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AN HISTORICAL OVERVIEW OF JUDICIAL SELECTION IN TEXAS

LANCE A. COOPER†

Americans have struggled since colonial times with the notion that judges should be independent, yet accountable to the people. The tension inherent between these two concepts has manifested itself throughout this nation's history in the conflict over whether judges should be elected by the people or appointed by representatives. Presently, the citizens of Texas choose state judges through direct election.¹ However, at different times during the nineteenth century, judges were elected or appointed by various branches of state government, depending on which constitution the state was operating under at the time.

Since gaining independence from Mexico, the citizens of Texas have ratified six constitutions.² Four provided for judges by appointment, while two provided for judges by election.³ Not surprisingly, questions arise as to why the method of judicial selection changed during the nineteenth century, and what efforts have been made to change the system in the twentieth century.⁴ This article offers an historical

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1. Due to space limitations, reference is made only to appellate judges and judges of the district courts. Selection of inferior court judges will not be traced.

2. See 3 TEX. CONST., *Introduction to Constitutions of Texas*, 463, 467 (West 1993) [hereinafter *Introduction*].

3. See TEX. CONST. art. V, § 2; TEXAS CONSTITUTION of 1869, art. V, § 2 (reprinted in TEX. CONST. app. 463, 606 (West 1993)); TEXAS CONSTITUTION of 1866, art. IV, § 2 (reprinted in TEX. CONST. app. 463, 563 (West 1993)); TEXAS CONSTITUTION of 1861, art. IV, § 5 (reprinted in TEX. CONST. app. 463, 536 (West 1993)); TEXAS CONSTITUTION of 1845, art. IV, § 5 (reprinted in TEX. CONST. app. 463, 509 (West 1993)); Constitution of the Republic of Texas, art. IV, § 1 (1836) (reprinted in TEX. CONST. app. 463, 486 (West 1993)).

4. Key primary sources for the study of selection of judges in Texas are prior Texas constitutions, contemporary newspapers, and the journals and debate records of the various constitutional conventions. Of the different constitutions, three stand out in importance on this issue: the Constitution of 1876, which is still in force in Texas, the first State Constitution of Texas, and the Constitution of the Republic of Texas. See TEX. CONST. art. V (1876); TEXAS CONSTITUTION of 1845 (reprinted in TEX. CONST. app. 463, 502 (West 1993)); Constitution of the Republic of Texas (reprinted in TEX. CONST. app. 463, 482 (West 1993)). An official record of the 1845 debates, *Debates in the Texas Convention, 1845*, was kept during the 1845 Convention. WILLIAM F. WEEKS, *DEBATES: THE TEXAS CONVENTION* (Houston, J. W. Cruger 1846). The delegates to the 1875 Convention voted against keeping a record of the debates, but Professor Seth McKay has prepared an unofficial record of the debates from contemporary newspaper accounts. *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION of 1875* (Seth S. McKay ed. 1930). No record, official or unofficial, exists for the debates of the Convention of the Republic of Texas. A partially completed journal, combined with the diary notations of an observer of the convention, are the primary sources for that convention.

overview of the judicial selection process in Texas during these periods.

Americans formed strong opinions regarding the process for selecting judges before the United States existed as a nation. Throughout the colonial period, the English Crown retained the power to appoint and remove judges at its pleasure. This lack of judicial independence became a point of contention for the colonists. As a result, the Framers drafted the Federal Constitution so there was no doubt as to their intent: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."⁵ Moreover, state governments of the new United States enacted their own versions of the federal model. Of the original thirteen states, seven provided for selection of judges by the legislature, five by the governor and council, and one by the governor and legislature.⁶ From the colonial period through the ratification of the 1845 Texas Constitution, every state entering the Union did so with an appointed judiciary.⁷

Debate regarding the merits of an appointed judiciary began to occur in the early nineteenth century.⁸ Some Americans advocated a mixed system of election and appointment, but the emerging debate was generally cast in terms of one or the other. During this time, the Democratic party began to take a leadership role in pushing for election of judges.⁹ Democrats voiced support for judicial elections as a way to curb judicial review. Why should popularly elected legislatures be frustrated by judges not directly accountable to the people?¹⁰ The Whig party answered this question by reminding voters that the more conservative appointment system ensured judicial independence. Moreover, concern regarding manipulation of elected judges by party leaders and reduced respect for the bench led many Whigs to contest the move toward an elected judiciary.¹¹ Ultimately, however, the Whigs fought a losing battle against a growing trend.

5. U.S. CONST. art. III, § 1. In the words of Alexander Hamilton, "Every reason which recommends the tenure of good behaviour for judicial offices, militates against placing the judiciary power in the last resort in a body composed of men chosen for a limited period." THE FEDERALIST NO. 81, at 410 (Alexander Hamilton) (Bantam Books ed. 1982).

6. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966).

7. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993).

8. Lawrence Baum, *Electing Judges*, in CONTEMPLATING COURTS 18, 19 (Lee Epstein ed. 1995).

9. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 341 (1983).

