



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Fall 2017 Vol. 7, No. 1 General Editor Lynne Liberato Executive Editor David Furlow

Columns

Message from the President

By Dale Wainwright

This fall the Society has already held the John Hemphill Dinner, a Portrait Dedication Ceremony, and a Texas Appellate Hall of Fame Induction Ceremony.

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Hon. Dale Wainwright

Executive Director's Page

By Sharon Sandle

The history of the impact of storms like Hurricane Harvey can be found in the way the Texas courts addressed the aftermath.

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The latest book in the Taming Texas series, part of our Judicial Civics and Court History Project, is an exciting addition. [Read more...](#)



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Executive Editor's Page

By David A. Furlow

Groundwater and surface water are so important that our Editorial Board chose to dedicate this issue to the history of water law in Texas. [Read more...](#)



David A. Furlow

Lead Articles

It's the Law—You Own the Water under Your Land: The Evolution of Texas Groundwater Law

By Edmond R. McCarthy, Jr.

The title for this article is taken from a billboard displaying similar text along State Highway 79 in Franklin, Robertson County, Texas.

[Read more...](#)

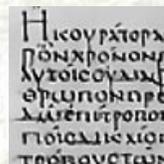


Texas drought in the 1950s

Texas Groundwater Law from Its Origins in Antiquity to Its Adoption in Modernity

By Dylan O. Drummond

Before "ownership in place" and the "rule of capture" were recognized in Texas, the debate between the two concepts had already raged for some 2,000 years. [Read more...](#)



From the Roman Emperor Justinian's "Digest"

A Brief History of the Short History of the State of the Judiciary in Texas

By Osler McCarthy

The ritual of the Chief Justice's biennial State of the Judiciary address to the Legislature seems a mainstay in this state, but the tradition is only thirty-eight years old.

[Read more...](#)



Chief Justice Joe R. Greenhill delivered the first address

Features

Texas Supreme Court and Court of Criminal Appeals Pass Emergency Relief Orders in Hurricane Harvey's Wake

By Dylan O. Drummond

Texas's two highest courts—for the first time—issued a slew of emergency administrative orders to assist litigants as well as both the bench and bar.

[Read more...](#)



Flooding in Houston

22nd Annual John Hemphill Dinner: Chief Judge Diane P. Wood Was the Featured Speaker

**By Marilyn P. Duncan
Photos by Mark Matson**

Almost 400 attendees filled the Grand Ballroom of the Four Seasons Hotel in Austin to enjoy dinner and the evening's program.

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Attendees toast memorialized Court members

Retired Supreme Court Justice Scott Brister's Portrait is Unveiled

**By Dylan O. Drummond
Photos by Mark Matson**

The portrait, presented to the Texas Supreme Court in a ceremony in its courtroom, was beautifully painted by Hill Country artist Patsy Ledbetter. [Read more...](#)



Portrait detail



[Appellate Legends Chief Justice Jack Pope, Professor Don Hunt, and Trailblazer Helen Cassidy Join the Texas Appellate Hall of Fame](#)

The Society and the Appellate Section cosponsored the Texas Appellate Hall of Fame Induction Ceremony at the Four Seasons.

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Bill Chriss honors Chief Justice Pope

[2017 Briefing Attorney Breakfast Brings Court Family Together](#)

By Mary Sue Miller

About 80 current and former justices, briefing attorneys, staff attorneys, staff and their guests gathered at the Texas Law Center.

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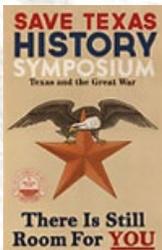
BA Breakfast attendees

[Over Here: Saving Texas History One War at a Time](#)

By David A. Furlow

When the Texas General Land Office announced that it would preserve, digitize, and share the history of "Texas and the Great War" at its 2017 symposium, the Society answered the call to arms.

[Read more...](#)



[Sharing Judicial Civics Lessons with Fellow Legal History Professionals](#)

By David A. Furlow

The Society shared its insights and experience with historians, archivists, and court officials at the American Association for State and Local History's Annual Meeting.

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The Taming Judicial Civics presentation

Book Reviews

[The Key of Life: A Review of David O. Brown's *Called to Rise*](#)

By Rachel Palmer Hooper

It is well chronicled that Brown understands pain and tragedy. Some call it empathy, but I think it is much more. Brown uses his perspective to acknowledge others.

[Read more...](#)

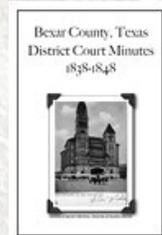


[A Review of Bexar County, Texas, District Court Minutes 1838-1848](#)

By David A. Furlow

Like a feedstock in a manufacturing process, courthouse records constitute the bottleneck assets, *i.e.*, the raw, unprocessed, recorded facts of our legal history.

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News & Announcements

[Society Members Nominated to the Fifth Circuit Court of Appeals](#)

By Dylan O. Drummond

Texas Supreme Court Justice Don Willett and Gibson Dunn Appellate and Constitutional Law practice group co-chair Jim Ho have been nominated to the United States Court of Appeals for the Fifth Circuit. [Read more...](#)



The nominees

[Calendar of Events](#)

Membership & More

[Officers, Trustees & Court Liaison](#)

[2017-18 Member Upgrades](#)

[2017-18 New Member List](#)

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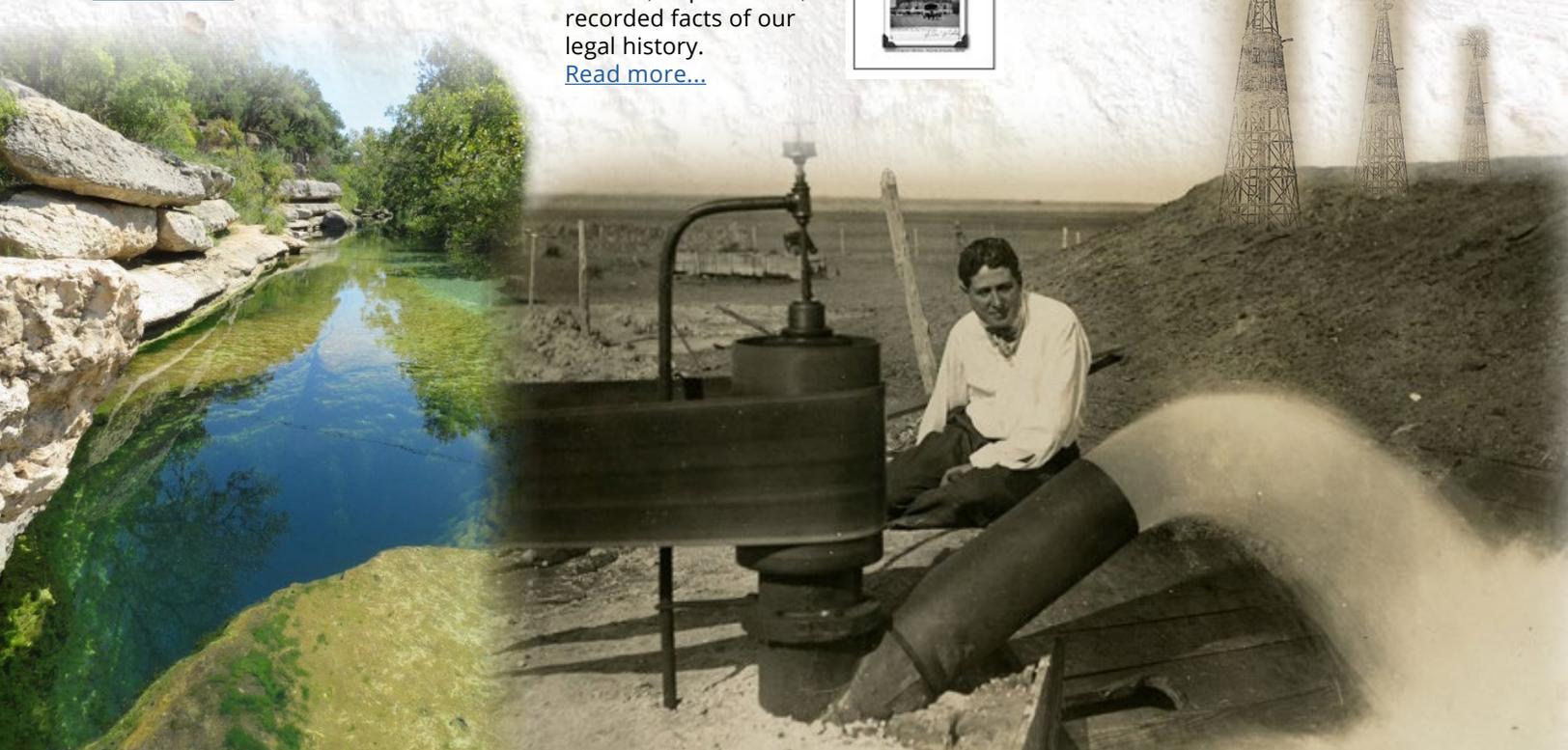


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Hon. Dale
Wainwright

Message from the *President*

The Society opened the fall season with an unusual number of special events. Our premier event, the Annual John Hemphill Dinner, was at the Four Seasons Hotel on Friday, September 8 and was a great success. As you will see in the story featured in this issue of the *Journal*, the keynote speaker was the Honorable Diane P. Wood, Chief Judge of the United States Court of Appeals for the Seventh Circuit. Board member Tom Leatherbury chaired the Dinner Planning Committee, and he and the committee members did an admirable job. Thanks also to the Society's Administrative Coordinator, Mary Sue Miller, for organizing the dinner and the receptions that preceded it.

Earlier the same day, the Supreme Court and the Society cosponsored a Portrait Dedication Ceremony to unveil retired Justice Scott Brister's portrait and present it to the Court. Planning these ceremonies is an important function of the Society, fulfilling its mission of preserving significant artifacts of the Court. Board member Bill Ogden heads the Society's Portrait Committee and joined me and many other Society members at the ceremony to congratulate Justice Brister. Photos from the ceremony appear on page 68.

The day before the Dinner and Portrait Dedication, on September 7, the Society cosponsored the Texas Appellate Hall of Fame Induction Ceremony at the Four Seasons during the State Bar of Texas Advanced Civil Appellate Seminar. Posthumously inducted, this year's honorees are Chief Justice Jack Pope, who of course had strong ties to the Society; Helen A. Cassidy, long-time chief staff attorney for the Fourteenth Court of Appeals; and Texas Tech Law School Professor Donald M. Hunt, whose teachings and moot court mentorships spawned numerous accomplished advocates in the Texas bar. This event is spotlighted on page 70.

Another important Society-sponsored event, the annual Briefing Attorney Breakfast, was at the State Bar's Law Center the morning after the Hemphill Dinner. Some 80 past and present justices and briefing attorneys gathered to break bread, and we all had a great time. See the story by Mary Sue Miller on page 72.

The Society was also pleased to sponsor the Texas General Land Office's Save Texas History Symposium on Saturday, September 16. This year's symposium focused on Texas's role in World War I, and the Society sponsored a presentation by Texas State University Professor Patricia Shields on the women's peace movement during that war. David Furlow's account of the symposium begins on page 74.

The next event on our calendar is the fall meeting of the Society's Board of Trustees on Wednesday, October 18 at the Law Center in Austin. The luncheon speaker will be University of Texas Film Professor Don Graham, who will discuss how the movie *Giant* changed Texas history and the world.

It was a great start to what promises to be another exciting and productive year for the Society.

DALE WAINWRIGHT *is a shareholder with Greenberg Traurig, LLP and chairs its Texas Appellate Practice Group. He is a former Justice on the Supreme Court of Texas.*

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Sharon Sandle

In the Aftermath of a Historic Hurricane, *Texas Courts and Lawyers* *Make Their Own History*

Remembering history is very different from living through it, as the last few months in Texas have dramatically illustrated. The impact of Hurricane Harvey on Houston and the Gulf Coast of Texas has been repeatedly described as “historic.” But the people living in those areas would surely have preferred not to be making history.

This issue of the Texas Supreme Court Historical Society *Journal* is devoted to water law. So often in Texas, when the law takes on the issue of water, the impetus is a scarcity of water. But sometimes Texas is faced with the opposite problem, as has been the case over the last several months. The law is not silent when the problem is more water than we need, and the history of the impact of storms like Harvey on the lives of ordinary Texans can be found in the way the Texas courts addressed the aftermath of hurricanes. The reported cases in Texas are full of names that most Texans will readily recognize—Ike, Rita, Alicia, Carla, and Celia—as well as the many unnamed storms that have battered the Texas coast.

On July 21, 1909, a category 3 hurricane hit the Texas coast with winds of 130 miles per hour, causing two million dollars’ worth of damage and resulting in 41 deaths.¹ The Galveston Court of Civil Appeals in 1912 heard a case between the Santa Fe Railway Company and Texas Star Flour Mills.² The case did not involve millions or even thousands of dollars. Texas Star Flour Mills sued the Santa Fe Railway Company to recover the sum of \$119.48, alleged to be the amount of damages to a shipment of flour over the railway that was damaged when the storm tore the roof from the railway car carrying the load. The account of A. Brugger, the fireman on the train, gives a vivid picture of what it was like in the middle of the storm:

There were really two storms on July 21, 1909. When we got to Bonus—that is about 10 miles this side of Glen Flora—I think it was about 1 o’clock in the afternoon. Northwest, I think, it struck us there; and we have got to go down a piece of track there we call the loop to Garwood, about 10 miles down there, and that far back, and we were going down there, and the wind got harder all the time until we got

¹ E. B. Garriott, “Monthly Weather Review” (pdf), U.S. Weather Bureau, 1909. Online at <ftp://ftp.library.noaa.gov/docs.lib/htdocs/rescue/mwr/037/mwr-037-07-0397.pdf>.

² *Gulf, Colo. & Santa Fe Ry. Co. v. Tex. Star Flour Mills*, 143 S.W. 1179 (Tex. Civ. App.—Galveston 1912).

back to Bonus, when it was blowing so bad several cars on the side track started to move, and the brakeman managed to stop them, and we had to go inside. We couldn't go any further. And everything flew around—houses and windmills.

I suppose we stayed there until 3 o'clock and the wind slacked up, and we started out again and done pretty well until we got about a mile of Glen Flora, and it looked to me like the wind came back the other way from the opposite direction, and that is the time we had the fun right. We got to Glen Flora, and we pulled onto the main line. We couldn't see nothing, couldn't go any further; and that lasted until (the hardest part) between 6:30 and 7 o'clock....

During the storm I was on the engine firing. I had a full view. All I had to do was to stick my head out and look. I have been firing on the railroad since October 23, 1903, about eight years. I do not remember of being in any storm as violent as this one, except the storm of 1900 at Bellville; and in my opinion it was not near as bad, didn't tear things up as this one of 1909 did....

While I was at Glen Flora during this storm I saw roofs of several cars blown off, but whether this car of flour here or not, I never paid any attention to it at all; in fact, it was none of my business. I saw them while going across the country. I was not anxious to see much more anyway. I was trying to keep myself in the clear as much as possible. I saw houses blown down and telegraph wires and posts blown down, and trees rooted up and blowed to pieces.

To know from the records that the hurricane of 1909 was a category 3 storm gives you an idea of how the storm compares to other hurricanes. But it is the description of the storm in the words of the witnesses of this case that paints the picture of what it was like to live through the storm. Witnesses describe homes, churches, schools, and businesses demolished.

The court decided that the damage to the railway car carrying the flour was caused by an act of God which the railway company could not have foreseen and for which they could not have prepared. More than one hundred years later, we are far better able to predict the path of a hurricane. We can see it coming, but we are still unable to truly prepare for a hurricane or prevent the damage it causes to lives and property. In the words of the Galveston court, "All that is required in this regard to make an occurrence of this kind an act of God is to show that it was so unusual that it could not have been reasonably expected or provided against."³ That definition is as apt today as it was in 1912.

What is different today is the ability to respond quickly to the damage caused by an event like a hurricane. On television and through social media, we immediately saw the effects of Hurricane Harvey on the Gulf Coast, and Texans were quick to react. As relief in the form of food and supplies were being sent to the affected areas, the Texas Supreme Court responded with an order [resetting limitations periods](#) in civil cases and, in a [joint order](#) with the Court of Criminal Appeals, suspending court proceedings in the affected areas, giving Texas lawyers time

³ 143 S.W. 1179 at 1182.

to recover from damage to their practices. And the Court issued an [order](#) allowing out-of-state lawyers to temporarily practice in Texas for the purpose of providing pro bono services to those in need of legal advice on how to put their lives back together after the storm.

More than 2,000 lawyers have volunteered to provide legal advice to those affected by the storm. In many cases, these volunteers are able to reach those in need of help through the internet through websites such as texaslegalanswers.org and texaslawhelp.org rather than in person. Such an effort would not have been possible in 1909.

While damage from Hurricane Harvey will be measured in terms of millions or even billions of dollars, for the people who lived through the storm, the damage is measured in lost homes, lost possessions, and lost businesses. For many, putting their lives back together after this historic storm will require the help of lawyers and the courts. In the aftermath of a historic storm, Texas' lawyers and judges will be making history one case at a time.

* * * * *

Note: Disaster resources for the public and for attorneys are available on the [State Bar of Texas's website](#). If you would like to volunteer to assist victims of Hurricane Harvey, you can do so online [here](#).

SHARON SANDLE, *in addition to serving as the Society's Executive Director, is Director of the State Bar's Law Practice Resources Division and of TexasBarBooks.*

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Fellows Column

By David J. Beck, Chair of the Fellows



We had an excellent turnout of Fellows for the Society's recent 22nd Annual John Hemphill Dinner on September 8, 2017. At the dinner, we presented a recap of the Fellows' activities, and we want to report that same information here.

The latest book in the Taming Texas series, part of our Judicial Civics and Court History Project, is an exciting addition. While the first Taming Texas book, *How Law and Order Came to the Lone Star State*, covered the evolution of our state's legal system from the colonial era through the present day, the second book, entitled *Law and the Texas Frontier*, focuses on how life on the open frontier was shaped by changing laws. The historical photographs include a large number of original drawings, giving the new book a dramatic and attractive look. Taken together, the two books offer a colorful, educational, and sometimes surprising picture of the legal heritage of Texas.

We should have the books from the printer in a few weeks and will send a copy to all Fellows. This will be another exceptional work.

We are pleased that Chief Justice Nathan L. Hecht has written the foreword for both Taming Texas books. We would like to thank Chief Justice Hecht; Justice Paul Green, the Court's liaison to the Society; and the entire Supreme Court of Texas for their support of this important project.

The Fellows allow the Society to undertake new projects to educate the bar and the public on the third branch of government and the history of our Supreme Court. The generosity of the Fellows has allowed us to produce the books for this project.

James L. Haley and Marilyn Duncan are the coauthors of the Taming Texas books, and they were both with us at the Hemphill Dinner. We are appreciative of the work they have done to bring us these terrific books. Jim and Marilyn are currently working on the third book in the series, which will be entitled *The Chief Justices of Texas*. It is our fervent hope that Chief Justice Hecht will write the foreword for our new book as well.

Our Taming Texas project puts judges and lawyers in classrooms teaching students about judicial civics. We have partnered with the Houston Bar Association to take the Taming Texas project into the schools across the Houston area. In the last two school years, HBA volunteers

taught the program to nearly 15,000 seventh graders. Under the leadership of Justice Brett Busby, Fellow David Furlow, and Richard Whiteley, the HBA is implementing Taming Texas in Houston again in the spring of next year. The response by teachers and students has been overwhelmingly positive, and we plan to expand the program even more in the coming years.

Finally, I want to express once again our appreciation to the Fellows for their support of educational programs, like our Taming Texas Judicial Civics and Court History Project, and our historic oral argument reenactments. If you are not currently a Fellow, please consider joining the Fellows and supporting this important work. If you would like more information or want to become a Fellow, please contact the Society office or me.

DAVID J. BECK *is co-founder and senior partner with Beck Redden LLP in Houston.*

FELLOWS OF THE SOCIETY

Hemphill Fellows

(\$5,000 or more annually)

David J. Beck* Joseph D. Jamail, Jr.* (deceased) Richard Warren Mithoff*

Greenhill Fellows

(\$2,500 or more annually)

Stacy and Douglas W. Alexander	Thomas F.A. Hetherington	Hon. Thomas R. Phillips
Marianne M. Auld	Allyson and James C. Ho*	Hon. Jack Pope* (deceased)
S. Jack Balagia	Jennifer and Richard Hogan, Jr.	Shannon H. Ratliff*
Robert A. Black	Dee J. Kelly, Jr.*	Harry M. Reasoner
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Marcy and Sam Greer	Nick C. Nichols	Peter S. Wahby
William Fred Hagans	Jeffrey L. Oldham	Hon. Dale Wainwright
Lauren and Warren Harris*	Hon. Harriet O'Neill and Kerry N. Cammack	Charles R. Watson, Jr.
		R. Paul Yetter*

*Charter Fellow

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David A. Furlow

When Cold Spring Water *Becomes Legal Hot Water*

*In Xanadu did Kubla Khan
A stately pleasure-dome decree:
Where Alph, the sacred river, ran
Through caverns measureless to man
Down to a sunless sea.*

— *Kubla Khan*
by Samuel Taylor Coleridge

The rivers that run through Texas caverns measureless to man carry *groundwater*, an ageless resource. Groundwater and surface water are so important to today's Texans, and to the history of Texas, that our *Journal's* Editorial Board decided to dedicate this issue to the history of water law in Texas.



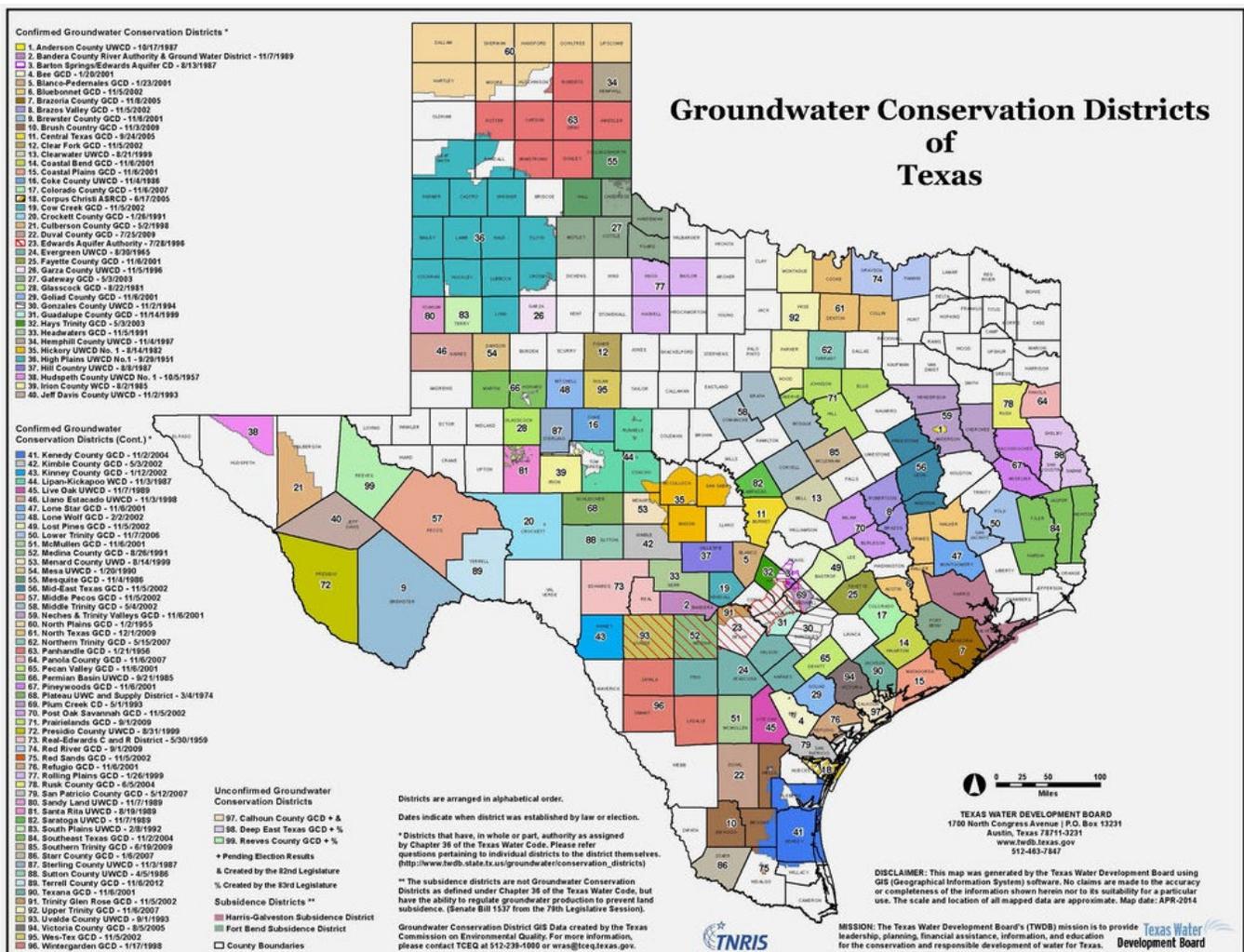
Subterranean rivers carry groundwater through deep caverns that leave their signatures on the surface when they collapse. Left, a subterranean river in Lechuguilla Cavern, Wikimedia photo.¹ Right, a collapsed cavern lying alongside the north bank of the Blanco River in Wimberley, Texas. Photo by David A. Furlow.

¹ Wikimedia photo by Dave Bunnell showing stalagmites, stalactites, and draperies by a pool in Lechuguilla Cave, New Mexico. http://en.wikipedia.org/wiki/Image:Lechuguilla_Cave_Pearlsian_Gulf.jpg.



Edwards Aquifer groundwater springs up through Jacob's Well and arises to feed the Blanco River in Hays County, Texas. Photos by David A. Furlow.

Tales of groundwater flow through Texas history. Some folks say that Wimberley's founder, William Winters, named a 140-foot-deep, natural artesian well Jacob's Well because its clarity and power reminded him of wells in the Bible's Promised Land. Others assert that Jacob de Cordova, a Jamaican-born Jewish entrepreneur who became Texas's largest landowner and greatest advocate, named the well after himself. Whoever named the well, it pumps millions of gallons of crystal clear water up to the surface, into Cypress Creek, and over to Blue Hole every year.



In addition to etching exquisite underground beauty, filling Hill Country swimming-holes, and enticing tourists, groundwater supplies more than half of the water used by people living in Texas's cities. Yet underground water does more than rush through the tap, the toilet, and the sprinkler; it fills the table with food. Groundwater provides 70 percent of the water Texans use to irrigate six million acres of the Lone Star State, constituting the single greatest use of this state's groundwater. Since the earliest grist mills, water has flowed into Texas's industries, cleaning, carrying away waste, and cooling the engines of commerce. Ample supplies of water are essential for running the air conditioning systems that make life livable in semitropical Texas.

Aside from a few statutes of relatively recent vintage (from 1949 onwards) authorizing the creation of Groundwater Conservation Units to govern use of Texas's seven major and twenty-one minor aquifers, and a few other laws governing the use and disposal of water during petroleum production, the State regulates neither the production nor the use of underground water.

As one might expect for a resource fundamentally important to every aspect of Texas life, special rules of law govern the ownership, exploitation, and sale of groundwater. In contrast to the offshore waters, spray-soaked beaches, rivers, streams, lakes, and other surface waters Spanish conquistadors claimed for the Crown, which now belong to the State of Texas, groundwater belongs exclusively to the owner of the land surface under the Rule of Capture.

In his article, "It's the Law—*You Own the Water under Your Land: The Evolution of Texas Groundwater Law*," Edmond R. McCarthy, Jr., an Austin attorney who specializes in water law with extensive experience in Hill Country groundwater litigation, describes how the Rule of Capture arose and developed through a series of literally ground-breaking Texas Supreme Court decisions. Beginning in 1904, when the Texas Supreme Court decided *Houston & Texas Central Railway Co. v. East*, 98 Tex. at 149, 81 S.W. at 280 (1904), and adopted the English Rule a/k/a Absolute Ownership Rule, a/k/a the "Rule of Capture" in *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843), McCarthy explains how the current Texas law of groundwater sprang up and spread across Texas.

Ed McCarthy's article is the place to begin for anyone interested in the legal origins of the Hill Country aquifer litigation that has generated so many signs between Kyle and Wimberley reading, "It's Trinity Water, not Infinity Water." As competing uses for groundwater grow more intense, the cold, clear spring water of Hill Country aquifers will become the hot water of litigation time and time again.

In another example of scholarly writing informed by the Muse of History, the *Journal's* own Dylan O. Drummond then tracks the Rule of Capture back through the subterranean mists of time to its source along the banks of Rome's River Tiber to the caves beneath the Palatine in "Texas Groundwater Law from its Origins in Antiquity to its Adoption in Modernity." Readers who love reading ancient manuscripts, parsing Latin texts, and seeing the law evolve in the hands of the some of the world's greatest rulers, lawyers, and judges will find much to love about Dylan's article.

Texas Supreme Court Staff Attorney for Public Information Osler McCarthy's special contribution, "A Brief History of the Short History of the State of the Judiciary in Texas" flows as well as Ed McCarthy's and Dylan Drummond's contributions, yet does not focus on hydrology. Osler describes how Chief Justices of the Texas Supreme Court began, during the late twentieth century, going before the Legislature to offer a biennial snapshot of the state of the courts in Texas and articulate a vision of how the law should evolve. Anyone interested in Chief Justice Hecht's recent State of the Judiciary addresses will want to read Osler McCarthy's article to put these important texts into their historical context.

This issue also includes a book review by Houston attorney Rachel Palmer Hooper on Dallas Police Chief David O. Brown's new memoir, *Called to Rise: A Life in Faithful Service to the Community That Made Me*, as well as my review of *Minutes of the Bexar County District Court 1838-1848*. News stories focus on recent events, including the Society's panel presentation on the Taming Texas project at the American Association of State and Local History's Annual Meeting in Austin on September 7, Seventh Circuit Chief Judge Diane Wood's keynote speech at the John Hemphill Annual Dinner on September 8, the Briefing Attorney Breakfast on September 9, and the Society's participation in the Texas General Land Office's *Save Texas History* symposium focusing on the history of "Texas and the Great War" on September 16.

September was a *busy* month even without Hurricane Harvey's inundation of Texas's ground with far more water than anyone needed or wanted. The *Journal's* editors hope that you'll enjoy these articles and features about Texas history viewed through the law's lens during what promises to be a spectacular autumn.



DAVID A. FURLOW is a First Amendment attorney, photojournalist, and archaeologist.

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It's the Law—*You Own the Water under Your Land*: The Evolution of Texas Groundwater Law

By Edmond R. McCarthy, Jr.

The title for this article, “It’s the Law—*You Own the Water under Your Land*,” is taken from a billboard along State Highway 79 in Franklin, Robertson County, Texas.¹ The use of an old-school billboard medium to announce this fundamental proposition of property law evidences the development of groundwater law in Texas. Specifically, while Texas courts have been addressing issues related to groundwater law for more than a century, we are now seeing an increase in its “visibility” as an evolving key legal proposition affecting our daily lives.



Billboard on State Highway 79 in Franklin.
Photo by John Hurley, BVGRA.

A century apart, 1904 and 2012 are two milestone years in the evolution of Texas groundwater jurisprudence. Both years mark seminal decisions by the Texas Supreme Court governing groundwater law.

The Evolution of Texas Groundwater Jurisprudence

In 1904 the Texas Supreme Court decided *Houston & Texas Central Railway Co. v. East*,² adopting the English Rule or Absolute Ownership Rule of groundwater by the owner of the surface estate where groundwater is pumped. The “Rule of Capture,” as it has become known, has been Texas law ever since.³

Following the *East* decision, the Texas Supreme Court’s opinions relating to groundwater appeared consistently to recognize the landowner’s property right in the groundwater underlying his land.⁴ It was not until more than a century after *East*, however, that the Court published its

¹ The billboard is sponsored by the Brazos Valley Groundwater Rights Association, a nonprofit association comprised of local landowners interested in protecting the property rights in their groundwater, and educating the public about those rights.

² 98 Tex. 146, 81 S.W. 279 (1904).

³ See *Edwards Aquifer Auth. v. Day*, 369 S.W.3d at 814 (Tex. 2012) (hereinafter *Day*); *Sipriano v. Great Spring Waters of Am.*, 1 S.W.3d 75, 76 (Tex. 1999) (hereinafter *Sipriano*); *Hous. & Tex. Cent. Ry. Co. v. East*, 81 S.W. 279 (Tex. 1904) (hereinafter *East*).

