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INTRODUCTION

The Democratic Judge

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It is a special privilege for me to return to this great law school to honor one of its greatest graduates. Each time I return to Nashville, it feels like a homecoming. Each time I return, I also feel that as I am getting older, Judge Merritt is getting younger. The last time I was here, he got married; and the time before that, we squared off for the umpteenth time on a tennis court. He also writes more opinions, gives more speeches, and has taken more of a leadership role in protecting the interests of the federal judiciary than just about any other judge. Meanwhile, a good source—Judge Richard Arnold—informs me that Judge Merritt has taken up golf.

So, I hope you will appreciate my confessing that I do not regard Judge Merritt's stepping aside as chief judge as a sign he is slowing down. This is just the start of a new phase of his already distinguished career. For those who know him best, he will always be the chief judge in our hearts and respect. He will always be the consummate teacher, adviser, role model, friend, and doubles partner.

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Even for those who know Judge Merritt best, however, it might seem a bit odd to honor him with a symposium on defining democracy for the next century. When we think of democracy most of us tend to think only about the political activity in Washington. If we think of the judiciary at all, most of us tend to think only of the Supreme Court.

It is easy to miss that the real test of democracy is not in Washington. The real test is in places like Nashville or Mobile, Alabama, where I grew up. When I was growing up, school prayer was flourishing, even though the Supreme Court had much earlier struck down public school prayer.[1] Nor did it matter that the Supreme Court had struck down state-mandated segregated schools in 1954.[2] The public schools were still largely segregated when I graduated in 1974. If you want to know how democracy works, you have to look outside of Washington.

Tennessee is an especially good place to look. Here the nation's movement away from republicanism and toward democracy began. Judge Merritt knows that history well. Through his classical legal training under the watchful eye of Dean John Wade, and through his experiences as a first-rate lawyer, prosecutor, educator, and judge, he has developed a keen appreciation of what makes our constitutional democracy exceptional. His vision of democracy has not been a political scientist's ideal, but rather the legal ideal specified by the Constitution. He has always appreciated that judicial power has limits and that our constitutional democracy is lost if its citizens, who are the ultimate sovereigns, are unwilling or unable to rise to the challenge of governing themselves. He has appreciated, like Justice Robert Jackson before him, that "[c]ivil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, [no one] in Washington could . . . supply its want."[3] Judge Merritt has understood that federal judges cannot make all of the hard decisions for the citizenry; they can ask the people to rule but they cannot make them rule. Federal judges can expose injustice, but they cannot make people just. Federal judges can lead by example or instruction, but they cannot make an unwilling or cynical citizenry follow. Federal judges cannot energize democracy single-handedly, but they can, by judiciously deferring to it, avoid unnecessarily sapping its energy.

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1. *Engel v. Vitale*, 370 U.S. 421 (1962).
2. See *Brown v. Board of Education*, 347 U.S. 483 (1954).
3. *Douglas v. City of Jeannette*, 319 U.S. 157, 182 (1943) (Jackson, J., concurring).

Judge Merritt has also understood that the very idea of judicial review has its origins in the democratic acceptance of the Constitution. He has understood that a written constitution without federal judges to enforce its limitations is either anarchy or crude majority rule. The latter is fine as long as one is not a member of an unpopular minority or does not express unpopular ideas. The problem is, as James Madison observed, that "[a] dependence on the people . . . is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[4] One such safeguard is judicial review.

