



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Spring 2015 Vol. 4, No. 3 General Editor Lynne Liberato Executive Editor David Furlow

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The Society's 2015 calendar of events is an usually full and exciting one. I hope you'll plan to attend as many as you can. [Read more...](#)



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Lead Articles

Magna Carta at 800: How a Medieval Charter Shaped American Law

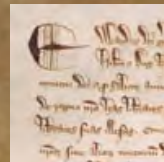
By Justice Eva Guzman and Andrew Buttaro
Borne as a pact concluded between a weakened king and ambitious barons, the charter has lived in the imagination ever since. [Read more...](#)



Justice Eva Guzman

On Thursday, June 18, 2015, TSCHS's Panel of Judges and Historians Will Examine Magna Carta's Rule of Law Legacy in Its 800th Year

By David A. Furlow
Be sure to make time during the State Bar of Texas Annual Meeting for our 1-hour CLE program. [Read more...](#)



Detail of the Magna Carta

Six Constitutions Over Texas: Law and Political Identity in Texas, 1845-1861

By William J. Chriss
Intellectual historians see constitutions as artifacts that illuminate the ideologies and thought worlds of those who produced them. [Read more...](#)



William J. Chriss

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Jesús F. de la Teja

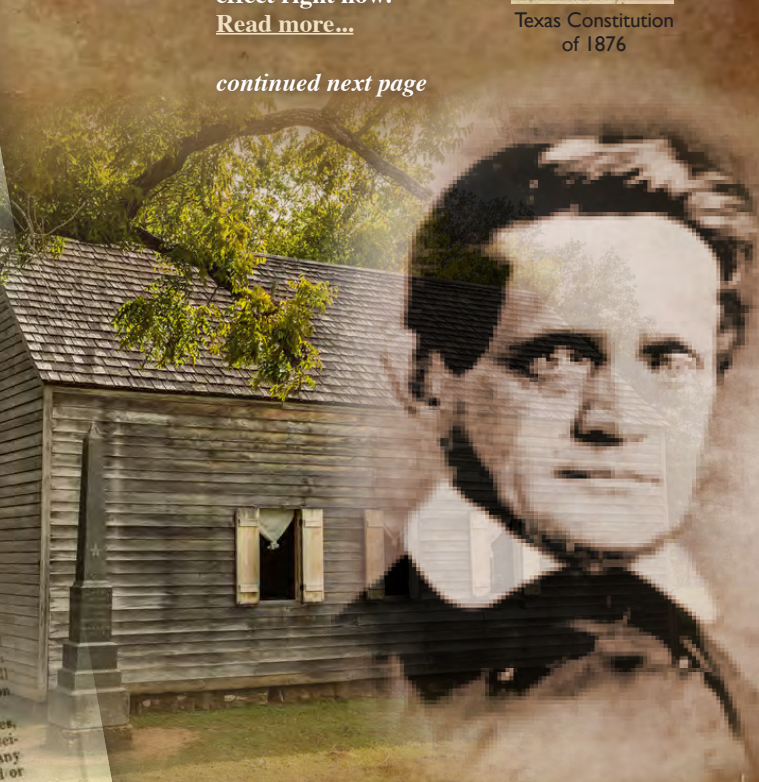
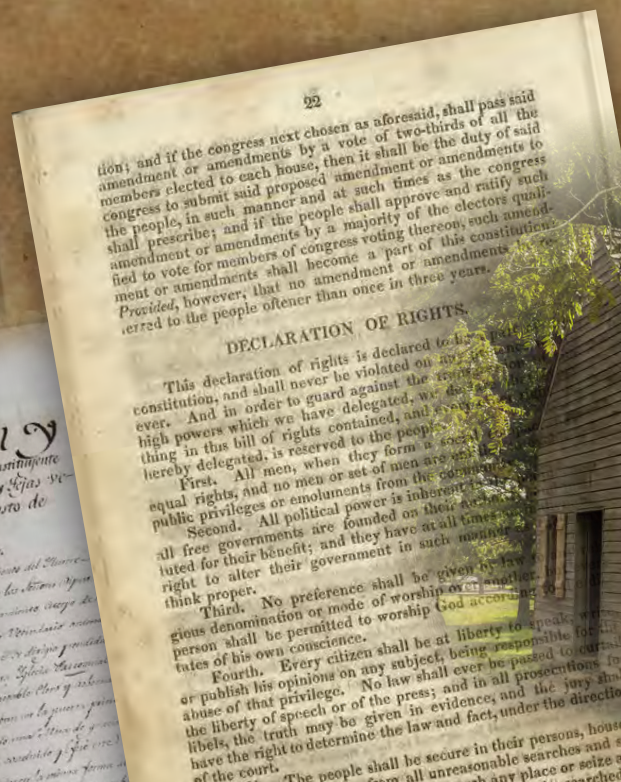
No One Knows What the Texas Constitution Is

By Jason Boatright
Texas might have as many as six constitutions, or no constitution at all, in effect right now. [Read more...](#)



Texas Constitution of 1876

continued next page



tion; and if the congress next chosen as aforesaid, shall pass said amendment or amendments by a vote of two-thirds of all the members elected to each house, then it shall be the duty of said congress to submit said proposed amendment or amendments to the people, in such manner and at such times as the congress shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of congress voting thereon, such amendment or amendments shall become a part of this constitution: Provided, however, that no amendment or amendments be referred to the people oftener than once in three years.

DECLARATION OF RIGHTS.

This declaration of rights is declared to be a part of the constitution, and shall never be violated on any pretence whatever. And in order to guard against the exercise of any high powers which we have contained, and reserved to the people, in this bill of rights, is reserved to the people, and hereby delegated, is reserved to the people.
First. All men, when they form a society, shall enjoy equal rights, and no men or set of men are entitled to exclusive public privileges or emoluments from the government.
Second. All political power is inherent in the people; all free governments are founded on their consent, and instituted for their benefit; and they have at all times the right to alter their government in such manner as they shall think proper.
Third. No preference shall be given by law to any religious denomination or mode of worship over another.
Fourth. Every citizen shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege. No law shall ever be passed to curtail the liberty of speech or of the press; and in all prosecutions for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and fact, under the direction of the court.
Fifth. The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable searches and seizures; and no warrants to search any place or seize any person or property shall be issued, but on probable cause to be searched or

Features

Law and Order in Texas

By Rachel Palmer Hooper
Seven women. Two hundred and sixty-eight men. All are currently sentenced to die in Texas. [Read more...](#)



Rachel Palmer Hooper

Introduction to Researching Texas Constitutional History Online

By Justice Michael Massengale
Basic research on the Texas Constitution is easily performed online and for free, using a few valuable internet resources. [Read more...](#)



The home page of the Justice's blog

Interview with First Court of Appeals Justice Michael Massengale about the Texas Constitution History Blog

By David A. Furlow
It is hoped the blog will ignite interest among lawyers who might not otherwise realize the arguments they could make about the Texas Constitution. [Read more...](#)



Justice Massengale

News & Announcements

Supreme Court History Course Expands Subject Matter

By Lynne Liberato
The Society's bi-annual seminar will now extend beyond Supreme Court history to include other aspects of Texas legal history. [Read more...](#)



Lynne Liberato

Society's March 6 TSHA Joint Session Will Explore the History of Texas School Prayer Litigation

By David A. Furlow
The session will explore how historic judicial records can shed light on cases that profoundly transform Texans' constitutional rights. [Read more...](#)



The Church v. Bullock case file

Members Are Invited to Attend H.W. Brands Talk and Ransom Center Tour on March 27

By David A. Furlow
Society President Marie Yeates made it possible for noted historian H.W. "Bill" Brands to speak on American history for Society members. [Read more...](#)



H.W. "Bill" Brands

Reenactment of Johnson v. Darr Marks the Ninetieth Anniversary of the Historic All-Woman Texas Supreme Court

By Elizabeth Furlow
The first case in the United States presided over by an all-woman state supreme court panel was commemorated with a reenactment of its oral argument. [Read more...](#)



The All-Woman Court of 1925

Former Texas Supreme Court Justice Greg Abbott Sworn-In as 48th Governor of Texas

By Dylan O. Drummond
On January 20, 2015, Greg Abbott joined a select group of former Texas Supreme Court Justices who have gone on to serve as Texas Governor. [Read more...](#)



Gov. Abbott being sworn in

Chief Justice Hecht Delivers His First State of the Judiciary Address

By Dylan O. Drummond
The Chief Justice called upon the Legislature to help the judicial branch improve how it serves Texans. [Read more...](#)



Chief Justice Hecht

Justice Debra Lehrmann and the Court Host the Uniform Law Commission

By Dylan O. Drummond
At the end of January, the Commission held its Midyear Meeting in Austin, which included several functions hosted by Justice Lehrmann at the Court. [Read more...](#)



Justice Lehrmann

Lone Star Legal Aid Establishes Hall of Heroes

By Dylan O. Drummond
To celebrate its sixty-fifth anniversary, Lone Star Legal Aid announced its Hall of Heroes, recognizing sixty-five lawyers, judges, and community leaders. [Read more...](#)



Lone Star Legal Aid logo

Beck Appointed to UT Board of Regents

By Dylan O. Drummond
In January, Governor Greg Abbott appointed the Chair of the Society's Fellows program, David Beck, to the UT System Board of Regents. [Read more...](#)



David J. Beck

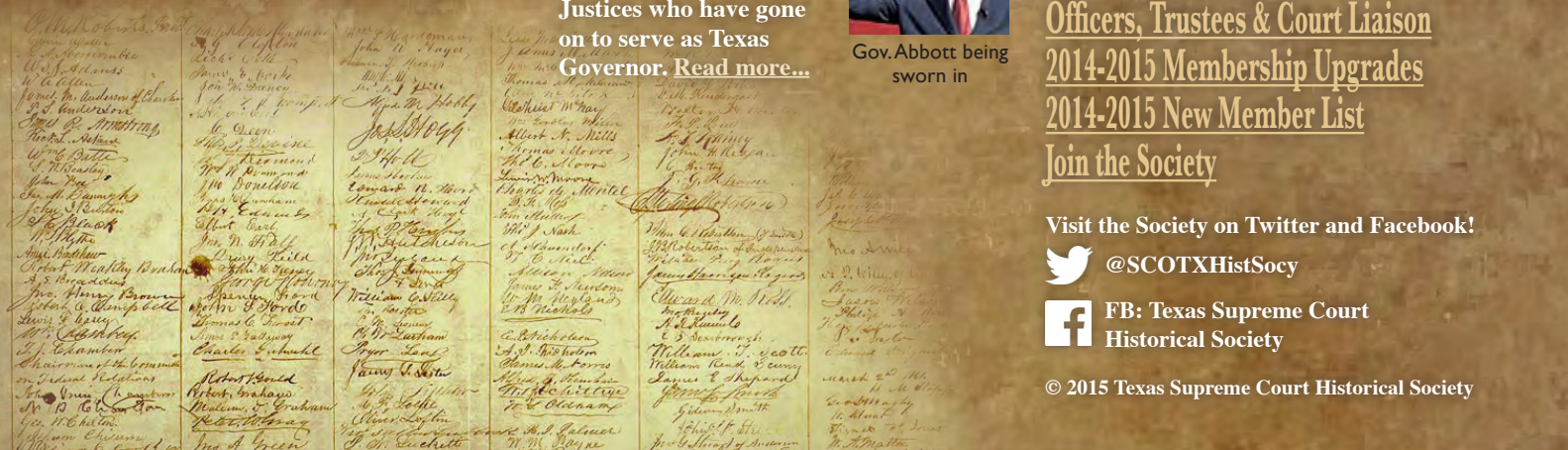
Membership & More

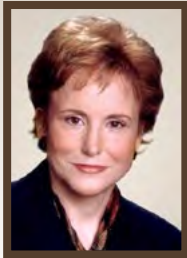
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Marie Yeates

Letter from the *President*

Dear Members,

The Society's 2015 calendar of events is an unusually full and exciting one. All of the programs are open to Society members, so I hope you'll plan to attend as many of them as possible.

On Friday, March 6, we will hold a joint session at the Annual Meeting of the Texas State Historical Association, which is in Corpus Christi this year. I will preside over the session, which will feature presentations by David Furlow and archivist Laura Saegert on the history of school prayer cases in Texas and a commentary by Bill Chriss. See the article in this issue for program details.

Three weeks later, on Friday, March 27, the Society's Board of Trustees will hold our spring meeting in Austin. It promises to be unlike any we've had before. The venue is the beautiful AT&T Center on the UT campus, and the lunch speaker is my favorite historian, H. W. Brands. We will also tour the Harry Ransom Center, which houses an amazing collection of original manuscripts and artifacts (including an original copy of the Gutenberg Bible). All members are invited to attend the lunch and take the tour. Again, see the article in this issue for details.

Also on the spring calendar is the Society's second biennial symposium on the history of Supreme Court jurisprudence. Scheduled for Thursday, May 7, in Austin, it will offer participants great insights on such topics as the evolution of case law on free speech and the aftermath of *Pennzoil v. Texaco*. Lynne Liberato is once again the course director for this MCLE-accredited symposium. (See the announcement and registration information on p. 66.)

As I mentioned in the previous issue of the *Journal*, this year's John Hemphill Dinner will be held in September rather than in June. The Board decided last fall that the move would have a number of advantages, including the tie-in with the State Bar of Texas Advanced Civil Appellate Course and the increased potential for getting speakers from the U.S. Supreme Court and other organizations with heavy summer schedules. We will announce this year's keynote speaker later this spring. In the meantime mark your calendar for the evening of Friday, September 11, at the Austin Four Seasons Hotel.

Each of these events is important to the Society's mission of celebrating and preserving the state's judicial history. They are also great perks of being a member. I invite you to take full advantage of them.

Very truly yours,
Marie R. Yeates

Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

WE ARE NEARING COMPLETION of our judicial civics book project for seventh-grade Texas history classes. The book and program is tentatively named *Taming Texas: How Law and Order Came to the Lone Star State*. Authors James L. Haley and Marilyn Duncan have completed the writing and editing phases of the book and have sent the manuscript for layout and illustration. We are especially excited to announce that Chief Justice Hecht has agreed to write the foreword for our book. We appreciate the Chief as well as Justice Green, the Court's liaison to the Society, for their support of this project.

Jan Miller and her team at the State Bar's Law Related Education Department have arranged for the presentation of a sample copy of the *Taming Texas* book to a statewide history teachers conference later this month in Austin. The teachers will be encouraged to use the book in their Texas history curriculum during the next school year. We are already beginning work on the second book in the *Taming Texas* series, *Texas Law and the Frontier*, and will keep you updated on developments of this exciting project.

As a benefit to our Fellows, we are offering complimentary admission to the Society's upcoming second biannual *History of Texas Supreme Court Jurisprudence* symposium. The symposium, a day-long CLE course to be held on May 7, 2015 in Austin, is cosponsored with TexasBarCLE. The Fellows are able to attend the symposium on a complimentary basis, one of the benefits of being a Fellow. We hope all Fellows will be able to attend this exceptional program.

Our Third Annual Fellows Dinner will be held in Austin on May 7, the evening of the history symposium. The dinner is exclusively for Fellows as another complimentary benefit. We hope all Fellows will join us at both events. Further details on the dinner will be sent to all Fellows in the near future.

Finally, I want to express our appreciation to the Fellows for their support of programs like our judicial civics book project. If you are not currently a Fellow, please consider joining the Fellows and helping us with this important work. If you would like more information or want to join the Fellows, please contact the Society office or me.

FELLOWS OF THE SOCIETY

HEMPHILL FELLOWS

(\$5,000 or more annually)

David J. Beck*

Joseph D. Jamail, Jr.*

Richard Warren Mithoff*

GREENHILL FELLOWS

(\$2,500 or more annually)

Marianne M. Auld

S. Jack Balagia

Bob Black

E. Leon Carter

Tom A. Cunningham*

David A. Furlow and Lisa Pennington

Harry L. Gillam, Jr.

William Fred Hagans

Lauren and Warren 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.*

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Nick C. Nichols

Hon. Thomas R. Phillips

Hon. Jack Pope*

Shannon H. Ratliff*

Robert M. Roach, Jr.*

Leslie Robnett

Professor L. Wayne Scott*

Reagan W. Simpson*

S. Shawn Stephens*

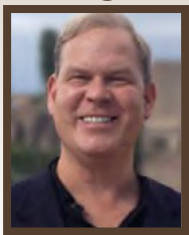
Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter*

*Charter Fellow

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David A. Furlow

Learning from the *Constitution*

THE CURRENT, 1876 CONSTITUTION OF THE STATE OF TEXAS begins with a preamble: “Humbly invoking the blessing of Almighty God, the people of the state of Texas do ordain and establish this constitution.” In this issue, we’ll explore what the people of Texas ordained and established.

This is the fifth issue our Editorial Board has devoted to a special aspect of Texas legal history. After examining the role of chief justices in the Winter 2013 issue, investigating Civil War and Reconstruction Texas in the Spring 2014 issue, addressing murder and mayhem on the Texas Supreme Court in the Fall 2014 issue, and remembering the Republic in the Winter 2014 issue, the *Journal’s* coeditors have focused this issue on the Constitution.

Why bother studying the Texas Constitution? Are we going to learn anything valuable from legal history? And even if we learn something useful, aren’t we just as likely to ignore history’s always ambiguous lessons?

Yes, we *can* learn valuable lessons that make a difference in our daily lives, and we *can* avoid repeating the past’s errors, even if we’re not litigating a constitutional challenge. As historian Peter N. Stearns has observed, studying history improves a person’s ability to assess the ambiguous evidence often weighed and balanced in a life-determining second:

The study of history builds experience in dealing with and assessing various kinds of evidence—the sorts of evidence historians use in shaping the most accurate pictures of the past that they can. Learning how to interpret the statements of past political leaders . . . helps form the capacity to distinguish between the objective and the self-serving among statements made by present-day political leaders. Learning how to combine different kinds of evidence—public statements, private records, numerical data, visual materials—develops the ability to make . . . arguments based on a variety of data . . .

Evidence-assessment is a valuable skill for an attorney, a judge, a historian, or a law student.

The study of legal history provides experience in assessing past examples of change. “Learning history helps one figure out . . . if one main factor—such as a technological innovation or some deliberate new policy—accounts for a change or whether, as is more commonly the case, a number of factors combine to generate the actual change that occurs.”

Texas's Constitution offers lessons teachers should share with their students and ideas parents should discuss with their children. As my daughter prepares to go to law school, I've invited her to assist me in evaluating the kinds of evidence in this issue of the *Journal*. I did so not to make my life easier, but to make it richer, and to better prepare her for the trials she'll soon face. "Learning history means gaining some skill in sorting through diverse, often conflicting interpretations," Stearns notes. The study of history teaches a valuable skill: the ability to assess, weigh, and act upon conflicting interpretations of ambiguous evidence.

In her article about the Magna Carta's 800th anniversary and the great charter's influence on Texas, Texas Supreme Court Justice Eva Guzman examines how the dull, nasty, brutish and short life of medieval England led slowly, ever so slowly, to Magna Carta's Rule of Law. If the violence and uncertainty of the medieval world seem too afield to teach any lessons for the modern world, all one has to do is gaze upon the tragic landscapes of Syria, Iraq, and Afghanistan to see that major parts of the world could still benefit from Magna Carta's example.

Professor Frank de la Teja's powerful analysis of the Constitution of Coahuila and Texas shows that constitutionalism did not arrive fully-developed in 1836 like Athena emerging fully-armed out of Zeus's forehead. Constitutionalism and republican forms of government originally came to Texas through Mexico's federal constitution of 1824 and the Mexican state of Coahuila and Texas's experiments of the late 1820s and 1830s.

Bill Chriss's excellent article about the constitutions of 1845 and 1861 reveals how one generation of Texans subordinated their republic's independence to join the Union. Just sixteen years later, the next generation rewrote their constitution, ended their allegiance to the Union, and pledged their fealty to the Confederacy. Bill's article examines the acrobatic intricacy of Texas's entry into and exit from the Union.

In addition, this issue offers former prosecutor Rachel Hooper's insights about the birth and development of the Texas Court of Criminal Appeals. First Court of Appeals Justice Michael Massengale offers his tips about conducting constitutional research using online resources. Jason Boatright's reprinted article on the important variations among versions of the Constitution of 1876 further expands the constitutional theme in this issue.

As Executive Editor, I'd like to join General Editor Lynne Liberato, Deputy Executive Editor Dylan Drummond, and Managing Editor Marilyn Duncan in asking you to share ideas, photographs old and new, and stories about the Texas judiciary, state appellate courts, and the Texas Supreme Court with like-minded friends and members of the public. If you'd like to join the Texas Supreme Court Historical Society in preserving, protecting, and sharing the history of Texas courts and Texas law, please e-mail your draft article to dafurlow@gmail.com or call me at 713.202.3931 to discuss how we at the *Journal* and the Society can work with you.

DAVID A. FURLOW *is a historian, archeologist, and lawyer.*

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Magna Carta at 800: How a Medieval Charter Shaped American Law

By Justice Eva Guzman and Andrew Buttaro

Introduction

EIGHT HUNDRED YEARS AGO this June, the Magna Carta—Latin for the “great charter”—was drafted in a marshy village twenty miles west of London.¹ Borne as a pact concluded between a weakened king and ambitious barons, the charter has lived in the imagination ever since as a pivotal moment when fundamental rights were memorialized in writing and embryonic limits were placed on monarchical power.² The charter had a tremendous influence on much of English history, but was established as iconic in the firmament of English law by leading seventeenth and eighteenth century English jurists, chiefly Sir Edward Coke.³ British settlers to North America carried with them ideas of English justice, including the understanding of foundational rights granted in the Magna Carta.⁴ As a result, the Magna Carta proved as influential in the American colonies as it did in medieval England.⁵

Although conceived in circumstances far removed from our modern world, it is nonetheless undeniable that contemporary society has been deeply shaped by the aspirations and ideals in the Magna Carta. In this article, we recall the charter’s early history, discuss its imprint on Texas and the rest of the United States, and conclude with some words on why the charter deserves remembering in this anniversary year.



Copy of Magna Carta from the British Library’s Online Gallery (MS Augustus II.106).jpg, [http://commons.wikimedia.org/wiki/Magna_Carta#mediaviewer/File:Magna_Carta_\(British_Library_Cotton_MS_Augustus_II.106\).jpg](http://commons.wikimedia.org/wiki/Magna_Carta#mediaviewer/File:Magna_Carta_(British_Library_Cotton_MS_Augustus_II.106).jpg) (last visited Feb. 13, 2015).

- ¹ James Podgers, *Learning Opportunity: ABA Initiatives Seek to Raise Public Awareness About the Magna Carta’s Significance*, 100 A.B.A. J. 66 (2014); Nicholas Vincent, *Magna Carta: A Very Short Introduction* 1 (2012) [hereinafter *Very Short Introduction*].
- ² James Podgers, *Star of the Show: The Magna Carta Reaches Celebrity Status as its 800th Anniversary Nears*, 100 A.B.A. J. 64 (2014) [hereinafter *Celebrity Status*].
- ³ Nathan Dorn, *Magna Carta: A Charter for the Ages*, 3 *Libr. Of Congress Mag.* 11 (2014) [hereinafter *Charter for the Ages*].
- ⁴ A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 11 (1968) [hereinafter *Road from Runnymede*].
- ⁵ *Id.* at 12–13.

English History

In the summer of 1215, King John of England and a group of recalcitrant barons gathered in Runnymede, a riparian village in the shadow of the majestic Windsor Castle, to discuss terms of peace.⁶ The barons were in a rebellious mood.⁷ King John ascended to the throne in 1199, and rapidly established a reputation for capricious rule (no small achievement given the legacy of his predecessors).⁸ Worse still, John was widely viewed as incompetent.⁹ He was a bumbling military strategist, and just five years into his reign, he had lost massive land holdings in France that had been bequeathed to him by his ancestors. Much of the period between 1204 and 1215 was consumed by John's desperate struggle to regain those lost French lands. Then as now, war required vast sums of money, and John levied crushing taxes on the barons to fund his unsuccessful revanchist campaigns.¹⁰ The financial burdens would have been galling had they been imposed by any monarch; coming from a king as personally unpopular as John, they were nearly unbearable.¹¹

It was against this backdrop that the factions met at Runnymede. John arrived weakened by a depleted treasury and humiliated by another military defeat—this time, at the Battle of Bouvines in France.¹² The barons, on the other hand, were eager to reclaim rights that they felt had lapsed under John's reign, and they were emboldened both by John's weakness and by the force of their outrage. The Archbishop of Canterbury, Stephen Langton, may have served as a *de facto* mediator as well as an amanuensis for the parties.¹³ Perhaps surprisingly, the sides came to terms relatively quickly, agreeing on general provisions in just five days. Just over a week after the meeting began, the text of the Magna Carta was completed and sealed, and the barons renewed their oaths of loyalty to John.

The document that emerged is as fascinating as it is paradoxical.¹⁴ Some of its terms were hyper-specific, like the call to remove fish weirs on the Thames and the Medway.¹⁵ Other clauses were striking in their expansiveness. Chapter 39 stated boldly, "No free man will be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor shall we go or send against him, save by the lawful judgment of his peers and by the law of the land."¹⁶ Similarly, Chapter 40 pledged, "To no one shall we sell, to no one shall we deny or delay right or justice."¹⁷ It is these latter chapters of the charter that account for its longevity.

⁶ VERY SHORT INTRODUCTION, at 2–3.

⁷ DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 244 (2003) [hereinafter YEAR OF MAGNA CARTA] (noting the barons "came armed, an unmistakable signal that rebellion was in the air").

⁸ *Id.* at 141; VERY SHORT INTRODUCTION, at 35–36 ("Magna Carta was a response not to one particular king or set of circumstances, but to an entire tradition of 'Angevin' kingship. There is no doubt that John was a bad king. His badness, however, was an inherited, family characteristic.").

⁹ VERY SHORT INTRODUCTION, at 43 ("The events of the past few years had branded John a failure for his loss of Normandy His reputation was irreparably destroyed.").

¹⁰ *Id.* at 57 ("Already, by the time the battle was fought, a number of the English barons had signaled their disapproval of the king, refusing either to serve in person in John's continental armies or to pay the 'scutage' demanded from those who stayed at home. In effect, this represented a tax strike: the first signal of the coming storm. It gathered pace after Bouvines.").

¹¹ YEAR OF MAGNA CARTA, at 245.

¹² *Charter for the Ages*, at 11.

¹³ VERY SHORT INTRODUCTION, at 49 ("Historians in search of an 'author' for Magna Carta have on occasion advanced the claims of Stephen Langton, even though there is little evidence to suggest that it was he in person who drafted the document.").

¹⁴ YEAR OF MAGNA CARTA, at 251 ("There is much that is paradoxical in the history of Magna Carta. Despite its huge later success and mythical status as the cornerstone of English liberties, in 1215 Magna Carta was an abysmal failure.").

¹⁵ J.C. HOLT, MAGNA CARTA 1 (1992).

¹⁶ WILLIAM F. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 316–21 (1965).

¹⁷ *Id.*

In the short term, however, the charter was an utter failure. Designed to prevent war, it in fact was tantamount to a *casus belli*. The rebels, distrustful of John, were hesitant to disarm. John, for his part, probably never intended to respect the agreement. Soon after consenting to its terms, he petitioned Pope Innocent III to strike the document, and the Pontiff complied with a bull declaring the charter “not only shameful and base but also illegal and unjust,” and therefore “null and void of all validity for ever.”¹⁸

By the time the papal bull arrived on English soil, however, war between John and the barons had again erupted. Not for the last time in English history, the rebel faction looked across the English Channel for assistance,

and connived to install Prince Louis of France as regent.¹⁹ Before those plans could be consummated, however, John fell ill from dysentery and died in October 1216.²⁰ The throne was left to his young son, Henry III, who had been stowed away in a royal castle for protection during the tumult of the previous months.²¹



King John of England in battle with the Franks (left), Prince Louis VIII of France on the march (right), British Library Royal 16 G VI f. 385 (ca. 1332). Image from Wikimedia Commons, http://upload.wikimedia.org/wikipedia/commons/7/71/John_of_England_vs_Louis_VIII_of_France.jpg (last visited Feb. 13, 2015).

Henry’s ascension proved fortuitous for the Magna Carta.²² Only nine years old and with half of his kingdom controlled by rebels, Henry—no doubt at the urging of his advisers—renewed the royal pledges contained in the charter as a way of eroding support for the rebellious barons.²³ The

gambit ultimately proved successful. The war drifted into a stalemate as French support ebbed, and fighting limped to a close by 1217. That same year, the Magna Carta was again reissued, and an accompanying document, the Charter of the Forest, was also promulgated.²⁴

In the succeeding centuries, the Magna Carta was reaffirmed dozens of times, and its provisions permeated the jurisprudence of the period.²⁵ In 1297, the Magna Carta was officially entered into the statutes of the realm.²⁶ But the crucial link between the thirteenth century Magna Carta and its later preeminence was Sir Edward Coke, the leading English jurist. The attorney general for Queen Elizabeth I and chief justice during the reign of James

¹⁸ YEAR OF MAGNA CARTA, at 253; Cullen Couch, *The Sheer Force of an Idea*, UVA LAW., Fall 2014, at 23 [hereinafter *Sheer Force*].
¹⁹ YEAR OF MAGNA CARTA, at 254. The Glorious Revolution of 1688, of course, also featured an English faction inviting the rule of a continental king. See, e.g., SIR WILLIAM HOLDSWORTH, 6 A HISTORY OF ENGLISH LAW 193 (1971); T.K. DERRY, THE UNITED KINGDOM 49 (1963).
²⁰ YEAR OF MAGNA CARTA, at 260.
²¹ *Id.* at 261.
²² *Id.* (“John’s death brought Magna Carta back to life.”).
²³ *Id.* (commenting that “reissuing Magna Carta was a propaganda move in the struggle for control of the kingdom—and a highly effective one”).
²⁴ *Id.* at 269. The Magna Carta’s name derives from a physical comparison to the more diminutive Charter of the Forest. Printed on larger parchment, the document originally negotiated at Runnymede became alternatively known as the “great charter” or the “big charter” on account of its sheer size. *Id.* Howard acknowledged, rightly, that “Magna Carta survived because of its potential for growth.” ROAD FROM RUNNYMEDE, at 8. It is serendipitous that not only its provisions, but its name proved malleable enough to accommodate its later stature and purpose.
²⁵ ROAD FROM RUNNYMEDE, at 9.
²⁶ *Sheer Force*, at 24.

I, Coke resurrected and reinterpreted the charter.²⁷

Coke hailed the Magna Carta as a foundation of English constitutionalism that stood above even a monarch as supreme law. As he wrote in his landmark *Institutes of English Law*, “Magna Carta is such a fellow, that he will have no ‘sovereign.’”²⁸ To Coke, the general clause from the Magna Carta was a “roote” from which “many fruitfull branches of the law of England have sprung.”²⁹ In this fashion, then, Coke’s cornerstones of English law were quarried from the agreement reached at Runnymede.



