

A Penny for the Court's Thoughts? The High Price of Judicial Elections

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“[I]t was ‘never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.’”¹

– Justice John Paul Stevens

I. INTRODUCTION

¶1 When commenting on the importance of judicial independence, the great John Marshall once opined: “I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary.”² In keeping with that statement, this article undertakes an assessment of one of the most fundamental principles in the Anglo-American legal system: judicial independence. It is a time-honored ideal that must be, in the words of Justice Brennan, “jealously guarded against outside interference.”³ Specifically, this article examines judicial elections, as currently used by some states across America today,⁴ and demonstrates how these elections, now more than

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¹ Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997) (citing Justice John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting 12 (Aug. 3, 1996) (quoting Florida Supreme Court Justice Ben Overton) (on file with the New York University Law Review)).

² Jefferson B. Fordham & Theodore H. Husted, Jr., *John Marshall and the Rule of Law*, 104 U. PA. L. REV. 57, 61 (1955) (quoting PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 615-19 (1830)). Other notable giants, such as ex-President William Taft, felt likewise. See WILLIAM H. TAFT, THE SELECTION AND TENURE OF JUDGES 6 (1913) (noting that judicial elections are inherently “disgraceful” and “so shocking . . . that we ought to condemn without stint a system which can encourage or permit such demagogic methods of securing judicial position”).

³ *Mistretta v. United States*, 488 U.S. 361, 409 (1989) (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982)).

⁴ Currently, thirty-nine states use judicial elections to appoint some or all of their judges to the bench. See Raymund A. Sobocinski, *Adumbrations on Judicial Campaign Speech*, 43 IDAHO L. REV. 193, 201-02

ever, jeopardize the autonomy of the courts, threaten individual liberties and erode the esteem of the judiciary in the eyes of the public.⁵ Judicial elections require judges to solicit contributions from donors who will likely appear before them in court—a fact that may influence a judge’s future decision making, and certainly, if nothing else, creates the appearance of judicial impropriety.⁶ Judicial elections also invite unqualified candidates with deep pockets to run for judgeships,⁷ “destroy[] the traditional respect for the bench,”⁸ and virtually guarantee that judges will base their decisions partially, if not completely, upon the vicissitudes of popular politics instead of the law.⁹ Accordingly,

(2006).

⁵ See Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 142 (2003) (“Each election cycle, additional states experience divisive, expensive, agenda-driven campaigns, increasingly accompanied by independent expenditures from national interest groups. The problem is now national in scope, and it demands national attention. If we do nothing, we risk not just an erosion, but indeed a meltdown in respect for the courts and the rule of law.”); see also Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 309-10 (2002).

⁶ Former Nevada Supreme Court Justice Bob Rose, who concurred in *Guinn v. Nevada State Legislature*, 71 P.3d 1269 (Nev. 2003), *overruled in part* by Nevadans for Nev. v. Beers, 142 P.3d 339 (Nev. 2006), but decided to retire instead of run for reelection, “laments that judicial candidates must go out and hustle campaign contributions from lawyers and others who eventually may try cases before them.” Ed Vogel, *Retiring Justice Laments Influence of Money: But He’s Hopeful Times are Changing*, LAS VEGAS REV.-J., Dec. 26, 2006, at B5, available at http://www.reviewjournal.com/lvrj_home/2006/Dec-26-Tue-2006/news/11558186.html (last visited Jan. 22, 2008). Former Justice Rose continued: “I don’t think money changes a judge’s decision, but it gives a very bad perception to the average person. . . . You have a lawyer who gave a judge \$10,000, and you have a lawyer who gave nothing. Which lawyer do you want to make arguments for you? Does money talk? I don’t believe so, but it does create the perception of impropriety to many people.” *Id.* Although Justice Rose does not believe that “money talks” in Nevada, there is strong evidence to the contrary. Indeed, prior to the Seat G election, several Nevada judges, including then-Judge Nancy Saitta (the winner of the Seat G race), were the subject of a *Los Angeles Times* article that demonstrated that numerous judges, including Saitta, not only heard cases involving campaign donors (a conflict of interest?), but also issued rulings that were favorable to the various campaign donors (another conflict of interest?). See Michael J. Goodman & William C. Rempel, *In Las Vegas, They’re Playing With a Stacked Judicial Deck*, L.A. TIMES, June 8, 2006, at B5, available at <http://www.latimes.com/news/politics/la-na-vegas8jun08,1,7420641.story> (last visited Jan. 22, 2008).

⁷ Republican Party of Minn. v. White, 536 U.S. 765, 788-89 (2002) (O’Connor, J., concurring).

⁸ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 23 (1956).

⁹ See, e.g., *White*, 536 U.S. at 789 (O’Connor, J., concurring); see also Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (when asked whether his election year decisions were influenced by the upcoming vote and public perception, California Supreme Court Justice Joseph Grodin candidly replied, “I just can’t be sure.”); JOHN H. CULVER & JOHN T. WOLD, *JUDICIAL REFORM IN THE STATES* 139, 156 (Anthony Champagne & Judith Haydel eds., University Press of America 1993) (in discussing a case he voted on prior to his upcoming election in 1982, Justice Otto Kaus of the California Supreme Court stated: “I decided the case the way I saw it. But to this day, I don’t know to what extent I was subliminally motivated by the thing you could not forget—that it might do you some good politically to vote one way or the other.”); Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 313 (1994) (noting that judges’ fears that a “controversial case or opposition by some group, could stir voters to oust them.”); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988); see Deborah A. Agosti, *My Life and the Law: A Short Overview*, 36 U. TOL. L. REV. 863, 881 (2005) (“I doubt that many judges now sitting on the bench in Nevada will be in a hurry in the future to make a legally sound decision that also happens to be repugnant to vocal political extremists.”). Of course, when I speak of the need for judges to foot their decisions based upon “the law,” I am not suggesting that there is a chemical or mathematical formula that pre-determines the outcome of any given decision. Rather, when I speak of basing decisions upon “the law,” I speak of a *process* whereby judges consider a variety of probative factors.

this article urges all states that employ judicial elections to abandon this precarious method of placing judges on the bench,¹⁰ as the American Bar Association (ABA),¹¹ the Supreme Court of the United States,¹² and legal commentators¹³ have urged time and time again.¹⁴

At the crux of this article lies Nevada's recent 2006 Supreme Court race for Seat G—another unfortunate judicial election that involves a new and dangerous twist. In the race for Seat G on Nevada's high court, incumbent Chief Justice Nancy Becker—who concurred in the controversial five to one constitutional decision in *Guinn v. Nevada State Legislature*,¹⁵ and the first justice in the majority to run for reelection after *Guinn* was issued¹⁶—was ousted by an arguably much less qualified opponent¹⁷ who, with the help of several wealthy special interest groups and the press,¹⁸ grossly, carelessly, and “shameless[ly]”¹⁹ distorted the facts of *Guinn* to the voting public.²⁰ Considering this

¹⁰ See Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 *FORDHAM URB. L.J.* 835, 844 (2002) (“By far the most troubling threats to judicial independence are those associated with judicial elections.”). My call for the Nevada Legislature to amend Article VI should come as no surprise to those familiar with this area of legal literature. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. REV.* 759, 760 n.296 (1995) (noting that “calls for new methods of judicial selection frequently come after elections or other events that diminish the standing of the courts”). Although numerous commentators have called for reform after an unseemly judicial election, this is the first judicial election, and the first law journal article for that matter, which revolves around an incumbent being ousted on the basis of a civil decision.

¹¹ See MODEL CODE OF JUDICIAL CONDUCT Canon 5(c)(2), Comment (2004) (“Merit selection of judges is a preferable manner in which to select the judiciary.”); AM. BAR ASS’N, AN INDEPENDENT JUDICIARY: REPORT ON THE ABA COMMISSION OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 96 (1997) (“The American Bar Association strongly endorses the merit selection of judges, as opposed to their election Five times between August 1972 and August 1984 the House of Delegates has approved recommendations stating the preference for merit selection and encouraging bar associations in jurisdictions where judges are elected . . . to work for the adoption of merit selection and retention”).

¹² See, e.g., *White*, 536 U.S. at 788 (O’Connor, J., concurring) (“I join the opinion of the Court but write separately to express my concerns about judicial elections generally . . . the very practice of electing judges undermines this interest [a State’s interest in an impartial judiciary].”).

¹³ See, e.g., generally, Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 *U. COLO. L. REV.* 733 (1994).

¹⁴ The sea of legal literature calling for the abandonment of judicial elections is overwhelming. Indeed, one commentator, in noting the seemingly endless amount of academic work on the subject, concluded that the issue has been addressed “*ad nauseam*.” Alex B. Long, “*Stop Me Before I Vote for This Judge Again*”: *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 *W. VA. L. REV.* 1, 14 (2003). In light of Justice Brennan’s admonition to “jealously guard” judicial independence, commentators and courts should continuously track the status of judicial independence and welcome new commentary that seeks to protect this time-honored ideal. This article does just that and is the first article to address a judicial election in which a sitting incumbent was ousted in a judicial election because of a single, unpopular civil decision. See *Mistretta v. United States*, 488 U.S. 361, 409 (1989).

¹⁵ 71 P.3d 1269 (Nev. 2003), *overruled in part by* *Nevadans for Nev. v. Beers*, 142 P.3d 339 (Nev. 2006).

¹⁶ Although Justice Becker was the only Justice in the *Guinn* majority to run for reelection, prior to the Seat G race, Justice Deborah A. Agosti, the author of *Guinn* opinion, resigned from the high court after the attacks launched on her and the Nevada Supreme Court after *Guinn* was handed down. See Agosti, *supra* note 9. Additionally, Justice Bob Rose, who also concurred in the *Guinn* opinion, retired from the high court instead of running for reelection. Although Justice Rose retired, it seems clear that in light of Justice Becker’s fate, both Justice Agosti and Rose would have suffered the same ending.

¹⁷ See *infra* notes 157-167, 175-176, and accompanying text.

¹⁸ See *infra* notes 177-183 and accompanying text.

¹⁹ See Jon Ralston, *Jon Ralston on this Election Season’s Top 10 Performances*, *LAS VEGAS SUN*, Nov. 1, 2006, at A5 (“[H]ere are the Top 10 nominees for Most Shameless Performance of Campaign ’06 You raised our taxes, Justice Becker: Except she didn’t. Judge Nancy Saitta ran an ad accusing Justice Nancy

unprecedented result, one might rightly feel perplexed, perhaps agitated, with the realization of liberty jeopardized.

¶3 Although the books are full of examples in which an incumbent judge has been voted out of office in a judicial election and replaced by a less qualified opponent who distorted the holding of one politically unpopular decision to the voting public, those elections dealt exclusively with an unpopular criminal decision.²¹ The Seat G race, however, breaks new ground, as Justice Becker lost her seat on the Nevada Supreme Court not because of a single unpopular criminal decision, but because of a single unpopular civil tax opinion.²²

¶4 To Nevada and America's dismay, Seat G illustrates that the problems with judicial elections—once confined to criminal decisions—have now crept into the civil realm of dispute resolution. It further illustrates that judges who seek retention must now not only worry about their jobs when making a politically unpopular criminal decision, but also fear reprisal for making a politically unpopular, yet legally justifiable, decision in a civil matter.²³ Noting this perilous movement, all states should abandon judicial elections in all forms, lest the courts become “obligated to do the will of the people, to act like legislators in surveying the public's desire and then representing it in its decision making, rather than dispassionately interpreting the law, and weighing and balancing conflicts in the law.”²⁴

Becker of signing onto a decision—the infamous *Guinn v. Legislature*—that caused the ‘biggest tax increase’ in the state annals. But it didn't. The Legislature passed the 2003 increase with two-thirds of each house.”)

²⁰ See Agosti, *supra* note 9, at 881 (“The public's reaction to the decision was being shaped without having the benefit of hearing anything other than one extreme view of the decision. Even those papers that favored the decision did so without such an accurate explanation of the decision as would reassure the citizens of Nevada. The public was told that the court had disregarded the will of the people, had ignored and ‘thrown out’ a constitutional mandate the voters had placed in the constitution, and had violated principles of law to get to its result. Of course, none of these accusations were true.”); see also Sean Whaley, *State Supreme Court: Incumbent Justices Lead Opponents But Vast Numbers of Voters Undecided*, LAS VEGAS REV.-J., Sept. 27, 2006, at 3B, available at http://www.reviewjournal.com/lvrj_home/2006/Sep-27-Wed-2006/news/9891060.html (last visited Jan. 22, 2008) (“Becker is the subject of negative ads about the decision, which suggests she is responsible for the \$833 million dollar tax increase approved by the Legislature. The ads are paid for by a group called Nevadans Against Judicial Activism.”).

²¹ See *infra* notes 110-120 and accompanying text; see also *e.g.*, Bright & Keenan, *supra* note 10.

²² See *infra* notes 136-167 and accompanying text.

²³ One commentator has noted that, in discussing the California Supreme Court election debacle of 1986 in which three Supreme Court justices were ousted due to a single unpopular criminal decision, the reelection prospects of these three justices were also hurt because of because of several civil opinions that the court had issued that were unfavorable to the powerful banking community of California. The commentator, however, explicitly noted that it was the death penalty opinion which ultimately did the Justices in (or, I guess one could say, out). See Stephen R. Barnett, *California Justice*, 78 CAL. L. REV. 247, 255 (1990) (reviewing JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989)). Additionally, some commentators have speculated that Justice David Lanphier of the Nebraska Supreme Court may have been defeated in 1996 after he had authored a unanimous opinion invalidating a term-limits amendment to the state constitution. See Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 523-24 (2001). However, Justice Lanphier was likely ousted because of several rulings that overturned second-degree murder convictions. See Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70-71 (1999).

