



El Castillo, 1702, in St. Augustine, Florida
(author's photo, March 2011)

“The Separation of Texas from the Republic of Mexico Was the Division of an Empire”:

The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court, Part I: Spanish Texas, 1541-1821

by **David A. Furlow**

In 1968, President Lyndon Johnson proclaimed Hispanic Heritage Week to celebrate the many contributions Hispanic Americans have made to American civilization, and President Ronald Reagan expanded it to the thirty days from September 15 through October 15 in 1988. Every year since, the National Archives, Library of Congress, and Smithsonian Institution have joined in acknowledging Spain's profound influence on American society. But long before the federal government recognized the nation's Hispanic heritage, the Justices of the Texas Supreme Court incorporated an important part of that heritage – the Castilian legal tradition – into the fabric of Texas law.

Castilian law came to Texas with conquistadors and shipwrecked sailors during the sixteenth century. The Spanish imposed their law by force on Native American inhabitants, then, over time, permitted local colonial officials to adjust that law to fit local circumstances. Spanish law governed Texas until the Republic of Texas' Congress, in its fourth session, superseded the Castilian law of Mexico with Anglo-American common law in an enactment dated January 20, 1840. Although Texas' Rule of Decision statute, Section 5.001 of the Civil Practices and Remedies Code,

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states that, “[t]he rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, or the laws of this state...” Castilian law continues to shape Texas jurisprudence and Texas Supreme Court decisions until this day. The story of how Castilian law became a subject of Texas Supreme Court jurisprudence deserves to be told.

Spain Lays Claim to Present-Day Texas. Spain first laid legal claim to Mexico, and subsequently present-day Texas, when Hernan Cortés discovered New Spain in 1518. During the seventeenth century, the Spanish referred to the westernmost of the Caddo Native American peoples as “the great kingdom of Tejas.” Tejas was the way Spanish soldiers and colonial administrators spelled the Caddo word *taysha*, which meant “friend” or “ally.” Tejas, or early Spanish Texas, referred to the realm of Spain’s allies. Tejas, then, was the friendly buffer zone that protected the Spanish Empire from unfriendly Native Americans to the north and east.

Spanish Texas was essentially rectangular in shape, stretching from what is now Corpus Christi, Texas, to Lake Charles, Louisiana. The landscape may have seemed limitless to the first Spanish explorers, but the Nueces River bounded early Texas in the south while the Calcasieu River in present-day Louisiana did so in the east. From this coastal strip, it extended inland to the Medina River west of present-day San Antonio. This area, added to the rest of the northern frontier of New Spain south of the Nueces River, stretched more than 2,000 miles from east to west, and almost 1,500 miles from north to south, encompassing some 960,000 square miles.

The first known Spaniards to set foot in Texas and live to tell the tale were Cabeza de Vaca, Andrés Dorantes de Carranza, his African-born slave Estevanico, and Alonso Castillo Maldonado, four of some eighty survivors of a disastrous expedition to Florida. Their raft crashed ashore on an island, possibly San Luis, now Follets Island, along the Texas shore near modern Galveston in November 1528. They spent the next five years either wandering through Texas or serving as slaves of Native Americans who captured them. Cabeza de Vaca later published a *Relación* and joined with the other four men in authoring a joint report of their time in Texas. The only law that mattered to those castaway Spaniards was the law of survival.

The Audiencia Real convenes in 1546 to consider Coronado’s conquistadorial conduct. The Spanish Empire, the superpower of the early Atlantic world, exported Castilian law to New Spain along with the conquistadors, friars, settlers, and colonial administrators who first came to Tejas, *i.e.*, Texas. Spanish settlements in the modern-day continental U.S. began in 1565 at St. Augustine, Florida, when King Phillip II of Spain sent conquistador Admiral Pedro Menéndez de Avilés to La Florida to destroy Fort Caroline, a French Huguenot (Lutheran) settlement at what is now Jacksonville, Florida. Incidentally, another Spanish settlement, Santa Fe, New Mexico, was established in 1608, making it the oldest current capital in the U.S. (since St. Augustine and Jamestown, Virginia, no longer serve as capitals).

The first time Castilian law directly affected events in Texas was in 1546, when an *audiencia real*, or royal appellate court of inquiry, convened to consider the conduct of the conquistador Francisco Vázquez de Coronado. The *audiencia* began its work several years after the end of Coronado’s spectacularly unsuccessful effort to find the Seven Cities of Quivira, for it was Spanish custom to convene an official inquiry, or *residencia*, after an expedition.

After examining Coronado’s march across the Llano Estacado (“Stockaded Plains,” not “Staked Plains”) of the Texas Panhandle and drive as far east as what is now Kansas in 1542, the *residencia* indicted Coronado for gambling, graft, and inflicting “great cruelties upon the natives” of New Mexico and Texas. However, the Mexican *audiencia* absolved Coronado of guilt in February 1546. Although relieved of his office as governor, Coronado remained a member of the Council of Mexico (which governed Spain’s interests in its Mexican territory) until his death.

When contested legal issues were important or when judgment amounts were large, residents of New Spain could appeal to one of the *audiencias reales* (also spelled *audencias reales*) in Mexico City, Guadalajara, Chihuahua, Monclova, San Luis Potosí, or Havana. Through these *audiencias*, Spanish administrators created the first system of appellate law in the Americas. In Peru, where the best Spanish records survive, the seven-man appellate court of the *Audencia Real de Lima* in Peru was comprised of a *presidente*, several *alcaldes de corte* (chief magistrates in a town), a *fiscal* (treasurer), and an *alguacil mayor* (constable).

Two *audiencia* appellate systems began in Mexico. The one that judged Coronado’s case was formed in Mexico City in 1527. Two decades later in 1548, Spanish officials founded a second *audiencia* in Guadalajara to relieve the legal burden on the Mexico City *audiencia*. Each such *audiencia* was organized as follows:

- Two chambers: one civil, one criminal.
- Civil chamber: eight *oidores* (judges) and one *fiscal* (treasurer).
- Criminal chamber: four *alcaldes del crimen* (criminal chief magistrates) and its own *fiscal*.
- Other employees: notaries, bailiffs, and the equivalent of public defenders.
- Addressed: collectively as, “*vuestra merced*” (“your grace”) and directly as “*señores*.”

Each *audiencia* featured a top-down structure that evolved in Spain and was then exported, by royal directive, into New Spain. That structure appears below:



Castilian administrative law and trade regulations reached Texas in the 1550s, only to stifle economic and political development until the end of Spanish rule. Castilian law touched the face of Texas again a few years later, in April 1554, when the vessels *Santa María de Yciar*, *San Esteban*, and *Espíritu Santo* wrecked along the southern end of what is now Padre Island National Seashore, spilling their treasure chests into the sea and sand. Thirty survivors out of the two hundred who straggled ashore salvaged a boat and sailed south to Veracruz. Almost all of the remaining one hundred seventy men, women and children died along a death march back to Mexico as a result of exposure, starvation, and Indian attacks.

The Spanish organized their commerce with the Indies by creating the *Casa de Contractación* (“House of Trade”), in 1503. Because the kingdom of Castile claimed exclusive right to the discoveries in the New World—as well as all real property by virtue of the Bull of Donation (also called the *Bull Inter Cetera*) of Pope Alexander VI, issued on May 4, 1493—the Castilian port of Seville became the administrative center of the Spanish colonial empire.

