

January 1995

## Foreword

Craig Enoch

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### Recommended Citation

Craig Enoch, *Foreword*, 48 SMU L. REV. 723 (1995)  
<https://scholar.smu.edu/smulr/vol48/iss4/2>

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# FOREWORD

Justice Craig Enoch\*

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NOT long ago, Charles Moody<sup>1</sup> and I had teamed up to write an article addressing proposals for finance reform of judicial elections in Texas. In the process we found ourselves pondering a fundamental question — what is the proper role of judges in a society that has vague, but strongly held, notions of democracy and concerns over who “picks” the judges? It is my honor to provide this year’s Foreword to the *SMU Law Review’s 1995 Annual Survey of Texas Law*. In setting the tone for this volume, it appears to me to be particularly appropriate to tweak the subject of judicial selection in Texas. But rather than enter the war of words over how we should select our judges, I believe there has been too little debate over the question Charles and I confronted — a question which I believe must be answered before the citizens of this State could ever hope to come to a consensus on a proper method of selection. To state the question:

“Judicial accountability” has a virtuous ring to it, until one asks, “accountability” for what?<sup>2</sup>

What follows are our reflections on this basic question.

### I. JUDGES IN THE POLITICAL ARENA

By now the problem highlighted seven years ago in the *60 Minutes* broadcast raising the question “Justice for Sale?”<sup>3</sup> is a familiar one to

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1. Formerly briefing attorney for Chief Justice Tom Phillips of the Texas Supreme Court, now with Graves, Dougherty, Hearon & Moody in Austin, Texas.

2. Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 3 (1992).

3. *60 Minutes: Justice for Sale?* (CBS television broadcast, Dec. 6, 1987).

most Texans, lawyers and non-lawyers alike. The immediate focus of that story was the substantial contributions made to the presiding judge in the *Texaco v. Pennzoil* case,<sup>4</sup> who was then up for re-election, by the lawyers on both sides of the case. The broader topic was the influence of money on judicial elections and judicial performance.

Texas is among an increasingly smaller handful of states that still elect their judges through party-affiliated primary ballots and at partisan general elections.<sup>5</sup> Like state representatives and senators, governors, U.S. representatives and senators, and Presidents, judges in Texas must make political appearances and advertise. Such campaigning costs money. More than perhaps any other issue in the selection of judges, how the funds necessary to support a successful campaign are generated should squarely focus attention on the role of the judge and the propriety of judges acting like politicians.<sup>6</sup>

Since the *60 Minutes* story, some changes have occurred in Texas, though not all for the better. All the judges involved in that *60 Minutes* program are no longer serving, having either retired, not sought reelection, or been defeated in their next election. Also, voters appear to be more selective in their voting patterns, not casting their votes along either party lines or slates promoted by any particular special interest group. Whereas through 1987, only a small number of supreme court justices felt compelled to raise and spend large sums of money on their campaign (and in any event they raised only a few hundreds of thousands of dollars), by 1992 virtually every incumbent justice reasonably expected an election opponent and the prospect of raising and spending over \$1 million. The concerns raised by the size and source of political donations to Texas judges have not abated.<sup>7</sup>

To an extent, this attention may be part of a general concern that public officials are overly dependent on financial contributions.<sup>8</sup> When the

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4. 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), cert. dismissed, 485 U.S. 994 (1988).

5. As of 1992, eight states used partisan elections to select the judiciary. CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, INTO THE TWENTY-FIRST CENTURY app. J., at 54. Since then, two more states abandoned partisan elections. Mississippi recently amended its election laws to move to nonpartisan judicial elections, 1994 Miss. Laws 564 § 80, and Tennessee enacted nonpartisan retention elections. TENN. CODE ANN. § 17-4-114 (1994).

6. The reporter for the ABA's Model Code of Judicial Conduct referred to the problem of campaign finance as "probably . . . the greatest of all conflicts between political necessity and judicial impartiality." E.W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 98 (1973), quoted in PATRICK MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 138 n.33 (1990).

