



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2013 Vol. 3, No. 2 General Editor Lynne Liberato Executive Editor David Furlow

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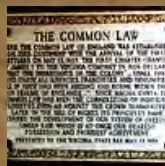


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Chief Justice Jefferson

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### A Brief History of the Journal of the Texas Supreme Court Historical Society

By Lynne Liberato  
When I became the Society's president, I knew that producing a newsletter was critical to our development as an organization.  
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Lynne Liberato

### Journal Indexes

These indexes of past *Journal* issues, arranged by issue and by author, are a great resource for finding articles.  
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### Significant Dates in the History of the Supreme Court of the Republic of Texas

December was an important month in the history of the Republic of Texas Supreme Court.  
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## News & Announcements

### Supreme Court Investiture Ceremony

U.S. Supreme Court Justice Antonin Scalia recently administered the oath of office to Texas Supreme Court Chief Justice Nathan Hecht and Justice Jeff Brown. [Read more...](#)



Justice Scalia at the podium

### Chief Justice Jack Pope Shares Advance Copies of New Book with Friends and Colleagues

The Texas Law Center was the site of a celebration of the former Chief Justice's new book.  
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Chief Justice Pope signs his book

### Society Takes Over Maintenance of the Supreme Court's Alumni Directory

The Society has offered to assume maintenance of the Court's directory in order to alleviate the administrative burden its upkeep imposes on Court staff.  
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### Supreme Court History Book Ends Its First Year with a Holiday Sales Push

The Society is running a series of ads to reach the larger audience of Texas attorneys who might not know about the book or the Society.  
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James Haley's book

### Society's TSHA Joint Session Goes to the Dark Side of Court History

The theme of the upcoming Society-sponsored session at the TSHA Annual Meeting is guaranteed to generate more than passing interest in the Supreme Court's unique history. [Read more...](#)

### Chief Justice Pope Donates Law Books to New UNT-Dallas Law Library

The former Chief Justice has donated his personal collection of *South Western Reporters* and more to the new public law school at the University of North Texas in Dallas. [Read more...](#)



Chief Justice Pope

## Membership & More

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### Join the Society



*Douglas W. Alexander*

## Celebrating Our *Common Law Judge*

Friday, November 22, 2013 was a special day for the Society, as beloved former **Chief Justice Jack Pope**, 100 years old, signed copies of his book *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas*. A special group of honored guests attended the book-signing ceremony, including **Chief Justice Nathan Hecht; Justices Paul Green, Phil Johnson, Jeffrey Boyd, John Devine, and Jeff Brown;** and former **Chief Justice Wallace Jefferson**. This is the third in a series of books sponsored by the Society, which also includes *The Texas Supreme Court: A Narrative History, 1836–1986* and *The Laws of Slavery in Texas*.

Special thanks are owed a number of important people for helping to make this book a reality.

**Marilyn Duncan**, who serves as Consulting Editor for the Society, edited *Common Law Judge*, and authored the book's Introduction. Marilyn was responsible for the herculean task of taking Justice Pope's massive collection of writings and transforming them into a well-organized and highly readable 400-plus-page volume. She did a masterful job.

Respected historian **H. W. Brands**, who had interviewed Judge Pope for an oral history project years ago, authored the Foreword to the book, observing that, "Readers who have met Judge Pope . . . will know that he is not a towering figure physically; but they will not fail, on finishing this book, to recognize that he is a towering figure intellectually and professionally, and well worth our gratitude and study."

Past Society President and Pope Book Project Chair **Larry McNeill** authored the Preface and Acknowledgements section of the book. But Larry himself is owed the highest of acknowledgements for his tireless efforts in bringing not only this book, but also the previous books published by the Society, to light. With the publication of *Common Law Judge*, Larry is now relieved of his duties as Chair of the Society's Book Projects Committee. With tremendous gratitude and affection we wish him well, but we will also miss him as he spends increasing amounts of his time in East Texas.

A note of thanks also goes to former **Justice Craig Enoch**, who both during and after his term as Society President led the fund-raising effort for the Pope Book Project. The Center for Legal Ethics and 95 individuals, including all members of our Board, made generous contributions.

Society Trustee and respected legal historian **William J. Chriss** authored the biography of Justice Pope, which appears at the end of the book. Bill grounded his biography on, among other sources, a series of oral-history interviews of Justice Pope that he conducted in 2008. Bill traces Justice Pope's remarkable legal career all the way

from judging his brother in a elementary school debate at six years of age (he ruled against his brother) through his retirement from the Texas Supreme Court in 1985 — with the longest continuous tenure in the Texas court system of anyone who has ever served on the Supreme Court.

*Common Law Judge* will be available for purchase by Members of the Society and the public after the first of the year. Stay tuned—this is a remarkable book. U.S. Court of Appeals Fifth Circuit Judge Thomas M. Reavley put it well in saying: “Jack Pope remains at the top of my list of great judges for many reasons, not the least of which was his ability to write powerfully about the law, the judiciary, and professional ethics.... I hope every attorney in Texas will read this book.”

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

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# Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston



**T**he Fellows are excited to be working on their second reenactment of a historic case. The reenactment will be presented on June 27, 2014 in Austin in conjunction with the State Bar of Texas at its 2014 annual meeting. To celebrate the 50th anniversary of the Civil Rights Act, the Fellows will reenact the United States Supreme Court argument in *Sweatt v. Painter*, 339 U.S. 629 (1950).

The case involves the denial of Heman Marion Sweatt's application for admission to the University of Texas Law School. The Supreme Court, in a landmark ruling, held that the law school's admissions scheme violated the Equal Protection Clause of the Fourteenth Amendment. Arguments in the case were originally presented by Thurgood Marshall on behalf of Sweatt and Joe Greenhill on behalf of the law school.

We have confirmed several of the speakers for the event. Former Chief Justice Tom Phillips will present a historical perspective of the case before the reenactment. Former Justice Dale Wainwright will argue for Sweatt. Justice Paul Green, the Society's liaison to the Texas Supreme Court, will lead a distinguished panel of judges. Other roles will be announced soon.

We are also making plans for the second annual Fellows Dinner next spring. This dinner is exclusively for the Fellows, and members of the Court will be invited. Please watch for details on the dinner.

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

## FELLOWS OF THE SOCIETY

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

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

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

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

\*Charter Fellow      [Return to Journal Index](#)

# 170 Years of Texas Contract Law — Part 2: *The Texas Experience*

By **Richard R. Orsinger**

Abridged for the *TSCHS Journal* by Dylan O. Drummond

*Ed. note:* We are pleased to present the second installment of an abridged version of Richard Orsinger's excellent paper on the history of Texas contract law. Richard presented the paper at the April 2013 History of Texas Supreme Court Jurisprudence Symposium, co-sponsored by the Texas Supreme Court Historical Society and the State Bar of Texas. The article published here is excerpted from his original paper, with ellipses reflecting the omitted material. The full unabridged version is available at <http://www.orsinger.com/PDFFiles/170-Years-of-Texas-Contract-Law.pdf>.

## **T**HE REPUBLIC OF TEXAS CONTINUED SPANISH PLEADING PRACTICE.

Texas took its pleading practices from Spanish law, where the emphasis was on pleading facts and not the category of claim involved. The Supreme Court of the Republic of Texas stated that pleadings are intended to be “the statement in a legal and logical manner of the facts which constitute the plaintiff’s cause of action, or the defendant’s ground of defense, or the written statement of those facts, intended to be relied on, as the support or defense of the party in evidence.” *Mims v. Mitchell*, 1 Tex. 443, 447 (1846). Chief Justice Hemphill phrased it as “the unmeaning fictions of the common law are abrogated, and facts only are to be alleged in the pleadings.” *Garrett v. Gaines*, 6 Tex. 435, 445 (1851).

In *Pridgin v. Strickland*, 8 Tex. 427, 434 (1852), Justice Abner Lipscomb wrote, “neither the action of trover nor detinue is known to our forum, and that our petition, in its structure, is more analogous to a bill in chancery or to a special action on the case than to any other forms known in other systems of jurisprudence.”

In *Fowler v. Poor*, Dallah 401 (1841), the Supreme Court concluded that in adopting the common law, the Legislature expressly excluded the common-law system of pleading. *Accord, Whiting v. Turley*, Dallah 453 (1842); *Bradley v. McCrabb*, Dallah 504 (Tex. 1843).

Notwithstanding Texas’s more flexible approach to pleading, Texas law necessarily recognized some claims as valid causes of action and refused to recognize others that were not. The recognized claims were largely inherited from forms of action under English law. In present-day Texas, the categories of claims are criminal, tort, contract, equitable, and statutory. Those are much broader categories than existed under the writ system and under traditional forms of action in English law. But the problem still persists that the distinctions between these categories can blur in certain cases, with consequences for the remedy available.

## **The Roots of Texas Contract Law: Spanish, Mexican, Louisianan, and Common Law.**

Prior to independence from Mexico, the applicable law in Texas was the *Siete Partidas*, and the *Novísima Recopilación*, but the most authoritative treatise on this law at the time was *Febrero Novísimo*. Peter L. Reich, *Siete Partidas in My Saddlebags: the Transmission of Hispanic Law from Antebellum Louisiana to Texas and California*, 22 TUL. EUR. & CIV. L.F. 79, 81 (2007) [hereinafter *Siete Partidas in My Saddlebags*].

