

THE ROLE OF SECTION 5 OF THE VOTING RIGHTS ACT IN THE DEBATE OVER ELECTED JUDGES IN TEXAS

BY GREGORY S. COLEMAN (*Deceased*) & RENEA HICKS

THE DEBATE OVER WHETHER TEXAS SHOULD CHANGE its method for selecting judges focuses on issues of state public policy. But federal policy also plays a role. The debate over judicial selection for Texas cannot avoid, as it has, taking the federal policy into account—and, even so, may not be able to overcome it.

I. Introduction

Texas is one of only seven states that currently select judges by partisan election.¹ Yet, nationwide, “the debate rages . . . over whether judges should be ‘appointed’ or ‘elected,’ identified by party affiliation or prohibited from any partisan activity, subject to a contested race for re-election or merely an up-or-down ‘retention’ referendum, bound by the same ethical and electoral rules as other public officials, or treated as wholly distinct from the political branches.”² In Texas, the debate—which hardly reaches the level of rage, but does ebb and flow—over whether to retain the longstanding system of choosing judges by partisan election has generally focused on the policy question whether or not the state *should* move to an appointed judiciary. But rarely, if ever, has attention been focused on whether Texas *could* move to eliminate judicial elections under the strictures of the Voting Rights Act.³ Specifically, §5 of the VRA⁴, which requires Texas to “preclear” any changes affecting voting with the U.S. Department of Justice or the federal district court for the District of Columbia, stands between the current Texas judicial selection system and any move away from judicial elections. Clearing this hurdle likely will be difficult, some say impossible. At a minimum, those aiming to change the current system would be ill-advised to proceed much further without contemplating what might be required to clear the hurdle.

Criticisms of the practice of choosing judges by election, in Texas or elsewhere, continue unabated, with some commentators purporting to observe an increase in the politicization of elected judiciaries in recent years.⁵ Critics of the practice of selecting Texas judges by election—including former Texas Supreme Court Chief Justice Tom Phillips and current Chief Justice Wallace Jefferson—point to increasing concerns over the role that campaign contributions and special interests

can play in partisan elections for state judges.⁶ Supporters of judicial elections hesitate to cede so much power to the governor (who would presumably do the appointing) and to absolve judges of direct accountability to the electorate. Striking the right balance between judicial independence and judicial accountability is not getting any easier.

The appointed-versus-elected debate in Texas has to this point, however, largely failed to account for the significant hurdle to any change from elected to appointed judges posed by the VRA, specifically §5. Section 5 requires that any change to voting practices in Texas receive preclearance from the Department of Justice or the D.C. federal district court. In the past, the Justice Department has applied §5—in Texas and elsewhere—in ways indicating that it regards with considerable skepticism moves away from electing officials to appointing them because it is concerned that such moves can be retrogressive in terms of minority voting rights, which is impermissible under §5. The D.C. district court has indicated that the state’s burden in this context is, at least, quite significant. The state would likely need to show that the projected makeup of an appointed judiciary, as compared to an elected one, is not unfavorable to minorities and that minorities exert sufficient voting power over the official (presumably, the governor) who would do the appointing. These interpretations of §5 show that it would likely play a significant role in any attempt to move from selecting Texas judges by election to selecting them by appointment.

II. The Debate in Texas Over Appointed Versus Elected Judges Has Thus Far Ignored the Ramifications of §5

The debate in Texas over elected or appointed judges is by no means a new one, and Texas has at different points in its history either appointed or elected its judges. When Texas was a new state, the governor appointed judges with the consent of the state senate.⁷ By the second half of the Nineteenth Century, Texans had opted to have their judges selected by popular election.⁸ Texas judges were appointed during Reconstruction. With the adoption of the Texas Constitution of 1876, Texas again resumed electing its judges, a practice that, at least in large part, remains in

effect, and is constitutionally mandated, today.⁹

Texas became subject to §5 of the VRA in 1975.¹⁰ The long-standing debate in Texas over appointed judges, however, has essentially ignored the VRA and §5. Well after §5 was on the books, indeed even as late as 2003, legislation calling for gubernatorial appointment of judges, with retention elections, found significant traction in the legislature, seemingly without any in-depth consideration of §5's role.¹¹

