



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Spring 2016 Vol. 5, No. 3 General Editor Lynne Liberato Executive Editor David Furlow

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Texas Supreme Court Staff Attorney for Public Information Osler McCarthy distributes a weekly email of the court's orders, along with entertaining and informative historical reflections. [Read more...](#)



Osler McCarthy

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The "All-Woman Court" of 1925

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The Honorable Paul D. Clement, former Solicitor General of the United States, will keynote the Society's 21st Annual John Hemphill Dinner. [Read more...](#)



Hon. Paul D. Clement

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TSHA logo

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By David A. Furlow

Bill Kroger led an exploration of Baker Botts's archives and 175 years of Texas legal history. [Read more...](#)



Bill Kroger

[Harry Reasoner Honored with Anti-Defamation League's Jurisprudence Award](#)

The League named former Society board member Harry Reasoner the recipient of the 2016 Karen H. Susman Jurisprudence Award. [Read more...](#)



Harry Reasoner

[Texas Supreme Court Holds Argument at Baylor Law School](#)

This marked the fourth time the Court has convened at Baylor since the school hosted the Court's first excursion outside of Austin in 1998. [Read more...](#)



Baylor's Kronzer Appellate Courtroom

Membership & More

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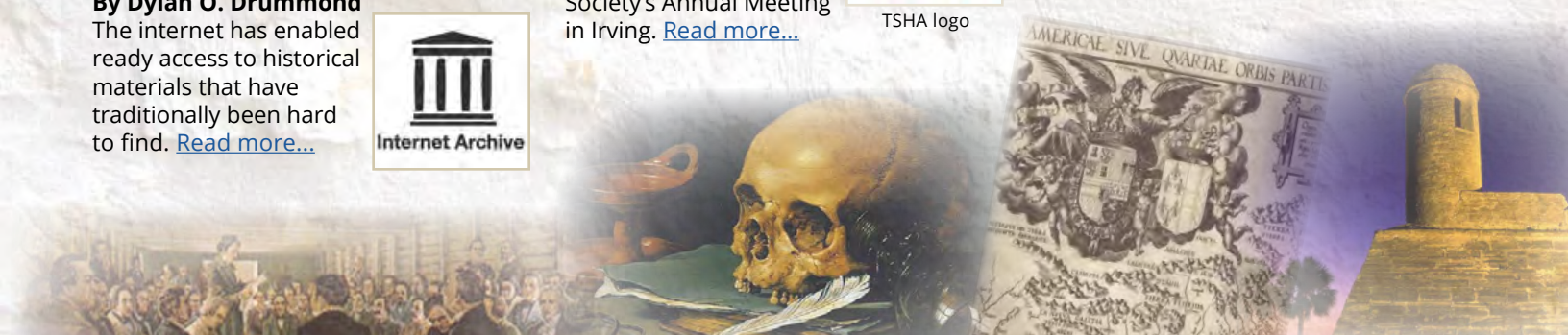


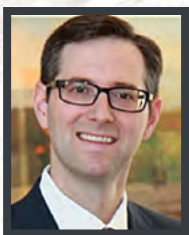
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Ben L. Mesches

Letter from the *President*

Members of the Society—

The Society is focused on strategic initiatives with one fundamental goal in mind: preserving the history of the Supreme Court of Texas. Our board had a productive spring meeting; our committees and members are hard at work on several projects that I would like to share with you; and the planning for the 2016 Hemphill Dinner is well underway.

Spring Board Meeting

Our Board of Trustees met on April 1 in Houston. A special thanks to President-Elect Macey Reasoner Stokes, her partner Bill Kroger, and Baker Botts, LLP for hosting this meeting and making available to our board and members some spectacular historical documents, books, and photos from the firm's library.

Our board meeting was a productive one. We reviewed the Society's strong financial position and approved a conservative budget for the next fiscal year. We reported that the Society's membership is robust and growing. We are now over 460 members strong. We had a thoughtful discussion about publications projects and a strategic vision for future book projects. We learned about the efforts of our website committee in maintaining our recently updated website and promoting the Society's work and events through social-media platforms. And Warren Harris updated the board on the Fellows' project—*Taming Texas*—which you will read more about in this issue.

The Society's Work

One of the most important items on my agenda for this year was establishing a strategic plan for the years to come. To that end, I asked Warren Harris to chair the Society's long-range planning committee. We have already had one meeting, and a second will take place at the end of April. Our committee is already tackling several important projects, including leadership transition, social media, historical records collection and preservation, and an evaluation of the Society's mission statement.

These organizational and management plans are important, but as I mentioned, we are also pursuing projects that provide scholars and the public with the critical historical perspective

only our Society can provide. In March, the Society sponsored a session at the Texas State Historical Association's annual conference. With David Furlow's leadership, the Society put on a program about the influence of the American Law Institute on Texas law, the landmark asbestos-liability case *Borel*, and multi-district litigation that has unfolded since *Borel*.

The Society continues its efforts to educate the public about the role of the courts in Texas history. Warren Harris is leading an aggressive outreach program in our public schools, centered on the Society's new book *Taming Texas: How Law and Order Came to the Lone Star State* by Jim Haley and Marilyn Duncan. With the help of the Houston Bar Association, we have made one-hour presentations about the book to more than 9,000 seventh graders at Houston-area middle schools.

2016 Hemphill Dinner

The 21st Annual Hemphill Dinner will take place on Friday, September 9, 2016 at the Four Seasons in Austin. As many of you already know, former U.S. Solicitor General Paul D. Clement of Bancroft PLLC is our keynote speaker. Justice Dale Wainwright is the chair of this year's dinner. Planning is well under way, and we are pleased to have received a number of table sponsorship commitments from firms across the state. But our work is not done. If you haven't committed to sponsor this year's dinner, please contact Justice Wainwright or me to ensure that you and your firm have a spot at what I am certain will be another memorable evening celebrating the work of the Society. Information about sponsorship opportunities can be found here: <http://texascourthistory.org/hemphill>.

Very truly yours,
Ben L. Mesches

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

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Pat Nester

My Annual “*You Should Go*” Column

The Texas State Historical Association Annual Meeting in Irving March 3-5 was, as usual, replete with fascinating presentations. Our Society's was of course the most fascinating and dealt with subject matter that in terms of Texas history hit with a harder punch than many other sessions. The topic was the influence of the American Law Institute's Restatements of the law, specifically with regard to the large number of recoveries for mesothelioma damages under ALI's Restatement of Torts II. Exposure to asbestos often happened years or decades ago, and the Restatement allows causation to be inferred, and therefore liability attached, if exposure to a substantial dose of asbestos over time was a “substantial factor” in developing disease. This differs from an earlier standard that required proof of a specific incident leading to the disease. Texas courts now follow the Restatement standard, and many horribly injured workers and their families have recovered judgments as a result.

The Hon. Evelyn Keyes of the First Court of Appeals addressed the Restatement process. Professor Robert Robertson of Lamar University discussed the landmark case of *Borel v. Fibreboard Paper Products Corp.*, 493 F. 2d. 1076 (5th Cir. 1973). And the Hon. Mark Davidson of the Multi-District Litigation Panel brought the audience up to date on the long line of litigation since then. Society president Ben Mesches presided, and executive editor of this journal David Furlow provided dynamic PowerPoints and videos. Watch for a recording of these presentations to be posted on the Society website in the near future.

Among other sessions your correspondent attended was an unsettling exploration of Texas Baptists during the Civil War entitled, “Finding Heaven in the Midst of Hell.” According to Michael Williams of Dallas Baptist University, Confederates focused intently on the piety of their soldiers. Partly in the interest of keeping up morale, religious institutions and officials in Texas articulated deeply religious reasons justifying the combat against the North. Rosalie Beck of Baylor University pointed out that Anglo Texan women of the time were even more enthusiastic about the cause than other Southern women and would, according to their writings, rather hear news of the death of their loved ones than news of their cowardice. But according to Estelle Owens of Wayland Baptist University, the most prominent Baptist of all, Sam Houston,

just as secession was announced from the balcony of the Tremont House in Galveston, publicly doubted its success and warned that the North was determined to preserve the Union and “would move like a mighty avalanche” to do so.

Given the politics of our times, I was drawn to a session on “Texans’ Love-Hate Relationship with the Federal Government.” We Texans have long celebrated our individualism. We are skeptical of, if not hostile to, the political elite in Washington, and can name good reasons for this stance. But, as with many other propositions we lawyers encounter, our cherished John Wayne persona can’t stand up to close scrutiny. It turns out, according to annoying historians like Gregg Cantrell of TCU, that what we do, as compared to what we say, is to demand the federal government’s help with all kinds of things.

For instance, just after statehood we wanted and got the feds to bankroll and staff an invasion of Mexico. Before the Civil War, we wanted federal legislation and soldiers to help in returning fugitive slaves to their owners. We wanted constant military protection from the Indians. (After the Civil War, 18 percent of the entire U.S. Army was stationed in Texas.) We wanted federal money to cope with severe droughts and the re-seeding of drought-stricken areas. We wanted forts and other military installations for their economic effects as well as for protection. We wanted dams and highways, rural electrification, regulation to protect the cotton industry. We wanted an Angora Goat Bill passed to reduce the tariff on wool. Since the historians presenting had ferreted out the actual numbers of dollars involved in all this, I asked whether the taxes and tariffs coming from and through Texas (surely a mighty avalanche of its own) ever exceeded the federal resources coming to Texas? Uh, no.

There were dozens of other presentations, many focusing on the delights of our state. Our fine Texas sense of hospitality, for instance, is traceable largely to women on the early frontier who engineered a system for developing close and enduring social relationships. In those early days, they proved necessary for sheer survival, but then they evolved into a complicated system of good manners, general civilization, and barbecue. Also, one of only sixteen states to do so, Texas resisted the eugenics movement and its legislatively approved sterilizations of the “feeble minded,” which swept the nation in the name of “enlightened” science in the early twentieth century—until the Nazis showed the world the movement’s nastiest ramifications. And much, much more.

Anyhow, the TSHA Annual Meeting is a real treasure for anyone with a historical perspective, which should include all of us. Next year’s meeting will be at the Hyatt Regency in Houston March 1–3. The Society has already planned its session. You should go.

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Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

Our judicial civics and history book, *Taming Texas: How Law and Order Came to the Lone Star State*, is now being taught in the classroom. In conjunction with the Houston Bar Association, we have been able to teach the *Taming Texas* program to almost 10,000 seventh-grade students in the Houston area. We would like to thank the HBA and its President, Laura Gibson, for recruiting more than 160 judges and lawyers to serve as volunteers to go into the classroom and teach this important curriculum. Because of the vast resources required to teach this number of students, we would not have been able to implement such

a large-scale program without the HBA partnership. We also thank the HBA chairs of the program, Justice Brett Busby, Judge Erin Lunceford, and David Furlow, for making the classroom part of the program a major success.

We also greatly appreciate Chief Justice Hecht who, among other things, wrote the foreword to the *Taming Texas* book, and Justice Paul Green, the Court's liaison to the Society, for their support of this project. In addition, we would like to thank Justice Jeff Brown for coming to Houston to teach *Taming Texas*.

As part of the *Taming Texas* project, the Society also has created a dedicated website, www.tamingtexas.org. On that website, you can view firsthand all of the project's classroom materials as well find iBook, Kindle, and pdf versions of the *Taming Texas* book. If you have not yet seen it, please download a free copy of the book and review it.

Taming Texas continues to grow. The Houston classroom project is a pilot project, and we will take *Taming Texas* statewide next year. The *Taming Texas* book has been a great success, and there are more books to come in the *Taming Texas* series. Authors Jim Haley and Marilyn Duncan have completed the manuscript for the second book in the series, *Taming Texas: Texas Law and the Frontier*. This book will be published in early 2017. And work is already underway on the third book, *Taming Texas: The Chief Justices of Texas*. No other state has produced a judicial civics book like *Taming Texas*, and soon there will be a series of books to broaden its reach.

This great project would not be possible without the Fellows. The generosity of the Fellows has allowed us to produce the *Taming Texas* book and website, as well as allowing us to begin development of the upcoming books in the series.

The Fellows are also planning their third historical case reenactment. The reenactment will take place at the State Bar annual meeting in Fort Worth on June 16 at 10 a.m. Participants include Chief Justice Hecht, Justice Eva Guzman, and Justice Debra Lehrmann from the Texas Supreme Court and Judge Jennifer Elrod from the United States Court of Appeals for the Fifth Circuit. Arguing the case of *Johnson v. Darr* (the 1925 Woodmen of the World case argued to the All-Woman Texas Supreme Court) will be Fellows Doug Alexander and David Keltner. A special thanks goes to Fellow David Furlow for his work in coordinating this project.

The 2016 Fellows Dinner is in the planning stage. We will let all Fellows know as soon as we set the date for the dinner. Rest assured it will be a special evening.

Finally, I want to express once again our appreciation to the Fellows for their support of programs like our Taming Texas Judicial Civics and History Project. If you are not currently a Fellow, please consider joining the Fellows and helping us support 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.* (Deceased)

Richard Warren Mithoff*

Greenhill Fellows

(\$2,500 or more annually)

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

*Charter Fellow

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David A. Furlow

Procedure, Progress, and *Plurality of Opinion*

The 1986 action-adventure film *Highlander* depicts the end of a centuries-long contest between the forces of civilization and chaos. Sean Connery, portraying Juan Sánchez Villalobos Ramírez, a master swordsman and metallurgist, warns Christopher Lambert, who plays rustic Scottish Highland hero Connor MacLeod, that the Kurgan, a pitiless barbarian from the steppes of Russia, intends to kill the Scotsman in his quest for the power to control the world:

Ramírez: *The Kurgan. He is the strongest of all the immortals... the perfect warrior. If he wins the Prize, mortal man would suffer an eternity of darkness.*

MacLeod: *How do you fight such a savage?*

Ramírez: *With heart, faith and steel. [But in] the end, there can be only one.*



That lesson applies equally well to Texas's centuries-long evolution from frontier chaos to civilized superstate. The simple petition and answer pleadings that began in eighteenth century San Antonio evolved into hybrid unified pleadings that combined the best traditions of Anglo-American jurisprudence and Tejano frontier informality. The process continued, giving us Texas rules of civil, criminal, and appellate procedure "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law... with as great expedition and dispatch and at the least expense both to the litigants and to the state ..."¹ This issue of the *Journal* examines Texas procedural law's promise and achievements.

Our *Journal's* Deputy Executive Editor Dylan Drummond has captained this issue, soliciting authors to write articles that show and tell how procedural law evolved from complexity to

¹ TEX. R. CIV. P. 1.

ever-increasing simplicity over the course of four centuries. Hats off to Dylan. He has done a wonderful job of presenting a two-hundred-year story of procedural progress.

Jason Boatright, whose credentials include service as Director of the Texas Railroad Commission's General Counsel Division and Chairman of Attorney General Greg Abbott's Opinion Committee, takes us back to the 1820s, when Stephen F. Austin promulgated legal codes for the *alcaldes*, or judges, of his Anglo-American colony in Mexican Texas.

Houston Fourteenth Court of Appeals Justice Ken Wise takes us from Mexican Texas to the Republic of Texas. Justice Wise, creator of his own historical podcast, *Wise About Texas*, tells the remarkable story of the Republic's first judge, Benjamin Franklin Cromwell, from his tactical appointment as district judge in the early days of the Republic to his election as state senator in the closing days of Reconstruction.

When is Texas Supreme Court precedent good law—and when is it not so good? That's what Dylan asks in his article enticingly titled "Odious Blots upon the Pure and Exalted Judicial Annals..." It takes readers through the Court's major historical eras and evaluates the precedential impact of cases.

Part III of my four-part article, "Theodora Hemphill's Guide to the Texas Constitution," analyses how changes to the Texas constitution shape and reshape rights, lives, and society. This part analyzes two conflicting interpretations of Article XII, Section 27 of the 1869 Reconstruction Constitution. In *Honey v. Clark*, 37 Tex. 686 (1873), the Semicolon Court construed it favor of the mixed-race children of slaves. But its Redeemer Court successors repudiated *Honey* two years later to rule in favor of white heirs in *Clements v. Crawford*, 42 Tex. 601 (1875). What happened to *stare decisis*? Theodora's story examines how Texas law changes.

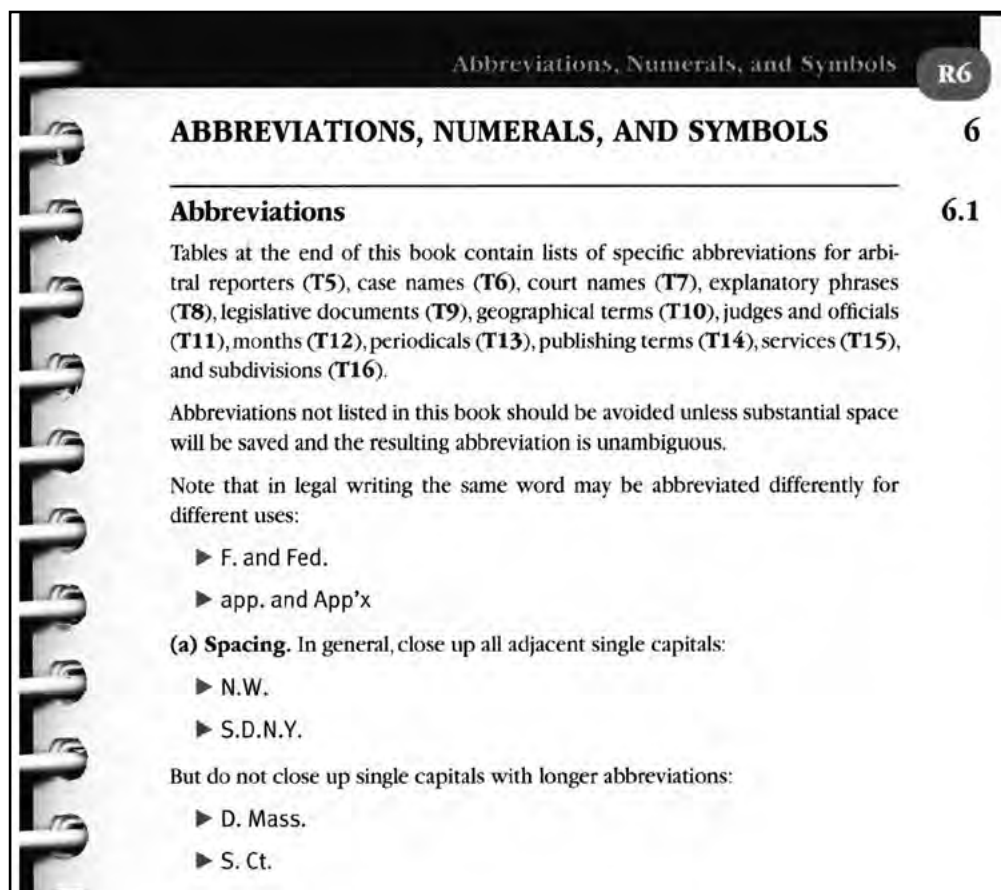
Now back to modern times. No name symbolizes civil procedure as much as William V. Dorsaneo at SMU's Dedman School of Law. Every appellate attorney has turned to the twenty-six turquoise volumes of his *Texas Litigation Guide*. Professor Dorsaneo begins with the 1939 Rules of Practice Act, describes the Texas Supreme Court's first advisory committee's role in creating the 1941 Rules of Civil Procedure, and discusses the origin of the Texas Rules of Appellate Procedure in the 1980s. The Texas Supreme Court's Archivist, Tiffany Shropshire Gilman, provided the *Journal* with photographs of historic orders in the Court's archival collection.

David Slayton, Administrative Director of the Office of Court Administration and Executive Director of the Texas Judicial Council, shares his inside story of how the OCA arose in the 1970s and how the scope of its responsibilities has grown in response to changing technologies.

This issue also includes a special tribute to legal giant Harry Reasoner by his son, Barrett Reasoner. Barrett reveals that Harry's accomplishments in the legal realm are matched by those he has brought to the role of father to him and to the Society's president-elect Macey Stokes Reasoner.

A variety of news items cover the Society's scholarly and educational work: a Texas legal history panel at the Texas State Historical Association's Annual Meeting in March 2016; historic

An excerpt of a
Bluebook page Judge
Richard Posner cites in
Greenbag.
http://www.greenbag.org/v19n2/v19n2_articles_posner.pdf



books, records, and lessons the Society shared with the Houston judiciary at its Spring 2016 meeting; and Warren Harris's pilot-program rollout of the Society's book, Jim Haley's and Marilyn Duncan's *Taming Texas: How Law and Order Came to the Lone Star State*, in Houston area schools. This issue also memorializes the passing of legal scholar Joe McKnight and notes the historical musings of Court Staff Attorney for Public Information Osler McCarthy.

To conclude this column, I'll share some thoughts related to another great feature in this issue—Dylan Drummond's engaging history of two books all Texas law students receive: the *Bluebook* and the *Greenbook*. *Bluebook's* publishers preach the *Highlander* lesson that it is the only one "definitive" guide for judges, lawyers, and law students:

Welcome to *The Bluebook*, the definitive style guide for legal citation in the United States....In a diverse and rapidly changing legal profession, *The Bluebook* continues to provide a systematic method by which members of the profession communicate important information to one another about the sources and legal authorities upon which they rely in their work.²

But Seventh Circuit Judge Richard Posner took another approach: "The first thing to do is burn all copies of the *Bluebook*, in its latest edition 560 pages of rubbish, a terrible time waster for law clerks employed by judges who insist, as many do, that the citations in their opinions conform

² THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) available at <https://www.legalbluebook.com/Public/Introduction.aspx>.

to the *Bluebook*.”³ Instead of using *Bluebook* pages like the one copied above, Judge Posner gives his law clerks two pages of rules intended to simply and clarify citations to legal authority.⁴

Judge Posner criticized the *Bluebook* to spark a lively debate in the age-old battle between creative chaos and unduly authoritarian authority. Texas’s *Greenbook* demonstrates there are more ways than *Bluebook* to cite a Texas source.⁵ The same is true for this *Journal*, which uses a blend of *Bluebook* citation style and *Chicago Manual of Style* conventions to convey information. Dylan Drummond’s article “Ivy-League Edicts and Bovine Mandates—A Quick History of the *Bluebook* and the *Greenbook*” offers readers a disinterested, scholarly history of both guides. Readers interested in joining Judge Posner’s debate should write the *Journal* at my email address: dafurlow@gmail.com.



³ Debra Weiss, “Posner says *Bluebook* is ‘560 pages of rubbish,’ suggests changes to improve jury trials,” *ABA Journal*, March 29, 2016, http://www.abajournal.com/news/article/want_to_even_out_lawyer_quality_and_end_contingent_fees_adapt_a_uniform_pay; Richard A. Posner, “What is Obviously Wrong with the Federal Judiciary, Yet Eminently Correctable, Part I,” 19 *Green Bag2d* (Winter 2016): 187, 193–97, http://www.greenbag.org/v19n2/v19n2_articles_posner.pdf.

⁴ See *Chicago Manual of Style Online*, <http://press-booksweb.uchicago.edu/MOSSSF/FreeTrial.aspx>.

⁵ THE GREENBOOK: TEXAS RULES OF FORM (Texas Law Review Ass’n ed., 13th ed. 2015).

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

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Judge Benjamin Cromwell Franklin, the First Judge in the Republic of Texas

By Justice Ken Wise



Judge Benjamin Cromwell Franklin.
Photo courtesy of State Bar of
Texas Archives.

Judge Benjamin Cromwell Franklin led an interesting life. From lawyer to soldier, judge to legislator, Judge Franklin served Texas at her most critical moments and helped build a better state.

Benjamin Cromwell Franklin was born in Clarke County, Georgia on April 25, 1805. He was the eldest of Abednego and Mary Franklin's seven children. A graduate of Franklin College in Athens, Georgia,¹ he then studied law and was admitted to the Georgia Bar in 1827. He was described as "about six feet high, well proportioned...a good lawyer, affable and courteous in manners."²

Franklin began practicing law with his brother-in-law, Charles McDonald, in Macon, Georgia. McDonald was married to Franklin's sister Anne and had previously served as a solicitor general and later judge of the Clint County Superior Court.³ He would go on to become Governor of

Georgia in 1839. By all accounts, Franklin enjoyed a prosperous law practice in partnership with his well-respected brother-in-law.

In 1835, like many of his fellow Georgians, Franklin's "sympathies were enlisted in behalf of the Texans."⁴ His enthusiasm for Texas independence followed that of fellow Georgians James Fannin and the eventual President of the Republic of Texas, Mirabeau B. Lamar. Later in 1835, many more Georgians would join the fight for Texas independence.

Franklin sailed for Texas and arrived at Velasco on April 16, 1835.⁵ He found a thriving port and population center of Texas. In 1831, Mexican officials established a customs house at

¹ Judge Franklin's father, Abednego, founded Franklin College in 1801. It is now known as the University of Georgia. *U.S. Sons of the American Revolution Membership Applications, 1889-1970* [database on-line] (Provo, Utah: Ancestry.com Operations, Inc., 2011).

² Francis Lubbock, *Six Decades in Texas* (Austin: Ben Jones & Co., 1900), 44. Lubbock is also noted for taking the steamship *Laura* up Buffalo Bayou to Houston in 1837, making her the first boat to land at the new city. Judge Franklin was on that trip. *Ibid.* at 45-46.

³ *Ibid.*

⁴ James D. Lynch, *The Bench and Bar of Texas* (St. Louis: Nixon-Jones Printing Co. for James D. Lynch, 1885), 173.

⁵ *Ibid.* Velasco was the main port of entry into Texas at this time.

the port. Between 1831 and Franklin's arrival, some 25,000 settlers passed through Velasco.⁶

Three years prior, in June 1832, some of the first bloodshed in what would become the Texas revolution occurred in Velasco. Several Texans tried to take a cannon from Brazoria, through Velasco, to Anahuac to support some other Texas settlers against the Mexican authorities. The Mexican garrison at Velasco tried to prevent it and was forced to surrender after an armed engagement.⁷ Into this unsettled political scene stepped the independence-minded Franklin.

After joining an expedition against raiding Indians, Franklin settled in Velasco.⁸ In September 1835 a group of citizens met at Columbia, located on the Brazos River in present-day Brazoria County, to discuss Texas independence.⁹ Franklin attended this meeting and advocated independence from Mexico.¹⁰ He helped raise a company of men for the Texas Army to fight under Captain Robert Calder.¹¹

Around this same time, the Texian army captured the town of Bexar. Unbeknownst to the victorious Texians, Mexican President Antonio López de Santa Anna was planning to enter Texas at the head of a large army to end the Texas rebellion once and for all. The Texians had assembled about 375 men, including Franklin, at Gonzales. Sam Houston arrived from Washington-on-the-Brazos to assume command of the Army on March 11, 1836.¹² Houston then began his now-famous retreat to the east.

Houston took the army across the Colorado River and camped at Beason's Crossing.¹³ While camped, a Mexican force of approximately 600–800 men arrived on the west side of the river. On one occasion, some Texian scouts rode up on some Mexican scouts and gave chase. Overcoming the Mexican troops, the Texians killed one, wounded two and captured several horses. Franklin was on a different scout and encountered this party on his way back to camp.¹⁴

Franklin hoisted the Mexican prisoner behind him on his horse and took him back to the main force.¹⁵ Another Texian soldier recalled that one of the captured Mexican horses carried some clothing from a murdered Alamo defender.¹⁶

⁶ Merle Weir, "Velasco, TX," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/hwv07>.

⁷ *Ibid.*

⁸ Lynch, *Bench and Bar of Texas*, 173.

⁹ Columbia was founded by Josiah Hughes Bell on his land grant on the Brazos River. It was an early center of commerce and activity in Stephen F. Austin's colony.

¹⁰ Benjamin C. Franklin biographical sketch in the Louis Kemp papers, 74 San Jacinto Museum of History (accessed online at <https://www.sanjacinto-museum.org/content/documents/KempSketches/SJV46.pdf>).

¹¹ Lynch, *Bench and Bar of Texas*, 173.

¹² Dr. Stephen L. Hardin, "The Generalship of Sam Houston," accessed online through Alamo de Parras at <http://www.tamu.edu/faculty/ccbn/dewitt/adp/archives/feature/hardin.html>.

¹³ "Beason's Ferry" or "Beason's Crossing" was a ferry and boarding house operated by Benjamin and Elizabeth Beason at the site of present day Columbus. Stephen L. Moore, *Eighteen Minutes: The Battle of San Jacinto and the Texas Independence Campaign* (Lanham, Md.: Republic of Texas Press, 2004).

¹⁴ *Ibid.*, 89.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The Texian army grew significantly during this period. Franklin estimated the number of troops at 1,400 as they resumed their march eastward. The Texans turned toward San Jacinto at a spot near present-day Tomball on April 16. The army arrived at a spot near Lynch's Ferry on April 20 and camped in a grove of oak trees.¹⁷

April 19 found Benjamin Franklin on Galveston Island for an unknown purpose, but likely to deliver communications to Texas President David G. Burnet.¹⁸ A courier arrived on Galveston Island bearing news that Houston was determined to fight the Mexicans "very soon" and that the army was in need of ammunition and any reinforcements available.¹⁹ President Burnet put Franklin in charge of all the men on the island capable of bearing arms, numbering a total of nine, and they boarded a rowboat for San Jacinto. The men rowed all night across Galveston Bay and up the San Jacinto River, reaching the Texian camp at dawn on April 20.²⁰ Franklin delivered dispatches from the President to General Houston and, most importantly, six kegs of gunpowder for the artillery. Franklin surveyed the Texian army and concluded that, "a more savage band could scarcely have been assembled."²¹

Franklin was put right to work. On April 21, he was commanding an observation post on the far right of the Texian lines when he spotted Mexican General Cos arriving with 500 reinforcements.²² A discouraged Franklin immediately reported the news directly to Houston who informed him that he would rather rest his troops than call for immediate action.²³ Later that afternoon, Franklin would get the action he craved.

About 3:30 in the afternoon of April 21, the infantry formed its lines of assault. Franklin had transferred to the Texian cavalry under the command of fellow Georgian Mirabeau B. Lamar.²⁴



Colorado River in today's Beason's Park in Columbus, the site of Beason's Crossing in the 1830s. Photo courtesy of Wikimedia Commons.

¹⁷ In 1822, Nathaniel Lynch began operating a ferry across the San Jacinto River on a main route from Mexico into southeast Texas. The ferry operates to this day in the same spot, although it is now operated by Harris County and crosses the Houston ship channel. Diana J. Kleiner, "Lynch's Ferry," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/rtl01>.

¹⁸ From his arrival in Texas, Franklin's stature and responsibility seemed to grow steadily. He was better educated than most Texian settlers which, coupled with his military training, probably catapulted him quickly to trusted leadership.

¹⁹ Franklin noted that Galveston had no town and only the "sick, infirm, and women and children upon it, in addition to the members of the government..." Benjamin C. Franklin, "The Battle of San Jacinto By One Who Fought In It," *Little's Living Age*, September 7, 1844: 260. This account was originally published in *United Service Magazine* in 1837. See Moore, *Eighteen Minutes*, 495.

²⁰ Franklin, "The Battle of San Jacinto By One Who Fought In It," 260.

²¹ *Ibid.*

²² *Ibid.* at 261.

²³ *Ibid.*

²⁴ *Ibid.* at 262.

Franklin's unit rode to the enemy's left to try and draw them into the open, without success.²⁵ Meanwhile, the infantry charged to within 60 or 70 yards of the enemy before engaging. The artillery kept up a constant barrage from a distance of about 200 yards. The left wing of the Texian army attacked first, to raucous shouts of "Remember the Alamo, Goliad and Tampico!"²⁶ Franklin's cavalry unit pursued the retreating Mexicans to the now-destroyed Vince's Bridge where the "greater part" surrendered and were taken into custody.²⁷ The Mexican president and military commander, Santa Anna, had abandoned his men and fled, only to be captured the following day.

Franklin stood talking to Lamar and famed Texas Ranger Captain Henry Karnes when Santa Anna was brought before Sam Houston, who was lying wounded beneath a tree.²⁸ Franklin was a witness to the negotiations between Houston and Santa Anna that would change world history. Franklin's San Jacinto adventures, however, were not over.

Secretary of War Thomas Rusk needed someone to notify President David Burnet and the rest of the Texas government that the battle was won and Texas was free. He asked Franklin to travel to Galveston and deliver the news. Franklin asked his Captain, R.J. Calder, to accompany him.²⁹ They commandeered the nearest naval vessel, a rowboat, and also commandeered two privates to do the rowing.³⁰ Off they went down the San Jacinto River toward Galveston Bay. After four days of rowing and soaked by the rains of a cold front, they encountered the Texas Navy schooner *Invincible* in Galveston bay. Her captain, Jeremiah Brown, provided a launch and some labor to get them to Galveston Island.³¹

The rest of the Texas navy's ships were anchored in the Galveston harbor awaiting favorable winds and tides to take the government and Texian settlers on to New Orleans.³² Franklin and Calder were taken aboard the flagship of the Texas Navy, the *Independence*, and treated to a feast of food and



Texas Navy schooner *Invincible*.
Image courtesy of Wikipedia Commons.

