



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2019 Vol. 8, No. 2 General Editor Lynne Liberato Executive Editor David Furlow

Columns

Message from the President

By Marcy Hogan Greer

In November, we held the Great War Commemoration in the Historic Supreme Court Courtroom in honor of the 100th anniversary of the Armistice that ended World War I.

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Marcy Hogan Greer

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By Sharon Sandle

Each year, the Society sponsors a session at the Texas State Historical Association Annual Meeting.

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This issue of the *Journal* examines tools used by people who want more out of life and demand it sooner rather than later—often through a petition or a remonstrance. [Read more...](#)



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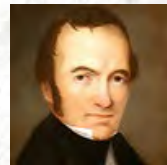
Leads

America's Forgotten Freedom: The Development, Meaning, and Significance of the Petition Clause

By Chad Baruch

Nestled quietly at the end of the First Amendment, the Petition Clause appears to the modern eye "almost like an afterthought. . . ."

[Read more...](#)



Stephen F. Austin, imprisoned for conveying a petition

And Still He Rose: William A. Price, Texas's First Black Judge and the Path to a Civil Rights Milestone

**By John G. Browning and
Hon. Carolyn Wright**

The history of Texas's earliest African American lawyers has been, until recent years, among the most neglected chapters in Texas legal history.

[Read more...](#)



Hon. W.A. Price

Chief Justice Jack Pope: Common Law Judge and Judicial Legend

**By Marilyn P. Duncan and
Benjamin L. Mesches**

Chief Justice Jack Pope is widely acknowledged in the legal community as one of the Texas judiciary's brightest stars. [Read more...](#)



Jack Pope as a UT law graduate

Embarking on a Journey of Research

By Hon. Jason Boatright

Why were there different versions of the preamble to the Texas Constitution? Which version was correct? Were there different versions of other parts of the Constitution?

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Research resulted in an exhibition at the Bob Bullock Texas State History Museum

Justice Phil Johnson Has Been a Guiding Light for Public Service

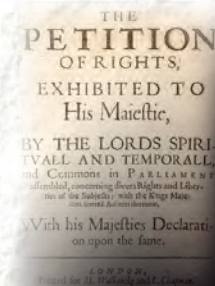
By Hon. Jeff Brown

Justice Phil Johnson retired from the Texas Supreme Court on December 31, 2018 after 13 years of distinguished service.

[Read more...](#)



Justice Phil Johnson



News & Events

In Memoriam:

Justice C. L. Ray, Jr., 1931-2018

By Osler McCarthy

Retired Justice C.L. Ray Jr., a progressive who served on the Texas Supreme Court for 10 years, died December 9, 2018. [Read more...](#)



Justice
C. L. Ray, Jr.

Great War Commemoration a Great Success

By David A. Furlow

Our Society's Great War Commemoration took place on November 14, 2018 in the Historic Supreme Courtroom in the Capitol. [Read more...](#)



Guests filled
every seat

Texas Constitutionalism: TSHA 2019 Annual Meeting

By David A. Furlow

The Society will present a panel on "The History of Texas's Constitutions, 1827 and Beyond" at the Texas State Historical Association (TSHA) 123rd Annual Meeting. [Read more...](#)



TSHA logo

Spring Board and Members Meeting to Be Held at San Felipe de Austin Museum

By David A. Furlow

Plan now to attend the meeting of the Society's Board of Trustees and Members at the San Felipe de Austin Museum and Visitors' Center on March 28, 2019. [Read more...](#)



Statue outside
the Visitor's
Center

Society Cosponsors Supreme Court History and Procedure Course

By Lynne Liberato and Richard Orsinger

In conjunction with the State Bar, the Society will sponsor the Texas Supreme Court: History & Current Practice Course in Austin on Friday, April 12, 2019. [Read more...](#)



Texas Law
Center, site for
the course

Texas Appellate Hall of Fame Inducts Six New Members

By Marilyn P. Duncan

Six new honorees were inducted posthumously into the Texas Appellate Hall of Fame last fall: Chief Justice Carlos C. Cadena, Chief Justice Clarence A. Guittard, Chief Justice Adele Hedges, Justice Shirley W. Butts, appellate practitioner Charles Lunn Black, Sr., and appellate practitioner Hobart Price, Sr. [Read more...](#)

Lynne Liberato Gives Keynote Address at Naturalization Ceremony

Former TSCHS Society President Lynne Liberato presented the keynote address to new Americans at a naturalization ceremony in Houston in December. [Read more...](#)



Lynne Liberato

Membership & More

Calendar of Events

Officers, Trustees & Court Liaison

2018-19 Membership Upgrades

2018-19 New Member List

Join the Society

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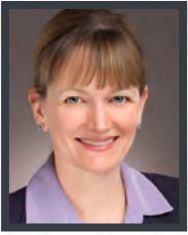
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Marcy Hogan
Greer

Message from the *President*

In November, we held the Great War Commemoration in the Historic Supreme Court Courtroom in honor of the 100th anniversary of the Armistice that ended World War I. We honored the eight Texas Supreme Court Justices, two Court of Criminal Appeals Judges, and three Governors who served in the Great War. The speakers included Justice Paul Green, Justice Jeff Brown, Judge Mark Davidson, Bryan Garner, David Furlow, Governor Beauford Jester's granddaughter, Alice Jester Berry, and Warren Harris. The tributes were so inspiring and moving. A video of the entire program can be found here: <https://www.youtube.com/watch?v=RBvryBxcGSI>. David Furlow has provided a detailed account of the program, including many photos, in this issue of the Journal.

The Co-Chairs really delivered an incredible program: Judge Mark Davidson shared his research about the Great War at the National World War I Museum and Memorial in Kansas City, Missouri and explained why the Great War still matters. David Furlow presented a beautifully illustrated PowerPoint describing the lives and accomplishments of the judicial honorees. Judge Davidson followed with a similarly fabulous presentation on the three governors whom we honored. Bryan Garner shared a priceless recording of his grandfather, Texas Supreme Court Justice Meade Griffin, talking about his feelings about leaving his family to serve in the war. Alice Jester Berry honored her grandfather, Governor Beauford Jester, with a beautiful tribute. We are also grateful to all the librarians, archivists, and others who helped track down the justices' and governors' service records and photos in various archives and shared them at a World War I-themed reception following the program at the Texas Law Center.

This past December, we also paid tribute to Justice Phil Johnson, who retired from the Supreme Court of Texas after more than 13 years of service. Justice Johnson also served as Chief Justice on the Seventh Court of Appeals in Amarillo before joining the Supreme Court. He leaves a long legacy of service to Texas, both as a highly respected jurist and a decorated Air Force fighter pilot. We will miss his smile, his warm and gracious demeanor, and thoughtful words. And we hope that he and his lovely wife Carla will stay in close touch with the Court and the Society. A video of remarks both from and about Justice Johnson on the occasion of his retirement can be found here: <https://www.youtube.com/watch?v=vGg2ZADmxAY&feature=youtu.be>.

We look forward to a lively Spring, with our Board of Trustees' meeting "taking a roadtrip" on March 28 to the San Felipe de Austin Historic Site, where Stephen F. Austin established a headquarters for his colony in Mexican Texas in 1823. This colonial capital was burned during

the Runaway Scrape as Sam Houston's volunteer forces moved eastward after the fall of the Alamo to their ultimate victory at San Jacinto. It should be an inspiring venue for us to conduct the Society's business and make plans for its future.

We will also present what promises to be another stellar program at the Texas State Historical Association's annual meeting. Former Chief Justice Manuel González Oropeza of the Mexican Federal Election Court will speak about the 1827 Constitution of Coahuila y Tejas, Bill Chriss will discuss the six constitutions of Texas from 1836 to 1876, and our Executive Director, Sharon Sandle, will serve as Commentator. The program is Thursday, February 28, 2019, from 9-10:30 am at the Omni Shoreline Hotel in Corpus Christi. Thank you to our Program Coordinator Extraordinaire, David Furlow, for putting together this blue-ribbon panel.

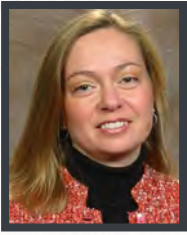
On April 12, the Society will present its biannual History of Texas Jurisprudence CLE program at the Texas Law Center. Lynne Liberato and Richard Orsinger are organizing the program, which includes presentations by Chief Justice Nathan Hecht, Justices Jeff Brown and Jimmy Blacklock, and Court Clerk Blake Hawthorne. See the news announcement in this issue of the Journal for more details.

The Society's Fellows continue to support the Taming Texas Judicial Civics and Court History Project for seventh-grade Texas history students. Our third Taming Texas book is coming out later this year, and we eagerly await its publication. In conjunction with TexasBarBooks, we also look forward to copublishing a book edited by William D. Elliott that will not only chronicle the development of the State Bar, but also provide a history of the practice of law in Texas.

I invite you to take advantage of the educational opportunities available to you as a member of the Society. This spring's TSHA and CLE programs are a great place to start—I hope to see you there.

MARCY HOGAN GREER *is a partner in the appellate boutique of Alexander Dubose Jefferson & Townsend in Austin, Texas.*

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Sharon Sandle

A Thriving *Educational Mission*

*“The advancement and diffusion of knowledge
is the only guardian of true liberty.”*

— James Madison

*“Education is the most powerful weapon
which you can use to change the world.”*

— Nelson Mandela

The mission of the Texas Supreme Court Historical Society is not merely to preserve the history of the Texas Supreme Court but, “[t]hrough research and scholarship, the Society educates the public about the judicial branch and its role in the development of Texas.”

The educational mission of the Society is always reflected in the thoughtful and scholarly articles that appear in the *TSCHS Journal*, but the journal is only one of many educational initiatives undertaken by the Society.

Each year, the Society sponsors a session at the Texas State Historical Association Annual Meeting. This year, the conference will take place from February 28 to March 2, in Corpus Christi. The Society's session is entitled *The History of Texas's Constitutions, 1827 and Beyond*. Society President Marcy Hogan Greer will moderate the panel, Manuel González Oropeza, from Universidad Nacional Autónoma de México, will present his paper *The 1827 Constitution of Coahuila y Texas Blended Mexican and Anglo-American Constitutionalism*, William J. Chriss will present his paper *Six Constitutions of Texas, 1836-1876 and Beyond*, and I have the privilege of acting as commentator for the panel.

On April 12, 2019, the Society and the Appellate Section of the State Bar of Texas will cosponsor a course entitled *Texas Supreme Court: History & Current Practice* at the Texas Law Center in Austin. The course combines practical topics on Supreme Court procedure with topics

that illuminate the history of the Court, such as a review of the school finance cases that have been reviewed by the Court. For those who cannot make it to Austin for the course, it will be webcast live. Registration is available at texasbarcle.com.

But the Society's mission to educate the public about the judicial branch extends beyond lawyers and historians. With publication of the *Taming Texas* book series, the Society seeks to bring educational resources about the history of the Texas judiciary to Texas classrooms. The *Taming Texas* book series is written specifically for seventh-grade Texas history classes. The books describe the development of the court system in Texas from an early Texas with little law and order through 150 years of legal history that reflects the Texas experience. *Taming Texas: How Law and Order Came to the Lone Star State* and *Taming Texas: Law and the Texas Frontier* are available as pdfs and digital e-books [here](#), and hard copies are available for purchase [here](#).

The *Taming Texas* book series is the centerpiece of the Taming Texas Project, which brings Texas lawyers and judges into seventh-grade classrooms to introduce students to the history of the courts in Texas while also giving students the opportunity to meet attorneys and judges from their communities. The program started in the Houston area in collaboration with the Houston Bar Association in 2016, and has reached more than 15,000 students. The program expanded to Dallas this year, and plans are underway to introduce it in Austin soon.

The Society is fortunate to have dedicated volunteers who are willing to travel to the TSHA conference, to CLE events, and to Texas classrooms. But we're also fortunate that in this digital age we can reach people even when they can't attend an event in person. As it was last year, the Society's session at the TSHA conference will be captured on video and will be posted on the Society's Hemphill YouTube channel. The *Texas Supreme Court: History & Current Practice* CLE program will be available in TexasBarCLE's online library, as is the *History of Texas Supreme Court Jurisprudence* course from 2017. As noted above, the *Taming Texas* book series is available for download, and, of course, past issues of the *Texas Supreme Court Historical Society Journal* can also be downloaded [here](#).

Clearly, the Society's educational mission is thriving, and we are all beneficiaries.

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

We are pleased to report that our Taming Texas project has expanded to Dallas. The Dallas Bar Association recently taught Taming Texas at Atwell Law Academy in the Dallas Independent School District. The presentation, by Society Trustees Justice Jason Boatright and Ben Mesches, marked the first time Taming Texas has been presented in Dallas. “We had a blast presenting to these engaged students,” said Mesches. Special thanks go to Dallas Bar Association President Michael Hurst for implementing our program in Dallas. If you would like to volunteer to teach in the Dallas-area schools, please contact Melissa Garcia at mgarcia@dallasbar.org.

Taming Texas will soon be taught in Houston for the fourth year. From April 1 to May 10, the Houston Bar Association (HBA) will again use our Taming Texas materials to teach seventh-grade students. In the past three years, HBA volunteers have reached over 15,000 Houston-area students. Society Trustee Justice Ken Wise and Richard Whiteley will co-chair this year’s HBA program and are currently recruiting volunteer attorneys and judges to teach this Spring. If you would like to participate in this important program, please contact the HBA or one of the co-chairs.

Taming Texas is a wonderful project that teaches middle-school students about judicial civics, the rule of law, and court history and would not be possible without the Fellows. Because of the generosity of the Fellows, we are able to produce the *Taming Texas* books and website, and to continue developing additional works in the series. Our plan is to expand this project to other major Texas cities.

The manuscript for the third book in the Taming Texas series will soon be published. This book is entitled *The Chief Justices of Texas* and will educate readers on the era in which each of the twenty-seven Chief Justices served and why his work was important to the Court. We want to give special thanks to Chief Justice Hecht for all of his support of our Taming Texas project and for writing the foreword for the book. Watch for information on the fourth Taming Texas book. Jim Haley and Marilyn Duncan are co-authors of the series.

Due to the success of the Taming Texas project, we are in the process of considering other worthwhile projects. We encourage you to share with us any ideas you may have.

We are currently nominating new Fellows. If you are not a Fellow, please consider joining

the Fellows and helping us with our important work.

Finally, we are finalizing plans for the annual Fellows Dinner. Please save the date for February 20. Further details will be sent directly to all Fellows.

If you would like more information or want to join the Fellows, please contact the Society office or me.

FELLOWS OF THE SOCIETY

Hemphill Fellows

(\$5,000 or more annually)

David J. Beck, Chair*

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

E. Leon Carter

Kimberly H. and Dylan O. Drummond

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

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.*

Hon. David E. Keltner*

Thomas S. Leatherbury

Lynne Liberato*

Mike McKool, Jr.*

Ben L. Mesches

Nick C. Nichols

Hon. 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. (Randy) Roach, Jr.*

Leslie Robnett

Professor L. Wayne Scott*

Reagan W. Simpson*

Allison M. Stewart

Peter S. Wahby

Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter*

*Charter Fellow

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David A. Furlow

Petition *and* Remonstrance

On June 18, 1053, a 6,000-man Lombard-Swabian army commanded by Pope Leo IX confronted a surging Norman Sicilian army half its size commanded by Robert Guiscard, “the Fox,” at the Battle of San Paolo di Civitate.¹ Anna Comnena, the Byzantine historian, described Guiscard as a man whose

stature was so lofty that he surpassed even the tallest, his complexion was ruddy, his hair flaxen, his shoulders were broad, his eyes all but emitted sparks of fire, and in frame he was well-built . . . this man’s cry . . . put thousands to flight. Thus equipped by fortune, physique and character, he was naturally indomitable, and subordinate to no one in the world.²

Through audacity and tactical genius Guiscard’s outnumbered band crushed their opponents, humbling the Lombards and slaughtering every last Swabian.³ The terrified merchants and landowners of the nearby town the Pope was defending, Civitate, seized the Pope and his bishop and immediately surrendered them to the enemy.

Confronted by a rampaging Norman army commanded by a commander fiercer than any other Norman or Sicilian, Pope Leo condemned Guiscard for murder, robbery, rape, conquest and defilements beyond number. “What do you Normans want?” the Pope demanded. Guiscard gazed upon his defeated opponent, a man dressed in rich purple silk robes with ermine collars, a high ecclesiastic hat, and a gold-encrusted miter. “We want *more*,” Guiscard answered, then paused. “And we want it *now*.”

Yet a petition usually does not include an implied threat of violence. Often it involves a plea for mercy or kindness. When Dickens’ *Oliver Twist* asked, “Please sir, can I have some more?” he, too, was petitioning for relief.

¹ Siggurdson, “Battle of Civitate: Normans Defeat Papal-Lombard Army, Capture the Pope,” *American Legion Burn-Pit Blog* (June 16, 2010), <http://www.burnpit.us/2010/06/battle-civitate-normans-defeat-papal-lombard-army-capture-pope>; Graham Loud, *The Age of Robert Guiscard: Southern Italy and the Northern Conquest (The Medieval World)* (London: Routledge Pub., 2000), 114-16; Will Durant, *The Age of Faith: A History of Medieval Civilization—Christian, Islamic, and Judaic—from Constantine to Dante: A.D. 325-1300* (New York: Simon & Schuster, 1950), 452, 543.

² Anna Comnena (translated from the Greek by E.R.A. Sewter), *The Alexiad of Anna Comnena* (London & New York: Penguin Books, 1969), 54.

³ Siggurdson, “Battle of Civitate,” *American Legion Burn-Pit Blog*; Durant, *Age of Faith*, 543.

This issue of the *Journal* examines tools used by people who want more out of life and demand it sooner rather than later. When such people act peacefully, within the bounds of law, they often file a petition or a remonstrance. For centuries, English and American courts have recognized and protected an individual's right to petition the government for relief or to remonstrate for redress.

Let's consider the most common form of such a request for relief: the humble petition to be released from incarceration by posting a bail bond, a hallmark of Anglo-American justice since 1628, when Jamestown was twenty-one years old and Plymouth colony was eight. In 1628, Sir Edward Coke led Parliament to enact the "Petition of Right" in response to the tyrannical excesses of Charles I, who routinely demanded "forced loans" and "ship money" from noblemen within his realm, then jailed them indefinitely without bail or formal charges if they refused. The Petition of Right statute stated that "no freeman, in any manner as before mentioned, be imprisoned or detained . . ." without being able to secure liberation from jail by posting bond.⁴

An individual who requests a court to grant bail is petitioning a court for relief. In *People v. Dowdye*,⁵ for example, the court discussed how the right to bail emerged from petitions to common law courts and the Parliamentary reform known as the *Petition of Right*:

With its origins in medieval England, bail was first determined by local "Sheriffs," who could use any standard and weigh any factor in determining whether to release a suspect on bail, thereby resulting in widespread abuse of discretion. *History of Bail*, Bail.com: Freedom At Your Fingertips, at <http://www.bail.com/history.htm> (last visited, June 7, 2006). Through a litany of subsequent laws, including the Statute of Westminster (1275), Petition of Right of 1628, and the Habeas Corpus Act of 1677, the groundwork was laid for the subsequent bail statutes adopted by the American legal system.⁶

From the first trials in colonial America until the present, parties have petitioned courts for bail. During the Salem Witch Trials, the accused defendants filed a "most humble petition for bail," but the Massachusetts magistrates denied their request.⁷ The Republic of Texas carried over that tradition of English common law by statute. In *People v. Dowdye*, the court noted that, "[t]he Petition guaranteed that no individual could be held before trial on the basis of an unspecified accusation."⁸

⁴ Sir Edward Coke (edited by Steve Sheppard), *Selected Writings of Sir Edward Coke* (Indianapolis, Indiana: Liberty Fund, Inc., 2003), volume III, xxiii, lxiv, lxiv, 496, 1186, 1225-26; J.A. Guy, "The Origins of the Petition of Right Reconsidered," 328-56, in Allen D. Boyer, *Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke* (Indianapolis, Ind.: Liberty Fund, Inc., 2004), 328-56; John M. Barry, *Roger Williams and the Creation of the American Soul* (New York: Viking, 2012), 67-74, 99-100, 176, 260, 299. Sir Edward Coke's enactment of the Petition of Right and redefinition of Magna Carta as a limitation of royal prerogative have been so important to the protection of Anglo-American liberties that the foremost legal scholars of every generation since the seventeenth century have steadfastly averred that things go better with Coke.

⁵ Crim. No. ST-06-CR-0000128, 48 V.I. 45 (Virgin Islands Sup. Ct. 2006).

⁶ *Ibid.*, 57, 57 n.14.

⁷ AMERICA'S STORY, http://www.americaslibrary.gov/jb/colonial/jb_colonial_salem_1_e.html.

⁸ "History of Bail," *Bail.com: Freedom at Your Fingertips*, <http://www.bail.com/history.htm>.

The First Amendment guarantees not only freedom of speech and freedom of the press but also the “right of the people to peaceably assemble, and to petition the government for a redress of grievances.” In *Garrison v. Louisiana*,⁹ the Supreme Court held that “speech concerning public affairs is more than self-expression; it is the essence of self-government.” And in *Mills v. Alabama*, the Court explained that “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”¹⁰ The First Amendment’s protection of petitioning activities extends to a wide variety of cases. In *Gorman Towers, Inc. v. Bogoslavsky*, the court held that “private citizens and their lawyer were absolutely privileged by the First Amendment to petition for the zoning amendment that caused plaintiff’s damages.”¹¹

Since its adoption by the electorate on February 15, 1876, Article I, Section 8 of the Texas Constitution has guaranteed the right of free speech to all citizens. It protects the right of a bondsman, attorney, or incarcerated defendant to engage in free speech, including such protected activities as petitioning the government for relief, redress and rights:

§ 8. Freedom of speech and press: libel

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press....

Article I, Section 8 grants substantially greater free speech rights than the negatively-phrased First Amendment,¹² as reflected in *Hajek v. Bill Mowbray Motors, Inc.*,¹³ where the Supreme Court of Texas voided an injunction that did *not* violate the First Amendment.¹⁴

The right to exercise free speech and to petition for redress and relief have been inextricably intertwined in Texas since Texas was a province of Mexico. Article I, Section 8 began when Stephen F. Austin drafted a constitution for the Mexican State of Coahuila and Texas in April, 1833.¹⁵ The Republic of Texas broadened that right in the Constitution of 1836.¹⁶ In 1845, the drafters of the first State Constitution preserved that broad free-speech right as Article I, Section 5 of the Constitution:

Every citizen shall be at liberty to speak, write, or publish his opinions on any

⁹ 379 U.S. 64, 74-75 (1964).

¹⁰ 384 U.S. 214, 218 (1966).

¹¹ 626 F.2d 607, 614-15 (8th Cir. 1980). *See also Sawmill Products, Inc. v. Town of Cicero*, 477 F. Supp. 636 (N.D. Ill. 1979).

¹² *See Davenport v. Garcia*, 834 S.W.2d 4, 8-9 (Tex. 1992); *O’Quinn v. State Bar*, 763 S.W.2d 397, 402-03 (Tex. 1988).

¹³ 647 S.W.2d 253 (Tex. 1983) (*per curiam*).

¹⁴ *See ibid.*, 645 S.W.2d at 827, 833-34.

¹⁵ Article I, § 16 of that draft constitution read, “The free communication of thoughts and opinions, is one of the inviolable rights of man; and every person may freely speak, write, print, and publish, on any subject, being responsible for the abuse of that liberty... [with further provisions regarding libels of state officers and jury trials regarding same].” Ernest Wallace, David M. Vigness, and George B. Ward, *Documents of Texas History* (Austin: State House Press, 1994), 80 (emphasis and bold supplied).

¹⁶ Wallace, Vigness, and Ward, *Documents* (emphasis and bold supplied), 105.

subject, being responsible for the abuse of that liberty. No law shall ever be passed to curtail the liberty of speech or of the press.¹⁷

A corresponding right to petition the government for relief and redress appears in Article I, Section 27 of the Texas Constitution. Article 27 reads as follows:

RIGHT OF ASSEMBLY; PETITION FOR REDRESS OF GRIEVANCES. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.¹⁸

That last word, remonstrance, an individual's right to complain of an injury or wrong, is rarely heard today, but is an important part of European, American, and Texas legal history.

Let's travel back in time to a cold night, October 28, 1644, when the Big Apple, New York City, was still known as *Nieuw Amsterdam*. The first popularly elected representatives of the "Commonalty," eight merchants and plantation owners chosen by the common people of that Dutch colony, signed the *Remonstratie van Acht Man van Manhatas*, or *Remonstrance of the Eight Men of Manhattan*. The Remonstrants' Revolt that brought municipal government and a new governor to the Dutch colony of *Nieuw NederLandt*, New Netherland, began when the *Eight Men of Manhattan* sent their remonstrance to the *Heeren XIX*, the High Nineteen Directors, of the West India Company.¹⁹

The *Acht Man*, the Board of Eight Men of Manhattan, complained mightily—they remonstrated—about the cowardice, cruelty, and incompetence of the man the Company had foisted on them as their colonial governor-general, Willem Kieft:

Honored Lords!

This is what we have, in the sorrow of our hearts, to complain of; that one man, who has been sent out, sworn and instructed by his Lords and masters, to whom he is responsible, should dispose here of our lives and properties at his will and pleasure, in a manner so arbitrary that a King dare not legally do the like.

We shall terminate here, and commit the matter wholly to our God; who, we pray and heartily trust, will move your hearts and bless your deliberations, so that one of these two things may happen; that a Governor may be speedily sent with a beloved peace to us; or, that your Honors will be pleased to permit us to return, with wives and children to our dear Fatherland.

For it is impossible ever to settle this country until a different system be

¹⁷ *Ibid.*, 149. The Reconstruction Legislature of 1869 renumbered it as Article I, Section 8.

¹⁸ See, e.g., *Ex Parte Neill*, 32 Tex. Crim. 275, 275, 22 S.W. 923, 923 (Tex. Crim. 1893).

¹⁹ Russell Shorto, *The Island at the Center of the World: The Epic Story of Dutch Manhattan & the Forgotten Colony that Shaped America* (New York: Doubleday/Random House, 2004), 110-45.

Honored Lords! This is what we have, in the sorrow of our hearts, to complain of; that one man, who has been sent out, sworn and instructed by his Lords and masters, to whom he is responsible, should dispose here of our lives and properties at his will and pleasure, in a manner so arbitrary that a King dare not legally do the like.

We shall terminate here, and commit the matter wholly to our God; who, we pray and heartily trust, will move your hearts and bless your deliberations, so that one of these two things may happen; that a Governor may be speedily sent with a beloved peace to us; or, that your Honors will be pleased to permit us to return, with wives and children to our dear Fatherland. For it is impossible ever to settle this country until a different system be introduced here, and a new Governor sent out with more people, who will settle in suitable places, one near the other, in the form of villages or hamlets, and elect from among themselves a Bailiff or Schout and Schepens, who will be empowered to send their deputies and give their votes on public affairs with the Director and Council; so that the entire country may not be hereafter, at the whim of one man, again reduced to similar danger. So long as this is not done, we say, the rural districts can never be cultivated. We respectfully request that the aforesaid may be taken into consideration. We remain, as we are, your Honors' faithful, poor and distressed inhabitants of New Netherland.

Done Manatans this 28th October, A° 1644.

The Remonstrance complained of Willem Kieft. Images from John Romeyn Brodhead, *Documents Relative to the Colonial History of the State of New York* (1853). Public domain.

introduced here, and a new Governor sent out with more people, who will settle in suitable places, one near the other, in the form of villages or hamlets, and elect from among themselves a Bailiff or *Schout* and *Schepens* [Sheriff and Aldermen], who will be empowered to send their deputies and give their votes on public affairs with the Director and Council; so that the entire country may not be hereafter, at the whim of one man, again reduced to similar danger. So long as this is not done, we say, the rural districts can never be cultivated. We respectfully request that the aforesaid may be taken into consideration. We remain, as we are, your Honors' faithful, poor and distressed inhabitants of New Netherland.

Done at the Manatans this 28th October, AN 1644.²⁰

Now, *that's* a remonstrance. It seethes with righteous indignation. Just imagine a group of early American colonists dressed in the black frock coats and broad white ruffs of Rembrandt van Rijn's *Dutch Masters* while quilling a plaintive demand that their company town respect their rights as citizens.

The Remonstrance of the Eight Men of Manhattan was successful, too. The West India Company sacked Willem Kieft, ordered him to report home to Old Amsterdam, and replaced him with a cantankerous Dutch governor general, Peter Stuyvesant, destined to stomp through the history of the American East Coast on his famous wooden leg.²¹

²⁰ See, e.g., John Romeyn Brodhead, edited by E. B. O'Callaghan, *Documents Relative to the Colonial History of the State of New York, Procured in Holland, England, and France* (Albany: Weed, Parsons & Co., Printers, 1856), Volume 1, 209-13.

²¹ Russell Shorto, *The Island at the Center of the World: The Epic Story of Dutch Manhattan & the Forgotten Colony that Shaped America* (New York: Doubleday/Random House, 2004), 146-66.



Rembrandt van Rijn, *The Syndics of the Drapers' Guild* (1662), also known as *The Dutch Masters*. Wikimedia Commons.

Petitions and remonstrances are important because they represent lawful ways of changing the world. That's why we're so proud to publish our lead article, Chad Baruch's "America's Forgotten Freedom: The Development, Meaning, and Significance of the Petition Clause." He begins by quoting the American Bill of Rights' most important amendment—the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Chad does a splendid job of telling the story of the right to petition, from earliest times to the present, from the U.S. Supreme Court to the Texas Supreme Court. He makes a full-throated argument for a broader reading of the petition clause in recognition of its powerful role in protecting the rights of citizens and companies.

Our second article comes to us from John G. Browning and Chief Justice Carolyn Wright. They explore the heroic story of a man who petitioned judges and juries to recognize his and his clients' rights to be treated equally and decently in racially segregated, nineteenth century Texas.

Their article, “And Still He Rose: William A. Price, Texas’s First Black Judge and the Path to a Civil Rights Milestone,” brings to vivid life the story of a man who devoted his life to remonstrating against the inherent inequality of society during the Jim Crow era.

In our third article, our Society’s former President, Ben Mesches, and the *Journal’s* Managing Editor, Marilyn Duncan, share stirring stories about a scholarly man who helped found this Society, in “Chief Justice Jack Pope: Common Law Judge and Judicial Legend.” As a lawyer, Jack Pope crafted petitions for relief and remonstrances for redress on behalf of his clients. As a judge, he decided both, authoring more than a thousand cases, often on issues critically important to Texans or on matters of first impression. As a scholar, he petitioned for many needed reforms of Texas law and remonstrated against the continuation of outdated or unjust rules and procedures.

In our next feature, “Embarking on a Journey of Research,” Jason Boatright, a true legal scholar, discusses the odyssey of discovery that led him past the Scylla of unexamined assumptions about the Preamble to the Texas Constitution and the Charybdis of swirling, utterly inconsistent legal authorities to discover important truths about the simplified Texas pleading system that reshaped the modern legal world. Once you’ve embarked on Jason’s journey of discovery, you’ll tie yourself to the mast rather than suffer the distracting song of siren email or the cyclopean peril of an impending deadline. Jason’s paean to research is a classic example of the dream appellate attorneys seek.

Finally, my article about our Society’s Great War Commemoration remonstrates against television documentaries of the *Ancient Illegal Aliens* variety that speculate, with absurd improbability if not irresponsibility, that Carthaginians, Ch’in, or Celtic armies conquered ancient America. My summary of our Capitol historical adventure and special issue of the *Journal* petitions our Society’s members and the public to pay attention to real history, the history of Texas citizens who answered their nation’s call to make the world safer for democracy.