This also meant that the governing law of peninsular Spain, *Las Siete Partidas* (the *Seven Books of Law*), constituted an authoritative statement of Spanish Castilian law in New Spain. Compiled during the reign of King Alfonso X, *La Siete Partidas* incorporated the Codex Justiniana, the Roman emperor Justinian’s *Corpus Juris Civilis*

(*Body of Civil Law*). Justinian, the East Roman Emperor in Constantinople from 527 to 565 A.D., sent his legions west to reunite the Roman Empire, recovering Italy and turning southern Iberia into the revived empire's new province of Spania. Although Justinian's legions made the Codex Justiniana the governing law of Spania in the sixth century A.D., there is little evidence that the rule of the Codex Justiniana survived the Visigoths' reconquest of Byzantine Spania or the Moorish conquest of Iberia in the seventh century. In fact, there is little evidence that the Codex Justiniana played a significant role in Spanish jurisprudence until 1265 A.D., when King Alfonso's scribes compiled *La Siete Partidas* by combining the code with the works of Italy's Roman-law glossators Franciscus Accursius and Azzus; the Decrees of Pope Gregory IX and other medieval canon law sources; the Islamic legal text *Villiyet* from Andalusian Spain; the *Doctrinal de los juicios* (*Trial Manual*) and the *Flores de Derecho* (*Flowers of Law*) by Maestro Jacobo; Spanish royal decrees; medieval Castilian privileges and charters known as *fueros*; and Visigothic tradition derived from ancient Germanic custom. When Spanish conquistadors and captains introduced *Las Siete Partidas* to Texas, they gave that new province of New Spain an eclectic, pan-European jurisprudence of great antiquity and authority.

On the day the captains of the *Santa María de Yciar*, *San Esteban*, and *Espíritu Santo* set sail for the Indies and their dramatic appointment with destiny on the Texas coast, Prince Phillip (later King Phillip II of Spain) ordered the publication and distribution of the *Ordenanzas Reales* ("Royal Ordinances"), popularly known as the New Laws. The New Laws were a lengthy, comprehensive, and extraordinarily detailed set of trade regulations approved by Prince Phillip's father, the Emperor Charles V, at Barcelona on November 20, 1542. Castilian administrative law thus came to govern the Texas coast even before three Spanish vessels crashed on its shore.

To encourage Iberian industries, Spain's New Laws and successive statutes discouraged colonial manufacturing and commerce. The usual policy was to limit trade to Spanish goods carried in Spanish vessels by Spanish merchants. To minimize smuggling and maximize tax revenues, administrators in Mexico limited trade to the port of Veracruz and closed the Texas coast to maritime commerce. On October 7, 1779, Athanase de Mézières wrote to Teodore de Croix in San Antonio de Béjar to urge the opening of a port for legal commerce in Matagorda Bay to alleviate continuing shortages of basic commodities. "What an abuse!" de Mézières exclaimed. "Do you not have the sea so nearby?" Texas stagnated as a frontier defensive outpost that drained the royal treasury. In Spanish Texas, trade regulations reflected a mercantilist philosophy that could be summarized as follows: "If it moves, restrict it and tax it. If it keeps moving, regulate it. If it stops moving, subsidize it."

The Anglo-American reaction against the bureaucratic inertia and monopolies of the Spanish and Mexican legal systems resulted in constitutional protections that eventually evolved into the Equal Rights Clause of the current Texas Constitution in Article I, Section 3, which states that, "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The treasure salvors who set sail for the Texas coast in late 1779 kept elaborate records of their efforts to recover the king's treasure. Treasury officials demanded reports and oversaw an official accounting. The captains of the recovery vessels encountered further storms in the Bahama Straits and especially in the Azores, where five ships and four recovered treasure cargos sank. The final accounting for the maritime disaster on the Texas coast took years to write. But the detailed manifests of cargo, the elaborate bureaucratic records of the salvage operations, and the maps depicting the wreck sites enabled the Texas Antiquities Commission to determine the identity of the shipwrecks that treasure-hunters located and began to loot in the early 1970s.

The Spanish founded their first permanent Texas settlement in 1691. The first Spanish settlement in Texas did not begin, as is popularly believed, in 1718. Instead, it occurred in El Paso, in 1691, which was then deemed to be a part of New Mexico. In that year Fray (friar) García de San Francisco founded a

small adobe church to house the mission of Nuestra Señora de Guadalupe del Paso del Rio del Norte (“Our Lady of Guadalupe of the Pass at the River of the North”). Texas, or Tejas, first appeared as a geographical designation in 1691, when the governor of the Spanish territory of Coahuila, in northern Mexico, received an appointment to serve as the governor of Texas. Spanish legal process soon followed later that year, when the first Spanish explorers crossed the Rio Grande into the future state.

By that time, the *Recopilacion de Leyes de los Reynos de las Indias* (the *Re-compilation of the Laws of the Kingdoms of the Indies*), promulgated ten years earlier in 1681, governed legal affairs in New Spain. The drafting of the *Recopilacion* was a monumental task in which Spain’s legal scholars pared down over 400,000 cédulas (royal edicts) to fewer than 6,400 provisions. It was an example of the continuing codification of statutory law that has occurred frequently in Texas during the past several decades. During the seventeenth and eighteenth centuries, both the *Recopilacion* and the *Partidas* governed legal affairs in New Spain, for Book 2, Title 1, Law 1 of the *Recopilacion* expressly provided that, “when colonial law is silent on a topic, one must look to the laws of Peninsular Spain.” *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250, 252 (Tex. 1984).

In February 1685, René Robert Cavelier, Sieur de La Salle, a French explorer who obtained Louis XIV’s backing to create a new colony along the Mississippi River, missed that river, sailed west, and landed in Matagorda Bay, Texas. He soon commenced a disastrously unsuccessful effort to found a French colony at Fort St. Louis, along Garcita Creek in what is now Victoria County, Texas. Within two years two of LaSalle’s ships were at the bottom of Matagorda Bay, only 15 of LaSalle’s 300 colonists were still alive, Indians had overrun the settlement, and LaSalle was dead at the hands of one of his own men. But afterwards, Spain lived in fear of another French invasion of Texas.

Concerned that France’s King Louis XIV might again try to seize Texas, Spanish colonial leaders ordered the founding of a Franciscan mission along the banks of the San Pedro River – San Antonio de Béjar, later known as the Alamo – as well as a presidio (fortress) and a chartered municipality, the nearby villa of Béjar. A villa was more than a mere village, but not yet a ciudad (city). Work began during the week of May 1-5, 1718. Playing politics, Fray Antonio de San Buenaventura de Olivares named the city after the Duc de Béjar, the brother of the Viceroy of New Spain.

The military commander in charge of the frontier, Martín de Alarcón, continued on to east Texas to strengthen the struggling missions that protected the frontier of Tejas from Indians and French soldiers based in Louisiana. Spanish authorities devised schemes to encourage peasants from the Canary Islands, Galicia, and Mexico to emigrate to the new colony. In March 1731, 55 immigrants from Tenerife in the Canary Islands reached San Antonio de Béjar. The Canary isleños, the mission’s residents, the presidio’s soldiers, as well as their wives and children raised the early eighteenth-century population of Spanish San Antonio to 300 people. A 1749 treaty with the Apache resulted in peace. The local hidalgos expanded their ranching, farming, and mining activities during the second half of the eighteenth century just enough to make the colony viable.

The population of Spanish Texas grew throughout the eighteenth century. In 1731, there were some 500 people in Spanish Tejas, as it was sometimes known. By 1760, around 1,160 people lived in the Spanish province. Some 350 Tejanos lived at the fortified Los Adaes settlement in east Texas, where they could keep French soldiers from crossing the Louisiana border into the province, while another 260 or so lived around the mission complex at La Bahía, known after 1829 as Goliad (an anagram of Hidalgo intended to commemorate Father Miguel Hidalgo y Costilla, the priest who began the Mexican independence movement). By 1790, San Antonio had a non-Indian population of some 1,500 people. There were some 600 Tejanos living around La Bahía. And another 400 or so lived around Nacogdoches, the successor to the Los Adaes settlement in the piney woods of Spanish-controlled east Texas.

