



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2018 Vol. 7, No. 2 General Editor Lynne Liberato Executive Editor David Furlow

Columns

Message from the President

By Dale Wainwright

The Society's dual mission of preserving the history of the courts and educating the public about that history is again in full bloom this year.

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Hon. Dale Wainwright

Executive Director's Page

By Sharon Sandle

Last year I attended the Texas State Historical Association's Annual Meeting. One of the highlights for me was browsing the books in the exhibitor hall.

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Sharon Sandle

Fellows Column

By David J. Beck

I am pleased to report that the 2018 Annual Fellows Dinner was a tremendous success.

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Executive Editor's Page

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Welcome to our journalistic battlefield, a cockpit of conflicting ideas, competing visions about justice, and gunslingers in frontier Texas. [Read more...](#)



David A. Furlow

Lead Articles

A Practicing Lawyer's Tribute to Professor Joseph W. McKnight (1925-2015)

By Josiah M. Daniel, III

Here was a professor who truly understood the historical nature of legal process and the historical origins and the evolution over time of substantive law.

[Read more...](#)



Prof. Joseph W. McKnight

Reconstruction Politics and the Galveston Seven: The Struggle to Appoint a Judge in the Eastern District of Texas, 1869-72, Part I

By Stephen Pate

This story reflects the deep divisions in Texas during Reconstruction, including strife within a Texas Republican Party that within a few short years would become extinct. [Read more...](#)



The first federal court building in Texas



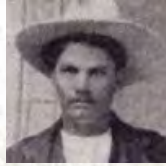
From Outlaw to Attorney at Law: The Brief Legal Career of

John Wesley Hardin

By John G. Browning

The Texas bar once included one of the most notorious outlaws of the West, credited with at least twenty-seven murders.

[Read more...](#)



John Wesley Hardin

Celebrating Houston's Appellate History

By David A. Furlow

Current and former Justices, judges, staff, clerks, and many local attorneys attended the celebration that commenced on the afternoon of September 12, 2017. [Read more...](#)



The audience for the event

The "Friendly First," Texas's First Court of Appeals, 1892-2017

By Hon. Terry Jennings

The Court has endured and thrived during times of peace and war, political and social progress and strife, economic booms and recessions, and fair weather and foul.

[Read more...](#)



The First Court of Appeals located in Galveston

The Fourteenth at Fifty: Poised for Change, Prepared for Challenge, and Pointed Toward the Future

By Hon. Kem Thompson Frost

Houston is home to two of Texas's fourteen intermediate courts of appeals. Having two such courts is unique to Texas. [Read more...](#)



Hon. J. Curtiss Brown, the Court's longest serving Justice

Features

In Memoriam:

Justice Ted Z. Robertson, 1921-2017

By Osler McCarthy

Justice Robertson is credited with helping lead the Court to a modern system of discretionary review.

[Read more...](#)



Justice Ted Z. Robertson

The Great Debate

By Dylan O. Drummond

In October 1988, an extraordinary debate took place in Houston involving *nine* current or future Supreme Court Justices. [Read more...](#)



Four of the debaters



Gentleman Killer
HERE IS ONE WE ARE LOOKING FOR



JOHN WESLEY HARDIN
NOW WANTED for killing Deputy Sheriff Charles Webb of Brown County Texas, on May 26, 1874. Though courteous & well-dressed, he is extremely dangerous & always armed. Reputed to be a professional gunfighter for hire, kills on any provocation. If you have information on this man notify any office

**THE TEXAS RANGERS
GUNFIGHTER AND
KILLER**

Book Review

[Dress \(Your Writing\) for Success: A Book Review of *Typography for Lawyers*](#)

By Jay Jackson

The author believes that lawyers are professional writers, and so our documents should display a professional appearance.

[Read more...](#)



News & Events

[This Past Fall, Trustees Learned the History of a Giant Film](#)

Story and photos by David A. Furlow

Noted author and University of Texas Professor Don Graham, Ph.D., made a star performance as the guest speaker at the Society's Fall 2017 Board of Trustees meeting.

[Read more...](#)



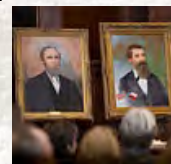
Don Graham's forthcoming book

[Historic Portrait Ceremony Honors Reconstruction Judges Wesley Ogden and Colbert Coldwell](#)

Photos by Mark Matson

In January, a ceremony at the Supreme Court dedicated portraits of two Supreme Court judges from Texas's Reconstruction era.

[Read more...](#)



At the ceremony

[TSHA Annual Meeting 2018: Laying Down Early Texas Law](#)

By David A. Furlow

The Society will present a special panel, "Laying Down Texas Law: From Austin's Colony through the Lone Star Republic," at the TSHA Annual Meeting March 8-10.

[Read more...](#)



TSHA logo

[Come Join Us for the Spring 2018 Members Meeting and Bush Presidential Center Tour](#)

By Cynthia Timms

Following the Meeting, all trustees and members, as well as members of the judiciary, are invited to a free, catered lunch.

Our speaker will be Ms. Harriet Miers. [Read more...](#)



Harriet Miers





Membership & More

[Justice Jimmy Blacklock Joins the Texas Supreme Court in January](#)

On January 2, Governor Greg Abbott appointed and swore in Jimmy Blacklock to the Texas Supreme Court. [Read more...](#)



Justice Jimmy Blacklock

[Grand Opening of a New Visitor's Center and Museum at San Felipe](#)

By David A. Furlow
San Felipe was the political, legal, and economic capital of Stephen F. Austin's new colony. [Read more...](#)



Artist's rendering of the Center

- [Calendar of Events](#)
- [Officers, Trustees & Court Liaison](#)
- [2017-18 Member Upgrades](#)
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- [Join the Society](#)

[Chief Justice Hecht and Florida Chief Justice Labarga Address Access to Justice in the Wake of Hurricanes Harvey and Irma](#)

By Dylan O. Drummond
Each Chief Justice also addressed what efforts their courts undertook in response to the storms. [Read more...](#)



The Chief Justices

[Celebrating the Legacy of Heman Marion Sweatt](#)

Story and photos by David A. Furlow
The dedication of UT Law School student Heman Marion Sweatt's portrait proved the truth of the motto, "What Starts Here Changes the World." [Read more...](#)



Heman Sweatt in 1950

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- FB: Texas Supreme Court Historical Society

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Hon. Dale
Wainwright

Message from the *President*

The Society's dual mission of preserving the history of the courts and educating the public about that history is again in full bloom this year.

On March 8, the Society will sponsor an informative session at the annual meeting of the Texas State Historical Association in San Marcos. The Society's participation in this statewide forum is central to our educational mission, and I look forward to moderating this year's panel discussion on lawyers and judges in early Texas. See page 89 in this issue for program and registration information.



In January, the Society cosponsored, with the Texas Supreme Court, a special portrait dedication ceremony for two Reconstruction-era justices—Colbert Coldwell and Wesley B. Ogden. Justice Coldwell served on the Court during the post-Civil War period from 1867 to 1869 and was removed from office by the U.S. military. Chief Justice Ogden served on the Court from 1870 to January of 1874, when he was unceremoniously ousted from office after he and the other justices issued the controversial opinion in the "Semicolon Case." In *Ex parte Rodriguez*, the Court's opinion invalidated the state election of 1873; however, newly elected Governor Richard

On January 10, the Society joined the Texas Supreme Court in dedicating the portraits of Reconstruction-era Chief Justice Wesley Ogden (left) and Justice Colbert Coldwell (right).
Photo by Mark Matson.

Coke refused to enforce the decision and took office by force. The historical period during which they served and the recounted circumstances combined to result in neither Ogden nor Coldwell having received formal recognition of their historical significance. The portrait ceremony in the

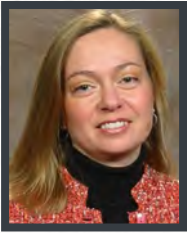
Supreme Court was an important step in continuing to complete the history of the Texas judicial system. The story to be told in the next issue of this journal is how Society board member Bill Ogden, a great grandson of Wesley Ogden, and Society member Colbert Coldwell, a great grandson of his namesake ancestor, took the initiative to approach the Society and the Court to make it happen.

The Society's Fellows are also promoting our educational mission through the Taming Texas Judicial Civics and Court History Project. The project's classroom program on the history and operations of our state's courts was introduced two years ago and has reached thousands of seventh-grade Texas history students so far. The Houston Bar Association's Teach Texas Committee is preparing to launch this year's program in Houston area schools. You'll hear more about the curriculum and the new book in the Taming Texas series this spring.

When the Society's board travels to Dallas for its March 28 meeting, we'll hear reports from the various committees that do the majority of the work of this organization. At last fall's meeting in Austin, I was impressed by how much is accomplished by a group of volunteers who are extremely busy in their legal careers. I know that the spring meeting will be equally productive. The post-meeting field trip to the George W. Bush Presidential Library will be a special treat, and I greatly appreciate Cynthia Timms's efforts in planning it for us.

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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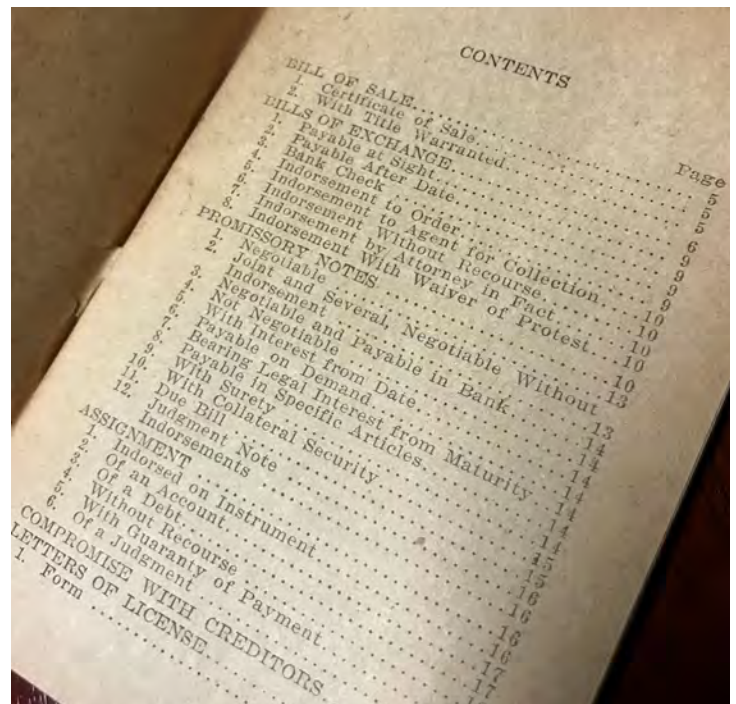


Sharon Sandle

TSHA Annual Meetings Have *Tangible, Intangible Takeaways*

Last year I had the chance to attend the Texas State Historical Association's Annual Meeting in Houston. Although I attended many fascinating sessions, one of the highlights of the meeting, for me, was browsing the books in the exhibitor hall.

Some of the books available are new publications from the university presses in Texas, but there are also sellers who have items of historical significance for sale. One item that I came across ended up returning home with me. It's a narrow pamphlet entitled *Hand-book of Legal Forms*, by John W. Shannon. The pamphlet is No. 629 in the "Little Blue Book" series that was published between 1923 and 1967. *Hand-book of Legal Forms* was probably published in the early '40s.¹ The series was the brainchild of Emanuel Haldeman-Julius, who began issuing "pocket books" in 1919. Haldeman-Julius published over a thousand titles, and the topics were diverse. He published everything from abridged versions of classic literature, to philosophical tracts, to self-help and advice manuals. Titles such as *How to Psycho-Analyze Yourself*, *Chemistry for Beginners*, and *What Every Married Man*



¹ While there's no copyright date in the pamphlet, such features as the color, design and serif typeface on the cover, and a small "union made" label on the back indicate that the pamphlet was probably released in the early '40s. Jake Gibbs, "Dating Little Blue Books," *Big Blue Newsletter*, No. 4, 2004. Available online at www.haldeman-julius.org/haldeman-julius-resources/dating-little-blue-books/.

of conveyance of land by an attorney, under such a power, see DEED EXECUTED BY AN ATTORNEY IN FACT. For conveying or incumbering of real estate, letters of attorney must be executed, acknowledged, and recorded, in the same manner as deeds.

1. GENERAL FORM OF POWER OF ATTORNEY

Know all men by these presents, that I, Charles Dunham, of the city of Boston, state of Massachusetts, do hereby make, constitute, and appoint James Wood, of Nashua, New Hampshire, my true, sufficient, and lawful attorney, for me and in my name to (here state the substance of the power, in plain terms), and to do and perform all necessary acts in the execution and prosecution of the aforesaid business in as full and ample a manner as I might do if I were personally present.

In witness whereof, I have hereunto set my hand and seal, this tenth day of January, nineteen hundred and

Charles Dunham. (Seal.)

Signed, sealed, and delivered in presence of:
Clarence Hull.
Norman Cross.

2. POWER OF ATTORNEY TO SELL LANDS

Know all men by these presents, that I, Charles Dunham, of Boston, Mass., hereby make, constitute, and appoint James Wood, of Nashua, N. H., my true and lawful attorney in fact, for me and in my name, place, and stead, to bargain, sell, and convey, in fee simple, by deed

Should Know give you some idea of the topics covered. The series was extremely popular. By 1949, over 300 million copies had been sold, all for ten cents each or less.

I'm both amused and a little horrified by the thought of a book of ten-cent legal forms for sale alongside titles such as *What You Should Know About Palmistry*. And like all lawyers, I believe that the best legal advice comes from a lawyer, not a handbook. The pamphlet purports to provide legal forms covering promissory notes, deeds and mortgages, wills, and liens; all in 63 pages. I can't recommend substituting this pamphlet for the advice of legal counsel, but I think it is a reminder of the role that the law plays in the everyday lives of people. The table of contents includes the kind of legal issues that anyone might face during their lifetime: selling property, borrowing money, and providing for your family after death. The law plays a role in the lives of Texans and in shaping Texas history.

This year's TSHA Annual Meeting will be held March 8-10 at the Embassy Suites Hilton in San Marcos. As it has for many years, the Society will sponsor a session that focuses on legal history in Texas. This year's session, moderated by the Society's president, Hon. Dale Wainwright, is entitled *Laying Down Texas Law: From Austin's Colony through the Lone Star Republic*. The session includes a discussion of the alcaldes and advocates in Stephen F. Austin's colony by Hon. Jason Boatright, and a discussion of the attorneys who fought in the Texas Revolution by Dylan O. Drummond. David A. Furlow, the *TSCHS Journal's* executive editor, will serve as commentator. The Society's session is always well attended; in fact, last year it drew a standing-room-only crowd. The word has spread that legal history is interesting and important.

Online registration for the TSHA Annual Meeting ended February 20th, but on-site registration is available beginning March 8th. I'm looking forward to the sessions and to browsing the books in the exhibitor's hall again. I hope to see you there!

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



Photo by Alexander's Fine Portrait Design-Houston

I am pleased to report that the 2018 Annual Fellows Dinner was a tremendous success. All nine of the Justices from the Texas Supreme Court joined us last month at the Bullock Texas State History Museum in Austin for a wonderful evening of history, dinner, and conversation. We appreciate Justice Green, the Court's liaison to the Society, coordinating the scheduling of the dinner so that the Justices would be able to attend. Unique events such as this are one of the benefits of being a Fellow. The photos below will give you some sense of the evening's elegance, uniqueness, and fellowship. We are beginning plans now for the next Fellows Dinner, to be held in the Spring of 2019.

The Fellows are a critical part of the annual fundraising by the Society and 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. As we have informed you previously, a major educational project of the Fellows is "Taming Texas," a judicial civics program for seventh-grade Texas history classes. The generosity of the Fellows allowed us in 2016 to produce a book for this project, *Taming Texas: How Law and Order Came to the Lone Star State*.

I am pleased to announce that we have now published our second book in the Taming Texas series. The new book was presented for the first time to the Court and the Fellows at the recent Fellows Dinner. While the first book 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.

We appreciate Chief Justice Hecht's writing the foreword for both books. Jim Haley and Marilyn Duncan are the coauthors of these books, and Jim was with us for the book release at the Fellows Dinner. They have done a great deal of work to bring us these terrific books.

We are in the process of nominating the Fellows Class of 2018. If you are not currently a Fellow, please consider joining the Fellows and helping us with this important work. Also, we are in the process of considering future projects. So please share with us any suggestions you might have.

Finally, I want to again express our appreciation to the Fellows for their support of programs like our judicial civics book project. If you would like more information or want to join the Fellows, please contact the Society office or me.



TSCHS Fellows Dinner

Bob Bullock Texas State History Museum

Austin, Texas January 10, 2018

Photos by Mark Matson



Justice Paul Green (left), Chief Justice Nathan Hecht, Skip Watson



Top: Justice Dale Wainwright (ret.), Justice Paul Green
Bottom: Chief Justice Tom Phillips (ret.), Justice Phil Johnson, Carla Johnson



Top: Angelique Devine, Justice John Devine, Jim Haley
Bottom: Justice Debra Lehrmann, Marianne Auld



Top: Jessica Blacklock, Justice Jeff Boyd
Bottom: Justice Jimmy Blacklock, Ben Mesches, Warren Harris



Top: Kerry Cammack, Judge Priscilla Owen
Bottom: Lindsay Hagans, Fred Hagans, Reagan Simpson



Top: (standing at center table) Justice Dale Wainwright (ret.), (seated, from left) Judy Beck, David Beck, Judge Priscilla Owen, Chief Justice Nathan Hecht, Lindsay Hagans, Fred Hagans Bottom: David Beck

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

Marianne M. Auld

S. Jack Balagia

Robert A. Black

Elaine Block

E. Leon Carter

Tom A. Cunningham*

David A. Furlow and

Lisa Pennington

Harry L. Gillam, Jr.

Marcy and Sam Greer

William Fred Hagans

Lauren and Warren Harris*

Thomas F.A. Hetherington

Hon. James C. and Allyson Ho*

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.*

David E. Keltner*

Thomas S. Leatherbury

Lynne Liberato*

Mike McKool, Jr.*

Ben L. Mesches

Nick C. Nichols

Jeffrey L. Oldham

Hon. Harriet O'Neill and

Kerry N. Cammack

Hon. Thomas R. Phillips

Hon. Jack Pope* (deceased)

Shannon H. Ratliff*

Harry M. Reasoner

Robert M. Roach, Jr.*

Leslie Robnett

Professor L. Wayne Scott*

Reagan W. Simpson*

S. Shawn Stephens*

Peter S. Wahby

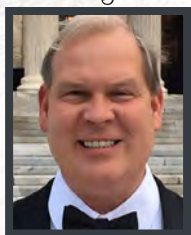
Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter*

*Charter Fellow

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David A. Furlow

The Theater of the *Real*

Welcome to our journalistic battlefield, a cockpit of conflicting ideas, competing visions about justice, and gunslingers in frontier Texas. But isn't that what you'd expect when arbitrations routinely end in 2-1 decisions, every jury trial has become an ordeal by combat, and the U.S. Supreme Court grants certiorari to resolve circuit *conflicts*?

Should we believe that legal history written by institutional academics, think tank scholars, and law school professors reflects pure reason divorced from interest, information, and ideology? Not when everyone, high and low, private and public, brings an agenda to the pen, paper, and ink atop the table. Every case—whether one resolved by arbitration, trial, or appeal—involves the resolution of conflicting ideas and interests. The judges and justices who decide cases operate not in the digital context of a computer program but in the “theater of the real,” the felicitous phrase John le Carré coined for undercover operations in *The Little Drummer Girl's* tale of infiltrating a terrorist cell.

In a memorial essay honoring the late Texas legal historian and law professor Joseph W. McKnight, Josiah Daniel, an attorney who practiced law for decades in Vinson & Elkins's law office, proclaims the virtues of a “deeply researched, serious scholarship that is [either] motivated by or speaks to contemporary issues,” in short, legal history that veteran lawyers and experienced judges apply while analyzing Texas law, lawyers, and courts. Daniel defends the “forensic history” attorneys use in appellate courts from academic ivory tower critics who claim that this “law office history” is “both inappropriately applied” and “unlikely to be good history.” Along these lines, First



Top: the posse that pursued Cherokee wanted-man *NeDe WaDe*, a.k.a Ned Christie. Bottom: screenshot from *The Great Train Robbery* (1903). Public domain.

Amendment specialist Erwin Chemerinsky observes that complaints against the Supreme Court began “more than a quarter century ago, [when legal scholar] Alfred Kelly complained of what he called ‘law office’ history practiced by [a] Supreme Court that ‘picks and chooses from its reading of history and selects those practices that confirm the conclusion that it wants to reach.’”

What are the alternatives to the “law office” history critics condemn? Should we prefer the pomp and pretentiousness of “history office” law to the argumentative edge of “law office” history? No thanks. I cannot count how many times I’ve read histories of law, lawyers, and legal systems that quickly reveal that an academic has little to no working knowledge of courts, civil and criminal procedure, and clients. As Keith Wheeler and Michael Lambert said of President Lyndon Johnson’s financial transactions,

Following the trail of some of these transactions resembles the action in a Western movie, where the cowboys ride off in a cloud of dust to the south, the herd stampedes northeastward, the Indians start to westward but, once out of sight, circle toward the north, the rustlers drift eastward and the cavalry, coming to the rescue, gets lost entirely—all over stony ground leaving little trace.

But at least those “history office” law stories offer *some* action.

Nothing is as boring as some law school professors’ histories of the history of law. Should work-related stress deprive you of that sleep that knits up the “raveled sleeve of care,” seek slumber in page-long paragraphs of turgid prose about deductive formalism, calls for a collectively oriented and pragmatic sociological jurisprudence, “negotiations” between “consociation” and subordination, and, most exciting of all, explications of legal embryology. Immensely important to graduate school history department programs, the resulting tomes are as cold, dull, and dead



Left: A studio portrait of Myra Maybelle Shirley, a.k.a. Belle Starr, Queen of the Outlaws, probably in Fort Smith in the early 1880s. Public domain, Wikipedia. Right: Wild Bill Hickok after killing Davis Tutt in a duel. *Harper’s New Monthly Magazine*, February 1867, Wikipedia.

as the dark side of the moon.

There are exceptions, of course. Academic historians such as Joe McKnight, Frank de la Teja, Gary Lavergne, Jim Paulsen, and Bill Chriss, whose writings have all appeared in this journal, exemplify natural born storytellers. Each has brought this state's courthouse and legal history to life. Page-turners trump academia's trope-churners seven days out of seven.

But we also like "law office" histories grounded in credibility challenges, evidentiary objections, and procedural battles about lives, deaths, and injuries; conflicts arising from the accumulation of wealth and the pain of poverty that results from wealth's sudden loss; struggles involving the abridgment and vindication of cherished constitutional rights; regulatory wars between individuals and state officials over the brewing of beer, drilling of oil, and pumping of water; recoverability of damages for pain, suffering, and gross negligence; and tell us about the fears and dreams that motivate people of pride, property, passion, and power.

This journal publishes stories by veteran lawyers, experienced judges, and historians capable of bringing to life the conflict of ideas and interests on legal battlefields. To paraphrase Theodore Roosevelt's April 23, 1910 speech at the Sorbonne, we publish articles by lawyers, judges, and historians "in the arena"; their faces are marred by dust, sweat, and blood because they strove valiantly to change the world, save lives, or preserve freedoms. They "who err, who come short again and again" do so because there is no effort without error and shortcoming. They know "great enthusiasms, great devotions" who at best know in the end the "triumph of high achievement" and, at worst, "if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat."

Veteran trial attorney Stephen Pate, a superb law office historian, presents the first chapter of an epic, three-year political and legal battle to appoint a federal district court judge in Texas. In "Reconstruction Politics and the Galveston Seven: The Struggle to Appoint a Judge in the Eastern District of Texas, 1869-1872," Mr. Pate examines the give and take of a process that would eventually elicit no fewer than seven nominations before a new judge occupied the bench in Galveston. A member of the American Law Institute and American Board of Trial Advocates, and a Fellow and Regent of the American College of Coverage and Extracontractual Counsel as well, he traces the cut and thrust of presidential, U.S. Senate, and national politics as nuanced and vicious as anything in Washington, D.C. today.

In his article "From Outlaw to Attorney at Law: The Brief Legal Career of John Wesley Hardin," John Browning, a man as experienced at writing as he is at making courtroom history, shares an amazing story of Texas's most infamous legal gunslinger, a man whose belt bore more notches from killing—twenty-seven—than from courtroom conquests. Mr. Browning, the author of *The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law*, serves as the Chair of the *Texas Bar Journal* Board of Editors. He applies his law office knowledge of history to proffer a tale of a bad man gone good, an outlaw who turned the page on the killing to open a new chapter entitled "Attorney and Counselor at Law." But Browning also explores the lifelong weaknesses for women and gambling that led Hardin to his own Boot Hill in El Paso in 1895. No spoilers, here: you have to read Browning's cautionary tale for yourself.

We leave El Paso's Wild West behind and head east to Houston, where two appellate justices tell us of the century-long battle to bring appellate justice to Houston. On September 12, 2017, Houston Bar Association Historical Committee Chair Jennifer Hasley organized an extraordinary anniversary celebration for the First and Fourteenth Courts of Appeals. That celebration brought well over three hundred justices, judges, and attorneys to Houston's 1910 Historic Courthouse. Ms. Hasley memorialized the event by publishing two articles in the *Houston Bar Journal* that this journal is proud to reprint here.

Senior Justice Terry Jennings examines how the Legislature waged war against the Texas Supreme Court's expanding docket by creating "The 'Friendly First,' Texas's First Court of Appeals, 1892–2017." Fourteenth Court of Appeals Chief Justice Kem Frost matches Justice Jennings's court office history by describing the Friendly First's sister court in "The Fourteenth at Fifty: Poised for Change, Prepared for Challenge, and Pointed toward the Future."

Next we turn to another Houstonian, personal injury trial lawyer Jay Jackson, who has long been center stage in this theater of the real. His review of Matthew Butterick's innovative *Typography for Lawyers* offers illustrative examples and exciting antidotes to murky and mundane brief writing. Do you want to catch your reader's eye and hold her attention? Then read Jackson's book review and learn how.

In this issue's news coverage, we explore a Tinseltown story of a few actors and a director so handsome, beautiful, rich, and talented that they towered over the arid West Texas landscape of Marfa like giants. During the Society's Fall 2017 Board of Trustees Meeting, Dr. Donald Graham, the J. Frank Dobie Regents Professor of American and English Literature in the University of Texas's English Department, told how maverick director George Stevens bought the rights to New York writer Edna Ferber's scathing novel *Giant* and convinced Rock Hudson, Elizabeth Taylor, and James Dean to star in a quintessentially Texas blockbuster.

In the film, Rock Hudson's wealthy Texas rancher character, Jordan "Bick" Benedict, ventures east to Virginia to convince Elizabeth Taylor's rich, fox-hunting character Leslie Lynnton to come to Texas. When James Dean's poor but ambitious ranch-hand Jett Rink strikes oil next to the Benedicts' land, big-as-Texas conflicts and battles divide "Rich'Un" Rink from



Bill Gold, U.S. theatrical poster for the film *Giant* (1956). http://www.filmsite.org/posterpages/p_giant.html, Wikimedia Commons.

the Benedicts. In his presentation, Dr. Graham showed the “Sarge’s Diner” sequence from the film to demonstrate, image by image, how Stevens’ Hollywood vision of a Texas fist-fight between Hudson’s Bick Benedict and the brutal Sarge became one of the most powerful on-screen weapons in the long struggle to end racial discrimination in America.

