



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2014 Vol. 4, No. 2 General Editor Lynne Liberato Executive Editor David Furlow

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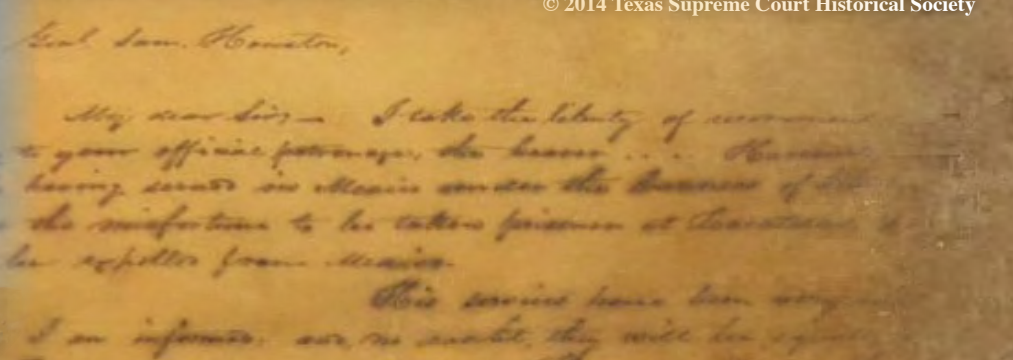
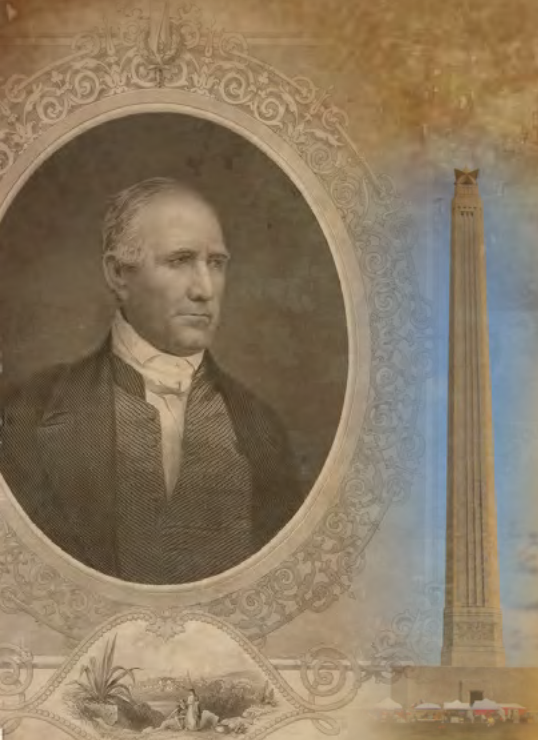
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Marie Yeates

Letter from the *President*

Dear Members,

The fall meeting of the Society's Board of Trustees was an extremely interesting and productive one. After hearing from Pat Nester that our finances and administrative operations are better than ever, we heard reports on all the exciting projects and events that the Society is sponsoring this year. I want to share a few details about some of these endeavors, both to let you know the extent of the Society's outreach and to invite you to participate in any or all of them.

One of the Society's most ambitious undertakings is the history book series. The Hon. Craig Enoch reported that two new book projects are underway, one by former Chief Justice Tom Phillips on the history of judicial elections, and another by former board member Bill Chriss on the six constitutions of Texas. The current plan is to publish the elections book as part of the Society's self-published series in 2016 to allow Chief Justice Phillips to do additional research and writing. Bill Chriss's book, which will be based on his doctoral dissertation, is a strong candidate for publication in the cosponsored series with the University of Texas Press. Bill will begin working on the manuscript with editor Marilyn Duncan this spring with the goal of submitting it to UT Press in the fall of 2015.

Warren Harris brought the board up to date on a very different kind of book project sponsored by the Society's Fellows—a volume on the history of the Texas courts for seventh-grade students. James Haley, author of the Society's narrative history of the Supreme Court, has written the manuscript, which will be illustrated with colorful graphics to appeal to young readers. Warren is working with Marilyn Duncan and the Law-Related Education staff at the State Bar to produce the book and have it ready for distribution to teachers for the 2015–2016 school year. The aim is to have a copy in every seventh-grade Texas history classroom in Texas, and to have judges and attorneys visit as many classrooms as possible to present cases and stories from the book. This project is a prime example of the kind of educational outreach the Society's founders envisioned.

A substantial portion of the board meeting was devoted to discussing plans for upcoming programs and events. Among them was the John Hemphill Dinner, which will mark its twentieth anniversary in 2015 as the Society's major fundraising event. Although the dinner has traditionally been held in June, several strong arguments were raised in favor of moving it to September. While the June date takes advantage of the University of Texas appellate CLE program, holding the event in September in conjunction with the State Bar's Advanced Civil Appellate Course may be of more interest to dinner attendees. Another consideration is that the September date expands the slate of desirable keynote speakers, including U.S. Supreme Court justices, who are in session in June. For those and other reasons, most board members said they are strongly in favor of moving the dinner to September. We'll offer full details about the dinner, including the speaker, in the Spring 2015 issue of the *Journal*.

Several other important events are scheduled for this spring. David Furlow reported that he, Laura Saegert of the Texas State Archives, and Bill Chriss will make presentations at the Society's joint session on school prayer at the Texas State Historical Association's Annual Meeting in Corpus Christi in early March. These TSHA sessions spotlight the Society's scholarship for the wider community of historians in Texas, and our visibility grows each year. I'll be moderating this year's session, and I'd like to see a large gathering of Society members in the audience.

Richard Orsinger reported that he and Lynne Liberato are organizing another symposium on the history of jurisprudence, which will follow the template that proved tremendously successful in 2013. As with the previous symposium, the 2015 program will be held in conjunction with the State Bar's Practice Before the Texas Supreme Court Course, and will feature papers on a variety of legal history topics. Richard noted that several of the papers presented at the first symposium, including his own on the history of contract law, have been published, which is good for both the authors and the Society. He and Lynne are open to suggestions for topics and speakers.

Another event of special interest to Society members is a program to be held in conjunction with our spring board meeting on March 27. David Furlow and Bill Chriss have arranged for historian H. W. Brands to speak at the luncheon following the meeting, which will be held at the AT&T Center on the UT Austin campus. The program will also include a tour of the nearby Harry Ransom Center. All members of the Society are invited to attend the luncheon program and tour. We'll email an invitation next spring, but I wanted to share the exciting news about H. W. Brands, who is one of my favorite authors.

See the calendar of events in this issue of the *Journal* for information on all of these events. The TSHA joint session and the symposium are also described in greater detail in the News and Events section. One of the most valuable perks of Society membership is the opportunity to participate in programs that are not available anywhere else. I hope you will take full advantage of them.

Very truly yours,
Marie R. Yeates

MARIE R. YEATES *is a partner with Vinson & Elkins LLP in Houston.*

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Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

THE FELLOWS CONTINUE to make progress on our educational project. This project is a judicial civics program that will present the history of the Texas Supreme Court to Texas history classes in middle schools statewide. Thanks to the support of the Fellows, the Society has engaged award-winning author James L. Haley to write the book to be used with our project. The Society also has engaged a talented executive editor, Marilyn Duncan, to edit our new book. Since my last column, the first draft of the

book has been prepared and is already in the process of being edited. Jim and Marilyn recently presented an overview of our project to teachers at the Exploring Texas Workshop at the Bullock Texas History Museum. Jan Miller and her team at the State Bar's Law Related Education Department are partnering with us on this project and are providing us with invaluable assistance. We plan to present a sample copy of the fully designed book to a statewide teachers' conference in January 2015. We will keep you updated on this exciting project.

Please save the date for our Third Annual Fellows Dinner. The dinner is exclusively for the Fellows and will be held in Austin on May 7, 2015. Further details will be sent to all Fellows.

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

On behalf of the Society, I want to express our appreciation to 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.

DAVID J. BECK is a Partner with Beck Redden LLP in Houston.

FELLOWS OF THE SOCIETY

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

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

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

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

*Charter Fellow

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David A. Furlow

The Republic of Texas *Lives On...*

ON A WINTRY FEBRUARY 19, 1846, Dr. Anson Jones, the last President of the Republic of Texas, stood before the weather-beaten flagpole in front of the old capitol in Austin. Surrounded by a throng of Texans, Americans, and Europeans assembled to witness Texas's entry into the United States, Jones spoke slowly and solemnly:

“The lone star of Texas, which ten years since arose amid clouds over fields of carnage and obscurely shone for a while, has culminated and, following an inscrutable destiny, has passed on and become fixed forever in that glorious constellation which all freemen and lovers of freedom in the world must reverence and adore—the American Union...”

Heads bowed, chests heaved, and tears streamed down weather-worn cheeks. As President Jones lowered the Lone Star Flag, a sudden gust snapped the wooden flagstaff with an unexpected *crack*. Jones furled the Lone Star and attached the Stars and Stripes to the halyard.

“The final act in this great drama is now performed,” Jones proclaimed to the now-silent crowd. “The Republic of Texas is no more.”

*Hold on, Anson. You might have thought that the Republic was no more in 1846, but in 2014, the Republic lives on. Its legacy lives in the jurisprudence of Texas law. It lives in the hearts and minds of Texans. And it lives in this special issue of the **Texas Supreme Court Historical Society Journal**.*

The Alamo Bar Association. We begin in 1836 with Dylan Drummond's story about the most glorious but shortest-lived bar organization in Texas history: the Alamo Bar Association. In February and March, 1836, six attorneys associated together to defend the Alamo. To join, those six lawyers paid the ultimate dues: their lives. Yet they also showed that lawyers are willing to fight for something other than clients and billable hours. The six Alamo lawyers' fight to abolish arbitrary government and end tyranny inspires Texas attorneys to this day. Dylan's story reminds us that these brave men once had families, dreams, and aspirations—as well as courage.

The Constitution of 1836. Next, we present attorney/historian Bill Chriss's article analyzing the Republic's Constitution of 1836. Bill reprises one of the most informative parts of the PowerPoint program he presented to the October 28, 2014 Fall Meeting of the Society's Board of Trustees: *The Six Constitutions of Texas*. In this article, Bill points out how American filibustering efforts made Mexican leaders suspicious of the Anglo-American Texian colonists settling in their midst. He then explains how these Texians reacted against

Mexican restrictions on their religious, political, and economic (slave-holding) liberties by drafting a Jacksonian constitution intended to protect their newfound freedoms for themselves and their posterity.

Bill, who just earned his Ph.D. in History under the mentorship of University of Texas History Department Professor Bill Brands, offers special insights about the constitution that governed the Republic from its birth in 1836 until its annexation in 1845.

Three competing, contending legal cultures in the Lone Star Republic. In this issue of the *Journal*, I contribute the final part of a three-part series about the three distinctive legal cultures that shaped the Texas Supreme Court's jurisprudence during the Republic. When I began writing this series, I sought to do something that had not been done before: to apply David Hackett Fischer's cultural folkways analysis, as exemplified in his book *Albion's Seed: Four British Folkways in America* (1989), to analyze the conflict, competition, and confluence of three cultural traditions that shaped Texas's legal bedrock during the Republic era: (1) Castilian/Tejano; (2) Tidewater Chesapeake; and (3) Scotch-Irish.

In *Albion's Seed*, Fischer argued that America's profound regional differences are best explained by examining the geographical and cultural origins of four groups of British settlers in America: first, the Pilgrims and Puritans, who voyaged from East Anglia and London to Massachusetts; second, the small Cavalier elite who moved from southern England to the Chesapeake; third, the Quakers whose ancestors came from the northern Midlands of England and Wales to the Delaware Valley; and fourth, the Scotch-Irish who brought the cultural norms of the violent borders of northern Britain and Ireland first to the Appalachian Back Country and then to Texas. Fischer argued that each group brought defining "folkways" to America, where they left an indelible impression even on Americans not from Britain.

In this three-part series, I asked what cultural influences shaped the attitudes and jurisprudential choices of the Texas Supreme Court's chief justices and associate judges during the Republic. I examined the Castilian/Tejano legal tradition as the last bequest of a declining European empire whose Tejano subjects created a flexible, informal frontier justice that judges with Anglo-American backgrounds later embraced. The second part evaluated the traditions of hierarchical liberty and economic slavocracy that Stephen F. Austin's planter aristocrats brought with them to Texas from the Tidewater Chesapeake. This third part examines the Scotch-Irish culture's influence on Andrew Jackson and Sam Houston, as well as the way that culture affected Chief Justice Thomas Jefferson Rusk and Chief Justice John Hemphill's contributions to the jurisprudence of the Texas Supreme Court during the Republic.

Special theme issues of the *Journal* ahead. This issue is the fourth our Editorial Board has devoted to a special aspect of the Texas Supreme Court's rich lore and legend. After examining the role of chief justices in shaping the jurisprudence of Texas courts in the Winter 2013 issue, investigating Civil War and Reconstruction Texas in the Spring 2014 issue, and focusing on the theme of murder and mayhem on the Texas Supreme Court in the Fall 2014 issue, your *Journal*'s editors have chosen this issue to examine new aspects of the legal history of the Lone Star Republic.

As Executive Editor, I'd like to join General Editor Lynne Liberato, Consulting Editor Marilyn Duncan, and Deputy Executive Editor Dylan Drummond in asking you to share ideas, photographs old and new, and stories about the Texas judiciary, state appellate courts, and the Texas Supreme Court with like-minded friends and members of the public.

We now plan to offer a special issue about the history of the Texas Constitution in the Spring 2015 issue.

And we plan to dedicate a special issue to the history of oil, gas, and energy law in Texas in the Fall 2015 issue. We are looking for submissions from lawyers, judges and justices, drillers, operators, historians, biographers, political scientists, sociologists, and economists.

If you'd like to join us in preserving, protecting, and sharing the history of Texas courts and Texas law, please email your draft article to dafurlow@gmail.com or call me at 713.202.3931 to discuss how we at the *Journal* and the Society can work with you.

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

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San Jacinto Monument. Photo by the author.

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THE TOUGHEST BAR IN TEXAS: The Alamo Bar Association, Est. 1836

By Dylan O. Drummond



Fall of the Alamo, or, Crockett's Last Stand by Robert Jenkins Onderdonk (1903). On display at the Texas State Archives. Wikimedia Commons. <http://en.wikipedia.org/wiki/File:FalloftheAlamo.jpg>

YOU CAN'T BUY A DRINK in or even visit the toughest bar in Texas. That's because it was never formally established in brick and mortar but was instead an association forged by blood, bravery, and sacrifice. The toughest bar in Texas was—and still is—the “Alamo Bar Association.”

A total of six lawyers perished at the Alamo in March 1836: (1) Micajah Autry; (2) Peter James Bailey; (3) James Butler Bonham; (4) Daniel William Cloud; (5) Green Berry “Ben” Jameson; and (6) William Barrett Travis.¹ They ranged in age from their early twenties to their mid-forties. Only

one of their number had formally earned a law degree,² two had previously been opposite each other in court,³ and another pair may even have been second cousins.⁴

Each trod a unique path in their journey to the Alamo, but all earned the eternal respect of future Texans and attorneys through their shared valor.

The Lawyers of the Tennessee Mounted Volunteers

The tale of how half of the lawyers who defended and perished at the Alamo came to be in that old, crumbling Spanish mission just outside of San Antonio de Béxar on March 6, 1836 traces back to the former Congressman from Tennessee, the Honorable David Crockett.⁵

Crockett's bid for a fourth term in the U.S. House during the summer of 1835 was a difficult one.⁶ His opponent was a savvy, peg-legged attorney whose candidacy



David Crockett, by Chester Harding, 1834. Wikipedia.

¹ “I GO THE WHOLE HOG IN THE CAUSE OF TEXAS”: LAWYERS AT THE ALAMO, 71 TEX. B.J. 210, 210 (Mar. 2008) [hereinafter *WHOLE HOG*].

² See *WHOLE HOG*, 71 TEX. B.J. at 211; see also Amelia W. Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of its Defenders*, 37 SW. HIST. Q. 1, 244 (Jul. 1933) [hereinafter *Critical Study*].

³ JAMES DONOVAN, *THE BLOOD OF HEROES* 174 (2012) [hereinafter *BLOOD OF HEROES*].

⁴ Bill Groneman, *Bonham, James Butler*, HANDBOOK OF TEXAS ONLINE, <https://www.tshaonline.org/handbook/online/articles/fbo14> (last visited Nov. 12, 2014) [hereinafter *Bonham*].

⁵ See *BLOOD OF HEROES*, at 162.

⁶ *Id.* at 156.

was enthusiastically supported by Crockett's onetime political mentor and military commander, President Andrew Jackson.⁷ By Crockett's second term in Congress in 1830, he had begun to publically and repeatedly denounce President Jackson for what Crockett believed to be Jackson's political opportunism.⁸ Crockett chiefly blamed Vice President Martin Van Buren for the political faults he saw in President Jackson.⁹ Crockett said, "I am still a Jackson man, but General Jackson is not—he has become a Van Buren man."¹⁰

It was perhaps little surprising, then, that President Jackson hand-picked Vice President Van Buren as his electoral successor.¹¹ Such was Crockett's disdain for Van Buren that he vowed to "leave the [U]nited States" if Van Buren was elected.¹² Crockett's very public criticism of the President and Vice President infuriated both men.¹³ In return, Jacksonians gerrymandered Crockett's congressional district just prior to the election of 1835, which weakened his electoral base.¹⁴

Never one for political ambiguity, Crockett famously made clear on the campaign stump that if his constituents elected his Jacksonian-backed rival, "You may all go to hell and I will go to Texas."¹⁵ On the morning of November 1, 1835, less than three weeks after his defeat by just 252 votes, Crockett made good on his promise and headed to Texas.¹⁶

Forty-nine-year-old Crockett crossed the Sabine River into Texas near the end of December 1835. He was sworn into the Texas Volunteer Auxiliary Corps for a six-month tour on January 12, 1836.¹⁷

He and his party set out for Washington-on-the-Brazos on the El Camino Real (called the "Old San Antonio Road" by the Anglo-Texians),¹⁸ where they hoped to receive their orders from the newly-appointed general of the Texian Army, Sam Houston.¹⁹ Crockett rode with some sixteen to eighteen companions, most of whom were educated professionals from Tennessee and Kentucky, who called themselves the "Tennessee Mounted Volunteers."²⁰ Three of the Tennessee Mounted Volunteers were attorneys who would come to their end with Crockett at the Alamo.²¹

Daniel William Cloud

Daniel William Cloud was a twenty-two-year-old attorney from Logan County, Kentucky. He had traveled westward through several states and territories seeking a suitable place to begin his law practice.²²

⁷ *See id.* at 143–44, 155–56.

⁸ *Id.* at 143, 154.

⁹ *Id.* at 154.

¹⁰ *Id.*

¹¹ *Id.* at 143.

¹² *Id.* at 156.

¹³ *Id.* at 143.

¹⁴ *Id.* at 152.

¹⁵ *Id.* at 144, 156.

¹⁶ *Id.* at 157–58.

¹⁷ *Id.* at 160–61; *see also Critical Study*, 37 SW. HIST. Q. at 165.

¹⁸ *See BLOOD OF HEROES*, at 162; Adèle B. Looscan, *Micajah Autry, a Soldier of the Alamo*, 14 SW. HIST. Q. 315, 322 (Apr. 1911) [hereinafter *Alamo Soldier*].

