



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Fall 2013 Vol. 3, No. 1 General Editor Lynne Liberato Executive Editor David Furlow

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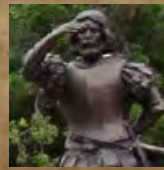
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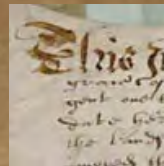
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Justice Hightower

Book Review: Lone Star Law: A Legal History of Texas by Michael Ariens

Reviewed by S. Shawn Stephens

Ariens has produced a surprisingly readable story that can be enjoyed by lawyers and nonlawyers alike.
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A Texas-sized story!

News & Announcements

Chief Justice Jefferson Leaves the Court: Justice Hecht is Appointed Chief Justice

During his nine-year tenure, Jefferson worked to improve the Court's efficiency and transparency. As successor, Hecht will continue as the longest-serving justice on the Texas Supreme Court.
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Chief Justice Jefferson

Justice Jeff Brown Appointed to the Texas Supreme Court

Gov. Perry called Justice Brown "an outstanding and accomplished jurist whose highest priority is preservation of the rule of law."
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Justice Jeff Brown

Pope Common Law Judge Book Now in Press

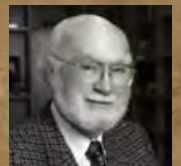
The Society's 450-page volume brings together essays, lectures, articles, and opinions by the esteemed former chief justice.
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Chief Justice Pope

Texas Appellate Hall of Fame Inducts Hon. John R. Brown

The former Chief Judge of the U.S. Court of Appeals for the Fifth Circuit was posthumously inducted on September 12, 2013.
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Hon. John R. Brown

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Douglas W. Alexander

A New Year and a *New Era for the Society*

This promises to be an exciting year of transition for the Society.

First, instead of a full-time Executive Director, we will have a part-time one. Pursuant to a Services Agreement that the Society executed with the State Bar of Texas, **Pat Nester**, who for years has served as Director of the Professional Development Division of the Bar, will simultaneously serve as Executive Director of the Society. He will be assisted by **Mary Sue Miller** as Administrative Coordinator. This extraordinary team will provide efficient leadership for the Society at a substantial cost savings. Hats off to Immediate Past President **Warren Harris** for spearheading this leadership transition.

Second, we have moved. For years, through the generosity of the Texas Supreme Court, the Society was housed without charge in the Supreme Court building. But the Court finally needed the space, so the Society agreed to give it back. Happily, Pat Nester found the Society a new home, without charge, in the Texas Law Center, home of the State Bar. So, within weeks of assuming the helm, Pat saved the Society in rent more than the expense of the Services Agreement under which he serves. Hats off to Pat!

Third, the costs savings from the leadership transition, combined with increased revenue from a record-breaking Hemphill Dinner and extraordinary contributions from the Fellows, have provided the Society with the financial footing necessary to fund a variety of existing and special projects. Hats off to **David Beck** for his continuing phenomenal leadership of the Fellows!

Pope Book Project: Under the guidance of **Larry McNeill** and **Marilyn Duncan**, we went to press this month with *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas*. We will wait until January to officially release the book, but Chief Justice Pope will receive his copy immediately.

Oral Histories: **Bill Chriss** has graciously agreed to perform, without charge, oral histories of a number of former Justices who played important roles in Texas judicial history.

E-Journal: Under the continuing leadership of **David Furlow** and **Lynne Liberato**, the Society's E-Journal is attracting and building a rich reservoir of scholarly works.

Website: Technophiles **Dylan Drummond** and **Don Cruse** are leading an initiative to substantially upgrade the Society's website, and make it a useful tool for historical research.

History Education: Leveraging the successful release during 2013 of **James Haley's** *The Texas Supreme Court: A Narrative History, 1836-1986*, **Warren Harris** will be shepherding an initiative to bring education about the history of the Texas judicial system into Texas classrooms.

Museum: Supreme Court Clerk **Blake Hawthorne** has agreed to lead a long-term initiative to establish a museum of Texas judicial history. The focus of the initiative will be educational, incorporating precepts developed by iCivics, spearheaded by **Justice Sandra Day O'Connor**.

—*Douglas W. Alexander*, Alexander Dubose Jefferson Townsend

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Warren W. Harris

A Message from the *Immediate Past President*

It has been an honor to serve as President of the Society this past year. Our Hemphill Dinner last June was an appropriate culmination of a successful year for the Society as we were privileged to have Justice Sandra Day O'Connor as our honored speaker and so many distinguished guests. The funds raised at the dinner allow the Society to accomplish its mission of preserving the Court's history. Special thanks go to **Macey Reasoner Stokes** for chairing the dinner and making this a special event. For the second year in a row, it was a sell-out.

The grand achievement this past year was the long-awaited publication of our book on the history of the Texas Supreme Court, the first such book in a century. The Court received the book sitting in special session in the Historic Courtroom in the Capitol. Award-winning author **Jim Haley** did a masterful job on this book and was in attendance at the Hemphill Dinner, talking to members and signing books. Special thanks go to **Larry McNeill**, **Harry Reasoner**, and **Joe Jamail** for making this book a reality.

This book also enhances our mission to spread the story of our third branch of government across the state so that students and the public can learn about our judicial system and the history of our Supreme Court. We will be working with the State Bar's Law-Related Education group to get the book into classrooms across the state.

In addition to releasing our history book, this past year we had several other accomplishments, including:

- We sponsored a history program on Supreme Court jurisprudence that received rave reviews, thanks to course directors **Lynne Liberato** and **Richard Orsinger**;
- We prepared a new membership brochure for the Society, thanks to **Ben Mesches**;
- We began an assessment of the Society's archives, thanks to the State Bar and **Michelle Hunter**. Our archives have great historical documents, like the 1856 certification of the election of Chief Justice John Hemphill, and we are working to be sure they are properly preserved;
- We worked with the Court to help preserve its portrait collection;
- We watched our Fellows program grow, thanks to **David Beck**;
- We continued publication of our wonderful eJournal, thanks to **David Furlow**, **Dylan Drummond**, **Lynne Liberato**, and their editorial team;

- And, because of all of these things, we substantially increased our membership again this year.

Our staff is so important in getting these things done. A special thanks goes to **Bill Pugsley, Mary Sue Miller, and Marilyn Duncan.**

Our long-time Executive Director, **Bill Pugsley**, left the Society this summer. I want to thank Bill for his nearly 15 years of service with the Society. Bill has been integral to the Society's projects over those years, such as growing the Hemphill Dinner to an extraordinary level and providing invaluable assistance on our book projects.

I would like to give a very special thanks to **Chief Justice Jefferson, Justice Green**, who is the Court's liaison to the Society, and all of the **Justices of the Texas Supreme Court** for their support. The Society has the closest working relationship with the Court that we have ever had.

We are pleased to have added many new members this year. Members' support not only enhances the ability of the Society to serve its mission, but members also receive significant member services, including the eJournal, discounts, and other benefits depending on membership level. Please encourage your friends to join the Society.

It has been great fun to work with the Society's board of trustees this past year. I know the Society is in good hands with our new president, **Doug Alexander**, and his wonderful board.

— *Warren W. Harris*, Bracewell & Giuliani LLP

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Pat Nester

First *Impressions*

Before getting the opportunity to serve as its part-time Executive Director,* I knew very little about the Society. As I've gotten to know more, I am seriously dazzled. First, there is a formidable list of projects that the Society has undertaken with, by my lights, modest staff support: multiple substantive books, the Hemphill Dinner with stellar guest speakers, the e-Journal, the website, museum-quality upgrades to displays at the Court, ongoing collection of oral histories, a website displaying the public face of the Society, education initiatives including a full-day CLE event, as well as the longer-term duties of archiving and preserving documents, artifacts, and portraits.

As a student for 35 years of what it takes to drive results in an association, I know that such accomplishments can only flow from a large cadre of dedicated volunteers. But these are not just any volunteers. They—you—are highly accomplished and incredibly busy in your own spheres but nevertheless take on specific tasks that in other contexts might be done by professional staff. Maybe even more important, you take seriously the need to build the human relationships with the Court and with each other that give the Society the coordinated, day-to-day sense of purpose as well as practical resources needed to get big things done.

No doubt part of your willingness to help just comes from a good upbringing. Congratulations to your parents. But I think another element in our particular Society is the potency of curiosity. (I'm a fellow victim here.) We'd like to play a part in bringing to modern light and appreciation the great legal institutions of Texas. In a world of frequent heartbreak and rough justice, what exactly did those somber figures in the grey portraits do and how did they do it? As we bring that body of knowledge to the surface, we have the opportunity to re-interpret, perhaps creatively resolve, modern challenges through the prism of great thinkers and doers of the past.

At the time, surely their issues seemed at least as great as ours. (E.g., we no longer seem to have indomitable Comanche war parties roaming the land.) More often than not, these intellectual adventurers succeeded in hewing out some workable result, sometimes imperfect and eventually improved, sometimes spectacular, as the creative merger of law and equity and the cunningly foresighted absorption of community property principles.

Back at the ranch, I am very happy to be working with Mary Sue Miller, the Society's Administrative Coordinator, whom I've known for many years. I've now lunched with Marilyn Duncan, the Society's editor par excellence who will shortly have shepherded three scholarly books into existence in a scant five years. My colleague in TexasBarCLE, David Kroll, I was delighted to learn, helps the Society with design and layout of communications like this one.

* Nester is also the Director of the Professional Development Division of the State Bar and the part-time Executive Director of the State Bar College. He has worked at the State Bar in various capacities since 1978.

I've also recruited some other State Bar professionals for occasional help. With the support of State Bar Executive Director Michelle Hunter, the Society was provided the services of the Director of State Bar Archives Alexandra Swast and her associate Caitlin Brumford, who went through almost 200 boxes of Society records to begin cataloguing their contents and searching out significant documents and artifacts. Alexandra is preparing a list of recommendations to assist the Society in preserving, expanding, and communicating our holdings according to the best standards of professional archivists.

Executive Director Hunter has also made available a commodious work and storage space for the Society just outside the Governor Bill and Vara Daniel Center for Legal History on the P1 level of the Texas Law Center. Mary Sue recently supervised the move to the new quarters and has now set up shop therein.

eJournal Committee Chair David Furlow wants to extend an open invitation to members to submit articles or short notes of historical interest for this publication.

My foremost duty as a new executive director is to command you to join and to continue joining the Society. (See www.TexasCourtHistory.org.) Please recruit your colleagues as well. The more robust our membership, the more constructive the work we can accomplish.

I know we would all like to wish one of the leading enthusiasts for the work of the Society, Chief Justice Wallace Jefferson, a bon voyage. He has been a steady force for the good in our state, and we hope we can continue working with him in some capacity as he undertakes a new venture.

Finally, I would like to thank the Society's President Doug Alexander for his help in getting me going with the Society. I knew him before as a truly superior CLE speaker and as a brother tennis player in our Wednesday night doubles league. (He has a positively Federerian forehand!)

If you get by the Law Center, come up and say hello. My office is on the 6th floor in the southwest corner. The security guard will beam you up.

— *Pat Nester*, Executive Director

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Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston



I am pleased to report that the Society's Fellows program continues to grow. In the last few months we have added 11 new Fellows, bringing the total number to 28. They are all listed below. We are pleased that the majority of the Fellows—including many of the newest Fellows—were able to attend the June 2013 Hemphill Dinner and the reception with Justice Sandra Day O'Connor.

The Fellows are a critical part of the annual fundraising by the Society and allow the Society to undertake new projects to educate the bar and the public on the third branch of government and the rich history of our Supreme Court. One interesting project we are working on is taking the Society's new history book into Texas history classes in schools across the state.

We are currently making plans for the second annual Fellows Dinner next spring. This dinner is exclusively for the Fellows, and members of the Court will be invited. Please watch for an announcement about the dinner.

On behalf of the Society, I want to thank you for your support. If you are interested in becoming a Fellow of the Society, please contact me or the Society's office.

FELLOWS OF THE SOCIETY

HEMPHILL FELLOWS (\$5,000 or more annually)

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

GREENHILL FELLOWS (\$2,500 or more annually)

S. Jack Balagia
Bob Black
E. Leon Carter
Tom A. Cunningham*
Harry L. Gillam, Jr.
William Fred Hagans
Lauren and Warren W. Harris*
Allyson and James C. Ho*
Jennifer and Richard Hogan, Jr.
Dee J. Kelly, Jr.*
David E. Keltner*
Thomas S. Leatherbury
Lynne Liberato*
Mike McKool, Jr.*
Ben L. Mesches
Nick C. Nichols
Hon. Thomas R. Phillips
Hon. Jack Pope*
Shannon H. Ratliff*
Robert M. Roach, Jr.*
Professor L. Wayne Scott*
Reagan W. Simpson*
S. Shawn Stephens*
Hon. Dale Wainwright
R. Paul Yetter*

*Charter Fellow

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The Lone Star Republic's Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Legal Traditions

Part 1: Material Differences in Legal Culture

By David A. Furlow

I. Three conflicting cultural traditions contended in the Lone Star Republic, empowering the Texas Supreme Court to reshape the warp and woof of American law.