Dylan Drummond’s sleuthing takes us back to 1988 to witness a candidate-debate showdown among nine former or current candidates for the Texas Supreme Court that forever changed the Lone Star State’s politics and jurisprudence.

We chronicle the century-long struggle the descendants of Reconstruction-era Texas Supreme Court Justices Colbert Coldwell and Wesley Ogden waged to win a place for their ancestors’ portraits among the pictures of Texas Supreme Court Justices. Now you can see why that matters.

We end this issue by joining with University of Texas Law School Dean Ward Farnsworth, Harvard Law School Professor Randall Kennedy, and UT historian Gary Lavergne to re-examine one of the most important battles in Texas’s long history—Houston postman and civil rights plaintiff Heman Marion Sweatt’s battle to end the Pigmentocracy of racial segregation at UT Law School and throughout the state.

Here and in the pages that follow, you can read stories scripted in the theater of the real by lawyers, judges, and historians who once strove to change the world and now strive to share their stories of Texas law.

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

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A Practicing Lawyer's Tribute to Professor Joseph W. McKnight (1925-2015)

By Josiah M. Daniel, III

Members of this Society and readers of this *Journal* will fondly recall Joseph W. McKnight, the longtime professor at the SMU Dedman School of Law who died at age ninety in 2015, and all will readily join in an acknowledgment of his significant role in this Society and its projects over the years.¹ It was 1980 when I originally met Joe McKnight, as a very young lawyer with a strong interest in legal history who had wrangled an appointment to a committee of the State Bar of Texas, on which Joe was already serving, quaintly called the "Committee on the History and Traditions of the Bar."

The individual committee members wrote the chapters for a book published in 1982 under the title *The Centennial History of the Texas Bar*,² and Joe authored its final chapter, "Tracings of Texas Legal History: Breaking Ties and Borrowing Traditions." He concluded:

While outgrowing the need for blind adherence to timeworn customs and borrowed traditions, the law of Texas has evolved—with a healthy respect for those institutions of the past which have withstood the test of time. The law of today is the product of selective incorporation through which the ways of yesterday have been challenged to meet present needs. It is an ongoing process and one to which the Texas Bar is proud to contribute.³

I thought then, and time has proven, that here was a professor who truly understands the *historical* nature of legal process and the *historical* origins and the evolution *over time* of substantive law⁴ as it applies in the lives of Texans.⁵

¹ William S. Pugsley, "Foreword," in James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013), xix (McKnight was "the doyen of Texas legal history").

² *The Centennial History of the Texas Bar* (Austin: State Bar of Texas, Committee on the History and Traditions of the Bar, 1982).

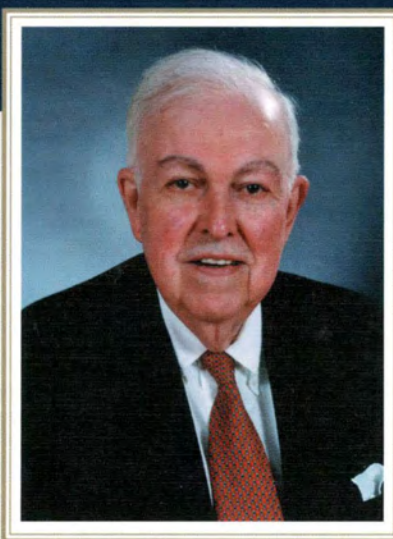
³ Joseph W. McKnight, "Tracings of Texas Legal History: Breaking Ties and Borrowing Traditions," in *ibid.*

⁴ A prominent professor of both law and history once remarked that "there is a close relationship between law and history." Michael R. Belknap, *Introduction to Bicentennial Legal History Symposium*, 24 CAL. W. L. REV. 221, 222 (1988). Another commentator has observed "a fairly close relationship between the day-to-day methodology of the judicial process and that of historical scholarship. Each judicial decision builds on the law developed through a historical progression of prior decisions, and the history of a case being appealed is of critical importance." Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, SUP. CT. REV. 119, 121 (1965). Moreover, legal history "can help us to understand our current conception of 'law' better, as well as to enliven our single legal link with the past." Calvin Woodward, *History, Legal History and Legal Education*, 53 VA. L. REV. 89, 121 (1967).

⁵ The reification of these observations may be found in a representative selection of Joe's writings such as: "Law Books on the Hispanic Frontier," *Journal of the West* 27, no. 3 (July 1988); "The Persistence of the Spanish Law of Succession on the North American Frontier," in Harold Benoist, ed., *The Community Heritage in the Spanish*

Professor Joseph W. McKnight

Larry and Jane Harlan Faculty Fellow and Professor of Law



Symposium

honoring Professor McKnight's

Contributions to Texas law, to legal
history and to SMU Dedman School of Law

Thursday, May 15, 2014

3:00 p.m.

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Given in conjunction with the award of the Doctor of Laws
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In the fullness of time I came to realize and appreciate that the genial man whom I had met in annual meetings of that State Bar committee was in fact one of the titans of the legal-historical community of scholars of our nation. By the mid-1990s I began to attend annual meetings of the American Society for Legal History, and that is where and how I came to really know Joe as a friend over twenty years. A few years ago, in assisting with the documenting of that learned Society's history by taking Joe's oral history,⁶ I learned that Joe was indeed one of its founders, six decades ago, in 1956.

That he was preeminent in the field of Texas legal history should be obvious to the members of the communities in which he lived and worked, including not only the faculty, students, and alumni/ae of the Dedman School of Law but also the legal historians of our nation. Moreover, I wish to posit here, he and his life work should be long known within the community of the 100,000 practicing lawyers who are members of the State Bar of Texas, "the second largest active-member state bar in the United States."⁷ For anyone uninformed, one simple demonstration of Joe's eminence and significance in all three realms can be quickly grasped by referring to the wonderful festschrift in his honor in the *SMU Law Review* of sixteen years ago, for which SMU's law librarian Gregory L. Ivy created an excellent bibliography, up to that point, of Joe's book and law-journal publications.⁸

I reviewed that bibliography in preparation for my tribute, and I researched in the legal-periodical indices and found a good double handful of additional works that he published even after 2002. Collectively, his is a monumental body of scholarship,⁹ and it is significantly *historical* in nature and approach—and it is quite *useful* to practicing lawyers. My objective in this essay of homage is to point out that *Joe's legal-historical work* has had, and will in the future have, an influence beyond the walls of law-school classrooms, and that has been, and will be, his impact upon the world of the *practicing lawyer*.

I have just retired from practicing law for thirty-nine years, both in the courtroom and in the office. I advised clients and represented them in legal cases, resolved their disputes and effectuated their desired transactions, and performed other legal services to them; this is the work that has come to be known by the generic term "lawyering."¹⁰ In my lawyering for clients,

Americas: selected papers and commentaries from the November 1991 quincentenary symposium (Washington, D.C.: U.S. Department of the Interior, National Park Service, 1999), 60; *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W. L. REV. 117 (1971); and *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24 (1957).

⁶ American Society for Legal History website, "History of the Society: Personal Histories," http://aalt.law.uh.edu/AALT7/ASLH_Archive/Personal%20Histories/ASLHPersHist.html.

⁷ State Bar of Texas website, "Frequently Asked Questions—How Many Lawyers Are State Bar of Texas Members?," <https://www.texasbar.com/Content/NavigationMenu/AboutUs/AboutUsFAQs/default.htm>.

⁸ *Publications of Joseph W. McKnight*, 55 SMU L. REV. 367 (2002).

⁹ In all, Joe "author[ed] more than 100 articles and several books." SMU website, Featured News & Experts/2015 News Archives, "SMU remembers longtime Dedman Law Professor Joseph W. McKnight," <https://www.smu.edu/News/2015/joseph-webb-mcknight-obituary-01dec2015> (Dec. 1, 2015).

¹⁰ I have defined "lawyering" as the work of "a specially skilled, knowledgeable, or experienced person who, serving by mutual agreement as another person's agent [the lawyer], invokes and manipulates, or advises about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the *status quo* for his or her principal [the client]." Josiah M. Daniel,

throughout my career, I always tried to bring historical perspective to bear. Specifically, I sought to adduce and discuss relevant history as a source of authority or as a form of persuasion to back up arguments that I have presented in my work, on behalf of clients, to resolve their problems or to obtain a desired outcome in a dispute. In doing this, I believe that I have followed Joe's admonition that *legal history* is important because it provides to lawyers "the *necessary historical frame of reference* for substantive rules" that apply in their work for clients.¹¹

So I have long puzzled over the criticism that a few legal historians, such as John Phillip Reid, have leveled against what they have labeled as "forensic history." In a 1993 article titled "Law and History,"¹² Reid complained about "a species of history that does *not* meet the canons of *historians' history* It is *forensic* history." He also called it "*law office* history."¹³ The adjectival phrase "law office" placed before the noun "history" highlights that Reid regards such history as both inappropriately employed in the service of a lawyer's client and, furthermore, "unlikely to be good history."¹⁴ In another article, Reid fulminated against

[t]he *forensic historian*... [who] searches the past for *material applicable to a current issue*. The purpose of the advocate, *unlike that of the historian*, is to use the past for the elucidation of the present, to solve some contemporary problem or, most often, *to carry an argument*. It is *the past put in the service of winning the case at bar*.¹⁵

Reid has even named the U.S. Supreme Court as a practitioner of "law office history."¹⁶

Reid's denunciations do *not* apply to Joe McKnight, who has written what Reid calls "*historians' history*," or pure history, history that is often referred to as "history for its own sake." But I have always read Reid's words as addressed *to me*, a practicing lawyer who, in my work in a "law office," has tried consistently to incorporate history, with full citation to pertinent works of

III, *A Proposed Definition of the Term "Lawyering,"* 101 LAW LIBR. J. 207, 215 (2009); see also Robert K. Vischer, *Moral Engagement Without the "Moral Law": A Post-Canons View of Attorneys' Moral Accountability*, 2008 J. PROF. LAW. 213, 213 (2008) ("The primary objective, when it comes to lawyers, is to attain the client's stated objectives to the extent permitted by law."). In 2014, *Black's* substantially adopted my definition of the term "lawyering." *Lawyering*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹¹ Joseph W. McKnight, *Review* of VERN COUNTRYMAN & TED FINMAN, *THE LAWYER IN MODERN SOCIETY* (1966), 41 S. CAL. L. REV. 215, 216 (1968) (emphasis added).

¹² 27 LOY. L.A. L. REV. 193 (1993).

¹³ *Ibid.*, 215, 218 (emphasis added).

¹⁴ Alfred L. Brophy, "Introducing Applied Legal History," *Law and Legal History* 31 (2013): 233, 234.

¹⁵ John Phillip Reid, "The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries," in Ellis Sandoz, ed., *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Columbia: University of Missouri Press, 1993), 147, 158 (emphasis added).

¹⁶ See, e.g., Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L. J. 901, 913 (1993) ("More than a quarter century ago, Alfred Kelly complained of what he called 'law office' history practiced by the Supreme Court. The Court picks and chooses from its reading of history and selects those practices that confirm the conclusion that it wants to reach."), citing Alfred H. Kelly, *Clio and the Courts: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122, 125-33 (1965). See also Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy—Symposium: History and Meaning of the Constitution*, 3 CLEVELAND ST. L. REV. 23, 26 (2014); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 395 (2003).

history authored by professional historians such as Joe, into my legal positions and arguments on behalf of clients. It has not seemed to me a bad thing to “*put [the past] into the service of winning the case at bar,*” at least where the history is informative to the court and supportive of my interpretation of a statute or of my request to apply certain law to certain facts.

I have therefore been heartened and uplifted as, more recently, some legal historians have begun openly to speak of “*applied legal history*”—not pejoratively, but as a good thing. Al Brophy, for instance, in articles over the past several years, has applauded “an emerging . . . trend” of “legal history speak[ing] to contemporary issues.” Brophy defines “*applied legal history*” as “deeply researched, serious scholarship that is [either] motivated by or speaks to contemporary issues,” in short, a “*turning to history in law.*” He posits various types of “*useable legal history*” including, pertinently, history that “looks to *how we got where we are now.*”¹⁷

What follows is the perspective of those “users” who appreciate and seek to employ “applied, or useable, legal history,” that is, the viewpoint and experience of practicing lawyers who not only have *read* the work of Professor McKnight for their own heuristic purposes (and reading Joe has always been both enlightening and pleasurable because he wrote so well) but also have *utilized* his work in the *service of clients* who have real world issues and disputes as to which Joe’s work speaks informatively and has, in relevant instances, provided support for the attorneys’ arguments and the legal positions of their clients.

To begin, it should be observed that the books of legal historians such as Joe McKnight are trustworthy sources to which practicing lawyers may turn. Historians are those scholars who are specially educated, trained, or at least highly experienced in the art and craft of researching deeply and then writing serious, documented, and analytical accounts of the past. They “mak[e] the past accessible for the present and the future”; they make the past “legible.”¹⁸ Historians, like all humans, have their own world views, of course; but “[t]he historian’s first duty is to be sincere,” in the words of the great French historian, Marc Bloch.¹⁹

Honest historians let the reader know about their predilections, and they make a bona fide effort to be accurate and fair in the narrative presentation of the fruits of the research and in the conclusions drawn from the historical record. Historians’ facts and assertions can, moreover, be verified because they footnote or otherwise cite their sources. Historians are not bashful about critiquing each other’s work, so if a book contains flaws, the subsequent historical literature will point that out.

¹⁷ Brophy, *Applied Legal History*, 233, 236, 238 (emphasis added). See also Mitu Gulati, Sarah Ludington, and Alfred L. Brophy, “Applied Legal History: Demystifying the Doctrine of Odious Debts,” *Theoretical Inquiries in Law* 11 (2010): 247; Geoffrey R. Watson, “The Fun of Teaching American Legal History,” *American Journal of Legal History* 53 (2013): 426; Emanuel van Dongen, “Teaching Legal History: Comparative Perspectives,” *Comparative Legal History* 3 (2015): 344.

¹⁸ John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* (New York: Oxford University Press, 2002), 135.

¹⁹ Marc Bloch, *The Historian’s Craft: Reflections on the Nature and Uses of History and the Techniques and Methods of Those Who Write It* (Manchester, Eng.: Manchester University Press, 1992), 3. See also Edward H. Carr, *What is History? The George Macaulay Trevelyan Lectures at the University of Cambridge January—March 1961* (London: McMillan Press, 1962), 19–20.

To prepare my tribute, I searched the databases of reported Texas and federal cases for judicial decisions that have cited *Joe's published works*. In those cases in which McKnight writings have been cited and relied upon in judicial decision-making, one area easily stands out: Texas family law including community property law, the underlying principles of which are heavily indebted to historic Spanish and Mexican law, as Joe's publications have demonstrated so well. Other commentators such as Chief Justice Nathan Hecht have amply covered Professor McKnight's family-law and also civil-procedure contributions.²⁰

I will turn to other areas of Texas law in which Joe's publications have been importantly *applied*. One is *homestead*. In fact, any attempt to understand the Texas homestead and the exemption of personal property from the claims of creditors must begin with Joe's work. Joe has written of the history of the Texas homestead in various places but most comprehensively in an article that I have treasured (it has a permanent place of honor on my bookshelf) and that I have cited in briefs for thirty years: "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle."²¹ In it he explained that

the Hispanic and Anglo-American traditions of exempt property interacted [in Texas] to produce the lasting concept of protecting the family home and certain movables from the claims of creditors. These ideas came to full flower in the formulation of the homestead and chattel-exemption provision of the Texas Constitution of 1845. Forceful minds, well versed in the Hispanic concepts of exempt property and the constitutional provision that would publish the expanded concept of exempt property in louder tones to the rest of the United States.²²

Indeed, Texas courts have always liberally construed these historic homestead and personal-property exemptions.²³

Because homestead issues figure prominently in many individual debtors' bankruptcy cases as well as in estate-tax cases, the forum in which Joe's work has been most cited in the West Publishing Company's case reporters has been a federal court. For example, in deciding whether the value of a decedent's homestead property should be reduced for federal estate tax purposes by the value of the surviving spouse's interest in the homestead under Texas law, in the case styled *Estate of Johnson*,²⁴ the Fifth Circuit Court of Appeals relied on Joe's *Southwestern Historical Quarterly* article to lay out and explain the origins of the Texas homestead not only as a protection for the family from creditors but also to protect a spouse against involuntary loss of the home either by act of the other spouse or by his death. Furthermore, in *In re Bouchie*,²⁵ on

²⁰ Chief Justice Hecht also observed that "Professor McKnight was a prolific writer, *but* unlike many prolific writers *he was actually cited* [by courts]." Nathan L. Hecht, "Introduction," in "A Tribute to Professor Joseph W. McKnight, Father of Texas Family Law," *Journal of the Texas Supreme Court Historical Society* 6, no. 2 (2017), 12 (emphasis added).

²¹ *Southwestern Historical Quarterly* 86 (1983): 369.

²² *Ibid.*, 396.

²³ *Woods v. Alvarado St. Bank*, 19 S.W.2d 35 (Tex. 1929) ("The rule that homestead laws are to be liberally construed to effectuate their beneficent purpose is one of general acceptance.").

²⁴ *Est. of Johnson v. IRS*, 718 F.2d 1303, 1307 n. 11 (5th Cir. 1983).

²⁵ 324 F.3d 780, 785 (5th Cir. 2003).

the question of classifying homestead property as either rural or urban in a bankruptcy dispute, the Fifth Circuit relied on another article by Joe in the *SMU Law Review*.²⁶

A third area in which Joe's historical work has had an impact is freedom of speech. In *Davenport v. Garcia*,²⁷ a mandamus proceeding, the Texas Supreme Court decided an important issue of freedom of speech—under the *Texas* Constitution. There a state trial court issued a "gag order" forbidding former and present counsel to "discuss or publish...any matters of this case with any persons other than their clients." The Supreme Court considered whether the gag order violated the guarantee of free expression in Article 1, Section 8 of the *Texas* Constitution. "The history of this provision is a rich one," said the Court, as it cited and relied on Joe's article "Stephen Austin's Legalistic Concerns"²⁸ to explain that Texas's version of freedom of expression is based to a significant extent upon the writings and the work of the "founding father" of Texas.²⁹ The Court vacated a gag order in the light of that history, finding "Texas has always selected an expansive freedom of expression clause . . . to ensure broad liberty of speech." The Court added that *Texas* freedom of speech is *broader* than that protected by the First Amendment to the U.S. Constitution.

To simply list cases in which Joe's historical publications have been cited by courts, state and federal, in the areas of marital relations and community property, civil procedure, homestead, and free speech of course does no more than hint at the extent of the impact or influence Joe has had upon practicing Texas lawyers because subsequent judicial decisions have cited the cases Chief Justice Hecht and I have mentioned, but without repeating the citation to Joe's articles. His historical work will continue to resonate and reverberate through the *Southwestern Reporter*, the *Bankruptcy Reporter*, and the *Federal Reporter*.

Joe McKnight's bibliography is, as acknowledged earlier, extensive. One of the works on that list that has been particularly helpful to me, and should be always helpful to young lawyers who will enter the practice in the future and will deal with Texas marital property, homestead, and other principal aspects of Texas law that have Spanish and Mexican roots, is "The Spanish Legacy to Texas Law."³⁰ In it, Joe demonstrates masterfully that "the Spanish law influence in the field of Texas law is of lasting significance."

As a practicing lawyer,³¹ I am grateful to Professor Joe McKnight for his lifetime of work that has afforded me, and that continues to provide to new generations of Texas lawyers, the "necessary historical frame of reference" for understanding and for applying substantive legal

²⁶ 324 F.3d 780, 785 & nn. 29 & 31 (5th Cir. 2003), citing Joseph W. McKnight, *Family Law: Husband and Wife*, 55 *SMU L. REV.* 1035 (2002).

²⁷ *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992).

²⁸ Joseph W. McKnight, "Stephen Austin's Legalistic Concerns," *Southwestern Historical Quarterly* 89 (1986): 239–68.

²⁹ *Ibid.*, 239, 268.

³⁰ *American Journal of Legal History* 3 (1959): 299–323.

³¹ It should at least be noted here that, although primarily an academic, Joe occasionally undertook the representation of clients in courts. For instance, in the appellate litigation over artifacts recovered from the undersea site of the sinking of the Spanish galleon *Espiritu Santo* in a storm in 1555 off the Texas coast, Joe authored the brief for amicus curiae Advisory Council on Underwater Archaeology. See *Platoro Ltd. v. Unidentified Remains of a Vessel, Her Cargo, Apparel, Tackle, and Furniture, in a Cause of Salvage, Civil and Maritime*, 695 F.2d 893 (5th Cir.1983).

rules as we lawyers work to accomplish the resolution of disputes and issues for our clients under Texas law.



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This essay is a revised and enlarged version of the author's tribute orally presented in "A Celebration of Joseph Webb McKnight, His Contributions to Texas Law, to Legal History, and to the SMU Dedman School of Law," held in the Dedman School of Law of Southern Methodist University in Dallas on May 15, 2014.

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Reconstruction Politics and the Galveston Seven: The Struggle to Appoint a Judge in the Eastern District of Texas, 1869-72, Part I

By Stephen Pate

On April 19, 1870, Judge John Charles Watrous, the only U.S. District Court Judge of the Eastern District of Texas, had managed, with the aid of his wife, to scrawl an X upon a letter resigning his judgeship.¹ Three days later, President Ulysses S. Grant accepted the resignation.² The resignation had not been unexpected. Judge Watrous had suffered a paralytic stroke while serving on the bench in Galveston in January 1869. Watrous had been the first federal judge in Texas. Until 1857 he had been the only one. By the time of his 1870 resignation, the vast Eastern District included the bustling port city of Galveston, then Texas's largest city, as well as Houston and Jefferson. Besides Galveston, federal court was also held in Brownsville.³

The position was an important one — perhaps even more important than a federal district judgeship today. Under the U.S. Constitution, federal judges are nominated by the President and confirmed by the Senate. They hold office during good behavior, typically for life. Even in normal times, a judicial opening for a federal bench would attract attention and controversy concerning the nominees. Yet these were far from normal times. This was Reconstruction Texas. It had been only on March 30, 1870, roughly three weeks before Watrous's resignation, that Texas had been readmitted to the Union after seceding nine years before. Texas was the last state readmitted and was still deep in the grips of Reconstruction. The Republican Party was ascendant, holding not only the Governor's office but the two Senate seats and, for a time, the entire federal House of Representatives delegation.

All of these officials, plus some more, felt they were entitled to a say in who President Ulysses S. Grant appointed to the greatest patronage prize available—a federal judgeship. The fact that the two Senators despised each other, and the fact that both despised the Governor, who had at first had the ear of Grant on patronage but then lost it, and the fact that Grant was notorious for sometimes ignoring his party in making appointments,⁴ meant that there would be no fewer than seven nominations made before the spot was filled. Moreover, the Attorney General's chart of applicants reveals that no fewer than eight more were seriously considered, with applicants not only from Texas, but from New York, Kentucky, and Alabama.⁵ Even this list does not include the former Governor, the sitting Governor, or a former Texas Supreme Court Justice who all sought the same prize.

¹ Wallace Hawkins, *The Case of John C. Watrous* (Dallas: University Press, 1950), 66.

² *Ibid.*

³ Erwin C. Surrency, "Federal District Court Judges and the History of Their Courts," 40 F.R.D. 139, 164 (1966-67).

⁴ Carl H. Moneyhon, *Edmund J. Davis of Texas* (Fort Worth: TCU Press, 2010), 197.

⁵ "Applicants for Office under the Attorney General's Department," Texas General File, Box 682, Records of the Department of Justice, Records Group 60 Entry A1-350, Appointment Files for Judicial Districts 1853-1906 (hereinafter NARA, RG 60).



President U.S. Grant had to fill the bench in the first federal court building in Texas, located at Post Office and Twentieth Streets on Galveston Island, shown above left as it originally appeared.⁶ At right is the same 1861 Custom House and Federal Courthouse today.

Of these seven nominations, two were actually confirmed by the Senate. One man died after being confirmed. Another was confirmed, and then had his confirmation taken away at a Senator's request. One man received a recess appointment and served as judge for some five months before his nomination failed. One man was actually never nominated—though he at one time was the odds-on favorite and the most discussed. Last but not least, though not a formal nomination, history shows that Grant, whose administration was about to be engulfed in scandal, offered his own Attorney General the judgeship as a consolation prize when he forced the Attorney General's resignation because of that official's resistance to corruption.

At the end of the day, this story reflects the deep divisions in Texas during Reconstruction, including the strife within a Texas Republican Party that within a few short years would become extinct. The clashes involved deep personal divisions, disagreements over party loyalty, and accusations about who had remained loyal to the Union during the Civil War, and who had been a rebel at heart.

Yet there is another part of the story. That part concerns a Texas and a United States that were on the cusp of the Gilded Age, where there was immense corruption in many areas of society and where there was what historian Ron Chernow calls "a complete breakdown of public and private morality."⁷ This part of the story concerns Wall Street financiers attempting to influence the judicial selection process, and a fight against the "Railroad Rings" and corrupt Reconstruction politicians.

J.W. Flanagan and Morgan Hamilton—Two Senators Who Did Not Like Each Other

The key to a successful federal district court nomination is the backing of a United States Senator from the nominee's state. In 1870 state legislatures still elected Senators. Thus it was in March 1870 that the 12th Texas Legislature, with a Radical Republican majority, elected two men, James Winwright (J.W.) Flanagan and Morgan C. Hamilton, to represent the newly readmitted

⁶ Wallace Hawkins, *The Case of John C. Watrous: United States Judge for Texas, A Political Story of High Crimes and Misdemeanors* (Dallas: University Press, 1950), 54.

⁷ Ron Chernow, *Grant* (New York: Penguin Press, 2017), 729.

state as Senators.⁸

If history remembered these two men at all, it would be unkind to them. Flanagan had been a member of the “Know-Nothing” Party before the Civil War.⁹ He was from Henderson in East Texas. He had opposed secession, but remained in Texas during the war and operated a tannery that sold leather to the Confederate army, while his son served as an officer in a Confederate cavalry unit.¹⁰

After the war, Flanagan threw in his lot with the Radical Republicans, playing an active role in the 1869 Constitutional Convention. He ran for Lieutenant Governor on the ticket with E.J. Davis in the disputed 1869 election in which Davis defeated “Conservative Republican” A.J. “Jack” Hamilton.¹¹ After the ticket’s victory, Flanagan took his seat as Lieutenant Governor, only to shortly thereafter win the election to become Senator.

The main problem with Flanagan was that he was regarded as dishonest.¹² He was not in fact, a Radical Republican, but a social conservative, and his sole legislative agenda seemed to be enhancing the interests of the railroad companies where he had personal interests.¹³ The *San Antonio Express*, a Radical Republican newspaper, described him as “Our Southern Pacific Senator,”¹⁴ and described him as “a man who lacks character.”¹⁵ The moderate Democratic *Galveston News* was even more scathing, saying that he was a public official who “regard[s] the treasury as the chief end of government, and a fair chance at the same as the only worthy ambition of the official.”¹⁶



Governor Edmund Jackson “E.J.” Davis in his Union Army uniform. Texas State Library and Archives.

Morgan Hamilton, on the other hand, could not have been more different. Morgan, or “M.C.” as he was often known, was the taciturn brother of the ebullient Jack Hamilton, former Provisional Texas Governor, former Texas Supreme Court Justice, and the man who was defeated by Davis in the 1869 Governor’s race.¹⁷ While Jack Hamilton was a conservative Republican, his brother

⁸ Carl H. Moneyhon, *Republicanism in Reconstruction Texas* (Austin: University of Texas Press, 1980), 126.