Colonial officials with little legal training administered a rough justice, largely without the assistance of trained lawyers or judges north of the Rio Grande, except for those parts of the Southwest governed from New Orleans in the period 1783-1800. Administrators carried out jurist Francisco Suarez's doctrine of "*Se obedece pero no se cumple*" ("I obey but I do not execute."). Durango attorney Rafael Brucho, writing in 1815, complained that, "very few contracts would remain standing . . . if we were to examine them in conformity with the law." Litigants vented frustrations about drawn-out and expensive appeals that were "causing much injury to the parties and considerable delay . . ."

Nevertheless, David J. Weber, the Robert and Nancy Dedman Professor of Spanish History at Southern Methodist University, has observed that, "Spaniards of means on the North American frontier lived by Spanish law and custom, and surrounded themselves with traditional Spanish amenities." By the nineteenth century, the Spanish Empire included many settlements that would later become American cities: St. Augustine and Pensacola, Florida; Santa Fe, Santa Cruz, and Albuquerque, New Mexico; El Paso, Nacogdoches, and San Antonio, Texas; Mobile, Alabama; and New Orleans, Louisiana, a part of the Spanish Empire from 1767 until 1800.

The eighteenth and nineteenth century governors of Spanish Texas.

From 1721 until 1770, the capitol of Spanish Texas was a hexagonal fortress, or presidio. It enabled an army captain at Los Adaes, a dozen miles east of Nacogdoches, to protect Spanish Texas from French Louisiana. The captain lived within the walls of a presidio that commanded a few houses, a friary, and a mission church. At the end of an eight hundred mile supply route, the soldiers posted at this fort turned to French traders to supply food, clothing, guns, and gunpowder.

After the late seventeenth century danger of a French invasion of East Texas lifted, King Carlos III appointed the Marquis de Rubí inspector of frontier presidios. Rubí's inspection and report resulted in the Royal Regulations of 1772. In 1770, the Spanish government had decreed that the capital of Texas must be moved from Los Adaes to Presidio de San Antonio de Béjar. Rubí's orders stipulated that the captain of the presidio at Béjar serve as the governor of Texas. The *Commandancia* of the Captain of the Presidio of San Antonio de Béjar served as the Governor's Mansion in eighteenth and nineteenth century Spanish Texas.



**The Spanish "Governor's" Palace at
105 Plaza De Armas in San Antonio**

The Spanish Governor's Palace in San Antonio, shown above, is a 1930-31 reconstruction of a prominent Spaniard's colonial home and office. Erected as a one-room structure in 1722, it expanded to include three more rooms in 1749, the year that appears on the keystone above the entrance that bears Spanish King Ferdinand VI's coat of arms and the inscription "*año 1749 se acabo*," which refers to that presidio's construction in 1749. In an effort to secure municipal funding, Harvey P. Smith designed a visually stunning re-imagining of Texas' first capitol. Strictly speaking, it is a house, not a "palace," and it belonged to a frontier-rough captain of soldiers, not a true civil governor. Its ten rooms incorporate information gained during the excavation of the building's foundation, although the architect did not believe it necessary to adhere strictly to the archaeological evidence. The best way to understand the Spanish Governor's Palace is to enjoy it as a twentieth century architect's vision of the way an aesthetically-minded colonial official's residence *should* have looked.

Crucifixes and candles fill the Spanish Governor's Palace because the law of New Spain compelled adherence to Catholic orthodoxy. The front door of the Governor's Palace is thus rich in religious symbolism. The seashells carved into that door represent Columbus' ships *la Nina*, *la Pinta*, and *la Santa Maria*, which crossed the sea to the New World, ostensibly to bring Christianity to the Indians. The dragons symbolize pagan Indians and the dangers the first Spanish settlers encountered, while the flowers represent the fertility of the land. The baby's face recalls the baby Jesus while expressing Spain's hopes for the infant colony.

The Inquisition and the history of Texas religious freedom. The religious symbolism of the Spanish Governors' Palace reflects that Texas' Spanish governors (its military commanders) established the Roman Catholic Church as the official religion of the colonial state. In La Florida, King Phillip II sent an admiral to keep French Huguenots from threatening the Spanish galleons that brought gold and silver treasure from the New World back to Seville. After a hurricane scattered some three hundred French Huguenot soldiers and settlers, Admiral Pedro Menéndez de Avilés slaughtered them using swords, daggers, and axes, then hung a placard above their bodies reading, "Not as Frenchmen, but as heretics." He proudly named the waterway that runs by that place *Matanzas*, or Massacre, to commemorate his triumph over heresy. The River Matanzas, south of St. Augustine, bears that name to this day.

During a vengeance campaign against the coastal Native Americans who killed almost all survivors of the three Spanish ships that crashed on Padre Island in 1554, Luis de Carvajal y de la Cueva crossed the lower Rio Grande into southern Texas, around Brownsville, becoming the first Iberian known to cross the river there. Born in 1540 in Portugal to *conversos* (Jewish converts to Catholicism) Gaspar de Carvajal and Francisca De León, Carvajal served as governor with authority over broad coastal regions of Texas. After being imprisoned in Mexico for subjecting Native Americans to slavery, Carvajal found himself to be a target of the Spanish Inquisition, something he did not expect. He was accused of heresy for failing to denounce his niece, Isabel Rodríguez, who had reverted to Judaism. Found guilty and sentenced on February 23, 1590, Carvajal was ordered into exile, but died in prison waiting for the sentence to be executed.

In a Southwest where there was no separation of the sacred from the secular, religious controversies spawned political crises and political differences flared into holy wars. Franciscan friars established the Inquisition in New Mexico in 1626, sent political enemies including governors López de Mendizábal and Diego de Peñalosa to the Inquisition, and excommunicated governors Pedro de Peralta (twice), Bernardino de Ceballos, and Juan de Eulate.

The Spanish state and the Catholic church joined to suppress Native American spirituality, which they branded as an idolatry of ceremonial dances, ancestral spirit-worship, kachina figurines, and art that did not conform to Catholic norms. Efforts to forcibly Catholicize the Pueblo Indians led to the most successful Native American rebellion in North America in 1680, when Native Americans re-conquered New Mexico, murdered friars, desecrated every church, and burned every mission. After studying the official reports from the frontier, the Mexico City scholar Carlos de Sigüenza y Góngora, writing in 1693, blamed the revolt on "the idle life of their pagan neighbors. . . . or, more likely . . . their inborn hatred of the Spaniards." Two centuries later, in 1883, Anglo-American historian L. Bradford Prince came to a different conclusion, writing that "[r]eligious feeling was a very strong element among the causes which led to the revolution, and a bitter hatred [of] the Christianity of the Spaniards was evinced in every act during the struggle."

The Pueblo Revolt of 1680 affected Texas because it compelled the Spanish to retire from New Mexico. For a brief time, they made El Paso del Norte, now El Paso, their forward base for reconquering the lost territory. The Spanish established a mission there, Corpus Christi de la Isleta, the site of modern Ysleta.

The Spanish Inquisition contributed to Louis XIV's abortive attempt to create a French colony in Texas. Soon after being appointed as the governor of New Mexico, a Peruvian-born Spaniard, Diego Dionisio de Peñalosa Briceño y Berdugo, conducted a *residencia* to examine the conduct of his predecessor—Governor Bernardo López de Mendizábal—and seized ex-Governor Mendizábal's property. During a conflict with the Franciscan supervisor of New Mexican missions, Alonso de Posada, Peñalosa publicly criticized the Inquisition. Posada brought charges against Peñalosa, and the Inquisition commenced an investigation of Peñalosa's attitude toward the Inquisition.

