



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Summer 2014 Vol. 3, No. 4 General Editor Lynne Liberato Executive Editor David Furlow

Columns

President's Page

By Douglas W. Alexander

A battalion of people have contributed to a great year, but I would like to single out a few who have made particularly extraordinary contributions.

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Douglas W. Alexander

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By Pat Nester

The recent Texas State Historical Association meeting spanned the humorous to the sublime in grand fashion.

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Pat Nester

Fellows Column

By David J. Beck

In April, all nine of the Supreme Court Justices joined the Fellows for an evening of fine dining at the Lt. Governor's private dining room in the Texas Capitol.

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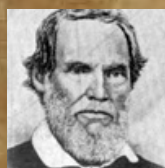
David J. Beck

Features

The Enduring Legacies of Judge R.E.B. Baylor, Part 2

By Thomas R. Phillips and James W. Paulsen

Judge Baylor ranks as one of the more productive members of the Republic Supreme Court. [Read more...](#)



Judge Baylor

The Lone Star Republic's Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Legal Traditions, Part 2

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The lives of fifteen white and Hispanic captives, and the hope of a lasting peace between the Comanches and Texans, depended on Judge Hemphill's skill as a make-peace in his new Council House courtroom. [Read more...](#)



The Council House

An Interview with Texas Supreme Court Chief Justice Nathan Hecht

By Jacqueline M. Furlow
Chief Justice Hecht's capacity for clear and impactful communication, informed by extensive study of writing and philosophy, has served him well in his thirty-year judicial career.

[Read more...](#)



Chief Justice Hecht

Appellate Oddities

By Charles "Chip" Orr

In my several years of practicing and working as a staff attorney at the Supreme Court of Texas, I've noticed some funky, quirky things.

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Guess what this guy has to say!

Significant Summer Dates in the History of the Texas Supreme Court, 1837-1982

By Marilyn P. Duncan

Test your knowledge of these facts, some of them hard to believe. [Read more...](#)

News & Announcements

19th John Hemphill Dinner Will Feature Keynote by Ambassador Ron Kirk, Memorial to Justice Jack Hightower, Pope Awards

The Hemphill Dinner is the Society's main fundraising event and is not to be missed.

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Ambassador Kirk

"Murder and Mayhem" Program Earns High Marks at the Texas State Historical Association's 2014 Annual Meeting

The Society's session was one of the most widely-attended of the forty-two programs at the TSHA's 118th Annual Meeting in early March.

[Read more...](#)



A good crowd for "Murder"

Former Chief Justice Wallace Jefferson Is Named 2014 Pope Professionalism Award Recipient

The Texas Center for Legal Ethics has honored the former Chief Justice as one who personifies the highest standards of legal professionalism and integrity. [Read more...](#)



Chief Justice Jefferson

Richard Orsinger Doubly Honored: State Bar College Award and Texas Bar Foundation Award

This Society Board Member received two prestigious awards this spring, one for an outstanding legal history article and the other for his distinguished record of service. [Read more...](#)



Richard Orsinger

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Warren Harris Will Receive State Bar's 2014 Gene Cavin Award

The Society's Immediate Past President has been selected to receive the 2014 Gene Cavin Award for Excellence in Continuing Legal Education. [Read more...](#)



Warren Harris

In Memoriam: J. Chryst Dougherty, III May 3, 1915–February 20, 2014

In a speech at the State Law Library, Chief Justice Greenhill told Chryst Dougherty's story as no one else could tell it. [Read more...](#)



Chryst Dougherty

The Court Takes a Historic Road Trip to Hillsboro

The Texas Supreme Court made just its second visit to the picturesque Hill County Courthouse in Hillsboro to hear oral argument in two causes. [Read more...](#)



Justice Green and
Justice Johnson

SCOTX Takes SXSWS!

Former Chief Justice Wallace Jefferson made a presentation during the legendary South by Southwest Festival this past March. [Read more...](#)



The SXSWS logo

Society President Sports Gnarly Board

According to a recent *Texas Bar Journal*, Doug Alexander has a passion for skateboarding! [Read more...](#)



Doug's wheels

Chief Justice Jack Pope Celebrates His 101st Birthday

Chief Justice Pope is the oldest living former chief justice of any supreme court of any state in United States history. [Read more...](#)



Chief Justice Pope
at his birthday
luncheon

Membership & More

Calendar of Events

Officers, Trustees & Court Liaison

2013-2014 Membership Upgrades

2013-2014 New Member List

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Douglas W. Alexander

Thanks for a *Great Year!*

THIS IS THE LAST EDITION OF THE E-JOURNAL before I finish my term as President of the Society and pass the baton to the legendary **Marie Yeates**. A battalion of people have contributed to a great year, but I would like to single out a few who have made particularly extraordinary contributions.

First, I would like to thank my predecessor as President, **Warren Harris**, for the generous guidance he provided me during this past year. I was never able to fill Warren's shoes, but I happily and proudly followed in his large footsteps.

I would like to thank **David Beck** for his continuing service as **Chair of the Fellows**, whose expanding ranks of exceptional members provide both financial backbone and prominence to the Society.

I want to extend special thanks to **David Furlow** and **Lynne Liberato** for all their hard work in continuing to lift the quality of an already great e-Journal. **Richard Orsinger** helped to further burnish the e-Journal with the contribution of his award-winning article *170 Years of Texas Contract Law*.

Larry McNeill deserves huge kudos for his tireless efforts presiding over the release of *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas*. This magnificent book, edited by **Marilyn Duncan** and with a biography of the Chief by **Bill Chriss**, joins a growing pantheon of prominent publications sponsored by the Society that are available for purchase [www.texascourthistory.org].

Dylan Drummond helped the Society on multiple fronts this past year, through his assistance with the e-Journal, work on updating and expanding the capacity of the Society's website (stay tuned), and bringing the Society into the 21st century through social media.

Our annual fundraiser, the **Hemphill Dinner**, promises to be a soaring success this year largely due to the efforts of **Marcy Greer**, who sold out almost all of the tables before we even mailed invitations.

Ben Mesches has been devoting considerable efforts this year to expanding the membership of the Society. The Trustees demonstrated their gratitude for his hard work by unanimously voting him **President-Elect**.

I am greatly appreciative of **Blake Hawthorne** for helping to spearhead on behalf of the Society an important and exciting initiative: the **Texas Judicial Civics and Education Center**. We recently learned that the **Texas Bar Foundation** awarded a **\$50,000** grant for the design phase of the project. Blake is now working with the other partners in this joint-venture effort to put together a Request for Proposal to hire a design firm to create

a plan that can be used to assist us in raising funds for the project.

Finally, last, but certainly not least, I would like to express my deep gratitude to the Society's **Executive Director, Pat Nester, Administrative Coordinator, Mary Sue Miller, and Consulting Editor, Marilyn Duncan**, who have provided exceptional leadership this past year under a substantially retooled administrative structure that has given the Society tremendous bang for its buck. Thanks, you three, we couldn't have done it without you!

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

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Pat Nester

Why You Should Go to a *Texas State Historical Association Conference*

A S A MEMBER OF THE SOCIETY, you have an interest in the history of our profession. We all know that sons and daughters of Texas have made great contributions to the jurisprudence of the United States, and because of the wonderful written record they left us, we can study the thinking of scholarly and courageous judges in tracing the evolution of Texas law as it is practiced today.

Of course, the way we do it now was never guaranteed. Wrenching social and economic forces hammered out a template for what was possible and sharpened our sense of what was desirable.

But Texas is just too big, too cataclysmic. Taking it all in can seem just too much to contemplate. We took Texas history in the 7th grade, and I once read a history book by Jim Haley. That's enough.

I'm here to report, however, that listening to the reverberations from our noisy past is made easy and mostly pleasant at the Texas State Historical Association conference, the last one of which I attended in San Antonio last March as a representative of the Society. Next time, you should go too.

Your first impression walking into the pleasant Wyndham on the west side of downtown San Antonio is that some big CLE event is under way. Serious looking people scurry around purposefully, and a pleasant crew, much younger than most of us, mans registration tables. Looking at the event calendar, you see that most of the time, four or five different presentations are going on all at once—in fact, 37 over two-and-a-half days. At each session, three or four presenters take the podium.

You get to pick what interests you: military, international, religious, sociological, economic, political and legal themes—all historical, all professional in presentation. There are lots of PhDs lurking.

The Society had its own session, “Murder and Mayhem on the Texas Supreme Court.” Gary Lavergne of UT Austin recounted the astonishing story, beginning in 1935, of the murder of a Supreme Court justice and his wife by their mentally ill son. Defended by none other than Tom Reavley many years later, he was found not guilty and lived out his life in Seattle with an estate inherited from his parents worth \$800,000. Another Society presentation delivered by the Hon. Mark Davidson dealt with the public's confusion over the names Yarbrough and Yarborough in electing a Supreme Court justice whom, the candidate claimed, “God told to run” but who turned out to have several nasty problems amounting to “flimflam and fraud” in the eyes of contemporaries and historians. These exigencies and the fact that he never wrote a word of any opinion tarnished his time in office and

spotlighted the problem of what we now call “low information voters” in judicial elections.

In bouncing pretty much randomly from session to session, I also learned the following:

Lyndon Johnson was not so much a champion of civil rights as a populist who cared about the equitable allocation of power, social justice, and the eradication of poverty. He worried more about class than about race.

The *Veramendi* case regarding who got title to the Comal Springs tract was a Dickensian *Bleak House* of Texas law—dozens of lawsuits lasting more than 25 years ending in 1879.

For several decades after the Civil War, Texas citizens of Mexican descent living in South Texas retreated to Mexico to escape raids, murders, and torture by renegade Anglo settlers, sometimes losing legal title to substantial ranches.

In the 20th century, premillennialist Texas Baptists became so potent as to influence U.S. relations in support of the creation of Israel. A wonderful charismatic speaker, Dr. Karen Bullock of the B. H. Carroll Theological Institute, gave a stirring account, and many examples of Baptists, ancient and modern, as “peace weavers.”

Luncheon speaker Michael Olivas, a University of Houston law professor engaged, he says, “in the unauthorized practice of history,” wins the award for best maxim of the conference (for us lawyers anyhow): “Law scholars are so much better at afflicting the comfortable than comforting the afflicted.” Although his “Nothing propinques like propinquity” comes in a close second.

According to Daniel Romero of UTEP and other historians, Cuelgas de Castro was a chief of the Lipan Apaches. Surprisingly, de Castro served as and was paid as a general in the Texas Rangers during the Texas Republic. As a Ranger, de Castro fought in momentous encounters with the Comanches, the Lipan Apaches’ mortal enemies. According to Romero, the only other officer commissioned with the rank of general in the Rangers was Sam Houston.

In a joint session with the Texas Folklore Society, James B. Kelly gave his audience key historical knowledge that is just as useful today. Recounting traditional deer hunting trips along the Rio Frio, Kelly said he disregarded his father’s solemn advice never to shoot the ubiquitous javelinas that roamed the area. After falling out of a tree while trying to shoot a buck, Kelly in a fit of pique shot and killed a 35-pound javelina, and carried it back to camp. Unknown to him, Kelly also carried all the lice infesting the javelina, which now infested Kelly. The cold waters of the Frio, we learn, are an insufficient remedy for javelina lice.

In short, the conference spanned the humorous to the sublime in grand fashion. Of special interest to lawyers was the significant proportion of the proceedings that included an obvious legal element or at least questions of causation or reasoning from evidence—difficult tasks shared by historians. Understanding the historical context renders the rules emerging out of the courts of the time much more understandable.

The next TSHA conference will be March 5–7, 2015 in Corpus Christi at the Omni Bayfront Hotel. Registration is reasonable. Check the website at www.tshaonline.org/annual-meeting/future-meetings-information. Under the leadership of Journal Executive Editor David A. Furlow, the Society will present a session on preservation of legal documents, one of the core missions of our Society. You should go.

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Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

I AM PLEASED TO REPORT that the Second Annual Fellows Dinner was a great success. In April, all nine of the Supreme Court Justices joined the Fellows for an evening of fine dining at the Lt. Governor's private dining room in the Texas Capitol. We appreciate Justice Green coordinating the scheduling of the dinner so that the Justices would be able to attend. Unique events such as this one are included as a no additional charge benefit of being a Fellow. The attached photos will give you some sense of the elegance, uniqueness, and camaraderie of the evening. We are beginning plans

for the Third Annual Fellows Dinner, to be held on May 7, 2015 in conjunction with the Society's biannual Symposium.

As part of 2014 State Bar of Texas Annual Meeting, the Fellows will present their second reenactment of the oral argument of a historic case. The Fellows will present a live oral argument reenactment and discussion of *Sweatt v. Painter*, 339 U.S. 629 (1950), which challenged the constitutionality of the separate-but-equal doctrine in law school admissions in Texas. Chief Justice Tom Phillips will give a historical overview of the case before the oral argument reenactment. The Honorable Dale Wainwright will argue on behalf of Hemann Sweatt and the Honorable David Keltner will argue on behalf of the State. Chief Justice Nathan Hecht will preside over the oral argument with a panel that includes Justice Paul Green, the Supreme Court's liaison to the Society, and Judge Priscilla Owen of the United States Court of Appeals for the Fifth Circuit. The reenactment will be presented at 2 p.m. on June 27, 2014 in Austin at the State Bar Annual Meeting.

We are working with Justice Green on some exciting new projects. The Fellows are a critical part of the annual fundraising by the Society and enable the Society to undertake new projects to educate the bar and the public on the third branch of government and the history of the Supreme Court. One of our major educational projects is to present the Society's history book on the Texas Supreme Court to Texas history

FELLOWS OF THE SOCIETY

HEMPHILL FELLOWS

(\$5,000 or more annually)

David J. Beck*

Joseph D. Jamail, Jr.*

Richard Warren Mithoff*

GREENHILL FELLOWS

(\$2,500 or more annually)

Marianne M. Auld

S. Jack Balagia

Robert A. Black

E. Leon Carter

Tom A. Cunningham*

David A. Furlow and Lisa Pennington

Harry L. Gillam, Jr.

William Fred Hagans

Lauren and Warren Harris*

Allyson and James C. Ho*

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.*

David E. Keltner*

Thomas S. Leatherbury

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Hon. Thomas R. Phillips

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Charles R. Watson

Dick Watt

R. Paul Yetter*

*Charter Fellow

classes in middle schools statewide. “This is an exciting project that will spread the story of the Court and the judiciary to classrooms across the state so that students and the public can learn of the rich history of our Supreme Court,” says Justice Green. “I appreciate the Fellows undertaking this important initiative.” We are actively working on this project and will give you updates as we progress.

We are also in the process of nominating the Fellows Class of 2014. I am excited to welcome as new Fellows Marianne Auld, David Furlow, Lisa Pennington, Leslie Robnett, Charles “Skip” Watson, and Dick Watt.

The Society is appreciative of the Fellows for their support. If you would like more information on the Fellows of the Society or are interested in joining the Fellows, please contact me or the Society’s office.

★ ★ ★ ★ ★

Annual Fellows Dinner, April 22, 2014: An Evening to Remember

The Fellows enjoyed great food and conversation with members of the Supreme Court and other special guests.





ABOVE: Chair of the Fellows David Beck welcomes the dinner guests.
BELOW: Chief Justice Nathan Hecht thanks the Fellows on behalf of his colleagues on the Supreme Court.





ABOVE: Justice John Devine and his wife Nubia Devine

BELOW: Fellow Ben Mesches and Justice Don Willett



(left to right) Fellow David Furlow, Justice Paul Green, and Fellow Warren Harris



ABOVE: (clockwise from left) Fellows David Furlow and Lynne Liberato, Justice Paul Green, Maxine Scott, Fellow Wayne Scott, Justice Jeff Brown, and Susannah Brown
BELOW: (seated at large table, clockwise from left) Fellows Shannon Ratliff and Jack Balagia, Judy Beck, Chief Justice Nathan Hecht, Judge Priscilla Owen





ABOVE: Fellow/former Justice Dale Wainwright and Justice Phil Johnson
BELOW: (left to right) Houston appellate attorney Jennifer Hogan, Fellows Lynne Liberato and Warren Harris,
Justice Debra Lehrmann





(left to right) Justice Jeff Boyd, Jackie Boyd, Greg Lehrmann, Justice Debra Lehrmann, Fellows Chair David Beck, Judy Beck

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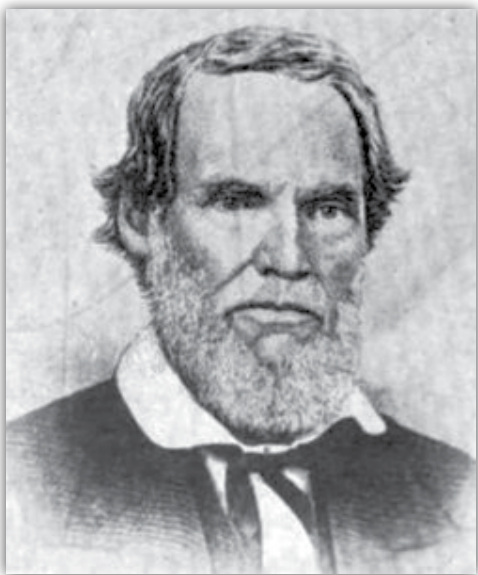
The Enduring Legacies of R.E.B. Baylor, Part 2

By Thomas R. Phillips and James W. Paulsen

From Part 1:

ROBERT E.B. BAYLOR, said a biographer, “believed profoundly that the courthouse, the church and the school ... were the institutions through which the moral and intellectual elements of human society must find their highest and best expression.” (Joseph W. Hale, *Judge Baylor in Review*, 3 *BAYLOR L. REV.* 379, 387–88 (1951).) If this indeed was his personal philosophy, then Baylor’s life was well lived. In each area, his contributions were substantial and lasting. It is fitting that his name lives on in a university which claims service to church and state as its motto (Pro Ecclesia, Pro Texana) and whose adherents seek to spread word of the school “to light the ways of time.” It is equally fitting that, in modern decades, some of Judge Baylor’s formative court judgments and opinions have been preserved, studied, and disseminated, shedding new light on how a fledgling polity like mid-nineteenth century Texas could combine multiple jurisprudential traditions to install a generally functioning and widely respected legal system on a far-flung, hostile frontier.

Baylor’s Impact on Texas Supreme Court Jurisprudence



Baylor performed creditably as an associate judge during the five years of the Republic, both in output and quality of written decisions. During five sessions, he wrote a total of 15 opinions for the Court, and wrote separately in several other cases.¹ This may not seem like much when compared to today’s output, but Baylor actually ranks as one of the more productive members of the Republic Supreme Court. His cumulative work product is exceeded only by that of full-time Chief Justice John Hemphill—who had no trial-court duties—and two other judges.²

Two of R.E.B. Baylor’s opinions are among the most interesting decisions issued during the Republic period. Judge Baylor’s very first opinion, issued at the January 1841 term, also was the first decision to rule an act of the Republic’s Congress unconstitutional.³ The appeal in *Morton v. Gordon*⁴ involved a technical question of probate law, with just over \$100 at issue. Neither party contested Supreme Court jurisdiction.

However, the Court raised the issue *sua sponte*, noting that Congress had restricted appeals to cases with more than \$300 in controversy.⁵

Judge Baylor’s opinion in *Morton v. Gordon* is comparatively long for the time, running about five pages in *Dallam’s Digest*.⁶ The opinion combines then-recent jurisprudence from the United States Supreme Court with textual analysis of the Republic’s Constitution. Most important, Baylor observed that, while the United States Constitution conferred appellate jurisdiction on the U.S. Supreme Court “with such exceptions and under such regulations as the Congress shall make,” the Republic Constitution contained no such limitation.⁷

Morton v. Gordon is a capable analysis of constitutional doctrine, especially considering the conditions under which it was written. Baylor concludes the exposition with an apology (as was his wont both from the pulpit and from the bench):

We have had but little time to examine the important principle here settled; if errors should hereafter be found to exist in the opinion, we trust it will not be attributed to a love of power, but to an over-jealousy in guarding the rights of the people, and a desire to hear them, unrestricted, in this, the last citadel of justice known to the laws and constitution of the nation. *Morton*, Dallam at 397, 400.

Morton v. Gordon does show signs of hasty drafting. The decision leads off with a close paraphrase of the famous words of the U.S. Supreme Court in *Cohens v. Virginia*, to the effect that a court has no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given; the one or the other would be treason to the constitution.⁸ However, though this language in *Morton* is set off by quotation marks, no source is given.⁹

Morton also illustrates the limited resources available to the Supreme Court of Texas in those early days. Judge Baylor cited only two sources: Chief Justice John Marshall's decision in *Gibbons v. Ogden*, 22 U.S. 9 Wheat. 1, (1824),¹⁰ and Story's *Constitutional Commentaries*.¹¹ Even that short list can be narrowed down. In all likelihood, the only source on which R.E.B. Baylor relied in writing the first significant constitutional decision in the Court's history was the first edition of Joseph Story's work published in 1833. The quote from *Gibbons v. Ogden*,¹² the paraphrase of the *Cohens* language¹³ and several principles of constitutional interpretation relied on by Judge Baylor in *Morton* can be found in Story's *Constitutional Commentaries*.¹⁴ Still, if Baylor had only one source available to him in 1841, Texans can be grateful that single source was Story's famed work.

The second opinion of special interest written by Judge Baylor is also the last of his opinions found in *Dallam's Digest*:¹⁵ *Republic v. Skidmore*, Dallam 581 (1844). The decision relates to a subject of vital interest to Texans at the time—headright certificates. These land-grant certificates were awarded to various classes of individuals, including heads of families residing in Texas on the date independence was declared. One recurring issue was the treatment of land claimants who were present in Texas as required on the date of independence, but who left shortly thereafter and returned with their families only after the Mexican Army had been defeated. Was the resident's absence from Texas only temporary, or had the claimant not yet become a resident? Two years before taking up *Skidmore*, Judge Baylor had written the Court's opinion in *Republic v. Young*, Dallam 464 (1842). William Young arrived in Texas in February 1836, leaving in mid-March to return to Mississippi. He claimed he was returning to Mississippi to fetch his family, who had been staying with relatives during the interim. However, the timing also suggested he might have joined the Runaway Scrape,¹⁶ fleeing the Mexican Army after the fall of the Alamo and destruction of Fannin's force at Goliad, and returning only after the new nation was comparatively secure.

Baylor's analysis in the 1842 *Young* decision began with a rote recital of residency law—that residence or domicile consists of physical presence plus an intent to remain. Once both requirements were met, domicile would be established instantaneously.¹⁷ Subsequent temporary absence would not matter. Citing another one of Judge Story's works—*Conflict of Laws*—as sole authority,¹⁸ Baylor affirmed Young's favorable jury verdict.

Baylor's opinion in *Skidmore* presented a variation on the same theme. Abraham Skidmore arrived in Texas in February 1836 and departed in June, promising to return with his family. However, the family remained in their Alabama home throughout 1836, and did not move to Texas until April 1839. This time, Judge Baylor reversed Skidmore's favorable jury verdict and remanded the case for further fact-finding.