As our Great War Commemoration Committee Chair Judge Davidson ruefully observed in the Capitol’s Supreme Courtroom on November 14, 2018, American films and documentaries focus on Greatest Generation generals of World War II such as Dwight David Eisenhower, George S. Patton, Omar N. Bradley, and Douglas MacArthur, while ignoring equally dramatic truths about General of the Armies John Joseph “Black Jack” Pershing, Commander of the American Expedition Force in Europe.

It’s time to give heroes and heroines their due—and to take history seriously. Because we want *more from our history*—and we want it *now*.

DAVID A. FURLOW *is an attorney, historian, and archaeologist.*

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America's Forgotten Freedom:

The Development, Meaning, and Significance of the Petition Clause*

By Chad Baruch

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, Amendment I.

The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

TEX. CONSTITUTION, Article I, Section 27.

Nestled quietly at the end of the First Amendment, the Petition Clause appears to the modern eye “almost like an afterthought. . . .” Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORD. L. REV.* 2159, 2159 (1998). In *McDonald v. Smith*, 472 U.S. 479 (1985), the Supreme Court treated it as something less than an afterthought, a redundant clause affording Americans no greater freedom than they already possess under the speech guarantee. Yet the petition right predates freedom of speech in the Anglo-American tradition and represents one of the most cherished protections in our constitutional constellation.

The roots of petitioning run deep in English and American history, long before the founding of Texas. For virtually its entire history, the petition right included an absolute immunity for those exercising it. The strongest judicial expression of this immunity dates to 1688, when an English court concluded that statements made in a petition to the government are privileged and cannot support a libel action.

In recent years, however, American courts have held that statements in a petition can support an action for libel if made with actual malice, apparently in reliance on *McDonald*. But *McDonald* is the target of withering scholarly criticism—and with good reason. *McDonald* is seriously flawed and based on—at very best—suspect historical analysis of the petition right. The Court recently has suggested that it may be reconsidering at least some of its analysis in

* This article is an updated version of a paper prepared for a State Bar of Texas Bill of Rights course in 2008.

McDonald. If so, that would be a welcome development in First Amendment jurisprudence.

Texans should be especially concerned about this trend in petition rights. The Texas Constitution affords broad protection for petitioning. Yet the only Texas court to address the issue recently adopted the *McDonald* analysis and applied it to the Texas Constitution. This article argues (1) that the Supreme Court got it wrong in *McDonald*, and (2) even if *McDonald* were an appropriate statement of the federal right of petition, it should not apply to the Texas petition right.

To understand the proper scope of the right to petition—and to comprehend why the Supreme Court’s analysis in *McDonald* was incorrect and should not be adopted in interpreting the Texas Constitution—requires a review of the history of the right to petition from its beginning. “The right to petition boasts a distinguished pedigree, running from Magna Carta in 1215 through royal commitments in the Petition of Right in 1628 and the Bill of Rights of 1689 to seventeenth- and eighteenth-century parliamentary guarantees of a general right to petition.” Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 Nw. U. L. Rev. 739, 741 (1999) (citations omitted).

The Right of Petition and Magna Carta

The American petition right derives from its English ancestor. The right to petition and concept of immunity share a common history in Parliament’s struggle to assert its claim to be the embodiment of popular will and the ultimate law-making authority. Parliament knew that without immunity, petitioners could be charged by the King with seditious libel and the petition right would lose its meaning. For that reason, development of the right to petition was linked inseparably to immunity for petitioners.

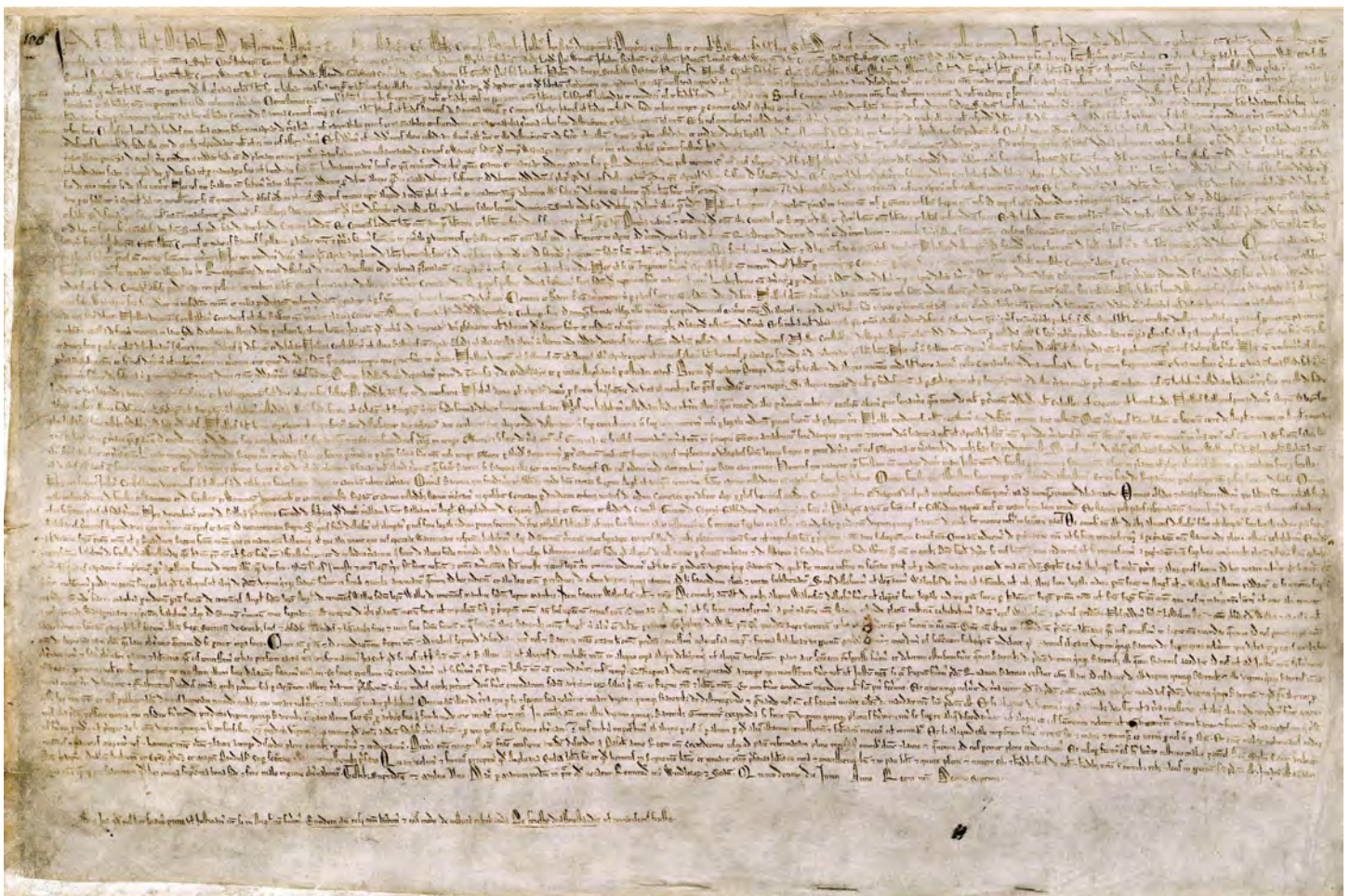
When William the Conqueror conquered England, he retained his lands in Normandy and became overlord of territories on both sides of the English Channel. When William’s grandson, Henry II, ascended to the throne in 1152, he became ruler of vast expanses of land in present-day England and France. Henry II augmented these territories by marrying Eleanor of Aquitaine, only recently freed by the annulment of her marriage to the French king. An effective and competent ruler, Henry II maintained relative control over his empire, formalizing government procedures and developing judicial procedures. At his death, the kingdom was inherited by Henry’s son, Richard the Lionheart.

As his name implied, Richard was a warrior-king whose focus remained conquest both at home and abroad, most famously on his crusade to the Holy Land. Though a competent general, Richard placed tremendous financial strain on the kingdom with his war making, crusading, and particularly by the hefty ransom England paid to redeem him after his capture while returning from the crusade. When Richard died unexpectedly from a war wound at the young age of 42, his younger brother, John, inherited a kingdom stretched across two land masses, burdened by heavy taxation, and coveted by King Philip of France. While historians continue to argue over the competence and legacy of King John, the better evidence tends to suggest that Magna Carta really was the almost inevitable result of an unsustainable kingdom divided by the English Channel.

King John's efforts to preserve and oversee his kingdom required substantial revenue, and the resulting financial strains placed John increasingly at odds with many of his barons. When John returned in defeat from a devastating foray into France in 1214, he found that discontent among the barons had matured into active revolt. Emboldened, the barons presented a series of demands, which John rejected categorically. The barons revolted in civil war. They marched on London and when the city threw open its gates to them, John knew he had to come to terms for peace.

In June 1215, King John met the barons in a meadow at Runnymede and agreed to Magna Carta. The immediate impact was less than impressive. The peace that Magna Carta contemplated failed to last. England again erupted in civil war, which lasted until John's death in October 1216.

Though Magna Carta's beginnings were inauspicious, it has fared better over the course of history. In both England and the United States, Magna Carta is considered the touchstone not only for constitutional liberties, but for the very notion of limited government. Indeed, the prism of history makes it easy to graft present day American sensibilities onto Magna Carta. To the modern eye, Magna Carta seems to establish familiar concepts like privacy, due process, and equal protection under law. But we must exercise caution, for our interpretations of the Great



The Magna Carta (originally, Charter of Liberties) of 1215, written in iron gall ink on parchment in medieval Latin, using standard abbreviations of the period, authenticated with the Great Seal of King John. British Library, "British Library, Manuscript Augustus II.106," Wikimedia Commons.

Charter would shock the men who joined King John at Runnymede. Magna Carta was a practical document directed primarily at defining feudal relationships, formalizing court procedures and the administration of justice, curtailing abuses by local officials, and establishing rules for the administration of decedents' estates.

Of course, "the chief value of the Charter did not lie in its specific provisions. Many who knew little and cared less about the contents of the Charter have, in nearly all ages, invoked its name, and with good cause, for it meant more than it said. For one thing, it was a code of law . . . established by royal charter at the prompting of the king's subjects. As such, it . . . implied that government should not be conducted to the damage of the governed." W.L. WARREN, *KING JOHN* 240 (1978).

Magna Carta also constitutes the first formal expression of the right to petition. The charter permitted petitions by barons to the King notifying him of any failure to observe pledges guaranteed by the charter:

[I]f we or any of our justiciar or our bailiffs or any of our servants offend against anyone in any way, or transgress any of the articles of peace or security, and the offense is indicated to four of the aforesaid twenty-five barons, those four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we have it redressed without delay.

J.C. HOLT, *MAGNA CARTA* 333-35 (1965). From its first expression, then, the right to petition represented the means by which citizens enforced other rights guaranteed to them, and checked infringements on them by the government.

During the 300 years following Magna Carta, the petition right became an important and cherished part of the English constitutional fabric:

Petitioning came to be regarded as part of the Constitution, that fabric of political customs which defined English rights. That is, by its use, petition came to be such a clear part of English political life that, certainly by the seventeenth century, monarchical challenge to a petition could be, and was, defended on the basis that petitioning was an ancient right.

Mark, *The Vestigial Constitution*, at 2171.

Until the fifteenth century, legislative petitioning was tied to parliamentary fulfillment of the King's financial needs. The King called parliamentary sessions to address those needs, but Parliament conditioned appropriations on the granting of its petitions. In 1414, however, Parliament finally asserted itself as the sole source of legislative authority. By the fifteenth century, then, Parliament had used the petition right to achieve sovereign authority to enact legislation.

Parliament's immunity from judicial and executive retaliation for petitioning and legislative

activities developed alongside the petition right. Immunity from executive inquiry was first expressed in 1399, when royal condemnation of a member of Parliament for introducing a bill to reduce royal household expenditures was annulled as violating parliamentary rights. Van Vechten Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L.J. 131, 132 n.4 (1910).

Immunity from judicial inquiry followed in 1512, when the law condemned as void all legal proceedings against members “for any bill, speaking, reasoning, or declaring of any matter concerning the Parliament, to be communed or treated of.” Veeder, *Absolute Immunity*, at 132 (citation omitted). By the middle of the sixteenth century, the Speaker of the House of Commons opened each parliamentary session by describing immunity as one of the “ancient and undoubted rights and privileges” of members. *Ibid.*

Over time, then, the parliamentary petition developed into the legislative bill. As it did so, a tradition of private petitioning to the King evolved. Some private petitions required judicial solution and were referred to courts. Others required legislative solution and were the subject of competition for control between the King and Parliament. By the fourteenth century, “the House of Commons attempted to secure that all petitions involving a change of law should be determined by themselves.” Kingsley B. Smellie, *Right of Petition*, 12 ENCYC. OF SOC. SCI. 98, 98 (1934).

As with parliamentary petitioning, private petitioning gave rise to immunity. In 1699, the House of Commons resolved:

That it is an inherent right of every commoner of England to prepare and present Petitions to the house of commons in case of grievances...

That it is the undoubted right and privilege of the commons to judge and determine concerning the nature and matter of such Petitions...

That no court whatsoever hath power to judge or censure any Petition presented to the house of commons....

David Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74, 79 (1961) (citing Smellie, *Right of Petition*, at 99 and quoting 4 PARL. DEB. (1st ser. Cobbett) 432-33 (1669)).

The critical point in all of this is that the petition right developed well in advance of the right to free speech in England, and actually was the precursor of speech protections. As the number of petitions to Parliament grew, so did the need for an increased right of free speech for Parliament’s members. After all, they could not very well consider and debate the merits of controversial petitions without a commensurate right to speak about them.

While this may seem elementary through the lens of historical hindsight, it was not until the reign of Elizabeth I—centuries after establishment of the petition right—that this parliamentary right to free speech emerged. “From its origins in Parliament, free speech later became a right secured to all citizens.” David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, 115 (1991) (citation omitted).

The more things change . . . *Lake v. King* and the *Trial of the Seven Bishops*.

The question now at the fore of the right of petition—whether statements made in a petition can support a defamation claim—was decided by two English courts during the 1680s. The principle of citizen immunity for petitions to Parliament was recognized judicially in *Lake v. King*, (1668–69) 85 Eng. Rep. 137 (K.B.), when a citizen was sued for libel after sending a petition to a committee of Parliament in which he accused a public official of extortion. The court held that a libel action could not be based on a petition to a committee with the power to redress the grievance:

And it was agreed that the exhibiting of the petition to a Committee of Parliament was lawful, and that no action lies for it, although the matter contained in the petition was false and scandalous, because it is in a summary course of justice, and before those who have power to examine, whether it be true or false.

Ibid. at 139.

English courts extended immunity to petitions to the King eight years later, in *Trial of the Seven Bishops* (1688), 12 A COMPLETE COLLECTION OF STATE TRIALS 183 (T.B. Howell ed., 1816). See also 3 CELEBRATED TRIAL AND REMARKABLE CASES OF CRIMINAL JURISPRUDENCE FROM THE EARLIEST RECORDS TO THE YEAR 1825 144, 144 (George Borrow ed., 1825). That case established the English notion of absolute



The Trial of the Seven Bishops by John Rogers Herbert (1843). Wikimedia Commons.

immunity for petitioning. In 1687, James II issued his declaration for Liberty of Conscience providing for freedom of worship and commanding all clergy to read and distribute it in their churches. The Archbishop of Canterbury and six other bishops petitioned the King asking to be excused from that duty. James responded by having them arrested and charged with seditious libel.

At trial, the bishops' counsel took pains to establish that his clients' petition was in fact just that, and not simply libel in disguise. He argued that a petition need only possess a "head" and "tail," meaning a direction to a body and a prayer for relief. *Ibid.*, at 317-19. The attorney general sought to avoid consideration of the petition right by contending that for purposes of a libel action, only the libelous matter is material. The solicitor general, equally determined that the prohibition against seditious libel trumped the petition right, argued that:

[I]f it be as the information says, then it is not the speaking of ill things in the body of a petition, and then giving it the good title of a petition, and concluding it with a good prayer. 'Tis not, I say, any of these that will sweeten this crime, or will alter or alleviate it. . . .

Ibid., at 322.

In a landmark enunciation of the broad scope of immunity for petitioning, the court agreed with the bishops' counsel and expressly rejected the argument that the petition right was subsumed by or commensurate with other speech rights. Justice Holloway made clear the preferred position of the petition right in comparison to speech rights when rebuking the recorder for his comparison of a petition to publication of a book or pamphlet: "Pray, good Mr. Recorder, don't compare the writing of a book to the making of a petition; for it is the birthright of the subject to petition." *Ibid.*, at 419. In the words of Justice Powell, a petition and book "are no more alike than the most different things you can name." *Ibid.*

The bishops were acquitted, making clear the principle of immunity from libel for petitioners under English law. Any lingering doubt about immunity was resolved a year later when England adopted the Declaration of Rights, providing "[t]hat it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal." SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 464 (George Burton Adams & H. Morse Stephens eds., 1927). The adoption of this right to immunity for petitioning codified the clear understanding in England that statements made in a petition could not support an action for defamation.

The petition right assumes even greater importance in colonial America.

American colonists brought to the new world a deep appreciation of the petition right. While some English rights were abandoned or narrowed in the colonies, the petition right was expanded. "A content analysis of the colonial charters shows that petition appears, either specifically or as one of the 'ancient liberties' of Englishmen, in over fifty provisions." DON L. SMITH, THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES: CONSTITUTIONAL DEVELOPMENT AND INTERPRETATIONS 46 (1971) (unpublished Ph.D. dissertation, Texas Tech University).

Petitioning was critical to political life in colonial America. Unlike other rights including suffrage, petitioning was not restricted. “Disenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans, and even slaves, exercised their rights to petition the government for redress of grievances.” Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 688-89 (2003). This continued to be true after adoption of the Constitution. Members of the Cherokee tribe—lacking suffrage and other civil rights—nevertheless utilized the petition right to protest their forced removal from Georgia to Oklahoma. MORRIS L. WARDELL, *A POLITICAL HISTORY OF THE CHEROKEE NATION* 364-65 (1938).

This broad petition right existed alongside significant restrictions on non-petition speech. “Seditious libel laws existed in all of the colonies, and punishment for statements critical of the government was an accepted, lawful practice which continued even after the framing and ratification of the First Amendment.” Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS L.Q. 15, 37 (1993). Yet the right of petition, including the right to criticize government officials without fear of reprisal, continued unabated throughout this period.

During the Articles of Confederation period, North Carolina, Georgia, Vermont, Rhode Island, Connecticut, Delaware, Maryland, Pennsylvania, Massachusetts, and New Hampshire all guaranteed the petition right in their state constitutions or charters. Frederick, *John Quincy Adams*, at 117, n.18. Petitioning was particularly important during this period as a means of political expression for colonists, who lacked parliamentary representation and relied on petitions to convey their grievances. Even the colonies themselves utilized the petition right to communicate with Parliament. Rhode Island petitioned Parliament to protest the Molasses Act of 1733, and also joined New York and Virginia to petition Parliament following enactment of the Stamp Act in 1765. SMITH, *RIGHT TO PETITION*, at 56-63.

Parliament was not the only recipient of colonial petitions. The colonial assemblies received so many petitions from their constituents that they were forced to devise special procedures for response. Several state assemblies established committees for the sole purpose of processing and responding to citizen petitions. See MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 210-14 (1943).

By the American Revolution, petitioning played a central role in the American concept of self-government. The Declaration of Independence marked King George III’s infringement of the petition right as tyrannical:

In every state of these Oppressions we have Petitioned for redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant is unfit to be the ruler of a free people.

THE DECLARATION OF INDEPENDENCE (U.S. 1776).

All this took place during a period when the freedoms of speech and religion were

undeveloped in the colonies. As in England, the right of petition developed as the far stronger right. “In both England and the American colonies, citizens could petition government on any subject without fear of punishment, an important protection unmatched by the right of free speech.” Frederick, *John Quincy Adams*, 115-16 (citation omitted).

With harsh sedition laws proscribing anti-Revolution speech, the less-restricted right to petition often represented the only means by which citizens could communicate criticisms to the government without risking prosecution. Spanbauer, *The First Amendment Right to Petition*, at 37.

In the colonies, then, as in England, petitioning represented the primary tool by which citizens expressed their grievances to government. Far from being subsumed by free speech, the right to petition both preceded and exceeded free speech rights.

The right to petition takes hold in the fledgling republic.

The Constitution as originally drafted did not contain any express protection of the right to petition, and anti-federalists seized on this omission to criticize the instrument. Wishnie, *Immigrants*, at 694 n.153 (citation omitted). Alexander Hamilton responded that the right to petition was so ancient and well established that its expression in the Constitution was unnecessary. THE FEDERALIST No. 84 (Alexander Hamilton). Even so, James Madison set about remedying this deficiency.

Madison envisioned a petition right separate from speech rights, and to that end proposed the following amendment: “The people shall not be restrained . . . from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.” 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971). Eventually, of course, this petition right was joined with the rights of speech, press, assembly, and religion to form the First Amendment.

During debates about the Petition Clause, there was no recorded discussion that anyone challenged the scope of that right as practiced in England and the colonies, including the immunity from liability for defamation established by *Lake and Seven Bishops*. “[T]here is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the petition clause harbored any objection to or intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states.” Eric Schnapper, “*Libelous*” Petitions for Redress of Grievances—Bad Historiography Makes Worse Law, 74 IOWA L. REV. 303, 345 (1989). Once enumerated in the First Amendment, the petition right enjoyed favored status. By the early 1800s, a substantial portion of Congressional energy was devoted to consideration of citizen petitions.

Throughout early American history, the rule of immunity for petitioners set forth by *Lake and Seven Bishops* was well known and respected by American courts. The earliest judicial expression of immunity for petitioning in the United States came in *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802). A citizen made false and malicious statements about a public official in a petition to the government. The official sued for libel. The petitioner argued that the state constitution

Congress of THE United States,
begun and held at the City of New York on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Constitution of the United States, having at the time of their adopting the Constitution, expressed a desire, in order to give effect to the provisions of the powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution:
RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled, two thirds of the whole concurring, that the following Articles, be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all the powers of which are hereby ratified by the Senate and House of Representatives, to be added to said Constitution, and that they are part of the said Constitution: 1791

ARTICLE in addition to, and amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

- Article the first. After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than one hundred Representatives, nor less than one Representative for every fifty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.
- Article the second. No law, varying the compensation for the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.
- Article the third. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or extending the jurisdiction of judges, or the right of citizens, generally, to a private and to petition the Government for a redress of grievances.
- Article the fourth. A well regulated Militia, being necessary to the security of free States, the right of the people to keep and bear arms, shall not be infringed.
- Article the fifth. No Soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by Law.
- Article the sixth. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- Article the seventh. In Suits at Law, where the value in controversy shall exceed five Dollars, no Jurors shall be taken from any State, when such trial occurs, in time of War or public Danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of Law; nor shall private property be taken for public use, without just compensation.
- Article the eighth. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.
- Article the ninth. In Suits at Common Law, where the value in controversy shall exceed five Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than on review taken of the records thereof.
- Article the tenth. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
- Article the eleventh. The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people.
- Article the twelfth. This paper and stipend to the Members, shall be the same as to the Constitution, nor prohibited by it to the States, nor reserved to the States respectively, or to the people.

Approved: *James Madison*, Speaker of the House of Representatives
John Adams, Vice President of the United States and President of the Senate

The Bill of Rights' First Amendment protects the right to petition. National Archives and Records Administration.

afforded absolute immunity from suit for petitioning activity. The Vermont Bill of Rights provided a right to redress of grievances "by address, petition, or remonstrance." *Ibid.*, at 143. Rejecting the libel claim, the court held petitioning activity to be absolutely protected:

An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of the petitioning the supreme power for the redress

of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it. ***And it would be equally destructive of the right, for the Courts of Law to support actions of defamation grounded on such petitions as libelous.***

Ibid., at 139-40 (emphasis added). According to the court:

Petitions for redress of grievances will generally point to officers of the government who have, or may be supposed to have abused its confidence by mal-administration; and although government should refrain from prosecuting the petitioners criminally, yet it operate as effectual a restraint upon them to expose them to an action for damages at the suit of those whose conduct they have complained to government.

Ibid., at 140.

The court's opinion makes clear that the reasoning and result in *Seven Bishops* were well known to early American courts, as were the Crown's many attempts to violate the immunity attached to petitioning. *Ibid.*, at 141-42. The court concluded that petitioning must be protected by absolute immunity even though it may result in occasional injury to reputation:

But if this right of petitioning for a redress of grievances should sometimes be perverted to the purpose of defamation, as the right of petitioning with impunity is established both by the common law and our declaration of rights, the abuse of the right must be submitted to in common with other evils in government, as subservient to the public welfare.

Ibid. at 146. *Harris* establishes the preferred position of the right to petition in the decades following the nation's founding, and demonstrates that American courts understood petitioners to enjoy absolute immunity from suit in the new republic just as in England.

Congress eviscerates petitioning to protect slavery.

In the 1830s, the ugly specter of slavery collided with the petition tradition. Abolitionists flooded Congress with anti-slavery petitions. To thwart these abolitionist petitioners, Congress for the first time took the position that it could peremptorily reject petitions on the basis of their subject matter—a startling view for most Americans. To protect slavery, Congress limited the petition right:

The procedural disagreement about the reception of abolition petitions profoundly affected the practice of the right. Commentators and activists of the period believed the right to be fundamental to republican government. By the 1830's, the right of petition operated as a vehicle for mass agitation on numerous topics, ranging from the legality of the Bank of the United States to the annexation of Texas. Abolitionists saw in the right a means of forcing recalcitrant southern congressmen to confront the issue of slavery and debate it in public. One effect of this petition

drive—a campaign that produced hundreds of thousands of petitions calling for the abolition of slavery—was that Congress devised means of thwarting the right of petition without drawing the scrutiny of the courts. Although this petition campaign was an important factor in the emancipation movement that led to the Civil War and the freeing of slaves, it also produced a reaction in Congress that severely weakened the right of petition. Never again would any group exercise the right of petition on so grand a scale to engage in a dialogue with Congress on an important social issue.

...

Subsequent developments have led to an elaboration of the right of free speech without treating petition as an independent right.

Frederick, *John Quincy Adams*, at 119 (citation omitted).

A decade later, with slavery still threatening to rend apart the nation, the Supreme Court made its first significant foray into the petition right, recognizing a qualified privilege at common law for statements made in a petition to the President. *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845). When a group of citizens sent letters to the President denigrating the character of a local official and requesting that he be removed from office, the official sued for libel. The Court held that statements in a petition to the President enjoyed only a qualified privilege. *Ibid.* at 267-74.

White addressed only the common law issue of immunity, not the constitutional parameters of the right. But even its analysis of common law immunity was flawed. Among its many errors was its dismissal of *Lake* as “anomalous” (*Ibid.*, at 289)—an almost inexplicable statement given that case’s position in the development of the petition right and its consistency with *Seven Bishops* and the English Bill of Rights. At the root of the Court’s mistake in *White* was its failure to cite a single pre-Revolutionary case other than *Lake*.

At the time of the Court’s decision in *White*, the petition right was under political attack in both England¹ and the United States, and those attacks likely informed the Court’s analysis, as did the controversy with respect to abolitionist petitioning. But those attacks had **not** taken place at the time the Constitution was written and adopted, and could not possibly have informed the **Founders’** analysis of immunity for petitioning. “[C]onstitutional interpretation inquiries are directed at the *original understanding* of a provision.” *J & J Const. Co. v. Bricklayers & Allied Craftsmen*, 664 N.W.2d 728, 737 (Mich. 2003) (Young, J., concurring) (emphasis in original).

By the middle of the nineteenth century, the right of petition was established in the United States as a legitimate means of communication between citizens and their government. As the right developed, it did so with the underpinnings of *Lake* and the *Seven Bishops* case firmly supporting the notion of immunity for petitioning. Legislative and judicial infringements on the right to petition—which only decades earlier the Founders had declared tyrannical—came only as the government struggled to preserve the Union in the face of the abolitionist movement.

¹ During the late 1790s, Parliament responded to more than 150,000 petitions for parliamentary reform and cessation of war with France by restricting the right of citizens to assemble for the purpose of petitioning. IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 245 (1965).

The Supreme Court applies the Petition Clause to antitrust litigation.

The twentieth century brought dramatic developments in American freedom of speech, as the Supreme Court enunciated clear freedoms of expression in a series of landmark rulings. The increase in freedom of speech brought a corresponding decline in the right to petition as an independent constitutional guarantee. "As free speech rights blossomed in the twentieth century, the right to petition became submerged in general first amendment doctrine." Frederick, *John Quincy Adams*, at 119. There has been little protection of the petition right by the Court:

[T]he more common position by a majority of the Court has given lip service to the right [of petition] without giving it teeth. Justice Brennan, in a concurrence that echoed a view shared by many justices, wrote in *McDonald v. Smith*: "[W]e have frequently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression." The debates of the 1830s reveal that these rights were not always viewed in this way, that petition was a first amendment coequal of free speech, and that the gag rule led to a transformation of the early American practice of petitioning.

Ibid., at 120 (citation omitted).

Despite this general trend, the Petition Clause came to the fore of American antitrust law during the 1960s and 1970s, as the Supreme Court applied the petition right to insulate certain conduct from the reach of otherwise applicable antitrust laws. This principle, known as the *Noerr-Pennington* Doctrine, allows companies to associate for the purpose of influencing the government even though their association otherwise would violate antitrust laws. Even where the intent in petitioning the government is to eliminate competition, the activities remain protected by the Petition Clause.

The origins of the *Noerr-Pennington* Doctrine are found in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). When a group of railroad companies launched a deceptive lobbying and public relations plan to block deregulation of the trucking industry, the trucking companies sued alleging the campaign restricted competition and thus violated the Sherman Antitrust Act. The Supreme Court held the petition right protected the activity regardless of bad intent:

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so.

[A]t least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

Noerr, 365 U.S. at 139-40. The Court imposed one important limitation on the right. Petitioning is not protected when it is "a mere sham to cover what is actually nothing more than an attempt to

interfere directly with the business relationships of a competitor and application of the Sherman Act would be justified." *Ibid.*, at 144. This would eventually be known as the sham exception.

Five years later, the Court decided *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), holding that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington*, 381 U.S. at 670. The Court expounded on the sham exception in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). As explained in that case, the sham exception means petitioning that is subterfuge for preventing competitors from gaining access to the government or that subverts the integrity of the government process remains unprotected. *Ibid.*, at 515.

The Court extended petitioning protections in the antitrust arena even further in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), a dispute between two advertising companies. As newcomer Omni attempted to gain a local foothold, competitor COA successfully lobbied city officials to adopt zoning ordinances destroying Omni's ability to compete. Omni sued COA and the city claiming that COA's petitioning was a sham designed to interfere directly with Omni's business. A jury awarded Omni damages of \$2.2 million. The Supreme Court held the case should have been dismissed.

Justice Scalia drafted the majority opinion, which addresses the Petition Clause in Part III, a unanimous portion joined even by the dissenters. *Ibid.*, at 379-84. *Omni* dramatically strengthens the Petition Clause by holding that it shields an effort "to influence public officials regardless of intent or purpose." *Omni*, 499 U.S. at 380 (citing *Pennington*, 381 U.S. at 670).

After *Omni*, the test for protection is clear in the antitrust arena—petitioning aimed at procuring government action is protected without regard to other motive or purpose. On this, all nine justices agreed: communications to government officials can only give rise to antitrust liability if they are not aimed at procuring government action.

Bad historical research makes worse law: The Court misinterprets the Petition Clause in *McDonald v. Smith*.

