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The Supreme Court of Texas Welcomes James P. Sullivan as its Newest Justice

By the Supreme Court of Texas

Governor Greg Abbott appointed his General Counsel James P. Sullivan to serve as the newest justice on the Supreme Court of Texas.
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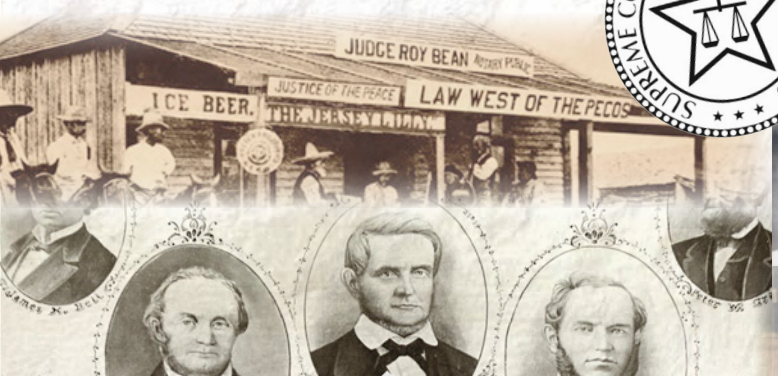

Lisa Bowlin Hobbs

Message from the President

I am excited to share our Winter Issue with you. The issue focuses on aspects of the Republic of Texas that defy expectations and popular conceptions, so please read and let us know on social media what you think about this scholarship.

First, Professors Volanto and Preuss ask "How did Texas become Texas?" and contrast the popular myths of the Republic's annexation to the United States with the complex reality of the end of Texas national sovereignty.

Then, Professor Swanson, from Northeastern School of Law, demonstrates in her article how the Republic of Texas implemented and operated a patent system in accordance with a belief that the system could be a means of attracting innovative citizens and a tool for promoting political stability.

Finally, Justice John G. Browning examines the Supreme Court of Texas' treatment of Black free and enslaved people in a variety of cases pointing to a nuanced, complicated and surprising approach on the part of the Court.

By the time you read this, the Society will have presented at the Texas State Historical Association's Annual Meeting. The title of our presentation will be "The Thrill of Victory, the Agony of Defeat and the History of Texas Sports Law." Led by Texas historian Jim Haley, our presenters will explore the intersection of sports and law in Texas history. This session promises to enthrall both sports enthusiasts and legal scholars with its deep dives into landmark cases and pivotal moments that shaped the sports legal landscape.

The Society also is planning our Spring meeting in Nacogdoches, Texas, which is the area of my roots. Board members have never visited Nacogdoches together, and I can't wait to share with you in the next issue what all we learned about "the oldest town in the state."

Until then...

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Executive Director's Page

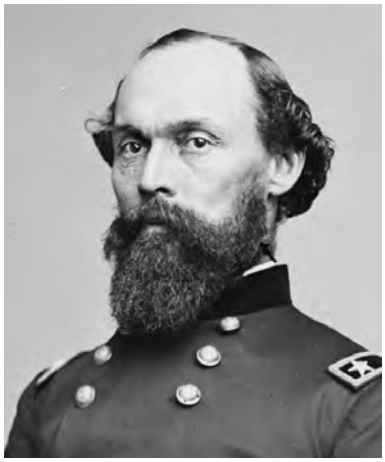
Sharon Sandle

Law and Legend in Texas Legal History:

What We Get Right—And Wrong—About Our Legal Past

Historical change rarely happens in one clean, cinematic moment, even if that's how we choose to remember it afterwards. In their article, Keith Volanto and Gene Preuss point to one such example, the "annexation ceremony" on February 19, 1846. Anson Jones's declaration *"The Republic of Texas is no more"* seemed to turn a page in history in one decisive moment, a moment recorded with an illustration of the event. But legally speaking, Texas had already been part of the United States for nearly two months. The transition from republic to statehood had begun even earlier, and took longer to complete, as is illustrated by the confusion in the courts that lasted through consideration of *Calkin v. Cocke* by the U.S. Supreme Court.

Likewise, the changes to Texas and to the nation post-slavery did not happen in an instant with the signing of the Emancipation Proclamation or with the surrender of the Confederacy at Appomattox. Or even on June 19, 1865, when Major General Gordon Granger ordered the final enforcement of the Emancipation Proclamation in Texas. Our celebration of Juneteenth focuses our attention on that symbolic moment, but that moment was far from the complete story. The story of dismantling slavery in Texas was more complex. It started earlier than you might expect, with cases like *Chandler v. State* and *Nix v. State*, in which the Texas Supreme Court upheld the rights of enslaved persons to protection under the law. And it lasted beyond the simple enunciation of the Emancipation Proclamation with cases like *Westbrook v. State* holding that a free person could not sell himself into slavery.



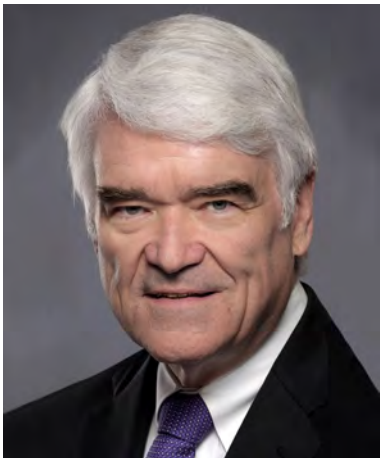
Major General Gordon Granger

This year marks another dramatic moment in the legal history of Texas. In December, Chief Justice Nathan Hecht retired from the Texas Supreme Court. As the longest-serving member of the Court in Texas history—he was first elected to the Court in 1988—Chief Justice Hecht saw many transitions in Texas and in the Texas courts. The Society was lucky to have the opportunity to hear Chief Justice Hecht reflect on his service to Texas at the Hemphill Dinner in September.

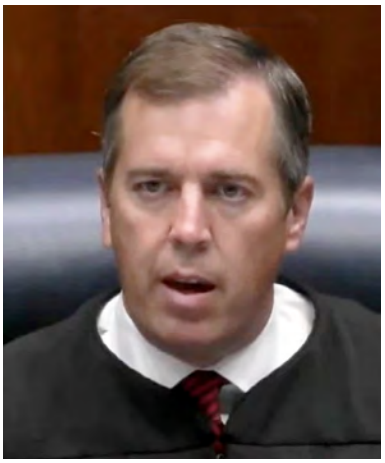
But if you weren't able to join us at the Hemphill Dinner, here is an interview with Chief Justice Hecht available online: State Bar of Texas Podcast: A Justice's Legacy—a Conversation with Supreme Court of Texas Chief Justice Nathan L. Hecht.

With Hecht's retirement, Chief Justice Jimmy Blacklock steps into a role that carries both history and responsibility. He now inherits leadership of a court that has played a defining role in Texas legal history**.** His tenure will shape the Court and the legal landscape of Texas. Like all transitions, this one will not happen in a single, decisive moment, but will develop over time one decision after another.

Over time, some moments become legendary, but history is far more complex, and change unfurls slowly. This is the impetus for the work of the Society—collecting and preserving the legal history that shapes Texas. This year, the Texas Supreme Court Historical Society will again sponsor a panel at the Texas State Historical Association Annual Meeting. The 2025 TSHA Annual Meeting takes place in Houston on February 27–March 1. This spring, the Society will again sponsor the Texas Supreme Court History & Current Practice course with TexasBarCLE; you can register for the webcast at https://www.texasbarcle.com/new/home.asp. Understanding legal history shapes how we see today's courts and the rule of law. The Society is committed to playing a role in working to preserve, clarify, and tell the full story of Texas legal history.



Chief Justice Nathan Hecht



Chief Justice Jimmy Blacklock

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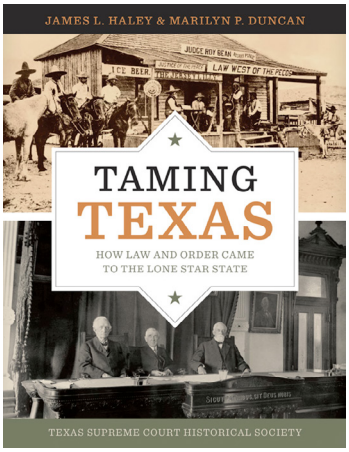
Fellows Column

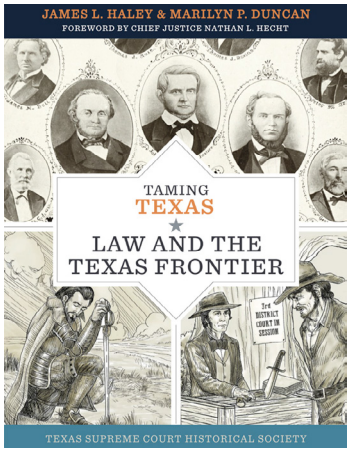
By Warren W. Harris, Chair of the Fellows

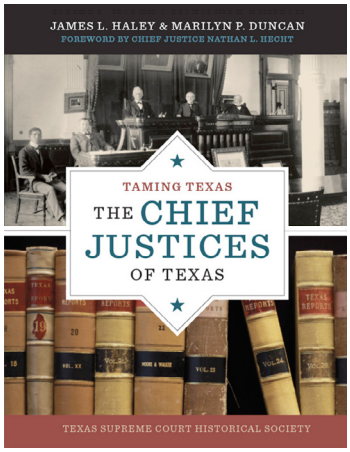
The Fellows in 2016 launched Taming Texas, an innovative judicial civics program that sends attorneys and judges to seventh-grade classrooms to teach an interesting curriculum on the history and workings of the Texas court system. The Houston Bar Association has used our Taming Texas materials to teach seventh graders in Houston-area schools. This program has already reached over 23,000 students, and the HBA is partnering with us on Taming Texas again this year. It will take over sixty lawyers and judges to reach the thousand-plus students we will teach this year, and we could not implement this vast program without the HBA's invaluable support.

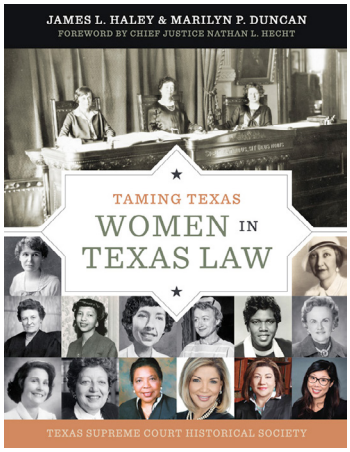
We are also working to expand Taming Texas to other parts of the state. Justice Brett Busby is coordinating efforts with the Austin bar, which did a pilot of Taming Texas last year. We are hoping to expand the project in more Austin-area schools this school year. Additionally, Mindy Davidson will be working with us to coordinate the implementation of Taming Texas in other areas of the state.

The Fellows have sponsored an illustrated legal history book series as part of its Taming Texas judicial civics course materials. Coauthored by Jim Haley and Marilyn Duncan, the books include *Taming Texas: How Law and Order Came to the Lone Star State* (2016); *Law on the Texas Frontier* (2018); *The Chief Justices of Texas* (2020); and *Women in Texas Law* (2023). Copies of the hardback books are donated to the classrooms that participate in the Taming Texas judicial civics program. You may download a free copy of the books at www.tamingtexas.org.









As you see from Taming Texas, the Fellows undertake new projects to educate the bar and the public on the third branch of government and the history of our Supreme Court. The Fellows are also a critical part of the Society's annual fundraising. We are pleased that we added four new Fellows in 2024, and information on each of these Fellows is below:

Hon. John H. Cayce joined Kelly Hart & Hallman as co-chair of its appellate section after serving as Chief Justice of the Second Court of Appeals from 1995 to 2009. Judge Cayce has served the legal profession in many capacities including the Texas Supreme Court Advisory Committee, Chair of the Council of Chief Justices, the Texas Judicial Council, the Texas Center for the Judiciary, and President of the Tarrant County Bar Association.

David A. Furlow has had a distinguished career in legal and historical fields. He has been named a *Texas Monthly* Super Lawyer for the past 20 years. David has served as Executive Editor and Social Media Chair for the Texas Supreme Court Historical Society's Journal, is a co-founder of the Society, and has been a trustee. He is a Life Member of the Colonial Society of Massachusetts and received the NSDAR Historic Preservation Award.

Mary T. Henderson is a board-certified civil appellate specialist and litigator at Butler Snow's Austin office. Mary has held key roles at the Texas Attorney General's Office and is recognized for her strategic legal approach. She is a Fellow of the Texas Bar Foundation. In honor of her Longhorn father, Mary created a charitable trust at the University of Texas to provide law scholarships to support veterans and small-town students.

Macey Reasoner Stokes leads the appellate section at Baker Botts in Houston. With 30 years of experience, she specializes in civil appeals and extraordinary proceedings, particularly for energy clients. Macey has received numerous accolades, including the 2022 Gregory S. Coleman Award from the Texas Bar Foundation and *Texas Lawyer's* triennial "Winning Women" list in 2014. In 2024, the Texas Supreme Court appointed Macey to its Supreme Court Advisory Committee for a three-year term.

If you are not currently a Fellow, please consider joining the Fellows and helping us with this important work. If you would like more information, please contact the Society office or me.

FELLOWS OF THE SOCIETY

Hemphill Fellows
($5,000 or more annually)

David J. Beck*
David E. Chamberlain
Lauren and Warren Harris*
Joseph D. Jamail, Jr.* (deceased)
Thomas S. Leatherbury
Richard Warren Mithoff*

Greenhill Fellows
($2,500 or more annually)

Stacy and Douglas W. Alexander
Marianne M. Auld
Hon. Jane Bland and Doug Bland
E. Leon Carter
Hon. John H. Cayce
Joshua and Mindy Davidson
David A. Furlow
Harry L. Gillam, Jr.
Marcy and Sam Greer
William Fred Hagans
Lauren and Warren W. Harris*
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Shannon H. Ratliff*
Harry M. Reasoner
Robert M. Roach, Jr.*
Leslie Robnett
Professor L. Wayne Scott* (deceased)
Macey Reasoner Stokes
Cynthia K. Timms
Hon. Dale Wainwright
Charles R. Watson, Jr.
R. Paul Yetter*

*Charter Fellow

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Editor-in-Chief's Column

Hon. John G. Browning

Challenges of the Early *Republic of Texas*

In this issue, we're proud to present a closer look at some of the legal challenges that confronted the fledgling Republic of Texas. It's not the first time the Journal has published articles that focused on this brief but significant time in Texas history, but it is our first themed issue on this period. From the standpoint of a historian, the Republic of Texas represents a pivotal moment in America's westward expansion, embodying the concept of Manifest Destiny. With the Republic's status as a slaveholding nation, the growing debate over slavery in the United States loomed over and greatly complicated the young republic's relationship with (and ultimate annexation by) the United States. More than anything, however, the Republic's short existence reveals the challenges in establishing a stable government and economy. The ongoing threat of action by Mexico, the desire for international recognition, the relatively small population, and the indebtedness of the new Republic were all issues that weighed heavily on the minds of not only the Republic's founders but American leaders as well. President Andrew Jackson even punted to Congress on the question of recognizing the nascent Republic, due to the threat posed by "an immense disparity of physical force on the side of Mexico."