²⁵ *Ibid.* Franklin was careful to note that these maneuvers were plainly seen by the Mexicans. He alleged that the only people who refer to the Texian attack as surprising the Mexicans are the "paid servants of Mexico." *Ibid.* at 262.

²⁶ In 1835, a group of men attacked Tampico, Mexico in an attempt to create unrest in eastern Mexico against the centralist policies of Santa Anna. Thirty-one men were taken prisoner and were executed shortly thereafter. "Tampico Expedition," *Handbook of Texas Online*, <https://www.tshaonline.org/handbook/online/articles/qyt01>.

²⁷ Franklin, "The Battle of San Jacinto," 263.

²⁸ *Ibid.* at 264.

²⁹ Charles W. Hayes, *History of the Island and City of Galveston* (Cincinnati: Jenkins Garrett Press, 1974), accessed online at www.tamu.edu/faculty/ccbn/dewitt/miscmemoirs6.htm. This request exhibited the wisdom that would mark Franklin's career, because a certain young lady in whom Captain Calder was particularly interested had fled to Galveston Island with her family. Calder readily agreed to the journey.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

drink hosted by Texas Navy Commodore Charles Hawkins. Commodore Hawkins went ashore and delivered the news of victory to President Burnet, returning to urge Franklin and Calder to put down their cups and deliver their dispatches in all haste.³³ Though doubtless glad of victory, all Burnet could muster was an insult for his old enemy Houston for picking two men that would rather eat and drink than come ashore themselves to deliver the news.³⁴ Burnet must have forgiven them because he would soon call on Franklin for a very urgent and special assignment relating to an incident that had occurred earlier in April. That incident threatened delicate international relations for the new republic.

On April 3, 1836, the *Invincible* was patrolling the Gulf of Mexico. She captured an American brig called the *Pocket*, taking her to Galveston.³⁵ The *Pocket's* manifest reflected the usual provisions and cargo that had cleared through customs at New Orleans. Her holds, however, contained powder, ammunition and other military items. Among the ship's papers were dispatches for Santa Anna and a detailed map of the Texas coast and defenses.³⁶ It was likely gunpowder from the *Pocket* that Franklin carried to San Jacinto later that month.

Seizing the *Pocket* caused considerable consternation in the United States. The *New Orleans Bee* wrote, "It is high time that American commerce in the Gulf of Mexico should be protected from both Texas and Mexico...As much as we love Texas, we love America more..."³⁷ The Texas agent in New Orleans, William Bryan, wrote President Burnet that, "[i]t would require but few such instances as that of the *Pocket* to turn the government of the United States against you and stop every expedition in favor of Texas."³⁸

The *Pocket's* cargo was shipped by Lizardi & Co., known as sub-agents of Santa Anna.³⁹ The cargo was insured by Louisiana State Marine and Fire Insurance Company. That company successfully requested that the Texas ship *Invincible* and her crew be seized when the *Invincible* arrived in New Orleans for repairs.⁴⁰ The crew was charged with piracy and jailed.⁴¹ After a two-day examining trial, the crew was released.⁴²

Shortly after the crew's release, the officers and crew of the *Pocket* arrived in New Orleans and passions were again stirred against the Texian sailors. To avoid more unpleasantness, William Bryan and the company of Toby & Brother bought the *Pocket* and paid damages to her officers and crew.⁴³ As Bryan had written to Burnet the month prior, "Our situation with all the

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ C. T. Neu, "The Case of the Brig *Pocket*," *Quarterly of the Texas State Historical Association* 12, no. 4 (April 1909): 276.

³⁶ *Ibid.* at 278.

³⁷ *New Orleans Bee*, May 4, 1836, Jefferson Parish Library, accessed online at <http://nabee.jefferson.lib.la.us/Vol-012/index.html>.

³⁸ William Bryan to David Burnet, Records Department of State, Texas, Book No. 34, p. 251, cited in Neu, "The Case of the Brig *Pocket*," 282.

³⁹ Neu, "The Case of the Brig *Pocket*," 279.

⁴⁰ 3 U.S. Op. Atty. Gen. 120, 121 (U.S.A.G.), 1836 WL 1059.

⁴¹ *Ibid.*

⁴² *New Orleans Bee*, May 9, 1836 accessed online at <http://nabee.jefferson.lib.la.us/Vol-012/index.html>.

⁴³ Neu, "The Case of the Brig *Pocket*," 286.

wealth and power of New Orleans arrayed against us [was] one of peril and danger.”⁴⁴ Texas had to do something to help resolve the situation.

Clearly the right course for the Texas government was to adjudicate the capture of the *Pocket* under admiralty law. While that was an obvious solution, there was one small but important problem—Texas had no courts! On April 12, President Burnet wrote to James Collinsworth (a/k/a Collingsworth), informing him that the Texas government had established a district court and asking Collinsworth to be its judge, which Collinsworth rejected.⁴⁵ On May 8, 1836, Burnet appointed Benjamin C. Franklin the judge for the newly created “District of Brazos.”⁴⁶

After the appointment, there was some delay in holding the trial. Eventually, a trial was held at Velasco and Franklin ruled that the *Pocket* was a lawful prize.⁴⁷ Later there was much litigation over the *Pocket* in New Orleans and a court had requested the original decree from Judge Franklin, which could not be found. The attorney who had prosecuted the case, F.A. Sawyer, scribbled out a duplicate judgment on the back of the original petition in the case and had the current judge sign it.⁴⁸ Apparently, the hasty “retrial” was satisfactory, or at least went unchallenged.

Judge Franklin’s service was also satisfactory because he was elected as one of the first four judges of the Republic.⁴⁹ The Texas Congress divided the settled part of the Republic into four judicial districts. The Congress elected Franklin as judge of the Second Judicial District. As one of the four District Judges, Franklin would also become an Associate Judge of the Supreme Court.⁵⁰ Judge Franklin served until 1839 when he resigned his seat and moved to Galveston to practice law. Continuing his custom of working with family, he joined his sons Robert and Cleveland in a law practice.⁵¹ He could not abandon public service, however, and was elected to the Texas House of Representatives from Galveston in 1848, two years after Texas entered the United States.

In his first term, Franklin served on a special committee examining whether the United States government was violating Texas’s state sovereignty by instituting a military government in portions of the former Republic of Texas.⁵² Those portions included much of what is now New

⁴⁴ Records Department of State, Texas Book No. 34, p. 249, *cited in* Neu, “The Case of the Brig *Pocket*,” 284.

⁴⁵ David Burnet to James Collinsworth, Records Department of State, Texas, Book No. 34, p. 251 *cited in* Neu, “The Case of the Brig *Pocket*,” 282.

⁴⁶ Republic of Texas Claims, Benjamin C. Franklin Claim No. 1, accessed online at <https://tslarc.tsl.texas.gov/repclaims/33/03300103.pdf>.

⁴⁷ One presumes Judge Franklin applied some generally known principles of admiralty law because he presided over a court which, though presumptively legitimate, existed in a country that had yet to create or adopt any laws.

⁴⁸ F. A. Sawyer to Secretary of State of Texas, Domestic Correspondence, Texas, December 21, 1837, *cited in* Neu, “The Case of the Brig *Pocket*,” 291.

⁴⁹ The original judges of the Republic of Texas were elected by a majority vote of both houses of Congress. Repub. Tex. Const. of 1836, art. IV, § 9, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1073 (Austin: Gammel Book Co. 1898). The other three district judges were Shelby Corzine in the First Judicial District; future Texas Supreme Court Associate Judge Robert McAlpin “Three Legged Willie” Williamson in the Third Judicial District; and James W. Robinson in the Fourth Judicial District. James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013), 21–26.

⁵⁰ Gammel, *The Laws of Texas*, at 1069, 1073.

⁵¹ Hon. Thurman Guppton, “Benjamin Cromwell Franklin,” *Texas Bar Journal* (Nov. 1975): 935.

⁵² H.J. of Tex., 3rd Leg., R.S., 665 (1849).

Mexico. That committee reported that the U.S. government was violating Texas state sovereignty and recommended a demand be made to dissolve any military command of an area in west Texas.⁵³ The report began a dispute that finally resolved with the U.S. paying Texas \$10 million in exchange for the land now comprising roughly the eastern half of New Mexico.

Representative Franklin served as Chairman of the Judiciary Committee in the Third Legislature as well as on the Penitentiary Committee and the Select Committee on the Governor's Message.⁵⁴ He also served on a special committee to review Oliver Hartley's creation of a digest of Texas laws.

Franklin again represented Galveston in the House during the 1853 and 1859 sessions.⁵⁵ Notably, Judge Franklin was a member or the chairman of the Judiciary Committee during his entire career in the House. He would have had great influence on shaping the laws of Texas during early statehood. When he left the Legislature in 1859, secession was imminent. A true southerner, Franklin's sympathies certainly were with the Confederate cause but he was too old for military service. He also suffered from rheumatism and possibly a bout with malaria.⁵⁶ He retired to a farm in Livingston, Polk County, for the duration of the war.⁵⁷

In 1870, Judge Franklin returned to Galveston. Reconstruction was in full swing during this time and Texas was readmitted to the union in 1870. Judge Franklin, perhaps seeing an opportunity to help return his state to normalcy, became involved in civic affairs once again.

The Constitution of 1869, adopted during Reconstruction, contained a provision that within five years after adoption, the laws of the state were to be revised, digested, arranged, and published at the direction of the Legislature.⁵⁸ A bill was introduced for that purpose with Franklin being the natural selection for the task.⁵⁹ The bill did not pass and reconstruction Governor Edmund Davis attempted to appoint Franklin to head a commission for the revision of the laws.⁶⁰ Franklin, believing that Davis didn't have the authority to make such an appointment, turned it down. One suspects that his enthusiasm to accept an appointment from Davis might have been tempered by his desire to end Reconstruction.

The election of 1873 was to be a landmark moment in Texas history. The restoration of voting rights to the citizens made it possible for the will of the people, which was most decidedly against the Reconstruction government, to be fully expressed at the ballot box. Throughout Texas, with only a few counties in the exception, a Democrat victory was virtually assured. Galveston had been the site of one of the few battles in Texas during the War Between the

⁵³ *Ibid.*

⁵⁴ During this period, the "Governor's Message" was a list of items the Governor wanted the legislature to address during the session.

⁵⁵ Interestingly, Franklin served on the Federal Relations Committee during the 1859 session, shortly before secession.

⁵⁶ Lynch, *Bench and Bar of Texas*, 175.

⁵⁷ *Ibid.*

⁵⁸ Tex. Const. of 1869, art. XII, § 35.

⁵⁹ *Galveston Daily News*, November 2, 1873, 1.

⁶⁰ *Ibid.*

States so it was certain to be a Democrat stronghold. Against this background, Franklin entered the race for state Senate against radical Republican and former District Judge Chauncy Sabin.

Newspapers around the state encouraged the election of Democrats and the ouster of the radical government. Warmly welcomed back to his old city of residence, the *Galveston Daily News* gave Franklin a ringing endorsement. In its endorsement, the paper made much of the prior Davis appointment, stating that Franklin was certain to “be approved by the enlightened judgment of both parties in the State.”⁶¹ A cloud of bitter division hung over Texas, but Franklin occupied a unique position of respect given his long history of service dating to the 1836 war for independence.⁶² The paper further praised Franklin as the right man to “represent this Senatorial District, including Brazoria ‘the cradle of the liberties of the Republic’” because “[Franklin] stood by that cradle in his young manhood, and it was by the victorious crack of his rifle and that of the few hundred Texans on the field of San Jacinto that Texas liberty was won.”⁶³ That endorsement would be hard to top in any election.

The election results were as expected. Democrat Richard Coke beat radical Republican Davis by a margin of two to one. Franklin beat Sabin by an even greater margin, winning 2,380-1,148.⁶⁴ One author described Franklin as having “lived to see the clouds that lowered in the political heavens of his State pass away behind the horizon, and its people once more on the highway to that prosperity which destiny and nature had shaped for them.”⁶⁵ Unfortunately, Senator-elect Franklin would not live much longer.

On Christmas day, 1873, Judge Franklin passed away suddenly. He had been sick for some weeks before the election but it was not thought to be serious. The *Galveston Daily News* declared that his death “produced a profound and melancholy sensation” in Galveston.⁶⁶ The Galveston Bar Association assembled to pass a resolution honoring Judge Franklin. The lawyers of Galveston described Judge Franklin as “eminent alike on the bench and at the bar” and stated that “[h]e adorned the profession by the free gifts of a mind of immense force and clearness, refined by culture and education.”⁶⁷ The resolution went on to praise his judicial service saying that “[a]s a judge, first chosen to wear the ermine of the young Republic, he was just, exact, able, impartial...”⁶⁸ His passing was clearly a tremendous loss to Galveston and the State of Texas.

Franklin left behind a widow, Estelle (Maxwell), his second wife. They had no children. She returned to her native Illinois shortly after Judge Franklin’s death.⁶⁹ Franklin was first married to Ms. Eliza (Brantley) Franklin, the daughter of a preacher in Georgia.⁷⁰ They had two children,

⁶¹ *Ibid.*

⁶² At least one Galveston citizen wanted Judge Franklin nominated for Governor. *Galveston Daily News*, June 12, 1872, 4.

⁶³ *Ibid.*

⁶⁴ Election results printed in the *Galveston Daily News*, December 2, 1873, 1.

⁶⁵ Lynch, *Bench and Bar of Texas*, 176.

⁶⁶ *Galveston Daily News*, December 27, 1873, 1.

⁶⁷ Resolutions of the Galveston Bar on the Death of Judge Franklin, printed in the *Galveston Daily News*, January 4, 1874.

⁶⁸ *Ibid.*

⁶⁹ Benjamin C. Franklin biographical sketch in the Kemp papers, 75.

⁷⁰ Hunting For Bears, comp. *Georgia Marriages, 1699-1944* [online database] (Provo, Utah: Ancestry.com Operations Inc., 2004).

Robert M. Franklin and C.B. Franklin.⁷¹ Eliza Franklin had died shortly after the birth of C.B. in 1844. Judge Franklin was laid to rest in the New City Cemetery in Galveston.

Judge Benjamin Cromwell Franklin had an exemplary record of service to the state he helped create. The *Galveston Daily News* put it best saying, “[h]e was a most devoted friend to Texas, jealous of her honor, and warmly attached to his old associates in the early struggles of the country.”⁷² Judge Franklin was personally, “[w]arm and unvarying in all his attachments, and respected[ed] true men in all walks of life, the vigor of his character and convictions, and the warmth of his attachments were only more clearly developed by the lapse of time.”⁷³ That is appropriate and high praise for the devoted and interesting life of a great Texan, Judge Benjamin Cromwell Franklin.

⁷¹ *Ibid.*

⁷² *Galveston Daily News*, December 27, 1873, 1.

⁷³ *Ibid.*



JUSTICE KEN WISE was appointed to the 14th Court of Appeals by Governor Rick Perry in October 2013. Prior to his appointment, Justice Wise served as the Judge of the 334th Judicial District Court in Harris County and Judge of the 152nd Judicial District Court in Harris County. In 2011, the 59 District Judges in Harris County elected Justice Wise to lead them as Local Administrative Judge. Justice Wise is an adjunct professor at the University of Houston Law Center, as well as the proprietor and host of the Texas Legal History Podcast, Wise About Texas.

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Answering the Call in the Wilderness: Establishment of the Texas Office of Court Administration

By David Slayton

When most people think of the court system, they consider the judges sitting in black robes on the bench making decisions. Unknown to most, the vast majority of the work of the courts occurs off the bench by judges, court coordinators, clerks, and other court personnel.¹ This work relies heavily upon professional court administration—case management, court policy, records management, technology, budgeting, and other administrative duties. However, most judges were without such court administration assistance through the majority of our history as a state. This lack of support began to change in 1977 with the creation of the Texas Office of Court Administration (OCA). As we near the fortieth anniversary of the creation of this judicial branch agency, a treasure of handwritten notes from the judicial leaders in 1977 reveal the impetus behind OCA's creation. We also explore the role that OCA has played in court administration over the past forty years.

History of Court Administration in Texas

Roscoe Pound, one of America's foremost legal scholars, first drew the nation's attention toward effective administration of the courts with his address to the American Bar Association in 1906.² However, not until the late 1920s did the state courts begin to see structural changes meant to address the need to improve the administration of justice.

The late 1920s saw the nationwide movement in judicial administration of establishing judicial councils or conferences in the states. The judicial councils were included in the Model Judiciary Act of 1920 promoted by the National Municipal League and American Judicature Society.³ Judicial councils were seen as a way to address the fact that there was not a body in the judiciary that was responsible for "seeing that the machinery of the courts [was] working smoothly."⁴ Most of these bodies operated with the dedicated service of judges and others interested in the work of the courts, but without a professional cadre of court administrators to assist the council improving the administration of justice.

¹ In Fiscal Year 2015, less than one-half percent of cases in Texas were disposed by jury trial.

² Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395 (1906), reprinted in 35 F.R.D. 273, 1964.

³ Steven W. Hays and James W. Douglas, "Judicial Administration: Modernizing the Third Branch," in *Handbook of Public Administration*, 3rd ed., Jack Rabin et al., eds. (Boca Raton, Fla.: CRC Press, 2007), 983.

⁴ State of California, *Profile: Judicial Council of California; Administrative Office of the Courts* (4th ed., 2006) available online at <http://www.courts.ca.gov/documents/profilejc.pdf>.

Such was the case with the Texas Judicial Council, which was created by the Forty-First Legislature—albeit under a different name, the Civil Judicial Council.⁵ The Judicial Council was charged with “continuously ... study[ing] the organization, rules, procedures and practice, work accomplished, results, and uniformity of the discretionary powers of the state courts and methods for their improvement.”⁶ The Council operated with no staff until 1960, employed part-time law students from 1960 to 1962, had one employee from 1962 to 1974, and three employees from 1974 to 1977.

Yet despite the creation of the Council and its operation for over a decade, Chief Justice James P. Alexander began the call for the creation of an administrative agency for the Texas courts in his 1943 speech before a joint meeting of the Judicial Section of the State Bar of Texas and the Texas Subcommittee of the American Bar Association Special Committee on Improving the Administration of Justice.⁷ In the speech, Chief Justice Alexander described the judicial system as a “thousand-legged worm without any head, each leg being free to pull its own direction,” and suggested that an administrative office of the courts similar to that created in other states and the federal courts would be helpful. Chief Justice Alexander was not alone in his cry for professional administration of the courts, as others over the proceeding decades would echo his call.⁸

The tide began to change to bring about professional court administration with United States Chief Justice Warren Burger’s first public address in 1969 where he answered that delays in the courts were the result of “a lack of up-to-date procedures and standards for administration, or management, and especially the lack of trained court administrators.” His call to action, along with the dedicated efforts of Texas’s own Associate Justice Tom C. Clark, led to the creation of the Institute for Court Management in 1970 to train a professional cadre of court professionals. At the same time, states were creating administrative offices of their courts at an increasing pace.⁹ A bill establishing an office of court administration for Texas was introduced in 1955 but failed to gain any momentum.¹⁰

Efforts to establish such an office in Texas continued into the Constitutional Convention of 1974, where a new judicial article was proposed. Within that new judicial article was a provision that would have authorized the Legislature to create an office of court administration.¹¹ While the voters of Texas refused to adopt the new constitution, Chief Justice Joe R. Greenhill (supported

⁵ Act of May 23, 1929, 41st Leg., 1st C.S., ch. 19, 1929 Tex. Gen. Laws 51. The original entity was called the advisory Civil Judicial Council and its work focused on the civil judicial system. *Ibid.* The Council’s charge was expanded to include the criminal judicial system in 1969 (Act of May 29, 1969, 61st Leg., R.S., ch. 812, §§ 1–5, 1969 Tex. Gen. Laws 2425), and the Council’s name was changed to the Texas Judicial Council in 1974 (Act of Apr. 10, 1975, 64th Leg., R.S., ch. 64, § 1, 1975 Tex. Gen. Laws 150).

⁶ TEX. GOV’T. CODE § 71.031

⁷ Hon. James P. Alexander. *An Administrative Agency for the Texas Courts*, 27 J. AM. JUD. Soc’y 90–92 (1943).

⁸ *See, e.g., Should Judiciary Article Be Revised?*, 17 TEX. B.J. 686 (1954); Allen E. Smith. *Court Administration in Texas: Business without Management*, 44 TEX. L. REV. 1142 (1966); Thomas M. Reavley, *New Role: The Texas Judicial Council*, 35 TEX. B.J. 433 (1972).

⁹ The first administrative office of court was created in West Virginia in 1947, and between 1947 and 1969, an additional twenty-three offices were created.

¹⁰ Tex. H.B. 195, 54th Leg., R.S. (1955).

¹¹ Tex. S.J. Res. 11, art. V, § 7(d), 64th Leg., R.S. (1975).



Chief Justice Joe R. Greenhill.
Detail from Supreme Court of
Texas Archives photo.

behind the scenes by Texas Supreme Court Justice Tom Reavley¹² and Texas Judicial Council Executive Director C. Raymond Judice) called for the establishment of an office of court administration during the first legislative session (1973) during which he served as Chief Justice.¹³

Even though the bill advocated by Chief Justice Greenhill died in the Texas House of Representatives, he continued his efforts in the 64th Legislative Session, convincing Senator Jack Ogg and Representative Ronald Earle to file bills again in 1975. After an aggressive letter writing campaign by the Chief Justice, the bill made it through the Texas Senate and passed the Texas House on second reading, only to die on the final day of the legislative session when a four-fifths majority could not be garnered to bring the bill to a final vote.¹⁴

Undeterred by the failures of the previous two sessions, Chief Justice Greenhill delivered a lengthy speech in 1977¹⁵ stating that “some of us of the courts and leaders of the State Bar Association feel a little like John the Baptist crying in the wilderness ... trying to bring into being meaningful public administration in the third branch of government, the judiciary.”¹⁶ In the speech, Chief Justice Greenhill noted that forty-six states and the District of Columbia had established offices of court administration and that “only the enlightened states of Mississippi, Montana, and Texas, and the tiny state of New Hampshire, are without a court administrator.”¹⁷ This time, the Chief Justice, along with Justice Reavley, convinced the Legislature of the need to overwhelmingly pass Senate Bill 192, creating the Office of Court Administration of the Texas Judicial System, which was promptly signed into law on April 5, 1977.

OCA Contributes to Improving the Administration of Justice

Since its creation in 1977, the OCA has been the central repository of statistical information for the Texas Judiciary. From information about the salaries and demographics of judges, security incidents, payments made pursuant to court appointments, and case filing and disposition information—just to name a few—OCA has provided this detailed information to the judiciary, Legislature, and public.

The method for collecting the information has migrated from a manual submission and entry process (followed by OCA staff keypunching the data into the only state computer for the Texas judiciary) to an automated upload process from court clerks used today. Interested

¹² Justice Reavley was the president of the Texas Judicial Council at the time.

¹³ Tex. H.B. 1402, 63d Leg., R.S. (1973).

¹⁴ A letter from Chief Justice Greenhill to Representative Earle seems to suggest that Court of Criminal Appeals Judge Truman Roberts “stirred up” issues that there were then “two Supreme Courts in Texas.”

¹⁵ While the text of the speech, obviously written for delivery, is available, it is unclear where the speech was delivered.

¹⁶ Text of Speech by Chief Justice Joe R. Greenhill (unknown date).

¹⁷ Ibid.

stakeholders can now review details online¹⁸ from the almost 130,000 monthly reports submitted annually by all courts in the state. Information from the central repository is used to guide policy decisions, resource allocation,¹⁹ and various research studies²⁰ every year.

In addition to being a repository of information on the workings of the Texas judiciary, OCA regularly serves as a resource to provide technical assistance, consultation, and research for the courts. OCA provides these services in any area requested by the courts, but most often the technical assistance and consultation services involve the areas of caseflow management,²¹ improving compliance with monetary judgments in criminal cases,²² or office organization. In addition to these generalized services, OCA provides a vast amount of training each year to judges, court staff, clerks, and other justice stakeholders. The training might include updates on legislative changes,²³ use of protective orders,²⁴ or some other requested area of interest.²⁵

Another service provided by OCA to the judiciary is Spanish-interpretation and -translation services.²⁶ This free service that utilizes telephonic or video interpreting is provided to ensure that courts are able to provide access for individuals who have limited English proficiency.

OCA may be most known to the bar and court community as the provider of much of the judiciary's technology. After all, this function was one of OCA's first mandates. Soon after the courts of appeals were given criminal appellate jurisdiction in 1981, OCA developed the courts' first case management system, followed shortly thereafter by a case management system for the Supreme Court in 1983 and for the Court of Criminal Appeals in 1985.

Support for the appellate courts' case management systems has continued through the most recent deployment of TAMES (Texas Appeals Management and E-filing System) 2.0 in recent months. At the request of judges and clerks of the trial courts, OCA developed a case-management system for trial courts in 1988, which was used by many courts until the project was terminated in the early 2000s. OCA also established the first statewide judiciary website in the late 1990s and has since assisted the appellate courts in establishing a public access system

¹⁸ A real-time database of information is available for queries at <http://www.txcourts.gov/statistics/trial-court-activity-database.aspx> and annual statistical reports are available at <http://www.txcourts.gov/statistics/annual-statistical-reports.aspx>.

¹⁹ A 2007 study on judicial workload is used to determine the need for additional judges in the district courts and is available at <http://www.txcourts.gov/media/868706/Weighted-Caseload-StudyFinal-Report-July-7-08.pdf>.

²⁰ Several other statistical reports analyzing information are available at <http://www.txcourts.gov/statistics.aspx>. Several recent research reports are available at <http://www.txcourts.gov/publications-training/publications/studies-special-reports.aspx>.

²¹ Examples of such reports include the *Case Management and Space Needs Review: Harris County IV-D Courts*, available at <http://www.txcourts.gov/media/524150/harrisreport.pdf>, and the *Criminal Justice Process Study: Midland County*, available at <http://www.txcourts.gov/media/524148/midland.pdf>.

²² Information on OCA's Collection Improvement Program is available at <http://www.txcourts.gov/cip.aspx>.

²³ OCA publishes legislative updates after each session, available at <http://www.txcourts.gov/publications-training/legislative-information.aspx>.

²⁴ Information on OCA's domestic violence resource attorney program is available at <http://www.txcourts.gov/dvrp.aspx>.

²⁵ A listing of training resources developed by OCA is available at <http://www.txcourts.gov/publications-training/training-materials.aspx>.

²⁶ Information on OCA's Court Remote Interpreter Service is available at <http://www.txcourts.gov/programs-services/interpretation-translation.aspx>.

to the courts' case records.²⁷

In addition to software support, OCA provides and supports the appellate courts, judicial branch agencies, and specialty courts with computer hardware. Perhaps the largest and most complex technology project in OCA's history has been the eFileTexas system that is now operational in all Texas counties.²⁸ The eFileTexas system is the largest eFiling system in the country and is a remarkable feat considering the state's decentralized and fragmented court system. The eFiling system receives over 6 million documents filed annually into courts across the state from anyone with an internet connection.



Since 1989, OCA has assisted the regional presiding judges in administering the specialty courts program, which employs the associate judges and court staff for the IV-D child support courts and child protection courts.²⁹ These specialized courts focus on the needs of families, adjudicate almost half of the family law caseload in the state, and have been recognized nationally as a model for other states.

When the Legislature and Supreme Court needed someone to assist with licensing and regulating the auxiliary judicial professions of court reporting, court interpreting, professional guardians, and private process servers, they looked to OCA to provide this service. Beginning in 2003 with court reporters, 2005 for professional guardians and private process servers, and 2014 for court interpreters, OCA has overseen the process of issuing and renewing licenses/certifications and reviewing complaints filed against these professionals. Today OCA is responsible for regulating over 7,000 of these professionals.

OCA is also a resource for the Legislature and Supreme Court when it comes to providing staffing for various boards, commissions, and task forces.³⁰ After all, this was a primary reason for early calls for the OCA's establishment. OCA played key roles in the staffing of the Citizen's Commission on the Texas Judicial System (1992) and the Commission on Judicial Efficiency (1996–1997). OCA continues to staff the following boards, commissions, and task forces:

- Texas Judicial Council;³¹
- Judicial Districts Board;³²
- Council of Chief Justices;
- Board of Regional Presiding Judges;³³

²⁷ Texas Judicial Branch, www.txcourts.gov. OCA has recently announced that it will soon establish a registered user access system to all electronically filed documents in the state (the Registered Access to Court Electronic Documents system—"RACER"), marking the first time Texas will have a method to review court documents filed statewide.

²⁸ EFILETEXAS.GOV, <http://www.efiletexas.gov/>.

²⁹ Information on the specialty courts is available at <http://www.txcourts.gov/about-texas-courts/specialty-courts.aspx>.

³⁰ OCA publishes an annual report of the judicial support agencies, boards, and commissions that is available at <http://www.txcourts.gov/publications-training/publications/annual-reports.aspx>.

³¹ TEX. GOV'T CODE § 72.022; TEX. JUD. COUNCIL, <http://www.txcourts.gov/tjc.aspx>.

³² TEX. CONST. art. 5, § 7(a); TEX. GOV'T CODE § 24.942 Judicial Branch Certification Commission, <http://www.txcourts.gov/jbcc.aspx>

³³ Texas Judicial Branch, Administrative Judicial Regions, <http://www.txcourts.gov/organizations/policy-funding/administrative-judicial-regions.aspx>.

- Texas Indigent Defense Commission;³⁴
- Judicial Committee on Information Technology;³⁵
- Judicial Compensation Commission;³⁶
- Judicial Branch Certification Commission;³⁷
- Timothy Cole Exoneration Review Commission;³⁸ and
- Task Force on Judicial Emergency Preparedness.³⁹

The Future in Court Administration

As the users of the Texas judiciary continue to demand more from the court system and resource constraints continue to place pressure upon the courts to do more with less, OCA will continue to play a key role in providing resources and information to aid the Texas judiciary in administering justice efficiently and effectively. With OCA's help, perhaps the thousand-legged worm described by Chief Justice Alexander over 70 years ago and still in existence today can instead pull in a uniform direction to best serve those seeking access to justice and produce a judiciary that is "the first object of every people."⁴⁰

³⁴ TEX. GOV'T CODE § 79.033; Texas Indigent Defense Commission, <http://www.tidc.texas.gov/>.

³⁵ TEX. GOV'T CODE § 77.014; Judicial Committee on Information Technology, <http://www.txcourts.gov/jcit.aspx>.

³⁶ TEX. GOV'T CODE § 35.007; Judicial Compensation Commission, <http://www.txcourts.gov/jcc.aspx>.

³⁷ TEX. GOV'T CODE § 152.103; Judicial Branch Certification Commission, <http://www.txcourts.gov/jrcc.aspx>.

³⁸ TEX. CRIM. PROC. art. 43.27, § 4; Timothy Cole Exoneration Review Commission, <http://www.txcourts.gov/organizations/policy-funding/timothy-cole-exoneration-review-commission.aspx>.

³⁹ Order of Mar. 22, 2016, Misc. Docket No. 16-9038, available at <http://www.txcourts.gov/media/1332592/169038.pdf>.

⁴⁰ Sam Houston, Address to the Sixth Congress of the Republic of Texas (1841).



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Stephen F. Austin's Alcalde Codes: The Surprising Origin of Texas Law

By Jason Boatright

When did Texas begin? Not in 1845, when Texas joined the United States, or even in 1836, when it became an independent republic. By then, the law and culture that would make Texas profoundly different from places like Oklahoma and New Mexico were already in place. Nor did it begin in 1691 when the first governor was appointed for Texas by the Viceroyalty of New Spain, or in 1821 when it became a part of the Republic of Mexico. At that time, the legal culture that would one day distinguish Texas from places like Nuevo Leon and Tamaulipas were not yet established in Texas.¹ So, Texas became *Texas* sometime between joining and leaving Mexico.

The earliest characteristically Texan legal and cultural event—the moment the family tree of Hispanic legal culture grew its Texas branch—was probably on January 22, 1824, when Stephen F. Austin promulgated legal codes for the *alcaldes* in his colony. In many ways, the codes that Austin wrote, and the *alcaldes* he wrote them for, combined Anglo-American and Spanish-Mexican legal traditions to create a new and distinctive legal culture.² Austin's codes were a mix of common and civil law.³ The *alcaldes* who administered them held an ancient Spanish municipal office combining the duties of judge, legislator, and mayor.⁴ The first *alcalde* of San Felipe de Austin, which was the capital of Austin's colony and the place where Austin enacted his legal codes, was elected on December 13, 1823, by a procedure that was very different from the one that was used in the first Spanish settlements in Texas.⁵ The San Felipe de Austin *alcalde* served an Anglo-American population in a Mexican jurisdiction far away from the nearest Mexican or American government office.⁶ The Mexican government had encouraged Austin to enact his

¹ *But see* Andres Tijerina, *Tejanos and Texas under the Mexican Flag, 1821–1836* (College Station: Texas A&M University Press, 1994) at 46 (noting that the rugged environment of the frontier made Tejanos unique in Mexico before Anglo settlement).

² Austin's *alcalde* regulations contained two codes, one for civil matters, the other for criminal matters. "Civil Regulations," in *Establishing Austin's Colony*, by Stephen F. Austin (1832) (Austin: Pemberton Press, 1970), at 82, 85.