Sir Edward Coke (1552-1634), attributed to Thomas Athow, after Cornelius Johnson. Image from Wikimedia Commons, http://commons.wikimedia.org/wiki/File:Edward_coke.jpg (last visited Feb. 13, 2015).



Sir Edmund Coke's *The First Part of the Institutes of Laws of England*, on display at the University of Texas Joseph D. Jamail Center for Legal Research, Tarlton Law Library. Photo by David Furlow.

Some modern scholars have criticized Coke’s arguments on the Magna Carta as unsupportable. Coke’s contention that the 1215 charter was “for the most part declaratory of the fundamental lawes of England”—in other words, the charter merely canonized what had been existing English law—is particularly subject to question.³⁰ But regardless of the merits of his arguments, Coke’s framing of the Magna Carta as quasi-constitutional was undeniably compelling. William Blackstone, the eighteenth century author of the magisterial *Commentaries on the Laws of England*, furthered Coke’s arguments on the importance of the charter.³¹ For instance, Blackstone expressly tied the right to a trial by jury to the guarantees contained in the charter. Calling this protection “the grand bulwark” of an Englishman’s liberties, Blackstone decreed that it was “secured to him by the [G]REAT [C]HARTER.”³²

²⁷ *Charter for the Ages*, at 8.

²⁸ *ROAD FROM RUNNYMEDE*, at 120.

²⁹ Edward Coke, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 45 (photo. reprint 1986) (W. Clarke & Sons 1817) (1641), quoted in Hon. Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U. L. REV. 1309, 1345 (2003) [hereinafter *Right to a Remedy*].

³⁰ *YEAR OF MAGNA CARTA*, at 270 (“A myth that was once widely believed by lawyers is that Magna Carta embodied the ancient laws of Anglo-Saxon England, subverted by the ‘Norman Yoke’ after 1066, but then recovered and set out for all time in the charter.”).

³¹ See *Right to a Remedy*, 78 N.Y.U. L. REV., at 1322.

³² 4 WILLIAM BLACKSTONE, *COMMENTARIES* 342–43.

Blackstone was a jurisprudential titan in both England and the American colonies.³³ Speaking of Blackstone’s reputation in America, the legal and literary scholar Robert Ferguson notes that “all our formative documents—the Declaration of Independence, the Constitution, the *Federalist Papers* and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in Sir William Blackstone’s *Commentaries on the Laws of England*.” The impact is so pronounced, argues Ferguson, that “the *Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions.”³⁴

The American Experience

Coke and Blackstone constituted the crucial link between medieval England and the American colonies. Their emphasis on the Magna Carta, coupled with their leading stature on both sides of the Atlantic, ensured that the charter’s maxims would be engrafted into the American experience.³⁵ As A.E. Dick Howard, author of a seminal work on the Magna Carta and American constitutionalism, has written, Coke had “dramatic influence on the course of American legal and constitutional thought.”³⁶ This influence can be seen in the colonial charters granted to the original colonists, in the statements of rights that were produced by the early legislatures, and ultimately, in the constitutions that the states produced after independence.³⁷

The language of the Magna Carta was embedded in the wording of some of the colonial charters themselves. For instance, the Virginia Company Charter of 1606—which almost surely was reviewed by Coke, and perhaps even drafted by him—stated that the colonists had all “liberties, franchises and immunities” as if they had been born in England, a category that necessarily encompassed rights granted by the Magna Carta.³⁸ Similar language appears in the charters of Maine, Connecticut, Carolina, and Rhode Island, among others.³⁹

But the reach of the Magna Carta in the colonies extended beyond the semantics and construction of the original charters. Massachusetts provides an early and apt example of the pervasiveness of its influence. John Winthrop, the famed Puritan governor who expressed his wish that the colony should serve as a “city upon a hill,” also emphasized the importance of the Magna Carta.⁴⁰ Commenting on a legislative meeting in 1635, Winthrop urged that “men should be appointed to frame a body of laws, in resemblance to a Magna Charta” for the colony.⁴¹ Winthrop’s hope was realized in the Body of Liberties of 1641, a prescient document that embodied

³³ BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 2* (2001) (“Also essential in determining the scope of individual protections were the writings of legal commentators, particularly those of Lord Edward Coke and Judge William Blackstone. Early American courts (both federal and state) utilized these sources to resolve conflicts between the government and the people.”).

³⁴ William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 8 (1994).

³⁵ YEAR OF MAGNA CARTA, at 268 (“Taken to the American colonies, it influenced both the Constitution of the United States and the laws of individual states.”); ROAD FROM RUNNYMEDE, at 369 (“What Americans from the first settlements to the eve of Revolution knew of the Great Charter, they knew ... because of Coke.”).

³⁶ A.E. Dick Howard, *RIGHTS IN PASSAGE: ENGLISH LIBERTIES IN EARLY AMERICA 4* (1992).

³⁷ ROAD FROM RUNNYMEDE, at 10–13.

³⁸ *Id.* at 15, 18.

³⁹ *Id.* at 19.

⁴⁰ John Witte, Jr., *How to Govern A City on A Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41 (1990) (quoting Winthrop as having written: “[M]en shall say of succeeding plantations: the lord make it like that of New England: for wee must Consider that wee shall be as a City upon a Hill, the eies of all people are upon us.”).

⁴¹ ROAD FROM RUNNYMEDE, at 35–36. Although the modern trend is to spell the document “Magna Carta,” earlier writers, like Winthrop, often referred to it as “Magna Charta.” As Bryan Garner has acknowledged, “[t]hough Charta vastly predominated before the mid-20th century, it now seems archaic” in comparison to the standard modern spelling. *A Magna Carta Style Guide*, 101 A.B.A. J. 26 (2015).



Portrait of Massachusetts Bay Colony Governor John Winthrop thought to have been painted by a follower of Anthony van Dyck and held by the Winthrop family, donated to the American Antiquarian Society in Boston, Massachusetts. Image public domain, courtesy of Wikimedia Commons, <http://commons.wikimedia.org/wiki/File:JohnWinthropColorPortrait.jpg> (last visited Feb. 13, 2015).

the best traditions of the English common law and also seemed to anticipate the bills of rights that were to later become a routine feature of colonial American life.⁴² The precepts contained in the medieval charter were evident here; as one author notes, the Body of Liberties’ “resemblance to the Magna Carta is striking.”⁴³

New England was not the only region influenced by the Magna Carta. Maryland’s colonial legislature protected religious freedom with language clearly borrowed from the “general and elastic” wording of the Magna Carta, and William Penn had a certified copy of the ancient charter rendered in England and deposited in the archives of the colony that bore his name.⁴⁴ Penn proselytized on behalf of the Magna Carta in the colonies and was responsible for the first colonial publication on the subject.⁴⁵

The Magna Carta’s influence was only more pronounced in the Revolutionary era, with protests against the Stamp Act and other perceived British outrages couched in terms redolent of Coke’s writings. In 1765, the Massachusetts Assembly declared the Stamp Act “against the MAGNA CARTA and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void.”⁴⁶ The charter remained resonant in the post-revolutionary period as well. For instance, the Massachusetts constitution was undoubtedly shaped by the Magna Carta.⁴⁷ This is not wholly

surprising, as the state constitution was largely authored by John Adams, whom Howard describes as “steeped in the traditions of Magna Carta.”⁴⁸

Though removed by time and distance from the Eastern seaboard, Texas was hardly immune to the charter’s influence. The 1836 Texas Constitution, written by delegates who gathered around the same time as the fall of the Alamo, incorporated large portions of the federal Constitution and looked to other intellectual fountainheads as well, including the Magna Carta.⁴⁹ Unlike the Massachusetts constitution discussed previously,

⁴² *Id.* at 37.

⁴³ *Id.*

⁴⁴ *Id.* at 55, 88.

⁴⁵ *Id.* at 89 (“Moreover, to ensure wide public knowledge of the Charter’s contents, [Penn] was responsible for the first publication in America of a commentary on Magna Carta.”).

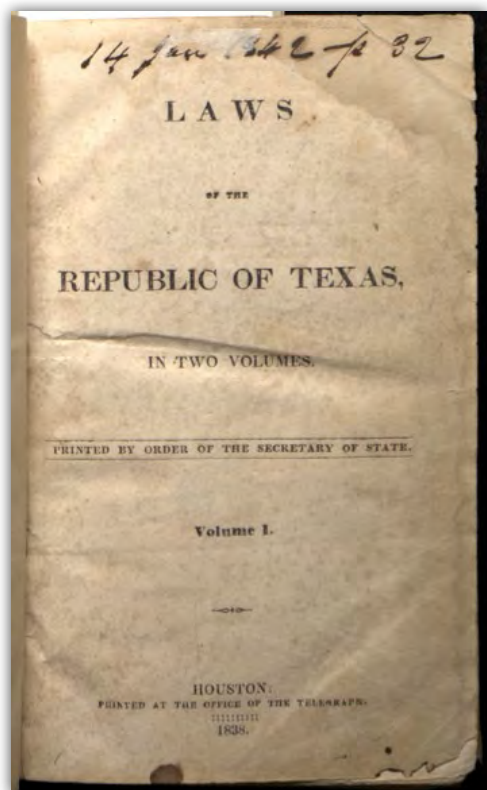
⁴⁶ Roger L. Kemp, *DOCUMENTS OF AMERICAN DEMOCRACY: A COLLECTION OF ESSENTIAL WORKS* 13 (2010).

⁴⁷ Daniel W. Halston, *The Meaning of the Massachusetts “Open Courts” Clause and Its Relevance to the Current Court Crisis*, 88 *MASS. L. REV.* 122, 125 (2004) (“In his appeal to the council, Adams actually cited Magna Carta, Chapter 40 and Coke’s work, evidencing that the framers of the Massachusetts Constitution were likely aware of the principles that were the foundation of Magna Carta—including the concern that the courts be open and independent.”).

⁴⁸ *ROAD FROM RUNNYMEDE*, at 157.

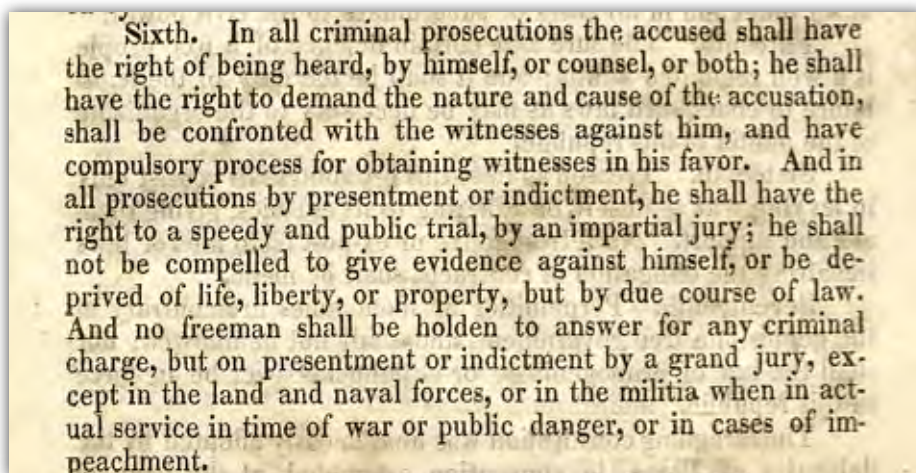
⁴⁹ Lance A. Cooper, *An Historical Overview of Judicial Selection in Texas*, 2 *TEX. WESLEYAN L. REV.* 317, 321 (1995) (“In December of 1835, the Texas General Council adopted a resolution calling for an election of delegates to a plenary convention. Elections were held on February 1, 1836, and the delegates assembled at Washington-on-the-Brazos in March to draft a constitution for the soon-to-be-republic.”); TODD HANSEN, *THE ALAMO READER: A STUDY IN HISTORY IX* (2003) (recounting that the siege of the Alamo “took place from the afternoon of February 23 to the morning of March 6, 1836”).

the Texas Constitution of 1836 cannot be considered the product of a single leading author.⁵⁰ But a number of serious constitutional thinkers, including former Mexican official Lorenzo de Zavala, were well known and familiar with the intellectual arguments in favor of republican government.⁵¹ As one commentator has observed, the Texas constitution ultimately produced “was an amalgam of Jacksonian democracy, British common law, Spanish civil law, the ideals in the Magna Charta, the English Bill of Rights, William Penn’s Frame of Government, the Charter of Privileges for Pennsylvania, the Declaration of Independence, and George Mason’s Virginia Bill of Rights.”⁵²



Constitution of the Republic of Texas, 1836. Image courtesy of University of Texas Tarlton Law Library, <http://tarlton.law.utexas.edu/constitutions/slider/constitution/texas1836/index/1> (last visited Feb. 13, 2015).

Subsequent Texas constitutions, including the sixth constitution still in force today, have also incorporated principles stemming from the Magna Carta.⁵³ Two portions in particular of the 1876 Texas Constitution trace their lineage to guarantees contained in the Magna Carta. Article 1, Section 13 decrees that “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”⁵⁴ Similarly, Section 19’s mandate that “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land,” echoes



Excerpt from Page 2 of the Declaration of Rights on page 23 of Texas’s 1836 Constitution. Public domain image, University of Texas Tarlton Law Library, <http://tarlton.law.utexas.edu/constitutions/slider/constitution/texas1836/dor/2> (last visited Feb. 13, 2015). Article 1, Section 6, above, in the 1836 Constitution has evolved into Article 1, Section 13 of the current constitution.

⁵⁰ John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1120 (1995) (“Among those assembled, however, were several well-educated men, as well as men of vast experience, although no delegate could reasonably be considered the “Father” of the 1836 constitution.”).

⁵¹ *Id.*

⁵² James C. Harrington, *Framing A Texas Bill of Rights Argument*, 24 ST. MARY’S L.J. 399, 402 (1993).

⁵³ Cristen Feldman, *A State Constitutional Remedy to the Sale of Justice in Texas Courts*, 41 S. TEX. L. REV. 1415, 1418 (2000) (“The common law meaning of ‘open courts’ and ‘due course of law’ can be traced to the Magna Carta. The fundamental concepts of the Magna Carta were carried over to the American colonies and in turn the state of Texas. Commentary to section 13 of article I of the Texas Constitution cites the Magna Carta declaration ‘[t]o none will we sell, to none deny or delay, right or justice’ as the primary influence behind the open courts provision. There have been six constitutions in the state of Texas and each contained an ‘open courts’ provision with identical wording. This includes the current constitution adopted in 1876.”).

⁵⁴ TEX. CONST. art. I, § 13.

the very language of the medieval charter.⁵⁵ Both clauses find their ultimate roots in Chapters 39 and 40 of the Magna Carta.⁵⁶

When the Supreme Court of Texas has had occasion to cite to the Magna Carta—as it has several times over the course of its existence—it is typically to note the provenance of the open-courts and due-process guarantees of the Texas Constitution. *Compare* TEX. CONST., art. I, § 13, *with, e.g.,* *Weiner v. Wasson*, 900 S.W.2d 316, 322 (Tex. 1995) (“The history available to us indicates that the open courts provision ... dates back to the Magna Carta.”); *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988) (“We note that there is no provision in the federal constitution corresponding to our constitution’s ‘open courts’ guarantee. Indeed, that guarantee is embodied in Magna Carta and has been a part of our constitutional law since our republic.”); *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) (“The open courts provision’s history also reflects its significance. It originates from Chapter 40 of Magna Carta, the great charter of English liberties obtained from King John in 1215”); *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) (noting that these two sections of the Texas Constitution “have their origin in Magna Carta”).

Thus, while constitutional development necessarily occurred later in Texas, it nonetheless was influenced by the Magna Carta in much the same fashion as the original colonists were. The fact that both Texas and the Eastern states, separated though they are by time, distance, and the force of history, have found the Magna Carta to be a source of inspiration speaks to the document’s extraordinary universality.

The Charter’s Importance

In this anniversary year, then, we celebrate the charter’s influence, power, and sheer ability to endure. Of course, encomiums to the charter have hardly been in short supply over the centuries. The nineteenth century bishop and famed British historian William Stubbs once commented that “the whole of the constitutional history of England is little more than a commentary on Magna Carta,” a grandiose if not entirely unjustifiable claim.⁵⁷ William Pitt the Elder called it “the Bible of the English Constitution.”⁵⁸ The English judge Lord Denning described it as “the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.”⁵⁹ And the poet Rudyard Kipling memorialized the Magna Carta in verse, in “What Say the Reeds at Runnymede?”

And still when mob or Monarch lays
Too rude a hand on English ways,
The whisper wakes, the shudder plays,
Across the reeds at Runnymede.
And Thames, that knows the moods of kings,
And crowds and priests and suchlike things,
Rolls deep and dreadful as he brings
Their warning down from Runnymede!⁶⁰

⁵⁵ *Id.* art. I, § 19.

⁵⁶ WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* 316–21 (1965) [hereinafter *LEGEND & LEGACY*].

⁵⁷ *ROAD FROM RUNNYMEDE*, at ix.

⁵⁸ *YEAR OF MAGNA CARTA*, at 268.

⁵⁹ *Id.*

⁶⁰ Rudyard Kipling, *RUDYARD KIPLING’S VERSE* 751 (1919).

But arguably the finest tribute to the Magna Carta came from Winston Churchill, whose biography and temperament uniquely suited him to celebrate a charter beloved in both the United States and Great Britain.⁶¹ Writing in 1956, Churchill noted that the medieval charter serves as “the foundation of principles and systems of government of which neither King John or his nobles dreamed.”⁶² Churchill was surely correct that the charter’s longevity would have surprised its authors, and his belief that the charter’s lasting power stemmed from its stand against unchecked royal power was equally apt.⁶³ “This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect which men have held it.”⁶⁴

Because many of the charter’s clauses are obsolete or arcane, and the handful of clauses that remain relevant today are so elastic and imprecise, the reality of the charter has been criticized as incommensurate with the praise of its most outspoken admirers. Such criticism is not new.

In their celebrated book on the Magna Carta, Danny Danziger and John Gillingham recall that in the early twentieth century, “it became fashionable to take a debunking view of the Magna Carta, to see it as being all about the self interests of ‘feudal barons.’”⁶⁵ The prototypical example of this sort of criticism is Edward Jenks’s 1904 article on “The Myth of Magna Carta.”⁶⁶ Given the title, the rather unsurprising thesis is that the charter basically reflects the selfish desires of wealthy elites and is undeserving of much of its acclaim. A subsequent writing by Morris R. Cohen continued in this vein, dismissively noting that “very few” of the provisions of Magna Carta could have been useful to the “great mass” of medieval people, and agreeing with Jenks that the charter was at heart a “reactionary document.”⁶⁷

The debunking impulse has persisted in more recent scholarship. Although far more temperate than the previous critics, a writer in *The New Yorker* recently commented on the anniversary by noting, “The Magna Carta actually did less—indeed, a lot less—than is widely believed,” and distanced portions of it as expressing “small grievances with the feudal system or with ways of life peculiar to the early thirteenth century.”⁶⁸

Though not necessarily inaccurate, such criticism is far too facile. The importance of the Magna Carta lays not in its specifics, but in its lasting symbolism. Much like the Declaration of Independence—itsself a document with a lengthy list of grievances unique to the era in which it was written—the middling feudal complaints contained in much of the document are vastly outweighed by the striking importance of a king pledging to respect “the law of the land.”⁶⁹

⁶¹ See generally WILLIAM MANCHESTER & PAUL REID, *THE LAST LION: WINSTON SPENCER CHURCHILL, DEFENDER OF THE REALM, 1940–1965*.

⁶² Winston Churchill, *Barons Against the King*, LIFE MAG., Apr. 2, 1956, at 66.

⁶³ *Sheer Force*, at 24.

⁶⁴ *Id.*

⁶⁵ YEAR OF MAGNA CARTA, at 273.

⁶⁶ Edward Jenks, *The Myth of Magna Carta*, 4 INDEP. REV. 260 (1904), quoted in ROAD FROM RUNNYMEDE, at 2. Jenks’s title has been borrowed by subsequent authors. See, e.g., Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060 (1947).

⁶⁷ MORRIS R. COHEN, LAW AND THE SOCIAL ORDER, 19–21 (1933).

⁶⁸ Robin Wright, *Free Speech and the Magna Carta*, NEW YORKER (Jan. 14, 2015), <http://www.newyorker.com/news/news-desk/al-qaeda-vs-magna-carta>.

⁶⁹ See, e.g., William F. Dana, *The Declaration of Independence*, 13 HARV. L. REV. 319, 337–38 (1900) (“The Declaration, primarily, had one thing, and one thing only, in view, and that was, a justification of the separation of the Colonies from Great Britain, and incidentally, therefore, a defence of the rights of revolution in respect of the then condition of the original thirteen States.”); LEGEND & LEGACY, at 317.

The Magna Carta's steps, however tepid, toward establishing the rule of law, instituting judgment by one's peers, and circumscribing absolute royal power are what we honor in this anniversary year.⁷⁰ Conceived in aristocratic interests and intended to remedy parochial concerns, the Magna Carta is justly remembered today as a blow for human freedom. That alone is worth celebrating.

⁷⁰ *Celebrity Status*, 100 A.B.A. J. at 64 (“Today, Roberts said, the Magna Carta is recognized ‘because it laid the foundation for the ascent of liberty’ and constitutional democracy. ‘We celebrate not so much what happened 800 years ago, but what has transpired since.’”).



JUSTICE EVA GUZMAN is a justice on the Supreme Court of Texas. She is a graduate of the University of Houston, the South Texas College of Law, and recently received her L.L.M. from Duke University. She has served at all three levels of the Texas judiciary during her more than fifteen years on the bench. Andrew Buttarro is a 2014–15 judicial clerk to Justice Guzman.

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On Thursday, June 18, 2015, TSCHS's Panel of Judges and Historians Will Examine Magna Carta's Rule of Law Legacy in its 800th Year

By David A. Furlow

IF YOU ENJOYED JUSTICE GUZMAN'S MAGNA CARTA ARTICLE, you should attend the one-hour C.L.E. program the Texas Supreme Court Historical Society is sponsoring, *The 800-Year Legacy of MAGNA CARTA*. The program will occur from 10 to 11 a.m. on Thursday, June 18, 2015 during the State Bar Annual Meeting in San Antonio. See <http://www.texasbar.com/AM/Template.cfm?Section=Registration&Template=/CM/HTMLDisplay.cfm&ContentID=27106>.

First Court of Appeals Senior Justice Terry Jennings, retired First Court of Appeals Justice Murry Cohen, a partner in the Houston office of Akin, Gump, Strauss, Hauer & Feld, LLP, City of Houston Municipal Court Magistrate Charles Spain, and this *Journal's* Executive Editor, David Furlow, will reprise the presentation they made to a large audience of lawyers, judges, justices and members of the Thomas More Society on June 12, 2014 in Houston's 1910 Historic Courthouse.

The Honorable Terry Jennings is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. The Texas Association of Civil Trial and Appellate Specialists named Justice Jennings as its 2009 Appellate Judge of the Year. In 2003, Justice Jennings was appointed to the Texas Supreme Court Advisory Committee, where he serves on the Texas Rules of Evidence and Texas Rules of Appellate Procedure Subcommittees. Justice Jennings believes that study of Magna Carta advances the bar and bench's stewardship of the law.

Elected to four terms from 1982 to 2000, the Honorable Justice Cohen was the highest-rated appellate judge (1997, 1999, and 2001) and the highest-rated of 118 incumbent state judges (1997, 1999) in Houston Bar Association polls. He was named Appellate Judge of the Year in 1994 by the Texas Association of Civil Trial and Appellate Specialists. Having been certified in Civil Appellate Law and in Criminal Law by the Texas Board of Legal Specialization, Justice Cohen leads Akin, Gump, Strauss, Hauer & Feld, LLP's appellate practice.

Charles A. Spain serves as an associate judge for the City of Houston. He worked as staff attorney for the Texas appellate courts for twenty-three years before retiring in 2013. He is a graduate of Baylor Law School and Rice University, a founder of the State Bar of Texas LGBT Law Section, a Baden-Powell Fellow of the World Scout Foundation, and an Eagle Scout. He is a recipient of the Texas Historical Commission's Award for Historic Preservation for his work on the history of the flags and seals of Texas. Since 1997 he has served as the elected Secretary-General of the International Federation of Vexillological Associations.



The Hon. Senior Justice Terry Jennings



The Hon. Justice Murry Cohen



The Hon. Associate Judge Charles "Kin" Spain



David A. Furlow

Session organizer David Furlow first walked the field at Runnymede, Windsor, where King John sealed (rather than signed) Magna Carta in 1215. While studying law at King's College in London, he visited the American Bar Association's monument to Magna Carta and the Rule of Law at Runnymede. David has been writing and speaking about the history, archaeology, and traditions of Roman, English, American, and Texas law, litigation, and constitutional history for twenty years.

David Furlow will open by discussing *From Medieval to Modern, MAGNA CARTA's History in England and Early America*. The Honorable Justice Terry Jennings will describe MAGNA CARTA's Impact on Legal and Judicial Ethics. The Honorable Justice Murry Cohen will focus on *MAGNA CARTA's Role in Shaping the U.S. and Texas Constitutions*. Municipal Court Magistrate Charles "Kin" Spain will conclude the program by analyzing *MAGNA CARTA's Effect on the Administration of Justice*.

The Texas Supreme Court Historical Society is sponsoring the program because of its focus on the history of law from medieval England to modern Texas. The panel's presentation will occur at the Henry B. Gonzalez Convention Center at 200 E. Market St. in San Antonio, Texas 78205.



Medieval knight at the Magna Carta exhibit in the Houston Museum of Natural Science. Photo by David A. Furlow

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Six Constitutions Over Texas: Law and Political Identity in Texas, 1845-1861

By William J. Chriss

WHAT IS A CONSTITUTION? For political scientists beginning with Plato and Aristotle, constitutions—as the literal meaning of the word implies—organize the structure of a community. For attorneys, a constitution is a basic law that limits governmental action. But intellectual historians see constitutions as artifacts that illuminate the ideologies and thought worlds of those who produced them. Both the artifacts and the ideologies evolve over time.

My upcoming book, *Six Constitutions Over Texas*, examines Texas's six constitutions as windows onto the changing ideologies and identities of the Texans that produced them.¹ And I argue that cultural identity and political ideology are often products of fear that marginalize “others” perceived as threats.² This article, rather than being an excerpt from the book, summarizes some of my conclusions with respect to the seminal constitutions of 1845 and 1861 that ushered Texas into statehood and Secession.

As for the “others” early Texans feared, the 1836 Declaration of Independence described Indians and the papist Mexican government as allied enemies. The threat of a Mexican-abetted Indian war remained high on the list of Texian fears throughout the 1840s. Anglo Texians had long feared that this Mexican-Indian axis might aid a slave uprising. The fledgling Texan nation's geographic and military situation was precarious; its citizens had good reason to worry. In the 1840s, Mexico intermittently invaded Texas and fomented plots to incite a Tejano/Indian insurrection that might ultimately include slaves. Texians of the republican era responded with continued demands for the protection of American statehood. The Republic's limited military and economic power made annexation to the United States its best hope, and the constitution adopted in 1845 illustrates these realities.

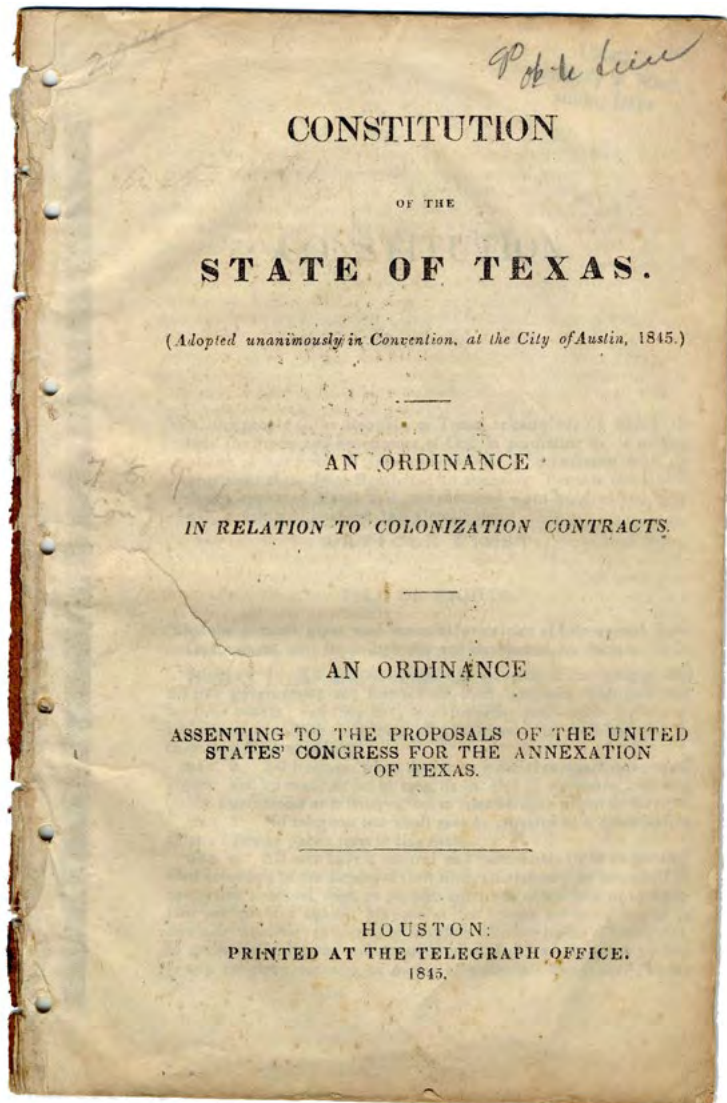
¹ The book will be published through the sponsorship of the Texas Supreme Court Historical Society as part of the Texas Legal Studies Series.

² See generally GARY JACOBSON, *CONSTITUTIONAL IDENTITY* (Harvard Univ. Press 2010); see also generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (Cambridge: Belknap Press 1991). Ackerman's thesis is the subject of some dispute. See generally, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *STANFORD L. REV.* 759 (Feb. 1992); Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts We the People*, 108 *YALE L. J.* 2237 (Jun. 1999); Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 *YALE L.J.* 1990 (May 2013). For studies of “otherness,” generally referred to by scholars by the French term “alterite,” see generally EMMANUEL LEVINAS, *ENTRE NOUS: THINKING OF THE OTHER*, (Michael B. Smith, trans., Columbia Univ. Press 2000); EMMANUEL LEVINAS, *TOTALITY AND BEING: AN ESSAY ON EXTERIORITY* (Alphonso Lingis, trans., Duquesne Univ. Press 1969); EMMANUEL LEVINAS, *OTHERWISE THAN BEING OR BEYOND ESSENCE* (Alphonso Lingis, trans., Cornell Univ. Press 1998); MICHAEL TAUSSIG, *MIMESIS AND ALTERITY* (Routledge 1993); EDWARD SAID, *ORIENTALISM* (Knopf Publ. Group 1979); EDWARD SAID, *CULTURE AND IMPERIALISM* (Knopf Publ. Group 1994).