⁴ E.g., *Day*, 369 S.W.3d at 814; *Sipriano*, 1 S.W.3d at 83 (where the Texas Supreme Court declined to change the Rule of Capture based on the Legislature’s enactment of Senate Bill 1); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996) (where Justice Abbott noted that the Court reserved the question relating to the “clash between property rights in water and regulation of water”) (hereinafter *Barshop*);

decision in *Edwards Aquifer Authority v. Day*,⁵ declaring that groundwater in place belongs to the landowner as a matter of constitutionally protected property right.⁶

Texas groundwater law traces its foundation principles back much further than the last century and the Court's decision in *East*, however. In 1840, the Texas Republic adopted English Common Law.⁷ Prior to 1840, Texas lands had been granted by three different sovereigns: the Kingdom of Spain, the Republic of Mexico, and the Republic of Texas.⁸ The property rights of landowners, and the laws governing them, were influenced by the laws of each of the respective sovereigns from whom the lands were originally patented.⁹ Moreover, the foundations of those legal principles can be traced back millennia to their Greek and Roman roots.¹⁰

Mother Nature too has played an influential role in shaping our groundwater jurisprudence.¹¹ As the late Texas Supreme Court Chief Justice Jack Pope noted, "The story of water law in Texas is also the story of its droughts."¹² Unlike the development of our oil and gas

City of Sherman v. Pub. Util. Comm'n of Tex., 643 S.W.2d 681, 686 (Tex. 1983) (reaffirming the Court's adherence to the Rule of Capture and the "Absolute Ownership Theory" in *Friendswood*) (hereinafter *Sherman*); *Friendswood Dev. Co. v. Smith-S.W. Indus., Inc.*, 576 S.W.2d 21, 30 (Tex. 1978) (recognizing prospectively that the Rule of Capture/Absolute Ownership Rule did *not* permit negligent pumping that caused subsidence of neighboring land) (hereinafter *Friendswood*); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) ("Water, unsevered expressly by conveyance or reservation, has been held to be a part of the surface estate.") (hereinafter *Whitaker*); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 801 (Tex. 1955) (recognizing the only limitations to the English Rule are that the "owner may not maliciously take water for the sole purpose of injuring his neighbor ... or wantonly and willfully waste it; there is no limitation at common law on its movement") (hereinafter *Corpus Christi*); *Ellif v. Texon Drilling Co.*, 210 S.W.2d 558, 562 (Tex. 1948) (Rule of Capture is "another way of recognizing the existence of correlative rights"); *Brown v. Humble Oil Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935) (citing *East* as authority for the Law of Capture); *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927) (no restriction against landowner exporting produced percolating groundwater) (hereinafter *Burkett*); *Stephens Cnty. v. Mid-Kan. Oil & Gas Co.*, 254 S.W. 290, 292, 293 (Tex. 1923) (citing *East* as supporting correlative rights; and recognizing the surface owner as the "owner downward to the centre ... [t]he air and the water he may use."); *Tex. Co. v. Daugherty*, 176 S.W. 717, (Tex. 1915) ("the analogy between deposits of oil and gas and things *ferae naturae* is, at best, a limited one ... [t]he difference between them is that things *ferae naturae* are public property, and all have an equal right to reduce them to possession and ownership, while the right to [capture] ... is an exclusive and private property right in the landowner, [and] ... may not be deprived without a taking of private property"). See generally *East*, 81 S.W. at 280 (adopting the doctrine announced in *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843) (hereinafter *Acton*)).

⁵ *Day*, 369 S.W.3d at 814.

⁶ *Id.* at 817, 831–32.

⁷ Act approved of Jan. 20, 1840, with Cong. R.S. reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822–1897, at 177, 177–78 (Austin, Gammel Book Co. 1898) (adopting, with certain limitations, the common law of England). See generally TEX. CIV. PRAC. & REM. CODE ANN. § 5.001.

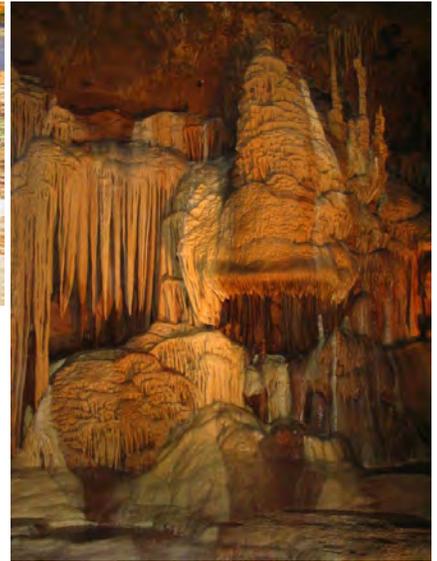
⁸ *Miller v. Letzerich*, 49 S.W.2d 404, 407 (Tex. 1932). See generally *Pecos Cnty. Water Control & Improvement Dist. No. 1 v. Williams*, 271 S.W.3d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.) (the rule of groundwater ownership inherited from English common law goes back to Roman law) (hereinafter *Pecos County*); Dylan O. Drummond, Lynn Ray Sherman & Edmond R. McCarthy, *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 29–30 (2004) (hereinafter *Still So Misunderstood*).

⁹ *Still So Misunderstood*.

¹⁰ *Id.* at 15–29; see generally *Day*, 369 S.W.3d at 825 n.47 (citing to the thorough examination of the historical origins and development of the Rule of Capture in *Still So Misunderstood*).

¹¹ See, e.g., *Barshop*, 925 S.W.2d 618, 626 (Tex. 1996); *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 441 (Tex. 1982) (hereinafter *Upper Guadalupe*); *Pecos County*, 271 S.W.2d at 505.

¹² *Upper Guadalupe*, 642 S.W.2d at 441.



Left: Cracked dry land appeared frequently in Texas during the drought of the 1950s.¹⁴ Center: A swimmer in Jacob's Well, Hays County, Texas. Photo by Larry D. Moore. Groundwater is most familiar to Texans when it rises to the surface from one of the Lone Star State's many aquifers, in this case, Jacobs Well, or (far right) when it carves magnificent caverns out of karst limestone, as with the Queen's Throne in Cave without a Name near the Hill Country town of Boerne, Texas.¹⁵

jurisprudence which was fueled by a combination of the industrial revolution and consumer demand, the history of water, and the evolution of its jurisprudence in Texas have both been driven by continuing drought.¹³

Water in Texas is classified into four types: surface water, groundwater, diffused water, or developed water. Surface water is owned by the state and held in trust for the benefit of all of the people of the state.¹⁶ Diffused water is an oddity under Texas law because it is neither "surface water" nor "groundwater" from a regulatory perspective. In its "diffused" state, water is the property of the landowner who may capture and beneficially use it before it enters a defined watercourse without obtaining authorization from the state.¹⁷ Less well developed in Texas jurisprudence is "developed water," which can originate as either surface or groundwater, but constitutes "new water" to the affected watercourse or aquifer, because it is introduced by some man-made or "artificial" activity.¹⁸

In Texas, both the ownership of and the regulatory scheme governing the various types of

¹³ See *id.* at 441. See generally Drummond, et al., *Still So Misunderstood*; see also Day, 369 S.W.3d at 825 & n.47.

¹⁴ Image provided through Wikimedia Commons by Texas Department of Transportation, Highway Department Historical Records, Texas Commission on Environmental Quality, Texas State Library and Archives Commission, https://www.tsl.texas.gov/highlights/2012_02/lobby-exhibits-3b.html.

¹⁵ This image of Jacob's Well, above, is provided courtesy of Larry D. Moore through Wikimedia Commons, License No. CC BY-SA 4.0, https://commons.wikimedia.org/wiki/File:Swimming_in_Jacob%27s_Well.jpg. See *Jacob's Well*, Wikipedia, [https://en.wikipedia.org/wiki/Jacob%27s_Well_\(Texas\)](https://en.wikipedia.org/wiki/Jacob%27s_Well_(Texas)). The image of the Queen's Throne, above, is made available by Peggy Hollin at Wikipedia, https://commons.wikimedia.org/wiki/File:Queen%27s_throne.JPG.

¹⁶ See TEXAS WATER CODE ANN. § 11.021; see generally Edmond R. McCarthy, *Environmental Flows: Water Development Perspective*, 34 TEX. ENVTL. L.J. 248, 250–51 (Summer 2004); Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L.J. 1281, 1294–95 (1986).

¹⁷ See *Dietrich v. Goodman*, 123 S.W.3d 413, 417 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Raburn v. KJI Bluechip Invs.*, 50 S.W.3d 699, 704 (Tex. App.—Fort Worth 2001, no pet.); see generally Mary K. Sahs, *Groundwater 101*, State Bar of Tex. Prog. Dev. Program, Nuts & Bolts of Water Rights ch.2, at 15 (2009).

¹⁸ Frank R. Booth, *Ownership of Developed Water Rights in Texas: A Property Right Threatened*, 17 ST. MARY'S L.J. 1181, 1189 (1986).

water are dependent upon its classification. While not classified as a “mineral,”¹⁹ groundwater, like oil and gas, is privately owned and subject to the Rule of Capture.²⁰ Like oil and gas, the groundwater estate can be severed from the surface and sold separately.²¹ Despite its private ownership, a landowner may be required to secure a permit to produce his groundwater from a local groundwater conservation district.²² It is important to note that the sale or lease of groundwater produced at the wellhead and groundwater rights in place are to be distinguished.²³ The latter is a sale of real property, and the former is the sale of personal property.²⁴ In a conventional real estate transaction involving the sale of surface acreage, the conveyance also includes the groundwater in place, together with all the oil, gas, and other minerals, unless the same are expressly “excepted” from the conveyance.²⁵

The sale of “groundwater rights,” however, involves the sale of the groundwater in place, or *in situ, i.e.*, beneath the surface of the property in an undeveloped state. The groundwater in place belongs to the owner of the surface of the property or surface estate.

Many of the issues involved in the conveyance of groundwater rights are similar to those associated with traditional real estate transactions, *e.g.*, title defects and physical contamination issues. In fact, many of them can be insured against with title insurance.²⁶

Since the Texas Supreme Court adopted the so-called rule of “Absolute Ownership” from the English case of *Acton v. Blundell*²⁷ in *East*²⁸ in 1904 and concluded that the owner of the surface had the right to dig and to capture the water percolating from beneath his property

¹⁹ *Fleming Found. v. Texaco, Inc.*, 337 S.W.2d 846, 851 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.) (water is not a “mineral” within the meaning of the phrase “all oil, gas and other minerals” in an oil and gas lease) (hereinafter *Fleming*); *Whitaker*, 453 S.W.2d 808, 813, 813n.2. (Tex. 1972) (Daniel J., dissenting).

²⁰ *E.g., Day*, 369 S.W.3d 814, 817 (Tex. 2012); *Sipriano*, 1 S.W.3d 75, 76 (Tex. 1999); *Barshop*, 925 S.W.2d 618, 625-26 (Tex. 1996); *Friendswood*, 576 S.W.2d 21, 30 (Tex. 1978); *Corpus Christi*, 154 Tex. 289, 292–94, 276 S.W.2d 798, 800–01 (Tex. 1955); *Burkett*, 296 S.W. 273, 278 (Tex. 1927); *East*, 81 S.W. at 281; TEXAS WATER CODE ANN. §§ 26.002, 35.003, 36.002; *see generally Still So Misunderstood*.

²¹ *Coyote Lake Ranch LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016); *see Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865, 867 (Tex. 1973) (ownership of groundwater is “an incident of surface ownership in the absence of specific conveyancing language to the contrary”); *Whitaker*, 483 S.W.2d at 811; *Pfluger v. Clack*, 897 S.W.2d 956, 959 (Tex. App.—Eastland 1995, writ denied) (water, surface or subsurface, unsevered expressly by conveyance or reservation, is part of surface estate) (hereinafter *Pfluger*); *see generally Evans v. Ropte*, 96 S.W.2d 973 (Tex. 1936); *City of Del Rio v. Clayton Sam Colt Hamilton Tr.*, 269 S.W.3d 613, 617–18 (Tex. App.—San Antonio 2008, pet. denied) (hereinafter *City of Del Rio*); TEX. PROP. CODE ANN. § 5.001; Drummond, et al., *Still So Misunderstood*, 37 TEX. TECH L. REV. at 78.

²² *See* TEXAS WATER CODE ANN. ch. 36.

²³ *Day*, 369 S.W.3d at 817; *Burkett*, 296 S.W.2d at 278; *Whitaker*, 483 S.W.2d at 811; *City of Del Rio*, 269 S.W.3d at 617–18; *Pfluger*, 897 S.W.2d at 959; *Pecos County*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.).

²⁴ *See generally Still So Misunderstood*, 37 TEXAS TECH L. REV. at 80–82.

²⁵ *See Whitaker*, 483 S.W.2d at 811 (citing *Fleming*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref’d n.r.e.)); *Pfluger*, 897 S.W.2d at 959 (water, surface or subsurface, that has *not* been severed by express conveyance or reservation remains part of surface estate). *See generally* TEX. PROP. CODE ANN. § 5.001.

²⁶ *See generally* James L. Gosdin, *Title Insurance for Groundwater and Surface Water Deals*, State Bar of Tex. Prof. Dev. Program, 6th Annual Changing Face of Water Rights in Texas, ch. 5 (2005).

²⁷ 152 Eng. Rep. 1223, 1235 (1843).

²⁸ *East*, 81 S.W. 279 (Tex. 1904).

even if doing so affected his neighbor,²⁹ Texas has followed the “Rule of Capture.” During the century since the *East* holding, Texas’s Rule of Capture has evolved.³⁰

The Rule of Capture is actually a theory of tort law rather than a property right. While not truly one of the “sticks” in the so-called “bundle of sticks” traditionally associated with the ownership of real property, the rule and the associated rights and protections emanate from the property right associated with the water in the ground.³¹

In *Day*, the Texas Supreme Court explained its statement in *East* that “the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth,” as follows:³²

By “correlative rights,” we referred specifically to the right *East* claimed: to sue for damages from a loss of water due to subsurface drainage by another use for legitimate purposes. The reasons the law did not recognize that right...did not preclude all correlative rights in groundwater. On the contrary, we noted that *East* had made “no claim of malice or wanton conduct of any character...,” *suggesting at least the possibility that an action for damages might lie in such circumstances, despite difficulty in proof.*³³

The Rule of Capture, however, has become confused with the more fundamental property right that led to its adoption, *i.e.*, the ownership of the groundwater in place. The Supreme Court’s ruling in *East* that the railroad company that had caused the injury to its neighbor’s well had no liability to the neighbor would have been meaningless if the injured neighbor did not own the groundwater in place.

Texas courts since the *East* decision have consistently recognized a landowner’s property right in the groundwater in place.³⁴ Because the landowner owns the groundwater, he has the right to develop and produce it.³⁵ Due to the migratory nature of groundwater, courts protect the landowner’s right under the Rule of Capture to prevent a neighbor from claiming harm or injury for the production of groundwater that might include water that in a static state was beneath the neighbor’s property.³⁶

The protection from the tort liability afforded by the Rule of Capture for damages associated

²⁹ *East*, 81 S.W. 279 at 280.

³⁰ *Day*, 369 S.W.3d 814, 823–31 (Tex. 2012); *Still So Misunderstood*, 37 TEX. TECH. L. REV. at 41–57.

³¹ *See Day*, 369 S.W.3d at 825–26, 825 n.47 (citing *Eliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948)).

³² *Id.* at 825–26, 825 n.48 (quoting *Frazier v. Brown*, 12 Ohio St. 294 (1861), *overruled by Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324 (Ohio 1984)).

³³ *Id.* at 825–26 (emphasis added).

³⁴ *See, e.g., id.* at 817, 831–33; *Burkett*, 296 S.W.2d 273, 278 (Tex. 1927); *Pecos County*, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.).

³⁵ *Day*, 369 S.W.3d at 817, 831–33.

³⁶ *Sipriano*, 1 S.W.3d 75 (Tex. 1999); *Friendswood*, 576 S.W.2d at 21, 30 (Tex. 1978); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d at 798, 803 (Tex. 1955); *East*, 81 S.W. at 279, 280 (Tex. 1904); *see generally Day*, 369 S.W.3d at 814 (Tex. 2012); *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d at 613 (Tex. App.—San Antonio

with a landowner's production of groundwater has evolved (or been diluted) over time by the Texas Supreme Court.³⁷ Specifically, the Court has recognized exceptions to the limitation on tort liability related to waste, or malicious injury,³⁸ negligent injury,³⁹ and subsidence⁴⁰ resulting from the production of groundwater.⁴¹ These so-called "exceptions" to the Rule of Capture, however, have not affected, much less limited or curtailed, the landowner's property right, *i.e.*, ownership interest, in the groundwater beneath his property.⁴² As noted, however, it was not until 2012 in *Day* that the Court specifically held that the groundwater in place was one of the sticks in the bundle—a protected property right.⁴³

In 1927, the Texas Supreme Court clarified that the property rights in groundwater are associated with the ownership of the surface of the land. In *Texas Company v. Burkett*,⁴⁴ the Court recognized that the ordinary percolating waters are the "*exclusive property of the owner of the surface.*"⁴⁵ The Court also concluded that there was no restriction against the sale of percolating waters for industrial use off the land from which the groundwater was produced.⁴⁶ The Court held that there was a "presumption" that the source of those percolating waters was groundwater,⁴⁷ and that it could be sold or bartered by the landowner the same as any other interest in real property.⁴⁸

Almost a quarter of a century after *Burkett*, in *City of Corpus Christi v. City of Pleasanton*,⁴⁹ the Supreme Court again considered the question of a landowner's rights in the groundwater produced from wells on the landowner's property. While the Court was focused on whether or not the substantial evaporative and seepage losses during the transport of groundwater down the bed and banks of a state-owned watercourse constituted "waste,"⁵⁰ it concluded that "losses" between the point of pumping the groundwater and the point of use were necessary to achieve the intended beneficial use of the water.⁵¹ In its opinion, the Court reaffirmed the "Rule

2008, pet. denied).

³⁷ *Friendswood*, 576 S.W.2d at 30; *City of Corpus Christi*, 276 S.W.2d at 803; *East*, 81 S.W. at 280.

³⁸ *East*, 81 S.W. at 281–82; see *Day*, 369 S.W. 3d at 825–26; *Corpus Christi*, 276 S.W.2d at 803.

³⁹ *Friendswood*, 576 S.W.2d at 29–30; see *Day*, 369 S.W.3d at 827.

⁴⁰ *Id.*

⁴¹ *Id.*; *Sipriano*, 1 S.W.3d at 77 (Rule of Capture has exceptions in Texas).

⁴² *Day*, 369 S.W.3d at 823–29; *Sipriano*, 1 S.W.3d at 83; *Barshop*, 925 S.W.2d 618 at 626 (Tex. 1996); *Sherman*, 643 S.W.2d 681, 686 (Tex. 1983); *Friendswood*, 576 S.W.2d at 30; *Whitaker*, 483 S.W.2d at 811; *Corpus Christi*, 1276 S.W.2d at 798, 801 (1955); see generally *East*, 81 S.W. at 280 (adopting the doctrine announced in *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843)).

⁴³ *Day*, 369 S.W. 3d at 831–32.

⁴⁴ 296 S.W. 273 (Tex. 1927).

⁴⁵ *Id.* at 278 (emphasis added).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (citing Long on Irrigation, Secs. 47, 45).

⁴⁹ 294, 276 S.W.2d 798, 801, 803 (Tex. 1955); see also TEX. CONST. ART. XVI, § 59.

⁵⁰ *Corpus Christi*, 276 S.W.2d at 803.

⁵¹ *Id.* at 802–03.

of the Capture” it established in the *East* case,⁵² and the attendant ownership interests of the landowner in groundwater articulated in *Burkett*.⁵³

The Court went further in its *City of Corpus Christi* opinion, and concluded that, at common law, there was no “limitation of the means of transporting the [ground]water to the place of use.”⁵⁴ The Court also admonished the Legislature that the “duty” to implement the public policy found in the Conservation Amendment⁵⁵ did *not* belong to the courts, but was conferred “exclusively to the legislative branch of government.”⁵⁶ The Court’s opinion in *Corpus Christi* clarified *East* insofar as it recognized that “waste” was a limitation on the right of the surface owner to produce and use the groundwater from beneath its property.

The Supreme Court’s analysis and decision of the issues presented was not clear. The 1955 decision came in the midst of the infamous drought of the 1950s, and Corpus Christi’s need for water for municipal demands as well as the demands of Texas’s petrochemical industry cannot be overlooked or discounted.

In 1972, the Court considered groundwater-related issues in *Sun Oil Co. v. Whitaker*.⁵⁷ The matter again arose in an oil and gas case, and consideration of waste was a recurring theme.⁵⁸ The primary focus of the opinion was the right of an oil and gas lessee to use groundwater to produce and enjoy the mineral estate under a lease.⁵⁹ The groundwater source in question was essential to the landowner/lessor’s agricultural activities. Sun Oil’s desire to use substantial quantities of the groundwater for a secondary recovery water flood program, which threatened the availability for groundwater for the landowner’s use, prompted the suit where the lease was silent on the issue.⁶⁰

The Court held that the owner of the dormant mineral estate had an implied grant of “reasonable use” of the groundwater to develop the oil and gas in the absence of an express contractual provision to the contrary or a prior severance of the groundwater estate from the

⁵² *Id.* at 802. See generally *East*, 81 S.W. at 279.

⁵³ *Corpus Christi*, 276 S.W.2d at 802–03; *Burkett*, 269 S.W. at 278 (percolating waters “were the exclusive property of [the landowner], who had all the rights incident to them one might have as to any other species of property”).

⁵⁴ *Corpus Christi*, 276 S.W.2d at 802.

⁵⁵ TEX. CONST. ART. XVI, § 59.

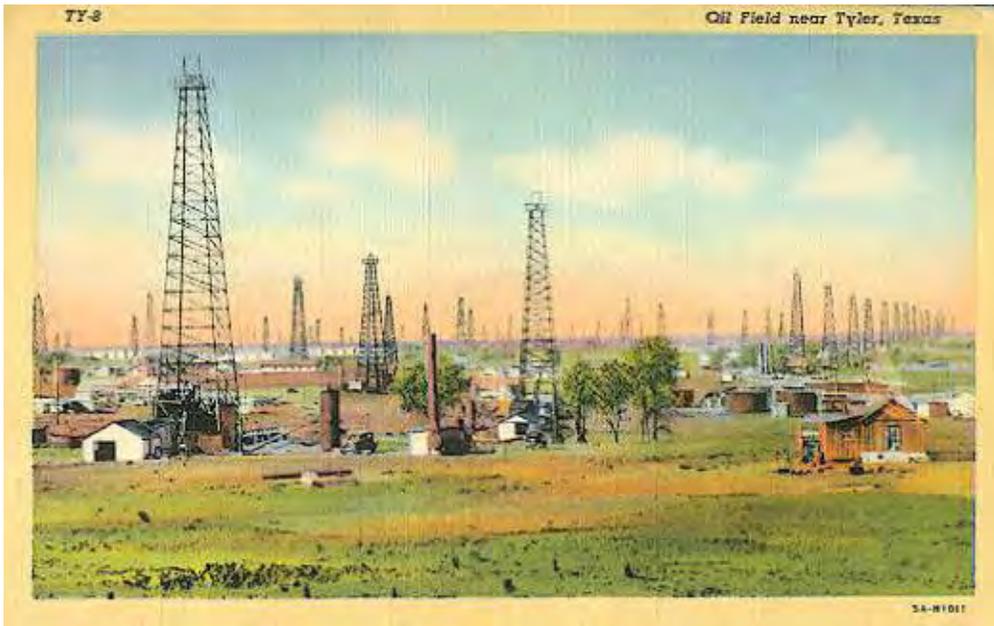
⁵⁶ *Corpus Christi*, 276 S.W.2d at 803.

⁵⁷ 483 S.W. 2d 808 (Tex. 1972).

⁵⁸ Judicial application of the Rule of Capture to petroleum production dates back to 1889 in Pennsylvania, where oil and gas production at Titusville led the nation into the petroleum age. See *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235 (1889) (the Pennsylvania Supreme Court applied the law of wild animals, *ferae naturae*, because of petroleum’s “power and tendency to escape without the volition of the owner” and its “fugitive and wandering existence within the limits of a particular tract was uncertain”); Julia Cauble Smith, “East Texas Oilfield,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/doi01> (“Whether in town or on farms, independent operators were compelled to drill wells as quickly as possible to prevent neighboring producers from sucking up their oil. This principle, known as the rule of capture, guided the development of oilfields since the 1889 Pennsylvania Supreme Court decision gave ownership of oil to the one who captured it, even if part of that oil migrated from an adjoining lease.”).

⁵⁹ *Whitaker*, 483 S.W. 2d at 809.

⁶⁰ *Id.* at 809–10.



Beginning with a Pennsylvania Supreme Court case in 1889, American courts have applied the Rule of Capture to petroleum production. This postcard shows the East Texas oil and gas field.⁶¹

surface estate.⁶² The Court also considered and dismissed arguments concerning whether the use of groundwater in a water flood recovery project constituted waste as a beneficial use of the resource.⁶³ Noting several Texas and Oklahoma court decisions where water flood projects had been found “reasonably necessary operations”⁶⁴ and that this use had been approved by the Texas Railroad Commission, the Court upheld Sun Oil’s use of fresh groundwater for that purpose, making note that the lease was silent on the question.⁶⁵

Noting that attempts to use saltwater for the water flood recovery had failed, the Court distinguished its holding in the *Getty Oil* case,⁶⁶ where a year earlier the Court had adopted the “Accommodation Doctrine” as a limitation on the dominant mineral estate owner to use other alternative means to facilitate the servient surface estate owner’s right to continue to enjoy the land.⁶⁷ The Court distinguished its decision in *Getty Oil* on the basis that the application of the Accommodation Doctrine was limited to situations where the dominant estate had available “reasonable alternative methods that may be employed by the lessee *on the leased premises* to accomplish the lease purposes. Here, the Court found Sun Oil had no such alternatives.⁶⁸

In 1978, the Supreme Court further limited the right of a landowner under the Rule of Capture to produce groundwater from beneath his property for beneficial use. In *Friendswood*

⁶¹ This postcard image is found in a *Handbook of Texas Online* article, Julia Cauble Smith, “East Texas Oilfield,” <http://www.tshaonline.org/handbook/online/articles/doe>.

⁶² *Whitaker*, 483 S.W. 2d at 810–13 (citing *Fleming*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo, 1960, writ ref’d n.r.e.)).

⁶³ *Id.* at 811.

⁶⁴ *Id.*

⁶⁵ *Id.* at 811–12.

⁶⁶ 470 S.W.2d 618 (Tex. 1971).

⁶⁷ *Whitaker*, 483 S.W.3d at 811–12.

⁶⁸ *Id.*

Development Co. v. Smith-Southwest Indus., Inc.,⁶⁹ the Court held that a landowner was prohibited from *negligently* pumping groundwater in a manner that would cause subsidence.⁷⁰ The Court's ruling, which was expressly made prospective in its application, had no effect on the proposition that the landowner owned the groundwater beneath his property, *i.e.*, Absolute Ownership continues to be the rule of land in Texas.⁷¹

In 1983, the Court relied upon its decision in *East* to hold that the Public Utility Commission of Texas (the PUC) lacked jurisdiction to regulate a city's production of groundwater for a lawful purpose.⁷² The Court did not address of the ownership of the groundwater in question.⁷³ Instead, the Court "piggybacked" the "absolute ownership theory" of groundwater adopted in *East*,⁷⁴ with the proposition of law that "[a]gencies [such as the PUC] may only exercise those powers granted by statute, together with those necessarily implied from the statutory authority conferred or duties imposed."⁷⁵

Noting that the Texas Water Code "is the sole source of statutory regulation of groundwater production,"⁷⁶ the Court concluded that the PUC had no power, express or implied, "to regulate groundwater production or adjudicate correlative groundwater rights."⁷⁷ Accordingly, the Court held that the PUC had "no jurisdiction" over the City of Sherman's production of groundwater.⁷⁸

In 1996, the Texas Supreme Court side-stepped a confrontation with the issue of whether to continue to recognize the *East* holding, as well as address challenges to the specific question of the landowner's vested rights in the groundwater beneath the surface of their property and the application of the Rule of Capture,⁷⁹ in *Barshop v. Medina County Underground Conservation District*.⁸⁰ Determining that the issue presented was a facial challenge to the constitutionality of the 1993 legislation creating the Edwards Aquifer Authority (EAA),⁸¹ the Court concluded that the question "was *not* presented to the Court."⁸² In *Barshop* the Court limited its ruling to upholding the constitutionality of the legislation creating the EAA.⁸³ The Court reserved the question of ownership of the groundwater, at least in the context of the EAA, for a case in which

⁶⁹ 576 S.W.2d 21 (Tex. 1978).

⁷⁰ *Id.* at 30.

⁷¹ *Id.* at 32.

⁷² *Sherman*, 643 S.W.2d 681, 686 (Tex. 1983).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *Stauffer v. City of San Antonio*, 344 S.W.2d 158, 160 (Tex. 1961)).

⁷⁶ *Id.* (citing former TEXAS WATER CODE ANN. §§ 52.001-.002, *codified at* TEXAS WATER CODE ANN. §§ 36.001-.002).

⁷⁷ *Sherman*, 643 S.W.2d at 686.

⁷⁸ *Id.*

⁷⁹ *Barshop*, 925 S.W.2d 618, 630-31 (Tex. 1996).

⁸⁰ 925 S.W.2d 618 (Tex. 1996).

⁸¹ *See id.* at 630-31.

⁸² *Id.*

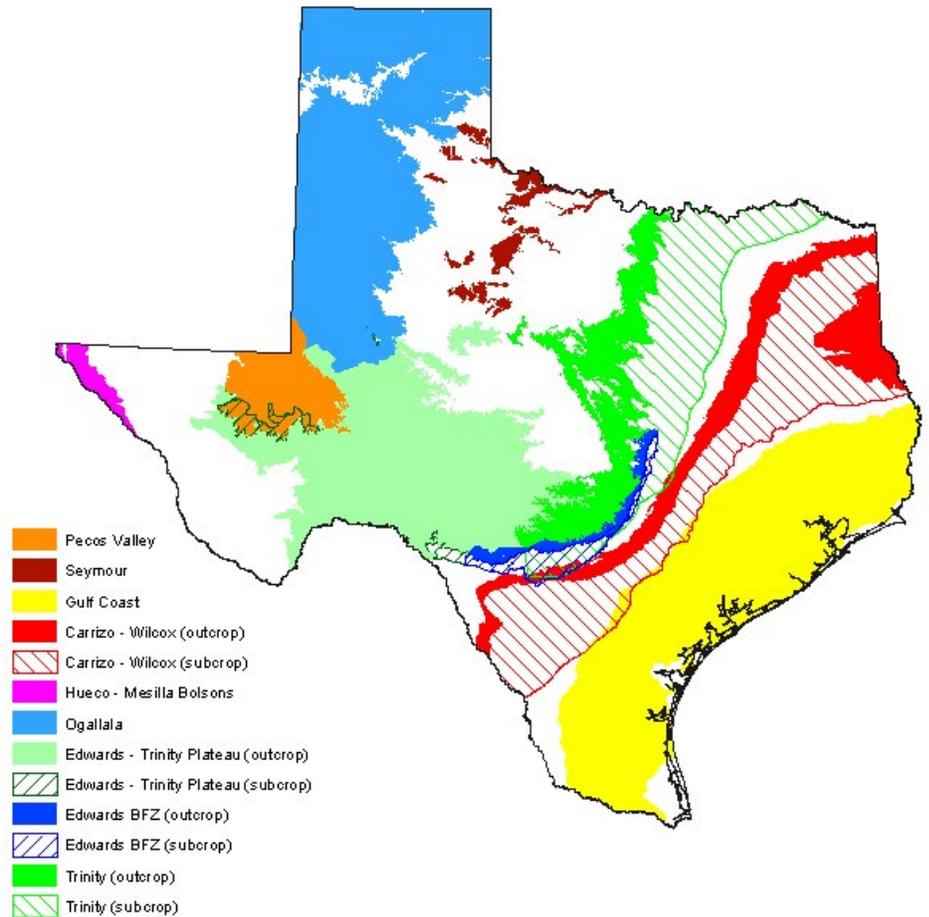
⁸³ *Id.* *See generally* Act of May 30, 1993, 73rd Leg. R.S., Ch. 626, 1993 Tex. Gen. Laws 2350.

the “application” of the EAA Act resulted in allegations of a “taking” of a landowner’s groundwater.⁸⁴

The *Barshop* case grew out of drought conditions plaguing Texas similar to, though not as drastic as, those leading up to the 1950s decision.⁸⁵ Drought conditions and a booming population combined during the 1990s to highlight both the existing and looming water supply shortages around the state.

One of the first and largest modern-day “battle fronts” over groundwater arose in San Antonio. The Alamo City relied upon the Edwards Aquifer in central Texas as its primary water supply for then approximately 1.8 million Texans. The multi-year litigation over the pumping and use of the Edwards Aquifer involved the threatened impact of aquifer pumping on several endangered species dependent upon the aquifer and the flows discharged at Comal and San Marcos Springs.⁸⁶ The prospect of federal regulation of the aquifer resulting from the litigation led the Legislature to enact the Edwards Aquifer Authority Act and create the Edwards Aquifer Authority.⁸⁷

The EAA Act imposed a cap on the annual volume of groundwater that could be pumped



Map of Texas’s aquifers.⁸⁸

⁸⁴ *Barshop*, 925 S.W.2d at 625–26.

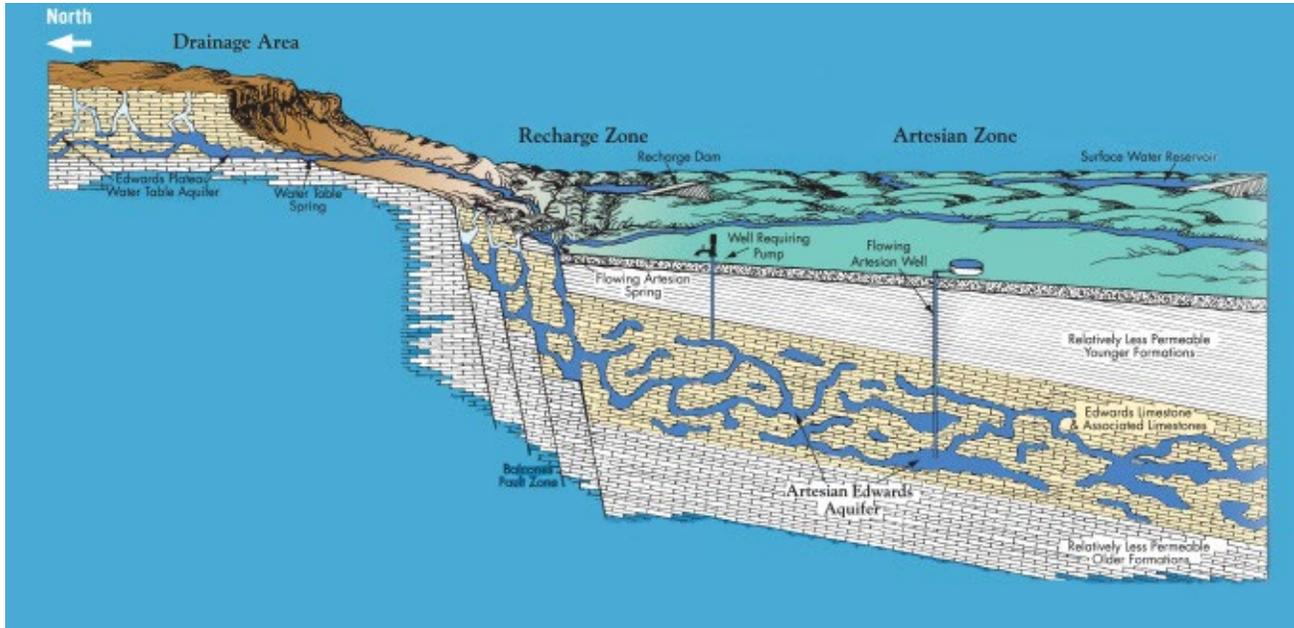
⁸⁵ *Compare Barshop*, 925 S.W.2d at 630–31 with *City of Corpus Christi*, 154 Tex. at 294, 276 S.W.2d at 801.