Exactly what justifies treating *Skidmore* differently than *Young* is not immediately apparent. In one important respect, *Skidmore* actually presented a more compelling case for residency. Unlike Young, Skidmore

stayed in Texas through the Alamo, Goliad, and San Jacinto, which was seemingly the sort of conduct this class of headright certificate was meant to reward. On the other hand, Skidmore's family did remain in their Alabama home for more than three years (most of the time with Mr. Skidmore in residency) before Skidmore returned to Texas with his family to claim their land. Baylor would not have been faulted for sustaining the jury's verdict in both cases. But Baylor reversed Skidmore's favorable jury verdict, in part because there was no direct proof that Skidmore had participated actively in the defense of the Republic.

When writing *Skidmore*, Judge Baylor explicitly acknowledged that some would see the result as conflicting with his earlier decision in *Republic v. Young*. Baylor tried to distinguish the facts of the two cases, but also said he simply declined to extend the liberal doctrine announced in *Young* any further. He explained that "some of the members of the [C]ourt are not entirely satisfied with the doctrine laid down in that [*Young*] case."¹⁹

The most remarkable aspect of the *Skidmore* decision, however, is not what the decision says, but what the version of the decision printed in *Dallam's Digest omitted*—a full-blown blistering dissent by Associate Judge William Beck Ochiltree.²⁰ James Wilmer Dallam's *Digest*, the closest thing to an official report of decisions at the time,²¹ notes at the end of the decision that Baylor's opinion was "concurrent in" by the other members of the Court. Indeed, a one-paragraph concurrence by Associate Judge Richard Morris²² is published alongside Baylor's majority writing.²³ But the version of *Skidmore* found in Dallam's *Digest* gives no hint of dissent—much less an extended written dissent. Thus, the presentation of the opinion by Dallam was materially misleading because one member of the Court's *Skidmore* panel most decidedly did not concur with Judge Baylor's opinion at all.²⁴

And it varied from Dallam's usual practice as well. If the information available to him at the time he organized his *Digest* was not sufficient for him to note a separate writing like a concurrence, he might just write something like, "nothing on record to show that it was concurrent in."²⁵ The most likely explanation is that Dallam decided to exclude Judge Ochiltree's dissenting opinion from the printed version of *Skidmore* because it was very long (unusual for those times), and because a separate dissent was not "the law" in any event. Dallam seems to have made the same editorial decision in one other important Republic case, though he at least noted in his reporting of that opinion the *existence* of a dissenting opinion.²⁶

The omitted dissenting opinion in *Skidmore* and a post-statehood appeal in the same case suggest that Baylor's original decision in *Young* was premised on a legal error from which the Supreme Court was trying to extricate itself with as much grace as possible under the circumstances. In his *Skidmore* dissent, Judge Ochiltree's ire was not directed principally at *Skidmore*'s result, but with the destabilizing effect the Court's failure to honor its own recent rulings might have on the fledgling institution.

"The decisions of this tribunal," he protested, "should present a steady beacon light to guide the citizen on to a proper investigation of his rights and not an *ignis fatuus* to lure him on to cost and disappointment."²⁷ Ochiltree argued that, if Young became a citizen instantaneously once he was living in Texas with the intent to remain for the indefinite future, Skidmore also should have similarly become a Texas citizen. Subsequent details—such as the fact that Young and his family had given up their home while Skidmore's did not, and that Skidmore did not return to Texas for a significantly longer time—should not have weighed against Skidmore's intent to return to Texas at the time he left (or, as Ochiltree put it, his "*animo revertendi*").²⁸

Ochiltree also fretted at the sorry state of the record, and at the Court's refusal to give sufficient weight to the jury's verdict. He lamented that his colleagues had seen fit to reverse a jury verdict because of the exact phrasing of a statement of facts written by a forgetful trial judge months after the event.²⁹ On a more practical note, but with a few rhetorical flourishes, Ochiltree warned Skidmore to develop a better record when the case was

retried: “At the time of the commencement of this suit, the path which led to the temple of justice was but a blind one at best.” But Ochiltree cautioned that “[t]he blind path has now become a beaten road.”³⁰ A growing body of case law—or, as Ochiltree put it, “finger boards of decision...placed at the forks” of a beaten road—made further evidentiary missteps less forgivable.

Later decisions established that the terms under which the Republic’s Congress authorized the grant of headright certificates should be restrictively read, perhaps even a little more restrictively when considering the claims of Hispanics who fled to temporary safety in Mexico during the worst of the hostilities.³¹

Even so, Judge Baylor’s relaxed headright requirement in *Young* was not completely repudiated. After statehood, the Texas Supreme Court reversed another favorable jury verdict for Abraham Skidmore.³² This time, the Court interpreted the headright statute to require that Skidmore’s family actually be present in Texas on the date of independence.³³ Reading the statute this way, neither Young nor Skidmore would have been entitled to a head-of-family headright grant—because neither man’s family had been in Texas on the date of independence.

Nonetheless, in the subsequent post-statehood case, Chief Justice Hemphill did not overrule *Young*. Hemphill instead allowed that Baylor’s opinion in *Young* had “departed to some extent from what appears to be the more obvious meaning”³⁴ of the statute, and he endorsed the “lucid opinion delivered by Judge Baylor” in *Skidmore*.³⁵ But the Court still remanded (again) to give Skidmore the opportunity to establish facts that might bring the case within the limited exception unwittingly created by Baylor in *Young*.³⁶ The story ultimately had a happy ending for the Skidmore family; on a third appeal, with additional evidence, Skidmore finally prevailed.³⁷

Baylor Returns to Politics as Texas Enters Statehood

Meanwhile, Texas’s efforts to join the United States were proceeding apace. In June 1845, Fayette County elected Judge Baylor as one of two delegates to the convention to frame a state constitution. Each of his three opponents—James S. Mayfield, John W. S. Dancy, and James S. Lester—had served in the Congress of the Republic.³⁸ Mayfield had been secretary of state under President Lamar;³⁹ Dancy was a prominent planter and lawyer, as well as a trustee of Rutgersville College;⁴⁰ and Lester, the Fayette County chief justice, was also a leading Baptist and, like Baylor, a charter trustee of Baylor University.⁴¹ Yet Baylor enjoyed a comfortable lead over the field, with Mayfield edging out the others for the second seat.⁴²

Baylor was a leading figure at the Convention, speaking successfully in favor of such diverse issues as homestead protection, appointed rather than elected judges, and banning ministers from legislative service.⁴³ Texans overwhelmingly approved the new constitution in an October referendum, and the United States Congress adopted a joint resolution annexing the Republic of Texas on December 29, 1845. Noah Smithwick recalled that Baylor was presiding in open court in Bastrop when word of Congress’s action reached the town. Baylor immediately adjourned court for the day so that all might celebrate, with the pronouncement that “No man should be considered drunk on Independence day, so long as he could pronounce the word ‘Epsom.’”⁴⁴ Smithwick added, “Judge Baylor, Baptist preacher though he was, made a full hand with the boys.”⁴⁵ This was undoubtedly memorable behavior by one who only months before had been elected the first president of the Texas Temperance Society!⁴⁶

The state’s new governor, J. Pinckney Henderson, appointed Baylor to be judge of the state’s Third Judicial District on April 16, 1846. The Senate confirmed him without a dissenting vote that day, although Senator Jesse Grimes moved unsuccessfully to lay the nomination on the table and did not vote on the confirmation itself.⁴⁷ Baylor served until 1863, through several changes in the boundaries of his district, being the last of the old judges of the Republic to lay down his gavel. Yet no evidence suggests that he ever sought elevation to the Supreme Court or to the federal bench.

But Baylor's devotion to the administration of justice, while no doubt real, did not supplant his ordinary political ambitions. Indeed, at the commencement of statehood he openly mused about vying for one of Texas's two U.S. Senate seats if General Thomas J. Rusk did not run,⁴⁸ Houston being considered an inevitable candidate and certain choice. Baylor also was briefly a candidate in a March 30, 1846 election for a stub-term in Congress.⁴⁹ But Rusk did run for Senate, and Baylor bowed out of the congressional fray, although not before a prominent Houston newspaper reprised his Alabama political career and denounced him as a Whig "masquerading" as a Jacksonian Democrat.⁵⁰

Yet despite his selection to a six-year term as district judge in April 1846, and his self-professed disinclination "to mingle again in the politics of the day,"⁵¹ before year's end Baylor was all-in on a bid for a full two-year term in Congress. He probably thought his judicial service across the northwestern portion of the district, his leading role in the recent Constitutional Convention, and his many educational and denominational activities would make him a more attractive candidate than either the incumbent, Massachusetts-born politician Timothy Pilsbury of Brazoria County, who was accused of being a Northern sympathizer,⁵² or the businessman Pilsbury had narrowly defeated in March, Samuel May Williams of Galveston County, who had openly opposed annexation and was perceived as interested chiefly in securing federal assumption of the substantial debts owed to him by the Republic.⁵³ The *Houston Morning Star* observed, somewhat tongue-in-cheek, that "Baylor has rather the advantage of all his opponents in electioneering, for he can electioneer from the pulpit and bench as well as the stump."⁵⁴

But Baylor's pulpitering was a two-edged sword, particularly given his eloquent speeches in the Constitutional Convention against ministers serving as elected legislators. As the editor of the *Democratic Telegraph and Texas Register* observed, Baylor could be "arraign[ed]" by his own remarks, reminiscent of the lament of Job: "'If I justify myself, my own mouth shall condemn me.' (Job, Chap. 9, v. 20)."⁵⁵ In the end, Baylor finished a distant last, behind not only Pilsbury and Williams, but also fellow district judge William E. "Fiery" Jones of Guadalupe County, the other new candidate.⁵⁶

Sometime before the year was out, Baylor relocated to Washington County, since Fayette County was no longer in his judicial district. Baylor settled in the Gay Hill community, about five miles west of Independence, and named his home Holly Oaks.⁵⁴⁷



Baylor's Holly Oaks home near Independence

One of Baylor's rulings as a state district judge caused at least as much of a stir as any opinion he issued while serving on the Republic's Supreme Court. On October 25, 1848, Baylor declared the Mercer Colony contract invalid.⁵⁸

A little background is necessary. The Mercer colonization agreement had been controversial from the day it was signed.⁵⁹ Strapped for cash and concerned about the possibility of a Mexican invasion, in 1841 the Republic of Texas Congress authorized revival of the old *empresario* system, authorizing agreements with private parties to colonize large blocks of land on the frontier. The theory was that, by jump-starting immigration, government tax revenue would be increased, while simultaneously increasing the number of able-bodied men who could defend the Republic's borders.⁶⁰ This legislation resulted in contracts with W.S. Peters and Henri Castro, among others.

While all the Republic *empresario* contracts were controversial, none was more so than the agreement President Sam Houston entered into with Charles F. Mercer on January 29, 1840. Mercer had represented Virginia in the U.S. Congress at the same time Houston represented Tennessee.⁶¹ Many believed Mercer obtained the contract by trickery.⁶² The Congress of the Republic actually had repealed the *empresario* legislation before Mercer got his contract. However, President Houston vetoed the bill and authorized Mercer's Colony just one day before Congress overrode the veto. Procedural irregularity was not the only problem. Some of the land granted to Mercer overlapped Peters Colony land. Plus, Mercer himself was rumored to be an abolitionist, an accusation that probably contained more than a grain of truth.⁶³

Though not directly repudiating the Mercer contract, the 1844 legislation did declare invalid any prior contracts that were not "strictly and rigidly complied with." The controversy carried through into the 1845 constitutional convention. Though drafters did not address the *empresario* issue directly in the statehood constitution, they did authorize a public vote on an ordinance authorizing the attorney general to sue the *empresarios*. The ordinance passed, the state brought suit to invalidate Mercer's contract, and District Judge Baylor did so in his October 1848 ruling.

One practical problem with Judge Baylor's ruling was that many immigrants already had settled on the land in reliance on Mercer's contract. So, in 1850 and 1852, the legislature passed measures protecting the rights of settlers but denying any benefits to the *empresario* and his associates.

Judge Baylor's decision evidently was not appealed. Subsequent decisions on the validity of the Mercer Colony contract are mixed. In 1858, the Supreme Court of Texas ruled in favor of the Mercer contract's validity,⁶⁴ while the United States Supreme Court in 1883 declined to enforce the contract.⁶⁵ However, both decisions are qualified. The Texas Supreme Court upheld the contract because there was no trial evidence that Mercer and his associates *failed* to comply with to the contract's terms;⁶⁶ the United States Supreme Court declined to enforce the contract because there was no trial evidence that Mercer and his associates *did* comply with the contract's terms.⁶⁷ In the 1883 case, the Texas General Land Office argued that Judge Baylor's 1848 district court ruling was *res judicata*.⁶⁸ However, the U.S. Supreme Court refused to consider Baylor's 35-year-old decision dispositive, because the Court believed the Texas district court never acquired personal jurisdiction over the defendants.⁶⁹

From 1846 to 1858, Baylor continued his routine—riding circuit, preaching, sitting on the board of various Baptist and Masonic endeavors, and advocating for such diverse initiatives as railroad-building and temperance.⁷⁰ Although the counties composing Baylor's judicial district changed several times, the greatest change in Baylor's job came in 1850, when, by constitutional amendment, judicial appointments were jettisoned in favor of popular judicial elections. Baylor could not have been happy about the change, as he had advocated for appointed judges at the 1845 Convention and his congressional race had demonstrated how his views as a framer could be used against him in a subsequent candidacy. But no opposition developed, and Baylor won all but a few scattered votes.⁷¹

Baylor Joins the Know-Nothing Party

In 1855, Baylor re-entered the political fray one last time with his election as President of the Grand Council of the Know-Nothing Party of Texas at a secret state convention held at Washington-on-the-Brazos on June 11.⁷² Despite this preeminent position, the depth of his commitment to the movement is uncertain. While the state's leading Democratic organ observed that he "seems ... to have been the most active canvasser for 'Sam' [Houston] in that region" around Washington County,⁷³ he was not a delegate to the Know-Nothing State Convention in Austin on November 23–24, 1855, and may not have even attended the Washington County mass meeting of party members that selected that county's delegates on October 27.⁷⁴ Of course, his judicial duties might well have precluded his attendance, just as they kept him from attending many trustee meetings at Baylor University despite his keen devotion to his namesake institution.

Why did Baylor affiliate with this movement, which even then seemed peculiar at best, repulsive at worst? For many, especially former Whigs, Know-Nothingism seemed the only viable alternative to a Democratic Party that had embraced the Kansas-Nebraska Act and other ultra-Southern slavery-expansion schemes.⁷⁵ For others, especially Protestant fundamentalists, the party's anti-immigrant, anti-Catholic stance, which seems to contemporary minds so un-Christian, was at the time quite seductive.⁷⁶ But perhaps Baylor, like other frustrated office-seekers, merely "saw the party as a means to use office or influence."⁷⁷ Regardless, the Know-Nothings enjoyed less electoral success in Texas than in many Northern states, winning just enough victories to keep the party viable.⁷⁸ Like the Whigs earlier in the decade and the Democrats shortly thereafter, the new party foundered on the expansion of slavery issue, and it simply collapsed after its poor showing in the 1856 presidential race and the 1857 state contests.⁷⁹

The flirtation could not have helped Baylor's career aspirations. An Austin Democratic paper challenged Baylor "to say whether he is ignorant of these proceedings [at the June 11 meeting]."⁸⁰ Closer to home, a local editor, noting that Georgia students in Athens rallied against the Know-Nothings, called for a similar demonstration at Baylor. "We hope yet to see the day, when its founder, Judge Baylor, will renounce the oppressive and anti-American principles of Know Nothingism, and enter the Republican fold, and battle against tyranny and oppression. Then will ... the name of Baylor be revered, by the Texas youths who graduate in [the university's] halls."⁸¹

Against this backdrop, Baylor's judicial term of office expired in 1857. While his district had become somewhat more compact—encompassing only eight counties instead of the eleven he oversaw in 1851—it still extended from Brenham to Stephenville. He was well past sixty, and weary of riding circuit, but he needed the salary. His niece and her children had moved to Gay Hill some years before, and he had no savings to support himself or this brood.⁸² So he sought another term. Although political parties did not yet endorse in judicial races, Baylor's past political activities were clearly a matter of comment in the race,⁸³ and his principal challenger was closely affiliated with the "fire-eating" faction of the Democratic Party.⁸⁴ The campaign started early,⁸⁵ and Baylor won with only a plurality of the votes.⁸⁶ While he won seven of the district's eight counties, he lost Washington County by nearly 200 votes. Baylor's friend, Sam Houston, was an unsuccessful candidate for governor at the same election.⁸⁷ To some extent they were natural political allies,⁸⁸ Houston having been even more prominent in the Know-Nothing effort than Baylor;⁸⁹ but they did not run as a ticket⁹⁰ and their vote did not correlate closely throughout the district.⁹¹

Baylor's Final Years and Enduring Legacy

In 1857, Baylor University opened a law department, the first in the state. Along with Supreme Court Justice Royall T. Wheeler, Representative John Sayles, and William P. Rogers, Baylor was named to the faculty.⁹² While his

judicial duties did not permit him to present regular lectures, he was a favorite of the students when he did appear.⁹³

Baylor did not seek re-election when his term expired in 1863.⁹⁴ But retirement did not mean withdrawal from public affairs. He served as interim president of Baylor University in 1867⁹⁵ and president of the Baylor Female College Board of Trustees thereafter,⁹⁶ while remaining active in denominational affairs. He never stopped trying to save lost sinners, as a letter from noted biologist and self-professed infidel Gideon Linsecum shows:

Almost everybody has gone to the war now. I stay here by myself having no associates, until I have almost forgotten the language. I spend my time altogether in the investigation of the natural sciences Some of the old fellows around here have been stepping off to the “good hunting ground” recently, leaving me ... no playmate now but Judge Baylor. He, to be sure, does very well, visiting me pretty often. He performs on the violin, and we spend our time quite pleasantly, so long as we keep from thinking of our kindred and friends who are participants in the hateful, bloody strife. The judge is a preacher, if you recollect; I can very well stand his fiddling, for he performs pretty well and knows some good pieces, but when he undertakes, as he sometimes does, to approach me on the subject of religion, I can’t stand it. That is, I can’t maintain my gravity. For it looks to me that a man of his oppertunities [sic] and his middling good sense ought not to talk about such foolishness, particularly when there is no one present but a single friend who is in earnest on all serious subjects.⁹⁷

Baylor lived into his ninth decade, dying at Holly Oaks on the next to last day of 1873.⁹⁸ At his request, he was buried on the campus of Baylor in Independence. After that school closed, many Baptist leaders wished to see his resting place moved. The hostility of Independence residents toward the new Baylor University in Waco was too great to permit reburial there,⁹⁹ so eventually Judge Baylor was re-interred in the main building at Mary Hardin-Baylor in Belton.¹⁰⁰ When a fire destroyed the building and ruined the gravesite in 1964, he was buried again in a small historical park on the campus.¹⁰¹ The current monument, finished in 1966, is a raised tomb with a slab bearing the single word “Baylor.”

Baylor is also memorialized on the Waco campus by a seated bronze statue erected in 1936 by the State of Texas with federal funds as part of the Texas Centennial commemoration. The statue, designed by architect Donald Nelson and executed by the noted sculptor



Bronze statue of Judge Baylor by Pompeo Coppini

Pompeo Coppini, depicts Baylor in early middle age, clean shaven and elegantly dressed.¹⁰² More recently, the Student Life Division of Baylor University has conducted a summer freshman orientation at the ruins of the Independence campus, where the histories of Judge Baylor and the school’s other founders are celebrated.¹⁰³

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- ¹ See James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305, 322 (1986).
- ² Those judges were William J. Jones (17 opinions in 4 terms) and William Beck Ochiltree (18 opinions in 3 terms). *Id.* at 343, 349. Anderson Hutchison tied Baylor, at 15 opinions each. *Id.* at 334. However, Hutchison's output was the highest per term of all Justices (not including the Chief Justice), because he sat only during the 1841 and 1842 terms. *Id.* at 334–35.
- ³ See James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 284 (1986).
- ⁴ Dallam 396 (1841).
- ⁵ *Id.* at 397.
- ⁶ *Dallam's Digest* prints about 140 decisions of the Supreme Court of the Republic of Texas in a total of 276 pages, for an average of almost exactly two printed pages per opinion. See Paulsen, *supra* note 3 at 275 n.234, 303.
- ⁷ *Morton*, Dallam at 397.
- ⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, (1821).
- ⁹ Baylor actually copied the *Cohens* language from *Story's Constitutional Commentaries*. See 3 JOSEPH A. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 434–35 (1833) [hereinafter CONSTITUTIONAL COMMENTARIES].
- ¹⁰ See *Morton*, Dallam at 398 (quoting Marshall for the statement that “[t]his limitation on the means which may be used is not extended to the powers which are conferred”).
- ¹¹ *Id.* at 400.
- ¹² Compare *Morton*, Dallam at 398, with 1 CONSTITUTIONAL COMMENTARIES at 402.
- ¹³ See *supra* note 9.
- ¹⁴ E.g., compare *Morton*, Dallam at 399 (grant inuring to the sole benefit of the grantor, and power conferred in general terms), 400 (restrictions founded on conjectures), with 1 CONSTITUTIONAL COMMENTARIES at 405, 401, 407.
- ¹⁵ While the majority opinion in *Skidmore* (as well as a concurring opinion) was originally published by Dallam, the dissenting opinion in that case penned by Associate Judge William B. Ochiltree was inexplicably omitted. It may be found in the officially reprinted version of *Skidmore* (Tex. 1845), 65 TEX. L. REV. 441 (Paulsen rep. 1986), which was reported by one of this article's co-authors, who was specially appointed in 1986 by the Texas Supreme Court to the position of Reporter for the 1845 Term of the Republic's Supreme Court.
- ¹⁶ See generally Carolyn Callaway Covington, *Runaway Scape*, in 5 RON TYLER, ET AL., EDs., NEW HANDBOOK OF TEXAS 715 (1996).
- ¹⁷ See *Young*, Dallam at 465.
- ¹⁸ See *id.*
- ¹⁹ *Skidmore*, Dallam at 583.
- ²⁰ Compare *Skidmore*, Dallam 581, with *Republic v. Skidmore*, (Tex. 1845), 65 TEX. L. REV. 441, 445–49 (Paulsen rep. 1986) (Ochiltree, J., dissenting).
- ²¹ See, e.g., Dylan O. Drummond, *Dallam's Digest and the Unofficial First Reporter of the Supreme Court of Texas*, J. SUP. CT. HIST. SOC'Y, Spring 2013, at 9–10, 13 n.39.
- ²² When judged by modern standards, most decisions and separate writings of the Republic Supreme Court were quite short and light on citations. This was due to many factors, not the least of which was that the Court met for only a comparatively short period of time each year, and the district judges serving double-duty as Supreme Court Justices were probably anxious to return to their homes and district-court duties.

Even so, dissents and separate concurrences were not uncommon. In fact, the dissent rate was much higher during the Republic period than during the first decade of statehood, when a full-time three-member Court presumably had more time to write. Indeed, by the authors' rough count, at least one judge dissented from the majority opinion in at least 10 cases printed in *Dallam's Digest*, giving a dissent rate of about 7 percent. By contrast, the dissent rate during early statehood was less than 1 percent.