Among the many challenges facing the new nation was establishing a judicial system. The Republic's first Congress established a Supreme Court, consisting of a chief justice appointed by the president along with four associate justices (to be elected by both houses of Congress for four-year terms). James Collinsworth, a Tennessee lawyer and former U.S. Attorney for the Western District of Tennessee (as well as a signer of the Texas Declaration of Independence) was named as the first Chief Justice. Collinsworth held this position from December 16, 1836, until his death in July 1838.[1]

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[1] For those interested in reading more about Texas' first jurists, see Joe E. Ericson's book Judges of the Republic of Texas (1836-1846): A Biographical Directory (1980).

President Andrew Jackson

James Collinsworth

Anson Jones

In this Winter 2025 issue, we're pleased to feature three principal articles that provide important insights into the legal history of early Texas. In "*When Was the Republic of Texas No More? Legal Issues Related to the Annexation of Texas,*" Professors Keith Volanto and Gene B. Preuss provide a fresh look at the complicated legal issues surrounding the annexation of Texas, from the question of when sovereignty would actually end to the impact on pending cases. In *"Beyond the Progress of the Useful Arts: The Inventor as Useful Citizen in the Republic of Texas"* Professor Kara W. Swanson gives us a rare look at intellectual property law in the young Republic. As one of the only areas of law enshrined in the U.S. Constitution, intellectual property—the protection of ideas and innovation—was deemed vital to the growth of the burgeoning United States. As Professor Swanson points out (in an excerpt from her longer Houston law review article on the topic, which looked at "start-up" nations like the Republic of Texas and the Confederate States of America), protecting the rights of inventors was viewed as critical to the Republic's economy as well. Finally, in *"An Uncommon Fairness: The Antebellum Supreme Court of Texas and Its Treatment of Black Americans,"* I offer a look at how the early Supreme Court of Texas treated Black Americans in a series of decisions. In contrast to the other slaveholding states in the South, Texas' highest court was strikingly humane and protective of Black people, emphasizing the importance of the rule of law and its protections.

Anson Jones, the last president of the Republic of Texas, had the solemn duty of ordering the Texas national flag lowered over the capital and the U.S. flag raised in its place in 1846. As he did so, he said that "the final act in this great drama is now performed. The Republic of Texas is no more." We hope you enjoy this issue, as we bring the Republic to life once more on its pages.

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When Was the Republic of Texas No More?

Legal Issues Related to the Annexation of Texas[1]

By Keith Volanto and Gene Preuss

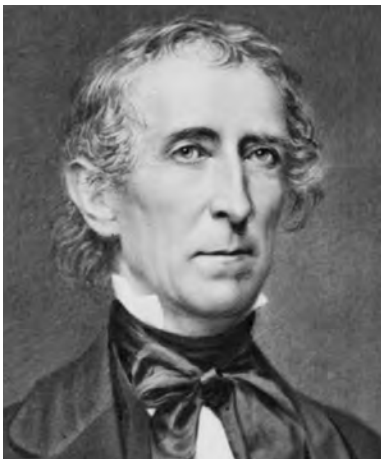
The scene has been described countless times in Texas history textbooks and classroom lectures on the Republic of Texas. On February 19, 1846, a crowd assembled in Austin in front of a cabin located just a few steps from the south entrance of the present capitol building to witness history as Texas's first U.S. governor, James P. Henderson, was inaugurated. "The great measure of annexation, so earnestly desired by the people of Texas is happily consummated," Anson Jones, the last President of the Republic of Texas told the assembled legislators of the new State of Texas, "and I am happy to greet you as their chosen representatives, and tender to you my cordial congratulations on an event the most extraordinary in the annals of the world, and one which marks a bright triumph in the history of republican institutions." Jones's hyperbole-laden valedictory address continued: "I, as President of the Republic, with my officers, am now present to surrender into the hands of those whom the people have chosen, the power and authority which we have some time held." After giving an account of his administration and the steps that he and his cabinet took to make annexation a reality, Jones' speech rose to a maudlin crescendo, "The Lone Star of Texas, which ten years since arose amid clouds, over fields of carnage, and obscurely shone for a while, has culminated, and, following an inscrutable destiny, has passed on and become fixed forever in that glorious constellation which all freemen and lovers of freedom in the world, must reverence and adore—the American Union." Finally, he built to the climax that has reverberated through Texas history: "The final act in this great drama is now performed: the Republic of Texas is no more."[2] Jones then lowered the flag of the Republic and raised the flag of the United States. "During the whole time," one observer noted, "tears crept unconsciously from the eye of many a weather-beaten Texian, who had toiled and suffered, and bled to establish an independent government." Texas history textbooks frequently describe the scene with the famous drawing by illustrator Norman Mills Price depicting President Jones dramatically lowering the flag of the Republic one last time.[3]

Gov. James P. Henderson

Anson Jones

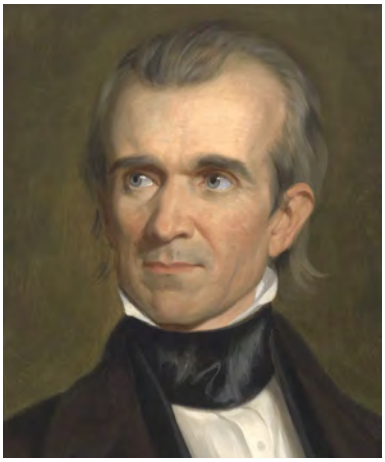
Illustration of Anson Jones lowering the Republic of Texas flag. Original engraving by Normal Mills Price.

For all its drama, this creation tale of Texas statehood contains the seeds of a glaring misconception that qualifies as historical myth: the idea that the famous "annexation ceremony," as it is often labeled, signified an actual transfer of sovereignty from the Republic of Texas to the United States. This myth has persisted even though the Republic ended two months prior, on December 29, 1845, when the United States government formally annexed Texas by vote of Congress. An overview of the annexation process followed by a close review of relevant primary sources and an analysis of two important legal cases will hopefully provide some much-needed clarity regarding this false assumption regarding the true endpoint of Texas national sovereignty.



President John Tyler

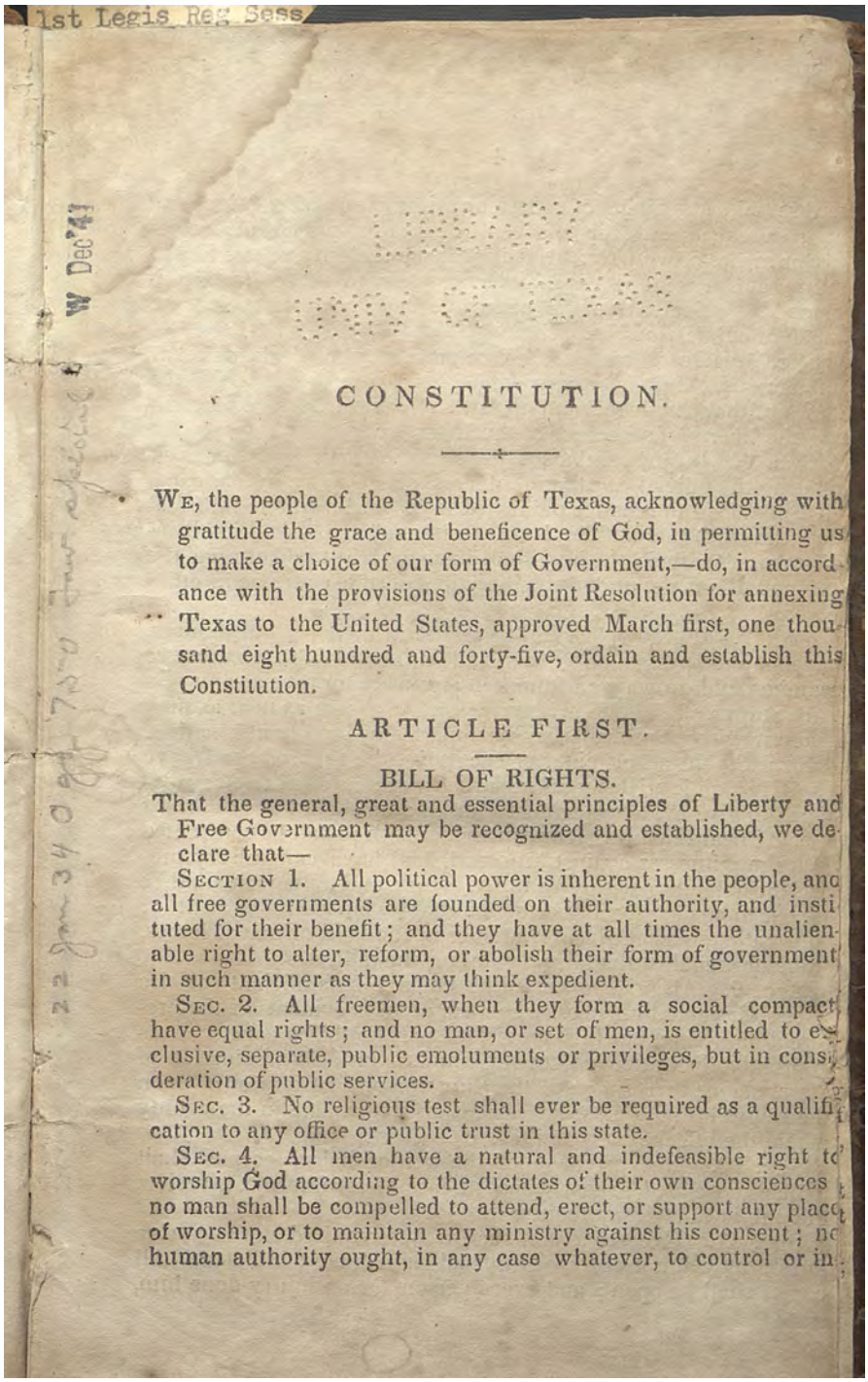
Soon after the victory of expansionist candidate James K. Polk in the 1844 U.S. presidential race, outgoing president John Tyler saw a rare opportunity for political success by formally asking Congress to annex Texas though the unprecedented procedure of a joint resolution.[4] Congress obliged, with Tyler approving the measure on March 1, 1845, just days before leaving office. The resolution called upon Texas to create a state constitution establishing a republican form of government that



President James K. Polk

needed to be approved by Texas voters before submission to Congress on or before January 1, 1846. Section 3 of the resolution stated that Texas would become a state "as soon as" the terms and conditions of Texas's admission were agreed upon by both Texas and the United States. Thus, Texas would be considered a state in the federal union the moment that Congress accepted the proposed state constitution.[5]

After President Jones formally presented the Texas Congress with the joint congressional resolution, the measure was approved, setting the stage for a state constitutional convention. Starting on July 4, delegates met in Austin for almost two months to create the proposed state constitution, soon to be known as the Constitution of 1845. During the convention, while delegates crafted the structure of the future state government, they frequently made reference to the endpoint of Texas national sovereignty. A close reading of the convention debates reveals that most of the solons who publicly expressed opinions on the matter clearly believed, in accordance with the terms of the congressional resolution, that acceptance of the new state constitution by the U.S. Congress would mark the moment when Texas sovereignty would cease.[6]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CONSTITUTION.

We, the people of the Republic of Texas, acknowledging with gratitude the grace and beneficence of God, in permitting us to make a choice of our form of Government,—do, in accordance with the provisions of the Joint Resolution for annexing Texas to the United States, approved March first, one thousand eight hundred and forty-five, ordain and establish this Constitution.

ARTICLE FIRST.

BILL OF RIGHTS.

That the general, great and essential principles of Liberty and Free Government may be recognized and established, we declare that—

Section 1. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times the unalienable right to alter, reform, or abolish their form of government in such manner as they may think expedient.

Sec. 2. All freemen, when they form a social compact have equal rights; and no man, or set of men, is entitled to exclusive, separate, public emoluments or privileges, but in consideration of public services.

Sec. 3. No religious test shall ever be required as a qualification to any office or public trust in this state.

Sec. 4. All men have a natural and indefeasible right to worship God according to the dictates of their own consciences; no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority ought, in any case whatever, to control or in-

First page of a copy of the Texas Constitution of 1845 in the Tarlton Law Library at the University of Texas School of Law.

Confusion over the issue often involves misunderstandings regarding the temporary governing situation established by the delegates at the convention for the interim period between congressional acceptance of the state constitution and the establishment of the newly elected Texas state government. In order to avoid any gap in governance during that time, the delegates chose to maintain most of the Republic's laws and to empower its existing governing officials to enforce them. As stated in Article XIII, Section 10 of the Constitution of 1845:

> That no inconvenience may result from the change of government, it is declared that the laws of this Republic relative to the duties of officers, both civil and military, of the same, shall remain in full force; and the duties of their several offices shall be performed in conformity with the existing laws, until the organization of the Government of the State under this Constitution, or until the first day of the meeting of the legislature; that then, the offices of President, Vice President, of the President's Cabinet, Foreign Ministers, Chargés, and agents and others repugnant to this constitution, shall be superseded by the same; and that all others shall be holden and exercised until they expire by their own limitation, or be superseded by the authority of this Constitution, or laws made in pursuance thereof.[7]

This provision, however, should not be interpreted as implying that the Republic of Texas would still exist, and that United States sovereignty was not supreme, as Section 3 of the constitution's same article clearly states, "All laws or parts of laws now in force in the Republic of Texas, *which are not repugnant to the Constitution of the United States* [emphasis added], the joint resolutions for annexing Texas to the United States, or to the provisions of this constitution, shall continue and remain in force as the laws of this *State* [emphasis added], until they expire by their own limitation, or shall be altered or repealed by the legislature thereof." In other words, those Texas laws that did not conflict with U.S. law (or with any new provisions specified in the new state constitution) would continue unabated as state law during the interim period, enforced by existing Republic of Texas government officers acting as caretakers for the United States government. Because the old laws of the Republic would be in effect during the transition period, the Republic's sheriffs, for example, could still arrest and detain criminals; its judges could still hear cases and pass judgments; the President of the Republic could still issue pardons and perform other permitted executive functions. Other officials drawing a salary despite the curtailment of primary duties, such as tariff collectors and ambassadors, could still maintain Texas government property (customhouses and embassies) and manage personnel, even though their former principal functions, such as collecting import duties or negotiating with foreign nations, would no longer be legally valid.[8]

One major exception to the convention delegates' general consensus regarding acceptance of the proposed state constitution by the U.S. Congress as the endpoint of the Republic of Texas' sovereignty occurred during a lengthy discussion taking place near the end of the convention, during a series of exchanges regarding the portion of the proposed constitution that eventually became Section 10 of Article XIII (the aforementioned section retaining the officers of the Republic during the transition period.) It began when John Caldwell of Bastrop County expressed confusion over the idea of continuing the Republic's officials after the proposed constitution was accepted by the U.S. Congress:

> That strikes me as very strange. It seems to hang with tenacity to the President and Foreign Ministers, and to contemplate that they shall retain their offices until the organization of the state government. Suppose that our Constitution is adopted on the first Monday in December, how can the President possibly exercise his functions as the head of a separate and distinct government, and what would Foreign Ministers be doing? How can we have a President drawing his salary, a secretary of State and a Secretary of the Treasury, and Foreign Ministers, being at the same time a part


Senator John Caldwell

of the United States? I cannot conceive of such a state of things. In my opinion, this will have to be altered, because when our Constitution is accepted by the Congress of the United States, the functionaries must go out of office. This is a dilemma from which I cannot see how we are to extricate ourselves.[9]


Chief Justice John Hemphill

In response, John Hemphill, the Republic of Texas's Chief Justice at the time, then entered the debate, by promoting his personal belief that Texas could actually continue to operate as a sovereign nation even after its acceptance into the Federal Union. The jurist based a portion of his argument on the supposed inability of the U.S. government to impose its immediate control over Texas, asserting that for Texas sovereignty to end, the laws of the United States needed to be enforceable over the territorial limits of the new state or chaos might ensue, stating at one point: "The crimes punishable by the government of the United States are not cognizable as offences against a State, and might be perpetrated here without check from any lawful authority." He posited that it would take time before the jurisdiction and laws of the United States could be effectively extended over Texas**:** "All the mass of powers belonging to the government of the United States must be enforced by the government of the [American] Republic, or not at all."[10]

Hemphill also argued that ample historical precedent existed for a delay. Reaching to an example from early American history, he noted that there was also a transition period between the time when states operating under the Articles of Confederation ratified the Constitution and when they began to operate under the new document's terms.[11]

Hemphill's reliance for precedent upon the original thirteen states joining the new government under the Constitution contained a major limitation, however, because a significant difference existed between the nature of the transition from the Articles to the Constitution and that of the Republic of Texas joining the United States. The Confederation Congress had actually passed a specific act delaying operation of the new government under the Constitution until March 1789, by which time a president and new Congress would be installed. The joint congressional resolution of March 1845, however, had no such delay provision, specifically stating, as previously noted, that Texas would join the Union "as soon as" the two governments agreed to the terms laid out in the document, or when the U.S. Congress formally accepted the Texas state constitution.