³ Clarence Wharton, *Early Judicial History of Texas*, 12 TEX. L. REV. 311, 315 (1934).

⁴ J. H. Elliot, *Imperial Spain, 1469–1716* (New York: Penguin, 2002) at 93. However, the *alcalde* was originally a judge of Islamic law called the *al-qadi*. Karen B. Graubart, "Learning from the Qadi: The Jurisdiction of Local Rule in Early Colonial Andes," *Hispanic American History Review* 95, no. 2 (2015): 204.

⁵ Eugene Barker Papers, Briscoe Center for American History, "Election Returns." The first *alcalde* of Villa San Fernando—present-day San Antonio—was selected by the appointed members of the town's *cabildo*, which was like a city council. Gilbert R. Cruz, *Let There Be Towns, Spanish Municipal Origins in the American Southwest, 1610–1810* (College Station: Texas A&M Press, 1988) at 75–76. San Felipe de Austin did not have a *cabildo*, or any formal municipal government until an *ayuntamiento*—which is very similar to a *cabildo*—was established in 1828. Tijerina, *Tejanos and Texas under the Mexican Flag*, at 32–33.

⁶ Samuel H. Lowrie, *Culture Conflict in Texas 1821–1835* (New York: Columbia University Press, 1967) at 35, 37 (describing the composition of Austin colony's population in 1825).

own laws to govern his Anglo-American colonists,⁷ and approved the codes a few months later, as soon as they were reviewed by a Mexican official.⁸

That Austin's *alcalde* codes resulted from a mix of Anglo and Hispanic legal traditions, rather than a confrontation between them, was a logical consequence of the fact that neither the Anglos nor the Hispanics brought a singular, purely Mexican or American, legal culture to the interior of Texas. At the time Austin founded his settlement, Mexico had been rocked for over a decade by revolutions, coups, and civil wars that reinvented the country's law and government over and over again, while the Anglo settlers in Austin's colony had been profoundly influenced by the civil law culture of the old Louisiana Territory, where many of them had lived and worked before they came to Texas. Both the Hispanic and the Anglo groups, then, were themselves mixes of cultural and legal influences.

Austin's legal codes, and the first *alcaldes* elected to administer them, show how the mixing of those two cultures—Mexico's rapidly-changing political and legal environment, and the Anglo settlers' Spanish and French legal heritage from Louisiana—created Texas.

Austin's Alcalde Codes in a Cultural Context

Most of the early Anglo settlers in Austin's colony emigrated from areas that were part of the old Louisiana Territory, which included the present states of Louisiana, Arkansas, and Missouri.⁹ The families of some of the most important Anglo settlers—like Stephen F. Austin—had been in those areas when they were territories of France, then Spain, then France again.¹⁰ Naturally, those families brought a version of Anglo-American legal culture that had been influenced by their experiences in places that had been a part of French and Spanish Louisiana and, because they were early and influential settlers in Texas, they helped create an Anglo-Texas legal culture that was partly a Spanish legal culture, even before Mexican authorities had extended Spanish-Mexican law to Austin's colony.¹¹

The Mexican influence on Texas legal culture was muddled, too. Although Spanish exploration of Texas began in 1519, there were very few permanent Spanish settlers living beyond the immediate vicinity of the Rio Grande until 1731,¹² when San Antonio was established.¹³ San

⁷ Eugene Barker, "The Government of Austin's Colony, 1821–1831," *Southwestern Historical Quarterly* 21 (January 1918): at 223, 225.

⁸ *Ibid.* at 229. The official, who was the Political Chief of the Province of Texas, added two articles to the civil regulations. Stephen F. Austin, *Civil Regulations*, 82.

⁹ Barker Papers (showing that Louisiana provided over 5% more immigrant families to Austin's colony than any other state). See also Eugene Barker, *The Life of Stephen F. Austin, Founder of Texas, 1793–1836* (Nashville: Cokesbury Press, 1926) at 149 (explaining that immigrants from Missouri comprised a larger proportion of the earliest colonists than later ones).

¹⁰ When Moses Austin moved to Missouri in 1798, most of the residents spoke French; there were some Spaniards, but very few Americans. Joseph W. McKnight, "Stephen Austin's Legalistic Concerns," *Southwestern Historical Quarterly* 89 (1986): at 239–40.

¹¹ Barker, *Life of Stephen F. Austin*, at 15.

¹² El Paso, which was founded in 1680, was governed by New Mexico, rather than any of the provincial governments that governed Texas. Cruz, *Let There Be Towns*, at 54, 64.

¹³ *Ibid.* at 51. Other early settlements in the interior of Texas, like Nacogdoches, had been abandoned at various times, and did not have permanent residents in the early 1820s. *Ibid.* at 141.

Antonio was over 300 miles from the state capital and, when Mexico gained its independence from Spain in the early 1820s, the settlement still had only 1,800 permanent residents.¹⁴ This created an environment in which all settlements in the interior of Texas were so distant from state and national government that they frequently had to improvise political and legal institutions.¹⁵

Consequently, San Felipe de Austin was not an Anglo-American enclave surrounded by, and in constant contact with, an energetic and dominant Spanish-Mexican legal culture. It was instead an Anglo-American outpost far beyond a handful of widely scattered and small Hispanic outposts; and the Spanish-Mexican outposts were themselves somewhat independent of the Mexican legal culture that prevailed hundreds of miles to the south, beyond the Rio Grande.

Chaos in Mexico

Even the Mexican legal culture south of the river was struggling to find a single, durable identity. The transition from Spanish to Mexican control of Texas was extremely complex, with the dissolution and restoration of a monarchy, an empire, a regency, a triumvirate, and several different kinds of republics. Even a highly simplified version of the history of Mexico during the fifteen years preceding the 1823 San Felipe de Austin alcalde election shows that the region had no reliable law at all.

In 1808, the King of Spain abdicated. Two years later, Father Miguel Hidalgo and others led a series of revolutions that briefly won independence for Mexico.¹⁶ Spain began to restore control over Mexico after enacting the classical-liberal Spanish Constitution of 1812, which guaranteed equality under law, freedom of contract, and the protection of private property rights.¹⁷ In 1814, Spain regained Mexico¹⁸ but revoked the Constitution of 1812.¹⁹ The revolution in Spanish Mexico continued in fits and starts for seven more years.

Meanwhile, Spain and the United States were negotiating what would become the Adams-Onís Treaty of 1819, which set the Sabine River as the western boundary of the United States and recognized Spanish sovereignty over Texas.²⁰ In 1820, before the treaty was ratified, Spain restored the Constitution of 1812.²¹

¹⁴ Tijerina, *Tejanos and Texas under the Mexican Flag*, at 12. About 500 civilians lived at Goliad. *Ibid.*; see also Barker Papers, Census Notes; Lowrie, *Culture Conflict in Texas*, at 18, 19 (explaining that the distance between the Texas settlements and other parts of Mexico created a natural barrier to the extension of Mexican influence and control).

¹⁵ For example, the Mexican government instructed settlements in Texas to form their own militia companies, which formalized a practice that settlers had adopted since the earliest days of Spanish colonization. Tijerina, *Tejanos and Texas under the Mexican Flag*, at 83.

¹⁶ *Early Judicial History*, 12 TEX. L. REV. at 315.

¹⁷ James Q. Dealey, "Spanish Source of the Mexican Constitution of 1824," *Quarterly of the Texas Historical Society* 3 (January 1900): at 161, 168–69.

¹⁸ Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft*, Vol. XII, *History of Mexico* (San Francisco: A.L. Bancroft & Co., 1885) at 596.

¹⁹ *Ibid.*

²⁰ Treaty of Amity, Settlement and Limits between the United States of America and His Catholic Majesty, 1819. Art. III. Avalon Project, Yale Law School, http://avalon.law.yale.edu/19th_century/sp1819.asp.

²¹ Bancroft, *History of Mexico*, at 697.



Stephen F. Austin.
Photo courtesy of Wikipedia Commons.

Those two events—the agreement to establish Spanish sovereignty in Texas and the restoration of a system of government that would be congenial to Anglo-Americans—convinced Moses Austin, an entrepreneur who had been a Spanish subject in Missouri at the turn of the nineteenth century, to travel to Texas in 1821 and petition the Spanish government for the right to settle families on land grants in Texas.²² Austin presented his petition in San Antonio to Texas Governor Antonio Martinez, who forwarded it to the commandant of the four Eastern Internal Provinces (Texas, Nuevo Leon, Coahuila, and Tamaulipas) with the recommendation that it be approved.²³

Moses Austin left San Antonio almost immediately to return to Missouri. The commandant granted the petition on January 17, 1821, but Austin did not receive confirmation of that until May, by which time he had fallen gravely ill from the extreme hardships resulting from the journey.²⁴ On his deathbed, Moses Austin asked that his son, Stephen, take over the settlement project. Stephen left for Texas on June 18, a week after his father lost his life.²⁵

Between that January and June, Spain had lost Mexico, too. Colonel Augustine Iturbide published the *Plan de Iguala* on February 2, and declared that Mexico was an independent constitutional monarchy.²⁶ By July, Iturbide had abrogated the recently-reinstated Constitution of 1812, and crowned himself Emperor Augustine I.²⁷ So, in less than six months, the country that the United States recognized as the sovereign government of Texas had been replaced by another, the classical-liberal constitution that was reassuring to immigrants like Austin had been revoked, and the man who had been granted legal authority to settle Anglo-American families in Texas was dead.²⁸

Antonio Martinez, though, was still the Governor of Texas—he had recognized Iturbide as the leader of an independent Mexico two months before the Colonel had formally gained control of the country.²⁹ Martinez named Stephen F. Austin as successor to his father's colonization

²² Barker, *Life of Stephen F. Austin*, at 13, 25.

²³ Daffan Gilmer, *Early Courts and Lawyers of Texas*, 12 TEX. L. REV. 435, 437 (June 1934).

²⁴ Barker, *Life of Stephen F. Austin*, at 31 (he ate roots and acorns on his way back).

²⁵ *Ibid.* at 33.

²⁶ *Early Texas Courts & Lawyers*, 12 TEX. L. REV. at 435.

²⁷ Bancroft, *History of Mexico*, at 777.

²⁸ Fane Downs, "The Administration of Antonio Martinez, Last Spanish Governor of Texas, 1817–1822," M.S. Thesis, 1963, at 70.

²⁹ Felix D. Almaraz, Jr., *Governor Antonio Martinez and Mexican Independence in Texas: An Orderly Transition* (San

plan, and gave him permission to explore the grant and devise terms for land distribution to settlers.³⁰ Martinez also told Austin that, because of the lack of government institutions and law in Texas, Austin would have to make up the law of the colony as best as he could:

You will cause them all [the colonists] to understand that until the government organizes the authority which is to govern them and administer justice, they must be governed by and subordinate to you; for which purpose I authorize you, as their representative and relying on your faithful discharge of the duty. You will inform me of whatever may occur, in order that such measures may be adopted as may be necessary.³¹

Austin spent the next several months exploring his grant, then left for Mexico City to ask the government to confirm that his settlement project was legal.³² Austin arrived in the capital in April of 1822, spending the next several months trying to persuade Emperor Augustine's congress to pass a colonization law, and to approve his grant pursuant to that law.³³ In October, however, Augustine dissolved the congress that Austin had been lobbying, and replaced it with a Junta Nacional Instituyente.³⁴ The Junta drafted a new colonization law and, on February 18, 1823, the Emperor decreed that Austin's grant was approved pursuant to that law, with the now-familiar caveat that Austin would be on his own:

[U]ntil the government of the settlement is organized, he [Austin] is charged with the administration of justice, settling all differences which may arise among the inhabitants, and preserving good order and tranquility, rendering an account to the government of any remarkable event that may occur.³⁵

While the Emperor was creating a junta and issuing decrees in its name, however, he was keenly aware that his position was precarious because he had alienated some of the powerful political forces that had enabled him to assume power.³⁶ Accordingly, he reinstated congress, hoping that by doing so he would encourage their support for his reign.³⁷ Just two weeks after reconvening, though, congress forced Iturbide to abdicate.³⁸ The new congress placed the executive power of Mexico in a triumvirate called the Supreme Executive Power,³⁹ and declared that all acts of the Iturbide government were illegal, including, specifically, the colonization law

Antonio: Bexar County Historical Commission, 1979), DeGolyer Library, Southern Methodist University, at 11.

³⁰ Barker, *Government of Austin's Colony*, at 225 (citing letter from Martinez to Austin, August 14, 1821).

³¹ *Ibid.* at 225 n.10 (citing Martinez to Austin, August 24, 1821).

³² *Ibid.* at 225–26.

³³ *Early Texas Courts & Lawyers*, 12 TEX. L. REV. at 437–38.

³⁴ Bancroft, *History of Mexico*, at 785.

³⁵ Dudley G. Wooten, ed., 1 *A Comprehensive History of Texas 1685 to 1897*, Vol. 1 (Dallas: William G. Scarff, 1898) at 474 (Decree of the Emperor, Andres Quintana, Mexico, February 18, 1823).

³⁶ 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 11 (Austin: Gammel Book Co. 1898).

³⁷ Bancroft, *History of Mexico*, at 799.

³⁸ 1 *Gammel's Laws of Texas*, at 12.

³⁹ Bancroft, *History of Mexico*, at 779.

that had allowed Austin's settlement project to be approved.⁴⁰ Austin asked congress to confirm that his grant was still legal anyway and, just three days after it had invalidated the colonization law, congress confirmed the validity of Austin's grant.⁴¹

Austin on His Own

During his return trip to Texas, Austin stopped in Monterrey, which was the capital of the Eastern Internal Provinces, and asked the commandant-general to give him any special instructions or copies of laws that might help him govern his colony.⁴² The commandant forwarded Austin's request to the provincial deputation, which decreed that Austin's authority:

[W]as full and ample, as to the administration of justice, and of the civil local government of the colony ... in short, that he should preserve good order, and govern the colony in all civil, judicial, and military matters, according to the best of his abilities, and justice might require, until the government was otherwise organized, and copies of laws were furnished, rendering to the governor of Texas an account of his acts, or of any important event that might occur, and being himself subject to him and the commander-general.⁴³

The government did not give Austin copies of any legal codes or specific instructions that would tell him or his colonists what the law in his colony would be.⁴⁴ Instead, the commandant wanted the colonists to know that *Austin* was the law. The commandant sent a letter to Baron de Bastrop, the commissioner for the colony, instructing him to tell the colonists that

Stephen F. Austin is authorized by the government to administer justice in that district ... which you will make known to the inhabitants of said district, in order that they may recognize the said Austin, invested with said powers, and obey whatever he may order⁴⁵

Thus, Austin had legal authority to rule as he pleased. The chaos of Mexico's revolutionary era and the colony's distance from Mexican government officials meant that, if he had wanted to, he could have governed his colony without any formal legal rules at all.⁴⁶

⁴⁰ 1 *Gammel's Laws of Texas*, at 12.

⁴¹ *Early Texas Courts & Lawyers*, 12 TEX. L. REV. at at 435.

⁴² Barker, *Government of Austin's Colony*, at 226.

⁴³ 1 *Gammel's Laws of Texas*, at 13.

⁴⁴ *Ibid.*

⁴⁵ Wooten, *Comprehensive History of Texas*, at 477-78 (letter from El Baron de Bastrop to James Cummings, [Provisional Alcalde on the Colorado] at Castleman's, August 5, 1823).

⁴⁶ The colonists had been governed by a series of "constables" and appointed alcaldes who appear to have decided cases or imposed punishments guided purely by common sense. When the constables had written to Bexar or Monterrey for advice on whether their decisions had been correct, they received no reply. Barker, *Government of Austin's Colony*, at 228 (citing "Bell to Trespalacios, May 4, 1823, Austin Papers"); *ibid.* (citing "Tumlinson to Bastrop, March 5, 1823).

1.^a *Mea ardua labora, quibus deinde, laqueum del. post. Impositum. Etiam, quia hinc, quod tenet, et alibi in* *etiam, quia hinc, quod tenet, et alibi in*
2.^a *De laqueum, quibus deinde, laqueum del. post. Impositum. Etiam, quia hinc, quod tenet, et alibi in*
3.^a *De laqueum, quibus deinde, laqueum del. post. Impositum. Etiam, quia hinc, quod tenet, et alibi in*
4.^a *De laqueum, quibus deinde, laqueum del. post. Impositum. Etiam, quia hinc, quod tenet, et alibi in*

[illegible]

The original returns of the San Felipe de Austin alcalde election of 1823. Stephen F. Austin Papers, Briscoe Center for American History, University of Texas at Austin. Photo by Jason Boatright.

The Government of this Province by their official letters
 dated 12th of Feb. 1824, have informed me that the
 Sovereign Congress of the Mexican Nation has decreed
 in the 20th of September last that all goods and Merchandise
 whether national or foreign introduced into this
 Province of Texas for the consumption of its inhabitants
 shall be free of all import Duties for the term of
Seven Years:
 They have also ordered me to rebuke any violence
 to keep out of this Colony all Vagabonds and persons of
 bad character. They have also ordered that copies of these
 orders shall be posted up by the
 Alcaldes in order that no one may pretend ignorance as an
 excuse for not obeying the authorities of this Colony, and
 at the same time ordering me to punish severely
 all persons who attempt to create disorder and confusion
 in the Colony, by propagating false and malicious slanders
 and false stories relative to Government or any of its
 authorities. Also they directed me by an official
 letter a translation of which I enclose to return the
 thanks of the Government of this Province in a particular
 manner to those whose names are signed to the Subscrip-
 tion for the Deputy Cortes of which letter you will post
 up in the most public places in your District.

The Donatario Don Erasmo Seguin the Deputy in Congress
 from this Province writes me under date of 2nd of January 1824
 from the City of Mexico and informs me that the Congress
 decided by a vote of 20 to 16 in favour of the Texas and Texas
 Mexican System of Government and that they have proposed
 as far as the 1st article of the Constitution is concerned
 Concord and unanimity appear to exist in Congress
 the Deputy is animated by the most sanguine hopes that
 the Government will be speedily established on the solid
 basis of justice and natural and Republican Liberty.
 All which you will communicate to the
 Subalterns of your District in the most proper
 manner.
 I remain
 your obedient servant
 San Felipe de Austin
 Feb. 26th 1824.
 Stephen F. Austin
 Political Chief

To Sylvanus Castleman
 Alcalde of the District
 of San Felipe de Austin

65

Notice regarding import duties on goods in Austin's Colony, issued by Stephen F. Austin, Political Chief, to Sylvanus Castleman, first Alcalde of the district of San Felipe de Austin, February 26, 1824. Colonial Archives of Austin County, Texas. Photo by Jason Boatright.

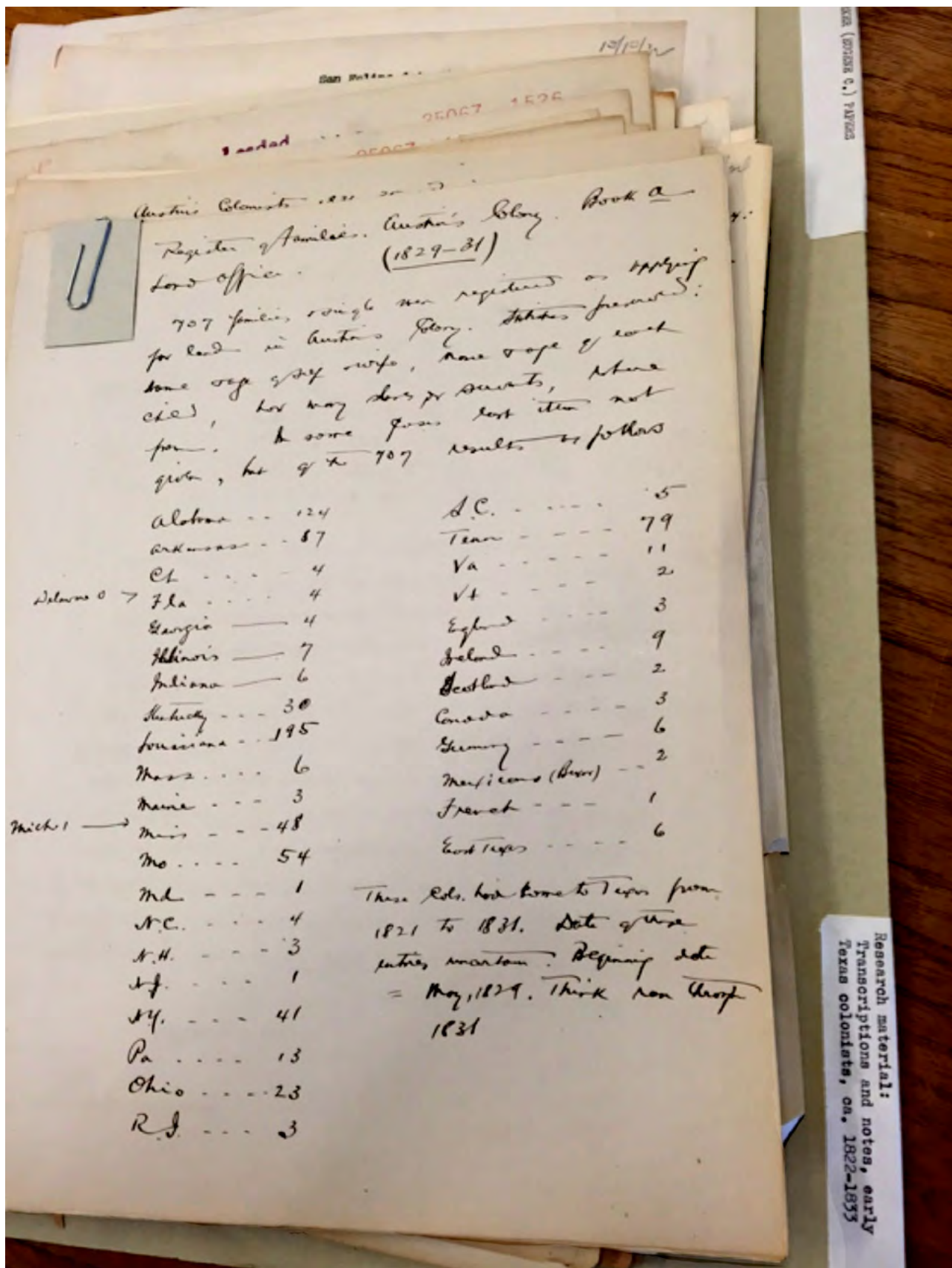
Austin's Codes: The "Instructions and Regulations for the Alcaldes"

Austin and his colonists, however, were well prepared to devise and administer laws that would be suitable for a common-law people living in a civil-law country. Austin had served in the Missouri Territorial Legislature in 1815—just twelve years after the area had been acquired in the Louisiana Purchase—and introduced several bills to reform court procedure and the judicial system.⁴⁷ Austin briefly served as a circuit judge in 1819 in Arkansas, which had also been part of the Franco-Spanish Louisiana Territory.⁴⁸ By early 1820, Austin was in New Orleans working in the office of a prominent attorney and learning the civil law.⁴⁹

⁴⁷ McKnight, *Austin's Legalistic Concerns*, at 243–44.

⁴⁸ Barker, *Life of Stephen F. Austin*, at 32.

⁴⁹ *Ibid.* at 33.



Eugene Barker's notes on the origin of settlers in Austin's Colony. Briscoe Center for American History, University of Texas at Austin. Photo by Jason Boatright.

Austin's colonists were also familiar with the civil law. The winner of the 1823 alcalde election was Sylvanus Castleman, who been a landowner in St. Genevieve, Missouri with the Austins⁵⁰ at a time when the area was largely French-speaking and still retained elements of French and Spanish law.⁵¹ Many of the electors in the 1823 alcalde election had come to Texas from Missouri, Arkansas, and Louisiana.⁵² Like the Austins, living in the states of the recently-acquired Louisiana Territory would have given them an "instinctive, sympathetic understanding" of Hispanic institutions.⁵³

Austin's alcalde codes were the result of that kind of understanding, so much so that Austin apparently adapted some parts of his codes from the laws that were in force in New Orleans during the time he studied law there. For example, a prototype of the appeal bond in article 20 of Austin's civil regulations was from an 1807 Louisiana statute.⁵⁴ Similarly, article 21 contains a sample order of execution on a judgment, which appears to have come straight from an 1805 Louisiana law.⁵⁵

Perhaps the most important example of Austin's use of Louisiana law is in article 3, which establishes a petition-and-answer system of pleading, and includes the form of summons on a petition that is from an 1805 Louisiana law.⁵⁶ Texas still has the petition-and-answer system, and it has long been considered a vestige of Mexican law.⁵⁷ In the *Whiting v. Turley* case in the Supreme Court of the Republic of Texas, Judge Hutchinson explained that Texas did not adopt the Anglo-American system of pleading, but retained the petition system, and that questions about the legal sufficiency of pleadings must be "referred to the doctrines and jurisprudence coming to us through Coahuila."⁵⁸ Austin's codes for the alcaldes, however, suggest that the petition-and-answer pleading system came to Texas through Louisiana, not Coahuila.

This is not to argue that the Texas pleading system is a vestige of French law rather than Spanish law; on the contrary, the Louisiana law when Austin studied it in New Orleans was written in French, but its origin was largely Spanish.⁵⁹ Instead, noting that the Texas system of pleading was introduced from Louisiana rather than Coahuila is an invitation to consider whether the political and legal conditions in Mexico at the beginning of Anglo settlement discouraged the transmission of the civil law to Texas from Mexico, and whether the origin and experiences of the earliest Anglo settlers encouraged the transmission of the civil law to Texas from the old Louisiana Territory.

The traditional explanation for why Texas adopted the petition-and-answer system is that

⁵⁰ Stephen F. Austin to Henry Elliot, Agreement to accept Castleman's lot in the "Common Field" of St. Genevieve, Mo., in exchange for debt on Texas land. March 1, 1822. Austin Papers.

⁵¹ Joseph W. McKnight, "Law Books on the Hispanic Frontier, in Spanish and Mexican Land Grants and the Frontier," *Journal of the West* 27 (1989), n. 34 (explaining that lower Missouri retained French culture for a while after statehood). *Ibid.* (citing cases in post-statehood Missouri which relied on Spanish law).

⁵² Of the 17 voters, 10 have a known state of origin. Eight out of the 10 came from the old Louisiana Territory. Six emigrated from Arkansas: Abner and Gibson Kuykendall, Thomas and Friend Boatright, David McCormick, and David Bright. Sylvanus Castleman came from Missouri, and Seth Ingram emigrated to Texas from Louisiana. *Handbook of Texas*, Texas State Historical Association (1996): *passim*; Worth S. Ray, *Austin Colony Pioneers* (1995): *passim*.

⁵³ Barker, *Life of Stephen F. Austin*, at 12.

⁵⁴ McKnight, *Austin's Legalistic Concerns*, at 244 (citing 1807 Louisiana Gen. Laws 2, ch. 1, § 19).

⁵⁵ *Ibid.* (citing 1805, 2d Sess., Louisiana Gen. Laws 236, ch. 26, § 14).

⁵⁶ *Ibid.* (citing 1805, 2d Sess., Louisiana Gen. Laws 210, ch. 26, § 2).

⁵⁷ Joseph W. McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24, 26 (Nov. 1959).

⁵⁸ Dallam 453, 454 (1842).

⁵⁹ J.-R. Trahan, *An Elementary Treatise on the Civil Law of Louisiana*, Vol. 1 at 14, http://www.laed.uscourts.gov/200th/cle/civil_law_in_louisiana.pdf.

it was part of the law of Castile, that Mexico had retained Castilian law, that Texas was part of Mexico, and that, when the Anglo settlers in Mexican Texas encountered the Castilian system, they decided that its simplicity was ideally suited to harsh frontier conditions and the ignorance of their amateur judges.⁶⁰ That explanation, however, is difficult to accept, because the government of Mexico was in such turmoil, and was so far away from the Anglo settlements, that it did not even attempt to extend Spanish-Mexican law to Austin's colony until 1828,⁶¹ by which time Anglos had already developed a distinct legal culture.

In fact, no one in the Anglo settlements was officially licensed to practice law in Mexico until 1834,⁶² and even then there was almost no contact between the trial courts in Austin's colony and the appeals courts in the newly-designated capital city of Saltillo⁶³ where, it was said, law books could not be bought "*por ningun dinero*" anyway.⁶⁴ By 1834, Anglos outnumbered Hispanic Texans by over 5 to 1,⁶⁵ and the first skirmishes in the Texas Revolution had already been fought.⁶⁶ Anglo Texans established a provisional government the next year, instituting a new judicial system and imposing the common law of England (but not for the system of pleading).⁶⁷ All of this suggests that there was very little opportunity for the Spanish or Mexican government to introduce, much less establish or enforce, the law of Castile in Texas.

Instead, Stephen F. Austin and the *alcaldes* at San Felipe de Austin evidently promulgated, established, and enforced Castilian laws that they had observed while living and working in the states of the old Louisiana Territory. In this way, Austin's law codes, and the election of the San Felipe de Austin *alcalde* to administer them, show that Texas began when Hispanic and Anglo legal influences combined with one another to create something new, and that the composition and origin of each of those influences might be quite different from what has been previously supposed.

⁶⁰ *Spanish Influence*, 38 TEX. L. REV. at 26.

⁶¹ In that year, formal town governments, or *ayuntamientos*, were established in Austin's colony under the new constitution and statutes of the state of Coahuila y Texas. Tijerina, *Tejanos and Texas under the Mexican Flag*, at 32–33. However, in 1830—two years after the *ayuntamiento* in San Felipe de Austin had been established—Stephen F. Austin said that its officers "did nothing on any subject that they ought to have attended to." Barker, *Government of Austin's Colony*, at 247.

⁶² Hans W. Baade, "Law and Lawyers in Pre-Independence Texas," *Centennial History of the Texas Bar, 1882–1982* (Austin: State Bar of Texas, 1981), at 246.

⁶³ Barker, *Life of Stephen F. Austin*, at 217–18.

⁶⁴ Baade, "Law and Lawyers in Pre-Independence Texas," at 246.

⁶⁵ Tijerina, *Tejanos and Texas under the Mexican Flag*, at 24. Cf. Lowrie, *Culture Conflict in Texas*, at 31 (showing that the ratio was closer to 3 to 1 than 5 to 1).

⁶⁶ Barker, *Life of Stephen F. Austin*, at 384.

⁶⁷ John C. Townes, "Sketch of the Development of the Judicial System of Texas," *Southwestern Historical Quarterly* 2 (July 1898): at 1, 39–40.



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The History of Texas Civil Procedure*

By William V. Dorsaneo, III¹

I. 1939 Rules of Practice Act

In 1939, the 46th Legislature passed the Rules of Practice Act, relinquishing to the Supreme Court of Texas “full rulemaking power in the practice and procedure in civil actions.”² Under the Rules of Practice Act, neither Court-made rules nor their amendments require advance legislative approval.³ The Practice Act also provides broadly that the Texas Supreme Court may list, as “repealed or modified,” “conflicting laws and parts of laws governing practice and procedure

* Ed. note: This article is an excerpt of Professor Dorsaneo’s longer article, which was originally published at 65 BAYLOR L. REV. 713 (2013). The excerpt is reprinted here with permission of the author.

¹ I respectfully acknowledge the contributions made to this article and to the developments discussed and explained in it by the many past and present members of the Advisory Committee to the Supreme Court of Texas. I also want to thank my professional and academic colleagues who reviewed various drafts of the article during the many years of its preparation and particularly Chief Justice Nathan L. Hecht and Chief Justice Thomas R. Phillips, Professors Elizabeth Thornburg, Anthony Colangelo and Jeffrey Kahn, Luther A. Soules, III, Des Dorsaneo, Robert B. Gilbreath, Josiah Daniel, Carl Hamilton, as well as many, many research assistants including Paula J. Miller, Margaret Jewell, Parker Graham and Charley Dorsaneo.

² On May 12, 1939, the legislature passed House Bill 108, which is usually referred to as the Rules of Practice Act. Act of May 15, 1939, 46th Leg., R.S., ch. 25, § 2, 1939 Tex. Gen. Laws 201, 201, repealed by Act of June 12, 1985, 69th Leg., ch. 480, § 26(1), 1985 Tex. Gen. Laws 1720, 2048 (current version at TEX. GOV’T CODE § 22.004). Through express provision of the Act, full authority to make rules governing civil case was relinquished to the supreme court by the legislature, subject to the limitation that the rules not “abridge, enlarge or modify the substantive rights of a litigant.” *Id.* The court was ordered to promulgate rules and file them with the secretary of state within a specified time frame such that the rules would become effective on September 1, 1941. *Id.* See James W. Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 766–67 (1951). Perhaps indicative that the Texas Legislature would not be content to leave court rules to the courts, the Legislature passed in the same session ten additional bills containing sometimes minute adjustments in practice and procedure. See, e.g., Act of June 7, 1939, 46th Leg., R.S., ch. 28, 1939 Tex. Gen. Laws 205, 205–13. Even after the Texas Supreme Court had filed the first edition of the civil procedure rules with the Texas Secretary of State, the Legislature in 1941 enacted a bill to authorize the Court to amend these initial rules and to reserve the Legislature’s right to alter or repeal them. See Act of Mar. 6, 1941, 47th Leg., R. S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67.

