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Jeffrey W. Stempel

University of Nevada, Las Vegas – William S. Boyd School of Law

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MALIGNANT DEMOCRACY: CORE FALLACIES UNDERLYING ELECTION OF THE JUDICIARY

Jeffrey W. Stempel*

INTRODUCTION

Although this is the inaugural Symposium of the Justice and Democracy series of UNLV's Center for the Study of Democratic Culture ("CDC"), I am constrained to stake out what may initially be seen as an anti-democratic position.¹ I confess to being no fan of an elected judiciary even though we have been socialized since birth in this country to equate more elections with more democracy. In fact, if one is looking for a very shorthand definition of democracy it might be this: a society in which scheduled elections regularly occur without interference.

How can anyone object to elections? The answer, at least to me, is that one can rationally and correctly embrace democracy as a whole while realizing that not every public office in a democracy needs to be filled by popular election. The office of judge – at both the trial and appellate level (including the state's highest court) – is one of those offices.

In this commentary, I present an outline of standard democratic theory that, in my view, supports an appointed judiciary rather than election of judges (Part I). Part II examines the public policy and prudential concerns surrounding judicial selection and finds that these factors auger in favor of appointing, rather than electing, judges. Part III of this paper discusses the optimal means of selecting judges by appointment to ensure that judicial selection does not become naked political patronage, ideological warfare, a tool of special inter-

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. An abbreviated version of these remarks was presented at the Symposium on Judicial Evaluation and Selection, sponsored by the Center for the Study of Democratic Culture (CDC) at UNLV and the William S. Boyd School of Law on December 10, 2002. Special thanks to CDC Director Dmitri Shalin, the Symposium participants, Dean Richard Morgan, and Professor Ann McGinley for ideas, initiative, support, and occasional provocation regarding this topic.

¹ CDC's avowed mission is sustained study and dialogue concerning democracy, and raising the level of both intellectual and public dialogue regarding democracy and democratic institutions. This does not mean, however, that CDC must inflexibly be committed to arguing that referenda and plebiscites are the preferred means of addressing all public policy concerns. Democratic values may frequently be served by some restrictions on "pure" democracy. For example, the American Constitution protects many minority rights from majority preferences. In addition, as society becomes larger and more complex, division of labor naturally ensues. There is a reason that representative government has replaced the town meeting or tribal convocation. Selecting judges or other technocratic officials by appointment rather than direct election is, in my view, more consistent with the overall evolution of democratic government.

ests, or an old boys' club of the "connected." Part IV offers suggestions for less drastic change on the assumption that political realities in Nevada make it unlikely the state will abandon direct election of judges in the near future.

I. THE WISDOM OF APPOINTING JUDGES SUGGESTED BY DEMOCRATIC THEORY

There is no requirement of democratic theory that mandates that all public offices be filled by election. This is particularly true in modern democratic states, which are simply too large to justify the administrative burden of electing everyone who has significant responsibilities in our society.

Examples of this are everywhere in modern democracies, such as the United States and Europe. In England, for example, the Prime Minister is not directly elected by the people. Does this mean Great Britain has ceased to be a democracy? In most large, sophisticated nation-states, national cabinet officers have great power but are the political appointees of the chief executive. In many nations, these important decision makers are not even approved for office by the legislature. Is this still democracy? Of course it is, provided that the directly elected government leaders are faithfully discharging their duties. For example, in the United States, federal cabinet officers must first be nominated by a President who was elected (in most years by a majority of the people); he is not "directly" elected because of the Electoral College, yet we still regard this as democracy. And, of course, the President's nominee for a cabinet-level post must be confirmed by the U.S. Senate, a group that is elected by its constituents.²

Thus, there are two democratic checks on the appointment of federal cabinet officers in the United States. Even in European or other nations lacking any requirement of legislative confirmation, the process is still essentially democratic; officials are selected by a chief executive who represents the popular majority (or at least a working majority coalition) as expressed at the polls in the last election.

Even for controversial selections of high government policy-making officials, the democratic connection is present and sufficient to guard democratic values. Take, as an example, our current Attorney General. John Ashcroft has been a relatively controversial figure. I readily admit to being no fan of Ashcroft. But it would be unfair of me to characterize his selection as illegitimate or undemocratic simply because he gained his position by appointment. The U.S. Attorney General is very much a product (albeit an indirect product) of democratic selection. Most voters in the 2000 election were quite aware that

² Ironically, the U.S. Senate violates the ideal of "pure" democracy. Each state gets two Senators, regardless of its population. South Dakota, with less than a million people, has the same number of Senators as California, which has more than 20 million residents. Thus, one of our most cherished "democratic" institutions violates the constitutional principle of one person - one vote. *See Baker v. Carr*, 369 U.S. 186 (1961) (finding that state legislatures without representation proportional to population of electoral districts present a justiciable cause of action under the Equal Protection Clause of the Fourteenth Amendment). The U.S. Senate escapes the reach of equal protection because it is a federal body, rather than a part of state government, and because there is direct constitutional text establishing that there shall be two Senators for each state. U.S. CONST. art. I, § 3.

George Bush would choose an Attorney General like Ashcroft while Al Gore was more likely to choose someone like Janet Reno. Ironically, Ashcroft was available for the post of Attorney General because he had lost his bid for re-election to a U.S. Senate seat in Missouri.³ But, even if one regards the Ashcroft appointment as a product of a back-to-work program for losing GOP politicians, Ashcroft had to be nominated by a sitting President who was elected (however controversial that election may have been)⁴ and whose views on legal issues were quite clear. Thereafter, because of questions as to whether Ashcroft's legal and political views were too extreme, the Attorney General-designate received greater-than-normal scrutiny from the Senate than most nominees. After considerable debate, Ashcroft was confirmed. Although the vote was not nearly as strong as those attending most cabinet appointments, Ashcroft ascended to the Attorney General position fair-and-square according to both the ground-rules of U.S. politics and democratic theory.

Other examples of the legitimate use of the power of appointment abound. Many important policy-making government positions do not require legislative confirmation. Examples are the numerous upper management positions in key administrative agencies. Although a few of the almost-cabinet-level agency heads are subject to confirmation (e.g., SEC Chair, FTC Chair), as are some assistants or undersecretaries (such as in the Justice Department), many of the high-ranking assistants are political appointees not subject to confirmation hearings and votes. Just as important, large government agencies are staffed by millions of middle and lower-level employees with decision-making authority.

None of these government decision-makers were directly elected or selected through the electoral process. But only the most extreme critic would characterize this situation as "undemocratic" or even inconsistent with society's overall commitment to democratic values of citizen choice. Appointed agency workers and the civil service bureaucracies over which they preside remain subject to democratic constraints. Agency officers subject to the political process, chief executives, and legislatures all set policy for the agency. These elected or confirmed officials make decisions and, on occasion, even countermand the decisions of non-elected employees. The agency form of government, wherein most of the "law" in a modern nation is administrative law, has been accepted as legitimate since the 1930s. No earnest observer has seen this development as a serious threat to democratic values.

Neither does one hear a serious hue and cry about the power of presidential and legislative advisors, who are often accorded broad discretion by the executives and legislatures who hire or consult them. For example, one need only pick up the morning paper to appreciate the political power held by advisors to the executive, such as Bush presidential advisor Karl Rove. Top aides to important Senators and Representatives wield similar *de facto* power. None of us voted for any of them but it would seem unduly petty to characterize the

³ Republican Ashcroft lost the 2000 Senate election in Missouri to the late Mel Carnahan, a Democrat and the state's governor. Term one by Carnahan was served out by his widow, Democratic Sen. Jean Carnahan. The seat was recaptured by Republicans in the 2002 election.

⁴ See *Bush v. Gore*, 531 U.S. 98 (2000).

power of Rove or others as “undemocratic” or “illegitimate” merely because they were not directly elected.

People like Rove are selected by elected officials, such as President Bush, because of the elected official’s desire to receive the advice and counsel of these unelected government workers. Rove’s status as the right hand of candidate Bush was particularly well known, as was the influence of other Bush advisors such as Karen Hughes. It was not much of a shock to see candidate Bush’s team of Texas-based advisors come to the White House with him, just as it would not have been surprising if the Gore vice-presidential staff had walked over to the Oval Office had Florida’s electoral votes fallen to the Democratic column.