It is tempting to think of judicial review and respect for democratic values as being at odds with each other. Such thinking has its origins in the discontent triggered by the Warren Court's activism. In 1962, Alexander Bickel captured this discontent when he coined the phrase "countermajoritarian difficulty"[5] to refer to unprincipled judicial interference with legitimate majoritarian decisionmaking. Ironically, Professor Bickel's argument overshadowed the publication just two years before of a book by his Yale Law School colleague, Charles Black, arguing that this dilemma was illusory. For Professor Black, judicial review

> must be and can be justified not as a means of defeating but as a means of fulfilling the will of the people. It is a means—the chief means at hand—for making real in the world the idea of the limitation of the power of the State itself (and hence, in a democracy, the power of the people) by law. But the noble paradox is that the State itself must set up this limit on itself, and submit to the organ of its enforcement.[6]

Subsequently, scholars have tended to agree with Professor Bickel that the "countermajoritarian difficulty" poses the central dilemma of constitutional law. The most tempting solution has been the development of so-called "grand" theories of constitutional law designed to ground all constitutional interpretation in a single unifying concept. These theories have often been thought to be the salvation of constitutional law because they might, if adopted by federal judges, provide clear principles that could restrain or justify judicial interference with democratic decisions.

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4. John L. Hines, Jr., *Forum: The Confirmation Hearings*, 1991 Wis. L. Rev. 833, 834.

5. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (Yale U., 2d ed. 1986).

6. Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 223-24 (MacMillan, 1960).

Yet, the movement toward "grand" constitutional theories has largely failed. One reason is that no such theory can explain constitutional law fully or be applied consistently. Such theories also have failed because of judges like Gil Merritt. He has appreciated as well as any judge the debates generated by and about such theories. He has, like Richard Arnold and Frank Coffin, to name but a couple of other equally distinguished judges, resisted the temptation to indulge in such theorizing or attempt in one fell swoop to solve the mysteries of constitutional law. He has understood that judging is not the forum for measuring the viability of a constitutional theory.

Judge Merritt has followed a different path. He has been a distinguished devotee of what Karl Llewellyn called the grand tradition of common law judging, of deciding cases incrementally, one at a time.[7] I think Judge Merritt would agree with former dean, now Judge Guido Calabresi, who said,

> I feel more comfortable approaching a topic like this in common law fashion, trying to build up from cases, hypothetical and real, than by working down from great principles. I would rather approach the issues from a specific field of law—itself affected by other fields of law as well as by its own peculiar problems and questions—and see where that leads us, than to try to deal with the topic as if I—or anyone—knew *all law* and was ready to describe it in terms of an abstract theory.[8]

The great common law judges do not regard defining democracy for the general public or the other branches as their task. Common law judging is compatible with our form of democracy because it confines the scope of judicial comment *and* does not try to preempt democratic forces from sorting through competing conceptions of democracy.[9]

The absence of a coherent general theory of judicial review in Judge Merritt's decisions is the mark of a good judge. His opinions reflect that the process of adjudication differs from the process of legislation[10] or the process of academic theorizing. Judges have sub-

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7. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* v (Little, Brown, 1960).

8. Guido Calabresi, *Ideals, Beliefs, Attitudes and the Law: Private Law Perspectives on a Public Law Problem* xv (Syracuse U., 1985).

9. As Professor Phil Frickey has noted, "the very process of adjudication makes the judicial creation or adoption of Big Theory next to impossible except in interstitial or bitesize pieces." Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 Tulane L. Rev. 276, 312 (1985).

10. I feel certain Judge Merritt would agree with his friend and fellow circuit judge, Richard Arnold, on this score. As Judge Arnold has observed:

> [J]udges make law in a number of senses, but we do not do it, or at least we ought not to do it, in the same sense that Congress makes law. We do not do it simply because we think a certain rule of law is a good thing, although that may be one of the ingredients

stantial freedom of decisional choice, but they are restrained by institutional values, such as democratically managed jurisdiction or the need for consensus on a collegial court.

Of equal importance, Judge Merritt has understood that the freedom enjoyed by life-tenured judges imposes on them a special responsibility akin to that of the liberty enjoyed by each citizen. Life tenure, like citizenship, imposes great responsibility on those privileged to bear it. Freedom belongs to those who use it wisely. Judges are role models to those who wield power in a democracy. In this sense, judges are like teachers. Judge Merritt drew just such an analogy recently:

> Like judges, teachers should not punish or reward people on the basis of inadmissible factors—race, religion, gender, political ideology—but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking.[11]

Judicial deference is essential for maintaining the credibility of judicial restraint and for nurturing the confidence of democratic decisionmakers. Judicial review is essential for vindicating liberties that would cease to exist in its absence. If there is a tension between these functions, it is one embedded within the idea of constitutional democracy; it is not one federal judges are obliged to resolve.

