Journal of the
TEXAS SUPREME COURT HISTORICAL SOCIETY

Spring 2017 Vol. 6, No. 3 General Editor Lynne Liberato Executive Editor David Furlow

Columns

Message from the President

By Macey Reasoner Stokes


Macey Reasoner Stokes

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Pat Nester

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Chip Babcock

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Alicia Wagner Calzada

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JT Morris

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Peter D. Kennedy

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Stephen Pate

In 1959 a powerful Senator stalled *all* pending judicial nominations until his preferred candidate was nominated by the President. Read more...

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Chief Justice Jack Pope: Bidding Farewell to Our Common Law Judge

By Marilyn P. Duncan

Chief Justice Pope

The extent of this judicial legend's contributions can best be understood by looking back at how his career unfolded.
Read more...

In Memoriam: James P. Wallace, Justice (ret.), Supreme Court of Texas

Justice Wallace

His record of public service as a Judge, Justice, and State Senator earned him wide respect in the legal community.
Read more...

Pat Nester: Looking Back, Moving On

Interview by Marilyn P. Duncan

Pat Nester

As no one has succeeded in convincing him to stay longer, we're faced with saying goodbye to our retiring Executive Director.
Read more...

Case Update: *Moore v. Texas*

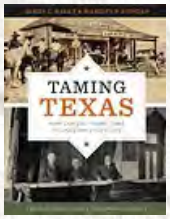
By Jani Maselli Wood

Jani Maselli Wood

The U.S. Supreme Court rejected the Texas scheme for determining whether someone's intellectual disability made them ineligible to be executed.
Read more...

Taming Texas Judicial Civics and Court History Project: Spring 2017 Update

By Warren W. Harris
Photos by David A. Furlow



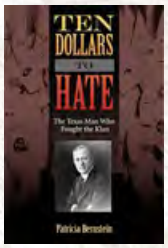
Taming Texas book cover

Sponsored by the Society's Fellows, the project sends judges and attorneys into 7th-grade Texas history classrooms to teach the history and workings of the state's court system.
Read more...

Book Reviews

Patricia Bernstein's *Ten Dollars to Hate: The Texas Man Who Fought the Klan*

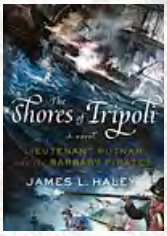
Book review
by Terence L. O'Rourke



Bernstein paints a political-cultural diorama of Texas and America in the early 20th century, explaining how bias, fear, and hatred can become so virulent and ubiquitous. Read more...

James L. Haley's *The Shores of Tripoli: Lieutenant Putnam and the Barbary Pirates*

Book review
by Marilyn P. Duncan



Jim Haley, the Society's own historian, is at his best when he lends his narrative talents to making historical characters and events come alive. Read more...

News & Announcements

U.S. Seventh Circuit Chief Judge Diane P. Wood Will Keynote Hemphill Dinner


Chief Judge Wood

The Honorable Diane P. Wood will be the principal speaker at the Society's Twenty-Second Annual John Hemphill Dinner on September 8 at Austin's Four Seasons Hotel. Read more...

The Society's Spring 2017 Members' Meeting and Pat Nester's Award

By David A. Furlow


New Executive Director Sharon Sandle

Society President Macey Stokes convened an exceptionally well-attended Members' Meeting which involved three memorable moments. Read more...

Texas Semate Passes Judicial Security Bill Named in Honor of District Judge Who Survived Assassination Attempt

By Dylan O. Drummond


Judge Kocurek and son Will

The "Kocurek Act" recommends improvements to judicial security from the Texas Judicial Council and authored by Councilmember and Senator Judith Zaffirini. Read more...

The Society's TSHA Annual Meeting Program Was a Standing-Room-Only Success

By David A. Furlow


Macey Stokes began the day

The Society presented a superb program at the Texas State Historical Association's 2017 Annual Meeting on March 2, 2017. Read more...

J.P. Bryan, Jr.'s West Began at the Society's Spring 2017 Board Meeting

By David A. Furlow


J.P. Bryan, Jr.

"The West begins in Texas," the Society's special guest speaker, J.P. Bryan, Jr. proudly proclaimed to more than sixty attendees. Read more...

TSHA Approves Society's TSHA 2018 Panel Proposal


Old Main in San Marcos

For the March 2, 2018 meeting in San Marcos, the Society's session's title is *Laying Down Texas Law: From Austin's Colony through the Lone Star Republic.* Read more...

Texas Women Judges' Day Celebrated at Texas Capitol

By Dylan O. Drummond


Women judges at the Capitol

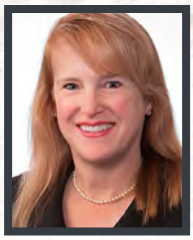
First celebrated during the 84th Legislative Session in 2015, this year's event again recognized women serving in the Texas judiciary. Read more...

Membership & More

Visit the Society on Twitter and Facebook!

@SCOTXHistSocy

FB: Texas Supreme Court Historical Society



Macey Reasoner Stokes

Message from the President

Since my last message, there have been a number of developments that I would like to share with you:

Chief Justice Jack Pope, 1913–2017

February saw the passing at 103 of the Society's Chair Emeritus Jack Pope, Retired Chief Justice of the Texas Supreme Court. Chief Justice Pope was an exemplar of a Texas jurist and a great man. One of the first books the Society published was the Chief's book, *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas* (edited by Marilyn P. Duncan), a fascinating collection of his essays on the art and science of judicial decision-making, as well as excerpts from ten of his landmark opinions. His intelligence, humor, and common sense will be sorely missed at Society Board meetings. A beautiful tribute to Chief Justice Pope's life and work can be found on the Texas Supreme Court's home page.

Upcoming Book Publications

The second book in the *Taming Texas* series, ***Law and the Texas Frontier***, will be released later this spring. The Society is grateful to the Fellows for continuing to support this important series of books designed to teach seventh-graders about the important role that the judiciary has played in our state history. We are always in need of volunteers for the presentations that we make to teach the book to seventh-grade history classes around the state, so please let me know if you would like to participate in one of these one-hour presentations in your city or town.

Trustee Bill Chriss is revising his ***Six Constitutions Over Texas*** book manuscript to resubmit to the University of Texas Press at the end of the summer. The book will be part of the Society-sponsored Texas Legal Studies Series.

Trustee and Former Chief Justice Thomas R. Phillips continues to work on his **judicial elections book** that, when completed, will be the first comprehensive study of judicial elections over the course of Texas history.

Society-Sponsored Spring and Fall Events

The Society held its biennial symposium on the ***History of Texas and Supreme Court Jurisprudence*** (co-sponsored by the State Bar) on **Thursday, April 27**, in the Texas Law Center in Austin. Thank you to our course directors, *Journal* General Editor Lynne Liberato and Trustee

Richard Orsinger, and all the Society trustees and members who volunteered to speak at or help plan the symposium.

The **Twenty-Second Annual John Hemphill Dinner** will be held **Friday, September 8** at 6:30 p.m. at the Four Seasons Hotel in Austin. Our keynote speaker will be Diane Wood, Chief Judge of the United States Court of Appeals for the Seventh Circuit and an engaging speaker. Please sign up for a table sponsorship soon, as tables for the dinner tend to sell out quickly. I am grateful to Trustee Tom Leatherbury for serving as our dinner chair this year.

The Society is a sponsor of the Texas General Land Office's Eighth Annual ***Save Texas History Symposium***, to be held on **September 15 and 16** on UT Austin's J. J. Pickle Research Campus in far north Austin. This year's symposium is entitled "Texas and the Great War," to commemorate the centennial of the United States' entry into World War I on April 6, 1917. More information and registration can be found at http://www.glo.texas.gov/save-texas-history/symposium/index.html.

Pat Nester's Retirement and Sharon Sandle's Welcome

Finally, our beloved Executive Director Pat Nester is retiring next month, despite our attempts to make him work for the Society forever. Pat has been crucial to the growth and success of the Society over these past several years, and we cannot thank him enough for his excellent stewardship. At our last membership meeting on March 2, I was proud to present Pat with a proclamation of the Texas Supreme Court, which recognized his significant contributions to the Court and the Society.

Fortunately, Pat helped us select an outstanding replacement as Executive Director, Sharon Sandle. Sharon is the Director of the State Bar's Law Practice Resources Division, a lawyer, and a member of the Society. She has extensive experience producing and marketing legal publications and managing people. Employing Sharon under the same part-time arrangement that we currently have with the Bar for Pat will meet the Society's needs, while conserving Society resources and allowing us to continue receiving the many benefits of Bar relationships and services that we have enjoyed during Pat's tenure. Sharon and Pat have been working together this spring to facilitate the transition of the Executive Director role in May.

As always, thank you for your support of the Society, and I hope to see you at the Hemphill Dinner on September 8.

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Executive Director's Page

Pat Nester

What Do Plutonium Pits, Hydrilla, and the Yellow Rose Have in Common?

A Final Pitch to Sample TSHA's History Smorgasbord

In my quest to entice members of the Society to attend the Texas State Historical Association Annual Meeting, here are some assorted nuggets from the March 2-4 event at the Hyatt Regency in Houston:

TSHA
Texas State Historical Association

- In 1935, Texas was the second least electrified state after Mississippi. Since then, twelve dams have been built on Texas rivers to provide power but, just as important, to control flooding.

- The 20,000 or so plutonium "pits" for hydrogen bombs stored at the Pantex nuclear weapons plant near Amarillo—once run by toothpaste vendor Procter and Gamble—are about as big as a bowling ball.

- After LBJ's Great Society, Richard Nixon invented the "Southern Strategy," which turned the Old South from solidly Democratic to solidly Republican.

- In the 1970s, a water weed called hydrilla choked up Lake Conroe north of Houston so badly that biological warfare was initiated with the importation of the Asian grass carp, which as it turned out ate the hydrilla so ravenously that for a time, the lake became a "muddy bathtub." Now the Asian grass carp has invaded several other Texas lakes, but fortunately bass love to eat Asian grass carp fingerlings.

- In one of the first major branding lawsuits, movie cowboy and singer Gene Autry sued a travelling circus that used his brother's name in promoting itself, on the theory that Gene Autry had become synonymous with the mythic American West itself and any other Autry would sully that equivalency. Former Texas Governor Dan Moody represented Gene and got the injunction.

- Col. Robert M. Coleman, a Texas Ranger battalion commander, had a running feud with Sam Houston, partly because he thought Sam was too sympathetic to the Indians. Houston had the colonel jailed on somewhat trumped-up charges, but the Republic of Texas's first chief justice, James T. Collinsworth, released him on a habeas corpus writ filed by William Gray, a principal of the firm that later became Baker Botts.

- Unlike their co-workers, Native Americans working in the Texas CCC camps during the Great Depression were never paid.

- Also during the Depression, plans were formalized by the City of Corpus Christi to create a giant statue of Jesus calming the waters of Corpus Christi Bay. While the idea was popular with many, some thought it too idolatrous, and an election to ratify the idea was called off.

- Just before Texas became a state, Englishman William Bollaert traveled around central and southeastern Texas for two and half years writing a dozen articles that give the best account of the social life of the period. A cut and pasted passage in one may be responsible for Emily Morgan being identified as the Yellow Rose of Texas, Santa Ana's consort. If it weren't for male bias over the years, Emily more than Sam Houston would probably have been given credit for the victory during the eighteen-minute battle of San Jacinto.

- The Texas Supreme Court Historical Society's session at the meeting, first under the baton of Judge Mark Davidson, focused on the "Semicolon Court" case after which Democrats supporting Richard Coke seized the second floor of the Capitol in defiance of the Court's ruling that Coke's election was illegal, resulting eventually in Coke becoming the first Democratic governor after the Civil War. Then Bill Kroger of Baker Botts reported on the amazing life and murder of William Marsh Rice, the founder of Rice University and client of Baker Botts. Former Chief Justice Wallace Jefferson, acting as commentator, reminded us all of the amazing variety of narratives—from sometimes reprehensible to frequently remarkable—that comprise Texas history and the diversity of Texans who overcame all obstacles to bequeath to us the beautiful state we have today.

This will be my last attempt at persuading you to bone up on your history at TSHA meetings. Sharon Sandle, the director of the State Bar's Law Practice Resource Division, will be taking over my role as part-time executive director of the Society beginning June 1, when I will be retiring. Sharon's jurisdiction at the bar includes Texas Bar Books, which includes the Pattern Jury Charge series, the *Family Law Practice Manual*, and many others. She also oversees the bar's law practice management activities and the bar's new incubator project for beginning lawyers wanting to establish a solo practice. You will find Sharon to be highly competent and easy to like, and I couldn't be more pleased to hand her the keys. I hope to see you all at the next Hemphill Dinner on September 8 at the Four Seasons in Austin. It's another of those Society-sponsored events that shouldn't be missed.

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Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston

Our acclaimed judicial civics and history book *Taming Texas: How Law and Order Came to the Lone Star State*, continues to be taught in schools throughout Houston. In conjunction with the Houston Bar Association, we are teaching the Taming Texas program to over 3,500 seventh-grade students in the Houston area. We would like to thank the HBA and its President, Neil Kelly, for recruiting over 75 judges and lawyers to serve as volunteers to teach this important curriculum. Because of the vast resources required to teach this number of students, we would not have been able to implement such a large-scale program without the assistance of the HBA. And we certainly could not have done it without the hard work of the HBA chairs of the program, Justice Brett Busby, Judge Debra Mayfield, and David Furlow, who made the classroom part of the program a major success.

Our Taming Texas project continues to grow. The second book in the Taming Texas series, *Law and the Texas Frontier,* is now being printed, and will be an exciting addition to the our judicial civics and court history project. This new book focuses on how life on the frontier was shaped by changing laws, and will have a new look, with historical photographs enhanced by a large number of original drawings. We are pleased that Chief Justice Hecht has again written the foreword for the book. Justices Paul Green, Harriet O'Neill, and Dale Wainwright have provided complimentary quotes that will appear on the back cover.

Coauthors Jim Haley and Marilyn Duncan have already commenced work on the third book in the series, *The Chief Justices of Texas*. No other state has produced judicial civics books like *Taming Texas*, *Law and the Texas Frontier*, and the planned third book in the series. These books offer an entertaining and educational view of the legal heritage of Texas.

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

The Fellows' historical case reenactment presented at the State Bar annual meeting in Fort Worth last summer was well attended and will be presented again this year. The Society and TexasBarCLE presented an encore of the argument at the History of Texas and Supreme

Court Jurisprudence seminar in Austin on April 27. Participants included Judge Jennifer Elrod from the United States Court of Appeals for the Fifth Circuit and Justice Debra Lehrmann and Justice (ret.) Harriet O'Neill from the Texas Supreme Court. Arguing the case of *Johnson v. Darr* (the 1925 Woodmen of the World case argued to the All-Woman Texas Supreme Court) were Fellows Doug Alexander and David Keltner. Fellow David Furlow moderated the program. The Society owes a special thanks to Blake Hawthorne, Clerk of the Supreme Court of Texas, and Tiffany Gilman, the Court's Archivist, for their work in gathering the historical materials used by the participants in the reenactment.

Finally, I want to express once again our appreciation to the Fellows for their support. If you are not currently a Fellow, please consider joining the Fellows and helping us support this important work. If you would like more information or want to join the Fellows, please contact the Society office or me.

FELLOWS OF THE SOCIETY

Hemphill Fellows
($5,000 or more annually)

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

Greenhill Fellows
($2,500 or more annually)

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

*Charter Fellow

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Executive Editor's Page

David A. Furlow

Coming in from the Chill: *Cheers to the First Amendment*

Ice gets in your blood. The frozen St. Lawrence River in front of the Hotel Frontenac, Quebec City, March 12, 2017. Photo by David A. Furlow.

You know it's cold when your breath fogs the air in front of you, your lungs burn, the wind strikes your exposed face and hands like frozen iron, your teeth chatter, when there's so much ice inside you don't talk or listen to anyone but just search for the warmth of shelter. You keep your mouth closed, lest your tongue freeze to the roof of your mouth. Find a fireplace, light a torch, huddle in a corner, try as hard as you can, you may never get that *cold's* chill out of your marrow.

But there's another kind of cold that can chill your bones, too, leaving ice in your veins. George Orwell, a journalist who reported the Spanish Civil War from the barricades of Barcelona, knew that kind of chill from experience:

> Outside, even through the shut window pane, the world looked cold. Down in the street little eddies of wind were whirling dust and torn paper into spirals,

and though the sun was shining and the sky a harsh blue, there seemed to be no color in anything except the posters that were plastered everywhere. The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite.

BIG BROTHER IS WATCHING YOU, the caption said, while the dark eyes looked deep into Winston's own. Down at street level another poster, torn at one corner, flapped fitfully in the wind, alternately covering and uncovering the single word INGSOC.

In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. The patrols did not matter, however. Only the Thought Police mattered.[1]

Big Brother looks down from the view-screens in Victory Plaza, from the film *Nineteen Eighty-Four* (Twentieth Century Fox, 1984). Copyright by Atlantic Releasing, 1984.

"Who controls the past controls the future," Orwell wrote in *1984*. "Who controls the present controls the past." Big Brother's view of history recalls Lord Acton's warning, "Power tends to corrupt; absolute power corrupts absolutely. Great men are almost always bad men."[2]

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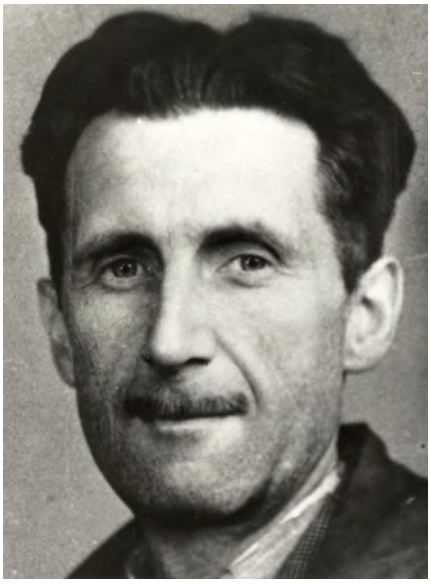
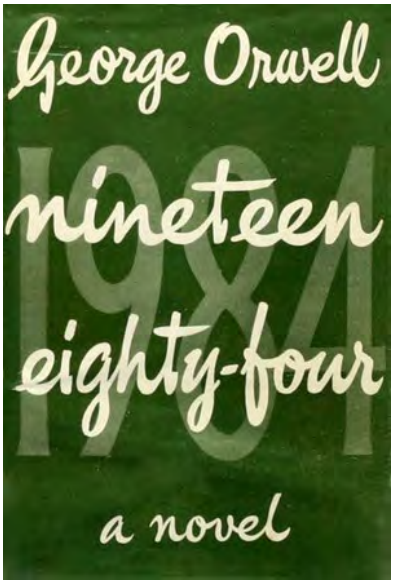
1 George Orwell, *1984* (London: Secker & Warburg, 1949), pt. I, chap. 1, 1. *See also* William H. Rehnquist, "Review: *1984* by George Orwell," *Michigan Law Review* 102, no. 6, 2004, Survey of Books Relating to the Law (May 2004), 981–87.

2 John Emerich Edward Dalberg Acton, first Baron Acton (1834–1902), letter to Bishop Mandell Creighton from Cannes on April 5, 1887 ("Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it…"). *Online Library of* Liberty, accessible at https://history.hanover.edu/courses/excerpts/165acton.html, March 29, 2017.





Above, left to right: George Orwell; cover of *Nineteen Eighty-Four*; symbol of English Socialism, the political ideology of the totalitarian government of Oceania in Orwell's novel.
Below, left: On April 22, 1937, Water Commissar Nikolai Yezhov, the figure on the far right, walked with his colleague Joseph Stalin and Stalin's Foreign Minister Vyacheslav Molotov along the shore of the Moscow-Volga Canal. Below, right: After Commissar Yezhov's February 4, 1940 execution, Soviet censors airbrushed him out of the photo.[3]

Come in out of the cold. This issue of the *Journal*, over a year in the planning, explores the history of the First Amendment in Texas. It examines how Texas's judges, justices, and lawyers have preserved, protected, and expanded freedom of speech, writing, and the press in response to overbroad laws, ambiguous legislation, and judicial rulings that chill the speech and writings of any man or woman, leaving nothing but a land cold, arid, and devoid of critical thought. In *Secretary of State of Maryland v. Joseph H. Munson Co.*,[4] the Supreme Court recognized that "[b]y placing discretion in the hands of an official to grant or deny a license [permitting the exercise of

[3] Public-domain photo (U.S. and Russia) available on Wikimedia, in care of the Tate Modern Museum, London, http://www.tate.org.uk/context-comment/articles/revelation-erasure.

[4] 467 U.S. 947 (1984).

First Amendment rights], such a statute creates a threat of censorship that by its very existence chills free speech."[5]

Charles L. "Chip" Babcock, one of the nation's foremost trial lawyers, begins this issue with an article analyzing constitutional issues involving juries and the First Amendment in "The Role of Juries in Libel Litigation under the Texas Constitution." Mr. Babcock's article reflects the experience he has garnered while trying over one hundred cases to a jury and while arguing over fifty appeals, many on First Amendment issues. A *Texas Monthly* Super Lawyer from 2003 through the present, a fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, the American Board of Trial Advocates, and the Litigation Counsel of America, Mr. Babcock has represented individuals such as Warren Buffet, Oprah Winfrey, Dr. Phil McGraw, and George W. Bush. Because the Texas Supreme Court appointed him to serve as Chair of the Texas Supreme Court Advisory Committee in September 1999, Mr. Babcock's article includes his insights about the way changing laws and procedural rules have affected the constitutional rights of Texans over many years as courts seek to balance individual rights, societal duties, and the public interest.

"They that can give up essential liberty to obtain a little temporary safety," Benjamin Franklin observed in his 1759 *Historical Review of Pennsylvania*, "deserve neither liberty nor safety." In her article "Don't Mess with the First Amendment in Texas—How This State Became One of the Best for Protecting First Amendment Rights," media law attorney Alicia Wagner Calzada, a former photojournalist, describes how Texas Court of Criminal Appeals and Fifth Circuit rulings chilled the free press rights of reporters, journalists, editors, newsrooms, bloggers, and ordinary citizens. Ms. Calzada describes how free press advocates, including attorney Laura Prather and former Texas Supreme Court Justice Craig Enoch, convinced the Texas Legislature to enact and Governor Rick Perry to sign the Free Flow of Information Act in 2009, Texas's first anti-SLAPP statute; the Texas Citizens Participation Act, in 2011; and the Defamation Mitigation Act in 2013 to address overbroad subpoenas, excessive punitive damages, and frivolous lawsuits.

Another First Amendment attorney, Pete Kennedy, offers a free-spirited defense of truthful, non-misleading commercial speech about Texas micro-brewing in his article "A Twenty-First Century Clash with Prohibition: The First Amendment Trumps Texas's Arcane Alcohol Laws." If you want to read about Texans' complicated relationship with alcohol and free speech rights from the Republic to the present, and learn about everything from the 1876 Constitution's authorization of local-option "wet" and "dry" elections to the rise and fall of Prohibition, this Bud's for you.

"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties," the poet John Milton wrote in his 1644 defense of free speech rights, *Areopagitica*. JT Morris, in "Free Speech and Prior Restraint in Texas, with Some Help from Hollywood," uses actor John Goodman's character, Walter Sobchak, the boisterous Vietnam-veteran-turned-bowling-alley denizen in the cult classic *The Big Lebowski*, to guide us through the Texas Supreme Court's vindication of liberty interests in *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014). Mr. Morris takes us through the history of prior restraint litigation and Article I, Section 8 of the Texas Constitution to explain why the Texas Supreme Court ruled that an injunction restraining speech not yet adjudicated to be defamatory was an unlawful prior restraint.

[5] *Ibid.*, 964 n. 12.

Stephen Pate, a veteran trial lawyer, offers timely perspective on the constitutional controversies surrounding presidential nominations and Senate confirmation of federal judges in "Making of a Federal Judge." Mr. Pate tells how Lyndon B. Johnson, at the height of his Senate Majority Leader mastery of the U.S. Senate, exercised his enormous personal power to secure what may still rank as the fastest nomination-to-confirmation process for a federal judge in modern history, the nomination of Joseph Jefferson Fisher to serve as the U.S. District Judge for the Eastern District of Texas in Beaumont. Richly illustrated with photos and headlines literally ripped from the front pages of history, "Making of a Federal Judge" offers an important contribution to Texas judicial history.

In addition to analyzing First Amendment rights, this issue bids a sad farewell to one of the Texas Supreme Court Historical Society's founders and guiding spirits, Chief Justice Jack Pope. Pope's book editor and friend Marilyn Duncan pays tribute to his many contributions to Texas law and society. Photographs of the Chief Justice, including those of his memorial service and burial at the Texas State Cemetery, celebrate the life of a great man, Texas's common law judge.

In "Case Update—*Moore v. Texas,*" public-defender Jani Maselli Wood shares the March 28, 2017 outcome of the case she described in her Winter 2017 feature "A Texas Case in the U.S. Supreme Court," where she shared her impressions about watching U.S. Supreme Court oral argument in an appeal of a Texas death penalty case, *Moore v. Texas*, Cause No. 15-797. Now she tells readers about the important ruling that resulted from the U.S. Supreme Court oral argument she witnessed. No feature could be more timely than this one.

A current events feature recounts how Texas historian J.P. Bryan, Jr., the founder of Galveston's Bryan Museum, presented a special program, "Texas, Where the West Begins," at the Spring 2017 Board of Trustees meeting of the Texas Supreme Court Historical Society.

Another feature chronicles the Society's standing-room only panel presentation "Semicolons, Murder and Counterfeit Wills: Texas History through the Law's Lens" by Judge Mark Davidson, attorney Bill Kroger, and former Chief Justice Wallace Jefferson at the Texas State Historical Association's Annual Meeting on March 2, 2017.

Please join the *Journal* in celebrating the history of freedom of speech and the press in the Lone Star State. Texans may endure blizzards and Blue Northers from time to time, but they don't let anyone chill their rights. *Cheers to the First Amendment.*

DAVID FURLOW *is a First Amendment lawyer, a historian, an archaeologist, and a journalist.*

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The Role of Juries in Libel Litigation under the Texas Constitution

By Chip Babcock

It was Sunday, February 28, 1836 as delegates to the Texas Constitutional Convention began to arrive in Washington-on-the-Brazos, a very small settlement on the banks of the Brazos River approximately nine miles southwest of Navasota and northeast of Brenham. A letter was received that day from Lieutenant Colonel William B. Travis, commander of the Alamo, dated four days earlier, which reported that he and his troops were under siege by Santa Anna's Mexican Army and that an unconditional surrender was demanded.

"I have answered the demand with a cannon shot," Travis reported. "I am determined to sustain myself as long as possible and die like a soldier who never forgets what is due to his own honor & that of his country. VICTORY OR DEATH."[1] Texas was not yet a country at the time of Travis's letter, but it soon would be.

1836 was a leap year, and on the last day of February "many other members [of the Convention were seen] coming in" and, as described by William Fairfax Gray, "it is now evident that a quorum will be formed tomorrow."[2] Gray was in Texas to purchase land titles for his principals in Virginia and observed and noted the proceedings of the Convention.[3] On March 1, forty-one members (a number that ultimately grew to fifty nine) gathered at an unfinished frame building, without doors or windows, on Ferry Street. It was bitterly cold with the temperature hovering around freezing, while a gale force wind was blowing from the north accompanied by lightening, thunder, rain, and hail.[4]

Gray, who would later become the first clerk of the Texas Supreme Court,[5] kept a daily diary of the sixteen-day Convention. He wrote that "notwithstanding the cold, the members of the Convention met [at the building] . . . and in lieu of glass, cotton cloth was stretched across the windows, which partially excluded the cold wind."[6] The first order of business was to draft a Declaration of Independence, which was accomplished by the following day, voted upon, and approved unanimously. This document borrowed from the U.S. Declaration of Independence

1 "Texas Treasures: Travis letter from the Alamo," *Texas State Library and Archives*, https://www.tsl.texas.gov/treasures/republic/alamo/travis-full-text.html.

