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Failure to Launch: How the Delinquent Politics and Policies of the Texas Legislature Have Failed to Remedy Texas's Antiquated Judicial System and How Voters Have Accepted the Status Quo for Far Too Long

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FAILURE TO LAUNCH: How the Delinquent Politics and Policies of the Texas Legislature Have Failed to Remedy Texas's Antiquated Judicial System and How Voters Have Accepted the Status Quo For Far Too Long

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I. INTRODUCTION

Several scholars, most notably judges, have called for judicial reform in the selection process of appellate and supreme court justices in Texas. However, not much attention has been placed on the selection process of Texas trial court judges. This Article focuses on the genealogy of district courts in Texas, with an emphasis on Texas's family court system, an area of the law that decides the fate of thousands of children who, for the most part, are unable to speak for themselves and that comprises a majority of civil cases within the state of Texas.[1] As the majority of family court cases are decided by the trial court, judicial review by an appellate or higher court is virtually non-existent.[2] It is therefore necessary to have associate and district court family judges who are educated and adequately staffed to handle the multifarious complex issues involving children and families.

It is also vital that citizens better educate themselves about our judicial candidates and the judiciary in general until such time as the

† This Article is dedicated to Harrison Lee Chambers, who, at the tender age of thirteen, constantly inspires the Author to seek justice for those whose voices are often ignored with an inquisitive mind that continues to believe all things are possible if one works hard, studies hard, and treats others with dignity and kindness. This Article is also dedicated to Judge Charles Bleil and his entire staff including Carol King Bowen and Becky Fitzhugh who have shown the Author the true meaning of justice, compassion, and empathy.

1. *See* TEX. OFFICE OF COURT ADMIN., DISTRICT COURTS ACTIVITY SUMMARY BY CASE TYPE FROM JANUARY 1, 2006 TO JANUARY 31, 2009, at 2, http://www.dm.courts.state.tx.us/oca/reportselection.aspx (choose "district court data reports" and "district activity summary by case type"; then select "January 2006" through "January 2009") (last visited Feb. 1, 2010).

2. Given that such a small percentage of family cases are appealed, our family trial courts are the "court of last resort" for an overwhelming number of litigants in the family court system in Texas and in family court systems across the country. For example, in New York, 52% of all cases appealed resulted in the trial court's order or judgment being affirmed, and 62% of all *matrimonial cases* were affirmed. Daniel Clement, To Appeal or To Not to Appeal: Statistics, http://divorce.clementlaw.com/2008/06/articles/divorce/to-appeal-or-to-not-to-appeal-statistics/ (June 5, 2008). In addition, in New York it was reported that as of 2007, 14% of the domestic relations cases were reversed, and that at the end of the day, appellants only had a 25% chance of either getting a reversal or modification of a matrimonial order or judgment. *Id.*

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Texas legislature gets serious and enacts fundamental change pertaining to the selection of state judges at all levels.

A. *Problem No. 1: Public Misunderstanding of the State Judiciary*

As the result of various elements in pop culture including television, film, mystery and suspense novels, cartoons, and ever-recurring cocktail party jokes, lawyers and the judiciary have a less-than-shiny reputation. The Texas Office of Court Administration (OCA) and the State Bar of Texas conducted a study in 1998 that focused on issues varying from the general trust and confidence in Texas's state courts to the performance of Texas courts including fairness, representation, strengths, and weaknesses of the Texas judicial system.[3]

According to the study, 84% of judges had positive overall impressions of Texas judges while only 55% of attorneys had a positive impression of judges.[4] "The groups who tended to have the most negative overall impression of judges were local trial court judges, local trial court staff, and minority attorneys."[5] Given the high caseload with which trial court judges must deal,[6] it is not hard to imagine that trial court judges and personnel would feel a bit discouraged under our current rules and judicial structure.

In the family court system, the perceptions are further exacerbated because "[c]ases involving the family have been labeled the 'stepchildren' of the justice system, due to the low level of importance many courts and judges place on domestic issues."[7] Family courts involve people from all walks of life and all levels of education. Everyday litigants who are already dealing with delicate and personal issues often do not understand how the court system operates, nor do they understand the overall culture of the judicial environment.

B. *Problem No. 2: The Stark Reality of Civil Appeals—So Few Judges, So Many Cases, So Little Time*

Most cases, including family court cases, are decided by lower court judges at the trial court level.[8] In 2006, 2007, and 2008, there were

3. TEX. OFFICE OF COURT ADMIN. & STATE BAR OF TEX., THE COURTS AND THE LEGAL PROFESSION IN TEXAS—THE INSIDER'S PERSPECTIVE: A SURVEY OF JUDGES, COURT PERSONNEL, AND ATTORNEYS (1998), http://www.courts.state.tx.us/pubs/publictrust/execsum.htm.

4. *Id.*

5. *Id.*

6. *See* COMM. ON DIST. COURTS, TEX. JUDICIAL COUNCIL, ASSESSING JUDICIAL WORKLOAD IN TEXAS' DISTRICT COURTS 14, http://www.courts.state.tx.us/tjc/TJC_Reports/Final_Report.pdf (last visited Feb. 1, 2010).

7. Erin J. May, *Social Reform for Kentucky's Judicial System: The Creation of Unified Family Courts*, 92 KY. L.J. 571, 571 (2004).

8. *See* TEX. OFFICE OF COURT ADMIN., *supra* note 1, at 2.

6,099 reported divorces and annulments in Texas.[9] Family court cases are of particular importance because of the intimate nature of the circumstances and subject of the lawsuit—minor children. The average duration of first marriages is seven to eight years,[10] and during this time that relationship will most likely produce a child, and that child will be under the jurisdiction of the Texas family court system for somewhere between eleven to eighteen years.[11]

At the district court (trial court) level, of the approximate 450,000 civil cases that were filed, more than half of the civil cases brought in 2007 were family law cases.[12] Of these civil cases, divorce cases constituted 26%.[13] Motions to modify an existing parent-child agreement fell into a category that included all other family law matters such as annulments, adoptions, name changes, and termination of parental rights. This category comprised 27% of civil cases filed that year.[14]

In Texas, since 1998, civil filings have hovered around 500,000 per year.[15] Very few of these cases are ever appealed after trial court disposition.[16] In fact, of the approximate 450,000 civil cases filed in 2007, as of August 31, 2007, only 8,744 were pending review on appellate dockets across the state.[17] Of course, a case filed in 2007 would not usually be appealed the same year.[18] However, even if the case was originally filed in 2006 or before, the disparity between the hundreds of thousands of cases filed versus the number pending on appeal is extremely wide.[19]

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9. Ctrs. for Disease Control and Prevention, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2008*, 57 NAT'L VITAL STAT. REP. No. 19, 5, *available at* http://www.cdc.gov/NCHS/data/nvsr/nvsr57/nvsr57_19.pdf.

10. The average duration of first marriages that end in divorce for men is 7.8 years; for women, it is 7.9 years. DIVORCE MAGAZINE, U.S. DIVORCE STATISTICS (2002), http://divorcemag.com/statistics/statsUS2002.shtml.

11. *See* Stephanie J. Ventura, et al., Ctrs. for Disease Control and Prevention, *Estimated Pregnancy Rates for the United States 1990–2005: An Update*, 58 NAT'L VITAL STAT. REPS. No. 4, at 2, 13 (2009), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_04.pdf. Eleven years would mean that the child was born at the end of the marriage. Eighteen years would mean that the child was born at the beginning of the marriage.

12. TEX. OFFICE OF COURT ADMIN., DISTRICT COURTS ACTIVITY SUMMARY BY CASE TYPE FROM JANUARY 1, 2007 TO DECEMBER 31, 2007, at 2, http://www.dm.courts.state.tx.us/oca/reportselection.aspx (choose "district court data reports" and "district activity summary by case type"; then select "January 2007" through "December 2007") (last visited Feb. 1, 2010).

13. *Id.*

14. *Id.*

15. *See id.*; OFFICE OF COURT ADMIN., ACTIVITY FOR THE FISCAL YEAR ENDED AUGUST 31, 2007, at 4 (2007), http://www.courts.state.tx.us/pubs/AR2007/coas/4-activity-detail-2007.xls.

16. *Id.*

17. *Id.*

18. *See* TEX. OFFICE OF COURT ADMIN., *supra* note 1.

19. *Id.*

In Texas, of the 3,426 civil cases appealed as of August 31, 2007, 1,413 were affirmed by the appellate court,[20] which computes to an affirmation rate of 41.24%; 532 cases were reversed,[21] computing to a reversal rate of 15.58%.[22] But family law is different. Unlike general civil cases, in Texas "[f]amily law appeals meet with more success than one might suspect,"[23] with an overall reversal rate of 32%,[24] almost twice the overall reversal rate for civil trials in Texas. Given the great deference provided to trial judges and the higher than usual reversal rates, one is forced to examine whether judicial discretion is either abused or flat out blind.[25]

The numbers for family court appeals in Texas are a bit skewed because so few litigants ever appeal family court decisions.[26] While "[f]amily cases form the largest group of civil cases filed, few of them are tried. Even fewer are appealed. . . ."[27] Thus, the trial court is the court of last resort, and usually the associate judge is the judge of last resort before the presiding district court judge has an opportunity to review the case.[28]

In Texas civil trials, and especially in the Texas family court system, "[t]rial judges enjoy largely unfettered discretion in decisions relating to the conduct of trials."[29] Trial judges' control over the trial begins before the jury is even selected. The presiding judge rules on countless objections, controls the manner and timing of how attorneys select jurors, the duration of witness testimony, and the general tenor of the entire trial such as when trial breaks are held and when jurors are allowed to go home for the evening.[30]

At a seminar at Baylor Law School in 2006, at least one judge stated that he tries to limit temporary hearings to half a day.[31] This particular judge, Judge Strother, stated that he did not want to hear the same

20. *Id.* (showing that 41.24% of total trial court decisions were upheld).

21. *Id.* (showing that 15.58% of total trial court decisions were reversed).

22. Clement, *supra* note 2.

23. Lynne Liberato & Kent Rutter, *Evaluating Appeals by the Numbers*, 66 TEX. B.J. 768, 772 (2003).

24. *Id.*

25. *Id.* at 772–73 ("Broken down by type, the figures show that in divorce cases, including actions to enforce or modify existing decrees, the reversal rate was 24 percent. In suits to modify the parent-child relationship, the reversal rate was 34 percent. In child support cases, including actions to collect child support or modify a child support obligation, the reversal rate was 42 percent.").

26. *Id.* at 773 (Some have argued that "[t]he high reversal rate [of family law cases] may be *connected to the low number of appeals in family cases.*") (emphasis added).

27. *Id.*

28. *See* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 101 (1997) ("State trial courts are the venue where most legal disputes both begin and end.").

29. *Id.* at 145.

30. *Id.*

31. Kevin Priestner, *Kids in the Crossfire: Family Law Section Offers Free Pro Bono Training*, 69 TEX. B.J. 436, 436–37 (2006).

thing corroborated by ten different witnesses and that he mostly "played it by ear."[32] Another judge, Judge Meyer, stated that he "relies on a stopwatch."[33] A third judge, Judge Mayfield, stated that he is a fan of using timers.[34] Judge Mayfield stated that he uses a double timer, but only on certain cases and only with certain lawyers.[35] Thus, trial judges hold incredible power to set the tenor for the trial from day one until its conclusion.

In the family court context, the power of judicial discretion is of particular importance because our family court judges decide the fates of those who cannot speak for themselves—our children.[36] Family court judges decide everything from visitation schedules, to monthly child support, to an infinite number of issues that are unique to each case involving a minor child.

However, according to a study released in June 2008 from the National Center for State Courts, the average time spent by judges to decide a divorce is 47 minutes.[37] The average time spent on a parent-child modification or enforcement of an order is a mere 33 minutes.[38] Judges and court personnel in the family court system have blamed the backlog of cases as a major weakness in the judicial system.[39] Perhaps this backlog, at no surprise, is part of the reason that family court cases are dispensed of in such quick fashion.[40]

However, when one considers the average duration of first and second marriages and the likelihood that children are born into these marriages, even in the best of circumstances these children would still be under the jurisdiction of a family court that decides at least one decade of the children's lives. It would be prudent to spend more than approximately half an hour to three quarters of an hour to decide what will happen to these children's lives until these children reach the age of majority.[41] These fast-paced decisions often ignore children who have special needs or the quality of the child's life that he or she

32. *Id.* at 437 ("I don't want to hear the same thing corroborated by 10 different witnesses . . . . Mostly, I play it by ear. When I've heard enough, I let them know.").

33. *Id.* ("I give them 50 or 60 minutes . . . . Some lawyers have problems running up against the clock. I also use a stopwatch for voir dire.").

34. *Id.*

35. *Id.* ("I use a double timer . . . . It cost me $19 and is the best investment I've made. But I don't use it on every lawyer, nor do I use it on every case.").

36. *See* Lance A. Cooper, *An Historical Overview of Judicial Selection in Texas*, 2 TEX. WESLEYAN L. REV. 317, 327–28 (1995).

37. BRIAN J. OSTSROM, MATTHEW KLEIMAN & NEIL LAFOUNTAIN, THE NAT'L CTR. FOR STATE COURTS, MEASURING CURRENT JUDICIAL WORKLOAD IN TEXAS, 2007, at 8 (2008); *available at* http://www.courts.state.tx.us/oca/jnas/pdf/WeightedCaseloadStudy.pdf.

38. *Id.*

39. *Id.*

40. *Id.* (showing that Judges cited backlog as their primary concern, followed by judicial selection. The order was reversed among attorneys).

