TEXAS SUPREME COURT
CHIEF JUSTICES

ROBERT WILBURN CALVERT (1905-1994)
JOSEPH ROBERT GREENHILL III (1914-2011)
ANDREW JACKSON POPE (1913-2013)

(With a Special Section on Judicial Selection)

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State Bar of Texas
Texas Supreme Court: History & Current Practice
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CALVERT, GREENHILL, & POPE

by

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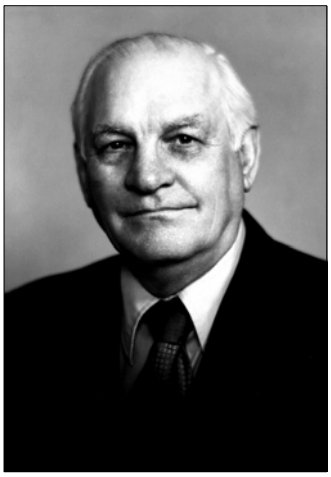
INTRODUCTION.

In preparing this article on these three great Chief Justices of the Texas Supreme Court, an effort has been made to show the reader the stories of their lives through what other people who knew them said about them during and after their lifetimes, and through their voices as expressed in interviews and through their own writings, both official and unofficial. These three persons, lawyers, judges, were each very different, and yet similar in that they chose the path of public service rather than the pursuit of personal wealth, they were all committed to deciding cases based on sound reasoning from legal principles and not expediency or transient politics, and they used their position and authority for the betterment of our legal institutions and our government as a whole. They were truly great men.

I. CALVERT. Robert Wilburn Calvert (1905-1994) was an Associate Justice on the Texas Supreme Court, 1950-1961, and Chief Justice 1961-1972.



A. TIMELINES.

1. Robert W. Calvert's Personal Timeline.

1905 - Born in Tennessee
1912 - Father died; went to live with paternal grandparents
1913 - Mother took kids to Texas and put them in Corsicana Orphans' Home
1918 - Sister died in influenza epidemic
1921 - took train to lobby Legislature for Orphan's Home; secured $100,000 grant
1923 - graduated from Orphans' Home high school; entered Univ. of Texas pre-law; job operating elevator in Capitol
1924 - dropped out of school
1925 - full-time job at Industrial Accident Board
1926 - entered law school
1927 - half-time job as mail clerk in State Fire Insurance Dept.
1928 - quit school; full time job as night watchman at Land Office Building
1929 - re-entered law school; full time job as night watchman
1931 - graduated law school; moved to Hillsboro; free office; earned $7.50 his first month
1933 - Elected House of Representatives from Hill & Navarro Counties; amended State Highway Commission bill over Gov. Ma Ferguson's objections
1934 - 2nd term in the House; ran for Speaker, lost to Coke Stevenson
1936 - 3rd term in House; unopposed for Speaker; practiced law
1943 - elected Navarro County criminal district attorney; Hillsboro School Board
1946 - 1948 Chair of State Democratic Executive Committee
1948 - canvassed votes in LBJ's narrow/notorious primary election victory over Coke Stevenson for U.S. Senate
1994 - died; buried in State Cemetery, Austin

2. Robert W. Calvert's Professional Timeline.

1933 - 1937 Member Texas House of Representatives
1937 - Speaker Texas House of Representatives
1939 - 1950 Served on the Supreme Court Advisory Committee on Rules
1940-1947 County Attorney for Hill County
1950 - 1961 Appointed then elected Associate Justice Texas Supreme Court
1961 - Chief Justice Texas Supreme Court
1965 - Helped establish the Texas Judicial Qualifications Commission
1970 - Chair National Conference of State Chief Justices
1971-72 Chaired Chief Justice's Task Force on Court Improvement
1972 - Retired from Supreme Court; Of Counsel with McGennis, Lockridge & Kilgore
1973 - Chair of Texas Constitutional Revision Committee
1973 - Received the Herbert Harley Award from the American Judicature Society
1983 - *Calvert v. Employees Retirement System of Texas*
1984 - 1985 Member Texas Ethics Advisory Commission
1989 - Co-founded, along with successor Chief Justices Greenhill and Pope, the Texas Center for Legal Ethics

3. The Supreme Court in 1958. The make-up of the Texas Supreme Court on January 1, 1958 was: Chief Justice J. E. Hickman, and Associate Justices W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell, and Joe Greenhill.

B. SHORT BIOGRAPHIES, MEMORIALS, AND OBITUARIES.

1. Presiding Officers of the Texas Legislature 1846-2016. The following description was taken from *Presiding Officers of the Texas Legislature 1846-2016*, prepared by the Research Division of the Texas Legislative Council.[1]

> During a public career in Texas that spanned more than four decades, Judge Robert W. Calvert served the state in many capacities. He was a state representative, speaker of the house, county attorney, supreme court justice, chief justice of the supreme court, and chair of the first constitutional revision commission in 100 years.
>
> Robert Calvert was born in Lawrence County, Tennessee, on February 22, 1905. Following the death of her husband, Calvert's mother moved with her children to Texas, where in 1913 she placed Calvert and two of his siblings in the State Orphans' Home in Corsicana. Calvert spent his subsequent childhood, until his high school

graduation in 1923, at the home. He worked his way through college and law school at The University of Texas, ultimately receiving his law degree in 1931. He then opened a practice as an attorney in Hillsboro.

Calvert was elected to the house of representatives for three consecutive terms from 1933 to 1939 during the 43rd through the 45th Legislatures, serving as speaker his last term. During his tenure in the office, the legislature passed measures providing benefits for blind, dependent, and neglected children; measures repealing the law permitting pari-mutuel betting on horse races; and measures providing for temporary commitment of persons with mental illness. Other enacted bills that Calvert considered equally significant were those providing a system of probation for persons convicted of crimes, extending proration laws regulating the amount of oil each well in the state could produce, and creating the Old Age Assistance Commission.

County attorney of Hill County from 1943 to 1947, Calvert also served as chair of the State Democratic Executive Committee from 1946 to 1948, before his 22 year tenure with the Supreme Court of Texas. He first held the office of associate justice from 1950 to 1961 and then was elected to two consecutive terms as chief justice. He held that office from 1961 to 1972, when he chose not to seek reelection. Although Judge Calvert retired from elected office at that time, he was appointed chair of the Texas Constitutional Revision Commission in 1973.

A longtime advocate of judicial reform, Calvert believed that the state's court system needed reorganizing and suggested that one final court of appeals be established by combining the Supreme Court of Texas and the Texas Court of Criminal Appeals. He blamed the overloaded dockets on the "lack of the proper number of judges and proper efforts of judges" and proposed the creation of a central court administrator to alleviate this problem.

After leaving public office, Judge Calvert lived in Austin, where he was of counsel to the firm of McGinnis, Lockridge & Kilgore. A frequent contributor to many distinguished law journals, he was also a recipient of numerous legal honors, including The University of Texas School of Law's Outstanding Alumnus Award, The University of Texas Distinguished Alumnus Award, the American Judicature Society's Herbert Lincoln Harley Award, and the Southwestern Legal Foundation's Hatton B. Sumners Award. Calvert's autobiography, *Here Comes the Judge: From State Home to State House*, was published in 1977. He died on October 6, 1994, in Waco.

2. Gaynor Kendall. Gaynor Kendall, *Upon Becoming Chief Justice Robert W. Calvert*, 24 TEX. B.J. 15 (1961) wrote the following tribute to Robert W. Calvert upon his ascending to Chief Justice.

On January 3, 1961, Robert W. Calvert became Chief Justice of the Supreme Court of Texas. His seventeen predecessors in that high office, from Hemphill to Hickman, have been men of great learning and ability. The new Chief Justice is worthy of wearing the mantle they have graced.

From a biographical standpoint, the new Chief Justice breathes new life into the old American tradition that a man who possesses the qualities of leadership may rise to exalted offices on his own merits and ability, though he come from humble origins and from remote or small places. Born February 22, 1905 in Giles County, Tennessee, Robert W. Calvert was the son of tenant farmers, Porter and Maude Calvert. After the father's death in 1911, his mother moved to Texas. In 1913, when he was eight, young Bob was placed in the State Orphans' Home at Corsicana, Texas; he remained in the Home until he graduated from its High School in May, 1923.

After working as a "water boy" at the Magnolia Refinery at Corsicana during the summer of 1923, the future Chief Justice invested his savings in the beginning of a higher education: he entered the University of Texas, and was a student in the College of Arts and Sciences for two years, working part-time to earn his way. Although he was forced to stop school on two occasions for more than a year in order to restore depleted finances by working full-time, and in addition had to work part-time throughout his scholastic career, he graduated from the School of Law of the University of Texas with an L.L.B. degree in January, 1931.

Private practice

With his freshly-acquired law license, he went to Hillsboro, Texas, and entered the general practice of law. Despite repeated opportunities which came his way to pursue his calling in one or another of the large cities of Texas at much greater financial reward, he continued to practice at Hillsboro until his election as Associate Justice of the Supreme Court in 1950. Two or three years ago, he told the students at the Law Day Activities at his alma mater that if he had a chance to start his career all over, he would elect to go to Hillsboro and practice law there.

During his almost twenty years as a small-town lawyer, he handled cases of almost every kind, ranging across the entire spectrum of legal problems. In the courtrooms of his own and neighboring counties, he acquired an extensive and first-hand knowledge of the workings of the judicial machinery at the trial level, and acquired an abiding faith in the basic soundness of the jury system. In 1940, he served with other leaders of the bench and bar on the Advisory Committee appointed by the Supreme Court of Texas to formulate the Rules of Civil Procedure, and the fruit of their labors was the adoption of the rules which since have simplified and expedited court procedures.

His Hillsboro neighbors elected Robert W. Calvert county attorney for two terms; for three successive terms, he served in the House of Representatives, representing Hill and Navarro Counties, and he was Speaker of the House during his last term, 1937-1939.

Broad understanding

When he came to the Supreme Court in 1950, therefore, he brought the training and experience, the outlook and notions of basic justice, which only extensive practice as an advocate in a small town can teach. He also brought an understanding of the problems and aims of the Legislative branch, and out of experience gleaned as an advocate from both sides of the docket, an understanding of the problems arising out of conflicts between the state and the individual.

As Associate Justice Robert W. Calvert since September 18, 1950, has earned the respect and admiration of the whole legal community. His dedication to the work of the Court is boundless; his efforts are unstinting; his writing is lucid, but terse. But the new Chief Justice is not an animated legal tome. While he is a serious and hard-working student of the law, he has an infectious grin and a keen sense of humor. He enjoys sports, mostly as a spectator, as limited time permits, and is such a student of baseball that in a pinch he might substitute effectively for the coach of the college baseball team.

Like the owner of an antique automobile who knows that the steering-wheel has too much play, and that it takes two pumps of the pedal to operate the brakes, the new Chief Justice is intimately acquainted with the limitations and idiosyncrasies of the machinery of justice, while knowing too of its basic soundness. The legal community is therefore justly confident that Mr. Chief Justice Robert W. Calvert will furnish the kind of leadership that has raised our Supreme Court to its present position of eminence among all others in the country.

3. **Inns of Court.** The following short biography of Robert W. Calvert is at the Robert W. Calvert Inns of Court web page.[2]

Robert Wilburn Calvert was born the son of a sharecropper on Washington's birthday in 1905, in Lawrence County, Tennessee. After Calvert's father died in 1912, Calvert's mother and her young children moved to Texas. Mrs. Calvert was unable to provide for her children, and in 1913, she placed Calvert, then age eight, and two of his siblings in the State Orphans Home in Corsicana, Texas. Calvert remained there for ten years.

Life at the Orphans Home had a Dickensian flavor. Calvert remembered always being hungry. He barely survived the great influenza epidemic of 1918, and endured a savage beating by a supervisor. His sister died there. On the positive side, Calvert became an avid reader and a success in the class room, graduating in 1923 from the Orphans Home school as salutatorian of his class. The Orphans Home instilled in Calvert a fearless, independent spirit and a strong sense of discipline and honor that remained with him for the rest of his life.

In the fall of 1923, Calvert entered the University of Texas at Austin, with the intention of studying law. At that time, a person could be admitted to the University's School of Law after only two years of undergraduate work. Calvert supported himself by working at the Texas State Capitol for several state agencies. These jobs enabled Calvert to meet leading state officials and to make valuable friendships that served him well in his political life. Because of the need to work, Calvert dropped out of law school several times. As a result, his academic record was undistinguished. Calvert later described it as a flop.

After graduating from the University of Texas School of Law in 1931, Calvert began his legal career in Hillsboro, then a small town of 8,000 in Hill County, Texas. Calvert became the twenty-third member of Hillsboros bar. By 1940, Calvert had become one of the area's leading attorneys. Litigants were retaining him in nearly every major civil suit filed in Hill County. A future chief justice of the Supreme Court of Texas remarked that "[t]his young fellow Calvert can make it easier for you to agree with him and harder for you to disagree with him than any young lawyer I know."

While building a lucrative legal practice, Calvert also pursued a political career. A moderate Democrat, Calvert was elected to the Texas House of Representatives in 1932 to the first of three consecutive terms. Calvert quickly emerged as a leader of the Texas House. In 1935, he narrowly lost a race for Speaker to future governor Coke R. Stevenson. Two years later, Calvert was elected Speaker without opposition. After losing a race for Attorney General of Texas in 1938, Calvert left the Texas House in January 1939, but remained active in politics. In 1939, Calvert worked as an unpaid lobbyist to secure passage of a bill creating the integrated, organized State Bar of Texas. Between 1942 and 1950, Calvert served as Hillsboro City Attorney, Hill County Attorney, and as president of the Hillsboro Independent School District. In 1946, Calvert became the chair of the state executive committee of the Democratic party and served in that capacity during the storied Lyndon B. Johnson-Coke Stevenson senate race of 1948. Calvert was often encouraged to run for Governor, but steadfastly declined to do so.

Calvert was primarily a trial lawyer, but he had come to enjoy briefing cases for appeal. His love of appellate practice led him to enter a 1950 race for a position as an associate justice of the Supreme Court of Texas. Calvert was elected and took office in October 1950. In later years, he enjoyed telling people that his victory was due, in part, to a timely advertising campaign by the makers of Calverts Whiskey. The whiskey companys ad was I switched to Calvert.

Calvert served on the nine member Supreme Court of Texas for twenty-two years, the last eleven as chief justice. During his service, Calvert developed a reputation as a staunch law man. He passionately believed in keeping the law stable and predictable. He would follow an established rule of law even if the rule appeared to cause an unpopular or undesirable result in a particular case. Calvert once explained his philosophy on this point in a dissenting opinion [in *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742 (Tex. 1962)]:

> It is cases such as this that make a judge wish, for the moment at least, that ours were courts of men and not of law; that make a judge wish if I may borrow language from the majority opinion that he could lay aside what he regards as sound principles of law and decide the case on the practicabilites of the situation. But intellectual integrity ought to be the individual judges most compelling force; and when in his honest judgment sound rules of law are sacrificed to practicability and expediency, failure to protest is a dereliction of duty.

As this quotation shows, Calvert's opinions were clear, direct, and understandable. Calvert frowned on the use of the per curiam opinion in politically sensitive or controversial cases. When I get to the point where I am afraid to sign my name to an opinion I have written, I will simply resign and leave the court. Many of the 378 opinions that Calvert wrote are still considered landmarks of Texas law.

Calvert was neither pro-plaintiff nor pro-defendant. A lawyer once told him that the trouble with you is that you have no judicial philosophy; you will write a case for an injured plaintiff one week and for an insurance company the next. Besides performing his duties as a judge, Calvert worked hard as chief justice to improve the judiciary. In 1965, he helped secure the creation of the Texas Judicial Qualifications Commission to investigate charges of judicial misconduct. In 1970, he served as chair of the National Conference of State Chief Justices. Calvert also supported significant reforms in the procedural rules for the trial and appeal of civil cases. In particular, Calvert worked to remove technical barriers that prevented a decision on the merits of a case.

After his retirement from the Supreme Court of Texas in 1972, Calvert became of counsel to the prominent Austin firm of McGinnis, Lochridge & Kilgore. He assisted the firm primarily in the preparation and revision of appellate briefs. Calvert also served as chair of the Texas Constitutional Revision Commission, which unsuccessfully attempted to fashion a new constitution for the state. Calvert's concern over influence of large contributions in partisan judicial elections led him to become an increasingly vocal advocate for the merit selection of judges. In 1973, the American Judicature Society conferred on Calvert the Herbert Harley Award in recognition of Calvert's outstanding contributions to the administration of justice. Calvert died on October 6, 1994, leaving a splendid legacy and example of hard work, honesty, and fairness.

4. House Concurrent Resolution Upon Calvert's Retirement

By Cole H.C.R. No. 5

HOUSE CONCURRENT RESOLUTION

WHEREAS, The Honorable Robert W. Calvert, Chief Justice of the Supreme Court of Texas, has served the people of the State of Texas with impeccable integrity and honor; and

WHEREAS, This outstanding jurist, who has diligently discharged the duties of numerous positions of honor and trust throughout his life, was born February 22, 1905, in Lawrence County , Tennessee, and moved to Corsicana, Texas, where, in 1913, he was placed in the State Orphans Home at Corsicana, and there he stayed until his graduation from high school at that institution in 1923; he then entered The University of Texas and, after working his way through school, was graduated from the Law School in 1931; and

WHEREAS, Chief Justice Calvert set up a law practice in Hillsboro, Texas, where he soon became a member of the firm of Morrow & Calvert, and continued to practice law there until September, 1950; after winning the Democratic Party's nomination to the Supreme Court, he was appointed to finish the term of the incumbent justice who died before the end of his term; and

WHEREAS, While in Hillsboro, Texas, Chief Justice Calvert served for six years as a member of the Texas House of Representatives from Hill and Navarro counties, and was elected Speaker of the House of Representatives in

1937; he served as Speaker for the last two years of his term in the House, and, in 1946, was elected chairman of the State Democratic Executive Committee; and

WHEREAS, In 1960, this noted attorney and distinguished legislative leader was elected Chief Justice of the Supreme Court of Texas for a six-year term beginning January 1, 1961; he was reelected to a second term in 1966, and during his 22 years on the Supreme Court of Texas he has been a prodigious and prolific worker, always seeking that highest plateau of law and justice for all; and

WHEREAS, He was elected chairman of the National Conference of State Chief Justices in 1970, and served in that capacity, bringing great honor to himself and the State of Texas; and

WHEREAS, Chief Justice Calvert will not be seeking reelection when his present term of office expires on December 31, 1972, and it is appropriate that the Texas Legislature recognize the outstanding leadership of this eminent jurist and public official whose dedicated service to the people of Texas has been an inspiration to all; now, therefore, be it

RESOLVED by the House of Representatives of the 62nd Legislature, 3rd Called Session, the Senate concurring, That the Texas Legislature express appreciation for the great service of Chief Justice Robert W. Calvert, who has demonstrated time and time again his devotion to his country, his dedication to public service, and his never-ceasing quest for justice; and, be it further

RESOLVED, That the prayers and good wishes of the Texas Legislature and all the people of Texas go with Chief Justice Calvert; and be it further

RESOLVED, That this Resolution be entered upon the Journals of the House of Representatives and the Senate and that an official copy be prepared for Chief Justice Calvert as an expression of appreciation for his service to the State of Texas and the Nation.

Ben Barnes
Lieutenant Governor
President of the Senate

William Henry Sinclair
Speaker of the House

APPROVED: 6-21-72

Preston Smith
Governor

5. Thomas Reavley's Memoriam. The following piece was written by Thomas M. Reavley, *Chief Justice Calvert: Man of Imperturbable Integrity*, 26 ST. MARY'S L.J. 915 (1995):

In Memoriam

CHIEF JUSTICE CALVERT: MAN OF IMPERTURBABLE INTEGRITY

Robert W. Calvert attributed the success of his 1950 campaign for the Texas Supreme Court to the widely known name of the state comptroller, Robert S. Calvert, and a timely advertising campaign of Calvert Whiskey. He was an early convert to the superiority of merit selection, rather than election by uninformed voters, as the method of judicial selection. His preference strengthened over the years as he observed judicial elections. We might speculate about Calvert's chances of being elected to the court today. My opinion is that neither section of the bar would support him, inadequate money would be contributed, and his chances would be poor. He was much too independent. That says a lot about current practice and affairs.

It has been said that the court led by Chief Justice Calvert was committed to ancient rules of law favorable to wealthy defendants and was opposed to change. That judgment comes from persons who are either misinformed or who confuse the judicial and legislative functions. Calvert believed that lawyers, judges, and citizens should be able to rely on the law as declared by the courts -- at least until their representatives change the law through the legislative process. When people who depend upon the law were prepared for change, he could support court improvement of court-made rules.

Chief Justice Calvert was open-minded to changes in procedural rules. The rule change to allow the ten-to-two jury verdict in civil cases provides one such example. I advocated abandonment of the requirement of twelve-juror unanimity, but my proposal met with [p. 916] broad opposition, especially from defense lawyers. The court's advisory committee voted against this change. During several meetings of the court the summer we considered

proposed rule changes, my arguments seemed futile. However, on one July afternoon, as we were finishing our work, Chief Justice Calvert said that he had decided we should try the ten-to-two verdict. The other judges slowly, one or two grudgingly, followed after. I was almost breathless, but knew very well that Calvert had turned the tide. Incidentally, the first ten-juror verdicts after the rule change favored the defendants. No further opposition to the new rule was heard.

In 1971, Chief Justice Calvert organized the Calvert Task Force, which included thirteen judges and lawyers most knowledgeable about Texas courts. The Task Force undertook to rewrite the Judicial Article of the Texas Constitution, and despite its diverse membership, it accomplished the mission of substantial change. Calvert then led some of us to travel the state to explain and advocate the proposed reforms. I wrote about this project in Court Improvement: The Texas Scene, which appeared in the Texas Tech Law Review.[1] In 1973, the Texas Constitutional Revision Commission overtook the effort for court reform. Calvert, having left the supreme court, chaired the Commission. The thirty-seven Texas leaders on the Commission then involved almost 3,000 persons in a statewide effort to hear and discuss constitutional revision. They presented a complete rewrite of the Texas Constitution to the legislature, which sat as a convention. The convention failed to reach accord, but the legislature submitted a constitutional proposal to the voters during its regular session in 1975. Unfortunately, too few Texas officials shared Calvert's willingness to work for the improvement of Texas government, and all of the proposed amendments failed. Calvert was deeply disappointed, especially by the failure of the rewritten Judicial Article.

For years after he left the court, Calvert carefully read its opinions and wrote many letters to the justices to point out their errors. For example, he fervently opposed the use of incorrect terms in the appellate court judgment. Calvert often reminded us that an appellate judgment acts upon the lower court's final judgment. In an appellate opinion, the writer may approve or reject the statements [p. 917] or rulings of the trial judge. However, the judgment, and that only, affirms, reverses, vacates, or modifies the final judgment below. Calvert wanted us to get it right, and he never stopped teaching.

Calvert was a model chief justice and a delightful colleague. His work was excellent. He was decisive and left no doubt where he stood, yet he was attentive and respectful of the opinions of others. When he thought a judge was delinquent in performance, he made his opinion known without any personal abuse. The man could say more in the way he cleared his throat than others can convey by look or sound.

My years at the court's conference table under Chief Justice Calvert's leadership were the most enjoyable time of my judicial experience. Everyone took the work seriously. It called for your best effort. Rarely did signs of personal animosity materialize, and the few that did passed quickly. Good humor was appreciated. We were comfortable with each other.

Bob Calvert was a man of fierce integrity. No one ever questioned that. He decided the merits of each case without the slightest attention to the identity of the parties or the lawyers. The blindfold never slipped. In all of his years of public service, he was absolutely impervious to favoritism or improper influence.

In 1974, at a dinner in his honor, I presented a plaque and said to him:

We like you, Judge. You get pretty testy in an argument, but anybody who could make a living in Hillsboro during the Depression had to be. And you accept adverse decisions as gracefully as you pronounce your own victorious views. You do not bear grudges. You wear well. You take great care and pride in your personal and professional honor. And yet, you have never been too full of self.

You are as approachable -- as easy to talk to -- as you were when you were the student operator of the capitol elevator or when you waited at the bottom of the stairs to your office, hoping to catch a client in Hillsboro. Calvert liked that description. The following week I received a handwritten note from him. He wrote:

> There is a file in my office labeled "Vanity." Into it I dump all the little nuggets of praise I come by, even those of an overkill variety.
>
> I must ask that your presentation remarks of last Friday be put in writing so that they can be put in "Vanity" and thereby be preserved for the grandchildren.

[p. 918] He left instructions for his memorial service "in the event one should be conducted." He explained that he "came into this world without pomp or ceremony and preferred to depart in the same manner." At the gathering, he directed, an opportunity should be offered "to anyone present to make a brief statement of either praise or criticism."

At the service held for him in Austin on October 9, 1994, we tried to follow his wishes -- consistent, however, with our deep affection and enormous respect for him.

Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit. B.A., University of Texas; J.D., Harvard University; LL.M., University of Virginia. Judge Reavley served as a justice on the Supreme Court of Texas from September 1968 to September 1977.

[1]Thomas M. Reavley, Court Improvement: The Texas Scene, 4 TEX. TECH. L. REV. 269 (1973).

6. Jack Pope's Rememberance of Robert Calvert. Jack Pope[a], *Chief Justice Calvert: Simple Rules Made Him Great*, 26 ST. MARY'S L.J. 919, 920-22 (1995):

CHIEF JUSTICE CALVERT: SIMPLE RULES MADE HIM GREAT

I first saw Robert W. Calvert in 1935 from the gallery of the Texas House of Representatives in Austin. At the time, I was a law student at the University of Texas, and he was a candidate for election as Speaker of the House. I had heard about this bright young man who was challenging the establishment. Although he lost that race, he won in 1937.

In 1950, our paths crossed many times. He was running for a position on the Texas Supreme Court, and I was a candidate for the Fourth Court of Civil Appeals in San Antonio. Robert Calvert was a country lawyer from Hillsboro who had earned statewide respect as chairman of the Texas Democratic Party.[2] He won, and so did I.

Robert Calvert easily assumed the role of a judge. He put aside his party leadership and promptly gained the respect of the bench and bar as an industrious member of the court. When I began my tenure there in 1965, he was serving as the court's chief justice.

From the foot of the court's conference table I daily watched Chief Justice Calvert. Unhurried, deliberate, pressing for decisions and votes, patient, attentive, organized, prepared -- these were some of my first impressions as I tried to become comfortable with the meetings in which important decisions had to be made week after week.

I had served as a trial and appellate judge for more than eighteen years, but I was surprised at the differences in operation between the Texas Supreme Court and the Fourth Court of Civil Appeals. For example, the intermediate appellate court did not [p. 920] have the burden of deciding applications for writs of error. Granting and denying writs consumed at least one-third of our judicial time and effort. I was accustomed to discussing opinions with two justices. At the supreme court, I had to persuade eight. Nine justices produced three times as many opinions as the three of us on the court of civil appeals.

I soon learned that the supreme court devoted several days each week to court conferences. Monday was "application day," Tuesday was "opinion day," and Wednesday was "argument day." Finding time to study and write an opinion was a problem I had to learn to resolve.

Chief Justice Calvert had the ability to keep things simple. He had some rules, but very few. I do not recall ever reading them. Perhaps his own daily example best displayed these rules. After a while, I realized that his rules for the conduct of the court's affairs were similar to Robert Fulgum's All I Really Need to Know I Learned in Kindergarten.[3]

Chief Justice Calvert's first rule involved punctuality for each court conference, for oral arguments, and for the court's ceremonial occasions. Of course, he always arrived first at all of our meetings. In January 1971, former Governor Price Daniel was scheduled to take the oath of office as a justice of the court. The clerk advised the chief justice that Governor Daniel had not yet arrived. Nevertheless, Chief Justice Calvert looked at his watch and said it was time to begin. We entered the courtroom with all the chairs on the front row empty. The chief justice began the program as it was printed. Smiles appeared on faces throughout the assembly as Governor Daniel and his party walked into the courtroom late. It did not happen again. We needed no printed rules to know what the Calvert rules required.

Another Calvert rule was that each judge should hear what every other judge had to say about every case. Stated in a different way, the rule was "Do not lobby other judges in their offices." With nine judges walking in and out of offices up and down the third floor of the supreme court building, little undisturbed research and writing could be done. This rule also meant that discussion in the court's conference room, with all present, was [p. 921] important. Everyone would hear the same arguments and reasons to grant or deny an application or to accept or dissent from an opinion. Each judge was equally responsible for every decision.

Every judge had an equal right to speak about an application or cause. Chief Justice Calvert recognized each justice in succession until we had circled the conference table. He also enforced what has been called the first rule of civil procedure ever announced on the North American continent. An unknown Indian chief created the rule when he said that only one brave may speak at a time. Every judge had the privilege to "pull down" an application or cause and

to take the file to his office for study, for writing, or, as Chief Justice Calvert would say, "to agonize" for a few days. Once taken, however, an obligation existed to give that item priority so that it could be returned to conference for disposition.

Extraordinary proceedings had their own special unwritten rules. When a mandamus, prohibition, or habeas corpus proceeding was filed, the file was immediately delivered to a judge in his turn to examine it and to determine whether it was an emergency. When we received notice to go to the conference room, we knew that a case needed prompt attention and an early setting.

To Chief Justice Calvert, court conferences were court confidences. The integrity of our decision making, the arguments, the close votes, and the changes of votes were all privileged. Thus, the conference discussions were always free and open, but spirited arguments sometimes led to hurt feelings. Nevertheless, we all knew that disclosure of our votes on dispositions could result in a miscarriage of justice to the parties or their attorneys. The Calvert rule concerning confidentiality was always observed and respected. This rule also encompassed a requirement that judges leave their arguments and wounded feelings inside the conference room, never to be mentioned outside.

Finally, Chief Justice Calvert expected judges to arrange their affairs to prevent any conflicts with the court's work. Successful performance of judicial services did not include absenteeism. Thus, except for sickness or other emergency, we seldom had an absence from the court.

These represent some of the rules I discovered when I first reached the court. Perhaps Chief Justice Calvert also derived them from the court's practices upon his arrival. Fairness dictated these rules and they were effective. Chief Justice Greenhill carried them [p. 922] forward during his able administration, and I saw no reason to change them.

Conditions, like courts, change. Different courts proceed in a variety of ways. It was Chief Justice Calvert's fairness, the justices' uniform acceptance of his rules, and his long, untroubled administration that kept our conferences focused upon the work at hand.

Chief Justice Calvert's court produced many landmark cases and hammered out a number of reforms. It was an era when the court declared rules that will govern the civil law for a long time. His own opinions, prepared after diligent research, were consistently written clearly and with forceful reasoning, resting solidly upon settled law. Lean and stripped of distracting dictum, his opinions evidenced scholarship, independence, detachment, judicial restraint, and integrity. He upheld the common law, located the legislative purpose in construing statutes, and wisely took the next step in novel cases or those that moved beyond the periphery of the existing case law.

Chief Justice Calvert always seemed to be guided by the inscription over the portal of the United States Supreme Court building: "Equal Justice Under Law." He never lost sight of his North Star. For his long and honorable career of service, I would put him in my mythical Texas Supreme Court Hall of Fame.

[a] Chief Justice (retired), Supreme Court of Texas; B.A., Abilene Christian University; LL.B., University of Texas. Chief Justice Pope retired in 1985 after nearly 40 years of service as a member of the Texas judiciary.

[2] Chief Justice Calvert's story is fully recorded in his autobiography, *Here Comes the Judge: From State Home to State House: Memoirs of Robert W. Calvert* (Joseph M. Ray ed., 1977).

[3] Robert Fulgum, *All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things* (1988).

7. Lochridge, our Highly Regarded "Of Counsel." Lloyd Lochridge wrote the following remembrance, *Chief Justice Calvert, Our Highly Regarded "Of Counsel"*, 26 ST. MARY'S L.J. 923, 923-25 (1995):

When Robert W. Calvert resigned as chief justice of the Supreme Court of Texas in 1972 and walked a few blocks across the state capitol grounds to our law offices, we began an enjoyable association with him spanning more than twenty years. We already knew something of his background, including his practice as a small-town lawyer in Hill County, his participation in the Texas political scene, and his years on the supreme court. At that time, however, none of us could have fully known or imagined the qualities of this man who ultimately became our friend and counselor.

From the beginning, we heard about Judge Calvert's life in the state home in Corsicana. We also learned about his experiences as a small-town practitioner in Hillsboro that, because of the Depression, proved financially unrewarding. He intrigued us with stories of his service in the Texas House of Representatives and in Democratic politics during the 1940s. When Judge Calvert spoke of his tenure on the Texas Supreme Court, it was apparent that he had liked most of his colleagues. Over time, we learned how he regarded each of them. He generally reflected a high degree of respect; however, in those rare instances when he did not display enthusiasm or affection for a particular individual, he always exercised restraint in his comments.

When referring to his accomplishments or the positions in which he had served, Judge Calvert never demonstrated any self-adulation or egotism. Still, he created the impression that, as the high court's chief justice, he mandated an efficient and hard-working [p. 924] court. He was punctual, as former Governor and United States Senator Price Daniel learned: Governor Daniel arrived late to his first session of the court to find that Judge Calvert had started -- without him and on time.

Judge Calvert's strong work ethic quickly became evident. He continued as an early riser all the years we knew him. If the Dallas Morning News was not delivered by 6:00 a.m., by which time he had been awake for a while and had expected to read it, he would call the newspaper's office. He liked to be busy and was quite willing to take work home when required by the many deadlines of our law practice.

Those in our firm who were privileged to work with Judge Calvert learned of his keen analytical ability, his knowledge of legal precedents, his clarity of thought and expression, his dedication to simplicity and brevity, and his decisiveness.

Although he was quick to find the issue and reach an answer, Judge Calvert was always willing to discuss the legal problems facing our lawyers. He might end a discussion by saying that the view advanced was not his own, but if the lawyer wished to assert it, that was quite all right.

We quickly learned that Judge Calvert had the integrity, honesty, and independence desired in every judge. He fiercely advocated these characteristics in the legal profession and expected his colleagues to adhere to the same standards.

If a particular individual failed to exercise these qualities, Judge Calvert's opinion of that person would change, but he would not state his views publicly.

We could not have had a better counselor.

Judge Calvert's keen legal intellect and vast experience on the court, combined with his openness with all the lawyers in our firm, created an invaluable resource. Those of us who battled Clinton Manges for more than ten years on behalf of the Guerra family remember well the benefits of his wise counsel and hands-on help throughout that litigation.

However, Judge Calvert did not place great financial value upon his services and contributions. This view was not entirely due to his years of country law practice during the Depression. Judge Calvert was simply not an acquisitive person. At times, he became dissatisfied with his compensation, but only because he felt that he was being paid too much. He would occasionally take up this matter with the firm, asking that his compensation be reduced -- requests we promptly but politely turned down.

[p. 925] Our firm also shared a mutually enjoyable social relationship with Judge Calvert. He liked people and enjoyed their company, whether at lunch, at some outing over a beer, or at the birthday parties we had for him. His birthday, celebrated annually by the firm, was enjoyed by everyone and particularly by Judge Calvert and his wife, Corrine. He was the friend of all at the firm, whether they be a lawyer, secretary, law clerk, receptionist, runner, or handyman. His good humor and kindness made him everyone's favorite.

There was so much to learn from this man. He was direct and candid, yet also civil and courteous. He expected lawyers engaged in adversarial proceedings to represent their clients well and with zeal. Nevertheless, he did not expect opposing lawyers to take this approach personally. He set high standards of impartiality, competence, and temperament for the judiciary. As he observed the influence of "big bucks" -- as he called it -- on partisan elections, he became an outspoken advocate for a better judicial selection process. He never gave up on that cause.

Judge Calvert was a fine example to all of us. Our years of association with him were indeed fortunate.

8. The Calvert Court and Tort Law. The following excerpt comes from J. Caleb Rackley, *A Survey of Sea-Change on the Supreme Court of Texas and its Turbulent Toll on Texas Tort Law*, 48 S. TEX. L. REV. 733 (2007). Rackley was briefing attorney for Texas Supreme Court Justice Paul Green. "II. The Early-Calvert Court (1961-1967): The Calm Before the Storm ¶ Robert Wilburn Calvert was born the son of a sharecropper farmer, and after his father died when young Robert was seven years old, his mother gave him up for adoption to the State Orphans Home in Corsicana, Texas.18 Ultimately nicknamed "Mr. Judiciary of Texas" by his friend and fellow Texan, United States Supreme Court Justice Tom C. Clark,19 Calvert graduated with sub-par grades from the University of Texas School of Law in 1931,[20] was elected to the House [p, 739] of Representatives in 1932 and Speaker of the House in 1937,[21] served as City Attorney in Hillsboro, Texas from 1943 to 1947, chaired the State Democratic Executive Committee from 1946 to 1948, and was appointed to the Supreme Court of Texas in 1950 by Governor Allan Shivers.[22] After then-Chief Justice J.E. Hickman announced his retirement in 1960, Calvert ran for and won election as chief justice.[23] A moderate Democrat,

Calvert earned 'a reputation as a staunch law man . . . [who] passionately believed in keeping the law stable and predictable. He would follow an established rule of law even if the rule appeared to cause an unpopular or undesirable result in a particular case.'[24] ¶ [p. 740] Not surprisingly, the Calvert court, at least in its early years, mirrored Calvert's modest approach and philosophy. The justices during the early-Calvert era were a stable group, both 'homogenous and closely-knit.'[25] They served an average of twelve years[26] and, while the system was technically elective, it was largely appointive in effect. Because six of the nine justices who served on the early-Calvert court were originally appointed, all by Democratic governors, the court was largely insulated from any kind of political activism.[27] And like Calvert, the court during his tenure was for the most part "neither pro-plaintiff nor pro-defendant."[28] Rather than stridently ideological, [p. 741] the court could best be described as 'semi-conservative, but taking care of the little people--just as it had always been.'[29] ¶ Together, the personal injury case *Kainer v. Walker*[30] and the wrongful death case *Sheffield Division, Armco Steel Corp. v. Jones*,[31] both decided in 1964, are illustrative of the respect for precedent and judicial philosophy that prevailed during Calvert's early years as chief justice." [pp. 739-40.] In a section entitled "Subtle Change: The Late-Calvert Court, 1967-1972," Rackley wrote: "Three weather-vane cases in the latter years of Calvert's tenure as chief justice – *McKisson v. Sales Affiliates, Inc.*,[55] *Felderhoff v. Felderhoff*,[56] and *Howle v. Camp Amon Carter*[57]--signaled the beginnings of what would later become a dramatic shift in Texas jurisprudence. But what led to the turn? The answer appears twofold: (1) there was new blood on the court that may have begun pushing the court away from its traditionalist roots; and (2) the changes were inevitable in that they reflected a broad national trend." p. 744.

C. AUTOBIOGRAPHY. Because Robert Calvert wrote an autobiography, we know very much of the details of his life. He was born in the hills of Tennessee in 1905. His father died when he was 6 years old. He started school in a one-room frame schoolhouse while living with his paternal grandparents on a 65-acre hilly farm. His mother took her three children and rode the train to Texas, where she placed Robert and his older brother and younger sister in the State Orphans' Home in Corsicana. Robert was hospitalized with Influenza during the epidemic of 1918; his sister died from it. Calvert recounts many details of growing up in the Orphans' Home. He was unfairly given a whipping by the superintendent that was so severe that the superintendent was replaced shortly thereafter by a kinder man. By necessity Calvert learned to fight with fists, and to wrestle, skills which he used in his adult life. He read all the Horatio Alger books and Zane Grey westerns. He played the cornet and later trumpet in the Children's Home Band. He participated in literary societies that trained the boys in declamation, oratory, debate, and essay writing. He participated in a state-level interscholastic debate competition. The Superintendent sent Calvert, at age 16, alone on a train to Austin to meet with State Representatives and Senators to acquaint them with the Orphans' Home and hopefully procure additional funding. The visit was fruitful, because afterward the Legislature appropriated $100,000 to build a new dormitory and a Legislative Committee paid a visit to the home. The Dallas Morning News later called Calvert "the $100,000 boy." In the Home's high school, Calvert became proficient in judging stock cows and hogs, and was on the Texas team at a national stock judging competition in Atlanta. He had the lead role in the Senior Class high school play. He played tennis and quarterbacked the school's football team. Upon graduation, Calvert was torn between going to Texas A& M to get a degree in animal husbandry or going to the University of Texas and getting a law degree. His "Big Brother" in Corsicana was Luther Johnson, a lawyer who was elected to the U.S. Congress. He was also well-acquainted with Beauford Jester, a Corsicana lawyer who eventually was elected governor of Texas. Based on their example, Calvert decided to pursue law, and the superintendent of the school arranged for Calvert to get a job operating the "front" elevator in the State Capitol. (Calvert said: "Running an elevator in the state Capitol is a good apprenticeship for a political career.")

In Austin, Calvert developed a taste for pleasure and not study. One day an impatient passenger on the elevator held the button down to keep the bell ringing until Calvert brought the elevator to the floor where he was waiting. Calvert told him he didn't have to sit on the elevator button, that we would come as soon as he could. The man became angry, and after Calvert left and returned several times, the other man brandished a knife and said "You son-of-a-bitch, I'll cut your guts out," whereupon Calvert hit the man with all he had and knocked the man to the floor and his knife across the lobby. Calvert picked up the knife and kept it. The man threatened to hang around until Calvert got off work, but at 5:30pm he was nowhere to be seen. Calvert thought for sure he'd lost his job, and when his boss came over and said he'd heard that Calvert had gotten into a fight, Calvert told him "It wasn't much of a fight. I hit a fellow and knocked him down." After telling his boss that the man called him an SOB, which he said in the orphanage were fighting words, his boss said: "Well, it's too bad you didn't beat the hell out of him." He kept his job.

Calvert took a year off from school and got a job working for the Industrial Accident Board. The next year he started back to school, working part-time as a mail clerk at the IAB. He decided to quit school again and got a full-time job at the State Fire Insurance Department, then became a night watchman at the Land Office Building and re-entered law school. He worked nights, seven days a week, and had nothing to do but study so his grades improved. In his senior year, Calvert found out that he had missed too many P.E. classes and did not meet the physical education requirements for a degree, so he took a semester of handball and finally graduated in January of 1931.

Graduating in the middle of the Great Depression, no jobs were available. However, a law school friend advised Calvert of an opportunity in Hillsboro to have a place to work in a law office, with no pay but no overhead. Calvert moved to Hillsboro, roomed in a boarding house, and earned $7.50 his first month in practice and $5.00 his second month. He tried and lost some criminal cases and engaged in a general practice, then decided to run for the State Legislature and was elected in 1932 to the 43rd Legislature as the Representative from Hill and Navarro Counties. He opposed an effort by

Governor Miriam "Ma" Ferguson to establish a State Highway Commission in a bill that would allow her to appoint five new commissioners. Calvert moved for an amendment that would delay the law until the 1934 election. In the floor debate, Calvert read from the transcript from the impeachment trial of Ma's husband, former governor James Ferguson, who had been convicted by the Senate on 10 out of 21 charges of vetoing appropriations to the University of Texas as retribution against political enemies, resulting in his removal from office. The passages contained testimony that "Pa" Ferguson has received one-third of a bribe. The Senate sponsor of the bill said that Ferguson was the victim of dishonest friends, like Jesus had been betrayed by Judas Iscariot. Calvert responded: "Now, Senator McGregor, you say that Ferguson was a victim of dishonest friends, and like Jesus had his Judas Iscariot. I fail, Senator, to find in my Bible anywhere an account of Jesus demanding his one-third cut in the thirty pieces of silver!" According to Calvert, the Representatives who had so far been quiet during his speech broke into loud cheering, and his amendment was approved by a vote of 74-63. This confrontation earned both him friends and enemies. At the end of his first term, Calvert was voted by the Associated Press, the United Press, and the International News Service as one of the five most valuable members of the Texas House of Representatives.

In 1935, Calvert was elected again to the 44th Legislature and, at the urging of friends, he put his name in the race for Speaker of the House. His opponent was Coke Stevenson, who had been Speaker in the prior Legislative session and was a supporter of Ma Ferguson. Stevenson won the secret ballot by a vote of 80 to 65. Stevenson appointed Calvert to the Judiciary Committee. In 1936, Calvert was elected to a third term, in the 45th Legislature, and this time he was nominated without opposition and was elected Speaker of the House. Midway through the Session, at the end of a day, Calvert went into the men's room, where there was a porter, and two State Representatives. One of them, Abe Mays, was over 6 feet tall and weighed 215-225 pounds, while Calvert was 5 feet 10-1/2 inches tall and weighed 145 pounds. Abe walked up to Calvert and said he didn't like the way Calvert had been acting and he would give him a good whipping right there and then. Mays put Calvert is a headlock with his arm around Calvert's neck. Calvert describes: "To get my head out of the headlock I lost some skin off both of my ears, but I was then behind him and tripped him and lunged forward and fell on top of him with him flat on his stomach. I promptly applied a half-nelson ... and had him helpless. I kept putting pressure on him there on his stomach on the floor of the men's room; I really didn't care it I hurt him seriously; but he decided that he had had enough, and he asked me to let him up. I said, 'I'll let you up when I have your word that you are through, and that I'm not going to have any more problems with you.' He made me that promise, and I let him up." After the end of the legislative session, Calvert ran for Attorney General but he lost.

In 1939, Calvert was an unpaid lobbyist for the State Bar of Texas in the regular session of the Legislature. He had two goals, one to pass a law creating an integrated Bar, and the other to pass a law conferring power on the Supreme Court to write rules of procedure for civil cases. Both became law.

In 1943, Calvert ran for and was elected as criminal district attorney in Corsicana. The Texas Supreme Court held the law creating district attorneys in certain counties unconstitutional, eliminating Calvert's position, but the county hired him as a county attorney at a lower salary and he served two terms. Also in 1943, Calvert was appointed to the Hillsboro School Board. In 1944, Calvert was asked to make a radio broadcast in favor of former Corsicana resident Beauford Jester, who was running for governor. Calvert was offered $10,000 to do this, but Calvert turned down the money, saying "... when I was a youngster here in the State Orphans Home, Beauford and brother Charley Jester were my friends, and nobody can pay me to help friends who helped me." Jester proposed Calvert to be Chairman of the State Democratic Executive Committee. Calvert was opposed by conservative Democrats, but Calvert received the chairmanship. As Chair of the State Democratic Executive Committee, Calvert oversaw the final canvassing of the votes for the 1948 runoff for Democratic candidate for the U.S. Senate, between Coke Stevenson and Lyndon B. Johnson. The vote was close, and both candidates claimed victory up to the time the Executive Committee did the final canvas of the ballots. Amidst great controversy, the report of votes from the various counties was upheld by a vote of 29 to 28, making "Landslide Lyndon" the winner. Calvert wrote: "I was fully convinced that an election fraud had been perpetrated in Jim Wells County, by which 201 votes had been mysteriously added to Johnson's total vote and one had been added to Stevenson's total." Because there was not a tie, Calvert as chairman of the Executive Committee did not vote. However, he said that he would have voted to certify the vote for Johnson because of a Supreme Court decision saying that the Committee had a purely ministerial duty to accept the votes reported by county chairmen. In 1947, Calvert was elected President of the Hillsboro School Board. During his term as President, he worked with an African American lawyer from Dallas to have an election taking control of the schools away from the City so that black teachers could be paid the same salaries as white teachers. The election was won, and salaries were equalized and a new segregated school was built for African Americans.

In 1950, Calvert decided to run for the position of Associate Justice of the Texas Supreme Court. Popular election was his only path to the Court Calvert said, in that he could not get a gubernatorial appointment "because I was extremely controversial in Texas politics." Calvert had no money to spend on the race, but he was supported by the AFL-CIO and the African-American community. Calvert won the election, and he left Hillsboro and took the oath of office as Associate Justice of the Texas Supreme Court in 1950. A.E. Hickman was Chief Justice. Calvert said of Hickman: "No man with higher moral and ethical standards ever graced the Texas bench. He could quickly cut through to the heart of a case; his opinions were usually brief and succinct." When Hickman retired in 1960, Calvert decide to run for Chief Justice, and won his election by 906,193 votes to 466,684 votes. In 1970, Calvert served as the Chairman of the National Conference of Chief Justices. As Calvert was nearing the end of his second term as Chief Justice, he decided not to run for re-election.

Joe Greenhill ran unopposed for the Chief Justice spot. Calvert gave no personal description of Joe Greenhill other that to call him an Austin lawyer.

Shortly after his arrival at the Supreme Court, Calvert became the Justice with administrative responsibility for amendments to the rules of civil procedure. When Calvert became Chief Justice he turned that responsibility over to Justice Ruel Walker. Calvert actively supported a 1965 amendment to the Texas Constitution for the formation of a State Judicial Qualifications Commission. In 1968, Calvert served as Chairman of a committee to recommend changes to the 1876 Constitution regarding the judiciary in Texas. Recommendations were forwarded to the Legislature at the end of 1972. The proposed amendments passed the House but died in the Senate. In 1973, Governor Dolph Briscoe appointed Calvert to chair a Constitutional Revision Committee to revamp Texas' 1876 Constitution. The proposed amended Constitution was sent to the Legislature, sitting as a Constitutional Convention, but it fell 3 votes short of the required 2/3 vote of members to allow the proposal to go to public election. In 1975, Calvert chaired an effort to submit an Article-by-Article amendment of the Constitution, but all proposals were voted down by a ratio of 8 to 3 against.

In 1933, Calvert married his first wife. They divorced in 1958. In 1963, he married his second wife and they remained married until she died in May of 1994. Robert Wilburn Calvert died in October of 1994.

D. OPINIONS AND PUBLICATIONS.

Court Opinions. In his autobiography, Chief Justice Calvert said that he wrote 378 Opinions, covering 260 volumes of the Southwestern Reporter. Here is a selection of some of his Opinions.

1. ***Renfro Drug Co. v. Lewis***, 235 S.W.2d 609, 615 (1950). This was Associate Justice Calvert's first Supreme Court Opinion, issued on December 6, 1950. Calvert wrote without dissent in a damage suit, where the plaintiff fell through a doorway leading from a parking garage into a drug store, that there was some evidence to support a trial court finding of the defendants' negligence and proximate cause, and that contributory negligence by the plaintiff was not established as a matter of law. The case also addressed the right of indemnity between a lessor and a lessee for claims paid to a third person. The Opinion ended on a point of contract law: "It is said that there would have been no purpose in requiring indemnity except to protect Bank against loss or liability for injuries arising out of some cause for which it would be liable and that it was not intended that all loss or liability of Bank be excepted from the indemnity agreement. The obvious answer to this contention is that we have no right to make a new contract for the parties. The indemnity agreement and the exception therefrom are stated in clear and unambiguous language. If the parties had intended the agreement to read as herein reconstructed they had it within their power to so write it." *Id.* at 531. The case has been cited 77 times for its statement that, where there are no findings of fact and conclusions of law, the trial court's judgment implies all necessary fact findings in support of the judgment. The case has been cited 244 times usually for its statement that, in assessing the sufficiency of the evidence to support the trial court's findings, "it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature." Calvert cited two very old cases in support: *Austin v. Cochran*, Tex. Com. App., 2 S.W.2d 831, 832 (1928); and *Cartwright v. Canode*, 106 Tex. 502, 171 S.W. 696 (1914).

2. ***Cavanaugh v. Davis***, 235 S.W.3d 972 (Tex. 1951). This was Associate Justice Calvert's second Opinion for the Court. Calvert also wrote the Opinion in the companion case of *Stewart v. Davis*, 235 S.W.2d 979 (Tex. 1951). According to Westlaw as of March 9, 2021, *Cavanaugh v. Davis* has been cited in 168 Opinions, as recently as the Texarkana Court of Appeals on October 8, 2020, as well as in 44 secondary sources. In the case, Justice Calvert acknowledged that the doctrine of adoption by estoppel was recognized in Texas, but that "[i]n no case has this Court upheld the adoptive status of a child in the absence of proof of an agreement or contract to adopt." *Id.* at 577.

3. ***Transports of Texas, Inc. v. Robertson Transports, Inc.***, 261 S.W.2d 549 (Tex. 1953). Calvert's Opinion, as of the time of his autobiography, had been cited 265 times, but by the time this article was written, citations in appellate opinions available on Westlaw has risen to 453, the most recent case being published on July 24, 2020. The *Transports of Texas* case involved when a temporary injunction can be granted, what proof is required, and what the injunctive order must say.

4. ***McKee, General Contractor v. Patterson*,** 153 Tex. 517, 271 S.W.2d 391 (1954). In this case, Associate Justice Calvert wrote: "There are two legal theories, wholly aside from the plaintiff's own negligence, for denying liability in a suit against an owner or occupier of land brought by an invitee for injuries growing out of open and obvious dangers thereon. One rests on the judicial concept that there is no breach of any duty the landowner owes to his invitees. The other arises out of the doctrine of volenti non fit injuria—voluntary encountering of risk—which is regarded as a defense to all negligence actions. In this state both theories are recognized. Actually, in their application to a given fact situation the two theories so completely overlap as to be almost indistinguishable. Actually, also, the defenses of voluntary exposure to risk and contributory negligence are frequently treated as one and the same. The failure of counsel to segregate and separately preserve all of these questions in pleadings in the trial courts and in briefs in the appellate courts, thereby offering the appellate courts no alternative except to decide the cases before them on the questions presented, and the tendency of the appellate courts to group them in analyzing the evidence, or to seek the most obvious and simplest solution, has led to much confusion in the decided cases. In greatly similar fact situations some are decided on the basis of no breach of duty by the defendant, some on the basis of voluntary encountering of risk by the plaintiff, some on the basis of the contributory negligence of the plaintiff, and some on the basis of two or more of these factors without distinction between them. This has led to what appears to be conflicting results." *Id.* at 393. Later in the Opinion Calbert wrote: "It would greatly simplify

our procedural problems if we could follow the course suggested by the San Antonio Court of Civil Appeals in *Camp v. J. H. Kirkpatrick Co.*, 250 S.W.2d 413, writ refused, n.r.e., [author's note–this Opinion was written by Justice Jack Pope] and let this class of cases fall into the pattern of the usual negligence case, deciding the question of negligence and breach of duty on the part of the owner by looking only to his conduct and the question of voluntary exposure to risk on the part of the invitee by looking alone to his conduct, but to do so would be to ignore the well-settled law of this state, as expressed in the cases above cited, that there is no duty on the owner of premises to take precautions to protect his invitee from dangers on the premises of which the invitee is or should be fully aware and which he voluntarily encounters. To determine the existence and the extent of the owner's duty we must therefore look not only to the conduct of the owner but to the conduct of the invitee as well. It may well be that when we examine the conduct of the invitee for the purpose of deciding whether there has been a breach of duty by the owner we necessarily decide, as an incident thereto, the defensive issue of voluntary exposure to risk, with the result that a decision of the first question follows a decision of the second automatically. This was precisely the situation with which this court was confronted by the motion for rehearing in *Wood v. Kane Boiler Works*, 150 Tex. 191, 238 S.W.2d 172, 180. But this resulting intermingling of the two problems would not justify our rewriting the substantive law of the state to impose a duty where it is so firmly established none exists. Even if voluntary exposure to risk be not pleaded as a defense the duty question would still be present. On the other hand, the problem being presented by the facts so as to raise the question of "no duty", there would seem to be little or no place in the case for the defense of voluntary exposure to risk except, perhaps, to highlight the problem. If the case were submitted on special issues placing on the plaintiff the burden of proving that the dangers were not so open and apparent that he should have realized them, the defendant could hardly be prejudiced or heard to complain because of the refusal of the trial court to resubmit the same issues, from a defensive standpoint, with a less onerous burden on the plaintiff." *Id.* at 394.

Justice Griffin, joined by Justice Smith, dissented.

5. ***Missouri-Kansas-Texas Railroad v. McFerron***, 291 S.W.2d 931 (Tex. 1956). In this railroad crossing death case a widow and child received a favorable jury verdict against a railroad company. The railroad complained that the trial court should have granted an instructed verdict because the deceased was violating V.A.T.S. art. 6701d at the time of the accident. Associate Justice Calvert wrote: "The point of error calls for an analysis of the statute which, in turn, poses many difficult problems. We note some of them in their logical order, as follows: 1. What duties are imposed by the statute? 2. Are the duties absolute or conditional? 3. If conditional, what are the conditions? 4. By what test shall the courts determine whether in a given case a train was 'plainly visible' and 'in hazardous proximity'" to a crossing? 5. Does the evidence in the particular case establish conclusively the existence of the conditions giving rise to a duty to stop? 6. Does the evidence in the particular case establish conclusively a breach of the duty to stop? 7. Does breach of the duty to stop constitute negligence as a matter of law under the facts of the particular case? [¶] In this opinion we will have occasion to discuss the first six questions listed, but because of the conclusion we reach in answering the sixth question, will have no occasion to consider or discuss the seventh."p. 934. Calvert noted: "Intensive and extensive research has failed to discover any case squarely in point, either in this or in any other jurisdiction, other than [one] Indiana case ...." p. 936. The Court applied the reasonably prudent standard to the questions of whether the train was "plainly visible" and "In hazardous proximity" to a crossing. p. 939. The Court held that as a matter of law that a reasonably prudent person should have known that crossing the track ahead of the train was hazardous. p. 940. The Court did not, however, find the evidence conclusive that the deceased failed to stop, notwithstanding the train's fireman's testimony to that effect. p. 940. The Court found the next point of error, claiming contributory negligence, was waived for failure to state or explain the allegedly negligent act. p. 941. What Calvert called "one of the most difficult questions in the case" was whether the widow's testimony that her husband "never crossed the crossing in question without first stopping the car and looking and listening for trains." p. 941. Reviewing the Texas authorities, Calvert wrote: "All in all, considering the state of the decided cases, it can probably be said that the question is yet an open one in this state." p. 942. Calvert goes on to note: "With the exception of the writer and Associate Justice Smith, all members of the Court are in agreement that this Court should adopt and follow the majority rule that habit evidence should not be admitted where there is an eyewitness to the accident, even though the eyewitness be an employee of the opposite party. What is now to be said on the subject is said in support of the writer's position that such evidence has probative force and therefore should be admitted under circumstances to be noted." p. 942. Calvert goes on to say that the erroneous admission of the habit evidence would not matter if the jury's finding on discovered peril was upheld. However, the Court found that there was no evidence that the fireman could have acted to avoid the accident. Consequently, the case had to be remanded for a new trial. p. 945. Having written the Opinion of the Court, Calvert concludes: "The writer and Associate Justice Smith dissent from the judgment. We do not agree that the admission of the habit evidence was error and we find no other reversible error in the record. We accordingly believe the judgment of the courts below should be affirmed." Thus, Calvert dissented from his own Opinion. Associate Justice Garwood concurred, agreeing with the Court on all issues except the application of a reasonable care standard to the question of whether the train was "plainly visible" and "in hazardous proximity" to the crossing. p. 945. Associate Justice Culver joined the concurrence. Garwood wrote: "If one hears in conversation or reads in a book that "the moon was plainly visible" or that "the falling aircraft was in hazardous proximity to the earth", he has a quite clear idea of what is meant, without speculating about whether someone kept a "proper lookout" for the moon or, in the exercise of due care under the circumstances, would have appreciated that the aircraft was in danger of crashing." p. 946. See discussion of Justice Calvert's article on this topic, in Section I.D.6 (publications) below.

6. ***Ex Parte George***, 358 S.W.2d 590 (Tex. 1962). *Ex Parte George* was an application for writ of habeas corpus filed by Sherman D. George, a local labor leader who picketed outside the main gate of American Oil Company in defiance of a temporary injunction issued by a Galveston County state district judge. George was held in contempt of court and

sentenced to jail for 72 hours and fined $100. The case has the earmarks of being a test case, designed to bring into issue the question of whether the National Labor Relations Act preempted jurisdiction of state courts over this type of labor dispute. In this instance, the employer had invoked the jurisdiction of the NLRB over its secondary gates, but not to the main gate of the facility, and the main gate is where George and his fellow-picketers made their demonstration. The Texas Supreme Court initially rejected habeas corpus relief without dissent. However, upon rehearing Justice Calvert, joined by Justice Norvelle dissented from the denial of a motion for rehearing. Calvert wrote: "Further consideration of this matter has convinced me that relator should be discharged. Being thus convinced, I must dissent." Calvert wrote a 13-page Dissenting Opinion explaining why he had come to believe that the state district court did not have jurisdiction to issue the temporary injunction against the picketers. The case was taken to the United States Supreme Court, Mr. George being represented by the Houston lawyer Arthur J. Mandell of Mandell & Wright, and the oil company being represented by Tom Davis, of Baker, Botts, Shepherd & Coates. Calvert was vindicated when the U.S. Supreme Court, in a short, Per Curiam Opinion, without oral argument, reversed the decision of the Texas Supreme Court. *Ex Parte George*, 371 U.S. 72 (1962). Because the Per Curiam Opinion was short, it may have disappointed those who were hoping for a more definitive ruling on the legal principles involved.

7. *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 59 (Tex. 1964). Chief Justice Calvert concurred: "Courts try to solve disputes over the meaning of contracts by giving them the meaning the parties intended them to have. This is as it should be. But what meaning the parties to a contract intended it to have is often unclear. Once a dispute arises over meaning, it can hardly be expected that the parties will agree on what meaning was intended. It is for this reason that the courts have built up a system of rules of interpretation and construction to arrive at meaning, ignoring testimony of subjective intent. 'Intention of the parties' is often guess-work at best. Sometimes the true intention of one or eIven of both parties may be defeated.... So, while use of rules of interpretation and construction may not always result in ascertaining the true intention of parties in using particular language ... , their use yet must be better than pure guess-work in most cases else they would never have been evolved."

8. *Oil Field Haulers Ass'n v. Railroad Commission*, 381 S.W.2d 183 (Tex. 1964), Chief Justice Calvert wrote: "This case presents a number of novel procedural questions, jurisdictional and otherwise, which must be resolved before substantive questions are reached." Calvert lists, answers, and explains four procedural questions: "1. Does this Court have jurisdiction of the application filed by Hill & Hill? We answer this question 'No.' A negative answer is clearly compelled by our Rules of Civil Procedure. ... 2. Does this Court have jurisdiction of the application filed by Haulers and of the points of error contained therein? We answer the first part of the question 'yes.' Strict application of the Rules would require a negative answer to the second part, but considering all of the attendant facts and circumstances, we have decided to take jurisdiction of the points. ... 3. Are the defects in the bond filed by Haulers and others preliminary to issuance of the writ of temporary injunction fatal to an order reinstating the injunction? We answer this question 'No.' 4. Does this Court have jurisdiction of Haulers' first point of error asserting that the Court of Civil Appeals erred in holding that the strict de novo appeal of the Commission's rate order did not suspend such order? We answer this question 'No'." In a 1981 article, Chief Justice Greenhill wrote of this case: "One caveat before getting to our court, and that is about our jurisdiction if the court of civil appeals has granted rehearing or changed its judgment. If the court of civil appeals grants a motion for rehearing, and changes its judgment, you must file another motion for rehearing and set out your points. And that motion must be overruled before we have jurisdiction. This is the teaching of an opinion of our court called *Oil Field Haulers Ass'n v. Railroad Commission* by Judge Calvert.[1] That is a complicated opinion, and I will not take the time to go into it. The bottom line is that if the court of civil appeals changes its judgment in a y respect on rehearing, do yourself a favor and study *Oil Field Haulers*."

9. *Tarver v. Tarver*, 394 S.W.2d 780 (1965). In *Tarver v. Tarver*, Chief Justice Calvert wrote an Opinion restating bed rock rules on community and separate property and discussing the commingling of separate and community property funds and the tracing of separate property. Westlaw indicates that the Opinion has been cited in 129 later Opinions and 69 secondary sources, as of March 9, 2021. Subsequent cases citing include Per Curiam in *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011); Justice Robertson in *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987); Justice Pope in *Cameron v. Cameron*, 641 S.W.2d 210, 216 (Tex.1982); Justice Denton in *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); Justice Barrow in *Maples v. Nimitz*, 615 S.W.2d 690, 691 (Tex. 1981); Justice Johnson in *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex.1975); and Justice Denton in *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973). *Tarver* is also cited for the esoteric but then-fatal procedural mistake of failing to file an application for writ of error attacking the Court of Civil Appeals' adverse ruling on a cross-point raised by the appellee in the Court of Civil Appeals. *See e.g.*, *Hernandez v. City of Ft. Worth*, 617 S.W.2d 923, 924 (Tex. 1981) (Per Curiam). See Calvert, *Some Problems of Supreme Court Review*, 21 TEX. B. J. 75 (Feb. 22, 1958), discussed under Publications, Para. 8 below.

10. *Houston Fire & Cas. Ins. Co. v. Nichols*, 435 S.W.2 140 (Tex. 1968). Chief Justice Calvert wrote the Opinion in this case involving the amount to be paid by the insurance company on cotton burrs that were destroyed by fire. The Supreme Court held that the insurance contract to cover the cotton burrs for $6,000 was the amount of insurance and not a contractually agreed-upon price and that it was necessary to present evidence of value. Despite the fact that "there is absolutely no evidence in the record supporting the jury's answer to the damage issue," the record did reflect some market value and some intrinsic value to the insured. The Court remanded in the interest of justice, under Tex. R. Civ. P. 505. *Id*. at 141-43.

11. *State v. Cook United, Inc.*, 464 S.W.2d 105, 107 (Tex. 1971). Chief Justice Calvert issued a short concurrence:

I concur in the judgment rendered.

The requirement in Rule 683 that the reasons for issuing an injunction be stated in the order could hardly be couched in stronger language. It is mandatory. The order in the instant case states no reasons for its issuance. I concur in the judgment here rendered only because I am willing to recognize an exception to the Rule's requirement in cases involving injunctive orders granted on behalf of the State to restrain the operation of statutorily declared public nuisances. That, in my judgment, is the effect of the majority's opinion.

12. ***Del Bosque v. Heitmann Bering-Cortes Co.***, 474 S.W.2d 450, 453 (Tex. 1971). In this case the Supreme Court held that a verdict finding the plaintiff negligent conflicted with a finding that the plaintiff acted prudently in the face of an emergency ("the sudden emergency doctrine"). Speaking of statements in prior Supreme Court Opinions, Chief Justice Calvert wrote: "[s]uch expressions are not intended to mean, and do not mean, that a person will be relieved of the legal consequences of unreasonable and imprudent conduct when confronted with a sudden emergency; they mean only that the fact finder, judge or jury as the case may be, may conclude that conduct which in other circumstances would be unreasonable or imprudent is not so in emergency situations. In this respect the doctrine of 'sudden emergency' would seem to differ from the doctrine of 'imminent peril.' A person is not legally accountable for imprudent conduct resulting in injury to himself when such conduct results from a state of terror reasonably springing from an imminent peril created by the negligent conduct of the defendant." *Id.* at 452-53. Calvert ended his Opinion with this: "The frustration of conflicting jury answers should not reoccur upon retrial of the case if the question of sudden emergency is submitted to the jury as an explanatory instruction in keeping with our suggestion in *Yarborough v. Berner*, 467 S.W.2d 188 (1971)," an Opinion written by Justice Pope. See Section III.D.2 below.

13. ***Joe Adams and Son v. McCann Const. Co.***, 475 S.2d 721, 733 (Tex. 1971) (Calvert, C.J., Dissenting), Chief Justice Calvert wrote in dissent: "The decision in this case establishes not only bad contract law but also bad summary judgment law." Calvert was joined in dissent by Justices Steakley, McGee, and Denton. The Majority's decision was later overruled by *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987).

14. ***Morrow v. Shotwell***, 477 S.W.2d 538 (Tex. 1972). In this case, Chief Justice Calvert wrote: "The rule by which to test the sufficiency of the description [in a deed] is so well settled at this point in our judicial history, and by such a long series of decisions by this court, as almost to compel repetition by rote: To be sufficient, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty." *Id.* at 539. Calvert also confirmed Justice Greenhill's statement in *Scott v. Liebman* that either the court of civil appeals or the Supreme Court could remand a case in the interest of justice when "when a case was tried on a wrong theory and it appeared to us that the justice of the case demanded another trial." *Id.* at 540. According to Westlaw as of March 9, 2021, this Opinion has been cited in 225 later cases, and 51 secondary sources. *Scott v. Liebman* is discussed in Section II.D.20 below.

15. ***Swilley v. Hughes***, 488 S.W.2d 64 (Tex. 1972). This was one of Chief Justice Calvert's last two Opinions for the Texas Supreme Court, issued on October 4, 1972. The case was a suit on a promissory note, in which summary judgment had been granted. Chief Justice Calvert wrote: "Under Rule 166-A, Texas Rules of Civil Procedure, the party moving for summary judgment has the burden of establishing that there exists no material fact issue and that movant is entitled to judgment as a matter of law. When a defendant moves for summary judgment on the basis of his affirmative defense, he must, therefore, conclusively prove all essential elements of that defense." Justices Walker and Pope dissented on the scope of the remand. According to Westlaw as of March 9, 2021, the Opinion has been sited in 943 later cases, and 63 secondary sources.

16. ***Moore Burger, Inc. v. Phillips Petroleum Co.***, 492 S.W.2d 934, 938 (Tex. 1972). This was one of Chief Justice Calvert's last two Opinions for the Court, issued on October 4, 1972. Westlaw indicates that this Opinion has been cited in 422 other cases and 83 times in secondary sources, as of March 9, 2021. In this case, Chief Justice Calvert recognized the doctrine of promissory estoppel as an exception to the general statute of frauds, where the application of the statute would amount to a fraud. In a short Opinion Overruling Motion for Rehearing, Justice Reavley wrote: "Respondents read the Court's opinion to make any promise enforceable, though within the proscription of the statute of frauds, if foreseeable action or forbearance by the promisee meets the requirements of Section 90 of the Restatement of Contracts (or fulfills Section 217A of the Restatement, Second, Supp.Tent.Draft No. 4, 1969). This is not the holding. *** The promise which is determinative here is the promise to sign a written agreement which itself complies with the statute of frauds." Ten years later, in *Nagle v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982), Chief Justice Greenhill wrote: "This Court's original opinion in '*Moore Burger*' was considered to have been too broadly written. On rehearing, the Court wrote to narrow the promissory estoppel exception to cases where the promise was 'to sign a written agreement which itself complies with the Statute of Frauds.'" *Moore Burger, Inc.* also is cited for its ruling that on summary judgment, a non-movant raising an affirmative defense in the nature of confession and avoidance has the burden of raising a fact issue regarding the affirmative defense.

17. ***Calvert v. Employees Retirement System of Texas***, 648 S.W.2d 418 (Tex. Civ. App.–Austin 1983, writ ref'd n.r.e.). In this case, Robert W. Calvert filed suit in a Travis County District Court seeking a declaratory judgment that the Employees Retirement System of Texas was required to give him the names and mailing addresses of retired appellate court justices whose records were in the custody of the System. The System secured an Attorney General's Opinion that

the records were exempt from the operation of the Texas Open Records Act. The trial court granted the A.G.'s motion for summary judgment without stating the rights of either party under the applicable statutes. In an ironic twist, the Court of Appeals reversed the trial court for failing to declare the parties' rights, citing as sole authority Calvert, *Declaratory Judgments in Texas*,14 ST. MARY'S L.J. 1 (1982). The appellate court went on to "render the judgment that the district court should have rendered," and ordered that the names and addresses of retired appellate judges be disclosed to Robert W. Calvert.