¹⁹ *BLOOD OF HEROES*, at 162; *see also Critical Study*, 37 SW. HIST. Q. at 165.

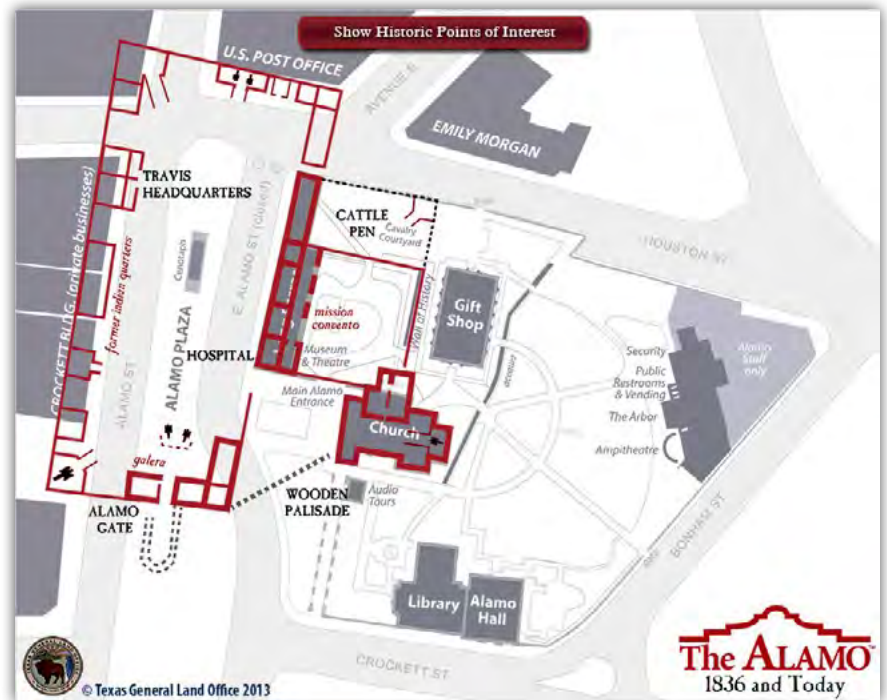
²⁰ *Compare BLOOD OF HEROES* at 162, with *Critical Study*, 37 SW. HIST. Q. at 165, 167.

²¹ *Critical Study*, 37 SW. HIST. Q. at 167, 244, 251.

Although he nearly founded his practice in Arkansas, he decided to journey yet further on to Texas upon hearing of the Texians' plight.²³

Cloud showed that, despite his youth, he already possessed the rhetorical skill that would have made him a fine lawyer in practice, and perhaps even suited him for service as a judge in his newfound home. He described the Mexican government's treatment of the Texian settlers as a "monarchical tyrannical, central despotism."²⁴ "Ever since Texas has unfurled the banner of freedom and commenced a warfare for liberty or death," he wrote his brother, "our hearts have been enlisted in her behalf."²⁵ A little over two months before he would meet his fate at the Alamo, Cloud wrote that, "If we succeed, the Country is ours. It is immense in extent, and fertile in its soil and will amply reward all our toil. If we fail, death in the cause of liberty and humanity is not cause for shuddering."²⁶

He enlisted as a private in the Volunteer Auxiliary Corps of Texas on January 14, 1836 in Nacogdoches, Texas. He arrived at the Alamo with Crockett around February 11, 1836.²⁷ During the battle, Cloud fought alongside Crockett on the wooden palisade running between the Alamo chapel and the gatehouse,²⁸ and fell on March 6, 1836.²⁹



Interactive Map: The Alamo in 1836. Courtesy Texas General Land Office, <http://www.thealamo.org/plan-a-visit/interactive-map/index.html>.

Peter James Bailey

Peter James Bailey was a friend of Cloud and a fellow native of Logan County, Kentucky.³⁰ He was an 1834 graduate of Transylvania University Law School in Lexington, Kentucky, and was the only lawyer at the Alamo who had earned a law degree.³¹ Bailey left Kentucky in the fall of 1835 alongside Cloud in search of the site of his future law practice.³²

²² See BLOOD OF HEROES at 162; WHOLE HOG, 71 TEX. B.J. at 211; Bill Groneman, *Cloud, Daniel William*, HANDBOOK OF TEXAS ONLINE, <https://www.tshaonline.org/handbook/online/articles/fcl49> (last visited Nov. 11, 2014) [hereinafter *Cloud*]; *Critical Study*, 37 SW. HIST. Q. at 251.

²³ See BLOOD OF HEROES, at 162; WHOLE HOG, 71 TEX. B.J. at 211.

²⁴ WHOLE HOG, 71 TEX. B.J. at 211.

²⁵ BLOOD OF HEROES, at 162.

²⁶ WHOLE HOG, 71 TEX. B.J. at 211.

²⁷ See *Cloud*; see also *Critical Study*, 37 SW. HIST. Q. at 165, 167, 251.

²⁸ BLOOD OF HEROES, at 282.

²⁹ See *Cloud*; *Critical Study*, 37 SW. HIST. Q. at 159.

³⁰ BLOOD OF HEROES, at 162; WHOLE HOG, 71 TEX. B.J. at 211.

³¹ WHOLE HOG, 71 TEX. B.J. at 211; see also *Critical Study*, 37 SW. HIST. Q. at 244.

³² WHOLE HOG, 71 TEX. B.J. at 211

At the age of twenty-four, he enlisted as a private on January 14, 1836 in Nacogdoches, Texas, just two days after their leader, Davy Crockett, was sworn into the Texian Volunteer Auxiliary Corps.³³ Bailey perished with his fellow Kentuckian, Cloud, when the Alamo fell on March 6, 1836.³⁴

Because of his service to the Republic, Bailey's heirs received parcels of land in what are now Archer, Baylor, and Hamilton counties. In addition, Bailey County in the Texas Panhandle now memorializes his name.³⁵

Micajah Autry

The third lawyer in Crockett's party was also the oldest lawyer at the Alamo.³⁶ Micajah Autry was forty-three years old, and hailed from Sampson County, North Carolina.³⁷ He was a veteran of the War of 1812, in which he had fought at the tender age of seventeen.³⁸

Autry was admitted to the Tennessee Bar in Nashville around 1828 or 1829.³⁹ He built a thriving law practice in Jackson, Tennessee with his law partner, Andrew L. Martin, from 1831 to 1835.⁴⁰ He lived during this time not far from the Hermitage, the home of President Andrew Jackson.⁴¹ Autry was later forced to sell his house and lands after speculating in a dry-goods venture with Martin, but this indignity paled compared to the loss he was soon to suffer.⁴²

While out at a camp meeting one evening, Autry and his wife returned home to find the youngest of their three children, Edward, drowned after having climbed into a bathtub—an accident that occurred despite being left in the care of a nurse.⁴³ Grief-stricken and near-destitute, Autry heard tales of “Austin's Colony.” He decided to scout it for himself and his family.⁴⁴

Autry met up with Kentucky attorneys Cloud and Bailey on the road into Texas.⁴⁵ He wrote his wife, Martha, that he was “determined to provide for you a home or perish.”⁴⁶ In a January 13, 1836 letter, he explained the prospects for his family in Texas and the motivation driving his journey: “I go the whole Hog in the cause of Texas. I expect to help them gain their independence and also to form their civil government, for it is worth risking many lives for. From what I have seen and learned from others there is not so fair a portion of the [E]arth's surface warmed by the sun.”⁴⁷

³³ Compare *id.*, with BLOOD OF HEROES, at 160–61; see also Ronald G. Bailey, *Bailey, Peter James III*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fbach> (last visited Nov. 11, 2014) [hereinafter *Bailey*]; *Critical Study*, 37 Sw. HIST. Q. at 165, 244.

³⁴ See *Bailey*; *Critical Study*, 37 Sw. HIST. Q. at 159.

³⁵ *Bailey*.

³⁶ See WHOLE HOG, 71 TEX. B.J. at 210–11.

³⁷ See *id.* at 211; *Critical Study*, 37 Sw. HIST. Q. at 167, 244.

³⁸ BLOOD OF HEROES, at 162; Bill Groneman, *Autry, Micajah*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fau16> (last visited Nov. 11, 2014) [hereinafter *Autry*].

³⁹ *Autry*.

⁴⁰ See *Autry*; WHOLE HOG, 71 TEX. B.J. at 211; *Critical Study*, 37 Sw. HIST. Q. at 167, 244.

⁴¹ See BLOOD OF HEROES, at 162; *Alamo Soldier*, 14 Sw. HIST. Q. at 316.

⁴² See BLOOD OF HEROES, at 163; *Alamo Soldier*, 14 Sw. HIST. Q. at 317; *Autry*.

⁴³ BLOOD OF HEROES, at 163.

⁴⁴ *Id.*

⁴⁵ *Id.* at 163–64.

⁴⁶ WHOLE HOG, 71 TEX. B.J. at 211.

Memphis Dec 7th 1835-

My Dearest Martha

I have taken my passage on the Steam Boat Pacific & shall leave in an hour or two. I hope I may say I have drained the cup of sorrow to the very last drop, not on account of any thing so much as leaving you & my Dear little children in so dependent a situation. It gave me great consolation however to meet with Brother Jack at Bolivar who promised me & he will perform to the best of his ability I know that he would sustain & try to comfort you while I am absent. I have met in the same Boat a number of acquaintances from Nashville & the District bound for Texas among whom are George C. Childress & his Brother. Childress thinks the fighting will be over before we get there & speaks cheerily of the prospects. I feel more energy than I ever did on any thing I have undertaken. I am determined to provide for you ^{a home} or Perish.

I am in a great hurry. Tell Mr. Smith that Mr. Roberts who lived at my place in Keaysboro last year owes for the rent of it \$40. besides for some oat ground which I understood he sowed I wish him to collect & use the money when he goes up there. Tell Amelia May God prosper her & her little son & My Dearest Martha fare well - fare well Mary - fare well James & fare you all well till you hear from me again perhaps from Nashville.
M. Autry

Letter from Micajah Autry, Private in the Texan Auxiliary Corps, to Martha Autry, Dec. 7, 1835.
Courtesy Rice University Digital Scholarship Archive.

Autry was sworn into the Texas Volunteer Auxiliary Corps as a private on January 14, 1836 in Nacogdoches.⁴⁸ Municipal Judge John Forbes recorded the oath Autry and the other members of the Tennessee Mounted Volunteers took after administering it to the men:

Know all men by these presents: That I have this day voluntarily enlisted myself in the Volunteer Auxiliary Corps, for and during the term of six months.

And I do solemnly swear that I will bear true allegiance to the provisional Government of Texas, or any future Government that may be hereafter declared, and that I will serve her honestly and faithfully against all her enemies whatsoever and observe and obey the orders of the Governor of Texas, the orders and decrees of the present and future authorities and the orders of the officers appointed over me according to the rules and regulations for the government of the Armies of Texas.

“So help me God.”⁴⁹

He arrived at the Alamo on or around February 9, 1836.⁵⁰ A letter Autry wrote to his wife on February 11, 1836 is still on display there.⁵¹ Autry was reputed to be an able marksman, and it is said that he had only a single clear shot at Santa Anna during the Alamo siege, which he took but missed.⁵² Autry was assigned to defend the wooden palisade between the Alamo chapel and gatehouse alongside Cloud, where he fell with several of his fellow Tennessee Mounted Volunteers on March 6, 1836.⁵³

Green Berry “Ben” Jameson

Green Berry “Ben” Jameson was another Kentuckian who made his way west to join the Texian fight, arriving in Texas in 1830 before any of his fellow Alamo lawyers.⁵⁴ Perhaps inspired to law by his grandfather, who had served as an early Lieutenant Governor of Virginia,⁵⁵ Jameson opened his law office in the capital of Austin’s Colony, San Felipe.⁵⁶ He later practiced mainly as a sales agent in Brazoria for the Galveston Bay and Texas Land Company.⁵⁷ When the Texas Revolution began, Jameson enlisted in the Texas Army at Gonzales in October 1835, saying, “When I left home it was with a determination to See [the] Land free and independent, Sink or Swim[,] die or perish.”⁵⁸

Just before the end of December, after having taken part in the Siege of Bexar, Jameson remained and

⁴⁷ See BLOOD OF HEROES, at 164; WHOLE HOG, 71 TEX. B.J. at 211; see also *Alamo Soldier*, 14 SW. HIST. Q. at 319 (relaying to his wife that, in recompense for his service in the Texian Army, he would “be entitled to 640 acres of land ... and 4444 acres upon condition of settling my family here”).

⁴⁸ See *Critical Study*, 37 SW. HIST. Q. at 167; *Autry*.

⁴⁹ *Alamo Soldier*, 14 SW. HIST. Q. at 320–21.

⁵⁰ Compare BLOOD OF HEROES, at 178, with *Autry*.

⁵¹ *Autry*.

⁵² WHOLE HOG, 71 TEX. B.J. at 211.

⁵³ See BLOOD OF HEROES, at 282; *Critical Study*, 37 SW. HIST. Q. at 159.

⁵⁴ BLOOD OF HEROES, at 282.

⁵⁵ Bill Groneman, *Jameson, Green B.*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fja20> (last visited Nov. 11, 2014) [hereinafter *Jameson*].

⁵⁶ *Id.*

⁵⁷ BLOOD OF HEROES, at 98.

⁵⁸ WHOLE HOG, 71 TEX. B.J. at 210.

was appointed as Chief Engineer to the Alamo.⁵⁹ Upon his appointment, Jameson achieved the rank of ensign, although there is no record that he ever had had formal training in engineering.⁶⁰ His task of fortifying the Alamo was a challenging one, as it was in dire need of repair after the Texian force's bombardment during the Siege of Bexar, which had just concluded earlier that month after seven weeks.⁶¹ Jameson met this engineering challenge with ambitious fervor, and soon impressed his commander, Lieutenant Colonel James C. Neill, and later James Bowie and Alamo Commandant William B. Travis.⁶²

Although Jameson had more grandiose plans to fortify the Alamo—including the construction of a moat, a drawbridge, and trap doors—his construction efforts were limited by lack of manpower.⁶³ Instead, he focused the garrison's efforts towards fortifying the northern wall of the Alamo compound, which had been battered by Neill's cannon during the Siege of Bexar.⁶⁴ He and his crews set about buttressing the limestone and adobe walls of the compound with log braces, digging trenches outside the walls, erecting banquettes, and building an *abatis* composed of felled trees with the branches sharpened and pointing toward advancing forces.⁶⁵ They also constructed a wooden palisade of eight-foot-high cedar timbers to buttress the weakest spot in the Alamo's perimeter, between the chapel and the main gate.⁶⁶ It was on this palisade that Autry and Cloud would later perish.⁶⁷

Jameson kept his crews working in shifts, day and night, throughout the siege of the Alamo.⁶⁸ Despite their heroic and determined efforts, the Alamo remained in much the same condition in March 1836 when it fell to Santa Anna as it had been in December 1835 when it fell to Neill, Ben Milam, and Edward Burleson.⁶⁹

On the first day of the siege on February 23, 1836, Jameson was sent by Bowie to carry a message to the Mexican forces regarding a rumored parley by the Mexicans, which defiantly concluded, "God and Texas!"⁷⁰ He gave his life on the last day of the siege on March 6, 1836.⁷¹

James Butler Bonham

Twenty-nine-year-old James Butler Bonham grew up just five miles from William Barret Travis—reputedly his second cousin⁷²—in the farm country of Edgefield County, South Carolina.⁷³ Bonham came from a line of

⁵⁹ See *WHOLE HOG*, 71 TEX. B.J. at 210; *BLOOD OF HEROES*, at 98; *Jameson*.

⁶⁰ Compare *BLOOD OF HEROES*, at 98, with *Critical Study*, 37 SW. HIST. Q. at 266. All "engineers of the Texan Revolutionary Army were called ensigns." *Critical Study*, 37 SW. HIST. Q. at 266.

⁶¹ *BLOOD OF HEROES*, at 175, 282. See Alwyn Barr, *Bexar, Siege of*, HANDBOOK OF TEXAS ONLINE, <https://www.tshaonline.org/handbook/online/articles/qeb01> (last visited Nov. 12, 2014) [hereinafter *Siege of Bexar*]; *BLOOD OF HEROES*, at 80–91, 98.

⁶² *BLOOD OF HEROES*, at 99, 113, 174–75.

⁶³ *Id.* at 99, 174–75.

⁶⁴ *Id.* at 175.

⁶⁵ *Id.* at 175, 177, 184. Banquettes were elevated steps dug along the inside of a rampart or parapet, by which marksmen could fire upon enemies.

⁶⁶ *Id.* at 177.

⁶⁷ See *BLOOD OF HEROES*, at 282; *Critical Study*, 37 SW. HIST. Q. at 159.

⁶⁸ *BLOOD OF HEROES*, at 237, 242–43, 272.

⁶⁹ *Critical Study*, 37 SW. HIST. Q. at 18; see also *BLOOD OF HEROES*, at 90; *Siege of Bexar*.

⁷⁰ See *Critical Study*, 37 SW. HIST. Q. at 16; *Jameson*.

⁷¹ See *Critical Study*, 37 SW. HIST. Q. at 160; *Jameson*.

⁷² See Bill Groneman, *Bonham, James Butler*, HANDBOOK OF TEXAS ONLINE, <https://www.tshaonline.org/handbook/online/articles/fbo14> (last visited Nov. 12, 2014) [hereinafter *Bonham*].

⁷³ See *BLOOD OF HEROES*, at 110; *Critical Study*, 37 SW. HIST. Q. at 247.



James Butler Bonham. Courtesy of Daughters of the Republic of Texas.

Revolutionary War veterans, so his embrace of the Texas Revolution was unsurprising.⁷⁴ He was also a passionate supporter of the secession and nullification movements, which—in addition to protests of campus regulations requiring prompt attendance at classes even in inclement weather—may have contributed to his expulsion during his senior year from South Carolina College.⁷⁵

He was admitted to the South Carolina bar in 1830.⁷⁶ Shortly thereafter, he gained many distaff admirers for caning an opposing counsel who had insulted Bonham's female client.⁷⁷ He was held in contempt of court for refusing to apologize to the lawyer, and was sentenced to ninety days in jail.⁷⁸ While imprisoned, it is said that he was routinely brought both food and flowers by his newfound throng of admiring women.⁷⁹

By October 1834, Bonham had moved his law practice to Mobile, Alabama, where he led a rally in support of the Texian cause at the Shakespeare Theater a year later on October 17, 1835.⁸⁰ His support of the Texians was no doubt fanned by regular correspondence he maintained with Travis, with whom he had remained fast friends since childhood.⁸¹ After raising a volunteer band dubbed the "Mobile Greys," Bonham set out for Texas.⁸² He arrived in San Felipe in November 1835, and joined Travis in the recruiting office of the Texian Army.⁸³

On January 18, 1836, General Sam Houston ordered Bonham and Bowie to the Alamo.⁸⁴ There he remained until about February 16, 1836, when Travis sent him to Goliad to obtain reinforcements from Fannin.⁸⁵ Around 11 a.m. on March 3, 1836—some sixty-six hours before he was to sacrifice his life—Bonham solitarily bore through the Mexican lines and returned to the Alamo.⁸⁶ He had had with him two companions, both of whom refused to enter the Alamo upon seeing it encircled by the Mexican army.⁸⁷ It is said that Bonham's lifelong friendship with Travis drove him to re-enter the fort against such overwhelming odds, perhaps inspiring a subsequent description of Bonham as "as chivalrous a soul as ever fought and died for liberty."⁸⁸

Bonham brought word from Robert McAlpin Williamson, a future Associate Judge of the Republic

⁷⁴ BLOOD OF HEROES, at 110.