²⁴ See Agosti, *supra* note 9, at 881. Agosti's article emphasizes the movement of the problems of judicial elections into the civil realm to demonstrate the fact that the problems of judicial elections now threaten all aspects of our law.

¶5 In the wake of Seat G—an election that will likely go down as one of the more embarrassing and judicially debasing state supreme court elections in our nation’s history²⁵—it was only apropos that several Nevada Senators proposed Senate Joint Resolution No. 2 (SJR2),²⁶ seeking to amend Article VI of the Nevada Constitution. SJR2, which the Nevada legislature recently enacted,²⁷ proposed that Nevada eliminate judicial elections and adopt the “Missouri plan,”²⁸ which is a merit-based appointment method by which Nevada District Court Judges and Nevada Supreme Court Justices are chosen by a nominating commission, appointed by the Governor, and later subject to a retention vote.²⁹

¶6 Despite this amendment, SJR2 is still insufficient to bolster judicial autonomy and eliminate the problems Nevada has experienced with judicial elections. As such, this article urges the Nevada legislature to promulgate legislation to amend various portions of Article VI. Specifically, this article argues that the Nevada legislature should amend Article VI, Section 22 of the Nevada Constitution by adding a provision providing for Senate approval of nominees and setting the term of their judgeship at twelve years. This article also pleads with all states that retain judicial elections, in any form, to promulgate legislation that would completely eliminate judicial elections in all forms. For, as the Seat G election illustrates, judicial elections are a “disgraceful”³⁰ “scourge”³¹ for a variety of reasons. The people of Nevada and America deserve better than judicial elections;

²⁵ Numerous Nevada media moguls have openly expressed their embarrassment with Nevada’s judicial elections. See e.g., Jon Ralston, *Jon Ralston on the Embarrassing State of Nevada’s Judicial System*, LAS VEGAS SUN, June 9, 2006, at A4. Ralston’s sentiments reflect not only those of Nevadans, but also of those Americans who are familiar with Nevada’s judicial elections. Cf. Linda P. Campbell, *Sitting Ducks on the Bench*, DALLAS FORT WORTH STAR-TELEGRAM, Nov. 10, 2006, at B1. In this Dallas Fort Worth newspaper article, recently retired United States Supreme Court Justice Sandra Day O’Connor notes that, out of all the decisions she authored or in which she concurred while a sitting Justice, she wishes that she could change her vote in *Republican Party of Minnesota v. White* because of the embarrassing and undesirable state court elections that have taken place after *White* was handed down. Campbell’s article, to no surprise, specifically references the Nevada Seat G race and cites some of the embarrassing and judicially debasing tactics used by the candidates during the election.

²⁶ S.J. Res. 2, 74th Gen. Assem., Reg. Sess. (Nev. 2007).

²⁷ See Nevada Legislature Bill History of SJR2, <http://www.leg.state.nv.us/74th/Reports/history.cfm?DocumentType=8&BillNo=2>. SJR2, which originated in the Senate, passed with a fifteen to six vote in that house. Afterwards, SJR2 went to the Assembly, where it passed thirty to eleven (with one excused). On May 31, 2007, SJR2 was enrolled and delivered to the Secretary of State.

²⁸ Missouri was the first State to adopt this method of appointment, thus the name “Missouri plan.” See LARRY C. BERKSON, *JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT* 1, 4-5 (Am. Judicature Society 2004) (1980). Although the Missouri plan tries to inject more judicial independence into the method of placing judges on the bench, this method of appointment is not without its own set of problems. Indeed, as will be discussed more fully in Section III, *infra*, this article concludes that the retention portion of the Missouri plan is just as dangerous to judicial independence as popular judicial elections. As Professor Charles Gardner Geyh observed:

[H]orror stories emerging from partisan judicial elections in Texas have led to calls for non-partisan judicial elections, which can be countered with horror stories from non-partisan elections in Wisconsin, Ohio and Michigan, which in turn have served as fodder for merit selection proponents to load their cannons, only to have them backfire in the face of retention election disasters in Tennessee and Nebraska. All of the foregoing examples are illustrative of the perils to impartial justice inherent in selecting or retaining judges by popular vote.

Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 74 (2003).

²⁹ See Nev. S. Res. 2.

³⁰ See TAFT, *supra* note 2, at 418.

³¹ See Fordham & Husted, Jr., *supra* note 2, at 61.

indeed, as Justice Jackson once stated: “One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”³²

¶7 The undesirable realities of judicial elections and the recent spread of their ills into the civil realm of dispute resolution render this method of placing judges on the bench more dangerous than ever, particularly on the state supreme court level.³³ Noting this reality, it is fortunate that certain politically unpopular decisions—*Brown v. Board of Education*³⁴ and *Engel v. Vitale*,³⁵ for example—were brought, and decided, in federal court, a forum in which highly talented and solicitous judges are given protection from public retaliation for socially unpopular, yet legally justifiable, decisions.

¶8 Section Two of this article begins by defining the term “judicial independence” as it is used in this article, and then examines the various historical and contemporary views regarding the importance of judicial independence to the preservation of liberty, individual rights, and respect for the bench. Section Three looks at judicial elections in general, and the Seat G election in particular, and demonstrates how these elections impinge on judicial independence and individual liberties and corrode public respect for the judiciary. This section also examines SJR2 and demonstrates how these amendments fail to eliminate the ills associated with judicial elections. Finally, this section discusses how the Nevada legislature should amend Article VI, Section 22 of the Nevada Constitution to eliminate these problems. In the Conclusion, this article urges the Nevada legislature to amend Section 22 (which was amended by SJR2) in the next legislative session, with the modifications outlined in this article, and pleads with all other states that still retain judicial elections to follow in Nevada’s footsteps. By completely eliminating judicial elections, states will be, in the words of the late Chief Justice William Rehnquist, bolstering “one of the crown jewels of our system of government today.”³⁶

II. JUDICIAL INDEPENDENCE

¶9 Before discussing historical and contemporary views regarding the significance of judicial independence, it is imperative to first understand what judicial independence is, and from whom, or of what, the judiciary is seeking to be independent. The founders sought to establish judicial independence in two senses, which are interrelated.³⁷ First, the founders wanted to make the judiciary literally independent of the two other branches of government.³⁸ In other words, the framers sought to create a separate and distinct judicial branch of government that was autonomous from the legislative and executive

³² *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

³³ One commentator has noted that federal habeas corpus review has been significantly diminished in recent years because of the increasing trust that the Supreme Court of the United States has placed in state supreme courts. See Bright & Keenan, *supra* note 10, at 768-69. Noting this fact, it is clear why it is important to have judges who are not beholden to public vicissitudes.

³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that segregation of children in public schools on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment).

³⁵ *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that required participation in official daily classroom prayer violated the Establishment Clause).

³⁶ Federal Judges Association, <http://www.federaljudgesassoc.org/scholars> (last visited Jan. 22, 2008).

³⁷ *Id.* (“The Federal Constitution is structured so as to foster . . . independence in two ways: first, by making the Judiciary separate from the other two branches of government; and, second, by guaranteeing to Article III Judges the right to life tenure ‘during good behavior’ and by prohibiting the diminution of their compensation.”).

³⁸ *Id.*

branches. Second, the founders sought to provide the judiciary with independence in their decision making by protecting the judiciary from improper outside influences and from reprisal from the other two branches for unpopular opinions.³⁹ This was done, as will be discussed more fully below, through the prophylactic protections of life tenure and fixed salary in Article III of the Constitution. It is this second sense of judicial independence with which this article is concerned.

¶10 When this article speaks of judicial independence in decision making, it does not intend to “connote the image of some isolated jurist in the desert completely separated from reality, including being separated from the legislature and the executive, or immune from constraints or criticism.”⁴⁰ Rather, when this article speaks of judicial independence, it is speaking of “a general principle of the highest importance to the proper administration of justice,”⁴¹ and the need for “a judicial officer, in exercising judicial authority . . . [to] be free to act upon his own convictions, without apprehension of personal consequences to himself.”⁴² In other words, when this article speaks of judicial independence, it speaks of a position in which a judge, as the interpreter of the law, will not feel compelled to consider improper factors, to wit, anything other than the facts and the applicable principles of law.

¶11 The Federal Judges Association (FJA), in discussing judicial independence, provides an excellent explanation of the concept: “What do we mean by judicial independence? We mean, in simple terms, an environment in which ‘Article III Judges’ (that is, federal judges appointed pursuant to Article III of the Federal Constitution) are able to render principled and unbiased court decisions based solely on the ‘rule of law,’ that is, what the law says.”⁴³ Professor Archibald Cox, in further defining and articulating what is meant by judicial independence, also stated:

The idea of judicial independence implies: (1) that judges shall decide lawsuits free from any outside pressure: personal, economic, or political, including any fear of reprisal; (2) that the courts’ decisions shall be final in all cases except as changed by general, prospective legislation, and final upon constitutional questions except as changed by constitutional amendment; and (3) that there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.⁴⁴

¶12 Judicial independence thus implies “two reciprocal obligations.”⁴⁵ First, judges must cut ties from “loyalties or implied commitment” to individuals or entities, and second, judges must foot decisions “‘according to law,’ according to a continuity of reasoned principle found in the words of the Constitution, statute, or other controlling

³⁹ *Id.*

⁴⁰ Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487, 493 (2007).

⁴¹ *Bradley v. Fisher*, 80 U.S. 335, 347 (1871).

⁴² *Id.*

⁴³ See Federal Judges Association, *supra* note 36.

⁴⁴ Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 DAYTON L. REV. 565, 566 (1996).

⁴⁵ *Id.*

instrument, in the implications of its structure and apparent purposes, and in prior judicial precedents, traditional understanding, and like sources of law.”⁴⁶ Those judges who have not cut ties, or are beholden to outside groups or influenced by politics or who fear reprisal for unpopular decisions are “putting the independence of the courts at risk.”⁴⁷ As Justice Kennedy observed, the law “makes a promise—neutrality.”⁴⁸ Judges who are beholden to special interests or parties, even ostensibly, fail this great guarantee.

¶13

Turning now to our forefathers, after their painful experiences with the English monarchy, they came to understand the importance of, and need for, an independent judiciary. Indeed, the founders considered judicial autonomy so important, so vital, so essential, that it was one of the express reasons they declared independence from England.⁴⁹ For in England, judges were appointed by the King and served at his pleasure;⁵⁰ judges’ salaries and the length of their tenure were dependent on the King,⁵¹ and judges were often, if not always, removed from the bench by the King when he disagreed with a judicial decision.⁵² From time to time, the King would not only dispense with judges’ jobs when he was unhappy with their performance, decisions or views, but also would dispose of judges’ lives.⁵³ As Thomas Paine aptly observed, in England, the King was the law.⁵⁴

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 1 (Feb. 2002) (quoting Justice Anthony Kennedy in a speech to an ABA symposium on judicial independence), available at <http://www.abanet.org/judind/pdf/commissionreport4-03.pdf> (last visited Jan. 22, 2008).

⁴⁹ See THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776). In breaking from England, the founders listed as one of their grievances the fact that the King had made “[j]udges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.”

⁵⁰ See Grodin, *supra* note 9, at 1970. In England, prior to the time when the King appointed judges, the judicial function was intertwined with the Curia Regis, or the King’s Court. Indeed, the King and a group of advisors (whom he selected) adjudicated all royal legal matters. It was not until after the death of William the Conqueror that a separate judiciary came into existence. See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 346-47 (1983).

⁵¹ See THE DECLARATION OF INDEPENDENCE, *supra* note 49, para. 3; see also THE FEDERALIST NO. 79, at 512 (Alexander Hamilton) (E. Earle ed., 1973) (“Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . [for] power over a man’s subsistence amounts to a power over his will.”); cf. *Weiss v. United States*, 510 U.S. 164, 179 (1994) (“A fixed term of office . . . is a means of promoting judicial independence, which in turn helps to ensure judicial impartiality.”).

⁵² See Frank J. Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711, 712 n.2 (1975) (noting that the Stuart monarchs often removed judges who issued opinions that were unfavorable to the Crown). Consider, as an example of the King’s control over the judiciary, when Chief Edward Coke opposed the King’s claim that the King could sit in lieu of an English judge in a case. Not only did Coke’s objections fail, but also King James I nearly imprisoned Coke and promised to confine Coke to the Tower of London if Coke dared challenge the King’s authority again. See Burkeley N. Riggs & Tamera D. Westerberg, *Judicial Independence: An Historical Perspective*, 74 DENV. U. L. REV. 337, 337 n.3 (1997).

⁵³ See JACK M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA 32 (1989) (discussing the hanging of the chief justice of the King’s Bench in the 14th century).

⁵⁴ See THOMAS PAINE, COMMON SENSE 57 (Penguin Books 1987) (1776) (“Let a day be solemnly set apart for proclaiming the Charter; let it be brought forth placed on the Divine Law, the Word of God; let a crown be placed thereon, by which the World may know, that so far as we approve of monarchy, that in America the law is king. For as in absolute governments the King is Law, so in free Countries the law ought to be king; and there ought to be no other.”).