Publications.

Calvert said that he "began as early as 1952 writing "articles for publication which I thought would be helpful to both bench and bar." Here is a list of articles written by Calvert over the years. [If the reader knows of other articles by Calvert, please email the author so this article can be updated.]

1. Law and Legislators. The earliest published article authored by Robert Calvert that research uncovered was in Volume 1 of the Texas Bar Journal, Calvert, *Law and Legislators*, 1 TEX. B.J. 62 (1938). Calvert wrote the article when he was Speaker of the Texas House of Representatives, 45th Legislature. Calvert wrote:

> Who has not heard the story of citizen A who, in sympathizing with citizen B whose son had been sentenced to serve a term of years in the penitentiary, suggested that after all he, A, had suffered a greater humiliation and indignity--his son had been sent to the state Legislature! Members of the Legislature, individually and collectively, have been subjected to so much adverse criticism the writer is forced to admit that of all public officials the public generally regards the legislator as the official 'of lowest estate.
>
> To the press should go a large measure of the blame (or credit) for developing and fostering this "anti- legislature" public attitude. Most of as, like the late Will Rogers, only know what we see in the papers, and the powerful influence of the editorial, the cartoon, and the featured stories on legislative sessions has convicted the legislator of all the sins of omission and commission known to the law; so that his constituents usually approach him in the same attitude as that adopted by the Justice of the Peace who faced all defendants hailed into his court with the same query: "Do you want to plead guilty, or do you want me to find you guilty?"

It is not the purpose of this article to offer a defense of the Legislature. It needs no more defense than does the Democratic form of government itself, for in theory at least, the legislative is the most important branch of a democratic government. The legislative branch makes the laws; the judicial and the executive branches only interpret and execute them.

> * * *
>
> The proof of the pudding is in the eating. The people would not continue to elect, honor and promote crooks, grafters and horse-thieves. A glance at the records reveals that greater public honor has come to many men who began their careers as humble members of the House of Representatives. [In this comment, Calvert foreshadowed his own future.]
>
> * * *
>
> When next you feel like cussin' your legislators because they have passed some law that does not exactly suit your fancy, just remember that they are the same type of men that you are; that they are the victims of a Democratic system of government which William James has described as "a system in which you do something and then wait to see who hollers. Then you go and relieve the hollering as best you can, and wait again to see who hollers as a result of your remedying the first woes. And so on."

2. New Rules of Procedure. Calvert, *Some of the Important Changes Effected by the New Rules of Practice and Procedure in Civil Actions*, 6 Dallas Bar Speaks pp. 17-182 (1941). This article is a report of comments delivered by Calvert, then County Attorney of Hill County, to the Dallas Bar Association on June 21, 1941.

3. Supreme Court Review. Calvert, *Method of Review by the Supreme Court*, 14 Dallas Bar Speaks 5 (1951).

4. Harmless Error. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1 (1952). This 18-page article is an historical analysis of the doctrine of harmless error, starting with Wigmore's recounting of "presumed prejudice" in English law, and continuing through Justice Calvert's analysis of the harmless error rule in Texas case law. "Development of the court's attitude toward the prejudicial error provisions of Rules 434 and 503 can best be brought into proper focus by a [p. 10] general analysis of the twenty-two cases[52] involving the problem, either decided by the court or in which the court refused a writ of error, thereby placing its approval upon the decision and opinion of a court of civil appeals." *Id*. at 9-10. The earliest case citing this law review article was *Kansas City S. Ry. Co. v. Frederick*, 276 S.W.2d 332, 333 (Tex. Civ. App.–Beaumont1955, writ ref'd n.r.e). In his 1979 article on this subject, Calvert revealed a letter he received from Robert W. Stayton, Professor of trial and appellate procedure at the University of Texas School of Law, saying about this 1952 article by Calvert: "Your article on *Development of the Doctrine of Harmless Error* is in my opinion a benchmark from which all future efforts will proceed. It is most excellent." Calvert & Perin, *Is the Castle Crumbling? Harmless Error Revisited*, 20 S. TEX. L.J. 1(1979). See Section I.D.36 (publications) below.

5. Special Issues. Calvert, *The Submission of Special Issues*, 16 Dallas Bar Speaks 330-336 (1953-54). This article is drawn from Associate Justice Calvert's April 24, 1954 speech to the Dallas Bar Association. Calvert discussed. among other things, the requirement in Rule 289 that the court "shall submit the controlling issues made by written pleadings and the evidence."

6. The Application for Writ of Error. Calvert, *The Application for Writ of Error*, 3 TEX. R. CIV. P. ANN. 404-12 (Vernon 1955) (following Rule 469).

7. Special Issues. Calvert, *Special Issues Under Article 6701d, Section 86(d), of the Texas Civil Statutes*, 34 TEX. L. REV. 971, 978 (1956). In this article, Associate Justice Calvert wrote extensively on a recent Supreme Court Opinion he had authored, on how to frame special issues and instructions in a jury charge to implement the statute governing duties in a railroad crossing case. Calvert wrote:

> By its recent opinion in *Missouri-Kansas-Texas R.R. v. McFerrin*,[1] the Supreme Court of Texas sought, as best it could, to settle some of the problems which article 6701d, section 86(d)2 has posed in railroad crossing cases. Whether it succeeded only time and future litigation will tell. It is not entirely unlikely that it created as many problems as it solved.
>
> One problem the court did not have before it and therefore did not undertake to solve was the problem of framing special issues for jury submission of the defenses provided by the statute. That the framing of issues has been a problem, rarely solved in the same manner by trial courts, is obvious from a casual glance through opinions of courts of civil appeals in some of the cases dealing with the subject.
>
> Actually, the *McFerrin* opinion charted the way on most of the issues arising under the statute. It stated that the statute imposes no duty on a motorist approaching a crossing unless a train is approaching, is plainly visible, and is in hazardous proximity to the crossing, and it defined the terms "plainly visible" and "in hazardous proximity." It noted that [p. 972] when the three foregoing conditions exist the statute imposes on a motorist two duties: (1) a duty to stop, and (2) a duty not thereafter to proceed until he can do so safely."

This article was cited by Justice Walker in *Christy v. Blades*, 448 S.W.2d 107, 111 (Tex. 1969), overruled by *S. Pac. Co. v. Castro*, 493 S.W.2d 491 (Tex. 1973), where Justice Walker wrote: "The problem of submitting impossibility of compliance with Article 6701d, s 86(d), was considered by at least one legal writer shortly after our decision in McFerrin. On the theory that this excuse for violating the statute is legally analogous to sudden emergency, it was suggested that the motorist should have the burden of proving: (1) that after the train became plainly visible and in hazardous proximity to the crossing, he could not by the exercise of ordinary care have stopped his vehicle within fifty feet but not less than fifteen feet from the nearest rail of the track; and (2) that his inability to stop was not caused by his own negligence. Calvert, Special Issues under Article 6701d, Section 86(d), of the Texas Civil Statutes, 34 Tex.L.Rev. 971. See also Hodges, Special Issue Submission in Texas, s 25, p. 67. ¶ We agree with these conclusions. It is also our opinion that when impossibility of compliance is raised but not conclusively shown by the evidence, the motorist must request the submission of proper excuse issues before he will be heard to complain of their omission from the charge."

8. Some Problems of Supreme Court Review. Calvert, *Some Problems of Supreme Court Review*, 21 TEX. B.J. 75 (Feb. 22, 1958). In this article, Associate Justice Calvert wrote: "The purpose of this article is to point up and illustrate some of the problems which are often encountered by the practitioner in seeking review by the Supreme Court on application for writ of error or by answer to an application." P. 75. In discussing preservation of error, he wrote:

> It is elementary that review of an erroneous ruling can be obtained only where the party seeking review has preserved the error at every vital step of the appellate process from its origin or commission to its presentation by point of error in the application or by cross-pointin the answer to the application.[9] ... These steps include proper objection, where required, when the ruling occurs in the course of the trial in the trial court;[10] assignment of error in the motion for new trial where a motion is required as a prerequisite of appeal;[11] complaint by point of error or by cross-point in the brief in the Court of Civil Appeals;[12] assignment of error in the motion for rehearing in the Court of Civil Appeals;[13] and complaint by point of error in an application for writ of error in the Supreme Court or by cross-point in the answer.[14] Right of reveiw by the Supreme Court is often lost through failure to preserve the error by assignment of error in the motion for rehearing in the Court of Civil Appeals[15] or by point of error in the application for writ of error.[16]

Calvert goes on to discuss the intricacies of cross-assignments, conditional points of error, cross-points, independent grounds for affirmance of the court of civil appeals, fundamental error, and an arduous explanation of problems arising from presenting two or more independent points of error where one was not addressed by the lower court, or where one is a rendition point and the other a remand point and the lower court erroneously reversed on the rendition point without addressing the remand point, or vice versa. For all of the problems he analyzes, Calvert sets out an example walking the advocate through the steps s/he must take, with the multiple points problem presented in 11 alternate scenarios. Calvert dropped two footnotes, one setting out suggested language the advocate should use to present a request for a conditional writ of error and the other setting out a sample reference to independent grounds for affirming the court of civil appeals' judgment. Some of these traps for the unwary in Supreme Court practice were banished with the adoption of the Texas

Rules of Appellate Procedure effective September 1, 1997, but the problem of how to deal with unaddressed remand or rendition points is with us still.

See *Enloe v. Barfield*, 422 S.W.2d 905 (Tex. 1967) (Calvert, C.J.), where the Supreme Court reversed the court of civil appeals' ruling that there was no evidence to support two jury findings that the plaintiff was negligent. Because the plaintiff did not cross-assign a point of error in the court of civil appeals that the two findings were against the "overwhelming preponderance" of the evidence (a factual sufficiency complaint that was under the exclusive jurisdiction of the court of civil appeals), the Supreme Court reversed and rendered judgment for the defendant. The Court declined to remand in the interest of justice.

It is noteworthy that the section of the article on "no evidence" and "insufficient evidence" discussed nomenclature and proper disposition on appeal, saying that a no-evidence point requires rendition while an insufficient-evidence point requires remand. pp.114. In Footnote 29, Calvert cites to W. St. John Garwood's *The Question of Insufficient Evidence on Appeal*, 30 TEX. L. REV. 803. In Footnote 30, Calvert wrote: "To determine whether the point is a 'no evidence' or an 'insufficient evidence' point the court will look beyond the strict wording of the point and consider the statement and argument under it." Calvert apparently had not yet reached the essential insight presented in his 1960 article on *No Evidence/Insufficient Evidence Points of Error*, that "[t]he controlling consideration with an appellate court in passing on a point of error directed at the state of the evidence is not whether the point uses the preferable, or even the proper, terminology, but is whether the point is [p. 362] based upon and related to a particular procedural step in the trial and appellate process and is a proper predicate for the relief sought." See Section I.D.8 below.

Calvert's 1958 article was revised sixteen years later and was published in 6 ST. MARY'S L.J. 303 (1974).

9. No Evidence/Insufficient Evidence Points of Error. Calvert, *No Evidence "And Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960). This law review article is the most important one that Justice Calvert wrote; it is the most cited and most influential law review article ever written in Texas.

In an 1989 article for the St. Mary's Law Journal, Chief Justice Calvert commented that the heart of his article on standards of review "was placed up front on page one; all else was filler." Robert W. Calvert, *How an Errorless Judgment Can Become Erroneous*, 20 ST. MARY'S L.J. 229, 230 (1989). Here is page one of Calvert's *"No Evidence" and "Insufficient Evidence" Points of Error*, published in 38 TEX. L. REV. 361 (1960):

"NO EVIDENCE" AND "INSUFFICIENT EVIDENCE" POINTS OF ERROR

> It was thought that the per curiam opinion of the Supreme Court in *In re King's Estate*[1] and the publication of former Associate Justice Garwood's excellent article, *The Question of Insufficient Evidence on Appeal*,[2] would resolve, both for lawyers and judges of Courts of Civil Appeals, most of the problems growing out of points of error challenging a verdict or judgment because of a lack of evidence or lack of sufficient evidence to support it, or because it is contrary to the great weight and preponderance of the evidence; but a growing number of recent decisions indicate a continuing misunderstanding in some quarters of the nature and office of points of error of that type, justifying, it seems to the writer, a somewhat more analytical discussion of the subject. The analysis will be made without extensive comment and with a minimal number of citations. No good purpose would be served by citing the decisions which have prompted this effort.
>
> Under the injunction of Rule 1 that the Rules of Civil Procedure be given a liberal interpretation "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants," magic in words in points of error should be as extinct as the dodo bird. In his article Justice Garwood referred to two types of points, i.e., "no evidence" points and "insufficient evidence" points. Expressions in points of error such as "no evidence," "insufficient evidence," "no sufficient evidence," "no legally sufficient evidence," "against the great weight of the evidence," "contrary to the preponderance of the evidence," ad infinitum, have definite connotations in the mind of an appellate judge, but, except in a very limited way, they are not, or at least should not be, controlling. The controlling consideration with an appellate court in passing on a point of error directed at the state of the evidence is not whether the point uses the preferable, or even the proper, terminology, but is whether the point is [p. 362] based upon and related to a particular procedural step in the trial and appellate process and is a proper predicate for the relief sought. It is for that reason that we tend to assign a point of error to either one or the other of the two broad classes mentioned by Justice Garwood.
>
> Points of error of the type to be discussed are most often encountered when appeals are taken in cases tried to a jury. Discussion of the problems will therefore be in that context. What is said can easily be applied to points of error in cases tried without a jury.
> * * *

Here is the Conclusion of Associate Justice Calvert's article:

> Conclusion

Most of what has been said here is repetitious of what has been said before in the cited cases and articles. The purpose of the writer here has been to try to bring former writings on the subject into compact form and under somewhat closer analysis. It was said in the beginning that magic in words in points of error should be as extinct as the dodo bird. That is undoubtedly true, but if counsel wish to challenge the state of the evidence on appeal for the purpose of securing a reversal of a trial court's judgment and a rendition of judgment, or, alternatively, a reversal and a remand for retrial, they must continue to present in Courts of Civil Appeals both "no evidence" and "insufficient evidence" point of error.[49] Thus, while the choice of language in which the points are presented should not be all-controlling if the points of error are properly related to procedural steps and the relief sought, it would be helpful if counsel in presenting the points and [p. 372] courts in deciding them would speak a common language. To this end it is respectfully suggested that:

1. If reversal of a trial court's judgment and rendition of judgment for appellant is sought and a proper procedural predicate is laid for that result, the point should be that there is no evidence of probative force to support the finding of the vital fact. If through carelessness or otherwise counsel states the point in terms of "insufficient" evidence, courts should interpret the language as meaning legally insufficient.

2. If reversal of a trial court's judgment and a remand of the cause for retrial is sought on the ground that the only evidence adduced is that offered to prove the existence of a vital fact and that it is factually too weak to support the finding, the point should be that the evidence is insufficient to support the finding of the vital fact. In ruling on the point the courts should speak of the sufficiency or insufficiency of the evidence to support the finding.

3. If evidence has been adduced to prove the existence of a vital fact and to disprove its existence and a reversal of the trial court's judgment and remand of the cause for retrial is sought, the point of error should be that the finding of the vital fact is so contrary to the great weight and preponderance of the evidence as to be clearly wrong. In deciding the point the courts should speak in the same terms.

4. If the language of a point of error leaves a Court of Civil Appeals in doubt as to whether it is a "no evidence" point, an "insufficient evidence" point, or a "preponderance of the evidence" point, the Court should resolve the doubt by looking to the procedural predicate for the point, the argument under the point, and the prayer for relief.

5. Courts of Civil Appeals should carefully avoid the use of "no evidence" rules of decision in deciding "insufficient evidence" and "preponderance of the evidence" points of error. While their use may be harmless if the point is sustained, they are not proper rules for that purpose.

This article was cited by Justice Walker in *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965), for the proposition that "[f]actual insufficiency of the evidence does not, however, authorize the court to disregard the finding entirely or make a contrary finding in entering final judgment for one of the parties."

This article was also quoted in Justice Brister's Opinion in *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005):

> The question presented here is not a new one. More than 40 years ago, then Justice Calvert[11] addressed the standards for reviewing legal and factual sufficiency in the most-cited law review article in Texas legal history.[12] Frustrated that despite this Court's efforts to explain those standards "a growing number of recent decisions indicate a continuing misunderstanding,"[13] the author summarized and attempted to clarify Texas law up to 1960.[14] The article's impact remains substantial today, having been cited more than 100 times by Texas courts in the last five years.
>
> According to the article:
>
> > "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact.[15]
>
> We have quoted a similar formulation on many occasions.[16]
>
> Notably, Justice Calvert then proceeded to put the question before us in the proper context:
>
> > It is in deciding "no evidence" points in situation (c) that the courts follow the further rule of viewing the evidence in its most favorable light in support of the finding of the vital fact, considering only the evidence and the inferences which support the finding and rejecting the evidence and the inferences which are contrary to the finding.
>
> 11 Robert W. Calvert was an associate justice of this Court from 1950 to 1960, and Chief Justice from 1961 to 1972.

12 Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L.REV. 361 (1960).

13 *Id*. at 361.

14 "Most of what has been said here is repetitious of what has been said before in the cited cases and articles. The purpose of the writer here has been to try to bring former writings on the subject into compact form and under somewhat closer analysis." *Id*. at 371.

15 *Id.* at 362–63.

10. John Hemphill. Calvert, *John Hemphill*, 24 TEX. B.J. 937 (Oct. 1961). Considering that this is a history article offered in connection with a history course related to the history of the Texas Supreme Court, Chief Justice Calvert's verbal portrait of Chief Justice John Hemphill is set out in full. Calvert wrote:

> One may take his choice - Hemphill, Wheeler, Roberts, George F. Moore, Willie, Morrill, Evans, Ogden, Gould, Stayton, Gaines, Brown, Phillips, Cureton, W. F. Moore, Alexander, Hickman. But whether or not one agrees that John Hemphill was the State of Texas''greatest Chief Justice, I doubt that any of us would compile a list of the five greatest and omit his name.
>
> Talent alone rarely achieves renown; "Full many a flower is born to blush unseen." Time and circumstance are the soil in which judicial talent blooms. Time and circumstance were lush for the unusual talents of John Hemphill. They made possible the full flowering and expression of his love of equity and justice and of his ability through reason and logic to attain those worthy objectives.
>
> Hemphill was twice favored by time. His combined service as Chief Justice of the Republic and the State was longer than that of any other Chief Justice of the Supreme Court of Texas, except Cureton, and thus he had time for development and crystallization of his judicial philosophy. Moreover, his service was at a time when the jurisprudence of the Republic and the State was in its formative period and he was therefore unhampered by the rule of stare decisis. Circumstance favored him also. Although the Republic and the state officially adopted the common law as its basic legal system, some Spanish civil law concepts were incorporated into the system. In those areas Hemphill was perhaps at his best; they afforded him an opportunity to exalt the equities of the civil law over the rigidities of the common law.
>
> John Hemphill was born in South Carolina December 18, 1803. He graduated, second in his class, from Jefferson College in Pennsylvania in 1825. He taught school for a brief period, studied law in the office of D. J. McCord of Columbia, South Carolina, and was admitted to practice law in that state in 1829. He immigrated to Texas in 1838 and settled at Washington on the Brazos. He practiced law at Washington and Bastrop until he was elected a district judge on January 20, 1840. When Thomas J. Rusk resigned as Chief Justice of the Supreme Court of the Republic in December, 1840, Hemphill was elected to fill the vacancy by the joint vote of the two houses of the Congress. Within three years, at the youthful age of 37, the immigrant lawyer from South Carolina had become Chief Justice of the Supreme Court of the Republic of Texas.
>
> Hemphill remained Chief Justice of the Republic until Texas was admitted to the union. The judicial section of the state constitution of 1845, largely Hemphill's handiwork, provided for a Supreme Court of three members to be appointed by the Governor. Hemphill, Wheeler and Lipscomb were appointed. All three appointees were men of outstanding judicial talents and ability as history was to record. Moreover, Lipscomb had served as Chief Justice of the Supreme Court of Alabama. But Hemphill became Governor Henderson's choice for Chief Justice of that first great court, and his devotion to his aim of building a firm foundation for the new state's system of justice fully confirmed the wisdom of the choice.
>
> U. S. Senator
>
> Hemphill laid aside his judicial robes in November, 1857, when he was elected by the State Legislature to succeed Sam Houston in the United States Senate, never to don them again. He was a staunch advocate of the right of a state to secede from the union. When Texas cast its lot with the Confederacy he was elected as a delegate to the Confederate Provisional Congress and he was a member of the Confederate Congress at the time of his death on January 4, 1862.
>
> Glowing tributes have been paid John Hemphill by such personalities of the bench of Texas as Oran M. Roberts, Asa H. Willie and Reuben R. Gaines, each in his turn an outstanding Chief Justice.
>
> Roberts served for a brief period as an Associate Justice during Hemphill's tenure as Chief Justice. In presenting a portrait of Hemphill to the court in 1883, he said of him: "He was one of the few judges that have been on the supreme bench who gave very especial attention to the literary excellence of his written opinions. * * * He presided in court with a rather auster dignity, and gave to those addressing the court a respectful and silent attention, * * *

In his intercourse with the members of the bar he preserved a reserved dignity, that, though hardly repulsive, did not invite familiarity; yet he was a man of kindly and friendly disposition generally * * *."[1]

Faultless opinions

In responding to Roberts' presentation, Chief Justice Willie referred to Hemphill's "faultless opinions, few of which have ever been questioned by his successors; and in the reading of which one scarcely knows which most to admire, the force of the reasoning or the beautiful language in which it is clothed," and stated: "His ability as a judge was most fully developed when he found himself without precedent or authority for the questions under consideration. It was then that his capacity for profound and lucid reasoning was most fully displayed, and from his own luminous mind light was shed upon the subject of discussion which made the most abstruse points seem clearly elucidated to any mind."[2]

Gaines wrote that almost every one of Hemphill's opinions, if not all, "exhibits a painstaking care in the examination of the authorities bearing upon the points and an elaborate discussion of the questions involved." He further commented that the opinions were "elevated," "clear" and "luminous," and stated that "As a whole they exhibit a disposition on his part to give full scope to the principles of our equity jurisprudence and show; that he was profoundly impressed with the justice and equity of the rules of the Spanish law."[3]

1. 49 Texas Reports VIII.
2. 49 Texas Reports X.
3. IV Great American Lawyers 22.

Note: Hon James P. Hart, former Associate Justice of the Supreme Court of Texas, is the author of an excellent article on the life and work of John Hemphill, 3 Southwestern Law Journal 395. Other sources used as a basis for this sketch are Davenport's History of the Supreme Court of Texas, and an address delivered by M. L. Crawford before the annual session of the Texas Bar Association in 1908.

11. Problems of Judicial Administration. Calvert, *Problems of Judicial Administration*, 25 TEX. B.J. 639 (August 1962). This article was condensed from an address Chief Justice Calvert made at a judicial luncheon sponsored by the Judicial Section of the State Bar of Texas and presided over by Judge Jack Pope of the San Antonio Court of Civil Appeals. Chief Justice Calvert said:

Fifty-six years ago Roscoe Pound stirred the lethargy of the legal profession in this country and set the stage for judicial reform. The title of his address was "The Causes of Popular Dissatisfaction with the Administration of Justice." In the course of his address Pound pointed out six things which were needed to improve the administration of justice. Fifty years later, Shelden D. Elliott, Director of the Institute of Judicial Administration, former Professor of Law at New York University and former Dean of the University of Southern California School of Law, looking back upon the half century of failures, frustrations and partial successes of the various states to achieve the goals set by Pound, added other needs, some of which were only incidental to those voiced by Pound.

If Roscoe Pound was the prophet of the course judicial reform must take to eliminate or minimize the causes of popular dissatisfaction with the administration of justice, Arthur T. Vanderbilt of New Jersey was the general who coordinated and led the forces of reform against the natural disposition of bench and bar to resist change. It is enough to say that he cut the cloth to the pattern furnished by Pound, and by his work in New Jersey, the American Bar Association and other arenas, through imagination, vision, determination and tireless energy, he furnished an unparalleled example of accomplishment. In the book, "Minimum Standards of Judicial Administration," we find pinpointed once again many of the same roadblocks to efficient judicial administration which were noted by Pound and enlarged by Elliott.

How have we in Texas met the challenge of these men? We have not been altogether laggard, but, neither have we reached perfection. Let us look quickly at the nine needs I have taken from Pound and Elliott and see how we have fared.

Chief Justice Calvert then listed the needs: 1. The need for judicial councils. 2. The need for strengthening Bar Association responsibility. 3. The need for adequate judicial salaries and retirement benefits. 4. The need for flexibility in the assignment of judges and the distribution of judicial business. 5 and 6. The need for a simplified and integrated court system, and the need for a centralized administrative office, functioning under a responsible head of the judicial system, go hand in hand. 7. "I shall pass the need for improving popular interest in jury service. This, it seems to me, is a need which will not be fulfilled in our time." 8. The need for taking the selection of judges out of partisan politics. 9. The need for reform of procedural law to eliminate or minimize its obstruction to the decision of controversies on their basic merit.

Since the issues of judicial selection continues to be a question in our time, and since Calvert's opinions on that subject evolved over time, here is what he said about judicial selection in 1962:

> I have long defended the system of selecting judges by popular election. I have even made speeches on the subject, as some of you are well aware. But I am rapidly becoming a convert to some system of appointment of appellate judges, perhaps of the nature of the American Bar or Missouri plan.
>
> Such factors as loss of time from duties during campaigns and the tremendous expense of campaigning statewide or throughout large districts, requiring the acceptance of financial help, have begun to weigh heavily in my mind against popular election of judges. In any event, the movement for taking the selection of judges out of partisan politics is not dead in Texas, and we shall surely hear more of it in our own day.

In a section titled "Everlasting Credit," Chief Justice Calvert thanked the Texas Legislature:

> It is to the everlasting credit of the Legislature that Texas was one of the first states in the nation to follow the lead of the federal government in shifting rule-making power from the legislative to the judicial branch of the government. The federal Rules of Civil Procedure were adopted in 1938, and the Texas Legislature conferred the rule-making power on the Supreme Court in 1939. The "New Rules," as many of us still are prone to call them, became effective September 1, 1941, and from that day to this they have remained under constant study and have undergone periodic amendment. I doubt that anyone, having knowledge and understanding of the facts, would wish to shift the rulemaking power back to the Legislature.

The Chief Justice moved on to docket management:

> I hope you will not think me either too bold or too officious if I say that our courts in Texas face today an immediate need greater than any of those enumerated by Pound and Elliott. It is the need for utilization, with maximum efficiency and ingenuity, of all the rules and procedural devices available, for the speedy dispatch of judicial business.
>
> If we as judges are to earn and deserve the respect of the public, we cannot afford the paralyzing effect of that type of creeping inertia which often comes with a monthly salary check and the realization that no one can fire us from our jobs. "Creeping inertia" is a polite term. It means laziness. Neither can a properly functioning judiciary have room for a judge who seeks office only as an escape from the competitive forces of private law practice, or for one who takes a judgeship as a sideline to a more lucrative private enterprise.
>
> *Speed* is not the ultimate object of the courts. *Justice* is. But justice without speed is all too often not justice at all. I am convinced all of us can do a much better job of speeding the course of litigation. I can afford to throw stones because we of the Supreme Court are not without sin.

The Chief Justice concluded his remarks by exhorting trial judges to expeditiously resolve the cases pending in their courts.

12. Lawyers' Obligations. Calvert, *Obligations in the Legal Profession*, 31 TENN. L. REV. 1 (Fall, 1963).

13. Judicial Selection. Calvert, *Selection of Appellate Judges*, 26 TEX. B.J. 101 (Feb. 22, 1963). Chief Justice Calvert starts this article this way:

> I am a convert: a recent convert, to be true, but nevertheless a convert. Once a staunch defender of our present system of selecting appellate judges, I have become convinced that the weight of logic favors a change.
>
> Perhaps my former position was never logical. Perhaps it was personal and defensive. Perhaps it sprang from a firm conviction, still held, that under our present system of selection I could never have attained a Supreme Court Justiceship except by popular election. Whatever the reason for my former position, of one thing I am certain: My conversion does not spring from self-interest. In weighing the merits of the Texas system of selecting appellate judges against the merits of the system proposed by the American Bar, we are all too apt to draw a line of demarcation between an elective system and an appointive system. That is a false line. The present Texas system is not *just* an elective system; it is an elective-appointive system. The American Bar system is not *just* an appointive system; it is a selective-appointive-elective system.
>
> The Texas system of selecting appellate judges is made elective-appointive by Secs. 2, 4 and 6 of Art. V and Sec. 12 of Art. IV of the Constitution. By the provisions of those sections, as is well known to members of the Bar, judges of appellate courts are elected for six-year terms, but vacancies on the courts are filled by appointment by the Governor. This blended elective-appointive system works out as just that in practical operation.
>
> Roughly one-half of the judges on our appellate courts today first became appellate judges through gubernatorial appointment. All three of the Judges of the Court of Criminal Appeals were elected; but of the nine Justices of the Supreme Court, five were appointed, and of the thirty-three Justices of the eleven Courts of Civil Appeals, sixteen were appointed. Of forty-five persons who have served as Justices of the Supreme Court since 1874, only ten began their service through popular election. What, then, are the disadvantages of our present system of selection?

I shall deal first with the appointive feature of our present system. The major fault in the system is not that it is made to order for the appointment of political hacks, for history attests that it has not been so abused or misused. Without exception those now serving as appellate judges through gubernatorial appointment are generally regarded as men of character. A great majority also enjoy a general reputation as of more than average legal ability. The same thing can be said of those who have served by appointment in times past. The real weakness of the system is not that it permits the appointment of unqualified persons, but that for all practical purposes it excludes from consideration for appointment, and therefore from appointment, many persons with top qualifications. For all practical purposes it excludes all of those who either are not in position to give aid to a successful candidate for Governor, or who, being in position to do so, prefer an inactive role in politics: It excludes by way of example, all Justices of Courts of Civil Appeals from appointment to the Supreme Court.

POLITICAL APPOINTMENTS

It is but natural that a Governor should limit his consideration of possible appointees to high public office, judicial or other, to those who have been close to him in his political career.

This, in all likelihood, accounts for the fact that only two Justices of Courts of Civil Appeals have been appointed to the Supreme Court since creation of the Courts of Civil Appeals in 1891.

Chief Justice Calvert's comments on judicial selection remain relevant and insightful. Interested persons should read his entire article.

14. Appellate Courts of Texas. Calvert, *The Judicial System of Texas*, in Texas Cases, 361-362 S.W.2d 1-18 (1963).

15. Policing the Judges. Calvert, *Judicial Retirement, Discipline and Removal*, 27 TEX. B.J. 963-64 (Dec. 22, 1964). In this article, Chief Justice Calvert wrote in support of a resolution of the Judicial Conference to support legislation which "will help to eliminate 'dead-heads' and incompetents from our ranks and will discourage corruption from entering them." P. 964. "We must rescue it [our image] from those few who think they can discharge their public and official obligations with a 24-hour work week, those who believe a judicial salary is only a subsidy for sideline business activities, those who think that judicial office is only a quiet place of retirement for the lawyer who is battle-worn and tired of it all!" Calvert said it was only one percent who fit this category, "the one percent who cloud our image; it is they from whom we must rescue our integrity." p. 964. After discussing problems in the judiciary, Calvert concluded: "The duties of judicial office, trial or appellate, properly discharged, are demanding. They demand that the judge be fearless of political consequences; that he yield not to bias or prejudice, neither rewarding friends nor punishing enemies; that to him the 40-hour work week be nothing more than a myth; that he make his judgments with dispatch and get on to the next order of business. By our action at our recent Judicial Conference, we gave notice that we, too, recognize the need for a judicial housecleaning and for a continuing effort to keep our house in order; that we want to deserve the public respect and confidence which we so earnestly seek." p. 964.

16. Visit to SMU School of Law. On March 10, 1966, seven members of the Texas Supreme Court visited SMU School of Law and met with third year law students and faculty. Chief Justice Calvert gave a talk on "The Mechanics of Judgment Making." As reported by *The Brief* (The April 1966 Alumni Magazine):

Applications for writ of error are assigned to members of the court in rotation, one-ninth to each judge, said Justice Calvert. Opinion writing is parceled out the same way. "We have no experts," he said, "no special areas of the law for a particular member of the court." Monday mornings are set aside for oral reports on and discussion of applications for writ of error. Discussion may verge on "heated debate," said Justice Calvert. "We sometimes have to recess for coffee."[3]

17. Judicial Qualifications. 1966 saw the creation of the State Judicial Qualifications Commission. The members were sworn in by Chief Justice Calvert on May 21, 1966. A report in the Texas Bar Journal said that "[t]he commission, created by constitutional amendment, will administer a program calling for compulsory retirement of district and appellate judges at age 75. The new law empowers the Supreme Court upon recommendation of the commission to remove district and appellate judges for misconduct and to retire such judges in cases of disability." p. 439. The article reports that "[i]n introductory remarks, Judge Calvert called the program 'a new venture in the judicial field.'" He said the Supreme Court, the Governor and the State Bar followed the same guidelines in appointing the commissioners -"men of integrity, firmness of judgment, and above all, men with good judgment and good sense." Calvert said the commission was not established as a "witch-hunting board." p. 439.

18. First Annual Survey of Texas Law. Chief Justice Calvert wrote the introduction to the first Annual Survey of Texas Law published by the SMU School of Law in 1967. 21 SW. L.J. 1 (1967):

Introduction

With this issue of the Southwestern Law Journal, the students and faculty of Southern Methodist University School of Law launch a new project – the Annual Survey of Texas Law. Each year one issue of the Journal will be devoted to a complete survey of meaningful appellate court decisions which tend to illuminate the law in particular areas as

it has been, is, and will be in the foreseeable future. The project should be challenging to the author-professors who recognize that research and writing are as essential as teaching to achievement of standing in the profession. Of even greater significance is the contribution which the project, well managed and well executed, can make to the judiciary and the bar.

Neither trial nor appellate judges have adequate time to research exhaustively, case by decided case, the many questions of substantive and procedural law which are presented in nearly every case they must try or decide. Overloaded dockets and the need for expeditious disposition result, more often than judges would wish, in notice of only a few decided cases of significant precedential value. And if the press of "getting on with it" leaves little time for judicial research, the atmosphere it develops dulls incentive for analytical or creative judicial thinking. Lawyers are also beset by the twin plagues of press of business and scarcity of time, and all too often their research and briefing are of little real help to the judges. The Journal's annual survey issue can relieve the time problem and fill the research vacuum for both bench and bar.

A cursory examination of cases in the early Texas Reports will disclose that the determining issues, although usually important in building a judge-made body of law, were in most cases sharp and uncomplicated. Civil and criminal codes of statute law in early state history were also basically simple and uncomplicated. The rule of stare decisis was easy to apply and often solved the only issue in the case. One hundred and thirty years of population growth, legislative sessions, judicial precedents and social progress has slowly thrust the courts into a different world. The simple judicial life of deciding land titles, interpreting simple contracts and worrying about actions in trespass quare clausum fregit, ended with the age of the automobile, workmen's compensation laws, discovery of oil and gas, expanding growth of the corporate form of doing business and licensing of public transportation. In the offing and already claiming legislative and judicial attention is the law of airspace and the law of waters. New codes have become the order of the day. Uniform interstate codes, new probate, corporation, commercial and criminal procedure codes challenge our best legal minds to strive for careful and sound interpretation and application.

Where once the areas of activity of the three departments of government were sharply defined, the advent and increasing multiplication of administrative agencies have dimmed the lines of demarcation and eroded the powers of each. Impact of these agencies on the judicial process and the legal rights of litigants is not yet fully explored. Hundreds upon hundreds of appellate court decisions fill sixty-five volumes of the Texas Reports, and more than seven hundred volumes of the Southwestern Reporter pose an ever growing research problem. A judge of one of our courts of civil appeals once said to me that he was surprised that the Supreme Court did not occasionally overlook one of its prior decisions and write a conflicting opinion. I, too, am somewhat surprised.

It is in this judicial environment, then, that the Journal's annual survey of Texas law is launched. In addition to the survey's importance as a research source, it can be genuinely helpful in charting the course of the law. It will only be so if it winnows sounds principles of law from decided cases to light the way for the courts in their search for justice for the individual litigant in a society of laws equally applicable to all litigants.

19. Justice Norvell. Calvert, *James Rankin Norvell*, 20 BAYLOR L. REV. 274 (Summer 1968). Chief Justice Calvert wrote this tribute to retiring Justice James R. Norville:

Retirement in this year of 1968 will come gracefully for James Rankin Norvell, Associate Justice of The Supreme Court of Texas. No law compels him to retire. He does not go grudgingly. He will not be "turned out to pasture," lost in the sea of the elderly who know neither how to adjust to a new life lying outside the ruts of a lifetime of routine nor how to develop new areas of interest and activity. Jim Norvell, savant, philosopher, humanitarian, raconteur (as often as not his stories and anecdotes are self-deprecating), prodigious worker, activist, constitutionalist, expert on everything as a Justice of a court which boasts of having no experts, is, without a doubt, the Supreme Court's finest scholar. His mind is a storehouse of historical events, legal precedents, medical facts and theories, great ideas advanced by great thinkers, biblical precepts and admonitions, and humorous tidbits which will illustrate a point he wishes to make. His associates often comment, enviously, that he has the greatest store of the most useless information of any nuin who ever sat on the Supreme Court.

Justice Norvell is a staunch advocate and exponent of justice; legal cliches and restraining rules of law crumble beneath the strokes of his pen when he is outraged by a lower court's result which shocks his conscience. Affectionately known to his associates a.s the court's official "quiggler" (a noun derived from the verbs "squirm" and "wiggle"), he can deftly work his way around apparently insurmountable legal roadblocks in a fashion which leaves a losing attorney wondering just exactly how he lost his air-tight case. If one needs convincing evidence, let him read Justice Norvell's recent opinion in the "widow Humber's" case. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968)."

20. Justice Griffin. Calvert, *Meade F. Griffin*, 21 BAYLOR L. REV. 1 (1969). Chief Justice Calvert write a testimonial to Meade Felix Griffin,, Associate Justice of the Texas Supreme Court who retired at the end of 1968. Calvert said that Griffin "is cut from the fabric or the West Texas Plains Country. He is sinewy of heart, mind and body. His are the simple virtues instilled in him by pioneering parents, with the woodshed at times the place of indoctrination. He stands straight, thinks right, walks humbly before his God, deals fairly and charitably with his fellow man, and fears neither man or the devil." Calvert went on to say: "Shunning change for the sake of change, he does not accept the philosophy that

established rules of law are outmoded merely because they are rooted in ancient precedents, and he has often admonished us to 'remove not the ancient landmarks.' See dissenting opinion, *Casaulty Ins. Co. v. Salinas*, 333 S.W.2d 109, 118 (Tex. 1960)." Describing Griffin's youth, Calvert wrote: "Justice Griffin was born March 17, 1894, at Cottonwood, Callahan County, Texas, where his father operated a country store. As a youth. he knew first hand the limited comforts of the woodburning stove, the coal-oil lamp and the old-fashioned outhouse; and he knew the agony of milking a cow by lantern light in the freezing temperatures of a winter morning." One can feel Calvert's recalling his own childhood memories as he wrote.

21. Supreme Court Judgments. Calvert, *The Mechanics of Judgment Making In The Supreme Court of Texas*, 21 BAYLOR. L. REV. 439 (1969).

22. Texas PJC. Calvert, Foreword to Texas Pattern Jury Charges (1969).

23. Civil Disobedience. Calvert, *Civil Disobedience*, Texas Realtor, p. 8 (July 1969).

24. Intro. to Sup. Ct. of Texas. Calvert, *Introduction to "The Supreme Court of Texas,"* 7 HOU. L. REV. 20 (May 1971).

25. Court Modernization. Calvert, *Court Modernization: Jurisdiction, Assignment of Cases*, 33 TEX. B. J. 977 (Dec. 22, 1970). In this short article, Chief Justice Calvert discussed three proposals drafted by the Judicial Section's Committee on Judicial Reform, approved by the Board of Directors of the State Bar of Texas. The first proposed a statute that would permit judges of an county with three or more district courts to sit in matters pending in each other's court. The second proposed a statute and rule change to give district courts concurrent jurisdiction with county courts and county courts-at -law over eminent domain cases. The third proposed a statute giving county-courts-at-law jurisdiction over matters in controversy from $500 to $10,000.

26. Justice Norvell. Calvert, *James R. Norvell*, 1 ST. MARY'S L.J. 19 (1970).

27. Retirement of Judges. Calvert, *Mandatory Retirement of Judges*, Vol. 54, No. 10, JUDICATURE (May 1971).

28. The Next 100 Years. Calvert, *The Next 100 Years–Progress or Stagnation?*, THE HOUSTON LAWYER Centennial Issue (June 1971).

29. Judge Wilson. Calvert, *Frank M. Wilson, The Judge*, 23 BAYLOR L. REV. 345 (1971).

30. Oral Argument. Calvert, *A Judge's-Eye View of Oral Argument in an Appellate Court*, published in THE INSTRUMENTS OF APPELLATE ADVOCACY, p. 12, published by the Univesity of Texas Law School Foundation (1972).

31. In the Interest of Justice. Calvert, *In the Interest of Justice*, 4. ST. MARY'S L.J. 291 (Winter, 1972). [The article was not available on Westlaw.] The article was cited in the Per Curiam Opinion in *Sears, Roebuck & Co. v. Marquez*, 628 S.W.2d 772, 773 (Tex. 1982), for the proposition that "it is well settled that an errorless judgment of a trial court cannot be reversed in the interest of justice." This article was also cited in a Per Curiam Opinion in *Karl & Kelly Co. v. McLerran*, 646 S.W.2d 174, 175 (Tex. 1983), where the Court wrote: "The McLerrans argue that 'in the interest of justice' the cause should be remanded for a new trial rather than rendered for the defendants. We agree. It has long been the rule of this Court to remand to the trial court for a new trial rather than to render judgment when the 'ends of justice will be better subserved thereby.'... Such remanding has often been ordered to supply additional testimony or to amend the pleadings. ... Further, this Court has remanded when it appears that the cause was tried upon an erroneous legal theory. ... In this case it would be unjust to both parties to render judgment rather than remand for a new trial. Obviously, the McLerrans tried the case on an erroneous legal theory, since they did not attempt to prove alter ego. Just as clearly, the defendants did not have an opportunity to develop their evidence fully, since neither they nor their attorney was present at trial." The article was also cited in Chief Justice Pope's concurring and dissenting Opinion in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 434 (Tex. 1984), complaining of unfair treatment of the defendant in that the Supreme Court did not remand the case in the interest of justice. And the article was cited by Chief Justice Phillips in his Opinion in *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (on motion for rehearing): "Kerr cannot recover based on the cause of action under which she proceeded. It may well be, however, that she failed to assert and preserve alternative causes of action because of her reliance on our holding in *Garrard*. We have broad discretion to remand for a new trial in the interest of justice where it appears that a party may have proceeded under the wrong legal theory. *See American Title Ins. Co. v. Byrd*, 384 S.W.2d 683 (Tex.1964); *Dahlberg v. Holden*, 150 Tex. 179, 238 S.W.2d 699 (1951). Remand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled. *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex.1990) (case remanded because plaintiff might have relied on subsequently overruled precedent in preparing her summary judgment response); *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex.1966) (remand in the interest of justice appropriate where defendant requested jury issues in reliance on precedent no longer controlling). *See generally Robert W. Calvert*, "... In the Interest of Justice.", 4 St. Mary's L.J. 291 (1972). It is even more appropriate where we have also subsequently given formal recognition to a cause of action which might be applicable to the facts of this case. *See Twyman*, *supra* (expressly recognizing the tort of intentional infliction of emotional distress). We therefore reverse the judgment of the court of appeals and remand this cause to the trial court for a new trial." 27 TEX. B.J. 299 (May 1964).

32. Court Improvement. Calvert, *Summary of Major Changes Proposed by Chief Justice's Task Force for Court Improvement*, 36 TEX. B.J. 24 (1973). In this article, retired former Chief Justice Calvert wrote a summary of the December 15, 1972 draft of proposed amended Article V of the Texas Constitution. The article is discussed in Section I.E below.

33. Art. V, Tex. Const. Calvert, *Proposed Revision: Article V, Texas Constitution*, 35 TEX. B.J. 1001 (Nov. 22, 1972). Retired Chief Justice Calvert wrote a one page Introduction to proposed Article V of the Texas Constitution. He pointed out that "[i]t is not unnatural that the immediate concern of each person in the system is how he or she will be affected by the propose changes–what rights and privileges are abrogated or abridged, or what additional additional duties or obligations are imposed. It is to be hoped that, with the passage of time, immediate concern for one's own comfort will give way to thoughtful appreciation of the fact that real improvement cannot come without minor dislocations." He went on to point out the fact that the Task Force's recommendation resulted from many compromises, and mentioned John Onion's willingness to relinquish his position as Presiding Judge of the Court of Criminal Appeals to become a justice of one court of last resort, and Justice Charles W. Barrow of San Antonio and Justice Clarence Guittard of Dallas being willing to take jurisdiction in criminal cases in their courts of civil appeals to relieve the Court of Criminal Appeals' appellate case load. p. 1001. Calvert reiterated: "it is definitely not the purpose of the Task Force, however, to do away with any person's position. Rather, it is expected that present personnel will be absorbed into the new judicial system." p. 1001.

34. Constitutional Revision. Calvert, *Constitutional Revision*, 36 TEX. B.J. 1126 (Dec. 22, 1973). Former Chief Justice Calvert, Chairman of the Constitutional Revision Committee, wrote this article, to describe the work of the Committee in preparation for the Legislature convening as a constitutional convention on the second Tuesday in January, 1974. It would require a 2/3 vote to submit a new constitution for consideration by the voters of Texas. p.1126. The 37-person commission worked over a period of eight months, with 19 public hearings attended by more than 4,000 persons, to produce its proposed constitution to the Texas Legislature. p.1127. Skipping to the article on the judiciary, the Commission recommended the gradual merger of the Supreme Court and the Court of Criminal Appeals. The combined court would have jurisdiction "by writs of review as in the case of civil cases." p. 1128. The new Supreme Court would consist of at least eight justices. Courts of appeals would consist of at least three justices. The Supreme Court would have rule-making authority, subject to legistlative veto. Appellate justices would be selected by the "merit system," or Missouri Plan, or alternatively by election on a non-partisan ballot. District and county judges would be elected on a non-partisan basis. The judicial department would be adminstered through a central Judicial Council, headed by the Chief Justice with members from other segments of the judicial system. p. 1129. Calvert concluded his observations: "The proposed Constitution is not, of course, a perfect document. I am certain that every one of the commission members would make some changes if permitted to write a constitution exactly as he or she would want it. It is not a purely 'pure' Constitution of fundamental principles, but neither is it a purely 'political' Constitution. On the whole, the proposed document is such an improvement on the present 97-year-old document with its 212 amendments that the time and money spent in its construction should prove to have been justified." p. 1130. In the same issue of the Texas Bar Journal, Corpus Christi attorney Tony Bonilla wrote: "Shortly after the commission was organized, it was decided public hearings should be held throughout the State of Texas, thereby giving us an opportunity to gather grassroots sentiment to the changes and improvements needed in our present Constitution. I was fortunate enough to attend hearings in 16 of the 19 cities selected. During these hearings, I first realized the difficult task we would have in deciding whether to draft a pure or political constitution. While various officials recommended constitutional change, they also urged their offices not be removed from constitutional concrete. It became readily apparent some form of a compromise between a pure and political document was necessary if we were to avoid creating organized opposition." p.1131. Houston Domestic Relations Judge Andrew Jefferson, Jr. noted other aspects of the proposed reforms. He noted opposition to the consolidation of the Supreme Court and Court of Criminal Appeals from prosecutor and criminal defense organizations. p. 1133. According to Jefferson, "[t]he issue most debated involved the question of the method of selecting our appellate judges." "With respect to appellate judges, the Commission recommends the establishment of a Judicial Selection Commission, composed of eleven members, the majority of whom are to be lay people. The appointments to the Commission are to be made by the combined action of the Governor, Lieutenant Governor and Speaker of the House. The Commission would be responsible for submitting nominations to the Governor in the case of all judicial vacancies at the appellate level." p. 1133. Jefferson discussed the Judicial Council, with the authority to assign judges throughout the system. Houston personal injury attorney James Kronzer described the Commission's efforts as "many months of arduous and painstaking effort," saying that the Commission "fluctuated and vascillated on many key issues." p. 1135. Attorney Mark Martin of Dallas, former president of the Texas Association of Defense Counsel, wrote this: "At the 1964 Conference in Austin on Judicial Selection, Tenure and Compensation, I and one or two other trial lawyers led the opposition to merit selection, but the evils of the present system through the ensuing nine years have changed my mind. The reasons I had then for opposing merit selection, namely, keeping the judges "responsible to the people" and the concentration of the authority in the nominating process were good reasons; but they are now far outweighed by better reasons for merit selection: the public's almost complete lack of knowledge of the qualifications of appellate judges, the exclusion from the bench of many of the most capable lawyers who would abhor statewide fund soliciting and campaigning, the weakening of the independence of the judiciary, the demeaning of judges through their collection of campaign funds, and the necessary neglect of judicial duties in order to campaign, solicit funds, and engage in other political activities." pp. 1136-37.

35. Problems of Supreme Court Review. Calvert & Mike Hatchell, *Some Problems of Supreme Court Review*, 6 ST. MARY'S L.J. 303 (1974).

36. Appellate Court Judgments. Calvert, *Appellate Court Judgments: Or Strange Things That Happen on the Way to Judgment*, 6 TEX. TECH L. REV. 915 (Spring 1975). Retired former Chief Justice Calvert started this article: "Drafting of judgments in cases reaching appellate courts by appeal should be a simple clerical task. The task will not be simple, however, unless certain fundamental concepts are fully understood and kept in mind; and clerks of the courts who are not lawyers and by and large are untrained in the technical aspects of judgment drafting need the help of judges who are aware of the concepts and are alert to their observance. ¶ The concepts are not the product of personal whim or of a mind committed to the idea of fitting all legal procedures into a personally fashioned mold. Neither are they the product of an overly technical approach to judgment drafting. Rather, they are expressly recognized and commanded by the Texas Rules of Civil Procedure which govern procedure in our supreme court and the courts of civil appeals. Most of such rules are reenactments of statutes and rules of court in effect in this state for more than 80 years.[1]" Sounding like he is scolding children, Calvert goes on to distinguish between deciding issues and causes, writing opinions, rendering judgments, and disposing of causes. pp. 915-16. He comments: "An increasing number of appellate court opinions and judgments indicate an unfamiliarity with, or indifference toward, these basic concepts and an erroneous application of them." p. 916. He then examines each area of action in detail, followed by a list of eight Do's and Don'ts. Calvert concludes: "CONCLUSION ¶ Pride should be the hallmark of the appellate judge who puts his work product in books of judicial history, and it is unthinkable that failure of a judge to observe the most elementary principles of judgment drafting can be charged to deliberate disregard of those principles. Carelessness cannot be defended on the theory that "everyone knows what the court meant." If Merchandise Mart teaches nothing else, it teaches that, when an incorrectly drafted judgment is called into question, the defense of "everyone knows what the court meant" will not work. Moreover, if the court's intention is so easy to discover, its intention should be equally easy for the court to express correctly and clearly. ¶ A correct draft of a judgment to be included in an opinion which has been written with care should be the final challenge to the writing judge. Sometimes, as in situations requiring modification or severance, the drafting process may seem difficult, but observance of the four basic concepts itemized in the forepart of this article will simplify the task. In that event, perhaps this writing will have been helpful to my brethren of the bench." p. 925. The present author can relate a conversation with the late and great Helen A. Cassidy, the Chief Staff Attorney for the 14th Court of Appeals in Houston, back in the 1990s. Helen described the process for preparing judgments in the cases that her Justices had decided: "At the end of the day, the Justices put their Opinions on the desk of the Clerk of the Court and every the night the 'Judgment Fairies' would come through and write judgments for all of them."

37. Harmless Error. Calvert & Susan G. Perin, *Is The Castle Crumbling? Harmless Error Revisited*, 20 S. TEX. L.J. 1 (1979). One day, retired Chief Justice Robert W. Calvert called the South Texas College of Law Journal office asking for someone on the journal staff to assist him in writing an article. Susan G. Perin was chosen, at the time a third-year law student and associate editor of the law journal. In a personal communication on April 5, 2021 with the author, Ms. Perin wrote of Calvert: "What an amazing man. When we wrote the article, he kept telling me to put my name first because I had my whole career in front of me and worked so much on it, and of course I would not. He was so kind and generous and I treasure the opportunity I had to work with him!!!" This 1979 article was a reprise of Calvert's article *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1 (1952). See Section I.D.4 (publications).

38. 1980 Constitutional Amendment. Calvert, *For Amendment No. 8*, 43 TEX. B.J. 910 (Oct.1980). In this article, former Chief Justice Calvert supports the adoption of an amendment to Article V of the Texas Constitution to give courts of civil appeals appellate jurisdiction in criminal cases. Death penalties would be appealable directly to the Court of Criminal Appeals, and for other punishments the appeal would go to the court of appeals and after that the Court of Criminal Appeals would have discretionary review. In his article, Calvert said that this proposal was a culmination of a decade of research and study, which suggested the need to relieve the Court of Criminal Appeals of a large too-large docket to process efficiently. p. 910. Calvert noted that the 1977 constitutional amendment raising the number of judges on the Court of Criminal Appeal from five to nine, and allowing the Court to sit in panels of three judges, did not resolve the backlog. Calvert suggested that the courts of appeals could "weed out some of the chaff in criminal appeals." p. 911. Calvert noted that this proposed amendment was one of only two that passed through the legislative process for amending the Constitution. p. 911. The next article in the Texas Bar Journal was by Dallas County District Attorney Henry Wade, who recounted the constitutional history of intermediate appellate courts in Texas and strongly supported the proposed amendment. pp. 912-14. Strong opposition was voiced by San Antonio attorney James L. Branton, former president of the Texas Trial Lawyers Association, who argued that a well-functioning civil court system should not be sacrificed in order to "cure an ailing criminal appellate system." p. 915. The amendment was also opposed by San Antonio criminal defense attorney Charles D. Butts, who likewise opposed the companion amendment that would give the State of Texas the right to seek an interlocutory appeal in a criminal cases. p. 917. He opposed doubling the case load of the intermediate courts of civil appeals, and expressed concern about conflicting opinions from the fourteen courts of appeals. p. 917. Butts was also concerned that locally elected judges would be subject to local political pressure in cases of notoriety. And he decried giving the Court of Criminal Appeals the discretion to decline to review a conviction. p. 915. He suggested that the appellate case load could be lightened if prosecutors recognized that their primary duty was not to convict, but to see that justice is done, and if they did not suppress facts or secrete witnesses capable of establishing innocence. p. 918. He also suggested certifying criminal judges, especially in big cities. p. 918.

39. Supreme Court's Divorce Jurisdiction. Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAY. L. REV. 51, 51 (Winter 1981). In this article, former Chief Justice Calvert expressed his disagreement with the Texas Supreme Court's decision in *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979). At that time the Supreme Court did not have jurisdiction in divorce appeals unless there was a dissent in the court of civil appeals or the court of civil appeals's decision conflicted with the holding of a case in another court of appeals. The Court's Opinion written by

Justice Franklin Spears, held that it had "implied" jurisdiction because of a conflict between the court of appeals's decision and a prior United States Supreme Court decision. Calvert wrote: "What is both interesting and alarming about the court's decision is how it could get that answer, considering the strict, unambiguous limitations placed on its jurisdiction by the Texas constitution and statutes. Although the route to the court's ultimate conclusion is difficult to trace, the path followed can be discovered by rearranging the parts of the court's opinion." p. 52. Calvert discussed the constitutional grant of express jurisdiction to the Supreme Court, but disagreed that implied jurisdiction followed from that grant of express jurisdiction. In fact, Calvert noted, the Supreme Court's jurisdiction in divorce appeals was by statute "limited to situations in which there is a disagreement between judges of a court of civil appeals, or there is a conflict of decisions between courts of civil appeals, or a statute is held void.[24] It thus appears that the very first step—the critical step upon which the court's entire reasoning process depends—is premised upon a tenuous, if not totally erroneous, construction of the constitution." p. 54. Calvert then notes another statute that made the decision of the Court of Civil Appeals final in divorce cases except where there is a dissent or conflict among the Texas Courts of Civil Appeals (not a conflict with the U.S. Supreme Court). Calvert commented on Justice Spears' discussion of "inherent jurisdiction" which Calvert says was not involved in the case. Calvert concluded: "*Eichelberger v. Eichelberger*[59] is an abrupt departure from all generally recognized norms and standards for judicial decisions. The selective emphasis on certain provisions of article V, section 3[60] of the constitution; the failure to note the limiting language in article II;[61] and the summary treatment given the article 1821[62] prohibition against granting writ of error in divorce cases, strongly indicate that the decision was strictly result oriented. Additional evidence that this is so is found in the fact that the court also ignored its prior decisions which insisted upon strict compliance with certain procedural requirements to invoke the court's jurisdiction in conflict cases, to wit: (1) the conflict must be with a prior decision, and conflict with a subsequent decision will not suffice;[63] [p. 61] and (2) the conflict must clearly and affirmatively appear in the application.[64]" pp. 61-62. In a conversation in 1990 Justice Spears told this author that he had in his desk drawer a collection of letters from former Chief Justice Calvert that were critical of his view of Supreme Court jurisdiction. *Eichelberger* was cited approvingly in *Mayhew v. Caprito*, 794 S.W.2d 1 (Tex.1990) (per curiam).

40. Declaratory Judgments. Calvert, *Declaratory Judgments in Texas -- Mandatory or Discretionary?*, 14 ST. MARY'S L. J. 1 (1982). This article was cited by the Austin Court of Appeals in *Calvert v. Employees Retirement System of Texas*, 648 S.W.2d 418 (Tex. Civ. App.--Austin 1983, writ ref'd n.r.e.). See Section I.D.14 above.

41. Judicial Disqualification. In Calvert, *Disqualification of Judges*, 47 TEX. B.J. 1330, 1337 (Dec. 1984), former Chief Justice Calvert wrote:

> With the Supreme Court decision in *Manges v. Guerra* fresh in our minds, it seems to be a good time to rethink our thought of disqualifying judges on purely ethical grounds; there is a monumental stumbling block to disqualification on such grounds – the Texas Constitution.

Calvert discussed the adoption of Canon 3C(1) of the Code of Judicial Conduct, which said that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding...." *Id.* at 1333. Then in 1980 the Texas Supreme Court adopted Tex R. Civ. P. 18a, setting out grounds for recusal or disqualification of a judge. Calvert noted his opposition to these developments:

> Canon 3 C(l) and Rule 18a were a clear break from the constitutional limitations in art. 5, §11; and Rule 18a was most unclear as to what "grounds" and "disability" would or could disqualify a judge. These questions were raised by this writer[23] in the session of the Supreme Court Advisory Committee on Rules of Civil Procedure, but his objections to the proposed rule were rejected by the committee and the rule was approved.
>
> Apparently, the century-old line of cases firmly establishing that the constitutional grounds of disqualification were both "inclusive and exclusive" were wiped out in favor of an undefined category of disqualifications included in the phrase, "any disability of the judge." The category would obviously include all grounds established in Canon 3 C(l), but would not necessarily exclude other grounds that might occur to counsel inasmuch as a ruling of disqualification by the assigned judge is not reviewable. This writer was gravely concerned that the combination of the canon and the rule portended disqualification proceedings in a high percentage of cases on grounds of alleged bias or prejudice.

Id. at 1334. Calvert goes on to describe the recusal motions filed in the Supreme Court case of *Manges v. Guerra*, against Justices who had accepted large contributions from one of the litigants, Clinton Manges. He wrote:

> The court's opinion did not address specifically the constitutionality or validity of Canon 3 C(l), or the validity of Rule 18b. The opinion made short shrift of the matter of recusal in this language:

> After this court rendered its judgment in this cause, the Guerras filed motions that three of the justices be recused. Each of the justices is qualified under Article V, Section 11, of the Texas Constitution to serve. Prior to any further proceedings in the case and in compliance with the provisions of Rule 18b of the Texas Rules of Civil Procedure, each challenged justice certified the matter to the entire court. The court then decided the motions by a vote of the justices of the court sitting en banc, except that the challenged justice did not sit when his challenge was considered. The court has concluded that each motion to recuse should be and is denied.[30]
>
> The opinion seems to the writer to leave not the slightest doubt that the only grounds for disqualification of a judge are those listed in art. 5, §11, of the constitution, and that the grounds set out in Canon 3 C(l) should not be considered in the future as grounds for disqualification. The necessary implication of the court's opinion is that, inasmuch as the three justices were qualified under art. 5, §11, the Guerras' motion, even if soundly based on the provisions of Canon 3 C(l), did not state grounds which, if true, could result in disqualification.
>
> While the death of Canon 3 C(l) as providing grounds for disqualification appears to have been sealed by *Manges v. Guerra*, what of Rules 18a and 18b? Inasmuch as Canon 3 C(l) no longer provides viable grounds of disqualification, it seems to this writer that motions for recusal or disqualification of judges on nonconstitutional grounds do not invoke jurisdiction of a judge or court to act further than to dismiss.
> * * *
> Most judges honor high ethical standards in the profession and believe in fair trials for all litigants; they will voluntarily recuse themselves in any situation where their conduct or motives can be seriously questioned and they are not required to sit.
>
> The writer witnessed many voluntary recusals, but never a questionable sitting, in his 22- years of Supreme Court service.
> * * *
> However much we may regret the passing of the Canon 3 C(l) requirement for ethical judicial conduct, the legal profession should give credit to a court that by a vote of eight to one chose to honor constitutional limits on its powers, even to the extent of striking down the interpretation of its own product. There is a better way of breathing life into Canon 3 C(l) than by violating the constitution: Do it the old-fashioned way - AMEND IT![32]

Id. at 1338.

A recusal issue arose in *Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. 1979), a lawsuit attacking the Supreme Court's special fee assessment members of the State Bar of Texas in order to reduce debt associated with constructing the Texas Law Center. The Petitioner lost in the trial court and Court of Civil Appeals. In filing a petition for writ or error, the petitioner filed a motion to disqualify all members of the Court, or in the alternative asking that each Justice recuse from the case. In a Per Curiam Opinion, the Court concluded that none of the Justices was "interested" in the case for purposes of Tex. Const. art. V, §11, which states that a judge is disqualified to hear a case "wherein he may be interested." The Court said that its members did not have a pecuniary or personal interest in the case, or an interest greater than any of lawyer or member of the public. The Court further noted that "[t]he Constitution does not contemplate that judicial machinery shall stop. If this is threatened, the doctrine of necessity will permit the judge to serve." The Court also rejected a Due Process of Law claim. saying that it was not a denial of due process for the Court that ordered a referendum among lawyer regarding the assessment in question to rule on its validity. The Court said that since the Justices were not disqualified, "it is our constitutional duty to serve." The Court then refused the application for writ of error on the grounds that the lower courts correctly determined that the Administrative Procedure and Texas RegisterAct does not apply to the Supreme Court.

42. The Errorless Judgment. Calvert, *How an Errorless Judgment Can Become Erroneous*, 20 ST. MARY'S L.J. 229 (1989).

43. The LBJ vs. Stevenson Primary Election of 1948. Josiah M. Daniel, III, *LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*, 31 REV. LITIG. 1, 70 (2012). Daniel wrote:

> Robert Calvert, the chair of the State Democratic Party and later Chief Justice of the Texas Supreme Court, recalled in his oral history interview: "The evidence that was produced before the committee that evening left me convinced absolutely and without the shadow of a doubt that somebody had added two hundred votes in Box 13 in Jim Wells County for Johnson that were not actually cast for him."

Daniel cited the interview by David McComb with Chief Justice Robert Calvert, The Supreme Court of Texas, in Austin, Tex. (May 6, 1971), at 15, transcript available at <http:// webstorage4.mcpa.virginia.edu/lbj/oralhistory/calvert_robert_1971_0506.pdf>.

44. *In re Reece*. In the case of *In re Reece*, 341 S.W.3d 360, 385-89 (Tex. 2011), Justice Eva Guzman wrote in depth about the effort to revise Article V of the Texas Constitution from the 1970s to 1990s. She wrote:

C. A Century of Pleas for Structural Reform Have Failed.

The urgency of sweeping judicial reorganization was "a perennial theme"[74] throughout the twentieth century. Earnest reformers like Roscoe Pound[75] and [p. 386] blue-ribbon studies galore urged a sweeping restructuring of our hodgepodge judiciary. Throughout the 1900s, "in virtually every decade of [the] century,"[76] there were regular calls in the Legislature, the academy, and the profession for structural reforms at every level, including high-court merger.[77] There have been periodic small-bore reforms, yet even those piecemeal tweaks were "inexorably tedious and protracted";[78] ad hoc is the rule evolutionary rather than revolutionary.

The 1970s were particularly reform-minded. The Judicial Section of the State Bar of Texas pushed for substantial changes to our judicial structure during the 1971 legislative session.[79] That same year, the Legislature proposed a constitutional amendment, eventually adopted by voters in 1972, directing the Legislature to form a Constitutional Revision Commission to "study the need for constitutional change" and then convene in 1974 as a constitutional convention.[80] Also that same year, in October 1971, then-Chief Justice Calvert formed the Chief Justice's Task Force for Court Improvement to rewrite Article V, the Judiciary Article of the Texas Constitution. In September 1972 the Task Force proposed, among other things, simplifying the trial-court maze, investing the courts of civil appeals with criminal jurisdiction (which happily happened in 1980), reforming judicial selection, and merging our twin high courts.[81] The Calvert Task Force coincided with a court-reorganization report by the House Judiciary Committee, which in 1972 called for extensive changes in the judicial [p. 387] branch.[82]

In early 1973, the thirty-seven members of the Texas Constitutional Revision Commission began nine months of study and public hearings, culminating in a proposed new state constitution.[83] (The Revision Commission was chaired by then-former Chief Justice Calvert, who had left the Court the previous October, one month after his Task Force unveiled its proposed Judiciary Article). Essentially, the Calvert-led Revision Commission adopted the recommendations of the Calvert-led Task Force.[84] Notably, though, the Revision Commission, unlike the Task Force, wrestled with modernizing the entire Texas Constitution, not just Article V. And the document it presented to the Legislature in November 1973 was the first comprehensive effort to draft a new constitution for Texas since the Constitutional Convention of 1875.[85]

The following January, the Legislature convened unicamerally in the House chamber as the Constitutional Convention of 1974. Like the Revision Commission, the Constitutional Convention favored a wholesale overhaul of the entire Constitution, and many of the proposed reforms, especially a right-to-work provision, provoked raucous debate.[86] The Convention dissolved seven months later, falling three votes shy of submitting a new constitution to Texas voters.[87] That October, the House Judiciary Committee submitted a report calling on the Legislature to submit to voters the revision of Article V that the 1974 Constitutional Convention considered.[88]

The Legislature reconvened in January 1975, and this time, acting as a regular legislature and not as a constitutional convention, it approved what became a package of eight separate amendments, including a new Article V, which resurrected the recommendations for a combined high court, courts of appeals with both civil and criminal jurisdiction, and substantial trial-court unification.[89] For the first time in a century, Texans had an opportunity to consider a revised constitution. It was not to be. As in the Constitutional Convention the previous year, fierce opposition arose over various non-judiciary proposals (like annual legislative sessions, a right-to-work provision, and taxation and education reforms) and each and every proposed revision was defeated, including the modernized Article V (which received more votes than any other amendment).[90]

[p. 388] A 1976 interim study of the House Judiciary Committee submitted fifteen piecemeal recommendations,[91] six of which the Legislature enacted (like the creation of the Office of Court Administration).[92] In 1979, then-Chief Justice Greenhill championed in his State of the Judiciary address the rifle-shot reform of giving criminal jurisdiction to the courts of civil appeals,[93] [See Section II.D.10 (publications) below] and voters agreed in 1980.[94]

The call for broader reforms persisted throughout the 1990s from TRL,[95] to the Comptroller,[96] to the Court-appointed Citizens Commission.[97] In May 1991, TRL urged a totally new Judicial Article, saying our courts are so "fragmented" that "[t]he Texas court system really is not a system at all."[98] In 1991, we directed an eighty-four-member Citizens Commission on the Texas Judicial System to "study and recommend any necessary or desirable improvements in the courts of Texas."[99] Given our constitutional responsibility "for the efficient administration of the judicial branch,"[100] the Court invited common-sense reforms, predominantly those related to the "jurisdiction and title of the trial and appellate courts of Texas."[101] Believing "a sound organizational and administrative structure is essential to a well-regarded judiciary," the Commission proposed a system that simplified general-jurisdiction trial courts and unified our dual high courts, though the new Supreme Court would have "two divisions, civil and criminal, each with seven justices."[102]

In the 1990s, the Citizens' Commission proposals did draw support as part of broader efforts to streamline our ungainly constitution down to something approaching comprehensibility.[103] No such luck; the efforts sputtered. Our unwieldy constitution lives, including our crazy-quilt court system, a top-to-bottom mess. The push for modernization has continued apace in the 2000s. Many observers, including members of this Court,[104] have [*389] continued pushing for lower-court simplification, and other voices urge high-court merger as part of a broader restructuring.[105]

Against this bizarre background I turn to Reece's petition for writ of habeas corpus. It determines the procedural posture that so interestingly animates this case, and channels the kinds of cases this Court can and cannot hear. The issue of jurisdiction deciding to decide may sound like a meta-interest floating in the jurisprudential ether, but its importance as a threshold issue cannot be overstated. The matter of to whom the courts are open and for which claims colors our bifurcated high-court system, and ultimately disposes of this case. Sections II and III discuss, respectively, the statutory and precedential evidence that suggests we are not permitted by law to hear this case. Section IV explains that even if we do maintain jurisdiction, it would be unwise to exercise it. The former is a matter of a legal directive, the latter a matter of judicial discretion, but both yield the same conclusion: "no compelling case to hear this case."

II. GREENHILL. Joseph Robert Greenhill, III (1914-2011) was an Associate Justice on the Texas Supreme Court, 1957-1971, and Chief Justice 1972-1982.