Just because officials are appointed does not mean they are insulated, immune, or invulnerable. To the extent that the use of power by the powers-behind-the-throne are seen as inappropriately deployed, there is an obvious remedy looming at the next presidential election. The appointing executive can be removed from office. There is no need to have direct electoral control over the advisor.⁵

In evaluating the elective-appointive debate over judicial selection, it is important to remember that we are dealing with modern democracies in which the administrative, or even bureaucratic, state has become the norm. No matter how much some may waive the banner of limited or reduced government, facts are facts. There are, of course, differences between the coalitions of elected officials (Democrats and Republicans, Tories and Labour, Christian Democrats and Social Democrats) as to what parts of government need expansion, maintenance, or contraction. But, in the main, the overall size of government and the commitment to the administrative state remains robust; this is particularly so in Western democracies in the wake of the September 11th terrorism.

At the federal level, this has been the case not only since the New Deal, but essentially since the late 18th Century when agencies such as the Interstate Commerce Commission began. Arguably, the trend goes back even further, with roots in the decision of nation-states to maintain large standing armies during peacetime. At this juncture, the administrative state – which by nature does not have public elections for many important positions – cannot be said to be the result of any late-breaking or ephemeral 20th Century binge of big gov-

⁵ Of course, one major difference between most executive branch political appointees and judges is that the executive advisor normally leaves when the executive is replaced, while an executive-appointed judge continues in office. If the electorate is displeased with the executive’s judicial appointments, it can prevent future such appointments, but the sitting judges remain. This is both a problem of democratic control, and part of our democratically elected republican form of government, in that it helps to ensure the independence and continuity of the judiciary. The retention of judges even after the appointing executive is removed, even if removed in disgrace, is also justified by another difference between judges and executive advisors. As noted above, many important advisors (e.g., Karl Rove) are not subject to the process of legislative approval or review by a merit selection commission as are judges in the federal system and state appointive systems. Even where the presidential advisor or official is subject to confirmation, the standard of review is far more deferential than that applied to appointment of judges. For most appointees, legislatures like the U.S. Senate give the executive leeway to appoint his or her “own man” for the job. By contrast, judicial appointments must generally be within the ideological mainstream to be confirmed. Greater scrutiny generally attends review of the judge’s background and qualifications as well.

ernment. More importantly, citizens of modern democracies accept these circumstances and implicitly recognize that they do not undermine the society's basic commitment to democracy. Imagine trying to rally public opinion for the direct election of federal Cabinet officers. It would be a lonely vigil.

To some extent, of course, states and localities have consistently retained more allegiance to direct popular election of a greater proportion of decisionmakers. Most state equivalents of federal cabinet level officers are elected, such as state attorneys general, secretaries of state, state comptrollers or auditors. This probably reflects some deeper traditional commitment to direct democracy as one comes closer to the "grass roots" of American politics, but also probably reflects political inertia. To express a truism: state constitutional officers are elected because this is required by the state constitution. Many state constitutions are the product of 19th Century populism and might not be replicated were the body politic to draft a constitution today. As a matter of political reality, however, this avenue is foreclosed. Even if there were widespread support for appointing more state executive officials, such a change would require constitutional amendment in most states; this is a process likely to be viewed as simply too difficult even by reformers.

At the local level, the tendency is expanded and arguably exacerbated. Local officers, right down to the proverbial dog catcher, are often elected. Although this is not necessarily inconsistent with democratic theory, neither is it required. Arguably, it is destructive in that it places the public in the position of voting upon scores of offices about which it is impractical to know much about the candidates. Even the candidates themselves may come to take such a process of "micro-democracy" or "hyper-democracy"⁶ less seriously. For example, two candidates for mayor in a small California town broke a tie vote in the 2002 election by literally drawing cards to determine the winner.⁷ Although this perhaps represents the triumph of pragmatism, it is nonetheless a little unsettling for those who think elections should have meaning for public policy and reflect majority opinion.

State and local democracy are also differentiated from the federal system by the presence of the referendum, a process by which the electorate at large votes on specific policy questions, including such items as: bond issues; land acquisition; road building; school funding; and even constitutional content ranging from government structure to idealized images of proper family life (e.g., 2002 Nevada ballot Question No. 2 which essentially establishes a state constitutional bar to gay marriage).

This sort of micro-democracy is hardly what James Madison or other founding fathers had in mind. They were keenly aware of the dangers of interest group "faction" and were suspicious of, even fearful of, mobs or mass

⁶ I borrow the apt term "hyper-democracy" from Steve Chapman. See Steve Chapman, *Is Hyper-Democracy a Good Thing? Selecting People to Run for Obscure Offices We Don't Understand*, LAS VEGAS REV.-J., Nov. 5, 2002, at 9B, col. 3.

⁷ See Ty Phillips, *Luck Was a Lady for Waterford Mayor*, MODESTO BEE, Dec. 6, 2002, at A1 (describing how two candidates for mayor broke tie by drawing cards, with candidate drawing Queen of Diamonds being declared Mayor of Waterford, California. A 1969 tie election in the same town was decided by a coin flip).

movements that acted without sufficient information, discussion, and deliberation.

Although early America was marked by something of a flowering of civic activity, the new federal government and the state governments were not pure, tribal, direct democracies. Rather, they were democratic republics, in which the mass electorate chose legislators and an executive (although even this was filtered by the Electoral College and similar state constraints). These representatives then made policy.⁸ The democratic check on these policymakers was the looming presence of regular future elections as well as professional and social constraints on official behavior. In addition, of course, there was the judiciary.

Seen in historical light, an appointed judiciary can hardly be called anti-democratic or non-democratic. At least for the federal system, the appointment of judges (by the President and subject to Senate confirmation), was seen as an integral part of the effective functioning of a democracy. Elected officials would have plenty to say about the selection of judges. But once selected, Judges would have considerable independence due to life tenure (without needing to stand for re-election) and protection against salary diminution. This independence was thought to further the scheme of checks and balances underlying the concept of three branches of government in the constitutional order. Although Supreme Court Chief Justice John Marshall may have stretched the boundaries of this concept when *Marbury v. Madison* held that judicial review of the constitutionality of legislation was part of the system,⁹ the concept was rather readily accepted. Although there were early attempts to politicize the judicial process using methods like prosecution under the Alien and Sedition Acts, wiser heads prevailed. Independence – and nonpartisan impartiality – of the federal judiciary became well established.

A similar pattern was replicated in the states that had been among the original 13 colonies and in other Eastern states. To the extent that original understanding is important to accessing the democratic legitimacy of an appointed judiciary, this factor clearly suggests that there is nothing inconsistent with appointing judges in a democracy.

As the nation moved South and West, the judiciary became the subject of direct election, and arguably of politicization. In the South, the power of trial lawyers (a prevalent theme in modern debates over law reform) led to a “democratization” of the judiciary. Many have criticized this as essentially anti-democratic because it reduced the stature of the courts as a restraint against inappropriate conduct by lawyers or juries due to the bench’s fear of the electoral consequences.¹⁰ In the West, the trend was fueled by the populism of the era and the notion that “the people” should select judges as well as other government officials. As in Nevada, much of this sentiment was enshrined in diffi-

⁸ Until passage of the 17th Amendment, state legislatures – not the mass electorate – chose U.S. Senators. Some scholars have, in fact, bemoaned the change as undermining state power under the flag of direct democracy. See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997).

⁹ See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁰ See, e.g., Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000).

cult-to-amend state constitutions, providing for the continued presence we still see today of what I call “rough-and-tumble” judicial elections in the Western states.

By rough-and-tumble judicial elections, I mean elections that look quite similar to elections for political office in which incumbents are challenged, large sums are raised, substantial mass media is purchased by the candidates, and negative campaigning takes place in significant amount. Nevada judicial elections since 1990 fit this model, a point to which I return in Part II.

Between the rough-and-tumble judicial election and the federal appointive model is the so-called “Missouri Plan” and similar state approaches based on fusing appointment, merit selection, and direct democracy. Under these sorts of arrangements, judges are initially appointed to the office. Most commonly, a merit selection organization submits to the governor a list of potential appointees, with the governor selecting one of the names. If the governor (an elected official, of course) does not want to select any of those on the merit list, many states permit the governor to request a second list, or perhaps more, of merit-vetted names.¹¹

The point of my thumbnail sketch of comparative government is simply this: there is no requirement that judges be elected in the manner of legislators in order for the judiciary to be “democratic” in character. Certainly the history and practice of the United States government, and many of the states, belies this notion, however romantic it may be to many.

In addition, there is nothing in the theoretical underpinnings of democratic theory that requires election of judges. To the contrary, the democratic and republican notions of checks and balances suggest that the optimal means for selecting judges is by appointment involving both the executive and legislative branch. In this way, the judiciary would not only be independent vis-à-vis mass public sentiment (no matter how vehement, sustaining, or episodic), but also would be independent of the executive and legislature. Judges could be removed for “bad behavior,” but could not be removed because they rendered decisions with which the executive or a legislative majority disagreed.