10. *Id.*

11. *Id.*

Debate in state constitutional conventions of the mid-nineteenth century reflected the concerns of both parties. As Professor Morton Keller notes, "By the 1830s it was clear that state constitutional revision was deeply mired in party politics and changing social and economic interests. Constitutional conventions were arenas for the working out of particular, ongoing conflicts rather than for restating fundamental principles."¹² According to Professor Keller, these conventions reflected the need for greater political democracy. Delegates often derided appointive systems as relics of the monarchy and last vestiges of aristocracy.¹³ In other words, Jacksonian Democracy was beginning to impact the judiciary.¹⁴

Many legal commentators opposed election of state judges.¹⁵ Many of them reasoned, as did James Willard Hurst in the mid-twentieth century, that the movement "was based on emotion rather than on a deliberate evaluation of experience under the appointive system."¹⁶ According to Hurst, the decision to change to an elective judiciary did not occur as the result of measured consideration.¹⁷

Nevertheless, evidence reflects that many delegates *did* think through and vigorously debate the merits of an elective system. At some conventions, lengthy debates over the issue prompted delegates to suggest time limits on speeches.¹⁸ According to Professor Keller, both New York and Mississippi made sweeping changes to their respective constitutions reflecting the prevailing spirit of democratization. These revisions, intended to "hobble the power of the executive, the legislature [and] the courts[.]. . ." led to Mississippi's most novel change of all: the election of all judges, including its supreme court justices.¹⁹ Moreover, New York's change to an elective system for judgeships and other technical state offices prompted convention delegates across the country to discuss the merits of elective systems.²⁰ In line with national trends, discussion of the issue among Texas constitutional convention delegates grew with each convention.

The Texas experience began early in the nineteenth century while the future state belonged to Mexico. Though subjects of the Mexican government, most Texas colonists adhered to a political philosophy that differed considerably from that of the Mexican government. Ap-

12. Morton Keller, *The Politics of State Constitutional Revision, 1820-1930*, in *THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE* 67, 71 (Kermit L. Hall, et al. eds., 1981).

13. Nelson, *supra* note 7, at 191.

14. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 140 (1950).

15. Nelson, *supra* note 7, at 190-91.

16. HURST, *supra* note 14, at 140.

17. *Id.* at 140-41.

18. Nelson, *supra* note 7, at 192.

19. Keller, *supra* note 12, at 72.

20. Nelson, *supra* note 7, at 193.

proximately three-fourths of the colonists moving into Texas after 1821 hailed from states west of the Alleghenies and south of the Ohio and Missouri rivers.²¹ Moreover, living in the United States had instilled in these Texas colonists concepts of natural rights that they believed the Mexican government should not take away. In a speech given in Brazoria, Stephen F. Austin declared he never "in any manner, agreed to any thing, or admitted any thing, that would compromise the constitutional or vested rights of Texas. These rights belong to the people, and can only be surrendered by them."²²

Texans grappled with how to create an effective judicial system years before they successfully rebelled against Mexico in 1836. In theory, Spanish law was in force in the colonies. This frustrated the colonists, as few were familiar with the Spanish system.²³ In an effort to relieve this situation, the provincial governor gave Stephen F. Austin the power to administer justice and preserve good order in the colony until it could be regularly organized under the constitution and laws of Mexico. Austin responded by issuing his "Instructions and Regulations" to serve as a guide for officials of his colony.²⁴ In 1828, these "Instructions and Regulations" were displaced as the law of the colony, and a governmental system based on the constitution of Coahuila and Texas came into existence. Under this system, all laws and public records were in Spanish, a source of annoyance to the primarily Anglo colonists.²⁵ Moreover, the lack of a satisfactory appellate system for the review of local decisions compounded the problem.

Newspapers reflected the sensitivity of the colonists toward what they considered infringement of their natural rights. In 1835, the Mexican government moved to tighten its grip on the colonists by enforcing the collection of customs at Anahuac and Galveston.²⁶ Mexican General Martin Perfecto de Cos was charged with administering this policy.

General de Cos sent a letter to the garrison commander at Anahuac promising reinforcements to help enforce customs collections. Colonists, however, intercepted the letter, and considered it a direct threat to their liberty. The Texans formed a militia and captured the garrison, prompting an alarmed General de Cos to move from Matamoras to San Antonio with reinforcements. An editorial in the *Brazoria Texas Republican* captured the anxiety of many Texans: "Now, if the present government of Mexico is sincere in its professions of liberal

21. Gerald Ashford, *Jacksonian Liberalism and Spanish Law in Early Texas*, 57 SW. HIST. Q. 1, 2 (1953).

22. Speech by Stephen F. Austin to Brazoria, Texas Citizens (Sept. 8, 1835), in TEL. & TEX. REG., Oct. 10, 1835, at 5.

23. Ford W. Hall, *An Account of the Adoption of the Common Law By Texas*, 28 TEX. L. REV. 801, 803 (1950).

24. *Id.*

25. *Id.* at 804.