However, just as was the case with majority opinions, written concurrences and dissents during the Republic period tended to be short. Separate opinions usually ran no longer than a paragraph (as Judge Morris's did here). See, e.g., *Chevalier v. Rusk*, Dallam 611, 614 (1844) (W.E. Jones, J., dissenting and Jack, J., dissenting); *Binge v. Smith*, Dallam 616, 618 (1844) (Morris and Baylor, J.J.,

dissenting); *Ward v. Boon*, Dallah 561, 563 (1844) (Jones, J., concurring and dissenting; Hemphill, C.J., concurring and dissenting; Jack and W.E. Jones, JJ., concurring and dissenting); *McKinney v. Peters*, Dallah 545, 546 (Jack, J., dissenting) (1843). Sometimes a dissent or “concurrence in result” consisted only of a notation to that effect, or, in at least one instance, a promise—apparently broken—to submit a dissenting opinion at a later date. *See, e.g., Tinnin v. Weatherspoon*, Dallah 590, 592 (1844) (notation); *Tompkins v. Republic*, Dallah 488, 490 (1842) (later dissent promised); *Sloo v. Powell*, Dallah 467, 470 (1842) (notation); *Fowler v. Poor*, Dallah 401, 403 (1841) (notation).

²³ *Republic v. Skidmore*, Dallah 581 (1844); *see also Republic v. Skidmore*, (Tex. 1845), 65 TEX. L. REV. 441, 449 (Paulsen rep. 1986) (discussing same in the official *Reporter’s Note*).

²⁴ *Republic v. Skidmore*, (Tex. 1845), 65 TEX. L. REV. 441, 445–49 (Paulsen rep. 1986) (Ochiltree, J., dissenting).

²⁵ *See, e.g., Knight v. Huff*, Dallah 425, 426 (1841); *Grayson v. Cummins*, Dallah 391, 394 (1841).

²⁶ *See Williams v. Borden*, Dallah 577, 577 (1844).

²⁷ *Republic v. Skidmore*, (Tex. 1845), 65 TEX. L. REV. 441, 445 (Paulsen rep. 1986) (Ochiltree, J., dissenting).

²⁸ *Id.* at 442–43.

²⁹ *See id.* at 448.

³⁰ *Id.*

³¹ *See, e.g., State v. Casinova’s Executor*, 1 Tex. 401 (1846).

³² *Republic v. Skidmore*, 2 Tex. 261 (1847).

³³ *Id.* at 264–65.

³⁴ *Id.* at 267.

³⁵ *Id.* at 262.

³⁷ *See State v. Skidmore*, 5 Tex. 469 (1849).

³⁸ Some sketches of Baylor’s life state that he served in the House of Representatives of the Republic of Texas. *See, e.g.,* Rufus C. Burleson, “‘The Old Guard’ Biographies: R. E. B. Baylor,” in *THE LIFE AND WRITINGS OF RUFUS C. BURLESON* 692 (Georgia J. Burleson, comp. and publisher, 1901) [hereinafter *BURLESON*] (reporting that Baylor served in the Seventh Congress, 1842–43). This assertion is incorrect; both Baylor’s judicial office and his status as an ordained minister would have prohibited his taking a seat in the Congress of the Republic.

³⁹ 4 HANDBOOK OF TEXAS 587 (1996).

⁴⁰ 2 HANDBOOK OF TEXAS 500 (1996).

⁴¹ Act of February 1, 1845, LAWS PASSED BY NINTH CONGRESS OF THE REPUBLIC OF TEXAS 84–87 (Washington, 1845), reprinted in 2 H. P. N. GAMMEL, *THE LAWS OF TEXAS 1822–1897*, at 1130–33 (Austin: Gammel Book Co. 1898).

⁴² The results of the election, where each voter was permitted to cast up to two votes, were as follows:

Precinct	Baylor	Mayfield	Dancy	Lester
LaGrange	120	111	95	84
Townsend’s	25	26	6	16
Rutersville	6	12	27	16
Ingram’s	20	7	1	12
Cumming’s Creek	19	16	6	16
Navidad	18	-	18	-
Woods’	9	14	15	19
Total	217	186	168	163

LA GRANGE INTELLIGENCER, June 9, 1845, at 2. Baylor’s worst showing, predictably enough, was in Methodist-dominated Rutersville.

⁴³ 2 DICTIONARY OF AMERICAN BIOGRAPHY 78 (Allan Johnson, ed. 1929). Baylor was less successful in advocating for annual elections and opposing the governor’s veto power. *Id.*

⁴⁴ NOAH SMITHWICK, *THE EVOLUTION OF A STATE OR RECOLLECTIONS OF OLD TEXAS DAYS* 211 (1983).

- ⁴⁵ *Id.*
- ⁴⁶ LA GRANGE INTELLIGENCER, Sept. 23, 1845, at 2 (reporting on September 17 organizational meeting). Baylor was active in other temperance organizations at the same time. EUGENE W. BAKER, IN HIS TRACES: THE LIFE AND TIMES OF R. E. B. BAYLOR 137–38 (1996) [hereinafter BAKER] (discussing the rise and precipitous decline of the Annexation Temperance Society).
- ⁴⁷ S.J. of Tex., 1st Leg., R.S. 364 (1846).
- ⁴⁸ BAKER, at 142.
- ⁴⁹ The initial election filled Texas’s two congressional seats for the remainder of the Twenty-Ninth Congress, which expired on March 3, 1847. Then, on November 2, 1846, voters returned to the polls to choose representatives for full two-year terms in the Thirtieth Congress, which commenced on March 4, 1847. On January 24, 1845, the *La Grange Intelligencer* announced that it would support Baylor if he ran. On February 28, the same paper carried an announcement of Baylor’s candidacy.
- ⁵⁰ BAKER, at 142 (quoting TELEGRAPH AND TEX. REG., Jan. 14, 1846).
- ⁵¹ LA GRANGE INTELLIGENCER, Mar. 7, 1846, *quoted in* BAKER, at 144.
- ⁵² BROADSIDE, T. PILSBURY, “TO THE VOTERS OF THE SECOND CONGRESSIONAL DISTRICT,” OCTOBER 5, 1847 (sold at Heritage Auction Galleries, November 2009 Signature Texana; Auction 6028, lot 45124).
- ⁵³ MARGARET SWETT HENSON, SAMUEL MAY WILLIAMS: EARLY TEXAS ENTREPRENEUR 131–37 (1976). After a rain-delayed count, Pilsbury was finally declared the winner of the March election: 1,276 to 1,233 votes. The remaining candidates, who did not offer themselves again in November, included William G. Cooke of Bexar County: 954; John M. Lewis of Montgomery County: 423; Joseph C. Megginson of Montgomery County: 253; and four others who totaled 109 votes. ELECTION RETURNS CERTIFICATE, J. PINCKNEY HENDERSON (GOVERNOR), DAVID G. BURNET (SECRETARY OF STATE), AND JOHN G. CHALMERS (ATTORNEY GENERAL), MAY 9, 1846, TEXAS STATE ARCHIVES.
- ⁵⁴ DEMOCRATIC TELEGRAPH & TEX. REG., Oct. 21, 1846, at 3, *quoted in* BAKER, at 151.
- ⁵⁵ *Id.* at 2, *quoted in* BAKER, at 151. *See also* DEMOCRATIC TELEGRAPH & TEX. REG., Oct. 26, 1846, at 2 (decrying the evils of mixing judging and politics).
- ⁵⁶ The exact returns are in doubt. Professor Baker, drawing upon returns that we cannot locate in the Texas State Archives, says that Baylor received only 363 votes, or “less than ten per cent of the almost four thousand votes cast.” BAKER, at 151–52. But the most authoritative contemporary source gives Baylor almost one hundred more votes than that, out of a smaller total. CONGRESSIONAL QUARTERLY, GUIDE TO U. S. ELECTIONS 982 (3d ed. 1994) (Pilsbury 1,751; Jones 678; Williams 621; Baylor 458). Yet, even with seven of the thirty-seven counties missing, the individual county results in the Texas State Archives show Baylor garnering 483 votes, as follows:

County	Pilsbury	Jones	Williams	Baylor	Scattering
Austin	155	2	6	5	
Bastrop	52	71	6	1	
Bexar	49	114	18	1	
Brazoria	126	6	27	1	
Brazos					
Burleson	39	-	5	16	
Calhoun	72	35	18	-	
Colorado	98	-	12	5	
Comal	31	73	-		
Dallas	34	-	-	5	
DeWitt	20	33	-	-	
Fayette	143	66	5	16	
Fort Bend	83	-	1	-	
Galveston	121	3	374	1	
Goliad					
Gonzales	20	92	-	-	
Grayson					
Grimes	92	3	6	32	
Guadalupe	17	41	-	1	
Harris	256	13	135	16	

Jackson	17	13	-	1	1
Lavaca	43	9	1	4	
Leon	71	1	2	24	
Limestone	29	1	-	82	
Matagorda	121	2	7	2	
Milam					
Montgomery	26	-	8	23	
Navarro	6	-	-	61	
Nueces	14	-	46	-	
Refugio					
Robertson					
San Patricio	18	-	-	-	
Travis	96	106	10	6	2
Victoria	51	36	4	4	
Walker	161	1	39	49	
Washington	185	38	39	127	
Wharton					
Total	2,215	759	769	483	3

Returns from some of these counties, or perhaps from some of the precincts within these counties, might have been rejected as defective or tardy under the strict standards then in effect, but the official tally has not been found.

In Bexar, Comal, and Limestone Counties, the returns actually show which candidate each voter selected. In Bexar, Comal, and Limestone Counties, the returns show each voter's choice, a reflection of the viva voce method of voting adopted earlier that year by the Legislature. Act of March 19, 1846, 2 H.P.N. GAMMEL, LAWS OF TEXAS 1822–1897, at 1318 (Austin, Gammel Book Co. 1898). Because Baylor got no votes in the first two, and an overwhelming majority of votes in the third, however, it is impossible to gain any insight from this granulated information.

In Washington County, Baylor narrowly won Washington and Jacksonville—the latter no longer extant but then a thriving settlement several miles north of the current Chappell Hill. 3 HANDBOOK OF TEXAS 900 (1996). He fared worst in Kerr's Settlement, now known as Union Hill, where a Methodist church was located. 6 HANDBOOK OF TEXAS 624 (1996). The precinct-by-precinct results in the county were as follows:

Precinct	Pilsbury	Jones	Williams	Baylor
1. Washington	30	8	10	31
2. Independence	29	9	11	18
3. Kerr's	23	-	-	2
4. Brenham	78	16	14	36
5. Jacksonville	35	5	4	40

ELECTION RETURNS CERTIFICATE, N. J. CHAPPELL (CHIEF JUSTICE OF WASHINGTON COUNTY), NOV. 13, 1846, TEXAS STATE ARCHIVES.

⁵⁷ BAKER, at 158.

⁵⁸ The United States Supreme Court gives the date as September 25, 1848. *Walsh v. Preston*, 109 U.S. 297, 308 (1883). The date more commonly given is October 25, 1848, a date which also is referenced in subsequent legislation. See Act approved Feb. 2, 1850, § 1, in 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 558 (Austin, Gammel Book Co. 1898) (stating in part that “every colonist . . . citizens of the Colony of Charles Fenton Mercer and his associates, on the 25th of October, 1848, shall receive the quantity of land to which such colonists have been entitled”). The authors have not independently confirmed the date. It is possible that the actual date of the decision was September 25, and that October 25 was the date the decision became final by operation of law.

⁵⁹ In the discussion of the Mercer Colony litigation that follows, some basic information is drawn from MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 74-78 (2011), an excellent basic introduction to Texas legal history. Professor Ariens' contribution is not indicated by separate footnotes.

⁶⁰ The latter consideration was emphasized by the United States Supreme Court in later litigation. See *Walsh v. Preston*, 109 U.S. at 308–09.

⁶¹ For basic information on Charles F. Mercer, the authors have found no source better than Nancy Ethie Eagleton, *The Mercer Colony in Texas*, 39 SW. HIST. Q. 275 (1936). The *New Handbook of Texas* also contains a good write-up, based principally on Ms. Eagleton's

work. See Joe E. Ericson, *Charles Fenton Mercer*, in 4 RON TYLER, ET AL., EDs., *NEW HANDBOOK OF TEXAS* 628–29 (1996).

⁶² See, e.g., THOMAS LLOYD MILLER, *THE PUBLIC LANDS OF TEXAS, 1519-1970* 41 (1972).

⁶³ As a member of the United States Congress, Mercer had been instrumental in the establishment and colonization of Liberia. After selling out his interest in the colony, Mercer spent three years touring Europe, pressing for abolition of the slave trade. See Eagleton, 39 Sw. Hist. Q. at 284–85, 289–90.

⁶⁴ See *Melton v. Cobb*, 21 Tex. 539 (1858).

⁶⁵ See *Walsh v. Preston*, 109 U.S. 297 (1883).

⁶⁶ See *Melton*, 21 Tex. at 544.

⁶⁷ See *Walsh*, 109 U.S. at 310-20.

⁶⁸ See *Walsh*, 109 U.S. at 303 (stating that “[t]he answer of the defendant denies that the contract is a valid contract, alleges that in a suit by the governor of the state of Texas in a court of competent jurisdiction, against said Mercer and his associates, the contract was by a decree of that court annulled and declared void, and all rights under it forfeited, and relies on that decree in bar of the present suit”).

⁶⁹ See *id.* at 308 (stating: “Of this decree it is as well to say now, that while it would, if valid, dispose of the whole case, we are not satisfied, in the absence of personal service on the defendants and of any personal appearance by them, that there was such substituted service by publication as gave the court jurisdiction. The decree, therefore, is no bar to the rights of the present plaintiff, and the matter is here referred to as showing the unvarying hostility of the State authorities to this contract.”).

⁷⁰ Henry Baylor, at 4, 5.

⁷¹ The results of the August 4, 1851 election for Judge of the Third Judicial District were as follows:

County	R.E.B. Baylor	Others
Bell County	144	-
Brazos County	51	-
Burleson County	157	-
Falls County	-	-
Freestone County	60	-
Leon County	127	G. H. B. Grigsby 1
Limestone County	150	-
McLennan County	70	-
Milam County	130	W. H. White 8
Robertson County	111	-
Washington County	566	Towsey 27
Total	1,566	36

EXECUTIVE RECORD BOOK, P. H. BELL (GOVERNOR), TEXAS STATE ARCHIVES.

⁷² SISTER PAUL OF THE CROSS McGRATH, *POLITICAL NATIVISM IN TEXAS 1825–1860* at 79–80 (1930) [hereinafter *POLITICAL NATIVISM*]. The same day, Judge Baylor also addressed a River Convention in Washington, giving a speech deemed by one editor as “credible to [himself] and to the occasion.” *TEX. RANGER & LONE STAR*, June 16, 1855, at 2.

⁷³ *TEXAS STATE GAZETTE*, August 1, 1855, p. 2.

⁷⁴ *WASH. AM.*, Nov. 1, 1855, at 2.

⁷⁵ WALTER L. BUENGER, *SECESSION AND THE UNION IN TEXAS* 28–29 (1984) [hereinafter *SECESSION & THE UNION*].

⁷⁶ *SECESSION & THE UNION*, at 26–28.

⁷⁷ *SECESSION & THE UNION*, at 29. It is impossible to know if Baylor sought any political office for himself. The proceedings of the Convention are unpublished, and indeed were never fully revealed. See *POLITICAL NATIVISM*, at 80 (“All that was known of this convention outside the Know-Nothing lodges was merely inferential, conclusions being based on the subsequent acts of men suspected of membership.”); *TEX. RANGER & LONE STAR*, June 16, 1855, at 2 (“The Know-nothings, we believe, were in secret session two nights, selecting available candidates for State offices ... [but] as ‘they pulled the hole in after them,’ ... we could not find the balance of their proceedings [beyond their nominees for three high offices].”).

⁷⁸ *SECESSION & THE UNION*, at 29–30; DALE BAUM, *THE SHATTERING OF TEXAS UNIONISM: POLITICS IN THE LONE STAR STATE DURING THE CIVIL*

WAR ERA 31 (1998) [hereinafter BAUM].

⁷⁹ DAVID M. POTTER, *THE IMPENDING CRISIS 1848-1861* at 248-61 (1976); ALAN NEVINS, *2 ORDEAL OF THE UNION: A HOUSE DIVIDING 1852-1857* at 398-402 (1947). The Know-Nothings held no convention in 1857, and “as a state organization [the party] gradually ceased to exist.” *POLITICAL NATIVISM*, at 157.

⁸⁰ *TEX. STATE GAZETTE*, June 14, 1855, at 2. Baylor’s reputation was such that the paper added: “His denial would receive full credence.” Subsequently, the paper chided his forsaking the Baptist denomination’s traditional fidelity to “religious freedom” to side with “bigots and demagogues.” *Id.*, August 1, 1855, p. 2.

⁸¹ *TEX. RANGER & LONE STAR*, June 28, 1855, at 2. The reference to the “Republican Party” is curious, and was probably sarcastic; neither John C. Fremont in 1856 nor Abraham Lincoln in 1860 received a single recorded vote in Texas as Republican presidential nominees.

⁸² After complaining of the arduousness of his duties in an 1853 letter to Senator Houston, Baylor nevertheless concluded that, “I am too poor to live without it [the salary], and I suppose I will have to die in the traces and toil on to the last.” Letter from R.E.B. Baylor to Sam Houston (Dec. 20, 1853), *quoted in* BAKER, at 201.

⁸³ Waco *SOUTHERNER*, June 6, 1857, p. 1.

⁸⁴ Thomas Harrison of McLennan County, an Alabama native who was reared in Mississippi, was subsequently a Confederate officer who became a brigadier general in the waning days of the Civil War. He served briefly as a judge immediately thereafter, but was removed as an impediment to Reconstruction. 3 *HANDBOOK OF TEXAS* 486–87 (1996). He died in 1891, “[u]nreconstructed to the end.” *Id.*

⁸⁵ Baylor and Harrison both announced more than six months before the election. *See* *THE WEEKLY TELEGRAPH* (Houston), January 28, 1857, p. 2.

⁸⁶ The results of the August 3, 1857 election for Judge of the Third Judicial District were as follows:

County	R.E.B. Baylor	Thomas Harrison	T.B. White
Bell County	221	212	42
Bosque County	96	42	4
Burleson County	299	251	29
Coryell County	231	77	3
Erath County	40	28	
McLennan County	284	214	7
Milam County	214	176	46
Washington County	399	594	112
Total	1,784	1,594	243

EXECUTIVE RECORD BOOK, E. M. PEASE (GOVERNOR), at 608, TEXAS STATE ARCHIVES.

⁸⁷ Houston was a close friend of Baylor’s older brother John, and Robert Baylor himself had saved Mrs. Houston’s life when she was a young girl in Alabama. BAKER, at 88–89. Baylor gave the invocation at Houston’s second presidential inauguration in 1841, and they served together on Baylor University’s Board of Trustees. *See* BAKER, at 89.

⁸⁸ The extent to which Baylor identified with Houston’s pro-Union sympathies is unclear. Gay Hill was one of two precincts in Washington County to vote unanimously to leave the Union in the February 23, 1861 secession referendum. WASHINGTON COUNTY ELECTION RETURNS, at 9, WASHINGTON COUNTY COURTHOUSE. Thus, while the poll list from that election is no longer extant, if Baylor participated, he voted to secede. Moreover, however much sympathy the Union cause may have enjoyed on the Baylor campus, the vote at the town of Independence was 153 to 1 for Secession. *Compare* Rufus C. Burleson, Address to the Texas Legislature at the Memorial Services on the One-Hundredth Anniversary of the Birth of Gen. Sam Houston (Mar. 24, 1893), *in* BURLESON at 580–82, *with* ELECTION RETURNS at 9, WASHINGTON COUNTY COURTHOUSE. Of course, the conditions under which the secession referendum was conducted may have discouraged unionist participation, although this cannot be statistically shown for Washington County. *Compare* SECESSION & THE UNION, at 174–76, *with* BAUM at 42–81.

⁸⁹ Houston was mentioned as a possible Know-Nothing presidential candidate in 1856, but he received only a few votes at the party’s nominating convention in Philadelphia. EDWARD STANWOOD, *A HISTORY OF THE PRESIDENCY* 264 (Boston: Houghton Mifflin, 1898).

⁹⁰ The leading Know-Nothing organ in the Third Judicial District, the *Washington American*, did not place Baylor’s name on its candidate slate or otherwise support his candidacy.

- ⁹¹ Overall, Houston drew four more votes in the district than Baylor, but he lost the district by over 100 votes to his lone opponent, Lieutenant Governor Hardin R. Runnels. The correlation between Baylor and Houston's vote was strong in Bell, Burleson, Erath, McLennan, and Milam Counties, but Baylor did markedly better than Houston in Bosque and Coryell Counties and markedly worse in Washington County. EXECUTIVE RECORD BOOK, TEXAS STATE ARCHIVES.
- ⁹² BAKER, at 220.
- ⁹³ *Id.* at 226.
- ⁹⁴ See, e.g., HOUSTON TRI-WEEKLY TELEGRAPH, July 6, 1863, p. 1 (announcing four contenders for the position).
- ⁹⁵ *Id.* at 260–61.
- ⁹⁶ *Id.* at 265–66.
- ⁹⁷ Letter from Gideon Linsecum to Jos. C. Snively, Oct. 11, 1863, in JERRY BRIAN LINCECUM, ET AL., EDS., GIDEON LINSECUM'S SWORD: CIVIL WAR LETTERS FROM THE TEXAS HOME FRONT 242–43 (Jerry Brian Lincecum et al., eds. 2001).
- ⁹⁸ *Id.* at 273–74.
- ⁹⁹ See A. Weaver, *Hon. R. E. B. Baylor's Neglected Grave*, TEX. BAPTIST AND HERALD, Jan. 11, 1900, in R. E. B. BAYLOR PAPERS, Texas Collection, Baylor University [hereinafter BAYLOR PAPERS].
- ¹⁰⁰ Coleman Craig, *An Eminent Baptist and an Historic Occasion*, BAPTIST STANDARD, May 17, 1917, in BAYLOR PAPERS.
- ¹⁰¹ Thomas E. Turner, *Man of Action in Life, Judge Baylor Moves Again*, DALLAS MORNING NEWS, Mar. 27, 1966.
- ¹⁰² HAROLD SCHOEN, MONUMENTS ERECTED BY THE STATE OF TEXAS TO COMMEMORATE THE CENTENARY OF TEXAS INDEPENDENCE 61 (1938).
- ¹⁰³ Lane Murphy, *Right from the Start*, BAYLOR MAG., Fall 2009, available at <http://www.baylor.edu/alumni/magazine/0801/news.php?action=story&story=60398> (last visited May 14, 2014).



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

Part 2

By David A. Furlow

This article is the second of a three-part series that debuted in the Fall 2013 issue of the Journal.

I. Prologue: Judge Hemphill's Mediation at the Council House

On March 19, 1840, John Hemphill, the recently-elected district court judge of Texas's Fourth Judicial District, adjourned his morning docket early at the Council House, a Spanish-style courthouse next to City Jail on the east side of San Antonio's Main Plaza. He cleared the courtroom for a peace conference between Mukwahruh, a/k/a "Spirit-Talker," a chief of the Penateka Comanche tribe, and San Antonio's civil and military authorities under President Mirabeau Buonaparte Lamar's Republic of Texas.¹ A wiry, blue-eyed, Scots Irish Presbyterian from South Carolina's Back Country, Judge Hemphill had been in Texas two years, mostly in Washington-on-the-Brazos.² The lives of fifteen white and Hispanic captives, and the hope of a lasting peace between the Comanches and Texans, depended on Judge Hemphill's skill as a make-peace in his new Council House courtroom.³

"The Court House and Jail were of stone, one story, flat roofed, and paved with dirt," wrote Mary Maverick, the wife of San Antonio Mayor Sam Maverick.⁴



The Plaza and the Council House (right) in San Antonio at the time of the Council House Fight, March 1840. Public domain image from Wikipedia.