In *McDonald v. Smith*, 472 U.S. 479 (1985), the Court applied the actual malice standard to petition cases. When a citizen wrote a letter to President Reagan arguing against a candidate for U.S. Attorney, the candidate sued for libel. The Court held the Petition Clause did not insulate the writer from liability under state defamation laws, concluding that the petition right is not absolute and the *New York Times v. Sullivan* actual malice standard applies to petitioning. According to the Court, "the right to petition is cut from the same cloth as the other guarantees of [the first] amendment." *McDonald*, 472 U.S. at 482. Thus, it remains subject to the same analytical standards as the speech guarantee because "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Ibid.*, at 485.

McDonald treats the right to petition as a subcategory of free speech, and fails to articulate any scope to the right. After all, a petitioner already possesses the free speech right to speak

about matters in the petition. If the Petition Clause confers no additional protection, then it becomes redundant of the free speech guarantee.

The Court's decision in *McDonald* has been the focal point of sustained and withering scholarly criticism. "The near-unanimous conclusion of the modern commentators [in response to *McDonald*] is that there is more to the Petition Clause than is generally recognized by the Supreme Court's jurisprudence or by contemporary understandings and practice." Lawson & Seidman, *Downsizing*, at 739. The following passages are representative of the criticism:

The fundamental weakness in the Court's opinion in *McDonald v. Smith* is its careless assumption that the right to petition can never be accorded higher protection than the cognate expression rights. The Court should reconsider this assumption. Most of the limitations that have been imposed on speech and the press, whatever their justifications in the contexts of these expressive rights, are inappropriate restrictions upon petitioning.

...

The Supreme Court's recent decision in *McDonald v. Smith* reflects an inadequate understanding of the history and purpose of the right to petition and placed inappropriate limitations on this right.

Norman B. Smith, "*Shall Make No Law Abridging...*": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 CIN. L. REV. 1153, at 1153, 1188 (1986).

The expression of this right in the First Amendment is not meant to be redundant or simply an additional clause to further detail the freedom of speech. The right to petition is an independent right in desperate need of restoration to its original significance.

Rebecca A. Clar, *Comment, Martin v. City of Del City: A Lost Opportunity to Restore the First Amendment Right to Petition*, 74 ST. JOHN'S L. REV. 483, 508 (2000).

This assimilation has produced a clause in the first amendment curiously devoid of meaning. . . .

Frederick, *John Quincy Adams*, at 142 (citation omitted).

Is the Supreme Court ready to reconsider *McDonald*?

As discussed below, the Amarillo Court of Appeals applied *McDonald* to the Texas Petition Clause in *Clark v. Jenkins*, 248 S.W.3d 418 (Tex. App.—Amarillo 2008, pet. denied). The author of this article, along with Ted Cruz, Allyson Ho, and Eliot Shavin, filed a petition for writ of certiorari in the United States Supreme Court, arguing that *McDonald* was wrongly decided and should be overturned. The Court held the petition for its entire term, and then held it over to the following

term (Justice Sotomayor was joining the Court in its next term, and the speculation was that the Court was divided over whether to grant the petition and thus held it to await her deciding vote). The next term, the Court denied the petition. This seemed to suggest that, despite the storm of scholarly criticism, *McDonald* would remain the final word on the national right of petition outside the antitrust arena.

But in 2011, the Court decided *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011). That case involved a petition claim in the context of a lawsuit by a public official claiming wrongful retaliation under section 1983 for the exercise of petition rights. Ultimately, the Court held that the scope of a public official's right to petition turns on the nature of the petition—specifically, whether it concerns a public or private matter. But in discussing the right to petition, the Court—for the first time—suggested that it might be reconsidering at least some of its earlier analysis in *McDonald*. The Court again noted the “substantial common ground” between the speech and petition rights.

But this time it cautioned that “[c]ourts should not presume that there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims.” *Ibid.*, at 388. Perhaps a bit disingenuously, the Court went so far as to deny that *McDonald* had enunciated such an equivalence—which it clearly did. And, of course, the Court ultimately applied the same “public concern” framework in the Petition Clause context that it applies to claims under the Speech Clause.

Justice Scalia dissented, arguing explicitly that the Speech Clause rules should not govern the right of petition. As he noted:

The complexity of treating the Petition Clause and Speech Clause separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a First Amendment that included *both* provisions as *separate* constitutional rights. A plaintiff does not engage in pernicious “circumvention” of our Speech Clause precedents when he brings a claim premised on a separate enumerated right to which those precedents are inapplicable.

Guarnieri suggests some willingness by the Supreme Court—at least in some circumstances—to reconsider *McDonald*. But, at least for now, *McDonald* remains the governing precedent in petition-clause claims.

The root of the right to petition in Texas.

The right to petition has deep roots in Texas. To this day, Texas students study Stephen Austin's imprisonment in Mexico for conveying a petition, and the resulting outrage that helped pave the road to San Jacinto. The Founders of Texas and the men who fought for its independence from Mexico had at the fore of their thoughts this infringement of the right to petition.

In 1836, Sam Houston served as chair of the committee that drafted the first Constitution of Texas. That Constitution drew heavily on a variety of sources, including “Jacksonian democracy,

Replica of the building at Washington-on-the-Brazos where Sam Houston and other delegates signed the Texas Declaration of Independence. Photo by J. Williams, March 29, 2003, Wikimedia Commons.



British common law, Spanish civil law, the ideals in the Magna Carta, the English Bill of Rights, William Penn's Frame of Government, the Charter of Privilege for Pennsylvania, the Declaration of Independence, and George Mason's Virginia Bill of Rights." James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 402 (1993) (citations omitted).

Jacksonian democrats, who formed a majority of the drafters of this original Constitution, favored a broader constitutional guarantee of liberties than those provided by the U.S. Bill of Rights. *Ibid.* As a result, they took pains both to stake out broad guarantees of rights and to provide a wider berth for their exercise by prohibiting violations "on any pretense whatever." REPUB. TEX. CONST. of 1836, *reprinted* in H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1069 (1898). The "Proposed Constitution for the State of Texas" provided that "[t]he people have a right to assemble together . . . and to apply to those invested with the powers of government, for redress of grievances, or for other proper purposes, by address or remonstrance." DOCUMENTS OF TEXAS HISTORY 74, 74-76 (Austin: E. Wallace ed., 1963).

This original Constitution was intended to establish Texas not as a nation but as an independent Mexican state. Stephen F. Austin took the proposal to Mexico City and presented it to Valentín Gómez de Farías, the head of the Mexican government. T. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 182 (Austin: 1983). For this audacity in petitioning his government, Austin sat for eighteen months in a Mexico City jail after Farías accused him of agitating for independence.



Stephen F. Austin, date of painting unknown.
Texas State Library and Archives Commission, Wikimedia.

Upon his release and return to Texas, Austin angrily denounced the charge and defended the right to petition: "This is indeed a right of petition which belongs to every free people and is an essential part of the republican system...." *Explanation to the Public Concerning the Affairs of Texas, By Citizen Stephen F. Austin, reprinted in 8 QUARTERLY OF THE TEXAS STATE HISTORICAL ASS'N 232, 246-55 (1905).*

UNANIMOUS
DECLARATION OF INDEPENDENCE,

BY THE
DELEGATES OF THE PEOPLE OF TEXAS,
IN GENERAL CONVENTION,
AT THE TOWN OF WASHINGTON,

ON THE SECOND DAY OF MARCH, 1836.

When a government has ceased to protect the lives, liberty, and property of the people, from whom its legitimate powers are derived, and for the advancement of whose happiness it was instituted; and so far from being a guarantee for their inestimable and inalienable rights, becomes an instrument in the hands of evil rulers for their oppression. When the Federal Republican Constitution of their country, which they have sworn to support, no longer has a substantial existence, and the whole nature of their government has been forcibly changed, without their consent, from a restricted Federal Republic, composed of Sovereign States, to a consolidated Central Military despotism, in which every interest is disregarded but that of the army and the priesthood, both the eternal enemies of civil liberty, the ever ready minions of power, and the usual instruments of tyrants. When, long after the spirit of the constitution has departed, moderation is at length so far lost by those in power, that even the semblance of freedom is removed, and the forms themselves of the constitution discontinued, and so far from their petitions and remonstrances being regarded, the agents who bear them are thrown into dungeons, and mercenary armies sent forth to force a new government upon them at the point of the bayonet.

When, in consequence of such acts of malfeasance and abduction on the part of the government, anarchy prevails and civil society is dissolved into its original elements, in such a crisis, the first law of nature, the right of self preservation, the inherent and inalienable right of the people to appeal to first principles, and take their political affairs into their own hands in extreme cases, enjoins it as a right towards themselves and a sacred obligation to their posterity to abolish such government, and create another in its stead, calculated to rescue them from impending dangers, and to secure their welfare and happiness.

Nations, as well as individuals, are amenable for their acts to the public opinion of

man-kind. A statement of a part of our grievances is therefore submitted to an impartial world, in justification of the hazardous but unavoidable step now taken, of severing our political connection with the Mexican people, and assuming an independent attitude among the nations of the earth.

The Mexican Government, by its colonization laws, invited and induced the Anglo-American population of Texas to colonize its wilderness under the pledged faith of a written constitution, that they should continue to enjoy that constitutional liberty and republican government to which they had been habituated in the land of their birth, the United States of America.

In this expectation they have been cruelly disappointed, inasmuch as the Mexican nation has acquiesced in the late changes made in the government by General Antonio Lopez Santa Ana, who having overturned the constitution of his country, now offers, as the cruel alternative, either to abandon our homes acquired by so many privations, or submit to the most intolerable of all tyranny, the combined despotism of the word and the priesthood.

It hath sacrificed our welfare to the state of Coahuila, by which our interests have been continually depressed through a jealous and partial course of legislation, carried on at a far distant seat of government, by a hostile majority in an unknown tongue, and this too, notwithstanding we have petitioned in the humblest terms for the establishment of a separate state government, and have, in accordance with the provisions of the national constitution, presented to the general congress a republican constitution, which was, without a just cause, contemptuously rejected.

It incarcerated in a dungeon, for a long time, one of our citizens, for no other cause but a zealous endeavour to procure the acceptance of our constitution and the establishment of a state government.

It has failed and refused to secure, on a

firm basis, the right of trial by jury, that palladium of civil liberty and only safe guarantee for the life, liberty, and property of the citizen.

It has failed to establish any public system of education, although possessed of almost boundless resources, (the public domain); and although it is an axiom in political science, that unless a people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self government.

It has suffered the military commandants, stationed among us, to exercise arbitrary acts of oppression and tyranny, thus trampling upon the most sacred rights of the citizen, and rendering the military superior to the civil power.

It has dissolved, by force of arms, the state congress of Coahuila and Texas, and obliged our representatives to fly for their lives from the seat of government, thus depriving us of the fundamental political right of representation.

It has demanded the surrender of a number of our citizens, and ordered military detachments to seize and carry them into the interior for trial, in contempt of the civil authorities, and in defiance of the laws and the constitution.

It has made piratical attacks upon our commerce by commissioning foreign desperadoes, and authorizing them to seize our vessels and convey the property of our citizens to far distant parts for confiscation.

It denies us the right of worshipping the Almighty according to the dictates of our own conscience, by the support of a National Religion, calculated to promote the temporal interest of its human functionaries, rather than the glory of the true and living God.

It has demanded us to deliver up our arms, which are essential to our defence—the rightful property of freemen—and formidable only to tyrannical governments.

It has invaded our country both by sea and by land, with the intent to lay waste our

territory, and drive us from our homes; and has now a large mercenary army advancing, to carry on against us a war of extermination.

It has, through its emissaries, incited the merciless savage, with the tomahawk and scalping knife, to massacre the inhabitants of our defenceless frontiers.

It has been, during the whole time of our connection with it, the contemptible sport and victim of successive military revolutions, and hath continually exhibited every characteristic of a weak, corrupt, and tyrannical government.

These, and other grievances, were patiently borne by the people of Texas, until they reached that point at which forbearance ceases to be a virtue. We then took up arms in defence of the National Constitution. We appealed to our Mexican brethren for assistance: our appeal has been made in vain; though months have elapsed, no sympathetic response has yet been heard from the interior. We are therefore forced to the melancholy conclusion, that the Mexican people have acquiesced in the destruction of their liberty, and the substitution thereof of a military government; that they are unfit to be free, and incapable of self government.

The necessity of self preservation, therefore, now decrees our eternal political separation.

We, therefore, the delegates, with plenary powers, of the people of Texas, in solemn convention assembled, appealing to a candid world for the necessities of our condition, do hereby resolve and declare, that our political connection with the Mexican nation has forever ended, and that the people of Texas, do now constitute a FREE, SOVEREIGN, and INDEPENDENT REPUBLIC, and are fully invested with all the rights and attributes which properly belong to independent nations; and, conscious of the rectitude of our intentions, we fearlessly and confidently commit the issue to the decision of the supreme Arbiter of the destinies of nations.

RICHARD ELLIS, *President.*

C. B. STEWART, } *Austin.*
THOMAS BARNETT, }
JAS. COLLINSWORTH, }
EDWIN WALLER, } *Brazoria.*
ASA BRIGHAM, }
J. S. D. BYROM, }
FRANCISCO RUIS, } *Becar.*
ANTONIO NAVARO, }
JESSE B. BADGETT, }
WILLIAM D. LACY, } *Colorado.*
WILLIAM MENIFEE, }
JAMES GAINES, } *Sabine.*
W. CLARK, JR., }

JOHN FISHER, } *Gonzales.*
MATT. CALDWELL, }
WILLIAM MOTLEY, } *Goliad.*
L. DE ZAVALA, } *Harrisburgh.*
STEPH. H. EVERITT, } *Jasper.*
GEORGE W. SMITH, }
ELIJAH STAPP, } *Jackson.*
CLABORNE WEST, } *Jefferson.*
WILLIAM B. SCATES, }
M. B. MENARD, } *Liberty.*
A. B. HARDIN, }
BAILEY HARDMAN, } *Matagorda.*

J. W. BUNTON, } *Mina.*
THOS. J. GAZELEY, }
R. M. COLEMAN, }
ROBERT POTTER, } *Nacogdoches.*
THOMAS J. RUSK, }
CH. S. TAYLOR, }
JOHN S. ROBERTS, }
ROBERT HAMILTON, } *Red River.*
COLLIN MCKINNEE, }
ALB. H. LATTIMER, }
MARTIN PARMER, } *San Augustin.*
E. O. LEGRAND, }
STEPH. W. BLOUNT, }

SYD. O. PENNINGTON, } *Shelby.*
W. CARL CRAWFORD, }
JAMES POWER, } *Refugio.*
SAM. HOUSTON, }
DAVID THOMAS, }
EDWARD CONRAD, }
JOHN TURNER, } *San Patricio.*
B. BRIGGS GODDRICH, }
G. W. BARNETT, } *Washington.*
JAMES G. SWISHER, }
JESSE GRIMES, }

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Texas Declaration of Independence, San Felipe de Austin, 1836. Wikimedia Commons.

When Texas declared its independence from Mexico shortly thereafter, it specifically referenced Mexican incursions on the petition right: “When, long after the spirit of the Constitution has departed, moderation is at length so far lost by those in power, that even the semblance of freedom is removed, and the forms themselves of the Constitution discontinued, and so far from their petitions and remonstrances being regarded, the agents who bear them are thrown into dungeons, and mercenary armies sent forth to enforce a new government upon them at the point of the bayonet.” THE DECLARATION OF INDEPENDENCE, REPUBLIC OF TEXAS, para. 1 (1836), *reprinted in* 3 TEX. CONST. 478 (Vernon 1993). Not surprisingly, the Texas Constitution has long guaranteed the rights of petition and remonstrance to Texans.

The Texas Petition Clause provides broader protection for petitioning than its national counterpart.

The Texas Constitution provides substantially greater protection for petitioning than does the First Amendment. In construing the state’s Bill of Rights, Texas courts focus their rights analysis on the individual liberties afforded rather than on their societal impact. *See, e.g., LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986). The Texas Supreme Court has stressed the unique role played by the Texas Constitution in protecting the freedoms of Texans:

Like the citizens of other states, Texans have adopted state constitutions to restrict governmental power and guarantee individual rights. The powers restricted and the individual rights guaranteed in the present constitution reflect Texas’ values, customs, and traditions. Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans . . . By enforcing our constitution, we provide Texans with their full individual rights and strengthen federalism.

Ibid., at 339 (citations omitted).

The Petition Clause of the Texas Constitution provides that “citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of their grievances or other purposes, by petition, address, or remonstrance.” TEX. CONST. art. I, § 27. Under Texas law, “a citizen’s right to approach an elected official or body cannot be abridged.” *Corpus Christi Indep. School Dist. v. Padilla*, 709 S.W.2d 700, 704 (Tex. App.—Corpus Christi 1986, no writ).

Those Texas courts considering the state’s petition right have applied a standard that mirrors the Supreme Court’s analysis in *Omni*, focusing not on the good faith or actual malice of defamatory statements within a petition but rather on whether the petition itself is a good faith request for government action. The Fort Worth Court of Appeals reached this conclusion more than a century ago in *Connellee v. Blanton*, 163 S.W. 404 (Tex. Civ. App.—Fort Worth 1913, no writ):

Every communication is privileged which is made in good faith with a view to obtain redress for some injury or to prevent some public abuse.

Ibid., at 406; *see also Aransas Harbor Terminal Ry. Co. v. Taber*, 235 S.W. 841 (Tex. Comm’n App. 1921, op. adopted) (citing *Connellee* favorably).

Under *Connellee*, statements are privileged so long as they are made in good faith to obtain redress or prevent public abuse. The Texas Court of Criminal Appeals stated the rule with even more clarity in 1978, when it held that liability for statements made in a petition requires proof of *both* bad faith *and* motive other than to obtain government action:

The appellant's actions were an attempt to obtain redress for what she arguably perceived as official misconduct, thus the State must prove that her allegations were made in bad faith and for reasons other than to obtain action on a valid grievance.

Wood v. State, 577 S.W.2d 477, 479 (Tex. Crim. App. 1978), *overruled on other grounds by Hankin v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1981). In this respect, the Texas rule mirrors the *Omni* analysis by conditioning liability on proof that the petition itself was a sham. Under Texas law, however, this rule is not even arguably limited to antitrust cases.

That Texas law should extend absolute immunity to petitioners is underscored by the Texas Supreme Court's favorable citation of *Harris v. Huntington*, the 1802 case in which the Vermont Supreme Court held petitioning activity to be absolutely protected. In *Hott v. Yarbrough*, 245 S.W. 676 (Tex. 1922), the court described *Harris* in glowing terms, stating that the case "reviews the history of the subject [of immunity], and discusses it from every angle." *Ibid.*, at 678. The court specifically quoted the following passage from *Harris* with approval:

An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of the petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it. ***And it would be equally destructive of the right, for the Courts of Law to support actions of defamation grounded on such petitions as libelous.***

Ibid. (quoting *Harris*, 2 Tyl. at 139-40 (emphasis added)).

Texas is not the only state to hold that its state laws provide greater immunity than does the First Amendment. A Connecticut appeals court declined to apply *McDonald v. Smith* to a state libel claim because "this state may, under its common law and constitutional law, provide greater immunity to citizen complaints than does federal law." *Craig v. Stafford Const., Inc.*, 827 A.2d 793, 799 (Conn. App. 2003), *aff'd*, 856 A.2d 372 (Conn. 2004).

The Amarillo Court of Appeals adopts *McDonald* to interpret the Texas Petition Clause.

The Amarillo Court of Appeals is the only Texas appellate court to address the scope of the Texas Petition Clause since the Supreme Court's decision in *McDonald*. In *Clark v. Jenkins*, 248 S.W.3d 418 (Tex. App.—Amarillo 2008, pet. denied), the court confronted the applicability of the Court's reasoning in *McDonald* to the Texas Constitution. The core question in *Clark* mirrored the issue in *McDonald*: Can statements made in a petition support an action for libel? The Amarillo Court of Appeals held that the Texas Petition Clause grants no broader protection than its national counterpart, and the *McDonald* analysis therefore applies to the Texas guarantee: "We also find the United States Supreme Court's holding in *McDonald v. Smith* persuasive and agree

that, although “[t]he right to petition is guaranteed, the right to commit libel with impunity is not.” *Ibid.* at 429 (citing *McDonald*, 472 U.S. at 485). The court expressly declined to extend the sham exception to cases outside the antitrust sphere, and instead applied the actual malice standard.

The history of the right to petition makes clear that it provides broader protection than the *McDonald* Court recognized.

As the history of the petition right makes clear, it has developed from the very beginning alongside a commensurate immunity. The rulings in *Lake*, *Seven Bishops*, and the English Bill of Rights had established this immunity by the time the petition right was imported to the American colonies and incorporated into the Constitution. While there is overwhelming historical evidence establishing the intent to continue this tradition of immunity in the founding of the American republic, there is not one shred of evidence to suggest that the Founders did not intend to provide the same level of immunity for petitioning as their English forebears.

McDonald flies in the face of this history by holding that statements made in a petition can support a claim for defamation if made with actual malice. The foundation for this conclusion is the Supreme Court’s conclusion that the right to petition was “cut from the same cloth” as the right to free speech and therefore remains subject to the same limitations. The Court’s “cut from the same cloth” analysis suffers from a variety of defects, not the least of which being its abject disregard for:

- the fact that the American right to petition predated the drafting of the Bill of Rights and was meant to mirror the English right to petition, which preceded and gave rise to the right of free speech;
- the explicit consideration and rejection of this very position in *Seven Bishops*, where the judges made clear that they considered petitioning and publication of a book or pamphlet “no more alike than the most different things you can name”;
- the petition right’s position in Magna Carta as the means by which infringement of other rights was brought to the government’s attention; and
- the immunity set forth in *Harris*, the earliest American judicial decision to consider the question and the only one decided at a time when most of the Founders were still alive.

If the petition right was cut from the same cloth as the free speech guarantee, it was at minimum woven into an entirely different type of garment, and the Court’s decision in *McDonald* failed to grasp the distinction.

The right to petition and the right to freedom of speech are separate and independent liberties.

The right to petition preceded the right of free speech and developed independently of it. The Court’s decision in *McDonald* to fold the petition right into the speech right makes little sense and

represents a marked and disturbing departure from 300 years of judicial interpretation. The right to petition is an independent right meant to provide a broader protection than the right to free speech.

The most important argument in favor of a separate petition right is the plain text of the First Amendment, which enunciates a separate right to petition. Had the Founders not intended for petitioning to be a separate right, they could have omitted it in the confidence that—as a form of speech—it would be protected and afforded a qualified privilege by the speech guarantee. That they did not provides powerful evidence of their belief that the qualified privilege provided for speech was insufficient protection of the right to petition.

Madison actually envisioned petitioning as its own amendment separate from the other First Amendment guarantees. See Kara Elizabeth Shaw, *Recent Development, San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L.REV. 1697, 1732 n.207 (1995) (citation omitted). Texas courts adhere to the rule that “the people, in adopting constitutional texts, carefully selected the language and intended to give each text its own effect.” Harrington, *Framing a Texas Bill of Rights Argument*, at 414 (citations omitted).

The First Amendment did not create the petition right. The Bill of Rights did not create new rights but rather confirmed that certain rights were beyond the purview of the new national legislature to affect. Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 RICH. L. REV. 511, 513-15 (1999). Rights included in the Bill of Rights should be preserved as they existed under English common law in 1791. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 193 (1974); see also *Markham v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). English common law provided for absolute immunity for petitioning, as set out in *Lake*. The Court’s decision in *McDonald*, then, has the curious effect of holding that the right to petition actually was diminished by its inclusion in the Bill of Rights.

Petitioning serves a separate and vital function in American democracy—and in Texas.

The people enjoy a privileged role in the American system of government. As Madison explained, “[t]he people, not the government, possess the absolute sovereignty.” 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 569 (1876). At the time the Constitution was drafted, this represented a critical difference between the English and American systems of government. While English rights were directed solely toward the King rather than Parliament, in the United States “the great and essential rights of the people are secured against legislative as well as executive ambition.” *Ibid.*

The Founders understood petitioning as directly rooted in popular sovereignty. It stands apart from and as a check on representative institutions. Just as the Constitution establishes checks and balances between branches of government, the right to petition establishes a checking balance between the people and government. As conceived by the Founders, this check was broader than the citizens’ other primary control over government, the right to vote. Suffrage, after all, was more limited than the right to petition. Moreover, because neither the President nor Senators were directly elected, petitioning was the only way most citizens could exercise direct influence on many government officials. Finally, because voting is only periodic and generally not on specific issues, it remains less useful than petitioning for checking or criticizing specific government policies or practices.

The Framers properly realized that any interference with the right to petition threatened the ability of the people to check the organized institutions of government. The delineation of a separate right to petition in the First Amendment demonstrates the Founders' intent to protect that right. Read in this context, the Petition Clause confers absolute immunity on statements made in petitions to the government.

The chilling effect on citizen participation resulting from liability for statements made in petitions undermines popular sovereignty and self-government. Restrictions on the right to petition threaten to shift sovereignty from the people to the government. Citizens with personal knowledge of government abuses are unlikely to report them if doing so will subject them to civil liability for defamation. The Framers intended for citizens to check government, not for the government—through liability imposed by its judicial system—to check citizens. Informing government is a critical component of the checking function:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes . . . would impute to the Sherman Act a purpose to regulate, not business activity, but political activity. . . .

Noerr, 365 U.S. at 137-38.

Stephen F. Austin recognized the central role that petitioning plays in self-government, and took pains to explain it to his fellow Texans:

This is indeed a right of petition which belongs to every free people and is an essential part of the republican system, because it is born of the fundamental principle that the will of the people forms the safest standard to guide the deliberations of public agents, and that this will ought to be expressed in the simplest and most direct manner, not by means of insurrections, clash of arms, threats, nor with lack of respect.

Austin, Explanation to the Public, at 240.

The right to petition serves a critical role in our democracy completely unrelated to freedom of speech. Limitation of that right necessarily eviscerates its meaning and destroys its ability to play its rightful role in checking governmental abuse.

The actual malice standard is inappropriate in petition cases, and should instead be replaced by a standard based on *Omni* and prior Texas law.

In addition to being inconsistent with the absolute immunity historically conferred on petitioning, the actual malice standard is inappropriate for petition cases. Actual malice is easy to allege but very difficult to prove or disprove absent a full-scale trial. As a result, petitioners

are unable to obtain dismissal of harassing lawsuits on First Amendment grounds without going through a full-blown trial:

[W]hen . . . “interference” consisted of petitioning a governmental body to alter its previous policy a privilege is created by the guarantee of the First Amendment. This court, however, does not believe that the privilege should depend upon malice. . . .

Moreover, this court believes that the malice standard invites intimidation of all who seek redress from the government; malice is easy to allege . . . and therefore in most cases even those who acted without malice would be put to the burden and expense of defending a lawsuit. Thus, the malice standard does not supply the “breathing space” that First Amendment freedoms need to survive.

Sierra Club v. Butz, 349 F. Supp. 934, 938 (N.D. Calif. 1972).

The better standard is the one enunciated in *Omni* and applied by Texas courts for the past century. Petitioning should be protected in all cases except where the petition is not genuinely aimed at procuring government action. If a petitioner seeks favorable government action, all statements in the petition should be absolutely privileged without regard to truth, falsity, actual malice, or improper motive.

The *Omni* test for protecting petitioning means that genuine petitioning is deemed to be directed at the government, not the person claiming defamation. Thus, the test under *Omni* is objective and outcome-oriented, rather than subjective. After all, while libel is inherently baseless, petitions to the government are not deemed baseless solely because of the petitioner’s bad intentions. This is the essence of the sham exception. See *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743-44 (1983).

The sham exception should be the sole limitation on the right of petition not just in the antitrust arena but in all petition cases. Even when petition rights are properly protected, one would not be able to evade constitutionally acceptable limitations on speech by disguising a communication as a petition. At the same time, application of the sham exception to all petition cases would ensure the continued vitality and meaning of the right to petition as both the American and Texas Founders envisioned it.



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And Still He Rose: William A. Price, Texas's First Black Judge and the Path to a Civil Rights Milestone

By John G. Browning and Hon. Carolyn Wright¹

*Out of the huts of history's shame
I rise
Up from a past that's rooted in pain
I rise
I'm a black ocean, leaping and wide,
Welling and swelling I bear in the tide.
Leaving behind nights of terror and fear
I rise
Into a daybreak that's wondrously clear
I rise
Bringing the gift that my ancestors gave,
I am the dream and the hope of the slave.
I rise, I rise, I rise.*

Maya Angelou²

The history of Texas's earliest African American lawyers has been, until recent years, among the most neglected chapters in Texas legal history. Lack of available information, the confused or incomplete state of what sources remain, and even uncertainty on the part of the few local and national historians to examine this subject have all been offered as reasons for this dearth of scholarship.³ But a lack of contributions to our state's rich legal heritage has never been such a justification. Texas's first African American attorneys spawned a vital legacy that transcends the state's borders, none more so than Texas's very first black lawyer—and first black judge and first black county attorney—William Abram (“W.A.”) Price.

W.A. Price's historical significance comes not just from the trail he blazed in becoming the first African American to practice law in Texas, the first to hold judicial office, or the first to be elected a county or district attorney. Price would eventually cast such a shadow after leaving Texas that one of his singular civil rights victories before the Kansas Supreme Court in 1891

¹ This paper builds upon previous research first published as John G. Browning and Chief Justice Carolyn Wright, “Unraveling a Mystery: Who Was Texas's First African American Attorney?,” *Journal of the Texas Supreme Court Historical Society* 5, no. 2 (Winter 2016): 72–81.

² Maya Angelou, *And Still I Rise* (New York: Random House, 1978).

³ See, e.g., DARWIN PAYNE, *QUEST FOR JUSTICE: LOUIS A. BEDFORD, JR. AND THE STRUGGLE FOR EQUAL RIGHTS IN TEXAS* 9 (2004) (discussing the “uncertain” history of Texas' first black lawyer); J. CLAY SMITH, *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844–1944* (1993), 344.

would help lay the foundation for a later school desegregation battle to originate in Kansas and make it all the way to the U.S. Supreme Court—*Brown v. Board of Education* in 1954. Price's path toward the law, public office, and civil rights advocacy was not a direct one, but his work left echoes that are still felt today.

"A Man of Fine Talent."

Relatively little is known about W.A. Price's early years; in fact, one historian writing about Price and one of his later Kansas peers, John Lewis Waller, refers incorrectly to both Price and Waller's being "born into slavery."⁴ In reality, Price was born a free man in 1848, the son of free parents of mixed Native American and African American heritage living near Mobile, Alabama. Price was educated as well, and furthered his formal education by attending Wilberforce University in Xenia, Ohio for at least three years. Wilberforce, the nation's oldest private, historically black university, was founded in 1856 as a joint venture between the Methodist Episcopal Church and the African Methodist Episcopal Church. A destination point on the Underground Railroad, it closed temporarily in 1862 before reopening on July 10, 1863 under the sole ownership of the A.M.E. Church. Clearly, Price not only received a college education at one of the few institutions open to a person of color at that time, but his learning was likely influenced by the abolitionist leanings at Wilberforce.

