



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2016 Vol. 5, No. 2 General Editor Lynne Liberato Executive Editor David Furlow

## Columns

### Letter from the President

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As we begin 2016, the Society remains focused on our core mission: preserving the history of the Supreme Court of Texas. [Read more...](#)



Ben L. Mesches

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Meet the new archivist of the State Bar, who will be helping the Society with its document- and artifact-preservation projects. [Read more...](#)



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This *Journal* chronicles the boom and bust reversals of Texas law that resulted from the development of oil and gas production. [Read more...](#)



David A. Furlow

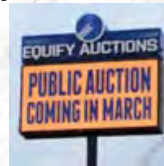
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Today, technological improvements have put oil and gas production at an all-time high, while prices have approached a decade low.

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Sale of surplus oil & gas equipment

### How Texas Law Promoted Shale Play Development

**By Bill Kroger, Jason Newman, Ben Sweet, and Justin Lipe**

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A Spindletop oil field gusher, 1903

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**By Vincent R. Ryan, Jr.**

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### Theodora Hemphill's Guide to the Texas Constitution. Part II

**By David A. Furlow**

The older daughter of Texas Supreme Court Chief Justice John Hemphill offers a unique perspective on the way Texas's constitutions shape and reshape lives.

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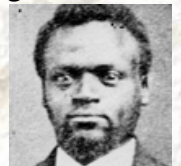


Studio portrait, unidentified woman, 1870's

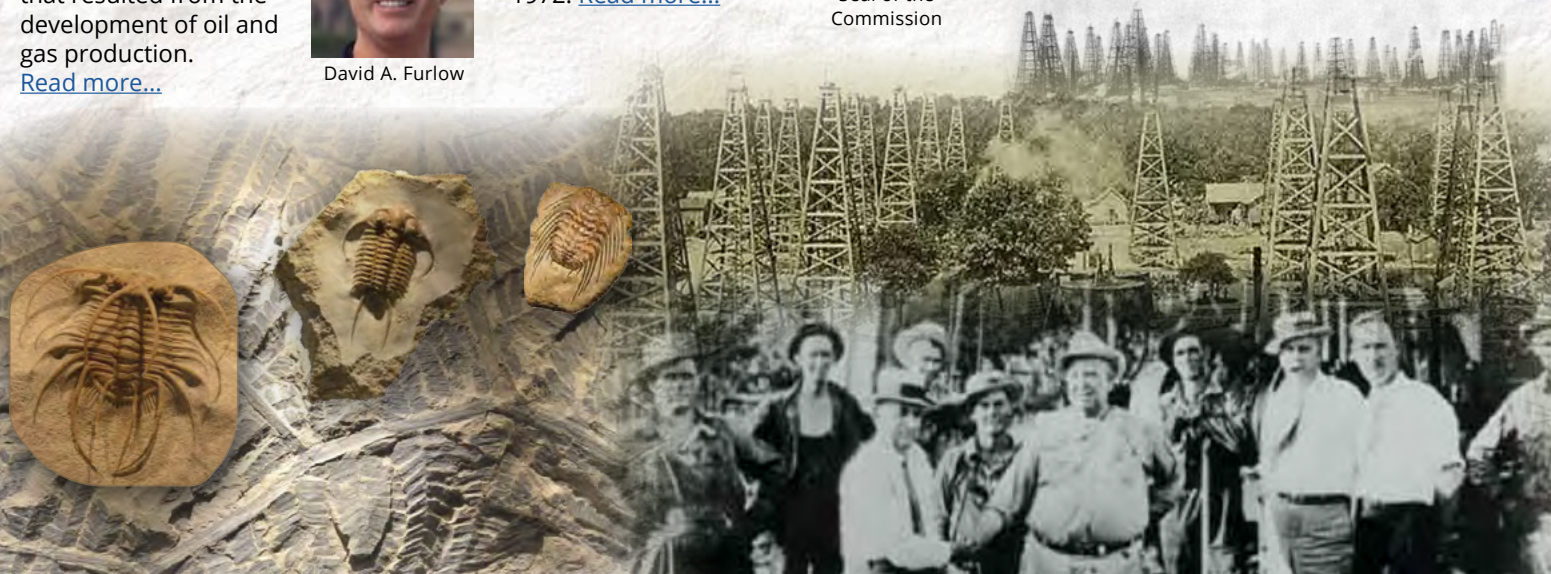
### Unraveling a Mystery: Who Was Texas's First African-American Attorney?

**By John G. Browning and Chief Justice Carolyn Wright**

Our research sheds light on the two likeliest candidates for the title of Texas's first black lawyer: W. A. Price and A. W. Wilder. [Read more...](#)



A. W. Wilder





## News & Announcements

### In Memoriam:

#### Joseph D. Jamail, Jr., 1925-2015

**By Marilyn P. Duncan**

The Society lost one of its most enduring friends and supporters on December 23 of last year. [Read more...](#)



Joe Jamail, Jr.

### Beck Recognized for Lifetime of Excellence in Advocacy

**By Charles B. McFarland**

The Texas Association of Civil Trial and Appellate Specialists named David J. Beck as the 2015 recipient of its Lifetime of Excellence in Advocacy Award.

[Read more...](#)



David Beck in his youth

### Supreme Court Establishes Texas Commission to Expand Civil Services

**By Dylan O. Drummond**

The new commission is charged with exploring ways to bring more affordable legal services to small businesses and people who cannot qualify for legal aid.

[Read more...](#)

### Texas History Podcasts Offer Listeners Another Great Way to Learn about Texas's Past

**By Dylan O. Drummond**

Texas legal historians now have two great resources to learn more about Texas's rich history and legal lineage.

[Read more...](#)



### Jim Haley Shares Supreme Court Stories at the GLO Save Texas History Symposium

**By David A. Furlow**

The Society's historian wowed a crowd with colorful stories at the Texas General Land Office's fifth annual symposium. [Read more...](#)



Jim Haley at podium

### Fall 2015 Board Meeting Featured a Talk by Dr. Frank de la Teja and Tour of the Texas State Cemetery

**By David A. Furlow**

The meeting was filled with special presentations and good news about Society projects. [Read more...](#)



Dr. Frank de la Teja

### What Wings They Were: The Case of Emeline

**By Laura Gibson**

In 1847, the histories of the Houston Bar Association, Baker Botts, and a free woman of color named Emeline became forever intertwined. [Read more...](#)



Emeline's lawyer, Peter Gray

### This March, the Society Examines the Restatement and Reformation of Texas Law

**By David A. Furlow**

The Society will present a prestigious panel program during the Texas State Historical Association's Annual Meeting. [Read more...](#)



TSHA logo

### Update: Texas State Library and Archives' Texas Digital Archive Continues to Grow

**By David A. Furlow**

TSLAC invites its "virtual visitors" to explore their heritage through its "Places Collection" and "People Collection."

[Read more...](#)



A photo from the Places Collection

### The Houston Bar Association Teach Texas Committee Seeks Volunteers to Teach the Taming Texas Project

**By Warren W. Harris**

The HBA is seeking volunteers from its ranks to teach middle-schoolers lessons from the Society's new book.

[Read more...](#)



## Membership & More

### Calendar of Events

### Officers, Trustees & Court Liaison

### 2015-16 Membership Upgrades

### 2015-16 New Member List

### Join the Society

Visit the Society on Twitter and Facebook!



@SCOTXHistSoc



FB: Texas Supreme Court Historical Society

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Ben L. Mesches

# Letter from the *President*

**A**s we all begin our work in 2016, the Society remains focused on our core mission: preserving the history of the Supreme Court of Texas. In this letter, I will provide an overview of our last board meeting, update you on the work of the Society, and give you a preview of this year's Hemphill Dinner.

## ***Fall Board Meeting***

In late October, our Board of Trustees met in Austin. We had the opportunity to welcome the following new trustees: Justice Jeff Brown, Justice Dale Wainwright (retired), Justice Elizabeth Lang-Miers, Justice Ken Wise, former Justice David Keltner, and Bill Chriss.

Our fall board meeting had a tremendous energy as a result of this infusion of new leadership. We tackled a wide range of issues: the Society's budget; the outstanding work of our publications team; an update on the annual briefing attorney breakfast; judicial portraits; and our renewed online presence. The entire board was particularly excited by Blake Hawthorne's passionate presentation on the status of the Texas Judicial Civics and Educational Center, which will be located in the Tom Clark building. This is a project that all members of the Society will enthusiastically follow in the years to come.

## ***The Society's Work***

As the new year begins, we are placing an emphasis on building our membership. I will appoint a new membership committee focused on bringing trial and appellate lawyers from across the state into the Society. If you would like to be a part of our membership efforts, please email or call me, and I will put you on our team.

I also would like to highlight the work of David Furlow to promote the Society's scholarship. At David's initiative, the Society sponsored an important Texas history program put on in November by the Texas General Land Office called "Save Texas History." Our books and other publications were on display, and the Society's historian—Jim Haley—gave a talk on the history of the Texas Supreme Court. The Society's involvement in programs like this is another important way that we are the forefront of preserving the history of the courts and the legal system.

## **2016 Hemphill Dinner**

The Twenty-First Annual Hemphill Dinner will take place on Friday, September 9, 2016 at the Four Seasons in Austin. We are privileged to have Paul D. Clement of Bancroft PLLC as our keynote speaker. You will begin hearing more about the dinner, including sponsorship opportunities, in the coming weeks and months. But for now, please mark your calendars for this special evening.

Very truly yours,  
Ben L. Mesches

**BEN L. MESCHES** *is a partner with Haynes and Boone, LLP in Dallas, where he co-chairs the firm's litigation department.*

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Pat Nester

## Introducing Our New *Archivist Extraordinaire*

One of the best things about my job is getting to work with top-flight professionals at the peak of their game. Usually they are lawyers, but today I want to introduce you to Caitlin Bumford, the new archivist of the State Bar, who from time to time—it has been arranged—will be helping the Society with its document- and artifact-preservation projects. Caitlin succeeds Alexandra Myers Swast, former State Bar archivist, who recently moved to Seattle and with whom Caitlin had been working for several years.

Caitlin has been certified nationally by the Academy of Certified Archivists and has a B.A. from the University of Michigan (graduating with high distinction) and an M.S. from UT Austin in information studies. She presides over a suite of offices and work rooms adjacent to the Society's headquarters on the P1 level of the Texas Law Center.

Caitlin's career has taken some interesting twists and turns. For example, she developed the archives for the Congregational Church of Austin, preserving a century's worth of evidence relating to the famous church's social activism.

She worked at the LBJ Library in Austin for a time. I asked her whether she was privy to any hitherto unreleased information about LBJ's turbulent presidency, and she said that the people who would know that were those who had security clearances. She says she did not. (For the time being, I'm going to accept that. But just FYI, she happens to be proficient in spoken and written Russian. I'm not connecting these dots.)



Caitlin Bumford; photo by Pat Nester



At the University of Nevada–Las Vegas, Caitlin developed expertise in the cleaning, humidification, spine-mending, and encapsulation of paper artifacts. No doubt this knowledge will be immediately useful to the Society, since we have more than a hundred boxes of records that we will be sorting through to find noteworthy documents. Our intent is to post them online on the Society’s webpage, to give immediate access to researchers and scholars. Lucky for us, Caitlin happens to be well grounded in object-oriented computer programming.

For several years, Caitlin served as archivist for the Foundation for Recovery in Nevada, where she established a library and museum program as well as curated archives. The foundation seeks to prepare current and future educators, healthcare professionals, policy makers, and the general public about “the positive impact of addiction recovery in the community and the lives of individuals and families affected by the disease of addiction.” It also provides facilities for twelve-step groups and training on interventions and elements of treatment. Just in case this issue comes up with your lawyer colleagues, don’t forget the confidential Texas Lawyers Assistance Program hotline at 800-343-8527.

Most on point for us, Caitlin worked for a time for the Supreme Court of Missouri Historical Society on conservation and indexing tasks relating to the society’s case file indexing project.

Finally, Caitlin interned at the National Baseball Hall of Fame in Cooperstown, New York. She says that while working there she had to learn scripted answers to questions relating to Pete Rose’s prospects for getting inducted into the Hall of Fame, in case you would like to ask her yourself. I suspect that the short answer is “nyet, nyet, nyet.”

Welcome and congratulations, Caitlin. We are honored to be working with you.

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# Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston



It is with great regret that we announce the passing of one of our Charter Hemphill Fellows, Joseph D. Jamail, Jr. Joe was a legal legend and a close personal friend. Having tried cases against him, I can honestly say that Joe was the best lawyer I ever saw. He also was very generous in his support of many charitable and civic organizations, including the Society. There is a memorial to Joe elsewhere in this issue.

I am pleased to report that our judicial civics and history book *Taming Texas: How Law and Order Came to the Lone Star State* has been completed. The book, written by Jim Haley and Marilyn Duncan with a foreword by Chief Justice Hecht, is the first book of its kind in the country. The generosity of the Fellows has allowed us to produce this new book as an integral part of the *Taming Texas* statewide judicial civics program for seventh-grade Texas History classes. This project will put judges and lawyers in classrooms across the state teaching students about our third branch of government. Chief Justices Wallace Jefferson and Tom Phillips provide quotes that appear on the back cover of the book:

"A seventh-grade curriculum would be incomplete without an examination of the law's fundamental impact on society. *Taming Texas* serves that purpose brilliantly and, along the way, gives concrete meaning to 'Justice for All' in judicial civics."

*Chief Justice Wallace B. Jefferson (ret.)  
Supreme Court of Texas*

"The seventh grade is none too early to introduce students to the history and workings of the Texas courts. *Taming Texas*, with its colorful stories and illustrations, offers that introduction in a way students will enjoy and remember."

*Chief Justice Thomas R. Phillips (ret.)  
Supreme Court of Texas*

We are preparing *Taming Texas* for the classrooms. Laura Gibson, President of the Houston Bar Association, and David Keltner, President of the Tarrant County Bar Association, have agreed for their respective organizations to provide judges and lawyers as volunteers to assist us in putting *Taming Texas* in Houston and Fort Worth schools this spring. We will take the *Taming Texas* project statewide the following year. We are very excited about getting this project into the schools.

We are planning our 2016 Fellows Dinner. We will let all Fellows know as soon as we set the date for the dinner.

Finally, the Society's Fellows program continues to grow. We have recently added as new Fellows Marcy & Sam Greer and Peter S. Wahby, bringing the total number of Fellows to 39. They are all listed below. On behalf of the Society, I want to thank all of our Fellows for their generous support.

## FELLOWS OF THE SOCIETY

### Hemphill Fellows

(\$5,000 or more annually)

David J. Beck\*

Joseph D. Jamail, Jr.\* (Deceased)

Richard Warren Mithoff\*

### Greenhill Fellows

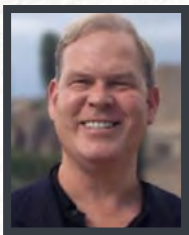
(\$2,500 or more annually)

Stacy and Douglas W. Alexander	Lynne Liberato*
Marianne M. Auld	Mike McKool, Jr.*
S. Jack Balagia	Ben L. Mesches
Bob Black	Nick C. Nichols
Elaine Block	Jeffrey L. Oldham
E. Leon Carter	Hon. Harriet O'Neill and Kerry N. Cammack
Tom A. Cunningham*	Hon. Thomas R. Phillips
David A. Furlow and Lisa Pennington	Hon. Jack Pope*
Harry L. Gillam, Jr.	Shannon H. Ratliff*
Marcy and Sam Greer	Robert M. Roach, Jr.*
William Fred Hagans	Leslie Robnett
Lauren and Warren Harris*	Professor L. Wayne Scott*
Thomas F.A. Hetherington	Reagan W. Simpson*
Allyson and James C. Ho*	S. Shawn Stephens*
Jennifer and Richard Hogan, Jr.	Peter S. Wahby
Dee J. Kelly, Jr.*	Hon. Dale Wainwright
David E. Keltner*	Charles R. Watson, Jr.
Thomas S. Leatherbury	R. Paul Yetter*

\*Charter Fellow

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David A. Furlow

# Oil and Gas: *A Giant* Impact on Texas Law

**T**his, then, is Texas, the giant land I love....” The theme song of director George Stevens’s 1956 epic, *Giant*, tells you everything you need to know about the impact of oil and gas on Texas law. Early on, Rock Hudson’s character Jordan “Bick” Benedict, a wealthy Texas rancher and landowner, ventures east to a columned plantation in Virginia to woo Elizabeth Taylor’s spirited, fox-hunting character Leslie Lynnton. Intrigued, Leslie stays up reading about the Lone Star State. The next morning, she challenges Bick’s Texas braggadocio: “We really stole Texas, didn’t we, Mr. Benedict? From the Mexicans.” *Not* an auspicious beginning. “You’re catching me early in the morning to start joking, Miss Leslie.” But Leslie is not joking. Exasperated, Bick replies,

I’ve never heard anything as ignorant as some eastern people. You all think that the glory happened here in the East, don’t you, with Valley Forge and Bunker Hill? Do you know about San Jacinto? Have you heard about the Alamo?

“Why certainly,” she replies. “I read all about them last night.”

Well, Bick, Leslie will learn plenty soon about the Alamo and San Jacinto after she marries you and moves to Texas. But it will take



Bill Gold, U.S. theatrical poster for the film *Giant* (1956).  
[https://en.wikipedia.org/wiki/Giant\\_\(1956\\_film\)#/media/File:Giant\\_Poster.gif](https://en.wikipedia.org/wiki/Giant_(1956_film)#/media/File:Giant_Poster.gif)

James Dean's character Jett Renk, an up-from-nothin' wildcatter, to show you how oil, black gold, Texas tea, transforms the world:

Everybody thought I had a duster. Y'all thought ol' Spindletop Burke and Burnett was all the oil there was, didn't ya? Well, I'm here to tell you that it ain't, boy! . . . My well came in big, so big, Bick and there's more down there and there's bigger wells. I'm rich, Bick. *I'm a rich 'un*. I'm a rich boy. Me, I'm gonna have more money than you ever *thought* you could have – you and all the rest of you stinkin' sons of ... Benedicts!

As Chill Will's stereotypically Texas character Uncle Bawley explains, "Bick, you shoulda shot that fella a long time ago. Now he's too rich to kill."

In this issue, our *Journal* chronicles the dramatic boom and bust reversals of Texas law that resulted from the development of oil and gas production in the twentieth century and the twenty-first century's fracking revolution. This history begins with natural history, when ancient oceans covered Texas, then turned into vast primordial swamps that nurtured dinosaurs until an enormous asteroid hit the Yucatan Peninsula and ended the age of dinosaurs.

Sixty-five million years later, new giants walked the land: oilmen, wildcatters, the Seven Sisters of Oil, the lawyers who sued them, the advocates who defended them, and the judges and justices who resolved their earth-shaking disputes. Texas state court judges shaped a new landscape of oil and gas law. The resulting jurisprudence inspired other states' hydrocarbon law, profoundly influenced federal legislation and case law, and transformed the world economy.

Bill Kroger, Jason Newman, Ben Sweet, and Justin Lipe's article "How Texas Law Promoted Shale Play Development" describes how Texas's uniquely pro-business legal environment, the law of capture, private ownership of land, and Texas legal doctrines nurtured the fracking revolution that is reshaping international economics and politics to this day. That revolution has not only led Congress to lift its decades-long ban on the exportation of Texas crude, it has also made many a wildcatter into a "rich un" *Giant's* Jett Renk would envy.

In "Busted: A History of Bankruptcy and Insolvency in the Oil and Gas Industry," creditors' rights and bankruptcy attorney Charles A. Beckham, Jr. shows the way Texas law evolved in response to the roller-coaster ride oil and gas prices have brought to the Texas economy. Mr. Beckham's history begins when Lyne T. Barret drills the first productive oil well 1866 Nacogdoches County, proceeds through the Corsicana, Spindletop, and Luling production peaks, perilous price-hikes, and terrifyingly steep declines to arrive at twenty-first century bankruptcy reforms, production-hedging, and court-ordered auctions of oil and gas equipment. If you want to know why the Benedicts began drilling wells rather than running so many cattle, this article will 'splain things.

Harris County Attorney Vince Ryan traces this boom and bust cycle all the way back to its origin when he examines how American Indians, Aztecs, and Spanish padres exploited *chapapote* oil from natural seeps. Vince Ryan's "Development of the Mexican Petroleum Industry to 1914"



brings to life his Rice University Master's Thesis in History. Castilian Spanish and Mexican law governed both Mexico's and Texas's early production and use of naturally-occurring seep oil. Yet, over the centuries, Texas legislators and judges opened oil fields to private ownership and development, while Mexican presidents and caudillos insisted that hydrocarbons belong to the State. One path led to Texas's fracking revolution. The other road led to PEMEX, which, like Sarge's Diner in *Giant*, reserves the right to refuse business to anyone.

In Texas, a commission organized to regulate iron horses governs the production of oil and gas resources. Oil and gas specialist Mitch Ayer's article "The Texas Railroad Commission: The First OPEC" shows how a railroad-regulating commission withstood the tests of time to nurture efficient production of Lone Star State hydrocarbons and inspired a University of Texas petroleum engineering student to cofound the Organization of Petroleum Exporting Countries.

As in Edna Ferber's book *Giant* and George Stevens's film, this issue of the *Journal* addresses the history of racial discrimination in Texas. John G. Browning and Chief Justice Carolyn Wright share a story of the triumphant struggle to end racial violence and discrimination as they unravel the mystery of "Who Was Texas's First African-American Attorney?"

Houston Bar Association President Laura tells an exciting story about a coming night at the Houston Grand Opera. If that seems out of place here, well, this is that rare opera that celebrates the life and accomplishments of a Justice of the Texas Supreme Court. On May 24, 1847, private attorney Peter Gray filed a civil case styled "*Emeline, a Free Woman of Color v. Jesse P. Bolls*" in Harris County District Court. Gray sought to permanently enjoin Jesse P. Bolls from selling Emeline and her children as slaves. The opera tells a tale similar to the film *12 Years a Slave*, director and script-writer Steve McQueen's 2013 adaptation of *Twelve Years a Slave*, an 1853 memoir by Solomon Northrup, a New York State-born, free African-American man, memorialized his kidnapping in Washington, D.C. in 1841, sale into slavery, and liberation through a lawsuit similar to the one Peter Gray filed to vindicate the freedom of Emeline and her children. Sometimes, as in *Giant* and *12 Years a Slave*, Hollywood brings new life to Texas history.

The last installment of "Theodora Hemphill's Guide to the Texas Constitution" shows how Chief Justice John Hemphill's mixed-race daughter Theodora Hemphill returned from Xenia, Ohio's Wilberforce University to Reconstruction Texas to claim her father's probate estate and win a settlement sealed with gold. When Jim Crow laws replaced those of Reconstruction a few years later, she remained in Texas but found her own unique way of declaring her independence from a society that relegated her to second-class citizenship.

We'll conclude this issue by making you aware of the Society's recent and upcoming activities: sponsoring the Texas General Land Office's *Saving Texas History* Symposium; expanding the content and scope of the Society's Hemphill YouTube Channel; and sending a panel of legal historians to the Texas State Historical Association's Annual Meeting. Join us now in examining history through the lens of the law. It's a giant story.

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# Busted: A History of Bankruptcy and Insolvency in the Oil and Gas Industry

By Charles A. Beckham, Jr.

“Plus ça change, plus c’est la même chose.”<sup>1</sup> The more things change, the more they stay the same. Or, in the words of Jed Clampett, “Lord please give me one more boom and I promise not to piss it away this time.”<sup>2</sup> The same is true for the oil and gas boom and bust cycle Texas has experienced this decade. Today, while oil and gas production is at an all-time high because of technological improvements in extracting oil and gas, prices have approached a decade low. The increase in production despite an oversupply of oil in the global market, among other factors, caused the price of oil to fall more than 50 percent from June 2014 to January 2015. The price has remained low since then.<sup>3</sup>

Because oil and gas production is a significant portion of the Texas economy, these drastic price declines have had dramatic impacts on the Texas economy. This cycle, however, is not the first time the oil and gas industry has faced such highs and lows. This paper provides a historical perspective on the history of oil and gas booms and busts. By looking at the historical booms and busts, bankruptcy practitioners may see what to expect in the current downhill slide.

## The Beginning (1800s)

The first oil and gas boom and bust occurred in Titusville, Pennsylvania in 1860. Titusville was the first oil boomtown in the United States. In 1860, the price of oil produced in and around Titusville rose to \$10 a barrel. The following year it fell to \$0.10 a barrel and the boomtown imploded. It was a chilling harbinger of things to come in the oil and gas industry.

Texas quickly followed the Titusville boom with its own oil boom. In 1866, Lyne T. Barret drilled the first producing oil well in Nacogdoches County, Texas.<sup>4</sup> Nacogdoches became the first major commercial field in Texas. Shortly thereafter, the original Nacogdoches Field was abandoned. At the time, the price of oil was so low that continued production was unwarranted, causing drilling to cease. By 1883, there was not a single oil field in the Lone Star State.<sup>5</sup> Production resumed by 1886, and by 1890, there were approximately fifty producing wells in

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<sup>1</sup> Jean-Baptiste Alphonse Karr, *Les Guepes* (Jan. 1849).

<sup>2</sup> Jed Clampett, *The Beverly Hillbillies* (Jan. 1986).

<sup>3</sup> See note 49, accompanying text, and Figure 4 (using a chart to show the drastic change in oil prices, focusing on 2014 to 2015).

<sup>4</sup> Mary G. Ramos, “Oil & Texas: A Cultural History,” *Texas Almanac*, <http://www.texasalmanac.com/history/highlights/oil/>.

<sup>5</sup> C.A. Warner, *Texas Oil and Gas Since 1543* (Houston: Gulf Publishing Co., 1939), 449.



the Nacogdoches area.<sup>6</sup> Around the same time, a San Antonio rancher accidentally drilled oil when he was searching for water. This rancher produced forty-eight barrels, valued at \$1,728.<sup>7</sup>

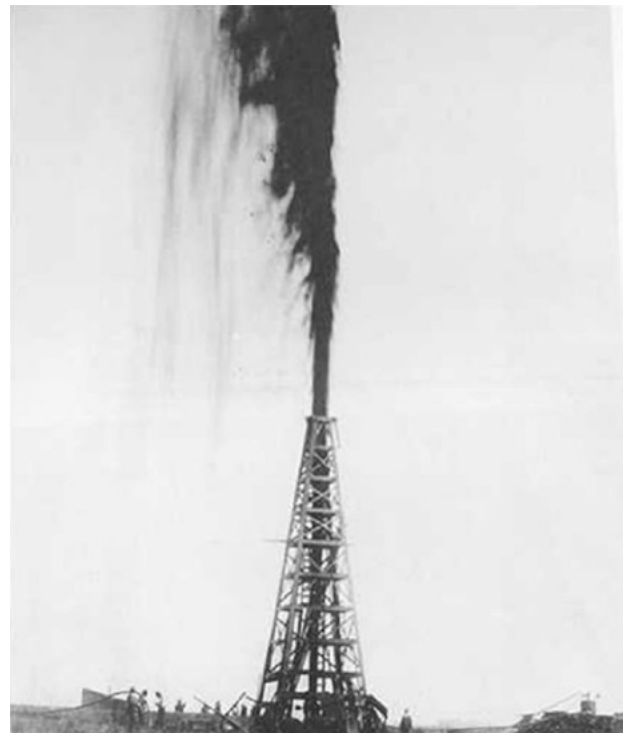
Texas was still largely unimportant in the oil and gas industry until the discovery at Corsicana in the 1890s.<sup>8</sup> This discovery was also accidental. By October 15, 1895, the Corsicana Oil Development Company produced approximately two barrels per day, and by 1896, with five wells, produced 1,450 barrels in a year. Convinced that oil and gas production would take off in Texas, developers installed a pipeline and refinery to “develop the market for oil.”<sup>9</sup> Despite adversities, the Corsicana Field laid a strong foundation for the Texas oil industry. In 1899, Texas passed its first statute regulating oil production, which was aimed primarily at protecting groundwater, addressing the abandonment of wells, and conserving natural gas.<sup>10</sup> Soon thereafter, Texas’s oil and gas industry rapidly developed, and the “booms” of previous oil and gas discoveries were quickly dwarfed.

## The 1900s

**Spindletop.** Texas exploded into the global oil industry on January 10, 1901, when the Lucas No. 1 well, just outside Beaumont, spewed mud, gas, and oil more than 100 feet in the air and was estimated to have produced 100,000 barrels of oil in its first day.<sup>11</sup> After nine days, the well was capped, and Texas was no longer just a rural, agricultural state.

Virtually overnight, Texas became one of the frontrunners in oil and gas production. To put this in perspective, Texas oil production jumped from 836,039 barrels in 1900 to over 17 million barrels in 1901.<sup>12</sup> That is a 1,933 percent increase, which means production increased by a factor of *nineteen* in *one* year.

It was during this time of growing production that Texas planted the initial seeds of oil and gas conservation. Companies seeking investors showed off their wells by producing “gushers” and launching



The Lucas gusher at Spindletop Hill, south of Beaumont; original photo by John Trost, January 10, 1901; Wikipedia, public domain

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., 451; Roger M. Olien, “Oil and Gas Industry,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/doogz>.

<sup>11</sup> Warner, *Texas Oil and Gas*, 449.

<sup>12</sup> Ramos, “Oil & Texas.”

oil into the sky, just for show. To prevent this waste of oil and gas resources, on August 30, 1901, a committee of operators and representatives voluntarily organized and appointed George A. Hill, Sr. as their chairperson to develop, publicize, and enforce measures to prevent waste and protect the lives of workers. This meeting was the first organized oil and gas conservation effort in Texas, and perhaps the first such effort in the world.<sup>13</sup>

Within three years of the Spindletop discovery, three more major fields were developed within a 150-mile radius of Spindletop. From 1905 to 1910, oil production spread to all areas of Texas.<sup>14</sup> During this time, in 1909, Lone Star Gas Company began constructing the major gas transportation lines “throughout and from Texas.”<sup>15</sup> Production continued to surge, and it spread to all corners of the state.<sup>16</sup>

To regulate oil and gas production, in 1919, the Railroad Commission of Texas established an Oil and Gas Division. As production intensified, oil companies faced operating problems and fires, and the State wanted to ensure that oil and gas resources were being conserved.<sup>17</sup> The Oil and Gas Division “was charged with the general supervision of operations in drilling, completing and producing oil and gas wells, in the transportation of production, in the elimination of fire hazards, and ... to conserve the oil and gas resources of the state.”<sup>18</sup>

By 1930, major oil fields had been developed all over Texas. To adequately develop all of these fields, boomtowns arose to accommodate the workers. The small, agricultural towns were insufficient—shacks



Oil and gas production transformed the City of Luling, Texas, beginning in 1922. Photo of well derrick in Blanche Park, owned by the Luling Oil and Gas Museum, by David A. Furlow

<sup>13</sup> C.A. Warner, “Texas and the Oil Industry,” *Southwestern Historical Quarterly*, 50, 1 (July 1946), 1, 8-9; Warner, *Texas Oil and Gas*, 452.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, 453 (noting that during that era, companies experimented, though unsuccessfully, to power locomotives with natural gas).

<sup>16</sup> *Ibid.* (discussing the discoveries at Electra, Thrall, Ranger, Hull, and West Columbia fields from 1911 to 1917).

<sup>17</sup> *Ibid.*, 454.

<sup>18</sup> *Ibid.*



were constructed, schools became overcrowded, and the influx of traffic on the unpaved roads caused terrible dust storms. Many operators sought to capitalize on Texas's liquid gold, and it was not long before "oil derricks sprouted thick as bamboo all over the field."<sup>19</sup> In addition to oil and gas production, many downstream facilities were constructed to handle the service, supply, and refining of oil and gas, which further diversified Texas's economy.<sup>20</sup>

The high demand for oil fueled increased development and production from a growing number of fields. Due to the abundant supply, oil and gas soon became the fuel of choice for transportation and manufacturing companies. As a result of increased demand, Texas oil and gas production continued to steadily increase.

**The Great Depression and World War II.** In the 1930s, leaders of the U.S. oil industry believed that a major oil shortage was around the corner. Companies began searching for oil in the Middle East, Southeast Asia, and South America. Columbus Marion Joiner did not give up on U.S. oil production and believed there was a great wealth of oil in East Texas. On October 3, 1930, "Dad" Joiner became "father" of the East Texas field when he struck oil and opened up the largest oilfield in the world at that time.<sup>21</sup> This field contained over five billion barrels of oil.

Unfortunately, this discovery occurred at the beginning of the Great Depression. As Texas oil production skyrocketed, the market for oil shrank. The Great Depression quickly wreaked havoc on the Texas oil and gas industry, and it was during this time that Texas saw the first major



Oil man "Dad" Joiner (third from left), shaking hands with Dr. A.D. Lloyd in front of the well. The third man from the right is oilman H.L. Hunt, who purchased Joiner's interest and became one of the richest men in the world. [http://www.johnmartinmeek.com/uncle\\_lum.htm](http://www.johnmartinmeek.com/uncle_lum.htm) "Joinerville, Texas," Wikipedia.

<sup>19</sup> Ramos, "Oil & Texas."

<sup>20</sup> Olien, "Oil and Gas Industry."

<sup>21</sup> Dorman H. Winfrey, "Joiner, Columbus Marion [Dad]," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fjo40>.

“bust” of its most lucrative industry. In 1931, the price of oil fell to ten cents a barrel, turning the oil and gas industry on its heels. As *The Economist* noted, “Massive oil discoveries in Texas, alongside falling global demand for energy, sent oil prices tumbling downwards. . . . [I]n 1931, that not only caused investors in oil firms to suffer huge losses, but also contributed to deflation around the world.”<sup>22</sup> By the mid-1930s, Dad Joiner’s oil company went into receivership and he was forced to sell all of his property to satisfy creditors.

The price decline lasted through the 1930s, but the oil and gas industry began to rebound during World War II. After the attack on Pearl Harbor on December 7, 1941, Texas, along with other oil and gas producing states, had to increase production to help with America’s war effort. The military needed fuel, but transporting it safely out of Texas was a challenge. The price of oil was frozen, however, to avoid wartime profiteering.

In the early 1940s, German submarines attacked shipments of petroleum that were going from the Gulf of Mexico to the northeastern United States. The aftermath of the German attacks was so devastating that many islands and beaches were polluted with oil.<sup>23</sup> Due to obstacles imposed by transporting oil by sea, the U.S. Secretary of the Interior, Harold Ickes, recommended constructing Big Inch, a pipeline that would transport crude oil from Texas to Illinois.<sup>24</sup> Additionally, another pipeline, Little Big Inch, would take gasoline, heating oil, diesel oil, and kerosene to New York and Pennsylvania.<sup>25</sup> The federal government approved the project, and the lines began operating in 1943. This movement of supplies allowed the United States to successfully deliver massive quantities of oil to England in preparation for the D-Day invasion.<sup>26</sup> Without delivery of these essential supplies, it is uncertain whether the Allies would have won the war.

After World War II, the market for oil and gas expanded rapidly. For the first time in eight years, the Texas Railroad Commission did not order any shutdown days.<sup>27</sup> While the price of West Texas intermediate crude was frozen at \$0.92 a barrel during World War II, after the war the price climbed \$1.27 by July 1946. It increased to \$2.32 a barrel by December 1947.<sup>28</sup> The price increase incentivized oil and gas developments in Texas, and by 1954, Texas had over one hundred major oil discoveries.<sup>29</sup>

The post-war American lifestyle depended on cheap oil.<sup>30</sup> Although oil prices increased after World War II, the desire for “black gold” spread worldwide, cutting into domestic producers’

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<sup>22</sup> “Oil Gluts, Great Depression Style,” *Economist* (Dec. 30, 2014), <http://www.economist.com/news/business-and-finance/21637484-too-much-oil-flooded-world-early-1930s-contributing-deflation-oil-gluts-great>.

<sup>23</sup> American Oil & Gas Historical Society, “Big Inch Pipelines of WW II,” <http://aoghs.org/petroleum-in-war/oil-pipelines/>.

<sup>24</sup> Jerrell Dean Palmer and John G. Johnson, “Big Inch and Little Big Inch,” *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/dob08>.

<sup>25</sup> Ibid.

<sup>26</sup> “Big Inch Pipelines of WW II.”

<sup>27</sup> Olien, “Oil and Gas Industry.”

<sup>28</sup> Ibid.

<sup>29</sup> Ramos, “Oil & Texas.”

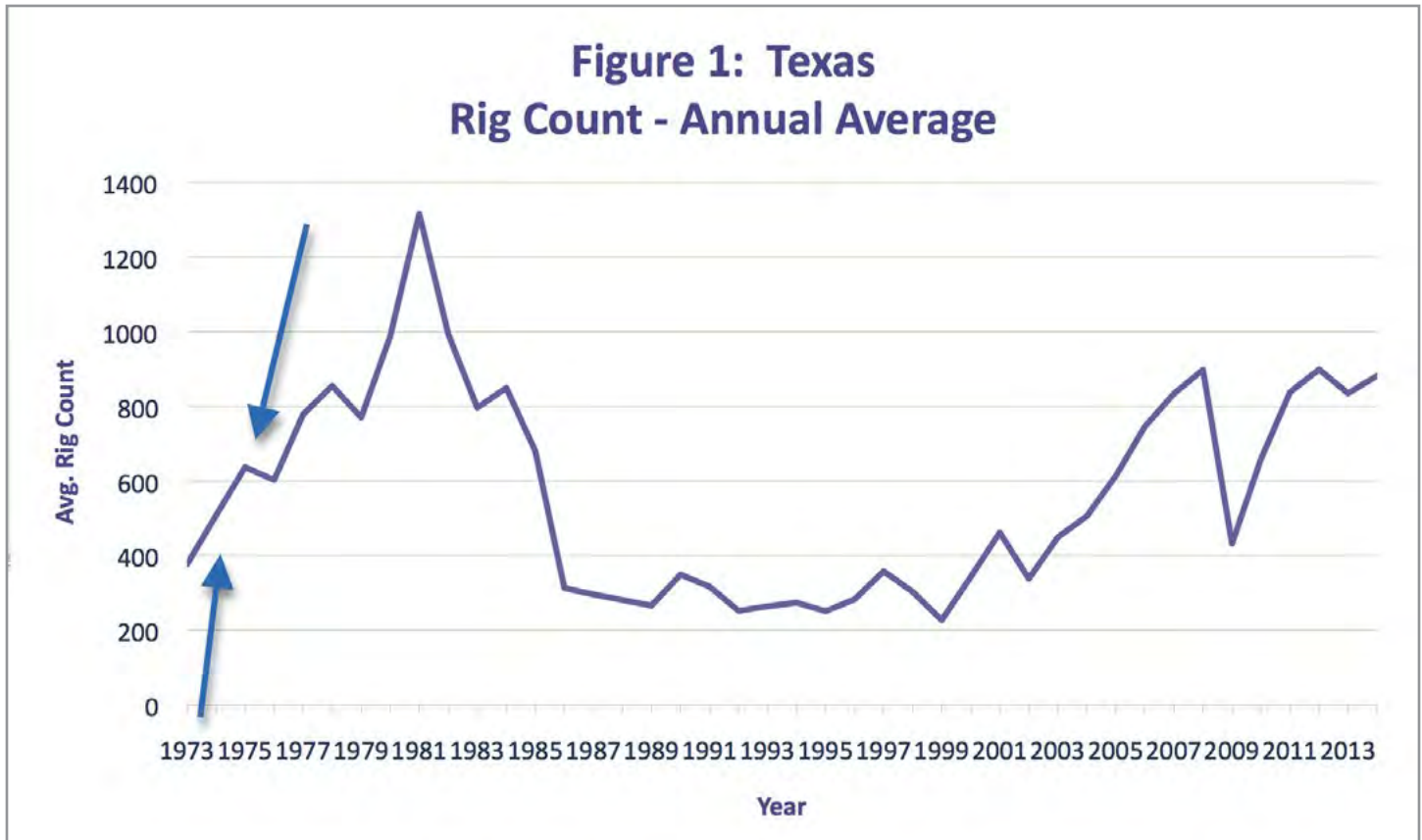
<sup>30</sup> Bennett Wall, “Oil Industry,” *History*, <http://www.history.com/topics/oil-industry>.



share of the market. Foreign crude oil became plentiful and was cheaper than domestic oil, thus reducing U.S. market share and making it difficult for domestic producers to sustain or develop additional reserves.<sup>31</sup> Wars caused further depletion of U.S. oil reserves, with World War II exhausting approximately six billion barrels of domestic oil, and the Vietnam War reducing oil reserves by an additional five billion barrels.<sup>32</sup>

### There is a Bust Coming

Texas's oil and gas industry expanded in the early 1970s, and between 1973 and 1974, the Texas onshore drilling rig count increased 35 percent and another 26 percent the following year, evidenced by Figure 1 below.<sup>33</sup>



While many independent domestic energy and exploration companies flourished during the 1970s, trouble was on the horizon. In 1960, the Organization of Petroleum Exporting Countries (OPEC) formed, and united mostly Middle Eastern oil producers.<sup>34</sup> OPEC was comprised of five founding members: Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela.<sup>35</sup> Two of the representatives

<sup>31</sup> Olien, "Oil and Gas Industry."