A. TIMELINE.

1914 Born in Houston, Texas
1936 University of Texas B.A. & B.B.A. degree (both w. highest honors)
Texas Cowboys
1939 U.T Law School LL.B. degree (highest honors; 1st in class)
1940-41 Briefing attorney, Texas Supreme Court, for Chief Justice Alexander and Assoc. Justices Sharp and Critz
1940 Married Martha Shuford of Tyler
1942 Active duty Naval Intelligence, Executive Officer on the minesweeper USS Control, AM-164
1946 Briefing attorney for Texas Supreme Court
1948 First Assistant Attorney General
1950 Argued *Sweatt v. Painter* in the U.S. Supreme Court
1950 Co-founded Graves, Dougherty & Greenhill
1957 Appointed as Associate Justice, Texas Supreme Court
1958 Fended off Sarah T. Hughes' effort to unseat him from the Court in the Democratic primary
1972 Appointed/elected Chief Justice Texas Supreme Court
1974 Distinguished Alumnus University of Texas at Austin
1974 Distinguished Alumnus University of Texas College of Business Administration
1977 Distinguished Alumnus University of Texas School of Law
Honorary Doctor of Law Degree SMU School of Law
1982 Retired; became Of Counsel to Baker & Botts
2009 Retired from Baker Botts
2011 Joe R. Greenhill died and was buried at the Texas State Cemetery

B. BIOGRAPHIES AND OBITUARIES.

Joseph Robert Greenhill, III was born in 1914 in Houston, Texas. His father, Joseph Robert Greenhill, Jr. was a railroad clerk with the Gulf, Colorado and Santa Fe Railroad. His parents, Joe Jr. and Violet Stancell Greenhill, lived with Joe Greenhill Sr. and his wife Elenor at 2520 Mason Street in the Montrose area of Houston. Joe Jr. died in 1918, at age 29. Joseph III and his mother continued to live with Joe Sr. and Elenor on Mason Street. Both of Violet's parents were born in Ireland. Ocean transit records reflect that Greenhill, along with a large number of Texas boys, returned by ship from France to New Orleans in 1929. Greenhill attended San Jacinto High School in Houston. He attended the University of Texas, where he earned Bachelor of Arts and Bachelor of Business Administration degrees in 1936 and the Editor of the Cactus, the university's yearbook. He was a member of the Texas Cowboys (custodians of Smokey, the cannon fired at UT football games). He received a Bachelor of Laws degree from U.T. Law school in 1939 where he graduated first in his class. After graduating he was employed as a briefing attorney for the Texas Supreme Court. He married Martha Shuford in 1940. Greenhill went to work for the Houston law firm of Bryan, Suhr, Bering & Bell. During World War II, he served as an Ensign and then Lieutenant in the United States Navy, first in intelligence and then as executive officer of a mine sweeper in the Pacific Theater. Greenhill became First Assistant Attorney General of the State of Texas. In 1948, he co-founded Graves, Dougherty & Greenhill. Greenhill was appointed as an Associate Justice of the Texas Supreme Court in 1957, and in 1972 he became Chief Justice. He received an honorary Doctor of Law degree from Southern Methodist University in 1977. After he retired from the Court, Greenhill was of counsel at Baker Botts where he assisted in preparing appellate briefs.

1. Justice Barrow's Tribute. Charles W. Barrow, *A Tribute to Chief Justice Joe R. Greenhill.* 14 ST. MARY'S L.J. xii (1982): Charles W. Barrow, Justice, Supreme Court of Texas; B.A., J.D., Baylor University. Justice Barrow delivered these remarks at a retirement ceremony for Chief Justice Greenhill on November 29, 1982:

A TRIBUTE TO CHIEF JUSTICE JOE R. GREENHILL

On October 25, 1982, Chief Justice Joe R. Greenhill left this Court to begin a well-earned retirement.

This marked the end of twenty-five years and twenty-one days of dedicated and distinguished service to the people of Texas. This is longer than any other justice ever sat on this Court and certainly no one has ever contributed more to the administration of justice.

On October 4, 1957, Joe Greenhill responded to the urging of his longtime friend and former colleague, Governor Price Daniel, left a prosperous and growing law practice, and accepted appointment as Associate Justice of the Supreme Court of Texas. This was to fill a vacancy created by the resignation of Judge Few Brewster.

Few, if any, have come to this Court with better credentials: BA, BBA and LLB degrees from the University of Texas, where he earned Phi Beta Kappa, Order of the Coif and served as Editor of the Texas Law Review. Under Governor Price Daniel, he served as First Assistant Attorney General of Texas. He twice served as Briefing Attorney of this Court; his first term was interrupted by Pearl Harbor and World War II Naval duty in the Pacific Ocean, with duty on mine sweepers (which is quite a bit less luxurious than a cruise on the Queen Elizabeth). He returned to the Supreme Court after the war to complete his term as Briefing Attorney.

Few, if any, have served this Court with more distinction. The judges on this Court do not specialize in any particular field of law, but take the cases as they come. As a result, the hundreds of opinions authored by Judge Greenhill can be found in all areas of law. All are marked by careful and thorough research, clear and concise writing and an honest application of the controlling legal principles without fear of favor.

[*xiii] His cases are found in 331 volumes of the Southwestern Reporter, Second Series. The first in 309 S.W.2d related to the grounds for disqualification of an independent executor. The last published case is in 640 S.W.2d and relates to usury. He has authored decisions in many unsettled and developing areas of law. *Coffee v. Rice University* permitted Rice to become an integrated University. *Davis v. City of Lubbock* upheld the validity of urban renewal. *Fisher v. Carrousel Motor Homes* permitted damages to be recovered for a restaurant's refusal to serve a Negro. *Shackleford v. City of Abilene* gives a citizen standing to enforce the Open Meetings law. I could go on for the rest of the afternoon citing cases wherein Judge Greenhill authored landmark and even historic opinions.

I asked him what opinion he was proudest to have authored.

He responded that Judge Calvert had asked a similar question in regard to a book Judge Calvert plans to publish. But, after considerable thought, Judge Greenhill could not come up with such a case.

I am sure the reason was stated recently by Retired United States Supreme Court Justice Potter Stewart in response to a similar question. He said:

> I worked hard on every opinion. I think its very important for a judge--any judge, anywhere--to remember that every case is the most important case in the world for the people involved in that case, and not to think of a case as a second-class case or a third-class case or an unimportant case. It behooves the judge or justice to apply himself fully to every case and to give it conscientious consideration.

This is the judicial philosophy of Judge Greenhill and why he is justifiably so proud of every case he has authored.

History will be very kind to his ten years service as Chief Justice. He has given great leadership as Chief Justice and head of our Judicial Branch of government. In my judgment, his service will be marked as a period in which the Court struggled and successfully coped with the litigation explosion.

Through his leadership and example, the Texas Supreme Court is the most current appellate court in the United States. This has not happened by accident. Judge Greenhill is literally obsessed with keeping our docket [*xiv] current. Judging has been a seven-day-a-week job to him. When any holiday, except Christmas, came on a regular conference day, we worked. Before the Court recessed at the end of each July, every application filed by June 1st was considered.

Conferences were started again on the first Monday in September with Judge Greenhill's infamous "Two-A-Days." We held conference every day and the backlog was eliminated before we began the regular term on October 1.

While his leadership has been firm, his even disposition and gentle personality has kept the court harmonious. There are no cliques here. We are all members of a Court family--deeply interested in the personal and family life of the other members. This can be attributed a great deal to the type of person that Judge Greenhill is and what he stands for.

He has been deeply interested in improving the administration of justice and has courageously responded, irrespective of personal popularity, when he saw a need for change. Judge Greenhill is almost personally responsible for the passage of the constitutional amendment giving the Courts of Civil Appeals criminal jurisdiction. He will not stop that fight until criminal justice is as current as civil justice.

He personally had nothing to gain by taking a strong stand for a change in our present partisan elective system for appellate judges. But, he sees the danger in the present system and the need to speak out. Sooner or later the electorate will demand a change.

His leadership has been recognized nationally. He is now President-elect of the National Center for State Courts. Also, he is President-elect of the Conference of Chief Justices of the United States and a gold medal award winner from the Freedoms Foundation at Valley Forge.

Yes, this has been a golden twenty-five years of judicial service. He has fully earned his wish now to place his beloved family first in his life.

This seven-day-a-week service would not have been possible without the encouragement and sacrificial support of Martha. We shall miss her as much as him from our Court family. She has willingly been number two to this Court for twenty-five years.

We now give him back to Martha and their wonderful family [*xv] with our deepest gratitude on behalf of the people of Texas. But we shall keep the personal memories of the beautiful relationship we have been privileged to share as members of the Court family with Martha and Joe Greenhill.

May God enrich both your lives.

2. Houston Chronicle Obituary. *Associated Press*, published in the Houston Chronicle:

Joe Greenhill, who was the longest-serving member of the Texas Supreme Court, has died. He was 96. In a statement e-mailed to the Associated Press, Gov. Rick Perry said he joined Greenhill's family and friends in "mourning the loss and celebrating the exceptional life of this fine Texan." Greenhill served on the state's highest civil court from 1957 until 1982 and was chief justice the final 10 years. In 1946, as first assistant attorney general, he defended Texas in a U.S. Supreme Court case brought by Hemann Sweatt, a black man who sought admission to the University of Texas law school after Texas created a separate law school for black students. The court struck down the segregated law school as unequal.

3. Tarlton Law Library Obituary. The Tarlton Law Library website has this biography:

Joe Robert Greenhill was born July 14, 1914 in Houston. Following graduation from Houston public schools, he attended The University of Texas, where he earned B.A. and B.B.A. degrees in 1936 and an LL.B. degree in 1939, each with highest honors. He began practicing law in Houston and joined the U.S. Naval Reserve during World War II, serving in the Pacific. In 1948 Greenhill became first assistant attorney general for the state of Texas, and helped argue the landmark case, *Sweatt v. Painter*, before the U.S. Supreme Court. In 1950 he co-founded the Austin law firm, Graves, Dougherty & Greenhill, where he practiced until 1957.

Greenhill's long and distinguished career on the bench began in 1957, when Gov. Price Daniel appointed him an associate justice of the Texas Supreme Court. Greenhill won election to the position the following year. He served as an associate justice until 1972, when he was appointed chief justice. He served as chief justice for ten years before retiring in 1982. While on the bench he labored to bring about a Texas constitutional amendment to give the court of civil appeals criminal jurisdiction.

Following his retirement from the bench, Greenhill served in leadership positions in numerous legal organizations and worked to change laws that discouraged mediation and arbitration, which has reduced the backlog of cases and given low-income citizens better access to the judicial system. He also served as the director emeritus of the Texas Bar Foundation and president of the Texas Supreme Court Historical Society. He lived in Austin until his death on February 11, 2011 at the age of ninety-six. He was buried in the Texas State Cemetery.[4]

4. Dallas Morning News Obituary. The following is an obituary for Joe Greenhill, longest-serving justice on the Texas Supreme Court. The obituary was published in the February 13 edition of the Dallas Morning News.

GREENHILL, JOE ROBERT (1914 - 2011).

Greenhill, Judge Joe R. - The Hon Joe R. Greenhill, chief justice of the Texas Supreme Court from 1972 to 1982, was born in Houston July 14, 1914, the son of Joe Greenhill, Jr., and Violet Stanuell Greenhill. He was graduated from San Jacinto High School in Houston and afterwards received B.A., and B.B.A. degrees from the University of Texas, and an L.L.B Degree from the University of Texas Law School, where he graduated at the top of this class. He was a member of Phi Beta Kappa, the editor of the Cactus (the University of Texas yearbook), and a student editor of the Texas Law Review. Judge Greenhill received a Doctor of Law degree (honorary) from Southern Methodist University. He was selected Distinguished Alumnus of the University of Texas at Austin (1974), the University of Texas Law School (1977), and the University of Texas College of Business Administration (1977).

He was married to Martha Shuford of Tyler on June 15, 1940. He and Martha celebrated their 70th wedding anniversary in June 2010 with the entire immediate family. Judge Greenhill commenced his legal career as a briefing attorney for the Texas Supreme Court working with Chief Justice James Alexander and Associate Justices John Sharp and Richard Critz. During World War II, he served 4 years on active duty, first in naval intelligence, then as Executive Officer on a fleet minesweeper in the forward area in the Pacific. As First Assistant Attorney General of Texas from 1948 to 1950, he tried and handled appeals for many major cases, including several argued before the United States Supreme Court.

He was a partner in the firm of Graves, Dougherty & Greenhill, Austin, from 1950 until 1957, when he was appointed to the Texas Supreme Court by Governor Price Daniel. His tenure, capped by service as chief justice from October 1972 to October 1982, was the longest in the history of the state's highest tribunal. After retirement from the Supreme Court he became Of Counsel with Baker Botts in Austin. Judge Greenhill was Executive Director, then Executive Director Emeritus of the Texas Bar Foundation. He received the Gold Medal Award from the Freedom Foundation, was a member of the Warren W. Burger Society and the Order of St. John's, and was a 33rd Degree Scottish Rite Mason.

He was a member and former president of the Texas Supreme Count Historical Society and of the Philosophical Society of Texas. He is the honoree of the Chief Justice Greenhill Presidential Scholarship in Law by the University of Texas Law School and the Chief Justice Joe Greenhill Scholarship by the Texas Wesleyan School of Law, Fort Worth, which provide scholarships for law students each year. He was co-incorporator of the Texas Center for Legal Ethics and Professionalism. Judge Greenhill was a member, vestryman, and Senior Warden of St. David's Episcopal Church in Austin. As legal advisor to the Right Reverend John Hines, Bishop of the Diocese of Texas, he was instrumental in resolving legal issues involved in the acquisition of the land on which the Episcopal Seminary of the Southwest in Austin was built. Judge Greenhill's years as Chief Justice of the Texas Supreme Court were distinguished by transformation in Texas negligence law, a breakthrough he engineered to allow greater alternative dispute resolution, and his championing expansion of the state's courts of appeals' jurisdiction to ease years of backlogs at the Texas Court of Criminal Appeals.

As First Assistant Attorney General he defended Texas in *Sweatt v. Painter*, a desegregation challenge to the University of Texas School of Law in 1950. He lost before the U.S. Supreme Court. Twenty-seven years later he helped dedicate a new building at Texas Southern University's Thurgood Marshall School of Law, named for the African-American counsel who had prevailed in the *Sweatt* case. Marshall became in 1967 the U. S. Supreme Court's first African American justice. Initially reluctant to have the Texas Southern law school named for him, Marshall yielded upon Judge Greenhill's urging. The two jurists had personal and professional relationships that intersected more than once. On May 17, 1954, when the U. S. Supreme Court unanimously struck down state laws requiring school segregation, in *Brown v. Board of Education of Topeka*, the Greenhill family was visiting the Court.

Thurgood Marshall, once an opponent, now the elated victor in U.S. history's greatest civil-rights case, swept Judge Greenhill's son, Bill, onto his shoulders and ran him through the white marbled Great Hall of the Court.

Judge Greenhill is survived by his wife, Martha, his sons, Joe Jr. (Austin), Bill and his wife Ann (Fort Worth), granddaughter, Emily Pierce and her husband, Adam, (Brooklyn), grandsons Duke Greenhill, Frank Greenhill, Joe Greenhill V and his wife, Melissa, and great grandson Elliott Pierce and great granddaughter Violet Pierce. Honorary Pall Bearers are: Bob Shannon, Larry York, Scott Field, Susan Gusky, Mary Keller, Patrick Keel, Joe Knight, Bob Howell, Polly Powell, and Joe Faron. Instead of flowers, contributions may be sent to The Gladney Center for Adoption, Development Department 300 John Ryan Drive Fort Worth, TX 76132; St. David's Episcopal Church, 301 East 8th Street, Austin, TX 78701-3280; the Texas Supreme Court Historical Society, 205 West 14th Street, Austin, TX 78701-1614; or to a charity of choice. A memorial service will be held at 2:00 P.M. at St. David's Episcopal Church, 301 East 8th Street in Austin, on Tuesday, February 15. There will be a reception in the Parish Hall following the memorial service. Obituary and memorial guestbook available online at www.wcfish.com Arrangements by Weed-Corley-Fish Funeral Home 512-452-8811.

Greenhill died on February 11, 2011.[5]

5. Texas Supreme Court Advisory. The Texas Supreme Court issued this advisory on February 11, 2011:

Former Chief Justice Joe Greenhill, who in 25 years on the Texas Supreme Court was the longest-serving† justice in Texas history, died Friday in Austin at 96. His 10 years as chief justice were distinguished by transformation in Texas negligence law, a breakthrough he engineered to allow greater alternative dispute resolution and his championing expansion of the state's courts of appeals' jurisdiction to ease years of backlogs at the Texas Court of Criminal Appeals.

"Not only this Court, but the people of Texas have lost a great treasure," said Chief Justice Wallace B. Jefferson, the fourth person to serve as chief since Greenhill retired in 1982.

Services will be at 2 p.m. Tuesday at St. David's Episcopal Church in Austin. A private burial will be in the Texas State Cemetery.

Until two years ago he kept regular hours at Baker Botts LLP in downtown Austin's San Jacinto Tower, his 16th-floor office looking down on Lady Bird Lake and offering a sweeping panorama of Southwest Austin and the beginning breaks of the Texas Hill Country beyond. Always at his desk, or nearby, was his trademark cigar, handmade Honduran, mostly a stub, always chewed up. He kept a box of cigars in a cabinet behind his desk. His remarkable legal and judicial career moved from defending Texas in a desegregation challenge to the University of Texas School of Law – a U.S. Supreme Court decision he lost that led to the Court's landmark public school-desegregation order in *Brown v. Topeka Board of Education* – to helping to dedicate a new building for Texas Southern University's Thurgood Marshall School of Law. Thurgood Marshall, later the first African-American justice on the U.S. Supreme Court, was his opponent in the law school-desegregation case.

As chief justice from October 1972 until October 1982, Joe Robert Greenhill considered his proudest accomplishments to be his success in passing a constitutional amendment to give Texas' 14 intermediate appellate courts criminal jurisdiction and in changing restrictive laws that discouraged arbitration and mediation to resolve legal disputes in Texas.

He later worried that arbitration had gone too far.

Ultimately history would call him a good judge, he said before his death, one who worked for stability in the law. "Generally speaking," he said, "people who draw up contracts are entitled to have the law followed."

"The modern Texas judiciary was born in large part from Joe Greenhill's great efforts," Jefferson said. "I owe him, every Texas judge owes him and the people of Texas owe him more than mere gratitude can measure."

Former Chief Justice Thomas R. Phillips called Greenhill a giant of Texas law. "Despite his brilliant academic record and his success in both public service and private practice, he was always modest and approachable," Phillips said.

"After leaving the Court, he helped open the Austin office of Baker Botts where he mentored a generation of young lawyers."

Survivors include his wife, Martha, whom he married in 1940 in Tyler, and sons Joe R. Greenhill Jr. of Austin and Bill Greenhill of Fort Worth.

Joe Greenhill, born in Houston on July 14, 1914, was educated in business and law at the University of Texas, where he was named to Phi Beta Kappa as an undergraduate and graduated at the top of his law-school class. He was honored as a distinguished alumnus of both the business and law schools and was awarded an honorary doctor of laws by Southern Methodist University.

He was the first briefing attorney to become a justice and the only briefing attorney to serve twice as a law clerk when he returned to the Court after service in World War II.

"It was like having an historical figure on the Court," said former Justice Scott Brister, who clerked for Greenhill in 1980-81. "He had been on the Court for so long and had written so much of the law in Texas."

After Greenhill's graduation in 1939 from UT's law school and following a stint as briefing attorney, he interrupted his legal career to join the U.S. Navy at the beginning of World War II. He worked in intelligence, then as executive officer on a mine sweeper, the U.S.S. Control, in the Pacific.

After the war he returned to clerk for the Court, then became first assistant attorney general. In that role he argued *Sweatt v. Painter* before the U.S. Supreme Court, the challenge by Hemann Marion Sweatt, a black postal worker, to gain admission in 1946 to UT Law School. The issue was not, as Greenhill later told oral biographer H.W. Brands, whether the state provided unequal and separate facilities. For Greenhill, the issue was one of principle: Why would the 14th Amendment, which allowed states to segregate schools in 1868, prohibit that same practice in 1946?

The state, which provided no legal training for blacks, decided to create a separate law school for blacks. Legislators, he recalled, "wanted an instant equal, separate school."

The U.S. Supreme Court, though, found that Sweatt's segregated law school was substantially unequal and ordered his admission to the University of Texas.

"He took me to lunch shortly after I became chief in 2004," Jefferson said. "He wanted me to know that his principled stance in *Sweatt* took nothing away from his admiration for Thurgood Marshall – and his pride in my promotion as Chief Justice."

Six years later, after Texas lost that case, Greenhill recalled that he visited the Supreme Court in Washington, D.C., with his son, Bill, the day the Court issued its decision in *Brown v. Board of Education*. Thurgood Marshall, once an opponent, now the elated victor in U.S. history's greatest civil-rights case, swept Bill onto his shoulders and ran him through the white marbled Great Hall of the Court.

Twenty-three years later Greenhill, then chief justice, would honor then-Justice Marshall in remarks at the dedication of the Thurgood Marshall School of Law. Greenhill said he talked Marshall into permitting the school to be named for him when Marshall at first said no.

"'I don't want my name on any segregated school,'" Greenhill remembered Marshall objecting.

"I pointed out to him that the law school was something like 66 percent African-American," he said. "And he said OK."

After Greenhill's retirement from the Court, the Thurgood Marshall Law Review dedicated a special issue to him in 1983.

In 10 years as chief justice, Greenhill, then with power to appoint Board of Pardons and Paroles members, appointed a black woman – a first.

And at a time when women were beginning to enter law practice in significant numbers, Greenhill was ahead of his time, said one former law clerk, Sally Miller of Austin. "Most importantly," she said, "I recall his hiring women law clerks back when women were still a relatively 'new thing.'"

Court records show Chief Justice Greenhill had women law clerks on his staff every year from 1976 until his retirement.

Greenhill, whose mother was the first state social-work director when she was appointed in 1931, reared him in a Houston home in which she took in working women as boarders to help them make ends meet. "I grew up in an environment of working women," he said. "It seemed natural for me that if they were qualified to do the work they were just as capable as man to be law clerks."

But his greatest accomplishment as chief justice, he said, was passing a constitutional amendment giving the Texas courts of civil appeals jurisdiction over criminal cases to relieve a backlog at the Court of Criminal Appeals. The three-judge Court of Criminal Appeals, then the only criminal appellate court in Texas, labored on a caseload long out of balance.

The amendment also expanded the Court of Criminal Appeals to nine judges.

To pass it, his strategy was to do almost nothing after the Legislature approved the ballot proposal. "I got it passed by refusing to debate it," he said. "People opposing something can find more reasons not to change than you can imagine."

He also knew the Federal Communications Commission's equal-time provision would work against the amendment proposal. If he spoke on television for it, the station would be required to give equal time to opponents.

Greenhill helped found the Austin law firm now known as Graves Dougherty Heron & Moody in 1950 and left it when he joined the Court in 1957, appointed by his former boss, Price Daniel. Daniel, elected governor after serving as attorney general, was a leader of the Texas Democratic Party's conservative wing.

"Everyone presumed I would also be very conservative," Greenhill said.

He drew Sarah T. Hughes as an opponent, then a Dallas judge (and who was later remembered as the federal judge who gave the presidential oath to Lyndon B. Johnson aboard Air Force One after President Kennedy's assassination in 1963).

"At that point," Greenhill said of her challenge, "she was the liberal and I was the conservative."

He defeated Hughes in that race. But the political winds changed when he ran to succeed Robert W. Calvert as chief justice in 1972. Then he would draw opposition from what he called the far right and insurance companies.

As chief justice he worked for a "more level playing field" in negligence law, bringing Texas in line with states that adopted a system that would account for comparative fault among the parties involved in an accident and measure the risk an injured person assumed before an accident.

Greenhill, whose great-grandfather served as attorney general in Ireland and later on the Irish Supreme Court, lived with his mother, who reared him as single parent from the time he was 2. He joined the U.S. Navy after law-school graduation and his clerkship on the Court he would lead three decades later.

He clerked again for the Court after the war, making him the only briefing attorney ever to serve separate clerkships.

On a table in his Baker Botts' office were seven volumes of bound briefing in the Sweatt case. In a cabinet behind the table he pulled the volume of the Thurgood Marshall Law Review dedicated to him, proudly showing the symbolic end of perhaps his most famous case.

Next to that, on a credenza behind his desk, sat a chewed-up Honduran cigar.

† Chief Justice Greenhill served 25 years and 21 days. The second longest-serving justice, who, as Greenhill, served as chief justice for part of his tenure, was Reuben Gaines.[6]

6. Texas State Cemetery. The Texas State Cemetery published the following:

Upon his retirement from the Texas Supreme Court, Judge Greenhill was President-Elect and member of the Board of Directors for the National Center for State Courts; President-Elect for the Conference of Chief Justices; and Vice-Chairman of the Texas Criminal Justice Division Advisory Board. He was Executive Director of the Texas Bar Foundation; former Chairman of the Judicial Section of Texas State Bar and the Bar's Section on Natural Resources; Life Fellow of the Texas Bar Foundation; and Life Member of the American Bar Foundation.

Judge Greenhill was also the recipient of several awards throughout his distinguished career. He was awarded the Gold Medal Award, Freedom's Foundation at Valley Forge, 1971; was a Distinguished Alumnus, School of Business Administration in 1974, University of Texas; Distinguished Alumnus, School of Law in 1977, University of Texas; named Outstanding Texas Lawyer by Texas Bar Foundation, 1989; the Herbert Hartley Award for promoting Administration of Justice from the American Judicature Society, 1992; and the Distinguished Lawyer Award from the Travis County Bar, 1995. He was Co-Incorporator in 1989 for The Texas Center for Legal Ethics and Professionalism. Currently Judge Greenhill is the President of Texas Supreme Court Historical Society and is Counsel for the law practice of Baker and Botts in Austin.

A brief interview with former Chief Justice Greenhill is at:
<http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/video/JRG_after_Calvert.wmv>

7. Memorial Service. The following was on the printed program at Chief Justice Greenhill's memorial service held in Austin:

Joe R. Greenhill spent 25 years and 21 days as a justice on the Texas Supreme Court, from 1957 through 1982, the last 10 years as chief justice. When he died February 11, 2011, he left a legacy as the longest-serving justice in Texas history and a decided mark on Texas jurisprudence, by transforming negligence law in Texas, by creating a framework for alternative dispute resolution and by engineering jurisdictional changes for the state's courts of appeals that relieved an overburdened Court of Criminal Appeals in a state that had long grown beyond its 1890s court system. Born in Houston, he earned business and law degrees at the University of Texas, where he was named to Phi Beta Kappa as an undergraduate and graduated at the top of his law-school class. UT honored him as a distinguished alumnus of both the business and law schools and Southern Methodist University awarded him an honorary doctor of laws. He was the first briefing attorney to become a justice and the only briefing attorney to serve twice as a law clerk when he returned to the Court after service in the U.S. Navy in World War II. He then became first assistant Texas attorney general. In that role he argued *Sweatt v. Painter* before the U.S. Supreme Court, the challenge to integrate UT Law School. Greenhill helped found the Austin law firm now known as Graves Dougherty Heron & Moody in 1950 and left it when he joined the Court, appointed by his former boss as attorney general, Price Daniel, then Texas governor. As chief justice, Greenhill considered his proudest accomplishments to be his success in passing a constitutional amendment to give Texas' 14 intermediate appellate courts criminal jurisdiction and in changing restrictive laws that discouraged arbitration and mediation to resolve legal disputes in Texas. His survivors include his wife, Martha, whom he married in 1940 in Tyler, and sons, Joe R. Greenhill Jr. of Austin and Bill Greenhill of Fort Worth.[7]

8. York Eulogy. Larry F. York gave this eulogy to Joe Greenhill:

Field Marshall Montgomery, who served under Supreme Commander Dwight Eisenhower as commander of the British troops in the Normandy invasion, said of Eisenhower:

> "His real strength lies in his human qualities…He has the power of drawing the hearts of men towards him as a magnet attracts the bit of metal. He merely has to smile at you, and you trust him at once."

These words could have as truly been said about Judge Greenhill. He was a brilliant student of the law, and a superb writer, but I think it was that kind of trust which enabled him to be a great Chief Justice—to effectively lead a strong minded and independent group of justices, to be "first among equals" with grace and good will. Judges he appeared before as a litigator knew they could trust him not to mislead them, and so did his adversaries. His friends knew that he was always there for them. People just knew immediately that they could trust Joe Greenhill.

He thought the law was a noble endeavor, and he made those around him feel that.

One young lawyer who started her career at Baker Botts told me in the last few days "My parents regretted that I left teaching until they were his guests for lunch one day. He made such an impression and from that time forward, if the law was good enough for Joe -- the way he introduced himself to them-- it was good enough for their daughter."

One of Judge Greenhill's most endearing qualities was his ability to make fun of himself. I think my favorite story of his, one many of you have heard him tell, always with great relish. I think he had as much fun telling it as we had hearing it. As you know, he clerked at the court in the 40's, and got to know an older black man named Mr. Gregg who worked at the court as a porter. Years later, when Judge Greenhill was sworn in as a justice, the old gentleman was still there. He came around to Judge Greenhill's office as the Judge was arranging his things. He said "Mr. Greenhill, you are a big man now!" Judge said "Well thank you Mr. Gregg!" Mr. Gregg said, "Yes sir, you are a big man now." Judge Greenhill said "well, it is a great honor" Mr. Gregg said "yes sir, must weigh 200 pounds!"

I just wish I could capture what I know so many of you know--just how much FUN it was to be around Joe Greenhill. He was a great story teller, and always had sort of "back story" tales about famous people. Some of those, I'm afraid, will have to wait another 50 years to be told.

One of my favorite "back stories" was of him swearing in Bill Hobby as Lt. Governor in front of a large crowd at the Capitol in 1973. When Judge Greenhill said "Raise your right hand," Gov. Hobby, who is left-handed, raised his left hand. Without missing a beat, Judge Greenhill just raised his left hand and administered the oath. Judge said far as he knew, no one ever questioned whether Gov Hobby was "legal."

And speaking of swearing people in, there is no telling how many brand new lawyers he swore in. And he always did it the same way. He'd be there in his robe, very solemn and judgelike, and he'd go through the oath. At the end, while the new young lawyer's right hand was still in the air, the Judge would reach out to shake hands, and with that big Greenhill grin, he'd say "You're in!"

Some of you may remember the old green Dodge that the Judge had when he was Chief. It was at least 12 years old when it developed a problem with a door. The man at the garage told the Judge they weren't even making parts for it, but he could fabricate something that would work. Judge said go ahead. The fellow went around to the rear of the car to get the license number for the ticket, and saw the "SO"—state official" license plate. He turned to the Judge and said "Are you some kind of state official?" Judge said "Well, yes, I am Chief Justice of the Texas Supreme Court." The fellow looked at him, shook his head, and said "Damn—you must really be honest!"

One Monday morning in 1983 or so, just after he and I had opened the Austin Baker Botts office, one of the secretaries told me he had come in that morning and reported to her that something had happened in the library over the weekend, but that he had had nothing to do with it, even though he admitted that he had been in the library for awhile on Sunday. Some of you will remember the old Lexis terminals of that day—a red stand alone terminal with its own keyboard, and own supply of tractor feed paper. Well, Judge reported to the secretary, "I was at a table reading, when all of a sudden that red machine in there started belching out all of its papers. Now I never touched it. It belched, and belched, until it had finally belched out all of its paper on the floor. And, he reported, "Then it got the dry heaves."

It was a wonderful and stimulating experience to work with him on preparing a brief or a motion. He had such a depth of experience and such an understanding of how and why cases had been decided they were. He had an extremely keen and analytical mind. But to be effective advocates, and to make effective legal arguments, he taught that we had to distill the complicated arguments down. He told us to always follow what he called the KISS rule—"Keep it Simple, Stupid." Stephen King has said that he always writes with an "ideal reader" in mind—his is nearly always his wife; if she likes it, it'll be OK. Judge Greenhill said he wanted to write in such a way that an intelligent person, like his wife or perhaps a first year law student, who knew nothing of the particular subject, could understand what he was talking about. His idea was to understand the problem at its deepest levels, and then to explain it as simply as possible.

Sometimes when we'd be working on a brief, and struggling with a concept that sounded like a good argument, but just having trouble finding a way to fit it in, the Judge would say, "You know, this is just one of those things that "The longer you chew it, the bigger it gets."

And when, after struggling, we would hit on some idea that worked, he liked to quote his great friend Chrys Dougherty who said, "There is nothing lovelier than a mental sunrise."

Judge Greenhill was First Assistant Attorney General under Price Daniel, and he used to say "The advantage of being Attorney General, instead of First Assistant, is that the AG gets to choose the cases he works on. Price took the Tidelands cases and became US Senator and Governor. He made me take *Sweatt v. Painter*." But that case indicates something about Judge Greenhill's professionalism. He did not have a prejudiced bone in his body, yet it was his duty to defend a state statute that required "separate but equal" schools for blacks and whites. The state's argument was not about morality, but about the narrow issue of the intent of the authors of the 14th Amendment in 1868. Thurgood Marshall came to state district court in Austin to represent Hemann Sweatt. Marshall had been vilified all over the South as he went about trying these cases. But in Austin, he found a respectful adversary in Joe Greenhill, who helped him find a place to stay in segregated Austin. Marshall said he did not feel hated in Austin. He and Judge Greenhill became friends, and when by coincidence they both happened to be at the US Supreme Court the day *Brown v. Board* was handed down, Thurgood Marshall put young Bill Greenhill on his shoulders and ran through the halls whooping with joy.

Judge Greenhill showed all of us how to disagree without being disagreeable, and how to be effective advocates while maintaining our professionalism. He wanted our points to be made without personal attacks on opposing counsel or parties. He was the "Anti Rambo".

And the Judge was a great note writer and letter writer. Any courtesy extended to him or Martha resulted in a note or letter back. If you did something or achieved something, you'd get a note. If he wrote a memo about some law point or recollection of some historic event, I'd often get a long marginal handwritten note about the "real story—not for publication". I treasure my files of these notes.

Of course, he was not the only Greenhill to write notes and letters. Martha did the same thing. My mother, who was in her 80's when this happened, had never met the Greenhills. She called me from Palestine one night and said "Well, I just got the most unusual thing when I went to the mailbox today. I got a letter from Mrs. Greenhill—JUDGE Greenhill's wife—and she just said the nicest things about you!" My Mother was just thrilled. It was one of the nicest things that ever happened to me.

Who but Martha Greenhill would do that?

But with all those kindnesses, people understood that you didn't mess with Judge Greenhill. He could have fun, but he was a formidable trial lawyer and a no-nonsense, incorruptible judge when it came to the serious business of the law and of the Court. He was firm in his leadership of the Court, and in his advocacy for the judiciary with the Legislature.

He pushed for the Constitutional Amendment to give criminal jurisdiction to the Courts of Appeals, and he got it done—despite the opposition of the all 14 Courts of Appeals, about half of the Court of Criminal Appeals, the criminal defense bar, and most of the civil trial bar. It needed to pass, and it did. But it wouldn't have without Judge Greenhill.

When he wanted the UT law school to start requiring more Texas procedure courses, they said no—they were not a trade school. Judge Greenhill saw to it that the bar exam included additional questions on procedure. Some of UT Law's finest flunked the bar exam. Thereafter, more Texas procedure was required.

Once Martha and a lady friend were having lunch at a local private luncheon club. They unknowingly sat down in a room that was designated for men only. They were asked to leave. The Judge was not pleased, and he let the club know in no uncertain terms. That policy changed.

And when one former judge made a very disparaging public comment about the Judge, that man looked up in surprise at his office downtown one day and found a very irate Martha Greenhill standing in front of him telling him in uncertain terms that he was NOT to speak of her Joe in that way.

Joe and Martha definitely had each other's backs during their 70 years of marriage. And in a way they've had all of our backs. They've stood for all that is right and decent in our families, and in our City, and in our society, and made us all richer for having known them.

My mother's highest accolade was to say that someone was "just an unusual person." Judge Joe Greenhill was, truly, an unusual person.

His family has lost a wonderful husband, father, and grandfather,

and we've all lost a dear friend—

and the rule of law has lost a great champion.[8]

9. Turning Point of His Life. During an oral interview on Dec. 12, 2006, of retired Chief Justice Joe R. Greenhill, by Supreme Court Staff Attorney Osler McCarthy, this occurred:

Q. I want to ask you what, if you look back over your long career, in the Bar, on the Court, what's the remarkable turning point that you would point to and say "This is where my life change."

A. Well, I guess, when I went on the Court, my wife was not really enthusiastic about it at all. The reason was economic. I was a partner with an Austin law firm, Graves, Daugherty and Greenhill, at that time, we'd been partners for about seven years. And we'd gotten up to where we were making $50,000 to $60, 000 Dollars, 1957 dollars, which was pretty good. I was offered a place on the Supreme Court of Texas; it paid $20,000. So I went from 50 to 20. You've got to like something pretty good to take that kind of pay cut. My wife, a wonderful wife, we had two boys to put through the University of Texas. This cut her income a good deal. It was a major step. But that's what I wanted. Same was true after 25 years. After a while, the Bible says there's a time for everything, and time to quit is one of them. Baker Botts, which didn't offer me a job when I graduated, did offer me a job to "help" open the Austin office of Baker Botts, at this time at a very substantial increase in pay, more than the Chief paid. There was no argument at home about taking that. It was major." EN Dec. 12, 2006 interview with Joe R. Greenhill.[9]

10. Thurgood Marshall School of Law. Gwendolyn Bookman, Associate Dean of Law at Texas Southern University in Houston, wrote a piece on Joe Greenhill, Gwendolyn M. Bookman. *A Tribute to Chief Justice Joe R. Greenhill*, 8 T. MARSHALL L. REV. x (1982-1983): "During my year as Briefing Attorney with the Supreme Court in 1978-79, I found Judge Greenhill to be a very warm and generous man. His sincerity and caring have been very specially felt by our law school family. Through Judge Greenhill's testimony and support before the Texas legislature, at a very critical point in our efforts to secure funding for the then evolving clinical program, we were successful in obtaining a special appropriation which was essential for that program's existence. He has continually made himself available to the law school as speaker and friend, and delivered the luncheon address at the dedication of our new facility as the Thurgood Marshall School of Law in 1976."

11. Grandson. Interview with Chief Justice Greenhill's grandson, while a clerk at the Supreme Court:

Q. What are your earliest memories of Judge Greenhill?

A. It's interesting, I have memories of Papu (we called him Papu, which my Greek wife, Melissa, tells me means "grandfather" in Greek, although none of us knew that until after I met Melissa) from when I was very young. Mostly just glimpses of him and his cigars that he chewed on. But, my earliest concrete memories are when I was probably five or six when he would take us fishing down in the Gulf. He always hired out this real rough and tumble captain named Butch who had missing teeth, and if my memory serves me, an eye patch. Anyway, we'd hire out a twenty-footer and head out from Galveston. I don't remember much of what was said, but I do remember Papu would sit in his chair and hold court over the rest of the occupants-including the captain. Papu loved to fish; I think it was one of the great pleasures of his life.

My grandfather's favorite Bible passage was: "He has told you, O man, what is good; And what does the Lord require of you but to do justice, to love kindness, and to walk humbly with your God." To him, I think this passage required that he do his duty to the public, which he did by serving in the Navy and also for many, many years on this Court.[10]

12. Martha Greenhill Obituary. The Dignity Memorial website has the following obituary for Martha Greenhill:

Martha Shuford Greenhill, known to many as "GG," passed away on May 2nd, 2018 at the age of 100. She was the devoted wife of Judge Joe Greenhill, and a loving mother, grandmother, and great-grandmother.

Martha was born August 25, 1917 in Tyler, Texas. She was the daughter of Harry D. Shuford and Alla Mae "Bright Rose" Duke, and sister to her two brothers, Harry and Bill. At age 16, she attended Tyler Junior College, where she was elected to Phi Theta Kappa, and was the Princess of Tyler's first Rose Festival. She went on to attend the University of Texas from 1936-1938 as a Phi Theta Kappa and Phi Lamba Theta, honorary. She graduated with a B.A., Cum Laude at age 20.

After college, she taught elementary school at Becker and John B. Winn. She married Judge Joe Greenhill on June 15th, 1940. They were married for 70 years, residing in the same Austin home since 1945.

Martha loved St. David's Church in Austin. An active member there, she taught Sunday school, served on the altar guild, and in many other volunteer positions. Outside of St. David's, she was a founding member of the Austin Wives Club and an organizing member of the Women's Symphony League. She was involved with the Settlement Club and Junior League, working with children in the Cerebral Palsy Center.

Martha liked pink, pound cake, and Miss Piggy. She adored bridge, crossword puzzles, and her Bible study fellowship. She was a prolific letter writer. She made friends wherever she went and loved her family fiercely.

Martha is survived by her two sons, Joe Greenhill, Jr. and William D. Greenhill, and her daughter-in-law, Ann Greenhill. She will be missed by her grandchildren, Emily Greenhill Pierce, Duke Greenhill, Frank Greenhill, and

Joe Greenhill V and his wife Melissa, by her great-grandchildren Elliott, Violet, James, and Joe; by her nephews, Harry and David Shuford, and her grandnieces, Rebecca Shuford and Virginia Freire. We love you, GG.[11]

13. Supreme Court Advisory, Martha Greenhill. The Texas Supreme Court issued this advisory: Martha Greenhill Dies in Austin at 100.[12]

Martha Greenhill, who with unsurpassed grace fortified her husband Joe R. Greenhill's career as the second-longest-serving justice in Texas Supreme Court history and her own presence in the Austin community and society, died Wednesday in Austin at 100.

Her family called her "GG."

Services will be at 2:30 p.m. Tuesday, May 8, at St. David's Episcopal Church in Austin, where she was a longtime member.

"Martha was a good friend and great champion of the Texas Supreme Court," Chief Justice Nathan L. Hecht said. "She was a full partner with her husband in his quarter century of service as justice and chief justice and continued to be part of the Court family to the end of her life."

"She was remarkable," former Chief Justice Thomas R. Phillips said. "Always happy, always optimistic and yet possessed of a wicked sense of humor. She was an inspiration to generations of the Court family in many, many ways."

Chief Justice Greenhill, who took his seat on the Court as junior justice in 1957, became chief justice in 1972 and served until his retirement in 1982. When he retired he was then the longest-serving justice in Court history. He died in 2011 at 96.

Martha Shuford Greenhill was born in Tyler and was a graduate of Tyler Junior College and the University of Texas at Austin, where she earned her bachelor of arts cum laude when she was 20. She taught elementary school in Austin, was active in the Settlement Club and its Settlement Home for Children, the Junior League in Austin and St. David's Church, where she was a longtime member and served on the altar guild and as a Sunday school teacher. She was a founding member of the Austin Wives Club and an organizing member of the Women's Symphony League.

She and Joe Greenhill were married in 1940. They were married for 70 years

Survivors include her two sons, Joe Greenhill Jr. and William D. Greenhill, and her daughter-in-law, Ann Greenhill; grandchildren Emily Greenhill Pierce, Duke Greenhill, Frank Greenhill, and Joe Greenhill V and his wife, Melissa; and four great-grandchildren.

"So long I have loved Joe and Martha Greenhill," said U.S. Circuit Judge Thomas M. Reavley, who served with Justice Greenhill on the Texas Supreme Court from 1968 through mid-1977. "Very special, very dear and we are so grateful."

14. The Greenhill Court and Tort Law. The following excerpt comes from J. Caleb Rackley, *A Survey of Sea-Change on the Supreme Court of Texas and its Turbulent Toll on Texas Tort Law*, 48 S. TEX. L. REV. 733 (2007). As noted above, Rackley was briefing attorney for Texas Supreme Court Justice Paul Green. "Dickens wrote, 'Change begets change. Nothing propagates so fast.'[86] Such a sentiment is certainly true with respect to the 'dynamic system' of common law. 'It is constantly changing, sometimes growing, sometimes retreating, and sometimes a little of both at the same time. Historically, this has been proven true in Texas tort law.'[87] Accordingly, the changes initiated in the latter half of Calvert's tenure as chief justice would snowball as the court traversed the 'litigation explosion' of the 1970s.[88] When Chief Justice Calvert retired from the court in October 1972, Governor Preston Smith elevated Associate Justice Joe R. Greenhill to replace him.[89] Not surprisingly, a change at the helm of the court brought more changes to Texas law, and Texas tort law in particular. ¶ The change in the court's leadership was emblematic of the transformation of Texas law that would soon occur. Whereas Chief Justice Calvert came of age in the small town of Hillsboro and, by his own admission languished at the University of Texas, Chief Justice Greenhill was born and raised under the bright lights of Houston and graduated law school with highest honors, 'earn[ing] Phi Beta Kappa, Order of the Coif and serv[ing] as Editor of the Texas Law Review.'[90] [p.750] While Calvert was widely recognized to be brilliant in his own right (his poor law school performance is generally attributed to, for example, a lack of maturity at the time rather than to a lack of ability), Greenhill's big-city and top-of-the-class background suggested a less cautious approach. Not uncharacteristically, then, the Greenhill court picked up the pace of change, moving the Supreme Court of Texas by the end of his tenure closer to the forefront of tort law innovation and development.[91] ¶ Rightly or wrongly, at the time Greenhill ascended to the chief justice's chair, there was a perception that the Calvert court-- and the supreme court for most of its history, for that matter--had been largely 'committed to ancient rules of law favorable to wealthy defendants.'[92] 'During the late nineteenth century and early twentieth century, the Texas Supreme Court's definitions of gross negligence 'placed a substantial burden upon a plaintiff seeking punitive damages' where, '[b]ecause of [the] demanding standard, no appellate court in Texas ever upheld a punitive damages award.''[93] Moreover, 'consumers'

in Texas were virtually defenseless when it came to dealing with unscrupulous, or simply careless, merchants. The available remedies--fraud, maxim "caveat emptor" reigned supreme.'[94] ¶ But the ascendancy of Greenhill in 1972 was truly a changing of the guard--especially with regard to tort law. Greenhill and Calvert's philosophies were different. Calvert seemed to see the expansions of tort law that occurred on his watch during the latter years of his tenure as chief justice as minimal, incremental expansion that had to happen; in other words, because of the changes throughout the [p. 751] country, Texas had little choice but to keep up. Yet, while Calvert sided with the majority's position in the three landmark cases of *McKisson*, *Felderhoff*, and *Camp Amon Carter*, it seemed a bit of a struggle because of his overriding conservative judicial philosophy. '[O]n more than one occasion,' Calvert recalled, 'I said, 'This is a legislative matter and ought to be left to the legislature.''[95] Of the paradoxical tort law expansion that began to occur under his leadership, he confessed almost apologetically, 'That products liability--enlargement of liability--took place all over the country, just shortly before I left the [s]upreme [c]ourt. . . . [I]t just really sort of burst upon us.'[96] ¶ With Greenhill, on the other hand, the tort law expansion was more deliberate. In general, he agreed with Calvert that changes in the law 'probably ought to come from the legislature.'[97] Especially with regard to contract law, he believed, 'It ill becomes the court to say we're going to change that law, and you people are just out of luck. In that area I think that the court, if it makes the law, ought to stick with it.'[98] In other words, 'where persons enter into contracts or agreements in reliance on the [court] decision after having been fully advised by their counsel as to what their rights are and invest substantial sums of money, they should be upheld.'[99] ¶ But Greenhill's thinking with regard to tort law was clearly different. In the area of torts, he surmised, '[W]here persons injure each other . . . I have voted for some changes with the rationale that people don't run into each other thinking about what their rights are. . . . That kind of law can be changed with less effect.'[100] The bottom line for Greenhill was that people do not hurt each other 'in reliance on any law . . . so there's a great deal more freedom there than with contracts.'[101] As such, the change at the top of the court--like Dickens predicted--begat more and more change in the law of torts."

C. FIRST ASSISTANT ATTORNEY GENERAL. In an oral history interview that Joe Greenhill gave to Bill Brands on February 10, 1986, Greenhill said that after eight to nine months as a briefing attorney for the Texas Supreme Court he was able to get a job working for Attorney General Price Daniel. Greenhill said that Daniel's wife Jean Baldwin had lived across the street from him as he grew up in Houston. Greenhill's pay went from $200 per month at the Court to $300 per month with the AG. Since Greenhill had experience writing draft Opinions for the Supreme Court, he was useful to General Daniel for writing AG Opinion. Then Greenhill worked on litigation involving title to tidelands and litigaton involving Texas policy of racial segregation. Greenhill was put in charge of defending segregation cases. Greenhill worked on two significant segregation cases, *Cassell v. Texas* and *Sweatt v. Painter*.

1. *Cassell v. Texas*, 339 U.S. 282 (1950). This segregation-related case has not gained as much notice as *Sweatt v. Painter*, discussed below, but it is as significant. The U.S. Supreme Court appointed Christian Dixie, Esquire, of Houston Texas, to be counsel for the convicted defendant and Petitioner in the U.S. Supreme Court . Chris Dixie was a prominent Houston labor lawyer (he died at age 86 in 2001). Chris was born the same year as his adversary, Joe Greenhill, the Assistant Attorney General representing the State of Texas.

The following description of facts is taken from *Cassell v. State*, 216 S.W.2d 812 (Tex. Crim. App. 1948):

> The offense is murder. The punishment assessed is death.
>
> Appellant challenges the sufficiency of the evidence to sustain his conviction.
>
> The evidence adduced by the state, briefly stated, shows that appellant and Eddie Hamilton killed Lester Linwood Wilson with a piece of iron pipe while burglarizing the "Sportsmen's Center," a store owned and operated by one James M. Brooks. It appears from the record that appellant and his companion entered the back door of a secondhand furniture repair shop where the deceased was employed and where he slept at night. After they had entered the repair shop which was in an adjoining room to the "Sportsmen's Center," they noticed that the deceased was on his bed asleep; they picked up a piece of pipe about three feet long and struck him several blows on the head, crushing his skull which resulted in severe injuries to his brain which caused his death. ... After appellant and Eddie Hamilton were arrested ... Appellant made a verbal confession to the officers which led to the recovery of the Savage automatic pistol. He later made a written confession. On the trial of his case he repudiated the confession, but admitted that he signed it because the officer to whom he made the confession had promised to help him out all he could and in addition to the promise of help, he, the officer, had told him to sign it. His only defense was an alibi. In our opinion, the evidence is ample to sustain the jury's conclusion of his guilt.
>
> Appellant filed a motion to quash the indictment. ... His next complaint in his motion to quash the indictment is based on the ground of race discrimination practiced by the jury commissioners who selected the grand jury which returned the indictment herein against him. He charged that he was a Negro; that the deceased was a white man; that no Negro was selected by the jury commissioners as a grand juror; that there were from five to ten thousand adult male Negroes, resident citizens of Dallas County, Texas, who were qualified for grand jury service, being about one-seventh of the jury population of Dallas County, Texas; that the jury commissioners who selected the grand jury were white men; that they selected no Negro to serve on the grand jury; that in doing so they discriminated against the Negro race, and thus denied him the equal protection of the law guaranteed him under the 14th Amendment to the Constitution of the United States.

> The trial court heard evidence relative to the allegations of race discrimination. Appellant called as witnesses the three jury commissioners to support the allegations in his motion. Each one of the jury commissioners testified in substance that they did not discriminate against the Negro race in the selection of grand jurors; that they sought to select fair and impartial men who were qualified for grand jury service; that they were instructed by Judge King not to discriminate in any way against any race or creed; that he did not tell them that they had to put a Negro on the grand jury; that it was up to them; that it applied to Mexicans and Italians as well. One of the members of the jury commission contacted the principal of the Negro high school, who is a Negro, but he said that he could not serve — that his time belonged to the city schools; that he knew Negro doctors, school teachers, and lawyers, but no one could hardly expect them to neglect their professional duties to their patients and clients to serve for a period of three months on a grand jury. He further testified that before they selected any grand jurors, they contacted men who they knew were qualified to ascertain if they could and would serve. Although there was no Negro selected by them for grand jury service, there was no intentional discrimination by them against the Negro race.
>
> Appellant next called A. C. Partee, who testified that he lived in Dallas County; that he is Executive Secretary of the Progressive Voters' League; that in that capacity he maintained a list of qualified Negro voters in Dallas County; that he would estimate that the adult male voting strength of the Negro race in Dallas County is about five thousand five hundred; that figure included both poll tax payers and poll tax exemptions; that if a Negro had been selected as a grand juror for the October Term, he would have known about it; that he knew the names of some Negroes who have served on grand juries, to-wit: Travis Clark, S.W. Hudson, Jr., W. Barton Beatty, Jr., T. W. Pratt, C. F. Stark, and L. M. Turley. The record further discloses that since the year 1943, Negroes were selected as and served as grand jurors at each and every term of court up to October, 1947, when this indictment was returned. It occurs to us that an issue of fact was raised by the evidence which the court, in the exercise of his discretion determined adversely to appellant, and the court's determination of the issue is binding on this court as much so as if the issue had been decided by a jury. We think that the court was justified in overruling the motion to quash the indictment unless it can be said that a failure to select one or more Negroes for grand jury service at each and every term of court when a grand jury is empaneled is in and of itself conclusive evidence of race discrimination, notwithstanding the fact that Negroes were selected for grand jury service at every preceding term of court for a number of consecutive years. We have not found any case in which a court has held that it is imperative that one or more Negroes be selected on each and every grand jury in order to comply with the equal protection of the law.

The U.S. Supreme Court reversed the conviction. Author Herbert Saul Rovner, in *The Effect of Racial Discrimination in the Indictment Stage*, WYOMING L.J. 97 (1950), analyzed the U.S. Supreme Court's decision:

> A colored citizen convicted of murder in a state court in Texas by a petit jury admittedly chosen without racial discrimination, sought a reversal of his conviction on the theory that colored citizens were purpose-fully discriminated against in the selection of the grand jury that indicted him. It appeared that although 15.5 per cent of the population of the county were Negroes, only one colored person had served as a juror on any of the twenty-one consecutive grand juries called during the period of five and one-half years preceding the indictment in the instant case. The grand jury commissioners in explaining the situation stated that they knew no available Negroes who were qualified; but they also stated that they chose jurymen only from those persons with whom they were per-sonally acquainted. The inescapable conclusion would appear to be that Negroes are not those with whom white people are personally acquainted in Texas! *Held*, that the conviction must be reversed because the equal protection clause of the 14th Amendment had been violated through discrimination in selecting the grand jury. *Cassell v. State of Texas*, -U.S.-,70 Sup. Ct. 629, 94 L. Ed. 563 (1950). Justice Douglas did not participate, and Justice Jackson was the only dissenter.
>
> The decision indicated several schools of thought among the justices. Reed, J., with whom Vinson, Ch. J., and Black, J., concurred, found discrimination in the fact that the jury commissioners failed to familiarize themselves with the qualifications of eligible Negroes. Joined by Burton and Minton, J. J., Frankfurter, J., found that discrimination existed by reason of the fact that never more than one Negro had sat on twenty-one consecutive grand juries, the jury commissioners believing mistakenly that the mere presence of one Negro at some time or other satisfied the constitutional prohibition against discrimination. These justices emphasized the unbroken line of Supreme Court decisions supporting the majority decision.
>
> Jackson, J., dissented on the theory that no substantial error had in fact been committed, inasmuch as a fair trial was subsequently had. Clark, J., was inclined to agree with the dissenter if it had been an original issue, but because of reluctance to break with long established precedent concurred with the majority, lining up in this respect with Justices Frankfurter, Minton and Burton.

The non-discrimination principles of *Cassell v. State* were extended to Texas' systematic exclusion of Hispanic Americans from the grand jury in *Hernandez v. Texas*, 347 U.S. 475 (1954), written for a unanimous Court by Chief Justice Earl Warren.

For further discussion of Texas' system for selecting grand jurors, see Frederick W. Burnett Jr., *The Texas Grand Jury Selection System - Discretion to Discriminate*, 21 SMU L. REV. 545 (1967).

2. *Sweatt v. Painter*, 339 U.S. 629 (1950). The parties and lawyers in *Sweatt v. Painter* expected the case to lead to overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld the constitutionality of racial segregation in public facilities so long as the facilities of the segregated race were equal in quality to those of the non-segregated races. Greenhill was an Assistant Texas Attorney General working under Attorney General Price Daniel. Working in conjunction with the NAACP, Heman Sweatt, who was African-American, applied for admission to the University of Texas School of Law. He was rejected, based on his race. He immediately filed suit in Travis County. His attorneys were Robert L. Carter and Thurgood Marshall. The State of Texas was represented by Attorney General Price Daniel and Assistant Attorney General Joe Greenhill. The Texas trial court abated the case and ordered the University of Texas to make available to Mr. Sweatt, within six months, a course for legal instruction substantially equivalent to the existing law school; otherwise they must admit him to the existing law school. Joe Greenhill said in his oral history given to Bill Brands, as quoted in Adam Scott Miller, *Whatever Means Necessary: Uncovering the Case of Sweatt v. Painter and Its Legal Importance Painter and Its Legal Importance* (2011):[13]

> We needed to get a substantially equal library to the law school. So we bought up all the law books you could buy. A lot of the good law books were not available for sale...then substantially equal professors [sic] aspect was accomplished by using the same professors that taught at Texas Law School."

p. 60. Miller's article goes on to describe the efforts of law school staff to create a semblance of an equal educational institution within a matter of months. Not withstanding these accommodations, Sweatt persisted in his effort to enter the University of Texas School of Law, and the case went up on appeal to the U.S. Supreme Court. Carter and Marshall intended to argue that segregation was banned by the Fourteenth Amendment. However, Greenhill's legal research indicated the contrary. Greenhill stated in the Brand oral history:

> My main job was to research the law. The whole United States had been separate but equal with the possible exception of Massachusetts. So there was a case called Plessy against Ferguson by the Supreme Court of the United States, that said it was no federal obligation to teach or to educate. Nothing in our constitution says you shall. The states, if they offered educational opportunities to one group, they had to offer equal opportunities to all groups. The same is true of transportation. You had to have equal facilities but in different parts of the Pullman car. Churches were all segregated.
>
> I researched the adoption of the 14th Amendment and the Civil Rights Act of 1868, I believe it was, as to what the Congress meant in proposing the 14th Amendment, and what the states meant when they adopted it. I think I have a book that may end up with you all where I researched the Congressional Record and its predecessor the Globe. I read all the speeches, I read all the acts that were introduced and was able to demonstrate, I think to the satisfaction of the Supreme Court of The United States, that the 14th Amendment was not proposed or adopted to require integration of the races. (At the same time that the 14th Amendment was proposed by a group of Republican senators and representatives and discussed mainly in a caucus of the Republican Party, so we don't have that record, but we do have the debates in Congress.) The most telling part of the debates in Congress was that, the 14th Amendment, and the Civil Rights Act of 1868.
>
> Right after the Civil War, there were a few, including Senator Sumner of Massachusetts, who insisted on integration. Senator Sumner introduced a bill in Congress that required integration in schools, transportation and, I think, churches. The problem with churches was on account of another part of the constitution. That was debated very openly and Sumner couldn't get his bill passed. When Sumner was home ill, his bill was amended to take out the requirement of integration in schools and transportation and was adopted in that form.
>
> BB: So it seemed to you a pretty clear case that integration was not what the Congress wanted?
>
> JG: As clear as it could be. At the same time Congress was doing this, Congress was providing separate but equal schools in Washington, D.C. It was providing for federal land grant colleges like Texas A&M on a segregated basis. An argument is still going on now as to how the constitution should be interpreted. One approach says you look to the intent of the Congress and the people at the time of the constitutional amendment and the other says you look at the words in the Constitution as if they were handed down from a man on Mars and what do they mean in light of the present situation. This is a big thing today. This school looks at the meaning of the words as would be best for the country today. That's a dangerous doctrine that's worked out very well. I think it worked out well in Sweatt. What they held in Sweatt was indicated in the opinion that begins: "We appreciate the diligent research by counsel but we find it unnecessary to decide the segregation issue by overruling the Plessy against Ferguson because we find as a matter of law these two schools are not substantially equal."
>
> BB: So as a matter of fact you may well have persuaded the court of the original intent of Congress?
>
> JG: People who write about the Court say that. Frankfurter particularly wanted the decision to be held to the narrowest ground possible, which was to say no equal facilities.
>
> BB: Which presumably left the door open to improved black schools that would still be constitutional?
>
> JG: Yes.[14]

Greenhill's original-intent argument was so strong that Carter and Marshall took an alternate approach, the sociological approach, that segregation in public facilities is inherently unequal, regardless of the comparability of the physical facilities, because African-Americans were denied the opportunity to interact with white students, and the like. The decision in *Sweatt v. Painter* was read aloud on June 5, 1950, when by coincidence Greenhill and his family and Thurgood Marshall were sitting together in the Supreme Court courtroom. Carter and Marshall must have been disappointed with the Court's response, since the Court decided to avoid that constitutional question and instead held the discrimination unlawful because alternate facilities for African-Americans were not equal. Justice Tom Clark, a graduate of UT Law School, wrote in his Memorandum to the Conference in a companion case out of Oklahoma: "If some say this undermines *Plessy* then let it fall, as have many Nineteenth Century oracles."[15] Heman Sweatt was admitted to U.T. Law School. In the meantime the State of Texas built a bona fide law school for African-Americans located in Houston, which Greenhill described as "[j]ust beautiful ... [b]etter than the Texas Law School." On the constitutional question of the inherent inequality of segregated public facilities, it was four years later in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), that the United States Supreme Court held that segregation was itself a denial of equal protection of the law.

D. OPINIONS AND PUBLICATIONS. In Brands' oral history interview of April 22, 1986, Brands asked Greenhill: "Did you find that articles in law reviews or in the bar journal were an effective means of communicating in perhaps a slightly less official way than through opinions of the court?" Greenhill answered: "I think both have a place, and I did it both ways. In several other places, the legislature's attention was called to a defect in the law or was informed that it would be wise that the legislature would do so and so, and quite often that was done." Courtlistener.com lists 236 Opinions written by Joe R. Greenhill, and gives the number of later court Opinions citing each one. The following Greenhill Opinions are listed in chronological order, with the number of citing Opinions and secondary sources reflected on Westlaw.

Court Opinions

1. *Boyles v. Gresham*, 309 S.W.2d 50 (Tex. 1958) (29 Opinions, 19 secondary sources). This is Associate Justice Greenhill's first Opinion for the Supreme Court, issued on January 8, 1958. In this appeal from the appointment of an independent executor of an estate, the Supreme Court reversed the Court of Civil Appeals and affirmed the trial court's appointment, saying that the individual was not an unsuitable person to serve in that capacity.

2. *State of Cal. v. Copus*, 309 S.W.2d 227, 233 (Tex. 1958) (102 Opinions, 46 secondary sources). This is Associate Justice Greenhill's second Opinion, dissenting from a holding that a California statute, imposing liability upon children of persons confined in a California hospital for their support and maintenance, could not create a legal obligation on a Texas citizen who was not a California citizen when the support obligation arose, but that liability could be imposed for the period of time before he became a Texas resident. Associate Justice Greenhill, joined by Associate Justices Griffin and Calvert, wrote:

> I respectfully dissent.
>
> The majority correctly announces that this is a case of first impression in Texas. Under the particular facts of this case, and because of the announced policies of the several states, including Texas, in the recent enactment of Uniform Support Acts [p. 205] and the Probate Code of Texas, I believe this to be a case of first impression in the United States.
> * * *
> As conceded by the majority here, and as set forth in our Probate Code and our Uniform Support Law, the enforcement of the California statute is not contrary to our public policy. So far as I can ascertain, no provision of the constitution or laws of this State or the United States would prevent our honoring and enforcing the California statute. The authority first cited herein correctly states that such will be enforced unless there is good reason for refusing to enforce it. There being no good reason shown in this record, it should be enforced.

3. *Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959) (143 Opinions). In this case, Associate Justice Greenhill wrote the 15-page Opinion with 48 footnotes addressing a claim that the Texas Urban Renewal Law was unconstitutional. Greenhill noted that the general purpose of the Urban Renewal Law was to provided for the clearance of slum and blighted areas in Texas cities and redevelopment by private enterprise under restrictions imposed by local government. The case navigated Texas appellate opinions, and the U.S. Supreme Court, plus cases from Arkansas, Delaware, Oregon, Virginia, Georgia, South Carolina, Florida, Michigan, Kansas, Missouri, Massachusetts, Pennsylvania, Wisconsin, California, Connecticut, Rhode Island, New Hampshire, New Jersey, and New York. It upheld the Law, except for Section 17, which it ruled unconstitutional as applied based on separation of powers, in that the Section purported to give the courts authority to review a local government's decision of what area to take for urban renewal, which the Court said was a legislative function, not a judicial function, and therefore political in nature and involving questions of public policy. *Id.* at 713-14. Greenhill wrote that a trial court could review the decision of the local government to determine if the decision "is reasonably supported by substantial evidence." *Id.* at 715.

4. *Ex Parte Martinez*, 331 S.W.2d 209 (Tex. 1960) (15 Opinions). Associate Justice Greenhill wrote a short Opinion saying that "It is well settled by the decisions of this Court, as well as those of the Court of Criminal Appeals, that a person may not be imprisoned for contempt without a written order of commitment," citing seven pior cases.

5. *Ex Parte Threet*, 333 S.W.2d 361 (Tex. 1960) (66 Opinions). In this case, a woman filed a divorce suit claiming an informal marriage. The trial court ordered the alleged husband to pay interim support while the case was pending, which he refused to do and so he was held in contempt of court. Associate Justice Greenhill wrote for the unanimous Court that the party seeking support, in a divorce involving an alleged informal marriage, must make at least a prima facie showing of the three elements of informal marriage: (i) an agreement to be married; (ii) cohabitation as husband and wife; and (iii) a holding out to the public of being married. *Id.* at 363-64. The Supreme Court held that there was no evidence of two of those elements, so the order was unenforceable, and the alleged husband was discharged from custody.

6. *Cohrs v. Scott*, 338 S.W.2d 127 (Tex. 1960) (43 Opinions, 26 secondary sources). In this post-divorce case, the ex-wife brought a claim of fraud case against a third party. Associate Justice Greenhill restated the law of resulting trust, which "arises by operation of law when title is conveyed to one person but the purchase price or a portion thereof is paid by another." *Id*. at 130. One of the cases cited by the Petitioner's counsel "in their able brief" was *Johnson v. Deloney*, 35 Tex. 42 (1871-1872). Greenhill parenthetically said the case was "decided by the Semicolon court," and wrote that, "[A]ssuming [*Johnson v. Deloney*] to be authoritative," the issue in that case was not involved in the current appeal. Greenhill thus acknowledged the view that the Semicolon Court cases were considered by some to be non-authoritative, but he skipped over the controversy by saying that even if the case was precedent it did not apply. Greenhill dropped a footnote in which he mentioned dictum in an Opinion written by Chief Justice Hemphill in 1855, picked up later in separate writings by Professors de Funiak, Speer, and Huie.

While *Cohrs v. Scott* has been cited many times on the doctrine of resulting trust, the case was reaffirmed and expanded in *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008), which cited *Cohrs v. Scott* for the proposition that "a third party can[not] be held liable in tort when community property is taken by one of the spouses." Justice Greenhill's opinion addressed a suit against a third party after the divorce had been settled, which was not the case in *Chu v. Hong*. However, the actual holding in *Chu v. Hong*, is narrower than the language quoted above: "We hold the courts below erred in allowing one spouse to recover damages without first recovering the community property from the spouse who took it." *Chu v. Hong*, at 443.

7. *Ex Parte Rhodes*, 352 S.W.2d 249 (Tex. 1961) (29 Opinions). In this case the mother of a child was held in contempt of court for 12 hours and until she returned her child from Brazos County to Karnes County. The mother sought habeas corpus, arguing that the trial court's underlying order, requiring the child to live in Karnes County, was not enforceable by contempt. The geographical restriction was imposed in the divorce decree and not appealed. The mother remarried and moved to Brazos County, but left the child behind to live with her parents in Karnes County. Eventually, however, the mother relocated the child to Brazos County. The father brought suit seeking an order to return the child to Karnes County, contempt enforcement, and a more detailed visitation schedule. Justice Greenhill's Opinion noted that prior decisions by the Court of Criminal Appeals and four courts of civil appeals had upheld the right of the court to restrict the residence of a minor child. *Id*. at 250-51. Greenhill wrote: ""We therefore hold that the court had the power to direct that the child's residence should not be removed from Karnes County." *Id*. at 251. Of great significance to family lawyers and family law judges, he then wrote: "While we have held that the restrictive residence provision of the custody decree was not void, it is one of an extreme nature. It may drastically affect the freedom of decision of the custodian of the child as to what is best for the child. And, as pointed out by counsel for Betty Rhodes, if request for removal to another county is denied, it may materially restrict the right of a citizen (who would not move without her child) to change the place of his or her residence. If permission to move were denied, she would be in a better position to assert that she was deprived of her liberty without due process. We express no opinion on that matter. In any event, the appellate [p. 252] court will look with care to see whether there has been an abuse of discretion on the part of a court which denies permission to remove the residence of the child to that of the new residence of the person having been adjudged the proper person to be the custodian of the child. By citing *White v. Lobstein*, 246 S.W.2d 953, we are not to be understood as approving the decision that there was no abuse of discretion in refusing to grant consent for the removal of the child to the residence of the custodian. That case did not reach this court." In other words, restricting the residence of a child to a particular county may be an abuse of discretion, but it is not a void order, so habeas corpus was denied. The Opinion ended: "Betty Rhodes is remanded to the custody of the sheriff of Karnes County."

8. *Isenhower v. Bell*, 365 S.W.2d 354, 357 (Tex. 1963) (49 Opinions, 15 secondary sources). Associate Justice Greenhill wrote: "Where one has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based upon a plea that the party defrauded might have discovered the truth by the exercise of proper care." Greenhill cited *Labbe v.Corbett*, 6 S.W. 808 (1888) (Stayton, J.).

9. *Halepeska v. Callihan Interests,Inc.*, 371 S.W.2d 368 (Tex. 1963) (247 Opinions, 29 secondary sources). Associate Justice Greenhill wrote the Opinion for the Court. He said: "The case involves the difficult and sometimes overlapping questions of "no duty" to invitees, the doctrine of volenti non fit injuria, or voluntary exposure to risk, as well as negligence and contributory negligence. ¶ Because there were no eyewitnesses to the accident and because circumstantial evidence becomes important, a rather full description of the facts is necessary. The transcribed testimony fills three thick volumes, and there are numerous exhibits and pictures. It is difficult to reduce this material to the usually desired brief statement of facts." *Id.* at 370. After a detailed discussion of the underlying facts, and setting out the granulated jury charge, Greenhill sought clarity in the discussion. He wrote that in the "no duty" area there are occupiers of the premises and their invitees and business guests, trespassers and licensees, landlord and tenant, and master-servant. *Id.* at 377. Greenhill continued: "the problems of obvious dangers, assumed risk, and voluntary exposure have received treatment in Texas which is different from that in many jurisdictions. The labels given to the particular concepts as they have been

applied are largely unique to Texas. This is illustrated by the cases set out above. For this reason, texts and authorities from other jurisdictions are of but limited applicability." *Id*. at 377. Greenhill proceeds to analyze volenti non fit injuria, no duty, and contributory negligence. Further on in the Opinion Greenhill wrote: "Having found error in the opinion and judgment of the Court of Civil Appeals, we turn to a proper disposition of the case in this Court." Then, in a passage that would echo in several of Greenhill's future Opinions, he wrote: "The defendant Callihan did not request any other contributory negligence issues. Even if we assume that from the defendant's standpoint that the case was tried on the wrong theory, we cannot order a reversal and remand for a new trial unless we also find error in the trial court's judgment. *Davis v. Davis*, 141 Tex. 613, 175 S.W.2d 226 (1943)."