¶14 The King’s control of the judiciary extended beyond England and into colonial America. To be sure, when the King’s dominion of the English judiciary was eliminated by the 1701 Act of Settlement, King George III continued to exercise power over the judiciary in colonial America.⁵⁵ Indeed, King George III frequently invoked his power over the colonial courts, repeatedly appointing and removing judges from the colonial bench, probably to demonstrate to the colonialists that it was the King, not the judge, who declared what the law was.⁵⁶

¶15 Given this tyrannical behavior by the King, the colonialists knew that in order for America to be a land of liberty and justice, it would need to have a judiciary free from the control of a King or representative body.⁵⁷ They knew that judges needed to be sufficiently independent from the King so that they could adjudicate legal disputes without outside pressure or influence.⁵⁸ Accordingly, the colonialists, through Article III, created a judiciary where—much like the judiciary in England after the 1701 Act of Settlement—federal judges were afforded life tenure and a fixed salary during good behavior, which could not be diminished while they were in office.⁵⁹

¶16 The protections of Article III were explicitly fashioned to combat the undesirable consequences—which the founders had experienced firsthand⁶⁰—associated with a judiciary who was beholden to the representative body. These safeguards were grounded on the idea that “[i]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”⁶¹

¶17 In drafting the structure of Article III, the revolutionaries not only drew heavily upon their experience with the monarchy in both England and colonial America, they also drew heavily upon the great legal minds of Blackstone and Montesquieu.⁶² Consider, for

⁵⁵ See Joseph J. Darby, *Guarantees and Limits of the Independence and Impartiality of the Judge*, 41 SAN DIEGO L. REV. 997, 998 (2004) (“It should be noted that the Act of Settlement of 1701 did not apply to the English colonies in North America. Colonial judges were regarded by most American colonists as subservient agents of the King.”).

⁵⁶ Cf. L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221, 257 (2000) (noting that the King continued to control Colonial judges after the 1701 Act of Settlement).

⁵⁷ The idea of judicial independence is deeply rooted in the history of English law. Consider, for example, *Dr. Bonham’s Case*, 77 Eng. Rep. 646 (1610), in which Lord Coke held that, in a false imprisonment case brought by a student against the Board of Censors of the Royal College of Physicians, the Board could not adjudicate the case against itself because of the interest which the Board had in the outcome of the case. This view—*nemo iudex in re sua*—or “no man is to be a judge in his own case,” was, undoubtedly, influential in the founders’ belief that judicial independence was vital to a properly functioning court system. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 480 (1986). The roots of judicial independence, however, can be traced to around 350 B.C. and Aristotle and his three elements of government: general assembly, public officials, and the judiciary. See ARISTOTLE, *THE POLITICS* 165-77 (Ernest Barker trans., R.F. Stalley rev. trans., Oxford Univ. Press 1995) (c. 335-322 B.C.E.).

⁵⁸ See THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

⁵⁹ U.S. CONST. art. III, § 1.

⁶⁰ See Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 997 n.56 (2003-04) (“It has been suggested that the Founders’ conceptual commitment to judicial independence was a reaction to prior experiences under colonial rule, rather than an outgrowth of a culture that promoted judicial independence as a core governing principle.”).

⁶¹ THE FEDERALIST NO. 79, *supra* note 51, at 513.

⁶² See, e.g., Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1377 n.16 (2006); Graham O’Donoghue, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1155 n.192 (2006).

example, the views of Alexander Hamilton—a brilliant Federalist and a significant force in establishing the protections afforded the judiciary in Article III—regarding judicial independence. Hamilton, drawing and building upon Blackstone⁶³ and Montesquieu,⁶⁴ in Federalist Paper No. 78 eloquently examined and discussed the importance of judicial independence. He believed that judicial independence was “one of the most valuable of the modern improvements in the practice of government . . . an excellent barrier to the encroachments and oppressions of the representative body.”⁶⁵ Indeed, Hamilton strongly believed that “‘there is no liberty, if not the power of the judging be not separated from the legislative and executive powers.’ . . . The complete independence of the courts of justice is . . . essential”⁶⁶ Like Blackstone and Montesquieu, Hamilton believed that judicial independence was essential to the preservation of judicial autonomy and, in turn, the preservation of individual rights, liberty, and the neutral interpretation and application of the Constitution.⁶⁷ He was convinced that liberty “can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments,”⁶⁸ and he strongly supposed that judicial independence was “‘indispensable’”⁶⁹ to the preservation of the law and individual liberty.

¶18

Blackstone, Montesquieu, and Hamilton’s insights and observations regarding judicial independence have been fortified by years of American experience. Without a doubt, Article III’s endowments of life tenure and fixed salary have bolstered courts’ autonomy, which in turn has secured the liberties of all Americans and furthered the public’s respect and faith in the judicial branch. Federal courts, throughout their existence, have rejoiced in the independence afforded the judiciary through Article III, and have expressly decried outside influences which may weaken these protections or otherwise undermine the autonomy of the court at any time.⁷⁰ The late Chief Justice

⁶³ With regard to judicial independence, Blackstone stated:

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislature, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe.

1 WILLIAM BLACKSTONE, COMMENTARIES *259-60 (1765), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch10s6.html>.

⁶⁴ See CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 11, ch. 6, at 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (“Nor is there liberty if the power of judging is not separate from legislative power and from executive power If it were joined to executive power, the judge could have the force of an oppressor.”).

⁶⁵ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 51, at 583.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See generally *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (O’Connor, J., concurring); see also *Mistretta v. United States*, 488 U.S. 361, 409 (1989); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1998) (noting that courts have an ongoing duty “to take steps necessary to maintain public confidence in the impartiality of the judiciary”); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972) (noting that parties are entitled to have impartial and detached courts decide merits of case); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (finding a due process violation where a party’s liberty or property is subjected “to the judgment of

William Rehnquist, in discussing the importance and benefits of judicial autonomy, stated that the “independence of [the judiciary] . . . is every bit as important in securing the recognition of the rights granted by the Constitution as is the declaration of those rights themselves.”⁷¹ Former Justice Penny White of the Tennessee Supreme Court—an individual all too familiar with the value of judicial independence—aptly noted:

[H]istorical and academic statements about judicial independence may be somewhat helpful in our effort to assess its significance to our system of justice, [but] these examples are not nearly as helpful as practical ones. When thinking about judicial independence, what it is and how essential it may be, it is perhaps more helpful to think about where we would be without it. Our courts would be quite different had judicial independence not been a foundation of our legal system. As we have noted, no legislative acts would be subject to judicial review because Chief Justice Marshall would have minded the Jefferson administration, which characterized *Marbury v. Madison* as “a brazen attempt to induce the Supreme Court to interfere unlawfully with the conduct of the Executive Branch of the Government.” Poll taxes, literacy tests, loyalty oaths, political gerrymandering, segregated public accommodations, and lynchings would all have survived because the judiciary would have been powerless to question, let alone invalidate, the actions of the legislative or executive branches.⁷²

Numerous other judges⁷³ and scholars⁷⁴ have echoed the sentiments of Chief Justice Rehnquist and Justice Penny White.

¶19 Having defined judicial independence and identified how that term is used in this article, this section looks at the difficult duties of today’s judges and demonstrates how these duties are made even more complex and intricate because of the harsh political landscape in which judges operate today. By understanding the difficult duties of a judge and the thorny political climate in which he or she now operates, the reader will better understand why states should now, more than ever, do everything in their power to eliminate judicial elections and bolster the independence of their court systems.

¶20 The duties of a judge are complex; the responsibility of interpreting and declaring what the “law is”⁷⁵ is no easy task. United States District Court Judge Bruce S. Jenkins,

a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case”).

⁷¹ William H. Rehnquist, *An Independent Judiciary: Bulwark of the Constitution*, 9 N. ILL. U. L. REV. 1, 8 (1988).

⁷² Penny White, *It’s a Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 5 (1996) (internal citations omitted).

⁷³ See Bobby R. Baldock et al., *A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit*, 74 DENV. U. L. REV. 355, 356 (1997) (noting Judge Baldock’s belief that the judiciary’s “independence com[es] largely from the constitutional provisions regarding life tenure and guaranteed compensation”); Judge Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 759-60 (2001) (discussing the value of judicial independence).

⁷⁴ See generally Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L.L. REV. 187 (1996).

⁷⁵ See *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity

in discussing the role and duty of a judge, has stated: “No judge seeks business. He takes what comes, and within the tradition of service and the boundaries of power and competency does the best he can to deal with questions put to him by others. Many a question is asked that a judge would prefer not to answer, but a judge is duty bound to answer as best he can.”⁷⁶

¶21 One of the many jobs of a judge, indeed, one of the many duties of a judge, is to answer difficult legal questions. This duty becomes even thornier when the question involves an unpopular group or a criminal defendant.⁷⁷ Judges must, among other things, protect the Constitutional rights of all—underrepresented individuals, unpopular groups, and criminals included. Indeed, the Bill of Rights, which judges are duty bound to uphold and protect, was created for the “very purpose . . . [of] withdraw[ing] certain subjects from the vicissitudes of political controversy, [and] to place them beyond the reach of the majorities and officials and to establish them as legal principles to be applied by the courts.”⁷⁸ Not only are judges often required to make unpopular decisions upholding the rights or privileges of unpopular groups or criminal defendants, judges must, pursuant to their duty as interpreters of the law and checks on legislative and executive power, invalidate acts of Congress, the executive, or other lawmakers.⁷⁹

¶22 Often when judges protect the rights of unpopular groups or invalidate acts of the legislature or executive, the public is enraged. As the FJA has stated: “Inevitably from time to time the protection of individual rights requires unpopular decisions that invoke adverse reactions from the public, its legislative representatives, or the executive branch.”⁸⁰

¶23 In addition to the complex and socially unpopular legal questions that judges must answer, the difficulty of a judge’s duty is further compounded by the harsh political landscape in which judges now operate. Today, judges face unparalleled attacks from a variety of political and special interest groups for their legal decisions. Consider, for example, some of the comments made by various newspapers across America in recent times, wherein judges have been dubbed as “idiots,” “fuzzy headed buffoons,” “stooges,” “arrogantly authoritarian,” “a band of outlaws,” “felonious five,” “transparent shells for the right wing of the Republican Party,” and “‘judicial sociopaths’ who ‘belong behind bars’ for their ‘treasonous behavior.’”⁸¹ Consider also the attacks which are being exerted on the courts by the other two branches of government. Tom DeLay, once House majority leader from Texas, stated that “[j]udges need to be intimidated.”⁸² Former

expound and interpret that rule.”).

⁷⁶ Bruce S. Jenkins, *The Integrity of Words*, 1988 UTAH L. REV. 291, 292 (1988).

⁷⁷ See Susan N. Herman, *Commentary*, 72 N.Y.U. L. REV. 339, 339 (1997) (“Article III suggests that federal judges are expected to take the part of minorities, dissenters, and other politically powerless and unpopular people, including criminal defendants.”); see also Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 527-28 (2005).

⁷⁸ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

⁷⁹ See Barnett, *supra* note 23, at 257.

⁸⁰ Federal Judges Association, <http://www.federaljudgesassoc.org> (last visited Jan. 22, 2008).

⁸¹ Geyh, *supra* note 28, at 45; see also Cox, *supra* note 44, at 574-75 (“‘Bashing judges’ has become a long and distinguished tradition, as we are often reminded by quotations from Thomas Jefferson, Abraham Lincoln and Franklin D. Roosevelt.”) (internal citations omitted). Such comments, as Judge Jenkins has noted, often tell us much more about the speaker. See Bruce S. Jenkins, *Is That a Fact? Evidence and the Trial Lawyer*, 12 UTAH BAR J. 19, 23 (1999).

⁸² Joan Biskupic, *Hill Republicans Target “Judicial Activism” Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1.

Governor Gray Davis of California, when asked what should happen to a judge who issues an opinion contrary to his own, stated that such an individual “shouldn’t be a judge. They should resign. My appointees should reflect my views. They are not there to be independent agents.”⁸³ Tennessee Governor Don Sundquist, after a Tennessee Supreme Court Justice was voted out of her seat on the basis of a single death penalty decision that he opposed and helped distort to the voting public, remarked: “Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so.”⁸⁴

¶24 Although judge-bashing has a long and distinguished history,⁸⁵ the practice has, according to many within the legal profession, reached unprecedented heights.⁸⁶ To be sure, numerous jurists have concluded that today’s courts face unrivaled amounts of inappropriate disparagement.⁸⁷ Justice O’Connor, for example, has stated that “the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history.”⁸⁸ United States District Court Judge Paul Friedman, in light of the attacks being launched on the courts, concluded: “It is hard to remember a time when judges, courts, and the judicial branch in general were subjected to so much gratuitous criticism, vitriolic commentary, and purposely misleading attacks. . . . if this current, often politically motivated drumbeat against judges continues unchallenged, more and more people . . . will lose faith not just in the courts but in the rule of law itself.”⁸⁹

¶25 Noting this harsh political landscape in which today’s judges operate, it is imperative that we afford judges—judges who are called upon to protect the rights and liberties of all and declare what the “law is”⁹⁰ in the face of harsh criticism, public outrage or misunderstanding—sufficient protection and independence to exercise wisdom and courage in their legal decision making. Do we really want judges to feel intimidated, to look over their shoulders, or to simply be mannequins in the hands of a governor in deciding legal questions? Do we really want judges—who have been called idiots, buffoons, bandits, or stooges—to feel that they must issue decisions that will avoid such public descriptions and preserve their jobs? In answering this question, one need only consider where we would be as a society if the Justices in *Brown v. Board of Education*⁹¹ reflected the views of popular politics or paused to look over their shoulders before rendering this monumental decision.