The VRA was “designed by Congress to banish the blight of racial discrimination in voting,” and it was later expanded to address discrimination against members of language-minority groups as well.¹² Section 5 requires “covered jurisdictions,”¹³ including Texas, “to obtain . . . ‘pre-clearance’ from the District Court for the District of Columbia or the DOJ before enacting or seeking to administer any alteration of their practices or procedures affecting voting.”¹⁴ State judiciaries—at least elected ones—are not immune from its strictures. The Supreme Court, unanimously, made it quite clear that §5 applies to judicial selection in the covered jurisdictions, which means it applies to Texas's judicial selection.¹⁵ As the Court stated in a companion case out of Texas, involving §2 of the Voting Rights Act, “[i]f a State decides to elect its trial judges, as Texas did in 1861, those elections must be conducted in compliance with the Voting Rights Act.”¹⁶

The rule actually goes further. Even if a state covered under §5, at any rate—decides it no longer wants to elect its judges, it has to comply with §5 in making a changeover. The Supreme Court has made clear that “a change from election to appointment is a change with respect to voting and thus [is] covered by §5.”¹⁷ The Department of Justice's guidelines for implementing §5 embody this rule. “Any change . . . in the offices that are elective (e.g., by . . . changing from election to appointment . . .)” is expressly made subject to §5 preclearance requirements.¹⁸

The substantive test for whether something subject to preclearance is *entitled to* preclearance focuses on the purpose and effect of the change insofar as minority voters are concerned. Changes with respect to voting are not eligible for preclearance if they are intended to or will “have the effect of denying or abridging the right to vote on account of race or color, or because of membership in a language minority group.”¹⁹ A change has the “effect of denying or abridging the right to

vote if it leads to retrogression in the position of racial or language minorities with respect to their effective exercise of the electoral franchise.”²⁰ In other words, a change affecting voting cannot leave “minority voters worse off than they were prior to the change.”²¹

A shift by Texas to selecting judges by appointment rather than election would, it would be expected, be made for policy reasons having nothing to do with a desire to leave “minority voters worse off.” The most prominent vocal proponents of an appointed judiciary in modern-day Texas espouse good-government and good-jurisprudence rationales, not race-based motivations.²² We can assume for present purposes that these kinds of motivations will carry the day on the “intent” side of the §5 ledger. That still leaves the question of racially discriminatory effect to be dealt with.

There is no doubt that minority voters would lose electoral opportunities with a switch to appointed judges. Everyone would. That is the

plan. By definition, the switch to an appointed judiciary would mean that numerous government offices that have long been elective offices will be elective no more. The issue under §5 becomes, then, whether replacing an elective office with an appointive one—a change that, broadly taken, affects all voters' electoral opportunities—is retrogressive, and thus precluded by §5.

III. Preclearance for Any Texas Switch from Elected to Appointed Judges Could Be Difficult to Obtain

If past decisions are any guide, Texas could face a difficult task in convincing the Justice Department or the D.C. district court to preclear a move from electing to appointing judges, regardless of the underlying motive. The recent opinion in *Riley v. Kennedy*²³ provides useful insight into the Justice Department's reasoning on the issue. The case involved an attempt to change the method of replacing county commissioners in Mobile County, Alabama from special elections to appointment. Although the Supreme Court's opinion ultimately addressed the quite technical question of whether a specific state law had originally been in force or effect,²⁴ not whether the Justice Department's retrogression formulation was valid, the opinion includes an instructive quotation from the Justice Department's refusal to preclear the change at issue. That quotation could presage the Justice Department's analysis of whether a change in Texas from electing to appointing *all* judges would be impermissibly retrogressive:

The VRA was “designed by Congress to banish the blight of racial discrimination in voting,” and it was later expanded to address discrimination against members of language-minority groups as well.

“The African-American voters of District 1,” the DOJ explained, “enjoy the opportunity to elect minority candidates of their choice under the [scheme requiring elections to fill midterm vacancies for county commissioner positions]. . . . A change to gubernatorial appointment would be retrogressive because it “would transfer this electoral power to a state official elected by a statewide constituency whose racial make-up and electoral choices regularly differ from those of the voters of District 1.”²⁵

The Justice Department’s reasoning as quoted in *Riley v. Kennedy* is particularly relevant to the Texas judiciary because most judges in Texas are elected on a county-based district, not statewide, basis while the governor, of course, is elected in a statewide race. If the Justice Department hews to this analytical approach in the Texas “switchover” context, it at least means that there will be a district-level analysis—which effectively means county-by-county—of how any change to appointive would affect the opportunities of minority voters that have been in place up to the changeover.