⁸⁶ See generally Todd H. Votteler, *Raiders of the Lost Aquifer? Or, the Beginning of the End to Fifty Years of Conflict over the Texas Edwards Aquifer*, 15 TUL. ENVTL. L.J. 257 (2002); Todd H. Votteler, *The Little Fish That Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide over the Texas Edwards Aquifer*, 28 ENVTL. L. 845 (1998).

⁸⁷ Acts of 1993, 73rd Leg., R.S., Ch. 626, 1993 TEX. GEN. LAWS 2350 (referred to herein as the EAA Act). See generally, Votteler, *Raiders of the Lost Aquifer?*; Votteler, *Little Fish That Roared*.

⁸⁸ This map of Texas’s aquifers is found in the Texas Water Development Board’s online Aquifers of Texas report. See Peter G. George, Ph.D., P.G., Robert E. Mace, Ph.D., P.G., and Rima Petrossian, *Aquifers of Texas*, Texas Water Development Board Report No. 380 2011, P.G. http://www.twdb.texas.gov/publications/reports/numbered_reports/doc/R380_AquifersofTexas.pdf?d=16492.190000000002.

from the Edwards Aquifer.⁸⁹ It also mandated that in order for a landowner to be allowed to pump water from the aquifer beneath his property that a permit be obtained from the EAA.⁹⁰



The Edwards Aquifer is a geologically complex feature stretching across the Hill Country from San Marcos to Brackettville, as reflected in the U.S. Geological Survey map above.⁹¹

The constitutionality of the EAA's enabling legislation was challenged in *Barshop*⁹² by landowners within the EAA's jurisdiction and the Medina County Underground Water Conservation District on the basis that the EAA Act violated a landowner's right to withdraw groundwater from beneath his property. As the EAA had never acted to limit, or otherwise restrict, any landowner's pumping from the aquifer at the time the suit was brought, the Supreme Court interpreted the litigation as a "facial challenge" to the constitutionality of the EAA Act.⁹³

The Court determined that the Act was, on its face, "constitutional," and reserved the question of whether the implementation of its authority to issue permits and actually restrict, or prohibit, a landowner's pumping constituted an unconstitutional "taking."⁹⁴ In limiting the scope of its 1996 decision, the Court postponed addressing the alleged conflict between the "Rule of Capture" and the state's exercise of "Police Powers" through the EAA Act.⁹⁵

Three years later, in *Sipriano*,⁹⁶ the Supreme Court confronted a direct challenge to its

⁸⁹ Act of May 30, 1993, 73rd Leg. R.S., Ch. 626, 1993 Tex. Gen. Laws 2350.

⁹⁰ *Id.* (the EAA Act has been amended on multiple occasions. Complete citation to the Act, as amended, and more information about its history can be found on the EAA's website: www.edwardsaquifer.org/legislation-and-policy). See *Barshop*, 925 S.W.2d at 618.

⁹¹ See *Texas Hill Country Water Resources*, Meadows Center for Water and the Environment, USGS Report No. 94-4093, in Texas State University, <http://txhillcountrywater.wp.txstate.edu/groundwater/edwards-hydrologic-geology/>.

⁹² 925 S.W.2d 618.

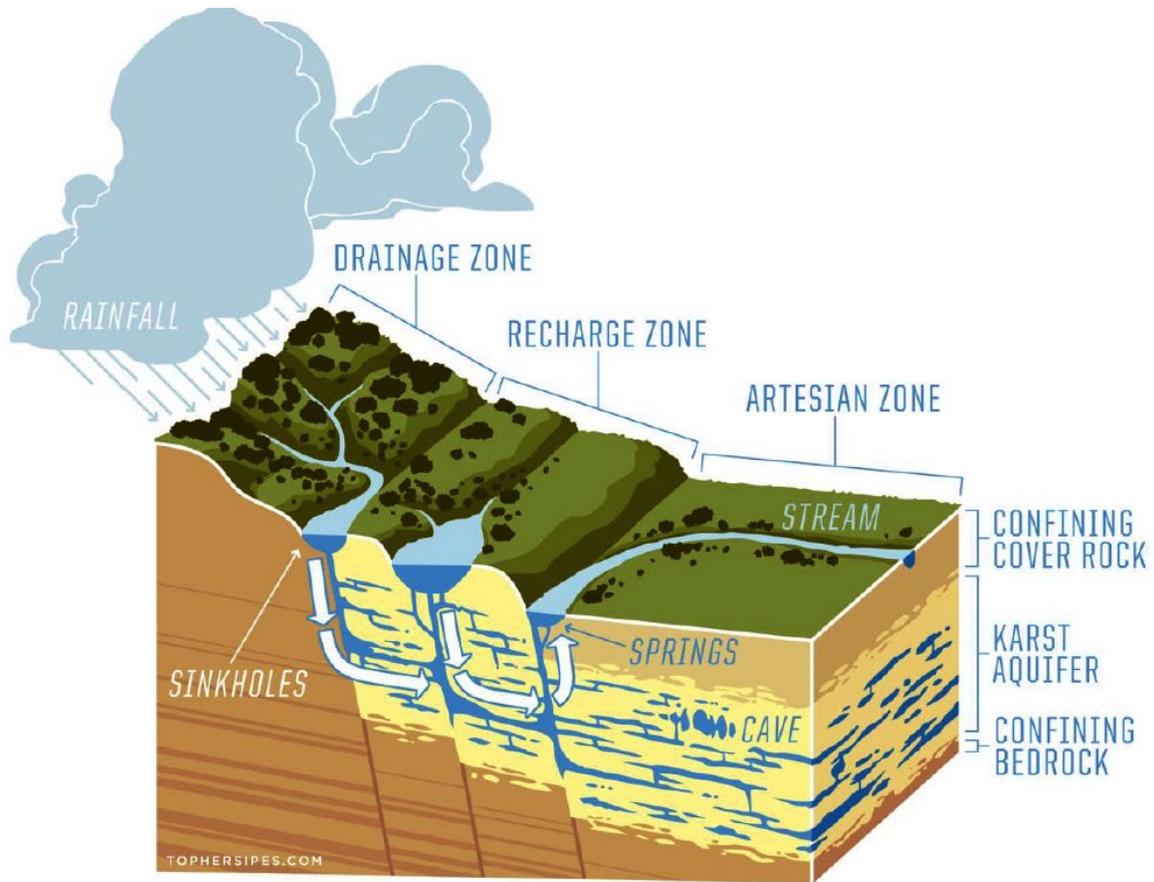
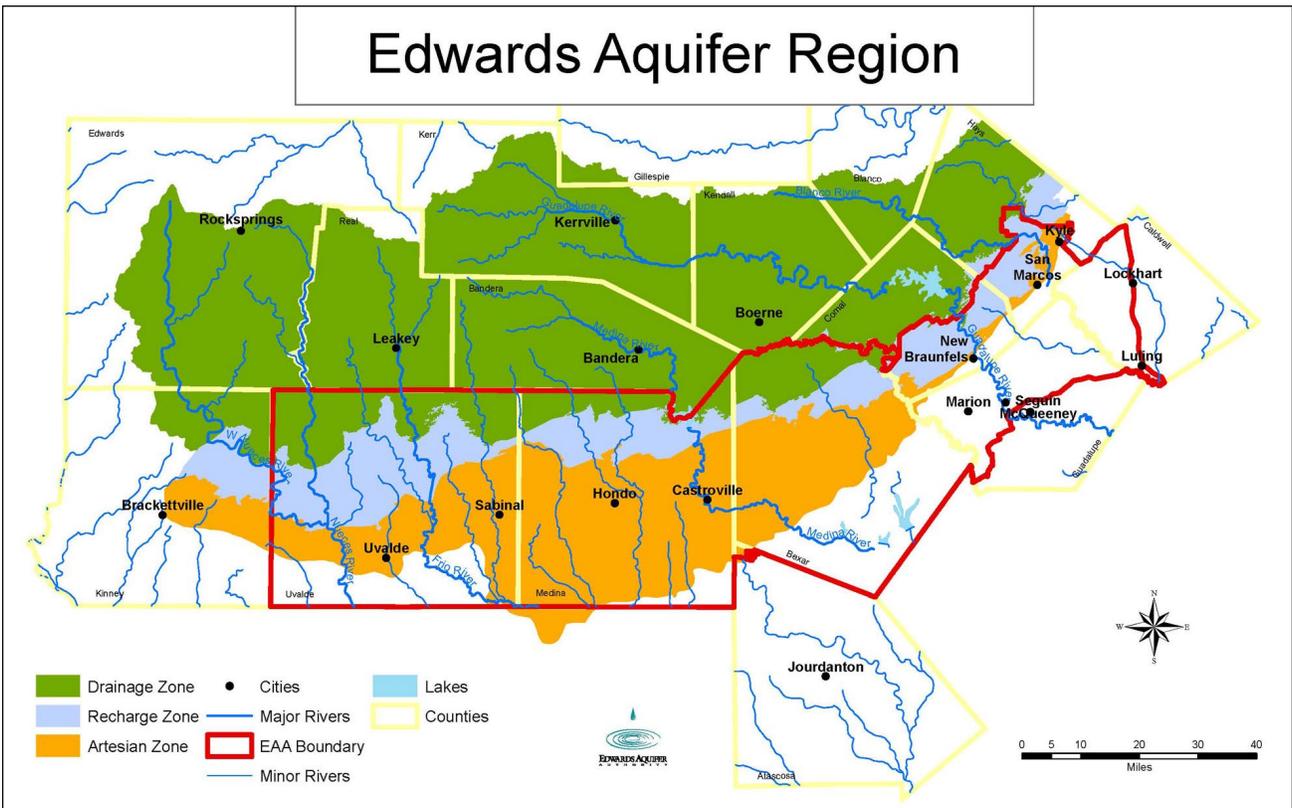
⁹³ *Id.* at 623.

⁹⁴ *Id.* at 626.

⁹⁵ *Id.* See generally Drummond, et al., *Still So Misunderstood*, at 69–70.

⁹⁶ *Sipriano*, 1 S.W.3d 75 (Tex. 1999). This case is often referred to as the *Ozarka* case.

Edwards Aquifer Region



This map and water-flow diagram depict the scale and geologic structure of the Edwards Aquifer.⁹⁷

⁹⁷ See Texas Hill Country Water Resources.

continued reliance on the Rule of Capture in Texas.⁹⁸ Landowners filed suit for damages alleging that Ozarka, which installed wells to support a bottling plant that produced approximately 90,000 gallons of water a day “24/7,” had negligently drained their groundwater. The trial court granted summary judgment for Ozarka on the basis of the Rule of Capture. In a split decision the Supreme Court upheld, for then, the Rule of Capture adopted by the *East Court* in 1904. In doing so, the Court reaffirmed the position it had taken in its 1955 *City of Corpus Christi* decision:⁹⁹ “By constitutional amendment, Texas voters made groundwater regulation a duty of the Legislature.”¹⁰⁰

In a strongly worded concurring opinion, then Justice Nathan Hecht reiterated the Legislature’s position that “[g]roundwater conservation districts . . . are the state’s preferred method of groundwater management,”¹⁰¹ and made clear that the Court was prepared to act if the Legislature did not. Writing for the Court majority, Justice Craig Enoch admonished that, “We do not shy away from change when it is appropriate.”¹⁰² In his concurring opinion, Justice Hecht built upon that foundation, writing: “I agree with the Court [majority] that it would be inappropriate to disrupt the process created and encouraged by the 1997 legislation before they have had a chance to work. *I concur in the view that, for now—but I think only for now—East should not be overruled.*”¹⁰³

In a footnote to his *Sipriano* concurring opinion,¹⁰⁴ Justice Hecht may have foreshadowed his position in more recent opinions authored as Chief Justice.¹⁰⁵ Among other treatises, Justice Hecht cited to a law review article discussing the application to Texas’s more mature body of oil and gas jurisprudence as a possible source of law to apply to groundwater issues.¹⁰⁶

Two years after *Sipriano*, the Legislature amended Texas Water Code Section 36.002,¹⁰⁷ purportedly modifying the State’s policy on ownership of groundwater to further empower groundwater districts:

The ownership and rights of the owners of the land ... in groundwater are hereby recognized, and nothing in this Code shall be construed as depriving or divesting the

⁹⁸ *Id.* (“We are asked today whether Texas should abandon this rule [of capture] for the rule of reasonable use, which would limit the common-law right of a surface owner to take water from a common reservoir by imposing liability on landowners who “unreasonably” use groundwater to their neighbors’ detriment”).

⁹⁹ *City of Corpus Christi*, 154 Tex. at 294, 276 S.W.2d at 801.

¹⁰⁰ *Sipriano*, 1 S.W.3d at 80; see TEX. CONST. Art. XVI, § 59.

¹⁰¹ *Sipriano*, 1 S.W.3d at 79 (citing TEXAS WATER CODE ANN. § 36.0015).

¹⁰² *Id.* at 80.

¹⁰³ *Id.* at 83 (Hecht, J., concurring) (emphasis added).

¹⁰⁴ *Id.* at 82 and 82 n. 17 (Hecht, J., concurring) (citing Robert McClesky, Comment, *Maybe Oil and Water Should Mix—At Least in Texas Law: An Analysis of Current Problems with Texas Groundwater Law and How Established Oil and Gas Law Could Provide Appropriate Solutions*, 1 TEX. WESLEYAN L. REV. 207 (1994)).

¹⁰⁵ *Id.*; see *Day*, 369 S.W.3d at 829–30; *Coyote Lake Ranch LLC v. City of Lubbock*, 498 S.W.3d 53, 558–59 (Tex. 2015). See generally Marvin W. Jones & C. Brantley Jones, *The Evolving Legacy of EEA v. Day: Toward and Effective State Plan*, 68 BAYLOR L. REV. 765, 778–83 (2016).

¹⁰⁶ *Sipriano*, 1 S.W.3d at 82 n. 17 (citing McClesky, Comment, *Maybe Oil and Water Should Mix*).

¹⁰⁷ TEXAS WATER CODE ANN.

owners ... of the ownership or rights, *except as those rights may be limited or altered by rules promulgated by a [groundwater] district.*¹⁰⁸

The broad interpretation being given to the underscored language by some groundwater districts has resulted in the mindset that groundwater districts can adopt any rules they desire to restrict the production and/or use of groundwater until they are told otherwise at the courthouse. The lack of additional appellate decisions on groundwater for another decade would further fuel the districts' position that they could exercise broad rulemaking authority.

In 2002, the Court avoided tackling the issue of groundwater ownership and regulation again, when it found that a claimed "taking" by the EAA was not yet "ripe" for adjudication.¹⁰⁹

Landowner's rights related to the ownership of the groundwater were further refined by the El Paso Court of Appeals in *Pecos County WCID No. 1 v. Williams*,¹¹⁰ commonly known as the "Comanche Springs" case. At issue was the complaint by the Pecos County Water Control and Improvement District, which owned permits for surface water rights downstream of Comanche Springs, that the large volume of groundwater pumped for irrigation in an area west of Fort Stockton known as the Leon Belding area was causing the springs to stop flowing to their detriment.

Despite complaints by the downstream Water Control and Improvement District of harm based upon the alleged loss of surface water for irrigation supply from the spring flows of Comanche Springs, the Court upheld the landowner's right to pump the groundwater for beneficial use notwithstanding the detriment to adjacent or downstream landowners. In making its ruling, the El Paso court relied upon the Texas Supreme Court's ruling in *East and Burkett* that the surface landowner had absolute ownership of the water beneath his land.¹¹¹ The El Paso court further held that there were no "correlative rights" in the groundwater for the benefit of downstream landowners.¹¹²

Approximately ten years after the Court's *Friendswood* decision,¹¹³ the Austin Court of Appeals reconfirmed the sweeping application of both the Rule of Capture and the Rule of Absolute Ownership as developed in the lineage of the Supreme Court's ruling¹¹⁴ in *Denis v. Kickapoo Land Co.*¹¹⁵ In *Kickapoo*, the Austin Court of Appeals upheld a landowner's right to capture groundwater before it reached the surface at a spring opening and, thereafter, to flow the same downstream to a place of beneficial use. The Court of Appeals observed that "[w]hen squarely faced with the issue, the Supreme Court has consistently adhered to the

¹⁰⁸ *Id.* at § 36.002 (emphasis added).

¹⁰⁹ *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002).

¹¹⁰ *See Pecos County*, 271 S.W.2d at 505.

¹¹¹ *Id.* at 506. *See generally* W. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS, 560–85 (1961).

¹¹² *Pecos County*, 271 S.W.2d at 505.

¹¹³ *Friendswood*, 576 S.W.2d at 21.

¹¹⁴ *See Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. Civ. App.—Austin 1989, writ denied).

¹¹⁵ *Id.*

English rule [*i.e.*, the Absolute Ownership Rule].”¹¹⁶

In 2011 the Legislature narrowed the powers granted to groundwater districts, and declared the ownership of and property rights in groundwater in place with the passage of Senate Bill 332.¹¹⁷ In SB 332 the Legislature mandated that nothing in Chapter 36 of the Texas Water Code was intended to be construed as a granting of authority to groundwater districts “to deprive or divest a landowner, including a landowner’s lessees, heirs or assigns, of the groundwater ownership and rights described in this Section [36.002].”¹¹⁸ The next year, 2012, a decade after its initial ruling in the *Bragg* case, the Texas Supreme Court issued its landmark decision in *Day* confirming the landowner’s constitutionally protected property rights in the groundwater beneath his property.¹¹⁹

In 2016, operational conflicts and disputes about the Accommodation Doctrine in the groundwater context came to center stage in *City of Lubbock v. Coyote Lake Ranch LLC*.¹²⁰ The key facts precipitating the conflict in the *Coyote Lake* case were as follows:

- In 1953 the City purchased the groundwater rights associated with the land now owned by the developer, Coyote Lake Ranch LLC.
- The 1953 deed conveyed to the City all rights to groundwater beneath the property.
- The 1953 deed gave the City the right to drill wells to explore for and produce the groundwater beneath the property at any time and at any location on the property.
- The 1953 deed gave the City blanket easements and rights across property for purposes of locating pipelines and associated groundwater development infrastructure including booster pumps, and treatment and storage facilities.¹²¹

The surface owner, Coyote Lake Ranch LLC, which operated a large cattle operation, sought to enjoin the City’s exercise of these broad and express rights in 2012 when the City mobilized to commence drilling and construction of a well field to produce groundwater on the property for the first time. The trial court granted the injunction against the City. The City immediately filed an accelerated appeal to the Amarillo Court of Appeals, which sustained the City’s point that the trial court had abused its jurisdiction in applying the Accommodation Doctrine.¹²²

The Supreme Court confirmed that the Accommodation Doctrine did apply to

¹¹⁶ *Id.* at 238.

¹¹⁷ See Acts of 2011, 82nd Leg. R.S. Ch. 1207, § 1, 2011 TEX. GEN. LAWS 3224 (SB 332 is codified as TEX. WATER CODE ANN. § 36.002).

¹¹⁸ TEX. WATER CODE ANN. § 36.002.

¹¹⁹ *Day*, 369 S.W.3d at 817.

¹²⁰ 440 S.W.3d 267 (Tex. App.—Amarillo 2014), rev’d, 498 S.W.3d 53 (Tex. 2016).

¹²¹ *Id.* at 270.

¹²² *Id.*

groundwater,¹²³ and noted that the groundwater estate, like the mineral estate, could be severed by the landowner from the surface estate and conveyed separately.¹²⁴ This act of severance gives rise to an implied right in favor of the groundwater owner, like the mineral estate owner, to use as much as the surface estate as reasonably necessary to use, produce, and remove the groundwater (or minerals).¹²⁵ The Court explained that, “in the law of servitudes, the mineral estate is dominant and the surface estate ‘servient,’ not because the mineral estate is in some sense superior, but because it receives the benefit of the implied right of use of the surface estate.”¹²⁶

The characteristic composition of the severed subsurface estate, whether mineral or groundwater, was not the key factor in determining the rights, duties, and obligations between the owners of the surface and subsurface estates, the Supreme Court held. In reaching its conclusion, the Court noted:

Groundwater and minerals both exist in subterranean reservoirs in which they are fugacious. An interest in groundwater can be severed from the land as a separate estate, just as an interest in minerals can be. A severed groundwater estate has the right to use the surface that a severed mineral estate does. Both groundwater and mineral estates are subject to the rule of capture. And both are protected from waste.¹²⁷

The Court noted that: “[c]ommon law rules governing mineral and groundwater estates are not merely similar; they are drawn from each other or from the same source.”¹²⁸ The Court’s decision in *Coyote Lake Ranch* carries far-reaching implications. In *Day*, the Court concluded that “groundwater is owned in place by the landowner, in part analogizing to oil and gas, which we have long held is owned in place by the landowner.”¹²⁹ Yet in *Coyote Lake Ranch* the Court opined:

Analogizing groundwater to minerals in determining the applicability of the accommodation doctrine is no less valid than it is in determining ownership. Common law rules governing mineral and groundwater estates are not merely similar; they are drawn from each other or from the same source.¹³⁰

The *Coyote Lake Ranch* decision brings to a total of less than a dozen times the Court has been required to render a significant decision focused on groundwater, its use and/or ownership, the Rule of Capture and the Legislature’s modification of the Common Law rule

¹²³ *Coyote Lake Ranch LLC v. City of Lubbock*, 498 S.W.3d 53, 55 (Tex. 2016) (hereinafter *Coyote Lake Ranch LLC*).

¹²⁴ *Id.* at 63.

¹²⁵ *Id.*

¹²⁶ *Id.* at 63–64.

¹²⁷ *Id.*

¹²⁸ *Id.* at 64.

¹²⁹ *Day*, 369 S.W.3d at 823. See *Coyote Lake Ranch LLC*, 498 S.W.3d at 64. See generally Marvin W. Jones & C. Brantley Jones, *The Evolving Legacy of EEA v Day: Toward an Effective State Plan*, 68 BAYLOR L. REV. 765 (2016).

¹³⁰ *Coyote Lake Ranch LLC*, 498 S.W.3d at 64.

through regulation by groundwater districts in the century following *East*.¹³¹ Essentially, the Court recognized that the similarities in the physical properties and legal standing of the mineral and groundwater estates require that, when applicable, concepts from oil and gas law should inform the resolution of groundwater disputes.¹³² Going forward, the application of oil and gas law to groundwater disputes will inevitably lead to challenges to groundwater regulatory regimes that afford differing treatment to groundwater owners in the same aquifer.¹³³

Applying Oil and Gas Jurisprudence to Texas Groundwater

The profound impact that oil and gas exploration and production has had on Texas leaves Texans with the impression that the industry and the jurisprudence related to it have been with us since the days of the Republic. While the Constitution of 1836 released and relinquished mineral rights to the “owners of the soil,” it was not until the 1900s that litigation began reaching the courts about the rights of landowners to the oil and gas in place.¹³⁴ In fact, it was not until 1915 that the Texas Supreme Court adopted the Absolute Ownership Rule a/k/a the Rule of Capture with respect to a landowner’s rights in the oil and gas beneath his or her property.¹³⁵

In *Texas Company v. Daugherty*,¹³⁶ over a decade after the Court adopted the Rule of Capture and Absolute Ownership Rule relating to groundwater in *East*,¹³⁷ the Court confronted arguments of the “fugitive nature or vagrant habit—the disposition to wander or percolate” of oil and gas beneath the ground as the basis for denying the surface owner any property right in the

¹³¹ *Coyote Lake LLC v. Lubbock*, 498 S.W.3d 53 (Tex. 2016); *EAA v. Day*, 369 S.W.3d 814 (Tex. 2012); *Guitar v. Hudspeth County UWCD No. 1*, 263 S.W.3d 910 (Tex. 2008); *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002); *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75, 83 (Tex. 1999); *Barshop v. Medina County UWCD*, 925 S.W.2d 618, (Tex. 1996); *City of Sherman v. Pub. Util. Comm’n of Tex.*, 643 S.W.2d 681 (Tex. 1983); *Friendswood Development Co. v. Smith-S.W. Industries, Inc.*, 576 S.W.2d. 21 (Tex. 1978); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955); *Texas Company v. Burkett*, 117 Tex. 16, 296 S.W. 273 (1927); *Houston & Texas Central Railway Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904); *cf.*, *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, 291 S.W.3d 392 (Tex. 2009) (case focused on the effective date of the Court’s decision on the constitutionality of the Edwards Aquifer Authority Act and the impacts on filing deadlines for Initial Regular Permits).

¹³² *Coyote Lake Ranch LLC*, 498 S.W.3d at 64. *See generally* Marvin W. Jones & C. Brantley Jones, *The Evolving Legacy of EEA v. Day: Toward and Effective State Plan*, 68 BAYLOR L. REV. 765, 794-95 (2016); *see also* Marvin W. Jones & Andrew Little, *The Ownership of Groundwater in Texas: A Contrived Battle for State Control of Groundwater*, 61 BAYLOR L. REV. 578 (2016).

¹³³ *See Marrs v. Railroad Commission*, 177 S.W.2d 941, 948 (Tex. 1944). *See generally* Marvin W. Jones & C. Brantley Jones, *The Evolving Legacy of EEA v. Day: Toward and Effective State Plan*, 68 BAYLOR L. REV. 765, 783-90 (2016). Likewise, the decision in *Eliff v. Texon Drilling Co.*, 210 S.W.2d 558 (Tex. 1948) can be used to argue that every groundwater rights owner should be afforded a fair opportunity to produce his fair share of the groundwater. *Cf.*, *Day*, 369 S.W.3d at 830 (“one purpose of the EAAA’s regulatory provisions is to afford landowners their fair share of the groundwater beneath their property” citing *Eliff*). Because the Railroad Commission rules (specifically Rule 37) are geared toward the prevention of confiscation (drainage without compensation), the many Rule 37 cases provide useful guidance for future disputes regarding spacing, production limits and even Desired Future Conditions.

¹³⁴ *See* RICHARD W. HEMINGWAY, *THE LAW OF OIL AND GAS* 26–34 (1991 3rd Ed.).

¹³⁵ *Texas Co. v. Daugherty*, 176 S.W. 717, 720 (Tex. 1915); *see generally* HEMINGWAY, *LAW OF OIL AND GAS* at 29–30; STATE BAR OF TEXAS, *SELECTED WORKS OF A.W. WALKER, JR.*, Chapter 1, at 2 (2001).

¹³⁶ 176 S.W. 717 (Tex. 1915).

¹³⁷ 81 S.W. 279 (1904).

substances *in situ*.¹³⁸ The Court went to great length in the *Daugherty* case to explain the flaws in the arguments proffered (1) supporting the position that there could be no property right because they were incapable of absolute ownership until captured and reduced to possession, and (2) analogizing the ownership of oil and gas in place beneath the surface of the ground to that of “things *ferae naturae*.”¹³⁹



The Rule of Capture compares Texas groundwater to *ferae naturae*, “wild animals,” most frequently analogized as foxes in their natural environment.¹⁴¹

The *Daugherty* Court opined that the purchaser of the oil and gas in the ground “assumes the hazard of their absence through the possibility of their escape from beneath that particular tract of land...”¹⁴⁰ If there is no oil and gas discovered in the ground, either because it escaped or was never present, the Court analogized the “absence” to be no different from the risk that the purchaser of land looking to mine a solid mineral from the land assumes if he discovers “it does not exist.”¹⁴² The Court then posed the following three questions:

- 1) Conceding that they [oil and gas] are fluid in their nature and may depart from the land before brought into absolute possession, will it be denied that so long as they [oil and gas] have not departed they [the oil and gas] are a part of the land?
- 2) Or when conveyed in their natural state and they [oil and gas] are in fact beneath the particular tract, that their grant amounts to an interest in the land?
- 3) [H]ow does that possibility alter the character of the property interest which they [oil and gas] constitute while in place beneath the land?

The *Daugherty* Court’s collective answer to these three questions was as follows:

The argument [against the landowner possessing a property right in the oil and gas in place] ignores the equal possibility of their [oil and gas] presence, and that the parties have contracted upon the latter assumption; and if they [oil and gas] are in place beneath the tract, they are essentially a part of the realty, and their grant,

¹³⁸ *Texas Company v. Daugherty*, 176 S.W. at 719.

¹³⁹ *Id.*

¹⁴⁰ *Texas Company v. Daugherty*, 176 S.W. at 719.

¹⁴¹ Wild Island fox pair, U.S. National Park Service, Wikimedia Commons, https://commons.wikimedia.org/wiki/File:Urocyon_littoralis_pair.jpg.

¹⁴² *Texas Company v. Daugherty*, 176 S.W. at 719–20.

therefore, while in that condition, if effectual at all, is a grant of an interest in the realty.

The Court's analysis can be summarized as follows:

If the oil and gas that are the subject of the conveyance are not, in fact, beneath the land and, therefore, are not capable of being reduced to possession then the conveyance is of no effect. If the oil and gas have not departed, however, they are a part of the realty and the conveyance of them in place is the conveyance of an interest in real property.¹⁴³

The Texas Supreme Court concluded in *Daugherty* that oil and gas, while in the ground, "constitute a property interest."¹⁴⁴ Since *Daugherty*, the Court has adhered to the Absolute Ownership Rule with respect to the surface landowner's property interest in oil and gas in place.¹⁴⁵ In August 2008, the Supreme Court reaffirmed its reliance on the Rule of Capture in oil and gas jurisprudence in *Coastal Oil and Gas Co. v. Garza*.¹⁴⁶ Justice Hecht, author of the majority opinion in *Coastal Oil*, wrote that, "The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation."¹⁴⁷ In support of that declaration, Justice Hecht cited a treatise, *The Texas Law of Oil and Gas*: "The rule of capture may be the most important single doctrine of oil and gas law."¹⁴⁸

A landowner may sever the oil and gas estate, either by a conveyance of the oil and gas estate, or by conveyance of the surface realty reserving or excepting from the conveyance the oil and gas estate.¹⁴⁹ In their severed states, the oil and gas estate is considered to be the "dominant estate" and the surface the "servient estate."¹⁵⁰ As the dominant estate, the owner of the oil and gas estate, in the absence of some express restriction or limitation to the contrary, is entitled to use as much of the premises of the surface estate as is "reasonably necessary to effectuate the purpose of the [oil and gas] lease."¹⁵¹ This includes the right to use water from the leased premises, *i.e.*, the groundwater in place beneath the surface.¹⁵²

Although the Supreme Court adopted the Absolute Ownership Rule in *East*, some years

¹⁴³ *Id.* at 720.

¹⁴⁴ *Id.* See generally 719–21.

¹⁴⁵ *Coastal O&G v. Garza*, 268 S.W.3d 1 (Tex. 2008); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W.290 (Tex. 1923); *cf.*, *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1998) ("A royalty interest is an interest in real property that is a distinct part of the mineral estate"); see generally SELECTED WORKS OF A.W. WALKER, JR., *supra*, at Chapter 1, p. 2.

¹⁴⁶ 268 S.W.3d 1 (2008).

¹⁴⁷ *Id.* at 13 n.38.

¹⁴⁸ E. Smith & J. Weaver, TEXAS LAW OF OIL & GAS, § 1.1(A) (2d ed. 1998); see *Coastal O&G*, 368 S.W.3d *supra* at 13 n.38.

¹⁴⁹ *Humphreys-Mexia Co. v. Gammon*, 254 S.W.296, 302 (1923). See generally, Richard W. Hemingway, at 30–31 in SELECTED WORKS OF A.W. WALKER, JR., Chapter 1, at 3.

¹⁵⁰ *Whitaker*, 483 S.W.2d at 810–11.

¹⁵¹ *Id.*

¹⁵² *Id.* at 811.

before it did so with respect to oil and gas in *Daugherty*,¹⁵³ jurisprudence in Texas surrounding oil and gas has grown and evolved much quicker than it has with respect to groundwater. The invention of the internal combustion engine in the late 1800s, Henry Ford's introduction of the Model T in 1908, and Ford's subsequent development of the "assembly line" that facilitated the mass production of automobiles created a huge increase in the demand for oil and other petroleum products.¹⁵⁴ The resulting social, cultural, and economic impacts on society helped promote an increase in the litigation of issues dealing with the exploration, development, and ownership of oil and gas.

Conclusion

The old saying "oil and water don't mix" is not precisely correct. It does signal the fact that despite the multiple similarities between the characteristics and circumstances of the two substances,¹⁵⁵ it should not be taken as a "given" that the same legal analysis will be applicable to every dispute arising under analogous fact situations.¹⁵⁶ Until we have more reported groundwater decisions by Texas's appellate courts,¹⁵⁷ or further express guidance from the Legislature,¹⁵⁸ practitioners will be well served to heed the guidance from the Court's most recent opinions¹⁵⁹ and look to the potential use of both the terms and conditions and the principles from Texas's oil and gas jurisprudence in their groundwater transactions.¹⁶⁰

¹⁵³ Compare 81 S.W. 279 (Tex. 1904) with 176 S.W. 719 (Tex. 1915).