Price moved to Texas sometime during Reconstruction, although it is not clear when. His early ambitions did not lead him to the law; based on property records in Matagorda County, he owned a tract of land and likely pursued farming. And he was active in Republican politics, one of the many African Americans flexing their newfound political muscle in Texas during Reconstruction. As historian C. Vann Woodward noted, "As a voter, the Negro was both hated and cajoled, both intimidated and courted, but he could never be ignored so long as he voted."⁵ Price actively campaigned for the reelection of Congressman (and former Union General) William T. Clark in 1871, giving speeches supporting Clark and writing to local newspapers. Though Clark was unsuccessful, Price proudly referred to himself as "a thorn while I was there" (at a hotly-disputed state Republican convention) in one such letter to an editor.⁶

Ironically, Price's decision to explore a career in law may have been spurred by his firsthand experience in seeing the system at work. According to Matagorda County records, in October 1871, Price was indicted for the theft of a cast iron wheel (likely part of a cotton planter) valued at twenty-five dollars.⁷ The wheel was the property of one Asa W. Thompson, quite possibly a neighbor or business rival of Price's. While an acquittal by an all-white jury was probably more than any African American defendant could have hoped for, Price apparently made a favorable impression on the jury and on Judge William Burkhart of the 20th Judicial District. The first trial ended with a guilty verdict, but with a verdict of only one dollar. The verdict was set aside as being "unauthorized by law," and a new trial was ordered. At the second trial, on June 12, 1872, the jury once again found against Price, but "assessed the punishment at five minutes in the

⁴ RANDALL BENNETT WOODS, *A BLACK ODYSSEY: JOHN LEWIS WALLER AND THE PROMISE OF AMERICAN LIFE, 1878–1900* (1981), 58.

⁵ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966), 54.

⁶ *THE REPRESENTATIVE* (Galveston, Tex.), Vol. 1, No. 14, Ed. 1 (Sept. 2, 1871), <https://texashistory.unt.edu/ark:/67531/metaph203072/?q=The%20Representative%20journal>.

⁷ Matagorda County Civil Minutes, Book C, p. 153, *The State of Texas v. William A. Price*, Cause No. 408 (Oct. 1871 term.).

County jail.”⁸ Price appealed this verdict as well, and while on appeal the district attorney voluntarily dismissed the case.⁹

Even while this courtroom drama over an iron wheel was playing out, W.A. Price was becoming more involved in the judicial system—this time as a judge. Although the circumstances of how he attained office are unknown, by at least January 1872, the young man became “Judge Price,” serving as Justice of the Peace of Matagorda County’s Precinct Number 2. Besides scattered references to “Judge Price” in contemporary local newspapers, legal notices issued by “W.A. Price, J.P. Precinct No. 2” appeared in these papers as well. One such example was the citation appearing in the case of *J.M. Barbour, Guardian v. Wm. A. Gibson* summoning the defendant Gibson to answer the complaint (a dispute involving the sum of \$98.96) before Justice of the Peace Price “at my office on Caney creek.”¹⁰

Other than such fleeting notices, Price’s work as a justice of the peace remains a mystery. He remained active politically (running unsuccessfully for the Texas Legislature against G.M. Bryan), and frequently published letters in local newspapers. The newspapers catering to the black community regarded him highly. Galveston’s *The Representative* said “the Judge is an able and intelligent gentleman,” and called him “a fair representative of his race, an active and influential Republican, and by his courtesy commands respect from even his opponents.”¹¹

Evidently, Price’s talents went beyond legal acumen as well. He was credited with being the mastermind behind a canal from Wilson Creek to the Colorado River, which “will take off enough of the water to prevent the overflow, letting in the bay at Palacios.”¹² The white-owned *Galveston Daily News* predictably found it “[s]trange to say, that this scheme was

⁸ *Ibid.*, 238–39.

⁹ *Ibid.*, 318.

¹⁰ INDIANOLA WEEKLY BULLETIN (Indianola, Tex.), vol. 5, no. 47, ed. 1 (Jan. 24, 1872), <https://texashistory.unt.edu/ark:/67531/metaph178919/?q=Indianola%20Weekly%20Bulletin%2C%20Vo.%205%2C%20No.%2047>.

¹¹ THE REPRESENTATIVE (Galveston, Tex.), vol. 1, no. 22, ed. 1 (May 4, 1872), <https://texashistory.unt.edu/ark:/67531/metaph203082/?q=The%20Galveston%20Representative%2C%20>.

¹² *Canal*, GALVESTON DAILY NEWS (May 14, 1874), <https://texashistory.unt.edu/ark:/67531/metaph464256/?q=Galveston%20Daily%20News%2C%20May%2014%2C%201874>.

HON. W. A. PRICE,
President, Colored-men’s Protective
Union.



The above cut is taken from a photograph of Hon. W. A. Price, of Peru, Chantauqua county, Kansas. He is one of the ablest colored men of the State, as a writer, he has few equals and no superiors and is thoroughly posted on all matters of government. Hon. John A. Waller says: “The ablest argument I ever heard delivered on tariff in the last campaign, was by Judge Price.” He is a power among his people of Southern Kansas and his worth and devotion to his race, has made him a State reputation. In 1882, he was one of the committee sent to Washington, to ask Congress to give Oklahoma to the Freedmen in 1884. He represented Kansas in the National Colored Conference at Pittsburg, Pa., when he distinguished himself as a leading thinker, a ready debater and received the highest compliments from Hons. Fred. Douglass and Geo. T. Fleming. He is now practicing law and is associated with A. M. Thomas, late graduate of the University of Michigan, under the firm name of Price & Thomas, 415 Kansas Ave., Topeka, Kan.

Announcement in *The Chautauqua Journal* (Sedan, Kansas), June 8, 1885.

gotten up by a colored man, W.A. Price, the colored lawyer of this place.”¹³ However begrudgingly the newspaper gave such credit to Price, it did go on to observe that he was well-regarded by whites and blacks alike, calling him “a man of fine talent” and saying that “the good feeling existing here between the two races is due to his influence; the white people speak very highly of him.”¹⁴

“The Only Practicing Lawyer of His Race in the State.”

Then, as now, justices of the peace were not required to have any legal education or license. Perhaps it was his experience handling the tasks of a J.P. that awakened a desire in Price to become a lawyer, or perhaps it was his earlier sojourn through the justice system as defendant. It may have been his political ambitions that triggered his decision, or even as simple a reason as a path to financial prosperity for Price and his growing family (Price took a wife, Susan, and would later welcome daughter Benita Price and sons William “Willie” A. Price, Jr. and Haywood J. Price). Price may not have even known that in seeking to become a lawyer, he would in fact be the first African American in Texas to do so.

In certain ways, such as his college education at Wilberforce, W.A. Price may have been better prepared for admission to the bar than many white Texas lawyers of his day. For most of the nineteenth century, candidates for admission to the Texas bar usually lacked a formal legal education, having instead “read the law” under the tutelage of one or more older attorneys.¹⁵ Texas didn’t have a bar exam until 1903.¹⁶ The standards for earning a license to practice law had changed little between Texas’s days as a republic in 1839 and the passage of a bar licensing statute in 1891.¹⁷

From 1839 onward, a candidate had to be 21 years old and provide “undoubted testimonials of good reputation for moral character and honest and honorable deportment.”¹⁸ The candidate also had to be examined in open court by a committee of lawyers (usually three) appointed by the local district judge; two of these lawyers had to indicate that they were satisfied with the applicant’s legal qualifications in order for him to obtain his law license.¹⁹ Upon licensure, the newly-minted attorney was permitted to practice in any trial court in the state (until 1873, a lawyer was only allowed to appear before the Supreme Court, Texas’s only appellate court at the time, if he applied directly to it).²⁰

Being admitted to practice in Texas during the nineteenth century has been described as “extraordinarily easy” in spite of attempts at rules detailing formal expectations.²¹ For example, the 1877 rules for district courts spelled out that those seeking admission to practice were

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* 182 (2011).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.* at 183.

required to read a variety of legal treatises, such as those by William Blackstone, James Kent, Simon Greenleaf, and others.²² As one historian observed, however, it is highly unlikely that most applicants ever 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.”²³

Like so many others before him, Price “read the law” in the offices of a more senior member of the bar—in his case, Judge William H. Burkhart of the 20th Judicial District, the same judge who had presided over Price’s 1872 wheel-theft trials. Why would Judge Burkhart mentor a young African American man seeking admission to the bar? Perhaps he saw a spark of promise in the young man who had appeared in his court. Or perhaps there was a less altruistic reason. After all, Burkhart was a Radical Republican himself, newly elected to office during Reconstruction, and a prominent member of the party at the time. Certainly, it would not hurt Burkhart’s standing with the all-important African American voters to extend a helping hand to a rising star in that community.

Regardless of any ulterior motives, the Matagorda County Civil Minutes reflect a historic moment during the October 11, 1873 term—the formal application of William A. Price for a license to practice law, making him the first African American in Texas to do so.²⁴ The Court noted that Price, the petitioner, had made application for a license to practice before “the District and inferior tribunals of this state,” and had produced the required certificate attesting to his residency in the state and county for at least six months, to his age of at least 21 years, and to his being “a man of good moral character.” This certificate was signed by H.P. Love, the “Chief Justice of the County Court of Matagorda.” Judge Burkhart wasted no time in appointing the required committee of three local attorneys to examine Price on his qualifications, naming local Democrat attorneys W.L. Davidson, D.E.E. Brannan, and James E. Wilson to the task and directing them to “report as soon as practicable.” The committee members apparently did so on the same day, responding that they “report favorably upon said application,” that they are “satisfied as to the qualifications of said applicant for the purposes of Practicing Law,” and that they “unite in the prayer of said applicant” for a law license. With that, W.A. Price took the historic step of becoming the first African American admitted to practice in Texas.

Between his admission to practice in October 1873 and his 1875 campaign to become Texas’s first African American county or district attorney, little is known about Price’s actual law practice. We do know that he remained active in politics, and that he was an important voice among the black Republican voters who were growing increasingly disenchanted with being used by white Republicans as a powerful voting bloc while not reaping the rewards of office themselves. In July 1873, a “colored convention” of black Republicans met in Brenham, Texas. As one Galveston paper described the mood prior to this convention, “The colored brother is tired of picking bones and munching crusts while the white Radical enjoys the meat and the bread of the loaves and the fishes.”²⁵ At the convention itself, speakers including Price warned against the dangers of “50,000 loyal men” of color being “sold out” by Republican officeholders who “may

²² *Ibid.* at 182–83.

²³ *Ibid.* at 183.

²⁴ Matagorda County Civil Minutes, Book C, p. 374, Cause #1461, Application of Wm. A. Price for License to Practice Law.

²⁵ GALVESTON DAILY EWS (Galveston, Tex.) (June 12, 1873).

seek to use our power for their great greed of gain” and who “for self-interest would barter all the rights we hold most dear.”²⁶

“A Colored District Attorney.”

Whether for personal, professional, or political reasons, Price moved from Matagorda County to Fort Bend County by 1875. By December of that year, newspapers in the state were not only taking note of Price and the viability of his candidacy for office, but also of the power wielded by African Americans at the ballot box. The *Galveston Daily News* bemoaned “the Egyptian darkness of the Eighteenth Judicial District, composed of the counties of Waller, Wharton, East Bend, Brazoria, Matagorda, and Jackson, where the colored race predominate.”²⁷ Noting that it was “impossible to elect a Democrat” in this “tolerably dark district,” the newspaper speculated about who the Radical Republicans would install in office, concluding that “Price (colored), lawyer of Wharton, seems now to be the winning horse, but time brings about many changes, and before the election comes off, we expect of some others in the field.”²⁸

Indeed, Price was elected Fort Bend County Attorney, and formally took office April 18, 1876.²⁹ As the *Galveston Daily News* reported, he was “elected without opposition; the county being so largely Radical, it would have been useless to have made the race.”³⁰ He was the first African American to hold office as a county attorney or district attorney, and the jarring impression that this might make to casual (white) observers was not lost on the media of the time:

COLORED DISTRICT ATTORNEY

On entering that courtroom a stranger would, like your correspondent, feel somewhat startled on looking among the attorneys, to see one of them a colored man. Yet such was the case, and he is the newly elected County Attorney, W.A. Price by name.

Predictably given the racism and pseudoscience of the times, the journalist seems to equate Price’s achievement and intelligence with his lighter-skinned appearance and racially-mixed ancestry. He devotes an inordinate amount of attention to Price’s appearance, noting that the new county attorney is “of light or bright copper color; very black, yet almost straight hair and whiskers, and like Galveston’s quondam Senator—‘Ruby’—has very little African blood in his veins, both his mother and father being half Indian and half bright mulattoes.”³¹

The author goes on to describe Price’s personal appearance as resembling “that of an

²⁶ Merline Pitre, *Through Many Dangers, Toils and Snares: Black Leadership in Texas, 1868–1898* (Texas A&M University Press 1985), 192.

²⁷ GALVESTON DAILY NEWS (Galveston, Tex.) (Dec. 22, 1875), <https://texashistory.unt.edu/ark:/67531/metaph464315/?q=Galveston%20Daily%20News%2C%20Dec.%2022%2C%201875>.

²⁸ *Ibid.*

²⁹ At the time, many Texas counties used the term “county attorney” and “district attorney” interchangeably to denote that county’s chief elected prosecutorial official.

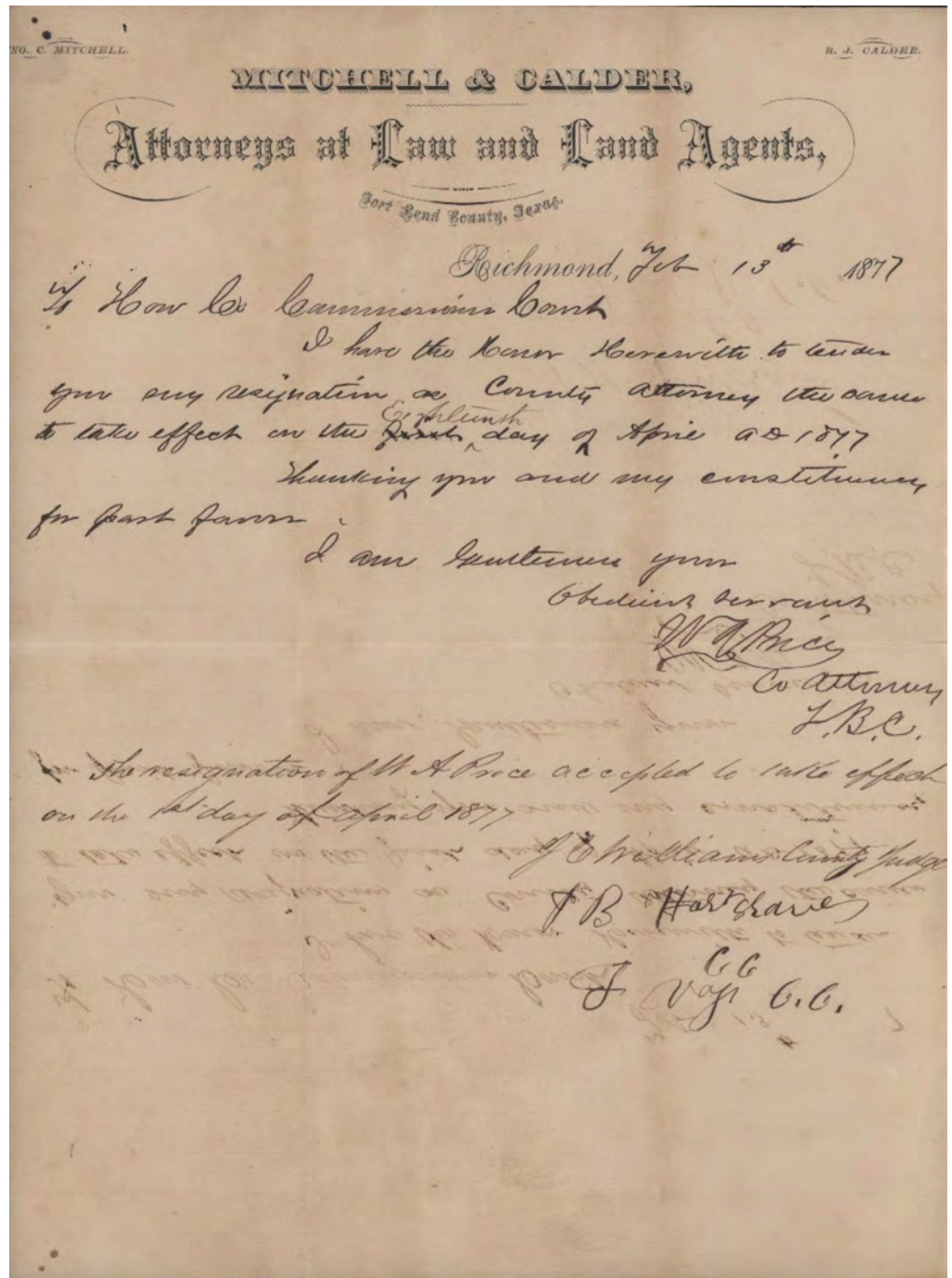
³⁰ GALVESTON DAILY NEWS (Galveston, Tex.) (Mar. 19, 1876), <https://texashistory.unt.edu/ark:/67531/metaph462149/?q=Galveston%20Daily%20News%2C%20Mar.%2019%2C%201876>.

³¹ *Ibid.* The Senator referred to by the author is G.T. Ruby of Galveston.

Indian; his features are rather delicate than otherwise; his hands and feet slender and tapering and his conversation indicates that he has not neglected the opportunities afforded him."³² In fact, the bigoted author even contrasts Price with Fort Bend County's newly-elected sheriff, also African American, who "[u]nlike Price . . . is of the regular cornfield darky appearance," who he snarkily speculates "will find much difficulty in filling the required bond" for his office.³³

Historic as his election was, Price's tenure was brief and unremarkable. Courtesy of the archives of the Fort Bend County Museum, we have his Oath of Office.³⁴ We also have a handwritten document made by Price in his official capacity, charging four individuals on November 25, 1876, with illegal gambling "contrary to . . . statute"

and "against the peace and dignity of the State."³⁵ But beyond such evidence that Price diligently carried out the duties of his office, there is a stark indication that less than a year into office he had decided to leave. On February 13, 1877, Price formally resigned the office of county attorney,



W.A. Price's letter of resignation from the elected office of Fort Bend County Attorney. Courtesy of Fort Bend County Museum Association.

³² *Ibid.*

³³ *Ibid.*

³⁴ Oath of Office of W.A. Price, Apr. 18, 1876 (courtesy of the Fort Bend County Museum Association, Richmond, TX).

³⁵ W.A. Price Charging Document, County Court December Term, 1876 (courtesy of the Fort Bend County Museum Association, Richmond, TX).

submitting his formal letter of resignation on the stationery of a local Fort Bend County law firm, Mitchell and Calder.³⁶

What caused Price to resign? The historical record is largely silent, and Price himself left no written explanation. We do know that as Radical Reconstruction ended in the South and federal troops withdrew, that incidents of racial violence and “bulldozing” black farmers off of the land they had worked escalated. Even a duly-elected county attorney might have found himself targeted for unwelcome attention. The records of Matagorda County offer some potential clues. They reveal that during the May 3, 1878 judicial term, Price was named in two indictments brought by the state, one for “swindling” (Cause No. 630) and one for forgery (Cause No. 631). No descriptions of the purported basis for the charges are provided, and indeed both were dismissed by the state in June 1880 “on account of defect in the indictment.” Was there any basis to these actions brought against Price, or were they trumped-up charges brought against a prominent African American community leader by political opponents? There simply is no way of knowing. We do know that, regardless of the basis for the allegations, W.A. Price seemed to feel that a change in scenery would do him good.

Although he returned to Matagorda by 1878 after leaving office, Price and his family soon moved east to Louisiana, settling in Madison County, Louisiana no later than 1879.³⁷ But for many African Americans in East Texas, Louisiana, and Mississippi during this time, the promise of economic opportunity, enfranchisement, and social mobility was proving elusive, and a new “promised land” beckoned: Kansas.

From Exoduster to Civil Rights Champion.

Much has been written about the “Great Exodus” that began in 1879, as over 50,000 African Americans from the South migrated to Kansas and other Midwestern states.³⁸ Blacks were not just lured by the promise of cheap land in Kansas or the purportedly more tolerant nature of the land of John Brown; they were also fleeing racial violence, poverty, and the erosion of their civil rights and political influence. “Black codes” were passed, for example, and in 1879 the Louisiana Constitutional Convention decided that voting rights were a matter for state, not federal, government, clearing the way for the disenfranchisement of Louisiana’s African American population. Figures like Benjamin “Pap” Singleton and Alfred Fairfax, both former slaves, helped establish all-black communities in Kansas as thousands settled there beginning in 1878. The “Kansas fever” led to the establishment of towns like Nicodemus and Singleton’s Dunlop Colony. Fairfax arrived in Chautauqua County near Peru, Kansas as one of the leaders of a group of several hundred black families in late 1879 (in 1888, he would become the first black elected to the Kansas state legislature).

The other leader of this “Little Caney Colony” near Peru, Kansas, was none other than W.A. Price, described later by one Methodist publication as “a lawyer of considerable information.”

³⁶ W.A. Price Letter of Resignation, Feb. 13, 1877 (courtesy of the Fort Bend County Museum Association, Richmond, TX).

³⁷ U.S. Census records for 1880 list Price and his family as living in Madison County, Louisiana at that time.

³⁸ See, e.g., Nell Irvine Painter, *EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* (1976); QUINTARD TAYLOR, *IN SEARCH OF THE RACIAL FRONTIER: AFRICAN AMERICANS IN THE AMERICAN WEST, 1528–1990* (1998); Morgan Peoples, *Kansas Fever in North Louisiana*, 11 J. LOUISIANA HISTORICAL ASSOC. 121–35 (Spring 1970).

Pointing to the success of the group that Price and Fairfax had brought to that part of Kansas, the Southwestern Christian Advocate observed several years later that in addition to owning and cultivating their own land, these “Exodusters” “can have a free ballot, and an honest count, and the public schools are open for their children. They are facing East.”³⁹ Price himself seemed to prosper individually as well from this fresh start. He became one of Kansas’s first African American lawyers, and in Topeka founded one of the state’s only all-black law firms—partnering with such fellow Kansas legal luminaries as A.M. Thomas (a University of Michigan graduate) and John Lewis Waller. Price served as president of the Colored Men’s Protective Union, represented Kansas in the National Colored Conference in Pittsburgh, and in 1882 was part of the committee sent to petition Congress to give the Oklahoma Territory to African American settlers in 1884. Price also cofounded (with G.S. Fox) a newspaper, the *Afro-American Advocate*, “published in the interest of the Negro race of Southern Kansas, and the Freedmen of the five civilized tribes of the Indian Territories.”⁴⁰

Price’s leadership in Kansas’s growing African American community went beyond politics, public service, and journalism. He put his legal expertise to good use as well. In 1888, he and John L. Waller represented a black man who had been denied service at a local lunch counter, in apparent violation of the Kansas Civil Rights Act. But the case had to be dismissed when the plaintiff’s chief witness, Will Pickett, was “bought off” and left town just as the trial was about to begin.⁴¹

In 1889, Price and Waller represented a light-complexioned black named Simpson Younger, who had purchased two tickets to the Ninth Street Theater in Kansas City, only to be refused admission when he showed up with a woman much darker than he was. Price was unsuccessful when the trial judge ruled that the denial of access to entertainment facilities resulted only in inconvenience, and that the theater proprietors could lawfully exclude any clientele they considered detrimental to their business.⁴² Price and Waller also lobbied the Kansas legislature to pass a civil rights bill that would eliminate public school segregation whenever blacks objected to it.

It was this last subject, public school desegregation, that provided Price with an opportunity to make his most lasting impact in the courtroom. While segregation was well-entrenched at this time in states like Texas and Oklahoma, Kansas school policy shifts reflected much more division in the white community. In 1874, the Kansas legislature passed a civil rights law prohibiting state educational institutions from making distinctions based on race, only to reverse itself in 1879 and allow cities of ten thousand or more to establish separate primary schools. In the 1890 decision *Reynolds v. Board of Education of Topeka*, the Kansas Supreme Court held the state’s segregation law to be constitutional.⁴³ So, when Jordan Knox came to Price’s law office in 1890 seeking help in compelling the Board of Education in Independence, Kansas to allow his two African American daughters to attend the school nearest their home, Price had his work cut out for him.

Knox’s daughters, Bertha (age 8) and Lilly (age 10) wanted to attend the closer Second Ward

³⁹ SOUTHWESTERN CHRISTIAN ADVOCATE (New Orleans, LA) (Aug. 30, 1883).

⁴⁰ WOODS, A BLACK ODYSSEY.

⁴¹ *Ibid.*, 72–73.

⁴² *Ibid.*

⁴³ No. 13, 140, 72 Pac. 274 (1903), <http://brownvboard.org/sites/default/files/opinion-reynolds.pdf>.

School, only 130 yards from their home, instead of the Fourth Ward School farther away which all African American children were required to attend (as if to add insult to injury, the plaintiffs actually had to pass by the school of their choice en route to the required Fourth Ward School). As the Kansas Supreme Court would later observe, at the time the Knox children were denied admission, neither of the classrooms for their respective grades were filled to capacity. Moreover, no white children living in the Second Ward were required to attend the Fourth Ward school building.

Price took the case and sought mandamus relief to order the Independence School Board to admit the Knox children. He argued that the legislature had not given the boards of education in cities the size of Independence “the power to establish separate schools for the education of white and colored children, and to exclude from the schools established for white children all colored children, for no other reason than that they are colored children.” On January 16, 1891, the Kansas Supreme Court agreed, granting the writ of mandamus and awarding the plaintiffs their costs. As the Supreme Court noted in ruling for Price and his clients:

If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed children and blondes. We do not think that the board has any such power.⁴⁴

For a span of nearly seventy years, from 1881 to 1949, the Kansas Supreme Court became *the* venue for the constitutional question of public schools and segregation. Many of the decisions did not go in favor of the African American plaintiffs, while some like 1941’s *Graham v. Board of Education of Topeka* did (holding that keeping African American children in elementary schools longer than whites violated the black children’s right to equal educational opportunity).⁴⁵ And when NAACP lawyers like Thurgood Marshall argued in *Brown v. Board of Education* in 1954 that Linda Brown and her sister should not have to bypass a closer elementary school reserved for white students only and travel farther away to an all-black school because separate educational facilities were inherently unequal, they likely had an earlier pair of sisters like Bertha and Lilly Knox in mind. *Knox* helped lay the foundation for later challenges to school segregation.⁴⁶ For W.A. Price, that victory symbolized a journey from a humble justice of the peace office on Caney Creek, Texas to the thriving black community of Little Caney, Kansas.

Price would not live long to bask in this victory. He died at his home on May 6, 1893, at the age of 48, likely due to complications from pulmonary issues. While one obituary tempered its praise of Price as “a thinker and a man of ability” with a reference to his race and the observation that “what white blood he had was Spanish,”⁴⁷ *The Afro-American Advocate* was predictably more effusive in its description. “In his death the race loses one of her brightest lights, and also an able defender.” Calling him a lawyer who “occupied the front ranks in his profession,” the *Advocate*

⁴⁴ *Knox v. Board of Education of the City of Independence*, 45 Kan. 152 (Ks. 1891).

⁴⁵ No. 34, 791, 114 P.2d 818 (Ks. 1941).

⁴⁶ 347 U.S. 483 (1954).

⁴⁷ THE SEDAN LANCE (May 10, 1893).

described Price as a “forceable speaker” who was “up at all times on all points of law and as a politician,” and who “enjoyed a large practice” with a clientele that was largely “outside of his race.” And although this notice observed that Price was “the first of his race to be admitted to the bar in this county and in the southern part” of Kansas, it omitted any mention of Price’s Texas background and his unique status of being Texas’s first African American lawyer, first African American judge, and first African American county or district attorney.

Today, there is no monument or historical plaque to honor W.A. Price’s memory or his significance. In fact, he has suffered the ignominies of being misnamed by historians (as “W.B. Price”) or not named at all. Until recently, the Fort Bend County Historical Commission didn’t even list him in its historical roster of Fort Bend’s elected officials (inexplicably identifying a white lawyer as county attorney in 1876–77 instead).

Yet Price’s legacy is measured not in monuments or historical records, but in human terms—the countless African Americans who followed him into the legal profession. His importance cannot be denied—not only for the trail he blazed for every black lawyer in Texas to follow him, but for the important role he played on the winding path to the civil rights touchstone of the twentieth century, *Brown v. Board of Education*. William Abram Price went from advocating in Texas courtrooms, to shepherding a flock of “Exodusters,” and finally to championing two little girls who wanted to go to the same school as their white peers. At every juncture, and to every challenge and setback, still he rose.



CHIEF JUSTICE CAROLYN WRIGHT (ret.) *presided over the Fifth District Court of Appeals in Dallas, the largest intermediate appellate court in Texas, and served in the judiciary for more than thirty years. She is a graduate of the Howard University School of Law, an inductee into the Texas Women’s Hall of Fame, and the recipient of numerous professional awards for her contributions to the law and the community. She is also the first African American woman in Texas history to be elected in a multicounty election.*



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Chief Justice Jack Pope: Common Law Judge and Judicial Legend*

By Marilyn P. Duncan and Benjamin L. Mesches

Chief Justice Jack Pope is widely acknowledged in the legal community as one of the Texas judiciary's brightest stars. During his 38 years on the bench he not only authored more than 1,000 opinions, many of them landmark cases, but he also led the charge to bring about fundamental judicial reforms, among many other contributions. He was one of those rare individuals who looked to the past and to the future with equal sharpness of vision, a legal historian and judicial reformer who applied his talents to improving the law as well as administering the law.

The first part of this article focuses on Jack Pope the man and judge, on the aspects of his character and personality that earned the respect and support of his peers and enabled him to bring about major changes in the state's jurisprudence. It also takes a closer look at how his distinctive style and scholarship were manifested in his opinions and other writings.

The second part extends the examination to specific areas of the law and judicial administration influenced by Chief Justice Pope's opinions and actions. His writings on the common law, the art of crafting opinions, and the jury system offer valuable lessons for those practicing law today.

Jack Pope: Common Law Judge and Uncommon Man

Education for the Law and the Judiciary

Andrew Jackson "Jack" Pope, Jr. was born in the West Texas town of Abilene on April 18, 1913. As the son of a medical doctor and the nephew of a Corpus Christi lawyer and state legislator, Jack was expected from the beginning to go to college and enter one of the professions. The decision about which one came at age 12 when his Uncle Elmer was visiting from Corpus Christi and asked Jack's father what he was going to do with him. As the story goes, Dr. Pope answered, "Well, Jack's going to be a lawyer," and in Jack's words, "End of discussion....This is what my father had said about me and I felt highly complimented. And I just never gave it any thought, never did....He thinks I'd make a good lawyer and...that was good enough for me."¹

It was a self-fulfilling prophecy, as Jack Pope prepared himself for the law by immersing himself in debate and student politics in his undergraduate years at Abilene Christian College and

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¹ William J. Chriss, "Chief Justice Jack Pope: An Oral History Interview," pt. 2, 1 (2008); cited in Chriss's biographical essay on Chief Justice Pope in Marilyn P. Duncan, ed., *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas* (Austin: Texas Supreme Court Historical Society, 2014), 324.

then excelling in law school at UT Austin. When Pope came to the University of Texas Law School in 1934, the case law method of legal study developed at Harvard was just being introduced. He was also exposed to important changes in American legal thought through the works of Justice Oliver Wendell Holmes, Justice Louis D. Brandeis, and Dean Roscoe Pound on legal realism and sociological jurisprudence. Pope was drawn to this practical approach, and he later attributed his abiding interest in improving civil procedure to his law school Civil Procedure course under Professor Robert Stayton.²

The Young Lawyer Becomes the Youngest Judge

After graduating from law school in 1937, Pope joined his Uncle Elmer's law firm in Corpus Christi and proved himself to be an extraordinarily gifted trial and appellate attorney. His uncle was less interested in practicing law than in serving in the Legislature, with additional involvement in real estate and other commercial endeavors, so Jack was put in charge of all the cases that required courtroom work. This assignment required him to be versatile and hard-working—in one week in 1939 he appeared in corporation court, county court, district court, a



Jack Pope, UT Law School graduate, 1937. Photo from Chief Justice Jack Pope file, Texas Supreme Court Historical Society.