41. In the best case scenario, the average time spent on other family law matters is about three quarters of an hour. *Id.*

enjoyed prior to the divorce as opposed to after the divorce when the managing conservator's (usually the mother) standard of living has decreased.[42] Further, because so many litigants in family court represent themselves *pro se*, the gavel of the trial judge wields power that is even greater than if these parties were represented by counsel. To these litigants who represent themselves, the trial court truly is their "court of last resort."[43] Appeals are difficult enough for parties that were represented at the trial court level by even the best of counsel. However, when one is *pro se* and does not adequately preserve the trial record, an appeal is all but impossible, even excluding the financial costs.[44] More importantly, in the family court system the emotional and psychological costs are born by litigants and their minor children.[45]

II. HISTORY OF TEXAS COURTS—A LOOK BACK AT THE FOUNDATIONS OF OUR CURRENT CONSTITUTION

In Texas, many citizens are under the false impression that "the ability to elect a judiciary is a 'birthright' of Texas citizens."[46] This conveys an unfortunate "basic misunderstanding of Texas history"[47] that is important for citizens to understand, because if we do not understand our history, then we will not be able to make informed and intelligent choices about where to proceed in the future. Further complicating Texan's misconceptions about our state judiciary are the multiple articles written by legal scholars that have stated that our present system, in which judges are selected in popular elections, began in 1876 with the adoption of the current Texas Constitution.[48] The 1876 Constitution called for electing state judges at all levels; however, Texas actually had other periods of time where certain types of judges

42. *See* BOB LEONARD LAW GROUP, TEXAS FAMILY LAW FAQS: WHY SHOULD I PAY ALL OF THIS CHILD SUPPORT, WHEN SHE JUST SPENDS IT ON HERSELF?, http://www.bobleonard.com/FAQs/Family-Law-FAQ/#why_pay_child_support (last visited Sept. 7, 2009) ("Studies have shown that in the typical arrangement where mom has custody and dad pays child support, mom's standard of living goes down after the divorce and dad's goes up.").

43. *See* CAROLE BELL FORD, THE WOMEN OF COURT WATCH: REFORMING A CORRUPT FAMILY COURT SYSTEM 169 (2005).

44. *See* Tex. R. App. P. 33.1 (showing how many steps are necessary at trial court level to preserve any issue for appeal).

45. *See* Bruce C. Zivley, Divorce FAQs: Who Will Win Custody of the Children?, http://www.brucezivley.com/CM/Custom/Divorce-FAQs.asp?ss=faq-wrap-single-questions.xsl#05 (last visited Dec. 29, 2009).

46. John L. Hill, Jr., *Taking Texas Judges out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 344 (1988).

47. *Id.*

48. *See, e.g.*, Charles Bleil, Comment, *Can a Twenty-First Century Texas Tolerate its Nineteenth Century Judicial Selection Process?*, 26 ST. MARY'S L.J. 1089, 1090 (1995); Hill, *supra* note 46, at 347.

were elected by either the legislature, the general public eligible to vote, or by a combination of both systems.[49]

For decades, Texas flip-flopped back and forth between a system of appointment, elections by the legislature, and eventually elections by the general public.[50] The significant changes to the Constitution were made in reaction to various civic and political crises.[51] Thus, our 1876 Constitution was not so much a radical departure from the status quo, but rather was based on reactions to decades of cultural strife and the fact that Texas is the only state in our Union that was its own sovereign nation.[52] The history of our present-day Constitution is best understood when one looks at *who* our founding fathers were and their ancestors. One should keep in mind that these were individuals who were brave, but flawed, who lived in the wilderness fighting not only Indian tribes but Mexico, and also their own American brothers during the Civil War.[53] The following sections explain who Texans are, where Texans have been, and why "Texas is a whole other country" and truly is unique in the nation.[54] The following sections also discuss the reactionary provisions made to our state's Constitution in times of crisis.

A. *Texas: Colonization and The Early Pre-Republic Years*

The early years of Texas were chaotic to say the least. In addition to briefly being its own sovereign, Texas was a frontier republic whose leaders and settlers were at war with the Comanche Indian tribe and Mexicans who gradually saw Texans (or Texians as they were called at the time) slipping away from their control.[55] From time to time, Texas's constitutional delegates struggled with not only the problems of dealing with Mexico, but secession, and also framing and re-framing a state government over and over for more than fifty years.

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49. Hill, *supra* note 46, at 346.

50. *Id.*

51. LONE STAR JUNCTION, TEXAS HISTORY TIMELINE: KEY EVENTS IN EARLY TEXAS (Lyman Hardeman ed.), http://lsjunction.com/events/events.htm (last visited Sept. 7, 2009) (providing a general timeline of major events in Texas's history).

52. *Id.*

53. The Author is a daughter of Goliad, the Alamo, and the Civil War on her mother's side of the family.

54. *See* Barry Popik, "Texas: It's Like a Whole Other Country," http://www.barrypopik.com/index.php/texas/entry/texas_its_like_a_whole_other_country/ (Aug. 10, 2006). For example, in addition to the idiosyncrasies that are commonplace to native Texas and foreign to outsiders, "Texas was the first jurisdiction to merge law and equity, the first to adopt a homestead exemption law, and a pioneer in community property law." James W. Paulsen, *Remember the Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. 7, 9 (1993). Thus, not only has Texas been a pioneer in petrochemicals, aerospace, and cancer research, but Texas lawmakers and judges have historically "found themselves in the position of legal innovators." *Id.*

55. Paulsen, *supra* note 54, at 8–9.

On January 3, 1823, the Mexican government granted Stephen F. Austin permission to begin colonization near the Brazos River in what is now central Texas.[56] After colonization began, a Constitution was enacted in 1824 that gave Mexico a republican form of government of which Texas was a part.[57]

All judges under the 1824 Constitution were appointed.[58] For judiciary matters, the requirements were fairly simple. One had to be a citizen of the Union (the Mexican Republic) and be a mere twenty-five years or thirty years of age, depending on the judicial position.[59] Circuit judges were also appointed and had a thirty-year-age requirement as well as maintain citizenship status.[60] These circuit judges represent modern-day district judges in that they were designated to handle controversies that exceeded $500.[61] There were also district court judges who were disallowed to hear cases where the amount in controversy exceeded $500.[62] The age requirement for these judges was a bit less, only twenty-five years.[63] The Texas Supreme Court would name the three candidates whom the president would appoint.[64] These district court judges represent our modern-day county court judges in that they were limited to cases and controversies where $500 or less was in dispute.[65] Thus, judges were appointed, but there were recommendations at least at the highest state court level,

56. LONE STAR JUNCTION, *supra* note 51; *see also* RANDOLPH B. CAMPBELL, GONE TO TEXAS 105 (2003).

57. FEDERAL CONST. OF THE UNITED MEXICAN STATES of 1824, tit. II, arts. 4–5, *reprinted in* 1 *H.P.N. Gammel, the Laws of Texas 1822–1897*, at 73 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth5872/m1/81/.

58. *Id.* tit. V, § 6, art. 144 (designating the appointment of District Judges); *Id.* § 5, art. 140 (designating the appointment of Circuit Judges).

59. *Id.* tit. V, § 6, art. 144, *Gammel* at 90 ("To be a judge of the district court, it is necessary to be a citizen of the Union, and twenty-five years of age [and that the president would appoint] these judges from three candidates named by the supreme court.").

60. *Id.* § 5, art. 141. Further, there was a requirement that "[t]he circuit court of a judge [must be] skilled in law and a fiscal, both named by the supreme executive power from three candidates, designated by the supreme court, and of two associates, according to law." *Id.* art. 140. The requirements of citizenship and being at least thirty years of age were also in force. *Id.* art. 141.

61. *Compare id.* art. 141, *and* TEX. CONST. art. V, § 1, *with* TEX. GOV'T CODE ANN. §§ 24–27 (Vernon 2004) (establishing Section 24 of the Texas Government Code, which describes district court jurisdiction; Section 25 of the Texas Government Code, which describes county courts at law; Section 26 of the Texas Government Code, which describes the jurisdiction of constitutional county courts; and Section 27 of the Texas Government Code, which describes justice courts).

62. FEDERAL CONST. OF THE UNITED MEXICAN STATES of 1824, tit. V, § 6, art. 143, *Gammel* at 90.

63. *Id.* art. 144.

64. *Id.* § 5, art. 140. The use of the word "designated" is the equivalent of "appointed," and the use of the word "named" is essentially the equivalent of a *strong* recommendation of allowing the names who are named to be approved.

65. *Id.* § 6, art. 143.

and categories of judges and limitations on the types of cases and controversies were established.[66]

Between 1824 and 1827, things appeared to be working smoothly in the new Texas territory, on paper at least; but that was soon about to change, especially in what is now south central Texas. A dark period of history that involved a bitter revolution was about to begin. During 1827, Texas was still part of Mexico, and a new constitution was enacted.[67] Under the 1827 Constitution, like the 1824 version, judges were again appointed.[68]

Changes to the judiciary included a provision for a supreme court that would be divided into three halls with at least one magistrate in each of the three halls and a fiscal who would organize the halls.[69] This system was similar to our modern day court clerk system of case organization and scheduling and the federal Supreme Court where the Chief Justice assigns cases.[70] In 1833, Texas delegates made significant changes regarding the state judiciary. Instead of being appointed, judges were to be elected by the state legislature.[71] It is important to note that the judges were elected by members of the legislature—not by the voting public at large.[72] There was also a provision for judges to be removed by an impeachment process very similar to impeachment in the modern-day federal system.[73] However, the 1833 Consti-

66. *See generally id.* §§ 5–6.

67. *See* STATE OF COAHUILA AND TEX. CONST. of 1827, *reprinted in* 1 *H.P.N. Gammel, the Laws of Texas 1822–1897*, at 423 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth5872/m1/431/.

68. *Id.* tit. III, art. 201, *Gammel* at 450 ("Both magistrates and fiscal shall be appointed by congress on nomination by the executive. They shall receive a competent salary, to be designated by law, and cannot be removed from office, except from a legally established cause.").

69. *Id.* art. 194, *Gammel* at 449 ("In the capital of the state there shall be a supreme tribunal divided into three halls, each composed of the magistrate or magistrates whom the law designated, and said tribunal shall have a fiscal, who shall despatch [sic] all the subjects of the three halls. Should the hall consist of one minister only, said special law shall determine whether colleagues should be appointed, and the manner and form it shall be done.").

70. Further provisions in the 1827 Constitution included a "special law" that determined whether colleagues (i.e., justices and other members of the court) *should be appointed*, and the manner and form for said appointments. *Id.*

71. CONSTITUTION OR FORM OF GOVERNMENT OF THE STATE OF TEXAS of 1833, art. 77, *available at* http://tarlton.law.utexas.edu/constitutions/text/cah3gp.html ("The judicial power shall be vested in a supreme court, and inferior courts."); *Id.* art. 78 ("The State of Texas shall be divided into four judicial districts, in each of which there shall be appointed a district judge."); *Id.* art. 79 ("The said district judges shall compose the supreme court . . . ."); *Id.* art. 81 ("The judges of the district and supreme courts, *who shall be elected* at the first session of the legislature, shall hold their offices for the term of three years, eligible for re-election; and their successors in office shall hold their office for the term of six years, *eligible to re-election* by the legislature every six years.") (emphasis added).

72. *Id.* art. 81.

73. *Id.* art. 86 ("The judges may be removed from office by a concurrent vote of both houses of the legislature: but two-thirds of the number present, must concur in

tution did not last for long. Texans were gradually seeking more and more independence from Mexico, and this desire for independence from Mexico erupted in a bitter and lengthy revolution that began in 1835.[74]

B. *Texas Independence and Statehood*

In 1836, Texas declared itself independent precipitating a dark revolutionary period that involved battlefields such as Goliad (1836), the Battle of the Alamo (1836), and a decisive battle for Texas at the Battle of San Jacinto (1836).[75] After declaring independence, Texians, who were about to become "Texans," enacted the 1836 Constitution of the Republic of Texas.[76] The 1836 Constitution for the new Republic revised the fixed number of four judicial districts to a number between three and eight.[77]

Unlike when Texas was part of Mexico, judges were to be elected, not appointed,[78] a further reactionary move away from Mexican control. With the 1836 Constitution, though, voting again was by members of the legislature, not the voting public at large.[79] In the 1836 Constitution, judicial power was vested in a supreme court and inferior courts of which the justices would serve four-year terms and then were subject to re-election.[80] However, this was not an election by the general public eligible to vote; rather, these supreme and district court judges would be elected by joint ballot of both houses of the state legislature.[81] Inferior county courts were also established in each

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such vote, and the causes of removal shall be entered on the journal of each. The judge against whom the legislature may be about to proceed, shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least thirty days before the day on which either house of the legislature shall sit thereupon."); *Id.* art. 87 ("The judges may also be removed by impeachment."); *Id.* art. 88 ("The power of impeachment shall be vested in the house of representatives."); *Id.* art. 89 ("All impeachments shall be tried by the Senate: when acting for that purpose, the members shall be upon oath, and no person shall be convicted without the concurrence of two-thirds of the members present.").

74. LONE STAR JUNCTION, *supra* note 51.

75. Campbell, *supra* note 56, at 140–47.

76. REPUB. TEX. CONST. of 1836, *reprinted in* 1 *H.P.N. Gammel, the Laws of Texas 1822–1897*, at 1069 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth5872/m1/1077/; *see* THE DECLARATION OF INDEPENDENCE MADE BY THE DELEGATES OF THE PEOPLE OF TEXAS, *reprinted in* 1 *H.P.N. Gammel, the Laws of Texas 1822–1897*, at 1063 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth5872/m1/1071/.

77. REPUB. TEX. CONST. of 1836, art. IV, § 2, *Gammel* at 1073.

78. *Id.* § 9, *Gammel* at 1074.

79. *Id.* ("The judges of the supreme and district courts shall be elected by joint ballot of both Houses of Congress.").

80. *Id.* § 1, *Gammel* at 1073.