Upon adjournment of the delegates' work in late August, the finished product was sent to Texas voters, who approved the document by a 4,174 to 312 vote on October 13 and forwarded the constitution to U.S. Congress. While awaiting American approval, Texans on December 15 held elections for the anticipated state government, choosing James P. Henderson to be Texas's first U.S. governor, as well as other executive officials and members of the first state legislature. Congress accepted the Constitution of 1845 by approving a new joint resolution which declared that all provisions of the March resolution had been met. When President Polk signed the measure

on December 29, Texas immediately became the twenty-eighth state in the Union, thus ending the Republic of Texas.[12]

After President Polk approved the resolution, Congress further signaled its understanding of what had just transpired with respect to the end of Texas national sovereignty by passing a separate measure, signed by the president later that same day, which immediately extended all laws of the United States with "full force and effect" upon Texas, while also creating a new federal judicial district for the state. Two days later, on December 31, the president signed into law another measure, creating a new U.S. customs district for Texas, with Galveston serving as the official port of entry. These momentous actions by the federal government are consistently absent from most accounts of Texas annexation.[13]

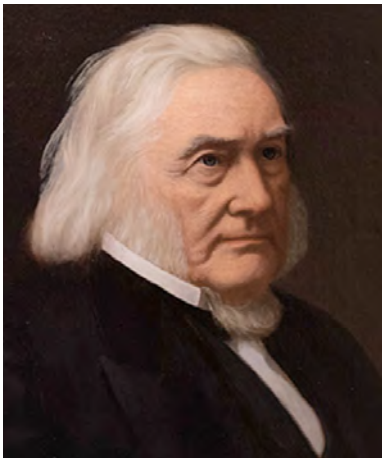
Despite such clear and assertive actions by the U.S. government, the period between Congress's admission of Texas into the Union and the establishment of the Texas state government has long been misconstrued, leading to the belief that the Republic of Texas somehow continued as a sovereign entity until the "annexation ceremony" at the inauguration of Governor Henderson on February 19, 1846. As previously noted, that was clearly not the understanding of most Texas leaders at the time, as evidenced by their statements at the state constitutional convention. Though John Hemphill's views on the issue were in the minority at the convention, his appointment as the first Chief Justice of the Texas State Supreme Court would place him in a powerful position to assert his personal theories regarding the endpoint of Texas sovereignty during a series of legal cases originating during the transition period.

Soon after Congress annexed Texas, Galveston newspapers noted (and complained vociferously about) Republic of Texas customs officials continuing to exact customs duties from merchants for items imported from the United States. Numerous Galveston merchants formally protested the federal government and sought indemnification for the seizure of their property for refusing to pay the Republic of Texas tariffs placed on American goods.[14] One mercantile house, E. P. Calkin and Company, sued the local customs official, James H. Cocke, in Texas district court for withholding $1,000 worth of goods to cover Republic of Texas duties on $4,500 worth of merchandise arriving in Galveston from New Orleans on January 30, 1846. Calkin's lawyers based their protest on the federal law of December 31, 1845, which created the U.S. Customs District for Texas and upon a circular issued by the U.S. Secretary of the Treasury that declared goods arriving in Texas from the U.S. were to be treated as domestic trade items. The company won its case in district court and received a judgment of $250 in damages for the unlawful detention of the goods.[15]

The verdict was subsequently overturned on appeal by the Texas State Supreme Court. In an opinion based upon most of the points that he initially laid out during his constitutional convention speech on the subject, Chief Justice Hemphill once again maintained that Texas sovereignty continued until the establishment of the state government, which he defined as when the state legislature first met on February 16, 1846. Therefore, he concluded, on the date in question Texas could continue to legally charge duties on imports from the United States. Hemphill contended that the March 1845 joint resolution only erected the "model" for the establishment of the future state government. The creation of the proposed state constitution merely signaled "acceptance by the convention of the terms" of Congress' offer. Further, "This acceptance was not a grant of territory, but a mere pledge of the national honor, that Texas would carry out the terms

of the proffer in like good faith with the United States." Citing sections of Article XIII of the state constitution that stipulated the continuation of the Republic's laws and officeholders until the state government became operational when the legislature first met, Hemphill asserted: "By these provisions, the sovereign will of this republic was declared, in accumulated and most perspicuous terms, that its government and laws should continue in force until the first day of the meeting of the legislature under the new constitution." Hemphill's arguments might have carried substantial weight if not for Section 3 of Article XIII which specified that the Texas Republic's laws that would continue to operate were those "not repugnant to the United States Constitution." Additionally, his argument was weakened by the fact that the March 1845 joint resolution clearly stated that Texas would join the United States "as soon as" the terms were finally met by both parties; that is, when Congress accepted the proposed Texas state constitution.[16]

Hemphill persisted by again using the example that he gave during his convention speech of the original states' transitional period between the Articles of Confederation and the U.S. Constitution: "The early history of the constitution of the United States furnishes conclusive proof of the correctness of the proposition, that a constitution may be established, and yet remain months without force or activity, and that a union between confederating parties may be completed and the instruments of confederation be fully ratified and finally acted upon, and yet the former government and laws of the contracting parties may continue in operation for a long period subsequent to the complete and perfect sanction of the new compact or form of government."[17]


Justice Samuel Nelson

After losing in the state supreme court, lawyers for Calkin and Company appealed the verdict to the United States Supreme Court, which agreed to hear the case. Ultimately, the Supreme Court voted unanimously to overturn Hemphill's decision. Final judgment was rendered in an opinion penned by Justice Samuel Nelson, a states' rights northern Democrat. After laying out the particulars of the Texas tariff case, Justice Nelson methodically refuted the defendant's position. He started by dispensing of the notion that U.S. law did not immediately apply over Texas once congressional acceptance of the state constitution in late December 1845 occurred, followed by the subsequent organizing acts passed soon after by Congress:

> It is quite apparent from the joint resolution of Congress admitting the State of Texas into the Union and the acts passed organizing the federal courts and revenue system over it, that the old system of government, so far as it conflicted with the federal authority, became abrogated immediately on her admission as a state. This is clearly so unless some provision is found in the act of admission postponing the time when it shall take effect, and, as applied to the case before us, postponing it until after 31 January 1846, when these goods were shipped to the port of Galveston.[18]

Nelson noted that Cocke's lawyers attempted to use the sections of the state constitution continuing the laws of the Republic of Texas, until the first meeting of the state legislature on February 16 to provide the necessary postponement, thereby justifying the customs official's seizure of Calkin and Company's merchandise. He found such arguments wanting: "The obvious answer to this view is

that these several provisions in the constitution were designed and intended, and had the effect, to organize a government at once on the adoption of the constitution by the people, and thereby to avoid an interregnum between the abrogation of the old and the erection of the new system and until the legislative body could meet and put the government in operation in conformity with the requirements of the organic law."[19] Nelson proclaimed that Article XIII Section 3 of the state constitution ("All laws and parts of laws now in force in the Republic of Texas which are not repugnant to the Constitution of the United States") "negatives [sic] the idea the Constitution and laws of the Union were not in force within the state as soon as her admission into the Union took place." [20] In ruling that Calkin and Company had full right to retrieve their property along with compensation in the form of accumulated court costs, Nelson concluded: "Our opinion is that the admission of Texas into the Union is to take date from 29 December, 1845, the time of its admission by Congress, and that the laws of the Union extended over it from that time, and, consequently the seizure of the stock of goods in question by the defendant under the revenue laws of the Republic on 30 January, 1846, was without authority of law."[21]

In addition to the tariff collection challenge, disagreements originating during the transition period generated other notable examples of litigation. For example, the case of *Lee v. King* involved a land title dispute that culminated in an 1858 Texas Supreme Court decision based on the *Calkin* precedent that reaffirmed the legal end of the Republic with the admission of Texas into the Union on December 29, 1845. The case was an appeal of a verdict from a Kaufman County probate court. The children and heirs of a deceased man, W. P. King, had been granted the land, but due to creditor demands on King's estate, the county probate court ordered the land in question to be sold. A resident of Louisiana, William M. Beal, purchased the land on February 3, 1846—one month after congressional approval of the Texas state constitution—and sold the land in 1852 to Thomas B. Lee. The King children sued Lee for ownership of the land, claiming the original sale to Beal was illegal because the man was not a legal Texas resident at the time—a requirement for land ownership under Republic of Texas law. Thus, the Kings argued that because the sale to Beal had taken place on February 3, 1846, two weeks before the Texas state government had been established, Republic of Texas law prevented him from legally gaining title to the land in question. Therefore, he could have never legally possessed and sold the real estate to Thomas Lee in the first place. The judge hearing the case agreed with the plaintiffs. The defendant appealed to the Texas Supreme Court, then still under Chief Justice John Hemphill.[22]

Among the arguments made by the Kings' lawyers, one in particular made by attorney John J. Good clearly showed that he had read Justice Hemphill's opinion in the Texas tariff case:

> When did Texas cease to exist as a Republic and become incorporated into the American Union as one of the States thereof?
>
> It is true Congress, as appears from the legislation upon that subject, regarded it as a State from and after the passage of the Act providing for its admission, but the transition was not the change of a territory of the General Government to that position, nor was it the result of a cession, purchase or conquest from a foreign power. It was a solemn contract by and between two free and independent Governments on an equal footing, by which one agrees to dispense with a portion of its sovereignty and become part and parcel of the other, and the other to receive it on certain terms stipulated.
>
> Congress could not, by its simple act and resolution, blot out a Republic and

> create a State, and while her action may be regarded as persuasive of the law it certainly is not conclusive. Texas, as one of the contracting parties, has an equal right with the United States to fix that important period, and neither the Legislature nor Judicial branches of the General Government has the right to supervise her action in regard thereto.
>
> 1st. The new Government did not exist until the old had expired.
>
> 2nd. That the Republic did exist in all its force and vigor until the organization of the State Government, was so regarded by the Executive, Legislative, and Judicial branches of the Republic, and since, her admission has been settled by the highest Judicial tribunal of the State.[23]

Despite Good's use of Hemphill's familiar arguments, the chief justice wrote the court's opinion that supported Thomas Lee's appeal and overturned the lower court's decision. Citing the decision in *Cocke v. Calkin & Co.*, though clearly not agreeing with it, Hemphill nevertheless stated that his court was bound to follow its interpretation regarding Texas national sovereignty. As a result, William Beal could not be legally denied title to the Kings' land on the grounds that he was not a resident of Texas at the time of the purchase. Because Texas was then legally a part of the United States and Beal was an American citizen, he could not be denied the ability to purchase the land in Texas; therefore, his subsequent sale of the land to Thomas Lee was valid:

> One of the counsel [John Good] for the appellees has briefly but forcibly maintained the position that the Constitution and Laws of the United States were not in force in Texas until the 16th February, 1846, nor were the Constitution, Laws and Government of the Republic of Texas abrogated or superceded [sic] until that day. We concur in these propositions and attempted to maintain them in *Cocke v. Calkin & Co.*, but the record of that cause having been taken to the Supreme Court of the United States, that tribunal decided, that by the Acts admitting Texas into the Union, extending over it the laws of the United States, &c., on the 29th of December, 1845, the old system of Government so far as it conflicted with the Federal authority was abrogated, and in substance that the Constitution and the Laws of the United States were in force in Texas immediately upon her admission as a State....
>
> If it be admitted then that the views in *Calkin & Co. v. Cocke*, are a sound interpretation of the acts which together formed the compact between the two nations, it results of necessity that Wm. M. Beal, the purchaser, was not an alien to Texas on the 3rd of February, 1846. As a citizen of Louisiana he was, under the Constitution of the United States, (Art. 4, Sec. 2) entitled to the privileges and immunities of the citizens of Texas.[24]

That the Republic of Texas ended the moment that the United States Congress voted to accept the Texas state constitution on December 29, 1845, should be beyond dispute. But while it is settled law, it is not yet "settled history."[25] With its ability to deliver dramatic closure to the Republic period, many scholars, historical museums, professional history associations, and Texas history textbooks still cling to the overly romanticized account of the annexation ceremony as a more satisfactory coda to the Republic of Texas than the more mundane process that annexation actually took.

Much of the reason for this misunderstanding among the historical community and general public alike derives from the manner in which the first generation of Texas history textbooks appearing at the turn of the twentieth century covered the subject. Often writing with a melodramatic flair and overt romanticism, with a concern more in interesting young readers in history by telling exciting stories with moral lessons than in promoting objective truth, authors frequently used the annexation ceremony as a moving scene to literally close the chapter on Texas nationhood before ushering in the statehood period.[26] Large numbers of textbooks approved for seventh-grade Texas history classes continued to perpetuate the ancient misconceptions throughout the twentieth century, as did many college-level Texas history textbooks.[27] Historical monographs examining the topic of annexation, as well as popular general works on Texas history appearing over the years, by failing to consult proper primary sources, continued to provide confusing descriptions for the end point of the Republic, often asserting that despite becoming the 28th U.S. state on December 29, 1845, Texas somehow retained its national sovereignty until the inauguration of Governor Henderson on February 19, 1846.[28] These discrepancies have continued into the digital age, with many Texas historical websites run by professional organizations promoting the improper 1846 end date for the Republic of Texas.[29]

Some of the textbooks that perpetuated the myth that the "annexation ceremony" signified an actual transfer of sovereignty from the Republic of Texas to the United States (see endnote 27)

Historians are obligated to correct falsehoods of the historical record, especially glaring ones of long duration, whenever they conflict with available evidence. This case reveals more than a mere factual oversight, but rather, the persistence of a long-held creation tale laced with old-school traditionalism that needs to be expunged, with the purely symbolic ceremony explained within its proper context. As more attention is being paid by scholars to the Republic of Texas era, historians should work with a firm understanding of when that period truly ended rather than perpetuating a romantic myth.

Endnotes

1 This article is an abridged version of "When Was the Republic of Texas No More?: Revisiting the Annexation of Texas," which appeared in the *Southwestern Historical Quarterly* 123 (July 2019): 30-59.

2 Anson Jones, "Valedictory Speech," Feb. 19, 1846, Texas State Library and Archives Commission, https://www.tsl.texas.gov/treasures/earlystate/nomore-1.html.