⁷⁵ Compare *id.*, with *Critical Study*, 37 SW. HIST. Q. at 248, Milledge L. Bonham, Jr., *James Butler Bonham: A Consistent Rebel*, 35 SW. HIST. Q. 124, 126 (Jul. 1931) [hereinafter *Consistent Rebel*].

⁷⁶ See *Consistent Rebel*, 35 SW. HIST. Q. at 126; BLOOD OF HEROES, at 110.

⁷⁷ See BLOOD OF HEROES, at 110; *Bonham*.

⁷⁸ See BLOOD OF HEROES, at 110; *Consistent Rebel*, 35 SW. HIST. Q. at 127; *Bonham*.

⁷⁹ See BLOOD OF HEROES, at 110; *Consistent Rebel*, 35 SW. HIST. Q. at 127.

⁸⁰ See *Bonham*; BLOOD OF HEROES, at 110.

⁸¹ *Critical Study*, 37 SW. HIST. Q. at 80, 248.

⁸² See BLOOD OF HEROES, at 110; *Bonham*.

⁸³ Compare *Critical Study*, 37 SW. HIST. Q. at 248, with BLOOD OF HEROES, at 110; *Bonham*.

⁸⁴ *Critical Study*, 37 SW. HIST. Q. at 248; see *Consistent Rebel*, 35 SW. HIST. Q. at 129.

⁸⁵ See BLOOD OF HEROES, at 196; *Bonham*.

⁸⁶ See BLOOD OF HEROES, at 244–45; *Critical Study*, 37 SW. HIST. Q. at 31; *Consistent Rebel*, 35 SW. HIST. Q. at 131; *Bonham*.

⁸⁷ *Consistent Rebel*, 35 SW. HIST. Q. at 129.

⁸⁸ See *id.* at 131.

Supreme Court better known by his nickname, “Three-Legged Willie.”⁸⁹ Williamson was in charge of organizing volunteers in Gonzales, and implored Travis to hold out until reinforcements from Goliad and Gonzales arrived, rumored to already be on the march to the Alamo.⁹⁰

Bonham was a Second Lieutenant in the Texas Cavalry, but Travis referred to him in correspondence as “Colonel”—likely a nod to the rank Bonham previously received from the Governor of South Carolina.⁹¹ Bonham’s valor in the desperate waning hours of the fall of the Alamo is regarded equal to that of Travis, Bowie, and Crockett.⁹² Indeed, the Alamo monument on the grounds of the Texas Capitol lists Bonham’s name atop the names of fallen Alamo defenders, alongside those of only Travis, Bowie, and Crockett.⁹³ He fell on March 6, 1836, either manning one of the cannons inside the Alamo chapel, or after fighting his way to the fort’s magazine in an attempt to ignite it to kill as many Mexican soldiers as he could.⁹⁴



William Barret Travis, by Henry McArtle.
Courtesy Texas State Library and Archives.

William Barret Travis

William Barret Travis was reared in Edgefield County, South Carolina, and met his reputed second cousin, Bonham,⁹⁵ while attending the Red Banks country school there.⁹⁶ His family moved to Alabama in 1818, where he received a formal elementary education.⁹⁷ Thereafter, he studied law with one of the most prominent attorneys in Alabama, James Dellet, while teaching during the interim in order to make ends meet.⁹⁸

During this time, Travis—then nineteen years old—fell in love with one of his students—herself just sixteen—and they soon married.⁹⁹ Travis gained admission to the Alabama bar before he turned twenty.¹⁰⁰ Within a few years, however, both his professional life (he had founded a newspaper, the *Claiborne Herald*, in addition to his law practice) and his personal fortunes turned for the

⁸⁹ See BLOOD OF HEROES, at 245; *Bonham*; see also JAMES L. HALEY, THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986, 24, 235 (2013) [hereinafter NARRATIVE HISTORY]. Judge Williamson’s nickname originated from a lame leg he suffered from as a result of a bout with juvenile tuberculous arthritis, which he compensated for by using a wooden crutch strapped behind his afflicted leg. NARRATIVE HISTORY, at 24, 101. Judge Williamson is also credited with convening the first regular session of a district court in the Republic of Texas. *Id.* at 101.

⁹⁰ See BLOOD OF HEROES, at 245; *Bonham*.

⁹¹ Compare *Critical Study*, 37 SW. HIST. Q. at 247–48, with *Bonham*.

⁹² Compare *Consistent Rebel*, 35 SW. HIST. Q. at 136, with *Bonham*.

⁹³ See *Consistent Rebel*, 35 SW. HIST. Q. at 136; *Critical Study*, 37 SW. HIST. Q. at 292.

⁹⁴ Compare *Consistent Rebel*, 35 SW. HIST. Q. at 134, with *Bonham*; see also *Critical Study*, 37 SW. HIST. Q. at 159.

⁹⁵ *Bonham*.

⁹⁶ *Critical Study*, 37 SW. HIST. Q. at 80; see also Archie P. McDonald, *Travis, William Barret*, HANDBOOK OF TEXAS ONLINE, <https://www.tshaonline.org/handbook/online/articles/ft03> (last visited Nov. 12, 2014) [hereinafter *Travis*].

⁹⁷ *Critical Study*, 37 SW. HIST. Q. at 81.

⁹⁸ See BLOOD OF HEROES, at 11; *Critical Study*, 37 SW. HIST. Q. at 81; *Travis*.

⁹⁹ BLOOD OF HEROES, at 11.

¹⁰⁰ *Id.*

worse.¹⁰¹ He came to believe his bride had been unfaithful to him, so he left her, his young son, and unborn daughter with access to a sizeable bank account and headed for Texas.¹⁰²

He arrived in San Felipe in the spring of 1831, and promptly put \$10 down for title to the one league of land (4,428 acres) available to Texas settlers.¹⁰³ He established a law practice first in the sparsely populated coastal town of Anahuac, and later in San Felipe, once his local prominence had expanded.¹⁰⁴ His practice consisted mainly of land dealings, slavery transactions, wills, colonization cases, and criminal defense matters.¹⁰⁵

Travis soon became a leader in the Texas Revolution alongside San Felipe's *alcalde*, the Republic's future Supreme Court Judge "Three-Legged Willie" Williamson. Travis's fame soon resulted in General Santa Anna's issuance of arrest warrants for Travis and Williamson—dubbed by Santa Anna as "obnoxious Texans."¹⁰⁶ By late fall, General Sam Houston appointed Travis the chief recruiter for the Texas Army, and soon promoted Travis to the rank of Major in the artillery corps.¹⁰⁷ Travis preferred the cavalry, however, and accepted yet another promotion to Lieutenant Colonel of the Texas Cavalry on Christmas Eve, 1835.¹⁰⁸

The following month, Houston ordered Travis to reinforce Colonel James C. Neill at Bexar.¹⁰⁹ Once there, Travis worked with fellow Alamo Bar attorney Ben Jameson to fortify the mission.¹¹⁰ A few years before they came together to fight at the Alamo, Travis and Jameson were opposing counsel,¹¹¹ where Travis bested Jameson and won a \$50 judgment for his client.¹¹²

The oratorical and drafting skills Travis learned as a practicing lawyer in frontier Texas greatly aided him within the walls of the Alamo. He famously exhorted his comrades to stay and defend the Alamo by stepping across a line he drew in the sand with his sword,¹¹³ and sent many letters seeking reinforcements, the most renowned of which he penned on February 24, 1836, promising and underlining three times the phrase, "Victory or Death!"¹¹⁴ At the age of twenty-seven, on March 6, 1836, Travis kept his promise while defending the north wall of the Alamo.¹¹⁵

¹⁰¹ *Id.* at 12; *Travis*.

¹⁰² See *Critical Study*, 37 SW. HIST. Q. at 81; BLOOD OF HEROES, at 12; *Travis*. Travis would later pay off his debts in Alabama after successfully establishing his law practice in Texas. BLOOD OF HEROES, at 17. His wife filed for divorce in 1834, charging Travis with desertion, which was granted by the Alabama legislature in November 1835. Compare *id.* at 18, with *Travis*; see *Critical Study*, 37 SW. HIST. Q. at 86–87.

¹⁰³ BLOOD OF HEROES, at 12–13.

¹⁰⁴ See *id.* at 13, 17; *Critical Study*, 37 SW. HIST. Q. at 82; *Travis*.

¹⁰⁵ BLOOD OF HEROES, at 17.

¹⁰⁶ See *id.* at 19, 21; *Critical Study*, 37 SW. HIST. Q. at 83.

¹⁰⁷ See *Critical Study*, 37 SW. HIST. Q. at 83; *Travis*.

¹⁰⁸ See *Critical Study*, 37 SW. HIST. Q. at 83–84; BLOOD OF HEROES, at 22; *Travis*.

¹⁰⁹ See *Critical Study*, 37 SW. HIST. Q. at 84; *Travis*.

¹¹⁰ See BLOOD OF HEROES, at 99, 113, 174–75; *Travis*.

¹¹¹ BLOOD OF HEROES, at 174.

¹¹² *Id.*

¹¹³ BLOOD OF HEROES, at 270, 346, 357–60.

¹¹⁴ See *id.* at 212–13; *Travis*. Perhaps no better recitation of this letter can be found than that by another great Texan, Willie Nelson, recorded in 1968. WILLIE NELSON, TRAVIS LETTER (RCA Records 1968), available at <https://youtube.com/watch?v=Q43iuWIjJUJ> (last visited Dec. 4, 2014).

¹¹⁵ See BLOOD OF HEROES, at 278; *Critical Study*, 37 SW. HIST. Q. at 84, 160, 282.

Commandant of the Alamo -
 Bexar, Feb. 24th 1836 -
 To the People of Texas &
 all Americans in the world -
 Fellow Citizens & Countrymen -
 I am besieged, by a thousand
 or more of the Mexicans under
 Santa Anna - I have sustained
 a continual Bombardment &
 cannonade for 24 hours & have
 not lost a man - The enemy
 has demanded a surrender at
 discretion, otherwise they
 are in the fort to the sword -
 I have refused the demand with a cannon
 shot & our flag still waves
 proudly from the wall - I
 will never surrender a retreat
 them, I call on you in the
 name of Liberty, of patriotism
 & every thing dear to the American
 Character to come to our aid

Letter from William B. Travis, Commandant of the Alamo, to The People of Texas and All Americans, Feb. 24, 1836. Courtesy Texas State Library and Archives.

with all despatch - The enemy is
 receiving reinforcements daily &
 will no doubt increase to three
 four thousand in four or five days
 if this call is neglected, I am deter-
 mined to sustain myself as long as
 possible & die like a soldier
 who never forgets what is due to
 his own honor & that of his
 Country -
Victory or death
 William B. Travis
 Lt. Col. Comd't

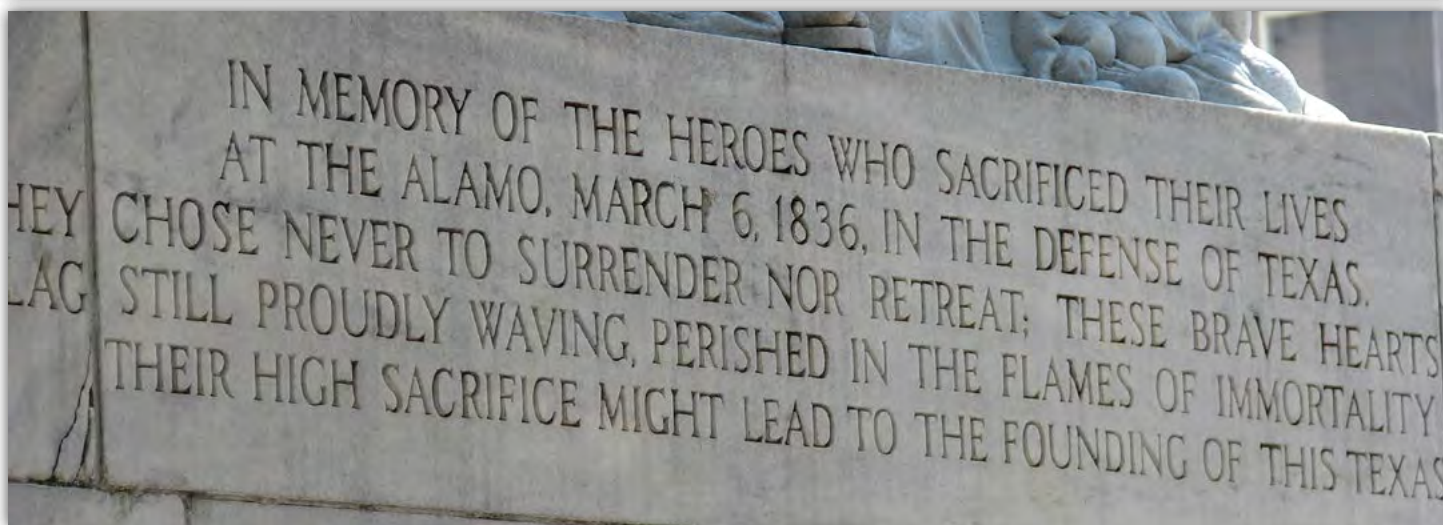
When the Lord is on our side
 we had not three barrels of corn -
 we had since found in several
 places 80 or 90 bushels & got into
 the well 20 or 30 head of oxen -
 Travis

Since the above was written I have a very long
 Comrade during the whole day, think that should
 have been an article made upon the ground where
 shot of an animal when I left Albany in all
 the summer you can see that
 when I left the city
 but 150 & determined to
 die or die tomorrow
 for I will not live
 here I will not live
 at all every

Col. Monroe is there the troops are
 under the command of Gen. Scurry
 At I hope that
 our mice
 as the
 Scurry
 should not be
 our movement
 Travis



The first bar association in Texas was comprised of ambitious and able lawyers whose legal skills and training enabled each to leave his mark on Texas history apart from his service in the law. Although Texas jurisprudence may not have been directly impacted by the Alamo Bar Association's legal contributions, its valiant members' shared sacrifice and courage has inspired and will continue to inspire the Texas bench and bar to fulfill their mandate for centuries to come.



The Alamo Cenotaph, or Spirit of Sacrifice, is a memorial to the Alamo defenders in the Alamo Plaza Historic District in downtown San Antonio. Designed by Pompeo Coppini, 1936. Wikipedia.



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The Constitution of the Republic of Texas

By William J. Chriss

OF COURSE, THE FIRST CONSTITUTIONS OR FUNDAMENTAL LAWS governing Texas were those generated by the Spanish and Mexican governments while Texas was a province within those nations. And even the earliest Anglo-Texian constitutions were state constitutions proposed in the event that the Mexican government could be cajoled or threatened into separating Texas from the state of Coahuila-Texas. For example, in 1833, Anglo colonists and their indigenous Tejano compatriots held a convention to petition the central government for separate statehood, and a committee headed by Sam Houston drafted a proposed constitution for that purpose. The attempt was unsuccessful, but the reasons that led Texians to want their own government persisted and soon bloomed into full-fledged revolt and a demand for complete independence.¹

Yet this was not the first such project undertaken by Anglo adventurers and disenchanting Tejanos. In 1812, with Mexico roiling in the midst of its own revolt from Spain, José Bernardo Gutiérrez de Lara, a Mexican liberal, and Augustus Magee, an American adventurer, led a combined force from Louisiana all the way to San Antonio, where they captured the town but were ultimately defeated by Spanish loyalists.² In 1819, James Long, an American filibuster, led another attempt to detach Texas from Spain and Mexico by force of arms. He was joined by Gutiérrez de Lara and by Anglo adventurers that included Ben Milam, and perhaps even James Bowie. This group took Nacogdoches and declared an independent republic. But again, initial success led to ultimate failure when Long was forced to surrender to the new Mexican government.³ And in 1826, an Anglo empresario named Haden Edwards declared yet another independent republic, this one dubbed “Fredonia,” in Northeast Texas, only to be suppressed by Mexican authorities.⁴

As the 1830s dawned, these incidents caused increasing concern in Mexico City over instability in the frontier province of Coahuila-Texas. Soon the Mexican government was debating immigration policy, and that debate was eerily similar to today’s, but with the polarities reversed. Official after official tasked with solving the “Texas problem” bemoaned the fact that Anglos were flooding into the province, many illegally, and that soon they would constitute a majority of its population, even though the Anglos were unable to speak the official language (Spanish), unfriendly to the official religion and culture (Catholicism), and bent on exploiting the native Tejano population, stealing its land, and usurping its traditions. Mexican attempts to reverse this situation

¹ See Ralph W. Steen, *Convention of 1833*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mjc10> (last visited Nov. 11, 2014); S. S. McKay, *Constitution Proposed in 1833*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mhc09> (last visited Nov. 11, 2014).

² See Jesús F. de la Teja, *Mexican War of Independence*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/qdmcg> (last visited Nov. 11, 2014).

³ See Harris Gaylord Warren, *Long Expedition*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/qyl01> (last visited Nov. 11, 2014).

⁴ See Archie P. McDonald, *Fredonian Rebellion*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/jcf01> (last visited Nov. 11, 2014).

“Reading of the Texas Declaration of Independence” by Charles and Fanny Normann for the Texas Centennial in 1936, now on display at Washington-on-the-Brazos. Image courtesy Portal to Texas History, University of North Texas Libraries.



Independence Hall, late 1800s. Courtesy Texas State Library and Archives.



Inside Independence Hall today. Photo by Dylan O. Drummond.

by strengthening the central government and clamping down on immigration by Anglos (and especially on the African slaves that accompanied them) precipitated the Texas Revolution of 1835–36.⁵

It came naturally to the Anglo-American colonists that they should formally declare their independence in writing, and that—if victorious—they should promptly draft and ratify a national constitution. So they did. The Texas Constitution of 1836 comprised a preamble, seven articles, a schedule for elections, and a Declaration of Rights.⁶ Most of the constitution’s provisions were unabashedly modeled on the U.S. Constitution. Thus, the new nation would have an elected president and vice president, Senate, and House of Representatives. An independent judiciary with a supreme court and district courts was established, but with the innovation that the judges were to be elected by Congress to four-year terms, not appointed for life by the president.