7. See, e.g., Ken Dilanian, *Lawyers Give, Judges Take, Ethics Experts Worry*, FORT WORTH STAR TELEGRAM, July 11, 1994, at A1; *Picking Judges*, FORT WORTH STAR TELEGRAM, July 12, 1994, at A18.

8. The first section of a recent *New York Times* contained separate stories reporting the death, for the present congressional term, of campaign finance reform legislation and describing the President's fund-raising campaign since his election, consisting of private briefings, White House parties, and seats at state dinners for significant donors. See David E. Rosenbaum, *The 1994 Campaign: Campaign Finance; G.O.P. Filibuster Defeats Campaign Finance Curbs*, N.Y. TIMES, Oct. 1, 1994, at 1, 9.

public officials are judges, however, the concerns are particularly acute. Most obviously, this is true when donations are made by persons appearing before the judges, as in the *60 Minutes* story. But even beyond this situation, there is a general discomfort with the notion of judicial campaigning and fundraising that does not follow other elected officials: a sense that it is not "judicial" to seek support, monetary or otherwise. In the case of judges, I suspect, many people find troubling not just the idea of judges being responsive to particular litigants, but also the idea of judges being responsive to public sentiment in general.

At the same time, and perhaps more so in Texas than in many other places, populist roots run deep, and the notion of accountable elected officials is one that commands strong allegiance. Senior Judge Hans Linde of Oregon described a similar ambivalence in writing of the public's "two conflicting ideals" regarding judges: "[f]irst, they are to follow the law without fear or favor, regardless of personal sympathies and preferences," and "[s]econd, they are to reach results that are preferred by or at least acceptable to their communities."<sup>9</sup>

These distinct, and arguably contradictory, ideals are evident in the types of political advertisements and speeches one hears during judicial elections. Some candidates rely on claims of integrity and a pledge to "adjudicate, not legislate from the bench." Others, particularly in recent elections, have directly targeted judicial decisions as issues in the campaign. During a 1994 Democratic primary race for the Texas Supreme Court, one challenger circulated a brochure picturing an abused woman and portrayed the incumbent justice as a judge who voted for wrongdoers rather than victims. The obvious implication was that if voters did not like the result in that case, they needed to elect the challenger in order to produce a different result.

It seems apparent that these candidates are directing their advertisements and speeches at people with substantially different visions of a judge's role. Moreover, it seems clear that, at least in the calculation of some candidates and political advisers, the group of voters who will find it perfectly appropriate to campaign on a promise to reach a certain type of result is sufficiently large to make such an assertion an advantageous campaign strategy.<sup>10</sup>

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9. Linde, *supra* note 2, at 1.

10. It might be argued in response that this distinction is more superficial than real, in that a promise to "adjudicate, not legislate" will be understood by many voters to connote a judicial approach likely to lead to outcomes that they favor, and that they may choose to support the candidate for reasons that are little different from those of the voters who respond to the brochure of the abused woman. Even to the extent some voters may make such an assumption, though, I do not think the distinction can be erased so easily, at least not in the context of a court of exclusively civil jurisdiction. If the "adjudicate, not legislate" candidate were to run a comparable overtly issue-oriented campaign (e.g., promising to "protect large companies from expansive tort awards," or to "resist the expansion of civil rights for minority groups"), he or she would (rightly) be dismissed outright by most of these same voters for adopting an unjudicious approach.

When we view these trends — increasingly contested and often bitter judicial campaigns, large sums of money being pumped into judicial races, and candidates presenting drastically different pictures of their promised performance once in office — in conjunction, we must conclude that we are not engaged merely in a series of periodic efforts to fine-tune the electoral process. Rather, we are engaged in a basic debate over the true role of the judiciary in our society.