26. RUPERT N. RICHARDSON, TEXAS: THE LONE STAR STATE 115 (1943).

guarantees for Texas, why all this preparation for a military invasion? Why has general [sic] Cos marched with all the disposable force at Matamoras (about four hundred men) to Bexar. . .?"²⁷ The editorial continued: "[I]s it that the promised guarantees, are only a cover and false show, to quiet Texas until the general government is prepared to give to it a military government?"²⁸

Efforts at conciliation proved fruitless, and the call went out for a meeting of colonists to discuss the recent events with the Mexican government. On October 16, 1835, representatives of the Texas colonists held a "Consultation" at San Felipe to discuss creating a mechanism to govern Texas themselves. The delegates faced creating a judiciary that would be sensitive to the needs of the colonists. They responded to this challenge by setting up a provisional government pursuant to the Plan and Powers of the Provisional Government of Texas.²⁹ A "General Council" was created to fulfill the function of a legislature.³⁰ The Plan set up a provisional judiciary with judges nominated by the General Council and commissioned by the governor.

The members of the Consultation rejected the idea of independence from Mexico. However, support for a complete break with Mexico grew among the colonists. Several months after the deliberations of the Consultation, the *Weekly Houston Telegraph* ran an article condemning the flaws of the 1824 Mexican Constitution. The article criticized the Constitution for giving the Mexican Congress the right to construe the constitutionality of its own laws. In objecting that the Mexican Congress had the right to nullify judiciary power, the editorial recognized the importance of a strong and independent judiciary.³¹ The article reflected Texans' views regarding the role of the judiciary: protector of their vested rights.

In December of 1835, the Texas General Council adopted a resolution calling for an election of delegates to a plenary convention.³² Elections were held on February 1, 1836, and the delegates assembled at Washington-on-the-Brazos in March to draft a constitution for the soon-to-be-republic. Like most of the colonists they represented, the vast majority of the delegates were not native to Texas, and thus brought to the convention judgments and beliefs conceived prior to their arrival in Texas.

Thomas Jefferson Rusk, arguably the most able and influential member of the convention, exemplified this phenomenon. Born in

27. Stephen F. Austin, *Report of the Chairman of the Committee of the Jurisdiction of Austin*, TEX. REPUBLICAN, Oct. 10, 1835, at 3.

28. *Id.*

29. *Introduction*, *supra* note 2, at 466.

30. RICHARDSON, *supra* note 26, at 124.

31. *To An Impartial World*, TEL. & TEX. REG., Feb. 27, 1836, at 121.

32. EUGENE C. BARKER, *THE LIFE OF STEPHEN F. AUSTIN: FOUNDER OF TEXAS, 1793-1836* 424 (U. Tex. Press, 4th prtg. 1990).

South Carolina in 1803, he studied law under John C. Calhoun.³³ He moved to Georgia in 1825, where he practiced law and speculated in land. Rusk's partners in one land speculation venture, however, stole a considerable amount of his money and fled to Texas, with Rusk in pursuit. Rusk decided to remain in Texas, where he actively participated in the Convention of 1836 and served as president of the 1845 Convention.³⁴

Sources on the 1836 Convention are scarce. The delegates did not keep an official record of the debates.³⁵ According to Professor Rupert Richardson, it is impossible to determine how the delegates developed the draft constitution into the final version.³⁶ One of the most useful sources on convention activities is the diary of William F. Gray, a Virginian who attended the convention. While not acting as a reporter of the convention, his shrewd judgments regarding the abilities of the participants shed light on who influenced the shape of the constitution.³⁷ Unfortunately, Gray did not specifically comment on the delegates' opinions about the best way to select judges. He did, however, have an opportunity to review the first draft of the constitution. Gray concluded it was "awkwardly framed, arrangement and phraseology both bad; general features much like that of the United States. It is too close a copy, for some features of the Constitution of the United States which they are attempting to introduce here are not applicable."³⁸

The Convention considered the draft constitution so flawed that upon a motion by Thomas Rusk, it was referred to a committee of five for the purpose of correcting errors and phraseology.³⁹ William Gray wrote, "The Constitution has been gone over by sections, and much has been altered and amended; but it is still so imperfect that it has been recommitted to another committee to amend the phraseology and arrangement — as the President expresses it, to correct the *verbiage*."⁴⁰ As a member of this committee, Thomas Rusk undoubtedly exercised considerable influence over the committee's work. "By a process of elimination it is not difficult to arrive at the conclusion that Rusk, the only one of the five who ever manifested great ability at such duties, did most of the work"⁴¹

33. 2 THE HANDBOOK OF TEXAS 516 (Walter P. Webb & H. Bailey Carroll eds., 1952).

34. *Id.* at 516-17.

35. Ashford, *supra* note 21, at 21.

36. Rupert N. Richardson, *Framing the Constitution of the Republic of Texas*, 31 SW. HIST. Q. 191, 208 (1928) [hereinafter Richardson, *Framing the Constitution*].

37. See FROM VIRGINIA TO TEXAS, 1835: DIARY OF COL. WM. F. GRAY (Fletcher Young Publishing Co. 1965) [hereinafter FROM VIRGINIA TO TEXAS].

38. *Id.* at 126.