This type of independence was thought to work against the dangers of defacto political dictatorship by a charismatic executive and pliable legislators. It was also thought to foster judicial decisions based on the merits of the case before the judge rather than due to any overarching political considerations that might otherwise influence or cloud a judge’s legal analysis. As observed by prominent jurists, judges “must strive constantly to do what is legally right, all

¹¹ See Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107 (2003) (describing Missouri plan and similar systems of judicial selection); James J. Alfani & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683 (2002) (same); Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729 (2002) (same). Merit selection systems of this sort are generally referred to as a “Missouri plan” because that state, in 1940, was the first to adopt a plan of this type along the lines recommended by the ABA and the American Judicature Society. See Alfani & Gable, *supra*, at 691. See also Standards on State Judicial Selection Report of the ABA Standing Committee on Judicial Independence Commission on State Judicial Selection Standards (July 2000) (reproduced as an Appendix to Alfani & Gable, *supra*, at 696-97).

the more so when the result is not the one the Congress, the President, or 'the home crowd' wants."¹²

At first reading, it may seem anti-democratic to embrace a system in which a judge is free to render a decision opposed by most voters, perhaps even hated by most voters. But to the legally trained (and, I hope to the philosophically trained), this is an essential attribute of a good judicial system. The judge is by no means encouraged to render unpopular decisions; there are plenty of informal constraints running in the opposite direction.¹³ Rather, judges are encouraged to follow the law as applied to the facts of the case.

This is not a democratic charge so much as it is an administrative and technical charge. One might even classify courts as the first of the administrative agencies that have so come to dominate the governmental landscape. Both courts and agencies share some of the same rationale for their existence. They each seek the application of rational, fact-based, non-ideological, expertise to problems (implicitly in substitution for the ideology, favoritism, prejudice, fear, or pressure that may affect executive, legislative, or electoral decisions).

By definition, the judiciary has a somewhat different task in a democracy than do the other branches. The bench has a primary function of resolving disputes. It can do this more effectively if it is less subject of social or political pressure than the executive, legislative, or administrative branches. Deciding cases can then be more the product of legal expertise and principle and less the result of popular (but often legally erroneous) sentiment or the identity of the disputants.

In this discharge of its duty to adjudicate disputes, the judiciary is subject to another democratic influence of no small import: the jury. Jurors represent, to some degree, the electorate in microcosm. Although jurors are instructed by the judge in the law and are sworn to uphold the law, the jury nonetheless introduces aspects of popular sentiment into an adjudication of the facts of a

¹² See Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 U. HAW. L. REV. 603 (1998) (quoting William H. Rehnquist, *Dedicatory Address: Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 229-30 (1980)). As might be expected, Chief Justice Rehnquist continues to hold to this assessment. See William H. Rehnquist, *Keynote Address, Washington College of Law*, 46 AM. U. L. REV. 267, 273-74 (1996) (referring to judicial independence as one of the "crown jewels" of American government).

¹³ For example, even a judge with great job security pays a price if his or her decisions are unpopular with even a significant part of society. A judge who strikes down a popular law or upholds a jury verdict for an unpopular local businessperson or institution will face public criticism and informal social sanctions such as shunning. On occasion, it can be worse, even deadly. Perhaps the best example is that of federal judges in the South, who enforced the U.S. Supreme Court's *Brown v. Board of Education* decision, which mandated an end to segregated public school. These judges and their families were targets for ridicule, intimidation, vandalism, and even death threats. See JACK BASS, *UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY* (1981). Eleventh Circuit Judge Robert Vance was murdered by a letter bomb, apparently because the sender did not like Vance's opinion enforcing the civil rights laws. See *United States v. Moody*, 977 F.2d 1425, 1428 (11th Cir. 1992). Texas federal district judge John Wood of San Antonio was gunned down (by the father of popular actor Woody Harrelson, no less), apparently because he was known to impose stiff sentences in criminal matters. See GARY CARTWRIGHT, *DIRTY DEALING* (1984); FREDERICK S. CALHOUN, *VIOLENCE TOWARD JUDICIAL OFFICIALS*, 56 *Annals*. 54 (July 2001).

dispute. Only if the jury's verdict is unreasonable or the amount awarded excessive may the judge vitiate the verdict.

A second major function of courts is to decide the legal questions over which government entities are in dispute. This may involve constitutional or statutory interpretation. In such cases, the jury is generally less important because the facts are often uncontested and the court is presented with a relatively "pure" or straightforward question of law. When a court decides such matters, its decisions have a more direct impact on law and public policy. Occasionally, acts of a legislature or executive orders are set aside or forced into revision by judicial decision.

Is this sort of activity any more or less democratic based on whether the judge is elected or appointed? In my view, whatever "counter-majoritarian difficulty" exists remains even if the judge has been elected. When the elected judge strikes down legislation, a single judge (or perhaps more depending on the size of an appellate court) has effectively blocked the desire of a majority of an elected legislature. This still looks suspiciously anti-democratic (in the narrow sense) to me. The problem (if it is a problem) gets worse if the judge strikes down a popular plebiscite. When an initiative or referendum result is struck down by a court, the direct will of "the people," and not just the views of a majority of representatives, has been defeated. At the trial level, this effect can be acute and pronounced. A judge elected by citizens of a barely populated county might, for example, strike down a law passed by a large majority of the state's legislature or an overwhelming majority of those voting in a recent election.

If one finds judicial interference with statutes problematic, it is hard to see how electing judges makes the matter less problematic. Either judicial review is legitimate in a democracy or it is not. If it is legitimate, that legitimacy remains whether the reviewing judge was elected or appointed to the position. The participation of appointed judges in all of this seems not to add much to any counter-majoritarian difficulty. As discussed above, the appointed judge was nonetheless selected by an elected executive, subject to confirmation by an elected legislature, and is subject to the political process of a retention election (or possible discipline by a Judicial Ethics Commission) if the judge is thought to behave improperly.¹⁴ In short, the problem posed by the judiciary in democratic theory is what role the judiciary should play rather than the means of selection of the judiciary.

There is an additional advantage of appointment beyond independence and commitment to expertise. An appointed judiciary may provide temporal balance because the judge has not necessarily emerged from the same social forces that produced the executive or legislature under judicial review. Judges can take the "long view" in a way that fully elected politicians cannot. Although this may vex the winners of contemporary elections (e.g., Franklin Roosevelt faced a Supreme Court that was not part of the New Deal electoral majority; Richard Nixon was forced to deal with a Supreme Court selected by predecessor politics), this is arguably a brief for judicial appointment rather than against

¹⁴ See, e.g., NEV. REV. STAT. 1.425 et seq. (1998) (establishing state Commission on Judicial Discipline that has power to sanction judges, including power of removal).

it. The appointment process, more than the electoral process, tends to provide for the stability and incremental change that is most valued in American politics (and probably all politics).

In sum, election of judges is not required by democratic theory, democratic norms, American History, or a functional analysis of judicial role. Appointment of the bench is thus perfectly consistent with both historical and modern democratic norms.

II. PRUDENTIAL, PUBLIC POLICY FACTORS SUPPORTING APPOINTMENT OF JUDGES

Considerations of public policy and prudence also counsel in favor of appointing judges rather than electing them.

First, as discussed in Part I, judges play a different role in a democracy than do other elected officials. It is a role that supports selection by appointment rather than election. The role of the judge – in both federal and state systems – involves a degree of willingness to supervise and perhaps operate as a check upon popular passions. Appointed judges are better equipped to fulfill this aspect of the judicial role precisely because they are somewhat insulated from the control of current popular passions of the electorate, even in states with retention elections.¹⁵ The landmark Supreme Court case of *Brown v. Board of Education*¹⁶ is an obvious example. In the same vein, one commentator has also noted that during the era when the Supreme Court decided *Loving v. Virginia*¹⁷ (striking down state ban on inter-racial marriage), well over half the electorate supported the ban, which was the law of the clear majority of the states.¹⁸ Would elected judges have the moral courage and clarity of constitutional vision to make the same decisions the U.S. Supreme Court has made in matters of race and the law?

Second, the specialized and technical nature of judicial work makes it inherently difficult for voters to evaluate candidates for the office. For example, much of a judge's time is spent in the relatively non-partisan, non-ideological¹⁹ application of the laws of evidence to trial proceedings (and discovery

¹⁵ See Reddick, *supra* note 11, at 743 n.107 (citing studies suggesting that elected judges are more likely to respond to popular pressure concerning high-profile public issues). See, e.g., Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 24 (1995) (finding elected judges more likely to support application of death penalty than appointed judges). But see Reddick, *supra* note 11, at 743 n.108 (citing a smaller number of other studies suggesting no difference between elected and appointed judges on this dimension).