⁹ Philip J. Avillo, Jr., “Phantom Radicals: Texas Republicans in Congress, 1870–1873,” *Southwestern Historical Quarterly* 77 (1974): 431, 434.

¹⁰ Thomas W. Cutrer, “Flanagan, James Winwright,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/ffl04>.

¹¹ Avillo, “Phantom Radicals,” 434.

¹² *Ibid.*

¹³ Moneyhon, *Davis*, 164.

¹⁴ “Our Southern Pacific Senator,” *San Antonio Express*, August 5, 1870, 2.

¹⁵ *Ibid.*

¹⁶ Quoted in Avillo, “Phantom Radicals,” 434.

¹⁷ *Ibid.*



UNITED STATES SENATOR MORGAN C. HAMILTON

(1809-93)

AN OUTSTANDING PATRIOT WHO ACTED AS SECRETARY OF WAR AND MARINE IN REPUBLIC OF TEXAS AND LATER SERVED THE STATE IN MANY ROLES, MORGAN HAMILTON IN 1837 OBTAINED A 1009-ACRE LAND GRANT IN THIS AREA. WHILE HIS BROTHER A. J. HAMILTON WAS GOVERNOR (1865-66), HE RETRIEVED FOR TEXAS SOME BONDS SENT TO EUROPE DURING THE CIVIL WAR. IN 1870-77 HE SERVED AS A UNITED STATES SENATOR FROM TEXAS. HIS NEPHEW THEODORE VAN BUREN COUPLAND (1836-90) SETTLED HERE AND IN 1887 FOUNDED TOWN OF COUPLAND ON LAND THAT FORMERLY BELONGED TO SENATOR HAMILTON.

(1975)

Left: U.S. Senator Morgan Hamilton (1870-1877). Library of Congress.
Right: Texas Historical Commission historical marker in Coupland, Texas.

Morgan was described as “one of the most extreme and vindictive radicals,”¹⁸ and he lacked his brother’s charm. Morgan Hamilton had been a storekeeper before the Civil War and became wealthy through real estate investments. When war came he became a staunch Unionist.¹⁹

After the war, Morgan began to be active in Radical Republican politics, even opposing his own brother. He was regarded as personally honest, and a man with principles. Indeed the *Galveston Tri-Weekly News* praised his integrity and intellect.²⁰ Yet he hated all former rebels and was difficult to deal with.²¹ He has been described in one newspaper as “one of the slimy serpents that creep[s] along and coils on your hearth with fang and poison ready for a sting.”²²

In December 1871, the *Nashville Union and American* published an article entitled “The United States Senate. The Leading Spirits—How They Look and What They Do.”²³ The article described the Senate chamber as “a gem of a place,”²⁴ and Flanagan as “a gentleman with the

¹⁸ *Ibid.*, 435.

¹⁹ *Ibid.*

²⁰ *Galveston Tri-Weekly News*, April 25, 1870, quoted in Avillo, “Phantom Radicals,” 435.

²¹ Avillo, “Phantom Radicals,” 435.

²² *Texas State Gazette*, May 7, 1870, quoted in Avillo, “Phantom Radicals,” 435.

²³ *Nashville Union and American*, December 21, 1871, 1.

²⁴ *Ibid.*

usual bald head and spectacles.”²⁵ The article had choice words for Morgan Hamilton, calling him “a clever looking gentleman who could pass for a country merchant in good standing, but who was not born a statesman.”²⁶

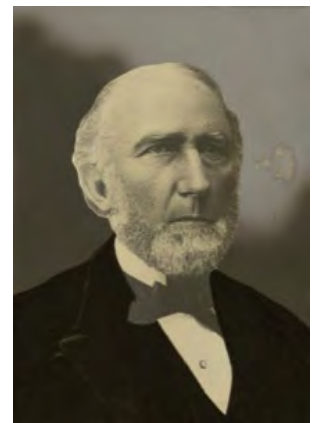
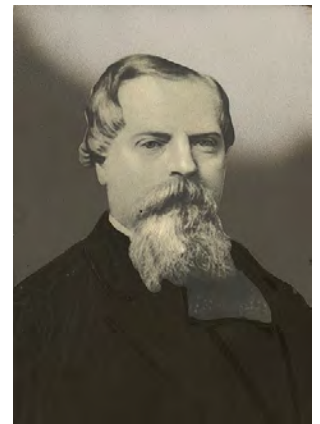
It was inevitable that two such men would clash. The first skirmish, leading to an estrangement, occurred within a month of their taking office. It involved the appointment of a United States District Judge for the Eastern District of Texas.

Nominee Number One—John F. Appleton of Maine: The General Sends His Regrets

Traditionally, nominees for United States District Judges are residents of the state where they would serve. Since Judge Watrous had been paralyzed since January 18, 1869,²⁷ there had been speculation over who would get his post when he either died or resigned. That speculation centered on Texans. There was a great need; other judges, such as Judge Thomas DuVal of the Western District, Circuit Judge W.B. Woods of Mobile, and Justice Joseph Bradley of the United States Supreme Court were being called in to handle the Galveston docket.²⁸

As early as July 2, 1869, Governor Davis sent a letter to President Grant recommending Chauncey B. Sabin for the judgeship.²⁹ Other letters recommending Sabin would follow, including one in March 1870 from James G. Tracy, Chairman of the State Republican Executive Committee and editor of the Radical Republican newspaper, the *Houston Union*.³⁰ There was another candidate as well.

On January 1, 1870, General J.J. Reynolds, then Military Commander of Texas, wrote Congressman W.T. Clark (Galveston Congressman and an ex-Union General) recommending Judge Amos Morrill, then Chief Justice of the Texas Supreme Court and former law partner of Jack Hamilton. Reynolds knew that Davis was recommending Sabin, and disapproved of this, believing that Sabin lacked the temperament to be a judge.³¹ Other letters, including one from former Governor James Throckmorton supporting Morrill, and another from former Governor E.M. Pease disapproving of both men, went to Washington.³²



Top: Chauncey B. Sabin. Bottom: Judge Amos Morrill. Tarlton Law Library.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Hawkins, *Watrous*, 61, 68.

²⁸ *Ibid.*, 68.

²⁹ E.J. Davis letter to U.S. Grant, July 2, 1869, Sabin Nomination File, Records of the Department of Justice, National Records and Archives Administration, Records Group 60 Entry A1-350, Appointment Files for Judicial Districts 1853–1906 (hereinafter NARA, RG 60).

³⁰ James G. Tracy letter to U.S. Grant, March 23, 1870, NARA, RG 60.

³¹ Letter, J. J. Reynolds to W.T. Clark, January 1, 1870, NARA, RG 60.

³² Letter, James W. Throckmorton to U.S. Grant, September 26, 1870, Morrill Nomination File, NARA, RG 60, Districts 1853, E.M. Pease to E.R. Hoar, January 29, 1870, Sabin Nomination File, NARA, RG 60.

In this early period, another name was mentioned: that of Jack Hamilton, former provisional governor, and the defeated 1869 opponent of Governor Davis. Davis would have none of this. On April 2, 1870, Davis wrote the Attorney General, stating that, "I think it necessary that the personal habits of that Gentleman are not such as would make it safe to appoint him to so responsible a position."³³ Another letter, signed by many Radical Republicans who had supported Davis, referred to Hamilton's "habit to continuously use intoxicating liquors to excess."³⁴ That letter included other protests against Hamilton. The damage was done, and Hamilton's chance was gone.

From this early set of letters it would appear that the next judge would be either Sabin or Morrill. Sabin might have seemed to be the favorite. Senators from a particular state have a great deal of influence on judicial nominees from their state. Indeed, Senator Flanagan stated that he and Hamilton "were usually consulted upon the subject of the proper officers to be elected to fill the various positions in the State."³⁵ Adding to the brief for Sabin, in the spring of 1870, Flanagan was a Sabin supporter.³⁶

But Senator Hamilton was not. In fact he was adamantly opposed to Sabin.³⁷ Why? The *Houston Union* declared that "the Hon. Senator complains that Judge Sabin once wrote a letter in a little humorous but good-natured satire, and that he cannot forgive him for it."³⁸ This did not mean that Morrill was the man. Though Hamilton would later become a strong supporter of Morrill, he did not seem to support him in the spring of 1870. Instead, the person he did push caused a bitter dispute between himself and Flanagan, and many Texas Republicans. Senator Flanagan later wrote of the particular incident:

On one occasion when we and the other members of the Texas Delegation were together with the Attorney General, Hoar, Degener [a Radical Republican Texas Congressman] said that we wanted no man from Texas to fill the vacant position of United States District Judge. I replied that I wanted no other than a Texas man for that position. Morgan Hamilton said by God we have not got the material. I named one, who I knew to be a gentleman of ability, honor and integrity. Hamilton damned him outright and denounced him as being anything but the man



Top: U.S. Army General Joseph J. Reynolds, Civil War engraving by J.C. Buttre. Library of Congress, Division of Prints and Photos. Bottom: John Francis Appleton, May 27, 1863. State Archives of Maine.

³³ Letter, E.J. Davis to E.P. Hoar, April 2, 1870, Box 682, NARA, RG 60.

³⁴ Letter, James P. Newcomb and others to President U.S. Grant, March 31, 1870, Box 682 NARA, RG 60.

³⁵ "Senator Flanagan against Morgan Hamilton," *Houston Telegraph*, September 22, 1870, 1.

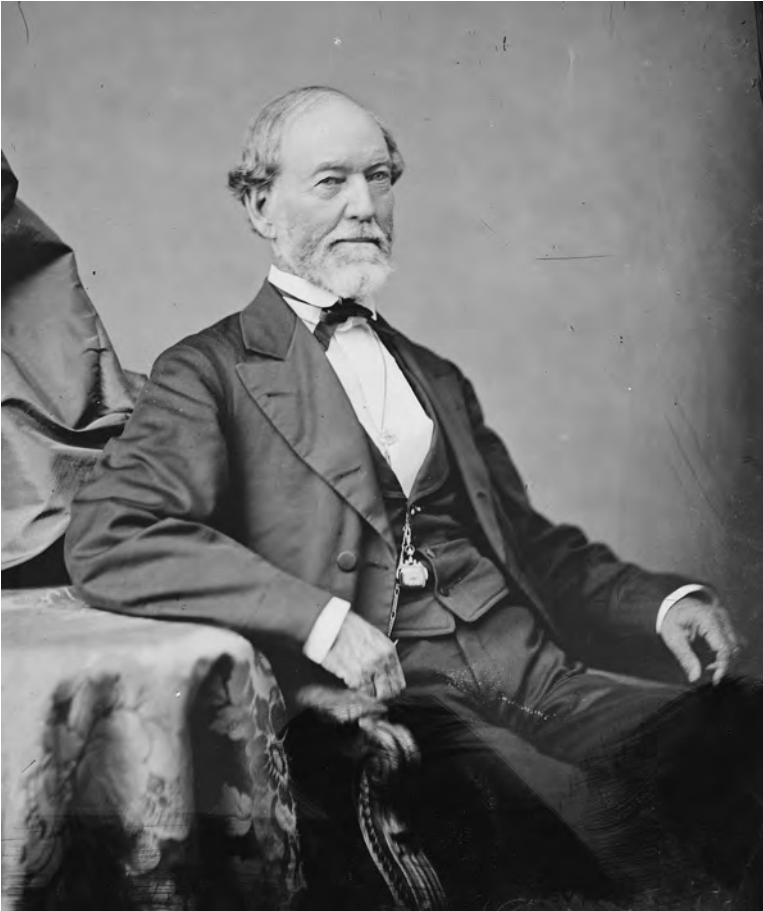
³⁶ *Ibid.*

³⁷ "Hon. Morgan C. Hamilton and Judge Chauncey B. Sabin," *Houston Union*, June 28, 1870, 2.

³⁸ *Ibid.*

I had recommended. And having thus cursed and abused the gentleman of my choice, I felt impeached and insulted. Hamilton named a man from Maine for the position. I objected and told him that I had letters from leading men recommending a gentleman from the State. He replied that he did not believe it, upon which I thrust my finger in his face and told him thereafter to go his way—that social, friendly relations between us had closed.³⁹

This confrontation apparently occurred on the Senate Floor.



Senator James Winwright Flanagan of Texas.
Library of Congress Prints and Photographs Division,
Brady-Handy Collection.

Later, Flanagan wrote the Attorney General about the judicial nomination:

My Dear Sir,

You were present in the Senate Chamber and witnessed unpleasant remarks with my Colleague, the necessity for the same I regret, I was driven to the extreme in the charge of [indecipherable] in my visits to you touching the interests of the Hon. C.B Sabin.

I mentioned that I had the Gov. of my state with me and Col J. G. Tracy, Chairman of the Executive Committee of the Republican party of Texas, urging me to aid Judge Sabin. My colleague said he would not believe any of them. Neither did he believe I had any such letters....⁴⁰

Yet Flanagan did have the letters. Morgan Hamilton's lack of knowledge about them is an indication of his growing estrangement from his fellow Texas Republicans. Though he had campaigned for E.J. Davis in 1869 against his own brother, he was increasingly disillusioned with Davis and the state party.⁴¹ Hamilton saw the Davis Administration as increasingly corrupt and willing to make concessions to railroad interests.⁴²

³⁹ "Senator Flanagan against Morgan Hamilton," *Houston Telegraph*, September 22, 1870, 1.

⁴⁰ Letter, J.W. Flanagan to Ebenezer Hoar, May 13, 1870, Sabin Nomination File, NARA, RG 60.

⁴¹ Moneyhon, *Republicanism*, 147–48.

⁴² *Ibid.*, 146–47.

It was Senator Hamilton who won this first battle. For on April 26, 1870, five days after he had accepted Judge Watrous's resignation, President Grant nominated John F. Appleton of *Maine* to be the Eastern District Judge.⁴³ As might be imagined, Texans were in shock over this nomination. The *Houston Telegraph* wrote:

Will some of our contemporaries oblige us by telling who our appointed District Judge is, and where he has his domicile? His name is John F. Appleton, if the telegraph is to be credited. John F. Appleton. Who? Where? Why?⁴⁴

Who was John F. Appleton, the Maine man nominated for the Galveston judgeship? Appleton was a 32-year-old former Union General and war hero.⁴⁵ His father was Chief Justice John Appleton of the Maine Supreme Court.⁴⁶ He had connections, but he also had merits. He graduated from Bowdoin College in 1860, and began to study law. As one Northern paper put it "on the breaking out of the rebellion" he raised a company of the Twelfth Maine, becoming a captain.⁴⁷ At the siege of Port Hudson, Louisiana, Appleton led a battalion of the Twelfth in an unsuccessful attack upon the Confederate earthworks. One newspaper wrote that he charged "at the head of his men, who were swept down by the fire of the batteries, he alone making his way over the parapet, and stood alone within the Confederate works, discharging every barrel of his revolver into the ranks of the foe, who, admiring the gallantry of one within their power, spared his life and permitted him to escape."⁴⁸

For his gallantry, Appleton was promoted to Colonel of the 81st Regiment of Infantry, United States Colored Troops, an African-American unit. Later, Congress "brevetted" him a Brigadier General in honor of his service.⁴⁹ After the war, he returned to Bangor, where he studied law under his father, and was admitted to the Bar.⁵⁰

By early 1869, it seemed that Appleton was seeking a federal appointment from Grant. His former commanding officer wrote Grant on January 30, 1869 (shortly before Grant's inauguration) to say that Appleton's friends "inform me that the post of Commissioner to the Sandwich Islands will soon become vacant and request me to address you in his behalf."⁵¹ Appleton did not receive this Hawaiian appointment, but a year later he received a judicial nomination.

How was this "Boy-General" regarded as a lawyer? Apparently, well. The *Dallas Herald* wrote that, "He is said to have an eminently legal mind and to have had the best experience."⁵² The

⁴³ Senate Executive Journal, *Congressional Globe*, April 26, 1871, 463.

⁴⁴ *Houston Telegraph*, April 28, 1870, 1.

⁴⁵ "State Items," *Christian Mirror*, September 6, 1870, 3.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ "Judge Appleton," *Dallas Herald*, June 11, 1870, 2.

⁴⁹ Roger Hunt and Jack Brown, *Brevet Brigadier Generals in Blue* (Gaithersburg, Md.: Olde Soldier Books, 1990), 17.

⁵⁰ "Judge Appleton," *Dallas Herald*.

⁵¹ John Y. Simon, *The Papers of Ulysses S. Grant*, vol. 22: June 1, 1871–January 31, 1872 (Carbondale, Ill.: Southern Illinois University Press, 1998), 290.

⁵² "Judge Appleton," *Dallas Herald*, June 11, 1870, 2.

Washington correspondent of the *Galveston News*—the Democratic paper—said that Appleton “has the reputation of being a good lawyer and an impartial judge.”⁵³ That same correspondent, however, stated something that could not have been true: “He was appointed by the President after conference, and with the concurrence of Senators Flanagan and Hamilton.”⁵⁴

The correspondent must have been unaware of Senator Flanagan’s letter to President Grant dated April 28, 1870, two days after the Appleton nomination. Flanagan co-wrote the letter with Congressman W.T. Clark and Texas Congressman George Whitmore. In that letter, Flanagan wrote that, “The undersigned members of the Texas Delegation would respectfully protest against the selection of a man living outside of their State for the position of Judge of the Eastern Dist[ri]ct. of Texas and would respectably request that you recall the nomination already made and in lieu thereof suggest that of C.B. Sabin.”⁵⁵ Morgan Hamilton’s name does not appear upon the letter.

Why was Appleton nominated? As has been said, the Grant Administration sometimes went its own way on appointments. It would have seen Appleton as deserving of a federal position. Moreover, the Administration was well aware of the conflict between Hamilton and Flanagan over Sabin. Appleton was an outsider. We know from three subsequent nominations—all of which ended in disaster—that Grant appointed outsiders in an attempt to keep the peace among Texas Republicans. We can surmise this was the case here.

Despite the absence of support from Flanagan, the nomination went through. On May 10, 1870, Senator Lyman Trumbull, Chairman of the Judiciary Committee, stated that his committee was reporting favorably on Appleton. That same day, the Senate confirmed him.⁵⁶ There is no record of Flanagan voting against confirmation.

Sadly, Appleton’s judgeship was not to be. On June 22, 1870, the *San Antonio Express* reported: “A late communication from Chief Justice Appleton, of Maine, father of Hon John F. Appleton, declines the appointment of the judgeship, vice Watrous, offered to his son, and reports the latter at death’s door.”⁵⁷ Appleton’s health had been failing, for reasons unknown. He died on September 1, 1870.⁵⁸ He probably never came closer to Texas than the battlefield in Louisiana where he earned Glory.

“The Fragrance of His Half-Smoked Havana”: Morrill, Sabin, and Others Campaign for the Nomination

With the unavailability of General Appleton, the Eastern District nomination was again up for grabs. Much activity occurred regarding the prize during the summer of 1870. Sabin wanted the judgeship, and campaigned for it vigorously. Senator Hamilton supported Amos

⁵³ “New Officials,” *Houston Telegraph*, May 9, 1870, 1.

⁵⁴ *Ibid.*

⁵⁵ Letter, J.W. Flanagan to U.S. Grant, April 28, 1870, Sabin Nomination File, NARA, RG 60.

⁵⁶ Senate Executive Journal, *Congressional Globe*, 41st Congress, 2nd Session, May 10, 1870, 451.

⁵⁷ “Telegraphic,” *San Antonio Express*, June 22, 1870, 2.

⁵⁸ “State Items,” *Christian Mirror*, September 6, 1870, 3.

Morrill.⁵⁹ Other names were brought forth as well. For a time it was thought the nomination would go to another former Union officer, Moses B. Walker.⁶⁰

Walker, a native of Ohio, was a military appointee to the Texas Supreme Court in 1869 and was regarded as a “carpetbagger” who obtained the highest judicial office in Texas during Reconstruction.⁶¹ He held some political clout in Washington, as his first cousin was a prominent Maryland Republican Congressman.⁶² There is no indication he had support from the Texas delegation and his star soon faded.⁶³ He would remain on the Texas Supreme Court during E.J. Davis’s tenure, destined to be reviled for authoring the opinion in *Ex Parte Rodriguez*, the “Semicolon” case.⁶⁴

Yet Walker was not the only new candidate. An attorney named Jefferson Falkner of Montgomery, Alabama wrote Grant, asking for the appointment, giving as references one Alabama Republican Senator and two congressmen.⁶⁵ This Alabama request was not as far-fetched as it seems. In early September, Justice Samuel Miller of the United States Supreme Court suggested former Union General John Bruce of Alabama for the spot.⁶⁶ We will hear of Bruce again.

Yet as far as the Texas Republican Party was concerned, the contest was between Sabin and Morrill. And, indeed, it was a contest. So who were these two men?

Amos Morrill was born in Salisbury, Massachusetts in 1809.⁶⁷ Like John F. Appleton, he was a graduate of Bowdoin. He studied law with an attorney in Massachusetts in the early 1830s, and while there, became friendly with American poet John Greenleaf Whittier.⁶⁸ He came to Texas to practice law in 1838, and by 1856 he was in Austin working as Jack Hamilton’s partner.⁶⁹ He opposed secession, and when the Civil War began, he fled to the North. He returned to Austin after the war, and resumed practicing law. In 1868, General Joseph J. Reynolds appointed him to the Texas Supreme Court, where he served for two years.⁷⁰ Looking at a picture of him, one thinks of a sober-sided, respectable and reserved man. He did not appear to be overly political.

⁵⁹ “The Successor of Judge Watrous,” *Galveston Daily News*, July 7, 1870, 3.

⁶⁰ *Ibid.*, 2.

⁶¹ Randolph B. Campbell, “Walker, Moses B.,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fwa21>.

⁶² *Ibid.*

⁶³ “The Successor to Judge Watrous,” *Galveston Daily News*, June 28, 1870, 2.

⁶⁴ Campbell, “Walker, Moses B.,” *Handbook of Texas Online*.

⁶⁵ Simon, *Papers of Ulysses S. Grant*, vol. 22, 293.

⁶⁶ *Ibid.* Interestingly, Justice Miller had a Galveston connection. His brother-in-law was W.P. Ballinger, a prominent Galveston attorney discussed below and in Part 2 of this article (forthcoming in the Spring 2018 issue of this *Journal*).

⁶⁷ James D. Lynch, *The Bench and Bar of Texas* (St. Louis: Nixon-Jones Printing Co., 1885), 151.

⁶⁸ John Benedict Pickard, *The Letters of John Greenleaf Whittier*, vol. III (Cambridge: Harvard University Press, 1975), 424.

⁶⁹ Lynch, *Bench and Bar of Texas*, 151.

⁷⁰ *Ibid.*

Chauncey Sabin, on the other hand, was a pistol. Sabin was a Northerner, born in New York in 1824. He was admitted to the New York bar in 1846, and moved to Houston the next year.⁷¹ Before the war, Sabin was anti-slavery and pro-Union. One of his close friends was Lorenzo Sherwood, the anti-slavery Galveston lawyer almost run out of Texas for his beliefs.⁷² Sabin named a son after Sherwood. Sabin was a strong Unionist and also fled to the North during the war, although he did not leave Texas until 1863.⁷³ In the North he campaigned for acceptance of the Emancipation Proclamation.⁷⁴

Sabin returned to Houston after the war, but then went to Washington, D.C. to organize the Southern Republican Association with Sherwood and to work for Congressional Reconstruction.⁷⁵ When he returned to Texas for good, he became one of the founders of the Republican Party and became a frequent contributor to the *Houston Union*. He supported African-American suffrage and African-Americans serving on juries, both very controversial ideas and ones not always supported by other Republicans.⁷⁶ He received a military appointment as a State District Judge in 1867, but resigned only a few months later.⁷⁷ As noted, there was an allegation that he lacked judicial temperament.⁷⁸

Like Morrill, Sabin served on the Texas Supreme Court—apparently. The word “apparently” is appropriate, because while the official list of Texas Supreme Court Justices includes Sabin, his term of office is obscure. Certainly, the *Houston Union* reported on March 19, 1870 that General Reynolds had appointed Sabin to the Supreme Court.⁷⁹ Ocie Speer, in *Texas Jurists*, observed that Sabin qualified to serve on March 19, 1870 but that there was no record of his ever having served.⁸⁰ Sabin himself did not believe he ever served on the Court.

In April 1870, Sabin wrote Grant to say “General Reynolds wrote me January 27 '70 offering to put me on the Supreme Bench but I did not receive the letter until my return to Texas but this appointment was really complementary and only lasted a few days, and since my name having been accidently omitted on the last engrossment of the disability bill it placed me in rather an

⁷¹ Randolph B. Campbell, “Sabin, Chauncey Brewer,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fsa02>; “Chauncey Brewer Sabin (1824–1890),” *Justices of Texas 1836–1986*, Tarlton Law Library, <https://tarltonapps.law.utexas.edu/justices/profile/view/92>; Charles Zelden, “History of the District,” United States District and Bankruptcy Court for the Southern District of Texas, <http://www.txs.uscourts.gov/page/history-district>; entry for Chauncey Sabin, *Biographical Encyclopedia of Texas* (New York: Southern Publishing Company, 1880), 97.

⁷² John Moretta, “The Censoring of Lorenzo Sherwood: The Politics of Railroads, Slavery and Southernism in Antebellum Texas,” *East Texas Historical Journal* 35, no. 2 (1997): 39. Sherwood might be called the first truly great plaintiff’s attorney in Texas, and was known as a gadfly who got large verdicts against corporations.

⁷³ *Biographical Encyclopedia of Texas*, 97.

⁷⁴ Letter, C.B. Sabin to U.S. Grant, April 28, 1870, Sabin Nomination File, NARA, RG 60.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Campbell, “Sabin,” *Handbook of Texas Online*; “Sabin,” *Justices of Texas*.

⁷⁸ Letter, James W. Throckmorton to U.S. Grant, September 26, 1870, Morrill Nomination File, NARA, RG 60, Districts 1853; E.M. Pease to E.R. Hoar, January 29, 1870, Sabin Nomination File, NARA, RG 60.

⁷⁹ *Houston Union*, March 19, 1870, 1.

⁸⁰ Ocie Speer, *Texas Jurists, 1836-1936* (Austin: Ocie Speer, 1936), 65.

embarrassing position.”⁸¹ Sabin is referring to the fact that since he had stayed in the South until 1863, he had been forced to feign loyalty to the Confederacy, and had paid Confederate taxes. Thus, under the Fourteenth Amendment, before he could hold office, he needed to have his “disability” removed.⁸²

Sabin had campaigned strongly for E.J. Davis.⁸³ It was obvious that most of the State Republican Party was behind him.⁸⁴ Yet, by early July, it appeared that Morrill had the inside track. On July 7, 1870, a letter supporting Morrill was sent to the President signed by no less than General Reynolds (known to be a favorite of Grant’s), Congressman Whitmore, former Governor Throckmorton, and William Phillips, Chairman of the Republican Executive Committee of the 18th Judicial District, and both Senator Hamilton *and* Senator Flanagan.⁸⁵

Flanagan had turned bitterly against Davis, and thus against Sabin. Flanagan, the “railroad senator,” had strongly backed a bill in the Texas Legislature to give the Southern Pacific Railroad and the Houston and Texas Central Railroad vast amounts of land and great financial incentives.⁸⁶ To his credit, Davis vetoed the railroad bill, leading to a split between Flanagan and the Governor.