¶26 Our founders sought to afford every individual who had his or her day in an American court a thoughtful, neutral, evenhanded, and unbiased judge who would follow the applicable principles of law when ruling on a case. Individual liberties, as well as continued public respect for the court, depend upon this independence. In the spirit of this noble and worthy aspiration, all states should strive to protect and further the

⁸³ Transcript of Governor’s Comments on Judges, SACRAMENTO BEE, Feb. 29, 2000, at 8.

⁸⁴ Penny J. White et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?* 31 COLUM. HUMAN RIGHTS L. REV. 123, 140 (1999).

⁸⁵ See Sandra Day O’Connor, *The Threat to Judicial Independence*, THE BENCHER 10 (Jan./Feb. 2007); see also Campbell, *supra* note 25, at B1.

⁸⁶ See O’Connor, *supra* note 85, at 10.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Traynor, *supra* note 40, at 496-97.

⁹⁰ *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

⁹¹ 347 U.S. 483, 483 (1954).

autonomy of the judiciary. For our forefathers, freeing judges from the control of the King and affording them life tenure and a fixed salary was essential to achieving judicial independence. In the next section, this article discusses why, in our day and time, states must eliminate judicial elections to protect the independence of the court.

III. JUDICIAL ELECTIONS, SEAT G, AND SJR2

¶27 Having discussed what judicial independence is, the various historical and contemporary views regarding the importance of judicial independence to individual liberties and public respect for the court, as well as the harsh political environment in which judges now operate, this article now looks at how judicial elections, as currently used by various states, threaten the independence of the judiciary. Further, this section illustrates why, in the spirit of our forefathers' aspiration for an independent judiciary, all states should abandon judicial elections.

¶28 The section begins by examining the views of our founders and the original thirteen states regarding judicial elections, and discusses why our forefathers believed judicial elections were dangerous. This section then looks at when and why the practice of judicial elections began in the states and examines the negative consequences these elections have had upon the independence of the judiciary. As an example of the impropriety of judicial elections, this section looks at two recent judicial elections in Texas and Tennessee, and then reviews the subsequent United States Supreme Court decision in *White v. Republican Party of Minnesota*,⁹² wherein Justice O'Connor's concurrence explicitly condemned the use of judicial elections. This section then turns to the Seat G race—a race that has broken new ground and illustrates all of the problems inherent in judicial elections—and discusses how this race has drastically broadened the dangers of judicial elections. After discussing the impropriety of the Seat G race, this section then examines SJR2—which was recently enacted by the Nevada legislature—and argues that Article VI, Section 22 of the Nevada Constitution should be amended in the next legislative session to completely eliminate judicial elections in Nevada.

¶29 Not only did Hamilton and the federalists believe that life tenure and a fixed salary for judges was vital to securing the independence of the court,⁹³ they also believed that judicial elections were precarious and a serious threat to the autonomy of the judiciary.⁹⁴ Indeed, Hamilton believed that judicial elections, much like the ability of the King to control a judge's tenure and pay, threatened the very foundation of America's proposed legal system.⁹⁵ Even the anti-federalists, who were extremely suspicious of the power of the courts to conduct judicial review and who desired to have judicial decisions subject to the review of the legislature, believed that judicial elections were dangerous.⁹⁶

¶30 The original thirteen states shared the views of federalists, anti-federalists, and authors of the Constitution regarding the impropriety of judicial elections, as evidenced

⁹² 536 U.S. 765, 789 (2002) (O'Connor, J., concurring).

⁹³ See THE ANTIFEDERALIST NO. 78, at 224-25 ("Brutus") (Morton Borden ed., 1965) ("It would be improper that the judicial [branch] should be elective, because their business requires . . . that they may maintain firmness and steadiness in their decisions.").

⁹⁴ See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 671 (2001).

⁹⁵ See Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1201 (2000).

⁹⁶ *Id.*

by the fact that all thirteen states, just like the federal government, originally appointed, not elected, judges to the bench.⁹⁷ Indeed, it was not until the early nineteenth century that judicial elections were introduced among the states as a form of appointing judges to the bench.⁹⁸ Prior to this time, judicial elections were, in the words of one commentator, “unheard of.”⁹⁹

¶31 Judicial elections began in the states in the early 1830s during Andrew Jackson’s presidency and his pursuit of Jeffersonian ideals.¹⁰⁰ At this time in history, there was a push toward public control of all aspects of government. According to this rising mode of thought, in a democratic society, the populace, not an elite few, should have control over all aspects of government, including, of course, the judiciary.¹⁰¹ Accordingly, Jacksonians sought to establish state judicial elections so that the general populace could exercise broader control of public office, wrest power from the politically influential,¹⁰² increase judicial accountability,¹⁰³ and, particularly in the southern states, break up the stronghold that white males had on the judiciary.¹⁰⁴ From 1846 to 1860, Jackson’s vision gained strength and America saw nineteen states adopt constitutions providing for judicial elections.¹⁰⁵ During the 1860s, twenty-two states elected their judges.¹⁰⁶ Currently, thirty-nine states elect some or all of the members of their bench.¹⁰⁷

¶32 Although judicial elections were fueled and forged by worthy ideals, such as pure democracy and judicial accountability, the results and consequences of judicial elections have, in practice, turned out to be much worse than the method devised by the founders. To be sure, by the early 1900s, the problems of judicial elections began to rear their ugly heads, and those states that adopted and employed judicial elections began to see, among other problems, an “emergence of strong political party machines in large urban areas and various states [that] resulted in political bosses effectively hand-picking incompetent political hacks for judicial positions who then, through party-controlled elections, replaced otherwise competent nonpolitically favored judges.”¹⁰⁸ Indeed, the judiciary, in

⁹⁷ See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 5 (1994). One commentator has noted that provisions in state constitutions, such as the Massachusetts Constitution’s provision for life tenure (championed by John Adams), may well have served as a model for Article III. See Carlton, Jr., *supra* note 10, at 836; cf. Hiller B. Zobel, *Judicial Independence and the Need to Please*, JUDGES’ J., Fall 2001, at 5, 8 (quoting John Adams’s belief that judges should be “‘free, impartial, and independent as the lot of humanity will admit’”).

⁹⁸ See Grodin, *supra* note 9, at 1971.

⁹⁹ *Id.*

¹⁰⁰ Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 311-12 (2003).

¹⁰¹ See, e.g., Rorie Sherman, *Is Mississippi Turning?*, 11 NAT’L L.J. 1 (1989).

¹⁰² See Dimino, *supra* note 100, at 310.

¹⁰³ See Sobocinski, *supra* note 4, at 201.

¹⁰⁴ *Id.*

¹⁰⁵ James E. Lozier, *The Missouri Plan A/K/A Merit Selection is the Best Solution for Selecting Michigan’s Judges?*, 75 MICH. B.J. 918, 919 (1996).

¹⁰⁶ *Id.*

¹⁰⁷ See Sobocinski, *supra* note 4, at 201-02.

¹⁰⁸ Lozier, *supra* note 105, at 918; see also Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 466 (1993) (“The innovation of electing judges soon proved to contain its share of problems. Political machines began to control the selection of judges through the nomination process, and elections became rubber stamps of the machine’s selections. This led to the creation of a politically responsive, yet at times incompetent, judiciary.”).

the words of one commentator, was seen as “corrupt, unethical, unqualified, and incompetent.”¹⁰⁹

¶33 Since the early 1900s, the problems of judicial elections have steadily worsened, and this method of placing judges on the bench has become increasingly dangerous. As the Seat G election illustrates, the problems of judicial elections now pervade all forms of dispute resolution in the states; in both criminal and civil actions, no claim brought in state court is free from the problems inherent in judicial elections.

¶34 In contemplating the problems associated with judicial elections, consider two state elections in Texas and Tennessee, along with Justice O’Connor’s subsequent concurrence in *White*. These two elections—one a popular partisan election and one a Missouri plan election, respectively—illustrate some of the many problems associated with judicial elections. Justice O’Connor’s concurrence in *White* points out how this method of placing judges on the bench threatens the independence of the courts. The Texas and Tennessee examples are, of course, by no means exhaustive, and one can find numerous other state elections that mirror those of Texas and Tennessee.¹¹⁰

¶35 In anticipation of the 1994 Texas judicial elections, after the highest criminal court in Texas had reversed a conviction in a highly publicized capital case, the former chairman of the state Republican Party made a state-wide call for the Republicans to take over the court.¹¹¹ During the election, the Republicans provided a one-sided and distorted view of the Texas Criminal Court’s holding to the voting public, stirred up public anger and ultimately succeeded in placing numerous Republicans on the bench, including Judge Stephen Mansfield.¹¹² Judge Mansfield, who had only been a member of the Texas bar for two years, had been disciplined in Florida for practicing law without a license, and who had completely misrepresented his academic writing on criminal law to the voting public, ousted a much more qualified incumbent judge, a former prosecutor of twelve years who had the support of the criminal bar.¹¹³ Judge Mansfield, undoubtedly less qualified than the incumbent, ran his campaign solely on the basis of the highly publicized capital case on which the Republican Party focused and misrepresented to the voting public.¹¹⁴ To no one’s surprise, there was little discussion of Judge Mansfield’s qualifications, such as his experience, publications, discipline, or ethics.

¶36 In the 1994 Tennessee Supreme Court election, Justice Penny White was appointed to the Tennessee Supreme Court by the Governor to fill an existing vacancy on the high court.¹¹⁵ Justice White was subject to a retention vote in 1996.¹¹⁶ Just prior to the retention election, Justice White concurred in a decision reversing the death sentence of a

¹⁰⁹ Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 168 (2007).

¹¹⁰ See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 881 (2001) (noting that the problems of judicial elections occur in numerous states).

¹¹¹ See, e.g., Janet Elliot & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn’t What It Seems*, TEX. LAW, Oct. 3, 1994, at 1.

¹¹² See generally *id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See generally Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

¹¹⁶ See B. Michael Dann & Randall M. Hansen, *National Summit on Improving Judicial Selection: Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1434 (2001). The case was *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).

criminal defendant in a highly publicized case.¹¹⁷ Although the decision was well grounded in law,¹¹⁸ and despite the fact that no one (Tennessee Supreme Court Justices included) enjoys giving or would ever want to give special treatment to a murderer, Tennessee Governor Don Sundquist criticized and distorted¹¹⁹ the decision to the voting public. A special interest group simultaneously launched a smear campaign against Justice White in the 1996 election and completely misled the voting public with respect to Justice White's concurrence.¹²⁰ Justice White, with little time and few resources to combat the Governor's attacks and the wealthy special interest ads in the news, lost the election.¹²¹ After less than two years on the bench, Justice White, on the basis of a single, legally justifiable decision, was gone. Her qualifications, her accomplishments, her mental acuity, and her judicial temperament were of no relevance to the voting public. Justice White's concurrence, which her opponent utterly distorted, was the sole criterion by which she was measured.

¶37 The lessons of the Texas and Tennessee judicial elections are clear: if a judge wishes to keep her seat on the bench in a state where judicial elections are employed, she must consider the popular views of her constituents, even if that means sacrificing constitutional guarantees for the vicissitudes of popular politics. Regardless of qualifications or abilities, a judge who issues a single unpopular decision that goes against the ideals of a special interest or political group may face strong opposition that may lead to that judge's removal. Further, unqualified candidates who are wealthy, have wealthy backing, or who can potentially generate campaign money (a factor which, as Justice O'Connor pointed out in *White*, is completely unrelated to judicial capacity)¹²² will likely run for and win a seat on the bench over other more qualified candidates. Judges who are ultimately successful in obtaining office must not only consider the public's views when issuing their legal decisions, but also be particularly cognizant of the interests of donors or money players who can influence the public perception of their views or record in the next election. Last, judicial elections—with their attendant fundraising, campaign rhetoric, and smear tactics—have lowered the status and respect of the court to the same level of a typical political campaign, where rhetoric and confusion, not information or honest and thoughtful consideration of the candidates, predominates.

¶38 After the election debacles in Texas, Tennessee, and elsewhere, the United States Supreme Court heard and decided *White*,¹²³ a case that dealt with speech restrictions placed upon judicial candidates in Minnesota. Justice O'Connor, concurring with the majority decision that struck down Minnesota's ban on certain aspects of judicial election

¹¹⁷ *Id.* In sum, the *Odom* court held that when various errors occurred during the penalty phase, a new sentencing was required. *Id.*

¹¹⁸ See Penny J. White, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 138-39 (1999) (discussing merits and justification of the *Odom* decision).

¹¹⁹ See Chief Justice Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 KY. L.J. 1, 11 (2005-06) (noting that Justice White was defeated because of a "profound distortion of her death penalty views").

¹²⁰ See generally Dann & Hansen, *supra* note 116, at 1434.

¹²¹ *Id.*

¹²² Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring).