The following comments are taken from Harvard Law School Professor Robert E. Keeton, *Assumption of Products Risks*, 19 SMU L. REV. 61 (1965)

> "This problem is well illustrated by *Halepeska v. Callihan Interests,Inc*. This was a wrongful death action against a gas well owner. The well blew out while Halepeska was working on it, causing his death. Plaintiffs contended that the well was negligently equipped…. The Supreme Court of Texas held that, because of the finding that Halepeska did not have full knowledge and appreciation of the risk arising from the defendant's negligence in improperly equipping the well, no defense based on voluntarily encountering known danger could be sustained. This resulted in a remand to the intermediate court for consideration of other contentions that might require reversal and remand to the trial court for new trial.21
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> * * *
>
> The *Halepeska* case presented to Justice Greenhill of the Supreme Court of Texas an ideal opportunity to invoke the arguments presented before the American Law Institute in May, 1963, concerning assumption of risk. Justice Greenhill capitalized on the opportunity with an opinion that reports the opposing views expressed before the ALI and skillfully traces in Texas cases colossal support for both of the opposing views.

10. *Brown v. Lee*, 371 S.W.2d 694 (Tex. 1963) (52 Opinions, 36 secondary sources). This case involved the intersection of community property law and the Simultaneous Death Act. Both spouses died in a plane crash with no last will and testament. The husband had several community property insurance policies on his life, with his wife as beneficiary. Probate Code § 47(b) provided that when a husband and wife die with community property, and there is no direct evidence that they died other than simultaneously, then half the community estate is divided as if the husband survived and half as if the wife survived. There is an exception however, described in § 47(e), that where the insured and beneficiary of a life insurance policy die and there is no direct evidence as to who died first, the proceeds are distributed as if the insured survived the beneficiary. The question is how do these statutory provisions apply when the insured is a spouse, the beneficiary is the other spouse, and the policy is community property. The probate court divided the policy proceeds 50-50 between husband's heirs and wife's heirs. Associate Justice Greenhill wrote that the right to receive benefits under an insurance policy had been defined by the Legislature as property, in the nature of a chose in action which matures upon the death of the insured. This unmatured chose "logically belongs to the community, unless it has been irrevocably given away under the terms of the policy, i.e., where the purchaser has, without fraud, foreclosed any right to change the named beneficiary." Greenhill cited an 1890 Supreme Court case. He continued that the proceeds at maturity are likewise community property, except where the named beneficiary is surviving, in which case it is presumed that a gift to the beneficiary was intended and completed by the death of the insured. In other cases, where the uninsured spouse died before the insured spouse, half of the unmatured insurance chose passed to the dying spouse's estate. In this case, where it is assumed that the wife-beneficiary died first, her community interest in the policy passed to her husband under intestate succession law, Probate Code § 45. So the husband's heirs took 100% of the policy proceeds and the wife's heirs received nothing. Greenhill noted that the Supreme Courts of Washington and California, both community property states, had ruled the same way. *Id*. at 696. Greenhill also noted that the Uniform Simultaneous Death Act was modified in 1953 to avoid exactly this problem, but that the Act adopted by the Texas Legislature did not include the amendment. Greenhill mentioned that the wife's heirs argued a right of reimbursement; however, they were not seeking to be reimbursed for the cost of premiums, but rather asserted a claim for half of the policy proceeds. Greenhill commented: "It might well be argued that the result here is inequitable and inconsistent with the probable intentions of the deceased spouses; nonetheless, the conscience of a court of equity cannot speak in the face of a clear legislative mandate to the contrary." *Id*. at 698. The wife heirs claimed that the policy was an annuity, and therefore not within the scope of § 47(e). Greenhill rejected that contention, saying that this policy was a life insurance policy whose benefits were payable over 20 years instead of in a lump sum. *Id*. at 698. The wife's heirs also claimed a gift of the proceeds to the wife, but Greenhill noted that the husband retained the right to change beneficiaries, so that the wife acquired no vested, separate property ownership of the policy at the time it was purchase. *Id*. at 698. Justice Walker alone dissented, saying that "it seems clear to me that the presumption of survival created by Section 47(e) governs only the right of the beneficiary to take in that capacity." He would have applied community property ownership principles instead, awarding half of the proceeds to each spouse's heirs. *Id*. at 698.

11. *Hanks v. Rosser*, 378 S.W.2d 31 (Tex. 1964) (143 Opinions, 25 secondary sources). In this case, Associate Justice Greenhill wrote the Opinion for the Courts over one dissent, on the standards for bringing an equitable bill of review to set aside a default judgment, where an answer was filed after default judgment but the court clerk misinformed the defendant's attorney that no judgment had been taken so that a motion for new trial was not timely filed. Greenhill wrote that a bill or review is an equitable proceeding to prevent manifest injustice, that requires a showing of three things: (i) a meritorious defense, (ii) which he was prevented from presenting by fraud, accident or wrongful conduct of the opposite party, (iii) unmixed with negligence of his own. *Id*. at 33-34. However, on these facts the Court applied the principles of

Craddock v. Sunshine Bus Lines, 133 S.W.2d 124 (1939), for an equitable motion for new trial, saying where the failure to file an answer was not "intentional or the result of conscious indifference, that if a litigant is misled or prevented from filing a motion for new trial by misinformation of an officer of the court, acting within his official duties, and this misinformation is given to the party or his counsel within the ten-day period for filing the motion for new trial so as to bring about the failure to file a motion for new trial in time, the trial court, upon finding that the party has a meritorious defense and that no injury will result to the opposite party, may grant the bill of review." *Id.* at 35. The holding was narrow, but Justice Griffin took the Court to task for replacing the third prong of the bill of review test "unmixed with any fault or negligence of his own," with the third prong of an equitable motion for new trial after default judgment, which is "not intentional or the result of conscious indifference." *Id.* at 38.

12. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964) (109 Opinions, 46 secondary sources). In this case, Associate Justice Greenhill wrote: "The important question to be decided is whether a covenant not to sue given to [p. 766] one of two negligent joint tortfeasors precludes the plaintiff from recovering more than one-half of the damages from the non-settling tortfeasor." *Id.* at 766. Greenhill wrote: "While the outcome of this particular case is important, we have attempted to review the authorities in order to determine the view to be followed not only in this case but in those which will follow. Because of this consideration, or reconsideration, the arguments and authorities are set out in more detail than is ordinarily desirable in an opinion. ¶ The rules among the various states on contribution between joint negligent tortfeasors are strikingly divergent, particularly where there has been a settlement with one tortfeasor. Legal scholars likewise have been unable to agree among themselves on a solution satisfactory to all. Almost half the states have attempted to bring order out of chaos by permitting and regulating contribution among tortfeasors through legislation. 1 Harper & James, The Law of Torts, 719, § 10.2 (1956)." Greenhill then reviewed a number of Texas cases, the Uniform Contribution Among Tortfeasors Act, the Restatement of Torts (1st ed.), the Uniform Contribution Act, Dean Prosser on Torts, UT Law Professor, Gus Hodges on Contribution and Indemnity Among Tortfeasors, the Supreme Court of New Jersey, the Court of Appeals for the D.C. Circuit, and the *Gattegno* case. Greenhill wrote: "We now return to the language of *Gattegno v. The Parisian*, 53 S.W.2d 1005 (Tex.Com.App. 1932). The respondent and the Court of Civil Appeals say that it is dictum and should not be followed. The language appears in the opinion after the Commission of Appeals had determined that the judgments of the courts below should be reversed and the cause remanded to the trial court for a new trial. The Commission of Appeals conceded that the points then discussed by it had not been raised; but since the case was to be retried, it set out rules to be applied upon a retrial of the case and the results which were to follow upon the finding of certain facts. The Supreme Court approved 'the holdings' of the Commission. Whether this sort of instruction by the Commission of Appeals to the trial court is to be described as 'dictum' is debatable. In any event, it is judicial dictum, deliberately made for the purpose of being followed by the trial court. It is not simply 'obiter dictum.' It is at least persuasive and should be followed unless found to be erroneous. *Railroad Commission v. Aluminum Co. of America*, 380 S.W.2d 599 (Tex.1963), which followed the dictum in the *Normanna*[3] case; *Parker v. Bailey*, 15 S.W.2d 1033 (Tex.Com. App.1929); *Thomas v. Meyer*, 168 S.W.2d 681 (Tex.Civ.App.1943, no writ); 21 C.J.S. Courts § 190, pp. 316, 317. ¶ While there is room for a difference of opinion, the language in the *Gattegno* case has substantial support from other authorities set out above, and is not without merit. While there is also merit in the holding made by the Court of Civil Appeals in this case, the *Gattegno* case has been on the books for over twenty years. We think the better course is to follow the *Gattegno* case. Accordingly, we do so."

13. *McKanna v. Edgar*, 388 S.W.2d 927 (Tex. 1965) (431 Opinions, 61 secondary sources). The Supreme Court reversed a default judgment on a promissory note against a non-resident served with citation by substituted service on the Secretary of State of Texas. Associate Justice Greenhill wrote that the plaintiff's failure to plead that the defendant did not "maintain a place of regular business in this State or a designated agent upon whom service may be made" invalidated the service of process. Greenhill concluded: "[The defendant], having now appeared to attack the judgment, is presumed to have entered her appearance to the term of the court at which the mandate shall be filed. Rule 123, Texas Rules of Civil Procedure. The judgments of the courts below are reversed, and the cause remanded to the District Court for a trial on the merits." *McKanna v. Edgar* has been cited repeatedly by the Texas Supreme Court for the proposition that the plaintiff must plead allegations bringing a non-resident defendant within the reach of the long-arm service statute, and the proposition that there is no presumption in favor of valid issuance, service, or return of citation in a out-of-time appeal from a default judgment.

14. *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1966) (267 Opinions, 111 secondary sources), Associate Justice Greenhill wrote a Concurring Opinion saying:

> The Court of Civil Appeals denied a recovery of damages here because the contract, it felt, was too indefinite in its provisions under *Bryant v. Clark*, 163 Tex. 596, 358 S.W.2d 614 (1962). The holding in *Bryant v. Clark* was that the contract was not sufficiently definite to be specifically enforceable. The contract here in question, viewed in context, is different in some respects from that in the *Bryant* case; and I would not extend *Bryant v. Clark*. See the criticism of that case in 5A Corbin, Contracts 283 (1964).
>
> [p. 98] But assuming that the contract here, under *Bryant v. Clark*, is not definite enough to be specifically enforced, it is sufficiently definite to support an action for damages. Restatement, Contracts § 370, comment b.
>
> There are Texas cases in which damages have been denied after a holding that the contract was not specifically enforceable. *See, e. g.*, *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150 (1945); *Robertson v. Melton*, 131 Tex. 325, 115 S.W.2d 624, 118 A. 1505 (1938); and *Alworth v. Ellison*, 27 S.W.2d 639 (Tex. Civ. App.1930, writ refused).

In each of these cases, however, the contracts were held to be within the Statute of Frauds and not enforceable for that reason in a suit for damages. 1 Williston, Contracts § 16 (Rev. ed. 1936). The contract here in question is not within the Statute of Frauds and will support an action for damages.

While I agree with the judgment entered by the Court, it seems to me that the above is a sounder ground upon which to rest our decision.

15. *Ex Parte Proctor*, 398 S.W.2d 917 (Tex. 1966) (40 Opinions). In this case Associate Justice Greenhill wrote an Opinion granting a writ of habeas corpus to a man held in contempt for non-payment of child support. The contempt order said the man "should pay the sum of $550 as child support payments," but did not make a finding of arrearages. Greenhill wrote: "This holding does not disturb the recognized power of a court to confine a party for contempt until he obeys the order for which he has been held in contempt for disobeying. *Ex parte Davis*, 101 Tex. 607, 111 S.W. 394, 17 L.R.A. (N.S.) 1140 (1908); *Ex parte Kottwitz*, 117 Tex. 583, 8 S.W.2d 508 (1928). However, where this remedy is followed, the order should clearly state in what respect the court's order has been violated and that the party is committed to jail until the court's order is complied with to the extent required by the court. In the instant case, if the court had found that the relator was delinquent in the amount of $550 in support payments ordered to be paid in its judgment of December 22, 1964, and if the court had further found him in contempt and had committed him to jail for three days and until he had paid the $550 and court costs, the relator could have been held until he made such payments. In the instant case there was no finding that relator's delinquent payments amounted to $550."

16. *Ellis v. Moore*, 401 S.W.2d 789 (Tex. 1966) (32 Opinions). In this case, the jury found the defendants negligent in a number of respects, and acquitted the plaintiff of many issues of contributory negligence. *Id* at 792. The trial court entered judgment for the plaintiff, but the court of civil appeals reversed, invoking the doctrine of assumed risk and saying that the defendant owed no duties to the plaintiff. *Id.* at 792. After a lengthy discussion of the facts, Associate Justice Greenhill wrote: "This Court in *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (1963), recognized that the assumed risk doctrine is a relatively harsh one, and the Court indicated that it felt required to keep it within justifiable limits. 371 S.W.2d 368 at 380. In our opinion, the Court of Civil Appeals in this case erroneously extended the doctrine." *Id* at 792. He continued: " there must be knowledge and appreciation of the particular danger involved so that the plaintiff proceeds to encounter the risks as the result of an intelligent choice." *Id.* at 793. Justice Griffin, joined by Justices Hamilton and Pope, dissented. Greenhill wrote the Court's Opinion in *Halepeska*.

17. *Coffee v. William Marsh Rice University*, 403 S.W.2d 340 (Tex. 1966) (25 Opinions). *Coffee* was the lawsuit brought by the trustees of Rice University invoking the doctrine of *cy pres* to have the court reform William Marsh Rice's deed of indenture that, along with the charter, founded Rice Institute which became Rice University. The deed of indenture provided that the Institute and associated library were to be "free and open to all," which was taken to mean tuition-free, available both to men and women. However, the charter provided that the institute was for the "instruction for the white inhabitants of the City of Houston, and the State of Texas." Over time, the trustees encountered difficulty in obtaining grants from charitable foundations which expected the University to use tuition dollars to help fund operations before asking for grant money. The trustees were thus motivated to revise the charter to allow for the charging of tuition. At the same time, pressure was growing to admit African-American students ("to desegregate"). The landmark cases of *Sweatt v. Painter*, 339 U.S. 629 (1950), and *Brown v. Bd. of Educ. of Topeka, Kansas*, 347 U.S. 438 (1954), applied only to state-sponsored schools, not private institutions like Rice University. But the movement for equal opportunity without regard to race was building momentum, so the Trustees brought suit, naming the Texas Attorney General as the defendant, to have the court approve the trustees' desire to charge tuition and eliminate race-based exclusion. The case was *Rice v. Carr*, filed on February 21, 1963. On April 20, Attorney General Waggoner Carr gave notice that Texas had no objection to the changes. On September 20, 1963, alumni Coffee, Billups, and others intervened to defend the original charter. The case was tried to a jury which found for the trustees. Coffee et al. appealed, but the First Court of Civil Appeals dismissed the appeal on the grounds that Coffee et al. lacked standing. Coffee et al. appealed to the Texas Supreme Court. Justice Greenhill wrote the Majority Opinion in *Coffee v. William Marsh Rice University*, 403 S.W.2d 340 (1966), over three dissents, finding that the alumni had standing to intervene and remanding the case to the Court of Civil Appeals for a decision on the merits. On remand, the Court of Civil Appeals affirmed the trial court's judgment that was based on the jury's verdict. On re-appeal, the Texas Supreme Court denied the writ of error, and the case was finished.

However, Rice University had admitted its first African-American, a graduate student, in 1963, and after the trial court's judgment was affirmed Rice admitted one male and one African-American female as first-year students. [The foregoing description was drawn from Steven Harmon Wilson, *The Will to Change: The Legal Battle Over the Rice University Endowment* (2011), published by the University of Houston's Institute for Higher Education Law & Governance. Wilson has earned M.A. & Ph.D. degrees in History from Rice University.]

18. *Bell v. Still*, 403 S.W.2d 353, 353 (Tex. 1966). In this short Opinion, Associate Justice Greenhill wrote:

There having been sufficient votes to grant the application for writ of error in this case, it was brought before us for a review of the correctness of the holding of the courts below. The matter is a difficult one because doubts exist as to the wisdom of a policy under which an independent executor, accused of gross mismanagement of an estate, is not subject to removal by the probate court as any other executor or administrator. This, however, is a matter within the control of the Legislature. It is our opinion that the Probate Code did not change the rule previously existing that the probate court did not have this power unless the independent executor, properly appointed and qualified, was

required to post bond and could not or would not do so. We do not have here the question as to whether the district court has this power of removal.

[p. 354] The opinion of the Court of Civil Appeals sets out the facts and correctly declares the principles of law in this case. 389 S.W.2d 605. That opinion is adopted as the opinion of this Court.

The judgment of the Court of Civil Appeals is affirmed.

19. *Scott v. Liebman*, 404 S.W.2d 288, 290 (Tex. 1966), Associate Justice Greenhill wrote a Plurality Opinion in which Chief Justice Calvert concurred, while Associate Justices Walker, Griffin, Hamilton and Steakley dissented. In this case the plaintiff went from a motel room through a sliding glass door into the parking area to retrieve a map from his vehicle. After he left his wife felt chilled and closed the siding glass door. Upon returning, the plaintiff did not see that the door had been closed and walked into it and sustained injury. The jury found negligence by the landlord, that the plaintiff did not fail to keep proper lookout, that his wife was not negligent, and that it was not an unavoidable accident. The trial court nonetheless entered a judgment for the defendant. The defendant did not attack the negligence findings, so the case on appeal turned on assumed risk eliminating any duty owed by the landlord due to actual knowledge of the danger. The Supreme Court agreed with the Court of Civil Appeals to reverse the judgment for the defendant but the question arose whether to render judgment on the verdict for the plaintiff or to remand "in the interest of justice." The Court decided to remand. In doing so, Greenhill distinguished his earlier Opinion in *Halepeska*, where the Supreme Court said that it was precluded from remanding in the interest of justice because the trial court had entered an errorless judgment. *Id.* at 294. Here the trial court had committed error, so remand was an available remedy. After the trial in this case, the Supreme Court in *Halepeska* changed prior law, holding that "should have known" and "should have appreciated" were not fact issues of assumed risk. Justice Greenhill wrote: "Counsel for the defendant here tells us that in good faith and in reliance upon this Court's opinion in *McKee*, he prepared and requested his 'should have known' issue or issues as part of the 'no duty' theory rather than as contributory negligence issues to be followed by issues of proximate cause. He therefore urges that his client has not been fairly treated when this Court changes the rules after the case has been tried." *Id.* at 294. Chief Justice Calvert concurred in a short Opinion stating what he believed to be the proper definition of the duty of an occupier of land to his invitees, quoting *Halepeska*. Associate Justice Walker dissented, joined by Associate Justices Walker, Hamilton, and Steakley, saying that the Majority relied too much on the plaintiff's actual knowledge that the door was closed and did not give proper weight to what the plaintiff should have known. Walker found the present case to be indistinguishable from *Robert E. McKee, General Contractor v. Patterson*, 271 S.W.2d 391 (Tex. 1954) [written by Calvert], involving a fixed glass partition rather than a removable one. *Scott v. Liebman* was abrogated by *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978), its Opinion written by Justice Pope. Other cases remanding in the interest of justice are: *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 26 (Tex. 1994) (change in gross negligence standard); *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 20 (Tex. 1993) (change in the legal standard for liability of oil company for injuries sustained at service station); *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) (plaintiff's lawyer abandoned other viable causes of action in favor of a negligent infliction of emotional distress claim which the Court held not to exist); *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993) (the case was tried on the theory of negligent infliction of emotional distress, later overturned in *Boyles v Kerr*); *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992) (refusing to remand to assert a cause of action not recognized in Texas law). *See* McDonald & Carlson, TEXAS CIVIL PRACTICE § 33.15, Remand "in the interest of justice."

20. *J.&W. Corporation v. Ball*, 414 S.W.2d 143 (Tex. 1967) (32 Opinions, 5 secondary sources). In this case, the plaintiff was injured by an employee of the defendant. The jury found the agent negligent and the plaintiff not negligent. However, the jury found that the plaintiff had assumed the risk. Associate Justice Greenhill wrote that two legal theories can bar plaintiff's recovery, in addition to contributory negligence: no duty of a landowner to invitees, and assumption of the risk. *Id* at 146. Greenhill cited *McKee, General Contractor v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954) [written by Calvert], and wrote that "[t]hese two legal theories were again explained in *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. Sup. 1963)." The *Halepeska* Opinion had been written by Greenhill.

21. *Eubanks v. Winn*, 420 S.W.2d 698 (Tex. 1967) (71 Opinions 31,secondary sources). In this car-wreck case the jury returned a verdict favoring the defendant on liability but set damages at $1,600. The plaintiff moved to disregard the answers favoring the defendant, which the trial court denied. The plaintiff then moved for a new trial. The defendant moved to set aside the judgment in his favor and to render a judgment in favor of the plaintiff for the damages set by the jury. The trial court rendered a new judgment for the plaintiffs, which the plaintiffs protested. Justice Greenhill wrote: "The order and judgment set out above is unique and difficult to interpret. The judgment recites that it was the trial court's opinion that plaintiffs' motion for new trial should be granted on certain grounds; and it is capable of the construction that the motion was granted in part but overruled in part. Then the judgment proceeds to grant defendant's motion and to set aside the previous judgment. It set aside the jury's answers to the liability issues. Then based on the defendant's waiver of the answers in his favor, the court enters judgment for plaintiffs on the damage issues. Such an order is foreign to our practice and cannot stand." *Id*. 701. Greenhill later noted: "We do not consider that the plaintiffs invited the error here. In their motion for judgment, they did have an alternative motion for judgment based upon the disregarding of the answers to the liability issues. This motion was overruled and a take-nothing judgment entered. The amended motion for new trial did contain points of no evidence and insufficient evidence to support the liability issues. These were a necessary predicate for an appeal on these phases of the case. But the prayer was for a new trial on "all issues made herein." There was no prayer for judgment by disregarding the liability issues. This did not invite the error, nor do we consider that it was plaintiffs' prayer for general relief which invited error. It was the motion of the defendant "not to consider" the

answers to the liability issues which was sustained in the court's "final judgment." [¶] We conclude that there is no authority under the Rules of Civil Procedure to support the action of the trial court in giving effect to defendant's confession of liability after the jury's verdict and entering judgment contrary to the jury verdict over plaintiffs' objections. The judgments of the trial court and the Court of Civil Appeals are reversed; and the cause is remanded to the district court for further proceedings not inconsistent with this opinion." *Id*. at 702. Justice Hamilton dissented. [It is interesting that Justice Greenhill did not direct the trial court on the judgment to render on remand, which he did in some other instances.]

22. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967) (131 Opinions, 177 secondary sources). This case resulted in a small extension of the tort law of battery, but it reflected lingering vestiges of racial segregation that the law began to dismantle in the 1950s. The plaintiff Fisher was an African-American mathematician working at the NASA Center near Houston. Fisher was invited to a meeting to discuss electronics held at the Carrousel Motor Hotel. While Fisher was waiting in the buffet line, the motel manager approached him, snatched the empty plate from his hand, and shouted a race-based insult. *Id*. at 628. However, there was no touching of Fisher's body. The court repeated its rejection of the tort of intentional infliction of severe emotional distress, but upheld liability, saying: "Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting." *Id*. at 630. The Court also upheld the award of exemplary damages against the corporate defendant. *Id*. at 631. [Author's note: The damage recovery was only $900. Fisher's attorney, Ben G. Levy, was a co-founder in 1957 of the Texas Chapter of the American Civil Liberties Union.]

23. *Smith v. Davis*, 426 S.W.2d 827 (Tex. 1968) (169 Opinions, 38 secondary sources). Justice Greenhill wrote: "This controversy turns upon the constitutionality of a statute providing a manner of taxation for the financing of hospital districts. The particular district before the Court is that of Bexar County which is establishing a teaching hospital in San Antonio to be affiliated with the Medical School, South Texas Branch, of The University of Texas. The suit was instituted by B. L. Davis and four other citizens, herein called plaintiffs, for themselves and as representatives of a class of taxpayers, to enjoin permanently the levying, assessment, and collection of taxes under Article 4494n, Section 2b,[1] and for a declaration that the statute is unconstitutional. The defendants were the County Judge, County Commissioners, and County Tax Assessor-Collector of Bexar County. Trial was to the court without a jury. The court upheld the validity of the statute and denied the injunction. The case was brought directly to this Court under Rule 499a, Texas Rules of Civil Procedure. The record does not contain a statement of facts, but the transcript contains findings of fact made by the trial court which are not attacked here. The only questions before us relate to the constitutionality of the statute." *Id*. at 829. The Court rejected all the constitutional challenges and upheld the judgment of the district court. *Id*. at 834. Justice Griffin dissented without a written Opinion.

24. *Ex Parte Herring*, 438 S.W.2d 801 (Tex. 1969) (36 Opinions, 9 secondary sources). This habeas corpus proceeding arose out of a divorce case where the trial court ordered Herring to pay temporary support to his wife and children. Herring failed to pay and the wife filed a motion for contempt which she served by certified mail sent to Herring's attorney of record. No personal service was attempted. Herring's attorney filed an affidavit that she was unable to reach Herring to tell him about the hearing, and further stating that Herring should be served personally where jail time was an issue. *Id*. at 802. The hearing went forward. Herring did not appeal, he was held in contempt and later arrested. Justice Greenhill wrote that TRCP 21a notice to an attorney could meet due process of law requirements, for example if the attorney received notice and informed his client. The Court granted habeas corpus, Greenhill stated the Court's holding narrowly: "We do hold, however, that it is a denial of due process to commit a person to prison for contempt who is not shown to be avoiding deliberately the service of process, and who has had no personal notice or knowledge of the show-cause hearing at which he was held in contempt. The adequacy of the personal notice or knowledge is not now before us because Mr. Herring, under our record, had absolutely none. And, as suggested above, we also reserve the problem which will be presented when it is shown that the person is deliberately evading the service of process." *Id*. at 803. [Author's note: the contemnor's attorney, Marvin O. Teague, later served as a Judge on the Court of Criminal Appeals from 1981 through 1991.]

25. *First National Bank in Dallas v. Zimmerman*, 442 S.W.2d 674 (Tex. 1969) (54 Opinions, 14 secondary sources). In this case a defendant failed to plead the Statute of Frauds as a defense, but did object to admission of the contract in question based on the Statute of Frauds. Justice Greenhill explained the history behind the Rule 94 requirement that affirmative defenses must be affirmatively pled: "This observation was quoted with approval by this Court in *Petroleum Anchor Equipment, Inc. v. Tyra*, 419 S.W.2d 829, 835 (1967), in which it was held that the defense of ratification, not having been pleaded, was waived. The second sentence of Rule 94 corrected a similar situation with regard to the old practice of requiring a claimant under an insurance policy to negative in his pleadings and proof all of the policy exceptions to liability. The second sentence was intended to reform an unjust [p. 677] practice of pleading in one specific area, but the underlying evil sought to be remedied by that sentence also pervaded our system of pleading in general. The matter was expressed in *T. I. M. E., Inc. v. Maryland Casualty Company*, 300 S.W.2d 68 (Tex.Sup.1957), as follows: "Before the adoption in 1941 of our present Rules of Civil Procedure a system of pleading had developed in this state in which there was such "sandbagging" of courts as well as of opposing litigants. The pleading device known as a "general demurrer" coupled with the general denial method of putting in issue rebuttal defenses and defenses based on exceptions and exclusions led to innumerable reversals, interminable delays and unnecessary expense. In adopting the Rules of Civil Procedure this Court sought to eliminate these roadblocks to a sound administration of justice. The general demurrer was abolished. Rule 90, Texas Rules of Civil Procedure. By Rule 279 a party was denied the right to a submission of special issues on rebuttal defenses in the absence of special pleading. *Luther Transfer & Storage, Inc., v. Walton*, Tex.Sup., 296

S.W.2d 750. In the same spirit the quoted provisions of Rule 94 were intended to eliminate hidden defenses to liability based on exceptions contained in insurance policies. The ultimate object of all of these changes in rules of pleading was to require a litigant, in so far as was reasonably possible, to put openly in issue on the trial of a case all of the reasons, in fact and in law, why the other party should not prevail." ¶ Given this background and the plain and direct wording of Rule 94, it is our opinion that a party waives his right to assert the Statute of Frauds as a defense if he does not plead it. An objection to the evidence will not suffice. We recognize that a number of cases contain expressions to the contrary, but in every instance the court's statement was dictum."

26. *City of Hutchins v. Prasifka*, 450 S.W.2d 829 (Tex. 1970) (110 Opinions, 45 secondary sources). In this zoning case, Justice Greenhill set out the legal issues and holding prior to laying out the facts. He wrote: "There are three main problems here: (1) The city council zoned the city by ordinance. Later it purported to amend the ordinance by a resolution. Question: may a city zoning ordinance be amended by a resolution? (2) After the adoption of the resolution, the legislature enacted a general validating act which will later be discussed herein. Question: what is the effect of the validating act? (3) Is the city, in any event, estopped to enjoin the Prasifkas from using the property for 'heavy manufacturing' purposes? Our holdings are (1) that the zoning classification of an area of a city, having been enacted by ordinance, could not be changed by resolution; (2) that the general validating act did not change the resolution into an ordinance or give the resolution the force in law of an ordinance; and (3) that the city is not estopped." *Id.* at 831. On a procedural point, Greenhill wrote: "Under the above holdings, we would reverse the judgment of the Court of Civil Appeals. Under such circumstances, we must examine the brief of the Prasifkas, the prevailing party in the Court of Civil Appeals, to determine whether there is another ground upon which the judgment of that court should be affirmed. *Meyer v. Great American Ind. Co.*, 154 Tex. 408, 279 S.W.2d 575 (1955); *McKelvy v. Barber*, 381 S.W.2d 59 (Tex. Sup.1964); *Southwestern Bell Telephone Co. v. Johnson*, 389 S.W.2d 645 (Tex. Sup. 1965)." *Id.* at 833. Greenhill explained that the Prasifkas had raised a cross-point in the court of civil appeals that as a matter of law the city was estopped from contesting the validity of the resolution passed by the city council converting the zoning of the tract from residential to manufacturing, which would be an independent ground to affirm the court of civil appeals' judgment. Id. at 833. Greenhill indicated that the government is not subject to an estoppel except in exceptional cases in order to prevent manifest injustice. Greenhill wrote: "[u]nder the facts set out above, we find no such exceptional case here." *Id.* at 836. Greenhill then wrote the judgment the lower should have issued: "[t]he judgments of the Court of Civil Appeals and the trial court are reversed, and the cause is remanded to the trial court with directions to grant a permanent injunction restraining and enjoining use of the property in violation of the ordinance."

27. *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881 (Tex. 1970) (87 Opinions, 50 secondary sources). In this libel case, Justice Greenhill characteristically laid out the issues and the court's ruling, then laid out the facts. In this instance, the Court withdrew its original opinion and judgment and changed its initial ruling. Greenhill wrote: "Our former opinion of July 29, 1970, in this cause is withdrawn, our judgment of that date is withdrawn, and the following opinion is substituted therefor: Plaintiff D. B. Boyd sued the Denton Publishing Company alleging he was libeled in a newspaper report of a Denton City Council meeting published by defendant in the Denton Record-Chronicle the day following the council meeting. The trial court held the statement was libelous as a matter of law, instructed the jury that the plaintiff was entitled to at least some damages, and submitted only an issue on the amount of the damages. The jury answered in the amount of $10,000. The Court of Civil Appeals affirmed, 448 S.W.2d 145, rejecting the newspaper's contentions that the article was privileged under Sections 2 and 3 of Article 5432[1] as a fair, true and impartial report of a regular public meeting of the Denton City Council. That court also held that the trial court did not err in holding as a matter of law that the statement was libelous per se, was not privileged, and in instructing the jury to find at least nominal damages for the plaintiff. In our original opinion we reversed the judgments below and rendered for the defendant publishing company, holding that the newspaper account, when considered in the context of the complete item, was a fair, substantially true and impartial report of the proceedings of the City Council meeting, and as such, was privileged in the absence of proof of actual malice. However, on rehearing, the Court is of the view that the article in question is not privileged as a matter of law, because there are issues of fact as to what was said at the meeting and how the statement would have been interpreted by the ordinary reader. It is the burden of the defendant to prove its affirmative defense of privilege in this case, and to obtain favorable jury findings in support of its defense. There were no correct jury issues submitted or requested by the defendant upon which its defense of statutory privilege can be based, and its failure to get such findings is a waiver of the defense of privilege. The authorities for this holding will be discussed later herein. We, therefore, affirm the judgments of the courts below." *Id.* at 882. Justice Greenhill wrote: "It was conceded in oral argument that the plaintiff was not a public figure, and we do not consider this cause as coming within the area of fair comment and criticism." Id. at 883. The court of civil appeals as a matter of law rejected the defendant's assertion of privilege, and the Supreme Court ruled that the court of civil appeals was wrong, but the defendant waived the defense by failing to request a jury issue on privilege. As a result, the court of civil appeals was right for the wrong reason. Greenhill wrote: "since the courts below reached a legally correct result, and there is no error in their judgments, we may not reverse those judgments and remand the case for a new trial. *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 at 385 (Tex. Sup. 1963); *Davis v. Davis*, 141 Tex. 613, 175 S.W.2d 226 (1943)." [Author's note: Justice Greenhill wrote the Court's Opinion in Halepeska. See Section II.D.9 above.]

28. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972) (82 Opinions, 126 secondary sources). This significant marital property decision involved the constitutionality of a provision in the Texas Family Code. Chief Justice Greenhill set out the issue and the Court's holding in the first paragraph: "The writ of error was granted in this case to pass upon the constitutionality of a statute which provides: 'The recovery awarded for personal injuries sustained by either spouse during marriage shall be the separate property of that spouse except for any recovery for loss of earning capacity during

marriage.'[1] We hold that the statute, as construed, is constitutional. We also hold that the acts of negligence of the husband as found by the jury are not imputed to the wife so as to bar her recovery." *Id.* at 391. Greenhill stated: [t]he problem in this litigation begins with the early Texas case of *Ezell v. Dodson*, 60 Tex. 331 (1883). The court had before it the right of a wife to sue alone for her personal injuries growing out of an assault. The defendant filed exceptions on the ground that the husband was a necessary party. The wife refused to amend, and the trial court dismissed her suit. This Court affirmed. We have examined the transcript in that case, and the only question was one of necessary parties. The character of the recovery, if any, whether separate or community, was not at issue. Nevertheless, by dictum, the court added that the assault and battery upon the wife gave rise to a chose in action; that the chose in action was property; and since it was acquired after marriage and not by way of gift, devise or descent, it would be community property. Thus the dictum was that an injury to the wife constitutes an asset or claim of the community estate. [¶] The holding of *Ezell* was correct on the parties question as the law then existed. But we are of the opinion that its dictum was wrong for the reasons set out below and as ably discussed by Dean Leon Green in his analysis of the Texas Death Act in 26 Texas Law Review 461 at 466 et seq." *Id*. at 392. Have dispatched one case as dictum, Greenhill tackled the next impediment: "This Court in *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925), held unconstitutional a statute which attempted to declare as separate property the rents and revenues from the wife's separate realty. The holding of that case is so limited; and in view of the history of our community property system and laws, it was a correct decision. The language of the opinion, however, is broad. The reasoning of the court in *Arnold v. Leonard*, and of cases following it, is one of implied exclusion; i. e., if property was acquired during marriage by any other means than gift, devise, or descent, it was and is necessarily community. [¶] A much later case of this Court reverted to a test more akin to that prevailing under the Spanish and Mexican law, and several early opinions of this Court, dealing with community property. It applied an affirmative test; i. e., that property is community which is acquired by the work, efforts or labor of the spouses or their agents, as income from their property, or as a gift to the community. Such property, acquired by the joint efforts of the spouses, was regarded as acquired by 'onerous title' and belonged to the community. *Norris v. Vaughan*, 152 Tex. 491, 260 S.W.2d 676 (1953); *DeBlane v. Lynch*, 23 Tex. 25 (1859); *Smith v. Strahan*, 16 Tex. 314 (1856); *Epperson v. Jones*, 65 Tex. 425 (1886); De Funiak, Principles of Community Property (1971) § 62; Moynihan, Community Property, 2 American Law of Property (1952) § 7.16. Under this reasoning, it is clear that the personal injuries to the wife are not acquired "by the efforts of the spouses and would not belong to the community." *Id*. at 392. Greenhill thus navigated around two adverse cases, Greenhill launched into an examination of Spanish and Mexican marital property law. Greenhill called upon the writings of "able scholars" as alternative authority. Then Greenhill makes the following extraordinary statement: "Granted our great reluctance to disapprove or overrule decisions in the field of property, or in the field of contracts upon which people deliberately rely, we consider it our particular duty to follow the constitution and to right the wrongs especially where the Legislature has felt strongly enough about it to take the action it has. This Court has, in the past, corrected the dictum of its previous decisions when the dictum was wrong. *Valmont Plantations v. State of Texas*, 163 Tex. 381, 355 S.W.2d 502 (1962). We have also overruled opinions where we regard them as erroneous. *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530 at 535 (Tex. 1966), and *Howle v. Camp Amon Carter*, 470 S.W.2d 629 at 630 (Tex.1971). The dictum of *Ezell v. Dodson* is therefore overruled. [¶] Most of the opinions of this Court dealing with injuries to the wife after *Ezell* were, like *Ezell*, concerned with procedural matters, mainly the question of who could or should, or should not, bring the suit. The merits of the question of the character of the recovery, whether separate or community, apparently were not re-examined. *Texas Central Ry. Co. v. Burnett*, 61 Tex. 638 (1884); *G. C. & S. F. Ry. v. Greenlee*, 62 Tex. 344 (1884); *Missouri Pacific Ry. Co. v. White*, 80 Tex. 202, 15 S.W. 808 (1891). These and other opinions are likewise overruled to the extent that they conflict with this opinion." *Id*. at 395. Greenhill states the holding: "Our holding is that, independent of the statute involved, recovery for personal injuries to the body of the wife, including disfigurement and physical pain and suffering, past and future, is separate property of the wife. And, of course, a statute which provides that such recovery shall be the separate property of the wife is constitutional." *Id*. at 396. Greenhill goes on to say that recovery for medical or other expenses and lost wages are community property. *Id*. On the final point, Greenhill wrote: "[w]here, as in the case of medical expenses and lost earnings, the recovery would be community, the contributory negligence of the husband must be attributed to the marital community so far as affects any right of action on behalf of the marital community." *Id*. at 397. As to the disposition, Greenhill wrote with characteristic specificity: "The opinion and judgment of the Court of Civil Appeals was that the part of the judgment of the trial court which denied a recovery to the husband was affirmed; but as to the wife, that court reversed the judgment of the trial court and remanded the cause for a new trial. The effect of the judgment of the Court of Civil Appeals was to sever the cause of action of the wife for such damages as she may be entitled to recover, but its judgment did not so provide. We order such a severance. Accordingly, the judgment of the Court of Civil Appeals is reformed to provide for a severance; and as reformed, it is affirmed." *Id*. at 398. [Author's note: in this Opinion, Greenhill dismissed the seminal case as "dictum", another foundational case as "overbroad," and subsequent cases were "overruled." Instead, Greenhill relied upon "able scholars" and his interpretation of secondary authorities about Spanish law and Mexican law to read into the Texas Constitution a form of separate property that was not mentioned in the Constitution. He then apologized for overturning precedent. Wow!]

29. *Curtis v. Gibbs*, 511 S.W.2d 263 (Tex. 1974) (223 Opinions, 53 secondary sources). Chief Justice Greenhill wrote: "In this original mandamus proceeding, we are called upon to settle a jurisdictional conflict between the 202nd District Court of Bowie County and the Third Domestic Relations Court of Dallas County. … The background of the case will be set out later herein. The immediate reasons for the mandamus proceedings are these: The father and mother were divorced by a judgment of the Bowie court in 1971, and the mother was awarded custody of the children; but she was not to remove the children from Bowie and an adjacent county without permission. The parents and the children all lived in Bowie County at that time. [¶] On January 18, 1974, the father filed a petition for change of custody in the Bowie court. Subsequently, on February 15, 1974, the mother filed a petition in the Dallas court to remove restrictions on her custody of the children and to increase the father's child support payments. [¶] Judge Guy Jones, Judge of the Bowie court, issued

a writ of attachment ordering that the children, who were in Dallas with their mother, be returned to Bowie County. Judge Dan Gibbs of the Dallas court issued an order suspending the writ of attachment and forbidding the sheriff of Dallas County from executing it. The father thereupon filed his original petition in this court seeking writs of mandamus and prohibition directing Judge Gibbs to abate the mother's suit in Dallas County and to vacate orders interfering with the Bowie County proceeding. After the filing of the petition in this court, the father has presented his plea in abatement in the Dallas court, and Judge Gibbs has overruled it. [¶] We conclude that the Bowie court first acquired jurisdiction of the controversy between the parties and therefore retained dominant jurisdiction to the exclusion of other courts. Judge Gibbs had no right to interfere with the actions or orders of Judge Jones, or to take any other action with respect to the suit filed in Dallas except to sustain the plea in abatement and to dismiss the suit." *Id*. at 265. Greenhill followed with an extended statement of the underlying facts, followed by a review of the law of dominant jurisdiction. Then, as he often did to be perfectly clear, Greenhill stated the holding of the case: "We hold that the Bowie court has dominant jurisdiction of the parent-child relationship with respect to the children involved in this suit. It was the clear duty of Judge Gibbs to sustain the plea in abatement and to dismiss the mother's suit." *Id*. at 268. He then directed the terms of a writ of prohibition and a writ of to issue against the Dallas County District Court. *Id*.

30. *State v. Thurmond*, 516 S.W.2d 119, 121 (Tex. 1974). (29 Opinions, 9 secondary sources). In this mandamus proceeding, Chief Justice Greenhill stated the then-prevailing standards for issuance of a writ of mandamus:

> The development of the principles of law governing our exercise of the power to issue such writs has been extensively examined in *Pope v. Ferguson*, 445 S.W.2d 950 (Tex.1969). Except in rare instances, we will not issue a writ to control or correct rulings or judgments on motions or pleas which are mere incidents in the normal trial process when there is an adequate remedy by appeal for correction of any erroneous ruling or judgment. *Pope v. Ferguson*, cited just above; *Shamrock Fuel and Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex.1967); *Neville v. Brewster*, 163 Tex. 155, 352 S.W.2d 449 (1962); *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 85 A.L.R. 2d 1 (1958); *Ewing v. Cohen*, 63 Tex. 482 (1885); *Little v. Morris*, 10 Tex. 263 (1853). But this court will issue a writ of mandamus directing a district judge to enter or to set aside a particular judgment or order when the directed course of action is the only proper course, and the petitioner has no other adequate remedy. *Pope v. Ferguson*, *supra*; *Maresca v. Marks*, 362 S.W.2d 299 (Tex.1962); *Wallace v. Briggs*, 162 Tex. 485, 348 S.W.2d 523 (1961); *Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959); *Polk v. Davidson*, 145 Tex. 200, 196 S.W.2d 632 (1946); *Thomason v. Seale*, 122 Tex. 160, 53 S.W.2d 764 (1932); *Yett v. Cook*, 115 Tex. 175, 268 S.W. 715 (1925), 281 S.W. 843 (1926). Our jurisdiction to issue writs of mandamus to district judges extends to criminal cases as well. *Pope v. Ferguson*, *supra*; *Stakes v. Rogers*, 139 Tex. 650, 165 S.W.2d 81 (1942). In issuing writs to judges in criminal cases, however, as a matter of comity we operate within the procedural framework of the Texas Code of Criminal Procedure as interpreted by the Court of Criminal Appeals. *Pope v. Ferguson*, *supra*; *Commissioners' Court of Nolan County v. Beall*, 98 Tex. 104, 81 S.W. 526 (1904).

The Supreme Court exercised jurisdiction and issued mandamus directing the trial court to set aside its order downgrading a criminal sentence of two years' confinement for possession of marijuana to six months in jail and a $500 fine. The trial judge applied the subsequently-enacted Texas Controlled Substances Act which made the crime a misdemeanor, but the Court of Criminal Appeals had previously declared that retroactive application of the statute would unconstitutionally invade the Governor's exclusive power to commute sentences. The jurisdiction to correct the abuse of discretion lay in the Texas Supreme Court.

31. *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975) (294 Opinions, 134 secondary sources). In this products liability case a majority of the Supreme Court upheld a verdict of liability against a rental company who leased to a construction company scaffolding equipment that the jury found was unreasonably dangerous because the wooden boards in the scaffolding lacked cleats to hold the boards in place. *Id*. at 798. Chief Justice Greenhill noted in his Majority Opinion that both sides produced evidence whether the boards were or were not unreasonably dangerous. "[R]eview[ing] the evidence in its most favorable light, considering only the evidence and inferences which support the findings, and rejecting the evidence and inferences contrary to the findings," Greenhill wrote that the Court could not overturn the jury's verdict. *Id*.at 799. The Court also rejected arguments that strict liability applied only to the sale and not rental of products, that a finding of no negligence by the defendant conflicted with the unreasonably dangerous finding, that there was evidence of voluntary exposure to risk, that the rental company was absolved of liability because the construction company's job foreman had a duty to warn his employees or because the scaffolding was erected by construction company employees, and that the jury should have been charged on proximate cause and not producing cause. *Id*. 800-02. The Majority also upheld the trial court's decision to disregard the jury's verdict of apparent authority, advanced by the rental company to support a duty on the part of the construction company to indemnify the rental company based on the fine print on the backside of a delivery ticket signed by the construction company's job superintendent. Justice Daniel dissented, joined by Justices Steakley and Denton. The Dissenters believe that the boards and the cleats were separate products, that the scaffolding and cleats could be rented separately, that there was no evidence that the boards alone were defective, and that the lack of cleats was open and obvious. *Id*. at 806. Daniel noted that the plaintiff worked for a large industrial contractor with much experience in the erection and use of scaffolds, which ordered, rented, and erected the scaffold equipment. *Id*. at 805. Daniel also noted that the plaintiff had received workmen's compensation for his injuries, and that the comp carrier was to be reimbursed out of the recovery against the rental company. *Id*. at 805. [Author's note: since the employee could not sue his employer for negligence, and his injuries were compensated by workmen's comp insurance, the decision in this case was to afford a recovery to the worker for a work-related injury for an amount in

excess of workmen's comp limits to be paid by a rental company that leased standard equipment to the worker's employer.]

32. *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 302 (Tex. 1976) (386 Opinions, 84 secondary sources.) Here the Supreme Court held that the waiver of governmental immunity for "injuries arising out of condition or use of property" applied to football equipment provided by Texas Tech University to a student athlete. Chief Justice Greenhill issued a Concurring Opinion saying: "The purpose of this concurring opinion is to encourage the Legislature to take another look at the Tort Claims Act, and to express more clearly its intent as to when it directs that governmental immunity is waived. Speaking at least for myself, it is difficult to understand the language of the present statute and to apply it. I am not concerned with the broadness or the narrowness of the waiver. I was among those who encouraged the passage of the Act.[1] Our problem is trying to determine what the Legislature meant." In Footnote 1, Greenhill cited two of his articles: "Greenhill, *Should Governmental Immunity for Torts Be Reexamined, and If So, by Whom*? 31 TEX. B.J. 1036 at 1072 (1968). *See also*, Greenhill and Murto, *Governmental Immunity*, 49 TEX. L. REV. 462 at 472-3 (1971)." Greenhill's Concurring Opinion was cited favorably by Chief Justice Phillips in *Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001), and again by Justice Hecht in *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342 (Tex. 1998).

33. *Francis v. Int'l Serv. Ins. Co.*, 546 S.W.2d 57 (Tex. 1976) (23 Opinions, 14 secondary sources). Chief Justice Greenhill wrote the Majority Opinion in a 5-1-3 decision on whether to invalidate a State Board of Insurance exclusion of government vehicles from the scope of Texas uninsured motorists policies. Chief Justice Greenhill wrote:

> To support her argument that the exclusion at issue in this case is invalid, the plaintiff cites decisions from several other jurisdictions that have declared invalid exclusions of governmentally owned vehicles from the scope of the states' uninsured motorist acts. [Greenhill listed cases decided by the 8th Cir., the Alabama Supreme Court, the Georgia court of appeals, an Illinois court of appeals, and a Louisiana court of appeals.] These opinions are not persuasive on the issue in this case. In none of the above cases did the state's Uninsured Motorist Act contain language that expressly authorized the exclusion of vehicles whose operators were, in fact, uninsured. The Texas Act, on the other hand, does contain express language to that effect. See Article 5.06—1(2), Supra. Moreover, in the only decision cited to us in which the exclusion of governmentally owned automobiles from the policy coverage was upheld, the uninsured motorist chapter was by statute expressly made not applicable to vehicles owned by government units. *Jones v. Southern Farm Bureau Casualty Co.*, 251 S.C. 446, 163 S.E.2d 306 (1968). The *Jones* case is thus persuasive authority for the proposition that express statutory language excluding uninsured automobiles from the statute's coverage shall be given effect. Although the language of the Texas Act does not expressly exempt governmentally owned vehicles, as did that of the South Carolina statute, we do not believe that difference to be significant.
>
> The Texas cases cited by the plaintiff in support of her position do not control the resolution of the question in this case. ... In *Ranzau* there was no statutory language expressly giving the Board authority to limit recoveries under the Act when other compensation was available to the insured. In this case there is statutory language expressly giving the Board the authority to exclude from the ambit of the Act vehicles whose operators are in fact uninsured. Therein lies the distinction between *Ranzau* and this case and the reason why we are not bound by our earlier holding there.

The petitioner's final attack had to do with the purpose of the Texas Uninsured Motorist Act. After analyzing three portions of the Act in conjunction, Greenhill wrote:

> The purpose of the Act is to protect insureds against negligent, financially irresponsible motorists. It was not designed as a system for giving relief to people who cannot recover from a tortfeasor because of sovereign immunity.

Greenhill then gave a brief history of sovereign immunity in Texas, citing one Texas Supreme Court case and his article, Greenhill and Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462 (1971). Justice Daniel concurred, saying:

> I concur but respectfully suggest that this is a subject to which the Legislature and the Texas State Board of Insurance might give further study. It is apparent from cases cited by the Court that several states provide their citizens with the opportunity for greater insurance protection against owners and operators of uninsured motor vehicles by not excluding vehicles owned by political agencies and subdivisions.

Justice Johnson dissented, joined by Justices Steakley and McGee:

> The majority finds no ambiguity in Article 5.06—1(2), Texas Insurance Code Annotated (Pamp. Supp.1975—76), and a furtherance of the purpose of that statute by the exclusion of government-owned vehicles from the definition of 'uninsured automobile.' This dissent challenges the conclusion of the majority in both instances.

Justice Johnson noted that the Act permits the Board to exclude vehicles whose *operators* are uninsured, while the Board policy excludes motor vehicles whose *owners* are uninsured. *d* at 63. Johnson also disagreed with Greenhill about the intent of the Act.

34. *Westheimer Ind. Sch. Dist. v. Brockette*, 567 S.W.2d 780 (Tex. 1978) (60 Opinions, 27 secondary sources, on Westlaw as of 3-11-2021). In this case Chief Justice Greenhill wrote: "The court is not unmindful of the sweeping judgment of December 8, 1977, by the Federal District Court in Houston, which, in effect, wipes out the Westheimer Independent School District.[1] The basis of that injunction order is that the creation and operation of the district interferes with the desegregation orders of the federal courts under the Fourteenth Amendment to the U.S. Constitution. As will be discussed below, the desegregation questions involving the Westheimer Independent School District have been before the federal courts since 1973, and no such problems are before this court in this case. [¶] What is before this court is the orderly disposition of cases of administrative law." The Court Majority went on to hold that an appeal in 1978 of an administrative order issued in 1972 is, as a matter of law, an unreasonable delay that forecloses appeal. *Id*. at 791. Justice Johnson dissented, joined by Justices Steakley and Denton. Johnson wrote: "The majority states that it is 'not unmindful' of the judgment of the federal district court in *Ross v. Houston Independent School District*.[1] Neither should this court be unmindful that appeal might be made from the federal district court's judgment with the ultimate result being wholly unknown. The federal district court did make certain findings, however, and among them was the determination that the 'formation of WISD would be a major step towards the creation of a deteriorating central city" and that "[t]he formation of WISD and its continued existence have been motivated by and are still motivated by a demonstrated discriminatory purpose.' [¶] The majority opinion in the instant case, coupled with a reversal of *Ross v. Houston Independent School District*, *supra*, by the Fifth Circuit Court of Appeals, would implement the results so graphically described by Federal District Judge Cowan. This court cannot blind itself to those results by asserting that the instant case presents nothing more than 'the orderly disposition of cases of administrative law.' [¶] The majority holds that Houston Independent School District may not challenge through judicial appeal the validity of the order creating Westheimer Independent School District because Houston I.S.D. has as a matter of law delayed in bringing such appeal for an unreasonable time." Id. at 792. "Accordingly, this writer would affirm the judgment of the court of civil appeals which permits a possible future challenge to the validity of the creation of Westheimer I.S.D. in an appropriate state district court." *Id*. at 795. [Author's note: the Wesheimer I.S.D. was never constituted.]

35. *State v. Terrell*, 588 S.W.2d 784 (Tex. 1979) (235 Opinions; 44 secondary sources, on Westlaw as of 3-11-2021). In this case the Supreme Court considered whether the doctrine of sovereign immunity shielded the State of Texas from respondeat superior liability when a DPS, who was using radar to detect speeders, entered the highway to give chase without turning on his siren or flashing red lights and negligently collided with another motorist. Chief Justice Greenhill, writing for a unanimous court, evaluated the Texas Tort Claims Act, which makes the State liable for the negligent or wrongful act or omission of an employee while operating a motor-driven vehicle or motor-driven equipment in the scope and course of employment. This broad scope is limited by exceptions, two of which were raised in the case: (8) a claim arising from an officer, agent or employee responding to emergency calls or reacting to an emergency situation in compliance with applicable laws and ordinances; and (9) a claim of an act or omission arising out of civil disobedience, riot, insurrection, or rebellion, or the failure to provide or method of providing, police or fire protection. Chief Justice Greenhill wrote that exception No. 9 applied only to policy-level decisions of a governmental agency and not the manner in which those policies were carried out by a state employee. *Id.* at 787. Greenhill wrote that the purpose of the exception was to avoid judicial review of policy decisions that governments must make about how much protection to provide. *Id*. at 787-88. If the negligence arises from formulating policy, then the State is immune. If an officer or employee acts negligently in carrying out the policy, then the State is not immune. *Id*. at 788. The emergency exception in Subsection 8 did not apply because the officer was not in compliance with the requirement to use his siren and red lights when responding to an emergency. *Id*. at 788. Greenhill then plainly stated that the Court's holding: "Our holding in this case is that the State of Texas is subject to liability for injuries arising out of the negligence, if any, of Officer White in operating his vehicle, provided such negligence occurred while Officer White was acting within the scope of his employment and not in an emergency." *Id*. at 789.

36. *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348 (Tex. 1977) (76 Opinions; 78 secondary sources). In this case Chief Justice Greenhill began his Opinion: "This case involves the validity of an arbitration award. We hold that when, as here, both parties participated in the arbitration proceedings, when neither party unequivocally withdrew its consent to arbitrate, and when the arbitration proceedings resulted in an award, the award is valid and enforceable under Texas common law." *Id.* at 350. The issue arose because the Texas arbitration statute by its terms did not apply to construction contracts. Greenhill noted: "Under the traditional common law, courts have refused specific enforcement to agreements to arbitrate future disputes. Either party to an executory agreement providing for arbitration of future disputes has been allowed to revoke the agreement at any time before the arbitration proceeding resulted in an award. The only penalty for such revocation consisted of damages, if any, for breach of contract. *Deep South Oil Co. v. Texas Gas Corp.*, 328 S.W.2d 897 (Tex.Civ.App.—Beaumont 1959, writ ref'd n. r. e.), Dougherty & Graf, *Should Texas Revise Its Arbitration Statutes?*, 41 T.L.R. 229 (1962). The rationale behind these rules rested on a "public policy" argument against allowing private persons to oust the courts of their jurisdiction to determine the rights and liabilities of parties to a contract. This notion was a result of early English precedent which was transferred to the United States and to Texas through our adoption of the common law.[7] The doctrine has long since been abandoned in England by case law and by statute,[8] and an increasing number of American jurisdictions have rejected the rationale by adopting modern and comprehensive arbitration statutes. Coulson, *Texas Arbitration—Modern Machinery Standing Idle*, 25 Sw.L.J. 290, 291 (1971). The doctrine was evolved in an era when court congestion was not a major problem as it is today, and in modern times a policy encouraging agreements to arbitrate is preferable. In addition to alleviating some measure of the burden on the courts, arbitration in a commercial context is a valuable tool which provides business people, and all citizens, with greater

flexibility, efficiency, and privacy. Coulson, *supra*. While it is unnecessary in this case to alter common law arbitration rules, the policy of refusing specific enforcement to executory arbitration agreements is not justifiable when the case fits within the common mold." *Id.* at 352.

37. *Ex Parte Gorena*, 595 S.W.2d 841 (Tex. 1979) (91 Opinions, 38 secondary sources). Mr. Gorena was held in contempt of court for not paying part of his military retirement to his ex-wife and remanded to jail until he paid $1,807.44 in arrearages. Gorena sought habeas corpus from the Supreme Court, arguing that the trial court could not hold him in contempt because the divorce decree was an agreed decree and is enforceable only as a contract. Chief Justice Greenhill, writing for the Court, rejected this contention, in the process disapproving language in *Ex parte Jones*, 163 Tex. 513, 358 S.W.2d 370 (1962), and asserting that a court's contempt power does not derive from statute but "this power is an inherent power that is an essential element of judicial independence and authority." *Id* at 845. The Court also rejected the claim that the term "gross" in "gross retirement pay for month" was too vague to enforce by contempt, and rejected Gorena's claim that he was imprisoned for debt. *Id*. at 846.

38. *Young v. Young*, 609 S.W.2d 758 (1980). The Supreme Court held that, in a divorce granted based on the fault of one spouse, the trial court may consider fault in breaking up the marriage when making a property division. The Court also held that a parent's duty to support an unmarried disabled adult child could be considered in diving the community estate. In this case, the Supreme Court had jurisdiction over the divorce appeal because of a conflict between the Dallas Court of Civil Appeals and the Eastland Court of Civil Appeals. On the procedural side, Chief Justice Greenhill wrote:

> In his brief in the court of civil appeals, James complains that there was no evidence to support the award of attorney's fees to Laura. The court of civil appeals did not rule on this point. James filed no motion for rehearing in the court of civil appeals and no brief in this Court. He attempted to raise the point on oral argument.
>
> Neither party complained of the action, or inaction, of the court of civil appeals, and neither party has a point or cross-point in this Court on attorney's fees. While we may look to points in the court of civil appeals upon which to affirm that court's judgment, the judgment of that court was that of reversal and remand. The attorney's fees point was a "no evidence" point; and, if sustained and severed, it would have resulted in a reversal and rendition. We may not, therefore, use that point here. Since the attorney's fees question has not been preserved to this Court, we have no jurisdiction to decide it.

39. *Nagle v. Nagle*, 633 S.W.2d 796 (Tex. 1982) (107 Opinions) ("and so forth"). In this case, the Supreme Court ruled that an oral promise to convey real property was unenforceable under the Statute of Frauds. Chief Justice Greenhill set out Texas law on when estoppel precludes the assertion of the Statute of Frauds, mentioning *Hooks v. Bridgewater*, 229 S.W. 1114 (Tex. 1921), and Chief Justice Calvert's Opinion in *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972). Greenhill wrote: "This Court's original opinion in 'Moore Burger' was considered to have been too broadly written. On rehearing, the Court wrote to narrow the promissory estoppel exception to cases where the promise was 'to sign a written agreement which itself complies with the Statute of Frauds.' *Id*. at 799-800. He later continues: "This brings us to Margie's assertion that she had an action for common law fraud. The decision in *Hooks v. Bridgewater* was addressed to fraud, and it was obviously common law fraud. Her counsel cites, as does the Court of Civil Appeals, the line of cases which allows a recovery when there is a promise made without an intention to perform, made for the purpose of having the opposition party's relying on it, which is relied upon, *and so forth*." (Emphasis added by the Author of this article.] Greenhill wrote: "By affirming Margie's award for such damages, the Court of Civil Appeals has enforced an oral promise to convey land, despite the Statute of Frauds, merely because Frank did not perform that promise. If we allowed that holding to stand, the Statute of Frauds would become meaningless." *Id*. at 801.

40. *Cameron v. Cameron*, 641 S.W.2d (Tex. 1982) (Greenhill, Concurring). In this case, Chief Justice Greenhill joined in Justice McGee's Concurring Opinion that continued the attack on Justice Pope's Opinion in *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977), which said that both the Texas Constitution and Texas Family Code prohibited a divorce court from divesting a spouse of separate property and awarding it to the other spouse. See Section III.D.5 (court opinions) below. Greenhill wrote:

> I agree with the substance of the concurring opinion of Mr. Justice McGee.
>
> I also agree with the holding of the Court that marital property acquired in a common-law jurisdiction is not separate property within the framework of the Texas community property laws.
>
> The majority opinion gives several grounds for its holdings with which I obviously do not agree. Since there are many reasons given, it is not necessary to reach constitutional grounds, particularly the "due process" argument. A wise rule of opinion writing and appellate judgments is that constitutional grounds are not decided unless it is absolutely necessary.
>
> A redeeming feature of the majority opinion, as I understand it, is that it does not reach the "due process" point. If it even suggests such a holding, it is unnecessary to the opinion.

The Court's opinion does not disavow the dictum of the earlier opinion in *Eggemeyer*. Separate personal property was not before the Court in *Eggemeyer*; and any observation about "due process" was, in my opinion, clearly dictum. With this state of the law, we also have the undisturbed language of *Hedtke* that it was permissible to deal differently with separate realty and separate personalty.

It is my hope, therefore, that the Court's power to deal with separate property, particularly separate personal property, may be addressed by the Legislature. After all, the Legislature is the policy making body of this state. In this context, the Legislature [p. 229] will have an alternative to enacting alimony statutes which will surely result if the "due process" dictum of *Eggemeyer* should ultimately prevail. The Legislature can change the "estate of the parties" and other statutory provisions; but it cannot change the "due process [due course] of law" of the Texas Constitution,—without a constitutional amendment.

Publications

1. Ground Water. Practicing lawyers Joe Greenhill & Thomas Gibbs Gee, *Ownership of Ground Water in Texas; The East Case Reconsidered*, 33 TEX. L. REV. 620 (1955). The article analyzed Texas law regarding one land owner's use of ground water in such a way as to reduce or eleminate ground water flow to a neighbor. The authors ended with a plea to the Texas Legislature to adopt a rule prohibiting the use of ground water in a manner that injured others. The article was cited by Justice Enoch in *Sipriano v. Great Spring Waters of America, Inc.*, 2 S.W.3d 5 (Tex. 1989).

2. Supreme Court Practice. Greenhill, *Presentation of a Case to The Supreme Court of Texas*, 38 TEX. L. REV. 538 (1960). Associate Justice Greenhill noted the existence of "many excellent articles and opinions" on preparing an application for writ of error to the Texas Supreme Court. Greenhill cited to two articles by Justice Calvert, a case and an article by Justice Alexander, and an article by Justice Norvell while he was on the court of civil appeals. Greenhill said that his purpose in writing the article "is to add some suggestions which, it is hoped, will be practical, specific, and helpful to counsel." p. 538. "There is, of course, no substitute for merits. Regardless of the method of presentation, the Supreme Court will do its best to see that justice is done and that the law has been followed. But good advocacy does sometimes win cases, and poor advocacy sometimes loses cases that should be won." p. 538. Greenhill mentioned the necessity of a motion for rehearing in the court of civil appeals. As to the application for writ of error, he discussed the preliminary statement, the jurisdictional statement, the points of error (put your best point first), the appendix, the table of contents (he calls the subject index). He discussed answer to applications and motion, conditional applications, and second motions for rehearing. As to oral argument, Greenhill said: "Judges and lawyers often speculate on the value or importance of oral argument in the appellate court. I believe it to be highly important and that it may have a material bearing on the outcome of the case. ¶ The application and the reply have been particularly studied by one or more members of the court, and the case has been discussed by the whole court when the application was granted. But the oral argument is your opportunity to bring your case home forcefully to all nine judges. They will thereafter read or reread your brief in the light of the argument." 'The petitioner is allowed thirty minutes to open, the respondent thirty minutes to answer, and the petitioner fifteen minutes to close.' Greenhill said to budget your time. p. 545. He quoted U.S. Supreme Court Justice Robert Jackson to never divide your time with other counsel. Greenhill suggested an introductory statement: "I would suggest that in the first few minutes these questions be answered: (1) what kind or type of case is it? (2) was it tried to a jury or to the court? (3) what did the trial court hold? (4) what did the Court of Civil Appeals hold? (5) what are the controlling points in the case? Then give a discussion of the facts." p. 546. He said: "Do not mind questions." p. 546. Greenhill explained: "A generous attitude toward the questions of the court will be helpful. Most of the questions are asked simply for information. It is of course necessary for the court to have the full facts and an understanding of your contention before it can evaluate them properly. Sometimes the questions are asked to clarify or advance the argument. Since all the judges gave the case preliminary consideration when the writ was granted, tentative opinions or questions are apt to linger in their minds. Some questions may appear to be "loaded." Such questions may be asked to test your argument as it might apply to other situations or to the jurisprudence of the state in general. The decisions of the court will be, of course, binding in many other situations besides your particular one. ¶ Sometimes the judge who asks the question knows the answer, but he asks it for the enlightenment of another member of the court whom he may suspect of not understanding the answer. In many instances, we have argued among ourselves about the subject of a question which is asked of counsel, and we are looking to him to straighten us out. ¶ In any event, it is good for the judge to ask the question if the matter is bothering him. He is going to ask someone—himself or another member [p. 547] of the court—and you can give him the answer you want him to have." Greenhill discussed demonstrative evidence, useful for the construction of a statute or oil and gas lease. Among general observations, Greenhilll said that oral arguments should be *oral*. p. 548. Stand behind the rostrum at all times. p. 548. Post-submission briefs. p. 548-49.

3. Assumption of Risk. Greenhill, *Assumption of Risk*, 16 BAYLOR L.REV. 111 (1964). The article can be considered a follow-up of the discussion started in the *Halepeska* Opinion in 1963. See Section II.D.9.

4. Uniform Citations for Briefs. Greenhill, *Uniform Citations for Briefs, With Observation on the Meaning of Stamps or Markings Used in Denying Writs of Error*, 27 TEX. B.J. 323 (May 1964). Associate Justice Greenhill wrote: "The citation of authorities in briefs has several functions. One of the most important facilitate the finding and identification of the authority cited. A correct citation immediately assists the court in evaluating the authority. This is particularly true as to the precedential value of opinions of Texas Courts of Civil Appeals, depending upon what disposition was made of them upon application for writ of error in the Texas Supreme Court. As will be discussed later herein, notations such

as 'writ refused' had a different meaning at one time from that which they now have. The action, or lack of action, on the writ of error should always be given with the citation, and the date of the decision of the Court of Civil Appeals. The date is not only helpful in appraising the citation, it is a check against an error in the citation. For example, the '2d' may have been erroneously inserted or omitted, and the date will quickly lead to a correct citation. ¶ It is helpful in all cases for the court to be informed which court of what state wrote the opinion cited, and when it was written...." Greenhill goes on the discuss how to cite cases. With regard to the Military Court, Greenhill wrote: "Opinions of the Military Court are reported in Volumes 30-33 (p. 583) of the Texas Reports (October, 1867, to June 8, 1870). This court had no Texas constitutional basis, and hence its decisions do not operate as precedents under the rule of stare decisis. The Supreme Court in 1878 said, '. .. the opinion of this [military] tribunal [is] authoritative exposition of the law involved in the cases upon which it was called to pass, but merely as conclusive and binding determinations of the particular case in which such opinion was expressed.' *Taylor v. Murphy*, 50 Tex. 291 at 295." Greenhill was kinder to the Semicolon Court: "Opinions of the so-called Semicolon Court, or Third Reconstruction Court, belong in a different category from the Military Court. Its authoritative basis was the Constitution of 1869. Its opinions are reported in Volumes 33 (p. 585 et seq.) through Volume 39 (December 1, 1870, to November 28, 1873). The last opinion of this court gave the tribunal its name, 'The Semicolon Court' (*Ex parte Rodriguez*, 39 Tex. 706 (1873), because the validity of a statute was determined by a semicolon in a constitutional provision. The opinions of this court are to be evaluated on an individual basis. The Texas Supreme Court has relied for authority on many of the opinions of the Semicolon Court. For example, *Alexander v. Gilliam*, 39 Tex. 227 (1873), is cited as controlling in *Trueheart v. McMichael*, 46 Tex. 222 (1876). It is cited with approval in *Parker v. Ft. Worth & D.C. Ry.*, 71 Tex. 132, 8 S.W. 541 (1888), in *Holman v. Herscher*, 16 S.W. 984 (Tex. 1891 not officially reported), and in *Dawson v. Tumlinson*, 150 Tex. 451, 242 S.W. 2d 191 (1951). Recently it was cited in *Land v. Turner*, 7 SUP.CT.J. 237 (Feb. 22, 1964). An excellent discussion of the Texas Supreme Court during this period and a list of opinions of the Semicolon Court which have been cited with approval are to be found in Norvell, Oran M. Roberts and the Semicolon Court, 37 TEX.L.REV. 279 at pp. 296-302 (1959). If a case from this period has been cited with approved by the Texas Supreme Court, it may, of course, be used as an authority. If not, it is recommended that the opinion be appraised carefully before being cited." After many pages of detail, Greenhill moves on to citing constitutions, statutes, treatises and texts, periodicals, and when to use citation calls. p. 392.

5. Oil & Gas Hearings. Greenhill & Robert McGinnis, *Practice and Procedure in Oil and Gas Hearings in Texas*, 12 SW. L.J. 406 (1964).