<sup>32</sup> Wall, "Oil Industry."

<sup>33</sup> Olien, "Oil and Gas Industry." See also Baker Hughes, "North America Rig Count" (2015), <http://phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reports&other> (providing the data used for the chart. The data for 1973–1986 were calculated by finding the mean of Texas rig counts for that year).

<sup>34</sup> Wall, "Oil Industry."

<sup>35</sup> James Williams, "Oil Price History and Analysis," *WTRG Economics* (2011), <http://www.wtrg.com/prices.htm>.

at the initial meetings had studied the Texas Railroad Commission's methods of controlling prices by limiting production.<sup>36</sup> OPEC's ability to control prices by limiting production was realized in 1973, when several of the OPEC member nations imposed an embargo on oil exports to nations supporting Israel in the conflict against Syria and Egypt, thereby cutting production by four million barrels per day and quadrupling the price of oil.<sup>37</sup>

Further production limitations in the late 1970s led to further surges in the price of oil. Prior to 1978, the United States depended heavily on Middle Eastern oil. In 1979, however, Iran cut its production and cancelled contracts with U.S. companies.<sup>38</sup> By cutting production and reducing oil exports, Iran created an international shortage of oil. The war between Iran and Iraq further slowed production from the region and drove up the price of oil.<sup>39</sup> By 1980, the price of crude oil rose to an all-time high of \$37.42 per barrel.<sup>40</sup> To keep up with the demand for oil, domestic producers undertook costly secondary and tertiary development programs to obtain more oil from fields already explored, adding to their production costs per barrel.<sup>41</sup> Within a few years, the demand for oil slowed significantly because of a decline in economic activity in Europe. Reduced demand, conservation efforts, and fuel substitutions significantly reduced the demand for Texas oil, to the detriment of the Texas economy.

## The 1980s

The early 1980s saw the beginning of the largest oil bust of all time. The Iran Hostage Crisis had caused the price of oil to skyrocket. Because the price was high, domestic producers were able to conduct more expensive drilling operations. When the crisis abated, OPEC member countries maintained their production levels, which reduced interest in domestic drilling. By the fall of 1982, many oil field service companies began to fail. The ripple effect of the downward spiral of the price of oil caused many drilling companies to file bankruptcy in the spring of 1983. By the winter of 1983–84, many exploration and production companies also filed bankruptcy. By the fall of 1983, Texas banks began to fail. By 1985, the price of oil continued to plummet and finally dropped to as low as \$9.00 a barrel.<sup>42</sup>

**The Banks.** Texas has the second-largest economy in the United States but does not have a single major bank.<sup>43</sup> The largest bank headquartered in Texas, Comerica, ranks only fourteenth among the nation's largest lenders.<sup>44</sup> In the 1980s, however, Texas housed more banks than any

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Sam Ro, "An Annotated History of Oil Prices Since 1861," *Business Insider* (Dec. 19, 2014), <http://www.businessinsider.com/annotated-history-crude-oil-prices-since-1861-2014-12>.

<sup>39</sup> Ibid.

<sup>40</sup> See Tim McMahon, "Historical Crude Oil Prices" (Table), *InflationData.Com* (May 1, 2015), [http://inflationdata.com/inflation/inflation\\_rate/historical\\_oil\\_prices\\_table.asp](http://inflationdata.com/inflation/inflation_rate/historical_oil_prices_table.asp) (showing that with inflation, this is equivalent to \$107.36 today).

<sup>41</sup> Olien, "Oil and Gas Industry."

<sup>42</sup> McMahon, "Historical Crude Oil Prices."

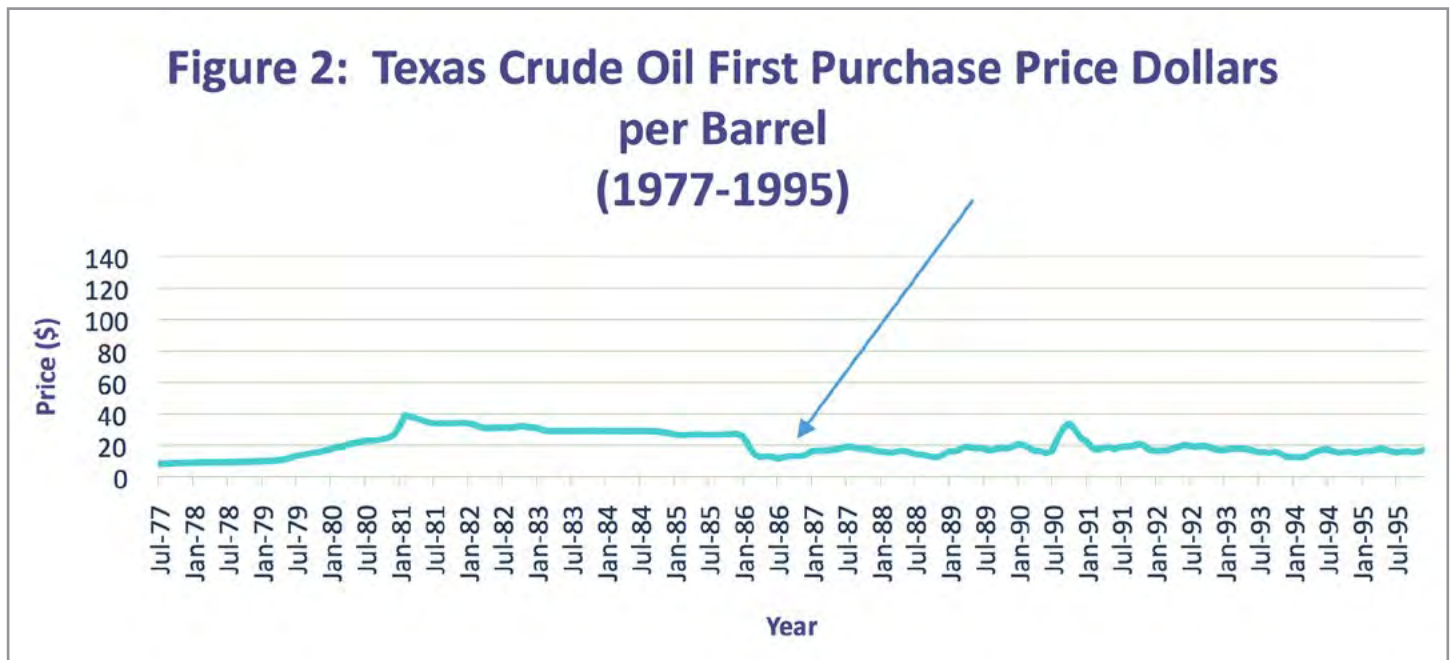
<sup>43</sup> John Maxfield, "Why Almost Every Big Texas Bank Failed in the 1980s," *Motley Fool* (Apr. 22, 2015), <http://www.fool.com/investing/general/2015/04/22/why-almost-every-big-texas-bank-failed-in-the-1980.aspx>.

<sup>44</sup> Ibid.



state in America. The banks lived off Texas's major industry: the oil and gas industry.<sup>45</sup> Texas banks had narrow portfolios, focusing primarily on oil and gas lending.<sup>46</sup>

While Texas banks were growing their oil and gas portfolios during a time when oil prices were high, the 1980s saw a sharp drop in the oil price. In the 1970s, crude oil prices increased because of the OPEC embargo.<sup>47</sup> During the 1970s and early 1980s, prices soared from \$3 per barrel to \$37 per barrel. When the embargoes lifted in the 1980s, the price dropped to as low as \$9 a barrel.<sup>48</sup> This drastic change, without adjustments for inflation, can be seen in Figure 2.<sup>49</sup>



The volatility in the oil price in the 1980s had a significant impact on banks. Banks with large oil and gas portfolios were the hardest hit, and many ultimately failed. In total, 349 Texas commercial banks failed, and an additional 76 required some assistance from the Federal Deposit Insurance Corporation (FDIC).<sup>50</sup> In September 1983, the first major bank to fail in Texas was the First National Bank of Midland. First National was the leading lender to Texas exploration and production companies. When the First National Bank of Midland failed, it was the second largest bank failure of all time.

Seven of Texas's ten largest commercial banks failed from 1987 to 1990. Texas Commerce Bancshares and Allied Bancshares survived, but were forced to merge with out-of-state banks.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> John O'Keefe, "The Texas Banking Crisis: Causes and Consequences (1980-1989)" (July 1990), 3, in *Fraser Federal Reserve Archive* [https://fraser.stlouisfed.org/docs/publications/texasbankcrisis\\_1980\\_1989.pdf](https://fraser.stlouisfed.org/docs/publications/texasbankcrisis_1980_1989.pdf).

<sup>48</sup> McMahon, "Historical Crude Oil Prices."

<sup>49</sup> *Petroleum and Other Liquids*, U.S. ENERGY INFORMATION ADMINISTRATION (Oct. 1, 2015), [http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=F003048\\_3&f=M](http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=F003048_3&f=M).

<sup>50</sup> O'Keefe, "Texas Banking Crisis."

Seven other banks were insolvent, absorbed by out-of-state interests, and recapitalized with help from the FDIC. The failed banks included MCorp, Texas American Bancshares, National Bancshares Corporation of Texas, BancTexas Group, and First City Bancorporation of Texas. The only major Texas bank to survive without assistance from the FDIC and remain independent was Frost National.<sup>51</sup>

The oil and gas boom and bust also caused a “boom and bust in Texas real estate.”<sup>52</sup> Texas banking laws restricted out-of-state banks, which made Texas banks too exposed to the Texas economy. Because of the development of oil and gas, office and land development projects grew, expanding real estate and office space. When the oil prices dropped, however, the expansion in commercial real estate outpaced the demand for this real estate. When the real estate market contracted, real estate and construction borrowers were unable to repay their loans. Many banks began to accrue nonperforming loans, meaning the loans were overdue by ninety days or more. From 1982 to 1987, Texas banks’ nonperforming assets increased from 1.7 percent to 6.6 percent.<sup>53</sup> Banks with fewer nonperforming oil and gas and real estate assets were better able to maintain their operations during the tumult of the 1980s.<sup>54</sup>

To attempt to stem the tide of bank failures, after persuasion from major Texas banks, the Governor of Texas called for a special legislative session in the summer of 1986 to address interstate banking law. As a result of this special session, the Texas Legislature passed an interstate banking law and approved a public referendum to amend the Texas Constitution to allow limited branch banking. The interstate banking law permitted out-of-state banks to buy Texas banks but prohibited out-of-state banking companies from controlling more than 25 percent of total deposits in Texas.<sup>55</sup> When the interstate banking law went into effect in 1987, many out-of-state banks responded favorably and merged with Texas banks.

**Impact on the Economy.** The disaster in the oil and gas industry also affected individuals and cities, which was a natural extension of the larger Texas crisis. The economic situation facing the Permian Basin in the mid-1980s paints a picture for what the rest of Texas looked like during the crisis. When the oil price fell, it caused a domino effect on all of the related industries. Many oil field service companies failed first, followed by drilling contractors, exploration and production companies, banks, and small businesses. Cities like Midland and Odessa, which were dependent on the oil and gas industry, had even more dominos ready to fall. Because of the lack of diversity of industries in Midland and Odessa, when people lost their jobs in the oil and gas industry, they were unable to find alternative employment and left the Permian Basin in droves. As a result of the population outflow, the real estate market in Midland and Odessa declined, the restaurant industry began to crumble, and businesses were forced to salvage themselves in

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<sup>51</sup> Olien, “Oil and Gas Industry.”

<sup>52</sup> O’Keefe, “Texas Banking Crisis.”

<sup>53</sup> Lawrence Crum, “Banks and Banking,” *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/czb01>.

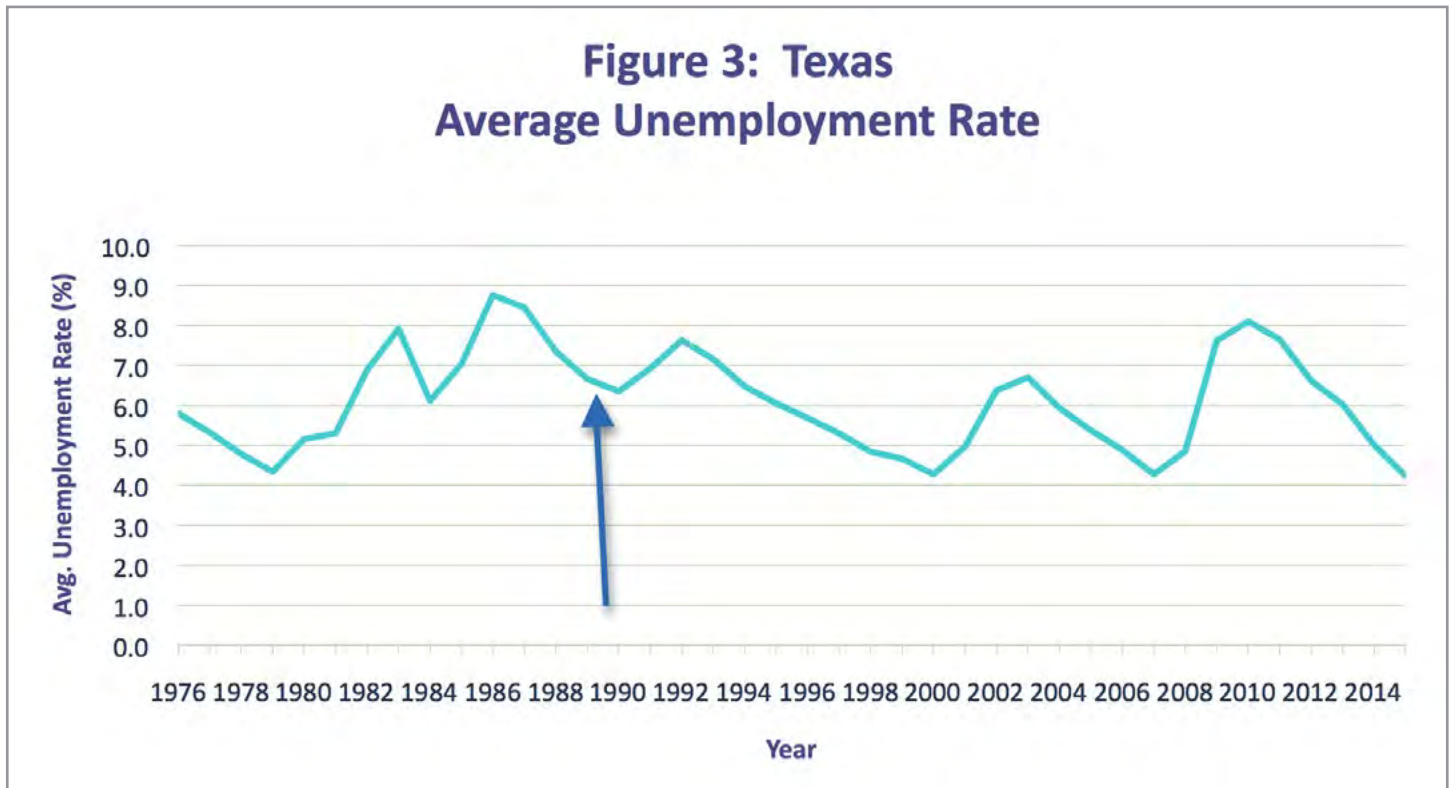
<sup>54</sup> O’Keefe, “Texas Banking Crisis.”

<sup>55</sup> “The Texas House Approved Interstate Banking,” *LA Times*, Aug. 28, 1986, [http://articles.latimes.com/1986-08-28/business/fi-13712\\_1\\_texas-banks](http://articles.latimes.com/1986-08-28/business/fi-13712_1_texas-banks); “Bank Bill Gains in Texas,” *New York Times*, Aug. 27, 1986, <http://www.nytimes.com/1986/08/27/business/bank-bill-gains-in-texas.html>.



bankruptcy proceedings. By 1985, the largest single employer in Midland County was the FDIC, and some resourceful entrepreneur printed t-shirts with the unpopular saying, "Midland: Home of the FDIC."

From the 1970s to early 1980s, Texas's job growth outpaced that of the nation and the state's own previous growth pace. From 1979 to 1986, however, Texas's unemployment rate more than doubled, jumping from 4.3 percent to 9.2 percent.<sup>56</sup> In total, the U.S. petroleum industry lost over 400,000 jobs. Texas lost one-third of oil and gas employment from 1982 to 1994.<sup>57</sup> The effects of this can be seen in Figure 3, showing the increase in unemployment rates in Texas from 1976 to 2014.<sup>58</sup>



The number of foreclosure postings surged in the mid-1980s. In Harris County, Texas, foreclosure postings went from under 5,000 in 1980 to nearly 12,000 in 1984.<sup>59</sup> During the first six months of 1985, foreclosure postings in Harris County exceeded the number of postings for all of 1984, climbing to 12,029.<sup>60</sup> In the month of September 1985 alone, there were 2,911 foreclosure postings.<sup>61</sup>

<sup>56</sup> U.S. Department of Labor, Bureau of Labor Statistics, "Databases, Tables, & Calculators by Subject," (Oct. 17, 2015), <http://data.bls.gov/timeseries/LASST4800000000000003>.

<sup>57</sup> Olien, "Oil and Gas Industry."

<sup>58</sup> U.S. Department of Labor, Bureau of Labor Statistics, "Databases, Tables, & Calculators by Subject," (Oct. 25, 2015), [http://data.bls.gov/timeseries/LASST4800000000000004?data\\_tool=XGtable](http://data.bls.gov/timeseries/LASST4800000000000004?data_tool=XGtable) (providing the data for Figure 4).

<sup>59</sup> Wayne King, "A Rising Tide of Foreclosures," *New York Times*, Oct. 20, 1985, <http://www.nytimes.com/1985/10/20/business/a-rising-tide-of-foreclosures.html>.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

When people could hardly afford their homes, going out to eat at a restaurant was a rarity. To lure customers through its doors, the upscale Houston restaurant La Colombe d'Or pegged the price of its three-course lunch to the price of WTI crude oil and called it the "C'est la Vie Oil Barrel Special." The price of the three-course meal quickly became a bargain.

Restaurants were "dropping like flies" because of the crash, which caused additional domino effects, such as that to the wood industry, which supplied many restaurants with mesquite.<sup>62</sup> During this time, only four or five wood-processing companies remained in operation.<sup>63</sup> Although Texas saw growth in other industries, such as manufacturing, wholesale and retail trade, transportation, communications, and agriculture, the growth in other industries was not enough to compensate for the losses in the oil and gas industry.

**Reflecting the Change in the Bankruptcy Code.** Following the crash in the oil and gas industry and the proliferation of oil and gas bankruptcies, the Bankruptcy Code had to adapt to what was happening. United States Senator Lloyd Bentsen of Texas proposed certain oil-and-gas-specific amendments to the Bankruptcy Code, including a bill "to exclude certain farmout agreements from property of the estate."<sup>64</sup> Section 541(b) was ultimately amended in 1992 to add subparagraph (4), which provided that the property of the estate does not include any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

- (A) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and
- (B) but for the operation of this paragraph, the estate could include such interest only by virtue of section 365 or 544(a)(3) of this title.<sup>65</sup>

In the same amendment, Congress also expanded the definition of "farmout agreement" to provide that any agreement for the assignment of an interest in an oil and gas lease that includes, as consideration, the defined operations upon the property will be considered a farmout agreement.<sup>66</sup> By doing this, Congress clarified the meaning of a farmout agreement as it pertains to bankruptcy, and expanded the meaning to apply to more agreements and transactions than originally considered to be a farmout agreement.<sup>67</sup>

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<sup>62</sup> Ken E. Rogers, *The Magnificent Mesquite* (Austin: University of Texas Press, 2000).

<sup>63</sup> *Ibid.*

<sup>64</sup> S. 2161, 100th Cong. (1988).

<sup>65</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, § 3017, 106 Stat. 2776, 3130-31 (1992). Section 541(b)(4) was further amended in 1994 to exclude production payments from property of the estate. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 208, 108 Stat. 4106, 4124-25.

<sup>66</sup> 11 U.S.C. § 101(21A) (2015).

<sup>67</sup> Rhett G. Campbell, "Significant Issues in Oil and Gas Bankruptcy Cases" (1999), 29, [http://www.tklaw.com/files/Publication/b230f92c-d2e1-4d67-bff9-d61599254ffb/Presentation/PublicationAttachment/a1af9032-4b65-4f5a-88ac-016b4f48fc17/Significant%20Issues%20in%20Oil%20and%20Gas%20Bankruptcy%20Cases%20\(Campbell,%20R\).pdf](http://www.tklaw.com/files/Publication/b230f92c-d2e1-4d67-bff9-d61599254ffb/Presentation/PublicationAttachment/a1af9032-4b65-4f5a-88ac-016b4f48fc17/Significant%20Issues%20in%20Oil%20and%20Gas%20Bankruptcy%20Cases%20(Campbell,%20R).pdf).



Because farmout agreements are typically considered executory contracts subject to rejection under Section 365 of the Bankruptcy Code, a debtor-farmor would realize a significant windfall by rejecting a farmout agreement and terminating the obligation to assign earned interests to the farmee. The amendment to Section 541(b) created a “safe harbor” for farmees in two ways. First, Section 541(b)(4)(A)(ii) excludes from property of the estate any interest in liquid or gaseous hydrocarbons that the debtor “has transferred or agreed to transfer” pursuant to a farmout agreement and thereby extinguishes the debtor-farmor’s ability to invalidate the farmee’s right to receive title to what it has earned on the date of filing by rejecting the farmout agreement under Section 365. Second, 541(b)(4)(A)(ii) provides that a farmee’s right to assignment of title, if properly earned, is not defeated by the mere fact that the farmee’s interest is not of record.<sup>68</sup>

In sum, the 1980s rattled Texas’s industries and caused a surge in the number of bankruptcy filings. Many banks failed, businesses shut down, cities’ populations shrank, and millionaires lost everything almost overnight. The 1980s also taught Texas the importance of diverse portfolios—whether for oilmen, banks, or attorneys. Moving forward, the mistakes of the 1980s have taught Texas how to approach the current crisis, which nearly mirrors the bust of the 1980s.

## **The Twenty-First Century**

From the 1990s to the early 2000s, oil prices steadily increased and peaked at \$91.48 per barrel in 2008. In 2008, the Eagle Ford Shale was discovered, spanning from Laredo up through Austin. This discovery “breathed new life into industry in the region.”<sup>69</sup> The rising development brought new jobs, income increases, and new wealth. By 2011, the number of drilling permits in the Eagle Ford Shale had more than doubled.<sup>70</sup>

During the 2000s, the price of oil increased because of a weak dollar and because of emerging foreign markets, which demanded more oil. Eventually, the industry caught up to the market through technological advances such as hydraulic fracturing. Oil production increased in the United States, and the price of oil continued to rise. Increased production in the United States reduced the market for foreign imports. As major oil exporters like Iraq, Iran, and Libya reduced their production, in 2011, the price of oil shot up, reaching over \$110 per barrel.<sup>71</sup> The spikes from the 1990s to 2015 can be seen in Figure 4, below.<sup>72</sup>

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<sup>68</sup> Section 544(a)(3) of the Bankruptcy Code empowers the debtor to avoid an assignment of property if a bona fide purchaser for value could take title superior to the assignee.

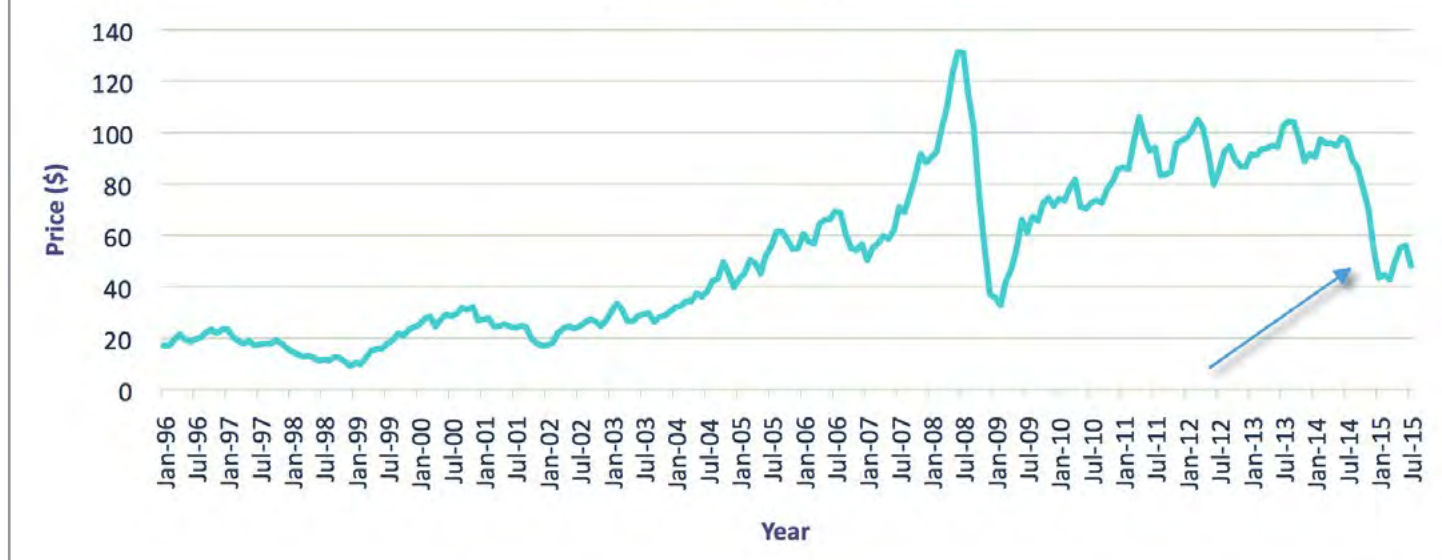
<sup>69</sup> Robert Gilmer, et al., “Oil Boom in Eagle Ford Shale Brings New Wealth to South Texas,” *Southwest Economy* (Federal Reserve of Dallas, Second Quarter 2012), 3, <https://www.dallasfed.org/assets/documents/research/swe/2012/swe1202b.pdf> .

<sup>70</sup> Ibid.

<sup>71</sup> Nasdaq, “Crude Oil,” (2015), <http://www.nasdaq.com/markets/crude-oil.aspx?timeframe=7y>.

<sup>72</sup> *Supra* note 49, *Petroleum and Other Liquids*.

**Figure 4: Texas Crude Oil First Purchase Price  
Dollars per Barrel  
(1996-2015)**



What goes up, however, must come down. During the second half of 2014, oil prices began to drop significantly as a result of oversupply in the global oil market. OPEC has declined to intervene to limit production from its member countries.<sup>73</sup> Further, turmoil in the Middle East has caused some Middle Eastern countries to produce at full capacity to fight insurgencies. In addition to the steady stream of production in the market, Iran has introduced large quantities of stored oil into the market. Moreover, demand is shrinking in certain markets, including China and parts of Europe.<sup>74</sup>

**Learning From Mistakes and Moving Forward.** There is no shortage of headlines claiming that the current bust in the oil and gas industry mirrors that of the 1980s.<sup>75</sup> While this comparison is an apt one, the current situation is also different. For example, interest rates in the 1980s were significantly higher, with many loans carrying interest rates in the teens. Today, with lower interest rates, there is greater access to capital and liquidity and reduced likelihood of default. Further, in the prior bust, oil production was seldom hedged against fluctuations

<sup>73</sup> See Clifford Krauss, "Oil Prices: What's Behind the Drop? Simple Economics," *New York Times*, Oct. 5, 2015, <http://www.nytimes.com/interactive/2015/business/energy-environment/oil-prices.html>.

<sup>74</sup> International Energy Agency, "World Energy Outlook," <http://www.worldenergyoutlook.org/pressmedia/quotes/quotes/>.

<sup>75</sup> See Russell Gold, "Back to the Future? Oil Replays 1980s Bust," *Wall Street Journal*, Jan. 13, 2015, <http://www.wsj.com/articles/back-to-the-future-oil-replays-1980s-bust-1421196361>; David Fehling, "Why a 1980s-Style Bust Is Not Happening for Texas as Oil Prices Drop," *Houston Public Media*, Dec. 23, 2014, <http://www.houstonpublicmedia.org/news/a-1980s-style-bust-for-texas-as-oil-price-drops-maybe-not/>; Collin Eaton, "Crude Calculation: Another decade, another oil bust," *Houston Chronicle*, Dec. 21, 2014, <http://www.houstonpublicmedia.org/news/a-1980s-style-bust-for-texas-as-oil-price-drops-maybe-not/>; Rakteem Katakey, "Oil's Big Slump Looks Like the 1980s 'Lost Decade,'" *Bloomberg Business*, Oct. 22, 2015, <http://www.bloomberg.com/news/articles/2015-10-22/oil-slump-resembles-lost-decade-as-saudi-targets-market-share>.



in the price of oil. Today many exploration and production companies have hedged at least a percentage of their production and still have liquidity from oil fixed at prices above the market line. Nonetheless, the current challenges faced by the oil and gas industry cannot be understated.

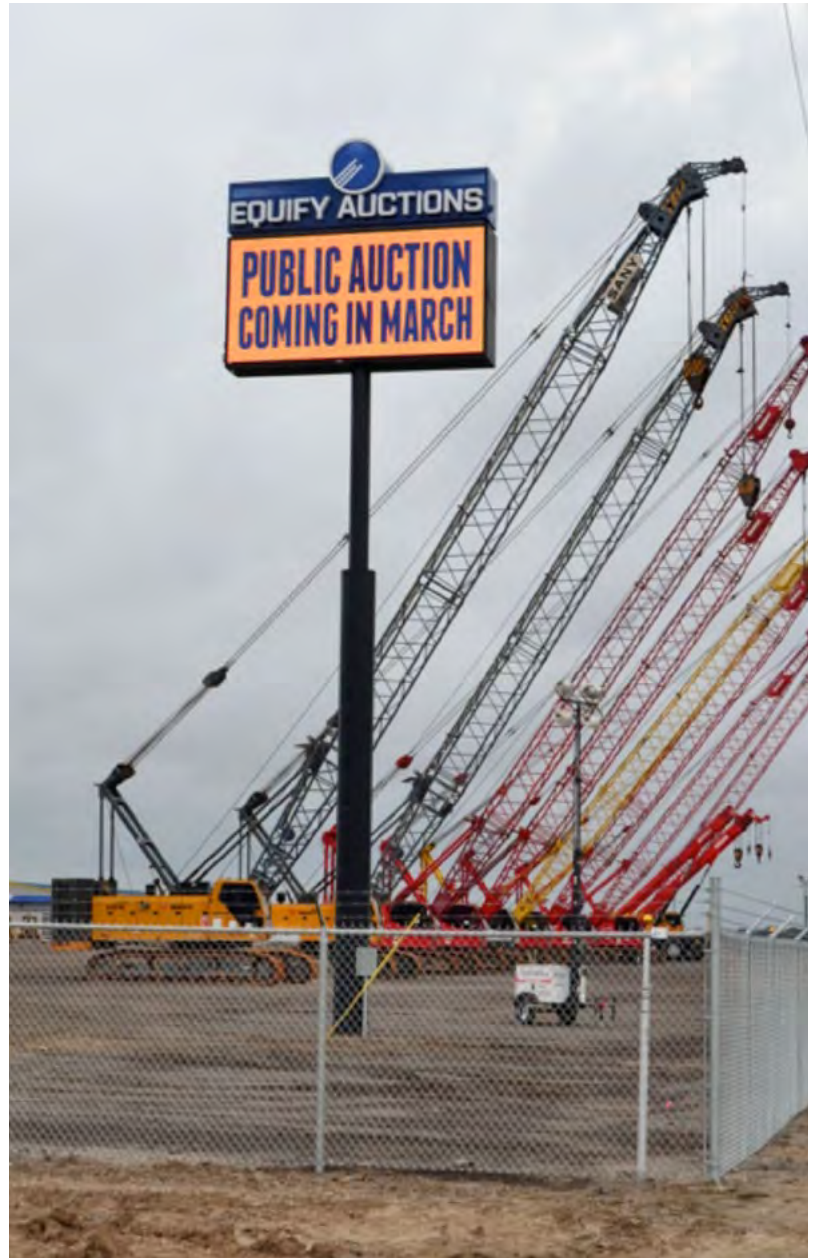
On August 24, 2015, the price of oil dipped to a six-year low at \$39 per barrel. As of the date of submission of this paper, prices remain under \$50 per barrel. The distress in the oil and gas industry has shaken even the major production companies, causing nationwide concern.<sup>76</sup> For bankruptcy lawyers, the current crisis could mean that the 1980s are back.



(Above) Hamilton Metals drilling-rig count sign on the north side of I-10 near Columbus, Texas, showing a 28-rig drop in the count

(Right) An auction yard advertising the sale of surplus oil and gas equipment along I-10, near Columbus, Texas.

Photos by David A. Furlow, December 2015



<sup>76</sup> See Joe Carroll, "Oil-Stock Plunge Erases \$17 Billion as Exxon Hits Four-Year Low," *Bloomberg Business*, Aug. 24, 2015, <http://www.bloomberg.com/news/articles/2015-08-24/oil-explorers-tumble-as-commodities-bloodbath-sinks-markets>; Clifford Krauss, "Exxon and Chevron Report Worst Quarterly Results of Current Decade," *New York Times*, July 31, 2015, <http://www.nytimes.com/2015/08/01/business/energy-environment/exxon-mobil-chevron-q2-earnings-oil-prices.html>.

## Conclusion

If history is any indication, the oil and gas industry will continue to fluctuate between spectacular booms and unfortunate busts. Texas's oil and gas industry has experienced these fluctuations since the 1800s and will continue to experience further fluctuations in the future. Things will always change, but they will always stay the same.



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Santa Rita No. 1 on the grounds of the campus of the University of Texas at Austin



# How Texas Law Promoted Shale Play Development

By Bill Kroger, Jason Newman, Ben Sweet, and Justin Lipe

***In 2015, Baker Botts celebrated its 175th anniversary. The firm's energy practices date back to Spindletop (1901). More than one hundred years later, Texas remains a leading producer of oil and gas in the United States, and Baker Botts represents many of the energy companies that have revolutionized the industry with horizontal drilling in the Texas shale plays. In this article, four Baker Botts attorneys summarize developments in Texas law that have caused Texas to be a leader in oil and gas production.***

The production of oil and gas from shale plays in the past ten years, much of it in Texas, has transformed the economies of the world. Hydrocarbons produced from the Eagle Ford and Barnett shale plays, as well as the Permian Basin and other places in Texas, have made the United States more energy independent, disrupted OPEC cartel economics, and strained oil-dependent economies from Argentina to Russia. As the supply of shale oil and gas has risen, energy prices have collapsed worldwide, lowering the cost of production for goods across the United States, reducing transportation costs for millions of Americans, and making U.S. manufacturing more competitive. Some observers argue that these transformations, while undeniably economically advantageous, have curtailed the development of renewable energy resources and contributed further to global environmental change.

Texas ingenuity and technology drove the developments that led to the recovery of hydrocarbons from shale and other tight rock plays. Technical difficulties of producing hydrocarbons from shales, which have low permeabilities and vary in brittleness, had to be overcome.<sup>1</sup> Important new technologies, such as horizontal drilling, hydraulic fracturing, and 3-D seismic imaging, allowed for this type of development.

The story of shale development is generally well known. George Mitchell of Mitchell Energy drilled some of the first gas wells using horizontal drilling and hydraulic fracturing in the Barnett shale play in Wise County, Texas in the early 1980s and 1990s.<sup>2</sup> By 1999, Mitchell had produced more than four hundred Barnett shale wells.<sup>3</sup> Other operators recognized Mitchell's success and entered the play, so that by 2005, the Barnett shale was producing nearly 500 billion cubic feet

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<sup>1</sup> "Unconventional Gas Technology," *Oil & Gas Journal* 105 (Dec. 24, 2007): 48.

<sup>2</sup> Scott Reeves and Vellow Kuuskraa, "New Basins Invigorate U.S. Gas Shales Play," *Oil & Gas Journal* 94 (Jan. 22, 1996): 4.

<sup>3</sup> "Mitchell Hikes Barnett Shale reserves," *Oil & Gas Journal* 97 (Sept. 27, 1999): 39.



of natural gas per year.<sup>4</sup> Operators adapted these techniques to produce crude oil and gas from the shale plays in the Eagle Ford, Haynesville, Marcellus, Woodford, and other locations.

And with each new well drilled in these tight rock formations, operators continue to improve the extraction of previously unrecoverable hydrocarbons. Drilling risks have decreased, and dry holes are rare, except in the most speculative areas. But while these technological developments have allowed for this U.S. energy resurgence, less well-recognized is the contribution that Texas law made to the shale boom.