81. *Id.* § 9, *Gammel* at 1074.

county with county judges and justices of the peace who were appointed by the president of Texas.[82]

On December 29, 1845, Texas joined the United States becoming the twenty-eighth state admitted to the Union.[83] During this time, unlike every other state that entered the Union, Texas provided for judicial elections.[84] "When Texas became a state, its constitution called for the appointment of [Supreme Court] judges by the governor, with the concurrence of the Senate."[85] However, upon closer examination of the 1845 Constitution, that is not the full story of the judiciary. There is much more to the 1845 Constitution than appointing justices to the supreme court. In fact, the 1845 Constitution included major changes to the judiciary such as the power to issue writs of habeas corpus vested in the Supreme Court[86] and also writs of mandamus,[87] along with other important procedures concerning lower court judges. While supreme court judges were to be appointed by the governor and approved by the senate,[88] Texas was again divided into districts with each district having an appointed, presiding judge.[89] A procedure for removal of these appointed district judges was stated, again similar to previous removal provisions in prior Texas Constitutions and similar to our current federal system.[90]

One of the most significant changes, though, is that for the first time eligible (or "qualified") voters determined county judges and justices of the peace.[91] This is extremely significant because it is the first instance in Texas's constitutional history where eligible (or "qualified")

82. *Id.* § 12; Cooper, *supra* note 36, at 322–23. As an aside note, in 1839, Austin became the capital of the Republic of Texas. LONE STAR JUNCTION, *supra* note 51.

83. *See* TEX. CONST. of 1845, *available at* http://texashistory.unt.edu/ark:/67531/metapth6726/m1/1281/.

84. Cooper, *supra* note 36, at 324.

85. *Id.*

86. TEX. CONST. of 1845, art. IV, § 3, *available at* http://texashistory.unt.edu/ark:/67531/metapth6726/m1/1289/.

87. *Id.*

88. *Id.* § 5 ("The governor shall nominate, and, by and with the advice and consent of two-thirds of the Senate, shall appoint the judges of the supreme and district courts, and they shall hold their offices for six years.").

89. *Id.* § 6 ("The State shall be divided into convenient judicial districts. For each district there shall be appointed a judge, who shall reside in the same, and hold the courts at one place in each county, and at least twice in each year, in such manner as may be prescribed by law.").

90. *Id.* § 8 ("The judges of the supreme and district courts shall be removed by the governor, on the address of two-thirds of each house of the legislature, for wilful [sic] neglect of duty, or other reasonable cause, which shall not be sufficient ground for impeachment . . . .").

91. *Id.* § 13 ("There shall be appointed for each county a convenient number of *justices of the peace*, one sheriff, one coroner, and a sufficient number of constables, who shall hold their offices for two years *to be elected by the qualified voters of the district or county* as the legislature may direct. *Justices of the peace*, sheriffs, and coroners, *shall be commissioned by the governor.* The sheriff shall not be eligible more than four years in every six.") (emphasis added).

voters played a direct role in determining who served on at least some of our courts.[92]

C. *The Mexican-American War (1846–1848), 1850 Constitutional Amendments, and Secession from the Union (1861)*

In 1846, new problems faced the fledgling new state of Texas. The Mexican-American War began, and Texas's state border (and a significant portion of the border between the United States and Mexico) was fixed at the Rio Grande River.[93] The war was a "defining event for both nations [Mexico and the United States], transforming a continent and forging a new identity for its peoples. By the war's end in 1848, under the Treaty of Guadalupe Hidalgo, Mexico lost nearly half of its territory, the present American Southwest from Texas to California, and the United States became a continental power."[94]

In 1850, two years after the Treaty of Hidalgo was signed, judicial elections became partisan, following the lead of New York, a most unlikely predecessor.[95] Amendments were made to Texas's 1845 State Constitution that provided that district judges were to be elected by eligible voters within their respective districts.[96] Another 1850 amendment provided that justices of the peace were to be appointed, and after their two-year term was over, the justices would be subject to re-election by qualified voters of the district or county.[97] Again, though, justices of the peace were to be appointed.[98]

Eleven years later, the 1861 Convention that ultimately led to Texas's secession from the Union began on January 28, 1861.[99] Days later, on February 2, 1861, Texas's fate concerning secession was

92. *Compare id., and* REPUB. TEX. CONST. of 1836, art. IV, §§ 2–12, *reprinted in* 1 *H.P.N. Gammel, the Laws of Texas 1822–1897*, at 1073–74 (Austin, Gammel Book Co. 1898), *with* FEDERAL CONST. OF THE UNITED MEXICAN STATES of 1824, tit. II, arts. 4–5, *Gammell* at 90.

93. *See* EUGENE C. BARKER ET AL., A SCHOOL HISTORY OF TEXAS 192–93 (1912).

94. PBS, THE U.S.-MEXICAN WAR (1846–1848), http://www.pbs.org/kera/usmexicanwar/war (last visited Sept. 6, 2009).

95. Hill, *supra* note 46, at 346–47 (citations omitted).

96. TEX. CONST. of 1861, art. IV, at § 2, *available at* http://texashistory.unt.edu/ark:/67531/metapth6727/m1/27/.

97. *Id.* at § 5.

98. *Id.* at § 13 ("There shall be appointed for each county a convenient number of Justices of the Peace, one Sheriff, one Coroner, and a sufficient number of Constables, who shall hold their offices for two years, to be elected by the qualified voters of the district or county, as the Legislature may direct.").

99. JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 9 (Ernest William Winkler, ed., 1912), *available at* http://tarlton.law.utexas.edu/constitutions/pdf/pdf1861/January%2028,%201861.pdf.

sealed.[100] Much debate has been proposed concerning the reason(s) why Texas made the decision to secede.[101]

The 1861 Convention Journal provides much insight into this discussion. The delegates, led by President O. M. Roberts, a staunch Confederate, declared that "[t]hey [the Federal Government] have proclaimed, and at the ballot box sustained, the revolutionary doctrine that there is a 'higher law' than the constitution and laws of our Federal Union, and virtually that they will disregard their oaths and *trample* upon our rights."[102] This laid the footwork for what was to become the 1866 Constitution and later, the present Constitution.[103]

These same delegates of minority opinions sent a second important letter on March 14, 1861, to the President of the Convention, General O. M. Roberts. In the letter, James W. Throckmorton, William H. Stewart, and Elijah Sterling Clark stated they felt that "[f]ifty years hence the population of this great State will have increased to millions, and notwithstanding such vast increase in the population as we know will take place, yet the school fund will have so increased, and even long before the period alluded to, that not only the indigent orphan children can be educated by the State, but every child of Texas, of however exalted or humble parentage, can be most munificently cared for and educated."[104]

The 1861 Constitution of the State of Texas represents something between either chaos because of secession from the Union or a more underlying current that seems to reflect Texas and Texans in general—the desire for autonomy that is an undercurrent in even modern-day literature and pop culture.[105]

The 1861 secession convention resulted in Texas joining the Confederacy and created the 1861 Constitution that returned selection of all state judges to an appointment system by the state governor with confirmation by the Senate.[106] This was the first time in thirty-four years (since the 1827 Constitution when Texas was still part of Mexico) where judges at all levels were again appointed, including district

100. *See id.* at 61–66. "The controlling majority of the Federal Government, under various pretences (spelling in original) and disguises, has so administered the same as to exclude the citizens of the Southern States, unless under odious and unconstitutional restrictions, from all the immense territory owned in common by all the States on the Pacific Ocean, for the avowed purpose of acquiring sufficient power in the common government to use it as a means of *destroying the institutions of Texas* and her sister slave-holding States." *Id.* at 62 (emphasis added).

101. *See generally id.*

102. *Id.* at 63 (emphasis added).

103. *See generally* Mary M. Brown, A Condensed History of Texas for Schools 200–05 (Dallas, J.J. Little & Co., 1895).

104. JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, *supra* note 99, at 162.

105. *See generally* TEX. CONST. of 1861, *available at* http://tarlton.law.utexas.edu/constitutions/text/1861index.html.

106. Hill, *supra* note 46, at 347.

court judges who had been elected by qualified (eligible) voters as of the 1850 amendments, and the 1845 Constitution where justices of the peace and county judges were elected by eligible, qualified voters of the general public.[107] Thus, Texas's secession from the Union caused Texas to depart from the pattern of judicial elections across the Union that was in place in 1846.[108]

This was also a departure from amendments that were made in 1850 that called for Texas Supreme Court justices and district court judges to be elected by qualified electors in Texas in the event of a vacancy.[109] The 1850 amendments[110] stated that within each district would be an elected judge.[111]

D. *The Civil War (1861–1865), Reconstruction, and the Immediate Years Prior to Texas's Current State Constitution (1876)*

During the Civil War (1861–1865), judges "had to preside at a time in which governmental authority was, at first, largely handed over to military authorities, and later, totally disappeared."[112] Later, as shown below, "[d]uring Reconstruction, a judge was subject to removal by the occupying forces of the United States government any time a ruling disappointed the commanding general, or one of his friends."[113] This military "occupation" led to fear of northern control of the South and was likely one of the primary reasons that Texas has elected state judges at all state levels.

After the Union won the war, healing was not only necessary between the North and the South, but also between west and east Texas. In 1866, in the wake of the Civil War, amid fear of being controlled by the federal government and repercussions from seceding in 1861, car-

107. *See* TEX. CONST. of 1861, art. IV, § 5, *available at* http://tarlton.law.utexas.edu/constitutions/text/EART04.html ("The Governor shall nominate, and by and with the advice and consent of two-thirds of the Senate, shall appoint the Judges of the Supreme and District Courts and they shall hold their offices for six years."). Texas Supreme Court judges were still appointed at this time.

108. Cooper, *supra* note 36, at 326.

109. TEX. CONST. of 1861, art. IV, § 1, *available at* http://tarlton.law.utexas.edu/constitutions/text/EART04.html ("The Judges of the Supreme Court, Judges of the District Courts . . . shall, at the expiration of their respective terms of office, or in a case a vacancy may occur in either of them, by death, resignation, or otherwise, after this amendment takes effect, and thereafter, be elected by the qualified electors of the State, in the manner prescribed by law.").

110. *Id.* There was also a minor amendment made in 1856 that merely adjusted judicial salaries of Supreme Court Justices and District Court Judges. No other substantial changes were made in 1856. *Id.*

111. *Id.* § 6 ("The state shall be divided into convenient judicial districts. For each district, there shall be elected a Judge who shall reside in the same, and hold the courts at one place in each county, and at least twice in each year, in such manner as may be prescribed by law.").

112. Mark Davidson, *A Look Back at the Era of Uniform Judicial Rulings in Harris County*, HOUS. LAW, Sept.–Oct. 1995, at 16, 16.

113. *Id.*

petbaggers, who were businessmen from the North, quickly headed South during the early days of Reconstruction (1865–1877).[114] Most agree that these carpetbaggers, who got their name from the type of luggage they used, were, for the most part, scoundrels who sought to make quick profits as quickly as possible and then head back home to the North.[115] Distrust of the North was not only felt in the 1866 Convention, but also lingered a decade later into the 1875 Convention for our present constitution.[116]

From the Journals of the 1866 Constitutional Convention it is clear that tensions still abounded between those who supported secession during the war and the newly appointed provisional Governor of Texas, Andrew Jackson Hamilton, who was, for the most part, a Union loyalist.[117] Early in his career, Governor Hamilton was a member of the "Opposition Clique," a group of Texas Democrats who opposed secession.[118] He also was appointed as Provisional Governor of Texas by President Andrew Johnson in 1865.[119] Later, he fled the State of Texas because of numerous death threats and did not return to Texas until the summer of 1865, shortly before the Convention began the following winter.[120]

In 1866, Governor Hamilton rose to his greatest fame as a delegate to the Constitutional Convention in 1866 and as provisional governor, having been appointed by President Lincoln in 1865.[121] One can hardly imagine the fear and trepidation that Governor Hamilton was under when he addressed the Convention. Governor Hamilton was walking a very tight line between his personal convictions concerning abolition and his fear of other delegates whom might have made threats against him or knew others who had.[122]

Governor Hamilton, who had a well-documented reputation of being a proponent of freed slaves' rights, by his own words during the address at the Convention in 1866, questioned his own reported repu-

114. *See* Dudley G. Wooten, A Complete History of Texas: for Schools, Colleges, and General Use 376 (Dallas, The Tex. History Co. 1899).

115. *See* BARKER, *supra* note 93, at 229.

116. *See generally* Brown, *supra* note 103.

117. *See generally* JOURNALS OF THE CONSTITUTIONAL CONVENTION OF TEXAS 1866, *available at* http://tarlton.law.utexas.edu/constitutions/pdf/pdf1866/index1866.html.

118. Telegram from Andrew Johnson, President, United States, to A.J. Hamilton, Governor, Tex. (Feb. 13, 1866), *available at* http://www.tsl.state.tx.us/governors/war/hamilton-johnson-1.html.

119. D.W.C. BAKER, A BRIEF HISTORY OF TEXAS: FROM ITS EARLIEST SETTLEMENT 126–27 (N.Y., A.S. Barnes & Co. 1873).

120. *Hamilton, Andrew Jackson (1815–1875)*, *in* INFOPLEASE, http://www.infoplease.com/biography/us/congress/hamilton-andrew-jackson.html (last visited Sept. 22, 2009).

121. *Id.*; *see also* Telegram from Andrew Johnson, *supra* note 118.

122. *See generally* INFOPLEASE, *supra* note 120; Telegram from Andrew Johnson, *supra* note 118.

tation by contradictory statements.[123] Governor Hamilton first stated that eligible voters should only include individuals who swore an oath of loyalty to the United States, and these eligible citizens were not just eligible voters, but eligible delegates to the convention as well.[124] Of course, this proclamation makes some sense politically. Later, however, Governor Hamilton made remarks about his desire for the reconciled Union to remain a "white man's government."[125]

Remarks like this demonstrate the undercurrents that were swirling during the 1866 Convention, and these undercurrents were comprised of significant unresolved tension, anger, depression, and resentment about a war among brothers and families who were destroyed. One delegate, E. Degener, stated, "These people [slaves] were called upon to defend with their lives the integrity of the Union, and thousands of them are still under arms, ready to perish in defence [sic] of their native land; and they are now everywhere clamoring for the right of suffrage."[126] These remarks were made to a majority of members of the Convention who, while they wanted equality and voting of officials and judges, still wanted only white males to be eligible to vote.[127] Hamilton, however, was fierce in his stance on black suffrage, but he still wanted a purely white, male-only government.[128] The result was a system where all state judges are elected, as well as the governor.[129] Thus, one gets the sense of a general mistrust that the federal government might try to exercise too much control in exchange for an "oath of loyalty" to the Union.[130]

123. *See* JOURNALS OF THE CONSTITUTIONAL CONVENTION OF TEXAS 1866, *supra* note 117, at 25.