³ TEX. GOV’T CODE § 22.004(b). The Texas Supreme Court is required to file the rules or amendments promulgated by the Court and must mail a copy of the rules or amendments to each member of the State Bar of Texas not later than the 60th day before the date on which they become effective. *Id.* Unlike the federal Rules Enabling Act, which requires the U.S. Supreme Court to transmit a proposed rule to Congress by May 1 of the year in which the rule is to take effect (see 28 U.S.C. § 2074(a)), the Texas Rules of Practice Act, as amended in 2011, provides only that on written request from a member of the legislature, the secretary of state must provide the member with electronic notification when the supreme court has promulgated rules or amendments. *Id.* Prior to the 2011 amendment, the statute required the secretary of state to report the rules or amendments to the next regular session of the legislature by mailing them to each elected member of the legislature on or before December 1 immediately preceding the session. See Act of May 15, 1939, 46th Leg., R.S., ch. 25, § 2, 1939 Tex. Gen. Laws 201, 201 (amended 2011) (current version at TEX. GOV’T CODE § 22.004(b)). But because there has never been a statutory requirement for the Texas Supreme Court to transmit a proposed rule or amendment to the legislature before their effective date, the statutory process is not designed to facilitate collaboration between the Texas Legislature and the Texas Supreme Court. In fact, the opposite is true.

in civil actions.”⁴ The rules and amendments to rules remain in effect until disapproved by the legislature.⁵

On January 10, 1940, the Court appointed a 21-member advisory committee to assist the Court in carrying out its rule-making responsibilities.⁶ As explained by one of the committee members, the committee did not attempt “to overhaul the structure of [the] procedural rules from beginning to end” but only decided:

(1) to examine all rules of procedure then in use in the courts of Texas, whether they had come into existence and use through legislative enactment, promulgation by the Supreme Court of Texas, or promulgation by the Supreme Court of the United States for the use in federal courts ... (3) to select out those rules regarded by the committee and the legal profession generally as trouble-makers and to improve them, if possible⁷

II. 1941 Rules of Civil Procedure

After conducting a series of meetings during an eight-month period in 1940,⁸ the committee proposed adoption of 822 rules.⁹ Most of the rules were based on the procedural provisions of the Revised Civil Statutes of 1925 and the existing Texas District and County Court Rules.¹⁰ Others

⁴ TEX. GOV'T CODE § 22.004(c) (“The list has the same weight and effect as a decision of the court.”).

⁵ TEX. GOV'T CODE § 22.004(b).

⁶ See Order Appointing Supreme Court Rules Advisory Committee, Misc. Docket No.99-9167, 3 TEX. B.J. 520 (Tex. Jan. 10, 1940); Order Appointing Supreme Court Rules Advisory Committee, Misc. Docket No.99-9167, 4 TEX. B.J. 617 (Tex. Jan. 10, 1940); Order Appointing Supreme Court Rules Advisory Committee, Misc. Docket No.99-9167, 6 TEX. B.J. 462 (Tex. Jan. 10, 1940). The membership of the original advisory committee included the following judges and lawyers: Angus Wynne, Chairman; retired Supreme Court Associate Justice, F.A. Williams; retired Supreme Court Associate Justice, Thomas B. Greenwood; M.N. Chrestman; Austin Court of Appeals Chief Justice, James W. McClendon; Waco Court of Appeals Associate Justice, James P. Alexander; Professor Robert W. Stayton; Professor Roy W. McDonald; W.R. Chapman; Olin R. VanZandt; William A. Vinson; Judge Alan Montgomery; Winbourne Pearce; Randolph L. Carter; Allen Clark; Judge R.B. Levy; J. B. Dooley; Richard F. Burges; W.E. Orgain; former House Speaker Robert W. Calvert and Dallas Scarborough. *Id.*

Justice Alexander also served as Professor of Practice and Procedure at Baylor University Law School. *Id.* He was elected chief justice of the Texas Supreme Court in 1940 and was sworn in on January 1, 1941. Alexander, James P., Supreme Court Chief Justices, Texas Politics, http://www.laits.utexas.edu/txp_media/html/just/justices/10.html (last visited Oct. 6, 2013). Chief Justice Alexander became the Court's first “Rules Member” and continued his interest in rule making for the Court until his death on January 1, 1948. See Hon. Jack Pope & Steve McConico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 12 n.44 (1978). Subsequent rules members include Justices James P. Hart, Robert W. Calvert (who served from September 1949 until he became the Court's chief justice in January 1961), and Ruel Walker (who served as the rules member from 1961 until Justice Jack Pope was appointed in May 1975 on Justice Walker's retirement). *Id.* Justice Pope's tenure as Rules Member itself lasted until September 1982, when he became the Court's chief justice. Justice James P. Wallace succeeded Justice Pope as the rules member. After Justice Wallace's retirement in August 1988, Justice William W. Kilgarlin succeeded Justice Wallace. Justice Kilgarlin was succeeded by Justice Nathan L. Hecht in January 1989.

⁷ Hon. Robert W. Calvert, Some of the Important Changes Effected by the New Rules of Practice and Procedure in Civil Actions, Address Before the Bar Association of Dallas (June 21, 1941), in 6 DALL. B. SPEAKS, 1941, at 170–71.

⁸ For a general discussion of this activity see Wilson, 29 TEX. L. REV. at 770–80.

⁹ See generally former TEX. R. CIV. P. 1–822, 4 TEX. B.J. 487, 487–608 (1941).

¹⁰ See Hon. Clarence A. Guittard, *The Rule-Making Process: A Review of Court-Managed Procedural Reform in Texas*, 60 TEX. B.J. 404, 406 (1997).



When James P. Alexander was appointed in January 1940 to the Texas Supreme Court's Advisory Committee on the Rules of Civil Procedure, he was an Associate Justice on the Waco Court of Civil Appeals. In November of that year he was elected Chief Justice of the Supreme Court and became the Court's first "Rules Member," a position he held until his death in 1948. Photo courtesy of the State Bar of Texas Archives, Caitlin Bumford, Director.

were based on a slightly modified version of the 1938 federal rules, including the federal rules dealing with permissive and compulsory joinder of claims and parties, interpleader and class actions, consolidation, severance and separate trials,¹¹ written discovery, sanctions for failure to obey an order to produce documents and pretrial practice.¹² Parts of federal rules concerning pleading of claims and defenses, as provided in Federal Rule 8, and concerning amendments to pleadings, as provided in Federal Rule 15, were also adopted, among others.¹³

The Texas Supreme Court's initial Order Adopting Rules was entered on October 29, 1940, with an effective date of September 1, 1941.¹⁴ After the Court made some significant modifications,¹⁵ particularly with respect to the trial court's charge to the jury,¹⁶ and motion for new trial practice,¹⁷ the new Rules of Civil Procedure went into effect September 1, 1941.¹⁸

¹¹ *Id.* at 404; see former TEX. R. CIV. P. 38-43, 51, 97, 166, 174, 4 TEX. B.J. at 493-96, 503, 512, 514 (1941).

¹² See former TEX. R. CIV. P. 166-170, 4 TEX. B.J. at 512-13 (1941).

¹³ See former TEX. R. CIV. P. 47, 48, 66, 67, 71, 94, 4 TEX. B.J. at 495-96, 498, 502-03 (1941).

¹⁴ See Order Adopting Rules, Misc. Docket No.99-9167, 3 TEX. B.J. at 522; Order Adopting Rules, Misc. Docket No.99-9167, 4 TEX. B.J. at 619; Order Adopting Rules, Misc. Docket No.99-9167, 6 TEX. B.J. at 464.

¹⁵ Order Adopting Amendments Sept. 20, 1941, Misc. Docket No.99-9167, 4 TEX. B.J. 624 (Tex. Sept. 20, 1941); Order Adopting Amendments Sept. 20, 1941, Misc. Docket No.99-9167, 6 TEX. B.J. 469 (Tex. Sept. 20, 1941).

¹⁶ See former TEX. R. CIV. P. 277-279, 6 TEX. B.J. at 368-70 (1943).

¹⁷ See former TEX. R. CIV. P. 324, 6 TEX. B.J. at 375-76 (1943).

¹⁸ See former TEX. R. CIV. P. 47, 48, 66, 67, 71, 94, 4 TEX. B.J. at 495-96, 498, 502-03 (1941).

W. F. MOORE,
CHIEF JUSTICE
JOHN H. SHARP
RICHARD CRITZ
ASSOCIATE JUSTICES
A. PHILQUIST,
CLERK

The Supreme Court of Texas
Austin

October 29, 1940.

To the Secretary of State and
the Members of the 47th Legislature
of the State of Texas.

In compliance with the provisions of Chapter 25, pages 201-2-3, Acts Regular Session of the 46th Legislature of the State of Texas, approved May 15, 1939, the Supreme Court of Texas hereby transmits to you the rules of practice and procedure governing civil actions in the various courts of this State which have been adopted and promulgated by this Court in obedience to, and in conformity with, the above Act.

As shown by the order of this Court, a copy of which is herewith transmitted, these rules will become effective on September 1, 1941, unless disapproved by the Legislature of this State prior to such date.

In the work of forming and promulgating these rules the Supreme Court has been very ably assisted by the committee appointed by the Court, whose names appear signed to the letter of date September 16, 1940, reporting these rules to the Supreme Court and recommending their adoption.

Finally, we wish to say that these rules are the result of many months of labor and research by the above-mentioned committee and this Court, and represent the combined labor and approval of both.

Respectfully submitted,

W. F. Moore
W. F. MOORE

Chief Justice.

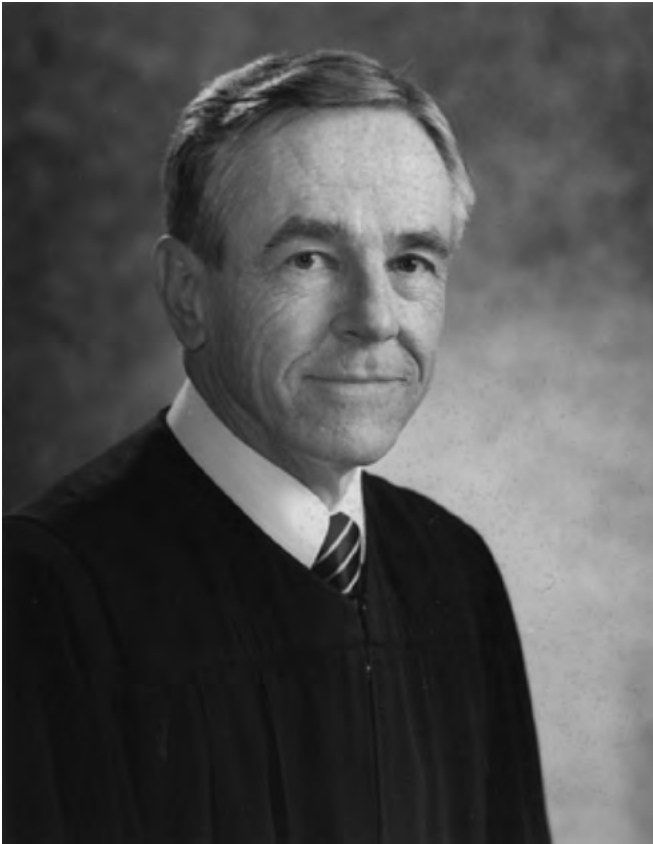
John H. Sharp
JOHN H. SHARP

Associate Justice.

Richard Critz
RICHARD CRITZ

Associate Justice.

a



Chief Justice Clarence Guittard of the Dallas Court of Appeals. Photo courtesy of the State Bar of Texas Archives, Caitlin Bumford, Director.

Many years later, Chief Justice Clarence Guittard of the Dallas Court of Appeals and a longtime active and influential member of the Advisory Committee to the Texas Supreme Court accurately described the new rules as a mixture of Texas procedural statutes, with some revisions and additions, some federal rules thought necessary to update Texas statutes, and with many former Texas Rules.¹⁹ As Guittard explains, “most of the rules then adopted, and many still in force, contain obsolete provisions and much of the convoluted language common in 19th century legislation.”²⁰

III. Adoption and Revision of the Rules of Appellate Procedure

On September 1, 1981, Senate Joint Resolution 36 became effective and amended Article 5, Section 6 of the Texas Constitution by conferring criminal jurisdiction on the former courts of civil appeals and providing for discretionary review of courts of appeals’ decisions in criminal cases by the Court of Criminal Appeals.²¹ It was implemented in 1981

by Senate Bill 265, which increased the number of intermediate appellate court justices from fifty-one to seventy-nine.²²

In the mid-1980s, the criminal-law bar proposed vesting in the Court of Criminal Appeals the power to make rules governing post-trial and appellate procedure in criminal cases.²³ In response, at the urging of the Subcommittee on Criminal Matters of the Select Committee on the Judiciary, chaired by Senator Bob Glasgow,²⁴ the Court of Criminal Appeals and the Texas Supreme Court appointed a joint committee in 1983 to draft “uniform” rules for appeals of both civil and criminal cases.²⁵ The joint committee of distinguished lawyers and judges from both civil and criminal practice held meetings from April through October 1984 and presented a

¹⁹ Guittard, 60 TEX. B.J. at 404.

²⁰ *Id.* Chief Justice Guittard was appointed to the Advisory Committee in the early 1960s and, with a short hiatus during Chief Justice John Hill’s tenure as chief justice of the Texas Supreme Court, Chief Justice Guittard served on the committee until his death in 1998.

²¹ TEX. S.J. RES. 36, § 4, 66th Leg. R.S., 1979 TEX. GEN. LAWS 3223, 3224–25; TEX. CONST. Art. V, § 6 (amended 1979).

²² See Act of June 8, 1981, 67th Leg., R.S., ch. 291 § 13, 1981 TEX. GEN. LAWS 761, 761–62 (current version at TEX. GOV’T CODE § 22.201). For a discussion of these changes, see generally Clarence A. Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH L. REV. 549 (1983).

²³ Guittard, 60 TEX. B.J. at 406.

²⁴ Hon. Clarence A. Guittard, *Proposed Uniform Rules of Appellate Procedure*, 48 TEX. B.J. 24, 24 (1985).

²⁵ Guittard, 60 TEX. B.J. at 406 (“Justice Clarence Guittard served as chair and Professor William V. Dorsaneo, III was the principal drafter.”).

draft of the proposed appellate rules covering procedure from perfection of the appeal through issuance of the mandate by the court of appeals.²⁶ The proposed appellate rules were rearranged in the order of the Federal Rules of Appellate Procedure, renumbered, and, based largely on the provisions of the Texas Rules of Civil Procedure governing civil appeals,²⁷ were rewritten by the drafting of new rules with informative headings and subheadings for subdivisions contained in the new appellate rules, without making many substantive changes in the rules applicable to civil appeals.²⁸

One of the main reasons why the Joint Committee on Appellate Rules did not need to make many “substantive” revisions in appellate practice in civil cases was that the post-trial and the appellate rules had recently been reviewed and revised by another joint committee appointed by the Judicial Section of the State Bar and the State Bar Committee on the Administration of Justice,²⁹ submitted to and substantially approved by the Advisory Committee, and adopted by the Texas Supreme Court with minor changes in 1980.³⁰

During this process, specific amendments were made to simplify post-trial procedures, trial and appellate timetables, the procedures for perfection of civil appeals, obtaining and filing the record on appeal, the appellate briefing process, motion for rehearing practice in the courts of appeals, and for further appeal to the Texas Supreme Court.³¹ In addition, another round of proposed amendments was recommended to the Texas Supreme Court in 1982 concerning post-verdict motion and appellate practice.³² Most of these proposals were adopted as amendments to the rules of civil procedure, effective April 1, 1984.³³ Ultimately, the amendments to the civil procedure rules concerning appellate practice in the first half of the 1980s were incorporated in the new appellate rules recommended for adoption to the Texas Supreme Court and to the Court of Criminal Appeals.³⁴

²⁶ The members of the Advisory Committee on Appellate Rules were as follows: Judge Sam Houston Clinton (Court of Criminal Appeals), Justice James P. Wallace (Texas Supreme Court), Chief Justice Austin McCloud (Eastland Court of Appeals), Justice Shirley Butts (San Antonio Court of Appeals), Judge Don Metcalfe, Judge Robert Blackmon, Hubert Green (Chair, Committee on Administration of Justice), Luther H. Soules, III (Chair, Advisory Committee to Texas Supreme Court), Clifford Brown (past president, Texas Criminal Defense Lawyers Association), Stephan H. Coppel, Russell H. McMains, Carl E. F. Dally (State Prosecuting Attorney's Office) and Professor William V. Dorsaneo, III. Guittard, 48 TEX. B.J. at 24–25 & n.1. Subsequent work added rules for original and appellate proceedings in the Texas Supreme Court and the Texas Court of Criminal Appeals.

²⁷ See TEX. R. CIV. P. 21c, 38 TEX. B.J. 823, 823 (1975) (repealed 1986); TEX. R. CIV. P. 14a, 14b TEX. B.J. 532, 532 (1945) (repealed 1986); see also TEX. R. CIV. P. 352–515.

²⁸ See James Hambleton & Jim Paulsen, *Appellate Procedure: New Rules: A Pocket Introduction*, 49 TEX. B.J. 554, 554 (1986).

²⁹ The members of the joint committee included: Chief Justice Clarence A. Guittard, Chairman; Justice Quentin Keith; Justice Charles L. Reynolds; Justice Bob Shannon; David M. Kendall; Richard J. Clarkson; and Professor William V. Dorsaneo, III. Charles W. Barrow, *Appellate Procedure Reform*, 12 ST. MARY'S L.J. 615, 616–617 & n.1 (1981).

³⁰ See Order of June 10, Adopting Amendments to the Rules of Civil Procedure, 43 TEX. B.J. 767, 775–794 (1980).

³¹ See generally Barrow, 12 ST. MARY'S L.J. 615.

³² Meeting of the Texas Supreme Court Advisory Committee, 4 (Nov. 12–13, 1982), available at http://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1982/agendas/November_12_1982.pdf (last visited Mar. 18, 2016).

³³ See Order of Dec. 5, 1983, Adopting Rules of Civil Procedure, 47 TEX. B.J. Pull-Out Section at 3 (1984).

³⁴ Order of Oct. 20, 1997, Final Approval of Revisions of Texas Rules of Evidence, 61 TEX. B.J. 373, 373 (1998).

Notwithstanding the fact that the development and adoption of a unified body of appellate rules was “a magnificent effort,” in 1985 Senator Bob Glasgow expressed the view that:

[E]ven if the merits of this proposal prove persuasive, we are still sensitive to the many changes being digested by the civil bar in Texas with the introduction of the new rules of evidence and substantial amendment of the Rules of Civil Procedure last spring. It just may be that this magnificent work will be the straw that breaks the camel’s back.³⁵

Fortunately, the proposed rules were promulgated by Orders of the Texas Supreme Court and the Court of Criminal Appeals issued on April 10, 1986.³⁶ Thus, for the first time, Texas adopted a unified and comprehensive set of rules for both civil and criminal appeals.³⁷

Thereafter, the Rules of Appellate Procedure were amended again in 1990³⁸ and substantially rewritten in 1997.³⁹ The 1997 revisions to the Texas Rules of Appellate Procedure were first developed over several years beginning in 1991, by the Committee on State Appellate Rules of the Appellate Practice and Advocacy Section of the State Bar of Texas.⁴⁰ The Section Committee’s objective was to make the appellate rules clear and definite so as to reduce litigation about procedural matters, to remove procedural obstacles to disposition of appeals on the merits, and to make the appellate process less costly for both practitioners and the appellate courts.

Subsequent cumulative reports were prepared by the Section Committee in 1993 and 1995. These cumulative reports were provided to and studied by the Advisory Committee, which recommended adoption of the final product to the Texas Supreme Court and the Texas Court of Criminal Appeals, after an extensive review and revision process. During this process, Bryan A. Garner helped both the Section Committee and the Advisory Committee by redrafting the proposed rules in compliance with contemporary legal writing standards.

The new 1997 Rules of Appellate Procedure were initially promulgated by the Texas

³⁵ S. Bob Glasgow, *Appellate Procedure: An Integrated Code*, 48 TEX. B. J. 142, 142 (1985). Similar reservations about the pace of rule-making by the Texas Supreme Court had been expressed earlier. See Steve McConnico and Daniel R. Bishop, *Practicing Law With the 1984 Rules: Texas Rules of Civil Procedure Amendments Effective April 1, 1984*, 36 BAYLOR L. REV. 73, 128 (1984) (“The Courts and bar need time to learn how to effectively use the recent changes before they are confronted with new changes.”).

³⁶ See Order of April 10, 1986, Promulgating New Rules of Appellate Procedure, 49 TEX. B.J. 556, 556 (1986); see Order Adopting Amendments to Rules of Post-trial, Appellate and Review Procedure in Criminal Cases, 49 TEX. B. J. 558, 558 (1986).

³⁷ See generally Hon. Jack Pope & Steve McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 492–528 (1980); see generally Barrow, 12 ST. MARY’S L.J. 615.

³⁸ See Order of Apr. 24, 1990, Changes to the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, 53 TEX. B.J. 589, 606–616 (1990).

³⁹ See Order of Mar. 20, Approval of Revisions to the Texas Rules of Appellate Procedure, 60 TEX. B.J. 408, 408 (1997).

⁴⁰ The committee membership included the following persons: Chief Justice Clarence Guittard, Chairman; Sarah B. Duncan; Elaine Carlson; Michael A. Hatchell; Chief Justice Austin McCloud; Chief Justice Paul Nye; William V. Dorsaneo, III; Ron Goranson; Kevin Keith; and Ruth Kollman Justice Nathan L. Hecht of the Texas Supreme Court and Judge Sam Houston Clinton of Texas Court of Criminal Appeals participated ex officio. Molly Anderson (now Hatchell) acted as the committee’s reporter.

(This page and the next) 1986 Supreme Court order amending the Rules of Civil Procedure. Image courtesy of Supreme Court of Texas Archives, Tiffany Shropshire Gilman, Archivist.

ORDER OF APRIL 10, 1986 ADOPTING
AMENDMENTS

*Posted
pg 380*

TO

TEXAS RULES OF CIVIL PROCEDURE

Effective September 1, 1986

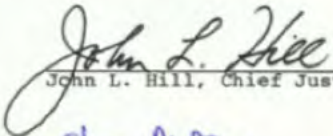
IT IS ORDERED by the Supreme Court of Texas with
reference to the Texas Rules of Civil Procedure:


1. That the following amendments to existing rules
are made and the following rules are repealed;
2. That such amendments become effective on
September 1, 1986;
3. That the notes appended to these amendments are
for the convenience of the bench and bar, but they are not a
part of the rules and they are incomplete;
4. That this order showing amendments and appending
notes shall be filed by the Clerk of this Court, for and in
behalf and as the act of this Court, by means of a duplicate
original copy of this order, with the Secretary of State; and
the publication of such amendments shall be made by the Clerk
of this Court, for and in behalf and as the act of this Court
in the Texas Bar Journal and a copy thereof mailed by said
Clerk to each registered member of the State Bar of Texas, at
least 60 days before the effective date thereof;
5. That this order, including such amendments with
the appended notes, shall be recorded in the minutes of this
Court, and that one original filed copy of this order shall
be preserved by the Clerk of this Court as a permanent record
of this Court;

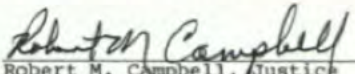
6. That the rules now so amended are as follows:
2, 3a, 5, 18a, 306a, 306c;

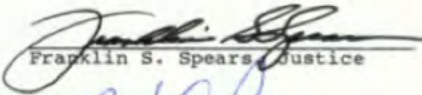
7. That the rules now repealed are as follows:
14a, 18b, 21c, 352-515;

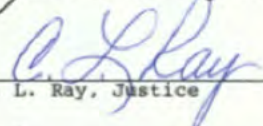
SIGNED AND ENTERED in duplicate originals this 10th day
of April, 1986.


John L. Hill, Chief Justice


Sears McGee, Justice



Robert M. Campbell, Justice

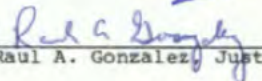

Franklin S. Spears, Justice


C. L. Ray, Justice


James P. Wallace, Justice


Ted Z. Robertson, Justice


William W. Kilgarlin, Justice


Raul A. Gonzalez, Justice

Supreme Court and the Court of Criminal Appeals by court orders dated March 20, 1997,⁴¹ to become effective on September 1, 1997, and received final approval by court orders entered on August 15, 1997.⁴² The 1997 rules were designed to increase the likelihood that appeals would be decided on the merits, rather than on the grounds of noncompliance with procedural requirements.⁴³ As summarized by Chief Justice Tom Phillips, the 1997 rules abolished the use of cost bonds to perfect appeals in the courts of appeals, shifted most of the responsibilities for preparing and filing the record to the clerk of the trial court and the official court reporter, and replaced the curiously named “application for writ of error to obtain review of the judgments of the courts of appeals by the Texas Supreme Court” with a petition for review procedure similar to certiorari practice used by the U.S. Supreme Court.⁴⁴

Other important changes included a requirement that each party seeking an alteration of the trial court’s judgment must file a notice of appeal,⁴⁵ allowance in appellate briefs of “issues presented” instead of points of error,⁴⁶ and elimination of the former requirement that each party seeking review in the Texas Supreme Court must have filed a motion for rehearing asserting the party’s complaints as a prerequisite to further appeal and appellate review in the Texas Supreme Court.⁴⁷

⁴¹ See Order of Mar. 20, Approval of Revisions to the Texas Rules of Appellate Procedure, 60 TEX. B.J. 408, 408 (1997).

⁴² See Order of Aug. 15, Final Approval of Revisions to the Texas Rules of Appellate Procedure, 60 TEX. B.J. 876, 876 (1997).

⁴³ See generally Richard R. Orsinger & Lynne Liberato, *Practicing Under the New Appellate Rules*, 60 TEX. B.J. 730 (1997).

⁴⁴ Hon. Thomas R. Phillips, *Texas Supreme Court Update*, 60 TEX. B.J. 858, 861 (1997).

⁴⁵ TEX. R. APP. P. 25.1(c).

⁴⁶ TEX. R. APP. P. 38.1(f), 60 TEX. B.J. 878, 910 (1997) (amended 2008).

⁴⁷ See TEX. R. APP. P. 49.9.



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Odious Blots upon the Pure and Exalted Judicial Annals: Revisiting Texas Supreme Court Precedent by Historical Era

By Dylan O. Drummond

The Texas Supreme Court enjoys a robust and storied history. But the Court's history, colorful and fascinating as it may be, also informs the precedential weight accorded to its decisions. Depending upon when a given decision was delivered, it may or may not carry with it the full precedential import otherwise due an opinion of the Court. Specifically, the precedential significance afforded a decision issued during a particular Court era is derived from the degree of constitutional authority under which the Court in question operated.

The time periods examined herein include the Court's founding during the Republic, its operation during the Civil War, and the three Reconstruction Courts (Presidential Reconstruction Court, Military Court, and Semicolon Court) that followed.

This article revisits how these epochs in the Court's history continue to affect the precedential persuasiveness of the Court's jurisprudence today.

The Inaugural Session of the Republic Supreme Court—January 1840 Term

The Congress of the Republic of Texas enacted legislation to create the Supreme Court on December 15, 1836¹ and elected the Court's Chief Justice and four Associate Judges the following day.² Yet the inaugural term of the Republic Supreme Court did not actually convene until *three years later* on January 13, 1840.³

Under the Republic Constitution of 1836, the Supreme Court had only one permanent member—its Chief Justice.⁴ The Court's Associate Judges were comprised of a rotating and fluctuating roster of district judges serving dual *ex officio* roles on the Court.⁵ Indeed, the

¹ Act of Dec. 15, 1836, 1 H.P.N. GAMMEL, LAWS OF TEXAS 1822–97, 1139 (Austin, Gammel Book Co. 1898).

² Tex. J. Res., 1st Cong. 95–96 (1836).

³ James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 248, 248 n.63, 253 (1986) (explaining at length the possible explanations for this delay) [hereinafter *Short History*]; see James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013), 20.

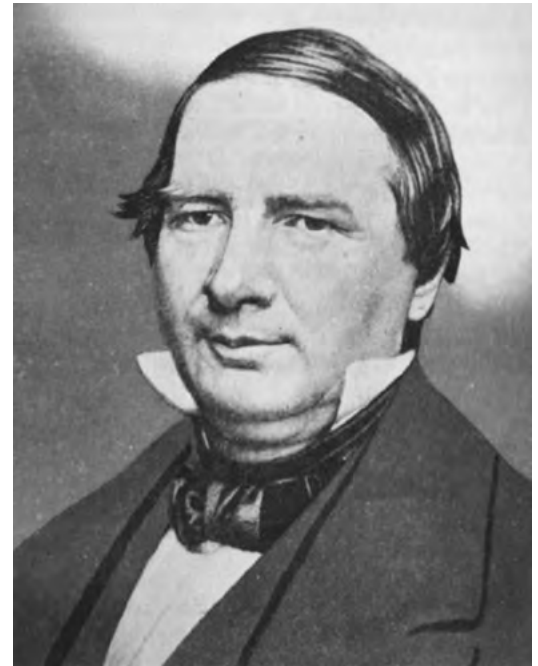
⁴ *Short History*, 65 TEX. L. REV. at 241; see F.A. Williams, *Suggestions for Improving Court Procedure in Texas*, 5 TEX. L. REV. 174, 174 (1927) [hereinafter *Court Procedure*]; see also Repub. Tex. Const. of 1836, art. IV, § 7 (1836).

⁵ *Short History*, 65 TEX. L. REV. at 241, 295; see Haley, *Texas Supreme Court*, 54; *Court Procedure*, 5 TEX. L. REV. at 174. Because district judges were required to hold court in the various counties constituting their judicial district, district judges would travel throughout their districts during the spring and fall, which left only the summer or winter free to fulfill their duties as Associate Judges of the Supreme Court. *Short History*, 65 TEX. L. REV. at 241. This travel demand often meant that many district judges would decline to serve on the Court at all. *Ibid.* at 243. Only 16 of the 25 Republic district judges ever attended a session of the Supreme Court. *Ibid.* Absence

Republic Supreme Court was little more than a “temporary committee composed of the district judges, presided over by a permanent chief justice.”⁶

The Court issued its first opinion in January 1840—*Texas v. McCulloch*—which perhaps prophetically dismissed the first appeal ever brought before the Court for lack of jurisdiction.⁷ The January 1840 term convened in the home of Major Asa Brigham, who was then the Treasurer of the Republic and would later serve as Mayor of Austin in 1842.⁸ His residence was located on what is now the southwest corner of Congress Avenue and Second Street, which is currently occupied by a 22-story office tower.⁹ Although brief, the Court’s maiden session boasted an opinion output that would be the envy of any modern court clerk—49 opinions in just 2 weeks.¹⁰

McCulloch was appropriately denoted as cause number “I,” but was authored by the Court’s *third* Chief Justice—Thomas Jefferson Rusk.¹¹ The reasons for the three-year delay in the Court’s operation and its first opinion being authored by its third Chief Justice include the failure of the Court to achieve a quorum in 1837, the likely suicide of its first Chief Justice in 1838, and the Republic Congress’s rejection of the second Chief Justice appointee—the Republic’s then-Attorney General, John Birdsall.¹² As a result, the first period of precedential Texas Supreme Court authority began with *McCulloch* in January 1840, and proceeds from page 357 of *Dallam’s Digest*.¹³ The Republic Court would go on to issue



Chief Justice Thomas J. Rusk presided over the first session of the Republic of Texas Supreme Court in January 1840. Photo from the Justices of Texas Collection, courtesy of the University of Texas Tarlton Law Library.

of district judges from their duties as Supreme Court Associate Judges was so pronounced that the Republic Congress even passed a law making failing to attend a Supreme Court session by a district judge punishable by a \$1,000 fine—fully one third of a district judge’s salary at that time. *Compare ibid.* at 265, with James W. Paulsen, *A Sesquicentennial Celebration: The Establishment of a Unique Texas Institution*, 53 TEX. B.J. 43, 43 (Jan. 1990) [hereinafter *Sesquicentennial Celebration*].

⁶ *Short History*, 65 TEX. L. REV. at 241.

⁷ *Texas v. McCulloch*, Dallam 357 (Tex. 1840); see Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 16.

⁸ *Sesquicentennial Celebration*, 53 TEX. B.J. at 43; see *Short History*, 65 TEX. L. REV. at 253; see also Jeffrey Stuart Kerr, *Seat of Empire: The Embattled Birth of Austin, Texas* (Lubbock: Texas Tech University Press, 2013), 205.

⁹ Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006, at 8–9 n.12 (noting that street corner is now occupied by the 100 Congress building).

¹⁰ *Short History*, 65 TEX. L. REV. at 253–54.

¹¹ *McCulloch*, Dallam at 357.

¹² *Texas Supreme Court*, 19–20; *Lone Star Law*, 19; see *Sesquicentennial Celebration*, 53 TEX. B.J. at 43; *Short History*, 65 TEX. L. REV. at 252; James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305, 316 (Dec. 1986) [hereinafter *Republic Judges*]; *History of the Supreme Court*, 10.