## **The Foundation: Texas Oil and Gas Law**

Texas oil and gas law started with the discoveries at Spindletop in East Texas in 1901. As the jurisprudence evolved over the next hundred years, Texas became recognized worldwide as possessing the most sophisticated body of energy law.<sup>5</sup> Unlike other oil-rich states, such as Pennsylvania and North Dakota, Texas has had continuous drilling and production over this time, allowing for the constant refinement of Texas oil and gas law. While some states and countries actively seek to constrain the production of hydrocarbons, Texas and Texas law—including the following concepts—generally encouraged its development.

This article will survey eight concepts of Texas oil and gas law that contributed to the development of the shale plays.

### **1. Private Ownership of Minerals (a/k/a “Ownership in Place”).**

In many countries rich with natural resources, the minerals are owned by the sovereign.<sup>6</sup> Not in Texas. Since *Texas Company v. Daugherty* (1915), Texas has recognized that an owner of the land owns all of the resources underneath it, to the center of the earth.<sup>7</sup> In Texas, while some land is state-owned, most is owned by individuals. And the state-owned minerals were set aside to benefit educational institutions like the University of Texas.<sup>8</sup> Thus, if crude oil is discovered on Texas lands, the beneficiaries are typically citizens of Texas.

One reason that oil and gas law in Texas developed in a way that favored production is because so many citizens benefited from that production. Indeed, “[m]any of the major oil companies were born at Spindletop or grew to major corporate size as a result of their involvement

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<sup>4</sup> “Review of Emerging Resources: U.S. Shale Gas and Shale Oil Plays,” U.S. Energy Information Administration (release date, July 8, 2011), <http://www.eia.gov/analysis/studies/usshalegas/pdf/usshaleplays.pdf>.

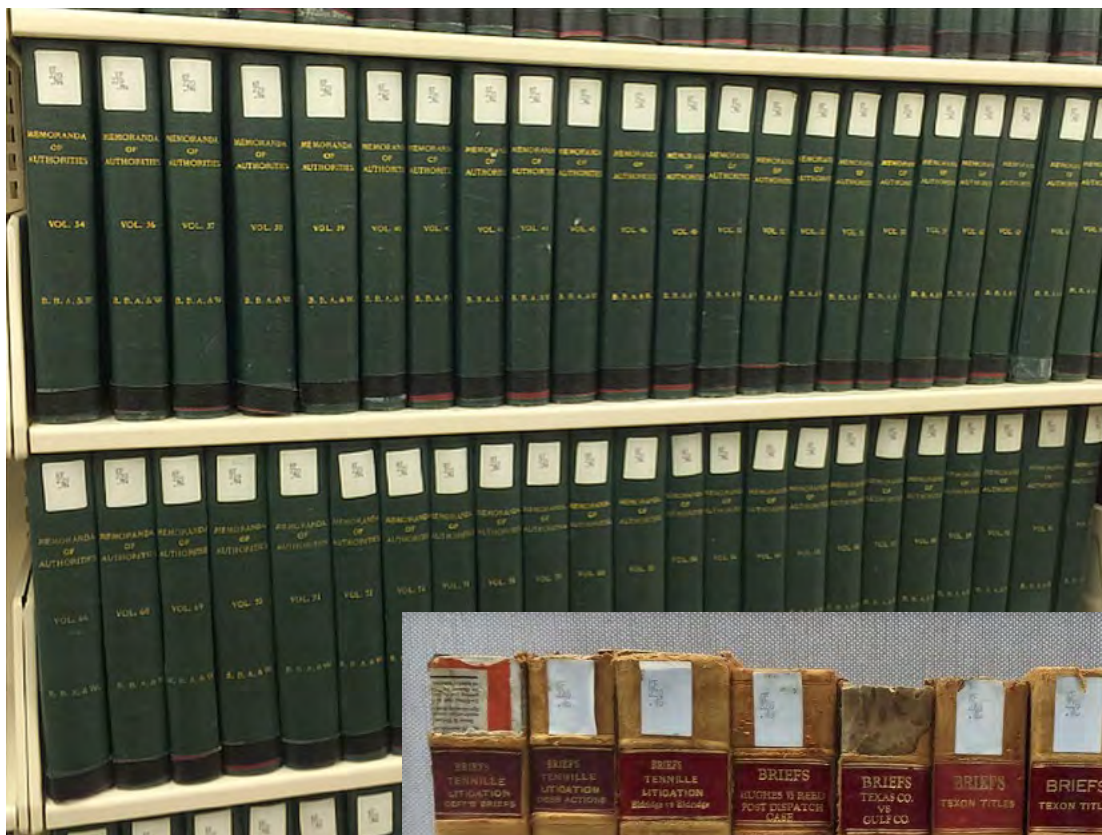
<sup>5</sup> In 1923, the Texas Supreme Court announced six opinions, in one day, that became foundational oil and gas cases, including *Texas Co. v. Davis*, 254 S.W. 304, 309 (1923).

<sup>6</sup> Christopher S. Kulander, “Common Law Aspects of Shale Oil & Gas Development,” *Idaho Law Review* 49 (2013): 367, 369 (noting that either the national government or state-owned entities own minerals in most foreign countries); Jared C. Bennett, “Ownership of Transmigratory Minerals, Utah and Zebras: Proof That Oil and Gas Ownership Law Needs Reform,” 21 *Journal of Land Resources & Environmental Law* 21 (2001): 349, 359 (listing states that have rejected the ownership-in-place theory, such as California, Oklahoma, and New York).

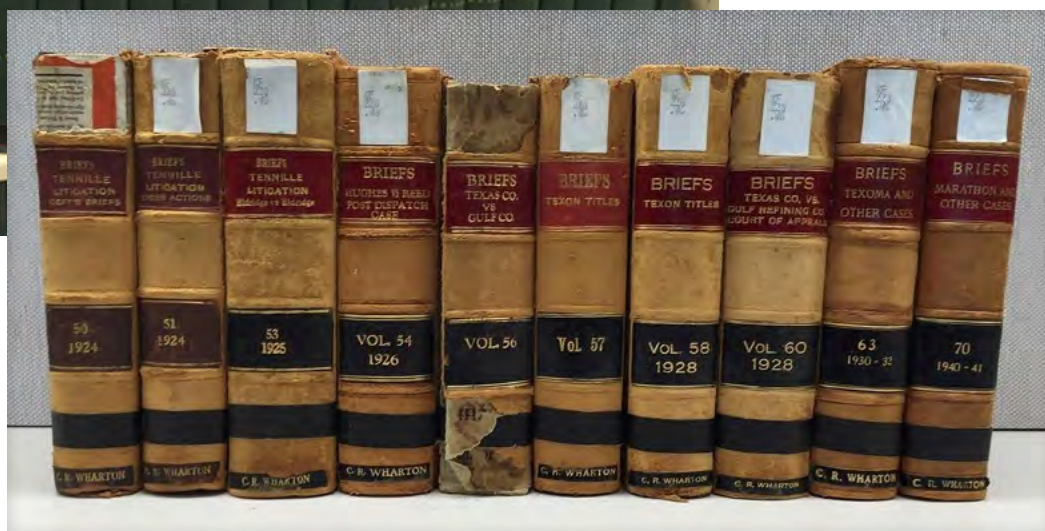
<sup>7</sup> 176 S.W. 717, 720 (1915); see also *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 829 (Tex. 2012) (citing *Daugherty*, 176 S.W. at 720).

<sup>8</sup> H. Philip (Flip) Whitworth, “Leasing and Operating State-Owned Lands for Oil and Gas Development,” *Texas Tech Law Review* 16 (1985): 673, 684.

at Spindletop . . . [including] [T]he Texas Company (later Texaco), Gulf Oil Corporation, Sun Oil Company, Magnolia Petroleum Company, and Humble (later Exxon Company, U.S.A.).<sup>9</sup> The operations for many of these companies were eventually relocated to Houston, making Houston “the focal point of the oil industry in the Southwest.”<sup>10</sup> Additionally, many of the most important projects of the State of Texas, including the advancement of higher education,<sup>11</sup> were funded from taxes on the production of hydrocarbons.



Some of Baker Botts' briefing and case files date back to the Spindletop era. Photos provided by Baker Botts



<sup>9</sup> Robert Wooster and Christine Moor Sanders, “Spindletop Oilfield,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/dos03> .

<sup>10</sup> Tommy W. Stringer, “Cullinan, Joseph Stephen,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fcu07> .

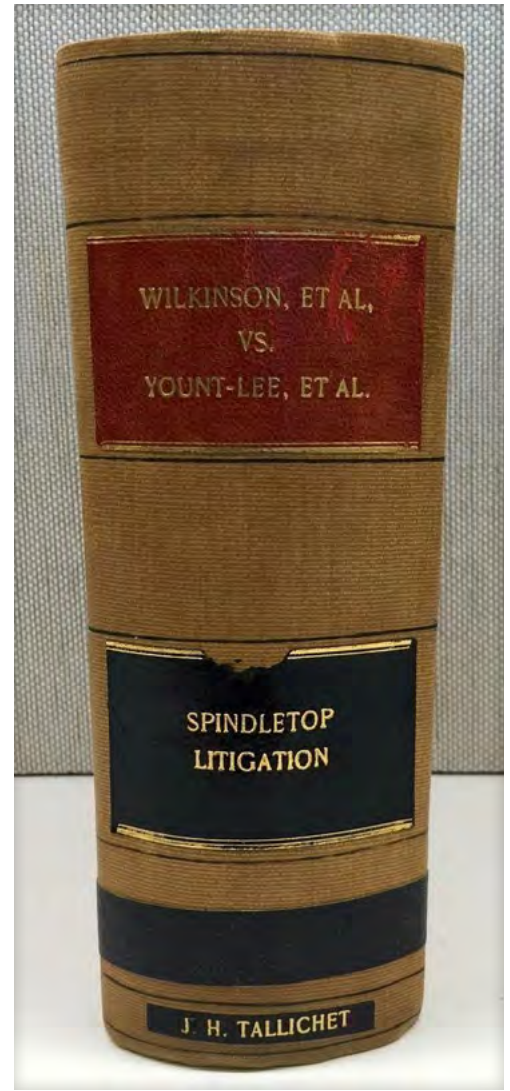
<sup>11</sup> “Santa Rita No. 1,” Board for Lease of University Lands website, The University of Texas System, <http://www.utsystem.edu/bfl/santarit.html>. The University of Texas famously leased more than 400,000 acres of land that it owned for the development of oil and gas, and began receiving substantial royalties when, in 1923, the Santa Rita #1 struck oil. That pumpjack itself was moved to the University of Texas in 1940 as a memorial to the University’s oil and gas roots.





A gusher at the Spindletop oil field near Beaumont, Texas, March 1903; Arthur J. Trost, *Sunset* (March 1903), 385; Wikimedia, [https://commons.wikimedia.org/wiki/File:Spindletop\\_Oil\\_Gusher.jpg](https://commons.wikimedia.org/wiki/File:Spindletop_Oil_Gusher.jpg)

Baker Botts' bound volume of Spindletop litigation; from the Baker Botts archives



## 2. Severance of Minerals.

Texas recognizes that land rights are a “bundle of sticks,” which allows the surface rights to be severed from the minerals rights.<sup>12</sup> The “dominant estate” theory in Texas generally provides that, when severed, the surface estate is subservient to the mineral estate.<sup>13</sup>

This legal concept spurred economic development in Texas because the owners of land found ways to sell or lease their minerals and receive compensation from the operating companies. For instance, the well-developed body of law allowing for the creation of bonus payments, overriding royalties, production payments, and term royalties compensates the owners of minerals while providing operators the kind of certainty to budget for and fund oil and gas development.

<sup>12</sup> *Humphreys-Mexia Co. v. Gammon*, 254 S.W. 296, 299 (1923) (“It is elementary that the minerals in place may be severed from the remainder of the land by appropriate conveyances.”).

<sup>13</sup> *Getty Oil Co. v. Jones*, 470 S.W.2d-618, 621 (Tex. 1971) (“It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; but that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate.”).



Mineral severance has also allowed Texas land to be developed for multiple, overlapping uses, which allows efficient, productive use of land.<sup>14</sup> A developer, for example, can sell the surface estate to a person who wants to use land for ranching or farming, and the minerals to an energy company that wants to drill (and even the wind rights to a wind developer). The farmer is not forced to purchase the rights to the minerals if he only wants to farm, and the energy company is not required to buy a farm to develop the minerals. In other words, oil and gas development and agriculture (or other uses) are not mutually exclusive in Texas. This concept prevents waste.

### 3. Rule of Capture and Drainage

The oil and gas legal principle most fundamental to the promotion of hydrocarbon development in Texas is the adoption of the rule of capture—a common law principle dating back to English law.<sup>15</sup> This rule, simply stated, is that an oil and gas operator who drills a well on his land can produce as many minerals from that land as possible, even if the oil and gas produced was originally located underneath the land of his neighbor. This development encouraged the drilling (and overdrilling) of wells: a landowner sitting above an oil reservoir would be strongly encouraged to develop the subsurface hydrocarbons, or risk having them drained by his neighbor.

The rule of capture in Texas actually pre-dates its application in the oil and gas context. In *Houston & T.C. Railway Company v. East* (1904)<sup>16</sup> the Texas Supreme Court first considered the rule as it applied to water rights. As disputes arose regarding the production of oil and gas from surrounding tracts, Texas courts considered whether the rule of capture should be extended to oil and gas. And in *Brown v. Humble Oil & Refining Company* (1935)—a decision that shaped the landscape of oil and gas law in Texas as we know it today—the Texas Supreme Court extended the rule of capture to govern the ownership of oil and gas produced from a reservoir.<sup>17</sup>

The rule of capture, while encouraging rapid exploration and production, led to inefficient development of pressurized formations in Texas. As a result, the Texas Legislature empowered the Texas Railroad Commission (TRRC) to protect correlative rights and prevent waste through well spacing and production allowables.<sup>18</sup> The TRRC's core statutory role has been to prevent the waste of natural resources and protect the correlative rights of different interest owners.<sup>19</sup> Texas courts furthered these policies through the development of implied covenants in oil

<sup>14</sup> Leases for wind rights is a more recent example of using severance to maximize land productivity, although Texas courts have not recognized the severability of a wind estate.

<sup>15</sup> *Houston & T.C. Ry. Co. v. E.*, 81 S.W. 279, 280 (1904) (adopting the rule of capture and noting that the doctrine “has been recognized and followed in the courts of England, and probably by all the courts of last resort in this country before which the question has come, except the Supreme Court of New Hampshire.”).

<sup>16</sup> *Ibid.* Baker Botts handled this case.

<sup>17</sup> 83 S.W.2d 935, 940 (1935).

<sup>18</sup> *See R.R. Comm'n v. Shell Oil Co.*, 380 S.W.2d 556, 559 (Tex. 1964) (“It is now well settled that the Railroad Commission is vested with the power and charged with the duty of regulating the production of oil and gas for the prevention of waste as well as for the protection of correlative rights.”).

<sup>19</sup> *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 562 (1948) (“The landowner is privileged to sink as many wells as he desires upon his tract of land and extract therefrom and appropriate all the oil and gas that he may produce, so long as he operates within the spirit and purpose of conservation statutes and orders of the Railroad Commission.”)

and gas leases, including the obligation of an operator to protect and defend the lease. This implied covenant gave rise to offset well obligations in oil and gas leases designed to promote development, while TRRC rules provided necessary limitations on the same.<sup>20</sup>

Texas courts and regulators now grapple with aspects of this legal framework—a body of law designed for the world of vertical wells and porous sand formations that allowed hydrocarbons to freely migrate.<sup>21</sup> Traditional spacing rules and certain lease obligations make less sense in tight shale where operators must fracture the formation to produce oil and gas, making substantial drainage far less likely to occur. The TRRC has responded to these problems with specialized rules for horizontal drilling in shale plays, and Texas courts are now interpreting older lease forms in this new context. But the conflict remains.

#### **4. Statewide Regulation by Texas Railroad Commission.**

In the early days of Texas oil and gas exploration, reservoirs were often depleted as a result of production races, manifested by the practice of drilling as many wells as possible in as little space as possible. Due to increasing concerns over the waste and volatility in crude oil prices generated by these practices, the State of Texas in 1919 gave the TRRC the jurisdiction to regulate the production of oil and gas development.<sup>22</sup> Shortly thereafter, the TRRC adopted its first statewide rule regulating the industry, which was also the first well-spacing rule in the country.<sup>23</sup>

The history of the TRRC is a book unto itself. A common theme of that book is that Texas benefits immensely by having one statewide regulator with oil and gas expertise whose core purpose is to protect correlative rights, promote safety, and prevent waste and pollution.<sup>24</sup>

The TRRC adopted the nation's first regulation of horizontal drilling in 1990 with the passage of Statewide Rule 86.<sup>25</sup> Rule 86 allows additional acreage to be assigned to the proration unit for a horizontal well so that it will be eligible for proportionately larger production allowables—the traditional proration units were simply not large enough to accommodate horizontal laterals that can stretch more than a mile.

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<sup>20</sup> See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 568 (Tex. 1981) (“The implied covenant to protect against drainage is part of the broad implied covenant to protect the leasehold. The covenant to protect the leasehold extends to what a reasonably prudent operator would do under similar facts and circumstances.”).

<sup>21</sup> *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 14–17 (Tex. 2008) (deciding “not to change the rule of capture to allow one property owner to sue another for oil and gas drained by hydraulic fracturing that extends beyond lease lines”).

<sup>22</sup> David F. Prindle, “Railroad Commission,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mdr01>. See also “History of the Texas Railroad Commission 1866-1939,” Railroad Commission of Texas website, <http://www.rrc.state.tx.us/about-us/history/history-1866-1939/>.

<sup>23</sup> *Ibid.*

<sup>24</sup> See “Oil & Gas,” Railroad Commission of Texas website, <http://www.rrc.state.tx.us/oil-gas/> (stating that the commission’s role is “to (1) prevent waste of the state’s natural resources, (2) to protect the correlative rights of different interest owners, (3) to prevent pollution, and (4) to provide safety in matters such as hydrogen sulfide.”).

<sup>25</sup> See “History of the Railroad Commission 1980-1999,” Railroad Commission of Texas website, <http://www.rrc.state.tx.us/about-us/history/history-1980-1999/>.

The TRRC also began adopting Special Field Rules in shale plays, starting with the Barnett shale, allowing the unique major Texas plays to be developed efficiently. The Barnett Field Rules, for example, adopted new lease-line spacing rules that allowed horizontal wells to be drilled closer to the boundary of a lease, thereby allowing leases to be more fully developed.

Additionally, the TRRC adopted horizontal well-spacing rules, which allowed horizontal wells to be drilled closer together than vertical wells, again allowing for more complete development of a lease. And in 2008, the Barnett Field rules were amended to allow operators to drill off a lease or unit so long as the first take point or perforation was on the lease and otherwise complied with the well-spacing rules. These liberalized field rules were applied in most of the other large Texas shale plays, including the Eagle Ford.<sup>26</sup>

Many other states with oil and gas resources have resisted statewide schemes of oil and gas regulation. For example, New York and Pennsylvania have allowed local governmental authorities to develop their own regulations for oil and gas operations.<sup>27</sup> Some of these local communities have responded by banning drilling and exploration, thereby preventing the state's natural resources from being fully developed.<sup>28</sup>

Statewide regulation has also been under attack in some Texas communities. In 2014, a majority of City of Denton voters passed an ordinance that banned hydraulic fracturing within city limits, which are located within the Barnett shale play. A few other cities have passed similar ordinances. The Texas Legislature responded to this attempted local regulation by passing House Bill 40, which clarified that the TRRC has exclusive jurisdiction over oil and gas operations, subject to narrow exceptions. Denton then repealed its ordinance and drilling moratorium in 2015.

## **5. Pipeline Condemnation for Right of Ways.**

Once oil and gas is developed, it must go to market. Historically, Texas has been friendly to the development of pipeline infrastructure. For example, until very recently, pipeline companies were almost de facto considered “public utilities,” even when the pipeline was mainly carrying product owned by an affiliate. This “public utility” designation allowed the pipeline company to use the power of condemnation to acquire easements across private property. This, in turn, reduced the cost of transporting hydrocarbons to market and allowed Texas to develop the most extensive network of pipelines in the United States for oil, gas, and other hydrocarbons.<sup>29</sup>

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<sup>26</sup> See Robert Grable, “Royalty Payments and Other Current Issues from Horizontal Wells,” No. 4, Rocky Mountain Mineral Law Foundation Paper No. 13A (Nov. 8-9, 2012).

<sup>27</sup> Jarit C. Polley, “Uncertainty for the Energy Industry: A Fractured Look at Home Rule,” *Energy Law Journal* 34 (2013): 261, 281-84.

<sup>28</sup> *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1192 (2014) (describing how the New York towns of Dryden and Middlefield banned the exploration and development of natural gas resources under local zoning ordinances).

<sup>29</sup> A 2012 decision from the Texas Supreme Court has called into question how restrictive Texas will be going forward regarding the construction of new pipelines. In *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC.*, 363 S.W.3d 192, 197-202 (Tex. 2012), a dispute arose when a Texas rancher refused to allow Denbury, a pipeline company, to survey its property. At that time, Denbury had complied with the then-existing law, which allowed it to claim status as a common carrier (and thus, exercise eminent domain) simply by checking a box on a Texas Railroad Commission T-4 form. See *ibid.*, 197-202. The trial court granted summary judgment in favor of



Many other states have struggled to build the necessary pipeline infrastructure to allow oil and gas to flow efficiently from the wellhead to market. North Dakota, for example, has lagged in pipeline developments, causing much of the natural gas production of that state to be flared over the past five years. Further, until recently, much of the crude oil produced in North Dakota was transported to market by railcar. Several high profile, catastrophic accidents involving railcar transportation of crude oil have raised awareness about safety issues associated with the transportation of crude oil.<sup>30</sup>

Texas's extensive pipeline infrastructure gives Texas a competitive advantage in producing and selling hydrocarbons, which is especially important when crude oil prices are low.

## **6. Development of Standardized Contract Forms.**

The oil and gas industry has developed standardized contract forms for use in defining the terms and conditions between lessors, lessees, and working interest owners. Standardized lease forms define operations, royalty calculations, and environmental obligations between the owners of the minerals (or lessors) and operators (or lessees). In addition, operators have developed standard joint operator agreements that define the rights and obligations between the operators and other working-interest owners in a lease. These forms have been interpreted and enforced for decades by the Texas courts,<sup>31</sup> reducing the risk of misunderstandings between the parties.

These standardized forms have promoted oil and gas development in Texas by allowing operators to purchase hundreds or thousands of leases and develop standardized methods for calculating royalties and costs and resolving other accounting issues. They have reduced the cost of lease administration. The forms have reduced litigation by resolving the meaning of disputed lease terms. They have also allowed buyers and sellers to more accurately value leases and efficiently buy and sell them, reducing transaction costs and allowing more capital to flow to the oil patch.

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Denbury, holding that Denbury had done all that was required to gain common carrier status, and thus, the right to condemn property. The Beaumont Court of Appeals affirmed, but the Texas Supreme Court reversed, citing concerns with the level of deference given to Denbury's claim of common carrier status. The Court outlined a new test to determine whether an entity could qualify as a common carrier under the Texas Natural Resources Code, holding that "a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." *Ibid.*, 202. The Court further held that "once a landowner challenges [common carrier] status, the burden falls upon the pipeline company to establish its common carrier bona fides if it wishes to exercise the power of eminent domain." *Ibid.* Thus, on a going-forward basis, it appears that courts will take a deeper look into the actual substance of pipeline projects to determine whether they are truly "public" projects before allowing the pipeline company to exercise the right to condemn land.

<sup>30</sup> Clifford Krauss and Jad Mouawad, "Accidents Surge as Oil Industry Takes the Train," *New York Times*, Jan. 25, 2014 ([http://www.nytimes.com/2014/01/26/business/energy-environment/accidents-surge-as-oil-industry-takes-the-train.html?\\_r=0](http://www.nytimes.com/2014/01/26/business/energy-environment/accidents-surge-as-oil-industry-takes-the-train.html?_r=0)) ("Today about two-thirds of the production in North Dakota's Bakken shale oil field rides on rails because of a shortage of pipelines.").

<sup>31</sup> See, e.g., *Reeder v. Wood Cnty. Energy, LLC*, 395 S.W.3d 789, 797 (Tex. 2012) (concluding that the operator was exempted from liability for breach of contract claims because the "parties modeled their joint operating agreement after the revised exculpatory clause in the 1989 form" published by the American Association of Petroleum Landmen).

During the last several years, lawyers representing lessors in some of the shale plays have drafted customized lease forms. Many of these forms address issues unique to horizontal development, and represent necessary changes to the standard “Producers 88” lease form.<sup>32</sup> Others, however, impose obligations on operators that do not exist under standardized lease forms, such as fiduciary duties on the operator in its development of the lease. Texas courts are now confronting these issues, and some have been reluctant to interpret the customized forms in a way that undermines a century of oil and gas law.<sup>33</sup> Oil and gas leases have always reflected a balance between the rights of the operator and those of the mineral owner, and we will continue to see Texas courts attempt to strike this balance going forward.

## **7. Strong Property Rights and Limited Zoning.**

Texas has also been a strong state for enforcing private property rights, and many of the factors listed above reflect this core value. The Accommodation Doctrine, for example, has prevented surface owners who don’t have an interest in the minerals from blocking oil and gas development.<sup>34</sup>

Development in Texas has benefited from the fact that most of its richest oil and gas fields are located in sparsely populated areas.<sup>35</sup> More recently, however, in areas such as the Barnett shale play, subdivisions have been built on top of gas fields owned by a different set of interests. This had made it more difficult for operators to develop their minerals. And surface owners, who may each own very small parcels, may have a hard time accommodating an oil and gas well

Plaintiff’s lawyers often use nuisance law to curtail development. For example, in a recent case, plaintiffs claimed that noise, odors, and toxic chemicals from surrounding oil and gas operations caused them to become sick and damaged their property and the foundation of their home.<sup>36</sup> However, there was no scientific evidence to support their claims. In an important decision, the San Antonio Court of Appeals affirmed the Karnes County District Court’s judgment,

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<sup>32</sup> The Producers 88 form is the most well-known “standard form” oil and gas lease, but it is far from standard. It originated, or so the story goes, when a landman asked a printer to make him a large number of copies of his standard form. The printer needed a name for the print job, and decided to call it “Producers 88,” and in fact, stamped that title in the upper left hand corner of the lease form. Thereafter, many lessors asked for the Producers 88; and many oil and gas operators simply provided their own form and stamped “Producers 88” in the upper left corner. By 1950, there were rumored to be more than 175 “standard” Producers 88 lease forms. See Clarence E. Hinkel, “Fundamentals of Oil & Gas Law,” *ABA Journal* 37 (Aug. 1951): 571, 572.

<sup>33</sup> Bill Kroger and Jason Newman, “Understanding Hydrocarbon Trends: Ten Issues That Lawyers Can Help the Energy Industry Solve,” *Houston Lawyer* 57 (2014): 10, 11.

<sup>34</sup> See *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248–49 (Tex. 2013) (citing *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621–22 (Tex. 1971)). (“The issue is one of fairness to both parties in light of the particular existing use by the surface owner and the principle underlying the accommodation doctrine: balancing the rights of surface and mineral owners to use their respective estates while recognizing and respecting the dominant nature of the mineral estate.”).

<sup>35</sup> Unlike most states, most counties in Texas do not have the power to zone or engage in land use planning efforts. Arthur J. Anderson, “Zoning and Land Use,” *Southern Methodist University Law Review*, 64 (2011) 617, 627 (“Most land use litigation involves a municipality because counties generally do not have zoning authority.”).

<sup>36</sup> See *Cerny v. Marathon Oil Corp.*, No. 04-14-00650-CV, 2015 WL 5852596 (Tex. App.—San Antonio, Oct. 7, 2015, pet. filed).

dismissing all claims asserted against the operator and extending several well-established legal principles to claims based on hydrocarbon exposure in the context of oil and gas operations, including the stringent causation standard imposed by the Texas Supreme Court in *Merrell Dow Pharmaceuticals, Inc. v. Havner*.<sup>37</sup>

Applying this methodological standard, the San Antonio Court of Appeals held that the plaintiffs failed to present more than a scintilla of evidence in support of their claims.<sup>38</sup> This opinion, along with a handful of other recent cases and upcoming decisions,<sup>39</sup> should provide much-needed guidance to operators and begin to shape the landscape of nuisance law in the context of oilfield activities in the coming years.

## **8. Protection of Intellectual Property.**

The Texas shale plays would not have been developed without the advent of new drilling, exploration, and production technologies. Indeed, efficient oil and gas exploration is as dependent on new technologies as any Silicon Valley technology firm.

Drilling companies such as Schlumberger, Baker Hughes, and Halliburton invented technologies for 3-D seismic, horizontal drilling, and hydraulic fracturing. These technologies have been patented and protected and are now used by these companies around the world.

This is hardly unprecedented. Texas oil companies have been aggressive in pioneering new technologies and then protecting their intellectual property rights since at least the invention of the Hughes tool bit. Some of Baker Botts' first intellectual property work involved protection of new oilfield technologies.<sup>40</sup>

Protection of intellectual property rights is essential to encouraging continued innovation in the oil and gas industry. It is not an accident that many of the new technologies that have changed the economics of oil and gas production originated in companies with large Texas operations.

Recently, one of the ongoing disputes over intellectual property rights in the oil and gas industry concerns whether operators should be required to disclose the chemical properties of their fracturing fluids and additives. Operators consider their formulas and ingredients to be trade secrets. Texas has responded to these concerns by requiring a modified disclosure to regulators of all toxic, hazardous, or carcinogenic chemicals in such fluids or additives.<sup>41</sup> These rules balance the need for openness with the importance of protecting innovation.

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<sup>37</sup> *Ibid.*, \*5–6, 8.

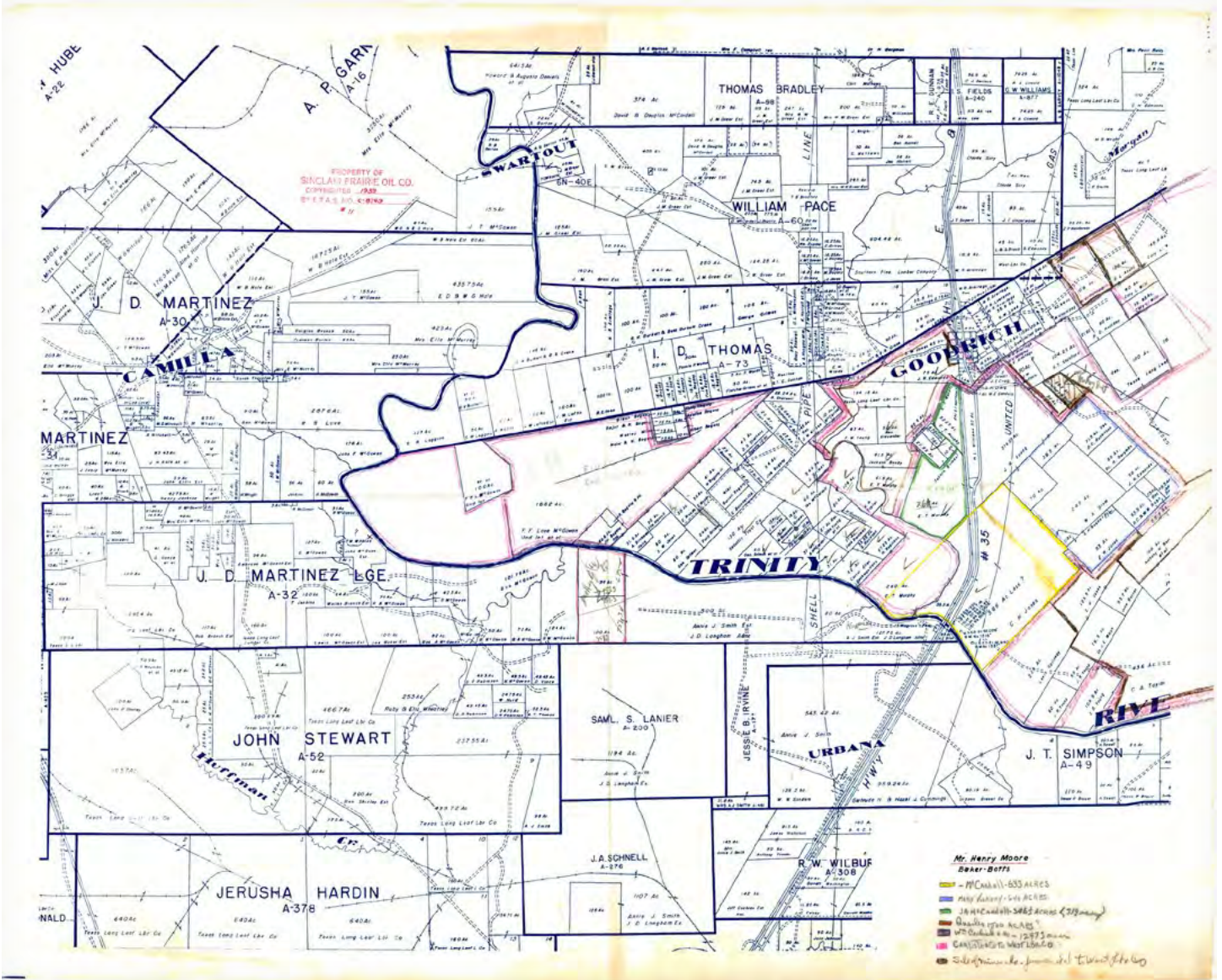
<sup>38</sup> *Ibid.*, \*5–6.

<sup>39</sup> *See, e.g., Sciscoe v. Enbridge Gathering (N. Texas), L.P.*, No. 07-13-00391-CV, 2015 WL 3463490 (Tex. App.—Amarillo, June 1, 2015, pet. filed); *Lazy R Ranch, L.P. v. ExxonMobil Corp.*, 456 S.W.3d 332 (Tex. App.—El Paso 2015, pet. filed); *Crowder, et al. v. Chesapeake Operating Inc.*, No. 2011-008169-3 (Co. Ct. at Law, Tarrant County, Tex. May 16, 2014).

<sup>40</sup> *See, e.g., Reed Roller Bit Co. v. Hughes Tool Co.*, 12 F.2d 207, 208 (5th Cir. 1926).

<sup>41</sup> Tex. HB 3328, 82nd Leg., R.S. (Sept. 1, 2011).





Detailed maps of oil and gas fields comprise an important part of Baker Botts' archival records



The Shale Play development favored by Texas law resulted in the development of property and hotels throughout much of rural Texas.  
Photo by David A. Furlow



## Conclusion

The legal principles and developments outlined in this article allowed Texas to become the world leader in horizontal drilling, hydraulic fracturing, and the production of oil and gas from shale plays. These developments will continue to push the Texas energy industry forward as it continues to lead the United States towards energy independence.



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Well equipment north of I-10 West near Columbus. Photo by David A. Furlow

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# The Texas Railroad Commission—The First OPEC

By Mitchell E. Ayer

**A**t a recent speech at the Houston Petroleum Club, Texas Railroad Commissioner Ryan Sitton spoke about how the Texas Railroad Commission had controlled the price of oil longer than OPEC had. The Commission played the central role in interstate production coordination for forty years from 1933 through 1972. But wait—*there's more*. The Texas Railroad Commission also served as the model for the Organization of Petroleum Exporting Countries (OPEC).<sup>1</sup> Moreover, the Commission did a better job of controlling prices than OPEC. In 1933 when the price of oil dropped to ten cents per barrel, the Commission (with the support of the Texas Supreme Court) saved the oil and gas industry by leading the first cartel.

But today no cartel is controlling prices, with disastrous results. The rig count in Texas has dropped from 1,872 rigs a year ago to only 324 rigs today.<sup>2</sup> Prices have cratered, with natural gas at \$1.81 MMBtu and WTI oil at \$34.94 per barrel.<sup>3</sup> In these troubled times, can the Commission ride to the rescue again?

## **Why Does a State Railroad Commission Govern the Production of Oil and Gas?**

The Texas Railroad Commission is the oldest state regulatory agency in Texas, and for decades was the most powerful state agency in all of the United States, if not the world. In the late 1800s, farmers were under financial pressure. Railroads would charge high prices to haul goods to grain elevators and cotton brokerages. Excessive rates were charged for storage. Loan companies charged interest rates up to 40 percent.<sup>4</sup> These conditions gave rise to the Populist Party and in turn to the Railroad Commission. Agrarian populists feared Eastern state monopolies that dominated banking, railroads, and manufacturing. In 1889 Texas passed strong antitrust laws and in 1891 formed the Railroad Commission to protect farmers and small business from railroad cartels. Ironically the agency created to fight railroad cartels would eventually become the mightiest oil cartel in the world.

In 1917 the existence of monopoly power in the oil pipeline business caused the Texas Legislature to pass an act declaring oil pipelines to be common carriers. Because the Railroad

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<sup>1</sup> OPEC is an organization of eleven oil producing and exporting countries, from Africa (Algeria, the Socialist People's Libyan Arab Jamahiriya, and Nigeria); Asia (Indonesia); the Middle East (the Islamic Republic of Iran, Iraq, Kuwait, Qatar, Saudi Arabia, and the United Arab Emirates); and Latin America (Venezuela).

<sup>2</sup> Baker Hughes Rotary rig count, 12/11/15.

<sup>3</sup> Nymex, December 17, 2015.

<sup>4</sup> A.P. U.S. History Notes, Topic Outlines, "Agrarian Revolt," <https://www.apstudynotes.org/us-history/topics/agrarian-revolt/>.



Commission already regulated pricing of railroads, the Legislature gave the Commission power to regulate oil pipelines as common carriers.