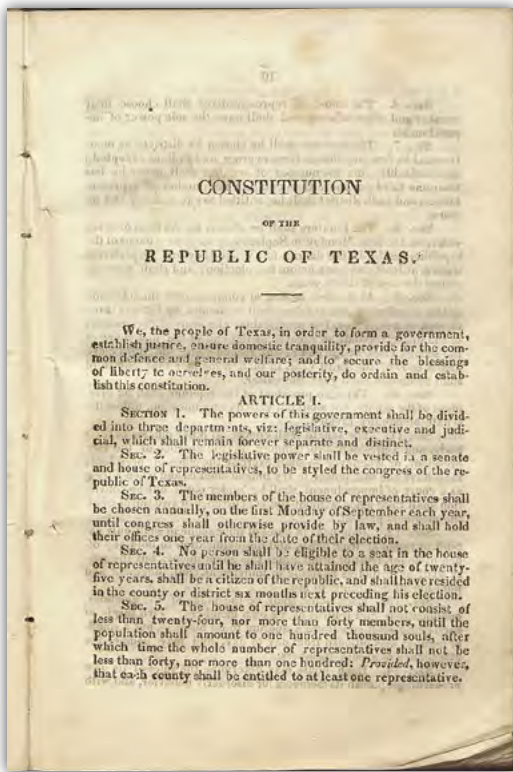
But in other respects the 1836 Texas Constitution was uniquely suited to the Texians who founded a frontier republic at the edge of Anglo-American civilization. The sections of the Declaration of Rights dealing with freedom of speech and press, the right to bring lawsuits, and the right to keep and bear arms were significantly broader than their U.S. counterparts and were worded as affirmative rights rather than negative restrictions on governmental

⁵ See Margaret Swett Henson, *Anglo-American Colonization*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/uma01> (last visited Nov. 11, 2014). C. Barker and James W. Pohl, *Texas Revolution*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/qdt01> (last visited Nov. 11, 2014); Randolph B. Campbell, *Slavery*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/yps01> (last visited Nov. 11, 2014).

⁶ See JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, 17–52 (2013); MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS*, 13–21 (2011); Joe E. Ericson, *Constitution of the Republic of Texas*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mhc01> (last visited Nov. 11, 2014).

power.⁷ For example, freedom of the press was balanced against the right to sue for libel, but in all such cases, the jury was empowered to decide not only the facts, but also the law, an overt nod to jury nullification.⁸ The open courts provision, the only portion of the entire constitution to survive unchanged in every subsequent Texas Constitution,

guaranteed not only that rights and privileges would not be infringed except by “due course of law”⁹ but also that “All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation, shall have remedy....”¹⁰



Republic Constitution of 1836. Courtesy Texas State Library and Archives.

The violent realities of frontier life produced a right to weaponry beyond that found in the Second Amendment. In Texas, irrespective of any militia or joint or communal right of self-defense, “Every citizen shall have the right to bear arms in defense of himself...”¹¹

And these Texians were largely from the South, particularly the upper and western South, and they were Jacksonians. The constitution testified to this orientation. First, the article on General Provisions went to extraordinary lengths to protect the institution of slavery. The article provided that:

Congress shall pass no laws to prohibit emigrants from the United States of America from bringing their slaves into the Republic with them, and holding them by the same tenure by which such slaves were held in the United States; nor shall Congress have power to emancipate slaves; nor shall any slave-holder be allowed to emancipate his or her slave or slaves, without the consent of Congress, unless he or she shall

send his or her slave or slaves without the limits of the Republic. No free person of African descent, either in whole or in part, shall be permitted to reside permanently in the Republic, without the

⁷ See James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L. J. 399, 402 (1993). 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, THE LAWS OF TEXAS 1822–1897, 1063 (Gammel Book Co. 1898).

⁸ The free-speech provision, which appeared as Article I, Section 4 in the 1836 Constitution's Bill of Rights, now appears as Article I, Section 8 in the Bill of Rights of the 1876 Texas Constitution.

⁹ Article I, Section 13 of the current constitution, titled, EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW,” protects a citizen's right to “due course of law,” a traditional term broader than “due process” based on the words of MAGNA CARTA (June 15, 1815) (emphasis supplied). Section 13 states that, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by *due course of law*.” (Emphasis supplied). In contrast, the Fifth Amendment to the U.S. Constitution guarantees that, “No person shall be deprived of life, liberty or property without *due process* of law.” See David Richards & Chris Riley, *Symposium on the Texas Constitution: Developing a Coherent Due Course of Law Doctrine*, 68 TEX. L. REV. 1649, 1664-65 (June 1990) (analysis of the “due course of law” language). Because every Texas constitution has contained a separate “due course of law” provision, now Article I, Section 19, and because Section 13 precedes Section 19, the Section 13 “due course of law” provision must provide different and broader rights than the guarantee of due process rights in Section 19. Section 19 is worded slightly differently than Section 13, providing that “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

¹⁰ For the survival unscathed of the open courts provision, see *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986). This provision, originally Article I, Section 6 of the 1836 Constitution, survives as Article I, Section 13 of the 1876 Texas Constitution.

¹¹ This provision survives now as Article I, Section 23 of the 1876 Texas Constitution.

consent of Congress, and the importation or admission of Africans or negroes into this Republic, excepting from the United States of America, is forever prohibited, and declared to be piracy.¹²

Second, the Jacksonian suspicion of eastern mercantile interests was also on display. The constitution prohibited, except on two-thirds vote of both houses of Congress, any appropriation of public funds for any “private or local purposes.” There would be no subsidization of industry or banks or corporations in Texas. But the enemy Texians most feared was not the eastern financier or even the Indian raider. It was the recently overthrown Mexican Catholic overlord, and the possibility that it, with Tejano co-religionists, might re-invade, and worse, foment a slave insurrection. And once inspired to revolt, slaves would have even more dangerous allies. The Declaration complained that the Mexican government had, “through its emissaries, incited the merciless savage, with the tomahawk and scalping-knife, the [sic] massacre the inhabitants of our defenseless frontiers.”¹³ For this reason, the 1836 Declaration of Independence condemned Catholic priests as “the eternal enemies of civil liberty, the ever ready minions of power and the usual instruments of tyrants,” and, to re-emphasize for good measure the connection between Catholicism and tyranny, the colonists added that they would never submit to “the most intolerable of all tyranny, the combined despotism of the sword and the priesthood.”¹⁴ The same sentiments were more blandly reflected in the constitution’s requirement of complete secularity in all government operations. Under Section 1 of Article V, “no minister of the gospel or priest of any denomination whatever shall be eligible to the office of the Executive of the Republic, nor to a seat of either branch of the Congress of the same.”¹⁵

Carefully studying the constitution of the Texas Republic can thus yield interesting and unconventional insights. Texas’s national heroes were certainly fighting for their own freedom and for traditional American notions of liberty, but also for the continued enslavement of Africans. While many were devout Christians, their political stance was radically and overtly anti-clerical. And they were suspicious of moneyed interests and careful to preserve the right to seek redress for damages in court and before a jury. This unique combination of ideologies does not tarnish their achievements or their boldness, but the founders of Texas as we now know it should be appreciated for who they were, not who we would like them to have been.

¹² See REPUB. TEX. CONST. OF 1836, Gen. Provisions, § 9, available at <http://www.tamu.edu/faculty/ccbn/dewitt/texascon.htm> (last visited Dec. 3, 2014).

¹³ See TEX. DECL. OF INDEP. (Mar. 2, 1836), available at <http://www.lsjunction.com/docs/tdoi.htm> (last visited Nov. 11, 2014).

¹⁴ See WILLIAM CAREY CRANE, THE LIFE AND SELECT LITERARY REMAINS OF SAM HOUSTON OF TEXAS 264–66 (J. B. Lippincott and Co., 1885); see also TARLTON LAW LIBRARY, JAMAIL CENTER FOR LEGAL RESEARCH, DECLARATION OF INDEPENDENCE (1836), <http://tarlton.law.utexas.edu/constitutions/slider/constitution/doi1836/index/2> (last visited Dec. 3, 2014). Crane’s book includes an appendix containing not only some of Houston’s writings, but also a copy of the *Texas Declaration of Independence* and other primary source material.

¹⁵ See REPUB. TEX. CONST. OF 1836, art. V, § 1, available at <http://www.tamu.edu/faculty/ccbn/dewitt/texascon.htm>.



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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 3: The Scotch-Irish, Born Fighting

By David A. Furlow

In two previous parts of this article, published in the Fall 2013 and Summer 2014 issues of the Journal, we examined the first two of the three competing legal traditions that shaped Texas law during the Republic—the Castilian influence that came to Texas through Spain and Mexico¹ and the planter-elite culture that Stephen F. Austin and his colonists brought from the Tidewater South.²

This final installment analyzes a third influence on the constitution and case law of early Texas—the fiercely independent, frequently violent, and usually clannish Scotch-Irish culture.³ They introduced ideas of natural liberty, low taxes, severely limited government, and pro-debtor legislation to Texas. We'll examine several men of Scotch-Irish background who wove the contending, competing traditions of Castilian/Tejano, Tidewater Chesapeake, and Southern Back Country culture into the fabric of Texas jurisprudence. The cultural origins of the Republic's lawmakers help explain the mindset, constitutional ideals, and decisions of Sam Houston, Thomas Jefferson Rusk, and John Hemphill.

Scotch-Irish legal traditions blended with other legal traditions to create a unique Texas culture, *continued*.

America preserves a variety of contending cultures. If you want to see the way cultures shape societies and frame choices, go out for a meal. If you sit down in San Antonio's *Mi Tierra* restaurant, you can toss back shots of *Monte Alban* Agave Mezcal con Gusano, order *chiles rellenos* and *tres leches*, gaze on fading photos of Pancho Villa, and hear *Feliz Navidad* play every Christmas season.

Go to the Williamsburg Inn's Regency Room in Virginia's former capital and you'll breakfast on steak and eggs, snack on stuffed Chesapeake crabs, listen to a spirited rendition of *The World Turned Upside Down* (the tune Lord Cornwallis's drum and fife corps played when they surrendered at Yorktown), and drink mint juleps beneath Neoclassical columns.

¹ David A. Furlow, *The Lone Star Republic's Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Traditions—Part 1: Material Differences in Legal Culture*, 3(1) TEX. SUP. CT. HIST. SOC. J. 9–22 (Fall 2013), available at http://www.texascourthistory.org/documents/TSCHS_Journal_Fall_2013.pdf (last visited Nov. 10, 2014).

² David A. Furlow, *The Lone Star Republic's Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Traditions—Part 2*, 3(4) TEX. SUP. CT. HIST. SOC. J. 28–34 (Summer 2014) (http://www.texascourthistory.org/documents/TSCHS_Journal_Summer_2014.pdf) (last visited Nov. 13, 2014).

³ As an ethnic group, the Scotch-Irish are frequently referred to as “Scots Irish” or as “Scot-Irish,” but the terms are interchangeable. See, e.g., JIM WEBB, *BORN FIGHTING: HOW THE SCOTS-IRISH SHAPED AMERICA* (New York: Broadway Books, 2005), 12–21 [hereinafter *BORN FIGHTING*]; MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (New York: Little, Brown & Co., 2008), 166–68 [hereinafter *OUTLIERS*]; DAVID HACKETT FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* (New York: Oxford Univ. Press, 1989), 606–08, 618–21 [hereinafter *ALBION'S SEED*].

Stop by the Loveless Café in Nashville and you'll enjoy a Country Western experience. After a day watching NASCAR races, you may sip *Jack Daniel's No. 7 Tennessee Whiskey* on a dog-trot porch, dine on fried catfish, pass the cornbread, and listen to the Grand Ole Opry before retiring to a featherbed.

Transmitted from parent to child, lover to lover, spouse to spouse, and teacher to student over the generations, foodways, music, and architecture are social inheritances as long-lasting as regional accents. As *New Yorker* staff journalist and author Malcolm Gladwell observed,

Cultural legacies are powerful forces. They have deep roots and long lives. They persist, generation after generation, virtually intact, even as the economic and social and demographic conditions that spawned them have vanished, and they play such a role in directing attitudes and behavior that we cannot make sense of the world without them.⁴

Cultures encompass more than food, drink, music, and architecture, however. They include ways of creating order, attitudes toward authority, and ideas about liberty and restraint. Reproduced through child-rearing, religious institutions, education, work, rules, regulations, and codes, every society creates a legal culture and passes it down the generations.⁵

To understand how cultures shape expectations, foster institutions, and administer justice, Malcolm Gladwell states that “you have to go back into the past—and not just one or two generations...[but] two or three hundred years, to a country on the other side of the ocean, and look closely at what exactly the people in a very specific geographic area...did for a living.”⁶

A mass migration of the Scotch-Irish travelled to America in the seventeenth and eighteenth centuries.

In 1773, Dr. Samuel Johnson noted how emigrants to America retained their traditional folkways:

Whole [Border Country] neighborhoods formed parties for removal; so that departure from their native country is no longer exile. He that goes thus accompanied, sits down in a better climate, surrounded by his kindred and friends; they carry with them their language, their popular songs, and hereditary merriment: they change nothing but the place of their abode.⁷

As they moved their families from the Atlantic seaboard to the Appalachians, the emigrants' Border Country ways turned into the American South's Back Country traditions.⁸

⁴ OUTLIERS, 175.

⁵ ALBION'S SEED, 9-10.

⁶ OUTLIERS, 170.

⁷ ALBION'S SEED, 605.

⁸ JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* (New York: Random House, 2009 paperback ed.), 44, 316, 324, 345 [hereinafter *AMERICAN LION*]; T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* (Boston: Da Capo Press, 2000), 308; JAMES L. HALEY, *PASSIONATE NATION: THE EPIC HISTORY OF TEXAS* (New York: Free Press, 2006), 107–116, 129, 135, 148–152, 168, 181–84, 187, 202–207, 215–16, 233–49 [hereinafter *PASSIONATE NATION*]; RANDOLPH CAMPBELL, *GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE* (New York: Oxford Univ. Press, 2003), 141 and 147–148 [hereinafter *GONE TO TEXAS*]; MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* (Lubbock: Tex. Tech. Univ. Press, 2011), 13-15 [hereinafter *LONE STAR*].

Scotch-Irish traditions of honor, violence, and vengeance infused Britain's Border Country, America's Southern Back Country, and Texas.

Where crops grow poorly, people are impoverished, and property is threatened, codes of honor that embrace strength, violence, and vengeance often arise. Malcolm Gladwell offers a valuable insight:

If you live on some rocky mountainside, the explanation goes, you can't farm. You probably raise goats or sheep, and the kind of culture that grows up around being a herdsman is very different from the culture that grows up around growing crops.

The survival of a farmer depends on the cooperation of others in the community. But a herdsman is off by himself. Farmers also don't have to worry that their livelihood will be stolen in the night, because crops can't be easily stolen unless...a thief wants to...harvest[] an entire field on his own. But a herdsman...[is] under constant threat of ruin through the loss of his animals. So he has to be aggressive: he has to...be willing to fight in response to even the slightest challenge to his honor—and that's what a "culture of honor" means...⁹

Carrying Border Country cattle-ranching and cattle-reeving folkways with them, Scotch-Irish settlers brought cows from England, Scotland, and Northern Ireland, including "Celtic," long-horned Kerry cattle, and took them to Appalachia, Alabama, and Arkansas.¹⁰ In Texas, they bred their cows with the native Spanish stock to produce Longhorns and to recreate a culture of honor among the vaqueros, cowboys, ranchers, rustlers, and Rangers of the Lone Star Republic.¹¹

How did a culture of honor arise in Texas, as it had in the British Border Country and in America's Southern Highland (Appalachian) Back Country?

It was because of where the original inhabitants of that region came from. The so-called American [B]ack [C]ountry states—from the Pennsylvania border south and west through Virginia and West Virginia, Kentucky and Tennessee, North Carolina and South Carolina, and the northern end of Alabama and Georgia—were settled overwhelmingly by immigrants from one of the world's most ferocious cultures of honor. They were "Scotch-Irish"...from the lowlands of Scotland, the northern counties of England, and Ulster in Northern Ireland.¹²

⁹ OUTLIERS, 166–67; ALBION'S SEED, 605–42.

¹⁰ Lisa Whalen, *A Rare Story Unfolds Daily*, 7(1) PLYMOUTH LIFE 16–23 (2008) (Plimoth Plantation's rare breed Kerry cattle); Grady McWhiney and Forrest McDonald, *Celtic Origins of Southern Herding Practices*, 51 J. SOU. HIST. 165–82 (1985) [hereinafter *Celtic Origins*]; DON WORCHESTER, *THE TEXAS LONGHORN: RELIC OF THE PAST, ASSET FOR THE FUTURE* (College Station: Tex. A & M Univ. Press, 1987), 3–46; J. FRANK DOBIE, *THE LONGHORNS* (Austin: Univ. of Tex. Press, 1980), vii–xvii, 3–68; FISCHER, ALBION'S SEED, 741–42. See generally TERRY G. JORDAN, *TRAILS TO TEXAS: SOUTHERN ROOTS OF WESTERN CATTLE RANCHING* (Lincoln: Univ. of Nebraska Press, 1981) [hereinafter *TRAILS TO TEXAS*].

¹¹ ALBION'S SEED, 741–42; *Celtic Origins*, 51 J. SOU. HIST. 165–82; see generally *TRAILS TO TEXAS*.

¹² OUTLIERS, 166–68; BORN FIGHTING, 1–184. Britain's Border Country included the bloody No Man's Land between England and Scotland and Northern Ireland's Ulster and Londonderry, where conflict between Irish Catholics and Presbyterian Scots continued for centuries. Border Country immigrants, mostly Calvinists, first came to America as indentured servants and Scottish prisoners of war in seventeenth century Virginia and Maryland. ALBION'S SEED, 605–07. In the eighteenth century, Border Country settlers emigrated to New England, New York, Delaware, Pennsylvania, and Maryland before moving southwest. *Id.*, 606, 633; BORN FIGHTING, 133–35. Mostly sailing in large clans between 1713 and 1774, they settled up-country in Virginia, the Carolinas, Georgia, and the Appalachians, then trekked through the South, Arkansas, and Missouri into Texas. ALBION'S SEED, 633–50, 655, 691–96, 633–50, 691–96, 741–53, and 758–65; BORN FIGHTING, 121–84. Militant Presbyterianism and tent-revival Baptist fundamentalism shaped

The [British Border Country consisted of]...remote and lawless territories ...fought over for hundreds of years. The people of the region were steeped in violence. They were herdsman, scraping out a living on rocky and infertile land. They were clannish, responding to the harshness and turmoil of their environment by forming tight family bonds and placing loyalty to blood above else. And when they immigrated to North America, they moved into the American interior, to remote, lawless, and marginally fertile places...that allowed them to reproduce in the New World the culture of honor they had created in the Old World.¹³

Sociological studies show that America's Scotch-Irish immigrants exulted honor, violence, and vengeance far more than their English, German, Dutch, and Scandinavian neighbors.¹⁴

The pugnacious, self-reliant Scotch-Irish settlers who came to Texas recognized an informal system of retributive justice in which each individual acted as an armed guard of his financial, familial, and other interests.¹⁵ They continued feuding and seeking retributive justice, *lex talionis*, that started in Britain's Border Country, and continued in America. The feud between the Hatfields and McCoys, for example, began as a dispute over two razorback hogs but resulted in twenty deaths.¹⁶ Similar feuds, including the chaotic Regulator-Moderator War, erupted in east Texas during the Republic.¹⁷ Texas's first appointed chief justice, Scotch-Irish James Collinworth challenged Anson Jones, the Republic's last president, to "fight with pistols at ten steps," but settled the dispute after Jones agreed to battle it out.¹⁸

their worlds. ALBION'S SEED, 703–08; LONE STAR, 323–24; ROBERT WUTHNOW, ROUGH COUNTRY: HOW TEXAS BECAME AMERICA'S MOST POWERFUL BIBLE-BELT STATE (Princeton: Princeton Univ. Press, 2014), 14–41. John C. Calhoun, Andrew Jackson, and Sam Houston led the Scotch-Irish into battle and in politics. ALBION'S SEED, 691–97; BORN FIGHTING, 200–87. The Scotch-Irish ate Southern Back Country cooking, played Border Country "Highland Games," and wore an early version of Country Western clothing. ALBION'S SEED, 727–40. This Scotch-Irish cultural package came with them to Texas and remains a major influence here to this day.