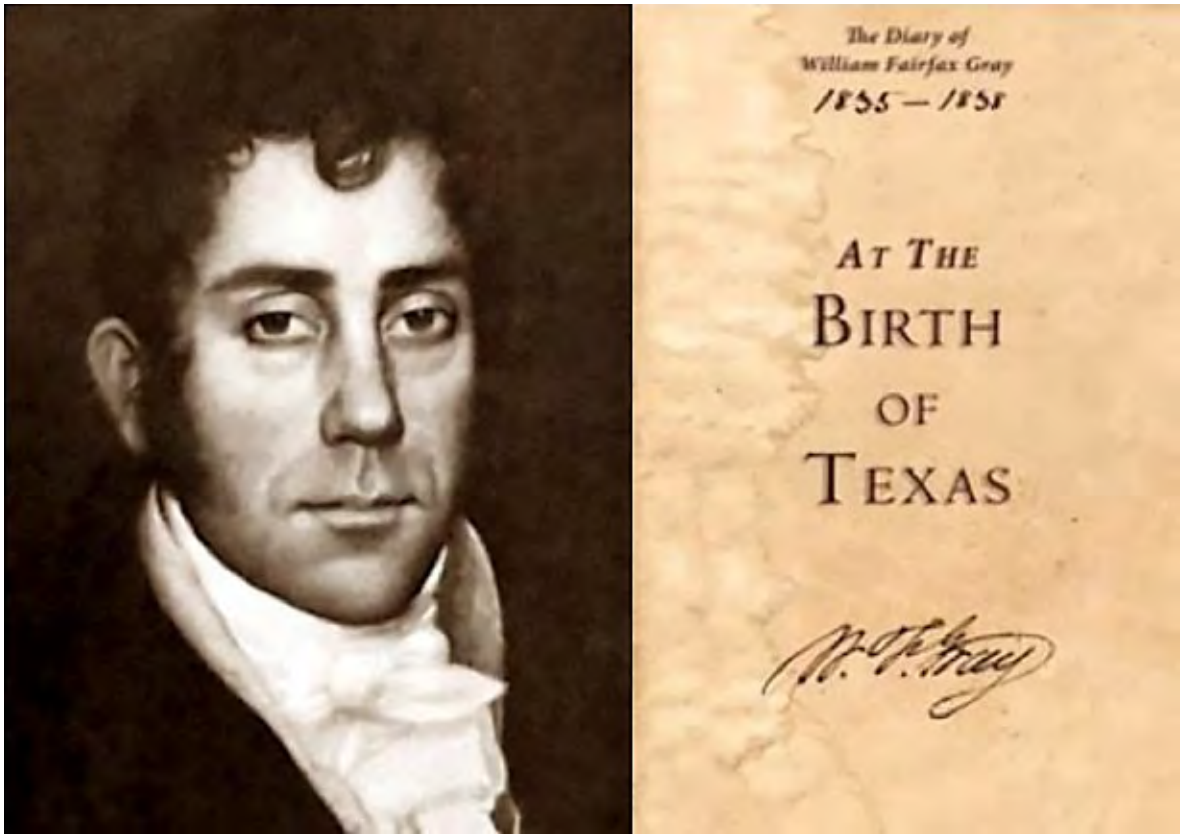
2 *The Diary of William Fairfax Gray, from Virginia to Texas, 1835–1837*, ed. Paul Lack (Dallas: Clements Center for Southwest Studies, Southern Methodist University, 1997), 112, https://sites.smu.edu/swcenter/fairfaxgray/wg_cont.htm.

3 Tiffany Gilman and Blake Hawthorne, "A Brief History of the Texas Supreme Court Clerk's Office," *Journal of the Texas Supreme Court Historical Society* 5, no. 4 (Summer 2016).

4 *Diary of William Fairfax Gray,* 112.

5 Gilman and Hawthorne, "Brief History," 34.

6 *Diary of William Fairfax Gray*, 112.



William Fairfax Gray and his diary.[7]

and like it contained a list of grievances. Common to each was a complaint that there had been a denial of the right to jury.

As the Texans wrote: "It [the Mexican Government] has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen."[8] The Americans similarly complained that the British had deprived "us, in many cases, of the benefits of the trial by jury."[9]

The Texas Declaration of Independence also contained a specific complaint about the Mexican government's retaliation for exercising the right of free speech in criticizing the government. A citizen, who turned out to be none other than Stephen F. Austin, was incarcerated for publishing a letter describing his opinion that the government needed to be reorganized. The Texas Declaration wrote in complaint that the Mexican government had "incarcerated in a dungeon, for a long time, one of our citizens, for no other cause but a zealous endeavor to procure the acceptance of our constitution, and the establishment of a state government."[10]

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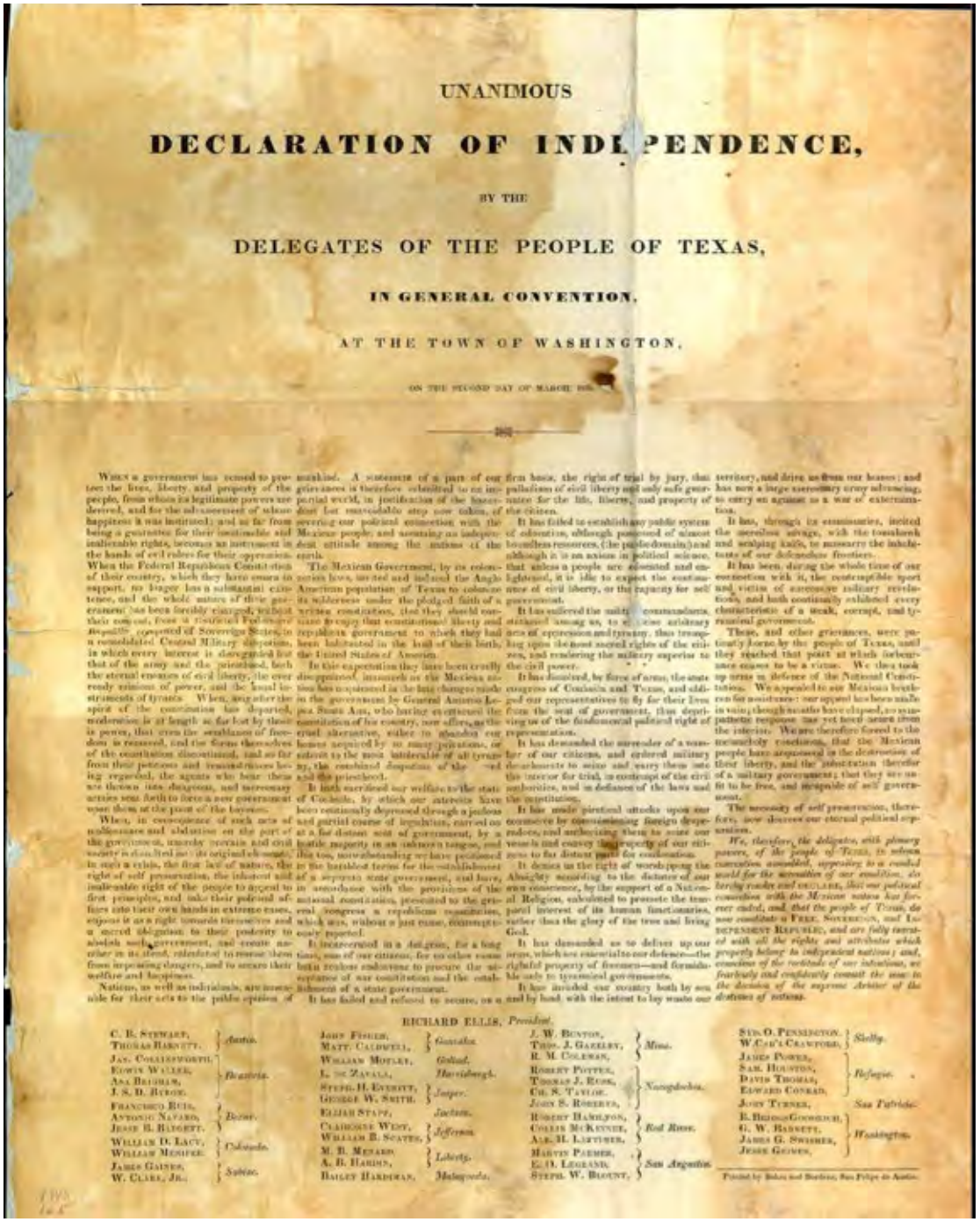
[7] Texas General Land Office, "William Fairfax Gray—Eyewitness to History," https://medium.com/save-texas-history/william-fairfax-gray-eyewitness-to-history-db4ae5faa10c.

[8] "Journals of the Convention of the Free, Sovereign, and Independent People of Texas, in General Convention, Assembled," in H.P.H. Gammel, *The Laws of Texas, 1822-1897* (Austin: Gammel Book Company, 1898), Vol. I, 821-904, 15 Tarlton Law Library, Jamail Center for Legal Research, the University of Texas Law School, *Tarlton Constitutions 1824-1876*, http://tarlton.law.utexas.edu/constitutions/ ("*Convention Proceedings*").

[9] The Declaration of Independence, para. 14 (U.S. 1776).

[10] *Convention Proceedings* at 15.



UNANIMOUS

DECLARATION OF INDEPENDENCE,

BY THE

DELEGATES OF THE PEOPLE OF TEXAS,

IN GENERAL CONVENTION,

AT THE TOWN OF WASHINGTON,

ON THE SECOND DAY OF MARCH 1836.

The Texas Declaration of Independence, March 2, 1836.
Image courtesy of the Texas State Library and Archives.[11]

The reference was to Austin's trip to Mexico City, where he was cited for treason for authoring a letter which urged the *ayuntamiento* of Bexar (the City Council) to "begin the process of organizing a separate state government."[12] He was imprisoned in what he described as a dungeon and kept for many months in solitary confinement before finally being released over a

[11] "Treasures of Texas: Declaration of Independence," Texas State Library and Archives, https://www.tsl.texas.gov/sites/default/files/public/tslac/treasures/images/republic/declar.jpg.

[12] Amelia White, "The Imprisonment of Stephen F. Austin," *Alamo Messenger*, (June 13, 2016), 1, http://medium.com/the-alamo-messenger/the-imprisonment-of-stephen-f-austin-36038ea3fd6b.

year later. His return to Texas preceded the Convention by five months, and while his case was a cause for grievance against Mexico, Austin was not elected to serve at the Convention.

On Wednesday, March 2, a committee of twenty-one delegates was appointed to draft a constitution. The following day, four additional delegates were appointed including Sam Houston and James Collinsworth, a Tennessee lawyer who was to become the first Chief Justice of the Texas Supreme Court. A week later the group presented a draft of the document which included two sections (four and five) in the Declaration of Rights that outlined speech and press rights. Section four provided that: "Every citizen may freely speak, write and publish his own sentiments on all subjects, being responsible for the abuse of the same." Section five stated that: "No law shall ever be passed to curtail the liberty of speech or the press. In all prosecutions for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and the fact, under the direction of the court."[13]

The federal constitution was surely the inspiration, in part, for the first sentence of section five of the Texas draft. As the U.S. First Amendment states: "Congress shall make no law abridging the freedom of speech or of the press." But state constitutions also contained this language and were the source of provisions not contained in the U.S. First Amendment.

Texans borrowed liberally. New York's Constitution of 1821 provided, in language virtually identical to the Texas draft, that, "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence, to the jury . . . and the jury shall have the right to determine the law and the fact."[14] The President of the Texas Convention and a member of the "Select Committee" to consider the draft Constitution was Stephen Everett, who came from New York.[15]

The Pennsylvania Constitution of 1790 had virtually identical language to the Texans' section four. As Pennsylvania articulated it, "every citizen may freely speak, write and print on any subject being responsible for abuse of that liberty."[16] The Quaker State Constitution also included language which was repeated in the second sentence of section five: "[I]n all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court as in other cases."[17] Many other state constitutions had similar language at the time. Both Samuel Fisher and John Moore, members of the drafting committee, were from Pennsylvania and had arrived in Texas six years before the Convention.[18]

On Monday, March 14, 1836 the Convention appointed "a select committee of five, with directions to correct errors and phraseology relating to the present provisions, with leave to

[13] *Convention Proceedings* at 48.

[14] N.Y. Const. art. VII, § 8 (1821), "The Second Constitution of New York," *New York Publications,* https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1821-NY-Constitution.pdf.

[15] "The Delegate Connection," Texas Independence website, http://txindependence.org/delegate_name.php.

[16] Pa. Const., art. IX, § 7, *Pennsylvania Archives*, 3d series, William Henry Eagle, ed. (Philadelphia, 1896), 747, "Constitution of the State of Pennsylvania-1790," *Duquesne University Gumberg Library*, http://www.duq.edu/academics/gumberg-library/pa-constitution/texts-of-the-constitution/1790.

[17] *Ibid.*

[18] "The Delegate Connection," *Texas Independence* website, http://txindependence.org/delegate_name.php.

Image of the "barn" at Washington City, a/k/a Washington-on-the-Brazos, on display at the Washington-on-the-Brazos historic site.

submit reflections by report. . ."[19] One of the five was a lawyer from South Carolina, Thomas Jefferson Rusk, who later succeeded Collinsworth as Chief Justice of the Supreme Court and, still later, was named president of the Constitutional Convention of 1845 (when the Constitution was rewritten upon Texas's admission to the United States).

The Select Committee worked on the document into the night of Tuesday, March 15. That evening "a letter from Gen. Sam Houston, announcing the fall of the Alamo, was read by the President." Travis and his men, it was said, did not survive.[20] The following day on Rusk's motion the proposed Constitution was taken up for its final reading and adopted. It was signed on March 17.[21]

Sections four and five from the draft were combined so that the 1836 Texas Constitution

[19] *Convention Proceedings* at 74, https://tarltonapps.law.utexas.edu/constitutions/files/journals1836/1836_03_14_jnl.pdf

[20] *Convention Proceedings* at 80, https://tarltonapps.law.utexas.edu/constitutions/files/journals1836/1836_03_15_jnl.pdf

[21] *Ibid.*

read: "Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege. No law shall ever be passed to curtail the liberty of speech or of the press; and in all prosecutions for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and fact, under the direction of the court."

After passage the Convention was adjourned and Washington-on-the-Brazos was evacuated under threat of the approaching Mexican Army. As Gray described the scene, "The Alamo has now fallen, and the state of the country is becoming every day more and more gloomy. In fact, they begin now to feel that they are hourly exposed to attack and capture[;]…the members are now dispersing in all directions, with haste and confusion. A general panic seems to have seized them."[22]

But the Constitution was finished. It was ratified by the citizens in September. An inscription on Independence Hall, as the unfinished building which hosted the Convention was later named, reads, "a Nation was Born."[23]

In all material aspects, Article I Section Four of the 1836 Constitution is similar to the current Article 1 Section 8,[24] which reads:

> Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publications of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and facts, under the direction of the court, as in other cases.

Although there is "right to trial by jury [which] shall remain inviolate,"[25] Article 1 Section 8 and its predecessors are the only place where a specific cause of action (libel) is singled out for decision by jury and the jury is entitled to given the right to "determine the law and facts."

One commentator has suggested that "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."[26] This thought is not far-fetched[27] when one

[22] *Diary of William Fairfax Gray*, 124–25.

[23] Washington-on-the-Brazos, Texas, http://en.wikipedia.org/wiki/Washington-on-the-Brazos,_Texas.

[24] J. E. Ericson, "Origins of the Texas Bill of Rights," *Southwestern Historical Quarterly* 62, no. 4 (1959): 461, 462.

[25] Tex. Const. art. I, § 15.

[26] William J. Chriss, "The Constitution of the Republic of Texas," *Journal of the Texas Supreme Court Historical Society* 4, no. 2 (2014): 19, 21.

[27] There is, however, authority that suggests the language giving the right to determine the law under the direction of the court, as in other cases, is nothing more than stating the obvious. The jury decides the facts pursuant to instructions as to the law provided by the judge. *See McArthur v. State*, 41 Tex. Crim. 635, 639 (1900) (a criminal prosecution for libel under a penal statute identical to Article 1, Section 8). In answering a complaint that the court should not have instructed the jury, the Court held: "This provision makes the jurors simply the judges of

considers the historical events that inspired the early state constitutions which in turn influenced the 1836 delegates. And the incarceration of Stephen Austin for stating his opinion critical of the government was a stated grievance that the Texans sought to remedy.

Sir William Cosby, first governor of New York, did not like his policies to be criticized in the press. Image courtesy of Wikimedia Commons and Wimbit.

The early state constitutions and, to an extent, the First Amendment, were shaped by the case of New Yorker John Peter Zenger.[28] In 1731, William Cosby traveled from England to New York to become the colony's new governor.[29] He was regarded as a rogue governor and reports described him as a spiteful, greedy, and haughty man.[30] Cosby engendered almost immediate opposition.[31]

James Alexander, one of the many colonists who opposed Cosby, decided to publish an independent political newspaper, the *New York Weekly Journal*, for the purpose of exposing Cosby's misdeeds.[32] Alexander asked John Peter Zenger, one of two publishers in the colony, to publish the newspaper.[33] Although Zenger had primarily printed religious tracts, he agreed.[34] On November 5, 1733, the first issue of the *New York Weekly Journal*, criticizing Cosby, was published.[35]

Cosby eventually became tired of the *New York Weekly Journal*'s attacks.[36] In January 1734, he tried to shut down the paper.[37] When that effort failed, Cosby had Zenger arrested and charged with libel.[38] Zenger was arrested on November 17, 1734, and was forced to remain in

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the law under the direction of the court, as in other cases. In other cases the jury take (sic) the law from the court, and are required to be governed thereby; and we understand the constitution and the statute to mean the same thing, and it was never intended that the jury, with reference to libel, should construe the law for themselves and without direction from the court."

28 This discussion of the impact of the John Peter Zenger case on jury trials of libel cases appeared in an earlier form in Charles Babcock, "Judge & Jury Symposium: The Role of the Court and Jury in Libel Cases," 47 *S. Tex. L. Rev.* 325 (2005). *See also* Douglas Linder, *The Trial of John Peter Zenger: An Account* (Kansas City: University of Missouri at Kansas City, School of Law, Aug. 2001), http://famous-trials.com/zenger.

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

prison until his trial began on July 29, 1735.[39] Andrew Hamilton, one of the most prominent and eloquent attorneys of that time, traveled from Philadelphia to defend Zenger.[40]

Numb. X.

THE

New-York Weekly JOURNAL,

Containing the freshest Advices, Foreign, and Domestick.

MUNDAY January 7, 1733.

TO THE ENGLISHMAN,

——*With native Freedom brave,*
The meanest Briton scorns the highest Slave.
THE CAMPAIGN.

Since you have taken upon your self the noble Appellation of the Englishman, I am perswaded you will not be displeased if, out of the tender Regard I have to the Honour of my Country, I venture to give you my thoughts upon the Duty of an English Man; and endeavour at the same Time to awaken in you, and all my Country Men, the honest Ambition of Coming up to it in all Respects.

A *True English Man* in a civil and political Sense, is the greatest Character in Life.

While the Liberties of Rome remained intire, there could be nothing said more to the Honour of a Man, than to say he was a Roman: And for the very same Reason, so long as we continue true to our own Laws and Constitution, may every freeborn or naturalized Inhabitant of the British Dominions, glory in the Name of English Man: wherein lies the Honour, the Advantage now to Englishmen? are not our Privileges, our Rights, our Immunities, as great as ever were theirs? Are we not to all honourable Purposes as free a People? Are we not as brave? Do we not equal them in all the Arts and Embellishments of Life? Is not even our Wit and Eloquence upon an Equality with theirs? In Navigation, in Trade, in Manufactures, and the several Means of Acquiring Wealth, and furnishing our selves with the Products of distant Countries, they came far short of us. Then as to our Religion, it is as far beyond theirs, as the Wisdom of God is Superiour to the Inventions of Men.

Considering these ineffimable Bleffings, which we enjoy in a greater Measure, than any other Nation now in being, what should be the Duty of every English Man, and of you in Particular, but to maintain his happiness and his Birthright to the Utmost? To stand by the free Constitution of his Country with his Influence, with his Pen and with his Sword? In a Word, with his whole Might and Main? An English Man may speak his Opinion *without Doors* as well as *within Doors*: He may, nay he ought to have a jealous Eye, upon the Officers and Servants of his Prince: He may and he ought to alarm his fellow Subjects when he sees any apparent Danger, either from Enemies abroad, or from Traitors at home. The Prince receives his Information from others and those may be corrupt, and it may be Our Nothing less than the Clamours of a Nation can reach the Ears of a Prince, and give him an Opportunity of Defeating the Treachery and Ignorance of those that pretend to serve him. For this Reason I compose you, as an *English Man*, to cry aloud and spare not, when ever you shall see Occasion.

It is the Prerogative of our Prince to choose his Ministers, but it is the Privilege of the People by their Representatives, to Judge of, and even to arraign the Conduct of those Ministers.

In a Kingdom where an absolute and tyrannical Government prevails, the Prince and his Ministers are in effect the same: But God be praised it is not so with us. Our Laws have fenced the Person of the Prince as it were with a Wall of Brass: He is by them secured from violence, or any

The *New York Weekly Journal*, January 7, 1733. Image courtesy of Wikimedia Commons.

In a move shocking to everyone in the courtroom, Hamilton argued that Zenger had indeed published the alleged writings.[41] However, he continued, "the words themselves must be libelous, that is, *false, scandalous, and seditious* or else we are not guilty."[42] Hamilton also argued that if innuendo is all that was needed for libel, almost anything that a man writes may be construed as a libel.[43] Cosby's counsel argued that this position went against the common view of the law of libel in which the jury decided only whether a defendant published the alleged libel. That is because

> the law had taken so great care of men's reputations that if one maliciously repeats [a libel], or sings it in the presence of another, or delivers the libel or a copy of it over to scandalize the party, he is to be punished as a publisher of a libel.[44]

Hamilton responded that the jury had

> the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court *whether the words are libelous or not* in effect renders juries useless (to say no worse) in many cases....[45]

For the first time in American jurisprudence, Hamilton, with those words, informed a jury on

[39] *Ibid.*

[40] *Ibid.*

[41] *Ibid.*

[42] James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of The New York Weekly Journal,* ed. Stanley Nider Katz (Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 1963), 62.

[43] *See ibid.* at 65.

[44] *Ibid.* at 63–64.

[45] *Ibid.* at 78.

their option of "jury nullification."[46]

Until Hamilton's argument, the jury believed that its only option was to determine whether the defendant had published the statement. The judge was left to decide whether the statement was libelous.[47] This, after all, had been the common practice in libel cases since 1275.[48] Hamilton artfully provided the jury with information on their right to fairly judge an alleged crime by determining the law and the facts.[49] Hamilton told the jury that, if they decided that there was no falsehood in Zenger's statement, they had the right to say so.[50] In closing, Hamilton argued:

> And has it not often been seen (and I hope it will always be seen) that when the representatives of a free people are by just representations or remonstrances made sensible of the sufferings of their fellow subjects by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by His Majesty he was appointed, and by the law he is bound, to protect and encourage.
>
> But I pray it may be considered of what use is this mighty privilege if every man that suffers must be silent? And if a man must be taken up as a libeler for telling his sufferings to his neighbour?. . . No, it is natural, it is a privilege, I will go farther, it is a right which all freemen claim, and are entitled to complain when they are hurt; they have a right publicly to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.[51]

The jury returned a general verdict of not guilty.[52]

Hamilton was successful in characterizing Zenger's trial as an affront on the colonists' right to speak out against tyrannical governments and abuses of power. In finding for Zenger, the jurors took a stand on the value they placed on liberty and on freedom of speech, and demonstrated the extent to which they would go to preserve them. Hamilton skillfully played upon popular community prejudice against the government in the defense of free press and speech.

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[46] Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 Whittier L. Rev. 17, 44 (1992).

[47] *See* Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. Miami L. Rev. 765, 795–96 (1989).

[48] At that time the action was applicable to both written and spoken defamation. *Ibid.*

[49] Alexander, *A Brief Narrative,* 91.

[50] *Ibid.* at 96.

[51] *Ibid.* at 80–81.

[52] *Ibid.* at 101.

As we became a united government of states, these sentiments found expression in the individual state constitutions. Twenty state constitutions provide that "in all indictments for libel, the jury shall have the right to determine the law and facts"—guaranteeing their citizens the right to a jury trial in libel cases.[53]

Throughout the course of U.S. history, more and more situations arose where the jury, as representatives of the community, sided with a popular government or a public official intent on suppressing unpopular speech or punishing an unpopular speaker. One of the most famous situations occurred in the 1960s in the Deep South where an all-white, all-male jury was asked to judge publications which were critical of the southern way of life and threatened the political order of the day.[54] The very same jury system that had protected Zenger became a threat to publishers such as the *New York Times* and civil rights leaders arguing for the extension of fundamental civil rights to all people within the United States.

From the founding of the United States, the jury was seen as the protector of free speech. The jury, however, took on a different role in the 1960s. In the Deep South, the Civil Rights Movement threatened the so-called "southern way of life." The antagonists were the large and elastic class known as the "outside agitators," as personified by the *New York Times*.[55] The southern majority reviled organizations such as the National Association for the Advancement of Colored People (NAACP) and the Southern Christian Leadership Conference, which were led by Martin Luther King, Jr. and Ralph Abernathy.

The established political order in the south fought Dr. King, the Rev. Abernathy, and their sympathizers, and sought to silence them with dogs, fire hoses, billy clubs, and libel suits. All of the parties came together in a remarkable lawsuit after the *New York Times* published an editorial advertisement entitled "Heed Their Rising Voices," sponsored by the NAACP and signed by Abernathy.[56] The advertisement ran on March 29, 1960, and stated in part:

> As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom . . .[57]

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[53] Ala. Const. art. I, § 13; Colo. Const. art. II, § 10; Conn. Const. art. I, § 6; Del. Const. art. I, § 5; Ky. Const. § 9; Me. Const. art. I, § 4; Miss. Const. art. III, § 13; Mo. Const. art. I, § 8; Mont. Const. art. II, § 7; N.J. Const., art. I, § 6; N.Y. Const. art. I, § 8; N.D. Const. art. I, § 4; Pa. Const. art. I, § 7; S.C., Const. art. I, § 16; S.D. Const. art. VI, § 5; Tenn. Const. art. I, § 19; ; Tex. Const. art. I, § 8; Utah Const. art. I, § 15; Wis. Const. art I, § 3; Wyo. Const. art. I, § 20. Although use of the word "indictments" connotes a criminal trial, these provisions are viewed as justification for jury trials in civil libel actions. As discussed above, the rules for civil and criminal libel cases began to overlap and merge as the law of libel emerged over time. Moreover, the criminal libel statues of at least seven states have been struck down as unconstitutional. *See* Jeffrey Hunt and David Reymann, "Criminal Libel Law in the U.S.," 2002 *LDRC Bulletin* No. 2, 79, 88-90 (Mar. 27, 2002), http://www.medialaw.org/.

[54] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

[55] *Ibid.* at 294 (Black, J., concurring).

[56] *Ibid.* at 256.

[57] *Ibid.* at app.

The New York Times.

NEW YORK, TUESDAY, MARCH 29, 1960.

"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. . . . Let Congress heed their rising voices, for they will be heard."

—New York Times editorial Saturday, March 19, 1960

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is *our* America as well as theirs . . .

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW!!

Stella Adler
Raymond Pace Alexander
Shelly Appleton
Harry Van Arsdale
Harry Belafonte
Julie Belafonte
Dr. Algernon Black
Marc Blitstein
William Bowe
William Branch
Marlon Brando
Mrs. Ralph Bunche
Diahann Carroll
Dr. Alan Knight Chalmers

Joseph Cohen
Richard Coe
Nat King Cole
Cheryl Crawford
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Sammy Davis, Jr.
Ruby Dee
Harry Dufty
Sonny Eckford
Dr. Philip Elliott
Dr. Harry Emerson Fosdick

Anthony Franciosa
Matthew Guiman
Lorraine Hansbury
Rev. Donald Harrington
Nat Hentoff
James Hicks
Mary Hinkson
Van Heflin
Langston Hughes
Morris Iushewitz
Mahalia Jackson
Paul Jennings
Mordecai Johnson
John Killens

Eartha Kitt
Rabbi Edward Klein
Hope Lange
John Lewis
Viveca Lindfors
David Livingston
William Michaelson
Carl Murphy
Don Murray
John Murray
A. J. Muste
Frederick O'Neal
Peter Ottley
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Albert P. Palmer
Clarence Pickett
Shad Polier
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Michael Potoker
A. Philip Randolph
John Raitt
Elmer Rice
Cleveland Robinson
Jackie Robinson
Mrs. Eleanor Roosevelt
Bayard Rustin
Robert Ryan
Maureen Stapleton

Frank Silvera
Louis Simon
Hope Stevens
David Sullivan
Julius Sum
George Tabori
Rev. Gardner C. Taylor
Norman Thomas
Kenneth Tynan
Charles White
Shelley Winters
Max Youngstein

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Rev. Ralph D. Abernathy (Montgomery, Ala.)
Rev. Fred L. Shuttlesworth (Birmingham, Ala.)
Rev. Kelley Miller Smith (Nashville, Tenn.)
Rev. W. A. Dennis (Chattanooga, Tenn.)
Rev. C. K. Steele (Tallahassee, Fla.)