The Texas Constitution of 1845

After the Texian victory at San Jacinto in April of 1836,³ the provisional Texas government released Santa Anna and allowed him to return to Mexico, where his government promptly repudiated the Velasco agreements he had made recognizing Texas independence. With Houston incapacitated by his San Jacinto wounds, Mirabeau B. Lamar—a cavalry commander at the Battle of San Jacinto—was elevated to the post of Secretary of War. Lamar soon headed the new “hothead” or war party in Texas, drawing a natural constituency from American filibusters who kept coming to Texas to fight the Mexicans even though the war was over. Stephen F. Austin, now leading the Texas diplomatic mission to the United States, was shocked when Texas’s overtures for immediate statehood were rebuffed by U.S. President Andrew Jackson, who wanted a more stable government in Texas to assure that American annexation would not precipitate an all-out war with Mexico.⁴

America’s hesitancy continued into the 1840s. Indeed, although an indecisive President John Tyler ultimately supported it, a treaty annexing Texas as a federal territory was defeated in the United States Senate in 1844. Under the rejected treaty, Texas’s debts would be assumed by the federal government in exchange for ceding her public lands. Although the bid to make Texas a territory failed in 1844, the Democratic candidate for president that same year—James K. Polk—pledged to annex Texas if elected.



Texas Constitution of 1845. Photo courtesy of Center for American History, University of Texas at Austin, <http://www.cah.utexas.edu/texashistory/annex/annexation/exhibit.php?s=6>.

He was motivated in part by concern that Texas would become a powerful independent nation to the west supported by England, France, and/or Spain.⁵

³ RANDOLPH B. CAMPBELL, *GONE TO TEXAS* 160 (Oxford Univ. Press 2003) [hereinafter *GONE TO TEXAS*]; SAM W. HAYNES, *SOLDIERS OF MISFORTUNE: THE SOMERVELL AND MIER EXPEDITIONS* at 169 (Univ. of Tex. Press 1990); STANLEY SIEGEL, *A POLITICAL HISTORY OF THE TEXAS REPUBLIC, 1836-1845*, 40–41 (Univ. of Tex. Press 1956); JOSEPH M. NANCE, *AFTER SAN JACINTO: THE TEXAS-MEXICAN FRONTIER, 1836-1841*, at 45–67 (Univ. of Tex. Press 1963); SAMUEL AUGUSTUS MITCHELL & JAMES H. YOUNG, *A NEW MAP OF TEXAS, WITH THE CONTIGUOUS AMERICAN & MEXICAN STATES* (James H. Mitchell 1836); see also DAVID RUMSEY MAP COLLECTION, <http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~216~20055:A-New-Map-Of-Texas,-With-The-Contig> (last visited Feb. 9, 2015).

⁴ STANLEY SIEGEL, *THE POET PRESIDENT OF TEXAS: MIRABEAU B. LAMAR* 51–90 (Jenkins Publ. Co. 1977); STANLEY SIEGEL, *A POLITICAL HISTORY OF THE TEXAS REPUBLIC, 1836-1845*, at 100–36, 173 (Univ. of Tex. Press 1956); *GONE TO TEXAS*, at 160.

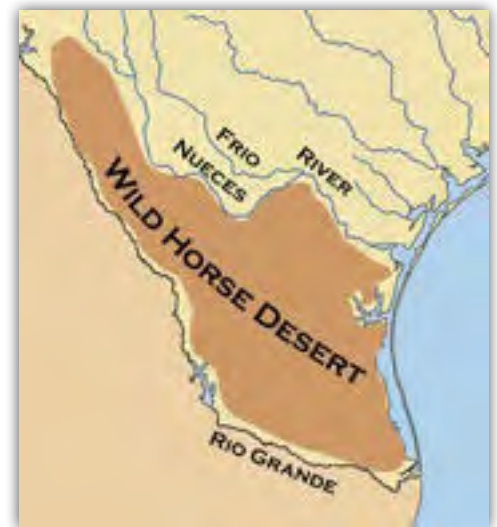
⁵ MARY BELL HART, *JOURNALS OF THE CONVENTION ASSEMBLED AT THE CITY OF AUSTIN ON THE 4TH OF JULY 1845 FOR THE PURPOSE OF FRAMING A CONSTITUTION FOR THE STATE OF TEXAS*, ii–iii (Shoal Creek Publishers 1974) (1845) [hereinafter *JOURNALS OF THE CONVENTION (1845)*]. The same proceedings were also published in 1846 by J.W. Cruger under the title, “Debates of the Texas Convention,” but all citations to the proceedings will follow the Hart reprinted edition of the Journals. See WILLIAM F. WEEKS, *DEBATES OF THE TEXAS CONVENTION* (J.W. Cruger 1846), available at <http://tarlton.law.utexas.edu/constitutions/texas1845/debates> (last visited Feb. 9, 2015).

When Polk won the presidency on a platform of territorial expansion, President Tyler saw this as a mandate to try again to annex Texas before his term ended. In the face of northeastern sentiment against it because slavery was legal in Texas, the U.S. Congress passed a new joint resolution in favor of annexation on March 1, 1845. In the Senate, the margin was perilously close, just 27 votes for to 25 against. Because the latest congressional act was merely a joint resolution of both houses, rather than a treaty submitted by the executive, this slim majority in the senate sufficed instead of the two-thirds vote required to ratify a treaty. And unlike the failed treaty, this resolution allowed Texas to keep her public lands subject to paying her own debts. The resolution also contained an interesting proviso that Texas could form four new states out of her own territory to apply for separate admission to the Union “which shall be entitled to admission under the provisions of the Federal Constitution.”

The resolution also required that Texas adopt a new constitution that would satisfy the federal constitution’s guarantee of a republican form of government to the citizens of every state. Texas President Anson Jones issued a proclamation on May 8 calling for the election of deputies to a state constitutional convention beginning on the auspicious date of July 4, 1845.⁶

Since the Van Buren administration, Mexico had threatened war if the United States annexed Texas, and the Texas Republic was already deploying its tiny militia in the disputed Nueces Strip between the Nueces and Rio Grande rivers. Then, on March 6, 1845—two days after Polk’s inauguration—the Mexican ambassador left Washington in protest. In April the War Department ordered General Zachary Taylor to depart his headquarters at Fort Jessup, Louisiana with the U.S 3rd Infantry Regiment and join the Texas militia in the Nueces Strip. Taylor and his troops took ship to Corpus Christi, where they encamped.⁷

While three republics (Mexico, Texas, and the U.S.) maneuvered for advantage in this “Wild Horse Desert,” as it was known on contemporary maps, fifty-six Texans were elected delegates and assembled in Austin on July 4th. They unanimously chose Houston’s wartime aide-de-camp, Thomas Jefferson Rusk, as president of the convention. Rusk soon came to regard John Hemphill, Abner S. Lipscomb, and John Caldwell as among the ablest delegates. Given their distinguished backgrounds, this is not surprising.



Wild Horse Desert. Image courtesy of San Patricio Municipal Water District, <http://sanpatwater.com/water-wise.php>.

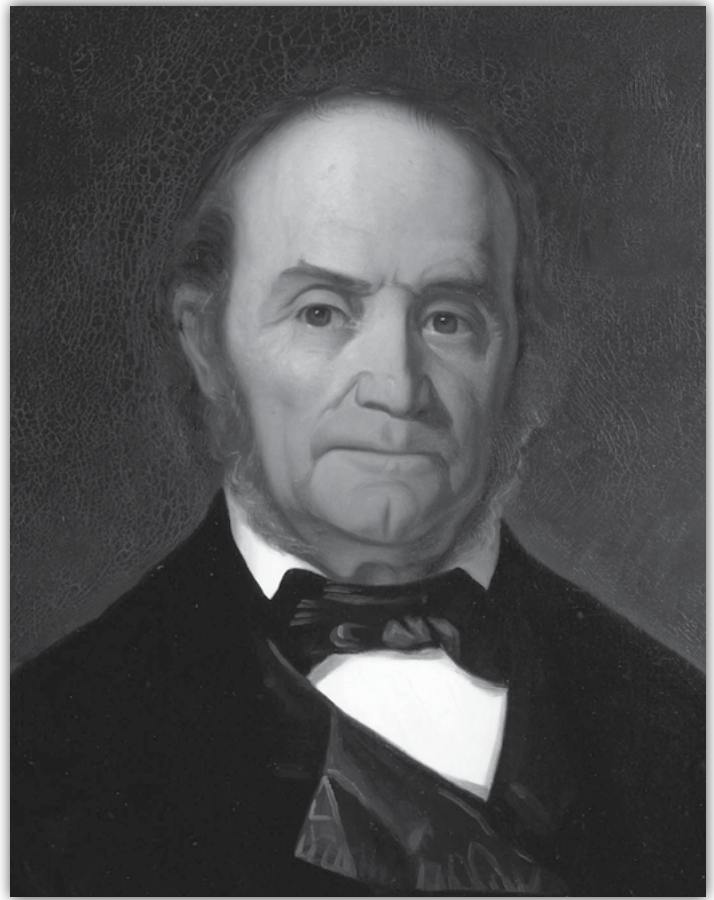
Hemphill and Lipscomb were experienced jurists who would go on to serve as members of the Texas Supreme Court for decades. Hemphill was already chief justice of the Republic Court at the time of the convention and continued to serve the new state in that capacity until 1858. Lipscomb, a protégé of Mirabeau B. Lamar, had earlier served twelve years as chief justice of the Alabama Supreme Court. He would be appointed associate justice of the Texas Supreme Court after annexation, and would serve until he died in office in 1856. Rusk appointed these two men to important posts in the convention: Hemphill as chairman of the committee that

⁶ JOURNALS OF THE CONVENTION (1845), at i, iii; TEXAS STATE LIBRARY AND ARCHIVES COMMISSION, JOINT RESOLUTION FOR ANNEXING TEXAS TO THE UNITED STATES APPROVED MARCH 1, 1845, <https://www.tsl.state.tx.us/ref/abouttx/annexation/march1845.html> (last modified Aug. 24, 2011); Anson Jones, *Proclamation of President Anson Jones, May 8, 1845*, NAT’L REG. (May 8, 1845), available at https://www.tsl.state.tx.us/exhibits/annexation/part5/anson_jones_may8_1845_proclamation.html (last modified Apr. 5, 2011).

⁷ JOURNALS OF THE CONVENTION (1845), at v; AMERICAN PRESIDENT: A REFERENCE RESOURCE, JAMES KNOX POLK, <http://millercenter.org/president/polk/essays/biography/5> (last visited Feb. 9, 2015); SAM W. HAYNES, JOHN SLIDELL’S MISSION TO MEXICO, available at http://library.uta.edu/usmexicowar/item.php?content_id=180 (last visited Feb. 9, 2015); Murphy Givens, *Corpus Christi: Training Ground for the War with Mexico*, CORPUS CHRISTI CALLER-TIMES, Aug. 28, 2013.



John Hemphill. Photo from Texas Supreme Court Historical Society archives.



Abner Lipscomb. Photo courtesy Texas State Preservation Board.

worked on provisions concerning the judicial branch and land titles, Lipscomb as head of the committee that framed an ordinance adopting Texas's annexation as a state.

Caldwell, a Kentuckian, was a second-generation Irish-American who came to Texas in 1831 and ultimately settled in Bastrop County near Austin, which was then the Indian frontier. A lawyer, he was elected several times to the Republic congress and subsequently to the new state senate. Characteristically, among these men whom Rusk admired and who clamored for joinder to the United States, only Caldwell—who lived among the anti-slavery Germans and Tejanos of the western frontier—would remain loyal to the Union a mere fifteen years later.⁸

Bearing witness to the importance the delegates placed upon the military protection Texans needed from the United States, one of the first proposals made at the convention was Caldwell's ordinance requesting that the President of the United States "occupy without delay, the frontier of this Republic with such troops as may be necessary for its defense" for the reason that "there are many tribes of Indians, belonging to the United States of America, located within and adjacent to the territory of Texas...."⁹ Only after passing this measure by a large margin did the convention proceed to form committees to deal with other matters.

⁸ NARRATIVE HISTORY, at 20–21, 54; JOURNALS OF THE CONVENTION, (1845) at v–vi, ix; Claude Elliott, *Henderson, James Pinckney*, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/fhe14> (last visited Feb. 9, 2015); *Runnels, Hiram George*, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/fru14> (last visited Feb. 9, 2015); Rose M. Harris, *Love, James*, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/flo27> (last visited Feb. 9, 2015); Alice Duggan Gracy, *Caldwell, John*, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/fca11> (last visited Feb. 9, 2015).

⁹ JOURNALS OF THE CONVENTION (1845), at 12–13.



Isaac Van Zandt. Photo courtesy of Wikipedia Wikisource at http://en.wikipedia.org/wiki/Isaac_Van_Zandt.

On July 8, 1845, the convention passed a resolution authorizing the Committee on General Provisions of the Convention headed by Isaac Van Zandt to draft a bill of rights to be “prefixed to the Constitution.” This was a departure from the 1836 Constitution, which possessed only a “Declaration of Rights” at the end. Three days later, on July 11th, Van Zandt reported the proposed bill of rights to the convention. It began with a declaration that “all political power is inherent in the people; and all free governments are founded on their authority, and instituted for their benefit...” It went on to claim that “all free men” have equal rights. Additional provisions prohibited religious tests for public office, guaranteed freedom of religion and freedom of speech and the press, and guaranteed similar procedural rights to those available to criminal defendants under the U.S. Constitution. It also continued the 1836 Constitution’s prohibition of imprisonment for debt, and its ban on “perpetuities or monopolies” as “contrary to the genius of a free government.” This Bill of Rights was finally passed on its third reading on August 19th.¹⁰

The Committee on the Organization of the Executive Department recommended that the supreme executive should be titled the “Governor of the State of Texas,” who would be the commander in chief of the army and navy “of this state, and of the militia, except when they shall be called into the service of the United States.” The governor was to be allowed to convene the legislative branch at the capital or elsewhere if the capital “shall have become, since their last adjournment, dangerous from an enemy”¹¹ The executive article of the new constitution authorized the organization of the state militia, to be accomplished by the legislature, but commanded by the governor with authority to “call forth the militia to execute the laws of the State, to suppress insurrections, and to repel invasions.”¹²

The Judiciary Committee headed by Chief Justice Hemphill proposed a constitutional article organizing the judicial branch on July 11, 1845. The committee proposed that the judicial power be vested in one Supreme Court, and in district courts and such other inferior courts as the legislature might create. The Supreme Court was to be composed of one chief justice and two associate justices, a reduction in number from the up to eight associate judges that served on the Republic Court. All judges would be nominated and appointed by the governor with the advice and consent of two-thirds of the senate.¹³ The district courts were to have original jurisdiction in criminal cases and in all civil cases where the matter in controversy was greater than \$100, whereas the Supreme Court was to possess appellate jurisdiction only.¹⁴

The convention’s next important business was to determine who would be entitled to elect legislative representatives. It determined that qualified voters should include “every free white male person who shall be

¹⁰ JOURNALS OF THE CONVENTION (1845), at 22–23 (report), 33–35 (contents of bill of rights), 264 (passage).

¹¹ JOURNALS OF THE CONVENTION (1845), at 36.

¹² JOURNALS OF THE CONVENTION (1845), at 35–39. Again, the proposed article on the executive was considered sufficiently important to require that 500 copies of it be printed and distributed showing the work of the convention.

¹³ The system of appointment inaugurated by the 1845 Constitution only lasted five years. In 1850, an amendment passed to change the selection system to one where all judges were thenceforward to be elected. See TEX. CONST. of 1861, art. IV §§ 5–6, available at <http://tarlton.law.utexas.edu/constitutions/texas1861> (last visited Feb. 9, 2015) (note between Sections 5 and 6, as reflected in digital version found within the collection, *Texas Constitutions 1824–1876*).

¹⁴ JOURNALS OF THE CONVENTION (1845), at 46–49. Five hundred copies of Hemphill’s report were printed and distributed.

a citizen of the United States, or who is, at the time of the adoption of this Constitution, a citizen of the now Republic of Texas” and who resided in the state for a year preceding the relevant election; with “Indians not taxed, Africans and descendants of Africans excepted.” This wording remained in the version of the constitution finally adopted. As in the Republic, only adult white males would choose who would serve in the two chambers (senate and house) that would sit as the new state’s legislature.¹⁵

On July 28, 1845, Van Zandt’s committee reported a substantial number of additional “general provisions,” many of which dealt with prohibitions on dueling. Another prohibited lotteries, while yet another contemplated that the legislature would have the power to exempt certain properties, including homesteads, from execution to pay for judgment for debt. While legal historians have pointed to Spanish and Mexican antecedents as explaining this new (and unique among contemporary American constitutions) homestead law, Van Zandt’s report also recommended prohibiting corporate banking. Any other non-bank corporation was to exist only for a specified term of years, with the sole exception of public utilities. Clearly more was at work than adherence to Spanish and English precedent. The Jacksonian anti-corporate bent of the delegates was also on display.¹⁶

On the following day, the convention finally took up the question of slavery. Van Zandt’s report on this subject prohibited the legislature from passing any law emancipating slaves without the consent of their owners, or without paying their owners “full value.” Continuing the eighteenth and early nineteenth century practice of passing laws prohibiting the mistreatment of slaves, the proposed article contained provisions guaranteeing slaves a right to trial by jury in felony cases, prohibiting any person from maliciously dismembering or depriving a slave of life, and prescribing the same penalty for same as in cases where “a like offense had been committed on a free white person.” However, an exception was allowed if the slave had been involved in “insurrection.” The convention adopted these provisions in substantially the same form. As others have shown, provisions like these, coming as they did on the heels of slave rebellions in various states, beginning with Stono’s Rebellion in South Carolina, were less about benevolence than about preventing uprisings caused by indiscriminate master-inflicted cruelty.¹⁷

Interestingly, the convention devoted substantial time to debating the rights of women. Chief Justice Hemphill’s Judiciary Committee determined to continue the Spanish legal tradition, adopted by the Republic, of community property. As chief justice of the Republic, Hemphill, a scholar of Spanish law, amalgamated English common law traditions with Texas’s Spanish legal heritage, borrowing the best of both. The initial Judiciary Committee report provoked proposal of a substitute version of the section of the constitution dealing with women’s rights, and ultimately that substitute was adopted. It provided that all property of a wife owned or claimed by her before marriage or acquired after marriage by gift or inheritance was her separate property, and called upon the legislature to pass laws providing for registration of the wife’s property.¹⁸

¹⁵ *Id.* at 54, 341.

¹⁶ See, e.g., Joseph W. McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 SW. HIST. Q. 369 (Jan. 1983); JOURNALS OF THE CONVENTION (1845), at 109–16.

¹⁷ JOURNALS OF THE CONVENTION (1845), at 116–17; WINTHROP D. JORDAN, *THE WHITE MAN’S BURDEN, HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES* at 61–68, 79, 87 (Oxford Univ. Press 1974); PETER H. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION*, at 271–84, 308–30 (W.W. Norton & Co. 1974); JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 192–248 (Oxford Univ. Press 1972). While slave codes in older states like South Carolina and Virginia date to the early and mid-1700s, after Nat Turner’s well publicized rebellion of 1831 in Virginia, newer states of the Cotton South nearer to Texas began enacting their own (e.g., Alabama in 1833). See JOHN G. AKIN, *DIGEST OF THE LAWS OF ALABAMA*, at 391–98 (Alexander Towar 1833), available at <http://www.archives.state.al.us/teacher/slavery/lesson1/doc1.html> (last visited Feb. 9, 2015).

¹⁸ JOURNALS OF THE CONVENTION (1845), at 262, 270; James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237 (Dec. 1986); NARRATIVE HISTORY, at 36–43.

Finally, on August 28, 1845, after assurances by a special committee chaired by Hemphill that the record-keeping of the convention had been correct and that the copy of the constitution thus compiled and based upon the votes taken on various proposals, amendments, and substitutes was also accurate, the convention's leaders circulated the constitution in final form and unanimously adopted it, subject to a popular vote on its ratification scheduled for October.¹⁹

Significantly, the first article of the constitution was the Bill of Rights. Article II prescribed separation of powers between the three branches of government, and Articles III, IV, and V organized the legislative, judicial, and executive branches, respectively. Article VI provided for a state militia. Of particular relevance to the subject of this essay are portions of Article VII (General Provisions), and the inclusion of Articles VIII (a specific article covering slavery), and X (a specific article requiring a public school system). Article XI concerning land titles and Article XII establishing the general land office were related to the education provisions that required the allocation of some portions of the public lands for the support of public schools. Article IX governed impeachment of state officeholders, should that become necessary. This format would provide the basic rubric for all future Texas constitutions, including the next one, the Secession Constitution of 1861.²⁰

That the 1845 Convention established a bicameral state legislature and defined its powers should generate little comment. From the perspective of defining Texan identity, the qualifications for voters who could select the members of these two houses are of greater interest. Particularly telling was the requirement that all electors be free, male, and at least twenty-one years of age. Women, blacks, mixed race peoples, and Indians not amalgamated within the white community as evidenced by subjection to property taxation were *de jure* excluded.²¹

Articles X, XI, and XII, as well as some of the "General Provisions" of Article VII, show a preoccupation with the white yeoman farmer ideal and a heightened mistrust of banks and other incidents of northeastern commercial power. The 1836 Constitution had placed no restrictions on the power specifically given the legislature to "grant charters of incorporation, patents and copy rights . . .," other than the provision carried over into the 1845 Constitution that "perpetuities or monopolies are contrary to the genius of a free government, and shall not be allowed." The 1845 Convention deemed this limitation insufficient. It specifically directed, in two new constitutional provisions, that Texas be made unfriendly to eastern banks and commercial interests. Section 30 of Article VII specifically prohibited any "corporate body . . . with banking or discounting privileges," and Section 31 prohibited any corporate charter being issued at all except upon a two-thirds vote of both houses of the legislature.²²

While both the constitutions of 1836 and 1845 prohibited imprisonment for debt, the 1845 Convention thought this insufficient to protect the economic interests of working whites from financiers and creditors. By 1845, sentiment in Texas had grown sufficiently anti-commercial and anti-bank to impel the Convention to add provisions specifically authorizing the legislature to "protect by law, from forced sale, a certain portion of the property of all heads of families . . . not to exceed two hundred acres of land. . . ." These provisions also prevented a married man from alienating the same "unless by the consent of the wife" and exempted "from taxation two hundred and fifty dollars' worth of the household furniture, or other property belonging to each family in this State."²³ Suspicion of the unwholesome and deleterious influence of northern and eastern bankers, lenders, and commercial creditors would continue through the end of the century, rising precipitously during the Secession crisis.

¹⁹ JOURNALS OF THE CONVENTION (1845), at 337–38.

²⁰ See generally TEX. CONST. of 1845.

²¹ TEX. CONST. of 1845, art. III, § 1–2.

²² REPUB. TEX. CONST. of 1836, art. II, § 3, DECLARATION OF RIGHTS, § 17; TEX. CONST. of 1845, art. VII, §§ 30–31.

²³ DECLARATION OF RIGHTS, § 12; TEX. CONST. of 1845, art. I, § 15; art. VII, § 22, 28.

Unlike the 1836 Constitution, the 1845 Constitution required a system of public education. It provided that “a general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be duty of the Legislature ... to make suitable commissions for the support and maintenance for public schools.” These schools were to be funded by a tax on property and by allocating public lands for their support.

The outcome of the referendum of October 1845 was a foregone conclusion (annexation passed 4,254 to 267 and the constitution was ratified 4,174 to 312). By May of 1846, negotiations to avert war between the U.S. and Mexico over annexation failed and war ensued.

After American victory in that war, the constitutional identity of the new American state of Texas continued to exhibit fear of slave insurrection and unease over Indians, Mexicans, and fifth columnists that might assist or foment it. But Texas’s constitutional identity had also always included the southern and Jeffersonian ideal of the yeoman farmer opposed to bankers and financiers. This intensified with annexation, and when the Mexican threat was virtually eliminated by the Mexican War, the 1850s would see Anglo-Texans really shift their fears of a slave revolt from instigators south of the border to those residing in the commercial centers of the north. Pro-slavery and anti-commercial sentiment combined in this new way to produce a new *bête noir*.²⁴

The Constitution of 1861



Oran M. Roberts. Photo courtesy Tarlton Law Library, Justices of Texas, <http://tarlton.law.utexas.edu/justices/profile/view/87>.

In the 1850s, the leader of the anti-northern, anti-Union party in Texas was Texas Supreme Court Associate Justice O.M. Roberts. In November of 1860, Roberts drew up the “First Call upon the People of Texas to Assemble in Convention.” The Call, like secessionist pronouncements before it, listed the affronts recently suffered at the hands of the “black” Republicans of the North. In response, a convention was convoked by the Texas Legislature over the objection of Governor Houston, the state’s leading Unionist, but the legislature did agree to Houston’s demand that even if Secession passed the convention, it should still be submitted to a popular referendum.²⁵

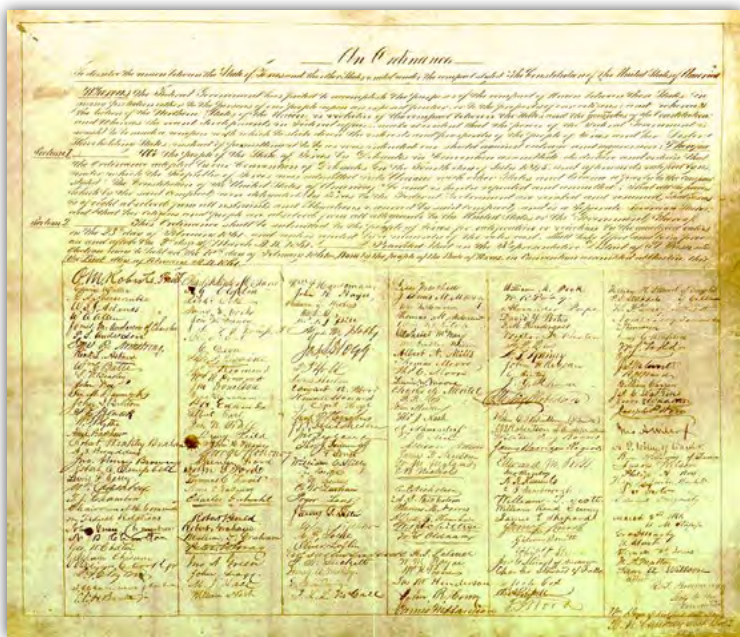
The Secession Convention met in January of 1861 and elected O.M. Roberts its chairman. On January 29th, Roberts appointed a committee to confer with Governor Houston on “the subject of federal relations.” The next day the committee reported “in secret session” the result of its conference with Houston. While the governor assured the committee that “whatever will conduce to the welfare of our people will have my warmest and most fervent wishes,” his written reply of the following day, January 31, 1861, insisted that a vote by the citizens of Texas was still necessary before any decision could

²⁴ Claude Elliott, *Henderson, James Pinckney*, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/fhe14> (last visited Feb. 9, 2015); Matthew Ellenberger, *Horton, Albert Clinton*, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/fho62> (last visited Feb. 9, 2015); GONE TO TEXAS, at 186–91. I have omitted an account of the Mexican War and its immediate effects as unnecessary to the current argument. For this, see, e.g., T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND TEXANS at 270–71 (The Macmillan Co. 1968).

²⁵ See generally O.M. Roberts, *1860, The First Call Upon the People of Texas to Assemble in Convention*, O.M. ROBERTS COLLECTION, THE CENTER FOR AMERICAN HISTORY, UNIVERSITY OF TEXAS AT AUSTIN. This document, handwritten by Roberts, is attached to his personal description of the events surrounding it, from which the quotes in this paragraph are taken. It was a slightly amended version written by George Flournoy that was printed and published in December 1860, according to Roberts’s notes.

be made about “federal relations.”²⁶

The next day, February 1, 1861, the convention passed a resolution seceding from the Union by a vote of 166 to 8. Convention President Roberts signed it first, followed by the remaining Secessionist delegates.²⁷ On February 2nd, in anticipation of the required plebiscite, a resolution was passed endorsing “a declaration of the causes which impelled the state of Texas to secede from the federal union.” This document occupies several pages of the *Journal of the Convention*.



1861 Ordinances of Secession. Photo courtesy of CTMCM.com at <http://www.ctmcm.com/TexasStuff/TXCivilWar.html>.

Chief among its grievances was that the states of the North had become “a great sectional party” bent upon controlling Texas and the South “based upon the unnatural feeling of hostility to these Southern States and their beneficent and patriarchal system of negro slavery, proclaiming the debasing doctrine of the equality of all men irrespective of race or color....” No one reading this declaration can have any illusions as to whether slavery was the right among “states’ rights” that Roberts and his allies most wanted to protect. The declaration expressed the fear of Roberts and others that, like Vikings of old, north-men had “invaded Southern soil and murdered unoffending citizens” and like religious zealots, they from “a fanatical pulpit have bestowed praise upon the actors and assassins in these crimes.”²⁸

But this was not all. Other old enemies were included in the indictment of northern perfidy. The declaration’s complaints included that:

The federal government, while but partially under the control of these our unnatural and sectional enemies, has for years almost entirely failed to protect the lives and property of the people of Texas against the Indian savages on our border, and more recently against the murderous forays of banditti from the neighboring territory of Mexico.

The vestigial appearance of Mexicans and Indians in the Secessionists’ nightmare vision is telling. It testifies to the way in which alienation proceeds incrementally and new enemies grow out of old ones.²⁹

The convention made clear that the final straw was the election of Abraham Lincoln “by the combined sectional vote of the 17 non-slave holding states” In a superficially correct but nonetheless unsettling

²⁶ JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, 24–26, 36–38, 46–48 (Austin Printing Co. 1912), available at <http://tarlton.law.utexas.edu/constitutions/texas1861/journals/jan29> (24–26), <http://tarlton.law.utexas.edu/constitutions/texas1861/journals/jan30> (36–38), <http://tarlton.law.utexas.edu/constitutions/texas1861/journals/jan31> (46–48) (last visited Feb. 9, 2015) [hereinafter SECESSION CONVENTION JOURNAL]; see generally also JOURNAL OF THE HOUSE OF REPRESENTATIVES, 8TH LEGISLATURE STATE OF TEXAS.

²⁷ See generally JOURNAL OF THE HOUSE OF REPRESENTATIVES, 8TH LEGISLATURE STATE OF TEXAS; SECESSION CONVENTION JOURNAL, at 48–49; DONNA TOBIAS, THE STATES’ RIGHTS SPEAKING OF ORAN MILO ROBERTS, 1850–1861: A STUDY IN AGITATIONAL RHETORIC, at 213.