¹³ BORN FIGHTING, 1 (quoting VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (New York: Harcourt, Brace, & Co., 1927)). "Of the different racial strains that mingled their blood with the earlier English—Irish, Huguenot-French, German, Scotch-Irish—the last was by far the most important...They were desperately poor; the available lands near the coast were already pre-empted; so armed with axes, their seed potatoes, and the newly invented rifle, they plunged into the backwoods...A vigorous breed, hardy, assertive, individualistic, thrifty, trained in the democracy of the Scottish kirk, they were the material out of which Jacksonian democracy was to be fashioned...."; OUTLIERS, 166–69.

¹⁴ OUTLIERS, 168 ("[A] culture of honor helps to explain why the pattern of criminality in the American South has always been so distinctive. Murder rates are higher there than in the rest of the country. But crimes of property and 'stranger' crimes—like muggings—are lower...In the [B]ack [C]ountry, violence wasn't for economic game. It was personal. You fought over your honor."), 170–74 (studies and statistics).

¹⁵ ALBION'S SEED, 765–70; LONE STAR, 296–302; CLARENCE E. CARTER, TERRITORIAL PAPERS OF THE U.S. (Washington, D.C.: 27 vols., 1934–1969), vol. VI, 243–46, 268–69.

¹⁶ D. L. W. TOUGH, THE LAST YEARS OF A FRONTIER: A HISTORY OF THE BORDERS DURING THE REIGN OF ELIZABETH (Oxford: Oxford Univ. Press, 1928), 12–16, 117, 131, 156, 174, 180, 225; ALBION'S SEED, 765–71; FISCHER, ALBION'S SEED, 765–771. See generally OTIS K. RICE, THE HATFIELDS AND THE MCCOYS (Lexington: Univ. Press of Ky., 1978).

¹⁷ JAMES L. HALEY, THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986 (Austin: Univ. of Texas Press, 2013), 25–30 (2013) [hereinafter NARRATIVE HISTORY]; LONE STAR LAW, 25–33; LONE STAR, 574–75.

¹⁸ Letter from Edward Morehouse to Anson Jones (Nov. 25, 1843), in ANSON JONES, MEMORANDA AND OFFICIAL CORRESPONDENCE RELATING TO THE REPUBLIC OF TEXAS, ITS HISTORY AND ANNEXATION, 1836–1846 (New York: D. Appleton & Co., 1859; reprint, Chicago: Rio Grande Press, 1966), INCLUDING JONES' LETTERS, ETC., TO AND FROM ANSON JONES[,] MOSTLY OF A PUBLIC OR SEMI-OFFICIAL CHARACTER, FROM 1836 TO 1845, WITH MY ENDORSEMENTS AND NOTES AT THE TIME, letter from Edward Morehouse (Nov. 25, 1843) [hereinafter JONES OFFICIAL CORRESPONDENCE]; FISCHER, ALBION'S SEED, 768–69 (citing Edward M. Steel, "Criminality in Jeffersonian America—A Sample, 18 CRIME AND DELINQUENCY 154 (1972) [hereinafter *Jeffersonian America*]).

Judges who acted in accord with Scotch-Irish tradition placed more emphasis on punishing crimes against property than crimes of violence.¹⁹ That pattern has persisted for two centuries in Texas,²⁰ where “the criminal codes of the state of Texas regarded casual killing as a relatively minor crime, drawing two to twenty years,”²¹ while “horse theft logically had to be punished by death.”²² Texas’s Scotch-Irish immigrants shared a shoot-now-and-ask-questions-later veneration of violence with their Border Country forbears and Back Country ancestors. This tradition reflected an Anglo-American culture distinctly different from the Virginia Tidewater ideals of a chivalric, aristocratic “Southern Gentleman” society that arrived in 1820s Texas when Stephen F. Austin settled Texas with Tidewater plantation owners.²³

Scotch-Irish politicians and judges shaped Texas’s legal culture.

Sometimes disparaged in Britain as “the Scum of the Earth,” “Rednecks,” and—in America—as “Hillbillies,” “White Trash (in modern times, “Trailer Park Trash”) and “Crackers,” a wave of rough and ready Scotch-Irish settlers overflowed into Texas in the 1820s, 1830s, and 1840s.²⁴ They were the last phase of a decades-spanning migration of a quarter million largely poor farmers and laborers from the British Border Country that began in the seventeenth century and ended in the eighteenth.²⁵ As Texas historian T. R. Fehrenbach observed,

This immigration into Texas was part of the expansion of the South itself; it was not an expansion out of the adjacent states of Louisiana or Arkansas, but by families who leapfrogged from Alabama or Tennessee. One-half the white population came from these two states, Alabama and Tennessee.

These settlers largely came from the hill and forest regions, not from the plantation south; they were “red-necks” or yeoman farmers who went entirely into the prairie and post-oak regions far up the Texas rivers. They wanted to get away from the slave plantations, with which they could not compete; they could most easily acquire land on the far edge of settlement, and there was, noticeably, in these people an urge toward the far frontier²⁶

Lumping together early nineteenth century white settlers as “Anglos” ignores the conflicting cultural traditions that gave rise to two very different legal cultures.

¹⁹ ALBION’S SEED, 768–69 (citing *Jeffersonian America*, 18 CRIME AND DELINQUENCY at 154).

²⁰ ALBION’S SEED, at 768; JOHN CHARLES CAMPBELL, *THE SOUTHERN HIGHLANDER AND HIS HOMELAND* (New York: Russell Sage Foundation, 1921), 119.

²¹ LONE STAR, 564.

²² *Id.*, 565.

²³ *Id.*, 304–18.

²⁴ See, e.g., Mackubin T. Owens, *Review of James Webb’s Born Fighting: How the Scots-Irish Shaped America*, ASHBROOK UNIV. (Dec. 2004), available at <http://ashbrook.org/publications/oped-owens-04-webb/> (last visited Nov. 24, 2014) (“Commenting on a statement that Howard Dean made during the Democratic primaries, Charles Krauthammer opined that Dean was campaigning for the ‘white trash vote’ by pandering to ‘rebel-yell racist rednecks.’”); BORN FIGHTING, 133–34, 181–84; ALBION’S SEED, 732–35, 741–43, 747–53, 758–65; LONE STAR, 298–300.

²⁵ ALBION’S SEED, 606–08, 618–21.

²⁶ LONE STAR, 287.

Border Country dialects carried Scotch-Irish culture into Southern Back Country speech and Texas talk.

As Malcolm Gladwell notes, “[w]hatever mechanism passes on speech patterns probably passes on behavioral and emotional patterns as well.”²⁷ Many Southerners who came to Texas in the nineteenth century shared a distinctive regional dialect known as “Scotch-Irish speech.” Still heard in the Appalachians and Ozarks, the lower Mississippi Valley, and the Southern Plains to this day, this Southern dialect connected the Southern Highland Back Country Scotch-Irish with their Border Country ancestors.²⁸

Southern Back Country speech used *whar* for where, *thar* for there, *hard* for hired as in *hard hand*, *critter* for creature, *deef* instead of *deaf* (the name of the San Jacinto Scout is pronounced *Deef* Smith rather than *Deaf* Smith), *pizen* for poison, *nekkid* for naked, *widder* for widow, and *young-uns* for young ones.²⁹ The Border Country’s cadenced lilt and Appalachia’s rough Back Country accents echo in the Country Western sound of Clint Black and Reba McEntire, the humor of Larry the Cable Guy, the violence in Clint Eastwood’s *The Outlaw Josie Wales*, and the exuberance of Slim Pickens’s character Major “King” Kong in *Dr. Strangelove*.

Hostility toward “foreigners” characterized Border Country, Back Country, and Texas attitudes.

To Border Country immigrants and their Scotch-Irish elite descendants in America (the “Ascendancy” in nineteenth century parlance),³⁰ “the word foreigner...[was] used ...in its Elizabethan sense of someone who is the same nationality as the speaker, but not from the speaker’s immediate area.”³¹ The result was a xenophobic outlook hostile to the “Other” throughout American history: first and foremost toward Native Americans; then to Virginia and Massachusetts economic elites; then to Parliament, and King George III; later, to Spaniards, Mexicans, and Tejanos; later still, to Africans, freed slaves, Yankees, Jews, and northern intellectuals—none of whom were cultural “kith and kin” with Scotch-Irish settlers:

The people of the southern highlands would become famous in the nineteenth century for the intensity of their xenophobia, and also for the violence of its expression. In the early nineteenth century, they tended to detest great planters and abolitionists in equal measure. During the Civil war some fought against both sides. In the early twentieth century they would become intensely negrophobic and antisemitic. In our own time they are furiously hostile to both communists and capitalists. The people of the southern highlands have been remarkably even-handed in their antipathies—which they have applied

²⁷ OUTLIERS, 175, n.

²⁸ ALBION’S SEED, 652–54. See generally HANS KURATH, A WORD GEOGRAPHY OF THE EASTERN UNITED STATES (Ann Arbor: Univ. of Mich. Press, 1949); CRAIG M. CARVER, AMERICAN REGIONAL DIALECTS: A WORD GEOGRAPHY (Ann Arbor: Univ. of Mich. Press, 1987), 1-20, 93-160, 225-31.

²⁹ American Southern Back Country dialects played a major role in shaping Texas speech. See ALBION’S SEED, 652–54. Verbs included *she done finished*, *they growed up*, *he done did it* and *he don’t have none*. *Id.*, 653. Scotch-Irish phrases that came to Texas include *fixin*, i.e., *getting ready to do something*; *man* for *husband* (as in Tammy Wynette’s *Stand by Your Man*), *sparkin’* for courting; and *honey*, as a mark of “hibernian” (Irish and Scotch Irish) affection. *Id.*, 653, 653 n.6. Cf. E. BAGBY ATWOOD, THE REGIONAL VOCABULARY OF TEXAS (Austin: Univ. of Tex. Press, 1986), 67, 72 (widoe/widder), 115–16, 121, 241 (Map 11).

³⁰ ALBION’S SEED, 642–50. In America, the Ascendancy comprised some of the most important Back Country clans, including the Bankheads, Bells, Calhouns, Grahams, Henrys, Houstons, and Jacksons. See ALBION’S SEED, 649.

³¹ ALBION’S SEED, 650; CARL BRIDENBAUGH, MYTHS AND REALITIES, SOCIETIES OF THE COLONIAL SOUTH (Baton Rouge: Praeger Press, 1952), 183; Wylene P. Dial, *The Dialect of the Appalachian People*, 30 WEST VA. HIST. 463–71 (1960) [hereinafter *Appalachian People*].

to all strangers without regard to race, religion or nationality.³²

In the Border Country, the Back Country, and Texas, fear of the “Other” was always great.

Distrust of banks, creditors, and big government characterized Scotch-Irish culture in the Border Country, Back Country, and Texas.

As a rule, individuals who exemplified the British Border Country, Southern Back Country, and Republic Texas opposed governing authority not when it was *close*, e.g., inside their clan or a local justice court. But they chafed when governments raised taxes, loomed large, or governed from a distance, whether the capitol was in London, Williamsburg, Washington, D.C., Mexico City, Saltillo, or Austin.³³ President Andrew Jackson, for example, shut down Nicholas Biddle’s Second Bank of the United States for the same reasons his Border Country ancestors would have shuttered the Bank of England.³⁴

Scotch-Irish military and political leaders shaped Southern Back Country and the Republic of Texas’s legal culture.

Like their ancestors in the violent, British Border Country and their forefathers in feud-riven Appalachia, Texas’ Scotch-Irish settlers of the 1820s, 1830s, and 1840s recreated a traditional culture of honor. They zealously defended their honor, punished property crimes more heavily than crimes of passion, waged relentless war on Indians (with a few exceptions such as Sam Houston), prayed fervently in Calvinist churches, viewed “foreigners” with hostility or suspicion (except for John Hemphill), and refused to accept restrictions on the natural liberty their war-chieftain leaders espoused.³⁵

The Scotch-Irish joined with Austin’s planter slavocracy to oppose the entry of “soulless corporations” into Texas, required a two-thirds vote of the House of Representatives to create any corporation, and flatly barred banks from incorporating.³⁶ The opposition of poor Scotch-Irish settlers and Austin’s slavocracy to taxes brought the Republic to near bankruptcy.³⁷

When Scotch-Irish, Southern Back Country settlers came to Texas in the nineteenth century, they followed rough-hewn leaders and chose judges eager to fight for their political, economic, and religious interests. Their elected officials and their judges played the same social role as the thanes (war chieftains) in the British Border Country:

The Calhouns, Polks, Jacksons, Henrys, Houstons, Bells, Grahams and Bankheads were typical of the [B]ack [C]ountry elite. The founders of these families in America had all been

³² ALBION’S SEED, 650; *Appalachian People*, 30 W. VA. HIST., 463–71.

³³ ALBION’S SEED, 650, 747–58. As the citizens of Mecklenberg County, North Carolina publicly declared in 1768, “We shall ever be ready to support the government under which we find the most liberty.” *Id.*, 777; LONE STAR, at 287; NORRIS W. PREYER, HEZEKIA ALEXANDER AND THE REVOLUTION IN THE BACKCOUNTRY (1987), 66.

³⁴ ALBION’S SEED, 849.

³⁵ ALBION’S SEED, at 821–23, 889 (“In 1982, the murder rate in the nation as a whole 9.1 per 100,000. . . . The southern highlands and the southwestern states had extremely high murder rates—14.7 in the west south central states and 16.1 in Texas.”), 890–98.

³⁶ LONE STAR LAW, 18 24–25.

³⁷ LONE STAR, 25; PASSIONATE NATION, 97, 102, 113, 191, 151.

people of substance in North Britain These elite families firmly established their hegemony in the [B]ack [C]ountry before the American War of Independence³⁸

Southern Back Country notions of natural law, *lex taliensis* rough justice, fearlessness in battle, and fanatical commitment to individual liberty dominated Texas during the Republic.

The most prominent national leader of the Scotch-Irish in America, President Andrew Jackson, supported Texas's drive for independence and annexation to the United States.³⁹ Like Andrew Jackson, Sam Houston favored greater constitutional guarantees than those in the U.S. Bill of Rights. Most of the Scotch-Irish settlers who came to Texas seeking free or cheap land were Jacksonian Democrats, who fervently sought to defend their newfound liberties because they had not fully participated in East Coast political institutions.⁴⁰ Houston and



Andrew Jackson, Official White House portrait by Ralph E.W. Earl (1835), Wikipedia Commons.



Sam Houston as a U.S. Senator, photo by Matthew Brady. Wikipedia Commons.

³⁸ ALBION'S SEED, 648.

³⁹ AMERICAN LION, 44, 316, 324, 345; LONE STAR, 190–215, 308; PASSIONATE NATION, 107–16, 129, 135, 145–68, 181–84, 187, 202–07, 215–16, 233–49.

⁴⁰ LONE STAR, 239–302; James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L. J. 399, 402 (1993); Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L. J. 93, 96–97 (1988); Joseph W. McKnight, *Stephen Austin's Legalistic Concerns*, 89 SW. HIST. Q. 240, 265 (1986); J. E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457–59, 461, 466 (1959); Rupert N. Richardson, *Framing the Constitution of the Republic*, 31 SW. HIST. Q. 191, 209–14 (1928).

Jackson remained close personal friends through decades of war, peace, and politics.⁴¹

Houston shaped the Jacksonian nature of the Republic's 1836 constitution and courts. He led the fifty-nine delegates who issued the Texas Declaration of Independence and promulgated its constitution at the March 1–2, 1836 Convention at Washington-on-the-Brazos.⁴² His victory at San Jacinto transformed the dream of Texas independence into reality.⁴³ He won election as the Republic's first president in 1836 and won again in 1842, then served the Lone Star State as a U.S. senator and governor.⁴⁴

Born into a wealthy, prominent family in the Valley of Virginia on March 2, 1793, Sam Houston was proud of his Scotch-Irish ancestry.⁴⁵ His ancestor John Houston was a border baronet, a Border County chieftain.⁴⁶ He left the British Isles in 1730 with his family to sail to America carrying a chest of gold sovereigns.⁴⁷ When the ship's captain tried to steal that gold, John organized a mutiny, seized the ship, and took its passengers to build a new life in America. In Virginia, John Houston served as a judge, purchased vast tracts of fertile farming land in the Valley of Virginia, and won a prominent place for his descendants in North America.⁴⁸

Sam's family moved him from Virginia's hilly back country to Tennessee's mountains in 1807. After nearly losing his life (and winning Andrew Jackson's life-long respect) in the Creek War, Houston began reading law in Nashville, opened a law firm and, with the support of Andrew Jackson, won appointment as Attorney General and election as Tennessee's governor.⁴⁹

When his first marriage dissolved, Sam Houston resigned the governorship and exiled himself from Tennessee.⁵⁰ He rejoined the Cherokee, and after three years, went to Texas with President Jackson's support.⁵¹ As a modern-day Scotch-Irish warrior-chieftain who rarely took counsel, his victory at San Jacinto proved his valor and military skill to the largely Back Country soldiers he commanded.⁵² Houston exercised a profound influence on Texas and American history as a protégé of Andrew Jackson, another self-made man of Scotch-Irish descent.⁵³

⁴¹ AMERICAN LION, 44, 316, 324, 345; LONE STAR, 223–24; 237–39, 247–51; ALBION'S SEED, 642–44.

⁴² 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, THE LAWS OF TEXAS 1822–1897 (Gammel Book Co. 1898), 1063; GONE TO TEXAS, 141 and 147–48; LONE STAR LAW, 13–15; PASSIONATE NATION, 148–52.

⁴³ STEPHEN L. MOORE, EIGHTEEN MINUTES: THE BATTLE OF SAN JACINTO AND THE TEXAS INDEPENDENCE CAMPAIGN (Dallas: Republic of Tex. Press 2004), 309–428 [hereinafter EIGHTEEN MINUTES]; CAMPBELL, GONE TO TEXAS, 148–58; LONE STAR LAW, 15–21; NARRATIVE HISTORY, 17–52.

⁴⁴ Thomas H. Kreneck, *Houston, Samuel*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fho73> (last visited Nov. 16, 2014) [hereinafter *Houston*]; GONE TO TEXAS, 159–61; LONE STAR, 246–54; NARRATIVE HISTORY, 17; PASSIONATE NATION, 206–16.

⁴⁵ JAMES C. LEYBURN, THE SCOTCH-IRISH: A SOCIAL HISTORY (1962), 200–10, 306 [hereinafter SOCIAL HISTORY].

⁴⁶ Sam Houston's ancestor referred to himself as "John Houston, Gent." to reflect his status as a man of substance. See also ALBION'S SEED, 648–49; J SOCIAL HISTORY, 91.