3 "The Inauguration," *Texas Democrat* (Austin), Feb. 20, 1846; Noah Smithwick, *Evolution of a State: or Recollections of Old Texas Days* (Austin: Gammel, 1900), 283–284.

4 In this article, we have not entered the debate over the constitutionality of the joint resolution process for annexation. For those interested in that topic, Ralph H. Brock has explored it extensively in "'The Republic of Texas is No More': An Answer to the Claim that Texas Was Unconstitutionally Annexed to the United States," *Texas Tech Law Review* 28 (1997), 679–751.

5 J. Res. 8, 5 Stat. 797, 28th Cong. (1845).

6 See, for example, *Debates of the Texas Convention,* Wm. F. Weeks, reporter (Houston: J. W. Cruger, 1846): 159-61; 330-33; 513; 553-54; 673. For the exact quotes and their context during the debates, see pages 38-45 in our *Southwestern Historical Quarterly* article.

7 Tex. Const. of 1845, art. XIII, § 10.

8 Tex. Const. of 1845, art. XIII, § 3. See: *Debates of the Texas Convention,* 101. Years earlier, at the birth of the Texas Republic, Stephen F. Austin had actually foreseen such an interim arrangement. During his brief stint as the Republic's first Secretary of State, Austin sent general instructions to William H. Wharton, Texas's minister plenipotentiary to the United States, charging the ambassador to negotiate an annexation treaty:

> In forming said Treaty of Annexation, the right ought therefore to be secured to Texas, of becoming a State of the American Union on an equal footing with the other States, and as such to adopt her constitution and present it to the next Congress of the United States for approval, and to organize her state Government without delay, so soon as the Treaty of annexation shall be duly ratified by both parties. The authorities of the Republic that may be in office at the ratification of said treaty, should continue administering the government under the constitution and laws of this Republic, which are not contrary to those of the United States, until the State government is organized, so as to avoid an interregnum.

Austin to Wharton, Nov. 18, 1836, in George P. Garrison (ed.), *Diplomatic Correspondence of the Republic of Texas, in Annual Report of the American Historical Association for the Year 1907* (2 vols.; Washington, D.C.: Government Printing Office, 1908), II, pt. 1, 132.

9 *Debates of the Texas Convention*, 727.

10 *Debates of the Texas Convention*, 729. For information on the life of John Hemphill, see James P. Hart, "John Hemphill - Chief Justice of Texas," *Southwestern Law Journal* 3 (Fall 1949): 395–415, and Thomas W. Cutrer, "Hemphill, John," *The Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/hemphill-john.

11 *Debates of the Texas Convention*, 730.

12 J. Res. 1, 9 Stat. 108, 29th Cong. (1845).

13 An Act to Extend the Laws of the United States over the State of Texas, and for other Purposes, 9 Stat. 1, 29th Cong. (1845); and An Act to Establish a Collection District in the State of Texas, and for other Purposes, 9 Stat. 2, 29th Cong. (1845).

[14] *Weekly Civilian and Galveston Gazette*, Jan. 24, 1846; *Galveston News*, Feb. 27, 1846; *Journal of the Senate of the United States of America: The First Session of the Twenty-Ninth Congress* (Washington, D.C.: Ritchie and Heiss, 1846): 344–345.

[15] *Cocke v. Calkin & Co.*, 1 Tex. 542-43.

[16] *Cocke v. Calkin & Co.*, 1 Tex. 543-44, 547.

[17] *Cocke v. Calkin & Co.*, 1 Tex. 549.

[18] *Calkin v. Cocke*, 55 U.S. 236 (1852).

[19] *Calkin v. Cocke*, 55 U.S. 237 (1852).

[20] *Calkin v. Cocke*, 55 U.S. 237–38 (1852).

[21] *Calkin v. Cocke*, 55 U.S. 239 (1852).

[22] *Lee v. King*, 21 *Texas*, 577–78.

[23] *Lee v. King*, 21 *Texas*, 580–81.

[24] *Lee v. King*, 21 *Texas*, 581–82.

[25] The *Calkin* case continues to be cited by judges and legal authorities. In 2005, then-Texas Attorney General Greg Abbott received an inquiry from Frank Madla, chair of the State Senate Committee on Intergovernmental Relations, regarding whether the 1838 Live Oak Treaty between the Lipan Apache and Texas was still a binding agreement. Abbott responded with a legal opinion stating that the treaty was no longer valid because the treaty was made with the Texas Republic that ceased to exist in December 1845: "Upon its initial admittance to the Union, the State of Texas became subject to the United States Constitution, see *Calkin v. Cocke*, 55 U.S. 227, 235 (1852) (stating that the State of Texas was admitted to the Union on December 29, 1845, on an equal footing with the original states and 'all laws of the United States . . . extended over, and to have full force and effect within, the State'), which gives the federal government exclusive authority over Indians." Abbott to Madla, July 18, 2005, Texas Attorney General Opinion No. GA-0339 https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2005/ga0339.pdf.

[26] See, for example, Dudley G. Wooten, *A Complete History of Texas for Schools, Colleges, and General Use* (Dallas: The Texas History Company, 1899), 310; Anna J. H. Pennybacker, *A New History of Texas for Schools* (rev. ed.; Austin: Mrs. Percy V. Pennybacker, 1900), 239.

[27] For grade-school textbook examples, see: Ralph W. Steen, *History of Texas* (Austin: The Steck Company, 1939), 217–218; A. Garland Adair and Ellen Bohlender Coats, *Texas: Its History* (Philadelphia: The John C. Winston Company, 1954), 144–146; William C. Pool, Claude Elliot, and Lucile Williamson Raley, *Texas: Wilderness to Space Age* (San Antonio: The Naylor Company, 1962), 264–265; June Rayfield Welch, (Austin: Steck-Vaughn Company, 1972), 96; Adrian N. Anderson and Ralph A. Wooster, *Texas and Texans* (Austin: Steck-Vaughn Company, 1978), 228. For college textbook examples, see Rupert Norval Richardson, *Texas: The Lone Star State* (New York: Prentice-Hall, 1943), 167; Jesús F. de la Teja, Paula Marks, and Ron Tyler, *Texas: Crossroads of North America* (Boston: Houghton Mifflin Co., 2004), 242.

[28] See: Justin H. Smith, *The Annexation of Texas* (New York: Macmillan, 1919), 468; Frederick Merk, with the collaboration of Lois Bannister Merk, *Slavery and the Annexation of Texas* (New York: Knopf, 1972), 176; Andreas Reichstein, *Rise of the Lone Star: The Making of Texas* (College Station: Texas A&M University Press, 1989), 177; T.R. Fehrenbach, *Lone Star: A History of Texas and the Texans* (New York: Collier Books, 1968), 267; Randolph B. Campbell, *Gone to Texas: A History of the Lone Star State* (2nd ed.; New York: Oxford University Press, 2012), 184; Archie P. McDonald, *Texas: A Compact History* (Abilene, Tex.:, State House Press, 2007), 85.

[29] While Joseph Milton Nance's entry on the Republic of Texas in the Texas State Historical Association's *Handbook of Texas Online* correctly relates that the Republic ended on December 29, 1845, C. T. Neu's entry on Texas annexation states that while the December date marked Texas's "legal entry into the Union," a formal "transfer of authority" from the Republic to the State of Texas supposedly did not occur until Governor Henderson's inauguration ceremony on February 19, 1846. That date is also cited by the "Texas Day by Day" feature on the Texas State Historical Association's website. The websites for the Bob Bullock Texas State History Museum and the Star of the Republic Museum at Washington-on-the-Brazos both declare that the Republic ended in 1846. See: Joseph Milton Nance, "Republic of Texas," The *Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/republic-of-texas; C. T. Neu, "Annexation," *Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/annexation.

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Beyond the Progress of the Useful Arts: The Inventor as Useful Citizen in the Republic of Texas

By Kara W. Swanson

The TSCHS Journal gratefully acknowledges permission to reproduce this excerpt from Professor Kara Swanson and the University of Houston Law Review. The original and unabridged version was published in 60 Houston Law Review 363 (2022). The article can be found in its entirety here.

I. INTRODUCTION

What are we doing in the United States when we implement and maintain a patent system? This question is significant both descriptively and normatively, as U.S. legislators and bureaucrats consider how best to shape and administer the patent system.[1] This article argues that when answering it, we should consider what Texans and Confederates thought they were doing when they implemented and operated patent systems.[2] By analyzing how two wartorn and impoverished republics copied the U.S. patent system, we can see how U.S. citizens had come to understand the purposes of their patent system. Using comparative legal history, this Article demonstrates that by the mid-nineteenth century, when the U.S. patent system took its present form, U.S. citizens believed that it was promoting the functioning of their democratic republic. The U.S. patent system, as it had been haltingly shaped into its modern contours, encouraged the "useful arts" *and* useful citizens, the type of individuals needed to make an uncertain experiment in democratic republicanism succeed.[3] This underappreciated purpose explains why a U.S.-style patent system was a priority in countries struggling to replicate the U.S. government and, more consequentially, why the patent system has retained pride of place in the U.S. national imagination.

This Article applies comparative legal history, a perspective-shifting approach that exposes the implicit assumptions of U.S. citizens about their patent system by analyzing the actions of those who left the United States and formed imitative democracies: the Republic of Texas (1836–1846) and the Confederate States of America (1861–1865). Each of these new countries, engaged in desperate battles for survival, devoted scarce resources to establishing a patent office,

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1 *See, e.g.*, Patent Eligibility Jurisprudence Study, 86 Fed. Reg. 36257 (July 9, 2021) (seeking information regarding possible need to reform patentable subject matter); Andrei Lancu & Laura A. Peter, USPTO, *Study of Underrepresented Classes Chasing Engineering and Science Success: SUCCESS Act of 2018* (Oct. 31, 2019) (reporting on efforts to increase patent system inclusion in response to congressional mandate).

2 I use Texans to refer to white Anglophone residents of the Republic of Texas, distinct from Tejanos, "native Hispanic inhabitants of Texas." Andres Tijerina, *Tejanos and Texas Under the Mexican Flag, 1821–1836* (1994). "Confederates" refers to white residents of the Confederate States of America.

3 U.S. CONST. art. I, § 8, cl. 8 (capitalization modernized).

choosing the U.S. patent system as a model even as other patent systems, such as those of Great Britain and Mexico, offered alternatives seemingly more advantageous to these cash-strapped and underindustrialized nations. I argue that these choices demonstrate that the white men who founded these countries carried with them from the United States a belief that a patent system could be a means of fostering useful citizens who would promote much-needed political stability as well as the stimulus to the useful arts sought by these countries reliant on slave-based commodity agriculture. By investigating what these imitators copied and changed as they established patent systems even in the midst of wartime turmoil, we can uncover the understandings they brought from the United States about the dual roles of patents in a republic. Identifying these understandings can assist us in understanding the U.S. patent system.

II. REPUBLIC OF TEXAS

In March 1836, while their army was fighting Mexico and the Alamo was under siege, a group of men met in convention to found the Republic of Texas and draft its constitution.[4] The majority of the delegates were white Anglophone immigrants from the United States.[5] The constitution they produced reflected their embrace of the U.S. model of democratic republicanism as well as their views about how the U.S. Constitution should be updated to reflect fifty years of experience.[6] Most prominently, the Texans settled then-disputed questions in the United States by constitutionally limiting citizenship to whites only and prohibiting any legislative emancipation of slaves.[7] The Texas constitution established a government by, for, and of white people built on a permanent foundation of racial slavery.

Even amid the rush of war—the delegates were eager to conclude their business so that they could return to battle or flee with their families and slaves from the advancing Mexican troops—the Texans took time to redraft the enumerated congressional powers listed in Article I of the U.S. Constitution.[8] One of these, added by amendment and without discussion, was the power to "grant . . . patents and secure to . . . inventors the exclusive use thereof for a limited time."[9] The Texans replaced the general grant in the U.S. Constitution descriptive of ends ("to promote the progress") with an explicit grant of power to pursue the means the United States had chosen

4 Rupert N. Richardson, "Framing the Constitution of the Republic of Texas," 31 *Southwestern Historical Quarterly* 191, 191–92, 198 (1928); Stanley Siegel, "A Political History of the Texas Republic 1836–1845" 30–32 (1973); *see also* Paul D. Lack, *The Texas Revolutionary Experience: A Political And Social History 1835–1836*, 75–95 (1992) (detailing events of the convention and constitution, and describing the convention as occurring in a time of "division and disorder" and "prolonged crisis").

5 Richardson, "Framing the Constitution," 196 (describing delegates as including three Spanish-Americans among Anglo-Americans); Ralph W. Steen, "Convention of 1836," *Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/convention-of-1836 (listing delegates and their birthplaces).

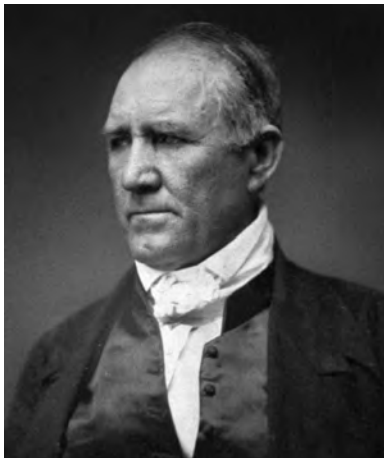
6 *Ibid*., 209 (explaining that the constitution was a "composite" of the U.S. Constitution and various state constitutions).

7 CONSTITUTION OF THE REPUBLIC OF TEXAS (1836), at Gen. Provisions §§ 6, 9, 10, *reprinted in* 1 H.P.N. Gammel, THE LAWS OF TEXAS 1822–1897, at 1078, 1079–81 (Austin, Gammel Book Co. 1898).

8 H.P.N. Gammel, *Journals of the Convention of the Free, Sovereign, and Independent People of Texas*, *in* GENERAL CONVENTION, ASSEMBLED MARCH 9, 1836 (1898); Siegel, "A Political History," 34; Lack, *The Texas Revolutionary Experience,* 98 (noting "hasty" adjournment followed by "panic"); *cf.* Richardson, "Framing the Constitution," 209 (arguing that word changes were sometimes "to no apparent advantage").

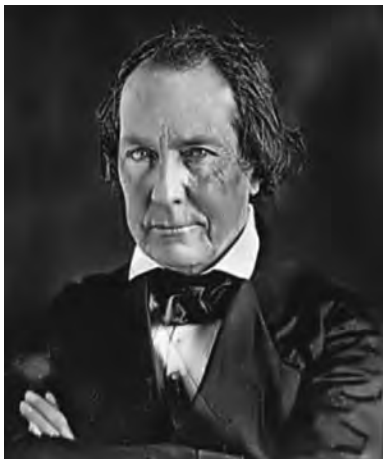
9 CONSTITUTION OF THE REPUBLIC OF TEXAS (1836), Art. 2, § 3, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1072, 1072 (Austin, Gammel Book Co. 1898).

to reach that end, patents.[10] Despite their haste to establish a government while anticipating an invading army, Texans ensured that their government could grant patents.



Daguerreotype of Sam Houston, 1856, from Mathew Brady's studio, Library of Congress.