Peñalosa fled the jurisdiction, but Posada's prosecution of him continued. The Inquisition conducted a three-year trial before finding Peñalosa guilty of expressing a "seditious and scandalous" attitude toward the Inquisition, questioning its power, and disseminating errors harmful to the Catholic church and the Pope. The Inquisition found Peñalosa guilty, barred him from ever again holding a public office, fined him, sentenced him to a public humiliation, and ordered him to be exiled from New Spain and the West Indies.

Peñalosa again fled the jurisdiction, first to the Canary Islands, then to England, and finally to France in 1673. In France he assumed the name Count of Peñalosa and devoted the rest of his life to plotting ways to retaliate against the leaders of New Spain. He repeatedly presented plans for an attack on Spanish colonies to Louis XIV that may have made it easier for René Robert Cavelier, Sieur de La Salle, to invade Spanish territory west of the Mississippi River—namely, in Texas. Spanish efforts to create a harmonious society by insisting upon a single faith exposed Spanish Texas to one of its greatest foreign threats.

Anglo-American settlers' negative experience of the unseparated power of the Catholic church and Spanish state led them to base the Republic's and Lone Star State's constitutional protections on those found in the constitutions of the U.S., Pennsylvania, and Tennessee, now found in the current Texas Constitution in:

- (1) Article I, Section 4 ("Religious Tests"), which states that, "[n]o religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being";
- (2) Article I, Section 6 ("Freedom of Worship"), which declares that, "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences," that "[n]o man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent," that "[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship," and that "it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship"; and
- (3) Article I, Section 7 ("Appropriations for Sectarian Purposes"), which orders that, "[n]o money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes."

In *Church v. Bullock*, 104 Tex. 1, 109 S.W. 115 (Tex. 1908), an early school prayer case, the parents of Catholic, Jewish, and atheist students brought a mandamus action against the board of trustees of a Corsica public school to compel those school board trustees to stop: (1) conducting school prayer based on the King James Bible, (2) using the Bible to teach Bible classes, and (3) singing religious songs in class. The parents contended that those practices converted schools into places of worship in violation of Section 6, Article 1 of the Texas Constitution; rendered schools "sectarian" under Section 7, Article 1 and Section 5, Article 7 of the constitution; and converted public schools into sects or religious societies under Section 7, Article 1 of the constitution.

The Texas Supreme Court began its analysis of those constitutional provisions in light of the framers' negative response to Catholicism's status as the only established religion in Spanish and Mexican Texas:

Prior to the Revolution of 1836, the Catholic [church] was the established religion of the Republic of Mexico, and all citizens of Texas were required to conform to the teachings of that church. It was supported by the Government, and, by taxation, the citizens were compelled to contribute thereto. One of the charges made against the Republic of Mexico in the Declaration of Independence was, "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."...our Constitution was a protest against the policy of Mexico in establishing and maintaining a church of State and compelling conformity thereto and was intended to guard against any such action in the future...

Id., 109 S.W. at 117. In *Church*, the Court upheld a Protestant form of school prayer in Texas' public schools after noting the contemporary use of prayer in other Texas public institutions including the Legislature and the University of Texas. The Court affirmed the decision of the court of appeals on the grounds that school prayer did not establish a "State religion" and that religious minorities should not be able to deprive the majority of the power to teach a Bible-based morality. *Id.*, 109 S.W. at 117-18.

Public school prayer based on the King James Bible came to an end in Texas on June 17, 1963 because the U.S. Supreme Court barred the practice as a violation of the First Amendment's Establishment Clause in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 205-227 (1963) and *Murray v. Curlett*, 374 U.S. 203, 213-227 (1963). A comparison of the Texas Supreme Court's *Church* decision and the U.S. Supreme Court's opinions in *Schempp* and *Murray* offers illuminating examples of how courts can use religious history, institutional practices, and textual analysis in different ways to reach strikingly divergent results. Debates about the separation of church and state that began during the centuries when Spain ruled Texas continue unabated to this day, not in the Inquisition's dungeons but in the state's courthouses.

The Spanish Constitution of 1812 was the first written constitution to govern Texans.

The first written constitution to govern Texas was the short-lived Spanish Constitution of March 19, 1812. It was an abortive response to Napoleon's invasion of Spain and installation of his brother on the Spanish throne. Promulgated by the Cádiz Cortes (the "General Courts"), the national parliament of Spain, while it was in refuge during the Peninsular War, the Constitution of 1812 established the principle of universal male suffrage, limited the power of the king by creating a constitutional monarchy, enshrined national sovereignty, protected freedom of the press, and provided support for a system of free enterprise.

The Constitution of 1812 ended six weeks after Spain's exiled king, Ferdinand VII, returned to Spain on March 1814. Ferdinand abolished that constitution because it interfered with his exercise of absolute power. An army coup of January 1, 1820 compelled Ferdinand to restore the Constitution of 1812, resulting in the erection of the only still-standing monument to that constitution, now found in the plaza of St. Augustine, Florida. The Mexican revolution of 1821 ended the sway of Spain's 1812 constitution in Texas even before French intervention ended constitutional government by restoring Ferdinand to full power in 1823.

For a few years between 1812 and 1821, Spain's Constitution of 1812 offered Tejano settlers an example of how a free people could govern themselves. The Spanish example, along with the U.S. Constitution of 1812, inspired Mexicans to frame the liberal Constitution of 1824, which had a profound effect on Texas' liberty as well as its legal history.

The Castilian legal heritage continues in America's community property law states today. During the Spanish regime, no legally-trained judges presided over trials and appeals in Texas. No university-trained lawyers practiced law in the modern sense. The only legal professional who continuously functioned in Texas during the entire period of Spanish rule was the self-taught notary of San Fernando, Francisco de Arocha. Spanish authorities lacked legal professionals and their small European population rarely had recourse to the kind of legal rules that governed the homeland. But Spanish authorities nevertheless laid a legal foundation strong enough to support this state's comprehensive legal system. A simplified version of Castilian law provided residents of the future Lone Star State with the guidance needed to conduct their affairs.

After Mexico declared its independence from Spain in 1821, Mexican authorities permitted North American lawyers to introduce elements of Anglo-American law and procedure in Texas courts. The records of largely Hispanic towns in the San Antonio River valley (San Fernando and La Bahía) and Nacogdoches in East Texas, as well as those of El Paso and Laredo (which were outside of Spanish Texas), reflect the vitality of Castilian legal traditions.

In *Airhart v. Massieu*, the U.S. Supreme Court declared that, "[t]he separation of Texas from the Republic of Mexico was the division of an empire." 98 U.S. 491, 494 (1879). The law that governed that empire, in both Mexico and Texas, was Castilian. When the Texas Congress decreed, in early 1840, that the common law of England would henceforward govern legal relations in Texas, it and Texas' first judges permitted Texas courts to continue following Castilian custom in what Southern Methodist University School of Law Professor Joseph W. McKnight identifies as three distinct areas of law:

- (1) principles of law governing marital and family relationships, including the concepts of community property, separate property, and adoption;
- (2) procedural rules affecting venue, pleading, and trial; and
- (3) the law of land titles and related water rights.

The Castilian law practiced in those settlements profoundly affected later Texas law regarding, *inter alia*, marital property and family relations, probate proceedings, rules of pleading and venue, title to land and subsurface resources, and, by way of negative example, the need for religious freedom and constitutional rights no government could later abridge or deny.

The rough-hewn, informal jurisprudence first developed throughout Spain's North American territories continues to affect the lives of millions of people today, especially as to community property. Under the common law, marriage merged the property of a husband and a wife into one person, leading English legal commentator William Blackstone to observe that "the husband was the one."