¹ See JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836-1986*, 26-27 (2013) [hereinafter *NARRATIVE HISTORY*]; MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS*, 16-17 (2011); S.C. GWYNNE, *EMPIRE OF THE SUMMER MOON: QUANAH PARKER AND THE RISE AND FALL OF THE COMANCHES, THE MOST POWERFUL INDIAN TRIBE IN AMERICAN HISTORY*, 83-88 (2010) [hereinafter *QUANAH PARKER*]; TARLTON LAW LIBRARY DIGITAL COLLECTIONS, *JUSTICES OF TEXAS 1836-1986: JOHN HEMPHILL (1803-1862)*, <http://tarlton.law.utexas.edu/justices/profile/view/50> (last visited May 21, 2014); Thomas W. Cutrer, *Hemphill, John*, *HANDBOOK OF TEXAS ONLINE*, <http://www.tshaonline.org/handbook/online/articles/fhe13> (last visited May 21, 2014); Jodye Lynn Dickson Schilz, *Council House Fight*, *HANDBOOK OF TEXAS ONLINE*, <http://www.tshaonline.org/handbook/online/articles/btc01> (last visited May 21, 2014).

² Founded in March 1731 by fifteen families from the Canary Islands, San Fernando Cathedral stood at San Antonio's center, making it the perfect place to negotiate a peace treaty. See Ann Graham Gaines, *San Fernando Cathedral*, *HANDBOOK OF TEXAS ONLINE*, <http://www.tshaonline.org/handbook/online/articles/ivs01> (last visited May 21, 2014). During the second siege of the Alamo, Generalissimo Santa Ana flew his red "no quarter" flag from San Fernando's bell tower. *Id.*; QUANAH PARKER, at 82.

³ See QUANAH PARKER, at 83, 87-88.

⁴ See MARY A. MAVERICK & GEORGE M. MAVERICK, *MEMOIRS OF MARY A. MAVERICK*, 31 (Rena Maverick Green ed., 1921) [hereinafter *MEMOIR*], available at <http://books.google.com/books?id=0hkaAAAAYAAJ&dq=Mary%20Maverick%20Memoirs&pg=PA31#v=onepage&q=Mary%20Maverick%20Memoirs&f=false> (last visited May 21, 2014); Paula Mitchell Marks, *Maverick, Mary Ann Adams*, *HANDBOOK OF TEXAS ONLINE*, <http://www.tshaonline.org/handbook/online/articles/fma82> (last visited May 21, 2014).

Chief Mukwahruh sought peace because “[t]he white man comes and cuts down the trees, building houses and fences, and the buffalos ... leave and never come back, and the Indians are left to starve ... [but i]f the white men could draw a line defining their claims and keep on their side of it the red men would not molest them.”⁵

The chief led thirty-five Penateka warriors into the Council House. Bedecked with beads, feathers, and red ribbons, they smacked of pagan pride to the Texans. Another thirty-two Comanche elders, women, and children waited outside, sold furs and traded horses with locals. Comanche boys shot arrows at coins local Texans affixed to trees. Prospects for a negotiated peace treaty seemed high.⁶

Colonel Henry Wax Karnes, a Tennessee-born hero of the Texas Revolution and San Antonio’s military commander, joined Judge Hemphill in the Council House. Despite an unhealed 1838 Comanche arrow wound to his hip, Colonel Karnes had agreed to a summit meeting during a parley with Comanche chiefs three months earlier, where Colonel Karnes warned that he would not discuss peace unless the Comanches returned *all* captive Texans.⁷

Secretary of War Albert Sidney Johnston notified Colonel Karnes that “the government [of Texas] assumes the right with regard to all Indian tribes ... to dictate the conditions of such residence [in Texas because] ... our citizens have the right to occupy vacant lands ... and they must not be interfered with by the Comanche.”⁸ In his inaugural address, President Lamar promised to prosecute an “exterminating war upon their warriors, which will admit of no compromise, and have no termination except in their total extinction, or total expulsion.”⁹

Mukwahruh brought a Tejano boy and a white girl, Matilda Lockhart, whom “they reluctantly gave up,” to trade with the Texans as his ancestors had traded captives when Spain and Mexico owned San Antonio. Matilda was a fifteen-year-old captured, along with Matilda’s seven-year-old sister, in an 1838 home invasion that included the murder of two other Lockhart children.

Matilda privately told Mary Maverick that she was “utterly degraded, [so she] could not hold up her head again—that she would be glad to get back home again, where she would hide away and never be seen.” She had been gang-raped, repeatedly, an experience common to every woman who fell into Comanche hands.¹⁰ And Matilda also bore scars from Comanche women who treated her as a slave:

Her head, arms, and face were full of bruises, and her nose [was] actually burnt off to the bone— all the fleshy end gone, and a great scab formed on the end of the bone.... She told a piteous tale of how dreadfully the Indians had beaten her, and how they would wake her from her sleep by sticking a chunk of fire to her flesh, especially to her nose ... and how they would shout and laugh like fiends when she cried. Her body had many scars from fire.... Ah, it was sickening to behold, and made one’s blood boil for vengeance.¹¹

⁵ See NOAH SMITHWICK, *EVOLUTION OF A STATE OR RECOLLECTIONS OF OLD TEXAS DAYS, 188–89* (Austin, Gammel Book Co. 1900), available at <http://books.google.com/books?id=8-n1RXaZr9YC&pg=PA188#v=onepage&q&f=false> (last visited May 21, 2014), quoted in QUANAH PARKER, at 85.

⁶ See MEMOIR, at 35; QUANAH PARKER, at 83.

⁷ See QUANAH PARKER, at 82–88, 326–27; David A. Furlow, *Ten Myths and Legends of Texas Law*, in State Bar of Tex. Prof. Dev. Program, Advanced In-House Counsel Conference, at 8–9 (2010).

⁸ See QUANAH PARKER, at 83 (quoting 5 *THE INDIAN PAPERS OF TEXAS AND THE SOUTHWEST, 1825–1916*, 105 (Dorman H. Winfrey & James M. Day, eds., 1995)).

⁹ See “Messages of the President, submitted to both Houses,” LAMAR PAPERS, DOC. 948, at 11 (Dec. 21, 1838), quoted in QUANAH PARKER, at 7, 326 n.7; JEFFREY STUART KERR, *SEAT OF EMPIRE: THE EMBATTLED BIRTH OF AUSTIN, TEXAS*, 138–39, 254 n.2 (2013).

¹⁰ See QUANAH PARKER, at 84. Cf. *id.*, at 17, 19, 37, 43, 44–45, 56, 104, 106, 120–21, 124, 156, 173, 184, 202, 211, 272.

¹¹ See MEMOIR, at 35; QUANAH PARKER, at 83–84.

Matilda, who had learned the Comanche language, reported that her captors held another fifteen prisoners they planned to ransom one by one to secure the highest price.¹²

Mary Maverick shared Matilda's information with the Texans before the parley began. It was obvious that Mukwahruh had no idea how Texans would react to Matilda Lockhart's scarred body, noseless face, and tale of abuse. The Chief viewed himself as a warrior entitled to ransom hostages, and, like the Texans, thought nothing of treating a slave roughly.¹³ But this time the slave was white, and the Texans viewed him as a vicious, pitiless, pagan savage.¹⁴

Chief Mukwahruh began negotiations by suggesting that he "should be paid a great price for Matilda Lockhart, and a Mexican they had just given up, and that traders be sent with paint, powder, flannel, blankets, and such other articles as they could name, to ransom the captives."¹⁵

Colonel William G. Cooke, Acting Secretary of War, ordered Lieutenant Colonel William Fisher's Texas infantry to seize the chiefs as hostages. "Where are the prisoners you promised to bring in to this talk?" the Texans demanded.

"We have brought in the only one we had," Mukwahruh replied. He probably told the truth, for the Comanches were a confederacy of independent war-bands. "How do you like that answer?" Mukwahruh made the mistake of asking.¹⁶

Emotions flared among the Texans. Peace commissioner Lieutenant Colonel William Fisher replied,

I do *not* like your answer. I told you not to come here again without bringing in your prisoners. You have come against my orders. Your women and children may depart in peace... When those [Texas] prisoners are returned, your chiefs here present may likewise go free. Until then we hold you as hostages.¹⁷

At Fisher's signal, a squad of Texas soldiers burst in, disregarding the chiefs' status as ambassadors.¹⁸ Judge Hemphill did not prevent Colonel Cooke, Colonel Fisher, or the others from taking the Comanche chiefs hostage.

So the Comanches tried to fight their way out. Mukwahruh bolted for the door, unsheathed his knife, and stabbed a soldier; others shot arrows. In a chaos of rifle, musket, and pistol blasts, flying arrows, tomahawks, stray bullets, and billowing gray smoke, Texans opened fire, killed Mukwahruh, dropped warriors, and even shot fellow Texans. Colonel Hugh McLeod's after-action report stated that,

John Hemphill ... assailed in the council house by a chief and slightly wounded, felt reluctantly compelled (as he remarked to the writer afterwards) to disembowel his assailant with his bowie knife, but declared that he did so under a sense of duty, while he had no personal acquaintance

¹² *Id.*

¹³ See QUANAH PARKER, at 36–52, 85.

¹⁴ See QUANAH PARKER, at 85.

¹⁵ See MEMOIR, at 31.

¹⁶ See "Hugh McLeod's Report on the Council House Fight" (March 20, 1840), APP. TO THE JOURNALS TO THE HOUSE OF REPRESENTATIVES, FIFTH CONGRESS, ARCHIVES AND INFO. SERVS. DIV., TEX. ST. LIB'Y AND ARCH. COMM'N, 1–2 [hereinafter McLeod Report], available at <https://www.tsl.texas.gov/exhibits/indian/war/mcleod-mar1840-1.html> (last viewed May 21, 2014), quoted in QUANAH PARKER, 85.

¹⁷ See QUANAH PARKER, at 86 (quoting WILLIAM PRESTON JOHNSTON, LIFE OF GENERAL ALBERT SIDNEY JOHNSTON, 117 (1879)).

¹⁸ See QUANAH PARKER, at 86.

with nor personal ill-will towards his antagonist.¹⁹

Comanches in the courtyard attacked, while soldiers fired back. Street battles erupted as soldiers and citizens of San Antonio hunted down Comanches trying to swim the river or hide in houses. A massacre ensued. When the smoke cleared, thirty Comanche warriors, three women, and two children lay dead in San Antonio. Thirty-two remained behind to be imprisoned in the city jail. Six Texans, including two judges and one Tejano, were dead, and another ten were wounded.²⁰

The Comanches soon struck back to redeem their lost pride, avenge dead relatives, and punish a breach of customary ambassadorial immunity.²¹ Grief-maddened Comanches tortured and roasted Matilda Lockhart's young sister and all but two of the remaining hostages. The Council House Fight and violation of Comanche expectations about diplomatic immunity ended any hope for peace for a generation.²² On August 1, 1840, another Comanche leader, Buffalo Hump, led a large tribal coalition army (400 warriors and 600 camp followers) south to attack Victoria, murder 20 settlers, and burn coastal Linnville before running into a Ranger ambush at the Battle of Plum Creek.²³ And that was only the beginning of Indian wars that lasted until the 1870s. The Council House Fight led to decades of warfare that might—just might—have been avoided.



Texas historic sign marking the Battle of Plum Creek battlefield stretching east of Lockhart. Photograph by David A. Furlow.

¹⁹ See McLeod Report, at 1–2. Historian Clarence Wharton described how “Judge Hemphill drew a long knife from under his judicial robes and slew his antagonist.” See also NARRATIVE HISTORY, at 27; James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 255 (Dec. 1986).

²⁰ See *Eyewitness Descriptions, Council House Fight*, TEXAS A&M UNIVERSITY SONS OF DEWITT COLONY, TEXAS website, available at <http://www.tamu.edu/faculty/ccbn/dewitt/plumcreek.htm#mcleod> (last viewed May 25, 2014); TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890, 103 (1999); QUANAH PARKER, 86–87.

²¹ See QUANAH PARKER, at 86.

²² See *id.*, at 87–101.

²³ See FREDERICK WILKINS, THE LEGEND BEGINS: THE TEXAS RANGERS, 1823-1845, 83-85 (1996); WALTER PRESCOTT WEBB, THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE, 55-63 (1965); QUANAH PARKER, 94-101, 111, 114, 136, 140, 266, 327 n.

II. **Conflicting Cultural Traditions Contended in the Lone Star Republic Empowering the Texas Supreme Court to Reshape American Law**

The Council House Fight exemplifies how conflicts among legal cultures can shape history. In Part I of this article, in the Fall 2013 issue of the *Journal*, we considered how Spaniards introduced Castilian law into Texas and how that law evolved into a flexible system of local frontier justice. The courthouse next to San Fernando Cathedral embodied those Spanish, Mexican, and Tejano traditions until the Republic's leaders secularized it as a courthouse.

Comanche chiefs and their warriors viewed Texans as lawless violators of sacred customary law. In the absence of common or codified law, the Comanches relied on custom. When tribal chiefs met in a peace parley, Comanche custom dictated that their lives and freedom were sacred. Comanche customary law held diplomats inviolable. Otherwise, diplomacy was impossible.

Because Texans tried to take Comanche chiefs prisoner during a peace parley and then killed them and their women and children, Comanches came to see Texans as treacherous murderers with no respect for the law embodied in custom immemorial. The shock to Comanche norms was as profound as the American public's surprise at the Iranian government's violation of the American embassy and seizure of diplomats as hostages in Tehran in 1979 and 1980.

Texans viewed Comanche chiefs as pirates outside the law of nations. Judge Hemphill and Colonel Karnes viewed the Comanche chiefs not as honorable ambassadors of sovereign nations but as perfidious, pagan pirates of the plains and organized criminals not entitled to immunity under the law of any civilized nation. Matilda Lockhart's scarred appearance and pitiful tale reinforced their beliefs that the Comanches were pitiless, lawless murderers, torturers, kidnappers, child-rapists, and arsonists.

U.S. Army General Thomas Jesup used a similar false-parley tactic in the 1836–37 Seminole War to capture Seminole Indian resistance leaders in Florida, including Osceola and Micanopy, whom Jesup induced to negotiate under a flag of truce.²⁴ Judge Hemphill must have learned of the feigned-truce tactic, which was the subject of great controversy in Eastern newspapers, where it was often called dishonorable. In accord with Judge Hemphill's Back Country Scots Irish cultural tradition of venerating military service, he joined the U.S. Army and took a steamboat to the front lines at St. Augustine, Florida in 1836 to serve as a lieutenant in the war before falling victim to malaria.²⁵

When Judge Hemphill participated in the parley at the Council House, he showed no sympathy for the Comanche chiefs who appeared before him as tribal ambassadors. They were foreigners to him and to all he held dear in his Scots Irish culture. In *Herbert v. Moore*, the Hemphill Court—writing through Associate Judge William J. Early—asked whether Indian tribes were independent nations or, instead, wards of the state “who looked to the government for protection, and relied on its kindness and power.”

Shall we apply *post liminy* to Pirates on land, or Indian robbers? And how do these Indian tribes, the Wacoes and Comanches, live ...? To avenge their imaginary wrongs, they have uniformly had recourse to rapine and bloodshed. Shall we then dignify them with the proud title of nationality?²⁶

²⁴ See MICHAEL GANNON, *THE NEW HISTORY OF FLORIDA*, 195 (1996); 1 JAMES W. COVINGTON, *THE SEMINOLES OF FLORIDA*, 72–109 (1993).

²⁵ See ROSALEE MORRIS CURTIS, *JOHN HEMPHILL: FIRST CHIEF JUSTICE OF TEXAS*, 20–24, 86 (1971); TEXAS STATE CEMETERY, JOHN HEMPHILL, PLOT 59, http://www.cemetery.state.tx.us/pub/user_form.asp?pers_id=59 (last visited May 21, 2014); HEMPHILL PAPERS; HUEBNER, *SOUTHERN JUDICIAL TRADITION*, 102 (certification of Hemphill's honorable discharge on April 12, 1836).

²⁶ Dallam 592 (1842), *quoted in* NARRATIVE HISTORY, at 48, 262, nn.17–21.

The Court answered *no*. Citing Chief Justice John Marshall's decision in *Cherokee Nation v. Georgia*,²⁷ the Hemphill Court's *Herbert* opinion held that Indian tribes remained in a state of "pupilage," subordinate to the needs and interests of the state in which they resided.

President Mirabeau B. Lamar's "extinction or expulsion" Indian policy reflected his continuation of the elite Virginia Tidewater legal tradition. The Texas *empresario*, Stephen F. Austin, and the Republic's second president, Mirabeau B. Lamar, strove to create a southwestern version of Virginia, an imperial slavocracy destined to expand to the Pacific Ocean. Both exemplified the cavalier, aristocratic culture of the Tidewater Chesapeake.

Austin was born in Virginia, while Lamar grew up amidst privilege on a Tidewater Georgia plantation. Both breathed the heady air of a legal tradition of hegemonic freedom that secured liberty for a tiny, white, male planter-elite whose members subordinated indentured servants and exploited an even larger number of African and African-American slaves.

The Indian policy President Lamar announced at his 1838 Inaugural tracked the same policy of extermination or expulsion Virginia's planters pursued after the Great Massacre of 1622. Virginia Company officials condemned the Powhatan Indians to death by ordering Governor Sir Francis Wyatt to begin "surprising them in their habitations, demolishing their Temples, destroying their Canoes, plucking up their [fish-]weares, carrying away their Corne, and depriving them of whatsoever may yeeld them succor or relief." Virginia Company officer Edward Waterhouse suggested that settlers use "horses, and Bloodhounds to draw after them, and Mastives to seize" Indians.²⁸

President Lamar revived Virginia's mid-seventeenth century Indian extermination-or-expulsion policy in mid-nineteenth century Texas. By treating Comanche chiefs as pirates or mob-bosses rather than as ambassadors of a warring nation in conflict with the Republic of Texas, President Lamar made diplomacy between Texans and Comanches very difficult. President Lamar's Indian policy made the Council House Fight and decades of Indian warfare almost inevitable.

The Council House Fight reflects the continuation of the Castilian/Tejano legal culture. The first part of this article, published last autumn, described the introduction of Castilian law into Spanish Texas, as well as the evolution of an informal, rough and ready Tejano legal tradition in places such as San Antonio de Bexar. Lorenzo de Zavala, Juan Seguin, Angel and José Navarro, and Silvestre and Fernando de Leon exemplify the Castilian legal tradition that resulted in the use of San Antonio's Council House as a courtroom of the Republic.²⁹

Lorenzo de Zavala, a life-long constitutionalist and the Republic's first Vice President, preserved the Castilian/Tejano tradition and incorporated it into Texas law. Born in the village of Tecoh in the Yucatan Peninsula,

²⁷ 30 U.S. 1 (1831).

²⁸ See JAMES HORN, *A LAND AS GOD MADE IT: JAMESTOWN AND THE BIRTH OF AMERICA*, 263–78 (2005) [hereinafter *JAMESTOWN*] (citing 3 RECORDS OF THE VIRGINIA COMPANY 544–45, 669–70, 683 (Susan Myra Kingsbury, ed. 1906–1935)); HELEN C. ROUNTREE, *POCAHONTAS, POWHATAN, OPECHANCANOUGH: THREE INDIAN LIVES CHANGED AT JAMESTOWN*, 219–35 (2005); T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS*, 254–55 (1983).

²⁹ See Craig H. Roell, *de Leon, Fernando*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fde81> (last visited May 21, 2014); Craig H. Roell, *De Leon, Silvestre*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fde80> (last visited May 21, 2014); Camilla Campbell, *Navarro, Angel*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fna17> (last visited May 21, 2014) [hereinafter *Navarro*]. Lorenzo's full Spanish name was Manuel Lorenzo Justiniano de Zavala y Sáenz.

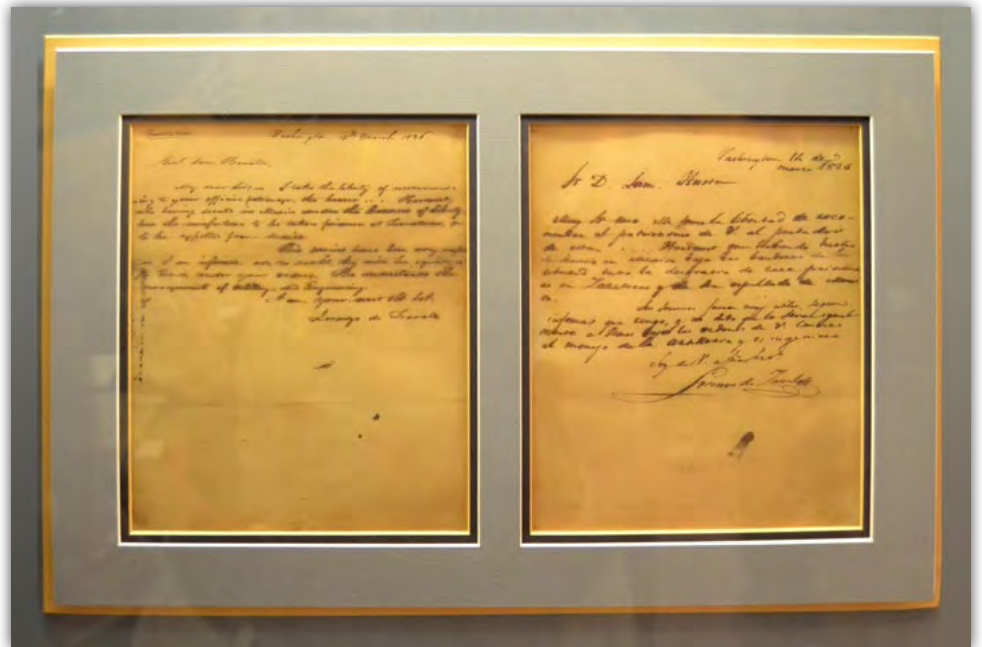
de Zavala received a traditional Catholic education at the Tridentine Seminary of San Ildefonso in Mérida in 1807. He began as a reform-minded journalist, newspaper editor, and Secretary of the City Council of Mérida from 1812 until 1814. After being imprisoned by Spanish authorities in Veracruz in 1814, he became a prison physician in 1817, learned English, and traveled to Madrid in 1821 as a deputy to the Spanish Cortes.³⁰

De Zavala drafted and signed the federalist Mexican Constitution of 1824, represented Yucatán in Constituent Congresses and the Mexican Senate, and served as Governor. When he learned of General Santa Ana's seizure of power while serving as a Mexican diplomat in Paris, he denounced the tyrant, resigned his post, and returned to participate in the Texas Revolution.