¹²³ *Id.* at 788.

speech, wrote separately to point out the many problems associated with judicial elections.¹²⁴

¶39 Justice O'Connor's concurrence brilliantly points out the numerous problems inherent in judicial elections. The *White* opinion is a breath of fresh air from the high court, particularly when considering the disturbing judicial elections just discussed in Texas, Tennessee, and other states. It is also interesting to note that *White* was passed down after years of legal commentary and numerous symposia condemning the use of judicial elections,¹²⁵ along with various declarations from the ABA concluding likewise.¹²⁶ Further, it is noteworthy that, although the question in *White* did not deal directly with the question of the propriety of judicial elections (only speech limitations placed on judicial candidates),¹²⁷ Justice O'Connor took the time and energy to write a separate concurrence identifying the problems with judicial elections. It seems clear that, in light of the timing and context of her comments, Justice O'Connor was trying to send a powerful and clear message to the states regarding judicial elections.

¶40 In her concurrence discussing the problems of judicial elections, Justice O'Connor first noted that judicial elections compromise a judge's impartiality.¹²⁸ Specifically, she stated that if "judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."¹²⁹ Justice O'Connor went on to explain that even if judges did not pay attention to popular passions, and even if the vicissitudes of popular politics did not compromise judicial impartiality, judicial elections create the perception that judges could be influenced by popular views, and such a perception is, in and of itself, dangerous and erodes the public confidence.¹³⁰

¶41 Secondly, Justice O'Connor noted the problems involved with judicial campaigning.¹³¹ In doing so, she noted that campaigning, a characteristic that is "unrelated to judicial skill," may encourage unqualified candidates who are wealthy to run for judicial office.¹³² In other words, judicial elections may attract incompetent or inferior legal minds to the bench. Not only does campaigning lead to less qualified candidates, it is also problematic because "relying on campaign donations may leave

¹²⁴ *Id.* at 788-96.

¹²⁵ See generally Phillips, *supra* note 5 (opening article for symposium by Ohio State); Eule, *supra* note 13; see also Symposium, *Judicial Review and Judicial Independence*, 14 GA. ST. U. L. REV. 737 (1998); Symposium, *A Symposium on Judicial Independence*, 25 HOFSTRA L. REV. 703 (1997). Other events include the University of Tulsa's 1998 symposium entitled: "Judicial Independence—A Public Education Symposium." A similar symposium was held in 1998 at John Marshall Law School in Chicago entitled "A Symposium on Judicial Independence." Marquette University also held a symposium in 1998, which was sponsored by the American Public Philosophy Institute and was entitled "Reining in Judicial Imperialism: Effectively Limiting the Judiciary to its Constitutional Powers." Numerous other symposia were held, all in an attempt to promote the principle of judicial independence. See, e.g., Symposium, *Court Bashing and Reality*, 36 JUDGES' J. 8 (1997); Symposium, *Judicial Independence: An Introduction*, 80 JUDICATURE 155 (1997).

¹²⁶ See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 11.

¹²⁷ See *White*, 536 U.S. at 765.

¹²⁸ *Id.* at 788.

¹²⁹ *Id.* at 788-89.

¹³⁰ *Id.* at 788.

¹³¹ *Id.* at 789.

¹³² *Id.*

judges feeling indebted to certain parties or interest groups.”¹³³ Once again, even if a judge isn’t beholden or influenced by campaign contributions, the mere perception of influence is sufficient, in and of itself, to undermine the public’s confidence.¹³⁴

¶42 Justice O’Connor’s observations regarding the evils of judicial elections are pointed and informative when considering the Texas and Tennessee judicial elections discussed *supra*. Indeed, in the Texas case, given that Judge Mansfield received so much support from the Republican Party, it is likely that he will feel beholden to the Republican Party and their interests when ruling on future cases, lest the Texas Republicans call upon the party to remove Judge Mansfield in the next election. Likewise, in Tennessee, it is difficult to believe that, given the fate of Justice White, a future Tennessee Supreme Court Justice will issue a decision that works against Governor Sundquist’s views or those of any other wealthy special interest group. If nothing else, it would appear to the public that courts would consider these outside factors, and the mere appearance of such impropriety is sufficient to lower the esteem of the courts in the public’s eyes. Consider also the Texas election in light of Justice O’Connor’s views regarding judicial campaigning. In Texas, Judge Mansfield—an individual with much less judicial experience than the incumbent judge, no significant academic writing experience, and who concealed disciplinary action taken against him—replaced a much more qualified incumbent who had the support of the criminal bar.

¶43 Having briefly traced the genesis of judicial elections, from their inception to their current status, and having elaborated upon a variety of the problems and views denouncing this method of placing judges on the bench—from the United States Supreme Court¹³⁵ to the world of academics¹³⁶—as well as having discussed two recent examples of disastrous state elections in which incumbents were ousted for issuing unpopular, yet legally justifiable criminal decisions, this article now turns to the Seat G election.

¶44 The Seat G election is significant because it represents the first major judicial election in which an incumbent justice was ousted on the basis of a single, unpopular *civil* decision. As such, this election demonstrates that if judges wish to keep their jobs, they must now make all of their legal decisions with an eye toward public sentiment (much to the joy of a variety of newspapers, Governor Sundquist, and Tom DeLay, no doubt) and the next election. Given that judges are being ousted for unpopular decisions in both civil and criminal decisions, it is imperative that states, now, more than ever, abandon judicial elections.

¶45 To fully and fairly understand the Seat G election and its implications, one must appreciate the context in which the election occurred as well as comprehend the circumstances that led up to this groundbreaking judicial race. Below is an account of the Seat G election, beginning with the controversial Nevada Supreme Court decision in *Guinn*. This section begins by discussing the circumstances surrounding *Guinn* and the majority’s opinion in the case. The discussion then turns to the Seat G election and how it presents a new and even more dangerous threat to judicial independence. This section concludes with a look at SJR2 and Section 22 of the Nevada Constitution (which SJR2

¹³³ See *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O’Connor, J., concurring).

¹³⁴ *Id.* at 788.

¹³⁵ *Id.*; *Mistretta v. United States*, 488 U.S. 361, 361 (1989); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982).

¹³⁶ See generally Phillips, *supra* note 5 (opening article for a symposium by Ohio State); Eule, *supra* note 13.

amended), Nevada’s response to the judicial elections, and a discussion of why the Nevada legislature should amend Section 22 during the next legislative session.

A. *Guinn v. Nevada State Legislature*

¶46 *Guinn* came to the high court of Nevada (the high court did not go to *Guinn*—an important fact to remember)¹³⁷ in the midst of a legislative crisis and a political stalemate. But for the court’s intercession in this crisis, Nevada’s public school system would have collapsed. “Schools ha[d] not been funded for the upcoming school year. Teachers ha[d] not been hired. Educational programs ha[d] been eliminated. Planning for the academic year [was] not possible, and the state’s bond rating may [have] been jeopardized.”¹³⁸ Indeed, had this legislative standoff in Nevada continued and the court not interceded, there would have been dire consequences for Nevada’s children.

¶47 In *Guinn*, the Nevada legislature, which is responsible for funding education under the Nevada Constitution, could not agree upon the amount of funds to be appropriated to education,¹³⁹ specifically, the legislature failed to balance the State budget by the end of the legislative session.¹⁴⁰ As a result, Nevada’s public education system faced a meltdown.¹⁴¹ Even after the legislature called two special sessions to resolve the crisis, it still could not agree on a budget.¹⁴² Finally, in an attempt to resolve the crisis, the Governor petitioned the court for a writ of mandamus, asking the Nevada Supreme Court to order the legislature to perform its constitutional duty to approve a budget for education so that the legislature could provide the children of Nevada with an education.¹⁴³

¶48 The *Guinn* court was asked to examine and reconcile several provisions of the Nevada Constitution ostensibly pitted against each other: Article 9, Section 2, which requires the legislature to approve a balanced budget; Article 11, Section 6, which mandates that the legislature fund public education; and Article 4, Section 18(2), which requires a two-thirds supermajority to generate or increase public revenue to fund those appropriations.¹⁴⁴ In the end, the *Guinn* court (in light of the constitutional mandate requiring the legislature to provide an education to the children of Nevada) ordered the legislature to fulfill its constitutional obligation to approve a budget for education and balance the budget. Specifically, the high court held that Article 4, Section 18(2) of the Nevada Constitution must yield to Article 11, Section 6 and Article 9, Section 2 of the Nevada Constitution, which require the Nevada legislature to fund education and approve

¹³⁷ See Jenkins, *supra* note 76, at 126. Judge Jenkins, in discussing the term “judicial activism,” points out that courts are not active; they do not seek business.

¹³⁸ *Guinn v. Nevada State Legislature*, 71 P.3d 1269, 1274 (Nev. 2003), *overruled in part by* Nevadans for Nev. v. Beers, 142 P.3d 339 (Nev. 2006).

¹³⁹ *Id.*

¹⁴⁰ See *id.* at 1272.

¹⁴¹ *Id.* at 1274 (“The Legislature’s failure to fulfill its constitutional duties by the beginning of the new fiscal year has precipitated an imminent fiscal emergency. Nevada now faces an unprecedented budget crisis.”).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (noting that the court must resolve the “tension between the legislature’s constitutional obligation to fund public education and the constitutional provisions requiring a simple majority to enact appropriations bills but a two-thirds majority to generate or increase public revenue to fund those appropriations”).

a balanced budget, respectively.¹⁴⁵ To address the legislature's impasse and the failure of the two special sessions, the Court held that the legislature could bypass Article 4, Section 18(2), and approve the educational budget by a simple majority.¹⁴⁶ As a consequence, the legislature, *not the court*, imposed a tax via a simple majority vote to raise money for public education. Funding was granted, and disaster was avoided.

¶49 After the decision in *Guinn*, various legislators filed a petition for rehearing with the Nevada Supreme Court.¹⁴⁷ The petition was denied.¹⁴⁸ Unsatisfied with this result, these same legislators attacked the *Guinn* decision in federal court, once again failing. The legislators ultimately filed a petition for writ of certiorari and this, too, was rejected by the Supreme Court of the United States.¹⁴⁹ Consistent with both the Nevada state and federal court decisions, commentators examining *Guinn* have concluded that the decision was legally sound.¹⁵⁰

¶50 After rendering its decision in *Guinn*, the Nevada Supreme Court came under heavy fire from the media¹⁵¹ and special interest groups. Although it was the legislature, *not the court*, that ultimately raised the taxes of the Nevadans, and despite the fact that numerous legal scholars have concluded the *Guinn* decision was sound¹⁵² and the United States Supreme Court denied review of *Guinn*¹⁵³ (for whatever reason, we do not know for sure), the local media and various special interest groups preyed upon the decision,¹⁵⁴ distorted the holding to the public,¹⁵⁵ and created a significant amount of unwarranted public upheaval and disdain for the court.¹⁵⁶ Indeed, the media and special interest groups' distortion of the decision was so pervasive and malignant that Justice Agosti, the

¹⁴⁵ *Id.* at 1276.

¹⁴⁶ *Id.*

¹⁴⁷ 76 P.3d 22 (Nev. 2003).

¹⁴⁸ *Id.*

¹⁴⁹ The petition alleged that the *Guinn* decision violated the Republican Guarantee Clause, the Due Process Clause of the Fourteenth Amendment, and, by diluting the votes of the dissenting legislators, violated the Equal Protection Clause's guarantee of one-person, one-vote. The petition was denied. *See Amodei v. Nev. State Senate*, 99 Fed. App'x 90 (9th Cir. 2004). These legislators then petitioned for certiorari in the federal version of the *Guinn* litigation (which had been dismissed under the *Rooker-Feldman* abstention doctrine). The Supreme Court denied this petition on January 24, 2005. *Angle v. Legislature of Nev.*, 543 U.S. 1120 (Jan. 24, 2005).

¹⁵⁰ *See* William D. Popkin, *Interpreting Conflicting Provisions of the Nevada State Constitution*, 5 NEV. L.J. 308, 308-09 (2004) (noting that "the result the court reached was correct, because it implicitly recognized an important difference between interpreting constitutions and statutes and exercised the judicial discretion to make the difficult value judgments its rhetoric seemed to deny"); *see also* Steve R. Johnson, *Supermajority Provisions, Guinn v. Legislature and a Flawed Constitutional Structure*, 4 NEV. L.J. 491, 491-92 (2004) (concluding that "much of the criticism has been misplaced" in the *Guinn* case, and stating: "I do not think the court made the best decision among the alternatives available to it. Rather, I should say, the court did not make 'the least bad decision.' That more precise phrasing acknowledges the following fact: there was no *good* alternative available to the court in the case.").

¹⁵¹ *See* Agosti, *supra* note 9, at 881; *see generally*, Ralston, *supra* note 19.

¹⁵² *See generally* Popkin, *supra* note 150; *see also* Johnson, *supra* note 150.

¹⁵³ *See generally* *Angle*, 543 U.S. 1120. Although denial of certiorari does not always demonstrate the validity of the decision, the denial is probative. *But see* *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950).

¹⁵⁴ *See* Agosti, *supra* note 9, at 881 ("this kind of propaganda poses a direct and substantial threat to judicial independence. I doubt that many judges now sitting on the bench in Nevada will be in a hurry in the future to make a legally sound decision that also happens to be repugnant to vocal political extremists.").