¹⁵⁴ See generally Hemingway, LAW OF OIL AND GAS at 2. See also Kirk Kite, "Highway Development," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/erh02>.

¹⁵⁵ *Coyote Lake Ranch LLC*, 498 S.W.3d at 58 & n.12 (citing *Day* for the proposition that "the similarities between groundwater and minerals require consistent rules of ownership").

¹⁵⁶ *Id.* (Boyd, J., concurring) (observing that "the key to the Court's holding is that the accommodation doctrine only applies to groundwater rights—just as it only applies to mineral rights—when the parties' dispute is not governed by the express terms of the parties' agreement").

¹⁵⁷ See footnote 131, *supra*.

¹⁵⁸ *Sipriano*, 1 S.W.3d at 80; *City of Corpus Christi*, 154 Tex. at 294, 276 S.W.2d at 801; see TEX. CONST. Art. XVI, § 59.

¹⁵⁹ *Coyote Lake Ranch LLC*, 498 S.W.3d at 63–64; *Day*, 369 S.W.3d at 825–36.

¹⁶⁰ *Id.* See generally Marvin W. Jones & C. Brantley Jones, *The Evolving Legacy of EEA v. Day: Toward an Effective State Plan*, 68 BAYLOR L. REV. 765, 794–95 (2016); see also Marvin W. Jones & Andrew Little, *The Ownership of Groundwater in Texas: A Contrived Battle for State Control of Groundwater*, 61 BAYLOR L. REV. 578 (2016).



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Texas Groundwater Law from Its Origins in Antiquity to Its Adoption in Modernity

By Dylan O. Drummond

Introduction¹

As Justice Oliver Wendell Holmes remarked just seven years before the Texas Supreme Court issued its opinion in *Houston & Texas Central Railroad Co. v. East*,² the “rational study of law is still to a large extent the study of history.”³ Before groundwater property rights (“ownership in place”)⁴ and tortious immunity (the “rule of capture”)⁵ were first recognized in Texas over a century ago in *East*,⁶ the underpinnings of the debate between the

¹ The author would like to extend special thanks to Professor Megan Benson, Ph.D., whose exhaustive and engaging work on the *East* case has been invaluable in drafting this article; and Robert E. Mace, Cynthia Ridgeway, John M. Sharp, Jr., Robert F. Flores, and Edward S. Angle, whose authoritative and comprehensive efforts analyzing the factual background to the *East* case, as well as compiling most of the original case materials, have been crucial to the research of this presentation. See Megan Benson, *Railroads, Water Rights and the Long Reach of Houston and Texas Central Railroad Company v. W. A. East (1904)*, 116 S.W. HIST. Q. 261 (Jan. 2013) [hereinafter *Long Reach*]; Robert E. Mace *et al.*, *Groundwater Is No Longer Secret and Occult—A Historical and Hydrogeologic Analysis of the East Case, in 100 Years of the Rule of Capture: From East to Groundwater Management*, TEX. WATER DEV. BD. REP. 361 (2004) [hereinafter *East Historical Analysis*].

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² 98 Tex. 146, 81 S.W. 279 (1904).

³ Hon. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (March 1897) [hereinafter *Path of the Law*]. Justice Holmes served as an Associate Justice on the United States Supreme Court for three decades from December 1902 until his retirement in January 1932. FEDERAL JUDICIAL CENTER, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES: HOLMES, OLIVER WENDELL JR., <http://www.fjc.gov/servlet/nGetInfo?jid=1082&cid=999&ctype=na&instate=na> (last visited Feb. 12, 2013).

⁴ While it used to be a matter of much dispute in Texas, it now appears settled that “a landowner owns the groundwater below the surface of the landowner’s land as real property,” TEX. WATER CODE § 36.002(a), and that such groundwater is owned in place, *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831–32 (Tex. 2012).

⁵ As the Texas Supreme Court confirmed in *Day*, the rule of capture means the same today as it did in 1904 when it was first adopted by the Court in *East*:

That the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor’s well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

Day, 369 S.W.3d at 825 (quoting *East*, 98 Tex. at 149, 81 S.W. at 280; *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843)). Put another way, the rule of capture means that “absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in doing so they deprive their neighbors of the water’s use.” *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999).

⁶ *East*, 98 Tex. at 150, 81 S.W. at 281 (quoting *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)) (relying upon ownership in place); *East*, 98 Tex. at 149, 81 S.W. at 280 (citing *Acton v. Blundell*, 152 Eng. Rep. 1223, 1230 (1843)) (relying upon the rule of capture).

two legal concepts had already raged for some 2,000 years.⁷ Because the historical formulation of these two doctrines trace a uniquely-direct lineage to the Court's decision in *East*, they bear some investigation in this historical exposition of Texas groundwater jurisprudence.

Ancient Legal Development

Although Rome was founded in 753 B.C., the first written expression of Roman law was not completed until 300 years later in 451 B.C.⁸ This first written code is referred to as the "Twelve Tables" after the twelve bronze tablets upon which it was inscribed.⁹

A few hundred years after the promulgation of the *Twelve Tables*, a system of nationally renowned jurists developed in Rome during the first century B.C. who interpreted the *Twelve Tables*, as well as edicts of Roman emperors.¹⁰ Because the writings of these jurists were drafted mainly as a critique of or in response to the Imperial edicts and the Twelve Tables, such writings were called *responsa*.¹¹ These jurists were akin to modern-day law professors except that their written legal critiques were accorded precedential weight and applied by Roman judges of the day,¹² thereby becoming legally binding in many instances.¹³

The *responsa* of these jurists were eventually collected into a single comprehensive code

⁷ See, e.g., Dylan O. Drummond, *Groundwater Ownership in Place: Fact or Fiction?* at 4–5, in UTCLE, TEXAS WATER LAW INSTITUTE (2008) [hereinafter *Fact or Fiction*]; Dylan O. Drummond, Lynn Ray Sherman, and Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 15–29 (Winter 2004) [hereinafter, *Still So Misunderstood*].

⁸ ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* 10, 13 (1970) [hereinafter *LAW OF THE ANCIENT ROMANS*]; PHARR ET AL., *THE THEODOSIAN CODE AND NOVELS AND SIRMONDIAN CONSTITUTIONS* xxiii (1952) [hereinafter [THEODOSIAN CODE]].

⁹ *LAW OF THE ANCIENT ROMANS*, at 13. A commission, charged with the task of "writing down the laws," produced the *Twelve Tables* in order to settle authoritatively many controversial cases that had arisen under the application of the unwritten, customary law of the time. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1539–40 (1995) [hereinafter *Legal Reasoning in Roman Law*]. The *Twelve Tables* were so crucial to the later development of modern property law that they have been called "the foundation of modern Western jurisprudence." Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 492–93 (1996) (quoting ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* 3 (1975)).

¹⁰ W.W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 21–23 (3d ed. 1966) [hereinafter *ROMAN LAW TEXTBOOK*]; *LAW OF THE ANCIENT ROMANS*, at 26–27.

¹¹ See *Still So Misunderstood*, 37 TEX. TECH L. REV. at 19 n.71, 21 n.91; BLACK'S LAW DICTIONARY, *Responsa Prudententium* (10th ed. 2014) (the legal opinions of leading jurists were called *responsa*).

¹² See, e.g., BLACK'S LAW DICTIONARY, *Responsa Prudententium* (10th ed. 2014) (quoting HANNIS TAYLOR, *THE SCIENCE OF JURISPRUDENCE* 90–91 (1908)) ("the *judex*, or as we would call him, the referee, might have no technical knowledge of law whatever. Under such conditions[,] the unlearned judicial magistrates naturally looked for light and leading to the *jurisconsults* who instructed them through their *responsa prudentium*, the technical name given to their opinions as experts"). At Roman law, a *judex* was a "private person appointed by a praetor or other magistrate to hear and decide a case," who was "drawn from a panel of qualified persons of standing." BLACK'S LAW DICTIONARY, *Judex* (10th ed. 2014).

¹³ During the reign of Emperor Augustus from 31 B.C. to A.D. 14., he issued the right of public *respondere* (referring to the Juristic Responses to the Imperial Edicts) to certain jurists, which made their *responsa* binding. *ROMAN LAW TEXTBOOK*, at 23. Around a century later, when jurists of equal stature would issue conflicting opinions, Emperor Hadrian settled the resulting quandary by declaring *responsa* binding only if they were in agreement with each other. *Id.* Some may argue modern-day law professors believe this to currently be the case.

some 600 years later in 533¹⁴ by the Roman Emperor Justinian¹⁵—along with previous Roman codes,¹⁶ constitutions, and Imperial edicts—called the *Digest of Justinian* (the “*Digest*”).¹⁷ As part of this monumental effort,¹⁸ a sort of legal textbook for students—not unlike a first-year law student’s casebook—called the *Institutes of Justinian* (the “*Institutes*”) was also promulgated.¹⁹ Indeed, the *Institutes* later formed the basis of much of Western jurisprudence, including being relied upon by common-law judges in England and throughout Europe,²⁰ in addition to forming the basis of Spanish mainland law.²¹

¹⁴ The *Institutes* and the *Digest* were issued on December 30, 533. LAW OF THE ANCIENT ROMANS, at 93.

¹⁵ Justinian officially became emperor in April 527, but he was forced to share his reign until the death of the former emperor (his uncle, Justin) on August 1, 527. A.M. Honore, *The Background to Justinian’s Codification*, 48 TUL. L. REV. 859, 864 (1974) [hereinafter *Justinian’s Codification*].

¹⁶ The Roman Empire split in two during the fourth century A.D. THEODOSIAN CODE, at xxiv. This schism began around 305 under the rule of the Emperor Diocletian and was finalized in 395 during the reign of Theodosius I. *Id.* Two distinct yet connected empires resulted, which were ruled from two capitals—Constantinople in the East and Rome in the West—until the fall of the Western Empire in 476. *Id.* at xxiv, xxvi. The Eastern Empire, founded by the Emperor Constantine in 330, survived until 1453 when the Turks captured Constantinople. *Id.* Theodosius II ruled the Eastern Empire from 408–50. *Id.*

Theodosius II issued a decree at Constantinople on March 26, 429 appointing a commission of nine scholars to collect and combine all of the previous imperial edicts, constitutions, and the three then-existing codes—Gregorianus, Hermogenianus, and Theodosianus—and then to publish them together in one single code. *Id.* at xvii; *Justinian’s Codification*, 48 TUL. L. REV. at 866. The Theodosian Code, as it is now known, was completed nine years later and was formally adopted by the Empire on Christmas Day 438. THEODOSIAN CODE, at xvii.

¹⁷ LAW OF THE ANCIENT ROMANS, at 92–93; ROMAN LAW TEXTBOOK, at 40–41. Through the intervening centuries, the *Digest* has sometimes been referred to as the Pandects. ROMAN LAW TEXTBOOK, at 41.

¹⁸ In February 528, Justinian appointed a ten-member commission to compile and update the many existing Imperial constitutions. *Justinian’s Codification*, 48 TUL. L. REV. at 866; LAW OF THE ANCIENT ROMANS, at 92; ROMAN LAW TEXTBOOK, at 40. This commission successfully issued a code fourteen months later in April 529, but it was replaced in 534 by a second code because the inordinate amount of legislation passed during the intervening years had already made the first code obsolete. *Justinian’s Codification*, 48 TUL. L. REV. at 866; LAW OF THE ANCIENT ROMANS, at 92–93; ROMAN LAW TEXTBOOK, at 47.

In order to draft the *Digest* and *Institutes*, Justinian gave instructions to one of his trusted legal advisors to organize another commission to accomplish the task, and the result was a sixteen-member body comprised of some of the greatest legal minds of the day. ROMAN LAW TEXTBOOK, at 41; LAW OF THE ANCIENT ROMANS, at 91. Justinian’s aim in this pursuit was not to alter or even modernize the old writings, but to conflate them and make the law less unwieldy. ROMAN LAW TEXTBOOK, at 41; LAW OF THE ANCIENT ROMANS, at 92–93. As such, Justinian instructed the commission to delete only that which was obsolete or superfluous. LAW OF THE ANCIENT ROMANS, at 92. This goal of staying true to the original texts was evidenced by the express citation to each jurist’s work in the *Digest*. *Id.* at 93. Throughout the following three years, the commission reduced some 3,000,000 lines of legal text, taken from around 2,000 separate books, to just some 150,000 lines comprised of 800,000 words eventually included in the *Digest*. *Justinian’s Codification*, 48 TUL. L. REV. at 866, 879; LAW OF THE ANCIENT ROMANS, at 92–93.

¹⁹ ROMAN LAW TEXTBOOK, at 28; LAW OF THE ANCIENT ROMANS, at 17, 93.

²⁰ See, e.g., *Acton v. Blundell*, 152 Eng. Rep. 1223, 1234 (1843) (allowing that, while “Roman law forms no rule, binding in itself, upon the subject these realms,” it has nevertheless formed the “fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe”); IV SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 221 (1926) [hereinafter HISTORY OF ENGLISH LAW] (“The text of Justinian was both the Aristotle and the Bible of the lawyers.”); ALAN WATSON, ROMAN AND COMPARATIVE LAW 167 (1991) (“[t]hroughout many centuries, when Continental lawyers had to find a ruling, they looked for it in Justinian’s Corpus Juris Civilis”) [hereinafter ROMAN AND COMPARATIVE LAW]. The *Corpus Juris Civilis* was comprised of Justinian’s *Institutes*, *Digest*, and second *Code*. Hans W. Baade, *The Historical Background of Texas Water Law: A Tribute to Jack Pope*, 18 ST. MARY’S L.J. 1, 57–87 (1986) [hereinafter *Tribute to Jack Pope*]; LAW OF THE ANCIENT ROMANS, at 93.

²¹ Harbert Davenport & J. T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 138, 157–58 (1956) (the “law as declared in the Las Siete Partidas [which governed peninsular Spain], ... was taken almost bodily from the Roman Law; and, more particularly, from the

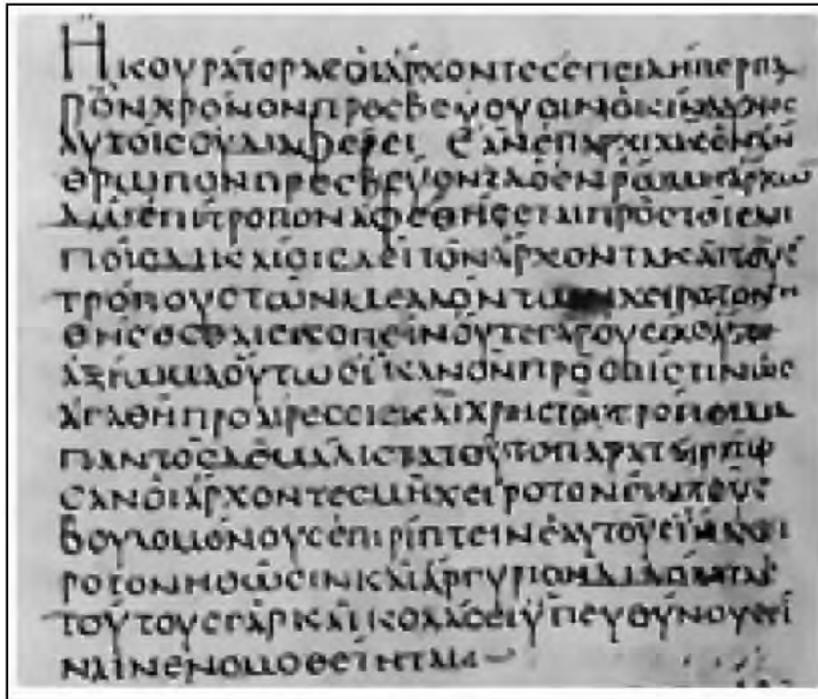


Fig. 1 – This page is from the *Pandectarum codex Florentinus*, and is the oldest existing edition of the *Digest*, copied just after its promulgation in the sixth century A.D.²²

A. Groundwater-Related Juristic Excerpts

Although several jurists wrote extensively on groundwater-law concepts,²³ only two directly influenced Texas groundwater jurisprudence: Marcellus and Ulpian.

Institutes) [hereinafter *Law of Flowing Waters*]; LAS SIETE PARTIDAS lii, liv (Samuel Parsons Scott trans., 1931); *Still So Misunderstood*, 37 TEX. TECH L. REV. at 1, 31, 31 n.196, 32; see also *State v. Balli*, 144 Tex. 195, 248, 190 S.W.2d 71, 99 (1944) (referring to the *Institutes* as the foundational text of the LAS SIETE PARTIDAS); *Valmont Plantations I*, 346 S.W.2d at 857.

²² A.D. ROMAN LEGAL TRADITION AND THE COMPILATION OF JUSTINIAN, THE ROBBINS COLLECTION, SCHOOL OF LAW (BOALT HALL), UNIVERSITY OF CALIFORNIA AT BERKELEY, <http://www.law.berkeley.edu/library/robbins/RomanLegalTradition.html#just> (last visited Feb. 27, 2013).

²³ One such jurist was Quintus Mucius, who reached the zenith of his influence during his service as Consul around 95 B.C. See *Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. at 1544; *Comparative Law*, 48 AM. J. COMP. L. at 21. He wrote that a downstream property owner would have no recourse against a spring-owner who diverts or uses the water before it reaches the downstream property owner's land. See DIG. 39.3.21 (Pomponius, *Quintus Mucius* 32) (as translated in 3 THE DIGEST OF JUSTINIAN 402 (Theodor Mommsen & Paul Krueger trans., Alan Watson ed., 1985) [hereinafter DIG.].

Pomponius was another first-century A.D. jurist who, along with Ulpian, was one of the “principal writers on water law” that appear in the *Digest*. See EUGENE F. WARE, ROMAN WATER LAW: TRANSLATED FROM THE PANDECTS OF JUSTINIAN 23 (1905) [hereinafter PANDECTS OF JUSTINIAN]. His contributions to groundwater law mainly center on his commentary describing the legal theories of Quintus Mucius Scaevola from more than a century earlier. DIG. 39.3.21 (Pomponius, *Quintus Mucius* 32); see also *Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. at 1544; *Comparative Law*, 48 AM. J. COMP. L. at 21. Specifically, Pomponius wrote of Quintus Mucius’s earlier *responsum*, recounting that:

If water which has its sources on your land bursts onto my land and you cut off those sources with the result that the water ceases to reach my land, you will not be considered to have acted with force, provided that no servitude was owed to me in this connection, nor will you be liable to the interdict against force or stealth.

DIG. 39.3.21 (Pomponius, *Quintus Mucius* 32).

1. Marcellus's *responsum*

The jurist most pertinent to the exploration of current groundwater law in Texas is Marcus Claudius Marcellus, who died in 45 B.C. and was a contemporary of Cicero.²⁴ Marcellus was made *Curule Aedile* in 56 B.C. (the sixth-highest elected office in Rome) and was named *Consul* five years later in 51 B.C. (the second-highest elected office in Rome).²⁵

His original formulation of the rule of capture—the first ever recorded—held that:

[N]o action, not even the action for fraud, can be brought against a person who, while digging on his own land, diverts his neighbor's water supply.²⁶

2. Ulpian's *responsa*

While Marcellus's musings on what would become the modern-day rule of capture were no doubt important in their day, their subsequent inclusion in the *Digest* and recounting by perhaps the most famed jurist in antiquity made Marcellus's work immortal.²⁷

Ulpian was one of the most renowned jurists to ever live, and even served as the *Praefectus Praetorio* (commander of the Praetorian Guard and chief advisor to the Emperor) for a time.²⁸ Not only do his works form the basis for approximately one-third²⁹ to one-half³⁰ of the *Digest*, the name Ulpian was almost synonymous with Roman law during the Middle Ages.³¹ Ulpian was among five noted jurists whose writings were made authoritative due to their inclusion in the *Law of Citations*,³² which was issued in 426.³³ He is also considered to be one of the three "principal writers on water law" featured in the *Digest*.³⁴ Indeed, after his death at the hands of his own guards in 228, the study and development of Roman law went into decline until the publication of the *Theodosian Code* in the fifth century A.D.³⁵

In Book 53 of his collection, *Ad Edictum*, Ulpian reasoned that "anyone who fails to protect himself in advance ... against anticipated injury [by work carried out on neighboring land] has only himself to blame."³⁶ Construing the *responsum* of another jurist—Trebatius—who lived some

²⁴ COLUM. ENCYCLOPEDIA 1752 (6th ed. 2000).

²⁵ *Id.*

²⁶ DIG. 39.3.1.12 (Ulpian, *Ad Edictum* 53).

²⁷ *See Still So Misunderstood*, 37 TEX. TECH L. REV. at 22.

²⁸ LAW OF THE ANCIENT ROMANS, at 93 ("Ulpian was the most popular jurist."); ROMAN LAW TEXTBOOK, at 32–33.

²⁹ *See* ROMAN LAW TEXTBOOK, at 32.

³⁰ *See* LAW OF THE ANCIENT ROMANS, at 93.

³¹ *See* ROMAN LAW TEXTBOOK, at 33.

³² *See* LAW OF THE ANCIENT ROMANS, at 91; ROMAN LAW TEXTBOOK, at 32. This group of honored jurists was sometimes referred to as the "favoured five." *See* ROMAN LAW TEXTBOOK, at 32.

³³ *See* LAW OF THE ANCIENT ROMANS, at 91; *Justinian's Codification*, 48 TUL. L. REV. at 862.

³⁴ *See* PANDECTS OF JUSTINIAN at 23.

³⁵ LAW OF THE ANCIENT ROMANS, at 90; ROMAN LAW TEXTBOOK, at 32.

³⁶ DIG. 39.3.3.3 (Ulpian, *Ad Edictum* 53).

250 years before him,³⁷ Ulpian explained how this theory of damage without injury—described some 1,600 years later by the maxim, *damnum absque injuria*³⁸—applied to groundwater rights:

Again, let us consider when injury is held to be caused; for the stipulation covers such injury as is caused by defect of house, site, or work. Suppose that I dig a well in my house and by doing so I cut off the sources of your well. Am I liable? Trebatius says that I am not liable on a count of anticipated injury [because] I am not to be thought of as having caused you injury as a result of any defect in the work that I carried out, seeing that the matter is one in which I was exercising my rights.³⁹

As Ulpian commented regarding the *responsum* of the jurist Proculus,⁴⁰ no action may lie:

[U]nder this stipulation; the grounds for this are that a person who prevents somebody from enjoying an advantage which he has hitherto enjoyed should not be held to be causing injury, there being a great difference between the causing of injury and the prevention of enjoyment of an advantage previously enjoyed.⁴¹

The late-1600s French legal scholar Jean Domat summarized Ulpian and Proculus's property rights *responsa*, cautioning that an aggrieved landowner ought to have acted "so as to be out of danger of this inconvenience, which he had no right to hinder, and which he might have easily foreseen."⁴² Specific to groundwater law, Domat wrote that a landowner "may dig for water on his own ground, and if he should thereby drain a well or spring in his neighbor's ground, he would be liable to no action of damages on that score."⁴³

Interestingly, Ulpian even foretold the legal remedies arising from subsidence caused by

³⁷ Trebatius lived from 84 B.C. to A.D. 4. Alan Watson & Khaled Abou El Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 AM. J. COMP. L. 1, 21 (2000) [hereinafter *Comparative Law*].

³⁸ Although the *Acton* and *East* courts are more famously known for applying *damnum absque injuria* to groundwater law, the maxim was first applied to this debate by the Massachusetts Supreme Court in its 1836 opinion in *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 123 (1836). Incidentally, *Greenleaf* was issued in March 1836, the same month and year that some 190 militiamen bravely stood against 2,400 Mexican troops for thirteen days in an old, crumbling Spanish mission just outside of San Antonio de Béxar. Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 36 S.W. HIST. Q. 251, 265 (April 1933); Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 37 S.W. HIST. Q. 237, 237–38 (1934); see also JAMES A. MICHENER, *TEXAS* 325 (Univ. Tex. Press 1985).

³⁹ DIG. 39.2.24.12 (Ulpian, *Ad Edictum* 81).

⁴⁰ Proculus was an active jurist in the first century A.D. *Comparative Law*, 48 AM. J. COMP. L. at 25. His writings were held in such high regard around A.D. 27 that one of the two dominant schools of juridical thought in Rome—the more liberal and interpretative school—was named after him (the "Proculians"). *Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. at 1545. The other dominant school—the Sabinians—were more conservative and textualist. *Id.*; ROMAN LAW TEXTBOOK, at 27. Although the Proculians took their name from Proculus, the school was actually founded by Antistius Labeo (a republican—in the Roman sense) who died around 21. *Id.*; *Comparative Law*, 48 AM. J. COMP. L. at 25. In fact, Proculus was a follower of Nerva, who was himself a follower of Labeo. ROMAN LAW TEXTBOOK, at 27.

⁴¹ DIG. 39.2.26 (Ulpian, *Ad Edictum* 81).

⁴² JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* § 1047 (William Strahan trans. Luther S. Cushing ed. 1980) (1850).

⁴³ *Id.*, § 1581.

overpumping,⁴⁴ opining that, “if I dig so deeply on my land that one of your walls cannot stand upright, a stipulation against anticipated injury will become operative.”⁴⁵

B. “Recent” Legal Development

Roman law was instrumental in influencing much of the law throughout Western Europe nearly a millennium after Justinian promulgated his *Digest*,⁴⁶ including the laws of Spain and England. The laws of Spain bear powerfully upon Texas jurisprudence today because of Texas’s former colonial status to the Spanish Crown.⁴⁷ Although Britain never actually held title to Texas soil,⁴⁸ the Texas Republic expressly recognized and adopted English common law in 1840,⁴⁹ and explicitly relied on the common law of England just over sixty years later in *East* (citing, quoting and discussing the 1843 British Exchequer-Chamber court decision in *Acton v. Blundell*).⁵⁰

Indeed, “[l]ands in Texas have been granted by four different governments, namely, the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas.”⁵¹

1. Spanish derivation

Spain laid legal claim to Mexico, and subsequently present-day Texas, when Hernan Cortés

⁴⁴ See *Friendswood Dev. Co. v. Smith-S.W. Indust., Inc.*, 576 S.W.2d 21, 30 (Tex. 1978).

⁴⁵ DIG. 39.2.24.12 (Ulpian, *Ad Edictum* 81).

⁴⁶ GEORGE TOUMBOUROS, *PARALLEL LEGISLATIONS OF ENGLAND, U.S.A., FRANCE, GERMANY, ITALY AND COMPARATIVE LAW: VOLUME I: THE LAWS OF THE ANCIENT GREECE* 21 (1959).

⁴⁷ See *State v. Sais*, 47 Tex. 307, 318 (1877); JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, 2–3 (Univ. Tex. Press 2013) [hereinafter *SCOTX NARRATIVE HISTORY*]; David A. Furlow, “*The Separation of Texas from the Republic of Mexico Was the Division of an Empire: The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court, Part I: Spanish Texas, 1541–1821*,” J. TEX. SUP. CT. HIST. SOC’Y, Winter 2011, at 1 [hereinafter *Influence of Castilian Law*].

⁴⁸ See *S. Pac. Co. v. Porter*, 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960).

⁴⁹ Act approved Jan. 20, 1840, 4th Cong., R.S., reprinted in 2 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822–1897*, at 177, 177–78 (Austin, Gammel Book Co. 1898). However, as the Texas Supreme Court clarified twelve decades later, English common law was only adopted so far as it was consistent with Texas’s constitutional and legislative enactments, as well as the “rule of decision” in Texas. *Porter*, 160 Tex. at 334, 331 S.W.2d at 45. No English statutes were similarly adopted, and the Republic’s congressional act adopting English common law “was not construed as referring to the common law as applied in England in 1840, but rather to the English common law as declared by the courts of the various states, of the United States.” *Id.* This adoption is still enshrined in Texas statute to this day. See TEX. CIV. PRAC. & REM. CODE § 5.001 (“The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, and the laws of this state.”).

This distinction may be largely without jurisprudential difference because Texas did not address groundwater rights either legislatively or judicially until *East* in 1904, and American courts from 1836 to 1861 largely held consistently with the Texas Supreme Court’s later pronouncements in *East*. See *Still So Misunderstood*, 37 TEX. TECH L. REV. at 38–41; *Fact or Fiction* at 7–8, in UTCLE, *TEXAS WATER LAW INSTITUTE*. Put another way, from the time of the English common law’s adoption in 1840 until *East* was delivered in 1904, both the English common law itself, as well as the “English common law as declared by the courts of the various states[] of the United States,” was generally consistent the explicit framing of Texas groundwater law in *East*. See *Still So Misunderstood*, 37 TEX. TECH L. REV. at 38–41; *Fact or Fiction*, at 7–8.

⁵⁰ *Fact or Fiction*, at 9–10.

⁵¹ *Miller v. Letzerich*, 121 Tex. 248, 253, 49 S.W.2d 404, 407 (1932) (citations omitted). “Where one government succeeds another over the same territory, in which rights of real property have been acquired, the preceding government is not a foreign government, whose laws must be proved in the courts of the succeeding government.” *Sais*, 47 Tex. at 318.

discovered New Spain in 1518.⁵² Ten years later in 1528, Álvar Núñez Cabeza de Vaca⁵³ became the first Spaniard to set foot on Texas soil.⁵⁴ Spanish Texas was essentially rectangular in shape, with the coastal strip stretching from modern-day Corpus Christi, Texas, to Lake Charles, Louisiana, surrounded by the Nueces and Calcasieu Rivers and extending from that point inland to the Medina River slightly west of the City of San Antonio to the Arroyo Hondo, just west of Natchitoches.⁵⁵ This area, added to the rest of the northern frontier of New Spain south of the Nueces River, stretched more than 2,000 miles from east to west and almost 1,500 miles from north to south, encompassing some 960,000 square miles in total.⁵⁶

During the 1600s, Spanish settlers referred to the westernmost of the Caddo Native-American peoples as “the great kingdom of Tejas.”⁵⁷ “Tejas” was the way Spanish soldiers and colonial administrators spelled the Caddo word, *taysha*, which meant “friend” or “ally.”⁵⁸ Tejas then, or early Spanish Texas, referred to the realm of Spain’s allies,⁵⁹ and was the friendly buffer zone that protected the Spanish Empire from unfriendly Native Americans to the north and east.⁶⁰

Nearly two hundred years after Cabeza de Vaca first landed near what is now Galveston, Texas first appeared as a geographical designation in 1691 when the governor of the Spanish territory of Coahuila, in northern Mexico, received an appointment to serve as the governor of the territory.⁶¹ The first written mention of Texas came a few years before in 1689 when a Spanish priest named Father Damián Massanet described the region by a Hasinai Indian word that meant friends or allies—*techas* or *thechas*.⁶²

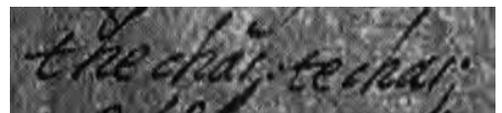
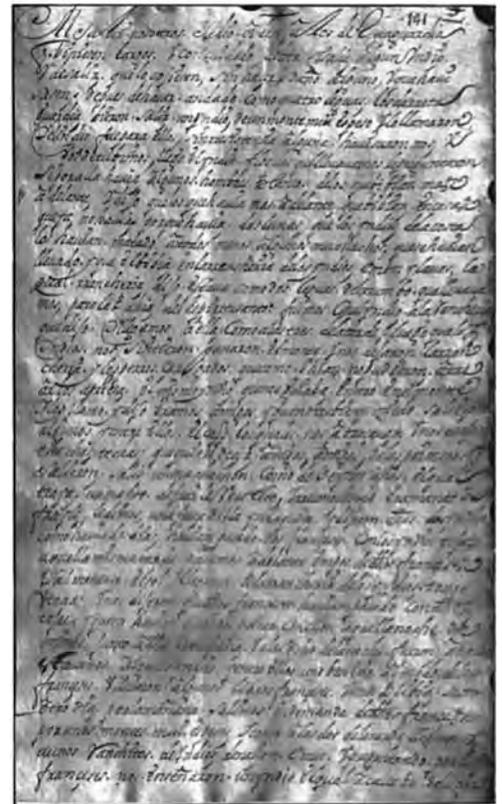


Fig. 2 – 1689 correspondence from Father Damián to Spanish officials documenting the La Salle Expedition, containing the first mention of Texas—*techas* or *thechas*.⁶³

⁵² *Influence of Castilian Law*, J. TEX. SUP. CT. HIST. SOC'Y, Winter 2011, at 2; Robert L. Dabney, Jr., *Our Legal Heritage, in Two Parts: Part One: Texas—The Land of the Brave (1518–1821)*, 39 HOUS. LAW. 12, 14 (2002).

⁵³ Cabeza de Vaca's surname came from his mother's side, and originated from an ancestor's marking of a strategic pass with a cow's skull ("cabeza de vaca"). SCOTX NARRATIVE HISTORY, at 3.

⁵⁴ *Id.*

⁵⁵ *Influence of Castilian Law*, at 2; *Tribute to Jack Pope*, 18 ST. MARY'S L.J. at 26.

⁵⁶ *Influence of Castilian Law*, at 2; MICHAEL C. MEYER, WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY 1550–1850, 3 (1984) [hereinafter SOCIAL AND LEGAL HISTORY].

⁵⁷ *Influence of Castilian Law*, at 2.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR L. REV. 225, 232 (2003); *Influence of Castilian Law*, at 5.

⁶² Hon. Jason Boatright, *Thechas to Texas: The History of Our Word*, J. TEX. SUP. CT. HIST. SOC'Y, Winter 2017, at 53, 54 n.6.