## II. PERSPECTIVES ON JUDICIAL INDEPENDENCE

### A. SUPERIOR “DEMOCRATIC PEDIGREE” FOR ELECTED JUDGES?

In a 1989 article, Justice Robert Utter of the Washington Supreme Court argued that because of electoral checks on the constitutional jurisprudence of state courts which do not exist at the federal level, the actions of state courts may be more “democratically legitimate” than those of their federal counterparts.<sup>11</sup> Specifically, Justice Utter highlighted two checks on the actions of state court justices: (1) in a majority of states, justices are answerable to the electorate, either by being elected initially or by facing periodic retention elections, and (2) as a rule, the procedures for amending a state constitution are far less cumbersome than the procedure for amending the federal Constitution.<sup>12</sup>

Both circumstances make it possible for voters to “correct” the direction of constitutional interpretation by their state courts. Because the process of state constitutional interpretation thus permits a type of “give-and-take” between the courts and the voters, Justice Utter suggests, the product that emerges is more authoritative than the federal analogue.<sup>13</sup> The voters can validate a court decision either by not producing a public outcry against the decision<sup>14</sup> or by creating a popular reaction against the decision that is not strong enough to result in amendment of the constitution.<sup>15</sup> Indeed, even indirect signs of popular sentiment revealed in the legislative arena serve this role: where the Oregon Supreme Court relied on the state constitution to afford criminal suspects greater protections than required by the U.S. Constitution, and a subsequent ballot initiative by Oregon voters for *statutory* changes in related areas (victims’ compensation, sentencing and parole, and search-and-seizure law) was defeated, “[t]he Oregon Supreme Court is entitled to consider the defeat of this

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11. Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 35 (1989).

12. *Id.*

13. *See id.* at 44 (“[T]he more democratic nature of the state judiciary can provide positive feedback for assessing state court independent decisions.”).

14. *See id.* at 37 (“[W]here an important state court decision interprets the state constitution to provide more protection than its federal counterpart, the absence of negative commentary is significant.”).

15. *See id.* (citing the example of Washington, in which a proposed constitutional amendment requiring the state courts to apply federal search-and-seizure precedent failed to gain legislative approval).

measure a democratic legitimization of much of its independent state constitutional analysis."<sup>16</sup>

## B. DOES POLITICAL ACCOUNTABILITY EQUAL DEMOCRATIC LEGITIMACY?

I have thought Justice Utter's argument worth summarizing because it seems representative of a school of thought that embraces issue-specific advertising, party-affiliated primaries, etc., for judges.<sup>17</sup> In general, the view is evidently that the breakdown of distinctions between the judiciary and other branches of government is to be welcomed and promoted, because in so doing we lessen the anomalous, undemocratic character of the judiciary.<sup>18</sup> Thus, Justice Utter finds greater "democratic legitimacy" in a system where such distinctions are weakened at least to the extent that (1) judicial decisions are less permanent in character, because of the relative ease of a popular overrule through constitutional amendment, and (2) judges must answer to the electorate for politically unpopular decisions. I suggest a third convergence of the operations of the judicial and legislative branches might be added, although Justice Utter stops short of hailing it as progress in his article. The first two checks will operate not only after the fact, but before the fact; inevitably, judicial decisions themselves will be made in a more overtly politically conscious manner.<sup>19</sup>

Certainly, the undemocratic nature of the judicial role, and particularly judicial review of legislative action, is an issue that has troubled commentators from the days of the founding of the republic. In fact, Justice Utter's argument seems in some ways a modern entrant to a recurring debate in our history: "[i]s judicial review a menace to popular democracy [or] a way to perfect democratic government?"<sup>20</sup> This debate provides a good background against which to assess the claim that greater popular control over judges confers greater democratic legitimacy.<sup>21</sup>

16. *Id.* at 36.

17. See *infra* notes 32-33 and accompanying text.

18. On the occasion of his successor's swearing-in, Justice Oscar Mauzy noted that judicial elections have value in that when judges "are insulated from the real world, there's a dangerous tendency for them to lose sight of the real impact on everyday people that their decisions are." *New Justices Sworn in, Including First Woman*, AUSTIN AMERICAN-STATESMAN, Jan. 2, 1993, at B1.