Meanwhile, in San Antonio, Juan Seguin, Chief of the Department of Bexar, "urged every municipality in Texas to appoint delegates to a convention . . . to consider the impending dangers and to devise means to avert them."³¹

When it became clear that federalism's prospects were dim in Mexico, the publication of the "Opinions of Lorenzo de Zavala" and the petitions of men like Juan Seguin helped Texas newspapers launch the Texas independence movement. De Zavala represented Harrisburg in the Consultation of 1835 and played an even more prominent role in the independence-minded Convention of 1836.

In 1835 and 1836, two representatives of San Antonio de Bexar—Francisco Ruiz and Antonio Navarro—went to the Convention Stephen F. Austin helped organize at Washington-on-the-Brazos on behalf of San Antonio de Bexar. De Zavala helped write the Texas Constitution of 1836. Soon after being appointed there as the Republic's first Vice President, de Zavala ensured that officials translated the Constitution and the Republic's statutes into Spanish for Tejano citizens.³²



Lorenzo de Zavala's March 17, 1836 letter to Republic of Texas General Sam Houston, San Jacinto Battleground Museum, photograph by David A. Furlow, April 2014.

³⁰ See Raymond Estep, *de Zavala, Lorenzo*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fza05> (last visited May 21, 2014) [hereinafter *de Zavala*].

³¹ See ERNEST WALLACE, DAVID M. VIGNESS & GEORGE B. WARD, DOCUMENTS OF TEXAS HISTORY, 80, 105 (1994); STEPHEN L. MOORE, EIGHTEEN MINUTES: THE BATTLE OF SAN JACINTO AND THE TEXAS INDEPENDENCE CAMPAIGN, 78 (2004) [hereinafter EIGHTEEN MINUTES]; *de Zavala*; A REVOLUTION REMEMBERED: THE MEMOIRS AND SELECTED CORRESPONDENCE OF JUAN N. SEGUIN, 75 (Jesus F. de la Teja, ed. 2002).

³² See T. R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS, 200 (1973); James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L. J. 399, 402 (1993); *de Zavala; Navarro*; Jose R. Juarez, Jr., *The American Tradition of Language Rights, !Que Viva Texas!: The Forgotten Right to Government in a 'Known Tongue,'* 1 SCHOLAR 45 (Spring 1999) [hereinafter *Language Rights*] (citing JOURNALS OF THE CONVENTION OF THE FREE, SOVEREIGN, AND INDEPENDENT PEOPLE OF TEXAS, IN GENERAL CONVENTION ASSEMBLED (March 1, 1836), reprinted in 1 H.P.N. GAMMEL, LAWS OF TEXAS 1822-1897, 1063 (Austin, Gammel Book Co. 1898); EIGHTEEN MINUTES, at 390, 403, 407-408.

The 1836 Constitution that Lorenzo de Zavala helped write provided that, “All laws relating to land titles shall be translated, revised, and promulgated.” The Republic’s Congress mandated that the Commissioner of the Texas Land Office hire a translator who “shall understand the Castillian [sic] and English languages” with the ability to record “all the laws and public contracts relative to the titles of land which are written in the Castillian [sic] language...” to preserve Tejano property rights.³³ The Castilian/Tejano legal tradition lived on in San Antonio, where it continued to influence Texas law, most notably in Chief Justice John Hemphill’s Texas Supreme Court. The fact that the Council House Fight occurred in a San Antonio courtroom represents the physical manifestation of the Tejano legal tradition in the Republic.

Part 1 of this article also discussed how Stephen F. Austin, Tidewater planters, and land-hungry First Colony settlers who followed him brought a second legal tradition to Texas. They introduced the cavalier, aristocratic culture of the Chesapeake with its hegemonic concept of freedom, protection of constitutional rights through written constitutions, and race-based chattel slavery.

In the third part of this article, scheduled for publication this autumn, we’ll trace the arrival in Texas of a third legal tradition. Sam Houston exemplifies the introduction of Back Country Scots Irish norms of natural liberty, low taxes, limited government, and debtor-sympathetic legislation to Mexican Texas and the Republic from the 1820s through the 1840s.

Chief Justice John Hemphill, another immigrant Texan who shared much of Sam Houston’s Back Country cultural background, braided together these three competing legal traditions—Castilian Spanish, Tidewater Virginian, and Back Country Scots Irish— weaving them into the fabric of a Texas jurisprudence that changed the world.

³³ See *Language Rights*, at 124–25.



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An Interview with Texas Supreme Court Chief Justice Nathan Hecht

By Jacqueline M. Furlow



AN INTRIGUING PORTRAIT of a distinguished-looking man with a gray beard and long, pulled-back gray hair hangs in Chief Justice Nathan Hecht’s office. An equally intriguing story accompanies it. “That is a portrait of my father,” Chief Justice Hecht said. “At the time, a haircut cost more than a bushel of wheat, and my father vowed that he would not cut his hair again until the price of a haircut dropped below that of a bushel of wheat. The price never dropped, and he never cut his hair again.” The Chief Justice chuckled.

Chief Justice Hecht is an excellent storyteller. His capacity for clear and impactful communication, informed by extensive study of writing and philosophy, has served him well in his thirty-year judicial career. Recently appointed Chief Justice and celebrated as the longest-serving justice in Texas Supreme Court history, Nathan Hecht shares his story.

JF: Where did you grow up, and how did that affect your school decisions and your career?

CJH: I was born in Clovis, New Mexico, where my grandfather had homesteaded back when New Mexico became a state. My father farmed with him. I went to public schools in Clovis and had a wonderfully ideal childhood on the farm, out in the country. Then when I was in high school — I guess I was a junior or a senior — a previous graduate, the son of the pharmacist in town that we did business with, returned from Yale. He was a senior and the first person from our school to have gone to Yale. There weren’t many who went from New Mexico. He came back touting the virtues of Yale and an Ivy League education, and I was very much taken by that. So I went home and told my parents that I was going to apply. My father thought at first that Yale was way beyond reach because of our modest financial situation. But as he thought about it more, he quickly decided that if that’s what I wanted to do, he’d do everything he could to make it possible. So I got on a train and went off to New Haven, Connecticut.

JF: That must have been a big change in weather for you, too.

CJH: It was a change in everything. I went there to be a mathematician. I’d done very well in mathematics

in high school and was in all the advanced courses. But when I got to Yale, I quickly decided that was not what I wanted to do at all. To this day, I'm a frustrated scientist. I still love physics, cosmology, and science in general, but I'm not good at the math. Yale taught me that in short order. So my first semester, I visited with my family's lawyer, who handled business things for the farm once in a while. He was a friend and just a few years older than I was. We talked, and I decided that I would change my major to philosophy and think about being a lawyer.

JF: I have a couple of questions for you about philosophy — that's my background too. Given your interest in science and math, did you focus on analytical philosophy?

CJH: My first course in philosophy was in existentialism. Philosophy was not a subject I had studied in high school, so this was all new to me. I was very taken by the difficulties in life that the existentialists tried to grapple with. Kierkegaard changed my life, literally. After that, I took courses in the history of philosophy and the basic courses for the major — Socrates, Plato, Aristotle, Aquinas, Hegel, Kant, Nietzsche, Sartre, and others. Then the last two years I settled in on ethics. That was my focus toward the end, though I had a great seminar on the concept of evil and a totally different seminar on the philosophy of constitutional law. This was in the Vietnam War era, and professors and students alike were wrestling with real-world ethics issues.

JF: You've obviously continued an interest in philosophy. Do you feel that your educational background informs how you reason as a judge?

CJH: Definitely. I approach cases pragmatically but also philosophically. I want workable results but it's important to me to know why the law is the way it is, how it's developed, why it's different in other jurisdictions, and what that says about us. My training as a philosopher influences that.

JF: Then you clerked. How did that, in particular, help you in your early years as a judge?

CJH: I think almost everybody who has been a law clerk thinks it was one of the highlights of his or her career. One reason it is such a great experience is that, even though all judges are lawyers, there is this gulf between them that is hard to bridge, and it was so wonderful and enlightening to me to see a judge at work — to see the way he looked at things, why he did what he did, what he thought of my work, and how he related to his colleagues on a collegial court. That was very important because Judge Robb was regarded as a very conservative judge, and one of his best friends on the court was Judge J. Skelly Wright, one of the court's great liberal judges. It was interesting to see how they could be such good personal friends, despite the fact that they hardly ever agreed on anything, and were from very different backgrounds. Judge Wright was from Louisiana, and Judge Robb was a D.C. native — he had actually been born in the District. They were both great lawyers and judges with storied careers.

JF: So how did you decide to become a part of the Navy JAG program, and is there any memory that sticks out for you? How did practicing in such a protocol-heavy area impact how you think?

CJH: The draft was reinstated in the late sixties. There was a lottery, and you were going to be eligible for the draft depending on the number your birthday drew in this lottery. If you had a very high number, the chances were that the draft would never reach you. But if you had a low number, you were going to be drafted for sure. My number — I'll never forget — was 102. That meant I would receive my induction notice within a few days of my college graduation in June. I wanted to go a

different route, so I explored the Navy. I went to New York City and took all the tests, and I was accepted into the Officer Corps, and then into the JAG Corps. When I signed up, you had to agree to serve four years' active duty, but I could go to law school. Then my last year of law school, the Navy wrote me and said I didn't have to stay but for two years because the war was winding down, budgets were tightening, and the need for officers was diminishing. They would also let me have a year for a clerkship. And then, during my clerkship, they wrote me and said, budgets really are tight now, and unless you want to make the military a career, we're only going to ask you for two months' service and that's it. I didn't want to make the Navy a career, so I elected the two months.

I was stationed in Corpus Christi. They had four departments in the JAG office — prosecution, defense, procurement, and — I think they called it — community-related matters — divorces, traffic tickets, probate, and other matters that Navy people get involved in with the local community. They put all the rookies in criminal defense, for whatever reason, but that just made us all the more determined. I tried two criminal defense cases while I was in the Navy, which was very meaningful in many respects. I enjoyed it very much, though I've never done any criminal defense work since. You know, people always ask you as a lawyer, how can you defend someone who is guilty? But lawyers know, and certainly I learned in that experience, that you're just trying to be sure the defendant gets a fair trial, that the Government treats him fairly, and that you do your very best by him. I got to do that in two cases.

I still remember every minute of those trials, blow by blow. They've given me a lot of good war stories. But the trouble with being a lawyer in the military is that the military is very much an establishment. Its whole mission, its survival, depends on orders being followed, on a strict hierarchy, on a strong team mentality. People pulling for one another — that's very important. The military couldn't function without it.

JF: Right.

CJH: Everyone in the chain of command must be depended upon to follow orders to the letter. But lawyers, they're very independent and sort of anti-establishment, particularly when you're representing people in the Navy. You're in a difficult position because sometimes you have to tell very senior officers that they can't do what they want to do. That breeds a lot of resentment and difficulty, though it's not so much different from giving hard advice to a client, who doesn't want to hear it. It's something lawyers have to do.

JF: And do you mind me asking what kind of cases you tried?

CJH: Not at all. For example, one was a case in which my client, an enlisted man, had been asleep in his bunk when, about 3:00 or 4:00 in the morning, someone else in the barracks came in and urinated on him, and that was what he woke up to. That was early Sunday morning. Sunday evening, while everybody was sitting out on the front porch of the barracks, and people were tossing Frisbees and hanging out in the front yard, someone came up behind Urinator and knocked the top of his head off with a broom handle. My client was accused, though none of the scores of men standing around would admit to seeing him. It was a very serious offense. And it happened to coincide with a lot of disciplinary problems elsewhere on the base. The base commander wanted to make an example out of somebody, and that somebody was my client.

The prosecutors, my desk-mates, found every infraction that my client had ever been accused of — five other offenses — and charged him with the highest punishment that the Code of Military Justice would allow on each. My client was not only going to be disciplined for this incident on the Sunday afternoon, he was going to be dishonorably discharged, he was going to lose all of his pay and benefits, and he was probably going to the brig for most of the rest of his life.

For various reasons, we got him off of everything but one or two charges, and the punishment was a dishonorable discharge. That was it, which we regarded as a great victory. He didn't want to be in the Navy anyway, so he was fine.

JF: What did you gain from private practice that has helped you as a judge?

CJH: Well, of course some knowledge of the courtroom. Some knowledge of business cases — I handled mostly business cases. My first trial, I was second chair to the senior trial lawyer in the firm, Stanley Neely. It was a group boycott case in federal court in San Antonio before the late Judge John Wood. The trial lasted about ten days. Later, I and another associate at the firm, Orrin Harrison, tried a plaintiff's class action price-fixing case out in Lubbock before Judge Hal Woodward. We won that case.

I also enjoyed writing because I had written a lot during my clerkship. Back then, law firms did most of their own appellate work, and trial lawyers often did their own appellate work. They just went ahead and handled the appeal. So having a lawyer come in and help with an appeal was not something that was done all the time. We did it some at Locke Purnell, and I'd handle appeals when I had only been tangentially involved in the trial.

JF: Very good — I hope to ask some questions about your writing process, too, but for now I would like to turn to your judicial career. Who were your role models or mentors on or off the Court early on, and do you have any role models now in your new position?

CJH: I had some trial experience when I came to the bench, but I'd only been in practice a little over five years, and it was very important to me as a District Judge to have good role models that I could learn from. There's an art to being a good trial judge. One of my heroes was Hal Woodward, a United States District Judge in Lubbock. He had a wonderful temperament for a trial judge — very firm and very direct in his rulings, but fair and with common sense. He read what you filed and worked very hard, not something you always found in trial judges, even federal trial judges. I wanted to emulate him.

When I came to this Court, I revered our former Chief Justice Calvert, Chief Justice Greenhill, Chief Justice Pope, and Chief Justice Hill. They were all friends, men I had known and worked with, and that I had the greatest regard for. I had revered this Court as an institution, as they had. Seeing their work over the years gave me an idea of what I hoped my own tenure would be like.

JF: Do you feel like you read cases differently now than you did when you began?

CJH: Not so much. You're always looking, not just at the ruling in the case, but how the court got there, and whether its analysis hangs together, and whether the bases for the opinion are sound. Sometimes you think the Court got the right result though you don't think much of the logic.

Sometimes you think the logic is sound, but maybe the result is not. Most importantly, you're trying to understand how each case fits like a brick into the edifice that is the law—or not.

JF: It sounds like your clerkship gave you such good, thorough practice in analyzing case law in a way that would then help you as a judge.

CJH: Right. There is usually a back story to cases that you don't appreciate in law school because you don't know very much. Judge Robb often knew the lawyers and judges in a case, which put things in a broader context, though of course, he was always a stickler for the law. We had one case when I was clerking in which I was convinced the criminal defendant should win, based on the language of the statute. The Judge was an old prosecutor, and he said, well, but we all know he's guilty. And I said, well, maybe so, Judge, but the Government still has to prove it. And the Judge agreed, though when the defendant was later convicted again in a new trial free of error, the Judge made a point to tell me he had been right all along.

JF: So how does it feel being the longest-serving justice on this Court, and do you feel comfortable in the role now? You've obviously gained much experience.

CJH: I am comfortable here. One thing has led to another. I never planned, or aspired to, any of this. Before I came to the bench, one of my law partners had asked me once just in passing, on a trip to take a deposition, would I ever want to be a judge. I said maybe, I don't know, probably. But I didn't do anything to make it happen. I was not political at all. My only involvement in politics had been to help Chief Justice Guittard be re-elected. And then suddenly, there was a position on the District Court, because Governor Clements was going to appoint my great friend, Joe Fish, to the newly reconstituted court of appeals. Almost before I knew it, Governor Clements was going to appoint me to Joe's seat. I ran successfully for reelection. Then a position suddenly opened on the court of appeals, and I was put on the ballot to run for that. And I was barely getting used to that job when my good friend, Tom Phillips, was appointed Chief Justice of this Court. We decided to run together in 1988, and surprisingly, that ended successfully, all to Tom's credit. I've enjoyed every minute being a Justice — well, most minutes. I've served under two great Chiefs, Tom Phillips and Wallace Jefferson. And I'm glad to follow in their footsteps, though I can't say I was ever really trying to get here.

JF: What has been your proudest accomplishment on the Court?

CJH: That's hard to say. I'm glad of a reputation for writing clear, thorough, solid opinions. I work very hard at that. I'm proud of my reputation of being dedicated to the Court and its work, of staying late every night till everything's done. And I take the oath of office very seriously. There are lots of good jobs in life for which no oath is required. If you pick one for which you must take an oath, a lot more is at stake. You swear to God to do your best, and one day there'll be an accounting.

One of the most heartening things I've been involved in over the last several years is trying to get support for access to justice. The Court has always supported that mission fully, and I've always cooperated with our efforts. We've had great leaders in Justice Deborah Hankinson and Justice

[Y]ou're trying to understand how each case fits like a brick into the edifice that is the law—or not.

Harriet O'Neill. I was content to cheer them on. And then when Justice O'Neill left and Chief Justice Jefferson asked me to serve as liaison, I was anxious to do it. It has been very rewarding. One contribution I've made is to convince our friends in the legislative branch of government and the public that access to justice is not a partisan issue, not a Republican or Democrat issue, not a Liberal or Conservative issue. It's about good government. And it's about the rule of law. And it's about basic civil legal needs that are critical to poor people who don't know where else to turn. So being able to contribute to the effort, shoulder to shoulder with many others, has been very rewarding.

JF: I'm glad. It's very important. There are so many needs —

CJH: Six million — there are nearly six million Texans who qualify for legal aid, ten percent need it, and only one in five can be served with available resources. Hard times have increased the need while reducing the resources. The lawyers who handle pro bono cases and who work in legal aid will all tell you how life-changing it is for them to get no other fee in a case than a Christmas card or a note from a client telling you how much you mean to them and how you really helped them when they had nowhere else to turn. That's very rewarding for lawyers, money aside.

JF: In what ways do you think the Supreme Court has changed while you've been here? What were the moments of most significant change?

CJH: We have technology, and 25 years ago we didn't. That's changed everything. When I came, we kept the docket on three-by-five cards, and now you push a button to see everything. There's always a lot of reading to do, and 25 years ago, it was mailed or Fed-Ex'd wherever you were. Now it's all available on the Internet, and you can carry it around on your iPad and read on planes. That's a big change.

The nature of our docket has changed a lot. When I first came, we had more common law cases. Now we have a lot more statutory construction cases, in which the issue is not what should the law be from a point of view of the development of the common law, but what did the legislature intend. That change marks a shift in the government throughout the United States. Legislatures are far more involved in policy-making and governing more aspects of our lives. So we just get more statutory cases.

JF: As for technology, do you like to read on screens, or do you like to print?

CJH: I read entirely on screens. I dislike printing it out. Every once in a while, if I'm going to make a speech and I'm afraid my iPad will blink off suddenly in the middle of it, I'd rather have a piece of paper that won't vanish on me. But otherwise, briefs and opinions, all the Court's work, I read on computer.

JF: So what do you think the most pressing challenges are for the Supreme Court now?

CJH: We still have many administrative challenges. The Bar is growing bigger — something like 95,000 members. Trying to meet the needs of its diverse members and helping them meet the public's legal needs is a challenge. Technological advancements are always challenging. We're trying to move the State completely to electronic filing in the trial courts. When we get there — we plan to in 2016 — people will wonder what took us so long. But getting everybody comfortable, and making sure the technology is dependable, intuitive, and doesn't get in the way, but facilitates the operation of the courts and access to the information — that's the challenge.

Access to Justice continues to be a challenge. In the last ten years, there has been a very cooperative spirit between the Third Branch and the Legislature. We have worked with them on policy issues that impact the Judiciary, like children's cases and juvenile cases, and starting now, mental health cases. I think it is a real advancement to have two Branches of Government who are designed to check and balance each other and to be competitive, actually work together where they can for the public good.

We're almost completely caught up in our docket, and we want to stay that way and do what we can to be sure that our cases are processed on a timely basis. And we still, every day, want to get it right in every case.

JF: That challenge will not go away.

CJH: So we keep trying to do that.

JF: It sounds as if writing is perhaps your favorite feature of this job. How has your writing changed and what's your process for attacking that?

CJH: I've been privileged to do two kinds of writing here — opinions and the memos that lead up to opinions, and rules. They're completely different. To write opinions well, two things are critical. One, you have to constantly read writers that you enjoy and try to understand why. Writing is an art taught more by example than by instruction, though my friend Bryan Garner is a tremendous instructor. You read things that speak to you and then try to understand why they do. To this day, I remember reading a brief when I was clerking on the circuit in a case in which the Attorney General was representing both sides, which happens from time to time, when government entities have disputes among themselves. There was a private entity in the case as well, and the opening line in its brief was: "The governments of the United States are unusually divided in this case." Which put very nicely what we could all see, and was in contrast to thinking about a united government instead of a divided government. That beginning sentence imported all sorts of ideas and set the stage for what was to be argued. It's reading elegant things like that, which can be legal, or fiction or some other area of nonfiction, that makes you see a style that is clear and one that isn't, one that's direct and one that isn't, one that's artful and one that this isn't. You need lots of examples.

And then the second thing is to just do a lot of writing. You have to practice. It doesn't have to be legal writing. The problem today — well, it's been true since I've been in practice — is that the practice of law is so much a business that does not seem to put a premium on the time it takes to write something that you're proud of. Mostly, you're trying to get the job done. That's why lawyers have been criticized since the beginning of time for opaque writing, obfuscation, use of big words (like that last one), lots of long sentences, doing everything possible to keep from getting to the point. These are things you would never do in a love letter or a letter to your parents or your children — someone that you were trying to communicate with. If you haven't written to communicate — and you certainly don't do that on Twitter — it's very hard to write legal opinions.

JF: Right.

CJH: The other problem with writing is that it's a chore. It's agonizing to write and rethink and edit and change and make clearer. And rule-writing must not only be clear but very exact. There's not much room for freedom of expression in rule-writing. You're trying to make sure the bolts are tight and everything is covered. You're always thinking about how language can be misconstrued. What am

I assuming that my reader will not be assuming? Will this survive people trying to avoid it?

JF: It's a different kind of thinking—

CJH: Yes.

JF: In anticipation.

CJH: Right.

JF: So building on that then, when you are writing your opinions, do you have a target audience and does that change?

CJH: It does. For rules, your target audience is really lawyers — the best lawyers, who are going to be using the rules over and over and thinking very hard about what they mean in different contexts. In opinion writing, there are different schools of thought about the audience you should write to. Some judges think you should write for the lawyers in the case and pretty much leave it at that. You can assume they have the background of the case in mind, and you can use words that you wouldn't find in a newspaper article. It will be plain to the lawyers. Others say no, you should write as plainly as you would perhaps for a newspaper, for all different kinds of people who are going to be reading it, many without any legal knowledge.

I think it's somewhere in the middle. I do think it is important for the public to understand the Supreme Court's decisions and the reasons for them. So I think you have to write — not as for a newspaper, that's too far removed from what's expected of legal writing, but for people somewhat knowledgeable in the subject who are trying to understand why the law is what it is. I always think of my mother and dad, who weren't lawyers but appreciated what lawyers and judges do and were interested in public ideas.

JF: Very good. Another question I have relates to the splitting of civil and criminal supreme courts. I'm originally from Oklahoma, and I find it interesting that Texas and Oklahoma are still the only two states that split their supreme courts. So I was curious about your view on that. Do you think that splitting them facilitates efficiency, and do you think that would be a good thing in the federal courts on some level?