²⁸ SECESSION CONVENTION JOURNAL, at 58–65.

²⁹ *Id.* at 61–65.

construction of the principles behind the Declaration of Independence, the convention held it undeniable that American governments “were established exclusively by the white race, for themselves and their posterity,” and that in such “free” governments “all white men are and of right ought to be entitled to equal civil and political rights.” This “Declaration of Causes” was signed first by Roberts as president of the convention, and then the arrangements for the popular vote were made in secret session under his watchful eye.³⁰

Before the convention recessed to organize the popular vote, delegate John Gregg moved that when the convention reconvened, “as few changes should be made in our State constitution and laws as can be made in order to fit our government for the condition of separation from the United States.” Later events would show that he correctly expressed the sense of the members, but the motion was tabled until after the plebiscite as premature.³¹

Secession was approved by Texas voters by a margin of 46,153 for and 14,747 against, although the real balance of sentiment on the issue was probably not reflected in an election where secret balloting did not occur and many Unionists did not vote.³² After victory in the election, the convention reassembled on March 2, 1861. On March 4th, it passed an ordinance accomplishing secession from the Union and adopted another ordinance demanding withdrawal of all federal troops. It also resolved to have Roberts appoint a ten-member committee “on the Constitution.”

On March 5th, the delegates overwhelmingly voted to join Texas to the Confederacy and a committee of five was appointed to inform Governor Houston that the convention had reassembled, had counted the popular vote, and had determined that Secession was an accomplished fact.³³

Houston’s response was less than enthusiastic. He held that the sole reason for the convention was to submit Secession to popular vote, and that having done that, the delegates should all go home and leave Houston and the legislature “to take into consideration the important issues arising out of the severance of our connection with the United States,” including calling another convention for the purpose of framing a new constitution. The clear implication was that Texas, if no longer in the federal union, should remain independent—Roberts’s convention had no authority to join the new republic of Texas to any other confederacy of states. On March 8th, Roberts came down from his chair and proposed his own resolution in response to Houston’s recalcitrance. The resolution, which passed unanimously, provided that the convention “not only had the power” to pass a secession ordinance, but to do anything else necessary “in the present emergency,” including joining the Confederacy.³⁴

On March 11, 1861, Gregg’s resolution to use the 1845 Constitution as a model was passed in slightly altered form. It continued to contemplate only such changes as were made necessary by Secession, but now also allowed those related to “our connection with the Confederate States of America.”³⁵ On March 14th, the constitution was amended to broaden the power of the legislature to raise and borrow money to defray “the extraordinary expenses arising from the condition of public affairs,” while a suggestion to open for other uses the public lands dedicated to public education in 1845 was rebuffed.

³⁰ *Id.* at 58–59.

³¹ *Id.* at 79–85.

³² *Id.* at 68; Walter L. Buenger, *Secession*, Handbook of Texas Online, <http://www.tshaonline.org/handbook/online/articles/mgs02> (last visited Feb. 9, 2015); Dale Baum, *The Shattering of Texas Unionism* 71–72, 74–79 (La. St. Univ. Press 1998); NARRATIVE HISTORY, at 66–67.

³³ SECESSION CONVENTION JOURNAL, at 86–98.

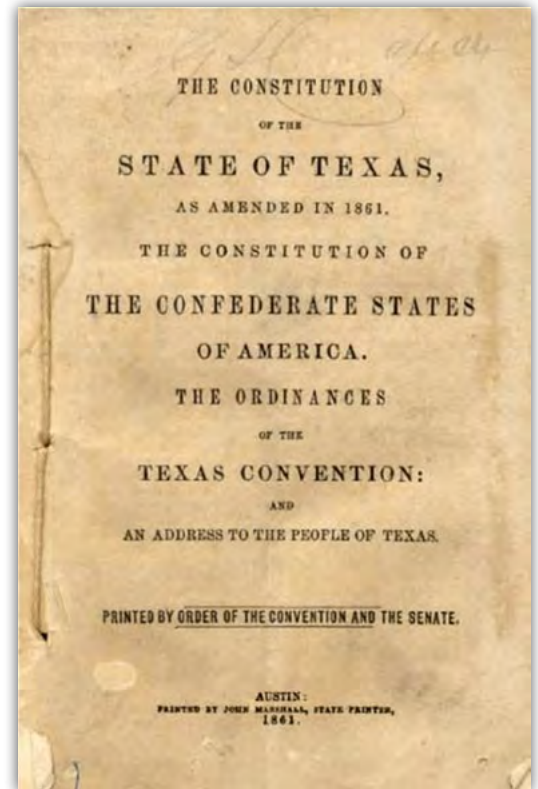
³⁴ *Id.*, at 128–29.

³⁵ *Id.*, at 133–34.

Meanwhile, an amendment to the constitution changing the loyalty oath required of state officers to one including adherence to the Confederacy was passed on the third reading. Thereafter state officers were administered their new oaths of office, an oath that Governor Houston refused to take, with the result that he was removed from office. Members of the legislature did take the oath and they assembled on March 18th.³⁶

Given the desire to use the 1845 Constitution as a model, the amendments required by the current situation were left largely to the committee to which they had been referred. The 1861 Constitution was only sporadically discussed by the full complement of delegates and only for the one week period from March 18th until the Convention adjourned on March 25th. While the delegates specifically ratified the Constitution of the Confederacy on March 24th, no vote was taken ratifying a new constitution for Texas. Rather, the few amendments reported by the committee were voted upon, including those changing the loyalty oath and expanding fundraising procedures.

Most important from the perspective of constitutional identity were the few changes made to the provisions on slavery. The three-section article in the 1845 Constitution was amended and completely reorganized into six new sections—the most significant editing work done on the entire document. Gone were the provisions concerning emancipation of slaves. In their place was a total prohibition of any form of emancipation, gradual, public, private, compensated, uncompensated, or otherwise. No slave in Texas would ever be set free, not by the legislature, even with the master’s consent (as the 1845 Constitution had allowed if compensation was paid), and not privately by any master so inclined. In other respects the slavery article remained essentially the same, e.g., discouraging inhumane treatment, but in addition to insurrection, the circumstances where a white might kill or dismember a slave with impunity now included rape or attempted rape “on a white female.”³⁷



Texas Constitution of 1861. Photo courtesy of the Hispanic Blog at <http://thehispanicblog.com/2012/02/17/this-day-in-latino-american-history-february-6th-17th/>.

It is not unreasonable to perceive here a subconscious fear of the domestic traitor most horrifying to the white male master, an unfaithful wife. The situation was becoming precarious indeed, especially on the frontier where runaway slaves had well-established allies and asylums among the Indians and Hispanic Catholics to the south and west.³⁸

Final Thoughts

In times of unrest, declarations of independence (or in this case, declarations of secession) define the constitutive moment of the polis as much as the legal provisions that ensue. This is especially true among

³⁶ *Id.*, at 159–86.

³⁷ Walter L. Buenger, *Constitution of 1861*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mhc04> (last visited Feb. 9, 2015); TEX. CONST. of 1845, art. VIII; TEX. CONST. of 1861, art. VIII.

³⁸ See generally, e.g., DIANE MILLER SOMMERVILLE, *RAPE AND RACE IN THE NINETEENTH CENTURY SOUTH* (Univ. of N.C. Press 2004); MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH* (Yale Univ. Press 1997); WILLIAM FAULKNER, *LIGHT IN AUGUST* (Random House 1959); ELIZABETH FOX GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD* (Univ. of N.C. Press 1988).

revolutionaries who see themselves as conserving the existing order against an outside threat, in this case both the “fanatical” North and domestic compromisers, chief among whom was Sam Houston. Hence, the Secessionists preserved the Constitution of 1845 because they believed they were being faithful to the bilateral terms under which it had accomplished union with the North, making only those changes necessary in light of “the condition of public affairs.”

New enemies came to share the same characteristics as old ones. The Northerner suddenly became a “black” Republican, a papist/puritan religious fanatic in pursuit of power at the expense of constraining sacred texts, an ally of the Mexican and the Indian, and an instigator of slave rebellion. Language, when intended for public consumption, reveals as much about that public and its nightmares as about its speaker. Thus, to historians, leaders are neither unimportant nor to be studied or psychoanalyzed for their own sake. Rather, the language of their most fundamental pronouncements reflects the dominant ideology of the moment, the fears and ideals which resonate in the minds of their audience.



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Texas in Mexico's Constitutional Order, 1821-36¹

By Jesús F. de la Teja

THE CONSTITUTION OF COAHUILA Y TEJAS is symbolic of the final phase of the history of Texas as part of Mexico. In one sense, it represents the cause for the break that took place between Texas and the rest of the Mexican nation in 1835–1836, for the union of Coahuila and Texas was an act of political expediency that quickly changing circumstances in both Texas and Coahuila made unworkable. At the time of its drafting in 1825–1826, the population of Texas still numbered less than 7,000 residents, not including the approximately 15,000 autonomous Indians not counted among the citizenry. Even at that early date, moreover, Americans already made up a little more than half the total. By comparison, in 1828 Coahuila counted 66,131 residents, and in the mid-1830s, well over 70,000. In 1836 there were more than 20,000 Texas residents, overwhelmingly documented and undocumented immigrants from the United States. Fewer than 15 percent were Tejanos (Texans of Mexican heritage).²

Demographics apart, the political interests of Texans and Coahuilenses had made for an uneasy union from the very beginning of independence. It is therefore impossible to properly understand the Constitution of Coahuila y Tejas and its role in the break between Texas and Mexico without a brief introduction to the history of the relationship between the two and their place in Mexico's northeastern frontier region.

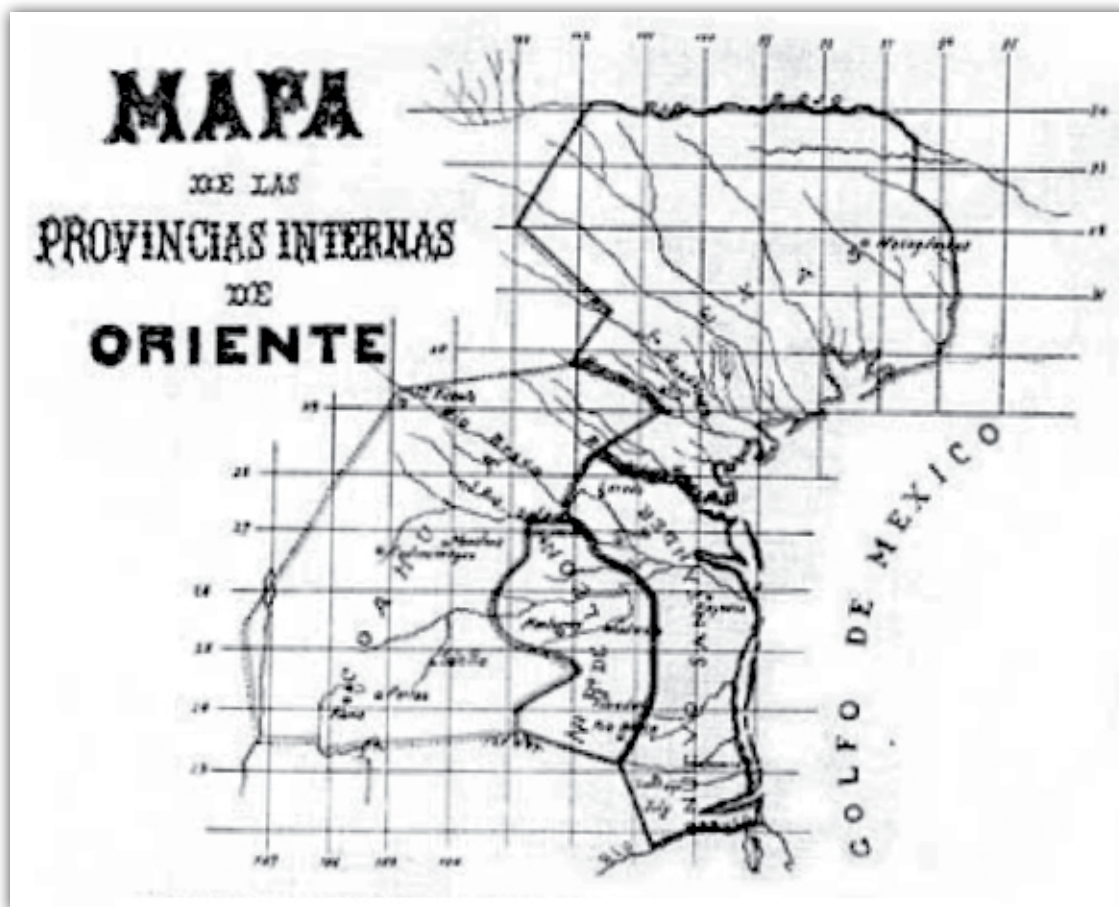
Although Texas started out as an extension of Coahuila in the 1690s, by 1722 it had become a Spanish province in its own right. Many of Texas's early residents came from Coahuila or had relations there, and Monclova and Saltillo were frequent destinations for Tejano merchants and cattlemen. Even after the settlement of Laredo in the 1750s, San Juan Bautista del Río Grande—now Guerrero, Coahuila—remained the principal link between Texas and the interior of New Spain. Presidio troops from Texas and Coahuila often acted in concert on Indian campaigns, and on occasion the governor of Coahuila also functioned as interim governor of Texas.³

¹ This is a revised version of the introductory essay that is to appear in the two-volume *Proceedings of the Constituent Congress of Coahuila and Texas: Mexico's Only Bilingual Constitution* (to be published by the Supreme Electoral Tribunal of the Federal Judiciary of Mexico).

² Tina Laurel Meacham, *The Population of Spanish and Mexican Texas, 1716–1836*, 311–16 (2000) (unpublished Ph.D. dissertation, University of Texas); VITO ALESSIO ROBLES, *1 COAHUILA Y TEXAS DESDE LA CONSUMACIÓN DE LA INDEPENDENCIA HASTA EL TRATADO DE PAZ DE GUADALUPE HIDALGO* 327–28 (Editorial Porrúa, 1979) [hereinafter *COAHUILA Y TEXAS*]. The figures in Alessio Robles are from the official census forms for 1828, which only account for 4,824 residents in Texas. Meacham's numbers, based on an analysis of a variety of sources, yield a substantially higher and more accurate number of Texas residents.

³ The story of Texas's relationship to Coahuila during the Spanish era is best told by VITO ALESSIO ROBLES, *COAHUILA Y TEXAS EN LA ÉPOCA COLONIAL* (Editorial Porrúa, 2nd ed. 1978). An overview of Texas's economic links to Saltillo can be found in Jesús F. de la Teja's *The Saltillo Fair and Its San Antonio Connections* in *TEJANO EPIC: ESSAYS IN HONOR OF FÉLIX D. ALMARÁZ, JR.* 15–28 (Arnoldo De León, ed., Tex. St. Hist. Ass'n 2005); see also DONALD E. CHIPMAN & HARRIETT DENISE JOSEPH, *SPANISH TEXAS, 1519–1821* (Univ. of Tex. Press rev. ed. 2010) (also alluding to the longstanding relationship of Texas with Coahuila).

Beginning in the 1770s the Spanish Crown experimented with a separate governmental structure for its vast northern frontier region through the creation of the Comandancia General de las Provincias Internas (“General Commandancy of the Internal Provinces”). Because of the geographic expanse of a territory stretching from California to Texas, the Crown periodically tinkered with the alignment and composition of the jurisdiction, including the creation and use of separate commands for the eastern and western provinces. As a result, from a political perspective, on the eve of Mexican independence Texas was part of the Provincias Internas de Oriente (“Internal Provinces of the West”) with the neighboring provinces of Coahuila, Nuevo León, and Nuevo Santander.



Map of the Provincias Internas de Oriente (Eastern Internal Provinces) in northeastern New Spain, created by orders of Chief Civil and Military Commandant Joaquín de Arredondo (1768 - 1837), public domain, Wikimedia, http://commons.wikimedia.org/wiki/File:Provincias_Internas_de_Oriente.jpg (last accessed Feb. 15, 2015).

The four provinces were also united by their fiscal dependence on the Intendencia of San Luis Potosí, another governmental innovation of the late colonial period that was superimposed on existing jurisdictions. When Texas proved unable to send a delegate of its own to the Cortes in Spain between 1809 and 1813, José Miguel Ramos Arizpe, Coahuila’s delegate, represented the province’s interests.⁴

Limited as the self-government experience of Texas was, Tejanos quickly adapted to increased local participation in national affairs following independence. The most prominent citizens of San Antonio, Texas’s largest population center, took the lead in organizing the province’s responses to the quickly changing political

⁴ PETER GERHARD, *THE NORTH FRONTIER OF NEW SPAIN 10–19* (Univ. of Okla. Press 2nd ed. 1993); Nettie Lee Benson, *Texas Failure to Send a Deputy to the Spanish Cortes, 1810–1812*, 64 Sw. Hist. Q. 28–29 (1960).



Viceroyalty of the New Spain 1800 (without Philippines).png c/o Wikimedia at [http://en.wikipedia.org/wiki/New_Spain#mediaviewer/File:Viceroyalty_of_the_New_Spain_1800_\(without_Philippines\).png](http://en.wikipedia.org/wiki/New_Spain#mediaviewer/File:Viceroyalty_of_the_New_Spain_1800_(without_Philippines).png)

situation. At first they relied on sending instructions to representatives before the Commandant General, and later they worked through members of the provincial deputation organized in Monterrey for the four eastern provinces.

When Mexican national authorities convened an Imperial Congress in 1822, local elections were held that resulted in Father Refugio de la Garza, a San Antonio native and the city’s parish priest, being elected as Texas delegate. Given Texas’s dire need for population and the abundance of public lands at the province’s disposal, Garza gained appointment to a colonization committee and helped draft the laws secularizing the remaining mission property in Texas and authorizing Stephen F. Austin to carry out the colonization agreement his father had made with Spanish authorities two years earlier. Garza’s communications to Texas make clear his frustrations with the growing dysfunction of the imperial government, so it is no surprise that after Mexican Emperor Agustín Iturbide’s abdication and collapse of the imperial system he should write home,

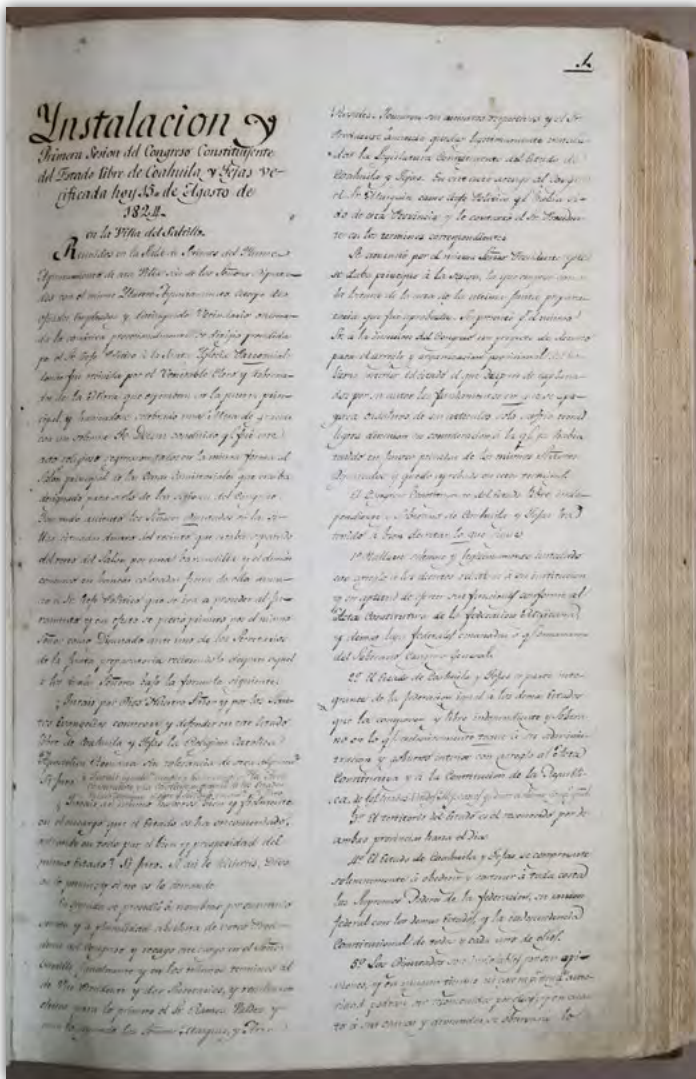
To repeat what I have written in my previous letters: Arbitrariness is ended as are oppression, despotism, and tyranny. Today Texas enjoys unlimited freedom, without obstacles or hindrances. Texas may dispose of everything which prodigal nature has bestowed upon it, land and sea, without regard to any laws other than those that the province may itself liberally impose.⁵

Tejanos wasted no time in asserting local rule once news arrived of the fall of Iturbide’s government. A *junta gubernativa* with seven representatives from San Antonio and one each from La Bahía and Nacogdoches

⁵ Jesús F. de la Teja, *The Colonization and Independence of Texas: A Tejano Perspective*, in MYTHS, MISDEEDS, AND MISUNDERSTANDINGS: THE ROOTS OF CONFLICT IN U.S.-MEXICAN RELATIONS 84 (Jaime E. Rodríguez O. & Kathryn Vincent, eds. Scholarly Resources 1997) [hereinafter *Colonization & Independence of Texas*].

took over legislative functions. In fall 1823, Tejanos elected their own provincial deputation. The deputation in turn selected Erasmo Seguín, a long-time public figure and friendly to U.S. immigration, as Texas delegate to the Constituent Congress. Having acquired a taste for local governance, Tejanos would be reluctant to give it up.⁶

Seguín's time in Mexico City in 1823–1824 was spent largely in brokering Texas's place in the emerging federalist order. Soon after his arrival it became clear that Miguel Ramos Arizpe's contemplated union of the four northeastern provinces of Tamaulipas (Nuevo Santander's new name), Nuevo León, Coahuila, and Texas was unachievable. Tamaulipas soon convinced congress that it should be autonomous, leaving the other three provinces as a single state. Nuevo León then began lobbying for separate statehood, and when it was granted, Coahuila and Texas remained joined together.



The first page of the Proceedings of the Constituent Congress of Coahuila y Texas contains an account of the installation of the congress in Saltillo on August 15, 1824, in the presence of the municipal council, military and civic officers, clergy, and distinguished citizens. Image care of the author through permission of the Tribunal Electoral del Poder Judicial de la Federación, Mexico.

The official record of the Coahuila constitutional proceedings consists of a large leather-bound ledger book, produced for a Philadelphia company, with gold-leaf script at the top, into which a clean copy of each day's minutes was inserted. The original is in the state archives of Coahuila, Saltillo. This image comes courtesy of this article's author, through permission of the Tribunal Electoral del Poder Judicial de la Federación, Mexico.

⁶ *Id.* at 82–83; NETTIE LEE BENSON, THE PROVINCIAL DEPUTATION IN MEXICO: HARBINGER OF PROVINCIAL AUTONOMY, INDEPENDENCE, AND FEDERALISM 59 (Univ. of Tex. Press 1992) [hereinafter PROVINCIAL DEPUTATION].

Although autonomy may have been possible for Coahuila, as Ramos Arizpe concluded after exploring unions with Zacatecas, Durango, and San Luis Potosí, such an outcome was not a possibility for Texas. With its small population and development challenges, Texas could not hope to be accepted as a separate state. At the same time, Seguín's perception of the national government's dysfunction made territorial status—the only other possibility for Texas—unappealing. Eventually, Seguín reluctantly came to agree with Ramos Arizpe that union with Coahuila was the best hope for stable and autonomous government in Texas. Congress did make a concession to Texas's aspirations by inserting in the law that united the two provinces a provision allowing Texas to apply for separate statehood on meeting certain minimum requirements.⁷

The new constitutional government was realized in Coahuila y Tejas without the active representation of Texas's interests, either in the number of representatives or in the form of the relationship between the department administration and the state government. The proceedings of the constituent congress over the composition and organization of the state's governmental institutions make clear that Texas was the junior partner in the relationship. Immediately after it opened on August 15, 1824, with only six of eleven representatives present, the state congress proceeded to issue a provisional statute of governance and to elect a governor. Word was sent to San Antonio ordering the dissolution of the provincial deputation there and the suspension of the *jefe politico's* authority.⁸

Texas never warmed to its relationship with Coahuila. In fact, when word of the new government in Saltillo arrived in San Antonio, the provincial deputation at first refused to disband. With the new capital located at the southern end of the state, the reins of power were far from Texas, as demonstrated by the fact that the new state legislature had begun taking action without the participation of the representative from Texas, the Baron of Bastrop, who did not arrive until the end of October. San Antonio saw an immediate demotion in status and an uncertain future. It took all the mediating skills of parish priest and former delegate to the imperial congress Refugio de la Garza to calm tempers between members of San Antonio's town council and the provincial deputation, which finally agreed to disband and accept the new political order.⁹ As Anglo-American immigration changed the face of Texas, tensions with both Saltillo and Mexico City rose, making the union with Coahuila one of the principal grievances in the coming decade.

During the first months of 1825, the relationship between Texas and the rest of the state was worked out in legislation that addressed the critical needs of Texans. In February 1825 the old province of Texas became one of two departments in the state governed by *jefes politicos* under the direct authority of the governor. Perhaps to emphasize respect for local prerogatives, José Antonio Saucedo, who had been *jefe politico* of Texas under the provincial deputation, was appointed to the post by Governor Rafael González.

In response to Stephen F. Austin's requests for regulation of colonization, the congress issued a colonization law on March 24, 1825, long before it produced a constitution for the state. The law, extremely generous to foreign immigrants, was based on the concessions that Austin had extracted from the imperial congress and that had been ratified by the national constituent congress. Settlers who immigrated as families were entitled to one *sitio* (league) of land (4,428 acres) on very favorable terms in return for demonstrating their good character and Christian faith and swearing to abide by Mexican law. The law did contain the seeds of what grew to become a major point of friction between Texas and the rest of the state, namely a provision that required settlers to abide by all existing and future laws concerning the introduction of slaves.¹⁰

⁷ *Colonization & Independence of Texas*, at 84–85; 1 COAHUILA Y TEXAS, at 171–75; PROVINCIAL DEPUTATION, at 127.

⁸ 1 COAHUILA Y TEXAS, at 190–95.

⁹ Charles A. Bacarisse, *The Union of Coahuila and Texas*, 61 SW. HIST. Q. 341, 346–49 (1958).

¹⁰ 1 COAHUILA Y TEXAS, at 201–06.

Despite measures incorporating foreign settlers into the fabric of the state and the lobbying of Austin and others, the “Constitution of the State of Coahuila and Texas,” signed on March 11, 1827, contained a clear indication of the limits of Coahuilan generosity. Again, Texas was missing from the proceedings, as Bastrop had died the previous fall, leaving Texas unrepresented as the finishing touches were put on the new organic law. Until his death, Bastrop had kept Austin informed of the delegates’ antipathy to slavery and worked to prevent outright abolition. Article 13 stated: “From and after the promulgation of the constitution in the capital of each district, no one shall be born a slave in the state, and after six months the introduction of slaves under any pretext shall not be permitted.” In effect, from November 1827 onward the only slaves in Texas would be those already living in the department.¹¹

The status of slavery, over which Texans and Coahuilans remained divided until Texas gained its independence, was not the only point of friction between Coahuiltexanos, as the citizens of the combined state were to be known. The Centralist-Federalist rivalry at the national level had its counterpart in Coahuila y Tejas.

So did growing alarm on the part of both Federalist and Centralist national officials over the tidal wave of immigration from the United States that threatened to overwhelm Mexican control of the region. Texans, particularly the Tejanos, were squarely within the Federalist camp, as were Coahuilans from the northern portions of Coahuila, but they were also in favor of continued immigration. In spring 1833 the Federalist legislators from northern Coahuila and Texas managed to remove the capital from the Centralist stronghold of Saltillo to the old colonial capital of Coahuila, Monclova. There, the now-Federalist-controlled legislature began enacting reforms favorable to Texas. So, too, did the national congress, although neither group was inclined to listen to Texas demands for separate statehood.¹²

With state coffers empty, however, the legislature sank even deeper into the corruption of American land speculators who sought to acquire vast tracts of land in Texas. Anglo Texans came to see the efforts of the legislators to sell land, ostensibly to raise revenue for the state and provide for a frontier militia, as nothing more than a land grab. Increasingly alienated from the Federalists and having rejected Centralist usurpations of power, they were divided among themselves. Some became increasingly vocal in their calls for separation from Coahuila as the only means of preventing the abolition of slavery and the preservation of Texas’s public lands.

Others were more openly hostile to continued membership in the Mexican union. For them, the continuing political chaos, particularly what they considered the arbitrary rule of the now Centralist Antonio López de Santa Anna, required a complete break from Mexico. Stephen F. Austin, arrested for having written a letter in October 1833 to the town council of San Antonio stating that Texas should prepare to separate from Coahuila, whether the national government approved or not, added his voice to those calling for military resistance against the national government in the summer of 1835.¹³

Few authors have dealt with Coahuila’s role in the growing Texas-Mexican divide that led to the Revolution. And, despite the pioneering work of Vito Alessio Robles, there has been no systematic analysis of the story of Texas during the Mexican period from the perspective of the relationship with Coahuila. Such a history promises new insights into how the forced union of two provinces that at first shared numerous cultural, social, economic,

¹¹ CONST. OF THE STATE OF COAHUILA AND TEXAS, art. 13, *reprinted in* 1 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822–1897*, at 424 (Austin: Gammel Book Co. 1898); GREGG CANTRELL, *STEPHEN F. AUSTIN: EMPRESARIO OF TEXAS 191–92* (Yale Univ. Press 1999).

¹² *Colonization & Independence of Texas*, at 90–93; DAVID J. WEBER, *THE MEXICAN FRONTIER, 1821–1846: THE AMERICAN SOUTHWEST UNDER MEXICO* (HISTORIES OF THE AMERICAN FRONTIER 176–78 (Univ. of N.M. Press 1st ed. 1982).

¹³ A good summary of growing Anglo-American discontent with Mexican rule is found in: PAUL D. LACK, *THE TEXAS REVOLUTIONARY EXPERIENCE: A POLITICAL AND SOCIAL HISTORY, 1835–1836*, at 3–16 (Tex. A&M Press 1992).

and historical factors contributed to the disaffection from the rest of Mexico of Anglo Texans and Tejanos alike. Thus, in such a study we might find a fuller and richer understanding of how Mexico came to lose Texas and how Texas came to be the twenty-eighth of the United States.