Even after Texas established its independence, Spanish and Mexican law continued to determine the effect of conveyances of land titles and contracts made prior to independence, and—for a short period—the statute of limitations on contractual enforcement as well. *Compare McMullen v. Hodge*, 5 Tex. 34, 86–87 (1849), (holding that the new government of Texas had the power to negate Spanish and American land titles, but did not do so except where explicitly declared), *with Gautier v. Franklin*, 1 Tex. 732, 742 (1847) (describing various Spanish statutes of limitation and eventually adopting the Louisiana Supreme Court’s conclusion that a 10-year statute of limitation applied to private contracts). Texas courts later adopted Louisiana law to govern probate proceedings in Texas. *Pleasants v. Dunkin*, 47 Tex. 343, 355–56 (1877).

The meaning and effect of Spanish law were matters of law for a court to determine, not questions of fact for a jury. The practical necessity of this approach was later explained by Chief Justice Taney in *U.S. v. Turner*:

[I]f the Spanish laws prevailing in Louisiana before the cession to the United States were to be regarded as foreign laws, which the courts could not judicially notice, the titles to land in that State would become unstable and insecure; and their validity or invalidity would, in many instances, depend upon the varying opinions of witnesses, and the fluctuating verdicts of juries, deciding upon questions of law which they could not, from the nature of their pursuits and studies, be supposed to comprehend.

52 U.S. 663, 668 (1850).

The same considerations applied to Texas courts presiding over the litigation of Spanish and Mexican land titles. The Texas Supreme Court could not take judicial notice of evidence in other cases pertaining to a land title (even the same land title), but the Court could consider the evidence of Spanish law presented in the trial court and could also judicially notice Spanish law in force at the time of the events in question. *Dittmar v. Dignowity*, 78 Tex. 22, 26–27, 14 S.W. 268, 269 (1890).

A similar approach was taken by the Supreme Court of the Republic of Texas regarding Louisiana law, which was relevant because of Louisiana’s similar reliance on Spanish law. Texas’s Justices had access to Louisiana case law, and in some cases, Justices looked to Louisiana case law for guidance on the content and interpretation of treaties, Spanish law, Louisiana statutes, etc. The Texas Supreme Court sometimes informed itself of the details of Louisiana law without reliance on expert witnesses or other evidence of Louisiana law developed in a Texas trial court.

**The *Siete Partidas*, a/k/a *The Seven Parts of the Law*.** The *Siete Partidas* was a Spanish language compilation of the laws of the Kingdom of Castile and León, part of what is now the Kingdom of Spain. *Siete Partidas*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Siete\\_Partidas](http://en.wikipedia.org/wiki/Siete_Partidas) (last modified Feb. 20, 2013). Originally called *Libro de las Leyes (Book of Laws)*, the work came to be known by the number of its subdivisions (seven parts).

Traditional history holds that *Siete Partidas* was compiled from the mid-1250s to the mid-1260s by a commission of four jurists who were personally supervised by King Alphonso X. Previous efforts to standardize the law of the Kingdom of Castile and León were more in the nature of promulgating standardized local laws, somewhat akin to America's present-day uniform state laws. *Siete Partidas* was more in the nature of a superior law, not unlike our present-day preemptive Federal legislation.

*Siete Partidas* had legal force until Texas adopted the common law of England as its criminal law and as to juries and evidence in 1836, and adopted the common law of England in civil proceedings generally in 1840. *McMullen v. Hodge*, 5 Tex. 34, 75 (1849) (“The old laws continued to be administered through the instrumentality of the old officers until the establishment of a new system, and until changed were supposed to exert the same binding influence in the protection of persons and property that had been claimed for them before the relations between Texas and the other parts of Mexico had been changed. In fact the body of our jurisprudence remained the same until the introduction of the common law by the act of Congress in 1840”); see Ford W. Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEX. L. REV. 801, 808 (June 1950).



Spanish church in Chimayo, New Mexico, in December  
Photo by David A. Furlow

The *Siete Partidas* continued to be the applicable law in Texas after 1840 with regard to contracts formed, land titles, and mineral rights granted.

In *Edwards v. Peoples*, Associate Justice John T. Mills applied Spanish law to resolve a suit to set aside the sale of a diseased slave, in an action called a “redhibitory action.” Dallam 359, 360-61 (1840). Under Spanish law, a redhibitory action was a suit to nullify a sale, or refund all or part of the sales price, because defects in the article sold made the item unusable. The Court cited two Louisiana Supreme Court cases, controlled by a Louisiana statute, as authority for the rule that a redhibitory action would not lie if the vendor “proclaims the defect of the thing sold,” or if the defect was so apparent that “the vendee would be necessarily compelled to observe the same.” *Id.* at 360.

In *Edwards*, Justice Mills cited the Moreau-Lislet/Carleton translation of the *Siete Partidas* for the rule that, where the vendor was not aware of the defect, the buyers’ remedy was a reduction in sales price. See *Siete Partidas in My Saddlebags*, 22 TUL. EUR. & CIV. L.F. at 82. Justice Mills pointed out that, under Spanish law, the judge determines damages; but under the jury system in Texas, the jury decides, and “[t]his court will never interfere with the verdict of a jury unless manifestly contrary to law and evidence.” *Id.* at 360.

In *Selkirk v. Betts & Co.*, the law of Spain was applied to promissory notes executed in 1839 (before English common law was adopted for civil matters in Texas). Dallam 471, 472 (1842).

In *Garrett v. Gaines*, the Court applied Spanish law to a contract entered into in 1836. 6 Tex. 435, 452–53 (1851); see also *Miller v. Letzerich*, 121 Tex. 248, 254, 49 S.W.2d 404, 408 (1932) (the validity of contracts and



Spanish 15<sup>th</sup> century caravel, Corpus Christi Museum of Science and History  
Photo by David A. Furlow

land grants predating the adoption of the common law of England governs such contracts and land grants).

**The *Novísima Recopilación de leyes de España*, a/k/a *The Brand New Recompilation of the Laws of Spain*.** The *Recopilación de las Leyes de los Reynos de las Indias* was a four-volume collection of laws adapting the laws of Spain to its colonies (including Mexico), originally promulgated by King Don Carlos II in 1681. A *Novísima Recopilación de las Leyes de España* was published by Charles V in twelve books in 1805–1807.

**The *Febrero Novísimo o Librería de jueces, abogados y escribanos*, a/k/a *The Library of Judges*.** The *Febrero Novísimo* was a

treatise on Mexican law published in Valencia, Spain by Jose Febrero in 1829. Texas Supreme Court Chief Justice John Hemphill appears to have started with a copy of the *Siete Partidas*, but he did not have access to *Febrero Novísimo* until the 1842 term of court and he did not use the *Novísima Recopilación* until after 1843. *See Garrett v. Nash*, Dallam 497 (1843) (Chief Justice Hemphill did not have the *Novísima Recopilación* when *Garrett v. Nash* was decided).

**The 1827 *Constitución de Coahuila y Texas*, a/k/a 1827 *Constitution of Coahuila and Texas*.** The *Constitution of Coahuila and Texas* was adopted on March 11, 1827. *Chambers v. Fisk*, 22 Tex. 504, 522 (1858). It is unknown to what extent this constitution became the law of Texas, but it is certain that the despots who exercised political power from Mexico City had no respect for it. This constitution had little impact on Texas law.

## **Introducing English common law to Texas.**

The common law of England became the law of Texas in criminal matters from the outset, under Article VI of the Declaration with Plan and Powers of the Provisional Government of Texas (1836), adopted in the Convention that began on March 1, 1836. *See* TEX. CONST. of 1836, art. VI (1836); *see also* TARLTON LAW LIBRARY JAMAIL CENTER FOR LEGAL RESEARCH, *DECLARATION, WITH PLAN AND POWERS OF THE PROVISIONAL GOVERNMENT OF TEXAS* (1836), <http://tarlton.law.utexas.edu/constitutions/slider/constitution/dpppgt1836/plan/3>, <http://tarlton.law.utexas.edu/constitutions/slider/constitution/dpppgt1836/plan/4> (last visited Nov. 18, 2013). No civil judicial system was provided for under the provisional system of laws. Section 13 of Article IV of the 1836 Constitution of the Republic of Texas, adopted on September 8, 1836, provided:

The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision.



TEX. CONST. art. IV, § 7 (1836). *See also* TARLTON LAW LIBRARY JAMAIL CENTER FOR LEGAL RESEARCH, *DECLARATION, WITH PLAN AND POWERS OF THE PROVISIONAL GOVERNMENT OF TEXAS* (1836), <http://tarlton.law.utexas.edu/constitutions/slider/constitution/dpppgt1836/plan/2>, <http://tarlton.law.utexas.edu/constitutions/slider/constitution/dpppgt1836/plan/3> (last visited Nov. 18, 2013).