In 1919 the Legislature passed an act declaring that natural gas and oil should not be produced in such a manner as to constitute waste, and that it was the duty of the Railroad Commission to make and enforce rules and regulations for the conservation of oil and gas.<sup>5</sup> Early on, the railroads challenged the Commission's power, contending that it infringed on the power of the federal government to regulate interstate commerce. The power of the agency was upheld in *Gulf, Colorado, and Santa Fe Railway Co. v. Eddins* (1894).<sup>6</sup>

The railroads later sought again to set aside the power of the Commission by contending that its rules and regulations were "unreasonable, unfair, unjust, and unlawful." In 1897 the Texas Supreme Court gave effect to the populist will of the people and upheld the Commission's authority in *Railroad Commission of Texas v. Houston and Central Texas Railway Company*.<sup>7</sup> The Court held that inasmuch as the law creating the Railroad Commission provided for judicial review of its decisions, the Commission was not taking of private property without due process.<sup>8</sup> Justice Thomas J. Brown stated that "courts will determine the question of the reasonableness or justice of any matter by the same rules as if it were an issue in other classes of suits."<sup>9</sup>



The Luling Oil and Gas Museum memorializes the history of Texas production; photo by David A. Furlow, November 2015

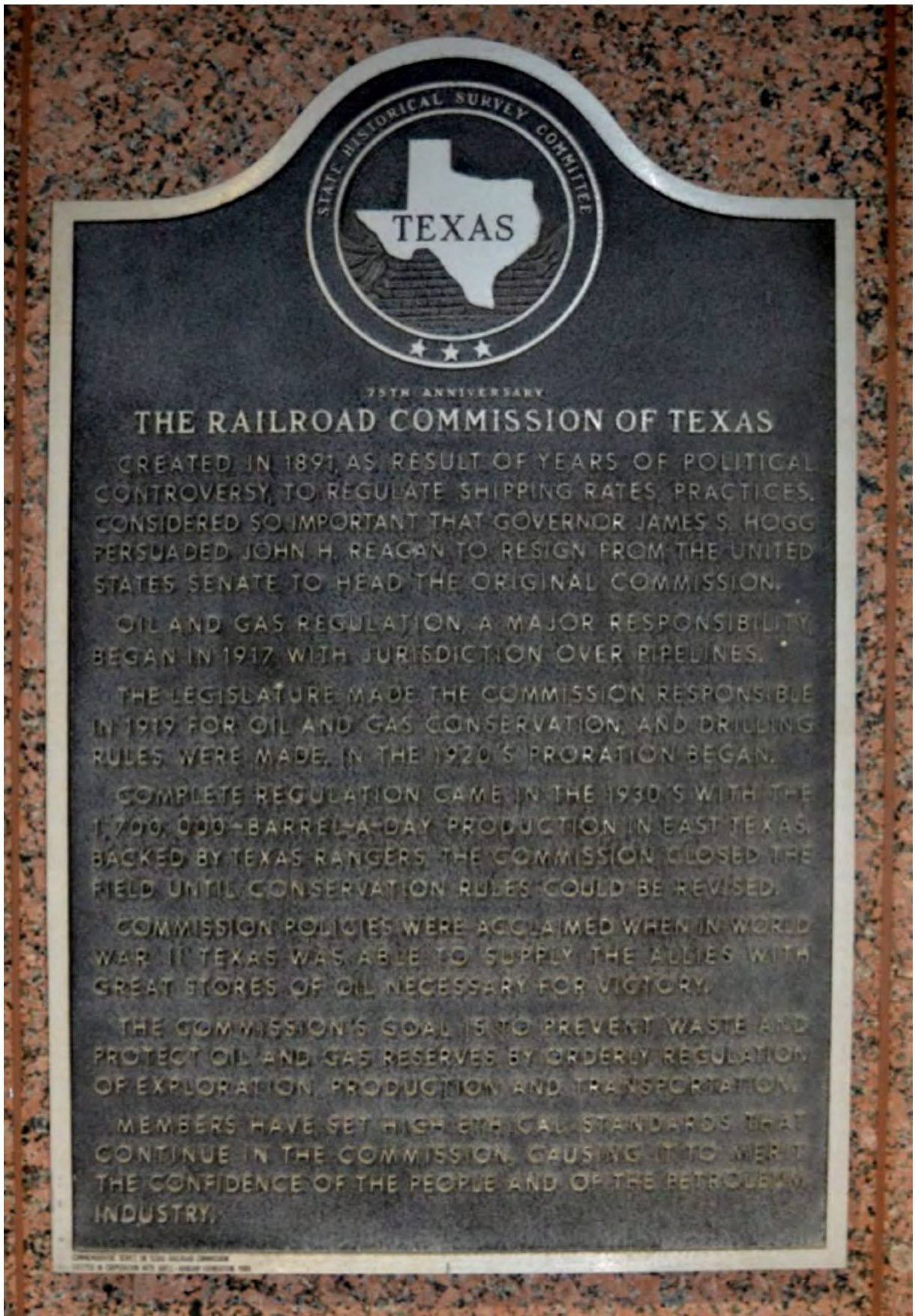
<sup>5</sup> Ernest E. Smith and Jacqueline Weaver, *Texas Law of Oil and Gas*, Chap. 8.1 (Lexis Nexis Matthew Bender, 2d ed., 3 vols., 2015).

<sup>6</sup> 26 S.W. 161, 166 (Tex. Civ. App.—Austin 1894, no writ).

<sup>7</sup> 90 Tex. 340, 38 S.W. 750, 752 (1897).

<sup>8</sup> James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013), 137.

<sup>9</sup> *Ibid.*



Texas Historical Commission's "Railroad Commission of Texas" sign in the lobby of the William B. Travis Building in Austin; photo by David A. Furlow



## The Creation of the First Cartel: The Interstate Oil Compact

In October 1930, Columbus Marion “Dad” Joiner drilled the Daisy Bradford No. 3 Well. This led to the rapid development of the huge East Texas Oilfield, with production reaching 1,700,000 barrels a day. As production was not controlled, the vast supply of oil caused the price of crude to plummet worldwide.<sup>10</sup> The Railroad Commission issued pro-rationing orders restricting production, but in 1931, those orders resulted first in violence, then in the declaration of martial law in Upshur, Gregg, Rusk, and Smith Counties, Texas.<sup>11</sup> Facing the same problems, Oklahoma also declared martial law.<sup>12</sup>

In order to control the price, production needed to be reduced. Oklahoma Governor William Murray organized the Oil States Advisory Committee to set total production quotas for Kansas, New Mexico, Oklahoma, and Texas. They had to overcome some legal and operational hurdles before the Committee and Congress eventually came up with a structure that would work for some forty years. At first they just relied on setting production quotas, but massive and ingenious cheating took place in the East Texas and Oklahoma City fields. The efforts at martial law failed. Total chaos resulted. And to top it off, a federal court struck down the quotas.

As an example of the production violations, in March 1933, East Texas’s oil output approached 1,000,000 barrels per day, despite a production quota from the Texas Railroad Commission of 400,000 barrels.<sup>13</sup> The Oil States Advisory Committee met with Department of the Interior Secretary Harold Ickes to discuss a new quota structure to raise prices.<sup>14</sup> Production quotas were incorporated into the National Recovery Administration (NRA) Oil Code.<sup>15</sup> At the request of Secretary Ickes, Kansas Senator George McGill introduced legislation in Congress to give teeth to the production quotas by authorizing federal enforcement. Congress did this by amending the False Claims Act to include criminalizing making false statement by producers of “hot oil”— oil produced in violation of production restrictions.

Under the NRA, interstate pro-rationing of crude oil production worked well. Federal administration reduced total production, and as supply fell, crude oil prices quickly rebounded to over \$1.00 per barrel. But the way the federal government gave Texas the short end of the stick made Texas resistant to future federal regulation of production.

The NRA had the East Texas field bear almost all of the production cuts—more than a half million barrels per day. By May 1934, East Texas was producing only 509,000 barrels per

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<sup>10</sup> For example, the nominal price for a barrel of oil fell from \$2.29 per barrel in 1926 to \$0.10 per barrel in 1933. See Gary D. Libecap and James L. Smith, “Political Constraints on Government Cartelization: The Case of Oil Production Regulation in Texas and Saudi Arabia,” in Peter Grossman, ed., *How Cartels Endure and How They Fail: Studies of Industrial Collusion* (Cheltenham, UK: Edward Elgar Publishing Ltd., 2014), 193. See also Julia Cauble Smith, “East Texas Oilfield,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/doi01>.

<sup>11</sup> See Wayne Gard, “Hot Oil,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/doh04>.

<sup>12</sup> Ibid.

<sup>13</sup> See Libecap and Smith, “How Cartels Endure,” 194.

<sup>14</sup> Ibid., 197.

<sup>15</sup> See Ben H. Procter, “Great Discussion,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/npg01>.



day, less than half of its March 1933 output. But during the same period, while Texas was taking a big cut, the federal government allowed Oklahoma and Kansas to increase their output by 70,000 and 20,000 barrels per day, respectively.<sup>16</sup>

In 1935, the Committee faced another legal hurdle when the United States Supreme Court unanimously struck down Section 9(c) of the NRA. The Supreme Court held that: (1) Section 9(c) was an unacceptable delegation of power from the legislature to the executive; and (2) it attempted to regulate commerce that was not interstate in character.<sup>17</sup> The response was quick. In February 1935, Congress passed the Connally Hot Oil Act. Although characterized as protecting industry from “contraband oil,” it was needed to set up a cartel to keep prices higher. The Hot Oil Act prohibited interstate shipment of any oil in excess of any state law such as the orders of the Texas Railroad Commission. The government could seize oil shipped in violation of state production quotas. Violators could be jailed up to six months or fined \$2,000. Importantly for Texas, the legislation maintained individual state rather than federal regulation of oil production.

But how were the states going to coordinate their regulations to maintain prices? Texas was in the driver’s seat with some 46 percent of U.S. reserves. Texas Governor James Allred opposed federal intervention beyond enforcement of restrictions on hot oil shipments. The Oklahoma and Kansas governors wanted to negotiate an interstate oil compact and threatened legislation for federal regulation of oil production. Since Texas had been stung by federal regulation of production before, Allred called for a compact among the states that would serve as a loose advisory body for regulatory agencies in coordinating output decisions.<sup>18</sup>

The Constitution provides for a right for states to “compact” or work together. The states finally agreed to enter into an Interstate Oil Compact along the lines desired by Governor Allred. Regulatory authority would not rest with the Compact Commission but with the individual state agencies, which would set monthly production totals. Congress ratified the Interstate Compact on August 27, 1935. The stated purpose of the Compact was to “conserve oil and gas by the prevention of physical waste thereof from any cause.” States that ratified the Compact agreed to enact legislation for this purpose. Initially the Compact Commission comprised six members, all states: Colorado, Illinois, Kansas, New Mexico, Oklahoma, and Texas.

The Interstate Oil Compact established the interstate oil cartel which lasted until 1972, when OPEC production made U.S. production irrelevant. The Compact functioned essentially through voluntary cooperation. The governors and their regulatory agencies met quarterly to discuss prices, oil production plans, and other regulatory issues. When determining monthly output levels, the regulatory agencies met and shared information about their respective production plans. Then each state agency set monthly production levels and allocated the state total among regulated wells.

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<sup>16</sup> Libecap and Smith, “How Cartels Endure,” 202.

<sup>17</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>18</sup> See Floyd F. Ewing, “Allred, James Burr V,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fal42>.

A major concern of state regulatory agencies was looking out for the little guy—in the form of “stripper wells.” These “stripper wells” were high-cost wells that produced ten barrels or less per day from older fields. Owners of stripper wells represented a large and powerful political lobby. In 1931 these wells accounted for 40 percent of Texas production and 87 percent of total wells in Oklahoma.

One of the goals of the state agencies was to protect the stripper wells and force output controls on the newer low-cost wells. Stripper wells were exempted from output controls. In addition to stripper well exemptions, the Railroad Commission also gave preferential treatment to small oil-producing firms even though this practice encouraged the drilling of extra wells by these small firms. These policies proved so politically popular that one well-respected commissioner, Ernest O. Thompson, served thirty-three years on the Commission.<sup>19</sup>

Given political constraints such as no proration for stripper wells, Texas could not fine-tune output to match varying output from other states. But the other states had strong incentives to cooperate with Texas, since the Railroad Commission capped the large reserves of low-cost production. In return, all of the pro-rationing states shared monthly production adjustments to maintain crude oil prices so that the responsibility was not left solely to the Railroad Commission. Further, during crises, Texas had to step up and adjust production to protect the Interstate Compact.

The first crisis was caused by Illinois’s defection from the Interstate Compact. There were new discoveries in Illinois in 1937 that led to increased production. This new Illinois production displaced some of Kansas and Oklahoma’s share in Midwestern markets. New Illinois production contributed to a 16 percent fall in crude oil prices from \$1.22 in 1937 to \$1.07 per barrel by October 1938.<sup>20</sup> The interstate oil cartel seemed close to collapse as states threatened to raise their oil output in retaliation against Illinois. Kansas threatened to leave the Compact and demand federal controls unless it got a minimum market share.

Texas feared that collapse of the cartel would lead to federal control and result in bigger cutbacks for Texas, as had happened under the NRA. The Interstate Oil Compact conducted an emergency meeting in August 1939, and Texas was the first to cut its production. Other states followed Texas’s lead, with immediate results. Among the compact states, total output of crude oil fell by 29 percent, from 98,070,000 barrels in July to 69,893,000 barrels in August. This alleviated downward pressure on crude prices to keep federal regulation at bay.<sup>21</sup>

The Illinois problem was overtaken by events as that state’s production peaked quickly and then started falling. By 1941, increased oil demand for World War II and greater controls on Illinois output brought an increase in crude oil prices.<sup>22</sup>

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<sup>19</sup> See David F. Prindle, “Railroad Commission,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mdr01>; George N. Green, “Thompson, Ernest Othmer,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fth18>.

<sup>20</sup> Libecap and Smith, “How Cartels Endure,” 206.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, 206–7.

Major increases in production in Louisiana caused a second crisis. Between 1958 and 1963, crude oil output in Louisiana rose by 62 percent from 26,276,000 barrels to 42,512,000 barrels. In 1958, U.S. crude oil prices began to fall for only the second time since 1933. Prices fell from \$3.07 per barrel in 1957 to \$2.92 per barrel in 1963. The Railroad Commission lowered allowable monthly production from 48 percent of capacity in 1956 to just 27 percent by 1962. This brought criticism and a political offensive to either have the Legislature set allowables or create a new state agency. The Commissioners responded by increasing allowables. As in Illinois, production in Louisiana gradually declined, resolving that crisis.<sup>23</sup>

The Texas Supreme Court has been creative in suggesting how the Railroad Commission can legally accomplish its mission to protect correlative rights and prevent waste. In 1953, the Commission had shut down all 2400 wells in the entire Spraberry field near Midland. Many wells had been flaring casing head gas, and the Commission shut these wells in to prevent waste.

At the same time, the Commission shut in wells that had pipeline connections; otherwise the wells lucky enough to have pipeline connections would drain the flaring wells. In *Railroad Commission of Texas v. Rowan Oil Co.*, the Supreme Court invalidated the Commission order on the grounds the Commission had no authority to shut in wells for the sole purpose of protecting correlative rights.<sup>24</sup>

But the Court suggested that the Commission use its broad powers under what is now Chapter 86 of the Texas Natural Resources Code, which clearly applied to gas wells even though the Spraberry wells were oil wells. By interpreting Chapter 86 to apply to oil wells, the Court allowed the Commission to prorate the non-flaring wells on the sole basis of protecting correlative rights. The non-flaring wells were allowed to produce at such low rates that not much oil could be drained from the flaring wells until pipeline connections came on for the rest of the wells. As the other wells were connected, the allowables were increased.<sup>25</sup>

During this period of domestic control by the Interstate Oil Compact, a corresponding “secret” international cartel was established by the major oil companies. The Federal Trade Commission (FTC) issued a report in 1952 on the International Petroleum Cartel (making it not so secret). The gist of the FTC findings was that seven companies<sup>26</sup> controlled all the principal oil-producing areas outside the United States, and all foreign refineries, patents, and refinery technology. This cartel maintained artificially high prices for oil<sup>27</sup> by dividing world markets between them and sharing pipelines and tankers throughout the world.

## **The Founding of OPEC**

The founding of OPEC can be traced to Texas. Abdullah Tariki, one of the men who founded

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<sup>23</sup> Ibid., 207.

<sup>24</sup> *Railroad Commission of Texas v. Rowan Oil Co.*, 152 Tex. 439, 259 S.W.2d 173, 176 (1953).

<sup>25</sup> See Smith and Weaver, *Texas Law of Oil and Gas*, Sec. 8.3 [C](2).

<sup>26</sup> The “Seven Sisters” were Exxon, Shell, Texaco, Gulf, Mobil, British Petroleum (BP), and SoCal.

<sup>27</sup> See Anthony Sampson, *The Seven Sisters: The Great Oil Companies and the World They Shaped* (New York: Viking Press, 1975), 123.



OPEC, went to graduate school at the University of Texas. Tariki was the son of a camel owner who organized caravans from Kuwait to Saudi Arabia. Tariki graduated with a master's degree in petroleum engineering and geology from the University of Texas in 1947. He also trained at the Texas Oil Company (later, Texaco) after graduation. Tariki studied the history of conservation in Texas. After leaving the U.S., he became Director-General of Petroleum and Mineral Affairs in the Ministry of Finance and National Economy.<sup>28</sup>

Tariki's work at the directorate involved processing the petroleum production statistics provided by Aramco for the Saudi royal family. He accused Aramco of concealing discounts on its oil from the Saudis so that the 50-50 split was really 32-68 in Aramco's favor.<sup>29</sup> This led to his call for the nationalization of Arab oil.

The other founder of OPEC was Venezuelan Juan Pablo Pérez Alfonso. His aides attended UT at the same time as Tariki. Alfonso sought political asylum in the United States after spending nine months in jail following the overthrow of democracy in Venezuela. Returning to his country in 1958, Alfonso accepted the role of Minister of Mines and Hydrocarbons. He has been described as a "scholarly and monkish economist ... who really understood the economics of oil."<sup>30</sup> He had studied the way Texas rationed oil. He insisted Venezuela have a 50-50 share in oil profits. This idea spread to the Middle East.

In 1960, the international oil cartel was facing a glut of oil. Russian oil was coming on the market and leading to price discounts. In February 1959, the Sisters made a posted price cut of eighteen cents a barrel. On August 8, 1960, Exxon made a second reduction, unilaterally cutting Mideast oil posted prices by ten cents a barrel.<sup>31</sup> British Petroleum and the other companies followed suit with cuts in posted prices.

This was the last straw, and the five major exporting countries—Saudi Arabia, Venezuela, Kuwait, Iraq, and Iran—convened a meeting in Bagdad on September 15, 1960. Led by Tariki of Saudi Arabia and Alfonso of Venezuela, they created OPEC. As Alfonso said, "We have formed a very exclusive club....Between us we control ninety percent of crude exports to world markets and we are now united. We are making history."<sup>32</sup>

The five founding members later admitted eight more oil producers to their club: Qatar (1961), Indonesia (1962), Libya (1962), the United Arab Emirates (1967), Algeria (1969), Nigeria (1971), Ecuador (1973–1992 and 2007–present), and Gabon (1975–94).

Although OPEC was founded in 1960, it took some twelve years to learn to use the power of the cartel. During this early period, OPEC pretty much cooperated with the major oil companies that sold Persian Gulf crude for \$1.80 a barrel while Texas oil, which was protected by foreign

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<sup>28</sup> "Abdullah Tariki," in *Wikipedia*, [https://en.wikipedia.org/wiki/Abdullah\\_Tariki](https://en.wikipedia.org/wiki/Abdullah_Tariki) .

<sup>29</sup> Sampson, *Seven Sisters*, 162.

<sup>30</sup> *Ibid.*, 105

<sup>31</sup> Exxon had originally planned to also cut Venezuela but changed its mind after the company's local representative threatened to resign if that happened.

<sup>32</sup> Sampson, *Seven Sisters*, 156.

import quotas and Railroad Commission pro-rationing, went for \$3 per barrel.

But nationalistic political changes finally led to OPEC's rise as a world oil power. Colonel Muammar al-Qaddafi showed OPEC the way in 1972 and 1973 when he nationalized British Petroleum and the huge holdings of Texan Bunker Hunt, then forced the other foreign oil companies to accede to his terms. OPEC members were quick to learn from Qaddafi.

In October 1971, OPEC raised the price to \$5.12 while curbing production. By December, the Shah of Iran announced the official price would now be \$11.65. A new sheriff was in town. By 1972, oil production the U.S. had peaked, but consumption was still rising rapidly. The Railroad Commission no longer needed to impose production limits. Even if Texas wells pumped at 100 percent of capacity, there would still be a need for imported oil. The supposedly endless oil glut of the fifties and sixties was over.

The 1973-74 Arab oil embargo lasted from October to March, a total of five months. This created a fear that the West would run out of oil, a fear that allowed OPEC to quadruple official prices. When the OPEC countries threatened to cut back production in the grand tradition of the Texas Railroad Commission, they were able to impose their terms of payment. The increased world demand for oil ensured that the price would be met, for Texas and the other Compact States were pumping around the clock and still coming up short.<sup>33</sup>

For forty years the Texas Railroad Commission and the other oil producing states curtailed production to maintain prices and employment. Likewise, oil import quotas were used to maintain prices. It would make a lot of sense for these successful policies to be revisited. We need to learn from Texas's oil and gas history, not ignore it.

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<sup>33</sup> Roger M. Olien, "Oil and Gas Industry," Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/doogz>.



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# The History of Mexican Oil and Gas Law from the Conquistadors' Conquest until 1914\*

By Vincent R. Ryan, Jr.

If the nineteenth century can be characterized as the age of coal, the twentieth century must be called the century of oil. By the end of the nineteenth century the world was awake to the vast possibilities of petroleum to fuel the machines of a modern civilization. More efficient and transportable than coal, oil was the fuel of the future in 1900. In the first third of the century, as it does now, Mexico played a significant role in the history of oil. Although large amounts of commercially profitable oil were not produced in Mexico until 1910, Mexico was the second leading petroleum-producing nation of the world by 1921, surpassed only by the United States. This article discusses chronologically the development of the Mexican oil industry to 1914 and describes the political and economic environment in Mexico during that period of development. An examination of Mexico's experience with oil and gas sheds new light on early Texas's experience with the oil and gas business.

## **Chapopote: The Petroleum the Indians Used**

Although the successful commercial production of petroleum in Mexico did not begin until after 1900, oil and its by-products have been known and used in Mexico since the days before the Spanish conquest of Hernando Cortés. Many seepages of petroleum dotted the pre-Columbian Mexican Gulf Coast in a region beginning in the countryside outside of modern Tampico and extending to the area south of Vera Cruz. This one-hundred-mile strip provided coastal Indians with bitumen and asphalt for cement in construction projects and a petroleum base for incense burned by the Aztecs during their sacred rituals.<sup>1</sup> The early Indians called the peculiar petroleum "chapopote" or "chapapote."<sup>2</sup>

The Spanish conquerors observed chapopote being sold in the great market in the Aztec capital of Tenochtitlan, the site of modern Mexico City.<sup>3</sup> Friar Bernadino de Sahagún, a chronicler of the period, described chapopote as:

a bitumen which comes from the sea and is similar to Spanish tar, being easily decomposed. Upon certain fixed days according to the stage of the moon, it comes to the surface from the bottom of the sea. Those who live near the sea go out and

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\* This article is excerpted from the author's master's thesis at Rice University.

<sup>1</sup> "Historical" No. 5347, DeGolyer Collection, Southern Methodist University Library, Dallas, Texas, 1.

<sup>2</sup> *The Mexican Yearbook, 1920-21* (Los Angeles: Mexican Yearbook Publishing Company, 1922), 290.

<sup>3</sup> Everette Lee DeGolyer, "History of the Petroleum Industry in Mexico," paper presented to the Mexican Oil Association in Tampico, Mexico, March 11, 1914, DeGolyer Collection, 1.



collect it. This material is very odoriferous and is much appreciated by women. When burned...it gives off a great odor. . . This bitumen, mixed with copal or incense of the country . . . is a good incense.<sup>4</sup>

Father Sahagún defined chapopote as an Aztec word derived from two terms: “tzauc,” meaning paste or cement and “popochile,” meaning perfume.<sup>5</sup>

For religious rites the Aztec priests mixed chapopote with aromatic herbs and burnt the blend during ceremonies to their gods Quetzalcoatl, Huitzilopochtli, and Tlaloc.<sup>6</sup> The Aztecs also considered chapopote to have curative powers and, as such, it was an important ingredient of medicinal creams and salves. So highly regarded was petroleum in Aztec medicine that their symbol for the goddess of healing was an elaborate pan of chapopote.<sup>7</sup>

Another chronicler of the Spanish conquest, Bernal Díaz del Castillo, noted the Indians used chapopote-treated wood for illumination in the coastal regions. These coastal Indians also caulked their canoes with the substance while other tribes chewed the chapopote.<sup>8</sup> These two uses of chapopote continued into modern times.<sup>9</sup>

Evidence of early Indian uses of petroleum can still be found in the “ojos de chapopote,” or oil mounds, lying along the Mexican coast. These mounds are the remains of Indian efforts to use asphalt and gas from the open springs of petroleum in the firing process during the manufacture of pottery. Some of the mounds are quite large and consist of broken pottery, burned shale, obsidian chips, and broken tools.<sup>10</sup>

### **Modern Use of Mexico's Seepage Oil**

Modern commercial usage of seepage oil in Mexico was first reported by Captain G. F. Lyon in 1826. Captain Lyon, the newly appointed Commissioner for the Real del Monte and Bolanos Mining Companies, was traveling to the interior of Mexico and spent five weeks in the vicinity of the newly founded village of Tampico. After proceeding up the Pánuco River from Tampico, Captain Lyon noted in his *Journal of a Residence and Tour in the Republic of Mexico in the Year 1826*:

Passing for some time the banks of San Pedro, we come to the Estero de Chila, another extensive rancho, the cattle of which were either grazing or lying under the shade of the trees close to the water's edge. On this estate, at about three or four miles from the river, is a large lake, from whence I understand that the petroleum which is brought in great quantities to Tampico is collected. It is here

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<sup>4</sup> Ibid., 2.

<sup>5</sup> Frank C. Hanighen, *The Secret War* (Westport, CT: Hyperion Press, 1934), 131.

<sup>6</sup> DeGolyer, “History of the Petroleum Industry,” 2.

<sup>7</sup> Ibid.

<sup>8</sup> “Historical,” DeGolyer Collection, 2.

<sup>9</sup> Charles W. Hamilton, *Early Day Oil Tales of Mexico* (Houston: Gulf Publishing Company, 1966), 19.

<sup>10</sup> Ibid.

called Chapopote, and is said to bubble from the bottom of the lake and float in great quantities on the surface. That which I saw at different times was hard and of good appearance and was used as a varnish, or for the covering of the bottom of canoes: the general price was four reals (half a dollar) for a quintal (one hundred pounds).<sup>11</sup>

No effort was made to market the oil produced from the seepages until 1857, when a group of merchants organized a company to build storage tanks for petroleum that flowed from a spring near their town of Macuspana in the Isthmus of Tehuantepec. The merchants were able to sell the oil to local natives who used it to light their homes. The merchants made a small profit but did not expand their efforts.<sup>12</sup>



This McKittrick Tar Seep oil, from the McKittrick formation in California, exemplifies the kind of seepage oil first exploited in Mexico; Wikimedia Commons, licensed by Lidenke

After the world's first oil well was drilled in Pennsylvania by Edwin L. Drake in 1859, several groups of Mexicans attempted to exploit the numerous surface deposits of chapopote. The "Memoria de Fomento," or Records of the Interior Department of Mexico, noted, in 1865, that permission was given to Don Ildelfonso López to exploit deposits of "petroliferous substances" on the Hacienda de las Rusias near Soto de la Marina, a small port north of Tampico.<sup>13</sup> Similar permission was granted to another Mexican citizen in 1865 to develop the chapopote

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<sup>11</sup> Quoted in Hamilton, *Oil Tales*, 19-20.

<sup>12</sup> P. Harvey Middleton, *Industrial Mexico* (New York: Dodd, Mead and Company, 1919), 48.

<sup>13</sup> Everette Lee DeGolyer, "The Crude Oil Industry of the Tampico Region, Mexico," March 8, 1912, No. 5347, DeGolyer Collection, 3.

at Carancitos on the Hacienda de Bejarano in the state of Tamaulipas.<sup>14</sup> In 1868 the United States consul at Minatitlán reported to the State Department that petroleum existed in almost unlimited quantities on the Isthmus of Tehuantepec and the consul suggested that American oilmen investigate the area. According to the consul, it was not uncommon for petroleum to form small lakes on the surface of the countryside.<sup>15</sup>

Also, in 1868, Dr. Adolph Autrey, “an excellent and well respected” physician from Fort Bend County, Texas became interested in the oil seepages around his cotton farming property at Papantla in the state of Vera Cruz.<sup>16</sup> At the Cougas Springs, Dr. Autrey found the remains of primitive Indian works surrounding several large exudes of oil.<sup>17</sup> Dr. Autrey built distilling equipment at his home in Papantla and carried oil by mule from the springs to the distillery. Periodically, Dr. Autrey would refine kerosene, which found a ready market in the local towns and villages.<sup>18</sup>

Due to Dr. Autrey’s activities, several local, wealthy Mexicans became interested in the land around the Cougas Springs not controlled by Dr. Autrey and formed the Compañía Explotadora de Petr leo del Golfo Mexicano to exploit the area.<sup>19</sup> Refining and drilling equipment was imported from the United States and a three-inch well was drilled to a depth of 125 feet.<sup>20</sup> In an effort to increase production, a tunnel was driven into a hill near the largest seepage of the well. Although an additional four or five barrels of oil per day were produced, only some two hundred cans of refined petroleum were eventually obtained from the well site.<sup>21</sup> Poor management<sup>22</sup> and low production caused the company to fail.<sup>23</sup>

Petroleum indications at Chapa and San Cristobal along the Rio Coachapan in the Isthmus of Tehuantepec were described by the naturalist John Spear in 1872.<sup>24</sup> The following year several groups of Tampico residents began to work the seepages along the Tamesi River, but these attempts, poorly organized and financed, were quickly abandoned.<sup>25</sup> During the same period, efforts were made to mine the asphalt deposits in Tamaulipas near Portrero del Cristo and to transport the asphalt by barge to Tampico. But navigational problems made this venture unprofitable and it was discontinued.<sup>26</sup>

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<sup>14</sup> DeGolyer, “History of the Oil Industry,” 4.

<sup>15</sup> *Mexican Yearbook, 1920-21*, 290.

<sup>16</sup> John Henry Brown, *Two Years in Mexico* (n.p., 1867), DeGolyer Collection, 100.

<sup>17</sup> DeGolyer, “History of the Petroleum Industry,” 4.

<sup>18</sup> *Mexican Yearbook, 1920-21*, 290; DeGolyer, “History of the Petroleum Industry,” 5.

<sup>19</sup> DeGolyer, “The Crude Oil Industry,” 3.

<sup>20</sup> DeGolyer, “History of the Petroleum Industry,” 4.

<sup>21</sup> “Notes on Mexican Oil Industry,” No. C9-306, DeGolyer Collection, 1; DeGolyer, “History of the Petroleum Industry,” 4.

<sup>22</sup> “Notes on Mexican Oil Industry,” 1; DeGolyer, “History of the Petroleum Industry,” 4.

<sup>23</sup> DeGolyer, “The Crude Oil Industry,” 3.

<sup>24</sup> “Notes on Mexican Oil Industry,” 1; DeGolyer, “History of the Petroleum Industry,” 5.

<sup>25</sup> DeGolyer, “History of the Petroleum Industry,” 5.

<sup>26</sup> *Ibid.*



Petroleum indications at Papantla, Tuxpan, Tantoyuca, and Ozuluama in the Vera Cruz region interested a man named John Foster in 1878.<sup>27</sup> In reply to Foster's inquiries, the Secretaria de Hacienda reported on January 15, 1879 the existence of petroleum in El Chapopotillo Mpio. of Pánuco, Canton of Ozuluama; in Laguna de Chila; in El Alamo; in Cerro de La Pez; in Tantoyuca in the Paso del Capadero; in Tuxpan; in Cerro Chapopote; in Papantla, the Arroyo Coapechapa, Canton of Minatitlán; and at Chacalapa.<sup>28</sup> Chapopotillo, La Pez, Capadero, Coapechapa, and Chacalapa are all variants of Indian words for the physical states of petroleum.<sup>29</sup>

Meanwhile, a New England syndicate known as the Boston-Mexican Oil Company was making an ambitious effort to commercially produce oil during this period. In 1876, George Glidden, a Yankee sea captain, settled in Mexico and became interested in the surface pools of petroleum near Tuxpan.<sup>30</sup> By 1881 Captain Glidden had claimed two thousand acres in the area but died before he could develop the property. His widow sold the claims, which consisted of four haciendas, to the Boston-Mexican Oil Company.<sup>31</sup> The company found the property extremely attractive for investment, although the local ranchers thought the petroleum seepages a hindrance to ranching and agriculture. So profuse were the springs in the area that "great lakes extending for a distance of a mile through a depression in the soil fifty feet in width filled with viscous petroleum" endangered the local cattle and crops.<sup>32</sup> Two wells were drilled by the company to a depth of four hundred feet, but the slight flow of oil contained large amounts of gas, making further production unprofitable.<sup>33</sup> After spending additional capital, the company decided to suspend operations. Their wells were profitably put into production by another English company after the turn of the century.<sup>34</sup>

Between 1885 and 1889, success eluded other companies and individuals who sought to tap the petroleum deposits of Mexico.<sup>35</sup> During this period the local Indians and residents relied on age-old methods of dealing with the oil exudes. In many districts the natives set fire to the petroleum pools three or four times a year to prevent overflow danger to livestock and agriculture, while others used crude equipment to distill oil for lighting and medicines. Asphalt washed ashore at Tuxpan was sold for export to Hamburg, Germany at four dollars a hundred weight and at the end of the nineteenth century the asphalt deposits two miles north of the Tuxpan River were being commercially developed by local businessmen who floated the asphalt down the river sixty miles to the port for export to the United States.<sup>36</sup>

Although the commercial production of petroleum in Mexico was largely unsuccessful during this early stage, Mexico's need for oil was growing due to the expansion of the railroads

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<sup>27</sup> Tuxpan is sometimes spelled "Tuxpam."

<sup>28</sup> "Notes on Mexican Oil Industry," 1.

<sup>29</sup> *Mexican Petroleum* (New York: Pan American Petroleum and Transport Company, 1922), 23.

<sup>30</sup> William E. McMahon, ed., *Two Strikes and Out* (Garden City, NY: Country Life Press, 1939), 27.

<sup>31</sup> *Mexican Yearbook, 1920-21*, 291.

<sup>32</sup> *Ibid.*, 292.

<sup>33</sup> DeGolyer, "History of the Petroleum Industry," 6.

<sup>34</sup> *Mexican Yearbook, 1920-21*, 291.

<sup>35</sup> DeGolyer, "History of the Petroleum Industry," 6; "Notes on Mexican Oil Industry," 6.

<sup>36</sup> *Mexican Yearbook, 1920-21*, 292.

and industry. To meet the increased need, the Waters-Pierce Company of St. Louis, Missouri established itself in Tampico in 1887.<sup>37</sup> As a subsidiary of the Standard Oil Trust, Waters-Pierce's purpose was not to work the Mexican deposits, but rather to control the importation and distribution of oil in Mexico.<sup>38</sup> To supply its main customers, the railroads, the company built a refinery in Tampico. Until 1906 Waters-Pierce had the only refinery in Mexico and held a virtual monopoly in the distribution of petroleum products in Mexico.<sup>39</sup>

In 1889 the oil deposits of the Mexican Gulf Coast interested two noted geologists in Austin, Texas, Josiah Owen and Dr. E. T. Dumble. Owen made a trip down the east coast of Mexico as far as Tuxpan and sent back samples and reports to Dumble. The two were encouraged, but waited until 1899 to take steps to contact potential investors. They contacted the president of the Southern Pacific Railroad, who declined participation as he thought the potential oil lands were too far from existing Southern Pacific operations to be worthwhile.<sup>40</sup>

As early as 1887 the British Foreign Service reported to its government the existence of large petroleum deposits in Mexico, but eleven more years elapsed before the first British efforts were initiated to drill in Mexico. In 1898 George Jeffrey, one of the early prospectors in the Peruvian oil fields, obtained a lease on lands a mile from the village of Pánuco, southwest of Tampico.<sup>41</sup> He ordered equipment from Chicago and spent four thousand pounds before drilling started in 1900. Jeffrey's company, the Oil Fields of Mexico, Ltd., remained in independent production until 1911, but the firm never showed a profit on its laboriously wrought yield.<sup>42</sup>

Almost simultaneously with the starting of Jeffrey's company, the famous English empire-builder Cecil Rhodes backed a venture seeking a concession to exploit oil lands near Dr. Autrey's Papantla property.<sup>43</sup> This organization was called the Mexican Petroleum and Liquid Fuel Company and incorporated in 1899 with paid-up capital of almost thirty thousand pounds.<sup>44</sup> Although the company drilled twenty-four wells, some to a depth of fifteen hundred feet, no significant strike was made.<sup>45</sup> After spending far more than its initial capital, the company dissolved in 1901<sup>46</sup> and left behind much abandoned equipment.<sup>47</sup>

These early and unsuccessful attempts to develop the petroleum wealth of Mexico were

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<sup>37</sup> Lorenzo Meyer, *Mexico and the United States in the Oil Controversy, 1917–1942*, trans. Muriel Vasconcellos (Austin: University of Texas Press, 1977), 3.

<sup>38</sup> Ralph W. Hidy and Muriel E. Hidy, *Pioneering in Big Business, 1882 – 1911* (NY: Harper and Brothers, 1955), 22.

<sup>39</sup> Meyer, *Mexico and the United States*, 3.

<sup>40</sup> Lon Tinkle, *Mr. De, a Biography of Everette Lee DeGolyer* (Boston: Little, Brown and Company, 1970), 26-27.

<sup>41</sup> Alfred Tischendorf, *Great Britain and Mexico in the Era of Porfirio Diaz* (Durham, NC: Duke University Press, 1961), 122-23.

<sup>42</sup> Ibid.

<sup>43</sup> Wendell C. Gordon, *The Expropriation of Foreign-Owned Property in Mexico* (Washington, D.C.: American Council on Public Affairs, 1941), 48; Middleton, *Industrial Mexico*, 52; McMahon, *Two Strikes and Out*, 127.

<sup>44</sup> Tischendorf, *Great Britain and Mexico*, 169.

<sup>45</sup> *Mexican Yearbook, 1920-21*, 292.

<sup>46</sup> Tischendorf, *Great Britain and Mexico*, 169.

<sup>47</sup> Middleton, *Industrial Mexico*, 152.

prompted by the accelerating pace of oil use after the success of the Drake well. Both in the United States and Europe, technological advances motivated a search for oil deposits and prompted increased production of petroleum to fuel the machines of the future. In the United States, new fields were discovered in West Virginia and Kentucky in 1860, and in 1861 oil was exported to Europe. In 1867 oil was first used experimentally for steam locomotives, and the first specifically designed ocean-going oil tanker launched in 1870 with a capacity of 794 tons.