⁶³ *Id.*

In early May 1718, the first permanent settlement in Texas was established along the banks of the San Antonio River at the eastern edge of a range of limestone hills—San Fernando de Béxar.⁶⁴ The settlement included a Franciscan mission (later and more popularly known as the “Alamo”) as well as the chartered municipality itself, best described as a *villa* (a *villa* was more than a mere village, but not yet a *ciudad* (city)).⁶⁵ Playing politics, Fray Antonio de San Buenaventura de Olivares named the villa after the Duc de Béjar, the brother of the Viceroy of New Spain.⁶⁶ The villa’s *notario*,⁶⁷ Francisco de Arocha, was called upon to devise a system to prepare cases for legal process.⁶⁸ Because of this, Arocha has been called Texas’s “first lawyer.”⁶⁹

Spanish law governing Texas was contained in two distinct, yet related sources: (1) *Las Siete Partidas* (*Partidas*)—compiled in 1265 by King Alfonso X,⁷⁰ which governed peninsular Spain;⁷¹ and (2) the *Recopilación de Leyes de los Reynos de las Indias* (*Recopilación*)—promulgated in 1681,⁷² which governed New Spain.⁷³ Both these codes were authoritative in New Spain because of a passage in the *Recopilación* that provided, “when colonial law [was] silent on a topic, one must look to the laws of peninsular Spain.”⁷⁴

The *Partidas* was founded upon the works of Justinian.⁷⁵ The influence of Roman law upon

⁶⁴ SCOTX NARRATIVE HISTORY, at 6; see also *Influence of Castilian Law*, at 5.

⁶⁵ *Influence of Castilian Law*, at 5.

⁶⁶ *Id.*

⁶⁷ Secretary to the ayuntamiento (town council). SCOTX NARRATIVE HISTORY, at 7.

⁶⁸ *Id.* The system he devised was shorter by many steps than what was then required under the common law of England. See *Id.* Instead, he required only that a “plaintiff who came to court set down who he was, what wrong had been done him and by whom, and what redress he sought.” *Id.*

⁶⁹ *Id.* But “Texas’s first legal advocate in recorded history” might very well have been an anonymous Karankawa warrior who successfully lobbied a Native-American court called a mitote to spare what was left of Cabeza de Vaca’s crew in early 1529 near present-day Galveston. SCOTX NARRATIVE HISTORY, at 3–4.

⁷⁰ See M. Diane Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexican-United States Border Area*, 24 ST. MARY’S L.J. 639, 639, 656–58 (1993) [hereinafter *Legal Dilemma of Groundwater*]. King Alfonso was also referred to as “Alfonso the Wise of Castile.” See also *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157. Like Justinian before him, Alfonso “the Learned” took up the compilation of the *Partidas* almost immediately after his ascension to the throne. See *LAS SIETE PARTIDAS I* (Samuel Parsons Scott trans., 1931). Ironically, while the *Digest* took only roughly three years to complete, the *Partidas* took three times as long to finish—nine years. See *Id.* at li n.21.

⁷¹ *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250, 252 (Tex. 1984). Indeed it was termed “the essence of the law of Peninsular Spain after 1348.” *State v. Valmont Plantations*, 346 S.W.2d 853, 857 (Tex. Civ. App.—San Antonio 1961, writ granted) (op. adopted) [hereinafter “*Valmont Plantations I*”], *aff’d*, 163 Tex. 381, 355 S.W.2d 502 (1962) [hereinafter “*Valmont Plantations II*”]; see *LAS SIETE PARTIDAS*, at lii–liiii.

⁷² *Legal Dilemma of Groundwater*, 24 ST. MARY’S L.J. at 657–58. The drafting of the *Recopilación* was a colossal task that distilled over 400,000 *cedulas* down to just under 6400 provisions. *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 30. *Cedulas* were royal and special edicts. *Valmont Plantations I*, 346 S.W.2d at 866.

⁷³ *Medina River*, 670 S.W.2d at 252; *Valmont Plantations I*, 346 S.W.2d at 860 n.13.

⁷⁴ *Medina River*, 670 S.W.2d at 252 (quoting Book 2, Title 1, Law 1 of the *Recopilación*).

⁷⁵ Some sources, including the Texas Supreme Court, refer specifically to the *Institutes* as the foundational text. *State v. Balli*, 144 Tex. 195, 248, 190 S.W.2d 71, 99 (1944); *Manry v. Robinson*, 122 Tex. 213, 223, 56 S.W.2d 438, 442 (1932); *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157. Additional sources refer only to “Justinian’s sixth century code.” See *Valmont Plantations I*, 346 S.W.2d at 857. This may have referred to all three components of the *Corpus Juris Civilis* or to only the second *Code* itself. Other sources explicitly state that the *Partidas* was based on the *Corpus Juris Civilis*. *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 31; SOCIAL AND LEGAL HISTORY, at 107; see *LAS SIETE PARTIDAS*, at liv. Still other sources simply recount that the *Partidas* was derived generally from Roman law. See *Legal Dilemma of*

Castilian Spain was so great that the *Institutes* formed the “substance[] of civil law instruction at the Spanish and [Colonial]⁷⁶ universities,” and even furnished the text.⁷⁷

However, as great as Justinian’s influence was over its promulgation, the *Partidas* was much more than just a “[p]oor copy of the pandects of Justinian.”⁷⁸ The *Partidas* was a modification, not a recitation, of Justinian’s writings in that it was “modified by custom and usage in medieval Spain,” and Justinian’s texts were only used to clarify the corresponding provisions of the *Partidas*.⁷⁹ While the whole of peninsular Spain was governed by the *Partidas*, the *Partidas* itself was supplemented by provincial codes and laws enacted in each region of the country.⁸⁰

In particular, one such provincial code was the *Constitutiones de Cataluna*, which governed 13th-century Cataluna and provided that “live springs” belonged, not in common, but to the lords of the land “without impediment or contradiction from anybody.”⁸¹ This ownership right was described as exclusive and hostile to others.⁸²

Indeed, New Spain and the entirety of Colonial Spain were the private property of the King,⁸³ and ownership of land could only be achieved by virtue of a grant from the Crown.⁸⁴ One example of such a royal grant was exemplified by the territorial gift made to Hernan Cortés on July 6, 1529,⁸⁵ which expressly ceded title to the “running, stagnant, and percolating waters” found thereon.⁸⁶ The grant to Cortés made imminent sense in context with the provisions of the *Partidas*, which plainly mandated that springs and waters that originated on land went with it in sale.⁸⁷

Just before Christmas 1820, a former lead-mine operator from Missouri named Moses

Groundwater, 24 ST. MARY’S L.J. at 656; LAS SIETE PARTIDAS, at lii, liv. Still other authorities cite Spanish jurisprudence as arising from both the *Institutes* and the *Pandects*. See *Law of Flowing Waters*, 8 BAYLOR L. REV. at 158.

⁷⁶ Throughout the literature, the territories of New Spain are described interchangeably as colonial, ultramarine, or the Indies. See, e.g., *Medina River*, 670 S.W.2d at 252; *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 31–32.

⁷⁷ *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 31–32; see LAS SIETE PARTIDAS, at liii. Indeed, the Texas Supreme Court “has uniformly held that . . . the law as declared in *Las Siete Partidas*, . . . was taken almost bodily from the Roman Law; and, more particularly, from the *Institutes*....” *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157 (emphasis added); see LAS SIETE PARTIDAS, at lii, liv.

⁷⁸ *Law of Flowing Waters*, 8 BAYLOR L. REV. at 158 (citation omitted).

⁷⁹ *Id.*

⁸⁰ *Valmont Plantations I*, 346 S.W.2d at 858.

⁸¹ *Id.* at 858 n.6.

⁸² *Id.* at 858 n.7.

⁸³ All of New Spain, including present-day Texas, was privately owned by the Crown of Castille by virtue of the Bull of Donation (also called the “*Bull Inter Cetera*”) of Pope Alexander VI, issued on May 4, 1493. See *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250, 253 (Tex. 1984); *Valmont Plantations I*, 346 S.W.2d at 859.

⁸⁴ *Medina River*, 670 S.W.2d at 253; see also *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 70–71.

⁸⁵ See *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 68.

⁸⁶ *Medina River*, 670 S.W.2d at 253 (quoting the royal grant that transferred title to a large portion of Central Mexico to Hernan Cortés) (emphasis added); see also *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 67–68; Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY’S L.J. 1281, 1292 (1986).

⁸⁷ *Valmont Plantations I*, 346 S.W.2d at 860 n.14 (citing Law 19, Title 32, Part 3 of the *Partidas* because the *Recopilación* did not have a provision dealing explicitly with the alienation of groundwater property rights).

Austin appeared in the provincial capital then-known as San Antonio de Béxar seeking approval to settle Anglo-American colonists from the newly-minted United States in the largely vacant wilderness of Texas.⁸⁸ Seeking to populate the province with Catholic Americans who would swear allegiance to Spain, and who might unwittingly serve as a barrier to hostile Indian tribes, the Spanish authorities approved the proposal.⁸⁹ Unfortunately, Moses died shortly after returning to the United States to organize potential settlers.⁹⁰

2. Mexican influence

Mexico achieved its independence from Spain in September 1821,⁹¹ and Stephen F. Austin—who had taken over his father’s settlement efforts in Texas—obtained the Mexican Emperor’s approval for the “Austin Colony” just two years later on February 18, 1823.⁹²

After its independence, Mexico retained much of the same water law that existed under Spanish rule.⁹³ Indeed, the legal system in Coahuila y Tejas remained largely rooted in ancient Roman law.⁹⁴ What new legislation the Mexican Republic enacted did not elaborate on nor modify groundwater law, but did concern the law of flowing waters, as was ably and exhaustively recounted by future Texas Supreme Court Chief Justice Andrew Jackson (“Jack”) Pope while he was a Justice on the Fourth Court of Appeals in *State v. Valmont Plantations*.⁹⁵

One Mexican scholar, in describing Spanish colonial land grants with and without water rights, framed the existence of a private property right in groundwater as follows: “Private property in waters not only existed, but the legislation of [the] Indies fostered the reduction of unappropriated waters to private ownership,” revealing that private ownership of water was not only possible, but encouraged.⁹⁶ The express grants of springs described in early twentieth-century Mexico also aided the private ownership of water.⁹⁷

⁸⁸ SCOTX NARRATIVE HISTORY, at 9. Despite two and half centuries of dominion over the nearly million square acres of Texas, a 1783 Spanish census found only 2,819 subjects residing north of the Rio Grande river. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 47; *Law of Flowing Waters*, 8 BAYLOR L. REV. at 176.

⁹² See *Tribute to Jack Pope*, 18 ST. MARY’S L.J. at 48.

⁹³ *Valmont Plantations I*, 346 S.W.2d at 863.

⁹⁴ SCOTX NARRATIVE HISTORY, at 11.

⁹⁵ *Valmont Plantations I*, 346 S.W.2d at 863. Chief Justice Pope’s intermediate-appellate court opinion so impressed Texas Supreme Court Justice Bob Hamilton—who authored the Court’s opinion adopting Chief Justice Pope’s lower court ruling—that he remarked, “it would serve no good purpose to write further on the subject” because Chief Justice Pope’s opinion was so “exhaustive and well documented.” *Valmont Plantations II*, 355 S.W.2d at 503. It marked the first—and perhaps only—time the Court adopted wholesale a lower court’s opinion without refusing writ of application. See SCOTX NARRATIVE HISTORY, at 199. Chief Justice Pope’s opinion in *Valmont Plantations* has more recently been described as a “lengthy, punctiliously scholarly history lesson.” *Id.* at 198. Because it deftly dodged the troublesome Court precedent set in *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926), it had the welcome effect of giving Texas a “fresh start” regarding riparian water law. *Id.*

⁹⁶ *Valmont Plantations I*, 346 S.W.2d at 862 (quoting ANDRÉS MOLINA ENRIQUEZ, LOS GRANDES PROBLEMAS NACIONALES 171 (1909)).

⁹⁷ *Id.* at 862–63 (citing PENA, PROPIEDAD INMUEBLE EN MEXICO 146 (1921)).

3. British derivation

Much of British water law developed from Justinian's works as well.⁹⁸

a. Bracton & Blackstone

Henry of Bracton's seminal 13th-century work, *The Laws and Customs of England*, is the "earliest scientific exposition of the English common law," and relies heavily upon the *Digest*, even to the extent that the first third of *The Laws and Customs of England* contains "quotations from almost two hundred different sections of Justinian's *Digest*."⁹⁹ In turn, William Blackstone's *Commentaries on the Laws of England*, published some 500 years later in 1766, relied upon the previous works of many other early legal scholars, including Bracton.¹⁰⁰ In addition, the "fundamental structure" of Blackstone's *Commentaries on the Laws of England* was "a direct descendant of Justinian's *Institutes*."¹⁰¹

Blackstone is sometimes credited with introducing into western jurisprudence the legal tenet central to the modern Texas groundwater legal concept of ownership in place: absolute ownership¹⁰²—long described by the Latin maxim, *cujus est solum ejus est usque ad coelum et ad infernos*.¹⁰³ It is translated to mean "[w]hoever owns the soil owns everything up to the sky and down to the depths."¹⁰⁴ However, this axiom was apparently first recorded at common law in the 1586 case of *Bury v. Pope*,¹⁰⁵ but therein, the King's Bench court indicated it had been applied

⁹⁸ PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 152 (1988) [HISTORICAL ESSAYS]; PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 64 (1999) ("[m]any passages echo the language of [the] *Digest* and *Code*[,] ... [t]hey show that he had made Roman law part of his way of thinking as a lawyer"); *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157 ("The English Common Law of Waters ... derive ... from the *Institutes* of Justinian, the ancient Roman Law.").

⁹⁹ HISTORICAL ESSAYS, at 152. In addition to being a 13th-century legal scholar, Bracton also served as Justice of the King's Bench. See *ENCYCLOPEDIA BRITANNICA* 369 (11th ed. 1910).

¹⁰⁰ *ROMAN AND COMPARATIVE LAW*, at 166.

¹⁰¹ *Id.* at 173, 175–76 (noting Book 2 of William Blackstone's *Commentaries on the Laws of England*, addressing the law of things, corresponds to books 2 and 3 of Justinian's *Institutes*).

¹⁰² 2 WILLIAM BLACKSTONE, *COMMENTARIES* *18; *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11 n.30 (Tex. 2008); John G. Sprankling, *Owning the Center of the Earth*, 55 U.C.L.A. L. REV. 979, 982–83 (April 2008) [hereinafter *Owning the Center of the Earth*].

¹⁰³ See, e.g., *Wheatly v. Baugh*, 25 Pa. 528, 530 (1855). While it is unlikely *cujus est solum ejus est usque ad coelum et ad infernos* comes as directly from Roman law as does *damnum absque injuria*, Roman law certainly recognized the concept of absolute ownership. See W.W. BUCKLAND & ARNOLD D. McNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* 67, 69 (2d ed. 1952) ("[f]or the Roman lawyers ownership was absolute ... [because] a positive root of title, with nothing relative about it ... gave absolute ownership"). But see *Owning the Center of the Earth*, 55 U.C.L.A. L. REV. at 982–83 (although "Blackstone boldly proclaimed the doctrine in his famous treatise *Commentaries on the Laws of England* ... [i]t was not a principle of Roman law"). Indeed, Professor Goudy of Oxford even attributed some sections of the *Digest* as the theoretical forebears of the doctrine. H. Goudy, *Two Ancient Brocards*, in *ESSAYS IN LEGAL HISTORY* 230–31 (Paul Vinogradoff, ed., 2004) (2013) [hereinafter *ESSAYS IN LEGAL HISTORY*].

¹⁰⁴ *BLACK'S LAW DICTIONARY*, *Ad Coelum Doctrine* (10th ed. 2014); see, e.g., *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843) (ownership of groundwater "falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that he land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water"). It is an "ancient doctrine that at common law ownership of the land extended to the periphery of the universe." *United States v. Causby*, 328 U.S. 256, 260–61 (1946).

¹⁰⁵ 78 Eng. Rep. 375 (1586); Robert R. Wright, *Development of Policy for Use of Airspace*, in *LEGAL, ECONOMIC, AND ENERGY CONSIDERATIONS IN THE USE OF UNDERGROUND SPACE* 7 (1974) (stating *Bury v. Pope* "is the first case to enunciate the maxim") [hereinafter *Development of Policy*]. Prior to 1865 there was no official series of law reports in England. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION*, at 413. (Columbia Law Review Ass'n et al. eds., 19th ed.). Instead, cases were

even since the time of Edward I in the late thirteenth century.¹⁰⁶

b. Hammond & Acton

The first English case to address tortious immunity for groundwater drainage was *Hammond v. Hall* in 1840.¹⁰⁷ While the court did not ultimately reach the merits of the groundwater arguments because the claim was not yet ripe, it did recognize that the “question [pertaining to drainage of one well by another, deeper well] ... was said never to have been discussed before, namely, whether a right or easement could be claimed with respect to subterranean water.”¹⁰⁸ In its opinion, the court expressly recognized Marcellus’s writing in the *Digest* by quoting the original Latin phrasing, which translated to read that “no action ... can be brought against a person who, while digging on his own land, diverts his neighbor’s water supply.”¹⁰⁹

Just three years after the *Hammond* decision, the Exchequer Chamber Court¹¹⁰ heard the case of *Acton v. Blundell*.¹¹¹ In *Acton*, a coal-mining company dug a coal pit in 1837, which was a little less than a mile away from a neighboring cotton-mill owner, and a second pit three years later a little closer to the mill.¹¹² When the coal pits reached 105 feet in depth, the cotton-mill’s well water began to run dry.¹¹³

reported in numerous commercial reporters, commonly referred to as the “nominate reporters.” *Id.* at 413–14. Subsequently, most of the nominate reporters were reprinted in the English Reports. *Id.* at 414.

¹⁰⁶ *Bury*, 78 Eng. Rep. at 375 (“Nota. *Cujus est solum, ejus est summitas usque ad coelum*. Temp. Ed. I.”); *Development of Policy*, at 7 (“*Bury v. Pope* does make reference, however, to the existence of the maxim during the time of Edward I (1239–1307),” and explaining that “Temp. Ed. I” means the maxim stemmed from that time); VII HISTORY OF ENGLISH LAW, at 485 (“This maxim is referred to in Croke’s reports in 1586, and is there said to be as old as Edward I.”); ESSAYS IN LEGAL HISTORY, at 230 (“It is cited in Croke’s Reports, in an action for stopping lights, as *Cujus est solum ejus est summitas usque ad coelum*, and a reference is there made to its use at the time of Edward I.”). This is plausible, because Blackstone himself acknowledged the influence of Bracton, whose *Laws and Customs of England* was published in the same century that Edward I ruled England. See ROMAN AND COMPARATIVE LAW, at 166. For his efforts “of ordering, of methodizing, [and] of arranging” the “too luxuriant growth” of English law, Edward I was even known as the “English Justinian.” FREDERIC W. MAITLAND AND FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 91 (James F. Colby ed. 1915). Of more recent notoriety, Edward I is perhaps better known to modern audiences as the villainous English king “Longshanks” in 1995’s *Braveheart*. IMDB.COM, SYNOPSIS FOR BRAVEHEART, <http://www.imdb.com/title/tt0112573/synopsis> (last visited Feb. 26, 2013).

¹⁰⁷ *Hammond v. Hall*, 59 Eng. Rep. 729 (1840).

¹⁰⁸ *Id.* at 730, 730 n.1.

¹⁰⁹ *Id.* at 730 n.2 (providing the untranslated version of this quote); see DIG. 39.3.1.12 (Ulpian, *Ad Edictum* 53).

¹¹⁰ The Exchequer Chamber court was an intermediate appellate court, established in 1822, which heard appeals from English common law courts (Court of King’s Bench, Court of Common Pleas, and the Court of Exchequer), and from which appeal could only be had to the parliamentary House of Lords. See A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 93 (1902) [hereinafter ENGLISH LEGAL HISTORY]; BLACK’S LAW DICTIONARY, Exchequer Chamber (10th ed. 2014). The Court of Exchequer derived its name from the checkered cloth, which was said to resemble a chef’s board, that covered the bench. II JOHN ADOLPHUS, THE POLITICAL STATE OF THE BRITISH EMPIRE 481 (1818). The “King’s Bench” was the highest common-law court in England, presided over by the reigning monarch. BLACK’S LAW DICTIONARY, King’s Bench (10th ed. 2014) (citing 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 156 (2d ed. 1826)). During a queen’s reign, the court is renamed the “Queen’s Bench.” *Id.*

¹¹¹ 152 Eng. Rep. 1223 (1843).

¹¹² *Id.* at 1224–25, 1232–33; see *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 824 n.40 (Tex. 2012); see also *Long Reach*, 116 S.W. HIST. Q. at 269.

¹¹³ See *Acton*, 152 Eng. Rep. at 1224–25; *Long Reach*, 116 S.W. HIST. Q. at 269.

Perhaps more fascinating than the facts underlying the dispute are some of the excerpts from the oral argument delivered in the case, which are preserved in the *English Reports* reprinting of the opinion.¹¹⁴ Acton's counsel began by acknowledging that "water is the party's as long as it is on his land, as every thing is his that is above or below it."¹¹⁵ However, he may have gone too far in his argument when he cited as controlling authority only cases where surface water was at issue.¹¹⁶ In addition, at the end of his surface-water recitation, Acton's counsel mistakenly included a citation to Marcellus's writings in the *Digest*;¹¹⁷ at which point one of the justices on the panel—Justice Maule—interrupted him and responded, "It appears to me that what Marcellus says is against you. The English of it I take to be this: if a man digs a well in his own field, and thereby drains his neighbour's, he may do so, unless he does it maliciously."¹¹⁸ The exchange continued as Acton's attorney cited to more English law adjudicating surface watercourses until Justice Maule again posed a pointed question, asking whether subterranean water could be legally defined as a watercourse?¹¹⁹ Acton's counsel replied, positing that "the term 'watercourse [s]' [whether subterranean or surface] must apply to all streams," but the court did not reach this point in its decision.¹²⁰

In his response, Blundell's attorney cited to the maxim that defined the rule of capture—*damnum absque injuria*—explaining that, in order "[t]o constitute a violation of that maxim, there must be *injuria* as well as *damnum*. There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbour, so as it be not *injuriousum*."¹²¹ In the same paragraph that the court cited to the *Digest* and its recital of Marcellus's *responsum*, the court noted that "[t]he authority of one at least of the learned Roman lawyers [that is, Marcellus] appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity."¹²²

Chief Justice Tindal¹²³ delivered the opinion of the court, and concluded by holding that

¹¹⁴ *Acton*, 152 Eng. Rep. at 1226–32.

¹¹⁵ *Id.* at 1226.

¹¹⁶ *See Id.* at 1227–28.

¹¹⁷ *Id.* at 1226; *see* DIG. 39.3.1.12 (Ulpian, *Ad Edictum* 53).

¹¹⁸ *Id.* at 1228. Justice Maule's interjection was particularly important because it represented perhaps the first formal jurisprudential restriction on the operation of the rule of capture due to a pumper's malicious conduct. *See Still So Misunderstood*, 37 TEX. TECH L. REV. at 35.

¹¹⁹ *Id.* at 1229.

¹²⁰ *Id.* at 1229–30.

¹²¹ *Id.* at 1230. Blundell's counsel then described the analogous situation where a wall built by one neighbor on his own land that blocks out the light of another is not held to be injurious. *Id.* Notably, he took this example almost verbatim from the *Digest*, wherein Ulpian quotes Proculus for the proposition that buildings increased in height such that they block the light reaching a neighbor's land result in "no action [for injury being] available" to the neighbor. *See* DIG. 39.2.26 (Ulpian, *Ad Edictum* 81).

¹²² *Acton*, 152 Eng. Rep. at 1235.

¹²³ Chief Justice Nicholas Conyngham Tindal was a 19th-century British jurist who served with great distinction. WIKIPEDIA, NICHOLAS CONYNGHAM TINDAL, http://en.wikipedia.org/wiki/Nicholas_Conyngham_Tindal (last visited Feb. 27, 2013). However, he was perhaps best known not for his posthumous contributions to Texas groundwater law, but for successfully defending the then-Queen of the United Kingdom—Caroline of Brunswick—at her trial for adultery in 1820, as well as for introducing the special verdict of "not guilty by reason of insanity" into English jurisprudence. *Id.* Unfortunately though, Chief Tindal's conception of the insanity defense came at the expense of one of the author's ancestors—Edward Drummond—whose murderer Chief Tindal found not guilty in 1843 by reason of insanity. *Id.*; WIKIPEDIA, EDWARD DRUMMOND, http://en.wikipedia.org/wiki/Edward_Drummond (last visited Feb. 27, 2013).

the case before them was:

[N]ot to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.¹²⁴

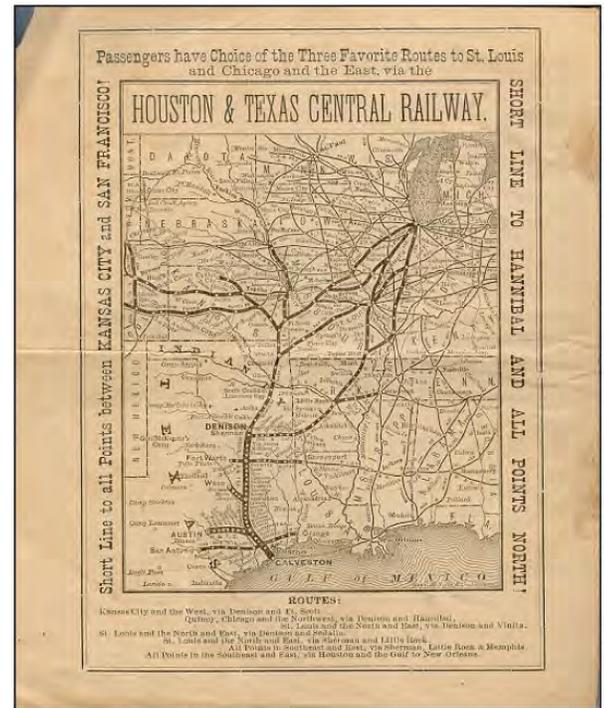


Fig. 3 – A railroad route map from the early 1900s, showing Denison as one of its major hubs.¹³¹

East's Direct Reliance on Acton and Marcellus

Because the Texas Supreme Court hinged its adoption of the rule of capture in its seminal 1904 decision in *Houston & Texas Central Railroad Co. v. East*¹²⁵ directly on the 1843 Exchequer Chamber Court's decision in *Acton v. Blundell*¹²⁶—which in turn based its holding on Marcellus's groundwater *responsa* from the first century B.C.¹²⁷—the events surrounding *East* bear particular significance.

A. Factual Background

The Houston & Texas Central Railroad Company (the "Railroad") was first established in 1853 as the Galveston & Red River Railway ("G&RR") by Thomas William House and two other partners.¹²⁸ House was a Houston planter who originally constructed the G&RR to transport his crops from Houston to the Brazos River.¹²⁹ The Railroad later reached Denison in the 1870s, from where it connected with rail lines to the north.¹³⁰

After Thomas died in 1880, his youngest son, Edward M. House, took over his father's

¹²⁴ *Acton*, 152 Eng. Rep. at 1235.

¹²⁵ 98 Tex. 146, 81 S.W. 279 (1904).

¹²⁶ 152 Eng. Rep. 1223 (1843).

¹²⁷ *East*, 98 Tex. at 149, 151, 81 S.W. at 280–82 (citing *Acton*, 152 Eng. Rep. at 1226, 1228 (citing Dig. 39.3.1.12 (Ulpian, *Ad Edictum* 53))).

¹²⁸ *Long Reach*, 116 S.W. Hist. Q. at 265.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Railroad map from the early 1900s (on file with author, courtesy of Professor Megan & Benson, Ph.D.).

railroad empire.¹³² Edward soon became heavily involved in Texas politics, and was a charter member of a group comprised of the wealthiest businessmen in Texas that came to be known as “Our Crowd.”¹³³ So influential was House that he was thought to sway virtually every appointment made by Texas Governors Stephen Hogg, Charles Culberson, Joseph Sayers,¹³⁴ and Samuel Lanham—including all three Justices sitting on the Texas Supreme Court when W.A. East’s suit against House’s railroad came before the Court in 1904.¹³⁵

In 1872, the town of Denison, Texas was established by the Missouri, Kansas, and Texas Railroad (“KATY”), and named after its vice-president, George Denison.¹³⁶ By 1901, Denison had grown to more than 10,000 residents and was a bustling railroad town that served as a shipping center and stopping point for more than 10 railways.¹³⁷

William Alexander East was born in Grayson County in 1851, two years before the Railroad was formed.¹³⁹ He owned four lots near the intersection of Lamar Avenue and Owings Street in Denison. Sometime prior to 1901, East sunk a well on one of his lots that was 33 feet deep and 5 feet in diameter.¹⁴¹

During 1901, there were newspaper accounts of a drought plaguing Denison, and the recorded

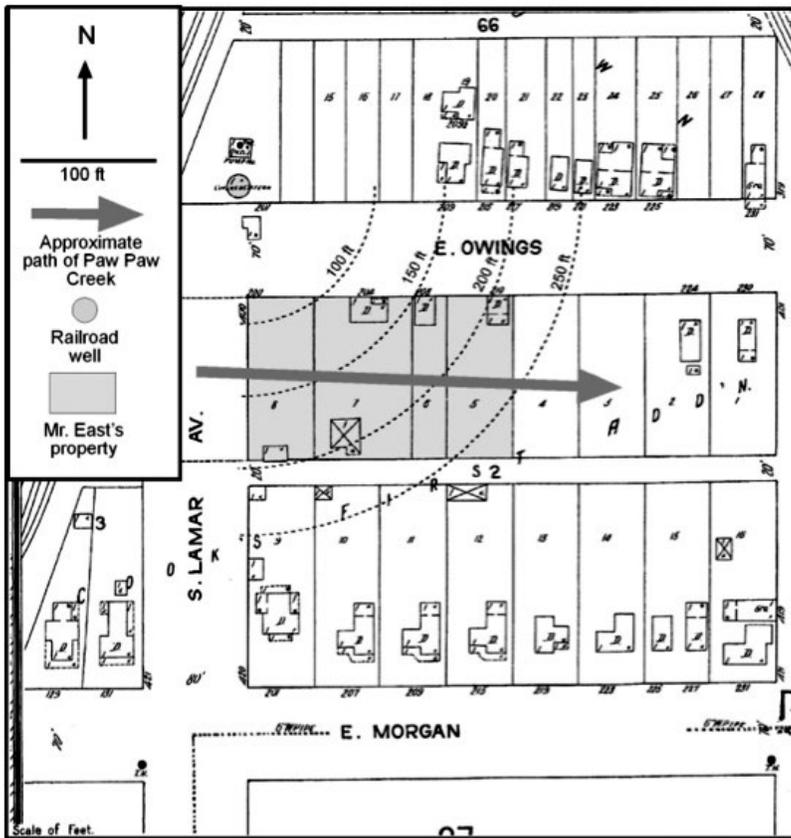


Fig. 4 – 1914 Sanborn fire-insurance map of East’s property relative to the Railroad’s well, overlaid with pertinent annotations and legend by Robert E. Mace, *et al.*¹³⁸

¹³² *Id.*

¹³³ *Id.* at 266.

¹³⁴ In August 1898, Governor Sayers wrote to House, promising that he would “not commit myself to any person on anything, in my own mind, until we shall have canvassed it fully and thoroughly together.” *Long Reach*, 116 S.W. Hist. Q. at 275.

¹³⁵ *Id.* at 266.

¹³⁶ *East Historical Analysis*, at 63.

¹³⁷ *Id.*

¹³⁸ *Id.* at 73.

¹³⁹ Compare *Id.* at 87 n.6, with *Long Reach*, 116 S.W. Hist. Q. at 265.

¹⁴⁰ *East Historical Analysis*, at 71. While East’s pleadings in the case state he owned only two and a half lots on the corner of Lamar Avenue and Morgan Street, the deed records show he owned four lots on the corner of Lamar Avenue and Owings Street. Compare *East Historical Analysis*, at 71, with *Id.* at 100.

¹⁴¹ *East Historical Analysis*, at 71; see *Long Reach*, 116 S.W. Hist. Q. at 266; see also *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 823 (Tex. 2012); *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 148, 81 S.W. 279, 280 (1904).

rainfall was about 30% lower than normal that year.¹⁴² In need of water for its passengers at the station, water for its machine shops, and water for the steam boilers in its locomotives,¹⁴³ the Railroad went searching during the summer of 1901 for nearby land upon which to drill a groundwater well.¹⁴⁴ Finding several wells already in place near the intersection of Owings Street and Lamar Avenue—including East’s—which indicated accessible groundwater below, the Railroad drilled a well that August which measured 20 feet in diameter and 66 feet deep, just some 100 to 250 feet away from East’s well.¹⁴⁵ While the Railroad’s new well was producing 25,000 gallons a day,¹⁴⁶ it was by no means the largest railroad well nearby.¹⁴⁷ The newspaper, the *Sunday Gazeteer*, reported that KATY had sunk a well two and a half miles from Denison that was piping 750,000 gallons per day.¹⁴⁸



Fig. 5 – Looking north at the intersection of Owings Street and Lamar Avenue in Denison, Texas, with the probable location of the Railroad’s well circled.¹⁴⁹

B. District Court Proceedings

Sometime between August 1901 and April 1902, East and his neighbors’ wells began to run dry, prompting him to file suit in which he sought \$1,100 in damages.¹⁵⁰ In December, just days after East filed his First Amended Original Petition, Judge Rice Maxey of the 15th District Court in Grayson County (sitting in Sherman) found in favor of the Railroad, concluding that no “correlative rights exist between the parties as to underground, percolating waters, which do not run in any defined channel.”¹⁵¹

C. Review by the Dallas Court of Civil Appeals

After Judge Maxey denied East’s motion for new trial, East sought review in the Dallas Court

¹⁴² *East Historical Analysis*, at 80–81.