On December 20, 1836, Sam Houston, as President of the Republic of Texas, signed an act adopting the common law of England, “as now practiced and understood ... in its application to juries and to evidence ... 1 H.P.N. Gammel, *The Laws of Texas 1822–97*, at 157 (Austin, Gammel Book Co., 1898). However, the Texas Congress did not adopt the common law of England into Texas civil law until January 20, 1840. That statute stated:

Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled,

That the Common Law of England, so far as it is not inconsistent with the Constitution or acts of Congress now in force, shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by the Congress.

Tex. Laws 1840, An Act to adopt the Common Law of England § I, at 3, 2 H.P.N. Gammel, *The Laws of Texas 1822–97*, at 177 (Austin, Gammel Book Co., 1898) (now codified at TEX. CIV. PRAC. & REM. CODE § 5.001).

Section II of the 1840 Act repealed all laws existing in Texas prior to September 1, 1836, except laws adopted by the Provisional Revolutionary Government and laws relating to land grants and mineral rights. The Act expressly carried forward the Spanish conception of community property as the marital property law of Texas, which gave both spouses *ownership* of community property but which gave the husband *management rights* over the community property during marriage.

On February 5, 1840, the Republic Congress enacted a statute declaring that “the adoption of the common law shall not be construed to adopt the common law system of pleading, but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer...” *See* Edward Lee Markham, Jr., *The Reception of the Common Law of England in Texas and the Judicial Attitude Toward That Reception, 1840–59*, 29 TEX. L. REV. 904, 909 (1951).

The Texas Congress’s directive to adopt the common law of England in civil court proceedings was implemented incrementally, as cases were decided. The Legislature’s directive could not be taken literally. At the time, England was a monarchy, with primary legislative power residing in Parliament. In turn, Parliament was made up of the House of Commons—consisting of representatives elected from geographical districts, and the House of Lords—consisting of men who inherited their legislative positions from their fathers. The House of Lords also served as the ultimate judicial authority, but it had no clear power to override either Royal decrees or laws enacted by Parliament.

In contrast, Texas was a Republic founded on a written constitution patterned after the United States Constitution. The political powers of the executive, the legislative, and the judicial branches were constrained by internal checks and balances, while the government in its entirety was constrained by constitutional limits on the power of government generally and the division of authority between the Federal government and the constituent states. The United States Constitution, and the similar constitutions of American states, imparted a constitutional dimension to American court decisions that was absent from, or only implicit in, English court decisions.

Another point of uncertainty was the fact that the common law of England in some respects developed through the judicial application of Royal decrees and acts of Parliament stretching back six centuries, and the Texas Congress could not have envisioned a full-scale adoption of English statutory law.

In *Cleveland v. Williams*, the Court held that the common law of England in force in Texas did not include England's statute of frauds adopted during the reign of Charles II, which had been adopted "in nearly all the states of the Union except Texas." 29 Tex. 204, 209–10 (1867). In *Paul v. Ball*, the Court stated that:

It is a singular fact, that, although this state has adopted the common law by express legislative enactment, yet, unlike most, if not all, of the states which have adopted the common law, we have not, as they have, also adopted all English statutes of a general nature, up to a particular period, not repugnant to or inconsistent with the constitution and laws of the state. Hence our rules of construction and interpretation must be predicated upon the common law, upon our statutes, and upon the general policy embodied in our varied form of government.

31 Tex. 10, 15 (1868).

The Supreme Court reconfirmed this view in *Southern Pac. Co. v. Poster*, when it held that: "No English statutes were adopted." 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960).

At the appellate level, determining the common law of England and other American states was a legal determination for a court but not a factual determination for the jury. To determine the common law, early Texas Supreme Court opinions examined appellate decisions of the U.S. Supreme Court, appellate decisions from courts of American states, and American treatises or commentaries on the law (which themselves were derived from appellate decisions from the supreme courts of the United States and various American states, as well as appellate decisions from English courts).

The Texas Supreme Court also periodically relied on English treatises or commentaries on the common law of England. Occasionally the Texas Supreme Court would cite an English case.

As to the statutory and case law of other states, a dichotomy existed. Trial courts could "learn" the laws of sister states, statutory or decisional, only through evidence presented in court. *Hill v. George*, 5 Tex. 87, 91–92 (1849). The Texas Supreme Court, however, could "learn" the *case* law of other states by reading appellate opinions and learned treatises.

In relation to the statutory law of other American states, judicial notice was not generally used by Texas trial or appellate courts. In *Hill v. McDermot*, the Supreme Court refused to take judicial notice of the common law in force in Georgia. Dallam 419, 421–22 (1841). The Court wrote:

We are presumed to know what doctrines of the common law pertain to the jurisprudence of Texas, but this presumption does not carry our judicial knowledge beyond the limits of the republic as to any doctrine or rule of municipal law of any kind in use in a foreign state .... We are to notice officially the *jus gentium*, but not the internal or municipal laws of other countries. These last must be proved—written laws by authenticated copies, and unwritten ones by the oral testimony of those skilled in them.

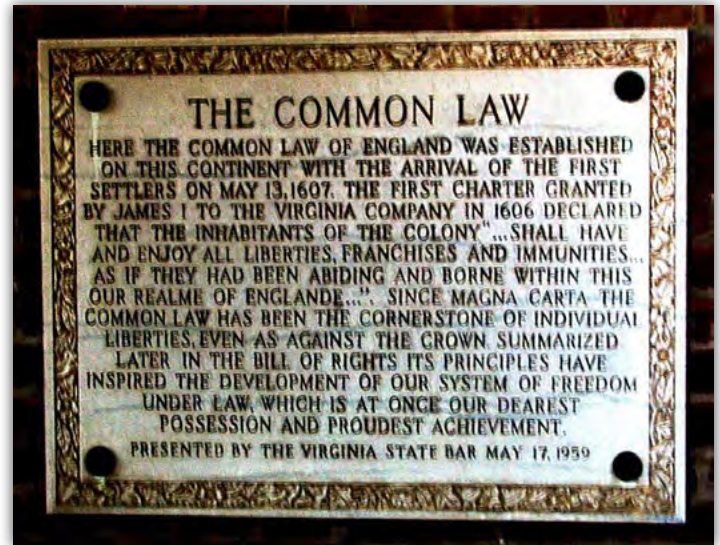
*Id.*

In *Crosby v. Huston*, the Supreme Court held that, “Where the validity, nature, obligation and interpretation of a contract depend on the laws of a foreign country, these laws must be proved before they can become guides for judicial action.” 1 Tex. 203, 203 (1846). In *Bradshaw v. Mayfield*, the Court refused to take judicial notice of the common law of Tennessee when it had not been proven in the trial court. 18 Tex. 21, 29–30 (1856).

The earliest learned legal treatises cited by American courts were American treatises that drew heavily from English court decisions and treatises on English law. This served to incorporate English common-law doctrines into American common law.

Still, the courts of American states that had, prior to the creation of Texas, adopted the common law of England, had concluded that the common law adopted in their jurisdiction was actually the common law of England as applied in America. So it happened in Texas, where Texas Supreme Court decisions frequently cited common-law principles articulated in prior decisions by the U.S. Supreme Court and the appellate courts of American states, as opposed to the decisions of English courts.

The early justices of both the Supreme Court of the Republic of Texas and the Supreme Court of the State of Texas were all trained as lawyers in American states. One, Justice Abner S. Lipscomb, had served for fifteen years on the Alabama Supreme Court before coming to Texas. Therefore, it can be said that the common law adopted in Texas was really the constitutional common law of America, as derived from the common law of England. The Texas Supreme Court confirmed this point in *Grigsby v. Reib*:



Common law declaration plaque, Jamestown, Virginia  
Photo by David A. Furlow

[W]e conclude that “the common law of England,” adopted by the Congress of the republic, was that which was declared by the courts of the different states of the United States. This conclusion is supported by the fact that the lawyer members of that Congress, who framed and enacted that statute, had been reared and educated in the United States, and would naturally have in mind the common law with which they were familiar. If we adopt that as our guide and source of authority, the decisions of the courts of those states determine what rule of the common law of England to apply to this case.

105 Tex. 597, 600–01, 153 S.W. 1124, 1125 (1913) (rejecting the English common law of informal marriage).

In *Clarendon Land, Investment & Agency Co. v. McClelland*, the Court observed that “[n]either the courts nor the legislature of this state have ever recognized the rule of the common law of England which requires every man to restrain his cattle either by tethering or by inclosure.” 86 Tex. 179, 185, 23 S.W. 576, 577 (1893); *accord Davis v. Davis*, 70 Tex. 123, 125, 7 S.W. 826, 827 (1888) (“this rule has not been regarded as applicable to the condition of the lands in this state”).

In a later case, the Texas Commission of Appeals characterized the decision of whether a common law doctrine had been incorporated into Texas law by the Act of 1840 in this way:

The Court of Civil Appeals has correctly announced the rule under the English common law. Whether that doctrine is in force in this state under the act of 1840, which makes the common law of England the rule of decision in this state, is a question requiring an examination not only into the common-law rule, but into its basis and its applicability to our system of jurisprudence as applied to lands and interest therein.

*Perry v. Smith*, 231 S.W. 340, 341 (Tex. Comm'n App. 1921, judgment adopted).