¹³ *McCulloch*, Dallam at 357. For more on *Dallam’s Digest*, see Dylan O. Drummond, “Dallam’s Digest and the Unofficial First Reporter of the Supreme Court of Texas,” *Journal of the Texas Supreme Court Historical Society* 2 no. 3 (Spring 2013): 8 [hereinafter *Unofficial First Reporter*].

170 opinions during its existence from 1840 to 1845.¹⁴

Although decisions of the Republic Supreme Court remain precedential, they were nevertheless affected by realities of frontier life, including frequent illness,¹⁵ Indian attack,¹⁶ criminal insurgency,¹⁷ and ongoing war with Mexico.¹⁸ Not the least of these hardships was the Court's lack of access to legal materials, including reporters and digests.¹⁹ Because Associate Judges traveled within their judicial districts for most of the year, much of what reference materials a district judge possessed was limited by what he could fit in his saddlebags.²⁰ Even gaining access to previous decisions of the Republic Court (at least from a prior panel on which the authoring Judge did not sit)²¹ was problematic because no official reprinting of Court decisions was undertaken until 1848.²²

Transition from Republic to State—June 1844 Term to December 1845 Term

While it might seem logical for decisions of a prior sovereign Republic to be regarded as merely persuasive authority by the succeeding State's courts, the precedence of Texas Supreme Court authority was unaffected by the transition from Republic to State. To this day, it remains mandatory authority on its successor.

The succession formally began on March 1, 1845 when U.S. President John Tyler signed a joint resolution of the U.S. Congress authorizing the annexation of the Republic of Texas as a State of the Union.²³ Some three months later, the Republic Congress accepted the United

¹⁴ James W. Paulsen, *The Missing Cases of the Republic: Reporter's Introduction*, 65 TEX. L. REV. 372, 372 n.1 (Dec. 1986) [hereinafter *Missing Cases*]. The Court issued 18 opinions during its January 1840 term, 30 during its January 1841 term, 19 during the January 1842 term, 38 during the January 1843 term, 35 during the June 1844 term, and 30 during the December 1845 term. Compare *ibid.*, with Daffan Gilmer, *Early Courts and Lawyers of Texas*, 12 TEX. L. REV. 435, 449 (1934).

¹⁵ Four Associate Judges died while in office, at least two of which succumbed to yellow fever. *Short History*, 65 TEX. L. REV. at 260.

¹⁶ Future Chief Justice John Hemphill was famously attacked in his own courtroom while serving as a district judge by an Indian warrior during the Council House Fight, in response to which he disemboweled his attacker with his Bowie knife. *Ibid.* at 255, 260; see Haley, *Texas Supreme Court*, 26–27. There were reports of Chief Justice Hemphill's own law books being used by the Comanche to torture their captives by forcing the prisoners to read the books aloud. *Short History*, 65 TEX. L. REV. at 271. An observer remarked, “[d]eath would have been preferable” to such treatment. *Ibid.* When not using the law books as torture aids, the Comanche tore out the pages to roll into cigarettes. *Ibid.*

¹⁷ District Judge Robert McAlpin “Three Legged Willie” Williamson once famously responded to a Shelby County ruffian's declaration that his Bowie knife was the “law of Shelby County” by pulling his pistol on the man and declaring it the “constitution that overrules your law!” Compare Haley, *Texas Supreme Court*, 25, with *Short History*, 65 TEX. L. REV. at 261. In law as in weaponry, hierarchies of authority matter.

¹⁸ District Judge Anderson Hutchinson was holding court in San Antonio in September 1842 when the Mexican army attacked, and subsequently imprisoned him in Mexico City for the next eight months, along with two other (one former and one future) Supreme Court Associate Judges. *Short History*, 65 TEX. L. REV. at 263–64.

¹⁹ *Short History*, 65 TEX. L. REV. at 270–76; see Ariens, *Lone Star Law*, 20; *History of the Supreme Court*, 15 (“there were practically no authorities accessible to the [Republic C]ourt”).

²⁰ *Short History*, 65 TEX. L. REV. at 270.

²¹ *Ibid.* at 275, 275 n.236.

²² Compare *ibid.* at 275, with James W. Paulsen and James Hambleton, *Whatever Happened to 1845? The Missing Decisions of the Texas Supreme Court*, 48 TEX. B.J. 830, 830 (July 1985) [hereinafter *Whatever Happened*].

²³ S.J. Res. 8, 28th Cong., 5 Stat. 797, 798 (1845); see Ralph H. Brock, *“The Republic of Texas is No More”: An Answer to the Claim That Texas Was Unconstitutionally Annexed to the United States*, 28 TEX. TECH L. REV. 679, 691 (1997) [hereinafter *Texas is No More*].

States' joint resolution of annexation on June 18, 1845.²⁴ That October, the Texas electorate ratified the new State Constitution.²⁵

President Tyler's successor, James K. Polk, signed a subsequent joint resolution of the U.S. Congress recognizing the admission of the State of Texas into the Union just before the close of the year on December 29, 1845.²⁶ This date is also recognized by the U.S. Supreme Court as the date upon which "Texas was admitted into the Union."²⁷ From that day forward, the Court explained, "the laws of the United States were declared to be extended over, and to have full force and effect within, the State," so that "the old system of [Republic] government, so far as it conflicted with the federal authority, became abrogated immediately on her admission as a State."²⁸

But article 13, section 3 of the 1845 Texas Constitution contained a savings clause that expressly mandated "[a]ll laws and parts of laws now in force in the Republic of Texas ... shall continue and remain in force as the laws of this State."²⁹ Therefore, no Republic Court decision has ever been disregarded by its State Court successor.

Even though President Polk officially recognized Texas's admission into the United States in December 1845, some sixteen of the Court's decisions issued during its December 1845 term were not published until nearly 150 years later in December 1986.³⁰ Because these decisions were issued between late December 1845 and early January 1846, they appeared too late to be included in *Dallam's Digest* (published September 1, 1845), and—not being decisions of the newly-formed State—were not published by Texas's state government after annexation.³¹

Additionally, the 1845 Constitution expanded the permanent Supreme Court judiciary beyond just the Chief Justice.³² Thereafter, the Chief Justice was joined by two Associate Justices (no longer called Associate "Judges"), who were to be appointed by the Governor and confirmed by two-thirds of the Texas Senate.³³

²⁴ Tex. J. Res., 9th Cong. 1, 3 (1845), reprinted in 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822–97, 1225, 1227 (Austin, Gammel Book Co. 1898); see *Texas is No More*, 28 TEX. TECH L. REV. at 691–92.

²⁵ *Texas is No More*, 28 TEX. TECH L. REV. at 692.

²⁶ *Ibid.*

²⁷ See *E.P. Calkin & Co. v. Cocke*, 55 U.S. 227, 235–36 (1852), overruling *Cocke v. E.P. Calkin & Co.*, 1 Tex. 542, 560 (1846) (holding that certain sections of article 13 of the newly ratified state constitution postponed the operation of the laws of the Union until such time as a state government was organized on February 16, 1846).

²⁸ *Cocke*, 55 U.S. at 235–36.

²⁹ TEX. CONST. of 1845, art. XIII, § 3; see Hon. Bill Aleshire, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 206 n.76 (2000).

³⁰ *Missing Cases*, 65 TEX. L. REV. at 372–73. In order to compile and publish these decisions, the Court appointed attorney Jim Paulsen, later a founding member of the Texas Supreme Court Historical Society, as the first Court Reporter in nearly a quarter century. Compare 65 TEX. L. REV. at iv (reprinting the Court's April 28, 1985 order appointing Jim Paulsen as the Court's Reporter for its December 1845 term), with *Unofficial First Reporter*, 11 (listing every Court Reporter from James Dallam to Jim Paulsen).

³¹ Compare *Missing Cases*, 65 TEX. L. REV. at 372, 377–449, James W. Paulsen and James Hambleton, *The "Official" Texas Court Reports: Birth, Death and Resurrection*, 49 TEX. B.J. 82, 82 (Jan. 1986), *Whatever Happened*, 48 TEX. B.J. at 830, with Bowen C. Tatum, Jr., *A Texas Portrait: James Wilmer Dallam*, 34 TEX. B.J. 257, 258 (Mar. 1971); see also James D. Lynch, *The Bench and Bar of Texas* (St. Louis: Nixon-Jones Printing Co., 1885), 67.

³² Haley, *Texas Supreme Court*, 54.

³³ *Ibid.*; *Court Procedure*, 5 TEX. L. REV. at 175; see Tex. Const. of 1845, art. IV, §§ 2, 5.

The Confederate Court—1861 to 1865 (26 Tex. through 27 Tex.)

Although Texas was in open rebellion against the United States from 1861 to 1865, the decisions of the Confederate Texas Supreme Court are nevertheless precedential.³⁴

During the Civil War, the Court operated under a different constitution (the Constitution of 1861) than it did prior to that war's outbreak or subsequently during Reconstruction.³⁵ But in *Texas v. White*,³⁶ the U.S. Supreme Court confirmed just three years after the Civil War ended that Texas "did not cease to be a State, nor her citizens to be citizens of the Union" during the conflict.³⁷ The High Court elaborated, reasoning that "the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null."³⁸

Though fully precedential because the Confederate Court sat pursuant to the Constitution of 1861,³⁹ the Court itself acknowledged that decisions issued from 1861 to 1865 were adjudicated "when the [C]ourt was compelled to dispose of the business before it in the absence of counsel, and without the aid of their investigation of questions upon which it was forced to act."⁴⁰



Justice James Hall Bell, although a Unionist, continued to sit on the Texas Supreme Court during the Confederacy. Photo from the Justices of Texas collection, courtesy of the University of Texas Tarlton Law Library.

³⁴ James W. Paulsen and James Hambleton, *Confederates and Carpetbaggers: The Precedential Value of Decisions from the Civil War And Reconstruction Era*, 51 TEX. B.J. 916, 916 (Oct. 1988) [hereinafter *Confederates and Carpetbaggers*].

³⁵ See, e.g., THE GREENBOOK: TEXAS RULES OF FORM 136 (Texas Law Review Ass'n, 13th ed. 2015) (acknowledging Texas's constitutions of 1845, 1861, 1866, and 1869).

³⁶ Famed author of the *Digest of the Laws of Texas*, George W. Paschal (who also served as the Court's official reporter from 1866 to 1869 for volumes 28–31 of the *Texas Reports*), represented Texas before the U.S. Supreme Court in *White*. See *White*, 74 U.S. at 717; Robert B. Gilbreath, *Slaves, Reconstruction, and the Supreme Court of Texas*, APP. ADVOC., Fall 2006, at 9; Robert B. Gilbreath, *The Supreme Court of Texas and the Emancipation Cases*, 69 TEX. B.J. 946, 953 n.16 (Nov. 2006).

³⁷ See *Texas v. White*, 74 U.S. 700, 726 (1868), overruled on other grounds by *Morgan v. United States*, 113 U.S. 476, 496 (1885).

³⁸ *Ibid.*

³⁹ Haley, *Texas Supreme Court*, 74; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 917 (Confederate Court opinions cited by not only the Texas Supreme Court, but the supreme courts of other states, and even the U.S. Supreme Court); *Court Procedure*, 5 TEX. L. REV. at 175.

⁴⁰ *Cherry v. Speight*, 28 Tex. 503, 517–18 (1866) (then-Chief Justice George F. Moore criticizing his own earlier opinion in *Taney v. Edwards*, 27 Tex. 224 (1863), issued when he was Associate Justice). Indeed, the general diminishing of civil legal practice in Texas during the Civil War led Paschal to undertake the preparation of his seminal *Digest of the Laws of Texas*. *Preface*, 25 Tex. Supp. at vii ("The courts of justice were entirely suspended, and neither the few members of the bar who remained in their profession, nor the officers or people, had use for judicial precedents."), cited in James W. Paulsen and James Hambleton, *Brother, Can You Spare a Cite?* Robard's Texas Conscript Cases, *The Official Texas Reporter That Has Never Been Cited*, 50 TEX. B.J. 1256, 1257 (Dec. 1987); Hon. James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23, 32, 32 n.7 (1949) (recounting that, during the Civil War, a "lawyer's office may, also, and in times like the present many doubtless are, very private and quiet and undisturbed places at all hours").

The Presidential Reconstruction Court—1866 to 1867 (28 Tex. through 30 Tex. 374)⁴¹

The “Presidential Reconstruction Court” is so named for its establishment during the period that would later be known as Presidential Reconstruction.⁴² During this time, U.S. President Andrew Johnson—who succeeded to the office after President Abraham Lincoln’s assassination—appointed former Texas congressman Andrew Jackson Hamilton as Provisional Governor of Texas.⁴³

The Court convened pursuant to the Constitution of 1866, which increased the Court’s Justices from three to five, and subjected its Justices to popular election.⁴⁴

Even though the Presidential Reconstruction Court was provisional and its tenure was short-lived, its decisions are nevertheless precedential today.⁴⁵ When, in 1869, Court Reporter George W. Paschal published the Court’s decisions in volume 28 of the *Texas Reports*, he noted that the “judgments rendered have been respected.”⁴⁶ Former Supreme Court Justice James Norvell subsequently opined that the Presidential Reconstruction Court “represents no break with the Texas tradition.”⁴⁷ Another commentator observed that “[n]o judicial act of this court was ever the subject of merited criticism; and the precedents established by the opinions of those men as firmly fixed today as they were when announced from the bench.”⁴⁸

Perhaps the final word on the precedential weight accorded the Presidential Reconstruction Court is that of Chief Justice Joe Greenhill, who wrote that the Court “acted ... with the general consent of the people ... and its decisions, unlike those of the two Courts which succeeded it, are regarded as authoritative today.”⁴⁹

The Military Court—October 1867 (30 Tex. 375)⁵⁰ to April 16, 1870 (33 Tex. 583)⁵¹

In the aftermath of President Lincoln’s assassination, the U.S. Congress impeached

⁴¹ *Billiard v. State*, 30 Tex. 367 (1867).

⁴² Haley, *Texas Supreme Court*, 75–79. For a detailed review of the Presidential Reconstruction Court, please see Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and “Redemption,”* 40 ST. MARY’S L.J. 17, 36–50 (2008) [hereinafter *Reconstruction and Redemption*].

⁴³ Hon. James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 280 (1959) [hereinafter *Semicolon Court*]; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 917.

⁴⁴ *Ibid.*, 77; see *Court Procedure*, 5 TEX. L. REV. at 175.

⁴⁵ See *Confederates and Carpetbaggers*, 51 TEX. B.J. at 917; see *Texas Supreme Court*, 78.

⁴⁶ *Preface*, 28 Tex. at vii–viii (1869). For more on Paschal, please see Dylan O. Drummond, “George W. Paschal: Justice, Court Reporter, and Iconoclast,” *Journal of the Texas Supreme Court Historical Society* 2, no. 4 (Summer 2013): 7.

⁴⁷ *Semicolon Court*, 37 TEX. L. REV. at 287.

⁴⁸ George E. Shelley, *The Semicolon Court of Texas*, *Southwestern Historical Quarterly* 48 (1945): 449.

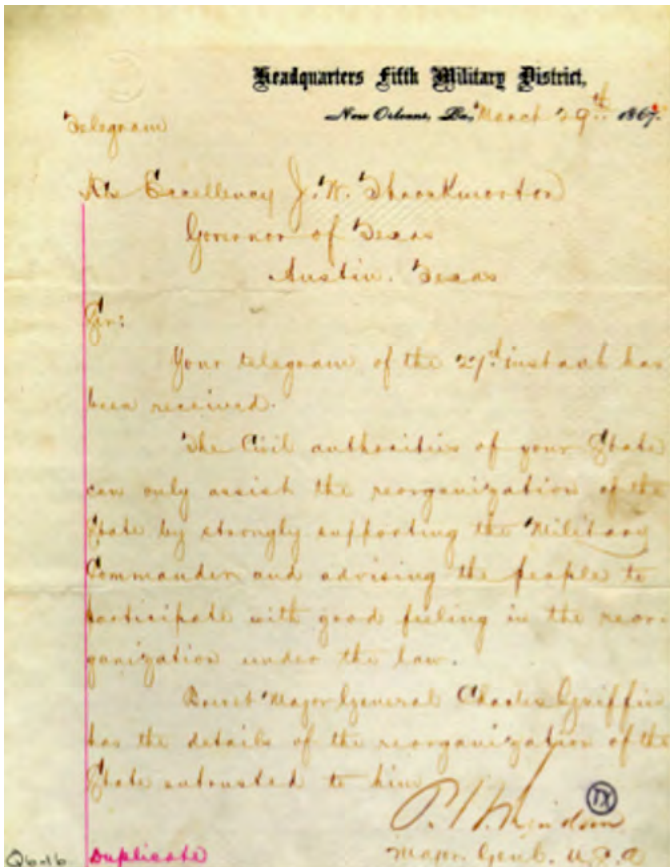
⁴⁹ Haley, *Texas Supreme Court*, 78, 269 n.11, 297.

⁵⁰ *Hammond v. Myers*, 30 Tex. 375 (1867).

⁵¹ *Johnson v. State*, 33 Tex. 570 (1870). Professors Paulsen and Hambleton peg the final page of Military Court opinions to page 584 of volume 33 of the *Texas Reports*, while former Attorney General Crawford C. Martin and Texas Supreme Court Chief Justice Joe Greenhill denote the final page as 583. Compare *Confederates and Carpetbaggers*, 51 TEX. B.J. at 920, with HON. CRAWFORD C. MARTIN, OFFICE OF THE ATTORNEY GENERAL OF TEXAS, UNIFORM CITATIONS FOR OPINIONS, CORRESPONDENCE AND BRIEFS 11 (1967) [hereinafter UNIFORM CITATIONS FOR OPINIONS]; Hon. Joe Greenhill, *Uniform Citations for Briefs: With Observations on the Meanings of the Stamps or Markings Used in Denying Writs of*

President Johnson and replaced Presidential Reconstruction with its own brand of Congressional Reconstruction.⁵²

Shortly thereafter, Congress refused to recognize Texas's government under the Constitution of 1866, and empowered military commanders to remove and replace state officials.⁵³ Major General Philip Sheridan was placed in command of the Fifth District, which included Texas and Louisiana.⁵⁴ In September 1867, military authorities issued Special Order No. 169, which removed the entire Texas Supreme Court for "their known hostility to the government of the United States."⁵⁵ In its place, Sheridan appointed replacement Justices to the Court that would come to be known as the "Military Court."⁵⁶



(Left): General Philip Sheridan's March 29, 1867 telegram to Texas Gov. James W. Throckmorton, demanding civilian support for Military Reconstruction. Image from the Records of James W. Throckmorton, courtesy of Texas State Library and Archives Commission.

(Right): General Philip Sheridan. Photo courtesy of Wikipedia.

Error, 27 TEX. B.J. 323, 385 (May 1964) [hereinafter *Uniform Citations for Briefs*]. An online review of the pagination of the final opinion of the Military Court, *Johnson v. State*, 33 TEX. 570 (1870), reveals that it does indeed end on page 583. The next opinion, *Johnston's Admin. v. Shaw*, 33 TEX. 585 (1871), begins on page 585.

⁵² Haley, *Texas Supreme Court*, 79; *Semicolon Court*, 37 TEX. L. REV. at 281.

⁵³ *Confederates and Carpetbaggers*, 51 TEX. B.J. at 917-19.

⁵⁴ Haley, *Texas Supreme Court*, 79; *Semicolon Court*, 37 TEX. L. REV. at 281.

⁵⁵ *Reconstruction and Redemption*, 40 ST. MARY'S L.J. at 25. Compare Haley, *Texas Supreme Court*, 80, *Semicolon Court*, 37 TEX. L. REV. at 281, with *Confederates and Carpetbaggers*, 51 TEX. B.J. at 917.

⁵⁶ Haley, *Texas Supreme Court*, 80-81; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 918; *Semicolon Court*, 37 TEX. L. REV. at 283. For a detailed review of the Military Court, please see *Reconstruction and Redemption*, 40 ST. MARY'S L.J. at 50-77.

As Chief Justice George F. Moore explained in 1878 (at least for himself, if not the entire Court at the time), the Military Court “did not exercise its functions under and by virtue of the Constitution and laws of the State of Texas, but merely by virtue of military appointment.”⁵⁷ Because it did, Chief Justice Moore concluded he could not “regard the opinion of this [military] tribunal as authoritative exposition of the law involved in the cases upon which it was called to pass, but merely as conclusive and binding determinations of the particular case in which such opinion was expressed.”⁵⁸

The following year, the Supreme Court adopted Chief Justice Moore’s position as its own—reasoning that, because the Military Court was not “organized under the Constitution and laws of the State,” its “opinions have not received the same authoritative sanction given to those of the [C]ourt as regularly constituted.”⁵⁹ Because the Military Court was without “constitutional basis,” Justice Norvell concluded, its decisions do not operate as precedents under the rule of *stare decisis*.⁶⁰

As a result, decisions issued during the thirty-three months the Military Court was installed are without precedential value in Texas.⁶¹ Nonetheless, just because these opinions are not technically precedential “does not mean that a later court will not find [them] persuasive anyway.”⁶² The Military Court disbanded on April 16, 1870 when military authority over Texas officially ended.⁶³

The Semicolon Court—December 1, 1870 (33 Tex. 585)⁶⁴ to⁶⁵ January 6, 1874 (39 Tex. 705)⁶⁶

Civil government resumed in Texas under the newly-ratified Constitution of 1869.⁶⁷ The new constitution reconfigured the Court, reducing its number back down to three Judges (renamed yet again from the former Justices), who were to be appointed by the Governor and confirmed by the Senate.⁶⁸ Instead of a Chief Justice, the Court was headed by a Presiding Judge.⁶⁹

Because the Semicolon Court acted under the authority of the 1869 Constitution, its

⁵⁷ *Taylor v. Murphy*, 50 Tex. 291, 295 (1878) (Chief Justice Moore qualified his remarks as being his “individual opinion,” even though they were delivered in a unanimous opinion of the Court).

⁵⁸ *Ibid.*

⁵⁹ *Peck v. San Antonio*, 51 Tex. 490, 492 (1879).

⁶⁰ *Semicolon Court*, 37 TEX. L. REV. at 287.

⁶¹ *Peck*, 51 Tex. at 490; see Haley, *Texas Supreme Court*, 81; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 918; UNIFORM CITATIONS FOR OPINIONS at 11; *Uniform Citations for Briefs*, at 385; *Semicolon Court*, 37 TEX. L. REV. at 287.

⁶² *Confederates and Carpetbaggers*, 51 TEX. B.J. at 918–19; see Haley, *Texas Supreme Court*, 81.

⁶³ Haley, *Texas Supreme Court*, 81. *But see* UNIFORM CITATIONS FOR OPINIONS at 11 (placing this date as June 8, 1870); *Uniform Citations for Briefs*, 27 TEX. B.J. at 385 (same).

⁶⁴ *Johnston’s Admin. v. Shaw*, 33 Tex. 585 (1871).

⁶⁵ When citing to volumes 34 and 35 of the *Texas Reports*, note that two non-precedential Military Court cases are published in volume 34 (*Kottwitz v. Knox*, 34 Tex. 689 (1869) and *Bird v. Montgomery*, 34 Tex. 714 (1870)), and one non-precedential Military Court decision is published in volume 35 (*McArthur v. Henry*, 35 Tex. 801 (1869)). *Confederates and Carpetbaggers*, 51 TEX. B.J. at 920 n.3.

⁶⁶ *Ex Parte Rodriguez*, 39 Tex. 705 (1874).

⁶⁷ Haley, *Texas Supreme Court*, 81; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919.

⁶⁸ Haley, *Texas Supreme Court*, 81–82; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919; *Semicolon Court*, 37 TEX. L. REV. at 284; *Court Procedure*, 5 TEX. L. REV. at 176.

⁶⁹ Haley, *Texas Supreme Court*, 82.

decisions are undeniably precedential.⁷⁰ Yet the final case it decided, *Ex Parte Rodriguez*,⁷¹ cast a jurisprudential pall over the whole of its tenure and gave it its ignominious moniker.⁷²

The case itself as published in the *Texas Reports* is undated.⁷³ And the opinion does not even begin until page 748—the first forty-three pages containing the text of various motions and transcriptions of oral argument as was the practice of the day.⁷⁴ Lacking a date of decision, perhaps compounded with the header in the *Texas Reports* noting it was decided during the 1873 term, has resulted in *Rodriguez* being cited by the Court as having been decided both in 1873 and 1874.⁷⁵ More recently, however, several historians and the Court's own archivist have confirmed that *Rodriguez* was issued on January 6, 1874.⁷⁶

Rodriguez was prompted by an original habeas corpus proceeding brought by a jailed voter—Joseph Rodriguez—who was arrested for voting twice in the gubernatorial election.⁷⁷ The makeweight reputation of the *Rodriguez* Court springs from its invalidation—on the sole basis of the placement of a semicolon in a provision in the Texas Constitution of 1869—of the December 2, 1873 gubernatorial election at which incumbent Reconstruction Republican Edmund J. Davis was defeated by Democrat Richard Coke by a two-to-one margin.⁷⁸ Specifically, the provision at issue read:

All elections for State, District and County officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four day, from 8 o'clock A.M. until 4 o'clock P.M. of each day.⁷⁹

Because the 13th Legislature had passed a law before the gubernatorial election reducing the number of days the polls were to remain open from four to one, the Court's decision hinged on whether article 3, section 6 prevented the statutory change and thereby invalidated the election held under its auspices.⁸⁰

Increasing disdain for the decision appears in the post-Civil War political lens through which it was viewed. Reconstructionist Governor Davis had appointed each Judge on the Court

⁷⁰ See *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919–20; see Haley, *Texas Supreme Court*, 87.

⁷¹ 39 Tex. 705 (1874).

⁷² *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919–20.

⁷³ See *Ex Parte Rodriguez*, 39 Tex. 705, 705–76.

⁷⁴ See *ibid.* at 705–47.

⁷⁵ Compare *Davenport v. Garcia*, 834 S.W.2d 4, 16 (Tex. 1992) (as 1874), with *Hofer v. Lavender*, 679 S.W.2d 470, 472 n.1 (Tex. 1984) (as 1873) and *Spears v. Davis*, 398 S.W.2d 921, 926 n.3 (Tex. 1966) (same).

⁷⁶ See, e.g., Email from Tiffany Gilman, Archivist, Supreme Court of Texas, to author (Apr. 7, 2016, 15:06 CST) (on file with author); Haley, *Texas Supreme Court*, 85; Ariens, *Lone Star Law*, 46; Lance A. Cooper, "A Slobbering Lame Thing"? The Semicolon Case Reconsidered, *Southwestern Historical Quarterly* 101 (1998): 321 [hereinafter *Slobbering Lame Thing*].

⁷⁷ 39 Tex. 706, 773–76 (1873); Robert W. Higgason, *A History of Texas Appellate Courts: Preserving Rights of Appeal Through Adaptations to Growth, Part 1 of 2: Courts of Last Resort*, 39 HOUS. LAW. 20, 23 (Apr. 2002). At least one historian has called Rodriguez's arrest and subsequent petition to the Court a "legal fiction" designed to keep Governor Davis in office. Ariens, *Lone Star Law*, 45–46.

⁷⁸ See TEX. CONST. OF 1869 art. III, § 6; *Lone Star Law*, 45 see also *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919.

⁷⁹ TEX. CONST. OF 1869 art. III, § 6.

⁸⁰ See *Slobbering Lame Thing*, 323.



Members of the Semicolon Court and staff, 1873. (Bottom row, left to right): Associate Judge Moses B. Walker, Presiding Judge Wesley Ogden, and Associate Judge J. D. McAdoo. (Standing behind them): Court Reporter E. M. Wheelock and Clerk of the Court W. F. De Normandie.
PICA 04708, Austin History Center, Austin Public Library.

when *Rodriguez* came before it.⁸¹ His appointees passed judgment on the validity of an election Davis had just lost in a landslide. The opinion met, unsurprisingly, with hostility from the victorious super-majority of the electorate.⁸²

The resulting impression amongst the bar and the public was that the “whole case was a trumped-up affair to get the [C]ourt to pass upon the legality of the election.”⁸³ The decision caused an armed band to march on the Capitol to force out Governor Davis.⁸⁴ Consequently, Texas Supreme Court historian James L. Haley noted that *Rodriguez* “is perhaps the only state

⁸¹ *Compare Reconstruction and Redemption*, 40 ST. MARY’S L.J. at 78, with Haley, *Texas Supreme Court*, 238; *Slobbering Lame Thing*, 324–25.

⁸² See, e.g., Haley, *Texas Supreme Court*, 85–86; Ariens, *Lone Star Law*, 46.

⁸³ *Semicolon Court*, 37 TEX. L. REV. at 285.

⁸⁴ Haley, *Texas Supreme Court*, 86; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919.

supreme court decision in American history that was reversed by a mob.”⁸⁵ The Court’s Reporter even noted in a footnote to *Rodriguez* that “the question before the [C]ourt ... received its final practical solution as a *political* and not a judicial question.”⁸⁶

Condemnation of the opinion did not lessen much with time. One of the most generous comments offered on the Semicolon Court came from former Texas Attorney General and Supreme Court Chief Justice John L. Hill, Jr., who proposed that the Court’s “[J]udges were not necessarily incompetent or unfair, just unwanted.”⁸⁷

But other Court observers were not so forgiving. Early Texas Supreme Court historian J. Harbert Davenport called *Rodriguez* an “infamous decision of a partisan Supreme Court, composed of foreign scalawags and military satellites”⁸⁸ Not satisfied that he had adequately conveyed his contempt for the decision, Davenport continued:

It was reserved to the [C]ourt as thus organized to place the only *blot* upon the *pure*, honored and *exalted* reputation of the Supreme Court of Texas which has marred the splendor of its history from its creation to the present time. In the *judicial annals* of no other country has there ever been a more lamentable, shameless prostitution of a court of justice to the interest of lawless political conspirators against constitutional government, the right of suffrage, and the liberties of a free people than that disclosed in *Ex Parte Rodriguez*, decided by the [C]ourt.⁸⁹

When informing former (and future) Texas Supreme Court Chief Justice Oran M. Roberts of the decision, the former district judge and counsel for the state,⁹⁰ Alexander W. Terrell, called the opinion a “slobbering lame thing.”⁹¹ Roberts himself described *Rodriguez* as:

So *odious* ... in the estimation of the bar of the State, that no Texas lawyer likes to cite any case from the volumes of the Supreme Court reports which contain decisions of the [C]ourt that delivered that opinion, and their pages are, as it were, tabooed by the common consent of the legal profession.⁹²

More recently, Court historians have sought to redeem the fallen reputation of the Semicolon Court. In 1998, historian and lawyer Lance Cooper provided a lengthy and detailed

⁸⁵ *Ibid.*

⁸⁶ *Rodriguez*, 39 Tex. at 776; *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919–20.

⁸⁷ Hon. John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 347 n.38 (1998).

⁸⁸ Davenport, *History of the Supreme Court*, 82.

⁸⁹ *Ibid.* at 97 ((emphasis added) (noting the inspiration for this article’s title)).

⁹⁰ In a curious bit of historical fate, *Rodriguez*’s lead counsel was A.J. Hamilton, who actually drafted article 3, section 6 of the 1869 Constitution (albeit without the notorious semicolon, which was likely incompetently but not nefariously added later by military scribes). Ariens, *Lone Star Law*, 46; *Slobbering Lame Thing*, 334–36. During the constitutional convention, future-governor Davis even moved to strike the section entirely, but was rejected. *Slobbering Lame Thing*, 325

⁹¹ *Slobbering Lame Thing*, 325; Haley, *Texas Supreme Court*, 84, 236, 239.

⁹² *Comprehensive History of Texas*, 201 ((emphasis added) (noting the inspiration for this article’s title)).

defense of the opinion on its merits.⁹³ This coming year at the Texas State Historical Association's annual meeting, Multi-District Litigation Panel Civil Court Judge Mark Davidson plans to present his own argument in support of both *Rodriguez* and the Semicolon Court, entitled "The Semicolon Court: An Honorable Court."

Despite the calamitous predictions of some, *Rodriguez* has not actually had the effect of making decisions issued by the Semicolon Court non-precedential.⁹⁴ Instead, certain decisions of that Court have sometimes been questioned⁹⁵ and, less frequently or recently, disregarded entirely.⁹⁶

Fully Precedential Texas Supreme Court Authority: January 1840 (Dallam 357)⁹⁷ to October 1867 (30 Tex. 374)⁹⁸ and 1871 (33 Tex. 585)⁹⁹ to the Present

Several periods of the Court's history have left their own deleterious marks on otherwise seminal decisions penned by towering figures of Texas jurisprudence. Whether it was the lack of available legal texts during the Republic Court, the absence of counsel during the Confederate Court, or the dearth of public support for the Semicolon Court, each of these historical episodes contributed their own measure of uncertainty and imprecision to the law of the Court.

Yet none but the Military Court have been precedentially denuded. It was undone neither by the quality of its decisions nor the caliber of its Justices, but instead by its artificial creation unmoored from constitutional mandate.

No other court in the nation's history has weathered such buffeting jurisdictional winds as has the Texas Supreme Court. From recognized national independence to statehood, through secession, war, and back to statehood, every decision the Texas Supreme Court has issued over the past 176 years remains fully precedential today save only for the two and a half years the Court sat pursuant to military installation.