124. *Id.* at 16.

125. *Id.* at 25.

126. *Id.* at 90.

127. *See id.*

128. *Id.*; "[Hamilton also] criticized the Constitutional Convention, which met in early 1866, for its reluctance to grant black suffrage." Tex. State Library & Archives Comm'n, *Andrew J. Hamilton, in* PORTRAITS OF TEXAS GOVERNORS: WAR, RUIN, AND RECONSTRUCTION, http://www.tsl.state.tx.us/governors/war/index.html (last visited Sept. 3, 2009). Governor Hamilton decided not to run for Governor in 1866, and James Throckmorton won the 1866 election. *Id.*

129. TEX. CONST. of 1866, art. IV, § 2, *available at* http://tarlton.law.utexas.edu/constitutions/text/FAR04.html ("The Supreme Court shall consist of five Justices, any three of whom shall constitute a quorum. They shall be elected by the qualified votes of the State at a general election for State or County officers . . . ."); *Id.* § 5 ("The State shall be divided into convenient Judicial Districts. For each District there shall be elected by the qualified voters thereof, at a general election for State or County officers, a Judge who shall reside in the same."); *Id.* § 15 ("There shall be established in each county in the State, an inferior tribunal, styled the County Court; and there shall be elected by the persons in each county, who are qualified to vote for members of the Legislature, a Judge of the County Court . . . ."); *Id.* § 19 ("There shall be elected a convenient number of Justices of the Peace . . . ."); *see also* JOURNALS OF THE CONSTITUTIONAL CONVENTION OF TEXAS 1866, *supra* note 117, at 153.

130. JOURNALS OF THE CONSTITUTIONAL CONVENTION OF TEXAS 1866, *supra* note 117, at 153.

A famous telegraph from President Andrew Johnson dated February 13, 1866, to Governor Hamilton speaks volumes. President Johnson stated, "I am still hopeful that in the end matters will take a different turn here and that loyal representatives will be admitted to take their seats in the Council of the Nation, From all States."[131] The Author believes it is fairly obvious that there is an undercurrent of pressure toward Union loyalty, and the recourse during the Convention was to try to negate that as much as possible—again, walking a tightrope.

This tightrope is evidenced in the Journals of the Convention concerning the judiciary when on March 21, 1866, Delegate Richard S. Walker offered an amendment proposing that judges should be elected, and not appointed.[132] A handful of other delegates opposed this language; however, the motion was eventually adopted and became part of the 1866 Constitution.[133] The result was a state supreme court with judges who were to be elected by qualified voters.[134] District Judges, among other state and county officials, were also to be elected by *qualified voters* in a general election.[135] However, in the event of a vacancy in the aforementioned courts (Supreme Court Justices and District Judges), vacancies would be filled by appointment by the Governor of Texas.[136]

In the wake of the Civil War, it is clear that Texas wanted to remain somewhat autonomous and perhaps feared retribution by the Union North against former secessionists in Texas, all while attempting to retain a way of life dictated by white males.[137] In 1868, West Texas

131. Telegram from Andrew Johnson, *supra* note 118.

132. JOURNALS OF THE CONSTITUTIONAL CONVENTION OF TEXAS 1866, *supra* note 117, at 236 ("[T]here shall be elected by the qualified voters of the county or counties composing the County Court district, as hereinafter provided, a Judge of said court, who shall be a conservator of the peace . . . .").

133. *Id.* at 236–37.

134. TEX. CONST. of 1866, art. IV, § 2, *available at* http://tarlton.law.utexas.edu/constitutions/text/1866index.html ("The Supreme Court shall consist of five Justices, any three of whom shall constitute a quorum. They shall be elected by the qualified votes of the State at a general election for State or County officers, and they shall be elected from their own number a presiding officer, to be styled the Chief Justice . . . .").

135. *Id.* § 5 ("The State shall be divided into convenient Judicial Districts. For each District there shall be elected by the qualified voters thereof, at a general election for State or County officers, a Judge who shall reside in same . . . .").

136. *Id.* § 10 ("In the case of a vacancy in the offices of Justice of the Supreme Court, Judges of the District Court, Attorney-General, and District Attorneys, the Governor of the State shall have power to fill the same by appointment, which shall continue in force until the office can be filled at the next general election for State or county officers, and the successor duly qualified.").

137. *See* TEX. CONST. of 1869, art. V, § 2, *available at* http://tarlton.law.utexas.edu/constitutions/text/GART05.html ("The Supreme Court shall consist of three Judges, any two of whom shall constitute a quorum. They shall be appointed by the Governor, by and with the advice and consent of the Senate, for a term of nine years. But the Judges first appointed under this Constitution, shall be so classified by lot, that the

split from East Texas, and even enacted its own Constitution.[138] This split was based on internal fighting between one faction called the "Conservative Republicans," who were in favor of private corporations and had not supported secession and the Civil War, and "Radical Republicans," who supported issues such as restoring the public school fund and initiating the split in Texas.[139]

In 1869, the method of selecting supreme court justices switched back from election by qualified voters to appointment by the governor with the advice and consent of the senate.[140] When vacancies arose, the governor filled them.[141] The governor, with the advice and consent of the senate, also appointed judges of the district courts.[142]

Six years later, in 1876, the judicial selection system switched back to general elections by all eligible voters for all judicial levels, a system that was in place ten years prior in 1866.[143] Our present Constitution was passed in 1876 making Texas one of seven states presently in the United States where state judges at all levels are elected by the general public.[144]

E. *The 1875 Convention and 1876 Constitution*

By 1875, when the Constitutional Convention convened to write the present Constitution, resentment between the eastern and western parts of Texas that led to Texas's secession from the Union during the Civil War was not resolved.[145] To further make their point clear re-

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term of one of them shall expire at the end of every three years. The Judge whose term shall soonest expire shall be the presiding Judge. All vacancies shall be filled for the unexpired term. If a vacancy shall occur, or a term shall expire, when the Senate is not in session, the Governor shall fill the same by appointment, which shall be sent to the Senate within ten days after that body shall assemble, and, if not confirmed, the office shall immediately become vacant."); *see also* Walter L. Buenger, Tex. State Historical Ass'n, *Secession*, *in* THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/SS/mgs2.html (last visited Sept. 24, 2009).

138. *See* W. TEX. CONST. of 1868, *available at* http://tarlton.law.utexas.edu/constitutions/text/1868index.html.

139. Carl H. Moneyhon, Tex. State Historical Ass'n, *Republican Party*, *in* THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/RR/war2.html (last visited Sept. 24, 2009).

140. TEX. CONST. of 1869, art. V, § 2, *available at* http://tarlton.law.utexas.edu/constitutions/text/1869index.html ("The Supreme Court shall consist of three Judges, any two of whom shall constitute a quorum. They shall be appointed by the Governor . . . .").

141. *Id.*

142. *Id.* § 6 ("The State shall be divided into convenient Judicial Districts, for each of which one Judge shall be appointed by the Governor, by and with the advice and consent of the Senate . . . .").

143. *See* TEX. CONST. of 1876, art. V, *available at* http://tarlton.law.utexas.edu/constitutions/text/1876index.html.

144. *See* AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES 1, http://www.abanet.org/leadership/fact_sheet.pdf (last visited Sept. 24, 2009); TEX. CONST. of 1876, art. V.

145. *See* Tex. Const. of 1876, art. I, § 1.

garding their preference for general elections concerning the judiciary, the 1875 delegates made sure that even county judges were to be elected by qualified voters in the general public on a county-by-county basis,[146] as well as justices of the peace.[147] County clerks, attorney generals, legislators, and other public officials who affected the laws of the State of Texas were to be elected as well.[148]

Prior to the Convention, much discourse abounded about where to lead Texas into the future. In 1874, the Austin Statesman began editorials that called for responses from other newspapers on whether to have appointed or elected judges.[149] The Houston Telegraph and Texas Register responded and entered into the discussion concerning whether appointments or elections of judges is the more appropriate method for selecting judicial officers.[150] The 1874 dialogue started by Austin's Daily Democratic Statesman noted that "[t]hese judges decide ultimately on the life, liberty and property of *every citizen* in the State."[151] When reading the plain language of this statement, it is fairly clear that even though women still did not have suffrage, women and children were citizens and were meant to be protected.

The Houston Telegraph suggested that elections would be best, but the Telegraph also cautioned that it would be presumptuous that the electorate at general would fully understand and be able to ascertain the qualities and fitness for judicial candidates.[152] Later, the Dallas Weekly Herald also entered into the discussion and stated its opposition to election of judges on the grounds that it "opens the door to corruption."[153] The caution about corruption basically involved the obvious—that judges might feel dependent or loyal to their political campaign contributors.[154] Editorials like these from over one hundred years ago captured the reasons given by many across the United States (not just in Texas) for either opposing or supporting election of judges. As the Houston and Dallas editorials reflected, both sides

146. TEX. CONST. of 1876, art. V, § 15 ("There shall be established in each county in the State, an inferior tribunal, styled the County Court; and there shall be elected by the persons in each county, who are qualified to vote for members of the Legislature, a Judge of the County Court, who shall be a conservator of the peace, who shall hold his office for four years, and who shall receive such compensation as may be prescribed by law, and who may be removed from office for neglect of duty, incompetency or malfeasance, in such manner as may be prescribed by law.").

147. *Id.* § 19 ("There shall be elected a convenient number of Justices of the Peace, who shall have such civil and criminal jurisdiction . . . .").

148. *Id.* §§ 7, 13, 14, 18.

149. Cooper, *supra* note 36, at 327.

150. *Id.* at 329–30.

151. *Id.* at 327–28 (emphasis added).

152. *Id.* at 328–29 ("It is a violent presumption for us to suppose that the fitness of candidates for judicial offices can be, and is understood among the people as it should be to enable them to make judicious selections.").

153. *Id.* at 329. The caution about corruption basically questioned whether judges might feel dependent or loyal to their political campaign contributors. *See id.*

154. *Id.* at 329–33.

listed fear of corruption to support their positions.[155] Moreover, lack of accountability, as discussed in the Austin editorial, concerned many supporters of the elective process.[156] Partly because of this journalistic dialogue and partly because of personal feelings after the Civil War, the Texas delegates who framed the new Texas Constitution, who were mostly rural[157] and not as urban or cosmopolitan as their counterparts in the North, were likely concerned about judges being appointed by Union sympathizers. Therefore, the swing toward an elected judiciary was made a permanent fixture that remains today. As a result, it is apparent that the 1876 Constitution "clearly evidences the determination of the people to overhaul the government completely and to make impossible in the future the abuses which they suffered at the hands of an autocratic Governor, a carpetbag Legislature, and a corrupt Judiciary."[158]

A majority report in the 1875 debates "recommended dividing [Texas] into five districts, with members of each district electing one of the five justices of the Texas Supreme Court. District judges were to be elected within their district of residence."[159] A minority report "preferred a *general* election for Texas Supreme Court justices."[160] The minority view won out not only for supreme court justices, but for all appellate judges and district judges; it was approved, became effective on April 18, 1876, and remains what we still have today.[161] In the

155. *See id.* at 329.

156. *Id.* at 329. I believe accountability is possible in an elective judiciary; however, the problem is that within the elective process, there is no real voter education and voters who vote party lines for judges who feel pressured depending upon their county to align themselves with a particular party, regardless of where their true party affiliations may lie. I feel that the power of removal is a very forceful accountability tool, and that certainly an appointment by advice and consent of 2/3 of the senate and removal by 2/3 of the senate would be appropriate and is much needed in the current century that is set to rival previous generations as being the most partisan and bitter century in not only Texas history, but American history as well. There is a tremendous difference between being subject to "removal" by the voters every four or six years versus being subject to removal at any time by 2/3 of the senate. I feel the public, in general, has been a poor watchdog of our family court judges so far, for all of the aforementioned reasons.

157. Hill, *supra* note 46, at 347.

158. Cooper, *supra* note 36, at 330 (internal quotations omitted) (citation omitted); Hill, *supra* note 46, at 347 ("The provision for the popular election of judges in the present [1876] constitution was clearly 'a reaction to the excesses and extravagances' of the Reconstruction era and the bitter experiences with 'carpetbag' judges appointed to the courts by the Reconstruction government.") (citations omitted).

159. Cooper, *supra* note 36, at 330.

160. *Id.* (emphasis added).

161. *See id.*; TEX. CONST. art. V, § 2 (amended 1891), *available at* http://texashistory.unt.edu/ark:/67531/metapth6731/m1/802/ ("The Supreme Court shall consist of a chief justice and two associate justices . . . . Said chief justice and associate justices *shall be elected by the qualified voters* of the State at a general election, shall hold their offices for six years, and shall each receive an annual salary . . . .") (emphasis added); *Id.* § 5 ("The Court of Appeals shall consist of three judges, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to a deci-

end, supreme court justices, district judges, and county judges are all elected by qualified voters in partisan elections, making Texas one of only *seven* states in the Union where judges at all levels are elected in such a manner.[162]

One cannot overstate the role that race and class prejudice played in the formation of the 1876 Constitution. Among debates concerning the proper measure to ensure uniformity of opinions, and ironically the salary of justices, no one seemed really concerned about election versus appointment until one reads the language on the fifty-second day on November 4, 1875, when Fletcher Summerfield Stockdale "alluded to the difficulties in the way of the election of judges in some localities, owing to the ignorance and prejudices *of a certain class* of the communities which thought not to control in judicial election, and said that by his method it would be placed out of the power of local majorities to elect men to the bench who were inimical to the interests of the state."[163] In other words, white men who still clung to a rural way of life based on racism and class structure. In a war where at least 618,000 Americans died,[164] resentment of rural East Texas delegates, who had depended on slavery for the continued establishment of their rural and trading livelihoods, were none too fond of being forced to lose that way of life after the end of the Civil War. These were delegates who wanted the judiciary to be decided by the people and for the people, assuming those people were white males.