Although Texans wrote a constitution that established the newly independent territory as a democratic republic, they also expected that their country would be extremely short-lived, merely an intermediate stage before admission to the United States as a state. In September 1836, Texas residents voted simultaneously to elect their first president, Sam Houston, and in support of a resolution to petition the United States for annexation.[11] It was only after Texas withdrew its unsuccessful petition in the fall of 1838 that the government turned seriously to nation-building.[12] As part of its renewed commitment to the future of the Republic of Texas, its congress swiftly drafted and passed "An Act Securing Patent Rights to Inventors," which then-President Mirabeau Lamar signed on January 28, 1839.[13]



Mirabeau B. Lamar, Texas State Library and Archives Commission.

The Republic of Texas was in dire straits. According to one historian, "[t]he national treasury was empty, the land devastated, and the frontier harassed by Indians."[14] To succeed as a nation, it needed to rebuild an economy ravaged by war. A local newspaper editor had argued in October 1838 that "[w]e are much in want of . . . labor-saving machines . . . in order to enable us to compete successfully with other countries."[15] It was not surprising that as it contemplated its national future, Texas set up a patent system, intending thereby to foster innovation and economic growth. In doing so, however, Texans made choices, not all of which were the obvious best means of reaching those goals.

Since the Texas Revolution, both Texas and U.S. residents had been petitioning the Texas legislature for patents, the ad hoc approach used previously by the British colonies and the states. By passing a patent act, Texans were making the choice to have a patent *system*, anticipating a steady flow of applications in a growing country, better processed by bureaucrats than legislators. The new law limited Texas patents to actual inventors; Texas would not offer patents of importation

[10] *Compare* U.S. Const. art. 1, § 8, cl. 8 (stating that Congress will promote progress by securing inventors with exclusive rights to their discoveries), *with* Constitution of the Republic of Texas (1836), Art. 2, § 3, *reprinted in* 1 H.P.N. Gammel, The Laws of Texas 1822–1897, at 1072, 1072 (Austin, Gammel Book Co. 1898).

[11] Siegel, "A Political History," 47, 54; *Joint Resolution for Sending a Minister to the United States of America*, *reprinted in* 1 H.P.N. Gammel, The Laws of Texas 1822–1897, at 1089–90 (Austin, Gammel Book Co. 1898) (recounting vote in favor of annexation).

[12] Siegel, "A Political History," 90–91, 104–05.

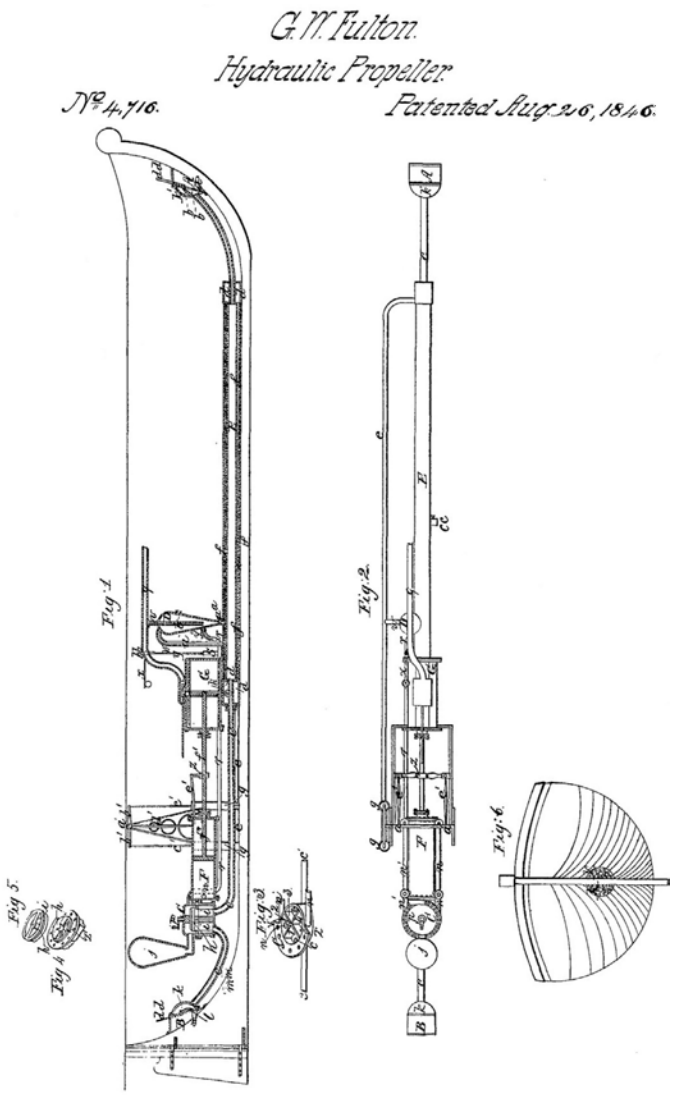
[13] 2 H.P.N. Gammel, The Laws of Texas 1822–1897, at 109–11 (Austin, Gammel Book Co. 1898); *see also* Andrew Forest Muir, "Patents and Copyrights in the Republic of Texas," 12 *Journal of Southern History*, 204, 210–11 (1946) (detailing the legislative history of the Act).

[14] Siegel, "A Political History," 56–57.

[15] Muir, "Patents," 208 (quoting *Matagorda Bulletin*, Oct. 18, 1838).

as incentive to bring new technologies into the country.[16] The legislators modeled the Texas patent act on the U.S. Patent Act of 1793, creating a registration system like that used in the United States until 1836.[17] Despite the existence of a new model of patent examination across the border, Texas chose the less resource-intensive approach to processing applications, appointing the chief clerk of the State Department to add processing patent applications to his duties.[18] Like the United States when it quickly ended its initial foray into examination in 1793, the Texas government was limited in funds and small. Unlike the early United States, though, Texas had a third choice: free riding.

The same newspaper editor suggested that because "our citizens [are] too much engaged in other pursuits" to invent, the speediest way of bringing needed "mechanic arts" into Texas was simply "to grant patents to [any U.S. patentee]" who sought one, thus obtaining the "benefit" of the U.S. examination system "without the 'great expense and trouble.'"[19] Like granting patents of importation, this approach would spur the importation of technology already proven valuable elsewhere. Rejecting this proposal, the Texas legislature instead created a system that required would-be patentees to submit all the proofs required in the United States: "a description, model or drawing," "full written instructions as to the most suitable materials, manner of constructing, and rendering useful such improvement," and an "oath" that the invention "originated with" the claimant.[20] U.S. patentees would have to reapply in Texas. But they need pay only $30, the same low fee as in the United States.[21] Texas needed revenue, but it too prioritized accessibility of patents to its citizens over its treasury.



An illustration by a Texas inventor applying for a U.S. patent in 1846

[16] Act approved Jan. 28, 1839, 3rd Cong., R.S., §§ 3, 5, 1839 Repub. Tex. Laws 109, 109–10, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 109–10 (Austin, Gammel Book Co. 1898) (requiring applicant to swear that he believes the invention "originated with himself," and denying rights to "persons who are not really original inventors or improvers").

[17] *Compare ibid. §§* 2, 7, *with* Patent Act of 1793, ch. 11, §§ 1, 4, 1 Stat. 318, 318–20, 322 (repealed 1836).

[18] Act approved Jan. 28, 1839, 3rd Cong., R.S., § 7, 1839 Repub. Tex. Laws 109, 109–10, *reprinted in* 2 H.P.N. Gammel, THE LAWS OF TEXAS 1822–1897, at 109–10 (Austin, Gammel Book Co. 1898).

[19] Muir, "Patents," 208–09 (quoting Matagorda Bulletin, Oct. 18, 1838).

[20] Act approved Jan. 28, 1839, 3rd Cong., R.S., §§ 2–3, 1839 Repub. Tex. Laws 109, *reprinted in* 2 H.P.N. Gammel, THE LAWS OF TEXAS 1822–1897, at 109 (Austin, Gammel Book Co. 1898).

[21] *Ibid.* § 4.

Texans did not copy all aspects of the U.S. registration system. The Texas patent system was financially accessible but geographically much more restrictive. While the United States facilitated applications from a distance, in Texas, no applications by mail or via an agent were accepted. Texas required that applicants appear before its Secretary of State to take the oath of inventorship.[22] Further, the applicant needed to be a citizen of Texas or legally declare their intention to become one.[23] While an inventor-patentee was allowed to leave the country after this ceremony, to maintain a patent for the fourteen-year term, they either had to continue to live in Texas or designate an agent within the state to manage the patent rights, a residence requirement also not part of U.S. law after 1836.[24] As a new country, Texas turned to a version of patent law recently discarded in the United States, limiting patents to those physically present in the country and willing to become citizens. While the United States by 1836 allowed nonresident aliens to obtain patents, albeit subject to higher fees, Texas prioritized the residence and citizenship of the inventor over the introduction of the invention.

Cumulatively, these requirements imposed multiple barriers to importing *inventions* into Texas, in favor of a system that brought *inventors* into Texas. Seeking to encourage white settlement, Texas legislators saw a patent system as an opportunity, like cheap Texas land, to incentivize "foreigners to come here."[25] The offer of intellectual property, however, was designed to lure a particular type of settler, one who could invent. Foreigners would come, join the polity as citizens, "and introduce their inventions."[26] Having knowledge of a new technology was not sufficient. The Texas patent system welcomed inventive would-be citizens, not simply those arriving with knowledge of someone else's idea.

This choice to prioritize inventors over inventions was deliberate and distinguished Texas from the Republic of Mexico, also newly independent and anxious to build its postcolonial economy. The Mexican republic granted patents of importation.[27] Further, Mexico welcomed non-Mexicans to apply for patents by mail and retain their citizenship, with the result that foreigners received the majority of Mexican patents during the nineteenth century.[28] While Mexico used its patent system to import technology, Texas rapidly found itself turning away new technologies. The clerk reported after six months that "[f]requent applications [for patents] have been made by persons residing in the United States, through an agent here . . . but have been refused until the applicant should appear in person."[29]

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[22] *Ibid.* § 3.

[23] *Ibid.* § 1.

[24] *Ibid.* § 4.

[25] Muir, "Patents," 208 (quoting *Matagorda Bulletin*, Oct. 18, 1838); *see also* Alice L. Baumgartner, *South to Freedom: Runaway Slaves to Mexico and the Road to the Civil War* 32, 44 (2020) (comparing Stephen F. Austin's proposal to charge 12.5 cents per acre in Texas with the rate of $50 an acre in the United States).

[26] Muir, "Patents," 208 (quoting *Matagorda Bulletin*, Oct. 18, 1838).

[27] Edward Beatty, *Technology and the Search for Progress in Modern Mexico* 12, 104 (2015) (arguing that Mexico relied primarily on patents of importation, and it was not until the patent law of 1890 that Mexico sought to encourage the inventiveness of Mexicans).

[28] *Ibid.,* 64.

[29] Nathaniel Amory, Dep't of State, Report of the Secretary of State: November, 1839 Document D (Nov. 6, 1839), *reprinted in* Journals of the Fourth Congress of the Republic of Texas 1839–1840, Reports and Relief Laws 30 (Harriet Smither ed., 1929).

Texas combined this emphasis on inventors with policies to encourage the circulation of information about Texas patents, incorporating some aspects of the U.S. Patent Act of 1836. Its statute designated a patent office as a bureau of the state department.[30] This office was to collect all "specimens, molds, models and devices, of all new inventions or discoveries," which were to be "considered as forming part of the national archives."[31] Although Texas did not have the funds, yet, to build a Patent Office Building with a museum, its legislature designated the patent office as a place where information about invention would be publicly available, copying the American approach to circulating patent information.

Republic of Texas
Secretary of State
Robert Anderson Irion

Like the United States, the Republic of Texas was limiting patents to those who originated inventions and establishing a system intended to foster increasing numbers of those inventive individuals in its population. Texas patents were credentials identifying inventors. Without the U.S. examination system, Texas patents were less high-quality credentials, but just as the United States had shifted from registration to examination as the country grew, Texas considered shifting to an examination system. The Texas legislature almost immediately began to consider other forms of a patent system, with multiple proposals to amend or repeal the first patent act.[32] Within a few years, the Secretary of State drafted a new patent act, modeled after the U.S. Patent Act of 1836.[33] In addition to a patent examiner, his draft included a requirement of an annual published patent list, including descriptions, which would use print to circulate information about Texas inventions, and the appointment of agents to receive applications throughout the Republic, eliminating the need to travel to the capital.[34] The revised system would thus increase the strength of patents as credentials of inventiveness and also the dissemination of those credentials throughout the Texas population. Like the United States, Texas wanted to establish and claim an inventive population. The Secretary's plan, however, was overtaken by a second—successful—push for annexation in 1846.[35]

During its seven years of existence, the Texas patent system remained mostly aspirational.[36] The Republic issued at least sixteen patents, although the records are incomplete.[37] There is little evidence that any of these, for technologies such as brick making, sawmills, and cotton gins, shifted the course of Texas technological or economic history.[38] The legal history of the Texas patent

30 Act approved Jan. 28, 1839, 3rd Cong., R.S., § 7, 1839 Repub. Tex. Laws 109, *reprinted in* 2 H.P.N. Gammel, The Laws of Texas 1822–1897, at 109 (Austin, Gammel Book Co. 1898).

31 Act approved Jan. 28, 1839, 3rd Cong., R.S., § 7, 1839 Repub. Tex. Laws 110, *reprinted in* 2 H.P.N. Gammel, The Laws of Texas 1822–1897, at 110 (Austin, Gammel Book Co. 1898) (spelling modernized).

32 Muir, "Patents," 213–14 (detailing proposals). Unfortunately, the text of these bills has not survived. *Ibid.,* 218.

33 *Ibid.,* 219.

34 *Ibid.*, 219–20.

35 *Ibid.*, 220.

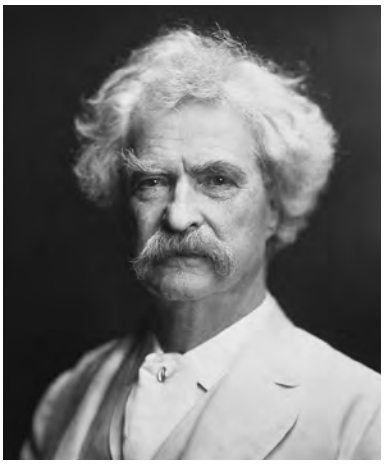
36 *Ibid.,* 212.

37 *Ibid.,* 218, 221 (noting failure of the office to make annual reports after 1841 or to keep systematic records).

38 *Ibid.*, 212, 222 (describing and evaluating some of the Texas patents).

system, however, reveals the ways in which Texans sought to accomplish additional purposes by establishing and maintaining their patent system.

III. CONCLUSION



Samuel Clemens

Although the Republic of Texas was short-lived, the beliefs that inspired its patent system continued. In 1889, for example, the U.S. writer Samuel Clemens (pen name Mark Twain) had his fictional protagonist, the inventive Hank Morgan, prioritize a patent office as he sought to modernize England in Clemens's pro-democracy satire, *A Connecticut Yankee in King Arthur's Court*: "[T]he very first official thing I did, in my administration—and it was on the very first day of it, too—was to start a patent office."[39] King Arthur's patent office, like that of the United States, would aid both the progress of industrialization, one of Morgan's chief goals, and support Morgan's efforts to replace feudal power structures, because "a country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or backwards."[40] Through the notion of the useful citizen,

Pen and ink drawing as frontispiece in *A Connecticut Yankee in King Arthur's Court*

[39] Mark Twain, *A Connecticut Yankee in King Arthur's Court* xv–xvii, 72 (Bernard L. Stein ed., Univ. of Cal. Press 1979) (1889).