An example from New York City further confirms the difficult hurdle Texas will have to clear if it expects the Justice Department to preclear a Texas shift to appointed judges. The example again shows there is no particular reason for optimism on the reformer’s side. In the 1980s and 1990s, New York state law required elections for selecting the state’s judges for its supreme courts (*i.e.*, trial courts). During that time, however, the state temporarily appointed judges from “the New York City Civil Court and Criminal Court or . . . the State Court of Claims” to serve on the supreme courts to help “cope with a steadily increasing caseload.”²⁶ In 1994, New York belatedly sought preclearance for these past practices, and for other similar practices going forward. The Justice Department denied preclearance.²⁷

A fairly recent §5 experience from Texas also reflects the difficulties that have to be faced in obtaining preclearance for a shift to appointed judges. The Texas legislature in 1993 passed Senate Bill 1477, increasing local regulatory powers with respect to groundwater,²⁸ and replacing the Edwards Underground Water District, as well as some other groundwater districts, with the Edwards Aquifer Authority (EAA).²⁹ The EAA’s powers were greatly expanded, but while the board of the Edwards Underground Water District was an elected body, the board of the new EAA was to be appointed.³⁰ The Justice Department denied §5 preclearance to Senate Bill 1477. Following the Justice Department’s refusal to preclear, Texas filed suit in the district court for the District of Columbia.

The court rejected the state’s argument “that retrogression will always be present if an elected system is replaced with an appointed system because minority voters will always have diminished voting power, *i.e.* it will be reduced to zero” and thus “Congress could not have intended to establish Section 5’s ‘effects’ prong as a prohibition on eliminating elected offices.”³¹ The court found that the change was subject to a retrogression analysis regarding the actual effect of the change from an elected to an appointed body on minority-voter influence.³² The court refused to grant the state’s motion for summary judgment on the preclearance issue. Specifically, the court noted that to show no retrogressive effect, the state would need to demonstrate that, “were the election [for the board] held today,” minority representation on an appointed board would not be worse than on the elected board.³³ The court also pointed out that “retrogression can be evaluated by examining the power of minority voters to elect the officials who appoint the [board] members of the EAA,”³⁴ which was an examination the state had yet to undertake.³⁵ Texas did not pursue the matter to final judgment because of the time pressures of the endangered species litigation and, ultimately, the legislature amended the Edwards Aquifer Authority Act to provide for the EAA board to be selected by election.³⁶

Whether these principles will be applied with their full force to any changeover to a more pure appointive judicial system for Texas remains to be seen, of course. Even as it refused to exempt state judiciaries from at least coverage under §2, the Voting Rights Act’s main antidiscrimination provision, the Supreme Court certainly showed a solicitude for the public policy of having state judiciaries appointive rather than elective:

The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.³⁷

And, right after this encomium to appointed judiciaries, the Court provided at least a peek into its basic mindset on the §5 switchover issue when it said that the state (there, Louisiana, but it could as well have been Texas) “could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion.”³⁸ What is unremarked upon in this passage is that the state—otherwise covered under §5—can’t get to that point without running the §5 preclearance gauntlet.

Then, in the companion §2 case out of Texas, the Court distinguished §2 coverage issues from the test of validity once coverage was established. There, the Court explained that the policy reasons underlying the state's configuration of its district judge election system belong not at the beginning, but at the end of the Voting Rights Act analysis. That is, the policy rationales for a given judicial selection system can play a role in determining whether the system is ultimately a valid one under the Voting Rights Act, even though they can't play a role in determining whether the system has to be put through full analysis under the Act. Whether and how this approach meshes with the §5 examples that have been discussed is unclear.

IV. Conclusion

To the extent the Department adheres to its past views on efforts to empower an official elected in a statewide election to appoint officers to positions previously filled in non-statewide elections, an attempt to simply do away with all judicial elections and adopt some form of judicial appointment is going to face intense Justice Department scrutiny and stands a good chance of failing to satisfy it. Moreover, obtaining preclearance to appoint even those judges currently selected in statewide elections—the Justices on the Texas Supreme Court and Court of Criminal Appeals—would require a significant showing by the state. That showing might include, for example, a demonstration that, were an election held today, the appointed judiciary would not include fewer minority members than an elected one, and that the voting power of minorities to select the governor (*i.e.*, the person who will appoint the judges) is at least as strong as their current power to elect judges. But, other factors, too, would undoubtedly have to be brought into play, with the fundamental focus being on what any change does to the before-and-after electoral opportunities of minority voters.