Finally, the common law of England adopted in Texas did not include the English forms of action. Chief Justice John Hemphill explained in *Banton v. Wilson* that:

All forms of action have been abolished in our system of jurisprudence, or rather they were never introduced. The distinctive actions of assumpsit, debt, trover, trespass, detinue, action on the case, ... are not now nor were they ever recognized or permitted to mar the beauty of our judicial system. The distinctive forms of action were supposed at common law to be essential to the administration of justice. We know from experience that the supposition is totally unfounded....

4 Tex. 400, 406 (1849).

Today, the operative statute is Texas Civil Practice and Remedies Code Section 5.001, which states that, "[t]he rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state." Currently, however, direct and even indirect citations to English common law seldom occur, and the primary source of common-law principles is prior Texas precedent.

To be continued in the Spring 2014 issue of the *TSCHS Journal*.



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**DYLAN O. DRUMMOND** is a civil appellate and commercial litigator practicing in Austin, Texas with the law firm of K&L Gates, LLP. He currently serves as a Trustee of the Texas Supreme Court Historical Society, subcommittee chair of the State Bar Pattern Jury Charge Committee for the business volume, Board member of the College of the State Bar, and as a Council member of the State Bar Appellate Section. He is rated AV<sup>TM</sup> by Martindale Hubbell® and has been selected as a Rising Star in appellate practice the past five years by Texas Super Lawyers®.

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# Interview with Former Texas Supreme Court Chief Justice Wallace B. Jefferson—Part 1

By William J. Chriss

**W**ALLACE B. JEFFERSON was appointed Justice of the Texas Supreme Court in 2001 by Governor Rick Perry. He was elected to that seat in 2002, but in 2004, before his term of office had elapsed, Governor Perry appointed him as 26<sup>th</sup> Chief Justice. He won election to that office in 2006, and he was reelected in 2008. In 2013, Chief Justice Jefferson announced he would retire from the bench effective October 1st of the same year. On November 15 he returned to the private practice of civil appellate law, joining the firm now named Alexander, Dubose, Jefferson & Townsend. Part 1 of his November 15 interview with legal historian William J. Chriss is excerpted below.

**WC:** The first question I want to ask you is what are some of the really formative experiences you remember from your childhood, I understand you grew up in San Antonio?

**WJ:** We moved to San Antonio from Guam in 1967. My father was in the military, U.S. Air Force, so I was four years old at the time. I have a faint memory of Guam, but San Antonio had the greatest influence for several reasons.

First, as home to several military bases, San Antonio had a military mentality. In our neighborhood, many of the parents were somehow connected to the military. The father in the family next door was born and raised in New York City; he met his British wife during a tour of duty somewhere. Next to them was a Hispanic family, next to them African-American, and across from us Anglo. It was a very diverse setting in which all of the neighborhood kids got along very well together. A dozen kids would congregate on the corner until late at night. If that same practice occurred in my neighborhood today, I wouldn't be surprised if the police were summoned to find out what is going on here. But there, in San Antonio, it was peaceful, reflecting a very close-knit community. And so I think one of my first impressions was, hearing about race riots in other cities (Detroit, Chicago, L.A.), why is there trouble in those places and serenity here?

Another formative experience was academics. There were six kids in our family and most of us were high-achieving. I was the fifth in the clan. Inevitably, when I would walk in a class, the teacher would say they had Darrell, Lamont, or Celeste years before and simply assumed I would excel. I think that it is good for expectations to be high rather than low.

And another incredibly important observation was going to church every Sunday, attending CCD (Confraternity of Christian Doctrine—catechism classes) and Catholic Church. We went to Mass



Former Chief Justice Wallace B. Jefferson  
Photo by Hannah Kiddoo

on Lackland Air Force Base. My father was in Intelligence at Kelly Air Force Base, but those bases were contiguous, and Lackland was closer, so we would go to Mass at Lackland. The time period is important. These were the late '60s during the Civil Rights Movement and the Voting Rights Act and the MLK assassination, et cetera, so there was a lot of turmoil in the country about race. Yet when we arrived at the guard station entrance to Lackland, the military officer would observe by the insignia on the front bumper that an officer was approaching. The guard would immediately stand at attention and give my dad a sharp salute. Now the guard could be male or female, or any race you can imagine, but it signaled to me that race was not a barrier to achievement. And everywhere we went on base he was accorded his status as a Major in the United States Air Force.

I remember feeling tremendous pride at being my father's son. That made a big impression on me. I think military life back then was one of the areas in which segregation and racism in the '60s was banished; merit was what mattered.

**WC:** Yes, it occurs to me that you're describing almost a color-blind childhood. I know that you know that lots of other people didn't have the same experience that you did.

**WJ:** Right.

**WC:** It sounds like that you were blessed to be part of at least two institutions that, as you say, at that time in American history, were a lot more color-blind than the rest of society, the military and the Catholic Church.

**WJ:** Right. But it was also confusing because at the same time I'm living in this good world, I would hear about trouble in the South and in the North, based along racial lines. My parents protected us to a large extent from that. It wasn't until I went off to school at Michigan State where I saw that even though Texas is considered the South, the Midwest had its own version of clear racial distinctions.

I was a resident assistant for two years. On more than one occasion I would have a conversation with a resident on my floor that took me by surprise. I would ask "where are you from?" and they'd say "the Detroit area." After we became better acquainted they would confess that I'm the first African-American that they've ever had a friendship with. And I said, "I thought you were from the Detroit area?" And they said, "well yes, but it's Grosse Pointe or Dearborn," the suburbs around Detroit that were more than 90 percent Anglo. It struck me that there was simply no real communication among the races then and that shocked me.

I also remember the first day walking into the cafeteria at Michigan State and noticing a segregated environment. There was a black section and then there was everyone else. And that seemed strange. There was an unstated pressure to dine with students of your own race. I'd get questions from some of the white students: "Why do the blacks segregate themselves that way?" And I responded, "Well, you can look at it the other way around, too. Why do whites segregate themselves?" I spent time in both worlds. It was the first time I experienced a world of clearly delineated racial lines.

**WC:** You were born in 1963?

**WJ:** '63.

**WC:** What were the two or three most important things that you were taught by your father and the two or three most important things you were taught by your mother?

**WJ:** Well, my father didn't lecture much. He didn't sit you down and say, "Son, let me tell you about the world." What he did was to demonstrate. Every morning, he was up before anyone else, usually working out. He was serious about physical fitness. He would dress in his sharp military uniform. He had joined the Air Force after playing football for a year at the University of Wisconsin and was determined to get a college degree. He received his undergraduate degree at Puget Sound when we were stationed at McCord Air Force Base in Tacoma, Washington. He received his Master's in political science at St. Mary's University. So on a typical workday afternoon we would see him hunched over a manual typewriter, working on his studies. We watched him work hard and earn the rewards associated with that. He was kind and honest. And intimidating. Six foot four, 230 pounds. He was also rather quiet. Not exactly an introvert, but there was very little drama.

On the other hand, with my mother, it's all drama. In fact, she was an actress and she participated in little theaters everywhere we went. And she taught me to love language. She would always have one of the kids help her rehearse the lines. And you know, you have to do that over and over again, and so practicing lines with her with authors like Henrik Ibsen and Mary Chase made me appreciate the power of language. And I memorized large segments of the plays so that when I went to the performances, I would know if the actors were reciting their lines accurately.

Mom taught me to be fearless. You can get out on stage and lay it all out there and move an audience emotionally, with great humor, passion, and conviction. Both of my parents created kind of an expectation that you're going to succeed and have a safe home environment in which to do that.

**WC:** Why did you choose to go to Michigan State for undergraduate school?

**WJ:** Even though I appreciated and loved my family and benefited from its good reputation, I got tired of constantly being compared to my brothers and sisters. So I started thinking about branching out. One of my brothers was a student at SMU, Lamont and Celeste were at Rice University. I was accepted there and I considered attending, but then I'd be behind Lamont, who played football at Rice and who was a big star on campus, and my sister Celeste who quickly became friends with everyone there. It would have been high school all over again. I applied to Michigan State. I knew about Michigan State because of the rivalry between Magic Johnson and Larry Bird. So I applied and was accepted immediately and then had an invitation to compete for a scholarship. I flew up to Michigan State in February. And it wasn't that cold. There was some snow on the ground, but not much, and I thought, what is everybody complaining about in terms of the weather? The campus was beautiful. And at 17 years old I was impressionable. The administrators and professors were very warm and welcoming. In an instant, I decided that this is a place where I could branch out on my own. No one knows me. Who knows whether I'll succeed or not, but it will never be said that I succeeded based on the reputation of my older siblings.

**WC:** Yeah, there are disadvantages and advantages to never being able to go to the HEB without somebody recognizing you.

**WJ:** Right.

**WC:** When and why did it occur to you to become a lawyer or how did that decision get made in your mind?

**WJ:** At Michigan State University I was in a college called James Madison College, which was a liberal arts residential college on the campus of Michigan State University. Many of the graduates of that college went on to law school. So there was sort of a gravitational pull to law school to begin with. My brother, Lamont, was a law student at the University of Texas when I was at James Madison College and he had great things to say about the professors and about the law school experience generally. I had two core majors at James Madison College, one was Urban Community Policy Problems (we studied community organizing, urban planning, and the bankruptcy of New York—that sort of thing). I thought about continuing my education in an urban planning field. But I wasn't passionate about it.