[40] *Ibid.*

an original thinker, the progress of useful arts and the progress of democracy were linked in the American imagination.

The U.S. patent system has been surprisingly resilient since 1836, persisting in its mid-nineteenth-century form, even after wholesale reenactment in 1952 and significant amendment in 2011.[41] Once we recognize the sociopolitical role of patents as certifying national inventiveness, and thereby a useful citizenry, this stability is easier to understand. This extraconstitutional role of the U.S. patent system, revealed in the choices of nineteenth century imitative republics and embedded in the national imagination, has supported a continued emphasis on an inventor-centric, high-volume patent system, despite the steady drumbeat of criticism from a technoeconomic perspective.

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[41] Mark A. Lemley, "The Surprising Resilience of the Patent System," 95 *Texas Law Review* 1, 3, 13–14 (2016); Greg Reilly, "Our 19th Century Patent System," 7 *IP Theory*, no. 2, 2018, 1, 2–3, 13–15 (analyzing the patent system as "remarkably stable" since the midnineteenth century).

PROFESSOR SWANSON *is an accomplished scholar, legal practitioner, and scientist whose chief interests are in intellectual property law, property, gender and sexuality, race and racism, the history of science, medicine, and technology, and legal history. She is a professor of law and affiliate Professor of history at Northeastern University in Boston, Massachusetts.*

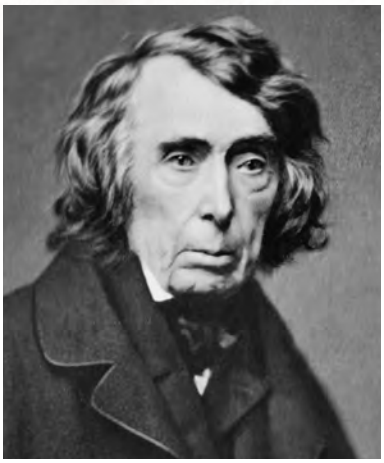
Return to Journal Index

An Uncommon Fairness:

The Antebellum Supreme Court of Texas and Its Treatment of Black Americans

By Hon. John G. Browning

I. INTRODUCTION



Chief Justice Roger Taney

When one considers the prevailing judicial attitude toward Black Americans before the Civil War, it is hard not to think about the cold, unrelenting racism of perhaps the most notorious of U.S. Supreme Court decisions, *Dred Scott v. Sanford*.[1] In the eyes of Chief Justice Roger Taney, Black people were "a subordinate and inferior class of beings who had been subjugated by the dominant race," and thus could not be citizens with all of the protections and liberties afforded to citizens under the law.[2] Throughout the South, the highest state courts largely typified this prevailing attitude in their treatment of Black people and regarded them as mere property rather than with compassion.[3]

Texas, however, was strikingly different—even to the point of being libertarian—in its treatment of Black people (both enslaved and free) before the law. It is not that Texans' attitudes toward the "peculiar institution" of slavery or its economic importance were different from their Southern counterparts. Slaveholders, after all, dominated the state's economy, controlled its politics, and occupied the top rung on the social ladder. In 1850, slaveholding households comprised 30

Dred Scott

John Sanford

[1] 60 U.S. 393 (1857).

[2] *Ibid.*

[3] *See, e.g.*, A.E. Keir Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South," 56 *Virginia Law Review*,(Feb. 1970).

percent of the total in Texas while owning 72 percent of the real property in the state.[4] That same year, 58 percent of all federal, state, and local officeholders in Texas owned slaves.[5] Slavery was viewed as vital to the state's economy, and with its defense came the claim that slavery was a christianizing and civilizing influence on enslaved Black people. As late as 1861, the *Dallas Herald* proclaimed slaveowners as "guardians of the grandest interests in the world," responsible for "the christianing of that portion of the African race and in making them useful members of society in restraining them in the only position that is consistent to their natures and for which they are fitted intellectually and morally."[6]

Texas courts were also fiercely protective of slaveowners' property rights in this antebellum period. In one early landmark case, slaveowner Henry Mims won damages from Isaac N. Mitchell after Mitchell "hired out" a young, enslaved woman from Mims, and then abused her so badly that she died. Writing for the Court, Justice Royall T. Wheeler held that "The hirer of a slave is bound to observe toward the slave the same care which a discreet, humane, and prudent master would observe in the treatment of his own slaves."[7] Yet, this was not out of concern for the wellbeing of the enslaved person; rather, it was intended to ensure that the property interests of owners who hired out their slaves were protected. Texas law even provided for slaveowners to collect indemnities from the state for any enslaved person who was convicted and executed for committing a capital offense.[8] Yes, as odd as it may sound, Texas law recognized enslaved persons as human enough to be held responsible for their crimes, while simultaneously treating them as property enough to be paid for when "destroyed" through execution at the hands of the state.


Justice Royall T. Wheeler

In light of this, the attitude of the Supreme Court of Texas from 1845 to the outbreak of the Civil War toward Black Americans is nothing short of extraordinary. While supreme courts in the rest of the South were almost monolithic in their defense of slavery, the antebellum Texas Supreme Court was remarkably protective of Black people under the rule of law. This attitude of viewing Black people's rights and protections under the law as equally worthy as those of the white man can be best understood by examining the four principal kinds of lawsuits in which Black rights played a central role. The first category of cases involved criminal prosecutions by the state against white people who harmed or abused Black people. The second category focuses on felony trials of Black people themselves for criminal offenses. A third category of cases involves what one might describe as subversions of the slavery system itself—suits in which white people either enticed enslaved people to escape from their masters' control or engaged in relatively minor infractions like selling alcohol to Black persons. The fourth area of cases are the "freedom suits" brought by Black people seeking their freedom from slavery.

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4 Randolph B. Campbell, *An Empire for Slavery: The Peculiar Institution in Texas, 1821–1865*, 209 (1989).

5 *Ibid*., 220.

6 *Dallas Herald*, Jan. 2, 1861.

7 Mims v. Mitchell, 1 Tex. 443 (1846).

8 Act of January 24, 2852, Laws of Texas (The jury that convicted the slave would have to also assess his value, not to exceed $1,000, and the state treasury would be obligated to pay half of it to the slaveowner).

Taken together, the record of the Supreme Court of Texas in these four varieties of cases points to something more nuanced and intriguing than simply a judicial bent toward upholding the property interests of white slaveowners. As this article points out these cases reflect both a measured insistence on the primacy of upholding the rule of law over protecting the institution of slavery, as well as a genuine belief that the humanity of Black people must be recognized as a countervailing force to notions of property.

II. CATEGORY ONE—INJURIES TO/ABUSE OF BLACK PEOPLE

There were four appellate cases for injuries to or abuse of Black people that reached the Supreme Court of Texas prior to the Civil War. Yet while the number of cases may have been small, the issues presented in them were significant. The first of these, the 1847 case of *Chandler v. State* presented a question that had plagued other Southern courts of the antebellum period: to what extent would the courts and judges view enslaved people purely as "property" as opposed to recognizing their fundamental humanity?

David Chandler was indicted for murder in Travis County for killing a Black enslaved man named Claiborne, but was convicted of manslaughter.[9] Chandler appealed arguing that no Texas statute specifically criminalized manslaughter of a slave. Moreover, his attorneys cited Roman law that had been embraced by other Southern courts (such as North Carolina, South Carolina, and Virginia) analogizing slavery to capture in battle, in which the captor enjoyed "absolute power" over the slave's life.[10] Writing for the Texas Supreme Court, Justice Wheeler rejected that interpretation. Wheeler embraced the humanity of the enslaved, even though he acknowledged that statutes created certain distinctions between free men and those in bondage. Justice Wheeler noted that despite these distractions, "It seems especially . . . the intention of our legislation . . . to throw around the *life* of the slave the same protection which is guaranteed to a FreeMan."[11]

Eight years later, in *Nix v. State*, the Court had the opportunity to either shrink from its earlier holding or expand upon it.[12] In this case, the white defendant, J.D. Nix**,** had been indicted for assault and battery of an enslaved woman named Lucy. Nix had attacked Lucy with a drawn knife and "did cut, bruise and wound, beat, ill-treat and [do] other wrongs to her."[13] Nix, who was only assessed a $25 fine and sentenced to ten days in the county jail, nevertheless appealed his conviction along lines similar to the appellant in *Chandler*. He argued that the only applicable statute provided that "if any person shall unreasonably treat, or otherwise abuse any slave," he shall be fined not less than $250 and not more than $2,500.[14] The Court could have elected to make light of assaults against Black people. Instead, Justice Wheeler wrote that the statute cited by Nix did not replace the common law—it augmented it. He held that Black people were as deserving of the law's protections as whites. Wheeler wrote that:

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9 Chandler v. State, 2 Tex. 305 (1847).

10 *Ibid.*

11 *Ibid.,* 319.

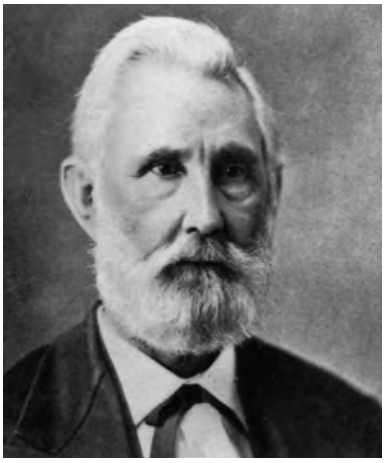
12 Nix v. State, 13 Tex. 575 (1855).

13 *Ibid.*

14 *Ibid.*

> The present [case] appears to have been a case of wanton, unprovoked, lawless violence, committed in a fit of drunkenness, upon an unoffending slave, without any pretense of authority, provocation, or excuse. And we entertain no doubt that it was a crime against the law of nature and the laws of society, and equally within the spirit and intention of the statute, as if it had been committed upon a free person.[15]

Two years later, the Texas Supreme Court added to its body of decision-making recognizing the humanity of enslaved Black people. In *State v. Stephenson*, the Court reversed the lower court's dismissal (on a flimsy technicality) of a case in which a white man (Stephenson) was prosecuted for whipping a Black enslaved woman named Malissa.[16] As Justice Oran Roberts pointed out, the lower court (the district court in Washington County, which during Reconstruction would become a Black-majority jurisdiction that elected multiple Black officeholders) took a position that was "predicated on the idea, that a slave is property only, as a horse or any other domestic animal."[17] Justice Roberts wrote that the correct view was, in fact, the opposite: "we recognize in the slave personal rights, [and] an assault and battery, by one not the owner, is prima facie an invasion of them."[18] Consequently, the Court remanded the case to Washington County and ordered Stephenson to be brought to trial.[19]


Justice Oran Roberts

In the fourth and final case in this category, *Westbrook v. State*, three white men—Thomas, John, and Stephen Westbrook—appealed their prosecution for unlawful enslavement.[20] In a case that sadly echoed many similar instances in antebellum America, the Westbrooks had kidnapped and imprisoned Lewis John Redrolls, a free Black man, for the purpose of enslaving him.[21] The Westbrook defendants argued that Redrolls had made a contract to sell himself as a slave. Writing for the Court, Justice Bell dismissed this argument, concluding "a free negro cannot sell himself into slavery."[22]

III. CATEGORY TWO—FELONY TRIALS OF BLACK PEOPLE FOR CRIMINAL OFFENSES

The second category of cases that demonstrates the Texas Supreme Court's dramatically different and decidedly humane treatment of Black people during the pre-Civil War period concerns Black defendants convicted of felonies. Somewhat surprisingly, one study has concluded that throughout the antebellum South, Black felony defendants generally fared better than white

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15 *Ibid.,* 579.

16 State v. Stephenson, 20 Tex. 152 (1857).

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 Westbrook v. State, 24 Tex. 563 (1859).

21 *Ibid.*; *see, e.g.*, the famous case of Solomon Northup, a free man kidnapped in Washington, D.C. in 1841 and sold into slavery in Louisiana. Northup wrote a memoir after his release in 1853 that was immortalized in the Oscar-winning film, *Twelve Years a Slave*.

22 *Ibid.*

counterparts who had injured either enslaved people or freedmen.[23] Professor Nash's study analyzed the appellate court records of nine states between 1830 and 1860. It concluded that of 238 Black parties, 136 (or 57.6 percent) won reversals, while only 17 of the 55 white litigants (30.9 percent) were successful.[24]


Chief Justice John Hemphill


Justice Abner Lipscomb

Yet, Texas still manages to stand out for its positive judicial treatment of Black people seeking appellate. Two appeals by Black defendants were dismissed during this time period, but on grounds that were race-neutral. In *Peter v. State*, a Black defendant convicted of arson appealed for the reason that the person purporting to act as the deputy of the county clerk and who drew the names for the venire panel had not been duly appointed.[25] The Court, in a short opinion by Chief Justice Hemphill, rejected the argument because it had not been timely made and supported by any proof in the record.[26] The second case, Ashworth v. State, involved the fairly charged question of interracial relationships.[27] Henderson Ashworth, a laborer and "free person of color," was convicted of living "in fornication with" a white woman, Lititia Stewart in Jefferson, in violation of Texas' anti-miscegenation statute.[28] While it is not surprising that the Court affirmed such a conviction in 1853, Justice Lipscomb, on behalf of the Court, again kept the opinion brief and free of racially-charged rhetoric. Instead, the conviction was affirmed due to the absence of anything in the record to support the appellant's argument that there was no evidence at trial of Lititia Stewart's white ancestry.[29]

But the two appellate victories for Black defendants convicted of felonies are remarkable for the Court's egalitarian treatment. In *Nels v. State*, a Black slave, Nels, was convicted of murder in Red River County in 1846.[30] On its face, the Court's holding—that the conviction must be reversed because the record did not show that the jury had been properly sworn—seems relatively innocuous. However, a closer reading of Justice Wheeler's opinion indicates a strong tendency to view Black defendants as invested with the same rights as those enjoyed by white defendants. First, Justice Wheeler reminded the trial judge of his duty to charge the law properly and without bias. Second, Wheeler criticized the judge's lack of oversight of what we would today characterize

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[23] Nash, "Fairness and Formalism in the Trials of Blacks," 79. The study does not include Virginia (whose court of appeals handled only civil suits until 1851) or Louisiana (whose Napoleonic code differs starkly from common law jurisdictions).

[24] *Ibid.*

[25] Peter v. State, 11 Tex. 762 (1854).

[26] *Ibid.*

[27] Ashworth v. State, 9 Tex. 490 (1853).

[28] *Ibid.*

[29] *Ibid.*

[30] Nels v. State, 2 Tex. 280 (1847).

as ineffective assistance of counsel. In Nels' first trial, his attorney had admitted to a number of facts that were prejudicial to Nels' case.[31] Wheeler stated that it was the trial judge's responsibility to prevent the jury from considering such statements; as Wheeler put it, no "confession" of defense counsel could be permitted to "bind or affect" the Black defendant who was on trial, any more than such statements would be permitted to impact a white defendant's chances.[32] In essence, Wheeler concluded that the right to a fair trial applied across racial lines, and did not depend on the color of the defendant's skin or any condition of servitude.

While *Nels* is significant for its stance that enslaved people had the same right as white people to not just counsel but *competent* counsel, the final case in this category, *Calvin, a Slave v. State* is truly extraordinary.[33] First, it involved the prosecution of one Black defendant for the 1858 murder of another enslaved person, a woman named Vina.[34] Black-on-Black crime was not ardently prosecuted in the antebellum South, nor did it receive the attention it deserved from (predominantly) white prosecutors during Reconstruction and beyond. Second, the opinion advanced the position that the state had an obligation to provide counsel for the accused—including a Black man unable to secure a lawyer for himself. A final reason for the case's importance is the Supreme Court's evident belief that Black defendants were no less deserving of the protections of the rule of law as white defendants.