¹⁴³ *Day*, 369 S.W.3d at 824.

¹⁴⁴ *East Historical Analysis*, at 63.

¹⁴⁵ *Id.* at 63, 71; see *Long Reach*, 116 S.W. Hist. Q. at 267; see also *Day*, 369 S.W.3d at 824.

¹⁴⁶ *Day*, 369 S.W.3d at 824.

¹⁴⁷ *East Historical Analysis*, at 63, 81.

¹⁴⁸ *Id.* at 81.

¹⁴⁹ *Id.* at 74.

¹⁵⁰ *Id.* at 63. The historical record is not clear when East first filed suit, but it is certain that the Railroad sank their well in August 1901, and filed their Original Answer to East’s suit on April 5, 1902. *Id.* at 87 n.7, 104.

¹⁵¹ *Id.* at 63, 107–08; see *Long Reach*, 116 S.W. Hist. Q. at 266, 268.



Fig. 6 – East file coversheet in the Dallas Court of Appeals, with annotations by the clerk showing eventual disposition at the Texas Supreme Court.¹⁵²

of Civil Appeals in early 1903.¹⁵³ On appeal, the Railroad retained the law firm of Baker, Botts, Baker & Lovett (now more commonly known as Baker Botts) as appellate counsel.¹⁵⁴ Even in 1903, Baker Botts was a venerable Texas law firm based out of Houston that counted among its clientele railroad company and businesses just beginning to brave the burgeoning oil and gas industry.¹⁵⁵ The contrast between East’s local counsel, Moseley & Eppstein, and Baker Botts was evident: the Railroad’s briefs “were professionally printed and leather bound,” while East’s were “roughly typed.”¹⁵⁶

While acknowledging that Acton governed in England and had even been adopted by some American states, authoring justice John Bookhout reasoned in the court’s November 1903 opinion that, to apply the rule stated in Acton to the case before him would “shock our sense of justice.”¹⁵⁷ Recognizing that the question before it had “not been passed upon by any of the appellate courts of this State,” the Dallas Court of Appeals chose to rely on the reasoning from an 1862 case issued by the Supreme Court of New Hampshire¹⁵⁸ that expressly rejected the tenets of ownership in place and the rule of capture as laid out in Acton, and which founded

¹⁵² *East Historical Analysis*, at 97.

¹⁵³ *Id.* at 64.

¹⁵⁴ *Id.* at 113.

¹⁵⁵ Compare *Long Reach*, 116 S.W. Hist. Q. at 271, with Baker Botts, *History*, <http://www.bakerbotts.com/about/history/> (last visited Feb. 27, 2013).

¹⁵⁶ *Long Reach*, 116 S.W. Hist. Q. at 271.

¹⁵⁷ *East v. Houston & T. Cent. Ry. Co.*, 77 S.W. 646, 648 (Tex. Civ. App.—Dallas 1903), *rev'd*, 98 Tex. 146, 151, 81 S.W. 279, 282 (1904); *Long Reach*, 116 S.W. Hist. Q. at 273; *East Historical Analysis*, at 129.

¹⁵⁸ *Bassett v. Salisbury Mfg.*, 43 N.H. 569, 573–79 (1862).

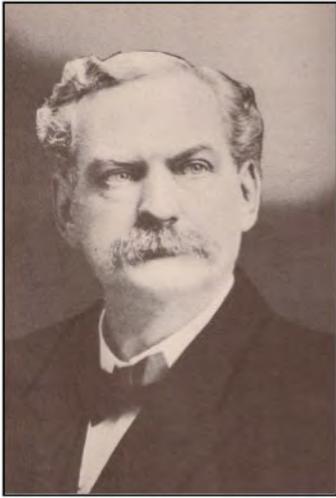


Fig. 7 – Justice John Bookhout of the Dallas Court of Appeals.¹⁶⁰

what is now known as the American branch of the Reasonable-Use doctrine.¹⁵⁹

Upon reversing the district court's judgment, Justice Bookhout rendered judgment awarding East \$206.25 in damages.¹⁶¹ The Railroad immediately moved for rehearing on December 10, 1903, which was denied nine days later on December 19, 1903.¹⁶²

D. The Texas Supreme Court's Opinion

During the era of the Texas Supreme Court in which the *East* case was decided, the Court became known as the "Consensus Court," due to the near unanimity with which it almost invariably issued its opinions.¹⁶³

The Railroad filed its application for writ of error at the Texas Supreme Court on January 16, 1904, which the Court granted on April 28, 1904.¹⁶⁴ Just over six

¹⁵⁹ *East*, 77 S.W. at 647–48, *rev'd*, 98 Tex. at 151, 81 S.W. at 282; *Long Reach*, 116 S.W. HIST. Q. at 273; *East Historical Analysis*, at 127–29. For an extended discussion of the American branch of the Reasonable-Use Doctrine, please see Dylan O. Drummond, Comment, *Texas Groundwater Law in the 21st Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH ADMIN. L.J. 173, 197–99 (Summer 2003) [hereinafter *21st Century Groundwater Law*].

¹⁶⁰ *Long Reach*, 116 S.W. HIST. Q. at 274. Justice Bookhout served on the Dallas appellate bench for nearly fifteen years, being first appointed in October 1897 and submitting his resignation in early 1912. Compare W.J. CLAY, STATISTICAL REPORT: 1904, 18 (Von Boeckmann-Jones Co.—State Printers, 1904), available at <http://books.google.com/books?id=19g9AAAAYAAJ&pg=PA13&ots=H3PZrsPXST&dq=justice%20%22john%20bookhout%22&pg=PA13#v=onepage&q=justice%20%22john%20bookhout%22&f=false> (last visited Feb. 28, 2013), with Domestic, THE BASTROP ADVERTISER, February 2, 1912, at 1, available at <http://texashistory.unt.edu/ark:/67531/metaph029/m1/1/zoom/> (last visited Feb. 28, 2013). Of note, in 1881, Justice Bookhout became the first telephone subscriber in Dallas. *Why Dallas?*, TEXAS MONTHLY, December 1973, at 58 (incidentally, 1973 marked the inaugural volume for TEXAS MONTHLY, whose first issue published earlier that year in February, *From the Publisher*, TEXAS MONTHLY, February 1973, at 1, 3 (TEXAS MONTHLY'S original publisher, Michael R. Levy, penned a spirited introduction to the magazine, vowing not to compete with "vapid Sunday supplements ..., with the promotional magazines with their prostititional story-for-an-ad format, or with the chamber of commerce magazines with their Babbitt perspectives.")).

¹⁶¹ *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 824 (Tex. 2012); *East*, 77 S.W. at 648, *rev'd* 98 Tex. at 151, 81 S.W. at 282; *Long Reach*, 116 S.W. HIST. Q. at 273; *East Historical Analysis*, at 64, 129.

¹⁶² Compare *East Historical Analysis*, at 130, with *Id.* at 148.

¹⁶³ SCOTX NARRATIVE HISTORY at 140. Chief Justice Reuben Gaines, Justice Williams, and Justice T.J. Brown served together for nearly twelve years. *Id.* During this time—encompassing a dozen volumes of the Texas Reports—only six dissents were filed (one by Chief Gaines, two by Justice Williams, and three by Justice Brown), and only one concurrence (by Justice Williams). *Id.* at 139–40.

While some have said that the Consensus Court "escorted Texas from the frontier into the industrial age with wisdom, discretion, and impeccable judicial temperament," other historians have taken a more critical view of that Court's legacy. Compare SCOTX NARRATIVE HISTORY at 150, with *Long Reach*, 116 S.W. HIST. Q. at 278–79.

¹⁶⁴ *East Historical Analysis*, at 147. Until 1997, the mechanism to invite the Texas Supreme Court to review a case was by filing at the Court an application for writ of error under former Texas Rule of Appellate Procedure ("TRAP") 133(a). See, e.g., Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 104 (Winter 2007). After the massive overhaul of the TRAPs in September 1997, Rule 133(a) was supplanted by Rule 56.1(b)(1), which introduced the current process of petitioning the Court for review. *Id.*; see TEX. R. APP. P. 56.1(b)(1), reprinted in *Texas Rules of Appellate Procedure*, 60 TEX. B.J. 878, 936 (Oct. 1997).

weeks later on June 13, 1904, the Court issued its unanimous opinion reversing the Dallas Court of Appeals and affirming the original judgment of the district court.¹⁶⁵

Writing for a unanimous Court, Justice Williams began by noting that Acton was then “recognized and followed ... by all the courts of last resort in this country before which the question has come, except the Supreme Court of New Hampshire”¹⁶⁶—the one jurisdiction Justice Bookhout relied upon below.¹⁶⁷ Therefore, the Court found to be persuasive Acton’s passage restating the rule of capture.¹⁶⁸ In the closing paragraphs of the *East* opinion, the Court explained that, because the Railroad was “making ... use of the water which it takes from its own land ..., [n]o reason exists why the general doctrine [(as stated in *Acton* and *Pixley*)] should not govern this case.”¹⁶⁹

Justice Williams did caution, though, that East had made “no claim of malice or wanton conduct of any character,” so no such inquiry was before the Court.¹⁷⁰ The jurisprudential import of this statement was to—at the same moment Texas formally adopted the rule of capture—simultaneously limit its operation in cases where a withdrawing landowner acted maliciously or wantonly (*i.e.*, wastefully).¹⁷¹

Although East initially moved for rehearing on June 28, 1904, just days after the opinion issued, he subsequently requested the Court dismiss his motion for rehearing the following month.¹⁷² And with that, *East* became enshrined in Texas jurisprudence.

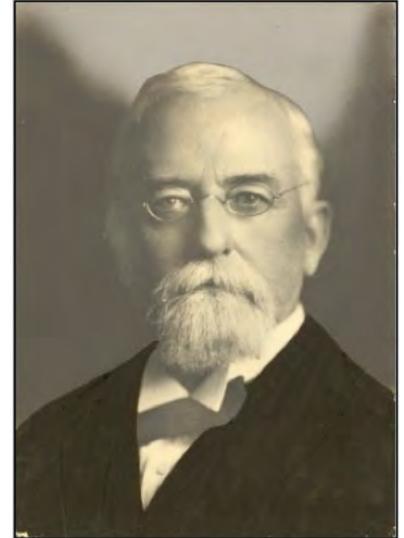


Fig. 8 – Justice F.A. Williams of the Texas Supreme Court.¹⁷³ Photo courtesy of the University of Texas Tarlton Law Library.

¹⁶⁵ *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).

¹⁶⁶ *Id.* at 149, 280; see *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 825 (Tex. 2012).

¹⁶⁷ *East*, 77 S.W. at 647–48, *rev'd*, 98 Tex. at 151, 81 S.W. at 282.

¹⁶⁸ *East*, at 149, 280 (quoting *Acton*, 152 Eng. Rep. at 1235); see *Day*, 369 S.W.3d at 826 (distinguishing and putting into context the *East* Court’s quotation to *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)).

¹⁶⁹ *East*, 98 Tex. at 151, 81 S.W. at 281–82.

¹⁷⁰ *Id.* at 151, 282; see *Day*, 369 S.W.3d at 825.

¹⁷¹ Justice Williams was undoubtedly referring to *Acton*’s earlier incorporation of a malicious restriction to the concept of *damnum absque injuria*. See *Acton v. Blundell*, 152 Eng. Rep. 1223, 1228 (1843).

¹⁷² *East Historical Analysis*, at 167–73.

¹⁷³ *Long Reach*, 116 S.W. HIST. Q. at 276. Justice Williams was from an antebellum Mississippi planter family but did not fight in the Civil War because he was only nine years old when it began. SCOTX NARRATIVE HISTORY at 139, 143. After being orphaned at sixteen, Williams migrated to Texas four years later to live with his sister in Crockett, Texas. *Id.* at 139. There, he read law with his sister’s husband, and practiced for twelve years in private practice. *Id.* Justice Williams was highly experienced when Governor Joe Sayers appointed him to the Texas Supreme Court, having already served eight years on the Austin Court of Appeals and another seven years on the newly-created Galveston Court of Appeals. *Id.* During his time on the Court, Justice Williams and Chief Justice Reuben Reid Gaines became close friends, often joining one another on hunting trips along with the Court clerk, deputy clerk, and the Court’s porter. *Id.* at 141.

After being reelected three times to his office, Justice Williams retired from the Court in 1911, just two and a half months after his longtime friend and colleague, Chief Gaines. *Id.* at 279; SCOTX NARRATIVE HISTORY at 155, 242.

Conclusion

Texas is unique in that it can trace its adoption of the rule of capture 100 years ago directly to the pronouncement of a Roman jurist some 1,900 years before that. The historical context surrounding the formulation of each informs a fuller understanding of the practical operation of modern Texas groundwater jurisprudence today.



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A Brief History of the Short History of the State of the Judiciary in Texas

By Osler McCarthy

The ritual of the Chief Justice's biennial State of the Judiciary address to the Legislature seems a historical mainstay in this state, but the tradition is only thirty-eight years old. By statute in 1977, the Legislature invited the Chief over to chat.¹ And Chief Justice Joe R. Greenhill came first, on January 31, 1979.



Chief Justice Joe R. Greenhill was the first Chief in Texas history to deliver a State of the Judiciary address to the Legislature. He is pictured here delivering his second address in April 1981. Photo courtesy of the Supreme Court of Texas Archives.

The statute was amended in 1993² to clarify that the “message” could be written as well

¹ Acts 1977, 65th R.S., ch. 83, General and Special Laws of Texas; http://www.lrl.state.tx.us/scanned/sessionLaws/65-0/HB_828_CH_83.pdf.

² Acts 1993, 73rd R.S., ch. 129, General and Special Laws of Texas; http://www.lrl.state.tx.us/scanned/sessionLaws/73-0/SB_596_CH_129.pdf.

as oral, but each odd-numbered year before and since saw the Chief walk across the street to the Capitol and, with four years' exception, stand at the lectern on the House Chamber dais and deliver his speech.

The State of the Judiciary's genesis was a 1971 proposal by the Conference of Chief Justices advocated by then-Chief Justice Robert W. Calvert, according to Dr. William Raftery, a senior analyst with the National Center for State Courts in Williamsburg, Virginia.³ Earlier that year, chief justices in Colorado and Michigan gave addresses to joint legislative sessions in their states.

Calvert, presiding officer of the National Conference of Chief Justices, recommended the Colorado and Michigan speeches be sent to all state chief justices. And the idea was born.

Then-State Rep. Ben Z. Grant of Marshall made Calvert's idea law with House Bill 828, passed in 1977 to "promote better understanding between the legislative and judicial branches of government and thereby promote the more efficient administration of justice."⁴



Chief Justice Robert Calvert set the idea in motion for a biennial address to the Legislature in 1971. Photo courtesy of University of Texas Tarlton Law Library.



Chief Justice Tom Phillips delivered eight State of the Judiciary addresses during his long tenure.

Venues for State of the Judiciary addresses generally fall into three categories, according to Raftery: legislatures (either in joint sessions or to judiciary committees), state supreme courts (to which legislators are invited), or bar association meetings.

But in Texas the venue has almost consistently been in the House of Representatives, although for four years from 1995 through 2001 the address was in the stately Old Supreme Court Courtroom on the Capitol's third floor. That location change may have been because of partisan politics: the Chief Justice, Tom Phillips, had been in the vanguard of a developing Republican trend in statewide Texas politics and the Legislature was still dominated by Democrats, although less so each election cycle.

Phillips gave his last State of the Judiciary address in the House Chamber in 2003 when a Republican majority took the House.

³ Author's telephone and email conversation with Raftery.

⁴ Acts 1977, 65th R.S., ch. 83, General and Special Laws of Texas. Grant left the House in 1981, serving as a state district judge and justice on the Texarkana Court of Appeals. Grant also was a newspaper columnist, historian novelist, and playwright, writing among other works (with noted writer Larry King) *The Kingfish: A One-Man Play Loosely Depicting the Life and Times of the Late Huey P. Long of Louisiana* (Dallas: Southern Methodist University Press, 1992).

Over the years, whatever the venue, whatever the legislative makeup, many addresses have been consistent in their admonitions: the Texas judiciary takes roughly one-third of 1 percent of the state's budget—what it costs to paint stripes on Texas highways (Chief Justice Jack Pope, attributed to Greenhill),⁵ what it costs for utilities and maintenance at the University of Texas at Austin (Pope),⁶ a figure that has not changed over the years since Greenhill employed it in 1979⁷ or when Chief Justice Nathan L. Hecht used it in 2015.⁸



Chief Justice Jack Pope was applauded by members of the Legislature after his State of the Judiciary address on January 17, 1983. Photo courtesy of Texas Senate Media Services.

⁵ “Chief Justice [Warren] Burger has said that Americans spend more money for peanut butter than the total cost of the judicial system. I do not know where the figures came from, however, my predecessor expressed it by saying that Texans spend more money painting white lines down the center of highways than they do for their judiciary.” Chief Justice Jack Pope, “State of the Judiciary 1983,” 68th Leg., R.S., January 17, 1983, 25; <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-1983.pdf>.

⁶ Pope continued the miniscule budget analogy: “I now add my own comparison: if every budget request sought by the judiciary were granted, it would be less than the utility and maintenance bill of the University of Texas at Austin.” *Ibid.*

⁷ Chief Justice Joe R. Greenhill, “State of the Judiciary 1979,” 66th Leg., R.S., January 31, 1979, 12; <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-1979.pdf>.

⁸ Chief Justice Nathan L. Hecht, “State of the Judiciary 2015,” 84th Leg., R.S., February 18, 2015, 5 (pages not numbered); <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2015.pdf>.



THE STATE OF THE JUDICIARY MESSAGE

Delivered by
CHIEF JUSTICE JACK POPE

January 17, 1983

Some years ago, Warren Burger, Chief Justice of the United States Supreme Court, initiated the practice of making State of the Judiciary speeches. In 1977, the 65th Texas Legislature adopted the practice in Texas. I am here to speak about some of the matters that concern the third constitutional branch of our government. That branch includes more than 760 municipal judges, 962 justices of the peace, judges of 254 constitutional county courts, 120 judges of county courts at law, 347 judges of district courts and 97 appellate judges.

On behalf of all those judges I thank Lt. Governor Hobby and the Texas Senate and Speaker Lewis and the House of Representatives for according the third branch of government this early opportunity to review with you matters of concern to all of us.

I will not discuss all of the material in the text that has been delivered to you, nor will I present this in the form of a budget request. I shall briefly discuss three broad subjects. First, I will give you an appraisal of the good and the bad in recent events

The States of the Judiciary may be for the lofty goal of understanding between the branches, but they might fairly be called hat-in-hand appeals over the years.

“The constitution does not expressly say that the three branches shall be equal,” Greenhill told his audience in the first address. “The facts of life are that some groups are more equal than others. But I think it does mean that there shall be three branches of government which shall be separate, and of equal dignity.”⁹

In the whole over almost forty years, each Chief Justice has addressed concrete problems with solid answers, many of them quickly successful, like Greenhill’s urging that the then-Courts of Civil Appeals be given criminal jurisdiction to answer the Court of Criminal Appeals’ years-long backlog. The Legislature that session sent voters a constitutional amendment to do that.

But other problems, not forgotten, have been abandoned on the wayside, like judicial districts and patchwork jurisdiction that need changing and the need for higher judges’ salaries, always lagging by national comparisons, to keep up with the times and inflation and competition for talent.

And then the nettlesome judicial-selection issue. If the State of the Judiciary has had a constant refrain over the thirty-eight years, that refrain is that the way Texans choose their judges is broken.

Greenhill politely broached judicial selection in his first address in 1979. “The quality of the people who serve as judges is of the utmost importance in carrying out any system of justice under law,” he said. “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.”¹⁰

That day of reckoning has not come, of course. In his second State of the Judiciary message, more combative on many issues he addressed, Greenhill hit harder on how judges are chosen in Texas. “There are no meaningful party platforms for the Judiciary,” he said. “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.”¹¹

With a few exceptions, almost every address to the Legislature since has beat the same drum. Most recently Chief Justice Hecht, mentioning yet another purge of judges caught in the throes of presidential politics in November 2016, said “qualifications did not drive” the election

⁹ Greenhill, “State of the Judiciary 1979,” 1.

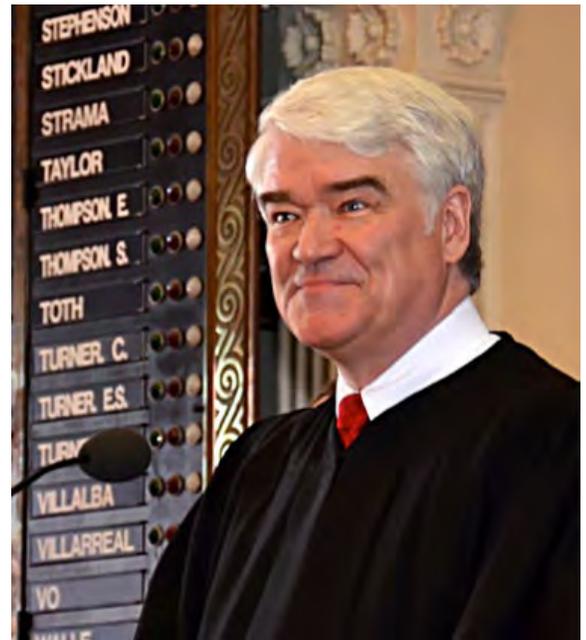
¹⁰ *Ibid.*, 13.

¹¹ Chief Justice Joe R. Greenhill, “State of the Judiciary 1981,” 67th Leg., R.S., April 21, 1981, 9; <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-1981.pdf>.

of new judges last year and the defeat of incumbent jurists.

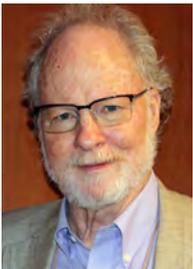
“Such partisan sweeps are demoralizing to judges and disruptive to the legal system,” he warned. “But worse than that, when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty.”¹²

Chief Justice Calvert sparked the idea of communication between divisions of state government. Like any communication between partners, much has been heard. And much in the end has not.



Chief Justice Nathan Hecht emphasized the need for judicial selection reform in his 2015 and 2017 addresses to the Legislature. Photo by Osler McCarthy.

¹² Chief Justice Nathan Hecht, “State of the Judiciary 2017,” 85th Leg., R.S., February 1, 2017, 6 (pages not numbered); <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2017.pdf>.



OSLER MCCARTHY is Staff Attorney for Public Information for the Texas Supreme Court.

Texas Supreme Court and Court of Criminal Appeals Pass Emergency Relief Orders in Hurricane Harvey's Wake

By Dylan O. Drummond

Hurricane Harvey struck the Texas Gulf Coast on August 25, 2017 and then lingered nearly a week, flooding and destroying innumerable homes, businesses, and even courts. In Houston, which suffered some of the worst inundation, flooding has closed the Criminal Courthouse indefinitely, compelling criminal court judges and staff to share Civil Courthouse courtrooms, while the Criminal Justice Center and the Jury Assembly Building will be closed for at least eight months. The storm severely damaged the county courthouse in Rockport and flooded Beaumont's courthouse. As a result, Governor Abbott declared a state of disaster in fifty-four counties.

Following the passage of legislation during the 81st Legislative Session in 2009 that permitted the Texas Supreme Court to "modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor,"¹ Texas's two highest courts—for the first time—issued a slew of emergency administrative orders to assist litigants as well as both the bench and bar.



Hurricane Harvey turned many Houston area streets into rivers. Photo by David A. Furlow.

Specifically, the Supreme Court issued seven administrative orders less than a week after Harvey made landfall that temporarily modified not only what constitutes "good cause" for modifying or suspending litigation deadlines and allowed out-of-state attorneys to practice in Texas, but also suspended statutes of limitations statewide. The orders provided as follows:

- Just three days after the hurricane hit, the Texas Supreme Court and the Court of Criminal Appeals ordered that all Texas courts "**should consider disaster-caused delays as good cause** for modifying or suspending all deadlines and procedures—whether prescribed by statute, rule, or order—in any case, civil or criminal."²
- The following day, the Supreme Court directed that "**any applicable statute of limitations is suspended** for any civil claim if the claimant shows that the disastrous

¹ See TEX. GOV'T CODE § 22.035(b).

² Tex. Sup. Ct. Order of Aug. 28, 2017, Misc. Docket No. 17-9019, ¶ 3 (emphasis added); Tex. Ct. Crim. App. Order of Aug. 28, 2017, Misc. Docket No. 17-010, ¶ 3 (emphasis added).

conditions resulting from Hurricane Harvey prevented the timely filing of the claim despite the party's and counsel's diligent efforts."³

- The same day, the Supreme Court permitted out-of-state attorneys to practice Texas law for six months if they were displaced due to Hurricane Harvey or provides legal-aid or pro-bono services to victims of Hurricane Harvey.⁴ The Court attached a registration form for the temporary practice of Texas law to the order that a temporarily-admitted attorney was required to submit to the Texas Bar.⁵
- Five days after Harvey made landfall, the Supreme Court extended the deadline for Texas attorneys in counties declared a disaster area by the Governor to pay their Texas Bar membership dues from August 31, 2017 to October 31, 2017.⁶
- The Supreme Court also suspended deadlines in certain child-protection actions in counties subject to a disaster declaration.⁷
- The Supreme Court and the Court of Criminal Appeals allowed the County Court at Law of Aransas County to conduct all court proceedings except jury trials in neighboring San Patricio County.⁸
- Both the Supreme Court and the Court of Criminal Appeals further allowed the Constitutional County Court and justice courts of Refugio County to conduct all court proceedings in neighboring Goliad and/or Victoria Counties.⁹ Unlike Aransas County, Refugio County jury trials may be conducted in Goliad and/or Victoria Counties only if plaintiff waives his or her right to a jury trial in Refugio County.¹⁰

³ Tex. Sup. Ct. Order of Aug. 29, 2017, Misc. Docket No. 17-9098, ¶ 4 (emphasis added).

⁴ Tex. Sup. Ct. Order of Aug. 29, 2017, Misc. Docket No. 17-9099, ¶ 2, *amended by* Tex. Sup. Ct. Order of Aug. 30, 2017, Misc. Docket No. 17-9101, ¶ 2.

⁵ *See* Tex. Sup. Ct. Order of Aug. 29, 2017, Misc. Docket No. 17-9099, ¶ 3, *amended by* Tex. Sup. Ct. Order of Aug. 30, 2017, Misc. Docket No. 17-9101, ¶ 3.

⁶ Tex. Sup. Ct. Order of Aug. 30, 2017, Misc. Docket No. 17-9102, ¶ 3.

⁷ Tex. Sup. Ct. Order of Sept. 5, 2017, Misc. Docket No. 17-9111, ¶¶ 2-3 (effective Aug. 28, 2017).

⁸ Tex. Sup. Ct. Order of Aug. 30, 2017, Misc. Docket No. 17-9100, ¶ 2; Tex. Ct. Crim. App. Order of Aug. 30, 2017, Misc. Docket No. 17-011, ¶ 2.

⁹ Tex. Sup. Ct. Order of Sept. 1, 2017, Misc. Docket No. 17-9110, ¶ 2; Tex. Ct. Crim. App. Order of Sept. 1, 2017, Misc. Docket No. 17-012, ¶ 2.

¹⁰ *Compare* Tex. Sup. Ct. Order of Aug. 30, 2017, Misc. Docket No. 17-9100, ¶ 2, and Tex. Ct. Crim. App. Order of Aug. 30, 2017, Misc. Docket No. 17-011, ¶ 2, *with* Tex. Sup. Ct. Order of Sept. 1, 2017, Misc. Docket No. 17-9110, ¶ 2; Tex. Ct. Crim. App. Order of Sept. 1, 2017, Misc. Docket No. 17-012, ¶ 2

22nd Annual John Hemphill Dinner

· Chief Judge Diane P. Wood Was the Featured Speaker ·

By Marilyn P. Duncan
Photos by Mark Matson

A keynote speech by the Honorable Diane P. Wood, Chief Judge of the United States Court of Appeals for the Seventh Circuit, was one of the highlights of this year's John Hemphill Dinner. Almost 400 appellate attorneys, judges, their spouses, and other members of the community filled the Grand Ballroom of the Four Seasons Hotel in Austin on Friday, September 8, to enjoy dinner and the evening's program, which also included several memorials and award presentations.

Prior to the general reception and dinner, members of the Court, Society Fellows, and other guests met with Chief Judge Wood in a private reception in the Four Seasons San Jacinto Room.

During the private reception before the dinner, Chief Judge Diane Wood (fourth from left) stands with (from left) 2017-18 Society President Dale Wainwright, Justice Don Willett, Judy Lenox (Chief Judge Wood's sister), Mike Powell, and Harriet Miers.



Left to right:
former Chief Justice
Wallace Jefferson,
Chief Judge Wood,
and Fellows Stacy Alexander
and Doug Alexander.

The dinner program began with a welcome by outgoing Society President Macey Reasoner Stokes, followed by the Pledge of Allegiance led by the Bedichek Junior Marine Corps. This is the sixth year that an honor guard from Austin's Bedichek Middle School has led the flag ceremony



Left: 2016-17 Society President Macey Reasoner Stokes welcomes dinner guests. Right: Members of the award-winning Bedichek Middle School Junior Marine Corps lead the flag ceremony.

at the Hemphill Dinner.

The Texas Center for Legal Ethics then presented the annual Chief Justice Jack Pope Professionalism Award to Chief Justice Carolyn Wright of the Fifth District Court of Appeals in Dallas. TCLE Executive Director Jonathan Smaby announced the award, which recognizes outstanding service and integrity in the field of law. Chief Justice Nathan Hecht presented the award to Chief Justice Wright on behalf of TCLE.



This year's Pope Award recipient, the Honorable Carolyn Wright, is congratulated by Jonathan Smaby of the Texas Center for Legal Ethics (left) and Chief Justice Nathan Hecht.

Next on the program were memorials to the three former members of the Texas Supreme Court who passed away during the past year: Chief Justice Jack Pope, Justice Jim Wallace, and Justice Barbara Culver Clack.

2017-18 Society President Dale Wainwright delivered the memorial for Chief Justice Pope, one of the Society's founders and most enduring supporters and board members. Justice Wainwright praised Chief Justice Pope's long record of judicial service and many achievements,



including his role in creating IOLTA and establishing mandatory judicial education and ethics rules for judges. Noting that Chief Justice Pope passed away last February at the age of 103, Justice Wainwright observed that he had been a “living judicial legend” for many decades. He concluded his remarks by having the audience raise their glasses in tribute to Chief Justice Pope’s legacy: “To Chief Justice Jack Pope—May his life, his scholarship, and his character continue to set the standard for judicial excellence for generations to come.”



Former Chief Justice Tom Phillips gave the memorial for Justice Wallace, who served on Phillips’s Court for eight months after he became Chief Justice in 1988. Noting that Justice Wallace served the state in all three branches of government and at all three levels of the state judiciary, Chief Justice Phillips described him as a man of quiet integrity. “In a time of sharp divisions on the Court and at the bar,” said Phillips, “he defied characterization as a plaintiff’s judge or defense judge, deciding each case as he saw the merits.”



Delivering the memorial to Justice Barbara Culver Clack was the Honorable Raul Gonzalez, who served on the Supreme Court with her in the 1980s. Describing his

Clockwise from upper left: Dinner guests raise their glasses in tribute to the three deceased Court members; Justice Dale Wainwright offers a memorial toast to Chief Justice Jack Pope; Chief Justice Tom Phillips praises the attributes and contributions of the late Justice Jim Wallace; Justice Raul Gonzalez pays tribute to Justice Barbara Culver Clack.

colleague as “firm, decisive, gracious, and collegial,” Justice Gonzalez praised Justice Culver Clack as an excellent judge whose stature was measured by her actions. “Although barely five feet tall,” he said, “she was a towering figure in West Texas politics, the legal profession, and the judiciary. She was an inspiration to all who knew her.”

Next, David Beck, Chair of the TSCHS Fellows, reported on the Fellows’ accomplishments over the past year. Highlights were the production of the second *Taming Texas* book—*Law and the Texas Frontier*—and the continued success of the Taming Texas Judicial Civics and Court History Project. He thanked the Fellows for supporting these important educational activities and invited members of the audience to join the Fellows (see Fellows Column in this issue, p. 6.)



David J. Beck describes the programs and priorities of the Society’s Fellows.



2017 President’s Award recipient Pat Nester stands with President Macey Reasoner Stokes.

Ms. Stokes then presented this year’s President’s Award for Outstanding Service to Pat Nester, who served as the Society’s Executive Director from 2013 until his retirement on June 1 of this year. In presenting the award, she listed the many ways Mr. Nester had improved the Society’s operations, from strengthening the partnership with the State Bar to implementing a strategic planning process.

“But just as important as his specific achievements for the Society,” she added, “is the fact that Pat was a joy to work with. He was always enthusiastic and upbeat, not easily rattled, and always willing to take on whatever was asked of him. Everyone loves Pat, and we already miss him a lot.”

The evening’s keynote speaker, Seventh Court of Appeals Chief Judge Diane Wood of Chicago, was introduced as an old friend to many in the Texas legal community, having grown up in the state and received her undergraduate and law degrees from UT Austin.

Speaking on the topic “Partners in Justice for All,” Chief Judge Wood offered her perspective on the current state of legal services for disadvantaged members of our society.

Citing a recent report by the Congressionally sanctioned Legal Services Corporation (LSC), Chief Judge Wood noted that in 2016, “86 percent of the civil legal problems reported by low-



Chief Judge Diane Wood describes ways the bar can help the courts do their job better.

income Americans received either inadequate or no legal help.”

Equally sobering, she said, is the fact that “some 70 percent of low-income households (those at 125 percent of the poverty line) experienced at least one civil legal problem in the last year, including problems with health care, housing conditions, disability access, veterans’ benefits, and domestic violence.”