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No One Knows What the Texas Constitution Is*

By Jason Boatright

INTRODUCTION

SEVEN DIFFERENT STATE CONSTITUTIONS HAVE GOVERNED TEXAS,¹ and another constitution governed the Republic of Texas.² The current Texas constitution is commonly known as the Constitution of 1876.³ It was framed by a constitutional convention in 1875 and ratified by Texas voters in 1876.⁴ Since then, it has been amended 474 times in seventy different ratification elections.⁵ The frequency with which the current constitution has been amended has made it notoriously long, detailed, and difficult to understand—so much so that in 1972 the state tried to replace the Constitution of 1876 with an entirely new document.⁶ That effort failed and the problems that it had intended to address remain.⁷ The Texas constitution is still notoriously long and specific,⁸ but it has a far more fundamental and important problem. The current Texas constitution might have several different versions, or no version, currently in effect because the constitutional convention and Texas voters approved six different original versions of the Constitution of 1876. Thus, Texas has not only had eight different constitutions over the last 180 years, it might have as many as six constitutions, or no constitution at all, in effect right now.

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¹ See *Printing History—Texas Constitutions 1824–1876*, THE UNIV. OF TEX. SCH. OF LAW, http://tarlton.law.utexas.edu/constitutions/printing_history (<http://perma.cc/3F5V-TYY2>) (last visited Jan. 7, 2014) (listing the Constitución Política del Estado Libre de Coahuila y Tejas (1827) and Constitution or Form of Government of the State of Texas (1833), which were Mexican state constitutions; Constitution of the State of Texas (1861), which was the state’s Confederate constitution; and Constitution of the State of Texas (1845), Constitution of the State of Texas (1866), Constitution of the State of Texas (1869), and Constitution of the State of Texas (1876), which have been Texas state constitutions under the United States).

² *Id.* (listing the Constitution of the Republic of Texas of 1836 (1838)).

³ See, e.g., *In re Nestle USA, Inc.*, 387 S.W.3d 610, 619 (Tex. 2012) (calling the current constitution the “Constitution of 1876”). See also *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 692 (Tex. 2012) (same).

⁴ SETH SHEPARD MCKAY, *SEVEN DECADES OF THE TEXAS CONSTITUTION OF 1876*, at 136, 179 (1942).

⁵ TEXAS LEGISLATIVE COUNCIL, *AMENDMENTS TO THE TEXAS CONSTITUTION SINCE 1876*, at 1–2 (2012), available at <http://www.tlc.state.tx.us/pubsconamend/constamend1876.pdf> (<http://perma.cc/QW49-RNC4>).

⁶ JANICE C. MAY, *THE TEXAS CONSTITUTIONAL REVISION EXPERIENCE IN THE ‘70’S*, at 147 (1975).

⁷ *Id.*

⁸ See Editorial, *State Constitution Is an Anachronistic Mess*, SAN ANTONIO EXPRESS-NEWS (Sept. 1, 2011), <http://www.mysanantonio.com/opinion/editorials/article/State-Constitution-is-an-anachronistic-mess-2150440.php> (<http://perma.cc/4NEM-X9C8>) (“In one of the Lone Star State’s most tortured traditions and by a small number of voters, the Texas Constitution is amended time after time, usually involving statutory level issues or increasing the state’s debt.”); Editorial, *Texas Constitution Needs Some Updates—and a Diet*, LONGVIEW NEWS-JOURNAL (Sept. 25, 2013), http://www.news-journal.com/opinion/editorials/editorial-texas-constitution-needs-some-updates-and-a-diet/article_6570bd56-815b-5d96-86a4-4f0a39e600a2.html (<http://perma.cc/N66L-DQ98>) (“The Texas Constitution is a big mess.”).

THE CONSTITUTION OF THE STATE OF TEXAS OF 1876

In order to become law, the Constitution of 1876 had to satisfy three requirements.⁹ First, the constitutional convention had to frame the constitution in 1875.¹⁰ Second, the convention had to submit the framed constitution to Texas voters for a ratification election.¹¹ Third, voters had to ratify the framed constitution in an election in 1876.¹² However, none of that happened.

The constitutional convention framed two different constitutions. The convention voted in favor of one of them, and ordered that it be enrolled,¹³ but it did not actually enroll that constitution. Instead, it enrolled another constitution—one with a text containing hundreds of punctuation marks and words that were different from those in the version that was approved and ordered to be enrolled.¹⁴ Neither of the two framed constitutions amended or replaced the other.¹⁵

The convention submitted four other constitutions to voters for ratification; one was written in English, another was in German, one was in Spanish, and the fourth was in Bohemian.¹⁶ Voters ratified those four constitutions.¹⁷ The English version that voters ratified was different from both of the versions that the convention framed. Of course, each of the constitutions not written in English was different from the two English constitutions that the convention framed, as well as the English constitution that the voters ratified. None of the four ratified constitutions amended or replaced any of the other three ratified constitutions or the two framed constitutions. Thus, there were six different original versions of the current constitution.

In fact, there are six different current versions of the current Texas constitution because some sections have never been amended.¹⁸ No court has identified which, if any, of the six versions is in effect today.

⁹ 8 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822–97* (1898).

¹⁰ *Id.* at 573–74 (reproducing a March 13, 1875 Joint Resolution that called for a Constitutional Convention to frame a new Texas constitution).

¹¹ *Id.* at 775 (reproducing an Ordinance of the Texas Constitutional Convention that required the submission of the framed constitution to voters for ratification or rejection).

¹² *Id.*

¹³ An enrolled bill is a bill passed by both houses of the legislature and signed by their presiding officers. BLACK'S LAW DICTIONARY 186 (9th ed. 2009).

¹⁴ Compare JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 270–71 (1875), available at https://ia600400.us.archive.org/5/items/journalofconstit00texas/journalofconstit00texas_bw.pdf [hereinafter JOURNAL OF THE CONVENTION OF 1875] (quoting the preamble that the Committee on Bill of Rights submitted for convention approval), and *id.* at 436 (showing convention approval of that language), and *id.* at 818–819 (showing convention approval of a constitution containing that language), with *id.* at 820 (reporting that delegates signed an enrolled constitution), and *Tex. Const. of 1876*, TEX. STATE LIBRARY & ARCHIVES COMM'N, <https://www.tsl.state.tx.us/treasures/constitution/1875-01.html> (last visited Jan. 7, 2014) [hereinafter *Enrolled Constitution*] (showing the enrolled version of the preamble).

¹⁵ See generally JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 820 (reporting that delegates signed an enrolled constitution that was supposed to have been the constitution they had previously approved and ordered to be enrolled).

¹⁶ See JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 818 (the convention ordered the printing of 5,000 copies of the constitution in German); *id.* at 215 (3,000 copies were ordered to be printed in Spanish); *id.* at 216 (1,000 copies were ordered to be printed in Bohemian). See also CONSTITUTION OF THE STATE OF TEXAS (Galveston, News Steam Book and Job Establishment 1875), available at <http://tarlton.law.utexas.edu/constitutions/texas1876> [hereinafter *Ratified English Constitution*]; CONSTITUTION DES STAATES TEXAS (Austin, E. Von Boeckmann & Sohn 1875) [hereinafter *German Constitution*]; CONSTITUCIÓN Y ORDENANZAS DEL ESTADO DE TEXAS (Austin, El Democratic Statesman 1875) [hereinafter *Spanish Constitution*]; USTAVA STATU TEXAS (Austin, Uredni Vydani Gazette Office 1875) [hereinafter *Bohemian Constitution*].

¹⁷ MCKAY, *supra* note 4, at 179 (noting that voters approved the constitution by a vote of 136,606 to 56,652).

¹⁸ TEXAS LEGISLATIVE COUNCIL, *supra* note 5, at 5.

The existence of six versions of the current constitution is an important problem that might be impossible to solve, as each of the different current versions of the Texas constitution could be the law today. No particular version is clearly more or less legitimate than the others. No Texas court has chosen which, if any, of the different current versions of the Texas constitution is in effect, nor has a court issued an opinion establishing criteria for determining which, if any, would be.

Versions of the Preamble in English

The framing and ratification history of the preamble reveals why several versions of the Texas constitution at the constitutional convention were framed and ratified. It also shows why a court probably would not be able to explain why any of those versions of the Texas constitution is the law today.

The Convention approved this preamble and ordered that it be enrolled: “Humbly invoking the blessings of Almighty God, the people of the State of Texas do ordain and establish this Constitution.”¹⁹

However, that preamble was not enrolled. This one was: “Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.”²⁰

The Convention ordered that the enrolled version be printed and distributed to voters before the ratification election,²¹ but it was not. Here is the English version of the preamble that was submitted to voters for ratification: “Humbly invoking the blessing of Almighty God, the people of the State of Texas do ordain and establish this Constitution.”²²

The three English preambles look very similar to each other. They differ only in the presence or absence of the letter *s* or a comma. Even small differences in the text of the constitution, however, can create large differences in meaning. Courts interpret the Texas constitution according to the ordinary meaning that its literal text had at the time the text was adopted,²³ and commas performed very important grammatical functions at that time.²⁴

Accordingly, the preamble that the Convention approved and ordered enrolled explains that Texans are invoking God’s gifts while they ordain and establish the constitution.²⁵ The preamble that was enrolled commands readers to ordain and establish the constitution while they invoke Texans, who are God’s gifts.²⁶ The English

¹⁹ See JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 270 (quoting the preamble that the Committee on the Bill of Rights submitted for convention approval); *id.* at 436 (showing convention approval of that preamble). The enrolled version of a bill is the final version. *Dillehey v. State*, 815 S.W.2d 623, 627 (Tex. Crim. App. 1991) (citing the TEXAS LEGISLATIVE COUNCIL, GUIDE TO LEGISLATIVE INFORMATION (1988)).

²⁰ See *Enrolled Constitution*, *supra* note 14, at 1; see also JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 820 (reporting that delegates signed an enrolled constitution).

²¹ JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 753.

²² See *Ratified English Constitution*, *supra* note 16, at 1.

²³ See *Harris Cnty. Hosp. Dist. v. Tomball Reg’l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (providing that courts rely on the constitution’s literal text); *Mumme v. Marrs*, 40 S.W.2d 31, 35 (Tex. 1931) (explaining that the meaning of the constitution is construed based on the conditions and prevailing sentiments at the time it was adopted); *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1942) (noting that, in interpreting the constitution, the courts will consider the absurdity of the conclusion only if the constitutional provision is open to more than one construction or interpretation).

²⁴ See generally JOHN WILSON, A TREATISE ON GRAMMATICAL PUNCTUATION 34–35 (1871).

²⁵ *Id.* at 34 (“Secondary or subordinate clauses . . . must be separated from the principal clauses, by means of commas . . .”).

²⁶ See *id.* at 35 (“Expressions of a parenthetical nature—that is, intermediate phrases or clauses, which may be omitted without affecting the construction of the passage, or injuring its sense—are separated from the context by commas . . .”). See also 2 OXFORD ENGLISH

preamble that the convention submitted to voters explains that Texans are asking for God’s approval while they ordain and establish the constitution.²⁷

Translated Versions of the Preamble

The convention also ordered that the enrolled version of the constitution be translated and printed in German, Spanish, and Bohemian for distribution to voters for the ratification election.²⁸ The Convention ordered that 40,000 copies be printed in English, 5,000 in German, 3,000 in Spanish, and 1,000 in Bohemian.²⁹

This is the preamble to the German version of the constitution: “Den Segen des allmächtigen Gottes erflehen, hat das Volk des Staates Texas diese Constitution entworfen und festgestellt.”³⁰

Here is the preamble in Spanish: “El Pueblo del Estado de Texas, invocando humildemente la bendicion del Todopoderoso, ordena y establece esta Constitucion.”³¹

This is the Bohemian preamble: “Pokorně vzývaje pomoc všemocného boha lid státu Texas nařizuje a ustanovuje tuto ústavu.”³²

The German, Spanish, and Bohemian versions look very different from one another. Some have letters that do not exist in the other languages.³³ They each have different numbers of commas. And, of course, they have only one word in common. The other words that comprise each of the foreign-language preambles have close analogs in the other two languages, but some of the words do have somewhat different meanings. For example, at roughly the time that the Texas constitution was distributed to voters for ratification, the German word “Segen” meant “blessing” or “benediction,” as in “[may] the Lord bless it!”³⁴ The Spanish word “bendicion” meant “benediction.”³⁵ The Bohemian word “pomoc,” however, meant “help” or “assistance,”³⁶ and was not a Bohemian word for “blessing” or “benediction.”³⁷ Thus, the German, Bohemian, and Spanish versions of the preamble, like the three versions of the preamble in English, use words that the framers probably intended to have the same meaning, but they do not. Those slight differences among small parts of the texts result in preambles that have different meanings from one another. Moreover, the foreign-language versions have the same kinds of differences in meaning that the English preambles have: they use words that, just like the English words “blessing” and

DICTIONARY 282 (1989) (defining “blessing” as it was used in 1875, and as it was used in this version of the preamble, as “beneficent gift[s] of God”); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395 (Tex. 1989) (using a dictionary definition of a term as it was used in 1875 to find the intent of the framers of the constitution).

²⁷ 2 OXFORD ENGLISH DICTIONARY 282 (1989) (defining “blessing” as it was used in 1888, and as it is used in this version of the preamble, as “bestowal of divine favour and prospering influence”).

²⁸ MCKAY, *supra* note 4, at 147.

²⁹ *Id.* at 148.

³⁰ *German Constitution*, *supra* note 16, at 3.

³¹ *Spanish Constitution*, *supra* note 16, at 3.

³² *Bohemian Constitution*, *supra* note 16, at 3.

³³ See CHARLES JONAS, *BOHEMIAN MADE EASY* 15–16 (1890) (discussing the letters ě, ř, and š).

³⁴ 2 H. BAUMANN, MURET-SANDERS *ENCYCLOPAEDIC ENGLISH-GERMAN AND GERMAN-ENGLISH DICTIONARY* 877 (1910).

³⁵ 1 MARIANO VELAZQUEZ DE LA CADENA, *A DICTIONARY OF THE SPANISH AND ENGLISH LANGUAGES* 56 (1865).

³⁶ 2 V.E. MOUREK, *A DICTIONARY OF THE ENGLISH AND BOHEMIAN LANGUAGES* 544 (1879).

³⁷ 1 V.E. MOUREK, *A DICTIONARY OF THE ENGLISH AND BOHEMIAN LANGUAGES* 74 (1879) (defining the word “benediction”); *id.* at 83 (defining the word “blessing”).

“blessings,” are apparently intended to have the same meaning as one another, but again, they do not.

Asking for God’s approval or help in ordaining and establishing a constitution was a common feature of preambles in other constitutions that were in effect around the time the Constitution of the State of Texas (1876) was adopted.³⁸ Invoking God’s gifts, however, was not. It does not make as much sense as asking for God’s approval either.³⁹ Although a preamble might purport to use God’s gifts, or express thanks for them, in ordaining and establishing a constitution,⁴⁰ none, presumably, would invoke God’s gifts in ordaining and establishing a constitution. Nor would a provision of a constitution, even a Texas constitution, invoke Texans and call them God’s gifts.⁴¹ Thus, the meaning of the preamble that invokes God’s blessing is reasonable, but the meaning of each of the preambles that invokes God’s gifts probably is not.

Many Texas courts have held that a provision of the constitution should be construed in a way that would avoid unreasonable conclusions if a reasonable conclusion is available.⁴² Therefore, if one version of the preamble had three meanings, two of which were unreasonable and the other reasonable, a court would likely choose to construe the preamble in a way that produced the reasonable meaning.

That, however, is not the choice that the existence of multiple versions of the preamble presents. Choosing which of the six versions is in effect today requires a decision about which preamble is the law, not what each preamble means.⁴³ Accordingly, one of the three English preambles could be in effect today regardless of the precise meaning of the word “blessing” or “blessings,” and regardless of the grammatical function of two commas or one.

For the same reason, one of the three non-English preambles might be the law today, whatever the word “Segen,” “bendicion,” or “pomoc” means. That is because the non-English preambles were probably official, legal documents, just like the versions of the constitution written in English. The non-English versions were printed and distributed to voters so that voters could decide whether to ratify or reject the new constitution.⁴⁴ Copies of

³⁸ See, e.g., ILL. CONST. of 1870 pmb., available at <https://ia600400.us.archive.org/6/items/constitutionofst00illi/constitutionofst00illi.pdf> (<http://perma.cc/G6JK-DXEN>) (“looking to Him for a blessing upon our endeavors”); MISS. CONST. of 1890 pmb., available at <http://mshistorynow.mdah.state.ms.us/articles/103/index.php?s=extra&id=270> (<http://perma.cc/C7LN-FLJZ>) (“invoking His blessing on our work”). See also *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) (providing that, in determining the meaning of a provision of the Texas constitution, courts rely heavily on the literal text, but they may also consider the meaning of analogous provisions of other jurisdictions’ constitutions).

³⁹ The phrase “invoking God’s blessing” in the *Ratified English Constitution* meant “appealing for aid or protection.” 8 OXFORD ENGLISH DICTIONARY 55 (1989) (defining the word “invoke” in the sense in which it was used in the English preamble submitted to voters for ratification, and as it was in 1885). The phrase “invoking God’s blessings” in the preamble that was approved, and in the enrolled preamble, meant “calling for a thing with earnest entreaty.” *Id.* (defining the word “invoke” in the sense in which it was used in those preambles, and as it was used in 1865).

⁴⁰ Some preambles to other constitutions do acknowledge the importance of God’s gifts in the making of a constitution without asking for God’s gifts or citing them as justification for establishing it. See, e.g., TEX. CONST. of 1845, available at http://tarlton.law.utexas.edu/constitutions/texas1845/preamble_a1 (<http://perma.cc/G6SU-KJZ6>) (“acknowledging with gratitude the grace and beneficence of God”). See also *Williams v. Castleman*, 247 S.W. 263, 265 (Tex. 1922) (providing that, in construing the constitution, courts may examine previous Texas constitutions); IOWA CONST. of 1857 pmb., available at http://publications.iowa.gov/9996/1/iowa-constitution_1857002.pdf (<http://perma.cc/H89M-Y2N6>) (“grateful to the Supreme Being for the blessings hitherto enjoyed”).

⁴¹ *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (citing F. DWARRIS, A GENERAL TREATISE ON STATUTES 268–269 (P. Potter ed., 1871)) (“But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”).

⁴² *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1942). See also *Sears v. Bayoud*, 786 S.W.2d 248, 251 n.5 (Tex. 1990) (explaining that Courts should not “ignore clear evidence of constitutional intent in favor of technical rules of grammar”).

⁴³ See Ross E. Davies, *Which is the Constitution?*, 11 GREEN BAG 2D 209, 214–16 (2008) (distinguishing identification, which is about what the law is, from interpretation, which is about what the law means).

⁴⁴ JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 109 (explaining that the German version was submitted to voters so that people

all four versions were filed in the secretary of state's office.⁴⁵ Each contains a certificate of authenticity from the secretary of state.⁴⁶ Unlike bilingual ballots in some elections today, they were neither mere foreign-language instructions or questions in an election for an office or a proposition,⁴⁷ nor were they summaries of the English text of proposed amendments to the Texas constitution like the Spanish-language summaries placed on ballots in modern-day ratification elections.⁴⁸ Those summaries are not legal texts; they are summaries of proposed legal text.⁴⁹ The German, Spanish, and Bohemian versions of the Texas constitution were themselves legal texts, submitted to voters for approval. Thus, the German, Spanish, and Bohemian versions of the Constitution of 1876 were distinguishable in appearance, but probably not in effect, from the three English versions.

The Existence of Different Versions of the Texas Constitution Results in Uncertainty

Common sense suggests that the constitutional convention probably did not intend to enact four different legally-effective Texas constitutions in four different languages, but nothing in the *Journal of the Constitutional Convention* or the *Debates of the Constitutional Convention* supports that notion. More importantly, nothing in the texts themselves indicates that they were intended to be anything other than ratified, legal texts. Recent Texas history supports that notion. The Texas Constitutional Convention of 1845 ordered that 1,000 copies of the ordinance annexing Texas to the United States be printed in Spanish and distributed to voters in areas of the state with the most Spanish-speaking citizens.⁵⁰ The text of the Spanish version of the ordinance was formally recorded in the convention's journal in the same way that the English version was recorded.⁵¹ Similarly, the Texas Constitutional Convention of 1836 ordered that the constitution and laws of the Republic of Texas be translated into Spanish.⁵² Consequently, deciding which, if any, of the six versions of the preamble is the law, in any of the four languages in which it was written, would depend on whether any of those versions satisfied the legal requirements for becoming law.

who could not read English could understand the text).

⁴⁵ *Id.* at 753.

⁴⁶ *Ratified English Constitution*, *supra* note 16, at 26; *German Constitution*, *supra* note 16, at 97; *Spanish Constitution*, *supra* note 16, at 85; *Bohemian Constitution*, *supra* note 16, at 59.

⁴⁷ See TEX. ELEC. CODE ANN. § 272.005(c) (West 2003) (requiring, for those elections that have Spanish text on ballots, that all ballots have English text, and that the Spanish instructions for completing the ballot be placed beneath the English text).

⁴⁸ See *id.* § 274.003(c) (West 2003) (requiring that, for each proposed constitutional amendment, the secretary of state certify in writing on the ballot the working of the proposition, and include ballot translation language, per 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I) (2013)).

⁴⁹ See TEXAS SECRETARY OF STATE, 2013 CONSTITUTIONAL BALLOT CERTIFICATION IN SPANISH, <http://www.sos.state.tx.us/elections/forms/2013-ballot-certification.pdf> (<http://perma.cc/7VRM-2H7Y>) (showing the Spanish-language ballot proposition for 2013). See also *id.* (citing TEX. ELEC. CODE ANN. § 274.003 (West 2003)) (explaining that the secretary of state certifies ballot propositions submitting constitutional amendments). See also TEX. ELEC. CODE ANN. § 274.001 (West 2003) (stating that propositions submitting constitutional amendments are merely descriptions of the text of constitutional amendments). See also TEXAS SECRETARY OF STATE, DECLARACIONES INTERPRETATIVAS PARA LA ELECCIÓN DE ENMIENDAS CONSTITUCIONALES DEL 5 DE NOVIEMBRE DE 2013, <http://www.sos.state.tx.us/elections/voter/2013novballotlang.shtml> (<https://perma.cc/7VRM-2H7Y?type=pdf>) (containing explanations, rather than summaries, in Spanish of proposed constitutional amendments).

⁵⁰ DEBATES OF THE TEXAS CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS, at 85–86 (1845), available at http://tarlton.law.utexas.edu/constitutions/files/debates1845/1845_07_16_dbt.pdf (<http://perma.cc/M5CD-YW95>).

⁵¹ JOURNALS OF THE CONVENTION OF THE STATE OF TEXAS 70–73 (1845), available at <http://tarlton.law.utexas.edu/constitutions/texas1845/journals/jul16> (<http://perma.cc/C7SZ-JMQ7>).

⁵² JOURNAL OF THE GENERAL CONVENTION OF 1836, at 58 (1838), available at http://tarlton.law.utexas.edu/constitutions/files/journals1836/1836_03_10thu_jnl.pdf (<http://perma.cc/QG8X-LLB4>). See also *id.* at 65, available at http://tarlton.law.utexas.edu/constitutions/files/journals1836/1836_03_10fri_jnl.pdf (<http://perma.cc/8T9Y-3MTX>). The previous year, the Texas General Convention of 1835 printed an identical Spanish-language version of its English-language declaration of intent to take up arms against Mexican General Santa Anna. *Declaration of the People of Texas (1835)—Spanish Text*, THE UNIV. OF TEX. SCH. OF LAW, <http://tarlton.law.utexas.edu/constitutions/dpt1835spanish> (<http://perma.cc/HPN8-HH5Z>).

No Texas court has ruled, or been asked to rule, on whether a particular version of the preamble is the law. Instead, Texas courts have cited several different versions of the preamble. Two Texas courts of appeals have quoted text from the enrolled preamble.⁵³ Another quoted the preamble that delegates approved and ordered to be enrolled.⁵⁴ One court used text from the English preamble that voters reviewed for ratification.⁵⁵ Thus, Texas courts appear to assume that there is a preamble to the Texas constitution, but they have not identified which one is correct, nor have they identified which preamble or preambles would be incorrect. In other words, Texas courts have identified three preambles that could be the law today, and they have done so without suggesting that those three preambles are the only ones that could be the law today. Therefore, a Texas court might choose to cite any version of the preamble.

Texas judges are not the only Texas public officials who have the authority to interpret and influence state law, nor are they the only officials who have cited different versions of the preamble. The Attorney General of Texas has cited a version with two commas⁵⁶ and a version with one comma.⁵⁷ The Texas legislature has published versions of the preamble that contain one comma.⁵⁸ However the Texas Legislative Council—an agency in the legislative branch of state government⁵⁹—has cited and quoted a version of the preamble with two commas.⁶⁰ Thus, offices in all three branches of state government have cited more than one version of the preamble to the Texas constitution. None of them has suggested that one version is more or less likely to be the law than any other version, nor has any of them identified criteria by which anyone else could choose which, if any, version of the preamble is the correct one. Consequently, it is probably impossible to predict which version of the preamble that any Texas official, not just Texas judges, would use today.

THE SECOND AMENDMENT OF THE U.S. CONSTITUTION

The framing, ratification, and recent jurisprudential history of the Second Amendment to the U.S. Constitution demonstrate why uncertainty about the correct version of a constitutional amendment could be an important problem.⁶¹ There are many versions of the Second Amendment, some of which contain no commas and some of which contain one, two, or three commas.⁶² New Jersey ratified a version that had no commas.⁶³ South Carolina, Pennsylvania, New York, and Rhode Island ratified a Second Amendment with one comma.⁶⁴

⁵³ *City of Houston v. Trail Enters., Inc.*, 377 S.W.3d 873, 886 (Tex. App.—Hous. [14th Dist.] 2012, pet. filed); *Robinson v. Crown Cork & Seal Co.*, 251 S.W.3d 520, 541 (Tex. App.—Hous. [14th Dist.] 2006) (Frost, J., dissenting), *rev'd on other grounds*, 335 S.W.3d 126 (Tex. 2010).

⁵⁴ *Waite v. Waite*, 64 S.W.3d 217, 232 n.4 (Tex. App.—Hous. [14th Dist.] 2001, pet. denied).

⁵⁵ *Church v. Bullock*, 100 S.W. 1025, 1027 (Tex. Civ. App. 1907).

⁵⁶ THE ATTORNEY GENERAL, CONSTITUTION OF THE STATE OF TEXAS (ADOPTED FEBRUARY 15, 1876) (1986).

⁵⁷ THE ATTORNEY GENERAL, CONSTITUTION OF THE STATE OF TEXAS 1876 (1973).

⁵⁸ THE REVISED STATUTES OF TEXAS, n.pag. (1895), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.35112105478434;view=1up;seq=11> (“Published by Authority of the State of Texas (Pursuant to Chapter 82, Acts 1895)”). See also THE REVISED STATUTES OF TEXAS ADOPTED BY THE REGULAR SESSION OF THE SIXTEENTH LEGISLATURE, A.D. 1879, n.pag. (1887) (containing the seal of, and an explanation by, the Texas secretary of state certifying “that the foregoing volume is a true and correct copy of the original bills on file in this department”).

⁵⁹ TEX. GOV’T CODE ANN. § 323.001(a) (West 2013).

⁶⁰ TEXAS LEGISLATIVE COUNCIL, TEXAS CONSTITUTION: INCLUDES AMENDMENTS THROUGH THE NOVEMBER 5, 2013 CONSTITUTIONAL AMENDMENTS ELECTIONS 1 (2013), available at <http://www.tlc.state.tx.us/pubslegref/TxConst.pdf> (<http://perma.cc/T4WL-ZH5R>).

⁶¹ See William W. Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas*, 10 GREEN BAG 2D 469, 476 (2007).

⁶² Davies, *supra* note 43, at 210–211.

⁶³ *Id.* at 210 & n.6.

⁶⁴ *Id.* at 211 & n.7.

Maryland and North Carolina ratified a version with two commas.⁶⁵ Delaware approved a text with three commas.⁶⁶ Some of those versions were framed but not ratified, or ratified by some states and not others.⁶⁷ No version of the Second Amendment was approved by enough states to be ratified and become law.⁶⁸

The U.S. Supreme Court has cited several different versions of the Second Amendment.⁶⁹ In fact, the U.S. Supreme Court cited a version of the Second Amendment in its *Heller* decision—the opinion that confirmed the existence of an individual constitutional right to keep and bear arms—that was different from the version that the U.S. Court of Appeals had cited in the very opinion that the U.S. Supreme Court was reviewing.⁷⁰ That matters because the grammatical function of the clauses created by commas in the Second Amendment was the first and longest part of the analysis of the majority opinion in *Heller*.⁷¹ The *Heller* Court quoted a version of the Second Amendment with three commas, but it did not explain why, nor did it hold that the version with three commas is the law today. The existence of those three commas created, in the opinion of the Court, a series of prefatory and operative clauses that rendered the reference to the militia merely introductory and the reference to the right to keep and bear arms effective.⁷²

Had the Court reviewed a version of the Second Amendment that did not contain three commas, there would have been no clauses, or fewer or different clauses, that could have vitiated the introductory function of the militia clause and the operative function of the rights clause.⁷³ The absence of those clauses could have resulted in the outcome that the dissenting opinions in that case supported.⁷⁴ Thus, differences in the number and placement of commas in the Second Amendment could create meanings, and legal outcomes, that are profoundly different from what they otherwise would be.⁷⁵

⁶⁵ *Id.* at 211 & n.8.

⁶⁶ *Id.* at 211 & n.9.

⁶⁷ Van Alstyne, *supra* note 61, at 476.

⁶⁸ U.S. CONST. art. V (providing that a proposed constitutional amendment becomes law when three-fourths of the states ratify it).

⁶⁹ See, e.g., *Presser v. Illinois*, 116 U.S. 252, 260 (1886) (quoting a version of the Second Amendment with one comma); *United States v. Miller*, 307 U.S. 174, 176 (1939) (quoting a version of the Second Amendment with three commas).

⁷⁰ *Compare Parker v. Dist. of Columbia*, 478 F.3d 370, 378 (D.C. Cir. 2007) (citing a version of the Second Amendment with two commas), with *Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (citing a version of the Second Amendment with three commas).

⁷¹ See *Heller*, 554 U.S. at 576–605 (discussing the grammatical function and legal effect of the prefatory and operative clauses).

⁷² See *Heller*, 554 U.S. at 578–79, 595–96.

⁷³ Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (discussing function of justification clauses and operative clauses in the three-comma Second Amendment to the U.S. Constitution).

⁷⁴ See *Heller*, 554 U.S. at 578; see also *id.* at 643–44 (Stevens, J., dissenting).