On a frontier where life was often short and always uncertain, a legal system based on the equality of a husband and wife better protected the widow and the widow's children than patriarchal common law. The concept of a married couple sharing in community property and of each spouse retaining separate property from before the marriage is derived from Castilian law and the Visigothic customs on which Castilians founded their legal system. By 1848, Texas Supreme Court Chief Justice John Hemphill could note that a wife could seek "the delivery to her of her separate property and the one-half of the common property of the conjugal partnership" in *Wright v. Wright*, 3 Tex. 168, 172, 1848 Tex. LEXIS 37 (Tex. 1848). The Chief Justice also recognized the right of a divorcing wife to appear in court as a party, consistent with the practice in "courts of justice, under our former laws":

The doctrines in relation to the right of the wife to appear in her own behalf in courts of justice, under our former laws, under certain circumstances, were familiar to the minds of the legislators at the time of the passage of this statute. As a general rule the wife could not appear as a party to a suit without the license of her husband or of the court. But to this there were the exceptions that she could implead her husband when he was about to dissipate her dowry for alimony or divorce, or nullity of marriage, etc. *Forense Practica, Pena y Pena*, vol. 1, p. 236. Where the wife deems it necessary to demand the protection of the courts adversely to her husband, or for the preservation of her property, she has always been regarded as having the right under our laws to appear in person and prosecute or defend as if she were an unmarried woman and laboring under no disability from her coverture.

Id., 3 Tex. at 188.

In *Edward v. James*, Chief Justice Hemphill, who had learned Spanish after coming to Texas to master the law of his new home, cited the *Partides* to demonstrate that if “the head of a family were a female, this would not exclude her from the benefit of the law, because the intention of the policy of the decree was to confer such a quantum of land on a family, whether they were represented by a male or female.” 7 Tex. 372, 380, 1851 Tex. LEXIS 151 (Tex. 1851) (citing *Partidas*, 7, Tit. 33, L. 6; 2 Sala. 352.). Inspired by the Castilian law he was analyzing, Chief Justice Hemphill asked why the law should not accord a frontierswoman the same rights as a frontiersman:

Again, can it be supposed that the government intended to reward only the male inhabitants of the frontier towns? Do not the women sustain the frontier with their toils, if not with their arms? Are they not subjected to the same, and to infinitely worse horrors from the hostilities of the savage foe? Do they not prepare the warrior for battle, rouse all the fires of his soul, and stimulate him to the most daring achievements? Do they not nerve his heart with the courage which prefers death to disgraceful flight, and inspire him with the resolution to return victorious or return no more? Do not their smiles of approbation operate as the most powerful incentive, and as the most grateful reward of the soldier? And while the warriors are absent on distant expeditions, are not their families sustained by the toils and struggles of their wives, mothers and sisters? Do not their hands bedeck the brow of the hero with laurels, in the hour of conquest, and their sympathies revive his drooping spirits, in defeat? Do they not bind up his wounds, soothe his anguish, and comfort him even in the hour of death?

And, if the Governor of the State should honor and reward one of the patriotic daughters of the soil, by a grant of land, under a power susceptible of such construction, and which, at all events, operates in precisely the same way, and to the benefit of the same persons, that would have been benefitted, had it been conceded to the husband, it would be too much to say that the act was void, for the want of power in the grantor or capacity in the grantee; and we are, therefore, of opinion that this grant is not void, at least on this ground.

Id. at 382-83.

Over time, the equality of the sexes that arose from Visigothic custom and inhered in Castilian traditions of community property and separate property evolved into Chapter 3 of the Texas Family Code, with its distinctions between community property and separate property, and inspired similar laws in other states. In addition to Texas, the states of California, Louisiana, New Mexico, Arizona, Idaho, Nevada, Washington, and Wisconsin adhere to community property concepts of marital law. In *Boggs v. Boggs*, 520 U.S. 833 (1997), an ERISA case

about employment benefits, the U.S. Supreme Court noted the influence of Spanish law on American marital and property law:

This case lies at the intersection of ERISA pension law and state community property law. None can dispute the central role community property laws play in the nine community property States... It is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship....*The community property regime in Louisiana dates from 1808 when the territorial legislature of Orleans drafted a civil code which adopted Spanish principles of community property The nine community property States have some 80 million residents, with perhaps \$1 trillion in retirement plans.*

Id. at 839-40 (emphasis added). The Castilian legal tradition remains not only an important part of Texas' past, but also its present and future family and marital law.

The second part of this article will connect the threads running from Castilian legal procedure and land titles to recent rulings of the Texas Supreme Court, the Fifth Circuit, and other courts deciding disputes involving Texas law. Using court records from what is now Brazoria County, but was in 1832 part of the Precinct of Victoria, in the Mexican State of Coahuila and Texas, we will examine ways North American lawyers and their Tejano counterparts created a unique body of Anglo-Castilian law between 1821 and 1836, then see how the Texas Supreme Court preserved, protected, and expanded that hybrid legal system during the Texas Republic, in the early years of the Lone Star State, and in recent years.

So, to learn the rest of the story about Castilian law in Texas, please read your next issue of THE JOURNAL OF THE TEXAS SUPREME COURT HISTORICAL SOCIETY three months from today....

Authorities Consulted

I'd like to thank Marilyn Duncan for her support and sharp editorial eye. But most of all, I owe Dylan Drummond a debt of gratitude for bringing to my attention primary sources I might not otherwise have noticed. Thank you so much for the time you spent improving this article.

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Lynne Liberato

On *Making History*

Both of my sons, who are in their twenties, guessed correctly that Leon Jaworski was a named partner of Fulbright & Jaworski. We had been to a luncheon named in his honor and that prompted my sons to ask who he was, other than a guy with a big firm named for him. His presence on the name plate was all they knew about the famed Watergate prosecutor.

My sons aren't lawyers. Certainly, I thought, young lawyers would know all about Mr. Jaworski. So I asked a few of them. All answered with blank stares. If, like me, you are a baby boomer or older, you probably are as surprised as I was, and perhaps as sad.

Our heroes' lights dim with the passage of time. They pass out of the popular mind and, if we are lucky, are resurrected by historians. For lawyers, the need to remember our judges is acute and that is where this Society comes in. Through our books, our archives, and our projects, we honor specific judges and the history of the judiciary. Two examples are the forthcoming books on Chief Justice Jack Pope and the history of the Texas Supreme Court.

Executive Director Bill Pugsley recently sent out membership renewal notices. As you likely saw from the attachment, which is reprinted in the final pages of this eJournal, higher levels of membership bring greater rewards. President-elect Warren Harris developed those levels to recognize the most generous donations to the Society. Depending on the level, members will receive books, invitations to special events, and free attendance at Society events.

These benefits provide a good reason to increase your contributions. And please know that the leadership and staff of the Society are committed to even more projects that will honor and preserve the legacies of our appellate courts and judges. One of these days, some of those youngsters who do not know of Leon Jaworski will ask about the likes of Justices Calvert, Hightower, Greenhill, Pope and Garwood. Thanks to your contributions, the Society will have helped provide an answer.

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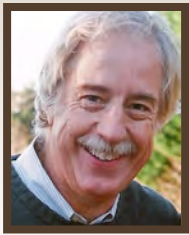
The hardest part of creating an eJournal such as this one is developing a template for the publication. State Bar technology wiz David Kroll skillfully created this publication and continues to develop it. Dylan Drummond, who edits the *Appellate Advocate* newsletter for the State Bar of Texas Appellate Section, has been invaluable in assisting editor David Furlow in producing the eJournal, especially by sharing his technical expertise. In this, our second edition, we give special thanks to both of them.

Our plan is to publish at least one historical feature in each issue. We also expect to include short, fun historical articles. David (at david.furlow@tklaw.com) would welcome hearing from you if you would like to write an article.

Whether you are a writer or only a reader of history, through your membership, you honor our legal history and preserve it for twenty-somethings who one day will be grateful.

— Lynne Liberato, Haynes and Boone, LLP

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Bill Pugsley

Looking Forward: *The Mission*

of the Texas Supreme Court Historical Society, Part 2

The Texas Supreme Court Historical Society has never lacked for good ideas.