Rev. Matthew D. McCollom (Orangeburg, S. C.)
Rev. William Holmes Borders (Atlanta, Ga.)
Rev. Douglas Moore (Durham, N. C.)
Rev. Wyatt Tee Walker (Petersburg, Va.)

Rev. Walter L. Hamilton (Norfolk, Va.)
I. S. Levy (Columbia, S. C.)
Rev. Martin Luther King, Sr. (Atlanta, Ga.)
Rev. Henry C. Bunton (Memphis, Tenn.)
Rev. S. S. Seay, Sr. (Montgomery, Ala.)
Rev. Samuel W. Williams (Atlanta, Ga.)

Rev. A. L. Davis (New Orleans, La.)
Mrs. Katie E. Whickham (New Orleans, La.)
Rev. W. H. Hall (Hattiesburg, Miss.)
Rev. J. E. Lowery (Mobile, Ala.)
Rev. T. J. Jemison (Baton Rouge, La.)

COMMITTEE TO DEFEND MARTIN LUTHER KING AND THE STRUGGLE FOR FREEDOM IN THE SOUTH
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Chairmen: A. Philip Randolph, Dr. Gardner C. Taylor; *Chairmen of Cultural Division:* Harry Belafonte, Sidney Poitier; *Treasurer:* Nat King Cole; *Executive Director:* Bayard Rustin; *Chairmen of Church Division:* Father George B. Ford, Rev. Harry Emerson Fosdick, Rev. Thomas Kilgore, Jr., Rabbi Edward E. Klein; *Chairmen of Labor Division;* Morris Iushewitz, Cleveland Robinson.

Please mail this coupon TODAY!

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Please make checks payable to:
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Copy of the full-page Committee to Defend Martin Luther King and the Struggle for Freedom in the South newspaper ad published in the *New York Times* on March 29, 1960. It was used as an exhibit in *New York Times Co. v. Sullivan* (1964). Wikimedia Commons.

The advertisement went on to describe incidents in the "wave of terror,"[58] including expulsion of protestors from schools, truckloads of police officers armed with shotguns and teargas surrounding the Alabama State College Campus, the campus dining hall padlocked when the student body protested, the bombing of Dr. King's home in which his wife and children were almost killed, and the numerous false arrests of Dr. King in an attempt to intimidate him.[59]

L.B. Sullivan, the Commissioner of Public Affairs for Montgomery, Alabama, brought a civil suit against the *New York Times*,[60] alleging that he had been libeled by the statements in the advertisement.[61] Although Sullivan was not mentioned by name, he contended that the allegations that the police circled the campus implied a reference to him since his duties as Public Affairs Commissioner included supervision of the Police Department.[62] He also claimed that the padlocking of the student dining hall, as well as the alleged false arrests of Dr. King, could be imputed to the police and hence to him, since the police are generally responsible for such actions.[63] According to Sullivan, since the police were implicated in the other acts of terror mentioned in the advertisement, the statements regarding the bombing of Dr. King's home could also be read as accusing the police and, by extension, to him as the Public Affairs Commissioner.[64]

A Montgomery County jury awarded Sullivan $500,000 in damages even though he had made no attempt to prove actual damages.[65] Furthermore, the bombing of Dr. King's home and three of his four arrests occurred before Sullivan became Commissioner, so those acts as described in the advertisements could not have been imputed to Sullivan.[66] Nonetheless, the Alabama Supreme Court affirmed the jury award.[67] Libel cases against the *New York Times* cropped up all over Alabama.[68] By the time *Sullivan* reached the United States Supreme Court, local and state officials in Alabama had filed eleven suits against the newspaper seeking $5.6 million in damages.[69] Without libel insurance, the numerous suits and potentially high jury awards threatened the paper's very existence.[70]

Sullivan was appealed to the United States Supreme Court, where Justice Brennan's decision fundamentally changed the law of libel.[71] Not only was a common law tort subjected

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58 *Ibid.*

59 *Ibid.* at 257–58.

60 *Ibid.* at 256.

61 *Ibid.*

62 *Ibid.* at 258.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.* at 256, 260.

66 *Ibid.* at 259.

67 *Ibid.* at 256.

68 *Ibid.* at 295 (Black, J., concurring).

69 *Ibid.*

70 *Ibid.* at 294 (Black, J., concurring).

71 *Ibid.* at 254, 264, 279–80 (holding that the rule of law applied by the Alabama courts in "a libel action brought by a public official against critics of his official conduct" failed to "provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments," and that the Constitution required a

to constitutional limitations requiring public officials to prove falsity and actual malice by clear and convincing evidence, but the decision also strongly reflected a distrust of juries by reversing a 700-year trend wherein juries had been perceived as the protector of speech (or at least as neutral) in their adjudication of libel cases.[72] The Supreme Court held that,

> the rule of law applied by the Alabama courts [was] constitutionally deficient for fail[ing] to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.[73]

According to Justice Brennan, the decision by the Alabama courts reflected "'the obsolete doctrine that the governed must not criticize their governors.'"[74] The Court also held that actual malice is a required element in libel actions brought by public figures where the alleged libel concerns their public duties.[75]

The Court considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[76] According to the Court, it had already been established that constitutional protection of free speech did not turn upon "'the truth, popularity, or social utility of the ideas and beliefs which [were] offered.'"[77] Based on the history of suppression of ideas and speech in the past, the forefathers had decided "'in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'"[78] Erroneous statements are inevitable in free debate; however, they too must be protected "if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[79]

Expressions of views critical of local government officials were protected, if at all, by juries during the pre-*Sullivan* era. But juries can easily turn against unpopular speech, and this is exactly what happened in *Sullivan*. That the United States Supreme Court stepped in and "constitutionalized" state libel law is as remarkable as it was necessary to protect speech and the press.

The Supreme Court in *Sullivan* conducted an independent examination of the whole record to determine whether it could constitutionally support a judgment for the respondent,

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new "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'").

[72] *See generally* Frederick Schauer*, The Role of the People in First Amendment Theory*, 74 Cal. L. Rev. 761 (1986) (tracing the role juries have historically played in the adjudication of libel cases).

[73] *Sullivan*, 376 U.S. at 264.

[74] *Ibid.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

[75] *Ibid.* at 283.

[76] *Ibid.* at 270.

[77] *Ibid.* at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

[78] *Ibid.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

[79] *Ibid.* at 271–72 (alteration in original) (quoting *Button*, 371 U.S. at 433).

and to assure itself that the judgment did not constitute a forbidden intrusion into the area of free expression.[80] Sullivan of course argued that the Seventh Amendment precluded the Court from conducting such an examination.[81] The Court reasoned that the Seventh Amendment's provision that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law" was applicable to states appearing before the Court.[82] Nevertheless, the Seventh Amendment's "ban on re-examination of facts [did] not preclude [the Court] from determining whether governing rules of federal law [had] been properly applied to the facts."[83] The Court held that it would "review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."[84]

After *Sullivan*, a widespread trend emerged of jury verdicts being overturned on appeal in order to protect the speaker.[85] More courts also began treading the fine line between the First and Seventh Amendments, conducting independent review in libel actions based on the rationale that:

> whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."[86]

Courts, following the Supreme Court's lead, held the view that independent appellate reviews were necessary in order to "preserve the precious liberties established and ordained by the Constitution."[87]

In Texas, an appellate court has the opportunity to review the sufficiency of the proof on an interlocutory appeal of denial of summary judgment in cases involving the media.[88] This device has proved remarkably effective for press defendants since it was enacted approximately twelve years ago.[89]

The genius of the 1836 Texas Constitution (and its predecessor 1827 state constitution of

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[80] *Ibid.* at 284–85.

[81] *Ibid.* at 285 n.26.

[82] *Ibid.* (quoting U.S. Const. amend. VII).

[83] *Ibid.*

[84] *Ibid.* (alteration in original) (quoting *Fiske v. Kansas*, 274 U.S. 380, 385–86 (1927)); *see also Haynes v. Washington*, 373 U.S. 503, 515–16 (1963).

[85] *See, e.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 489–93, 514 (1984).

[86] *Ibid.* at 511.

[87] *Ibid.* at 510–11.

[88] Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(6) (Vernon Supp. 2004-2005).

[89] *See Ibid.* § 51.014 note (Historical and Statutory Notes).

the twin-state of Coahuila y Texas[90] and draft 1833 Mexican state of Texas constitution[91]) with respect to free speech and press rights was that it gave juries "broader authority"[92] to deal with suits (both civil and criminal) against citizens who had displeased the government or its officials, including influential people (public figures) who either were pervasively famous or were involved in some public controversy. Thus, we arrived at a two-tiered level of protection for speech and the press. At the first level, the jury can repel attacks on speech as it did in Zenger's case (and Austin's had he been tried) but, if the jury fails, as it did in the *Sullivan* case, there is another level of protection through independent judicial review by judges.

England, which pioneered the right of trial by jury in libel cases with the Fox Libel Act of 1792,[93] has now retreated from its historical reliance on the jury and has abolished the right in libel cases.[94] A likeminded action would take a constitutional amendment in Texas because of the wisdom of those fifty-nine delegates who wrote the free press and speech rights as they did.

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[90] *See* David A. Furlow, "We're All Coahuiltexanos Now," *Journal of the Texas Supreme Court Historical Society* 6, no. 1 (Fall 2016): 55–61, 58–59; Manuel González Oropeza and Jesús Francisco de la Teja, *Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827*: *Primera Constitución bilingüe, a/k/a, Proceedings of the Constituent Congress of Coahuila and Texas, 1824–1827: Mexico's Only Bilingual Constitution* (Mexico City: Tribunal Electoral del Poder Judicial de la Federación, 2016), Vol. I, 191–221 (Constitution of Coahuila y Tejas in Spanish), *ibid*., 225–57 (in English), specifically, 314, Article 12 ("The state is also obligated to protect all its inhabitants in the exercise of the right they possess of writing, printing, and freely publishing their sentiments and political opinions, without the necessity of any examination, or critical review previous to their publication, under the responsibility and protections that are now, or shall be hereafter established by the general laws on the subject.") and 339, Article 192 ("One of the main objects of attention of congress shall be to establish the trial by jury in criminal cases, to extend the same gradually, and even to adopt it in civil cases in proportion as the advantages of this valuable institution become practically known.").

[91] When Texans proposed an 1833 constitution for an independent state of Texas, their leaders proposed a provision, Article 16, that affirmatively guaranteed their right to "freely speak, write, print and publish, on any subject," echoing the ideas set forth in Article 12 of Coahuila and Texas's 1827 Constitution: "Art. 16. *The free communication of thoughts and opinions, is one of the inviolable rights of man; and every person may freely speak, write, print, and publish, on any subject*, being responsible for the abuse of that liberty: but in prosecutions for the publication of papers investigating the official conduct of men in public capacity, the truth thereof may be given in evidence, as well as in personal actions of slander; and in all indictments for libles [sic], the jury shall have the right to determine the law and the facts, under the direction of the court as in other cases." (emphasis added). Article 4 guaranteed the right to jury trial: "Art. 4. The right of trial by jury, and the privilege of the Writ of Habeas Corpus shall be established by law, and shall remain inviolable." *See* "Constitution, or Form of Government, of the State of Texas, Made in General Convention, in the Town of San Felipe de Austin, in the Month of April, 1833—General Provisions," *Texas Constitutions 1824-187*6, University of Texas School of Law Tarlton Law Library, https://tarltonapps.law.utexas.edu/constitutions/texas1833/preamble_general_provisions. Personal communication with David A. Furlow, April 19, 2017.

[92] Bruce A. Ragsdale, *The Sedition Act Trials* (Washington, D.C.: Federal Judicial Center, Federal Judicial History Office, 2005), 15.

[93] Libel Act of 1792, 60 32 Geo 3 (Eng.), reprinted in 24 Halsbury's *Statutes of England & Wales* 7 (London: 4th ed., reissued 2003), "Legislation.Gov.UK," *National Archives* (Britain) http://www.legislation.gov.uk/apgb/Geo3/32/60.

[94] Defamation Act, 2013, c.26, 811 (U.K.).

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DON'T MESS with the FIRST AMENDMENT in Texas

· How This State Became One of the Best for Protecting First Amendment Rights ·

By Alicia Wagner Calzada

While current events are garnering a lot of attention on First Amendment rights and the need for government transparency, it is worth noting that Texas has some of the nation's strongest laws protecting the rights of a free press and free speech. But it was not always this way. The current environment for free speech in Texas took over a decade of hard hitting legislative efforts, strong support from key lawmakers, and compromise with both allies and opponents, to make Texas one of the most favorable environments for First Amendment rights in the country.

In the 1990s and 2000s, attorney Laura Lee Prather, like many other attorneys who represent media companies, had a close-up view of the punishing effect that defamation lawsuits and subpoenas against journalists had on the media and on the public's right to know. She saw the way in which subpoenas and lawsuits were used as weapons to stifle speech, and knew the system needed to be changed. She began actively working to pass laws to prevent abuses of the system that for decades had been plaguing the Fourth Estate and citizens who speak out. What started as a single effort to protect journalists' independence evolved into more than a decade-long campaign of improving free speech and transparency rights for all Texans.

Laura Prather

Reporter's Privilege: Texas Journalists Gain Freedom from the Threat of Subpoena

Prather first set her sights on addressing the increasing threat of reporters being dragged into court to testify, not for their unique knowledge as much as for their "star" power on the witness stand. However, each time a journalist is subject to a subpoena, it not only distracts from newsrooms' informing the public about matters of public concern in their communities, but also compromises the credibility of the media as an independent source of information. If journalists are forced to give up their sources or their newsgathering information, sources will no longer come forward, and the public's right to know will suffer.

Prior to 2009, journalists in Texas were unable to guarantee anonymity to their sources without the risk of going to prison.[1] Because of the inability of journalists to promise

[1] *See, e.g., In re Grand Jury Subpoenas,* No. 01A–20745 (5th Cir. Aug. 17, 2001) (refusing to recognize such a privilege). Despite the Fifth Circuit's ruling, the First Court of Appeals had recognized the existence of a privilege based in part upon the free speech and free press protections in Article I, §8 of the Texas Constitution. *See Channel Two Television v. Dickerson,* 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987). In *Channel Two*, the court found that a reporter's privilege existed based on the Texas Constitution. The court applied the three-part test of Justice Powell's concurrence in *Branzburg v. Haye*s, 408 U.S. 665 (1972), which held that a party seeking materials or

confidentiality, tragic stories like the abuse at the Texas Youth Commission were going unreported for months, years, or sometimes not reported at all. The problem was not a new one, nor was it one that hadn't been addressed successfully in other states.

The solution was a "reporter's privilege"—a law that would enhance the free flow of information by preventing prosecutors and attorneys from forcing journalists to testify or provide evidence based on their work product. At the time, thirty-six states and the District of Columbia had laws protecting the rights of journalists and their sources.[2] Passing a similar law in Texas, however, proved to be a formidable task. A reporter's privilege bill patterned after Department of Justice guidelines was first proposed in the 2005 legislative session, and again in 2007, but it wasn't ultimately passed until 2009.[3]

After literally decades of attempts to get a reporter's privilege passed, the tide changed in 2005 when Representative Aaron Pena heard about Rhode Island television reporter Jim Taricani being placed under house arrest for refusing to divulge a confidential source who provided him with a videotape showing a Providence city official accepting a bribe from an undercover FBI informant. Thinking this was wrong, Rep. Pena asked what would happen under similar circumstances in Texas and discovered there was no protection for journalists in Texas. He drafted a reporter's privilege bill to address the issue.[4] Although Taricani's case garnered national attention, there had been several other cases closer to home of journalists being jailed for refusal to give up their sources or their work product.

In 2001, Houston author Vanessa Leggett, an aspiring true crime writer working on a book about the murder of a prominent Houston bookie's wife, spent 168 days in jail for refusing to disclose her research and the identities of her sources to a federal grand jury investigating a murder.[5] Leggett was freed only after the grand jury term expired. A subsequent grand jury indicted the key suspect in the murder without any need for Leggett's testimony.[6]

In 1990, San Antonio TV reporter Brian Karem spent thirteen days in jail for refusing to reveal the names of individuals who arranged a jailhouse interview for him. He was only released

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testimony must show that it was: (1) highly material and relevant; (2) necessary or critical to the claim; and (3) not obtainable from other sources. *Channel Two,* 725 S.W.2d at 472. Yet afterwards, both state and federal courts in Texas ruled that there was no state or federal constitutional protection for journalists called to testify, to disclose their reporters' notes or to testify in a criminal case in the state of Texas. *See State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994 (*en banc*) and *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998)).

2 Ahnalese Rushmann, "Texas becomes 37th state to enact a shield law," Reporters Committee for Freedom of the Press, *News Media and the Law*, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2009/texas-becomes-37th-state-en (Spring 2009), 26.

3 *Ibid*.

4 *Ibid*.

5 Daniel Scardino, "Vanessa Leggett Serves Maximum Jail Time, First Amendment-Based Reporter's Privilege Under Siege," *Communications Lawyer* 19, no. 4 (Winter 2002), http://corporate.findlaw.com/litigation-disputes/vanessa-leggett-serves-maximum-jail-time-first-amendment-based.html#sthash.31TJjueK.dpuf. *See also* Skip Hollandsworth, "The Inmate," *Texas Monthly* (Dec. 2001), http://www.texasmonthly.com/articles/the-inmate/.

6 Adam Liptak with David Johnston, "A Reporter Jailed: The Overview; Reporter Jailed after Refusing to Name Source," *New York Times* (July 5, 2005), A16, http://query.nytimes.com/gst/fullpage.html?res=980CE5D6163DF934A35754C0A9639C8B63&pagewanted=all.

Until enactment of the Free Flow of Information Act in 2009, reporters who refused to disclose their sources faced a risk of jail time at institutions such as the Federal Detention Center in Houston. Wikimedia Commons.

when the sources came forward.[7] That same year, Corpus Christi reporter Libby Averyt was jailed for refusing to turn over her journalistic work product; she was ultimately released when the judge was convinced she would never turn over the unpublished information.[8]

Although the 2005 bill did not move very far in the process, it laid the groundwork for future sessions. In 2007, the bill received opposition from two groups—the business community and law enforcement. Prather and other proponents of the bill sat down with the business community leaders who were anxious about the potential for disclosure of trade secrets and other proprietary information and worked through their concerns. The negotiations were so successful that the business groups signed a letter in support of the bill. Nevertheless, prosecutors were not willing to negotiate and, while the bill made it out of the Senate and the House Judiciary committees, it was killed on one of the last days of session by a point of order supplied by a lawmaker who allegedly received it from a district attorney.[9]

Not to be deterred, Prather and other proponents worked during the interim educating the public through grassroots efforts, sharing examples of demonstrated need. During the interim, there was a spat of prosecutorial misconduct cases that helped to highlight the need for transparency in all settings—including oversight over prosecutors themselves. An informational website was established, meetings were held with lawmakers, and a public relations campaign was waged.

As the 2009 legislative session began, Sen. Rodney Ellis (D-Houston) and Sen. Robert Duncan (R-Lubbock), stalwart supporters of the bill, introduced it again in the Senate, and a new House sponsor, Rep. Trey Martinez-Fischer (D-San Antonio) led the charge in the House. In addition to the support of these lawmakers, the effort gained a big boost when Rep. Todd Hunter (R-Corpus Christi) was named chair of the House Judiciary and Civil Jurisprudence Committee. Chairman Hunter turned out to be a fierce advocate for the bill—knowing the consequences of there being no protection since it was his constituent, Corpus Christi journalist Libby Averyt, who had been jailed for refusing to release her unpublished notes from a jailhouse interview.[10]

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7 *Ibid*.

8 *See generally*, "Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify," Reporter's Committee for Freedom of the Press, http://www.rcfp.org/jailed-journalists.

9 Ahnalese Rushmann, "Texas Becomes 37th State," *News Media and the Law*.

10 Kirsten Crow, "Averyt's Storied Career at Newspaper Comes to a Close," *Corpus Christi Caller-Times* (Feb. 18, 2017), http://www.caller.com/story/news/local/2017/02/18/averyts-storied-career-newspaper-comes-close/97637318/.

Senator Rodney Ellis sponsored the Free Flow of Information Act and other statutes enacted to protect Texans' free speech rights. Photo taken at the Texas Capitol on May 14, 2014, Wikimedia Commons.

Protection of Texans' free speech rights required legislative reforms from 2009 through 2013. Photo by LoneStarMike, courtesy of Wikimedia Commons.

Testimony at the House Committee on the Judiciary and Civil Jurisprudence presented more dramatic stories of the need for the bill. *USA Today* reporter Toni Locy testified that when a suspect in the FBI's anthrax investigation, Dr. Steven Hatfield, filed a civil lawsuit against the FBI in 2003, his attorney subpoenaed her to reveal her confidential sources from a story about whether the investigation was fair to Dr. Hatfield. She was found in contempt of court, faced up to $5,000 per day in fines, and threatened with jail for failing to reveal the sources, and her supporters were banned from assisting her with payment of the fines. The D.C. Circuit ultimately stayed the fines, but declined to rule on several issues when the underlying civil lawsuit was settled. The judge in Locy's case went so far as to suggest that she shouldn't have written anything at all about Dr. Hatfield.[11]

Fort Worth journalist Gayle Reaves testified about her 1990 reporting on the drug war in South Texas, which relied heavily on confidential sources who literally feared for their lives if unmasked. After the series ran, the sheriff of Starr County sued her for libel. The newspaper settled when it appeared during depositions that the true purpose of the lawsuit was an attempt to unmask the source, which Reaves committed to, and did hold confidential. The sheriff also subpoenaed many individuals whom he suspected were sources for the story. One of them was later shot and badly wounded and entered the witness protection program, driving home the point that the confidentiality of Reaves's sources was a life-and-death matter. The sheriff himself was later indicted for corruption.[12]

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[11] Eric Lichtblau, "Reporter Held in Contempt in Anthrax Case," *New York Time*s (Feb. 20, 2008), A15, http://www.nytimes.com/2008/02/20/us/20anthrax.html.

[12] Gayle Reaves, "Broken Shield: Without Protection from Being Forced to Reveal Sources, Journalists Can't Give Voice to the Voiceless," *Fort Worth Weekly* (April 20, 2005), https://gaylereavesking.wordpress.com/.

Other investigative journalists testified about how they repeatedly rely on confidential sources to report on important issues such as government corruption and were it not for these sources the corruption would never be revealed or prosecuted.

Former Texas Supreme Court Justice Craig Enoch testified in favor of the Free Flow of Information Act in 2009.

In addition to the testimony from journalists, former Texas Supreme Court Justice Craig Enoch testified in favor of the bill, explaining the need for a judicial framework to approach these issues. He noted that the arguments for and against the bill were similar to the arguments that would be heard in court—the difference being that a current judge would not have any guidance from the legislature regarding how to resolve the dispute.

Justice Enoch pointed out that with statutory guidance, both the media and prosecutors or subpoenaing attorneys would be in a better position to determine whether it would be permissible to force a journalist to reveal source information or work product. Justice Enoch compared the situation to apex depositions, where the abuse of depositions of CEOs led to the need to provide guidance limiting them. Likewise, the reporter's privilege law would provide a real framework and firm guidance to courts and parties on the threshold showing required, saving judges from having to come up with their own rules on an ad-hoc basis.[13]

Attorney David Furlow, a former Harris County Assistant District Attorney, also testified in favor of the bill, outlining the importance of a reasonable standard for subpoenas of the media and explaining that criminal investigations would not be stymied by the passage of the law. Furlow noted the importance of confidential sources and how the resulting stories are the impetus for many investigations. He referenced such high-profile cases as the Watergate investigation, initiated after the confidential revelations by "Deep Throat" led to an explosive story in the *Washington Post*, which ultimately resulted in the downfall of President Nixon. Once such stories are published or aired, prosecutors can launch their investigation using all the tools of law enforcement to obtain information, but the journalist should be a last resort, not a first stop. Furlow agreed that the bill provided clear guidance and balance that blocks fishing expeditions while allowing for the subpoenas when there are no other options and the information is truly needed.[14]

Hunter's dynamic leadership included asking for a commitment from the prosecutors, who opposed the bill and had previously refused to come to the negotiating table, to sit down and have real, meaningful discussions with media representatives. After four negotiating sessions, including one that lasted thirteen hours, the two sides came to an agreement on language and the prosecutors testified that they no longer opposed the bill. With that political hurdle out of the way, the Texas Free Flow of Information Act (TFFIA) sailed through the House and Senate unanimously and was signed into law on May 13, 2009, becoming effective immediately.

[13] David A. Furlow, "Information must flow freely: Measure aimed at protecting journalists," *Houston Chronicle* (April 27, 2009), http://www.chron.com/opinion/outlook/article/Information-must-flow-freely-1748501.php.

[14] *Ibid*. *See also* "Latest News, 200 Texas FFOIA Legislative Effort" (April 24, 2009), http://alt.coxnewsweb.com/statesman/pdf/042909_ffoia_2009LegeUpdates.pdf.

Anti-SLAPP: Stopping the Threat of Lawsuits Targeting Free Speech

After passage of the Free Flow of Information Act, Prather set her sights on an even larger problem plaguing the rights to free speech—that of retaliatory lawsuits filed to silence someone from speaking about a matter of public concern or otherwise exercising their First Amendment rights. At the time, the Texas Rules of Civil Procedure did not provide for a motion to dismiss, making summary judgment the first opportunity to have a meritless claim dismissed. Because of this, First Amendment rights languished and were often times extinguished due to the time and expense of defending against meritless claims.

Meritless lawsuits that target First Amendment rights are called Strategic Lawsuits Against Public Participation[15]—SLAPP suits—had been growing in number and variety with the self-publishing capabilities of the internet and the increasingly creative ways to plead around defamation claims. Instead of righting a wrong—the legitimate purpose of most litigation—a SLAPP suit dissuades the defendant from exercising a First Amendment right, such as speaking on a matter of public concern, or petitioning their government.

There is no "typical" SLAPP defendant—ordinary citizens whose self-published communications are now easier to find and more permanent on the internet, media organizations whose hard-hitting investigative reports expose wrongdoing, and businesses who report on regulatory concerns and comment on employee referrals, all have been SLAPP targets. Even politicians participating in the political process or advocating for a change in government have found themselves on the receiving end of SLAPP suits. SLAPP plaintiffs use the pressure of the cost of fighting a lawsuit to bully the defendant into removing or retracting their statement or to keep them and others from making statements in the future or to shake down a settlement from a business, individual, or the media. So as soon as the ink dried on the Free Flow of Information Act, Prather and fellow First Amendment advocates turned their attention to this persistent problem.

Twenty-eight states, the District of Columbia, and the territory of Guam had already passed laws that made it easier to get these types of lawsuits dismissed through Anti-SLAPP statutes. In Texas, Rep. Richard Raymond (D-Laredo) was the first to introduce Anti-SLAPP legislation in Texas—doing so as early as 1995, and continuing every session that followed. In 2001, Rep. Raymond's bill passed the House and Senate but then was vetoed by Governor Rick Perry when it arrived on his desk on June 17, 2001.[16]

Given Raymond's past experience, it was clear that just making the argument for the law was not enough. The legislature would need to hear from a strong and broad-based coalition of supporters, and concerns raised by opponents would need to be addressed. Outreach to these groups began in the interim prior to the 2011 session.

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[15] George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Philadelphia: Temple University Press, 1996), 27.

[16] Laura Prather, "Passage of the Texas Anti-SLAPP Statute: A Walk in the Park or a Walk on a Tightrope," *MLRC Media-Law Letter* (July 2011), 18-22, http://files.sedgwicklaw.com/Publication/0cc66741-1485-4716-b2a1-ab90e78894ee/Presentation/PublicationAttachment/74db1d05-3d08-46e4-9a37-acafdad959bc/MLRC%20Anti-SLAPP%20article.pdf.

The coalition of supporters grew to include open government advocates, media organizations, citizen rights groups, consumer advocates, public interest groups, tort reform organizations, and more. Testifiers in favor of the bill ultimately included a wide swath of groups and individuals. Supporters included Texans for Lawsuit Reform, the Texas Municipal League, the Better Business Bureau, HomeOwners for Better Building, HOA Reform Coalition of Texas, the Texas League of Conservation Voters, and the Texas Conservative Coalition Research Institute, who joined civil liberties groups such as the ACLU, the Institute for Justice, and Public Citizen, as well as traditional First Amendment advocacy groups such as the Freedom of Information Foundation of Texas, the Texas Association of Broadcasters, and the Texas Press Association.[17] Many of these groups would otherwise be considered strange bedfellows, but the desire to eliminate these abusive lawsuits had them speaking the same language.