A young Jack Pope takes the oath of office as District Judge in Corpus Christi, December 16, 1946. Administering the oath is District Clerk Ben A. Ligon. Photo from Chief Justice Jack Pope file, Texas Supreme Court Historical Society.

court of civil appeals, and the Texas Supreme Court.³ He later opened his own law firm, and his remarkable record of success in the courtroom did not go unnoticed in the legal community.

In late 1946 Pope was appointed by Governor Coke Stevenson to fill the unexpired term of Judge Allen Wood of the 94th District Court in Corpus Christi. Governor Stevenson's successor, Beauford Jester, then appointed him to Judge Wood's four-year term, which began January 1, 1947. At 33 years of age, Pope was Texas's youngest district judge.⁴ It was the beginning of a career that would span almost four decades.

² H.W. Brands, *A Texas Supreme Court Trilogy, Part 3: Oral History Interview with the Honorable Jack Pope* (Austin: Tarlton Law Library, 1998); cited by Chriss, "Chief Justice Jack Pope," 330.

³ *Ibid.*, 332.

⁴ Duncan, "Timeline of Significant Events and Accomplishments," in *Common Law Judge*, 356.

The Drive for Statewide Judicial Education and Ethics

The genesis of Pope's later drive to improve the educational resources available to judges was in his discovery that hardly any existed when he first took the bench. "I was looking for books that would improve my approach, my background for being a judge," he recalled later. "I looked [all] over the United States to find a school ... but there was no place I could go ... to be trained, so I just decided to train myself as best I could."⁵ He accumulated an impressive library of volumes on law, history, philosophy, and politics, and biographies and legal writings of great lawyers and judges. As a scholar and practitioner who identified strongly with the common law, he was particularly interested in the writings of Justice Holmes and Justice Benjamin Cardozo, as well as legal philosopher Karl Llewellyn's *The Common Law Tradition*.⁶

In 1950, at age 37 and with almost four years' experience on the trial bench, Judge Pope was approached by South Texas lawyers and political leaders about filling an even higher judicial post, that of Justice of the Fourth Court of Appeals in San Antonio. He ran for and won election to the seat and spent the next 14 years on that court.

Because he been forced to tailor his own program of self-study, Justice Pope set about advocating for improved education and accountability for judges. In 1962, when he was on the Court of Appeals, a State Bar committee he chaired drafted the first voluntary judicial ethics code. Over the years he assisted in founding the Texas Center for the Judiciary, a judicial education institute, and signed the order mandating education for Texas judges. Also, in 1972, when he was on the Supreme Court, he drafted the first mandatory judicial conduct code for Texas judges.⁷

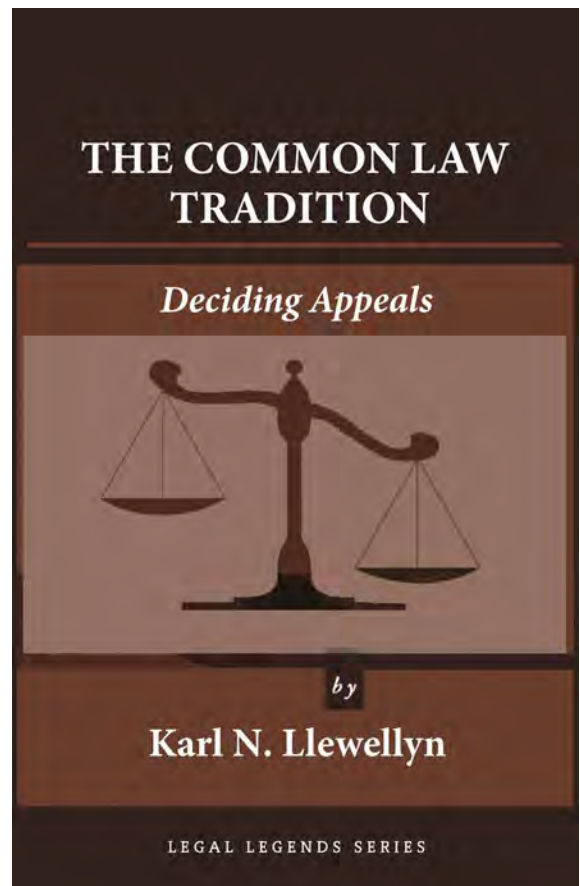
Improving the Jury System

Throughout his tenure on the Court of Appeals, Justice Pope served on the State Bar's Committee on the Administration of Justice, which recommended rules to make courtroom procedures fairer and more efficient. Early on, he had become fascinated with the jury system. In his landmark opinion in the 1953 case of *Trousdale v. Texas N.O.R. Co.* (264 S.W.2d 489), he had

⁵ Osler McCarthy, "Interview with Chief Justice Jack Pope" (oral history, 1994). Available online at <https://www.youtube.com/watch?v=K8VjtZF0CkQ>.

⁶ Chriss, "Chief Justice Jack Pope," 335.

⁷ Osler McCarthy, "Press Advisory, Supreme Court of Texas: Chief Justice Jack Pope, 1913–2017." Available online at <http://www.txcourts.gov/supreme/news/former-chief-justice-jack-pope-1913-2017/>.



Judge Jack Pope was strongly influenced by the legal philosophy expounded by Karl Llewellyn in *The Common Law Tradition*.

written about how to confine jury conduct and deliberation to the evidence properly admitted at trial. Attorney William J. Chriss, in his biographical essay about Justice Pope, offers this description of the sequence of events that led to one of Pope's most enduring legacies:

[Justice Pope] eventually catalogued every Texas case of alleged jury misconduct and generated a series of lectures and law review articles on the subject. He concluded that early and appropriate instructions to the jury from the trial judge were the best way to prevent jury misconduct. The State Bar's Committee on Administration of Justice then appointed him to prepare a model set of such instructions and he did so. After several years of work, and at the end of his tenure in San Antonio, Justice Pope's proposed instructions were approved by the full committee and he presented them for approval by the Texas Supreme Court. Two years later, and after he himself had joined the Supreme Court, Pope's proposed instructions were adopted, and they remain the basic litany of admonitions recited by trial judges to juries throughout Texas.⁸

Justice Pope was an unusually effective advocate for improvements in the judicial system because he was willing to write convincingly about the need for reforms and to drum up support through law review articles and speeches to local bar associations and other influential groups around the state. This aspect of his personality and talents—and the impact of his opinions and reforms related to juries—will be discussed later in this paper.

The Historian Changes Texas Water Law

One area of substantive law in which Jack Pope's name reigns supreme is that of water law. Pope's interest in water rights was evident throughout the 1950s as he and other jurists tackled the multitude of legal problems that arose during the devastating drought in Texas. The state's courts were hindered both by the lack of a coherent body of law governing water rights and by the fact that the seminal water law case—*Motl v. Boyd*, 286 S.W. 458, 116 Tex. 82 (1926)—was based on erroneous conclusions. In 1961, writing on behalf of the Court of Appeals, Justice Pope took the first step toward addressing both of those problems. His opinion in *State of Texas v. Valmont Plantations* (346 S.W.2d 853 (1961)), which legal historian Hans Baade called a "masterpiece on the water law of the Spanish and Mexican eras,"⁹ was adopted verbatim by the Texas Supreme Court in 1962 and replaced *Motl v. Boyd* as precedential case law. In 1967, the Texas Legislature responded to the statutory problem by passing the state's first comprehensive body of water laws.

Justice Pope continued to lend his expertise to subsequent water cases that came before the Supreme Court, including the landmark case that upheld the Water Rights Adjudication Act of 1967—*In Re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin* (642 S.W.2d 438 (1982)). Justice Pope, writing for the Supreme Court, held that the act did not violate the doctrine of separation of powers, and that after notice and

⁸ Chriss, "Chief Justice Jack Pope," 339.

⁹ Hans W. Baade, "The Historical Background of Texas Water Law—A Tribute to Jack Pope," 18 St. Mary's L.J. (1986–87), 1, 2.

on reasonable terms, the termination of the continuous non-use of riparian waters was not a taking of property.¹⁰

Two Decades on the Texas Supreme Court

The *Valmont* decision further increased Justice Pope's already strong reputation in the legal community, and in December 1963, he threw in his hat in the ring for an open seat on the Texas Supreme Court after receiving 80 petitions from 55 Texas counties with more than 2,000 signatures of attorneys pledging their support.¹¹ He won the 1964 Democratic primary election by 400,000 votes and inevitably won the general election over his Republican opponent the next November (at that time, winning the Democratic primary was tantamount to winning the election). He was reelected in uncontested races in 1970 and 1976.¹²

Pope's tenure as Associate Justice (the title changed to Justice in 1980) was a productive one, filled with researching and writing opinions, giving speeches and lectures, and continuing his advocacy of judicial reforms and continuing education. As noted earlier, his reform efforts resulted in both compulsory continuing judicial education and the Supreme Court's adoption of the Texas Code of Judicial Conduct in 1974. He was also instrumental in establishing the State Law Library as a resource for Texas lawyers and judges, and served on the Friends of the State Law Library Board of Directors. At the same time, he wrote hundreds of opinions in every area of the law, a number of them landmark cases (see below for a discussion of some of the most significant opinions). In June 1981, Pope announced that after 18 years on the Texas Supreme Court, he would retire when his term ended in January 1983. For the first eight years of his tenure on the Court, Pope had served under Chief Justice Robert W. Calvert. For ten years after that, he served under Chief Justice Joe R. Greenhill, who had been appointed by Governor Preston Smith to replace the retiring Chief Justice Calvert in 1972. When Chief Justice Greenhill announced his own retirement in October 1982, he hand-picked his colleague Justice Pope to take his place, despite the fact that Pope planned to retire in January. The story of how Justice Pope, a Democrat, was subsequently appointed by an outgoing Republican governor and confirmed by an antagonistic Texas Senate is an inspiring one.¹³ The outcome was that Chief Justice Pope took his place at the helm of the Supreme Court in November 1982 and proceeded to exercise the same degree of leadership and vision that had characterized his previous service on the bench. Bill Chriss catalogs Chief Justice Pope's administrative achievements well:

[He] went to work immediately, and over the next two years he led the charge to bring about widespread improvements to the administrative machinery of the

¹⁰ Duncan, "Texas Water Law," in *Common Law Judge*, 139; excerpts from *In Re the Adjudication of Water Rights*, 642 S.W.2d 438 (1982), *Common Law Judge*, 210–12.

¹¹ Mrs. Frank L. Weimar and Son, *The Alto Herald* (Alto, Tex.) 29, December 19, 1963, University of North Texas Libraries, *Portal to Texas History*, crediting Stella Hill Memorial Library. Available online at texashistory.unt.edu/ark:/67531/metaph215807/m1/3/?q=jack.

¹² Chriss, "Chief Justice Jack Pope," 344.

¹³ *Ibid.*, 344–49. See also Nathan L. Hecht, "Supreme Court of Texas—Chief Justice Andrew Jackson 'Jack' Pope, Jr., 'Always His Own Man,'" in *The Storied Third Branch: A Rich Tradition of Honorable Service Seen through the Eyes of Judges* (Durham, N.C.: Duke Law Center for Judicial Studies, October 2012). Available online at <https://law.duke.edu/sites/default/files/news/hecht2.pdf>.

Third Branch. Under his leadership the court created the Judicial Budget Board to unify budget requests for the first time, adopted Rules of Judicial Administration for all levels of the judiciary, created the Council of Administrative Judges, created time standards for the disposition of cases to reduce delays and pendency, ordered a referendum to repeal outmoded lawyer disciplinary rules and replace them with more stringent rules, substantially overhauled the Rules of Civil Procedure, and signed the order establishing the state's IOLTA program, among other initiatives.¹⁴

Although he considered these administrative contributions to be an important part of his duty as a public servant, Chief Justice Pope took his responsibilities as a sitting judge to be his highest priority. From his first month as Chief Justice to the last, he devoted untold hours to researching and writing opinions. By the time he left the bench in January 1985, forced into retirement by the age limit on sitting judges, he had written an unprecedented 1,038 opinions, and he later liked to say he remembered something about every single one.¹⁵

Chief Justice Jack Pope's Written Legacies

A Closer Look at the Opinions

Chief Justice Pope's erudition and highly readable prose style were always evident in his opinions, as were his deep interest in history and legal philosophy. In addition to his landmark opinions in water law and special issues submission, he made important contributions in many other areas of law—property rights, marriage law, and juvenile justice, to name a few.

When *Texas Lawyer* magazine sifted through the thousands of cases decided in the twentieth century to select 21 that "rocked the century," two of Chief Justice Pope's opinions made the prestigious list—*State v. Valmont Plantations*, 346 S.W.2d 853 (1961) and *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (1977).¹⁶ As noted earlier, *Valmont* corrected the prevailing misinterpretation of riparian water rights and paved the way for a viable set of water laws in Texas. *Eggemeyer* established that a spouse's separate real property cannot be divided by the court in a divorce decree, and that even if an act of the legislature seemed to allow the division of separate property, such a divestiture would be unconstitutional. Interestingly, some of Pope's most influential opinions were dissents. One of these was *State of Texas v. Santana* (444 S.W.2d 614 (1969)), in which Pope argued in dissent that the reasonable doubt standard, not preponderance of evidence, should be applied in juvenile proceedings involving a felony. When the case went to the U.S. Supreme Court, his dissent was adopted unanimously. In *Hall v. Helicopteros Nacionales de Columbia*, 638 S.W.2d 870 (1982), he held—and the U.S. Supreme Court agreed—that the Texas court had over-reached the state's long-arm statute by assuming jurisdiction over a case involving non-resident plaintiffs and a non-resident defendant with no qualifying connection to Texas.¹⁷

¹⁴ Chriss, "Chief Justice Jack Pope," 350.

¹⁵ Marilyn P. Duncan, conversations with Chief Justice Pope between 2007 and 2010.

¹⁶ Duncan, "Other Significant Opinions," *Common Law Judge*, 215.

¹⁷ *Ibid.*

Jack Pope the Master Writer

Jack Pope's talent as a writer was evident in all of his written work. He was an early advocate of clear, unambiguous language in legal writing, whether a court opinion or a law review article. To this principle of clarity he added an originality of thought and expression that distinguished all of his compositions—non-legal as well as legal. In addition to his 1,000-plus court opinions, he wrote more than 1,000 lectures and papers, and he continued this prodigious production after he left the Court. He also organized all of his written work into notebooks that he carefully indexed for accessibility.¹⁸

Chief Justice Pope's writing style can best be illustrated with excerpts from a few of his opinions and other written pieces. The examples below show how he was able to capture the essence of a topic with colorful—often epigrammatic—language.

1. "Water is life, and one accustomed to its uses who suddenly finds his supply is cut off, in our opinion, experiences a materially changed and tragically different status. To divert attention from that important fact is to abandon the substance of this controversy in favor of a legal mirage."

Hidalgo County Water Improvement District No. 2 v. Cameron County Water Control and Improvement District No. 5, 253 S.W.2d 254, Texas Court of Civil Appeals, San Antonio, November 12, 1952.¹⁹

2. "Law is applied history. Standards worth saving from the wear and tear of civilization are preserved in our Constitutions, Bills of Rights, statutes, and precedent. When we neglect our history, we also erode our heritage. Good law is born of decent customs, patterns of conduct, and experiences that are worthy of preservation or, perhaps, improvement."

"A Story about Texas Surface Waters," essay, May 1999.²⁰

3. "The common law is that application of history which affords the public and the professional bar, not certainty in the law, but predictability. Unless the common law possesses that quality of stability, then society itself cannot be stabilized."...

"If the system works, the product that comes off from week to week in the form of new declarations of the common law should give the law revived sinews. This then is the system, the unsung system, which is the foundation of the rights of people."

"The Common Law," speech delivered to various organizations, 1974.²¹

¹⁸ Duncan, "Introduction," *Common Law Judge*, xvii. Before his death in February 2017, Pope donated his 40 bound notebooks to Abilene Christian University as part of the Brown Library's Pope Collection.

¹⁹ Duncan, *Common Law Judge*, 158.

²⁰ *Ibid.*, 141.

²¹ *Ibid.*, 12.

4. “Liberty is our real concern. Perhaps no greater harm could come to Santana than the State’s misguided efforts to rehabilitate him if, in fact, he is innocent to begin with. His plea is that he wants fairness first; therapy second.”

State of Texas v. George Rivera Santana, 444 S.W.2d 614, Supreme Court of Texas, July 23, 1969.²²

5. “Appellate judges soon develop their own styles. Often that fact does not even occur to us. Advocates are slow to tell us anything but that our opinions are sound. It has never been good advocacy to tell us that our opinions are semi-literate, graceless, obscure, opaque, tiresome, mysterious, or that the opinion is florid, repetitious, elaborate, sketchy, garrulous.”

“So You Want to Write an Opinion?” lecture presented to the Lubbock Bar Association, 1977.²³

6. Pope was a veteran speech giver, and at one point during his campaign for Supreme Court in 1964, he decided to have in hand a satirical speech filled with non sequiturs and other meaningless statements. It never failed to surprise and amuse his audiences. A sample sentence:

“We must preserve influences which affirm, negate, and create feelings of validity. On this issue, there can be no middle ground.”

“All-Purpose Speech,” delivered to various audiences between 1964 and 1966.²⁴

Chief Justice Pope’s Legacy—Lessons for Today’s Problems

In reflecting on Chief Justice Pope’s legacy after his passing, it became clear that the Chief Justice’s thinking and writing remains—not just relevant—but essential in thinking about today’s legal problems. In the sections that follow, we will examine Chief Justice Pope’s writings about the common law, opinion writing, and the jury system and offer some thoughts about why they matter now more than ever.

The Critical Role of the Law-Conditioned Official

We live in a time of troubling attacks on the judiciary and the rule of law, both at home and abroad. Chief Justice Pope would no doubt have much to say about these troubling times and we submit would be confident in our common-law system’s ability to survive them if we are able to do one thing: maintain a commitment to “law-conditioned” officials. Pope explained that “[l]aw-conditioned officers who administer the law” are essential to stability in the law, “and in a government of law it is indispensable.”²⁵

²² *Ibid.*, 289.

²³ *Ibid.*, 15.

²⁴ *Ibid.*, 302.

²⁵ *Ibid.*, 9, 11, 13.

Chief Justice Pope wrote about this concept in the context of criticism of judicial decisions. Pope's concern was not that public critiques would be leveled—he welcomed them—but to ensure that we are using “reliable criteria for evaluating judicial opinions.”²⁶ This will aid judges and lawyers in understanding such criticism and, perhaps more importantly, responding to it. That is where law-conditioned officials come in.

So, what did the Chief Justice mean by the term “law conditioned”? “Law is to him no expedient; it is a necessary way of life. It is not a notion; it is an institution.” How does law become a “necessary way of life”?²⁷ One must have advised clients, “marshaled authorities,” “prepared for adversary arguments,” delivered written legal analysis, or taught the law.²⁸ Law-conditioned officials are tethered to “a body of legal doctrine which is embalmed in the books rather than in the personal notions of the public official.”²⁹

With increasingly ferocious attacks—rhetorical and even physical—on the judicial branch, Pope compels us to understand problems “through law spectacles rather than policy, popular, or political spectacles.”³⁰ Pope's observations are as true today as when he wrote them in 1964. As lawyers and legal historians, we have a special obligation to adhere to these principles to ensure the stability of a system built on “applied history,” careful and thoughtful application of precedent, and predictability.

As Lawyers, We Can Never Stop Our Journey of Learning

Chief Justice Pope had an unparalleled passion for learning. That passion comes through in many areas, but none more so than in the Chief Justice's commitment to learning the craft of judicial writing. “Jack Pope was first and foremost a judge, but he was also a formidable scholar. Having found himself unexpectedly appointed to the district bench at the age of thirty-three, and then to the civil appeals bench four years later, he searched in vain for courses or how-to manuals on decision making and opinion writing. Insatiably studious, he pursued a course of self-education that led to his being of the best-informed judges in the state on matters of legal history and jurisprudence.”³¹

The result of this scholarly pursuit was a bevy of articles and speeches on the topic of opinion writing. In Pope's *So You Want to Write an Opinion*, we get a window to his thinking about what it means to be a writer. The very first question the Chief Justice raises is particularly striking: who is the audience?³² One gets the sense that “audience” is not a topic judges thought a whole lot about before Chief Justice Pope put his ideas to paper.

This introspection shines through when Pope talks about what kind of opinion is right for

²⁶ *Ibid.*, 9.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*, 13.

³⁰ *Ibid.*

³¹ *Ibid.*, xviii.

³² *Ibid.*, 16.

a particular case. Is it the brush-off opinion for a frivolous appeal?³³ Or is it the simply-decide-the-case kind?³⁴ Sometimes a judge must take a deep-dive and write the “spelunking opinion.”³⁵ And in the rare case, the writer must prepare the magisterial opinion to bring synthesis to law and resolve conflicts.³⁶

What does this project have to do with being a “modern” lawyer? Quite a lot, we would submit. We may not all need to learn how to write the perfect judicial opinion. And we certainly cannot all be Jack Pope. But in an increasingly fast-paced business and legal world, it is often difficult to hit the pause button and think. Think about our clients’ legal problems, their business objectives, or telling their stories. Think about our role in the legal system.

The deep reflection that Chief Justice Pope applied to the craft of opinion-writing is instructive. One does not devise multiple approaches to deciding appeals without slowing down and setting aside the time to articulate a systematic approach to the discipline. As lawyers, we want to be better at our craft, better at solving problems, and better at making contributions to the legal system. We must be willing to pause, think, and learn. Chief Justice Pope’s approach to learning his craft provides a model for doing so.

Enduring Questions about the Jury System

As noted earlier, Chief Justice Pope was a leading figure in the effort to reform the jury system. An ardent proponent of the right to trial by jury,³⁷ Pope focused on improving the jury trial process—simplifying issues, protecting the jury’s deliberative process while at the same time reducing the risks of external influences, and eliminating procedural barriers to effective trials. Below we will examine a few of the Chief Justice’s projects and their modern-day relevance.

Instructing the jury and preventing misconduct.

Chief Justice Pope believed that the root problem in the jury system was inadequate and confusing instructions.³⁸ The failure to clearly explain a juror’s responsibilities resulted in a troubling number of misconduct complaints and mistrust amount jurors.³⁹

Pope’s opinion in *Trousdale v. Texas & N.O.R. Co.*⁴⁰ captures this concern. During the course of deliberations, two jurors allegedly opined that findings on negligence and unavoidable accident were irrelevant after the jury answered the damages submission.⁴¹ Based on this statement, two

³³ *Ibid.*, 3.

³⁴ *Ibid.*

³⁵ *Ibid.*, 3–4.

³⁶ *Ibid.*, 4.

³⁷ Jack Pope, “The Jury,” 39 *Texas L. Rev.* 426 (1961); reprinted in Duncan, *Common Law Judge*, 107–37.

³⁸ *Ibid.*, xxi, 79.

³⁹ *Ibid.*, 82.

⁴⁰ 264 S.W.2d 489 (Tex. Civ. App.—San Antonio 1953), *aff’d* 154 Tex. 231 (1955).

⁴¹ *Ibid.*, 491–92.



The Jury, by John Morgan, 1861. Wikimedia Commons.

jurors changed their votes.⁴² The question in this case was whether these internal deliberations constituted juror misconduct.⁴³ The Court held no, based on a long line of precedent that bars a court from delving into the jury's deliberative process.⁴⁴ The answer in this case was easy enough, but it also revealed shortcomings in the Texas jury-trial process—the absence of clear instructions about proper conduct during the trial and a lack of understanding about when the jury can be questioned about its conduct.

Chief Justice Pope wrote that “[j]uries were increasingly charged with a number of forms of misconduct in the period from 1940 to 1965.”⁴⁵ A public crisis had developed, with “[i]nnocent jurors ... outraged at the idea that the performance of a public service brought their integrity into question.”⁴⁶ Without clear instructions about how jurors were to conduct themselves at the various phases of trial, misconduct was possible and misconduct allegations could easily be hurled.⁴⁷ So, in the 1950s, the Chief Justice led the effort to publish a uniform set of admonitory instructions.⁴⁸ These are the same basic instructions that we still use today.

⁴² *Ibid.*

⁴³ *Ibid.*, 491.

⁴⁴ *Ibid.*, 493–95.

⁴⁵ Duncan, *Common Law Judge*, 81.

⁴⁶ *Ibid.*, 82.

⁴⁷ *See ibid.*

⁴⁸ *Ibid.*

The instructions—phrased in plain and accessible language—explain the jury’s role and responsibilities at each stage of the trial. A first set of instructions relate to contacts between jurors and lawyers.⁴⁹ The second set tells the jury how to conduct itself during the presentation of evidence.⁵⁰ A third round of instructions guides the deliberative process.⁵¹ And a final set explains that, after release, jurors are free to speak—or not—about the case and that they can be questioned by lawyers about whether these rules were followed.⁵² This project was a great success. It reduced the number of misconduct allegations and provided important context for jurors when an inquiry was made.⁵³

Pope’s writings in this area offer important insights about jury misconduct in the age of social media. It is the rare trial today that does not include at least some mention about the use of social media and related communications. And there are concerns about jurors conducting their own factual or legal diligence—a problem compounded by the relative ease of acquiring information on complex and specialized topics. Thoughtful reflection on Pope’s warnings and writings about misconduct and the critical role clear and specific admonitory instructions can play will be increasingly important in the years ahead.

Jury submissions.

Chief Justice Pope took the mantle of simplifying jury submissions early in his career. The problem of “special issues” in jury instructions was rampant, and the Chief Justice was a fierce advocate for their reform. He believed that special issues “complicate[d] trials,” “generate[d] conflicting jury answers and mistrials,” and created “traps for the jury.”⁵⁴ Recounting the history of this practice, Chief Justice Pope noted that there has been “such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible.”⁵⁵

The Legislature responded with the Submission of Special Issues Act, requiring the use of special issues to be submitted “separately and distinctly.”⁵⁶ This enactment properly targeted a pressing problem in jury trials. But it created another: “a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective.”⁵⁷

Pope undertook a “systematic campaign of lectures, articles, and opinions (at first, dissents) to convince the legal community” of the urgency of this issue.⁵⁸ It was certainly a journey. But by 1971, the Supreme Court of Texas embraced Pope’s vision when it issued *Yarborough v. Berner*, which held that it was improper to separately submit issues on “unavoidable accident” and

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 96.

⁵⁵ *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Duncan, *Common Law Judge*, xxi.

“sudden emergency” in a negligence case.⁵⁹

Writing for a unanimous Court, the Chief Justice made a broader case for simplifying jury submissions. The “unavoidable accident” submission—like many other prevalent special issues—had “become an instrument” to manufacture jury conflicts and “defeat a verdict and a trial.”⁶⁰ The solution? Include concepts like unavoidable accident, emergency, and new-and-independent cause in instructions or definitions.⁶¹ That way the jury is aware that those issues are in play without “smother[ing] what would otherwise be a simple submission of a negligence case.”⁶²

His project was fully realized in 1973 with the adoption of our current rule—Rule 277—commanding that issues be submitted in broad form “whenever feasible.”⁶³ This change eliminated “the requirement that issues be submitted distinctly and separately.”⁶⁴

Despite the rule change, “special issues still lingered in the court system.”⁶⁵ The Court’s 1984 decision in *Lemos v. Montez*⁶⁶—again authored by the Chief Justice—nailed the door shut on that practice. In that case, the trial judge included a back-door special issue on unavoidable accident by asking the jury whether the negligence was caused by the plaintiff, the defendant, or *neither*.⁶⁷ This submission forced the plaintiff to negate unavoidable accident.⁶⁸ A proper submission under Rule 277 was simply this: Whose negligence caused the collision? (a) Plaintiff, yes or no; or (b) Defendant, yes or no.⁶⁹

Chief Justice Pope’s writing in *Lemos* delivered a broader, system-wide message. Rule 277 was not a license “to devise new or different instructions and definitions,” compounded to the point that special issues become the norm.⁷⁰ Pope concluded that “[j]udicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.”⁷¹

Fast forward 20 years. The debate about the proper use of broad issues continues—informed by Chief Justice Pope’s thoughtful and considered advocacy for simplifying the jury-trial process. Courts continue to struggle with defining when a broad-form issue is truly “feasible” and when it might obscure trial court error.⁷² But all agree that we should not return to the

⁵⁹ 467 S.W.2d 188 (Tex. 1971).

⁶⁰ *Ibid.*, 192.

⁶¹ *Ibid.*, 193.

⁶² Duncan, *Common Law Judge*, 96.

⁶³ TEX. R. CIV. P. 277.

⁶⁴ Duncan, *Common Law Judge*, 99.

⁶⁵ *Ibid.*

⁶⁶ 680 S.W.2d 798 (Tex. 1984).

⁶⁷ *Ibid.*, 799.

⁶⁸ *Ibid.*, 800.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 801.

⁷¹ *Ibid.*

⁷² *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000) (presuming harm when broad-form question

confusion and conflict-riddled special-issue practice that dominated Texas trials for the better part of a century.

Public or private justice. Despite procedural deficiencies in the jury-trial process, Chief Justice Pope remained a faithful proponent of the jury trial. In a definitive historical piece titled simply *The Jury*, Pope provides a detailed account of the evolution of the jury system from the Old Testament to America's founding.⁷³

Pope believed the jury was the crowning achievement of the common law: "The common law has no achievement more remarkable than the transformation of the jury from a body of witnesses to a body before whom witnesses should appear and present evidence."⁷⁴ Pope observed that "the struggle for survival by the institution we call the jury is truly the epic story of our law."⁷⁵

Reverence, marvel, and staying power. For Chief Justice Pope, those ideas captured the defining characteristic of our system of public justice. Pope was also a realist and understood the challenges a jury-trial system faces. For many reasons—and many good ones—commercial actors have turned away from public, jury-trial litigation towards private, confidential arbitration to resolve disputes.

The use of arbitration panels to resolve cases may turn out to be a shift that stays with us. But Chief Justice Pope wouldn't bet against the jury system. After all, "[i]t is one of the most durable and stubborn of all human institutions."⁷⁶ Before transitioning to a private, and sometimes unaccountable, justice system, we would do well to think about why "[i]ndistinct yearning for popular participation in the affairs of justice have brooded over the spirits of many people."⁷⁷ Pope's writings provide us the opportunity to think critically about problems of public justice, with an eye towards historical context and a realistic understanding of challenges facing the jury system.

Conclusion

Texas has been fortunate to attract to its judiciary a number of individuals with the intelligence, vision, and energy to change the course of Texas law even as they work to preserve its fundamental tenets. Chief Justice Jack Pope is among that select group of judicial legends.

commingles damage elements that are unsupported by legally sufficient evidence); *Harris Cnty. v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (presuming harm when a broad-form question commingles damage elements that are unsupported by legally sufficient evidence); *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012) (presumed harm analysis does not apply to the broad-form submission in a single-theory negligence charge that includes both an improper defensive theory of contributory negligence and an improper inferential rebuttal instruction); *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753 (Tex. 2006) (holding that a presumed harm rule does not apply to inferential rebuttal instructions).

⁷³ Pope, "The Jury," 426.

⁷⁴ *Ibid.*, 438.

⁷⁵ *Ibid.*, 426.

⁷⁶ *Ibid.*, 448.

⁷⁷ *Ibid.*, 426.

As we have shown in this paper, his contributions to Texas jurisprudence began early in his career and spanned almost four decades. His production of more than 1,000 opinions alone was a record worth noting, but the fact that many of them were precedent-setting decisions is even more notable. His record of improvements to the judicial system—promulgating jury instructions, establishing a judicial code of ethics, and instituting required continuing education for judges, to name a few—added even further to his reputation in the legal community. He was a legend in his own time, but he was not one to rest on his laurels.