Federal judges are obliged, however, to decide cases and to ensure the efficiency, viability, and fairness of the court system. Judge Merritt has done this. For example, his exemplary performances as both the Chief Judge of the Sixth Circuit and head of the Executive Committee of the Judicial Conference of the United States illustrate his profound respect for democratic values and institutions. He has been the model of the truly collegial judge, and, as chief judge, he tirelessly strove to smooth court operations, to make sure every judge was treated fairly, to forge coalitions, to build bridges, and to reduce friction whenever possible. His legacy as chief judge is one of

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that you think about when you are making law in the narrow sense in which you are permitted to do so. Even Judge Cardozo in his lectures about the sociological method of jurisprudence—that is to say, that judges ought to take into account their notions, or somebody's notions, of social welfare, when they make decisions—even he stresses that judges make law only interstitially. They legislate, if you can call it that, only in the gaps. They fill the open spaces in the law.

Richard S. Arnold, *From the Bench: Judges and the Public*, 9 Litigation 5, 58 (Summer 1983).

11. *Settle v. Dickson County School Board*, 53 F.3d 152, 155 (6th Cir. 1995).

trust, collegiality, fairness, candor, and respectful and reasonable discourse.

As head of the Executive Committee of the Judicial Conference of the United States, Judge Merritt sent shock waves through the media and the judiciary by openly discussing judicial operations. He took inspiration from the First Amendment for the sake of promoting greater judicial accountability and informing the public about the judiciary. He knew that if the judiciary did not speak up for its own interests, no one would. He won quick and notable praise for these efforts. When first told about Judge Merritt's candor about the Judicial Conference's Executive Committee meetings, former Chief Judge and White House Counsel Abner Mikva said, "Surprise is not the right word. I was delighted."[12] Defending Judge Merritt's unprecedented approach, Judge Mikva said, "He's a modernist. He gave up using quill pens long ago."[13] Judge Merritt himself explained, "On any issue where the public interest is at stake, I think judges want to hear from people who have a view, not just irrational stuff, but a real considered opinion about it."[14]

Judge Merritt went where no federal judge had gone before—before the media and the public. In one forum, he defended life tenure for federal judges: "It was the Founding Fathers' intention that the judiciary should be a branch not dependent on taking a poll. It is the duty of the judiciary to maintain the liberties of the minority even if they are not popular."[15] In local fora, he has denounced the dangers popular election poses to judicial independence,[16] approved of "strong public criticism of judges," but condemned "mean-spirited personal attacks on our characters and vehement attacks on the judiciary as an institution."[17]

On behalf of the federal judiciary, Judge Merritt undertook actions that spoke louder than words, though one should understand that a judge's words often constitute his or her actions. He defended the jury system and judicial independence, pioneered the use of an electronic citation system in his circuit, advocated the use of cameras

12. Eva Rodriguez and Robert Schmidt, *Judicial Conference Tries a Little Uncharacteristic Openness; From Cameras to Protective Orders to Itself*, Legal Times 1 (Mar. 20, 1995).

13. Id.

14. Id.

15. Julie Cohen, *Term Limits for Judges?*, Legal Times 6 (Aug. 21, 1995).

16. See Catherine Trevison, *Should Public Opinion Tip the Balance of Justice?*, Tennessean D1 (Oct. 20, 1996) (quoting Judge Merritt, who stated that popular election would lead to "complete bastardization of the law").