CJH: Handling civil and criminal cases separately is probably more efficient. In courts with general jurisdiction, criminal cases usually come ahead of civil cases, and lawyers in civil cases often feel it's hard to get the judge's attention. That was part of the thinking in 1891 when the framers and ratifiers of the Constitution divided the Court of Appeals into the Court of Civil Appeals and the Court of Criminal Appeals. The concern for years had been how to keep the courts current, and one idea was to separate civil from criminal. Does it work? I don't know of any studies. It probably has some benefit. But it's worth noting that 48 other states and the federal courts do not do it. So you wonder why, if it's a good idea, others haven't adopted it.

There are problems whenever the justice system and judges and lawyers specialize in particular kinds of cases — criminal, tax, patent, family, bankruptcy. The process can become very inbred, making it harder for the system as a whole to learn from itself. A friend of mine who used to be

on the Court of Appeals and had been a Criminal District Judge recounted an oral argument in which the lawyer began by saying that the case was one of the most important ever to come before the Court. My friend interrupted to ask: really, how many people died? You can easily think that an area of law in which you're engaged is all there is, when the law needs to be thought of as a whole. That's a reason to keep criminal and civil cases together in the same court. But there are also reasons to separate them, and strong views in favor of doing so.

JF: That's a very good explanation. In the time we have left I did want to ask how playing the organ enriches your life.

CJH: Well, I started taking piano lessons when I was ten, and a few years later I began studying the organ. I got my first job as a church organist when I was in the eighth grade. There were more churches than organists in Clovis, so we were always in high demand. That was long before the days of praise bands, when lots of churches used the organ as the principal instrument in worship. Now church organs are few and far between, and church organists are disappearing. But I have stuck with it through the years, and it's been a marvelous part of my life, though I no longer play the organ for a church. I do play the piano for a church, and the piano is a good friend as well. When I get out of here after a hard day and get home, I can take it out on the piano, or be soothed. Music is very enriching.

JF: So my last question for you is about your hopes for the future for either your career or the Court.

CJH: Well, for the Court, I have great confidence. This is a very strong institution with a long, proud history, well-deserved. Our little book that has come out recently on the history of the Court —

JF: The Jim Haley book?¹

CJH: Yes. It's a real prize, well-written and informative. I often say that when we're down in the courtroom with all the portraits of judges hanging around the walls — some still alive and others who have passed on — I think of them as looking over our shoulders to make sure we're still doing it right. We owe history an enormous debt, and we want our posterity to feel the same way. I speak for all my colleagues in saying that we want a strong Court of the highest caliber, one that serves Texas well. And my hope for myself is to lead the Court well.

¹ See JAMES HALEY, *A NARRATIVE HISTORY OF THE TEXAS SUPREME COURT: 1836-1986* (Austin: University of Texas Press, with the Texas Supreme Court Historical Society, 2013).



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Appellate Oddities

By Charles G. “Chip” Orr

IN 2002, I MANAGED TO PERSUADE THE APPELLATE SECTION of the State Bar to indulge my desire to draft a paper (and present it at the Advanced Civil Appellate CLE in Austin that September) on some of the funky, quirky things I’d noticed in my several years of practicing and working as a staff attorney at the Supreme Court of Texas.¹ So I wrote the paper, did the presentation, and having scratched that itch, moved on with my life.

I was quite surprised, then, pleasantly so, to receive an email recently from appellate specialist and social-media guru Dylan Drummond² asking me if I’d like to update that paper for the Texas Supreme Court Historical Society. He didn’t have to twist my wrist. This one is fun. I hope you enjoy reading it as much as I enjoyed writing it back in 2002 and updating it now.

I. It all starts with the name. Or, a The Supreme Court of Texas by any other name would still smell like a The Supreme Court of Texas.³



Before every oral argument session, the guy on the right has to say “The Honorable The Supreme Court of Texas” and make it sound natural. (Photo by Mark Matson)

¹ See *infra* Part I regarding the Court’s name.

² I think Dylan may have had his name legally changed to @dodrummond. #AmITweetingNow #NoOrrYou’reJustWritingAnotherLengthyTextualFootnote #SorryBryanGarner. Dylan likely would be the undisputed king of Texas appellate social media were it not for Justice Willett. More on him later....

³ I deliberately capitalized the “The” in “The Supreme Court of Texas” in this heading to emphasize that this is the name of the Court. But elsewhere, I will follow the Court’s practice of only capitalizing the “The” in “The Supreme Court of Texas” when it appears at the beginning of a sentence, or as a free-standing phrase. Lest you think this is incidental, I have an ongoing debate with another lawyer at my firm (The Mulligan Law Firm) over whether our firm name, when it is used in the middle of a sentence, should be “The Mulligan Law Firm” or “the Mulligan Law Firm.” (I prefer the latter). Um, well, yeah, I guess it is sort of incidental, isn’t it?

We've all heard those familiar opening words from Blake Hawthorne (and Andrew Weber, and John Adams, etc.):⁴

The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas, are admonished to draw near and give their attention, for the Court is now sitting. God save the State of Texas and this Honorable Court.⁵

If I were to have added emphasis, I would have highlighted “The Supreme Court of Texas.” Because, you know, that’s the name. The Supreme Court of Texas. It’s not “The Texas Supreme Court.”⁶ If you don’t believe me, look at the Court’s website (<http://www.supreme.courts.state.tx.us/>). It’s right there in the upper left hand corner of the screen: The Supreme Court of Texas.⁷

This is odd, if for no other reason than that it forces Mr. Hawthorne (and before him, forced his predecessors) to the awkward phraseology above every time he calls the Court.

I was thinking about this recently while reviewing a pleading filed in a California court that used the phrase so many lawyers still open all their pleadings with: TO THE HONORABLE [insert name of court in which pleading will be filed here]. I eliminated this practice from my writing long ago. I mean, doesn’t the fact that one has filed a pleading with a court imply that that’s the court that should read the pleading?

I was pleased, then, to find that most former Justices of the Supreme Court of Texas who are currently practicing before the Supreme Court of Texas likewise avoid using this phraseology at the beginning of their Supreme Court of Texas briefs.⁸ But I have a confession: I only looked for this because I really wanted to find an example of a former Justice of the Supreme Court of Texas who left out the “the” when using this phrase: “TO THE HONORABLE SUPREME COURT OF TEXAS” (instead of “TO THE HONORABLE *THE* SUPREME COURT OF TEXAS”). But the Justices largely foiled my prurient efforts. As noted, most just omit the bulky language entirely (and with the shift in the Rules of Appellate Procedure to a word count instead of a page limit,⁹ I imagine most lawyers will follow suit if they haven’t already).¹⁰

⁴ See <http://www.supreme.courts.state.tx.us/court/clerks.asp> (Court History—Clerks of the Court) (last visited May 1, 2014).

⁵ I did this from memory, so if I got a word or two wrong, please forgive me. Legend has it that former clerk, John Adams, once slipped up and said, “God save this Court.” Even assuming this is mere legend, who could have blamed him if he had said it?

⁶ Anyone who ever had the pleasure of working with the late, great Justice James A. Baker can well imagine him circulating a redline making precisely this change, to avoid an unnecessary prepositional phrase of course.

⁷ WELCOME TO THE SUPREME COURT OF TEXAS, <http://www.supreme.courts.state.tx.us/> (last updated Apr. 17, 2014).

⁸ See, e.g., No. 14-0182, *In re Lexington Ins. Co.*, Petition for Writ of Mandamus (Chief Justice Jefferson) (starting with text, followed by “Reasons to Issue the Writ” heading [nice!]); No. 14-0122, *Life Partners, Inc. v. Arnold*, Life Partners, Inc.’s Petition for Review (a twofer: Chief Justice Jefferson and Justice O’Neill) (starting with heading “Reasons to Grant” [also nice!]); No. 13-0961, *Occidental Chem. Corp. v. Jenkins*, Petition for Review (Justice Hankinson) (jumping straight to “Statement of Facts”); No. 13-0597, *Plains Exploration & Prod. Co. v. Torch Energy Advisors, Inc.*, Petition for Review (Justice Brister) (starting with “Introduction”); No. 13-0597, *Plains Exploration & Production Co. v. Torch Energy Advisors, Inc.*, Response to Petition for Review (Justice O’Neill) (opening with “Reasons to Deny Review” [nice in the opposite direction!]); No. 13-0038, *Espinosa v. Umansor*, Petition for Review (Justice Wainwright) (opening with “Introduction”); No. 12-0522, *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, Petition for Review (Chief Justice Phillips) (jumping straight to “Statement of Facts”); and No. 10-0223, *Centocor, Inc. v. Hamilton*, Response to Petition for Review and Conditional Cross-Petition for Review (Justice Enoch) (starting with “Overview”); .

⁹ See TEX. R. APP. P. 9.3(i) (listing word counts for various types of appellate pleadings).

¹⁰ I really liked how Justice Gonzalez managed to get the Court’s name correct while avoiding the awkward “The Honorable the Supreme Court of Texas” phraseology. In No. 11-0037, *In re Whataburger Restaurants LP*, Justice Gonzalez was listed as counsel for the relator and the petition for writ of mandamus opened with: “TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:”. Well played, Justice Gonzalez!

I did find, however, two instances where a former Justice (1) used this phrase, and (2) left out the “the” in “the Supreme Court of Texas.” In No. 06-0933, *Southwestern Bell Telephone, L.P. v. Harris County Toll Road Authority*, the Petition for Review includes Justice Baker as counsel for the Petitioner, and opens with: “TO THE HONORABLE SUPREME COURT OF TEXAS.”¹¹ And in No. 13-0761, *In Re National Lloyds Ins. Co.*, the petition for writ of mandamus lists Justice Brister among the counsel for relator and opens with: “TO THE HONORABLE SUPREME COURT OF TEXAS.” Gotcha!

II. Former Chief Justice Phillips dissents to his own majority opinion.



Proud owner of the finest collection of political buttons of any former Chief Justice of the Honorable the Supreme Court of Texas.

One of my favorite appellate oddities is found in *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989). As a former Court employee who was privy to the Court’s conference discussions, I have long admired Chief Justice Phillips’s abilities to: (1) see both sides of an issue; and (2) poke fun at himself for this quality. The Chief took a fair amount of good-natured ribbing internally at the Court (he dished back pretty well, too). But he perhaps got the most grief for having once dissented to his own majority opinion.

Casso v. Brand is interesting, and an appellate oddity, because in it, the Chief authored two opinions—the majority opinion for the Court and an opinion dissenting in part for himself.¹² It seems that the Chief believed this was an appropriate case for a remand in the interest of justice rather than rendition of judgment (so he wrote in his dissent).¹³ But a majority of the Court disagreed, including the Chief!

III. *Stare decisis?* I’m Downs with that.

Those Chief Justices and their dissents to their own positions!

In a stirring defense of *stare decisis*, Chief Justice Jefferson once refused to acquiesce in the Court’s adoption of the position he advocated in a prior dissent. The case was *Southwestern Bell Telephone Co. v. Mitchell*, 276 S.W.3d 443 (Tex. 2008). The issue was whether a workers’ compensation carrier waives its right to contest the compensability of an injury if, within the first seven days after receiving a claim, it fails to either begin to pay the claim or give written notice of its refusal to do so. This statutory-construction issue was addressed by the Court in its 2002 decision in *Continental Casualty Co. v. Downs*, 81 S.W.3d 803 (Tex. 2002). There, the Court held in a 5-4 decision that a carrier did indeed waive its ability to contest a claim if it did not act within seven days

¹¹ See *supra* note 6.

¹² Compare *Casso v. Brand*, 776 S.W.2d 551, 552 (Tex. 1989) 552 (Phillips, C.J., for the Court), with *id.* at 565 (Phillips, C.J., dissenting in part).

¹³ See Tex. R. App. P. 60.3 (“When reversing the court of appeals’ judgment, the Supreme Court may, in the interest of justice, remand the case to the trial court even if a rendition of judgment is otherwise appropriate.”) (C.J. Phillips cited to a predecessor of this provision in his *Casso* dissent); see also, e.g., *R.R. Street & Co., Inc. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 254-55 (remanding in the interest of justice where trial court improperly determined that dispositive issue was question of law rather than fact and where no prior decision offered any guidance on proper submission of issue).

of receipt of the claim. *Id.* at 806–07. Chief Justice Jefferson (who at the time of *Downs* was but a mere Justice) wrote a dissent in which he argued that the statutes at issue unambiguously provide that a carrier is susceptible to administrative penalties if it does not act within seven days but only waives its right to contest compensability if it does not act within 60 days.¹⁴

Immediately after *Downs* was issued, the Texas Legislature amended the statutes at issue to clarify that the rule the Commission had long applied was indeed the rule the Legislature believed should be followed—“that a carrier that does not act within that seven-day period “does not waive [its] right to contest the compensability of the injury.”¹⁵ The issue in *Mitchell* was what should happen in those cases that arose during the several-month period when *Downs* was the law.



“When I lose, I stay lost!”

By a 5-3 decision (Justice Green did not participate), the Court reversed *Downs*. The Court discussed the importance of *stare decisis*—particularly in the context of statutory construction—but concluded that “judicial adherence to [*Downs*] in the name of *stare decisis* may actually disserve the interests of ‘efficiency, fairness, and legitimacy’ that support the doctrine.”¹⁶ The Court expressed concern that “[w]ere we to follow *Downs*, a different rule would apply only in those cases caught in the *Downs* gap.[¹⁷] *Stare decisis* does not warrant an obstinate insistence on precedent that appears to be plainly incorrect.”¹⁸



Emerson once said, “A foolish consistency is the hobgoblin of little minds.” This Chief Justice refuses to be foolishly consistent.

Even though “echoes of [his] dissent ring in the Court’s decision,” Chief Justice Jefferson steadfastly insisted that *stare decisis* should carry the day and *Downs* should not have been reversed.¹⁹ His dissent in *Mitchell* is a passionate defense of the importance of adherence to precedent in statutory construction cases. He invoked the Founding Fathers²⁰ and *Marbury v. Madison*²¹ in resisting the “vindication associated with the Court’s ruling,” noting that “*Downs* stated the law, and we should not so quickly cast it aside.”²² The lynchpins of Chief Justice Jefferson’s dissent in *Mitchell* were his arguments that: (1) acts by a later Legislature are not evidence of the meaning of laws passed by an earlier Legislature; and (2) the very words used by the Legislature when it amended the statute post-*Downs* support the position that *Downs* should not be reversed.²³

¹⁴ *Id.* at 808 (Jefferson, J., dissenting).

¹⁵ *Southwestern Bell Telephone Co. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008) (quoting a new section added by the legislature after *Downs*).

¹⁶ *Id.* at 447–48.

¹⁷ Band name alert: The Downs Gap.

¹⁸ *Mitchell*, 276 S.W.3d at 448.

¹⁹ *Id.* at 449 (Jefferson, C.J., dissenting).

²⁰ “Legislatures write statutes; courts construe them. Cf. THE FEDERALIST No. 78, at 466 (Alexander Hamilton) ... (“The interpretation of the laws is the proper and peculiar province of the courts.”) *Id.* at 450 (Jefferson, C. J., dissenting).

²¹ “To continue to press a dissent after the Legislature has had occasion to change the law essentially refutes the constitutional principle, laid down in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803), the *Court* ultimately declares the law’s meaning.” *Id.* at 449 (Jefferson, C.J., dissenting).

²² *Id.* at 449 (Jefferson, C.J., dissenting).

²³ *Id.* at 450–51. The Legislature provided that the statutory amendments would be effective prospectively only and that “[a] claim based on a compensable injury that occur[red] before the effective date of this Act is governed by the law in effect on the date the compensable injury occurred, and the former law is continued in effect for that purpose.” *Id.* at 451 (Jefferson, C.J., dissenting) (quoting from legislative amendment).

While perhaps not quite as odd as Chief Justice Phillips’s dissent to his own majority opinion within the same case, Chief Justice Jefferson’s refusal to accept the “vindication” of the Court’s adoption of his earlier dissent is certainly noteworthy.

IV. Chief Justice Phillips’s mandamus petition to his own Court is rejected because he didn’t go to the Court of Appeals first.

I hate to pick on Chief Justice Phillips again, but I still remember the surprise I felt at seeing an email from Osler McCarthy, the Court’s Public Information Officer, describing a mandamus petition in case no. 02-0772, *In re Thomas R. Phillips*. Yes, that Tom Phillips. A/k/a, the Chief.

Huh? The Chief filed a mandamus²⁴ petition? To the Supreme Court of Texas *while* he was Chief?

Yep. According to Osler’s email, the Chief alleged that the Libertarian candidate in the 2002 election for the position of Chief Justice of the Supreme Court of Texas was not a lawyer, which the Chief believed rendered his opponent ineligible under the Texas Constitution. So the Chief filed a mandamus petition with the Court asking it to order the Libertarian Party chairperson to have this candidate removed from the ballot.

The Supreme Court of Texas, however, promptly issued an order denying Chief Justice Phillips’s mandamus petition with the notation, “*See* Tex. R. App. P. 52.3(e).”²⁵ Such notations send appellate nerds like me scurrying for our copies of the Rules of Appellate Procedure to see what the Court is telling us. Rule 52.3(e) requires a relator to present a mandamus petition first to the court of appeals before filing it with the Supreme Court of Texas “unless there is a compelling reason not to do so.” The Chief apparently claimed there was such a compelling reason. But the Court disagreed.

This, of course, raises the question—when can one skip the court of appeals with a mandamus petition and go straight to the Supremes? The answer is, only in the narrowest of circumstances. The Chief was no doubt aware in 2002 that the previous two instances in which the Court allowed a relator to bypass the court of appeals involved time-sensitive, election-based issues, such as the one he raised in his petition.²⁶ But apparently, the Court did not agree that his case presented such exigent circumstances.²⁷

²⁴ By the way, Chief Justice Phillips pronounces it “man-DAMN-us.” I’ve always pronounced it “man-DAY-mus.” I have no idea who’s right.

²⁵ The order unsurprisingly noted, “(Chief Justice Phillips not sitting).”

²⁶ *See Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (in redistricting case, granting mandamus relief even though mandamus petition not previously presented to court of appeals, reasoning that because of imminent deadline for federal court intervention; “[t]ime has simply run out”); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 93–94 (Tex. 1997) (granting mandamus against trial court order requiring political party to provide booth to particular group at party convention where order was entered just two days before convention and issue “could have become moot without [Court’s] immediate attention”).

²⁷ *In re Sharp*, 186 S.W.3d 556 (Tex. 2006), was an election case in which the Court issued a mandamus over a dissent from Justice Johnson that listed failure to file the mandamus petition in the court of appeals first as a reason the petition should have been denied. Chief Justice Phillips was listed as counsel “for Other.” A check of the Court’s online docket showed that “Other” was “An undisclosed interested member of the judiciary,” whatever that means. And the docket sheet does not reflect any filing by this undisclosed interested member of the judiciary. But I hope the Chief felt a little vindicated by the result in that case. Or maybe his undisclosed interested client wanted the mandamus petition denied because it wasn’t filed in the court of appeals first???

V. Is that a Supreme Court of Texas opinion you're citing or is it a court of appeals opinion that Chief Justice Hecht attached to his dissent to the denial of the petition for review?

Chief Justice Hecht has been known to issue the occasional opinion dissenting to the denial of a petition for review. In 1999, well before he became Chief Justice, then Justice Hecht issued such a dissent in the case of *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (Hecht, J., dissenting to denial of petition for review). The court of appeals opinion in that case was unpublished (back when, I think, that might have still meant something), but Justice Hecht apparently thought it should be published so that the world could see why the petition for review should have been granted. So he attached the entire court of appeals opinion—all 40 pages of it—to his dissent to the denial of the petition for review.

Unfortunately, even though it is clearly labeled, the unpublished court of appeals opinion attached to Justice Hecht's dissent in *Vickery* has been cited in almost all of the Texas courts of appeals, as well as the Fifth Circuit Court of Appeals and several federal district courts, as if it were an opinion of the Supreme Court of Texas.²⁸

Texas Courts of Appeals:

- Houston [1st] – *Pruett v. Harris Cty. Bail Bond Bd.*, 356 S.W.3d 103, 111 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (cited for proposition that denial of motion to recuse is reviewed for abuse of discretion).
- Fort Worth – *Verhoev v. Progressive County Mut. Ins. Co.*, 300 S.W.3d 803, 816 n.11 (Tex. App.—Fort Worth 2009, no pet.) (cited for proposition that failure to include legal analysis, citations, and record references results in waiver of argument on appeal).
- Austin – *CTTI Priesmeyer, Inc. v. K & O Ltd. Partnership*, 164 S.W.3d 675, 681 (Tex. App.—Austin 2005, no pet.) (cited for elements of novation).
- San Antonio – *SBC Operations, Inc. v. The Business Equation, Inc.*, 75 S.W.3d 462, 466 (Tex. App.—San Antonio 2001, pet. denied) (cited for standard of review on no evidence challenge).
- Dallas – *Broyhill Furniture Indus., Inc. v. Murphy*, 2013 WL 4478172, at *5 (Tex. App.—Dallas Aug. 20, 2013, no pet.) (mem. op.) (cited for elements of novation).
- Texarkana – *Duffy v. State*, 2014 WL 685560, at *5 (Tex. App.—Texarkana Feb. 21, 2014) (cited for proposition that denial of motion to recuse is reviewed for abuse of discretion).²⁹
- Amarillo – *In re Williams*, 2000 WL 369687, at *4 (Tex. App.—Amarillo April 11, 2000, orig. proceeding) (cited for elements of laches).

²⁸ The following list is but a mere representative sample. Keyciting *Vickery* on Westlaw.com for this update yielded a list of exactly 100 cases in which it was cited. Time constraints kept me from reviewing all 100 of these, but of the 30–40 that I did look at, almost all cited the court of appeals opinion appended to Justice Hecht's dissent to denial of petition for review as if it were a Supreme Court of Texas case. In 2002, when I first published a version of this Paper, I cited 12 published opinions in which the court of appeals opinion attached to Justice Hecht's dissent to denial of petition for review was cited as if it were a Supreme Court opinion.

²⁹ Texarkana did get it right in *In the Matter of the Marriage of Notash*, 118 S.W.3d 868, 871–72 (Tex. App.—Texarkana 2003, no pet.). In that case, the court correctly cited *Vickery* as an attachment to Justice Hecht's dissent.

- El Paso – *21st Century Home Mortgage v. City of El Paso*, 281 S.W.3d 83, 87 (Tex. App.—El Paso 2008, no pet.) (per curiam) (cited for proposition that failure to include legal analysis, citations, and record references results in waiver of argument on appeal).³⁰
- Beaumont – *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 364 (Tex. App.—Beaumont 2008, no pet.) (cited for elements of novation).
- Waco – *Engelbretson v. Hyder*, 2005 WL 168838, at *2 (Tex. App.—Waco Jan. 26, 2005, pet. denied) (mem. op.) (cited for proposition that failure to include legal analysis, citations, and record references results in waiver of argument on appeal).
- Eastland – Eastland appears to be the only court of appeals to have never cited Justice Hecht’s dissent to denial of petition for review in *Vickery* as if the court of appeals’ opinion attached to that dissent is an opinion of the Supreme Court of Texas.
- Tyler – *Clark v. Smith County District Atty’s Office*, 2011 WL 3503138, at *1 (Tex. App.—Tyler Aug. 10, 2011, no pet.) (mem. op.) (cited for proposition that denial of motion to recuse is reviewed for abuse of discretion).
- Corpus Christi – *Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 526 (Tex. App.—Corpus Christi 2000, no pet.) (cited for sufficiency of evidence to support mental anguish damages).³¹
- Houston [14th] – *Gomez v. Pasadena Health Care Mgmt., Inc.*, 246 S.W.3d 306, 312 n.3 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (cited for proposition that failure to include legal analysis, citations, and record references results in waiver of argument on appeal).