⁷⁵ See Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. & Jeffrey P. Kaplan, Ph.D. as



Participants in the 1876 Convention

Because no court has ruled on which version of the Second Amendment is in effect, it is possible that a future U.S. Supreme Court case could overturn or modify the *Heller* decision, not merely because the Court might disagree with the *Heller* Court's construction of the Second Amendment, but because the future Court might disagree with the *Heller* Court's choice of Second Amendment text. The U.S. Supreme Court has not identified the criteria by which such a choice could be made. Presumably, the Court's choice of text would depend on whether it decided that the text of the U.S. Constitution must be framed and ratified, or only framed or ratified, to become law.⁷⁶

One law professor has argued that the Second Amendment is not in effect at all, because no version of it was framed and subsequently ratified by a sufficient number of states.⁷⁷ That conclusion is correct, but impractical because, among other reasons, too much depends on its existence. The U.S. Congress and state legislatures, including the Texas legislature, have enacted laws that are profoundly affected by the Second Amendment.⁷⁸ The courts, of course, have issued opinions interpreting many of those laws.⁷⁹ State and federal law enforcement agencies enforce and implement laws that the Second Amendment has been thought to authorize or circumscribe.⁸⁰ In addition, of course, American citizens have been making, buying, selling, keeping, and using firearms for centuries.⁸¹ The idea that a court would jeopardize all of those activities and the institutions surrounding them because of a legal problem with the ratification of the Amendment over 200 years ago is almost certainly incorrect.⁸²

Other legal scholars have argued that the version with three commas is the law because: (1) it is the one that the Constitutional Convention enrolled, and (2) it is the version that the United States Code uses.⁸³ However, enrollment and codification are two different processes, neither of which renders a legal text an effective federal law.⁸⁴ Moreover, if enrollment were more important than ratification, the act of copying an approved law would be more important than the act of approving it or ratifying it. Such an outcome would grant more power to clerks than to the framers and the people—those who are constitutionally authorized to write an amendment and those who are constitutionally authorized to ratify one.⁸⁵ Also, the version with three commas is not the version that the United States Code uses.⁸⁶

Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

⁷⁶ See Davies, *supra* note 43, at 214–15 (discussing *Coleman v. Miller*, 307 U.S. 433, 452–56 (1939)) (noting that the U.S. Supreme Court has held that such a choice would be a non-justiciable political question).

⁷⁷ Van Alstyne, *supra* note 61, at 476.

⁷⁸ See, e.g., TEX. GOV'T CODE ANN. § 411.177 (West 2012) (authorizing the Texas Department of Public Safety to issue licenses to private citizens to carry concealed handguns).

⁷⁹ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that the Fourteenth Amendment to the U.S. Constitution renders the Second Amendment individual right to keep and bear arms recognized in the *Heller* decision fully applicable to the states).

⁸⁰ See, e.g., *Texas Concealed Handgun Laws and Selected Statutes*, TEXAS DEPARTMENT OF PUBLIC SAFETY, REGULATORY SERVICES DIVISION, <http://www.txdps.state.tx.us/InternetForms/Forms/CHL-16.pdf> (<http://perma.cc/F737-2ECW>) (last visited Jan. 7, 2014). See also *National Instant Criminal Background Check System*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/nics> (<http://perma.cc/7UEQ-GD52>) (last visited Jan. 7, 2014) (noting that the system is required by the Brady Handgun Violence Prevention Act of 1993).

⁸¹ *Dist. of Columbia v. Heller*, 554 U.S. 570, 581–84 (2008).

⁸² Van Alstyne, *supra* note 61, at 477 (reproducing an email from Eugene Volokh to Van Alstyne describing the contention that there is no Second Amendment as “unsound” and not a “serious argument”).

⁸³ See, e.g., David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 707 n.91 (2012).

⁸⁴ See 1 U.S.C. § 112 (2013) (providing that publication of a legal text in the U.S. Statutes at Law “shall be legal evidence of . . . proposed or ratified amendments to the Constitution of the United States”). The appearance of a legal text in the U.S. Code is prima facie evidence that the provision has the force of law, but that does not confer legal status on the text. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

⁸⁵ U.S. CONST. art. V (requiring ratification of constitutional amendments).

⁸⁶ Harry Bain, *Errors in the Constitution—Typographical and Congressional*, PROLOGUE, Fall 2012, at 8–11 (showing that the U.S. Code

One law professor has argued that the printed version of the U.S. Constitution ratified by the voters, rather than the handwritten and signed version approved by the Constitutional Convention, is the correct version, because the people ratified it, and the people are the source of all government power.⁸⁷ That argument, however, does not adequately account for the fact that the people ratified Article V of the U.S. Constitution, which requires that amendments be framed before they may be ratified.⁸⁸ Perhaps more importantly, the notion that the people exercise their sovereign power through ratification, but not through framing, is inconsistent with the idea of republican government, under which the people have delegated the exercise of their sovereign power to representatives who act in the name, and on behalf of, the people who elect them.⁸⁹ Put differently, the people do not merely ratify the constitution, they also frame it insofar as they elect representatives. These representatives either write and approve the text that is submitted to the people's legislatures for ratification,⁹⁰ or elect the delegates who write and approve the text that is submitted to the people's legislatures for ratification.⁹¹ Thus, the notion that the people are the source of all governmental power does not give rise to the inference that ratification is the most important step in the creation of a constitution; it gives rise to the inference that framing and ratification are equally important steps in the process of making a constitution.

Thus, there is no consensus among legal scholars regarding which version, if any, of the Second Amendment to the U.S. Constitution is in effect. Nor do they agree on which criteria a court should use to choose a particular version. In fact, it is possible that a court would hold that it is forbidden from identifying such criteria and from holding that a particular version of the Second Amendment is in effect. One legal scholar has argued that the U.S. Supreme Court ruled, in its *Coleman v. Miller* opinion, that determining whether an amendment to the U.S. Constitution was in effect was a political question, rather than a legal one.⁹² As a result, the Court declined to answer it.⁹³ However, in that case, the Court did not hold that determining the validity of a constitutional amendment was nonjusticiable; the Court held that the questions that the Court was asked to answer in order to judge the validity of the amendment—questions regarding economics, publicity, and other concepts that had little, if anything, to do with the job of a court—were political and nonjusticiable.⁹⁴ Indeed, the *Coleman* Court favorably cited another U.S. Supreme Court case, *Dillon v. Gloss*,⁹⁵ in which the Court held that the Eighteenth Amendment to the U.S. Constitution had been validly ratified and was in effect.⁹⁶ The *Dillon* Court explained that the Eighteenth Amendment became effective the day that the last state required for ratification approved the amendment,⁹⁷ rather than the day that the U.S. Secretary of State proclaimed it to be ratified.⁹⁸

is different from the enrolled U.S. Constitution), available at <http://www.archives.gov/publications/prologue/2012/fall/const-errors.html> (<http://perma.cc/HB2F-X8MA>).

⁸⁷ Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 *YALE L.J.* 281, 294–95 (1987).

⁸⁸ U.S. CONST. art. V (requiring that the U.S. Congress, or a constitutional convention proposed by two-thirds of state legislatures, propose amendments to the U.S. Constitution for ratification by the people).

⁸⁹ *Id.* (requiring that proposed amendments “be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress”).

⁹⁰ *Id.* art. I, § 2 (“The House of Representatives shall be composed of members chosen every second year by the people of the several states . . .”).

⁹¹ *Id.* art. IV, § 4 (providing that the “United States shall guarantee to every state in this union a republican form of government”).

⁹² Davies, *supra* note 43, at 214.

⁹³ *Id.*

⁹⁴ *Coleman v. Miller*, 307 U.S. 433, 452–54 (1939)

⁹⁵ *Id.* at 452 (citing *Dillon v. Gloss*, 256 U.S. 368 (1921)).

⁹⁶ *Dillon*, 256 U.S. at 376–77.

⁹⁷ *Id.* at 376 & n.13.

⁹⁸ *Id.* at 376–77.

The *Dillon* Court did not explain its choice,⁹⁹ but the fact of the choice is important because, if the U.S. Supreme Court has the power to choose which act in the framing and ratification process renders a constitutional amendment effective, it could probably choose which version of the Second Amendment to the U.S. Constitution would be in effect. The U.S. Supreme Court, however, has issued no ruling that would enable anyone to predict with any confidence which version would be in effect.

The same is true of courts in Texas. Many courts have opined that the Texas constitution should be construed according to the intention of the Convention that framed it.¹⁰⁰ Other Texas Courts have held that the constitution should be read according to the decision of the voters who adopted it.¹⁰¹ And some Texas courts have opined that the constitution should be construed according to the wishes of the framers and the voters.¹⁰² However, none of those courts ruled that a version of the constitution that was framed but not ratified, or ratified but not framed, was in effect. Like the courts that held that the constitution should be construed in a way that avoids unreasonable results and finds a reasonable one, the courts that opined that the constitution should be construed according to the intention of the Convention, or the voters, or both, were trying to find the meaning of a text that was the law, rather than trying to find the text that is the law.¹⁰³ Thus, none of those holdings would help a court choose which of the six preambles to the Texas constitution, if any of them, is in effect today.

DOES THE LACK OF A SINGLE CONSTITUTION EVEN MATTER?

The absence of criteria for determining the legally-effective preamble to the Texas constitution might not seem like much of a problem because, unlike the Second Amendment to the U.S. Constitution, the preamble to the Texas constitution is rarely litigated¹⁰⁴ and has little, if any, force of law.¹⁰⁵ However, the point of examining the framing and ratification history of the preamble to the Texas constitution, and the different versions and meanings that its history has created, is not to suggest that uncertainty regarding the correct text and true meaning of the preamble threatens the stability of law and life in Texas. Rather, it is to suggest that if the very first, and probably simplest, provision of the Texas constitution is difficult or impossible to identify and construe, some of the other sections of the constitution that are far longer and more complex than the preamble probably are, too. That, in turn, suggests that the framing and ratification history of the Texas constitution, and the various versions that

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *Smissen v. State*, 9 S.W. 112, 116 (Tex. 1888). See also *Western Co. v. Sheppard*, 181 S.W.2d 850, 853 (Tex. Civ. App.—Austin 1944, writ ref'd) (explaining that, in finding the meaning of the Texas constitution, the search is to determine “the purpose, meaning and intent of the framers”). See also *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394–95 (Tex. 1989) (noting the difficulty inherent in determining the intent of voters over a century ago and discussing the intent of the framers at length).

¹⁰¹ See, e.g., *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 (Tex. Crim. App. 1993) (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) and *Williams v. Castleman*, 247 S.W. 263, 265 (1922)).

¹⁰² See, e.g., *Johnson v. Tenth Judicial Dist. Court of Appeals at Waco*, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008); *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000) (citing *Farrar v. Bd. of Trs. of Emps. Ret. Sys. of Tex.*, 243 S.W.2d 688, 692 (Tex. 1951)).

¹⁰³ See, e.g., *City of El Paso v. El Paso Cmty. Coll. Dist.*, 729 S.W.2d 296, 298 (Tex. 1987).

¹⁰⁴ The Texas preamble has not been cited in a holding of any appellate court. It could be one day, though. The words, “We the People of the United States . . . do ordain and establish this Constitution” in the Preamble to the U.S. Constitution are similar to the words, “the people of the State of Texas do ordain and establish this Constitution” in the preamble to the Texas constitution. Compare U.S. CONST. pmb., with TEX. CONST. pmb. The former constituted an important part of the reasoning of one of the most famous cases in American legal history. See *McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819) (noting that the phrase “We the people” in the Preamble to the U.S. Constitution identifies the source of constitutional authority).

¹⁰⁵ See 1 GEORGE D. BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 1 (1977) (explaining that the preamble “cannot be an independent source of power although it may help in the definition and interpretation of powers found in the body of the constitution”).

resulted from them, pose a profound problem for the state.

Indeed, the preamble is not the only provision of the current Texas constitution that has several versions, any or none of which might be in effect today. Every section of the original text of the current Texas constitution has a ratified version that differs from a framed version, because the Convention framed three English versions, and voters ratified three non-English versions. The differences are far more extensive than that, though. Many sections of the English version of the Texas constitution that was enrolled differ from the English version that was ratified. In fact, of the 279 sections of the original text of the current Texas constitution, 188 sections are different in the enrolled English version from the corresponding sections in the ratified English version.¹⁰⁶

Many of the differences in those sections are probably not important because they are differences in punctuation and orthography that probably cannot affect the meaning of the text. For example, the enrolled version of article 1, section 8 provides, “In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury.”¹⁰⁷ However, the version submitted to voters for ratification in English provides, “In all criminal prosecutions the accused”¹⁰⁸ The comma after “prosecutions” in the enrolled version creates an introductory clause that would not change the meaning of the sentence as a whole.¹⁰⁹ Similarly, one version of article I, section 12 italicizes the term “*habeas corpus*,” while another version does not.¹¹⁰ That could not affect the meaning of the terms.¹¹¹ Likewise, one version of article I, section 23 contains the word “defence,” while another contains “defense.”¹¹² The difference in spelling cannot change the meaning of the words, which had identical meanings in 1876 and, unlike today, were used interchangeably in British and American English.¹¹³

Other sections, however, do have enrolled and ratified versions that differ in ways that could produce different meanings. Some of those created differences in meaning are slight at most. For example, many sections of the Texas constitution have sections that contain words that are capitalized in one version of the section, but not in another version. The version of article 1, section 8 that was enrolled provides that, “in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the Court.”¹¹⁴ On the contrary, the ratified version in English contains the phrase, “under the direction of the court”¹¹⁵ It is possible that the capitalized word referred only to especially important courts, and the non-capitalized word referred to all courts.¹¹⁶ On the other hand, there might be no difference in meaning between the capitalized word “Court” and the lower case word “court,” because both words could refer to only those courts that the Texas constitution authorized and established.¹¹⁷

¹⁰⁶ *Comparison of the Enrolled and Ratified Texts of the Constitution of 1876* (on file with the author).

¹⁰⁷ *Enrolled Constitution*, *supra* note 14, at 1.

¹⁰⁸ *Ratified English Constitution*, *supra* note 16, at 1.

¹⁰⁹ WILSON, *supra* note 24, at 34 (explaining that a comma can create a “commencing” clause).

¹¹⁰ *Compare Enrolled Constitution*, *supra* note 14, at 1, with *Ratified English Constitution*, *supra* note 16, at 1.

¹¹¹ WILSON, *supra* note 24, at 120 (explaining that italicized words demonstrate emphasis or, as is the case with the term “*habeas corpus*,” a foreign origin).

¹¹² *Compare Enrolled Constitution*, *supra* note 14, at 2, with *Ratified English Constitution*, *supra* note 16, at 2.

¹¹³ 4 OXFORD ENGLISH DICTIONARY 375 (1989) (defining “defence” and “defense” interchangeably as those words were used in the late nineteenth century). *See also id.* (noting that “defence” is used primarily in Britain in the twentieth century).

¹¹⁴ *Enrolled Constitution*, *supra* note 13, at 1.

¹¹⁵ *Ratified English Constitution*, *supra* note 16, at 1.

¹¹⁶ *See generally* WILSON, *supra* note 24, at 118 (“Words marking some great event, or remarkable change in religion or government, are commenced with capital letters”).

¹¹⁷ *See* TEX. CONST. art. V, § 1 (requiring that the judicial power of the state reside in certain courts). *See also Collingsworth Cnty. v.*

Some sections that have versions differing in the capitalization of certain words probably have somewhat more important differences in meaning than the versions of article I, section 8 do. For example, the enrolled version of article 1, section 28 provides: “[n]o Power of suspending laws in this State shall be exercised except by the Legislature.”¹¹⁸ However, the ratified version provides, “[n]o power of suspending laws in this State shall be exercised except by the Legislature.”¹¹⁹ The version that contains the capitalized word “Power” is probably referring to particular powers enumerated elsewhere in the constitution or recognized at common law, while the version that contains the lower case word “power” could refer to any power of suspending laws, including those not yet enumerated or recognized. Thus, a difference that might seem to be unimportant, like the capitalization, or lack of capitalization, of a single letter could produce an important difference in meaning.

On the other hand, some sections of the Texas constitution have differences that appear to be important, but that, for various reasons, probably are not. For example, the version of article I, section 3 that was enrolled provides, “All persons, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.”¹²⁰ The version that was submitted to voters for ratification provides, “All free men when they form a social compact have equal rights”¹²¹ No Texas court has quoted the version of article 1, section 3 that contains the phrase “All persons.” Every one of the dozens of Texas courts that have quoted that section has quoted the version that contains the phrase “All free men.”¹²² However, no court has restricted the rights guaranteed in article 1, section 3 only to men. On the contrary, courts routinely apply the section to cases involving women.¹²³ And, of course, article 1, section 3 was ratified after emancipation, so it would apply to all people. Thus, the existence of two different phrases in two different versions of article 1, section 3 does not create a different legal meaning; courts construe the version that contains the phrase “All free men” in the same way they would construe the version that contains the phrase “All persons.”

Other sections, however, have differences that could be very important indeed. The double jeopardy clause of the Texas constitution is one of those sections. It has never been amended. Not only do the original versions of the double jeopardy clause differ from one another, but two commonly used versions of the Texas double jeopardy clause differ from one another today. Here is the text of the clause published on the Texas legislature’s website: “No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction.”¹²⁴

This is the text of the Texas double jeopardy clause published by the West Corporation: “No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.”¹²⁵

Allred, 40 S.W.2d 13, 15 (Tex. 1931) (explaining that two sections of the Texas constitution that related to the same subject must be read in the light of each other).

¹¹⁸ *Enrolled Constitution*, *supra* note 13, at 2.

¹¹⁹ *Ratified English Constitution*, *supra* note 16, at 2.

¹²⁰ *Enrolled Constitution*, *supra* note 13, at 1.

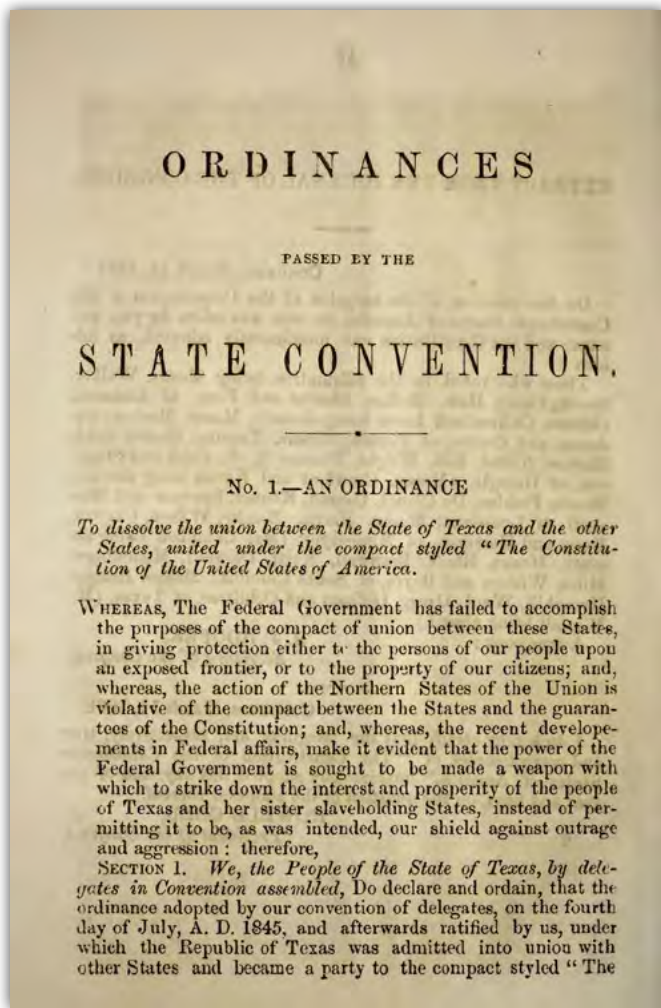
¹²¹ *Ratified English Constitution*, *supra* note 16, at 1.

¹²² *See, e.g., Richards v. League of United Latin Am. Citizens* (LULAC), 868 S.W.2d 306, 310 (Tex. 1993).

¹²³ *See, e.g., Carver v. Wichita Falls*, 427 S.W.2d 636 (Tex. App.—Fort Worth 1968, writ ref’d n.r.e.) (applying article I, section 3 of the Texas Constitution to women and men); *Turner v. Baytown*, 516 S.W.2d 270 (Tex. App.—Hous. [14th Dist.] 1974, no writ) (same).

¹²⁴ *Texas Constitution and Statutes*, TEXAS LEGISLATURE ONLINE, <http://www.statutes.legis.state.tx.us/Docs/CN/pdf/CN.1.pdf> [<http://perma.cc/Q9R7-FPW6>] (last visited Jan. 7, 2014) (forbidding double jeopardy at all times).

¹²⁵ TEX. CONST. art. I, § 14 (West 2007) (forbidding double jeopardy after acquittal).



Ordinances: Photo courtesy of Wikipedia Wikisource at http://en.wikisource.org/wiki/Page:Texas_Constitution_and_Secession.djvu/59

in front of the phrase, “general Welfare.”¹³² The Constitutional Convention realized what Morris had done and removed the semicolons in an attempt to withhold from Congress the independent power to provide for the general welfare.¹³³ Thus, something as simple as the presence or absence of a semicolon could be a powerful feature of constitutional text and would have been understood to be so by the framers of the Texas double jeopardy clause.

The version published online by the Texas legislature contains text from the version in English submitted to voters for ratification.¹²⁶ The version published by West contains text from the enrolled version.¹²⁷ Texas courts have quoted both versions.¹²⁸ No court has explained why it quoted the version it quoted. This is important because one of the versions might produce a result that is profoundly different from that of the other. The version submitted to voters for ratification, i.e., the one published by the Texas legislature, provides that a person cannot be placed in double jeopardy, ever.¹²⁹ The version that the Constitutional Convention enrolled—the one published by the West Corporation—provides that a person cannot be placed in double jeopardy after a not-guilty verdict.¹³⁰

Those differences in meaning depend completely on the presence, or absence, of a single semicolon. That might seem unlikely, but it would probably not be surprising to the kind of people who framed the Texas double jeopardy clause. To understand why, consider a widely-published story about the drafting of the U.S. Constitution. The committee in charge of drafting Article I, Section 8, Clause 1, which is known as the General Welfare Clause, did not separate the terms “to pay the Debts and provide for the common Defence and general Welfare of the United States” with any punctuation.¹³¹ Gouverneur Morris apparently wanted to grant the U.S. Congress an independent power to provide for the general welfare so, as a member of the Committee on Style, he changed the committee’s draft by inserting a semicolon

¹²⁶ Compare *Texas Constitution and Statutes*, *supra* note 124 (using language from the English version of the constitution submitted to voters for ratification), with *Ratified English Constitution*, *supra* note 16, at 2.

¹²⁷ Compare TEX. CONST. art. 1, § 14 (West 2007) (using language from the enrolled version of the constitution), with *Enrolled Constitution*, *supra* note 14, at 1–2.

¹²⁸ See, e.g., *Ex parte Necessary*, 333 S.W.3d 782, 787 n.1 (Tex. App.—Houston [1st Dist.] 2010) (citing the version published online by the Texas legislature); *Ex parte Lewis*, 219 S.W.3d 335, 340 (Tex. Crim. App. 2007) (quoting the version published by West).

¹²⁹ See *WILSON*, *supra* note 24, at 48 (“When several short sentences follow each other, slightly connected in sense or in construction, they may be separated by a semicolon . . .”).

¹³⁰ See *id.* at 40 (“When the concluding part of a sentence refers to two or more preceding expressions, it is separated from the last expression, and the expressions from each other, by means of commas . . .”).

¹³¹ MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 182 (1912).

¹³² *Id.* at 183.

¹³³ *Id.*

Texas courts have held that the double jeopardy clause of the Texas constitution is conceptually identical to the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution¹³⁴ and grants the same, rather than more, rights to defendants as the U.S. Constitution's Double Jeopardy Clause.¹³⁵ The federal Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"¹³⁶ The U.S. Supreme Court has held that this Clause protects criminal defendants against three things: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.¹³⁷ That is similar to the version of the Texas double jeopardy clause that has a semicolon, which prohibits double jeopardy of any defendant, ever, rather than the version that does not have a semicolon and prohibits double jeopardy after a not-guilty verdict.

Since Texas Courts have held that the Texas double jeopardy is conceptually identical to, and offers the same rights as, the federal Double Jeopardy Clause,¹³⁸ a Texas court might decline to construe the Texas double jeopardy clause as prohibiting double jeopardy only after a not-guilty verdict, even if the court were reviewing the version of the clause that has a semicolon. However, if that were so, it would be unclear what purpose, if any, the words, "nor shall a person be again put upon trial for the same offense, after a verdict of not guilty" in the Texas double jeopardy clause would serve. When construing the Texas constitution, Texas courts must avoid constructions that render text superfluous.¹³⁹ Therefore, Texas courts would probably try to construe that part of the Texas double jeopardy clause in a way that would render the "not guilty" language effective as well as consistent with the protections provided by the federal Double Jeopardy Clause—something that the meaning of the text would render very difficult, at best.

That would not be a problem if a court chose to construe the version of the Texas double jeopardy clause that lacks a semicolon; the court could continue to construe the clause as all courts have before it. If, however, a court chose to construe the version that contains a semicolon, the court would face a difficult problem: the court would either modify the meaning of the text, or change long-standing jurisprudence. Perhaps that problem would be reason enough to choose to construe the version of the Texas double jeopardy clause that lacks a semicolon, regardless of whether that version, or the other one, satisfied the requirements for becoming law. However, that would also be a problem because it would involve ignoring, or replacing, the wishes of the people who framed or ratified the Texas constitution.

CONCLUSION

Thus, if a court decided that the version of the Texas constitution that the people ratified is in effect today, the court would be marginalizing the influence of the delegates to the Constitutional Convention— the people legally required to choose which words the voters could ratify or reject. If a court decided that one of the texts that the framers wrote is the law today, the court would be dismissing the will of the voters— the source of all government power and those who were legally required to determine whether the framed text would become law. If a court decided that only the text that the framers and the voters approved could be in effect, there might not be an original text of the current Texas constitution at all. This would be defensible as a matter of law, but

¹³⁴ *Stephens v. State*, 806 S.W.2d 812, 815 (Tex. Crim. App. 1990).

¹³⁵ *Ex Parte Davis*, 893 S.W.2d 252, 256 (Tex. App.—Austin 1995), *aff'd*, 957 S.W.2d 9 (Tex. Crim. App. 1997).

¹³⁶ U.S. CONST. amend. V.

¹³⁷ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

¹³⁸ See cases cited *supra* notes 134–35.

¹³⁹ *Sw. Travis Cnty. Water Dist. v. City of Austin*, 64 S.W.3d 25, 30 (Tex. App.—Austin 2000) (citing *Purcell v. Lindsey*, 314 S.W.2d 283, 284 (Tex. 1958)).

indefensible as a practical matter, and unlikely according to common sense.

A logical solution would be to submit a version of the entire Texas constitution to the legislature, then submit the approved text to voters for ratification.¹⁴⁰ That way, the senators and representatives chosen by the people of Texas, and then the people themselves, could make the practical and political choices that courts have not made, and possibly cannot make, regarding what is and is not the genuine text of the Texas constitution. The people and their delegates could resolve all uncertainty about the content of the Texas constitution. This would help courts construe the constitution more predictably and accurately because the courts would then be construing a single text, rather than several. Re-framing and re-ratifying the Constitution of 1876 would not require a new constitutional convention or the time and other resources that a convention would require.¹⁴¹ The legislature could frame the text like it frames all other joint resolutions. The summary of the proposed amendment on the ratification election ballot could simply and truthfully explain that it is intended to be a non-substantive re-ratification of the existing Texas constitution. Ratification would almost certainly create no debt, require no new spending, benefit no special interest, and harm no one. Therefore, voters might approve the new, old Texas constitution. If they did not, the state would be no worse off than it is today, but if they did, the state would probably be considerably better off.

Until or unless a single version of the Texas constitution is conclusively identified, though, the people who use it should be aware that ostensibly small differences among the original versions of the Constitution of the State of Texas can create large and important differences in meaning. They should know that predicting which criteria a court might use to determine which version is the law would be difficult, perhaps even impossible, because any choice would be fundamentally flawed, and none would be clearly better or worse than the others. Therefore, people who use the Texas constitution should be advised that correctly interpreting the current constitution might be impossible without first determining what the text is. And determining what the text is might be impossible, too.

¹⁴⁰ See TEX. CONST. art. XVII, § 1 (listing the requirements for amending the Texas constitution).

¹⁴¹ See MAY, *supra* note 6, at 2–4 (describing the amount of time and tax money devoted to the 1974 Texas Constitutional Convention).



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Law and Order in Texas

By Rachel Palmer Hooper

Nothing so bespeaks a people as their notions of justice. Their jurisprudence . . . is the supreme expression of their moral convictions. In it their very character is indelibly written, and hence by it they are to be truly judged.

Nelson Phillips
Chief Justice (1915 – 1921)
Supreme Court of Texas

SEVEN WOMEN.¹ TWO HUNDRED AND SIXTY-EIGHT MEN.² All two hundred and seventy-five individuals are currently sentenced to die in Texas.³

In 2013, Texas held the highest rate of exonerations throughout the United States.⁴

For over a century, the Texas Court of Criminal Appeals has served as the court of last resort in Texas criminal cases. As Judge Tom Price declared, “We are the guardians of the process.”⁵ Judge Price served on the Court from 1997 until his retirement in 2014. In one of his last opinions, Judge Price wrote:

I am convinced that, because the criminal justice system is run by humans, it is naturally subject to human error. There is no rational basis to believe that this same type of human error will not infect capital murder trials. This is true now more than ever in light of procedural rules that have hastened the resolution of applications for writs of habeas corpus and limited subsequent applications for habeas relief.⁶

Judge Price’s argument for the abolition of the death penalty caused a stir across Texas. Most major newspapers ran op-ed columns in support of Price’s dissent. The statements arose over a possible stay of execution in a long series of litigation involving Scott Panetti and the issue of the constitutionality of imposing the death penalty on a person with mental illness.⁷

¹ See TEXAS DEPARTMENT OF CRIMINAL JUSTICE, DEATH ROW INFORMATION, http://www.tdcj.state.tx.us/death_row/ (last visited Jan. 20, 2015).

² *Id.*

³ *Id.*

⁴ THE NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf (last visited Jan. 20, 2015).

⁵ *Ex parte Graves*, 70 S.W.3d 103, 119 (Tex. Crim. App. 2002).

⁶ Hon. Tom Price, *Judge Tom Price: Abolish the death penalty*, DALLAS MORNING NEWS, Dec. 2, 2014, available at <http://www.dallasnews.com/opinion/latest-columns/20141202-tom-price-abolish-the-death-penalty.ece> (last visited Jan. 20, 2015).