17. Andy Sher, *Crime Fears, Death Penalty Debate Stirring Furor Over Judge Election*, Nashville Banner A1 (July 22, 1996) (quoting Judge Merritt).

in the courtroom, pleaded for the depoliticization of judicial confirmations, testified against congressional jurisdiction-stripping efforts, and opposed any legislative activity that could harm or weaken the federal judiciary. For instance, at the start of 1996, he stood alone in denouncing Congress for failing to fund the federal judiciary fully.[18] This failure threatened federal judicial operations, and he boldly called attention to its consequences through every available means, including threatening a lawsuit to force compliance with the fundamental obligations of Article III. It probably was no coincidence that shortly after he made this threat Congress passed an emergency bill to fund the federal courts.

Later in the same year he again publicly chastised Congress, this time for passing the Line-Item Veto Act of 1996. He testified that under this law "the balance would be tilted dangerously toward executive dominance and control over the judiciary if the president had line-item veto authority over the judicia[ry]."[19] When Senator Daniel Patrick Moynihan called to thank me for testifying against the same act, he suggested that I must have felt very lonely with only Professor Larry Tribe and Chief Judge Merritt joining me. I answered that two law professors could not have asked for better company.

Judge Merritt has shown his respect for democratic values in a second major way. He has acknowledged the needs for judicial restraint and for the judiciary to restrain itself. This might surprise those eager to dismiss Judge Merritt as just another liberal judge. Rather, he has taken the lead in helping to shatter the stereotype of Democratic judges. For instance, in explaining the basis for an en banc court's rejection of a district court's consent decree augmenting state parole procedures, he noted that the danger of ruling otherwise was that

> federal courts would take over from state administrators and courts the interpretation and enforcement of a whole host of local procedural rules governing such local matters as zoning, probate, licensing, school discipline or public health, and states would be discouraged from laying down reasonable and use-

18. See Robert D. Hershey, Jr., *Judge Says Budget Impasse Could Shut Nation's Courts*, N.Y. Times A5 (Dec. 23, 1995).

19. John Flynn Rooney, *Federal Judiciary Should Be Exempt from Line-Item Veto, Congress Told*, Chi. Daily L. Bull. 1 (Jan. 13, 1995).

> ful rules to govern the conduct of their own affairs for fear that those rules would subject them to jurisdiction and penalties in federal courts.[20]

In a separation of powers case,[21] Judge Merritt defended cooperation between federal prosecutors and the House of Representatives in sharing information relevant to the initiation of a judicial impeachment proceeding. Judge Merritt suggested:

> The framers did not contemplate that the branches would communicate by smoke signals from distant mountain tops. Rather, a number of functions were mixed between the legislative and the executive, *e.g.*, the war power, the treaty power, the appointive power, the budgetary process, the spending power. In all of these areas of government, the two branches check each other and there must be cooperation if government is to function.[22]

His decision supported democratic institutions at the same time it acknowledged the constitutional vulnerability of federal judges to them.

Judicial deference is not, however, the same thing as refusing to decide cases or abdicating all responsibility to political forces. In spite of his sensitivity to the need for judicial restraint, Judge Merritt has fiercely remained committed to the even-handed dispensation of justice. As the late J. Skelly Wright observed,

> It is claimed that judicial review is anomalously undemocratic, and if by that one means that it is often counter-majoritarian, the point must be conceded. But in another sense, the courts are the most democratic institutions we have. . . .
>
> It is in the nature of courts that they cannot close their doors to individuals seeking justice. . . .
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> . . . .The judiciary is thus the only branch of government which can truly be said to have adopted Dr. Seuss' gentle maxim: "A person's a person, no matter how small."[23]

Every day for twenty years, Judge Merritt has put this maxim into practice. He has done this in the same way as his friend, Judge Arnold, who described the time for judicial action as follows:

> After you are convinced that you have jurisdiction, after you have given to the state courts and to the other branches of government the deference and respect that is their due, after you have satisfied yourself that you really are, if there

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20. *Sweeton v. Brown*, 27 F.3d 1162, 1165 (6th Cir. 1994).

21. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438 (11th Cir. 1987) (Merritt, J., sitting by designation).

22. Id. at 1444.

23. J. Skelly Wright, *No Matter How Small*, 2 Hum. Rts. 115, 116-18 (1972) (citation omitted) (quoting Dr. Seuss, *Horton Hears a Who*, passim (1954)).

> is a statute involved, enforcing the will of the legislature, after all of those hurdles have been gotten over, then the greatest error that a judge can make is to pull your punches because you fear that the majority of your neighbors are not going to like what you decide.[24]

Judge Merritt has never pulled his punches. I imagine that this is not news to anyone who knows him. When the time for action has come, he has had the courage of his convictions. When the time for action has come, he has never hesitated to do what is necessary to vindicate a superior principle of law. In a wide range of cases, he has supported vindicating numerous individual liberties, including a woman's right to choose,[25] the Fourth Amendment's prohibition of unreasonable searches and seizures,[26] the Sixth Amendment's guarantees of the right of confrontation and against ineffective assistance of counsel,[27] the Fourteenth Amendment's promise of equal protection,[28] and the First Amendment's guarantees of freedom of speech,[29] free exercise of religion,[30] and prohibition of the establishment of religion.[31]

I will discuss only a few cases to illustrate the broader point that no matter how small the person, no matter how unpopular the cause, Judge Merritt has democratically dispensed justice. For instance, like another great Southern jurist who had been a prosecutor before he took to the federal bench, Hugo Black,[32] Judge Merritt has

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24. Arnold, 9 Litigation at 59 (cited in note 10).

25. See, for example, *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390 (6th Cir. 1987); *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352 (6th Cir. 1984).

26. See, for example, *Garner v. Memphis Police Dept.*, 710 F.2d 240 (6th Cir. 1983), aff'd as *Tennessee v. Garner*, 471 U.S. 1 (1985). See also *Carter v. City of Chattanooga*, 850 F.2d 1119, 1137 (6th Cir. 1988) (Merritt, J., dissenting).

27. See, for example, *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Lyle v. Koehler*, 720 F.2d 426 (6th Cir. 1983).

28. See, for example, *Aiken v. City of Memphis*, 37 F.3d 1155, 1168 (6th Cir. 1994) (Merritt, C.J., concurring); *Rural West Tennessee African-American Affairs Council v. McWherter*, 877 F. Supp. 1096 (W.D. Tenn. 1995); *Rural West Tennessee African-American Affairs Council v. McWherter*, 836 F. Supp. 447 (W.D. Tenn. 1993).

29. *Procter & Gamble v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996); *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987).

30. See *Thompson v. Kentucky*, 712 F.2d 1078 (6th Cir. 1983).

31. See, for example, *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987).

32. Judge Merritt clearly would agree with Justice Black, who said:

> Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and human excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of

invariably insisted that federal prosecutors respect the constitutional rights of criminal defendants. Surely, there are no more unpopular litigants than criminal defendants, especially those seeking reversals of convictions for heinous crimes. Yet, in urging a new trial for a criminal defendant sentenced to death, Judge Merritt explained:

> It is not the function of the federal courts to kowtow to the political passions of the day that decree that we supply only a swift execution without regard to whether the accused is guilty or received a fair trial. In the judicial arena, there is no traditional social value or constitutional principle requiring rapid execution or extinction of human life. . . .
>
> It is our job to make sure that the traditional principles of federalism are honored. It is our job to see that a life is not taken in the absence of a fair trial in which the constitutional rights granted to the accused are observed. . . . The process of deliberation, reflection, trial, review and the elimination of error and uncertainty takes time, including the time it takes to review new evidence when it becomes necessary. The traditional deliberative process must be fully complied with in order to insure that innocent life and the attributes of human dignity are preserved in the face of the biological passion and hostility in our species that lead us to kill each other without reason.[33]

United States v. Lanier,[34] in spite of the controversy it has generated, is just the most recent in a long line of Judge Merritt's decisions checking prosecutorial abuse of discretion. The issue in the case, now pending before the Supreme Court, was whether a state judge who had sexually harassed and assaulted judicial employees could be criminally prosecuted under a federal civil rights statute for "the willful 'deprivation of any rights . . . protected by the Constitution.' "[35] The critical question was not whether Judge Lanier had engaged in serious misconduct. He had clearly done so. The critical question was whether his acts fit within the scope of federal criminal liability.