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

author of the *Guinn* opinion, likened their coverage and evaluation of *Guinn* to propaganda.¹⁵⁷

B. Seat G

¶51 Four years after the issuance of the *Guinn* opinion, Justice Becker, who concurred in the *Guinn* decision, was set to run for reelection. Justice Becker was the only justice from the *Guinn* court who faced reelection. The 2006 Seat G election pitted Becker against then-District Judge Nancy Saitta. Judge Saitta's qualifications, like those of Judge Mansfield from Texas, were less than impressive. She was the most reversed District Court Judge in Nevada and an extremely inefficient lower court judge,¹⁵⁸ who had not published a single opinion¹⁵⁹ or academic article. Further, at the time of this article's publication, she has not published a single academic article.¹⁶⁰ Moreover, not only was Saitta unqualified for the Supreme Court, but she was also tied to several wealthy special interest groups who sought to oust Justice Becker.¹⁶¹ Additionally, she had, in the past, presided over and ruled in favor of several controversial cases involving campaign contributors.¹⁶² Much like the elections in Texas and Tennessee, however,

¹⁵⁷ *Id.*

¹⁵⁸ See Matt Pordum, *Nevada Judges Do Well When Cases Are Reviewed in Nevada*, LAS VEGAS SUN, Apr. 19, 2006, at A1. These numbers are based on a thirty-two month study conducted by a University of Illinois Urbana-Champaign journalism class.

¹⁵⁹ Then-Judge Saitta did have two unpublished opinions, which were found on Westlaw: *Wozniak v. Sahara Outpatient Surgery Ctr. Ltd.*, No. A457045, 2004 WL 3244352 (D. Nev. June 30, 2004) and *Purrier v. Chemical Lime Comp. of Arizona*, No. A429375, 2004 WL 3203140 (D. Nev. Sept. 8, 2004). Often, unpublished opinions by courts are similar to published opinions in that they require a serious amount of research, thought, and writing by the court. However, both *Wozniak* and *Purrier* are nothing more than simple clerical Judicial Orders which do nothing more than memorialize who prevailed in the action and describe the amount of money awarded. Both *Wozniak* and *Purrier* are judgments from trials, less than one page in length each. Neither opinion engages in any type of factual or legal analysis whatsoever. Moreover, it is likely that these unpublished opinions were not even written by then-Judge Saitta, and were simply stipulated Orders submitted by the parties for her signature. Even assuming that she did author these unpublished opinions herself, a review of both opinions (which, again, are each approximately one page in length) reveals that neither of these opinions engage in a factual statement of the case, a statement of the law, or provide a thoughtful analysis of the issues involved.

¹⁶⁰ A Lexis and Westlaw search revealed no publications—although my research did uncover one law review article that recounted a symposium discussion in which Saitta participated. See Symposium, *Judicial Selection and Evaluation*, 4 NEV. L.J. 61 (2003). This is not, however, a publication. Justice Becker had, on the other hand, published several hundred opinions in her capacity as a justice on the Nevada Supreme Court. Although Saitta was not a justice and Becker was (and thus had the opportunity to publish), the point is that, at the time of the election, Becker had significant writing experience and Saitta did not. Because writing and publishing opinions is integral to the position of a judge, particularly a Supreme Court justice, it is clear why publications are a probative factor in assessing the qualifications of a candidate. Indeed, recognizing the importance of publications to a potential nominee to the bench, the American Bar Association's Standing Committee on the Federal Judiciary (a committee that rates federal judgeships) looks at a nominee's prior publications in evaluating the quality of a potential judge. The more publications the potential judge has, the better his or her rating. Cf. generally, Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004).

¹⁶¹ See Jeff German, *Far Right Targets Justice Becker: Supreme Court Vote on Tax Increase Was Right Thing To Do, She Says*, LAS VEGAS SUN, Oct. 15, 2007, at A1.

¹⁶² See Goodman & Rempel, *supra* note 6, at B5.

qualifications did not matter in this election as Judge Saitta put the entire focus of the election on the *Guinn* case.¹⁶³

¶52 Throughout the Seat G race, Saitta continued with the propaganda that the media had fed the voting public regarding *Guinn*. Indeed, Saitta—without mentioning or otherwise alluding to the fact that *Guinn* came to the Nevada Supreme Court under dire circumstances, without even referencing the fact that it was the legislature, *not the court*, who was responsible for the tax increase, and without even bringing up the fact that the United States Supreme Court had declined to review the Nevada Supreme Court’s decision—accused Justice Becker of “judicial activism.”¹⁶⁴ Moreover, in a statement of utter boldness and irresponsibility, Saitta claimed that the *Guinn* court had “ignored the Constitution,”¹⁶⁵ as if a justice would, or could, in any sense of the term “ignore,” to wit, “refrain from noticing or recognizing”¹⁶⁶ a constitutional provision that lies at the very heart of the matter under consideration.¹⁶⁷

¶53 In the end, Saitta—despite being obviously less qualified—ousted Justice Becker, an established and solid jurist.¹⁶⁸ Saitta’s campaign against Becker, which was based largely on a single, politically unpopular decision that had been previously maligned in the media, helped Saitta win Seat G.¹⁶⁹ It appears that for the first time in American history, a sitting State Supreme Court justice was ousted on the basis of a single, legally justifiable, yet politically unpopular, opinion in a civil decision.

¶54 Seat G teaches several important lessons regarding the dangers of judicial elections. These unfortunate lessons wonderfully illustrate the new dangers which judicial elections now pose to liberty in America and demonstrate why states should do everything within their power to abandon this flawed method of placing judges on the bench. After this section discusses the lessons of Seat G, it discusses SJR2 and Article VI, Section 22 of the Nevada Constitution (which SJR2 amended), and demonstrates how the amendments to Section 22 are insufficient to promote judicial independence and to protect Nevada from yet again experiencing the problems of judicial elections. Ergo, this article urges

¹⁶³ See German, *supra* note 161.

¹⁶⁴ See Nancy Saitta Website, <http://www.nancysaitta.com/issues.php> (last visited Apr. 30, 2007); see also Washoe County, Candidate Information, http://www.co.washoe.nv.us/voters/candidate_info.html~c_detail=180#180 (last visited Jan. 22, 2008).

¹⁶⁵ Nancy Saitta Website, *supra* note 164; see also Adrienne Packer, *State Supreme Court District G*, LAS VEGAS REV.-J., Oct. 19, 2006, at 38DD, available at http://www.reviewjournal.com/lvrj_home/2006/Oct-19-Thu-2006/election/10204974.html (last visited Jan. 22, 2008).

¹⁶⁶ See Dictionary.com, <http://dictionary.reference.com/browse/ignore> (last visited Jan. 22, 2008).

¹⁶⁷ Of course, this article is not suggesting that *Guinn* was not problem free, nor is it saying that *Guinn* was not a valid case to be discussed by the candidates in the Seat G election. Indeed, all of Justice Becker’s cases (past cases, that is) were fair game for debate. I argue that consistent with fairness, the *Guinn* holding should have been discussed openly, fairly, and without the rhetoric. Moreover, the case should have been explored and framed in the larger context of the entire record of Justice Becker, and the public should have been given a full picture of Justice Becker’s decisions regarding her views and method of Constitutional interpretation. The dangers of focusing on a single case need not be explored, and it is rather self-evident that such a tactic would be extremely harmful to not only a candidate, but also to the voting public who is to decide who sits on the bench.

¹⁶⁸ See Packer, *supra* note 165.

¹⁶⁹ See Carri Geer Thevenot, *Supreme Court’s Becker Falls to Saitta; Douglas Retains Seat*, LAS VEGAS REV.-J., Nov. 8, 2006, at 5B, available at http://www.reviewjournal.com/lvrj_home/2006/Nov-08-Wed-2006/news/10690397.html (last visited Jan. 22, 2008). Although Thevenot’s article mentions that Becker had made an unpopular decision in an eminent domain case, this decision, when compared to what was said about the *Guinn* decision by the media, it received little to no attention. It is for this reason that I believe that the *Guinn* decision was the cause of Justice Becker’s eventual fall.

the Nevada legislature to amend Section 22 in the next legislative session to eliminate all forms of judicial elections in Nevada.

¶155 The first (and most important) lesson of Seat G is that in states where judicial elections are held, if judges want to keep their jobs, they are not free to make even a single, politically unpopular, yet legally justifiable decision. Indeed, it illustrates that those judges who do make socially or politically unpopular decisions, regardless of the legal justification, do so at their own peril.¹⁷⁰ This fact is alarming, and one cannot overemphasize the danger of this occurrence. As the ABA has stated:

Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case. In such a situation, it is particularly important for lawyers to support the judicial process and the rule of law.¹⁷¹

¶156 The Seat G election is even more alarming, however, because it demonstrates that the problems of judicial elections have now spread into the civil realm of dispute resolution. Indeed, it appears that Seat G is the first major judicial election in which an incumbent was ousted on the basis of an unpopular civil decision.¹⁷² This expansion into the civil realm of dispute resolution, in conjunction with the unprecedented attacks that the judiciary faces, should strike terror in the reader—as it did with federalists¹⁷³ and anti-federalists.¹⁷⁴ Indeed, Seat G teaches that now, no dispute or individual right brought before a state court—civil or criminal—is safe from the pressures and dangers that judicial elections exert. This fact undoubtedly represents the most dangerous period of judicial elections in the history of America.

¶157 In the Seat G election, it was Justice Becker's unpopular concurrence in *Guinn* and the subsequent distortion of that decision to the voting public that directly caused Becker to lose her seat to the less-qualified Saitta. This reality seriously jeopardizes the rights of every citizen and undermines the validity of the legal system as a whole. Indeed, it teaches that the law may take a back seat to popular politics. Systems of appointment that create this type of scenario should be shunned. Indeed, as Justice Stevens stated, "it was 'never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.'"¹⁷⁵

¹⁷⁰ See *supra* notes 109-121 and accompanying text (discussing the judicial elections in Texas and Tennessee in which a sitting judge was ousted on the basis of an unpopular legal decision).

¹⁷¹ See TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, AM. BAR ASS'N, 2 REPORT AND RECOMMENDATIONS: REGARDING CONTRIBUTIONS TO JUDGES AND JUDICIAL CANDIDATES 6 (1998) (emphasis added).

¹⁷² As discussed in footnote 23, *supra*, some have speculated that Justice David Lanphier of the Nebraska Supreme Court may have been defeated in 1996 after he authored a unanimous opinion invalidating a term-limits amendment to the state constitution. See Entin, *supra* note 23, at 523-24. However, Justice Lanphier was likely ousted because of several rulings that overturned second-degree murder convictions. See Reid, *supra* note 23, at 70-71.

¹⁷³ See *supra* notes 92-94 and accompanying text.

¹⁷⁴ See *supra* note 95 and accompanying text.

¹⁷⁵ See Bright, *supra* note 1 (citing Justice John Paul Stevens, Opening Assembly Address, ABA Ann. Meeting 12 (Aug. 3, 1996)).

¶158 Second, the Seat G race fortifies Justice O’Connor’s¹⁷⁶ observation that popular elections will attract only those who are wealthy, or who have the ability to run an expensive campaign, and thereby potentially decrease the likelihood that the most qualified candidates will run for and be elected to the bench. As discussed earlier, Saitta is much like Judge Mansfield in the Texas judicial election discussed *supra*: she was the most reversed judge in Nevada and an extremely inefficient lower court judge,¹⁷⁷ with no academic publications or published legal opinions.¹⁷⁸ Nonetheless, Saitta had the powerful backing of various wealthy special interest groups who sought to oust Justice Becker.¹⁷⁹ Indeed, it is well known that Saitta was approached by certain powerful and wealthy attorneys in Nevada who wanted to remove Becker because she had issued decisions that were contrary to a variety of the interests they frequently represented.¹⁸⁰ In this election, it was Saitta’s capacity to use wealthy special interest groups—an ability unrelated to judicial skill¹⁸¹—that allowed her to win the race, not her qualifications.

¶159 Third, Seat G illustrates the dangers associated with judges being beholden to campaign contributors. As Justice O’Connor noted in *White*, judges who solicit and receive campaign contributions for a judicial election may feel indebted to those campaign contributors.¹⁸² This is a very real danger in Nevada; indeed, prior to the Seat G election, the *L.A. Times* issued articles that rocked Nevada, detailing instances in which Saitta heard cases involving campaign contributors and ruled favorably for those campaign contributors.¹⁸³ Moreover, Saitta is now indebted to the group of powerful interest groups in Nevada who financed her campaign.¹⁸⁴ In light of these facts, can one seriously argue that if an issue arises before the Nevada Supreme Court that involves an issue in which one of Saitta’s large campaign donors has a significant interest, Saitta would be independent?¹⁸⁵ The mere fact that she took money, let alone large amounts of money, from such donors requires an answer in the negative. At best, these facts create the glaring appearance of being beholden to such contributors.

¶160 Fourth, the Seat G election and its attendant campaign rhetoric illustrate how judicial campaigns are becoming “nosier, nastier and costlier,”¹⁸⁶ and demonstrate how

¹⁷⁶ Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (O’Connor, J., concurring).

¹⁷⁷ See Pordum, *supra* note 158.