6. Assumed Risk. Greenhill, *Assumed Risk*, 10 SW L.J. 1 (1966). The article can be considered a follow-up of the discussion started in his opinion in *Halepeska*, issued in 1963. See Section II.D.9 above. Greenhill wrote:

> The doctrine of assumed risk, as it has come to be understood in most jurisdictions, embodies two separate concepts.[1]
>
> First, assumed risk is thought of as negativing the duty owed by the defendant to the plaintiff, particularly the duty of an owner-occupier to persons coming upon his premises. In Texas this concept is referred to as no duty.
>
> * * *
>
> Second, assumed risk acts to deny recovery to a plaintiff for injuries received either on or off the premises of an owner-occupier, when the plaintiff, with knowledge and appreciation of the danger, voluntarily encounters the risk. In Texas this concept is labeled volenti non fit injuria. In its application the plaintiff is said to assume the risk when he deliberately chooses to encounter a risk created by the defendant's breach of duty toward him. The doctrine embodies the element of an intelligent choice' and presupposes the existence of a duty.[6] Used in this sense, assumed risk is a pure defense, i.e., based on actual or implied consent, and requires knowledge and appreciation of the particular danger and a voluntary exposure to it. Thus, the burden of pleading, proof and submission of issues is upon the defendant.[7]
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> * * *
>
> The English view of contributory negligence was that such negligence intervened and prevented the defendant's primary negligence from being the proximate cause of the injury. The doctrine of assumed risk was a part of the defense of contributory negligence in the early cases. Assumed risk came to have an independent status only as recently as 1820. The doctrine arose from the common law philosophy which held paramount the freedom of the individual. Each individual was left free to do what he chose and was expected to protect himself. In the law of torts at least the idea of any obligation to protect others was abnormal. The same concept was used with respect to the rescue doctrine, i.e., rescue was considered to be an extravagance, and the rescuer generally was held to have assumed the risk of his good samaritanism.
>
> The duty to protect arose in time with relation to public pursuits, such as carriers, innkeepers and the like. So when an owner of public facilities permitted another to come on his premises, or even invited him, he was held bound to warn of any known defects not obvious to his guest. Throughout this development, however, it was an exceptional situation which required the landowner to do more than to warn of dangers and thus enable the invitee to protect himself.[11]

7. Governmental Immunity. Greenhill, *Should Governmental Immunity for Torts Be Reexamined, and If So, by Whom?* 31 TEX. B.J. 1036 (1968).

8. Habeas Corpus. Joe Greenhill & Martin D. Beirne, Jr., *Habeas Corpus Proceedings in the Supreme Court of Texas*, 1 ST. MARY'S L.J. 1 (1969). This article was the first article in the first volume of the St. Mary's Law Journal. Co-author Martin Bierne reminisced:

> Volume 1, Issue 1 debuted in spring 1969 with some impressive names. The lead article was authored by Joe Greenhill, then-associate justice of the Texas Supreme Court, and Martin D. Beirne, the Journal's first editor in chief, and was titled Habeas Corpus Proceedings in the Supreme Court of Texas.[60] Justice Joe Greenhill, who later became chief justice of the Texas Supreme Court, submitted an article about habeas corpus, which was causing controversy at the time. I worked with him on the research and later prepared a rough first draft. He thanked me in the footnotes for my efforts. Two days before the Journal was to be sent to press, Justice Greenhill submitted his final edits. On the first page, the footnote mentioning my work was circled and an arrow was drawn to indicate that he wanted me credited as a coauthor. Next to that, Justice Greenhill wrote: "Print it like this, or don't print it at all." This magnanimous action convinced me that people in the legal community truly wanted to see our young journal succeed.

9. Governmental Immunity. Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462 (1971). This article appeared three years after the authors' article on this subject appeared in the Texas Bar Journal. According to footnote a1, the article was "adapted from an address to the Texas Attorney Generals' Seminar at Austin, Texas, March 26, 1970." Murto was listed as an Associate Editor of the Texas Law Review. In Footnote 13 the authors cite Greenhill's earlier Texas Bar Journal article. The article describes two aspects of the doctrine of sovereign immunity, one that the sovereign cannot be sued without its consent, and the other that the doctrine of respondeat superior does not apply to governmental units. p. 462. The authors noted that prior to 1957, courts were unwilling to impose liability on the sovereign absent a statute permitting it. The authors observed that these courts "failed, however, to face the question of whether resolution of tort claims is a proper legislative function and ignored the inadequacy of the legislative machinery for the task. Inevitably, legislative committees broke down under the enormous number of proceedings and claims were likely to be reviewed mechanically without adequate individual consideration." *Id.* at 463. The authors noted: "Total immunity long ago became so intolerable to courts throughout the United States that they restricted it by creating exceptions such as the governmental-proprietary distinction," which had proved to be difficult to apply. p. 463. The authors noted that the Federal Tort Claims Act abolished the absolute immunity of the federal government, but that state legislatures lagged in curtailing the doctrine. "The courts that have abrogated governmental immunity have often been unable to resist voicing their hostility towards the medieval doctrine." p. 465. The authors gave a detailed recounting of the enactment of the Texas Tort Claims Act of 1969. Greenhill footnoted letters on the legislative process surrounding the Act from Page Keeton, Dean of the University of Texas School of Law, and from Howard Barker, president of the Texas Association of Defense Counsel, and W. James Kronzer, speaking for the position of the Texas Trial Lawyers Association. In Footnote 71, the authors said: "Although it would be unfair to imply that legislators might place personal considerations ahead of justice, it seems likely that hippies or similar persons might have difficulty obtaining favorable legislative action in several states." The authors concluded:

> VI. Conclusion
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> Absolute immunity from tort claims at any level of government is an unnecessarily harsh and arbitrary doctrine that must be substantially modified. There should be, however, a general reservation of immunity at the planning and policy-making levels of government and in the area of legislative and judicial action. Subject to the general reservation, immunity from liability for negligence resulting in physical injury should be abolished. Also, the rule should be governmental [p. 473] responsibility for injuries resulting from the tortious conduct of employees; immunity should be the exception.
>
> Texas has opened the door to waiver of governmental immunity very carefully. Immunity is, however, still the rule. While those responsible for enactment of the present statute are certainly to be commended, it is hoped that they and other leaders in the state government will continue to examine and improve our Texas Tort Claims Act.

This article has been cited in 45 cases, and 25 secondary sources, according to Westlaw on 3-11-2021. The article has been cited a number of times by the Texas Supreme Court. Chief Justice Greenhill cited this article in his Opinion for the Court in *Francis v. Int'l Serv. Ins. Co.*, 546 S.W.2d 57, 59 (Tex. 1976). The article was also cited in Justice Steakley's majority Opinion and Greenhill's concurring Opinion in *Lowe v. Texas Tech University*, 540 S.W.2d 297, 300-03 (Tex. 1976). Chief Justice Greenhill cited the article in *State v. Terrell*, 588 S.W.2d 784, 785 (Tex. 1979). The article's historical recounting on Legislative action in 1967 regarding the Tort Claims Act was cited by Justice Hecht in *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342 (Tex. 1998).

10. Judicial Reform. Joe R. Greenhill & John W. Odem, *Judicial Reform of Our Texas Courts -- A Re-Examination of Three Important Aspects*, 23 BAYLOR. L. REV. 204 (1971).

11. On Page Keeton. Greenhill, *Page Keeton: Influence on the Law of Texas*, 52 TEX. L. REV. 1053 (August 1974).

12. Introduction to Annual Survey. Greenhill, *Introduction to the Annual Survey of Law*, 29 Sw. L.J. 1 (1975).

13. Justice Reavley. Greenhill, *Mr. Justice Thomas M. Reavley - A Tribute*, 30 BAYLOR L. REV. 3 (1978).

14. State of the Judiciary (1979). Greenhill, *State of the Judiciary: Address By the Texas Supreme Court Chief Justice to the 66th Texas Legislature* on Jan. 31, 1979, printed in 42 TEX. B.J. 379, 380 (1979). This article is Texas' first State of the Judiciary message. It was given by Chief Justice Joe Greenhill to the 66th Legislature on January 31, 1979. Greenhill was given notice in the prior legislative session about the Legislature's desire for a report on the condition, future direction, and needs of the court system. In the interim, Greenhill called upon presiding administrative judges and appellate judges to assist, and Greenhill says that his comments reflect the views of the majority of them. Greenhill started by emphasizing that the judicial branch is separate and distinct from the legislative and executive departments. Greenhill said he started with this point because some persons seem to regard the government as two important branches, with the judiciary relegated to an agency or bureau. p. 380. "There are among us some lazy and inefficient judges. But after all, the judges of this state are ultimately elected by the people. Most judges, on the other hand, I believe, are dedicated and hard working people who are doing their best with the system and the tools at hand to make the system work." p. 380. Greenhill commented on delay in criminal justice, and the backlog of cases in the Court of Criminal Appeals, which must single-handedly hear all criminal appeals. That court's caseload has tripled from 1970 to 1979. Greenhill said: "The present intermediate appellate courts should be given criminal, as well as civil, appeals." p. 380. As to juvenile crimes, Greenhill said that there is a growing feeling that juveniles who commit adult crimes like murder, robbery by firearms, and rape should be prosecuted in the criminal justice system. p. 381. Greenhill said the staffing of juvenile probation departments is inadequate. p. 381. Greenhill commented on excessively lengthy jury selection in death penalty cases, saying that sometimes it takes longer to pick a jury than try the case.

Greenhill recommended that the Legislature enact a criminal statute like the rule for jury selection in civil cases. p. 381. Greenhill reported that the Speedy Trial Act adopted in the prior legislative session had shortened delay and that a commission appointed by the Governor was evaluating possible improvements. p. 382. Greenhill recommended that all trial courts be given a court administrator, or at least a secretary and a bailiff. p. 382. Greenhill recommended eliminating trial de novo on appeal from traffic violations. p. 382. Greenhill recommended raising the jurisdictional limit of small claims courts to $500. p. 383. Greenhill recommended increased funding for law schools to provide clinical education to avoid "on-the-job training at the expense of their clients and of the judicial system." p. 383. Greenhill remarked that the regulation, admission, and discipline of attorneys is a proper function of the Supreme Court. p. 383. Greenhill suggested that the Legislature reduce the number of cases by creating alternatives to court action and reducing the cost and time of litigation. He made no specific recommendation. He did say, however, that the statutes governing arbitration contain so many restrictions that arbitration is seldom used. p. 383. Greenhill siad the judiciary was following closely efforts in Florida, Atlanta, Los Angeles, and Kansas City to implement neighborhood dispute centers to resolve minor civil and criminal conflicts without the necessity of lawyers. p. 383. Greenhill recommended amending the statutes to eliminate a separate preliminary trial to establish venue, subject to appeal, which makes two cases out of one and causes delay in the ultimate disposition. p. 383. Greenhill recommended increased staffing for regional administrative judges. p. 384. Greenhill reported that the civil appellate docket was manageable, but an increase in case load is expected. p. 384. Greenhill suggested that legislation creating new causes of action have a judicial impact statement as well as a fiscal note. p. 384. Greenhill said that the Supreme Court docket was current, but that he spent more than half of his time working on court administration as well as handling 1/9 of the Court's caseload. p. 384. Greenhill noted that the Court works with Legislative committees and individual legislators on changes to the Rules of Civil Procedure. The cost and speed of service of process and subpoenas has been reduced, the number of jury issues have been reduced and simplified, and brought into line with comparative negligence and that the authorization of 10-to-2 verdicts has reduced the number of mistrials. p. 384. The Court is presently working on reducing the time and expense of pre-trial discovery. p. 384. Greenhill lauded the Judicial Retirement Act as "one of the finest things ever done to encourage able men and women to leave private practice and to accept the Judiciary as a career–for far less money than they could make in private practice." p. 384. Greenhill hastened to note that he was not asking for increased salaries or retirement for judges, but he did encourage "strengthening the incentive of a judicial career." p. 384-387. As to overall budgeting, Greenhill noted that less than 1% of the State's budget is allocated to the judiciary. The total state appropriations to the judiciary, a little over $22 million, is equivalent to what is allocated to the Committee on Aging, or the Adult Probation Commission, or the San Antonio State Hospital and Special School, or the Support Services Division of the Department of Public Safety, and only 1/4 of appropriations for the Department of Corrections. p. 387. After considering contributions from city and county and Federal governments, and $125 million generated by court costs, fines, forfeitures, etc., a net of just over $19 million is expended on the entire judicial branch at all levels. He said that the third branch can be funded to attain much greater efficiency "without encroachment on the overall tax structure of the state." p. 387. Greenhill touched lightly on judicial selection. Greenhill ended: "Finally, a word about the selection and tenure of judges. The quality of the people who serve as judges is of the utmost importance in carrying out any system of justice under law. While, as many of you know, I have some strong views, there are reasonable differences of opinion on how judges should be selected and removed. There is, I believe, a great deal of room for improvement and I hope that at this, or some future session of the Legislature, you will address this subject." p. 387. [Author's note: See the discussion of efforts to change our manner of selecting judges in Section I.E above.]

15. Appeals and Writs of Error. Greenhill, *Appeals and Writs of Error, Proceedings in the Supreme Court of Texas* State Bar of Texas Advanced Civil Trial Course, Vol. 2, Ch. DD (January 1979). This 19-page article is a succinct explanation of how the Supreme Court processes cases, with suggestions on things to do or avoid in handling a case in the Supreme Court. The article is a model of simplicity and clarity.

16. Tribute to Price Daniel. Greenhill, *Tribute to Price Daniel*, 31 BAYLOR L. REV. 3 (1979).

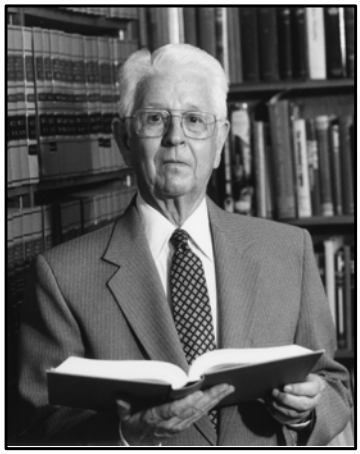
17. Constitutional Amendment of 1980. Greenhill, *The Constitutional Amendment Giving Criminal Jurisdiction to the Texas Courts of Civil Appeals and Recognizing the Inherent Power of the Texas Supreme Court*, 33 TEX. TECH L. REV. 377 (2002). In this article Chief Jusice Greenhill gave a detailed history of the unsuccessful effort to amend Article V of the Texas Constitution in 1974 and the successful amendment in 1980 that gave Courts of Appeals jurisdiction in criminal appeals. He wrote:

> The constitutional amendment of 1980 is regarded by many as the most important change in our judicial structure in more than one hundred years.
> * * *
> In October of 1971, Chief Justice Calvert formed a group to rewrite Article V.[20] This "Calvert Task Force" released a tentative draft in May 1972.[21] Among other things, it proposed a unified court system: merging the Court of Criminal Appeals with the Texas Supreme Court to form one supreme court and giving criminal jurisdiction to the existing courts of civil appeals.[22] Justice Tom Reavley set out a tentative draft of the revision of [p. 380] Article V in the Texas Tech Law Review.[23] In it, he wrote that there were eight citizens' conferences throughout the state to explain the proposals in 1972.[24] Those groups included the Houston Citizens' Conference.[25]
>
> Those early efforts did not bring about changes, but they were part of the impetus for changing the entire Texas Constitution, including a new Article V.[26] Efforts to improve the judicial article became bound up in efforts to adopt a whole new constitution.
>
> A constitutional amendment to create a Constitutional Revision Commission was adopted in 1972.[27] The Commission's work would be submitted to the legislature to adopt or reject.[28] The legislature rejected the proposed constitution and formed itself into a Constitutional Convention.[29] However, it adopted parts of the work of the Revision Commission, including most of the provisions of the Commission's draft of a new Article V.[30] This proposed constitution was submitted to the people in 1974, but the voters rejected it and the new Article V.[31]
> * * *
> In September of 1972, an important conference on judicial improvement was held in Houston.[41] The conference was sponsored by the American Bar Association, the American Judicature Society, the National College of the State Judiciary, and the Houston Bar Association.[42]
> * * *
> Chief Justice Robert Calvert and I both spoke to give our views.[44] Chief Justice Calvert had announced his retirement, and I had been elected to succeed him.[45] I introduced the keynote speaker, Justice Tom Clark of the Supreme Court of the United States.[46] Among other things, Justice Clark urged that the courts of civil appeals be given criminal jurisdiction so that Texas would have integrated intermediate courts, as did the federal system and "as do other intermediate appellate courts throughout the United States, with the exception of . . . [Texas,] Tennessee and Oklahoma."[47]
>
> Justice Calvert spoke and made the same recommendations.[48] He also urged that the Texas Court of Criminal Appeals be abolished and that its then five members be merged into the Texas Supreme Court, thereby granting both criminal and civil jurisdiction to the Texas Supreme Court.[49]

18. Advocacy in the Supreme Court. Greenhill, *Advocacy in the Texas Supreme Court*, 44 TEX. B.J. 624 (1981). Greenhill wrote: "Advocacy, oral or written, in any court is important. The effectiveness of advocacy in appellate courts varies from court to court. Preparation, it seems to me, is the most important element for any appellate argument. The written brief also deserves careful preparation. This article is limited to suggestions which, it seems to me, will be most helpful in presenting a case to our court. They are those ideas which, after 23 years on the court and an earlier term as a law clerk to the court, seem most important and persuasive." Greenhill talked about the motion for rehearing in the court of civil appeals, saying: "One caveat before getting to our court, and that is about our jurisdiction if the court of civil appeals has granted rehearing or changed its judgment. If the court of civil appeals grants a motion for rehearing, and changes its judgment, you must file another motion for rehearing and set out your points. And that motion must be overruled before we have jurisdiction. This is the teaching of an opinion of our court called *Oil Field Haulers Ass'n v. Railroad Commission* by Judge Calvert.[1] That is a complicated opinion, and I will not take the time to go into it. The bottom line is that if the court of civil appeals changes its judgment in any respect on rehearing, do yourself a favor and study *Oil Field Haulers*." Greenhill then wrote about the writ of error, mentions points and cross-points, says "put your best point first," and "always file an answer to applications and motions." p. 626. He discussed internal procedure, complete briefs, action on the application, general observations, appendix, presubmission brief, argument, use of time, "call the parties by name," "do not read," demonstrative evidence, amicus curiae, post-submission briefs, motion for rehearing, reply to motion, Ruls 21c, habeas corpus. He advised: "We are persuaded more by simplicity than by oratory, written or oral. I used to make a habit of asking my wife, not a lawyer, to read my brief. If she couldn't understand it, then I'd try again." p. 627.

19. Oral History Interview. Bill Brands <https://www.houseofrussell.com/legalhistory/sweatt/docs/goh.html>.

III. POPE. Andrew Jackson "Jack" Pope was an Associate Justice of the Texas Supreme Court, 1965-82, and Chief Justice, 1982-85.



A. TIMELINE.

1913 Born in Abilene
1934 B.A. Degree Abilene Christian College (served as Student's Ass'n President)
1937 L.L.B. Univ. of Texas School of Law; licensed as attorney; went to work for uncle in Corpus Christi
1938 married Allene Nichols
1944 Joined Naval Reserve
1946 Appointed to 94th District Court (unexpired term)
1947 Reappointed to 94th District Court (4-yr term)
1950 Appointed to Fourth Court of Appeals in San Antonio
1961 Opinion in *State v. Valmont Plantations*
1963 Elected Associate Justice of Texas Supreme Court
1982 Appointed Chief Justice, Texas Supreme Court
1985 Retired
1989 Along with Chief Justice Calvert & Chief Justice Greenhill, founded Texas Center for Legal Ethics
2009 Received First Chief Justice Jack Pope Professional Award fromTexas Center for Legal Ethics
2013 Died at age 103

B. SHORT BIOGRAPHIES AND MEMORIES.

December 1973 Texas Bar Journal 1139

Introducing Some Judges

The series of biographies of judges of the Supreme Court and Court of Criminal Appeals which began in September continues on these pages.

This month, sketches are of Associate Justices Jack Pope, Tom Reavley III, and W. Sears McGee of the Supreme Court, and Judges Truman Roberts and Wendell A. Odom of the Court of Criminal Appeals.

Jack Pope

The professional life of Jack Pope, associate justice of the Supreme Court, has included 26 years on the judicial bench.

Gov. Coke Stevenson appointed him to his first judicial position on the bench of the 94th District in 1946. A 1950 appointment by Gov. Allan Shivers placed him on the Fourth Court of Civil Appeals in San Antonio. He served there until 1965, when he became an associate justice of the Supreme Court.

When Judge Pope was sworn in to assume his position on the Supreme Court, Judge W. O. Murray, who was then chief justice of the San Antonio Court of Civil Appeals, said, "He is eminently qualified by education, by natural ability, by sterling character, by experience as a lawyer, as a trial judge, as an appellate judge, and as a legal writer to discharge fully the extremely important duties of a justice of the Supreme Court of Texas."

Born April 18, 1913 in Abilene, Judge Pope as ayoungster was a student at Central Ward School and at Abilene High. He received his B.A. degree from Abilene Christian College in 1934. Law school at the University of Texas followed his years at ACC. He received his law degree at Austin in 1937, moved to Corpus Christi and married Allene Nichols. They have two sons, Jackson and Allen.

Judge Pope practiced law in Corpus Christi from 1937 until 1946. His professional life was interrupted for two years during that time, when he served with the Navy during World War II.

Judge Pope's professional service includes the following: president of Nueces County Bar, 1946; chairman of State Bar Citizenship Committee, 1952-53; chairman of State Bar Committee on Rules and Statutes, 1959-60; Committee on Administration of Justice, 1958-64.

He is a member of the Nueces County, San Antonio, Hill Country, Travis County, and American Bar Associations; the American Judicature Society, the Law-Science Institute, and the American Society for Legal History.

He served as president of the Metropolitan Y.M.C.A. in San Antonio and holds the Silver Beaver Award from the Alamo Council Boy Scouts of America. He is the recipient of the Rosewood Gavel Award of St. Mary's School of Law.

Judge Pope has maintained a special interest in the jury as an institution. The Jury Handbook was first prepared for the State Bar in 1953 when he served as co-chairman of the Citizenship Committee. It has been used by a number of counties for distribution to jurors continuously since that time. He has authored a number of law review articles on the history of the jury, trials by jury, and the conduct of juries.

The legal articles written by Judge Pope are prolific. They have appeared in the American Bar Journal, Texas Bar Journal, Virginia Law Weekly, Barrister News, Case and Comment, Texas Law Review, Appellate Procedure in Texas, Baylor Law Review and Southwestern Law Journal.

In 1964, Judge Pope received the "Outstanding Alumnus" award from Abilene Christian College. He is presently a member of the Board of Trustees of Abilene Christian College.

1. Oral History Interview With the Honorable Jack Pope. The following is excerpted from Texas Supreme Court Trilogy, Volume 3; Oral History lnterview With the Honorable Jack Pope © 1998, Jamail Center for Legal Research School of Law, The University of Texas at Austin.

Q. Do you recall what your thoughts were on heading to Corpus, as you were about to begin the practice of law?

A. Oh, yes, very much so. I was frightened. I was ready. I had complete confidence that I was going to make it as a trial lawyer. Here again, I do not think that the mind or concept of young lawyers back at that period was in terms of what kind of a lawyer are you going to be, what will you specialize in. Then more than it is now, law was law. I went there with the concept that if a client needed assistance on the criminal side of the docket, a lawyer gave it to him. I(it was a corporate matter, the lawyer gave it to him. If it was a personal injury or an oil and gas matter, the lawyer is supposed to research it and provide that service co the client. I never thought much in terms of being a trial lawyer or an office lawyer. Whatever the client needed, that is what the lawyer was expected either to give to him off the cop of his head or research, and pro· vide it for him. The concept is entirely changed now.

I have, since that time, seen this same experience on the part of a score or more of people who had the opportunity to be a judge, and the decision is always the same. Once it sinks into you– "You, a judge! A district judge?"– I was then 33 years old – the next step is, "If I don't like it, I don't have to run for office. If I don't like it, I can resign. So why not take it on, and give it a try?' And without going through all of the ramifications of the thing, that was the decision that Allene and I came to. But it was not that easy.

Q. Well, what were your first thoughts then on taking the bench?

A. Well, I was awed. I made a resolve that I was going to prove to my critics that I was a patient judge, that I was not going to take cases away from the lawyers and try them, that I was going to be attentive, and that I was going to study the cases that I worked on. At heart, I'm a book man. I love the books. I think I ran a good court. I was told that I ran a good court. The press was good to me because I ran a court.

Q. You said that people said that you ran a good court. Could you be a little bit more explicit about what you understood by running a good court?

A. Yes. I knew how to try a case, and I knew that it wasn't necessary for a lawyer to romance a jury for an hour and a half or two hours. And when the panel would come in, I would tell the lawyers to cut their questions brief and don't repeat the same questions. Ask some general questions, and then go take one juror at a time. It expedited things. The taking of evidence, the examination and cross-examination of witnesses–I knew my rules of evidence. l knew them from study at the University of Texas, l knew because of my intensive review, and I knew from my experience as a lawyer. Many lawyers come into court rarely, and they are not on top of those rules. I was reading the advance sheets to stay abreast of things as they developed.

Q. Did you have any well-defined judicial philosophy when you entered the court?

A. I suppose that I did basically, because once I became a judge, I looked for a place where I could learn the skills of being a judge. There was no place in Texas where anyone could go to attend an institute, or even hear a lecture on what is a judge, what does a judge do, how do you impanel the jury, where do you find the oaths that you administer to the grand jury, to the jury panel–anything. There was not, so far as l remember, anywhere in the United States at that time that a judge could go to school to learn how to be a better judge. This, l think, is one of the gigantic steps that we have made in the progress of the law. Now, there are many schools, intensive training for weeks and months, so that a judge can learn the skills of being a judge.

I took office, and knew that the following week, I would have a jury panel. I had appeared before many juries. But, to get them in place, to get them–32 or more that would be selected for lawyers to question– all of those things took administration, and I had to go to the statutes, and mentally run through all of those steps, so that one would move and move and move. Now to answer your question more directly, I mapped out a curriculum of self-study for myself. I started putting together a black notebook–I've still got that notebook right over here, and that notebook stayed with me till the day I retired from the Supreme Court, with my adding notes. My theory was that once you

have looked up this material, write it down and index it, so that you don't have to look it up again and again and again. So I started putting on paper things that the jury should be charged about, the way you do it–I would carefully write these words.

Then, I wanted to learn some principles of being a judge, and I went to some biographies-the biography of Oliver Wendell Holmes, of Brandeis, Cardozo, those primarily– and Cardozo was the one that I think I learned the most from, because he had written two books on what does a judge do when he takes off his coat and works in his shirtsleeves? What are the things that go through his mind? And Cardozo's two books I really parsed, and made a notebook of them, and I still have that notebook. I would say that those three–I read the book of Judges in the Bible, and I read legal history–back then, I had more freedom, after I would leave the court, than I even have right now. I made the resolve that I would read one chapter of something every night before I went to bed. I kept that up for about 10 or 12 years, and that self-education got me up to a level that was my highest. I reached my highest stage of education, really, about 1956 or '57, and then, outside pressures started moving in, you know, and it kind of interrupted that. I read philosophers. I read no fiction-I never had time for fiction. I read sociology. I was trying to immerse myself, and to develop a judicial mind. Well, by this time, it didn't take too long for me to sense that this business of being patient wasn't all that hard. But I had to educate myself as a judge.

A. Now when you entered the Supreme Court in 1965, you were about halfway through what wouJd be your entire judicial career. Can you describe some of the changes that you had noticed in the law in Texas, up to that point?

A. But on the law–I came in there right at the edge. In 1937, I began the practice of law. At that time, there was a great movement to make what was then regarded as a tremendous reform in Texas law–and that was for the courts to have rule-making power. The one who is credited as the moving force is Judge James P. Alexander. He was a great reformer. Actually, there were others, who probably had as great a force–and one is Judge Stayton, who was a law professor at the University and taught me every procedure course that you could have. He taught me criminal procedure, and one year of civil procedure, and appellate procedure. He was a great scholar and a great teacher, had a great impact upon me, and I think there was my source for my ongoing interest in procedure. I'm still working with procedure, and I will meet with the pattern jury charge on Friday and Saturday of this week. We are rewriting the book on pattern jury charges.

But the Legislature, in 1939, had given to the Supreme Court of Texas rule-making power which meant that the Legislature would no longer write the rules on how to plead a case, how to submit a charge to the jury–all of the some 800 rules of procedure–but the Supreme Court would study and promulgate these rules. In 1941, those rules became effective. Prior to the time those rules were effective, there were some institutes conduced over the state of Texas, which itself was an innovation.

A. Looking back, what do you see to be the major contribution that you made to the Texas judicial system during your years on the court? Or perhaps put another way, what particular qualities do you think you brought to the court?

A. That I have provided the industry that was needed for each task that was set before me. I, in my own mind, have always been able to sleep well, and once I had decided a case, I did not look back. I went to the next case. And I don't think that I was motivated by anything other than the right and wrong of the law as I saw it. So, really I've had a story-book life. And, if I've had any success, it wasn't from any particular gifts. It was from industry and hard work. And I have been able to maintain that zest for the job, and did, right up to the very end. And I still have a zest for it, though I am taking things much, much easier–I'm reading some liter· ature and some history and–I never was much on fiction–some nonfiction materials that I really got away from during my tenure on the Texas Supreme Court, because of the pressures of the cases.

So anyway, that's my evaluation of my career, and but for an understanding wife, it would never have happened, because she's always permitted me the privacy of this library and has respected it. In fact, if at nine o'clock I'm in reading or listening to television or something, she would just ask me, "Aren't you going to work tonight?"

2. **Knights of Pythias.** The Knights of Pythias of Texas website has this biography:

Jack Pope, son of Dr. A.J. and Ruth Taylor Pope, was born in Abilene, Texas April 18, 1913. He died in Austin, Texas on February 25, 2017. He graduated from public schools in Abilene, earned a BA degree from Abilene Christian College in 1934 and a law degree from the University of Texas in 1937 after having been the editor of the Texas Law Review. While in Austin he met a recent graduate, Allene Nichols. They married June 11, 1938 and began a loving partnership that lasted 66 years.

Jack and Allene moved to Corpus Christi where he started practicing law with his uncle, W.E. (Uncle Elmer) Pope. He volunteered to fight in World War II like so many patriots. He was 32 with a two year old and another baby on the way when he became a Navy sailor. The timing was a double awful if you were hedging on your safety. The Axis before D Day had the momentum in Europe and the fighting in the Pacific was escalating. Jack and Allene expected he would ship out with his fellow sailors after boot camp to the Pacific but Jack was ordered to Washington D.C. to decode enemy telecommunications as a cryptologist. When the war ended he was back in

Corpus Christi again. Governor Coke Stevenson appointed him Judge of the 94th District Court. Then in 1960, Jack was elected to the Fourth Court of Civil Appeals in San Antonio and again elected in 1964 to the Texas Supreme Court. Governor Bill Clements appointed Judge Jack Pope in 1982 as Chief Justice of the Supreme Court. His 38 year service is believed to be the longest service of any Judge who has served on Texas' highest court. There he worked for law reform, initiated new procedures for handling grievances against attorneys, changed venue rules, in many instances, two trials for one case and promulgated the Texas Rule of Judicial Education. He got computer technology in all state appellate courts, wrote the first "Jury Handbook" which is given to those called to jury duty, sponsored the creation of the State Law Library, helped draft the first Judicial Code of Conduct and became a charter member of the Texas Center of Legal Ethics. As Chief Justice, he and others established a program (IOLTA) which provides legal service to over 100,000 poor families a year in civil matters like wrongful foreclosures, domestic violence and veterans who have not received their earned benefits. The money comes from Texas lawyers and not from taxes. Governor Rick Perry in 2012 recognized him and the IOLTA program with the signing of the "Chief Justice Jack Pope Act." A testimony to dedication and hard work he wrote 1032 opinions. No judge in Texas history ever wrote this much law.

Legal scholars recognize Jack as the expert of his times on matters of water laws of Texas and southwestern states where Spanish, Mexican, and English understanding of water rights sometimes differ yet still must be considered. James Michener in his book "Texas" felt that water and those who controlled it had a greater influence on Texas history than oil or longhorns. While he wrote "Texas" he and his secretary twice went to the Judge's home to discuss these water matters and the law. A sidebar to their meetings in Jack's library, Michener allowed, "authors love names like Jack Pope....sharp....crisp....easy to remember." True to his words, James Michener in his next book "Space" introduced his fictional test pilot John Pope.

Jack was made Outstanding Alumnus at Abilene Christian University as well as The University of Texas School of Law.

Joys and concerns of the family were always uppermost and a good example was when his father-in-law had his first stroke. Jack brought Allene's parents to San Antonio to care for them and to make it work he built on to his house. Grandpa Nichols could not speak but on so many occasions he thanked Jack with a smile and tears.

He was as comfortable outdoors as he was lecturing in the summers at NYU School of Law. His first visit to Austin was when he was eleven and he was with his Scout troop 2 camping on the banks of Barton Springs. When he was older and still the camper at heart Jack would amaze everyone with more rope tricks than Will Rogers. He played a mean harmonica at night and then in the morning he could awake you with a bugle call. The Longhorns filled him with happy memories like the TCU game in the 60's when his shoes froze to the floor at Memorial Stadium. As hard as he worked as a judge, he never forgot family. The family visited all the national parks but three by 1960. Before there was the Hike and Bike Trail around Zilker Park, Jack and Allene jogged there often. There is a tree in Zilker Park he would point to and say, "I got my first kiss from Allene under that tree." That would have been in 1938. He was still walking by that tree in 2013 at age 100.

After Jack retired he developed the Pope Fellows at ACU, which give scholarships to students interested in a career in public service. In 2010 the State Bar of Texas awarded him the Lifetime Achievement Award. On his 100th birthday all the living Presidents and their wives sent letters thanking the Judge for his life of service and one of giving.

His ancestors received land grants in Atascosito (Liberty) from Mexico before there was a Texas and some are named on the Honor Roll at the Battle of San Jacinto. He edited a family history "John Berry and His Family."

Jack was an incorporator of the Supreme Court Historical Society. The Freedom Foundation of Valley Forge gave him their George Washington Award. The Supreme Court Society published "Common Law Judge" in 2014. The book is a collection of essays, opinions and a biography of this uncommon man.

Judge Pope is survived by two sons, A.J. Pope III and his wife, Carla, of The Woodlands, Texas; Allen Pope and his wife Karen of Castle Pines, Colorado. He had three grandchildren, Drew Pope, Ryan Pope and wife Erin and Billie Pope Locke and husband Jeff Locke and four great-grandchildren, Dylan and Peyton Locke, Carinn and Caitlin Pope; and many nieces and nephews.

The family would like to thank his friends, neighbors and members of his church, University Church of Christ. They also would like to remember his long-time secretary, the late Peggy Littlefield. A special thanks to his caregivers and to their supervisor Lauren Barrett. Jack affectionately referred to his team of caregivers as the "Little United Nations" and even wrote a book about them and their ideas on caring for the elderly.

Pope was a member of Miramar Lodge # 135 and life member of Midlothian Lodge # 50. Jack Pope served as Grand Chancellor of Texas from 1947-1948.[16]

3. 100th Birthday. The Texas Supreme Court issued the following advisory that the Texas House would honor Chief Justice Pope on his 100th Birthday:

Pope's 38-year tenure as a Texas jurist is notable for his lasting imprint on state water rights, for accomplishing formal judicial education for Texas judges, for advocating a voluntary judicial-ethics code when judges had none and for succeeding in making that code mandatory and enforceable, and for streamlining and simplifying how cases are pleaded and tried.

Chief Justice Pope's career as a judge began with his appointment to a district court bench in Nueces County in 1946, at 33 then the youngest district judge in the state. When voters elected him to the San Antonio Court of Civil Appeals in 1950 he was the first justice on that court from south of San Antonio. He won election to the Texas Supreme Court in 1964 and retired in 1985 after slightly more than two years as chief justice.[17]

4. Texas Supreme Court Advisory. The Texas Supreme Court issued an advisory - Former Chief Justice Jack Pope, 1913-2017:

Retired Texas Chief Justice Jack Pope, who helped establish formal judicial education for Texas judges, fought for a voluntary judicial-ethics code when judges had none and fought again to make that code mandatory and enforceable, died at his Austin home Saturday at 103. He served Texas for 39 years as a district court judge, court of appeals justice and on the Supreme Court, the last two as chief justice.

His judicial tenure, as a whole, was the longest of any Texas Supreme Court justice.

Services will be at 1 p.m. Friday, March 3, at the University Avenue Church of Christ in Austin. Burial will follow at the Texas State Cemetery.

"Chief Justice Jack Pope was a judicial icon," Chief Justice Nathan L. Hecht said. "His hard work, scholarship, common sense, humor, and integrity are legendary. No Texas judge has ever been more committed to serving the rule of law and the cause of justice. He was my mentor, role model, counselor, and most especially, my friend. Texas has lost a great, great man."

As a court of appeals justice, Pope's reassessment of water rights conveyed by Spanish and Mexican land grants changed Texas water law forever. As chief justice he forged a way to guarantee income to finance legal assistance for the poor. Concerned with double litigation in the same case, he won legislative support for statutory changes to thwart "forum shopping" for favorable judges.

"I'm a common-law lawyer," he proudly would proclaim, his right hand jabbing at the air, his voice emphatic in the way Jack Pope's could get emphatic when his passions ran high about the law and judging. "And I was a common-law judge."

The common law is the wisdom tested by the ages, he believed, but for him it was more than that. "This is history and it's why the poor man, or the black man, is treated the same as all others," he said.

By the time he retired in 1985, he wrote 1,032 opinions – a record then in Texas, by his reckoning. Two of them are considered among the most-important opinions in the state's history.

"Common-law opinions," he once said, proudly.

With his chiseled features and shock of white hair, Hollywood could not have cast a better judge.

Two sons survive him, Andrew Jackson Pope III and Walter Allen Pope, and three grandchildren.

His wife of 66 years, Allene Nichols Pope, died in 2004. On the back of her headstone at the Texas State Cemetery he had inscribed: "Allene is the difference between deeds and wishes, finishing and quitting, success and failure."

"He devoted his life not only to the efficient administration of justice, but also to ensuring that justice is available to all," former Chief Justice Wallace B. Jefferson said. "Jack Pope will be remembered as second to none in the annals of Texas law."

One of his law clerks, former state Rep. Dan Branch of Highland Park, used the analogy of the old Olympics figure-skating scoring method to congeal the Pope legend. "Whether judging him as a man or a jurist or legal scholar or writer," Branch said, "whatever aspect of his life, I'd hold up a 10."

"Judge Pope was such a legend in the law, such a respected jurist," said another law clerk, Gwendolyn M. Bookman, a political science professor at Bennett College in North Carolina, who believes she was the first African-American woman to clerk for the Court. "Certainly working for and with him was the greatest honor of my career."

The sweep of his reforms and his opinions changed Texas law forever, said Austin attorney Steve McConnico, also a former law clerk. "What he did for trial practitioners, there's no way to measure it. …

“He really studied the law. If Roscoe Pound wrote something, he read it. If Cardozo wrote something, he read it.”

Senior U.S. Circuit Judge Thomas Reavley, a former Texas Supreme Court justice, did not hesitate to name the best jurist among hundreds with whom he served in a judicial career extending six decades, including judges on all but one of the 11 federal regional circuits.

“Jack Pope,” he said.

Andrew Jackson Pope Jr. was born to Dr. A.J. and Ruth Pope in Abilene in 1913, the year Henry Ford revolutionized automobile manufacturing with the assembly line and the year road-builders completed the first coast-to-coast paved highway.

Pope graduated in 1934 from what was then Abilene Christian College. In a sense, he never left his hometown, serving for years as a trustee on the Abilene Christian University board. Most of his library and papers were donated to the university.

He earned his law degree from the University of Texas in 1938 and began law practice in Corpus Christi under an uncle’s tutelage. The library table that was his first desk in his uncle’s office sat as the centerpiece of his Austin study.

On one corner rested the standup Royal typewriter Pope used as a judge to collect and express his thoughts, then, in his retirement, his memoirs, a family history and a tribute he published to honor a coterie of dedicated care-givers he depended on in his later years.

Following a stint in the Navy in World War II, Pope took his first bench in Corpus Christi in 1946, on the 94th District Court, and served for four years.

In 1951 he left for the San Antonio Court of Appeals, having beaten three contenders without a runoff in the all-important Democratic primary, becoming, he said, the first justice on the court from south of San Antonio. He served on that court for 14 years until his election to the Supreme Court of Texas in 1964.

A lifelong Democrat, he won his seat on the Court also in a three-way primary without a runoff when Texas was essentially a one-party state. He never had opposition for re-election to the court of appeals or Supreme Court.

But his appointment as chief justice to succeed Joe Greenhill might have been his greatest political triumph. By his recollection, Gov. Bill Clements, the first Republican governor since Reconstruction and a lame duck defeated in late 1982, could not find a chief justice who would survive the blackballing by which senators could kill an objectionable appointment from their home districts.

Greenhill urged Clements to appoint Pope. But 14 Democratic senators pledged to block any appointment Clements made, essentially dooming it in the Senate. They argued that such an important appointment should be saved for incoming Gov. Mark White, the Democrat who beat Clements.

White gave unqualified support to Pope.

So Clements picked Pope, who had voted for White. Despite the opposition, Pope took the oath, then demanded that he get the prerogative of giving the State of the Judiciary speech.

In it Pope argued for reforms he had championed for years. He urged nonpartisan judicial elections and, to promote equal access to justice for the poor, approval of the so-called IOLTA program to pay for civil legal help for the poor with interest on lawyers’ common client-trust accounts. He argued for overhaul of what he considered Texas’ wasteful venue statutes that almost guaranteed two trials – one on the venue question and one on the merits.

In a chapter for his memoirs he described resisting offers for a deal to win the Senate’s approval. Pope had no plans to run for the chief justice position because he would turn 75, the mandatory retirement age for Texas judges, in the middle of another term. But he said senators wanted him to promise to resign after the Senate approved him to allow White’s appointee as chief justice to run as an incumbent in the next election.

Pope said no. Such a deal would be unethical, even illegal, he said. “If the public sees that I will make a deal to get a job and to keep a job,” he later wrote, “then maybe they’ll think I’ll make deals on other matters.”

Branch chuckled at the thought. “How could you complain about Jack Pope? It was brilliance by Clements. He picked someone who was unassailable.”

Pope’s force for judicial education began as soon as he donned his robe in Nueces County. As a new judge he set a goal.

"At that point," he recalled, "I decided I was going to read legal literature, one chapter every night, seven nights a week, for 12 to 15 years."

Years later, many of those books and more lined the shelves of his home library in Austin. Talking about his life, Jack Pope pulled a book from a section of library, a copy of Minimum Standards of Judicial Administration.

"This is my bible," he said.

It could have been instead one of four volumes of Jurisprudence by the great legal scholar Roscoe Pound or a copy of the Magna Carta story or one of three volumes of Law and Society. Or any of the others among hundreds of books packed floor to ceiling with biographies and treatises in a garage-sized library at his home in the hills above Tom Miller Dam.

"These," he said of the books lining his walls, "are my friends."

When he was on the appeals court, he wrote New York University Law School to ask whether it offered judicial education for intermediate-appellate judges. NYU had the only judicial-education program in the country, but limited it to state supreme court jurists.

Finding nothing, he worked for years for judicial education, assisted in founding the Texas Center for the Judiciary, a judicial-education institute, and signed the order mandating education for Texas judges.

But judicial education was only one of several judicial-administrative reforms he envisioned. In 1962, when he was on the appeals court, a State Bar committee he chaired drafted the first voluntary judicial-ethics code. In 1972, when he was on the Supreme Court, he drafted the first mandatory judicial conduct code for Texas judges.

Perhaps his greatest contribution to Texas law, however, was *State v. Valmont Plantations*, decided in 1961 while he was on the San Antonio Court of Appeals. In Valmont, Pope reevaluated a landmark water-rights case from three and a half decades before, found it laden with dicta and without analysis of Mexican and Spanish land grants even though those land grants should have been critical to the decision.

So Pope cast aside the notion that he was abandoning settled law, methodically demonstrating its fallacies. His Valmont decision was a proud legacy because the Texas Supreme Court adopted his opinion as its own, a rare move.

Valmont reassessed water rights conveyed by Spanish and Mexican land grants. It held, in a case by landowners along the Rio Grande suing for irrigation water from the new Falcon Reservoir on the Texas-Mexico border, that irrigation-water rights in the Lower Rio Grande Valley were not included in Mexican and Spanish land grants unless expressly mentioned in the grants.

When historical novelist James Michener researched water and its bearing on Texas history for his novel Texas, Branch recalled, Michener called on Pope to explain it.

"His researchers had figured out that he was water law," Branch said.

In 1986, University of Texas law Professor Hans Baade honored Chief Justice Pope after his retirement with a law-review article titled, "The Historical Background of Texas Water Law – A Tribute to Jack Pope."

Abilene Christian, Pepperdine, Oklahoma Christian and St. Mary's universities awarded him honorary degrees.

In 2009 the Texas Center for Ethics and Professionalism presented its first Jack Pope Professionalism Award to Pope. In 2010 the State Bar's Judicial Section honored him with a lifetime achievement award.

"Just about the time I was getting the hang of being a judge," he said once, "I had to retire."

In a quarter-century of retirement he kept active, studying and writing about the law and his family history, preparing books and papers for donation.

His was a familiar figure as he walked through his West Austin neighborhood.

At 96, determined to walk 9.6 miles for his birthday, an Austin television station featured him preparing by stretching lengthwise across his legs to touch his toes. High school athletes would have been envious.

McConnico perhaps put it best.

"He was a man for all seasons."[18]

5. Obituary. The following obituary is from the Weed-Corley-Fish Funeral Home:

Obituary for Judge Andrew Jackson "Jack" Pope
April 18, 1913 - February 25, 2017
Austin, Texas | Age 103

Texas Supreme Court Chief Justice (Ret.)

Jack Pope, son of Dr. A.J. and Ruth Taylor Pope, was born in Abilene, Texas April 18, 1913. He died in Austin, Texas on February 25, 2017. He graduated from public schools in Abilene, earned a BA degree from Abilene Christian College in 1934 and a law degree from the University of Texas in 1937 after having been the editor of the Texas Law Review. While in Austin he met a recent graduate, Allene Nichols. They married June 11, 1938 and began a loving partnership that lasted 66 years.

Jack and Allene moved to Corpus Christi where he started practicing law with his uncle, W.E. (Uncle Elmer) Pope. He volunteered to fight in World War II like so many patriots. He was 32 with a two year old and another baby on the way when he became a Navy sailor. The timing was a double awful if you were hedging on your safety. The Axis before D Day had the momentum in Europe and the fighting in the Pacific was escalating. Jack and Allene expected he would ship out with his fellow sailors after boot camp to the Pacific but Jack was ordered to Washington D.C. to decode enemy telecommunications as a cryptologist. When the war ended he was back in Corpus Christi again. Governor Coke Stevenson appointed him Judge of the 94th District Court. Then in 1960, Jack was elected to the Fourth Court of Civil Appeals in San Antonio and again elected in 1964 to the Texas Supreme Court. Governor Bill Clements appointed Judge Jack Pope in 1982 as Chief Justice of the Supreme Court. His 38 year service is believed to be the longest service of any Judge who has served on Texas' highest court. There he worked for law reform, initiated new procedures for handling grievances against attorneys, changed venue rules, in many instances, two trials for one case and promulgated the Texas Rule of Judicial Education. He got computer technology in all state appellate courts, wrote the first "Jury Handbook" which is given to those called to jury duty, sponsored the creation of the State Law Library, helped draft the first Judicial Code of Conduct and became a charter member of the Texas Center of Legal Ethics. As Chief Justice, he and others established a program (IOLTA) which provides legal service to over 100,000 poor families a year in civil matters like wrongful foreclosures, domestic violence and veterans who have not received their earned benefits. The money comes from Texas lawyers and not from taxes. Governor Rick Perry in 2012 recognized him and the IOLTA program with the signing of the "Chief Justice Jack Pope Act." A testimony to dedication and hard work he wrote 1032 opinions. No judge in Texas history ever wrote this much law.

Legal scholars recognize Jack as the expert of his times on matters of water laws of Texas and southwestern states where Spanish, Mexican, and English understanding of water rights sometimes differ yet still must be considered. James Michener in his book "Texas" felt that water and those who controlled it had a greater influence on Texas history than oil or longhorns. While he wrote "Texas" he and his secretary twice went to the Judge's home to discuss these water matters and the law. A sidebar to their meetings in Jack's library, Michener allowed, "authors love names like Jack Pope....sharp....crisp....easy to remember." True to his words, James Michener in his next book "Space" introduced his fictional test pilot John Pope.

Jack was made Outstanding Alumnus at Abilene Christian University as well as The University of Texas School of Law.

Joys and concerns of the family were always uppermost and a good example was when his father-in-law had his first stroke. Jack brought Allene's parents to San Antonio to care for them and to make it work he built on to his house. Grandpa Nichols could not speak but on so many occasions he thanked Jack with a smile and tears.

He was as comfortable outdoors as he was lecturing in the summers at NYU School of Law. His first visit to Austin was when he was eleven and he was with his Scout troop 2 camping on the banks of Barton Springs. When he was older and still the camper at heart Jack would amaze everyone with more rope tricks than Will Rogers. He played a mean harmonica at night and then in the morning he could awake you with a bugle call. The Longhorns filled him with happy memories like the TCU game in the 60's when his shoes froze to the floor at Memorial Stadium. As hard as he worked as a judge, he never forgot family. The family visited all the national parks but three by 1960. Before there was the Hike and Bike Trail around Zilker Park, Jack and Allene jogged there often. There is a tree in Zilker Park he would point to and say, "I got my first kiss from Allene under that tree." That would have been in 1938. He was still walking by that tree in 2013 at age 100.

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birthday all the living Presidents and their wives sent letters thanking the Judge for his life of service and one of giving.

His ancestors received land grants in Atascosito (Liberty) from Mexico before there was a Texas and some are named on the Honor Roll at the Battle of San Jacinto. He edited a family history "John Berry and His Family."

Jack was an incorporator of the Supreme Court Historical Society. The Freedom Foundation of Valley Forge gave him their George Washington Award. The Supreme Court Society published "Common Law Judge" in 2014. The book is a collection of essays, opinions and a biography of this uncommon man.

Judge Pope is survived by two sons, A.J. Pope III and his wife, Carla, of The Woodlands, Texas; Allen Pope and his wife Karen of Castle Pines, Colorado. He had three grandchildren, Drew Pope, Ryan Pope and wife Erin and Billie Pope Locke and husband Jeff Locke and four great-grandchildren, Dylan and Peyton Locke, Carinn and Caitlin Pope; and many nieces and nephews.

The family would like to thank his friends, neighbors and members of his church, University Church of Christ. They also would like to remember his long-time secretary, the late Peggy Littlefield. A special thanks to his caregivers and to their supervisor Lauren Barrett. Jack affectionately referred to his team of caregivers as the "Little United Nations" and even wrote a book about them and their ideas on caring for the elderly.

Justice Pope will lie in state on Thursday, March 2, 2017 from 9:00am to 5:00pm at Weed-Corley-Fish Funeral Home North location. Funeral services will be held on Friday, March 3, 2017 at 1:00pm at University Avenue Church of Christ, 1903 University Avenue, Austin, TX 78705. Interment will follow at the Texas State Cemetery. Parking for the church services will be in the ATT Center parking lot.[19]

6. Jack Pope Day. The Texas Supreme Court Proclaimed April 18 'Jack Poe Day' on his 103rd Birthday:

Jack Pope Day

Chief Justice Pope courageously and effectively championed equal access to justice for the poor, and his devotion to this noble cause continues to inspire.

Chief Justice Pope helped establish formal judicial education for Texas judges, fought for a voluntary judicial ethics code when judges had none, and fought again to make that code mandatory and enforceable.

Chief Justice Pope has shaped Texas law enormously, authoring some 1,032 judicial opinions before his retirement from the bench in 1985. He proudly claims the title common-law judge and continues to be held in the highest regard for his scholarly work.

Chief Justice Pope served more than 38 continuous years on the trial and appellate courts, the longest judicial tenure of any Texas Supreme Court Justice in history. He is the oldest living former state chief justice and research indicates, at 103, he is the oldest in history.

For his influence on the judicial system, and for his devotion to and improvement of the State of Texas for all Texans, the Supreme Court of Texas commends and honors its former Chief Justice, Jack Pope.

Therefore, the Supreme Court of Texas proclaims April 18, 2016, to be Chief Justice Jack Pope Day.[20]

7. Dean Castleberry's Dedication to Chief Justice Pope. James N. Castleberry, Jr., Dean of the School of Law at St. Mary's University wrote a dedication to Chief Justice Pope in 1985, upon his retirement. 16 ST. MARY'S L.J. 291 (1985).

A DEDICATION TO CHIEF JUSTICE JACK POPE

On the occasion of his retirement from the judiciary, St. Mary's University School of Law is proud to honor Chief Justice Jack Pope of the Supreme Court of Texas for his many years of outstanding and distinguished service to this school of law, to the State of Texas, and to the United States.

Chief Justice Pope received a Bachelor of Arts degree in 1934 from Abilene Christian University. He then entered the University of Texas School of Law where he achieved an outstanding academic record, served as a member of the editorial board of the Texas Law Review, and was graduated with a LL.B. degree in 1937. Thereafter, he entered private law practice in Corpus Christi from 1937 until 1946, except for two years of service in the United States Navy during World War II.

His outstanding and distinguished judicial career has extended for a continuous period of thirty-eight years, which is longer than any person presently serving in any elected district or state office in Texas. This service has touched all levels of the judiciary, beginning in 1946 as a District Judge of the 94th Judicial District Court in Corpus Christi, Texas. Four years later, he was elected Justice of the Court of Civil Appeals for the Fourth Supreme Judicial

District, San Antonio, Texas, and served as a member of that court until 1964. Chief Justice Pope has served with particular distinction as a Justice of the Supreme Court of Texas since 1965 and as Chief Justice for the past two years.

The outstanding judicial service of Chief Justice Jack Pope has extended beyond his service on the bench. He has unselfishly contributed a considerable amount of his time and expertise serving on the Committee on Family Law of the Judicial Section (1952-55), as a member of the Legislative Committee of the Judicial Section (1959), as Chairman of the Judicial Section (1961-62), as Chairman of the Appellate Judges Section (1972), and as Chairman of the Ethics Committee of the Judicial Section (1972-73).

Chief Justice Pope has been acclaimed nationally for his many outstanding contributions as a legal scholar through his authorship of more than one thousand published judicial opinions, as Chairman of the Board of Editors of the authoritative treatise on "Appellate [p.292] Procedure in Texas," and as author of more than seventy highly meritorious articles, many of which have been published in national legal periodicals, including the St. Mary's Law Journal. For three consecutive years (1979, 1980, and 1981), Chief Justice Pope was the recipient of the annual award of the Texas Bar Foundation for authorship of the most outstanding law review article of practical value to the practicing bar. His distinguished service to the practicing bar includes the Presidency of the Nueces County Bar (1946), Chairman of the Citizenship Committee of the State Bar of Texas (1952-53), Chairman of the State Bar Committee on Rules and Statutes (1959-60), Chairman of the State Law Library Board, and member of the Nueces County Bar, San Antonio Bar, Travis County Bar, Hill Country Bar, American Judicature Society, American Bar Association, Law-Science Institute, and American Society of Legal History.

In his civic work and service, Chief Justice Pope is an active member of the Church of Christ, having served as an Elder of the Jefferson congregation in San Antonio (1957-64), and is currently a member of University Church of Christ in Austin. His service as a Trustee of Abilene Christian University now exceeds twenty-nine years.

Chief Justice Pope has also made valuable contributions to legal education as a lecturer at the School of Law of St. Mary's University and as author of significant law school course material in the area of evidence and procedure. Justice Pope's outstanding contributions to the furthering of Christian higher education have been recognized by the conferral of an honorary Doctor of Law degree from his alma mater Abilene Christian University, Pepperdine University, Oklahoma Christian College, and St. Mary's University of San Antonio.

Additionally, Chief Justice Pope has been the recipient of several awards and honors. These include the Silver Beaver award from the Alamo Council of the Boy Scouts of America, honorary membership in Tarlton Inn of the International Legal Fraternity Phi Delta Phi, and the Rosewood Gavel Award (1962) and St. Thomas More Award (1982) presented by St. Mary's University School of Law.

We, as members of the legal profession, are deeply indebted to this distinguished Texan who has so generously contributed so much to the improvement of our profession and the legal process as a practicing lawyer, jurist, teacher, author, historian, and civic [p. 293] leader. His lifetime of conscientious devotion to the highest standards and ideals of the legal profession is a monumental example and source of inspiration to all of us. It is, therefore, our great privilege and honor to dedicate this issue of the St. Mary's Law Journal to Chief Justice Jack Pope.

8. Chief Justice Hecht. In October of 2012, Duke Law School published the following in The Storied Third Branch:

Supreme Court of Texas
Chief Justice Andrew Jackson "Jack" Pope, Jr.
"Always His Own Man"
By Nathan Hecht,
Justice, Supreme Court of Texas

"I'm going to retire, I want you to take my seat, and the Governor agrees," Texas district judge Allen Wood told the 33-year-old Corpus Christi lawyer. Jack Pope could hardly believe his ears, and his wife, Allene, was even more incredulous.

Jack had been born and raised in Abilene, and after graduating Abilene Christian College and the University of Texas Law School, had moved to Corpus Christi to practice law with his uncle. When news broke that he was being considered for the bench, opposition quickly arose: he was too young, lacking in judicial temperament, and could not be trusted to be impartial. But in young Jack's mind, all the criticism boiled down to one thing: "They can't control Pope." The Governor was unmoved, and weeks later, on December 16, 1946, Jack Pope was sworn in as the youngest district judge in Texas.

Though he knew he would be periodically summoned to account to the electorate in a State that has always, insistently, elected its judges, Judge Pope resolved to be a firm but fair judge, popular or not. He would let lawyers try their cases without judicial interference but would set reasonable time limits. He would end the usual practice of speaking objections before the jury but hear the lawyers out at the bench. He would strengthen himself against

the weakness to act non-judiciously by putting a sign on the bench that only he could see, but he could not miss, bearing one word: "Patience." And he would strive for a reputation of unimpeachable integrity.

After four years on the trial bench, Judge Pope decided to run for election to the intermediate appellate court. LBJ's 87-vote victory over Governor Coke Stevenson in the 1948 U.S. Senate Democratic primary had left the Party bitterly divided, and Judge Pope hoped for support from both factions. Rather than try to finagle it, Judge Pope called on the former Governor and on George Parr, the leader of the LBJ camp, laid everything on the table with both, and came away with commitments from both sides because he had been straightforward and — what surprised the two political titans — very judicial.

By 1964, when Justice Pope ran for election to the Supreme Court, he was well on his way to earning the reputation he had sought, and he won his first statewide election handily. During three six-year terms on the Court, he wrote more than 700 opinions and worked to modernize procedural rules. Short of stature, Justice Pope was a giant in the Texas judiciary. When I was appointed to the district court in 1981, a year younger than he had been when first appointed, Justice Pope was one of my heroes. His plainspoken manner, with wisdom and wit, made him an iconic figure. I remember telling him once, as a young judge, how important I thought it was for judges to work hard. "But remember," he said, "there's nothing worse than a bad judge who works hard." The twinkle in his eye reassured me that the comment had not been directed my way.

In 1982, Justice Pope, the longest-serving judge in Texas at the time, announced he would not run for re-election. But as it turned out, his service to that point had only been preparation for two challenges that lay ahead.

Months before Justice Pope's term ended, the Chief Justice retired. For Governor Clements at that time, the State's first Republican Governor since Reconstruction, who had appointed many judges already, this was his chance to make the most influential appointment of his administration. But when Governor White, a Democrat, was elected in November, Democratic senators, more than enough to block confirmation of appointees, publicly pledged to vote against confirmation of all lame-duck appointments, whoever they might be. In a stunning move, Governor Clements appointed Justice Pope, a lifelong Democrat, Chief Justice. So universally venerated was Justice Pope, he would not fall victim to partisan
politics.

Caught between their pledge and their admiration for Justice Pope, the senators looked for a way to save face. Would Chief Justice Pope agree not to run for election at the end of his term, they asked. In fact, Justice Pope, at 69, had been ready to retire. But no, he said. No deals. "The citizens of Texas do not want their Chief Justice, or any other judge, to make a deal to get a job," Chief Justice Pope told them. "If he'll make a deal to get a job, he may keep on making deals to keep that job." Replied the senators: we don't want to bust you, but we must have some assurance that a Clements appointee will be interim only. No, said the Chief. No deals. Jack Pope had not changed his attitude in thirty-six years, and he refused to budge. He could not, he said, forsake principle in front of the State's 2,700 judges, all of whom were watching to see what their leader would do. Jack Pope stood his ground. And he was confirmed.

With all this drama playing out in public, the new Chief Justice's inspiration to the judicial rank and file was palpable, not to mention his effect on the public. So when, just two years later, the Court's integrity was challenged nationally on Sixty Minutes, Chief Justice Pope, who had just stepped down, spoke frankly with Mike Wallace. Even as the Chief conceded on national television that problems existed, hardly a viewer could doubt the Chief's character and determination to see the problems resolved. The integrity a young Jack Pope had hoped to achieve among the several dozen lawyers of the Corpus Christi bar had been established, through a lifetime of service, in Texas and the nation.

Chief Justice Pope's example to many young judges, me included, was inspirational. So in 1988, when I decided to run for election to the Supreme Court, Chief Justice Pope, then retired, was one of the first people I called on. Without his encouragement, I doubt I would have made the race.

Lacking the Executive's enforcement power and the Legislature's power of appropriation, the Judiciary's power lies in its character, its commitment to reasoned justice and adherence to law, and its integrity. In retirement, Chief Justice Pope has continued to serve as an inspiration to the Texas judiciary and a public witness to its integrity. There is much wrong with electing judges. Much. But what good there is in it is exemplified in Jack Pope, who resolved as a young judge that while he would account to voters for his stewardship of judicial authority, he would not kowtow to them, to lawyers, to politicians, to lawmakers, or to anyone. In recognition of his service to the Third Branch, the Legislature last session resolved to extend him "profound appreciation for his exemplary public service."

Jack Pope served the people of Texas thirty-eight years as a judge, longer than anyone else in Texas history. Next year, on April 18, he will celebrate his 100th birthday.[21]

9. The End of the Non-Partisan Court. In 2015, William Chriss published in The Appellate Advocate, the State Bar of Texas Appellate Section's Report, an article entitled *Chief Justice Jack Pope and the End of the Non-partisan Court,*

1964-1985, 27 APP. ADVOC. 509 (2015). Chriss briefly recounts Pope's early life, then goes into detail about his judicial career, with great detail on Pope's elevation to Chief Justice. Chriss quotes Jack Pope: "I am a judge by circumstance. I became a district judge without seeking it, went on to serve more than thirty-eight consecutive years on the trial court, the intermediate court, and the court of last resort, a longer period than any other person who served on the Supreme Court. I was appointed for short-term periods [p. 527] by three Democratic governors and one Republican. My name was on the ballot fourteen times, all but three of them without opposition. I was too young to be a judge in the beginning; too old to comply with the retirement law at the end. After thirtyeight years of judicial service and (just) when I was getting the hang of being a judge, I had to retire."

10. William Chriss's Tribute. William J. Chriss, *Lessons from the Life and Career of Chief Justice Jack Pope*, 1913-2017, 30 APP. ADVOC. 41, 41-58 (2017), wrote the following tribute to Jack Pope:

LESSONS FROM THE LIFE AND CAREER OF CHIEF JUSTICE JACK POPE, 1913-2017

At the age of six, Judge Pope was drafted to judge a debate involving his older brother Baylis. At the end of each year, the expression teachers held a public gathering to promote their services and showcase their students, and that year, Baylis's teacher decided to feature a series of student debates on the subject "Which is Mightier, the Pen or the Sword?" Schoolteacher volunteers would serve as judges, but the teacher was unable to enlist the proper number of teachers for all the debates, so she asked permission from Judge Pope's mother for him to judge the last debate, which happened to feature his brother Baylis as a participant. All Jack had to do was sit at [*42] an elevated place, look important, and listen while the debate proceeded. Baylis argued that wars clearly decided the fates of nations, while his opponent claimed that literature more profoundly influenced world affairs. As Judge Pope recalled almost a century later, "When it was over they [turned] to me and [asked who won]. And of course in my wisdom I made the adjudication, and it was for the pen." Brother Baylis's relationship to the judge availed nothing.[2]

Lesson #1: Judges Must Be Independent and Without Personal Bias:

In the rendering of this his first opinion from the bench, Jack Pope demonstrated two traits that would characterize his career, incorruptibility and dedication to the principle of nonviolent dispute resolution upon which all judicial activity is based.

The story of how lawyer Jack Pope became Judge Pope is fairly typical of judicial selection as it worked in mid-twentieth century Texas. In 1946, after practicing law for several years and serving in the Navy during World War II, Jack was approached by his friend Allen Wood. Wood was the judge of the 94th District Court in Corpus Christi, and he walked into Pope's law office and confided that he had submitted his resignation to Governor Coke Stevenson. To Jack's amazement, Judge Wood then said that he and others had recommended his successor to the governor, and it was to be Jack Pope. Pope protested. He had no desire to serve as a judge this early in his career, and he was daunted by the prospect of supporting his family on a judicial salary after just having returned to law practice from military service. But Wood would not take no for an answer and Pope eventually conceded that if the governor insisted, he would [*43] agree. Governor Stevenson, a long-time friend and political ally of Uncle Elmer's, did insist, and Judge Pope's career as a judge then began. After serving out Wood's unexpired term, Judge Pope easily won nomination and election to his bench two years later. Thus began a 39-year judicial career, a career that, characteristic of the times, only involved three contested elections.[3]

Lesson #2: The Office Should Seek the Person; Not the Person the Office

To put the matter in a broader political perspective, from 1900 until 1978, no one but Democrats held statewide office, and there were very few state legislators or even local officials who were Republicans. These were concentrated in a few suburban areas and in Dallas. But the Texas Democratic Party was by no means monolithic, although in the early part of the century, the main schisms among Democrats were between those who favored prohibition and those who opposed it, and between those who openly condemned the Ku Klux Klan, and those who did not. A realignment of sorts occurred with the Great Depression when the party was informally divided between progressive New Dealers or "Roosevelt Men" on the one hand, and conservatives on the other. By World War II, Lyndon Johnson came to be the leader of the progressive faction and Coke Stevenson of the traditionalists. But none of this dispute ended up breaking party ranks; it was "within the family" so to speak, and it hardly ever spilled over into primary campaigns for judicial office, where, as usual, the Democratic Party nomination meant you won the office, and most judicial primaries were uneventful and unremarkable. In fact, published studies of judicial elections in Texas found that from 1952 to 1962, only 5% of trial judges and 7% of appellate judges were defeated in contested primaries.[4]

[*44] We can see this political landscape in Judge Pope's next few campaigns. In 1950, at age thirty-seven and with almost four-years' experience on the trial bench, Pope was importuned to accept an even more prestigious judicial seat. This time, it was not one friend but an entire county bar association that insisted that he must serve. The Fourth Court of Appeals in San Antonio heard and decided appeals from trial courts like Judge Pope's throughout an area that included forty-eight counties and half of the boundary between Mexico and Texas. In 1950, South Texas newspapers, including the Corpus Christi Caller-Times, part of which Uncle Elmer had once owned, began editorializing over the lamentable fact that no statewide official had been elected or appointed from south of San

Antonio since Reconstruction. In addition, the Nueces County Bar Association, which included lawyers in Corpus Christi, unanimously passed a resolution calling upon Judge Pope to run for a seat on the San Antonio Court of Appeals.[5]

In April of 1950, Judge Pope announced he would accept the challenge and run for the seat on that court held by Justice Loren Broeter, who was too ill to seek re-election. Here again is another characteristic of judicial politics in the mid-twentieth century: opportunities to run for judge almost always required a vacancy to be filled. Incumbent judges were very seldom, if ever, challenged. As an illustration of how judicial politics was insulated from factionalism within the Democratic Party, it is important to note that although known as a Coke Stevenson man, Judge Pope was also able to garner the support of the legendary "Duke of Duval," George Parr, a longtime ally of Stevenson's political nemesis Lyndon Johnson. Parr, a powerful South Texas county judge and political padron who [p. 45] was associated with the well-known "Box 13" voting fraud incident that ensured Johnson's election over Stevenson in the 1948 senatorial election, and who later committed suicide while under federal indictment, was in 1950 still at the height of his political power and notoriety. When Judge Pope asked for his support in the 1950 election, Parr readily agreed, assuring him that "we are not looking for any favors. We do not expect to be treated any differently than anybody else, but on the other hand, we don't want somebody who's got a knife out for us." Obtaining Parr's endorsement was no mean feat, given that Judge Pope had already received ex-Governor Stevenson's blessing. Yet, in Judge Pope's case (and, I would argue by extension, in other judicial cases), both Stevenson and his enemy Parr had decided to let bygones be bygones.

As ex-Governor Stevenson told Judge Pope at the time, "that's to your advantage ... there's no problem, the fact that you would have the support of both of us."

Lesson #3: Great Judges Engender Respect and Admiration Across All Lines of Politics, Party, and Geography.

With the added backing of virtually all the lawyers and newspapers south of San Antonio, Pope defeated his three San Antonio rivals in the Democratic primary. At the urging of his superior, Chief Justice W. O. Murray, Justice Broeter resigned in order to allow Governor Allan Shivers to appoint Pope immediately in his stead.[6] And here are two more characteristics of the non-partisan judicial politics of that era: 1. Contested judicial races were not ideological contests as much as they were geographical ones; and 2. The winner of the primary was often, as a matter of courtesy, appointed to take his office before the legal date of inauguration. Indeed, from 1940 through 1962, 66% of all Texas judges were appointed before having to run for [p. 46] the office, and having been appointed, in their next election over 86% drew no opponent at all, and of those few who were opposed, less than 30% were defeated.[7]

Judge Pope served on the Fourth Court of Appeals in San Antonio for fourteen years, and for the first five, he was the youngest appellate judge in the state. Throughout his service, he had only four colleagues, Chief Justice W. O. Murray, James R. Norvell, Hunter Barrow, and eventually his son, Charles W. Barrow, and Pope enjoyed the remarkable efficiency and collegiality of that court. And here is another aspect of this era: there was much lower turnover of judicial personnel at the appellate level, and a greater opportunity to forge long collegial relationships.[8]

Because even from his years in Corpus Christi Pope had been known as a studious judge, he also delivered a massive number of speeches, papers, and keynote addresses to local and state bar associations and judicial groups. Many of these were eventually published. For example, in 1953, the State Bar of Texas published his pamphlet "The Right of Trial by Jury Shall Remain Inviolate," a description of the importance of the jury trial as evidenced by the Magna Carta, Declaration of Independence, and U.S. Constitution. He also wrote more than seventy articles.[9]

Judge Pope's education in jurisprudence also informed the State Bar's Committee on Administration of Justice, on which he served for the entirety of his tenure on the court of appeals. This committee recommended appropriate rules to make courtroom procedures fairer and more efficient and it appointed Judge Pope to prepare a model set of instructions to civil juries and he did so. After several years of work, Judge Pope's proposed instructions were approved by the full committee and by the Texas Supreme Court. Two years later, and after [p.47] he himself had joined the Supreme Court, Pope's proposed instructions were adopted, and they remain the basic litany of admonitions recited by trial judges to juries throughout Texas. They are familiar to every Texas lawyer and to many laypeople with only a passing familiarity with the courtroom.