In drafting the bill, Prather and other advocates surveyed other state's laws to determine what had worked and what had not. Many state Anti-SLAPP laws only cover statements made in a governmental setting, which have proven to be ineffective for the broader concerns, including speaking on matters of public concern. So, the proponents looked to the stronger laws in California, Indiana, Louisiana, and the District of Columbia for inspiration, drawing mostly from California's well tested law. To pre-empt a repeat Perry veto, it was also important to examine what was potentially troublesome to the Governor. Perry's previous concern regarding the 2001 bill centered around the inclusion of a private cause of action. The 2011 version would not have such a provision, relying instead on mandatory attorney's fees and sanctions to provide relief for SLAPP suit victims.

To help get the bill through the legislature itself, Prather turned to reporter's privilege sponsor Sen. Rodney Ellis and First Amendment ally Chairman Todd Hunter, who had since become chair of the House Calendars Committee. Sen. Kevin Eltife (R-Tyler), a friend of the Texas newspaper industry, also stepped up to co-sponsor the bill in the Senate. The final bill had Hunter as primary author, joined by nine joint authors and co-authors.[18] Former Sen. Don Adams, who was instrumental in passing the Texas Public Information Act in the 1970s, and who continues to lend his support to open government and First Amendment goals, also helped guide the legislation through the process.

Once the bill was drafted and assigned to the House Judiciary and Civil Jurisprudence Committee, proponents met with each member of the committee to discuss concerns and tweak the language as needed. For instance, the Vice Chair of the committee, Rep. Tryon Lewis (R-Odessa), a former state court judge, wanted a reciprocal right of appeal in the bill and a provision addressing what happened if the trial court did not rule in a timely manner, so changes were made to address these concerns.

The Texas Trial Lawyers Association expressed apprehension about the potential for

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[17] House Research Organization, Bill Analysis, Tex. H.B. 2973, 82nd Leg. R.S. (2011), available at http://www.lrl.state.tx.us/scanned/hroBillAnalyses/82-0/HB2973.PDF.

[18] The joint authors were Rep. Richard Raymond (D-Laredo), Rep. Scott Hochberg (D-Houston) and Rep. Trey Martinez-Fischer (D-San Antonio). Co-authors were Rep. Carol Alvarado (D-Houston), Rep. Jodie Laubenberg (R-Parker), Rep. Ken Legler (R-Pasadena), Rep. Jim Murphy (R-Houston), Rep. Todd Smith (R-Euless), and Rep. Vicki Truitt (R-Southlake).

attorneys to be liable for fees, and that language was removed at their request. They also wanted to specify that the law would not apply to their insurance cases and personal injury cases when speech was not involved. Further modifications were made to the exemptions portion of the bill, and as a result, after lengthy negotiations, TTLA removed its opposition to the bill. The resulting bill balanced the goals of judicial economy, tort reform, and First Amendment protections for all Texans.

When the hearings were held on the bill, author Carla Main flew to Austin and told her story about how she was sued by a developer over a book she wrote about eminent domain, and the local newspaper was added to the suit because they wrote a book review solely for the purpose of preventing removal of the case.[19] Brenda Johnson gave her story about being sued by her homeowners association for insisting that the association follow its own bylaws. After five lawsuits and $300,000 in legal fees, her fellow residents declined to participate in their association for fear of being targets for future lawsuits.[20]

Investigative reporter Joe Ellis testified about reports on Medicaid fraud, embezzlement from a non-profit, and ineffective schooling—all of which led to meritless but costly lawsuits.[21] More examples from recent litigation were presented to lawmakers as further evidence of need: a taxi driver sued by his former employer for statements made at a city council meeting while applying for a taxicab franchise in Austin;[22] a school district administrator sued by a Houston Independent School District contractor for making complaints about the company; and television stations sued by a political candidate for a political opponent's ad, despite the fact that a federal law prevents stations from altering political ads.[23] A website dedicated to highlighting the problem and outlining the solution was created to help build grassroots support and educate the public.[24]

The bill was approved unanimously in the House, and sent to the Senate. It was referred to the State Affairs Committee, and although none of the members indicated opposition prior to the hearing, a contentious debate arose during the hearing about the mandatory attorney's fees provision and, as a result, the phrase "as justice and equity may require" was added to the fee-shifting provision in an effort to clarify judicial discretion of the amount to be awarded.[25] With

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[19] House Research Organization, Bill Analysis, Tex. H.B. 2973, 82nd Leg. R.S. (2011), http://www.capitol.state.tx.us/Search/DocViewer.aspx?ID=82RHB029732A&QueryText=%22HB+2973%22&DocType=A. *See also Main and the Encounter for Culture and Education, Inc. v. Royall*, No. 05-09-015030CV (Tex. App.—Dallas, 2011, no. pet.); *see also* Carla T. Main, *Bulldozed: "Kelo," Eminent Domain, and the American Lust for Land* (New York: Encounter Books, 2007).

[20] Hearing on H.B. 2973 before the House Comm. on Judiciary and Civil Jurisprudence, 2011 Leg., 82nd Sess. (Tex. March 28, 2011) (statement of Brenda Johnson). *See* Texas H. Committee on Judiciary and Civil Jurisprudence, testimony heard during committee hearing on 3-28-2011, http://www.legis.state.tx.us/Committees/MeetingsbyDate.aspx?Chamber+H; video archive,

[21] *Ibid*. *See also AG Total Care Home Health Services, Inc. and Anderson v. Fox Television Stations, et al.,* No. 08-04668 (191st Dist. Ct., Dallas County, Tex. 2008).

[22] *See Means v. ABCABCO, Inc*., 315 S.W.3d 209 (Tex. App.—Austin 2010, no pet.).

[23] *See KENS-TV, Inc., et al. v. Farias,,* 2007 WL 2253502 (Tex. App.—San Antonio 2007, pet. denied) (reversal of denial of summary judgment for running political advertisement).

[24] The website, www.slappedintexas.com, is now a resource for information on the Texas Citizens Participation Act.

[25] The attorney's fees provision states: "If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require…" Tex. Civ. Prac. & Rem Code Ann. 27.009(a)

that, the Senate bill made it out of committee. But challenges with other pressing legislative issues threatened to block the path of the Senate bill, and it stalled on its way to the chamber.

Quickly changing course, proponents turned back to the House, where longtime advocate of Anti-SLAPP legislation Richard Raymond was asked by Chairman Hunter to lay out the House version of the bill. It passed unanimously and was referred to the Senate, just nineteen days before the deadline for all House bills to be considered by the Senate. Unfortunately, the shift from a Senate bill to a House bill meant that the House bill had to go through the committee process again. With just days to spare, the bill was voted out of the Senate State Affairs Committee with the previous amendment, and passed in the Senate unanimously less than a week later. The bill received concurrence in the House and was sent to the Governor.[26]

Knowing the history of Governor Perry's veto of the earlier Raymond Anti-SLAPP bill, Prather and her coalition were on alert. Supporters, from tort reform advocates to media groups, reached out to the Governor to urge signature. On June 17, 2011, exactly ten years to the day from vetoing the earlier Raymond Anti-SLAPP bill, Governor Perry signed the Texas Citizens Participation Act (TCPA).[27] Because the bill passed unanimously in both houses, it went into effect immediately. Within three days, a defamation lawsuit was filed against a television station for its reports on a police officer who was fired due to accusations of violating rules on a promotional exam. The case was dismissed pursuant to the TCPA.[28]

Retraction Statute: Meaningful Relief from Defamation through Retraction

In 2012, with a strong and successful coalition in place after two great successes with Reporter's Privilege law and Anti-SLAPP, and powerful legislative allies supportive of First Amendment protections, Prather and her fellow First Amendment advocates turned their attention to another law that has strengthened the First Amendment in other states—a retraction statute. Retraction statutes require pre-suit notification and the ability of an alleged defamer to right the wrong by publishing a retraction, correction, or clarification in a timely and conspicuous manner.

The goal of retraction laws is to serve the dual purpose of ensuring correct information gets to the public and to remedy any harm caused by errors previously published. The key to accomplishing these goals, however, is to have early and prompt notification followed by a prompt correction in as much prominence as the original publication, increasing the likelihood of reaching the original readers. Compliance on the part of the publisher limits a plaintiff's recovery to their actual damages, or eliminates punitive or exemplary damages. This provides relief for a genuinely defamed individual because the false speech is corrected, and it provides

(1). The Supreme Court of Texas recently determined that the phrase "as justice and equity may require" refers only to the "other expenses" due to the punctuation of the statute. *See Sullivan v. Abraham*, 488 S.W.3d 294, 296 (Tex. 2016) ("the statute does not include a comma after "other expenses" or after "legal action," and their absence indicates an intent to limit the justice-and-equity modifier to the last item in the series.").

[26] HB 2973, 2011 Leg., 82nd Sess., http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2973.

[27] Governor Rick Perry, bill signings, 2011 Leg., 82nd Sess., http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82RDAY90FINAL.PDF#page=45.

[28] *Salvaggio v. High Plains Broadcasting Inc.*, Cause No. 2011-CI-10127 (131st Dist. Ct., Bexar County, Tex. filed June 20, 2011).

breathing space for the errors inevitable in First Amendment discourse.

By 2013, thirty-one states had a retraction statute on the books, but Texas was not one of them. A bill patterned after the Uniform Law Commission's Uniform Correction or Clarification of Defamation Act was offered, with changes to make it comport with existing constitutional requirements and Texas laws. The bill required a party who feels it has been defamed to notify the publisher about a mistake prior to filing a lawsuit, much like under the DTPA—providing for pre-suit notice and an opportunity to cure.

The notification had to be within the statute of limitations for defamation, but no later than ninety days after receiving knowledge of the publication. The publisher can then publish a correction, clarification, or retraction, or the requestor's statement of facts, or a summary of the statement. If such a retraction is published, the aggrieved party can still sue for defamation, but no exemplary damages are allowed without a showing of actual malice. If a lawsuit is filed prior to a retraction request, the case is to be abated for sixty days to allow time to negotiate with the plaintiff regarding publishing a sufficient retraction—again mirroring the procedures from the DTPA. The law requires the complaining party to provide sufficient information regarding the error, and the publisher to publish the retraction within thirty days in the same conspicuous manner in which the original item was published.[29]

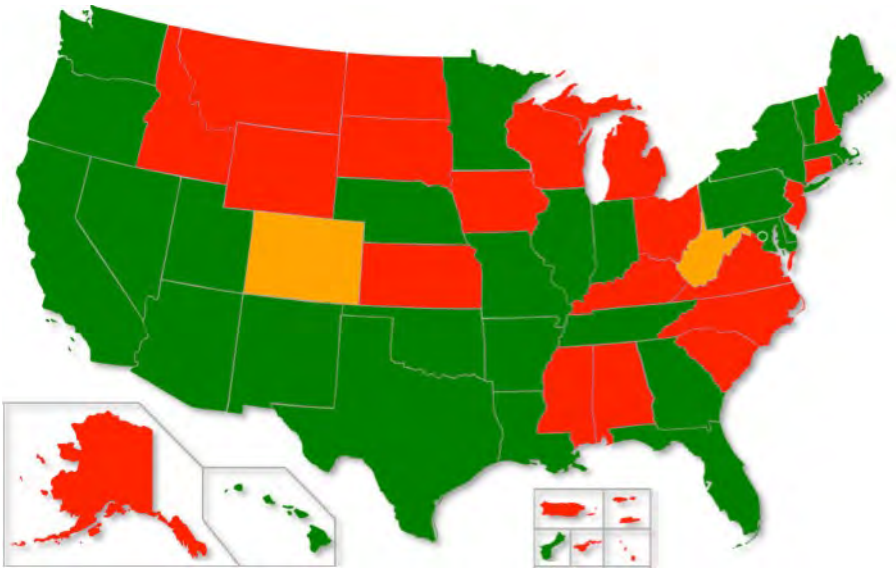
Again a broad coalition of free speech supporters and tort reformers became advocates for the bill. Chairman Hunter and Sen. Ellis sponsored the legislation and, after post-hearing negotiations with the Texas Trial Lawyers Association, which had raised some initial concerns, it passed with little drama. The Presiding Judge of the Fourth Administrative Judicial Region, David Peeples, testified about his service on the Uniform Law Commission's committee that drafted the Uniform Correction or Clarification of Defamation Act in the early 1990s. He also explained how the bill provided a framework for immediately remedying the damage from a defamatory publication, noting the benefits of early resolution to lawsuits and pointing out how the bill encouraged closure instead of protracted litigation.[30]

Media representatives including Shane Fitzgerald of the *Corpus Christi Caller Times* and Debbie Hiott of the *Austin American-Statesman* testified in favor of the bill, explaining that the goal of journalists is to get the facts right and, in those instances where there has been an error, the bill would encourage those who are aggrieved to come forward quickly instead of sitting on the error. In other states where retraction statutes exist, far fewer lawsuits are filed. Likewise, Hiott emphasized the problem of correcting mistakes when the subject goes to a lawyer and files a lawsuit instead of reaching out to the publication that made the error.

The cooling-off period provided by the statute allows defendants to rectify the harm and allows plaintiffs to reconsider pursuing a costly lawsuit. Media lawyers testified that most lawsuits are preventable when the subject reaches out to the publication prior to suit, but once litigation begins, a resolution is much harder to achieve. The average defamation lawsuit takes

[29] Jerry D. Bullard, "What Hath the Legislature Wrought? An Overview of Selected Bills Passed by the 83rd Legislature," *University of Texas Conference on State and Federal Appeals* (August 13, 2013), 5.

[30] House Research Organization Bill Analysis, HB 1759 (May 1, 2013), http://www.hro.house.state.tx.us/pdf/ba83r/hb1759.pdf.



Texas has joined most of the other states in enacting an anti-SLAPP law. Wikimedia Commons.

four years to resolve and likely won't result in a retraction, which is the best way to restore a subject's reputation. The retraction statute encourages subjects to come forward and identify mistakes and encourages publishers to print retractions quickly and prominently.[31]

When the bill—called the Defamation Mitigation Act—was signed into law on June 13, 2013, it completed for Texas a trifecta of First Amendment protection to be envied. Now journalists in Texas can do their job free from the threat of prosecution because of the Free Flow of Information Act; disputes on genuine mistakes and errors in speech can be resolved before a lawsuit is filed through the Defamation Mitigation Act; and if a lawsuit targeting speech is wrongly filed against any citizen, an early dismissal can be obtained through the Texas Citizens Participation Act.

Texas lawmakers have recognized that while aggrieved individuals who have been genuinely harmed must have a remedy, that remedy must be delicately balanced with the right of free speech—a right that lies at the heart of our democracy and must be preserved in the spirit, practice, and letter of the law.

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[31] Jason Chan, "New Texas Law Favors Retraction over Defamation Suits," *Law Office of Jason Chan* (July 18, 2013), http://attorneychan.com/blog/new-texas-law-favors-retraction-over-defamation-suits/.

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Free Speech and Prior Restraint in Texas, with Some Help from Hollywood

By JT Morris

"For your information, the Supreme Court has roundly rejected prior restraint." This perceptive summary of First Amendment jurisprudence did not emanate from a law professor, judge, or other heavyweight legal mind. Rather, it was loudly and proudly exclaimed by one Walter Sobchak, the boisterous Vietnam-veteran-turned-bowling-alley denizen from the cult classic *The Big Lebowski*.[1]

Walter Sobchak, Free Speech Champion (Copyright © 1998 PolyGram Filmed Entertainment Distribution, Inc.).

So insightful were Walter's words that the Texas Supreme Court cited them in its 2014 decision in *Kinney v. Barnes*, in which it held that an injunction restraining speech not yet adjudicated to be defamatory was an unlawful prior restraint.[2] Perhaps unsurprisingly, that a court would find something from *The Big Lebowski* profound enough to include in a significant opinion on free speech generated some attention.[3] One First Amendment attorney even dedicated a blog article on how to cite properly *Kinney*'s endorsement of Walter's words.[4]

The buzz around *Kinney*'s homage to *The Big Lebowski* alone cements its place in the annals of Texas Supreme Court history. But I recall that the first time I read *Kinney*, something equally notable stood out to me. Namely, that *Kinney* is centered on the protection of speech under the Texas Constitution. Although *Kinney* leans upon First Amendment precedent in illustrating principles of free speech, defamation, and prior restraint, the opinion confirms "that prior restraints are a heavily disfavored infringement" of the broad right to free speech protected under the Texas Constitution.

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1 True to his often-misplaced confidence, Walter's exclamation in the movie was ill-fitting to the situation at hand, as it was made in response to a diner waitress's gentle request that he stop cursing loudly in the family establishment. Walter failed to realize that the Supreme Court has "roundly rejected" prior restraint only as applied to state actors. Nonetheless, Walter's misdirected gusto does not diminish the clout of his statement.

2 443 S.W.3d 87 (Tex. 2014). As discussed in more detail below, *Kinney* also held an injunction requiring removal of speech adjudicated to be defamatory was not unconstitutional.

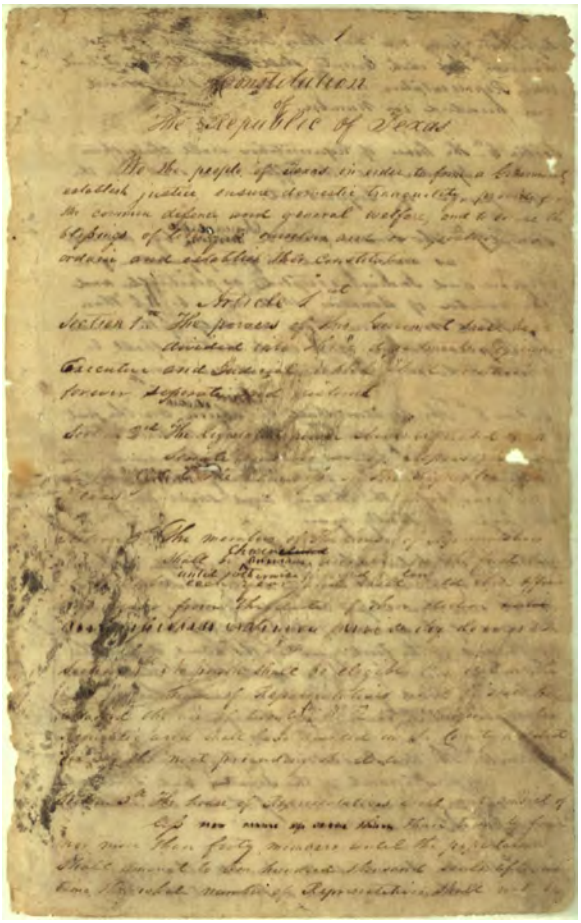
3 *See, e.g.,* "A Judge Cited 'The Big Lebowski' in a Legal Decision," *Business Insider* (Sept. 5, 2014) available at http://www.businessinsider.com/texas-judge-big-lebowski-2014-9; "Texas Supreme Court Approvingly Cites Movie About Pot-Smoking And Porn," *Abovethelaw.com* (Sept. 4, 2014) available at http://abovethelaw.com/2014/09/texas-supreme-court-approvingly-cites-movie-about-pot-smoking-and-porn/); "Legally Speaking: Awards We'd Like to See," *SE Texas Record* (Sept. 30, 2014) available at http://setexasrecord.com/stories/510624553-legally-speaking-awards-we-d-like-to-see.

4 Marco Randazza, "How to Cite Walter Sobchak," *The Legal Satyricon* (Oct. 11, 2014) available at https://randazza.wordpress.com/2014/10/11/how-to-cite-to-walter-sobchak/. According to Mr. Randazza, the proper citation is "*Kinney v. Barnes*, 57 Tex. Sup. J. 1428 at n.7, (Tex. 2014) (citing Sobchak, W., *The Big Lebowski*, 1998").

Kinney is a great reminder that despite all the renown given the First Amendment, the Texas Constitution is another source of strong protection for expressive rights. As well, the opinion provided me with an opportunity to examine the origin and development of free speech rights and prior restraint doctrine under Texas law, and how they apply to a world in which the protection of free speech is increasingly tested.

The History of Free Speech under the Texas Constitution

Freedom of speech under Texas law reaches back to the Proposed Constitution for the State of Texas, Republic of Mexico (1833), which included that "[t]he free communication of thoughts and opinion, is one of the inviolable rights of man; and every person may freely speak, write, print, and publish, on any subject, being responsible for the abuse of that liberty."[5]



The Constitution of the Republic of Texas (1836). http://wheretexasbecametexas.org/

Freedom of speech was soon again addressed when the Declaration of Rights under the Constitution of the Republic of Texas was drafted during the famed March 1836 independence convention at Washington-on-the-Brazos. This pre-statehood Declaration of Rights granted every Texas citizen the liberty to speak, write, and opine on any subject, and echoed the First Amendment in declaring that "no law shall ever be passed to curtail the liberty of speech or of the press."[6]

Fast forward to 1876, when the current Texas Constitution was adopted and ratified. The drafters of the 1876 Constitution notably made its first section the Texas Bill of Rights, which includes Section 1, Article 8:

> Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.[7]

That the both the current Texas Constitution and the 1836 version reflect free speech values similar to the First Amendment should come as no surprise. After all, those at Washington-on-the-Brazos noted in the

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[5] *Proposed Constitution for the State of Texas* (1833) art. 16; *see also Davenport v. Garcia,* 834 S.W.2d 4, 7 (Tex. 1992) (citing the same).

[6] The full text of the declaration stated "[e]very citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege. No law shall ever be passed to curtail the liberty of speech or of the press; and in all prosecutions for libels the truth may be given in evidence, and the jury shall have the right to determine the law and fact, under the direction of the court." *See The Constitution of the Republic of Tex*as (1836), at http://wheretexasbecametexas.org/texas-history/constitution-of-the-republic-of-texas-1836/.

[7] Tex. Const. Art I, § 8.

Texas Declaration of Independence that the citizens of the Republic of Texas "should continue to enjoy that constitutional liberty and republican government to which they had been habituated in the land of their birth, the United States of America."

Yet there are two stark differences between Article 1, Section 8 of the Texas Constitution and the First Amendment. Perhaps most striking is that Texas Constitution expressly grants an *affirmative* liberty to speak freely, and also extends that liberty expressly to writing and publishing. The First Amendment does not mention an affirmative right to speak, nor does it address in its text written expression or publication. Article 1, Section 8 also presents an interesting dichotomy not present in the First Amendment, making clear that while all enjoy the liberty of expression, one is "responsible for the abuse of" the privilege to speak, write, and publish freely.

Given the affirmative grant of expressive rights in Article 1, Section 8, the adage "Everything's Bigger in Texas" may apply even to the scope of expressive liberty under the Texas Constitution. Indeed, the Texas Supreme Court has often suggested that freedom of speech rights under the Texas Constitution are broader than those afforded under the First Amendment.[8] As the Texas Supreme Court squarely explained in *Davenport v. Garcia,* "we have recognized that in some aspects our free speech provision is broader than the First Amendment."[9]

More recently, the Texas Supreme Court has reeled in slightly the idea that the Texas Constitution grants broader protection to speech than the First Amendment. As it clarified in *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc*. in 1998, "Article 1, Section 8 may be more protective of speech in some instances than the First Amendment, but if it is, it must be because of the text, history, and purpose of the provision, not just simply *because.*"[10] And in *Kinney*, the Court declined to rule on the issue of whether the Texas Constitution is more protective of speech, hinting that at the end of day, the standards applied under the Texas Constitution and the First Amendment generally are the same.[11]

Regardless, an appreciation of the history and scope of free speech rights under the Texas Constitution is helpful, particularly when evaluating the Texas Supreme Court's treatment of prior restraint over the years.

A History of Prior Restraint in Texas

In relatively simple terms, a prior restraint is a government restriction of speech that aims to prevent speech from being heard or published whatsoever. Unlike laws or other state action

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[8] *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 402 (Tex. 1988) (noting that "Texas' free speech right [has been characterized] as being broader than its federal equivalent," the court concluded that "it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the first amendment"); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988) (Gonzalez, J., concurring) (the state provision is "more expansive than the United States Bill of Rights"). *See also Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) ("Our state free speech guarantee may be broader than the corresponding federal guarantee"); *Ex parte Tucci,* 859 S.W.2d 1, 5 (Tex. 1993).

[9] 834 S.W.2d 4, 7 (Tex. 1992).

[10] 975 S.W.2d 546, 559 (Tex 1998).

[11] *Kinney,* 443 S.W.3d at 92 (citing *Operation Rescue-National*, 975 S.W.2d at 559).

that target speech only after it has been made, a prior restraint targets speech prospectively. While prior restraints come in a variety of forms, most often they are encountered in the form of gag orders, licensing regulations, and injunctions targeting speech. Probably the most famous case involving a prior restraint was the "Pentagon Papers" clash from the early 1970s, in which the Supreme Court found an injunction sought by the Nixon administration was an unconstitutional prior restraint, as it sought to prohibit the *New York Times* and *Washington Post* from publishing parts of a highly-classified government document regarding the Vietnam War.[12]

Prior restraints are heavily disfavored under the law. Disfavor of prior restraints reaches long back in the history of Western jurisprudence. As William Blackstone noted in his legal commentaries:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[13]

Thomas Gainsborough, *Portrait of Sir William Blackstone*, 1774, National Portrait Gallery, after his appointment as a Justice of the Court of King's Bench. Wikimedia, http://www.tate.org.uk/servlet/ViewWork?workid=4914&searchid=23109&tabview=image.

Notably, Blackstone's reasoning that post-speech consequences are more appropriate than prior restraints in preserving liberty of speech is reflected in Article I, Section 8 of the Texas Constitution.

Article 1, Section 8 conditions the liberty of speech on "being responsible for the abuse of that privilege," but maintains that "no law shall ever be passed curtailing the liberty of speech or of the press." Accordingly, the Texas Supreme Court has made clear that "[w]hile abuse of the right to speak subjects a speaker to proper penalties, we have long held that 'pre-speech' penalties are presumptively unconstitutional."[14]

Most First Amendment aficionados would point to the U.S. Supreme Court's 1931 decision in *Near v. Minnesota*[15] as the genesis of modern prior restraint jurisprudence. But there is an

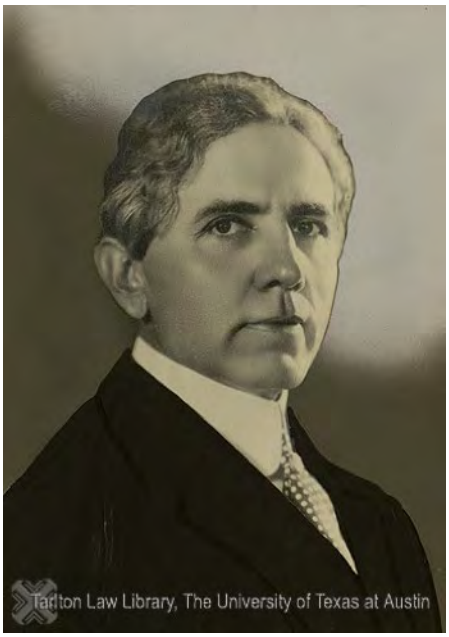
[12] 403 U.S. 713 (1971).

[13] William Blackstone, *Commentaries on the Laws of England*, Vol. 4 (a facsimile of the First Edition of 1765–1769) (Chicago: University of Chicago Press, 1979).

[14] *Kinney,* 443 S.W.3d at 90 (citations omitted).

[15] 283 U.S. 697 (1931).

argument to made that the Texas Supreme Court was "roundly rejecting" prior restraint prior to *Near.* In its 1920 decision in *Ex Parte Tucker*, the Texas Supreme Court overturned an injunction that prohibited union members from "vilifying, abusing, or using opprobrious epithets" against an employer and its employees.[16] In voiding the injunction, Chief Justice Nelson Phillips opined that under the Texas Constitution, the abuse of the privilege to speak freely "is not to be remedied by denial of the right to speak, but only by appropriate penalties for what is wrongfully spoken. Punishment for the abuse of the right, not prevention of its exercise, is what the provision contemplates."[17]



Texas Supreme Court Chief Justice Nelson Phillips. Image courtesy of the University of Texas Tarlton Law Library.

Going forward, the Texas Supreme Court consistently applied the reasoning of *Ex Parte Tucker* to void prior restraints, including a gag order[18] and an injunction prohibiting peaceful picketing.[19]

In 1983, the Texas Supreme Court addressed the intersection of prior restraints and defamation in *Hajek v. Bill Mowbray Motors*.[20] In deciding *Hajek*, the Court relied on the reasoning of *Ex Parte Tucker* in dissolving a temporary injunction that targeted speech that was alleged to be defamatory, but had yet to be adjudicated as such. The *Hajek* decision made clear that "[d]efamation alone is not a sufficient justification for restraining an individual's right to speak freely."[21]

Then, in 1992, the Texas Supreme Court made arguably its broadest declaration on prior restraints under the Texas Constitution in *Davenport v. Garcia*. In striking down a gag order, the Court in *Davenport* concluded that "[t]he presumption in all cases under section eight is that pre-speech sanctions or 'prior restraints' are unconstitutional."[22] The Court examined the history of free speech under the Texas Constitution, noting that "[u]nder our broader guarantee [of liberty of speech], it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs."[23]

As hinted earlier, the effect of *Davenport* and its proclamation about the "broader guarantee" of free speech under the Texas Constitution remains unsettled. Notably, in his opinion concurring in the judgement in *Davenport*, Justice Nathan Hecht cautioned against making such

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[16] 22 S.W. 75 (Tex. 1920). And there's even a case to be made that the Texas Supreme Court was rejecting prior restraints as early at 1908, when it overturned under Tex. Const. Art. 1, Sec. 8 a conviction for violating a judge's gag order on publishing trial testimony. *Ex parte Foster*, 44 Tex. Crim. 423, 71 S.W. 593 (Tex. Crim. App. 1903).