General John H. Whitfield and Fletcher Summerfield Stockdale, in particular, made several racist remarks expressing concern about "negro rule" in the judiciary.[165] General Whitfield sugar-coated his remarks by further stating, "*Not that he had the least prejudice* against

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sion of said court. They *shall be elected by the qualified voters* of the State at a general election.") (emphasis added); *Id.* § 7 ("The State shall be divided into twenty six judicial districts, which may be increased or diminished by the Legislature. For each district there shall be elected, by the qualified voters thereof, at a general election for members of the Legislature, a judge, who shall be at least twenty-five years of age, shall be a citizen of the United States, shall have been a practicing attorney or a judge of a court in this State for the period of four years, and shall have resided in the district in which he is elected for two years next before his election . . . .").

162. AM. BAR ASS'N, *supra* note 144.

163. *See* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 386 (Seth Shepard McKay ed., 1930), *available at* http://tarlton.law.utexas.edu/constitutions/pdf/pdf1875debates/index1875debates.html.

164. BURKE DAVIS, THE CIVIL WAR: STRANGE AND FASCINATING FACTS 215 (Wings Books 1994) (1960).

165. DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, *supra* note 163, at 386–87 ("Not only should a candidate for judge be well grounded in the law, but that he should have continued in it for twenty-five years, which would have excluded all danger that he might have been apprehended from the *colored man.* He would go as far as anyone in presuming the purity and ability of the judiciary, but was utterly opposed to the substitute.")

the negro, but it would force upon them a set of district judges elected by *the negroes* of those districts."[166]

Thus, clearly there were urban and rural issues in addition to racial issues. In the end, a majority of the delegates were from rural areas, and they got their wishes to have an elected judiciary that would best suit their desires for the future of Texas.

III. A Call for Making Judicial Selections a Mandatory Issue Each Legislative Session and Launching a Successful Mission for True Judicial Reform

"Although the current system of electing judges by popular vote may have best served Texas in the immediate years after the Civil War, there has been much debate for many years about whether the system continues to be effective."[167] Nevertheless, over sixty-two years of proposals have been made to reform judicial selection in Texas without any success.

During the period from the late 1940s until the early 1970s, Texas became a two-party state; judges were forced to campaign, and a growing trend toward "merit selection" rather than appointments began to emerge.[168] Unsuccessful reform efforts in Texas date back to 1946,[169] when the Texas Civil Judicial Council proposed a merit-based selection for all Texas state judges, but the state legislature failed to adopt the proposal.[170] The Texas Civil Judicial Council again rallied in 1955 for a merit-based system, and this proposal again failed.[171] Sixteen years later in 1971, Robert Calvert, the Chief Justice of the Texas Supreme Court, created a task force to propose merit selection of judges.[172] Despite voter support in 1972 to establish a commission to revise the Constitution regarding merit selection of judges, the legislature ultimately rejected the proposal.[173] Two years later, in 1974, the legislature again rejected more than *fifteen* proposals for merit selection of judges and nonpartisan elections of judges.[174]

In 1986, then Chief Justice John Hill proposed the "Texas Plan."[175] The Texas Plan was a merit-selection plan that sought to eliminate

166. *Id* at 424. This language makes the Author, for lack of a better word, ill. When one argues that we should look at the framers' intent, the Author would argue that we should look at the framers' souls.

167. Bleil, *supra* note 48, at 1090.

168. Cooper, *supra* note 36, at 332.

169. *See* Am. Judicature Soc'y, History of Reform Efforts: Texas, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state=tx, for a detailed and very accurate description of unsuccessful reform efforts of the Texas state judiciary (last visited Sept. 20, 2009).

170. *Id.*

171. *Id.*

172. *Id.*; Cooper, *supra* note 36, at 332.

173. Cooper, *supra* note 36, at 333.

174. Am. Judicature Soc'y, *supra* note 169.

175. *Id.*

partisan elections at the appellate level and Supreme Court level.[176] "By focusing on merit, not 'electability,' the Texas Plan [would have opened] up the opportunity for judicial service to qualified lawyers who would otherwise not be inclined to political participation. The Texas Plan would thereby [have increased] the pool of qualified candidates from which judges may be elected."[177]

Under the Texas Plan, a nomination commission would screen judicial candidates, decreasing the potential for a low voter turnout who simply vote straight ticket.[178] Further, the likelihood that voters who do not vote straight ticket but are often uneducated and feel pressured to simply check a box by someone's name—anyone's name, or worse, do not check a box at all—is decreased.[179] The problem, though, is the Texas Plan did not address judges at the trial court level where the overwhelming majority of cases begin and end,[180] including family court judges, but rather only proposed that "[j]udges for the supreme court, the court of criminal appeals, and the courts of appeals would be elected by the people in non-partisan uncontested confirmation elections."[181]

In 1987, the Texas legislature created a committee to examine judicial selection in Texas:[182]

> [T]he committee's final report called for a merit election system for appellate judges, where a screening commission recommended candidates to the governor, the governor nominated a candidate to be confirmed by the senate, and the candidate stood in an initial confirmation election and in retention elections thereafter; a nonpartisan election system for trial court judges; elimination of straight-ticket voting in judicial elections; lower campaign contribution limits and a shorter time period for accepting campaign contributions; and [for the first time] *voter information pamphlets.*[183]

A strong wind swept Austin in 1994 when "Lieutenant Governor Bob Bullock appointed a select group to devise the best judicial selection method and instructed the group to consider every possible method. In late 1994, the appointed group recommended a plan that proposed merit selection for appellate judges and nonpartisan elections, with re-election by voter approval, for district court judges."[184] The result was legislation that called for *nonpartisan* elections of ap-

176. Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm*?, 23 TEX. TECH L. REV. 525, 559 (1992); AM. JUDICATURE SOC'Y, *supra* note 169.

177. Hill, *supra* note 46, at 361.

178. Johnson & Urbis, *supra* note 176, at 562.

179. *Id.* at 559–62.

180. *Id.* at 562.

181. Hill, *supra* note 46, at 356; *see also* AM. JUDICATURE SOC'Y, *supra* note 169.

182. AM. JUDICATURE SOC'Y, *supra* note 169.

183. *Id.*

184. Bleil, *supra* note 48, at 1100.

pellate judges and district court judges, and the elimination of straight-ticket voting in judicial elections was proposed; however, the bill stalled.[185] Although this was a noble approach at attempting to correct the "justice for sale" image that the average citizen feels controls Texas courts, the movement died.[186]

In 1996 an "appoint-elect-retain" plan was proposed, but nothing was passed.[187] A year later the proposed change switched from merit and/or appointment to simply nonpartisan elections and the elimination of straight-ticket voting.[188] Even this relatively simple change to an antiquated Constitution failed after passing the house and being stalled in the senate.[189] Two years later in 1999, another appointment-retention plan was proposed.[190] This time, the roles were reversed; the bill passed the senate but died in the house.[191]

In 2001 the senate and the Judicial Committee of the House approved a measure for the appointment by the governor for justices of the Texas Supreme Court and judges of the Texas Court of Criminal Appeals, but the legislative session ended.[192] In 2003, again, a senate bill calling for appointment by the governor with retention of the Supreme Court and Court of Criminal Appeals was approved in the house, but stalled in the senate.[193]

Some have stated that "[o]ne obstacle to judicial selection reform in Texas is the fact that the Texas legislature only meets for six months every two years."[194] To this, the Author wholeheartedly disagrees. If the legislature can fast track such issues as a proposed constitutional amendment concerning same-sex marriage; the October 2008 halt to Governor Perry's executive order concerning immunization of teenage girls for the human papillomavirus (HPV); or in the 2007 legislative session when not one, but two measures were proposed to make English the official language of Texas; then why after two decades of aggressive proposals has nothing been done concerning the preservation of the branch of government where any litigant with a justiciable cause of action may go to have his or her legal dispute addressed with the hope that all parties will be treated under a system of "Equal Justice Under the Law"? It is a question that boggles the mind, except when you consider how partisan Texas is. Thus, it is not hard to imagine how certain parties' agendas play such an important part in what bills get fast-tracked, and what bills get stalled or tabled. Further, one

185. AM. JUDICATURE SOC'Y, *supra* note 169.
186. *See, e.g.*, Bleil, *supra* note 48; Hill, *supra* note 46, at 344.
187. AM. JUDICATURE SOC'Y, *supra* note 169.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

cannot ignore the power of the lobbyists in Austin who play a significant role in setting legislative agenda; thus, judicial reform gets pushed to the sidelines until it is too late for significant discussion and a vote.

IV. THE DANGERS OF PARTISAN ELECTIONS

In the United States, there are nine states where partisan elections decide trial courts of general jurisdiction, including family courts.[195] These states, including Texas, are Alabama, Illinois, Louisiana, New York, Ohio, Pennsylvania, Tennessee, and West Virginia.[196] Of these nine states, the only state where the judicial candidate's party affiliation is not listed on the ballot is Ohio.[197] States with partisan elections for appellate courts and courts of "last resort" include Texas, Alabama, Illinois, Louisiana, Ohio, Pennsylvania, and West Virginia.[198] It is important to note that of the aforementioned nine states that conduct partisan elections for judges of original jurisdiction, two of the nine then switch to a combined election plus merit-based plan at the appellate level—New York and Tennessee.[199]

Thus, in summary, Texas is one of only seven states in the entire country where state judges at all levels are seated based on partisan elections.[200] It is perplexing as to why the other forty-three states in the union have decided to use other methods to select judges including merit-based plans, combinations of merit plus election, non-partisan elections, and appointments, including life appointments.[201]

A recent survey has stated that among judges, 52% supported non-partisan elections. Non-partisan elections free up the judges' time allowing them to concentrate on making informed rulings and spend less time worrying about reelection.[202] However, only 21% favored initial appointment with subsequent retention elections.[203] Perhaps this shows that a noticeable percentage of judges favor lifelong ap-

195. AM. JUDICATURE SOC'Y., JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 3, 8, 10 (2009), http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts%208-09.pdf.

196. *Id.*

197. *Id.* at 9.

198. *Id.* at 4, 6, 9, 10.

199. *Id.* at 3, 8, 10.

200. *Id.* at 3, 10.

201. *Id.* at 3; *see also* LARRY C. BERKSON UPDATED BY RACHEL CAULFIELD, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 2–3 (2004), http://www.ajs.org/selection/docs/Berkson%205-09.pdf. *See* AM. JUDICATURE SOC'Y., METHODS OF JUDICIAL SELECTION: SELECTION OF JUDGES, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Sept. 7, 2009) for a more detailed statistical analysis of the various methods of judicial selection in the United States.

202. *See* Adam Liptak, *American Exception: Rendering Justice, with One Eye on Re-Election,* N.Y. TIMES, May 25, 2008, at A1, *available at* http://www.nytimes.com/2008/05/25/us/25exception.html.

203. *Id.*

pointments.[204] When one considers that 43% of district judges and appellate justices in Texas favor a plan where they would be appointed by the governor with approval by two-thirds of the senate, then be subject to a non-partisan initial election one year later and thereafter be subject to periodic retention elections, one wonders if state judges are not serving their own political agendas or the agendas of their donors.[205]

Some have also criticized the extent to which special interest groups influence partisan judicial elections.[206] With partisan or non-partisan elections, there is a very real probability that the candidate that spends the most will win.[207] Further, there is a very real concern that campaign contributions might bias an elected judge.[208] Partisan politics are not the only potential form of bias, though. Bias comes in all forms. As in Texas, across the nation, "Americans have struggled since colonial times with the notion that judges should be independent, yet accountable to the people."[209] However, bias permeates all of us in our day-to-day decision-making and can affect an elected judge's decision-making ability. Bias is subjective and very subtle, and it can affect not only elected judges but also appointed judges.

A further problem with partisan elections is name confusion.[210] Judge Charles Bleil writes in his article about one of the most notorious (and unfortunate) examples of name confusion among voters.[211] Don Yarbrough, an individual unknown to the general public, did not have any support in his campaign, and in fact, did not campaign for his slot on the Texas Supreme Court.[212] It is argued that the public confused his name with prominent and respected individuals who had minor differences in the spelling of their names.[213] Eventually, Yarbrough's name confusion won him the battle in terms of being

204. The Author would not like to be presumptuous, but perhaps this percentage of individuals is concerned about job security. A second theory would be that these judges enjoy the current system because it has been in place for over a century and has become the status quo.

205. TEX. OFFICE OF COURT ADMIN. & STATE BAR OF TEX., *supra* note 3. A fairly significant percentage, not only of judges, but also court personnel and attorneys favor this plan. The proposed plan was that "[d]istrict and appellate judges in Texas should be appointed by the Governor, subject to the approval of two-thirds of the Senate; then be subject to an open, contested but non-partisan initial election approximately one year after assuming office; and thereafter be subject to periodic retention elections where people vote to determine whether the judge should remain in office." *Id.* Forty-three (43%) percent of judges, fifty-three (53%) percent of attorneys, and half of court personnel favor this judicial selection plan. *Id.*

206. *See generally* Judith D. Moran, *Judicial Independence in Family Courts: Beyond the Election-Appointment Dichotomy,* 37 FAM. L.Q. 361 (2003).

207. *Id.* at 362–63.

208. Johnson & Urbis, *supra* note 176, at 543–68.

209. Cooper, *supra* note 36, at 317; *see generally* Bleil, *supra* note 48.

210. *See* Bleil, *supra* note 48, at 1092–93.