The instructions begin: "Do not mingle with or talk to the lawyers, the witnesses, the parties, or any other person who might be interested in the case ..." These instructions, in substance, have long since been codified in Rule 226a of the Texas Rules of Civil Procedure, and they were written by Judge Jack Pope. Here is another characteristic of judicial politics in the mid-twentieth century: freed from insecurity of office and the need to constantly campaign, judges were able to spend more time in scholarly writing and continuing education.[10]

Lesson #4: Even the Busiest and Most Successful Judges and Lawyers Should Work to Improve the Law and the Profession.

Judge Pope was reelected to the San Antonio Court of Appeals in 1956 and 1962, but as that last election came to a successful close (Pope was again unopposed) he was already considering a run for associate justice of the Texas

Supreme Court. His campaign was again typical of judicial campaigns of the period, and he had two advantages. First, since he would not be up for reelection in San Antonio for another six years, he could seek the higher court bench without losing his San Antonio judgeship were he to lose in the statewide race. Second, although the Supreme Court race would theoretically involve campaigning across 254 counties, Pope's existing district already included 48 of them, and he had become quite popular in all 48. Nonetheless, he began to hear rumors that he might face one or more rivals in the 1964 Democratic primary, a situation he had not encountered since 1950. By spring, it was clear that Judge Pope would have an opponent in the Democratic primary for Place 2 on the Texas Supreme Court--Sears McGee, a district [p. 48] judge from Houston.[11] Since no Republican had been elected to statewide office since Reconstruction, both contestants knew the race would be decided in the Democratic primary.

By this time, Pope was well known to all the important lawyers and many of the influential politicians in the state. He was able to put together an effective statewide organization, beginning with a meeting of forty-five to fifty advisors held in Fort Worth. The strategy they decided upon was to cede the Houston vote to Judge McGee and to campaign vigorously everywhere else. Pope's supporters raised $100,000, the overwhelming majority of which came from small contributions of $25 or less (think how different such things are today), even though Pope refused to ask anyone for money himself. "I cannot ask people for money," he explained. "I have never asked for a political contribution in my life. It embarrasses me." When Solomon Casseb[12] suggested at the initial Fort Worth steering committee meeting that the hat be passed to begin financing Pope's campaign, the judge demurred, declaring, "Well look, I just can't handle that," and left the [p. 49] room. $20,000 was nevertheless collected instantly and the campaign was launched.

Lesson #5: Great Judges Avoid Asking for Money

In addition to outspending his opponent and receiving the lion's share of newspaper editorial endorsements, Pope convincingly won the state bar's poll of its members on who should be elected to the seat. In the elections of 1964, although Judge McGee predictably carried Houston and Harris County, Jack Pope won the Democratic primary by more than 400,000 votes and sailed easily to victory in November over a lesser-known Republican opponent. Here was a classic case of an open seat on the Supreme Court being decided on the basis of geography on the one hand and the reputations of the candidates within the organized bar on the other.[13] In fact, as Texas Monthly writer Paul Burka said over 25 years ago:

> Justices[‘] names seldom appeared in the press and were known only to the legal community. Most justices had been judges in the lower courts; a few had served in the legislature. At election time, sitting justices almost never drew opposition. Some justices resigned before the end of their terms, enabling their replacements to be named by the governor and to run as incumbents. In the event that an open seat was actually contested, the decisive factor in the race was the State Bar poll, which was the key to newspaper endorsements, and the support of courthouse politicians.[14]

Justice Pope again did not draw either a Democrat or Republican opponent in the elections of 1970 and 1976, but [p. 50] the election of 1976 resulted in a harbinger of how judicial elections would soon change. An unknown lawyer named Don Yarbrough, who within a few years was: sued for disbarment by the State Bar, indicted and eventually convicted of aggravated perjury, and who gave up his law license, defeated incumbent Justice Charles Barrow, Judge Pope's old friend and colleague from the San Antonio court. Even though Barrow received 90% of the lawyers' votes in the State bar poll and all the newspaper endorsements, Yarbrough won the primary election, serving only six or seven months of his term before resigning. Yarbrough claimed to have made only one speech and spent only $350 on his entire campaign.[15] Everyone agreed that this unusual result must be attributed to Justice Yarbrough sharing a similar last name with popular Texas politicians Ralph and Don Yarborough (two O's), but many also concluded that "this episode proved that almost anyone could be elected to the Texas Supreme Court, if they had a popular name."[16]

Some have argued that this explains the primary victory of Robert Campbell over incumbent Justice T.C. Chadwick in 1978, since that was the year after Earl Campbell became the first University of Texas player to win the Heisman Trophy.[17] My own view is that Chadwick's very tentative incumbency (he had only been appointed by Governor Briscoe a few months before the primary) was just as important a factor. However, it did happen that Justice Campbell had practiced as personal injury plaintiff's lawyer before ascending to the bench, and by the late 1970s, this sequence of recent electoral events taught the more wealthy and savvy among the state's trial lawyers that Texas Supreme Court elections were winnable, and that the court's ideological composition could be thereby changed. But something else also happened in 1978 that would complicate matters and further politicize judicial elections. [p. 51] Texas became a two-party state. In the gubernatorial election of 1978, the national party realignment began with the election of Richard Nixon to the presidency in 1968 and the defection of prominent Southerners like John Connally, Jesse Helms, and Strom Thurman from the Democratic Party, took hold in Texas. Bill Clements, Texas's first Republican governor since Reconstruction, was elected rather unexpectedly in 1978.

In 1980, Justice James Wallace, a trial lawyer and former state senator, was elected to the Court after incumbent Justice Steakley announced his retirement. Wallace's election continued to move the Court's orientation toward reform of antiquated common law rules that artificially restricted tort recoveries, such as the pecuniary loss rule, pure contributory negligence, and assumption of the risk. And C.L. Ray, an even more liberal former state legislator

and appellate judge from East Texas, was also elected in that year to succeed Will Garwood, who had been appointed by Governor Clements.

By 1982, it had become clear that Supreme Court races in the Democratic Primary were polarized by ideology, with candidates perceived as either progressive and pro-plaintiff or conservative and pro-defendant, and it also became clear to astute observers that victory in the Democratic primary might not guarantee a win in the November general election. Democratic judicial candidates could expect well-organized Republican opposition, at least from time to time. But 1982 continued to be a good year for judicial progressives. In that year, William Kilgarlin challenged incumbent James Denton, by no means a hidebound mossback, and although he defeated Kilgarlin in a hotly contested primary, Justice Denton died in June after the primary and before the general election. At that point, the state Democratic Executive Committee appointed Kilgarlin to Denton's ballot slot and he was elected in November. This period of infighting within the Democratic Party was the end of the beginning of the politicization of Supreme Court races. The emergence of vigorous two-party politics, the 1987 60 Minutes scandal, and tort reform would spell the beginning of the end.

[p. 52] Lesson #6: The Good Old Days Involved Non-partisanship, and That May Re-emerge With Recent Legislation.

Meanwhile, Justice Pope was in his 18th year on the high court. At age sixty-nine and with his third six-year term on the Supreme Court about to end, Justice Pope and his wife were planning his retirement. Indeed, on June 18, 1981, Pope announced that after eighteen years on the Texas Supreme Court, he would retire when his term ended in January of 1983. For the first eight years of his tenure on the court, Pope served under Chief Justice Robert W. Calvert. For ten years after that, Joe R. Greenhill held the chief justiceship, having been appointed to replace Calvert by Governor Preston Smith in 1972. The story that unfolded when Pope decided to retire would bridge the end of the beginning and the beginning of the end. Unbeknownst to Justice Pope, while he was planning his retirement, Chief Justice Greenhill was planning his own. On October 4, 1982, more than a year after Pope had announced his own impending retirement, Greenhill summoned him to the chief's office and told him, "Jack, this morning I am going to deliver to Governor Clements my letter of resignation." Pope was both stunned and concerned, stunned by Greenhill's disclosure and concerned about its impact on the Court, given the political circumstances then prevailing.[18]

1982 was a pivotal and controversial political year, midway between President Ronald Reagan's successful presidential campaigns that transformed the national political landscape. But in November 1982, the Texas Democratic Party was still strong and Governor Clements was locked in a tight struggle for reelection against Attorney General Mark White, a moderate Democrat. Chief Justice Greenhill's October resignation thus came at a time when the hard-fought campaign between Clements and White was likely to delay appointment of a successor until the result of the election was known. Clements asked Greenhill not to publicly announce his retirement for [p. 53] a few weeks. Ultimately, the traditional underperformance of the president's party in midterm elections was aggravated by bad publicity from an oil spill in the Gulf of Mexico, and Governor Clements lost his bid for reelection. When Clements lost in November, the entire situation became somewhat peculiar: the incumbent, a lame duck with only a few remaining months in office, could appoint a successor to Greenhill, or the appointment could be delayed until 1983 and be made by Governor White.[19]

Meanwhile, with the campaign still pending and soon after Chief Greenhill's private conversation with Justice Pope, Greenhill had made a confidential retirement announcement to the other justices in chambers, and he had ceased to act as chief justice and begun moving out his papers and effects. With the news still not yet public and the gubernatorial campaign in full swing, Pope, as the senior remaining justice, quietly assumed the role of acting chief justice, presiding over conferences in chambers and undertaking other administrative functions. Greenhill also privately consulted Pope on the question of whom Governor Clements, even if a lame duck, should appoint as chief justice. As Justice Pope recalled:

He started going down this list. And I added this justice from the Court of Appeals, and this one, and I added a couple of law professors to the list. And when we got right down to the end I said, "You can put my name on that list." He said, "You're kidding." I said, "No, if he would appoint me, I would take it." He says, "Well, now that is interesting."[20]

Both before and after losing the election, the governor considered his options and spent time consulting confidants, including Greenhill. Once the election was over and Greenhill's retirement became public knowledge, however, fifteen members of the Democratically controlled state senate promptly resolved to require Clements to defer to incoming Governor- [p. 54] elect White on the appointment to the Supreme Court. These senators wrote Clements on November 8th stating that they were "committed to take every step necessary to ensure this result." This placed Governor Clements in the unenviable position of either surrendering to his political opponents or sending to the senate a judicial nominee who would almost certainly be unceremoniously rejected. The names of several able judges were informally floated as possible nominees, but none assuaged the aggravation of the Democrats in the senate, most of whom had committed themselves by signing the letter of November 8th.[21]

On November 22nd, the governor's office, after consulting Chief Justice Greenhill, contacted Justice Pope about the possibility of promotion to chief justice. Although Pope had already announced his retirement and Ted Z. Robertson, yet another progressive Democrat, had already been elected to succeed him as justice, the governor reasoned that appointment of a Democrat as experienced and uncontroversial as Pope might well defuse the entire situation. Tobin Armstrong, appointment secretary to Governor Clements, called Pope to say that Clements was considering appointing him chief justice and had some questions. Armstrong asked Pope whether he would serve if appointed, and Pope said he would. Armstrong next asked, "Now, this is not a condition to your being appointed, but if you were appointed, would it be your plan to run for reelection?" He then continued, "The governor simply needs to know this to deal with the situation." Pope replied, "No, I would not. I'm sixty-nine years old, and I would be seventy-one to be running for office for a six-year term." Before serving out that term, Pope explained, he would be forced to retire by law anyway because of his age. Although he guaranteed nothing, Justice Pope would never run for an office when he knew in advance he could not complete its term of service. Armstrong then told Pope that he would likely be named chief justice, and the following day, November 23rd, he was appointed by Governor Clements. Chief Justice Pope appeared at an administrative session of [p. 55] the Court that afternoon amid the congratulations and good wishes of those in attendance, including one of the senators who had signed the November 8th letter, Kent Caperton. After the meeting, Senator Caperton publicly announced that the lame-duck governor had made a wise appointment, the letter had accomplished its purpose, and he would vote to confirm Chief Justice-designate Pope. An editorial in the San Antonio Light put the matter succinctly: "What should Mark White do? Hail, of course, the naming of Pope, tell the senators to lay off and confirm Pope. Then he ought to hire Bill Clements as a part-time political consultant." But events were not fated to proceed quite so smoothly.[22]

Although Clements' appointment authorized Justice Pope's inauguration as Texas's twenty-eighth chief justice on November 29, 1982, the seat would become vacant by law if he were not confirmed by a two-thirds vote of the senate in its next session, convening in January 1983. Until then, Pope was, in effect, chief justice locum tenens. When the senate did convene on January 11th, Pope's prospects appeared bleak. Of the original bloc of fifteen opposing senators, only one, Kent Caperton, had formally withdrawn his opposition, and only eleven negative votes were required under the two-thirds rule to make Pope the state's briefest-serving chief justice. To make matters worse, although newly inaugurated Governor White tacitly approved of Chief Justice Pope's appointment and had even asked him to administer the gubernatorial oath of office, White's official pronouncements indicated that the matter was one for the senate alone. Meanwhile, several of the bloc of fifteen (whittled to fourteen by Caperton's defection) continued to make public statements against the judge's confirmation, not because of anything peculiar to Pope, but as a matter of principle. Prominent among them was Senator Chet Brooks, who declared that the chief justice had two choices: "retire or be busted." Democratic Lieutenant Governor Bill Hobby argued for Pope's confirmation, however, and duly requested that he administer the oath of office to the newly convened [p. 56] senate. With things in this state of disarray, the opposition, through its spokesman, Senator Brooks, soon made several attempts at a face-saving compromise. First, they offered to allow Judge Pope to be confirmed if he would promptly resign in order to allow Governor White to make the appointment. Next Brooks suggested that Pope agree to resign before his seventy-first birthday, which would save him an automatic reduction in pension for serving past that date. "The state pays me too much already," was Pope's response. Frustrated, Brooks finally concluded that "the senate was leaning over backwards to work with the man .... We're trying to give him every chance in the world to be confirmed and still meet the commitment of the fourteen senators .... I don't know why Pope can't understand that."[23]

Chief Justice Pope's public response was characteristically principled: "They can shoot me down in flames, but I will make no deals." The fact that he already had no plans to serve past age seventy-one could have given Justice Pope an easy way out. But he wouldn't take it; it was a matter of principle. Justice Pope felt strongly that it was illegal and unethical for any judge to negotiate for his position on the bench: "If the public sees that I will make a deal to get a job and to keep a job, then maybe they'll think I'll make deals on other matters." Lieutenant Governor Hobby publicly agreed, and retired Chief Justice Calvert concurred in a letter to many of the state's largest newspapers. In it he explained his reasoning:

> The official oath required Justice Pope to swear that he had "not promised any public office or employment as a reward to secure ... confirmation of his appointment." By agreeing to the senators' deal, he would have promised to reward those voting for his confirmation to give up the public office of chief justice before the end of his term in 1984.[24]

Stemmed by Pope's resolve and by mounting public and [p. 57] editorial opinion, the tide turned. Governor White finally let it be known publicly that if the senate was interested in his view, he had always regarded Justice Pope as eminently qualified and personally approved of his confirmation. On February 8th, Senator Chet Brooks, the leader of the "busting bloc," moved on the senate floor that the senate unanimously consent to voting on the Pope nomination without the formality of a hearing. He explained that no hearing was needed now that Governor White had publicly approved the nomination. Six of the fourteen bloc senators promptly rose to speak in Justice Pope's behalf, and Jack Pope was confirmed as Chief Justice of the Texas Supreme Court by a vote of 29 to 2.[25]

The chief justice later attributed his victory, in large part, to the unified backing of the Texas bench and bar and to the unwavering support of his wife, Allene. But there was at least one other factor that weighed in the balance, one

that the irascible Texas Comptroller Bob Bullock identified in a letter to Chief Justice Pope shortly after his confirmation:

> I can't tell you how much I admire you for the position you took and the statements you made during the controversy of your appointment as chief justice. I believe throughout it all you were as gutsy a person as has ever set foot on Texas soil.

Lesson #7: Never Compromise on Matters of Principle

I would argue that this nomination fight of 1981-82 was the last time that partisan judicial politics gave way to the old paradigm of judicial independence. And as chief justice, Pope continued his prodigious production of opinions and his work to improve the administration of justice. He served out his term, retiring in January of 1985 at age seventy-one. In describing his long career, Chief Justice Pope has often given some version of the following summary:

I am a judge by circumstance. I became a district [p. 58] judge without seeking it, went on to serve more than thirty-eight consecutive years on the trial court, the intermediate court, and the court of last resort, a longer period than any other person who served on the Supreme Court. I was appointed for short-term periods by three Democratic governors and one Republican. My name was on the ballot fourteen times, all but three of them without opposition. I was too young to be a judge in the beginning; too old to comply with the retirement law at the end. After thirty-eight years of judicial service and (just) when I was getting the hang of being a judge, I had to retire.[26]

For almost forty years, as a district judge, appellate justice, Supreme Court justice, and chief justice, Jack Pope sat in an elevated place and listened to debates, and as prefigured when he was six years old in Abilene, the participants turned to him for a decision and essentially asked "who won?"

And, though it stands for many noble ideals, Jack Pope's career as a common law judge may well leave as its most enduring legacy the same declaration he made those many years ago as a six-year-old child in Abilene and that inhered in every decision he made thereafter, that in a republic, the pen is, and indeed must always be, mightier than the sword.

Footnotes

1 William J. Chriss has been board certified in Civil Trial Law by the Texas Board of Legal Specialization for over 25 years, having tried to verdict and handled on appeal a wide variety of lawsuits. A fulltime practicing trial and appellate lawyer, he serves as Vice Chair of Volume 4 of the Texas Pattern Jury Charge Committee and as an officer of the Insurance Law Section of the State Bar, and he is immediate past editor-in-chief of the Journal of Texas Insurance Law and The Appellate Advocate. He is also a member of the American Law Institute, publisher of the Restatement. In 2005, the Texas Bar Foundation named Mr. Chriss the recipient of the Dan R. Price Award for service to the legal profession and excellence in teaching and scholarly writing, and he also received the 2016 Texas Center for Legal Ethics Chief Justice Jack Pope Award presented to an appellate lawyer or judge who epitomizes the highest level of professionalism and integrity. Mr. Chriss graduated from Harvard Law School where he received a Howe fellowship in Civil Liberties and Legal History. He also holds graduate degrees in theology and politics, as well as a Ph.D. in history from The University of Texas, where he was awarded an endowed doctoral fellowship under the acclaimed American historian H.W. Brands. His next book is Six Constitutions over Texas: Law in Creating Modern Texan Political Identity, 1835-1900. Portions of this article have appeared previously in "Chief Justice Jack Pope of Texas: Common Law Judge," (book chapter) Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas (Austin, Texas Supreme Court Hist. Society, 2014) 322-354, as well as in prior SBOT CLE papers to which the author retains the copyright.

2 William J. Chriss, "Chief Justice Jack Pope: An Oral History Interview," (2008), vol. 1, 2-3. The author would like to express his appreciation to H. W. Brands, Steve McConnico, Erika Fine, Marilyn Duncan, and Bill Pugsley, each of whom read drafts of this introduction and made helpful suggestions for improvement or otherwise leant valuable support to this work.

3 Osler McCarthy, "Interview with Chief Justice Jack Pope" (undated), at 4; Brands, Oral History Interview, at 29-30.

4 Anthony Champaign and Kyle Cheek, "The Cycle of Judicial Elections: Texas as a Case Study," 29 Fordham Urb. L. J. 907, 909 (2001-02), citing Bancroft Henderson and T.C. Sinclair, "The Selection of Judges in Texas," 5 Hous. L. Rev. 430, 441 (1968).

5 Pope, Andrew Jackson, Texas State Cemetery http://www.cemetery.state.tx.us/pub/user_form.asp?step=2&pers_id=2904&last_name=Pope&first_name=Andrew (accessed 16 January 2012); McCarthy, "Interview with Chief Justice Jack Pope" at 4; Brands, Oral History Interview, at 22-23, 46.

6 Brands, Oral History Interview at 36-47; Jack Pope, "The Path to the Supreme Court" (undated), 4-5. For additional detail, see Steve McConnico, "How Judge Jack Pope Got on the San Antonio Court of Appeals," San Antonio Lawyer (San Antonio: S.A. Bar Ass'n, July-August, 2012), 10-14.

7 Bancroft and Sinclair, "The Selection of Judges in Texas," supra n.4 at 442, as cited in Champaign and Cheek, supra n.4 at 909.

8 Jack Pope, "Development of a Common Law Judge (The San Antonio Judicial Era)," undated and unpublished essay, 2-6.

9 Id. at 11-12, 29, 32; quote from Hand, quoting Learned Hand, The Spirit of Liberty (New York: Alfred A. Knopf, 1952) 81.

10 Pope, "Development of a Common Law Judge", at 36-38. Brands, Oral History Interview, at 94.

11William Sears McGee had served twice as a district judge in Harris County and had been a director of the State Bar of Texas. After losing this race to Judge Pope, he returned to the district bench, only to successfully run for Place 9 on the Supreme Court in 1968, succeeding retiring Justice Meade Griffin. He was reelected to the Court in 1974 and 1980 and served until his retirement in 1986. He was succeeded by Justice Oscar Mauzy, who was elected in that year.

12 Solomon Casseb, Jr. was then a prominent San Antonio lawyer who was later elected to the district court bench in San Antonio. He eventually served as presiding judge of all district courts in Bexar County and then presiding judge of the district courts of the 4th Administrative District, which encompassed essentially the same geographic area as Judge Pope's when Pope was on the San Antonio Court of Appeals. Casseb later became a semi-retired senior district judge who occasionally sat by assignment as a visiting judge. In that capacity, he presided over the important phases of the *Pennzoil v. Texaco* case that resulted in the largest jury verdict in American history. In 1987, he received the Texas Bar Foundation's annual outstanding jurist award, and in 1992, an endowed professorship was established in his name at The University of Texas School of Law. See "Solomon Casseb, Jr., Obituary," (Legacy. com) [accessed 20 June 2012].

13 Brands, Oral History Interview, at 65-68. Justice Pope easily defeated Thomas Everton Kennerly of Houston, who two years later was the Republican nominee for governor and was defeated by incumbent Democratic Governor John Connally by a wide margin.

14 Paul Burka, "Heads We Win, Tails You Lose," Texas Monthly (May 1987), 138, 139 quoted in Champaign and Cheek, supra n.4 at 910.

15 Champaign and Cheek, supra n.4 at 911; "Donald Burt Yarbrough," Justices of Texas 1836-1986 (Tarlton Law Library: website), http://tarlton.law.utexas.edu/justices/profile/view/120 [accessed 19 February 19, 2013].

16 Champaign and Cheek, supra n.4 at 911.

17 Id.

18 Jack Pope, "They Can Shoot Me Down in Flames, But I Will Never Make a Deal," undated and unpublished essay, 2-6; Brands, Oral History Interview, at 79.

19 Pope, "They Can Shoot Me Down in Flames," supra n.18 at 2-6; Brands, Oral History Interview, at 79-83.

20 Brands, Oral History Interview at 79.

21 Pope, "They Can Shoot Me Down in Flames," at 3-14.

22 Id.; Brands, Oral History Interview, at 82-85.

23 Pope, "They Can Shoot Me Down in Flames," at 14-35.

24 See id.

25 Id.

26 Lang, Deeds, Not Words," at 78, quoting Pope, "Judges I Have Known."

11. Duncan & Mesches. Marilyn P. Duncan and Benjamin L. Mesches, *Chief Justice Jack Pope: Common Law Judge and Judicial Legend*, State Bar of Texas History of Texas and Supreme Court Jurisprudence, 2017.[22]

12. Austin Lawyer Honoring Pope. The Austin Bar Association published a piece written by Osler McCarthy, Staff Attorney for Public Information for the Supreme Court of Texas. The title was *Honoring Former Texas Supreme Court Chief Justice, Jack Pope*, 26 Austin Lawyer, No. 4 (May 2017). Here is what McCarthy wrote: "Years before he died on February 25, 2017, Jack Pope pulled a book from a section at his home library in Austin, a copy of "Minimum Standards of Judicial Administration." ¶ "This is my Bible," said the former Texas Supreme Court chief justice, whose tenure as a judge was longer than any Texas Supreme Court justice in history. ¶ But the book Jack Pope called his Bible might have been instead one of four volumes of "Jurisprudence" by the great legal scholar Roscoe Pound. Or any of the other hundreds of books he pointed to on shelves packed floor to ceiling with biographies and treatises in a library larger than most suburban garages. ¶ "These," he said of the books lining his walls, "are my friends." ¶ With his chiseled features and shock of white hair, Hollywood could not have cast a better judge. ¶ Andrew Jackson Pope Jr., who helped establish formal judicial education for Texas judges, fought for a voluntary judicial-ethics code when judges had none and fought again to make that code mandatory and enforceable, died Feb. 25 in his Austin home at the age of 103. He served Texas for 39 years on the district court, the court of appeals, and the state's highest civil court. ¶ He is buried in the Texas State Cemetery next to his wife of 66 years, Allene. ¶ As a court of appeals justice, Pope's reassessment of water rights conveyed by Spanish and Mexican land grants changed Texas water law forever. As chief justice, he forged a way to guarantee income to finance legal assistance for the poor. Concerned with double litigation in the same case, he won legislative support for statutory changes to thwart "forum shopping." ¶ "I'm a common-law lawyer," he proudly would proclaim. "And I was a common-law judge."'"Chief Justice Pope was an icon for the Texas judiciary: a judge of enormous character and uncompromising integrity," Chief Justice Nathan L. Hecht told an audience gathered for Pope's funeral—"judi-cial ethics incarnate; a fascinating story-teller with a distinct voice, sparkling eyes and a wry sense of humor; a strong and humble leader; a wise and patient mentor; and a good and dear friend." ¶ The sweep of his reforms and his opinions changed Texas law forever, said Austin attorney Steve McConnico, a former law clerk who delivered Pope's eulogy. "What he did for trial practitioners, there's no way to measure it," McConnico said.Pope earned his law degree from the University of Texas in 1937 and began his practice in Corpus Christi under an uncle's tutelage. ¶ Following a stint in the U.S. Navy in World War II, Pope was appointed to his first bench in Corpus Christi in 1946 and served for four years. ¶ In 1951 he left for San Antonio's Fourth Court of Appeals, having beaten three contenders without a runoff in the all-important Democratic primary, becoming the first justice on the court from south of San Antonio. He served on that court for 14 years until his election to the Supreme Court of Texas in 1964. ¶ Gov. Bill Clements appointed him chief justice in 1982 to succeed Joe Greenhill. Greenhill, who retired, urged Clements, a lame duck Republican governor, to appoint Pope. Fourteen Democratic senators pledged to block any appointment Clements made, essentially dooming it in the Senate. They argued that such an important appointment should be saved for incoming Gov. Mark White, the Democrat who beat Clements. ¶ So Clements picked Pope, who had voted for White. White gave unqualified support to Pope. ¶ In his State of the Judiciary speech just after his confirmation, Pope argued for reforms he had championed for years. He urged nonpartisan election of judges and equal access to justice for the poor, and approval of the so-called IOLTA program to pay for it with interest on lawyers' common client-trust accounts. He argued for overhaul of what he considered Texas' wasteful venue statutes. ¶ Perhaps his greatest contribution to Texas jurisprudence was *State v. Valmont Plantations*, decided in 1961 while he was on the San Antonio Court of Appeals. In *Valmont*, Pope reevaluated a landmark water-rights case from three and a half decades before, found it laden with dicta and without analysis of Mexican and Spanish land grants even though those land grants should have been critical to the decision.So Pope cast aside the notion he was abandoning settled law, methodically demonstrating its fallacies. His *Valmont* decision was a proud legacy because the Texas Supreme Court adopted his opinion as its own, a rare occurrence. ¶ When historical novelist James Michener researched water and its bearing on Texas history for his novel "Texas," recalled Dan Branch, a former law clerk to Pope, Michener called on Pope to explain it." ¶ His researchers had figured out that he was water law," Branch said. ¶ In 2009 the Texas Center for Ethics and Professionalism presented its first Jack Pope Professionalism Award to Pope. In 2010 the State Bar's Judicial Section honored him with a lifetime achievement award. ¶ In a quarter century of retirement, he kept active, studying and writing about the law and his family history, preparing books and papers for donation. And walking through his West Austin neighborhood."Just about the time I was getting the hang of being a judge," he said once, "I had to retire."

13. Charge Practice. Professor William V. Dorsaneo III said that "Former Chief Justice Jack Pope [was] clearly the most influential figure in the modem development of Texas charge practice in the last twenty-five years…." Dorseaneo, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 646 (1993).

C. BIOGRAPHY. A lengthy interview with retired Chief Justice Pope at age 93 is at <http://www.txcourts.gov/supreme/news/former-chief-justice-jack-pope-1913-2017/> and is well worth watching. Chief Justice Pope said: "I regard myself as a common law lawyer and I always regarded my self as a common law judge."

D. OPINIONS AND PUBLICATIONS.

Court Opinions.

1. *Camp v. J. H. Kirkpatrick Co.*, 250 S.W.2d 413 (Tex. Civ. App.–San Antonio 1952, writ refused, n.r.e.). This slip and fall case, according to Associate Justice Pope, "is an appeal by an invitee from an instructed verdict in favor of the defendant building owner, and concerns the nature of the duty the owner owed the invitee." *Id.* at 415. "Slip and fall cases, like other negligence suits, involve at least the existence of a legal duty toward the invitee and the owner's negligent breach of that duty proximately resulting in injury to the invitee. The burden of proving any claimed contributory negligence or other defense rests upon the owner. Some authorities hold that there is no original breach of duty by an

owner when the condition complained [p. 416] of is open and obvious. [Citations omitted.] Whether a condition is open and obvious is treated by still other cases as hearing on the issue of the invitee's own contributory negligence. [Citations omitted.] The significance of this dissimilar treatment of the same facts is that it confuses the plaintiff's burden to prove defendant's breach of duty and negligence with the defendant's burden to prove plaintiff's breach of duty and contributory negligence. ¶ To discern the burden that rests upon a plaintiff invitee, it is necessary to state correctly the duty the owner owes him, and the confusion of plaintiff's and defendant's burden is traceable to an overstatement of the duty owing the invitee. The oft-cited duty rule in *Marshall v. San Jacinto Building Co., Inc.*, Tex.Civ.App., 67 S.W.2d 372, 374, illustrates the point. It is there stated: "'The duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care.'" Such a duty statement, if applied to an automobile negligence suit, would be to state that a defendant driver was under a duty to keep a reasonable lookout so long as the plaintiff kept a reasonable lookout. Such a statement would confuse two duties, and result in decisions saying that the defendant driver did not breach his duty to keep a proper lookout because the plaintiff driver failed to keep a proper lookout too. That is what was happened in many slip and fall cases, by reason of an overstatement of the owner's duty so that it includes matters of contributory negligence. If a defendant driver was not negligent it is immaterial that a plaintiff driver may also have been negligent. And in a slip and fall case, if the defendant owner was not negligent because he did not have and ought not to have had knowledge of danger, it is immaterial that the plaintiff invitee was himself negligent in failing to see what he ought to have seen. Knowledge is the important inquiry, but description in the duty rule of a condition that may charge one with or excuse one from knowledge tends to reduce that inquiry to an evidentiary issue. Whether a condition is open and obvious or hidden and concealed may be, but not necessarily must be, the same thing as the presence or the absence of knowledge. ¶ A more correct statement of an owner's duty would be that he is under a duty to use reasonable care to make and keep the premises free from danger to invitees when the danger is known or should be known by the proprietor. [Citation omitted.] By such a duty rule, the invitee then is under a burden to prove the presence of a danger on the premises and that the owner knew or ought to have known of that danger, that he was negligent in maintaining the premises in that condition, and that such negligence proximately caused the injury. When there is added to the duty rule the requirement that the condition must be one that is hidden or concealed from the invitee, nothing is really added. Whether the condition is hidden or obvious, an invitee must still make prima facie proof that the owner either knew or ought to have known of the presence of danger. [p. 417] [Citations omitted] Otherwise, the proprietor would be liable without fault by virtue of mere ownership of premises where a person fell. [Citations omitted] A proprietor's duty does not compel perfection, nor must he render accidents impossible. ¶ An invitee is also under a duty to exercise reasonable care for his own self-protection against dangers of which he knows or ought to know. But the duty on the part of the defendant owner is often confused with the invitee's duty to protect himself, by stating in the duty rule that the owner is under a duty to protect the invitee from 'hidden dangers' or from those that are known to the owner and unknown to the invitee. Actually, an invitee's knowledge of danger or the existence of facts from which he ought to have knowledge is relevant on the issue of the invitee's own contributory negligence. ¶ There is a clearer understanding of the burden of proof and the respective duty rules imposed upon the invitee and owner when we keep slip and fall cases within the usual pattern of negligence suits so that the invitee is burdened with proving that the owner knew or ought to have known of the presence of danger, and the owner is burdened with proving that the invitee also knew or ought to have known of the presence of danger. [Citations omitted.] And this is true whether the condition is hidden and concealed or open and obvious, for even though concealed, one is responsible for his conduct, if in fact he had knowledge from whatever source. Assuming a condition of serious danger that is hidden from an invitee; he can not recover if the owner neither knew nor ought to have known of it, for there is no breach of duty. Or assume a like condition of danger that is hidden and concealed from optical examination, but one about which the invitee actually has knowledge; he still may be denied recovery by reason of his actual knowledge. Hence, whether one has or ought to have had knowledge is the significant inquiry." Pope's exhaustive analysis of the complicated standard continues on in the Opinion.

A Remarkable Link. Two years later, Associate Justice Calvert wrote in *McKee, General Contractor v. Patterson*, 271 S.W.2d 391, 394 (Tex. 1954), that "[i]t would greatly simplify our procedural problems if we could follow the course suggested by the San Antonio Court of Civil Appeals in *Camp v. J. H. Kirkpatrick Co.*, 250 S.W.2d 413, writ refused, n.r.e., and let this class of cases fall into the pattern of the usual negligence case, deciding the question of negligence and breach of duty on the part of the owner by looking only to his conduct and the question of voluntary exposure to risk on the part of the invitee by looking alone to his conduct, but to do so would be to ignore the well-settled law of this state, as expressed in the cases above cited, that there is no duty on the owner of premises to take precautions to protect his invitee from dangers on the premises of which the invitee is or should be fully aware and which he voluntarily encounters." The same thread continued in *Halepeska v. Callihan Interests, Inc.*, 371 SW 2d 368, 377-78 (Tex. 1962), where Associate Justice Greenhill wrote: "As stated by this Court in *McKee, General Contractor v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954), it would be simpler and perhaps preferable to treat these matters under ordinary negligence and contributory negligence; and many Texas cases have been decided on that basis.[2] [p. 378] This view is urged by many able scholars and text writers.[3] But this choice was afforded this Court in *McKee* and rejected because of stare decisis; that is, that the concepts of 'no duty' and voluntary exposure to risk had theretofore become established in this State." Pope suggested a simplification of the law, which Calvert acknowledged was worthy but rejected as violating stare decisis, and which Greenhill declined to reconsider because Calvert had rejected it. It is interesting to ponder what this says about these three justices.

2. *State v. Valmont Plantations.* 346 S.W.2d 853 (Tex. Civ. App.--San Antonio, 1961) (35 Opinions, 60 secondary sources), *aff'd, Valmont Plantations v. State*, 355 S.W.2d 502 (Tex. 1962). This may be Justice Pope's most-recognized appellate opinion. In this case, Pope conducts a thorough analysis of Spanish and Mexican law on the question of whether

the owner of land adjoining the Rio Grande has a "riparian" right to use the water for irrigation. Pope goes into great detail about specific law books and the word of land grants, and concludes that there was no riparian right to use water for irrigation under Spanish and Mexican law absent a specific grant from the sovereign. Justice Pope's approach to the problem is reminiscent of the Opinons on Spanish and Mexican law written by Chief Justice Hemphill, one difference being that Justice Pope had the benefit of a trial record with expert testimony where Hemphill did not. Pope concluded from his analysis that an earlier Texas Supreme Court decision on this subject was wrong. Pope goes into an extended analysis of stare decisis and dicta, determines that the portion of the earlier case that spoke to the issues in *Valmon Plantations* issues was dicta, and he then skewered the earlier decision for errors in its analysis of Spanish and Mexican law. Chief Justice Murray dissented on the grounds that the earlier Supreme Court case was stare decisis. The Supreme Court granted review, *Valmont Plantations v. State*, 355 S.W.2d 502 (Tex.. 1962). Justice Hamilton's Opinion for the majority of the Texas Supreme Court said: "The opinion of Mr. Justice Pope of the Court of Civil Appeals is exhaustive and well documented. We believe it would serve no good purpose to write further on the subject …." On the issue of stare decisis, Justice Hamilton continued: "With the granting of the writ of error in this case the question of whether the Court of Civil Appeals should have followed the dicta of *Motl v. Boyd* became academic. The question now relates to the action which should be taken by this court with reference to such dicta. When we apply the reasoning of Mr. Justice Pope relating to the doctrine of stare decisis (346 S.W.2d 878) to the Supreme Court, the answer is inescapable. Such dicta should not control our disposition of this case." *Id*. at 503. The Opinion ended: "The judgment of the Court of Civil Appeals is affirmed and the opinion of that court is adopted as the opinion of the Supreme Court." *Id.* As a footnote, Justice Pope owned an undivided interest in lands within the land grants involved in the case. The attorneys for all parties were advised, and no one moved to disqualify Justice Pope. p. 885. Justice Pope sold his interest prior to argument. The other two justices on the court wrote: "We have carefully and fully considered the matter and have come to the conclusion that Justice POPE is not only not disqualified to sit in this case, but it is his duty to do so. We regard the law so well settled on this question that a discussion is unnecessary." p. 885.

3. *Yarborough v. Berner*, 467 S.W.2d 188, 193 (Tex. 1971) (100 Opinions and 70 secondary sources). Justice Pope wrote: "We accordingly hold the better practice dictates that, upon retrial of this case, if the evidence presents these theories, the defendant Berner will be entitled to suitable explanatory charges or definitions which fairly present to the jury the fact that unavoidable accident and sudden emergency may be present. Separate issues will not be necessary." Justice Calvert cited this case favorably in *Del Bosque v. Heitman Bering-Cortes Co.*, 474 S.W.2d 450, 453 (Tex. 1971). See Section I.D.11 above.

4. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) (266 Opinions and 146 secondary sources). In this case Justice Pope wrote an Opinion overturning *Scott v. Liebman*, 404 S.W.2d 288, 290 (Tex. 1966) (Greenhill, C.J.).

5. *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984) (100 Opinions, 78 secondary sources). The case involved the proper way to submit a jury charge in an automobile accident case. Chief Justice Pope wrote: "Prior to 1913 there was such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible. In 1913, to escape from the unsuccessful general charge, the Texas Legislature enacted article 1984a. Submission of Special Issues Act, ch. 59, § 1, 1913 Tex.Gen.Laws 113. The new procedure required the use of special issues that would be submitted separately and distinctly. ¶ In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The Supreme Court in 1973 amended Rule 277, Tex.R. Civ.P., by abolishing the requirement that issues be submitted distinctly and separately. Since that time, broad issues have been repeatedly approved by this court as the correct method for jury submission. ¶ This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges." *Id.*at 801. See the discussion in Section III.E.2 below.

6. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977) (271 Opinions, 158 secondary sources). This may have been Justice Pope's most significant appellate Opinion in terms of the number of people affected. Pope wrote: "The question presented by this appeal is whether a trial court may in a divorce decree divest one spouse of his separate realty and transfer title to the other spouse." *Id.* at 138. Pope gave five reasons for his view that divestiture of separate property was not permissible. First, the marital property statute in effect prior to the adoption of Title 1 of the Texas Family Code in 1969, expressly prohibited divesting title to separate property realty. [Author's note: up to this point in time, courts freely divested title to separate *personalty* upon divorce.] The new Family Code provision governing property division did not prohibit divesting title to separate property. In other words, the statutory prohibition against divestiture of separate property realty was dropped in the new Family Code. However, Pope quoted Professor Joseph W. McKnight's commentary in Texas Tech Law Review that "[t]his is a codification of present law." *Id.* at 139. So Pope read the new law as if it prohibited divestiture of separate realty, although it did not. [Pope did not comment on the fact that the earlier statute prohibited the divestiture only of real estate without mentioning personalty.] Pope also read into a different Family Code provision relating to the support of a child [enacted four years later in 1973] that because a court could order property to be administered for the support of a child it followed the separate property could not be divested upon divorce. *Id.* at 139. Pope also looked at the words of the Family Code saying that the court shall order a division of the "estate of

the parties." Pope wrote there was only one "estate of the parties," and that was the community estate. *Id.* at 139. Pope gave two constitutional arguments: one that the definition of separate property in the Texas Constitution was complete and exclusive, and could not be expanded by the Legislature to include separate property taken from the other spouse in a divorce. *Id.* at 140. The second constitutional argument was that due course of law under the Texas Constitution (borrowing the Federal substantive due process concept) prohibits the state from taking one person's property for the benefit of another person without a justifying public purpose. *Id.* at 140. Pope distinguished a statement in an earlier Supreme Court case that "a divorce court may dispose of 'any and all property of the parties, separate or community' in the exercise of a wide discretion" as dicta, which he said had been recognized in two subsequent Supreme Court cases. *Id.* at 141-42. Pope's constitutional arguments took away from the Legislature the power to change the Family Code to permit the divestiture of separate property. Justices Steakley, Reaveley, Yarbrough and Chief Justice Greenhill dissented. *Id.* at 142. Justice Steakley meets each of Pope's arguments head on, and draws the opposite conclusion, supported by case citations, that a court can divest separate real property in a divorce.

7. *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1962) (187 Opinions, 156 secondary sources). In this case, Justice Pope wrote the Majority Opinion saying that the prohibitions against divestiture of separate property in *Eggemeyer* did not apply to property acquired while the parties lived in common law states. In his Opinion, Justice Pope included a section saying "Eggemeyer Correctly States the Law," in which he repeats his arguments from *Eggemeyer*. *Id.* at 213-20. Justice McGee issued a Concurring Opinion joined by Justices Barrow and Sondock, saying that Pope's current discussion of *Eggemeyer* was dicta, and that *Eggemeyer* itself was dicta insofar as it purported to prohibit the divestiture of separate property personalty. *Id.* 224-25. He noted that Pope's conclusion, that by omitting a prohibition against divesting separate property realty from the new Family Code the Legislature was not authorizing it and thereby was tacitly prohibiting it, was sufficient to resolve the *Eggemeyer* case, without extending the prohibition to separate property personalty. *Id.* at 224-25. McGee also challenged Pope's "estate of the parties" analysis. *Id.* at 224-25. McGee also attacked Pope's "implied exclusion" argument relating to the constitutional definition of separate property. McGee also attacked Pope's two constitutional bases for *Eggemeyer.* Chief Justice Greenhill also issued a Concurring Opinion in which he agreed with the current ruling that property acquired in common law jurisditions was not "separate property" under the Texas Constitution. *Id.* at 228. Greenhill's point was that the Supreme Court should not reach a constitutional basis for its decision when it didn't need to. "A wise rule of opinion writing and appellate judgments is that constitutional grounds are not decided unless it is absolutely necessary." *Id.* at 228. Greenhill continues: "The Court's opinion does not disavow the dictum of the earlier opinion in *Eggemeyer*. Separate personal property was not before the Court in *Eggemeyer*; and any observation about 'due process' was, in my opinion, clearly dictum. With this state of the law, we also have the undisturbed language of *Hedtke* that it was permissible to deal differently with separate realty and separate personalty. ¶ It is my hope, therefore, that the Court's power to deal with separate property, particularly separate personal property, may be addressed by the Legislature. After all, the Legislature is the policy making body of this state. In this context, the Legislature [*229] will have an alternative to enacting alimony statutes which will surely result if the 'due process' dictum of *Eggemeyer* should ultimately prevail. The Legislature can change the 'estate of the parties' and other statutory provisions; but it cannot change the 'due process [due course] of law' of the Texas Constitution,—without a constitutional amendment." *Id.* at 228-29. [Author's note: given the clear lines that were drawn over the issue, it is hard to escape the conclusion that Justice Pope extended his reasoning in *Eggemeyer* to include constitutional grounds in order to take away from the Legislature the power to make personal property divisible upon divorce.]

8. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 434 (Tex. 1984). Chief Justice Pope concurred and dissented, joined by Justices McGee, Barrow, and Campbell, in this important case. The Court's Opinion by Justice Spears adopted the most significant relationship test as the conflict-of-laws rule in contract cases. *Id.* at 420-22. The Court also replaced a contributory negligence bar with comparative fault in strict products liability cases. *Id.* at 424-28. The Court also held that where one or more parties in a non-negligence case settle with the plaintiff, the non-settling defendants liability and plaintiff's recover are reduced by the percent of causation assigned by the settling tortfeasor. *Id.* at 429-32. Although the defendant had induced the Supreme Court to to change the law and apply comparative negligence to strict products liability cases, the Majority failed to apply this change to the defendant because the defendant, whose negligence claims regarding the settling parties were twice stricken, pled negligence a third time and failed to make an offer of proof (make a "bill of exceptions") when the trial court refused to admit evidence of negligence. *Id.* at 433. Finally, the Majority refused to remand in the interest of justice, because error was not preserved due to the failure to make a bill of exceptions. *Id.* at 434. Chief Justice Pope wrote: "I concur in the court's action in sustaining defendant Cessna's contention that we should adopt comparative fault as a method for the trial of products liability and negligence cases. I respectfully dissent from that part of the court's opinion that adopts Cessna's contention but then denies Cessna those rights. The court sustains Cessna's contentions but renders judgment for Duncan. The majority opinion does not fairly state this record." *Id.* at 435. Further on Pope wrote: "Defendant Cessna successfully convinces this court of the correctness of the decisions of other states that adopt comparative fault. The plaintiffs, Duncan and Smithson, resisted that idea at every stage of trial and appeal. This court now adopts the position urged by Cessna. This case was pleaded and tried exclusively as a products liability case, and the majority says for the first time in Texas that it [p. 438] should have been tried with a comparison of plaintiffs' negligence and the defendants' product liability fault. Somehow Cessna, the one who successfully made that contention has lost its case. It lost because it failed to do what it was prevented from doing. Cessna's only mistake was that it was denied and could not use a trial method that never existed in Texas until 9:00 A.M. on Wednesday, July 13, 1983. ¶ The majority opinion accords an unequal treatment to plaintiffs and defendants. The most graphic illustration of this is a comparison of how we applied changed law in *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex.1983), decided just eighty days before our original decision in this case. Plaintiff Sanchez, represented on appeal by the same attorneys as

the plaintiffs, Duncan and Smithson, in this case, urged that we should change a century old rule that limited recovery of damages for loss of society and mental anguish arising out of the Texas Wrongful Death Act. The court in Sanchez wrote, 'This court has always endeavored to interpret the laws of Texas to avoid inequity.' To prove this court's fairness in availing the plaintiff of his victory, this court cited a number of examples of this court's evenhanded fairness. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978); *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971). *Id.* at 437-38." Pope went on to cite other examples of remand in the interest of justice, and concluded the dissenting part of his Opinion: "Plaintiff Sanchez got the advantage of another trial when this court changed a practice rule. Although this court says defendant Cessna was right all along in this case and adopts for all future cases its contentions, Cessna loses. The rule announced by this case is a simple one to state. Under *Sanchez*, the plaintiff prevails if he wins; under *Duncan*, the plaintiff prevails if he loses. The defendant loses both ways. [p. 439] There is no greater inequality than the unequal treatment by the same court of things that are equal. I agree that comparative fault is the fair method to try these causes. I would remand this cause so Cessna can have the fair trial it was denied." *Id*. at 438-39. [Author's note: the plaintiffs were represented by noted plaintiffs' lawyers Rusty McMains of Corpus Christi and Pat Maloney of San Antonio, along with Texas Tech Law Professor J. Hadley Edgar. The defendant was represented by Graves, Dougherty, Hearon & Moody. Chief Justice Pope did not explicitly accuse anyone of playing politics or favoritism.]

Publications

1. Evidence. A.J. Pope, Jr., *Presenting and Excluding Evidence*, 13 TEX. B.J. 135 (April 1950). This is Jack Pope's first article in the Texas Bar Journal, and the earliest of his articles that could be found in preparation of this paper. The article was condensed from an address Pope, Judge of the 94th District Court, presented to the Legal Institute in Harlingen on December 3, 1949. p. 169. Pope wrote: "Every day lawyers, young and old alike, handle complex problems thoroughly and confidently, but we stumble around with the simple, routine mechanics of the trial." p. 135. He proceeds to lay out the law of evidence, including conversations--telephone conversations, originator as witness, unfamiliar voice, recipient as witness; books and records of a business or corporation; letter and documents in hands of adversary; lost documents; telegrams; photographs; motion pictures; x-rays; private maps, plats, plans and diagrams; exclusion of evidence–objections, specific objection, motion to strike out testimony, and exceptions. Pope ends by quoting Byron K. & William F. Elliott, THE WORK OF THE ADVOCATE: A PRACTICAL TREATISE, 1st ed. © in 1888, 2nd edition © in 1911: "Quick and strong should be the interposition to prevent the introduction of harmful and incompetent evidence, but if it gets to the jury let the subsequent effort to reject it be quiet and mild, rather than earnest and determined; for the stronger the effort to get rid of it, the more importance jurors will attach to it, and the deeper it will sink into their minds ... ¶ "It is only evidence that is likely to do harm to which an objection should be made, except, perhaps where the purpose is to prevent a useless waste of time, or the concealment of important facts by a mass of immaterial matter. It is folly to make objections where there is no reason to believe that the testimony will do harm. If the testimony is not harmful it is far better to let it go in than to be thought a technical, carping critic. Those who fritter away time in unimportant objections bring upon themselves a reproach which much impairs their power with the jury. A man who abounds in objections finds no favor with court or jury. 'Never object to a question from your adversary,' says David Paul Brown, 'without being able and disposed to enforce your objection.' The reason for this rule is not far to seek. If objections are fruitlessly made an air of weakness is given to the case, for jurors are apt to infer that an advocate against whom the court often rules has a feeble case, which he is attempting to prop by technical objections. So, too, they are apt to regard it as an effort to keep the truth from them or to give them only a partial view of it. They, be sure, know of the charge so persistently, and most often so unjustly laid against lawyers, of attempting by tricks and artifices to bewilder courts and juries, and so defeat justice. It is but reasonable, therefore, to expect them to look with great disfavor on anything that looks like a professional trick or lawyer's technicality. What they want is full information, and they resent any effort to keep it from them." [Quoting pp. 196-97 of the Second Edition.] The Elliott Treatise can be downloaded for free from Google Books and could make interesting and enjoyable reading about the art of advocacy, which hasn't fundamentally changed since 1888.

2. Domestic Relations. Pope, *Report of the Committee on Domestic Relations of the Judicial Section of the State Bar of Texas*, 15 TEX. B.J. 557 (Nov. 1952). This is a report by Associate Justice Pope of San Antonio regarding the Domestic Relations Committee of the Judicial Section of the State Bar of Texas. The Committee made the following recommendations: common-law marriages should be abolished. After citing hostile out-of-state case law, Pope explained: "The rule upholding such marriage arose in Texas by reason of sparse settlements, long distance to place of record, bad roads, difficulties of travel and of access to officers or ministers. *McChesney v. Johnson*, Tex. Civ. App., 79 S. W. 2d 658. The same difficulties may have aided in establishing the doctrine in other states. Those difficulties do not exist in this state, at least at this time, and furnish no reason to adopt the rule here. There can be no doubt that under present-day conditions loose marriages are not favored. We find it stated in 29 Georgetown L. J. 869, that "the great weight of modern opinion advocates the abolition in this country of common-law marriage. The American Bar Association, The Commission on Uniform State Laws, and practically all authorities in the field of social reform, favor the abolition of common-law marriage." To the same effect is 1 Vernier, American Family Laws, 108." p. 581. The second recommendation was to slow-down marriage, by having a longer waiting period. "All admit that a suit for divorce should have its 'cooling off' period. We think that entry upon the marriage is also the time for careful and mature thought. In a sense, marriage is the cause of divorce, for it always precedes divorce. Wisdom in marriage, we think, will avoid many 'gin weddings' and many divorces. ¶ The chief argument against the waiting period to slow down hasty marriage is that it encourages migratory marriages. To that end your committee states that we can only hope that our neighbor states will be equally moved by the significance of preserving our faltering family institutions and adopt like legislation." pp. 581-82. The Committee recommended that the petition and cross-action contain af full and fair statement of the grounds for

divorce, and be sworn to. p. 582. It recommended a waiting period of 90 days after return of service or the filling of the waiver of citation before the divorce can be granted. p. 582. The Committee recommended that a party waiving process be given a copy of the divorce decree. p. 583. The Committee recommended taht children under the age of seventeen be represented by a next friend appointed by the court. pp. 583-84. The Committee recommends that an adoption require a stufy of the former home and future home, and that the chld must live in the adoptive home for six months before the adoption can be granted. p. 584. Pope wrote: "The one who is most helpless, whose life has not yet been ruined, is, the only one whose rights are not heard, and if heard at all are heard through the mouths of parents at war with each other. The child stands in this situation in the peculiar position of having a judgment about him, though he is not a party, has no voice, no counsel, no right to appear. Especially is this true in the case of uncontested divorces." p. 584. The Committee thinks the child should be represented by counsel. p. 584. The Committee endorses a bill prepared by Judge Sarah Hughes allowing a spouse to seek court-ordered support from the other without having to file for divorce p. 585. The Committee recommended that the court granting the divorce retain jurisdiction to modify. Under the law then in effect, support and custody had to be determined in two different counties. p. 585. The Committee recommended against legislation in the area of enforcing support orders against "fugitive spouses." The Uniform Reciprocal Supprt Act was the best legislative platform for enforcement. p. 585. The Committee recommended a 12-month prohibition on remarried after divorce. p, 586. The report made some general observations: "divorce; divorce is the result of the broken family. 2. The spouses in actual fact divorce themselves . . . The spouses separate themselves. In the last 8,000 cases tried in a midwestern city the spouses had already been separated an average of well over two years before coming into court to get their divorces. Divorce didn't separate them. 3. The real cause of broken families is not divorce but drunkenness, cruelty, neglect, desertion, infidelity, etc., of one or both spouses – things that used to be called sin. 4. The marriage fails because of the failure of the individuals who marry. The alleged grounds for divorce are merely pegs-often artificial-upon, which the decree is hung. The real grounds lie in the character defects of one or both spouses, The cruelty, infidelity, etc., are merely symptoms or outward manifestations of such character defects-which some of us believe can be summed up in selfishness and inconsiderateness." p. 586. The report ends with the following lament: "The one million divorces granted annually are an indictment of society when it is realized that the rate has increased while the laws themselves have generally not been relaxed. However, here as in any instance when self-disciplines break down, the law is expected to provide reasonable curbs upon the weakness of human nature. After the man and woman have failed, after their own immediate family has failed, after their friends and employers have failed, after the influence of church and social custom have failed, in fact after all others have failed, the already broken family is handed over to the law to take one last whack at creating a masterpiece of beauty out of society's junk pile. The limitations upon success are inherent in the problem, for the law can not compel one spouse to love another. The most that can or should be expected of the law is a sane and sensible effort commensurate with the seriousness of the problem." p. 586.

3. Scientific Evidence. Pope, *Presentation of Scientific Evidence*, 31 TEX. L. REV. 794 (June 1953). While he was a Justice on the Fourth Court of Appeals in San Antonio, Justice Pope wrote at p. 794:

> When the scientist comes to court, he may speak as an expert and express opinions and conclusions so long as he brings knowledge that has been sifted by the scientific process. At the point where he departs from that method, however, he ceases to be a genuine scientist, and not only should the court reject his information, but the scientist should also. As a preliminary predicate for the privilege of speaking as a scientist, he must first show that he has behaved as a scientist by observing the exactitudes of that for which he speaks.

4. Philosophical Views on Compartmentalization of Knowledge. Pope, *The Unfolding Unity*, 3 J. PUB. L. 319 (1954). Published for a Symposium on Law and Medicine, San Antonio Court of Civil Appeals Associate Justice Pope takes a reflective turn in his writings. The article starts: "Someone has compared our intellectual departments to a cluster of many islands in the ocean. We choose one of them as a place to dwell. We know that many others are scattered about, and we may even have visited on some of them or viewed them at close range at some time in the past; but for most of us, our knowledge is restricted to our own tiny domain which is isolated from all the rest. We treat inhabitants of the other domains as foreigners. Some isles may be better explored than others, but many are still undiscovered. We have given these imaginary islands of knowledge certain distinguishing names. Isles of Physics, Chemistry, Geology, Paleontology, Biology, Zoology, Genetics, Archaeology, Anthropology and Geography have been located and explored. Some of the more beautiful intellectual islands have been named Theology, Philosophy, Logic, Education, History, and Art. ... ¶ The occupants of each island have become so occupied with the significance of their own tiny domain that often they may devote their entire lives in isolation. They develop separate dialects and often find that they have completely lost the power of communication with other nearby isles even within the same group. There are adequate communication systems, and the mail is delivered daily between many of the islands, but such a tremendous mass of written material, some good and most bad, is produced by the prodigious work of all the ocean group, that there is hardly time to read any sizable quantity. So the islanders, instead of reading, simply accumulate the mountain of material and store it on Library Island. ¶ Actually the islands are just the peaks of little mountains jutting up from a common ground that lies below, and beyond the range of our vision. We shall leave the metaphor, for the point is clear. To conquer knowledge, we have divided it The method is effective, but in dividing knowledge, we have also divided man--divided man is not man at all."

5. Duties of the Profession. Pope, *Duties of the Profession: What the Organized Bar Owes to the Public*, 43 AM. BAR ASS'N J. 801 (Sept. 1957). This article is taken from an address that San Antonio Court of Civil Appeals Justice Pope gave to the Nueces County Bar Association in January of 1957. The article starts: "Governments are ruled either by law or by men. T'he free nations of oday's world are those which are governed by laws made by the people; the slave states arc those in which men impose their own ideas upon the people. ln America. where we have enthroned human rights in

constitutions and stare decisis, the laws of our land belong to the whole public. ln such a nation every individual is a part of his government. Government as we know it is non-existent without law. Government, law and the citizen are indispensab1e to each other. In addressing professional men, I am speaking to a group who, by the very nature of their calling, possess an understanding and a knowledge about government and law which most citizens are not privileged to share. Lawyers arc not only citizens, but as members of an ancient and noble profession, they are also professional citizens. ¶ A profession is sometimes more than a business or vocation. A profession deserving of the title embraces a body of persons who are learned. It conemplates further that its members are bound by a special code of conduct. That code of conduct requires that personal gain must be subordinated to the public good. Hence, our conduct imposes duties to ourselves, to ur clients and to the public. Let us examie that duty the public ... a public wo acttually owns the lws of which you and I are mere ministering servants. What may the public expect as its fair share of the law, primarily at our hands? ¶ *The public may first expect that our members be skilled concerning the dynamic laws of our expanding society*. There is probably a general feeling that the members of the American Bar possess the necessary intellectual attainments, and that we pursue our services with sufficient expertness. Certainly the hundreds of legal institutes which have been conducted during the past fifteen years should have filled our filing cabinets with printed material on scores of legal subjects, which if we will but read it, should furnish us a continuing coourse of professional education. Hardly a month passes but some bar association, law school, foundation, or institute sponsors a short course at which we can hear the finest lecturers who willingly deliver learned papers, with no reward but the profesional gratitude of their fellows. ¶ *The publi' may next expect that our members conform to a code of ethics.* The sarne public who owns the laws of our land also has an intcrcst in the ethics of those who practice the law. It is not my purpose to preach, and l shall therefore assume that all of us know and understand the code of our profession, and that we often re-examine those principles. I would speak about another matter. ¶ The bar associations of America have miserrably failed in getting over to the general public the extreme importance to them of some of our misunderstood canons. Our failure to explain the purpose of our mission has ignorantly resulted in criticism of high-minded and courageous memeber of the Bench and Bar." The article continues.

6. Public Impressions of the Courtroom Scene. Pope, *Public Impressions of the Courtroom Scene*, 22 TEX. B. J. 71 (Feb. 1959). This article was an abridgment of an address made by Associate Justice Jack Pope of the Fourth Court of Civil Appeals before the San Antonio Bar Association. It was one of twelve articles reprinted in Volume 76 of the Texas Bar Journal in 2013, to commemorate the Journal's 75th birthday. The article began: "The courts belong to the public. What happens in courts, therefore, is of public concern. Those of us who play leading roles in the courtroom drama must never forget that we are performing our professional roles before the public. The object of the courtroom scene is not to curry favor or to win plaudits, but to do justice, and often the true hero may win public disapproval rather than acclaim. When that disapproval is caused by our delay, harassment, waste and things which make people ashamed of their courtroom justice, or doubtful of the sincerity of the professional Bench and Bar, then we should examine ourselves." Pope proceeded to a serious admonitions to judges about how to conduct themselves and conduct trials. "Every judge I know is satisfied with the manner in which he conducts a trial. But as a lawyer, I was not always satisfied. I was not as satisfied with the judge who did not study his case as I was with the one who stayed on top of the case at all times, who analyzed the pleadings in advance of the trial, who tried to isolate the special issues, who anticipated the problems as the case progressed." p. 72. Pope went on to say that judges should become "delay conscious, and avoid every needless delay as we would the plague." p. 72. He siad that the judge sets the tone of a trial, "and often for an entire community." p. 72. He suggests 17 rules for judges: "1. From the time the docket is sounded, the court should be on the bench and all persons should be seated. 2. When the court ascends the bench, complete order should be observed. The bailiff should be schooled and trained to enforce this courtroom spirit of order. 3. The judge, the clerk, and the bailiff should run the court organization. Lawyers should not be asked to call in jurors or witnesses, or get the clerk. 4. At the time for convening of court, it should convene. It should proceed without interruption except for regular recesses. Uncontested matters and personal affairs should not interfere. The trial should have a full right of way along a one-way street until it is pressed to a conclusion. [ending p. 72; going to p. 102] 5. When the judge addresses counsel, it should be done impersonally, as by 'Counsel,' rather than by first name. Counsel should also behave impersonally toward the court. 6. The court should control fully the manner of behavior and should not let the trial degenerate into a trial by side-bar remarks, by jest, by wit, or by insult. 7. The court should require objecting counsel to rise at his place and state his legal objections. Stating the legal objection does not always mean a legal argument either. 8. The court should require the objections and remarks to be addressed to the court and not to counsel. 9. The one objecting or making a motion should first speak. The opposing side should respond, and the movant should close. Roundtable discussions and interruptions by opposing counsel should not be permitted. 10. After the court has heard fully and has listened patiently, he rules, and he should not tolerate further arguments. Arguments after the court has ruled too often degenerate into quibbles and quarrels. 11. The court should announce his ruling. Remarks such as 'Let's go on with the argument,' 'Lets' proceed,' do not show what ruling is made. Another practice by some judges is to wave at the lawyer to proceed. Counsel have the legal right to insist upon a ruling. 12. Judges on the bench should not smoke. Witness should not smoke while testifying, and lawyers should not smoke while questioning. In federal courts nobody smokes; but it seems to be rather shocking to suggest a different rule for state courts. 13. When the oath is administered, it should be administered in a manner calculated to impress jurors with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the bar or the court. The perfunctory mouthing of words by clerks or courts is a degradation of the courtroom scene. 14. Jurors, the bailiff, and spectators should not read newspapers in the courtroom, and bailiffs should be trained to so advise persons. 15. All of us judges should learn to keep our judicial mouths shut. In Bacon's Essay, 'Of Judicature,' he says: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions though pertinent.' He further wrote: 'Judges ought to be more learned than witty; more reverend than plausible; and more advised

than confident.' 16. A train of uncontested matters runs through every courtroom, carrying its witnesses and spectators. They, too, should be handled in open court if formal evidence, however brief, is to be heard. They, too, should be solemnly heard. This is one of the hardest things that a judge does to earn a day's wages. He must maintain an interest in a story he may have heard many times before. But the people who are in court on that matter may be in court for the first and last time. To them, this is court, and this is their case. Their image of the court will come from the measure of respect and dignity with which their case is heard. 17. All judges must strictly conform to the same high standards, else the good that is accomplished in one court during one week may be lost the next week in another court." p. 102.

7. Jury Misconduct. Pope, *Jury Misconduct and Harm*, 12 BAYLOR L. REV. 355 (Fall 1960). This article was cited in Calvert & Susan G. Perin, *Is The Castle Crumbling? Harmless Error Revisited*, 20 S. TEX. L.J. 1 (1979), for the proposition that "a party is not entitled to a perfect trial."

8. Comments on the Jury. Pope, *The Jury*, 39 TEX. L. REV. 426 (1960-1961).

9. How Jurors Think. Pope, *Mental Operations of Jurors*, 40 TEX. L. REV. 849 (June 1962).

10. Function of Jurors. Pope, *The Proper Function of Jurors*, 14 BAYLOR L. REV. 365 (Fall 1962).

11. Broad and Narrow Jury Questions. Pope, *Broad and Narrow Issues*, 26 TEX. B.J. 921 (1963). In this article, Justice Pope (then of the Fourth Court of Appeals in San Antonio) "discusses Rule 279, suggests some principles or rules of thumb for lawyers to remember, in submitting issues." Rule 279 required the court to submit controlling issues to the jury. Pope quoted *Hough v. Grapotte*, 127 Tex. 144, 90 S.W.2d 1090 (1936) which said "Multiplicity of issues should be avoided." p. 921. He next cited *Howell v. Howell*, 147 Tex. 14, 210 S.W.2d 978 (1948), in which the question of cruel treatment in a divorce was submitted in one issue that was "about as broad as it could be both in time and conduct." p. 921. He then cited *City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949), which submitted multiple pleaded violations of a city ordinance by asking whether the building constituted a serious fire hazard to life and property. The Supreme Court said that the City was seeking to prove "[t]hat the buildings, in their construction, present condition and use are serious fire hazards." The pleaded specifics were merely "allegations of matters of fact that fall withing the scope of the ultimate question. They are evidentiary ... being facts that tend to prove that the buildings are fire hazards ..." p. 922. Pope mentioned a case on duress, and a common law marriage case whether the court asked :"Was there a common law marriage between George Brown and the plaintiff Merenda Brown?" p. 922 Pope then discussed *Grieger v. Vega*, 153 Tex. 498, 271 S.W.2d 85 (1953), involving a shooting, where the court asked: "Do you find from a preponderance of the evidence that the action of Fred Grieger in shooting and killing the deceased, Arthur Vega, was wrongful?" Pope said that the word "wrongful" was "defined in words that take up forty-nine lines in the Southwest Reporter." The defendant objected that the issue was too global and multifarious, and urged that self-defense be broken into its elements. The Supreme Court said: "The method employed by the trial court of grouping several elements of an ultimate issues into one special issue is to be commended. The ultimate issue in this case was whether or not the killing was wrongful." p. 922. Pope then delved into negligence cases, where granulated issues seemed to have the courts' blessing. Pope concluded his article by suggesting that the following issues could be submitted broadly: the damage issue, res ipsa loquitur, attractive nuisance, and lookout and control. p. 979.

12. The Judge-Jury Relationship. Pope, *The Judge-Jury Relationship*, 18 SW L.J. 46 (March 1964).

13. Common Law Reasoning. Pope, *Methods for Common Law Judges,* Journal of the Texas Supreme Court Historical Society (Summer 2012).[23] This is a copy of a lecture presented to the Texas Railroad Lawyers Association in October of 1964 by Justice Jack Pope, then serving on the Fourth Court of Appeals in San Antonio, and who was the Democratic nominee for Place One on the Supreme Court of Texas. In many respects this lecture presents the essence of Pope's view of the proper role of a judge in deciding cases. Justice Pope said: "Mr. Justice Holmes once lectured his colleagues on the court about the binding force of the common law when he said in his dissent to *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917): 'A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say, I think well of the common law rules of master and servant and propose to introduce them here en bloc.' These are the words of a judge who had been nurtured in the common law, understood legal history, was experienced as a judge of a state court, and then was elevated to the highest court of law in the land. Justice Holmes knew that he would not go to jail if he violated those common law limitations, but he felt bound by the common law and said so. For a few minutes, we shall extend his remarks and explore the limitations upon and the leeways available to a common law judge. First we shall examine the range of choices open to a judge with respect to the kind of an opinion he will write in the case at hand. We shall then mention some of the limitations imposed upon a judge by his obligation to follow binding precedent. Finally, we shall call attention to some other, but less frequently mentioned, criteria which in a common law society contribute to stability in the law." Pope first addressed "choices of kind of opinion," a brush-off opinion, a simple decision, a spelunking opinion (exploring deeper into unknown caverns), a magisterial or grand style opinion. Next he addressed " the use of precedent." He said: "The common law practice of stare decisis is actually an example of applied history, though it consists of small pieces of history at a time. Our common-law system can make mistakes and errors, but the system provides means for healing. The practice which requires written opinions exposes the fat and unhealthy tissue which in time will be replaced with healthier tissue. The thing that the system will not stand is a sustained period of time during which a system of binding precedent is discounted or ignored. It is easy, when precedents are ignored or

discounted, simply to take the final step and discard the whole system." pp. 2-3. Pope said that a judge can cite precedent and follow it, or distinguish precedent and follow it, or elevate dictum to the level of a rule and follow it, or ignore adverse precedent. p. 3-4. Pope then lists Karl Llewellyn's (Llewellyn was associated with Yale, and later Columbia and Univ. of Chicago schools of law and is called a "Legal Realist") fourteen factors that are built-in stabilizers to a system of common law decision: "(1) Judges are or ought to be law-conditioned officials—officials who look at their problems through law spectacles. (2) Judges are tied to a body of legal doctrine which is embalmed in the books in your own libraries. We have discussed this element already. (3) Judges work with precedents and use them as binding, as analogous, as indicative, or as spurious. This is a system and technique known to all lawyers. (4) There is a sense of responsibility on the part of those deciding to do justice. I would have added, "under the law." (5) There is an idea that there is a single right answer to each problem. (6) The practice of writing an opinion eliminates hurried hunches, serves as a back-check and a cross-check, and also exposes our judicial mistakes and ignorance so they may be corrected. (7) The record is frozen, beyond which the judge and the attorneys are not free to rove. (8) That record is further narrowed and frozen by issues or points which sharpen the dispute. (9) There is an adversary argument which marshals and uses established law as its basis. (10) There is a court or team decision which is designed to eliminate the one-man opinion. (11) This makes more probable the recollection of prior actions, prior attitudes, and prior decisions. (12) Given a bench that has had reasonable continuity and tenure, its previous opinions reveal not just what was decided, but how it was decided. 5(13) Opinions, and there are not enough of them, says Llewellyn, which are grounded upon principles which check up on precedent from time to time and provide the foundation for a healthy body of law. (14) The written opinion also provides a sense of a judiciary that is professional." pp. 3-4.