¹⁶ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding that segregation was a denial of the equal protection of the laws under the Fourteenth Amendment. and that separate educational facilities were inherently unequal).

¹⁷ See *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁸ See Nicholas D. Kristof, *Love and Race*, N.Y. TIMES, Dec. 6, 2002, at A35, col. 5 ("In 1963, 59 percent of Americans believed that marriage between blacks and whites should be illegal. At one time or another, 42 states banned intermarriage . . .").

¹⁹ Being a legal realist or post-realist, my view is that all legal matters have at least some political, ideological, or public policy content. For example, Federal Rule of Evidence 412, concerning the admissibility of an alleged sex offense victim's past sexual behavior, reflects a policy judgment made by the rule-makers on how best to strike the balance between the

proceedings where evidentiary privilege is an issue). The basic course in Evidence at most American law schools involves 45 hours of class meetings, plus 3-4 times that amount in outside class reading, preparation for class, studying, and taking the final exam, for a total commitment of 200 hours or more (at least for the good students); and that's just the beginning. Thereafter, most litigators spend hundreds or thousands of hours learning evidence "on the job." Even non-litigators encounter evidence questions and must continue to know something about the field to avoid making mistakes when representing clients.

Compare this to the average layperson's knowledge of evidence. An elective system of judicial selection, in essence, is asking the non-technical, often uninformed or ill-informed lay voter to pass judgment on the technical skills of a judicial candidate regarding evidence and a myriad of other legal specialties. Such a system is simply not rational or well-suited to the task of evaluating technical skill. A judge may make eminently correct evidentiary rulings only to be slandered by an opponent for protecting criminals or letting them out on technicalities.

Those "technicalities," of course, are in fact the law that the judge is sworn to uphold and apply. Many times, an evaluation of such decisions will be difficult and uncertain even for skilled attorneys. How on earth are laypersons able to rationally decide whether Judge X makes correct evidentiary rulings? The honest answer is that most voters cannot make this type of assessment, even if they had all the information (which they do not – this is another problem associated with electing judges).

Third, the special role of the judiciary not only requires judicial independence but makes full-blown electioneering inconsistent with the function of the bench and the dignity of the office. In particular, the problem of campaign fund-raising, contributions, and spending is a serious one requiring states with elected judges to take a good look in the metaphorical mirror. To the extent that the judiciary is seen as another branch of government vulnerable to capture by special interests, public confidence will be eroded, not only in the bench but in the entire governmental system.²⁰

According to a survey of 2002 judicial elections conducted by NYU School of Law's Brennan Center, approximately 29 percent of judicial campaign ads were purchased and aired directly by interest groups. In addition, of course, interest groups operate more subtly in connection with the remaining 71 percent of the advertisements by contributing directly to judicial candidates. In states with hotly contested races, interest group spending was not much below that of the candidate's own campaign.²¹ For example, in Ohio's 2002 race, which involved a challenge to incumbent Justice Stratton, two interest groups

rights of an accused rapist and the privacy and dignity interests of the accuser. See FED. R. EVID. 412. For the most part, however, evidence is a more technical, less ideological part of the law than constitutional law, discrimination law, or criminal procedure.

²⁰ See CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 3-6 (1997) (describing popular dissatisfaction with perceived politicization of judicial elections); Alfani & Gable, *supra* note 11, at 686-87.

²¹ See Brennan Center for Justice at NYU School of Law, *Buying Time 2002: Television Advertising in the 2002 State Supreme Court Elections* (available on the Center website at www.brennancenter.org/programs/buyingtime_2002/index.html) (last visited Aug. 17, 2003). The figures were derived from a study of judicial advertising expenditures during

spent approximately three-quarters of a million dollars – each – on judicial election advertising.²² Logically, this type of media buying undoubtedly affects the election. But it is unlikely that the 30-second spots favored in political campaigns do much to actually illuminate legitimate issues or educate the lay voter. Most likely, interest group campaign spending is simply an exercise in raw political power, something that should concern society even more in judicial elections than for other political office.

Fourth, having elected judges merely adds to the problem of “hyper-democracy” or democracy “run amok” by creating another, significantly large, category of elective offices that add to the noise and confusion of an election. Voters, already hard-pressed to become informed or stay informed in states with hyper-democracy, have an even larger task when the bench is elected.²³ The problem is particularly pronounced in large metropolitan areas. For example, Clark County in 2002 had on the ballot 21 trial court positions in Nevada’s Eighth Judicial District in addition to another score of judicial positions for Family Court, Justice of the Peace, Probate Court, Clerk of Court, and so on. The average lawyer is hard-pressed to be even minimally knowledgeable about so many judicial races. The average layperson cannot hope to be an informed voter under such circumstances.

Fifth, hyper-democracy also makes it far more difficult for the free press in a democracy to properly discharge its implicit role of informing voters. Even the best news organizations cannot give infinitely good coverage of an infinite number of electoral offices. Where every decision-maker from Governor to dogcatcher is elected, the resources of the press are almost certain to be stretched too thin to provide quality coverage over lower profile elections. Although courts are sufficiently important that they tend to get more coverage than positions such as assessor, they never receive the sort of scrutiny that typically accompanies statewide offices. Under these circumstances, there is likely to be little real information about the judicial philosophy, ideology, or past record of candidates for judge.²⁴ Thus, most voters participating in local judicial elections are largely shooting in the dark in casting their ballots.

2002 state supreme court judicial elections in Alabama, Idaho, Illinois, Michigan, Mississippi, Nevada, Ohio, Texas and Washington.

²² *Id.* It should also be remembered that the Brennan Center study involved only television advertising for state supreme court campaigns. Consequently, any media battles concerning trial or intermediate appellate judges would not be included in the study, which undoubtedly eliminates some fairly important information. For example, the Brennan Center study would not include in Nevada any examination of advertisements in the hotly contested race between Judge Jeffrey Sobel and Jackie Glass, a contest won handily by Glass, who also handily outspent Sobel in a campaign marked by some nastiness on both sides.

²³ See Steve Chapman, *Is Hyper-Democracy a Good Thing? Scratching Our Heads Over a Plethora of Races*, LAS VEGAS REV.-J., Nov. 5, 2002, at 9B, col. 3 (“Judicial elections . . . impose . . . a burden on all the people who are expected to vote in elections. Most of us can’t know enough to cast sensible votes. We might as well fill these offices by picking names out of the phone book.”). With perhaps even more pith, Chapman concluded:

Americans love democracy, but do we need so much of it? A woman with two cats is an animal lover. A woman with 50 cats is touched in the head. When it comes to self-government, likewise, there’s a difference between a healthy impulse and an uncontrolled mania.

²⁴ This problem of limited information affects even the legal profession. For example, in preparation for an April 2003 judicial primary, the March 2003 issue of *Communique*, the

Sixth, judicial elections make it more difficult to obtain qualified judges. Almost by definition, a qualified judge is one who has substantial experience, strong intellectual pedigree, good interpersonal skills, and a vigorous work ethic. A person possessed of these skills, however, is also equipped to do quite a few things, including making a good deal of money practicing law or running a business. Most likely, such persons are already holding demanding, interesting, and remunerative positions if they are not already on the bench. Such persons will not leave positions they have worked hard to attain unless the bench is seen as a more attractive position for which the cost of attainment is not disproportionately high. In other words, I am positing that many of the highest caliber attorneys society wants for the bench are unlikely to “run for” or actively pursue the post, although they would probably entertain thoughts of an appointment.²⁵

To be sure, the lure of the bench remains attractive. A judge is charged with deciding cases on the merits rather than responding to the demands and constraints of clients and customers. But is this chance to serve the public and “call ’em as I see ’em” enough of an incentive to prompt a successful attorney to take a substantial pay cut and to incur the burdens of electoral campaigning, including fund-raising? For some, the answer remains affirmative. But for many other highly qualified potential judges, the answer surely must be that life is too short for them to abandon their current positions in order to grovel before special interest funding sources, pound the pavement in search of votes, and become a potential target in a mud-slinging campaign.²⁶

official journal of the Clark County [Nevada] Bar Association, ran a feature containing information about the candidates for the three open positions (3 candidates sought one position, 7 candidates sought another post, and 2 candidates sought the third judicial seat). The *Communique* article told the reader the following about each candidate: current employment; birth date; place of birth; education; number of years as a Nevada resident; and number of years practicing law in Nevada. Each candidate was asked: “Why are you seeking election or re-election?”, “What distinguishing characteristics make you the preferred candidate?”, and “What ideas do you have to improve the functioning of the court to which you are seeking election or re-election?” Replies to the question averaged 50 words or less. *Elections 2003*, COMMUNIQUE, March 2003, at 30-34.