Given that more than 60 million low-income Americans qualify for LSC assistance, these percentages are “shocking,” she said. Sadly, many in this group “have no idea that the problem they are facing is one that might be addressed by the legal system. Those people need not only education, but also pro-active efforts on the part of the courts and bar to guide them through the system.”



Chief Judge Wood added that an increasing number of low-income litigants who do deal with the legal system use do-it-yourself tools or use the courts on a *pro se* basis, with mixed results. In her court, the Seventh Circuit, almost two-thirds of cases are now filed by *pro se* litigants, prisoners as well as ordinary citizens with complaints stemming from employment discrimination, police brutality, and other issues. The growing number of unrepresented and self-represented people is a widespread problem, she said, and the bar must take steps now to reverse the trend.

One of several approaches she outlined is to follow the example of the medical profession and allow non-lawyers with special training to perform certain legal services. These providers could be conveniently located in shopping malls, libraries, and other public places to either handle straightforward legal problem or refer them to lawyers.

She noted that on the “criminal side of the ledger,” the shortage of competent defense lawyers for low-income defendants has even more serious implications. Statistics from various states in recent years showed attorney-client ratios that were far above the ABA standard of 150 level. For example, she said, in 2013, public defenders in Miami were handling 400 felony cases each, while in 2009 each attorney at the New York Legal Aid Society “handled 103 criminal defense cases at time, and 592 a year.” Other states reported similar averages.

Chief Judge Wood concluded her remarks with the observation that “far too many people caught up in the criminal justice system” are being left behind in the quest for equal justice for all. “We need new ideas, better imaginations, and plain old stubbornness,” she said. “As the Gene Krantz character said in *Apollo 13*, failure is not an option.”

To conclude the evening’s program, Justice Jeff Brown, a Trustee of the Society, administered the oath of office to incoming Society President Dale Wainwright.

President Wainwright then took the podium to thank Macey Reasoner Stokes for her year of outstanding leadership. He also thanked the dinner attendees for their support of the Society and gave a special thanks to the law firms who sponsored tables (see list of sponsors below).



Left: Justice Jeff Brown administers the president’s oath of office to Dale Wainwright.
Right: President Wainwright concludes the evening’s program.

2017 John Hemphill Dinner Table Sponsors

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Retired Supreme Court Justice Scott Brister's Portrait is Unveiled

By Dylan O. Drummond
Photos by Mark Matson

On September 8, 2017, retired Justice Scott Brister presented his judicial portrait to the Texas Supreme Court in a ceremony held in its courtroom. The portrait was beautifully painted by noted Hill Country artist Patsy Ledbetter.

First Court of Appeals Justice Jane Bland introduced Justice Brister, who in turn formally presented his portrait to the Court. Justice Brister served nearly six years on the Court, and wrote the state's seminal opinion on legal sufficiency during his tenure. *See City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005). He is also one of only four Texas Supreme Court Justices to have previously served as Court briefing attorneys, and this unique lineage is represented in his portrait. Specifically, he clerked for legendary Chief Justice Joe Greenhill, whose own portrait appears in the background of Justice Brister's.

Court rules forbid the hanging of a living former Justice's portrait in the courtroom itself, so Justice Brister's portrait will likely hang in the breezeway of the Tom C. Clark Building, between the Court and the Austin Court of Appeals. Justice Brister's portrait "hanging" was the first at the Court since Justice Harriet O'Neill presented hers in 2012.



Justice Brister speaks to the Court and the audience in presenting his portrait.





Following the ceremony, Justice Brister stands before his portrait with Justice Jane Bland and Chief Justice Nathan Hecht.



Justice Brister's family members who attended the Portrait Dedication Ceremony were (left to right) his wife, Julie Brister; his sister, Dr. Susan Brister; and his mother, Annette Brister.

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Appellate Legends Chief Justice Jack Pope, Professor Don Hunt, and Trailblazer Helen Cassidy Join the Texas Appellate Hall of Fame

On September 7, 2017, the Supreme Court Historical Society and the Appellate Section of the State Bar of Texas cosponsored the Texas Appellate Hall of Fame Induction Ceremony at the Four Seasons during the Appellate Section's Annual Meeting.

The members of this seventh Hall of Fame class remain as beloved and renowned as when they were with us. The three inductees were Chief Justice Jack Pope, Professor Donald M. Hunt, and appellate attorney Helen A. Cassidy. Chief Justice Jack Pope served as the 23rd Chief Justice of Texas, sat on the Texas Supreme Court for some twenty years, and was a judge on the trial and appellate benches for nearly forty years. Texas Supreme Court Historical Society Board member and attorney Bill Chriss inducted Chief Justice Pope during the ceremony.

Professor Don Hunt was a Professor at Texas Tech University School of Law for some thirty-four years, coached numerous national champion mock trial and moot court teams, and was an appellate pioneer and mentor. His colleague Skip Watson inducted Professor Hunt into the Hall of Fame.

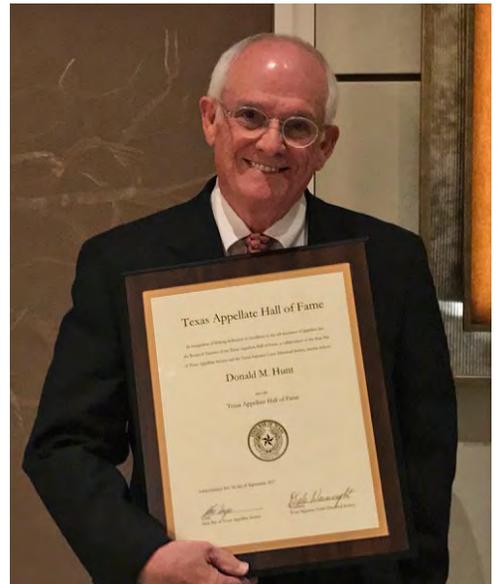


Left: Chief Justice Jack Pope. Photo courtesy of State Bar of Texas Archives.
Right: Bill Chriss describes the many reasons why Chief Justice Jack Pope is a legendary figure in the history of the appellate courts. Photo by Dylan O. Drummond.

Helen A. Cassidy was a trailblazing appellate attorney who served as the Chief Staff Attorney of the 14th Court of Appeals for nearly fifteen years, was board certified in appellate law, and chaired the Appellate Section of the State Bar of Texas. The Honorable Daryl Moore, Judge of the 333d Judicial District Court of Harris County, inducted Ms. Cassidy.

The Hall of Fame was created in 2011 by the Appellate Section of the State Bar of Texas and the Texas Supreme Court Historical Society to honor and recognize jurists and practitioners who made unique contributions to the practice of appellate law in the State of Texas. This year's inductees were selected by a Board of Trustees that consisted of the Chair of the Appellate Section, the President of the Historical Society, and other appellate practitioners from throughout Texas.

The inductees were selected based on their written and oral advocacy; professionalism; faithful service to the citizens of Texas; mentorship of newer appellate attorneys; pro bono service; participation in appellate continuing legal education; and other indicia of excellence in the practice of appellate law in our state.



Left: Professor Donald M. Hunt. Photo courtesy of Texas Tech University. Right: Skip Watson displays Professor Don Hunt's certificate of induction. Photo by Dylan O. Drummond.



Left: Helen Cassidy. Photo courtesy of Ms. Cassidy's family. Right: Family members and court colleagues attended the ceremony in Helen Cassidy's honor. Front row, left to right: her son, David Cassidy; her granddaughter, Hailey Cassidy; and a former colleague at the 14th Court of Appeals, Karen Vowell Sales. Judge Daryl Moore stands behind them. Photo by Dylan O. Drummond.

2017 Briefing Attorney Breakfast Brings Court Family Together

By Mary Sue Miller



On September 9, approximately 80 current and former justices, briefing attorneys, staff attorneys, staff and their guests gathered for the Briefing Attorney Breakfast at the Texas Law Center. This annual event is a cherished tradition, providing an opportunity to celebrate the shared experience of serving the Court.

Responsibility for planning the event has been transferred from the Court staff to a rotating committee of former briefing and staff attorneys with administrative support from the Texas Supreme Court Historical Society. This year, the attendees spent time visiting with former colleagues and enjoyed various behind the scenes stories. Next year's committee welcomes feedback and suggestions for future breakfasts.



Left to right: Dylan Drummond, Natalie Thompson, Chief Justice Nathan Hecht, Kristina Williams, Brian Tully, and Zach Bowman.



Justice (ret.) Raul Gonzalez, Ben Taylor, Chief Justice (ret.) Wallace Jefferson.

Please send feedback to Dylan Drummond ddrummond@grayreed.com, Lisa Hobbs lisa@kuhnobbs.com, or Amy Saberian Prueger asaberian@enochkever.com.



Melissa Davis, Casey Potter, Justice (ret.) Dale Wainwright, and Justice (ret.) Raul Gonzalez.

Susan Kidwell (foreground), Justice Phil Johnson (background).



Shawn Johnson, Mike Duncan, Jenny Hodgkins, and Brittney Greger.

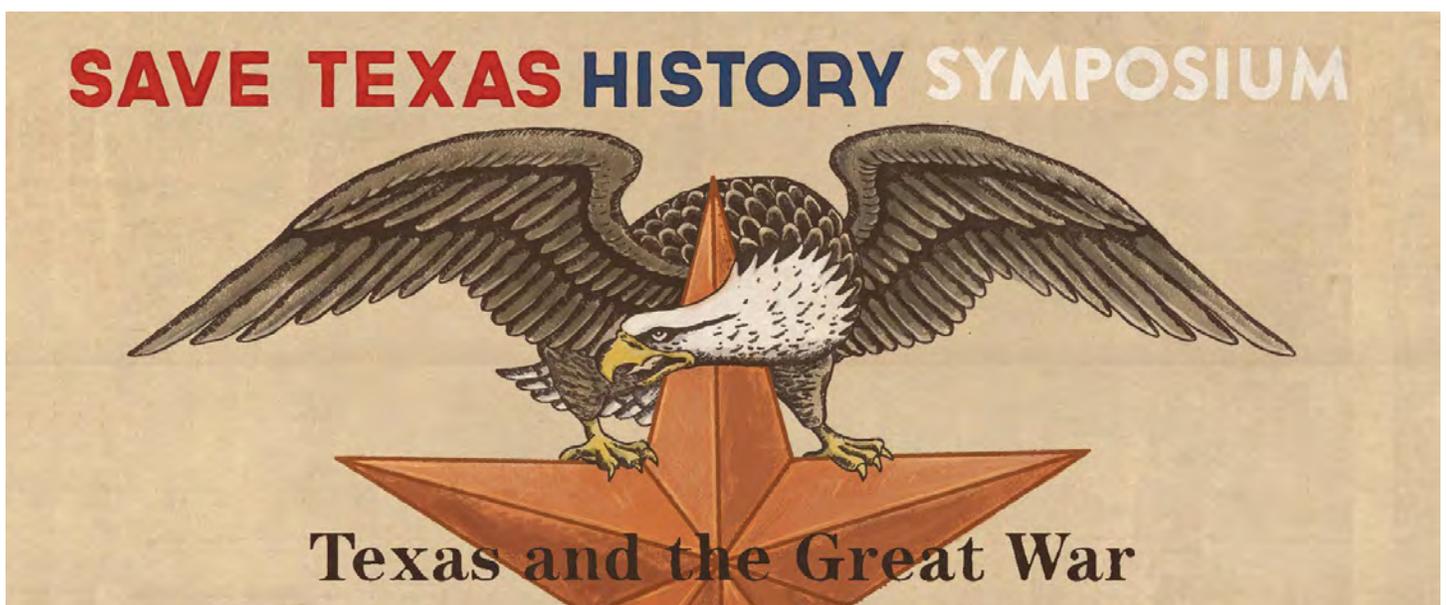
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Over Here: Saving Texas History One War at a Time

By David A. Furlow

Over there, over there
Send the word, send the word over there
That the Yanks are coming
The Yanks are coming
The drums rum-tumming
Everywhere
So prepare, say a prayer
Send the word, send the word to beware
We'll be over, we're coming over
And we won't come back till it's over
Over there...

Between 1917 and 1919, hundreds of thousands of American soldiers, the "Doughboys," sang *Over There* as they marched off to fight in the First World War and in the post-war intervention in revolution-wracked Russia that followed.



When the Texas General Land Office announced that it would preserve, digitize, and share the history of “Texas and the Great War” at its 2017 *Save Texas History* symposium, the Texas Supreme Court Historical Society answered the call to arms. The Society sponsors annual *Save Texas History* symposia because the two institutions share common goals of protecting Texas history, educating students, and making history accessible to the public. Since 2000, the GLO has made 3 million images of historic Texas maps, land grants, and archival records available online, while adding another 10,000 each month.

Pat Nester, the Society’s history-loving former Executive Director, joined Society Administrative Coordinator Mary Sue Miller and me to share information about the Society at the most recent *Save Texas History* event, which lasted from early morning to early evening on a balmy Saturday, September 16 at the Commons Learning Center of the University of Texas’s Jake Pickle Campus in north Austin.



Pat Nester

Mary Sue Miller brought the Society’s conference posters and large photos of the Society’s books to the Jake Pickle Center the day before the symposium began, then came early on Saturday to set up the Society’s table. While Mary Sue answered conference attendees’ questions about the Society and its publications during the symposium, Pat and I met with speakers who examined every aspect of Texas’s experience during the Great War.

Dr. Geoffrey Wawro, Professor of Military History at the University of North Texas, and Director of the UNT Military History Center, began by offering new perspectives on the First World War. According to Dr. Wawro, American intervention alone kept Germany from winning the war on the Western front during the Kaiser’s Offensive between March and July of 1918. Some 198,000 Texas men entered the armed forces through voluntary enlistments and the draft, while some 450 women served as nurses. Four Texans earned the Congressional Medal of Honor. At least 5,170 Texans died in the service of their country, including 7 “Gold Star” nurses. A little more than one third died inside the U.S., some through training accidents, but far more as a result of the Spanish Flu pandemic of 1918–19. Training camps sprouted up throughout Texas, including Camp Logan in Houston (the scene of an infamous race riot), Camp MacArthur in Waco, Camp Travis in San Antonio, and Camp Bowie in Fort Worth. The U.S. Army’s Signal Corps began building 28 air bases and training stations throughout the Lone Star State.

Jim Hogdson, Executive Director of the Fort Worth Aviation Museum, presented “The Zimmermann Telegram: Two Months that Changed the World.” He placed Germany’s Zimmermann Telegram to Mexico, which promised the return of Texas, New Mexico, Arizona, and California to Mexico if Germany won the War, into the context of German aggression in Europe and elsewhere, the organization of spy-rings inside the U.S., the sinking of the *Lusitania*,

and the German High Command's adoption of unrestricted submarine warfare. All of these together provided reasons for President Woodrow Wilson's April 2, 1917 request that Congress declare war on Kaiser Wilhelm II's German Empire and its allies.

Dr. Jeff Hunt, Director of the Texas Military Forces Museum at Camp Mabry, presented a superb PowerPoint that described how the 36th Infantry Division, a combined unit of Texans and Oklahomans, trained, deployed, and defeated opposing German forces during the Allies' Meuse-Argonne offensive during the last months of the war, culminating in 24 days of brutal combat and 2,601 casualties before being relieved by other units on October 28-29, 1918.

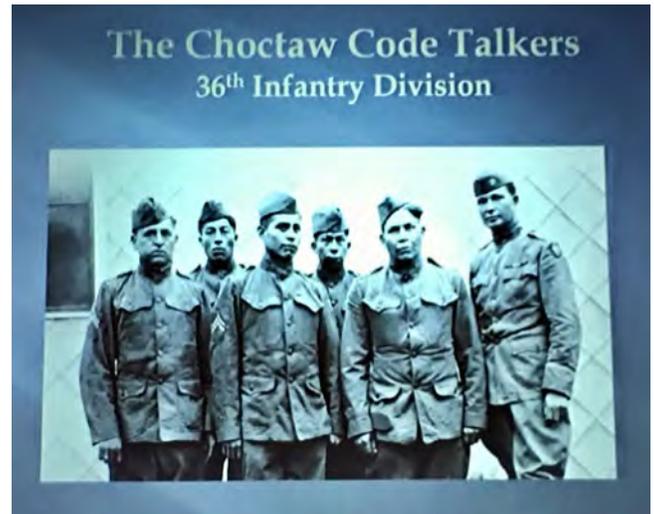


Historian Jeff Hunt's PowerPoint showed the 36th Infantry Division's descent into the desperate battles at the end of the First World War.

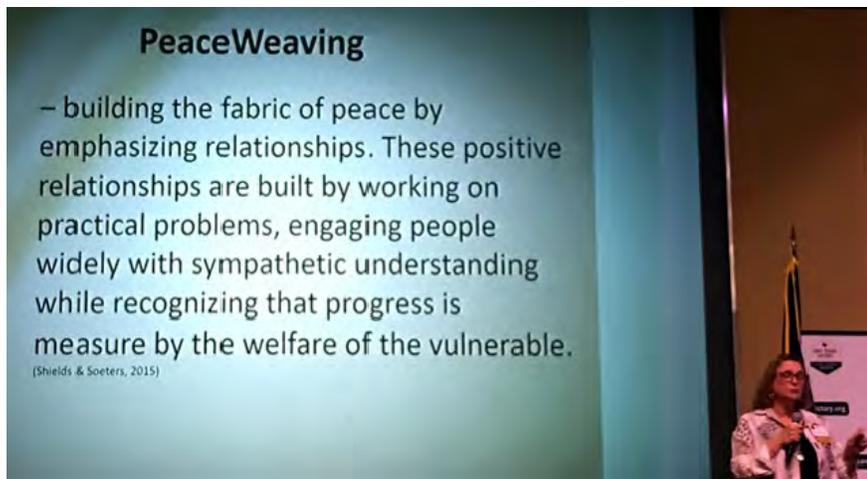


"We got so mixed up the Germans could not use their guns. Our men used their bayonets and rifles for clubs, some of them had pick handles and trench knives. A German major said he had been in the war ever since it began but never had seen such fighting."

"I knew that the U.S. used Navajo Indians to communicate in code and confuse the Japanese during World War II," Nester said. "But who knew that the Army's 36th Division used Choctaw Indian code-talkers to keep the Germans in the dark during the First World War?"



The Society sponsored Texas State University Professor Patricia Shields's presentation "Jane Addams and the Women's Peace Movement." Before this symposium, I had never heard of Jane Addams. But I learned much about her from Professor Shields. Born in Cedarville, Illinois, on September 6, 1860, Addams co-founded, with Ellen Gates Starr, a social settlement, Hull-House on Chicago's Near West Side in 1889. Addams worked at Hull-House, a secular social improvement institution, until her death in 1935. An early supporter of the Suffrage movement, the American Civil Liberties Union, and the National Association for the Advancement of Colored People, Jane Addams became the most famous woman in the country through efforts to alleviate the problems of urbanization, industrialization, and immigration.



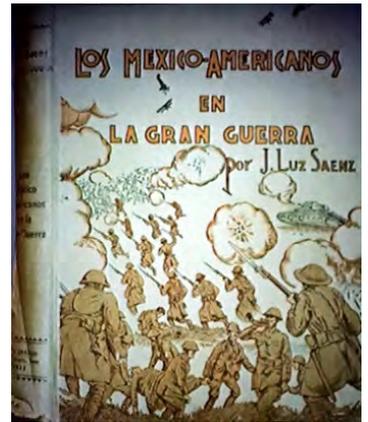
Professor Shields showed how Addams involved herself with the international peace movement in the early twentieth century, then organized the International Congress of Women at the Hague in 1915 to end the war. While other members of the Suffrage Movement supported the war to win popular acclaim, she founded the Women's Peace Party, which evolved into the Women's International League for Peace and Freedom in 1919, winning her the Nobel Peace Prize in 1931. Although peace did not come about as a result of those efforts, the lessons Jane Addams and other Texas women learned came to fruition in later humanitarian efforts.



Professor Patricia Shields connected Jane Addams's Women's Peace Movement with the efforts of Texas women to redefine themselves through suffrage, social work, and the promotion of civil liberties.

University of Texas Professor Emilio Zamora examined the impact of the war on José de la Luz

Dr. Emilio Zamora
 José de la Luz Saenz and World War I:
 Transcending the Horror
 Sponsored by The Texas State Historical Association
 Texas and the Great War

Dr. Emilio Zamora's PowerPoint examined the diary of José de la Luz Sáenz and the Tejano experience of the First World War.

Sáenz, a Tejano soldier from the San Antonio area who wrote a book about his battlefield experience, *Los Mexico-Americanos En La Grand Guerra*. Determined to continue the fight for dignity and freedom that motivated him to serve in the U.S. Army, Sáenz dedicated himself to advancing civil rights in post-war Texas. Sáenz later joined other community leaders in founding the civil rights group LULAC, the League of United Latin American Citizens.

A host of outstanding speakers, several in-depth breakout sessions, free posters and maps, and an excellent lunch made the program a remarkable experience for all who attended. "It was a great way to spend a Saturday," Pat Nester concluded. "I learned things about Texas I didn't know that I didn't know."

This year's *Save Texas History* program was a success on all fronts, according to James Harkins, the General Land Office's Manager of Public Services for Archives and Records. "As a result of 150 individual registrations," he

TEXAS AND THE GREAT WAR

The United States declared war on Germany on April 6, 1917. More than 2 million Americans, including nearly 200,000 Texans, went to fight. These Texans received the Congressional Medal of Honor. Additionally, hundreds of thousands of U.S. soldiers trained in Texas.

Black men: Texans showed their support by buying Liberty Bonds, which the government used to pay for the war effort, as well as participating in "Meatless Mondays" and "Woolless Wednesdays" to ensure adequate supplies for the troops. The economy boomed, and Texas did its part by providing fuel, oil, and other commodities for military use.

The war ended in November 1918.

Sponsored by: **VLB**

Significant People and Places of World War I in Texas

1. Black Battalion / Camp Hero / San Antonio	31. Camp Buchanan / Fort Worth	61. Paul Parks / Houston	71. Thomas Stone Council on Education / Dallas
2. Black Battalion / Houston, Texas	32. Camp Wheeler / Houston	62. Paul Parks / Houston	72. Texas Agricultural College / Lubbock
3. Black Battalion / San Antonio, San Antonio	33. Camp Wheeler / Houston	63. Paul Parks / Houston	73. Thomas Stone Council on Education / Dallas
4. Black Battalion / Houston	34. Camp Wheeler / Houston	64. Paul Parks / Houston	74. University of Texas / Austin
5. Black Battalion / Houston	35. Camp Wheeler / Houston	65. Paul Parks / Houston	75. University of Texas / Austin
6. Black Battalion / Houston	36. Camp Wheeler / Houston	66. Paul Parks / Houston	76. University of Texas / Austin
7. Black Battalion / Houston	37. Camp Wheeler / Houston	67. Paul Parks / Houston	77. University of Texas / Austin
8. Black Battalion / Houston	38. Camp Wheeler / Houston	68. Paul Parks / Houston	78. University of Texas / Austin
9. Black Battalion / Houston	39. Camp Wheeler / Houston	69. Paul Parks / Houston	79. University of Texas / Austin
10. Black Battalion / Houston	40. Camp Wheeler / Houston	70. Paul Parks / Houston	

The Land Office's new map, for sale through its website, is rich in detail and full of stories about the important role Texas played in World War I. <http://www.glo.texas.gov/history/archives/map-store/index.cfm#item/94412>

observed, the GLO “was able to raise over \$10,000 for conservation education.” In addition, the Land Office expects to raise additional thousands of dollars through the sale of its new Texas map about Texas and the Great War.

General Land Office Commissioner George P. Bush greeted sponsors and dignitaries who came to the Texas Military Museum at Camp Mabry on Saturday evening for a tour of the museum’s military vehicles, aircraft, exhibits, and archive. One of the evening’s speakers was Major General Ken Wisian (ret.), a highly-decorated Air Force navigator/bombardier with an extensive military record including combat service in the Balkans, Afghanistan, and Iraq, who now leads the Austin company SparkCognition’s initiatives in the field of Artificial Intelligence. John F. Nichols, the Adjutant General of Texas since 2011, discussed the Texas Army Guard and Texas Air Guard’s role in protecting the twenty-first century Lone Star State.

The General Land Office’s symposium demonstrated the many ways that the First World War changed Texas and altered the course of Western history. As Philip Larkin observed in his 1964 poem *MCMXIV*,

***Never such innocence,
Never before or since....***

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Sharing Judicial Civics Lessons with Fellow Legal History Professionals

By David A. Furlow

Caring means sharing. The Society cared enough about the importance of teaching judicial civics and landmark court case history to share its insights and experience with a room filled with historians, archivists, and court officials from all around the country at the American Association for State and Local History's Annual Meeting in Austin on September 7. Marilyn Duncan and I presented a PowerPoint that told the story of the Society's Taming Texas program from its origin to its implementation by the Houston Bar Association Teach Texas Committee in Houston classrooms.



Headquartered in Nashville, Tennessee, the American Association for State and Local History (AASLH) provides leadership and support for those who preserve and interpret state and local history to make the past more meaningful for the public. The organization works to increase funding and visibility for state and local history and assembles national committees and task forces to carry out its mission.

AASLH's leaders conduct high-quality continuing education programs for individuals and organizations, including a first-ever national standards program for small and medium history organizations. It facilitates networking and discussion through its workshops and annual meetings as well as its website and online conferences. It offers programs, books, and *History News* to its members. I was so impressed with the organization that I joined it early this year.

Our Society's introduction to AASLH began last fall when Catherine G. O'Brien, the Librarian-Archivist of the Virginia State Law Library, approached the Society about participating in a panel session on judicial civics education at the AASLH's 2018 Annual Meeting in Austin. Marilyn Duncan and I volunteered to represent the Taming Texas project on the panel, which was being organized by AASLH's Legal History Community subgroup.

The Legal History Community serves people working to preserve and promote legal and court history around the nation in history organizations of all types and sizes. Its members include university faculty, state and federal court historians and educators, law librarians/archivists/researchers, judicial assistants, a U.S. Supreme Court curator, and independent



Our schools and teachers are being graded on how well they prepare students in math, science, and reading, but our place in the world also depends on how well our students understand their obligations as citizens.

Sandra Day O'Connor (2011)

historical societies affiliated with courts such as the U.S. Supreme Court Historical Society and the Historical Society of the New York Courts. The group is constantly working to develop a network of professionals working in comparable fields and sharing similar focused interests.



Through our participation in the annual meeting and AASLH's Legal History Community, our Society is developing bonds of affinity and interest with a nationwide group of professionals who share a commitment to promoting judicial civics. Together with Rachael L. Drenovsky, the Coordinator of the Michigan Supreme Court Learning Center, Ms. O'Brien organized the panel session, "Taming Civics: Using Historical Narrative and Landmark Court Cases to Bring Civics to Life."

In the months before the September meeting, Marilyn and I began planning our presentation. AASLH members have been gathering together annually to share ideas and innovations since 1940. These days, some 800 to 1,000 history professionals participate in these national forums. We decided that a good approach to telling this group about the Taming Texas Judicial Civics and Court History Project would be to talk about the history of the Society's history book program, share photos of the classes taught by the Houston Bar Association Teach Texas Committee volunteers, and offer statistics to show what the Society's leaders have learned during the course of this project's organization and implementation.

TAMING CIVICS:
Using Historical Narratives and Landmark Court Cases to Bring Civics to Life

Rachael Drenovsky, Chair
Marilyn Duncan & David Furlow
Elizabeth Osborn



AASLH Annual Meeting
Austin, Texas
September 7, 2017

AASLH members who attended the presentation learned about our Society's programs and publications and those of our colleagues at the U.S. Supreme Court Historical Society.



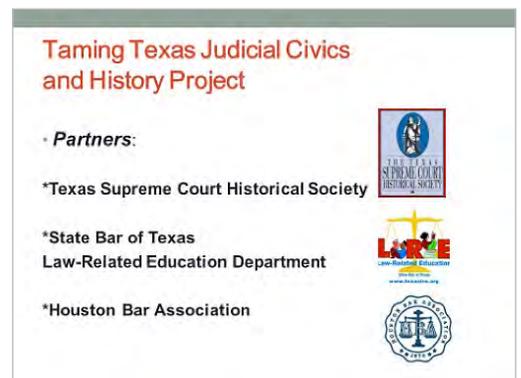
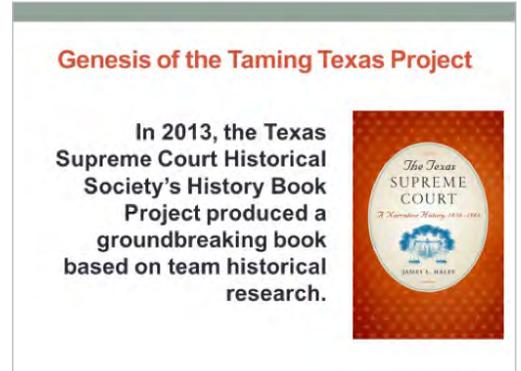
Thirty of the nation's leading scholars of judicial civics and courthouse history gathered at the University of Texas AT&T Center to hear our Society's Taming Judicial Civics presentation.

On the day of the presentation, which took place at the UT Austin's AT&T Conference Center, Marilyn began by describing how the Taming Texas project had its genesis in the 2013 publication of the Society's groundbreaking book *The Texas Supreme Court: A Narrative History of the Texas Supreme Court 1836-1986*. She then related how the Texas Supreme Court Historical Society Fellows provided the funding necessary to produce a series of books for seventh graders based on the stories from the *Narrative History*. She also related how the Society and the State Bar of Texas Law-Related Education Department worked together to develop a Taming Texas website and lesson plans for seventh-grade Texas history classes.

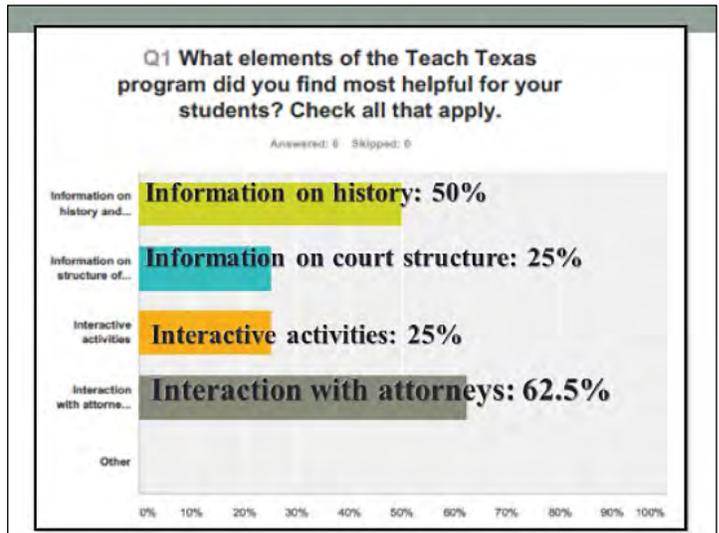
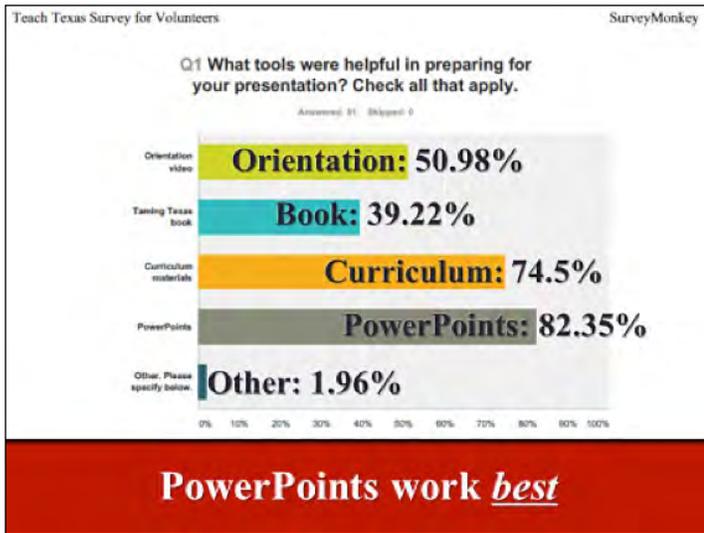
Marilyn then handed the presentation over to me to describe how the Society and the Houston Bar Association partnered to take the Taming Texas books and lesson plans into Houston-area classrooms.

My portion of the PowerPoint presentation revealed how the Society's Taming Texas book, website, and support enabled the HBA Teach Texas Committee to put theory into practice by educating 13,494 students in 34 Houston area schools during a two-year pilot project. I emphasized the community service nature of the committee's work and pointed out how it won the State Bar of Texas's Award of Merit at the State Bar's June 2016 Annual Meeting.

Together with colleagues from across the nation, Marilyn and I reviewed the metrics of the program's implementation with like-minded scholars from across the



The presentation began with a history of the Taming Texas project.



nation to discern every lesson those statistics had to offer. Amidst a group of scholars who came to Texas despite media coverage of Hurricane Harvey's damage to the coast and inundation of Houston, we candidly recognized the challenges that the aftermath of the hurricane may present to the project during the coming year.

Our new AASLH friends applauded the Society for blazing new trails in judicial civics education. After Marilyn and I finished our presentation, Elizabeth R. Osborn, Ph.D., the Project Director of the Indiana University Center on Representative Government, and formerly with the Indiana Supreme Court, took the floor to lead the audience through a hands-on activity using maps, courthouse records, and other primary sources from historically significant court cases available through the Smithsonian Institution and the National Archives. She then talked about her years of experience leading this kind of activity in which students learn judicial history by studying the primary source records that bring the past to life.



Society historian Jim Haley's tie shows that his heart is Texas true. Austin History Center archivist Mike Miller stands in the background. Photo by David A. Furlow.