“Who we are,” former President John Quincy Adams argued, “is who we were.” Adams made that statement in 1841 while arguing the *Amistad* slavery case in the United States Supreme Court, in *United States v. Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518 (518).¹

James Madison, Alexander Hamilton, Benjamin Franklin, Thomas Jefferson, John Adams.... We have long resisted asking you for guidance, perhaps we have feared in doing so we might acknowledge that our individuality, which we so revere, is not entirely our own. Perhaps we've feared an appeal to you might be taken for weakness.... *We understand now, we've been made to understand, and to embrace the understanding, that who we are is who we were.* We desperately need your strength and wisdom to triumph over our fears, our prejudices, ourselves. [Emphasis added.]

This paper discusses how the Texas Supreme Court came to be the way it *is* by focusing on the way it *was*. The Republic's Supreme Court interlaced the threads of three competing legal cultures to create a rich tapestry of pragmatic jurisprudence.

“Where you stand depends on where you sit,” observed Rufus E. Miles, Jr., the Assistant Secretary for Administration in the federal Department of Housing, Education, and Welfare under Presidents Eisenhower, Kennedy and Johnson.² “Miles's Law” recognizes the dominant role culture plays in shaping governmental decisions. In Miles's case, the culture was bureaucratic. But the same “where you stand depends on where you sit” rule applies to other institutions, including courts.

Judges, justices, and arbitrators do not render decisions in a factual and legal vacuum. They respond to specific circumstances, usually those presented to them by prosecutors, private parties, or legislatures. Their responses reflect the interaction of many factors, including the decision-maker's intellect, values, emotional condition, cultural heritage, geographic location, family background, source and scope of legal training, and experience, as well as the legal authority that parties, legislative bodies, other judges, or the media bring to their attention (or, brought to their attention in previous cases or research initiatives).

¹ See Jack Stanley, *The Amistad Speech before the Supreme Court by John Quincy Adams: As We Reflect on Liberty, Let Us Reflect on the Wonder of this Great Man* HISTORY IN THE RAW (THE BARE FACTS OF HISTORY THAT YOU DON'T GET TO READ VERY OFTEN), available at <http://edisoneffect.blogspot.com/2007/07/amistad-speech-before-supreme-court-by.htm> (July 1, 2007, 10:08 AM) (the website quotes much of President Adams's oral argument).

² Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38(5) PUB. ADMIN. REV. 399-403 (Sept.–Oct. 1978); Obituary, *Rufus Miles Jr.*, 85, *Aide to 3 Presidents*, N.Y. TIMES (April 15, 1996), available at <http://www.nytimes.com/1996/04/15/nyregion/rufus-miles-jr-85-aide-to-3-presidents.html>.

How and why did the Texas Supreme Court's first justices create the unique Texas jurisprudence they wrote across the blank slate of post-Revolution Texas? The jurisprudence crafted by the Republic's jurists enshrined Spain's best Castilian traditions in a written constitution modeled on those in Virginia and other Tidewater Southern states, as liberalized by a Scots-Irish, Back Country culture that sought to protect the impoverished, largely landless men and women settling on the frontier. The resulting body of law was simple, flexible, tough-minded, steeped in centuries-old tradition and, with the notable exception of slavery, more egalitarian than the complicated, ossified Anglo-American norms it replaced, both in Texas and, eventually, in the United States. The Republic's jurisprudence pointed like a compass toward the American future.

Everything has a beginning. Oaks start out as acorns. Calves grow into Longhorns. This paper grew out of an effort to write a modern, Texocentric update of Herbert Baxter Adams's Teutonic "germ" theory of legal history. The "germ" theory of cultural change began when Herbert Adams wrote a book tracing the majestic oak groves of nineteenth-century Anglo-American jurisprudence to the acorns of customary law, tribal self-government, and peer-based, neighboring-farmer jury trials that first germinated in the sylvan glades of ancient Saxony and then spread west, first to England, then to the rest of the British Isles, and, much later, to America.³

The germ theory was popular among German, English, and American scholars, jurists, lawyers, and imperialists who took pride in their nations' shared Teutonic ancestry, expanding empires, and innate superiority.⁴ The poet Rudyard Kipling memorialized the attitudes that prevailed at the birth of the germ theory when he hailed "The White Man's Burden" of governing a resentful world in need of order, enlightenment, and artillery, a wearisome burden shouldered stoically by the English, reluctantly by Americans, and with excessive enthusiasm by Kaiser Wilhelm's Germany.⁵

The germ theory survived the eclipse of racism, the end of empires, and the assumptions of innate white, male superiority. In recent years scholars not burdened by racism, imperialism, or assumptions of innate superiority have effectively used the theory to explore the origins, evolution, and future of Western traditions and institutions. A renewed focus on these aspects of Texas's legal traditions can be useful in exploring how the Republic's justices created a unique, innovative body of jurisprudence.⁶

In 1989, Brandeis University Professor David Hackett Fischer published a thought-provoking book, *Albion's Seed: Four British Folkways in America*, that modernized the germ theory of cultural origins. Distinguishing among the four cultures on the basis of twenty-four distinct "folkways,"⁷ the book showed how four waves of English-speaking immigrants carried their cultural traditions with them when they crossed the Atlantic Ocean between 1629 and 1775. Then it showed how those competing traditions were woven into the fabric of American culture:

³ See generally J. M. VINCENT, *et al.*, HERBERT B. ADAMS: TRIBUTES OF FRIENDS, WITH A BIBLIOGRAPHY OF THE DEPARTMENT OF HISTORY, POLITICS, AND ECONOMICS OF THE JOHNS HOPKINS UNIVERSITY, 1876–1901 (1902); JEAN YARBROUGH, THEODORE ROOSEVELT, AND THE AMERICAN POLITICAL TRADITION 5–6, 30, 55, 81 (1912).

⁴ See DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 87–91 (2013) (discussing the "germ" theory, its proponents, and its variations).

⁵ See Rudyard Kipling, *The White Man's Burden: The United States and the Philippine Islands*, MCCLURE'S MAGAZINE (Feb. 1899), at 12; see also WIKIPEDIA, WHITE MAN'S BURDEN, http://en.wikipedia.org/wiki/The_White_Man's_Burden (last modified Oct. 6, 2013) ("Take up the White Man's burden, In patience to abide, to veil the threat of terror[,] And check the show of pride; By open speech and simple, An hundred times made plain, To seek another's profit, And work another's gain."). Modern scholars no longer accept Kipling's idea that Britain created history's largest empire "to seek another's profit, [a]nd work another's gain."

⁶ See generally JAMES L. HALEY, THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986 17–65 (2013) [hereinafter NARRATIVE HISTORY]; RANDOLPH B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE 128–238 (2003) [hereinafter GONE TO TEXAS]; RANDOLPH B. CAMPBELL, AN EMPIRE FOR SLAVERY: THE PECULIAR INSTITUTION IN TEXAS, 1821–1865, 50–209 (1989).

⁷ See DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 8–9 (1989) [hereinafter ALBION'S SEED]. Certain folkways are useful in analyzing a cultural group's legal norms: work ways, rank ways, social ways, order ways, power ways, and freedom ways. See *id.* at 9.

1. a *Puritan exodus* from eastern England (Essex, Suffolk, Norfolk, Lincolnshire, and Cambridgeshire) to New England in the eleven years from the years 1629 to 1640;
2. the migration to North America of a *small Royalist cavalier elite* and large numbers of indentured servants from southern and western England to Virginia in the years 1642–1675;
3. the arrival of a *Quaker-dominated influx* from England’s northern Midlands and Wales (as well as the Netherlands and Germany) to the Delaware River Valley in the period from 1675–1725; and
4. the entry of successive tsunami waves of *Scots-Irish immigrants* from the border country of northern England, Scotland, and Northern Ireland between 1723 and 1773.⁸

All four of these Albionic groups spoke English, worshipped in Protestant churches, and defended their understanding of Great Britain’s heritage of law, liberty, and expansion, yet each exemplified distinctly different ways of understanding and interacting with their world.

The competing systems of law and order created by those four Albionic groups survive today in distinctly different regional traditions, including markedly different approaches to jurisprudence. A judge who grew up in and presided over cases in one of those regions would have viewed his own region’s legal traditions as familiar and legitimate, while often perceiving the others’ traditions as unfamiliar, outlandish, or illegitimate. Before the Civil War, for example, most Southern judges viewed slavery as a long-established institution deserving protection, while most Northern judges saw the peculiar institution as an abhorrence demanding strong condemnation if not immediate abolition.

Any examination of the myriad ways long-standing cultural traditions affected jurisprudence, in Texas and elsewhere, requires both a cultural and biographical approach to the evolution of law. It requires an honest acknowledgment that “culture wars” about the proper purpose and scope of American law began not at the Democratic Convention of 1968 or the Republican Conventions of 1992, but instead, during the seventeenth-century founding of the colonies that became America’s states.

As discussed later in this article, the second and fourth of Professor Fischer’s Albionic seeds played extraordinarily important roles in shaping the jurisprudence of Texas’s Supreme Court: the Cavalier culture of the Chesapeake’s Tidewater elite and the Scots-Irish culture of the Southern Back Country.

The first of Professor Fischer’s Albionic seeds—New England’s heritage of a covenanted society, Puritan congregationalism, literary culture, and town-meeting democracy—played a minor role in the Republic’s jurisprudence. Anson Jones, the Massachusetts-born physician, congressman, and historian, brought his New England education and many of that region’s values to Texas when he served as the Republic’s last president. Northerners ready to oppose the entry of another slave state in the Union found President Jones someone they could deal with and respect. His experience growing up in the most literate part of America gave him the confidence to write the best contemporary account of the Republic’s history by any of Texas’s elected leaders.

One northern-born justice added little to nothing of New England’s legal culture to the Republic’s highest court. James Robinson, an Indiana-born justice who witnessed the 1840 Council House Fight in San Antonio soon after he left the court under threat of impeachment, found his legal career further interrupted when he was taken prisoner in 1842 by Mexican mercenary general Adrian Woll during Woll’s invasion of Texas.⁹

⁸ See *id.* at 6–7.

⁹ See L. W. Kemp, *Robinson, James W.*, HANDBOOK OF TEXAS ONLINE <http://www.tshaonline.org/handbook/online/articles/fro37> (last visited Sept. 30, 2013).

Another justice with northern roots, Vermont-born Royall Tyler Wheeler, had considerably more influence on Texas jurisprudence. Wheeler, a Whig who grew up in Ohio, became part of the Republic Supreme Court in 1844 by virtue of his appointment to the Fifth District Court and then was appointed to the first Supreme Court of the State of Texas immediately after annexation. Although Wheeler later supported secession as the best option for Texas, he joined his fellow “Old Court” colleagues on the court—Chief Justice John Hemphill and Justice Abner Lipscomb—in handing down decisions that protected the rights of slaves and free blacks. After serving twenty years on the Supreme Court, seven as chief justice, Wheeler committed suicide in 1864, when it became clear that the Confederacy would lose the war.¹⁰

As Anson Jones observed in 1857, Northerners’ limited influence in the Republic dwindled to nothing before the Civil War. “The worst feature of Know-Nothingism has achieved a victory, i.e., the *proscription*, not of ‘foreigners and Catholics,’ but of native citizens, men who happened, half a century ago or more, to have been *born North* of Virginia.”¹¹ [Emphasis added.]

In contrast to Pennsylvania, the Republic of Texas was never a Quaker state. Hence the Delaware River Valley’s Quaker ways and consensus politics, the third Albionic seed, did not play a dominant role in shaping Lone Star jurisprudence.¹² A similarly well-educated, anti-slavery, and largely pacifist culture, the idealistic Germans whose immigration to Texas began when Friedrich Diercks, a/k/a Johan Friedrich Ernst, arrived in 1831, did not significantly shape Texas legal culture in the 1830s and 1840s.¹³

There are at least three good reasons to modernize Fischer’s “modified germ theory” of American cultural evolution and to apply it to the jurisprudence of the Texas Supreme Court:

first, to make it more expansive to include Hispanic culture, because Spaniards, Mexicans, and Tejanos, each a non-English-speaking group, played a significant role in shaping the Texas Supreme Court’s jurisprudence;

second, because Professor Fischer’s emphasis on Anglo-American culture relegates the Dutch, Swedish, German, and other northern Europeans to an undeserved, second-class status when they played a major role in shaping “Anglo-American” (really, northern European) legal traditions;¹⁴ and,

third, because Texas’s history, culture, and legal system reflect the impact of generations of warfare between

¹⁰ See H. Allen Anderson, *Wheeler, Royal T.*, HANDBOOK OF TEXAS ONLINE <http://www.tshaonline.org/handbook/online/articles/fwh09> (last visited Sept. 30, 2013); and MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 19, 24–26, 28 (2011) [hereinafter LONE STAR LAW]. Wheeler grew up, obtained an education, and began practicing law in the North, where education enjoyed more respect and approval than in the South, where lawyers, judges, and justices relied far more frequently on “natural law” theories of justice that did not require a scholarly exposition. This helps to explain Wheeler’s obvious frustration with fellow Texas Supreme Court Justice Abner S. Lipscomb, a South Carolinian, who routinely issued plain English opinions without authorities or ornamentation. In a September 20, 1849 letter to Oran M. Roberts, who would later take a bench on the Texas Supreme Court, Wheeler criticized Lipscomb’s opinions as “crude, superficial, partial and totally defective in legal accuracy and precision and habitually so.” LONE STAR LAW, at 25.