Now, in this debate, Sabin vocally took the side of the Governor. On June 9, 1870, he began to write for the *Houston Union* concerning the railroad issues, and in the words of James Tracy, its editor, “contributed the support of his powerful pen in the cause of the party during the present crisis.”⁸⁷ In an article entitled “The War at Austin,” the moderate Republican *Flake’s Bulletin* noted that Judge Sabin had taken sides “as every man should, with the Governor in his refusal to grant enormous subsidies to the railroad rings.”⁸⁸

This stance had earned Senator Flanagan’s enmity—and Sabin knew it. On August 18, 1870, Sabin advised President Grant that “Senator Flanagan came out here on a grand Rail Road scheme and got defeated and wrote a very abusive letter on the administration to Governor Davis. It was very demoralizing to the party in its character and I had to handle him without gloves in the *Union* in which I was writing.”⁸⁹

In that same letter, Sabin addressed his situation relative to Senator Hamilton. “[I]f I am nominated I am confident that Morgan Hamilton will assent to my nomination.”⁹⁰ Not that

⁸¹ Lynch, *Bench and Bar of Texas*, 151.

⁸² U.S. Constitution, 14th Amendment, Section 3. Congress could only remove the disability by a two-thirds vote of both houses.

⁸³ Lynch, *Bench and Bar of Texas*, 151.

⁸⁴ On June 27, 1870, for example, Don Campbell, the Lieutenant Governor, accompanied by twelve state senators, wrote Grant to support Sabin’s nomination. See Sabin Nomination File, NARA, RG 60. See also “Morgan Hamilton and Chauncey Sabin,” *Houston Union*, June 28, 1870, 2.

⁸⁵ Letter to U.S. Grant, July 7, 1870, Morrill Nomination File, NARA, RG 60.

⁸⁶ Moneyhon, *Republicanism*, 142.

⁸⁷ “Our Austin Editorial Correspondence,” *Houston Union*, August 6, 1870, 2.

⁸⁸ *Flake’s Weekly Galveston Bulletin*, August 13, 1870, 4.

⁸⁹ Letter, C.B. Sabin to U.S. Grant, August 18, 1870, Sabin Nomination File, NARA, RG 60.

⁹⁰ *Ibid.*

Hamilton would sponsor him, but that Hamilton would not stand in his way. Sabin underestimated Hamilton's opposition. By June 9, when Sabin began writing for the *Houston Union*, he knew that one Texas Senator—Hamilton—was against his nomination. He knew he was about to embark on a course that would ensure that the other Senator, Flanagan, would oppose him. What Sabin did have was the support of the grassroots of the Texas party. He embarked on a campaign for a federal judicial seat the likes of which has probably never been seen before or since.

Republican meetings—which might be compared to campaign rallies—were held all across the Eastern District, where resolutions supporting Sabin for federal judge were circulated and printed in newspapers. The *Houston Union* touted the prospective nominee: "Republican Meeting in Galveston. C.B. Sabin Endorsed for Federal Judge," "Endorsement of Judge Sabin. Anderson, Grimes Co., Texas July 4th 1870," "Republican Meeting in Houston," "Republican Meeting in McLennan County. Endorsement of Judge C.B. Sabin for the U.S. Judgeship," and "Letter from Fort Bend County."⁹¹

Sabin was not one to remain satisfied with a discreet letter of recommendation from a fellow judge or a respected member of the bar—the man went full bore. On July 16, 1870, he wrote the new Attorney General, Amos Akerman, correspondence that enclosed clippings of these meetings. He followed up on August 9 with even more.⁹²

Yet some unpleasant information was soon revealed about these meetings and resolutions. In late August, this newspaper item appeared:

The *Austin Republican* says it now turns out that the numerous complimentary notices of Judge Sabin in the *Houston Union* and the strong recommendations of him for United States Judge of the Eastern District were all *written by himself*. Also, that the meeting of the Loyal League was called by him, and the resolution adopted by the meeting endorsing him for that position was *written by himself*. Of course a man has a right to support himself, and he certainly has a right to have the use of the *Union* for that purpose, as he says he has no compensation for his services as editor.⁹³

Perhaps one should not be too harsh on Sabin. He had lost the support of a Senator by opposing the Senator's corrupt schemes—and history shows they were indeed corrupt. He was never, never going to have Morgan Hamilton's support. He needed, he thought, to show the Grant Administration that he did in fact have support in Texas. And in fact, Governor Davis still strongly supported him, as well as Galveston Congressman Clark.⁹⁴

As summer turned to fall, Sabin turned to Davis for advice on what to do to obtain the appointment. Davis wrote him on September 27 advising him to go to Washington: "You should go at once for I think prompt action may bring this business to a favorable close. You can say

⁹¹ C.B. Sabin Letters to Amos Akerman, July 16, 1870 and August 9, 1870, Sabin Nomination File, NARA, RG 60.

⁹² *Ibid.*

⁹³ *Galveston Tri-Weekly News*, August 22, 1870, 2.

⁹⁴ Letter, Clark to Grant, August 15, 1870, Sabin Nomination File, NARA, RG 60.

to the Attorney General that *we are unanimous* for you as U.S. District Judge—*never mind what may be said.*⁹⁵ That same letter had an interesting comment: “I cannot understand why no nomination either of yourself or someone else is made.”⁹⁶

That “someone else,” of course, would be Amos Morrill. In another odd twist of events in this strange story, Morrill was now in trouble. The issue was his connection to the railroad interests. On October 11, 1870, Morrill wrote the President a letter, which began, “Having been informed by Senator Hamilton, that I am charged with being interested or unduly prejudiced in the Galveston Railroad, as there is no other means to put myself on the record, I beg leave to state that neither at the present nor any former time, have I been personally interested therein; ...That no man, his agent or attorney claiming interest in the road adversely to Messrs. Cowdrey and James ever addressed me verbally or otherwise relative to said roads.”⁹⁷

In 1867, the Wall Street firm of Cowdrey and James, which in fact was connected with the Southern Pacific Railroad, had begun filing lawsuits in the Federal District Court in Galveston against the stockholders of the Galveston, Houston and Henderson Railroad. The firm had bought up a majority of the first mortgage bonds of the Railroad, and sought foreclosure, seeking to oust the stockholders and gain possession. The stockholders were principally prominent Galvestonians. They fought back bitterly.⁹⁸ Senator Flanagan—as might be surmised—was a strong supporter of this Wall Street firm’s interests. Hamilton had passed along the complaint to Morrill so Morrill could defend himself.

Sabin did make a trip to Washington, as did his supporters. Morrill also went to the Capitol. On October 9, the Washington correspondent of the *Galveston Daily News* wrote: “Gen. Clark is in the city urging the name of Sabin, who is also reported in Washington, but I have not seen him.”⁹⁹ This correspondent referred to delegations “who shook hands with the President and enjoyed the fragrance of his half smoked Havana.”¹⁰⁰

It was now October 1870. It had been twenty months since Judge Watrous’s stroke. The other judges pitched in to help, but they were temporary solutions. Despite the squabbling, an appointment had to be made. When it was made, it came as another shock.

Nominee Number Two: Judge J.C.C. Winch, the October Surprise

On October 11, 1870, in correspondence bearing the letterhead of Washington’s famed Willard’s Hotel, Justice Joseph P. Bradley of the United States Supreme Court, Circuit Justice for the Fifth Circuit,¹⁰¹ wrote Attorney General Akerman a frank letter concerning the nomination at

⁹⁵ Letter, Davis to Sabin, September 27, 1870, Sabin Nomination File, NARA, RG 60.

⁹⁶ *Ibid.*

⁹⁷ Letter, Morrill to Grant, October 11, 1870, Morrill Nomination File, NARA, RG 60.

⁹⁸ “The Late N.A. Cowdrey,” *Galveston Daily News*, October 22, 1885, 8.

⁹⁹ “Texas Appointments,” *Galveston Daily News*, October 18, 1870, 1.

¹⁰⁰ *Houston Telegraph*, October 27, 1870, 3.

¹⁰¹ “Bradley, Joseph P.,” *Biographical Directory of Federal Judges*, Federal Judicial Center, <https://www.fjc.gov/history/judges/bradley-joseph-p>.

hand. Bradley wrote:

Sir: I understand that the President has some embarrassment in selecting a suitable candidate for the District Judge of the Eastern District of Texas. My short stay in Texas last spring did not enable me to form the acquaintance of all the persons who perhaps might be very proper candidates. But understanding that Mr. Winch, the District Attorney, would be willing to accept of the place, I write this letter to say, from what I saw of Mr. Winch, and the acquaintance formed with him, I should consider that his appointment would be a good one. He has practiced in Texas since 1859, and has had, I understand, a pretty extensive practice; and I hear nothing but what was creditable to him whilst I was in Galveston. Of course, with the short time that he appeared before me I could not speak as fully as might be desirable about Mr. Winch's legal attainments; but as far as I had opportunity to observe, they were entirely satisfactory.

Yours respectfully,

Jos. P. Bradley¹⁰²

Willard's Hotel,
JAMES WYKES
Washington D.C. Oct 11 1870
Hon. A. T. Akerman
Attorney Genl.

Sir, I understand that the President has some embarrassment in selecting a suitable candidate for District Judge of the Eastern District of Texas. My short stay in Texas last Spring did not enable me to form the acquaintance of all the persons who perhaps might be very proper candidates. But understanding that Mr. Winch, the District Attorney, would be willing to accept of the place, I write this letter to say, that from what I saw of Mr. Winch, and the acquaintance formed with him, I should consider that his appointment would be a good one. He

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Jos. P. Bradley

U.S. Supreme Court Justice Joseph P. Bradley's October 11, 1870 letter to U.S. Attorney General Amos Akerman supporting Judge J.C.C. Winch's nomination.¹⁰³

¹⁰² Letter, Joseph P. Bradley to Amos T. Akerman, October 11, 1870, Winch Nomination File, NARA, RG 60.

¹⁰³ *Ibid.*

On October 13, 1870, the *Houston Union*, in its "By Telegraph" section, reported two items next to each other on the same page. "J.C.C. Winch has been appointed Federal Judge vice Judge Watrous. The death of General R.E. Lee is sadly received by the whole community. Talk of closing stores and draping in mourning."¹⁰⁴

President Grant had had given a recess appointment to J.C.C. Winch, then U.S. Attorney for the Eastern District, on October 11, 1870, for the judgeship, the very day of Justice Bradley's letter.¹⁰⁵ The news of the appointment soon reached Texas, only to be overshadowed that week by the news of Robert E. Lee's death, when even the Republican papers joined in mourning, and the *Galveston Daily News* lined its columns in black.¹⁰⁶

As the month wore on, though, Texans took notice of this appointment. In late October this article appeared in the *Galveston Daily News* with a dateline of October 16, 1870:

Judge Joel C.C. Winch

Has been appointed to succeed Judge Watrous, thus disappointing Judges Morrill, Sabin and other less prominent candidates. Sabin was recommended by Gov. Davis, but very violent opposition was manifested in certain quarters to his appointment....And as Sabin had been generally endorsed by Republican politicians and Republican meetings and the decision was against him, the Administration feared to appoint a rival candidate, and therefore determined to take up an "outside" man. It is understood that District Attorney Winch was recommended by Judge Bradley of the United States Supreme Court....Judge Winch left Washington this morning for the West, where he will make a brief visit before his return to Texas.¹⁰⁷

So Winch had been in Washington. Why? Porter, the *Galveston Daily News's* Washington correspondent, reported that, "Judge Winch had recommended Judge Sabin as successor to Judge Watrous, but finding he was ruled out, finally spoke up for himself."¹⁰⁸ Indeed, Winch had supported Sabin; he wrote a lengthy letter in support that is contained in Sabin's nomination file.¹⁰⁹

Once again—and not, by a far cry, for the last time—there were gasps of incredulity about the Galveston judgeship. The *Houston Union* did not believe the recess appointment had been made. It was only the *Galveston Daily News* correspondent who had reported this news, the *Union* scoffed, and "We have heretofore shown this correspondent to be unreliable....We reiterate our belief of the incorrectness of the statement about the appointment of the Federal Judge....Not a New York or Washington paper, not an Associated Press dispatch, mentions it."¹¹⁰ Regarding

¹⁰⁴ H.J. Labatt, "By Telegraph," *Houston Union*, October 13, 1870, 2.

¹⁰⁵ "Winch, Joel C." *Biographical Directory of Federal Judges*, Federal Judicial Center, <https://www.fjc.gov/history/judges/winch-joel-c-c>.

¹⁰⁶ *Galveston Daily News*, October 15, 1870.

¹⁰⁷ *Ibid.*, 2.

¹⁰⁸ *Ibid.*

¹⁰⁹ J.C.C. Winch to Amos Akerman, August 15, 1870, Sabin Nomination File, NARA, RG 60.

¹¹⁰ "The Federal Judgeship Again," *Houston Union*, October 26, 1870.

Winch, the article reported that, “Mr. Winch is our personal and political friend, and we have nothing to say against him. But Sabin is our nominee....”¹¹¹ The article included the statement that, “We conclude the whole thing is a Democratic trick to defeat the Republican nomination.”¹¹²

Yet it was true. Two days later the *Union* noted that Winch, “signing as judge,” sent an order for a venire panel for the December term of the Federal Court.¹¹³ The *Union* was furious. In an article that would draw a nasty retort from Senator Hamilton, it reported that, “Without any reference to Mr. Winch—for no man will refuse a fine position like this, we repeat what we have said before, that those Texas Republicans who, by omission or commission, have helped to defeat the party nomination in this matter will retire to private life, if not voluntarily, then involuntarily.”¹¹⁴ Moreover, the October 28th article threatened a campaign to defeat Winch’s confirmation.¹¹⁵

The usually less strident *Galveston Flake’s Weekly Galveston Bulletin* was even more adamant. In a piece entitled “Grant Not True To His Party,” the newspaper wrote, “It is a well-known fact that Grant has ‘cut’ the Davis Radicals in Texas by declining to appoint their nominees to office...The whole party, with the Governor at the head, recommended a strong Davis Radical for the U.S. District Judgeship.” When Winch was appointed instead, “[m]uch wonder and some bitterness are manifested in Radical circles, and the thing is ‘unaccountable indeed.’ The President cannot stand the pressure.”¹¹⁶ The only paper that said anything good at all about Winch was the *Houston Telegraph*, which wrote that, “Judge Winch’s appointment satisfies us and we congratulate him.”¹¹⁷

These comments did not bode well for Judge Winch, and as will be seen, a campaign was soon mounted to prevent his confirmation as the next federal district court judge to serve in Texas.

* * * * *

To be continued in the Spring 2018 issue of the *Texas Supreme Court Historical Society Journal*.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, 2.

¹¹⁵ *Ibid.*

¹¹⁶ “Grant Not True To His Party,” *Flake’s Weekly Galveston Bulletin*, November 23, 1870, 2.

¹¹⁷ *Houston Telegraph*, quoted in *Galveston Daily News*, October 15, 1870, 3.



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From Outlaw to Attorney at Law: The Brief Legal Career of John Wesley Hardin

By John G. Browning

Trial lawyers are fond of evoking the Wild West, comparing themselves to “gunslingers” or “hired guns” in championing their clients’ causes. But shortly before the close of the nineteenth century, the Texas bar included someone who was not only a gunslinger, but also one of the most notorious outlaws of the West: John Wesley Hardin. Credited with at least twenty-seven murders (Hardin himself claimed the number was as high as forty-two), the Bonham-born gunfighter became something of a folk hero, a fabled and prolific killer who insisted that he “never killed a man that didn’t need killing.” From shootouts with Texas Rangers to allegedly killing a man for snoring, Hardin’s exploits took on larger-than-life status. Long after he was dead, Hardin was immortalized in songs by artists like Bob Dylan and Johnny Cash.

Yet perhaps the most overlooked chapter in John Wesley Hardin’s life is his brief career as a lawyer. This article examines that forgotten chapter when the notorious outlaw embraced the law book. Ironically, Hardin’s brief legal career (along with his lifelong weaknesses for women and gambling) indirectly led to his death in 1895.

A Violent Past

John Wesley Hardin was born near Bonham in Fannin County on May 26, 1853.¹ His parents were James Gibson Hardin, a Methodist minister, and James’s wife, the former Mary Elizabeth Dixon.² The elder Hardin, a preacher who rode the circuit, started a school in Livingston, Texas that his sons John and Joe attended. Interestingly, James was also was a lawyer. Although James Gibson Hardin was admitted to the Texas bar in 1861, little is known about the elder Hardin’s legal career.³

John Wesley Hardin’s violent streak first emerged during his school years. He stabbed a fellow student with a pocket knife and nearly killed him (the altercation was sparked by a dispute over graffiti that the classmate, Charles Slotter, blamed on John).⁴

¹ Leon C. Metz, “Hardin, John Wesley,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fha63>. See also Biographical Note, *John Wesley Hardin Collection 1874-1931*, Southwestern Writers Collection/Texas State University–San Marcos, <https://legacy.lib.utexas.edu/taro/tsusm/00031/tsu-00031.html#did>.

² Biographical Note, *John Wesley Hardin Collection*.

³ Leon Metz, *John Wesley Hardin: Dark Angel of Texas* (Norman: University of Oklahoma Press, 1998), 10.

⁴ *Ibid.*, 7.

During Reconstruction-era Texas, young Hardin's violent path continued. At age fifteen, he shot and killed a former slave after an argument over a wrestling match. Pursued by the authorities, Hardin fled. He would later claim to have killed three Union soldiers sent to arrest him. By 1871, he was working as a cowboy on the Chisholm Trail. He had multiple run-ins with armed men that led to even more notches on his gun.⁵

Among Hardin's multiple victims along the Trail were five Mexicans and at least one Indian. In the rough and tumble Abilene saloons, Hardin rubbed elbows with the likes of Wild Bill Hickock and ex-lawman Ben Thompson, and killed at least three more men in gunfights.

In 1871, he returned to Gonzales County, Texas, where he settled down long enough to marry Jane Bowen in February 1872.⁶ But the life of gambling and other criminal ventures proved too powerful, and by August 1872, Hardin was piling up indictments and was soon on the run following yet another gunfight. He surrendered to the sheriff of Cherokee County and was returned to Gonzales County, breaking out of the jail there in October 1872.⁷



John Wesley Hardin.
Wikimedia Commons.

Less than two months after the birth of his first child, Hardin shot and killed J.B. Morgan in a Cuero barroom in April 1873—one of the two killings for which he would eventually be convicted.⁸ That same year, Hardin became embroiled in the famed Sutton-Taylor feud, aligning himself with Jim Taylor and his anti-Reconstructionist forces. Hardin shot and killed Jack Helm, one of the Sutton leaders and a former State Police captain.⁹ In March 1874, Hardin assisted Billy and Jim Taylor in their assassination of the leader of the Sutton faction, Bill Sutton.¹⁰

At this point, Hardin embarked upon a cattle drive, but even the rigors of the trail could not keep him out of trouble for long. In May 1874, while in a saloon in Comanche County celebrating his winnings from a horse race, Hardin argued with and killed Charles Webb, a deputy sheriff from Brown County.¹¹

⁵ *Ibid.*

⁶ *Ibid.*, 77–80.

⁷ *Ibid.*, 74–77, 83, 161. See also Metz, "Hardin, John Wesley," *Handbook of Texas Online*.

⁸ Metz, *John Wesley Hardin*, 106.

⁹ *Ibid.*, 102–11.

¹⁰ *Ibid.*, 127–30.

¹¹ *Ibid.*, 182.

With that, Hardin was once again on the run from the law. He briefly moved his wife and growing family to Florida (son John Wesley Hardin, Jr. was born in August 1875 and daughter Callie was born in July 1877). Just days after his daughter's birth, Hardin was captured by Texas Rangers in Pensacola, Florida on July 23, 1877.¹² They transported him back to Texas under heavy guard. Hardin was taken to Comanche County, where in September 1877 he was tried for the Webb murder.¹³

Hardin Turns to Law

*"Although we are all prisoners here we are on the road to progress."*¹⁴

After being convicted of the May 26, 1874 murder of Brown County deputy sheriff Charles Webb (a crime Hardin insisted was self-defense), John Wesley was incarcerated in the Travis County Jail while his appeal was pending. There the charismatic outlaw, for whom huge crowds had turned out during his train transport into custody, "received visitors as if he were a potentate instead of a prisoner."¹⁵

In June 1878, Hardin's appeal was denied, and Judge James Richard Fleming of the 12th Judicial District Court made the sentence official, sentencing Hardin to twenty-five years imprisonment at the state penitentiary in Huntsville. Hardin had been well represented at trial; his defense team consisted of Samuel H. Renick of Waco, Texas, Thomas L. Nugent of Stephenville, Abner Lipscomb of Brenham, and W.S.J. Adams and G.R. Hart of Comanche County.¹⁶ Hardin himself had actively participated in his appeal, and the outcome led a writer in the *Victoria Advocate* to quip, "It is likely Hardin's limited legal knowledge is entirely responsible for his career—had he known that killing was illegal, he might have done less of it."¹⁷

From his arrival at the state prison on October 5, 1878, Hardin was hardly a model prisoner. Early on, he was involved in multiple jailbreak attempts, the first of which occurred within two months of his arrival. His official Certificate of Prison Conduct (which oddly makes no specific mention of escape attempts), lists eleven formal misconduct charges over a period that ranged from January 1879 to May 26, 1893. The infractions included such things as "mutinous conduct," "trying to incite convicts to impudence," "throwing food on the floor," "gambling," and "laziness."¹⁸

Hardin's time inside was also tough physically on the outlaw, who entered Huntsville bearing multiple scars from a life on the wrong side of the law, including injuries on his right

¹² Metz, "Hardin, John Wesley," *Handbook of Texas Online*.

¹³ Metz, *John Wesley Hardin*, 179–84.

¹⁴ July 1881 letter from John Wesley Hardin, then in prison, to his wife June Bowen. Cited in Roy Stamps and Jo Ann Stamps, eds., *The Letters of John Wesley Hardin* (Burnett, Tex.: Eakin Press, 2001), 146.

¹⁵ Metz, *John Wesley Hardin*, 186.

¹⁶ *Ibid.*, 178. Although Metz did not identify Lipscomb as being the grandson of the late Texas Supreme Court Justice Abner Lipscomb, the time and place certainly suggest that connection.

¹⁷ *Victoria Advocate*, October 19, 1878.

¹⁸ John Wesley Hardin, "Certificate of Prison Conduct," *Texas State Penitentiaries*, March 15, 1894.

knee, left side, left thigh, right hip, right elbow, back, and right shoulder. Hardin was plagued by repeated flare-ups of old shotgun wounds to his stomach, sustained in an 1872 gunfight. In the fall of 1883, the wounds abscessed, leaving Hardin bedridden for the better part of two years.¹⁹

Over the years, John Wesley Hardin eventually began to make better use of his time in prison. By the fall of 1884, the Methodist preacher's son had become superintendent of the prison's Sunday school. One newspaper even reported that the "once notorious outlaw" "conducts the service in a very credible manner."²⁰ Hardin also became an avid reader, studying history, theology, and the classics. He took up debating as well, eventually serving as president and secretary of the prison's debate team. In July 1881, he wrote to his wife of his success in one debate on the subject of women's rights, in which he had argued against women having equal rights with men:

We had a lovely time...John is the champion for women's rights, but he failed to convince the judges, who after they had listened to my argument, decided in my favor.²¹

Hardin soon turned his attention to law. As he states in his autobiography, "In 1885 I conceived the idea of studying law and wrote to the superintendent [Prison Superintendent Thomas Goree] asking for his advice about what to read in order to have practical knowledge of both civil and commercial law."²² Superintendent Goree referred the letter to Col. A.T. McKinney, a leading member of the Huntsville bar. McKinney replied in a May 6, 1889 letter that "applicants for license under the rules of the Supreme Court are usually examined on the following books:

Blackstone's Commentaries, 4 vols.
Kents, 4 vols.
Stephens on Pleading, 1 vol.
Storey's Equity, 2 vols.
Greenleaf on Evidence, 1 vol.
Parsons on Contracts, 3 vols.
Daniels on Negotiable Instruments, 2 vols.
Storey on Partnership, 1 vol.
Storey's Equity Jurisprudence, 2 vols.
Revised Statutes of Texas, 1 vol."²³

Suspecting Hardin's likely area of interest, McKinney further noted that "for a person who desires special attention to criminal jurisprudence, I would advise him to read Walker's *Introduction to American Law*, 1 vol., and *Bishop's Commercial Law*, 2 vols. before reading the

¹⁹ Metz, *John Wesley Hardin*, 317 n. 9 (Hardin dropped out of sight for two years).

²⁰ *Longview Democrat*, December 2, 1881.

²¹ Letter, July 3, 1881, from John Wesley Hardin to June Bowen, "1881 Letters," *John Wesley Hardin Collection 1874-1931*, Southwestern Writers Collection/Texas State University-San Marcos, <https://legacy.lib.utexas.edu/taro/tsusm/00031/tsu-00031.html#did>.

²² *The Life of John Wesley Hardin, From the Original Manuscript as Written By Himself* (Seguin: Smith & Moore, 1896), 135.

²³ Letter, May 6, 1888 from A.T. McKinney to Thomas J. Goree, in Hardin, *Life of John Wesley Hardin*, 135.

course recommended by our Supreme Court.”²⁴ McKinney also helpfully included where these law books could be obtained, stating that they were available “at about \$6 per volume from T.H. Thomas & Co. of St. Louis,” and that the revised statutes “can be obtained from the Secretary of State, Hon. J.M. Moore, Austin, Texas, for \$2.50.”²⁵

As extensive as such a reading list might be, at least one Texas legal historian has noted how unlikely it was for most aspiring lawyers at that time to have satisfied such reading requirements—“not only because of the daunting nature of these works...but also because of the relative scarcity of these volumes in frontier Texas.”²⁶

Although the historical record is silent as to Hardin’s specific reading on the law during his time in prison, it is likely that he had access to at least some law books. He began to put his new-found interest to constructive use. On February 1, 1889, Hardin wrote a petition addressed “To the lawmakers of Texas assembled at Austin” and signed by himself and ninety-six other convicts. In it, Hardin and his fellow signatories argued for several specific prison reforms, as well as a revision to the length and conditions of imprisonment, particularly in homicide cases.²⁷

Among other suggested changes, the petition called for a “due diligence” requirement for the state to bring any other charges of which it should be aware against a person incarcerated for another crime within seven years. Otherwise, Hardin warned, “the laws of the prisons becomes a parody to anyone having a case of murder hanging over him when used to admonish him on entering these walls that if he comports himself decorously...that he will gain the diminution of sentence which the State so generously offers for meritorious conduct.”²⁸

Likely speaking from his own perspective, Hardin claimed it was an injustice to a man “when he knows that the agent of the State stands ready at the expiration of his term to lead him back in irons to the Scenes of his former deeds at a time when his health is broken without friends, money or witness but with the odium of having been a convict.”²⁹

Hardin put his legal reading to productive use in other ways, working actively with his attorney, W.S. Fly of Gonzales, to attend to other indictments hanging over his head while seeking a pardon and early release. Knowing that nothing was to be gained by seeing his client released only to be re-incarcerated for older crimes, Fly was able to confirm that only one indictment was still outstanding against Hardin. This case was pending in DeWitt County for the 1873 killing of James Morgan. Hardin agreed to voluntarily return to DeWitt County, and appeared on January 1, 1892.

Although his lawyer wanted him to plead justifiable homicide, Hardin pleaded guilty

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 183.

²⁷ Letter, February 1, 1887, in Roy Stamps and Jo Ann Stamps, eds., *The Letters of John Wesley Hardin* (Burnett, Tex.: Eakin Press, 2001).