My other core major was Philosophy—it was officially titled “Justice, Morality, and Constitutional Democracy.” But I took a couple of graduate philosophy courses and many of those students looked like they had been in a cave all their lives, they didn't care how they dressed, their hair was messy, and their destiny was, if they were exceptional, probably an academic post. And that just didn't appeal to me. I really didn't have any other options, and I wasn't sure whether my degree from James Madison College was marketable. So I decided on law school. Lamont encouraged me to do so, and I knew I wanted to come back to Texas. I applied only to the University of Texas School of Law.

**WC:** And so what did you think once you got to law school? Was it what you expected?

**WJ:** Well, it was phenomenal. My professors at Michigan State said if you go to Texas make sure that you do everything you can to be a student of Professor Charles Alan Wright. And fortunately I had that opportunity. I had him my first year for Constitutional Law, Federal Courts the second year, and his United States Supreme Court seminar my third year. He had a huge impact on what I would ultimately do as a lawyer. I was so impressed with him and with his intellect and his impact on the law, even though he was not a judge but a professor and a lawyer arguing cases in the Supreme Court and elsewhere. I didn't expect to achieve everything he did, but what I wanted to do was find a place to do appellate work.

The transition to law school was not seamless. The legal system is strange. As is true of most first-year law students, I felt out of place. I mean this isn't philosophy, you know. It is “the Rule against Perpetuities” and “res judicata.” Huh? But I came to really appreciate studying law. In particular, I loved Constitutional Law and Torts.

**WC:** So you gravitated towards appellate law even while you were in law school?

**WJ:** Yes. I interned at the Austin City Attorney's Office my first year, second semester. The next summer I worked at the City Attorney's Office in San Antonio. And both places I worked on appellate briefs.

My second and third years during law school, I worked at the Attorney General's Office and wrote appellate briefs. There was one case, a tax case that was scheduled for oral argument at the Third Court of Appeals, and the lawyer at the Attorney General's Office said, “You've done so much work on this brief why don't you come watch the argument,” and I did. Before the argument began, the senior justice on the panel, Justice Powers I think it was, said to the lawyers, “Counsel, I just want to stop before we begin argument and say we all thought this was going to be a very mundane, boring tax case, but the briefs that you've presented were extraordinary and they were



very helpful to the court, and I just wanted to compliment you on that.”

And so I’m sitting in the back of the courtroom thinking, wow, you know, I mean he’s complimenting me. It was amazing for a young kid. To hear that made me think, well, maybe I can do this, maybe this is sort of destiny. We lost the case, but it sealed the deal for me that I wanted to do appellate work.

**WC:** And so you decided to return to San Antonio and you went to work for the “mother-ship” there, Gross, Locke and Hebdon, like a lot of San Antonio lawyers did. What year was that?

**WJ:** 1988.

**WC:** I think that this is much less true of appellate lawyers than of other lawyers, but how did the practice of law change from the time you began until the time, well let’s say until now; you’re a practicing lawyer now.

**WJ:** I think the biggest difference is that I immediately began working on appellate cases my first year. Within six months I had a case in the Fifth Circuit and cases in the San Antonio Court of Appeals. I argued my first appellate case during my first year of practice. That’s unheard of these days. A new lawyer embarking on an appellate career is unlikely to appear in court for years. In the larger firms the partners parachute in for appellate arguments. So there was a lot more hands-on, in-court experience in 1988 than I think young lawyers experience today.

I was supervised very well by Tom Crofts, who was in the first class of Board Certified Appellate Lawyers, and Sharon Callaway. But I was given a lot of responsibility at a very early time to develop my own arguments and run them by the partners there, and to get in court and argue.

**WC:** You just mentioned Crofts and Callaway. Describe that experience where you were a young lawyer at the time and you sort of take your future by the scruff of the neck and see what’s going to happen. How did that feel?

**WJ:** Well, in the late 1980s and early 1990s the real estate and banking industries were struggling but the old tort wars continued to rage. As a result, many law firms began to break up along practice lines.

At Groce Locke, a big faction of lawyers decided to leave in 1990 or ’91, and that was a problem for me because a lot of my work came from those lawyers. Do I continue at the firm and transition into a trial type practice, insurance defense? Would Sharon continue her appellate practice but also be a second chair commercial litigator? Would Tom move over to this new firm and be their lead appellate lawyer, breaking up the good relationship we had formed? So we decided to venture out on our own and form the first purely appellate law firm in the State of Texas. We opened our doors on September 16, *diez y seis*, 1991 and we were immediately busy. We worked with a good number of former Groce, Locke and Hebdon lawyers who had come to trust us with appeals and we branched out from there. It was exciting and scary, but ultimately rewarding and profitable. I enjoyed my combined thirteen years of practice with Tom Crofts and Sharon Callaway.

**WC:** How did you come to realize that it was a possibility that you might be appointed to be a justice on the Supreme Court?

**WJ:** Well, I got a call first from Clay Johnson. Governor George W. Bush was considering candidates to replace Justice Raul Gonzalez, who had resigned from the Supreme Court of Texas at the end of 1998. Clay asked if I would be interested in submitting an application for that vacancy.

**WC:** And who was Clay Johnson?

**WJ:** Clay Johnson was the Governor's Chief of Staff. Well, I dilly-dallied. I hesitated because the timing seemed premature. But I finally submitted an application. Soon thereafter, the Governor appointed Al Gonzales to that seat. I was sort of relieved, you know, because I was not in a financial position to undertake the job.

Then fast forward, Governor Bush becomes President Bush, and he asks Al Gonzales to be White House Counsel, and so now there's another vacancy on the Supreme Court. I got a call from John Cornyn, who was then Attorney General, and he said, "You know, Governor Perry may be calling you about this vacancy on the Supreme Court." I received that call and was invited to come up to the Capitol to interview with the Governor. I didn't know the Governor and I didn't know any of his people, either in his administration as Governor or in his political office. So I didn't know what to expect.

**WC:** Do you know how these fellows came to know about you?

**WJ:** I don't know about Clay Johnson but with Governor Perry, my strong suspicion is that Bill Jones, who was the Governor's General Counsel, said you ought to take a look at Jefferson. And I'd known Bill for years. We worked with the Young Lawyers and Texas Minority Council Program. Bill and the Governor had a very good relationship and I think they trusted each other. And of course I knew John Cornyn, who had been a district judge in Bexar County for many years.

So I interviewed with the Governor, who asked about my background, asked a lot about my parents and a lot about my understanding of the role of judges in modern society. And then he sort of gave me an abrupt warning. He said, "If I were to appoint you, you will have to run for office and you have to think about what an opponent would say to defeat you in either the primary or general election." So we had a discussion about that.

*In Part 2 of this interview, former Chief Justice Jefferson talks about his family history and his interest in genealogy, which led to the discovery that his great-great-great grandfather was a slave owned by Judge Nicolas Battle. He also discusses his service on the Texas Supreme Court, both as a Justice and as Chief Justice, in terms of accomplishments and significant cases. Part 2 will appear in the Spring 2014 issue of the Journal.*



**WILLIAM J. CHRIS** is an Austin attorney with Gravelly & Pearson, L.L.P. From 2007–2009, he served as Executive Director and Dean of Curriculum and Instruction for the Texas Center for Legal Ethics. Chriss is the author of numerous legal and historical articles as well as a book, *The Noble Lawyer*, published in 2011. A member of the Texas Supreme Court Historical Society Board of Trustees, Chriss currently heads the Society's Oral History Project.

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# A Brief History of the *Journal of the Texas Supreme Court Historical Society*

By Lynne Liberato

**F**ITTINGLY, THE LEAD ARTICLE OF THE FIRST ISSUE of the *Journal of the Texas Supreme Court Historical Society* featured our first chief justice. “The Legendary Life and Tumultuous Times of Chief Justice John Hemphill,” which was written by David Furlow, turned out to be the right place to begin in more ways than one. Dominated by the scholarship and passion of David Furlow and marked by scholarly and fun articles like the one on Chief Justice Hemphill, here before you is the tenth issue in a series.

## **Body of Knowledge & Section News**

The article about Chief Justice Hemphill demonstrates one of the two key purposes of the publication. When the Society started publishing the *Journal* in the Fall of 2011, our first goal was to further develop and share the body of knowledge on the history of our appellate courts. The second was to report on section news. Under David’s leadership, we have been able to accomplish both. More later on David and the development of the *Journal*.

When I became the president of the Society, I knew that producing a newsletter was critical to our development as an organization. I brought with me knowledge accumulated from many years of work on the State Bar and the Houston Bar, including work in the sections. I had learned that many lawyers identified the newsletter for a given section as the only benefit of joining the section. Done right, an organization’s publication builds a community within the group.

So, despite the many valuable things the Society did, it needed a newsletter. Technology made it possible to cost-effectively produce the *Journal*. David Furlow made it possible to produce an outstanding *Journal*. Once he accepted the offer to be editor-in-chief, we were on our way.