19. Justice Utter recognizes that this is an inescapable component of the type of judicial system he describes by including at the outset of his article the following quote: "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub." Utter, *supra* note 11, at 19 (quoting former California Supreme Court Justice Otto Kaus). While Justice Utter calls judicial independence a "clearly desirable goal" to be balanced against accountability, *id.* at 44, the example he cites of a lack of independence is the intentional delaying of the publication of an opinion for political reasons; it is not clear whether reaching a particular outcome in a case in deference to political opinion would, under his analysis, be an unfortunate side effect or the proper functioning of the system.

20. ALBERT P. MELONE & GEORGE MACE, *JUDICIAL REVIEW AND AMERICAN DEMOCRACY* 177 (1988).

21. Justice Utter's principal area of focus was, of course, state constitutional law. Likewise, most of the historical perspectives on judicial independence that I will mention also

The classic justification for an independent judiciary is contained in *Federalist Papers* numbers 78 and 81, published in 1788 to urge ratification of the newly-drafted Constitution and believed to have been authored by Alexander Hamilton. Hamilton began from the premise that all acts by an agent contrary to the agent's commission from the principal are void. It therefore follows, Hamilton argued, that under a constitution in which the legislature holds limited, delegated powers from its principal (the People), all legislative acts contrary to the legislature's commission (the Constitution) must be void.<sup>22</sup> The function of assessing when the legislature has exceeded the scope of its authority is obviously one that must rest with a body other than the legislature itself, and the constitutional framers decided to place this power with the judiciary. That the judiciary could, on this basis, overturn acts of the legislature did not imply a superiority of the judicial to the legislative power, Hamilton argued; rather, "[i]t only supposes that the power of the people [as expressed in the fundamental law of the Constitution] is superior to both."<sup>23</sup>

This analogy alone does not go very far towards establishing the need for a judiciary independent of direct popular control, as opposed to merely a judiciary separate from the legislative branch. Why, we might ask, cannot "the People" ratify or disapprove each act of their agent, the Congress, as it is made? Or, if we are going to have a separate judiciary, should not the judiciary at least be continually sensitive and responsive to "the People's" instructions as to the scope of authority they intend Congress to exercise on their behalf? Hamilton's opponent in this particular phase of the Federalist-Antifederalist debates, who adopted the pseudonym of Brutus, raised similar arguments. This writer, believed to be constitutional delegate and New York Supreme Court Judge Robert Yates, questioned the need for judges to be appointed for life so as to be free from popular control. Although obtaining life tenure for judges in England represented an important reform because it freed them from the control of a hereditary monarch with a tendency toward despotism, the effect in America, Yates argued, would be to insulate them from the will

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are directed to judicial review on constitutional grounds, largely at the federal level, as this has been the dominant focus of scholarly attention over the years. I recognize that in some ways this is not the area of most immediate relevance to issues of campaign finance reform. The decisions that tend to generate the most controversy and that probably drive the high-dollar contributions to judicial campaigns in Texas tend to be tort decisions. And, as has been noted, the theoretical foundations for judicial action in a common-law context and in a constitutional context are to some extent distinct questions. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 67-68 (1980). But see *infra* notes 29-31 and accompanying text.

However, the constitutional context crystallizes the issue of judicial independence, and I think that the concepts addressed have relevance to the current cultural debate about the judge's role. Moreover, it seems likely that, as it has over the last decade, constitutional adjudication will continue to be an increasing part of the state courts' role, making the parallel to the cited materials even closer.

22. THE FEDERALIST NO. 78 (A. Hamilton), reprinted in MELONE & MACE, *supra* note 20, at 198, 200 [hereinafter THE FEDERALIST NO. 78].