⁴⁷ ALBION'S SEED, 648–49.

⁴⁸ MARQUIS JAMES, THE RAVEN: A BIOGRAPHY OF SAM HOUSTON (New York: Bobbs Merrill Co., 1929) [hereinafter RAVEN]; ALBION'S SEED, 648.

⁴⁹ *Houston*.

⁵⁰ ALBION'S SEED, 648 (Houston's Border Country background).

⁵¹ LONE STAR, 182.

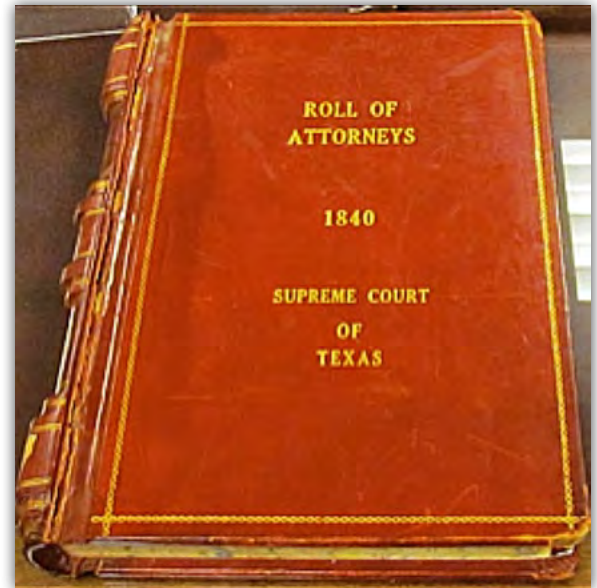
⁵² LONE STAR, 222–24, 229–54.

⁵³ ALBION'S SEED, 648.

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ROLL OF ATTORNEYS
LICENSED TO PRACTICE IN THE SUPREME COURT OF THE STATE OF TEXAS

NAME	RESIDENCE	DATE OF LICENSE		
		Month	Day	Year
Norris, Jas. W.		Jan'y	18	1840
Hemphill, John		"	"	"
Nimford, Jas. M.		"	"	"
Palmer, Edward L.		"	"	"
Houston, Sam		"	"	"
Hudson, Henderson C.		"	"	"
Hill, Wm Pinckney		"	14	"
Hendon, Jas. H.		"	17	"
Henderson, J. Pinckney		"	18	1841
Henderson, Jas. W.		June	15	1840
Hancock, John		Jan'y	29	1842
Harralson, Bertrand		Feb	15	"
Hale, Wm B.		Apr	8	"
Hamilton, Andrew J.		Jan'y	20	1841
Hendrickson, David		"	"	"

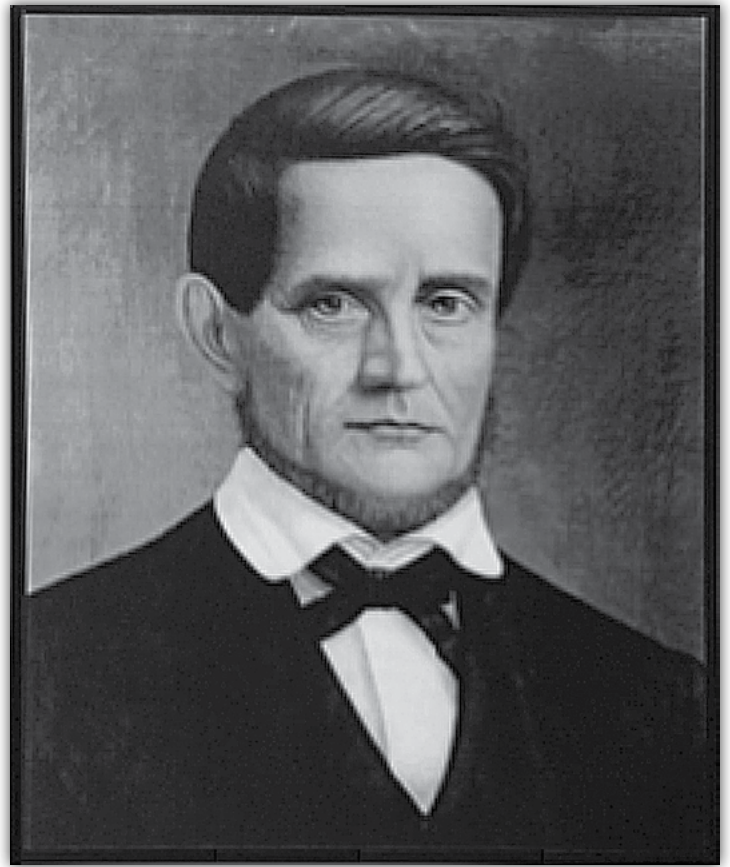


John Hemphill's and Sam Houston's names on the 1840 page of the Roll of Attorneys Licensed to Practice in the Texas Supreme Court, Texas Supreme Court Clerk's Office, author's photos (Feb. 2014).



On-site reenactment of Sam Houston's victory at the Battle of San Jacinto, with re-enactors in Scotch-Irish immigrant dress, author's photo (April 2014).

Two exemplars of Scotch-Irish, Presbyterian Back Country culture had a profound influence on the Texas Supreme Court’s jurisprudence: Thomas Jefferson Rusk was the first chief justice to convene a session of the court, and John Hemphill became the “John Marshall of Texas”—the court’s most important chief justice.



Two Texas Supreme Court Chief Justices with a Scotch-Irish, Southern Back Country background: Thomas Jefferson Rusk (left, U.S. Senate Biographical Guide to Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000518>), and John Hemphill at the age of 47 (right, a copy of the portrait in the Historic Texas Supreme Courtroom in the Texas State Capitol)

Thomas Jefferson Rusk was the first chief justice to preside over a session of the Republic’s Supreme Court.

Born in a family of Scotch-Irish descent⁵⁴ in Pendleton District in South Carolina’s Back Country on December 5, 1803, Thomas Jefferson Rusk taught himself law.⁵⁵ Rusk’s father, John Rusk, was a Presbyterian born between 1750 and 1760 in Northern Ireland, where Covenanter Scotch-Irish settlers remained in continuous conflict with native Irish Catholics for centuries.⁵⁶ Arriving in South Carolina in 1791, John Rusk settled at Fort Hill Plantation in the Old Pendleton District, later home of John C. Calhoun and now of Clemson College. John

⁵⁴ See Hon. Joe Greenhill, *The Early Supreme Court of Texas and Some of Its Justices*, 62 TEX. B. J. 646, 646-47 (1999).

⁵⁵ See Priscilla Myers Benham, *Rusk, Thomas Jefferson*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fru16> (last visited Nov. 17, 2014) [hereinafter *Thomas Jefferson Rusk*]; Aragon Storm Miller, *Rusk, John Cleveland*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fru46> (last visited Nov. 17, 2014) [hereinafter *John Cleveland Rusk*]; David A. Furlow, *Ten Myths and Legends of Texas Law*, ST. BAR OF TEX. PROF. DEV. PROGRAM, 9th ANN. ADV’D IN-HOUSE COUNSEL COURSE, ch. 6, 8 [hereinafter *Ten Myths and Legends*].

⁵⁶ See *Thomas Jefferson Rusk*; *John Cleveland Rusk*.

founded the Old Stone Church, a Presbyterian ministry, where he is buried.⁵⁷

After being admitted to the bar in Georgia in 1825, Rusk moved to Clarkesville, Georgia, where he practiced law. He also invested in a gold mine, hoping to use its profits to take care of his wife and seven children. After the men managing the gold mine absconded with the company's money in 1834, Rusk pursued them to Nacogdoches, Texas. But he soon learned that the embezzlers had gambled away the gold mine's money.⁵⁸

Sam Houston befriended Rusk in Nacogdoches and convinced him that Texas was a land of opportunity. When Rusk became a citizen of Mexico to continue living in Texas, Sam Houston served as a witness to Rusk's oath of allegiance.⁵⁹ Rusk won respect as Secretary of War during the Revolution and the Battle of San Jacinto, where he commanded the army after a musket ball severely wounded Sam Houston.⁶⁰

Adhering to the Scotch-Irish tradition of aggressive Indian-fighting, Rusk made war on Texas's Cherokee and Kickapoo Indians after Congress appointed him Secretary of War.⁶¹ Rusk alienated Houston when he joined in President Lamar's campaign to relocate and remove Cherokees. Rusk viewed Indians with the typical Scotch-Irish xenophobia toward "foreigners." Houston, in contrast, regarded Native Americans as his own kith and kin because the Cherokees adopted him into their tribe.⁶² Great men of Scotch-Irish descent responded to the tradition of kith and kin family loyalty depending on their own life-experiences.

Rusk was elected Chief Justice of the Republic's supreme court in December 1838, but did not learn of his election until late January of 1839, after the scheduled session had been cancelled due to lack of a quorum. District Judges Anthony Shelby, W.J. Jones, John T. Mills, and John Hemphill served with Rusk on the first session of the court, which Rusk convened on January 13, 1840 in the home of Major Asa Brigham, the Treasurer of the Republic and, later, Mayor of Austin.⁶³ Chief Justice Rusk wrote five opinions.⁶⁴ In fulfillment of an agreement entered into with President Mirabeau B. Lamar before his appointment, Rusk resigned the chief justiceship in May 1840.⁶⁵

Rusk presided over the Convention of 1845 to draft Texas's state constitution, during which he successfully opposed the popular election of judges.⁶⁶ Following annexation, Texas voters elected Rusk to the U.S. Senate.

⁵⁷ See NAT'L REG. INFO. SYS., *National Register of Historic Places*, 2009-03-13, http://en.wikipedia.org/wiki/Old_Stone_Church_and_Cemetery#mediaviewer/File:Old_Stone_Church (last visited Nov. 14, 2014); FREDERICK C. HOLDER, *HISTORIC SITES OF OCONEE COUNTY, S.C.* (Charleston: Oconee Cty. Hist. Soc., 2nd ed., 1991), 40-41.

⁵⁸ Gerald White, *The Almost Forgotten Pass in Review: Thomas Rusk*, MARCH 2 TEXAS (Aug. 31, 2013), <http://march2texas.com/the-almost-forgotten-pass-in-review-thomas-rusk/> (citing *Thomas Jefferson Rusk*).

⁵⁹ *Thomas Jefferson Rusk*.

⁶⁰ EIGHTEEN MINUTES, 77-79, 95-97, 101-111, 118-19, 248-368; GONE TO TEXAS, 148, 167-69.

⁶¹ Dabney, *A Historical Trilogy*, 37 HOU. LAW., 5; GONE TO TEXAS, 162.

⁶² JAMES L. HALEY, *SAM HOUSTON* (Norman: Univ. of Okla. Press, 2002), 8-10, 64, 108-12, 118, 164, 191, 203-06, 215, 256, 271; HALEY, *NARRATIVE HISTORY*, 20, 24, 47-48, 86, 262 n. 18, and 268 n. 38; JAMES, *THE RAVEN*, 20-21, 127, 151, 228, 309; ARIENS, *LONE STAR LAW*, 16.

⁶³ Dylan O. Drummond, *Dallam's Digest and the Unofficial First Reporter of the Supreme Court of Texas*, 3(3) J. TEX. SUP. CT. HIST. SOC., Spring 2013, 8; 1 YEAR BOOK FOR TEXAS 96-97 (1902); *NARRATIVE HISTORY*, 20-27, 34-35.

⁶⁴ *Thomas Jefferson Rusk*; *LONE STAR LAW*, 23-24; *GONE TO TEXAS*, 162.

⁶⁵ *NARRATIVE HISTORY*, 34-36, 235, Jim Paulsen, *A Short History of the Texas Supreme Court*, 65 TEX. L. REV. 237, 241 (1986) [hereinafter *Short History*].

⁶⁶ *Short History*, 65 TEX. L. REV., 253.

After his beloved wife's death and his discovery that he was suffering from a rapidly growing tumor, Rusk committed suicide in Nacogdoches on June 29, 1857, at the age of fifty-three.⁶⁷

Chief Justice Hemphill overcame his Scotch-Irish xenophobia to blend Anglo-American common law, Castilian civil jurisprudence, and Tidewater Chesapeake constitutionalism into the Republic's jurisprudence.

The Texas Supreme Court Historical Society honors its fourth chief justice at its annual banquet because no chief justice before or since has played a greater role in shaping the court's jurisprudence. Many historians refer to him as the John Marshall of Texas.⁶⁸

Hemphill was born into a Scotch-Irish family on December 18, 1803 in the hilly South Carolina Back Country near Chester.⁶⁹ He descended from a long line of Calvinist Presbyterian ministers, and traced his lineage back to Londonderry County in war-torn, Protestant Northern Ireland.⁷⁰ Hemphill's father, the Reverend John Hemphill, emigrated from County Tyrone, Ireland to the U.S. after the end of the Revolutionary War.⁷¹ Reverend Hemphill married Jane Lind, a woman of Scotch-Irish descent, daughter of a minister of the Associate Reformed Church in Pennsylvania, and accepted the call to the ministry in Hopewell Church in Chester, South Carolina.⁷² Like most of the Scotch-Irish, the Hemphills were ardent Presbyterian Covenanters.⁷³

Hemphill attended a one-room school in Pennsylvania, enrolled in Monticello Academy, and then entered Jefferson College (now Washington and Jefferson College), a Presbyterian-sponsored, rural college in Pennsylvania.⁷⁴ After demonstrating "superior scholarship" and a gift for learning languages, Hemphill graduated second in his class.⁷⁵ He taught school in classical academies in South Carolina for several years, but aspired to become a lawyer.⁷⁶ In 1829, he began legal studies under David McCord, a prominent attorney in Columbia, South Carolina.⁷⁷ After graduating, he gained admission to Chancery Court and moved to Sumter, where he began

⁶⁷ *Id.*; *Thomas Jefferson Rusk*; *Rusk, Thomas Jefferson*, BIO. DIR'Y OF U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=r000518> (last visited Feb. 3, 2013). See generally MARY CLARKE, THOMAS J. RUSK: SOLDIER, STATESMAN, JURIST (Austin: Jenkins Pub. Co., 1971).

⁶⁸ *Ten Myths and Legends*, 8.

⁶⁹ TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 (Athens, Ga.: Univ. of Ga. Press, 1999), 100 [hereinafter JUDICIAL TRADITION]; ROSALEE MORRIS CURTIS, JOHN HEMPHILL: FIRST CHIEF JUSTICE OF THE STATE OF TEXAS (Woodstock, Ga.: Rosalee Curtis, rev'd ed., 1997), 1-2 [hereinafter FIRST CHIEF JUSTICE].

⁷⁰ FIRST CHIEF JUSTICE, 1; YOUR DICTIONARY, JOHN HEMPHILL FACTS, <http://biography.yourdictionary.com/john-hemphill> (last visited Sept. 13, 2014) [hereinafter *Hemphill Facts*].

⁷¹ FIRST CHIEF JUSTICE, 1.

⁷² *Id.*; *Hemphill Facts*.

⁷³ FIRST CHIEF JUSTICE, 1-9.

⁷⁴ FIRST CHIEF JUSTICE, 11-12; TARLTON L. LIB., JAMAIL CTR. FOR LEG. RES., JUSTICES OF TEXAS 1836-1986: JOHN HEMPHILL (1803-1862), <http://tarlton.law.utexas.edu/justices/profile/view/50> (last visited Jan. 30, 2014) [JOHN HEMPHILL]; *Ten Myths and Legends*, 8. See generally SOUTH CAROLINIAN LIBRARY, UNIVERSITY OF SOUTH CAROLINA, JOHN HEMPHILL PAPERS. Sources differ about whether John Hemphill graduated in 1823, 1825, or 1826.

⁷⁵ JUDICIAL TRADITION, 100; *Ten Myths and Legends*, 8.

⁷⁶ JOHN HEMPHILL.

⁷⁷ FIRST CHIEF JUSTICE, 13; *Hemphill Facts*.

a private practice serving Back Country clients, most of them Scotch-Irish.⁷⁸

In 1832 and 1833, Hemphill zealously defended slavery's legitimacy, the right of states to nullify federal law, and a state's right to secede from the Union.⁷⁹ He condemned *Southern Whig* editor Maynard Davis Richardson as an "apostate traitor, the recreant and faithless sentinel, the cringing parasite, the hollow-hearted, hypocritical advocate of Southern interests ... who [] scattered firebrands of destruction everywhere in the South," merely because Richardson printed the record of the Virginia legislature's 1832 debates about slavery in the *Inquirer*.⁸⁰ On January 26, 1833, Hemphill swore a solemn oath to "obey, execute and enforce the [South Carolina] Ordinance to Nullify certain Acts of the Congress of the United States"⁸¹

On August 28, 1833, Hemphill challenged South Carolina merchant Mordechai Levy to a battle of smooth-bore pistols.⁸² A month later, at 5:30 PM on Friday, September 30, 1833, Hemphill and Levy exchanged shots at Carter's Upper Mill.⁸³ Levy's bullet smacked into Hemphill's pistol hand, rendered his muzzle-loader inoperable, and left a scar on the hand that later authored Texas Supreme Court opinions.⁸⁴ The duel convinced his Hemphill's Back Country friends that he was an "excellent skull-buster in a street fight" ready to fight to preserve his sacred Scotch-Irish honor.

A soldier in the Second Seminole War in Florida.

Consistent with his Jacksonian-era, Scotch-Irish veneration of military service, John Hemphill volunteered to help put down a Seminole Indian uprising in northern Florida in 1836.⁸⁵ He tried to raise a company of militia volunteers in 1835, then joined the U.S. Army in South Carolina and took a steamboat to the front lines at St. Augustine, Florida.⁸⁶ Hemphill served as a lieutenant under Brevet General Abraham Eustis as a second lieutenant in the U.S. Army during the Seminole War of 1836–37 in northern Florida.⁸⁷

In Florida, Hemphill fell victim to malaria or Acute Infectious Hepatitis with Necrosis, leaving him with a severely impaired liver for the rest of his life.⁸⁸ On April 12, 1836, he received an honorable discharge.⁸⁹ Yet, while still in Florida or while convalescing in South Carolina, Hemphill also learned how President Andrew

⁷⁸ *Hemphill Facts*; Thomas W. Cutrer, *Hemphill, John*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/fhe13> (last visited Feb. 4, 2013) [hereinafter *Hemphill, John*].

⁷⁹ FIRST CHIEF JUSTICE, 15–17.

⁸⁰ JUDICIAL TRADITION, 101.

⁸¹ FIRST CHIEF JUSTICE, 15.

⁸² *Hemphill Facts*.

⁸³ FIRST CHIEF JUSTICE, 18–19.

⁸⁴ *Id.*, 19.

⁸⁵ FIRST CHIEF JUSTICE, 20–24, 86; TEXAS STATE CEMETERY, JOHN HEMPHILL, PLOT 59, http://www.cemetery.state.tx.us/pub/user_form.asp?pers_id=59 (last visited October 6, 2014).

⁸⁶ JUDICIAL TRADITION, 102; *Hemphill Facts*.

⁸⁷ *Hemphill Facts*.

⁸⁸ FIRST CHIEF JUSTICE, 21.

⁸⁹ HEMPHILL PAPERS (containing John Hemphill's Certification of Honorable Discharge).