211. *Id.*

212. Bleil, *supra* note 48, at 1093.

213. *Id.*

elected to the bench, but it cost him the war.[214] He resigned under pressure after being indicted for perjury and forgery for events before his election on fifty-three violations of the law.[215] Other examples to which Judge Bleil cites are Gene Kelly's unsuccessful run for the Texas Supreme Court (no relation to the man whom everyone associates with "Singing in the Rain"), George Bush's successful run for the Court of Criminal Appeals (no relation to either George H.W. Bush or his son George W. Bush), among others.[216]

A. *The Dangers of Judicial Bias (Race, Gender, Economics, and Life Experiences)*

Judicial bias is something that no one prefers to talk about, but it is present, and all trial lawyers know it.[217] We all view the world through our own set of colored glasses, and the judiciary is no different. This section discusses several ways in which bias permeates our judiciary, even though "[t]he importance of detachment, disinterest and impartiality to good judging is so deeply imbedded in our legal mythology that acknowledging judges as representatives can be perceived as a threat to the judicial function."[218]

"[T]rial court decision making, by its very nature, challenges traditional images of judges as detached, disinterested experts applying objective standard to dispute resolution. State trial judges are most often called upon to resolve highly personal, value-laden disputes."[219] While some have stated that this is particularly true in criminal matters, because of the highly charged emotions involved in family law matters, the Author would argue that the proposition of personal, value-laden disputes is equal, if not more so, in family matters as it is in criminal matters.[220] Thus, in this realm of broad discretion, judges view the facts, the parties, the issues, the witnesses, the jurors, and all other aspects of the case while wearing colored lenses that, even when there are the best of intentions, are hard to filter.

As far as we have come as a nation concerning race relations, there are still instances where judges have been under attack in what is referred to as "race recusal."[221] In an election year where the United States elected an African-American president and had a Latino presidential candidate who speaks fluent Spanish, the Author believes the country as a whole has made great strides in "racial tolerance," or

214. *Id.*
215. *Id.*
216. *Id.* at 1093–94.
217. *See* Ifill, *supra* note 28.
218. *Id.* at 97. "The very suggestion that judges can represent a community counters the traditional view of judges as impartial decision makers." *Id.* (emphasizing the importance of racial diversity in the makeup of state judiciaries).
219. *Id.* at 103.
220. *See id.*
221. *See id.* at 114–16.

"color-blindness." However, we are far from achieving a color-blind society. Having been born in Birmingham and having grown up in the South, the Author can attest that more needs to be done. However, arguing that a particular judge should feel pressured to step down in response to a recusal motion that was filed for no other reason than the judge's race is a preposterous proposition. Perhaps with supporting evidence that the actual facts of the case are similar to a judge's own personal experience, then race could play a role. For example, if a judge was a civil rights advocate in the 1960s who happened to march and protest for equal rights and then decades later faces a First Amendment case with similar facts (for example, the recent marches by Mexican immigrants), or the judge presides over a case involving racial discrimination when that judge has experienced personal discrimination in the past, these circumstances might be called into question as grounds for recusal. However, the point is not the race, but rather the past personal experiences of the judges.[222]

Gender bias is also present in our judiciary.[223] In the family courts, which have been referred to as "stepchildren,"[224] the environment is ripe for gender discrimination against women, who are usually the ones that will be raising the children, that are the subject matter of litigation.[225] Currently in the family law courts of Tarrant County, Texas, seven men preside as judges of which two are district court judges, and five are associate judges.[226] Across Texas in general, there are more female family court judges than male judges.[227] At first glance, one would think that because more than 50% of family court judges are female, this statistic should benefit female litigants. The problem is that, as with race, it is about the judge's personal experiences.

When a family associate or district court judge has experienced a bitter divorce or bitter litigation concerning child support and visitation of his or her own children, should that judge recuse himself or herself from hearing the case? Should a male judge who is paying child support for one or more children and who feels he is paying more than his fair share be allowed to hear a case by a woman seeking an increase in child support? Should a female judge who feels the

222. *See* Steven Zeidman, *Careful What You Wish For: Tough Questions, Honest Answers, and Innovative Approaches to Appointive Judicial Selection*, 34 FORDHAM URB. L.J. 473, 477 (2007) (proposing a vetting system for judicial candidates based on personal characteristics and temperament).

223. *See* Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1 (1990).

224. *See* May, *supra* note 7.

225. As of 2002, approximately 27,269,757 single women (or 9.2% of the U.S. population) were heads of households taking care of minor children. *See* DIVORCE MAGAZINE, *supra* note 10.

226. Tarrant County Family Law Bar Association, Tarrant County Family Law Judges, http://www.tcflba.com/Judges.htm (last visited Sept. 20, 2009).

227. *See id.*

obligor in her own conservatorship is not paying his fair share be allowed to hear a case by a woman with a similar plight? These are questions that are never addressed during election season or during family court proceedings. Judges should not be personally biased because they are divorced, a single parent, or the parent paying child support. However, the reality is that we all look at the world through certain sets of lenses, and making such information available to the general public when the general public chooses judges that decide the fates of thousands of Texas children would help make better educated voters. Such general information should be made available to the public prior to the public entering the ballot box.[228]

Article V, Section 11 of the Texas Constitution states that "[n]o judge shall sit in any case wherein the judge may be interested. . . ."[229] Should a judge's particular personal experiences concerning divorce, custody, child support, etc. be included in the category of "any other reason"?[230] The importance of negating judicial bias is also stated in Rule 18b of the Texas Rules of Civil Procedure, which proscribes: "[a] judge *shall* recuse himself in any proceeding in which: (a) his impartiality *might reasonably be questioned* . . . ."[231] While it may seem an invasion into a judge's private life, we already request our elected judges to recuse themselves if they have worked with one of the parties' counsel, personally own stock in corporations, or for any other matter that might create actual bias or the perception of bias.[232] Thus, it would seem acceptable when dealing with families and children to know a bit of information about whether a judge might be biased because of his or her own personal family court experiences.

The following are hypothetical conflicts pertinent to the family court system that emphasize potential problems:

> **Hypothetical 1:**
> Judge A has been assigned a family law case involving M (mother) and F (father) where C (child) is the subject matter of the litigation. M has filed a motion to increase child support. Unbeknownst to M, Judge A has been personally embroiled in child support litigation. Should this be ground for recusal?
>
> **Hypothetical 2:**
> Judge A has been assigned a family law case involving M (mother) and F (father) where C (child) is the subject matter of the litigation. F is seeking a reduction in child support because of his increased needs because of his new family and new minor children to support. Unbeknownst to M, Judge A has been personally embroiled in child support litigation. Should this be ground for recusal?

228. Ifill, *supra* note 28, at 145.
229. TEX. CONST. art. V, § 11.
230. *See id.*
231. TEX. R. CIV. P. 18(a)–(b) (emphasis added).
232. *Id.* 18(b)(2).

Hypothetical 3:
Judge A has been assigned a family law case involving M (mother) and F (father) where C (child) is the subject matter of the litigation. M and F are going through a bitter divorce. Unbeknownst to M and F, Judge A is personally going through or has just completed a bitter divorce. Judge A is asked to decide an equitable property settlement between M and F as well as conservatorship issues and visitation. Should this be grounds for recusal?

These are issues that lawyers all know occur, but the Author has never heard nor personally witnessed a case where these issues were brought up for questioning a judge's ability to hear a family law case in an impartial manner. Being an effective member of the judiciary is applying law to facts, *without bias*. Of course, it is hard for judges, like anyone else, to leave their home lives at home when they go to work. One should not seek a judicial position if one cannot be impartial on the bench, especially when minor children are involved.

Should a judge's personal economic circumstances be grounds for recusal? Should parties, especially the top percent of income earners, be punished when attempting to obtain child support payments in excess of the recommended statutory guidelines? Should a judge recuse herself from a modification lawsuit to increase child support if she has a child with special needs that she is unable to meet alone and has tried and failed to obtain support for the child from the other parent? Should judicial candidates' personal background be made public so that voters will have a better understanding of *who* these candidates are? The Author would argue an emphatic "Yes." For example, the Author worked for a successful personal injury trial law firm for almost seven years prior to entering law school. The Author's firm did almost exclusively plaintiff's work. Should that information be made available to the general public if any former members of the firm choose to run for judge? Yes, of course it should, because despite the fact that legal scholars try extremely hard to apply law to facts, everyone still sees the world through different colored lenses.

Texans, and more importantly Americans, should never forget that "the right to an impartial judge is guaranteed by the Due Process Clause of the Fourteenth Amendment,"[233] and that "[l]itigants may seek to disqualify a judge who has an interest in the outcome of the litigation, has actual bias towards one of the parties or has even the appearance of bias."[234] Thus, the Author would extend judicial bias in family law matters to those judges who are unable to entirely distance themselves from the emotional, gender, and financial issues that are unique to family court cases. Additionally, the trial judge is the one who is closer to the dispute by interacting directly with the attorneys, parties, witnesses, and jurors; they exercise their judicial discretion

233. Ifill, *supra* note 28, at 98.
234. *Id.*

much broader than appellate judges who often rule without oral argument and rely heavily on the trial court record and appellate briefs summarizing the issues to determine whether there was an abuse of discretion on the trial judge's part.[235]

Thus, the problem of judicial bias is not one that can be completely ratified by the appellate process. Very few cases ever get appealed.[236] The costs are daunting, and appellate courts are a bit frightening to even the most experienced of attorneys. Of the cases that get appealed, most are affirmed.[237] Thus, it begs the question why so much of the attention on how we select judges in our state focuses on appellate justices, Texas Supreme Court justices, and judges of the Criminal Court of Appeals. As with local politics (school boards, councilpersons, mayors, etc.), should not our focus concerning the manner in which we select judges be focused on district and county judges and justices of the peace?

The Author would propose that we either amend the Texas Government Code to include specific recusal provisions for family court judges, or amend the Texas Family Code to incorporate similar recusal provisions, or both. The Author is well aware that some will argue this is discriminatory and that it could eliminate potential members from our family court benches who perhaps, because of their personal experiences, could argue that they are even *more qualified* to hear family law cases. However, given the alarming statistics on the amount of time spent on family law cases and the overwhelming percentage of family court cases that never make it to the appellate court level,[238] the Author feels the stakes are too high to risk bias when determining years of a child's future. These proposals are in addition to the concern that campaign contributions during an election year might perhaps bias an elected judge.[239]

V. UNTIL REFORM IS MADE: PROACTIVE SOLUTIONS TO A COMPLEX PROBLEM THAT WE CAN LAUNCH NOW—BETTER PUBLIC EDUCATION AND IMPROVED JUDICIAL SURVEYS

Until such time as our state legislature actually launches a genuine and concerted effort to reform our judiciary, there are two simple solutions to help mitigate the damage caused by partisan elections. These band-aids are (1) better public education and (2) better judicial surveys.

235. *See* Maixner v. Maixner, 641 S.W.2d 374, 376 (Tex. App.—Dallas 1982, no writ).

236. *See* OFFICE OF COURT ADMIN., *supra* note 15, at 4.

237. *See id.*

238. *See id.*

239. Johnson & Urbis, *supra* note 176, at 543–68.

A. *Better Public Education*

Most of the general public in Texas is not well versed in the law and often too busy to pay much attention to elections that do not involve high-profile figures such as presidents, governors, and other high-level state officials.[240] Most do not understand how the law works, other than what they view on popular television shows and in sound bites on the twenty-four-hour news networks, which is often incredibly inaccurate.[241]

Many short law review and other published articles about elected judges have been written over the years that are basically a formal introduction of a particular elected judge to the public,[242] but most citizens might not be aware of their existence. Former Chief Justice John Hill has suggested that "[n]either the Legislature, political parties, the State Bar, nor sitting judges ought to presume to know what a majority of Texans might desire with regard to the selection of their judges, if given a fair chance to consider the subject [whether to have appointed or elected appellate and supreme court justices]. It is only when an alternative is to be proposed to the voters that the political process is adequately invoked and genuine debate can be had over the merits of competing plans for judicial selection."[243]

The Author strongly agrees, but is not convinced that the general public would fully comprehend what is really going on when it comes to local elections and to our appellate and supreme court judiciary. At least in the Author's community, most constituents vote straight ticket, disregarding qualifications, history, and, most importantly, whether a particular judge will apply the applicable law to the facts in a fair and unbiased manner.[244] Because of the opportunity to vote "straight party,"[245] in some counties in Texas, one political party dominates virtually the entire judiciary in that county without realiz-

240. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1206 (2000).

241. *See id.*

242. George C. Hanks, Jr., *Children and the Law in Texas: What Parents Should Know*, 38 HOUS. LAW. 49, 49 (2000) (writing about RAMONA FREEMAN JOHN, CHILDREN AND THE LAW IN TEXAS: WHAT PARENTS SHOULD KNOW (1999)); Sharon Hemphill, *An Interview With Linda Motheral, Judge of the 257th District Court*, 39 HOUS. LAW. 57, 57 (2002); Suzanne Tice, *Profile: Texas Supreme Court Justice Craig Enoch*, 62 TEX. B.J. 682, 682 (1999); *The State Bar and Beyond: Willett Joins Supreme Court of Texas*, 68 TEX. B.J. 890, 890 (2005).

243. Hill, *supra* note 46, at 355.

244. Thomas R. Phillips, J., Supreme Court of Tex., Big Money in Texas Judicial Elections: The Sickness and its Remedies, Responses to Paul Carrington before Southern Methodist University School of Law, *in* 53 SMU L. REV. 281, 283 (2000).

245. FORD, *supra* note 43, at 141 (noting that "partisan elections shelter—sometimes [even] foster incompetence as distinguished judges of the minority party are swept out, often to be replaced by inferior candidates of the political majority") (citation omitted).

ing that judges are individuals with different personalities and that no two Republicans and no two Democrats are the same.[246]

B. *Better Judicial Surveys*

For efficiency purposes, given that Texas has 254 counties, the Author will focus on the five largest metropolitan areas and how they conduct their judicial surveys. These are (in order by population largest to smallest): Houston (Harris County), San Antonio (Bexar County), Dallas (Dallas County), Austin (Travis County), and Fort Worth (Tarrant County).

The Houston Bar Association monitors judges in the greater Houston area through judicial polls administered by its Judicial Committee.[247] There are three judicial polls, and the polls are not endorsements of judicial candidates by the Houston Bar Association, but rather serve a public education service.[248] Polls have been conducted since 1973.[249] The first of the three polls is the Judicial Candidate Qualification Poll, which is held before primaries in election years.[250] Members are asked to rate the judge as "qualified," "not qualified," "well qualified," or "not rated" (if the member has no knowledge or opinion).[251] The second poll is the Judicial Preference Poll, which is conducted before the general election in November.[252] Members are asked to indicate for whom they would vote in contested judicial races.[253] The third poll is the Judicial Evaluation Poll that is

246. *See also id.* at 155 (discussing the results of the 1998 elections in Harris County and how the results "all had to do with politics"); *id.* at 109 (discussing how the Houston system for electing judges is highly politicized and that so long as judges run on party lines, there will always be partisan rivalry in election years). I would also add that so long as religion is allowed to infiltrate our political parties along with language suggesting that one must choose whether you are with the United States or against it, we will never have a truly adversarial election process based on debate of the issues that form the legacy our children will inherit from us.