²⁸ *Ibid.*

²⁹ *Ibid.*

to manslaughter but made a moving presentation that “brought tears to the eyes of nearly everyone present.”³⁰ Hardin received a two-year sentence that ran concurrently with his present term. Even the newspaper accounts depicted him as a changed man with a prospective legal career ahead of him. The *Cuero Star* described him as “of sprightly intellect, and [he] has read law systematically for the past four years. He will likely practice this profession upon liberation.”³¹

Of course, the second hurdle was to obtain a formal pardon from the Governor of Texas. Here, Hardin benefited not only from timing but also his own changed circumstances. Governor James S. Hogg had swept into office in January 1891 riding a wave of populist fervor and an appeal to underdogs. And John Wesley Hardin was popular and an “underdog” in the eyes of many, someone who had killed only when provoked.

With the help of attorney Fly and a letter-writing campaign by Hardin himself, petitions seeking his early release begin pouring into Gov. Hogg’s office from practically every county in East Texas. As one historian noted, “Judges, politicians, and prominent business and professional men signed, as did twenty-six sheriffs attending a lawman’s convention.”³²

In addition, newspapers all over the state wrote sympathetically of Hardin, calling him a reformed man. Hardin himself submitted a long, detailed request to Gov. Hogg for a pardon on January 1, 1894, full of citations to law books he had evidently read, including *Wilson’s Criminal Statutes*.³³ In closing, he assured the governor that his “highest hopes, object, aim and ambition is to yet lead a life of usefulness and peace in the path of rectitude and righteousness.”³⁴

Indeed, the John Wesley Hardin who entered the Huntsville penitentiary was a very different man from the John Wesley Hardin who walked out on February 17, 1894 with an early release. After 15 years, 8 months and 12 days behind bars, the cocksure twenty-five-year-old outlaw had become a self-educated model prisoner. Hardin had lost his wife Jane in 1892. He was now a forty-year-old widower with three children who barely knew what he looked like. He needed to earn a living, and the law beckoned. Receiving a full pardon from Gov. Hogg on March 16, 1894, Hardin’s citizenship was fully restored.

Hardin the Lawyer

*“I feel sure that you have in you the making of a useful man ..”*³⁵

For many observers, the logical question might be, how could a convicted murderer, especially one of John Wesley Hardin’s notoriety, be admitted to the Texas bar? Indeed one modern legal

³⁰ Metz, *John Wesley Hardin*, 205.

³¹ *San Antonio Daily Express*, January 2, 1892, quoting from the *Cuero Star*.

³² Metz, *John Wesley Hardin*, 206.

³³ Stamps, *Letters of John Wesley Hardin*, 256.

³⁴ *Ibid.*, 263–64.

³⁵ Dallas lawyer Barnett Gibbs to John Wesley Hardin, undated letter, 1894, cited in Stamps, *Letters of John Wesley Hardin*.

On July 21, 1894, after a committee of attorneys appointed by the district judge in Gonzales County conducted an oral examination of Hardin's knowledge of the law, he was admitted to practice and duly licensed. Having declared that his future life "would be one of peace," Hardin was seemingly determined to make an honest living for himself.

When considering how the examining committee could have overlooked Hardin's murderous past when evaluating his "honorable deportment" for the practice of law, one must remember Hardin's statewide popularity among Texans including Texas lawyers. Typical among these was a letter Hardin received in 1894 from Dallas lawyer Barnett Gibbs:

I see from the *News* that you have been pardoned and I am glad of it for however great your offense I feel sure that you have in you the making of a useful man—I hope you will adhere to your good resolutions and many a man has started in life and in the law at your present age and made a success...Lawyers as a rule are generous and liberal in their views, and I don't think any of them will fail to appreciate your desire to make up the time you have lost in atoning for your offense against society—if you should come to Dallas call upon me.⁴⁰

Not much is known of John Wesley Hardin's actual law practice beyond some occasional correspondence and newspaper accounts that hint of a couple of murder cases as well as a few court actions relating to the brawls and business disputes that entangled Hardin's friends and family. Like many nineteenth century Texas lawyers (not to mention their twentieth century and twenty-first century counterparts), Hardin dealt with the gritty realities of law practice: clients who had difficulty paying, coping with creditors, and the necessity of advertising and networking.

For clients who could not pay, there was the barter system. Hardin's correspondence includes a note, dated August 16, 1894, from one E.F. Schlickeisen to Hardin for "One Bay Horse about 14½ hands high about 8 years old" in consideration for "Legal services rendered and to be rendered to the value of Twenty-five \$25.00 Dollars."⁴¹ For Mr. Schlickeisen, the client debt was such that he also signed over "one gray horse about 15 hands high, about 8 years old" and also valued at \$25.00.⁴² Hardin's correspondence also reveals dealings with court clerks and other interested individuals involving the real estate for a hotel and sanitarium on Sour Lake, Texas.

Hardin had a devoted clientele in the Mexican-American community in Gonzales County as well. Although no documentation exists of the exact offenses for which Ramon Aguero and Luis Aguero retained John Wesley Hardin, they were satisfied enough with his representation that they signed notes dated October 7 and 8, 1894 to transfer ownership to Hardin of the family wagon as well as "two mares and harnesses" in consideration for "his legal services in cases pending in the Justices [*sic*] court in the town of gonzales [*sic*]."⁴³

⁴⁰ Stamps, *Letters of John Wesley Hardin*, 268.

⁴¹ Note, August 10, 1894, by E.F. Schlickeisen to J.W. Hardin, in Stamps, *Letters of John Wesley Hardin*, 283.

⁴² *Ibid.*, 284.

⁴³ Letters, Ramon Aguero to Martina Mendosa (October 7, 1894) and to Luis Aguero (October 8, 1894), in Stamps, *Letters of John Wesley Hardin*, 291–92.

OFFICE OF
R. M. GLOVER,
SHERIFF GONZALES COUNTY.

GONZALES, TEXAS. 1894

Gonzales Texas Oct 7th 1894
Know all men by these presents
that we Luis Agüero Ramon Agüero
have this day bargained and
sold to John W. Hardin the
following property to wit
one Threshing Wagon and two Teams or
horses one Brown mare 13 1/2 hands high and one
Dun mare 13 hands high
for value received the considera-
tion being that he will render
us Luis Agüero & Ramon Agüero
his legal services as a lawyer
in cases pending against us in the
town and county of Gonzales in the Justice
Court and that we authorize the said
John W. Hardin to represent us in said suits
and we do this and sign our names

of our own free will and accord
and freely without our names
Luis Agüero Ramon Agüero

Witnesses
C. C. Briston
E. R. Rables

OFFICE OF
R. M. GLOVER,
SHERIFF GONZALES COUNTY.

GONZALES, TEXAS. 1894

Gonzales Texas Oct 7th 1894
Mrs. Matilde Mercedes

Dear Wife please
Deliver the new wagon and two
mares & horses to J. W. Hardin
and oblige me I am in faith he
is my att. I hope to be out soon

Ramon Agüero

Left and center: Note from Luis Agüero and Ramon Agüero on October 7, 1894, signing over two horses and a wagon to John W. Hardin as payment for legal services. Right: Note from Ramon Agüero to his wife the same day instructing her to deliver the property to Hardin. Images courtesy of the John Wesley Hardin Collection, Wittliff Collections, Texas State University.

In another case, Hardin defended six Mexican-American men who had been jailed for an unspecified offense, and in which Hardin argued that they had acted in the defense of themselves and their families. The lawyer's skills were such that he was able to persuade the judge to dismiss the charges against three of the men and release the remaining three on bond. Apparently, a result like this was rare enough in an environment biased against Mexican-Americans that it merited an editorial in Gonzales's Latino newspaper thanking Hardin for his efforts on behalf of the Mexican-American community.⁴⁴

At the same time, Hardin contended with the pressures of daily practice. His correspondence includes dunning letters from dry good stores as well as the Gilbert Book Company of St. Louis, holding themselves out as not merely "Publishers of Law Books," but also somewhat immodestly as "The Greatest Legal Publication of the Century."⁴⁵

After requesting (through a friend with presumably better credit, Mr. D. Cobb) pricing in the Gilbert catalogue of such law books as "Wilson's Criminal Form Books," "Sayles' Civil Form Book," and "Sayles' Civil Statutes," Hardin apparently ordered some of these useful titles, promising to pay at a later date. The Gilbert Book Company responded on September 28, 1894 that "We do not ordinarily...give time on accounts under \$50; but to accommodate you, if your references prove satisfactory, we will sell you a bill of that amount for \$20 or \$25 each, dividing the balance

⁴⁴ *La Opinion del Pueblo*, October 13, 1894, cited in Metz, *Dark Angel*, 211-12.

⁴⁵ Letter, September 25, 1894 from A.E. Gilbert to John Wesley Hardin, in Stamps, *Letters of John Wesley Hardin*, 294.

into three or four monthly payments, the notes of course to draw 10 [percent] interest and be secured on the books."⁴⁶

Community standing also influenced Hardin's business prospects as a lawyer in Gonzales County. On good terms with County Sheriff Dick Glover, Hardin publicly backed Glover's chosen successor, Robert R. Coleman of the Populist Party, in the 1894 election. This did not sit well with Democratic Party candidate William Jones, who had served as sheriff in 1871–72, during Hardin's outlaw years.

Among other things, Hardin publicly accused Jones of having aided in one of Hardin's early jail escapes and having beaten an African-American prisoner (the black vote being crucial in Gonzales County). Jones fired back at Hardin in the press, describing him as a man with "no character to lose" and saying of the outlaw-turned-lawyer, "Like most liars he tells a different tale every time."⁴⁷

Unfortunately for Hardin, Jones won the November 6, 1894 sheriff's race by eight votes. Hardin closed his office in Gonzales, left his teenaged children with a friend, and headed west. On paper he had a new legal challenge to face—the representation of his friend and cousin by marriage, James B. "Killer Jim" Miller—but in practice Hardin saw that the political winds in Gonzales County had changed.

The End of a Career and End of a Life

Ostensibly, Hardin went to Pecos County in March 1895 at the request of J.B. Miller. Miller had had a violent run-in with a former political rival, Reeves County Sheriff George A. "Bud" Frazer (Miller lost the 1892 sheriff's election to Frazer) on December 26, 1894. Miller and two associates had been indicted in September 1893 for conspiracy to murder Frazer. Yet after the case was transferred to El Paso, a crucial prosecutorial witness turned up dead and Miller and his co-defendants walked free. To add to Frazer's chagrin, he lost his bid for re-election as sheriff in November 1894. On December 26, Frazer encountered Miller in the street and shot him twice in the chest.⁴⁸

But Miller survived, and he reached out to John Wesley Hardin to come and file attempted murder charges against Frazer. He wrote:

I guess you know that I have had so much trouble that I am intirely [*sic*] broken but considering all of that I have got lots of friends in Pecos. [T]he best citizens of Pecos said they would make-up a reasonable fee for you if you would come and Prosecute [*sic*] him...⁴⁹

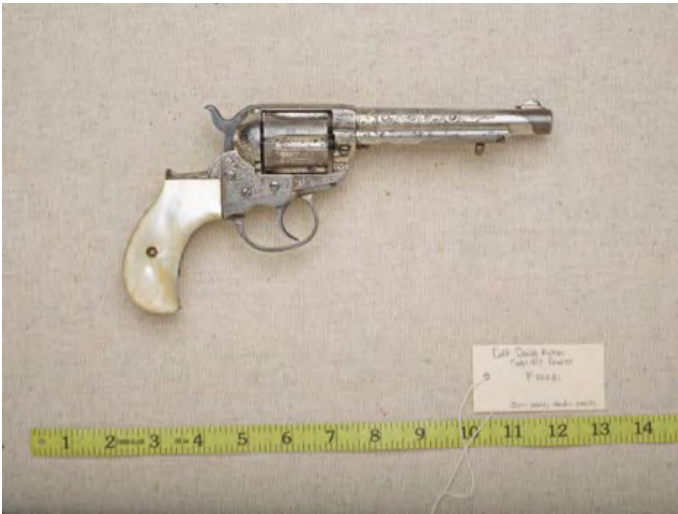
Hardin was ready for a change of scenery. Besides the winds of political change in Gonzales

⁴⁶ *Ibid.*

⁴⁷ *Gonzales Inquirer*, November 1, 1894; cited in Metz, *John Wesley Hardin*, 213.

⁴⁸ Metz, *John Wesley Hardin*, 218–19.

⁴⁹ Stamps, *Letters of John Wesley Hardin*, 308.



Colt Double Action Model 1877 Revolver owned by outlaw-turned-lawyer John Wesley Hardin. Photo courtesy of the Bryan Museum, Galveston.

Hardin decided to stay in El Paso.⁵¹ He took up offices on the second floor of the Wells Fargo Building at the corner of El Paso and San Antonio Streets, had business cards printed up with his new address and touting "Practice in All Courts," and he advertised. On April 2, 1895 the *El Paso Times* ran a notice referring to him as "John Wesley Hardin, Esq., a leading member of the Pecos City Bar."⁵² The article went on to describe how "forty-one years has steadied the impetuous cowboy down to a quiet, peaceable man of business. Mr. Hardin is a modest gentleman of pleasant address, but underneath the modest dignity is a firmness that never yields except to reason and the law."⁵³

Apparently, however, Hardin's new El Paso practice still left him ample time for old

County and the mounting pressures there to make ends meet, Hardin had impulsively married the fifteen-year-old Callie Lewis on January 9, 1895 and was already tiring of the May-December romance. In March 1895, he arrived in Pecos and filed attempted murder charges against Frazer. Frazer obtained a change of venue to El Paso, and Hardin and Miller followed. The Frazer trial ended with disappointment for Hardin and his client, however, as it resulted in a hung jury.⁵⁰ Hardin's compensation for his services was an engraved pocket watch and an engraved .38 caliber self-cocking pistol bestowed upon him by Miller. He would be wearing both when he died months later.



Hardin's attorney business cards featuring his El Paso office address and touting his "Practice in all courts." Ever the marketer, Hardin possessed nearly eighty of these cards at the time of his death, and he would also give out this signature "playing card with a bullet hole" to capitalize on his notoriety as well. Photo courtesy of the Bryan Museum, Galveston.

⁵⁰ Frazer would be re-tried, this time in Colorado City, Texas, where he was acquitted on May 26, 1896. Miller, however, caught up with the former sheriff and shot him dead on September 14, 1896 in a saloon in Toyah, Texas. Miller was acquitted. See Metz, *John Wesley Hardin*, 221.

⁵¹ Metz, "Hardin, John Wesley," *Handbook of Texas Online*.

⁵² *El Paso Times*, April 2, 1895. See also Biographical Note, "1895 Letters," *John Wesley Hardin Collection 1874-1931*, Southwestern Writers Collection/Texas State University-San Marcos, <https://legacy.lib.utexas.edu/taro/tsusm/00031/tsu-00031.html#did> ("One singular article of interest here is Hardin's business card—as an attorney at law in El Paso. The card is fixed to a note, which reads, 'This card and about 80 others were found in Hardin's room after he was killed in 1895.'").

⁵³ *Ibid.*

vices like gambling and drinking. A concerned friend, R.M. Glover, wrote to Hardin expressing concern:

[Y]our many friends here that know you and are acquainted with your honorable aim in life very much [*sic*] regret that you have found it necessary to again return to your old gaming life as they think it will throw temptations in your way which could be avoided in the quiet practice of your chosen profession...I believe however that you are more susceptible to temptation under certain influences than the ordinary man viz: whiskey cards and bad men.⁵⁴



Mrs. Helen Beulah M'Rose and her son.
Photo courtesy of the John Wesley Hardin
Collection, Wittliff Collections, Texas State
University.

Hardin's next case involved alleged cattle rustler Martin M'Rose with his wife Beulah.⁵⁵ Martin had been taken into custody in Juarez by Mexican authorities, while allegedly on the run from cattle rustling charges in New Mexico. He and Beulah had several thousand dollars on their persons, a hefty sum in 1895. While Beulah was released, Martin and the money were not. So she engaged the services of John Wesley Hardin.

With the aid of a Mexican attorney and the American consul, Hardin was able to get the money released to Mrs. M'Rose. But her husband languished in Juarez, seeking Mexican citizenship in an effort to defeat New Mexico's extradition attempts. In the meantime, Beulah and Hardin became closer than attorneys and clients normally are. She moved into the lawyer's rooms at the Herndon Lodging House, and broke off contact with her husband. M'Rose himself was killed under mysterious circumstances on June 29, 1895 while crossing to the Texas side of the border to see his wife (and his money).⁵⁶

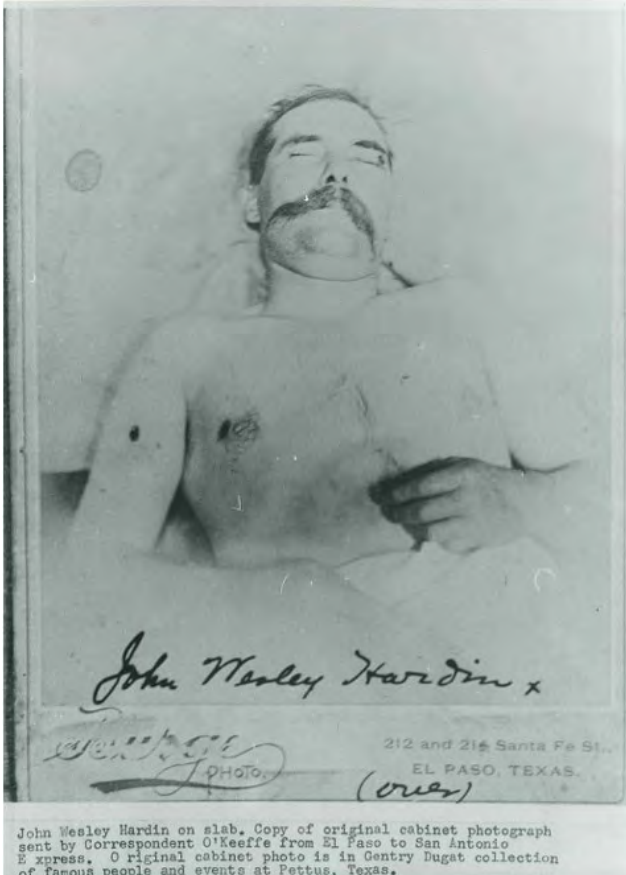
Beulah likely served as a bankroll for Hardin, who by now was spending more and more time drinking and gambling. He had plans to buy a half interest in one establishment, the Wigwam Saloon (buoyed by a "loan" from Beulah). But his behavior became more and more erratic, including incidents in gaming establishments where—believing he'd been cheated—Hardin would take back the money he'd lost, sometimes at gunpoint. One such incident at the Gem Saloon (where he relieved the dealer of \$95.00), led to Hardin being indicted for armed robbery on May 8, 1895.

⁵⁴ Letter, May 18, 1895 from R.M. Glover to John Wesley Hardin, in Stamps, *Letters of John Wesley Hardin*, 314.

⁵⁵ The name is variously identified as "M'Rose," "Mroz" and "Morose."

⁵⁶ Both contemporaneous newspaper accounts of M'Rose's death and theorizing by historians point to Hardin's likely involvement in the killing, but he was never charged. See, e.g., Metz, *John Wesley Hardin*, 250–52.

On August 1, 1895, Beulah was alone and drunk in public in downtown El Paso. John Selman, Jr., a local police officer, stopped her and she threatened to shoot him. Selman arrested her for unlawfully carrying a gun, confiscated the two Colt six-shooters she had on her, and jailed her. Although she bonded out and paid a fine, the episode did not sit well with John Wesley Hardin. Accounts differ as to whether he merely voiced his displeasure in public with young Selman's actions on August 19, or whether he physically accosted and intimidated the officer, calling him a coward.



In any event, Hardin was gambling at the Acme Saloon the evening of August 19, 1895, when Selman's father, City Constable John Selman, entered the building and shot Hardin in the back of the head, the back, and the hand.⁵⁷ El Paso's most colorful and controversial attorney, John Wesley Hardin, lay dead on the floor. Selman was tried for murder on April 29, 1896, but the jury hung.⁵⁸ While awaiting a retrial, Selman was shot and killed after an argument with U.S. Deputy Marshal George Scarborough. In a fitting epitaph, local newspapers reported that Selman's trial for killing John Wesley Hardin had been "transferred to a higher court."⁵⁹

To this day, there are those who theorize that Selman's murder of Hardin was not over the slight or threats made to his son, but were the actions of a hit man who'd been hired by Hardin to kill M'Rose only to be stiffed on payment. Whatever the motivation for his murder, even in death the justice system was not done with outlaw-turned-lawyer John Wesley Hardin.

The body of John Wesley Hardin was photographed on the mortician's slab in El Paso in August 1895. Photo courtesy of the John Wesley Hardin Collection, Wittliff Collections, Texas State University.

The attorney died intestate, and was buried at Concordia Cemetery in El Paso. His modest estate consisted of \$94.85 in cash, several law books, some jewelry, two revolvers, and Hardin's unfinished

165-page manuscript of his autobiography. The manuscript, which Beulah had helped Hardin produce, was the focal point of a court battle with Hardin's children. The children prevailed, and soon published the manuscript with Smith & Moore, a publisher based in Seguin, Texas.

Nearly a century after his death, the legal system still plagued John Wesley Hardin. In 1995, two groups went to court over Hardin's remains: one, comprised of several of his great-

⁵⁷ Biographical Note, *John Wesley Hardin Collection 1874-1931*, <https://legacy.lib.utexas.edu/taro/tsusm/00031/tsu-00031.html#did>.

⁵⁸ Leon C. Metz, "Selman, John Henry," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fse10>.

⁵⁹ Metz, *John Wesley Hardin*, 278.

grandchildren, wanted his body moved to Nixon, Texas to be interred next to the grave of his first wife Jane. The other was an El Paso group called the Concordia Heritage Association, a non-profit group “whose charter purpose is to promote and support the renovation, restoration, and preservation and to engage in activities...that will support, encourage and foster the cultural, social, entertainment, tourism, and historical benefits that will accrue to the benefit of the community by the restoration and preservation of the historical cemetery.”⁶⁰

Each side accused the other of being motivated by tourism revenue. Although the Concordia Heritage Association obtained a temporary restraining order and later a permanent injunction against Hardin’s body being moved, the El Paso Court of Appeals reversed and remanded.⁶¹ It noted that, among other grounds, mandatory venue for a suit seeking injunctive relief should have been in the underlying defendants’ county of residence.

And, while paying homage to Hardin’s outlaw notoriety as “the most dangerous man in Texas,” the appellate court also included a nod to Hardin’s career as a lawyer. The court observed, “It is ironic that John Wesley Hardin, himself a practicing attorney, if confronted with similar facts, would have been duty bound to advise any client seeking his legal advice that the mandatory venue provision required the filing of a similar action in the county of residence of the Defendants.”⁶²

John Wesley Hardin probably would have appreciated that observation. After all, when he died he was not just a once-notorious gunman, or an anachronism living in the waning days of the Wild West. He was also a lawyer, the ultimate hired gun.

⁶⁰ *Billings v. Concordia Heritage Association, Inc.*, 960 S.W.2d 688 (Tex. App.—El Paso 1997, pet. denied).

⁶¹ *Ibid.*

⁶² *Ibid.*



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Celebrating Houston's Appellate History

By David A. Furlow, with gratitude to *The Houston Lawyer* for sharing photos taken by HBA Communications Director Tara Shockley



An extraordinary commemoration of the history of Texas appellate law began when Fourteenth Court of Appeals Chief Justice Kem Thompson Frost shared her vision for “Celebrating a Commitment to Justice” to celebrate the 125th Anniversary of the First Court of Appeals and the 50th Anniversary of the Fourteenth Court of Appeals. First Court of Appeals Senior Justice Terry Jennings soon joined Chief Justice Frost, Houston Bar Association (“HBA”) Historical Committee Chair Jennifer Hasley, and other HBA leaders to honor the rich legacy of Houston’s appellate courts.



Left to right: Fourteenth Court of Appeals Justice Brett Busby; Court of Criminal Appeals Judge Kevin Yeary; and Fourteenth Court of Appeals Chief Justice Kem Thompson Frost.

“This program represented a collaboration among people who love the history of these courts,” HBA Communications Director Tara Shockley observed. “Chief Justice Frost came up with the idea, Justice Jennings carried it forward, and Jennifer Hasley did an excellent job of organizing it.” With the support of the HBA Appellate Practice and Litigation Sections, Chief

Justice Frost’s vision culminated in a special gathering.

Current and former Justices, staff attorneys, and clerks from the First and Fourteenth Courts of Appeals, several Supreme Court of Texas Justices and two Judges of the Court of Criminal Appeals, Houston and Harris County trial judges, and many local attorneys attended the celebration that commenced on the afternoon of Tuesday, September 12, 2017. The celebration proved extremely popular, resulting in 378 judges, justices, and attorneys registering for the program.

HBA President Alistair Dawson kicked off the event with welcoming remarks while a photo montage scrolled in the background. First Court of Appeals Chief Justice Sherry Radack recognized special guests and all members of the judiciary who attended.



HBA Historical Committee Chair Jennifer Hasley, left; HBA Communications Director Tara Shockley, right.



The First Court of Appeals came out in full strength. Photo at left: Justice Michael Massengale, Senior Justice Terry Jennings, and Chief Justice Sherry Radack. Photo at right: Justice Ken Wise shares stories about Houston’s courts of appeals.

The educational part of the program included speeches delivered by Senior Justice Terry Jennings and Justice Ken Wise, the latter of whom shared some “Wise about Texas” historical insights about the courts. Justice Michael Massengale brought an autumn afternoon of superb historical presentations to a conclusion with his presentation, “Continuing the Legacy: Preserving a Safe Harbor for the Rule of Law, Judicial Leadership for a Better Future.”



Top left: Senior Justice Terry Jennings discusses the history of the “Friendly First.”
Top right and below: Justice Michael Massengale advocates “Preserving the Legacy.”



Court of Criminal Appeals Judge Elsa Alcalá, left, and Texas Supreme Court Justice Eva Guzmán, right.



Left to right: Texas Supreme Court Justice Jeff Brown, Texas Supreme Court Justice Eva Guzmán, and former Texas Supreme Court Justice Scott Brister.

At the conclusion of the program, all of the judges, justices, attorneys, and staff gathered beneath the rotunda of the 1910 Courthouse for a reception that involved a cake commemorating the birthdays of the First and Fourteenth Courts of Appeals.



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The Texas Supreme Court Historical Society Journal thanks the author, the Houston Bar Association, Houston Bar Association Historical Committee Chair Jennifer Hasley, and the editor and staff of *The Houston Lawyer* for permission to reprint this article from the September/October 2017 issue.



The “Friendly First,” Texas’s First Court of Appeals, 1892–2017

By Hon. Terry Jennings

For 125 years, Texas’s First Court of Appeals has endured and thrived during times of peace and war, political and social progress and strife, economic booms and recessions, and fair weather and foul—from the Great Galveston Hurricane of 1900 to Hurricane Harvey of 2017. Through it all, the staff, attorneys, and justices of the Court have worked diligently and faithfully to administer justice without fear or favor.

As Stanley E. Babb of the *Galveston Daily News* wrote in 1929, “Thousands and thousands of cases have been argued, discussed, deliberated, and mediated within [the Court’s] walls, representing all phases of human behavior and experience.”¹ And the bar has made significant contributions to the Court’s history: “Many of the ablest lawyers in Texas have displayed their foremost abilities and their capacities for unraveling the Gordian knots of complicated and difficult legal problems in [its] historic old building[s].”² Over the years, the Court, with its user-friendly philosophy, became known as the “Friendly First,” with justices forming strong personal bonds with each other and staff, and strong professional bonds with members of the bar, in their mutual endeavor, even in disagreement, to “get it right” in their cases.