[17] *Ibid.*

[18] *Ex parte McCormick*, 129 Tex. Crim. 457 (Tex. Crim. App. 1935).

[19] *Ex parte Henry*, 147 Tex. 315 (1948).

[20] 647 S.W.2d 253 (Tex. 1983).

[21] *Id.* at 253 (citing *Ex parte Tucker*, 220 S.W. at 76).

[22] 834 S.W.2d 4, 9 (Tex. 1992).

[23] *Ibid.*

a proclamation of free speech rights under the Texas Constitution. Specifically, Justice Hecht appeared to question whether there was sufficient history and precedent to hold that the Texas Constitution grants broader protection than the First Amendment, and noted absent sufficient history and precedent, "Texas prior restraint law is born a teenager, a process as remarkable as it is frightful."[24]

Nonetheless, *Davenport* does reinforce the principle that like the First Amendment, the Texas Constitution strongly disfavors prior restraints of speech. As discussed below, the Texas Supreme Court's decision in *Kinney* carried forward this principle, finding that an injunction on future speech in the context of defamation would be unconstitutional.

Kinney v. Barnes—Prior Restraint in the Internet Age

The background of the *Kinney* decision is straightforward. A legal recruiter posted some unflattering things about a competitor on two internet forums. The competitor sued for defamation and sought as his only relief an injunction requiring removal of the defamatory statements from the online forums and enjoining the defendant from *future speech* related to the defamatory statements. The defendant, summoning his inner Walter Sobchak, moved for summary judgement on the grounds that such an injunction would constitute an impermissible prior restraint under the Texas Constitution. After the trial court granted the defendant's motion and the court of appeals affirmed, the plaintiff appealed to the Texas Supreme Court.

Thus, the Texas Supreme Court in *Kinney* was presented with the question of whether a permanent injunction is permissible under the Texas Constitution where it (1) requires the removal or deletion of speech adjudicated to be defamatory, and (2) prohibits future speech that is related to the speech adjudicated to be defamatory. The Court held that the portion of the proposed injunction calling for the removal of speech adjudicated as defamatory was permissible. But it also held that the portion of the injunction enjoining future speech was an unconstitutional prior restraint, reasoning that enjoining future speech in the context of defamation "impermissibly risks chilling constitutionally protected speech."[25]

These holdings in *Kinney* were not terribly surprising (in hindsight, at least), given how the Court had applied Article 1, Section 8 of the Texas Constitution in prior decisions. That an injunction compelling the removal of the defamatory remarks is permissible comports with the warning in Article I, Section 8 that one will be held "responsible for the abuse" of expressive liberty granted under the Texas Constitution. And the development of prior restraint doctrine under the Texas Constitution prior to *Kinney* presaged that the Court would hold enjoining future speech not adjudicated to be an abuse of the liberty of expression is an impermissible prior restraint.

From this author's perspective, *Kinney*'s significance (other than paying homage to *The Big Lebowski*) lies in how it addressed and rejected the appellee's arguments in support of the prospective injunction. The Texas Supreme Court rejected the appellee's argument that

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[24] *Ibid.,* 834 S.W.2d at 30 (Hecht, J. concurring).

[25] *Kinney*, 443 S.W.3d at 89.

injunctions in the context of obscenity and commercial speech, upheld in decisions from the Supreme Court of the United States, supported the constitutionality of a prospective injunction on future speech not yet adjudicated defamatory.[26] The Court discussed the traditional principle that injunctive relief is generally not available in defamation actions, and pointed to similar cases from other states "adher[ing] to the traditional rule that defamation alone will not justify an injunction against future speech."[27]

And the Court in *Kinney* delved even deeper into the issue. The Court reasoned that a prospective injunction in the defamation context would likely not be effective, at it would invite the subject of the injunction to engage in wordplay to avoid the literal scope of the injunction.[28] More critically, the Court illustrated why almost any such injunction would be overbroad and thus chill protected speech.[29] As Justice Lehrmann noted in the *Kinney* opinion, "[g]iven the inherently contextual nature of defamatory speech, even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time and in a different context may no longer be actionable."[30] In concluding that "[t]rial courts are simply not equipped to comport with the constitutional requirement not to chill protected speech in an attempt to effectively enjoin defamation,"[31] *Kinney* effectively restricts the available remedies for defamation, and arguably other speech-related torts as well. Indeed, the Court expressly reiterated that damages are almost always a proper and sufficient remedy for defamation.[32]

Kinney also rejected the argument that the long-standing rule disfavoring prior restraints should be loosened when defamatory speech is made on the internet. Drawing on prior decisions from the Supreme Court of the United States "guaranteeing equal protection for speech over the internet,"[33] Justice Lehrmann explained that the Court is "not persuaded that the policy concerns Kinney raises justify enjoining defamatory speech in a manner that substantially risks chilling constitutionally protected speech."[34] While the Court clarified that "we have never held that all injunctions against future speech are *per se* unconstitutional," it appeared to limit the possibility of a permissible injunctions on future speech to the narrow category of speech "that poses a threat of danger."[35] Given the ever-growing prevalence of the internet as an expressive medium, the effects of *Kinney* have the potential to be far-reaching.

"The Texas Constitution does not permit injunctions against future speech following an adjudication of defamation."[36] In making this sharp conclusion, Texas Supreme Court confirmed in *Kinney* that it also "roundly rejects prior restraint." If the Coen Brothers ever make a sequel to

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[26] *Ibid. at* 96–97.

[27] *Ibid. at* 96 (citing *Metro. Opera Ass'n v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1090 (C.D. Cal. 2012); and *Tilton v. Capital Cities/ABC Inc*., 827 F. Supp. 674, 681 (N.D. Okla. 1993)).

[28] *Kinney,* 443 S.W.3d at 97.

[29] *Ibid.* at 97–99.

[30] *Ibid.* at 98.

[31] *Ibid. at* 99.

[32] *Ibid. at* 99–100.

[33] *Kinney,* 443 S.W.3d at 100 (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

[34] *Ibid.*

[35] *Ibid. at* 101.

[36] *Ibid.* at 99.

The Big Lebowski, Walter Sobchak will have a new card up his sleeve the next time someone tries to chill his speech.

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A Twenty-First Century Encounter with Prohibition:
The First Amendment Meets Texas's Arcane Alcohol Advertising Laws

By Peter D. Kennedy

> ***"I am a firm believer in the people.***
> ***If given the truth, they can be depended upon to meet any national crisis.***
> ***The great point is to bring them the real facts, and beer."***
>
> – Quotation attributed to Abraham Lincoln (incorrectly)

Even if Honest Abe did not say those words, they distill the essence of this article. The most important commodity in both democracy and capitalism is *truth*. A citizen can neither vote responsibly nor make rational economic choices without full access to accurate information about what he or she is selecting—whether a representative or a product. While voting and political participating are essential, on a practical day-to-day basis the most frequent and important decisions a person makes are economic—where to shop, what to buy, where to save, and how to invest, if lucky enough to have anything left over.

For almost two hundred years, courts thought the First Amendment had little or nothing to say about commercial transactions. Even true product information could be suppressed if the government concluded that keeping consumers ignorant was best for them. The Constitution protected your right to cry "Give me liberty or give me death," but not your right to learn true information about products for sale—even essentials of good living like a well-made beer.

This changed in what is very recent history, constitution-wise, and the love of alcohol had a lot to do with it. But to understand the background of the story, you have to go back even further.

Prohibition in Texas begins—and ends.

Texas, with its diverse population, has had long and complex relationship with alcoholic beverages. In 1843—just seven years after the Battle of San Jacinto—the Congress of the Republic of Texas enacted what may have been the first local-option measure in North America, allowing localities to decide for themselves whether to allow for the production and sale of alcoholic beverages.[1] In 1845—on the verge of statehood—the Republic banned saloons entirely. The law went unenforced for a decade, though, and was repealed by the Legislature in 1856.[2]

In mid-nineteenth century Texas, except in "dry" households, it was commonplace to brew beer for home consumption, especially in German families.[3] Commercial-level brewing in Texas began in the shadow of the Alamo. The Western Brewery, built by William A. Menger in 1855

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1 K. Austin Kerr, "Prohibition," *Handbook of Texas Online*, http://www.tshaonline.org/handbook/online/articles/vap01.
2 *Ibid.*
3 Michael C. Hennech and Tracé Etienne-Gray, "Brewing Industry," *Handbook of Texas Online*, http://www.tshaonline.org/handbook/online/articles/dib01.

William A. Menger's commercial brewery preceded his historic hotel by four years, suggesting where Texans' true priorities lay. Photo by David A. Furlow.

on Alamo Square, is usually considered the first Texas commercial brewery.[4] Menger's brewery came first: his famous hotel did not open until four years later, in 1859. A huge cellar with limestone walls three feet thick cooled by the Alamo Madre acequia helped keep the lager beers preferred by Germans cold.[5] By 1860, there were eleven Texas breweries.[6] The Western Brewery became the largest brewery in the state before it closed in 1878.[7] The Menger Bar, however, continued serving Texas beer to thirsty visitors, including Teddy Roosevelt's Rough Riders in 1898. It remains open to this day.

The growth of Texas's commercial alcohol business was not unopposed; "dry" Baptists and Methodists argued with "wet" Germans and Catholics about the virtues of drinking. The State of Texas handled the dispute the same way the Republic of Texas had: local option. Article XVI, Section 20, of the 1876 Constitution required the Texas Legislature to "enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."[8] The Fifteenth Legislature complied, passing a local option enabling statute on June 24, 1876.[9]

Local option created a patchwork around the state, with the legality of alcohol manufacture and sale determined at the county, city, town, or even precinct level. Frustrated that liquor was legal *anywhere* in the state, the "drys," including the Women's Christian Temperance Union[10] and the Anti-Saloon League of Texas,[11] continued to press for complete prohibition. State prohibition constitutional amendments failed in 1887, 1908, and again in 1911, but with increasingly narrow margins as the national temperance movement grew.[12]

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4 *Ibid*.

5 *Ibid*.

6 Michael C. Hennech and Tracé Etienne-Gray, "Brewing Industry," *Handbook of Texas Online*, http://www.tshaonline.org/handbook/online/articles/dib01.

7 *Ibid*.

8 *See* Kerr, "Prohibition," *Handbook of Texas Online*; Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 65–66.

9 Act of June 24, 1876, 15th Leg., R.S., ch. 33, 8 H.P.N. Gammel, The Laws of Texas, 1822–1897, at 862 (Austin, Gammel Book Co. 1898), cited in Ariens, *Lone Star Law*, 296 n.85.

10 Judith N. McArthur, "Woman's Christian Temperance Union," *Handbook of Texas Online*, http://www.tshaonline.org/handbook/online/articles/vaw01.

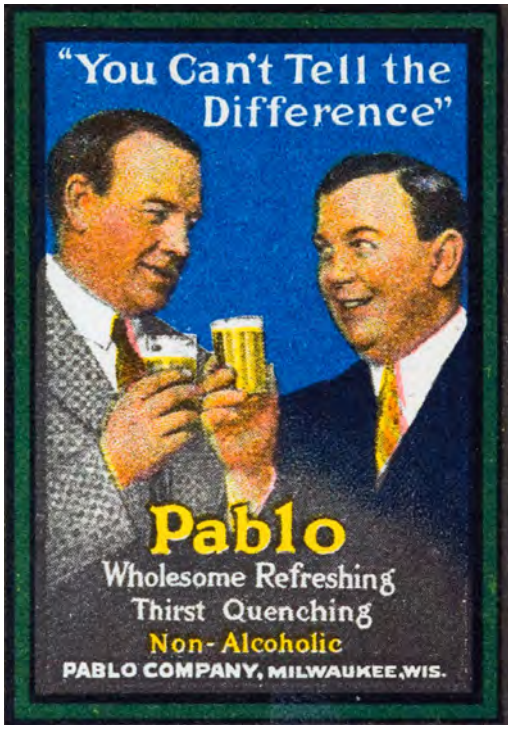
11 https://tshaonline.org/handbook/online/articles/vaa02.

12 *See* Kerr, "Prohibition," *Handbook of Texas Online*. *See also* James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013), 154–60.

In the midst of World War I, temperance won. The U.S. Congress in December 1917 sent the Eighteenth Amendment to the states for ratification. The amendment affirmatively prohibited the production, transport, and sale (but not consumption) of "intoxicating liquors anywhere in the nation."[13] The Texas Legislature quickly ratified the amendment on March 4, 1918. For good measure, Texas voters added a prohibition amendment to the Texas Constitution. By January 1919, enough states had joined Texas to make the Eighteenth Amendment the law of the land. Congress passed enabling legislation—the Volstead Act—in October 1919, displacing state liquor laws. President Wilson vetoed the Volstead Act, but Congress quickly overrode him. On January 16, 1920, Prohibition began.

This Prohibition-era photo shows Anheuser-Busch advertising its Budweiser-brand "hop flavored" "barley malt syrup"—which became beer with a bit of water and yeast.[14]

Significantly, the Eighteenth Amendment did not define "intoxicating liquors," leaving the task to Congress or the courts. Because the temperance movement had focused mostly on saloons and distilled spirits, breweries had assumed beers, with a much lower alcoholic content than spirits, would be exempted from Prohibition. They were wrong: the Volstead Act defined "intoxicating liquors" as any beverage with .5% or more alcohol by volume (ABV)—lower than the naturally-occurring alcohol content of sauerkraut or root beer. The legal production of beer stopped cold.



During Prohibition, Pabst claimed its "Pablo" non-alcoholic beer (a contraction of **PAB**st **LO**w) was just as good as the real thing. These men look unconvinced.[15]

Breweries that had enormous investments in equipment suddenly turned idle. They scrambled to stay open and preserve their brands, hoping Prohibition was a passing fad. Two strategies let some of the larger breweries survive. First, because consuming alcohol was not prohibited by the Volstead Act, breweries did everything except *ferment* their beer. They made and sold liquid malt extract, a sweet syrup extracted from malted barley. As every homebrewer knows, when combined with water and yeast at home, malt extract magically becomes beer.

Breweries also tried to keep their doors open by producing malt beverages of less than .5% ABV, which were classified as "cereal beverages" but commonly known as "near beers." Despite optimistic advertising campaigns, non-alcoholic beers were (as they are now) only mildly successful.

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[13] Volstead Act. *See* http://www.druglibrary.org/schaffer/Library/studies/wick/wick1.html, March 30, 2017. *See also* Kerr, "Prohibition," *Handbook of Texas Online*; Ariens, *Lone Star Law*, 65–66.

[14] Fedora Lounge website, http://farm4.staticflickr.com/3573/3943798771_ab39f2ec39_o.jpg.

[15] Source: https://www.hakes.com/Auction/ItemDetail/67845/PROHIBITION-ERA-POSTER-STAMPS-PROMOTE-PABLO-NON-ALCOHOLIC-DRINK-BY-PABST.

As the Twenties ended and the Depression began, Prohibition—inconsistently enforced and openly flaunted—was largely seen as a failed experiment. To the relief of brewers, Congress amended the Volstead Act in 1933 to permit the sale of beer up to 4% ABV, which simply required amending the statutory definition of "intoxicating liquor." Texas amended its constitutional prohibition provision in the same way, allowing beer sales to resume. National Prohibition fell when the Twenty-First Amendment became effective on December 15, 1933, leaving alcohol regulation largely to the states.

In August 1935, Texas voters fully repealed statewide prohibition, and the state reverted to its pre-Prohibition local option system, which remains in place to this day. The Legislature, meeting in special session, enacted the Liquor Control Act (precursor to the Alcoholic Beverage Code) and created the Liquor Control Board (precursor to the Alcoholic Beverage Commission), beginning the modern era of alcohol regulation in Texas.

Commercial speech gains First Amendment protection.

The First Amendment to the U.S. Constitution states, *inter alia*, that Congress shall not abridge freedom of speech and freedom of the press:

> Congress Shall Make No Law Respecting an Establishment of Religion, or Prohibiting the Free Exercise Thereof; or Abridging the Freedom of Speech, or of the Press; or the Right of the People Peaceably to Assemble, and To Petition the Government for a Redress of Grievances.

Yet during Prohibition and for years after, neither the First Amendment nor the Texas Constitution was applied to commercial speech. In *Valentine v. Chrestensen*, the U.S. Supreme Court said the Constitution imposes "no restraint on government as respects purely commercial advertising."[16] "As a result of *Chrestensen* and for a number of years thereafter, the term 'commercial speech' was used as an incantation sufficient to strip any expression with commercial content of all constitutional protection."[17]

Therefore, as states regulated alcohol labeling and advertisement in the years after Prohibition, they operated under no constitutional limits, often imposing severe restrictions. For example, some states prohibited any off-premises advertisements for alcohol entirely; some prohibited price advertising; many prohibited advertising alcoholic strength. At least one state prohibited any alcohol advertising whatsoever.

Post-Prohibition, Texas, like many states, adopted the "three-tier" system. This theoretically required complete separation of ownership and control between manufacturers, distributors, and retailers of alcoholic beverages. Over time, the Alcoholic Beverage Code imposed a dizzyingly complex system of licensing and regulation for different tiers, for different types of alcoholic beverages, and for labeling and advertising. The Alcoholic Beverage Commission added

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[16] 316 U.S. 52 (1942).

[17] *See* James B. Franks, "The Commercial Speech Doctrine and the First Amendment," 12 *Tulsa Law Review* 699, 701 (1977).

complexity with a vast number of permits and licenses, administrative rules, informal practices, and inconsistent enforcement.

In the meantime, the Supreme Court began to recognize some constitutional protection for commercial speech, culminating in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[18] *Central Hudson* still dominates commercial speech doctrine today, holding that commercial speech merits "intermediate" constitutional protection if it concerns lawful activity and is not false or misleading. Government may prohibit or regulate such speech only to advance a "substantial" governmental interest, and only through regulations that "directly advance" the asserted interest and that are "not more extensive than necessary" to serve the governmental interest.[19] After *Central Hudson,* regulations of commercial speech began to fall to constitutional challenges left and right, led in part by an alcoholic beverage industry still chafing under post-Prohibition and pre-*Central Hudson* laws.

For instance, fearing it was gaining a reputation as a "watery" beer, Coors successfully challenged a federal law prohibiting beer labels from displaying alcoholic content.[20] The Supreme Court was unconvinced that the ban on providing customers truthful information about Coors's products was necessary to prevent "strength wars" among brewers, when states retained the power to limit alcoholic strength directly.[21]

A chain of liquor stores, frustrated at its inability to advertise prices lower than its competitors, successfully challenged a state law prohibiting off-site advertising of liquor prices.[22] The U.S. Supreme Court was unconvinced that prohibiting truthful speech would effectively advance the state's purported goal of limiting alcohol consumption, especially when direct restrictions on sales volumes could have been enacted.[23]

The craft beer phenomenon comes to Texas.

Things were relatively quiet in Texas, however, at least for beer. The brewing industry had consolidated down to a few large companies. Consumer tastes had homogenized down to light or lighter pilsners, with a few regional exceptions such as Shiner Bock. The Alcoholic Beverage Code remained byzantine. While large brewers battled for market share, they offered a narrow range of styles that did not run into state regulatory problems of significance.

There was one exception: in a nearly-forgotten administrative law case, Pearl Brewing Company of San Antonio challenged the Alcoholic Beverage Commission's (TABC's) denial of its application to approve labels for private label budget beer brands, such as Value-Time Beer, Scotch Buy Beer, Cost Cutter Beer and Slim Price Beer.[24] Pearl, still an independent brewery,

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18 447 U.S. 557, 566 (1980).

19 *Ibid*.

20 514 U.S. 476 (1995).

21 *Ibid.* at 514 U.S. at 483–91.

22 *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

23 *Ibid*. at 483–91.

24 *TABC v. Pearl Brewing Co.*, No 04-83-00529-CV (Tex. App.—San Antonio Dec. 31, 1985) (unpublished).

argued that such private labels were "the only method by which Pearl may successfully compete with the large national breweries which increasingly dominate the Texas market," and that "without this marketing avenue, Pearl would be unable to continue its recent operation in Texas."[25] Without reaching any First Amendment issue, the San Antonio court held TABC's denial of Pearl's labels was legally erroneous and exceeded its statutory authority.[26] The TABC, however, continues to deny approval of private label beers, ignoring *Pearl Brewing Co.* and the settlement it reached with Pearl afterwards.[27]

Enter the craft brewers. Starting first on the West Coast, independent breweries began to spring up in the 1990s, offering a far wider range of beers—pale ales, IPAs, imperial stouts, porters, session ales, Belgian ales, dark lagers, and dozens of other beer styles.[28] The craft beer phenomenon reached Texas a bit late, but it came with a vengeance and continues unabated today. Starting from a handful of on-and-off-again microbreweries and brewpubs in the 1990s, according to the Texas Craft Brewers Guild there are now at least 105 craft breweries and 67 brewpubs in the state.[29]

However, these new brewers ran smack into Texas's post-Prohibition advertising and labeling laws—still on the books seventy years later—that threatened to hold down the explosion in Texas of this new industry. Three laws were particularly problematic.

First, as part of the three-tier system, Texas law prohibited breweries from giving anything of value to a retailer.[30] The TABC interpreted this to mean prohibiting a brewery from advertising where their beer was being sold. Breweries literally risked their licenses if their webpage identified stores or bars where their beers were available, or if they answered the question during a tour about where a visitor might buy a six-pack. Wineries, on the other hand, unquestionably could advertise where their products could be bought, thanks to a 2005 amendment to the Code.[31]

Second, the Alcoholic Beverage Code retained a unique—and inaccurate—set of definitions to describe malt beverages. "Beer" is commonly used to describe any fermented beverage made from malted grain, including ales and lagers. "Ale" and "lager" are different styles of beer, depending on the method of fermentation. Texas, however, alone in the United States, defines "beer" by its alcoholic content—no more than 4% alcohol by weight (ABW).[32] Any malted beverage above 4% ABW, regardless of style, could not be called "beer." They were required to be called "ale" or (an unattractive option for craft brewers) "malt liquor."[33]

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[25] *Ibid*., 15.

[26] *Ibid.*

[27] *See Mark Anthony Brewing, Inc. v. TABC*, No. D-GN-13-003570, 345th District Court, Travis County, Texas, Final Declaratory Judgment (Oct. 7, 2015); *Ibid*., Findings of Fact and Conclusions of Law (Nov. 25, 2015).

[28] *See* Joe Satran, "Craft Beer Growth Pushes Number of Breweries in U.S. Higher than Ever Before," *Huffington Post* (Dec. 13, 2012), http://www.huffingtonpost.com/2012/12/13/craft-beer-breweries_n_2287906.html.

[29] *See* "Members," *Texas Craft Brewers Guild*, https://texascraftbrewersguild.org/members.

[30] *Authentic Beverages Co. v. Texas Alcoholic Beverage Commission*, 835 F. Supp. 2d 227 (W.D. Tex. 2011); Alcoholic Beverage Code Annotated §102.07(2).

[31] Alcoholic Beverage Code Annotated §108.9.

[32] Alcoholic Beverage Code Annotated §104(12).

[33] Alcoholic Beverage Code Annotated §104(15).

Third, although *Rubin v. Coors* had allowed brewers to put the alcoholic strength on their labels, Texas still prohibited brewers from advertising alcoholic strength or using any name suggesting alcoholic strength, such as "strong," "full strength," or "prewar strength."[34]

These rules were apparently not a problem for the large breweries. Their products were lagers of less than 4% ABW, so they could be called "beer." Their products were widely available, so they had no need to promote specific retail locations And their growth was in *light* beers, so they had no need to advertise or suggest their beers might be stronger than expected.

Not so for craft brewers. With small output and limited distribution, they *needed* to tell customers where their beers were being sold. Retailers were not likely to feature a new, unusual product with limited shelf space. Proud of their revival of traditional beers and experimentation with new styles, craft brewers balked at mislabeling their strong lagers as "ales" or choosing between misnaming their session (low-alcohols) pale ales as simply "beer" or raising their alcohol content to use the accurate term "ale."

No one wanted to call unique, hand-crafted beer "malt liquor." At least thirty styles in the Association of Brewers' Beer Style Guidelines could not be accurately labeled or described under Texas' law.[35] And craft brewers *wanted* to advertise the strength of their beers' styles. Not because high alcohol sells, but because drinkers *need* to know whether the new, unfamiliar beer they are trying is a 2.5% table beer or a whopping 9% imperial IPA.

The TABC's arcane advertising rules caused real problems both for brewers and for Texas consumers. Many out-of-state craft breweries refused to ship their beers into Texas because it would require name and/or label changes. The laws caused the much-ridiculed label addition "Ale in Texas," as if beer changed its nature when it crossed state lines. Brewers changed their formulations to meet the beer/ale distinction, resulting in beers of *higher* alcohol content simply to maintain the integrity of the product's name—hardly a sensible result of regulation.[36]

But to challenge these laws required nerve—it would mean suing the very government agency that grants breweries their license and right to operate. Fortunately, one Austin brewery, Jester King, joined by a distributor (Authentic Beverages Co.) and a retailer (Zak's Restaurant), found the nerve to bite the hand that fed them, the TABC.

Authentic Beverages v. TABC.

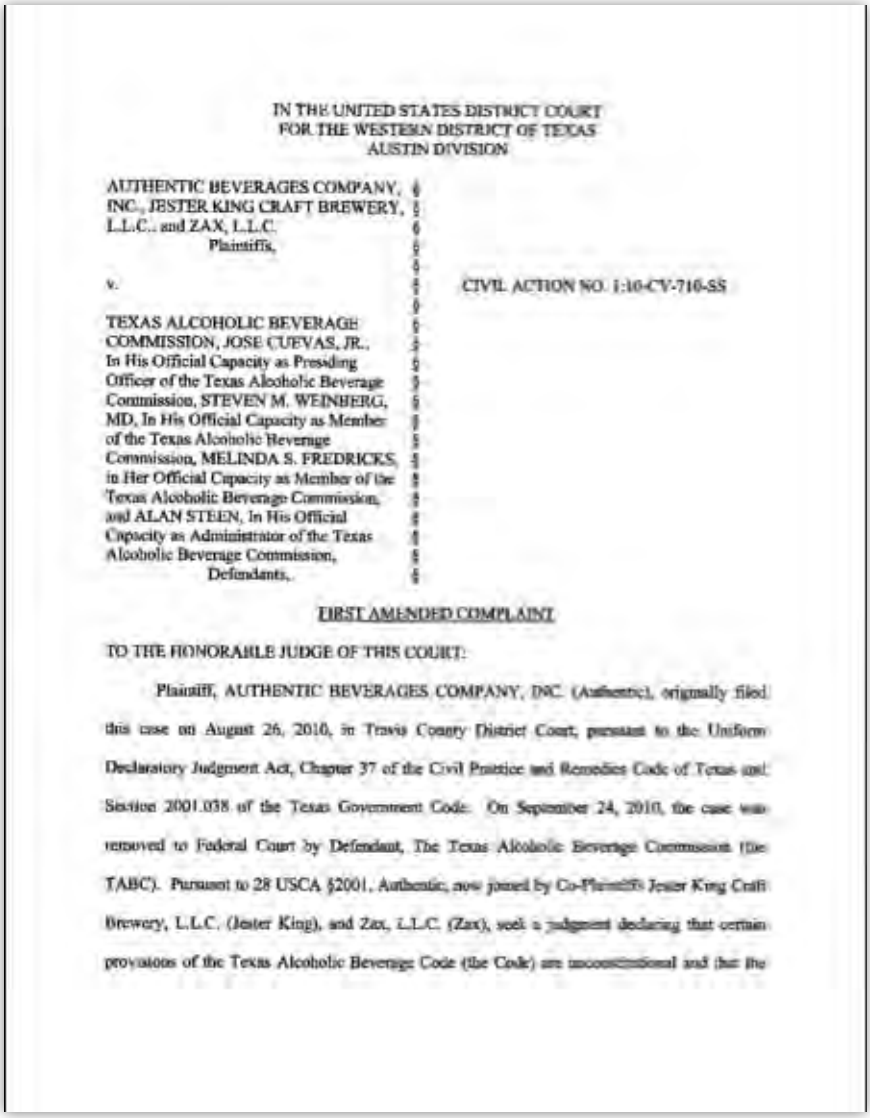
Jester King in particular faced problems with TABC's rules. It brewed a pale ale that fell below 4.0% ABW, so it increased the strength in order to accurately call it an "ale." Its Commercial Suicide Oaked Dark Mild had to omit the final word "Ale" from its name because it fell below 4.0%, as it was meant to do. It could not use the word "beer" to describe its Wytchmaker Rye IPA, Black Metal Imperial Stout or Boxer's Revenge Farmhouse Provision Ale, because they exceeded 4%.[37] Nor could it tell customers— even during brewery tours—where its unique farmhouse

[34] Alcoholic Beverage Code Annotated §45.49(a); §45.82(f).