After lunch, the Society's favorite Court historian, Jim Haley, led a group on a special tour of the Texas Capitol. Having served many years as a Capitol guide, and having devoted many more to unearthing the Lone Star State's judicial history, Jim offered insights about the early Republic, the judges and

justices who contributed to a unique and groundbreaking jurisprudence, and the governors and legislators who left indelible imprints on this state's history.

After spending an hour revealing the Capitol's secrets, Jim led AASLH's hearty crew back to the Texas Law Center for meetings to plan future gatherings of the Legal History Community. It was a day well spent in the company of new friends and great tales of the past.



Jim Haley told AASLH attendees riveting tales of Texas Supreme Court Justices who presided over cases in the Historic Courtroom in the Capitol, including Republic of Texas Chief Justice John Hemphill's Spanish law-based jurisprudence and stories about the All-Woman Court in *Johnson v. Darr* (1925).

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The Key of Life: A Review of David O. Brown's *Called to Rise*

By Rachel Palmer Hooper

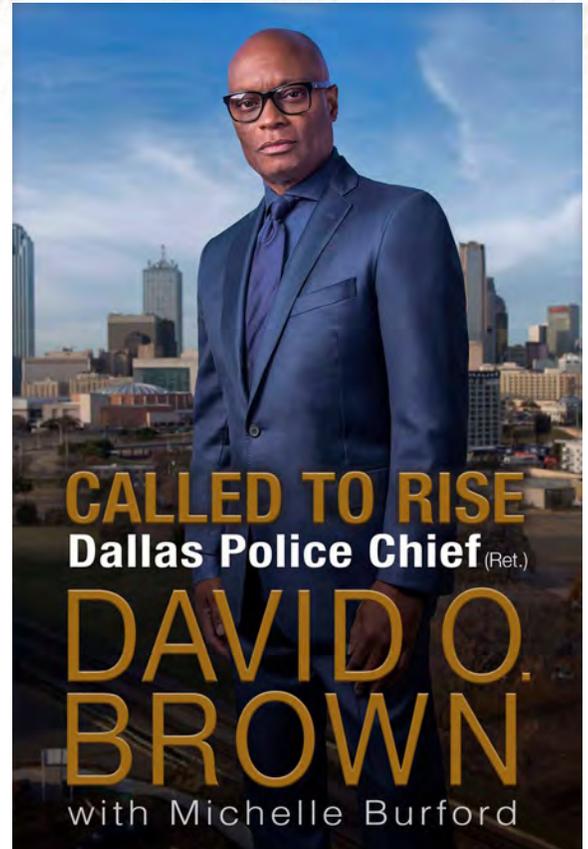
Dallas is my dad's hometown. As a child, we would drive to Dallas immediately after school ended for Thanksgiving break and spend the week with my grandmother. During every trip, we visited downtown Dallas and Dealey Plaza. From the back seat, I always asked my dad to drive the path that President Kennedy's motorcade traveled on November 22, 1963. During the drive, my dad would narrate the journey and take us back to his memories of that horrific day. I recently revisited the Sixth Floor Museum, which is chock full of our nation's memories.

Last year, I started visiting downtown Dallas, namely the George L. Allen, Sr. Courts Building, on a regular basis. On each visit, I find myself treasuring the memories of my childhood. I love looking out the window and thinking about the buildings where my dad once worked and I later worked after college.

On July 7, 2016, I got home from work and turned on the news—my regular routine—to hear the cliché: “BREAKING NEWS.” On that dark, hot night, a man decided to attack police in a deadly rampage in downtown Dallas that took the lives of five officers. Through this tragedy, the world was introduced to David O. Brown, Chief of the Dallas Police Department.

During the aftermath, Chief Brown demonstrated his strength of character and strong sense of self, which helped to guide Dallas through the tragedy. Chief Brown's tribute to the families of the slain officers was meaningful and pure. He quoted Stevie Wonder—a technique he used to overcome his teenage anxiety:

We all know sometimes life's hates and troubles
Can make you wish you were born in another time and place
But you can bet your life times that and twice its double
That God knew exactly where he wanted you to be placed.



David O. Brown, with Michelle Burford
*Called to Rise: A Life in Faithful Service to
the Community That Made Me*
New York: Ballantine Books, 2017

Over the days that followed, Chief Brown became a symbol of grace through service and it became clear that he was in the right place at the right time. In May, Brown delivered a practical and passionate commencement address at the University of Texas at Austin. Immediately after watching Brown, I preordered his book, *Called to Rise: A Life in Faithful Service to the Community That Made Me*.

Three aspects of Chief Brown's life drew me to learn more about him. First, I related to his spirit of community. Second, through great heartache, Brown has persevered. Third, Brown is a proven leader in policing strategy and leadership.

David O. Brown grew up in an area of Dallas called Oak Cliff with his two brothers, Kelvin and Ricky. Brown weaves stories of his mother and maternal great-grandmother into every part of his testimony. After high school, he traveled by bus to attend the University of Texas at Austin.



Over the next few years, Brown noticed that Oak Cliff was deteriorating due to the crack-cocaine epidemic. Short of a degree, he left school and joined the Dallas Police Department where he patrolled his old neighborhood in Oak Cliff. Brown cared about his community and worked to correct the crime problem it was suffering under. His personal connection to the community that he served made him a better officer because he understood its people, its problems, and its promise. Brown rose through the ranks of the police department and worked hard for these promotions, but he never forgot where he came from and the lessons learned there.

It is well chronicled that Brown understands pain and tragedy. Some call it empathy, but I think it is much more. Brown uses his perspective to acknowledge others. He lost his former police partner, Officer Walter Williams, in an officer-involved shooting. Shortly thereafter, Brown's brother, Kelvin, was murdered by a drug dealer. A few years before, Brown had noticed Kelvin's eyes and suspected drug use. He vividly provides the timeline of these two events, which caused him to question his faith and purpose. He did not know that these experiences would prepare him to lose his own son shortly after being sworn in as the Dallas Chief of Police.

This book addresses relevant issues for today from a unique perspective. For example, Brown reveals that his son lived with bipolar disorder. Brown's words on his son's death come from the perspective of a father and tenured police officer. He also addresses the conflict between police and the minority community. He discusses his purposeful transparency, which he used to de-escalate the rising tensions in Dallas. As a country, we have become deeply divided on the issue of proper policing, and Brown's words are significant.

One of the most remarkable aspects of this book is the fact that Brown does nothing to hide his blemishes. He served in the Dallas Police Department for over three decades, and he details his leadership accomplishments and failures in print. One of the failures includes his resistance to the idea of community policing. As it turns out, his early failure turned into one of his greatest achievements.

The personal and professional low point in Brown's life was the loss of his son. On Father's Day in 2010, his son and namesake murdered Lancaster Police Officer Craig Shaw and an innocent bystander, Jeremy Jontae McMillan. Responding officers killed the younger Brown.

Community policing incorporates a pro-active approach to solving crime issues. When Brown was transferred to a community policing role from the SWAT team, he was none too happy. He was completely uninterested in this soft approach. Over time, he learned that community policing was a smart approach that worked to outsmart offenders.

Brown was at the forefront of diversity in policing. I was struck by his decision to include a woman, Anita Dickason, as one of two counter-snipers on his all-male SWAT team. Brown witnessed his mother's hard work and wanted to pay it forward by promoting female officers. Anita "took care of business."

It is clear that Brown is dedicated to public service. While there are many dedicated public servants, Brown's perspective, willingness to give consideration to the voice of others, and ability to handle concerns with transparency is remarkable.

There is much to learn from Chief Brown, and I highly recommend his book with one warning—you will read it in one sitting.



RACHEL PALMER HOOPER, *a former prosecutor and trial attorney in the Harris County District Attorney's Office, is an associate in Baker Hostetler's Houston office with a focus on civil and complex commercial litigation.*

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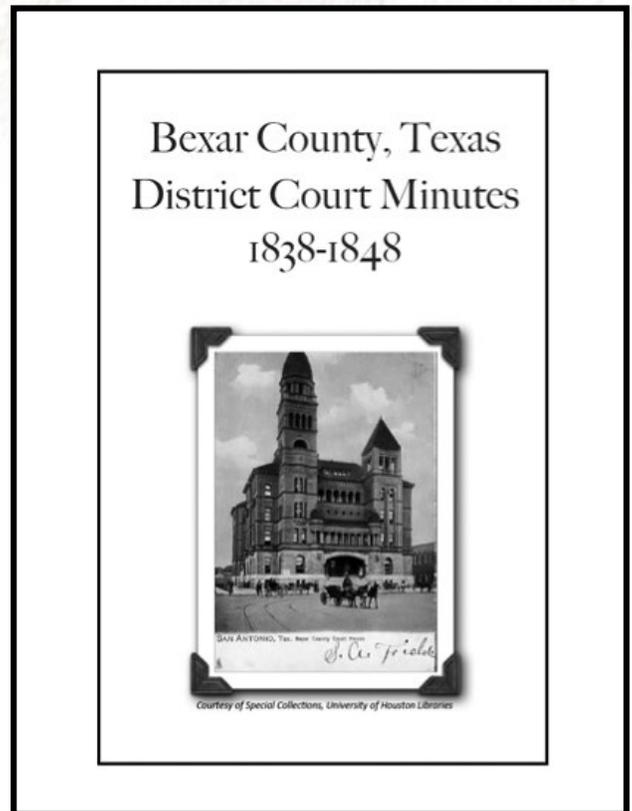
A Review of *Bexar County, Texas, District Court Minutes 1838-1848*

By David A. Furlow

The San Antonio Genealogical and Historical Society's publication of the *Bexar County, District Court Minutes, 1838-1848* supplies researchers with raw material for an important part of Texas legal history: the transition from Spanish, Mexican, and Tejano legal systems that governed Texas from 1718 through 1836 to the hybrid Anglo-American/Tejano law that arose after 1836. Like a feedstock in a manufacturing process, courthouse records constitute the bottleneck assets, *i.e.*, the raw, unprocessed, recorded facts of our legal history.

When we examine Texas history through the lens of the law,¹ we begin with definitions. A court's minute book is "a book in which a court clerk enters minutes of court proceedings."²

Next, we examine the completeness of a source, then go on to question its accuracy. Are minute books complete records of reality? *Never*. At best, a minute book offers a quickly-jotted summary of a case's most important points, a thousand-foot-high overview of the judicial forest with occasional flashes of an evidentiary tree. Yet a summary can constitute effective evidence of reality, historical or otherwise, so it is admissible in evidence at trial.³



Janey Eaves Joyce, compiler and researcher
Bexar County, Texas, District Court Minutes, 1838-1848

San Antonio: San Antonio Genealogical and Historical Society, 2012

173 pages

Available for purchase at the San Antonio Genealogical and Historical Society or online at <https://txsaghs.org/cpage.php?pt=20>

¹ Our Society's mission statement commits us to preserve, protect, and disseminate not only the history of the Texas Supreme Court, but also that of the judiciary and Texas when it declares that, "The Texas Supreme Court Historical Society—a nonpartisan, nonprofit organization—gathers and preserves the history and work of the Texas Supreme Court and the state's appellate courts. Through research and scholarship, the Society educates the public about the judicial branch and its role in the development of Texas." See "Mission Statement," *Texas Supreme Court Historical Society* webpage, <http://www.texascourthistory.org/DrawOnePage.aspx?PageID=62>.

² Bryan A. Garner, "Minute Book," *Black's Law Dictionary* (St. Paul, MN.: West, 9th ed., 2010), 854.

³ See Texas Rules of Evidence 1006 (June 14, 2016), <http://www.txcourts.gov/media/1240932/texas-rules-of-evidence-updated-with-amendments-effective-6142016.pdf>.

Are minute books reliable sources of information about trials? Well, yes, they are public records of a kind generally deemed reliable enough to be relied on at trial. Reliable, yes, but indisputable, no. Each minute entry constitutes hearsay, that is, it usually represents a statement that a declarant, the judge or clerk who prepares the minute, does not make while testifying at the current trial or hearing, and the entries are the kind of evidence that a historian, archivist, attorney, or judge offers to prove the truth of the matter asserted in the statement.⁴

As a public record, a minute book and its entries are admissible in evidence at trial. If the minute book sets out the court's activities, a hearing or trial observed while under a legal duty to report, the law deems records of judicial activities admissible in many instances. But that usually does not include a matter observed by law enforcement personnel in a criminal case or fact-findings in a civil or criminal case against the government. Evidence of regularly conducted judicial activities in a court are presumed to offer a reasonably reliable record, as long as an opponent of that evidence fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.⁵

After evaluating such a minute book for completeness (as a summary of orders in a case) and reasonable reliability, we collate and connect the facts in the primary source with other facts, then combine them into cause and effect narratives we call history. Minute books and the underlying, handwritten records they summarize are primary sources that can be cross-checked against other primary sources such as statutes, legislative history, letters, speeches, diary entries, and contemporaneous newspaper articles, documents, photos, videos and audio, inscriptions, artifacts, survey data, and anything else that provides firsthand accounts about a person or event.⁶

Why bother reading a work as dry and dull as court minutes? Because a minute book may be dry but it is not dull: it sheds contemporaneous light on individual lives, political issues, and cultural transformations, in this case, the transition of Texas from a Mexican state to an American one. As John Buchan wrote in his seminal work *The Nations of Today*, "History gives us a kind of chart, and we dare not surrender even a small rushlight in the darkness. The hasty reformer who does not remember the past will find himself condemned to repeat it."⁷

Proper historical research about law makes "the dullest topics kindle" and "the most recondite and technical fall into the order of common experience and rational thought," so that "many a hitherto unobserved relationship of ideas comes to light, many an old one vanishes, [and] many a new explanation of current doctrines is suggested."⁸

The San Antonio Genealogical and Historical Society, or SAGHS, chartered in 1959, is a nonprofit organization that conducts, teaches, and promotes genealogical and historical

⁴ See *ibid.*, 801(d).

⁵ See *ibid.*, 803(8), 803(10), 803(14), 803(15), 803(16), 901(1), 901(2), 902(4), 1005.

⁶ "Primary Sources: What Are They?" *TeachingHistory.Org*, <http://teachinghistory.org/best-practices/using-primary-sources/19079>; "Primary Sources: A Research Guide," *Healey Library at Massachusetts University, Boston*, <https://umb.libguides.com/PrimarySources/secondary>.

⁷ John Buchan, *The Nations of Today: Great Britain* (Boston: Houghton Mifflin Company, 1923), vol. 1, 12.

⁸ James Bradley Thayer, "The Teaching of English Law at Universities," 9 *Harvard Law Review* 169, 177-78 (1895), as quoted in David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge and New York: Cambridge University Press, 2013), 10.

research, publishes and preserves records, and increases awareness of genealogy and history.⁹ Those goals fit hand and glove with the legal historian's mission of preserving, protecting, and disseminating Texas's unique judicial history. Since SAGHS maintains an outstanding library of over 15,000 books and conducts educational seminars, classes, and workshops,¹⁰ it provides an excellent place to commence or conclude research for a book, article, or symposium.

In this book, a researcher can follow the public lives of John Hemphill, who served as the District Court Judge of the Fourth Judicial District in Bexar County between January 20, 1840, (when he was confirmed in office after being elected by the Republic of Texas's Congress as an associate justice of the Texas Supreme Court) until December 5, 1840, when Congress elected him Chief Justice of the Texas Supreme Court, resulting in his move to Austin. During that critical year, on March 19, 1840, a peace parley between representatives of the Republic of Texas and Penateka Comanche war chiefs, in which Judge Hemphill served as a mediator, erupted into the Council House Fight followed by decades of Indian warfare on the frontier. And one can read about the proceedings of the district court whose judge and staff Mexican general Adrian Woll captured on September 11, 1842 and took back to Mexico. This kind of courthouse history is anything but dull.

The *Minutes* offer fresh details about the lives of important Texans, including, *inter alia*, attorney and land speculator Samuel May Williams; Tejano revolutionary Juan Seguin (sometimes Anglicized "John Seguin"); early empresario Felipe Enrique Neri, colonizer, settler, and self-styled Baron de Bastrop; and Samuel Maverick, who came to Texas before the Revolution and remained to become one of the wealthiest and most powerful men in Texas.

Anyone interested in the evolution of injunctive relief in Texas should consult these minutes. A Friday, April 26, 1839 entry refers to injunction litigation between the Baron de Bastrop and the heirs of Juan Martín de Veramendi, the former governor of the Mexican twin-state of Coahuila y Texas.

Friday, 26 Apr. 1839

Republic of Texas vs. Isaac Allen. Indicted for murder; the venue changed to Bastrop County. Witnesses Horatio A. Alsberry, John Small and Jose Maria Sanches each posted \$2,000 bond to guarantee their appearance at Allen's trial in Bastrop County. [pg. 53-54]

Heirs of Verimendi vs. Baron de Bastrop, administrator. Injunction. Case continued. [pg. 54]

Close-up view of an entry on page 13 in the *Bexar County Court Minutes*.

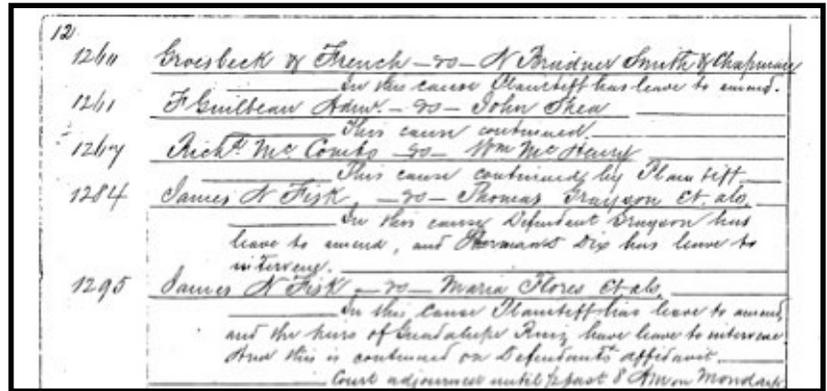
Jose de la Garza and others vs. John W. Smith and others. Injunction. Many witnesses who were among the oldest citizens in the county testified in this case. The court ruled that ample evidence had been presented; that the plaintiffs and those through whom they claimed had been in the peaceable and uninterrupted possession of the land in contest upwards of 40 years by virtue of a grant from the old Spanish government which had been continued down by various governmental orders, concessions and surveys to the present time. The court gave possession of the disputed land to the plaintiffs and ordered the defendant, Neill, off of the property with all of his effects. The court also ordered the sheriff to remove Neill and his effects from the disputed property if Neill did not immediately obey the court's order. Should Neill again intrude upon the land, the sheriff was ordered to arrest him and place him in the Bexar County jail for contempt of court until he gave bond and security for his good behavior. [pg. 51-53]

⁹ San Antonio Genealogical and Historical Society, *HomePage*, <https://txsaghs.org/about.php>.

¹⁰ San Antonio Genealogical and Historical Society, *The SAGHS Library*, <https://txsaghs.org/cpage.php?pt=38>.

An earlier entry on that same page for another injunction proceeding at the previous session of the court reveals how courts evaluated the testimony of witnesses who presented evidence on behalf of Plaintiff Jose de la Garza. The Plaintiff had peacefully occupied their ranchos for over forty years in reliance upon a Spanish land grant, only to confront Anglo-American squatters like John W. Smith, who forcibly occupied de la Garza's land and refused to leave until compelled to do so by the Sheriff. This record provides evidence of how prominent Tejanos used Bexar County's legal system to protect their homesteads against early Anglo-American land grabs.

The *Minutes* book saves the researcher the necessity of driving to San Antonio, parking at its courthouse, and poring through microfilm and microfiche records of court entries sometimes written with a bad, shaky, or inexperienced hand. A photo of Bexar County District Court Minutes from 1856, shown in the image above, demonstrates the challenges posed by even a clerk's exemplary handwriting. When the indices to records are incomplete or less than perfectly organized, books like the *Minutes* make researchers smile.



I strongly recommend the *Bexar County, Texas, District Court Minutes, 1838-1848* to anyone interested in the history of San Antonio, prominent early Texans, and the Texas judiciary.

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Society Members Nominated to the Fifth Circuit Court of Appeals

By Dylan O. Drummond

On August 28, 2017, President Donald Trump nominated Texas Supreme Court Justice Don Willett and Gibson Dunn Appellate and Constitutional Law practice group co-chair Jim Ho to the United States Court of Appeals for the Fifth Circuit.

If confirmed, both Willett and Ho will be making a return to the Fifth Circuit after both clerked there for the late Judge Jerre Williams and Judge Jerry Smith, respectively. Ho subsequently clerked for Justice Clarence Thomas on the U.S. Supreme Court as well.

Justice Willett was first appointed to the Texas Supreme Court in 2005 by then-Governor Rick Perry and has won reelection to Place 2 twice. Since then, he has been lauded both for his judicial writing and for his social media posting, being twice honored for the former by the *Green Bag* and named the “Tweeter Laureate” of Texas by the 83rd Texas Legislature for the latter. Ho served as Texas Solicitor General from 2008 to 2010, and also as Chief Counsel to former Justice and now Senator John Cornyn on the U.S. Senate Judiciary Committee.

Most impressive, perhaps, are the leadership roles the two nominees have undertaken within the Society. Justice Willett has been a Wheeler Life Member since 2011, and Ho has served as a Society Trustee since 2014, and as a Greenhill Fellow since 2011. It is through the Fellows program that the Society has been able to publish its Taming Texas middle school textbook series and curriculum that has been taught to some 15,000 Texas school children.



Justice Don Willett (left photo) and Fellow Jim Ho (right photo) enjoyed chatting with retired U.S. Supreme Court Justice Sandra Day O'Connor during the 2013 Hemphill Dinner reception in her honor. Photos by Mark Matson.

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Calendar of Events

Society-related events and other events of historical interest

Fall 2017

The Museum of the Coastal Bend opens the exhibit “Sunken History: Shipwrecks of the Gulf Coast.” The museum displays important collections of French, Spanish, Mexican, and Texas artifacts, as well as artifacts from the French warship *La Belle* and the French cannons that once guarded La Salle’s Fort St. Louis. It is located on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. For additional information, see <http://www.museumofthecoastalbend.org/exhibits>.

Through
January 7, 2018

The Bob Bullock Texas History Museum presents “American Spirits: The Rise and Fall of Prohibition.” Created by the National Constitution Center, *American Spirits: The Rise and Fall of Prohibition* is the first comprehensive exhibition about America’s most colorful and complex constitutional hiccup. <https://www.thestoryoftexas.com/visit/exhibits/american-spirits>.

The “La Belle: The Ship That Changed History” exhibition continues in the Bob Bullock Museum of Texas History’s first floor Texas History Gallery. The hull of the sunken *La Belle* is open for viewing. <http://www.thestoryoftexas.com/la-belle/the-exhibit>.

The “Mapping Texas” exhibition continues in the Bob Bullock Museum of Texas History. Significant historic maps available through the Texas General Land Office will interest Society members. <https://www.thestoryoftexas.com/visit/exhibits/mapping-texas>.

Through
January 10, 2018

The “Mapping Texas” exhibition continues in the Houston Museum of Natural Science. Significant historic maps available through the Texas General Land Office will interest Society members. <http://www.hmns.org/exhibits/special-exhibitions/mapping-texas-from-frontier-to-the-lone-star-state/>.

Through
February 11, 2018

The Amon Carter Museum offers a special exhibition, “Wild Spaces Open Seasons: Hunting and Fishing in American Art.” This selection of works on paper explores the popular outdoor subjects that have captivated American artists for centuries. Amon Carter Museum, 3501

Camp Bowie Blvd., Fort Worth, TX 76107-2631. <http://www.hmns.org/exhibits/special-exhibitions/mapping-texas-from-frontier-to-the-lone-star-state/>.

Through 2017

The Alamo presents a new kind of exhibit: Bowie: Man • Knife • Legend. The Alamo presents a brand new exhibition exploring the life of legendary Alamo defender James Bowie and his famous knife. James Bowie's transformation from mere mortal to enduring legend began ten years before his death at the Alamo. The knife that bears his family's name cuts deeply through American history and culture, even today. <http://www.thealamo.org/visit/exhibits/current/index.html>.

Through
December 17, 2017

The Panhandle Plains Museum presents "The Great War and the Panhandle-Plains Region." Using artifacts (militaria, uniforms, souvenirs, weapons, photographs, archives, and etc.) from PPHM's collections, the exhibition will examine the before, during, and after lives of various soldiers, Marines, sailors, and nurses (there was no Air Force) from the Panhandle-Plains region who served in "The Great War." <http://www.panhandleplains.org/p/collections-and-exhibitions/special-exhibitions/361>.

Through Fall 2017

The Museum of the Coastal Bend displays important collections of French, Spanish, Mexican, and Texas artifacts, as well as artifacts from the French warship *La Belle* and the French cannons that once guarded La Salle's Fort St. Louis. It is located on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. <http://www.museumofthecoastalbend.org/exhibits>.

October 12, 2017

The Bryan Museum hosts the exhibition "Eyes of Texas: A Century of Artistic Visions" to provide visitors with an opportunity to see the evolving artistic visions that helped to shape Texas. By focusing on the years between 1850 and 1950, the Bryan Museum's works of art highlight the artistic search for a regional identity. Each painting serves as both a window and a mirror—a window to view the past and a mirror to reflect on personal experience. See <https://www.thebryanmuseum.org/exhibitions-upcoming>.

October 17, 2017

The Bryan Museum presents a lecture, "The White Shaman Mural: An Enduring Creation Narrative in the Rock Art of the Lower Pecos," in its Fall 2017 Distinguished Lecture Series. Guest speaker Carolyn Boyd, PhD, Research Director of the Shumla Archaeological Research & Education Center will present the speech. <https://www.thebryanmuseum.org/events-museum-events>.

The Bryan Museum's galleries offer artifacts and records from all periods of Texas and Southwestern history. J. P. Bryan, Jr., a descendant of Moses Austin and a former Texas State Historical Association President, founded this museum at 1315 21st Street, Galveston, Texas 77050, phone (409) 632-7685. Its 70,000 items span 12,000 years. <https://www.thebryanmuseum.org/>. <https://www.thebryanmuseum.org/exhibitions-upcoming>.

Through
February 16, 2018

The Star of the Republic Museum at Washington-on-the-Brazos presents its exhibition, "Heirloom Genealogy: Tracing your Family Treasures," beginning March 4, 2017, and continuing through February 16, 2018. Stories come to light as artifacts are examined in depth through lineage research. Documents reveal where the artifacts originated, who owned them, and how they got to Texas. Items in the exhibit include three year-old Edward Boylan's buckskin suit, Pleasant B. Watson's diary, Heinrich Tiemann's clog-making tools, and Clara Lang's grand piano, among others. The exhibit is at 23200 Park Rd 12, Washington, Texas 77880. <http://www.starmuseum.org/exhibits/#featured>.

October 18, 2017
10:00 a.m. - 2:00 p.m.

The Texas Supreme Court Historical Society will conduct its Fall 2017 Board of Trustees Meeting at the Texas Law Center in Austin.

At noon, University of Texas Liberal Arts Professor Don Graham will speak about the film *Giant's* impact on Texas and the world, the subject of Prof. Graham's forthcoming book.

November 7-8, 2017

The Texas State Historical Association will conduct its "Discovering Texas History Conference" focusing on the period from 1836 to 1900, for teachers and school district administrators. Society editor Marilyn Duncan will make a presentation on the Taming Texas book series. The program will take place at the Thompson Conference Center from 8 a.m. until 4:00 p.m. on November 7, 2017 and at the Bob Bullock Museum in Austin on November 8, 2017, for a cost of \$35.00. For additional information, see <https://tshasecurepay.com/discovering-texas-history/>.

November 14, 2017

Texas Supreme Court Historical Society historian James L. "Jim" Haley will read from his new historical novel *A Darker Sea* (2017) at 7:00 p.m. in Austin. The novel about Commander Bliven Putnam brings to life naval aspects of the War of 1812 at Austin's BookPeople bookstore. <http://www.bookpeople.com/event/james-haley-darker-sea>.

November 30, 2017

The Bryan Museum presents a lecture, “Reaugh, Regionalists, and Roundups: Where Are All the Cowboys in Early Texas Art,” in its Fall 2017 Distinguished Lecture Series. Guest speaker Michael R. Grauer, Associate Director for Curatorial Affairs/Curator of Art and Western Heritage at the Panhandle-Plains Historical Museum, will present the speech. <https://www.thebryanmuseum.org/events-museum-events>.

January 20, 2018

Alamo Educator Day: “Military & Mexican Independence: 1803 – 1821. As part of its celebration of San Antonio’s 300th anniversary, the Alamo will present a series of Alamo Educator Days. This one lasts from 9 a.m. to 1 p.m., free, 4 CPE Hours. <http://www.thealamo.org/remember/education/workshops/index.html>.

February 2, 2018

The Austin History Center conducts its annual Angelina Eberly Lunch to celebrate the history of Austin. The luncheon occurs annually at the Driskill Hotel, 604 Brazos St, Austin, TX 78701. <http://austinhistory.net/events/>.

February 5-6, 2018

The Texas State Historical Association will conduct its “Encountering Texas History Conference” for the Houston area at the Aldine ISD Nutrition Center. The program will take place at the M. B. Sonny Donaldson Child Nutrition Center, Aldine ISD, Houston, Texas, for a cost of \$35.00 for teachers. For additional information, see <https://tshasecurepay.com/encounteringtexashistory/>.

February 15, 2018

The University of Texas at Austin Law School will hang a recently commissioned portrait of Heman Sweatt. Sweatt’s lawsuit desegregated that law school in the 1950 U.S. Supreme Court case *Sweatt v. Painter*. Sweatt was the first African American admitted into the UT School of Law after the Supreme Court ruled in the landmark case.

March 8, 2018

The Society will present a panel program, “Laying Down Texas Law: From Austin’s Colony through the Lone Star Republic,” at the Texas State Historical Association’s Annual Meeting in San Marcos. Texas Supreme Court Justice Dale Wainwright (ret.), in his role as the Society’s President, will introduce the panel.

Justice Jason Boatright, Fifth Court of Appeals in Dallas, will present a paper, “Alcaldes and Advocates in Stephen F. Austin’s Colony, 1822 through 1835,” to examine the elections and decisions of the alcaldes who administered law in Austin’s Colony in the Mexican State of Coahuila y Texas and the attorneys who tried cases in those courts.

Dylan O. Drummond, the Society’s Vice President and Deputy Executive Editor of the *Texas Supreme Court Historical Society Journal*,

will also present a paper, "From the Alamo to San Jacinto to Austin: The Attorneys Who Fought in the Texas Revolution and Founded the Republic, 1835 to 1845."

David Furlow, a Fellow of the Society and Executive Editor of the *Texas Supreme Court Historical Society Journal*, will serve as Commentator to spotlight issues raised by Justice Boatright and Mr. Drummond.

March 10, 2018

Alamo Educator Day: "Colonization & the Texas Revolution: 1821 - 1836." As part of its celebration of San Antonio's 300th anniversary, the Alamo will present a series of Alamo Educator Days. 9 a.m. to 4 p.m. | \$20 per person, Lunch & Tour Included | 6 CPE Hours. <http://www.thealamo.org/remember/education/workshops/index.html>.

March 25, 2018

The Austin History Center celebrates its 85th Birthday & Waterloo Press Open House. The event will occur at the Austin History Center, Grand Hallway, 810 Guadalupe, Austin, TX 7804. <http://austinhistory.net/events/85th-ahc-birthday-waterloo-press-open-house/>.

May 2018

The University of Texas at Austin Law School will conduct the Heman Sweatt Symposium on Civil Rights. The symposium commemorates Heman Sweatt's lawsuit, which desegregated the University of Texas School of Law in the 1950 U.S. Supreme Court case *Sweatt v. Painter*. Sweatt was the first African American admitted into the UT School of Law after the Supreme Court ruled in the landmark case.

June 21-22, 2018

The State Bar of Texas will conduct its annual meeting in Houston, Texas. https://www.texasbar.com/AM/Template.cfm?Section=Annual_Meeting_Home&Template=/CM/HTMLDisplay.cfm&ContentID=30096.

June 30, 2018

Alamo Educator Day: "Republic, Statehood, Civil War, & Reconstruction: 1836 - 1865." As part of its celebration of San Antonio's 300th anniversary, the Alamo will present a series of Alamo Educator Days. 9 a.m. to 4 p.m. | \$20 per person, Lunch & Tour Included | 6 CPE Hours. <http://www.thealamo.org/remember/education/workshops/index.html>.

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DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal's* readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal's* endorsement of the views expressed therein.

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2017-18 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2017, the beginning of the membership year.

TRUSTEE

Lawrence M. Doss

Hon. Jennifer Walker Elrod

D. Todd Smith

Mark Trachtenberg

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2017-18 New Member List

The Society has added 8 new members since June 1, 2017.

CONTRIBUTING

Neal Davis III

JT Morris

REGULAR

Kelly Canavan

Adam H. Charnes

Larry E. Cotten

Sara Harris

Jake Ritherford

Rachel Stinson

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Membership Benefits & Application

Hemphill Fellow \$5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow \$2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of Society Publications
- Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- Recognition in All Issues of *Quarterly Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

Trustee Membership \$1,000

- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- Complimentary Admission to Society's Symposium
- All Benefits of Regular Membership

Patron Membership \$500

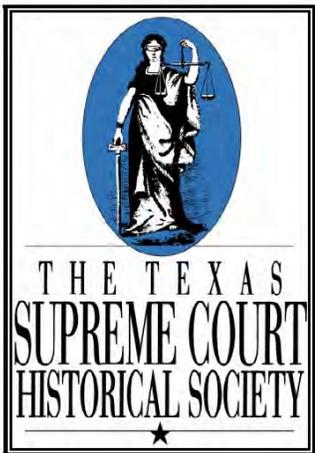
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Contributing Membership \$100

- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Regular Membership \$50

- Receive *Quarterly Journal of the Texas Supreme Court Historical Society*
- Receive Quarterly Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs



Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, education outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

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