39. Richardson, *Framing the Constitution*, *supra* note 36, at 208.

40. FROM VIRGINIA TO TEXAS, *supra* note 37, at 129-30.

41. Richardson, *Framing the Constitution*, *supra* note 36, at 208.

The delegates settled on a method of judicial selection similar to that promulgated by the Consultation. Under the new constitution, the Texas Supreme Court consisted of a chief justice and associate justices, who also served as the state's district judges.⁴² These justices were to be elected by joint ballot of both houses of Congress.⁴³ Thus, it is reasonable to conclude that William Gray's comment regarding similarities with the United States Constitution indicates the significant influence the document had on the drafting of the new Texas Constitution.

The circumstances surrounding the creation of the 1836 Constitution were not conducive to reflection and measured debate. The Constitutional Convention ended with members "dispersing in all directions, with haste and in confusion."⁴⁴ The chaos at the end of the 1836 Convention reflected the stress of drafting a treasonous document in the face of an attacking Mexican army. The delegates sought to create a constitution that incorporated the best elements of familiar constitutions as quickly as they could. The sections dealing with the judiciary represent what the delegates thought would be an adequate system for the young Republic.

The Republic of Texas operated under the 1836 Constitution for approximately nine years, until the United States annexed Texas. Thereafter, in 1845, delegates from across Texas met in Austin to draft a state constitution for Texas.⁴⁵ A number of committees were formed to draft the different parts of the constitution. Thomas Rusk, as president of the 1845 Convention, appointed the members of the various committees. Rusk chose John Hemphill to serve as chairman of the Judiciary Committee.⁴⁶ On July 11, the Judiciary Committee reported a draft judicial article. In accordance with this proposed article, the governor nominated, and with the advice and consent of the Senate, appointed the judges of the supreme and district courts.⁴⁷

The delegates spent little time debating the issue. A motion for an elective judiciary was made from the floor of the convention on August 11.⁴⁸ The motion went to a vote, and lost twenty-three to thirty-three.⁴⁹ Ultimately, however, the delegates went along with the Judiciary Committee's proposal for appointment of judges, which followed the federal model of recommendation by the executive with the advice and consent of the Senate.

42. Constitution of the Republic of Texas art. IV, § 7 (1836) (reprinted in *TEX. CONST.* app. 463, 486 (West 1993)).

43. *Id.* § 9.

44. *FROM VIRGINIA TO TEXAS*, *supra* note 37, at 134.

45. *JOURNAL OF THE TEXAS CONSTITUTIONAL CONVENTION* 3 (July 11, 1845).

46. Hemphill later served as Chief Justice of the Texas Supreme Court.

47. *JOURNALS OF THE CONVENTION* 47 (Austin, Miner & Cruger 1845) (no record exists of the debate within the committee).

48. *Id.* at 202.

49. *Id.*

Jacksonian Democracy swept through Texas shortly after voters approved the 1845 Constitution. Consequently, objections were made to the appointive system during the administration of the first governor of Texas, J. Pinckney Henderson.⁵⁰ The Texas House passed a resolution calling for a constitutional amendment that would require judges to stand for election.⁵¹ Two reasons were given for the proposed change: Election of judges was more in unison with principles of a democratic government, and during the first session of the legislature, judges were appointed to districts in which they did not reside. When put to a vote, however, the Texas Legislature considered the constitution too new to amend, and voted the measure down.

Nevertheless, the issue re-appeared during the administration of Governor Wood.⁵² Supporters of an elective system pointed out that Governor Henderson, a lawyer, knew many of his appointments, and was therefore able to personally evaluate their fitness to serve as judges. The fact that Governor Wood, a non-lawyer, did not have Henderson's ability to personally rate judicial candidates was a likely factor in persuading the legislature to press forward with the amendment. The legislature passed the amendment by two-thirds vote in each house, and submitted it to the citizens of Texas, who approved it on January 16, 1850.⁵³

The period from 1846 to 1912 resulted in dramatic change. During this time, the constitution of every state entering the Union provided for judicial elections.⁵⁴ From 1846 to 1860, only two proposed constitutions retained appointive systems, and in both cases, the voters rejected them.⁵⁵ Texas generally followed these patterns, but departed from them during Reconstruction.

On January 28, 1861, a convention was called to secede from the Union.⁵⁶ The *Journal of the Secession Convention of Texas* reveals that the delegates were primarily concerned with preparation for war.⁵⁷ The delegates spent little time debating constitutional provisions. Instead, they used the 1845 Constitution as a model, including the judicial article. The *Journal* does not provide any reasons, but the delegates ignored the judicial election amendment passed in 1850 during Governor Wood's term and created an appointed judiciary.

50. 2 A COMPREHENSIVE HISTORY OF TEXAS: 1685 TO 1897, at 33 (Dallas, William G. Scarff 1898).

51. *Id.*

52. *Id.* at 34.

53. *Id.*

54. Nelson, *supra* note 7, at 190.

55. *Id.* at 202.

56. JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 7 (Ernest Winkler ed., 1912).

57. *Id.*

On June 17, 1865, President Andrew Johnson appointed Andrew Jackson Hamilton governor of Texas.⁵⁸ The proclamation appointing Hamilton declared that the United States bore the duty of ensuring a republican government for Texas. The proclamation further instructed Hamilton to establish rules and regulations for a constitutional convention. As a result, the call for a convention was duly made and delegates from across Texas assembled in Austin on February 7, 1866.⁵⁹ Every delegate was required to take an amnesty oath in favor of the United States. A strong minority of delegates were Unionists, including Edmund J. Davis, who later served as governor of Texas.⁶⁰ A number of secessionists were present as well, including Oran M. Roberts, who served as president of the 1861 Secession Convention⁶¹ and chaired the Judiciary Committee.⁶²

The 1866 Convention work began slowly, due in part to personal squabbles among the delegates stemming from the Unionist-Secessionist split.⁶³ However, an elective judiciary was virtually assured. During the convention, the only contrary proposal advocated the election of supreme court justices, who would in turn be responsible for appointing district judges.⁶⁴ The delegates, however, rejected this proposal and the final version provided for the election of both supreme court and district judges.⁶⁵ The electorate subsequently ratified these amendments at an election held on the fourth Monday in June 1866.⁶⁶

From March to July, 1867, the United States Congress ended presidential Reconstruction through overrides of President Johnson's vetoes and passage of three acts.⁶⁷ The federal government placed Texas under direct military control. The military soon removed all members of the Texas Supreme Court and appointed their successors,⁶⁸ an action which drew angry responses from the democratic press. According to the *Daily State Gazette*, this move by the federal government continued "[t]he work of reconstruction, which was commenced by the removal of Gov. Throckmorton, [and] has been going on until it is

58. Charles W. Ramsdell, *Presidential Reconstruction in Texas*, 11 Q. TEX. ST. HIST. ASS'N 277, 277 (1908).

59. *Id.* at 300.

60. *Id.* at 302-03.

61. *Id.* at 303.

62. JOURNAL OF THE TEXAS STATE CONVENTION 30 (Austin 1866).

63. Ramsdell, *supra* note 58, at 303, 306.

64. JOURNAL OF THE TEXAS STATE CONVENTION, *supra* note 62, at 60.

65. See TEX. CONST. art. V, § 2 historical note (West 1993); *id.* § 7 interp. commentary.

66. *Introduction*, *supra* note 2, at 467.

67. James R. Norvell, *The Reconstruction Courts of Texas, 1867-1873*, 62 SW. HIST. Q. 141, 144 (1958).

68. *Id.*

nearly consummated. After the Governor and State officers, the judges — Supreme and District — followed”⁶⁹

Consequently, Winfield S. Hancock, the federal military commander of Texas, issued a call for a new constitutional convention to take place in 1868.⁷⁰ Convention members assembled for the first of two sessions in June 1868.⁷¹ Two groups dominated this Convention, the moderates and the radicals. The delegates elected Edmund J. Davis, the leader of the radical group, as presiding officer of the convention. To the Democratic *Tri-Weekly Gazette*, Edmund Davis’ election proved the Radical Republican contingent formed the strongest group in the Convention. “The selection of officers would indicate that the . . . ultra radicals are in the majority and have it all their own way.”⁷²

Former governor A. J. Hamilton chaired the Judiciary Committee.⁷³ The Judiciary Committee filed a draft judicial article by report dated July 22, 1868. Hamilton prefaced the report by stating that “many grave changes of our judicial system are proposed in the article. It is believed that the reasons for most of those changes can be found in the experience of almost every lawyer and of every law-abiding citizen in the State.”⁷⁴ Reversion to an appointive system constituted one of the “grave changes.” The only effort to provide for an elective judiciary from the floor of the Convention occurred during the second session. On January 27, 1869, one delegate proposed that district judges be elected by the people. The remaining delegates, however, voted down the proposal thirty-three to twenty-eight, and approved the return to appointed judgeships.⁷⁵

Many Texans looked with disdain upon the resulting constitution. The *Tri-Weekly Gazette* expressed displeasure with the proposed constitution on grounds that it allowed the governor to appoint many important positions. Despite this objection, the newspaper threw its support behind the constitution, believing that under the Reconstruction government Texas could “do no better, and because we may be placed in a worse condition by rejecting it.”⁷⁶ The editorial continued, “We don’t defend the Constitution—we are not responsible for it, neither are *the real people of Texas*.”⁷⁷ Texas voters ratified the Con-

69. *The Workings of Despotism*, DAILY STATE GAZETTE (Austin), Nov. 8, 1867, at 1.

70. Norvell, *supra* note 67, at 145.

71. *The Convention*, TRI-WKLY. TEX. ST. GAZETTE (Austin), June 3, 1868, at 1.

72. *Id.*

73. JOURNAL OF THE RECONSTRUCTION CONVENTION 465 (Austin, Tracy, Siemering & Co. 1870).

74. *Id.*

75. JOURNAL OF THE RECONSTRUCTION CONVENTION, *supra* note 73, at 400-01.

76. *Shall the New Constitution Be Accepted?*, TRI-WKLY. TEX. ST. GAZETTE (Austin), Mar. 12, 1869, at 1.