After Chief Justice Pope retired from the Court in 1985 he continued to advocate for the programs he had helped put in place—legal aid for the poor through the Texas Access to Justice Foundation, for example—and to sponsor new initiatives. In 1989, he joined with Chief Justices Robert Calvert and Joe Greenhill to found the Texas Center for Legal Ethics, a nonprofit foundation dedicated to promoting ethics and professionalism among attorneys. In 1990, he cofounded, again with Chief Justices Calvert and Greenhill, the Texas Supreme Court Historical Society to preserve the history of the courts. He continued to give lectures to local bar associations, judicial forums, law schools, and civic groups for many years—the sum of his speeches and lectures numbered more than 1,000 over his lifetime.⁷⁸

Not surprisingly, the Chief Justice accumulated many honors. Some of the most meaningful came in his later years. The Chief Justice Jack Pope Professionalism Award was established in 2009 by the Texas Center for Legal Ethics to honor an appellate judge or lawyer who epitomizes



Governor Rick Perry (seated) signs the Chief Justice Jack Pope Act on May 28, 2013. Standing, left to right: then-Justice Nathan Hecht, Rep. Senfronia Thompson, Sen. Robert Duncan, Chief Justice Jack Pope (ret.), and Chief Justice Wallace A. Jefferson. Photo by Stephen Stephanian, Texas Governor's Office.

⁷⁸ "Index of Jack Pope Papers," original volume compiled by Chief Justice Jack Pope and donated to Abilene Christian University; copy in the archives of the Texas Supreme Court Historical Society.

the highest level of professionalism and integrity.⁷⁹ To his great surprise (but to no one else's), Chief Justice Pope himself was the first recipient. In 2013, soon after he turned 100, the Texas Legislature passed the Chief Justice Jack Pope Act to increase funding for the state's system of legal aid to the poor—the IOLTA program he had signed into existence 30 years earlier. Chief Justice Pope was present when Governor Rick Perry signed the bill into law.⁸⁰

At the time of his death on February 25, 2017, Chief Justice Jack Pope was approaching 104 years of age. For several years he had held yet another record—as the longest-living chief justice of any state supreme court in U.S. history. His passing was widely noted and mourned, perhaps most eloquently by the current head of the Texas Supreme Court, Chief Justice Nathan L. Hecht. “Chief Justice Jack Pope was a judicial icon,” he said. “His hard work, scholarship, common sense, humor, and integrity are legendary. No Texas judge has ever been more committed to serving the rule of law and the cause of justice. He was my mentor, role model, counselor, and most especially, my friend. Texas has lost a great, great man.”⁸¹

⁷⁹ Texas Center for Legal Ethics, Chief Justice Jack Pope Professionalism Award, <https://www.legaethicstexas.com/Spotlight-on-Ethics/Awards/Pope-Award>; last visited March 20, 2017

⁸⁰ Texas Access to Justice Foundation, “Texas Legislature Provides Funding for the State’s Legal Aid System—‘Chief Justice Jack Pope Act’ to Increase Funds for Civil Legal Aid,” <http://www.teajf.org/news/releases/2013Session.aspx>.

⁸¹ Texas Supreme Court Advisory, <http://www.txcourts.gov/supreme/news/former-chief-justice-jack-pope-1913-2017/>.



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Embarking on a Journey of Research

By Hon. Jason Boatright

These pages are usually full of research about history, but sometimes they should make room for a history of research. After all, the very name of this *Journal* is rooted in the idea that it will tell stories about the life and times of inquiry. The word *history* comes from the Greek word for inquiry, not the word for history, and the word *journal* is cognate to *diary* and *journey*. So here is the diary, the journey, of a question and the search for answers.

Why were there different preambles to the Texas Constitution? While working on a legal opinion about religious liberty in 2011, I noticed that the preamble to the Texas Constitution contained a reference to God. A quick review of judicial opinions that cited that reference revealed that courts had quoted several different versions of the preamble. The versions of the preamble varied in punctuation, capitalization, and spelling, and some of these differences affected the semantic meaning of the reference to God.

This was fascinating to me. *Why were there different versions of the preamble?* This question soon raised others. *Which version was correct? And if there were several versions of something as simple as a preamble, wouldn't there be different versions of other parts of the Constitution?* I decided to try to answer those questions as soon as I finished my legal opinion.

After a few months of research, I learned that the Texas Constitutional Convention of 1875 approved one version of the preamble and ordered that it be enrolled,¹ but a different version was actually enrolled,² and that voters did not ratify either of these versions.³ Instead, voters ratified four other versions—one each in English, German, Spanish, and Bohemian—in 1876.⁴ And the preamble was not the only part of the Constitution that differed from version to version. Some very important provisions, like the requirement that criminal defendants receive a speedy trial, differed from one version of the Texas Constitution to another.⁵ Texas courts have been citing various versions of the drafted, approved, or ratified Constitution indiscriminately

¹ JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS, at 270-71 (1875) (Oct. 2. 1875), available at https://tarltonapps.law.utexas.edu/constitutions/files/journals1875/1875_10_02_jnl.pdf.

² *Tex. Const. of 1876, Preamble*, TEX. STATE LIBRARY & ARCHIVES COMM'N, available at <https://www.tsl.texas.gov/treasures/constitution/1875-01.html>.

³ CONSTITUTION OF THE STATE OF TEXAS, at 1 (Galveston, News Steam Book and Job Establishment), <https://tarltonapps.law.utexas.edu/constitutions/texas1876/a1>.

⁴ SETH SHEPARD MCKAY, SEVEN DECADES OF THE TEXAS CONSTITUTION OF 1876, at 147-48 (1942).

⁵ This provision is article 1, section 8 of the Constitution. The enrolled and ratified versions of this provision are different. *Compare Tex. Const. of 1876, Preamble*, TEX. STATE LIBRARY & ARCHIVES COMM'N, available at <https://www.tsl.texas.gov/treasures/constitution/1875-01.html> with CONSTITUTION OF THE STATE OF TEXAS, at 1 (Galveston, News Steam Book and Job Establishment), <https://tarltonapps.law.utexas.edu/constitutions/texas1876/a1>.

ever since.⁶ The *Journal* published these findings in an article called *No One Knows What the Texas Constitution Is*.⁷

When did English common law come to Texas? In preparing that article, I had compared the Constitution of 1876 with other Texas Constitutions, including the 1836 Constitution of the Republic of Texas. While reading the 1836 Constitution, I noticed a provision that required Congress to introduce, by statute, the common law of England as soon as practicable.⁸ This invited the inference that Texas did not have a common-law legal system during at least part of its existence as an independent, Anglophone republic.

This intrigued me. *Was the Republic of Texas governed by the civil law of Spain and Mexico? And if it was, did any of part of the Spanish legal system—as distinct from individual laws derived from Spain—survive to the present day?* The answers surprised me.

When the Republic finally adopted the common law for civil proceedings in 1840, it expressly excepted the common-law system of pleading and provided that “the proceedings in all civil suits shall, as heretofore, be conducted by petition an answer. . . .”⁹ This enactment was long thought to be a prominent example of the survival of Spanish law in independent Texas,¹⁰ but the evidence, I eventually learned, pointed in a different direction.

Re-examining how French, Spanish, and Orleans Territory law came to Texas. In theory, Texas was governed by the civil law of Spain for over 300 years.¹¹ In practice, however, there had been very little law at all in Texas and, what law there was tended to be local, ad hoc, and short-lived.¹² In fact, when Stephen F. Austin tried to find copies of the laws that governed his colony, the Mexican Governor, Antonio Martínez, told him in a letter dated August 14, 1821, that there were none available and that he would have to make up the law on his own.¹³ Accordingly, Austin drafted civil and criminal legal codes, and the Mexican government formally approved them.¹⁴

⁶ See, e.g., *City of Houston v. Trail Enters., Inc.*, 377 S.W.3d 873, 886 (Tex. App.—Houston [14th Dist.] 2012, pet. filed); *Robinson v. Crown Cork & Seal Co.*, 251 S.W.3d 520, 541 (Tex. App.—Houston [14th Dist.] 2006) (Frost, J., dissenting), *rev'd on other grounds*, 335 S.W.3d 126 (Tex. 2010); *Waite v. Waite*, 64 S.W.3d 217, 232 n.4 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

⁷ Jason Boatright, *No One Knows What the Texas Constitution Is*, 4 J. TEX. SUP. CT. HIST. SOC. 3, 39 (Spring 2015). This article had been published previously in the *Texas Journal of Law and Politics* as Jason Boatright, *NO ONE KNOWS WHAT THE TEXAS CONSTITUTION IS*, 18 TEX. R. LAW & POL. 1 (Fall 2013).

⁸ TEX. CONST. OF 1836, ART. IV, § 13, available at <https://tarltonapps.law.utexas.edu/constitutions/texas1836/a4>.

⁹ See, e.g., LAS SIETE PARTIDAS DEL REY DON ALFONSO EL SABIO, COTEJADAS CON VARIOS CODICES ANTIGUOS, POR LA REAL ACADEMIA DE LA HISTORIA, TOMO II, PARTIDA SEGUNDA Y TERCERA, Partida III, Título 11, 379 Madrid en la Imprenta Real 1807). See also Act approved Feb. 5, 1840, 4th Cong., R.S., § 1, 1840 REPUBLIC OF TEXAS LAWS 88, 88-93, 1 H.P.N. GAMMEL, LAWS OF TEXAS 262, 262-67 (1898).

¹⁰ Joseph W. McKnight, *The Spanish Legacy to Texas Law*, 3 AM. J. LEG. HIST. 222, 227 (1959).

¹¹ DONALD E. CHIPMAN AND HARRIET DENISE JOSEPH, SPANISH TEXAS 1519-1821, at 25, 137 (rev. ed. 2010).

¹² GILBERT R. CRUZ, LET THERE BE TOWNS, SPANISH MUNICIPAL ORIGINS IN THE AMERICAN SOUTHWEST, 1610-1810, at 15253 n.48 (1988); CHARLES R. CUTTER, THE LEGAL CULTURE OF NORTHERN NEW SPAIN, at 35-36 (1995).

¹³ Eugene Barker, *The Government of Austin's Colony, 1821-1831*, S.W. HIST. Q. 21, at 225 (1918) (citing letter from Governor Antonio Martínez to Stephen F. Austin, Aug. 14, 1821).

¹⁴ Barker, *Government of Austin's Colony*, at 229.

Austin's civil code established a simple petition-answer system of pleading for his colony's courts¹⁵ administered by an *alcalde*, an ancient Spanish office that came from the Roman *iudex* and the Arab *al-qadi*.¹⁶ Although Austin wrote his procedures for a Spanish office, he did not copy them from Spanish law,¹⁷ he adapted them from his memory of an Orleans Territory law.¹⁸ Austin's *alcalde* courts became the district courts of the Republic of Texas¹⁹ and his pleading provision was in use after Texas separated from Mexico.²⁰ Therefore, the pleading system that the Republic of Texas retained when it adopted the common law came from Orleans via Stephen F. Austin. The *Journal* printed much of this research in an article called *Stephen F. Austin's Alcalde Codes: The Surprising Origin of Texas Law*.²¹

Naturally, researching that article only raised more questions. *Where did the Orleans law come from? And did it influence current Texas law?*

The answers slowly emerged while comparing the Austin and Orleans laws with Spanish, French, English, and American laws. It turned out that Austin's law had almost nothing in common with Spanish and French law,²² and that the Orleans law had a lot in common with English equity practice.²³ However, English equity was ultimately descended from canon law and Roman law, which were important sources of Spanish law.²⁴ And the Orleans law showed traces of an element of Roman law that was also a feature of the civil law of Spain and Mexico.²⁵ In this way, Austin's law was partly Spanish, even though it came from English equity. Today's Texas pleading rules are direct descendants of Austin's law and are, therefore, also partly Spanish.²⁶

The legal sources that uncovered those findings revealed more than just the source of Texas pleading rules. They also showed that the letter of the law in early Texas was often very different from the lived-experience of the law. Nowhere was this more striking than in Spanish B́exar, where court records show little evidence of regular procedure, just the preferences of amateur judges,²⁷ while the laws that, in theory at least, governed judicial proceedings there

¹⁵ *Civil Regulations for the Alcaldes, Article 3*, in STEPHEN F. AUSTIN, ESTABLISHING AUSTIN'S COLONY, 76 (David B. Gracy, II, ed. 1979).

¹⁶ Karen B. Graubart, *Learning from the Qadi*, 95 HISP. AM. HIST. REV. 2, 204 n.32 (2015); JOSEPH F. O'CALLAGHAN, A HISTORY OF MEDIEVAL SPAIN, at 270 (1983).

¹⁷ Stephen F. Austin to John P. Coles, Alcalde of the Brazos, January 25, 1824, Austin Papers, Dolph Briscoe Center for American History, The University of Texas at Austin.

¹⁸ Joseph W. McKnight, *Stephen Austin's Legalistic Concerns*, 244 S.W. HIST. Q. 89 (1986) at 244 (citing 1805, 2d Sess., Louisiana Gen. Laws 236, ch. 26, § 14).

¹⁹ Clarence Wharton, *Early Judicial History of Texas*, 12 TEX. L. REV. 311, 323 (1934).

²⁰ See Michael Rugeley Moore, *Celia's Manumission and the Alcalde Court of San Felipe de Austin*, 5 J. TEX. SUP. CT. HIST. SOC. 38, 43 (Fall 2015) (showing a summons of witnesses dated May 14, 1833 that is identical to the form of summons in Article 3 of Austin's Civil Regulations for the Alcaldes).

²¹ Jason Boatright, 5 J. TEX. SUP. CT. HIST. SOC. 3, 28 (Spring 2016).

²² Jason Boatright, *The Curious Origin of Texas Pleading*, 71 SMU L. REV. 53-60 (Winter 2018).

²³ Jason Boatright, *The Curious Origin of Texas Pleading*, 71 SMU L. REV. 77-80 (Winter 2018).

²⁴ JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, 11-12 (1838).

²⁵ Jason Boatright, *The Curious Origin of Texas Pleading*, 71 SMU L. REV., 82 (Winter 2018).

²⁶ The pleading rules are also descended from the Federal Rules of Civil Procedure, which are themselves descended from old English equity rules. Jason Boatright, *The Curious Origin of Texas Pleading*, 71 SMU L. REV., 95 (Winter 2018).

²⁷ JESÚS DE LA TEJA, SAN ANTONIO DE B́EXAR, A COMMUNITY ON NEW SPAIN'S NORTHERN FRONTIER, at 141 (1995).

devoted thousands of words to elaborate procedures for bringing a lawsuit.²⁸

The Society allowed me to elaborate on these conclusions and the sources that revealed them. In a presentation called *The Alcalde Courts of Austin's Colony 1821–1833* at the 2018 Texas State Historical Association annual meeting, we displayed images of 13th Century Castilian laws, 18th Century court records from Spanish Texas, and 19th Century codes from San Felipe de Austin, then explained how they related to each other.

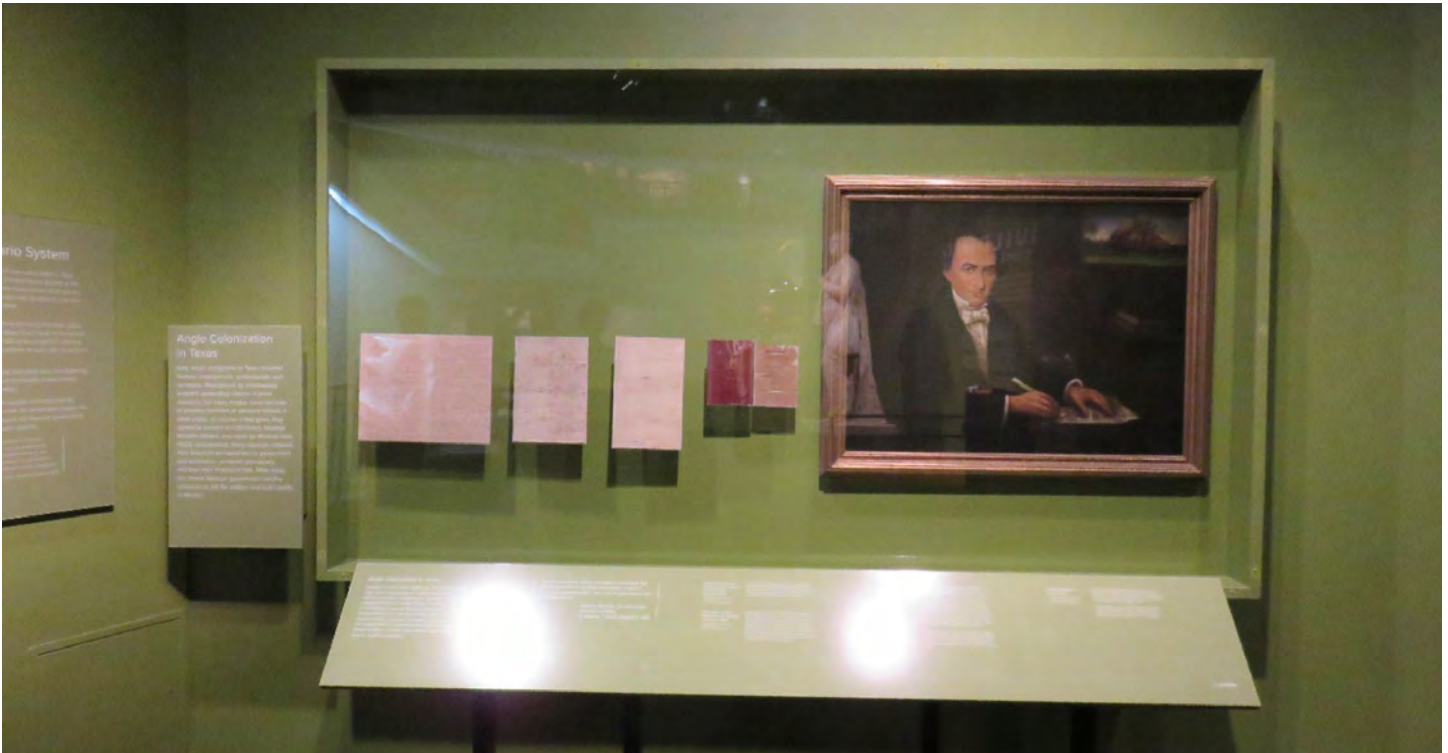
Sharing Texas legal research with the Bob Bullock Texas State History Museum.

In the audience at the TSHA annual meeting presentation was Tom Wancho, Exhibit Planner for the Bullock Texas State History Museum in Austin. He decided that the Museum should put together an exhibit displaying the kinds of documents highlighted in the Society's presentation. Throughout the summer of 2018, Mr. Wancho and I traded emails about which documents the exhibit should display and how to locate images of them. I possessed copies of many of the documents he was interested in, but Mr. Wancho had to dig through archives to find others. The exhibit displays many documents that show how Texas changed from a Spanish province to a Mexican State and independent republic, including some that were featured in the Society's presentation, like the 1821 letter from Governor Martínez telling Stephen F. Austin that he was the law of his colony.



This odyssey of exploration ended in an exhibition at the Bob Bullock Texas State History Museum.
Photo courtesy of Bob Bullock Texas State History Museum website.

²⁸ 5 NOVISIMA RECOPIACION DE LAS LEYES DE ESPAÑA, Libro XI, Titulo III, De las Demandas, Ley 1, D. Fernando Y D. Isabel en las Ordenanzas de Badrid de 4 de Dic. De 1502, cap. 1, 184 (Madrid 1805); *id.* Titulo VI, De las contestaciones, Ley 1, tit. 7. Del Ordenamiento de Alcala, 192 (Madrid 1805).



Above: The exhibition. Below: The Bob Bullock Texas State History Museum displayed records of the Green DeWitt Colony in the twin-state of Coahuila y Tejas. Photos courtesy of Jason Boatright.



Letter from Baron de Bastrop to the citizens of Austin's colony, August 4, 1823

Courtesy Dolph Briscoe Center for American History, The University of Texas at Austin

This letter from Stephen Austin relates a message from the Baron de Bastrop, the Commissioner of Austin's Colony, to the colonists. It conveys a direct message that the Mexican government considers Austin to be the law in the colony and the settlers are commanded to respect his authority.

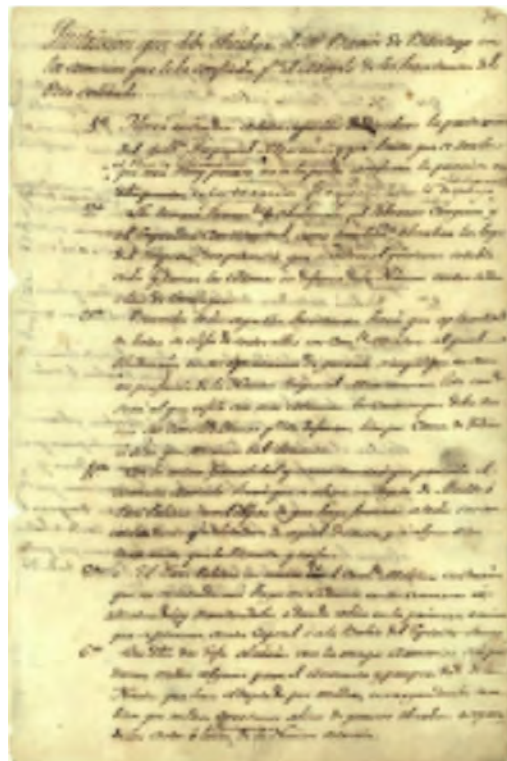
Handwritten draft of Regulations for Alcades January 22, 1824

Courtesy Dolph Briscoe Center for American History, The University of Texas at Austin

Responsible for all civil and military authority in his colony, Austin had to write his own laws for government, which he based primarily on Spanish law. Austin was already familiar with Spanish law, having lived in Missouri when it was ruled by Spain. He served in the Missouri Territorial Legislature in 1815 and also briefly as a circuit judge in the French-Spanish domain of Arkansas in 1819. This heavily edited, handwritten document is Austin's draft of Regulations for Alcades. The office of alcalde settled disputes, performed marriages, carried out Austin's orders, and oversaw the militia.

Photos of the Bob Bullock Texas State History Museum signboard, above, and instructions to Baron de Bastrop, below, provided by Jason Boatright.

Instructions to Baron de Bastrop on establishing local government in Austin's Colony



Anglo Colonization in Texas

Stephen F. Austin (1793-1836) was the first empresario to be granted land in Tejas and is responsible for settling the first 300 families. These settlers — farmers, stockmen, tradespeople, professionals, and surveyors — were Anglo immigrants from the United States. To receive a land grant, they agreed to convert to Catholicism, become Mexican citizens, and abide by Mexican laws. Highly independent, many colonists retained their American perspectives on government and economics, remained pro-slavery, and kept their Protestant faith. Miles away, the central Mexican government had few resources to aid the settlers and build loyalty to Mexico. Instead, they placed responsibility for making and upholding the laws on Austin's shoulders.

Above and below: The Bob Bullock Museum's signboards helped visitors understand how Stephen F. Austin and his legal code shaped the lives of settlers at San Felipe de Austin in Mexican Coahuila y Tejas.

"You will cause them all [the colonists] to understand that until the government organizes the authority to govern them, and administer justice they must be governed by and subordinate to you."

Anthony Martinez, the last Spanish
Governor of Texas,
to Stephen F. Austin, August 14, 1821

The exhibit opened in September 2018, but the inquiry that led to it began years earlier. And although the exhibit will close in February 2019, the body of research it displays is living still. The Texas Supreme Court Historical Society has helped raise this research at every stage of its life. Which is the kind of thing a historical society should do, after all.



JASON BOATRIGHT is a former Justice on the Fifth District Court of Appeals in Dallas, Texas. Before being appointed to the Court, he was Chairman of the Texas Attorney General's Opinion Committee, Director of the Texas Railroad Commission's General Counsel Section, and Briefing Attorney for Presiding Judge Sharon Keller of the Texas Court of Criminal Appeals. He has also been a litigator in private practice.

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Justice Phil Johnson

Has Been a Guiding Light for Public Service

By Hon. Jeff Brown

Justice Phil Johnson retired from the Texas Supreme Court on December 31, 2018 after 13 years of distinguished service. His opinions have left an indelible mark on Texas law, but those of us who have been privileged to work with him know his legacy runs much deeper.

In our system of partisan judicial elections, Texans have had multiple opportunities to vote for or against Justice Johnson. Many undoubtedly based their votes on whether they and he belonged to the same political party. But I am convinced that no matter your age, race, religion, or political persuasion, after spending a day following Justice Johnson on the job, you'd have proudly voted for him. He is a shining, unwavering example of what we should demand from our public servants.



Photo from www.justicephiljohnson.com.

Long before he was a judge, he served our country as a captain in the U.S. Air Force, flying an F-100 fighter-bomber during the Vietnam War. He was decorated with the Silver Star, the Vietnamese Cross of Gallantry, and the Distinguished Flying Cross — twice.

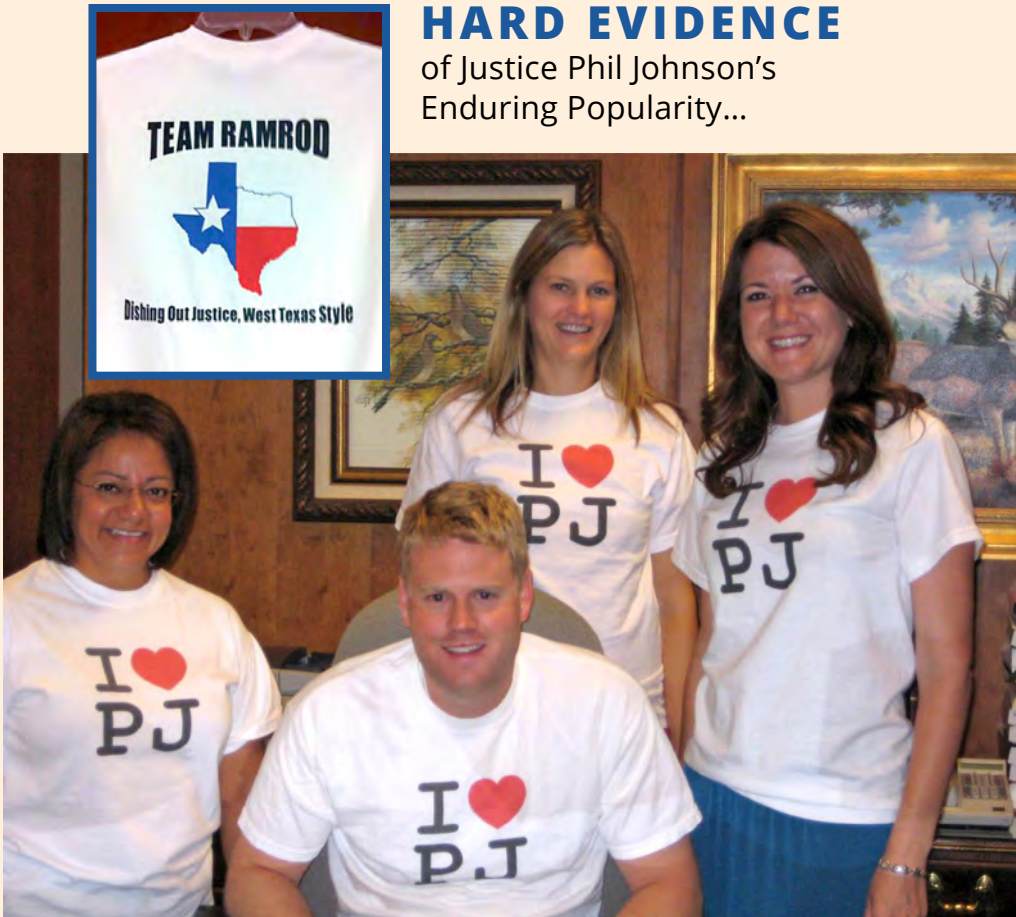
His enduring devotion to his wife, Carla, was born from tragedy and grief. They met at the ceremony where Justice Johnson was awarded the Silver Star. Carla's first husband, also an Air Force pilot, was also to receive the Silver Star, but had been killed in action. She was at the ceremony to accept the posthumous decoration on his behalf. And a love story was born.

Justice Johnson attended Texas Tech for both undergraduate studies and law school. After establishing his law practice in Lubbock, he ran for a seat on the Amarillo-based Seventh Court of Appeals, won, and was later elected chief justice of that court. In 2005, Gov. Rick Perry appointed him to fill a vacancy on the Texas Supreme Court.

For the past five years, I've served alongside Justice Johnson on the Texas Supreme Court. For nearly all that time, I was the court's junior justice, which means I had a lot to learn. There was never any better example to follow than Justice Johnson. He sets the bar for his devotion to

HARD EVIDENCE

of Justice Phil Johnson's
Enduring Popularity...



Above left: Justice Phil Johnson's Court staff, who called their boss "PJ," showed their affection and loyalty in many ways. Pictured left to right above wearing custom-made tee shirts are his executive assistant Georgie Gonzales, 2010-11 law clerk John Beck, staff attorney Heather Holmes, and 2010-11 law clerk Sara Berkeley Churchin. Photo courtesy of Georgie Gonzales. Above left inset: The back of the T-shirt includes the name "Ramrod," referring to Justice Johnson's Air Force code name. Above right: Although Justice Johnson is no longer physically present in the Court's offices, his likeness remains in the form of bobbleheads that appear on his fans' desks and shelves. Photo by Mary Sue Miller.

the court, his love for our staff, and the fundamental kindness and decency he so freely offers to everyone he meets.

Even at a spry 74 years old, Justice Johnson's work ethic is unmatched. Our workload is substantial. We hear and decide about the same number of cases every year as the United States Supreme Court, but as elected judges we must also mount statewide political campaigns.

While the demands on all of our time is similar, no one is better prepared for oral argument and our court conferences than Justice Johnson. I'm 25 years younger than he is and I marvel at his bottomless supply of good-natured energy.

Justice Johnson is universally beloved by our court's staff, and enjoys particularly fierce loyalty from his former law clerks. It's no secret why — he embodies the Golden Rule. He knows every law clerk's name — both his own and the other justices' — even before they walk in for

their first day of work. He treats everyone at the Court — from the housekeeping staff to the chief justice himself — with the same gentle, caring respect. He never raises his voice. He never shows anger or frustration. He exemplifies encouragement, optimism and steady-handedness.

His decency extends even to those who would seek to take his job away. Unaware that Justice Johnson was in earshot, I once made an unflattering remark about his opponent in a particular election. I was immediately embarrassed when I realized he heard me, because I knew it was something he'd never say. I acknowledged my remark was in poor taste and he was graciously dismissive. A lesser man would have reveled in my criticism of his opponent. Justice Johnson would have none of it.

Since I was young, I've held on to a romantic notion that America always calls out the best among us for public service. But the arc of history shows that politics rarely works that way. Even our greatest heroes are often deeply flawed human beings. But sometimes our faith is rewarded. And working alongside Justice Johnson has rekindled my hopeful faith in our system.

Across this great state, in both political parties, there are men and women of the highest character hard at work for the people of Texas. They're the quiet ones, avoiding the spotlight, focusing on good government rather than self-aggrandizement. For those good folks, and for anyone who aspires to the gold standard of public service, Phil Johnson is a guiding light. And whether you ever voted for him or not, I promise he has made you proud.

This story originally appeared in the Longview News-Journal on December 15, 2018.