America started its love affair with the automobile in 1879 with George Selden's patent application for an internal combustion engine-driven vehicle. In Germany, Gottlieb Daimler developed an operating automobile in 1887, and by 1889 gasoline was powering tractors.<sup>48</sup> Charles Duryea of Springfield, Massachusetts mounted a one-cylinder engine on a buggy to produce the United States' first gasoline-powered automobile in 1893, to be followed in 1900 by the country's first automobile show in New York City.<sup>49</sup>

Elsewhere, the United States was joined by other nations in the production of oil during the later third of the nineteenth century. The Baku region of Russia's Caspian Sea territory became a large producer, and Rumania reached commercially profitable production. Also, oil was gaining its adherents for military use. As early as 1882, Sir John Fisher, later Admiral of the Fleet, believed oil rather than coal would greatly increase the fighting capacity of British naval vessels.<sup>50</sup>

A revolution in rail, road, and sea transportation was underway by 1900. Oil was needed for industry and war in the coming years of the twentieth century, and the pioneers of the petroleum industry were seeking new sources of oil throughout the world. Although efforts to produce oil in Mexico had proved unsuccessful during the last half of the nineteenth century, the "bad lands" of the Mexican jungles still oozed with petroleum as the century of coal ended.<sup>51</sup>

### **Mexican President Porfirio Diaz's Oil and Gas Policies**

Although the subsoil of Mexico contained the petroleum sought by the world, the development of Mexico's oil industry was accomplished largely by foreigners. These foreigners had to work within the social, political and legal systems that existed in Mexico during the early part of the twentieth century. These systems were the results of the policies and desires of Porfirio Díaz, dictator of Mexico from 1876 to 1911. Díaz desired foreign investment for his country and established policies that created a favorable environment for that investment, but unfortunately, many of his actions eventually antagonized and harmed his people.

Díaz was born in 1830 the son of a prosperous innkeeper in Oaxaca in the south of Mexico. He was of mixed Spanish and Indian descent, a mestizo, his grandmother being a member of the prominent Mexteca tribe. Although Díaz was not born into the ruling elite of Mexico, his military ability enabled him to reach an early prominence. Following the final defeat of General

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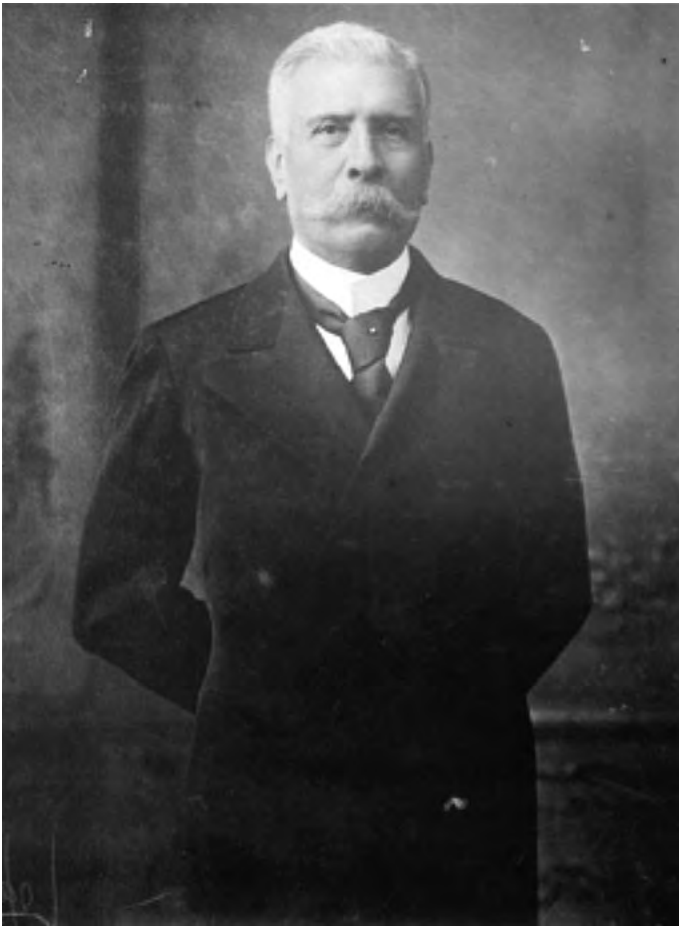
<sup>48</sup> Desmond Young, *Member for Mexico, A Biography of Weetman Pearson* (London: Cassell and Company, 1966), 122.

<sup>49</sup> McMahon, *Two Strikes and Out*, 25.

<sup>50</sup> Anton Mohr, *The Oil War* (Westport, CT: Hyperion Press, 1926), 3.

<sup>51</sup> Clarence W. Barron, *The Mexican Problem* (NY: Houghton Mifflin Company, 1971), 197.





Mexican President [Porfirio Díaz](#); Library of Congress, public domain, Wikimedia

López de Santa Ana, the infamous victor of the Alamo and a periodic strongman of Mexico, Díaz fought with Benito Juárez's Liberal forces against the entrenched Conservative faction.

The defeat of the Conservatives in 1861 was short-lived, as the French intervened in 1862 causing five years of bloody civil war. Faced by defeats in Mexico, harried in Europe, and pressured by the United States, France abandoned her puppet Austrian emperor and withdrew from Mexico. During the hard war against the French and their allies, Díaz distinguished himself in numerous battles. The war over, Díaz resigned his command and returned to his hacienda in Oaxaca.

When President Díaz came to power, he acted in the context of a long tradition of Spanish and Mexican law governing the development of oil, gas and mineral law. The Conquistadores brought to New Spain their own concepts of land law and tradition. Based in Roman law, Spanish law recognized individual ownership of both the surface and subsurface estates. Although private ownership of the subsoil was

recognized in early Spanish law, the Castilian ruler Alphonso XI declared in the early thirteenth century that all mines of any metal were the property of the crown and could not be worked without license or grant.<sup>52</sup> Don Juan I in 1387 modified the earlier law by decreeing that the owners of the surface of the land could exploit the subsoil freely, but that two-thirds of the wealth removed was the property of the king.<sup>53</sup>

The Emperor Charles V extended these Castilian Spanish laws to Mexico and amplified them in 1523 in the *Laws of the Indies*:

Lands must be properly marked out, and the house must be lived in; ... the lands must be cultivated, platted with trees and cattle placed thereon ... under forfeiture of the grant ... plus a certain return in money [to the crown].<sup>54</sup>

In New Spain the ultimate title to all land was in the sovereign who could grant the land to individuals while still reserving the subsoil to the crown.<sup>55</sup> In Mexico the gold and silver deposits

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<sup>52</sup> Merrill Rippy, *Oil and the Mexican Revolution* (Leiden, Netherlands: E.J. Brill, 1972), 1.

<sup>53</sup> Ibid.

<sup>54</sup> Carleton Beals, *Mexican Maze* (Philadelphia: J.B. Lippincott Company, 1931), 343.

<sup>55</sup> Ibid.

prompted many people to test the laws of the Spanish king, so in 1578 Phillip II decided to clarify the crown's ownership of the land and subsoil by declaring both to belong to the "royal patrimony."<sup>56</sup> Phillip only excepted grants from previous rulers of the homeland or those he bestowed.

In the eighteenth century the Spanish kings began to make a distinction between metals and hydrocarbons, specifically coal. The Mining Code of 1783, which applied to New Spain, placed all subsoil minerals together and under ownership of the crown, individually noting coal. In legislative changes in 1789 and 1792 the position as to coal was reversed and the ownership of coal was "incorporated into the property of the surface owner."<sup>57</sup> The two changes did not state they were to apply to New Spain, and opinion is divided as to whether they affected the ownership of coal in the colonies of the Western Hemisphere.<sup>58</sup> Fifteen years after Mexico's independence from Spain in 1821, the Treaty of Peace and Amity between the two countries transferred the past rights of the Spanish crown to the Mexican nation.<sup>59</sup>

Throughout the tumultuous period preceding Díaz's presidency, the principles of sovereign ownership and control of the nation's land resources remained. The liberal Constitution of 1857 reiterated these concepts: "In the nation is vested direct ownership of all minerals, solid and liquid or gaseous."<sup>60</sup> Porfirio Díaz wanted foreign capital. But the European and American investors demanded direct individual ownership of the land and subsoil before putting their money into Mexico. Additionally, the railroads needed coal and the old laws were bothersome and disconcerting to the foreign entrepreneurs. In 1883 Díaz decided to remove the causes for the capitalists' fears, and the 1857 Constitution was amended to give the national government power to "promulgate laws obligatory throughout the republic, relating to mining and commerce."<sup>61</sup>

In 1884 Díaz broke with the traditional Spanish-Mexican principle relating to the ownership of the subsoil:

Foreigners may acquire mining property on such terms and with such limitations as the laws of the Republic grant them the capacity to acquire, own and transfer ordinary property. . . . The following substances are the exclusive property of the owner of the land, who may therefore develop and enjoy them, without the formality of entry or special adjudication; . . . salts found on the surface, fresh and salt water, whether surface or subterranean; petroleum and gaseous springs of warm or medicinal water. In order to develop these substances the owner of the land shall subject his operations to all rules and orders of a police nature.<sup>62</sup>

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<sup>56</sup> Rippy, *Oil and Revolution*, 2.

<sup>57</sup> Gordon, *Expropriation in Mexico*, 56.

<sup>58</sup> Rippy, *Oil and Revolution*, 8-9.

<sup>59</sup> Antonio J. Bermudez, *The Mexican National Petroleum Industry* (Stanford, CA: Stanford University Institute of Hispanic and Luso-Brazilian Studies, 1963), 2.

<sup>60</sup> Beals, *Mexican Maze*, 343.

<sup>61</sup> Gordon, *Expropriation in Mexico*, 57.

<sup>62</sup> Articles 6 and 10 quoted in Gordon, *Expropriation in Mexico*, 57.

Future Mexican nationalists interpreted the 1884 law as maintaining the nation's ownership over the subsoil and allowing the landowner merely to tap the liquids beneath the surface.<sup>63</sup>

A second law in 1892 gave some support to this view, as the law used words which indicated the nation retained sovereignty over the subsoil:

Art. 4. The owner of the soil may exploit freely without the necessity of a special concession in any case the following mineral substances: Combustible minerals, oils and mineral waters. . . .<sup>64</sup>

Until 1901 no further laws concerning the subsoil were enacted. But in December of that year the first Mexican law dealing solely with petroleum was promulgated. This law did not discuss the ownership of the subsoil but was concerned with concessions for the development and exploitation of the nation's petroleum.<sup>65</sup> The law gave the chief executive the power to issue permits for exploration and drilling on national lands and waters for the purpose of discovering oil and gas deposits. The concessionaires enjoyed certain exemptions under the law:

- (1) exportation, free of all duty, of the natural refined or finished products resulting from their exploitation;
- (2) importation, duty free, of the initial lot of requisite materials and machinery for any new well, pipe line or refinery;
- (3) exemption of invested capital and capital goods of exploitation for ten years from all federal duties, excepting the stamp tax; and
- (4) continued enjoyment of the provisions of Article 4 of the Mining Law of 1892 relative to free exploitation without the need of special concessions.<sup>66</sup>

A third mining law was adopted in 1909 reiterating that certain substances such as petroleum were the exclusive property of the surface owner. This law was enacted when the commercial value of oil in Mexico was proven, and it was intended to sustain the principles of the law of 1884.<sup>67</sup> Thus, the position of the Díaz government was clarified: the subsoil petroleum of the nation belonged to the surface owners.<sup>68</sup>



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<sup>63</sup> Rippy, *Oil and Revolution*, 16.

<sup>64</sup> Quoted in Rippy, *Oil and Revolution*, 21.

<sup>65</sup> Harlow S. Person, *Mexican Oil: Symbol of Recent Trends in International Relations* (NY: Harper and Brothers, 1942), 36.

<sup>66</sup> *Ibid.*

<sup>67</sup> Rippy, *Oil and Revolution*, 1, 23.

<sup>68</sup> Editor's note: The life of Mexico's President Porfirio Díaz has generated many fine books and studies. *See, e.g.*, Carlos Gil, *The Age of Porfirio Díaz: Selected Readings* (Albuquerque: University of New Mexico Press, 1977); Ethel Alec-Tweedie, *The Maker of Modern Mexico: Porfirio Diaz* (NY: John Lane Co., 1906).



Today, Mexico owns and controls her petroleum industry but remembers the days of Porfirio Díaz when foreigners dominated the exploitation of the nation's subsoil. The revolution against Díaz was partially a reaction to that domination and to the great influence foreigners had over Mexico's economy. The early Mexican oil industry was developed by such men as Edward Doheny and Weetman Pearson who had the fortitude, energy and resources to accomplish the job. They and their successors resisted the efforts of Revolutionary Mexico to establish its control over the nation's petroleum resources until Lázaro Cárdenas ended foreign participation in the oil industry by expropriation. Today, once again, the industrialized world wants Mexico's oil, but this time Mexico ensures that its production and sale occurs on Mexico's terms.



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# Theodora Hemphill's Guide to the Texas Constitution

## • Part II •

By David A. Furlow

This second part of a three-part article examines the impact of Texas's changing constitutions on Theodora Hemphill, the older daughter of Texas Supreme Court Chief Justice John Hemphill. In Part I, we observed how the 1845 Constitution Hemphill helped draft made a slave of Theodora, whose mother was Hemphill's enslaved consort, Sabina. To emancipate her, that constitution compelled their father—then a U.S. Senator—to exile her at age twelve to Ohio's Wilberforce University, so she could receive an education in a free state and end her status as a slave.

In Part II, we'll examine how the 1861 Constitution helped Senator John Hemphill usher Texas into the Confederacy—and, by sending him to the Confederate capital at Richmond Virginia, orphaned Theodora the next year, when he died there of illness in early 1862. We'll follow Theodora as she returns to Texas from Ohio after the Civil War. And we'll investigate how Texas's 1869 Constitution, Reconstruction, and three amendments to the U.S. Constitution empowered Theodora to stake a probate claim to her father's vast estate in Texas.

In Part III, to be published in the Spring 2016 issue, we'll see how Texas's 1876 Constitution and the "Redeemer" Texas Supreme Court segregated and sidelined Theodora based on her race and sex. We'll watch as Theodora declares her independence from the disabilities and discrimination Jim Crow-era Texas lawmakers meted out to African-American women. Theodora's life sheds new light on the influences and dilemmas that shaped the lives and livelihoods of John Hemphill, his older daughter Theodora, and other nineteenth century Texans.\*

### **The Constitution of 1861 orphaned and excluded Theodora.**

By March of 1861, Hemphill had evolved from a South Carolina Nullifier into a Texas Secessionist who argued in the U.S. Senate that Southerners had an inherent right to secede from the Union.<sup>1</sup> Raised in a Scots-Irish South Carolina back country culture, he convinced himself that slaves were part of happy families and the "constant recipients" of their masters' generosity who "would eagerly sacrifice their lives" to defend their masters' hearths and homes.<sup>2</sup>

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\* South Texas College of Law Professor Jim Paulsen, a historian who shines a brilliant light on pre-Republic Texas and the Republic and Texas Supreme Courts' history, was the first person to tell me about Sabina and John Hemphill's daughters. Professor Paulsen is the expert on this matter, and I thank him for his insights and inspiration.

<sup>1</sup> See Rosalee Morris Curtis, *John Hemphill: First Chief Justice of the State of Texas* (Woodstock, GA: Rosalee Curtis, rev. ed., 1997), 79–82.

<sup>2</sup> Cong. Globe, 36<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Pt. I, 595, in Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens, GA: University of Georgia Press, 1999), 125.

In November of 1860, Oran Milo Roberts (at that time an associate justice on the Texas Supreme Court) published his "First Call upon the People of Texas to Assemble in Convention."<sup>3</sup> The Secession Convention met on February 1, 1861, and approved a resolution seceding from the Union by a vote of 166 to 8.

On February 2nd, the Convention endorsed "a declaration of the causes which impelled the state of Texas to secede from the federal union."<sup>4</sup> That declaration explained that Texas must secede to protect its rights "as a commonwealth holding, maintaining and protecting the institution known as negro slavery—the servitude of the African to the white race within her limits" and to respond to Northern "hostility to these Southern States and their beneficent and patriarchal system of African slavery, proclaiming the debasing doctrine of the equality of all men, irrespective of race or color—a doctrine at war with nature, in opposition to the experience of mankind, and in violation of the plainest revelations of Divine Law."<sup>5</sup>

Two days later on February 4, 1861, the Convention elected Hemphill and six other delegates to participate in the Provisional Confederate Congress, a convention of Southern states meeting in Montgomery, Alabama.<sup>6</sup> On February 23, 1861, a majority of Texas voters ratified the secession ordinance. On March 4, 1861, Texas seceded from the Union and joined the Confederacy the following day.<sup>7</sup> On March 11, Hemphill signed the Confederate Constitution.<sup>8</sup>

Texas's Constitution of 1861 subordinated a slave-owner's right to free a slave to the State's power to protect the Peculiar Institution forever.<sup>9</sup> Article VIII, Section 1 of the 1861 Constitution stated that, "The Legislature shall have no power to pass laws for the emancipation of slaves." Article VIII, Section 2 declared that, "No citizen, or other person residing in this State, shall have power by deed, or will, to take effect in this State, or out of it, in any manner whatsoever, directly or indirectly, to emancipate his slave or slaves."

After the Legislature ratified the Constitution of 1861, Hemphill had no further reason to sign a will or deed to emancipate his daughters Theodora and Henrietta. Article VIII, Section 2 of the Constitution invalidated any instrument Hemphill might write, inside or outside of Texas. By that time, Hemphill could not even legally criticize the institution of slavery in Texas. Texas law barred Hemphill from publicly or privately advocating abolition or limitation of slavery.<sup>10</sup>

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<sup>3</sup> Oran M. Roberts, "1860, The First Call Upon the People of Texas to Assemble in Convention," O.M. Roberts Collection, Dolph Briscoe Center for American History, University of Texas at Austin. See also Ford Dixon, "Roberts, Oran Milo," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fro18>.

<sup>4</sup> Walter L. Buenger, "Secession Convention," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mjs01>.

<sup>5</sup> Texas State Library and Archives Commission, *Declaration of Causes, February 2, 1861: A declaration of the causes which impel the State of Texas to secede from the Federal Union*, <https://www.tsl.texas.gov/ref/abouttx/secession/2feb1861.html>.

<sup>6</sup> Mary Boykin Chesnut, *A Diary from Dixie* (Cambridge, MA: Harvard University Press, 1980), 45-46.

<sup>7</sup> Buenger, "Secession Convention."

<sup>8</sup> Curtis, *Hemphill*, 83.

<sup>9</sup> Walter L. Buenger, "Constitution of 1861," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mhc04>.

<sup>10</sup> In early 1860, legislators added Article 653 to the Texas Penal Code to impose a two- to five-year prison sentence



After March 1861, there were only two ways Theodora and Henrietta could win their freedom: through the release of death or through a Union military victory bringing national emancipation.

The zealous pursuit of Southern independence and Texas's Constitution of 1861 led Hemphill to Richmond, Virginia. While there, the cold and rainy winter weather exacerbated the hepatitis-related cirrhosis of the liver that had plagued him since the Second Seminole War.<sup>11</sup> In January 1862, Hemphill fell ill in Richmond. Hemphill's nephew Robert Reid Hemphill, a veteran of the Confederate victory at Manassas in 1861, comforted the senator.<sup>12</sup>

When Robert asked about the Senator's last wishes, a stubbornly optimistic Hemphill answered that he had no intention of dying.<sup>13</sup> But, after four days suffering from typhoid pneumonia, Hemphill died on January 4, 1862 at the Exchange Hotel in Richmond, Virginia.<sup>14</sup>

On January 10, the Confederate Congress adjourned to honor Hemphill's funeral service at the Second Presbyterian Church in Richmond.<sup>15</sup> Congress then returned Hemphill's body to Austin.<sup>16</sup> The Right Reverend Alexander Gregg, D.D., delivered the eulogy at the State Capitol on February 1, 1862, before pallbearers took his body to the State Cemetery, where "almost the whole population turned out to honor the distinguished dead."<sup>17</sup> Theodora and Henrietta Hemphill were not among those who attended the funeral, however. They remained, out of sight and out of mind, at Wilberforce University in Xenia, Ohio.

Back in Texas, Charles Shannon West, a South Carolina-born power-broker educated, like Chief Justice Hemphill, at Jefferson College in western Pennsylvania,<sup>18</sup> petitioned Travis County's

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on anyone who made even a private statement that served to "bring the institution of slavery (African) into dispute in the mind of any free inhabitant." The same law criminalized any statement by a free person that "masters have not the right of property in their slaves." Michael S. Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 30 and 290, n.59; Act of Feb. 11, 1860, 8th Leg., R. S., ch. 74, reprinted in 4 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897*, at 1457, 1461 (Austin, Gammel Book Co. 1898). When it enacted those laws, the Legislature ignored Article I, Section 5 of the 1845 Constitution, which guaranteed that, "Every citizen 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." Proponents of "State's Rights" elevated State power over individual rights of free speech and a free press. Alwyn Barr, ed., "Records of the Confederate Military Commission in San Antonio, July 2-October 10, 1862," *Southwestern Historical Quarterly* 70, no. 3 (Oct. 1966), 289-313.

<sup>11</sup> Curtiss, *Hemphill*, 86-87 and 111 n.8, quoting Robert R. Hemphill's entry in a family scrapbook, "Hemphill Green Papers," Abbeville, South Carolina, forwarded by Thomas M. Stubbs to Rosalee Curtis, July 15, 1965.

<sup>12</sup> Curtiss, *Hemphill*, 85-86; *Senate Journal Ninth Legislature*, 238.

<sup>13</sup> Curtiss, *Hemphill*, 85-86.

<sup>14</sup> *Ibid.*, 86.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 90-91.

<sup>17</sup> *Ibid.*

<sup>18</sup> After moving to Texas, Charles S. West prospered in the practice of law while representing clients such as the Houston and Central Texas Railway. In 1859 he married Florence Duvall, the daughter of U.S. District Court Judge Thomas Howard Duvall, and soon became one of Austin's most prominent socialites. Appointed as Texas's Secretary of State on November 1, 1861, he served until September 9, 1862, then fought for the Confederacy with conspicuous bravery in the battles of Galveston and Saline. He served on the Texas Supreme Court from December 23, 1882 until September 29, 1885. See University of Texas Law School, Tarlton Law Library, "Charles Shannon West

probate court judge to commence a probate proceeding and to rule that Senator Hemphill had died intestate.<sup>19</sup> No emancipatory will emerged from Senator Hemphill's papers in Washington, D.C. or Richmond. Perhaps Hemphill failed to prepare the will to avoid a scandal.<sup>20</sup> Or perhaps one of Hemphill's friends or relatives found the will and destroyed it to avoid a scandal or to ensure that his extensive estate went only to the white members of his family.<sup>21</sup>

On February 13, 1862, West petitioned a Travis County District Court to administer Hemphill's estate on the grounds that Hemphill died intestate without leaving a will and with no heirs in Texas.<sup>22</sup> On July 22, 1862, Austin residents M.A. Taylor, J. Harrell, and F. W. Chandler posted a \$25,000 bond to administer the Hemphill estate.<sup>23</sup> The estate remained in limbo as the Civil War slowed Travis County courts and probate proceedings to a crawl.

In 1862, the Civil War took its toll on Wilberforce University. The war disrupted the mail, and some Southern plantation owners, pressed to fund the war effort and the needs of their families at home, no longer sent money north to their mixed-race children in Ohio. The school closed its doors until further funding was found. "[W]hen the school broke up during the war," Reverend Rust later explained, "I obtained homes for these children, and took a general oversight over them."<sup>24</sup>

By then, Theodora and Henrietta knew that their father had died in Richmond, the capital of the Confederacy, in January 1862. As the Civil War went on, her father's death, Ohio's cold climate, and Wilberforce University's dissolution weakened Henrietta's constitution. She began to suffer from "consumption" (tuberculosis) and perhaps meningitis.<sup>25</sup> She died of paralysis in Cincinnati, unable to speak, while Reverend Rust remained at her bedside.<sup>26</sup> Henrietta entered an unknown grave, mourned only by Rust and her older sister Theodora.<sup>27</sup>

(1829–1885)," *Justices of Texas 1836–1986*, <https://tarlton.law.utexas.edu/justices/profile/view/113>. West's political and military service and the Civil War kept West from bringing the Hemphill estate to an early conclusion.

<sup>19</sup> Petition dated Feb. 13, 1862, in *In re Estate of John Hemphill, Deceased*, No. 295, Travis County Probate Court Case Papers (1862–1882).

<sup>20</sup> Haley, *Texas Supreme Court*, 264 n.23.

<sup>21</sup> Personal comment from South Texas College of Law Professor James Paulsen to the author, Jan. 30, 2014. See also Mary Smith Fay's June 12, 1993 letter to James W. Paulsen, 2 ("I, for one, am sorry [John Hemphill] didn't get that will made before he died, if he didn't...."), Mary Fay Papers, Clayton Library.

<sup>22</sup> Estate of John Hemphill, No. 295, Travis County Probate Papers.

<sup>23</sup> Ibid. F.W. Chandler, later John Hemphill's estate administrator, and H.E. Shelley practiced law at a house at 1703 West Avenue in Austin from 1863 through 1909. See Texas Historical Commission, "Historic Marker Application: West Hill," 1973, <http://texashistory.unt.edu/ark:/67531/metaph491799/>. A Texas Historical Commission historic marker designates the site at or near 1703 West Ave., Austin Texas 78701.

<sup>24</sup> Ibid., Rev. Rust's response to Estate Administrator F. W. Chandler's Interrogatory No. 4.

<sup>25</sup> Henry Barnard, *Special Report of the Commissioner of Education on the Condition and Improvement of Public Schools, ...etc.* (Washington, D.C.: Government Printing Office, 1871), 319.

<sup>26</sup> Ibid.; Rev. Rust's response to C.S. West's Cross-Interrogatory No. 4, *Theodora Hemphill v. C. S. West, et al.*, Travis County District Court Records, 3; Haley, *Texas Supreme Court*, 264 n.23.

<sup>27</sup> Searches for a Henrietta Hemphill gravesite in Ohio have been unsuccessful. Lois E. Hughes, *Hamilton County Death Records 1865–1869* (Cincinnati: University of Cincinnati, 1992), I, 187 (listing "Friedrich M. Hempel" but no Henrietta) and 220 (listing a "Columbus Hemphill" and the "Infant Hemphill" but no Henrietta). Searches in the Find-a-Grave website (<http://www.findagrave.com/>) have produced no Henrietta Hemphill grave that matches the known facts of her life.

In 1864, the Clerk of the United States House of Representatives gathered up the papers John Hemphill left behind in Washington, D.C. when the U.S. Senate expelled him for supporting Texas's entry into the Confederacy. The Clerk sent those papers to Senator Hemphill's half-brother James Hemphill.<sup>28</sup> No one knows whether a will was among those papers.

*If* John Hemphill left a will emancipating Theodora and Hemphill after he sent them to the free state of Ohio, James Hemphill would have had the most to lose financially from a competing heir. James was the first of John Hemphill's South Carolina relatives claiming a share in Hemphill's probate estate in Texas.<sup>29</sup> If a valid will named Theodora and Henrietta as John Hemphill's only heirs, that instrument could have disinherited all of Hemphill's other relatives.

Nevertheless, mere motive and opportunity to destroy a will does not prove either that a will existed or that an existing will was actually destroyed. This author knows of no evidence that James Hemphill was a dishonest man. In fact, after he had practiced law for sixty-five years, James Hemphill's Chester, South Carolina peers published a tribute to him in which they deemed him a paragon of the legal profession. "In the death of Mr. James Hemphill," that April 10, 1902 memorial in the *Chester Reporter* states, "this bar has lost its most worthy member... [H]e was preeminent in the length of his professional service, in the safety and soundness of his counsel, in the nobility and integrity of his unspotted character, and in his unfailing kindness and courtesy."<sup>30</sup> The three-man Chester Bar Committee asked the presiding judge to include that memorial in the minutes of the court.<sup>31</sup> The man memorialized by Chester's Bar does not sound like someone who would destroy a will.

Chester's leaders and voters repeatedly placed their trust in James Hemphill's probity and integrity. In December 1838, the South Carolina Legislature elected this classically educated scholar, fluent in both Greek and Latin, to serve as the Chester District's Commissioner in Equity, a fiduciary post he held for fifteen years.<sup>32</sup> He became President of the Bank of Chester.<sup>33</sup> Chester's voters elected him to serve in the South Carolina House of Representatives in 1857, then reelected him to that office in 1862 and 1864, then elected him to South Carolina's post-Civil War constitutional convention, and then elected him to the South Carolina Senate.<sup>34</sup>

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<sup>28</sup> Letter from U.S. District Judge Robert W. Hemphill of the District of South Carolina to his relative Charles H. Fay in Houston, Texas, Jan. 15, 1981, John Hemphill Vertical File, Austin History Center.

<sup>29</sup> *Theodora Hemphill v. C. S. West, et al.*, Travis County District Court Records, John Hemphill Vertical File, Austin History Center.

<sup>30</sup> *Chester Reporter* (April 10, 1902). I thank Tybring Hemphill of Victoria, British Columbia, Canada, James Hemphill's great-great-grandson, for bringing this obituary to my attention.

<sup>31</sup> *Ibid.*

<sup>32</sup> The Autobiography of James Hemphill, 21-22. I thank Tybring Hemphill of Victoria, British Columbia, Canada, James Hemphill's great-great-grandson, for bringing this autobiography to my attention. See also *Journal of the Senate of the State of South Carolina, Being the Sessions, 1839* (entry: Dec. 3, 1838), 48, [https://books.google.com/books?id=OmgzAQAAAJ&pg=PA48&lpg=PA48&dq=%22James+Hemphill%22+Chester+Reporter+obituary&source=bl&ots=l1\\_r50vJ0&sig=XwhucgJJH0Ppw4tZjtLxHmQbvWY&hl=en&sa=X&ved=0ahUKewjciL\\_SgLXKAhXDMYKHSQSANkQ6AEIOTAI#v=onepage&q=%22James%20Hemphill%22%20Chester%20Reporter%20obituary&f=false](https://books.google.com/books?id=OmgzAQAAAJ&pg=PA48&lpg=PA48&dq=%22James+Hemphill%22+Chester+Reporter+obituary&source=bl&ots=l1_r50vJ0&sig=XwhucgJJH0Ppw4tZjtLxHmQbvWY&hl=en&sa=X&ved=0ahUKewjciL_SgLXKAhXDMYKHSQSANkQ6AEIOTAI#v=onepage&q=%22James%20Hemphill%22%20Chester%20Reporter%20obituary&f=false).

<sup>33</sup> Autobiography of James Hemphill, 22.

<sup>34</sup> *Ibid.*, 22-23.



Contemporary and later judicial decisions reflect that members of the Hemphill family trusted James Hemphill. Furthermore, he appears to have fully discharged his responsibilities to legatees even when his actions adversely affected other relatives' potential interests in those probate estates. In *DuBose v. Kell*,<sup>35</sup> the South Carolina Supreme Court reviewed a case from Chester County's Court of Common Pleas involving the probated, October 20, 1854 will of Mrs. Jane Hemphill, the widow of William Hemphill, deceased, and the probated, February 25, 1862 will of Miss Mary Hemphill.<sup>36</sup> Both appointed James Hemphill as their executor.<sup>37</sup> The will of Mary Hemphill bequeathed ten thousand dollars to the Board of Directors of the Theological Seminary of the Synod of South Carolina.<sup>38</sup> In 1873, James Hemphill, executor, petitioned and obtained a decree that permitted him to partition and sell that Hemphill family land to discharge and pay the ten thousand dollar legacy Mary Hemphill bequeathed to the Presbyterian seminary.<sup>39</sup> In each case, James Hemphill respected the testator's wishes.

No evidence known to this author suggests that James Hemphill or any other Hemphill relative destroyed John Hemphill's will. Aside from Reverend Rust's statements that John Hemphill intended to draft a will naming Theodora and Henrietta as heirs, no eyewitness, documentary or circumstantial evidence shows, or even suggests, that he actually did so. No lawyer came forward to testify that he prepared a will for John Hemphill. No witness or notary testified that he or she saw Senator Hemphill sign a will. No one ever testified about seeing an unattested holographic will or even a written bequest in Senator Hemphill's handwriting.

It is possible that John Hemphill never prepared or signed any will. Every state has intestacy statutes because some people never get around to writing a will. Maybe Senator Hemphill felt conflicted about writing a will. When he told Rev. Rust that he intended to leave his property to Theodora and Henrietta, it was clear that he had not prepared a will as late as 1859, when he saw the storms of war approaching. Yet his thorough knowledge of common law and mastery of Texas law should have enabled him to write a will, either back in Texas or then and there in Xenia, Ohio. He could have asked Rev. Rust, other employees of Wilberforce University or even his hotel's clerk to witness any will he signed. Yet he did not do so. Why not?

If Senator Hemphill had questions about Ohio inheritance law, he could have asked Rev. Rust to introduce him to an Ohio lawyer who could answer those questions and serve as a scrivener. He could have left a signed will at Wilberforce University, with Rev. Rust and his daughters, for safekeeping. Yet he did not do so. Again, why not?

Senator Hemphill apparently did not do so when he had the time, the opportunity, and, according to Rev. Rust, the intent to leave his substantial estate to his daughters. In the absence of new and unexpected evidence, the non-existence of a will attributable to Senator Hemphill seems likely to remain a continuing mystery.

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<sup>35</sup> 105 S.C. 89, 89 S.E. 555 (1916).

<sup>36</sup> *Ibid.*, 105 S.C. at 89, 89 S.E. at 556.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, 105 S.C. at 90, 89 S.E. at 557.

Assuming, in the absence of evidence to the contrary, that Senator Hemphill prepared such a will in Washington, D.C. or in Richmond, Virginia, there is no evidence that James Hemphill or anyone else destroyed it. Such a will, if executed, could have vanished in the confusion that resulted from his sudden, Secession-related departure from Washington, D.C. or, later, from his unexpected death in Richmond. If that happened, the will could have disappeared without James Hemphill or any other Hemphill relative ever seeing it or learning of its existence.

Theodora Hemphill, who grew up in a house filled with books, deeds, patents, and many discussions of real estate transactions, must have known that her father would have left behind a valuable estate. But, under Texas's Constitution of 1861 and the U.S. Supreme Court's ruling in *Hall v. United States*,<sup>40</sup> Theodora—as a slave—had no right to assert a claim to inherit her father's estate.<sup>41</sup> Worse, she risked being sold as an asset in her father's estate if she returned to Texas. She remained in Ohio, living with a foster family after Wilberforce University dissolved and reorganized in 1863. When Henrietta died, Theodora's family came to an end.

### **The Constitution of 1869 empowered Theodora to claim her inheritance.**

Theodora Hemphill's enslavement under the Constitution of 1861 ended on June 19, 1865—later celebrated in Texas as *Juneteenth*—when Union Army General Gordon Granger arrived in Galveston with 2,000 federal troops. On that date, General Granger announced his intention to enforce Abraham Lincoln's two-year-old Emancipation Proclamation in "General Order No. 3" from the balcony of Galveston's Ashton Villa:

The people of Texas are informed that, in accordance with a proclamation from the Executive of the United States, all slaves are free. This involves an absolute equality of personal rights and rights of property between former masters and slaves, and the connection heretofore existing between them becomes that between employer and hired labor....<sup>42</sup>

Union victory and the December 6, 1865 ratification of the Thirteenth Amendment elevated slaves and former slaves from chattels to free citizens.<sup>43</sup> The Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution lifted disabilities that barred slaves from vindicating their rights, including their right to inherit property from their white fathers.

On April 9, 1866, Congress implemented the recently-amended constitution by enacting the Civil Rights Act of 1866. It declared that,

such citizens, of every race and color, without regard to any previous condition

<sup>40</sup> 92 U.S. 27, 24–30 (1875).

<sup>41</sup> Ibid., in Darlene Goring, "The History of Slave Marriage in the United States," *Selected Works of Darlene C. Goring* (2006), 262, 299–347, [http://digitalcommons.law.lsu.edu/faculty\\_scholarship/262](http://digitalcommons.law.lsu.edu/faculty_scholarship/262).

<sup>42</sup> Teresa Palomo Acosta, "Juneteenth," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/lkj01>.

<sup>43</sup> Goring, "History of Slave Marriage," 339–40. See also John R. Vile, ed., "Thirteenth Amendment," *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues: 1789–2002* (New York: ABC-CLIO, 2003), 449–52.

of slavery or involuntary servitude, . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to [receive the benefit of the] full and equal benefit of laws....<sup>44</sup>

Through the U.S. Constitution's Supremacy Clause, the guarantee of a slave's inalienable rights trumped any inconsistent state law. In theory, at least, although rarely in practice.

Texas's Reconstruction-era government soon followed the national lead. In their Preamble to the 1869 Constitution's Bill of Rights, the drafters acted so that, "the heresies of nullification and secession, which brought the country to grief, may be eliminated from future political discussion; that public order may be restored, private property and human life protected; and the great principles of liberty and equality secured to us and our posterity."<sup>45</sup> Article I, Section 21 declared that, "[t]he equality of all persons before the law is herein recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege, or immunity, nor be exempted from any burdens, or duty, on account of race, color, or previous condition."

Article XII, Section 27 gave reality to the 1869 Constitution's promise of legal equality when it conferred legitimacy upon Theodora and other children born to the union of an enslaved woman and her master:

All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate....<sup>46</sup>

On August 15, 1870, Texas's Twelfth Legislature enacted Senate Bill 1, an "Act for the Relief of Freedmen and Freedwomen," to implement that change in identical statutory language.<sup>47</sup>

The Thirteenth, Fourteenth, and Fifteenth Amendments, together with the Civil Rights Act of 1866, Texas's 1869 Constitution, and Senate Bill 1, transformed Theodora's world. She was no longer an exiled, orphaned nobody. Suddenly she became Senator John Hemphill's legitimate heir, a young woman entitled at law to claim her late father's estate.

Two years later, in 1871, the Reverend Rust, former President of Wilberforce University, came to Austin. A distinguished white-haired man with a neatly-trimmed white beard devoid of a mustache, Rust sought to collect the unreimbursed sums the University advanced on behalf of Theodora and Henrietta Hemphill for tuition, board, and book expenses. A fifty-six-year-old

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<sup>44</sup> 14 Stat. 27 (1866).