Jackson's commander in chief, U.S. Army General Thomas Jesup, conducted Indian warfare.⁹⁰ On March 6, 1837, General Jesup compelled the leader of the Seminole resistance, Micanopy, to surrender and migrate west to Indian country, *i.e.*, Oklahoma. When seven hundred Seminoles who had received Army food escaped on May 7, 1837, Jesup waited until they were enfeebled by hunger, then invited their leaders to parley, break bread, and drink with him. During the warrior Coacoochee's parley under a flag of truce, General Jesup's men seized the young Indian and sent him to Castillo de San Marcos, Spain's seventeenth century citadel in St. Augustine, Florida.⁹¹

On October 25, 1837, General Jesup met with the Seminole Indian leader, Osceola, under the Seminoles' white flag of truce in northern Florida. Jesup and two hundred and fifty of his soldiers then imprisoned Osceola, another seven warriors, six women, and four African-Americans fighting for their freedom.⁹² Osceola died in captivity several months later from an aggravated infection of the throat made worse by malaria. General Jesup treated Indian emissaries not as leaders of foreign nations entitled to diplomatic immunity but as outlaws.⁹³

Back in South Carolina, John Hemphill learned that Indians who did not surrender could be taken captive by soldiers flying the white flag of a peace parley. In 1836, Hemphill journeyed to St. Augustine, Florida. The Castillo de San Marcos, a massive, star-shaped Spanish fortress built between 1672 and 1682, dominated the city.⁹⁴ Since "[n]o visit to St. Augustine was complete without a stroll past the ageless battlements of the impressive guardian of the city and its harbor," John Hemphill must have visited the Castillo, a reminder of the Spanish Empire's lost glory, as he waited for a steamboat to South Carolina.

Gone to Texas.

Meanwhile, in 1836, tales of two other Spanish fortresses, the Alamo and Goliad, along with a battlefield known as San Jacinto, filled the headlines of newspapers in Florida, Georgia, and Hemphill's native South Carolina. Hemphill's thoughts must have turned westward at that time.

The 1836 migration to Texas of the related Scotch-Irish family of William and Lucretia Hemphill and their children may have led John Hemphill toward Texas. William's accidental death in Mina (now Bastrop) Texas may have enabled John Hemphill to assert a survivor's land grant under a colonization law of Coahuila y Texas.⁹⁵ Meanwhile, the Bank Panic of 1837 led impoverished Southerners, many of Scotch-Irish descent, to leave home in search of richer fields, forests, and pastures in the west. Those settlers often notified the relatives, friends, and creditors they left behind that they had gone to Texas by painting the initials "G.T.T." on the homes and barns they abandoned.⁹⁶

In 1838, Hemphill left for Texas. Unlike the G.T.T. settlers pouring into Texas, Hemphill first paid his

⁹⁰ *Id.*, 19–21.

⁹¹ MICHAEL GANNON, *THE NEW HISTORY OF FLORIDA* (Gainesville: Univ. Press of Fla. 1996), 195 [hereinafter *NEW HISTORY*]; JAMES W. COVINGTON, *THE SEMINOLES OF FLORIDA* (Gainesville: Univ. Press of Fla. 1993), 72–109 [*SEMINOLES*].

⁹² *SEMINOLES*, 93.

⁹³ *NEW HISTORY*, 195.

⁹⁴ LOUIS RAFAEL ARANA & ALBERT MANUCY, *THE HISTORY OF CASTILLO DE SAN MARCOS* (St. Augustine, Fla.: reprint, Historic Map & Print Co., 2005), 19–25, 55–57 [hereinafter *CASTILLO DE SAN MARCOS*]. The Castillo was the "most notable structure [in Florida] to survive from Spanish times." See T. D. ALLMAN, *FINDING FLORIDA: THE TRUE HISTORY OF THE SUNSHINE STATE* (New York: Atlantic Monthly Press, 2013), 45 [hereinafter *FINDING FLORIDA*].

⁹⁵ *FIRST CHIEF JUSTICE*, 24–26.

⁹⁶ *FIRST CHIEF JUSTICE*, 26.

creditors before leaving home.⁹⁷ On September 10, 1838, Judge R. M. “Three-Legged Willie” Williamson licensed Hemphill to practice law in Texas.⁹⁸ Hemphill opened a law firm in Washington-on-the-Brazos that soon prospered.⁹⁹ Family tradition holds that Hemphill secluded himself to study Spanish and master the Castilian law that still governed Texas.¹⁰⁰ John Hemphill then moved to Bastrop, where his relative William Hemphill’s family had settled.¹⁰¹

Congress elects Hemphill to serve as a district judge in San Antonio.

John Hemphill advanced in public opinion and political influence during the term of Texas’s second president, Mirabeau B. Lamar.¹⁰² On January 21, 1840, Hemphill took the oath of office that made him a district judge of the Fourth Judicial District in San Antonio, qualifying him to act as an *ex officio* associate judge of the Texas Supreme Court.¹⁰³

As detailed in Part II of this three-part series, disaster ensued when District Judge John Hemphill—a South Carolinian who embodied the violent, vengeful, honor-based Southern Back Country culture—served as a mediator in San Antonio on March 19, 1840. Given the longstanding hostility between Scotch-Irish settlers and Native Americans on the East Coast, in the Appalachians, in Alabama, and in Texas, Judge Hemphill was not an ideal mediator to negotiate a lasting peace with Comanches he thought of as ruthless savages.¹⁰⁴

Familiar with General Jesup’s refusal to recognize the sacred status of Seminole peace negotiators in Florida, Judge Hemphill did not object to Texas Army Colonel Henry Karnes’ refusal to recognize the ambassadorial status of Penateka Comanche war chief Muk-wah-ruh when he mediated the peace parley in San Antonio’s Council House.¹⁰⁵ Conflicting understandings of the role of Comanche war chiefs at the 1840 Council House peace parley resulted in the failure of Judge Hemphill’s mediation and the deaths of many Comanches and Anglo-American settlers.¹⁰⁶

Hemphill defends Texas from Indian warriors and Mexican raiders.

Despite his post-Florida ill health, Chief Justice Hemphill fought in several campaigns against Comanche

⁹⁷ *Id.*, 21.

⁹⁸ *Id.*, 26.

⁹⁹ FIRST CHIEF JUSTICE, 29; JUDICIAL TRADITION, 103; *Hemphill Facts*.

¹⁰⁰ JUDICIAL TRADITION, 103; FIRST CHIEF JUSTICE, 27–28.

¹⁰¹ FIRST CHIEF JUSTICE, 29.

¹⁰² *Id.*, 28–30.

¹⁰³ *Myths and Legends*, 8; FIRST CHIEF JUSTICE, 31.

¹⁰⁴ FINDING FLORIDA, 45; ALBION’S SEED, 639.

¹⁰⁵ 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* (New York: Simon & Schuster, 2010), 82–88, 326–27 (2011) [hereinafter *SUMMER MOON*]; DORMAN WINFREY AND JAMES M. DAY (eds.), *THE INDIAN PAPERS OF TEXAS AND THE SOUTHWEST* (Austin: Pemberton Press, 5 vols., 1956–66), 11, 105 (containing Document 948, Mirabeau B. Lamar’s December 21, 1838 “Messages of the President, Submitted to both Houses”); *LONE STAR*, 254–55; *Ten Myths and Legends*, 8–9.

¹⁰⁶ *SUMMER MOON*, 85–86.

and other Indian warriors, as well as Mexican raiders, in 1840 and 1841.¹⁰⁷ San Antonio Mayor Sam Maverick recorded how Hemphill joined with young Captain Jack Hays, who later became one of the most feared and respected of all Texas Rangers, to organize a company of mounted “minute man” volunteers to defend San Antonio while he served there as a district judge.¹⁰⁸

John Henry Brown recorded how Hemphill, Hays, and Judge James W. Robinson, who had recently recovered from a wound received at the Council House Fight, returned a five year old girl to the family from whom a Comanche war-band had abducted her. The little girl, who had forgotten the use of English during her captivity and had grown so “wild” that she had to be tied to the return-party’s saddles every night, recognized her brother and sprang to his arms. Brown stated that, “Tears of joy mingled with audible sobs fell from three of the most distinguished men of Texas (Judge Hemphill, Judge Robinson, and John R. Cunningham).”¹⁰⁹

After Sam Houston returned to the presidency in December 1841, Hemphill accepted his appointment as Acting Adjutant General.¹¹⁰ When General Adrian Woll led a Mexican army to San Antonio in 1842, Hemphill advised Juan Seguin to arrest Bexarenos friendly to Mexico.¹¹¹ Hemphill’s Council House Fight knife-fighting and service as Adjutant General meant he never again had to prove the physical courage and military experience Back Country voters valued.

Congress elects Hemphill to serve as Chief Justice.

On December 5, 1840, Hemphill defeated a favored incumbent, James Webb, the former Attorney General of Texas to replace Rusk as Chief Justice of the Texas Supreme Court. Hemphill won by a narrow margin—two votes out of fifty-four cast—in both houses of Congress.¹¹² He served as Chief Justice for the remainder of the Republic era, with a brief stint as adjutant general of the Somervell expedition in 1842-43 when the court was not in session.¹¹³

Hemphill served Washington County as its delegate to the 1845 Convention charged with turning the Lone Star Republic into the Lone Star State. A strong proponent of Texas statehood, Hemphill chaired the Judiciary Committee.¹¹⁴ On July 11, 1845, Hemphill presented the annexation convention with a draft judiciary section for the new constitution, which largely accepted his proposals.¹¹⁵ In 1846, Texas Governor J. Pinckney Henderson appointed Hemphill chief justice of the state supreme court, which Texas’s state senate soon approved.¹¹⁶

During the 1850s, growing differences about slaves brought northern and southern states closer and closer to a civil war. While Sam Houston remained a staunch Unionist, Hemphill—the South Carolina Secessionist—

¹⁰⁷ *Id.*; FIRST CHIEF JUSTICE, 35-38, 40-43.

¹⁰⁸ FIRST CHIEF JUSTICE, 35-36.

¹⁰⁹ *Id.*, 36-37. *See also* JOHN HENRY BROWN, HISTORY OF TEXAS (Austin: L.E. Daniell, 1892), vol. 2, 51-53.

¹¹⁰ JUDICIAL TRADITION, 103.

¹¹¹ JESUS F. DE LA TEJA (ed.), JUAN SEGUIN, A REVOLUTION REMEMBERED: THE MEMOIRS AND SELECTED CORRESPONDENCE OF JUAN N. SEGUIN (Austin: Tex. St. Hist. Ass’n., 2002), 94.

¹¹² FIRST CHIEF JUSTICE, 39.

¹¹³ JUDICIAL TRADITION, 103.

¹¹⁴ FIRST CHIEF JUSTICE, 52-55.

¹¹⁵ LONE STAR LAW, 23.

¹¹⁶ *See id.*, 57-58.

vigorously supported the right of Texans and other Southerners to secede.¹¹⁷ After eighteen years on the supreme court, first of the Republic and then of the Lone Star State, Hemphill resigned in November 1858 after Texas's senate elected him to replace Sam Houston as U.S. senator.¹¹⁸ Anson Jones, the Republic's last president, had hoped that the Legislature would choose him as Texas's new senator but failed to receive a single vote. Embittered by that humiliating defeat, Jones lamented Hemphill's election victory:

I think it is most *unfortunate* for the country—the South particularly—and for...Texas, as well as for the stability and perpetuity of the Union, that the Legislature of our State should have selected for her Senators in Congress *two* South Carolina Nullifiers [Hemphill and Louis Wigfall], and thus probably committed us to the extreme Southern fire-eating doctrines of the ultras...leading to...a dissolution of the Union and...an independent Southern confederacy....¹¹⁹

On February 4, 1861, Texas's Secession Convention elected Hemphill to the Provisional Confederate Congress.¹²⁰ Hemphill took ill and died of pneumonia in Richmond, Virginia on January 4, 1862.¹²¹ His body lies in the State Cemetery in Austin.¹²²

The Hemphill court, influenced by a strong Scotch-Irish legal tradition, blended Texas's three legal traditions to benefit debtors, women, and people of color.

The prominence of the Scotch-Irish legal tradition in the Republic's supreme court helps explain why that court blended Castilian/Tejano customary law and construed Tidewater/Chesapeake statutes and constitutional provisions liberally in ways beneficial to the common man (and woman). For eighteen years, Chief Justice Hemphill led a court whose members acted in accord with the Scotch-Irish legal tradition.

Associate Judge John T. Mills served on the court from 1839 to 1846 as the judge of the Third, Seventh, and Eighth Judicial Districts, respectively. He was born in Scots-Irish County Antrim, Ireland on November 17, 1817. His family moved to Beaufort County, South Carolina, where they settled in that state's extensive immigrant Scotch-Irish community.¹²³ Associate Judge John Hanford, who served on the court from 1840-1842, was born in Glasgow, Kentucky, a town with a name that reflects its Scotch-Irish heritage.¹²⁴ Richardson A. Scurry, who served as an Associate Judge from 1840 to 1841, came from Gallatin, Tennessee, in the heart of the Scotch-Irish belt.¹²⁵ George Whitfield Terrell, an Associate Judge from 1803-1806, came from Nelson County, Kentucky,

¹¹⁷ *Id.*, 79–82.

¹¹⁸ *See id.*, 73–78.

¹¹⁹ JONES OFFICIAL CORRESPONDENCE, 643 (containing the letter from Anson Jones to John G. Todd, Nov. 17, 1857; emphasis in original letter).

¹²⁰ *Hemphill, John*. *See also* MARY BOYKIN CHESNUT, A DIARY FROM DIXIE, AS WRITTEN BY MARY BOYKIN CHESNUT, WIFE OF JAMES CHESNUT, JR., UNITED STATES SENATOR FROM SOUTH CAROLINA, 1859–1861..., <http://docsouth.unc.edu/southlit/chesnut/maryches.html> (last visited Apr. 12, 2014).

¹²¹ FIRST CHIEF JUSTICE, 86.

¹²² *Id.*, 90–91.

¹²³ TARLTON L. LIB., JAMAIL CTR. FOR LEG. RES., JUSTICES OF TEXAS 1836–1986: JOHN T. MILLS (1817–1871), <http://tarlton.law.utexas.edu/justices/profile/view/70> (last visited Dec. 11, 2014).

¹²⁴ TARLTON L. LIB., JAMAIL CTR. FOR LEG. RES., JUSTICES OF TEXAS 1836–1986: JOHN M. HANSFORD (?–1844), <http://tarlton.law.utexas.edu/justices/profile/view/46> (last visited Dec. 11, 2014).

¹²⁵ TARLTON L. LIB., JAMAIL CTR. FOR LEG. RES., JUSTICES OF TEXAS 1836–1986: RICHARDSON A. SCURRY (1811–1862), <http://tarlton.law.utexas.edu/justices/profile/view/94> (last visited Dec. 11, 2014).

another Scotch-Irish Appalachian community.¹²⁶

Associate Justice Abner Lipscomb, who developed the jurisprudence of the Texas court after being appointed as an associate justice in March 1846, generally shared Hemphill's South Carolina birthplace and view of the world.¹²⁷ Like Rusk, Lipscomb read law with John C. Calhoun, a Southerner of Scotch-Irish ancestry who, through his theory that states had the right to nullify federal law within their own borders, heavily influenced Hemphill's and Lipscomb's jurisprudence.¹²⁸ Lipscomb served with Rusk and Hemphill in the Constitutional Convention of 1845 and then served on the court from 1846 through 1856.¹²⁹

The Hemphill court was important for many reasons. *First*, Chief Justice Hemphill's scholarly judicial opinions enhanced the court's reputation as a citadel of frontier justice. He rose above Scotch-Irish provincialism to base his decisions on Texas's tradition of Castilian law when he found it to be just and persuasive.

In *Garrett v. Nash*, for example, he cited EL DICCIONARIO DO LEGISLAI to analyze the effect of remarriage on a widow's inheritance from her previous husband's estate.¹³⁰ In *Smith v. Townsend*, he cited "such Spanish works as are within the reach of the Court..."¹³¹ And in *Thouvenin v. Rodriguez*, Hemphill analyzed Articles 96 and 98 of DECREE 277 OF THE LAWS OF COAHUILA AND TEXAS, and ELEMENTS OF SPANISH LAW, Titles XI and XII, DE LA CONTESTACION and DE LA CITATION.¹³²

The Hemphill court's support of the Castilian tradition of using independent executors (the *albaceo universal*) to efficiently conduct probate cases and Castilian law's recognition of adoptions, neither of which were part of Anglo-American common law, became parts of Texas law.¹³³ The court retained the Castilian/Tejano idea that a defendant ought to enjoy the right to be sued where he or she lives, which has become the bedrock of Texas venue law.¹³⁴ And the court's respect for Spanish and Mexican land grants and Castilian water law, state ownership of riverine and subsea resources, and tidal boundaries provided Texas with a secure source of real property law. After Congress provided specific exceptions to Spanish civil law, Texas land law hybridized Castilian and Anglo-American legal traditions.¹³⁵

Second, by transcending a traditional Scotch-Irish hostility toward "foreigners" while carrying out the Scotch-Irish tradition of protecting debtors from abusive creditors, Hemphill blended debtor-friendly Castilian traditions with Border Country/Southern Back Country distrust of arbitrary authority to safeguard a family's home, land, and personal property.¹³⁶

¹²⁶ TARLTON L. LIB., JAMAIL CTR. FOR LEG. RES., JUSTICES OF TEXAS 1836–1986: GEORGE WHITFIELD TERRELL (1803-1846), <http://tarlton.law.utexas.edu/justices/profile/view/107> (last visited Dec. 11, 2014).

¹²⁷ NARRATIVE HISTORY, 54-62, 237.

¹²⁸ See, e.g., *Cocke v. Calkin & Co.*, 1 Tex. 542, 554 (1846); cf. *McCulloch v. Maryland*, 4 Wheat (17 U.S.) 316 (1819). See generally LONE STAR LAW, 25-26.

¹²⁹ NARRATIVE HISTORY, 54-56, 59-60, 62, 73, 103, 264 nn. 7, 13 and 19; LONE STAR LAW, 24-26.

¹³⁰ Dallam 497, 498–501 (Tex. 1843).

¹³¹ Dallam 569 (Tex. 1844).

¹³² 24 Tex. 468 (1859).

¹³³ See *id.*, 1-2.

¹³⁴ *Spanish Law*.

¹³⁵ See, e.g., *Smith v. Dunlavy*, 31 Tex. 693, (Tex. 1869).

¹³⁶ Act of Jan. 26, 1839, 3rd Cong., Repub. Tex., reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, 125 (Gammel Book Co.