The Birth of the Court

After Texans approved a constitutional amendment in 1891, the legislature, in a special session in 1892, established the Courts of Appeals for the First (Galveston), Second (Fort Worth),

¹ Stanley E. Babb, “Ghost Once Haunted Old Court Building, Soon to be Razed,” *Galveston Daily News* (March 3, 1929), 7.

² *Ibid.*

and Third (Austin) Supreme Judicial Districts of Texas to help alleviate a serious backlog in the Texas Supreme Court. Each district had jurisdiction in civil appeals geographically over approximately one-third of the state, with the First Court covering 57 counties.

The legislature's decision to locate the Court in Galveston was based, as were all its subsequent decisions in locating the intermediate court of appeals, on pure political whim. "It has always been my understanding," recalled Henry Garrett, the Court's clerk in 1929, "that the selection of Houston for the [1892] state [Democratic] convention had a strong influence in the selection by the legislature for Galveston for the location of the [First Court], many of the legislators saying, 'Well, Houston got the convention, let's give Galveston the court.'"³

In 1892, the state of Texas was only 47 years old. Jim Hogg was governor, Benjamin Harrison was president of the United States, and Victoria was the Queen of England. And the First Court, consisting of Chief Justice Christopher Columbus Garrett, Justices H. Clay Pleasants and Frank Williams, and Clerk S. D. Reeves, opened its first term in Galveston on Monday, October 3.⁴ It issued its first published opinions just nine days later on October 11, 1892, concerning a passenger's wrongful ejection from a train,⁵ an appeal from a district court's grant of a petition for a writ of mandamus brought by a newly elected county attorney,⁶ and the parole evidence rule.⁷ The opinions vary in length from two to six pages.

The Move to Houston

From 1892 to 1957, the Court's first home was the renovated 1878 Galveston County Jail, located at 20th and Winnie Streets. From the beginning, the Houston Bar looked upon the Court with envious eyes, and it made several unsuccessful attempts to have the Court moved to Houston. Finally, in 1957, Hurricane Audrey damaged the beautiful old red-brick, with white-limestone trim, building. And Chief Justice Gaius Gannon petitioned the legislature to move the Court to Houston to the Harris County Courthouse.

The legislature expanded the First Court to six justices in 1978, and, due to overcrowding, the new justices and their staffs moved to the Citizens Bank Building at 402 Main Street. Their stay there was short lived, due to malfunctioning elevators, no central air-conditioning, falling plaster, and an infestation of grasshoppers. Chief Justice Frank Evans then began to work in earnest to find a new home for the Court and its younger sister, the Fourteenth Court of Appeals, which the legislature had created in 1967.

The South Texas College of Law and Harris County Commissioners Court came to the rescue. The Commissioners agreed to pay for the construction of three additional floors on top of a building that the law school had previously planned, and the law school agreed to lease the space back to the courts for 99 years. The deal was timely struck as the legislature, in 1981,

³ *Ibid.*

⁴ Assisting the Court were Charles V. Johnson, deputy clerk, and J.E. Harmon, stenographer.

⁵ *Kan. & Gulf Short Line R.R. v. Scott*, 20 S.W. 725 (Tex. Civ. App.—Galveston 1892, no writ) (cause no. 2).

⁶ *Luckey v. Short*, 20 S.W. 723 (Tex. Civ. App.—Galveston 1892, no writ) (cause no. 4).

⁷ *Todd v. Roberts*, 20 S.W. 722 (Tex. Civ. App.—Galveston 1892, no writ) (cause no. 7).

added three new justices to each court, who were first elected in 1982. In 1983, the courts moved into the new space on the eighth, ninth, and tenth floors at 1301 San Jacinto, where they enjoyed a felicitous relationship with the law school that continues through today.



Court House and Court of Appeals.
Galveston, Texas.

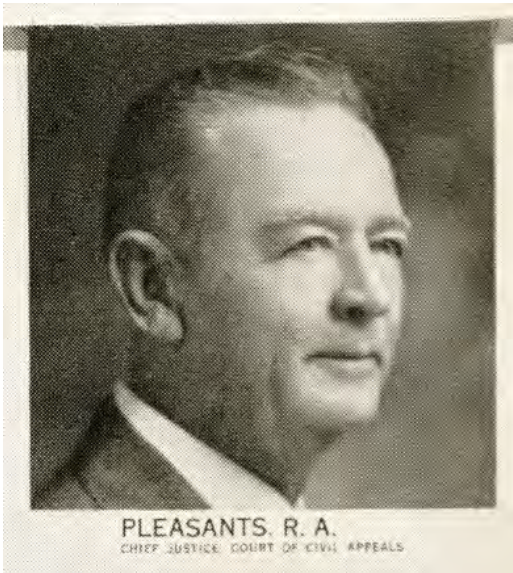
The First Court of Appeals was located in Galveston from 1892 to 1957. File photo courtesy of the Rosenberg Library, Galveston, Texas.

As the Houston area grew in population, so did litigation and the demands on the First and Fourteenth Courts. Over time, the legislature reduced the number of counties in their jurisdiction to ten. And although the justices and staff enjoyed the camaraderie that came with working in close quarters at the law school, the courts, with a growing staff, simply ran out of room. Again, the Harris County Commissioner's Court came to the rescue. Following the construction of the new Criminal Justice Center and Civil Courthouse, space became available in the old Harris County Courthouse. And under the leadership of Chief Justices Sherry Radack and Adele Hedges, the courts moved into their newly renovated home in 2011. There, Chris Prine, the Clerk of both courts, has worked to bring the courts into the 21st Century, instituting the electronic filing of all documents.

Members of the Court

There was little change on the First Court when it was in Galveston. The Court consisted of three judges, all white men, who served long, secure tenures. Justice George Graves served on the Court from 1917 to 1955 – 38 years, the longest tenure of any justice on the Court, spanning

the two world wars and then some. Chief Justice Robert Pleasants served for 31 years, from 1907 to 1938. And Henry Garrett served as the Court's Clerk from 1908 to 1947, 38 years.



Left: The Hon. Robert A. Pleasants served as a Justice on the First Court of Appeals from 1899 to 1907, then as Chief Justice from 1907 until 1938. File photo courtesy of the Rosenberg Library, Galveston, Texas. Center: The Hon. Henry E. Doyle, appointed to the First Court of Appeals in 1978, was the first African American to serve as an appellate court justice in Texas. Photo of his portrait from the 1910 Courthouse. Right: First Court of Appeals Justice Camille Hutson-Dunn was the first woman elected to an appellate court in Texas, taking office in 1985. Portrait, painted by her daughter, in the 1910 Courthouse.

Recently, most justices have served between one and two terms, or at most three, between six and eighteen years. And life on the Court in Houston has been dynamic, with many significant changes occurring in the 1980s and 1990s. As noted by former Justice Murry Cohen, "My generation on the First Court, 1983–2002, saw big changes. 1982 was the first election after the First and Fourteenth Courts were enlarged from three to nine justices and went from being the Courts of Civil Appeals to the Courts of Appeals, with criminal law jurisdiction." And the acquisition of jurisdiction in criminal cases required team work:

Most First and Fourteenth Court justices in 1983 were almost totally inexperienced in either civil or criminal law. There were some difficult moments, but the learning curve was remarkable; justices with no criminal law background were soon writing leading opinions in criminal cases, and vice-versa. The collegiality of the court speeded that process.

Moreover, as America progressed politically and socially, so did the First Court. In 1978, Governor Dolph Briscoe appointed to the Court Henry Doyle, the first black man to serve as an appellate court justice in Texas. In 1982, two Jewish justices were elected, Ben Levy and Murry Cohen. Justice Camille Hutson-Dunn, in 1985, was sworn in as the first woman elected to a Texas appellate court. In 1991, Governor Ann Richards named Alice Oliver-Parrott the first woman chief justice in Texas. And in 1993, the First Court appointed Margie Thompson as the first black woman clerk of an appellate court in Texas. Thompson, known for her broad smile and can-do

attitude, continued the user-friendly policy of her predecessor, Kathryn Cox, that earned for the Court the nickname of the “Friendly First,” coined by Justice Lee Duggan.



Three generations of appellate justices. From left: Hon. Murry B. Cohen, First Court Justice, 1983–2002; Hon. Charles W. Seymore, Fourteenth Court Justice, 2001–12; Eileen Wilson, briefing attorney for Justice Smith, 1985–86; Hon. Jackson B. Smith, First Court Justice, 1981–88; Mrs. Myrtle Smith; Hon. Terry Jennings, First Court Justice, 2001–present; and Cathy Smith, research attorney for Justice Smith, 1986–89. Photo courtesy of Justice Jennings.

Thus, the First Court has in many ways been “first” in making progress in Texas. Today, sadly, both the First and Fourteenth Courts are lacking in racial diversity. Women, however, have, in recent years, constituted a majority of both of the courts. Since Texas’s first all-woman appellate-court panel, with Chief Justice Oliver-Parrott and Justices Hutson-Dunn and Margaret Mirabal, met and heard oral arguments in 1991, all-woman panels now meet regularly in both courts. And the vast majority of staff attorneys and clerical staff on both courts consist of women.

Changes on the Court

The life of the Court has spanned the tenure of 28 governors and 23 presidents, and the reign of six British monarchs. Since the 1980s, one of the few constants on the Court has been change. The Court is technologically up to date, and several justices read almost everything on computer monitors. It has moved from deciding cases less on the common law and more on statutory interpretation. Court opinions average between 20 to 25 pages in length, and it is not uncommon in complex cases for an opinion to be 60 to 100 pages long. And although its justices each author between 60 and 80 opinions per year, most appeals in civil cases are not from judgments after a jury trial. With the rise of arbitration, it is often said that jury trials are vanishing in civil matters.

Camaraderie on the Court

Happily, another constant on the Court are the strong relationships that form between the justices and their staffs, many of which, because of their shared commitment to their life’s work, last for life. As noted by Justice Mirabal, “My first job out of law school was as a law clerk at the First Court for Justice Frank G. Evans, who served with Chief Justice Tom F. Coleman and

Justice Phil Peden. I learned more in that one year at the Court than I learned in three years of law school.” She was elected to the Court 13 years later. She adds, “I cherish my 14 years as a Justice on the First Court of Appeals, where I worked with the other dedicated justices and court staff to provide fair and impartial appellate review of the rulings from the trial courts.”

After I was elected to the Court in 2000, Justice Cohen, describing our job as “the best in the world,” was kind enough to act as my judicial mentor. And I had the opportunity to work with retired First Court justices like Frank Evans, Lee Duggan, and Jack Smith—all part of America’s greatest generation—who had come back to the Court on a special task force to help eliminate a backlog of cases. I immediately noticed something special about these justices. As explained by Justice Cohen:

Many early colleagues had served in World War II or the Korean War. None discussed combat experiences with me, but they often talked about funny and fascinating things they had seen and done in military service. To several, including Jack Smith who was like a second father to me, it was the most important experience of their lives.

These justices brought their life experience with them to the Court, and they had a profoundly positive effect on everyone that they worked with that is still felt today. It is not uncommon for current and former First Court justices to regularly meet with former law clerks and staff attorneys to bond and share fond memories of justices like Jackson B. Smith.

To illustrate the point, in December 2015, Justice Cohen invited me and several friends over to his home, which his parents had built in 1964, to celebrate his 70th birthday with his wife Meryl. They had just finished refurbishing their home after the Memorial Day Flood in 2015. It was a beautiful evening at which Justice Cohen toasted the Constitution and Justice Smith, as is our custom, and handed out awards. My award was for “Oldest Friend in Terms of Joint Judicial Service.” For a present, I gave him a copy of Melvin Urofsky’s biography of Louis Brandeis. When the party was over, we spoke outside his house in the crisp air under a star-lit sky about the flood and how difficult it had been to repair the house and get everything back in order.

On August 27, 2017, I received a text from Justice Cohen stating that Hurricane Harvey had destroyed “the Old Cohen Place”; “[e]verything is lost. And we will not return.” He later added that one of the things that he took with him as he left his house was the book that I had given him.

Such are the human bonds upon which the history of the First Court of Appeals is built. As long as there are men and women in Texas who, even in disagreement, share a commitment to justice and the rule of law, may there ever be the First Court of Appeals, Texas’s “Friendly First.”



TERRY JENNINGS, Senior Justice on the First Court of Appeals, first took his oath of office on January 1, 2001. From 2003 to 2014, he served with distinction as a member of the Texas Supreme Court Advisory Committee. The Texas Association of Civil Trial and Appellate Specialists named Justice Jennings its 2009 Appellate Judge of the Year. In 2011, the Houston Press named him “Houston’s Best Appellate Judge.”

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The Texas Supreme Court Historical Society Journal thanks the author, the Houston Bar Association, Houston Bar Association Historical Committee Chair Jennifer Hasley, and the editor and staff of *The Houston Lawyer* for permission to reprint this article from the September/October 2017 issue.



The Fourteenth at Fifty: Poised for Change, Prepared for Challenge, and Pointed Toward the Future

By Hon. Kem Thompson Frost

When newcomers to Houston discover the city is home to two of Texas's fourteen intermediate courts of appeals, they naturally ask, "Why two courts instead of one?" The unusual concept—unique to Texas—finds roots in the origin of the Fourteenth Court of Appeals.

In the 1960s, Houston's First Court of Appeals consisted of a chief justice and two associate justices.¹ The three-judge court needed relief from a heavy and growing backlog of appeals. But adding more judges posed a problem because, at the time, the Texas Constitution limited the size of intermediate appellate courts to three judges.² Texas lawmakers wanted to help, but they could not add more judges without a time-consuming amendment to the state constitution. Their solution was to create a new three-judge court for the Houston area—the Fourteenth Court of Appeals—with the same geographic jurisdiction as the First Court of Appeals.³ Born of necessity rather than design, the Fourteenth drew its first breath on September 1, 1967.⁴

This year we celebrate the Fourteenth's fiftieth birthday. A look back at the last half-century reveals big changes not only in the court's size, location, and jurisdiction but also in its judicial makeup, systems, and processes. Technological advances have improved the court's efficiency and enhanced its operations. Yet, the last five decades also have presented challenges

¹ See TEX. CONST. art V, § 6 (amended 1978, 1981, 1985, 2001).

² See *ibid.*

³ See Act of May 29, 1967, 60th Leg. R.S., ch. 728, §§1, 2, 3, 1967 TEX. GEN. LAWS 1952, 1952-54.

⁴ See *ibid.*

that force us to consider how problems inherent in the shared-jurisdiction model are impacting the jurisprudence and the delivery of justice in the First-Fourteenth District.

Changes in Size

As Houston has grown so has the size of its appellate bench. In 1978, Texans amended the state constitution to lift the restriction on the number of justices on intermediate appellate courts.⁵ The Texas Legislature then increased the count on both Houston courts from three to six, authorizing justices to sit in panels of no fewer than three. Three years later, the Legislature again expanded the size of the First and Fourteenth, this time to nine justices each.⁶

Changes in Subject-Matter Jurisdiction

Until 1981, all criminal appeals went directly to the Court of Criminal Appeals of Texas. In 1980, Texans amended the state constitution to give intermediate appellate courts jurisdiction over criminal appeals.⁷ All Courts of Civil Appeals (as they were known then) became Courts of Appeals.⁸

Adding criminal jurisdiction nearly tripled the court's yearly opinion count. Other surges in subject-matter jurisdiction further increased the court's workload (and staff size). Over the years, the Legislature has created a series of interlocutory and accelerated appeals,⁹ and the Supreme Court of Texas has expanded the scope of mandamus review. These changes have swelled the number of cases the court must handle on an expedited basis.¹⁰ With each change, the Fourteenth has developed protocols to ensure speedy decisions for the short-fuse cases, a challenging task given the expanding categories of accelerated appeals in recent years.

Changes in Geographic Jurisdiction

Originally the Fourteenth's geographic jurisdiction included fourteen counties. In 2003, the Legislature decided that Brazos County, which had been in both the First-Fourteenth District and the Tenth District (based in Waco), should be in just one court-of-appeals district and cut it from the First-Fourteenth's shared jurisdiction. Two years later, the Legislature moved three other counties—Burleson, Trinity, and Walker—from the First-Fourteenth District to the Ninth District (based in Beaumont), leaving the First and Fourteenth with jurisdiction over ten counties: Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington.¹¹

⁵ See TEX. CONST. art V, § 6 (amended 1981, 1985, 2001).

⁶ Act of May 31, 1981, 67th Leg., R.S., ch. 291, § 31, 1981 Tex. Gen. Laws 761, 777.

⁷ See TEX. CONST. art V, § 5, 6 (amended 1985, 2001).

⁸ See *ibid.*

⁹ See Elizabeth Lee Thompson, *Interlocutory Appeals in Texas: A History*, 48 ST. MARY'S LAW JOURNAL 65 (2017) (detailing the history of statutory authorization for interlocutory appeals).

¹⁰ See *ibid.*, 112–13.

¹¹ See TEX. GOV'T CODE ANN. 22.201 (West Supp. 2010).

Though based in downtown Houston, the Fourteenth seeks opportunities to strengthen the court's presence throughout the jurisdiction. Panels hear oral arguments across the district. The "road show" takes extra planning and personnel, but brings a measure of appellate process to places that might not otherwise get to experience it firsthand.

Members of the Court

Forty-six individuals (including sitting justices) have served on the Fourteenth, three of them as both an associate justice and chief justice. The longest-serving—J. Curtiss Brown—took his seat as an associate justice in 1973 and retired as chief justice in 1995. The shortest-serving elected justice—Gary C. Bowers—took office in 1993 and died the same year.

Several of the Fourteenth's justices went on to serve on the Supreme Court of Texas (Samuel D. Johnson, Jr., Harriet O'Neill, Scott Brister, Eva Guzman, and Jeff Brown) or in the federal judiciary (Samuel D. Johnson, Jr. and George E. Cire), or both.

With 18 sitting justices on Houston's two courts of appeals, even seasoned appellate practitioners struggle to keep the rosters straight, often quipping, "only 18 people know which judges are on which court."



Hon. J. Curtiss Brown was the longest-serving justice on the Fourteenth Court of Appeals, serving from 1973 until he retired as Chief Justice in 1995. Photo of his portrait from the 1910 Courthouse.



Left: The first three justices of the Fourteenth Court of Appeals: Justice John M. Barron, Chief Justice Bert Tunks, and Justice Samuel D. Johnson, Jr. Photo courtesy of Sam Johnson, son of Justice Johnson. Right: Hon. Eva Guzman, now a Texas Supreme Court Justice, was the first and only Latina justice to serve on the Fourteenth Court of Appeals, joining the court in 2001. Photo courtesy of Justice Guzman.

Two justices—Adele Hedges and Scott Brister—spent time on each court, first as associate justices on the First and then as chief justices of the Fourteenth. The Fourteenth’s first chief justice—Bert H. Tunks—served from 1967 to 1975. Five others followed: J. Curtiss Brown (1976-1995), Paul C. Murphy (1995-2001), Scott Brister (2001-2003), Adele Hedges (2003-2013), and Kem Thompson Frost (2013-present).

Clerks of the Court

Six individuals have served as Clerk of the Fourteenth: Richard Tisdale (1967-70), Thelma Mueller (1970-81), Claudine Parten (1981), Mary Jane Smart Gay (1982-2000), and Ed Wells, Jr. (2000-2007). The current clerk—Christopher Prine—holds the position for both the First and the Fourteenth.

“Firsts” in the Fourteenth

Felix Salazar, Jr., appointed in 1978, became the first and only Latino to serve on the Fourteenth. Eva Guzman, who joined the Fourteenth in 2001, became the first and only Latina to sit on the court.

Appointed in 1994, Patrice Barron became the first woman to serve on the Fourteenth. The same year Leslie Brock Yates and Wanda McKee Fowler became the first women elected to the Fourteenth. (Justice Yates took office first.) Nine years later, Adele Hedges became the Fourteenth’s first female chief justice. At times more women than men have occupied the Fourteenth’s judicial seats. Justice Yates recounts the time a seasoned gentlemen-advocate appearing for oral argument looked up from the podium to discover that women filled every other seat in the courtroom—the opposing advocate, the court’s attorneys and law clerks, and the three judges—all women. “When did this happen?” he asked.

“The People’s Court”

Local legal historian Judge Mark Davidson dubs the Fourteenth “The People’s Court” in recognition of two election sweeps that fundamentally changed the court’s judicial makeup, first in 1982 (when the people swept in Democrats) and again in 1994 (when the people swept in Republicans).

Notable Cases

In fifty years, the Fourteenth has produced 45,265 opinions and disposed of 46,241 appeals.¹² Some have made their way to the Supreme Court of the United States. The most famous culminated in the landmark decision in *Lawrence v. Texas*. In 2001, the en banc majority of the Fourteenth affirmed convictions of two men convicted of violating Texas’s anti-sodomy statute.¹³ The Court of Criminal Appeals declined review. Directly reviewing the Fourteenth’s decision, the nation’s high court concluded that the Texas statute violated the Fourteenth Amendment’s

¹² Provided by the Texas Office of Court Administration, this data is as of July 31, 2017.

¹³ *Lawrence v. State*, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (*en banc*), *rev’d*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

Due Process Clause. Overruling its own 1986 precedent in *Bowers v. Hardwick*,¹⁴ the Supreme Court changed the law and so reversed the Fourteenth's decision, but not before saying that the Fourteenth decided the federal constitutional issues properly under then-existing law.¹⁵

Other United States Supreme Court opinions in civil and criminal appeals originating in the Fourteenth include:

- *Windward Shipping (London) Ltd. v. American Radio Ass'n, AFL-CIO*, 415 U.S. 104 (1974)
- *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981)
- *Kaupp v. Texas*, 538 U.S. 626 (2003)
- *Salinas v. State*, 568 U. S. -- , 133 S.Ct. 2174 (2013)
- *Water Splash, Inc. v. Menon*, 581 U.S. -- , 137 S.Ct. 1504 (2017)

Locations of the Court

The Fourteenth has moved locations three times, all within downtown Houston. At its inception, the court heard arguments in a then-first-floor courtroom at the court's present location. Justices and staff worked nearby. In 1983, both the First and Fourteenth moved to the South Texas College of Law building, where they operated for the next 28 years. Today, the Fourteenth makes its home in the south side of the exquisitely restored Harris County 1910 Courthouse—a true palace of justice that combines the beauty of majestic courtrooms and historic surroundings with functional office space.



Current and former justices of the Fourteenth Court of Appeals gathered for a photo at the September 12th anniversary celebration of the First and Fourteenth Courts. Front row, from left: Former Justice Scott A. Brister; Chief Justice Kem Thompson Frost, Justice William J. Boyce. Back row, from left: Former Justice Richard Edelman, Former Justice Wanda McGee Fowler, Justice Sharon McCally, Former Justice Jeff V. Brown, Former Justice Eva Guzman, Justice Ken Wise, Justice J. Brett Busby, Justice Kevin Jewell, and Justice John Donovan. Current Justice Martha Hill Jamison is not pictured. Justice Eva Guzman and Justice Jeff Brown currently serve on the Supreme Court of Texas.

¹⁴ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁵ *Ibid.* at 563.

System Advances and Changes in Technology

In the Fourteenth's early days and even into the 1980s, judges wrote out draft opinions in longhand. For years the designated author would circulate a single draft to other panel members one at a time, in order of seniority. Panel members would handwrite edits and circulate proposed revisions the same way. Everyone would share one record. This time-consuming process slowed the court's pace and drained its resources. Word processors and computers brought gradual improvements, but the big changes came after Justice J. Harvey Hudson (1995–2007) joined the Fourteenth. An innovator with tech know-how and keen insight on how things ought to work, Justice Hudson put together a program and application for circulating draft opinions electronically so that judges could read, edit, and vote on their computer screens. The new system launched a new paradigm and served as the prototype for other courts. Under the leadership of then-Chief Justice Adele Hedges, the Fourteenth ushered Texas courts of appeals into a new electronic environment, paving the way for the state's Texas Appellate Management E-Filing System, known as "TAMES," now operated by the state's Office of Court Administration.

Today, the Fourteenth's justices and staff access briefs and evidence with the stroke of a key. Links to electronic records and cited legal authorities make access to the facts and the law nearly effortless. Justices circulate draft opinions and comment on one another's proposed edits electronically, accessing court computers from work or home. These technological advances make for a leaner, greener, practically paperless operation and enable justices and staff to complete the opinion-writing-and-approval process in a fraction of the time it used to take. The changes have revolutionized the way the court processes appeals.

Preserving Tradition amid Changes in Structure and Staffing

This year the Fourteenth bid farewell to its last briefing attorneys. Since the court's inception, first-year lawyers have served as briefing attorneys (law clerks) to justices, fulfilling a one-year commitment to the court before taking a permanent position with a law firm, company, or public-sector entity. Increased legislative funding has enabled courts gradually to replace one-year, fresh-out-of-law-school positions with permanent staff positions, filled by more experienced attorneys who can bring greater efficiency and expertise to the court's work. Still, judges viewed the briefing-attorney program as an important experiential-learning opportunity for new lawyers and did not want to abandon this longstanding tradition. Preserving it in a new way, the Fourteenth now channels its mentoring efforts and energy into a dynamic judicial internship program.

Focused on equipping law students for their professional journeys, justices host "chambers chats" and engage interns through roundtable discussions, conferences, and educational sessions designed to build practice skills and foster professionalism. The First and Fourteenth work together to provide both courts' interns with opportunities to observe trial and appellate courts in action. Students interact with judges and staff on a range of assignments. With this close attention to professional development, students emerge from the internship better prepared to begin their legal careers. More importantly, they leave the courts knowing the value of strong mentorship.

First-Fourteenth Combined Efforts

In recent years, the First and the Fourteenth have pooled resources to achieve greater efficiencies in court management and operations. Today, in addition to sharing a courthouse, an intake window, and an internship program, the two courts share some personnel and an exceptional court clerk, Christopher Prine, who oversees both courts' day-to-day operations in the ten-county jurisdiction. By joining forces, the First and Fourteenth have boosted court safety and security, enhanced employee training, and increased educational opportunities for the courts' professional staffs. Likewise, working collaboratively alongside bar associations and other groups, the two courts have implemented user-friendly procedures and improved public access to court records and information.

Challenges for the Future

In reflecting on the past, we also ponder the future, recognizing the challenges that lay ahead. Like courts of appeals throughout the state, the Fourteenth must continue to improve access to justice, balance open-courts issues with privacy concerns, keep up with technological advancements, and ensure a timely and well-reasoned judicial product. But, the Houston courts of appeals face an extra challenge—one that arises from their shared jurisdiction and impacts both the jurisprudence and the delivery of justice.

Neither the First nor the Fourteenth is bound by the other's precedent. Because the two independent courts share judicial power in a single ten-county region, when they come down on different sides of a legal issue, people and trial courts in the district ostensibly must obey two different yet equally binding rules. The law does not command a single result, so vertical stare decisis disappears. The loss makes the law unpredictable in split-of-authority cases. As the courts' jurisdiction, size, and caseloads have grown, so, too, have the conflicts in the jurisprudence.

The splits in authority create doctrinal ambiguity, bring greater costs and uncertainty to the appellate process, and produce disparate outcomes in the shared jurisdiction. Though the problem has not gone unnoticed, it has gone unfixed. And, with each passing year it creeps closer to center stage, relentlessly reminding us that the rule of law is best served when litigants in like circumstances are treated alike. The challenge for the future is to find a way to restore the lost benefits of stare decisis so that the law will be more predictable in the First-Fourteenth District.