¹⁷⁸ See *supra* notes 159-160 and accompanying text. Saitta was not wholly without experience prior to her election to the high court, however. Prior to the Seat G race Saitta was a district court judge in Nevada and a municipal court judge in Las Vegas prior to that. See Washoe County, Candidate Information, *supra* note 164. However, as discussed earlier, Saitta was the most reversed district judge and had not published a single opinion as a judge, nor had she published a single academic article. Because legal writing is one of the most important skills a Supreme Court Justice must possess, Saitta’s lack of any scholarly or judicial writing as a judge is extremely disconcerting and demonstrates her lack of qualifications. See *supra* notes 159-160 and accompanying text.

¹⁷⁹ See German, *supra* note 161; see also Sam Skolnik, *Who Owes Whom is Supreme Theme: Becker, Saitta Race is Rife With Accusations*, LAS VEGAS SUN, Aug. 27, 2006, at A1.

¹⁸⁰ *Id.*

¹⁸¹ See *White*, 536 U.S. at 789.

¹⁸² *Id.*

¹⁸³ See Goodman & Rempel, *supra* note 6, at B5.

¹⁸⁴ See German, *supra* note 161; see also Skolnik, *supra* note 179.

¹⁸⁵ *White*, 536 U.S. at 788 (O’Connor, J., concurring); see also Anthony Champagne, *Access to Justice: Can Business Coexist with the Civil Justice System?*, 38 LOY. L.A.L. REV. 1483, 1512 (2005) (noting that judicial candidates, if they want to be elected or retained, must “show that they are friendly to the goals of the group”).

¹⁸⁶ David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV.

judicial elections are lowering the traditional respect for the courts and the rule of law.¹⁸⁷ In her campaign literature against Justice Becker in the Seat G race, Saitta told the voting public that the Nevada Supreme Court's decisions in deciding *Guinn* "ignored"¹⁸⁸ the Constitution and engaged in "judicial activism,"¹⁸⁹ while simultaneously misrepresenting the *Guinn* decision to the public by feeding them a one-sided and oversimplified version of a rather complex case that was made under serious time-restraints and involved (and ultimately benefited) the education of the children of Nevada.¹⁹⁰ Of course, as Justice Agosti noted, these statements were extreme, one-sided, and simply inaccurate.¹⁹¹ Saitta's statements were nothing more than typical political rhetoric. Despite Saitta's assertions to the contrary, there was no "judicial activism" in the *Guinn* decision, nor did the Nevada Supreme Court "ignore" the Nevada Constitution (a claim that is unconscionable when considering the fact that the disputed provisions of the Nevada Constitution are expressly discussed throughout the *Guinn* opinion).¹⁹²

¶161 Like many cases, the *Guinn* decision is not problem free. However, the Nevada Supreme Court, in passing upon the merits of the case in the midst of a legislative emergency, was not active in soliciting, receiving, or deciding the case; to be sure, the court did not seek out the petition for a writ of mandamus. Rather, the Court took what came, "and within the tradition of service and the boundaries of power and competency [did] the best [it could] to deal with questions put to [it] by others."¹⁹³ In *Guinn*, the Nevada Supreme Court knew that it had been handed a political hot potato when it received the petition from Governor Guinn and, in all reality, the high court probably would have rather avoided touching the question. But, pursuant to its constitutional duty, it did not. Neither Justice Becker, nor the Nevada Supreme Court for that matter, "ignored" the Constitution. In fact, the court did just the opposite and tackled the difficult issue head-on.

¶162 The provision that Saitta accused Justice Becker and the Nevada Supreme Court of "ignoring" is expressly discussed and analyzed numerous times in the *Guinn* opinion,¹⁹⁴ and no informed jurist, commentator, or responsible citizen could, after reading the opinion and giving it thoughtful consideration, ever conclude that the *Guinn* court was "activist," or that the high court had "ignored" the Constitution.¹⁹⁵ At best, even if Saitta did not agree with the *Guinn* opinion, concluding that the court was "activist" and had "ignored" the constitution is a contemptuous assertion, particularly in light of the United

1369, 1373 n.5 (2001) (quoting Richard Woodbury, *Is Texas Justice For Sale?*, TIME, Jan. 11, 1988, at 74).

¹⁸⁷ See Hon. Hugh Maddox, *Taking Politics Out of Judicial Elections*, 23 AM. J. TRIAL ADVOC. 329, 335 (1999) (noting that judicial elections have created a "dangerous decline in the public's faith in impartiality of the judicial branch of government").

¹⁸⁸ See Nancy Saitta Website, *supra* note 164.

¹⁸⁹ *Id.*

¹⁹⁰ See *Guinn v. Nevada State Legislature*, 71 P.3d 1269, 1281 (Nev. 2003), *overruled in part by Nevadans for Nev. v. Beers*, 142 P.3d 339 (Nev. 2006).

¹⁹¹ See Agosti, *supra* note 9, at 881.

¹⁹² See generally *Guinn*, 71 P.3d at 1272.

¹⁹³ See Jenkins, *supra* note 76, at 293.

¹⁹⁴ See generally *Guinn*, 71 P.3d at 1272. Given the explicit discussion of the Constitution in the opinion, it is beyond comprehension how one could ever contend that the Nevada Supreme Court ignored the Constitution.

¹⁹⁵ See Popkin, *supra* note 150, at 308-09; Johnson, *supra* note 150, at 491.

States Supreme Court’s denial of certiorari¹⁹⁶ and the numerous academic articles opining otherwise.¹⁹⁷

¶163 Saitta’s campaign claims against Justice Becker were—to say the least—grossly distorted and “shameless[ly]”¹⁹⁸ and unequivocally hurt the image and public respect for the Court.¹⁹⁹ How can the public respect the judiciary when such blatant misrepresentations and nasty attacks are made in a judicial race? The foregoing problems with Seat G illustrate how such campaign rhetoric destroys the traditional respect for the bench. Indeed, the Seat G rhetoric and misrepresentations demonstrate why today’s public views judicial elections the same way as a typical political race: poorly.²⁰⁰

¶164 Fifth, the Seat G election teaches a great deal about what the public can expect from candidates in future judicial elections. Saitta’s record speaks for itself: she was the most reversed district judge in the State of Nevada;²⁰¹ an extremely inefficient adjudicator of justice (as evidenced by the large backlog of cases, many of which reached back three years) with no legal or academic publications;²⁰² an individual tied to wealthy special interests who wanted to oust Justice Becker;²⁰³ and a judge who presided over and rendered questionable rulings in favor of campaign contributors.²⁰⁴ Yet, despite her poor credentials, she won the election. Noting this fact, it is likely that in future judicial elections the candidates, instead of focusing on relevant factors and responsibly campaigning, will engage in the same smear tactics and distortion as did Saitta. Indeed, Seat G teaches candidates that if they shift the focus of the campaign and misrepresent selected issues, they may prevail despite a lack of experience, scholarly work, or poor legal record. As such, those individuals who “covet higher office”²⁰⁵ will likely mimic such tactics instead of running campaigns that are truly focused on the issues and those qualities that are probative in assessing someone’s capacity to serve on the bench.

C. SJR2

¶165 After years of problems with judicial elections in Nevada, with the independence of Nevada courts hanging by a string, and after being embarrassed by recent news articles in the *L.A. Times*²⁰⁶ regarding the Seat G election, on February 13, 2007, several Nevada legislators introduced SJR2, seeking to amend the Nevada Constitution to eliminate popular judicial elections. In sum, SJR2 was aimed at eliminating Nevada’s practice of popular elections and sought to replace this system with the “Missouri plan,” a practice whereby judges are appointed by the Governor (after being recommended by a nominating commission) and subject to a retention vote after six years, wherein a judicial

¹⁹⁶ See *Angle v. Legislature of Nev.*, 543 U.S. 1120 (2005) (denying petition for writ of certiorari).

¹⁹⁷ See Popkin, *supra* note 150, at 308-09; Johnson, *supra* note 150, at 491.

¹⁹⁸ See Ralston, *supra* note 19.

¹⁹⁹ See Maddox, *supra* note 187, at 335 (noting that judicial elections have created a “dangerous decline in the public’s faith in the impartiality of the judicial branch of government”).

²⁰⁰ *Id.*; see also Caufield, *supra* note 109, at 168 (noting that judicial elections have caused the public to view the judiciary as “corrupt, unethical, unqualified, and incompetent”).

²⁰¹ See Pordum, *supra* note 158.

²⁰² See *supra* text accompanying note 160.

²⁰³ See German, *supra* note 161; see also Skolnik, *supra* note 179.

²⁰⁴ See Goodman & Rempel, *supra* note 6, at B5.

²⁰⁵ *Harris v. Alabama*, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting).

²⁰⁶ See Goodman & Rempel, *supra* note 6, at B5.

commission will issue a report for the public recommending whether to retain the justice or judge.²⁰⁷ SJR2 also mandates that those justices or judges who currently sit on the bench and desire to continue to serve in their office are also subject to a future retention vote and must declare their candidacy by July 11, 2011.²⁰⁸

¶66 On March 8, 2007, the Nevada Judiciary Committee held hearings on SJR2. Various politicians, citizens, law professors, and groups testified for and against certain aspects of SJR2. Senator William J. Raggio, one of the five senators who proposed SJR2 (and who supported similar legislation in 1972 and 1998 that was defeated), testified at a hearing and explicitly discussed the underlying purposes of SJR2. Below are the relevant excerpts from his testimony before the committee:

Elections have become nasty, uncivil and subject to partisan politics.

[J]udicial candidates [are] sitting in outer offices soliciting contributions from attorneys Recently, there was a series in the Los Angeles media which was termed an exposé of the judicial system in Clark County. It gave examples of political solicitations and contributions alleged to have crossed the line.

Too many special interest groups want to place undue pressure on the judiciary to follow their issues. Some groups want to jail judges if they do not go along with what they perceive to be an appropriate decision. Judges should not live in fear or favor in making their decisions.

[J]udges who have been appointed to fill vacancies in the [Nevada] process measure up better than many judges who are initially elected.²⁰⁹

¶67 SJR2, to no surprise, received a warm welcome from the Senate and Assembly judiciary committees, as well as both houses of the Nevada legislature. SJR2 passed in both Houses with no substantive amendments and was sent for signature on May 31, 2007.²¹⁰ Not only was SJR2 treated well in the legislature, but SJR2 also received strong support from the Nevada populace, as evidenced by the assortment of groups, such as the Nevada State Bar, which supported the resolution.²¹¹

¶68 Although SJR2 is a step in the right direction in bolstering judicial autonomy, the amendments SJR2 made to Article VI of the Nevada Constitution are fatally flawed and simply will not eliminate the problems Senator Raggio identified as driving the resolution. Indeed, SJR2 should not include a retention vote provision. One need only consider the judicial election debacle involving Justice Penny White on the Tennessee Supreme Court when considering the problems which will continue to attend judicial

²⁰⁷ S.J. Res. 2, 74th Gen. Assem., Reg. Sess. (Nev. 2007).

²⁰⁸ *Id.*

²⁰⁹ See Nevada Legislature, Minutes of the Senate Committee on Judiciary, Mar. 8, 2007, <http://www.leg.state.nv.us/74th/Minutes/Senate/JUD/Final/486.pdf> (last visited Jan. 22, 2008).

²¹⁰ See Nevada Legislature, Bill History of SJR2, <http://www.leg.state.nv.us/74th/Reports/history.cfm?DocumentType=8&BillNo=2> (last visited Jan. 22, 2008).

²¹¹ See Nevada State Bar, White Paper, <http://www.nvbar.org/pdf/sjr2whitepaper.pdf> (last visited Jan 22, 2008).

elections in Nevada unless Article VI, Section 22 of the Nevada Constitution is amended. The Tennessee Supreme Court race, remember, did not involve a popular vote; it involved a retention vote.²¹² Although Tennessee employed the Missouri plan and did not use popular elections (which is essentially identical to what SJR2 did to the Nevada Constitution), the Governor of Tennessee and various wealthy special interest groups in Tennessee were still able to run distorted campaigns against Justice White based solely on one socially unpopular, yet legally justifiable, decision. And, in the end, Justice White was ousted.

¶69 As a practical matter, the only real difference between Article VI, Section 22 as amended and Nevada's previous method of popular elections is that under the new Article VI, Section 22, judges will be initially appointed to the bench by the Governor instead of being elected by popular vote. But this difference does not make a difference. Indeed, the only benefit this change would bring would be to prevent inexperienced candidates (who were only there because of their wealth)²¹³ from running and being elected to the bench. Aside from this marginal benefit, however, every other problem Nevada experienced with popular judicial elections will remain under Article VI, Section 22. Judges will still solicit donations. Judges will still run campaigns, truthful or not. Judges will still be beholden to campaign contributors. As such, Article VI, Section 22, as it now reads, is a failure and will not protect and promote judicial independence as a whole and cannot cure the problems which Senator Raggio identified as driving the resolution.²¹⁴ Indeed, because Nevada retained a retention vote in its appointment method for judgeships, Nevada will continue to see incumbents campaigning, incumbents soliciting contributions, and special interest and political groups mounting attacks on candidates.

¶70 The foregoing realities demonstrate the dire need for the Nevada legislature to rethink and amend Section 22 of the Nevada Constitution to eliminate judicial elections completely. Indeed, given the undeniable failure of the Missouri plan in those states that have adopted retention elections (e.g., Tennessee), it is imperative that the Nevada legislature rethink and rewrite Article VI, Section 22 so that the independence of Nevada's judiciary can be bolstered and the problems that Senator Raggio identified may be eliminated.