## **David Furlow Leads Team of Scholars & Whizzes**

David writes articles, seven thus far. He develops ideas. He recruits authors. He edits. He leads a team of devoted scholars and technical whizzes. And, he would be the first to credit the team that came together remarkably quickly.

After David, the next addition to our volunteer staff was Dylan Drummond. Little did we know how valuable he would be—not only to producing the *Journal*, but also in developing ideas and finding authors. When we recruited Dylan, David and I thought we hit a home run merely on the basis that Dylan he could bring to us his experience in recently overhauling the *Appellate Advocate*, the newsletter for the State Bar Appellate Section. (He also started our [Twitter feed](#), [Facebook page](#), and now is leading the charge on redoing the Society’s website.)

Dylan has also written several articles examining influential early Supreme Court reporters and developed authors and ideas. For example, Dylan had the idea for an article delving into the lore surrounding the Court’s “Sam Houston Bible,” which the Court’s archivist, Tiffany Shropshire, expertly researched and authored. Seemingly impossible, Dylan actually matched David in his energy and commitment to the *Journal*. Plus, he figures significantly into our succession plan.

Dylan also is one of our details guys — among other details, he makes sure that our Bluebook style is right. Just as in writing a brief, the details must be right or it casts doubt on the credibility of the entire publication. Dylan makes sure we get it right.

Dylan is not the only one who makes sure we get it right. The bulk of that task lies with Marilyn Duncan. Marilyn is the Society part-time consulting editor and our full-time “go to” editor in the true sense of editing articles and making sure our facts are right. As David Furlow explained her contributions to an article he authored: “I was about to steer left and she turned me right.” She also possesses the soft touch of an editor who knows how to gently deal with the egos of authors with the second affliction of being lawyers.

Pulling it all together is David Kroll. David is our technical guru who initially was called on to produce two versions each of the first six issues — an html version for email distribution to members, and a pdf version for posting on the website and archiving. Although they looked similar, the two types required different design and formatting skills. We have now moved to a single pdf version, so he can channel all his design energies into one version.

David takes our folder of Word documents and photo files and quietly works his magic on them. From the beginning, he has added a personal touch to the front index page, providing clever headlines and graphics. He also secures photos if extra ones are needed, and he methodically goes through the articles and ascertains that all html links are live. The extra touches add color and functionality to the publication and make it something really special.

Any volunteer leader of an organization can start a project. But, the real trick is to create a project that improves and endures. No tenure is more important than the one following the initiation of the project. As he did for so many aspects of taking the Society to the next level of success, Warren Harris provided support, ideas, and the leadership necessary to make



Covers of several past *Journals*

the *Journal* an integral part of the mission of the Society and one that will continue as long as the Society exists. We also benefited from the enthusiasm of former executive director Bill Pugsley, who wrote some of the most entertaining columns ever to appear in a newsletter. Now we enjoy the full support of executive director Pat Nester and president Doug Alexander.

## **Indexes Show Depth of Articles & Authors**

For this issue, Marilyn has prepared indices of articles that have appeared since our Fall 2011 first edition. One index lists articles by issue; the other by author. If you have even the slightest interest in the history of the Supreme Court, as you glance through the list you will find something to pique your interest. Some of the titles include: “The Mystery of the Sam Houston Bible”; “Before *Brown*: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice”; “Alexander’s Waterloo: The Fight for Padre Island and the Texas Supreme Court Intersects”; and “Governor Dan Moody and Judicial Reform in Texas During the Late 1920s.”

Marilyn’s list of articles and features also demonstrates that what is happening now is tomorrow’s “history.” For example, we have published interviews of the newly elected and appointed members of the Court (Justices Jeff Boyd and John Devine) as well as two newly retired judges (Chief Justice Wallace Jefferson and Justice Dale Wainwright). By publishing these stories (and there are plans to do more of them soon, including interviews with Chief Justice Nathan Hecht and Justice Jeff Brown), the *Journal* is preserving court history as it unfolds. Similarly, the photo albums of the Society’s major events—the Hemphill dinners, the April symposium, the Supreme Court special session in the Capitol Courtroom in honor of the narrative history book—will become part of the Society’s recorded history.

The *Journal* will continue to thrive if we meet our goal of timely producing each issue and those issues contain carefully researched and fact-checked scholarly articles that are fun to read. With each issue, we have improved on these goals. I hope you agree.



**LYNNE LIBERATO**, a partner in the Appellate Section of the Houston office of Haynes and Boone, was president of the Society in 2010–2011. She is also a past president of the State Bar of Texas and the Houston Bar Association, and currently serves as Community Campaign Chair for United Way of Greater Houston. Among many other honors, she is the recipient of the 2013 Karen H. Susman Jurisprudence Award, given by the Anti-Defamation League to honor a lawyer who exhibits an exceptional commitment to equality, justice, fairness, and community service.

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# Significant December Dates in the History of the Supreme Court of the Republic of Texas

**D**ECEMBER WAS AN IMPORTANT MONTH in the history of the Republic of Texas Supreme Court. Not only did several of the Court's major figures have December birthdays, but the institution was formed, justices were appointed, and opinions were issued during that month as well. The *Journal's* editors have compiled a selected list of December dates as a holiday toast to our ancestral Court.

## 1803

- Dec. 5** Thomas Jefferson Rusk, future Chief Justice of the Supreme Court of the Republic of Texas, was born in the Pendleton District of South Carolina. Although Rusk was the third Chief Justice elected by the Republic Congress, he was the first to preside over a session of the Supreme Court.
- Dec. 18** John Hemphill, future Chief Justice of the Supreme Court of the Republic of Texas and the State of Texas, is born in Blackstock, South Carolina. Known as the John Marshall of Texas, Hemphill played a crucial role in shaping Texas jurisprudence.

## 1815

- Dec. 27** Richard Morris, who became a member of the Texas Supreme Court upon being appointed judge of the First Judicial District, is born in Hanover County, Virginia. The Republic's second elected President, Mirabeau B. Lamar, appointed Morris in 1841. Morris served three terms before dying of yellow fever in 1844.

## 1835

- Dec. 5** James C. Neill, Ben Milam, and Francis W. Johnson lead a surprise attack on San Antonio de Béxar that later results in Ben Milam's death in battle, Mexican General Martín Perfecto de Cos's surrender of the Alamo on December 9, and the withdrawal of Mexican Centralist forces from Texas. Future Texas Supreme Court Chief Justice Thomas J. Rusk participates in the siege of Bexar.

## 1836

- Dec. 15** The Republic of Texas Congress passes the first of a series of acts organizing the judiciary; the term of the Supreme Court is set to begin annually on the first Monday in December.
- Dec. 16** Congress elects James Collinworth, an attorney who had served on the Permanent Council of the Texas revolutionary government, as the first Chief Justice of the Supreme Court of the Republic of Texas.
- Dec. 22** Congress establishes four judicial districts and elects four district judges, who will also serve as associate judges of the Supreme Court: Shelby Corzine, Benjamin C. Franklin, Robert McAlpin "Three-Legged Willie" Williamson, and James W. Robinson.



## 1837

- Dec. 4** The first scheduled Supreme Court session is canceled due to the lack of a quorum.
- Dec. 14** In response, Congress passes a law to fine absent associate judges \$1,000.

## 1838

- Dec. 12** Congress elects Thomas J. Rusk as Chief Justice; he is on a military campaign against the Indians and does not learn of his election until after the January 1839 session is to convene; the session is cancelled because the Constitution requires the presence of the Chief Justice. [Note: In May 1838, Congress had changed the annual meeting date for the Supreme Court from December to January.]

## 1840

- Dec. 5** Congress elects Judge Hemphill as Chief Justice to replace Rusk, who resigned after presiding over the first session of the Court the previous January (1840). Hemphill convenes the second session of the Court in January 1841 and heads the Court for the duration of the Republic's existence.

## 1845

- Dec. 15** The final session of the Republic Supreme Court convenes in Austin. [Note: The previous May, Congress had changed the Court's meeting date to the third Monday in December.]
- Dec. 29** U.S. President James Polk signs legislation annexing the Republic of Texas and making Texas the 28th state in the United States; the new State Constitution creates a three-member Supreme Court appointed by the Governor for six-year terms.