The first three objectives the founders identified—preserving historic documents and memorabilia, enhancing the judicial portrait collection, and publishing a history of the Texas Supreme Court—were not the *only* projects proposed during those early Board meetings, they were simply the most pressing on a long list of needs. In the first issue of the eJournal, we discussed how the original trio of objectives basically constituted the Society's mission for its first 20 years.

In this issue, we will look at the next set of objectives—producing a quarterly eJournal, sponsoring an annual symposium on history and ethics, and expanding the exhibits in the Tom Clark Building lobby— and how each of those ideas stems from earlier programs, revived and revamped for the needs of the present.

The eJournal you are reading now is a prime example of the retooling of the Society's priorities. Early on the Board expected a quarterly newsletter to be a normal administrative function, along with holding the annual fundraising dinner. However, because of limited staff in those early years, the first few newsletters could only be produced with substantial assistance from the State Bar and its printing office, which closed its doors in 1997. Consequently, Executive Director Paul Lucko continued to gather content with the help of Prof. Jim Paulsen, but hired an outside printer to finish the layout. The Society eventually purchased its own desktop publishing software, giving the executive director total creative control, including, by then, researching and writing all of the articles. The last issue rolled off the press in 2001, and although there was some discussion of reviving it over the years, the History Book Project was a higher priority.

Once the history book moved into its final publication phase this year, Society President Lynne Liberato again made the production of a quarterly newsletter an operational objective. During the intervening years the print industry changed, and the old print newsletter was reconfigured as an electronic journal that would be distributed by email. And unlike the previous venture, the eJournal would be a team effort, drawing on the ideas and talents of interested Board members as well as Society staff. An editorial committee, chaired by Board member David Furlow, would either locate articles on judicial history or write original articles themselves. The goal is for the eJournal to stretch beyond the bounds of a typical newsletter, and provide substantive content that will contribute to our members' understanding of the Court's rich history. This furthers the Society's dedication to education.

Sponsoring an annual symposium is another suggestion revived in recent months. This idea was first proposed by Professor Jim Paulsen as a means of disseminating new information that researchers would uncover while investigating the Court's history. This idea lay dormant despite the production of lots of new information, until Larry McNeill became president in 2009. He liked the idea of a history symposium, but insisted that any ongoing program proposed by the Board must be supported by a financial plan that assured break-even no later than the fifth year. The Society sponsored its first symposium in Houston the following year. Not only did the 2010 Fall Symposium offer a forum for educating attorneys from other fields of the law about the latest historical research on the Court, it provided those who attended the session with 3 hours of CLE credit in ethics. This creative

solution brought in good attendance, received favorable reviews, and will ensure the financial underpinning to continue over the long haul. Under Board member Richard Orsinger’s leadership, we plan to develop the next symposium in 2012.

The third project in the newest set of priorities draws from an idea that preceded the Society’s creation by five years or more. Collecting memorabilia of the Court satisfied more than the obvious need to preserve the Court’s history, it fulfilled the need to locate visually interesting items to fill display cases in a planned museum. Based on input from Justices Jack Pope and Robert Campbell, the Court’s construction liaisons, architects had allotted space for a “Court museum” in the expanded administrative wing of the Supreme Court building. From 1985 onward, architectural plans and models provided 1,500 square feet of exhibit space in what later became the main corridor of the Tom Clark Building. Despite concerted efforts to gather Court-related memorabilia, the Society made no effort to display the material it collected until the late 1990s when two antique display cases were purchased. The cases were placed in the lobby of the Tom Clark Building, and Angela Durea, archivist for the State Bar, designed and prepared the display. The remaining floor space was never developed. And the exhibits in the two display cases were never changed once they were installed.

When Chief Justice Wallace B. Jefferson vacationed in New Orleans in 2009 and toured the Louisiana court museum in the renovated state supreme court building, he returned determined to create a judicial timeline for Texas. After conferring with Court Clerk Blake Hawthorne, I agreed that this would make an ideal project for the Society once the book projects were completed. Incentive for expanding the Tom Clark Building exhibits received a further boost in 2011 when Bill Kroger, Chair of the Task Force on Preserving Judicial Documents, recommended taking some of the historically significant court documents identified in the course of their survey and exhibiting them at the Bob Bullock History Museum. The Society immediately began discussions with the Court about expanding the display cases, installing a timeline of the judicial history, and possibly adding a video kiosk in the lobby.

It took more than two decades for the Society to accomplish its original three objectives. Given the growth in the organization and the momentum of the Board, it is clear that the new objectives will be achieved very quickly. I have confidence in that prediction because the Society approaches projects and programs differently. Trustees seek creative solutions to problems, they work through committees that coordinate efforts of staff, consultants and Trustees, and the Board seeks active participation of the Supreme Court to address issues it has identified. And, most important of all, the Board solicits funding *before* launching a new project. Every project is fully funded from the start, or demonstrates a realistic financial plan. It is a formula that works: creativity, coordination, cooperation and consistent funding.

One might ask why, of all the ideas that had been put on the table over the years, those three were chosen. The answer is that they help direct the Society toward its core mission, the mission that the Society is uniquely situated to fulfill. What constitutes that mission will be the topic for the next issue.

— **Bill Pugsley**, Executive Director

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Society Honors Judge Greenhill at 2012 TSHA Session



The Society will honor the late Chief Justice Joe R. Greenhill during the 2012 Texas State Historical Association annual meeting, which will be held in Houston March 1–3. The joint session, titled “An Education in Higher Justice: Chief Justice Joe R. Greenhill and Houston’s Universities,” will explore decisions and advocacy by Judge Greenhill that made a lasting impact on Rice University and Texas Southern University. Chaired by President Lynne Liberato, the session will include papers by former trustee Dr. James M. Douglas of Texas Southern and current trustee Dr. Steve H. Wilson, a Rice alumnus. Prof. L. Wayne Scott of St. Mary’s Law School will provide the commentary, summarizing the sweep of Judge Greenhill’s remarkable judicial career.

At the same time, the Spring meeting of the Society’s Board of Trustees will be held in Houston on Friday morning, March 2, and timed so that members can attend the Society’s session later that afternoon. This will be the first time the Board has met outside of Austin since 1996.

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TCLE Makes Donation to Pope Book Project

The Society's Pope Book Project took a giant step toward being fully funded when the Texas Center for Legal Ethics made a \$10,000 contribution to the project in early November. Presented by TCLE Executive Director Jonathan Smaby, the donation came with a unanimous resolution from the TCLE Board of Directors supporting the publication of a book about former Chief Justice Jack Pope.

Kelly Frels, former president of TCLE, has thrown his support behind the Pope Book Project since the initiative was launched last June. As a result of his encouragement, every member of the Center's Board of Directors made a personal contribution toward the project. With the support of current President Jennifer Elrod, the organization added its own donation in November.

Because of the Center's generosity, the Pope Book Project has obtained over 80 percent of the funds needed to produce a book of Judge Pope's writings. Gleaned from his vast collection of articles, lectures, and court opinions, the book will be titled *Common Law Judge: The Legacy of the Chief Justice Jack Pope*. It will focus both on the behavior of good judges—professional demeanor, personal attributes, and intellectual high ground, for example—and on the administrative realities of running the third branch of government. The book will also include a biographical essay on Judge Pope written by Bill Chriss, former Executive Director of the Center. This will be the first book published under the Society's own imprint.