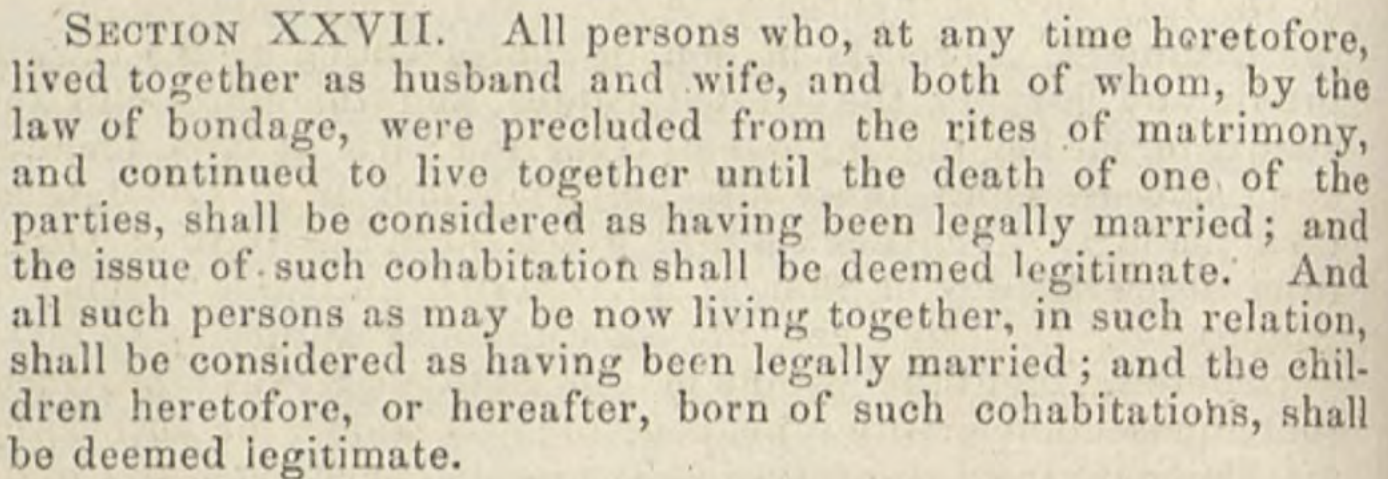
<sup>45</sup> Constitution of the State of Texas (1869), Preamble and Preface to the Bill of Rights, University of Texas Law School, Tarlton Law Library, [http://tarlton.law.utexas.edu/constitutions/texas1869/preamble\\_a1](http://tarlton.law.utexas.edu/constitutions/texas1869/preamble_a1).

<sup>46</sup> See TEX. CONST. art. XII, § 27 (1869), available at <http://tarlton.law.utexas.edu/constitutions/texas1869/a12>.

<sup>47</sup> See BILL FILE, SB 1, 12th Leg., R.S. (1871), at 100-1523, available at [https://www.tsl.texas.gov/sites/default/files/public/tslac/exec/documents/struggles3\\_2015001\\_23.pdf](https://www.tsl.texas.gov/sites/default/files/public/tslac/exec/documents/struggles3_2015001_23.pdf).



Methodist clergyman, he had spent the first two years after the Civil War educating African-American children, raising funds, and sharing the word of God.<sup>48</sup>



SECTION XXVII. All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate. And all such persons as may be now living together, in such relation, shall be considered as having been legally married; and the children heretofore, or hereafter, born of such cohabitations, shall be deemed legitimate.

Article XII, Section 27 of the Texas Constitution of 1869

Reverend Rust hired a well-respected Austin attorney, William Alexander, to handle his collection case. Through Alexander, Rust presented proof of his university's sworn account to the Travis County District Court, including letters mailed to Wilberforce University from the U.S. Senate franked with Hemphill's signature.<sup>49</sup> After itemizing fifty-three unreimbursed weeks of room, board, and tuition incurred at the rate \$2.00 per week each for Theodora and Henrietta from June 20, 1861 through June 25, 1862, Reverend Rust prosecuted his claim in a bench trial.<sup>50</sup> Reverend Rust soon won the case to recover the tuition, room and board that Hemphill or his Estate had failed to pay. The judgment ordered "that the plaintiff R. S. Rust, do have and recover of and from the Defendant...the sum of Five Hundred, Eight four and 27/100 Dollars being the amount sued on, with interest at 8 percent from the 1<sup>st</sup> day of January 1863 to this [June 30, 1871] date, together with all of the Cost of this suit."<sup>51</sup>

About that same time, another African-American Hemphill heir of Chief Justice Hemphill was counterclaiming to keep his land and recover damages from the Hemphill estate administrator. In *F. W. Chandler, Administrator of the Estate of John Hemphill, Decedent v. Washington Hemphill*, F.W. Chandler sued Washington Hemphill, an ex-slave of Judge Hemphill, to clear title to the estate's ownership of City of Austin Block 44's Lots 8, 9, and 10. Chandler claimed that Hemphill's

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<sup>48</sup> Dumas Malone, ed., *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1934), vol. 16, 253. See J. M. Buckley, *A History of Methodists in the U.S.* (New York: Christian Lit. Co., 1897).

<sup>49</sup> Rev. Rust's answer to Cross-Interrogatory No. 1 and Deposition of Richard Rust (July 1, 1871) in Cause No. 2954, *R. S. Rust, Plaintiff v. F. W. Chandler, et al., Defendants, Administrators for the Estate of John Hemphill, Deceased*, *Minutes of the Travis County Civil District Court*, vol. J, 398, and Travis County Civil District Court File Boxes, John Hemphill Vertical File, Austin History Center.

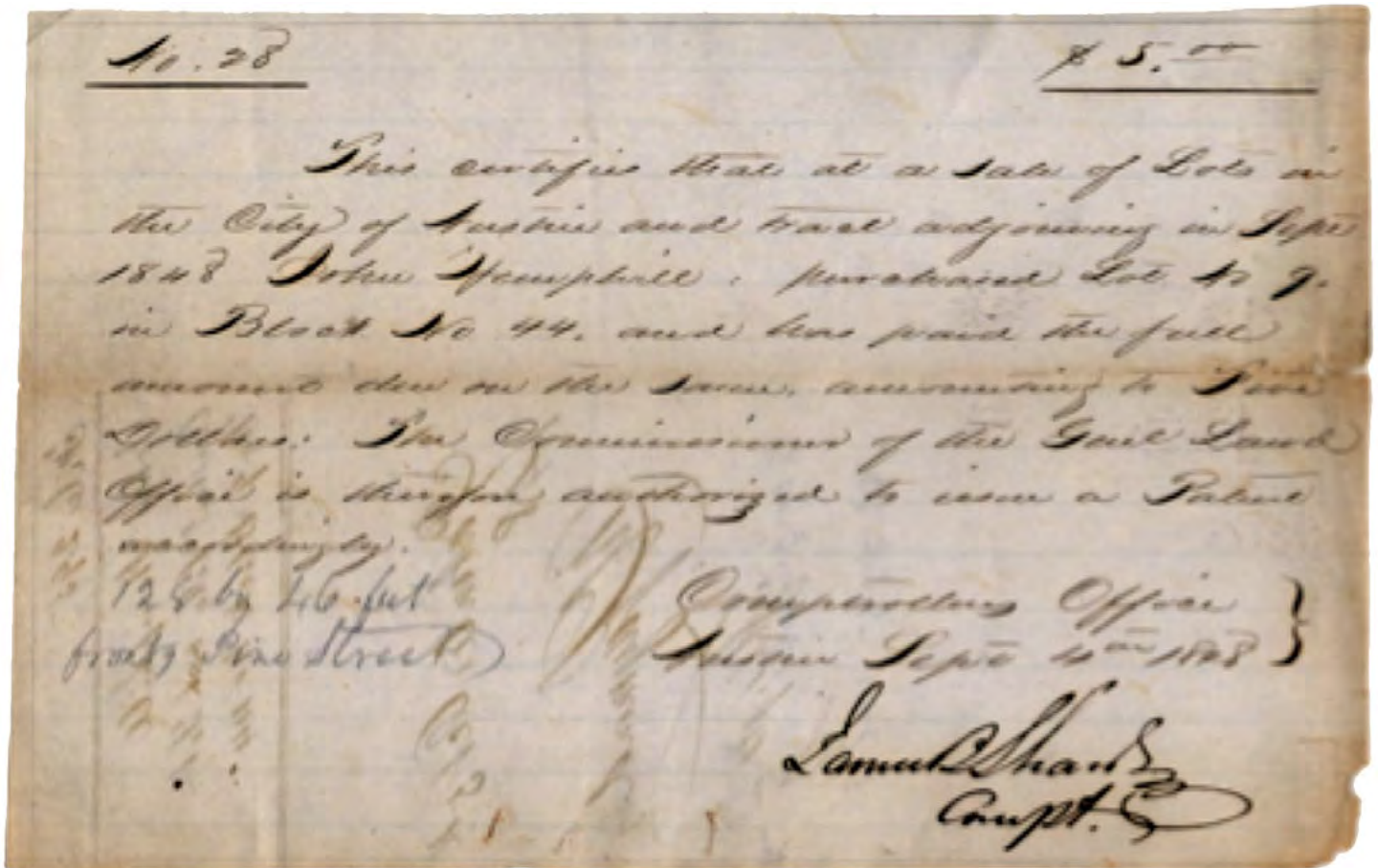
<sup>50</sup> Cause No. 2954, *Minutes of the Travis County Civil District Court*, vol. J, 398.

<sup>51</sup> *Ibid.*; Andrew F. Muir, "John Hemphill, Miscegenator," unpublished paper, Rice University, 1950, 12, in the Mary Smith Fay Papers, Clayton Genealogical Library, Houston.

ex-slave had trespassed upon and illegally exercised dominion over Judge Hemphill's land.<sup>52</sup>

Washington Hemphill hired his own attorney to prove that he lawfully took possession of three of Chief Justice Hemphill's lots. Washington counterclaimed, suing F. W. Chandler for trespass and for \$100 in damages. Another Reconstruction-era Travis County court ruled in favor of Washington Hemphill: "The court decreed that Wash. be given a clear title to the lots and that Chandler pay all costs of the suit and one cent damage to Wash."<sup>53</sup> The court cleared Washington Hemphill's title to the property, awarded him one cent in damages, ordered the plaintiff, F. W. Chandler, not to file any further litigation about Washington Hemphill's property, and ordered Chandler to pay all court costs.<sup>54</sup>

Washington's property, Lots 8, 9, and 10 of Block 44, now occupies the 200 block of Fifth Street between Lavaca and Colorado Streets. Now owned by Lincoln Property Company, it has become some of the most valuable land in Austin. A skyscraper known as "5<sup>th</sup> & Colorado" now rises high above the land Washington Hemphill worked and fought in court to defend.



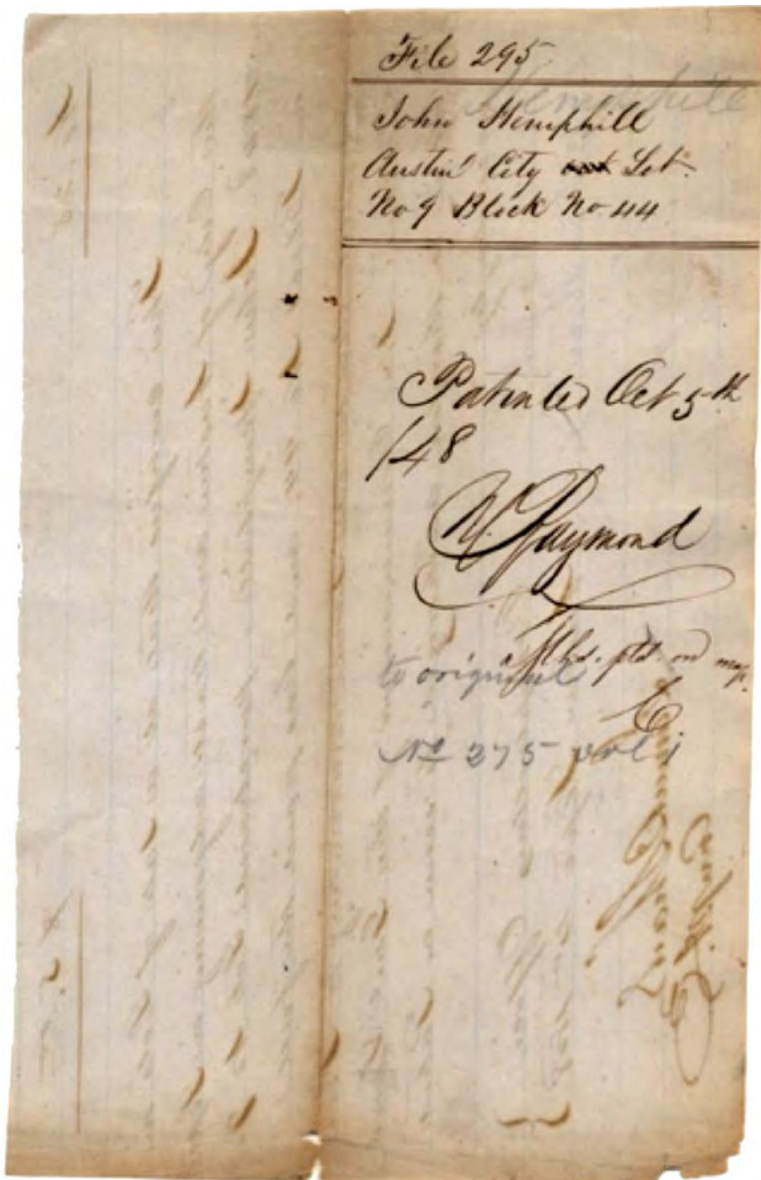
General Land Office File 295: Sale and Patent of City of Austin Block 44, Lot 9; image from Texas General Land Office Archives

<sup>52</sup> Cause No. 2774, *Minutes of the Travis County Civil District Court*, vol. J (Feb. 16, 1871), 398.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*





General Land Office File 295:  
The envelope/cover of the sale/  
patent instrument John Hemphill  
purchased and then gave to  
Washington Hemphill, his slave.



The Lincoln Property Company is now  
building the "5th + Colorado" office building  
atop the land that once comprised  
Lots 8, 9, and 10 of Block 44.  
Photo by David A. Furlow

After winning that case in court, Reverend Rust recommended that Theodora hire William Alexander to state her claim against the Hemphill estate's administrator and Hemphill's South Carolina relatives. She had to act quickly because West had placed a May 2, 1871 newspaper ad to sell the Hemphill estate's real property.<sup>55</sup> Theodora took the advice. In her June 7, 1871 probate court intervention, Theodora alleged that,

Plaintiff further avers that said John Hemphill & one Sabina, a negress, lived together as husband & wife from the year 1845 Continuously [sic] until the death of said Sabina in the year 1859, the said John Hemphill having no other wife nor the

<sup>55</sup> Case # 3074, *Theodora Hemphill v. C. S. West, et al.*, vol. J, 624, Travis County Court Records.



said Sabina having any husband other than the said John Hemphill who was her Master[;]

[T]hat Plff is the sole surviving issue of such cohabitation and that both the Said John Hemphill & the said Sabina were by the laws of bondage precluded from the rites of matrimony[;]

[T]hat by the Constitution & laws of Texas petitioner being the issue of the said parties so living together has been declared legitimate and by such declaration of the Constitution of the State of Texas[; and therefore]

She is the Sole heir of the Said John Hemphill and as Such [is] entitled to have all the property of the estate of the Said John Hemphill.<sup>56</sup>

Both sides conducted discovery and exchanged interrogatories. Charles S. West, receiver of her father's estate, initiated proceedings to distribute the estate's property to the Senator's South Carolina relatives on March 6, 1871.<sup>57</sup> But he did nothing to protect Theodora's right to inherit the estate that several 1862 inventories showed to be wealthy.<sup>58</sup>

While Theodora's suit moved forward, a case involving similar facts was beginning its path to review by a Reconstruction panel of the Texas Supreme Court. *Honey v. Clark* began in the Twentieth Judicial District Court of Wharton County on March 28, 1871, went to trial before Judge William Burkhart in December 1871, and resulted in a judgment in favor of Sobrina's children. The case ended in an affirmation on appeal prior to August 5, 1873, when the Wharton County District Court entered an order implementing the judgment post-appeal.<sup>59</sup> In *Honey*, John Clark, an extraordinarily wealthy man living in Wharton County, openly cohabited with an enslaved woman, Sobrina, beginning in the period of Mexican rule in 1833 or 1834.<sup>60</sup> Clark died in 1861 without leaving a will. But his \$500,000 in assets soon fueled a probate fight. The estate administrator determined that no heirs stood entitled to claim the estate's assets, justifying an escheat in favor of the State of Texas's Treasury Department.

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<sup>56</sup> Ibid., Plaintiff's Original Petition, Mary Hemphill Fay Papers, Clayton Library.

<sup>57</sup> *In re Estate of John Hemphill, Deceased*; No. 295, Probate Case Papers of Travis County (1862–1882).

<sup>58</sup> Ibid., Probate Case Papers of Travis County (itemizing \$17,139 in real property); Inventory No. 1 (Aug. 22, 1862) (itemizing property amounting to \$18,825.25); and Inventory No. 2 (Aug. 29, 1862) (itemizing additional property).

<sup>59</sup> [No Number in Original], 37 Tex. 686, 1873 Tex. LEXIS 177 (1873). For those matters that do not appear in the LEXIS and Westlaw versions of the Texas Supreme Court's opinion, I rely upon Texas Wesleyan University School of Law Professor Jason A. Gillmer's excellent, in depth analysis of the *Honey v. Clark* litigation, which I commend to anyone interested in issues of slavery, inheritance and probate law. See generally Jason A. Gillmer, "Base Wretches and Black Wenches: A Story of Sex and Race, Violence and Compassion, during Slavery Times," *Alabama Law Review* 59 (2008): 1501, 1502 n.3 (referencing the Transcript of Trial in *Honey v. Clark*, No. 789 (Texas District Court Wharton County, Dec. 1871 verdict and judgment) in the State of Texas's appeal to the Texas Supreme Court, at 11), 1549 n.368 (referencing the Transcript of Trial at 112, the verdict and decree of judgment) and the "order implementing the judgment after appeal, *Clark v. Honey*, No. 789, Minutes of Wharton County District Court Book "C," at 201, in a collection of Wharton County orders now on file, thanks to Jason Gillmer, with the Alabama Law Review).

<sup>60</sup> Ibid; see also *Honey v. Clark*, 37 Tex. 686 (1873). The Texas Supreme Court's Opinion begins at 37 Tex. 706. Summaries of the opposing briefs and oral argument begin at 37 Tex. 686 and end at 706.

But the estate administrator failed to count Clark's three adult children by Sobrina: Bishop Clark and his two married sisters, Lourinda and Nancy. If those three mixed-race children were legitimate, their claims trumped those of the State Treasurer, G. W. Honey. The three children were legitimate, and thus lawful heirs, if Clark and Sobrina were lawfully married when Clark died in 1861. Clark's children therefore contended that Article XII, Section 27 of the Texas Constitution of 1869 meant what it plainly said, that it legitimated them, and that it made them the lawful heirs of John Clark.

In contrast to John Hemphill, "Clark was a man of little or no education, unsocial temperament, and apparently engrossed by a desire to accumulate property. He appeared to have no intimates of his own color." Attorney General William Alexander, the same man who represented Reverend Rust and Theodora in their litigation, represented Clark's mixed-race children, the appellees. On appeal, Alexander argued that, "at this day, when it is hoped that the world has grown wiser and better, it would seem a violent presumption that a man of Anglo-American birth and education would marry a woman of African descent, at that time his slave, his chattel." But that presumption might not have seemed so violent to judges as familiar with Chief Justice Hemphill's relationship with Sabina as Theodora's attorney William Alexander was.



Studio portrait, unidentified African-American woman in Austin, Texas, ca. 1870s; courtesy Hubert Jones Glass Plate Negative Collection, Austin History Center

At trial, several white neighbors testified that Clark had not held Sobrina out as his wife, thus negating the existence of a common law marriage. Several former Clark plantation slaves testified about numerous occasions on which Clark made statements revealing that he considered Sobrina to be his *de facto* wife. Since the trial occurred during Texas's period of Congressional "Radical" Reconstruction, several freedmen served on the jury. The jury verdict read, "We, the jury, find the plaintiffs are the true heirs of John C. Clark."<sup>61</sup> The jury determined that the three children were lawful heirs because Clark and Sobrina had effectively married when they began cohabiting in 1833, when Texas was part of the Mexican state of Coahuila y Tejas.

In *Honey*, the Texas Supreme Court unanimously upheld the validity of the marriage declaration after asking whether the laws of bondage made a lawful marriage of the *couple* impossible. Relying upon "the learned opinion of the Attorney-General for the State" (William Alexander), Justice Moses B. Walker, an Ohio-born Union Army veteran wounded in action during

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<sup>61</sup> *Honey*, 37 Tex. at 706, 708.

the Civil War<sup>62</sup> affirmed the jury verdict. His opinion held that, “[t]hese children of Clark had a right to come in and contest with the State for the property” the State sought to escheat.<sup>63</sup>

Since no miscegenation statute barred marriages between whites and blacks in Mexican Texas, and since “a moral observance of the matrimonial condition” existed for slaves who lacked independent standing to enter into a lawful marriage, Article XII, Section 27 applied to and made legitimate Clark’s three children, Justice Walker ruled:

Prior to the emancipation of the slaves, marriage with that class was not, in a legal sense, authorized; yet there was that sort of contubernism among them which resulted in procreation of families. There was a certain degree of continence, and, to some extent at least, a moral observance of the matrimonial condition. This, but for the law of bondage, would have been regarded, in every sense, as legal marriage. The laws of slavery did not forbid the coupling together of man and woman in this manner, but none of the marital rights belonging to free and civilized society accompanied this cohabitation and sexual commerce.<sup>64</sup>

Although Chief Justice Hemphill was a far more civilized, learned, and powerful man than the boorish John C. Clark, Justice Walker’s statements about “a moral observance of the matrimonial condition” applied equally well to Hemphill’s monogamous relationship with Sabina. The Reconstruction Court awarded John Clark’s estate to his children and vacated the escheat in favor of the State.<sup>65</sup>

James Hemphill and John Hemphill’s white relatives contested Theodora Hemphill’s claimed inheritance of the Hemphill Estate. Perhaps they were not convinced that Theodora should inherit, either because they were not convinced she was John’s daughter, or more likely because they did not believe that she had a legal claim due to her having been born as a slave, or being born illegitimate in a mid-Victorian era society that esteemed legitimacy of birth.<sup>66</sup> Or perhaps they viewed Texas’s 1869 Constitution as flawed and the State’s Reconstruction era courts as corrupt. In his autobiography, James Hemphill condemned South Carolina’s Military Reconstruction government as “the horrible rule of the negroes, carpet baggers, and scallawags, which has never been surpassed in the history of any civilized people for fraud, filth, ignorance and rascality.”<sup>67</sup> James Hemphill and the other South Carolina relatives must have felt much the same about Reconstruction era Texas and its courts.

James Hemphill and Chief Justice Hemphill’s other South Carolina relatives learned a quick lesson from Reverend Rust’s and William Hemphill’s lawsuits while *Honey v. Clark* was still being

<sup>62</sup> See University of Texas Law School, Tarlton Law Library, “Moses B. Walker (1819-1895),” *Justices of Texas 1836-1986*, <http://tarlton.law.utexas.edu/justices/profile/view/109>. See also Gillmer, “Base Wretches,” *Alabama Law Review* 59: 1548 and 1548 nn.366-67.

<sup>63</sup> *Honey*, 37 Tex. at 709.

<sup>64</sup> *Ibid.*, 37 Tex. at 708.

<sup>65</sup> See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 59 STAN. L. REV. 221, 227 (1999).

<sup>66</sup> Email, Tybring Hemphill of Victoria, British Columbia, Canada, James Hemphill’s great-great-grandson, to David A. Furlow, January 18, 2016 at 8:02 p.m.

<sup>67</sup> Autobiography of James Hemphill, 23.



litigated in the Twentieth Judicial District Court of Wharton County. To avoid the risks and costs of litigation, and perhaps to keep news of the case from reaching South Carolina, Hemphill's relatives settled Theodora's claims. They paid her "the sum of One Thousand Seven Hundred dollars Gold, to me in hand paid, by Charles S. West, Agent."<sup>68</sup> Charles West's public payment of settlement consideration resolved Theodora's intervention inexpensively and permitted West to distribute the estate's assets to all heirs deemed to be lawful, *i.e.*, to Chief Justice Hemphill's white heirs, most of whom lived outside of Texas.

Theodora obtained the best deal she could negotiate in the rapidly changing world of Reconstruction era Texas. Her settlement of \$1,700 paid in hand in gold, however paltry it might seem in comparison with the remainder of Chief Justice Hemphill's probate estate, gave her the power to chart an independent future. She would need that money, too, as the bright promise of Reconstruction dimmed and the shadow of Jim Crow discrimination fell across Texas.

## End of Part II

In the *Journal's* Spring 2016 issue, we'll consider Theodora's unorthodox response to the 1876 Constitution's introduction of nearly eighty years of racial segregation. As the Jim Crow era sidelined her from society, she would declare her independence from the disabilities and discrimination ex-Confederate Texas lawmakers meted out to African Americans and women. Finally, we'll consider how Theodora's life affected Chief Justice John Hemphill's legacy and jurisprudence, and reflect on the ways a rapidly-changing nineteenth century Texas constitution continuously shaped and reshaped the life of a young African-American woman.

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<sup>68</sup> Cause No. 3074, Travis County Civil District Court File Boxes. *See also* Haley, *Texas Supreme Court*, 264 n.23.



**DAVID A. FURLOW** is an attorney, historian, and archaeologist. He would appreciate any additional information a reader can provide about John, Sabina, Theodora, and Henrietta Hemphill.

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# Unraveling a Mystery: Who Was Texas's First African-American Attorney?

By John G. Browning and Chief Justice Carolyn Wright

In early 2014, the *Texas Bar Journal* acknowledged the contributions of many of Texas's legal pioneers with an article chronicling, among others, the state's first Latino/Latina lawyers, the first Asian-American judge, and the first black woman admitted to the Texas bar. But conspicuously missing was an entry spotlighting the first African-American male to practice law in the Lone Star State. Why this glaring omission? Until recently, historians have maintained that "[t]he early history of black lawyers in Texas is uncertain" and that "a diversity of opinion" exists as to the identity of the first African-American lawyer in the state.<sup>1</sup> Our research sheds light on the two likeliest candidates for the title of Texas's first black lawyer, the remarkable W. A. Price of Fort Bend County and the equally remarkable A.W. Wilder of Washington County.

Before we examine the lives of these extraordinary individuals, however, it is important to note that part of the challenge in tracking the elusive history of Texas's earliest African-American attorneys is a factor of numbers. By 1890, there were only twelve black lawyers in Texas, most of whom practiced in rural areas or small towns (in contrast, the Texas bar as a whole consisted of 3,555 lawyers in 1890).

While Reconstruction brought newfound freedom and opportunities for educational, social, and political mobility, African-Americans emerging from the ashes of slavery were far more likely to join the ranks of clergy, educators, and physicians than they were to become attorneys. Despite the sizable African-American population in the state, the lack of a significant black business class translated to a tiny pool of prospective clients.

Even when the black community was substantial enough to support one or more lawyers, African-American attorneys had to confront resistance from within, as their own people "often used white lawyers at higher legal fees, because they thought that justice could only be obtained in this way."<sup>2</sup> And while the standards for admission to the Texas bar in the late 1800s have been described as "extraordinarily easy" by historians, the fact remains that access to the legal profession was nevertheless determined by white men, who were often less than welcoming at the notion of a black lawyer joining their ranks.<sup>3</sup>

<sup>1</sup> J. Clay Smith, Jr., *Emancipation: The Making of the Black Lawyer 1844-1944* (Philadelphia: University of Pennsylvania Press, 1993), 344; Robert L. Dabney, Jr., "We Were There," *Houston Law Review* 37 (1999): 42; Darwin Payne, *Quest for Justice: Louis A. Bedford Jr. and the Struggle for Equal Rights in Texas* (Dallas: Southern Methodist University Press, 2009), 9 ("The identity of the first African-American lawyer to practice law in Texas is uncertain.").

<sup>2</sup> Smith, *Emancipation*, 11.

<sup>3</sup> In a number of states, just being a lawyer who was African-American was enough to result in violence. In 1895, a mob of whites in Tuskegee, Alabama attacked Thomas A. Harris, shooting him in the leg, because they "did not

## William A. Price

Texas's two earliest African-American lawyers were not deterred by such circumstances. William A. Price, better known as W. A. Price, has probably the better claim to being not only Texas's first black attorney, but also its first black judicial officeholder and first black county attorney as well—even if both older and more recent historians incorrectly identify him as “W.B. Price.”<sup>4</sup> W. A. Price was, according to an 1872 African-American newspaper, a well-traveled man, “a fair representative of his race,” and “an active and influential Republican.”<sup>5</sup> He was born in Alabama and educated in Ohio before moving to Texas to practice law. In 1872, he served as a justice of the peace of Fort Bend County's Precinct Number Two; this may explain certain newspaper references to him as “Judge W. A. Price.”<sup>6</sup>

In December 1875, other newspapers in that part of the state were not only taking note of Price and the viability of his candidacy for judicial 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, Fort Bend, Brazoria, Matagorda, and Jackson, where the colored race predominate.”<sup>7</sup> Noting that it was “impossible to elect a Democrat” in this “tolerably dark district,” the newspaper speculated about who the Radical Republicans would make judge.<sup>8</sup> The editors concluded 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.”<sup>9</sup>

Price's talents also went beyond mere legal acumen. He was also credited in 1874 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.”<sup>10</sup> The white-owned *Galveston Daily News* predictably found it “[s]trange to say, that this scheme was gotten up by a colored man, W. A. Price, the colored lawyer of this place.”<sup>11</sup> 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.”<sup>12</sup>

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want any Negro lawyer” in their community. In 1871, three white men in Arkansas murdered Wyathal G. Wynn, a graduate of Howard University School of Law. *Ibid.*, 272, 304 n.20, 322–323.

<sup>4</sup> See, e.g., *Ibid.*, note 13, 314 (“W.B. Price of Matagorda, admitted in 1878 to practice in the state supreme court and federal courts, was the first Negro admitted to the bar in the state.”); Dabney, Jr., “We Were There,” 42 (“W.B. Price of Matagorda . . . is reputedly the first African-American admitted to the bar in this state.”) (citing Lawrence D. Rice, *The Negro in Texas, 1874-1900* (Baton Rouge: Louisiana State University Press, 1971), 194–195. While there was indeed a “W.B. Price” who was a white member of the Texas bar as of 1874, he was a veteran of the 1836 Battle of San Jacinto who died in Austin on April 2, 1876.

<sup>5</sup> *The Representative*, May 4, 1872, <http://texashistory.unt.edu/ark:/67531/metaph203082> .

<sup>6</sup> *Ibid.*

<sup>7</sup> *Galveston Daily News*, Dec. 22, 1875, <http://texashistory.unt.edu/ark:/67531/metaph464315> .

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> “Canal,” *Galveston Daily News*, May 14, 1874, <http://texashistory.unt.edu/ark%3A/67531/metaph464256> .

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*



# OATH OF OFFICE:

I, William A Price  
do solemnly swear, (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent upon me as County  
Attorney of Fort Bend County

according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I do further solemnly swear, (or affirm), that since the adoption of the Constitution of this State, I, being a citizen of this State, have not fought a duel with deadly weapons, within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, or aided, advised or assisted any person thus offending. And I furthermore solemnly swear, (or affirm), that I have not directly, nor indirectly paid, offered or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God.

(Sign here.) W. A. Price

Sworn to and subscribed before  
me this 18 day of

April 1876

M. L. Samwalk L.C.

R. B. C.

Oath of Office signed by W. A. Price as Fort Bend County Attorney, April 1876; courtesy of the Fort Bend County Museum Association, Richmond, Texas

By 1876, the well-regarded W. A. Price was so firmly ensconced in the Fort Bend County community and such a factor in its Republican politics that he ran for and won the office of Fort Bend County Attorney. According to the signed Oath of Office, which resides today in the Fort Bend County Museum, Price assumed his duties on April 18, 1876. He appears to have diligently carried out his responsibilities; one surviving artifact of this period is a handwritten document by Price in his capacity as Fort Bend County Attorney, charging four individuals on November 25, 1876 with illegal gambling “contrary to ... statute” and “against the peace and dignity of the State.” Yet by February 13, 1877— less than a year into office—Price formally resigned the office of county attorney, submitting his formal letter of resignation on the stationery of a local Fort Bend County law firm, Mitchell and Calder.

What caused Price to resign? The historical record is silent. We do know that by 1878, he moved to and was admitted to practice in Matagorda County.<sup>13</sup> Perhaps, he found public office to be a financial hardship, and made the decision to return to private practice and even relocate to another black majority county whose community might support an African-American lawyer. Since nothing else appears in the extant records or contemporary newspaper accounts, we can only speculate.

Curiously, despite clear documentary evidence of W. A. Price’s status as the first African-American judge and county attorney in Texas (and, since he was practicing at least as early as 1872, very possibly the first African-American lawyer in Texas, period), he has been completely overlooked by Fort Bend County’s own historical commission. The county’s official historical listing of judicial and county attorney (later district attorney) officeholders lists a white man, W.L. Davidson, as Fort Bend County Attorney for the time period spanning 1867–1878. Not only is this a glaring error thanks to the evidence we have of W. A. Price’s brief tenure, but it is factually suspect because the same official record also lists W.L. Davidson as county attorney from 1905 to 1907 and from 1921 to 1924.

Either W.L. Davidson was the Dorian Gray of the Fort Bend County legal community to have his service span such historical periods (from Reconstruction to Prohibition), or the “official” Fort Bend County records are woefully inaccurate. Equally inexplicably, the same record identifies a different African-American named Shade Croom as the Precinct Two Justice of the Peace in 1872–1873, but makes no mention at all of the man that newspapers referred to as “Judge Price.” Yet, while he may have been overlooked by his own county, W. A. Price’s place in Texas legal history is undeniable.

## **Allen W. Wilder**

Allen W. Wilder, or “A.W. Wilder” as he is often referred to, is credited by some historians with being the first African-American attorney in Texas.<sup>14</sup> If this is so, his career marked a remarkable odyssey from being born into slavery to becoming a lawyer and serving in the Texas

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<sup>13</sup> Smith, *Emancipation*, 345.

<sup>14</sup> John Mason Brewer, *Negro Legislators of Texas and Their Descendants* (Dallas: Mathis Publishing Co., 1935), 126, Smith, *Emancipation*, 345.

Legislature. Wilder was born a slave in North Carolina around 1845.<sup>15</sup> Remarkably, the 1870 federal census report identifies the twenty-five-year-old father of five as illiterate and working in a mechanical or engineering trade, yet by the 1880 census, he was identified as a lawyer.<sup>16</sup> Nothing is known about where he received his legal education or precisely when he began practicing law.

As with many African-Americans in Texas and throughout the South, Reconstruction and the rise of Republican power brought opportunities to Allen Wilder that he would likely never have enjoyed otherwise. One legal historian who chronicled the rise to power of African-Americans in Wilder's community of Washington County, Texas, during this period describes the changes in the following way:

[African-Americans] eagerly used their rights as free men and women to assert their independence of whites and to build community institutions. They also grasped the rights of citizenship, registering and voting in numbers that shocked and alarmed southern whites. African-Americans not only formed the bone and muscle of the Republican coalition; a remarkable group of black political leaders quickly emerged as active players in the political process and shaped the direction of political change in their communities.<sup>17</sup>



Portrait of Allen Wilder from the Thirteenth Texas Legislature composite portrait; courtesy of the Texas State Library and Archives Commission

In Washington County, as in other so-called "Black Belt" counties with African-American majority populations, black leaders became increasingly frustrated with white Republicans' domination of state and county offices; as preacher-turned-state-senator Matt Gaines implored one gathering of 3,000 at Brenham, "Shall we turn the mill forever and let someone else eat the meal?"<sup>18</sup> In the 1872 election, these African-American voters flexed their political muscle and elected Allen Wilder of Chappell Hill as one of Washington County's two state representatives in

<sup>15</sup> Paul M. Lucko, "Wilder, Allen W.," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fwifh> .

<sup>16</sup> "Forever Free: Nineteenth Century African-American Legislators and Constitutional Convention Delegates of Texas, A Joint Exhibit from the State Preservation Board and the Texas State Library and Archives Commission," <https://www.tsl.texas.gov/exhibits/forever/index.html> .

<sup>17</sup> Donald G. Nieman, "African Americans and the Meaning of Freedom: Washington County, Texas as a Case Study, 1865-1886," *Chicago-Kent Law Review* 70 (1994): 541, 543.

<sup>18</sup> *Ibid.*, 577; see *Brenham Banner*, Aug. 11, 1871.



the Thirteenth Texas Legislature.<sup>19</sup> Wilder served on the House Committee on Public Lands and Land Office.<sup>20</sup>

Wilder's legislative career was short-lived, although he would remain politically active for some time. He did not serve in the Fourteenth Legislature. After he won a close election to the Fifteenth Legislature in 1876, a House Committee determined that some of Wilder's votes came from illegal voters and gave the election to his opponent.<sup>21</sup> Wilder ran for the Texas Senate in 1878 but lost.<sup>22</sup> With Reconstruction over and with Democrats reasserting political control in Texas, political terrorism and violence became increasingly common as African-Americans tried to protect their voting rights. In 1884, Wilder was attacked and shot by white men in blackface at a ballot-counting site; the wound resulted in the amputation of his arm.<sup>23</sup>

In 1886, Wilder was a candidate for county attorney, a fact that angered local Democrats and also some white Republicans. Fearing interference by the Democrats, African-American leaders in Washington County posted an armed guard at the ballot box location for one predominantly black precinct. A group of disguised white men broke into the house after midnight, resulting in one of them being shot and killed—Dewees Bolton, son of the Democratic candidate for county commissioner.

Outraged whites lynched three African-American men they associated with the incident: forty-year-old T.H. Jones, forty-five-year-old Shed Felder, and sixty-year-old Alfred Jones. Typical of the racist "lynch journalism" of the era, the account of the lynching in the *Dallas Morning News* described the mob of between twenty and sixty men as "quiet, orderly, sober and well behaved."<sup>24</sup> The *Dallas Morning News* went on to blame the horrific act on the victims themselves and their white Radical Republican colleagues: "The wholesale hanging of the negroes is the culmination of the incendiary speeches made by the Radicals during the recent election and while all good citizens regret the hanging, they cannot but think that tardy justice was done."<sup>25</sup>

This lynching was just one of many incidents and politically- and racially-motivated violence perpetrated against African-Americans in Texas at this time, instigated in part by a fear of blacks like Allen Wilder seeking political offices like that of county attorney. Newspapers even spoke of a "Negro uprising in Brenham."<sup>26</sup> The violence and suppression of the African-American vote was so widespread that in 1889, the U.S. Senate investigated and held hearings on the "Alleged Election Outrages in Texas." One witness even testified about the link between the incidents and Wilder's candidacy for county attorney as "a colored man." The exchange went as follows:

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<sup>19</sup> Merline Pitre, *Through Many Dangers, Toils and Snares: The Black Leadership of Texas, 1868-1900* (Austin: Eakin Press, 1985), 41.

<sup>20</sup> Lucko, "Wilder, Allen W."

<sup>21</sup> See Pitre, *Through Many Dangers*.

<sup>22</sup> Lucko, "Wilder, Allen W."

<sup>23</sup> *Dallas Daily Herald*, Nov. 6, 1884, <http://texashistory.unt.edu/ark:/67531/metaph287210/m1/4>.

<sup>24</sup> "Three Negroes Hanged at Brenham," *Dallas Morning News* (Dec. 3, 1886).

<sup>25</sup> Ibid.