[35] *See* https://www.brewersassociation.org/resources/brewers-association-beer-style-guidelines/.

[36] Docket Entry 33 at 6–12.

[37] *Ibid.*



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AUTHENTIC BEVERAGES COMPANY, INC., JESTER KING CRAFT BREWERY, L.L.C., and ZAX, L.L.C.
Plaintiffs,

v.

CIVIL ACTION NO. 1:10-CV-716-SS

TEXAS ALCOHOLIC BEVERAGE COMMISSION, JOSE CUEVAS, JR., In His Official Capacity as Presiding Officer of the Texas Alcoholic Beverage Commission, STEVEN M. WEINBERG, MD, In His Official Capacity as Member of the Texas Alcoholic Beverage Commission, MELINDA S. FREDRICKS, in Her Official Capacity as Member of the Texas Alcoholic Beverage Commission, and ALAN STEEN, In His Official Capacity as Administrator of the Texas Alcoholic Beverage Commission,
Defendants.

FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff, AUTHENTIC BEVERAGES COMPANY, INC. (Authentic), originally filed this case on August 26, 2010, in Travis County District Court, pursuant to the Uniform Declaratory Judgment Act, Chapter 37 of the Civil Practice and Remedies Code of Texas and Section 2001.038 of the Texas Government Code. On September 24, 2010, the case was removed to Federal Court by Defendant, The Texas Alcoholic Beverage Commission (the TABC). Pursuant to 28 USCA §2001, Authentic, now joined by Co-Plaintiffs Jester King Craft Brewery, L.L.C. (Jester King), and Zax, L.L.C. (Zax), seek a judgment declaring that certain provisions of the Texas Alcoholic Beverage Code (the Code) are unconstitutional and that the

beers could be found. This made no sense.

Filing suit in Austin federal court, Jester King and the others drew the sometimes acerbic Judge Sam Sparks, who quickly realized the lawsuit concerned "two cornerstones of American society—the Constitution, and alcohol."[38] After initially holding that the plaintiffs had standing to attack the laws and rules at issue and that Jester King had stated a First Amendment claim, Judge Sparks considered the parties' merits arguments on cross-motions for summary judgment.[39]

The TABC—defending a hand of cards dealt almost seventy years before—gamely tried to argue that there was some "substantial" government interest in the web of rules ensnaring Jester King and the rest of the burgeoning craft beer industry in Texas. Judge Sparks was unconvinced.

First, the TABC suggested that the law preventing brewers from advertising which resellers sell their products prevented "vertical integration" of the beer industry.[40] Describing the TABC's argument as "anemic," Judge Sparks held that while "prevention of vertical integration may well be a substantial government interest, a restriction on the free speech rights of producers and resellers cannot be justified by pointing out that retailers are free to speak their minds."[41] That is, the fact that the government did not gag retailer outlets did not justify its gagging of brewers. "Nor does the existence of a substantial government interest justify the imposition of any restriction on speech the government deems appropriate; in the commercial speech context, such a restriction must directly advance the interest, and be no more extensive than necessary to do so. TABC offers neither argument nor evidence on these issues."[42]

Second, the TABC tried to justify the beer-ale distinction by claiming that it helped

[38] Doc. 18.

[39] *Authentic Beverages*, 835 F. Supp.2d at 231.

[40] *Ibid*. at 243.

[41] *Ibid*. at 243-44.

[42] *Ibid*. at 244.

consumers and retailers know the alcoholic content of beverages being bought and served, and it facilitated local communities administer local option limitations which permitted only "beer" sales.[43] Again, however, Judge Sparks held that the TABC failed to show "the beer-ale dichotomy directly advances any of these interests or, more obviously, that the regulations at issue are not more extensive than necessary to do so."[44] While conceding that the beer-ale distinction might be "better than nothing" in conveying information about alcoholic strength, "'better than nothing' is not the standard required by the First Amendment…"[45]

As the Plaintiffs had argued, the beer-ale distinction "is simply not that good at conveying information about the alcohol content of malt beverages.[46] The TABC showed that the weighted ABW of the twenty most popular malt beverages in 2004 was approximately 3.8% ABW.[47] But Judge Sparks realized this *disproved* TABC's point: if most beer is very near the beer-ale threshold of 4% ABW, the beer-ale distinction conveys very little useful information.

> In fact, this evidence could be taken to mean that "beer" in Texas typically means, "a malt beverage with an alcohol content probably a little less than 4% ABW, but potentially as low as 0.5% AB[W]; and "ale" means "a malt beverage with an alcohol content probably a little greater than 4% AWB, but potentially much greater." If, as TABC asserts, Texas wishes to allow consumers and providers to monitor alcohol consumption by themselves and those they serve, these two categories are not especially helpful.[48]

The court agreed with the Plaintiffs' argument that an actual statement of alcohol content—standard practice in the sale and serving of craft beer—serves the government's asserted interest better than the statutory definitions of "beer" and "ale," which "potentially conceal as much information as they provide."[49]

Finally, Judge Sparks quickly held against? the arcane prohibition against mentioning alcoholic strength in advertising, noting that the TABC failed to respond to the argument at all.[50] In doing so, he noted the seeming incoherence of the regulations:

> Indeed, it is difficult to articulate a substantial government interest that forbids advertisement of wine and malt beverages by reference to alcohol content; seems to require advertisement of the alcohol content of distilled spirits; permits inclusion of alcohol content on labels; but forbids the use of certain terms in doing so. The most obvious potential interest, informing consumers about the strength of alcoholic beverages, is clearly inadequate, because these regulations frustrate this interest as much as they advance it.[51]

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[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid*. at 245.
[49] *Ibid*. at 246.
[50] *Ibid*. at 242.
[51] *Ibid*. at 243.

Judge Sparks thus ensured Texas brewers may now confidently obtain TABC label approval of a "Prewar Strength Ale," correctly describe their products, and tell consumers where to buy them without risking their manufacturing permits and brewing licenses!

Conclusion

Authentic Beverages dealt Texas's outdated alcohol advertising regulations a significant blow, and the TABC declined to appeal. But the case turned out to be just the start of broad-ranging alcoholic beverage regulation battles in Texas. The *Authentic Beverages* plaintiffs also challenged seemingly irrational licensing distinctions, but did not succeed in a more difficult equal protection challenge.[52] Each legislative session since *Authentic Beverages* has seen a raft of bills seeking to equalize, simplify, and rationalize a byzantine regulatory system that, to some observers at least, exists in large part to justify itself. And the lawsuits have not ended; in 2015 a Travis County District Judge declared another set of TABC labeling regulations unconstitutional, the same set challenged decades ago by Pearl Brewing.[53]

Texans' love of beer and their suspicion of government overreach make for a potent combination, so it seems unlikely these controversies will end any time soon.

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[52] *Ibid*. at 247–51.

[53] *Mark Anthony Brewing, Inc. v. TABC*, No. D-GN-13-003570, 345th District Court, Travis County, Texas, Final Declaratory Judgment (Oct. 7, 2015); *ibid.*, Findings of Fact and Conclusions of Law (Nov. 25, 2015). The TABC *did* appeal this adverse ruling, and the case was set for oral argument before the Third Court of Appeals on April 26, 2017.

Pete Kennedy *is an avid craft beer drinker and co-founder of Old Homestead Brewing, his backyard home brewing operation. He has practiced law in Austin since 1990, after graduating from the University of Chicago Law School and clerking for Sr. Judge Thomas Fairchild of the Seventh Circuit in Madison, Wisconsin. Pete practices at the intersection of law and disruptive business models and technologies, where government regulations inhibit creative endeavors. He has handled a wide variety of intellectual property, Internet, commercial, and First Amendment litigation, as well as counseling clients on legal risk avoidance and mitigation. Pete is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization and was named 2017 Austin First Amendment Litigation Lawyer of the Year by Best Lawyers.*

Left: Pete's dad made sure he got an early start. Photo by Francis Kennedy, ca. 1964. Middle: Old Homestead Brewing in operation. Photo by Pete Kennedy. Right: Pete sporting a *Jester King* shirt on the Cliffs of Moher, County Clare, Ireland. Photo by Camila Kennedy.

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When LBJ Got His Way:
The Making of a Texas Federal Judge, 1959

By Stephen Pate

In recent years, it has been commonplace for federal judicial nominees to expect a long period of time from their initial nomination to the point when they are confirmed by the United States Senate. A United States Senator recommends a candidate, the nomination is made by the President, the FBI investigation progresses, and there is a hearing before the Senate Judiciary Committee. Finally, the full Senate votes. Even then, a change in administration or the end of a congressional session may mean that the judicial nominee will never be confirmed, or even have a hearing before or be voted out of the Senate Judiciary Committee. Some attorneys long for the days when well-qualified nominees were granted hearings before the Senate Judiciary Committee within a reasonable time and were then swiftly confirmed.

Those good old days did not really exist. Political calculations, sometimes based on philosophy and sometimes based on personal considerations, have always had a hand in the nomination of federal judges.[1] Given the rules of senatorial courtesy, and conflicts between a White House controlled by one party and a Senate controlled by the other, it has been rare, but not unheard of, for a Senator to scuttle a judicial nomination and put his own nominee in place. Nor is it uncommon for one party to delay confirmation of another party's nomination during a presidential election year, which has happened since at least 1948.[2]

Yet, in 1959, an unusual situation arose when a powerful Senator stalled *all* pending judicial nominations until his preferred candidate was nominated by the President. This incident can perhaps be said to presage many of today's judicial nomination battles. Moreover, in the end, the incident led to what may still rank as the fastest nomination-to-confirmation process for a federal judge in modern history, a grand total of *36 hours* between nomination by the White House and confirmation by the Senate. This 1959 battle involved none other than Lyndon Baines Johnson (LBJ), then Senate Majority Leader and future President. His displeasure in the circumstance led to all judicial nominees being held up for months, the first time in history one senator has done this. The battle resulted in Johnson's nominee, Joseph Jefferson "Joe" Fisher, being appointed. The controversy made national headlines and led to a *New York Times* editorial bemoaning the methods by which Johnson got his man.

The story began when Lamar Cecil of Beaumont, one of the United States District Judges

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1 *See* Sheldon Goldman, *Picking Federal Judges: Lower Court Selections from Roosevelt Through Reagan* (New Haven: Yale University Press, 1997).

2 *See* Peter Edson, "Justices Wait While Politicians Play Games," *Abilene Reporter-News* (Sept. 3, 1959), 51.

for the Eastern District of Texas, died on February 14, 1958.[3] Though it is hard to believe today, at that time the Eastern District of Texas, which sprawls from the Red River to the Gulf Coast, had only two federal judges. Cecil had been a practicing attorney in Beaumont and a member of the Texas Republican State Executive Committee prior to his 1954 appointment by President Dwight Eisenhower.[4] Upon his death, with Eisenhower still in the White House, it was widely assumed that another Republican would take Judge Cecil's place.[5]

Indeed, on February 27, 1958, less than two weeks after Judge Cecil's death, an article appeared in the *Abilene Reporter-News* titled "Capital Texans: Who'll Pluck Judicial Plum?"[6] In that article, Washington correspondent Leslie Carpenter discussed who would get the nomination for Judge Cecil's bench. It illustrates that, even more than today, a federal judicial nomination was an important matter. Carpenter noted that only three names of potential appointees had been circulated at that time. One was Bill Bryant, son and grandson of Eastern District federal judges and a prominent Republican (and also future Governor John Connally's brother-in-law).[7] The two others were John Blair, a Beaumont Republican, and Chilton O'Brien, a Democrat and former campaign manager for Senator Johnson in southeast Texas. Carpenter observed that "the judgeship does not necessarily have to go to a Republican although that would normally be the case in a GOP administration." He added that "the White House is not expected to be careless enough to offend [Johnson]."[8]

The last statement should be carefully noted. By 1958, Lyndon Johnson had been Senate Majority Leader for four years. As historian Robert Caro notes, Johnson was the "Master of the Senate" and quite possibly the most effective and powerful Senate Majority Leader in history.[9] In the Senate, if you crossed Lyndon Johnson, you would be chastised for your wayward ways and be subjected to Johnson's intimidating personality. Few people dared to vex him there, and the Eisenhower Administration was normally careful in its dealings with him.[10] He was, after all, the most powerful Democrat in the nation. Given this, it was known that Johnson expected that he would be entitled to make at least one judicial pick for Texas.[11]

In fact, Johnson had a nominee for the Eastern District in mind already. The Eastern District was the home of State District Judge Joe J. Fisher of Jasper. One of Lyndon Johnson's closest associates and personal friends was Ed Clark of Austin, who had formerly served as Texas Secretary of State and who had been Johnson's personal attorney.[12] Caro refers to Clark

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3 "Cecil, Lamar John Ryan," *Biographical Directory of Federal Judges*, *History of Federal Judges* website, https://www.fjc.gov/history/judges/cecil-lamar-john-ryan.

4 "Nominates Cecil for ETex Judge," *Longview Daily News* (Aug. 20, 1954), 48.

5 Leslie Carpenter, "Capital Texans: Who'll Pluck Judicial Plum?," *Abilene Reporter-News* (Feb. 27, 1958), 53. Interestingly, Carpenter was the husband of fellow Washington correspondent Liz Carpenter, who served on Lyndon Johnson's presidential campaign staff in 1960 and was Lady Bird Johnson's press secretary during the Johnson presidency.

6 *Ibid*.

7 *Ibid*.

8 *Ibid*.

9 *See* Robert A. Caro, *The Master of the Senate: The Years of Lyndon Baines Johnson* (New York: Knopf, 2002), xxii.

10 *Ibid.,* 562–69, 588–89.

11 Goldman, *Picking Federal Judges,* 133.

12 Robert A. Caro, *Means of Ascent: The Years of Lyndon Johnson* (New York: Knopf, 1990), 127.

Edward Clark, after becoming Ambassador to Australia. Courtesy of Historic Images Outlet, outlet.historicimages.com.

as Johnson's "principal operator."[13]

Clark, though largely unknown today, was in those days the consummate Texas politician, a man who wielded immense power behind the scenes, particularly on behalf of LBJ. Many saw him as a benefactor who could put in a good word for you. The less kind referred to him as a "fixer."[14] He was legal counsel to LBJ in the contested 1948 Democratic Senatorial Primary where Johnson defeated Coke Stevenson by 71 contested votes from Duval County.[15] He was from San Augustine, Texas, where Joe Fisher was from,[16] and, in fact, Joe Fisher had married Clark's sister, Kathleen.[17] Later, President Johnson would appoint Clark Ambassador to Australia.[18] It was well known that Ed Clark wanted his brother-in-law to get the Eastern District appointment. Joe Fisher was a sitting state judge in East Texas, a former prosecutor, and a well-known East Texas community leader.[19] Moreover, Joe Fisher was a close friend of Governor James V. Allred,[20] who had been a crucial supporter of Senator Johnson's when Johnson had first run for Congress in 1937.[21] Johnson, Clark, and Fisher had all been young "New Dealers" and supporters of Franklin Roosevelt along with Governor Allred in the 1930s. Given these circumstances, it was widely expected that Fisher would get the nomination.

In fact, approximately five weeks after Judge Cecil's death, the *Jasper News-Boy*, the Jasper Texas weekly newspaper, editorialized for Judge Fisher's nomination. "The name of Joe Fisher has been mentioned in connection with prospective Federal appointees to the Beaumont Federal Judgeship."[22] It noted Fisher's "high legal stature" and his work ethic, concluding "Joe Fisher is the man for the job."[23]

It did not happen. During the congressional recess of 1958, Beaumont attorney John Tucker was offered a recess appointment by President Eisenhower. Tucker was a Harvard Law School graduate, very well-respected, and a senior partner in the Beaumont law firm of

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13 *Ibid*.; Jon P. Newton, "Clark, Edward Aubrey," *Handbook of Texas Online*, https://tshaonline.org/handbook/online/articles/fcluv. *Hereinafter* "Clark," *Handbook of Texas Online*.

14 Robert Draper, "Death of a Fixer," *Texas Monthly Magazine* (Nov. 1992).

15 "Clark," *Handbook of Texas Online*.

16 *Ibid*.

17 Obituary, "Kathleen Clark Fisher," *Beaumont Enterprise* (Sept. 10, 2011); "Senate Unit Votes Fisher Step Nearer U.S. Bench," *Beaumont Enterprise* (Sept. 9, 1959), 7.

18 "Clark," *Handbook of Texas Online*.

19 "Judgeship Called "Well-Deserved," *Houston Chronicle* (Sept. 8, 1959), 1.

20 "Fisher Named for Federal Judgeship," *San Augustine Tribune* (Sept. 10, 1959), 1.

21 Robert A. Caro, *The Path to Power: The Years of Lyndon Johnson* (New York: Knopf, 1982), 405.

22 "A Wise Choice," *Jasper News Boy* (Sept. 10, 1959), 1.

23 *Ibid*.

Orgain, Bell and Tucker. Tucker did not take this recess appointment, as he would not have been paid for taking the position until he had been confirmed by the Senate.[24] Nevertheless, when Congress went back into session early the next year, President Eisenhower, at the suggestion of United States Attorney General William P. Rogers and the Texas State Republican Committee, formally nominated Tucker to the vacant bench on February 12, 1959, almost one year after Judge Cecil's death.[25]

Left: John G Tucker in 1953. Right: John G. Tucker in 1968. Both come from Jefferson County Bar Association Composite Photographs. In the 1953 photo, Tucker is not wearing his signature bow-tie. Tyrell Historical Library Oversized Small Collections, Box 2 File 1. Published by permission of the Tyrell Historical Library, Beaumont Texas.

Proof that it had been expected that Fisher would get the appointment came from an article that appeared in the East Texas newspaper *Longview News Journal* that same day. In what could have been a Freudian slip, the article's headline read, "Fisher Named to U.S. Court Post."[26] The article itself, however, goes on to state that John Tucker had received the appointment.[27] The article noted that Joe Fisher had been given consideration for the post along with William Steger of Tyler (later an Eastern District judge), Bill Bryant, "son of the late judge," and Joe Camp, Beaumont Congressman Jack Brooks's campaign manager.[28]

Articles concerning these nominations are full of information that probably would not appear today. For example, this article noted that Tucker was the brother-in-law of the attorney for the United States Ambassador to Great Britain and that Tucker had married "into the Chastain family of Beaumont."[29]

At the other end of the Eastern District, the *Beaumont Journal* also noted the nomination, but with an ominous headline. In its article headlined, "Delay Possible: John Tucker Nominated as Federal Judge," the newspaper noted the nomination, but stated that "indications [point] to a delay in Senate action on the nomination." The paper stated that "[t]he Senate's most powerful member, Democratic Leader Senator Lyndon B. Johnson of Texas is the potential stumbling block in Mr. Tucker's way."[30]

"Sen. Johnson told the *Journal* he has 'reached no conclusion' on whether to vote to confirm Tucker.... U.S. Atty. Gen. William P. Rogers informed Sen. Johnson in advance that the nomination would be sent to the Senate but Rogers apparently made no effort to win the Senator's approval

[24] "Fisher named to U.S. Court Post," *Longview News-Journal* (Feb. 12, 1959), 1.

[25] Goldman, *Picking Federal Judges,* 134.

[26] *See* "Clark," *Handbook of Texas Online.*

[27] *Ibid*.

[28] *Ibid*.

[29] *Ibid*.

[30] "Delay Possible: John Tucker nominated as U.S. Judge," *Beaumont Journal* (Feb. 12, 1959).

Fisher Named To U. S. Court Post

WASHINGTON — The White House announced this morning that the President is sending to the Senate the name of John Tucker of Beaumont to be United States district judge for the Eastern district of Texas, replacing the late Judge Lamar Cecil of Beaumont.

Because of the clamor of attorneys and residents of the lower part of the big Eastern district, a judge residing in that portion was picked. He will of course assist Judge Joe Sheehy of Tyler in all parts of the district but is expected to have regular sessions in divisions of the court in the more southerly area.

Tucker was offered the post last year during congressional recess. He would not have been paid until and unless he received confirmation by the Senate and he did not take the post.

He is a brother-in-law of Ben O. Schmidt, attorney for U.S. ambassador to Great Britain Jock Whitney, new owner of the Republican New York Herald-Tribune. Both men married into the Chastain family of Beaumont.

Among the East Texans who have been given consideration for the post were Judge Joe Fisher of Jasper; William Steger of Tyler and Longview, present U. S. district attorney for the area; Bill Bryant, Sherman, son of the late Judge Randolph Bryant, and George Camp, Beaumont, campaign manager for Rep. Jack Brooks, Beaumont.

The February 12, 1959 issue of the *Longview News-Journal* announced that President Eisenhower was nominating Joe Fisher to serve as the new judge in the Eastern District of Texas. Photo provided by the author.

of the action before it was taken."[31]

From a vantage point of sixty years, it is almost inconceivable that the Attorney General did not seek Johnson's approval of Tucker's nomination. John Tucker was an outstanding attorney and well-deserving of a judgeship. He was from Beaumont, where the Court would sit. Tucker would be, in fact, rated "exceptionally well-qualified" by the ABA Judicial Nominating Committee.[32] Still, his nomination has to be regarded as a political miscalculation by the Eisenhower White House. If LBJ felt that he was entitled to name at least one Texas federal judge, certainly it would be Ed Clark's brother-in-law. The Eisenhower Administration disregarded Johnson's wishes, and it would pay. The *Beaumont Journal* article had hinted at "delays." Surely, it meant the delays associated with the displeasure of an ordinary U.S. Senator meaning the blocking of one nomination. Yet, Lyndon Johnson was no ordinary senator or majority leader.

So, what happens when you cross the "Master of

[31] *Ibid*.

[32] Goldman, *Picking Federal Judges,* 133, n. 1.

Lyndon B. Johnson listens to Ed Clark speak at a 1945 homecoming reception for Admiral Chester W. Nimitz in Austin. Left to right: Texas Governor Coke Stevenson, Lyndon B. Johnson, Chester Nimitz, and Ed Clark. Photo courtesy of the Lyndon Baines Johnson Library.

the Senate"? Simple. Beginning in February 1959, Johnson stopped consideration of *all* judicial nominations by the Senate. In fact, he did not stop there. He stalled the nominations of all U.S. attorneys and U.S. marshals as well.[33] By June 1959, the list of stalled nominations included the appointment of five federal circuit judges, fourteen district judges, twelve U.S. attorneys, and five U.S. marshals.[34] Also stalled was a bill that would create forty new judgeships that would have relieved congestion in federal courts.[35] There was no beating around the bush about why these judicial nominations were blocked. When asked why the nominations were not going forward, Senator James Eastland of Mississippi, a Johnson ally and Chairman of the Senate Judiciary Committee (who owed his chairmanship to Johnson) was quite blunt. "All judgeships are being held up," said Eastland. "Attorney General Rogers and some very influential senators are feuding over a number of matters and until they are settled, nothing is going to be done about these appointments pending before our Committee."[36]

It was known that the most "influential" senator referred to by Eastland was LBJ. In a summer television broadcast, Senator Kenneth Keating, a Republican from New York and a new member of the Judiciary Committee, blamed the nomination situation squarely on Johnson. "[W]hen he [Johnson] says a nomination is to come out of the committee for action by the Senate, it comes out," Keating said, and "when he says it's not going to come out, it just sits there."[37] Johnson made no retort to Keating's statement. He did not need to reply. Indeed, it might be surmised that LBJ enjoyed this recognition of his power.

The hue and cry over the holdup of these judicial nominations continued to rise. A review of newspaper commentary over the summer of 1959 indicates it was a very serious matter with allegations of justice being delayed and denied. One opinion piece led off with the comment, "Plain old politics of the dirtier variety is held responsible for holding up confirmation of 21 of President Eisenhower's nominations for federal judges this year," noting "the monkey wrenches this throws in the federal legal machinery . . . slows down the wheels of Justice appreciably."[38] The problem was "bitter Democratic resentment at Attorney General William Rogers on a number of personal and policy scores. Foremost, being Rogers' disregard for Senator's nominations for judgeships."[39] The situation only grew worse as the summer of 1959 progressed. The end of the congressional session in the fall of 1959 meant all nominations would expire—and 1960 was a presidential election year.

Somewhat lost in the shuffle were two lawyers in East Texas. John Tucker had put his life on hold since his nomination. Surely, he could not accept new cases to try, nor develop new business. Meanwhile, in Jasper, Joe Fisher waited as well. Judge Fisher was somewhat nonplussed about the situation. While he wanted the nomination, he had no expectation of it, and once said that getting a federal judicial nomination would be like getting a "bolt from the blue." His dream

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[33] Robert Allen, "Judgeships Are Stalled, Too," *Abilene Reporter News* (June 4, 1959), 12-B.

[34] *Ibid*.

[35] *Ibid*.

[36] *Ibid*.

[37] "Most of Ike's Nominations Approved Despite Furor," *Bridgeport Post* (Sept. 20, 1959), 37.

[38] *See* Edson, "Justices Wait While Politicians Play Games," n. 2.

[39] *See* Allen, "Judgeships Are Stalled, Too," n. 25.

job was actually to be U.S. Attorney.[40]

Finally, Tucker himself had had enough. As reported in the *New York Times*, on August 4, 1959, Tucker sent a letter to President Eisenhower citing the delay in being confirmed and the damage to his law practice and his income as reasons for withdrawing his nomination.[41] Sadly, Tucker explained in his letter that so much time had passed without indication of action on the nomination that he had become "embarrassed."[42] Eisenhower replied to Tucker's letter stating, "I have been much aware that for some months your nomination has been pending and fully appreciate, as you point out, how difficult such a period of uncertainty has been for you, your clients and professional associations. Under these circumstances, I must regretfully accede to your wish."[43]

Still, it appears the logjam did not immediately break. By late August, open voices of protest were heard on the Senate floor (and probably duly noted "for later" by Lyndon Johnson). On August 24, Senator Jacob Javits (R-New York) said the Judiciary Committee's delays were "absolutely shocking."[44] Senator Clifford Case (R-New Jersey) said on August 27 that the Judiciary Committee was damaging the Senate's reputation by failing to act.[45] Yet, even after Tucker's withdrawal, the Texas Republican State Committee actually recommended another candidate, but the ABA did not report favorably upon this candidate.[46] Now, the Justice Department finally decided to "face reality."[47] Johnson indicated he would nominate Fisher, and the Administration acquiesced. Attorney General Rogers sent the formal nomination papers to Eisenhower, stating that Fisher "had a satisfactory reputation as to character and integrity. Although there is a division of opinion as to his professional qualifications it is believed that he will be able to perform the duties of his office—*and in view of the position of the Senate Majority Leader is the only alternative to a long continuing vacancy in this District* (emphasis added).[48] In other words, nominate Fisher—or else.

On August 22, three weeks after Tucker withdrew his nomination, the *New York Times* reported that the Senate Judiciary Committee was believed ready to end delays on the judicial nominees.[49] The article mentioned that Johnson was ready to allow confirmations because Tucker's nomination had been withdrawn, and it noted wryly "that Senator Johnson was said to have preferred other candidates."[50] On August 28, 1959, Senator Johnson visited San Augustine, Texas to speak at the Deep East Texas Electric Co-Operative. Johnson stayed at Joe Fisher's home that night.[51] Presumably it was then Johnson informed Fisher that he would definitely receive the nomination.

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[40] Judge Fisher to author. The author clerked for Judge Fisher between 1983 and 1985.

[41] "Nomination Withdrawn," *New York Times* (Aug. 4, 1959), 25.

[42] "East Texas Judgeship Nominee Withdrawn," *Longview News-Journal* (Aug. 3, 1959), 8.

[43] *See* Goldman, *Picking Federal Judges,* 133, n. 1.

[44] "1959 Presidential Nominations," *Congressional Quarterly Almanac 1959,* Online Edition.

[45] *Ibid*.

[46] Goldman, *Picking Federal Judges,* 134, n. 1.

[47] *Ibid*.

[48] *Ibid*.