Fifth Circuit and other federal courts:

- Fifth Circuit – *In the Matter of Soza*, 542 F.3d 1060, 1073 n.16 (5th Cir. 2008) (Weiner, J., concurring) (cited for proposition that constructive fraud is most frequently found in a breach of a fiduciary or confidential relationship); *Joslin v. Personal Investments, Inc.*, 2004 WL 436001, at *5 (5th Cir. Mar. 8, 2004) (cited for proposition that constructive fraud is most frequently found in a breach of a fiduciary or confidential relationship).
- S.D. Tex. – *Cadles of Grassy Meadows II, L.L.C. v. Whitney Nat’l Bank*, No. H-92-1692, 2010 WL 3984711, at *3 (S.D. Tex. Oct. 8, 2010) (cited for elements of novation).
- N.D. Tex. – *Anderson v. Nat’l City Mortgage*, No. 3:11-CV-1687, 2012 WL 612562 (N.D. Tex. Jan. 17, 2012) (cited for proposition that constructive fraud is most frequently found in a breach of a fiduciary or confidential relationship).

³⁰ El Paso did get it right (or at least Justice McClure did) in *Sprick v. Sprick*, 25 S.W.3d 7, 16-17 (Tex. App.—El Paso 1999, pet. denied) (McClure, J., concurring) (explaining rationale for Justice Hecht’s dissent in *Vickery*). But Justice McClure was in the majority in *21st Century Home Mortgage* almost ten years later, so I guess she forgot about this issue since authoring her *Sprick* concurrence.

³¹ Corpus Christi did get it right the next year in *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 236, 236 n.17 (Tex. App.—Corpus Christi 2001), *aff’d in part, rev’d in part*, 164 S.W.3d 607 (citing to *Vickery* as Justice Hecht dissent and then dropping footnote citing court of appeals opinion as “Unpublished opinion appearing as appendix to published dissent”).

- N.D. Tex. Bkrtcy. – *In re Frazin*, Bankruptcy No. 02-32351, Adversary No. 08-3021, 2008 WL 5214036, at *57, 60 (Bkrtcy. N.D. Tex. Sept. 23, 2008) (cited for proposition that duty of full disclosure requires absolute and perfect candor, openness and honesty, and absence of any concealment or deception).
- E.D. Mich. – *Harvard Drug Group v. Linehan*, No. 08-13617, 2010 WL 2527064, at *4 (E.D. Mich. June 18, 2010) (cited for elements of novation).

Other:

- Review Tribunal (appointed by Supreme Court of Texas) – *In re Rose*, 144 S.W.3d 661, 676 (Tex. Rev. Trib. 2004) (cited for proposition that failure to include legal analysis, citations, and record references results in waiver of argument on appeal).
- Texas Attorney General opinion – Tex. Atty. Gen. Op. OR2005-10670 (Nov. 29, 2005) (cited for proposition that “[i]n considering the legal meaning of ‘discussion,’ Texas courts have characterized ‘[e]vidence of conduct or statements made in compromise negotiations’ as settlement discussions”).

Even the Supreme Court of Texas itself was not immune from committing this error, although in the one instance I’m aware of where it did so, it caught the mistake before the opinion was published in the *South Western Reporter*. Compare *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 43 Tex. Sup. Ct. J. 806, 813 (Tex. June 8, 2000) (Gonzalez, J., concurring and dissenting) (“The fiduciary relationship between attorney and client requires ‘absolute and perfect candor, openness and honest, and the absence of any concealment or deception.’ *Vickery v. Vickery*, 999 S.W.2d 342, 376 (Tex. 1999)”), with *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 867 (Tex. 2000) (Gonzalez, J., concurring and dissenting) (using same quote but instead of citing *Vickery*, citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied)).



Coming soon:
Citations to the Lincoln-Douglas debates, the Roosevelts (Teddy and FDR), and Godzilla (the 1954 original, of course, not one of those cheesy remakes)

In 2002, I noted that, “By describing this phenomenon at Advanced Appellate, I hope to warn practitioners not to fall into the trap of citing *Vickery* as if it were a [Supreme Court of Texas] opinion.” I should have included judges.

VI. Justice Willett reads a lot of books, watches a lot of movies and television, and even quotes that great philosopher Yogi Berra.

In addition to being a prolific tweeter, Justice Willett has proven himself to be the Court’s most reliable source of diverse and interesting citations to non-legal sources. The man is a prolific reader and watcher! He’s also quite the historian. Here are just a few examples.³²

Most recently, in his dissent to the denial of the petition for review in *El-Ali v. State*, No. 13-0006, 2014 WL 1373582 (Tex. Mar. 28, 2014), Justice Willett implored the Court to grant a petition to review the State’s forfeiture law. Noting that the Court “ha[s] not examined the rights of innocent property owners in more than half a century,” Justice Willett painted an evocative picture of 1950s American life:

³² I’m quite sure that I missed some favorite Willett snippets (there are so many to choose from!).

Back then, the Dodgers were still in Brooklyn, *American Bandstand* premiered on network TV, Sputnik blasted off, and President Eisenhower sent federal troops to integrate Central High School. Asset forfeiture in 1957 was exceedingly narrow.³³

This stirring dissent also illustrated Justice Willett’s command of both American colonial history and contemporary scholarship:

Indeed, the Founders were intimately acquainted with confiscatory government. The Father of the United States Constitution, James Madison (who turned 85 the day the Republic of Texas adopted its Constitution and lived barely 100 days more, long enough to see Texas free) warned in Federalist 48 of the “encroaching nature” of government power. [citing THE FEDERALIST NO. 48, at 332 (James Madison) (J. Cooke ed., 1961)] Contemporary legal scholarship and journalism contend that modern civil-forfeiture law, which has spread with kudzu-like ferocity in recent years (amassing billions in seized profits along the way), seems less Madisonian than Orwellian. [citing Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013); Louis S. Rulli, *On the Road to Civil Gideon*, 19 J. L. POL’Y 683 (2011); Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77 (2001); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 75 (1998).]³⁴

Indeed, displaying a seemingly vast historical and philosophical acumen, Justice Willett frequently cites *political philosophers*,³⁵ *Greek philosophers*,³⁶ and *America’s Founding Fathers*.³⁷ He has also cited with approval the uniquely pragmatic and pithy *American philosopher Yogi Berra*.³⁸ The man can do it all—he even quotes *Romantic poets*.³⁹

³³ *El-Ali v. State*, No. 13-0006, 2014 WL 1373582, at *3 (Tex. Mar. 28, 2014).

³⁴ *Id.* at *4.

³⁵ See, e.g., *El-Ali*, 2014 WL 1373582 at *6, *6 n.28 (quoting Edmund Burke’s “Speech on Moving his Resolutions for Conciliation with the Colonies” from March 1775); *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (quoting John Locke’s SECOND TREATISE OF GOVERNMENT for Locke’s view that “preservation of property rights [is] ‘[t]he great and chief end’ of government”); *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 162 (Tex. 2010) (Willett, J., concurring) (quoting Thomas Hobbes’s LEVIATHAN for a 17th century example of a great philosopher grappling with the issue of finding the appropriate balance between liberty and order); *Id.* at 163 (quoting John Stuart Mill’s ON LIBERTY, THE SUBJECTION OF WOMEN, AND UTILITARIANISM for the proposition that the balancing of liberty and social control requires judicial enforcement of constitutional commands against legislative actions that exceed those commands); *Id.* at 164 (again quoting Edmund Burke—Justice Willett appears to be a big fan of that “fierce spirit of liberty” quote from Mr. Burke!).

³⁶ See, e.g., *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 2014 WL 1875637, at *1, *1 n.1 (Tex. May 9, 2014) (Willett, J., for the Court) (opening opinion in defamation case with quotation—“When the debate is lost, slander becomes the tool of the loser”—that “is widely, if not verifiably, attributed to Socrates, who taught Plato, who taught Aristotle, who taught Alexander the Great”); *Roccaforte v. Jefferson County*, 341 S.W.3d 919, 927 (Tex. 2011) (Willett, J., concurring) (quoting Aristotle’s NICOMACHEAN ETHICS and stating, “Aristotle would have enjoyed this case, which perfectly illustrates the challenge he recognized of reconciling the ‘absoluteness’ of the written law with equity in the particular case”).

³⁷ See, e.g., *In re EL Specialty Ins. Co.*, 373 S.W.3d 46, 57 (Tex. 2012) (Willett, J., dissenting) (“Since 1793, when Chief Justice Jay declined President Washington’s request for advice on twenty-nine questions regarding America’s duties under various treaties, the bar on advisory opinions has become firmly embedded in American law.”) (citing RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50-52 (6th ed. 2009)); *Robinson*, 335 S.W.3d at 164 (Tex. 2010) (Willett, J., concurring) (“‘Experience is the oracle of truth,’ wrote [James] Madison”) (quoting THE FEDERALIST No. 20).

³⁸ *Edwards Aquifer Authority v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 413 (Tex. 2009) (Willett, J., concurring) (“Yogi Berra was right: In law as in life, ‘It ain’t over ‘til it’s over.’”) (quoting Yogi Berra with Dave Kaplan, *When You Come to a Fork in the Road, Take It!* 88 (Hyperion 2001)).

³⁹ *Strickland v. Medlen*, 397 S.W.3d 184, 185 (Tex. 2013) (Willett, J., for the Court) (“*Beauty without Vanity, Strength without Insolence, Courage without Ferocity, And all the Virtues of Man without his Vices*”) (quoting Lord Byron, Inscription on the Monument of a Newfoundland Dog, in 7 THE WORKS OF LORD BYRON: WITH HIS LETTERS AND JOURNALS, AND HIS LIFE 292-93 n.2 (Thomas Moore ed., 1832)).



He hits from both sides of the plate. He's amphibious.

Lest one think that Justice Willett is limited to fancy book learning, he also appears to be a movie buff and a television fan. He has quoted with approval from a *Star Trek* movie⁴⁰ and asserted that “[e]ven the gruffest among us tears up (every time) at the end of *Old Yeller*.”⁴¹ And he even references the television classic *Seinfeld*.⁴²

★ ★ ★ ★ ★

Gee, now I have to get back to my actual legal work and I’m feeling sort of inadequate. Trying to think *Up* a way to incorporate a reference to a Pixar film into my motion to remand....⁴³

⁴⁰ *Robinson*, 335 S.W.3d at 162, 192 n.21 (Tex. 2010) (Willett, J., concurring) (noting that utilitarian philosophy “rings . . . Vulcan” and citing *STAR TREK II: THE WRATH OF KHAN* (Paramount Pictures 1982): “The film references several works of classic literature, none more prominently than *A Tale of Two Cities*. Spock gives Admiral Kirk an antique copy as a birthday present, and the film itself is bookended with the book’s opening and closing passages. Most memorable, of course, is Spock’s famous line from his moment of sacrifice: ‘Don’t grieve, Admiral. It is logical. The needs of the many outweigh ...’ to which Kirk replies, ‘the needs of the few.’”).

⁴¹ *Strickland*, 397 S.W.3d at 185 (citing *OLD YELLER* (Walt Disney 1957)). Justice Willett pointedly does not identify the “gruffest among us” who allegedly “tears up (every time)” during *OLD YELLER*.

⁴² *Edwards Aquifer*, 291 S.W.3d at 417-18 (Willett, J., concurring) (“But if a judgment is operative for all purposes upon issuance, what exactly is the mandate of a mandate—why enact rules and statutes that tie finality and enforceability to something that amounts to *Seinfeld*-ian nothingness?”). In the footnote accompanying this text, Justice Willett further references (without citation) a famous *Seinfeld* episode in which Jerry (the main character) frequently utters the phrase, “Not that there’s anything wrong with that.” *See id.* at 418 n.27. If you don’t already get the reference, I encourage you to Google it.

⁴³ Of course I’d have to be very *Brave* to actually do this, but wouldn’t it be *The Incredibles* if I could pull it off?



CHARLES G. “CHIP” ORR is an appellate/briefing attorney for *The Mulligan Law Firm* in Dallas. Prior to joining that firm in 2009, he was a staff attorney for the *Second Court of Appeals* and the *Fourth Court of Appeals*. He also worked for several years as general counsel and licensing/accreditation specialist for an international adoption agency, and as an associate with *Haynes and Boone, LLP*, and *Vinson & Elkins L.L.P.* Orr served as a briefing attorney for Justice Lloyd Doggett and later as a staff attorney for Justice Craig Enoch. From 2002 to 2005, he coauthored the Appellate Advocate’s “*Texas Supreme Court Update*.”

Orr wonders why it’s called the Texas Supreme Court Historical Society and not The Supreme Court of Texas Historical Society.

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Significant Summer Dates in the History of the Texas Supreme Court, 1837-1982

By Marilyn P. Duncan

July 11, 1837 The first Chief Justice of the Republic of Texas Supreme Court, James Collinworth, drowns in Galveston Bay, probably a suicide. He never convened a session of the Court.

August 10, 1838 President Sam Houston appoints John Birdsall as Chief Justice, pending approval of the Republic Congress. That approval never came, and Birdsall never convened a session of the Court.

June 30, 1840 The first Chief Justice to convene a session of the Texas Supreme Court, Thomas J. Rusk, resigns from office. He had made it clear when he accepted the position that he would resign after presiding over one session to clear the docket.

Summer 1845 Anticipating the annexation of the Republic of Texas by the United States, James Wilmer Dallam publishes the opinions of the Republic Court as part of *A Digest of the Laws of Texas: Containing a Full and Complete Compilation of the Land Laws; Together with the Opinions of the Supreme Court.*

August 4, 1851 In the first popular election of judges in Texas, John Hemphill is elected Chief Justice by the voters. Hemphill already held the position through gubernatorial appointment.

August 1, 1864 Oran Roberts is elected Chief Justice to replace Chief Justice Royall Tyler Wheeler, who had committed suicide in April.

June 25, 1866 The first constitution under Reconstruction is ratified. It enlarges the Court from three to five Justices, popularly elected for ten-year terms. The general election is held the same day.

August 1866 George Fleming Moore is selected Chief Justice by his fellow justices, in accordance with the 1866 Texas Constitution.

- July 9, 1879** In an effort to relieve the burgeoning case docket, the Texas Legislature creates a new Commission of Appeals to hear cases pending in the Supreme Court and Court of Appeals (later renamed the Court of Criminal Appeals).
- July 5, 1894** CJ Robert Stayton dies in office. Reuben R. Gaines is appointed Chief Justice by Gov. Jim Hogg.
- August 25, 1945** A constitutional amendment increases the membership of the Texas Supreme Court from three to nine members. The Commission of Appeals is abolished, and its six members become Associate Justices of the Supreme Court. James P. Alexander continues as Chief Justice.
- July 26, 1958** In the state Democratic primary, incumbent Associate Justice Joe R. Greenhill narrowly defeats State District Judge Sarah T. Hughes in a race for the Supreme Court. Hughes is the first woman to run for election to the Court. In her later role as U.S. District Judge, she will administer the oath of office to President Lyndon B. Johnson on Air Force One following the assassination of President John F. Kennedy.
- July 16, 1974** The Supreme Court establishes the Texas Board of Legal Specialization to certify attorneys in legal specialty areas for the first time.
- July 25, 1974** The Supreme Court adopts a new Code of Judicial Conduct by promulgating a rule of court; the Code becomes effective on September 1.
- July 1977** Justice Donald B. Yarbrough resigns from the Supreme Court to avoid impeachment.
- June 25, 1982** Governor Bill Clements appoints State District Judge Ruby Kless Sondock to the Supreme Court; she is the first woman to serve as a regular (as opposed to special) Justice.

Source: James L. Haley, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, Appendix A, *Milestones in the Organization and Operation of the Texas Supreme Court* (2013).

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19th Annual John Hemphill Dinner Will Feature Keynote by Ambassador Ron Kirk, Memorial to Justice Jack Hightower, Pope Awards



Ambassador Kirk

AMBASSADOR RON KIRK, former United States Trade Representative, will be the keynote speaker at the 19th Annual John Hemphill Dinner on June 6.

Ambassador Kirk served as U.S. Trade Representative from 2009 until April 2013. As a member of President Obama's Cabinet, he was the President's principal trade advisor, negotiator, and spokesperson on trade issues. He was the first African American to hold that post.

A native Texan, Ambassador Kirk had a distinguished career in local and state government before being appointed U.S. Trade Representative. He served two terms as the first African-American mayor of Dallas, and prior to that he served as Texas Secretary of State under Governor Ann Richards. In addition, Ambassador Kirk has practiced law as a partner in the international law firm Vinson & Elkins, LLP, and was a partner at Gardere Wynne Sewell in Dallas.

Since leaving his Cabinet post last spring, Ambassador Kirk has served as Senior Of Counsel in Gibson, Dunn & Crutcher's Dallas and Washington, D.C. offices.

The Hemphill Dinner program will also include a memorial to the late Justice Jack Hightower by Justice Jeff Brown, who was a briefing attorney for Justice Hightower, and the presentation of the Chief Justice Jack Pope Professionalism Awards.

This year's dinner, which is the Society's main fund-raising event, will be held on Friday, June 6, at the Austin Four Seasons Hotel. For ticket and other program information, visit the Society's website at www.texascourthistory.org, or email tschs@sbcglobal.net.



Justice Hightower

19th Annual John Hemphill Dinner

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“Murder and Mayhem” Program Earns High Marks at the Texas State Historical Association’s 2014 Annual Meeting

Story and photos by David A. Furlow

THE TEXAS SUPREME COURT HISTORICAL SOCIETY’S “Murder and Mayhem on the Texas Supreme Court” session was one of the most widely-attended of the forty-two programs at the Texas State Historical Association’s 118th Annual Meeting in early March. Fifty-seven lawyers, judges, historians, and TSHA members filled the Wyndham San Antonio Riverwalk’s Executive Salon 4, reflecting an exceptionally high level of interest in a Friday afternoon session focusing on Texas legal history.



Panel moderator and Society President Doug Alexander welcomed TSHA members to the Society’s “Murder and Mayhem on the Texas Supreme Court” session and introduced the two speakers.



A large audience crowded into Executive Salon 4 to hear the Society’s speakers describe some of the more macabre episodes in the Texas Supreme Court’s history.

The session began when Society President Doug Alexander introduced the session’s speakers as two scholars well-qualified to bring to life spectacularly dramatic episodes of Texas history. He explained that the Society sponsored the program as part of its continuing mission of collecting and sharing research, photographs, and artifacts related to Texas’s unique judicial history.

Gary Lavergne, Director of Admissions Research and Policy Analysis in the Office of Admissions at the University of Texas at Austin, then stepped to the rostrum. Author of the award-winning *Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice*, Lavergne spoke about the lives of a Texas judge and his wife cut tragically short by the mental illness of their own son.

In “Family Matters: The Shocking Death of Justice William Pierson,” Lavergne described the tragic deaths of Texas Supreme Court Justice William Pierson and his wife Lena in Austin in April 1935 at the hands of their twenty-one



Gary Lavergne described how the Texas justice system dealt with the decades-long case that arose from the murder of Justice William Pierson and his wife in 1935.



Judge Mark Davidson lamented the election of a Justice with a seemingly familiar name.

man whose legacy included a series of unique legal precedents, including a criminal conviction, a long prison sentence, a flight to the island of Grenada to avoid justice, the pursuit of a medical degree among swaying palm trees, and a perp-walk into a Caribbean airport in the company of Texas Rangers who borrowed H. Ross Perot's personal jet to return the Texas Supreme Court's breaking-bad justice. Judge Davidson will share this cautionary tale of sleaze, election politics, and the long arm of the law in the *Journal's* Autumn 2014 issue.

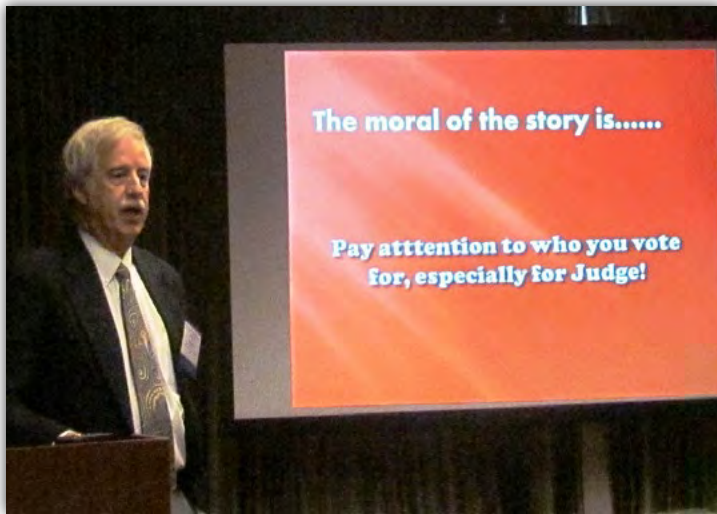
In his role as the session's commentator, former Society Executive Director Bill Pugsley began by asking what Howard Pierson's two trials suggested about the insanity defense in Texas. He focused on whether Howard was really insane or was simply an impatient young man with ample financial resources who got away with murder after killing his parents to gain an inheritance.

year-old son Howard Pierson. Using his own research and a cache of Justice Pierson's personal correspondence recently located by Texas Supreme Court Archivist Tiffany Shropshire, he recounted how Howard Pierson gunned down his parents, apparently while suffering from the delusion that they intended to thwart his efforts to save the world from epidemic disease.

Lavergne then described two widely-publicized court proceedings, decades apart, in which some of Texas's most prominent attorneys represented Howard Pierson in cases that stemmed from the Pierson murders. He also told the stories of Howard's two escapes from custody and his recapture many years later. Lavergne has agreed to present his research in the *Journal's* Autumn 2014 issue.

Mark Davidson, a well-respected Texas historian and the former judge of Harris County's Eleventh Judicial District, then presented his paper and PowerPoint, "Election Hustle: The Flimflam, Fraud, and Flight of Justice Donald B. Yarbrough." Using two of *Austin American-Statesman* artist Ben Sargent's best-known political cartoons as props, Judge Davidson focused on the absurd consequences of the 1976 judicial election. In that election, many Texas voters confused a third-rate, Bible-thumping con-man seeking the state's highest judicial office with Donald Howard Yarborough, a liberal, reform-minded Democrat who sought election as governor in 1962, 1964, and 1968. As Judge Davidson went on to explain, the reasons for that confusion were complex.

Judge Davidson traced the strange career of Justice Yarbrough, who hastily ended his benchmark career six months into his term in the face of impeachment proceedings and an indictment for aggravated felony perjury. It was a singular tale of a



Commentator Bill Pugsley drew an important lesson from Judge Davidson's tale of Don Yarbrough's travails and trials.

Pugsley shared a few salutary observations about Judge Davidson's story of Donald B. Yarbrough's unique legal legacy. Pugsley asked how voters could have elected such a man to one of the state's most powerful judicial offices. He noted Yarbrough's successful stealth campaign to win a seat on the Texas Supreme Court by stoking resentment against the State Bar and Texas's mainstream media.