Writing for an en banc majority, Judge Merritt answered the question "no." Initially, he found the statute not to have been drafted with sufficient precision to give proper notice to every citizen of its coverage to misconduct of the sort done by Judge Lanier.[36] He also

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> translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion.

Chambers v. Florida, 309 U.S. 227, 241 (1940).

33. *O'Guinn v. Dutton*, 88 F.3d 1409, 1413 n.1 (6th Cir. 1996) (Merritt, C.J., concurring).

34. 73 F.3d 1380 (6th Cir. 1996).

35. Id. at 1382 (quoting 18 U.S.C. § 242 (1994 ed.)).

36. He explained:

> [A]lthough members of Congress may have realized that in passing a large recodification of the existing body of federal law they might unwittingly be changing something, they had no actual knowledge that they were expanding criminal liability to cover violations

stressed the duty of federal judges not to correct Congress's mistakes by reading things into statutes that were not there. He explained, "[a]llowing the defendant who is guilty of reprehensible conduct to go free is not a satisfying result, but it is the result required by long-standing principles of federalism, separation of judicial and legislative powers and the right to formal public notice when new crimes are enacted."[37]

Judge Merritt's position in *Lanier* is like many he has taken to check official abuse of power. As early as his first year as a judge, he reversed a district court's denial of a motion to suppress from a defendant linked to organized crime. Surely, this ruling gave the former prosecutor, then judge, no pleasure. Yet, he held that federal officials lacked authority to break into an office to install wiretaps. He wrote:

> We believe, therefore, that federal judicial officers do not possess inherent power to issue search warrants or inherent power in the absence of statute to authorize law enforcement officers to engage in break-ins in the execution of search warrants. Any such power, according to Lord Camden's interpretation of the common law and Chief Justice Marshall's interpretation of the Constitution "must be given by the *written law*." Our understanding of the development of the common law and the Fourth Amendment and our understanding of the nature of federal law as settled in the early days of the Republic lead us to this conclusion.[38]

Similarly, Judge Merritt has consistently questioned the legitimacy of the Sentencing Commission's authority to direct the imposition of incremental penalties for unconvicted "relevant conduct." As he has said:

> I do not understand why my sisters and brothers, usually the voices of sweet reason and deference to the majoritarian branch of government, persist in following the Sentencing Commission and the Department of Justice in their defiance of the policy stated expressly in the statute we are interpreting. I understand . . . why the Sentencing Commission and the Department of Justice might believe it is in their interest to control the sentencing process. It is certainly in their bureaucratic interest to do so. Congressional appropriations and governmental power depend upon it. But it is not in anyone else's interest to adopt a policy contrary to the one expressed by Congress. It is certainly not in the interest of the judiciary as the "least dangerous branch," and not in the

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of rights beyond certain enumerated rights, primarily those of contract, property, and equal protection.

Id. at 1387.

37. Id. at 1394 n.13.

38. *United States v. Finazzo*, 583 F.2d 837, 844 (6th Cir. 1978).