Lipscomb presented Section 22, the homestead exemption, to the 1845 Convention with Hemphill's ardent support.¹³⁷ As co-drafters of the Constitution of 1845, Chief Justice Hemphill and, after joining the bench in 1846, Associate Justice Lipscomb advanced Scotch-Irish notions of natural justice and enshrined them in the Constitution of 1845, through the drafting of written constitutional protections in the Tidewater Chesapeake legal tradition.¹³⁸ In *Sampson & Keene v. Williamson*,¹³⁹ *Wood v. Wheeler*,¹⁴⁰ *Cobbs v. Coleman*,¹⁴¹ *Shepherd v. Cassady*,¹⁴² and *Pryor v. Stone*,¹⁴³ the Hemphill court expanded homestead rights and limited foreclosure to protect the property rights of immigrants living on the verge of bankruptcy on a violent frontier.¹⁴⁴

Third, the Hemphill court repeatedly encouraged adoption of the informal, unified pleadings that evolved in Tejano frontier society. The common man, whether Tejano, Scotch-Irish or otherwise, could understand simple pleadings. Simple pleadings limited the power of elites and eliminated archaic Anglo-American distinctions between common law and equity.¹⁴⁵

In *Pridgin v. Strickland*, Abner Lipscomb held that “neither the action of trover nor detinue is known to our forum, and that our petition...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.”¹⁴⁶ As Chief Justice Hemphill explained, “the unmeaning fictions of the common law are abrogated, and facts only are to be alleged in the pleadings.”¹⁴⁷ Texas's adoption of simple, unitary pleadings inspired other states and the federal judiciary to do the same.

Fourth, the Hemphill court's expansion of Castilian/Tejano community property marital rights offered women greater protection than contemporary Anglo-American common law.¹⁴⁸ By 1848, community property was so well established that Chief Justice John Hemphill ruled that a wife could seek “the delivery to her of her separate property and the one-half of the common property of the conjugal partnership” in *Wright v. Wright*.¹⁴⁹ In

1898); Decree 70, of Jan. 13, 1829, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, 220 (Gammel Book Co. 1898) (Mexican debtor-protection reform); Decree 173 of Apr. 8, 1831, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, 289 (Gammel Book Co. 1898); Act of Feb. 5, 1840, 4th Cong., Repub. Tex., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, 267 (Gammel Book Co. 1898); HALEY, NARRATIVE HISTORY, 36–42, 56–57.

¹³⁷ FIRST CHIEF JUSTICE, 55.

¹³⁸ NARRATIVE HISTORY, 57; Joseph W. McKnight, *Homestead Law*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mlh02> (last visited Sept. 19, 2014).

¹³⁹ 6 Tex. 102 (1851); *see also* LONE STAR LAW, 26, 290 n.5; NARRATIVE HISTORY, 56; Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840 to 1880*, 80 J. AM. HIST. 470, 470, 496 (1993).

¹⁴⁰ 7 Tex. 19 (1851). *See also* LONE STAR LAW, 26, 290 n.5.

¹⁴¹ 14 Tex. 594 (1855).

¹⁴² 20 Tex. 24, 29–30 (1857).

¹⁴³ 19 Tex. 371 (1857); LONE STAR LAW, 26, 290 n.5.

¹⁴⁴ NARRATIVE HISTORY, 1–3; FIRST CHIEF JUSTICE, 55, 58, 64, 66–67. The provisions Judge Hemphill preserved remain in the Texas constitution, including Article XVI, Sections 15 (community property) and 50 (homestead exemption).

¹⁴⁵ *Smith v. Dunlavy*, 31 Tex. 693 (Tex. 1869).

¹⁴⁶ 8 Tex. 427, *6 (Tex. 1852).

¹⁴⁷ *Garrett v. Gaines*, 6 Tex. 435, *8 (Tex. 1851).

¹⁴⁸ NARRATIVE HISTORY, 1–4, 58–60. *See generally* Joseph W. McKnight, *Spanish Concepts in Texas Law of the Family, Succession, and Civil Procedure*, ST. BAR OF TEX., THE INFLUENCE OF SPAIN ON THE TEXAS LEGAL SYSTEM (Austin: State Bar, 1992).

¹⁴⁹ 3 Tex. 168, 172 (Tex. 1848).

Edward v. James,¹⁵⁰ the Hemphill court recognized that a frontierswoman enjoyed the same rights as a frontiersman:

Again, can it be supposed that the government intended to reward only the male inhabitants of the frontier towns? Do not the women sustain the frontier with their toils, if not with their arms? Are they not subjected to the same, and to infinitely worse horrors from the hostilities of the savage foe?¹⁵¹

Because of Hemphill's rulings and the 1845 Constitution he helped draft, a spouse's community interest in marital property received constitutional and statutory protection.¹⁵²

Fifth, Chief Justice Hemphill moderated slavery's inhumanity to grant standing to slaves wishing to win or defend their freedom. In *Guess v. Lubbock*, the court ignored evidentiary deficiencies to substantively address an African-American's suit to prove her freedom.¹⁵³ In *Chandler v. State*, the court rejected a master's argument that slave-killing was outside judicial jurisdiction because a master owned a slave.¹⁵⁴ And in *Moore v. Minerva*, the court reaffirmed the freedom of a slave who traveled to Texas after being freed in Ohio.¹⁵⁵ Judge Hemphill's liberality may reflect his little-appreciated familial relationship with an enslaved woman he bought, Sabina, and his love for their daughters, Theodora and Henrietta.¹⁵⁶

During the 1883 hanging of Hemphill's portrait, Chief Justice Asa Willie recounted how Chief Justice Hemphill shaped Texas law:

His ability as a judge was most fully developed when he found himself without precedent or authority for the questions under consideration. It was then that his capacity for profound and lucid reasoning was most fully displayed, and from his own luminous mind light was shed upon the subject of discussion which made the most abstruse points seem clearly elucidated to any mind.¹⁵⁷

His rulings and contributions to the 1845 Constitution reshaped Texas law in a way W.W. Boyce of South Carolina attributed to Hemphill's Scotch-Irish background:

His ancestors were ... from Scotland, and of a [Presbyterian] sect distinguished in Scottish history for their vehement devotion to duty, daring the anger of a bigoted king, and the dangers of the battlefield, rather than compromise, even in matters of form, that religious belief which they

¹⁵⁰ 7 Tex. 372, 380 (Tex. 1851).

¹⁵¹ *Id.*, 382.

¹⁵² See, e.g., *Hemphill, John*; Joseph W. McKnight, *Spanish Law*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/iss01> (last visited Feb. 4, 2013) [hereinafter *Spanish Law*]; Joseph W. McKnight, *Community Property Law*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/iss02> (last visited Feb. 24, 2014); McKnight, *Separate Property Law*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mls01> (last visited Sept. 14, 2014); TEX. CONST. art. XVI, § 15. See generally WILLIAM O. HUIE, *THE COMMUNITY PROPERTY LAW OF TEXAS* (1960).

¹⁵³ 5 Tex. 525 (1851). See also NARRATIVE HISTORY, 61–62; Mark Davidson, *One Woman's Fight for Freedom*, 45 HOU. LAW. 10, 10–15 (Jan.-Feb. 2008), available at http://www.thehoustonlawyer.com/aa_jan08/page10.htm (last visited Dec. 8, 2014), 10–15, reprinted in RANDOLPH CAMPBELL (ed.) (William S. Pugsley & Marilyn Duncan, comps.), *LAWS OF SLAVERY IN TEXAS* (Austin: Univ. of Tex. Press, 2010), 87–93.

¹⁵⁴ 2 Tex. 305, 309 (1847). See also *Nix v. State*, 13 Tex. 575 (1855).

¹⁵⁵ 17 Tex. 539 (1856). See also LONE STAR LAW, 31, 290–91 n.64.

¹⁵⁶ NARRATIVE HISTORY, 59–60 (citing the Deposition of Richard Rust (July 1, 1871) in *Theodora Hemphill v. James Hemphill*, Cause No. 3074, Travis Cnty., Tex. (June 1871)).

¹⁵⁷ 59 *Texas Reports*.

held dearer than property or life itself¹⁵⁸

Ultimately, Chief Justice Hemphill's greatest legacy is the unique and abiding jurisprudence he and his court wove together from the Castilian/Tejano tradition, Tidewater Virginia's constitutional rule of law, and the Scotch-Irish Jacksonian debtor-oriented, natural justice intended to protect one's liberty and safeguard one's kith and kin from oppression by creditors and the government alike.

Conclusion.

The political philosopher Georg Wilhelm Friedrich Hegel theorized that real change results when a social group's long experience with status quo ideas for addressing the challenges of life, the *thesis*, encourages opponents to negate that thesis with an *antithesis*. When *thesis* proponents negotiate successfully with *antithesis* advocates, their compromises create a *synthesis* better adapted to the world than either the original *thesis* or its opposing *antithesis*.

In the Republic, that political process resulted in a synthesis of pro-debtor Castilian law tempered by Tejano frontier experience; Tidewater Chesapeake concepts of hierarchical liberties enshrined in written constitutional guarantees; and Scotch-Irish sympathies for pioneers living violent, economically uncertain lives. That jurisprudential synthesis has transformed Texas and American law, order, and justice for the better.

¹⁵⁸ CURTISS, FIRST CHIEF JUSTICE, 87; RICHMOND ENQUIRER (Jan. 10, 1862), 1.



DAVID A. FURLOW is a trial lawyer, appellate specialist, historian, and archaeologist.

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Bi-Annual Historical Society Course Set for May

By Lynne Liberato

For the second time, the Society and the State Bar will present a day-long seminar on Texas Judicial History. Titled “History of Texas and Supreme Court Jurisprudence,” this all-new program will be held on Thursday, May 7, 2015, at the Radisson Hotel at 111 East Cesar Chavez Street in Austin.

When first offered in 2013, eighty-one lawyers attended the program. According to State Bar CLE director Pat Nester, that is a large number for a new course. This year, the State Bar expects even more attendees as word about the symposium spreads. The evaluations for the last course were excellent. (The only recurrent complaint was about the uncomfortable condition of the room, but that has already been taken care of by moving the course to a different hotel.)

The topics are designed to be both interesting and educational— a way to enjoy learning information that is not available anywhere else. It also has the side benefit of contributing long-term to the historical record.

The course will cover not only Supreme Court history but other topics relating to our judicial system. None of the topics are repeats from the first course.

For example, **David Furlow** will speak about “Free Speech and the Court.” He says that one of the things he loves about this topic is the way Sam Houston, Thomas Jefferson Rusk, and Lorenzo de Zavala created one of the most broadly worded protections for free speech in the nation’s history with the predecessor to our current Article I, Section 8 of the Texas Constitution. He promises colorful slides of the Alamo, Washington on the Brazos, and the Battle of San Jacinto.

Richard Orsinger will speak on a different aspect of the paper he prepared for the last course: “Contract Law from Before the Civil War to Railroads.” His paper for the program won the State Bar’s award for best CLE paper in the state presented in 2013.

The Alamo Bar Association—the original one with members William Travis, James Butler Bonham, and others—will be discussed by **Dylan Drummond**. More good pictures are in the offing. **Judge Mark Davidson** and **Sarah Duckers** will use real court documents to tell compelling stories.

Former Supreme Court Justice **Scott Brister** will moderate a panel on *Pennzoil v. Texaco*, the case with the largest judgment in Texas history. The panel, which will be comprised of participants in the case, will offer lessons for lawyers, judges, clients and the legislature. The panel will also discuss changes in the law and procedure that grew out of the case and its appeal.

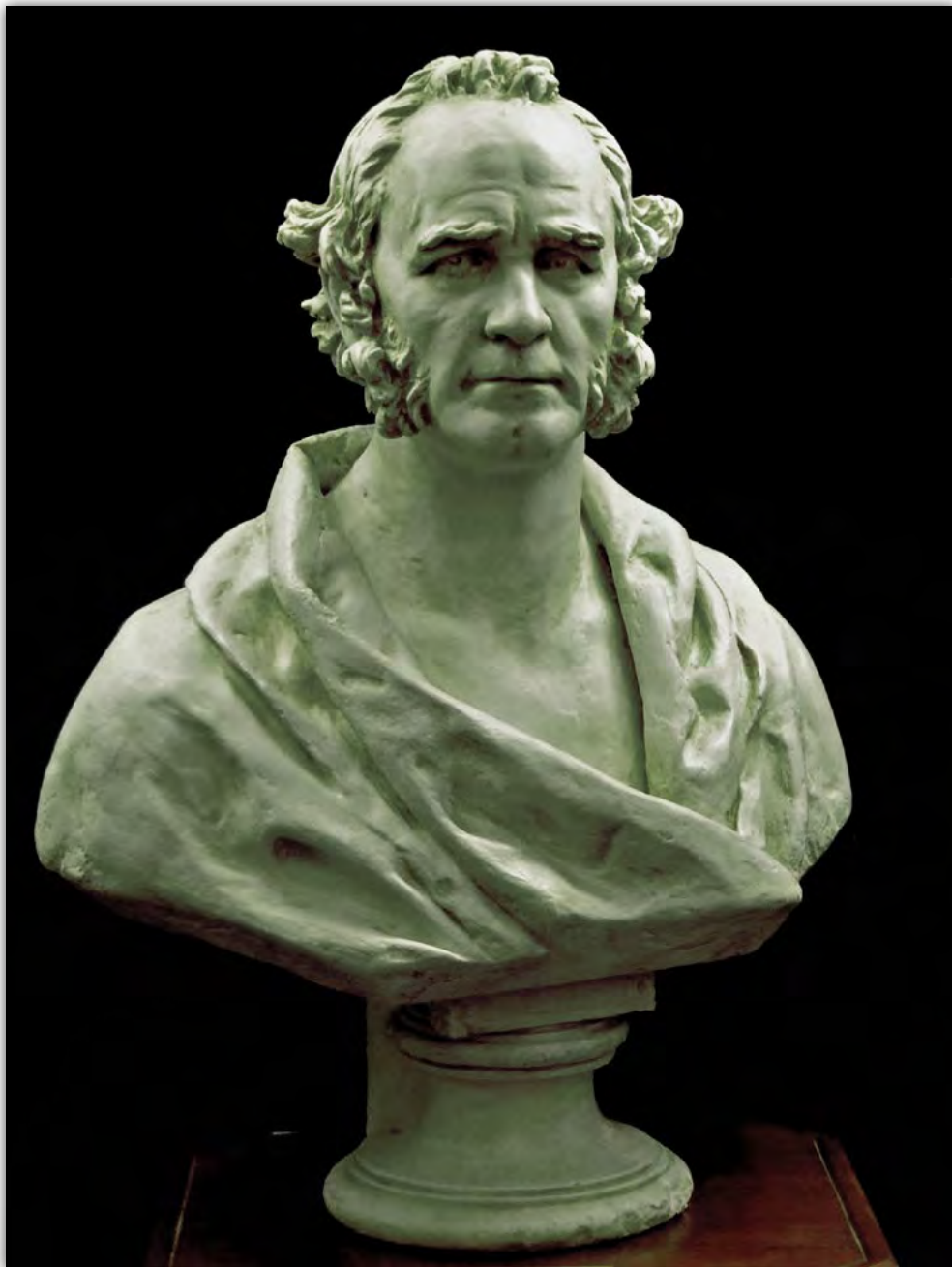
The author of the Supreme Court narrative history book, **Jim Haley**, will tell new stories about Texas judicial history. There will also be a judicial panel and much more. These are just a sample of the speakers and

topics. Others are being confirmed at press time.

The course directors for the program are **Warren Harris**, **Richard Orsinger**, and **Lynne Liberato**.

To sign up for the course, go to the State Bar CLE website (<http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&IID=13792>). Early-bird registrants who are members of the Society will get a \$75 discount. Late registrants (i.e., within two weeks of the course) will get a \$25 discount if they are members of the Society. Fellows of the Society are entitled to complimentary admission.

★ ★ ★ ★ ★



German sculptress Elizabet Ney's marble rendering of Sam Houston on display at the San Jacinto Museum of History. Photo by David A. Furlow.

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Calendar of Events

Society-sponsored events and other events of interest

Spring 2015

Friday, March 6

**TSCHS Joint Session
Texas State Historical Association Annual Meeting**

Nueces A Conference Room
Omni Bayfront Hotel, 900 North Shoreline Blvd.
Corpus Christi, TX 78401
10:30 a.m.–12:00 noon, Session 27
<https://tshasecurepay.com/annual-meeting/>

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

Session Chair: Marie Yeates, President, TSCHS

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

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

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

Friday, March 27

Spring Meeting, TSCHS Board of Trustees

Harry Ransom Center
The University of Texas at Austin
300 West 21st Street
Austin, Texas 78712

The Board of Trustee's Meeting will begin at 10 AM sharp at a location, TBD, close to the Harry Ransom Center. The Society will announce the precise time and location of the Board Meeting in the *Spring 2015 Journal*.

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

1:00-3:00 p.m. Society members are invited to attend a post-luncheon tour of the Harry Ransom Center and an HRC curator's presentation about the archival records, historic photographs, and rare books available there.

Saturday, April 18

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

United Way Community Resource Center

50 Waugh Drive, Houston, Texas 77007

9:00 a.m.–5:00 p.m.

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

Thursday, May 7

**The Second Biannual
History of Supreme Court Jurisprudence Symposium**

8:30 a.m. to 4:00 p.m.

Radisson Hotel Austin

111 E. Cesar Chavez St.

Austin, TX 78701

(See full story on pp. 45-46.)

Summer 2015

Thursday, June 18

2015 Annual Meeting, State Bar of Texas

Henry B. Gonzalez Convention Center

200 E. Market St.

San Antonio, Texas 78205

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

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

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

Presenter 1: The Hon. Terry Jennings,

MAGNA CARTA's Impact on Legal and Judicial Ethics

Senior Justice, First Court of Appeals

Presenter 2: David A. Furlow

From Medieval to Modern,

MAGNA CARTA's History in England and Early America

Presenter 3: The Hon. Murry Cohen

MAGNA CARTA's Role in Shaping the U.S. and Texas Constitutions

Former Justice, First Court of Appeals (retired)

Presenter 4: The Hon. Charles “Kin” Spain

MAGNA CARTA's Effect on the Administration of Justice

Municipal Judge, City of Houston

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2014–2015 Membership Upgrades

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

GREENHILL FELLOW

Charles R. “Skip” Watson

PATRON

Hon. Jeff Brown

Hon. Grant Dorfman

CONTRIBUTING

Thomas M. Michel

Jason F. Muriby

Justice Greg Perkes

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2014–2015 New Member List

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

GREENHILL FELLOW

Marianne Auld
Leslie Robnett

TRUSTEE

Hon. Rick Strange

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James W. McCartney
Prof. Ernest E. Smith

CONTRIBUTING

Austin Barsalou
Gilbert J. Bernal, Jr.
Barbara Bintliff
Stephanie Cagniard
John Grace
Mary Jo Graham Holloway
Elizabeth Kozlow Marcum

REGULAR

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

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Membership Benefits & Application

Hemphill Fellow - \$5,000

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

Greenhill Fellow - \$2,500

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

Trustee Membership - \$1,000

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

Patron Membership - \$500

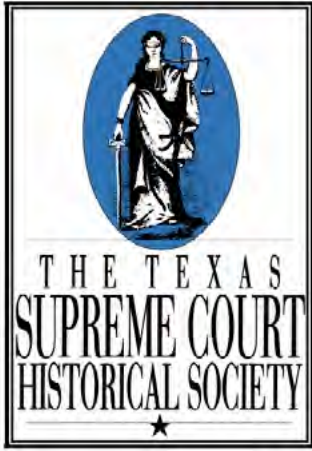
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Contributing Membership - \$100

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

Regular Membership - \$50

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



Membership Application

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

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