¶71 To eliminate the problems of judicial elections and bolster judicial independence, this article proposes that SJR2 be amended to delete the retention vote provision, and that Section 22 be rewritten to provide for: (1) Senate confirmation of nominees appointed by the Governor, (2) twelve-year judgeship terms,²¹⁵ and (3) a determination that all

²¹² See generally Uelman, *supra* note 115.

²¹³ Cf. Republican Party of Minn. v. White, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring) (noting that "[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.").

²¹⁴ A retention vote means, of course, that there is no opposing candidate against whom to measure the incumbent—another flaw in an already flawed social experiment.

²¹⁵ Of course, in providing for fixed twelve-year terms, it would be preferable if all of the justices do not leave the court at the same time. Indeed, given the complexity of the administrative aspects of a Supreme Court, it would be highly desirable to have several justices on the bench when new justices arrive, so that the new justices could learn the ropes, so to speak. This issue presents a problem in the initial implementation of fixed twelve-year terms because if the twelve-year rule applies to all from the date of the amendment (which will hopefully be in 2008), the Nevada Supreme Court would have seven new justices in 2020. Given the current composition of the court, however, it is likely that the court could develop some

justices/judges currently sitting on the bench prior to enactment of SJR2 are subject to SJR2's provisions (i.e., if a judge was elected three years ago, she will have nine more years on the bench; if a judge was elected or re-elected one year ago, he or she will have eleven years on the bench, etc.).²¹⁶ Specifically, I suggest that Sections 22 (1)-(9) be completely deleted and rewritten as follows:

Section 22

1. Each Justice of the Supreme Court, judge of the Court of Appeals, if established, or judge of the District Court, shall be appointed by the Governor, after being nominated by a nominating commission by and with the consent of a majority of all the members elected to the Senate, for the term of twelve (12) years each, with no reappointments thereafter, and the persons so appointed shall enter upon the discharge of the duties of their respective offices upon taking the oath of office prescribed by this Constitution. Before sending the name of any person to the Senate for confirmation as the appointment of the Governor to a vacancy in any Judicial Office as aforesaid, the Governor shall, not less than ten (10) days before sending the name of such person to the Senate for confirmation, address a public letter to the President of the Senate informing him or her that he or she intends to submit to the Senate for confirmation as an appointment to such vacancy the name of the person he or she intends to appoint.
2. All Justices or Judges in office prior to enactment of Section 22(1)-(2) shall be subject to these provisions and shall be deemed in office for the

type of initial internal rule or agreement to provide for staggered departures. Presently, the Nevada Supreme Court has two justices elected in 2007 (Justices Saitta and Cherry), three in 2004 (Justices Douglas, Hardesty, and Parraguire), one in 2003 (Justice Gibbons) and one in 1996 (Chief Justice Maupin). Worst case scenario, even if an internal rule could not be promulgated, the Nevada Legislature could simply create a section in Article VI that starts the twelve-year time period from the time in which the justice was initially appointed. Thus, Justices Saitta and Cherry would leave in 2019, Justices Douglas, Hardesty and Parraguire would leave in 2016, Justice Gibbons in 2015. Of course, this method would only be problematic for the Chief Justice, and the Nevada legislature could simply give him an initial extension for a period of time that they deem reasonable.

²¹⁶ At the early stages of implementation, it is possible that the Nevada Supreme Court may (depending on the current composition and the amount of time before amendments are adopted) be in a position whereby the Governor is able to stack the court with nominees from his party. This fact, of course, may be cause for concern. Ergo, if it turns out that this may be a reality at the time of the adoption of the amendments suggested above, the Nevada legislature may want to consider an addition to Section 22 of the Nevada Constitution that would eliminate the possibility that the court is packed with nominees of only one party. This issue is beyond the scope of this article, but the author suggests that, if this issue arises, the Nevada legislature consider provisions from other states that have dealt with this problem. For example, in Delaware, the legislature addressed the problem by adding the following provision to the Constitution:

Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations: First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

DEL. CONST. art. IV, § 3.

amount of time the Justice or Judge has been in office since the most recent election or appointment.²¹⁷

¶72 By amending Section 22 as suggested above, judicial elections will be eliminated in Nevada, and so will the problems associated with this flawed and dangerous method. To be sure, abolishing judicial elections from Nevada will not only eliminate the very real possibility that judges may look to the next election when rendering their legal decisions, but it will also remove the other serious problems discussed earlier, namely: (1) judicial campaigning, (2) judges soliciting contributions, and (3) special interests running campaigns against incumbents to have them removed for unpopular decisions. As a result, the amendments that this article suggests to Article VI, Section 22 of the Nevada Constitution will create a system of judicial appointment whereby judges need not campaign or solicit contributions, and the potential for judges to feel beholden to wealthy special interest or political parties will be non-existent, thus allowing Nevada judges to make their decisions solely upon the rule of law and facts of the case.

¶73 Not only will amending Section 22 of the Nevada Constitution as suggested above eliminate many of the problems with judicial elections and campaigning, but it will also provide a balanced method of appointment that addresses the concerns of having judges appointed by the executive branch.²¹⁸ Indeed, this article's suggestions will provide for the people, via their elected representatives, an opportunity to object to, or even prevent

²¹⁷ This language was drawn, in large part, from Delaware's Constitutional provision regarding judicial appointment. See DEL. CONST. art. IV, § 3 (Governor appoints judges and justices, with advice and consent of the Senate, for twelve-year terms). It also resembles constitutional provisions or laws that are in place in ten other states and the District of Columbia—all of which appoint judges to fixed terms with no retention votes. See CONN. CONST. art. 5, § 2 (Governor nominates judges from a list that a judicial selection commission submits, for eight-year terms); HAW. CONST. art. VI, § 3. (Governor appoints judges, from a judicial selection commission's list of nominees and with consent of the Senate, for ten-year terms; judicial selection commission determines retention); ME. CONST. art. 5, pt. 1, § 8 (Governor nominates judicial officers, with confirmation by a committee from both houses of the legislature), art. 6, § 4 (judges hold office for seven-year terms); MD. CONST. art. 4, § 41D (Governor appoints district court judges, with advice and consent of the Senate, for ten-year terms); MASS. CONST. pt. 2, c. 2, § 1, art. 9 (Governor appoints all judicial officers, with advice and consent of the Governor's Council), pt. 2, c. 3, art. I (judicial officers hold office during good behavior); N.H. CONST. pt. 2, art. 46 (Governor and Council appoint judicial officers), pt. 2, art. 73 (judges hold office during good behavior); N.J. CONST. art. 6, § 6, paras. 1, 3 (Governor appoints judges and justices, with confirmation by the Senate, for initial seven-year terms; upon reappointment judges and justices serve during good behavior); N.Y. CONST. art. 6, § 2 (Governor appoints court of appeals judges, with advice and consent of the Senate, for fourteen-year terms); R.I. Const. art. X §§ 4-5 (1994) (Governor appoints superior court and district court justices, with confirmation by the Senate; justices hold office during good behavior); VT. CONST. ch. II, §§ 32, 34 (Governor appoints judges from a judicial nominating body's list of candidates, with advice and consent of the Senate, for six-year terms; general assembly votes for retention; general assembly can vote by simple majority to remove); D.C. CODE ANN. § 11-1501 (1995) (President selects judges from names that a commission recommends, with advice and consent of the Senate, for fifteen-year terms; judicial qualification commission reviews performance).

²¹⁸ Recently, Professors Calabresi and Lindgren called for the abolishment of life tenure for United States Supreme Court Justices and proposed, among other things, fixed eighteen-year terms for the Justices. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 769 (2006). In making this proposal, Professors Calabresi and Lindgren's proposal revolves around the major concerns of life tenure, which they claim are "the Court's resistance to democratic accountability, the increased politicization of the judicial confirmation process, and the potential for greater mental decrepitude of those remaining too long on the bench." *Id.* at 809. The concerns of Professors Calabresi and Lindgren are applicable on the state level and are addressed by the proposed amendments that this article makes to Article VI, Section 22 of the Nevada Constitution.

certain judges who are clearly inexperienced, unqualified or perhaps radical, from sitting on the bench.²¹⁹ Moreover, amending Section 22 of the Nevada Constitution as suggested above will limit the time during which judges are in office so as to avoid the potential that one political party will pack the court, as well as ensure that judges do not become entrenched in their positions.²²⁰ Additionally, fixed terms of twelve years will also ensure that judges will be afforded a sufficient amount of time to learn their duties as judges so that they may competently perform their judicial duties, while at the same time ensuring that the court will continuously be provided with fresh minds.²²¹ Although disallowing reappointment may, in some cases, preclude a competent and talented jurist from serving on the bench in the future, it is unlikely that states would be unable to find new talent to sit on the bench every twelve years. If issues arise as to reappointment and a state finds that it is best to allow for reappointment, it is always free to add a provision within its Constitution that would permit a judge or justice to be reappointed.

¶74 If the retention portions of Section 22 of the Nevada Constitution are not deleted, Nevada will continue to experience virtually all of the same problems it has experienced with popular judicial elections. Indeed, as the Justice Penny White debacle demonstrates, nothing in Section 22 of the new Nevada Constitution will prevent another Seat G-like catastrophe, and Nevada's legislative attempt to bring respect and independence to the judiciary will fail and bring Nevada back to square one. By amending Section 22 of the Nevada Constitution as recommended, Nevada can avoid the pitfalls and evils of judicial elections, and Nevada's judicial branch of government can be freed from the problems of electing judges to the bench. Further, amending Section 22 of the Nevada Constitution will, on a much broader level, bolster the independence of the judiciary across America, protect individual rights, and further the public's respect for the judicial system as a whole.

IV. CONCLUSION

¶75 The Seat G election illustrates the dire need for states to abandon judicial elections in all forms. Indeed, given that the ills associated with judicial elections have now spread into the civil realm of dispute resolution, this flawed Jacksonian method of placing judges on the bench is more dangerous than ever before.

¶76 The framers of our federal Constitution "knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher

²¹⁹ Cf. Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 201 (2007) ("Although Justices of the Supreme Court are not elected, they owe their appointments to elected officials—the President and the Senate.").

²²⁰ One of the more prevalent concerns about life tenure is that judges will become too entrenched and resistant to new ideas. *Id.* (noting that "life tenure of federal judges allows them to become entrenched and to exercise power long after the political regime that empowered them has disappeared"); see generally Calabresi & Lindgren, *supra* note 218; Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800 (1986). This concern, however, has no real bite. See Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 499 (1975) (noting that, in testing the "bureaucratic judicial arteries," there was little evidence to support the hypothesis that tenured judges make irresponsible or poor legal decisions); Gregory C. Sisk, Andrew P. Morriss & Michael Heise, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1486 (1998) (noting that life tenure does not cause senior federal judges to become entrenched in their ways and resistant to new ideas).

²²¹ See Calabresi & Lindgren, *supra* note 218, at 815-18.

authority,”²²² and they took great pains to ensure that the new Republic that they had formed had a strong and independent judiciary.²²³ The American experience with judicial elections, just like our forefathers’ painful experience with the King’s control of the judiciary in colonial times,²²⁴ counsels against judicial elections. To be sure, judicial elections, as the Seat G election demonstrates, create a situation that may cause a judge to be “too responsive to the voice of higher authority”²²⁵ and threatens liberty and the public’s respect of the judicial institution. When one considers the modern day evils of judicial elections and their threat to judicial independence, to individual rights and to the integrity and esteem of the court, in conjunction with the spread of these problems into the civil realm of dispute resolution and the harsh political landscape in which judges now operate, it is clear that Nevada, as well as all other states, should eliminate this “disgraceful”²²⁶ “scourge”²²⁷ from society.

¶77

Given the increasing role of state courts in the protection of individual rights,²²⁸ it is imperative that states have methods of appointment in place that ensure that their judges are independent and free to make decisions without fear of public reprisal. When a state has a system in place that permits a judge to be displaced because of a single unpopular decision, the entire process of orderly and peaceful adjudication of disputes is disrupted, as well as the entire foundation of our court system.²²⁹

²²² *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

²²³ See Cal. Chief Justice Ronald M. George, *Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345, 1346 (2005).

²²⁴ See *supra* notes 49-59 and accompanying text.

²²⁵ *Duncan*, 391 U.S. at 156.

²²⁶ See TAFT, *supra* note 2, at 418.

²²⁷ See Fordham & Husted, Jr., *supra* note 2, at 61 (quoting Proceedings and Debates of the Virginia State Convention of 1829-30, at 615-19 (1830)).

²²⁸ See Bright & Keenan, *supra* note 10, at 768-69.

²²⁹ In this final footnote, I would like to make it unequivocally clear that, just because judicial elections *may* produce judges who are less qualified, and just because judicial elections *may* produce judges who may feel compelled to consider outside influences in making legal decisions, I am not saying that all, or even the majority of elected judges on the state level are less qualified, or that all state judges disregard what the law compels them to do just because it may be politically unpopular. Indeed, prior to my clerkship with Judge Greene on the federal level, I was a law clerk to Nevada State Senior District Judge James Brennan. Judge Brennan was highly capable, bright, a published author, experienced, thoughtful, and did not consider, in all the cases on which I worked for him, any improper outside influences or otherwise jeopardize his independence as a judge. Although Judge Brennan was a senior judge and therefore not subject to the same pressures as his colleagues who did not have senior status, I believe Judge Brennan represents the large majority of judges in Nevada.