### SOURCES

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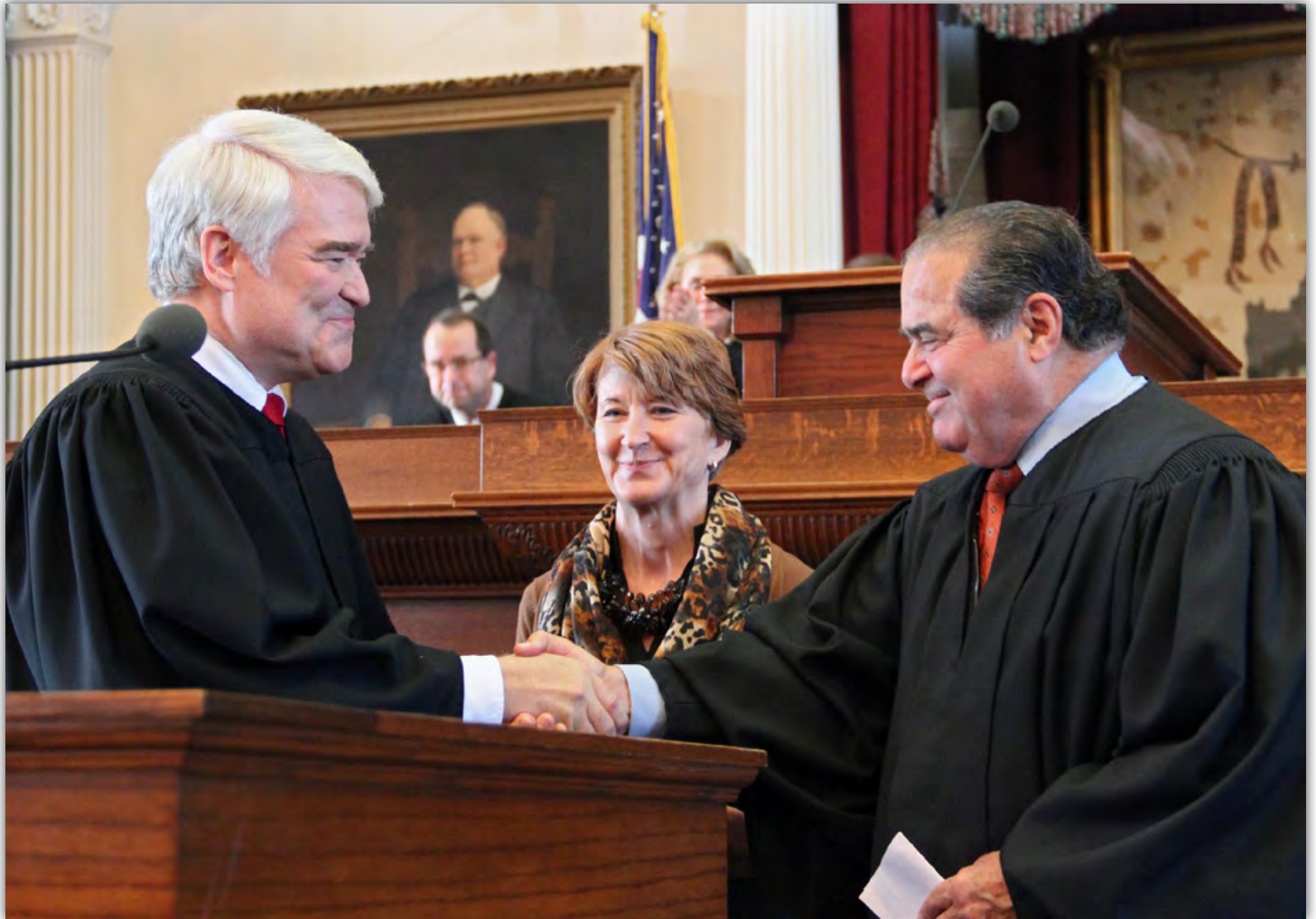
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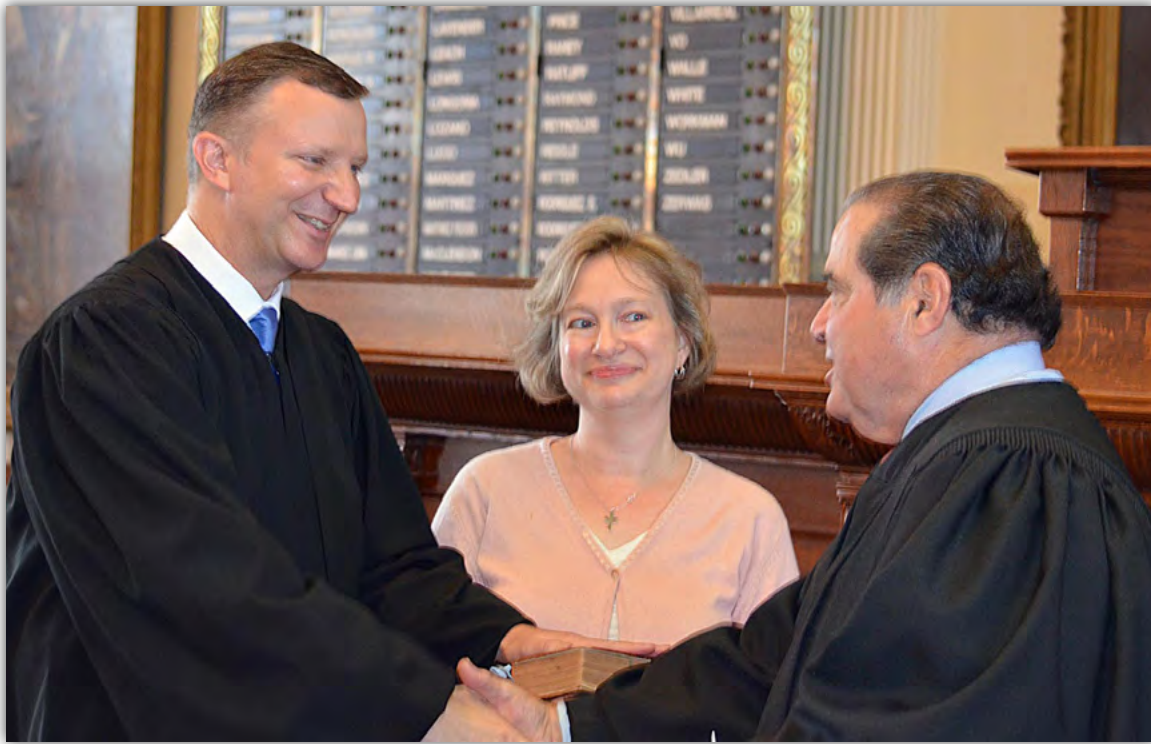
# Hecht, Brown Take Oath of Office During Ceremonial Investiture

**O**N NOVEMBER 11TH IN THE TEXAS HOUSE CHAMBER of the State Capitol, U.S. Supreme Court Justice Antonin Scalia ceremonially administered the oath of office to Texas Supreme Court Chief Justice Nathan Hecht and Justice Jeff Brown. Scalia holds responsibility for the U.S. Court of Appeals for the Fifth Circuit, which includes Texas, and has sworn in each of the past three Texas chief justices, including Hecht, Wallace Jefferson, and Thomas Phillips.

The ceremony, which drew a large crowd to the House Chamber, was held during a special session of the Texas Supreme Court.



Texas Supreme Court Chief Justice Nathan Hecht shakes hands with U.S. Supreme Court Justice Antonin Scalia after being administered the oath of office. The Chief's sister, Helen, looks on.



Justice Jeff Brown is congratulated by Justice Scalia after taking the oath of office. Brown's wife, Susannah, holds the Court's "Sam Houston Bible."



Justice Scalia prepares to deliver his remarks to the assembled crowd. Standing behind him are (l-r) Justice John Devine, Justice Debra Lehrmann, Justice Don Willett, Justice Paul Green, Chief Justice Nathan Hecht, Justice Phil Johnson, Justice Eva Guzman, Justice Jeff Boyd, and Justice Jeff Brown.

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## Chief Justice Jack Pope Shares Advance Copies of New Book with Friends and Colleagues

**O**N NOVEMBER 22, FORMER TEXAS SUPREME COURT CHIEF JUSTICE and centenarian Jack Pope shared his new book, *Common Law Judge*, with friends and colleagues during a book-signing event held at the Texas Law Center. The book is the first to be solely published by the Society and was edited by the Society's Consulting Editor, Marilyn Duncan. It will be released to the public in January 2014.

Photos by Hannah Kiddoo



Former Chief Justice Jack Pope (seated) poses with some of his esteemed guests and colleagues: (standing, l-r) Justice John Devine, Justice Phil Johnson, Justice Paul Green, Chief Justice Nathan Hecht, book editor Marilyn Duncan, Justice Jeff Boyd, and Justice Jeff Brown.

(Standing, l-r)  
Society President  
Doug Alexander,  
book editor Marilyn  
Duncan, and former  
Society President  
Larry McNeill,  
who chaired the  
Pope Book Project,  
celebrate the  
publication of the  
book with former  
Chief Justice Pope.



Chief Justice Nathan  
Hecht (l) and  
former Chief Justice  
Wallace Jefferson  
(r) look through  
the copies signed  
by their esteemed  
predecessor.



Former Chief Justice Pope signs a copy of the book for Justice Paul Green, the Supreme Court's liaison to the Society.

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# The Society Takes Over Maintenance of the Texas Supreme Court's Alumni Directory

By Dylan O. Drummond

**F**OR MANY YEARS, FORMER BRIEFING ATTORNEYS MAINTAINED A DIRECTORY of former justices, staff attorneys, briefing attorneys, and Court staff, all in order to host the Court's annual BA Breakfast, and allow the Court alumni family to keep track of one another.