14. Justice Hamilton. Pope, *Mr. Justice Hamilton, Common Law Judge*, 22 BAYLOR L. REV. 469 (Summer 1970).

15. Revised Rule 277. Pope & William G. Loweree, *Revised Rule 227 - A Better Special Verdict System for Texas*, 27 SW. L. J. 577 (1973).

16. Jury Question Under Revised Rule 277. Pope, *A New Start on the Special Verdict*, 37 TEX. B.J. 335 (April 1974). In this article, Associate Justice Pope wrote about jury questions:

> The revisions of Rule 277 again raise the question which has not been answered in Texas for more than a hundred years: What is an issue? Words, and particularly adjectives, have brought us no nearer to an answer. Justice Sharp in *Wichita Falls & Oklahoma Ry. Co. v. Pepper*, 134 Tex. 360, 135 S.W.2d 79 (1940), recognized this truth, saying that the Legislature imposed the duty to submit all of the issues made by the pleadings and evidence but it did not see fit to tell us the meaning of an "issue." After reviewing many cases and texts he concluded, "The decisions are in hopeless conflict." Justice Stayton had earlier made an effort to state a rule saying, "An issue is the question in dispute between parties to an action, and in the courts of this state, that is required to be presented by proper pleadings." *Freeman v. McAninch*, 87 Tex. 132, 135, 27 S.W. 97, 98, 47 Am. St. Rep. 79 (1894). *See Jack Cane Corporation v. Gonzales*, 410 S.W.2d 953 (Tex. Civ. App. 1967, no writ); Hodges, Special Issues Submission in Texas, Sec. 35 (1959); 3 McDonald; Texas Civil Practice, Sec. 12.06.1 (1970); Clifford Mays, Trial, Special Issues, 10 Tex. L. Rev. 217 (1932), listing four different meanings for the term. We are still where we began; a controlling issue is an ultimate issue.
>
> What will the courts say, under the revised rule, about the requested issue, "Do you find from a preponderance of the evidence that the defendant was negligent?" The question boggles the mind of the Texas personal injury lawyer after fifty years of familiarity with *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922), but that issue would not seriously be challenged in other jurisdictions. The new rule appears to give the court a discretion whether to submit that broad negligence issue or, alternatively, to submit the negligence issue with a listing of the particular acts or omissions alleged and proved.
>
> The most dramatic change in the authorized form of issues made by Revised Rule 277 is its abolition of the requirement that the issues be submitted distinctly and separately. *See Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922); *Roosth & Genecov Production Co. v. White*, 152 Tex. 619, 262 S.W.2d 99 (1953); *Solgaard v. Texas & N.O.R. Co.*, 149 Tex. 181, 229 S.W.2d 777 (1950).
> * * *
> Conclusions
>
> 1. The special verdict system will continue. The general charge will rarely be employed.
>
> 2. The broad special issue practice in other fields of the law will be imported into the personal injury field.
>
> a. In negligence cases, a court may broadly submit the negligence and contributory negligence issues as the controlling issue, or it may submit the negligence issue with respect to the specifics, as stated in the illustration described by revised rule 277.
>
> 3. When we get outside of the primary and contributory negligence issues, we will begin substituting instructions in place of the subsidiary and satellite issues and concepts. This means that:

a. Inferential rebuttal issues shall not be submitted. There will be no submission of issues about unavoidable accident, sole promimate cause, independent contractor and in some cases, borrowed servant.

b. Cases have not yet determined whether such things as voluntary assumption of risk, last clear chance, imminent peril will be the subject of an issue, but in a number of states in which comparative negligence has been adopted, they are handled by instructions.

4. Judges may not directly inform the jury of the effect of their answers or comment on the evidence in their instructions, except that they may incidentally do so if the instruction is helpful to a jury in understanding an issue. We are all writing on a clean slate, and all of us must use some judgment lest we write back into the new rule the things that the new has taken out. If we transfuse the old practice into the new one, personal injury trials will probably become the domain of administrators in which fault is not a consideration, and in my opinion, the public in the end will be the losers.

Good luck.

17. New Trials. Pope & Daniel J. Sheehan, Jr., *"Try, Try, Again..." A Proposal To Limit The Scope Of New Trials In Texas*, 7 ST. MARY'S L.J. 1 (1975)

18. Evidence. Pope & Charles E. Hampton, *Presenting and Excluding Evidence*, 9 TEX. TECH L. REV. 403 (1977-1978)

19. Rule Making. Pope & Steve McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5 (Winter 1978).

20. Dean Leon Green. Pope, *Dean Leon Green*, 56 TEX. L. REV. 567 (Feb. 1978).

21. Special Verdict. Pope & William G. Lowerre, *The State of the Special Verdict*, 11 ST. MARY'S L.J. 1, 43 (1979).

22. 1981 Rules. Pope & Steve McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457 (Fall 1980). [This article was not available on Westlaw.]

23. Advocacy for the Legal System. Pope, *Advocacy for the Legal System*, 36 BAYLOR L. REV. 757 (Fall 1984).

24. Advocacy. Pope, *Effective Briefs and Oral Arguments*, SBOT Advanced Civil Trial Course (1984), available from the State Bar of Texas Archives. Pope began this article by quoting Watson Clay who had quoted Cicero: "'Cicero aptly delineated the five essentials of good public speaking .... They are: (1) determining exactly what one should say; (2) arranging the material, with good judgment, in the proper order; (3) using well-chosen words and carefully phrased sentences; (4) fixing the entire presentation in mind; and (5) delivering it with dignity and grace." Presenting Your Case to the Court of *Appeals*, 16 KY. ST. B. j. 73 (1952). Pope went on to say that "Ordinarily, you should argue your case on appeal, but there may be some causes that are so simple that they do not justify the additional expense to the litigants. Argument served many purposes. It is more personal than the record, and the briefs have the smell of the library. Thoughts are often better crystallized and more tersely stated in argument than in the briefs." Pope quoted a circuit judge and Lleewellyn in support of oral argument. p. K-2. Pope then explained what the appellate court is like. p. K-3. He discussed what preparation the judges have made for argument. P. K-3. Regarding the aim of oral argument, Pope wrote: "The best statement of the objective for oral argument that I have found is that of the Honorable Atwood McDonald, "The important thing in oral argument is to put before the court the party's theory of the facts in such clear manner that all of the judges will know and remember that theory and then can study the recor~ in the light of the contentions made." McDonald, Briefing and Arguing Cases on Appeal, 7 TEX. B.J. 395 (1944). If that is done, the advocate has gone far toward a successful argument." p. K-5. Pope said that the point of oral argument is not to win the case there. "Most judges, at the argument stage, are not ready to make a final decision. Judgment, at that time, is and probably ought to be reserved. Facts need to be checked. Cases need to be read." K-6. Pope says not to try to get the court to rule for your side. The jury decides the facts and precedent does the same for law. Pope quotes, "Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law. Justice [Oran] Roberts in *Duncan v. Magette*, 25 Tex. 245, 253 (1860). Regarding preparation for oral argument, Pope suggests: "Many arguments prove disappointing to the advocate because he is. interrupted, and the whole procedure takes an unexpected course which may not display the case in its best light. Preparation and the disclosure of certain basic matters at the outset of your argument may eliminate some of these disturbances." p. K-7. Given 30 minutes to make a presentation, "the first niety seconds are important." p. K-8. His four recommendations: "1. Tell The Court Your Name if The Marshall Does Not do so. 2. Tell The Court The Kind of Case You Have. 3. State Whether The Case Was Tried Before a Jury or The Court, Who Won, And Whether Judgment Was on The Verdict or Non Obstante Veredicto. 4. State Which Points You Will Argue And Which Ones You Will Leave to The Briefs." Pope gives this illustration of a good opening: "'May it please the court. I am John Jones from Pearl Valley. This is a boundary case. It was tried before a jury and the court rendered judgment for the plaintiff on the verdict. Defendant here appeals from that judgment. We are before this court on five points, but we shall discuss only three of them. We shall leave the others to the briers. Our first point is that the surveyor of the tract in question went to the thread
of the stream instead of the cut bank. Our second point is that the verdict is incomplete. Our third point is that one of the jurors received outside information about the boundary line in question. We shall show that the cause should be

remanded.' K-9. Pope then gives a humorous example of a bad opening argument. Pope then asks: "How many points should I argue?" His answer: "Not many." Pope quotes U.S. Supreme Court Robert Jackson: "'The impact of oral presentation will be strengthened if it is concentrated on a few points that can be simply and convincingly stated and easily grasped and retained.'" K-10. "Should I argue fact or law points?" "Enough facts must be discussed to disclose the law points." K-11. "How can I present the argument?" "Be orderly. ... Be Clear, ... Be Candid. ... Do not Read. ... " pp. K-12-13. Regarding questions: "Questions are disturbing to some attorneys. Rather than resenting questions, counsel should welcome them if the questions are good ones. If counsel ever wishes to explain his theory to a court in quandary, this is his last opportunity to do it. Questions show, at least, that the court is interested and concerned--and awake. Counsel, on occasion, tell me that the reason they make oral arguments is to answer any questions the court might have. ¶ Do not be lured away from the points you are centering on, unless the court insists that you abandon that course. If, as is sometimes the case, you are unable to give a direct or satisfactory answer to a judge right then, ask the court for permission to submit a post-argument brief to the court and opposing counsel." K-14. "Should I Divide the Time with a Colleague? No." The article finishes with more tips to the practitioner.

25. Time Limits. Pope, *Supreme Court Establishes Time Standards for the Disposition of Civil Cases*, 48 TEX. B.J. 179 (Feb. 1985). On December 1, 1984, the Texas Supreme Court issued time standards for the disposition of cases in trial courts, in both civil and criminal cases. Under these Standards, so far as is reasonably possible, district judges should, so far as is reasonably possible, ensure that all civil cases are brought to trial or final disposition within the time standards: Civil Cases other than Family Law: jury, 18 months from appearance date; non-jury, 12 months from appearance date; Family Law Cases: contested, within 6 months from appearance date or expiration of the waiting period provided by the Family Code, whichever is later; uncontested, within 3 months from appearance date or expiration of the waiting period, whichever is later. Juvenile cases had standards relating to the various hearings required. For complex civil cases "It is recognized that in especially complex cases it may not be possible to adhere to these standards." p. 181. The Texas Bar Journal published an article by Former Chief Justice Pope shortly after he ended his final term as Chief Justice in December of 1984, regarding these standards. The Journal announced: "The Supreme Court of Texas recently issued orders concerning time standards for the disposition of civil cases, Texas Rules of Civil Procedure, local rules of practice and certification of transcriptions by shorthand reporters. The orders are reprinted here in their entireties, along with an interpretive article about the time standards by former Supreme Court Chief Justice Jack Pope." p. 179. Justice Pope wrote: "I have often heard the word 'accountability' in the halls of the Legislature, and among the members of the Senate-House Select Judiciary Interim Committee on which I served. Judges, as all public officials, are charged with an accountability to their constituents, to the Legislature and to the legal system. We can set our own standards for accountability, and should do so without having them legislatively imposed. With the aid of the Bar we are doing so now. ¶ Studies and research have shown that the primary cause of trial court delay is not the volume of cases or the lack of judges, but rather the local legal culture's attitude toward trial delay. Cases can be moved more quickly and the public better served by a more efficient judicial system. ¶ When time standards are set, courts have a frame within which to hold lawyers; lawyers know for the first time that they have responsibilities to perform within that time. It works. Our whole society, except for our open-ended legal system, has time limitations. Contracts have a performance date, taxes must be rendered and paid within a time frame. People attend school for semesters. Public officials hold offices for terms measured in time. Only the filing and disposition of a case, in all of our culture, has been open-ended. Over Texas, we have tens of thousands of open-ended cases. Judges and lawyers need a time standard to ensure the disposition of pending cases in a reasonable time." p. 179. Pope noted that the Texas Legislature fixed mandatory standards for disposing of criminal cases under the Speedy Trial Act of 1877. He noted that the Supreme Court and Fourteen Courts of appeals of Texas "established time standards for the disposition of both criminal and civil appeals pending in those courts." p. 179. Pope continued: "Based on the positive results reached by these two experiences, the Supreme Court, working with the presiding judges of the nine administrative judicial districts, has developed time standards for the trial courts of the state and by an order dated Dec. 3, 1984, has promulgated these standards. They are not onerous. They are not mandatory. They are reasonable. There are and will be no sanctions. They are what they are called: standards. They are really more of an aid for lawyers than for judges. The standards conform generally to those approved by the National Center for State Courts, the American Bar Association and the National Conference of Chief Justices." p. 180. Pope continued: "A first draft of the proposed standards was mailed to all of the district judges of the state. We asked for their views. We received numerous letters from judges from all parts of the state and these letters were almost unanimous in the endorsement of these standards. ¶ They will work and will provide the judges, lawyers and citizens with a better system of justice. But to make them work, we need the cooperation of every member of the Bar, of every judge and of every litigant. With your cooperation we will point with pride to our accomplishments in the utilization of these standards." p. 180.

26. Reversals. Pope, *Reasons for Case Reversal in Texas: A Preface*, 16 ST. MARY'S L.J. 295 (1985).

27. Professor Orville C. Walker. Pope, *Dedication to Professor Orville C. Walker*, 18 ST. MARY'S L.J. xiii (1986-87). Chief Justice Pope wrote a dedication to Professor Orville Walker upon his retirement from teaching procedure to a generation of law students at St. Mary's University School of Law. Pope wrote: "Procedure is the royal thread that bonds the whole of the law into what has been called a seamless garment. Our rules of fair play, being common to the whole fabric of the law, unite all of the sprawling and disparate fields of the substantive law. Every clarification or simplification of our procedures results in improvement of the whole system of justice. It was at this crucial and vital part of the law that Professor Walker focused his attention from the beginning of his career. ¶ The Texas Supreme Court named Professor Walker to the Supreme Court Advisory Committee in 1960. Since that time he has continuously worked as a member of that talented group of professors, judges, and lawyers in the permanent study of ways to improve the administration of justice. When we compare what the last generation gave us in the form of practices and procedures with what we now

have, we realize that the labors of Professor Walker and the Committee have been fruitful. Pre-trial and discovery practices have been harnessed and simplified, the court's charge has been shorn of its multiplicity of issues and excesses, appellate practice has been simplified, time intervals during trial and on appeal have been shortened, and appellate practices in civil and criminal cases have been coordinated." The article continues.

28. Public Impressions of the Courtroom. Pope, *Public Impressions of the Courtroom*, 76 TEX. B.J. 309 (April 2013). This was a reprint of Pope's article 75 years before in 22 Tex. B. J. 71 (Feb. 1959), in celebration of the 75th anniversary of the Texas Bar Journal. See Section III.D.6 (publications) above.

E. OTHER PROFESSIONAL ACTIVITIES.

1. Supreme Court Advisory Committee. Chief Justice Calvert appointed Justice Pope to be the liaison from the Texas Supreme Court to the Advisory Committee for the Supreme Court of Texas.

Retired Chief Justice Pope wrote: "Procedure is the royal thread that bonds the whole of the law into what has been called a seamless garment. Our rules of fair play, being common to the whole fabric of the law, unite all of the sprawling and disparate fields of the substantive law. Every clarification or simplification of our procedures results in improvement of the whole system of justice." Jack Pope, *Dedication to Professor Orville C. Walker*, 18 ST. MARY'S L.J. iii (1986-87).

Justice Pope's final meeting with the advisory committee occurred on November 12-13, 1982, at the Texas Bar Center. Here is Justice Pope's valedictory statement:

> This group of revisions and recommended repeals of rules may not reach the Advisory Committee by reason of time limitations. We still urge you to read them. We need your insights and suggested revisions about style of the text.
>
> Significant changes and simplification of the rules have been achieved in recent years. The rules are divided into eight parts as appears from your Desk Copy. Parts III through VIII have been generally reviewed, revised and rewritten. The important parts of Part I (General Rules), consisting of only 14 rules have had frequent revisions, but they still need to be examined. Part II (Rules of Practice in District and County Courts) have been reviewed and the important rules have been revised, but there has not been a general revision. The numbering system for the rules generally is in need of restudy.
>
> There is no consistency in the numbering system of the rules or their internal designation of sections. We are hearing complaints about the proliferation of local rules. Courts even within the same city and courthouse are adopting rules that differ. This is a problem that needs serious study.
>
> In this, my valedictory communication, I also acknowledge the service to the state by Ms. Peggy Hodges, Administrative Assistant. Ms. Hodges has maintained files and a docket of incoming revisions and recommendations and their progress through the rule-making process. She has drafted scores of rules and created the style and form for the agendas which enables the Advisory Committee more easily to comprehend and follow new proposals. She has largely organized and referenced this agenda that is here submitted as well as those that have been previously submitted. She has made it possible for me to discharge my regular court duties while also serving as the Supreme Court Rules Member.
>
> Te Honorable George McCleskey has continuously worked hard and cooperated with the court and with me in planning the agenda and conducting the business of the Advisory Committee. He is only the second person who has chaired the Advisory Committee since its inception in 1939.
>
> Finally, I express my gratitude to Chief Justice Greenhill who has maintained an ongoing and lively interest in the state of the rules and their improvement. I am grateful for his appointing me to serve as the Rules Member of the Supreme Court.
>
> I thank the Committee for the opportunity to work together in this important matter of public interest.

2. Special Issue Practice and Broad Form Submission. Professor William V. Dorsaneo, III wrote an article, *Evolution of Texas Procedure from 1826 to 2000*. Here is what he wrote about the history of jury submissions in Texas courts:

> The earliest Texas practice recognized the use of a special verdict in the form of narrative findings by the jury similar to the findings of fact made in bench trials.[46] From 1846 to 1913, both the general charge and special charges and verdicts were authorized. In the general charge, the judge stated the applicable law and it was "the province and duty of the jury to apply the facts, permitted to go before them under the rulings of the court, to the law as given them in the charge. . ., and directly and concretely decide by their verdict who shall prevail in the suit."[47] Due to its inherent technicalities, the general charge was viewed as the source of numerous reversals.[48] If any theory in a general charge was insupportable factually, legally, or procedurally, the entire case was reversed, even though the evidence would support one or more of the defective theories.[49]

> By the end of the nineteenth century, due to legislative enactments and court interpretation, submission of cases by special interrogatories became mandatory on the request of the party.[50] One of the principal early obstacles to the use of special issues was the rule that a verdict had to encompass all of the elements of the claim.[51] Even undisputed facts had to be found by the jury because the trial court was statutorily precluded from rendering judgment if all facts raised by the pleadings were not found, even if none of the evidence presented raised a fact issue. In 1897, the Texas Supreme Court criticized this dangerous aspect of special verdict practice. In *Silliman v. Gano*,[52] Chief Justice Gaines noted that the requirement that the special verdict include all findings necessary to support a judgment was too stringent.[53] In answer to this criticism, the Texas Legislature passed legislation mandating that Aan issue not submitted and not requested by a party . . . shall be deemed as found by the court in such manner as to support the judgment."[54]
>
> In 1913, the Texas Legislature enacted the Special Issues Act,[55] the predecessor of what is presently Rule 277 of the Texas Rules of Civil Procedure. It is commonly accepted that the legislation was enacted to provide an escape from a general charge practice that had become unmanageable because of "a gradual accumulation of instructions considered helpful to juries."[56] The new procedures mandated by the Special Issues Act required the use of special issues. The statute included language requiring that "special issues shall be submitted distinctly and separately, and without being intermingled with each other, so that each issue may be answered by the jury "separately."[57] This "distinctly and separately" requirement introduced a "system of fractionalization of special issues far beyond that employed in any other jurisdiction in the common-law world."[58]
>
> In *Fox v. Dallas Hotel Co.*[59] the Texas Supreme Court mandated the submission of each issue "distinctly and separately, avoiding all intermingling" in negligence cases.[60] Alexander Fox died as a result of injuries he sustained while trying to operate a defective elevator. Although many specific acts of negligence had been alleged, the court submitted the following single question concerning the decedent's contributory negligence:
>
> > Do you find from a preponderance of the evidence that Alexander Fox was guilty of contributory negligence in his conduct in, around, or at the elevator, or the shaft thereof, prior to or about the time he was injured?[61]
>
> The Texas Supreme Court rejected the trial court's submission of contributory negligence in broad-form, construing former Article 1984a as requiring that each separate factual theory be the subject of a separate question having a separate answer.[62] After Fox, the courts strictly enforced the requirement that issues be submitted "separately and distinctly" in negligence cases.
>
> The Special Issues Act, enacted in 1913, also permitted "such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues."[63] This principle of necessity was applied rigorously in an apparent effort to avoid complex jury charges.[64] Accordingly, after the adoption of the Special Issues Act,[65] hostility to the general charge historically meant a limited role for definitions and instructions. Indeed, before the adoption of the Texas Rules of Civil Procedure, the use of instructions, as distinguished from definitions of legal terms, was prohibited. The most that could be done was to define legal and technical terms used in the charge.[66]

As explained by Professor Dorsaneo, in *Fox v. Dallas Hotel Co.*, 240 S.W. 517, 522 (Tex. 1922), the Texas Supreme Court mandated the submission of each jury issue "distinctly and separately." Texas thus developed a very complicated system for jury submissions, in which the questions were called "special issues. "

Justice Pope long expressed an interest in the difficulties with special issues, inferential rebuttal issues, and conflicts between jury answers. Professor Bill Dorsaneo described Pope in these terms: "Former Chief Justice Jack Pope, [was] clearly the most influential figure in the modem development of Texas charge practice in the last twenty-five years ...." Dorsaneo, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 646 (1992).

Back in 1962, then Fourth Court of Appeals Justice Pope wrote an article for the Texas Bar Journal about "controlling issues." Justice Pope wrote: "I believe that lawyers and courts, particularly trial courts, could eliminate at least some of the superfluous issues, avoid some of the conflicts in issues, and reduce the number of incomplete verdicts. It is my opinion that the Supreme Court is trying desperately to tell all of us something." Pope, *Broad and Narrow Issues*, 26 TEX. B.J. 921, 979 (1963).

Years later, Justice Pope was able to instigate reform in broad form submission by amending TRCP 277 to permit broad-form submission (in 1973) and finally require it (in 1988).

In 1973, Rule 277 was amended and provided in part:

> It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.

The 1973 amendment also deleted from the rule language permitting the court in its discretion to submit separate questions regarding each element of the case. But old habits die hard. In *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245,

255 (Tex. 1974), the Supreme Court wrote that new Rule 277 meant what it said: the court should simply ask whether the party was negligent. In 1979, Justice Pope and Lowerre co-authored an article on *The State of the Special Verdict*, 11 ST. MARY'S L.J. 1 (1979).

In *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex.1980), the Court said that Rule 277 was designed to abolish the "distinctly and separately" requirement. In *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 925 (Tex. 1981), the Supreme Court expressly overruled all of the cases predating the 1973 rule revision.

In *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984), Chief Justice Pope wrote:

> Since 1973, the use of broad issues in the trial of cases has been approved. Rule 277, Tex.R.Civ.P., specifically authorizes broad submissions." *Id.* at 799.
>
> Prior to 1913 there was such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible. In 1913, to escape from the unsuccessful general charge, the Texas Legislature enacted article 1984a. Submission of Special Issues Act, ch. 59, § 1, 1913 Tex.Gen.Laws 113. The new procedure required the use of special issues that would be submitted separately and distinctly."
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> In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The Supreme Court in 1973 amended Rule 277, Tex.R. Civ.P., by abolishing the requirement that issues be submitted distinctly and separately. Since that time, broad issues have been repeatedly approved by this court as the correct method for jury submission.
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> This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.

Id. at 801.

TRCP 277 was amended effective January 1, 1988 to require the use of broad-form questions "whenever feasible."The Supreme Court emphatically put the last nail in the coffin of granulated special issues in *In re E.B.*, 801 S.W.2d 647 (Tex. 1990), where Justice Cook wrote: "The issue before this court is whether Rule 277 of the Texas Rules of Civil Procedure means exactly what it says, that is, 'In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.' Tex. R. Civ. P. 277." *Id.* at 648. The trial court had followed the Family Law Pattern Jury Charges and in a parental termination case instructed the jury on the several pleaded grounds for termination and asked: "Should the parent-child relationship be terminated?" The Austin Court of Appeal reversed, on the ground that less than ten jurors might have found one ground and less than ten jurors found another ground with the result that the verdict was not supported by the same ten jurors. The Supreme Court reversed, Justice Cook writing: "Rule 277 mandates broad form submissions 'whenever feasible,' that is, in any or every instance in which it is capable of being accomplished." *Id.* at 649. He continued:

> The history and struggle to recognize broad-form submission is a long one. The rule unequivocally requires broad-form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad-form questions. The court of appeals held that a single broad form question incorporating two independent grounds for termination of a parent-child relationship permits the state to obtain an affirmative answer without discharging the burden that the jury conclude that a parent violated one or more of the grounds for termination under the statute. Tex. Fam. Code § 15.02 (Vernon Supp. 1990); Tex. R. Civ. P. 292.
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> * * *
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> Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer.

Id. at 648-49.

[As an aside, your current author served on the Pattern Jury Charge Committee that wrote this instruction and question, and we consciously pushed the limit of broad form submission in crafting this submission, telling each other that "broad form means broad form." After the Austin Court of Appeals reversed, we held our breath to see what would happen, and we were gratified with the Supreme Court's emphatic approval of our decision to go really broad.]

IV. JUDICIAL SELECTION IN TEXAS. The method of selecting judges in Texas has been an important part of the political landscape since the 1960s, when Texas began to develop into a two-party state. In the 1970s, former Chief Justice

Calvert led the most formidable attempt to revamp not just judicial selection but the whole Judiciary Article of the Texas Constitution, and in fact the entire Texas Constitution. Reforming the Texas process for selecting judges has been a priority for Chief Justices Calvert, Pope, Greehill, Phillips, Jefferson, and Hecht, which makes the issue an important part of Texas Supree Court history. The following discussion puts those efforts in context.

1952. Starting with the recent distant past, back in February of 1952, State Bar of Texas President Albert P. Jones wrote his president's page on the "Missouri Plan--If life tenure is neither desirable nor acceptable, then the solution should be sought elsewhere, " 14 TEX. B.J. 56 (1951). Jones wrote: "a number of eminent members of our Bar advocate the adoption of the Missouri Plan for Judicial Selection and Tenure. I am unable to agree with them that this Plan is a proper solution of our problems. My experiences and observations as a member of the Bar have not caused me to feel that the power of judicial appointment may not safely be entrusted to our Governors. As a matter of fact, I think that we have been rather fortunate in the quality of judicial appointments. Particularly is this so in the light of the inadequate salaries that are paid to our judges. ¶ The problem of judicial tenure is formidable. However, it is my firm conviction that the Missouri Plan provides a remedy that is entirely too drastic. In short, I believe that this cure is worse than the disease. ... The basis of my objection to the Missouri Plan is that I am opposed to life tenure for our state court judges." p. 56.

In April of 1952, then-President of the State Bar of Texas Cecil E. Burney wrote a column entitled "Judicial Selection: Can we afford to allow persons untrained in the law who do not know the candidates' qualifications to select our judges?", 15 TEX. B.J. 144 (April 1952). Burney wrote: "If it were possible for the public to be fully informed of the qualifications of the judicial candidates, then I would have no hesitancy in trusting the decision to them. Under the present system this is an impossibility." p. 144. Burney wrote: Under the' Texas Plan,' which has been overwhelmingly approved by a majority of the lawyers of Texas in referendum vote, it is provided that any vacancy upon the Supreme Court, the Court of Criminal Appeals, or on the several Courts of Civil Appeals shall be filled by appointment of the Governor of one of three competent lawyers recommended by a joint layman-lawyer commission; that a judge be re-elected or defeated by the voters upon his record as a judge. This plan effectively removes the selection of judges of our appellate courts from politics." p. 144.

1964. Fast-forward to April 17 and 18, 1964, when the State Bar of Texas sponsored a conference held at the University of Texas School of Law. The conference was named "Texas Conference on Judicial Selection, Tenure and Administration." The chairman was Harry Jack, of Dallas. See Harry Jack, *Texas Conference on Judicial Selection, Tenure and Administration*, 27 TEX. B.J. 67 (Feb. 1964). Announced speakers were U.S. Supreme Court Justice Tom C. Clark, Texas Supreme Court Chief Justice Robert W. Calvert, and Presiding Judge of the Texas Court of Criminal Appeals K.K. Woodley. Further discussions were slated from Dean of the UT School of Law W. Page Keeton, and the Executive Director of the American Judicature Society, a justice from a California court of appeals, and a justice from the Supreme Court of Colorado. Harry Jack, *Speakers Named for Texas Conference on Judicial Selection, Tenure and Administration*, 27 TEX. B.J. 145 (March 1964). Glenn R. Winters, executive director of the American Judicature Society told the conferees that judicial selection is without question the most important aspect of the conference. "It has been demonstrated over and over again in every state, including yours, that able and dedicated judges can do a surprisingly good job of administering justice in spite of archaic organization, cumbersome procedure and inadequate equipment and facilities, while on the other hand, incompetent or mediocre judges cannot produce a good result even with the finest organization, procedures and supporting staff and equipment," he said. ¶ "In the long run, regardless of all other factors, justice in your state is going to be just about as good as the judges of your state – no better, no worse." 27 TEX. B.J. 304 (May 1964) Winters pointed out that the argument that citizens want to elect their judges if not borne out by the "notorious fact that in every election the judicial ballot is the most neglected." p. 358.

In the May edition of the Bar Journal, State Bar of Texas President Buster Cole wrote on his president's page: "On April 16 to 18, 1964 there was held in Austin a conference to study the judiciary of Texas. Approximately three hundred and sixty-five persons attended. The group was about evenly divided between lawyers and laymen. ¶ It was my impression that the non-lawyers were more enthusiastic than the lawyers about doing something constructive to improve the operation of the courts. ¶ The conference was not committed to any preconceived plan for improvements. It did announce at the end the consensus of opinion as to what should be done. The laymen Buster Cole expressed their opinion separately from the lawyers. ¶ I came away with the distinct feeling that the public wants something done to modernize the courts. I am convinced that if the lawyers do not wade into the problem and provide an acceptable solution, then the public will eventually provide one for us, which may not be to our liking. We lawyers ought to seize the opportunity before it slips away from our grasp. ¶ There are those who favor the 'Missouri Plan' and there are those who are opposed to it. This must not become a battlefield to divide the Bar. We must provide a Texas Plan. If all lawyers will become interested I firmly believe there will come forth a better way to select our judges, to adequately compensate them, to give sufficient tenure in office to them, and also to have supervision over them, including removal from office where warranted. ¶ The life blood of any democratic institution is replenished by changes to meet the needs of the people and the times. We are approaching the passing of a hundred years without materially having changed the basic concepts of how our courts and judges are to function. ¶ In short-we have not kept step with the changing times. The whole concepts of courts are not fully understood by our laymen. Little if any education is devoted to the explanation and understanding of the true function of judges and courts. ¶ The executive may apply and carry out the enacted law. The legislative branch can make the law. But it is the judiciary and its judges that finally give to a people their living philosophy through the application of constitutions and laws. ¶ We need to wake up and realize that if our judiciary is to be independent and of equal standing and strength with the other two branches of our government, then it must be equipped to command equal respect. This cannot happen if needed improvements are not made. ¶ I espouse no fixed plan. I am for improvements. I am convinced

that if most lawyers will give their effort in this direction that the judiciary will be strengthened. There are those who seem to fear removal of judges from a direct election. This should not cause the real issue to be side-tracked. Surely the lawyers of Texas have the intellect and courage to come forth with a plan that will permit up to date court operations and at the same time provide for the necessary check and balances. ¶ To this end we are all challenged." Buster Cole, *A Texas Plan*, 27 TEX. B.J. 297 (May 1964).

An unsigned article in the May Bar Journal commented: "Texas is struggling to cope with present-day problems with an antiquated judicial system. ¶ Modernization is long overdue. ¶ If Texas is to render the best possible judicial service to its citizenry, it must join the nationwide movement for reform. ¶ Those were the conclusions reached by 300 conferees who met in Austin April 17-18 for a concentrated study of judicial selection, tenure and administration. ¶ Specific recommendations made by the conference delegates are contained in two consensus statements, which are published on pages 305 and 306 herein." *Lawyers, Laymen Urge Modernization of Texas' Antiquated Judicial System*, 27 TEX. J. 299 (May 1964). The article goes on to describe the make-up of the Conference and details on the proceedings: "Laymen met with laymen, judges and lawyers met with judges and lawyers in 60 study sessions such as those shown here in a recent three-day conference to study the judiciary of Texas." p. 307. "The conferees met in several joint meetings and heard some 17 out-of-state persons relate the experience of other states that have modernized their court structure. ... The conferees also broke up into 12 separate study groups and each study group met five times to discuss specific aspects of the subject. Six groups were composed of judges and lawyers; the other six, of laymen. ... Each of the study groups had a chairman, two panelists and a reporter. The groups ranged in size from 19 to 32 persons. In each meeting of each group, the reporters summarized the opinions expressed by the participants. ... After the last meeting of the study groups, the six reporters from the citizens' groups met to combine the opinions of their groups, and prepared a suggested consensus statement for discussion in the final assembly of all citizen conferees. ... Likewise, the six reporters from the groups composed of lawyers and judges prepared a suggested consensus statement for the legal conferees." p. 299. The group issued two consensus statements. The Citizens' consensus statement suggested the elimination of partisan election as a way of selecting judges, and substituting instead nomination of judges by an independent commission, coupled with removal elections. p. 305. The Consensus Statement also recommended a commission to discipline and remove judges. The consensus statement also called for an effective retirement system with appropriate pensions. It called for a single court system with rule-making power in the Supreme Court. p. 305. The Judges' and Lawyers' Consensus Statement called for a study of alternative methods of selecting judges. p. 306.

The Consensus Statement from the Citizens' Discussions (April 18, 1964) gave this criticism of the partisan election of judges: "Texas has been fortunate in obtaining many excellent judges under its present system of selection by partisan political election. These judges, however, have not been excellent because of the system. With the emergence of present political conditions,[+] there is no assurance of continued excellence. ¶ Among the many shortcomings of partisan political election are: (1) judges must neglect their judicial duties and demean their judicial office by actively soliciting support both financial and political, for election and re-election; (2) judges are too often elected or rejected, not on the basis of their qualifications, but on the basis of unrelated national, state, local or other political issues; (3) political obligations may dissipate judicial independence and influence decisions in particular cases; and (4) many of the persons best qualified to serve as judges are unwilling to undergo the pressures, expense, and uncertainties of election campaigns; and, thus, the public is sometimes deprived of the best judicial personnel available." 27 TEX. B.J. 305 (May 1964). [The meaning of "present political conditions" was not explained, but Texas politics witnessed a sea change in 1961 when John Tower was elected U.S. Senator from Texas, the first Republican elected to state-wide office since post-Civil War Reconstruction. "Present political conditions" probably meant the begin of the rise of the Republican Party and the end of the Democratic Party's lock on general elections.] The remainder of the Consensus Statement addresses judicial administration. The Consensus Statement from the Judges' and Lawyers' discussions (April 18, 1964) addressed judicial selection: "The Texas judicial system, measured by modern standards, has certain weaknesses which should be eliminated or minimized. It has been our good fortune to have many dedicated and competent judges, but the present system of selecting judges of our courts reduces opportunities for the best possible judicial service. ¶ Among the defects in the present system are the political selection of judges, and the uncertainties in the matters of judicial tenure and retirement. ... Texas is distinguished by the general excellence of the judges who serve on its appellate and district courts. ¶ It is highly desirable to the proper functioning of the judicial system of Texas that men who are to be judges be selected solely on the basis of their qualifications for those judicial offices without political considerations. ¶ While the present method of gubernatorial appointment and election has resulted in many men of superior ability becoming judges of the courts of Texas, there are certain disadvantages to these methods of selection of judges. ¶ Among the many shortcomings of partisan political election are: (1) judges must neglect their judicial duties and demean their judicial office by actively soliciting support both financial and political, for election and re-election; (2) judges are too often elected or rejected, not on the basis of their qualifications, but on the basis of unrelated national, state, local or other political issues; (3) political obligations may dissipate judicial independence and influence decisions in particular cases; and (4) many of the persons best qualified to serve as judges are unwilling to undergo the pressures, expense, and uncertainties of election campaigns; and, thus, the public is deprived of the best judicial personnel available. ¶ The objective of any method of selection should be to obtain judges free of political bias and collateral influence and possessed of qualities that will lead to the highest performance of their judicial duties. It was the prevailing view that the Proposed Legislative Resolution to Amend Article V submitted by the Committee on Selection, Compensation and Tenure of State Judges of the State Bar of Texas merits the study and approval of the people of Texas, and that the proposal should apply to the District Courts as well. Some expressed concern that the State or some counties might sustain a wholesale loss of judicial experience in a partisan political upheaval under our present elective system."[+] [This comment on "political upheaval" confirms the earlier surmise that the motivating factor for the alarm about partisan election of judges in 1964 was the prospect that Republican judicial

candidates might start winning elections. From the current perspective of 57 years later, it turns out that the election of Republican judges did not devastate the Texas Judiciary. Current criticism of partisan election of judges is not that Republicans might get elected; rather it is the fact that all Republicans or all Democrats in some elections in some areas have lost their positions due to partisan sweeps influenced by national elections or top-of-the-ticket Texas political races. The point is that the elections are not necessarily won based on the qualifications of the candidates, which makes it possible for lesser qualified or unqualified candidates to become judges. [How judicial qualifications should be gauged is subject to debate, and who should judge those qualifications is central to the question of appointment versus election of judges.]

In the May 1964 Texas Bar Journal, U.S. Supreme Court Associate Justice Tom C. Clark, a Texan, wrote: "It gives me great satisfaction to note the presence at this Conference* of over 140 laymen conferees and an equal number from the bench and bar. In addition, there are 20 observers and 12 discussion teams with seventeen out-of-state consultants who come here to relate the experience of other states. We have brought them here to learn the effective techniques that brought them success in their states and to avoid the pitfalls that might have befallen them. We hope to learn as well by the mistakes of others as we do from their foresight, for we cannot live long enough to make all of the mistakes ourselves. Finally, the Conference is sponsored by eight Texas law schools and five law associations. It is simultaneously the first and the largest Conference of this type ever conducted in the United States, which, of course, is in keeping with Texas' standard of bigness." Tom C. Clark, *The Image of the Judge*, 27 TEX. B.J. 311 (May 1964). Clark's article is mostly about judicial administration, but he does make this comment touching on judicial selection: "It appears to me that there are two difficulties in Texas. First, the judges are not paid commensurately with those of other large states and, second, their tenure is woefully short. Indeed, a trial judge must start campaigning soon after he takes the bench. His term is only four years. In most jurisdictions it is ten and in New York State 14." p. 362. R. E. Schneider of George West, Texas wrote on the Conference's focus on judicial compensation. He said: "The laymen were practically unanimous in their opinion that the compensation of the members of the judiciary is inadequate and were somewhat shocked about at least one of the inequities contained in the Judicial Retirement Act, Article 6228b, the provision concerning retirement pay, and particularly possible forfeiture of contributions made by the Judges." R. E. Schneider, *The Judicial Retirement Act or, the Judge's Gamble*, 27 TEX. B.J. 685 (Sep. 1964). Several other post-conference articles were published in the September edition of Volume 27 of the Texas Bar Journal.

1972. Fast forward eight years. A news report in 35 TEX. B.J. 190 (March 1972) announced that the Chief Justice's Task Force for Court Improvements had been organized and commenced work. The goal of the Task Force was to impove the administration of justice in Texas, with an immediate objective of presenting to the 1973 Legislature a complete revision of Article V of the Texas Constitution and a comprehensive Judicial Code "embodying all statutory provisions concerning court organization and structures." p. 190. The news report continued that "[t]he Task Force has been broken down into subcommittees now studying other judicial systems. These subcommittees will make recommendations to the ful Task Force in the near future. It is anticipated that the report will be completed by Fall." p. 190. In Calvert, *Summary of Major Changes Proposed by Chief Justice's Task Force for Court Improvement*, 36 TEX. B.J. 24 (1973), retired former Chief Justice Calvert wrote a summary of the December 15, 1972 draft of proposed amended Article V of the Texas Constitution. He noted that "[t]he objective of the Task Force was twofold: first, to draft a Judiciary Article of sufficient flexibility to endure for the next one hundred years, and second, to draft a Judiciary Article that would be accepted by the people of Texas. We believe that we have done both."p. 24. Calvert continued:

> In order to accomplish these objectives the Task Force in September of 1972 published a proposed Article V which was distributed to interested groups and individuals both within and without the bar.Throughout the Fall, suggestions for improvement and criticisms of the draft were solicited, and pro and con articles appeared in the November 22 issue of theTexas Bar Journal. Such comments were sought in order to provide the Task Force with the information necessary to develop the final version of a revision of Article V.
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> The Task Force met on December 15, and in response to constructive comments from the various individuals and groups, drafted for submission to the Legislature in January what we believe to be the best and most acceptable judiciary article.

p. 24. Changes mentioned from the existing Constitution include the merger of the Supreme Court and the Court of Criminal Appeals, making the Courts of Civil Appeals into Court of Appeals and giving the Legislature the power to give them both civil and criminal jurisdiction. As to judicial selection, Calvert wrote: "All judges are selected by nonpartisan election. However, at the same election at which the proposed new judiciary article is submitted, voters will be given an opportunity to provide for merit selection of appellate judges. Merit selection will be submitted as a separate constitutional amendment. If that amendment is approved, appellate judges will be appointed bythe Governor from a list of qualified nominees submittedby a Judicial Nominating Commission consisting of three judges, two lawyers and six laymen. At the expiration of their terms, judges will be subject to approval or rejection by the voters; if approved, they will continue in office for another term; if rejected, the office will become vacant and will be filled by the Governor from a list of nominees submitted by the Nominating Commission. The Legislature is permitted to extend merit selection to trial judges." pp. 24-25. On judicial administration Calvert wrote: "The present Judicial Qualifications Commission and all major provisions of the present judicial retirement, removal, censure, and compensation system, including mandatory retirement of judges at age-75, are retained. Details of that system are removed from the Constitution and left to the Legislature." p. 25.

1981. On April 21, 1981, Chief Justice Joe R. Greenhill presented the first ever State of the Judiciary report to the 67th Texas Legislature. He made the following comments about judicial selection: "*Judicial Selection* ¶ A word about judicial elections.¶ The quality of the Judiciary can rise no higher than the quality of persons you can attract to, and retain the system. ¶ That, in turn, depends not only on judicial compensation, but upon the method of selection of judges. ¶ What is said here is without regard to individuals who were elected last November. It is a matter of principle and not personalties. ¶ Large attention was drawn to partisan judicial elections last November. This was not a new problem. Many of us have been trying for years to get the judiciary out of partisan politics. Some of you will remember the efforts of the Constitutional Revision Commission in 1973. ¶ There is a place for party politics in the election of the executive and legislative persons. You, and they, and the parties, have a platform. ¶ There are no meaningful party platforms for the Judiciary. The judge cannot favor a person, or his lawyer, because of his party. The judge must administer justice equally without regard to the persons before the bench. ¶ The judge should be elected, or defeated, because of his or her merit,--not because a person of a particular party is elected President. Election of judges by 'the big lever' is, in my opinion, a poor method. ¶ While my personal preference is for Merit Selection, or Missouri Plan types of retention elections, its adoption would require a constitutional amendment. Political reality tells me that this is not possible at this time. ¶ The question here is not whether we will continue to be elected or not, but how we will be elected. ¶ So I urge you to give serious consideration to the non-partisan election of judges,--just as we now elect our mayors and school boards."

1983. On January 17, 1983, Chief Justice Jack Pope presented his State of the Judiciary Message to the 68th Texas Legislature. He made the following comments about judicial selection: "The Texas Judicial Council was created by Article 2323a, for the purpose of making a continuous study of the courts, their procedures and methods. It is the Legislature's source of ongoing study. It has been very active since the adjournment of the 67th Legislature. Senator Farabee, Senator Mauzy, and Representative Bush are members of the Council. Honorable Ben Grant became a member as a Representative and as Chairman of the Judiciary Committee. It has submitted many proposals including (1) merit selection of judges, or (2) alternatively, a nonpartisan election, or (3) alternatively, separate ballot columns for judicial races, (4) limitations on time to raise campaign funds, (5) amendments of Article 1812 to permit assignment of justices to courts of appeals, (6) increase of filing fees in courts of appeals, (7) increase the interest rate on judgments, (8) simplify the venue statutes, (9) grant power to Court of Criminal Appeals to adopt Model Code of Evidence in criminal cases, (10) amend Article 35.17 concerning voir dire examination of jurors in criminal cases, (11) provide for support personnel for district judges, (12) the preservation and disposition of records of courts of appeals, (13) revise the proceedings of the Commission on Judicial Conduct concerning disclosure, (14) adopt a percentage relationship between judicial salaries, (15) statewide reapportionment of judicial districts, (16) revise the monetary limits of trial courts, (17) add additional members to the Judicial Council. ¶ Some of the recommendations were also developed in detail by the Interim House Select Committee on Judicial Selection, which disagreed with the Council on several matters including the first three listed." [Author's note: the interlocutory appeal in venue matter was abolished by the Texas Legislature in 1983.]

In January of 1983, President of the State Bar of Texas, Orrin W. Johnson, wrote *Judicial Selection: Something between the Extremes*, 46 TEX. B.J. 9 (January 1983). He noted that "On Sept. 7, 1982, the Texas Supreme Court ordered that a referendum be taken of our membership. The subjects will be (1) to decide whether or not our Bar should adopt a revised set of Administrative Rules; and (2) a preference poll of our members on the question of judicial selection." p. 9. He wrote: "Which method of judicial selection is the best is a subject on which practically every lawyer in Texas holds an opinion, each slightly different. Opinions vary with one extreme favoring no-holds-barred, "to-the-victors-belong-the-spoils" partisan elections, and a completely opposite view favoring a federal court, lifetime appointed, "I am accountable-to-nobody" system. My own belief is that the opinions of the mainstream of our membership lie somewhere between these extremes." p. 9. He continued: "My own personal view (which I certainly do not claim to be that of our membership) is that the nonpartisan election bill offers some improvement in our present system. It is by no means an answer to all of our prayers in choosing the best method of judicial selection. Neither of the extreme views urged by the opposing segments of our membership, in the long run, seem to best serve the public interest by providing us with the highly qualified, fair and independent judiciary needed to serve a democratic society. ¶ Until recently, Texas judicial elections were in fact nonpartisan elections. Because Texas was a one-party state for almost 100 years, partisan politics simply did not enter into our judicial elections. I have never been able to understand why membership in a political party has any bearing in determining whether an individual possesses the intelligence, patience, diligence, integrity, sensitivity, restraint, commitment or other qualities which are the hallmark of a good judge. It seems to me that adding the partisan element is simply a patronage factor which offers few, if any, real benefits to the public and may cause much ultimate damage to our system. This has previously occurred in some counties where the political foreknowledge of a straight single-lever party line vote assured the nomination and election of at least one judge who has since been disbarred. ¶ With a changing political climate in Texas, we have now, of course, entered into an era of partisan elections. As a by-product of this change many fine, well-trained and highly experienced judges are being ejected from public service purely because of party affiliation or are abandoning the judiciary because of the uncertainties inherent in partisan elections. Other lawyers of outstanding ability decline judicial positions because they do not care to be subjected to the expense, waste of otherwise needed judicial worktime, and the many vagaries of partisan elections. It seems to me that this cannot serve the public interest of our citizens. We desperately need to attract our best lawyers to judicial careers, not repel them from it." p. 10.

In February of 1983, Janice C. May and Nathan C. Goldman wrote *Judicial Reform Revisited*, 46 TEX. B.J. 218 (Feb. 1983). [Author's note: May was an associate professor of government at UT Austin, a former member of the State Bar of Texas Board of Directors, and a member of the Texas Constitutional Revision Committee 1973-74; Goldman was an assistant professor of government at UT Austin and a lawyer licenses in North Carolina.] They wrote: "It is probably not

too much of an exaggeration to say that judicial reform has entered a new era in Texas. We would be hard pressed to fix an exact date, but the winds of change have been blowing for more than 10 years. The following changes have altered the conditions of and the ideas about reform. ¶ *Political Party System* ¶ Foremost among changes affecting judicial reform in this state is the evolving two-party system about which so much has been written. Competition from the Republican Party promises to alter permanently the traditional non-competitive one-party judicial selection process, which had shared certain characteristics with non-partisan elections, with the important exception that Republicans were virtually frozen out of the system. In the 1982 election, over half of all judgeships in Harris and Dallas Counties were contested,[1] and in the state as a whole, the statistics show a steady rise in the number of challenges since 1978, as will be described more fully in the second article in this series. Competition raises a host of concerns about increased campaign costs, the defeat of qualified candidates of both parties in periodic party sweeps, short tenure, and the like, and no doubt has been a primary motive in the present movement for judicial selection reform. ¶ *Legitimacy, Public Participation, and Representativeness* ¶ Another change is the overwhelming concern about public attitudes toward state courts and other political institutions.[2] Loss of confidence, which has been well documented and well publicized, questions the very legitimacy of the courts. Many efforts have been made to counter the loss, among them new mechanisms for public participation, such as representation by non-lawyers on various judicial agencies, including judicial disciplinary commissions, Bar grievance committees and State Bar Boards of Directors.[3] ¶ Representativeness, an old concept with a new 'affirmative action' twist, has entered the dialogue on judicial reform. Although it is by no means unanimous that the judiciary should be a mirror of society,[4] sensitivity to representation of minorities and women in political institutions has become a fact of political life. Writing in the Texas Tech Law Review, one author has claimed that one of the two chief goals of judicial selection is 'representativeness.'[5] (The other is quality of the judiciary.) In 1973, the Texas Constitutional Revision Commission, which endorsed merit selection, recommended that the nominating commission be selected 'on a non-partisan basis with due regard to representation of the sexes, ethnic groups and geographical regions of the State.'[6] Moreover, in the selection of candidates for judgeships, the nominating commission was directed to 'give fair consideration to the sexes, ethnic groups and geographic regions of the state' among those who qualified for appointment.[7] More recently, the Select Committee on Judicial Selection of the Texas House of Representatives has recommended to the current Texas Legislature a proposal for a broadly representative bipartisan commission to screen and evaluate candidates for judgeships.[8] ¶ *Economic Conditions* ¶ Beyond the control of the State of Texas is another change, inflation. Never before has the United States experienced such a long, sustained period of high prices. Never able to compete equally with at least the top law firms of the state with respect to judicial compensation, the bench has the added burden of coping with inflation. Presently, Texas Supreme Court justices fare reasonably well in comparison with justices of the highest courts of other states, ranking eighth,[9] but there are other factors to be considered, which will be dealt with in the third article of the series. ¶ Inflation also exacerbates the problem of rising campaign costs. Campaign expenses affect poor and minority candidates with particular force. Concern for representativeness, fears of bought elections, charges of favoritism toward contributors, and the sheer dislike of soliciting funds have lent urgency to changes in financing, or alternatively, to a system in which costs become negligible, such as merit selection or appointment by the governor. The dialogue on judicial reform now includes public financing of judicial elections.[10] ¶ *Research* ¶ Last but not least is the contribution of scholarly research on judicial reform by lawyers and social scientists. Modern research tends to be more empirical and more critical of reforms than earlier works. Worthy of special mention is political scientist Philip L. Dubois's comprehensive and sophisticated study of judicial elections, From Ballot to Bench, in which partisan elections are defended.[11] Other political scientists have contended that changes in judicial selection systems have not materially altered the composition of the bench.[12] We will analyze these propositions in the articles that follow. * * * ¶ *Achieving Balance: Judicial Selection* ¶ We can illustrate our concepts by applying goals and implementing reforms to judicial selection. ¶ In the United States, the states use four types of selection processes, plus some hybrids: partisan election, nonpartisan election, Missouri (merit selection) and appointment. The oldest set of methods is appointment by the governor, the legislature or both. Many of the original colonies, such as South Carolina, Virginia and Massachusetts, still employ some variation of appointment. Inspired by the Jacksonian Revolution in the 1830's, the overwhelming majority of states adopted partisan election of judges. Very soon, however, many citizens became disillusioned with the party's spoils system, which was too often the reality behind the democratic rhetoric. ¶ In the late 19th Century, many states, to reject the spoils but to retain the democratic system, decided to adopt nonpartisan election of judges. Criticism of this reform was soon forthcoming. Nonpartisan election did not actually take politics out of the system; worse, voters lost, with party labels, one of their few voting cues; and moreover, fewer people voted in these elections. (See the second article of this series.) ¶ Dissatisfied with then current methods of judicial selection and guided by a seminal plan proposed in 1914 by Albert M. Kales, a founder of the American Judicature Society, reformers eventually worked out a new arrangement that attempted to blend the elective and appointive systems. Not until 1940 did Missouri become the first state to accept a variation of the method, giving its name to the plan. ¶ The most common version of this plan calls for a commission composed of lawyers (often appointed by the bar), lay members (appointed by various elected officials) and designated judge(s). The commission investigates candidates for a vacancy and recommends a list, usually of three, from which the governor (with or without legislative approval) appoints one. After a one-year term, or other trial period, the new judge faces retention in which the question is a yes or no vote to retain the judge for a full term. ¶ By 1982, the Missouri (merit) plan had been adopted by 31 states to elect some or all of their judges. Even though the merit plan is a present favorite of reformers, it too has been criticized for sublimating but not eliminating politics from the process.16 Among other things, it is claimed that the method increases but hides the role of the bar. Moreover, advocates of accountability - to the party or the populace - argue that the initial appointment and the low voter turnout for the retention balloting make the process undemocratic. (See the second article in the series.) ¶ The methods of judicial selection currently in use offer various mixes of independence and accountability. Selection, such as gubernatorial appointment, may lean heavily toward independence (at least from public opinion if not from the executive branch); nevertheless, short terms, mandatory retirement, effective removal techniques redress the balance towards the direction of accountability.

Conversely, the initial selection may be highly accountable - partisan elections with two well-balanced parties. Long terms, weak removal processes, high salaries and good working conditions, however, swing the overall balance back towards the independence side of the pendulum. ¶ The United States and Texas judicial systems offer extremes of the balance: the federal judge has nearly total independence - appointive selection, life tenure, ineffective removal as well as good salary, reputation and working conditions. Conversely, the Texas system is geared towards accountability (at least to the voters and the parties) - partisan election, short terms and various removal procedures including those initiated by the State Commission on Judicial Conduct. ¶ It is instructive to examine systems with more "mix." Illinois, one of only 11 states that provide for partisan election of their Supreme Court justices, is an example. The election leans heavily towards accountability (to the voter and the party). Other aspects lean towards independence - the 10-year term and retention elections thereafter. Illinois is the only state that requires more than 50 percent of the vote to retain judges. The 60 percent vote requirement enhances accountability because it makes removal more likely. Moreover, the Illinois Courts Commission has been active in disciplining judges. For Texas, this example suggests that adopting a selection method that grants more independence does not mandate that Texas judges will turn into 'tyrannical federal potentates' as some have charged. Texas judges serve short terms. Also, mandatory retirement, the disciplinary commission and the feasibility of impeachment or address limits independence of conduct or competence.[17] The wide range of implementing reforms and the concepts involving judicial independence and accountability suggest that reformers have a variety of options from which to work to reach their desired goals. ¶ *CONCLUSION* ¶ As political scientists, we cannot conclude our initial article without taking note of the basic fact that judicial reform in Texas is shaped by and dependent upon the distribution of power within the state. Reforms under discussion in our series of articles must be approved by the Texas Legislature, which by design is representative of many interests and highly political. The case for judicial change cannot be assessed solely on the grounds of theoretical merit but must also take into account such questions of power and privilege as who gains and who loses from the proposals. In the political process, argumentation is, not necessarily but may be, a facade for perceived individual or group advantage." p. 221.

In March of 1983, May and Goldman wrote *Judicial Selection An Analysis*, 46 TEX. B.J. 316 (Mar 1983), the second of four articles on judicial reforms. In this article they wrote about partisan elections, nonpartisan elections, and merit plan, and gave their conclusions. They noted that partisan elections are essentially nonpartisan in a one-party state like Texas once was. p. 316. They cite numbers reflecting that in 1982, Republicans won 20 percent of all district court races (including both contested and uncontested races). In Dallas and Harris Counties, more than half of the judgeships were contested. p. 317. They point out that in 1982 William Kilgarlin spend $450,000 in his losing primary contest with Associate Justice James Denton who spent $170,000. p. 317. [Author's note: After winning the election, Denton died while playing golf in San Antonio. and Kilgarlin was selected to be the Democratic candidate ofr that seat on the Texas Supreme Court.] The authors comment on merit plan selection: "Merit selection of judges, the most commonly adopted reform in judicial selection in modern times, is used at all levels of courts in 12 states and in some fashion in 31.11 The plan combines several judicial goals and principles. Nominating commissions screen, evaluate and nominate candidates who are then appointed by the governor for a trial term and retained or rejected by the voters for full terms. ¶ Two major problems with this plan deal with the composition of the commission at the beginning of the process, and with the viability of retention elections at the end. In 1974, Ashman and Alfini found that these commissions were composed almost totally of white, upper, middle class males, who reflected political elites.[30] Yet, a broadly representative commission can be required by law. One model is the proposal of the Texas Constitutional Revision Commission, referred to in the first article of this series. ¶ The retention election at the other end of the merit process allows the voters to exercise a veto by voting not to retain a judge following the completion of the trial period. Dubois documents the fact that fewer people vote in the retention election than in any other type. He also contends that the election is superfluous because so few judges are rejected. From 1972-1975, only 1.6 percent of the judges were not retained.[31] In 1978, however, the number climbed to three percent, a figure that compares favorably with the number of Texas incumbent judges defeated by the voters in partisan elections.[32] But the purpose of retention elections is to provide for a vote of confidence or no confidence rather than to dismiss numerous judges. Reformers anticipated that the initial screening by the nominating commission would reduce the need for popular disapproval of appointees. ¶ Unlikely to be introduced, let alone adopted, in the current legislative session, the merit plan, nonetheless, casts its shadow on judicial reform. Advocates of nonpartisan elections are accused of using them only as a transition to the merit plan. This may or may not be true, but approval by the Legislature and the voters would still be necessary. In 1982, the House Select Committee on Judicial Selection seemed to be influenced by the merit plan when it proposed a merit commission for appellate judgeships.[33] The commission would evaluate only, not nominate or recruit, judges on the election ballot. A 'Q' for qualified and an 'U' for unqualified would be placed on the ballot and a report made available to the public. The commission could also screen gubernatorial appointees, should the governor desire it. The proposal, an innovative and provocative one, is an admission that partisan labels do not provide enough information about candidates. Whether the designations on the ballot would be of much help except in the most egregious cases is open to question, but even minimal screening might be an improvement. Constitutionality may be an issue should the Legislature fail to devise objective measurements for assessing qualifications. Studies show that subjective criteria are used more often than objective standards in attempting to evaluate judges.[34] Although not before the Texas Legislature, retention elections could be added to either partisan elections, as in Illinois and Pennsylvania, or to nonpartisan elections. The end result should be greater judicial independence. ¶ Another alternative is to require the governor to select the persons to fill judicial vacancies from names submitted by a nominating commission. Gubernatorial appointment has been a major component of the Texas judicial system for years. From 1940-1962, 66 percent of district and appellate judges initially reached the bench by appointment.[35] In 1982, 80 percent of the judges on the courts of appeals and 71 percent of the district judges had been appointed.[36] The nominating commission would be a modification of the appointive rather
than election mode of the Texas system." p. 319

1985. On January 22, 1985, Chief Justice John L. Hill, Jr. presented his State of the Judiciary Message to the 69th Texas Legislature. He made the following comments about judicial selection: "SELECTION OF JUDGES ¶ Now, to the tough one. ¶ One matter that is affecting the state of our Texas judiciary that is a big concern to us all is the fact that over the past few years several of our well qualified judges have been turned out of office by the electorate on what appeared to be largely the mechanism of sheer party voting. The possibility of election to judicial office by reasons detached from ability should disturb us all. Were this phenomena to continue from election to election, it would be highly destructive to the morale and stability of our judiciary. It has already taken its toll in this regard, especially in some of our urban areas. Such a situation, focusing as it does more on the fortunes of political parties and national and other statewide candidates than on individual qualifications of the judicial candidates, makes it even more difficult to entice qualified lawyers to accept judicial appointment. The Select Committee on the Judiciary has recommended three alternative methods to deal with this, problem: (1) The plan providing for appointment followed by retention elections; (2) Non-partisan elections; and (3) Ballot changes to prevent straight-party voting in judicial races. ¶ I am confident that you will make legislative changes as in your wisdom will reflect the most appropriate plan to eliminate the problem. Let us know how, in any appropriate way, we can assist you in your legislative efforts to resolve this important issue. ¶ CAMPAIGN CONTRIBUTIONS ¶ Another election law issue which I hope you will address is that of campaign financing. A reasonable limitation in contributions from any one source is sound. Excessive campaign contributions from single sources can present the appearance of impropriety, and the Legislature should address this issue to ensure that public confidence is retained in all of our elected officers."

1987. On February 9, 1987, Chief Justice John L. Hill, Jr. presented his State of the Judiciary Message to the 70th Texas Legislature. He made the following comments about judicial selection: "In my view, the state of the Texas judiciary needs to be improved. Certainly its image is not excellent among our citizens today--and excellence should be our goal. In a recent poll commissioned by the Committee of 100 for the Merit Selection of Judges and conducted by the nationally known firm of Tarrance-Hill-Newport & Ryan, the following question was asked to 600 likely voters from varying geographic distributions across the state: And how would you rate the performance of the Texas state judicial court system--excellent, good, only fair, or poor? Excellent ...2%, Good ...33%, Only Fair ...43%, Poor ...18%, Don't Know/No Answer ...5%. ¶ It would be an act of folly for us to ignore these findings. Absent contrary evidence, we have no choice but to accept the findings as a valid indication that the majority of Texans--right or wrong--rate our Texas judiciary as only fair or poor. Remember, we are dealing here with a branch of government which depends strongly on public confidence for its strength, making these findings of special importance. Indeed, without public confidence in our courts, our free society and our free enterprise system cannot be long sustained. It is critical then that we address this perception problem. What are the steps we should take to enhance public confidence in our courts? ¶ The first fact to be focused on is that the partisan, contested election system which we continue to employ in Texas to select our judges places Texas outside the mainstream in America on this issue. In my view, this is a major part of our problem. The majority of states rely on either an appointive/retention/rejection election, commonly referred to as the merit system, or a non-partisan election system for the selection of judges. The appointive/retention/rejection election plan is the most used. I think we owe the people of Texas during this legislative session a serious examination of these processes used by other states. We need to take the time now to determine exactly how those processes work and to develop a consensus Texas plan for selecting and electing judges that will serve our people better than the present partisan system. If we do so, I believe we will improve our Texas judiciary and enhance public confidence. ¶ Reputable polling continues to reveal repeatedly and consistently that Texas lawyers and Texas citizens want to change our present system of partisan elections of judges. ¶ How many more polls do we need before we act to bring about change? If these polls show anything clearly, it is that beyond a shadow of a doubt approximately 80 percent of the people of Texas want a change. ¶ In my humble opinion, the voters of Texas are entitled to be heard on this issue through a constitutional amendment vote such as, for example, will take place in Ohio this November. Why should we deny our people that right of expression? Even if the voters of Texas adopt a Texas Plan for merit selection, it will not be a panacea for guaranteeing an excellent judiciary, but it will be a better system than the one we have now. Other Justices on our Court have spoken out on this subject and stated their preference for a change to non-partisan elections. Some may oppose any change. The non-partisan alternative may be worthy of consideration, but in my opinion it will not be as effective in dealing with our problems as the Texas Plan for merit selection which is in the hopper and which enjoys the support of Lt. Governor Hobby and Speaker Lewis. Additionally, it's important to note that the sponsors of this legislation are some of the finest legislative leaders currently serving our state--Senators Ray Farabee, Kent Caperton, and Bob McFarland, and Representatives Bruce Gibson and Terral Smith. ¶ Everyone who has seriously looked into this issue, regardless of their own preferences, usually concedes that an appointive/retention/ rejection election--or merit selection system--would be the best for curing the problem of 'big bucks' contributions that has so invaded our partisan judicial election process. It is unconscionable for a judicial race to cost a million dollars, as is sometimes the case today. That alone is enough to commend this legislation. ¶ The next fact that we must face is that the average tenure of a Texas judge today is only 6 years. Resignations of judges are on the upswing and our pool of available qualified persons willing to serve as a Texas judge is diminishing. Statistics are readily available to prove these sad facts. Part of the problem here is the one to which I have previously alluded--I'll call it the 'political hassle' element. Too many good lawyers who would like to consider becoming a judge, shy away because they don't want to be 'politically hassled' in a big bucks partisan contest. ¶ The other part of the problem is our inadequate compensation for Texas judges. That brings me to another sad fact. Today, Texas trial judges rank 37th nationally in salary, and our intermediate appellate judges rank 18th." [Author's note: Chief Justice John Luke Hill, Jr. retired from office on January 4, 1988, halfway through his term,]

1988. Hill, *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339 (Summer 1988). Former Chief Justice John L. Hill, Jr. started this article: "At the end of last year, I resigned as Chief Justice of the

Supreme Court of Texas so that I could be more free, as a private citizen and practicing attorney, to participate actively in a broad-based judicial reform movement dedicated to freeing Texas judges from the shackles of partisan politics. The wild escalation in the cost of recent judicial campaigns in Texas, the media attention given to perceived conflicts of interest, and the resulting loss of public confidence in the integrity of Texas courts have disturbed me more than any other political trend I have witnessed in my four decades as an attorney and public servant in this state. This crisis has caused me to join many other concerned citizens in examining the wisdom of continuing to select Texas appellate judges through partisan elections and to evaluate the advantages of an alternative elective system." p. 339. In an Appendix, former Chief Justice Hill summarized what he called "The Texas Plan": ¶ 1. Judges for the supreme court, the court of criminal appeals, and the courts of appeals would be elected by the people in nonpartisan uncontested confirmation elections. ¶ 2. A currently sitting incumbent appellant judge could stand for reelection in the year in which he would have stood for reelection under the current system, merely by filing a declaration of candidacy with the secretary of state. The incumbent judge would simply run against his or her record, and, if the people voted to confirm the judge in office, he or she would serve another regular term. ¶ 3. If an incumbent judge decides not to run for reelection, or a judge leaves office in the middle of his or her term, a successor is nominated under a system in which broad-based, non-partisan nominating commissions review candidates for judicial qualifications. The commission chooses three nominees for submission to the governor. The candidate nominated by the governor then stands for the confirmation election. If the vacancy is due to the retirement of an incumbent, the confirmation election is held before the nominee takes office. If the vacancy occurs in the middle of the term, the nominee serves until the next general election, at which time he or she must be electorally confirmed for the unexpired term. In either case, if the people vote not to confirm the nominee, the nomination and election process begins again. The Senate would continue to confirm nominees for mid-term vacancies, as it does now. ¶ 4. The Plan establishes one nominating commission for the supreme court and court of criminal appeals, and one for each court of appeals composed of citizens from the court's district. Each commission consists of fifteen citizens: two lawyers and two non-lawyers appointed by the governor; two lawyers and one non-lawyer appointed by the lieutenant governor; two lawyers and one non-lawyer appointed by the speaker; three lawyers appointed by the prsident of the State Bar; and two non-lawyers, one each appointed by the chairmen of the Democratic and Republican Parties. The governor, the lieutenant governor and speaker cannot make all of their respective appointments from the same political party. All nominees to the commissions must be confirmed by the Senate. Additionally, each commission is required to be representative of the citizens of the state or district with regard to race, creed, sex, religion, ethnicity, and geographical distribution. No sitting judge can serve on a commission, and no commission member may be nominated to fill a judicial vacancy.¶ 5. All meetings and records of the nominating commissions are subject to the Open Meetings and Open Records Acts to insure [p. 366] full public view and free public participation in the nomination process. Further, each commission must hold public hearings on its judicial nominees before submitting them to the governor." In Footnote a, Hill thanked an associate attorney at his law firm, James Snell in helping to prepare the article. [See 1990 below.]

On October 21, 1988, the *New York Times* ran an article: *THE LAW; Rubber Stamp Is Gone in Texas Judicial Election*. The article said: "Few Texans can identify Eugene Cook, Karl Bayer, Barbara Culver or most of the 13 candidates running for six seats on the Texas Supreme Court. ¶ But a judicial election that a few years ago was simply a routine ratification of hand-picked judges has evolved into one of the most emotionally charged and far-reaching Texas elections in years. ¶ The races for the state's highest civil court are being billed as having implications for the state's business climate, its political landscape and its image nationwide. At the least, they seem certain to produce the most expensive contested judicial races ever as business and professional groups have joined lawyers in the free-spending arena of judicial campaign contributions. ... ¶ Ten years ago, a battle royal over the Texas Supreme Court would have been unimaginable. Justices were quietly picked by the Governor; they invariably came from the large law firms that represented the state's establishment rather than from plaintiff's attorneys, more likely to sue corporations than to defend them. The justices ran uncontested. On the bench, they were partial to business interests. Texas was an extraordinarily difficult place for plaintiffs to recover damages. ¶ But in 1976, an unknown Houston lawyer, Don Yarbrough, was elected to the court when voters confused him with a former gubernatorial candidate, Don Yarborough. And in 1978, a plaintiff's lawyer from Waco, Robert Campbell, challenged an incumbent and won. ¶ The court was no longer impregnable; by 1982, plaintiff's lawyers had a majority on the nine-member court. Soon the court began issuing rulings radically altering liability law in Texas. Employers were made more liable for the behavior of off-duty employees. Consumers gained greater rights under the state's Deceptive Trade Practices Act. Injured workers could sue employers more easily. ¶ Overriding everything else are questions about the court's integrity. The state's Commission on Judicial Conduct last year rebuked two justices, C. L. Ray and William Kilgarlin, for questionable ties to lawyers. ¶ *Rise of Two-Party Politics* ¶ The battle has been further muddied by the rise of two-party politics in what has been a Democratic state. No Republicans have ever been elected to the court, but Gov. Bill Clements, a Republican, has appointed three. All are running now, and Republicans hope the race will increase their influence statewide. ¶ Chief Justice Tom Phillips, a Clements appointee whose Democratic opponent for the chief justice's seat is Justice Ted Z. Robertson, has pledged to limit individual contributions to $5,000. In this race, though, both he and Justice Robertson will spend more than $1.5 million. Anthony Champagne, a professor of political economy at the University of Texas at Dallas, said the contest would probably be the most expensive contested judicial race in history. ¶ *A $7 Million Contest* ¶ In all about $7 million will be spent on the campaigns, an amount exceeded only by the 1986 California elections in which Chief Justice Rose Bird and other justices were ousted. ¶ The election will not end the debate over the court. There are many proposals for change, including one to go to nonpartisan elections by using a modified appointment system in which voters accept or reject sitting judges. ¶ But that proposal is given little chance of passage, and experts say attitudes about the elected judiciary in Texas, one of 10 states with partisan elections for Supreme Court justices, have not changed. ¶ 'There is a kind of populism in Texas in which there's a very strong desire to select the people who are public officials and make decisions about people's lives,' said Mr. Champagne.