23. *Id.* at 201.

of a free and democratic people and thereby elevate judges above the people's elected representatives.<sup>24</sup>

Hamilton's answer was that the elimination of a hereditary monarch did not remove the threat of despotism. Rather, in a nation based on popular sovereignty the chief danger of encroachment would be shifted to the institution where popular power is exercised most directly — the legislature. Hamilton wrote: "In a monarchy [life tenure for judges] is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of a representative body."<sup>25</sup> The encroachments he envisioned are ones which, after two centuries of experience with the effects that interest group lobbying or temporary prejudice-based hysteria can have on legislative activity, we should have little difficulty in recognizing. Hamilton feared the "ill humors" that, through "the arts of designing men, or the influence of particular conjunctures" might temporarily gain sway and "occasion . . . serious oppressions of the minority party in the community."<sup>26</sup>

The answer to the seeming contradiction of how the judiciary can simultaneously act on behalf of "the People," in the sense of the agent who has conferred Congress's authority, and also act to check encroachments by "the People," acting through their legislative representatives in a particular circumstance, is the elegant balance of the constitutional structure. The will of the people that emerges from the solemn deliberative process of constitutional ratification or amendment is elevated to fundamental law. It binds even future majorities from adopting a course contrary to its principles.

In being entrusted with the responsibility of vindicating this fundamental law in the face of popular sentiment that may run strongly in the other direction, the judiciary is in a sense assigned the role of the "conscience" of a democratic society. It is as if the judge is entrusted with reminding the people of the pledge they made to conduct society's affairs according to certain basic precepts and moral aspirations (*e.g.*, securing certain freedoms and rights in a universal and neutral manner), even when in the immediate context being faithful to that precept is difficult and unpopular.<sup>27</sup> Ultimate sovereignty always remains with the people of the present: if the population is sufficiently committed to an idea to go through

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24. See *BRUTUS XV* (Mar. 20, 1788), reprinted in MELONE & MACE, *supra* note 20, at 189, 191-94.

25. *THE FEDERALIST* NO. 78, *supra* note 20, at 198, 199.

26. *Id.* at 202.

27. An example from the relatively recent past might be the Supreme Court's invalidation on First Amendment grounds of Texas's flag-burning statute in *Texas v. Johnson*, 109 S. Ct. 2533 (1989). Although my point is not to endorse or criticize the specific outcome in that case, I think it is a good illustration of the *type* of case for which we have judicial review by an independent judiciary. The Justices in the majority acted from a conviction that our broad constitutional commitment to free speech required the result, despite their obvious distaste for the acts of the defendant being shielded in the particular instance — a distaste that was no doubt shared by a vast majority of voters and that would seem futile to expect a legislature to disregard. Concurring, Justice Kennedy made the following observations:



the elaborate process of constitutional amendment and again become "the People" in the constitutional sense, they can undo the limits imposed by their forebears. However, "[u]ntil the people have, by solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually."<sup>28</sup>

If the judge's role is, in part, to act as the "conscience" of our democracy against the passions of the day, it seems clear that some degree of independence from popular control is an integral part of our political system. Professor Harry Wellington has suggested that a similar analysis applies in the area of common-law adjudication. He argued that "in much the same way that the judicial interpretation of documents (contracts, statutes, constitutions — especially constitutions) must proceed from the document," judicial reasoning in common-law cases "must proceed from society's set of moral principles and ideals."<sup>29</sup> The faithful derivation and application of these evolving ideals is best assured, he argued, by the process through which accretions are made to common-law precedent, free of political pressure:

The major difficulty for the official charged with the task of determining how the moral principles bear in a particular case is in disengaging himself from contemporary prejudices which are easily confused with moral principles. He must escape the passion of the moment and achieve an appropriately historical perspective. . . .

The problem is not entirely solved by the institutions we do have, but the common law manages reasonably well. Judges do not resort to moral principles in their pristine form as justification for common law rules. Rather, those principles are worked through a process which has some promise of filtering out the prejudices and passions

The case before us illustrates better than most that the judicial power is often difficult in its exercise. . . .

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.

. . . .

. . . [T]he flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us.

*Id.* at 2548-49 (Kennedy, J., concurring). In fact, shortly after this decision, public uproar led Congress to respond by making flag burning a federal crime. The Supreme Court once again struck down the legislation. *United States v. Eichman*, 496 U.S. 310 (1990).