The *Communique* feature was a worthy effort, and provided some additional knowledge to the reader, but it hardly amounted to sustained press coverage of these judicial elections or substantial exposition of the platforms of the candidates. Furthermore, this was the information provided to the lawyers in the electorate. Laypersons were undoubtedly generally less informed both because they do not receive *Communique* and because more general media outlets in the Las Vegas area largely tended to deliver even less information about the judicial elections.

²⁵ I realize there is an element of elitism in the suggestion that society is better off when the system chooses the person rather than when the person chooses to pursue judicial office. Many proponents of elections see value in having judicial candidates rub elbows with the electorate. Although interaction with, and exposure to, people with different backgrounds (e.g., non-lawyers) is generally a good thing, it is not salutatory enough to make up for the unappetizing burdens generally associated with running for judicial office.

²⁶ See Bowers, *supra* note 11, at 114:

[T]he cost of elections and the necessity to solicit contributions from prospective litigants . . . may serve to discourage competent and highly ethical individuals from running for judicial positions. Not only is the amount needed to run a campaign often staggering, but many might find the notion of soliciting potential litigants and their attorneys for contributions to be ethically

Even for wealthy incumbents, the pressing weight of fundraising can discourage pursuit of judicial office. For example, Nevada Supreme Court Justice Miriam Shearing recently announced that she would not seek re-election when her current term expires in 2004. Key among her reasons for planning to step down after 12 years on the bench and two successful elections (one extremely expensive and hard-fought to the point of meanness) was Justice Shearing's "dislike of the chase for the almighty fund-raising dollar[.]"²⁷

I don't feel like facing another campaign – rather, the money-raising part . . . You have to raise money before filing closes in order to be ready [in case an opponent mounts a challenge.] If it weren't for (that), I probably would stay on.²⁸

If the fundraising burden is too much for incumbent Justice Shearing, it surely must be discouraging candidacies of which we never become aware.²⁹

Seventh, direct election of judges creates an unnecessary substrata of politics involving a substantial expenditure of resources that is probably not cost effective. For example, judicial candidates in Clark County, Nevada in 2002 raised nearly \$3 million and spent almost \$2.5 million.³⁰ In other words, judicial campaigns have become a million-dollar industry. Unless society really receives something of value from judicial elections, this would appear to be \$2-3 million that could be better spent on other things.

National figures provide an even scarier picture. During the 2000 campaign, Alabama saw more than \$13 million in judicial fundraising.³¹ Other large states, or those with hotly contested races, produced similarly frightening numbers: Illinois (more than \$7 million); Michigan (More than \$6 million); Mississippi (nearly \$4 million); North Carolina (nearly \$2 million); Ohio (more than \$3 million); and Texas (nearly \$2 million).³² The average figures were far higher in states where the election was open-ended rather than a retention election.³³ These amounts of money are rather difficult to raise in small contributions from John or Jane Q. Public. Dependence on special interests to fund campaigns becomes inevitable. But even if one discounts the unholy alliance

distasteful. Although no definitive data exist on this issue, it is arguable that these concerns drive away from the bench those who would make fine, competent judges.

²⁷ See Jane Ann Morrison & Tony Batt, *Justice Cites Disdain for Fund Raising in Decision to Bow Out: Shearing Won't Seek Third Term on State Supreme Court in 2004*, LAS VEGAS REV.-J., May 5, 2003, at 2B, col. 1.

²⁸ *Id.*

²⁹ The fundraising criticism is an especially strong indictment of the system coming from Shearing, who had substantial personal wealth that she was willing to spend to first gain election in 1992. In addition to her earnings as a lawyer and Justice, her husband Stephen, now retired, was perhaps the most prominent ophthalmologist in Las Vegas and enjoyed great financial success as well.

³⁰ See 2002 *Judicial Campaign Contributions and Expenses*, COMMUNIQUE, March 2003, at 29.

³¹ See Deborah Goldberg, Craig Holman & Samantha Sanchez, *The New Politics of Judicial Elections: How 2000 was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns* 11 (2002) (available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf>) (last visited Aug. 17, 2003).

³² *Id.* Again, it should be emphasized that this study, like the more recent "Buying Time" study of the Brennan Center, examined only state supreme court races. There remain intermediate appellate and trial court elections that undoubtedly also consumed large amounts of campaign funding during 2000 and 2002.

³³ *Id.* at 12.

between big money and vested interests, this sort of mega-fundraising and spending is problematic.

Simply put, electing judges is a waste of money unless one can say with some certainty that either the resulting bench is better or that freewheeling judicial elections sufficiently serve some other social purpose. In my view, no such case has been made or can be made. Further, the burden of persuasion on the issue should rest on those who wish to justify a regular, multi-million dollar drag on the economy and the system.

Eighth, direct election of low-visibility offices like state court judge tends to vest undue importance in not only fund-raising but also marketing and campaigning, rather than electoral evaluation of the relative strength of competing candidates. Judicial elections shift the selective focus away from legal expertise and judgment and move it toward campaign funding, advertising cleverness, the appearance of the candidate, and the whimsy of voters. Perhaps of greatest concern, it makes judicial selection part of pure interest group politics. Arguably, judicial elections, because of their limited public scrutiny and voter knowledge, are subject to more interest group manipulation than executive or legislative races. Whether the dominant group *de jure* is the plaintiff's trial bar, the insurance industry, the gaming industry, the Chamber of Commerce, or other groups with less obvious self-interest, the result is an inevitable diminishment of the bench, the rule of law, the judiciary, and democratic government.

Money and interest group influence on judicial selection have been in the ascendency as judicial elections have become more politicized and expensive. An increasing number of state supreme court races involve million-dollar campaigns, with much of the money coming from self-interested contributors attempting to shape the path of law by electing judges likely to vote their way on issues. In Ohio, the Chamber of Commerce and other business groups targeted Justice Alice Robie Resnick and rallied for her defeat because she was viewed as unduly favorable to plaintiffs suing such businesses.³⁴ The campaign was marketed by advertisements widely regarded as unduly sharp, superficial, and partisan, whatever one's views on the underlying issues. The effort to unseat Justice Resnick failed, making it wasteful as well as expensive, demeaning, and partisan.

Of course, both the left and the right can play this game, with similarly anti-social or wasteful results. Ohio saw a comparable episode in 1996 involving the re-election campaign of Justice Evelyn Stratton, who was accused by her critics of being too pro-business.³⁵

In Alabama, money and electioneering effort successfully reconfigured the membership of the Alabama Supreme Court and, along with it, Alabama law concerning the enforcement of arbitration clauses. This business-led effort to obtain a High Court more favorably disposed to enforce compulsory arbitration clauses succeeded. But even for "arbitrationophiles," it was not a pretty picture. It was, however, a vivid illustration of the degree to which money and

³⁴ See Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 474-75 (2002).

³⁵ See *id.*

electioneering (rather than logic, facts of record, and lawyering) can change legal doctrine almost overnight.³⁶

To some extent, these developments, although disturbing, are simply another case of *deja vu* all over again for judicial election. As one examination observed:

[N]on-partisan judicial elections were a disappointment to the organized bar because they failed to bring the kind of changes for which much of the organized bar had hoped. Political parties still found ways to influence the selection process, voters often knew even less about judicial candidates, and the issue of campaign financing still raised questions about the independence of the bench.³⁷

To be sure, efforts to change court decisions by changing court personnel also take place in the federal system or any system of appointment. But in these arenas, the discussion is normally comparatively transparent, with a focus on the nominee's judicial philosophy and history in comparison to that of the retiring member of an appointed court. The discussion also tends to be held on a higher intellectual plane. By comparison, judicial election campaigns are the stuff of sound bites and quasi-smears: Judge X is "soft on crime" or "coddles criminals." Judge Y is a "judicial activist" (again without any real discussion of the concept generally or the alleged proof of Judge Y's membership in the activism clan). Judge Z is "ethically challenged" (without any full and fair examination of the alleged ethical impropriety).

The recent judicial political electioneering over arbitration provides an example. As Professor Ware demonstrates with a good deal of empirical precision, the Alabama Supreme Court made something close to a 180-degree turn in its arbitrability jurisprudence as the result of personnel changes caused by the election of candidates backed by interest groups favoring a more supportive judicial attitude toward arbitration.³⁸ But, to a large degree, the battle for the hearts and minds of the voters was not openly contested on the basis of attitudes toward arbitration. Rather, the process involved more general electioneering on the basis of the respective candidates' qualifications, experience, integrity, values, and so on. Yet it was clear that some candidates were supported by the business community while others were supported by the plaintiff's trial bar, two groups with opposite views on arbitration.³⁹

All of this strikes me as more than a bit amok. When the judiciary is chosen through rough-and-tumble elections, we have hyper-democracy that has become cancerous and perhaps metastasized so as to infect the judiciary adversely in ways beyond the selection process itself. Although my metaphor is perhaps hyperbolic, it is instructive and, in my view, accurate. With so much electioneering over so many offices about which the voters know so little, we have created a status quo that consumes public resources wastefully (e.g., more money spent on election administration and verification; more money spent on media, much of it merely negative rather than informative) for relatively little improvement in civic virtue.