⁹³ *Slobbering Lame Thing*, 321–39.

⁹⁴ *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919–20; see Haley, *Texas Supreme Court*, 78, 269 n.11, 297.

⁹⁵ See, e.g., UNIFORM CITATIONS FOR OPINIONS at 11; *Uniform Citations for Briefs*, at 385–86.

⁹⁶ *Confederates and Carpetbaggers*, 51 TEX. B.J. at 919–20.

⁹⁷ *Texas v. McCulloch*, Dallam 357 (Tex. 1840).

⁹⁸ *Billiard v. State*, 30 Tex. 367 (1867).

⁹⁹ *Johnston's Admin. v. Shaw*, 33 Tex. 585 (1871).



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Theodora Hemphill's Guide to the Texas Constitution

• Part III •

By David A. Furlow

Fellow citizens, we cannot escape history . . . In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give, and what we preserve. We shall nobly save, or meanly lose, the last, best hope of earth.

— President Abraham Lincoln, “Annual Message to Congress,” December 1, 1862.¹

Whenever [I] hear anyone arguing for slavery I feel a strong impulse to see it tried on him personally.

— President Abraham Lincoln, “Speech to the 140th Indiana Regiment,” March 17, 1865.²

We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.

— Charles Evans Hughes, “Speech before the Elmira, New Jersey Chamber of Commerce,” May 3, 1907.³

The story of Theodora Hemphill and the Texas Constitution continues. This article has examined the impact of Texas’s changing constitutions on Theodora Hemphill, the older daughter of Texas Supreme Court Chief Justice John Hemphill. In Part I, we saw how the 1845 Constitution made a slave of Theodora because her mother was Hemphill’s enslaved consort, Sabina. To emancipate his twelve-year-old daughter Theodora under the 1845 Constitution, then-Senator John Hemphill had to exile her to Ohio’s Wilberforce University, where she could receive an education while ending her legal status as a slave.

¹ Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, N.J.: Rutgers University Press, 1953), at 5, 537; <http://quod.lib.umich.edu/l/lincoln/lincoln5/1:1126?rgn=div1;singlegenre=All;sort=occur;subview=detail;type=simple;view=fulltext;q1=what+we+give%2C+and+what+we+preserve>.

² Basler, *Collected Works of Abraham Lincoln*, at 8, 361; <http://quod.lib.umich.edu/l/lincoln/lincoln8/>.

³ *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906-1908* (New York: G.P. Putnam’s Sons, 1908), at 139.

In Part II, we examined how Texas's Secession and adoption of the 1861 Constitution ushered Texas into the Confederacy. In response to Texas's Secession, John Hemphill's Unionist colleagues expelled him from the U.S. Senate. When he went to Richmond, Virginia in service to the Stars and Bars, Texas's 1861 Constitution barred Hemphill from emancipating any of his slaves, including his own daughters Theodora and Henrietta. John Hemphill died of malaria and liver disease in Richmond in early 1862, leaving his daughters free to fashion their own young lives while the Civil War tore their nation apart. One daughter died of consumption (tuberculosis) in Ohio's cold climate, but Theodora survived the war.

In this third part of the article, we'll follow Theodora as she returns to a defeated Texas after the Civil War. We'll investigate how the Union Army's military Reconstruction, Texas's 1869 Constitution, and three amendments to the U.S. Constitution empowered Theodora to stake a claim to her father's vast probate estate in Travis County, Texas. We'll see how Texas's 1876 Constitution and the "Redeemer" Texas Supreme Court segregated, sidelined and subordinated Theodora to second-class status based on her race and sex.

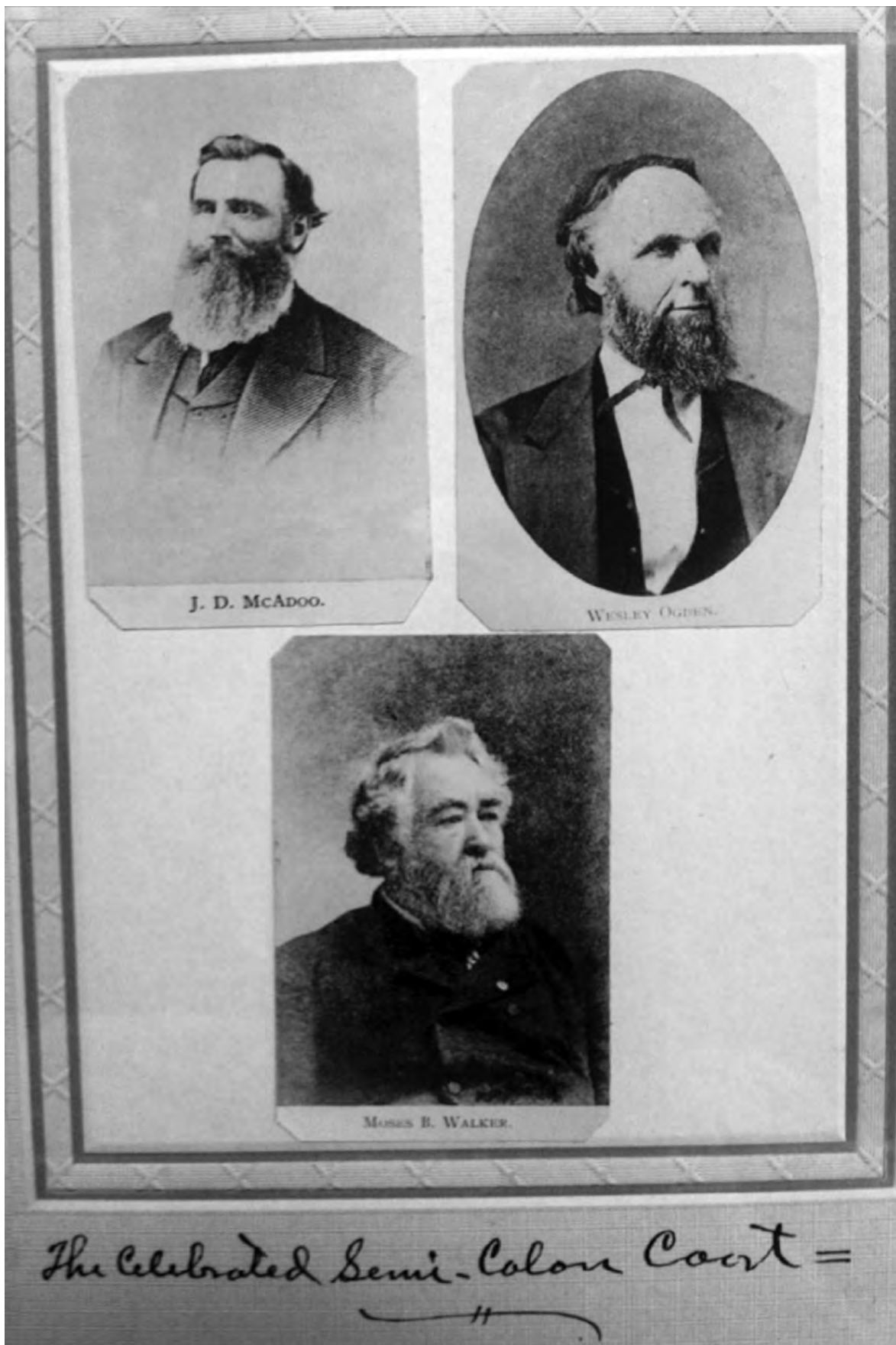
An armed band ended Reconstruction in 1874, resulting in the Redeemer Court's rise.

The Texas Supreme Court's Reconstruction Justices owed their jobs to a Radical Republican Congress and Yankee generals, guaranteeing their unpopularity in a state dominated by ex-Confederates. On January 6, 1874, a Reconstruction era Court comprised of Presiding Judge Wesley Ogden and Judges J.D. McAdoo and Moses B. Walker received the sobriquet "Semicolon Court" when they applied traditional rules of grammar in their statutory construction of the election law in the *Rodriguez* habeas corpus case.

The Semicolon Court earned the lasting enmity of Democrats not by parsing grammar but, instead, by invalidating the December 2, 1873 election in which a majority of voters cast their ballots against Republican Governor Edmund J. Davis and in favor of Democrat Richard Coke. An armed citizenry insisting upon the integrity of an election, or, alternatively, a howling rabble of armed ex-Confederates, turned Texas politics upside down when they besieged Governor Davis and his supporters in the Capitol in mid-January 1874. But President Ulysses S. Grant refused to send troops to support Governor Davis's retention of control, and Davis left office by the end of January to avert bloodshed.

On January 29, 1874, Governor Richard Coke appointed ardent, South Carolina-born secessionist, former slave-owner, and soon-to-be governor Oran M. Roberts as Chief Justice of the Texas Supreme Court.⁴ Chief Justice Roberts then convened a "Court of the Redeemers" that soon showed that the Confederacy's Lost Cause was not entirely lost.

⁴ See Gillmer, "Base Wretches," *Alabama Law Review* 59: 1553 and 1553 nn. 390-91. The 1860 Manuscript Census Returns, Schedule 1, identifies O. M. Roberts as a lawyer from South Carolina and, in Schedule 2, as the owner of eight slaves. *Ibid.*, 1553 n.390.



Judges of the Semicolon Court. Photo from Texas Supreme Court archives.

The Redeemers stripped mixed-race siblings of constitutionally-guaranteed inheritances.

The Redeemer Court swiftly reversed its Reconstruction panel's pro-freedman ruling in *Honey v. Clark*⁵ and other cases, and restored white supremacy in probate, property, and inheritance law in cases such as *Clements v. Crawford*⁶ and *Oldham v. McIver*.⁷ The common law principle of *stare decisis* has never commanded so little respect in the Texas Supreme Court.

In *Clements*, the Redeemer Court's Justices reinterpreted the word "both" in Article XII, Section 27 of the 1869 Constitution to mean that "both" the female former slave *and* her white master were forbidden to marry by the laws of bondage. Since Texas law did not preclude white men from marrying, Article XII, Section 27 could not, in the Redeemers' eyes, confer legitimacy upon mixed-race children born to white men and black women.

Only children born to two slaves, "both" of whom were barred from marriage by the laws of bondage, could benefit from the 1869 Constitution, the Redeemers ruled:

[The provision] refers only to those persons who were both precluded, not from intermarriage with each other merely, but from marriage with any one else A free white man, precluded by no law from marriage, who was living with a woman white or black, in violation of law, at the time of the adoption of the Constitution, was not thereby made a married man. It is not the letter of the Constitution, nor is it believed to be its intention, to confer on any parties, white or black, whose intercourse was illegal and immoral, the rights and benefits of lawful wedlock. In so far as the case of *Honey v. Clark* is at variance with this interpretation of the Constitution, it may be regarded as overruled.⁸

The Redeemers' ruling radically revised Texas law. Its analysis warrants close scrutiny.

Was intercourse between a white master and a slave "illegal and immoral" when the slave had neither right nor power to deny a master's commands? Who was to decide such a thing: the voters who approved the Texas Constitution of 1869 or the judges entrusted with interpreting and enforcing it? Was Justice Gould's Redeemer Court an activist one that overstepped its proper constitutional grounds?

To reverse *Honey*, Justice Robert Simonton Gould, a Confederate regimental colonel,⁹ narrowed the scope of a constitutional provision *Honey* interpreted broadly two years before.

⁵ 37 Tex. 686 (1873).

⁶ 42 Tex. 601 (1875). See also *State v. Wygall*, 51 Tex. 621 (1879); *Treasurer of the St. v. Wygall*, 51 Tex. 621 (1877). Part II of this article analyzed in depth the Texas Supreme Court's *Honey v. Clark* ruling recognizing the right of mixed-race children to inherit a white master's property in probate proceedings.

⁷ 49 Tex. 556 (1878).

⁸ *Clements v. Crawford*, 42 Tex. at 604.

⁹ See James L. Haley, *The Texas Supreme Court: A Narrative History, 1836-1986* (Austin: University of Texas Press, 2013), at 90, 90 n.9; University of Texas Law School, Tarlton Law Library, "Robert Simonton Gould," *Justices of Texas 1836-1986*, <https://tarlton.law.utexas.edu/justices/profile/view/39>.

He refused to respect the all-encompassing “all persons” language in the 1869 Constitution, which reflected the breadth of a remedial right that redressed the inherent inequality of master-slave relationships:

All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate¹⁰

The “all persons” language devolved into *some* persons, according to Justice Gould, who insisted on reading a one-sided morals clause into a constitution that contained no such language.

The 1869 Constitution’s drafters granted the mixed-race children of such relationships the right to inherit property. As Justice Walker recognized in *Honey*, “[t]he section under consideration was intended to legalize the marriage of certain persons, and legitimate their offspring; and the questions arises: who are such persons and offspring? We answer, the persons are those who, by law, were precluded the rights of matrimony.”¹¹

By banning the marriage of European-Americans and African-Americans, antebellum Texas law had made marriage illegal to “both” the master and the slave. Justice Walker recognized this reality in *Honey*, where he held that, prior to the Civil War,

the law forbid persons of the Caucasian race from marrying those of African descent. Free persons of color were not allowed to inhabit the State as citizens, except under special legal authorization. Whether, then, Sobrina, the mother of the appellees, was a slave or free woman, it mattered not; she could not legally have married Clark nor any other man, and Clark, being a white man, could not have married Sobrina after the year 1837.¹²

Yet post-war legitimization of mixed-race children was something the people “of the State, in the formation of their [1869] Constitution, had a right to provide for [in] such cases in the manner they have done in Section 27, Article 12 of the Constitution.”¹³

Justice Gould shut his eyes to antebellum reality, the 1869 Convention’s purpose, and the plain letter of the 1869 Constitution to strip mixed-race children of their constitutionally-granted inheritance rights in *Clements*. This ruling had a huge impact on the poorest of the poor. As discussed in Part I of this article, there were some 246,000 slaves of mixed race out of 3.9 million slaves in the United States in 1850, and that number grew as the Civil War approached.

¹⁰ See TEX. CONST. art. XII, § 27 (1869), available at <http://tarlton.law.utexas.edu/constitutions/texas1869/a12>.

¹¹ 37 Tex. at 709.

¹² *Ibid.* at 708. See also Act of June 5, 1837, Section 9, Laws of the Rep., Vol. I, 233 (June 5, 1837) (declaring that it was unlawful for any person of European blood, or their descendants, to intermarry with Africans, or the descendants of Africans, so any such marriage was null and void).

¹³ 37 Tex. at 709.

To “redeem” the economic interests of white heirs over their mixed-race siblings, Justice Gould and his colleagues disregarded the caption and plain language of the Twelfth Legislature’s August 15, 1870 enactment of Senate Bill 1, an “Act for the Relief of Freedmen and Freedwomen.”¹⁴ Legislators who sought to relieve the suffering of mixed-race freedmen and freedwomen born into an unequal relationship did not expect to see a reactionary panel of the Texas Supreme Court disinherit mixed-race children in favor of a former master’s white children. Reinterpreting the 1869 Constitution that way was peculiarly perverse and illogical.

Although the Reconstruction-era *Honey* Court had never deemed monogamous, companionate, child-bearing relationships of the kind that existed between Chief Justice Hemphill and Sabina as “illegal and immoral,” the Redeemers did so to separate races that had been entwined. As American University Washington School of Law Professor Adrienne Davis recognized, Reconstruction courts “went further than merely articulating rules protecting black relationships to property” and “rejected and cast aspersions upon the racial supremacy that had underpinned slave law.”¹⁵

Justice Gould’s Redeemers imposed financial obligations on African-American men resulting from past relationships between white masters and African-American women while exempting the estates and heirs of masters from such burdens.¹⁶ “The *Clements* ruling reflected the impact of the Redemption period upon the legitimacy of interracial relationships in the South. From state to state, interracial couples generally lost their right to maintain their relationships.”¹⁷

The 1876 Constitution further separated Theodora from Texas’s white society.

A Jim Crow spirit of “separate but equal” soon arose in all aspects of public life, especially in education, as a new constitutional convention convened. On September 6, 1875, Democrats determined to abolish the “radical” Constitution of 1869, end the centralized governorship of Edmund J. Davis, return schools to local control, and commence an era of segregation, convened the Constitution of 1875.¹⁸ On February 15, 1876, Texas voters approved the Constitution of 1876.¹⁹

Article VII, Section 7 of the 1876 Constitution stated that, “Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.” Article VII, Section 10 authorized “a university of the first class ... [to be] styled ‘The University of Texas,’ for the promotion of literature, and the arts and sciences,” while Section 14 empowered the Legislature “[to] establish and provide for the maintenance of a College or Branch University for the instruction of the colored youths of the State.” Article VIII, Section 1 authorized the

¹⁴ See BILL FILE, SB 1, 12th Leg., R.S. (1871), at 100–1523, available at https://www.tsl.texas.gov/sites/default/files/public/tslac/exec/documents/struggles3_2015001_23.pdf.

¹⁵ See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 59 STAN. L. REV. 221, 279 (1999).

¹⁶ *Ibid.* at 278.

¹⁷ Charles F. Robinson, *Dangerous Liaisons: Sex and Love in the Segregated South* (Fayetteville, Ark.: University of Arkansas Press, 2003), 42.

¹⁸ *Handbook of Texas Online*, Ralph W. Steen, “Constitutional Convention of 1875,” <http://www.tshaonline.org/handbook/online/articles/mjc05>.

¹⁹ *Handbook of Texas Online*, Joe E. Ericson and Ernest Wallace, “Constitution of 1876,” accessed April 15, 2016, <http://www.tshaonline.org/handbook/online/articles/mhc07>.

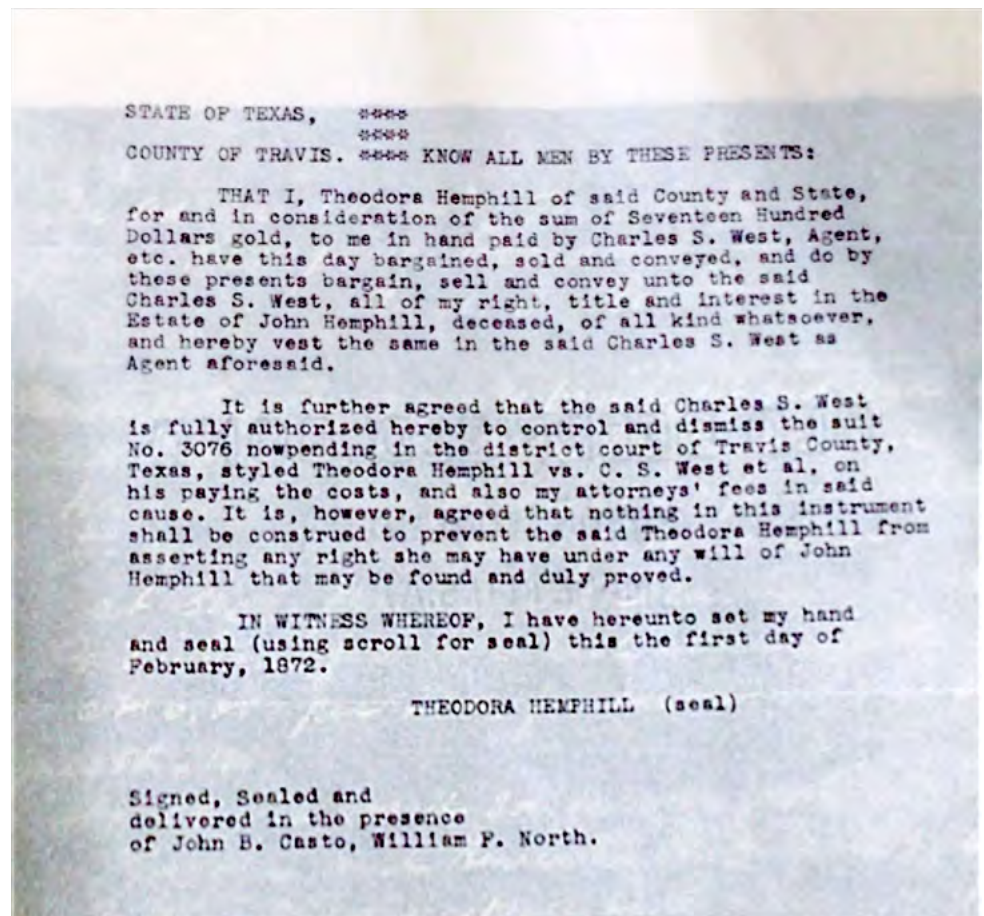
Legislature to impose a poll tax on voters. An age of separate and unequal segregation began.

The fear of “Negro Supremacy” common among the State’s ex-Confederates led to the formation of the Anti-Colored Movement in Austin. By 1885, it was so powerful that it prevented the reelection of all African-American officials in Travis County.²⁰ Scholtz’s Garten, a popular drinkery, publicly touted the whites-only nature of its business.²¹ So did many other businesses in Austin. The Texas Constitution, and Texas law in general, had once again turned hostile to Theodora Hemphill and to African-Americans.

But Theodora, thinking ahead, had settled her estate claims in 1872.

If Theodora had continued her estate litigation into 1874, she would have lost everything when the Redeemers repudiated *Honey’s* sweetness with *Clements’s* bitterness. But, in 1872, Theodora dismissed her claims to inherit her father’s probate estate after persuading her father’s white relatives to pay her “the sum of One Thousand Seven Hundred dollars Gold, to me in hand paid, by Charles S. West, Agent.”²² She was wise to recognize that a court could rule against her. Employing the same pragmatic prudence her father exhibited, Theodora negotiated the best settlement possible with her father’s white relatives to ensure they paid her, immediately, *in gold*.

Would that 1872 settlement be sufficient to support Theodora now that her father, mother and sister were all dead? How would the Constitution of 1876 affect the orphaned daughter of Chief Justice Hemphill? How would she get by in the frontier town of Austin given the walls of separation and segregation being erected all around her?

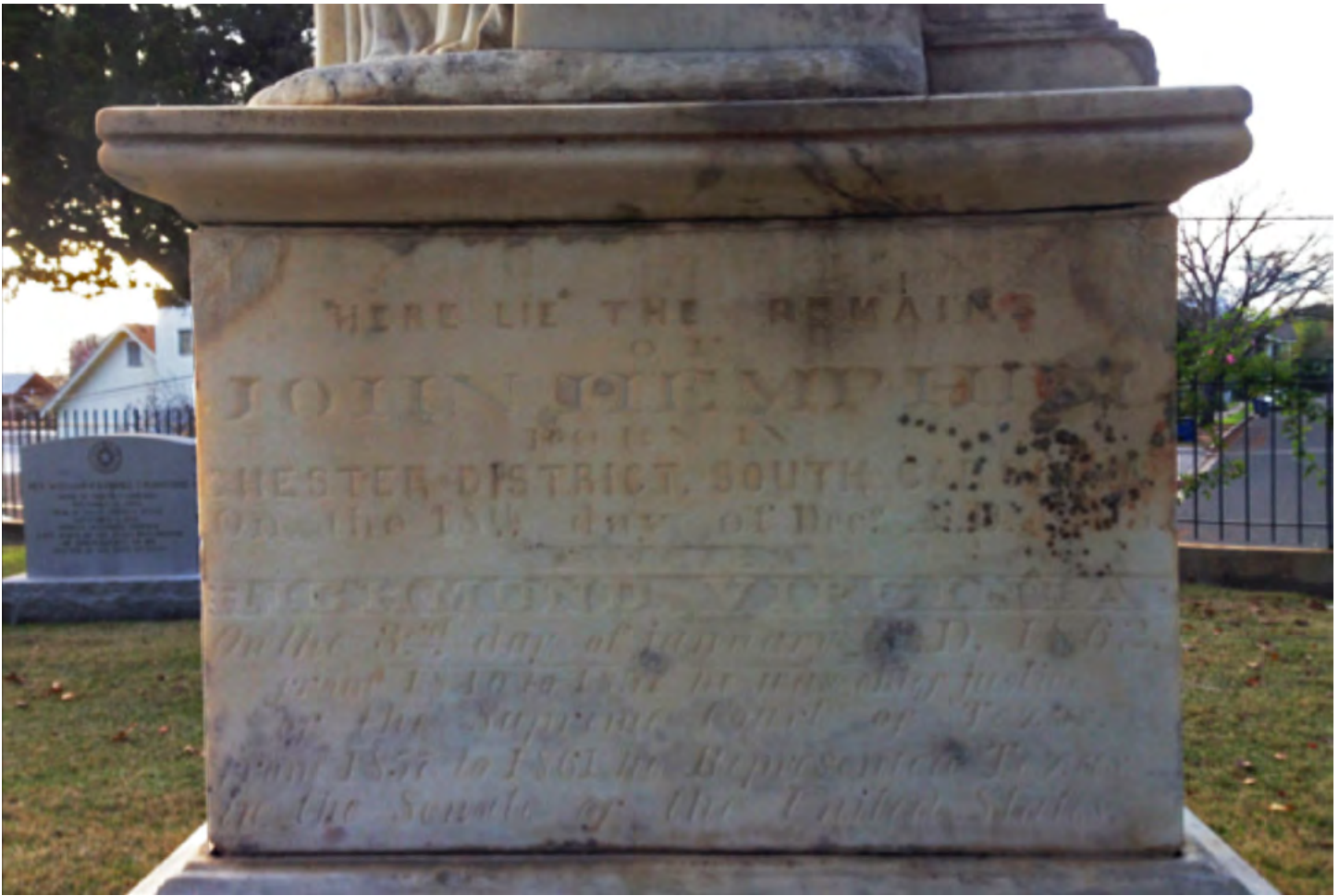


Paper settling Theodora Hemphill’s probate claims in Travis County.
Photo by David A. Furlow.

²⁰ Rachel Feit, James Karbula, John Clark, and S. Christopher Carran, *Boarding Houses, Bar Rooms and Brothels—Life in a Vice-District: Archaeological Investigations of a Changing Urban Neighborhood in Austin, Texas* (Austin: Hicks & Co., 2003), at 16.

²¹ *Ibid.*

²² Cause No. 3074, Travis County Civil District Court File Boxes. See also Haley, *Texas Supreme Court*, 264 n.23.



John Hemphill's tombstone in the Texas State Cemetery. Photo by David A. Furlow.

End of Part III

In the final chapter of this story, forthcoming Part IV, we'll examine Theodora's unorthodox response to the 1876 Constitution's introduction of Jim Crow segregation. We'll see the unique way she declared her independence from the disabilities and discrimination Texas lawmakers meted out to African Americans and women. And we'll evaluate the ways a rapidly-changing constitution shaped and reshaped the life of a young African-American woman, and of all people, living in nineteenth century Texas.



DAVID A. FURLOW is an attorney, historian, photojournalist, and archaeologist. If anyone has additional information about John, Sabina, Theodora, or Henrietta Hemphill, please forward it to David at dafurlow@gmail.com.

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A Tribute to Harry Reasoner

By Barrett H. Reasoner

When the Texas Supreme Court Historical Society Journal asked me to do a tribute to my father, my thoughts immediately turned to his still-developing legacy. Harry Reasoner continues to have a tremendous impact on his chosen profession, but nonetheless my focus will look back from a personal perspective on what his career and approach to life have meant to me and my sister, Macey Reasoner Stokes. Macey and I were in a fairly unique position when we decided to go into the practice of law. Not many young lawyers go into the legal business with a parent who is a legal “giant” in the same city and area of practice. This undoubtedly gave us the advantage of being able to meet many prominent people in the profession easily. When people have a positive impression of your parents, they are often welcoming and start out with a favorable impression of you. Along with this benefit, however, comes the downside of worrying about whether people will judge you on your own merits or instead view your achievements as having come only through having a famous father.



Harry Reasoner.

Fortunately for Macey and me, our father is not just a singularly focused legal giant. Harry Reasoner is a loving man who cares first and foremost about his family, followed by his many friends and our society as a whole. Though we certainly need more of it in the world, this approach to life is not what makes him unique. Instead, what sets him apart for me and Macey is the way his approach to life and the law prepared us so well to succeed in and enjoy this profession.

The first unmistakable aspect of his approach is our father’s deep respect for his profession and the critical role it plays in our society. He has always spoken with reverence about some of the lawyers who shaped our profession, including Judge Charles Clark of the Second Circuit, a great reformer of federal civil procedure whom he clerked for; Justice Thurgood Marshall,



Harry, age eight, fourth grade.



Harry at UT Law School,
Class of '62.



Harry's future wife
Macey Hodges,
UT Law School Student.

whom he worked for at the end of his clerkship after Judge Clark passed away; Professor Gus Hodges, his father-in-law, who was one of the pioneers in developing Texas civil procedure; UT Law Professor Charles Alan Wright, who was a beloved teacher and friend; and his mentors at Vinson & Elkins like David Searls, the great trial lawyer. The contributions of these people to his career and to the profession have always been of paramount importance to him.

Our father's respect for the legal profession is also reflected in other ways. He has always been active in organizations like the Texas Supreme Court Historical Society and the U.S. Supreme Court Historical Society, which preserve and celebrate our legal history. He has also diligently served organizations that strengthen the present-day practice, like the Antitrust Section of the ABA, which he chaired during a time when antitrust litigation was much more prevalent than it is today.

Coupled with this respect for the profession, however, has been an equally important sense of irreverence. Whether the subject was law, politics, or history, our dad has always enjoyed debunking positions that were presented in an arrogant way. He is always ready with the factual or legal needle to prick the balloon created by a blowhard's argument. Young lawyers often run into older lawyers who try to intimidate or bully them with positions that are, to put it gently, not completely accurate or fully researched. While Macey and I were not immune from the usual anxieties, it helped us to know that the person trying to intimidate us was but a pin prick away from having his or her argument exposed for what it was. Dad has also always preached that preparation and enjoying what you do—as opposed to some mysterious magic that only comes with experience—are the keys to success.

Another essential ingredient to our father's approach is recognizing how critical it is for our profession to provide legal services for those who cannot afford them. I can vividly remember as a child attending a hearing in which he was arguing on behalf of Texas Department of Corrections



(Upper left): Harry and Barrett, mock trial at UT Law, Spring 1990;
 (upper right): Family photo with (left to right) Susan Reasoner (Barrett's wife),
 Harry, Mrs. Harry Reasoner, Macey Reasoner Stokes, and Barrett Reasoner;
 (bottom): Harry and Macey, Susan and Barrett, HBA harvest party.

prisoners that they should have the right to receive confidential mail from their counsel without review by the guards. From our youthful perspective, there was nothing unusual to Macey and me about this: it was just what lawyers did. Dad has always talked about how providing pro bono service is essential to what makes the law a profession as opposed to just a business. I have prioritized this in my practice, and Dad continues to model this today. He currently serves as Chair of the Texas Equal Access to Justice Commission.

The last essential element of a successful law practice that we learned from our father is having a sense of humor. Anyone who ever had the pleasure of watching our dad, his dear friend Joe Jamail, and other friends trade stories over drinks knows what I am talking about. If there is a funnier or more entertaining way to pass the time, I am not aware of it. There is typically some poor vanquished sap on the losing end of the story, but denigrating that

person is never the point. Such exchanges are really all about the wonderful esprit de corps and excitement that can come from this profession—and remembering that if you are doing



Having fun, 1988.

it right, a lot of funny things happen in the practice of law. Dad has always said that this would be “a hard way to make a living” if you do not enjoy those moments.

They say that attitude is everything in life. That adage applies very well to the practice of law. Our father has done incredible things for Macey and me personally and for the profession. Happily, he is not finished giving in either case. But for Macey and me, teaching us how to approach this profession in a way that leads to success and, most importantly, enjoyment is among his most important and lasting gifts.



Harry and Macey in Central Park during a family trip in November 2015.



BARRETT H. REASONER is a partner with Gibbs & Bruns LLP in Houston. After graduating from the University of Texas School of Law in 1990, he served as an Assistant District Attorney for Harris County before joining Gibbs & Bruns in 1992. Barrett recently served on the Board of Directors of the State Bar of Texas, and is a past President of the Houston Bar Association (2009–2010).

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In Memoriam

Joseph W. McKnight, 1925-2015

By Marilyn P. Duncan

Professor Joseph W. McKnight, a founding member of the Texas Supreme Court Historical Society and a nationally renowned authority on family law, passed away in Dallas on November 30, 2015.

Mr. McKnight was Professor Emeritus of Law and Larry and Jane Harlan Faculty Fellow Emeritus at SMU Dedman School of Law. He had served on the SMU law faculty since 1955.



Joseph Webb McKnight was born on February 17, 1925 in San Angelo, Texas, the oldest of five children. Raised in San Angelo during some of the most severe years of the Great Depression, he graduated at the top of his class at the age of sixteen and entered the University of Texas. He was in ROTC and was commissioned a Navy ensign to serve in World War II shortly before he was to graduate in 1944.

After the war and a postwar tour of service, Mr. McKnight returned to UT in the fall of 1946 and completed his bachelor's degree in the spring of 1947. He immediately left for England on a Rhodes Scholarship. Over the next three years he earned three degrees from Oxford University's Magdalen College: a bachelor of arts in jurisprudence, a bachelor of civil law, and a master of arts. He then returned to UT to prepare for the Texas bar exam, which he passed in 1951.