The Judges on the Texas Court of Criminal Appeals are chosen through partisan judicial elections. At the time of the latest *Panetti* decision, Price was a lame duck, so he was free to make statements without concern for political repercussion. Judge Price’s famous “guardians of the process” statement was made years earlier in a 2002 dissenting opinion.⁸ Anthony Graves, the man seeking relief in that case, is a free man today, wholly exonerated of capital murder.⁹

Public safety and justice are terms commonly used in modern society. But what is the true definition of justice in Texas? And how did Texas judges and legislators arrive at that definition? Are we protecting society from human error or are we merely defining inherent fallibility out of existence?

Both the Supreme Court and the Court of Appeals Hear Criminal Cases

One Texas Supreme Court comprised of three judges held comprehensive appellate jurisdiction over all civil and criminal cases under Texas’s constitutions of 1836, 1845, 1861, and 1869.¹⁰ In 1873, a constitutional amendment enlarged the Supreme Court’s bench from three to five judges, but an ever-increasing workload outweighed any realistic chance that the judges could fulfill their duties.¹¹

A new, judicially-focused Article V in the Texas Constitution of 1876 created a Court of Appeals with civil and criminal appellate jurisdiction to alleviate the demanding workload of the Supreme Court.¹² This move stripped the Supreme Court of criminal jurisdiction, which meant that only one level of appellate review continued in Texas for criminal cases.¹³



Tom C. Clark Building, home of both high courts.
Photo by David C. Kroll

⁷ Jim Malewitz, *Court Declines to Stay Panetti’s Execution*, TEX. TRIB. (Nov. 26, 2014), <http://www.texastribune.org/2014/11/26/court-declines-stay-panettis-execution/>.

⁸ *Id.*

⁹ Pamela Colloff, *Anthony Graves’ Prosecutor Finally Has to Answer For His Actions*, TEX. MONTHLY, Jul. 7, 2014, 9:45 AM, available at <http://www.texasmonthly.com/story/anthony-graves-prosecutor-finally-has-answer-his-actions> (last visited Feb. 9, 2015).

¹⁰ TEXAS STATE LIBRARY AND ARCHIVES COMMISSION, TEXAS COURT OF CRIMINAL APPEALS: AN INVENTORY OF COURT OF CRIMINAL APPEALS RECORDS AT THE TEXAS STATE ARCHIVES, 1892-2010, <http://www.lib.utexas.edu/taro/tslac/50022/tsl-50022.html> (last visited Jan. 20, 2015) [hereinafter RECORDS INVENTORY].

¹¹ 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 235–236 (Austin, Gammel Book Co. 1898).

¹² RECORDS INVENTORY.

¹³ See Paul M. Lucko, *Texas Court of Criminal Appeals*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/jpt01> (last visited Jan. 20, 2015).

A great debate among legislators and jurists seeking prompt appellate review of cases preceded the creation of the Court of Appeals. In a 1966 *Texas Bar Journal* article, Bill Willis, chief administrator of the Texas Supreme Court from 1978–2005, iterated the thoughts of Charles DeMorse, a delegate to the Constitutional Convention of 1875:

He supposed that nearly every member . . . knew that the object to be obtained in the election of a judicial system was to relieve the mass of the people from the burdens they were carrying, which were plunging them into debt and filling their jails and keeping them filled at the expense of the people of the counties. He desired . . . that when appeals in criminal charges come before [the appellate court] from criminal courts there should be a speedy response, so that the party might be either punished or released, and the county relieved of the burden of keeping the prisoner.¹⁴

At the 1875 Constitutional Convention, a majority of delegates reached a consensus in favor of a five-judge Supreme Court with civil and criminal appellate jurisdiction.¹⁵ When even that court could not dispose of its rapidly-expanding docket, the Legislature could craft a supplemental commission capable of hearing those additional cases.¹⁶ The minority reports challenged both the jurisdiction of the existing court and the establishment of a new intermediate court of appeals.¹⁷ The Convention fused the two ideas and created a three-judge Court of Appeals with exclusive criminal appellate jurisdiction and the authority to hear civil appeals from county trial courts in matters under one thousand dollars.¹⁸

Throughout the ensuing years, Texans experienced consternation and controversy as they experimented with alternative ways of organizing the Texas judiciary. In 1886, for example, members of the Texas Bar Association were asked whether they favored two courts of last resort in Texas, one for criminal appeals and another for civil appeals. Some argued that the Supreme Court should divide into two benches—one civil and one criminal—to “give greater dignity to the court of ultimate resort.”¹⁹

Birth and Growth of the Texas Court of Criminal Appeals

Over time, judicial reformers came to favor the idea of a separate criminal court of last resort. Legislators placed that issue on the ballot in 1891. Texas voters approved a constitutional amendment that established a three-judge Court of Criminal Appeals, the Courts of Civil Appeals for intermediate civil matters, and the Supreme Court.²⁰ Beginning in September 1892, the Texas Court of Criminal Appeals held exclusive appellate jurisdiction in criminal cases in Texas. The first presiding judge of the Court of Criminal Appeals was James Mann Hurt, a

¹⁴ William L. Willis, *The Evolution Of the Texas Court of Criminal Appeals*, 29 TEX. B.J. 723, 723, (Sept. 1966) (quoting SETH S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, 422 (Univ. of Tex. 1930)) [hereinafter “*Evolution of the CCA*”].

¹⁵ *Id.* at 724.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Paul M. Lucko, *Texas Court of Criminal Appeals*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/jpt01> (last visited Jan. 20, 2015) [hereinafter *Court of Criminal Appeals*]; see *Evolution of the CCA*, 29 TEX. B.J. at 724; see also Hon. James T. Worthen, *The Organizational and Structural Development of Intermediate Appellate Courts in Texas, 1892–2003*, 46 S. TEX. L. REV. 33, 35 (Fall 2004).

¹⁹ *Evolution of the CCA*, 29 TEX. B.J. at 766.

²⁰ *Court of Criminal Appeals*.



The seal above the entrance to the court.
Photo by David A. Furlow

lawyer, judge, and former Confederate Army officer.²¹ After the 1866 Constitutional Convention, Governor James Throckmorton appointed Hurt as a district attorney, but Hurt refused to take the “ironclad oath” the Reconstruction Republicans required and he resigned his post.²² Later, Governor Edmund Davis reappointed Hurt to serve as a district attorney, but Reconstruction politics interfered.²³ So Hurt practiced law and specialized in criminal cases.²⁴ In 1880, Governor Oran Roberts appointed Hurt to the Court of Appeals and, when the Texas Court of Criminal Appeals was created, Hurt was chosen to preside over the court and did so until he retired in 1898.²⁵

The Court of Criminal Appeals functioned for many years as a three-judge panel. In 1925, to assist with case congestion, the Legislature created a two-person commission in aid of the Court of Criminal Appeals.²⁶ Originally, the commission members were gubernatorial appointments, but the Legislature later granted that appointment power to the Court of Criminal Appeals.²⁷ The commission’s decisions were binding once the court approved them.²⁸ In 1966, another constitutional amendment increased the three-judge panel to five, making the two members of the commission official judges. The amendment extended the court’s session from nine months to twelve.²⁹ This amendment also gave Texas voters the right to select the presiding judge of the court. The first judge selected in that capacity was John F. Onion, Jr., who was elected in 1970 and installed in 1971.³⁰

A 1977 constitutional amendment expanded the court to nine judges.³¹ Beginning in 1978, the nine judges sat in three-judge panels in all noncapital cases.³²

One of the biggest changes occurred with the 1980 constitutional amendment that extended intermediate criminal appellate jurisdiction to Texas courts of appeals.³³ The Court of Criminal Appeals retained its authority to hear capital cases directly from district trial courts. The Court of Criminal Appeals continues to serve as the court of last resort in Texas for most criminal cases. Texas and Oklahoma are the only two states with exclusive high

²¹ Cecil Harper, Jr., *Hurt, James Mann*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fhu44> (last visited Jan. 20, 2015).

²² *Id.*

²³ *Id.*; JAMES MANN HUNT (1830–1903), TARLTON LAW LIBRARY, JAMAIL CENTER FOR LEGAL RESEARCH: JUSTICES OF TEXAS 1836–1986, <http://tarlton.law.utexas.edu/justices/profile/view/140> (last visited Jan. 20, 2015) [hereinafter HUNT].

²⁴ HUNT.

²⁵ *Id.*

²⁶ Acts 1925, 39th Leg., R.S. ch. 53, § 1, 1925 Tex. Gen. Laws 193, 193–94; HUNT.

²⁷ *Court of Criminal Appeals*.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*



Courtroom of the Texas Court of Criminal Appeals. Photo by David A. Furlow

courts for criminal matters.³⁴ The Texas Court's caseload consists of (1) review of applications for post-conviction habeas corpus relief in felony cases; (2) original proceedings; (3) direct appeals; and (4) discretionary petitions.³⁵ Eight of the nine current judges on the Court of Criminal Appeals are former prosecutors.³⁶

Criticism and controversy are not foreign to the Court of Criminal Appeals. In 1975, Texas voters rejected a proposal to abolish the court.³⁷ Legislative bills proposing the merger of the Texas Supreme Court and the Texas Court of Criminal Appeals died in committee in 1993, 1999, 2003, 2011, and 2013.³⁸ In April 1982, *Texas Monthly*

³⁴ *Court of Criminal Appeals*.

³⁵ OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY (Jan. 2014), available at, http://www.txcourts.gov/media/467863/2013-Annual-Report9_26_14.pdf (last visited Jan. 20, 2015) [hereinafter 2013 JUDICIARY REPORT].

³⁶ OFFICE OF COURT ADMINISTRATION, COURT OF CRIMINAL APPEALS: JUDGES, <http://www.txcourts.gov/cca/about-the-court/judges.aspx> (last visited Jan. 20, 2015).

³⁷ *Id.*

³⁸ Maurice Chammah, *Bill Renews Debate on Merging Highest Two Courts*, TEX. TRIB. (Dec. 13, 2012), <http://www.texastribune.org/2012/12/13/bill-merge-highest-courts-brings-back-old-debate/>.

political editor Paul Burka wrote an article titled *Trial by Technicalities*, which highlighted a history of reversals based on “technicalities,” including those in Leon King’s 1978 case.³⁹ The Court of Criminal Appeals reversed King’s conviction for a brutal and vicious capital murder because the rape victim’s name did not appear in the indictment.⁴⁰ Upon retrial, King was sentenced to death and executed.⁴¹

The definition of what constitutes justice has never been a simple one, and it becomes even more complex as our society grows and changes. The Court of Criminal Appeals came into being almost fifty years after the state’s Supreme Court was established. Despite the controversies that arose over the next century, the court managed to grow from three members to its current nine and to avoid the Legislature’s attempts to merge it with the Supreme Court. Whatever its future, the Court of Criminal Appeals has a secure place in Texas’s unique judicial history.

³⁹ Paul Burka, *Trial by Technicality*, TEX. MONTHLY, April 1982, at 129, 131.

⁴⁰ *Id.*

⁴¹ *30th Inmate Is Executed in Texas*, N.Y. TIMES, Mar. 22, 1989, available at <http://www.nytimes.com/1989/03/22/us/30th-inmate-is-executed-in-texas.html> (last visited Feb. 10, 2015)



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Introduction to Researching Texas Constitutional History Online

By Justice Michael Massengale

BASIC RESEARCH ON THE TEXAS CONSTITUTION is easily performed online, and for free, using a few valuable internet resources.

The easiest access point for the current text of the Texas Constitution is the Texas Legislative Council's online home page for the Constitution and state statutes, <http://www.statutes.legis.state.tx.us>. Constitutional provisions are annotated to indicate dates of revision. There is also a link to a valuable document entitled *Amendments to the Texas Constitution Since 1876* (<http://www.tlc.state.tx.us/pubsconamend/constamend1876.pdf>), which summarizes in table form each section of the Texas Constitution, its date of original adoption, the dates of any proposed amendments, and the election result, including the percentage of voters who approved the amendment. Most helpfully, this table also links to an online image of the joint resolution associated with the proposal of each amendment, dating all the way back to a successful [1879 proposal to exempt all farm products from taxation](#).

To delve into the history of constitutional texts predating the 1876 Constitution, the one-stop portal to access texts, journals, and debates is hosted by The University of Texas School of Law's Tarlton Law Library (<http://tarlton.law.utexas.edu/constitutions>). This magnificent website presents the original texts of each of the five different constitutions adopted for the State of Texas ([1845](#), [1861](#), [1866](#), [1869](#), and [1876](#)). A comprehensive [subject index](#) collects links to the various state constitutions for easy comparison. Text-searchable electronic versions of the journals for each of the five conventions producing these constitutions are indexed by topic and linked by date ([1845](#), [1861](#), [1866](#), [1869](#), and [1876](#)). In addition, debates of the [1845](#) and [1876](#) constitutions are also indexed and linked. A note of caution about these journals and debates: the text under discussion is often referenced only by article and section numbers, which may not correspond to the final text of the document. Unless sufficient context is provided between the face of the journal entries or debate summaries and the final adopted text, further research may be required to ascertain precisely what provisions were being discussed by the convention at a given time.

The Tarlton Law Library site also collects pre-annexation Texas constitutions, to include the [1836 Declaration of Independence](#) and the [Constitution of the Republic of Texas](#) (with [journals](#)), as well as English and Spanish versions of the [1824 Federal Constitution of the United Mexican States](#) and the [1827 Constitution of the State of Coahuila and Texas](#).

Another indispensable online resource is the [Annotated and Comparative Analysis](#) of the Texas Constitution, written and edited by a team lead by George D. Braden and published in 1977. The project began as a resource to the 1974 Constitutional Convention. This digitized edition is hosted by the Texas State Law Library, and provides helpful historical summaries for each section of the Constitution, as well as interpretive commentaries and references to comparable provisions in the constitutions of other states. Since this resource is now nearly forty years old, the researcher must take care to check the verify the continuing accuracy of any commentary given the passage of time, amendments to the text, and evolution of legal doctrines.

Finally, a great general reference that often proves useful to understanding the historical context surrounding constitutional conventions is the Texas State Historical Association's *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online>). It includes entries describing each state constitution and its associated convention (to include the convention of 1974). The *Handbook* also provides biographies for many of the key figures at the various constitutional conventions.

While exhaustive research of the history of any particular provision probably cannot be done reliably online, these resources can facilitate tracing the textual evolution of the today's Constitution. In most cases, they also should be more than adequate to help an attorney or researcher to evaluate how, if at all, a provision of the Texas Constitution can be distinguished—textually or historically—from a similar provision in the United States Constitution.



JUSTICE MICHAEL MASSENGALE *serves as Justice on the First District Court of Appeals in Houston. He was appointed to the court in 2009, and has since been re-elected to the court twice in 2010 and 2012. He currently curates the [Texas Constitution History Blog](#) (twitter feed: [@TXConHist](#)), which is devoted to exploring all aspects of the constitutional history of Texas.*

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Interview with First Court of Appeals Justice Michael Massengale about the *Texas Constitution History* Blog

By David A. Furlow

ON JANUARY 1, 2015, FIRST COURT OF APPEALS JUSTICE Michael Massengale founded a new blog, *Texas Constitution History*, which he now curates. It may be found at <http://texconst.wordpress.com/>, and I commend it to all readers of this *Journal*.



Home page of the Texas Constitution History Blog

Upon arriving at the blog, the reader will find the most recent post at the top of the page. The past several entries have been a series OTD (“*On This Date*”) posts outlining major Texas constitutional events that occurred on that date. For example, on February 13, 1866, a “proposal to expand the Texas Supreme Court from 3 to 5 justices.” Hon. Michael Massengale, *OTD 1866: A proposal to expand the Texas Supreme Court from 3 to 5 justices*, TEXAS CONSTITUTION HISTORY (Feb. 13, 2015), <http://texconst.wordpress.com/2015/02/13/otd-1866-a-proposal-to-expand-the-texas-supreme-court-from-3-to-5-justices/>. You’ll also learn that, “Under the 1845 and 1861 constitutions of Texas, the Supreme Court had three justices. On [February 13, 1866](#), a proposal to expand the Court to five justices was introduced by Unionist delegate [Isaiah A. Paschal](#).” *Id.*

Other posts discuss the history of Texas’s Declaration of Rights and Bill of Rights provisions, the Texas Constitution’s definition of marriage, and how Tyler, Texas nearly became the official home of the Texas Supreme Court. See Hon. Michael Massengale, *OTD 1869: Tyler, Texas rejected as alternate site for Supreme Court of Texas*, TEXAS CONSTITUTION HISTORY (Jan. 28, 2015), <http://texconst.wordpress.com/2015/01/28/otd-1869-tyler-texas-rejected-as-alternate-site-for-supreme-court-of-texas/>; Hon. Michael Massengale, *In honor of MLK Day: A Short History of Equal Rights Provisions in the Texas Constitution*, TEXAS CONSTITUTION HISTORY (Jan. 19, 2015), <http://texconst.wordpress.com/2015/01/19/in-honor-of-mlk-day-a-short-history-of-equal-rights-provisions-in-the-texas-constitution/>; Hon. Hon. Michael Massengale, *Historic 5th Circuit argument today on Texas Constitution’s definition of marriage*, TEXAS CONSTITUTION HISTORY (Jan. 9, 2015), <http://texconst.wordpress.com/2015/01/09/historic-5th-circuit-argument-today-on-texas-constitutions-definition-of-marriage/>.

In addition, nearly every blog post contains hyperlinks to primary source material housed at the Jamail Center for Legal Research at UT Law School's Tarlton Law Library, as well as biographical information of relevant historical figures. See TEXAS CONSTITUTIONS 1824–1876, TARLTON LAW LIBRARY JAMAIL CENTER FOR LEGAL RESEARCH, <http://tarlton.law.utexas.edu/constitutions/> (last visited Feb. 4, 2014). For those who love Texas's legal history, Justice Massengale's blog is a well-organized and thoughtfully conceived gold-mine of cogent constitutional historical analysis, as well as biographical and primary source materials.

I was interested in how the blog came about, so I called Justice Massengale to interview him on Friday, February 6, 2015. Here are the results of that interview:

DF: Why did you create the *Texas Constitution History* blog?

MM: Because of my own interest in the Texas Constitution. And, hopefully, to ignite an interest about it among lawyers who might not otherwise have realized the arguments they could make about the Texas Constitution.

DF: When did you put your blog online?

MM: January 1 was a good day to start. But I'd been thinking about implementation of the idea for a while.

DF: What made you decide to put your blog on Wordpress?

MM: A friend who's a law professor, a prolific blogger, used Wordpress.

DF: What's the most important thing you've reported on your blog?

MM: The Texas Bill of Rights.

DF: What got you to think about creating the *Texas Constitution History* blog?

MM: Last election, I carried around a little pocket constitution of Texas because I found myself talking about the Texas Bill of Rights with friends and voters. Many of them knew little about the Texas Constitution. So that was something I could talk about without getting into specific issues or cases that might come before the Court. It was a way to communicate about the job of serving as an appellate court justice without partisanship or politics. And most people had never seen such a thing—a pocket constitution of Texas. Most never knew that Texas had its own, separate Bill of Rights.

DF: So have you talked about the Texas Bill of Rights post-election?

MM: Yes, I've been invited to speak before school groups, and I've been happy to do so. I spoke before a group of home-schoolers in San Antonio, for example.

DF: I've seen that the blog begins with Reconstruction, with "On This Date" entries that begin with the Reconstruction Convention. How did you decide what entries ought to appear first in your blog?

MM: I was interested in Reconstruction but in other constitutional conventions, too, so I mapped out on a calendar all conventions that affected the Texas constitution. When I finished, I realized that I'd covered

a large amount of the year. That exercise gave me a great deal of comfort that I could create a significant number of blog posts inspired by events that had taken place on a particular date. And I could use those days to comment on contemporary events.

DF: Like what?

MM: Recently there was an investiture of three Court of Criminal Appeals Justices. That's important because Texas differs from most states by using a court of criminal appeals separate from the state's supreme court.

DF: How far in advance do you select these blog entries?

MM: Often the night before. That's when I'll last come up with an idea. Something jumps off the page. Sometimes it's based on something I see on Facebook or on Twitter, or what's in the news.

DF: Can you give an example?

MM: Recently, when the Fifth Circuit [Court of Appeals in New Orleans] was hearing oral argument about the constitutionality of Texas's 2005 definition of marriage, I posted that provision of the Texas Constitution. I didn't want to write anything on the substantive issue, but just give people an opportunity to see what the dispute was about. And I saw that a lot of people picked up on that and reposted it on their own blogs. A lot of lawyers from around the country proved to be interested in how Texas voters had defined marriage.

DF: How did you choose to use the Tarlton Law Library as a source for your blog?

MM: The Tarlton Law Library makes available online many useful resources about constitutional conventions; things like journals, the text of debates, constitutional language and amendments — all indexed so they're easy to find, on a wide variety of subject matters.

DF: I've seen that you've posted pictures of state leaders who advanced ideas during the Reconstruction Convention, too.

MM: Yes, I sometimes will use include pictures of people involved in the process of amending the constitution, like Andrew Jackson Hamilton. Sometimes that's based on my research about who did what for whom, and at other times I rely on the Texas State Historical Association's *Handbook of Texas History Online*.

DF: I've known many members of genealogical societies and heritage groups. How about you, Justice Massengale? Does this interest in Texas history reflect an interest in your own family's history in Texas?

MM: I do have a deep interest in Texas history. My family's been here, what, I think has been here in Texas some six generations, back past Reconstruction to statehood, perhaps even back to the Republic But, yes, the family's long history in Texas has contributed to my interest in the way the Texas Constitution has changed.



Justice Massengale's great-great-great grandfather, Alfred Madison Massengale. In 1852, Alfred Massengale brought his family from Coosa County, Alabama by wagon to Milam County, Texas.

DF: Your blog shows that you've learned a lot of things that would be interesting to the [*Texas Supreme Court Historical Society*] *Journal's* readers. Would you be willing to write a feature article to share with our readers the online primary sources you use in running your blog?

MM: Sure, I'd be happy to do so. I'm working on some deadline-sensitive matters, but when I finish with those, I'll send you an article about some of the online sources that will provide a lawyer with valuable primary source materials about the Texas Constitution.

DF: Thank you for your time, Justice Massengale.

MM: Thank you for sharing news about the blog with the *Journal's* readers.

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Supreme Court History Course Expands Subject Matter

• Society-Sponsored Seminar Set for May •

By Lynne Liberato

THE BIGGEST LEGAL NEWS IN THE COUNTRY in 1987 was the *Pennzoil v. Texaco* case. Tried in Harris County, Pennzoil's suit against Texaco for tortious interference resulted in the largest verdict in Texas history (\$7.5 billion in compensatory damages and \$3 billion in punitive damages). It was one of the early dominos that fell on the path to massive tort reform in Texas. It changed the law of supersedeas bonds and recusal standards, as well as public perception of the courts.

Jacks Nickens, Roger Townsend, Marie Yeates, and Paul Yetter were on both sides of this monumental case. Their panel, moderated by Scott Brister, is one of the unique presentations at this year's Texas and Supreme Court Jurisprudence Course, scheduled for Thursday, May 7 at Austin's Radisson Hotel. This presentation represents a refinement to the bi-annual seminar, which now will extend beyond Supreme Court history to include other aspects of Texas legal history.

Jointly sponsored by the Supreme Court Historical Society and the State Bar of Texas, the course will also stay close to its roots with segments on history directly related to the Supreme Court. A fine storyteller, author James Haley, will draw from his book, *The Texas Supreme Court: A Narrative History, 1836-1986*, to spin raucous tales of the early days of the court. His luncheon presentation, "Taming Texas: Stories from Texas Judicial History," also features a free lunch.

The seminar will bring back some of the most popular speakers from the first program: Richard Orsinger on the rise of modern contract law; David Furlow on free speech issues; and Dylan Drummond on the toughest bar in Texas—the lawyers who fought and died at the Alamo.

Kicking off the day will be a panel of chief justices moderated by Warren Harris. Current Chief Nathan Hecht, along with Tom Phillips and Wallace Jefferson, will share their challenges and successes while leading the court. Another panel, moderated by Ben Mesches and including Ken Anderson and Luis Saenz, is a natural companion to the other presentations as panelists discuss the judicial appointment process.

Show and tell will again be an aspect of the program. The best at it—Judge Mark Davidson and Sarah Duckers—will bring actual documents and pleadings to tell the story of important cases, including that of the slave who fought for and won her freedom. Her story would have been lost to time were it not for Judge Davidson and others' valiant efforts to rescue our documentary history.

Drawing on their knowledge from reenacting *Sweatt v. Painter* (the case concerning integration of UT Law School), former Justice Dale Wainwright and David Keltner will provide the backstory of the case.

Justice Paul Green, the Supreme Court liaison to the Society, will moderate the afternoon segments. Lynne Liberato will moderate the morning segments. She, Richard Orsinger, and Warren Harris are course co-directors.

Members of the Society and members of the State Bar Appellate Section are entitled to reduced registration fees and Fellows of the Society are entitled to free admission (but must register). The course is a companion course to the Supreme Court Practice Course, which will be held the next day, May 8, 2015. Participants can sign up for the courses either individually or get a price break for signing up for both. (See next page for program agenda.)

HISTORY OF TEXAS AND SUPREME COURT JURISPRUDENCE

Thursday, May 7, 2015 7 MCLE hours including 1 ethics

View the full course brochure: <http://www.texasbarcle.com/materials/Programs/3083/Brochure.pdf>
or register for the program: <http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&IID=13792>

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|---|--|--|
| <p>8:00 Registration -
Coffee & Pastries Provided</p> <p>8:55 Welcoming Remarks
Course Director
Lynne Liberato, <i>Houston</i>
Haynes and Boone</p> <p>9:00 Challenges & Successes as
Chief Justice 1 hr (.25 ethics)
Moderator
Warren Harris, <i>Houston</i>
Bracewell & Giuliani</p> <p>Hon. Nathan L. Hecht, <i>Austin</i>
Chief Justice, Supreme Court of
Texas</p> <p>Hon. Wallace B. Jefferson, <i>Austin</i>
Chief Justice, Supreme Court of
Texas (ret.)
Alexander Dubose Jefferson &
Townsend</p> <p>Hon. Thomas R. Phillips, <i>Austin</i>
Chief Justice, Supreme Court of
Texas (ret.)
Baker Botts</p> <p>10:00 The Rise of Modern American
Contract Law .67 hr
Richard R. Orsinger, <i>San Antonio</i>
Orsinger, Nelson, Downing &
Anderson</p> <p>10:40 Break</p> <p>10:55 Free Speech and the Supreme
Court .58 hr
David A. Furlow, <i>Houston</i>
The Law Office of David A.
Furlow, P.C.</p> | <p>11:30 The Toughest Bar in Texas:
The Alamo Bar Association
.5 hr
Dylan O. Drummond, <i>Austin</i>
K&L Gates</p> <p>12:00 Break – Lunch Served</p> <p>12:15 Luncheon Presentation:
Taming Texas: Stories from
Texas Judicial History 1 hr
James L. Haley, <i>Austin</i>
Author, <i>The Texas Supreme
Court: A Narrative History,
1836-1986</i></p> <p>1:15 Break
Afternoon Moderator
Hon. Paul W. Green, <i>Austin</i>
Justice, Supreme Court of Texas</p> <p>1:30 30 Years After <i>Pennzoil v.
Texaco: A Retrospective by
Those Who Were There 1 hr</i>
(.25 ethics)
Moderator
Hon. Scott A. Brister, <i>Austin</i>
Justice, Supreme Court of Texas
(ret.)
Andrews Kurth</p> <p>Jacks C. Nickens, Jr., <i>Houston</i>
McGuireWoods</p> <p>Roger D. Townsend, <i>Houston</i>
Alexander Dubose Jefferson &
Townsend</p> <p>Marie Yeates, <i>Houston</i>
Vinson & Elkins</p> <p>R. Paul Yetter, <i>Houston</i>
Yetter Coleman</p> | <p>2:30 The Backstory of <i>Sweatt v.
Painter</i> .5 hr (.25 ethics)
David E. Keltner, Fort Worth
Kelly Hart & Hallman</p> <p>Hon. Dale Wainwright, <i>Austin</i>
Justice, Supreme Court of Texas
(ret.)
Bracewell & Giuliani</p> <p>3:00 Break</p> <p>3:15 Process to Decide Judicial
Appointments 1 hr
Moderator
Benjamin L. Mesches, <i>Dallas</i>
Haynes and Boone</p> <p>Hon. Kenneth W. Anderson, Jr.,
<i>Austin</i>
Public Utility Commission of
Texas</p> <p>Luis V. Saenz, <i>Austin</i>
Office of the Governor</p> <p>Speaker to be Announced</p> <p>4:15 Compelling Stories Told
Through Court Documents .
75 hr (.25 ethics)
Hon. Mark Davidson, <i>Houston</i>
Multi-District Litigation Civil
Court</p> <p>Sarah A. Duckers, <i>Houston</i>
Sechrist Duckers</p> <p>5:00 Adjourn</p> |
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Society's March 6 TSHA Joint Session Will Explore the History of Texas School Prayer Litigation

By David A. Furlow

THE TEXAS SUPREME COURT HISTORICAL SOCIETY and the Texas State Historical Association (TSHA) will host a joint session at the Texas State Historical Association's 119th Annual Meeting on Friday, March 6 in Corpus Christi. The session, titled *The King James Bible, the Courts, and the Preservation of Records: A Historical Tie-in with a Twist*, will explore how historic judicial records preserved in the Lorenzo de Zavala State Library and Archives can shed light on the origin, course, and outcome of cases that profoundly transform Texans' constitutional rights.



President
Marie R. Yeates,
Practice Group Leader
of Vinson & Elkins LLP's
Appellate Practice
Section, TSCHS/TSHA
Joint Session chair and
moderator

Session Chair and Society President Marie R. Yeates, a Vinson & Elkins, LLP partner and the Practice Group Leader of the firm's Appellate Practice Section, will introduce the program and speakers shortly after 10:30 a.m. According to *Chambers USA 2009*, Marie "is noted for her impressive advocacy and rapid grasp of the most complex issues."

The first speaker will be Laura K. Saegert, Assistant Director for Archives at the Texas State Library and Archives Commission. She is a member of the Texas Supreme Court's Texas Court Records Preservation Task Force. Laura and Texas State Archivist Jelain Chubb have jointly coauthored a PowerPoint presentation detailing the physical steps that an archivist undertakes to conserve historic judicial records, including removal of such early fasteners as metal fasteners, ribbons, strings, and other devices employed to hold the pages together; screening of water-soluble inks and other potential problems; humidification of

records to enable preservation; storage in acid-free files; and, in some instances, digitization.

Laura will also describe the State Archives' creation of a database detailing information about Texas case files being created to facilitate access to materials through original dockets (by old cause number), with entries accessible by the style of the case, such as *Lockhart v. Sawyer*. Many of the cases were not reported, making the dockets and the series index (both at the State Archives) the only avenues of access. Fields in the new database include the old cause number, the county the appeal was filed in, lawyers representing the parties, the date the appeal was filed, the presiding judge, the reporting citation, the cause of action or subject, additional parties, and a brief case summary.

