) judges be free to exercise independent judicial review; (2) judges be able to render impartial decisions; and, (3) judges be qualified to carry out the duties of their office. Popularly electing judges runs afoul of each of these essential elements. Judges held accountable at the ballot box are incapable of either exercising independent judicial review or rendering impartial decisions, and many of our elected judges are not the most qualified candidates for the job. It is time to stop this madness; it is time to stop electing judges!