247. The Judicial Polls Committee develops and distributes, in election years, a judicial candidate qualification and judicial preference poll, and in non-election years, a judicial evaluation poll to HBA members. The committee is also responsible for disseminating the results of these polls to members and the public. *See* Judicial Poll Results, Houston Bar Association, http://www.hba.org/folder-poll-results/poll-results.htm.

248. Much thanks is given to David A. Chaumette, a partner at Baker & McKenzie, L.L.P., and co-chair of the Judicial Polls Committee; Ben Aderhold of Looper Reed & McGraw, co-chair of the Judicial Polls Committee; and Tara Shockley, Communications Director for the Houston Bar Association, who were very helpful with understanding the judicial polls in Houston.

249. Bonnie Gangelhoff, *The Worst Judge in Harris County?*, HOUS. PRESS NEWS, Aug. 31, 1995, http://www.houstonpress.com/1995-08-31/news/the-worst-judge-in-harris-county/full.

250. HOUSTON BAR ASS'N, 2008 JUDICIAL CANDIDATE QUALIFICATION POLL (2008), http://www.hba.org/folder-poll-results/qual08.pdf.

251. *Id.*

252. HOUSTON BAR ASS'N, 2008 JUDICIAL PREFERENCE POLL RESULTS (2008), http://www.hba.org/home-elements/poll08.pdf.

253. *Id.*

conducted after the election.[254] Members are asked to evaluate judges who have sat on the bench for at least six months on a set of criteria.[255] Members are also asked to evaluate only if they have personal and firsthand knowledge of the judge.[256] These results are made available online.[257] In addition, the Houston Bar Association goes further by publishing summaries of key decisions in family courts broken down by judge.[258] This information is not only helpful to the public, but to attorneys and legal scholars as well.

The San Antonio Bar Association, like the other highly populated urban areas the Author surveyed, conducts two polls.[259] A judicial preference poll is conducted during election years as well as a judicial evaluation poll during non-election years.[260] In Dallas County, attorneys are sent surveys to evaluate judges by ranking them as "Excellent," "Acceptable," or "Needs Improvement."[261] The most recent judicial poll at the time this Article was written was conducted in 2009.[262]

In Austin, two polls are conducted by the Judicial Affairs Committee.[263] The first is a Judicial Evaluation Poll that is conducted every two years (odd years) in January.[264] The Evaluation Poll includes all judges who have been in a judicial position for at least eighteen months.[265] Unlike the other polls in the other five cities, the Austin Judicial Poll is a bit more thorough.[266] In addition to the standard questions (in Austin, there are five) about temperament, applying the correct law, impartiality, work ethic, and an overall evaluation, the questionnaire asks for *demographic information* of the attorneys who vote.[267]

254. HOUSTON BAR ASS'N, 2009 JUDICIAL EVALUATION RESULTS (2009), http://www.hba.org/folder-poll-results/2009evaluationresults.pdf.

255. Press Release, Houston Bar Ass'n, Houston Bar Association Judicial Evaluation Results (May 2009), http://www.hba.org/folder-poll-results/2009%20Result%20letter.pdf.

256. *See* Judicial Poll Results, *supra* note 248.

257. *See, e.g.*, HOUSTON BAR ASS'N, *supra* note 252; HOUSTON BAR ASS'N, *supra* note 254.

258. *See* Houston-Opinions.com, http://www.houston-opinions.com/HC-Civil-Courts-and-Judges.html (last visited Sept. 18, 2009).

259. The Author would like to thank Kim Palmer at the San Antonio Bar Association for her assistance in explaining San Antonio's judicial polls and surveys.

260. *See* HOUSTON BAR ASS'N, 2006 JUDICIAL PREFERENCE POLL (2006), www.hba.org/folder-poll-results/prefpoll06.pdf.

261. *See* DALLAS BAR ASS'N, 2009 JUDICIAL EVALUATION POLL (2009), www.dallasbar.org/judiciary/poll_2009.asp.

262. *Id.*

263. Austin Bar Association, Judicial Affairs Committee, http://www.austinbar.org/pages/judicial_affairs (last visited Sept. 18, 2009).

264. *Id.*

265. *Id.*

266. AUSTIN BAR ASS'N, 2007 JUDICIAL EVALUATION POLL (2007), http://www.austinbar.org/assets/pdfs/2007JudicialEvalPoll.pdf.

267. *Id.*

The Austin Bar Association also conducts a survey during election years as well.[268] It is a Judicial Preference Poll that is conducted every two years (even years) in January prior to the primary election.[269] The Preference Poll includes only those candidates who are contested.[270] While the Author admires the Austin Bar Association for including demographic information so voters know who voted, the Author feels strongly that all judges should be evaluated in a preferential poll regardless of whether they are in an uncontested election or not. Just because a judge is not contested, the Author believes that they should still be evaluated in election years as contenders in judicial races. To do otherwise proffers bias in favor of uncontested presiding judges.

In Tarrant County, attorneys are sent surveys that evaluate family court judges.[271] The Tarrant County Bar Association (TCBA) conducts two types of judicial polls.[272] In non-election years, the Judicial Evaluation covers judges of all courts of record, including federal courts, and inquires about each judge's qualifications.[273] The Judicial Preference Polls are conducted during an election year, and TCBA members express their views on the qualifications of judicial candidates through these non-partisan polls. Results of the evaluations and polls are made public.[274] For Judicial Qualifications Polls during election years, voters are asked to choose between: "Not Qualified," "Qualified," or "Well Qualified" for each candidate.[275]

Texas's judicial surveys in these five largest metropolitan areas in our state fall short in several ways—not dissimilar to a poorly written multiple choice exam where qualified answers are not allowed. Other states, as discussed below, allow for written comments in their judicial surveys. The Author believes that, especially in a partisan election state, written comments would help cut through party lines and provide valuable (and more personal) information to voters.[276] Written

268. *See* Austin Bar Association, *supra* note 263.

269. *Id.*

270. AUSTIN BAR ASS'N, *supra* note 266.

271. *See* Tarrant County Bar Association, http://www.tarrantbar.org/Default.aspx?tabid=58 (last visited Sept. 19, 2009).

272. *Id.*

273. *Id.*

274. *Id.*

275. *See, e.g.*, TARRANT COUNTY BAR ASS'N, 2005 JUDICIAL EVALUATION, http://www.tarrantbar.org/Portals/0/Uploads/Judicial_Evaluation_2005.pdf (last visited Oct. 1, 2009).

276. An already used workable model could be the platform for including written comments in evaluations of Texas judges. This workable model is the form that attorneys use when seeking to become eligible to sit for the board certification exam in Texas. The attorney seeking board certification, for example, must contact her or his prior counsel and obtain evaluations and recommendations from them based on that particular attorney's conduct throughout the litigation. These recommendations include written comments about the attorney's competence, reputation, and professionalism during the course of the litigation.

comments, if made available to the public and if understood by the public, would be very helpful in making educated decisions of elected judges in our state. The Author feels it would also help to restore the general public's perception of attorneys and the judiciary.[277]

VI. EXAMPLES FROM THE STATES OF WASHINGTON, KANSAS, COLORADO, AND NEVADA

In the State of Washington, two bar members, Salvador Mungia and John A. Miller, oversaw a successful survey project in 2008 to review elected judges.[278] One unique aspect of the project was that it included surveys from jurors.[279] Judge Thomas Larkin commented on the inclusion of jurors' remarks by stating that "[t]he jurors' comments might be the most objective measure of the way a judge does his or her job,"[280] because "[t]hey don't have a dog in the fight."[281] Judicial surveys can be "humbling at best and potentially embarrassing at worst."[282]

A ballot project in Kansas, where supreme court justices are appointed, but the voters decide every six years whether to retain the judges, involves surveys to help voters become better educated and "decide how to vote."[283] The Author suggests that a system like this, if used in a deeply divided partisan state such as Texas, would facilitate more educated voting decisions not based on strict party lines.[284] Proponents of the Kansas system have stated that survey results available online should improve judicial performance.[285] Kansas's judicial surveys, that are made available online, even make recommendations to voters on whom to keep and whom to replace.[286] This is similar to the days when groups like the League of Women Voters and other concerned groups transmitted news via print media (newspapers,

277. The Author has been licensed since 2002 and has been a member of the local bar for several years. However, she has yet to receive a judicial survey. This is particularly disconcerting for her given that 2008 was an election year and several judicial slots in Tarrant County were contested.

278. Adam Lynn, *Judging the Judges: Bar Association Survey Rates Pierce County Judiciary*, THE NEWS TRIB. (Tacoma, Wash.), June 1, 2008, at A1.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* (remarks by Washington bar member Salvador Mungia who co-oversaw the project).

283. John Hanna, *Reports on Kansas Judges to go Online This Month*, LAWRENCE J.-WORLD, Aug. 5, 2008, at B8, *available at* http://www2.ljworld.com/news/2008/aug/05/reports_kansas_judges_go_online_month/.

284. Six other states currently have a similar evaluation system to Kansas's system. They are Alaska, Arizona, Colorado, Tennessee, Utah, and our neighbors directly to the west, New Mexico. *Id.*

285. *Id.*

286. *See, e.g.*, Jesse Fray, *Report Recommends Judges Malone and Martin be Retained*, LAWRENCE J.-WORLD, Aug. 29, 2008, at B1, *available at* http://www2.ljworld.com/news/2008/aug/29/report_recommends_judges_malone_and_martin_be_reta/.

pamphlets, and the like). Having immediate online access would provide valuable information to voters who increasingly receive their news from internet sources instead of reading the morning paper with their coffee. Thus, unlike the survey conducted in 1998, the Washington state project includes not only numerical rankings, but written comments.[287]

Colorado has perhaps engaged in an even bolder survey project.[288] The State Commission on Judicial Performance and local commissions complete their evaluations of justices and judges.[289] The results are not only made available to the public, but also the recommendations.[290] These results and recommendations are made available online, and are mailed to each voter's household in the State of Colorado in what is called the "Blue Book."[291] According to Paul Farley, the Chair of the State Commission on Judicial Performance, the purpose of this program is to try to "strike an extremely difficult balance by making judges accountable to the public without becoming involved in politics."[292] As the Author is proposing in this Article, Mr. Farley agrees that "[i]t is important that citizens take the time to review the information the commissions have provided and cast informed votes on Election Day."[293]

In Nevada, on May 18, 2008, the Las Vegas Review-Journal released the results of 800 lawyers in southern Nevada.[294] Thomas Mitchell, editor of the Review-Journal, said he originated the survey to help voters.[295] Mr. Mitchell stated that "[s]ome of the most important votes citizens can cast are for our judges and justices, but most of us have little contact with the courts or lawyers and have little personal knowledge of what makes a good judge."[296] During the sixteen years the survey has been in place, some judges with poor ratings de-

287. Written comments provide immeasurable information that often do not fit squarely in a choice of A, B, or C. As an adjunct law professor, the Author finds students' written comments are much more valuable than statistical data that is often confusing and difficult to interpret. *See also* Lynn, *supra* note 278.

288. *See* Colo. Office of Judicial Performance Evaluation, Commissions on Judicial Performance, http://www.coloradojudicialperformance.gov/index.cfm (last visited Oct. 1, 2009).

289. *Id.*

290. *Id.*

291. Press Release, Colo. State Comm'n on Judicial Performance, Judge Evaluations Available on Internet August 8, at 1 (Aug. 7, 2006), *available at* http://www.courts.state.co.us/userfiles/File/Court_Probation/01st_Judicial_District/judge_evaluations.pdf.

292. *Id.* at 2.

293. *Id.*

294. A.D. Hopkins, *Judging the Judges: Nearly 800 Lawyers Turn in Judicial Performance Evaluation Grades*, LAS VEGAS REV.-J., May 18, 2008, *available at* http://www.lvrj.com/news/19053459.html.

295. *Id.*

296. *Id.* The survey asks lawyers to evaluate presiding judges with whom the lawyers have personal knowledge. *Id.* The survey is conducted each election year. *Id.*

cided to not file for reelection, and those judges who did file for re-election were more likely to face opposition than judges with good ratings.[297]

Unfortunately in Texas, because similar information concerning state judges is scattered and most often simply unavailable, and because our judicial elections have become so politicized, voters often vote on straight party lines without knowing the candidate for whom they are voting.[298] A simple survey could be sent via e-mail to state attorneys who provide e-mail addresses with the bar similar to the way that Texas attorneys vote for President of the Texas Bar Association.[299] It is an efficient eco-friendly manner of conducting business; however, a back-up plan for those attorneys who do not have e-mail access or choose to participate by mail could be used. This state bar election system is an already existing platform that could easily be used for judicial surveys with little modification.

VII. BEYOND JUDICIAL SURVEYS: THE NEED FOR SUMMARIES AND TRANSPARENCY OF DECISIONS AND JUDGES' RECORDS INCLUDING SURVEYS BY PRIOR LITIGANTS AND JURORS

Some basic data about judges' decisions should also be made available to the public. Given the "mistrust" of attorneys in general, which popular television shows and the media promulgate, voters might not be quite as persuaded as one might hope if judicial surveys of bar members are the only information that voters have before entering the ballot box.[300]

On judges' records of decisions in family law cases, the following data should be included and made available to the public: the percentage of cases from that judge's docket that are appealed; the percentage of cases affirmed on appeal; and the percentage of cases reversed or modified on appeal.

In family law jurisprudence, the Author also recommends that clarification on the above statistical data state whether it was the managing conservator (usually the mother) or possessory conservator (usually the father) who filed the appeal and the disposition of the case.

Another solution that could easily be enacted is to conduct surveys of prior litigants and jurors. This is a radical idea, but firms should use their right to survey jurors after each verdict.[301] If surveys were used

297. *Id.*

298. *See* Phillips, *supra* note 244, at 283.