The notion that having Congress's agency defined in the abstract in the Constitution by persons not in the midst of a particular heated controversy such as flag-burning (and indeed, not knowing which such controversies will arise, perhaps unable to predict where their sentiments and interests would lie) gives the agency so defined a more authoritative claim to represent the true principles and aspirations of society brings to mind Professor John Rawls's famous theory. Professor Rawls postulated a "veil of ignorance," behind which people would be forced to make decisions about the organizing principles for society without knowledge of the position and resources they would hold in that society. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

28. THE FEDERALIST NO. 78, *supra* note 20, at 198, 202.

29. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 244 (1973).

of the moment, some promise of providing the judge with distance and a necessary historical perspective.<sup>30</sup>

The filtering process described by Professor Wellington is the method of legal analysis: receiving common-law precedent, examining the justification for a common-law rule in light of the background from which it is derived, and, if appropriate, expanding that justification to address a new and unforeseen situation posed by changing and increasingly complex social and commercial interactions.<sup>31</sup>

The foregoing summary shows, I believe, that at least under traditional democratic theory regarding the judiciary, political responsiveness has little to do with "democratic legitimacy." Whatever legitimacy judges possess, it comes from competence to fulfill a particular function. In the area of constitutional law, it is principled adherence to a written document in the face of changing political currents. In the common-law arena, it is thoughtful and deliberate application of established principles to new circumstances. Direct political accountability for judicial decisions does nothing to ensure this type of competence.

#### C. "UNIQUE CONTRIBUTION" OF POLITICALLY ACCOUNTABLE JUDGES

I used the phrase "direct political accountability for judicial decisions" in the preceding sentence because it appears to me the necessary result of Justice Utter's thesis set forth in subpart A, and also the objective of many seeking to shape the judicial role in Texas today. If legitimacy for judicial action derives from popular approval (or, more accurately, the lack of popular disapproval), then presumably the more accountable a judge can manage to be, the better. Indeed, because the proper operation of the judiciary as described by Justice Utter relies upon voters paying attention to the outcomes being reached by state courts and casting ballots in judicial races based upon their approval or disapproval of those outcomes, we would need an electoral process that focuses voters' attention on those outcomes as squarely as possible. Under such circumstances, it would be not merely artificial, but indeed illegitimate, to forbid judicial candidates to campaign expressly on the issues being decided by the court, as both the ABA's Model Code of Judicial Conduct and Texas's Code of Judicial Conduct currently do.<sup>32</sup> If the proper balance between

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30. *Id.* at 248.

31. *See id.* at 250-54.

32. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (1990) ("A candidate shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, and shall not make statements that commit or appear to commit the candidate with respect to cases or controversies that are likely to come before the court."). The Texas version retains the first part of the model canon (prohibiting promises other than the faithful and impartial performance of duties) but substitutes the following prohibition for the second part:

A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's

judicial authority and popular control depends upon voters' ability to check the direction of the court's interpretations of a constitutional guarantee, then the voter must be able to learn from the justices' challengers that they will overturn those decisions if elected and given the opportunity.<sup>33</sup>

Little from Hamilton's (or Wellington's) view of the judiciary is recognizable in this picture. Admittedly, it may not be a fair criticism of Justice Utter's view to argue that it is inconsistent with the judicial role envisioned by the framers of the federal Constitution, when Justice Utter's very point is to contrast of the state system with the federal system. The discussion in subpart B reveals, however, at least in summary form, the justification for judicial authority under the federal constitutional theory. Judges are given authority, including the authority in certain circumstances to overturn legislative acts, and are insulated from direct popular pressure because of a belief in judges' institutional competence to make decisions necessary to our scheme of constitutional government. As one commentator has expressed it, "in one way or another most theories of judicial review turn on the belief that judges have something unique to contribute to public decisionmaking and that the nature of this contribution is closely tied to political insulation."<sup>34</sup>

It would seem incumbent upon those insisting that judges be more politically accountable to offer a comparable justification for the judicial role as they envision it. What is the "unique contribution" to public decisionmaking made by judges whose jurisprudence is subject to popular control, and thus inescapably guided by popular opinion? Under such a system, what justifies the structural authority with which courts are endowed?

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judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

TEX. CODE OF JUDICIAL CONDUCT, Canon 5(1) (1994).