Many say the answer is to combine the two courts. For years members of the legal profession and community groups have advocated just that. Former Supreme Court of Texas Justice Scott Brister, who served on both the First and the Fourteenth before taking a seat on the state's high court, says a merger would improve court administration, lower costs, and put an end to "practicing law on a guess and a gamble."¹⁶ Others emphasize the need to free trial courts from interpretive problems in split-of-authority cases and give practitioners and litigants a greater measure of certainty.¹⁷ Merging the courts would accomplish all these objectives and restore the predictability that is so essential to our rule-of-law system.

¹⁶ See Scott Brister, *Is It Time to Reform Our Courts of Appeals?* HOUS. LAW. (Mar.-Apr. 2003), 22, 26.

¹⁷ Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417 (2006) (condemning Texas jurisdictional overlaps for creating uncertainty about controlling legal authority).

Through five decades of transformative change, the Fourteenth has emerged a more efficient court, committed to building on a strong legacy of public service and resolute in delivering justice through adherence to the rule of law. At fifty, the Fourteenth stands poised for change, prepared for challenge, and pointed toward the future.



*Appointed to the Fourteenth Court of Appeals in early 1999 by Governor George W. Bush and elevated to Chief Justice in 2013 by Governor Rick Perry, **HON. KEM THOMPSON FROST** is the longest serving justice on the Houston courts of appeals. Before taking the bench, she developed enjoyed a fifteen-year civil trial and appellate practice, with an emphasis on business litigation.*

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In Memoriam

Justice Ted Z. Robertson, 1921-2017

By Osler McCarthy

Former Texas Supreme Court Justice Ted Z. Robertson passed away in Dallas on October 13, 2017. He was ninety-six.

Justice Robertson, from San Antonio, served on the Court from 1982 through 1988, and is credited with helping lead the Court to a modern system of discretionary review. He served as a Dallas County probate and juvenile judge, then as state district judge in Dallas County, and at the end of his six-year tenure on the Supreme Court unsuccessfully challenged then-newly appointed Chief Justice Tom Phillips in 1988.

“The Court, as a family, mourns the passing of one of us as a loss for all left behind,” Chief Justice Nathan L. Hecht said. “Ted Z. Robertson served this state in four distinct judicial positions that made his perspective on this Court often broad and varied.”



Theodore Zanderson Robertson was born September 28, 1921, and traced his family to the earliest American settlers in Texas. His great-great-grandfather, Sterling Clack Robertson, was an empresario from Tennessee who founded Robertson Colony in the Brazos River Valley in the 1830s. Sterling Robertson fought at the Battle of San Jacinto, signed both the Texas Declaration of Independence and the Constitution of the Republic of Texas, and was a Texas Senator in the first two sessions of the Congress of the Republic of Texas.

Ted Z. Robertson grew up in San Antonio, where he attended public schools. He was a graduate of Texas A&I University in Kingsville (now Texas A&M University–Kingsville), then earned his law degree in 1949 from St. Mary’s University after serving almost four years in the U.S. Coast Guard during World War II, much of it in the South Pacific.

His ship, the *USS Etamin*, a Navy cargo vessel operated by the Coast Guard, was struck and disabled by a Japanese torpedo in 1944. He spent the night in water off the coast of the Philippines.

“Growing up in South Texas, being torpedoed in the South Pacific, studying law in San Antonio and practicing law with Sam Houston Clinton and Oscar Mauzy would have been enough for any one attorney,” said George “Tex” Quesada, a Dallas attorney who practiced law with

Robertson after he left the Court.

“Ted Z. went on to serve as a judge in juvenile court, probate court, district court, the court of appeals, and the Supreme Court of Texas. He was a true lawyers’ lawyer and a judge’s judge.”

Retired Justice Raul A. Gonzalez, who served with Robertson on the Court for more than four years, called him “a congenial colleague who brought a wealth of judicial experience to the Court. He was easy to talk to even when we were on opposite sides of an issue. May he rest in peace.”

Following law school Robertson practiced law in San Antonio and Dallas until 1960, then headed the Dallas County District Attorney’s Civil Department. In 1965 he was appointed to the newly created Dallas County Probate Court No. 2, then in 1969 to a newly created Dallas County Juvenile Court. In 1975 Gov. Dolph Briscoe chose him for 95th District Court of Dallas County, then the following year appointed him to the Dallas Court of Civil Appeals.

After Governor Clements appointed Robertson to the Supreme Court in 1982, he assumed the bench to fill Pope’s unexpired term in December and won election for a term that ended in December 1988. Rather than seek reelection, he ran against Chief Justice Phillips in 1988.

In a 1985 *Texas Bar Journal* article and more comprehensive law-review article, Justice Robertson advocated the Court’s eventual shift from its writ-of-error system to one based on discretionary review of cases that presented issues bearing on their importance to Texas jurisprudence.

“Like several of his colleagues, Judge Robertson thought the Texas Supreme Court disserved the public by spending the bulk of its time grading the homework of the Courts of Appeal, instead of concentrating its time and resources on those cases that raised issues of general importance,” a former law clerk, Professor James Paulsen of South Texas College of Law, said. “He advocated for abolition of the writ-of-error system and saw the Legislature enact reforms along those lines in 1987.”

In a video interview in 1987 at Abilene Christian University, Justice Robertson said he supported the Texas judicial-selection system and rejected arguments that judges should be appointed—a key issue in Supreme Court races. “The system isn’t broken and I don’t believe in fixing something that’s not broken,” he said.

“Judges should be answerable to the people just like any other elected official.”

In the interview Robertson, who had announced he would run for Chief Justice, told ACU Vice President Gary McCaleb: “It’s a brass ring that comes around once in a lifetime and I’ve been in the judiciary all my life, practically, and it’s just something I didn’t think would come around.”

“And for me to be able to follow in the footsteps of Jack Pope and people like that, illustrious Chief Justices, it would be a great way to cap off a career.”

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The Great Debate

By Dylan O. Drummond

In any given election cycle, only three places on the Texas Supreme Court are typically put before the electorate.¹ But in 1988, twice that number of seats—fully two-thirds of the Court—were up for election. This is just one of the reasons the 1988 Texas Supreme Court judicial elections have been called “transformative.”²

In October 1988, an extraordinary debate took place in Houston involving *nine* current or future Supreme Court Justices. Incumbent Chief Justice Tom Phillips—appointed to the post just nine months earlier, after Chief Justice John Hill resigned—faced his colleague on the Court, Justice Ted Z. Robertson, for place 1. Future Justice and longtime Congressman Lloyd Doggett debated Fourteenth Court of Appeals Justice Paul Murphy for an open seat in place 2. The man who would go on to set the record as the longest-serving Justice on the Court—Fifth Court of Appeals Justice Nathan Hecht—was opposite incumbent Justice Bill Kilgarlin for place 6. Fifth Court of Appeals Justice Charles Ben Howell and Calvin Scholz challenged incumbent Justice Raul Gonzalez for place 4. Incumbent Justice Barbara



Chief Justice Tom Phillips was up for election in 1988 after having been appointed to the post earlier that year.



Fifth Court of Appeals Justice Nathan Hecht was poised to begin a tenure on the Texas Supreme Court that continues to this day.

¹ TEX. CONST. art. 5, § 2(c).

² Michael Ariens, *Lone Star Law* (Lubbock: Texas Tech University Press, 2011), 209.



Incumbent Justice Barbara Culver (top) was seeking election to her post in a race against former Congressman Jack Hightower (bottom).

Culver debated future Justice Jack Hightower for place 5. Just a month after being appointed to the post, incumbent Justice Eugene Cook faced attorney Karl Bayer for place 3.

Perhaps in part due to the national prominence these races attracted after a scathing *60 Minutes* report the year before (which can still be viewed at <https://youtu.be/ob3-llf6Vw>), CSPAN aired the debate live nationally. Amazingly, this debate may still be watched as well at <https://www.c-span.org/video/?4684-1/texas-supreme-court-judicial-debate>.

Never before or since have so many current and future Justices debated one another. One current and one future Chief Justice took the stage that night, as did the second woman to be appointed to a regular term of the Court. In all, it is an incredible glimpse into the history of the Court and the outstanding judges who've served it.

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Dress (Your Writing) for Success: A Book Review of *Typography for Lawyers*

By Jay Jackson

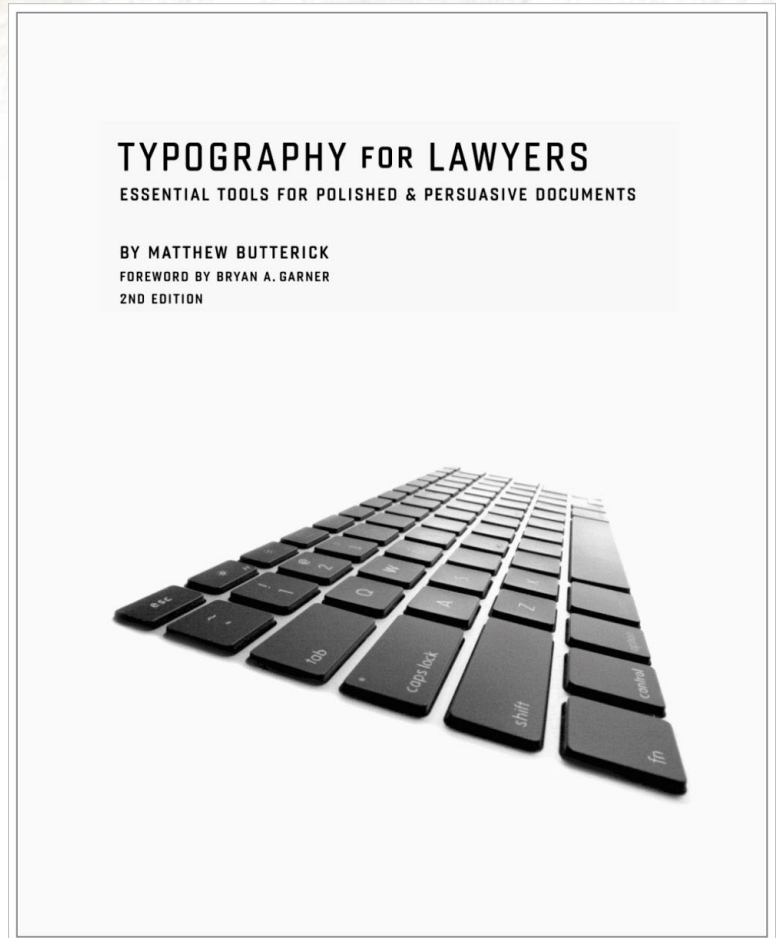
You have an important court appearance. You carefully select your clothing, making sure your shoes are shined, and your hair is combed. Why? Because, you instinctively know that, if you look your best, your message may get a better reception.

But, frequently, our work as lawyers is not presented orally. More often, we seek to persuade, or to provide services to our clients, in writing. Can we take steps to enhance the reception of our written work? Can we dress it up?

According to Matthew Butterick, we can. And in his breezy, sometimes humorous, book *Typography for Lawyers*, Butterick explains how. Butterick is particularly well qualified to offer this advice; he is one of the few attorneys (perhaps the only one) who has studied both law (UCLA) and typography (Harvard), and in fact he has actually designed fonts. It is Butterick's view that lawyers are professional writers, and so our documents should display a professional appearance. "A core principle of this book is that typography in legal documents should be held to the same standards as other professionally published material. . . ."

Desirable typography requires effective page layout. For Butterick, that means generous amounts of white space. Wider margins coupled with proper font size can create a refined and attractive presentation.

Speaking of fonts, Butterick points out that there is no perfect typeface; proper font selection depends upon the application: what looks great on a wedding invitation is not suitable for traffic signs. For lawyers, Butterick strongly warns against using "system fonts," meaning



Matthew Butterick
Typography for Lawyers
Houston: O'Connors, 2nd ed., 2015.
<https://typographyforlawyers.com/>



Matthew Butterick recommends that lawyers use custom-crafted fonts such as "Equity," above, and others he designed, in briefing.

those embedded in your computer. Instead, he promotes custom-designed fonts. Knowing that the experience of most of us has been limited to system fonts, Butterick supplies a gallery of alternative custom fonts in the same style groups as the fonts we have commonly encountered, like Arial and Times New Roman. (For those with an antiquarian interest, Butterick includes a brief history of Times New Roman, a font that, despite its ubiquity, he rates as "Questionable.") More useful for me, Butterick also assesses the usual system fonts, grading them as A ("generally tolerable"), B, C, and F (for typefaces he deems "fatal to your credibility," like Stencil).

Typography is not limited to margins and fonts, and neither is *Typography for Lawyers*. Butterick offers specific pointers that help create a professionally-typeset impression: he tells you *what* to do, and in many cases, *how* to do it with the major word-processing programs. For instance, there should be just one space after all punctuation. For old-timers (like me) who learned on a typewriter, that requires a real, but necessary, adjustment. Butterick explains that many of our typographical habits were formed on typewriters, perpetuating the limitations

of typewriters. But, with the arrival of advanced word-processing programs and computer printers, we need to replace those habits with modern and stylish approaches. This means no underlining: both *italics* and **bold** give emphasis better. BUTTERICK FURTHER CAUTIONS AGAINST THE EXCESSIVE USE OF ALL CAPS; WHEN THEY ARE EMPLOYED, EXPANDED LETTER-SPACING WILL IMPROVE LEGIBILITY. In addition, quotation marks should be “curled,” not “straight.” And, Butterick explains how attorneys can properly select among hyphens, em dashes, and en dashes.

These—and a host of other tips Butterick offers—will improve the image of your written work. In this regard, one final benefit of *Typography for Lawyers* is the “before-and-after” examples that conclude the book. They demonstrate the cumulative and positive effect you can achieve when you upgrade your typographical selections. You can see how, in motions, memoranda, and even letterhead, you can create a sophisticated appearance that is far easier to read than documents burdened with a 12-point Courier font and 1-inch margins.

Typography for Lawyers, available from O’Connor’s (formerly known as Jones McClure Publishing), is a quick and inexpensive (\$30.00) read, and packs loads of information helpful to “professional writers” in its 240 pages. But a word of caution: after you begin to incorporate these styles into your documents—which can be easily and inexpensively accomplished—not only will you never go back to the old ways, but you may grow to dislike reading papers that cling to the outmoded typographical methods of the typewriter era. Like Bryan Garner, who wrote the Foreword, I enthusiastically recommend this book. Once you enjoy the designer look Butterick teaches, you’ll never wear off-the-rack again.

¹ I would like to thank Lynne Liberato for introducing me to the Texas Supreme Court Historical Society. I would also like to thank David A. Furlow, Executive Editor of the *TSCHS Journal*, and Marilyn Duncan for their encouragement with this book review. Finally, I would like to thank Mary Sue Miller for all of her help; she is a tremendous asset to the Society.



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This Past Fall, Trustees Learned the History of a Giant Film

Story and Photos by David A. Furlow

Noted author and University of Texas Professor Don Graham, Ph.D., made a star performance as the guest speaker at the Society's Fall 2017 Board of Trustees meeting.

But first, Society President the Hon. Dale Wainwright and Executive Director Sharon Sandle welcomed new trustees to the Society's Board. Fifth Circuit Judge Jennifer Walker Elrod, First Court of Appeals Justice Jane Bland, Fifth Court of Appeals Justice Jason Boatright, and attorneys Larry Doss, Todd Smith, and Mark Trachtenberg attended their first meeting as new trustees. Officers and trustees then presented reports and answered questions about the Society's projects, culminating in Justice Wainwright's exciting news that the Spring 2018 meeting would occur at the George W. Bush Presidential Library in Dallas.



Clockwise from front center: Mark Trachtenberg, Ben Mesches, Cynthia Timms, and Justice Jeff Brown.



Bill Chriss displays Chief Justice Jack Pope's Texas Appellate Hall of Fame Award.

The Board of Trustees had special reason to celebrate the Texas Appellate Hall of Fame Awards. Trustee Bill Chriss nominated one of the Society's founders, the late Chief Justice Jack Pope, for an award. Bill brought the framed award to the board meeting in honor of Chief Justice Pope's pivotal role in organizing the Society.

Don Graham made the Fall 2017 meeting memorable by reading excerpts of his forthcoming book *Giant: Elizabeth Taylor, Rock Hudson, James Dean, Edna Ferber, and the Making of a Legendary American Film* and by analyzing the pivotal "Sarge's Place" fight scene near the

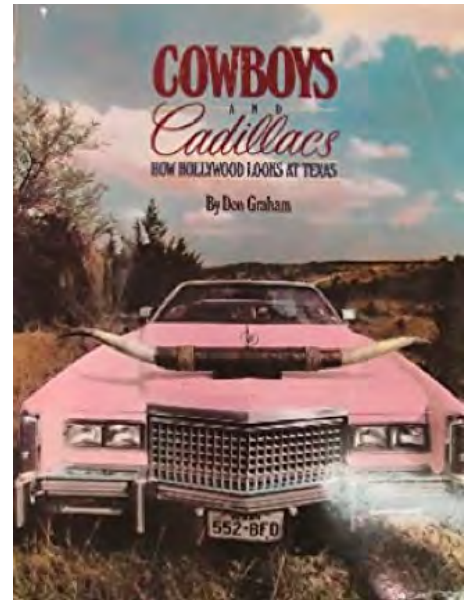
end of the film. Graham has been the J. Frank Dobie Regents Professor of American and English Literature in the University of Texas's English Department since 1987. He knows how to tell a good story and how to write a great book.

A favorite of University of Texas students and of readers everywhere, this *Texas Monthly* writer authored a host of famous and influential books, including *No Name on the Bullet: A Biography of Audie Murphy* (1989); *Cowboys and Cadillacs: How Hollywood Looks at Texas* (1983); and *Kings of Texas: The 150-Year Saga of an American Ranching Empire* (2003), which won the Texas Institute of Letters' Carr P. Collins Prize for Best Nonfiction Book.

Don Graham's forthcoming book *Giant* focuses a close-up lens on celebrity actors James Dean, Rock Hudson, and Elizabeth Taylor, and directorial genius George Cooper Stevens. But the list of stars did not end there. Carroll Baker, Jane Withers, Chill Wills, Mercedes McCambridge, Dennis Hopper, Sal Mineo, Rod Taylor, Elsa Cardenas, and Earl Holliman played memorable supporting roles, too.

Stevens scooped up the film rights to New York celebrity writer Edna Ferber's scathing depiction of Texas greed, excess, and love in the novel *Giant*. Before working on *Giant*, Stevens earned a reputation as an outstanding documentarian, made a name for himself with *A Place in the Sun*, the 1951 winner of six Academy Awards including Best Director, and made a fortune with *Shane*, the Oscar-nominated 1953 Western about a laconic gunfighter with a past.

Emphasizing Stevens's talents as a film-maker determined to unveil an epic tale of poverty and wealth, power, privilege, and generational change, Graham showed how Stevens presented a thinly disguised narrative about the King Ranch and its owner Robert "Bob" J. Kleberg, Jr., the Spindletop gusher's transformation of the Texas economy from one dominated by cattle to one ruled by oil, oilman Glenn McCarthy's construction of the Shamrock Hotel, and the casual racial discrimination of 1950s America. The resulting 1956 film won Stevens an Academy Award for Best Director, a nomination for Best Actor in a Leading Role for James Dean, whose life ended in an auto accident before the film was released, another Best Actor nomination for Rock Hudson, and seven other Oscar nominations.



Top: Don Graham's book *Cowboys and Cadillacs: How Hollywood Looks at Texas*.¹

Bottom: Don Graham's forthcoming book, *Giant*.²

¹ Don Graham, *Cowboys and Cadillacs: How Hollywood Looks at Texas* (Austin: Texas Monthly Press, 1983).

² Don Graham, *Giant: Elizabeth Taylor, Rock Hudson, James Dean, Edna Ferber, and the Making of a Legendary American Film* (New York: MacMillan Publishing Company, April 10, 2018), <https://us.macmillan.com/giant/dongraham/9781250061904/>.

Rock Hudson played a wealthy Texas cattle rancher, Jordan “Bick” Benedict, who represents Texas old money. Elizabeth Taylor’s Leslie Lynnton represented Chesapeake Tidewater aristocracy who passes her time hunting fox and flaunting East Coast class, education, and beauty. Young Bick goes east in search of a docile woman of good breeding eager to breed the next generation of Benedicts, but independent-minded Leslie Lynnton foreshadows the women’s liberation movement by refusing to remain a West Texas helpmeet. James Dean’s poor, lower class, but driven-by-ambition ranch-hand Jett Rink receives a small plot of land from Bick’s sister, which he refuses to sell when Bick offers to buy it back. Jett casts jealous eyes at the ranch and Leslie, wanting her for himself, wanting everything the Benedicts own.



Left: Edna Ferber in 1928. Nickolas Muray, photographer Wikimedia, public domain. Right: Director George Stevens with his Oscar for directing *Giant*. *Motion Picture Daily*, 1957, Wikimedia, public domain.

Leslie pities the awkward Jett Rink. “Money isn’t everything, Jett.”

“Not when you’ve got it,” he replies.

While Jett labors in the sun drilling for oil on his own tiny plot, Little Reata, Bick and his family wait for him to fail.

When Jett strikes a gusher that makes him a wealthy man overnight, a big-as-Texas rivalry divides nouveaux “Rich’Un” oilman Rink from the cattle-baron Benedicts. Jett immediately struts his stuff.

Everybody thought I had a duster. Y’all thought ol’ Spindletop Burke and Burnett was all the oil there was, didn’t ya? Well, I’m here to tell you that it ain’t, boy! It’s here, and there ain’t a dang thing you gonna do about it! My well came in big, so big, Bick and there’s more down there and there’s bigger wells. I’m rich, Bick.

I’m a rich ‘un. I’m a rich boy. Me, I’m gonna have more money than you ever *thought* you could have—you and all the rest of you stinkin’ sons of... Benedicts!

When Bick looks away, Jett sucker-punches him on the porch of Bick’s own mansion.

The high point of Graham’s presentation came when he analyzed, frame by frame, a video of *Giant’s* “Sarge’s Place” fist-fight between Rock Hudson’s Bick Benedict and Sarge, the brutal, racist owner of a greasy-spoon close to the Benedict oilfields. Stevens adhered closely to Edna



Don Graham held the Society's trustees, officers, and staff in thrall as he told the inside story of director George Stevens's making of the 1956 blockbuster *Giant*.

Ferber's story of Texas in transition. He did not hesitate to show the ugly nature of 1950s-era racism against Hispanics.

When Bick, Leslie, their physician son Jordy, their daughter Luz, and their Mexican daughter-in-law Juana attend the opening of Jett Rink's over-the-top Austin hotel, Jett picks a fight with Jordy, beats him, and orders his waiters to deny service to Jordy's wife because of her Mexican background. Bick looks on a drunken, debauched Jett with contempt, throwing his hotel restaurant's racks of fine wine to the ground as he walks out of Jett's disastrously embarrassing opening of his flashy hotel. On their way back home, Bick, Leslie, their daughter-in-law Juana and Bick's grandson Jordy Benedict IV stop by Sarge's Place, a grubby diner where oil workers can catch a quick meal.



A screen-shot from *Giant's* fight scene, courtesy of Warner Brothers, on Texas Public Radio.³

Graham showed how director Stevens transformed Bick's confrontation with Sarge into a powerful screen weapon in the struggle to end racial discrimination. Stevens invented the diner scene, which did not appear in Edna Ferber's novel, as a way to end the movie, shine a bright light on racial discrimination, and reveal Bick Benedict's growth as a character. Anyone who did not attend the Fall meeting can watch this exciting scene on YouTube.⁴ As Graham pointed out, a sign hanging on the wall inside the diner's door notified the Benedicts and other travelers that:



³ David Martin Davies, "Texas Matters: A 'Giant' Statement against Racism," *Texas Public Radio--KSTX-San Antonio Fresh Air* (February 20, 2015) (Fair Use commentary on the film, Don Graham's book, and the Texas Matters broadcast).

⁴ *Giant*—1956 Fight Scene—YouTube, <https://www.youtube.com/watch?v=e4ptm6F2KHQ>

Graham then explained that, in Southern states in the middle of the twentieth century, restaurant owners displayed such euphemistic signs to tell African-Americans (and in Texas, Hispanics), that they were not welcome. Graham offered newspaper stories about racial discrimination against Mexican Americans in Texas to demonstrate that the scene reflected the reality of racism in southern and western Texas. He observed that Stevens despised bigotry, while his depiction of Sarge as a veteran reduced to cleaning his diner while wearing a woman's white apron made the point that bigots bullied minorities because of their own sense of social exclusion and powerlessness. The dialogue resonates with an awful authenticity.



The fight scene begins shortly after Bick, Leslie, Luz, Juana, and little Jordy sit down for a meal. An old Mexican-American man, wife, and grandmother enter and sit down at a booth. The hulking restaurant owner, Sarge, played by Mickey Simpson, strides to their table.

“Buenos días,” the Mexican-American man says, while removing his hat as a sign of respect and submission to Sarge.

“You’re in the wrong place, amigo,” Sarge responds gruffly as he confronts the much older, much smaller Mexican-American. Rude and towering over the old man, Sarge claps the man’s hat on his head and ushers his family toward the door.

The Mexican-American man, assuming that Sarge is concerned about his ability to pay, opens his wallet.

“Come on, let’s get out of here,” Sarge responds. He claps the man’s hat on his head and grabs him by the arm, lifting him up to show him out. “Vámonos, ándale” [“Hurry up, let’s go,” in Spanish]. Your money’s no good here.” Sarge then speaks to the man’s wife and, presumably, his mother. “You, too.”

In this scene, Stevens confronted middle-class white Americans with something they had not seen at the movies before—racial discrimination of the kind experienced by countless African-Americans and Hispanics in the South during the 1940s and 1950s. For millions of Americans who had failed or refused to see it before, Stevens made racism real—and repulsive.

Bick overhears Sarge confronting the Mexican-American family from a booth at the end of the diner. Bick stands up and approaches Sarge. “Hold on a minute,” Bick says.

“Yes, what do you want?”

“Now look here, Sarge,” Benedict replies, obviously thinking of his own daughter-in-law

and grandson at the booth he just left. "Sure appreciate it if you'd be a little more polite to these people."

"Oh you would, would you?"

"I'm Bick Benedict. Your neighbor, you might say."

Sarge sneers. "Does that give you special privileges?"

"The name Benedict has meant something to people around here for a considerable time."

Sarge, unimpressed, turns to insult. "That there papoose down there, is his name Benedict, too?"

Bick looks back toward Juana and little Jordy. You can feel the gears moving as Bick realizes that bigotry affronts his own daughter-in-law and threatens, his own grandson, a Benedict. "Yeah, come to think of it, it is."

The scene shifts to Elizabeth Taylor, as her character Leslie looks at Bick, while Juana and Jordy look away.

"Alright, forget I asked you," Sarge responds in an intensely realistic scene. Great wealth has its privileges. Best not to take on the man who lives in the big house that dominates the landscape. "You just go back there and sit down and we ain't going to have no trouble. But this bunch here's going to eat somewhere else."

Sarge grabs the old man and pulls him out of the booth. Bick frees the Mexican-American man by thrusting Sarge aside.

"You're out of line, mister." Stevens shows how conflicts based on class, education, and wealth intersect racial animosities. Sarge unties his white apron and approaches Bick. Next comes the sound of fists and Sarge sprawls back across one of his tables. He rises and approaches Bick with clenched fists. The fight is on. It will fill another two exciting but painful to watch minutes of unforgettable film.

The soundtrack begins playing *The Yellow Rose of Texas* with the drumbeat and fife of a military march. Graham noted Stevens's awareness of how that song told the story of the enslaved African-American woman that Santa Ana took into his tent just before the Battle of San Jacinto. He quoted early versions of *The Yellow Rose of Texas* from the late 1800s and early 1900s far more racist than any version played in public in recent years.