The Society's Executive Director Bill Pugsley accepts a check from TCLE Executive Director Jonathan Smaby

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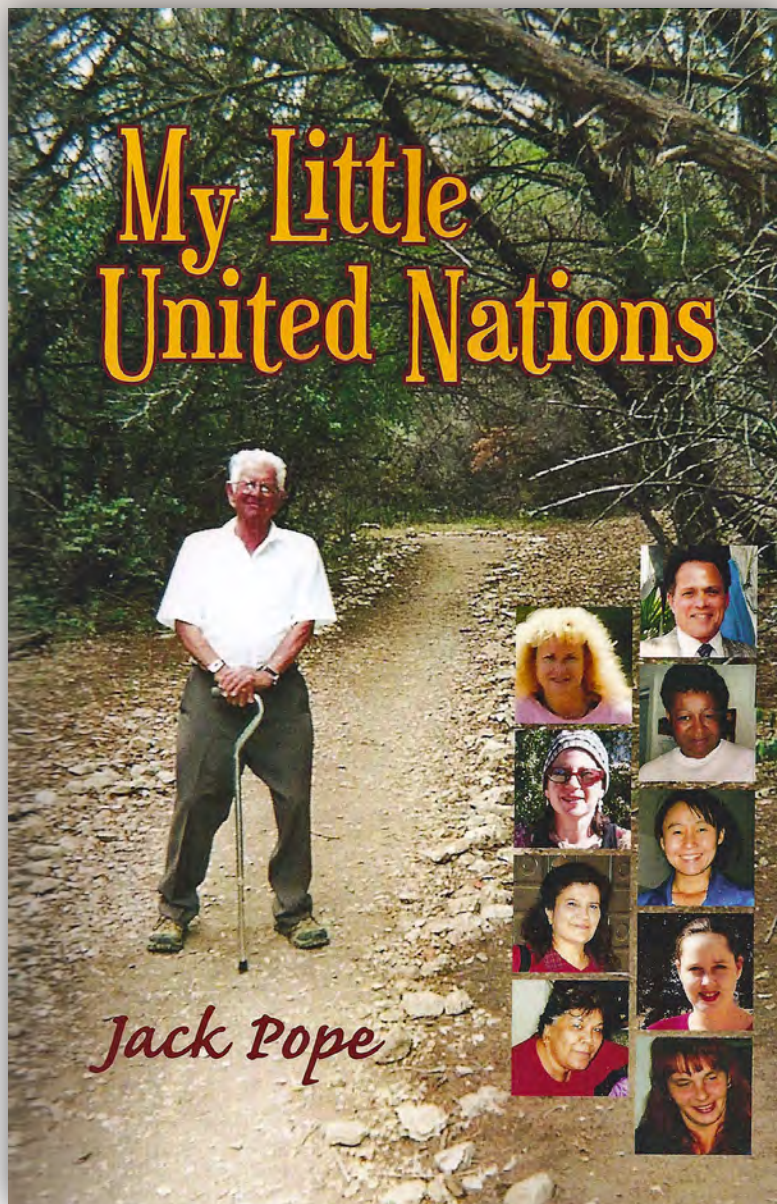
Judge Jack Pope Pens Book

Former Chief Justice Jack Pope turned 98 this year and to celebrate the occasion he did what few of us have the energy to do at half his age: he wrote a book. His collection of observations, anecdotes and short biographies under the title of *My Little United Nations* salutes his team of caregivers who have made his later years healthy and fun despite the loss of his wife Allene in 2004. When Judge Pope fell during one of his daily walks, it convinced him that he needed assistance. He called his late wife's caregiving manager, Lauren Barrett, who quickly reassembled many of the same people who had cared for Allene during her last years. Hailing from the four corners of the globe — Mexico, Japan, Germany, India, and Texas — the caregiving team brought strengths, talents and perspectives on life that amused and sustained Judge Pope on days when routines dragged and reluctance ruled.

My Little United Nations is a delight. Many will recognize the clear, precise prose that exemplified Judge Pope's judicial writing, but in this self-published tribute to his caregivers, he reveals more of his natural wit, his observant eye, as well as his compassion for the human condition, as he talks about coping with life at the far end of expectancy. Most of the stories were handwritten or typed on his trusty Royal typewriter between 2003 and 2010. The last third of the book expounds on the value of exercise, and how his caregivers kept his interest by exploring different walking paths and parks around Central Texas. Illustrated by photos from his family albums, and shaped by Marilyn Duncan's deft editing, the book was assembled over the past summer and fall and delivered in time for Christmas.

Although the Society had no role in the production of this book, we will gladly assist those who are interested in purchasing a copy. If you send us your contact information we will forward the list of names to Judge Pope along with the number of copies you want.

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Texas Supreme Court History Book Approved for Publication

The University of Texas Press faculty advisory committee unanimously approved for publication our manuscript of the Narrative History of the Texas Supreme Court. Written by award-winning Texas historian James L. Haley, the manuscript was submitted to UT Press in July and received enthusiastic endorsements from their reviewers.

The book, which tells the Court's story from the Republic Era to 1986, draws on research and archival materials compiled under the auspices of the Society's History Book Project. It will be the first book-length history of the Court in almost a century, replacing Harbert Davenport's 1917 *History of the Supreme Court of the State of Texas*.

Congratulations to the Board for its enduring support of this project, to Larry McNeill and Harry Reasoner for spearheading the fundraising drive that made this possible, and to Executive Director Bill Pugsley for his dedication in shepherding the project forward. Marilyn Duncan, Consulting Editor for the History Book Project, will continue to serve as liaison with UT Press until the book is published next year.

This will be the third book published through the Texas Legal Studies Series. The other two are *Supreme Court Justice Tom C. Clark, A Life of Service* (2009) and *The Laws of Slavery in Texas* (2010).



Consulting editor Marilyn Duncan submits the manuscript to UT press editor Allison Faust in July 2011.

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Twitter Image Has History

For the Society's first-ever Twitter page, Dylan Drummond, Deputy Executive Editor and lawyer with the Austin office of Griffith, Nixon & Davison, selected an image of the very first Chief Justice appointed to the Supreme Court for the Republic of Texas—**Chief Justice James Collinworth**, 1836-38.

Chief Collinworth is unique in the Court's history in that he never wrote an opinion while in his post because the Court itself never convened during his tenure. After being appointed in 1830 as the U.S. District Attorney for the Western District of his native Tennessee (thanks, in part, to his close friendship with then-Congressman and soon-to-be President James K. Polk), Collinworth declined reappointment to the federal office and instead opted to emigrate to Brazoria, Texas. As a delegate to the Constitutional Convention in March 1836, Collinworth was a signatory of both the Texas Declaration of Independence as well as the Constitution of the Republic of Texas. Following service as General Houston's aide-de-camp at San Jacinto, Collinworth served as Secretary of State in the cabinet of interim Republic President Burnet, before being elected by a joint vote of the Texas Congress on December 16, 1838 to serve as the Republic's first Chief Justice. If not for his untimely drowning in Galveston Bay on July 11, 1838, Chief Collinworth very well may have succeeded Sam Houston as the second President of the Republic—instead of his opponent in the election, Mirabeau B. Lamar.



The Collinworth portrait is probably the most curious painting in the Judicial Portrait Collection. It was one of the 86 paintings commissioned by Judge Ocie Speer, former member of the Commission of Appeals, and donated to the Supreme Court of Texas during the 1939 State Bar Annual meeting. All the other portraits were executed by accomplished artists, either Sollie Solomon (a European-trained painter from San Antonio) or Isabella Adam—except the Collinworth portrait. His was completed by a lesser-known artist, Anne Stubbs, who was—as we later discovered—Judge Speer's daughter.

The image used on the Twitter page is linked from the Tarlton Library Justices of Texas site. The library obtained the originals and negatives of Ocie Speer's book, *Texas Jurists, 1836-1936*, from Judge Jack Pope, who purchased them from the Steck Publishing company when that firm went out of business.

Check it out at www.twitter.com/TSCHSJJournal.