77. *Id.* (emphasis added).

stitution of 1869 at elections held November 30 to December 3, 1869.⁷⁸ The constitution became operative upon ratification.⁷⁹

The first governor to have the opportunity to nominate state judges under the 1869 Constitution was Edmund J. Davis, elected that same year. The Davis administration successfully passed a number of acts which drew the ire of many Texans, and inspired the Democrats to label them the "obnoxious acts."⁸⁰ These acts, combined with growing public indebtedness and taxation, contributed to the resentment many Texans felt toward Davis and his administration. Moreover, critics assailed a number of Davis' judicial appointments.⁸¹ In 1872, the Democratic party wrested control of the legislature from the Republicans.⁸² While Governor Davis stood for re-election in 1873, the Democrats fielded Richard Coke, a former Confederate officer, as their candidate. Coke handily won the election, and the Democrats swept state-wide offices and many local elections.⁸³

The democratic sweep, however, did not remove the 1869 Constitution, the very existence of which served to remind Texans of Radical Republican control. Democrats charged that the 1869 Constitution permitted the enactment of the obnoxious acts and allowed other perceived abuses by the Davis administration, and therefore was inadequate to protect the citizens of Texas. Consequently, the call went out for a new constitutional convention shortly after the Democrats gained control of the legislature, and by 1874, the need for a new constitution was generally embraced by most Texans.⁸⁴

As with previous constitutional conventions, the delegates to the 1875 Constitutional Convention faced the question of the best way to select judges. The issue prompted disagreement among Texans and Texas newspapers. Dallas, Houston, and Austin newspaper editorials published prior to or during the 1875 Constitutional Convention provide a glimpse of the contrasting views.

In 1874, Austin's *Daily Democratic Statesman* began a series of editorials concerning the selection of state officers.⁸⁵ The first editorial focused on the selection of judges. The editorial began with an acknowledgment that differences of opinion existed regarding this issue.⁸⁶ Next, it asserted the Texas Supreme Court "is really the judicial

78. TEXAS CONSTITUTION of 1869 (reprinted in TEX. CONST. app. 463, 591 (West 1993)).

79. *Id.*

80. SETH SHEPARD MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876, at 42 (1924).

81. *Id.* at 44, 46.

82. *Id.* at 42.

83. *Id.* at 45.

84. *Id.*

85. *The Election and Appointment of the Judges of the Supreme and District Courts, and Other Officers*, DAILY STATESMAN (Austin), Nov. 20, 1874, at 2.

86. *Id.*

department of the government" because it controls and supervises the subordinate courts.⁸⁷ As such, selection of Texas Supreme Court judges is critical because these judges are charged with the responsibility of expounding "what the law is . . . [and] have more to do in *practical* effect with shaping and making the laws than the Legislature."⁸⁸ These judges "decide ultimately on the life, liberty and property of every citizen in the State. Officers who wield such powers should be elected by, and be accountable directly to, the people."⁸⁹ Thus, since the Texas Supreme Court held the real power within the judiciary, the *Statesman* declared the selection of district judges "involves no principle, and presents simply a question of expediency."⁹⁰ Therefore, the article supported a system of appointment for district judges.

The article continued by pointing out "[t]he merits of appointing district judges by the Governor should not be judged by [Governor] Davis's abuse of the power."⁹¹ The editorial further stated the appointive system worked well under the administration of Governor Coke, and should be judged as applied under Coke's leadership.⁹² Shortly after publishing the article, the *Statesman* ran an editorial explaining its proposed procedure for the selection of district judges. The newspaper recommended that the Texas Supreme Court nominate district judges and submit their names to the governor, who in turn would submit them to both houses of the legislature for approval.⁹³ Upon submission to the governor, nominees would be publicly listed for thirty days to allow input from the public.⁹⁴

The *Statesman* called for responses from other newspapers.⁹⁵ The *Houston Telegraph and Texas Register* answered by arguing that all state judges should be appointed because the concept of judges campaigning for election constituted a distasteful misapplication of the *vox populi* idea. The *Telegraph* pointed approvingly to the federal system. "Political office should be filled by the people. They are presumed to know all about the principles of the respective parties to which they belong, and to understand how they desire the government to be administered . . ." Yet, the editorial continued, "[I]t is a violent presumption for us to suppose that the fitness of candidates for judi-

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *A New Way of Appointing the District Judges*, DAILY STATESMAN (Austin), Dec. 8, 1874, at 2.

94. *Id.*

95. *Id.*

cial offices can be, and is understood among the people as it should be to enable them to make judicious selections."⁹⁶

The *Dallas Weekly Herald* sided with the Austin paper regarding selection of district judges. In an editorial appearing several months prior to the convention, the Dallas paper stated its opposition to the election of district judges, primarily because election "opens the door to corruption."⁹⁷ The editorial contended, "A judge should never be dependent upon the litigants who come before him to have their rights adjusted."⁹⁸ The newspaper argued against election of district judges on grounds that "about one-fourth of the judicial districts will have a large radical majority, . . . and would as often as otherwise elect corrupt and incompetent judges."⁹⁹

Later in the same year, the *Weekly Herald* followed up and stated the issue of selecting judges is "a matter of general public interest, and a subject upon which the Constitutional Convention would certainly be called to legislate . . ."¹⁰⁰ The format of the article was an interview with Judge Hare. Judge Hare favored election of Texas Supreme Court justices and appointment of district judges.¹⁰¹ The article listed the names of three other men supposedly interviewed regarding the subject. All three men supported election of Texas Supreme Court justices and appointment of district judges.¹⁰² The editorials captured the reasons given by many across the United States for either opposing or supporting election of judges. As the Houston and Dallas editorials reflected, both sides listed fear of corruption to support their positions. Moreover, lack of accountability, as discussed in the Austin editorial, concerned many supporters of the elective process.