After practicing law for four years with Cravath Swaine & Moore in New York City, Mr. McKnight returned to Texas to join the faculty of the SMU School of Law in 1955. Over the next sixty years, he built a national reputation as a legal scholar, historian, and authority on family law. Equally significant, he undertook a number of legal reform efforts that had a lasting impact on Texas law.

In the mid-1960s Professor McKnight played a leading role in lobbying to remove the severe restrictions on married women's right to enter into contracts and take legal action without the joinder and consent of their husbands. He was the principal drafter, along with Dallas attorney and activist Louise Raggio, of the Marital Property Bill that was passed in 1967 and resulted in the

Texas Family Code. The Texas reforms later influenced law in other community property states.

Professor McKnight also drafted the Debtor-Exemption Reform Act of 1973, the Texas Homestead and Personal Property Laws of 1985, and various incremental laws and amendments relating to these subjects.

Beyond the realm of family law, Professor McKnight was an ardent advocate for historical preservation. He was the principal draftsman of the Texas Antiquities Code in 1969, designed to protect archeological finds on the Texas Gulf Coast. He then lobbied to expand that law in subsequent sessions of the Legislature and was a champion of the Texas Historical Commission. In 1988, he authored the initial proposals for the federal Abandoned Shipwrecks Act.

For many observers in the scholarly community, Joe McKnight's most enduring contribution is his body of work on the Spanish legal influence on Texas jurisprudence. Among other books, he is the author of *The Spanish Elements in Modern Texas Law* (1979), and coauthor, with W.A. Reppy, Jr., of the 1983 casebook *Texas Matrimonial Property Law*, published in nine editions. He also published more than one hundred scholarly articles on these topics.

Professor McKnight was a founding member and trustee of the Texas Supreme Court Historical Society in 1990, and in 1997 he was selected by his fellow board members to head the Society's Supreme Court History Book Project. The original research conducted through the project over the next decade became the key resource materials for the Society's groundbreaking book, *The Texas Supreme Court: A Narrative History, 1836–1986*.



During his career, Professor McKnight collected almost 7,000 antiquarian law books—thought to be the largest collection of its kind in private hands in the world, with the oldest book printed in 1481. He studied and taught bookbinding and book conservation at the Dallas Craft Guild for more than twenty years in order to restore his cherished volumes to their best possible condition. In 2011, Professor McKnight donated this extraordinary collection to the SMU Law School, which holds it in the school's Underwood Law Library. See his 2012 YouTube interview on his Antiquarian Book Collection at <https://www.youtube.com/watch?v=n6xDludaeil>.

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Ivy-League Edicts and Bovine Mandates

• A Quick History of the *Bluebook* and the *Greenbook* •

By Dylan O. Drummond

Legal citation has been traced to Roman antiquity in A.D. 71, and the earliest-known citation manual—the *Modus Legendi Abbreviaturas in Utroque Iure*—was first published around 1475.¹

More recently, Texas lawyers have relied upon *The Bluebook: A Uniform System of Citation* and the *Texas Rules of Form*—more familiarly referred to as the *Bluebook* and the *Greenbook*—for their citation guidance.² The history of each is fascinating and, in the case of one, is still hotly contested.

The *Bluebook*

To date, twenty editions of the *Bluebook* have been published. The first was created during the summer of 1926 when a second-year law student at Harvard Law School named Erwin Griswold enlisted a printer in his hometown of Cleveland, Ohio to prepare a 26-page style guide which “largely codified existing [citation] practices.”³ This new tome expanded upon the 8-page internal manual used by *Harvard Law Review* editors, and would later become known as the first “*Bluebook*.”⁴ Mr. Griswold went on to serve as Editor in Chief of the *Harvard Law Review*, Dean of Harvard Law School, and U.S. Solicitor General.⁵



Printer's mark, *Modus Legendi*, 1506.
Image courtesy of University of Texas
Tarlton Law Library.

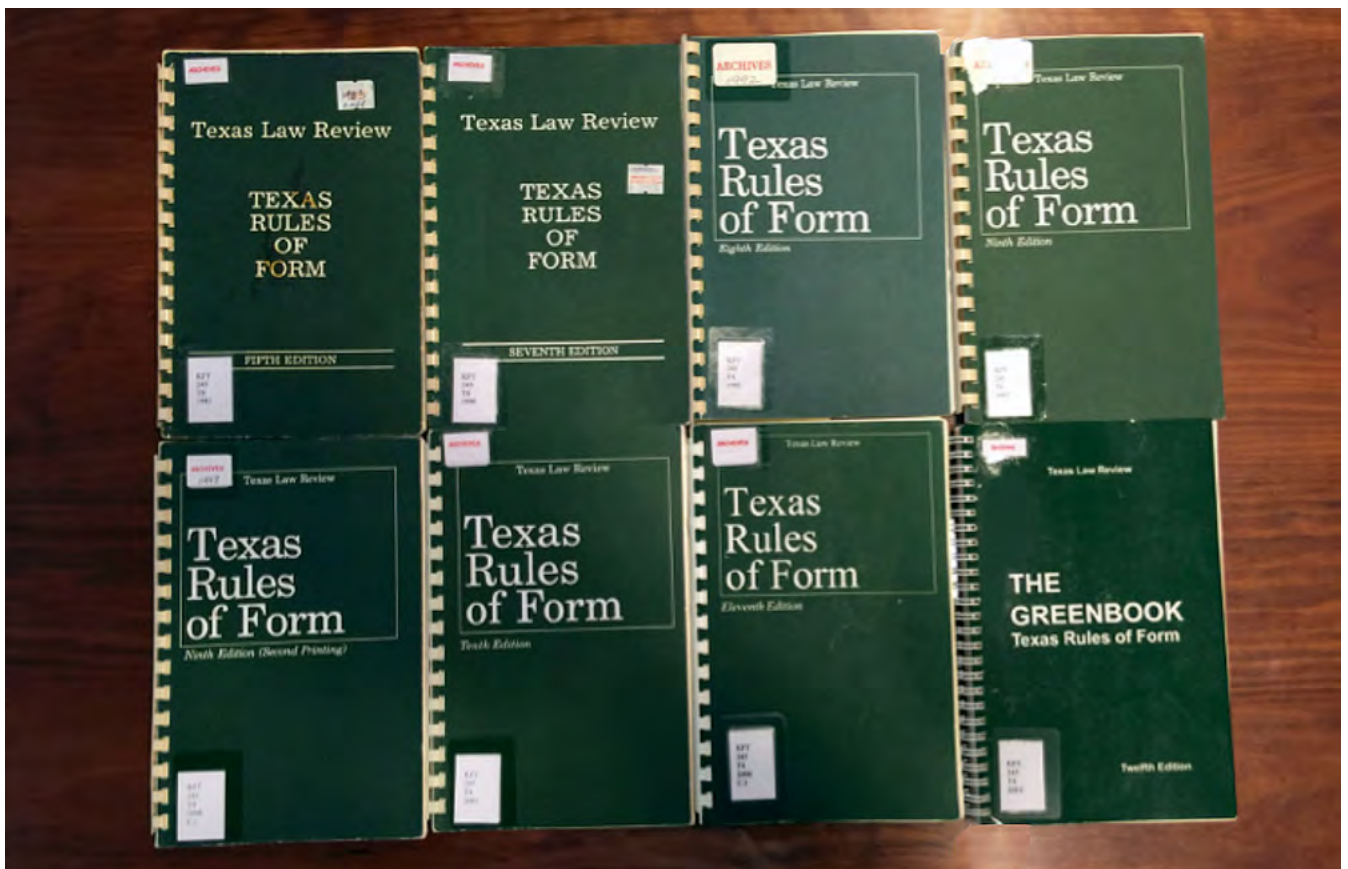
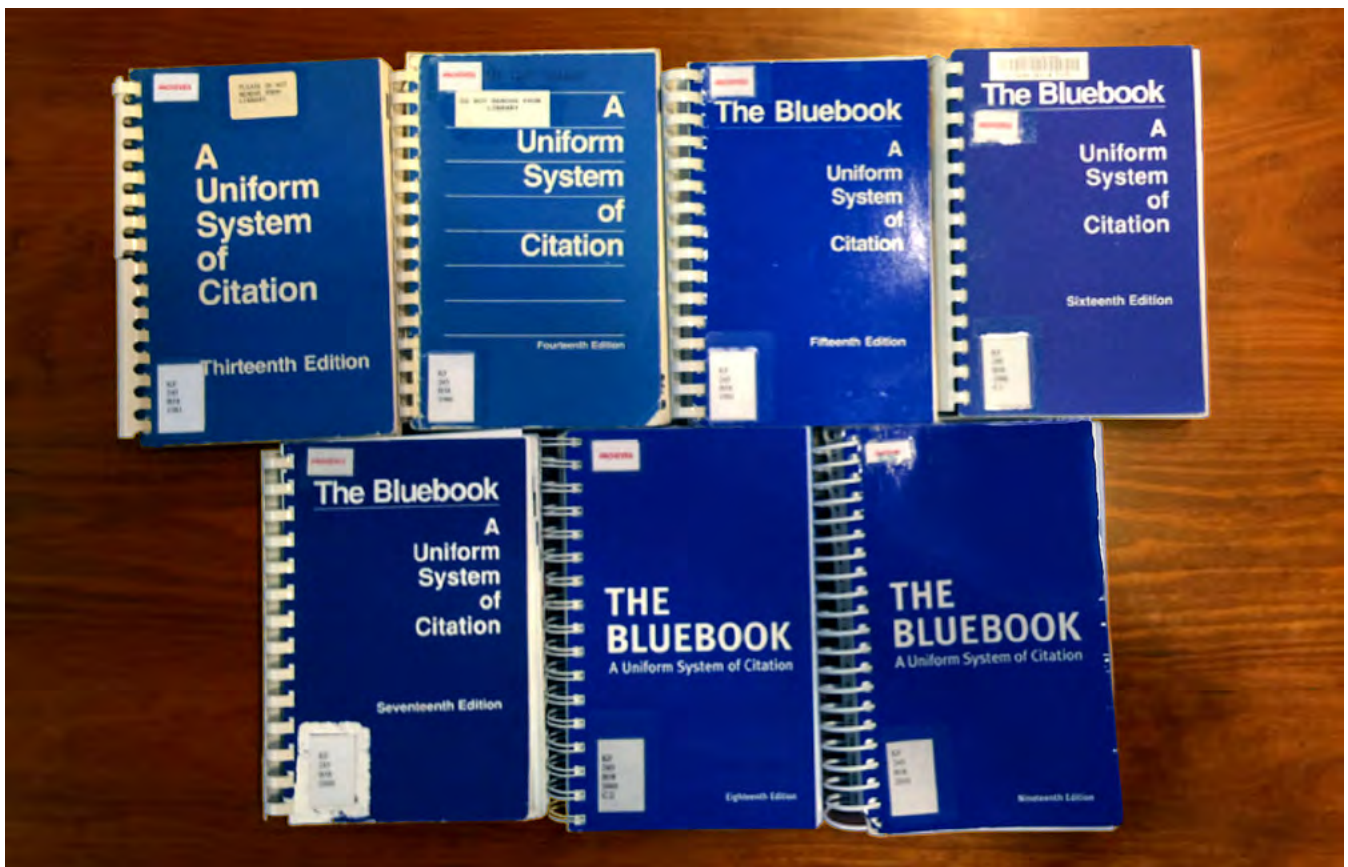
¹ A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook (Including Compendia of State and Federal Court Rules Concerning Citation Form)*, 26 STETSON L. REV. 53, 58 n.13 (Fall 1996) [hereinafter *Un-Uniform System*] (citing Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 L. LIBR. J. 3, 4, 20, 20 n.140 (1982)).

² See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) [hereinafter BLUEBOOK]; THE GREENBOOK: TEXAS RULES OF FORM (Texas Law Review Ass'n ed., 13th ed. 2015).

³ A UNIFORM SYSTEM OF CITATION 1 (Harvard Law Review Ass'n ed., 1st ed. 1926); see also *Un-Uniform System*, 26 STETSON L. REV. at 55 n.1, 57 n.10. Compare James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780, 1782, 1782 n.14 (May 1992) (recounting the general history of the original edition of the *Bluebook*) [hereinafter *Uninformed System*], with Hon. Richard A. Posner, *The Bluebook Blues*, 120 YALE L.J. 850, 854 (2011) [hereinafter *Bluebook Blues*] (discussing the content of the 1st edition of the *Bluebook*, as well as revealing Judge Posner's affinity for its strictures).

⁴ A UNIFORM SYSTEM OF CITATION 1 (Harvard Law Review Ass'n ed., 1st ed. 1926); see *Un-Uniform System*, 26 STETSON L. REV. at 55 n.1, 57 n.10; see also *Bluebook Blues*, 120 YALE L.J. at 854; *Uninformed System*, 105 HARV. L. REV. at 1782, 1782 n.14.

⁵ *Un-Uniform System*, 26 STETSON L. REV. at 57 n.11.



Displays courtesy of Leslie Prather-Forbis, Assistant Director, Texas State Law Library.
Photos by Dylan O. Drummond.

The current controversy surrounds the origin of the 8-page manual in use by the *Harvard Law Review* staff prior to Griswold's 26-page guide published in 1926. Yale law librarians Fred Shapiro and Julie Graves Krishnaswami have recently (and somewhat unsurprisingly) asserted that the *Bluebook's* true lineage may be traced to Yale—not Harvard—Law School.⁶ After putting his education on hold to enlist in the German Army during World War I (winning the Iron Cross along the way), Karl N. Llewellyn graduated from Yale Law School in 1918.⁷ While in law school, Llewellyn served as Editor in Chief of the *Yale Law Journal*, and coauthored an 8-page article entitled *The Writing of a Case Note*.⁸ Incredibly, a pdf of this article may currently be viewed (and downloaded) from the website of Yale Law School's Lillian Goldman Law Library.⁹ In 1922 the *Harvard Law Review* published its *Instructions for Editorial Work*, which included *eight* pages of rules on "abbreviations" and citation "form."¹⁰ Griswold later averred that it was this "eight page mimeographed supplement" upon which he expanded in Cleveland to create the first *Bluebook*.¹¹

However, the *Bluebook* did not attain its familiar cerulean cover until 1939, when its then-brown cladding was thought too reminiscent of Adolph Hitler's "brownshirts."¹² Sometime between the appearance of the cobalt-hued 6th edition in 1939, and the publication of the white-with-blue-trim-colored 11th edition in 1967, the moniker "Bluebook" attached to the legal vernacular—but it did not adhere to the official title until the publication of the 15th edition in 1991.¹³

The infancy of "practitioner"-friendly alternative citation forms originated in 1981, when the 13th edition of the *Bluebook* first included on the inside of the front and back covers alternative "Basic Citation Forms" for "Briefs and Memoranda."¹⁴ This quick-reference guide still exists in the 20th edition but is now reprinted on the inside back cover and facing page. By the 15th edition in 1991, these alternative citation forms were expanded into ten pages of "Practitioners' Notes."¹⁵ The publication of the 18th edition of the *Bluebook* in 2005 expanded fourfold the former 10-page "Practitioners' Notes" into a 40-page section called the *Bluepages*.¹⁶ Now in the 20th edition, the *Bluepages* span some 53 pages.¹⁷

⁶ Fred R. Shapiro & Julie Graves Krishnaswami, *The Secret History of the Bluebook*, 100 MINN. L. REV. 1563 (2016) [hereinafter *Secret History*].

⁷ *Ibid.* at 1569.

⁸ *Ibid.*; see Karl N. Llewellyn and William M. Field, *The Writing of a Case Note: Rules for the Writing of Cases*, YALE L.J. (1920) [hereinafter *Writing Rules*].

⁹ *Writing Rules*, YALE L.J., available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1006&context=yjsh> (last visited Feb. 22, 2016).

¹⁰ *Secret History*, 100 MINN. L. REV. at 1577.

¹¹ *Ibid.*; see *Bluebook Blues*, 120 YALE L.J. at 854; *Un-Uniform System*, 26 STETSON L. REV. at 55 n.1, 57 n.10; *Uninformed System*, 105 HARV. L. REV. at 1782, 1782 n.14.

¹² Alan Strasser, *Technical Due Process?*, HARV. C.R.-C.L. L. REV. 507, 508 (1977).

¹³ See *Un-Uniform System*, 26 STETSON L. REV. at 55 n.1, 58–59. Compare A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 6th ed. 1939), with THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 15th ed. 1991).

¹⁴ K.K. DuVivier, *The Scrivener: Modern Legal Writing: The Bluebook No. 18—"Thank God for competition"*, COLO. LAW., Nov. 2005, at 111.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 112; see THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 3-43 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

¹⁷ BLUEBOOK, at 3–56.

The Greenbook

Compared to the *Bluebook*, the *Greenbook* is relatively spry and without hereditary intrigue. While now in its lucky 13th edition, the original edition of the *Texas Rules of Form* was published in 1966.¹⁸ The earliest recorded reference I can find to the *Greenbook* in either caselaw or the literature is a mention of the 3d edition (published in 1974) in the 1977 Corpus Christi Court of Appeals case of *Continental Oil Co. v. Dobie*, 552 S.W.2d 183, 187 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). Although long colloquially called the “Greenbook,” in practice, this moniker was not incorporated into the guide’s official title until just last year in the 13th edition.

Other Notable Texas-Centric Citation Guides

1. Former Texas Supreme Court Chief Justice Joe Greenhill’s 1964 *Texas Bar Journal* article laying out *Uniform Citations for Briefs*. Hon. Joe Greenhill, *Uniform Citations for Briefs: With Observations on the Meanings of the Stamps or Markings Used in Denying Writs of Error*, 27 Tex. B.J. 323 (May 1964).¹⁹
2. Former Texas Attorney General Crawford Martin’s 1967 *Uniform Citations for Opinions, Correspondence and Briefs*—which may still be found in the stacks of the State Law Library. Hon. Crawford C. Martin, *Uniform Citations for Opinions, Correspondence and Briefs* (Office of the Attorney General 1967).
3. The State Law Library’s first Director Marian Oldfather Boner’s 1971 *Simplified Guide to Citation Forms*. Marian O. Boner, *Simplified Guide to Citation Forms* (Tarlton Law Library 1971).²⁰

¹⁸ Telephone interview with Paul Goldman, Texas Law Review Association, Publications Office (Mar. 25, 2013); see TEXAS RULES OF FORM ii (Texas Law Review Ass’n ed., 1st ed. 1966).

¹⁹ Copy on file with the author.

²⁰ Copy on file with the author.



DYLAN O. DRUMMOND practices civil appellate and commercial litigation with the law firm of Squire Patton Boggs (US) LLP. He currently serves as a Trustee of the Society, and as Deputy Executive Editor of the Society’s Journal. Beginning later this year, Dylan will begin his term as the Society’s Treasurer. He also serves as a director and incoming Treasurer of the Texas Bar College, as well as a subcommittee chair on the Texas Bar’s Standing Committee on Pattern Jury Charges for Business, Consumer, Insurance, and Employment. He is a past councilmember of the State Bar’s Appellate Section and Administrative and Public Law Section.

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“Returning Now to Yesteryear”

• McCarthy’s Historical Musings •

For many years now, the Capitol press corps and lawyers with cases before the Texas Supreme Court (or those who just wish to be kept abreast of the Court’s decisions) have been able to subscribe to an email distribution list circulating the Court’s weekly orders. The list is managed by longtime Court Staff Attorney for Public Information Osler McCarthy. But recipients of Osler’s weekly orders email may have noticed a few years ago that he began including entertaining and informative historical musings at the end of his weekly emails under the heading, “Returning Now to Yesteryear.”

Although Osler began distributing the Court’s weekly orders via email just after he assumed his post at the Court in 1999, he only began including historical anecdotes in 2014. Osler attributes the origin of the practice to having come across a historical tidbit he found particularly interesting regarding an English scientist who bequeathed his fortune to establish what would later become the Smithsonian. Although the historical asides often involve Texas legal history, they also touch upon general American legal history, as well as other general Austin- or Texas-centric arcana.



As the advisory itself developed over the years, Osler confirms that his intent has been not only to inform, but to also provide a momentary respite for lawyers from the often difficult and serious—and sometimes humorless—work of practicing law. Judging by the enthusiastically positive response Osler has received from both the bench and bar, no doubt he has accomplished his goal.

We know our readership joins us here at the *Journal* in welcoming many more years to come of returning to yesteryear every week with Osler.

If you wish to be added to Osler’s distribution list, email him at Osler.McCarthy@txcourts.gov.

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History on Demand: Modern Technology Brings Historic Works Within Reach

By Dylan O. Drummond

One of the more amazing and unexpected benefits of the internet has been its ability to enable ready access to historical materials that have traditionally been quite hard to find. Well that, and the expiration of these works' copyright!¹

Indeed, multiple websites now maintain digital copies of numerous historical works. Google Books has perhaps the largest repository of scanned public-domain materials. Another popular online clearinghouse is the Internet Archive, which is a 501(c)(3) nonprofit headquartered in San Francisco.

Some of these materials are of particular interest not only to Texas legal historians but to those who wish they were. For example, did you know that you can download a pdf copy of J. Harbert Davenport's 1917 *History of the Supreme Court of the State of Texas*?² Davenport's history of the Court was the only examination exclusively devoted to the Court's past until the Society sponsored the publication nearly a century later in 2013 of Jim Haley's masterful *The Texas Supreme Court: A Narrative History, 1836–1986*.³ Thanks to Google Books and the Law Library at the University of Michigan Law School, Davenport's seminal tome can now be downloaded at:



<https://books.google.com/books?id=cFAwAQAAAMAAJ&dq=%22history%20of%20the%20supreme%20court%20of%20the%20state%20of%20texas%22&pg=PP9#v=onepage&q=%22history%20of%20the%20supreme%20court%20of%20the%20state%20of%20texas%22&f=false>.

Or one can download a word-searchable pdf of the work from the Internet Archive courtesy of the Cornell Law School Library at <https://archive.org/details/cu31924024708350>.

Similarly, James D. Lynch's 1885 masterpiece, *The Bench and Bar of Texas*,⁴ is also available to download either from the Internet Archive at <https://archive.org/details/benchbaroftexas00lync>, or from Google Books via Columbia's library at:

¹ All works published in the United States before January 1, 1923 are in the public domain. United States Copyright Office, Library of Congress, Circular No. 15A, "Duration of Copyright" (2011), <http://copyright.gov/circs/circ15a.pdf>.

² See J.H. Davenport, *The History of the Supreme Court of the State of Texas* (Austin: Southern Law Book Publishers, 1917).

³ See, e.g., James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013), xiii.

⁴ James D. Lynch, *The Bench and Bar of Texas* (St. Louis: James D. Lynch through Nixon-Jones Printing Co., 1885).

<https://books.google.com/books?id=tupEAAAAYAAJ&dq=%22the%20bench%20and%20bar%20of%20texas%22%20lynch&pg=PA1#v=onepage&q=%22the%20bench%20and%20bar%20of%20texas%22%20lynch&f=false>.

And the entirety of George Braden's landmark 1977 analysis of the Texas Constitution can now be downloaded from the State Law Library at:

<http://www.sll.texas.gov/assets/pdf/braden/the-constitution-of-the-state-of-texas-an-annotated-and-comparative-analysis.pdf>.

Even the first decision issued by the Republic Supreme Court, *Texas v. McCulloch*, as well as the Republic Constitution of 1836 and the Republic statutes, can be downloaded in James Wilmer Dallam's seminal 1845 *Digest*.

https://books.google.com/books?id=3iFEAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad#v=onepage&q&f=false

Older and more obscure materials may be found as well. A member of our editorial staff has found not only the originally-paginated version of an 1843 decision of England's Exchequer Chamber court upon which Texas groundwater law has been built,⁵ but also a decision from 1586 first published in England's Elizabethan-era "nominate" reports.⁶

Now, it is truly more possible than ever to find that peculiar, rare, or little-known source you've always wanted to read or rely upon.

⁵ The Exchequer Chamber court was an intermediate appellate court, established in 1822, which heard appeals from English common law courts (Court of King's Bench, Court of Common Pleas, and Court of Exchequer), from which appeal could only be had to the parliamentary House of Lords. See A.T. Carter, *A History of English Legal Institutions* (London: Butterworth & Co., 1902), 93; *Black's Law Dictionary*, "Exchequer Chamber," 10th ed. (New York: Thomson Reuters, 2014). The Court of Exchequer derived its name from the checkered cloth, which was said to resemble a chef's board, that covered the bench. John Adolphus, *The Political State of the British Empire*, vol. II (London: T. Cadell & W. Davies, 1818), 481.

⁶ See *Bury v. Pope*, 78 Eng. Rep. 375 (1586). Prior to 1865 there was no official series of law reports in England. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 480 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). Instead, cases were reported in numerous commercial reporters, commonly referred to as the "nominate reporters." *Ibid*. Subsequently, most of the nominate reporters were reprinted in the *English Reports*. *Ibid*.

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Taming Texas Book and Judicial Civics and History Project Launched This Spring

By Marilyn P. Duncan

The Society's new judicial civics education program got underway this spring with the release of the first book in the Taming Texas series and the launch of a pilot classroom project in Houston.

Sponsored and funded by the Society's Fellows, the Taming Texas Judicial Civics and History Project is designed to introduce the Texas court system to the state's young people through an innovative program that combines colorful stories from the history of the Texas courts with hands-on classroom activities.

The centerpiece of the project is a series of books written specifically for seventh-grade students on various aspects of Texas court history. The first book in the series, *Taming Texas: How Law and Order Came to the Lone Star State*, tells the story of Texas law and courts from the early Spanish colonial period to the present day. Coauthored by James Haley and Marilyn Duncan, the book was published in January in both hardback and electronic formats (see description in the sidebar at the end of this piece).



Houston Bar Association President Laura Gibson welcomes Teach Texas volunteers to the February 19 orientation on how to teach the Taming Texas classroom curriculum. The orientation was led by Society Fellows Warren Harris (left) and David Furlow. Photo by Ariana Ochoa, Houston Bar Association.



Texas Supreme Court Justice Jeff Brown interacts with students during a classroom activity on court milestones at Houston ISD's Gregory-Lincoln Education Center in the historic Fourth Ward. Photo by Ariana Ochoa, Houston Bar Association.

The classroom portion of the Taming Texas Project had its debut in the Houston schools over a ten-week period this spring. Partnering with the Houston Bar Association, members of the project team from the Society and the State Bar Law-Related Education Department developed a teaching curriculum based on stories and information from the *Taming Texas* book. In an outreach effort coordinated through the HBA's Teach Texas Committee, teams of volunteer judges and attorneys presented the two-part curriculum in middle schools throughout Houston beginning in late February.

According to Society board member and Fellow Warren Harris, who heads the Taming Texas Project, the Houston rollout was a tremendous success on all counts.



Justice Brett Busby (standing, right) and Warren Harris lead a classroom exercise with students in the KIPP Courage College Prep program at Landrum Middle School in Houston's Spring Branch community. Photo by Ariana Ochoa, Houston Bar Association.



Drew Taggart of Bracewell LLP was one of 134 attorneys who took the *Taming Texas* book and curriculum to Houston area classrooms. Photo by Amy Wills, Katy Independent School District.

"We had all the ingredients for a successful launch of the classroom portion of our project," he said, "including an exciting new history book, an innovative civics curriculum, and an ideal location."

Mr. Harris credited HBA President Laura Gibson with galvanizing the support of the Houston legal community and school districts for the program.

"Laura took on the project as one of the primary initiatives of her presidency," he said. "She appointed a committee last fall to recruit volunteers and enlist the support of school administrators and teachers. The program took off from there."

The HBA's Teach Texas Committee is co-chaired by 14th Court of Appeals Justice Brett Busby, 61st District Court of Harris County Judge Erin Lunceford, and Houston attorney and Society Fellow David Furlow. Working with their colleagues on the committee and more than 160 volunteer judges and attorneys, they joined Warren Harris in taking the *Taming Texas* curriculum into middle school Texas history classrooms throughout the Houston area.

By the end of April, the Teach Texas volunteers had reached almost 10,000 students in 29 schools in 8 school districts—numbers that exceeded even the most optimistic estimates.

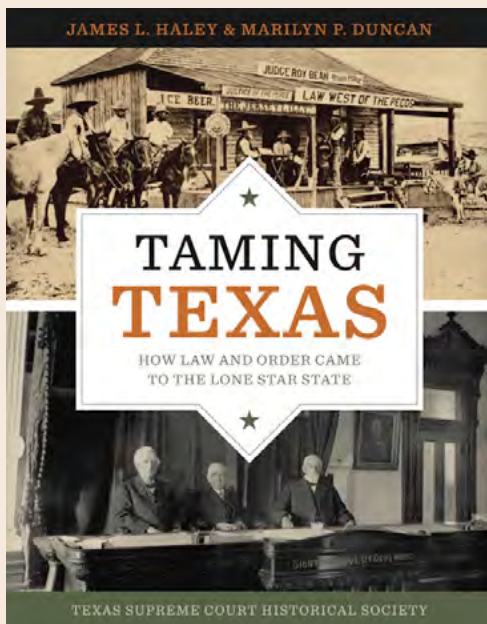
"The Society's Fellows hoped the judicial civics program would have an impact over time," said Society Fellows Chair David J. Beck, "but the enormous success of the Houston rollout took us all by surprise." He noted that the program will be expanded to other school districts in the 2016–17 school year, with the ambitious goal of reaching every middle school in Texas.

As the Houston program drew to a close in late April, HBA President Laura Gibson announced that she is awarding the 2016 President's Award to Warren Harris and the three Teach

Texas Committee co-chairs—Justice Brett Busby, Judge Erin Lunceford, and David Furlow—for their outstanding contributions to the HBA Teach Texas Program. They will be recognized at HBA’s Annual Dinner Meeting on May 19 at Houston’s River Oaks Country Club.

For more information about the Taming Texas Project, including videos of some of the classroom presentations, see the project’s website at www.tamingtexas.org.

Taming Texas: How Law and Order Came to the Lone Star State by James L. Haley and Marilyn P. Duncan



Published in January 2016, this colorfully illustrated book for seventh-grade students shows how the state’s court system fits into the larger picture of Texas history: its roots, heroes, growing pains, and milestones, from the days of early Spanish colonization to the present.

The book’s opening stories help students place themselves in an early Texas in which there was no law or order, and challenge them to think about how a society begins to organize itself. Subsequent stories show how laws were made and tested in the courts over the next 150 years, with an emphasis on the aspects of the Texas experience that are uniquely our own.

In his foreword to *Taming Texas*, Chief Justice Nathan Hecht asks the questions that are central to the the book’s purpose:

“The laws people choose for themselves describe the society they live in. Does it protect individual liberty? Respect property rights? Limit government? Treat people equally? Try to provide justice to the rich and poor, the strong and weak, alike? To us, the answers may seem simple. But over the years, judges and lawmakers have fought against power and prejudice to produce the society we enjoy today. This book is about how that happened in Texas”

Hardback copies of the book, which is the first of its kind in the United States, are being provided to middle school Texas history classrooms as part of the Judicial Civics and Court History Project. Electronic copies are available free of charge on the Taming Texas website in e-book format for Kindle and iBook as well as PDF (<http://tamingtexas.org/taming-texas-book>).

Taming Texas is the first volume in a series that will be published over the next five years. Each book will focus on a different aspect of the Texas law and the courts: law on the frontier, the twenty-seven Chief Justices of the Supreme Court, women and Texas law, the evolution of the Texas court system, and other topics. Over time, the series will form a library of colorful narrative texts on the state’s judicial history that will offer an important resource for teachers and students in seventh-grade history classes throughout Texas.

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Reenactment of Oral Argument before the All-Woman Texas Supreme Court: *Johnson v. Darr*

By David A. Furlow

Under the direction of David Beck, Chair of the Fellows of the Texas Supreme Court Historical Society, Fellow Warren Harris, and the *Texas Supreme Court Historical Society Journal*, the Society will present a reenactment of one of the Texas Supreme Court's most famous cases: *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925), decided by the "All-Woman Texas Supreme Court." The reenactment will take place from 10 to 11 a.m. on Thursday, June 16, 2016 at the State Bar Annual Meeting in Fort Worth.

The principal legal issue the All-Woman Court addressed was whether the trustees of an insurance company, the Woodmen of the World, were entitled to the ownership of two tracts of land in El Paso. In 1922, the Forty-First Judicial District Court of El Paso County granted the



From left, Hattie Henenberg, Hortense Ward, and Ruth Brazzil comprised the "All-Woman Court" of 1925. Photo courtesy of the Texas State Library and Archives Commission.

trustees clear title to only one of the two tracts, and the Woodmen appealed to the Court of Civil Appeals. Another appeal brought the case to the then three-member Texas Supreme Court in 1924. The case presented a problem to the 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. That large group of men included all three Justices of the Texas Supreme Court.

After the court's three Justices recused themselves, Governor Pat Neff, an early proponent of women's rights, decided to appoint three women to take their place. But Governor Neff's staff failed to do their homework before he made his appointments. The staff did not ask two of Governor Neff's first three appointees—Nellie Robertson of Granbury and Edith Wilmans of Dallas—whether they had the seven years of legal experience required by the Texas Constitution to serve on the special panel of the court. And they did not check to see if the appointees' spouses were insured by the Woodmen. Yet Governor Neff made a good choice with Hortense Sparks Ward of Houston, the first woman admitted to the State Bar of Texas.