³⁶ See Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656-661 (1999).

³⁷ See Alfini & Gable, *supra* note 11, at 688-89.

³⁸ See Ware, *supra* note 36.

³⁹ *Id.*

Arguably, judicial elections represent a decline in civic virtue in that they force even our most conscientious voters to simply pull voting booth levers at random or based on the most recent political sign viewed. In addition, the process discourages many able potential judges and needlessly consumes social resources on electioneering. Although the media purchased by judicial candidates may provide some economic stimulation, it is a highly problematic type of job-creation program.

Paradoxically, what at first seems like something supportive of democracy – judicial election – becomes an instrument that can undermine democratic government. In that sense, my analogy to cancer, although harsh, is apt. A cancerous cell is, to a degree, too much of what would otherwise be a good thing. All cells need to grow and reproduce. Cancerous cells do it to excess. Democracies need regular elections to function properly. But too many elections of inappropriately elected offices can wound or work against democratic values, just as the cancerous cell injures the human body.

In response to proposals for merit selection and appointment, defenders of the status quo in Nevada have been quick to trot out standard populist rhetoric, but slow to provide much solid defense of the rollicking electoral system that currently dominates Nevada. One commentator, Stephen F. Smith, defended the election of judges with the well-known comment of Winston Churchill: “Democracy is a bad form of government but all the others are worse.”⁴⁰ Churchill’s words would be considerably more reassuring had he actually lived in or led a country that elected its judges. Great Britain does not elect judges but presumably still qualifies as a democracy.

More importantly, as discussed in Part I of this article, there is nothing undemocratic or anti-democratic about appointing judges. Neither does electing judges make the overall government or society more democratic. The claim that those favoring judicial selection reform in Nevada wish to make the entire system of courts or government more elitist is simply an unsupported scare tactic.⁴¹ Another bit of rhetoric in the Smith article does perhaps need clarification. Smith accuses me of equating the election of judges with “electing the dog catcher,” a statement that is not false so much as potentially misleading as presented. Smith correctly observes that I made this statement at the Symposium in connection with my concerns about hyper-democracy: too many elected offices creating too much overload for the average voter. Unfortunately, Smith’s presentation could also give the impression that I equate the importance of state trial judges with that of dog catchers. For the record, I do want to state that I think state trial judges are vitally important components of our government and our society. That’s why they should be selected through a more rational, less politicized system that is less driven by money, marketing, and interest groups.

⁴⁰ See Stephen F. Smith, *Judges Should Be Elected Not Appointed*, COMMUNIQUE, March 2003, at 27-28.

⁴¹ A sentence after the inapt Churchill quotation, Smith engages in just this sort of apocalyptic rhetoric. See Smith, *supra* note 40, at 28: “After the election of judges is taken away, what is next – the right of peremptory challenge and the right to jury trial in civil cases?” This sort of slippery slope, “first they appoint judges, then they burn the Constitution” argument, is not really worth a reply.

Another commentator referred to support for appointment that surfaced at the Symposium as mere elitism by “the folks who know best.”⁴² Translated, this means that the reader is to conclude that anything supported by law professors (let alone the overwhelming majority of law professors) must be a Communist plot emanating from pointy-headed intellectuals. According to this columnist:

They just don't think you commoners have the wit and wherewithal to sort through all that confusing, hostile campaign rhetoric and make such vital decisions as to which wealthy lawyer is best suited to rest on his laurels at a leisurely pace on a princely salary and with early retirement.⁴³

One has to admire the columnist's attempt to bond with the reader through populist rhetoric worthy of a George Wallace or Spiro Agnew. The author suggests that those supporting an appointed judiciary are the elite “other,” not the average reader and the author with the common touch; these academic “others” are effete, intellectual snobs and the lawyers on the bench are not much better since we all know that judges do not work as hard as you and I do.

In addition to being a bit of a hypocritical indictment coming from a journalist (I've worked in a judge's chambers and I've worked on a daily newspaper and I think I was pretty observant while doing both; Most judges work at least as hard as most reporters or editors), this effort to flatter the reader/voter simply is not persuasive. Both common sense and available information suggest that lay voters do not have much of a clue about judicial elections. It's not because these “commoners” lack “wit and wherewithal.” Most lawyers have plenty of that as well but are still at a bit of a loss to be adequately informed about 20-plus judicial candidates. Not surprisingly, in judicial elections it appears that the candidate who spends the most or who is on television the most prevails.⁴⁴

Defense of judicial elections based on purported anti-elitism rests on faux populism rather than genuine populism or concern for the prerogatives of the average voter. The average voter is not in a position to do much about the average judicial election. Much better positioned to affect judicial election outcomes are the gaming industry, other corporate interests, wealthy litigants facing pending disputes, attorneys with a stake in particularly specific legal questions, political parties (even with nonpartisan elections, they can lend their organization to the fight, perhaps even flying under the radar so as not to repel voters who normally side with the other party), labor unions, and single-issue pressure groups.⁴⁵

⁴² See Thomas Mitchell, Column, *A Week Among the Folks Who Know Best*, LAS VEGAS REV.-J., Dec. 15, 2002, at 2D, col. 3.

⁴³ *Id.*

⁴⁴ See Goldberg, Holman & Sanchez, *supra* note 31.

⁴⁵ The extent of this sort of influence is well illustrated by an anecdote a Houston attorney shared with me. The lawyer's neighbor, a normally sane but religiously devout man, asked the attorney to sign a petition against a sitting woman judge, who the neighbor described as a “lesbian-atheist-communist” (I'm not making this up; it's hearsay of course, but in this comment, I'm not strictly bound by the Rules of Evidence and I consider my source reliable). The judge earned this label by ruling in favor of a gay mother's custody position in a complex, fact-sensitive domestic dispute. Although not every socially conservative, religious voter can be so vibrantly activated as was this neighbor, the story reflects the ease with

Commentary supporting the current judicial electoral system in Nevada also has attempted to defend the system by either pointing to the good judges it has produced,⁴⁶ or suggesting that any alternative is dreadful. For example, one commentator opposing judicial appointment limited his argument to: "I've seen patronage systems, and they're not pristine."⁴⁷

This is what one might call the short-form straw man argument. The critic sets up only part of a straw man and then does not even bother to knock it down. Although appointing judges will result in significant behind-the-scenes activity by political elites, this hardly makes it a "patronage" system – or at least it need not be. The Missouri Plan is not Tammany Hall, and U.S. Presidents do not play the role of Boss Tweed in appointing judges. Both state merit selection and the federal model involve substantial checks and balances with institutionalized input from a variety of actors.⁴⁸

III. THE OPTIMAL MEANS OF APPOINTMENT

What, then, is the best means of selecting judges? Per the preceding discussion, it is by now no secret that I prefer the appointive process. In particular, the federal model, with all its faults, provides a useful template for structuring the selection of judges.

An executive official nominates candidates for judicial office, presumably after serious consultation and reflection. As is the historical federal practice, the executive takes particular care to consult with the elected representatives from the jurisdiction in which the nominee would serve. This was, in the federal government, traditionally reflected in the practice of "senatorial courtesy," in which the senior senator of the party of the executive was given a crucial role in selecting nominees. If there was no Senator from the executive's party, the President consulted with political leaders from the state in question. If either Senator had violent objections to a prospective nominee, these objections

which single-issue voters can be mobilized against judges that have been unfairly characterized as anti-family, anti-abortion, anti-choice, anti-death penalty, pro-criminal, sexist, racist, etc.

This story clearly paints conservative religious groups and their supporters in a negative light but it should, of course, be remembered that interest groups of the left also generally are more supportive of electing judges. See, e.g., Julius Uehlien & David H. Wilderman, *Why Merit Selection is Inconsistent with Democracy*, 106 DICK. L. REV. 768 (2002) (former President and current legislative director of Pennsylvania AFL-CIO support judicial elections and oppose merit selection). Although one could argue that anything that unites the Right and the Left is a wonderful thing, I am constrained to disagree.

⁴⁶ See Smith, *supra* note 40.