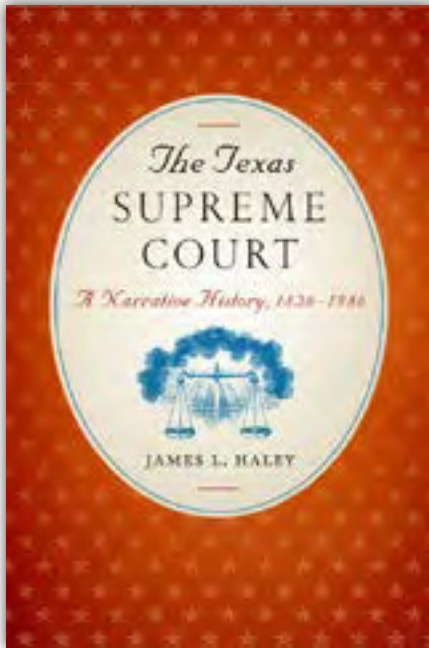
As was likely inevitable, the crush of private practice forced the maintenance of the directory upon Court staff for the past several years. With the cooperation of the Society's liaison to the Court, Justice Paul Green, as well as longtime Court administrative assistant Darla Sadler (now in the chambers of former Society Treasurer Justice Jeff Brown), the Society has offered to assume maintenance of the directory going forward and alleviate the administrative burden its upkeep imposes upon Court staff.

All directory contact information will continue to be held in the strictest confidence, and the directory itself is not for public inspection or republication. All former clerks and staff are encouraged to contact the Society to keep us abreast of your whereabouts so that we may keep the directory current!

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# Supreme Court History Book Ends Its First Year with a Holiday Sales Push

By Marilyn P. Duncan



**M**ANY TSCHS MEMBERS HAVE NO DOUBT ALREADY READ the Society's new book on the history of the Texas Supreme Court. Author Jim Haley has shared some of its more colorful stories with audiences at local bar association meetings in Austin, Houston, and San Antonio as well as at the Texas State Historical Association Annual Meeting, the Society's Symposium on the History of Texas Jurisprudence, and the Texas Book Festival. Those in attendance invariably lined up at the author's table to purchase books and have Jim sign them. The visibility has been a boon to the Society and a very effective way of generating interest in the Supreme Court and its history.

In a final push to showcase the book during its 2013 publication year, the Society is running a series of ads in *Texas Lawyer* magazine and its collateral publications, both print and electronic. The goal is to reach the larger audience of Texas attorneys who might not know about the book or the Society, as well as those who might buy additional copies for their colleagues or clients.

Members who are interested in buying copies can order either directly from the University of Texas Press at <http://utpress.utexas.edu/index.php/books/haltex> or through the Society at <http://www.texascourthistory.org>.

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# Society's TSHA Joint Session Goes to the Dark Side of Court History

By Marilyn P. Duncan

**T**HE THEME OF THE UPCOMING SOCIETY-SPONSORED SESSION at the Texas State Historical Association Annual Meeting in San Antonio is guaranteed to generate more than passing interest in the Supreme Court's unique history.

Bearing the name "Murder and Mayhem on the Texas Supreme Court," the March 2014 session will tell the stories of two justices forever associated with egregious crimes, one as a victim and the other as a perpetrator.

The murder of Justice William Pierson and his wife in 1935 and the string of investigations and trials associated with the crime are the focus of a presentation by author/historian Gary Lavergne. Using research gathered from contemporary newspaper accounts and court records, Lavergne will follow the progress of the case against the Piersons' son Howard as it moved through the courts. Of particular interest is how the justice system dealt with the insanity plea and what residual effects the case may have had on Texas law.

The lurid story of the rise and fall of Justice Don Yarbrough in 1976–1977 is the topic of a presentation by Judge Mark Davidson. Yarbrough, who won the Democratic primary against a well-respected opponent when voters associated his name with two well-known Texas political figures, took a seat on the high bench and served six months despite being under investigation for several major crimes. Judge Davidson will discuss how this dark episode in the Court's history played out in the politics of the 1970s, and how it affected the arguments for judicial-selection reform.

Lavergne, who serves as Director of Admissions Research and Policy Analysis at the University of Texas at Austin, is the author of several books, including the award-winning *Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice*.

Davidson served as judge of the Eleventh District Court in Houston for twenty years before his retirement in 2009. He is now serving as the Multi-District Litigation Judge for all asbestos cases in the State of Texas. A member of the Society's board of trustees, he has written a number of articles on the history of the Texas Supreme Court.

The Society's association with the Texas State Historical Association and its annual meeting is a long-standing one. Since the late 1990s, the Society has organized a session dealing with some aspect of court history as a means to integrate the history of the Texas Supreme Court into the broader study of Texas history. Several of the Society's sessions have been among the best attended and most talked-about programs at the conference, which draws noted historians and Texas history enthusiasts from throughout the state.

The 2014 TSHA conference will be held March 6–8 at the Wyndham San Antonio Riverwalk Hotel. The Society's joint session is scheduled for Friday, March 7, from 2:30 to 4:00 p.m. For registration and other information, see <https://tshasecurepay.com/annual-meeting/>.

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# Chief Justice Pope Donates Law Books to New UNT-Dallas Law Library

By Marilyn P. Duncan

**F**ORMER CHIEF JUSTICE JACK POPE has donated his personal collection of South Western Reporters to the new public law school at the University of North Texas in Dallas. The signed volumes cover the thirty-five years in which Pope served on the Fourth Court of Appeals and the Texas Supreme Court (1950–1985).

The contribution, which also includes other legal books from his personal library, was announced at a luncheon honoring Chief Justice Pope in Austin on October 28. On that occasion, UNT Law Library Assistant Dean Edward T. Hart noted that the collection has special meaning for law school library of the twenty-first century. “While technological and digital advancements have greatly altered tools and techniques for finding and using information,” he said, “the collection represents what remains essential to law and lawyering, including the common-law process, the civil-justice system, and principled judging.”

UNT Dallas College of Law is a new public law school located in a historic building in downtown Dallas. The first students will begin classes in fall 2014.



All four living chief justices of the Texas Supreme Court attended the luncheon hosted by the new UNT–Dallas College of Law. Pictured are (l–r) former Chief Justice Wallace B. Jefferson, Chief Justice Nathan Hecht, former Chief Justice Jack Pope, and former Chief Justice Thomas R. Phillips.

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# Calendar of Events

## Spring 2014

March 6

**TSCHS Joint Session,  
Texas State Historical Association Annual Meeting**  
“Murder and Mayhem on the Texas Supreme Court”  
Wyndham Riverwalk Hotel, San Antonio  
Session 32, Executive Salon 4  
2:30–4:00 p.m.

TBA

**Spring Meeting, TSCHS Board of Trustees**

June 6

**19<sup>th</sup> Annual John Hemphill Dinner**  
Four Seasons Hotel, Austin

June 26

**James Haley Talk, Supreme Court History,  
State Bar Annual Meeting**  
Austin Convention Center  
1:30 p.m.

June 27

**Reenactment of *Sweatt v. Painter*, State Bar Annual Meeting**  
Sponsored by the TSCHS Fellows  
(see Fellows Column, p. 3)

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# TEXAS SUPREME COURT HISTORICAL SOCIETY

*To profit from the past, we must first preserve it.*

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Justice Paul W. Green  
Supreme Court of Texas

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# 2013–2014 Membership Upgrades

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

## **HEMPHILL FELLOWS**

David J. Beck

Joseph D. Jamail, Jr.

## **GREENHILL FELLOWS**

Thomas S. Leatherbury

Ben L. Mesches

Hon. Thomas Phillips, Chief Justice (Ret.)

## **TRUSTEE**

William W. Ogden

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# 2013–2014 New Member List

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

## **GREENHILL FELLOWS**

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

## **TRUSTEE LEVEL**

Joe Garza  
Marc Tabolsky  
Cynthia Timms

## **CONTRIBUTING LEVEL**

Russell R. Barton  
Barbara Clack  
Thomas Fulkerson  
Rachel Palmer Hooper  
Kevin Jewell  
Daniel Lockwood  
Wes Lotz  
Patrick A. Nester

Jason M. Ryan  
Jane Lipscomb Stone  
Gilbert Vara, Jr.  
Anne Wynne

## **REGULAR**

Stacy Alexander  
Audrey Andrews  
James D. Blacklock  
Josh Blackman  
Jennifer Cafferty  
Chad Flores  
Yvonne Y. Ho  
Anne Johnson  
Margaret Lyle  
Eric E. Munoz  
Jimmy Eric Pardue  
Lisa Pennington  
Karen S. Precella  
Scott E. Rozzell  
Patti Gearhart Turner  
Michael J. Willson

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# Membership Benefits & Application

## **Hemphill Fellow - \$5,000**

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

## **Greenhill Fellow - \$2,500**

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

## **Trustee Membership - \$1,000**

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

## **Patron Membership - \$500**

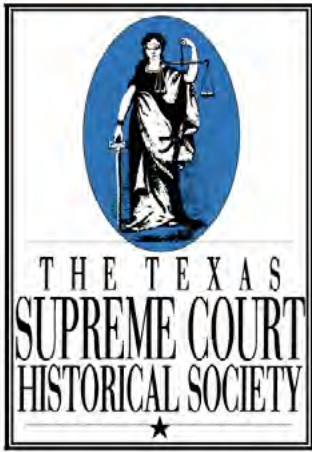
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

## **Contributing Membership - \$100**

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

## **Regular Membership - \$50**

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



# Membership Application

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

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

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

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