The convention delegates met in Austin on September 6, 1875, to create a governmental structure acceptable to the citizens of Texas.¹⁰³ The delegates formed committees to work on the different sections of the constitution, with John Reagan serving as chairman of the Judiciary Committee.¹⁰⁴ During the course of the Convention, many delegates registered their concerns regarding this issue by proposing resolutions in favor of election or appointment.¹⁰⁵ Most favored some

96. *Id.*

97. WKLY. HERALD (Dallas), Feb. 27, 1875 (page unknown).

98. *Id.*

99. *Id.*

100. *The Judiciary Question: The Views of Judge Hare on the Mode of Selecting the Judiciary of the State*, WKLY. HERALD (Dallas), Sept. 18, 1875, at 3.

101. *Id.*

102. *Id.*

103. JOURNAL OF THE CONSTITUTION CONVENTION OF THE STATE OF TEXAS 3 (Galveston News 1875).

104. *Id.* at 15.

105. Resolutions supporting an appointive system were introduced on September 9, 15, 17, and November 13. Resolutions for an elective system were introduced on September 9, 11, 14, 21, October 20, and November 3, 4, 5.

form of election. The resolutions were referred to the Judiciary Committee for review and consideration and were not voted on until October 20.

On October 20, the Judiciary Committee reported a draft judiciary article providing for election of judges.¹⁰⁶ However, the committee members split on the procedure for election, and presented majority and minority reports. The majority report recommended dividing the state into five districts, with members of each district electing one of the five justices of the Texas Supreme Court.¹⁰⁷ District judges were to be elected within their district of residence.¹⁰⁸ The minority report differed in that it preferred a general election for Texas Supreme Court justices.¹⁰⁹ John Reagan and three other members of the Judiciary Committee signed the minority report. On final vote, the delegates rejected the majority view, and approved the minority report's recommendation of a general election for seats on the Texas Supreme Court.¹¹⁰ The citizens of Texas approved the constitution, which became effective on April 18, 1876.¹¹¹

Several delegates voiced support for appointment of judges, but most debate focused on the procedure for electing judges, rather than the merits of an elective system. Whether election represented the best system for selecting judges simply did not provoke extended debate. One historian characterizes the election provision as the only noncontroversial portion of the judicial article.¹¹² The reactionary mood of the delegates ensured the production of an extremely conservative document. The resulting constitution "clearly evidences the determination of the people to overhaul the government completely and to make impossible in the future the abuses which they suffered at the hands of an autocratic Governor, a carpetbag Legislature, and a corrupt Judiciary."¹¹³ According to C. Vann Woodward, this constitution "froze a passing mood into fundamental law for decades."¹¹⁴ To the delegates, the elective system of judicial selection was just one part of an overall effort to eradicate the evils of Reconstruction.

Nationwide debate over this issue in academic and popular presses continued throughout the nineteenth century and well into the twenti-

106. JOURNAL OF THE CONSTITUTION CONVENTION OF THE STATE OF TEXAS, *supra* note 103, at 406.

107. *Id.* at 407. Texas now has two courts of last resort, splitting civil and criminal appeals: the Supreme Court, and the Court of Criminal Appeals.

108. *Id.* at 408.

109. *Id.* at 418.

110. TEX. CONST. art V, § 2 (1876).

111. *Introduction, supra* note 2, at 468.

112. See Oscar Walter Roberts, *Richard Coke on Constitution-Making*, 78 SW. HIST. Q. 70 (1974).

113. S. D. MYRES, JR., *MYSTICISM, REALISM, AND THE TEXAS CONSTITUTION OF 1876*, at 8 (Austin).

114. 9 C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, at 65 (1987 prtg.).

eth century. In 1906, Roscoe Pound delivered an address to the American Bar Association in which he stated: “[p]utting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.”¹¹⁵ In 1924, Professor John Wigmore characterized the practice of electing judges as a political anomaly. As Wigmore states:

We have a complex system of laws, and a vast bulk of litigated law and fact; and yet we expect to select competent and *upright* experts by subjecting the nominees to the vote of a multitude, who must be ignorant of the nominees' qualifications *yet have to be pleased with their names*. . . .