At the very least, the anti-retrogression requirement of §5 may require that, if they are to be appointed, judges below the statewide Supreme Court and Court of Criminal Appeals level be appointed at some level lower than the governor's office, by officials chosen by electorates in which the voting strength of minorities is consistent with their voting strength in currently drawn judicial districts. The logistics of such a system would certainly present a challenge.

The ongoing debate in Texas over appointed versus elected judges needs to take into account §5 of the VRA, which to this point has been largely, if not totally, absent from the discussion. If §5 is not taken into consideration, any decision by Texas legislators and voters to move from an elected to an

appointed judiciary is likely to come to naught.

Gregory S. Coleman was a partner at Yetter Coleman LLP in Austin. From 1999-2001, Mr. Coleman was the Solicitor General of Texas.

Renea Hicks is in solo practice in Austin. From 1993-1995, Mr. Hicks was the State Solicitor of Texas. ★

¹ Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, and West Virginia are the others. See Am. Judicature Soc'y, www.judicialselection.us; see also A.B.A. Coalition for Just., *Jud. Selection: The Process of Choosing Judges 7* (2008). New Mexico's system is somewhat of a hybrid system, with aspects of both election and appointment. See Am. Judicature Soc'y, www.judicialselection.us.

² Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL'Y 67, 68 (2009).

³ 42 U.S.C. §1971, *et seq.*

⁴ 42 U.S.C. §1973c.

⁵ E.g., Phillips, *supra* note 2, at 70-71 ("Some recent studies suggest that contested elections produce judges with less institutional independence and more result oriented jurisprudence.").

⁶ Phillips, *supra* note 2, at 79 ("The common denominators are campaign money and special interest agitation, making judicial elections 'nastier, noisier, and costlier' than ever before."); see Chuck Lindell, *Should Texas Judges Be Appointed Instead of Elected?*, AUSTIN AM.-STATESMAN, Apr. 20, 2009, available at <http://bit.ly/aFZwLd> (citing a February 2009 speech Chief Justice Jefferson delivered to the Texas Legislature in which he is reported to have noted that "party affiliation [too often] trumps a candidate's qualifications, and the influence of campaign money destroys public confidence in both justice and the judges who administer it" when judges are elected in partisan elections).

⁷ KYLE CHEEK & ANTHONY CHAMPAGNE, *JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS 5-6* (Peter Lang Publishing, Inc., New York 2005).

⁸ *Id.*

⁹ *Id.*; see TEX. CONST. art. V. Closely scrutinized, Texas's system is really, in practice, a hybrid one. It is not purely elective. In 2009, for example, Texas district courts were presided over for nearly 11,000 days of court time by judges who were not currently serving an elected term for the court in which they presided. See ANNUAL REPORT FOR THE TEXAS JUDICIARY, FISCAL YEAR 2009 38 (Office of Court Administration 2009), available at <http://www.courts.state.tx.us/pubs/AR2009/AR09.pdf> (Assigned Judges in the Trial Courts). This circumstance would potentially play at least a minor role in the §5 analysis of retrogression, which compares new electoral arrangement to a preexisting "baseline."

¹⁰ See Voting Rights Act Amendments of 1975: Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 23, 1975).

¹¹ In 2003, the Texas Senate approved Senate Bill 794, which called for "gubernatorial appointment and retention of judges of the supreme court and court of criminal appeals." See Am. Judicature

Soc’y, History of Reform Efforts: Texas, <http://bit.ly/9ljUxf>. The measure stalled in the House, before it would have been subject to §5 scrutiny by the Justice Department. *Id.*

¹² *Riley v. Kennedy*, 553 U.S. 406, 411, 128 S. Ct. 1970, 1976 (2008).

¹³ 28 C.F.R. Part 51 (listing the covered jurisdiction, including all or part of Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia).

¹⁴ *Riley*, 553 U.S. at 412, 128 S. Ct. at 1977 (internal quotation marks and brackets omitted).