For the next two minutes, Bick and Sarge brawl. Sarge, as massively muscled as a prize-fighter, slowly gains the upper hand, landing blow after blow on Bick as Leslie, Juana, and little Jordy helplessly look on. Bick lands some punches, too, but after two minutes lies on the floor so pulped bloody and bruised he cannot rise again. Leslie rushes to his side. Sarge walks to

the wall, lifts the sign from its hook, and throws it atop the sprawled Bick. The sign reads, "WE RESERVE THE RIGHT TO REFUSE SERVICE TO ANYONE."

Back at Reata Ranch, a bruised and blue Bick laments his failure to defend the Benedict family's honor with his fists. But Leslie replies that his willingness to fight made him her hero. She loves him because he stood and fought. He now looks on little Jordy as his own. The film ends with the triumph of traditional values of honor and courage, but also with an awakened social conscious unwilling to tolerate a racism that threatens the rich as well as the poor.

Aware that those in his audience valued legal history as much as historic Hollywood, Don Graham linked the film's box office success to the success of the civil rights movement that soon followed. The same year Stevens won his Best Director Oscar, Texas Senator Lyndon B. Johnson shepherded the Civil Rights Act of 1957 through the Senate, leading to its enactment on September 9, 1957. That voting rights bill was the first federal civil rights law Congress passed since the Civil Rights Act of 1875. Three years later, the Civil Rights Act of 1960 augmented the power of federal judges to protect voting rights while requiring local governments to maintain comprehensive voting records for federal review.

Graham noted that seven years after Stevens's victory at the Academy Awards, President Lyndon B. Johnson signed the Civil Rights Act of 1964 on July 2, 1964. In addition to outlawing discrimination based on race, color, religion, sex, and national origin, it prohibited racial discrimination in restaurants of the kind depicted in *Giant*.

Don Graham ended a powerful commentary on the role of culture in shaping Texas law. In return, Graham received both a Goode Company pecan pie and a warm round of applause from the Society's trustees, officers, and staff.

As for me, I'm looking forward to April 10, 2018, when I can buy Don Graham's book *Giant: Elizabeth Taylor, Rock Hudson, James Dean, Edna Ferber, and the Making of a Legendary American Film*.

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TSHA Annual Meeting 2018: Laying Down Early Texas Law

By David A. Furlow

The Society is proud to present a special panel program, “Laying Down Texas Law: From Austin’s Colony through the Lone Star Republic,” at the Texas State Historical Association’s Annual Meeting, March 8-10, in San Marcos. For more information about registration, hotel, meetings, and parking, see <https://www.tshasecurepay.com/annual-meeting/> and <https://www.tshasecurepay.com/annual-meeting/events-2/>.

The Society’s program, Session 13 at the TSHA Annual Meeting, will begin promptly at 2:00 p.m. and end at 3:30 p.m. on Thursday, March 8, in Veramendi Salon B, Hilton/Embassy Suites San Marcos Hotel & Conference Center, [1001 E. McCarty Ln @ I-35, San Marcos, Tx. 78666](https://www.tshasecurepay.com/annual-meeting/sessions). See <https://www.tshasecurepay.com/annual-meeting/sessions>. 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 titled “Alcaldes and Advocates in Stephen F. Austin’s Colony, 1822 through 1835.” Justice Boatright will 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.



Left: Justice Jason Boatright, Texas Court of Appeals for the Fifth District in Dallas. Right: Portrait of Stephen F. Austin. Texas State Library and Archives Commission, Wikimedia Commons.



Left and center: Letter from José Félix Trespalacios, Governor of Texas, instructing Baron de Bastrop, Commissioner of Austin’s Colony, to let colonists select alcaldes, November 10, 1823. Texas General Land Office, Spanish Collection. Right: Original returns of the San Felipe de Austin alcalde election of 1823. Stephen F. Austin Papers, UT Austin Briscoe Center for American History. Photos by Jason Boatright.

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, “The Toughest Bar in Texas: The Lawyers and Future Supreme Court Judges Who Won Texas’s Freedom at the Alamo and San Jacinto.”



Left: Dylan Drummond, Gray Reed law firm. Right: Painting of the Battle of San Jacinto, Texas State Library and Archives, Wikimedia Commons.

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

This great panel will explore the foundations of Texas law and history. All trustees, officers, and members of the Society should consider attending. But arrive early, my friends. Last year it was standing room only to see the Society’s panel at the 2017 Annual Meeting.

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Historic Portrait Ceremony Honors Reconstruction Judges Wesley Ogden and Colbert Coldwell

Photos by Mark Matson



On January 10, a special ceremony was held in the Supreme Court Courtroom to dedicate the portraits of two Supreme Court judges from Texas's Reconstruction era—Chief Justice Wesley B. Ogden and Justice Colbert Coldwell. The pictures below show some of the highlights of the ceremony, which was cosponsored by the Texas Supreme Court and the Society.

The Spring 2018 issue of this Journal will include more photos and a full story about this important event and the men who were honored.



Portraits of Chief Justice Wesley Ogden (left) and Justice Colbert Coldwell (right) were displayed in the Supreme Court Courtroom during the ceremony. Ogden served on the Texas Supreme Court from 1870 to 1874; Coldwell served from 1867 to 1869.

Former Chief Justice Wallace Jefferson shared his thoughts about the stories judicial portraits tell, including his own as the first African American to serve on the Texas Supreme Court.



Society Trustee Bill Ogden, a great-grandson of Chief Justice Wesley Ogden, told the story of the long journey that began with the post-Reconstruction rejection of his ancestor's legacy and culminated in the acceptance of his portrait by today's Supreme Court.



Colbert Coldwell (standing at podium) shared the story of his great-grandfather's contributions to the Court in the tumultuous post-Civil War period in Texas.



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Come Join Us for the Spring 2018 Members Meeting and Bush Presidential Center Tour

By Cynthia Timms

Our Spring 2018 meetings will occur on Wednesday, March 28, 2018, at the offices of Greenberg Traurig, LLP, 2200 Ross Ave., Suite 5200, Dallas, TX 75201. Trustees should arrive by 10:00 a.m. to attend the Board of Trustees meeting. Non-trustee members of the Society are encouraged to attend the Members Meeting, which will begin at 11:30 a.m. at the same location.

For directions to the Greenberg Traurig offices, go to the “get directions” link at <https://www.gtlaw.com/en/locations/dallas>. When you are in the building lobby, you will need to go to an elevator bank that has Greenberg Traurig’s name and is for floors 40-54 and the Sky Lobby. In the elevator, push the button for “SL.” When you arrive at the Sky Lobby, you will need to find the east elevator bank. From there, you can push the button for 52, and you will arrive at the Greenberg Traurig main lobby area. (If you go to the west elevator bank, there is no button for the 52nd floor.)

Parking is in a garage beneath the building and can be accessed from either Ross Avenue or San Jacinto Street. Greenberg Traurig will validate your parking.



Harriet Miers

At noon, following the Members Meeting, all trustees and members, as well as members of the judiciary, are invited to enjoy a free, catered lunch. Our speaker will be Ms. Harriet Miers, whom Justice Wainwright will present in a question-and-answer format.

Ms. Miers served in the administration of President George W. Bush from 2001 to 2007 as Staff Secretary, Deputy Chief of Staff for Policy, and Counsel to the President. She was with the President on September 11, 2001, and has served on the board of the George W. Bush Presidential Center. Prior to serving at the White House, Ms. Miers logged a series of firsts: first woman hired at the Dallas firm of Locke Purnell Boren Laney & Neely (1972); first woman President of the Dallas Bar Association (1985); and first woman President of the Texas State Bar (1992).

Ms. Miers is the recipient of many awards, including the Sandra Day O’Connor award from the Texas Center for Legal Ethics and Professionalism; the Robert G. Storey Award for Distinguished Achievement from the SMU Dedman School of Law; the Department of Justice Edmund J. Randolph Award for her “dedicated service to justice, the President, and the United

States of America”; and the Agency Seal Medal awarded by the Central Intelligence Agency.

If you’d like to attend the lunch, you must RSVP to me at ctimms@lockelord.com or to Mary Sue Miller at tschs@sbcglobal.net by March 21, 2018.

Following the lunch, the Society will present a program from 1:30 to 3:30 p.m. at the George W. Bush Presidential Center, which will be showing a special exhibit on *First Ladies: Style of Influence*. The exhibit examines how the role of the First Lady has evolved over time, and how First Ladies have used their position to advance diplomacy and other social, cultural, and political initiatives. It will examine the impact of a number of First Ladies, including Laura Bush, Barbara Bush, Jackie Kennedy, Dolley Madison, Michelle Obama, and Eleanor Roosevelt. Ms. Harriet Miers will be our tour guide.



Exterior of the Bush Presidential Center in spring.
Photo by Andrew Kaufmann, George W. Bush Presidential Center.

The George W. Bush Presidential Center is at 2943 SMU Boulevard, Dallas, Texas 75205. For directions on how to get there, please go to <http://www.bushcenter.org/plan-your-visit/directions-and-parking.html>. We will gather inside the main entrance area at 1:30 p.m. If you need transportation to the Presidential Center, please contact ctimms@lockelord.com. If you would like to attend, RSVP to ctimms@lockelord.com by March 21, 2018.



CYNTHIA TIMMS is Chair of the Locke Lord law firm’s Appellate Section in Dallas.

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Justice Jimmy Blacklock Joins the Texas Supreme Court in January



On January 2, 2018, Governor Greg Abbott appointed and swore in Jimmy Blacklock to the Texas Supreme Court following Justice Don Willett's confirmation to the U.S. Court of Appeals for the Fifth Circuit.

Justice Blacklock was born and raised in Texas and received his undergraduate degree from the University of Texas. Following graduation, he attended Yale Law School, where he received his J.D. in 2005. He honed his legal skills serving as a clerk for Judge Jerry Smith on the Fifth Circuit Court of Appeals. President George W. Bush then appointed him to a position in the Civil Rights Division within the United States Department of Justice.

More recently, Mr. Blacklock served as Governor Abbott's General Counsel after six years in the Texas Attorney General's office.

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Chief Justice Hecht and Florida Chief Justice Labarga Address Access to Justice in the Wake of Hurricanes Harvey and Irma

By Dylan O. Drummond



This past October, Chief Justice Nathan L. Hecht and Florida Chief Justice Jorge Labarga were featured panelists at a Harvard Law School forum discussing the strains on legal-aid networks and access to justice each state faced following two of the most destructive hurricanes in our nation's history. The panel was moderated by the former Chief Judge of New York, Judge Jonathan Lippman.



Florida Chief Justice Jorge Labarga

Each Chief Justice also addressed what efforts their courts undertook in response to the storms. In Texas, these efforts included allowing for: (1) the suspension of statutes of limitation for claims delayed by the disaster; (2) disaster-caused delays to constitute good cause for modifying or suspending deadlines; (3) out-of-state attorneys to temporarily practice in Texas; (4) attorneys to pay their state bar membership dues late; and (5) certain courts in disaster-affected areas to hold court in neighboring, unaffected counties.

Video of this panel discussion may be viewed at: <https://www.facebook.com/LegalServicesCorporation/videos/vb.119095738221297/1064318813698980/?type=2&theater>.

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Grand Opening of a New Visitor's Center and Museum at San Felipe

By David A. Furlow

Anyone interested in Justice Jason Boatright's 2018 TSHA Annual Meeting presentation, "Alcaldes and Advocates in Stephen F. Austin's Colony, 1822 through 1835" or fascinated by Dylan Drummond's paper, "The Toughest Bar in Texas: The Lawyers and Future Supreme Court Judges Who Won Texas's Freedom at the Alamo and San Jacinto" can learn more about some of early attorneys, judges, and courts in Texas by visiting the San Felipe de Austin State Historic Site.

According to Bryan McAuley, Site Manager of the San Felipe de Austin and Fannin Battleground State Historic Sites, San Felipe "played a pivotal role in events that led to the Texas Revolution, yet this story is not nearly as well known or understood as others in the chronicles of Texas history, including the Alamo and San Jacinto."

At San Felipe, a new town of log cabins and clapboard buildings arose in 1820s-era frontier Texas. San Felipe was the political, legal, and economic capital of Stephen F. Austin's new colony, a settlement in the Victoria District of the Mexican twin-state of Coahuila y Texas.

Samuel May Williams, the postmaster, initiated regular mail service in 1826 at the hub of seven converging postal routes. Texas's newspaper business began there with the September 25, 1829 publication of the *Texas Gazette*. Gail Borden first published the *Telegraph and Texas Register* there on October 10, 1835, and later made it the journal of the revolution. By the eve of the Texas Revolution, San



Top: Stephen F. Austin designed his own flag for the colony centered on San Felipe. Bottom: A replica of an early Texas printing press stands in the current Visitor's Center.

Felipe's population had reached 600, while many settlers lived nearby.

A small, crowded, and largely obsolete visitor's center houses historical signboards, artifacts excavated at the site and nearby, a scale model of the capital as it existed in 1830, and a plat showing the location of streets, buildings, and the Brazos River.

But soon, a new visitor's center and museum will show visitors much more. Opening on April 27, 2018, the new 10,000-square-foot museum will house interactive educational displays, historical dioramas, photographs, stories of life among the Old 300 Colony Settlers, their friends and slaves, and artifacts that resulted from archaeological excavations. The Texas Historical Commission's quarterly Commissioners' meeting will conclude with the formal opening of the new San Felipe de Austin visitor's center and museum at 1:30 p.m.



These renditions depict the new San Felipe de Austin visitor's center and museum scheduled to open on Friday, April 27, 2018. Images courtesy of the Texas Historical Commission and Bryan McAuley.

The Texas Historical Commission is celebrating Opening Weekend on Saturday and Sunday, April 28 and 29, 2018. A wide variety of special programs will be offered, including staffed custom tours, VIP program presenters, and hands-on activities for all ages.

Special weekend programming will continue throughout the month of May to celebrate the opening of the museum. The museum will also be open from 9:00 a.m. to 5:00 p.m. seven days a week.

The San Felipe de Austin site is located at 15945 FM 1458, in San Felipe, Texas, about a mile north of I-10. For more information go to www.visitsanfelipedeAustin.com or call 979-885-2181.

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Celebrating the Legacy of Heman Marion Sweatt

Story and photos by David A. Furlow



Anyone who has watched the University of Texas Longhorns football team, whether live, on television, or on a screen, has heard Walter Cronkite's voice intoning, "What Starts Here Changes the World."¹ The dedication of University of Texas Law School student Heman Marion Sweatt's portrait by the Law School proved the truth of the motto on the quiet afternoon of Thursday, February 15, 2018. The application for admission Sweatt submitted to the university's Registrar at the base of UT's Tower in 1946 changed the world.

The portrait dedication occurred during the UT Law School's annual Celebration of Diversity. The celebration's series of events began with a speech by a graduate of UT Law School, Chief Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit, sponsored by the Center for Women in Law. The celebration continued through Friday with presentations about U.S. Supreme Court Justice Thurgood Marshall's contributions to American jurisprudence.

UT Law School Dean Ward Farnsworth dedicated the portrait, paid for by the Law School's faculty, to make Heman Marion Sweatt's story known to a wider audience. In 1946, Sweatt, an African-American postman and NAACP activist living in Houston, applied for admission to

¹ "What Starts Here Changes the World," *University of Texas Horns UP website*, <https://www.utexas.edu/>.

the University of Texas Law School. Sweatt satisfied all academic requirements for admission. But Sections 7 and 14 of Article VII of the Texas Constitution of 1876 and state statutory law restricted admission to the university to whites, and Sweatt's application was automatically rejected because of his race. When Sweatt asked the state courts to order his admission pursuant to the guarantee of equal treatment under the law provided by the Fourteenth Amendment to the U.S. Constitution, the university attempted to provide separate but equal facilities for black law students by creating a separate law school in Houston.

University of Texas constitutional law professor Sandy Levinson provided an overview of the case's constitutional background. A Travis County district court held that a newly established state law school for Negroes offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," and denied mandamus to compel his admission to the University of Texas Law School. The Austin Court of Civil Appeals affirmed the trial court's judgment.² The Texas Supreme Court denied writ of error.

After Texas state courts refused to order the University of Texas Law School to admit him, Sweatt filed a petition for *certiorari* in an appeal to the U.S. Supreme Court. His petition asked whether the Texas law school admissions scheme violated the Equal Protection Clause of the Fourteenth Amendment. In *Sweatt v. Painter*,³ a unanimous decision authored by Chief Justice Vinson, the U.S. Supreme Court held that the Equal Protection Clause required that Sweatt be admitted to the university. The Court found, first, that Sweatt had been denied admission to the University of Texas Law School solely because he was African American, and that he had been offered, but had refused, enrollment in a separate law school newly established by the state for Negroes.

The University of Texas Law School had sixteen full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes had five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association, and one alumnus admitted to the Texas Bar, but it excluded from its student body members of racial groups that numbered 85 percent of the population of the state, including most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner would deal as a member of the Texas Bar. The U.S. Supreme Court concluded that the separate school would be inferior in faculty, course variety, library facilities, legal writing opportunities, and overall prestige. The Court also found that the mere separation from the majority of law students harmed students' abilities to compete in the legal arena.

During the Law School portrait dedication event, Dean Ward Farnsworth introduced a special keynote lecturer: Professor Randall Kennedy of Harvard Law School. As Harvard's Michael R. Klein Professor of Law, Professor Kennedy focuses on racial conflict and legal institutions in American life. No stranger to controversy, Kennedy is widely known for writing *Interracial Intimacies: Sex, Marriage, Identity and Adoption*; *Nigger: The Strange Career of a Troublesome*

² *Sweatt v. Painter*, 210 S.W.2d 442 (Tex. Civ. App.—Austin 1947, writ denied).

³ 339 US 629 (1950).



Harvard University Law School Professor Randall Kennedy discusses the *Sweatt v. Painter* decision's legal legacy.

Word; Race, Crime, and the Law; Sellout: The Politics of Racial Betrayal; and The Persistence of the Color Line; as well as for writing articles for The Nation, the Atlantic, and The Boston Globe.

In a searing, twenty-minute presentation before an audience packed into the Law School's Eidman Courtroom, "*Sweatt versus Painter Reconsidered*," Professor Kennedy examined a series of uncomfortable truths about Heman Sweatt's Fourteenth Amendment challenge to those provisions of the Texas Constitution that kept the University of Texas Law School lily-white until 1950. "A huge amount of time and energy went into keeping Sweatt out of UT Law School," Prof. Kennedy noted. "The story of the deceptions, the lies, the fraudulence, by the judges who held that the Negro Law School was the equivalent of the University of Texas, deserves to be unfurled... When the Court of Civil Appeals noted that Sweatt was the first Negro to apply to the University of Texas, it memorialized the success of the white supremacist system in discouraging African-Americans from even trying to get in. The U.S. Supreme Court's *Sweatt v. Painter* decision did not discuss the day-to-day realities of segregation, describe how the Jim Crow system arose, or end the Separate but Equal Doctrine, Kennedy observed, but it did prove to be a "strong blow against the Pigmentocracy."

Soon after the end of Professor Kennedy's speech, Dean Farnsworth commenced the unveiling of a new portrait of Heman Sweatt in the Susman Godfrey Atrium. University President Greg Fenves celebrated Heman Sweatt as the kind of student UT seeks today: engaged, scholarly, and well-rooted in the community.

Dean Farnsworth then introduced University of Texas administrator and historian Gary Lavergne, the author of *Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice*,⁴ *A Sniper in the Tower: The Charles Whitman Murders*,⁵ and many other books and articles about Texas history and culture, regaled the audience with stories about Heman Sweatt, his activism on behalf of the NAACP, and his family life.

"On Emancipation Avenue in Houston's Third Ward, a thoroughfare once named for a Confederate lieutenant stands the Wesley Chapel A.M.E Church," Lavergne announced, setting the scene for the unveiling of Sweatt's portrait at the Law School:

⁴ (Austin: University of Texas Press, 2010).

⁵ (Denton: University of North Texas Press, 1997).

In early October of 1945, during an evening meeting, Ms. Lulu White presented an overview of an NAACP search for a plaintiff for what was then called the University of Texas Law School case. Her presentation included what must have been a near-desperate plea for someone to step forward....Heman Marion Sweatt, a thirty-two-year-old mail carrier, stood up, and with a “soft but certain voice . . . said he would do it.”

Lavergne then described the support this humble Houston postman and dedicated NAACP activist received from “a family as remarkable as any American family who ever lived”:

His father, James Leonard Sweatt, Sr., was the son of a former slave who had been marched to Texas during the Civil War. Leonard grew to become one of the first African Americans to earn a degree from a public college in Texas. “Papa” Sweatt stood five feet six inches tall. As an adult he was thin, balding, and bespectacled—yet everyone knew he was a “forceful man of great dignity.” More than a few residents of the Third Ward considered him a “Great Prophet.”

Heman Sweatt had four siblings who lived to adulthood. They lived with parents who refused to allow their children to believe they could not compete with Whites enrolled in exemplary public and exclusive private schools. Sweatt and his brothers and sisters, all of them, not only went to college, but earned advanced degrees, an accomplishment that is remarkable even today—for anyone.

Lavergne then introduced Sweatt’s daughter, Hemella Sweatt.

Hemella spoke of the importance of continuing her father’s dedication to education. She brought her two children with her to witness the unveiling of their grandfather’s portrait in the law school that at first opposed his admission, then accepted him and, later, celebrated his attendance. She talked about how serious a man Heman Marion Sweatt was, of his suffering, his triumph, and his love of family.

The dedication was a remarkable day for Texas, UT Law School and its faculty, and the Sweatt family. The portrait dedication helped close the baleful legacy of Jim Crow and celebrated the triumph of civil rights in Texas and America. To quote Gary Lavergne,

On occasions like this, it is worthy to ponder what Jim Crow cost us as a nation. How many more architects could we have had to build magnificent structures? How many more scientists could we have had to make unimaginable discoveries? How many more physicians could we have had to treat us when we were sick and cure the diseases that plague us? How many more artists could we have had to make our world more beautiful? And yes, how many more lawyers could we have had to pursue justice?

Beyond *Sweatt v Painter*...Heman Marion Sweatt...is what we desperately need more of today. He never responded to bad manners with more bad manners. He



Clockwise from top left:

UT Admissions Research and Policy Analysis Director and historian Gary M. Lavergne.

Heman Marion Sweatt registers for classes in the University of Texas School of Law on September 19, 1950.⁶

University of Texas Law School Dean Ward Farnsworth welcomes Sweatt back to the Law School.

Heman Sweatt's daughter Hemella Sweatt proudly stands beside her father's recently unveiled portrait.



responded to hate and intolerance with class and dignity. His response to ignorance was scholarship. He was a quiet and humble man who did great things and asked for nothing more than to be treated, in this country, as an adult and citizen.

A new portrait celebrates the diversity of UT Law School's faculty, student body, and state. The legacy of Heman Marion Sweatt proves, once again, that "what starts here changes the law."

⁶ "Heman Sweatt and Sweatt v. Painter," Tarleton Law School website, <http://tarlton.law.utexas.edu/heman-sweatt>. Photo courtesy of the Dolph Briscoe Center for American History.

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Calendar of Events

Society-related events and other events of historical interest

Winter 2018

The Museum of the Coastal Bend continues 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>.

Winter 2018

The Bob Bullock Texas History Museum’s “La Belle: The Ship That Changed History” exhibition continues in the Museum’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 2018

The J.P. Bryan Museum presents its “Eyes of Texas: A Century of Artistic Visions” exhibition. This “Eyes of Texas” presentation provides a chance to see the evolving artistic visions that helped to shape Texas. By focusing on the years between 1850 and 1950, these works highlight the artistic search for a regional identity. <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>.

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, “The Toughest Bar in Texas: The Lawyers and Future Supreme Court Judges Who Won Texas’s Freedom at the Alamo and San Jacinto.”

David Furlow, a Fellow of the Society and Executive Editor of the *Texas Supreme Court Historical Society Journal*, will serve as Commentator to address questions from the audience and 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 22, 2018

The Museum of the Coastal Bend in Victoria, Texas, presents its John W. Stormont Lecture *Historic Homes of Victoria, Texas*. Presented by Jeff Wright, Director, Victoria County Heritage Department and Executive Director of Victoria Preservation, Inc., this Thursday night, March 22, 5:30 p.m. lecture will explore the architecture and life of Victorian Texas. For more information, see <http://www.museumofthecoastalbend.org/>.

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 78704. For more information, see <http://austinhistory.net/events/85th-ahc-birthday-waterloo-press-open-house/>.

March 28, 2018

10:15 a.m. The Texas Supreme Court Historical Society's Board of Trustees' Spring 2018 meeting begins at the offices of Greenberg Traurig, 2200 Ross Ave., 52nd Floor, Dallas, Texas. Afterwards, Harriet Miers takes trustees and members on a tour of the George W. Bush Library at 2943 SMU Blvd., Dallas, Texas 75205.

April 27, 2018

The Texas Historical Commission will open its new Visitor Center at San Felipe de Austin State Park. The Grand Opening will occur at 1:30 p.m. on April 27, 2018, the first day of a three-day Grand Opening weekend. See the News Item in this issue of the *Journal*. The San Felipe de Austin site is located at 15945 FM 1458, in San Felipe, Texas, about a mile north of I-10. For more information go to www.visitsanfelipedeaustin.com or call 979- 885-2181.

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 at the Marriott Marquis Hotel 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>.

September 7, 2018

The Society's Annual John Hemphill Dinner will occur at the Four Seasons Hotel in Austin. Justice Dale Wainwright, the Society's 2017-18 president, will preside over the evening program. For ticket information, visit the Society's website at <http://www.texascourthistory.org/hemphill> or email tschs@sbcglobal.net.

September 14-15, 2018

The Texas General Land Office's 9th Annual Save Texas History Symposium returns to San Antonio's historic Menger Hotel to focus on "San Antonio and the Alamo: Connecting Texas for Three Centuries." The Menger Hotel is located at [204 Alamo Plaza San Antonio, TX 78205](http://www.tglo.state.tx.us/204-Alamo-Plaza-San-Antonio-TX-78205).

The symposium will examine the 300-year history of San Antonio, including the Alamo. Cost: \$100 (which includes registration to the Saturday symposium; a Friday afternoon workshop on studying Texas history at Alamo Hall; a Friday evening tour of the Alamo & reception; a Saturday evening shuttle & reception at the Witte Museum for the closing of the GLO's latest exhibit, *Connecting Texas: 300 Years of Trails, Rails and Roads* (opening Feb. 15, 2018). It's a bargain! The symposium is limited to only 200 registrants. Speakers signed on so far: Frank de la Teja, Amy Porter, James Crisp, Mark Allan Goldberg, Everett L. Fly, Laura Hernandez-Ehrisman, Gregory Garrett, and Douglass McDonald. Alamo Battlefield Tours and Pioneer Surveying of the Alamo will also be offered.

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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 11 new members since June 1, 2017.

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Larry E. Cotten

Jarrod Foerster

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Jake Ritherford

Richard Schechter

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

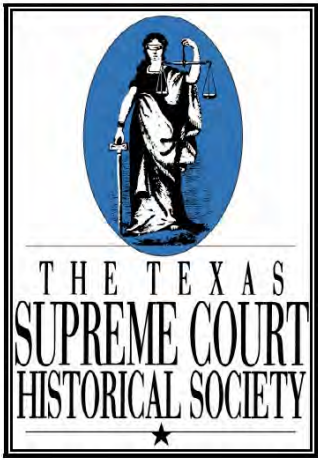
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

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.

Join online at <http://www.texascourthistory.org/Membership>.

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