299. *See* State Bar of Texas, 2009 State Bar and TYLA Elections, http://www.texasbar.com/Template.cfm?Section=Meet_the_Candidates1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=23851 (last visited Jan. 3, 2010).

300. As previously mentioned, over 100 years ago mistrust of the judiciary ran rampant prior to the 1875 Convention that resulted in our current state Constitution. *See generally* Cooper, *supra* note 36. Today, public mistrust of the judicial process continues. *See* Johnson & Urbis, *supra* note 176, at 542.

301. *See* TEX. R. CIV. P. 294.

for litigants in family courts to find out how they felt they were treated (not the results of the case), voters could more easily relate to "real people," rather than whom the general public mostly feels is the legal "elite."

Of course, the surveyors will have to sort the wheat from the fray. Because of the high emotional intensity involved in family law disputes and because litigants tend to be very verbose when discussing their tales, some data could be skewed. However, as with all statistical analysis, if a large enough sample is used, the margin of error would be decreased. This program would be an interesting experiment that could lead to important changes in how we select our judiciary and how we better educate our voters until such time as we have an appointed judiciary.

There are two upsides to surveys of this kind. First, they can prevent the problem that "[t]oo many times the public has no idea who their judges are or how they're doing."[302] However, by releasing the survey takers' comments to the public, it "helps give people a more complete picture of a judge's performance, something a numerical ranking alone cannot do."[303]

In Texas, a 1992 study, a bit out of date, but still relevant today, revealed campaigns often cost at least one million dollars or more.[304] Historically, plaintiffs' trial law firms have contributed the bulk of campaign contributions.[305] The reality is that Texas is such a politically divided state that in some counties judges of one political party run unopposed because judges of another political affiliation know they have little or no chance of being elected. In counties such as Tarrant, Dallas, and especially Harris, the overwhelming majorities of judges are listed on the ballot as Republican and most trial lawyers are registered Democrats, or at least vote Democrat in local elections.[306]

A recent article in *The New York Times* addressed the fact that the problem of campaign contribution pressures and re-election have not only continued, but have been exacerbated.[307] The article focuses on a judge elected in Wisconsin in April 2008 on a "vote [that] came after a bitter $5 million campaign in which a small-town trial judge with thin credentials ran a television advertisement falsely suggesting that the only black justice on the state Supreme Court had helped free a black rapist. The challenger unseated the justice with 51 percent of

302. Lynn, *supra* note 278.

303. *Id.*

304. Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, *in* JUSTICE FOR SALE, http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html#tx, *originally published in* 17 CRIME, L. & SOC. CHANGE 91 (1992).

305. *Id.*

306. *See generally* Maute, *supra* note 240 (discussing the problems with partisan elections).

307. Liptak, *supra* note 202.

the vote."[308] When one factors in that "[n]ationwide, 87 percent of all state court judges face elections, and 39 states elect at least some of their judges,"[309] coupled with the multi-million dollar campaigns in Texas, it is a bit unnerving and unsettling because it shows that with enough money, anyone could potentially run a successful and inaccurate smear campaign targeting voters and specific interest groups affiliated with particular parties.

"In the rest of the world, the usual selection methods [of judges] emphasize technical skill and insulate judges from popular will, tilting in the direction of independence."[310] In the rest of the world, judges are most commonly appointed by the executive branch, similar to the manner in which federal judges in the United States are chosen.[311] Even Sandra Day O'Connor has "condemned the practice of electing judges."[312] She has stated on record that "[n]o other nation in the world does that . . . because [these other nations] realize you're not going to get fair and impartial judges that way."[313] However, an appointment system or appointment with evaluations to determine retention is not a panacea for our state's judicial system. In fact, others agree. One critic, Professor David M. O'Brien at the University of Virginia, has commented that "[t]he selection of appointed judges . . . can be influenced by political consideration and cronyism that are hidden from public view."[314]

A further consideration is the quantity versus the quality of opinions written by judges. Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner[315] wrote a working paper at the University of Chicago Law School in 2004 "[t]hat found that elected judges wrote more opinions while appointed judges wrote opinions of higher quality."[316] Their findings were based on the notion that elected judges are perhaps more winners of a popularity contest with the general voting public than appointed judges.[317]

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308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* Hans A. Linde, a justice of the Oregon Supreme Court, who has since retired and is cited in the article, has stated that the United States's adherence to judicial elections "is as incomprehensible as [the United States's] rejection of the metric system." *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. Eric A. Posner is a law professor at the University of Chicago and is also the son of Richard A. Posner, a prominent appellate judge on the Seventh Circuit Court of Appeals.

316. Liptak, *supra* note 202.

317. "A simple explanation for our results . . . is that electoral judgeships attract and reward politically savvy people, while appointed judgeships attract more professionally able people. However, the politically savvy people might give the public what it wants—adequate rather than great opinions, in greater quantity." *Id.*

The public is to blame just as equally as partisan politics and the legislature for the current state of judicial affairs. Citizens have the right to vote,[318] and with that right comes the duty to become as educated a voter as possible. Steven E. Schier, a professor of political science at Carleton College in Minnesota has stated that "[w]hen you vote with no information, you get the illusion of control. The overwhelming norm is little or no information."[319] Further, voters need to actually show up at the polls on election day. With absentee ballots, early voting, and motor voting, there really is no excuse not to vote. In addition, the public does not understand what exactly it is that judges and attorneys do. For example, jurors are often confused when they see opposing counsel smile and say polite greetings in the hallway outside the courtroom. Behavior like this, without an explanation that we, as members of the bar, are zealous advocates in the courtroom but have an ethical duty to act with courtesy to our fellow bar members, leads some jurors, and a significant percentage of the public at large, to think that the legal profession works something like the mob—that it is organized, arranged, or fixed.[320] Three authors over twenty years ago suggested that "[j]urors often do not understand what attorneys and judges do in the jury's absence."[321] For example, jurors do not understand sidebar conferences or procedural issues concerning motions in limine, or conferences about the qualifications of experts, scheduling issues, and the like.[322] Attorneys who think that jurors do not go home at the end of a long day listening to testimony or do not talk about their experiences as a juror at some point long after the trial is over are fooling themselves. How many individuals have had conversations with spouses, parents, neighbors, and colleagues about their jury experiences? These experiences permeate the public's beliefs concerning the judiciary and legal profession, in addition to mainstream media broadcast nationwide, if not worldwide.

Further in trial, it is the judge's responsibility to ensure the fairness of voir dire proceedings and to do everything possible to eliminate the possibility of seating a juror who has prejudices or biases.[323] But what if these judges themselves are prejudiced or biased?

A further concern regarding partisan election of judges involves research that found that "all judges, even the most punitive, increase their [criminal] sentences as re-election nears."[324] While this study

318. U.S. CONST. amend. XIX.

319. Liptak, *supra* note 202 (emphasis added) (pointing out the stark reality that voters have basically no information when making decisions concerning judges).

320. *Id.* at 508.

321. Mark P. Brewster, Mary Katheleen Kinck & John P. Palmer, *An Overview of the Texas Bar Foundation Symposium on Cost Control at the Courthouse Held September 30, 1987, Corpus Christi, Texas*, 19 ST. MARY'S L.J. 507, 508 (1987).

322. *See id.* at 508–09.

323. *Id.* at 507–08.

324. Liptak, *supra* note 202.

concerned criminal cases, one wonders if it affects family law matters as well, including family law matters that are quasi-criminal and involve the juvenile court system.

As a practicing attorney, student of the law, professor, wife, mother, and a current litigant in the family court system, the Author wholeheartedly believes that people eligible to vote *should and must* vote, but that their decisions should be educated. The Author also believes that serious reform (not just the lip-service candidates give during election years concerning "reform") needs to be done to eliminate voter "[d]ecisions based on ad[vertisements] filled with lies, deception, falsehood and race baiting."[325]

VII. IT IS IMPERATIVE THAT WE REFORM OUR STATE JUDICIARY NOW

Given the current failed state of our judiciary, the stakes have never been higher for reformation of how we choose, and more importantly retain our state judges at all levels. Further, the understanding of how Texas has evolved from appointed judges to a purely electoral system provides priceless hindsight into our framers' true intent and, more importantly, their fears. Unlike the executive and legislative branch that deals with individuals as a collective body, the judicial branch deals with individuals on an individual, personal basis. As General Lawrence Sullivan (Sul) Ross[326] prophetically stated on the fifty-eighth day of the debates on November 11, 1875:

> The judiciary deals with the person and property of the individual members of society, while the other departments deal only with the general body politic. Wrongs done by the latter attract universal public attention, demand and receive speedy redress, while those done by the former fall upon the individual citizen, impose upon or crush him and he is without remedy, because the unjust judgment is law to him and his case. So that, in the ability, integrity, and learning of the judge, each individual citizen finds his most powerful, and frequently his only, assurance of protection for his person and property.[327]
>
> Unjust and oppressive laws may be repealed, but unjust and oppressive judgments, rendered in the lower, and affirmed in the higher, courts are irrepealable [sic] and fixed, and the luckless citizen is wronged without remedy and his wrongs do not even attract atten-

325. *Id.*

326. General Sul Ross, in addition to being a delegate to the 1875 Convention was also a President of Texas Agricultural and Mechanical College (now Texas A&M University). SUL ROSS STATE UNIV., A HISTORY OF SUL ROSS http://www.sulross.edu/pages/3718.asp.

327. DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, *supra* note 163, at 428.

> tion beyond his immediate neighborhood.[328] Uniformity in the decisions of the courts, so essential to the well being of the people can be secured only by obtaining and by keeping in office good judges. Rotation in political office is a wise rule, but when we get a good judge in judicial office, we should desire to keep him as long as he is able to do efficient work.[329]

Now is the time to unite together to enact fundamental change to the state's judiciary. Voters need to hold legislators accountable and refuse to allow them to continue to pass the buck and work together in a bicameral manner to pass real judicial reform. It is not an excuse for the house to blame the senate or for the senate to blame the house or that time simply ran out before a real reform bill can be passed. It is also not an excuse that our legislature only meets every two years. Voters need to stand up and demand that our legislature enact fundamental change to the way we select our state judges and make our representatives in the senate and house very aware that we are watching and will vote accordingly. In a state where recent legislation concerning same-sex marriage was fast tracked through the legislative process,[330] it boggles the mind how for over sixty years nothing has come to fruition concerning a real reform of our state's judiciary—a judiciary that affects all lives, especially the lives of children who cannot speak for themselves. Voters must send a strong message to their representatives in Austin that enough is enough. The stakes have never been higher.

The Author would prefer a system of appointed state judges at all levels who are retained on a merit-based system and are subject to removal by two-thirds of the senate, similar to what Texas had (after becoming sovereign from Mexico) in 1836 for county and justice of the peace courts; in 1845 for district and supreme court judges; 1861 for judges at all levels; and 1869 for judges at all levels. The reality is that "[n]o one can guarantee another's honesty in any walk of life, and the mere adoption of an appointive system would not accomplish that goal."[331] However, with an appointment system and retention that is merit-based and subject to two-thirds removal by the senate, there will be many beneficial results.

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328. *Id.* These words dealt with more criminal law issues and writs of habeas corpus, but law is law, and the Author finds these words speak volumes. A popular quote that gets bounced around among parents and educators is: "To the world you may be one person, but to one person you may be the world." The author of this quote, like the individuals that General Ross speaks of, were individuals who most likely were virtually unknown, except their lawsuit meant the world to them. The Author knows all too well how a lifetime can change in the blink of an eye or with a signature on a line—the lifetime of one of our precious Texas children.

329. DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, *supra* note 163, at 428.

330. *See* TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. § 6.204 (Vernon 2006).

331. Johnson & Urbis, *supra* note 176, at 565.

First, this will provide gatekeepers an oversight mechanism that will diminish bias in our judiciary. Second, appointed judges will not have to waste time away from the bench soliciting campaign contributions or running print and televised advertisements. Appointed judges are free of these entanglements that elected judges face every election year. Third, the best and the brightest will be selected to sit on our state benches, including benches that decide the fates of our children.

An appointment system, while not perfect, will help alleviate at least some of the "internal factors resulting from a judge's personal experience"[332] that may come into play and color a decision with either intentional or unintentional bias.[333] "Personal biases emanating from particular circumstances are bound to impact a judge's thinking"[334] because "[e]ach judge, after all, is herself the product of a family, and, presumably, she relates to many of the issues that bring families to court."[335]

Transforming the state's judiciary with a merit-based system that eliminates partisan elections as well as reforms the state Family Code to provide for recusal in the event of bias are two great steps toward reforming our antiquated judicial system and in particular our family courts. The stakes have never been higher. The future of our children and grandchildren depends on us to step up, be better voters, be better citizens, and finally say that there is no longer an excuse for our legislature to fail to launch a bill for our state's governor to review. The time is not only *now* to remedy the inadequacies of the outdated Constitution, but yesterday and the hundreds of yesterdays before it. We have failed to launch and actually land, feet forward, ready and prepared to embark on the next 132 years—years that have the potential to be Texas's finest years yet if Texans grasp the opportunity now and have a successful landing of the launches started by others before us.

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332. Moran, *supra* note 206, at 364. "The presumption is that when a judge is appointed, she will be freer to make decisions notwithstanding political forces." *Id.*

333. The Author bases her statements about the very real circumstances of judicial bias in the family law context not only based on her practice in family courts, but also based on her own personal experience as a litigant in family court. The Author does not think, and is not trying to convey that all family court judges are biased; however, the Author has witnessed first-hand bias in favor of attorneys or against attorneys and bias in favor of litigants or against other litigants on more than one occasion. The Author has also worked with several very kind and compassionate family law judges who gave her great assistance when she was first getting started as an attorney out of law school and was not quite certain how to proceed in a particular matter.

334. Moran, *supra* note 206, at 364.

335. *Id.* However, even with an appointed judiciary, "[n]o one can guarantee another's honesty in any walk of life, and the mere adoption of an appointive system would not accomplish that goal." Johnson & Urbis, *supra* note 176, at 537–38, 565.