JUSTICE JEFF BROWN *has served on the Texas Supreme Court since 2013. Prior to that, he served six years each as a trial judge and an appellate justice. He is a member of the Texas Supreme Court Historical Society's Board of Trustees.*

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In Memoriam

Justice C. L. Ray, Jr., 1931-2018

By Osler McCarthy



Retired Justice C.L. Ray, Jr., a progressive who served on the Texas Supreme Court for 10 years through the 1980s when it was pitched for change, died December 9, 2018 in Lansing, Michigan. He was 87.

“C.L. Ray served the Court with distinction,” Chief Justice Nathan L. Hecht said. “He was a country lawyer who supported simplified procedure that overcame ‘gotcha’ traps to be fair and to resolve legal disputes on their merits. His memory and contributions to Texas jurisprudence will endure.”

Born Cread L. Ray, Jr. in 1931 in Waskom, near Marshall, Texas, he graduated from Waskom High School in 1948, from Texas A&M University with a bachelor’s degree in business in 1952, and from the University of Texas School of Law in 1957 after serving in the U.S. Air Force in Korea. At A&M he was named Outstanding Cadet in the legendary Corps of Cadets.

After his return from Korea he left active service for the Air Force Reserve. He retired as a lieutenant colonel in 1987. An Eagle Scout as teenager, Ray was honored in 1981 by the Boy Scouts of America organization as an Outstanding Eagle Scout.

“He . . . had a pragmatic sense of what was right, which by itself is no substitute for learned explanations of the common law, but is always a jumping-off point for refining the issues and researching the law for opinions that explain the policy behind the common law,” said Charles Spain, one of Ray’s former Supreme Court briefing attorneys and newly elected justice on Houston’s 14th Court of Appeals. “For Judge Ray it was never enough to find cases that stated a proposition; the cases had to explain why. They also had to make sense.”

Ray died under hospice care in the late stages of prostate cancer he battled for years. He moved recently with his wife, Janet, to Michigan to be close to family. Burial was in the Texas State Cemetery.

Justice Charles Spain remembers C.L. Ray, Jr.

Admitted to the Texas bar in 1957, Ray returned to practice law in Marshall and, two years later, entered politics with his election as Harrison County judge. After serving as county judge for two years, he returned to private practice.

In 1966 voters in Harrison and Panola counties elected Ray to the first of two terms he would serve in the Texas House of Representatives. But instead of seeking re-election to the House, in 1970 he won a seat on the Texarkana Court of Appeals and served until his election to the Supreme Court in 1980.

On the Court Ray was among a philosophical-reform vanguard, especially in tort disputes. That produced controversy, but he also faced accusations that he improperly sided with a campaign contributor in voting to rehear a case decided against the contributor. He called that a partisan attack as the Court's supporters became more divided, Republican versus Democrat, and the Court itself became majority Republican through the 1990s. He retired when his term ended in 1990 and returned to law practice, this time in Austin, concentrating on appeals, oil-and-gas and personal-injury law.

After his return from Korea he left active service for the Air Force Reserve. He retired as a lieutenant colonel in 1987.

An Eagle Scout as teenager, Ray was honored in 1981 by the Boy Scouts of America organization as a Distinguished Eagle Scout. He remained actively involved in Scouting, serving as a scoutmaster and as a member of his local council executive board, including service as vice president for legal affairs.

"Perhaps there never was an age of 'great judges,' merely judges who appeared that way to us when we were young and just starting out," said Spain. "But Judge Ray did appear that way to me—and with good cause. He served his country in the Air Force in Korea, honed his skills for years as a country lawyer, and served two terms in the Texas House of Representatives and eventually 20 years on the bench—a decade on the Texarkana Court of Civil Appeals and a decade on the Supreme Court of Texas."

"For those of us who had the privilege to know him, Judge Ray cared deeply about the law, about justice, and about people," Spain said. "And he always had great stories. You were lucky to be his friend."



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



Voters elected former City of Houston Municipal Judge **CHARLES A. SPAIN** to serve on the Texas Court of Appeals for the Fourteenth District on November 6, 2018.

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Great War Commemoration a Great Success

By David A. Furlow



Left: The 36th Infantry Division led the way with an Honor Guard and a heart-felt delivery of *The Star Spangled Banner*. Right: Before the Great War Commemoration began, the Supreme Court led the audience in reciting the Pledge of Allegiance. Photos by Mark Matson.

Our Society's Great War Commemoration was a great success by every measure. Thanks to the leadership of our Chair Judge Mark Davidson, Texas Supreme Court Justice Paul Green, Texas Curator of the Capitol Ali James, and our Society's Executive Director Sharon Sandle, the event took place on November 14, 2018 in the Historic Supreme Courtroom in the Capitol.

The Society thus marked the anniversary of the November 11, 1918 Armistice that ended the Great War on the Western Front after four years of sacrifice, brutality, and heroism that forever transformed Texas, America, and the world. The commemoration was also an experiment unprecedented in Texas: a single program that combined judicial and military history while honoring veterans.

Paul Burks's compelling video appears on the Society's web-page. The event began immediately after the Society's Fall 2018 Board of Trustees Meeting. Executive Director Sharon Sandle and President Marcy Hogan Greer, as well as our Great War Commemorative Committee Chair Judge Mark Davidson and I, led the Society's officers and Fellows from the Texas Law Center to the Third Floor of the Capitol. State Bar of Texas Video Department Director Paul Burks was there to meet us. You can watch the beautiful, one hour, 22 minute video of the Great War Commemoration Paul produced, and introduced with rousing rendition of "Over There," on the Society's John Hemphill YouTube Channel at <https://www.youtube.com/watch?v=RBryvBXcGSI>.



The Texas Supreme Court in Special Session. From left to right: Justice John Devine, Justice Eva Guzman, Justice Paul Green, Justice Jeff Boyd, Justice Jeff Brown, and Justice Jimmy Blacklock. Chief Justice Hecht was in California attending a national conference of chief justices on the day of the Great War Commemoration. Photo by Mark Matson.

Senior Justice Paul Green presided over the commemoration. Texas Supreme Court Senior Justice and our Society's Court Liaison Paul Green entered the Capitol's Historic Texas Supreme Courtroom. Supreme Court Clerk Blake Hawthorne's "Oyez, Oyez, Oyez...The Texas Supreme Court. God Save the State of Texas and this Honorable Court" commenced the Special Session of the Court at 1:30 p.m. The Court's other Justices left the next-door Robing Room and took their seats at the elliptical bench in front of the three seats where Justices conducted Supreme Court of Texas sessions from 1888 until the Court was expanded from three to nine members in 1945. The expanded Court continued to meet in that Courtroom until it moved into its current quarters in 1959.

From the outset, Justice Green proposed that the Society should honor not just the judges and governors who served during the Great War, but all veterans. He proposed that the Society should begin the event with an Honor Guard drawn from one of the Texas units in which our honorees served—and worked with U.S. Army Master Sergeant Michael W. Leslie, the 36th Infantry Division's Senior Public Affairs Officer, to get things rolling with an Honor Guard.

The Guard arrived, entered with flags waving, and led the Court, the Society, and our guests in the Pledge of Allegiance and *Star-Spangled Banner*. Justice Green thanked those members of

our armed services who started the program in such a memorable way:

I'd like to thank the Honor Guard that comes to us by courtesy of the historic 36th Infantry Division, also known as the Arrowhead Division or the T-Patchers, based at Camp Mabry, which we will soon learn was one of the military units that produced several of the Texas Supreme Court Justices and others being honored here today. The Honor Guard consists of Sergeant First Class Jose Alvarado, Staff Sergeant Terry Bailey, and Staff Sergeant Hugo Luna, and the National Anthem was beautifully sung by Sergeant Melissa Bosque. The Honor Guard Detail was specifically costumed for this event by Master Sergeant Michael W. Leslie. We want to thank them all...

Justice Green also acknowledged Texas State Preservation Board Director Ali James and Capitol Scheduling Planner Robert Davis for making the Historic Supreme Courtroom available to the Society and the Court.

Justice Green then acknowledged, with gratitude, Texas State Librarian Mark Smith, Texas State Archivist Jelain Chubb, and Texas Military Forces Museum Director Jeff Hunt for providing the Society with timely assistance and for loaning archival materials on display in the Courtroom and at the Texas Law Center.



The Texas State Library and Archives loaned the Society and the Court an authentic gas mask used in World War I as a reminder of the harrowing experiences of the men who served their country in that war. Laura Saegert brought this 1915 gas mask to the Supreme Courtroom. Photo by Mark Matson.

Justice Green recognized distinguished guests in the audience, including former Supreme Court of Texas Chief Justice Wallace Jefferson; former Justice Dale Wainwright, who as the Society's President appointed Judge Mark Davidson as Chair of the Society's Great War Commemoration Committee in March of 2018; and former Justice Craig Enoch, also a former President of this Society. From the beginning, Judge Davidson and I sought to honor Judges of the Court of Criminal Appeals who served in the Great War, as well as Justices of the Texas Supreme Court. Justice Green thus recognized members of the Texas Court of Criminal Appeals Judges who attended the program, including Judges Michael Keasler, Bert Richardson, Kevin Yeary, Mary Lou Keel, and Scott Walker, and Court of Criminal Appeals Clerk Deanna Williamson. Also recognized were Fourteenth Court of Appeals Justice Ken Wise, First Court of Appeals Justice Jane Bland, State Bar of Texas Executive Director Trey Appfel III, State Bar President Joe K. Longley, and former Texas Representative Dan Branch.

Then Justice Green turned over the podium to the Society's President, Marcy Hogan Greer. President Greer welcomed descendants who had come to the



Guests filled every seat in the Supreme Courtroom, while others stood by the Courtroom's open doors to watch the Commemoration. Photos by Mark Matson.

Capitol from great distances to remember those veterans who served both their country and their fellow citizens in Texas. She discussed how our Society preserves and protects the history of the Texas Supreme Court, the Texas judiciary, and the Rule of Law; noted how the Society's publication of books furthers its educational mission; and described how this *Journal* was playing a critical role in publishing the stories of the Great War veterans who served. She then handed over the podium to Judge Davidson.

"Why It Matters," by Judge Mark Davidson. Judge Davidson described how the idea of a Great War Commemoration arose from his visit to the National World War I Museum and from his research about Houston lawyers and judges for the *Houston Lawyer*. While I advanced the slides in his PowerPoint, he explained the reason he proposed this special program. The *Journal* is proud to publish Judge Davidson's words.

HONORING THOSE WHO SERVED IN THE GREAT WAR

**Texas Supreme Court Historical Society
Texas Supreme Courtroom
November 14, 2018**

Why It Matters

May it please the Court:

One hundred years ago, the cannons were cooling down, but were not yet cold. An artillery captain who would become a prominent Houston attorney would order his men to unleash a final barrage on the German lines at 10:59 on the morning of November 11th. Two minutes later, soldiers were coming across the lines of No Man's Land to shake hands with their former enemies. The wounded and sick, who were the majority of the combatants, all heaved a sigh of relief, and could start looking forward to medical treatment, warm showers, clean clothes, and, in time, a boat ride home.

Since 2014, the countries of Europe have been noting the passage of the centennials of the events of The Great War, commonly known to Americans as World War I. In America, remembrance of the war has been muted. Unlike our friends, and former enemies across the pond, the war is largely forgotten in our history classes and popular culture. Generals Patton, Eisenhower, and MacArthur and Admiral Nimitz have all been celebrated in movies and documentaries galore, while Generals John J. Pershing, Tasker Bliss, and their contemporaries have not.

Given the fact that The Great War has been all but forgotten in popular culture, it is fair to ask: Why does it matter? Here are three reasons:

First, the Armistice Day Centennial is a day of significance for our nation and state. It marks the 100th anniversary of the beginning of the American Century. The 19th Century and the first fourteen years of the 20th Century were a European century. Through indoctrination, diplomacy, military conquest, and imperialism, the Old World largely took over the Third World and treated them as colonies. The deaths of an entire generation of young European men in the war and the mammoth financial costs left a vacuum that was filled in by the country that had stayed out of the war until the last year. The United States found itself financially and militarily powerful after the war. America had suffered a fraction of the casualties, or so we thought, and spent much fewer of our resources in the war. That led to our economy leading the world into the next hundred years, a state that would be enhanced by our late entry into World War II. Our nation's role as a world leader therefore began one hundred years ago.

The Great War was the first war in which use of, and therefore access to, petroleum was critical to long-term success. No state in America produced more oil than Texas. The war turned us from an agricultural backwater to a major player in the world economy.

The second reason the Centennial matters is that the cauldron of military service in time of war creates leaders who have answered and will continue to answer the call of duty to one's country. That is proven by the quality of the Judges and Governors we honor in this issue of the *Journal*. Whether their service was as an officer in the front lines of battle, a quartermaster corps member providing arms and food, or those soldiers or sailors who were on their way "over there," they became proven leaders at young ages. Among the American soldiers and sailors that would celebrate the day of the Armistice were eight young men who would come to serve on the Supreme Court. Three more would become Governor of Texas. Two would serve on the Court of Criminal Appeals. You will read about each of these men in this issue.

For the last three decades we have celebrated the accomplishments of the "Greatest Generation," the men and women who came of age in the 1940s. They are entitled to praise, but we have failed to recognize our debt to their predecessors of a generation before. When you hear about the lives and service to our state of

the Judges and Governors we honor today, consider how their service made the Courts and our state better. Countless veterans would become public servants in various capacities all over our State and Nation. Each of the twelve veterans we honor today made a difference for our State, and made a difference for the better.

The third reason the Armistice Day Centennial is significant is that each of these men, and each of the millions of American men and women who answered the call to service to our nation, deserve our thanks and praise for what they did. Each of them served at a time in which the technology of weapons had advanced far more than had developments in medicine, sanitation, and the prevention of disease. Their sacrifices during the war did not make it the war to end all wars, but it was the first step in a process of ridding the world of colonialism and dictatorship and helped us evolve into a world that, for the most part, honors democracy and cares about human rights. On the Centennial of the conclusion of the war, we should be and are pausing to thank each of the members of the generation that served, for this may be the last time any ceremony is made remembering them.

Last month, I was watching a college football game that was taking place about a mile north of the State Capitol. The television announcer said that the game was being played at "Darrell K Royal Memorial Stadium, honoring the legendary Texas football coach." I am not denigrating Coach Royal, who was a great coach and a greater gentleman. However, the word "Memorial" in the name of the stadium does not refer to the coach. When the stadium was built in 1924, it was built as a memorial to the Texans, and especially the alumni and students of the school, who gave their lives in the war.

The next time you go into that stadium, please remember what the original intent of that word was. When you do so, I would suggest that a great way to honor the real purpose of the name is to say "Freedom Forever" as you enter instead of "Hook 'em Horns." In this issue, and in the Great War Commemoration on November 14, we remember a forgotten war and judges whose works appear in cases that are seldom cited. We remember the Governors who each contributed to the modernization of our state. We owe each of them a great degree of thanks for all of their service to us. That is the greatest, and best, reason that Armistice Day matters.

The soldiers and sailors of the Great War are no longer with us, but their courage, sacrifices and deaths should not be forgotten. We are here today to remember them and to give them thanks. This Court is due praise for meeting today to thank them. You honor the history of our state and of this Honorable Court by your presence.

Honoring Every Judge and Justice for Their Service and Sacrifices. Judge Davidson then turned to me. I presented a PowerPoint that examined the lives and legacies of each judge and justice who served. We showed each judge or justice in uniform, described training camps in which they prepared for war, and then examined the horrific nature of the conflict that called many of them across an ocean infested with U-boats, far from their Texas homes and families,

to confront the enemy in the storm of steel that was battle on the Western Front: Texas Supreme Court Justice Few Brewster, who served on the Court from 1945 to 1957,

- (1) Texas Supreme Court Justice Frank P. Culver, Jr., who served from 1953 to 1965,
- (2) Texas Supreme Court Justice A.J. Folley, who served from 1945 to 1949,
- (3) Texas Supreme Court Justice Wilmer St. John Garwood, who served from 1948 to 1958,
- (4) Texas Supreme Court Justice Meade F. Griffin, who served from 1949 to 1968,
- (5) Texas Supreme Court Justice Robert W. Hamilton, who served from 1959 to 1970,
- (6) Texas Supreme Court Justice Gordon Simpson, who served from 1945 to 1949, and
- (7) Texas Supreme Court Justice Charles S. Slatton, who served from 1945 to 1947.

The Court of Criminal Appeals Judges

- (1) Texas Supreme Court Justice Meade F. Griffin (1949-1968), who also served as a Special Judge on the Court of Criminal Appeals in 1969, and
- (2) Commission of the Court of Criminal Appeals Judge George Christian, who served from 1927 to 1941.

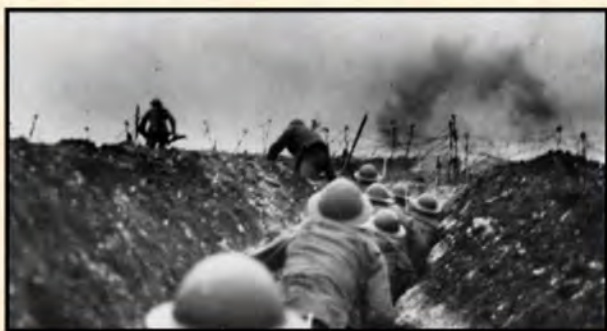


Justice John Devine looks on as David A. Furlow speaks from the podium. Photo by Mark Matson.

A few examples of those slides appear below. The story of each man's background, Great War training and service, and postwar contributions to the Rule of Law appeared in that slideshow and, today, remains accessible through the Fall 2018 issue of this *Journal*. Our authors and coauthors contributed scholarly articles, while our archivists generously shared photos, courthouse materials, and military records. The *Journal's* Managing Editor Marilyn Duncan devoted enormous time and careful attention to editing this massive collection of stories, while David Kroll supplied outstanding graphics, to make the largest issue of the *Journal* (152 pages) the best one as well. See <https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Fall%202018%20for%20WEB.pdf>

A few PowerPoint slides reflect how the Society shared the story of each judge's war-time service.

FEW BREWSTER (1945-1957)



George Christian's machine-gunners had to face experienced German machine-gun crews dug into defensive positions in the St. Mihiel Salient and in the Meuse Argonne Forest.

PowerPoint slides told individual stories of judges, justices, and governors, while other slides reexamined the unique nature of combat service in the Great War.

A BRUTAL WAR OF NEW TECHNOLOGY



In addition, our Society recognized the service of each of the four African Americans who trained at Camp Logan near Houston, and then won coveted *Croix de Guerre* awards in recognition of their uncommon valor. They answered their country's call, and made the world safer for democracy, despite the racially segregated nature of the American military at that time.



Private Arthur Johnson
proudly wears his *Croix de*
Guerre and Distinguished
Service Cross.

**The 370th
Infantry
Trained at
Camp Logan, in
Houston, Texas,
but Fought in
France.**



**Captain John H.
Patton** proudly wears
his *Croix de Guerre*.

We also recognized the vital contributions Texas women made to the war effort at a time when the suffrage movement was waging its own battle to gain women the vote by ratification of the Nineteenth Amendment.

WOMEN WENT TO WAR, TOO



Katherine Stinson and Her Aeroplane (1915).



Judge Mark Davidson points to the letter Captain Beauford Jester received from Great Britain's King George V, thanking him for his service in defense of the Allies.
Photo by Mark Matson.

Judge Davidson Paid Respect to the Governors Who Served. I then returned the lectern to Judge Mark Davidson, who presented his PowerPoint about the background, military service, and postwar record of each of the three Texas governors who took part in the Great War.

The Governors

- (1) Governor Dan Moody, who served from 1921 to 1931,
- (2) Governor James V "Jimmy" Allred, who served from 1935 to 1939, and
- (3) Governor Beauford Jester, who served from 1947 to 1949.

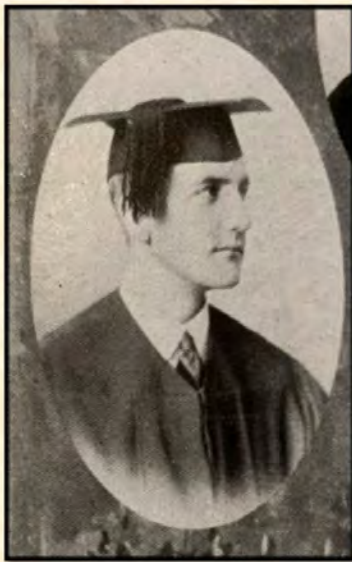
HE PROBABLY DIED OF A WAR WOUND—30 YEARS AFTER THE WAR

We now know that mustard gas leads to cardiac disease.

Captain Jester received (at least) two heavy doses of mustard gas.



MEADE F. GRIFFIN





Author and editor Bryan A. Garner spoke about his grandfather's Great War service. Photo by Mark Matson.

Bryan A. Garner spoke and played a tape of his ancestor Meade Griffin's recollections of the Great War. Texas Supreme Court Justice Meade Griffin's grandson Bryan Garner discussed the Great War service of his grandfather Meade F. Griffin and Griffin's inspiration for Garner's writing and study of the law. Bryan provided our *Journal* with family photos of Justice Griffin we presented as part of our PowerPoint dedication.

Representing the descendants of Justice and veteran Meade Griffin, Bryan took the podium to share an audio recording of his grandfather and mentor Meade Griffin's recollections of the Great War. But first, Bryan put Justice Griffin's Great War years in context. We reprint Bryan's speech in its eloquent entirety:

First of all, let me remark just how impressive it is that the Texas Supreme Court Historical Society is commemorating the service of the nine Justices honored here today. The ingenuity and effort that have gone into both this ceremony and the journal articles about the Justices are extraordinary. On behalf of all the descendants of the honorees, I think we all owe a hearty round of applause to David Furlow and his colleagues at the Historical Society.

The Justices honored here had unique paths that led them into World War I. They were men of great intelligence, patriotism, and bravery. Their service to our nation helped shape the lives of all who have followed.

For the descendants of Justices Brewster, Christian, Culver, Folley, Garwood, Griffin, Hamilton, Simpson, and Slatton, I can say most sincerely that we're awed by our ancestors' achievements and glad that they're remembered by more than just their families.

Justice Griffin, whom my brothers and I knew as "Papa," was proudest of his military service after World War II, when he played the role of chief drafter of the Rules of Criminal Procedure for Nazi war crimes. He based those rules principally on the Texas Rules of Criminal Procedure. But that responsibility, and that of Supreme Court Justice, lay far in the future in 1917, when he was a 23-year-old law student at UT. It was then that the United States declared war on Germany.

We shouldn't forget that the Great War occasioned severe disruptions in the lives not only of the soldiers, but also of their families. When the time came to volunteer, young Meade Griffin was under pressure from his family in Tulia to return home from Austin to help his father on their Panhandle farm in the heart of the dustbowl. He was torn.

But I should let him tell it in his own voice. In 1972, at his home here in Austin, he recorded recollections of his life on 7 long reel-to-reel audiotapes. Here is the segment dealing with his recruitment to the First Officers Training Camp, as he recalled at the age of 78. He recounts how reluctant he was at 23, and how guilty he felt for that reluctance. But let's hear him tell it:

"World War I came on. War was declared in the first of April—about the 7th of April (I think) 1917 [it was the 6th]—and the United States Government then decided they were going to have to train some officers. They had less than 75,000 officers and less than 200,000 men. And they knew they were going to have to have about 2 to 3 million men and about 200,000 to 300,000 officers.

"So they set up ten training camps all over the whole United States. They sent a major up here [to Austin] to interview those who wanted to go. I didn't go right at first. We knew they were coming a week or so ahead of time. I'd written my people, and my people had moved [from Cottonwood] out to Tulia in the meantime, and my father had just started large-scale wheat farming. He was farming 640 acres, which was large-scale for those days. Tractors were just beginning to come in, and he saw the economic advantage of using those tractors on that level country out there on the Plains.

"So he and mother wrote me—I'm the only son—and they didn't want me to go into Army or into the War. They wrote me and they said we're going to have to raise something for everybody to eat, and you come on back here and go in with your father in this farming business.

"The first week when the major was here, I didn't go. And then, by George, it just got to where every morning when I'd shave and comb my hair—I had hair in those days—why I'd just say to myself, you yellow-bellied cowardly so-and-so, you're not going to stay out of that war. Your country needs you.

"About the third morning when I talked to myself that way, I went on down there to be examined, and was accepted."

Garner turned the recorder off to address the audience as a friend and historian:

Patriotism is pretty much out of fashion today. We all remember that Samuel Johnson said that patriotism is the last refuge of the scoundrel. Too many forget that he was disparaging scoundrels, not patriotism. Mark Twain provided better context. He said, "In the beginning of a change, the patriot is a scarce man, and brave and hated and scorned. When his cause succeeds, the timid join him, for then it costs nothing to be a patriot."

Our nine judicial honorees today were at the beginning of a change, and they were scarce men, and brave. They succeeded. They were patriots.

Five years before he died, Justice Griffin sent his three Garner grandsons a book about World War I and the First Officers' Training Camp. He inscribed it in 1969, at the height of the Vietnam War. In the inscription, he wrote: "I am proud to have been part of this group of patriotic citizens [who served in World War I], and I trust you may get some thrills of patriotism for our great nation. Do not let anyone persuade you that you have no duty to defend it in its time of need."

The men we honor here today made history. They clarified Texas law, they made Texas history, and they contributed to American history. On behalf of all the descendants, I thank the Texas Supreme Court Historical Society for remembering their unique contributions.

Governor Beauford Jester's descendant Alice Jester Berry spoke for the families of the three Texas governors who served in the Great War. Alice Jester Berry spoke on behalf of her own family and the descendants of Governor Dan Moody and Governor James V "Jimmy" Allred. She spoke poignantly of family memories and the sacrifices our honorees and their families paid during, and long after the end of, the Great War:

May it please the Court,

I'm honored to be asked to address you today. My role is to speak for the families of the three governors of Texas who served during World War I. As you have already heard, I'm here to speak on behalf of the Moody, Allred, and Jester families, and it's because of the last name that I was asked to speak. My grandfather was Governor Beauford H. Jester, and Jester is my middle name.

At the outset, I want to thank the Texas Supreme Court of Texas, and the Texas Supreme Court Historical Society, for the idea of the Commemoration.

When a 17-year-old freshman at Rice University named James Burr V Allred signed up to join the Navy, he certainly had no idea we would be here today remembering his service, but we are.

When young Captain Moody in the Texas National Guard resigned to serve at the bottom rank of the United States Army, he might not have thought it was something to be honored. But it was.

When my grandfather was poisoned with mustard gas, yet refused to leave the men under his command, he probably did not think it to be praise-worthy, since he was just doing his part. But it was worthy of praise and commendation.

Today we remember and honor these men, and the many men and women who were their compatriots, for which we thank you from the bottom of our hearts.



Governor Beauford Jester's descendant Alice Jester Berry shared family memories of her Great War ancestor with the Society and the Court. Photo by Mark Matson.

Alice Jester Berry then thanked the Court and Society on a more personal level for locating previously unpublished war records and encouraging descendants in the three families to delve into unexamined attic records and correspondence.

"In other words," Alice explained, "the work leading up to this ceremony brought my family and me closer to my grandfather, a man I never had the privilege of meeting. I'm hopeful that all of us here today have learned from the stories of the young men who answered the call to defend freedom. If we do that, this event will be one of both remembrance and significance. I hope as well that the accomplishments of Governors Moody, Allred, and Jester can now be seen through the prism of their experiences and leadership during the Great War. Thank you again for the honor to address you today."

Warren Harris represented the Fellows. As a past President of the Society and as a representative of Fellows Chair David Beck, Warren Harris took the stage to note how the Fellows support the Taming Texas judicial civics teaching program and the Taming Texas book series. Warren announced the production of the third Taming Texas book, *The Chief Justices of Texas*, thanked Texas Supreme Court Chief Justice Nathan Hecht for his support of the project, and thanked the Fellows for their generous support of the Society's educational program.

BATTLE OF ST. MIHIEL SALIENT SEPTEMBER 1918



Left: U.S. Army postcard of a German biplane downed during the Battle of St. Mihiel, provided by David A. Furlow from his grandfather's Great War collection. Right: The U.S. Army's commemoration of Governor Jester's valor during the Battle of St. Mihiel.

Texas Supreme Court Justice Jeff Brown accepted the *Journal's* Great War Commemoration Special Issue on behalf of the Court. Justice Brown thanked the Society for researching the lives and sharing stories of Texas's Great War veterans:

On behalf of the current and past members of the Court, thank you to the Texas Supreme Court Historical Society and all of today's presenters and organizers of this very important and impressive event... I myself am not a direct blood descendant of any veterans of the Great War, but in a very real way, we are all their descendants because we have inherited what they left for us, what they defended for us, what they preserved for us, through their selfless service and sacrifice.

We are descendants of veterans because we are their heirs. And as their heirs we are stewards of their legacy. We fulfill that duty of stewardship by honoring their memory through efforts like this ceremony.

But more importantly, we fulfill that duty by following their example. It's my hope that today's event inspires all of us to rededicate ourselves to standing up for the values these brave ancestors fought to defend. Not only in their lives as soldiers and sailors, but in the lives they led before and after the war, as lawyers, judges, public servants and ordinary citizens. We should be happy to follow their lead.

Justice Brown then took possession of the print version of the Fall 2018, Great War Commemoration Special Issue of the *Texas Supreme Court Historical Society Journal* on behalf of the Court.

Senior Justice Green concluded the program by thanking Justice Brown and the Society for “putting on a remarkable program; it’s obvious that quite a bit of work has gone into this.” He reminded everyone that they would “find something remarkable to see”—photos, records, and artifacts—in the Texas Law Center, then adjourned the Special Session of the Court.

The Commemoration continued with a Texas State Library and Archives Commission exhibition at the Texas Law Center. To bring to life the experience of serving in the Great War, we sought to make World War I artifacts available to everyone who attended the program. Texas State Librarian Mark Smith, Texas State Archivist Jelain Chubb, and Texas State Assistant Archivist Laura Saegert provided the Society with a collection of Great War photos, records, and artifacts. Peggy Price, the Texas State Library and Archives Commission’s Education Outreach Coordinator, brought them to the Texas Law Center where judges, justices, and our Society’s officers, trustees, and members could examine them.

Those archival records included a letter from Clark M. Mullian, of the Thirty-Sixth Division, 144th Infantry Regiment, to his mother, dated 1 December 1918, just after the Armistice, as culled from the records of the 36th Infantry Division; a 1918 “Service Over There” banner that was among the Papers of Clarence Lincoln Test, Clarence Lincoln and Nellie Donnan Test papers; George Bickler Scrapbook of clippings about Camp Bowie, 1917-1919; and a United War Work Campaign Brochure dated November 18, 2018 from the American Legion’s collection. And photographs galore.

Society Administrative Coordinator Mary Sue Miller ensured that the Society’s guests, including descendants of the honorees, enjoyed a reception that featured a wide variety of excellent catered food and beverages.

The Great War Commemoration received wide recognition in the press, on Facebook, and in the Twitterverse. The State Bar Blog covered the Great War Commemoration two days later in Adam Faderewski’s post “Texas Supreme Court holds special session to commemorate 100th anniversary of World War I armistice.”¹

Judge Davidson and I were honored to take part in the Society’s Great War Commemoration. It was an experiment in combining military and judicial history, a worthy way of honoring Texas veterans and Texans who honored their nation’s call in time of war.

¹ *State Bar of Texas Blog* (Nov. 16, 2018), <https://blog.texasbar.com/2018/11/articles/news/texas-supreme-court-holds-special-session-to-commemorate-100th-anniversary-of-world-war-i-armistice/>.



Texas State Librarian Mark Smith loaned Texas State Library and Archive photos, records, and artifacts to the Society for the reception following the Supreme Courtroom session in the Capitol. Left to right: Governor Beauford Jester's great-granddaughter Janet Dundas; former Texas Supreme Court Chief Justice Wallace Jefferson; Texas Supreme Court Justice Paul Green; and Governor Beauford Jester's granddaughter Alice Jester Berry.