Pugsley contrasted Yarbrough's early political success with his failed efforts to hide fraudulent past practices. He described an ill-conceived plan to kill a material witness that backfired when the assassin proved to be a wire-wearing undercover officer; the cheat-and-retreat legal strategy that mobilized the judicial, law enforcement, and business communities

to unite in demanding Yarbrough's resignation, prosecution, conviction, and extradition; and the fate that granted Yarbrough a bench in a Texas prison less prestigious than the one he briefly occupied on the Supreme Court of Texas.

The audience responded with sustained applause and expressions of gratitude that afternoon and the next day. The program raised the Society's profile as a TSHA sponsor before more than seven hundred TSHA members and lovers of Texas history. Those who watched the Society's speakers left the room with nearly fifty copies of the Spring 2014 *Journal* issue, thanks to President Doug Alexander, Executive Director Pat Nester, and former President Lynne Liberato. Their decision to promote the Society's mission made the *Journal's* wide-ranging historical articles available to all who attended the session.

That same day, TSHA's leadership honored contributions to excellence in historical research, teaching, and scholarship at the Fellows Luncheon and Awards Presentation. Chief Historian Randolph "Mike" Campbell, Ph.D., presented University of Oklahoma scholar Megan Benson with TSHA's prestigious H. Bailey Carroll Award to commemorate her scholarly paper, "Railroads, Water Rights, and the Long Reach of *W.A. East v. Houston and Texas Central Railroad Company* (1904)" as the *Southwestern Historical Journal's* Best Article of the Year. Benson's article analyzed the historical context of the Texas Supreme Court's rulings about groundwater law in *Houston & Texas Central Railroad Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904). Anyone interested in reading the article can find it through the Project Muse website at <http://texascourthistory.org/documents/116.3.benson.pdf>.



TSHA recognized Megan Benson with its prestigious H. Bailey Carroll Award.

The *East* opinion continues to influence Texas law to this day, for the Court revisited and clarified it two years ago in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012). In 2010, Bill Pugsley recruited Benson to write what later evolved into her award-winning paper. She first presented it during the Society's 2011 TSHA session alongside now-Chief Justice Nathan Hecht and Society Trustee Dylan Drummond.

The Society will present its next joint session analyzing the history of the Texas Supreme Court and its jurisprudence at TSHA's 119th Annual Meeting in Corpus Christi in March 2015.

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Former Chief Justice Wallace Jefferson Is Named 2014 Pope Professionalism Award Recipient



THE TEXAS CENTER FOR LEGAL ETHICS (TCLE) announced in April that former Texas Supreme Court Chief Justice Wallace Jefferson has been named the 2014 recipient of the Chief Justice Jack Pope Professionalism Award.

TCLE annually honors a judge or attorney who personifies the highest standards of legal professionalism and integrity. The Pope Award is named after one of TCLE's founders, former Texas Supreme Court Chief Justice Jack Pope, who was the first individual to receive the award in 2009.

Chief Justice Jefferson was appointed to the Texas Supreme Court in 2001 by Governor Rick Perry before being elevated to Chief Justice in 2004. He worked to increase the openness of the judiciary, both technologically and substantively, and to improve access to justice for the poor while serving as a strong advocate for the judicial branch before the Texas Legislature.

During his tenure, Chief Justice Jefferson presided over many significant changes, including increasing the Court's transparency by allowing cameras in the courtroom and making oral arguments available online. Former Chief Justice Tom Phillips recently described Chief Justice Jefferson as "a fantastic chief justice in every way" and "flawless in presiding over the official functions of the court."

"Perhaps the most remarkable thing about Wallace Jefferson is not his numerous accomplishments—and there were many while he served as Chief Justice—it's that he was able to do so much while maintaining the respect of his colleagues and the state's lawyers," says TCLE Executive Director Jonathan Smaby. "The Chief Justice must necessarily deal with controversy and conflict, but Chief Justice Jefferson is widely liked and admired because he always performed his duties with dignity, patience, and a sense of humor. Our state's lawyers and judges would do well to emulate him."

The Pope Awards will be presented by current Texas Supreme Court Chief Justice Nathan Hecht at the Annual Texas Supreme Court Historical Society Dinner on June 6 in Austin.

Founded in 1989 by three retired Texas Supreme Court Chief Justices, TCLE promotes the values contained in the Texas Lawyer's Creed and serves as a leading resource for legal ethics and professionalism in Texas. For more information, visit the Texas Center for Legal Ethics website at <http://www.legalethicstexas.com>.

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Richard Orsinger Doubly Honored: State Bar College Franklin Jones Best CLE Article Award and Texas Bar Foundation Price Memorial Award

SOCIETY BOARD MEMBER RICHARD R. ORSINGER was named the recipient of two prestigious awards this spring, one for an outstanding legal history article and the other for his distinguished record of service.

The College of the State Bar of Texas named Orsinger winner of the 2013 Franklin Jones Continuing Legal Education Article Award for the paper he presented at the Society-cosponsored Symposium on the History of Texas Supreme Court Jurisprudence in April 2013. The paper, titled “170 Years of Contract Law in Texas,” was later edited and published in two parts in the *TSCHS Journal* (see links below).

The Franklin Jones CLE Article Award is presented annually to the College member who authors the best CLE article in the previous year. The award is named in honor of Franklin Jones, Jr. of Marshall, Texas, a co-founding father of the College. This is the second time Orsinger has received the award. His two-part paper entitled “Practicing Family Law in a Depressed Economy” earned him the honor as best CLE article of 2009.

Also this spring, the Texas Bar Foundation announced that Orsinger was selected to receive the Foundation’s prestigious Dan Rugeley Price Memorial Award for 2014.

Orsinger was chosen for the award because of his “demonstrated dedication to the Bar and service to the public with the same commitment, dedication and zeal which defined Dan Price’s life and work,” according to the Texas Bar Foundation. “He exemplifies the qualities of an accomplished legal writer and researcher, a talented and dedicated practicing lawyer, a servant of the profession as a volunteer and an advocate on its behalf.”

Orsinger will receive the award at the Foundation’s awards dinner held during the State Bar’s annual meeting on June 27 at the Hilton Austin. As part of the recognition, the Bar Foundation will make a donation in his name to Texas Southern University’s Thurgood Marshall School of Law Internal Scholarship Program.

A prolific writer and speaker, Orsinger has written and presented more than 225 CLE articles. He also authored an authoritative 900-page treatise on Texas civil appellate procedure, and was Chief Editor of a two-volume work on the use of experts in family law litigation, as well as the State Bar of Texas’s *Texas Supreme Court Practice Manual*.

Orsinger is a name partner and head of the San Antonio office of the family law firm McCurley Orsinger McCurley Nelson & Downing, L.L.P.



The 2013 Jones award-winning paper on the history of Texas contract law is available in its entirety at <http://www.orsinger.com/PDFFiles/170-Years-of-Texas-Contract-Law.pdf> .

The two excerpted versions are available in the Fall 2013 and Winter 2013 issues of the *Journal of the Texas Supreme Court Historical Society*, published on the Society's website at http://www.texascourthistory.org/documents/TSCHS_Journal_Fall_2013.pdf and http://www.texascourthistory.org/documents/TSCHS_Journal_Winter_2013.pdf.

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Warren Harris Will Receive State Bar's 2014 Gene Cavin Award



WARREN W. HARRIS has been selected as the 2014 recipient of the State Bar of Texas's prestigious Gene Cavin Award for Excellence in Continuing Legal Education.

Harris, a partner with Bracewell & Giuliani LLP in Houston, is Immediate Past-President of the Texas Supreme Court Historical Society. He has also served as Chair of the Texas Bar Foundation Fellows, the Houston Volunteer Lawyers Program, the State Bar Appellate Section, and the Houston Bar Association Appellate Practice Section. A frequent lecturer, Harris has spoken at more than one hundred legal education seminars.

Established in 1989, the Gene Cavin Award recognizes long-term participation in State Bar CLE seminars and publications. The award is named for the founder of the Professional Development Program who brought the program to international prominence during his service from 1964 to 1987. The winner is selected each year by a vote of all of the past recipients. Warren will be presented with the award by David Keltner and Lynne Liberato at the Advanced Civil Appellate Course in September.

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In Memoriam: J. Chrys Dougherty, III

May 3, 1915—February 20, 2014

PROMINENT ATTORNEY AND TSCHS MEMBER
J. Chrys Dougherty, III died in Austin in February after an extended illness. Dougherty, cofounder of Graves, Dougherty, Hearon & Moody, served on the Society's Board of Trustees from 2000 until October 2012.

In November 1999, former Chief Justice Joe R. Greenhill paid tribute to Dougherty in a remarkable speech he gave at the State Law Library to honor the establishment of an honorary chair in Dougherty's name. Chief Justice Greenhill, a close personal friend and an early partner at Graves, Dougherty, told Chrys Dougherty's story as no one else could tell it. We reproduce the speech—now part of the Society's historical archives—to give TSCHS members a greater understanding of their late colleague's life and contributions.



State Law Library Honor Roll Presentation of Chairs and the Honorees in the Supreme Court of Texas November 18, 1999

Remarks of Joe R. Greenhill

J. Chrys Dougherty

The outstanding Austin firm of Graves, Dougherty, Hearon & Moody has given this chair to honor Chrys Dougherty. His daughter, Molly, is here along with many lawyers of his firm.

Chrys and I were at The University of Texas at about the same time. As you would expect, he was a Phi Beta Kappa. He then went to Harvard Law School. As I will mention, we both worked on major cases in the Attorney General's department, where he as a Special Assistant Attorney General. Later we were law partners for seven years.

Chrys's name has always intrigued me. It's John Chrysostom Dougherty. I am an Episcopalian, and one of the most beautiful prayers in the Service of Morning Prayer is headed "A Prayer of St. Chrysostom." Saint John Chrysostom was born in Antioch in 347. He was called "golden mouthed" because of his eloquence. Our Chrys is eloquent in speech and in deed.

Chrys Dougherty, Sr., a fine lawyer in Beeville, died. So did his brother, J. Chrys, Jr. So our Chrys and his mother decided that, to perpetuate the family name, his name should be changed to John Chrysostom Dougherty, III. That was done in the district court in Beeville in 1932. Members of the family, both Roman Catholic and Presbyterian, were deeply religious, as Chrys is. The name of St. John Chrysostom was well chosen. A large part of Chrys's life has been to assist others in need, particularly in securing legal help for those who need, but cannot afford, legal counsel. I call him "John Chrysostom" about as much as I call him "Chrys."

During the period of 1947 to 1950, when Price Daniel was Attorney General, there were two major cases in that office: (1) *U.S.A. v. Texas*, known as the "Tidelands Case," and (2) *Sweatt v. Painter*, a segregation case involving the admission of a Black to the University of Texas Law School.

Chrys was an expert in international law, was fluent in Spanish, and was a very bright scholar. The Attorney General hired Chrys as a Special Assistant, along with Roscoe Pound, Joseph W. Bingham, Manley Hudson, and James W. Moore, to work on that case. The question was the seaward boundary of Texas. We claimed out to 3 marine leagues or 10.5 miles. The U.S. said that like other states, our limits extended only 3 miles to sea—the common law boundary.

Texas had unique boundaries. We obtained our independence from Mexico, and our Spanish and Mexican boundaries were unique. When Texas joined the Union as a State, it is my understanding that our boundaries were recognized. Anyway, suit was brought originally in the U.S. Supreme Court over our boundaries. When you think of all the oil and marine life in the 7 1/2 mile difference in boundaries, you recognize some of the importance of the case.

Chrys, because of his familiarity with Spanish, went to Spain to obtain a correct interpretation of some basic Spanish law, the Siete Partidas.

Meanwhile, however, Marion Sweatt, represented by Thurgood Marshall, demanded admission to the law school. Lucky me—I was assigned to that case. I helped try it here in Austin with Price Daniel; and I argued it, about two hours to the side, in the U.S. Supreme Court against Thurgood Marshall, after a brief introduction by Price Daniel.

Within the same week or ten days, Chrys was in Washington to argue the *Tidelands* case in the U.S. Supreme Court, and I was there to argue *Sweatt*. His wife, Miggie (Judge Graves' daughter) and my wife, Martha, were in Washington for the period for the two arguments.

Argument in the U.S. Supreme Court consumes the advocate. But both Chrys and I remember Justice Douglas. There is a sort of a jury box in that courtroom. In it were several beautiful young ladies: Miggie Dougherty, Jean Daniel, Martha Greenhill, and others. Douglas couldn't keep his eyes off of them. You argued to the side of his head. In *Sweatt*, I think he'd made up his mind and was not interested in my argument. Most of the time, I saw the back of his head, or the top of his head as he wrote letters or notes. Getting the side of his head was not all bad. Justice Frankfurter, who had been a Harvard professor, asked both of us lots of interesting questions. He did it in a cheerful fashion. That helped a lot.

About this time, Judge Ireland Graves and Chrys formed the firm of Graves & Dougherty. It is my understanding that Chrys recommended me to Judge Graves for association with them. I got a call from Judge Graves to come visit with him. I hoped that it would lead to work with him and Chrys. That was where I wanted

to be. Judge Graves asked if I would like to work there. I said that I sure would. I didn't ask anything about pay, or the amount of pay. That was not important. Getting to work with Judge Graves and Chrys was most important.

It was almost a month after I went to work when I went to Judge Graves to inquire about the terms of employment. Judge Graves said it was a partnership—equal partnership for the three of us. That really wasn't fair to Judge Graves and maybe to Chrys. Judge Graves was the rainmaker, Chairman of the Board of the Austin National Bank. So I was a partner with Chrys and Judge Graves for seven great years. We took in Tom Gee and Bob Hearon, both great guys and brilliant scholars, and later a few others of similar caliber. It was a wonderful experience.

Then Price Daniel appointed me to the Supreme Court, and I had to run for election, or reelection. Chrys Dougherty was my campaign manager. We beat Sarah T. Hughes, who ran against me, but not by much. Judge Graves contributed very generously to my campaign, and Chrys put in an awful lot of time. Chrys had a lot of bumper stickers made for the campaign, and Chrys does everything right. He got the best "Greenhill" bumper stickers, the highest quality paper and the best glue. Our friends complained for months that they couldn't get the blasted things off of their bumpers.

Chrys, of course, has gone on to be a leader in many worthwhile areas. He is a renowned expert in state and federal taxation, estate planning, and international law. Your printed programs list his honors. He has been president of the State Bar of Texas and of the Travis County Bar. More recently, he has been honored by the local, the state, and the American Bar Association for his successful pro bono programs for those who need them. The Texas Bar Foundation correctly honored him as the most outstanding lawyer of fifty years' practice. He is a member of the American Law Institute, the American College of Probate Counsel, a trustee of the University of Texas Law School Foundation, and a founder of "Lawyers Care," an organization to lend support to those in need of legal services who cannot afford them. A large part of Chrys's life has been given to help others who cannot help themselves.

Chrys, John Chrysostom Dougherty, we salute you.

—Marilyn P. Duncan

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The Court Takes a Historic Road Trip to Hillsboro



Justice Paul Green (second from left) speaks during the Supreme Court's historic visit to the Hill County Courthouse.

THIS PAST FEBRUARY, THE TEXAS SUPREME COURT made just its second visit to the picturesque Hill County Courthouse in Hillsboro, Texas to hear oral argument in two causes.

The Court had been constitutionally barred since the 1800s from hearing causes outside of Austin until Hill County native son Bob Bullock helped to pass an amendment lifting the restriction. In his remarks before oral argument was had, Chief Justice Hecht credited the late Lieutenant Governor not only with helping with the passage of the amendment itself, but with ensuring that funds were appropriated for the Court's travel. Chief Justice Hecht also credited another Hill County native, the late Chief Justice Robert Calvert. CJ Calvert served as a Justice on the Court in Place 3 from 1950 until 1961, when he was elected as Chief Justice and served in that position until his retirement in 1972.

The two cases in which the Court heard argument dealt with the surprisingly-controversial regulatory environment surrounding eyebrow threading, and a dispute concerning the clearing by a pipeline company of a grove of trees.

—Dylan O. Drummond

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SCOTX Takes SXSW!



(left to right) Steve McConnico, Larry Waks, former Chief Justice Wallace Jefferson.

IN WHAT WAS SURELY THE FIRST INSTANCE of a Texas Supreme Court Justice serving on a panel at the South by Southwest festival in Austin, former Chief Justice Wallace Jefferson made a presentation during the Interactive portion of the legendary event this past March.

Chief Justice Jefferson presented alongside Austin attorneys Steve McConnico of Scott, Douglass & McConnico LLP and Larry Waks of Jackson Walker LLP on the ethical issues entrepreneurial entertainment lawyers may face. While Waks moderated the panel, McConnico related various ethical conundrums that entertainment attorneys routinely face, particularly when they serve more than one role with an artist or a band. Chief Justice Jefferson provided insight as to what the Texas Disciplinary Rules of Professional Conduct provide, and how lawyers may comply with their ethical duties in a field like entertainment that is rapidly developing.

—Dylan O. Drummond

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Society President Sports Gnarly Board



THE MAY ISSUE OF THE *TEXAS BAR JOURNAL* featured a story on our own Society president, Doug Alexander, and his heretofore relatively unknown passion for skateboarding!

Alexander explained that his interest in skateboarding on a particularly large board (taller than some of his opposing counsel!) grew out of surfing while growing up in his native Santa Barbara, California. He even used his skateboard to commute to his downtown Austin office for several years.

No word yet whether Alexander plans to enter any of the skateboarding events at this summer's X Games in Austin!

—Dylan O. Drummond

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Chief Justice Jack Pope Celebrates His 101st Birthday

ON APRIL 18, 2014, retired Texas Supreme Court Chief Justice Andrew Jackson “Jack” Pope, Jr. celebrated his 101st birthday at his home in West Lake Hills, Austin. Born to Dr. Andrew Jackson Pope, Sr., a physician, and Ruth Adelia Taylor, a Nebraska native, on April 18, 1913 in Abilene, Texas, Jack Pope has worn many hats over the past century: attorney, Judge of the 94th Judicial District, Justice of the 4th Court of Appeals, Justice of the Texas Supreme Court (Place 2), Chief Justice of the Texas Supreme Court, legal scholar, and role model for healthful living.



After eating a hearty lunch at the Austin Headliners Club, Chief Justice Pope enjoys a birthday card and the company of Larry McNeill (seated, right), Molly Martin, and Terry Martin.

The author of more than 1,000 court opinions and hundreds of articles and speeches, Chief Justice Pope had a major impact on the state’s body of laws and judicial system. The Texas Supreme Court Historical Society recently published some of his most important writings in a 450-page book entitled *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas*. The book is both a tribute to Chief Justice Pope and a major addition to the legal history of Texas.

Not all of Chief Justice Pope’s writings have dealt with law and the judiciary. In 2011 he self-published a book called *My Little United Nations: A Team Approach to Growing Older and Wiser and Having Fun Along the Way*, a collection of vignettes and advice on living a healthy and productive life in old age. Having served in the Texas judiciary for more than 38 continuous years (1946–1985), Pope holds the record of having the longest continuous tenure in the Texas court system of anyone who has ever served on the Texas Supreme Court. He is also the oldest living former chief justice of any supreme court of any state in United States history.



Among those who visited the judge at home on his birthday was Marilyn Duncan, editor of *Common Law Judge* and a devoted friend.

During the week of his birthday, several friends and colleagues joined the judge in celebrating another year of friendship and service. On Tuesday, April 15, he was treated to lunch at the Austin Headliners Club by Larry McNeill, Terry and Molly Martin, and Marilyn Duncan, and on April 18, his birthday, he received several surprise visits at his home.

Members of the Society interested in learning more about Judge Pope's life and contributions to judicial history can purchase *Common Law Judge* for the special discount price of \$20.00 (www.texascourthistory.org/tschs/pope-book-order-form/).

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Calendar of Events

Society-sponsored events

June 6

**19th Annual John Hemphill Dinner:
Ambassador Ron Kirk, Keynote Speaker**

Four Seasons Hotel, Austin

6:30–9:30 p.m.

(See story, p. 56)

June 7

Annual Briefing Attorneys' Breakfast

UT Austin Alumni Center

9:00 a.m.

June 26

State Bar Annual Meeting, James Haley Presentation

“No Rest for the Weary: The Texas Court Enters the 20th Century.”

Austin Convention Center, Level 4, Room 18A

1:30 p.m.

June 27

State Bar Annual Meeting, Re-enactment of *Sweatt v. Painter*

Sponsored by the TSCHS Fellows

Old Supreme Court Courtroom, Texas State Capitol

2:00 p.m.

(See story, p. 5)

Other events of interest

Ends June 22

On the Run: Currency, Credit & Capitals of the Republic of Texas

Texas Capitol Visitors Center, Austin, Texas

<http://www.tspb.state.tx.us/CVC/exhibits/new.html>

Ends August 22

Magna Carta: Royal Power Limited

Houston Museum of Natural Science, Houston, Texas

http://www.hmns.org/index.php?option=com_content&view=article&id=652&Itemid=684

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2013–2014 Membership Upgrades

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

HEMPHILL FELLOWS

David J. Beck
Joseph D. Jamail, Jr.

GREENHILL FELLOWS

David A. Furlow and Lisa Pennington
Thomas S. Leatherbury
Ben L. Mesches
Hon. Thomas Phillips, Chief Justice (Ret.)
Charles R. Watson

TRUSTEE

William W. Ogden

CONTRIBUTING LEVEL

James P. Sharp, Jr.

PATRON

Justice Jeff Brown

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2013–2014 New Member List

The Society has added 45 new members since June 1, 2013.

GREENHILL FELLOWS

Marianne M. Auld
S. Jack Balagia
E. Leon Carter
Harry L. Gillam, Jr.
Nick C. Nickols
Leslie R. Robnett
Hon. Dale Wainwright, Justice (Ret.)
Dick Watt

TRUSTEE LEVEL

Joe Garza
Marc Tabolsky
Cynthia Timms

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Jane Lipscomb Stone
Gilbert Vara, Jr.
Anne Wynne

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Audrey Andrews
Susan Ayers
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Josh Blackman
Jennifer Cafferty
Chad Flores
Yvonne Y. Ho
Anne Johnson
Margaret Lyle
Eric E. Munoz
Jimmy Eric Pardue
Lisa Pennington
Karen S. Precella
Kenneth Pybus
Scott E. Rozzell
Patti Gearhart Turner
Glenn Williams
Michael J. Willson
Michael A. Yanof

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Membership Benefits & Application

Hemphill Fellow - \$5,000

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

Greenhill Fellow - \$2,500

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

Trustee Membership - \$1,000

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

Patron Membership - \$500

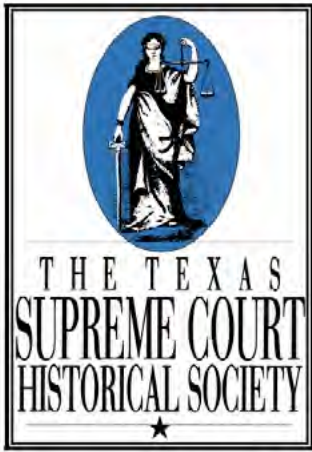
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Contributing Membership - \$100

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

Regular Membership - \$50

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



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

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