[49] "Senate Unit Set to Act on Judges," *New York Times* (Aug. 22, 1959), 38.

[50] *Ibid*.

[51] "Ike nominates Joe J. Fisher," *Beaumont Enterprise* (Sept. 8, 1959), 9.

JOE J. FISHER

inding Keeps Slowed Allowed

JUDGE SEEN AS CHOICE OF JOHNSON FOR U. S. BENCH

President Eisenhower yesterday nominated Joe J. Fisher, 49, First Judicial District judge of Jasper, to be a federal district judge for Eastern Texas, the Associated Press reported from Washington.

Joe J. Fisher

Newspaper copied by the author and published by permission of the *Beaumont Enterprise.*

The Jasper News-Boy

United Fund Way to Goal

Fifth JHS Homecoming Plotted in Two Weeks

Two-day Party November 6-7

S. A. Smith Case Is Transferred To Hardin County

Robert Goodger Wins Title

PTA Halloween Carnival Set

Pancake Feed Set This Week

Judge Fisher to Take Federal Court Oath

'Aunt Martha' Griggs Marks 103rd Birthday at Burkeville

Lawyers of Two States Meet To Compare Ideas

New Organization Of City Managers Elects Werner

Wreck Injures Mrs. Miller, Two Children

Jasper Army Reserve Unit Is Now Company Headquarters

The Jasper News-Boy, October 22, 1959.

By now, the U.S. District Court for the Eastern District of Texas had been short a judge for approximately a year and a half. The other judge in the district, Judge Joe Sheehy, was working extremely hard. In fact, friends and family were concerned about his health because of the workload he had undertaken.[52] This would soon change. Once the logjam broke, it broke quickly. On Monday, September 7, 1959, President Eisenhower returned from a European trip. That day, after consultation with Johnson, the President submitted Fisher's name to the Senate.[53]

Fisher then received a call at his chambers in Jasper telling him to come quickly to Washington.[54] Fisher made his way from Jasper to Dallas where he took a midnight commercial flight that arrived in the Capital at 5:30 a.m. on Tuesday morning.[55] Obviously without time for sleep, Fisher breakfasted with LBJ. Later that morning, he appeared before the Senate Judiciary Committee for a ten-minute hearing. Shortly thereafter, the Judiciary Committee voted the nomination out of committee and sent his nomination to the full Senate. The next morning, Wednesday, September 9, the full Senate confirmed Joe Fisher's nomination. In all, it had been an astonishing *36* hours between nomination until confirmation.[56] Judge Fisher received his commission the following day.[57]

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52 "GOP Issue Lost if Court Bill Passes," *Longview-News Journal* (July 13, 1958).

53 "Panel Approves Jasper Nominee for District Judge," *Beaumont Journal* (Sept. 8, 1959), 1.

54 "Senate Unit Votes Fisher Step Nearer U.S. Bench," *Beaumont Enterprise* (Sept. 9, 1959), 7.

55 "Joe J. Fisher is Confirmed as U.S. Judge for District," *Beaumont Enterprise* (Sept. 10, 1959), 3.

56 *Ibid*.

57 "Fisher, Joseph J.," *Biographical Directory of Federal Judges*, *History of Federal Judges* website, https://www.fjc.gov/history/judges/fisher-joseph-jefferson.

Judge Fisher was not stressed by the confirmation process as many nominees are today. He watched the Senate confirm his nomination. He then paid a courtesy call to the White House, where he met with Bryce Harlow, one of Eisenhower's top aides, and offered thanks for his nomination. He then paid his respects to the Attorney General, and paid a visit to fellow Texan Supreme Court Justice Tom Clark.[58] Years later, he recalled going to Washington for his brief trip and noted that actually, the highlight was the fact that he was able to visit with his friend, Senator Howard Cannon of Nevada, whom he had met while both were officers of Lions Club International.[59] Not coincidentally, on the same day that Fisher was confirmed, thirteen other nominees were confirmed by the Senate.[60]

Then-Sen. Lyndon B. Johnson, second from right, sits with Joe Fisher, second from left, on the day in 1959 when Fisher was sworn in as U.S. District Judge for the Eastern District of Texas.

Beaumont Enterprise photo published on October 24, 1959.
Left to right: U.S. District Judge Joe Sheehy, Judge Joe Fisher, then-Senator Lyndon B. Johnson, and Walter Ely, former roommate of Judge Fisher and Joe Tonahill, who robed Judge Fisher that day and later served on the U.S. Court of Appeals for the Ninth Circuit. Photo reprinted with the permission of the *Beaumont Enterprise*.

Johnson had won. Congratulations poured in upon Fisher. The *Houston Chronicle*, a paper known for its staunch pro-Johnson support, ran an editorial on September 10 headlined "President Makes Fine Choice in Naming Fisher to Bench" and stated that "Judge Fisher is one of

[58] *See* "Joe J. Fisher is Confirmed as U.S. Judge for District," *Beaumont Enterprise* (Sept. 10, 1959), 3.

[59] Personal communication, Judge Fisher to the author.

[60] "Senate Confirms 13 as Federal Judges," *New York Times* (Sept. 10, 1959), 16.

the most highly regarded young men—he's 49—in the Texas Judiciary."[61] The *Chronicle*, by the way, had been noticeably silent in its pages during the controversy about the judicial logjam. Yet, Johnson's process and pick did not please everyone. The day after Judge Fisher was confirmed, the *New York Times* editorialized:

> On Knowing the Right People
>
> How fortunate is the judicial nominee graced by a nod from Lyndon B. Johnson, the Senate majority leader. Other men named for Federal judgeships wait for months before they can get even a hearing before the Senate Judiciary Committee. But not Joe J. Fisher, the Johnson-backed candidate for District Judge in the Eastern District of Texas. Judge Fisher was nominated by the President on Monday. On Tuesday morning the Judiciary Committee held a ten-minute hearing on his nomination. At noon it approved him. Yesterday he was confirmed by the Senate. By a strange coincidence, a dozen other judicial nominees—some of them waiting for confirmation since last winter—also emerged from committee and were confirmed yesterday. It might just be that they were held up while the Senate majority leader waited for withdrawal of a Texas nominee of whom he did not approve, and for the Justice Department to get cracking and pick a Johnson candidate. All this might be funny if the federal courts were not in such desperate need for new judges, and if distinguished men—among them sitting judges designated for promotion—were not made to spend months in a particularly embarrassing and difficult limbo.[62]

There was even a local Texas Democratic voice raised in protest. When Fisher's nomination was announced, longtime Beaumont Democratic Congressman Jack Brooks complained, "It is a shame they could not find a qualified man in Jefferson County [Beaumont] who would know the people among whom most of the litigation will arise."[63] Brooks was no fan of Fisher. Joe Tonahill, Judge Fisher's former law partner, had been Brooks' opponent in Brooks' first campaign for Congress.[64] Fisher had campaigned vigorously against Brooks. Still, Brooks was an LBJ protégé, and there is no indication he actually tried to stop the nomination.

It would be forty years before a powerful Senator would again block all judicial nominees because his candidate did not get a nomination. In 1999, Senator Orrin Hatch of Utah, then Senate Judiciary Committee Chairman, blocked all President Clinton's pending judicial nominations because Clinton had not nominated Hatch's choice to a vacant Utah district court bench. Only after Clinton relented and nominated Hatch's candidate did Hatch allow any other nominations to continue.[65]

Joseph Jefferson Fisher was sworn in as a United States District Judge on October 24, 1959 and would remain a district judge until his death in 2000.[66] He had wanted his friend, former

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[61] "President Makes Fine Choice in Naming Fisher to Bench," *Houston Chronicle* (Sept. 10, 1959), 6.

[62] "On Knowing the Right People," *New York Times* (Sept. 11, 1959), 34.

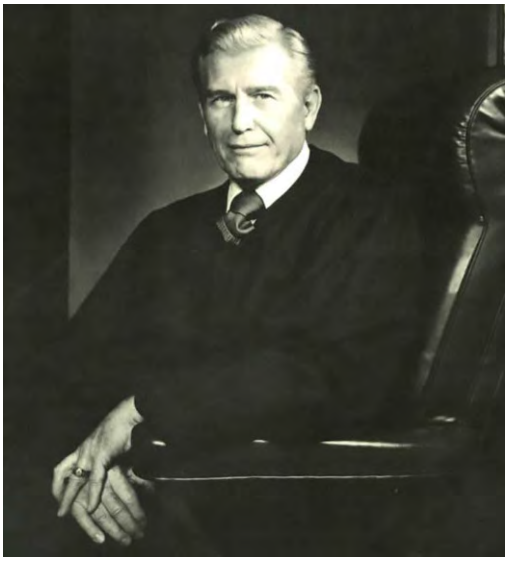
[63] "GOP Issue Lost if Court Bill Passes," *Longview-News Journal* (July 13, 1958).

[64] *Ibid*.

[65] Michael Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Raleigh: Duke University Press, 2001), 127.

[66] "Fisher, Joseph J.," *Biographical Directory of Federal Judges*, *History of Federal Judges* website, https://www.fjc.gov/history/judges/fisher-joseph-jefferson.

Governor and then Federal Judge James Allred to administer the oath,[67] but Judge Allred died September 24, 1959,[68] two weeks after Judge Fisher had been confirmed. At least Judge Allred died knowing his friend had been confirmed.



Portrait of Judge Joseph Jefferson Fisher, Federal Building, Beaumont, Texas.

John Tucker, after having withdrawn his nomination, continued as one of the lead partners in Orgain, Bell & Tucker. He died at the age of 100 in 2008.[69] Both men were revered in East Texas as legal giants and as mentors to many younger attorneys. Judge Fisher is still remembered as the trial judge in *Borel v. Fibreboard,*[70] the case which essentially began asbestosis litigation in the United States. John Tucker was one of the lead counsel for Johns Manville in that case.[71] Tucker enjoyed a good income, and would use that income for good things—such as offering to guarantee the mortgages of the young attorneys in his firm.[72] Joe Fisher and John Tucker became friends and Tucker tried many cases in front of Judge Fisher, who always respected him and valued his judgment and legal acumen. Tucker never betrayed any bitterness over his withdrawn nomination. Perhaps it was for the best that John Tucker remained an active practicing attorney while Joe Fisher went on to become a renowned judge in the Eastern District. Both men would probably be surprised that legal scholars and students of the Senate still mention their names when discussing the federal judicial nomination process.[73]

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67 "Fisher Named for Federal Judgeship."

68 "James V. Allred Fatally Stricken," *Longview Daily News* (Sept. 25, 1959), 1.

69 "Obituary, John J. Tucker," *Beaumont Enterprise* (Jan. 18, 2008).

70 493 F.2d 1076 (5th Cir. 1974).

71 *See*, Appearances of Counsel, *Borel v. Fibreboard*, 493 F.2d 1076 (5th Cir. 1974).

72 Tucker offered to guarantee the mortgage of Howell Cobb when Cobb was a young attorney in his firm. When Cobb was a federal judge, he relayed the story to his law clerk, Kevin O'Gorman, now a Houston attorney.

73 *See* Goldman, *Picking Federal Judges,* n. 1; Gerhardt, *The Federal Appointments Process*, 67.

Stephen Pate, *a member of the Cozen & O'Connor law firm, is a former law clerk for Judge Joe J. Fisher. He is a Fellow of the American College of Coverage and Extracontractual Counsel, a member of the American Law Institute, and a member of the American Board of Trial Advocates.*

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Chief Justice Jack Pope:

Bidding Farewell to Our Common Law Judge

By Marilyn P, Duncan

Chief Justice Andrew Jackson "Jack" Pope, Jr.
April 18, 1913–February 25, 2017.

"The common law is that application of history which affords the public and the professional bar, not certainty in the law, but predictability. Unless the common law possesses that quality of stability, then society itself cannot be stabilized."

Justice Jack Pope, 1974

Texas has been fortunate to attract to its judiciary a number of individuals with the intelligence, vision, and energy to change the course of Texas law even as they work to preserve its fundamental tenets. Chief Justice Jack Pope is among that select group of judicial legends. During his thirty-eight years on the bench he not only authored more than 1,000 opinions, many of them landmark cases, but he also led the charge to bring about fundamental judicial reforms. His influence on Texas jurisprudence was far-reaching and enduring.

The extent of Chief Justice Pope's contributions can best be understood by looking back at how his career unfolded. Even the nutshell version is illuminating.

Andrew Jackson "Jack" Pope, Jr. was born in the West Texas town of Abilene on April 18, 1913. As the son of a medical doctor and the nephew of a lawyer and state legislator, Jack

The young UT Law School graduate, 1937.

was expected from the beginning to go to college and enter one of the professions. The decision about which one came at age twelve when his Uncle Elmer—Walter E. Pope, the lawyer-legislator—was visiting from Corpus Christi and asked Jack's father what he was going to do with his older son.

As the story goes, Dr. Pope answered, "Well, Jack's going to be a lawyer," and in Jack's words, "End of discussion. . . . This is what my father had said about me and I felt highly complimented. And I just never gave it any thought, never did.... He thinks I'd make a good lawyer and ... that was good enough for me."[1]

It was a self-fulfilling prophecy, as Jack Pope prepared himself for the law by immersing himself in debate and student politics in his undergraduate years at Abilene Christian College and then excelling in law school at UT Austin. By the time he joined his Uncle Elmer's small Corpus Christi law firm in 1938, he was, in his words, "ready to sprint."[2]

And sprint he did. His uncle was less interested in practicing law than in serving in the Legislature, with additional involvement in real estate and other commercial endeavors, so Jack was put in charge of all the cases that required courtroom work. This assignment required him to be versatile and hard-working—in one week in 1939 he appeared in corporation court, county court, district court, a court of civil appeals, and the Texas Supreme Court. He later opened his own law firm, and his remarkable record of success in the courtroom did not go unnoticed in the legal community.

The young lawyer becomes the state's youngest district judge, taking the 19th District Court bench in 1946 at age 33.

In late 1946 Pope was appointed by Governor Coke Stevenson to fill the unexpired term of Judge Allen Wood of the 94th District Court in Corpus Christi. Judge Wood had hand-picked Pope for the job, to the young lawyer's complete surprise. "I became a judge by circumstance, not by choice," he liked to say later. He also admitted that he could not

[1] Bill Chriss includes this story in his biographical essay of Judge Pope in *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas*, ed. Marilyn P. Duncan (Austin: Texas Supreme Court Historical Society, 2014). Bill conducted an extensive oral history interview with Judge Pope in 2008.

[2] This was the term Judge Pope used in telling me the story of his early years.

have chosen a vocation more perfectly suited to his personality. At thirty-three years of age, Pope was Texas's youngest district judge, and he brought all the energy and discipline to his new job that he had brought to being a lawyer. It was the beginning of a career that would span almost four decades.

In 1950, at age thirty-seven and with almost four years' experience on the trial bench, Judge Pope was approached by South Texas lawyers and political leaders about filling an even higher judicial post, that of Associate Justice of the Fourth Court of Civil Appeals in San Antonio. He ran for and won election to the seat and spent the next fourteen years on that court.

The genesis of Pope's later drive to improve the educational resources available to judges was in his discovery that hardly any existed when he first took the bench. "I was looking for books that would improve my approach, my background for being a judge," he recalled later. "I looked [all] over the United States to find a school … but there was no place I could go … to be trained, so I just decided to train myself as best I could."[3] He accumulated an impressive library of volumes on law, history, philosophy, and politics, and biographies and legal writings of great lawyers and judges.

Already a strong writer, he focused on improving his opinion-writing skills through the study of the masters. Almost from the beginning, his opinions were distinguished by their references to philosophical and historical texts, and over time he became a noted scholar and historian in his own right.

Off the bench, Justice Pope wrote articles, gave speeches, and served on

Above: Justice Pope sits with his colleagues on the Fourth Court of Civil Appeals in 1953.
Below: Judge Pope's home office was enclosed on three sides by book shelves filled with the volumes that informed his court opinions, scholarly articles, and speeches as well as a complete set of *South Western Reporters* from his court years.

[3] Osler McCarthy, Interview with Chief Justice Jack Pope, 1994.

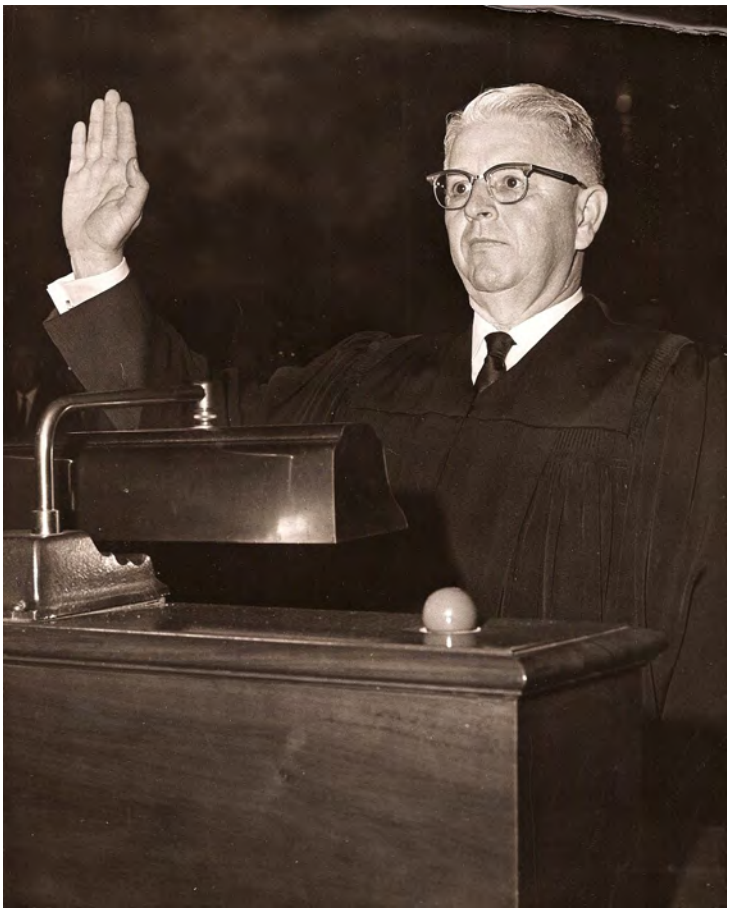
numerous committees in an effort to improve various aspects of the state's judicial system that he had found inadequate. Over time, this advocacy would find its way into the adoption of the state's first set of jury instructions, the establishment of mandatory judicial education for judges, and the promulgation of ethics rules for judges.

Pope's interest in water rights was evident throughout the 1950s as he and other jurists tackled the multitude of legal problems that arose during the devastating drought in Texas. His family owned a large ranch in West Texas, so he experienced firsthand the effects of water shortages and disputed groundwater claims. The state's courts were hindered both by the lack of a coherent body of law governing water rights and by the fact that the seminal water law case—*Motl v. Boyd*, 116 Tex. 82 (1926)—was based on erroneous conclusions.

In 1961, writing on behalf of the Court of Appeals, Justice Pope took the first step toward addressing both of those problems. His opinion in *State of Texas v. Valmont Plantations*, 346 S.W.2d 853 (1961), which legal historian Hans Baade called a "masterpiece on the water law of the Spanish and Mexican eras," was adopted verbatim by the Texas Supreme Court in 1962 and replaced *Motl v. Boyd* as precedential case law.

Justice Pope was already well known among his peers, but *Valmont* put him into the spotlight statewide. He decided to take advantage of his new visibility by tossing his hat in the ring for an open seat on the Texas Supreme Court in 1964. He won the Democratic primary against two opponents and sailed to victory the next November. He was reelected in 1970 and 1977 without opposition.

The story of Justice Pope's twenty-year tenure on the Supreme Court is a fascinating one, particularly the episode leading up to his appointment and Senate confirmation as Chief Justice. It is told well by Osler McCarthy in his tribute posted on the Supreme Court's website (http://www.txcourts.gov/supreme/news/former-chief-justice-jack-pope-1913-2017/) and in more detail by Bill Chriss in his biographical essay in the *Common Law Judge* book.[4] Pope himself told the story in an oral history interview with H. W. Brands.[5]



Justice Pope takes the oath of office for the Supreme Court of Texas, January 1965.

[4] To order a copy of the book, see the information on the Society's website at http://www.texascourthistory.org/Orders/Default.aspx?BookID=1&PageID=37.

[5] Brands conducted the interview in 1986 as part of the University of Texas Tarlton Law Library's Texas Sesquicentennial Oral History Series. It was published in 1998 as volume 3 of the Library's *Texas Supreme Court Trilogy*.

The Texas Supreme Court in 1968. Standing, left to right: Justices Robert W. Hamilton, Zollie Steakley, Jack Pope, and Thomas M. Reavley. Seated, left to right: Justices Ruel C. Walker, Meade F. Griffin, Chief Justice Robert W. Calvert, Justices Clyde E. Smith and Joe R. Greenhill. Photo courtesy of the Supreme Court of Texas Archives.

Soon after Justice Pope was appointed Chief Justice in late November 1982, he posed with fellow members of the Supreme Court. Standing, left to right: Justices Ruby Kless Sondock (in the last month of her six-month appointment), Cread L. Ray, Jr., Robert M. Campbell, Franklin S. Spears, James P. Wallace, and Ted Z. Robinson (appointed to replace Pope as Justice]. Seated, left to right: Justice Sears McGee, Chief Justice Jack Pope, and Justice Charles W. Barrow. Photo courtesy of the Supreme Court of Texas Archives.

Suffice it to say that Pope became Chief Justice by circumstance, coming full circle from his unexpected entrance into the judicial realm more than three decades earlier. And just as he had risen to the occasion in the transition from lawyer to judge, he stepped into the Chief Justice role and immediately got to work on some of the initiatives he considered important.

Over the next two years Chief Justice Pope led the charge to bring about widespread improvements to the administrative machinery of the Third Branch. Under his leadership the Court created the Judicial Budget Board to unify budget requests for the first time, adopted Rules of Judicial Administration for all levels of the judiciary, organized the Council of Administrative Judges, promulgated time standards for the disposition of cases to reduce delays and pendency, ordered a referendum to repeal outmoded lawyer disciplinary rules and replace them with more stringent rules, substantially overhauled the Rules of Civil Procedure, and signed the order establishing the state's IOLTA program, among other initiatives.

When he retired from the Court in January 1984 (he was about to reach the mandatory retirement age), Chief Justice Pope had accomplished much of what he had set out to do. Not that he was ready to step down, though. As he told his various interviewers and interested colleagues, "I was too young to be a judge in the beginning, too old to comply with the retirement law at the end. After thirty-eight years of judicial service and just when I was getting the hang of being a judge, I had to retire."

Retiring from the Court did not mean bowing out of the public eye, however. Chief Justice Pope remained an active advocate and mentor in the legal arena for many years. He had been in high demand as a speaker throughout his judicial career, and the invitations continued to come in from bar associations and judicial organizations as well as law schools and civic clubs. He also wrote articles for bar journals and numerous forewords and introductions to legal handbooks.

Chief Justice Pope, shown here in 1985, delivered more than 1,000 speeches and lectures during and after his years on the court. As with all his writings, he collected and indexed all of them in notebooks that lined one of his home library shelves.

One project of special historical value began when Chief Justice Pope purchased the originals and negatives used in Ocie Speer's 1936 book, *Texas Jurists*, from Steck Publishing Company in the early 1980s. Pope supplemented the collection with contemporary photographs until he had assembled a nearly complete gallery of judges of the Texas Supreme Court. In 1992 he

donated the entire collection to the Tarlton Law Library, along with notes, correspondence, and published materials. Tarlton used the images in its *Justices of Texas 1936–1986* digital library, (https://tarltonapps.law.utexas.edu/justices/).

In his post-Court years, Chief Justice Pope remained an active supporter of the organizations he had fostered earlier—the State Law Library and the Texas Bar Foundation, for example—as well as supporting the development of new programs and organizations. Most important of these (admittedly a biased opinion) was the Texas Supreme Court Historical Society, whose articles of incorporation were signed by Chief Justices Pope, Robert W. Calvert, and Joe R. Greenhill on January 13, 1990.

As a member of the Society's Board of Trustees from its inception, Chief Justice Pope remained actively involved in the business of the board for many years, and at the time of his death he held the position of Chair Emeritus. In addition, he was a founding member of the Society's Fellows. Those who attend the annual John Hemphill Dinner will also note that one of the premium table sponsor-categories bears his name.

The three signers of the Society's articles of incorporation: (left to right) Chief Justice Robert Calvert, Chief Justice Jack Pope, and Chief Justice Joe Greenhill.

A true leader remains a leader not only in the eyes and memories of those who were present during the leadership years, but in the collective public memory over time. Chief Justice Pope's record of achievement as a judge and judicial advocate was so remarkable and so enduring that long after he retired from the Texas Supreme Court, he continued to draw accolades for his contributions. In 2009 the Texas Center for Legal Ethics created the Chief Justice Jack Pope Award for Legal Ethics and Professionalism in honor of his role in establishing a judicial code of ethics and his unblemished record of integrity. In 2013, in conjunction with his 100th birthday, the Texas Legislature passed the Chief Justice Jack Pope Act to Increase Funds for Civil Legal Aid as a tribute to his role in creating IOLTA. Also in recognition of Chief Pope's 100th birthday, he received a letter from the United States Supreme Court—signed by each Justice—commending him on his "lifetime of dedication to the rule of law," and declaring the United States "fortunate to count you among her citizens and Texas among her heroes."

Chief Justice Pope was the surprise inaugural recipient of the Chief Justice Jack Pope Award for Legal Ethics and Professionalism in 2009, announced at that year's Hemphill Dinner. He continued to receive standing ovations at every Hemphill Dinner he attended. Photo by Mark Matson.

One of the highlights of Pope's life came with the signing into law of the Chief Justice Jack Pope Act in May 2013. The act increased funding for IOLTA, the legal aid program he had championed and signed into existence as Chief Justice thirty years earlier. Pictured left to right: then-Justice Nathan L. Hecht, Representative Senfronia Thompson (the bill's House sponsor), Governor Rick Perry, Senator Robert Duncan (Senate sponsor), Chief Justice Pope, and Chief Justice Wallace Jefferson.
Photo by Stephen Stephanian, Texas Governor's Office.

Supreme Court of the United States
Washington, D. C. 20543

March 22, 2013

Honorable Andrew Jackson "Jack" Pope, Jr.
Chief Justice (ret.)
The Supreme Court of Texas
Austin, Texas 78701

Dear Chief Justice Pope:

Congratulations on your 100th birthday. We commend you for your 38 years of judicial service and your lifetime of dedication to the rule of law. Your many contributions to the work of the Supreme Court of Texas, to procedural reform in Texas courts, and to the assuring of justice for the poor will long be remembered. The United States is fortunate to count you among her citizens and Texas among her heroes.

Warm regards.

Cordially,

Chief Justice Pope received this signed letter from the U.S. Supreme Court on his 100th birthday in 2013.

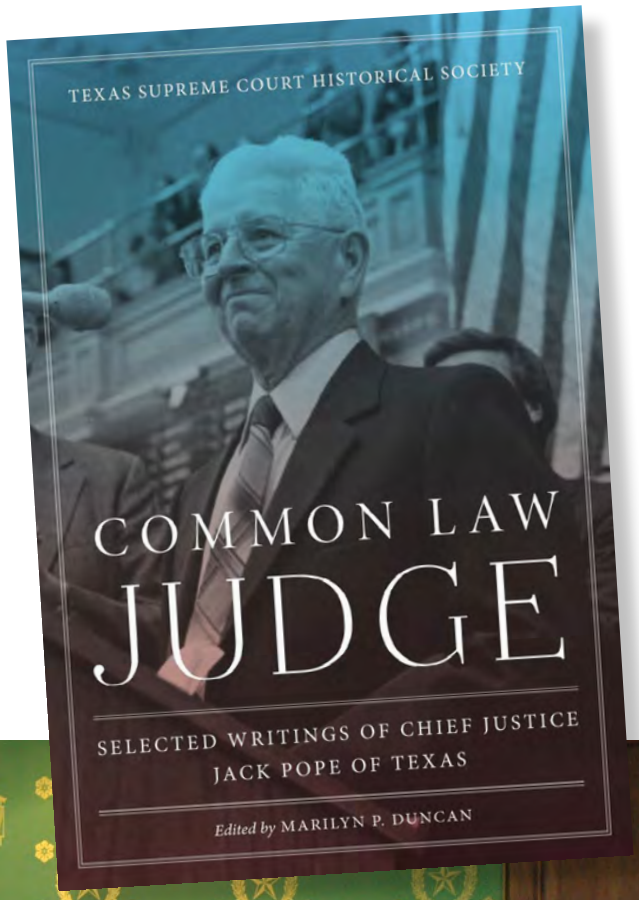
The news of Chief Justice Pope's passing on February 25, 2017 inspired an outpouring of tributes from throughout the state. His funeral on March 3 brought many more, including reminiscences by Chief Justice Nathan Hecht, attorney (and former Pope briefing attorney) Steve McConnico, and former Texas House member (and former Pope BA) Dan Branch. As friends and colleagues, they celebrated his considerable judicial legacy as well as his remarkable personal attributes—integrity, discipline, and humor, to name a few.