⁴⁷ See Mitchell, *supra* note 42. This is not to say, however, that anti-patronage appointment is completely without force. In Nevada, for example, the elected judiciary has acquitted itself well while the federal selection process recently produced a short list of recommendations to the President that included a son of one of Nevada's U.S. Senators. Appointments to the Article III bench in Nevada have also been distinctly devoid of gender, racial, or ethnic diversity. Nevada has excellent Article I Magistrate Judges, but Magistrate Judges are essentially selected by the District Judges rather than the President and Senate.

⁴⁸ See Reddick, *supra* note 11, at 743 (studies have with some frequency "failed to distinguish between merit systems and other appointive processes and have simply made comparisons between appointed and elected judges" rather than examining the type of process that produced a particular judge).

were usually respected by the White House, even if the objecting Senator were from another party.⁴⁹ Beginning with the Carter and Reagan Administrations, the practice of senatorial courtesy has been diluted, with the Administration exercising more control over the process. But consultation with Senators and others at the political grass roots remains.⁵⁰

After nomination, the nominee is investigated and confirmed by the legislature. In the federal system, the Senate serves this role. Although the Senate normally defers to the President's nominees, the Senate has a rather consistent historical record of rejecting nominees regarded as unqualified or extreme in their judicial views.

Despite the current controversy over the Bush Administration nominations and whether they are too extreme, or whether the Senate has been insufficiently deferential, I continue to see this sort of executive nomination-legislative confirmation system as a good basic format for selecting judges.⁵¹

Such a system can be improved by improving the factors used in the nomination decision and by improving the level of nonpartisan scrutiny given to nominees. For example, the executive can and probably should consult widely, even institutionalizing the input from the organized bar and a cross-section of groups representing the political spectrum. The Senate should be vetting nominees according to factors that most relate to the qualities of a good judge: impartiality; incorruptibility; legal skill; intelligence; apt demeanor; willingness to listen and decide on the record rather than on the basis of personal preferences. In the past two decades, the Senate has gotten most exorcised about a nominee's views on abortion, capital punishment, or other "hot button" issues of interest groups or sub-segments of the electorate. Although these issues are, of course, fair game for Senate consideration, they should not be litmus tests or even the driving force for evaluating judicial nominees.

The appointment process arguably needs a bit of consciousness-raising as to one particular matter: selection of women and minorities for judgeships. I am not arguing so much for affirmative action (although that is probably apt now for a federal bench that does not come close to mirroring the relative

⁴⁹ See HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 6-13 (1972).

⁵⁰ See Susan W. Johnson, *The Influence of Presidential Versus Home State Senatorial Preferences on the Policy Output of Judges on the United States District Courts*, 36 *LAW & SOC'Y REV.* 657 (2002).

⁵¹ As this is being written, the Bush Administration is engaged in a direct attack on the Senate (or, more precisely, Democrats in the Senate) for allegedly delaying action on Bush judicial nominees for political reasons. The Administration's attack is a bit melodramatic and ahistorical. Both political parties have for decades done their best to influence judicial appointments in favor of their own ideological interests. In the Clinton administration, Republicans worked mightily to discourage even the nomination of potential judges viewed as "too liberal" (e.g., Georgetown University Law Professor Peter Edelman, a former aide to Robert Kennedy). These same Republicans are now accusing Democrats of playing politics when they oppose ultra-conservative Bush nominees such as New York lawyer Miguel Estrada and Texas Supreme Court Justice Priscilla Owen. See Editorial, *The Brawl Over Judges*, N.Y. TIMES, May 5, 2003, at A22, col. 1:

At the heart of this dispute is a simple reality. The administration is intent on packing the courts with right-wing judges, but Democrats have the power to block them. The answer is not to try to twist the rules or demonize Democrats. It is for the White House to consult with the Senate and agree on nominees that senators from both parties can in good conscience confirm.

percentage of high quality women lawyers in the bar). Rather, I am arguing that the appointment process should not become a form of de facto affirmative action for middle-aged white males with clubby social or political ties to the executive or legislature.

One point of concern cited by defenders of the elective judicial system is that the elective model appears to result in the selection of more women judges, black judges, Hispanic judges, and Asian judges than does a purely appointive system such as the federal model. Further, there is no evidence suggesting that the non-white, non-male elected judges are any less qualified. This suggests that one benefit of judicial elections may be increased judicial diversity. At best, however, the evidence on this point appears to be mixed. One recent review of the literature found that

[S]ome empirical studies of the relationship between judicial diversity on state courts and judicial selection methods validate this assertion [that election increases diversity of the bench]. At the same time, several studies find no correlation between selection method and diversity, and others show a positive correlation between merit selection and the diversity of the bench.

The most recent study of selection systems and judicial diversity finds no evidence that women and minorities are more likely to become state appellate judges under merit systems than they are under non-merit systems. Their findings indicate that the proportion of minorities selected under merit systems was slightly less than the proportion of minorities on state courts nationwide.⁵²

Even if some diversity gains are eventually conclusively shown to be correlated with election rather than appointment, I would stand my ground. Diversity on the bench is desirable, but it is not the only consideration and it cannot alone overcome the many deficiencies of judicial elections compiled in Part II.⁵³ Furthermore, less diversity need not be a chronic trait of an appointive judicial system. The screening and nominating committees used by the executive can improve the diversity track record of judicial appointments merely by being more sensitive to this consideration.

This is particularly the case regarding gender diversity. Once upon a time, it may have been true that there were relatively few women attorneys with the background and experience to be judges since there were relatively few women in the profession, some of whom had reduced experienced due to social career barriers (e.g., sexism) or personal choices (e.g., taking substantial time off from practice for child-rearing). For more than fifteen years, approximately half of all law school classes have been filled by women. For decades, women have obtained top grades in law school, led law reviews, starred in moot court, obtained prestigious judicial clerkships and law firm posts, made partner at the most selective firms, and obtained top government offices. There is certainly

⁵² See Reddick, *supra* note 11, at 740-41 (footnotes omitted).

⁵³ In taking this position, I am assuming that any increase of the diversity on the bench is only slight, rather than dramatic, and that the appointed bench is not too unrepresentative of the population from which the court receives cases. If it were demonstrated that the appointed bench is palpably unrepresentative or that the elected bench is far more diverse, I would be forced to rethink my position. Diversity should not be a sacred cow, particularly where differences are relatively modest. But an adequate amount of diversity on the bench, as well as in the legal profession and the judicial system, is imperative if the system is to function fairly and adequately.

no shortage of women lawyers well-qualified for the bench. Those who appoint and nominate judges need only be held to account for gender diversity in order to make this more of a reality in appointive selection.

The issue of judicial selection of minorities is more problematic, largely because the number of minority lawyers is still relatively low. African-American enrollment in law school has remained relatively static. Asian enrollment is a relatively recent phenomenon, as is increasing Hispanic enrollment. It will take some time before junior Hispanic and Asian lawyers become sufficiently senior in large numbers to suggest that diversity in judicial selection will happen as a matter of course. Consequently, something like a more aggressive search for qualified nominees may be required to ensure racial and ethnic diversity on the bench, including the use of self-imposed targets by the political forces in charge of judicial nomination.

For example, a Governor may want to insist that a merit selection commission send forward a longer list of potential nominees than has historically been the case and may want to require that a certain proportion of the list be comprised of minorities or women. In similar fashion, the confirming body must be willing to ask hard questions when presented even with qualified white male nominees: Who else was considered? How many were minorities or women? What was the process by which candidates were considered? Why was more not done to increase diversity? If the nominators cannot provide decent answers to these questions, the legislature should be aggressive in refusing to confirm white male nominees, notwithstanding the normal deference given to the executive.

IV. STUCK INSIDE ELECTORAL POLITICS WITH THE MERIT BLUES AGAIN:⁵⁴ SUGGESTIONS FOR REFORM OF NEVADA JUDICIAL ELECTIONS

There are, of course, political realities facing Nevada regarding judicial selection. We have an elective judiciary. It is mandated by the state Constitution. It would take a constitutional amendment to alter the basic system, although, as discussed below, the current electoral system probably can be fine-tuned without violating the state Constitution so long as the ultimate selection of judges is by election.