In this case, at the beginning of Calvin's first trial, the indictment had read that the victim (Vina), "had been the property of the heirs of Robert Smith, deceased," while also stating that she "had belonged to Robert Smith."[35] The two original defense lawyers and the prosecutor agreed to strike the first description of ownership—no doubt because the "dead" Robert Smith turned up alive! During the trial, Calvin's lawyers withdrew for unknown reasons, and the trial judge appointed two new counsel—Richard S. Walker and John M. Dodson.[36] Walker and Dodson objected to the alteration of the indictment and made it the basis for appeal.


Justice James H. Bell

Speaking for a unanimous Court, Justice James H. Bell stated that even such a slight change in the indictment—including one agreed to by prior defense counsel—invalidated the grand jury's work and rendered the verdict defective.[37] The law, in all it details and formalities, was to be applied equally, regardless of race. As Justice Bell opined,

> In thus disposing of this case, we think it proper to say it has received our most careful consideration. **The law of the case . . . is precisely the same as if the accused**

[31] *Ibid.*

[32] *Ibid.*

[33] Calvin, a Slave v. State, 25 Tex. 789 (1860).

[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.*

[37] *Ibid.*

> **were a free white man, and we cannot strain the law even "in the estimation of a hair," because the defendant is a slave . . .**[38]

This is perhaps the clearest signal from the Court—on the cusp of the terrible conflict that was the Civil War and the resulting freedom from slavery that it brought—that Black men and women were to receive equal treatment under the administration of the law.

IV. CATEGORY 3—SUBVERTING THE SLAVERY SYSTEM

The third category of cases in which the antebellum Texas Supreme Court manifested a clear intention to afford Black people with the protections of the rule of law can best be described as cases involving those subverting the slavery system. These cases concerned white people convicted of harboring runaway slaves, those who sold alcohol to slaves or purchased goods from them without a master's permission, or slaveowners who allowed their slaves to possess firearms. The laws in question that were alleged to have been violated in these instances were statutes passed to prevent "unrest" and insurrection by the enslaved population.

In *Martin v. State*, the appellant had been convicted of "harboring and concealing a negro," alleged to have been the property of a William McGlenn.[39] However, the indictment and certain evidence had misspelled the owner's surname as "Glenn."[40] It was obviously a clerical mistake, and the Court could have ruled that the defendant had waived any right to complain due to his failure to timely object. Yet, it didn't, opting instead to reverse the conviction.[41] Similarly, in *Lovett v. State*, the Court reversed the conviction of a white man convicted of enticing a slave to leave his master.[42]

Lovett had allegedly promised to take a boy or young man named Jack away from his owner, Mr. Brown.[43] According to the record, Jack had dutifully informed Brown of the plot, and a scheme was hatched to entrap Lovett into "taking" another slave named Mart as well, while hidden witnesses observed.[44] During this "sting operation," Lovett made some vague statements about going off with Jack "in the spring" before being arrested. The Court reversed Lovett's conviction based on the insufficient evidence of any precise date on which the intended escape would happen. As Justice Wheeler saw it, there may have been an intent and preparations made, but no actual attempt:

> He may have meditated the stealing or enticing away of the slave . . . but it would be quite too much to affirm . . . that he actually attempted it. The most that can be affirmed . . . is that he was making preparations . . . and that falls short of an attempt to do so.[45]

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38 *Ibid.*, 796 (emphasis added).

39 Martin v. State, 16 Tex. 240 (1856).

40 *Ibid.*

41 *Ibid.*

42 Lovett v. State, 19 Tex. 174 (1857).

43 *Ibid.* The punishment for such "enticement" was three years' confinement in the state penitentiary.

44 *Ibid.*

45 *Ibid.*, 177.

In *State v. Wupperman*, the defendant Wupperman had clearly purchased produce from an enslaved woman "without the written consent of" her master, one Andrew Herron.[46] However, the Court noted that the wording of the indictment varied from the statute's language defining the offense.[47] It read that Wupperman had made his purchase without first securing written permission from the person "having charge" of the slave.[48] However trivial this might seem, Justice Wheeler seized upon it as sufficient reason to affirm the quashing of the indictment, saying "it would be unsafe to sanction any material departure from or the employment of any substitute for the words used as intended."[49]

The last of these "subversion" cases is *Greer v. State*, in which Greer appealed his 1856 conviction in Brazos County for allowing his slave to carry a firearm.[50] An 1840 statute had first banned slaves from carrying firearms, "without the written consent of the master, mistress, or overseer."[51] Later, an 1850 amendment to that law made it an indictable offense for any owner, overseer, or employer of slaves to permit his slave to "carry firearms of any description, or other deadly weapons, at other places than the premises of such owner, overseer, or employer."[52] But then an 1856 act repealed a portion of that statute, rendering it no longer an indictable offense for the slaveowner to permit such carrying on his own property. Greer's violation had occurred after the repeal, and the Court held that the result was a nullification of all unfinished trials brought under the law (even though the new law was silent on the subject).

Were such cases merely a concern with procedural niceties in criminal trials? It appears more likely that the Texas Supreme Court was generally committed to upholding fairness standards in criminal cases, regardless of whether or not they undermined the "peculiar institution" of slavery. Time and time again, the Court during this era strived to ensure that Black litigants enjoyed the same protection of the rule of law as white people.

V. CATEGORY 4—FREEDOM SUITS

Our fourth and final category of cases illustrating the antebellum Texas Supreme Court's striking recognition of the humanity of Black Americans are what can be loosely termed "freedom suits." Called "manumission suits" by some scholars, these typically involved a Black plaintiff(s) who had been either freed or promised freedom by a slaveowner (often in the testamentary wishes in a will), only to be opposed by white heirs claiming their "property" as part of their "rightful inheritance." All too many Southern appellate justices held views like South Carolina Judge Job Johnston, who considered such bequests of freedom the product of "the superstitious weakness of dying men . . . from an astonishing ignorance of the solid moral and scriptural foundations upon which the institution of slavery rests . . ."[53]

[46] State v. Wupperman, 13 Tex. 33 (1854).

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*, 35.

[50] Greer v. State, 22 Tex. 588 (1858).

[51] *Ibid.*

[52] *Ibid.*

[53] Gordon v. Blackman, 1 Richardson's Equity 61 (S.C. 1844).

As with the previous categories, these "freedom suits" provided the antebellum Texas Supreme Court with an opportunity to demonstrate their maverick, egalitarian tendencies. These cases between 1845 and 1860 usually centered on one of six issues in which liberty was involved: whether (1) a will that purported to free Black men and women and remove them from the state was valid;[54] (2) an enslaved person could make a legally recognized choice between slavery and freedom; (3) a free Black person could legally rescind an agreement selling himself into slavery; (4) manumission could be granted orally instead of in writing; (5) Texas was bound by interstate comity to apply the "pro-freedom" laws of another jurisdiction; and (6) an enslaved person could not only sue for freedom but seek money damages as well.

One case, 1854's *Purvis v. Sherrod*, involved two of these issues.[55] The case centered upon the will of the late William T. Weathersby of Harrison County, which state, in part, the following:

> I give my negro woman Charlott and her child Julian their freedom, because of Charlott's faithful services in aiding me to make all of the property which I own in the world. I also give my boy George Washington his freedom, because of affectionate regard for him. And I wish the above three negroes to be left under the charge of my sister Lucinda Sherrod, to be settled near her and under her charge; and if the State of Texas, or any of my relations, should object to their freedom on these conditions, I give my sister full power to send them to a free State, or to Liberia, as she and the negroes may agree.[56]

Weathersby also left Charlott a sum of money, supplies, and various livestock. The attorney for one of the would-be beneficiaries (Purvis), B.T. Wigfall challenged the will on several grounds. The first challenge focused on the fact that the grant of freedom would take effect in Texas, in apparent violation of the Texas Republic's constitution's provision prohibiting emancipation by a slaveholder "unless he shall send his or her slave or slaves without the limits of the Republic."[57] Wigfall also criticized the will as defective, since it proposed not only domestic freedom, but—barring that—a kind of "semi-freedom" under Lucinda Sherrod's care, as well as a third contradictory alternative: having the formerly enslaved people choose their own destination. Wigfall cited support for his position from an Alabama decision that held that the proper order of such manumission would be first remove the enslaved people in question from the state, and *then* liberate them (as opposed to freeing them first).[58]

One might expect Wigfall's argument to be well-received, especially since Justice Abner Lipscomb on the Court had previously served on Alabama's Supreme Court. But Lipscomb rejected this restrictive view of manumissions. He pointed to favorable authority from states like Tennessee, and opted to uphold the wishes of the deceased slaveowner that Charlott (with whom he had a son, George Washington) and her two children be freed. The Court's holding that such a bequest of freedom was valid—that the specific verbiage of the will mattered less than the

[54] This was, one must remember, a time period in which Texas law banned domestic liberation.

[55] Purvis v. Sherrod, 12 Tex. 140 (1854).

[56] *Ibid.*

[57] *Ibid.*

[58] Trotter v. Blocker, 6 Porter 269 (Ala. 1838).

testator's intent—reflected this libertarian streak. As long as a will contained *any* provision for removal of the newly freed Black person from the state, the Court would uphold it.[59] The Court later reaffirmed this position in 1859.[60]

As to the question of whether "interstate comity" should serve as a bar to a slaveholder's efforts to free his or her slaves, the Texas Supreme Court again followed its own path. In *Jones v. Laney*, an 1847 case, the Court rejected the argument that a Chickasaw Indian slaveowner lacked the right to free an enslaved person in Texas simply because it was contrary to the laws of the state within which the Chickasaw Nation existed.[61] At issue was Laney, born a slave of James Gunn's in 1811 in the Chickasaw Nation (in what became Mississippi). Gunn was a Chickasaw, and he freed her in 1814.[62] Laney continued to live with her mother and Gunn but was free. After Gunn died in 1823, Laney (and eventually her children) remained in the Chickasaw Nation until 1846. Appellant Jones claimed to have purchased Laney and her children from a Joseph Potts, who was purportedly one of James Gunn's heirs and the son-in-law of Gunn's widow.[63]

Justice Lipscomb, writing for the Court, pointed out that federal treaty recognized "the right of those Indian nations residing within the limits of a State, to regulate their own civil polity."[64] He held that neither the state where the will was made nor the state where the freedom suit was being heard could interfere with a Native American's right to manumit his slave.[65]

In 1856, the question of interstate comity came up again in the case of *Moore's Administrator v. Minerva*.[66] Gabriel Moore, an Alabama resident, had taken his slave Mary Minerva to Cincinnati, Ohio in 1841 or 1842, when she was between twelve and fourteen years old. She was left there, since Moore's intention was to see her gain an education and then become emancipated. In 1842, Moore in fact returned to Cincinnati and recorded a deed of manumission, freeing her.[67] Moore returned again in 1843, reunited with Mary, and brought her with him to Texas. He died in Texas in 1844, but left a will in which he specifically referenced Mary's deed of manumission and expressed his desire that she should be free.[68] Instead, Mary was "hired out" to a succession of "employers" (the most recent of whom was William A. Hill) before she sued in 1856—not just for the freedom of her and her children from a pretend "master," but also for money damages for unlawful detention. Moore's administrator, Obadiah Hendrick, argued that her claim of freedom by virtue of the Ohio manumission was forfeited by her entry into Texas.[69]

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59 If not, the will would probably fail. *See, e.g.*, Philleo v. Holliday, 24 Tex. 38 (1859).

60 Armstrong v. Jowell, 24 Tex. 58 (1859).

61 Jones v. Laney, 2 Tex. 342 (1847).

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*, 348.

65 *Ibid.*

66 17 Tex. 20 (1856).

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

Justice Lipscomb, writing for the Court, declared that Mary Minerva and her children were free. He held that the interests of Ohio law were superior to those of Texas, and that Mary's freedom was not forfeited by her presence. At worst, he said, it rendered her liable for arrest by the sheriff and a $1,000 bond required to guarantee her removal from Texas—measures which Moore's administrator had failed to employ.[70] As to Mary's claim for money damages, Justice Lipscomb opined—in dicta—that had these damages been sought in the lower court, the defendant would have been obligated to pay them, regardless of any "good faith" defense.[71] However, since Mary had not raised that issue until her appeal, there was no payday for her—just freedom.

In January 1858, the Texas legislature passed a statute authorizing willing free Black people to choose masters and voluntarily re-enter slavery. In 1859, the Court heard *Westbrook v. Mitchell*.[72] John Westbrook, a white man, claimed that in 1855, an unnamed but free Black man had willingly sold himself to Westbrook for $2,500, but later absconded—"enticed out of possession" by William L. Mitchell, Jr.[73] Westbrook sought either the purported slave or his $2,500 back.

Justice Bell, writing for the Court, denied Westbrook's claim. He pointed out that prior to the 1858 statute, no man could legally sell himself, and the Court would not recognize a suit by a purchaser who had acted contrary to the then-existing law.[74] The law similarly did not abate a companion case—that being a criminal conviction of one Thomas Westbrook for "imprisoning and kidnapping."[75] The new law, it seems, did not have any fans on the Texas Supreme Court.

In 1858, the Texas Supreme Court also addressed oral promises of freedom. In *Hillard v. Frantz*, the Court encountered the case of the late Mr. Fitzgerald, who two years before dying on June 10, 1855, gave an enslaved young woman to the appellant, Mrs. Hillard, on the condition that the girl be taken to a free state and manumitted as soon as she "arrived at such an age that she could support herself."[76] The defense claimed that such an oral "quasi-emancipation" agreement was against the law, pointing to other Southern states like North Carolina and Virginia that prohibited it.[77] As they argued, "it would open the door to a degree of looseness . . . most hazardous . . . to permit acts of an emancipation to be proved by parol 'understandings . . .'"[78] The Court, however, rejected this argument, citing the *Sherrod* case for the premise that an oral promise of freedom could be binding.

VI. THE JUSTICES BEHIND THE DECISIONS

What could possibly explain the Court's anomalous treatment of and apparent concern for Black Texans during the antebellum period? Were they "Yankee transplants" harboring abolitionist

[70] *Ibid.*

[71] *Ibid.*

[72] 24 Tex. 560 (1859).

[73] *Ibid.*

[74] *Ibid.*

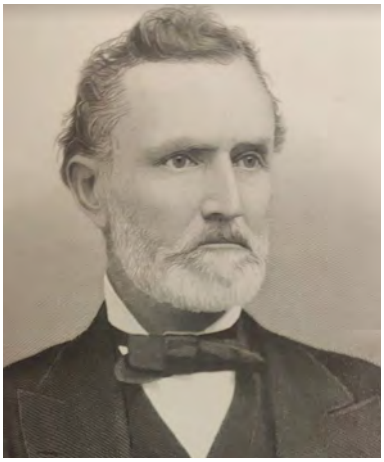
[75] Westbrook v. State, 24 Tex. 563 (1859).

[76] Hillard v. Frantz, 21 Tex. 192 (1858).