> interest of individuals in society who may be wrongly accused by prosecutors whose power has now been so eularged through our default.[39]

Judge Merritt has also sided with unpopular speakers. For him, nothing is more sacred in our constitutional democracy than freedom of speech. This freedom belongs to every American. Nor is any governmental institution immune from having to comply with the First Amendment. Thus, in setting aside a gag order, Judge Merritt explained that "[t]he courts are public institutions funded with public revenues for the purpose of resolving public disputes, and the right of publicity concerning their operations goes to the heart of their function under our system of civil liberty."[40]

Ironically, perhaps no area of law is more divisive than judicial enforcement of the constitutional guarantee of equality. It is here Judge Merritt's pragmatism and incrementalism probably have been most frustrating, because he has tended to resist extremism. His concerns have been with fairness, the need to abolish state-mandated or -generated discrimination, and the limits of judicial supremacy. Thus, he dissented in a fair housing case[41] because

> federal court[s] . . . should not get into the business of trying to change or improve [their] own or anyone else's image . . . by ordering the publication of a favorable publicity in the press. We are not equipped to change the public's perception of a city by judicial order. Not only does it seem to me a futile exercise; I am unable to square such an order by a federal court with the first amendment.[42]

He explained:

> The freedom that exists in this country to state beliefs different from those of the prevailing majority gave birth to the civil rights movement. That movement cannot last long if, in the name of equality, it undermines the conditions

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39. *United States v. Silverman*, 976 F.2d 1502, 1523 (6th Cir. 1992) (Merritt, J., dissenting).

40. *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987). Similarly, he recognized the importance of applying the First Amendment in the public school setting. Consequently, in a dissent, he defended the right of a public school student to criticize the administration of his school in his campaign speech as a candidate for student body president. As Judge Merritt explained:

> [T]he speech cannot be classified as one which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." If the school administration can silence a student criticizing it for being narrow minded and authoritarian, how can students engage in political dialogue with their educators about their education?

Poling v. Murphy, 872 F.2d 757, 766 (6tb Cir. 1989) (Merritt, J., dissenting).

41. *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981).

42. Id. at 580 (Merritt, J., dissenting).

> of liberty which sustain it by requiring others to publish statements agreeing with its position.[43]

In the final analysis, the quality of a judge is not measured by his notable rulings. As Judge Gerhard Gesell noted:

> The Third Branch has, in many ways, the most delicate role in our constitutional scheme. Whether judges like it or not, few judges will be long remembered. Decisions become outdated. Indeed, even the names of many truly outstanding judges have long since been forgotten. In a larger sense, what may count in the long run is whether or not a judge during his [or her] career has strengthened or weakened the fragile institution we call the Judiciary.[44]

If this be the test, then Judge Merritt has met it. He has written his share of landmark opinions, such as *Garner*[45] or *Procter & Gamble.*[46] But he has done more than that. As the consummate craftsman, he has scrupulously disclosed in each of his opinions the thought processes of an intelligent judge at work—considering all sides of an issue, weighing the arguments frankly, and defending his conclusions in a reasoned manner. But he has done more than that. He has improved federal judicial performance through his behavior toward his colleagues and his dedicated efforts to ensure that the Sixth Circuit's work was done efficiently and fairly, every voice was heard, and the public was informed about basic judicial actions. The future of the federal judiciary rests not with the dominance of a single judge or a coterie of judges, but rather with steady judicial performance that secures society's acceptance of the incalculable value of an independent federal judiciary.

I am sure if he were here no one would be prouder of Judge Merritt's record than his mentor, friend, and former colleague, the late John Wade. No one would be prouder than Dean Wade of the judge's refusal to preach or theorize. No one would be prouder of his dedication to do the often dirty work of judging with grace, precision, learning, and humor. No one would be prouder of the journey Gil

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43. Id. at 581 (Merritt, J., dissenting).

44. Gerhard A. Gesell, *In Memoriam: Judge J. Skelly Wright*, 57 Geo. Wash. L. Rev. 1029, 1034 (1989).

45. *Garner v. Memphis Police Dept.*, 710 F.2d 240 (6th Cir. 1983), aff'd as *Tennessee v. Garner*, 471 U.S. 1 (1985).

46. *Proctor & Gamble v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996).

Merritt has made from Tennessee Democrat to truly distinguished democratic judge. Since we gather today in the house Dean Wade built, I cannot imagine any greater nor more meaningful praise than that.