¹¹ See ANSON JONES, MEMORANDA AND OFFICIAL CORRESPONDENCE RELATING TO THE REPUBLIC OF TEXAS, ITS HISTORY, AND ANNEXATION, 1836–1846, 627 (Rio Grande Press 1966) (1859) (reprinting a November 25, 1843 letter to Anson Jones from Edward Morehouse).

¹² See ALBION’S SEED, at 13–205, 419–603 (discussing the Puritan/East Anglian migration, its creation of New England, and its spread westward to through Indiana, Illinois, to Washington, Oregon, and northern California; and describing the North Midlands migration to the Delaware River Valley and the origins of the Quaker culture, the rise of Mormonism, and westward expansion).

¹³ See WALTER STRUVE, GERMANS & TEXANS: COMMERCE, MIGRATION, AND CULTURE IN THE DAYS OF THE LONE STAR REPUBLIC 39–79 (1996); Terry G. Jordan, *Germans*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/png02> (last visited Sept. 30, 2013).

¹⁴ See generally David A. Furlow, *Historical Origins of American Appellate and Constitutional Law*, in UTCLE, Conference on State and Federal Appeals (2009).

Comanche Indians and Tejanos, Comanches and Southern planters, and Comanches and Scots-Irish families.¹⁵

In addition to the four waves of English immigration identified in *ALBION'S SEED*, another set of folkways—Texas's Castilian heritage, Hispanic history, and Tejano culture—helped lay the legal foundations of the Lone Star Republic. The hierarchical freedom customs of Virginia's Tidewater plantation elite strongly influenced both the constitutional framework of Texas law and the Republic's slave codes. Finally, the often-radical ideas of Jacksonian, Back Country Scots-Irish Southerners blunted the hard edge of Anglo-American common law. They sought to protect "Gone to Texas" (G.T.T.) debtors from "Back East" creditors, enshrine distrust of centralized government, and bar the imposition of high taxes.

The Republic witnessed the clashes of competing cultures. Three contending frameworks of law, power, authority, and freedom collided in the Lone Star Republic:

1. Tejano traditions of Castilian law, Hispanic culture, municipal elections, Catholic religiosity, and the informal dispensation of frontier justice far from the seat of Spanish (or, later, Mexican) governmental administration;
2. a Virginia cavalier culture committed to protecting the life, liberty, property, and Anglican faith of the oligarchical planter elite, including the right to enslave and to exploit poor, largely landless whites for its economic and political benefit; and
3. a Scots-Irish Southern Highlands Back Country antagonism to authority of every kind: against big government, against large creditors, against the high church politics of the Anglican religion, and against taxes almost always deemed to be too high or too redistributionist.

The Republic of Texas offered judges, justices, and lawyers an opportunity to make choices usually denied them as they created a new legal system. No long-standing tradition constrained the high court to abide by the persistent pressure of *stare decisis*. The justices could, for example, choose to accept and enforce the unified legal system that arose in Texas's Mexican courts. Or they could insist that Texas's new legal system adhere to a centuries-old distinction between common law and equity that the Republic's justices had learned in the American states (typically, Southern ones) where they were trained to practice law. The Texas Supreme Court's early jurists could order from an extraordinarily wide menu of legal traditions.

Chief Justice Hemphill continued Tejano traditions of Castilian community property law, protected family homesteads, and recognized that a woman living on the bloody frontier of Comancheria shared equally in both her husband's work and his risk of violent death. He took the lead in enshrining those community property and homestead protections in a written constitution, transforming them from privileges into inalienable rights, as Tidewater Virginians had done to protect free speech and religious liberty during the American Revolution. He joined with Justice Abner Lipscomb to provide legal protections for the Gone to Texas ("G.T.T.") debtors who shared President Andrew Jackson's fear and loathing of banks and other creditors.

The three predominating strands of Castilian, Tidewater Virginian, and Southern Highlands Back Country legal tradition were woven into the fabric of Texas law during Texas's Republic era. But before moving on to describe how that weaving process took place, this article will uncover the origins of those strands in the centuries before the Texas Revolution.

¹⁵ See S.C. Gwynne, *EMPIRE OF THE SUMMER MOON: QUANAH PARKER AND THE RISE AND FALL OF THE COMANCHES, THE MOST POWERFUL INDIAN TRIBE IN AMERICAN HISTORY* 84–114 (2010); see generally Ray Billington, *FREDERICK JACKSON TURNER: HISTORIAN, SCHOLAR, TEACHER* (1963).

II. In Spanish and Mexican Texas, Castilian jurisprudence evolved into a distinct form of Tejano frontier justice.

A strong foundation of Castilian law undergirds Texas jurisprudence. Conquistadors, friars, and colonial administrators brought the Castilian law that still survives in Texas's Spanish and Mexican land grants and legal titles, adoption and probate law, community property rights regime, and procedural law. When Castilian law first came to Texas, it was medieval, imperial, often bureaucratic, and always aligned with state-sponsored Catholicism, but that body of law changed over time, becoming more local, less rigid, less hierarchical, more Tejano, and more attuned to the conditions of life in an arid Southwestern frontier plagued by violence, uncertainty, and distance from the imperial capital.

Castilian law governed the Spanish Empire. At the beginning, Castilian law in the Spanish Empire mirrored Castilian law in the Spanish kingdom of Castile. After 1492, Spanish administrators organized their commerce with the recently discovered "Indies." They created the *Casa de Contractación*, or "House of Trade," in 1503, to govern bureaucratic, state-dominated enterprises.¹⁶ Castile, Spain's dominant kingdom, claimed exclusive right to New World lands because the Spanish-born Borgia Pope Alexander VI issued the *Bull Inter Cetera* (the "Bull of Donation") on May 14, 1493. The Castilian port of Seville maintained its monopoly on the Indies trade.¹⁷ *Las Siete Partidas* ("Seven Books [or Parts] of Law") governed Spain and its colonies.¹⁸

Spanish naval commander Alonso Álvarez de Pineda explored Texas's coast in 1519, bringing a shadow of that Castilian law to Texas, but he did not organize settlements.¹⁹ Alvar Nunez Cabeza de Vaca and his companions brought the memory of Castilian law to Texas in November 1528, but, as shipwreck survivors, they played no role in creating the Castilian law that would govern life here in later centuries.²⁰

Soon after the founding of Santa Fe, New Mexico, settlers began to live colonial lives under Spanish law.²¹ In arid New Mexico, Spain's law of communal water rights evolved in one of the northernmost provinces of the Spanish empire, shaping the context in which Texas law would later arise.²² The Spanish explorers who came to Central Texas in 1691 and trekked east to the piney woods brought their experiences of Mexico and New Mexico with them. Missionaries Alonso De León and Fray Damián Massanet founded the San Francisco de los Tejas Mission to minister to friendly Tejas Indians.²³

The first major Spanish effort to settle Tejas occurred after French explorer Louis Juchereau St. Denis led a trading expedition to a Spanish mission on the Rio Grande.²⁴ Captain Domingo Ramón and a Franciscan missionary, Padre Antonio de San Buenaventura y Olivares, founded the San Antonio de Valero mission along the

¹⁶ See J. BARTO ARNOLD, III & ROBERT S. WEDDLE, *THE SPANISH SHIPWRECKS OF 1554. THE NAUTICAL ARCHAEOLOGY OF PADRE ISLAND* 63 (1978).

¹⁷ See *id.*

¹⁸ See generally Guillermo F. Margadant, *The General Structure of the Law of New Spain*, in State Bar of Tex. Prof. Dev. Program, *The Influence of Spain on the Texas Legal System* (1992).

¹⁹ See GONE TO TEXAS, at 26; Robert Weddle, *Alvarez de Pineda, Alonso*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fa172> (last visited Mar. 30, 2013).

²⁰ See NARRATIVE HISTORY, at 3–4; GONE TO TEXAS, at 27–32.

²¹ NICHOLÁS KANELLOS, *HISPANIC FIRSTS: 500 YEARS OF EXTRAORDINARY ACHIEVEMENT* 71 (1997) [HISPANIC FIRSTS].

²² See Hans J. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 TUL. L. REV. 1, 35 (1978); DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA 172–338* (1992) [SPANISH FRONTIER].

²³ See T. R. Fehrenbach, *San Antonio, Tx.*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/hds02> (last visited Apr. 10, 2013); Robert S. Weddle, *San Francisco de los Tejas Mission*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/uqs15> (last visited Apr. 6, 2013).

²⁴ See MIKE FOWLER & JACK MAGUIRE, *THE CAPITOL STORY: STATEHOUSE IN TEXAS* 4–5 (1988).

banks of the San Pedro River in 1718.²⁵ A savvy Spanish leader, Antonio de San Buenaventura de Olivares, named the new town after the Duc de Béjar, brother of the Viceroy of New Spain.²⁶ They founded a Franciscan mission along the banks of the San Pedro River, San Antonio de Béjar, later known as the Alamo.²⁷

Spanish administrators created a top-down regimen de castas in Texas. Spanish colonial administrators imposed Castile's legal system on the Indian inhabitants of New Spain, then permitted colonists to tweak Castilian law in response to local circumstances. Spain's *regimen de castas* (regime of castes) placed Spaniards atop a steep power pyramid, with people of mixed Spanish and Indian ancestry (mestizos) in the middle, and Indians and Africans relegated to the base.²⁸ In St. Augustine, Florida, Governor José de Zuñiga declared, in 1702, that Spanish law intentionally and properly discriminated against "Negroes, mulattos, Indians, *mestizos* and other dastardly persons..."²⁹ Centuries of race-based discrimination preceded the chattel slavery planters and immigrants from the Tidewater South took to Stephen F. Austin's colony in the 1820s and 1830s.



Cannon-filled wall, seventeenth-century Spanish fort;
photo by David A. Furlow, 2012

Canary Island notario Francisco de Arocha devised a simple plea and answer system of law in San Antonio de Bexar. The commander of frontier outposts, Martín de Alarcón, continued to east Tejas, the Indian name for the territory north of the Rio Grande, to strengthen the struggling missions that protected the frontier from the French.³⁰ In March 1731, fifty-five immigrants from Tenerife in the Canary Islands reached San Antonio de Béjar after traveling through Havana, Veracruz, and Saltillo.³¹ The *isleños canarios*, the presidio's soldiers, and their wives and children raised the early eighteenth century population of San Antonio to some three hundred people.³² While the local hidalgos (nobles) expanded their ranching, farming, and mining activities in the second half of the eighteenth century,³³ Canary Islander Juan Leal Gorz filled some of Bexar's earliest records with his litigation against other settlers and officials.³⁴

In eighteenth century San Antonio, a member of the Canary Island elite, the self-taught *notario* (notary)

²⁵ See ARNOLD DE LEÓN, THE TEJANO COMMUNITY 1836–1900, 1 (1997) [TEJANO COMMUNITY]; LONE STAR LAW, at 4; Amelia Williams, *Alamo*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/uqa01> (last visited Apr. 5, 2013); SPANISH FRONTIER, at 161–63.

²⁶ See Furlow, *Spanish Texas*, J. TEX. SUP. CT. HIST. SOC'Y, at 3.

²⁷ See LONE STAR LAW, at 4; SPANISH FRONTIER, at 161–63.

²⁸ See Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico in "COLORED MEN" AND "HOMBRES AQUÍ": HERNANDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING* 5–6 (Michael A. Olivas ed., 2006) [hereinafter *HOMBRES AQUÍ*].

²⁹ See SPANISH FRONTIER, at 327, 476 n.123 (quoting Kathleen A. Deagan, *Mestizaje in Colonial St. Augustine*, in ETHNOHISTORY 61 (1973) [hereinafter *Mestizaje*]); JOHN MOORE, REVOLT IN LOUISIANA: THE SPANISH OCCUPATION: 1776–1770, 56 (1976) [SPANISH OCCUPATION]; Basque, *Law and Order in Texas, 1776–1786*, in EL CAMPANARIO 24, 27 (1988) [hereinafter *Basque*].

³⁰ See SPANISH FRONTIER, at 163–64.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See NARRATIVE HISTORY, at 8.

Francisco de Arocha, exemplified the *derecho indiano* by creating simplified pleadings for use in resolving disputes.³⁵ Arocha's notarial role required him to serve as secretary to the *ayuntamiento*, a town council consisting of four *regidores* or aldermen and two *alcaldes*, or justices of the peace with executive power.³⁶ Arocha required plaintiffs to state their identity, the facts, and the relief sought, while compelling defendants to answer.³⁷

By 1731, some five hundred Spaniards lived in Tejas. Thirty years later, the number was 1,160.³⁸ By 1790, San Antonio had a non-Indian population of fifteen hundred people. Six hundred Tejanos lived around La Bahía (Goliad). Another four hundred lived around Nacogdoches, the successor to Los Adaes, first capital of Tejas.³⁹ The population of Spanish Texas was growing, but Texas was one of Spain's least-populated Spanish provinces.⁴⁰

Cattle ranching and horsemanship thrived in Spanish Tejas and Mexican Texas.