'There may be some backlash against people making very large campaign contributions, but not about the elections themselves.'"[24]

1989. On February 14, 1989, Chief Justice Thomas R. Phillips presented his first State of the Judiciary message to the 71st Texas Legislature. He made the following comments about judicial selection: "Your second and final requirement of this message is that it evaluate 'the future directions and needs of the courts of this state.' While many areas merit discussion, I believe two needs are paramount: adequate funding and support for our judges, and a better method of judicial selection. Because of the importance of these issues, I will devote the balance of my remarks to them. ...¶ JUDICIAL SELECTION ¶ The most important issue facing our state regarding the third branch of government is judicial selection. For reasons I will discuss, it is an issue that I believe you must address in this session. ¶ You have heard the arguments about judicial selection before. You know that Texas is one of only eight states still selecting its entire state judiciary by partisan ballot. You know that our recent judicial elections were the most expensive in the history of the world.[23] You know that the politization of our judiciary has undermined confidence in the judicial process at home and made us the object of ridicule abroad. Texans want and deserve a change. ¶ But what change? On that issue, divisions are sharp, and positions strongly held. Even on the court where I serve, there is sharp disagreement. Under ordinary circumstances, this is an issue which you might like to defer to another day. But if I say only one memorable thing today, let it be this: the status quo in judicial selection is not an option. Change is occurring across our entire nation, either by popular will or federal judicial decree. Change will almost inevitably come to Texas. The only real questions are what those changes will be, and who will make them. The United States Court of Appeals for the Fifth Circuit has held that the Voting Rights Act[24], as amended in 1982, applies to elected judges the same as to all other elected officials. Last November, the Supreme Court declined to hear an appeal from that decision, and we are bound by it. Judicial district lines are illegal if their effect, whether purposeful or not, is to dilute minority voting strength. ¶ In response to the Fifth Circuit decision, two lawsuits have been brought in federal district court to challenge the Texas method of choosing judges. One suit, pending in Brownsville, attacks the at-large election of justices to the Thirteenth Court of Appeals in Corpus Christi. The other suit, pending in Midland, challenges the at-large election of 208 district judges from most metropolitan counties in Texas. These cases may soon be resolved, at least at the district court level. Discovery is scheduled to close at the end of this month in the Brownsville case, and trial is set for April 17 of this year in the Midland case. ¶ Texas is not facing these challenges alone. Similar lawsuits have been or are being filed in most states where judges are elected by open ballot; and in those cases which have proceeded to trial or appeal, the plaintiffs have thus far been uniformly successful. In Mississippi, for example, the state recently settled a lawsuit after the Legislature failed to address the issue. Under the terms of that settlement, trial judges in Hinds and Yazoo Counties will now be elected from single-member districts. Unlike Mississippi, we should let the people, not the federal courts, decide this fundamental question. ¶ Texans must be sensitive to why these lawsuits are being brought, and why they are succeeding elsewhere. People of all racial and ethnic backgrounds must feel that they have a stake in the judicial system, and that all qualified persons have equal opportunity to serve in the judiciary. If our current election system impedes this, it should be changed. You should examine the ways in which our election system might be structured to increase the opportunity for minority judicial services. Three principal methods have been suggested. ¶ Multiple Voting ¶ The first method is multiple voting. This system would abolish separate districts within a geographical area and require all judges, and judicial candidates, to run against each other in a single, at-large election. Voters would cast a number of votes, possibly with the right to cumulate more than one vote for a single candidate. ¶ This is a wholly unacceptable method of electing judges. Every judge would always be the political opponent of every other judge, and would-be judge, in his or her locality. The efficiency of the judicial process would almost surely be eroded. ¶ Sub-Districts ¶ The second option is electoral sub-districts. This method is advocated by the plaintiffs in both of the pending federal lawsuits. Under this approach, judges would be elected from an area within the districts where they serve, rather than by the voters of the entire district. These districts might be single-member, like legislative districts, or multi-member, with two or more judicial "posts" within a sub-district. I also believe this method is unacceptable, particularly as to trial judges. Unlike legislators, city council members, or other officials typically selected by district, trial judges are not members of a collegial body. They act alone and wield immense power. They must be accountable to all the people over whom they exercise primary jurisdiction, not just a portion or a segment of the electorate. Outside of Mississippi, I know of no jurisdiction which currently selects trial judges by sub-district.[26] ¶ Retention Elections ¶ The third alternative is retention elections, an essential element of the so-called merit election plan. While all judges would initially be appointed, all judges would also periodically face the voters for retention or rejection. Judges would continue to be responsible to the entire electorate in their district, with far more accountability than under our current open election system. ¶ The constitutional amendment you present to the voters to implement this plan must guarantee that qualified persons of all racial and ethnic backgrounds will have full opportunity to serve as judges. One possible solution, now under investigation by a legislative committee in Louisiana, is to require members of the nominating commissions, rather than judges, to come from sub-districts. Your careful deliberation will no doubt lead to a retention election plan that is right for Texas. ¶ Among those three alternatives, you will find it helpful to know that a majority of the justices on the Texas Supreme Court favor retention elections for the selection of trial judges. ¶ Even apart from the legal challenges to our existing system, I personally believe that the retention election system is an idea whose time has come for all our state judiciary. I am sure you read over the weekend the results of the latest Texas Poll, which show that only 19% of all Texans favor our current election system, while a substantial plurality favor retention elections. This poll is consistent with all impartial studies in recent years.[28] ¶ Opponents of reform call the current system the 'election' of judges, while labeling the retention elections system the 'appointment' of judges. This is clever, but misleading. Over 55% of all sitting state judges in Texas initially reached their benches by appointment, not election. [29] This is because judges, unlike legislators, are appointed, not elected, whenever an incumbent dies or resigns or a new district is created. [30] More strikingly, 43% of all sitting judges, however they initially reached the bench, have never been opposed for their positions. A change to retention elections would actually give the people more, not less, control

over their judicial officers. ¶ No system of judicial selection is perfect. In my opinion, however, retention elections best resolve the inherent tension between a judge's responsibility to the rule of law and a judge's ultimate obligation to the democratic process.[31] Merit election is used by more states than any other method of judicial selection, and no state has ever abandoned the system after adopting it. ¶ Regardless of what action you take, I further hope you will examine the whole area of judicial campaign financing. Judges have fundamentally different responsibilities and different obligations than other public officials. Any system of judicial election must recognize these differences by placing meaningful limits on both the amount and source of contributions to judicial candidates. ¶ It is within your power to let the people decide the momentous issue of judicial selection. A constitutional amendment is required to implement any of the proposed changes, including a retention election system. A federal court, on the other hand, may order changes in our system, even those that contradict our state constitution, by judicial decree. If Texans are to be heard on this issue before the 1990 elections, it is imperative that you submit a proposed constitutional amendment this year. It would be a tragedy for this state if an issue so fundamental to our right of self-government were decided by default in the federal courts.

1990. In 1990, Kirk P. Watson wrote an article, *People Should Have a Voice in Picking Their Policy-Makers*, 53 TEX. B.J. 757 (July 1990), as his President's Page for the Texas Young Lawyers Association. Watson did not comment on partisan sweeps. Instead he commented on the lack of racial minorities on the state district court benches. Watson starts his article with the statement: "Judges, including trial court judges, are the most powerful representatives of the people. Consequently, everyone should have a voice in who our judges will be since these people, who are literally clothed so as to separate them from the public they are serving, have the power and authority to impact society by affecting the lives of the rest of us." p. 757. He goes on to say "that judges be elected in such a way to assure that, at least some of the judges, will necessarily be responsive to the needs of ethnic minorities." While Watson does not suggest a particular solution, he does refer to the idea "that district judges need not be elected in a way to prevent dilution of a group's voting power..." p. 757. [Author's note: Watson was espousing the view of the plaintiffs in the *LULAC v. Clements* litigation discussed below..] Watson concludes: "Trial judges must make policy. They are the representatives closest to the people by virtue of the speed with which they can address societal needs and the direct access people have to them. As full members of a co-equal third branch of government, they serve as a check on the other branches and are able to step in when the other representatives do not act, such as with school financing. Consequently, the, people -- all of the people -- should have a voice in picking who may judge them and determine their future." p. 758.

Three months later, Houston lawyer James R. Snell wrote *Judicial Selection: Another View*, 53 TEX. B.J. 1104 (Oct. 1990), responding to Kirk Watson's July 1990 article. Snell wrote: "Any honest evaluation of the Texas judicial system requires recognition that the present at large elective system has resulted in serious under representation of minority group members in the judiciary. The solution supported by Mr. Watson is not the only one which has been offered by conscientious members of the Bar and the public." p. 1104. Snell mentioned the "Texas Plan," which he distinguishes from the "current judicial appointment process which takes place almost completely out of public view." p. 1104. Snell challenged Watson's proposal of single-member districts drawn along racial lines. He wrote that this idea "is based on the premise that trial judges make 'social policy' and, therefore, should be representative of all segments of the society." p Snell wrote that "[i]t seems that a judge's first obligation is to know and apply the law. Of course, from time to time, judges do act as fact finders and do exercise discretion. Both fact finding and the exercise of discretion require objectivity and fairness on the part of the judge; but both functions are also subject to review by the appellate courts. The notion that a judge should be representative of an identifiable constituency -- that he or she should perhaps even have an agenda of social policy to carry out – is inconsistent with the need for a judge to be objective and fair to every litigant who comes before the court." p. 1105. Snell continued: "There is no support that I am aware of in the traditional defenses of our present form of government for the theory that trial judges should be representatives of the people, in the sense that the term 'representative' is used in the discussion of governments. The people's representatives are in the Legislature, as they should be. The Legislature, then, is the proper place to determine social policy and for law making." p. 1106. Watson replied: "Although the law may tell all judges what their common goal should be in a generic case, each judge will exercise independent judgment in attempting to achieve that goal. The means chosen to achieve a result, dictated by an independent view of the world and distinct values, will impact individual lives and society as surely as the final result. ... An essential part of judging is exercising judgment. Merely saying a judge should apply the law ignores this reality. Consequently, all people should be heard regarding who these powerful people will be." p. 1106. [Author's comment: this conversation sounds very much like the debates between the proponents of Legal Formalism and the proponents of Legal Realism in the early part of the 20th Century. As to the ethnic and gender exclusion problem, since 1990 the elective process seems to have replaced statewide imbalances with local imbalances, but by 2021 it can be said that minorities and women are no longer excluded from the judiciary on a statewide basis.]

1992. Texas Senator Gene Green, of Houston, wrote *The Future of Judicial Selection in Texas: Appointments and Merit Selection,* 55 TEX. B.J. 359 (April 1992). His was the last in a three-part series discussing voting methods for electing judge that would "prevent diluting minority votes." p. 359. Green wrote: "Since before the turn of the century, Texans have elected their judges. This election scheme has been criticized throughout the state's history, yet it has withstood many challenges since its inception more than 113 years ago. The foremost reason for its survival is that most Texans hold sacred their right to vote for their own judiciary. Proponents of elections believe in the ability of the electorate to select a just and capable judiciary. ¶ However, not all Texans cherish our current elective system. In fact, some judicial reformers claim that a judicial elective scheme is the root of the many problems, real or perceived, associated with the judiciary in Texas. As a result, advocates of appointments or merit selection assert that now is the time to convert our judicial selection system to an appointment method since our current at large elective system has been called into question

by the LULAC litigation.[2]" Green lists reasons not to elect: "[o[ur electorate is often uninformed; "[p]olitical campaigns create the appearance of impropriety for judges;" "[c]ampaign costs are high;" "[j]udges must spend time away from the bench campaigning for reelection." p. 359. Green continues: "It is for these reasons that critics of our election method support the appointment or merit selection of judges. Yet, will the ills of judicial elections be solved by either of these selection methods? More importantly, if an appointment scheme is adopted, would appointments or merit selections to the bench ensure minority representation?" p. 359. Green compares a pure appointment system to a merit selection system to an elective process. and states in conclusion: "Thus, the philosophical debate between election and appointment methods of judicial selection continues." p. 360.

1993. On February 23, 1993 Chief Justice Thomas R. Phillips presented his State of the Judiciary in Texas report to the 74th Legislature. He made the following comments about judicial selection: "... This is my third such address to a joint session of the Legislature, and it is by far the most important. Judicial issues this year are among the most difficult and most significant awaiting your deliberation. The decisions you make in the next three months will profoundly affect the administration of justice for years to come. From many different directions, forces are in play to compel basic changes in the system we have known. From the Texas Constitution comes a mandate for comprehensive judicial redistricting. From a distinguished Commission created by our Court, as well as from private studies, comes a call for a simplified, more efficient court structure. From the Texas Ethics Commission comes a thorough blueprint for judicial campaign reform. And finally, perhaps from federal law, as interpreted by the United States Department of Justice and by the federal courts, comes a demand for a new method of judicial selection. ¶ These pressures could be viewed as discrete problems to be avoided if possible, or resolved with a minimum of bother if necessary. But they could also be seen as interrelated, challenging us to decide what judges should be doing, and how they should be organized and selected to do it. By treating these challenges as a coherent whole, you have a unique opportunity to provide our citizens with the best possible system of justice. As President Woodrow Wilson once said: 'So far as the individual is concerned, a constitutional government is as good as its courts. No better, no worse.' ¶ JUDICIAL SELECTION ¶Some of the reforms advocated by the Citizens' Commission and the Texas Research League, particularly those that relate to which judges should hear what kinds of cases, may become particularly significant if Texas changes the way it selects and retains judges. The state's current preference for specialization by court in most metropolitan areas is incompatible with several proposals for increasing minority participation in judicial selection. Moreover, judicial redistricting may be affected by a change in the selection process. One thing can be said with confidence about our current system of choosing judges: No one likes it. Opinion polls suggest that it enjoys little public confidence. Even the judges selected under this system do not support it. Of the 208 state judges who responded to a 1985 survey of the Texas judiciary by Judge Ron Chapman, for example, 88 favored merit selection, 74 favored non-partisan elections, and 18 favored removing the straight lever, but no one favored the status quo. While the options have broadened since then, I doubt that support for the current method has grown very much. ¶ As Attorney General Dan Morales said a few weeks ago: 'Texans deserve a judiciary free of partisanship, free of political influence, free of obligations to financial interests which exercise too much influence in the selection of our judges, and most importantly, Texans deserve a judiciary that gives meaning to the notion of fair and equal representation.' I agree in every respect with this assessment, and I believe most Texans share those views as well. ¶ The question, of course, is how to achieve these goals. There may, in fact, be more than one right answer. After careful consideration, however, I have concluded that there are at least three prerequisites to any successful plan of judicial selection. Let me discuss them briefly. ¶ *Campaign Reform* ¶ The first is judicial campaign and ethics reform. Enacting the recommendations of the Texas Ethics Commission with regard to campaign finance laws, judicial campaigns, and judicial relationships would help our judges function better, and would increase public confidence in our fairness and impartiality. The Commission's recommendations are simple and straightforward. They include: More frequent and more complete campaign finance disclosure, shorter campaign seasons, more detailed disclosure of financial activities and relationships, full disclosure of all fees paid to lawyers pursuant to judicial appointments, and a ban on fundraising by judges except during contested election campaigns. These are essential changes which are critically needed now. The appearance of a cozy relationship between some judges and some campaign contributors has been devastating to the public image of our system of justice. I urge your full support of all the judicial reforms proposed by the Ethics Commission, and your serious consideration of those additional reforms to be suggested by the forthcoming report of the Supreme Court's Task Force to Examine Appointments by the Judiciary. ¶ *Nonpartisan Elections* ¶ The second necessary reform is nonpartisan elections. Only eight other states, mostly in the South, select all their judges by partisan ballot. This practice had a certain practical virtue when all judges were of one party and the highest voter turnout was for that party's primary.[6] In a two-party state, however, political labels only produce confusion. How can anyone justify our practice of selecting mayors and school boards on a nonpartisan ballot, while requiring judges to be Democrats or Republicans? If anyone should be without party affiliation, it is a judge, who must restrict his or her campaign to a pledge of 'the faithful and impartial performance of the duties of office.'[7] ¶ *Retention Elections* ¶ The final essential reform is that elected judges should stand for reelection on a districtwide retention, or 'yes/no' ballot. Because of the unique nature of the judiciary, retention elections actually afford more, not less, popular control over the judiciary. The large number of judgeships, together with the relatively small number of qualified candidates, make most judicial races unopposed, particularly when incumbent judges are seeking reelection. ¶ Let's look at the 481 active state judges in Texas. While 58% were opposed in their initial election (275 out of 474), only 19% were opposed in their second election (66 of 343). In other words, over 80% of Texas judges were unopposed in both the primary and general election when they first sought reelection. And in bids for subsequent terms, that trend accelerates, with no more than 14% being opposed in a third (27 of 190), fourth (13 of 79) or fifth (3 of 40) race. Moreover, of those judges who initially reached the bench by appointment, rather than election, 55% have never had an opponent at any time, either in a primary or a general election.[8] ¶ The bottom line is that in most judicial elections, the people have no meaningful vote. With retention elections, the accountability of all judges to the electorate will be greatly enhanced, but the huge campaign warchests and

unseemly personal attacks that may accompany contested campaigns will be greatly reduced. ¶ *Initial Selection Options* ¶ Once these three principles - campaign finance reform, non-partisan elections and reelection retention campaigns - are accepted, we can focus on which method of initial judicial selection will best meet the goals of an independent and accountable judiciary while increasing its racial and ethnic diversity. ¶ Let there be no mistake: the current at-large system is no longer acceptable. In Dallas County, 37% of the people, but less than 14% of the judges, are African-American or Hispanic. In Harris County, 42% of the people, but less than 9% of the judges, are from the same minority populations. Candidates from these racial and ethnic groups have often been defeated in campaigns for benches in those counties. The federal courts may ultimately hold that the evidence presented in pending litigation is insufficient to demonstrate that the system is illegal, but they cannot make it fair or right. The status quo is unjust and inequitable. ¶ Three principal avenues have been suggested to increase diversity. Each has both promise and problems. ¶ *Merit Selection* ¶ Appointment from a recommended list with retention elections, frequently called "merit selection," is a relatively modern phenomenon now used by more states than any other single approach. Nationwide, more minority and women judges have reached the bench through merit election than any other method.[9] The recent voting rights challenge to Georgia's at-large election system may be settled by converting to merit selection.[10] No state that has adopted merit selection has ever abandoned it, and no merit selection plan has been successfully challenged under the Voting Rights Act. ¶ However, the central question in merit selection is always, who picks the pickers? Nominating commissions must be carefully constructed in order to secure diversity and reduce political pressures. Merit selection without dedicated, independent nominating commissions and an informed, vigilant public would be unacceptable. ¶ *Subdistricts* ¶ Dividing some judicial districts into electoral subdistricts has been used to settle voting rights challenges in Arkansas, Louisiana and Mississippi. Each of these settlements has been different. Louisiana allows widely varying numbers of judges in various subdistricts, while Arkansas keeps most judgeships at-large, creating subdistricts only in areas with substantial minority population. Subdistricts will best increase diversity only when minority voters are geographically concentrated and politically active. In the initial single member district elections in Mississippi, I am told, Anglos won in at least two districts that were drawn to protect minority voters. ¶ I recognize that many members of the Legislature are committed to electoral subdistricts, even without the protective features of nonpartisan ballots and district-wide retention re-elections. While sub-district elections have long been used to elect some appellate judges around the nation, particularly at the Supreme Court level, they are largely untested at the trial court level.[11] Many observers, and I am one of them, fear that trial judges will lose, or will be seen as losing, both independence and accountability if they report to only a portion of those whom they serve. Judges are not representatives in the legislative sense, but rather serve only the law. Whatever selection process you choose must preserve that distinction. ¶ *Multiple Post Voting* ¶ Some scholars believe that a better method of electing trial judges, particularly in metropolitan areas, would be limited or cumulative at-large elections.[12] For instance, if there are seven new judges or open seats on the ballot, all prospective candidates would run in one election, and the top seven vote-getters would win. Minority voters could be protected by any method which permits votes to be aggregated or limits each voter to fewer votes than the number of positions to be filled. While little used in judicial elections, such procedures have long been used in both public and private elections around the world. ¶ In fact, few of these methods are novel, even to the Texas judicial selection debate. At the 1875 Texas Constitutional Convention, for example, one delegate moved that all judges be appointed by the Governor, who was to declare that the nominee was believed to be 'the best appointment to be made to that office, without regard . . . to personal or partisan considerations.'[13] Another delegate proposed that trial judges be initially appointed, then elected for subsequent terms,[14] and that Supreme Court justices be elected from single member districts.[15] Finally, one distinguished member proposed as follows: 'To insure the just representation of minorities, the system of voting in all general, special or municipal elections, shall be by ballot, and shall be the cumulative system.'[16] ¶ The system that was ultimately devised by that Convention, of course, is still with us, despite persistent criticism for more than a century. Now, finally, it must be changed. The method you select will profoundly impact the future of all Texans, and your judiciary stands ready to offer advice, suggestions, and encouragement in these efforts."

5. For example, a 1988 Texas Poll found that 61% of all respondents believed that judicial campaign contributions were a very serious or somewhat serious problem, while only 6% believed they were not serious at all. *Dallas Morning News*, March 13, 1988. And a 1989 Texas Poll revealed that only 19% of all Texans surveyed favored the current election system, while 19% favored non-partisan elections, 12% favored gubernatorial appointment with Senate confirmation, and 38% favored gubernatorial appointment with retention elections. *Austin American-Statesman*, February 12, 1989.

These polls cited in support of the current system invariably pose the choices only as election versus appointment, ignoring other alternatives such as retention elections. 1990 Texas Poll, *Dallas Morning News*, February 19, 1990; 1988 Texas Democratic Primary Referendum.

6. Fifty years ago, in 1942, 951,216 persons voted for Governor in the Democratic primary, but only 289,939 voted for the same office in the general election. Last year, however, only 2,280,181 persons voted for President in both primaries combined, while 6,154,018 voted for that office in the general election.

7. Canon 7(2) of the Code of Judicial Conduct of Texas provides in full: A judge or judicial candidate shall not make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of office, but may state a position regarding the conduct of administrative duties. Any statement of qualifications, record, or performance in office of either the candidate or the candidate's opponent should be such as can withstand the closest scrutiny as to accuracy, candor and fairness.

8. Of the 236 initially appointed judges, 128 have never had an opponent, and 36 more have never had a general election opponent. Even of the 245 initially elected judges, 34 have never had an opponent, and 59 more have never had a general election opponent.

9. American Judicature Society, Women and African-American Judges Currently Serving on State Appellate Courts, 1991.

10. See *Cheeks v. Miller*, No. 593A0079; *Erhart v. Miller*, 593A0141 (Ga.Sup.Ct., Jan 29, 1993).

11. Justices are elected from districts to the Illinois, Kentucky, Louisiana, and Mississippi Supreme Courts, and run for retention from districts under merit selection plans to the Maryland, Nebraska, and Oklahoma Supreme Courts. In South Dakota, the initial retention election is by district, with subsequent retention elections statewide.

12. E.g., Samuel Issacharoff, *The Texas Judiciary and the Voting Rights Act: Background and Options* (1989).

13. Journal of the Constitutional Convention of 1875 at 117.

14. Id. at 651.

15. Id. at 185, 563-64.

16. Id. at 39.

Section 2 of the Voting Rights Act of 1965, as amended in 1982, provided: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." In 1989, in *LULAC v. Clements*, Federal District Judge Lucius Bunton held that Section 2 applied to the election of state district judges in Texas, and that Section 2 was violated in nine counties because county-wide voting diluted the vote of African-American and Hispanic-American voters in those counties. The plaintiffs argued that the provision in the Texas Constitution, providing that a judicial district could be smaller than a county only if a majority of the voters in the county approve, violated Section 2. Bunton enjoined future elections in those nine counties, divided each county into electoral subdistricts, and ordered non-partisan elections for district judge positions. A panel of the Fifth Circuit Court of Appeals held that Section 2 applied to judicial elections, but that Section 2 was not violated. The Court sua sponte reconsidered en banc, and ruled 7-to-6 that Section 2 did not apply to judicial elections. The U.S. Supreme Court reversed, saying that Section 2 did apply to judicial elections, but that Texas had an arguable justification for linking the electoral and jurisdictional bases of district judges, and remanded the case for a redetermination based on the totality of the circumstances. *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419 (1991). On remand to a panel of the Fifth Circuit Court of Appeals, the panel affirmed the district court's findings as to eight of the nine counties. *League of United Latin American Citizens v. Clements*, 986 F.2d 728 (5th Cir.1993). The Court of Appeals sua sponte went en banc again. Texas Attorney General Dan Morales moved the en banc Court of Appeals to remand the case to the trial court to enter a proposed a "consent" decree that would require 152 judges to run in districts smaller than a county, while 22 would continue to be elected on a county-wide basis. The new judicial districts would mirror state representative districts in Bexar, Dallas, Harris, and Jefferson Counties, while judicial candidates would run in Justice of the Peace districts in Tarrant County and commissioner's court districts in Ector, Lubbock, and Midland Counties. The plan carved out and left unchanged the judicial districts of two District Judges who had intervened in the lawsuit and who opposed the "consent" decree, and Morales moved to dismiss them on the grounds that their claims were moot. Morales also moved to dismiss Texas Chief Justice Tom Phillips (who was a party in his capacity as chair of the constitutionally-established Judicial Districts Board), so he could not object to the "consent" decree. Former Chief Justices of Texas, Joe R. Greenhill, Robert W. Calvert, and John L. Hill, filed friend-of-the-court briefs contesting the authority of Morales to bind the State to his proposed "consent" decree. The ultimate Majority Opinion described Morales' maneuvering in these words: "Even if all of the litigants were in accord, it does not follow that the federal court must do their bidding. The proposal is not to dismiss the lawsuit, but to employ the injunctive power of the federal court to achieve a result that the Attorney General and plaintiffs were not able to achieve through the political process. The entry of a consent decree is more than a matter of agreement among litigants. It is a 'judicial act.'" 999 F.2d 831, at 845. The Majority Opinion called Morales's position a "bold claim of authority," and rejected his contention that he alone could commit the State of Texas to a "consent" decree that was opposed by the Chief Justice of Texas in his constitutional capacity as chair of the Judicial Districts Board, as well as others. *Id.* at 843. The Majority also denied Morales's request to disqualify the Chief Justice's attorney and to non-suit the Chief Justice out of the case. *Id.* In *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied,* 510 U.S. 1071 (1994), the Court held that at-large elections for district court judges in Texas did not violate Section 2 of the Federal Voting Rights Act. The Majority Opinion said: "We would expect over time that the Texas judiciary would reflect the black and Hispanic population eligible to serve —if judges, for example, were drawn from a pool of all persons eligible to serve. In truth, minority lawyers fare better than we would expect from a random process. We do not suggest that because they fare better than they would in a system of random selection, voting rights of blacks and Hispanics could not have been illegally diluted. Rather, the observation is relevant because it brings perspective to this battle by drawing borders around its asserted implications and deflating overdrawn invocations of large wrongs of history, unremedied and unanswered. ¶ There is no disparity between the number of minority judges and the number of minorities eligible to serve. Rather, the only disparity is between the minority

population and minorities eligible to serve as judges. Much can be said about that—of deficits in education and other social shortchangings of black and Hispanic persons. To those who push judicial entry onto this larger field we must answer that our task is more narrowly drawn—to decide if voting rights have been denied. We lack the authority, even if we had the wisdom, to do more." Five Justice concurred in the Majority Opinion, but in their Concurring Opinion went on to say that members of different minority groups could not aggregate their strength in pursuing a Section 2 vote dilution claim. *Id*. at 894. Four Justice dissented on the ground that the Attorney General had the authority to settle the case on behalf of the State. Three of those Justices also dissented on the merits, quoting Section (b) of the Voting Rights Act: "(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class in numbers equal to their proportion in the population. ¶ 42 U.S.C. § 1973." *Id.* at 904. The dissenting Justice rejected the Majority's decision that proponents had to "negate partisan politics" or move current racial animus in order to prevail. *Id*. at 904. See Elizabeth M. Ryan, *Note: Causation or Correlation? The Impact of LULAC v. Clements on Section 2 Lawsuits in the Fifth Circuit*, 107 MICH. L. REV. 675 (2009). In the last analysis, the use of the Federal Voting Rights Act as a way to force a change in the way Texas elects its judges failed.

1995. On April 3, 1995 Chief Justice Thomas R. Phillips presented his The State of the Judiciary in Texas report to the 74th Legislature. He made the following comments about judicial selection: "*Judicial Selection* ¶ Although our courts are generally performing their duties well, our entire system of justice suffers because of Texas' abysmal method of judicial selection.[13] Public confidence in the fairness of our decisions, and the national and international reputation of our entire legal system, will continue to deteriorate until our current method is replaced with a modern system of choosing judges. ¶ The entire litany of defects in our current system is well-documented and well-known; I need not repeat the usual arguments here.[14] If you are not already convinced that there is a problem, probably nothing I can write here will change your mind. But if you do believe that a less partisan, less expensive and more inclusive system would be better for our state, I think that this session is the ideal time to effect such change. ¶ One reason for reform is our ongoing problem with the Voting Rights Division of the United States Department of Justice, which is denying preclearance for any new urban Texas courts until we implement a new selection system. Rumors abound that the Justice Department may even seek a court order to shut down the visiting judge program, which currently provides 17% of the total days of judicial time in the district courts of Texas. I am hopeful that the state's legal position will prevail in any current and future litigation, however, and I would not adopt a bad system merely in response to this threat. ¶ A better reason for change is that the people want and deserve a better system. In every recent poll, the overwhelming majority of Texans have endorsed both merit selection and nonpartisan elections. Nearly all Texans want at least a chance to vote on a new system. All the state's major newspapers, together with numerous legal and civic organizations, have called for selection reform. ¶ For six months last year, a diverse group of legislators, judges, and others met at the request of Lieutenant Governor Bullock to consider this issue. Their recommendation reflects a careful compromise between those groups who most want to depoliticize the judiciary and those who most want to diversify it. The essentials of this plan are incorporated into S. B. 313 and S.J.R. 26 by Senator Rodney Ellis, and H.B. 810, H.B. 811, H.J.R. 60 and H.J.R. 61 by Representative Duncan. You can no doubt improve on its particulars, but I believe the Bullock proposal is a good starting point for debate. ¶ To those who have worked so long this session to make our legal system more balanced and more predictable, I say that your work will not be complete until judicial selection is reformed. The perception that the Texas justice system provides fair and equal justice to all will never be restored until all traces of the 'justice for sale' image have been eradicated."

> 13. Most regular judges in Texas are selected in partisan elections, with vacancies filled by appointment. A chart showing all the ways by which judges may be selected in Texas is attached as Appendix D.
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> 14. I catalogued most of my complaints about the current system in my 1989 and 1993 State of the Judiciary addresses. I have also criticized the system in various editorial comments, including 'Judicial Selection Reform,' *Eye on Texas*, November/December 1991; 'There's a better way to finance judicial races than the way we do in Texas,' *Houston Chronicle*, October 18, 1992; 'Party, money shouldn't decide judicial races,' *Houston Chronicle*, March 4, 1993; "Several possibilities for fixing how judges are picked in Texas," *Houston Post*, August 14, 1994; 'Time to change an intolerable system,' *Houston Chronicle*, December 4, 1994 (with Attorney General Dan Morales, Senator Ike Harris, Senator Rodney Ellis); 'GOP sweep shouldn't obscure need for Texas court reform,' *Dallas Morning News*, January 27, 1995 (with former Governor Bill Clements).

1997. On February 24, 1997 Chief Justice Thomas R. Phillips presented The State of the Judiciary in Texas report to the 75th Legislature. He made the following comments about judicial selection: "The appropriations bill also created the Commission on Judicial Efficiency, which at your direction studied judicial funding parity, staff diversity, court technology and judicial selection. Chancellor Herbert H. Reynolds of Baylor University chaired this effort with matchless dedication and energy, and Task Force Chairs Judge Jack Hightower, Dean Susana Aleman, Dean Donald Hardcastle and Tom Luce each did a remarkable job in chairing their respective groups. Anthony Haley, the general counsel, won praise from across the state for his marvelous performance. In all, more than 140 legislators, judges, attorneys and lay persons gave of their time and talents on this important project. ... *Judicial Selection* ¶ Finally, the Commission unanimously

recommended that our antiquated, even embarrassing judicial selection system be replaced by a method that better serves the needs of modem Texans. Although serious reform efforts have been mounted for more than one hundred years, the need for change has become more urgent with the increased size of the judiciary and the advent of two-party politics. Our current system may have been acceptable in 1876, when there were six appellate and twenty-six trial judges in the entire state, and nomination by the Democratic Party Convention (not primary) was tantamount to election. By 1994, in contrast, Harris County voters alone were obliged to make decisions in 45 primary (23 Republican, 22 Democratic), 8 runoff (5 Republican, 3 Democratic) and 59 general election judicial contests! It could have been worse - 16 more judicial races were unopposed. ¶ Sadly, the results of these races are determined far more by party strength than by individual merit. At the 1994 general election, for example, 31 of the 40 incumbent opposed Democratic district and appellate judges in Texas were defeated, while all Republican incumbents prevailed. At the last general election, however, Democrats lost only 3 of 18 opposed judges, while Republicans lost 8 of 28. Thus, the shifting tides of party fortune, which have almost nothing to do with judicial performance, have caused the defeat of almost ten percent of the state judiciary in the last two years, with the prospect of further future destabilization. ¶ Another major problem with the current system is the perception of unequal justice that inevitably arises when judges and judicial candidates accept campaign contributions from lawyers and litigants who have a stake in current or future court decisions. With such a large electorate and with so many contested elections, the sums raised and spent are enormous. As the chart attached as Exhibit B demonstrates, judicial candidates for Texas appellate courts alone received over fifty million dollars in donations between 1988 and 1994. Last session, the Legislature made a valiant effort to reduce the appearance of impropriety by passing the Judicial Campaign Fairness Act, which limited the time and amount of judicial campaign donations. While the Act served some worthwhile purposes, it has not diminished the aura of impropriety that surrounds judicial campaign solicitations. As the Austin American-Statesman noted in endorsing my re-election last year: 'The way Texas elects partisan judges, and allows those who practice before them to supply the campaign money, will always fuel suspicion that justice here is for sale.' That's hardly an endorsement to frame on the wall, but its about the most a Texas judge can hope for under the current system. These high-dollar, partisan races not only lower Texans' confidence in their courts, but also discourage out of state investment and job creation here. For example, Richard Posner, Chief Judge of the Seventh Circuit and a nationally recognized legal commentator, has opined that public distrust of state courts exceeds that of federal courts because 'it is reinforced by the low professional quality and rampant politicization of many of the state judiciaries, led by Texas.' Posner's critique appeared in *Commentary* magazine, but one could easily find similar observations in the pages of *The New York Times*, *Forbes*, *The Financial Times*, or numerous other sources which influence decision-makers throughout the world. ¶ Finally, the continuing lack of diversity among the state judiciary threatens the legitimacy of the administration of justice in the eyes of many Texans. Although more than forty percent of all Texans are minorities, only one-ninth of the state judiciary is Hispanic or African American. Of course, no method of judicial selection can or should create guarantees or mandate quotas. But a successful system must encourage more minority lawyers to seek judicial positions and, once in office, afford them a more reasonable prospect of remaining there. ¶ The Judicial Efficiency Commission's proposed solutions were the product of a full year of intense effort by a diverse and knowledgeable group of concerned Texans. If it is not politically feasible to accomplish comprehensive reform in this session, I hope that you will at least attempt to implement some of the Commission's suggestions at some levels of the court system.

1999. On March 29, 1999 Chief Justice Thomas R. Phillips presented The State of the Judiciary in Texas report to the 76th Legislature. He made the following comments about judicial selection: "*Judicial Selection* ¶ While there is no perfect way to select judges, one sure way not to choose judges is Texas' existing high-dollar, partisan contested election method. A decade ago, Texas showed the nation how special interest groups could try to affect public policy by approaching judicial elections just like legislative and executive races. ¶ Now, as expensive judicial races erupt in other states, Texas can be a positive leader in enhancing the stability and independence of the third branch. ¶ The current judicial selection system has long since outlived its usefulness. Judicial service has become a revolving door, with the median tenure for an appellate judge or justice in Texas having shrunk to less than four years and three months. As a group, our appellate, district and statutory county judges do not begin to reflect the diversity of our great state - only about 8% are Hispanic and less than 3% are African-American.[4] And the ethical standards of the entire Texas judiciary have been questioned by those who believe, or at least purport to believe, that modern political campaign practices are incompatible with the promise of impartial and independent justice. ¶ There is little or nothing a judicial candidate can do to affect these realities. While most judges will freely concede that nothing about their job is partisan, no independent judicial candidate has run a viable race for state appellate or district court in modern times.[5] And while most judicial candidates intensely dislike raising funds, those who decline to raise money or severely restrict the contributions they accept are not likely ever to be called 'judge,' whatever other labels they may be given. To sum up, partisan, well-funded campaigns are necessary and inevitable in modern Texas. ¶ In truth, neither party labels nor campaign war chests necessarily compromise a judge's ability to be fair and impartial. Most judges in Texas, as elsewhere, base their rulings on the facts and the law, not on extraneous considerations. But these attributes of Texas justice *do* compromise the *appearance* of fairness. When judges are labeled as Democrats or Republicans, how can you convince the public that the law is a judge's only constituency? And when a winning litigant has contributed thousands of dollars to the judge's campaign, how do you ever persuade the losing party that only the facts of the case were considered? ¶ The recent Texas poll to which I earlier referred revealed that, despite generally favorable views of our courts, 83% of respondents thought judges were strongly or somewhat influenced by contributions in their decisions; only 7% did not. That the public so strongly holds this view should not surprise us. The most widely viewed television program in the world, CBS' *60 Minutes*, asks 'is justice still for sale in Texas?'[6] Chief Judge Richard Posner of the Seventh Circuit Court of Appeals refers to 'the low professional quality and rampant politicization of many of the state judiciaries, led by Texas.'[7] Legal ethics scholar Charles Wolfram refers to 'the ritualized scandals of political spending' in Texas judicial elections.[8] Texas college students are taught that a 'major public relations problem faced by the judicial system is the perception that many judges can be corrupted by

campaign contributions.'[9] The Legislature has tried to improve the electoral process by passing the Judicial Campaign Fairness Act. Tex. Elec. Code §253.151 et seq. The Supreme Court has made various changes to the Code of Judicial Conduct, and we will soon promulgate further amendments based on the recommendations of our Judicial Campaign Finance Committee, chaired by attorney Wayne Fisher of Houston.[10] But such changes, while important, will effect only marginal improvements in an inherently defective system. ¶ Thus, the Legislature must respond by placing a constitutional amendment before the voters. And while several good ideas have been put forth, S.J.R. 9, the appointment and retention election system for appellate judges, seems to have the most support. Under the leadership of Senator Duncan and Senator Ellis, this proposal has already passed the Senate with bipartisan support, and was referred to the Committee on Judicial Affairs of the House of Representatives last week. Some opponents say that you should oppose this change, notwithstanding its merits, because most Texans still want to elect their judges. There are several good reasons to reject this argument. ¶ First, under the current system, a significant number of current judges are actually appointed, not elected. The so-called elected system is now and has always been a mixed system of appointments and elections. ¶ Second, for there to be an election under the current system, at least two lawyers who meet the constitutional or statutory requirements must decide to file. Most of the time, this does not happen. In 1998, for example, only 100 of the 257 state appellate and trial court elections had more than one candidate. In fact, eighteen of the state's 80 intermediate appellate justices and 92 of the state's 396 district judges have never had either a primary or a general election opponent. A retention, or 'yes' or 'no' election, for every judge at the end of every term would actually increase electoral control over the judiciary, not take it away. ¶ Third, and most important, how do these critics 'know' that Texans want to keep the current system? Yes, there are public opinion polls indicating opposition to change, but there are just as many or more suggesting that people support a merit selection/retention election plan. The results seem to turn mainly on how the question is phrased, not the underlying merits of the issue.[11] Whether the people want merit selection should be answered not by commissioning a poll, but by letting them vote in an open election for or against a constitutional amendment.

4. State Bar of Texas Department of Research and Analysis, A Statistical Profile of Texas Judges (1998).

5. In 1976, Judge Ira Sam Houston and Houston attorney Tom Lorance combined for 24.4% of the vote as write-in candidates against Democratic Supreme Court nominee Don Yarbrough. In 1990, independent Jim Scott won 20.3% of the vote as an independent candidate against Democratic Chief Justice Curtiss Brown of the Fourteenth Court of Appeals. The best showing by an independent in 1998 was Debra Champagne's 9.3% as a write-in candidate for Judge of the 268th District Court of Fort Bend County.

6. November 1, 1998 broadcast.

7. Commentary, March 1995.

8. Wolfram, *What Will the Tobacco Fees Set in Motion?*, The National Law Journal, December 28, 1998 - January 4, 1999, page A25.

9. Richard H. Kraemer, et al., Essentials of Texas Politics 185 (7th ed. 1998).

10. copy of the Committee's report may be obtained from Mr. Robert Pemberton, Rules Staff Attorney for the Supreme Court of Texas.

11. The recent statewide poll showed that 70% of Texans wanted judges to be elected by the people, while only 20% wanted them to be appointed by the Governor subject to retention elections where people vote to determine whether the judge should remain in office. See note 1, supra. But other statewide polls have shown substantial public support for merit selection. In November 1995, a Baselice & Associates survey for Texans for Lawsuit Reform found that 74% favored merit selection and retention elections for appellate judges, a slight increase over the 71% who favored that method in a March 1995 Tarrance Group Poll. In April 1993, the Harte-Hanks Texas Poll found that 61% of Texans supported merit selection. In January 1990, a Shipley and Associates Poll revealed that Texans favored merit selection over the current system 48% to 42%. In Winter 1989, the Texas Poll found that voters favored gubernatorial appointment with voter or legislative approval over partisan or nonpartisan elections 50% to 38%. In Fall 1984, a Texas Poll found that voters supported gubernatorial appointment and voter approval of judges 57% to 29% over the current system.

2001. On February 13, 2001 Chief Justice Thomas R. Phillips presented The State of the Judiciary in Texas report to the 77th Legislature. He made the following comments about judicial selection: "*Judicial Selection* ¶ While many aspects of the Texas judicial structure could be improved, the greatest systemic problem with Texas courts remains the way our judges are selected. The current system has long outlived its usefulness, and now dangerously impedes public respect for the administration of justice. ¶ Texas first embraced popular judicial elections in the mid-nineteenth century, in the vanguard of a national reform movement to separate politics from the bench. As a prominent scholar has noted: 'Proponents of popular election insisted that the appellate judiciary had suffered because governors and legislators had distributed judgeships on the basis of "service to the party" rather than on the "legal skills or judicial temperament" of appointees.' Popular elections perhaps yielded more qualified and more independent judges as long as the judges were few, the candidates were all of one color, class, gender and political party, the electorate was informed, and the campaigns

were inexpensive. ¶ Those days are gone. Hundreds of judicial races are contested across the state each year; the winners do not adequately reflect the diversity of the state; all the candidates are virtually unknown to the public; and the only practical way to inform the electorate is through costly paid media. Is it still a reform to make judges raise thousands, hundreds of thousands, or millions of dollars from the bar or other interested persons to run for office? Is it still a reform to ask more than two million registered voters in Harris County to decide 55 contested judicial races, as they had to do in the 1994 general election? If opinion polls are to be credited, few people think so. ¶ Some have answered that change really isn't needed anymore, because the pitched battles of Texas judicial politics are behind us. They note that special interest groups have moved on to wage judicial election battles in Alabama, Ohio, Michigan and Idaho, and surely won't return here. This is wishful thinking. Since 1980, 207 district and appellate judges have been tossed out of office, more often than not simply because of their party label. That trend will accelerate if we do not change the system. The 2000 general election saw Republicans win seats on the Austin and Beaumont Courts of Appeals for the first time in history, while Democrats nearly won judicial races in Dallas and Harris Counties. ¶ As many of you know, I have long favored the adoption by constitutional amendment of an appointment-retention election system for all courts of record. In my past addresses I have made my best case for the so-called 'merit selection' plan, as I truly believe it would decrease partisanship, minimize fundraising, and increase diversity on the bench. This year, Senator Duncan has once again proposed a constitutional amendment to adopt such a plan for our appellate courts, S.J.R. 3. hope you will allow the voters to resolve this issue. ¶ But other remedies short of merit selection are also possible. Last December, Senator Ellis, Senator Duncan, Representative Gallego, and I attended a national Summit on Improving Judicial Selection in Chicago, where representatives from seventeen large states discussed incremental improvements to electoral systems that would enhance public confidence in the courts. Many of those suggestions were directed to courts, bar associations, print and broadcast media, and interested citizens, but some may be accomplished only by state legislatures. Among the proposals endorsed in the Symposium's Call to Action[12] are these: ¶ • Public funding of judicial elections. H.B. 4, by Representative Gallego, would dedicate the amount of money raised by the attorney occupation tax to fund campaigns for serious candidates for Texas' two highest courts, where candidates currently are either criticized for raising too much money from special interests (Supreme Court) or are unable to raise sufficient sums to communicate effectively with voters (Court of Criminal Appeals). ¶ • Improve judicial campaign finance laws. H.B. 167, by Representative Gallego, would prohibit unopposed candidates from accepting campaign contributions after the filing deadline. ¶ • *Voter information guides.* H.B. 59, by Representative Puente, would require the Secretary of State to prepare a judicial voters guide for dissemination on the Internet. Voter guides have been maintained on the Internet in recent years by the State Bar of Texas and the Texas Civil Justice League, but neither has been supported by extensive publicity. The Judicial Council recommends that print copies also be prepared for voluntary free distribution in the state's daily newspapers, as has been done in Washington State.[3] Other interesting ideas have also been advanced in Texas. Among those that I hope you will consider are: ¶ • *Retention elections*. Leave initial elections as they are, but subject all incumbent judges who have been elected and who seek re-election to a retention or 'yes/no' ballot, as is currently done in Illinois and Pennsylvania. ¶ • *Cross-filing.* Amend the Texas Election Code to permit judicial candidates to file for the nomination of more than one party, as has been endorsed by the Texas Judicial Council. This would encourage judicial candidates to be non-partisan without depriving either the parties or the candidates of the benefits of organized parties. Candidates who won both major party nominations would have dramatically shorter and cheaper campaigns. ¶ • *Signature requirements.* Frivolous campaigns could be discouraged by extending the petition requirements currently in place in the four largest counties for judicial candidates to other counties and to statewide judicial elections, as recommended by the Texas Judicial Council. Any one of these changes would improve Texas judicial elections, and enacting several of them would be a major step in restoring our judiciary's now-tarnished reputation."

2003. On March 4, 2003 Chief Justice Thomas R. Phillips presented The State of the Judiciary in Texas report to the 78th Legislature. He discussed judicial selection: "*Judicial Selection Reform* ¶ I have saved for last the issue which I personally believe is most critical for our courts - the question of how we elect our judges. Our partisan, high-dollar judicial selection system has diminished public confidence in our courts, damaged our reputation throughout the country and around the world, and discouraged able lawyers from pursuing a judicial career. I urge you to submit a constitutional amendment at the earliest possible date to allow the people to decide whether they would prefer another election method. When Texas adopted judicial elections in 1850, there were only three supreme and eleven district judges in the entire state. The judicial ballot was short: citizens voted in one or perhaps two races. Candidates campaigned through stump speeches and handbills, with a few kegs of whiskey for thirsty voters being the principal expense. Reformers believed then that judges chosen by the people would be more independent, more qualified, and more accountable. ¶ Today, long ballots, partisan sweeps and big money campaigns have completely negated the original intent of judicial elections. Only three other states - Alabama, Louisiana, and West Virginia - still choose all their trial and appellate judges, both initially and for re-election, in partisan contested elections. Most other states have concluded that the goals of an independent, qualified and accountable judiciary can better be achieved by treating judicial races differently. Many states have chosen retention elections, which require every judge to run on a non-partisan 'yes' or 'no' ballot at the end of each term. ¶ Under S.J. R 33 and H.J. R. 63, filed yesterday with bipartisan sponsorship, all current Supreme Court, Court of Criminal Appeals, Court of Appeals and District Court justices and judges would stand for retention elections at the end of their terms. When a vacancy occurs, whether by death, resignation, removal, defeat or new court creation, the Governor would appoint a successor. Although the new judge would take office immediately, his or her appointment would be subject to Senate confirmation before the first retention election. The Senate could also adopt rules requiring additional approval by the Nominations Committee for appointments made between sessions. ¶ Retention elections would preserve most of the good of electing judges while alleviating most of the bad. Far from diluting the democratic process, retention elections would actually give most voters more control over their judges than they now enjoy. Today, most Texas judicial races are unopposed, and most incumbents therefore need only one vote to be re-elected.[17] Almost half of all Texas judges

are initially appointed anyway, to a new bench or to fill an unexpired term.[18] Many judges, particularly in less populated counties, have never had an opponent in their judicial careers.[19] With retention elections, on the other hand, every judge would face his or her employers, the people, at regular intervals. If judges who know that voters can remove them are more patient, punctual and efficient, then why not ensure that all 516 state judges are subject to a meaningful vote? ¶ Because retention elections are non-partisan, they will encourage a more deliberate vote. Since 1980, nearly one-third of all state judges who were opposed in a general election were defeated. Most of these defeats, I submit, were more about party label than competence or qualifications. While justice should be blind, voting shouldn't be. Yet, because of rapid changes in demographics affiliations across many parts of Texas, judicial turnover will undoubtedly increase in the coming years if we keep the current system. Retention elections will also minimize the need for most judges to amass million-dollar war chests and hire image consultants. With very few exceptions, retention elections in other states more closely resemble the rather genteel canvasses of the 1850's than the raucous Texas Supreme Court elections of the 1980's and 1990's. The damage to public confidence caused by these nasty contests is hard to calculate, but a 1998 survey revealed that 83% of Texans believed that Texas judicial decisions were 'very' or 'fairly' significantly influenced by campaign contributions.[20] Perhaps worse, from watching *60 Minutes* or *Frontline* or reading the *New York Times*, the *Financial Times*, or *USA Today*, millions of people worldwide now believe that politics has compromised the rule of law in Texas courts. [¶] Sullivan Ross was right when, at the Constitutional Convention of 1875, he labeled '[t]he destruction of public confidence in the judiciary' as 'the greatest curse that can befall a country.'[21] When we look at the surcharges that some reinsurers impose on customers that do business in Texas, or the lengths to which some contracting parties will go to keep their disputes away from Texas courts, is it not possible that Governor Ross' curse is already upon us? ¶ Contested, partisan judicial elections are likely to erode public confidence even further in the wake of last year's United States Supreme Court opinion in *Republican Party of Minnesota v. White*.[22] Because of that decision, the Texas Supreme Court has repealed that canon of our Code of Judicial Conduct which kept judges and judicial candidates from commenting on issues that might come before their courts.[23] Issue-oriented campaigns make it difficult for people to distinguish between legislators who make the law and judges who merely interpret it. Last year, a lawyer stopped me on the street to share a problem: his law firm couldn't decide who to support in a high-profile race between two district judges for a seat on our Court. He very much wanted to support the winner, complaining that his firm would really be hurt if they guessed wrong. I was stunned. Weren't both candidates able jurists who put principle above politics? 'Yes,' he readily agreed. Then why not just support the better candidate, I inquired. 'Well,' he explained, 'our firm wants our clients to believe that we're players. If we back a loser, we'll have no credibility.' This year, you can offer the people of Texas a judiciary where no client will have to ask their lawyer, 'How are you with the judge?' You can end the years of debate on this issue by letting the people decide, once and for all, what kind of election system they prefer. We have talked about this issue enough. As Shakespeare put it, 'Action is eloquence.'[24]"

2009. On February 11, 2009 Chief Justice Wallace B. Jefferson presented The State of the Judiciary in Texas report to the 81st Legislature. He made the following comments about judicial selection: "*Public Perception of Bias in the Judiciary* ¶ For the remainder of my time here today, I would like to continue a discourse begun 23 years ago by my Democratic predecessor, Chief Justice John Hill. ¶ I am concerned by the public's perception that money in judicial races influences outcomes. This is an area where perception itself destroys public confidence. A month from now, the United States Supreme Court will hear argument on this very issue in a case called *Caperton v. Massey*. The Court will decide whether due process requires the recusal of an elected judge who has benefited from a litigant's campaign expenditures. Last month, retired United States Supreme Court Justice Sandra Day O'Connor gave a hint of what may be coming in that case. She said: 'If I could do one thing to protect judicial independence in this country, it would be to convince those states that still elect their judges to adopt a merit selection system and — short of that — at least do something to remove the vast sums of money being collected by judicial candidates, usually from litigants who appear before them in the courtroom.' ¶ I share Justice O'Connor's concern about the corrosive influence of money in judicial elections. Polls asking about this perception find that more than 80% of those questioned believe contributions influence a judge's decision. That's an alarming figure – four out of five. If the public believes that judges are biased toward contributors, then confidence in the courts will suffer. So I ask the question – is our current judicial election system, which fuels the idea that politics and money play into the rule of law, the best way to elect judges in Texas? The status quo is broken. It is time for Texas to set a high standard for judicial selection. That is why I am so pleased to be speaking to visionaries in the House and Senate, for the judiciary is incapable of commanding such reform. Your work on this issue can bequeath to all Texans the gift of courts that need labor no longer under the assumption that judicial decrees are encumbered by political or economic motives. ¶ *Reforming Judicial Elections*¶ The Founding Fathers believed that the best method to secure an independent judiciary is through nomination by the President and confirmation by the Senate. That method, said Alexander Hamilton, serves at least two purposes. First, it ensures that a judge's decision is influenced less by the preferences of a majority than by the Constitution and laws. And appointment is superior to popular election, he said, because the people lack the requisite information or interest to select judges of sufficient merit and integrity. Although Texas adopted the federal method for a few years after it joined the Union, it soon embraced the Jacksonian premise that citizens have not only the ability, but the right, to vote for the men and women who control their fate in our courts of law. We have been electing judges since 1876; only recently have those elections transitioned into truly partisan contests.¶ Sadly, we have now become accustomed to judicial races in which the primary determinants of victory are not the flaws of the incumbent or qualities of the challenger, but political affiliation and money. In 1994, 2006 and again in 2008, district judges lost elections due to partisan sweeps in the urban counties. We have witnessed similar partisan sweeps in our courts of appeals and high courts. I would like to claim that voters gave me the honor of continued service due to stellar credentials, but it may just as well have been tied to McCain's success in Texas. And this is the point. Justice must be blind – it must be as blind to party affiliation as to the litigant's social or financial status. The rule of law resonates across party lines. ¶ Both of my predecessors—Chief Justices Hill and Phillips—giants from opposite political

perspectives, advocated for merit selection, as have several Legislators who see the need for an independent, fair and respected judiciary. ¶ Currently, only seven states hold partisan judicial elections. Seven. Twenty-five states either have a complete merit selection system or a system that combines merit selection with other methods. There are other proposals that call for eliminating the straight ticket vote, so that Democratic judges have a chance at statewide office, and Republican judges might be competitive in urban district-court races. So long as we cast straight ticket ballots for judges, the fate of all judges is controlled by the whim of the political tide. A merit system, in which voters later vote the judge up or down, is the best remedy, but I commend any innovation in which the goals are to recruit and retain qualified judges, and to reduce the role of money in judicial campaigns."

2011. On February 23, 2011 Chief Justice Wallace B. Jefferson presented The State of the Judiciary in Texas report to the 82nd Legislature. He made the following comments about judicial selection: "*Judicial Selection* ¶ All that I have discussed depends on an impartial system of justice overseen by the judicial branch. We lost one of that branch's greatest leaders, Joe Greenhill, less than two weeks ago. He told me once that he regretted that Texas has continued to elect judges on a partisan basis. I regret it, too. A justice system built on some notion of Democratic judging or Republican judging is a system that cannot be trusted. I urge the Legislature to send the people a constitutional amendment that would allow judges to be selected on their merit. ¶ If we do not reform the process completely, judicial elections can at least be changed. And so my final call to action is that we consider common-sense solutions to the problems that plague partisan election of judges. First, I would eliminate straight-ticket voting that allows judges to be swept from the bench ... not for poor work ethic, not for bad temperament, not even for their controversial but courageous decisions – but because of party affiliation. We saw this in Dallas County four years ago and in Harris County in the 1990s, in 2008 and just last year. Hordes of judges replaced for no good reason. ¶ Let's extend terms for state judges, from four years to six for district court judges, and from six years to eight for appellate court judges. This will avoid some of the overhaul that occurs each election cycle, and drastically slows down the system. And let's bring sense to the process to allow a judge appointed to an unexpired term to serve a full term before having to face the voters. That will give her or him experience and – this is important – a record to run on. ¶ We can do this, if not more."

2013. On March 6, 2013 Chief Justice Wallace B. Jefferson presented The State of the Judiciary in Texas report to the 83rd Legislature. While he did not focus on judicial selection, he did make this passing comment: "*Conclusion* ¶ We must provide legal aid for the poor, modernize our system for the middle class, build a sane disciplinary regime for our children, protect our parents. We should do one more thing. Discard our broken system in which judges of enormous talent are removed from office not for ineptitude, but only because they happen to be a member of the wrong political party when partisan winds shift. All of these reforms are encompassed in the judiciary's obligation to provide access to justice. That phrase is often thought of in terms of providing legal services to the poor. It is that, to be sure, but an accessible justice system requires that even broader segments of our society be able to utilize it. Viewed this way, our remedies must be more expansive as well. Just as no single defect created the barriers, there is no unitary solution. So we must marshal all of our forces."

2015. Chief Justice Nathan L. Hecht's Address to the 84th Texas Legislature on February 18, 2015 on the State of the Judiciary in Texas contained comments in judicial selection: "*Judicial Selection* ¶ I have not spoken to the problems of judicial selection because I have no consensus solution. The issue has been discussed throughout the State's history and remains mired in controversy to this day. But let me say two things. First: Texans rightly demand that judges, like all public officials, be accountable, but when voters have no way of knowing a candidate's qualifications, election results are usually the product of campaign spending, familiar names, political swings, and blind luck. The current system rarely serves the public's desire for accountability. Second: The political parties want to participate in judicial selection, and their interest is legitimate. But the increasingly harsh political pressures judges face, and to which they are not permitted as judges to respond, threaten the independence judges must maintain to wield the power to decide the people's disputes with each other and with their government. Judges try to resist those pressures. The public is understandably skeptical they can succeed. ¶ Judges, like others, disagree about judicial selection. But in my view, the tensions in judicial selection are mounting and will tear at the Judiciary's integrity. I hope the Legislature will continue to consider paths to reform. ¶ All people yearn for justice. The prophet Amos cried, 'Let justice roll down like waters, and righteousness like an ever-flowing stream.' The Texas Judiciary is committed to this sacred cause. We ask for your help."

2016. In 2016, the Texas Bar Journal published two articles by Wallace B. Jefferson & David Butts, *Point/Counterpoint: Judicial Selection*, 79 TEX. B.J. 90 (Feb. 2016). Jefferson was formerly Chief Justice of the Texas Supreme Court. Butts was a political consultant living in Austin. Jefferson's "My View" began: "Texas's judicial selection process is broken. Judges are fundamentally different than legislators, but that important distinction is rendered meaningless by partisan elections. There are so many judges in Texas, arranged in such a confusing system, that even the most well-intentioned voter could not hope to make an informed choice. Judicial values we would favor—honesty, integrity, inquisitiveness—thus take a back seat to partisanship, fundraising, and name-based voting." p. 90. He continued: "It is thus a shame that in every election cycle, good judges of all political affiliations are swept out of office not as a judgment on their record but as a consequence of the state's political mood. We expect our legislators to be responsive to the populace's changing sentiments. Our constitution protects citizens' right to petition legislators and move them to one position or another. In judges, by contrast, we look to impassivity in the face of particular interests, be they special or general. We want independence and for each person before the court to have an equal chance. As U.S. Supreme Court Justice Ruth Bader Ginsburg recently put it, 'Partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain.'3 ¶ But partisan elections, especially those that include fundraising, shake the public's confidence in the judiciary. Opinion polling shows that voters believe that campaign contributions influence judicial decision-making.

And many judges struggle—as I myself struggled—to square their ethical obligation to be and to appear beyond corruption with the practical realities created by our partisan electoral system. Texas must value competence and integrity in its judges. But its current system, in which an overwhelmed electorate ineffectually uses partisanship and name recognition as a proxy for these attributes, fails to do so. The result is the loss of good judges and a decrease in public confidence. Reform, beginning with merit selection followed by retention elections, is imperative." p. 90.

Butts, a political consultant, presented a different perspective. He supported an elective system, and pointed out that "[i]n Texas, we do have an appointment system. The governor fills new courts and vacancies with confirmation by the Senate. Former Gov. Rick Perry appointed more district and higher court judges in the state of Texas, including seven of the nine sitting members of the Texas Supreme Court, than any previous governor. The Austin American-Statesman reported on September 20, 2014, that Perry 'appointed reliably like-minded people—donors to his campaigns, one-time staffers in his office, former lobbyists—to dozens of boards, commissions and judgeships.'" p. 91. Butt's suggestion: "Attempts at reform should start with restricting a governor's ability to appoint whom he or she chooses. Otherwise, with a strictly appointed system, even with retention, we will see a judiciary that is reflective of one mindset. Texans are not of one mind." p. 91. Butts concluded: "The governor's ability to use a judgeship for patronage should be eliminated. Create judicial selection committees with rotating membership comprised of a cross section of citizens. This approach could exist regionally and could fill new courts and vacancies. Trust the voters with the final say. Voters will not always make the best choice, but they usually get it right. In the end, a balanced democratic process is our best choice." p. 91. In sum, Butts suggestion was to keep the current system, except to have a committee exercise the Governor's appointment power.

2017. Chief Justice Nathan L. Hecht's Address to the 85th Texas Legislature on February 1, 2017 on the State of the Judiciary in Texas contained comments in judicial selection: "*Judicial Selection* ¶ I will say only a word about judicial selection, but it is a word of warning. In November, many good judges lost solely because voters in their districts preferred a presidential candidate in the other party. These kinds of partisan sweeps are common, with judicial candidates at the mercy of the top of the ticket. I do not disparage our new judges. I welcome them. My point is only that qualifications did not drive their election; partisan politics did. Such partisan sweeps are demoralizing to judges and disruptive to the legal system. But worse than that, when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty. There is no perfect alternative to judicial elections. But removing judges from straight-ticket voting would help some, and merit selection followed by nonpartisan retention elections would help more."

In the 85th Regular Session of 2017, the Texas Legislature enacted House Bill 25, amending certain provisions of the Texas Election Code to eliminate straight-party voting effective September 1, 2020, Section 64.004, Texas Election Code. The bill was largely supported by Republicans and largely opposed by Democrats, with a vote of 88-57 in the Texas House.

2019. Chief Justice Nathan L. Hecht's Address to the 86th Texas Legislature on February 6, 2019 on the State of the Judiciary in Texas contained comments in judicial selection: "*Judicial Selection* ¶ Historic as was the blow Hurricane Harvey dealt the Texas Judiciary, so was the blow from the November election. Of the 80 intermediate appellate justices, 28—35%—are new. A third of the 254 constitutional county judges are new. A fourth of trial judges—district, county, and justices of the peace—are new. In all, I am told, 443 Texas judges are new to their jobs. On the appellate and district courts alone, the Texas Judiciary in the last election lost seven centuries of judicial experience at a single stroke. ¶ No method of judicial selection is perfect. Federal judicial confirmation hearings are regarded as a national disgrace by senators themselves. States have tried every imaginable alternative. Still, partisan election is among the very worst methods of judicial selection. Voters understandably want accountability, and they should have it, but knowing almost nothing about judicial candidates, they end up throwing out very good judges who happen to be on the wrong side of races higher on the ballot. Merit selection followed by nonpartisan retention elections would be better. At a minimum, judicial qualifications should be raised, as the Judicial Council recommends. I urge you: at least, pass Senate Bill 561 and Senate Joint Resolution 35. ¶ Don't get me wrong. I certainly do not disparage our new judges. I welcome them. I've been in their shoes—though it was awhile ago. My point is that qualifications did not drive their election; partisan politics did. Partisan sweeps—they have gone both ways over the years, and whichever way they went, I protested—partisan sweeps are demoralizing to judges, disruptive to the legal system, and degrading to the administration of justice. Even worse, when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty. Make no mistake: a judicial selection system that continues to sow the political wind will reap the whirlwind."

2020. On June 24, 2020, U.S. District Judge Marina Garcia Marmolejo, sitting in Laredo, denied relief in *Bruni v. Hughs*, 468 F. Supp.3d 817 (U.S. Dist. Ct. 2020), to parties who claimed that elimination of straight-ticket voting in the Texas 2020 election would result in longer lines, voter confusion, and reduced turnout among Democratic-Party voters. On Friday, September 25, three weeks before voting started on October 13, 2020, in *Texas Alliance for Retired Americans v. Hughs*, Judge Marmolejo suspended House Bill 25, which eliminated straight-ticket voting starting with the 2020 election, and reinstated straight-ticket voting. Judge Marmolejo based her decision on her conclusion that the Texas law discriminated against African-American and Hispanic Americans. The State of Texas applied for an emergency stay of the Order, supported in part by the Declaration of the Bexar County Elections Administrator that "[r]equiring counties to put the one-punch, straight-ticket voting ('STV') option back on the ballots now would be catastrophic to the administration of the 2020 general election." On Monday, September 28, in Cause No. 20-40643, a panel of The Fifth Circuit Court of Appeals stayed Judge Marmolejo's order, calling part of her reasoning "deeply flawed."

In 2020, the Texas Commission on Judicial Selection met by Zoom-conference throughout the year, to develop recommendations on how to improve the way we select judge in Texas. Here is a news report from the *Texas Tribune* dated Dec. 31, 2020: "Texas looks unlikely to change its controversial partisan election system for judges — even after a commission studying the issue recommended ending the practice. ¶ On an 8–7 vote, the 15-member group recommended in a report released Thursday that the Legislature change the longstanding method in the state, which requires judges to run with a political party, often collecting campaign checks from the very lawyers, businesses and lobbyists whose cases land before their courts. But the group did not overwhelmingly back a replacement system. ¶ For decades, critics including former judges have pointed out that the system allows for the appearance of bias for donors or political allies, if not not improper influence itself. But the issue has always been politically intractable at the Texas Capitol, where large majorities would be required to change it through a constitutional amendment. ¶ This week's report marks a familiar logjam for the issue, which has been pushed for decades by lawyers, judges and good-government advocates, who rarely make much headway with Texas' political leaders." The article goes into more depth about the issues.[25]

2021. No bill was introduced in the 87th Texas Legislature to change the method of selecting judges. What, if anything, will come from the 2020 Commission's report remains to be seen. If the past is a predictor, probably nothing will come of them.

ENDNOTES

1.<https://tlc.texas.gov/docs/PresidingOfficers.pdf>

2. *The History of the Robert W. Calvert Inn of Court*
<https://inns.innsofcourt.org/for-members/inns/the-robert-w-calvert-american-inn-of-court.aspx>

3. <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1056&context=brief>.

4. Justices of Texas 1836-1986 <tarltonapps.law.utexas.edu/justices/profile/view/41>.

5. Dallas Morning News - Obituaries
<https://obits.dallasnews.com/obituaries/dallasmorningnews/obituary.aspx?n=joe-greenhill&pid=148552955>

6. Texas Supreme Court Advisory for Chief Justice Joe R. Greenhill, 1914-2011.
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/JRG_021111.htm>

7.` Information from the printed program at Chief Justice Greenhill's memorial service held at the State Capitol.
<http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/pdf/06.13.11_greenhill_tribute.pdf>

8. Eulogy for Chief Justice Joe R. Greenhill, given by Larry F. York.
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/Greenhill%20Eulogy_York.htm>

9. <http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/video/JRG_turningpoint_cemetery.wmv>.

10. Interview with Chief Justice Greenhill's grandson.
<https://www.texascourthistory.org/Content/Newsletters//TSCHS_Journal_Winter2012.pdf>

11. Dignity Memorial website Obituary for Martha Shuford Greenhill
<https://www.dignitymemorial.com/obituaries/austin-tx/martha-greenhill-8210160>

12. Texas Supreme Court advisory
<https://www.txcourts.gov/supreme/news/martha-greenhill-dies-in-austin-at-100/>

13. Adam Scott Miller, *Whatever Means Necessary: Uncovering the Case of Sweatt v. Painter and Its Legal Importance Painter and Its Legal Importance*, 4 HISTORY IN THE MAKING (2011)
<https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1191&context=history-in-the-making> [4-8-2021].

14. *Oral History Interview with the Honorable Joe R. Greenhill*
<https://www.houseofrussell.com/legalhistory/sweatt/docs/goh.html>

15. *Memorandum of Justice Tom C. Clark* <https://tarltonapps.law.utexas.edu/clark/pdf/sweatt/a2-03-10.pdf>

16. Knights of Pythias of Texas <https://www.pythias-tx.org/notablepythians>

17.<https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/pdf/Jack%20Pope_birthday_041713.pdf>

18. Texas Supreme Court advisory
<https://www.txcourts.gov/supreme/news/former-chief-justice-jack-pope-1913-2017/>

19. Weed-Corley-Fish website obituary.
<http://wcfish.tributes.com/obituary/show/Andrew-Jackson-Jack-Pope--104506941>

20. Texas Supreme Court Proclaims Jack Pope Day
<https://www.txcourts.gov/supreme/news/court-proclaims-april-18-jack-pope-day-on-his-103rd-birthday/>

21. Hecht, *Supreme Court of Texas: Chief Justice Andrew Jackson "Jack' Pope, Jr., "Always His Own Man."*
<https://law.duke.edu/sites/default/files/news/hecht2.pdf>

22. Marilyn P. Duncan & Benjamin L. Mesches, *Chief Justice Jack Pope: Common Law Judge and Judicial Legend*
<https://www.haynesboone.com/~/media/files/attorney%20publications/2017/common_law_judge_and_judicial_legend.ashx>

23. Pope, *Methods for Common Law Judges*
< https://www.texascourthistory.org/Content/Newsletters//TSCHS_JournalSummerDinner2012.pdf>.

24. *THE LAW; Rubber Stamp Is Gone in Texas Judicial Election*
<https://www.nytimes.com/1988/10/21/us/the-law-rubber-stamp-is-gone-in-texas-judicial-election.html>

25. *Despite committee's recommendation, ending Texas' partisan judicial elections looks unlikely*
`<https://www.texastribune.org/2020/12/31/texas-judicial-elections-partisan>.