33. Professor Stephen Carter of Yale Law School is among the commentators who have suggested that requiring contested elections, but restricting the types of campaigning, is an uneasy and perhaps unworkable compromise between the conflicting ideals of the judicial role. In an address to the 1993 Forum for State Court Judges co-sponsored by the Roscoe Pound Foundation and Yale Law School, Professor Carter observed:

My preference is for retention elections instead of contested elections, but if contested elections are going to be held, I do think candidates should be allowed to campaign. If the record of an incumbent cannot be criticized, the purpose of a contested election is difficult to see.

Stephen L. Carter, *Does Democracy Threaten Judicial Independence?*, in *PRESERVING THE INDEPENDENCE OF THE JUDICIARY: THE DUAL CHALLENGE OF DEMOCRACY AND BUDGET CRISIS* 37, 41 (1993). Professor Carter also noted the likelihood that restrictions such as those in Canon 5 of the Model and Texas Codes will be held unconstitutional. *Id.* at 40.

34. Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685-86 (1990). The writings of numerous constitutional theorists bear out Professor Nagel's description. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1962) (in justifying judicial review, "[t]he search must be for a function . . . which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of courts; which will not likely be performed elsewhere if courts do not assume it.").

I find it difficult to answer these questions satisfactorily, especially since the notion of a judiciary that finds authority for its decisions in a lack of public disapproval seems necessarily to imply an expansive judicial role. Writing in 1893, Harvard Law Professor James B. Thayer lamented the extent to which the perception of constitutional checks from the courts created a tendency for legislators to abdicate their responsibility for assessing the justice and constitutionality of legislation they passed. Legislators were encouraged to believe, Professor Thayer wrote, that their duty to be just consisted only of staying within constitutional limits, and that even the obligation of staying within constitutional limits was one that need not preoccupy them, because if they were wrong the courts would correct it.<sup>35</sup>

I fear a similar danger, removed one degree further, is presented by the system described by Justice Utter. If judges are encouraged to believe popular disapproval provides a measure of when a decision exceeds the scope of their legitimate authority, it is unlikely they will be restrained by a sense of their limited institutional competence. This concerns me, because the checks cited by Justice Utter are hardly in balance. Even in a state with the simplest procedures for amending a constitution, it is far easier to align five<sup>36</sup> justices behind an outcome than to mount the type of campaign necessary to amend the state's fundamental law. For this reason, I question the assumption that making decisions that voters fail to overturn is, in any true sense, democratic legitimation.

The invitation to a more expansive, politically guided role is also dangerous because, whether politically accountable or not, courts in our country wield great power. This is one aspect of the previously mentioned debate between Hamilton and Yates in which Yates proved far more prescient. Hamilton argued that citizens had nothing to fear regarding judicial usurpations, because institutionally it was the weakest of the three branches. He noted that the judiciary "has no influence over either the sword or the purse," meaning that it could not enforce its own judgments and was permanently subservient to the legislature's authority to allocate revenues.<sup>37</sup> Accordingly, the judiciary would be unable to stray too far from the directions of the executive or legislative branches because it would find itself without the means to enforce its judgments. In a conclusion now quoted only with irony,<sup>38</sup> Hamilton dubbed the judiciary the "least dangerous" branch.<sup>39</sup> This prediction has proved false. Because of simple popular allegiance to the constitutional scheme, even

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35. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), reprinted in MELONE & MACE, *supra* note 20, at 78, 95.

36. I say five justices because five is the magic number for a majority opinion in the United States Supreme Court and the Texas Supreme Court. In fact, four is the more common magic number in that most states' supreme courts have only seven justices. CONFERENCE OF STATE COURT ADMINISTRATORS, STATE COURT ORGANIZATION 1987, at 75-84.

37. THE FEDERALIST NO. 78, *supra* note 20, at 198, 199.

38. See, e.g., BICKEL, *supra* note 34.

39. THE FEDERALIST NO. 78, *supra* note 20, at 198, 199.

sweeping and unpopular decisions of the courts become the law of the land, and the backing of the executive branch — at least to the extent of enforcement — is secure.