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Texas Constitutionalism: TSHA 2019 Annual Meeting

By David A. Furlow



Join Us
— for the —
123rd Annual Meeting

The Society is proud to present a special panel program, “The History of Texas’s Constitutions, 1827 and Beyond,” at the Texas State Historical Association (TSHA) 123rd Annual Meeting. This prestigious panel program, jointly sponsored by this Society and TSHA, will begin promptly at 9:00 and last until 10:30 a.m. on Thursday, February 28, at the Omni Corpus Christi Hotel, 900 N Shoreline Blvd, Corpus Christi, Texas 78401. See <https://www.tshasecurepay.com/annual-meeting/sessions/>. Stay tuned!



Our Society's President Marcy Hogan Greer will introduce the speakers.

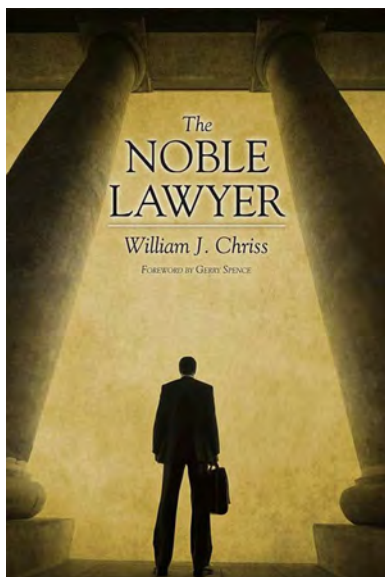
Marcy Hogan Greer, in her role as the Society's President, will introduce the panel. Ms. Greer is a partner at the Alexander, Dubose, Jefferson, Townsend law firm in Austin and is a Founder and Executive Committee member of the University of Texas Law School's Center for Women in Law.

Manuel González Oropeza will begin the program by presenting his paper, “The 1827 Constitution of Coahuila y Texas Blended Mexican and Anglo-American Constitutionalism.” A highly esteemed scholar at the Universidad Nacional Autónoma de México, Chief Justice Oropeza is the former Chief Justice of the Mexican Federal Election Court and is coauthor, with Professor Jesús Francisco “Frank” de la Teja, of *Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827: Primera Constitución bilingüe, a/k/a, Proceedings of the Constituent Congress of Coahuila and Texas, 1824–1827: Mexico's Only Bilingual Constitution* (Mexico City: Federal



Above left: The Hon. Manuel González Oropeza, photo by David A. Furlow.
Above right: *Map of Coahuila y Tejas, 1824*, Wikimedia Commons.

Election Court, 2016). Chief Justice Oropeza will discuss the 1827 Constitution of the Mexican twin-state of Coahuila y Tejas and the legal and administrative framework it created.



Bill Chriss, author of *The Noble Lawyer*, will speak about Texas Constitutions since 1836. Photo courtesy of State Bar of Texas.

Our second speaker, William (“Bill”) J. Chriss, will present a paper titled “Six Constitutions of Texas, 1836–1876 and Beyond.” A third-generation South Texan who speaks and writes on many matters, including legal ethics and history, Dr. Chriss is a member of the American Law Institute, recipient of the 2016 Chief Justice Jack Pope Professionalism Award, and author of the State Bar of Texas book *The Noble Lawyer*. His paper and excerpts from his forthcoming book on this topic examine the origins of the Republic of Texas’s Constitution of 1836 and the ways later Texas constitutions evolved in response to political crises involving slavery, Reconstruction, and the role of state government.



Top: The two-volume *Actas del Congreso* treatise about the 1827 Constitution of Coahuila y Tejas was on display at the Dolph Briscoe Texas History Center in 2016. Photo provided by *Texas Bar Journal* Assistant Editor Jillian Beck. Bottom: The Texas Convention met at Washington-on-the Brazos in 1836, where they drafted the Republic of Texas's Constitution. Wikimedia Commons.

Society Director Sharon Sandle, who is also the Director of the State Bar's Law Practice Resources Division, will serve as Commentator. She will discuss the two papers and field questions from the audience.

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. It was standing room only to see the Society's panels at the 2017 and 2018 TSHA annual meetings.

Registration in the foyer of the Omni Corpus Christi Hotel will begin at 8:00 a.m. on Thursday, February 28 for all who attend the annual meeting. For registration information, see <https://www.tshasecurepay.com/annual-meeting/registration/>. For more information about the hotel, sessions, and parking, as well as events such as lunches, dinners, and tours, see <https://www.tshasecurepay.com/annual-meeting/wp-content/uploads/2018/12/Events-TSHA-Annual-Meeting-2019.pdf>.

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Spring Board and Members Meeting to Be Held at San Felipe de Austin Museum

By David A. Furlow

Save the date, friends—please mark Thursday, March 28, 2019 on your calendar, now, to reserve that day for the Society's Spring Board of Trustees and Members Meeting at the year-old San Felipe de Austin Museum and Visitors' Center, 220 2nd St., San Felipe, Texas 77473. The museum is located on FM 1458, two miles north of I-10 between Sealy and Brookshire, approximately 50 miles west of Houston. The San Felipe de Austin State Historic Site is like a time machine that takes you back in time to watch Texas history unfold.

This is going to be a great event, not only because of the history, archaeology, and fresh air at the site, but also because of its central location. Houstonians who drive to San Felipe can save two hours behind the wheel going to Austin. Austinites and San Antonians can forego driving all the way into downtown Houston. Members who live in Fort Worth and Dallas escape the tedium and terror of driving the always-under-repair, never-quite-completed stretch of I-35 between Waco and Georgetown.

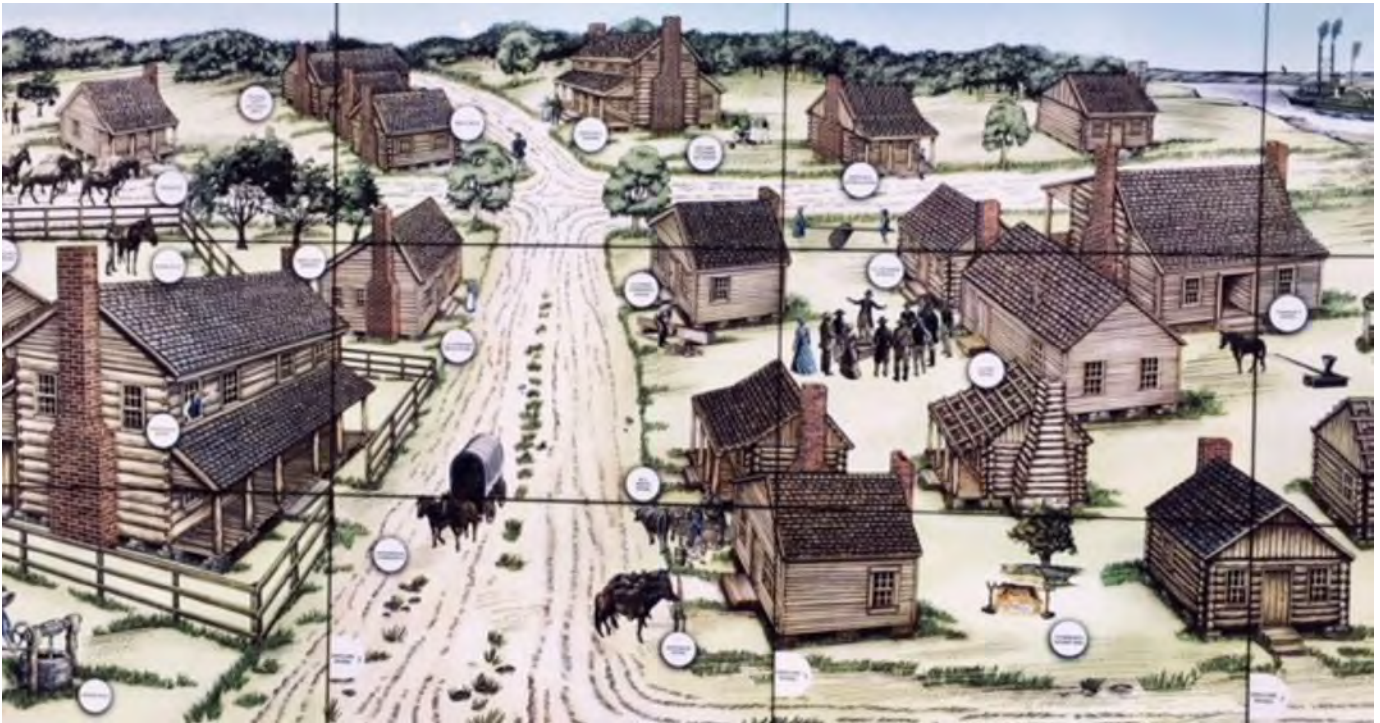


A statue depicting the Runaway Scrape greets visitors to the San Felipe de Austin Museum.
Photo by David A. Furlow.

As usual, our Spring Board Meeting will begin at 10:00 a.m. But this time, it will occur neither in Houston nor in Austin but in the original capital of Texas, San Felipe de Austin.

Mary Sue Miller is handling the arrangements to provide everyone with a catered lunch, so please let her know if you plan to attend. Mary Sue will send all members of the Society an email, so all you need to do is respond promptly.

San Felipe de Austin Historic Site manager Bryan McAuley will tell us true stories about the people who lived there in early Texas. We can count on a good speech from Bryan McAuley, a contributor to past issues of this *Journal*.



Coded map to the streets of San Felipe de Austin in 1835. Photo by David A. Furlow.

The place we will meet is uniquely historic. In 1823, empresario Stephen F. Austin established a headquarters for his colony in Mexican Texas. He carefully selected a place on the Atascacito Road along the Brazos River. The Mexican Governor named the town for his own patron saint while Austin gave the place his own last name, calling it San Felipe de Austin. The town quickly grew as new colonists arrived to settle Texas.

Between its founding in 1823 and the Texas Revolution in 1836, San Felipe was the center of political and commercial activity for Austin's Colony. Austin's land office, arguably the most important office in Texas at the time, was located in San Felipe. Austin also had a residence in town. There was a printing shop, William B. Travis's law office, a hotel, a blacksmith shop, three stores, and two taverns. It was one of the centers of Texas resistance to Santa Ana's usurpation of power in the Republic of Texas. Sam Houston urged fellow Texans to rebel against the dictator in letters he wrote from the settlement:

These, I may be permitted to hope, you will attend in person, that all the essential functionaries of the government may deliberate, and adopt some course that will redeem our country from a state of deplorable anarchy. Manly and bold decision alone can save us from ruin. I only require orders, and they shall be obeyed. If the government now yields to the unholy dictation of speculators and marauders upon human rights, it were better that we had yielded to the despotism of a single man, whose ambition might have been satisfied by our unconditional submission to his authority, and a pronouncement, for which we were asked, in favor of his power.¹

¹ Sam Houston to Henry Smith, in Amelia Williams and Eugene C. Barker, eds., *The Writings of Sam Houston 1813-1863* (Austin & New York: Pemberton Press/Jenkins Publishing Co., 1970), 332. See also Sam Houston, "Proclamation of Sam Houston, A Call for Volunteers January 15, 1836," Letter to Henry Smith, Texas State Library and Archives, <http://www.tsl.state.tx.us/treasures/republic/proclamation-houston.html>.



Top: The new San Felipe de Austin Museum contains wall-sized vistas that depict the settlement's appearance after Captain Moseley Baker burned it down to keep its supplies from being used by Santa Ana's Mexican army. Photo by David A. Furlow. Bottom: The museum contains artifacts and information about their importance. Photo by Ken Wise.

In 1836, the settlers who lived there—more than 600 people—watched Sam Houston's agent, Captain Moseley Baker, burn the place to the ground, leaving Santa Ana's advancing Mexican army nothing but scorched earth.

In the spring of 1836, the more than 600 residents saw their thriving town burned to the ground to prevent it from being used by Santa Anna's army. Captain Moseley Baker's company

TRAVIS LAW OFFICE

WILLIAM BARRET TRAVIS IS REMEMBERED as a revolutionary patriot and martyr of the Alamo. Before he gave his life for Texas' independence, he was a young attorney in San Felipe who ran a law office located on lot 50.

Travis represented his neighbors in a variety of disputes and was even successfully "retained to defend Celia, a free woman of colour, in the matter of her freedom."

When conflict with Mexico erupted, Travis put himself on the frontlines. He was assigned to the defense of San Antonio and rode out to his post in late January 1836. Travis never saw San Felipe again. He perished when the Alamo fell on March 6, 1836.



"Took lease from Dr. Miller for 12 months for House, stable lot & c. Fence to be made & roof to be put on House -- Gave note for rent \$100, payable 12 mo's after date."

Entry in Travis' diary, noting his lease of a building in San Felipe for his law office, November 10, 1835



William Barret Travis



WILLIAM A. TRAVIS' DIARY, ABOUT 1835 TO 1836. Travis' law partner Frederick S. Trice saved this diary from the burning of the town during the war. The only extensive record of Travis' daily life, the diary details his business, law practice, social life and even reading habits.



WILLIAM A. TRAVIS, Attorney-Counselor at Law, San Felipe de Austin, November 10, 1835.

LAW OFFICE
The Travis Law Office was located on Lot 50 in San Felipe de Austin. The building was destroyed by fire in 1836. The site of the law office is now the site of the Travis Law Office Museum. The site is located on the corner of Main Street and the old site of the Trinity Episcopal Church. The site is located on the corner of Main Street and the old site of the Trinity Episcopal Church. The site is located on the corner of Main Street and the old site of the Trinity Episcopal Church.

LEFT: RECEIPT FOR LAW OFFICE TOP: AN ANNOUNCEMENT OF THE LAW OFFICE IN SAN FELIPE

LEFT: NOTICE REGARDING TRAVIS' PARTNERSHIP WITH TRICE Before leaving for the Alamo, Travis filed up his business accounts. He died just six weeks later.



TRAVIS IN SAN FELIPE

Travis' San Felipe law practice flourished. He was also chosen secretary of the town council, where he applied his management and Spanish-language skills to recording, translating and organizing government documents.

As tensions with Mexico rose, Travis emerged as a strong voice for war and was an early enlistee in the Texian army. With Mexican forces threatening to overrun the Alamo, Travis wrote back to San Felipe an impassioned call to arms, signing off with the iconic words, "Victory or Death."

SEAL OF THE GOVERNMENT OF THE STATE OF TEXAS As secretary of the town council, Travis used this seal to mark official town documents and correspondence.

Image courtesy: Austin Center for the History of the State of Texas, Austin, Texas. Photo courtesy: Texas State Library and Archives, Austin, Texas. Photo courtesy: Texas State Library and Archives, Austin, Texas.

The museum displays reconstructed offices as they appeared when San Felipe de Austin was the capital of Stephen F. Austin's colony. Photo by David A. Furlow.

of around 40 men were guarding the Brazos River crossing at San Felipe along the river bank opposite the town. As the Mexican army marched towards the area, the town was set ablaze. Soon, it was no more. Captain Baker, in fact, set fire to his own law office. Though San Felipe continued to exist after the revolution, it never returned to its preeminent place among the cities of Texas.

We can walk the grounds, see where Three-Legged Willie administered alcalde justice, see the printing press that provided Texans and Tejanos alike with news and government forms. Archaeology continues at the site. Archeologists will conduct us to the site where Gail Borden printed his newspaper before making his fortune by canning condensed milk. We can see the law office that belong to William Barret Travis before he kept his appointment with destiny at the Alamo before dawn on March 6, 1836. We'll have lots to see, do, and experience.

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Society Cosponsors Supreme Court History and Procedure Course

By Lynne Liberato and Richard Orsinger



The Texas Supreme Court's history is colorfully represented in the State Capitol's historic Supreme Court Courtroom, restored to its original appearance in 1888. Photo by David A. Furlow.

In conjunction with the State Bar, the Society will sponsor the Texas Supreme Court: History & Current Practice Course in Austin on Friday, April 12, 2019. The course combines aspects of previous courses on history and procedure.

Not only will the course feature some of the most popular speakers in Texas, the speakers were specifically chosen because they possess direct knowledge of their topics. During the history section, a panel on school finance will feature key players in past lawsuits plus original research

and analysis of briefing by one of Texas's most prominent brief writers. The afternoon speakers are either justices or court personal who have implemented and enforce court procedures or justices and practitioners with intimate knowledge of the court.

History Topics

Top appellate lawyers and Chief Justice Hecht, who have played key roles in the development of school finance law, will address one of the hottest topics in Texas politics and policy, public school finance.

Mark Trachtenberg, who argued the most recent school finance case to the Texas Supreme Court, will set the stage with insight gained from authoring a law review article written as a Yale Law student about the first four school finance cases, and then as a lawyer representing a coalition of school districts in the two most recent school finance cases.

Mark will then moderate a panel made up of Chief Justice Nathan Hecht (the only Texas Supreme Court justice to have sat on the Court for all six school finance cases); J. David Thompson, III (who represented the Texas Education Agency in the first two cases and coalitions of school districts in the three most recent cases), Richard Gray (who represented a coalition of property-poor districts in five of the six cases); and Professor Albert Kauffman (who, with MALDEF, filed the first case in 1984, and represented Edgewood ISD and coalition of mainly Hispanic-majority school districts and families in the first four school finance cases).

Always a favorite speaker, Chad Baruch will begin the program by presenting his original research as he analyses key Supreme Court cases from each decade since the early days of the court. He will highlight briefs from each decade with an eye toward how written advocacy has evolved and how it reflects the times the briefs were written.

A lunch presentation by 261st District Judge Lora Livingston on Access to Justice will follow. As always, she will be both an inspirational and informative speaker.

Procedure Topics

The afternoon emphasis will switch to procedure, with Chief Justice Hecht kicking off the program with his State of the Texas Supreme Court presentation. Court Clerk Blake Hawthorne will follow with a review of clerk and court procedures, and Justice Jeff Brown will review recent significant Supreme Court decisions.

Appellate lawyers Christina Crozier and Lisa Bowlin Hobbs will detail procedure and strategy from petitioners' perspectives, Christina on the petition for review and Lisa on the brief on the merits. Doug Alexander will address brief writing from a respondent's point of view. Justice James Blacklock will offer insights into what makes an effective oral argument and staff attorney Peter McGuire will end the day with a discussion of original proceedings in the court.

Logistics

The course, to be held at the Texas Law Center, will begin at 8:50 a.m. and conclude at 5:15 p.m. Attendees will receive 7.25 hours of CLE credit, including 2 hours of ethics credit. For more information or to register, visit <http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&IID=16939>.

Richard Orsinger and Lynne Liberato are co-course directors.



LYNNE LIBERATO *is a partner at Haynes and Boone, LLP in Houston.*



RICHARD ORSINGER *is a partner at Orsinger, Nelson, Downing & Anderson, LLP in San Antonio.*

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Texas Appellate Hall of Fame Inducts Six New Members

By Marilyn P. Duncan

HALL OF FAME

Six new honorees were inducted posthumously into the Texas Appellate Hall of Fame last fall: Chief Justice Carlos C. Cadena, Chief Justice Clarence A. Guittard, Chief Justice Adele Hedges, Justice Shirley W. Butts, appellate practitioner Charles Lunn Black, Sr., and appellate practitioner Hobart Price, Sr.

Chief Justice Cadena, the first Hispanic Hall of Fame inductee, was a pioneering civil rights attorney whose cases included *Hernandez v. State of Texas*, which opened juries to Mexican Americans in Texas in 1954. A noted law professor at St. Mary's University and founder and first national president of the Mexican American Legal Defense and Educational Fund (MALDEF), Cadena was appointed to the Fourth Court of Appeals in San Antonio in 1965 and became chief justice of that court in 1977. He retired from the court in 1990 but continued to serve as a senior appellate justice until his death in 2001.

Chief Justice Guittard's long judicial career included service on the 14th District Court in Dallas County from 1961 to 1970, and as Justice and then Chief Justice of the Fifth District Court of Appeals in Dallas from 1971 to 1987. Guittard began his career as one of the first three briefing



Chief Justice Carlos Cadena was the first Hispanic inducted into the Texas Appellate Hall of Fame.
Photo courtesy of the University of Texas
Tarlton Law Library.



Chief Justice Adele Hedges (left) and Justice Shirley Butts were the first female jurists inducted into the Texas Appellate Hall of Fame. Photo of Chief Justice Hedges courtesy of the University of Houston Law Center; photo of Justice Butts courtesy of mysanantonio.com.

attorneys (along with Joe R. Greenhill) for the Texas Supreme Court in 1941. He was a member of the Texas Supreme Court Advisory Committee on Rules of Civil Procedure from 1961 to 1983.

Chief Justice Hedges was first elected to the bench in 1992 and served for eleven years as a justice on the First Court of Appeals in Houston before being appointed chief justice by Gov. Rick Perry in 2003. Among many other contributions to the Texas judicial system, Judge Hedges secured key funding for TAMES, the Texas Appellate Management E-Filing System, and permitted the Fourteenth Court to serve as the beta test court for the program. She retired from the court in 2013 and passed away in January 2018.

Justice Butts was appointed to the Fourth Court of Appeals in San Antonio by Governor Bill Clements in 1981, the first female appellate justice in the State of Texas. Prior to that she was chief of the civil service section of the Tarrant County District Attorney's Office, a successful criminal defense attorney, and the only female law professor at St. Mary's University.

Mr. Black was a founding member of Black and Graves, later Black, Graves, and Stayton. At the time of his death, he had argued more Texas Supreme Court cases than any other attorney and had argued in some of the most important antitrust, utility rate, and land use cases ever tried in Texas.

Mr. Price began his appellate practice in 1921 at the age of 22 after having served in World War 1 and excelled in UT Law School. A founding partner of Strasburger and Price, he practiced for 44 years and was considered one of the premier pioneers of appellate law in Texas.

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

The 2018 inductees were selected based on their written and oral advocacy; professionalism; faithful service to the citizens of Texas; mentorship of newer appellate attorneys; pro bono service; participation in appellate continuing legal education; and other indicia of excellence in the practice of appellate law in our state.

A video of the ceremony is available online on the Society's Hemphill YouTube Channel at <https://www.youtube.com/watch?v=5sF7zSSvBZY>.

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Lynne Liberato Gives Keynote Address at Naturalization Ceremony*



Former TSCHS Society President Lynne Liberato, a partner with Haynes and Boone, LLP in Houston, presented the keynote address to 2,204 new Americans from 116 countries at an “awe-inspiring” naturalization ceremony in Houston in December. She spoke at the invitation of U.S. District Judge David Hittner of the Southern District of Texas.

Liberato reflected on her family’s immigration to the U.S. from Sicily in the early 1900s. Naming some of the specific family members who immigrated to America, she told the audience: “Antonio, Morris and Leona—they are part of what made America great. By hard work and talent, they helped create a great nation that reflects mankind’s most cherished ideals. Now you will carry on that legacy and enrich the country that they and so many others have given us.”

“You are a testament to the greatness of this country,” she concluded. “One need look no further than this audience to find renewed enthusiasm and appreciation for our system and our people.”

**Adapted from a press release from Haynes and Boone, LLP, December 17, 2018.*

During the ceremony, Ava Trachtenberg, daughter of Haynes and Boone partner and TSCHS Board member Mark Trachtenberg and great granddaughter of Morris and Leona, led the audience of more than 5,000 people in the Pledge of Allegiance.

Afterward, Liberato posed for photos with the new citizens who shared sentiments with her, including “This is the happiest day of my life,” “I have been working for this day for 40 years,” and “I am an American!”

Liberato described the experience as “an awe-inspiring event. It made me realize how much I take for granted.”

Liberato has led teams in some of the most significant appeals and trials in Texas. A prolific speaker and legal writer, she coauthored “Summary Judgments in Texas,” often called the “bible” of summary judgments. Versions of this article have appeared in five law reviews since 1989, and it has been recognized as one of the ten most-cited articles by appellate courts nationwide.

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Calendar of Events

Society-related events and other events of historical interest

Winter/Spring 2019

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 museum is located at 1800 Congress Ave., Austin, Texas 78701.

Throughout 2019

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>.

Throughout 2019

The Texas Historical Commission's new Museum and Visitor Center at San Felipe de Austin State Park's galleries present the story of the capital of Stephen Fuller Austin's colony in Texas. The Grand Opening of this new museum occurred 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.

February 20, 2019

Texas Supreme Court Historical Society Fellows Dinner for the Fellows and Justices of the Texas Supreme Court at the Blanton Museum of Art in Austin.

February 22-23, 2019

The Bayou Bend Collection and Gardens at the Museum of Fine Arts, Houston presents the 2019 David B. Warren Symposium on American Material Culture and the Texas Experience "A Diverse History: Texas, the Lower South, and the Southwest before 1900." For more details and developments, see <https://www.mfah.org/visit/bayou-bend-collection-and-gardens/david-b-warren-symposium/>.

February 28, 2019
(in a TSHA annual meeting
from this date through
March 2, 2019)

The Texas Supreme Court Historical Society will again sponsor and present a panel program at the Texas State Historical Association Annual Meeting. This year's topic is the "History of Texas's Constitutions, 1827 and Beyond." The Hon. Manuel González Oropeza, Universidad Nacional Autónoma de México; Former Chief Justice, Mexican Federal Election Court (ret.), will present his paper, "The 1827 Constitution of Coahuila y Texas Blended Mexican and Anglo-American Constitutionalism." Dr. William J. Chriss, historian, author, and attorney, will then present his paper "Six Constitutions of Texas, 1836-1876 and Beyond." Our Society's President Marcy Hogan Greer will introduce the panel, while Society Executive Director Sharon Sandle will serve as Commentator.

February 28 -
March 2, 2019

The TSHA Annual Meeting, the largest gathering of its kind for Texas history enthusiasts, will occur at the Omni Corpus Christi Hotel, 900 N Shoreline Blvd, Corpus Christi, TX 78401, (512) 392-6450.

March 9, 2019

The Alamo offers its Workshop Series events with its program, "Texas History and Science" at the Alamo from 9:00 a.m. to 4:00 p.m. on March 9, 2019. All workshops are designed around TEKS curriculum standards and allow educators to earn CPE credit hours. Events occur at the Alamo, 300 Alamo Plaza, San Antonio, Texas 78205. See <http://www.thealamo.org/remember/education/workshops/index.html>, call Machaia McClenny at 210-225-1391 or send an email to: education@thealamo.org.

March 28, 2019

The Texas Supreme Court Historical Society Spring 2019 Board of Trustees and Members Meeting will commence with the Board of Trustees Meeting at 10:15 a.m., followed by the Members Meeting, at the San Felipe de Austin Museum, 220 2nd St., San Felipe, Texas 77473. The Texas Historical Commission's Site Manager, Bryan McAuley, will discuss the history of San Felipe de Austin during lunch and provide a tour to the historic site and its buildings afterwards.

All Trustees and members of the Society who wish to attend should respond to TSCHS Administrator Mary Sue Miller's emails requesting RSVPs to order lunch.

April 5, 2019

The Texas State Historical Association presents its Battle of San Jacinto Symposium, the preeminent conference on the Texas Revolutionary era, offering a forum for promoting public awareness and scholarship about the Mexican colonial era in Texas (1821-1835), the Texas Revolution (1835-1836), the Battle of San Jacinto (1836), and the Republic of Texas (1836-1845). The theme of the 2019 Symposium is "Women and the Texas Revolution." Co-sponsored by

the San Jacinto Conservancy, the Symposium was started in 2001 by the SJC and has now passed into the hands of the Texas State Historical Association. The symposium will occur at the University of Houston Downtown. For additional information, see <https://tshaonline.org/sanjacintosymposium>.

April 12, 2019

"Texas Supreme Court: History & Current Practice Course," cosponsored by TSCHS and the State Bar of Texas, will be held from 8:50 a.m. to 5:15 p.m. at the Texas Law Center. See story on page 105 of this issue of the *Journal*.

June 12-14, 2019

The State Bar of Texas Annual Meeting will occur at the J.W. Marriott Hotel, 110 E. 2nd St., Austin, TX 78701 or call 844.473.3959. For registration and more information, see annualmeeting@texasbar.com or call 800.204.2222, ext. 1515.

June 29, 2019

The Alamo offers its Educators' Workshop with its program, "Texas History and U.S. History" at the Alamo from 9:00 a.m. to 4:00 p.m. on June 29, 2019. All workshops are designed around TEKS curriculum standards and allow educators to earn CPE credit hours. Events occur at the Alamo, 300 Alamo Plaza, San Antonio, Texas 78205. See <http://www.thealamo.org/remember/education/workshops/index.html>, call Machaia McClenny at 210-225-1391 or send an email to: education@thealamo.org.

August 3, 2019

The Alamo offers its Educators' Workshop with its program, "Mission to Shrine: 1519 to 1836" at the Alamo from 9:00 a.m. to 4:00 p.m. on June 29, 2019. All workshops are designed around TEKS curriculum standards and allow educators to earn CPE credit hours. Events occur at the Alamo, 300 Alamo Plaza, San Antonio, Texas 78205. See <http://www.thealamo.org/remember/education/workshops/index.html>, call Machaia McClenny at 210-225-1391 or send an email to: education@thealamo.org.

September 6, 2019

The Society's Annual John Hemphill Dinner will take place at the Four Seasons Hotel in Austin. Marcy Hogan Greer, the Society's 2018-19 president, will preside over the evening program. More information will be announced later.

September 7, 2019

The Texas Supreme Court Annual BA Breakfast will take place at the Texas Law Center in Austin. More information will be announced later.

September 14-15, 2019

The Texas General Land Office presents its 10th Annual Save Texas History program in Austin: "X Marks the Spot: New Directions in Texas and Borderlands History." This program, cosponsored by the Texas Supreme Court Historical Society, will examine 500 years of the exploration and mapping of Texas, including Dr. Juliana Barr (Mapping Indian Sovereignty in Spanish Archives); Dr. Gene Smith (Expansion and the Adams-Onís Treaty and the impact on Texas); Dr. Andrew Torget (Stephen F. Austin's contributions to mapping Texas); Dr. Jay H. Buckley (Zebulon Pike's Journey through Texas and the Southwest); and Dr. Harriett Denise Joseph (Pineda's mapping of the Gulf Coast, a 500 year anniversary).

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DISCLAIMER

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

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

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2018-19 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2018, the beginning of the membership year.

GREENHILL FELLOW

Dylan O. and Kimberly H. Drummond

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2018-19 New Member List

The Society has added 29 new members since June 1, 2018, the beginning of the membership year. Among them are 18 Law Clerks for the Court(*) who will receive a complimentary one-year membership during their clerkships.

GREENHILL FELLOW

Allison M. Stewart

CONTRIBUTING

Julie Flowers

Michael Kawalek

REGULAR

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Michael Duncan	Mason Smith*
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Rachel Holland*	Jandi Wilson*

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Membership Benefits & Application

Hemphill Fellow \$5,000

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

Greenhill Fellow \$2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of All Society Publications
- Preferred Individual Seating and Recognition in Program at Annual 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
- All Benefits of Patron Membership

Patron Membership \$500

- Discount on Society Books and Publications
- All Benefits of Contributing Membership

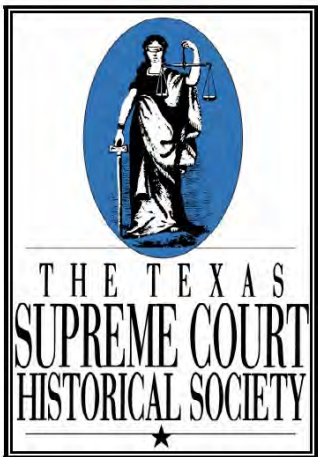
Contributing Membership \$100

- 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*
- Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs

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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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