As early as 1565, Spanish settlers and colonial officials began to develop stock-raising and cattle-ranching businesses in the area around Saint Augustine, Florida.⁴¹ The business spread to Santa Fe in 1598, when future governor Juan de Oñate introduced herding and livestock ranching to New Mexico.⁴² Like Spain, northern Mexico, and New Mexico, much of Texas was arid and hot in summer, requiring the development of water-management skills.



Texas longhorns; photo by David A. Furlow, 2013

Tejanos drew potable water *acequias* (small, ground-level canals), aqueducts, and dams that resembled those in Spain and Mexico.⁴³

Ranchos supplied the Spanish and Tejanos with beef using minimal labor, while *mais* (corn), *tortillas* (bread), and *frijoles* (beans) comprised the traditional diet. Tejano *vaqueros*

(cowboys) drove cattle into *corrales* during *rodeos* (roundups) and the *correduria* (cattle drive) that sent up to 20,000 cows and bulls along the Camino Real from Bexar or Goliad northeast to Nacogdoches and from there into the southwestern United States.⁴⁴ *Vaqueros* displayed their skills at horsemanship and cattle management during the *dias de toros* (days of the bulls), sometimes culminating in the *carrera de gallo*, where riders demonstrated their skills in the saddle.⁴⁵ The cowboy culture and Longhorns began with the Spanish.

³⁵ See *id.* at 7; see generally Joseph W. McKnight, *Hispanic Legal Precedents (1716–1836): Law on the Spanish Frontier* (2007) (unpublished manuscript) (on file with author) [hereinafter *Hispanic Legal Precedents*].

³⁶ See *NARRATIVE HISTORY*, at 7.

³⁷ *Id.*

³⁸ *Id.* at 194.

³⁹ *Id.* at 195.

⁴⁰ See Hans J. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 *TUL. L. REV.* 1, 35 (1978); *SPANISH FRONTIER*, at 172–338.

⁴¹ See *HISPANIC FIRSTS*, at 21.

⁴² See *id.*

⁴³ See *TEJANO COMMUNITY*, at 6.

⁴⁴ See *id.* at 5.

⁴⁵ See *id.* at 6.



Tejano Monument, Texas Capitol grounds; photos by David A. Furlow, 2012



Debtor-friendly Castilian civil law contrasted with pro-creditor Anglo-American common law. Spain governed its empire through civil law (*ius commune*) that traced its roots to the sixth century C.E. Justinian Code.⁴⁶ Spain's civil jurisprudence involved the application of statutory codes. In contrast, Anglo-American common law developed as judges applied legal principles to cases and reported their decisions.⁴⁷

⁴⁶ See LONE STAR LAW, at 5.

⁴⁷ *Id.* at 5.

The medieval legalisms in Spain's *Las Sietes Partidas* exemplified ideals far removed from the grubby reality of the American Southwest.⁴⁸

In 1681, the Spanish government published the *Recopilacion de Indias* (*Recompilation of the Law of the Indies*), a comprehensive body of colonial law that would govern Texas and the rest of the Spanish Empire in North America and the Caribbean.⁴⁹ Spain governed Tejas through the *derecho indiano* (Law of the Indies) and enforced it through *regidores*, *alcaldes*, and *notarios* holding court at the Governor's Palace in San Antonio and elsewhere.⁵⁰

Over time, Spanish law became increasingly bureaucratic; administrators issued some 400,000 edicts under the *Recopilacion de Indias* alone by 1635.⁵¹ Tejanos moderated the harsh letter of Spanish colonial law by giving their decision-makers discretion in administration. When Durango attorney Rafael Brucho complained that, "very few contracts would remain standing...if we were to examine them in conformity with the law," he described the state of law in Spanish Tejas at that time.⁵²

Castilian law was more debtor-oriented than its Anglo-Saxon counterpart. The Spanish did not use debtor's prison to incarcerate individuals unable to pay a debt. The Catholic monarchs Ferdinand and Isabella enacted laws to ensure that creditors would not deprive a Spaniard of the tools of the trade he needed to carry on a business and to repay creditors.⁵³ Tejanos' experience with a debtor-friendly legal regime laid a solid foundation for further liberalization during the Republic of Texas.

Tejanos lived under a system of law without lawyers. Few trained lawyers and judges ventured into the Spanish communities north of the Rio Grande. The exception was New Orleans during the period Spain ruled Louisiana between the 1783 end of the American Revolutionary War and Napoleon's re-acquisition of the vast Louisiana territory for France in 1800.⁵⁴ The first two *alcaldes ordinarios* in San Antonio were neither trained in law nor well-educated, but they presided over an informal system of justice that had to win the respect, if not the affection, of Spanish subjects living on the frontier.⁵⁵ One man who rode the circuit in Tejas and the Spanish Southwest, Pedro Galindo Navarro, was a professional *asesor* (legal assistant) who used a "small library" while working.⁵⁶

No legally-trained judges presided over trials or appeals inside the province of Tejas. No university-trained lawyers practiced or taught law in Tejas. Spanish authorities provided notice of and enforced the law by circulating a few well-thumbed books to local administrators. Those books helped Spanish officials, ranchers, merchants, and subjects draft simple versions of wills, contracts, and other instruments; prepare simple pleadings; and administer rough justice in the colonial backwater of a worldwide European empire.⁵⁷

⁴⁸ See Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Toward a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 263 (1994).

⁴⁹ See HISPANIC FIRSTS, at 71.

⁵⁰ LONE STAR LAW, at 5–6; Furlow, *Spanish Texas*, at 5; see also *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250, 252 (Tex. 1984).

⁵¹ See HISPANIC FIRSTS, at 71.

⁵² See SPANISH FRONTIER, at 325, 475, n.114 (quoting CHARLES R. CUTTER, THE PROTECTOR DE INDIOS IN COLONIAL NEW MEXICO, 1659–1821, 91 (1986)).

⁵³ See NARRATIVE HISTORY, at 56.

⁵⁴ See SPANISH FRONTIER, at 325, 475, n.115; JOHN JAY TePASKE, THE GOVERNORSHIP OF SPANISH FLORIDA, 1700–1763, 58–76 (1964); MARC SIMMONS, SPANISH GOVERNMENT IN NEW MEXICO 176–80 (1968); Basque, , at 17-48; JOSEPH McKNIGHT, LAW BOOKS ON THE HISPANIC FRONTIER 74–84 (1988).

⁵⁵ See LONE STAR LAW, at 6.

⁵⁶ See NARRATIVE HISTORY, at 7.

⁵⁷ *Id.*; see also Dr. Francis Levine, René Harris & Josef Díaz, *Spanish Administration of the North American Territories*, in THE THREADS

When contracts needed clarification, legal issues were complex, or judgments were large, individuals appealed to *audiencias reales* (“royal audiences” serving as appellate courts) in Guadalajara, Chihuahua, Monclova, San Luis Potosí, and Havana, far from colonial Tejas. Parties complained about lengthy, costly, and distant appellate litigation, often complaining that those proceedings were “causing much injury to the parties and considerable delay...”⁵⁸ In Tejas, appeals could ascend to the king in Madrid, if the appellant first appealed through an *Audiencia Reale y Chancilleria* (Royal Audience and Chancellery), which could include a *presidente*, several *alcaldes de corte* (chief magistrates in a town), a *fiscal* (treasurer), and an *alguacil mayor* (constable).⁵⁹ The image below depicts the centralized, imperial, bureaucratic nature of Spanish law in Mexico and the northern parts of Mexico, including New Mexico and Tejas.

An *audiencia* was structured as follows:



Two appellate systems evolved in North America from the sixteenth century onwards: first, an *audiencia* in Mexico City, in 1527, and, later, a second *audiencia* in Guadalajara, beginning in 1548. The components of the *audiencia* system were as follows:

- **Two chambers:** one civil, one criminal.
- **Civil chamber:** eight *oidores* (judges) and one *fiscal* (treasurer).
- **Criminal chamber:** four *alcaldes del crimen* and its own *fiscal*.
- **Other employees:** notaries, bailiffs, and the equivalent of public defenders.
- **Formal address:** collectively, “*vuestra merced*” (“your grace”) and directly as “*señores*.”⁶¹

OF MEMORY (EL HILO DE LA MEMORIA): SPAIN AND THE UNITED STATES (ESPAÑA Y LOS ESTADOS UNIDOS) 23 (2011) [hereinafter THREADS OF MEMORY] (“The Spanish presence in Texas was the weakest of all the colonial governments. The frontier province was the smallest and most insecure on the borders of New Spain.”).

⁵⁸ See SPANISH FRONTIER, at 325 (quoting DESERT DOCUMENTARY: THE SPANISH YEARS, 1767–1821, 86–92 (Kieran McCarty ed. & trans., 1976); see also Mardith Keithly Schuetz, *Professional Artisans in the Hispanic Southwest: The Churches of San Antonio, Texas*, 40 THE AMERICAS 17, 19 (1983) (appeals in Tejas).

⁵⁹ See RICARDO DONATO SALVATORE, CARLOS AGUIRRE, AND GILBERT MICHAEL JOSEPH, CRIME AND PUNISHMENT IN LATIN AMERICA: LAW AND SOCIETY SINCE LATE COLONIAL TIMES 54 (2001); see, e.g., FELIPE GUAMAN POMA DE AYALA, EL PRIMER NUEVA CORÓNICA Y BUEN GOBIERNO, in THE FIRST NEW CHRONICLE AND GOOD GOVERNMENT 488 (1616), available at <http://www.kb.dk/permalink/2006/poma/info/es/frontpage.htm> (last visited June 15, 2010).

⁶⁰ See generally LILLIAN E. FISHER, VICEREGAL ADMINISTRATION IN THE SPANISH AMERICAN COLONIES (1926) [hereinafter VICEREGAL ADMINISTRATION]; J. H. PARRY, THE AUDIENCIA OF NEW GALICIA IN THE SIXTEENTH CENTURY: A STUDY IN SPANISH COLONIAL GOVERNMENT (1948) [hereinafter AUDIENCIA OF NEW GALICIA].

⁶¹ See generally C. H. HARDING, THE SPANISH EMPIRE IN AMERICA (1947).

The localization and liberalization of Castilian law created an informal system of Tejano justice for a distant, violent frontier province. Tejano citizens elected and carried out the orders of their *alcaldes* and *ayuntamientos*, and judged their fellow citizens according to the pigment of their skin, that is, the law discriminated between *gente de razón* or *gente sin razón*.⁶² In Tejas, plazas dominated town centers. Cathedrals, chapels, and chanceries dominated the east side of Tejas's few plazas. Presidios, customs houses, and, in San Antonio, the Governor's Palace, occupied the plaza's western side.⁶³

Castilian law and Tejano custom governed business affairs and disputes that began in the municipality of Bexar and other Spanish towns. The configuration and public spaces of each municipality mirrored those of Spain and Mexico, with the *ejido* (commons), *tierra de pasto* (common pasturage), and *propios* (land the municipality rented to others).⁶⁴

Spain's governors ruled not by the letter of the law but through discretion. One leading jurist, Francisco Suarez, summarized his willingness to liberalize the law in response to local circumstances by declaring that, "*Se obedece pero no se cumple*" ("I obey the law but I do not execute it").⁶⁵

In eighteenth century San Antonio, a member of the Canary Islands settler elite, the self-taught *notario* (notary) Francisco de Arocha, exemplified the *derecho indiano* by creating a simplified set of pleadings for Spanish subjects to use in resolving disputes.⁶⁶ Arocha's notarial role required him to serve as secretary to the *ayuntamiento*, a town council consisting of four *regidors* or aldermen and two *alcaldes*, or justices of the peace with executive power.⁶⁷

Arocha required plaintiffs to simply state their identity, the facts supporting their claim, and the relief sought, while compelling defendants to answer, a simple and pragmatic system of pleading. The legal records of majority-Hispanic towns such as San Fernando and La Bahia (Goliad) in the San Antonio River valley, San Augustine and Nacogdoches in East Texas, Laredo in southwest Texas, and El Paso del Norte (old El Paso, now in Texas, then part of New Mexico) reflect a continuing de-formalization of Castilian law in Tejas during the late eighteenth and early nineteenth centuries.⁶⁸

Localization and liberalization accelerated as Spanish power declined.⁶⁹ In 1810, Spain's *Cortes*, its legislature, began enacting laws to improve the legal position of Indians and mestizos; then, in 1812, it enacted the Law of Cadiz to abolish racial distinctions in the empire.⁷⁰ When Mexico declared its independence in 1821, the Plan de Iguala declared that all Mexicans were citizens entitled to equality regardless of race.⁷¹ The Tejanos at last attained equal status with Castilians.

By the early nineteenth century, Spain's Inquisition-enforced Catholicism devolved into a nominal frontier Catholicism. State-supported churches left religion in local hands, while the Catholic hierarchy in Mexico City abandoned evangelism along the northern frontier.⁷² J. C. Clopper, an Anglo living in 1820s era San Antonio, declared that Bexareño spirituality involved little more than repetitions of "Our Fathers," "Ave Marías," and

⁶² See TEJANO COMMUNITY, at 5.

⁶³ See *id.* at 113–21..

⁶⁴ See *id.*, at 5.