<sup>26</sup> U.S. Senate, Testimony on the Alleged Election Outrages in Texas, Senate Miscellaneous Documents, 62, III, 50th Cong., 2d Sess. 1889, 614-615.

- Q: Why do you say that you would have considered it a misfortune if Wilder had been elected?
- A: Because I did not think he was a competent man for the place.
- Q: Competent in what respect?
- A: I did not think he was capable in point of intelligence and legal education.
- Q: To fill that office?
- A: To fill that office; that was my idea about it.
- Q: It is an important office in that county, is it?
- A: Yes, sir; I think so, somewhat important.
- Q: He was a practicing attorney, was he not?
- A: Yes, sir; he had been practicing I understand seven or eight years there.<sup>27</sup>

Unfortunately, life did not get any better for Wilder after his unsuccessful, violence-riddled bid for Washington County attorney. The Brenham lawyer encountered legal difficulties of his own, including charges of illegally signed school vouchers and perjury. He died in Houston on August 29, 1890.<sup>28</sup>

Wilder identified himself as an attorney in the 1880 U.S. Census, but it is uncertain when he started practicing law. Certainly, the witness testifying before the Senate described him as having practiced at least “7 or 8 years” before his ill-fated run for office in 1886, which would have been around 1878—a time when W. A. Price’s legal career was well underway. But even if Wilder wasn’t first, and even if his trailblazing career was marred by political controversy and racial violence, his most enduring legacy can be found in the fact that a surprising number of African-Americans followed in his legal footsteps by setting up practices in Washington County.

Within roughly fifteen years after Wilder’s legal career began, at least five other African-American lawyers hung out shingles in the Brenham area. The first of these was Alex (occasionally mistakenly referred to as “Aleck”) Thomas, of Burton.<sup>29</sup> Thomas began practicing at least as early as February 1878, when local newspapers described his first court case.<sup>30</sup> One account mentioned that “[i]n the district court on Friday rather a novel incident occurred—it being the maiden effort of Mr. Alex Thomas, colored, of Burton, a member of the Washington County Bar.”<sup>31</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> *Brenham Weekly Banner*, Sept. 4, 1890, <http://texashistory.unt.edu/ark:/67531/metaph115636/m1/5> .

<sup>29</sup> Rice, *Negro in Texas*, 73.

<sup>30</sup> Ibid.

<sup>31</sup> *Brenham Weekly Banner*, Feb. 8, 1878, <http://texashistory.unt.edu/ark:/67531/metaph115314> .

Another account, which mistakenly reported his last name as “Burton,” referred to the “young colored lawyer” as having “made a good speech in his first at the bar.”<sup>32</sup> His exploits in the courtroom continued to be noted by newspapers in Brenham and Galveston. In August 1878, newspapers reported about “a certain case in which Mr. Alex Thomas, the colored attorney from Burton, represented the defendant and County Attorney Senutze the state.”<sup>33</sup> Apparently, Thomas made a successful motion to quash the indictment, but the condescending tone of the reporting makes it clear that this underdog triumph was surprising not because an individual triumphed over state or the defense over the prosecution. Instead, this incident that “caused much amusement” was notable because it was the victory of a supposedly inferior black lawyer over a white lawyer.<sup>34</sup> As the newspaper account described it, “The idea of the county attorney’s indictment being quashed on motion of a colored attorney is regarded as being supremely rich, and is highly creditable to Mr. Thomas.”<sup>35</sup>

Thomas’s career, auspiciously begun, continued to build. By 1880, he was a candidate for county attorney.<sup>36</sup> Unfortunately, like A.W. Wilder before him, Thomas’s legal work came to an ignominious end. In December 1884, after being convicted of stealing a yoke of oxen, Thomas was sentenced to five years in the penitentiary.<sup>37</sup> At least one Republican-leaning newspaper in Dallas, Norton’s *Union Intelligencer*, found this sentence comically unfair, since “white lawyers round up whole herds with impunity.”<sup>38</sup>

George Loughridge would become the third African-American lawyer in the Brenham area in 1883, joining the ranks of Wilder and Thomas. Unlike his predecessors, however, little is known about Loughridge beyond the fact that he hailed from Georgia. In October 1883, news accounts noted that “Brenham has another colored lawyer,” and reported that “[i]n the District Court, on Wednesday, Mr. George Loughridge, colored, late of Georgia was admitted to the practice of law.”<sup>39</sup>

Indeed, from the Reconstruction era to shortly after the turn of the twentieth century, it was comparatively small, rural Washington County that had the most impressive concentration of African-American lawyers in Texas rather than larger metropolitan areas like Dallas, Houston, or San Antonio. At virtually any given time during this stretch, the Brenham area had at least three African-American attorneys—beginning with Wilder, Thomas, and Loughridge.

The “second wave” would come during the early 1890s. In 1892, J.S. Moten of Brenham was admitted to practice.<sup>40</sup> One newspaper account reported that “The committee appointed to examine J.S. Moten, the young colored man, as to his qualifications and knowledge of the

<sup>32</sup> *Weekly Democratic Statesman*, Feb. 7, 1878, <http://texashistory.unt.edu/ark:/67531/metaph277649>.

<sup>33</sup> *Galveston Daily News*, Aug. 9, 1878, <http://texashistory.unt.edu/ark:/67531/metaph461094/>.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Brenham Weekly Banner*, Aug. 19, 1880, <http://www.texashistory.unt.edu/ark:/67531/metaph115442>.

<sup>37</sup> *Norton’s Union Intelligencer*, Dec. 10, 1884, <http://www.texashistory.unt.edu/ark:/67531/metaph444264>.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Galveston Daily News*, Oct. 28, 1883, <http://www.texashistory.unt.edu/ark:/67531/metaph463577>.

<sup>40</sup> *Galveston Daily News*, Sept. 23, 1892, <http://www.texashistory.unt.edu/ark:/67531/metaph467690>.



law, reported favorably and the court granted him license to practice in any district, county or inferior court in the state.”<sup>41</sup>

In that same year are the earliest references to another of Brenham’s “colored lawyers,” S.J. Jenkins. By 1894, the appearance in court of this “prominent colored lawyer and politician from Calvert” was deemed newsworthy in and of itself.<sup>42</sup> Jenkins, however, clearly had ambitions that extended far beyond a small town law practice. He was politically active, speaking at numerous Republican meetings and gatherings.<sup>43</sup> In 1892, he made headlines for his efforts to petition Congress to appropriate funds for a study that would gather statistics “showing the progress of the race since their emancipation.”<sup>44</sup> By 1893, the Brenham lawyer was back in the news for his (ultimately unsuccessful) efforts at lobbying for the post of U.S. Minister to Liberia.<sup>45</sup> Jenkins ultimately succeeded in achieving a more modest degree of political patronage, however. By 1898, he had left the Brenham area and become superintendent of the Deaf, Dumb, and Blind Institute for Colored Youth in Austin.<sup>46</sup>

The third member of Brenham’s “second wave” of African-American lawyers, and the one who practiced the longest, was John C. Cain. Cain was in practice in Brenham at least as early as 1888, and possibly earlier. However, early in his legal career, he didn’t foster a particularly positive professional reputation. One April 1888 news article gleefully recounts how “J.C. Cain, the colored lawyer, was thrown out of court on application for a divorce for his client on the grounds of abandonment.”<sup>47</sup> The article goes on to describe how the witnesses Cain called not only couldn’t show which spouse had abandoned the other, but more importantly the witnesses proved more than the petition alleged: namely, that the time period of the abandonment “lacked several months of the three years required by statute.”<sup>48</sup>

Perhaps it was professional lapses like these that led one newspaper wag with a predilection for puns to remark, “Brenham has a colored lawyer named Cain, but does not call him able.”<sup>49</sup> Despite such bad press early in his career, Cain had achieved elder statesman status by the time of his death on January 16, 1909 at the age of sixty-five. His passing was front-page news in the *Brenham Evening Press*, with that newspaper noting his active role in Republican politics for over forty years, including status as “Chairman of the Republican party of the county, a frequent

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<sup>41</sup> Ibid.

<sup>42</sup> *Brenham Daily Banner*, Nov. 14, 1894, <http://www.texashistory.unt.edu/ark:/67531/metaph483276>.

<sup>43</sup> See, for example, *Brenham Daily Banner*, Sept. 27, 1892, <http://texashistory.unt.edu/ark:/67531/metaph485363>.

<sup>44</sup> *Brenham Daily Banner*, June 30, 1892, <http://www.texashistory.unt.edu/ark:/67531/metaph485878>

<sup>45</sup> “For Minister to Liberia.” *Galveston Daily News*, Mar. 16, 1893, <http://www.texashistory.unt.edu/ark:/67531/metaph467978>. For years, this post was referred to as “Minister” rather than “Ambassador.” And Jenkins might have counted himself lucky for not getting the appointment, given the unfortunate tendency for these “Ministers” to die during their tenure.

<sup>46</sup> *Houston Daily Post*, Nov. 1, 1898, <http://www.texashistory.unt.edu/ark:/67531/metaph114554>.

<sup>47</sup> “The City,” *Brenham Daily Banner*, Apr. 4, 1888, <http://texashistory.unt.edu/ark:/67531/metaph486276/m1/4/zoom?q=cain> .

<sup>48</sup> Ibid.

<sup>49</sup> “The State Press,” *Galveston Daily News*, Apr. 11, 1888, <http://www.texashistory.unt.edu/ark:/67531/metaph466748> .

delegate to State Conventions and once to the National Convention."<sup>50</sup> It also observed that Cain "for many years has been the only colored lawyer practicing at the bar here," with "[h]is principal practice consisting of divorce cases."<sup>51</sup>

While the Brenham area flourished as a hub of African-American lawyers for years, by the turn of the twentieth century that status had apparently changed. However, it is likely that few if any black lawyers would have practiced in that area if not for a legal pioneer named A.W. Wilder. Indeed, without trail blazers like A.W. Wilder and W. A. Price to inspire future generations of African-American lawyers in Texas, our profession would have very different appearance indeed.

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<sup>50</sup> "John Cain Dead," *Brenham Evening Press*, Jan. 17, 1909, <http://www.texashistory.unt.edu/ark:/67531/metaph519873>.

<sup>51</sup> *Ibid.*



**CHIEF JUSTICE CAROLYN WRIGHT** *presides over the Fifth District Court of Appeals in Dallas, the largest intermediate appellate court in Texas, and has 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 multi-county election.*



**JOHN G. BROWNING** *is a trial lawyer and shareholder in the Dallas law firm of Passman & Jones, where he handles a wide variety of litigation in state and federal courts. A graduate of Rutgers University and the University of Texas School of Law, he is the author of several books on social media and the law, as well as numerous articles in academic and practitioner-oriented publications. Browning also serves as an adjunct professor at SMU Dedman School of Law and Texas Tech University School of Law, and has received numerous awards for his legal writing.*

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# In Memoriam

## Joseph D. Jamail, Jr., 1925-2015

By Marilyn P. Duncan

**T**he Texas Supreme Court Historical Society lost one of its most enduring friends and supporters with the passing of Joseph D. Jamail, Jr. on December 23.

Mr. Jamail, an eminent Houston trial lawyer and philanthropist, was a charter member of the Society's Fellows. His support of the Society and its programs also extended to the project that produced the groundbreaking history of the Texas Supreme Court in 2013.

"To have an attorney of Joe Jamail's prominence give early support to our book project was instrumental in kickstarting the fundraising effort," said former Society Board President Larry McNeill.



McNeill noted that it was Jamail's close friend Harry Reasoner of Vinson & Elkins who asked Jamail to contribute.

Harry Reasoner recalled that Jamail didn't need persuading. He loved history, revered Chief Justice Jack Pope, and believed it was very important that the history of the Supreme Court of Texas be preserved.

A native of Houston, Joe Jamail returned there to practice law after he graduated from the University of Texas Law School in 1953. Founding his own law office—later called Jamail & Kolius—he built his practice representing plaintiffs in personal injury cases. Among them were a number of product liability cases that led to products being removed permanently from the market, including the prescription drug Parlodel.

Mr. Jamail was best known, however, for representing Pennzoil against Texaco in the oil companies' high-profile legal battle in 1985. The case yielded a verdict of \$10.5 billion for Pennzoil, until recently the largest civil judgment in history.

The *American Bar Association Journal* called Jamail "one of the most successful lawyers in history." He was proclaimed "King of Torts" by the *Washington Post* and *Chicago Tribune* and named "Lawyer of the Century" by *Texas Monthly Magazine* and the California Trial Lawyers Association.





Joe Jamail (right) speaks with author Jim Haley after the January 2013 ceremony to present the Society's new history book to the Texas Supreme Court. Mr. Jamail was one of the major donors to the book project.

Joe Jamail's phenomenal record of success in the courtroom led him to establish, with his wife Lee, a philanthropic foundation that over the years has supported a wide range of programs and organizations. Major among these was his alma mater, the University of Texas at Austin, which he credited with giving him a chance to prove himself and to become a lawyer.

Jamail's name is ubiquitous on the UT Austin campus. His ongoing support for the UT Law School led the university to create the Joseph D. Jamail Center for Legal Research in the Tarlton Law Library, the endowed Joseph D. Jamail Centennial Chair in Law and Advocacy, and the Jamail Center for Clinical Education and Justice Under Law. A statue in his honor is located in the Joe Jamail Pavilion in the Law School.

His presence is also strong on other parts of the campus. An avid UT sports fan, Jamail made significant contributions to the upgrading of the university's athletic facilities over the years. In 1997, the university combined the renaming of the Darrell K Royal-Texas Memorial Stadium with the designation of the football field as Joe Jamail Field. Statues of Coach Royal and Jamail overlook the field. The Olympics-quality Lee and Joe Jamail Texas Swimming Center also honors the Jamails.

Other educational and cultural institutions also benefited from the Jamails' generosity. Among them are the Baylor College of Medicine, Rice University, Texas Southern University, the Museum of Fine Arts, Houston, and Columbia University School of Journalism.

Joe Jamail received numerous honors and awards during his long career. Recent honors include the University of Texas Presidential Citation in 2013, the University of Texas Longhorn Legend Award in 2014, the *Texas Lawyer Magazine* Lifetime Achievement Award in 2014, the Aid to Victims of Domestic Abuse (AVDA) Joseph D. Jamail Award for Justice in 2014, an Honorary Doctor of Humanities in Medicine degree from Baylor College of Medicine in 2015, and induction into the National Football Foundation College Hall of Fame in 2015.

For more information about Joe Jamail's life and accomplishments, see his website at <http://www.joejamail.com/> or his memoir, *Lawyer: My Trials and Jubilations* (<http://www.amazon.com/Lawyer-Jubilations-Joe-D-Jamail/dp/1571688099>)

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# Beck Recognized for Lifetime of Excellence in Advocacy

By Charles B. McFarland

The Texas Association of Civil Trial and Appellate Specialists (TACTAS) named David J. Beck as the 2015 recipient of its Lifetime of Excellence in Advocacy Award. The ceremony was held November 18 in Houston.

Beck is a more-than-deserving recipient. Over a fifty-year career, he has received the highest attainable national honors from every credible source, including Best Lawyers in America, Super Lawyers, Chambers USA, Benchmark Litigation, and others.

As a young lawyer, Beck had the privilege of working with Leon Jaworski at the Houston firm that became Fulbright & Jaworski, one of the largest law firms in the United States. He developed into one of that firm's finest trial lawyers before he left to establish his own firm, Beck, Redden & Secrest, where he has continued to excel in his work for clients.

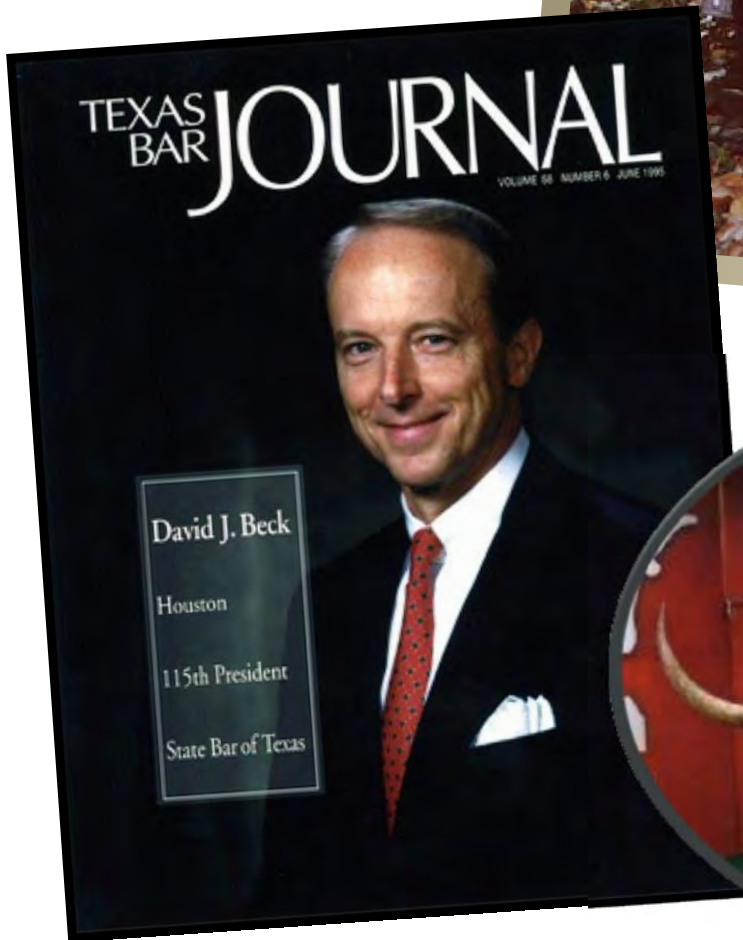
Beck's good work has not been limited to the practice of law, however. He served as President of the State Bar and is Chair of the Fellows of the Texas Supreme Court Historical Society and a Fellow of the American College of Trial Lawyers. The Anti-Defamation League awarded Beck with its Jurisprudence Award, recognizing his exceptional commitment to equality, justice, fairness and community service.

Beck was recognized as an Outstanding Alumnus of the University of Texas Law School in 2000 and in 2015 was confirmed as a Regent of The University of Texas System. He has been recognized for his teaching at the law school and for his legal writing. He has been a



David Beck, left, and Leon Jaworski, right; the *Journal* expresses its gratitude to U.S. District Judge Lee Rosenthal for generously sharing photos of David Beck from the PowerPoint presentation she made at TACTAS's Awards Ceremony.









David Beck, speaking with the audience at the TACTAS Lifetime Achievement Award Ceremony

staunch advocate for the jury trial system and has written and spoken on the issue of the vanishing jury trial.

Although known for his intensity and competitiveness, the hallmark of Beck's career has been his professionalism, all the more impressive when considering the high stakes, bet-the-company cases that he has handled over the years. He has worked with and against the best lawyers of the bar, and colleagues and opposing counsel alike have come away from the experience with the same respect for his legal ability and his integrity.

Beck was presented with the award by TACTAS President Teri Walter, and was introduced by his friend Judge Lee Rosenthal. While Judge Rosenthal touched on many of the attributes that make Beck a great lawyer, she also noted a mischievousness and sense of humor that complement his intensity, making him someone who is not only well respected, but also well liked. Beck displayed this side of his character in graciously accepting the award, eschewing from detailing career accomplishments in favor of humorous anecdotes of judges, lawyers, and lawsuits that he encountered along his storied career.

Beck previously received a lifetime achievement award from the Institute for Energy Law for his achievements in the area of energy litigation.

TACTAS was established in 1986 to promote the availability, accessibility, and quality of the services of civil trial and appellate lawyers to the public. The association is dedicated to promoting high standards in professionalism and to advancing the standards of the legal profession in the area of civil trial and appellate practices. TACTAS membership is limited to attorneys and judges who have obtained board certification in Civil Appellate Law, Civil Trial Law, or Personal Injury Trial Law.

Since 2003, TACTAS has awarded the Lifetime of Excellence in Advocacy Award to thirteen lawyers who have made a lasting impact on the practice of law in the State of Texas. They include such esteemed attorneys as Finis Cowan, Wayne Fisher, Rusty Hardin, Joe Jamail, Dick Miller, Jim Perdue, Sr., Harry Reasoner, and Jim Sales. Beck is a fitting addition to this distinguished group.



**CHARLES MCFARLAND** was a partner at Vinson & Elkins, LLP and Joyce, McFarland & McFarland before forming McFarland PLLC in 2015. In his twenty-year career, he has obtained successful jury verdicts, awards, and judgments all over the State of Texas.

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# Supreme Court Establishes Texas Commission to Expand Civil Services

By Dylan O. Drummond

**B**y order issued November 23, 2015, the Texas Supreme Court created a new eighteen-member Texas Commission to Expand Civil Legal Services, which is charged to explore ways to bring more affordable legal services to small businesses and people who cannot qualify for legal aid.

Society Trustee and former Chief Justice Wallace Jefferson leads the Commission. He is joined by leading lawyers, law school deans and professors, and judges—including Society Trustee Chief Justice Ann Crawford McClure of the El Paso Court of Appeals; Society Fellow Jack Balagia; and former Society Trustee Harry Reasoner.

The Commission will assess efforts in Texas and other states, as well as proposals by the American Bar Association, to find what may work to broaden legal services available to low- and middle-income Texans. The Commission's first report is due to the Court on November 1, 2016.

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# Texas History Podcasts Offer Listeners Another Great Way to Learn about Texas's Past

By Dylan O. Drummond

**A**lthough podcasting as a medium may seem almost heretical to some historical purists, Texas legal historians now have two great resources to learn more about Texas's rich history and legal lineage.

## Wise About Texas

One of our own Trustees, Justice Ken Wise of the Fourteenth Court of Appeals, is the host, producer, and writer of the most authoritative Texas legal history podcast available. He debuted his podcast, *Wise About Texas*, in November 2015 and has already published nine episodes. The topics range from secret, turn-of-the-century boxing matches on sandbars in the Rio Grande to the first capitals of Texas.



Justice Ken Wise



One of the Judge's most fascinating episodes (and one that he will later explore at more length in our pages) examines the first judges of Texas. The comprehensive detail with which he presents the fascinating explorations of Texas legal history come as little surprise to practitioners familiar with his legal opinions. As a result, *Wise About Texas* is a must-listen podcast for any Texas history enthusiast.

You can listen to *Wise About Texas* on its homepage at <http://wiseabouttexas.com> or by subscribing to it on iTunes. You can also follow *Wise About Texas* on Twitter (@WiseAboutTexas), Facebook, Google+, and Pinterest.



## ***Come and Take It***

Another fantastic Texas history podcast is one that has been churning out entertaining and informative episodes since September 2013. *Come and Take It* is a self-described “talk show about Texas by Texans.” The Texans who write, produce, and host the podcast are lifelong friends and amateur historians, all born and raised in Texas—Mike Zolkoski, Scott Elfstrom, and Sean McIver. Each shares their views on Texas’s history, culture, and “just what it means to be Texan.”

Those episodes now number north of one hundred, and wonderfully range in scope from chronicling Texas’s most famous sons (Sam Houston, William Travis, Davy Crockett, Jim Bowie, Deaf Smith, Audie Murphy, and many more) to examining the more modern origin of such cultural icons as *Dazed and Confused*, Stevie Ray Vaughan, Willie Nelson, Dr. Pepper, and Whataburger. Of particular interest to our readership is their excellent episode on the first and ill-fated Chief Justice of the Republic of Texas—James Collinworth.

You can listen to *Come and Take It* on iTunes or on its homepage at <http://brainstaple.com/comeandtakeit>. Follow it as well on Twitter (@texaspodcast).



Together these two outstanding Texas history podcasts offer easily accessible and digestible yet highly informative avenues by which Texans can learn more about their storied and shared history.

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# Jim Haley Shares Supreme Court Stories at the GLO *Save Texas History* Symposium

Story and photos by David A. Furlow

**T**exas Supreme Court Historical Society historian James L. Haley wowed the crowd as he shared colorful stories about the early twentieth century Texas Supreme Court at the Texas General Land Office's Fifth Annual *Save Texas History* symposium on November 14.

Intrigued by the title of Jim's speech, "Carpet Slippers and Flying Inkwells: The Texas Supreme Court a Hundred Years Ago," an audience of two hundred and twenty-five



James Haley shared stories about the early Texas Supreme Court with an appreciative audience.



people filled the auditorium at the Travis Building, twenty-five more than attended last year's *Save Texas History* symposium. Those people came to hear Jim explain, *inter alia*, how Justice Reuben Reid Gaines (1836-1914) changed from everyday shoes to carpet slippers when he arrived at work at each morning, and then pulled on his ordinary shoes at five o'clock each afternoon to signal the end of a judicial working day. In addition to telling tales of the Texas Supreme Court, Jim described this Society's educational efforts, praised the *Journal*, and shared the Society's website address with the people attending the conference.

In 2015, the Society supported the GLO's symposium as a General Level sponsor, for the first time, in fulfillment of the Society's mission of preserving papers, photographs, and artifacts relating to the Texas Supreme Court. The GLO uses symposium revenue to preserve historic maps, records, and land patents. James Harkins, the GLO's Manager of Public Services, Archives and Records Program Management Division, organized the program with the support



and assistance of Commissioner George P. Bush and Mark Lambert, Deputy Director, Archives and Records.

The Society's Administrative Coordinator, Mary Sue Miller, worked with State Bar of Texas Archivist Caitlin Bumford to prepare an excellent three-fold symposium poster. It featured black-and-white photos of important Texas Supreme Court Justices and highlighted significant events in Texas judicial history. I prepared a three-fold poster with color images to showcase the Society's mission, history, and accomplishments. The Society can use both of these posters at historical and judicial conferences in the future.



Society administrator Mary Sue Miller welcomed history-minded guests to the Society's table at the GLO Symposium.

The theme of the GLO's 2015 symposium was "Austin by Night and by Day." Local physician and noted Austin historian Jeff Kerr discussed the "Pig War" waged by Alphonse Dubois de Saligny, the French chargé d'affaires in Texas during the Republic of Texas, against the owner of the Bullock Hotel, Richard Bullock. Kerr told how the war began with a snub, when the French consul refused to pay his bill at Bullock's hotel on Congress Avenue. It quickly escalated into a skirmish when Bullock's hogs devoured the French diplomat's papers and bedroom linens after breaking into the Frenchman's house. When Saligny's servant retaliated by makin' bacon of Bullock's



beast, Bullock thrashed the servant and threatened to do the same to the French chargé d'affaires, who pled diplomatic immunity.

Ali James, the Curator of the Capitol serving on the Texas State Preservation Board, shed fresh light on the story of Texas by chronicling the 160-year history of Texas Capitol Square. She offered a lavish tapestry of events that have enlivened the 22-acre Capitol Square that anchors downtown Austin, the center of Texas law-making since the days of the Republic. Ali's fast-paced, colorful PowerPoint showed how the little frontier river-crossing village of Waterloo evolved into Republic of Texas President Mirabeau B. Lamar's log cabin complex, then grew into a forward-looking rural capital in the nineteenth century, a busy metropolitan area in the twentieth century, and a cutting-edge, fast-growth city of over one million inhabitants today.

Richard Zelade, the Austin author of *Guy Town by Gaslight*, pulled back the curtain to reveal how Austin's warehouse district started out as a whorehouse district. Doug Dukes discussed crime in early Austin in his "Servant Girl Annihilator" presentation. Teri E. Flack analyzed "Texas



Physician/historian Jeff Kerr chronicled Austin's "Pig War" of 1841-42.



Curator of the Capitol Ali James discussed the Capitol as the center of Texas's law-making process.

Civil War and Reconstruction Genealogy Research,” and Kevin Klaus provided fresh insights about German-Texan genealogy.

Dr. David Gracy spoke about “George W. Littlefield in Austin”, and Andres and Juanita Tijerina presented “Austin Slave Narratives.” GLO employees provided tours and showed how surveying shaped Texas land law.

Texas Land Commissioner George P. Bush concluded this fund-raising historical event by appearing for a VIP “Meet and Greet” and reception at the Capitol Visitors Center where Commissioner Bush and GLO officers James Harkins and Mark Lambert introduced speakers to the people who attended the symposium.

The GLO will dedicate \$2,000 of the \$12,000 net the symposium raised to conserve two historic Texas maps. The GLO will allocate the rest of the symposium funds to two activities. One is a joint exhibition (with the Witte Museum and private collectors Carol and Frank Holcomb) of *Mapping Texas: From Frontier to the Lone Star State*. The exhibition will run from April 29 through September 5, 2016 in the Russell Hill Rogers Texas Art Gallery of the Witte Museum in San Antonio. This year’s symposium proceeds will also finance the G.L.O’s seventh annual *Save Texas History* symposium, *The Alamo, Keystone of Texas History: Past, Present and Future*, in San Antonio on Saturday, September 17, 2016.



Texas General Land Office Commissioner George P. Bush and David A. Furlow. Photo provided by Texas General Land Office.

By helping conserve historic maps, fund museum exhibitions, and support educational programs, the Society’s sponsorship of the GLO’s *Save Texas History* symposium helped fulfill the Society’s mission of preserving, protecting, and making accessible records that reflect the history of the Texas Supreme Court and the Texas judiciary.

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# Fall 2015 Board Meeting Featured a Talk by Dr. Frank de la Teja and Tour of the Texas State Cemetery

By David A. Furlow

**O**n October 28, 2015, President Ben Mesches presided over an autumn Board of Trustees meeting filled with special presentations and good news about Society projects. The meeting took place in the Hatton Sumners Conference Room in the Texas Law Center.

In addition to the usual administrative business involved in running the Society, Texas Supreme Court Archivist Tiffany Shropshire joined with Texas Supreme Court Clerk Blake Hawthorne to make a presentation about the status of planning for the Texas Judicial Civics and Education Center. The Center is a project undertaken by the Supreme Court, the Court of Criminal Appeals, and several other partners, including the Society.



(Above) Texas Supreme Court Archivist Tiffany Shropshire, second from right, and Supreme Court Clerk Blake Hawthorne, right, made a presentation about plans for the Texas Judicial Civics and Education Center. Photo by David A. Furlow.

(Below) Meeting attendees and guests enjoyed a hearty lunch after the meeting. Photo by Mary Sue Miller.





The guest speaker after lunch was Texas's first State Historian (2007–2009), Dr. Jesús Francisco "Frank" de la Teja. Speaking on the topic "Union of Coahuila and Texas: A Forced Marriage and an Ugly Divorce," Dr. de la Teja showed that Texas constitutionalism began not at Washington on the Brazos but in the Mexico City of 1824 where Lorenzo de Zavala, later Vice President of the Republic of Texas, envisioned a federal constitutional order similar to that of the United States.

Dr. de la Teja talked about the work of the Constituent Congress, whose members wrote the state constitution of Coahuila and Texas in 1827. He described how his in-depth study of the Constituent Congress led him to rethink how Coahuila's politicians conceived of Texas in the first and second decades of Mexico's Republic. He offered new ways of thinking about the lives Mexican officers and administrators, Tejanos (native Texans of Hispanic origin), and Texians (Stephen F. Austin's Anglo-American settlers) tried to work together when the only constitutions governing Texas were the 1824 Constitution of Mexico and the 1827 Constitution of Coahuila and Texas.

Dr. de la Teja is the Jerome H. and Catherine E. Supple Professor of Southwestern Studies and Regents' Professor of History at Texas State University. He serves as Director of the University's Center for the Study of the Southwest.

Dr. de la Teja permitted Paul Burks, Director of the State Bar Video Department, to record his presentation for posting to the Society's Hemphill Channel. The video can be accessed through the Society's Youtube channel at <https://www.youtube.com/watch?v=ejaVTiaPOms>.

After lunch, David Furlow drove several Society trustees and members to the Texas State Cemetery to receive a special guided tour by Will Irwin, the Cemetery's Senior Historian, photographer, and a co-author of *Texas State Cemetery*.

Mr. Irwin led Board members into the State Cemetery on a cool, crisp, bright autumn day. He first led our group to see gravestones commemorating Texas heroes of World War II while sharing stories of their valor and sacrifice. Then he led the group to the shaded slope on the northern side of the cemetery, the last resting place of Texas governors, justices of the Texas Supreme Court, and veterans of the Texas Revolution.



Dr. Frank de la Teja shared insights about the constitution of Coahuila y Texas after the fall meeting. Photo by Mary Sue Miller.





During the tour, Mr. Irwin pointed out the headstones of Texas Supreme Court Chief Justice John Hemphill, Associate Justice Abner Lipscomb, Associate Justice Royal T. Wheeler, District Judge Robert “Three-Legged Willie” McAlpin, and District Judge Alexander Watkins Terrell, who also served Texas as a general, a statesman, and a president of the Texas State Historical Association.

Mr. Irwin ended an excellent tour by offering to guide members of the Society on future tours, an open invitation for independent study of Texas’s rich history.

The Texas State Cemetery. Photo by David A. Furlow.

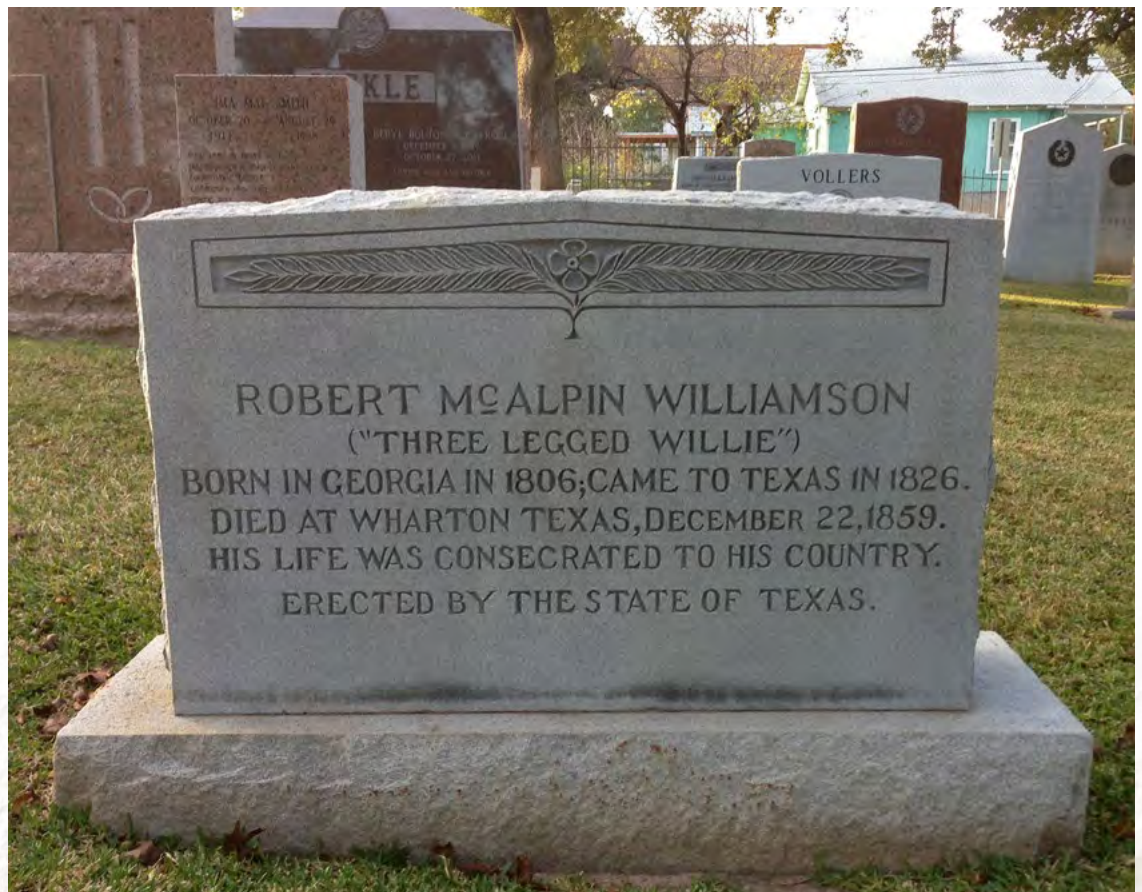


Will Irwin’s Tour of the Texas State Cemetery; (left to right) Dylan Drummond; Justice Elizabeth Lang-Miers; former Justice David Keltner; David Furlow; Cindy Timms; Justice Jeff Brown; Society historian Jim Haley; Texas State Cemetery tour-leader Will Irwin; and Justice Ken Wise. Photo by David Kroll.





Gravestone of Alexander Watkins Terrell, District Court judge, Confederate general, statesman, and president of the Texas State Historical Association. Photo by David A. Furlow.



Gravestone of District Court Judge Robert "Three Legged Willie" McAlpin Williamson. Texas State Cemetery. Photo by David A. Furlow.

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# What Wings They Were: The Case of Emeline

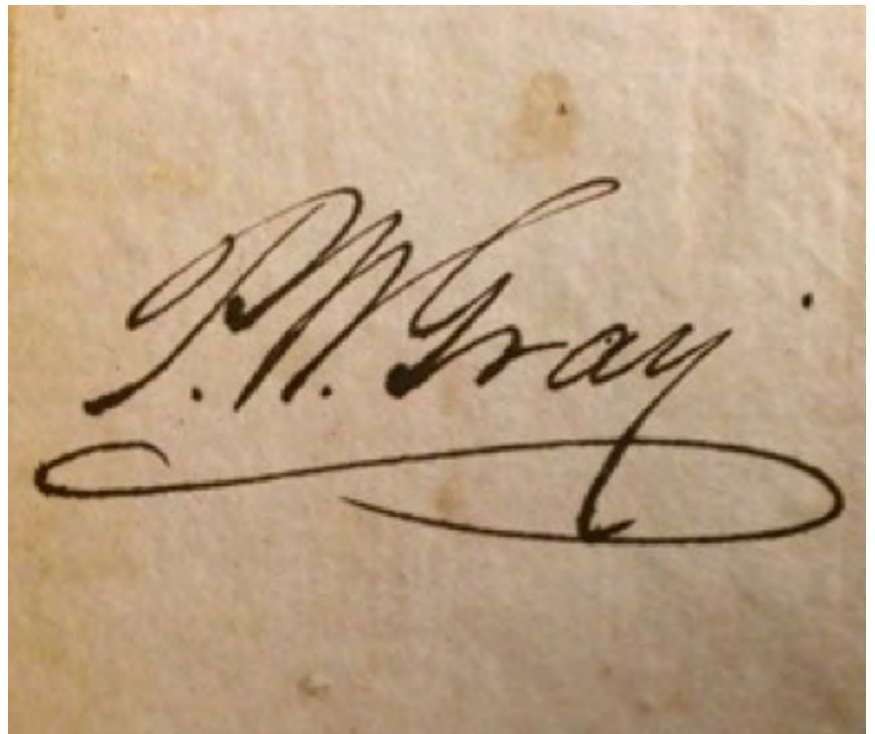
By Laura Gibson

In 1847, the histories of the Houston Bar Association, Baker Botts, and a free woman of color named Emeline became forever intertwined. In 2015, the Houston Grand Opera joined this shared history, and in May 2016, the result will be an opera entitled, "What Wings They Were: The Case of Emeline."