In 1925, fewer than ten women had the constitutionally-required seven years of experience necessary to serve on the Texas Supreme Court at the time of Governor Neff's appointments. After Ms. Robertson and Ms. Wilmans withdrew their names because of their constitutional inabilities, Governor Neff made substitute appointments to serve as associate justices: Ruth V. Brazzil of Galveston and Hattie L. Henenberg of Dallas. Houstonian Hortense Ward became Chief Justice and her new colleagues served as the special court's associate justices.

Long before the All-Woman Court convened, Chief Justice Ward led the successful movement to enact Texas's first Married Woman's Property Rights Act and spearheaded the suffrage movement in Texas. Associate Justice Henenberg was the first Jewish member of the Texas Supreme Court. Associate Justice Brazzil played a prominent role in leading South Texas women into social reform movements. Since the women of the All-Woman Court came from different parts of Texas, this is an ideal program for a State Bar Annual Meeting.

The Society's e-journal has published several articles about the All-Woman Court, including one written and illustrated by Chief Justice Hortense Sparks Ward's great-granddaughter, Linda Hunsaker. Ms. Hunsaker authored the most recent article and provided previously unpublished photographs, correspondence, and Ward family records in her article "Family Remembrances and the Legacy of Chief Justice Hortense Sparks Ward," 4(4) *Texas Supreme Court Historical Society Journal* (Summer 2015): 51-64, <http://texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Summer%202015.pdf>.

This *Journal's* Executive Editor has photographed the *Johnson v. Darr* file at the Texas State Library and Archive in Austin and has obtained photographic copies of original pleadings filed by Chief Justice Hortense Sparks Ward in Harris County. *Journal* staff photographed Chief Justice Ward's gavel and silver suffragette cup when Linda Hunsaker and her family attended the Society's and the Texas Supreme Court's 2013 ceremony marking the publication *The Texas Supreme Court: A Narrative History, 1836-1986*.



Chief Justice Hortense Sparks Ward's silver suffragette cup and the gavel she used during oral argument in the All-Woman Court. Photo by David A. Furlow.

As a result of the Society's and the *Journal's* unique access to previously unpublished archival documents, original photographs, and family records, the Fellows can offer the justices, judges, and attorneys who attend the 2016 State Bar Annual Meeting a uniquely scholarly and historical CLE program. The written materials will include copies of original pleadings, motions, and correspondence among the Texas Supreme Court Clerk's Office and the justices and parties relating to the January 30, 1925 oral argument in the case.

Texas Supreme Court Chief Justice Nathan Hecht will portray 1925 Texas Supreme Court Chief Justice Calvin Cureton. Fifth Circuit Judge Jennifer Elrod will appear as Special Chief Justice Hortense Sparks Ward. Texas Supreme Court Justices Eva Guzman and Debra Lehrmann will play Special Associate Justices Ruth V. Brazzil and Hattie L. Henenberg.

The reenactment will take place at the Fort Worth Convention Center, 1201 Houston St., Fort Worth, Texas 76102. Phone: (817) 392-6338. The conference hotel is the Omni Fort Worth, 1300 Houston St., Fort Worth, Texas 76102, (817) 535-6664. Additional information can be obtained on the State Bar of Texas Annual Meeting website or through an email to annualmeeting@texasbar.com.

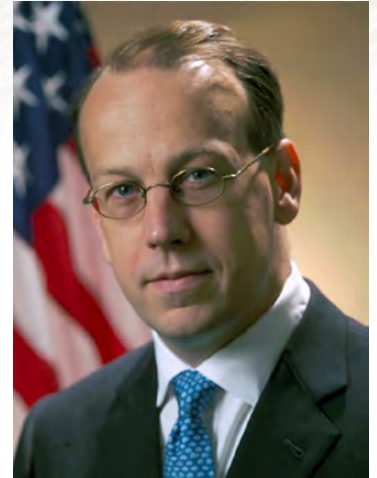
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Former U.S. Solicitor General Paul Clement Will Keynote Hemphill Dinner

By Marilyn P. Duncan

The Honorable Paul D. Clement, former Solicitor General of the United States, will be the principal speaker at the Texas Supreme Court Historical Society's 21st Annual John Hemphill Dinner. The dinner, which is the Society's main fundraising event, is scheduled for Friday, September 9, 2016, at the Four Seasons Hotel in Austin.

When he served President George W. Bush as the 43rd Solicitor General of the United States from June 2005 until June 2008, Mr. Clement wielded enormous persuasive power as the third-highest ranking official in the Department of Justice. He represented the federal government before the United States Supreme Court.



Working from an office in the U.S. Supreme Court Building, and sometimes referred to as the "tenth justice" because of the respect-based relationship among the Solicitor General, the nine justices of the U.S. Supreme Court, and their clerks and staffs, a Solicitor General and the attorneys who work for him typically argue dozens of cases every term, often about the most controversial issues in the country. A Solicitor General's endorsement of a petition for certiorari often makes the difference when the U.S. Supreme Court decides whether to grant review.

Mr. Clement is now a partner at Bancroft PLLC in Washington, D.C. Before his confirmation as Solicitor General in 2005, he served as Acting Solicitor General for nearly a year and as Principal Deputy Solicitor General for more than three years.

A native of Cedarburg, Wisconsin, Mr. Clement received his bachelor's degree *summa cum laude* from the Georgetown University School of Foreign Service, and a master's degree in economics from Cambridge University. He graduated *magna cum laude* from Harvard Law School, where he was the Supreme Court editor of the *Harvard Law Review*.

Following graduation, Mr. Clement clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Antonin Scalia of the U.S. Supreme Court. After his clerkships, Mr. Clement went on to serve as Chief Counsel of the U.S. Senate Subcommittee on the Constitution, Federalism and Property Rights.

The full program for the Hemphill Dinner will appear in the Summer 2016 issue of the *Journal*. A fact sheet and table reservation form are available on the Society's website at <http://texascourthistory.org/hemphill>.

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2016 TSHA Annual Meeting: Distinguished Panel Examines Restatement and Revolution

By David A. Furlow

As Charles Dickens said of the French Revolution, “it was the best of times, it was the worst of times...” And, as with Dickens, it was a tale of two cities. But this time, the cities were Philadelphia and New Orleans.

On a bright-sky afternoon in early March, First Court of Appeals Justice Evelyn Keyes and Lamar University Professor Robert Robertson presented the Texas Supreme Court Historical Society’s panel program at the Texas State Historical Society’s Annual Meeting in Irving: “The Restatement (Second) of Torts and the Revolution in Texas Asbestos Liability Law.”

Society President Ben L. Mesches began by discussing the Society’s mission of preserving, protecting, and publicizing the history, records, and artifacts of the Texas judiciary. He then introduced the Society’s two speakers and commentator.

The Honorable Evelyn Keyes, a Justice on Texas’s First Court of Appeals in Houston, presented the first paper: “The American Law Institute: Stating, Restating, and Shaping American Law since 1923.” She based it on her experience as an ALI member and commentator, noting that ALI’s members comprise a broad and inclusive body of the country’s best and brightest lawyers, who strive to restate American law for the benefit of citizens and jurists, rather than speculate about how the law ought to be. ALI exists, she said, to “promote the clarification and simplification



(left) Hon. First Court of Appeals Justice Evelyn Keyes. Photo excerpted from video by Pat Nester.
(right) American Law Institute Building in Philadelphia. Photo courtesy of Wikimedia Commons.

of the law and its better adaptation to social needs, secure the better administration of justice, and...carry on scholarly and scientific legal work."

Justice Keyes finished by describing ALI's publication of the Restatement (Second) of Torts 402A, which declares that, "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer...is subject to liability for physical harm thereby caused to the ultimate consumer or user."

Lamar University History Professor Robert J. Robertson followed up by presenting "*Borel v. Fibreboard: Justice for All Men*." He showed how then-Senator Lyndon Johnson orchestrated the appointment of the Hon. Joe Fisher as the U.S. District Judge for the Eastern District of Texas, so Judge Fisher could bring "justice to all men." After the Texas Supreme Court's adoption of the Restatement (Second) of Torts 402A, Judge Fisher used it as legal authority to instruct a jury panel and award damages to the widow of industrial worker Clarence Borel.



Lamar University History Professor Robert J. Robertson presents his "Justice for All Men" PowerPoint at TSHA's Annual Meeting. Photo excerpted from video by Pat Nester.

Then the action moved to the second city in this tale of two cities: New Orleans. Step by step, using photos of all parties and attorneys, Professor Robertson demonstrated how the Borel family's attorneys used the Restatement to fire the opening salvo in a battle at the U.S. Court of Appeals for the Fifth Circuit. Asbestos manufacturers brought in ALI scholar Page Keeton from the University of Texas School of Law to argue their *Après moi, le deluge* products liability defense in New Orleans. But Judge John Minor Wisdom's affirmation of Judge Fisher's damages award

in *Borel v. Fibreboard Paper Products*, 493 F.2d 1076 (5th Cir. 1973, reh'g. denied) revolutionized personal injury law. A flood of class action, toxic tort, and consumer protection cases swept open courthouse doors from Texas to Georgia.



The Hon. Mark Davidson, Multi-District Litigation Panel Judge, comments on the panelists' papers.
Photo excerpted from video by Pat Nester.

And, as with the French Revolution, an era of radical change resulted in an age of reaction and retrenchment. As when Tallyrand and Metternich brought the Revolution and Napoleonism to their *fin de siècle*, a Bourbon, or in the case of the Texas Legislature a lot of bourbon, was a critical component of the *ancien regime's* return, as a tort reform tsunami swept across ebbing tides of class action litigation, DTPA liability, and environmentalism. The Hon. Mark Davidson, former Eleventh District Court Judge and now Multi-District Litigation Judge of all asbestos cases in Texas, described how an expansive reading of the Fifth Circuit's *Borel* decision resulted, first, in an explosion of personal injury and class action litigation, and, afterwards, in a conservative counter-reaction in the Governor's Office, the Legislature, and the judiciary. The relaxation of causation standards and evidentiary burdens that characterized

the tort revolution led to late twentieth century skepticism of asbestos-related personal injury claims.

Justice Keyes and Professor Robertson have agreed to publish their TSHA papers in the Summer 2016 issue of this journal. Later this year, the Society will post videos of the panel presentations on the Society's YouTube channel at <https://www.youtube.com/channel/UCGbV2GrijFpIYoV377nYpynQ>. The Society thanks Justice Keyes, Professor Robertson, and Judge Davidson for helping carry out the Society's scholarly mission of preserving and protecting the history of Texas law.

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Baker Botts's History and Archives Spotlighted at the Society's Spring 2016 Meeting

By David A. Furlow

For the first time in two years, the Society returned to Houston to conduct a Board of Trustees meeting. On April 1, 2016, the spring meeting took place at the office of Baker Botts LLP, a historic site in itself where much of Texas's important legal history occurred. The Society's leaders were grateful that President-Elect Macey Stokes and Baker Botts opened their offices to the Society and provided a fine Irma's lunch to everyone who attended.

Members of the Society, and seven justices from the First and Fourteenth Courts of Appeals in Houston, joined the Society's trustees, officers, and staff after the board meeting to listen to luncheon speaker Bill Kroger, a co-chair of Baker Botts, LLP's Energy Litigation Section and an accomplished legal historian who has played an active role in preserving the history of Texas law.

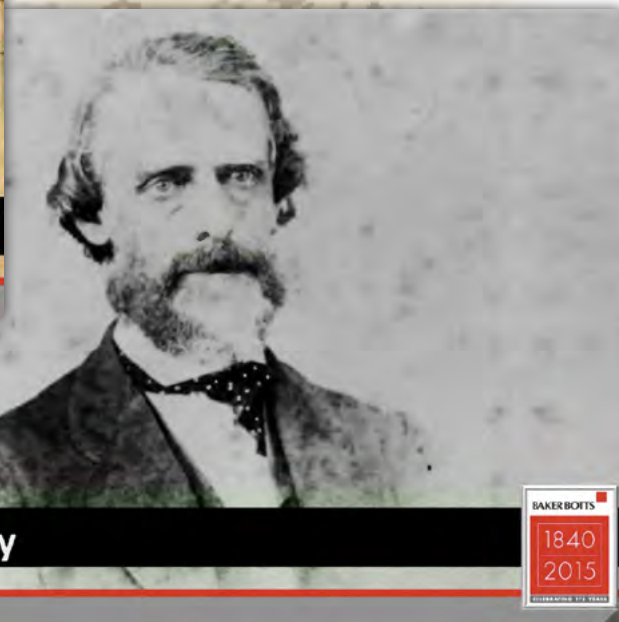
Bill Kroger began by speaking briefly about Baker Botts's and the Houston Bar Association's co-sponsorship of the Houston Grand Opera's May 2016 production of an opera based on Baker Botts attorney and later Texas Supreme Court Justice Peter Gray's successful pro bono vindication of the wrongfully enslaved Emeline's freedom.

He then led the audience on a shared journey of exploration through Baker Botts's archives and 175 years of Texas legal history. The story began with the 1835 arrival in Texas of Colonel William Fairfax Gray of Virginia and his son Peter W. Gray, also born in Virginia, who became an attorney, a captain in the Republic of Texas's army, and, eventually, a Justice of the Texas Supreme Court. Bill then introduced Walter Botts (as a partner in the Gray & Botts firm of 1865), Judge James A. Baker, and the earliest known Baker Botts photo of 1895.

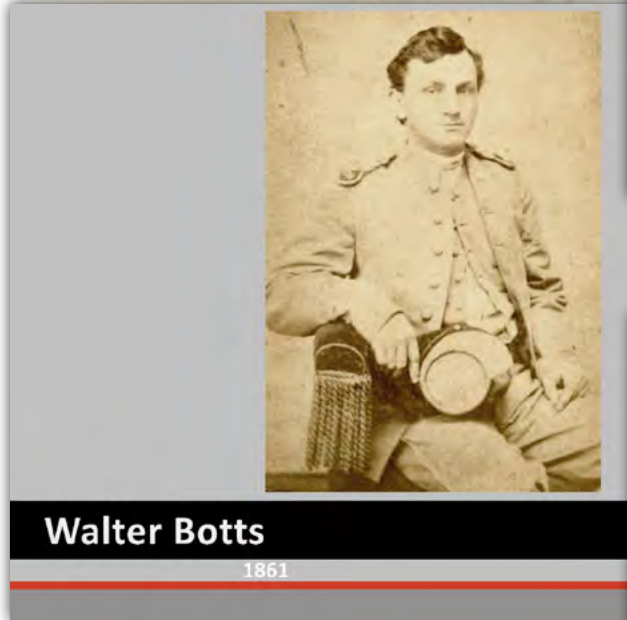
The story continued as Bill interwove the stories of Baker Botts and Texas, including vignettes of the Galveston hurricane of 1900, the Spindletop gusher of 1901, the growth of Houston, the creation of Rice Institute (later Rice University), the organization of Baker Botts's briefing banks and client notebooks, the Depression, and World War II. He also touched on a few of the topics he presented in the article he co-authored with Baker Botts attorneys Jason Newman, Ben Sweet, and Justin Lipe for the Winter 2016 issue of the *Journal*: "How Texas Law Promoted Shale Play Development."



William Fairfax Gray

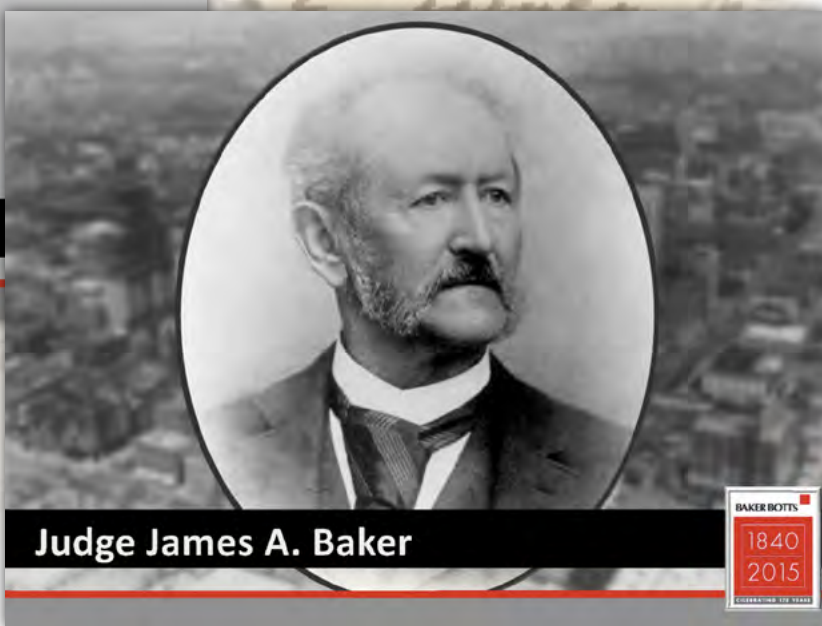


Peter Gray



Walter Botts

1861

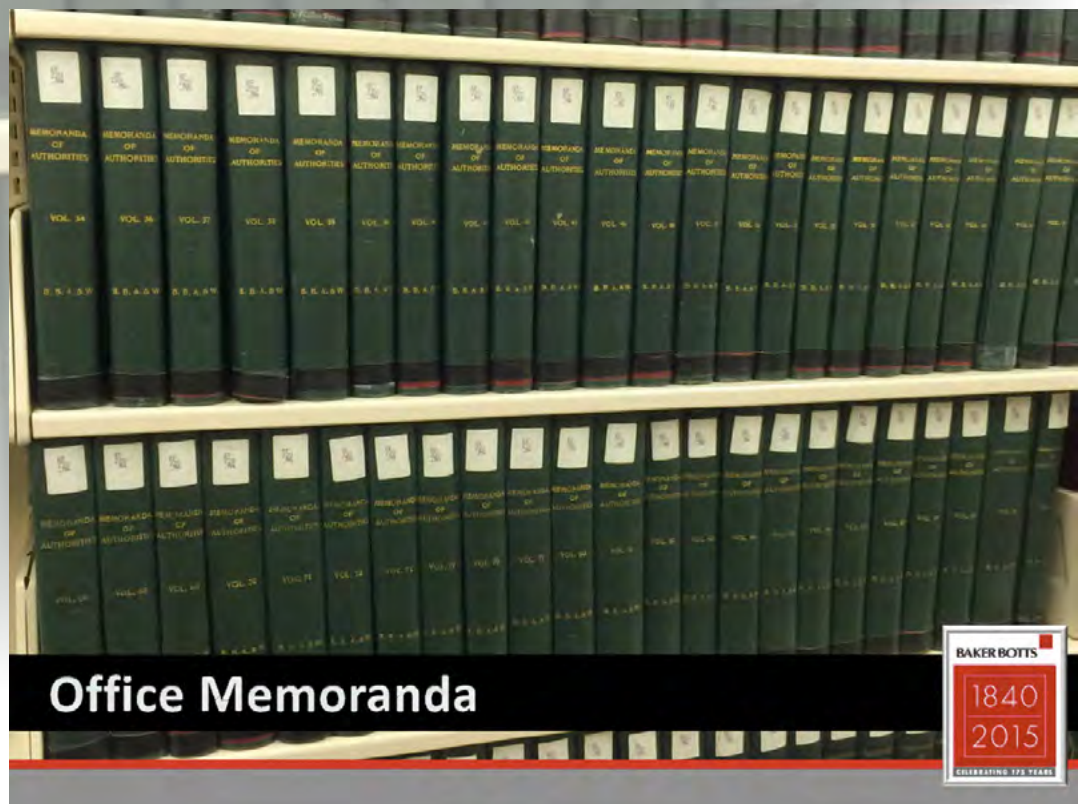


Judge James A. Baker

Slides from Bill Kroger's April 1, 2016 PowerPoint presentation.



Earliest Baker Botts photo, 1895



Office Memoranda



Slides from Bill Kroger's April 1, 2016 PowerPoint presentation.

Robert K. Downie, Baker Botts Law Librarian, has curated the law firm's archive of historically important books, records, ledgers, photos, and artifacts under the same exacting standards used by the professional archivists of national institutions and museums. Bob made a selection from the archives available for the Society's members and guests to review during the spring 2016 meeting.

In response to a request from a *Journal* editor, Fourteenth Court of Appeals Justice Bill Boyce brought a copy of his recently-published book *Miss Fortune's Last Mission: Uncovering a Story of Sacrifice and Survival*.¹ Before becoming a justice, Bill practiced law in Houston for eighteen years. An example of judicial history co-written by an appellate justice and a family historian, John Torrison, *Miss Fortune's Last Mission* tells the story of Bill's father William D. Boyce's U.S. Army Air Force service in the war over Europe.



Justice Bill Boyce and the cover of his book about his father's service during World War II.

The spring meeting concluded with a promise to meet again in Austin, at the State Bar of Texas Law Center, on Thursday, October 20, 2016 for a presentation by Texas State Preservation Board Director Alicia James about the history of the Texas Capitol Complex.

¹ (Houston: Bright Sky Press, 2016).



(above): Board of Trustees Meeting at Baker Botts. (below): Baker Botts's copy of *Las Siete Partidas*.
Photos by Dylan O. Drummond.



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Harry Reasoner Honored with Anti-Defamation League's Jurisprudence Award



The Anti-Defamation League has named former Society board member Harry Reasoner as the recipient of the 2016 Karen H. Susman Jurisprudence Award.

The award is given annually to an outstanding member of the legal community who exhibits an exceptional commitment to equality, justice, fairness, and community service.

Mr. Reasoner joined Vinson & Elkins in Houston in 1964, served as its Managing Partner from 1992 through 2001, and continues to practice complex commercial, regulatory, and appellate law at the firm today. Under his leadership, V&E implemented programs to increase pro bono participation, began offering insurance benefits to same sex couples, and launched the firm's Women's Initiative.

Mr. Reasoner currently serves as chair of the Texas Access to Justice Commission, appointed by the Texas Supreme Court to oversee initiatives expanding access to and enhancing the quality of justice in civil legal matters for low-income Texans.

The award ceremony was held April 7 in Houston.

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Texas Supreme Court Holds Argument at Baylor Law School



Members of the Texas Supreme Court convened in the Baylor Law School's Kronzer Appellate Courtroom. From left: Justice John Devine, Justice Debra Lehrmann, Justice Don Willett, Justice Paul Green, Chief Justice Nathan Hecht, Justice Phil Johnson, Justice Eva Guzman, Justice Jeffrey Boyd, and Justice Jeff Brown. Photo courtesy of Baylor Media Communications.

Under a 1998 Texas constitutional amendment that authorizes the Texas Supreme Court to convene anywhere in Texas, the Court held oral argument at Baylor Law School on March 30, 2016. The occasion marked the fourth time the Court has convened at Baylor since the school hosted the Court's first excursion outside of Austin in 1998.

The lone Baylor Law graduate on the Court, Justice Don Willett, said he lobbied his colleagues to return to the school. Two Baylor Law graduates, Sam Houston (J.D. '87) and Kristin Bays (J.D. '93), even argued opposite each other in the second of two cases heard that day.

See related story at <http://www.baylor.edu/mediacommunications/news.php?action=story&story=167500>

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Calendar of Events

Society-sponsored events (in dark red) and other events of historical interest

Current through
Sept. 5, 2016

The Houston Museum of Natural Science's special exhibition, "La Virgen de Guadalupe: Empress of the Americas" showcases Southwestern history, religion and culture. HMNS, 5555 Hermann Park Dr., Houston, Texas 77030. <http://www.hmns.org/exhibits/special-exhibitions/virgin-of-guadalupe-empress-of-the-americas/>

Current through
Dec. 31, 2016

The Bryan Museum's galleries offer artifacts and records from all periods of Texas and Southwestern history. Museum founder J.P. Bryan, a descendant of Moses Austin and a former Texas State Historical Association President, created this museum at 1315 21st Street, Galveston, Texas 77050, phone (409) 632-7685. Its 70,000 items span 12,000 years. <https://www.thebryanmuseum.org/>

Current through
June 10, 2016

The "La Belle: The Ship That Changed History" exhibition re-opens in the Bob Bullock Museum of Texas History's first floor Texas History Gallery. The hull of the sunken *La Belle* is open for viewing. <http://www.thestoryoftexas.com/la-belle/the-exhibit>

Current through
Feb. 15, 2017

The Star of the Republic Museum at Washington on the Brazos focuses on March 1836 with its exhibition "Legacy of Leadership: The Signers of the Texas Declaration of Independence." The exhibit is at 23200 Park Rd 12, Washington, Texas 77880. <http://www.starmuseum.org/exhibits/#featured>

April 29 through
Sept. 4, 2016

The Texas General Land Office presents its new exhibition "Mapping Texas: From Frontier to the Lone Star State" at the Witte Museum. The exhibit of over 40 rare maps of Texas can be seen at San Antonio's Witte Museum Russell Hill Rogers Gallery of the Helen C. and Robert J. Kleberg South Texas Heritage Center, 3801 Broadway St., San Antonio, 78209. <http://www.wittemuseum.org/mapping-texas-from-frontier-to-the-lone-star-state>

Through May 17, 2016

The Texas Supreme Court Historical Society presents "Taming Texas: Teaching the Rule of Law in Texas Schools" in Fellow

Warren Harris's pilot-project program in Houston area seventh grade classes. The program introduces the Society's Taming Texas series of textbooks co-authored by James Haley and Marilyn P. Duncan. HBA Teach Texas Committee Co-Chairs Hon. Fourteenth Court of Appeals Justice Brett Busby, District Judge Erin Lunceford and *Texas Supreme Court Historical Society Journal* Executive Editor David Furlow are assisting Warren. Volunteers can contact HBA Director of Projects Bonnie Simpson at bonnies@hba.org or at 713.759.1133.

Tues. to Wed.
May 3-4, 2016

Houston Grand Opera presents *What Wings They Were: The Case of Emeline*, an opera that tells the story of early Houston attorney and later Texas Supreme Court Justice Peter W. Gray's pro bono lawsuit to vindicate the freedom of Emeline, a "free woman of color" wrongfully enslaved. Performances on May 3 and May 4, 2016 will run from 6:00 to 9:00 p.m. at Houston's Historic 1910 Courthouse as a service-raiser for HBA Houston Volunteer Lawyers. For more information, see <http://www.eventbrite.com/e/houston-grand-operas-what-wings-they-were-the-case-of-emeline-tickets-21097571404>.

May 9, 2016

Carl Stewart, Chief Judge of the United States Court of Appeals for the Fifth Circuit, will open the Fifth Circuit Judicial Conference in Houston with an HGO performance of selections from *What Wings They Were: The Case of Emeline*. Fifth Circuit Judge Jennifer Walker Elrod will discuss recently discovered records of Emeline's case. HBA President Laura Gibson, Judge Mark Davidson, and Harris County District Clerk Chris Daniel will present those records for viewing during the Conference.

May 15, 2016

The State Bar of Texas Appellate Section hosts a meet-and-greet with Justices of Houston's First and Fourteenth Courts of Appeals. It will occur from 8:30 to 9:45 a.m. at the Attorney Waiting Room, Third Floor, 1910 Courthouse, 301 Fannin, Houston. <http://www.tex-app.org/DrawOnePage.aspx?PageID=54>

May 19, 2016

Houston Bar Association President Laura Gibson Recognizes Warren Harris's Teach Texas Committee with a President's Award at the HBA Annual Dinner at the River Oaks Country Club. Departing HBA President Laura Gibson will recognize Texas Supreme Court Historical Society Fellow Warren Harris, and HBA Teach Texas Committee Co-Chairs Fourteenth Court of Appeals Justice Brett Busby, Harris County District Court Judge Erin Lunceford, and TSCHS *Journal* Executive Editor David Furlow, for bringing the Society's Taming Texas civics project to nearly ten

thousand Houston area seventh grade students. River Oaks Country Club, 1600 River Oaks Boulevard | Houston, Texas 77019, starting at 7:00 p.m. <https://apps.hba.org/form.aspx/2016annualdinner>

May 1-31, 2016

The Harris County Law Library will explore *Miranda v. State of Arizona*, 384 U.S. 436 (1966) with an online exhibition and display of books and records. Harris County Law Library Director Mariann Sears and Assistant Director Joseph Lawson explore this case in ***Miranda v. Arizona: 50 Years Later***. The Library's Miranda web-page and 100-year history are accessible on its webpages: www.harriscountylawlibrary.org/100 and <http://www.harriscountylawlibrary.org/centennial-timeline>.

June 10-12, 2016

The Institute of Texan Cultures presents the 45th Annual Texas Folklife Festival. The festival, the biggest cultural celebration in Texas, with more than 40 different cultural groups in Texas represented, occurs at the Institute in San Antonio. http://www.texancultures.com/festivals_events/texas_folklife_2016/

June 16-17, 2016

State Bar of Texas Annual Meeting in Fort Worth, Texas. Registration and CLE programs occur at the Fort Worth Convention Center, 1201 Houston St., Fort Worth, 76102. The Omni Fort Worth, 1300 Houston St., Fort Worth, 76102 is the conference hotel. https://www.texasbar.com/AM/Template.cfm?Section=Annual_Meeting_Home&Template=/CM/HTMLDisplay.cfm&ContentID=30096

June 16, 2016
10:00-11:00 a.m.

Reenactment of Oral Argument before the All-Woman Supreme Court: *Johnson v. Darr*, presented by the Fellows of the Texas Supreme Court Historical Society. Texas Supreme Court Chief the Hon. Justice Nathan Hecht will portray 1925 Texas Supreme Court Justice Calvin Cureton, while the Hon. Judge Jennifer Elrod of the U.S. Court of Appeals for the Fifth Circuit and Texas Supreme Court Justices the Hon. Eva Guzman and the Hon. Debra Lehrmann will portray the three Justices of the "All-Woman Court," for one of the Texas Supreme Court's most historic cases, *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925). The reenactment will occur in the Fort Worth Convention Center, Conference Hall 1AB (Ground Floor), during the State Bar of Texas Annual Meeting.

June 1-30, 2016

The Harris County Law Library presents "The Founding Fathers' Magna Carta." The Law Library will display its 1763 print of Magna Carta in an exhibit focusing on the importance of the iconic document to America's founding fathers.

Sept. 8-9, 2016

28th Annual Advanced Civil Appellate Course and Civil Appellate Practice 101 Course. The Appellate Section of the State Bar of Texas and TexasBarCLE will present the course at the Four Seasons Hotel in Austin, Texas. <http://www.texasbarcle.com/materials/Programs/3314/Brochure.pdf>

Sept. 9, 2016

The Texas Supreme Court Historical Society holds its Annual John Hemphill Dinner at the Grand Ballroom of the Four Seasons Hotel, 98 San Jacinto Blvd, Austin, Texas 78701, with a 6:30 p.m. general reception and dinner at 7:00 p.m. See the “Hemphill Dinner” News Item in the *Journal* and <http://texascourthistory.org/hemphill>.

Sept. 10, 2016

2016 Texas Supreme Court BA Breakfast. The Texas Supreme Court Historical Society assists the Court in hosting its annual reunion. Current and former Justices, clerks, and staff are welcome to attend. Details will be posted at <http://www.texascourthistory.org/SCOTXbaBreakfast>

Sept. 17, 2016

The Texas General Land Office will conduct its 7th Annual Save Texas History Symposium, “The Alamo: Keystone of Texas History: Past, Present and Future.” This Society-sponsored event will occur from 8:00 a.m.-5:00 p.m. at the Menger Hotel, 204 Alamo Plaza, San Antonio, Texas 78205 with a reception from 6:30-9:00 p.m. <http://www.glo.texas.gov/save-texas-history/symposium.index.html>

Sept. 30, 2016 to
January 2, 2017

The Bob Bullock Texas State History Museum in Austin hosts the exhibition, “American Flags.” The exhibition includes flags, original artwork, and memorabilia at the museum, 1800 Congress Ave. Austin, Texas 78701, (512) 936-8746.

Oct. 20, 2016

Autumn 2016 Meeting of the Board of Trustees of the Texas Supreme Court Historical Society at the Texas Law Center in Austin, Texas.

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DISCLAIMER

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

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

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2015-16 Membership Upgrades

The following Society members have moved to a higher membership category during the 2015-16 membership year.

GREENHILL FELLOWS

Marcy and Sam Greer

Jeffrey L. Oldham

Hon. Harriet O'Neill and Kerry Cammack

Peter S. Wahby

TRUSTEE

Hon. Jeff Brown

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2015-16 New Member List

The Society has added 45 new members during the 2015-16 membership year. Among them are 17 Law Clerks for the Court (*) who received a complimentary membership.

GREENHILL FELLOWS

Elaine Block
Thomas Hetherington

TRUSTEES

Hon. Elizabeth Lang-Miers
Hon. Ann Crawford McClure

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Paul Dodson
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Connor Best*
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Hon. Reynolds N. Cate (Ret.)
Clay Coalson
Riley Daniels
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Natalie Thompson*
Scott Toland*
Mark Walters
Jessica Witte*

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Membership Benefits & Application

Hemphill Fellow \$5,000

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

Greenhill Fellow \$2,500

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

Trustee Membership \$1,000

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

Patron Membership \$500

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

Contributing Membership \$100

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

Regular Membership \$50

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



Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, education outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

Join online at <http://www.texascourthistory.org/Membership>

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