⁶⁵ See *id.*, at 3; Carrasco, 30 STAN. J. INT'L L. at 265.

⁶⁶ See NARRATIVE HISTORY, at 7; see generally Hispanic Legal Precedents.

⁶⁷ See NARRATIVE HISTORY, at 7.

⁶⁸ See LONE STAR LAW, at 6; Joseph W. McKnight, *Law*, THE HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/jzlp> (last visited Jan. 13, 2013) [hereinafter *Law*].

⁶⁹ See LONE STAR LAW, at 7–8; *Law*.

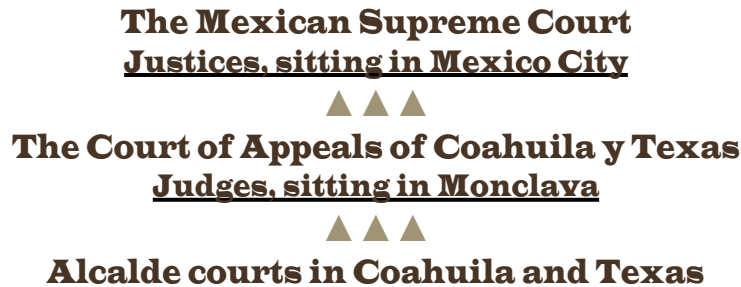
⁷⁰ HOMBRES AQUI at 6.

⁷¹ See *id.*

⁷² See TEJANO COMMUNITY, at 8.

“Credos.” Tejanos celebrated their living faith in the Feast of Corpus Christi, at Christmas, and during other holidays, but an increasingly independent-minded Tejano religious community began turning away from Mexico City and toward their own spiritual and political leaders.

Castilian law after the Mexican Revolution. As imperial Spanish power declined, local power grew in Mexico and other provinces of the Spanish Empire. Rebellions against Spanish power occurred throughout South, North, and Central America in the first decades of the nineteenth century. After Mexico gained its independence in 1821, its leaders created their own model of trial and appellate courts, which governed Coahuila and Texas, under the structure depicted below:



In the 1820s, Moses Austin and Stephen F. Austin, a father and son team of American entrepreneurs, asked permission, first from Spain and then from Mexico, to recruit Americans from the Southern United States. They offered to fill the largely vacant lands along Mexico’s bloody northern frontier with Comancheria, the realm of the Comanches. The Austins received that permission and took steps to attract a new and fundamentally different population of settlers to Texas.

III. In the 1820s, Southern plantation owners introduced Virginia’s cavalier culture, hegemonic freedom, and plantation slavery into Mexican Texas.

“How is it,” Dr. Samuel Johnson asked in 1775, “that we hear the loudest yelps for liberty among the drivers of negroes?”⁷³ The Southern planters who came to Texas in the 1820s and 1830s protected the Tidewater Chesapeake’s rule of law, yet preserved a hegemonic freedom to enslave others. In the seventeenth, eighteenth, and nineteenth centuries, Virginia’s planter aristocracy fought in George Washington’s army, supported James Madison’s creation of constitutional checks and balances, and rallied to Thomas Jefferson’s defense of religious freedom.

The Virginia-born Founding Fathers changed the world, but their plantation-owning colleagues also wrote and enforced Virginia’s slave codes.⁷⁴ The Tidewater slavocracy elevated their liberties and property rights far above their concern for the lives of the many slaves who toiled to make their tobacco, indigo, and, later, cotton plantations profitable.

Virginia’s plantation elite equated freedom with the power to enslave and exploit others for their personal benefit. “Virginia ideas of hegemonic liberty conceived of freedom mainly as the power to rule, and not to be overruled by others.”⁷⁵ The eighteenth-century English poet James Thomson summarized the Tidewater elite’s idea of hegemonic freedom in his poem *Rule Britannia*:

⁷³ SAMUEL JOHNSON, *TAXATION NO TYRANNY: AN ANSWER TO THE RESOLUTIONS AND ADDRESS OF THE AMERICAN CONGRESS (1775)*, excerpts available at <http://www.samueljohnson.com/tnt.html> (last visited April 2, 2013), quoted in *ALBION’S SEED*, at 410.

⁷⁴ See *ALBION’S SEED*, at 412–14.

⁷⁵ See *id.*

When Britain first, at Heaven's command,
Arose from out of the Azure main,
This was the charter of the land,
And guardian angels sang this strain:
Rule, Britannia,
Britannia, rule the waves;
Britons never, never, never, will be slaves.⁷⁶

No Virginia cavalier would ever submit to the “slavery” that must result from any governmental interference with his right to enslave and exploit others for his benefit.⁷⁷

William Fitzhugh, a late-seventeenth-century “Lord of the Potomac” and a legally-trained lawyer living in the Northern Neck’s Westmoreland County, acknowledged that Virginians were “natural subjects to the king” whose commands they obeyed.⁷⁸ Yet he also insisted upon their entitlement to the “due course of law” under the “laws of England.” If Virginians ever surrendered their rights as freeborn Englishmen, they would no longer be freemen, but slaves.

The planters’ concept of “hegemonic liberty” envisioned an aristocracy of the mind, where refined taste, governmental service, and adherence to the Anglican faith defined a well-ordered, hierarchical society. One English visitor concluded that Virginia’s plantation-owning elite was “haughty and jealous of their liberties, impatient of restraint, and scarcely [able to] bear the thought of being controlled by any superior power.”⁷⁹ They felt entitled to exercise a free-born Englishman’s power to rule a segregated, stratified society.⁸⁰ The elite enjoyed a right of *laissez asservir*, to enslave and exploit others.⁸¹

During the 1820s and 1830s, some of those planters left their family estates in Virginia, the Carolinas, and Georgia to buy cheap land in a northern province of Mexico. When their slaves and overseers joined them, they would become the lords of Stephen F. Austin’s colony in Texas.

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In Part II of this article, we’ll examine how a growing number of political, military, and cultural conflicts among Mexican military and political authorities, independent-minded Tejanos, Southern plantation owners aiming to create a slavocracy, and an influx of poor but proud Scots-Irish immigrants from the Back Country of the Southern United States erupted in the Texas Revolution.

⁷⁶ See JAMES THOMSON, *ALFRED*, act 2, scene 5 (1740).

⁷⁷ See *ALBION’S SEED*, at 411–12..

⁷⁸ See WILLIAM FITZHUGH AND HIS CHESAPEAKE WORLD 1676–1701: THE FITZHUGH LETTERS AND OTHER DOCUMENTS 72 (Richard Beale Davis ed. 1963) (reprinting an April 7, 1679 letter from William Fitzhugh to Thomas Clayton).

⁷⁹ See T.H. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF REVOLUTION* 244 (2001).

⁸⁰ See *ALBION’S SEED*, at 374–405.

⁸¹ See *id.* at 207–56, 405–18.



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170 Years of Texas Contract Law — Part 1

By **Richard R. Orsinger**

Abridged for the *TSCHS Journal* by David A. Furlow

Ed. note: It is an honor to share an abridged version of a scholarly paper on the history of Texas contract law written by one of the state's legal giants, appellate specialist Richard Orsinger. Orsinger is one of Texas's most well-respected family lawyers, a fine legal historian, and a board-certified civil appellate specialist. He presented the original version of this paper at the April 2013 History of Texas Supreme Court Jurisprudence symposium, co-sponsored by the Texas Supreme Court Historical Society and the State Bar of Texas. The article published here is excerpted from his original paper, with ellipses reflecting the omitted material. The Journal editors have made stylistic and transitional modifications as needed to adapt the article to this publication. We commend the unabridged version to our readers as an authoritative examination of the evolution of contract law in the United States as well as in Texas. See Richard R. Orsinger, 170 Years of Texas Contract Law, available at <http://www.orsinger.com/PDFFiles/170-Years-of-Texas-Contract-Law.pdf> (last visited Sept. 15, 2013). The Journal will present Part II of the abridged article in the Winter 2013 issue.

SOME HOLD THE VIEW THAT PROMISES OF FUTURE PERFORMANCE played no part in primitive society, where consensual economic transactions were concluded immediately, based on barter. They say that the role of contracts grew, and thus the need for contract law grew, out of a more complex economic life, where promises required delayed performance. See Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 555 (1933) [hereinafter *Basis of Contract*].

In medieval Europe, land was the basis of economic life. As time progressed, the economy developed a vigorous trade in commodities and goods, which gave rise to the need for money and credit. Industrialization required the moving of raw materials to manufacturing centers for processing, and then the moving of finished products to markets where the goods could be sold. As economic activities became more complex, and involved more capital and more labor, and involved greater distances and greater spans of time and greater risks, the need for businessmen to be able to rely on others to make and keep promises led to the development of a law that would enforce promises of future performance. This was contract law. See *Basis of Contract*, 46 HARV. L. REV. at 558.

Historians disagree about the relative importance of particular individuals versus broad societal trends in shaping events. This article considers the impact of trends as well as committed individuals on the development of contract law. Perhaps the absence of one or several prominent individuals might not have altered the way contract law developed. . . . But certain individuals left their imprint on the contract law, and their contributions are noted below. . . .

More generally, this article charts the course of Texas contract law through its origins in Spanish law and the common law of England, and describes how it responded to social and legal changes over the last 170 years. The focus is on some of the intellectual developments, paradigm shifts, and early attempts to record and systematize elements of the legal system.

Intellectualizing Contract Law

There are dangers in attempting to intellectualize the law. In simplifying the subject we may ignore important complexities. By rationalizing the law, we may project the way we think, but fail to observe things as they really are. As in every other intellectual endeavor, we proceed by categorization and identification. We create mental frameworks where each thing has its proper place, and we resolve a problem that comes before us by fitting the problem into the mental framework. . . .

The development of law in England and America has been a continuing process of creating and adapting a framework suitable for distinguishing between different kinds of claims, to allow lawyers and judges to fit cases into their proper categories within that framework. The history of law reflects that, over time, the boundaries of legal categories get stretched to accommodate new cases, but in doing so, the categories can lose their original integrity. When boundaries cannot be stretched far enough, new categories are created.

Sometimes new categories supplant old categories. Sometimes they coexist with the old. And once in a great while, an entire categorical framework is abandoned and a new one substituted. When this happens, vestiges of the old categories persist in the new categories, and they cling to life well past their usefulness.

The common law of England came to Texas not so much by the 1840 Act of the Texas Congress as by the training and experience of American lawyers who went to Texas. The development of Texas contract law was a lengthy process of adapting to the demands a changing society placed on a rigid legal system. *See, e.g.*, Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 *YALE L. J.* 221 (1910), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3933&context=fss_papers (last visited Mar. 12, 2013).

When ingenious lawyers and sympathetic judges bent and stretched the law to rectify wrongs, they expanded its scope. The distinctions between criminal and civil law, as well as the differences between tort and contract law, seem obvious now, perhaps even inescapable. But it was not always so. Many of the things we now think about contract law . . . are as much a product of early English common law as we are a product of our ancestors' DNA.

This study of Texas contract law begins by examining the roots of the common law in England. Then it moves to the late nineteenth-century America, where law professors reformulate the theory of contract law, using a quasi-scientific approach to identify underlying principles, thought to be universal, hoping that analysis could lead to certainty of outcome and thus predictability.

As soon as this scientific jurisprudence gained footing, it was immediately attacked by social scientists—progressives, and later, legal realists—as elevating theory over practical considerations or worse, as masking an exploitative political and economic order. It was not until the 1960s that Texas contract law was reformed to eliminate discrimination against married women. Over the last 100 years, there have been many efforts to develop a new intellectual framework of contract law to replace the one that developed in the late 1800s and early 1900s, but they have been largely ineffectual. . . .

Paradigm Shifts Reflect an Evolution of Legal Learning about Contract Law

A philosopher of science, Thomas Kuhn, proposed the idea of paradigm shifts in the progress of scientific thought in his book, *The Structure of Scientific Revolutions*, published in 1962. For Kuhn, a paradigm is a fundamental view shared by the scientific community. As time passes, anomalies occur that cannot be explained

by the current paradigm. Those anomalies are initially ignored, or blamed on observational error. Later on, exceptions are introduced to accommodate the anomalies. Eventually, the exceptions become so glaring that the existing paradigm must be abandoned and a new one adopted.

Sometimes a paradigm shift can be attributed to one discovery or to one publication. An example of a sudden paradigm shift would be Isaac Newton's conception that material objects have mass and momentum, coupled with the idea that a change in speed or in the direction of movement results from the application of an external force to an object. From that, Newton concluded that mass produces a gravitational force that causes objects to move toward one another, and he offered a mathematical formula that accurately quantified this gravitational attraction. Albert Einstein's suggestion in 1905 that mass could be converted into energy, and his famous formula that accurately quantified the conversion ($E = mc^2$), which led to the atomic bomb in 1945 and nuclear-powered electricity generation in the 1970s, were paradigm shifts as well. These new ideas caused sudden shifts in the prevailing scientific paradigm.

As has been true for the sciences, Anglo-American contract law has undergone paradigm shifts. They reflect an evolution in legal learning. The first paradigm shift actually began in the 1100s before contract law developed, when English law, with its roots in both Germanic and Roman law and tradition, entered the era when Royal writs were used to remove court actions from local to royal courts. Over a long period of time, the writ practice developed into a newer paradigm, the "forms of action," which determined what remedies the courts would offer for various wrongs.