The opera telling Emeline's story will be performed in school auditoriums in the Houston area. It will also be performed as a service-raiser for the Houston Bar Association's Houston Volunteer Lawyers, and as a celebration of the 175-year anniversary of Baker Botts.

In May 1847, a twenty-eight-year-old Houston attorney named Peter Gray filed a lawsuit on behalf of a woman of color born to a freed slave. The lawsuit was captioned *Emeline, a Free Person of Color v. Jesse P. Bolls*. Peter Gray alleged that Emeline was a free woman of color and a citizen of Tennessee, and that Jesse Bolls had wrongfully enslaved her in 1847.

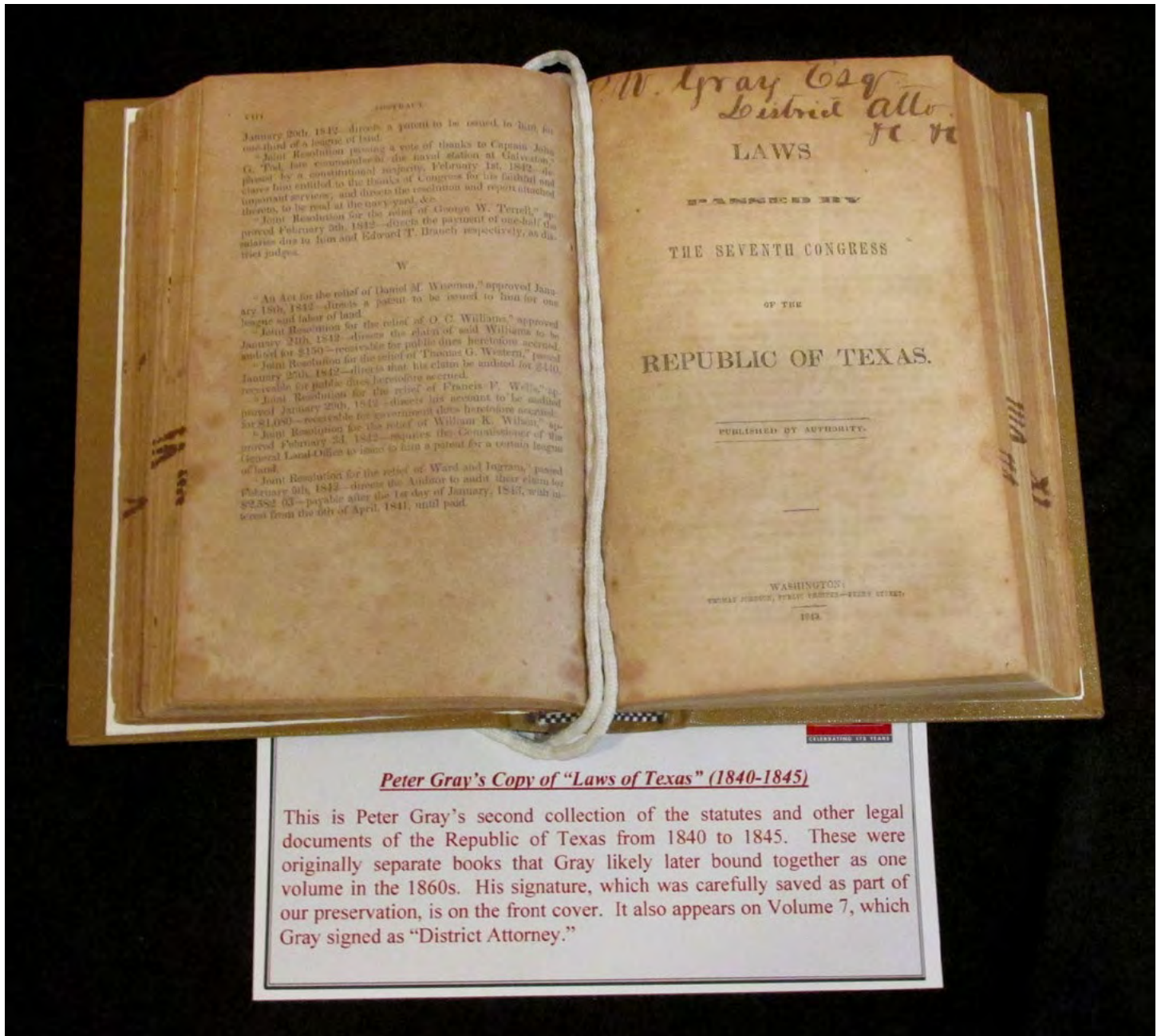
Gray put his career and his own money at risk representing Emeline. The court records reflect that he posted the \$200 restraining order bond against Bolls with his own funds. Gray



The Harris County Courthouse portrait of Peter Gray, later Texas Supreme Court Justice Peter Gray, left, and Gray's signature, right; photos by Bill Kroger

also used the procedures he drafted as the author of the Texas Practice Act, the precursor to the Rules of Civil Procedure, to his client's advantage in propounding interrogatories to witnesses in Tennessee and Louisiana. Gray successfully obtained a jury verdict from a Houston jury of six white men finding that Emeline and her two sons were free and were to remain free.

Emeline's ability to retain her freedom was obviously of great consequence to her and to her children. Without Peter Gray and his pro bono representation, she would most likely have remained a slave until 1865. The magnitude of living those seventeen years as a free woman rather than enduring years of slavery demonstrates how just one person can make a very meaningful difference in the lives of others.



**Peter Gray's Copy of "Laws of Texas" (1840-1845)**

This is Peter Gray's second collection of the statutes and other legal documents of the Republic of Texas from 1840 to 1845. These were originally separate books that Gray likely later bound together as one volume in the 1860s. His signature, which was carefully saved as part of our preservation, is on the front cover. It also appears on Volume 7, which Gray signed as "District Attorney."

Judge Peter Gray's library included *The Laws of Texas (1840-1845)*, Baker Botts Collection; photo by David A. Furlow



6<sup>TH</sup> FLOOR  
*Wings They Were:  
The Case of Emeline*  
Sing-Through  
REHEARSAL ROOM GOCKLEY



Left to right: Actors Brian Yeakley (The Figure/Jesse Bolls/Dr. Seip), Gwendolyn Alfred (Emeline/Lucy), and Christopher Besch (Peter Gray) appear in a rehearsal for Houston Grand Opera's production of *Emeline*. Both photos by Laura Gibson

Peter Gray continued his successful career as a lawyer and judge, and became the first president of the Houston Bar Association in 1870. He also founded the law firm that 175 years later would be known as Baker Botts LLP. In early 1874, he served briefly on the Texas Supreme Court before resigning due to illness. He died in October 1874 at the age of fifty-five.

The story of Emeline languished in the aging case files of the Harris County courts for years until Judge Mark Davidson began working with the District Clerk's Document Preservation Project to save these important files. He found the fascinating story of Emeline and her attorney, Peter Gray, and wrote about the case for the HBA's magazine, *The Houston Lawyer*.

In commemorating the 175th anniversary of Baker Botts, it seemed fitting to highlight the story of one of the firm's founders, and to contribute to the community through supporting pro bono legal services. Baker Botts graciously agreed to commission the cost of the opera, which will be performed in May 2016 in conjunction with Law Day. Performances on May 3 and May 4 will be held at the 1910 Courthouse.. Those events will run from 6:00 to 9:00 p.m. and will



include a reception and performance. Priority ticket sales will be given to Fellows of the Houston Bar Foundation, the charitable arm of the HBA. On May 5, the opera will be performed for the lawyers of Baker Botts and firm guests.

As a result of the HBA's partnership with Communities in Schools, we have also arranged for the opera to be performed in Houston area schools, including five middle schools and four high schools. Prior to the performances, a member of the HBA will tell the story of Peter Gray's pro bono representation of Emeline. It will then be followed by an opera performed by three talented young artists—one of whom looks remarkably similar to Peter Gray,—who not only tell the story, but introduce young people to a musical genre with which they may not be familiar. Following the performances, students will be given an opportunity to ask questions.

Through the story of Peter Gray's role in securing justice for Emeline, we hope to continue to motivate lawyers to engage in pro bono activities on behalf of those who cannot afford access to justice, while at the same time teaching students the important lesson that they too can make a difference in the lives of others.



**LAURA GIBSON** is the 2015-2016 President of the Houston Bar Association. She examined Peter Gray's trial of the Emeline case last year in "Peter Gray: The Difference One Person Can Make," Texas Supreme Court Historical Society Journal 4, no. 4 (Summer 2015): 25-34, <http://texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Summer%202015.pdf>. Laura wishes to thank Houston Bar Association Communications Director Tara Shockley for her assistance in preparing this article.

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# This March, the Society Examines the Restatement and Reformation of Texas Law

By David A. Furlow

On Thursday, March 3, 2016, at the Texas State Historical Association's Annual Meeting in Irving, the Texas Supreme Court Historical Society will present a prestigious panel program that examines, in appropriate depth, the historical process of restating and reforming law in Texas. The program is listed as "The Restatement (Second) of Torts and the Revolution in Texas Asbestos Liability Law" in the Texas State Historical Association's Annual Meeting program brochures. (A link to the program appears below.)

Society President Ben L. Mesches will preside over the panel and introduce the speakers, just as Marie Yeates did in 2015 and Doug Alexander did in 2014.



The Hon. First Court of Appeals  
Justice Evelyn Keyes

The Honorable Evelyn Keyes, Justice on Texas's First Court of Appeals in Houston, will present the paper, "The American Law Institute: Stating, Restating, and Shaping American Law since 1923." Judge Keyes can speak from her own ALI experience, since she is a member and an advisor to the ALI Government Ethics Project (she also serves on the National Advisory Council of the American Judicature Society and is a member of its Ethics Committee).

Appointed to the bench by Governor Rick Perry in 2002, Justice Keyes was elected in November 2002 and reelected in 2004 and 2010. She has a J.D. degree from the University of Houston Law Center, and earned an M.A. and Ph.D. in philosophy from Rice University and an M.A. and Ph.D. in English from the University of Texas. Justice Keyes has published numerous law review articles on judicial topics, including "Judicial Strategy and Legal Reason" (*Indiana Law Review*, 2011), and "The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent" (*Georgetown Journal of Law and Public Policy*, 2011).

Lamar University History Professor Robert J. Robertson will present the paper, "Clarence Borel v. Fiberboard Paper Products Corporation, et al. (1973), a Second Look at the Landmark Case in Asbestos Litigation." Robertson has published two books: *Her Majesty's Texans: Two English Immigrants in Reconstruction Texas* (College Station: Texas A&M University

Press, 1998), and *Fair Ways: How Six Black Golfers Won Civil Rights in Beaumont, Texas* (College Station: Texas A&M University Press, 2005). He has published articles about Beaumont on the eve of the Civil War; French homesteaders in the Texas Panhandle; Congressman Jack Brooks and the Civil Rights Act of 1964; and U.S. District Court Judge Joe Fisher and the *Borel* asbestos case, in various journals, including the *Texas Gulf Historical and Biographical Record*, the *East Texas Historical Journal*, the *West Texas Historical Journal*, *Military History of the West*, and the *Massachusetts Historical Review*.



Lamar University History  
Professor Robert J.  
Robertson

The Honorable Mark Davidson, former Eleventh District Court Judge and now Multi-District Litigation Judge of all asbestos cases in Texas, will serve as the panel's commentator. Judge Davidson is one of Houston's most frequently-published legal historians and most requested speakers. He has played a vital role in preserving historic county records throughout Texas, and serves on the Texas Supreme Court Task Force on Document Preservation.



The Hon. Mark Davidson, Multi-District Litigation Panel Judge

As this Society's Executive Director Pat Nester has attested in earlier issues of the *Journal*, TSHA's annual meetings are fascinating events. Interesting speakers, compelling panel programs, and visits to historical sites and museums fill the days and nights. The panel programs the Society jointly sponsors with TSHA have been filling conference rooms and generating greater attention in recent years.

If you're interested in the history of Texas, the Texas Supreme Court, and the Texas judiciary, you should attend TSHA's 2016 Annual Meeting.

Program: <https://tshasecurepay.com/annual-meeting/event-information.php>

Registration: <https://tshasecurepay.com/annual-meeting/register.php>

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# Update: Texas State Library and Archives' Texas Digital Archive Continues to Grow

By David A. Furlow

**T**he Texas State Library and Archives Commission (TSLAC) is expanding its new Texas Digital Archive (TDA) as part of its mission to “safeguard significant resources, provide information services that inspire and support research, education and reading, and enhance the capacity for achievement of current and future generations.” TDA has created an institutional infrastructure to manage, preserve, and provide access to records of Texas state government agencies in a variety of digital formats.”

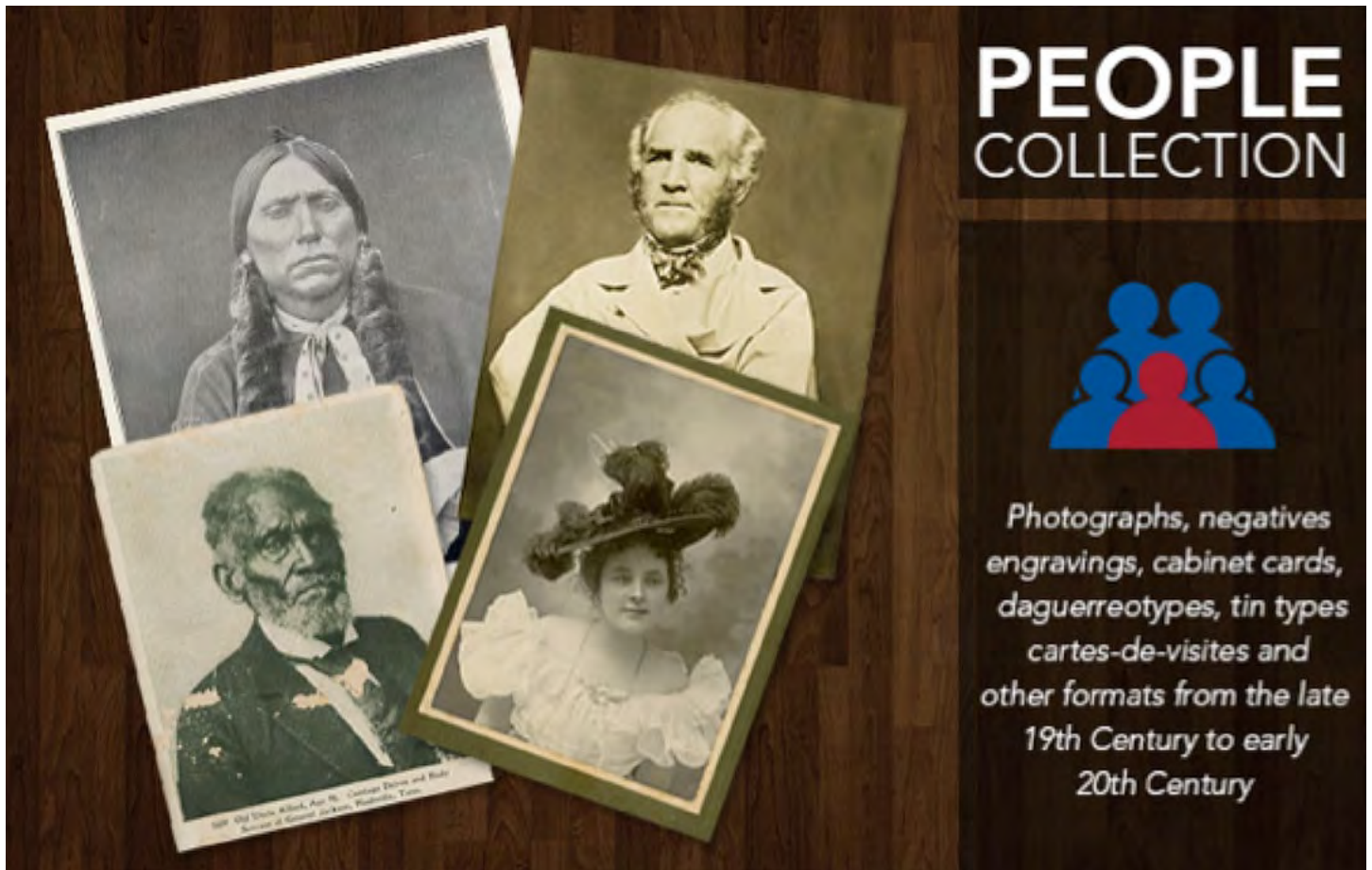
TSLAC invites its “virtual visitors” to explore their heritage through digitized prints, photographs, documents, and manuscripts made available through a \$706,593 appropriation for the 2016-2017 biennium from the 84<sup>th</sup> legislative session. TDA’s “Places Collection,” for example, offers visitors an opportunity to see Texas evolve before their eyes.



## PLACES COLLECTION



*Photographs of  
iconic Texas buildings,  
street scenes, homes,  
panoramic views,  
historic sites, monuments,  
events, scenic paintings  
and more*



And TDA's "People Collection" is a treasure trove for biographers, historians, essayists, and students of politics.



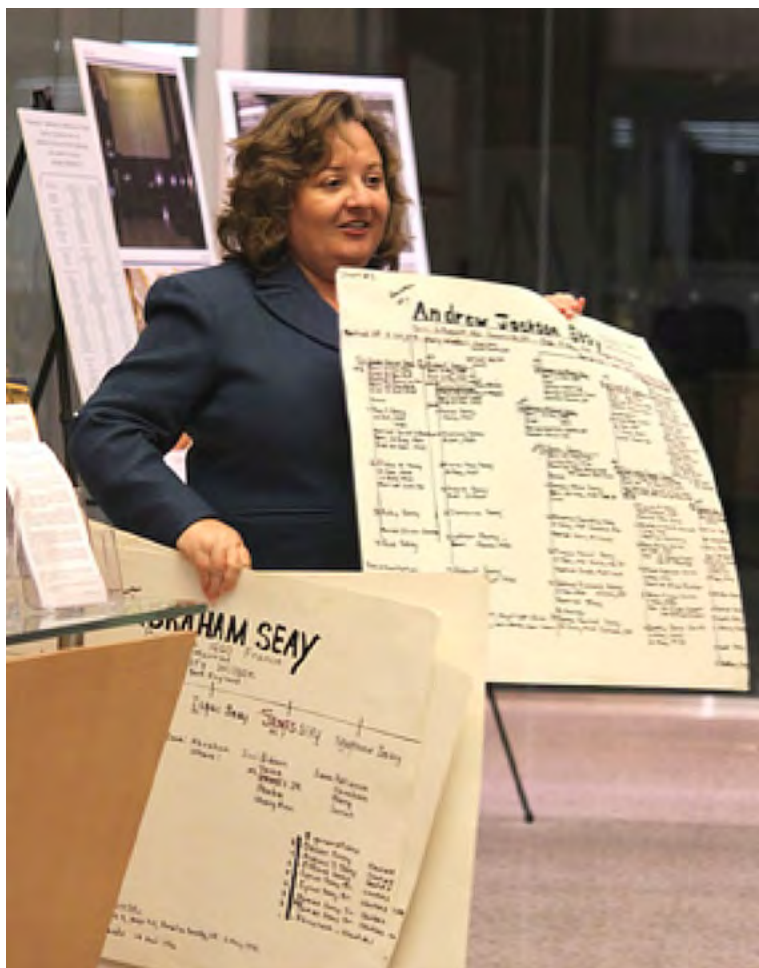
Texas State Librarian  
Mark Smith

"We thank the Texas Legislature for making funds available to finally launch the Texas Digital Archive," commented Mark Smith, Director and Librarian of the Texas State Library and Archives Commission. "This project will ensure that these materials of permanent value to the state of Texas will be preserved, maintained, and made available to Texans now and for generations to come."

TSLAC's launch of the TDA comes as the result of the transfer of over six terabytes of electronic records from the administration of former Texas governor Rick Perry in early 2015. These records, along with select images from TSLAC's historic prints and photographs collections, make up the foundation of an ever-growing digital research resource for all ages and for generations to come.

In the coming months, TSLAC archivists will add more than 150,000 files created during its decade-long digitization program, including over 18 terabytes of digital audio files from the Texas Senate that date from 1972 to 2006.





Jelain Chubb, Texas State Archivist, discussed family genealogy project at the Texas State Library and Archives Commission's *Genealogy After Dark* Program on December 3, 2015. Photo courtesy of TSLAC website, <https://www.tsl.texas.gov/news/afterdark/index.html>

“Long-term preservation of electronic data is a challenge,” explained Texas State Archivist Jelain Chubb, “especially as the hardware and software used to create digital records change so frequently. Fortunately, the protocols and tools we have in the TDA will help us ensure authenticity, integrity and accessibility of digital records over time.”

TSLAC will begin working with select state agencies to acquire, preserve, and make accessible their electronic records and continue to develop the TDA in 2016. The archive is built on the Preservica preservation system and uses Amazon Web Service to access the system in the Amazon Government cloud. This approach offers heightened back-end security for sensitive and restricted records while providing access to both archival staff and researchers.

Justices, judges, lawyers, historians, students, and members of the public can learn more about the Texas Digital Archive by visiting [tsl.texas.gov/texasdigitalarchive](http://tsl.texas.gov/texasdigitalarchive) and by exploring the growing collection of archival materials vital to the story of the Lone Star State.

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# The Houston Bar Association Teach Texas Committee Seeks Volunteers to Teach the *Taming Texas* Project

By Warren W. Harris

**T**he Houston Bar Association's Teach Texas Committee is now recruiting judges and attorneys to participate in a project organized by the Texas Supreme Court Historical Society and the State Bar of Texas Law-Related Education Department, based on teaching the book, *Taming Texas: How Law and Order Came to the Lone Star State* by James L. Haley and Marilyn P. Duncan.



The project focuses on seventh-grade Texas history classes, with the judges and attorneys teaching students how the state's court system fits into the larger picture of Texas history, from the days of Stephen F. Austin to the present.

Organized by Houston Bar Association President Laura Gibson, the Committee's Co-Chairs are the Hon. Brett Busby, Justice of the Fourteenth Court of Appeals; the Hon. Erin Lunceford, Judge of the 61st Civil District Court of Harris County, and David A. Furlow, Executive Editor of the *Texas Supreme Court Historical Society Journal*.

The Teach Texas Committee is now seeking lawyers and judges to train and team together to teach lessons from the Society's new book on a pilot project basis in middle schools in the Houston area between February 22 and March 11, 2016. Volunteers must be members of the HBA. Volunteers should fill out the form on the following page and send it to Houston Bar Association Director of Education Ashley Steinger at [ashley@hba.org](mailto:ashley@hba.org), or by calling her at 713.759.1133.

# You Are Invited to Participate in Teach Texas

February 22 - March 11, 2016

Harris County Middle Schools



Help teach Middle Schoolers about the importance of law in the founding and development of our state, using resources developed by Texas Supreme Court Historical Society with the assistance of the State Bar of Texas law related education department.

**Volunteers needed:**

**2 teams of Judges and Attorneys to teach two 1 hour sessions.**

To volunteer, fill out the information below and return to Ashley Steininger at [ashleyg@hba.org](mailto:ashleyg@hba.org)

Name: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_ Email: \_\_\_\_\_

For more information, contact Ashley Steininger at [ashleyg@hba.org](mailto:ashleyg@hba.org) or call 713-759-1133.

# Calendar of Events

## ***Society-sponsored events (in dark red) and other events of historical interest***

Jan. – Feb. 16, 2016

**The Star of the Republic Museum at Washington on the Brazos State Park will continue its current exhibit, *Enduring Spirit: African Americans in Nineteenth Century Texas*.** Artifacts include typical documents of the period such as slave records, freedmen contracts, Wilson Pottery stoneware, the intricate Pine Burr quilt pattern, and an oath of allegiance. See <http://www.starmuseum.org/>.

Feb. 1 – Dec. 31, 2016

**The Bryan Museum's galleries provide viewing of artifacts and records from all periods of Texas and Southwestern history.** Museum founder J.P Bryan, a descendant of Moses Austin (Stephen F. Austin's father), is a former President of the Texas State Historical Association. Located at 1315 21<sup>st</sup> Street, Galveston, Texas 77050, (409) 632-7685, the museum houses 70,000 items, spanning 12,000 years, including ancient Native American cultural artifacts, German, French, Spanish and English documents, saddles, spurs, firearms, rare maps and books, fine art, religious and folk art, portraits, documents and a diorama depicting the Battle of San Jacinto featuring over 1,200 hand painted figures and historically accurate terrain.

Jan. – March 27, 2016

**The Austin History Center hosts the exhibition, *Making the Grade: Austin's First Public Schools from September 16, 2015 – March 27, 2016*.** This exhibition explores the difficulties Austin faced in establishing a free public school system in the 1870s, and what life was like for students and teachers in the early years of the Austin Public Schools—long before the creation of the Austin Independent School District in the 1950s. See <http://library.austintexas.gov/ahc/current-exhibits-17946>.

Jan. – June 2016

**The exhibition *La Belle: The Ship That Changed History*, re-opens in the Bob Bullock Museum of Texas History's first floor Texas History Gallery.** The reassembled hull of the French ship *La Belle* that sank in 1686 in Matagorda Bay will remain open for viewing. See <http://www.thestoryoftexas.com/la-belle/the-exhibit>.



Jan. – March 18, 2016

**The Texas State Library and Archives will continue displaying its in-lobby exhibition *Evolution of the Texas Rangers, 1836-1920*.** TSLAC's lobby is at 1201 Brazos Street in Austin and is open Mon.–Fri 8 a.m. to 5 p.m. The early photos, letters, and government records of Captain Jack Hays, Captain Ben McCulloch, and Captain James H. Callaghan offer new insights into the myths, realities, and impact of the Texas Rangers in Texas and beyond. See <https://www.tsl.texas.gov/ranger-exhibit.html>.

Feb. 2, 2016

**The Texas Supreme Court Historical Society presents “Taming Texas: Teaching the Rule of Law in Texas Schools” at the *Energizing Texas History Conference*.** A representative of the Texas Supreme Court Historical Society will speak at this conference sponsored by the Texas State Historical Association and the Region 10 Education Service Center at 400 E. Spring Valley, Richardson, Texas 75081. This event, for 4th and 7th grade Texas history educators, will focus on the history of Texas from 1682 to the present.

Feb. 22 – March 11, 2016

**Society Fellow Warren Harris oversees the rollout of the Society's and Houston Bar Association's pilot program to introduce the Texas Supreme Court Historical Society's *Taming Texas: How Law and Order Came to the Lone Star State* series of seventh grade textbooks to Houston area schools.** Coauthored by James Haley and Marilyn P. Duncan, the book is the first of its kind to be offered by a state supreme court historical society.

Houston Bar Association Teach Texas Committee Co-Chairs the Hon. Fourteenth Court of Appeals Justice Brett Busby, Harris County District Court Judge Erin Lunceford and Texas Supreme Court Historical Society Journal Executive Editor David A. Furlow will assist Warren and David Beck, Chair of the Society's Fellows, to make the program a success. Anyone interested in volunteering should contact HBA Education Director Ashley Steinger at [ashley@hba.org](mailto:ashley@hba.org) or at 713.759.1133.

March 3, 2016,  
2:00-3:00 p.m.

**The Texas Supreme Court Historical Society presents the legal history program, *The Restatement (Second) of Torts and the Revolution in Texas Asbestos Liability Law*, at the Texas State Historical Association/TSHA's 120th Annual Meeting.** The Society is cosponsoring the event with TSHA as Session 13, commencing at 2 p.m. in the Andaman Room of the Omni Mandalay Hotel at 221 E. Las Colinas Blvd, Irving, Texas 75039, (972) 556-0800. See full story on pages 102-103.

March 5, 2016  
11:30 a.m.-1:00 p.m.

**David A. Furlow will present the program “Magna Carta’s Charter of Freedom in its 800<sup>th</sup> Year”** at the Annual Parliament of the National Society Magna Charta Dames and Barons, Texas Division, at the Houston Marriott Westchase Hotel, 2900 Briarpark Drive, Houston, Texas 77042, (713) 978-7400.

March 19, 2016

**The National Society of the Daughters of the American Revolution will present the NSDAR National Historic Preservation Medal of Honor to long-time Society trustee Harris County District Court Judge (ret.) and MDL Asbestosis Judge Mark Davidson.** The award ceremony will occur during the dinner banquet of the Daughters of the American Revolution Texas Society’s 117th State Conference at the Houston Hyatt Regency Hotel, 1200 Louisiana Street, Houston, 77002. A reception will begin at 6:30 p.m., followed by a color guard processional, a banquet at 7:00 p.m., and an award ceremony later that night. This event is formal attire.

March 19, 2016,  
2:00-5:00 p.m.

**Archaeologists and historians at the San Felipe de Austin State Historic Site will host an Authors’ Appearance to highlight new books about the Republic of Texas.** This program will include discussion of life among judges such as “Three Legged Willie” Robert McAlpin Williamson and lawyers Stephen F. Austin, Sam Houston, and William B. Travis at San Felipe de Austin.

Lee White, coauthor of *Joe, the Slave who Became an Alamo Legend*, and Jim Woodrick, author of *Cannons of the Texas Revolution*, will deliver short programs about their respective works. A book-signing will follow from roughly 4:00 to 5:00 p.m. For more information, please visit [www.visitsanfelipedeaustin.com](http://www.visitsanfelipedeaustin.com).

March 31, 2016  
3:30-4:30 p.m.

**Texas Supreme Court Historical Society Journal Executive Editor David A. Furlow will conduct a one-hour special tour of the Bayou Bend Collection and Gardens** with a full-time Bayou Bend guide for trustees and members attending the next day’s Texas Supreme Court Historical Society’s Spring Meeting. The tour will begin at Bayou Bend’s Visitor’s Center, 6003 Memorial Drive, Houston, Texas 77007. For additional information, please contact David A. Furlow at [dafurlow@gmail.com](mailto:dafurlow@gmail.com) or 713.202.3931.

April 1, 2016  
10:00 a.m.-1:00 p.m.

**Spring Meeting, Texas Supreme Court Historical Society Board of Trustees and Members.** Baker Botts Law Firm, Houston Office, One Shell Plaza, 910 Louisiana Street, Houston, Texas 77002-4995  
Luncheon Speaker: Bill Kroger, Practice Group Chair of Baker Botts, LLP’s Energy Litigation (firm-wide) and a curator of the Baker

Botts archival collection stretching back over its 175-year history, will discuss “The History of Texas Oil and Gas Law.” Mr. Kroger’s address will include many of the topics presented in the article he coauthored with Jason Newman, Ben Sweet, and Justin Lipe for this issue of this Journal: “How Texas Law Promoted Shale Play Development.”

Guests may park across the street from One Shell Plaza in the surface lot at Louisiana and McKinney Streets (directly across the street from One Shell Plaza) for \$30 a day, the 811 Louisiana garage (catty corner from One Shell Plaza) for \$18 a day, or the Houston Hobby Center Garage at 800 Bagby Street #300 (two blocks away) for \$10 a day.

April 6-8, 2016

**Texas Association of Museums annual meeting in Corpus Christi, Texas.** <http://texasmuseums.org/annual-meeting.html>

April 8-9, 2016

**Annual Meeting of the West Texas Historical Association in Abilene.** <http://swco.ttu.edu/WestTexas/WTHApapers.html>.

April 12, 2016

**David Furlow, Executive Editor of *The Texas Supreme Court Historical Society Journal*, will present the C.L.E. program, “Jurisprudence of the Republic of Texas’s Supreme Court: Castilian, Hispanic, and Tejano Contributions”** before the El Paso County Bar Association from noon to 1:00 p.m. at the El Paso Club. Further details to be announced. The speech will focus on Castilian, Hispanic and Tejano Contributions to Texas Law during a 45-minute, noontime CLE program.

April 15, 2016  
11:00 a.m.-1:00 p.m.

**The University of Texas School of Law’s Center for Women in the Law will present its 2016 Biennial Award Luncheon**, with Keynote Speakers Donna Brazil and Mary Matalin at the JW Marriott Austin, culminating in the Center’s award of its prestigious Hortense Sparks Ward Courageous Leader Award to Michele Coleman Mayes, the Vice President, General Counsel and Secretary of the New York Public Library. See <https://law.utexas.edu/cwil/2016-awards-luncheon/>

May 3-4, 2016

**The Houston Grand Opera presents “What Wings They Were: The Case of Emeline,” an opera that tells the story of Houston attorney, and later Texas Supreme Court Justice, Peter Gray’s vindication of the freedom of Emeline, a “free woman of color” wrongfully held as a slave.** Performances on May 3 and May 4 will run from 6:00 to 9:00 p.m. at the 1910 Courthouse as a service-raiser for the Houston Bar Association’s Houston Volunteer Lawyers. Priority ticket sales will be given to Fellows of the Houston



Bar Foundation, the charitable arm of the HBA. On May 5, the opera will be performed for the lawyers of Baker Botts and firm guests. (See full story on pages 98-101.)

May 1-31, 2016

**The Harris County Law Library explores *Miranda v. State of Arizona*, 384 U.S. 436 (1966) with an online exhibition and display of books and records.** San Francisco Police Department Inspector Harold Francis “Dirty Harry” Callahan had a hard time appreciating the *Miranda* warnings. So Harris County Law Library Director Mariann Sears and Assistant Director Joseph Lawson are exploring the implications of this case in ***Miranda v. Arizona: 50 Years Later***. The Law Library will also showcase materials from its collection related to the 2016 ABA Law Day theme, ***Miranda: More Than Words***. The Library’s 100-year history appears on its webpages: [www.harriscountylawlibrary.org/100](http://www.harriscountylawlibrary.org/100) and <http://www.harriscountylawlibrary.org/centennial-timeline>.

June 16-17, 2016

**State Bar of Texas Annual Meeting in Fort Worth, Texas.** Registration and all CLE programs will take place at the Fort Worth Convention Center, 1201 Houston St., Fort Worth, Texas 76102. Phone: (817) 392-6338. Additional information can be obtained through an email to: [annualmeeting@texasbar.com](mailto:annualmeeting@texasbar.com).

The conference hotel is the Omni Fort Worth, 1300 Houston St., Fort Worth, Texas 76102, (817) 535-6664. The Omni Fort Worth offers valet parking for \$25.00 per day per vehicle. The garage entrance is on 11th Street between Houston and Throckmorton (one block north of the hotel). Additional parking is available at the Fort Worth Convention Center for \$15.00 per day.

June 16, 2016,  
10:00-11:00 a.m.

**Reenactment of Oral Argument before the All-Woman Supreme Court: *Johnson v. Darr*, presented by the Fellows of the Texas Supreme Court Historical Society.** The “All-Woman Court” is one of the Texas Supreme Court’s most historic cases, *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925). The reenactment will occur during the State Bar of Texas Annual Meeting in Fort Worth, Texas. See information above.

June 1-30, 2016

**The Harris County Law Library presents “The Founding Fathers’ Magna Carta.”** The Law Library will display its 1763 print of Magna Carta in an exhibit focusing on the importance of the iconic document to America’s founding fathers.

Sept. 9, 2016

**The Texas Supreme Court Historical Society holds its Annual John Hemphill Dinner at the Four Seasons Hotel in Austin. The speaker will be former U.S. Solicitor General Paul Clement.** More details will be announced in the Spring and Summer issues of the *Journal*.

Sept. 17, 2016

**The Texas General Land Office will conduct its 7<sup>th</sup> Annual Save Texas History Symposium, "The Alamo: Keystone of Texas History: Past, Present and Future,"** from 8-5 p.m., with a reception and meet and greet from 6:30-9 pm. See <http://www.glo.texas.gov/save-texas-history/symposium>.

Sept. 30, 2016 –  
January 2, 2017

**The Bob Bullock Texas State History Museum in Austin hosts the exhibition, "American Flags."** Displaying early and rare examples of textiles that have the power to stir the soul, *American Flags* includes flags, original artwork, and related memorabilia from one of the most preeminent collections in the world offering an opportunity to explore the history of one of the country's most recognized symbols. The museum is located at 1800 Congress Ave. Austin, Texas 78701, (512) 936-8746.

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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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# 2015-16 Membership Upgrades

The following Society members have moved to a higher membership category during the 2015-16 membership year.

## **GREENHILL FELLOWS**

Marcy and Sam Greer

Jeffrey L. Oldham

Hon. Harriet O'Neill and Kerry Cammack

Peter S. Wahby

## **TRUSTEE**

Hon. Jeff Brown

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# 2015-16 New Member List

The Society has added 40 new members during the 2015-16 membership year. Among them are seventeen Law Clerks for the Court (\*) who received a complimentary membership.

## **GREENHILL FELLOWS**

Elaine Block  
Thomas Hetherington

## **TRUSTEES**

Hon. Elizabeth Lang-Miers

## **CONTRIBUTING**

Paul Dodson  
Amy Saberian  
Robert A. Shivers

## **REGULAR**

Ben Aguiñaga\*  
Abhishek Banerjee-Shukla\*  
Connor Best\*  
Timothy "Tim" Brown  
Hon. Reynolds N. Cate (Ret.)  
Clay Coalson  
Riley Daniels  
Michael S. Duncan\*  
Cynthia D. Ericson  
Eric C. Farrar  
Emily Fitzgerald\*

Benjamin Geslison  
Garret Gibson  
Brittany Greger\*  
Sylinda Harper  
Jefferson Harwell\*  
Jaclyn Joseph\*  
Susan Kidwell  
Matthew J. Kita  
Brytne Kitchin\*  
Christopher Knight\*  
David Kroll  
Lawrence R. Lassiter

Autumn Hamit Patterson\*  
Connie Pfeiffer  
Kelly Rodgers  
Lauren Scroggs\*  
Joshua S. Smith\*  
Ellen Springer\*  
Frank E. Stevenson  
Natalie Thompson\*  
Scott Toland\*  
Mark Walters  
Jessica Witte\*

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# Membership Benefits & Application

## **Hemphill Fellow \$5,000**

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

## **Greenhill Fellow \$2,500**

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

## **Trustee Membership \$1,000**

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

## **Patron Membership \$500**

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

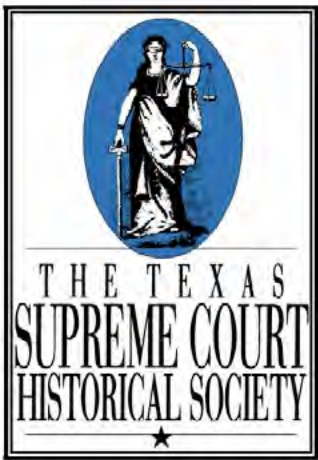
## **Contributing Membership \$100**

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

## **Regular Membership \$50**

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





## Membership Application

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

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

Join online at <http://www.texascourthistory.org/Registration/Default.aspx?PageID=100&EventID=1>

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Firm/Court \_\_\_\_\_

Building \_\_\_\_\_

Address \_\_\_\_\_ Suite \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone (\_\_\_\_\_) \_\_\_\_\_

Email (required for eJournal delivery) \_\_\_\_\_

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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       |   |

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