[77] *Ibid.*

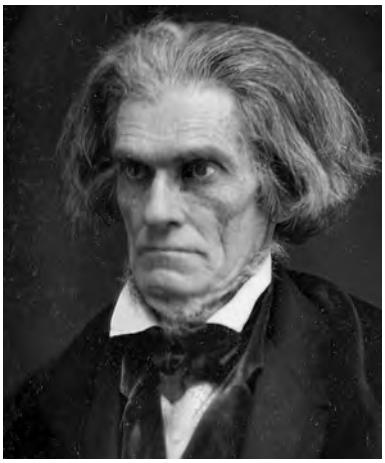
[78] *Ibid.*, 194.

sympathies, or were there religious reasons behind such decisions? The answer to these questions is no, while the answer to the originally looming question is more complicated. Three of the five justices on the Court during this period were born in South Carolina: John Hemphill, who served as chief justice from 1846 to 1858; Abner Lipscomb, an associate justice from 1846 to his death in 1856; and Oran Milo Roberts, who served as an associate justice from 1857 to 1864 (before serving as chief justice in 1864–1865 and again from 1874–1878). Justice Royall T. Wheeler, who was born in Vermont in 1810, was the only "northerner" on the Court. He was an associate justice from 1845 to 1857, and chief justice from 1857 to 1864. Yet he was so committed to the Southern cause that he committed suicide in 1864 as Confederate hopes for victory faded. Ironically, the only member of the Court at this time who was not a secessionist was its lone native Texan, Justice James H. Bell, who served as an associate justice from 1858 to 1864.[79]


William H. Jack

A closer examination of each of these jurists is warranted. As mentioned already, James H. Bell—born in Columbia, Texas on January 2, 1825, was the antebellum Court's only native Texan. Educated in Kentucky and later at Harvard, he "read law" under William H. Jack.[80] Bell practiced in Brazoria from 1847 to 1852, and then served as a district judge until 1856.[81] In 1858, he joined the Court, serving until August 1864. After Reconstruction, Bell tried his hand at mining in Mexico. He died in Austin on March 15, 1892.[82]

Royall T. Wheeler, born in Virginia on August 23, 1810, started his legal career in Fayetteville, Arkansas.[83] He moved to San Augustine, Texas in 1839, and was in private practice until 1842. At that point, Wheeler became first a district judge and then an associate judge on the Supreme Court of the Republic of Texas.[84] After Texas' annexation in 1845, he remained on the now-state's highest court. When Chief Justice Hemphill left for the U.S. Senate in 1858, Wheeler replaced him as Chief Justice on the Court and served until his death in 1864. Wheeler also had a passion for legal education. He served as a professor of law at Austin College in 1858, and was among the founding faculty of what would become Baylor Law School.[85]


John C. Calhoun

South Carolina-born Abner S. Lipscomb studied law under John C. Calhoun, and began his legal career in Alabama in 1811. After Alabama became a state in 1819, he became a circuit judge (which, in a quirk of the times, also made him a member of Alabama's Supreme

[79] "James Hall Bell," *Texas State Historical Association*, https://www.tshaonline.org/handbook/entries/bell-james-hall.

[80] *Ibid.*

[81] *Ibid.*

[82] *Ibid.*

[83] H. Allen Anderson, "Royal T. Wheeler," Texas State Historical Association, https://www.tshaonline.org/handbook/entries/wheeler-royal-t.

[84] *Ibid.*

[85] *Ibid.*

Court).[86] When that court's Chief Justice (Clement Clay) resigned in 1823, Lipscomb became Chief Justice and served in that capacity until 1835. He moved to Texas in 1839, establishing a practice in Brenham (Washington County).[87] In 1846, Lipscomb was appointed to the Texas Supreme Court. He was elected in 1851, and again in 1855, serving until shortly before his death in December of that year.[88]

Of all the justices, Oran Milo Roberts perhaps could be viewed as the least likely to offer Black-friendly positions on the Court. By the time Roberts started on the Supreme Court after winning election in 1856, he owned at least seven slaves on his 1,658 acre property in Shelby County.[89] He also owned properties in San Augustine County, Hunt County, and Smith County as well by 1859.[90] In January 1861, Roberts was elected president of the Secession Convention in Austin, and was a staunch defender of the institution of slavery. He served on the Court as an associate justice from 1857 to 1862 (when he resigned his seat and accepted a commission in the Confederate Army), as chief justice from November 1864 to June 1866, and again as chief justice from 1874 to 1879 (when he became governor).[91] Like his colleagues on the Court, Roberts was also a major supporter of legal education. In 1868, he opened a private law school in Gilmer, Texas (his students included a future Texas Supreme Court justice, Sawnie Robertson). And after his second term as governor, Roberts became a law professor at the newly opened University of Texas in 1883, where "the Old Alcalde" taught until 1893.[92]

It is certainly difficult to reconcile the Oran Roberts whose wealth and status depended on slavery[93] with the Oran Roberts who wrote in *State v. Stephenson* that enslaved people had personal rights. It is somewhat easier to understand Chief Justice Hemphill's sympathetic view of Black Texans when one considers his complicated private life. As a number of historians have documented, Chief Justice Hemphill fathered two biracial daughters, Theodora and Henrietta, with Sabina, an enslaved Black woman whom he purchased in 1844.[94] While the dynamics of Hemphill's relationship with Sabina were as problematic as any sexual relations between slaveowners and enslaved women in American history, there is ample evidence that Hemphill cared for his two daughters. In his wonderful and meticulously-researched articles, scholar David Furlow asked "whether Hemphill, the South Carolina Nullifier who fought two duels in defense of

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[86] "Abner Smith Lipscomb," *Encyclopedia of Alabama*, https://encyclopediaofalabama.org/article/abner-smith-lipscomb/.

[87] *Ibid.*

[88] James D. Lynch, *The Bench and Bar of Texas* (1885).

[89] William C. Yancey, *The Old Alcalde: Oran Milo Roberts, Texas' Forgotten Fire-Eater*, 104 (unpublished doctoral dissertation, U.N. Tex. 2016).

[90] *Ibid.*

[91] Ford Dixon, "Oran M. Roberts," Texas State Historical Association, https://www.tshaonline.org/handbook/entries/roberts-oran-milo.

[92] Yancey, *The Old Alcalde*. Interestingly, the academically-minded Roberts also served as the first president of the Texas State Historical Association.

[93] At the time he served, an associate justice's annual salary was $2,000. Roberts' landholdings were far more valuable.

[94] *See, e.g.*, James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986*, 59–60 (2013); David A. Furlow, "Theodora Hemphill's Guide to the Texas Constitution, Part I," *Texas Supreme Court Historical. Society Journal.* 1 (Fall 2015); David A. Furlow, "Theodora Hemphill's Guide to the Texas Constitution, Part II," *Texas Supreme Court Historical. Society Journal.* 1 (Winter 2016).

slavery came to love Sabina as his de facto 'wife'?"[95] Although we will never truly know the answer to that question, we do know that Hemphill ensured that his daughters were educated, enrolling them at Wilberforce University in Ohio in 1859, one of the few institutions of higher education that welcomed Black students.

Hemphill had to have known that this educational exile would emancipate his daughters, while Texas' 1861 Constitution would bar their return. By that time, Hemphill had resigned as chief justice in 1857 to become a U.S. Senator. After secession, Hemphill served in the Confederate Congress, but died of pneumonia in early January 1862.[96] Hemphill's decision to send Theodora and Henrietta to Wilberforce in 1859 was a fateful and potentially lifesaving one. While the Texas Supreme Court had exhibited a more humane and tolerant attitude toward Black people, the Texas Legislature had been passing increasingly harsh laws aimed at discouraging potential slave insurrections.[97] Fears of slave uprisings fueled mob violence around the state by 1860, resulting in the deaths of about eighty enslaved people and thirty-seven white people, including a Methodist minister.[98]

VII. CONCLUSION

The cases discussed in this article do not include the 1851 case of *Guess v. Lubbock*, in which the Texas Supreme Court ruled in favor of Margaret Guess, an enslaved woman who had been promised manumission and property.[99] While the Court's treatment of Guess was consistent with the more liberal standard discussed here, Ms. Guess was actually freed by the trial court after the Court remanded the case. In any event, any examination of the case here would pale by comparison to the masterful work already done by Judge Mark Davidson.[100]

Throughout these cases of the Texas Supreme Court's antebellum period, the Court chose to break—sometimes in striking fashion—from other Southern courts in its jurisprudence regarding Black Americans. All too often, and including our present day, judges are criticized for being overly politicized, for being malleable in the face of prevailing public sentiment, business interests, or other external pressures. Other high courts in pro-slavery states all too frequently rendered decisions that owed more to obeying popular whims or protecting the institution of slavery. Yet despite a composition on the Court that included slaveowners, the Texas Supreme Court time and time again made a conscious choice—whether it was considering an enslaved person seeking promised freedom, a Black litigant seeking a fair trial, or a white defendant who had abused a Black victim. It chose the rule of law.

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[95] Historian James L. Haley opined that the two "shared a relationship of love and respect within the "compulsion implied by their respective positions." Haley, *The Texas Supreme Court* , 59.

[96] James P. Hart, "John Hemphill—Chief Justice of Texas," 3 *Southwestern Law Journal* 395 (1949).

[97] Michael Airens, *Lone Star Law*, 29–30 (2011).

[98] *Ibid.*, 30.

[99] Guess v. Lubbock, 5 Tex. 535 (1851).

[100] Judge Mark Davidson, "One Woman's Fight for Freedom: Guess v. Lubbock, *Houston Law Review."* (Jan./Feb. 2008). While Judge Davidson points out that the litigant's actual surname was likely "Gesss," I have used the spelling used in the case reporter. On the subject of sources, a very useful one in this area is Dr. Linda Hudson's compilation *Black Texans in the Texas Supreme Court, 1840–1907: A Database of Free, Enslaved, and Former Enslaved Black Texans*.

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The Supreme Court of Texas commends Governor Abbott's choice of Justice Jimmy Blacklock as Chief Justice

By the Supreme Court of Texas

Governor Greg Abbott has appointed Justice Jimmy Blacklock to serve as the 28th Chief Justice of the Supreme Court of Texas.

"I am grateful to Governor Abbott for this appointment and for his leadership of our great state," Justice Blacklock said. "Chief Justice Hecht leaves behind an extraordinary legacy of service to the Court and to the People of Texas. I join all my colleagues in thanking him and honoring him for his wisdom and his leadership over the years. The Supreme Court of Texas belongs to the People of Texas, not to the judges or the lawyers. Our job at the Court is to apply the law fairly and impartially to every case that comes before us. My colleagues and I are committed to defending the rule of law and to preserving our Texas and United States Constitutions. I look forward to helping the Court continue to pursue equal justice under the law for all Texans."

Governor Abbott first appointed Justice Blacklock to the Court in 2018. Justice Blacklock was born in Houston and grew up in Missouri City, Texas, where he attended public school, graduating from Elkins High School. He then graduated from the University of Texas at Austin and from Yale Law School. Before joining the Court, Justice Blacklock served as Governor Abbott's general counsel and in the Attorney General's office, where he practiced appellate litigation among other duties. Justice Blacklock was appointed by President George W. Bush to serve in the U.S. Department of

Justice's Civil Rights Division. He clerked for Judge Jerry Smith on the U.S. Court of Appeals for the Fifth Circuit and worked in private practice in Houston and Austin. He lives in Austin with his wife and their three daughters.

"Governor Abbott's decision reflects his commitment to upholding the integrity and excellence of Texas' judicial system," Senior Justice Debra Lehrmann said on behalf of the Court.

Chief Justice Nathan L. Hecht, the longest-serving member of the Court in Texas history, retired on December 31, 2024. Hecht leaves a legacy of judicial excellence, steadfast commitment to the rule of law, and the delivery of fair, impartial, and efficient justice for all Texans. Chief Justice Hecht served 36 years on the Court, as Chief Justice since 2013. Under Chief Justice Hecht's leadership, the Court advanced access to justice initiatives and enhanced judicial efficiency.

Justice Blacklock won re-election to the Court in the 2024 general election. He previously won election in 2018 following his appointment to the Court. By appointing a current member of the Court to the Chief Justice's position, Governor Abbott now has the opportunity to fill that vacancy. Governor Abbott administered the oath of office to Justice Blacklock in a private ceremony on January 7.

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The Supreme Court of Texas Welcomes James P. Sullivan as its Newest Justice

By the Supreme Court of Texas

Governor Greg Abbott appointed his General Counsel James P. Sullivan to serve as the newest justice on the Supreme Court of Texas. Mr. Sullivan will fill a vacancy created when the governor appointed Justice Jimmy Blacklock to serve as the Court's 28th Chief Justice.

Chief Justice-designate Jimmy Blacklock noted he has known Mr. Sullivan for many years. "James Sullivan is a brilliant, hard-working lawyer who has served the People of Texas with distinction for many years. He will make an excellent addition to our state's Supreme Court. On behalf of the entire Court, I extend Mr. Sullivan a warm welcome and thank the Governor for this important appointment. Together all the members of the Court will continue to work hard to defend the rule of law and to pursue equal justice for every Texan."

Sullivan has served as the governor's General Counsel since 2021. He previously served as Assistant Solicitor General of Texas and Deputy General Counsel to the governor. He earned his Bachelor of Arts degree at Rice University. A Harvard Law graduate, Sullivan was a law clerk to Judge Thomas B. Griffith on the U.S. Court of Appeals for the D.C. Circuit, has served as an adjunct professor at George Mason University, and has been an appellate litigator in private practice.

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

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2024-25 Membership Upgrades

The following Society members have moved to a higher Membership category since June 1, 2024.

HEMPHILL FELLOW

Lauren and Warren W. Harris

GREENHILL FELLOW

David A. Furlow

TRUSTEE

Hon. April Farris

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2024-25 New Member List

The Society has added 34 new members since June 1, 2024.
Among them are 21 Law Clerks for the Court (*) who will receive
a complimentary one-year membership during their clerkship.

GREENHILL FELLOW

Joshua and Mindy Davidson

Mary T. Henderson

TRUSTEE

Heriberto “Eddie” Morales, Jr.

Amanda G. Taylor

J. Joseph Vale

PATRON

Brandon Duke

CONTRIBUTING

Jason Bramow
Kirk Cooper
Paul Gaytan
Danica Milios
Christine Nowak
Frank Rynd
Dwayne Simpson

REGULAR

Annie Adams*
Laura Beth Bienhoff*
Jeffrey Carr*
Steve Chiscano
Colton Cox*
Hannah Fassler*
Hartson Fillmore*
Garrett Gray*
Aiden Henderson*
Brandon King
Margaret Kohl*
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Elizabeth Kreager*
Spencer Lockwood*
C. Frank Mace
Benton McDonald*
Macy Merritt*
Caleb Morrison*
Mohmed Patel*
Richard Schechte
Courtney SoRelle*
Martha Vazquez*
Alison Welch*
Madeline White*
Rachel Wolff*

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Membership Benefits & Application

Hemphill Fellow $5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating & Recognition in Program at Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow $2,500

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

Trustee Membership $1,000

- Historic Court-related Photograph
- All Benefits of Patron Membership

Patron Membership $500

- Discount on Society Books and Publications
- All Benefits of Contributing 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*
- Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs

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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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Phone (_____)_____

Email (required for eJournal delivery) _____

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- ☐ Trustee $1,000
- ☐ Patron $500
- ☐ Contributing $100
- ☐ Regular $50
- ☐ Hemphill Fellow $5,000
- ☐ Greenhill Fellow $2,500

Payment options:

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