Another paradigm shift began in the late 1700s. The writers of legal treatises—beginning with William Blackstone—began to offer explanations of the law that were not just descriptions of available remedies, but instead, expositions of underlying legal principles. Those publications answered questions about what actions created rights and obligations, and when and how those rights and obligations would be enforced, or relieved, by courts.

The shift to the current paradigm in contract law occurred when law professors and legal treatise writers in the late 1800s and early 1900s moved away from classifying contract cases based on analogical similarities in fact patterns and instead explained contract law in terms of underlying principles, inductively discerned—somewhat (they thought) like laws of physics, including offer-and-acceptance, the requirement of contractual consideration, and the requirement of mutuality of obligation.

This is the current paradigm of contract law as applied in American courts. The paradigm was assaulted almost as soon as it arose by law professors wielding law review articles as weapons. Those professors believed that contract law and court decisions were not governed solely, or even principally, by neutral principles of law. Instead, they insisted, judicial decisions reflected *ad hoc* solutions to the problems presented by particular cases, or, worse, manifested perspectives molded by the judges' socioeconomic class, or, even worse yet, perpetuated a system that allowed the politically powerful and economically strong to exploit their advantage over weaker parties, or exhibited the preconceptions of old, white, propertied men regarding other races and the other gender.

Since 1900, legal philosophers and legal writers, and occasionally an appellate judge, have offered new theories to explain what contract law is or should be. These efforts have not been successful in bringing about a paradigm change. The principles of contract law that were expounded beginning in the 1870s, with some elaborations, are still applied by the courts in resolving actual disputes.

In a larger sense, however, our entire Anglo-American conception of compensating harm has had a 1,000-year cycle (so far). It started in the 1100s, when the English started developing particularized remedies to rectify

wrongs. Later, the English created forms of action, which determined the remedies that were available. These forms of action eventually became paramount, and fitting the claim into the right form of action became more important than finding the best remedy for the injury.

When the English forms of action were transplanted to American soil . . . they became . . . causes of action. At the present time, we are having increasing difficulty fitting new problems into the existing framework of causes of action and correlating the remedies that are or should be available.

There are signs that the existing approach to compensating harm is in existential trouble. Technology is changing the needs and demands of people faster than is possible for ten-year uniform law codification drafting projects. The tried-and-true “legal fictions” that ignore inconvenient facts are harder to justify to critics not already enthralled with prevailing legal doctrine. The fact that property transfers and contractual relationships can give rise to duties that, when breached, give rise to tort damages, suggests that the traditional separation of property law, contract law, and tort law no longer holds firm.

When the next paradigm shift in contract law occurs, it will not likely be the result of the general acceptance of a new moral philosophy applied to private parties who invoke governmental sanctions to enforce private promises. There are three fundamental changes that can be singled out as possible causes of a paradigm shift in contract law. One is a shift in focus away from the origin of the wrong to the nature of the injury suffered. The second is the transition of the economy from the provision of goods to services to information. The third is the rise of contract rights as a new form of property that can be bought, sold, invaded, misappropriated, damaged, and destroyed.

The Shift from Types of Claims to Types of Remedies

One significant symptom of a systemic problem with the current property law/contract law/tort law paradigm is the inability of judges to adequately distinguish between claims that could lie in property law, or contract law, or tort law, or any combination of the three. The traditional approach of announcing broad rules, and then creating exceptions on an ad-hoc basis when the rule does not work, is not leading to a consistent methodology.

Courts seem to be moving in the direction of looking at the injury to be compensated to determine whether a claim lies in property law, contract law, or tort law. That reverses the way the paradigm is supposed to work. Under the current paradigm, the nature of the claim is supposed to determine the remedy available, not the reverse. If, in fact, we can best distinguish property claims, contract claims, and tort claims based on the type of injury suffered, then we may ultimately need to abandon a framework based on the nature of the claim and create in its stead a framework based on the nature of the injury.

Such a new paradigm could in fact be much simpler than crisscrossing the connections of the old framework of property law, contract law, and tort law. But it would require us to refocus our attention away from the ancient writs, the English forms of action, and our traditional causes of action. It would compel us to abandon the traditional distinctions between property law claims versus contract claims versus tort claims, and to classify claims instead based on the type of injury suffered and the remedies the law provides as compensation.

The Shifts from Goods to Services to Information

The world’s economy is changing. It is shifting away from a system based on the transfer of tangible personal property to an engine based on the transfer of services and the transfer of information. Intel and IBM

proved that computers were the wave of the future. Bill Gates showed that designing software was more profitable than manufacturing computers. Steve Jobs established that more money can be made by selling information to the people who purchase his telephones than by making computers or designing software alone.

Much information, whether publications, music, or movies, is protected by federal copyright law, giving rise to a new form of property, called “intellectual property.” Intellectual property may be to tomorrow’s world what real property was to feudalism, and what commodities and later manufactures were in the days of world-wide trade. In America, intellectual property “rights” derive from federal statutes more than from state property law. As a result, the dominant contract law of the future may be the law that applies to the leasing and transfer and misappropriation of intellectual property, not the law that applies to state-law-derived property rights in physical things.

Whether the fundamental contract law that applies to the leasing and transfer and invasion of intellectual property rights will be state or federal, or whether the law governing such events will be contract law at all, or will instead be federal intellectual property law enforced by federal courts, remains to be seen.

Contract Rights Have Become Property

Modern contract law grew out of the need to regulate the transfer of possession (i.e., a lease) or ownership (i.e., a deed) of land, and, later, personal property. But contract law has progressed to the point where a contract is now seen as creating a new form of property, i.e., a contract right. With the rise of secondary markets for home mortgages, car loans, and student loans, contractual rights and obligations have themselves become personal property, to be bought and sold in a world-wide market, as if they were commodities. The “commodification” of contract rights and obligations breaks the “relational and situational” ties between the original contracting parties; it moves contractual inquiries about the formation and interpretation of contracts away from a subjective assessment of the circumstances surrounding the original contracting and into the realm of what a reasonable third party would believe the words and actions of the contracting parties to mean.

The protections that the law affords to assignees of contract rights and obligations thus become essential to the marketability of those rights and obligations. Further, the benefit of maintaining the marketability of contract rights and obligations introduces policy considerations that may outweigh the policies that developed during a time when contract suits were designed to balance only the interests of the original contracting parties.

Additionally, the development of derivative contracts that pay upon default of the underlying independent contract overlays a second, or third, or fourth layer of contractual rights and obligations that are dependent upon, but do not derive from, the original underlying bilateral contract. Derivatives originated as an *ex post facto* guarantee by a third party of the performance of an underlying contract, given in exchange for a fee. It was a form of insurance. But derivative rights and obligations themselves have become marketable, and speculators buy them and sell them in order to profit from fluctuations in value. This type of activity is little more than “educated gambling,” where speculators are essentially betting on winners and losers. To people who invest in derivatives for profit, the underlying contractual relationship is only important insofar as it affects the price at which derivatives can be bought and sold.

Courts will have to strain to adapt traditional “bilateral” contract law principles to contract disputes between assignees of the original contracting parties, and to contract disputes adjudicated in the context of derivative contracts that will be breached if the underlying contract is not performed. In making these adaptations, they will face a number of difficult questions:

- Will the court’s decision on enforcing a contract be affected if the parties to the lawsuit are not the original contracting parties?
- If contract rights and obligations are routinely assigned, what happens to the defenses of lack of consideration or failure of consideration for, or fraudulent inducement of, the original underlying obligation?
- Will the impact that a ruling might have on derivative contracts affect the decision to enforce or not enforce an underlying contract?
- Will the need for a liquid secondary market in contractual rights and obligations outweigh the rules and the policies that apply just between contracting parties?
- Will parties to a derivative contract have the right to intervene in a lawsuit involving the enforceability of the underlying contract?
- Will the person required to pay on a derivative obligation have a claim in tort or contract or equitable subrogation against the party who breaches the underlying contract, even though no privity of contract exists?
- Will the determination of damages for breach of contract move away from the assessment by a jury to the more objective and easily determined change in market price of the assigned contract interests or the derivative guarantees of performance?

Society’s need to answer these and similar types of questions may put such a strain on the existing 130-year old paradigm . . . that it will have to be abandoned, and a new one adopted.

Development of the Common Law Part I: Anglo-Saxon Britain

Texas is a common-law jurisdiction. Much of Texas’s common law originates in English common law. This study of Texas contract law begins by examining the common law of England, which consists entirely of legal procedure. *See* David M. Rabban, *Melville M. Bigelow: Boston University’s Neglected Pioneer of Historical Legal Scholarship in America*, 91 B.U. L. REV. 1, 13 (2011) (quoting Bigelow as saying, “The legal results produced by the Norman Conquest . . . touch mainly on the subject of procedure.”)

According to William Blackstone, the customs of indigenous Britons intermixed with the practices of Romans, Picts, Saxons, and Danes as a result of successive invasions without a formal exchange of one system of laws for another. *See* I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Bk I, Sec. III (“COMMENTARIES”).

By the beginning of the eleventh century, England had three principal systems of law: the law of the ancient Britons (which prevailed in some midland counties and west toward Wales); the law of the Saxons (in the south and west of England); and the Danelaw (in the midlands and along the eastern coast of the island). *See* WILLIAM BLACKSTONE, COMMENTARIES, Bk I, Sec. III. The last Saxon king, Edward the Confessor, extracted from these separate systems a sketchy but uniform law for the kingdom, which existed until William of Normandy earned the title William the Conqueror at the Battle of Hastings in 1066. *Id.*

Development of the Common Law Part 2: The Normans Rewrite English Law in French and Latin

At the time of the Norman Conquest in 1066 . . . the law of England was a loosely integrated form of feudalism, based primarily on a hierarchy of mutual obligation between the common man and his local lord, between the local lord and his overlord, and between the overlord and the king. After the success of his cross-Channel invasion, William the Conqueror replaced Anglo-Saxon overlords with his own military cohorts while leaving the structure of Anglo-Saxon feudalism in place.



Panel of the Bayeux Tapestry; photo by David A. Furlow, 2013

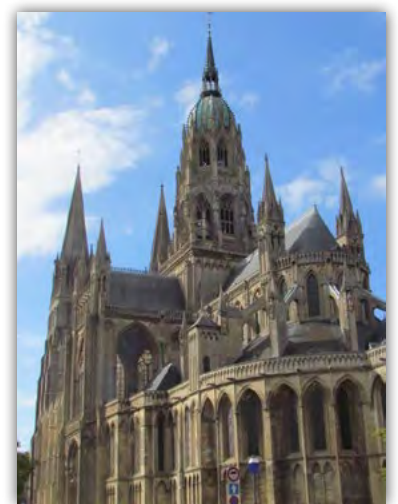
Roman civil law. See WILLIAM BLACKSTONE, *A DISCOURSE ON THE STUDY OF THE LAW* 16 (1758), available at <http://www.lonang.com/exlibris/blackstone/bla-001.htm> (last visited June 19, 2010).

Because England was on the periphery of the civilized world, even after the Norman Conquest, English law developed independently from law on the Continent. As with the English language, English legal writing reflected a mix of Anglo-Saxon, Roman, and French concepts and terms. Additionally, post-Conquest England suffered from a succession of absentee kings, dethronements, and institutional struggles as kings consolidated power at the expense of the feudal lords who had impeded development of a uniform, top-down legal superstructure. In England, law developed from the bottom up based on rulings by judges in specific cases that eventually gained broad acceptance.

Development of the Common Law Part 3: King Henry II's Reforms

Henry II succeeded in making inroads into the legal authority of local lords by promulgating statutes that centralized the English legal system by creating a "permanent court of professional judges," sending "itinerant judges

Anglo-Saxon England was so decentralized that a succession of Norman kings struggled to impose Norman ways across England with uneven effect. William the Conqueror grafted Norman French, the Roman Catholic Church, and vestiges of Roman civil law onto Anglo-Saxon custom. But, to use Blackstone's words, the English common law "weathered the rude shock of the Norman Conquest," so modern English law is thus an amalgam of pre-Norman institutions and France's version of canon law and



Bayeux Cathedral, Normandy, France; photo by David A. Furlow, 2013

throughout the land,” and establishing royal writs that allowed the removal of actions from local to royal courts. See POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 138 (1895). Henry II centralized the legal process and made it uniform, and thus “common” in being shared throughout the realm. But Henry’s changes focused on the structure of the system and not the content of laws, so individual judges still developed the common law incrementally. See Edward Rubin, *What’s Wrong with Langdell’s Method and What to do About It*, 60 VAND. L. REV. 609, 628-29 (2007).

The common law of England evolved into a mixture of disconnected royal decrees and parliamentary enactments (many merely codifying existing accepted practices), court rulings in inaccessible registers, local practices that varied widely, and settled customs that developed during daily lives without the benefit of legal assistance. See Ehrlich, *The Sociology of the Law*, 36 HARV. L. REV. 130 (1922) (describing the development of law from blood feuds to a pricing system for wrongs, to judicial decrees that resolve individual cases, to the development of general legal principles, and finally to the enactment of constitutions and statutes).