¹⁵ See *Clark v. Roemer*, 500 U.S. 646 (1991).

¹⁶ *Houston Lawyers’ Ass’n v. Att’y Gen. of Tex.*, 501 U.S. 419, 426 (1991).

¹⁷ *Id.* at 420, 128 S. Ct. 1982 (internal quotation marks omitted); *Allen v. State Bd. of Elections*, 393 U.S. 544, 569-70, 89 S. Ct. 817, 833-34 (1969).

¹⁸ 28 C.F.R. §51.13(i).

¹⁹ *Id.*, at 412, 128 S. Ct. at 1977 (internal brackets omitted).

²⁰ *Id.*

²¹ U.S. Dep’t of Justice Civil Rights Division, Voting Section, Frequently Asked Questions, <http://www.justice.gov/crt/voting/misc/faq.php>; see also *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364 (1976).

²² Under new §5 guidelines under consideration by the Department of Justice to implement the 2006 renewal of the Voting Rights Act, the test for discriminatory intent or purpose would follow the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). See 75 Fed. Reg. 33213 (June 11, 2010) (proposed 28 C.F.R. § 51.54(a)). This standard, if adopted, takes into account several factors beyond public statements of intent.

²³ 553 U.S. at 406, 128 S. Ct. at 1970.

²⁴ The case involved whether midterm vacancies on the Mobile County Commission should be filled by special elections or gubernatorial appointment. At the time Alabama came under the VRA in 1965, midterm vacancies were filled by gubernatorial appointment. A 1985 law required that such vacancies be filled by special election. The Justice Department precleared the change. But not long after the first midterm vacancy was filled by special election, the Alabama Supreme Court struck down the law mandating special elections. The vacancy was then filled by appointment.

Almost 20 years later, another midterm vacancy arose, which the governor filled with an appointee. A lawsuit followed in which the plaintiffs alleged that a state law passed in 2004 had cured the constitutional defect in the 1985 law requiring special elections. Because the 2004 law cured the defect, the plaintiffs argued, the 1985 law established the baseline practice in Alabama of filling midterm vacancies by special election. And because that was the baseline, Justice Department preclearance was required before any appointments could be made. The Court ultimately held that the 1985 law was never in force or effect for §5 purposes. Thus, the baseline practice was to fill vacancies by appointment and

no preclearance was required to appoint commissioners to fill midterm vacancies.

²⁵ *Riley*, 553 U.S. at 417, 128 S. Ct. at 1980.

²⁶ Joseph P. Fried, *Wide Use of Unelected Judges Prompts Voting-Rights Inquiry*, N.Y. TIMES, July 19, 1994, available at <http://nyti.ms/aYktzr>.

²⁷ Juan Cartagena, *Voting Rights in New York City: 1982-2006*, 17 S. CAL. REV. OF L. & SOC. JUST. 501, 509-10 (2008).

²⁸ Texas was under the gun with respect to increasing regulation of the Edwards Aquifer because of federal court rulings under the federal Endangered Species Act that too much groundwater was being pumped in parts of the aquifer.

²⁹ The Edwards Aquifer Authority Website, Laws and Regulations Applicable to the Edwards Aquifer, <http://www.edwardsaquifer.net/rules.html>.

³⁰ *Id.*

³¹ *State of Tex. v. United States*, 866 F. Supp. 20, 27-28 (D.D.C. 1994).

³² *Id.* at 28.

³³ *Id.*

³⁴ The EAA board members were to have been appointed by a number of different non-statewide governmental bodies, not the governor. *Id.* at 28.

³⁵ *Id.* In an earlier case, the D.C. district court considered similar factors in connection with a move in the other direction—from an appointive system to an elective system for selecting the governing board of a North Carolina County. *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694, 704 -06 (D.D.C. 1983). Evidence that, under an appointive system, the board might include at least two African-American members while the elected board contained none and assertions that the county-level at-large election scheme might dilute the African-American vote raised issues that precluded a summary judgment finding that there was no retrogression. *Id.* at 705-06.

³⁶ The Edwards Aquifer Authority Website, Laws and Regulations Applicable to the Edwards Aquifer, <http://www.edwardsaquifer.net/rules.html>.

³⁷ *Chisom v. Roemer*, 501 U.S. 380, 400-01 (1991).

³⁸ *Id.* at 401.