A wholesale change in the constitutional scheme is unlikely in the foreseeable future. Too many vested interests like the current system and they are in a strong position to thwart any movement toward merit selection by appointment. Media outlets and media consultants made millions they would otherwise not have made under an appointive system. It is not surprising that both Las Vegas daily newspapers generally support the current electoral system with considerable vigor. Interest groups have influence that can be more forcefully applied when money and media matter so much for judicial selection. Certain elements of the legal community are also probably unduly supportive of the status quo

⁵⁴ I would be on the border of plagiarism if I did not acknowledge Carl Tobias' role in my perhaps corny turning of this phrase and corruption of Bob Dylan. See Carl Tobias, *Stuck Inside the Heartland With Those Coastline Clerking Blues Again*, 1995 WIS. L. REV. 919; Bob Dylan, *Stuck Inside of Mobile With the Memphis Blues Again*, BLONDE ON BLONDE (1966).

because they are better positioned to influence elections than appointments. To be sure, powerful interests will make themselves heard in the appointment process, but they will probably not be nearly as influential as in electoral outcomes in low-visibility races.⁵⁵

In addition, political inertia makes a major constitutional change in this area unlikely. Economic issues like taxation take center stage in the Nevada Legislature. Nevada faces substantial economic pressure and hard fiscal decision-making. In this environment, there is little chance that government leaders will have the energy or opportunity for examining improvements to judicial selection.

A full-fledged merit selection system for Nevada judges will probably not be established during the lifetimes of any of the current disputants. Nonetheless, some modest modifications to the existing system could introduce some valuable aspects of merit selection to the Nevada system.

First, we should take some care in defining merit selection. According to a widely accepted definition of the concept, merit selection can be described as:

a way of choosing judges that uses a nonpartisan commission of lawyers and non-lawyers to . . . evaluate applicants for judgeships. The commission then submits the names of the most qualified applicants . . . to the appointing authority (usually the Governor), who must make a final selection from the list. For subsequent terms of office, judges are evaluated for retention either by commission or by the voters in an uncontested election.⁵⁶

Five elements are particularly associated with the concept of merit selection:

1. A nominating commission that makes recommendations to the appointing authority;
2. A nominating commission that is occupationally diverse (lawyers and non-lawyers) as well as socially diverse (in terms of gender, race, ethnicity, general background);
3. The nominating commission is appointed by both the Governor and legislative leaders;
4. The Governor submits for legislative approval judicial nominees from the list provided by the nominating commission. The Commission thus narrows the Governor's options but does not tie his or her hands completely; and
5. After the judge's initial term in office, the judge must be reappointed by the Governor or retain the position by prevailing in a nonpartisan retention election.⁵⁷

There is no reason that some of these traits of merit selection cannot be fused with an electoral system, particularly if the electoral system is entrenched as a practical matter because of the state constitution. Some possible avenues for partial reform in Nevada are:

⁵⁵ See Bowers, *supra* note 11, at 113-14.

⁵⁶ See J. Andrew Crompton, *Commentary: Pennsylvanian's Should Adopt a Merit Selection System for State Appellate Court Judges*, 106 DICK. L. REV. 755, 763 (2002) (quoting Am. Judicature Soc'y, *Merit Selection: The Best Way to Choose the Best Judges*, http://ajs.org/jl.ms_descrip.pdt).

⁵⁷ *Id.* at 764.

- Use of Merit Selection Panels to assess the qualifications of candidates for judicial office. Establishment of such a body by the Legislature or Governor would not appear to violate the state constitution so long as such a body merely evaluated candidates. Judgeships still would be filled by election, consistent with the constitutional requirement that judges be elected.
- Minimum required qualifications for seeking judicial office. One virtue of the elected system is that a judge need not come from within the "system" that normally does not consider someone "judge material" if they are too young or inexperienced. But that is also a vice of the system. In order to protect against the occasionally odd election of a true judicial greenhorn, Nevada could enact minimum qualifications for judicial office. For example, in most states, a judge must have been a member of the bar in good standing for at least 10 years. This would not be a bad measuring stick for Nevada, at least for District Judges, Supreme Court Justices, and Family Court judges.⁵⁸
- Endorsements of Judicial Candidates, including possible scrutiny and evaluation, by the State Bar of Nevada. For example, the Nevada Bar, like the ABA, could characterize candidates as "not qualified," "qualified," or "well-qualified," designations that would convey significant information to voters.
- Use of Party Affiliation. Current Supreme Court Rules permit candidates to indicate their party affiliation. Perhaps candidates should be required to either provide this information or expressly refuse to give it. For the average voter, knowing whether a judicial candidate is a Republican or Democrat probably conveys a good deal more information than the candidates' media campaign pronouncing the candidate's toughness on crime.
- Improved Press Coverage and Voter Education. The survey of judges conducted by the Clark County Bar Association and the *Las Vegas Review-Journal* is a useful tool for assessing judges, one for which credit is deserved. But press coverage of judicial races is generally light. The typical discussion in the Voter Guides that are published shortly before election tend to give only the name, rank, and serial number of the candidates along with a brief platitude. The information in *Communique* is somewhat more informative and should be the minimum available in general circulation newspapers. Ideally, both the *Review-Journal* and the *Las Vegas Sun* would present a substantial profile of each judicial race, complete with extensive candidate interviews. Although candidates will undoubtedly attempt to operate on the level of glittering generalities, this should still provide more information than the voters currently possess when voting on judges.
- Equal Time for Judicial Races. Consistent with the previous point, print and electronic media should attempt to give judicial races at least as much attention as is bestowed upon state legislative races or contests for

⁵⁸ For Municipal Judgeships and Justices of the Peace, perhaps a five-year minimum is more appropriate so that these positions are as likely to attract the young, talented and ambitious rather than the unsuccessful, burned out, or semi-retired.

constitutional officers. Better yet, judicial races should receive attention approaching that bestowed on contests for governor, U.S. Senate, or Congress.

- **Earlier Deadlines for Announcing Candidacy.** Requiring perspective judicial candidates to file earlier would reduce the effect of fund-raising that reportedly drove Justice Miriam Shearing toward an earlier retirement. Justice Shearing, and undoubtedly all incumbent judges, feel a bit put upon by the current system in that they must begin electoral fund-raising without knowing whether they will have a serious opponent and whether the “pursuit of the almighty dollar” will really be necessary. A Nevada Judge or Justice is therefore on an elongated or perpetual campaign because of the need to be fund-raising “just in case.” Not only is this a burden and distraction for the incumbent judges, it also provides an unnecessary opportunity for interest group influence by making interest group money part of the judicial process even where the judicial position is not actually contested.
- **Public Funding of Judicial Campaigns.** As discussed in the contribution of Professor Bowers to this Symposium, public funding is not a sure bet for improving judicial elections and is particularly difficult in Nevada, which has no state income tax. But it should be explored as a means of controlling the most extreme problems of judicial politics, such as the type of fund-raising pressure that apparently was an important factor in driving Justice Shearing away from seeking re-election.
- **Campaign Spending Limits.** Limits on campaign spending or television advertising would probably make judicial elections more like considered evaluation and less like the introduction of a new consumer product (or the destruction of a competitive product). Without large amounts of paid mass media exposure, candidates would be required to do even more of what they already do now in terms of meeting with community groups, being available to the press, and articulating positions on legal matters. Furthermore, in *Republican Party of Minnesota v. White*,⁵⁹ the U.S. Supreme Court recently struck down, on First Amendment grounds, any state-based regulations unduly restricting a judicial candidate’s ability to articulate his or her position on legal matters.

CONCLUSION

New Jersey Supreme Court Chief Justice Arthur Vanderbilt famously observed that “judicial reform is no sport for the short-winded.”⁶⁰ He was surely correct regarding electoral judicial selection. Although borne of the best populist and democratic intentions, the type of free-wheeling judicial elections found in Nevada have come to adversely affect the legal system. Although elections of this type remain the norm in nearly half the states (seven with partisan elections), the 20th Century has seen substantial progress with the

⁵⁹ 536 U.S. 765 (2002).

⁶⁰ MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, xix (Arthur T. Vanderbilt ed., 1949).

growth of merit selection and retention elections modeled on the Missouri Plan.⁶¹ Hopefully, the 21st Century will see Nevada move in this direction or emulate the federal model of appointing the judiciary.

⁶¹ See American Bar Association, Fact Sheet on Judicial Selection Methods in the States (2003) (available online at http://www.abanet.org/leadership/fact_sheet.pdf) (last visited Aug. 17, 2003). State judicial selection methods for state supreme courts break down as follows:

- Twelve states with appointment and life tenure or its essential equivalent (Connecticut, Delaware, Hawaii, Massachusetts, Maine, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Virginia, and South Carolina).
- Seventeen states with uncontested retention elections after the judge's initial appointment (Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming).
- Fourteen states with nonpartisan elections (Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin) (Ohio and Michigan have nonpartisan general elections, but political parties are involved with the nomination of candidates, who frequently run with party endorsements).
- Seven states with partisan elections (Alabama, Illinois, Louisiana, North Carolina, Pennsylvania, Texas and West Virginia) (although incumbent judges in Illinois and Pennsylvania subsequently run in uncontested retention elections).