Sixteenth-century indenture, Ex Coll Hyder Collection of the University of Texas Tarlton Law Library; photo by Dylan Drummond, 2013

Development of the Common Law Part 4: The Year Books

The Year Books, reports of legal decisions made by medieval English courts from 1268 to 1535, are the oldest English case reports. They were not comprehensive. Written in a mix of English, Latin, and French, these sketchy reports sometimes recount in abbreviated terms what the lawyers and the judges said in arguing and deciding the case. The focus was procedural, and the underlying substantive law can be discerned by asking which fact patterns were considered actionable and which were not.

Development of the Common Law Part 5: The Great Commentators

Periodically, a legal thinker would organize and summarize the law of England. The first was Ranulf de Glanville, the Chief Justiciar, i.e., prime minister, of Henry II and, reputedly, the author of the first treatise on English law: *Treatise on the Laws and Customs of the Kingdom of England* (1188). See WILLIAM BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND, at v., available at <http://www.constitution.org/cmt/blackstone/ale1762.htm> (last updated July 4, 2005) [hereinafter ANALYSIS OF THE LAWS OF ENGLAND].

The *Treatise* analyzed the complicated practice of writs, which were used to remove legal disputes from a court dominated by the local noble to one of the King's courts. See ANALYSIS OF THE LAWS OF ENGLAND, at v.

Around 1260, Henry de Bracton wrote a Latin treatise: *On the Laws and Customs of England*. See ANALYSIS OF THE LAWS OF ENGLAND, at v; THE AMES FOUNDATION, THE DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE ATTRIBUTED TO HENRY OF BRATTON, <http://amesfoundation.law.harvard.edu/digital/Bracton/bracton.html> (last updated Feb. 21, 2013). As a clerk to William de Raley during the reign of Henry III, Bracton had access to records of case dispositions, which he used to annotate the legal principles in his book. Bracton facilitated the development of *stare decisis*.

The next commentator of consequence was a person now called "Britton," although his identity has never been established ("Britton" appears on an untitled page). His comprehensive statement of laws was published between 1291 and 1292 under Edward I in an effort to regularize the law across England and Ireland. Edward I gave notice in the Prologue that it preempted all contrary local laws. See FRANCIS MORGAN NICHOLS, BRITTON (1865), available at <http://www.archive.org/details/brittonenglishtr00nichiala> (last visited June 19, 2010). This 615-page book, written in "Law French," the language of the courts, gives a comprehensive listing of the remedies available from the courts, and through them the rights they vindicated.

In 1481, Sir Thomas Littleton published a three-volume work on real property rights: *The Tenures* (in Law French). In 1523, Christopher St. Germain published his treatise *Dialogues Between Doctor and Student*, which discussed remedies in the Court in Chancery.

Development of the Common Law Part 6: Legal Dictionaries

In 1530, John Rastell published the first English law dictionary, with terms listed in alphabetical order, republished until 1819. Henry Finch published THE ART OF LAW in the 1580s, in Law French, and republished it in 1621. John Cowel, a professor of civil law at Cambridge, in 1607 wrote *The Interpreter*, a dictionary of legal terms. It was suppressed and burned, and it resulted in Cowel's imprisonment. Henry Spelman published his *Glossarium* of Anglo-Saxon and Latin legal terms in 1626. Thomas Blount published his *Nomo-Lexicon Law Dictionary* in 1670.

Development of the Common Law Part 7: The Abridgments

Another grouping of legal treatises, the "abridgments," contained one-sentence digests of case holdings in alphabetical order, making them useful as reference works for lawyers and judges. Important abridgments included *Statham's Abridgment of the Law* (1489), *Fitzherbert's Grand Abridgment of the Law* (1516), *Brooke's Grand Abridgment* (1570), *Hughes' Grand Abridgment of the Law* (1573), *Rolle's Abridgment* (1668), *Jacob's New Law Dictionary* (1729), and *Viner's Abridgment* (1742–53).

Development of the Common Law Part 8: Edward Coke's Institutes

From 1628 to 1644, Edward Coke published four volumes of what became his famous *Institutes on the Lawes of England*. Coke summarized the history of English common law and set forth the limitations the law imposed on judges—i.e., a judge's duty to recuse himself when he had a personal stake in a case that threatened his objectivity.

Development of the Common Law Part 9: Blackstone's Commentaries

From 1765 to 1769, William Blackstone published his still-famous *Commentaries on the Law of England*. These *Commentaries* birthed the modern view of English common law. Blackstone was the first legal writer who attempted to make sense out of outdated legal procedures and medieval legal ideas. Blackstone's treatise started as lectures he read to college students and the public for an admission fee. His lectures were so popular that Cambridge University chose him as the first professor, anywhere, to teach the common law of England.

Blackstone took the common law, which was segmented into forms of action, and "reinvented" it according to principles he thought fundamental. Contract law remained very limited in Blackstone's time, and his commentary treats contracts as a means to transfer interests in property. Other writers followed in Blackstone's footsteps, publishing ever more comprehensive treatises of the English law of contracts. In many respects, however, they were attempting to retroactively impose a structure that appealed to modern minds but did not truly reflect the structure of the English common law as it had evolved over the preceding centuries.

To be continued in the Winter 2013 issue of the *TSCHS Journal*,
as Richard Orsinger reveals
the history of contract law in Texas. . . .



RICHARD R. ORSINGER is a partner at the San Antonio law firm of McCurley, Orsinger, McCurley, Nelson & Downing, L.L.P. He has authored more than 200 continuing legal education and law review articles, along with a 900-page treatise on Texas appellate procedure. He is a member of the Texas Supreme Court Advisory Committee on Rules of Civil Procedure and serves as Supreme Court Liaison to the Texas Judicial Committee on Information Technology.

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In Memoriam: Justice Jack E. Hightower 1926–2013

By Justice Jeff Brown

EARLIER THIS YEAR, the Texas Supreme Court Historical Society, the Court whose history it preserves, and the State of Texas itself lost a dear and devoted friend. Justice Jack Hightower passed away on August 3 in Austin at the age of 86. Following a Masonic burial at the Texas State Cemetery on August 7, a memorial service was held at Austin's First Baptist Church, where Jack had been a deacon and longtime Sunday-school teacher, on August 10.

Jack Hightower was born on September 6, 1926, in Memphis, a small agricultural community in the Texas Panhandle. He grew up in Memphis, too, working in the family-owned Hightower Greenhouse and delivering flowers on his bicycle. Jack graduated from Memphis High School in May 1944 and immediately went to Waco to attend the summer term at Baylor University. He joined the navy that fall when he turned 18.

With the end of World War II, Jack was discharged in 1946. He returned to Baylor, where he soon met Colleen Ward from Tulia, another small Panhandle town. While a student at Baylor, Jack worked in the Texas Collection, a library of Texana. Books and history would be two of his greatest passions throughout his life.

Jack and Colleen both graduated from Baylor in 1949—his major was history and hers was organ performance. They married the following year. After he finished Baylor Law School in 1951, the couple settled in Vernon, where Jack entered private practice.

The first of Jack's many stints as an elected public servant came in 1952 when he won an open seat in the Texas House of Representatives. He next served as district attorney for the 46th Judicial District from 1955 until 1961, and was named "Outstanding District Attorney of Texas" in 1959. All three of Jack and Colleen's children were born while Jack was serving either in the House or as district attorney—Ann in 1953, Amy in 1956, and Allison in 1959.





Justice Jack Hightower administers the lawyer's oath to Jeff Brown in the Supreme Court courtroom on November 4, 1995—the day the bar results were announced. Brown was a briefing attorney to Justice Hightower at the time.

Jack was unsuccessful in a special election for Congress in 1961. But he won a seat in the Texas Senate in 1964 and served in that body for ten years. After he was elected president pro tem of the Senate, he was honored as Governor for a Day on April 3, 1971. During this time Jack also was also named as a delegate to the Democratic National Convention in 1968, a trustee of Baylor University in 1972, and a delegate to the Texas Constitutional Convention in 1974. In 1978, he was named a Distinguished Alumnus of Baylor University.

In 1974, Jack was elected to Congress, where he served five terms, including membership on the Agriculture and Appropriations committees. Losing his bid for reelection in the Republican sweep of 1984, Jack and Colleen moved to Austin in 1985 when he became First Assistant Attorney General, the number-two position in the office of Attorney General Jim Mattox.

At this point in his already distinguished career, Jack had worked in both the legislative branch—as state representative, state senator, and United States Congressman—and the executive branch—as district attorney and First Assistant Attorney General. But he had not served in the judiciary. The election of 1988 would change that. That year, Jack was elected as part of a reform ticket to the Supreme Court of Texas.

It is possible that no position Jack held in government fit him so well as that of judge. His even temper, thoughtful and polite demeanor, and innate wisdom suited him well for the bench. Justice Hightower thrived at the Supreme Court, and soon came to regard the venerable institution with a deep affection. A small acknowledgement of that veneration was visible in the attire of his staff attorney and law clerks—there was no “business casual” in the Hightower chambers. The Court, Justice Hightower maintained, deserved better than that.

Justice Hightower's regard for the Court was also evident at the birth of the Texas Supreme Court Historical Society. A lifelong lover of history, Justice Hightower was among a small group of current and former justices who were concerned about how little had been done to preserve the Court's historic artifacts and to chronicle its history. In January 1990, on the 150th anniversary of the first time the Supreme Court of the Republic of Texas sat to hear arguments, three former chief justices, Robert W. Calvert, Joe R. Greenhill, and Jack Pope, filed the incorporation papers of the Texas Supreme Court Historical Society. The Society's founding president was Justice Jack Hightower.

As the first president, Justice Hightower had secured the support of the Court for the Society's creation, and had also procured the cooperation and assistance of the State Bar. His work was vital to the Society in its infancy, and he remained dedicated to its mission for the rest of his life.

Justice Hightower retired from the Court at the end of 1995 after seven years on the bench. He returned to private practice, but still devoted much of his time to public service. He was especially proud of his appointment by President Bill Clinton in 1999 to the National Commission on Libraries and Information Science.

Over the long years of his life, Justice Hightower acquired a vast array of books and other collector's items. The collection included more than 3,000 first editions and other rare books. He was particularly fond of his trove of autographed volumes, including books signed by every president from John Quincy Adams through Barack Obama. These books and items, as well as his personal and official papers, now form the heart of the Jack E. Hightower Collection in the Poage Legislative Library at Baylor University.

Jack Hightower is survived by Colleen, his wife of 63 years, his three daughters, his sons-in-law, and his numerous grandchildren, nieces, and nephews. But his legacy also lives on in the human institutions to which he devoted so much of his time, his love, and his many talents. And among the most grateful of those beneficiaries is the Texas Supreme Court Historical Society, for we wouldn't be here without Jack Hightower.



JUSTICE JEFF BROWN *was appointed to the Supreme Court of Texas by Governor Rick Perry on September 24, 2013. At the time of his appointment, he was a Justice on the 14th Court of Appeals, a post he had held since 2007. Before taking the appellate bench, he served as a judge of the 55th District Court in Harris County for six years. Prior to that, he practiced civil litigation at Baker Botts in Houston. In 1995–96 he served as a briefing attorney to Texas Supreme Court Justices Jack Hightower and Greg Abbott. At the time of his recent appointment to the Supreme Court, he served as a member and Treasurer of the TSCHS Board of Trustees.*

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BOOK REVIEW:

Lone Star Law: A Legal History of Texas by Michael Ariens

Reviewed by S. Shawn Stephens

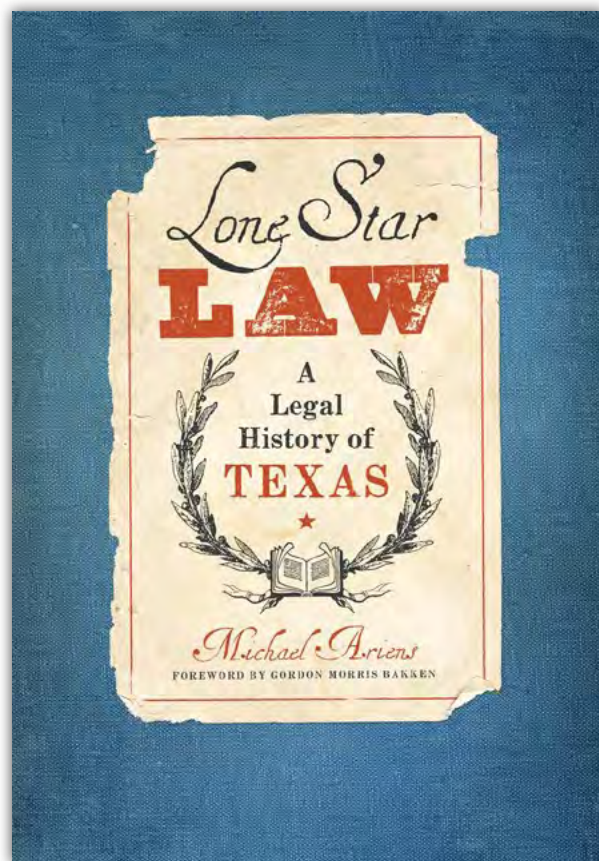
Texas Tech University Press, 2011 400 pages, \$49.95 (hardback) ISBN 978-0-89672-695-6

MICHAEL ARIENS ASSIGNS HIMSELF the Texas-sized task of recounting the history of Texas from Spanish colonial times to the present decade in his book, *Lone Star Law: A Legal History of Texas*. Ariens manages to pack an enormous amount of fact, anecdote, and law into a single volume while weaving that data into a surprisingly readable story that can be enjoyed by lawyers and nonlawyers alike. The book's readability may be aided by the fact that Texas has always attracted and/or spawned outrageous, larger-than-life colorful characters who engage in entertaining acts, but this book is not a mere recitation of amusing or shocking anecdotes. Instead, it is a serious retelling of our state's story with a particular focus on the laws that shaped the state and the state that shaped its laws. This book will be at home on the shelves of lawyers, law students, teachers, and history buffs.