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Board Welcomes Justice Green at Fall Meeting

Numerous Items on Its Agenda

At its Fall meeting, the Board of Trustees welcomed Justice Paul Green as the new Supreme Court liaison, elected two new trustees, amended by-laws and formally recognized former president Larry McNeill for his leadership.

Newly appointed by Chief Justice Wallace Jefferson, Justice Green will help further the collaboration between the Court and the Society. New projects are in the development stage that will particularly benefit from having him as a liaison. Plus, he will strengthen the ties and enhance communication between the Society and the Court. As an added bonus, Osler McCarthy, staff attorney for communications, will remain as adjunct liaison.

The Board was honored to have President Emeritus Judge Jack Pope present to lend his thoughtful words and gracious spirit to the occasion. Editorial work has begun on *Common Law Judge*, a collection of speeches, law review articles, and decisions written by former Chief Justice Pope.

Marcy Hogan Greer of Fulbright & Jaworski and Macey Reasoner Stokes of Baker Botts were elected to the Board. Both are respected appellate lawyers. They join new trustees who attended their first meeting: Rob Gilbreath of Hawkins, Parnell, Thackston & Young, and David Johnson of Winstead. New trustee Richard Orsinger of McCurley, Orsinger, McCurley, Nelson & Downing was unable to attend.

The by-laws were modified to bring them into compliance with standard operation practice for non-profits, including allowing for greater use of technology for distribution of information, notifications and voting. The amended by-laws also spelled out a greater role for trustees in financial support and committee participation that reflect the enhanced mission of the Society.

Following a formal vote of recognition, the Board thanked McNeill, former president, for his stewardship of the upcoming book on the history of the Texas Supreme Court. *The Narrative History of the Supreme Court of Texas* is at the core of the Society's mission. In partnership with Executive Director Bill Pugsley and Consulting Editor Marilyn Duncan, members of the trustees noted that were it not for McNeill's tenacity in pushing the book forward and in securing funding, the book would never have come to pass.

In other actions, the Board voted to grant all current Supreme Court briefing attorneys a one-year free membership to the Society. It also approved the budget and discussed projects including this eJournal, the website, membership, books in progress and strategic development. Members welcomed new Office and Accounts Administrator Mary Sue Miller, who joins the Society from the State Bar of Texas. Gary Lavergne, author of *Before Brown: Herman Sweatt, Thurgood Marshall and the Long Road to Justice*, spoke on the Sweatt case focusing on the participation of Society founder Chief Justice Joe Greenhill.

Members of the Society's Board of Trustees and other attendees gathered after the October 12 biannual meeting in Austin for a group photo.



Pictured are *(front row, l-r)*
Judge Jack Pope, Justice Paul W. Green,
President Lynne Liberato, President-elect Warren Harris, Trustee Chrys Dougherty;
(middle row, l-r)
TSCHS staff Mary Sue Miller, Trustee Peter Kelly, Treasurer Andrew Weber, Trustee Steve McConico,
Trustee Bill Chriss, Vice President Shawn Stephens, Trustee Richard Pena, TSCHS staff Marilyn Duncan;
(back row, l-r)
Executive Director Bill Pugsley, Trustee David Furlow, Trustee Larry McNeill,
Justice Jeff Brown, Trustee Rob Gilbreath, Trustee David Johnson, Trustee Frank Newton,
Secretary Doug Alexander, Osler McCarthy, Trustee Keith Calcote, Trustee Randy Sorrels.
Judge Craig Enoch was present but is not pictured.

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2011 New Member List

The Society added 86 new members in 2011. They are as follows:

GREENHILL FELLOWS

Mr. Robert M. Roach
Mr. R. Paul Yetter

WHEELER LIFE FELLOW

Honorable Don Willett

TRUSTEE

Mr. David F. Johnson

CONTRIBUTING (24)

Mr. J. Brett Busby
Ms. Mary Jo Cantu
Ms. Kirsten Castaneda
Mr. Edmund L. Cogburn
Mr. Don Cruse
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Ms. Gwen Samora
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Mr. William R. Thompson, II
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Ms. Lisa Hobbs
Mr. David L. Horan
Mr. Daniel Horowitz
Mr. Dustin Mark Howell
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Mr. David Iglesias
Ms. Jennifer Josephson
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Ms. Dana Livingston
Mr. Ronald Casey Low
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Mr. Iain G. Simpson
Ms. Catherine B. Smith
Mr. Jonathan S. Stoger
Mr. Paul Terrill
Prof. Elizabeth Thornburg
Mr. Steven M. Tipton
Mr. Mark Trachtenberg
Mr. James E. Trainor, III
Ms. Susan Vance
Hon. Sue S. Walker
Ms. Amy Warr
Mr. Greg White
Mr. Brice A. Wilkinson
Mr. James C. Winton

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2012 Calendar of Events

Friday, January 13

Board of Trustees Teleconference Meeting

Friday, March 2

Spring Board of Trustees Meeting, *Houston*

**Annual Meeting of the General Membership
of the Texas Supreme Court Historical Society, *Houston***
Trustee election

This meeting will be held immediately following the Board of Trustees meeting.

It contains two major changes from the normal routine:

- **First**, it will be held in Houston rather than in Austin.
- **Second**, as a result of bylaws revisions approved in October, this will be the second meeting of the Society's membership held in the same fiscal year. The Board of Trustees moved the meeting date to March so that the trustee election would coincide with election of officers, allowing both officers and trustees to begin their term on June 1.

Joint Session -

Texas State Historical Association Annual Meeting, *Houston*

Friday, June 1

Portrait Dedication Ceremony
Supreme Court of Texas courtroom

16th Annual John Hemphill Dinner
Four Seasons Hotel, *Austin*

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TEXAS SUPREME COURT HISTORICAL SOCIETY

To profit from the past, we must first preserve it.

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Justice Paul W. Green
Supreme Court of Texas

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Membership Benefits & Application

Regular Membership - \$50

- * Receive Quarterly *Journal of the 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

Contributing Membership - \$100

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

Patron Membership - \$500

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

Trustee Membership - \$1,000

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

Greenhill Fellow - \$2,500

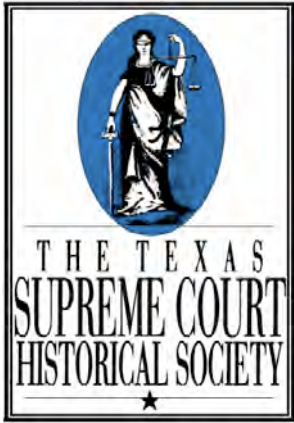
- * Complimentary Admission to Annual Fellows Reception
- * Complimentary Hardback Copy of Society Publications
- * Preferred Individual Seating and Recognition in Program at Annual Hemphill Dinner
- * Recognition in All Issues of Quarterly *Journal of the Supreme Court Historical Society*
- * All benefits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

Hemphill Fellow - \$5,000

- * Complimentary Autographed hardback copy of Society Publications
- * Complimentary Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- * All benefits of Greenhill Fellow

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Membership Application

The Texas Supreme Court Historical Society is a nonpartisan, nonprofit organization that conserves for posterity the lives and work of the appellate courts of Texas through research, publication, preservation and education. Your dues will support activities such as maintaining the judicial portrait collection, the ethics symposia, the Judicial Oral History Project and Texas Legal Studies Series. Annual dues are tax deductible to the fullest extent allowed by law.

Thank you

Name: _____

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Please select an annual membership level:

- | | | | |
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| <input type="checkbox"/> Trustee | \$1,000 | <input type="checkbox"/> Hemphill Fellow | \$5,000 |
| <input type="checkbox"/> Patron | \$500 | <input type="checkbox"/> Greenhill Fellow | \$2,500 |
| <input type="checkbox"/> Contributing | \$100 | | |
| <input type="checkbox"/> Regular | \$50 | | |

Payment options:

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- Credit card
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