. . . .
No community will get the justice which it ought to get if it insists on placing the judicial mind in subjection to the supposed popular demand. And a judge who has to please the “people” (and who are they?) by his record of decision on individual cases is in just such a plight.¹¹⁶

Twentieth century Texas commentators have questioned the wisdom of remaining under a Reconstruction-inspired system of selecting judges. In a 1924 *Texas Law Review* article, A.H. McKnight reports a strong belief existed among leaders of the bar that nomination of judicial candidates by convention would attract better qualified candidates than a popular primary.¹¹⁷ In 1946, the Texas Civil Judicial Council proposed to amend the Texas Constitution with a merit selection plan that would provide for initial appointments, followed by retention elections.¹¹⁸ The Judicial Council submitted the proposal to the legislature, which refused to adopt it.¹¹⁹ The Council re-endorsed the plan in 1961, but no formal action was taken for the next ten years, although debate over the issue continued through the 1960s.¹²⁰

However, in the 1970s a profound change occurred in the election of Texas judges. In previous decades, a convincing argument could be made that the elective system produced a stable judiciary. But after this time, campaigns for judicial office became increasingly competitive, and in turn, increasingly expensive. Moreover, increases in campaign expenses can be traced to the decline of the one-party

115. Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 Sw. L.J. 15, 15 (1986) (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 JUDICATURE 66 (1962)).

116. Ireland Graves, *Selection and Tenure of Appellate Court Judges*, 12 TEX. B.J. 13, 13 (1949) (quoting John H. Wigmore, *And Pilate Answered and Said Again Unto the Multitude, 'What Will Ye Then That I Should Do?'*, 1924 ILL. L. R. 93-95).

117. A.H. McKnight, *Suggestions for Improving Court Procedure in Texas*, 3 TEX. L. REV. 61, 66 (1925).

118. John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 350 (1987).

119. *Id.*

120. *Id.* at 352.

democratic political system in Texas. Under the one-party system, judicial turnover was low, and judicial races generally were not expensive, hotly contested affairs. Furthermore, a 1964 study found that between 1952 and 1962, eighty-six percent of Texas judges were unopposed when they ran for re-election.¹²¹ The same study found that sixty-six percent of all judges who served between 1940 and 1964 were appointed to the bench.¹²² In addition, from 1874 to 1962, only ten of forty-five Texas Supreme Court justices were initially elected to the bench.¹²³

However, as Texas became more of a two-party state, competitive judicial races forced Texas judges onto the campaign trail. Commentators in the Texas press began to link campaign expenses to public perceptions that a judge who accepts large campaign contributions from individual lawyers is not impartial when a contributing lawyer appears before him.¹²⁴ A number of legal and other commentators supported a change to an appointive system. In a 1973 study commissioned by the Institute for Urban Studies, Professor Allen E. Smith of the University of Texas School of Law concludes changing to an appointive system will probably "improve the quality of the Judiciary, of the judicial system, and of public confidence in both."¹²⁵

In November of 1972, a Constitutional Revision Commission was created, with Texas Supreme Court Chief Justice Robert Calvert appointed as chairman. A majority of Commission members recommended a merit selection system for judges.¹²⁶ The minority opposed the merit selection idea and filed a supplement to the Commission's report setting forth the reasons for their opposition. The minority report included a number of arguments often advanced by supporters of an elective system:

Running for election keeps [judges] close to the people. Our elected judges represent the feelings of their constituents on the bench. . . .

. . . Instead these fundamental principles of democracy would be cast aside by those who favor so called "merit selection" (which is really commission selection). And for what? While proponents claim that "better judges" are selected by the commission system,

121. *Id.* at 347 (citing B. HENDERSON & T. SINCLAIR, *JUDICIAL SELECTION IN TEXAS: AN EXPLORATORY STUDY* 22, 23-24 (University of Houston Public Affairs Research Center 1964)).

122. *Id.*

123. *Id.*

124. *Id.* at 341 (citing A. Champagne, *The Selection and Retention of Judges in Texas*, 1986 NAT'L SYMP. JUD. SELECTION 37-39). Judge Charles Bleil of the Texarkana Court of Appeals echoed the concerns about Texas' development into a two-party state in *Commentary: Can a Twenty-First Century Texas Tolerate its Nineteenth Century Judicial Selection Process?*, 26 ST. MARY'S L.J. 1089, 1091 (1994).

125. Allen E. Smith, *The Impact of the Texas Constitution on the Judiciary* 76 (1973) (unpublished copy on file with the author).

126. Hill, *supra* note 118, at 354.

studies made where the plan has been tried note no significant difference in the quality of judges.

The claim that commission selection takes judicial selection out of politics, is groundless. It merely substitutes lawyer politics for people politics.¹²⁷

Consequently, in 1974, the Texas Legislature met for seven months as a Constitutional Convention to debate the proposals of the Constitutional Revision Commission. The minority report carried the day within the Convention, as the members dropped the Commission's merit selection plan, thereby preventing the electorate from voting on it.¹²⁸

Texans' struggle in the nineteenth century to place judges into office who were independent, yet accountable to the people, reflected to a great degree the same struggle that faced American colonists in the eighteenth century. The liberal heritage that most of the early Texas settlers brought with them gave them the desire to seek a judicial system that would honor basic concepts of liberty. An impartial judiciary was a critical component of this. The willingness of Texas citizens to change the system of selecting their judges bears witness to their struggles. As the history of judicial selection in Texas demonstrates, this issue is not likely to be soon resolved.

127. TEXAS CONSTITUTIONAL REVISION COMMISSION, A NEW CONSTITUTION FOR TEXAS: SEPARATE STATEMENTS OF COMMISSION MEMBERS, ARTICLE 5, at 19-20 (1973).

128. Hill, *supra* note 118, at 354.