David Furlow, the Executive Editor of *The Texas Supreme Court Historical Society Journal* and a member of the Society's Board of Trustees, will focus on the way the appellate briefs and record of the Texas Supreme Court's first school-prayer



Laura K. Saegert,
Assistant Director for
Archives at the Texas
State Library and
Archives Commission,
first speaker



David A. Furlow,
Executive Editor of the
*Texas Supreme Court
Historical Society Journal*,
second speaker

case, *Church v. Bullock*, 104 Tex. 1, 109 S. W. 115 (Tex. 1908), *affirming* 100 S. W. 1025 (Tex. Civ. App.—Dallas 1907) enhance understanding of the issues decided in that case. David has analyzed and litigated First Amendment issues for twenty years.

David will compare and contrast the record and issues raised in *Church* with the record, issues, and opposite result in *Abington School District v. Schempp*, 374 U.S. 203 (1963), a U.S. Supreme Court case. In *Schempp*, the Court decided 8–1 in favor of Respondent, Edward Schempp, where Texas-born U.S. Supreme Court Justice Tom Clark’s Majority declared school-sponsored Bible reading in public schools in the United States to be unconstitutional. David will then discuss the



The *Church v. Bullock* Case File in the Texas State Archives. Photo by David A. Furlow

Bryan Morning Eagle

THURSDAY, APRIL 9, 1908

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Texas Supreme Court Holds It is Permissible in Schools

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Left, the BRYAN MORNING EAGLE’s April 9, 1908 front-page story about the Texas Supreme Court’s *Church v. Bullock* decision (“Bible May Be Read” close-up added) and, right, Pulitzer Prize-winning cartoonist Herb Block’s response to the 1963 *Abington School District v. Schempp* U.S. Supreme Court decision holding that state-sponsored school prayer violated the First Amendment to the U.S. Constitution, courtesy of plaintiff Ellery Schempp.

impact of *Church* and *Schempp* on Texas's schools, students, religious groups, and politics. David recently interviewed Ellery Schempp about his role as a plaintiff.

The session will end when commentator William J. ("Bill") Chriss, J.D., Ph.D., Gravely & Pearson, LLP, summarizes the presentations and places them in context. Bill holds graduate degrees in law, theology, and history and politics. He was one of the youngest members of his graduating class at Harvard Law School where he received a Howe fellowship in Civil Liberties and Anglo-American Legal History and earned his law degree at the age of twenty-three. Bill has recently completed his Ph.D. in Legal History under the tutelage of University of Texas History Department Professor H. W. "Bill" Brands, Ph.D.

The program, Session 27 on the TSHA schedule, will take place in the Nueces A Conference Room at the Omni Corpus Christi Hotel, at 900 North Shoreline Blvd., Corpus Christi, Texas (78401) from 10:30 AM to noon. See <https://tshasecurepay.com/annual-meeting/> at 22.



William J. (Bill) Chriss,
J.D., Ph.D., Gravely &
Pearson, LLP,
commentator

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Members Are Invited to Attend H.W. Brands Talk and Ransom Center Tour on March 27

By David A. Furlow

SOCIETY PRESIDENT MARIE YEATES has made it possible for noted historian H.W. “Bill” Brands to make a special half-hour presentation about American history for Society members beginning at noon on Friday, March 27, followed by a curated tour of the Harry Ransom Center Archive. Brands’s talk will take place at the AT&T Executive Education and Conference Center on the UT campus.



Bill Brands is one of America’s foremost historians. Born in Portland, Oregon, where he lived until he went to college, Brands studied history and mathematics at Stanford University. After graduation, he worked the West from the Pacific to Colorado as a traveling salesman. For nine years he taught mathematics and history in high school and community college. Meanwhile, he resumed his formal education, earning graduate degrees in mathematics and history, including a doctorate in history from the University of Texas at Austin.

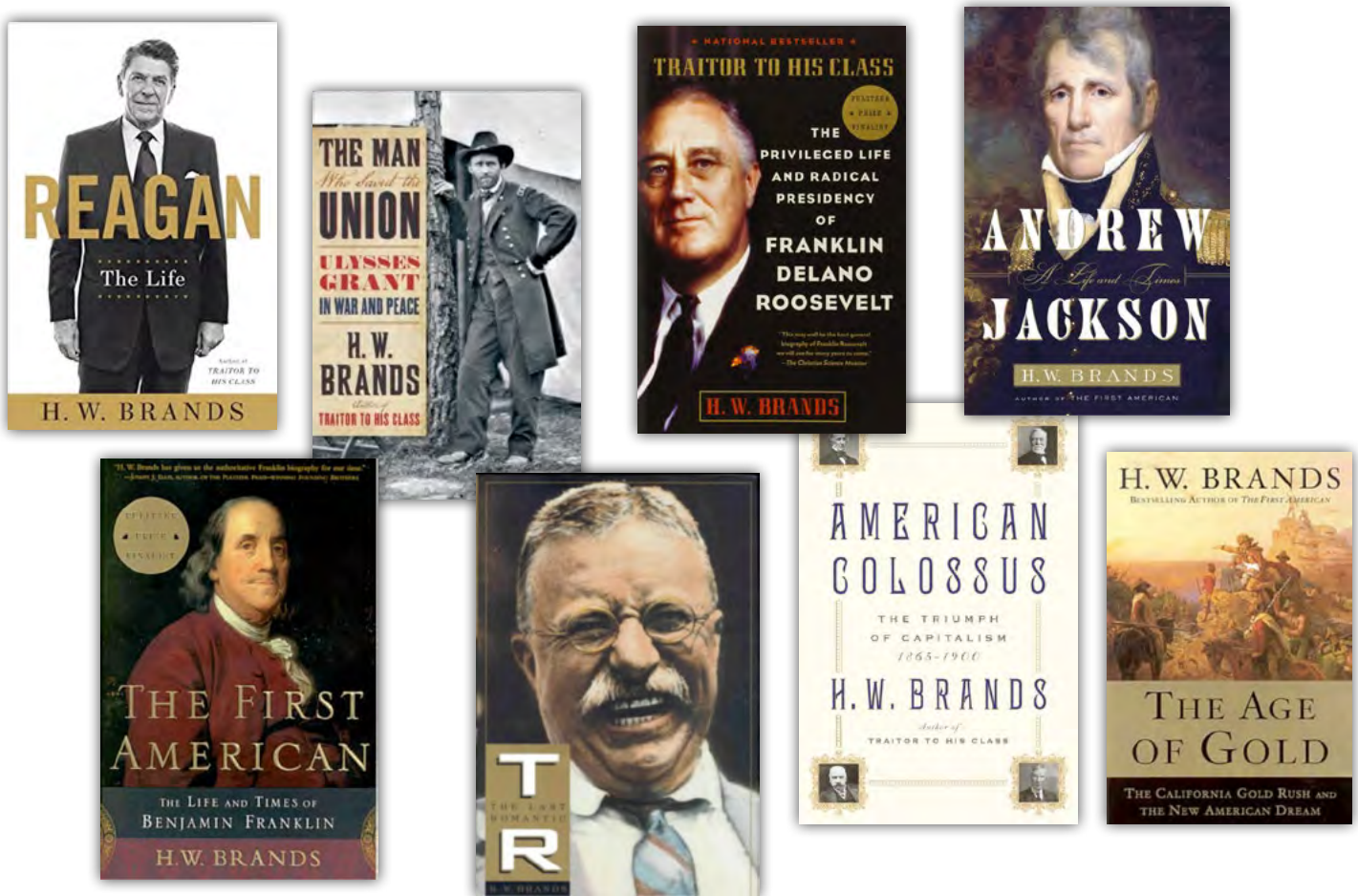
In 1987 Brands joined the faculty of Texas A&M University, where he taught for more than seventeen years. He returned to the University of Texas in 2005, and he now holds the Jack S. Blanton Sr. Chair in History.

Brands has written twenty-five books, coauthored or edited five others, and published dozens of articles and scores of reviews. *The First American* and *Traitor to His Class* were finalists for the Pulitzer Prize and the Los Angeles Times Prize. Several of his books have been bestsellers. His newest book, a biography of Ronald Reagan, will be available in June of this year.

INVITATION TO TSCHS MEMBERS

Join the Society’s
Board of Trustees
for a noontime lunch
and lecture
by award-winning
UT historian
BILL BRANDS,
followed by a tour of the
Harry Ransom Center Archives
on
Friday, March 27, 2015,
at the
AT&T Executive Education
and Conference Center,
1900 University Avenue,
Austin, Texas 78705.

To RSVP,
contact the TSCHS office at
tschs@sbcglobal.net or
512-481-1840,
by Friday, March 6.



A sampling of covers from books by H.W. Brands

Members are invited to attend the lunch and talk beginning at noon at the AT&T Center. Professor Brands will have copies of his books on hand, so attendees are welcome to buy a book or bring one for him to autograph.

A tour of the nearby Harry Ransom Center will begin at 1:00 p.m. and last until approximately 2:30 p.m.. The Harry Ransom Center not only contains a Gutenberg Bible and the world's oldest photograph, but also the Robert DeNiro film archive, a First Folio edition of Shakespeare's *Romeo and Juliet*, a signed first edition copy of T.S. Eliot's *The Wasteland*, and many of President Thomas Jefferson's letters.

Why not make it a weekend in Austin? The Bob Bullock Texas State History Museum offers a chance to explore the wreckage of the seventeenth-century explorer Robert de La Salle's French warship *LaBelle*. The nearby Blanton Museum of Art features American and contemporary art, Latin art, European paintings, prints, and drawings. The UT Tower offers magnificent views across the Hill Country. Sixth Street remains Texas's best music venue, while the Lady Bird Wildflower Center and nearby golf courses and rivers offer ample opportunities for family fun.

For more information and to RSVP for the lunch, contact the Society office at tschs@sbcglobal.net or 512-481-1840 by Friday, March 6.

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Reenactment of *Johnson v. Darr* Marks the Ninetieth Anniversary of the Historic All-Woman Texas Supreme Court

By Elizabeth Furlow

MEMBERS OF THE JUDGE ABNER V. MCCALL AMERICAN INN OF COURT commemorated the ninetieth anniversary of *Johnson v. Darr*,¹ the first case in the United States presided over by an all-woman state supreme court panel, with a reenactment of its oral argument at Baylor Law School on January 12, 2015. *Johnson v. Darr* involved a property dispute, but it is remembered for the women judges who presided over the case: Chief Justice Hortense Sparks Ward, Associate Justice Ruth V. Brazzil, and Associate Justice Hattie L. Henenberg.



(left to right) Justices Hattie Henenberg, Hortense Sparks Ward, and Ruth Brazzil comprised the All-Woman Court of 1925, as photographed in the historic Texas Supreme Court Chamber on the third floor of the State Capitol. Photo from the archives of the Texas Supreme Court Historical Society.

Justice Jan P. Patterson, who formerly presided over the Third Court of Appeals in Austin and now teaches classes at Baylor Law School, organized the Inn of Court presentation and wrote the script for the *Darr* reenactment. “We’re particularly eager to reenact this event—ninety years—and in another ten years it will be

¹ 114 Tex. 516, 272 S.W. 1098 (1925).

a century old, and so we wanted to share it with the law school, with the law students, and with the citizens of McLennan County,” Justice Patterson told a reporter for news station KWTX, which broadcast the event.²

Prominent members of the legal community participated as actors. Texas Supreme Court Justice Eva Guzman presided over the case in her role as Chief Justice Ward. Justice Patterson and Judge Vicki Menard of the 414th District Court represented Associate Justices Brazzil and Henenberg, respectively. Baylor Law School Dean Brad Toben—who dressed in a black hat and western tie for the reenactment—played Pat Neff, the Texas governor who appointed the members of the panel.

Over a hundred people, including lawyers, judges, and Baylor Law School faculty, staff, and students attended the reenactment. Appellate attorney Greg White, who helped prepare young lawyers for their reenactment roles as attorneys for the plaintiffs in error, said, “A main tenet of the Inn at Court movement is to mentor young lawyers. These programs help promote the ideas of civility and professionalism.”

The *Darr* presentation also included an introduction to the case, wherein Baylor Law School Professor Pat Wilson played Professor Margaret Amsler, who became the first female law professor in Texas while at Baylor Law School. The program as a whole emphasized the historic participation of women in the Texas legal system and their contributions to the law.



Baylor Law School Dean Brad Toben portrays Governor Pat Neff, who appointed the *Johnson v. Darr* “Three-Woman Court.”
Photo courtesy of Greg White.



Texas Governor Pat M. Neff.
Photo courtesy of the Library of Congress
George Grantham Bain Collection.

The *Darr* case asked whether trustees of the organization Woodmen of the World were entitled to the ownership of two tracts of land in El Paso. It came before the El Paso Court of Civil Appeals after the Forty-First Judicial District Court of El Paso County granted the trustees clear title to only one of the two tracts.³

The case presented a problem to the three-member, all-male Supreme Court. The insurer, Woodmen of the World, was a fraternal organization and mutual insurance company whose membership included many prominent and politically powerful men of the time, including all three Texas Supreme Court Justices.⁴

² See Laura Partain, *Waco: Baylor Marks 90th Anniversary Of Landmark Case*, OUR TOWN TEXAS (Jan. 12, 2015), <http://www.kwtx.com/ourtown/home/headlines/Waco-Baylor-Marks-Influential-Court-Cases-90th-Anniversary-288355261.html>.

³ See *Darr*, 114 Tex. at 519, 272 S.W. at 1098.

⁴ The pervasive power and extensive membership of Woodmen of the World resulted in similar judicial disqualification proceedings in states other than Texas. See *Woodmen of the World v. Alford*, 206 Ala. 18, 89 So. 528 (1921).



Justice Jan Patterson (left) portrays *Darr v. Johnson* Associate Justice Ruth V. Brazzil, while Texas Supreme Court Justice Eva Guzman (center) portrays Chief Justice Hortense Sparks Ward and Judge Vicki Menard plays Associate Justice Hattie L. Henenberg. Photo courtesy of Greg White.

There were fewer than ten women in 1925 who had the constitutionally-required seven years of experience to serve on the Texas Supreme Court, and Governor Neff appointed three of them to the judicial panel of *Darr* to resolve the judicial recusal problem.⁵ Governor Neff made the appointments at the end of his term, shortly before the inauguration of Miriam “Ma” Ferguson, the first female governor of Texas.

Chief Justice Ward was well qualified to lead the panel. She was the first woman licensed to practice law in Texas. She was also a political and social activist who championed the causes of women’s suffrage and property rights, as well as prohibition and the dissolution of the Ku Klux Klan.⁶ Alongside Associate Justices Henenberg and Brazzil, Chief Justice Ward affirmed the decision of the Texas Court of Appeals to reverse and render the lower court’s decision, thereby granting the full title of the two tracts of land.

Darr has since been cited with approval on all levels of the Texas court system. The Texas Supreme Court has cited *Darr* twice, most recently six years ago in a concurrence by now-Chief Justice Nathan Hecht.⁷ Texas

⁵ See Dylan O. Drummond, *Texas Groundwater Rights and Immunities: From East to Sipriano and Beyond*, in 115th Tex. St. Hist. Ass’n Ann. Meeting (2011) Jeffrey D. Dunn, *Legacy of Johnson v. Darr: The 1925 Decision of the All-Woman Texas Supreme Court*, in 108th Tex. St. Hist. Ass’n Ann. Meeting (2004), at 2 [hereinafter *Legacy of Johnson v. Darr*].

⁶ See Judith Nichols McArthur, *Motherhood and Reform in the Political Culture in the Progressive Era* (1992) (unpublished Ph.D. dissertation, University of Texas at Austin); *Legacy of Johnson v. Darr*, at 6; Barbara Bader Aldave, *Women in the Law in Texas: The Stories of Three Pioneers*, 25 ST. MARY’S L.J. 289, 291–92 (1993) [hereinafter *Women in the Law*].

⁷ See *Entergy Gulf Sts., Inc. v. Summers*, 282 S.W.3d 433, 447 n.11 (Tex. 2009) (Hecht, J., concurring); *Second Injury Fund v. Keaton*, 162 Tex. 250, 254, 345 S.W.2d 711, 714 (1961).

courts of appeal and civil courts of appeal, along with the Texas Commission of Appeals, have cited it twenty-four times.⁸ The Fifth Circuit has relied on it as authority on three occasions,⁹ and district courts within the Fifth Circuit have cited it an additional two times.¹⁰

Darr set a precedent by encouraging women’s participation in the justice system and public office. “[Women] were not able to sit upon juries until 1954 in our state and so this is a glimpse back into the past into a bit of history that was out of time even in its own time,” Baylor Law School Dean Brad Toben told a KTRX reporter on the night of the reenactment.¹¹

The late 1960s and early 1970s witnessed the rise of the feminist movement and a sustained effort to realize *Darr*’s promise of full equality under the law for Texas women. On November 7, 1972, Texas voters amended the Texas Constitution by approving the Equal Rights Amendment, which states that, “Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.” In 1982, Governor William P. Clements appointed Houstonian Ruby Sondock to serve an unexpired term on the Texas Supreme Court.¹² Voters began electing more and more women to serve as judges and justices.

Today, two women serve as Justices of the Texas Supreme Court: Justice Debra Lehrmann in Place 3, and Justice Eva Guzman in Place 9. Justice Guzman (as Chief Justice Ward) closed the ninetieth anniversary celebration with a call for questions from the “distinguished ladies and gentlemen of the assembled observers” in recognition of the progress made since the Three-Woman Court convened.

⁸ See *Legacy of Johnson v. Darr*, at 26.

⁹ *Mueller v. United States*, 119 F.3d 1, 2 n.10 (5th Cir. 1997); *Prewitt v. United States*, 792 F.2d 1353, 1356 (5th Cir. 1986); *Del Rio Bank & Trust Co. v. Cornell*, 57 F.2d 142, 143 (5th Cir. 1932); see *Legacy of Johnson v. Darr*, at 26.

¹⁰ See, e.g., *Citizens Nat’l Bank at Brownwood, Tex., v. Turner*, 14 F. Supp. 495, 496 n.6 (N.D. Tex. 1936); see also *Legacy of Johnson v. Darr*, at 26.

¹¹ See, e.g., JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836-1986*, 167-68 (Univ. of Tex. Press 2013); Debbie Mauldin Cottrell, *The All-Woman Supreme Court*, *THE HANDBOOK OF TEXAS ONLINE*, at <http://www.tshaonline.org/handbook/online/articles/jpa01> (last visited Feb. 4, 2015); Richard Connelly, *Shaking Up Texas’ Male Judiciary*, *TEX. LAW.*, Apr. 25, 1994, at 1, 30.

¹² See *Women in the Law*, 25 *ST. MARY’S L.J.* at 299.

Former Texas Supreme Court Justice Gregg Abbott Sworn-In as 48th Governor of Texas

By Dylan O. Drummond

ON JANUARY 20, 2015, Greg Abbott joined a select group of former Texas Supreme Court Justices who have gone on to serve as Texas Governor.

Governor Abbott served the Court as Justice in Place 5 from 1996 to 2001, when he resigned to make his successful run for Texas Attorney General. With his gubernatorial inauguration, Abbott becomes the *fifth* former Texas Supreme Court Justice to serve as Governor—joining Andrew Jackson Hamilton (Military Governor 1862–65; Provisional Civilian Governor, 1865–67), Richard Coke (1874–76), Oran Milo Roberts (1879–83), and John Ireland (1883–87). However, he is only the *fourth* former Justice to be elected as Governor (Andrew Jackson Hamilton was appointed as Military and Provisional Civilian Governor), and only the *third* former Justice to be elected both to the Court and to the governor’s office (Andrew Jackson Hamilton and John Ireland were appointed to the Court).

The occasion also marked the first time Chief Justice Nathan Hecht has administered the gubernatorial oath, and the first time in sixteen years that a new Governor has taken it. As has been the tradition for over 150 years since at least Sam Houston’s inauguration as Governor in 1859, Governor Abbott took his oath on the “Sam Houston Bible,” which the Court’s Clerk maintains on behalf of the State.



Photo by Bob Daemmrch



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Chief Justice Hecht Delivers His First State of the Judiciary Address

By Dylan O. Drummond

DESPITE HAVING SERVED ON THE TEXAS SUPREME COURT for 26 years and in the Texas judiciary for “over a third of a century,” Chief Justice Nathan Hecht delivered his first State of the Judiciary address on February 18, 2015 to a packed House chamber at the Texas Capitol.



In his address, the Chief called upon the Legislature to help the judicial branch improve how it serves Texans. First, he proposed exploring with the Legislature an interbranch project aimed at improving communication and understanding concerning statutory construction. He also encouraged legislators to decouple truancy violations from the criminal justice system—posing the question, “Playing hooky is bad, but is it criminal?”

He asked that the Legislature continue its support for access-to-justice programs, calling it a “righteous cause.” “Justice for only those who can afford it,” he remarked, “is neither justice *for* all nor justice *at* all.” A Navy JAG veteran himself, Chief Justice Hecht

requested that the Legislative Branch do more to support veteran’s access to basic civil legal services. As part of the effort, he held up the success of the more than 20 veterans courts in operation throughout the state. “The rule of the battlefield is to leave no one behind,” he said, but “our military cannot return from risking their lives in defense of our freedoms and values only to find that the justice system they fought for has left them behind.”



The Chief hailed the increased efficiency of the Texas court system, including the efforts of the Office of Court Administration and its Administrative Director, David Slayton, at implementing the state’s new mandatory e-filing requirements in trial and appellate courts serving Texas’s 39 largest counties.

Chief Justice Hecht concluded his remarks by encouraging legislators to consider the recommendations of the Judicial Compensation Commission and reminding them of the admonition of another Texas Chief Justice—Jack Pope—Texas spends more striping its highways than it does on its judicial system!

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Justice Debra Lehrmann and the Court Host the Uniform Law Commission

By Dylan O. Drummond



THE UNIFORM LAW COMMISSION was established in 1892, and is charged with providing states with non-partisan, well-conceived, and well-drafted legislation that makes uniform and brings clarity and stability to critical areas of state statutory law. The government of each state (as well as the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands) appoints commissioners to serve on the Commission. Texas has appointed eleven commissioners, including Western District Judge Lee Yeakel and Texas Supreme Court Justice Debra Lehrmann.

At the end of January, the Commission held its Midyear Meeting in Austin, Texas, which included several functions hosted by Justice Lehrmann at the Court. The meeting also coincided with the unveiling of the Commission's transfer of its voluminous archives to the University of Texas School of Law's Tarlton Law Library. The archives are rich in content, including the drafts of acts, reports, memos, and other materials that document the development of numerous uniform laws.



Texas Supreme Court Justice
Debra Lehrmann

To commemorate the occasion, the law school hosted a one-day conference on January 26, 2015, which included intriguing presentations by law-school faculty and several commissioners, including Judge Yeakel and Justice Lehrmann. Video of these discussions may be viewed at the Commission's website. See UNIFORM LAW COMMISSION, VIDEOS, <http://uniformlaws.org/videos.aspx> (last visited Feb. 18, 2015).

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Lone Star Legal Aid Establishes Hall of Heroes

By Dylan O. Drummond

LONE STAR LEGAL AID IS THE FOURTH LARGEST FREE LEGAL AID PROVIDER in the U.S., and serves low-income and disabled Texans located in approximately 60,000 square miles of Texas through its twelve branch offices. In 2010, it handled nearly 25,000 legal cases, recovering some \$7.7 million in one-time benefits and annualized monthly payments (including Social Security, food stamps, child support, and consumer-related savings or recoveries) on behalf of roughly 48,000 Texans.

This past December, Lone Star Legal Aid celebrated its sixty-fifth anniversary at its Lex Legacy Luncheon, during which it announced its Hall of Heroes recognizing sixty-five lawyers, judges, and community leaders who have supported legal aid efforts in Texas. Former Texas Supreme Court Chief Justices Wallace B. Jefferson and Thomas R. Phillips served as honorary chairs of the luncheon, and current Court Chief Justice Nathan L. Hecht and Justice Eva Guzman presided over the Hall's unveiling.



From left: Former Texas Supreme Court Chief Justice Thomas R. Phillips, current Chief Justice Nathan B. Hecht, former State Senator Steve Ogden, and former Chief Justice Wallace B. Jefferson.

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Beck Appointed to the UT Board of Regents

By Dylan O. Drummond

AS ONE OF HIS FIRST gubernatorial appointments on January 22, 2015, Governor Greg Abbott appointed the Chair of the Society's Fellows program, David Beck, as a member of the University of Texas System Board of Regents. His appointment was effective February 1, 2015, and is for a term of six years.

David is the founder of and senior partner at Beck Redden, LLP. In addition to his numerous awards throughout his long and distinguished career, David has served as President of the State Bar of Texas and has been recognized by *Super Lawyers®*, *Best Lawyers in America*, *Benchmark Litigation*, *Chambers USA*, and *Lawdragon*. He has been appointed twice to the Judicial Conference Standing Committee on Rules of Practice and Procedure by U.S. Supreme Court Chief Justices William Rehnquist and John Roberts. David graduated from The University of Texas School of Law and received the University's Distinguished Alumnus Award in 2010.



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Calendar of Events

Society-sponsored events and other events of interest

Spring 2015

Friday, March 6

TSCHS Joint Session

Texas State Historical Association Annual Meeting

Nueces A Conference Room

Omni Bayfront Hotel, 900 North Shoreline Blvd.

Corpus Christi, TX 78401

10:30 a.m.–12:00 noon, Session 27

<https://tshasecurepay.com/annual-meeting/>

Session: *The King James Bible, the Courts, and the Preservation of Records: A Historical Tie-in with a Twist*

Session Chair: Marie Yeates, President, TSCHS

Presenter 1: Laura K. Saegert, Assistant Director for Archives,
Texas State Library and Archives Commission

Presenter 2: David A. Furlow, Executive Editor of *The Texas Supreme Court Historical Society Journal*

Commentator: William J. (Bill) Chriss, J.D., Ph.D.,
Gravely & Pearson, LLP

Friday, March 27

Spring Meeting, TSCHS Board of Trustees

AT&T Executive Education and Conference Center

The University of Texas at Austin

1900 University Avenue

Austin, Texas 78705

Phone: 512-404-1900

Luncheon speaker: H.W. Brands, Jack S. Blanton Sr. Chair
in History, University of Texas at Austin; author of thirty books, including
Lone Star Nation, *American Colossus*, *The Age of Gold*,
and the forthcoming *Reagan: The Life*.

12:00-12:30 p.m. [Open to TSCHS members with RSVP (see p. 70)]

Tour of the Harry Ransom Center

Society members are invited to attend a post-luncheon tour (see p. 70).

1:00-3:00 p.m.

Saturday, April 18

**2015 Symposium of the San Jacinto Battleground Conservancy:
A Clash of Cultures—American Indians in Spanish, Mexican,
and Anglo Texas History**

United Way Community Resource Center
50 Waugh Drive, Houston, Texas 77007
9:00 a.m.–5:00 p.m.

<https://www.friendsofsanjacinto.com/San%20Jacinto%20Battleground%20Symposiums>

Thursday, May 7

**The Second Biannual Symposium on the
History of Texas and Supreme Court Jurisprudence**

Cosponsored by TSCHS and TexasBarCLE
8:30 a.m.–4:00 p.m.

Radisson Hotel Austin
111 E. Cesar Chavez St.
Austin, TX 78701

<http://www.texasbarcle.com/materials/Programs/3083/Brochure.pdf>

(See story on program on p. 65.)

Summer 2015

Thursday, June 18

2015 Annual Meeting, State Bar of Texas

Henry B. Gonzalez Convention Center
200 E. Market St.
San Antonio, Texas 78205
10:00–11:00 a.m.

<http://www.texasbar.com/AM/Template.cfm?Section=Registration&Template=/CM/HTMLDisplay.cfm&ContentID=27106>

Session: The 800-Year Legacy of MAGNA CARTA (1 hour C.L.E.)

Session Chair: David A. Furlow, *TSCHS Journal* Executive Editor

Presenter 1: The Hon. Terry Jennings,
MAGNA CARTA's Impact on Legal and Judicial Ethics
Senior Justice, First Court of Appeals

Presenter 2: David A. Furlow
From Medieval to Modern,
MAGNA CARTA's History in England and Early America

Presenter 3: The Hon. Murry Cohen
MAGNA CARTA's Role in Shaping the U.S. and Texas Constitutions
Former Justice, First Court of Appeals (retired)

Presenter 4: The Hon. Charles “Kin” Spain
MAGNA CARTA's Effect on the Administration of Justice
Municipal Judge, City of Houston

Fall 2015

Friday, Sept. 11

Twentieth Annual John Hemphill Dinner

Four Seasons Hotel
Grand Ballroom
98 San Jacinto Boulevard
Austin, Texas 78701
512-478-4500

Program to be announced in the Summer 2015 issue of the *Journal*

Wednesday, Oct. 28

Fall Meeting, TSCHS Board of Trustees

10:00 a.m.–1:00 p.m.
Hatton Sumners Meeting Room
Texas Law Center
1414 Colorado St.
Austin, Texas 78701

Luncheon Speaker: Jesús F. de la Teja, Supple Professor of Southwestern Studies and Regents' Professor of History; and Director, Center for the Study of the Southwest, Texas State University; former State Historian of Texas

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

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2014–2015 Membership Upgrades

The following Society members moved to a higher dues category since June 1, 2014.

GREENHILL FELLOW

Charles R. “Skip” Watson

PATRON

Hon. Jeff Brown

Hon. Grant Dorfman

CONTRIBUTING

Thomas M. Michel

Jason F. Muriby

Justice Greg Perkes

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2014–2015 New Member List

The Society has added 28 new members since June 1, 2014. Among them are nine Law Clerks for the Court (*) who received a complimentary membership.

GREENHILL FELLOW

Marianne Auld
Leslie Robnett

TRUSTEE

Hon. Rick Strange

PATRON

James W. McCartney
Prof. Ernest E. Smith

CONTRIBUTING

E. A. “Trey” Apffel, III
Austin Barsalou
Gilbert J. Bernal, Jr.
Barbara Bintliff
Stephanie Cagniard
John Grace
Mary Jo Graham Holloway
Elizabeth Kozlow Marcum

REGULAR

Whitney Blazek*
Marcella C. Burke*
Andrew Buttaro*
Lee Czocher*
Hon. John Donovan
Kayla J. Frank*
John Gunter*
Nina Hess Hsu
Austin Kinghorn
Ryan Rieger*
Krystal Elaine Garcia Riley
Maitreya Tomlinson
Kendall Valenti*
Ryan Vassar
Amy Wills*
William A. Worthington

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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

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

Contributing Membership - \$100

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

Regular Membership - \$50

- Receive Quarterly *Journal of the 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



Membership Application

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

Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, educational outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

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