Ariens begins his book by examining the Spanish legal structures that governed colonial Texas, including the *empresario* system. Ariens recognizes that, as Texas became more populated, new Texans brought practical frontier considerations to the existing civil law system as well as common-law influences, noting that the common-law right to a jury trial became a particular point of disagreement between the Texians and their Mexican rulers. This dispute, Ariens writes, led, in part, to the rebellion through which the Texians gained independence from Mexico and formed the Republic of Texas. Ariens moves through time by discussing the formation and development of the Republic's constitutions, the laws of the Republic of Texas, the early structure of the judicial system, and, finally, the legal structures by which Texas was annexed into the United States of America in 1845.

In the second section of the book, Ariens examines Texas law as it responded to various crises and social changes, including the Civil War, Reconstruction in a post-slavery state, overhauls to the judicial system (to address the dual problems of overburdened courts, and the rise in lawlessness and crime after the Civil War), the power of the railroads, the discovery of oil, Prohibition, and women's suffrage.

The third subpart of the book deals with Texas's property laws. Ariens describes the Mexican system of land distribution by which those settling in North New Spain (now Texas) acquired property. He then describes the subsequent system of land distribution employed by the Republic and addresses the way in which the boundaries



of Texas (first as a Republic, and later as a state) were fixed. This section of the book also describes the grass and fencing wars between ranchers and farmers (derogatorily called “nesters” by the ranchers). Importantly, it addresses the development of Texas’s oil, gas, mineral, and natural resources laws.

The fourth section deals with corporate structures and how those laws affected business and banking in Texas. It also addresses the 1949 modernization of Texas incorporation law—a much-needed update to a law that had driven business out of Texas and that had not been revised in any significant way since 1874. This section also includes a discussion of the Sharpstown Bank scandal and the laws and reforms that resulted from it, including the Open Records Act, Open Meetings Act, and ethics laws (such as campaign finance/fundraising laws, registration of lobbyists, criminalization of bribery, and efforts to address the corruption of government officials).

In the fifth section of his book, Ariens summarizes family law and cultural changes in Texas. He discusses the difficulty of obtaining an official marriage in a frontier territory (where a priest was seldom available) and the resulting efforts to deal with that problem (marriage by bond, common law marriage). He also covers the topics of bigamy, bastardy, adultery, marital status as it relates to both tort and criminal law, and divorce, and the effect of marital status on property law, including the separate/community property dichotomy and the legal status of women with regard to property ownership.

Ariens deals with the legal profession, legal education, and the courts in the sixth section of his book. He traces the changes in qualifications for admission to the Bar, the developments in lawyer discipline, and the creation of bar associations. Other topics include changes in the practice of law, the development of large law firms in Texas, and the role of women in the legal profession. Ariens notes that there were 17 women practicing law in Texas in 1900 and that, in 1925, Texas appointed an all-woman Supreme Court to hear the case of *Johnson v. Darr*; all of the regular members of the Court recused themselves as members of the Woodmen of the World, a fraternal organization involved in the case. Texas’s judicial selection method (partisan elections) is also discussed in this section.

In section seven, Ariens deals with criminal laws and civil rights in Texas, spending several pages on the death penalty and the prison system. In his final chapter, he addresses civil procedure and the effect these procedural rules and practices had on the substantive law in Texas.

Throughout, Ariens’s book is meticulously backed by endnotes that provide important additional resources for those using his book as a research tool. As the author himself notes, this book is written for a general public; therefore, he resists the use of legal jargon in favor of a more readily understandable book. Overall, this is a successful attempt to summarize the law in Texas and the law’s effect on, and relationship to, the story of our state.



S. SHAWN STEPHENS is a partner with BakerHostetler in Houston, where she leads the office’s appellate practice. She has a J.D. degree from the South Texas College of Law and an LL.M. in International Economic Law from the University of Houston Law Center. Stephens presently serves or previously served on the boards of various Houston arts organizations and museums, including the Houston Ballet, the Houston Symphony, and the Museum of Natural Science. In 2009, Governor Rick Perry appointed her to the Texas Commission on the Arts, and she currently serves as the Commission’s vice-chair. She also serves on the Executive Committee of the TSCHS Board of Trustees.

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Chief Justice Jefferson Leaves the Court; Justice Hecht is Appointed Chief Justice

Chief Justice Wallace B. Jefferson stepped down from his post on the Texas Supreme Court on October 1, and **Justice Nathan Hecht**, the senior member of the Court, assumed the seat the same day.

Chief Justice Jefferson announced his resignation on September 3, noting that he has achieved his goals for the Court and is ready to focus on his family. He joined the law firm of Alexander Dubose Jefferson & Townsend, formerly Alexander Dubose & Townsend, on October 2.

During his nine-year tenure as chief justice, Jefferson worked to improve the Court's efficiency and transparency. Under his leadership, the Court dramatically reduced the number of cases carried over from one term to the next and significantly increased the use of technology to improve public understanding of and access to the Court's operations. He also led efforts to preserve historic court documents throughout the state and helped to reform antiquated juvenile-justice practices.



Outgoing Chief Justice Wallace B. Jefferson (left) stands outside the Supreme Court courtroom with new Chief Justice Nathan Hecht (center) and former Chief Justice Thomas R. Phillips following Hecht's swearing-in ceremony on October 1. (Photo by Osler McCarthy)

Jefferson was originally appointed to the Court by Governor Rick Perry in 2001. Prior to his appointment, he practiced appellate law with Crofts, Callaway & Jefferson in San Antonio, where he successfully argued two cases before the U.S. Supreme Court. Governor Perry elevated him to chief justice in September 2004 when Chief Justice Thomas R. Phillips retired. He was elected to the post in 2006 and reelected to a full term in 2008.

Newly appointed Chief Justice Nathan Hecht is the longest-serving justice on the Texas Supreme Court. First elected to the Court in 1988, he has won reelection four times and has authored more than 350 opinions. As the Supreme Court's liaison to the Texas Access to Justice Foundation, he advocated successfully for the passage of the Chief Justice Jack Pope Act in May 2013, which significantly increased funding for the state's IOLTA program.

Prior to his service on the Supreme Court, Hecht served as a justice of the 5th Court of Appeals and as judge of the 95th Judicial District Court in Dallas County. He practiced with Locke, Purnell, Boren, Laney and Neely, PC, now known as Locke, Lord, Bissell and Liddell, LLP, and is a former law clerk to Judge Roger Robb of the U.S. Court of Appeals for the District of Columbia Circuit.

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Justice Jeff Brown Appointed to the Texas Supreme Court

Justice Jeff Brown, a member of the TSCHS Board of Trustees, has been appointed to the Supreme Court of Texas to fill the seat vacated by Justice Nathan Hecht.

Governor Rick Perry announced the appointment on September 24, noting that Justice Brown “is an outstanding and accomplished jurist whose highest priority on the bench is preservation of the rule of law.”

Brown had served as Justice of the Fourteenth Court of Appeals in Houston since December 2007. He was also Presiding Judge of the Harris County Success Through Addiction Recovery Drug Court No. 1. From 2001 to 2007 he served as judge of the 55th District Court.

Board-certified in civil trial law, Brown practiced at Baker Botts LLP prior to becoming a judge. Before joining Baker Botts, he was a briefing attorney to Justices Jack Hightower and Greg Abbott on the Texas Supreme Court.



Justice Jeff Brown (right) takes the oath of office from Chief Justice Nathan Hecht during a swearing-in ceremony held October 3 in the Supreme Court courtroom. Holding the Bible is Susannah Brown, Justice Brown's wife. (Photo by Osler McCarthy)

Justice Brown served as Treasurer to the TSCHS Board at the time of his appointment.

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Pope *Common Law Judge* Book Now in Press

THE SOCIETY'S FIRST SELF-PUBLISHED BOOK—*Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas*—went to the printer in late September.

The 450-page volume brings together a selection of essays, lectures, articles, and opinions by the esteemed former chief justice. It also includes a biographical essay by attorney/historian/TSCHS board member William J. Chriss and appendix lists of Pope's publications and his more than 1,000 court opinions.

The book is the product of a multi-year collaboration between Chief Justice Pope and the Society's editorial team: former Board President Larry McNeill, former Executive Director Bill Pugsley, and consulting editor Marilyn Duncan.

The fund drive for the project was led by Judge Craig Enoch, who was board president when the funding effort was launched in spring 2011. The drive reached and then exceeded its funding goal in September during a final call to TSCHS members. The full list of donors appears on the next page.



Chief Justice Jack Pope

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Texas Appellate Hall of Fame Inducts the Hon. John R. Brown

ON SEPTEMBER 12, 2013, THE HON. JOHN R. BROWN, former Chief Judge of the U.S. Court of Appeals for the Fifth Circuit, was posthumously inducted into the Texas Appellate Hall of Fame. The induction took place at the Four Seasons Hotel in Austin (in conjunction with the annual meeting of the State Bar of Texas Appellate Section), where Doug Alexander, one of Judge Brown’s former law clerks and the current President of the Texas Supreme Court Historical Society, offered a lively and heartfelt remembrance of his former boss. Judge Brown is rightly remembered for his service as one of the “Fifth Circuit Four”—four judges on the Fifth Circuit who were instrumental during the civil rights era in enforcing desegregation and protecting minority voting rights. Judge Brown was also an expert in admiralty law; the University of Texas’s admiralty moot court competition is named for him.

While noting Judge Brown’s soaring intellect and distinguished judicial career, Mr. Alexander also recalled a man of great warmth and unbridled joy, one who loved good cheer, colorful sportcoats, and above all, his family. The undisputed highlight of the event, however, was the presence of Judge Brown’s wife, Vera Brown, and his step-daughter, Jan Riley, who traveled from San Antonio to receive Judge Brown’s award in person. Mrs. Brown and Ms. Riley brought with them a large scrapbook documenting Judge Brown’s career; the book included signed letters from President Eisenhower and newspaper articles about notable cases. At the later cocktail reception, Mrs. Brown and Ms. Riley delighted the attendees with tales of Judge Brown’s life and tenure on the Court.



Following the Hall of Fame ceremony, Society President Doug Alexander (left) stands with Jan Riley (center), Judge Brown’s step-daughter; and Vera Brown, Judge Brown’s widow.

Now in its third year, the Texas Appellate Hall of Fame is a collaboration between the State Bar of Texas Appellate Section and the Texas Supreme Court Historical Society. Its purpose is to recognize and honor deceased appellate practitioners and judges who, through their outstanding advocacy, professionalism, and service to the citizens of this state, have left a significant mark on the practice of appellate law in Texas.

— *Thomas Allen*, Jones Day

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Calendar of Events

Fall 2013

October 17

Fall Meeting, TSCHS Board of Trustees, 10:00–1:30
San Jacinto Center Conference Room, Austin
James L. Haley, luncheon speaker

October 27

Texas Book Festival, 3:30-4:15
James L. Haley, speaker
State Capitol

Spring 2014

March 6

TSCHS Joint Session, Texas State Historical Association
Annual Meeting, Wyndham Riverwalk Hotel, San Antonio

TBA

Spring Meeting, TSCHS Board of Trustees

June 6

19th Annual John Hemphill Dinner
Four Seasons Hotel, Austin

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2013–2014 Membership Upgrades

The following Society members moved to a higher dues category since June 1, 2013.

HEMPHILL FELLOWS

David J. Beck

Joseph D. Jamail, Jr.

GREENHILL FELLOWS

Thomas S. Leatherbury

Ben L. Mesches

Hon. Thomas Phillips, Chief Justice (Ret.)

TRUSTEE

William W. Ogden

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2013–2014 New Member List

The Society has added 36 new members since June 1, 2013.

GREENHILL FELLOWS

S. Jack Balagia
E. Leon Carter
Harry L. Gillam, Jr.
Nick C. Nickols
Hon. Dale Wainwright,
Justice (Ret.)

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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 Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow - \$2,500

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

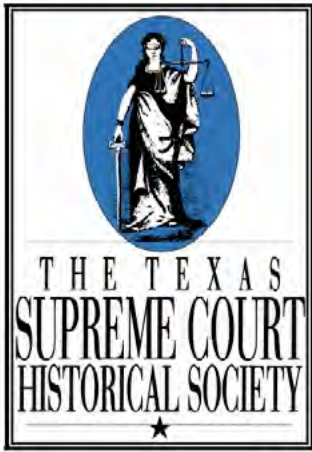
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- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

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



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The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education.

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