If, on the basis of political accountability, courts feel more free embracing a policymaking role, what justification exists for such authority? What is the “unique contribution” that such courts make to the democratic process? It cannot be their accountability itself, because even with all the checks Justice Utter’s system implies, courts will be less representative and responsive than legislatures. A state supreme court will typically be a body of seven or so members, not elected to represent particular geographical constituencies and not equipped to receive and act upon requests by voters. As Professor John Hart Ely has written:

Sophisticated commentary never tires of reminding us that legislatures are only imperfectly democratic. Beyond the fact that the appropriate answer is to make them more democratic, however, the point is one that on analysis may backfire. The existing antimajoritarian influences in Congress and the state legislatures, capable though they may be of *blocking* legislation, are not well situated to get legislation passed in the face of majority opposition. That makes all the more untenable the suggestion under consideration, that courts should invalidate legislation in the name of a supposed contrary consensus. Beyond that, however, we may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.<sup>40</sup>

In one sense, a court that accepts the notion that it ought to be responsive to political pressure offers the worst of all possible worlds: because of the nature of the office, a judge cannot successfully receive an adequate sampling of views and concerns by constituents, yet because of the small size and more direct power of a court as compared to a legislative body, a court will be an inviting target to the monied special interests who see the court as a promising avenue for promotion of their agendas.

#### D. POLITICAL CONTROL AND CAMPAIGN REFORMS

My point is not that all forms of political control, including the fact that judges in most states are subjected to a method of selection that includes an election component, are necessarily wrong. My point is simply that all such forms of political control are compromises with the vision of the judicial role we have inherited from the Constitution’s framers and the Anglo-American tradition, and they are compromises we should make only in pursuit of some distinct and separate goal.<sup>41</sup> We may, for exam-

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40. ELY, *supra* note 21, at 67.

41. One can, of course, take issue in a number of ways with this picture of the judicial role, and many commentators have. The most obvious response is that, in reality, adjudication is more the imposition of personal value choices than a precise scientific endeavor, and that therefore it is more important to have persons occupying judicial posts who reflect society’s wishes than to ensure an appropriately rarified atmosphere for the adjudicative process. See LINDE, *supra* note 2, at 4. A related but less sweeping critique would be to question whether even the task of discerning society’s fundamental commitments embod-

ple, conclude that we are more likely to wind up with persons of integrity and ability in judicial positions through a partisan electoral process than through some other method of selection. If so, then we should maintain the status quo because doing so produces people more able to fulfill the judicial role described in subpart B above, not because popular control is itself a desirable modification of the judicial role. And judges should not then assume a greater license to act by virtue of being elected.

Similar considerations should apply to judicial selection reform, to ethical guidelines governing judicial campaigning, and to the other judicial reforms presently being considered in Texas. In considering such reforms, we should begin with a vision of what we want our judiciary to be. My hope is that this vision would be close to the one described in subpart B: independent men and women committed to a scholarly and principled interpretation of the law and restrained by a keen sense of the courts' limited institutional competence. Reforms should then be assessed against this aspiration. Where they seem likely to bring us closer to that vision, they should be supported. Where they seem in tension with that vision, the benefits they offer should be identified and carefully weighed to see if they are worth the cost.

### III. CONCLUSION

Again, I wish to thank the editors, particularly Albert Lin, of the *SMU Law Review's 1995 Annual Survey of Texas Law*, for giving me the opportunity to present this Foreword. It has given me the opportunity to reflect on what role a judge plays in a democracy and for what is a judge "accountable." As you explore this volume of the *SMU Law Review*, I ask you to consider whether the decisions are principled, or whether they are excursions into the world of popular will. Are these decisions more or less "democratically legitimate" by virtue of the current selection process for the judges? Would some other method of selection of judges enhance or diminish this legitimacy?

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ied in a constitution or in the common law is most effectively carried out when judges are isolated from popular input. See, e.g., ELY, *supra* note 21, at 57.



# Articles