Left: During the burial service at the Texas State Cemetery, former State Rep. Dan Branch offers remarks about Chief Justice Pope's place in Texas history. Right: Rep. Branch presents the Texas flag that flew at half mast at the State Capitol to Chief Justice Pope's sons Andrew Jackson Pope III (left) and Allen Pope (center). Photos by David A. Furlow.

Chief Justice Pope, who would have turned 104 on April 18, would have insisted that all the praise was undeserved. Then again, as all of us who knew him well can attest, he would have basked in the limelight. He had had more than three decades since retiring from the Court to enjoy his status as judicial legend, and enjoy it he did. His legacy will endure, along with the respect, admiration, and affection he inspired in his family, friends, and colleagues.

Chief Justice Pope's close friend Terry Martin plays taps to close the burial service and bid a final farewell. Photo by David A. Furlow.

The Society published a book of Chief Justice Pope's writings in 2014.



Members of the Texas Supreme Court and other colleagues joined Judge Pope at a pre-release reception in November 2013 to obtain signed copies of *Common Law Judge*. Pictured left to right behind Pope: Justice Don Devine, Justice Phil Johnson, Justice Paul Green, then-Justice Nathan Hecht, editor Marilyn Duncan, Justice Jeff Boyd, and Justice Jeff Brown. Photo by Hannah Kiddoo.

Flags flew at half-staff at the State Capitol in honor of Chief Justice Pope. Photo courtesy of the Texas House of Representatives.

Governor's Directive to Lower Flags to Half-Staff in Honor of Chief Justice Pope

The State of Texas lost a respected leader with the passing of former Supreme Court Chief Justice Andrew Jackson "Jack" Pope, Jr. Chief Justice Pope had a distinguished career as a jurist in Texas. As a mark of respect for this highly regarded public servant, it seems fitting that flags in Texas be lowered to half-staff.

Therefore, pursuant to Chapter 3100 of the Texas Government Code and 4 U.S.C. § 7, I do hereby direct the lowering of all Texas and United States flags to half-staff in memory of Chief Justice Pope. Flags throughout the state should be at half-staff from sunrise on Friday, March 3, 2017, the day of his interment, through sunset on Tuesday, March 7. Please notify all pertinent personnel within your agency and other state agency leaders of this directive.

Individuals, businesses, municipalities and other political subdivisions and entities are encouraged to fly their flags at half-staff for the same length of time as a sign of honor and respect for this dignified public servant.

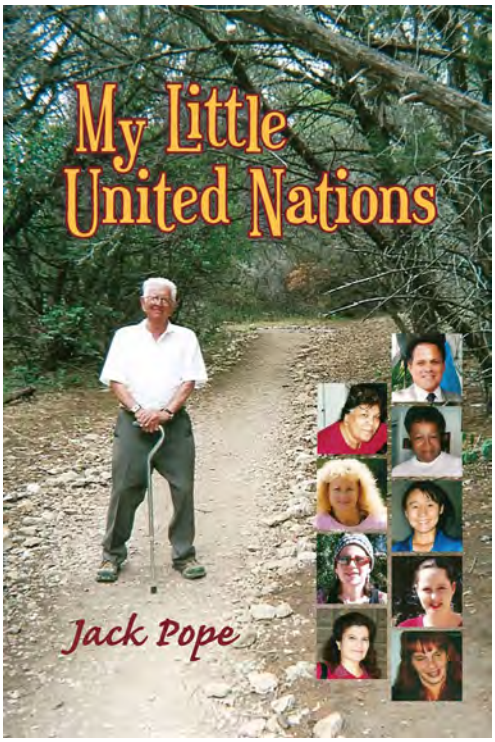
Our prayers of comfort are extended to Chief Justice Pope's family in their time of grief. I urge all Texans to commemorate his life of service to the State of Texas.

Respectfully,

Greg Abbott
Governor

While I was working with Chief Justice Pope on the *Common Law Judge* book in 2012, he asked me whether I could help him publish a volume of vignettes he had written about his remarkable group of caregivers. He called them his "Little United Nations" because of their cultural and geographical diversity—Japan, Germany, India, Mexico, Native American Indian—as well as their spirit of teamwork.

I found the vignettes to be as diverse as his United Nations team, ranging from accounts about the challenges of caring for his beloved wife Allene during her final illness to character sketches of his caregivers, to anecdotes about his coming to terms with slowing down with age, to advice columns on eating and exercising to stay healthy. They display a completely different side of Jack Pope—a man who appreciated the beauty and humanity of everyone he came in contact with, from his caregivers to strangers on his walking trails to a waitress in a coffee shop, and who was determined to live life to the fullest to the very end. That included satisfying his impulse to write, a carryover from his years of writing opinions and articles. His talent as a writer and storyteller shines through in these little gems.



Chief Justice Pope self-published *My Little United Nations* in 2012 as a gift to family, friends, and caregivers.

His primary caregiver, Lauren Barrett, had organized the pieces in a three-hole notebook and supplied a stack of photos that might be used to illustrate the book. It was just a matter of tying things together with transitional chapter openings and photo captions, and working with a local printer to produce the books.

Simple—particularly in comparison to producing the other book—and this one brought Judge Pope tremendous pleasure in his final years. When I last visited him at his home this past Christmas, he was sitting at his breakfast table looking at a copy of *My Little United Nations*. He beamed when I walked in, and said, "I'm reading our book! It's still good!" It's a memory I'll always treasure.

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In Memoriam

James P. Wallace, Justice (ret.), Supreme Court of Texas

April 8, 1918—April 17, 2017

Photo courtesy of
Tarlton Law Library.

The *Journal* learned of the passing of former Justice Jim Wallace as we were about to go to press. His record of public service as a Judge, Justice, and State Senator earned him wide respect in the legal community.

Born in White County, Arkansas on April 8, 1928, James Price Wallace attended rural schools there. Following high school, he served in the U.S. Navy for three years before entering the University of Arkansas. After graduating in 1952, he worked for IBM briefly before enrolling in law school at the University of Houston, earning his J.D. degree in 1957.

Wallace was admitted to the bar in 1957 and practiced law for the next eighteen years. He served two terms in the Texas Senate (1971–74), and was Judge of the 215th District Court of Harris County from 1975 to 1978. From 1978 to 1980 he was a Justice of the First Court of Civil Appeals in Harris County.

Justice Wallace was elected to the Texas Supreme Court in 1980 and again in 1986. While on the Court, he authored some ninety opinions, including the seminal *Sabine Pilot* decision that prohibited an employee from being discharged for refusing to perform an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

In September 1988, Justice Wallace left the Court and returned to private practice. He was appointed by Governor Ann Richards to fill an unexpired term on the Texas Railroad Commission in the early 1990s.

Justice Wallace was buried in the Texas State Cemetery.

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Pat Nester: Looking Back, Moving On

Interview by Marilyn P. Duncan

Photo by Martin Chait.

Most of us associated with Pat Nester at the Society and the State Bar have known for at least a year that he is retiring at the end of May 2017. That date is fast approaching, and as no one has succeeded in convincing him to stay longer, we're faced with saying goodbye.

The Society's board and membership paid tribute to Pat at the spring meeting in March, noting that he has brought outstanding leadership and service as well as abundant optimism to the organization during his four-year tenure as Executive Director (see story and photos on p. 103). Everyone who knows Pat—and that includes untold numbers of his fellow lawyers and administrators who have worked with him in his capacities as CLE Director and Bar College Director—knows he brings a rare level of competence and sheer likeability to every task.

As with anyone we've known and liked for many years, though, there are aspects of Pat's background and aspirations that remain unknown to most of his colleagues. He shares some of that information with *Journal* readers in the following interview.

MD: Tell us a bit about your early years and educational training.

PN: I was an oil company (Conoco) kid, and my family moved around from Ponca City, Oklahoma,

to Bountiful, Utah, to Spokane, Washington, and finally to Houston. I got a degree in degree in English literature from Principia College in Elsah, Illinois, an MS in Journalism from the University of Illinois, and my law degree from the University of Texas. A little 364-day tour in northern I Corps, Republic of Vietnam, intervened between Principia and U of I.

MD: What was the turning point in your career?

PN: Well, there were several, but the one that put me on my present path went like this: I had graduated from law school on the GI Bill and was practicing a little law, teaching writing in the journalism department at UT, and working as a research associate at the Center for Communication Research at UT. Mostly I was working on what is called in academia "soft money," a research grant, which unfortunately dried up and was not renewed.

Out of the blue, I wrote a letter to then president of the State Bar Travis Shelton to inquire about a job. Miraculously, I ended up in an interview with the venerable Gene Cavin, the founder of the State Bar's Professional Development Program. "What the heck is CLE," I asked. "It's a bird's nest on the ground," Gene said. And since 1978, so it has been.

MD: How has continuing legal education changed since you became involved in the State Bar's CLE programs?

PN: When I first started working on CLE programs, I would fairly frequently get a letter complaining that "I pay my bar dues too and we never get any CLE programs in Sweetwater or Beaumont or Tyler or Del Rio or you name it." Sadly, that was 100 percent accurate. But Mr. Cavin was a gadgeteer and technophile, and soon we were sending a staff person around the state in a van with recorded CLE programs on giant Ampex tape machines, which we showed at hotels and motels.

Later, we started live one-day "institutes" that went to ten cities, three per week. This was quite a burden for speakers—doing their thing and then hustling to the airport for the next day's event. I recall the thoroughly dignified Fort Worth lawyer Kleber Miller after a gig in one small city saying, "You know, Pat, I don't think I have ever stayed before in a motel with mirrors on the ceiling."

I followed Gene's lead in bringing several new generations of technology to CLE, which eventually allowed us to get high-quality content to every lawyer in the state who wanted it. What has remained the same over the years is the willingness of CLE speakers to give up a ton of time to write an article for the course book and to travel to wherever to make presentations.

So, I regard the most remarkable thing about CLE in Texas as that phenomenon, lawyers enthusiastically helping other lawyers to become better. The profession, the courts, and really all Texans have been beneficiaries of this impulse.

MD: You've also seen a lot of changes in the Society during your four-year stint as Executive Director. What do you consider to be the most positive and enduring of these?

PN: The Society is an amazing creation, with more activities per cubic inch than any other organization I know of. That impulse to help the profession burns particularly bright here with memorable Hemphill Dinners, a fabulous ejournal, magnificent book projects like *Taming Texas*, CLE programs on court history, and a snappy website that pulls it all together.

The best thing that has happened on my watch—and I really just played an administrative role in it—was the Society becoming fully self-sustaining and stable. This too was mostly the result of dedicated volunteers who helped with fund raising and planning. Michelle Hunter, executive director of the State Bar, also gets thanks for providing a work space for the Society at the Texas Law Center. I'm intentionally not mentioning specific names here because there are too many of them, but Michelle is an exception. So too are my splendid colleagues in the day-to-day work of the Society, Mary Sue Miller, Marilyn Duncan, and David Kroll.

MD: Any particularly memorable moments?

PN: I remember Chief Justice Jefferson coming over to me as I was sitting at a table at a Texas Bar Foundation Dinner in 2013 and asking me if I would please consider becoming executive director of the Society. Chief justices usually aren't clamoring to talk to me, and CJ Jefferson, a man I respect for an abundance of good reasons, really surprised me. What a good time it has been as a result of that conversation, and if you happen to be reading this, thank you, sir.

MD: I suspect that the real Pat Nester—the one who will shed his State Bar persona on June 1—is someone with a few surprises up his sleeve. Can you reveal what some of those might be?

PN: Travel, get in better shape—blah, blah, blah. And I plan to finish my historical novel about Maya Zimmerman, a 1954 UT law grad who, failing to get a legal job from regular law firms (guess why), gets involved in a secret government program initiated by a depressed President Eisenhower wanting to do whatever is necessary make the world safer after the hyperbolic bloodletting of WWII.

Also, years ago, I took piano lessons and learned to play by reading music, but I've always wanted to play jazz piano by ear. So that's on the agenda. (See the movie *La La Land* for my vision of a final result.)

And finally, I want to learn fluent Spanish. If you live in Texas, you just ought to be fluent in Spanish. *Vaya con dios, amigos*.

Well, it's not big enough for a Longhorn game, but it's OK.

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Case Update—*Moore v. Texas*

By Jani Maselli Wood

In the Winter issue of this journal, I authored an article about attending oral argument at the United States Supreme Court. The case was *Moore v. Texas* and the Supreme Court issued its decision on March 28, 2017.

In a 5–3 decision written by Justice Ginsburg, the Supreme Court rejected the Texas scheme for determining whether someone's intellectual disability made them ineligible to be executed. To understand this case, a brief review of the procedural posture of the case and the Texas Court of Criminal Appeals' first decision in this area is helpful.

When the United States Supreme Court decided *Atkins v. Virginia*,[1] outlawing the death penalty for intellectually disabled people, the states were put in the position of determining how to address this issue. As the Court of Criminal Appeals (CCA) explained in its first post-*Atkins* case: "This Court does not, under normal circumstances, create law."[2] But, in *Ex parte Briseno*, the Court of Criminal Appeals created a framework that has been used since 2004 because the Legislature never enacted a statute. The framework included seven judicially created inquiries, which asked questions including, for example, whether the person had ever lied effectively or whether he was a follower or a leader.[3]

The Court of Criminal Appeals shares a building with the Texas Supreme Court in Austin. Photo by David A. Furlow.

In Mr. Moore's writ of habeas corpus filed in 2003, his first claim was that he suffered from mental retardation (now called an intellectual disability) and that under the Supreme Court precedent of *Atkins,* he should not be executed. The writ took several years to percolate through the trial court, and ultimately a hearing was held regarding this issue. At the conclusion of the hearing, the trial court made findings that Mr. Moore was intellectually disabled and thus ineligible for execution. The trial court specifically found "by a preponderance of evidence …

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1 536 U.S. 304 (2002).

2 *Ex parte Briseno*, 135 S.W.3d 1, 4–5 (Tex. Crim. App. 2004), *abrogated by Moore v. Texas*, 15-797, 2017 WL 1136278 (U.S. Mar. 28, 2017).

3 *Ex parte Briseno*, 135 S.W.3d at 68–9.

that he meets the definition of mental retardation under the current guidelines of the AAIDD, under both DSM-IV and DSM-V, and under the prevailing standards per *Atkins v. Virginia*." The trial recommended that relief be granted and Mr. Moore's sentence either be commuted or his case remanded for a jury determination of whether he suffered from mental retardation. The trial court's findings were seventy pages and exceedingly detailed regarding why there was a recommendation for relief to be granted.

On appeal to the Court of Criminal Appeals, the trial court's findings were rejected with one dissent by Judge Elsa Alcala. In rejecting the trial court's findings, the CCA held that because the Texas Legislature had never enacted laws to implement *Atkins*, trial courts were still bound by the *Briseno* framework.[4] The fact that the trial court had used the most current scientific work on intellectual disabilities instead of the references used ten years earlier in *Briseno* was the basis for the Court of Criminal Appeals' decision in rejecting the trial court's findings.

Judge Alcala's sole dissent urged that, "As recommended by the habeas judge, it is time for Texas to reevaluate the decade-old, judicially created standard in *Ex parte Briseno* in light of a shift in the consensus of the medical community regarding what constitutes intellectual disability, and in light of the Supreme Court's recent holding in *Hall v. Florida* indicating that courts are required to consider that consensus in assessing intellectual-disability claims."[5]

Mr. Moore petitioned for certiorari and the Supreme Court granted review as to this issue:

> Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

Argument was heard on November 29, 2016, and less than four months later, the Supreme Court ruled for Mr. Moore. Despite the 5–3 ruling, *all* the judges rejected the *Briseno* framework. The majority opinion specifically set forth that adjudications of intellectual disability should be "informed by the views of medical experts."[6] The Supreme Court further held, "[m]oreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source."[7] Finally, the Court held that the Court of Criminal Appeals' test "creat[es] an unacceptable risk that persons with intellectual disability will be executed."[8] And the Supreme Court found compelling that "[i]ndeed, Texas itself does not follow *Briseno* in contexts other than the death penalty."[9] The Supreme Court's ruling was a complete disavowal of the Court of Criminal Appeals' decisions in *Briseno* and *Moore*.

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4 *Ex Parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015), cert. granted in part sub nom. *Moore v. Texas*, 136 S. Ct. 2407, 195 L. Ed. 2d 779 (2016) and vacated and remanded sub nom. *Moore v. Texas*, 15-797, 2017 WL 1136278 (U.S. Mar. 28, 2017).

5 *Ibid*., at 528.

6 *Moore v. Texas*, 15-797, 2017 WL 1136278, at *4 (U.S. Mar. 28, 2017).

7 *Ibid.*

8 *Ibid*.

9 *Moore v. Texas*, 15-797, 2017 WL 1136278, at *13 (U.S. Mar. 28, 2017).

The U.S. Supreme Court acted to clarify Texas law and national standards governing death penalty cases. Image courtesy of the U.S. Supreme Court, https://www.supremecourt.gov/.

Judge Alcala's lone dissent was referenced and quoted several times by the Supreme Court. One quote encapsulates much of Judge Alcala's dissent: "Most emphatically, she [Judge Alcala] urged, the CCA 'must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled'; 'reliance on ... standard[s] no longer employed by the medical community,' she objected, 'is constitutionally unacceptable.'"[10] The Supreme Court majority ultimately agreed with her assessment of the case.

In sum, the case of *Moore v. Texas* is a win not just for Mr. Moore but for other similarly situated defendants. Mere weeks before this decision, the Court of Criminal Appeals again rejected a condemned inmate's claim of intellectual disability in reliance upon *Briseno*. And, again, Judge Alcala was the sole voice dissenting, where she stated, "I would defer resolution of this appeal until after the Supreme Court decides *Moore v. Texas*, in which the issue there, as here, is whether Texas's legal standard for determining intellectual disability violates the Eighth Amendment's prohibition against the execution of intellectually disabled people."[11]

The Supreme Court has given guidance that current medical standards must be used. Judge Alcala's dissent was visionary. And for myself, being a former attorney for Mr. Moore, attending the argument, and then having the opinion come down in his favor, has been one of the highlights of my career as an attorney.

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[10] *Moore v. Texas*, 15-797, 2017 WL 1136278, at *8 (U.S. Mar. 28, 2017).

[11] *Petetan v. State*, AP-77,038, 2017 WL 915530, at *49 (Tex. Crim. App. Mar. 8, 2017).

After working in the Texas Department of Criminal Justice and at the Texas Court of Criminal Appeals, **JANI MASELLI WOOD** *currently serves as an Assistant Public Defender in Harris County and, in addition, is an Adjunct Professor at the University of Houston Law Center. Born in Massachusetts, she now lives in Houston.*

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Taming Texas Judicial Civics and Court History Project: Spring 2017 Update

By Warren W. Harris
Photos by David A. Furlow

The Society's Taming Texas Judicial Civics and Court History Project, which was launched in spring 2016 with the publication of the first *Taming Texas* book and an innovative Houston area classroom program, has continued to develop this spring. Sponsored by the Society's Fellows, the project sends judges and attorneys into seventh-grade Texas history classrooms to teach students about the history and workings of the state's court system.

Clockwise from upper left: Harris County Attorney Vince Ryan and Assistant County Attorney Francie Aguirre; Brian Humphrey of Abraham, Watkins, Nichols, Sorrels, Agosto & Aziz; Houston bankruptcy attorney and Jackson Walker partner Bruce Ruzinsky; Houston family law attorney Cindy Diggs of Holmes, Diggs, Eames & Sadler.

This spring, working again through the Houston Bar Association's Teach Texas Committee, the classroom project has reached more than 3,500 students in 132 classes in the Houston area. Some of the 77 volunteers who taught classes in April at O'Donnell Middle School in the Alief School District are pictured below. The HBA's Teach Texas Committee cochairs—Justice Brett Busby, Judge Debra Mayfield, and David Furlow—are leading this effort. We greatly appreciate all of those who continue to contribute their time and expertise to this important program.

More about the Taming Texas Project, including news about the second book in the series and plans for the upcoming year, will appear in the summer issue of the *Journal*.

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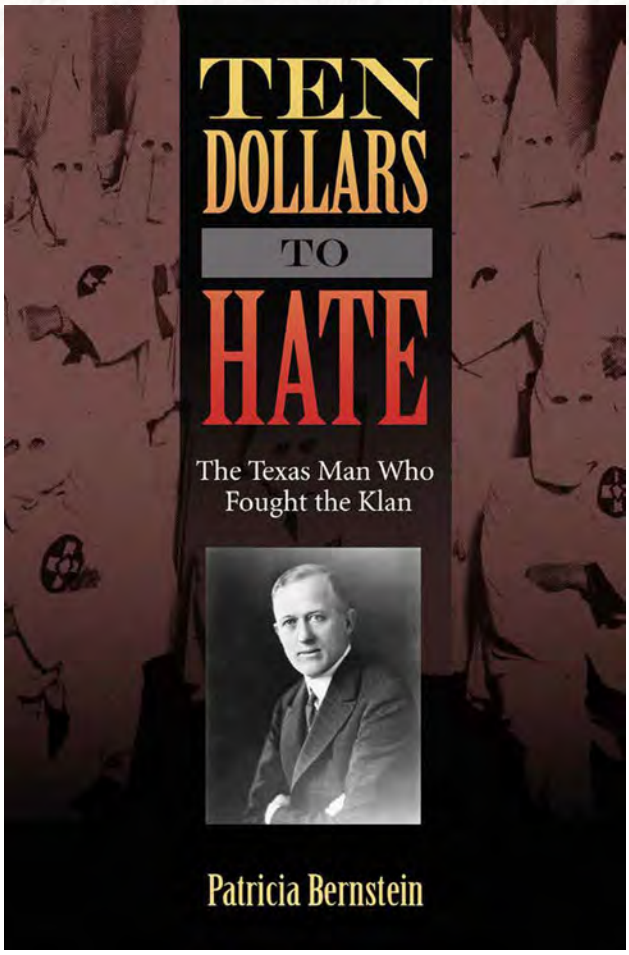
Patricia Bernstein's *Ten Dollars to Hate: The Texas Man Who Fought the Klan*

Book Review by Terence L. O'Rourke

This book is a true-crime, adventure narrative of a youthful, courageous Texas District Attorney who takes on a sinister and politically powerful, multi-state gang—the second Ku Klux Klan. Reading this engaging saga, you are tempted to wonder: who will play Dan Moody in the Steven Spielberg movie?



Ten Dollars to Hate:
The Texas Man Who Fought the Klan
By Patricia Bernstein
Texas A&M University Press, 2017
http://www.tamupress.com/product/Ten-Dollars-to-Hate,8740.aspx

With methodical, well-footnoted accuracy, author Patricia Bernstein produces a vivid portrait of a real hero who fights and defeats Goliath and his gang. Perhaps, more importantly, Bernstein paints a political-cultural diorama of Texas and America in the early twentieth century, explaining how bias, fear, and hatred can become so virulent and ubiquitous. She explains how this second incarnation of the KKK was far more broadly focused than an anti-Negro or anti-Catholic group of bullies. The author also shows how the Klan actually operated as an opportunistic movement capable of hating and targeting anyone who displeased it.

This book is also fascinating because it presents a nuanced context from which other political heroes arise. There is a poignant vignette of a courageous twenty-seven-year-old, first-time member of the Texas House from deep East Texas who delivers fiery orations against the Imperial Wizard and his representatives and introduces legislation to criminalize law enforcement officers who conspired with the Klan. Young John William Wright Patman would go on to become nationally prominent as the dean of the U.S. House of Representatives and Chair of its powerful Banking and Currency Committee.

Young Wright Patman was joined in his opposition to the Klan by his deskmate in the Texas House, Sam Ealy Johnson. In his Hill County district, many German Americans and Mexican Americans were vilified and intimidated by the Klan. Sam's son, Lyndon, became President of

the United States and was responsible for the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965. LBJ proudly explained in 1965:

> My father fought them [the Klan] many long years ago in Texas and I have fought them all my life because I know their loyalty is not to the United States of America but instead to a hooded society of bigots.

The protagonist hero, Dan Moody, goes on to become the youngest Attorney General in the history of Texas and later its Governor. Perhaps the blockbuster movie should end here. The rest of Patricia Bernstein's book is a rich and detailed chronicle of the rough and tumble of Texas politics including colorful figures such as Ma and Pa Ferguson and "Pappy" Lee (Pass the Biscuits) O'Daniel and the Hillbilly Boys.

This story of the anti-corruption crime fighter ends with irony. Dan Moody becomes the attorney for Coke Stevenson in his legal battle contesting the election of "landslide" Lyndon Johnson, who has won the 1948 U.S. Senate seat in Texas by 87 votes. Moody focuses on the now infamous Box 13 in Alice, Texas and the influence of George Parr, "The Duke of Duval." The case ends in an injunction hearing in the chambers of U.S. Supreme Court Justice Hugo Black. Lyndon Johnson is represented by five lawyers, including Abe Fortas; Coke Stevenson is represented by one, Dan Moody. Justice Black orders the injunction lifted, LBJ wins, and the rest is history.

Ten Dollars to Hate will be used as a reference and resource for a forthcoming Continuing Legal Education seminar on hate crimes and un-civil prejudice jointly sponsored by Harris County Attorney Vince Ryan and Harris County District Attorney Kim Ogg. Yet to be scheduled, this CLE will be online and free for all members of the State Bar.

TERENCE L. O'ROURKE is *a former Texas Assistant Attorney General and currently serves as Special Assistant County Attorney with the Harris County Attorney's Office in Houston, Texas.*

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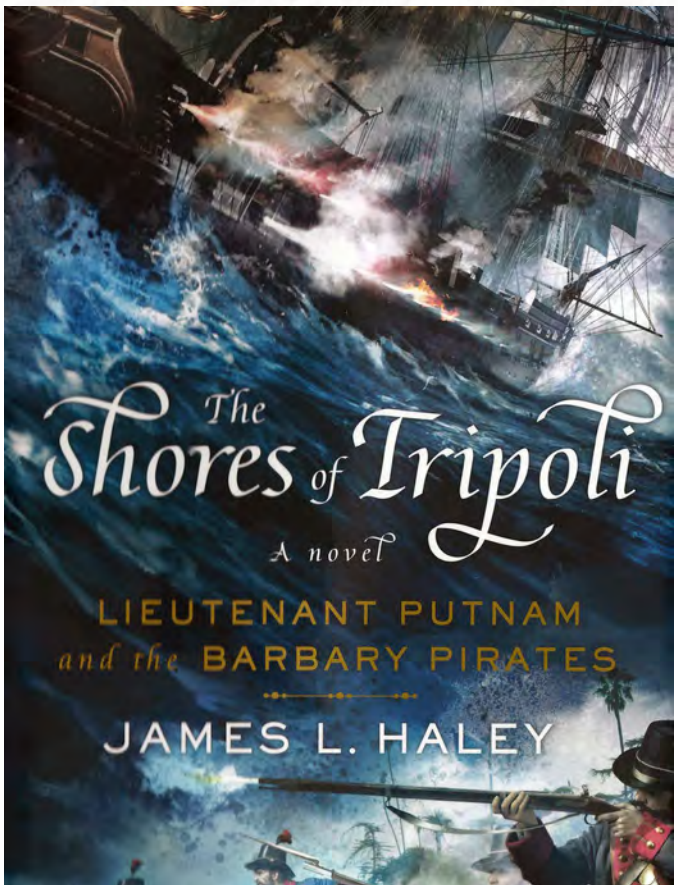
James L. Haley's *The Shores of Tripoli: Lieutenant Putnam and the Barbary Pirates*

Book Review by Marilyn P. Duncan

The Background...

The Society's own historian Jim Haley is not one to limit his scope to Texas history, having branched out in recent years to produce a definitive history of Hawaii (*Captive Paradise*, St. Martin's Press, 2014) and an award-winning biography of Jack London (*Wolf*, Basic Books, 2010). Haley is at his best when he lends his narrative talents to making historical characters and events come alive. Not surprisingly, the shift from nonfiction to historical fiction is a natural one for him, as is strikingly evident in his newest book, *The Shores of Tripoli: Lieutenant Putnam and the Barbary Pirates.*



The Shores of Tripoli: Lieutenant Putnam and the Barbary Pirates
By James L. Haley
Penguin Random House
Nov. 2016
Includes detailed glossary, map, and diagrams of the *U.S.S. Constitution*.
http://www.penguinrandomhouse.com/books/316560/the-shores-of-tripoli-by-james-l-haley/9780399171109/

According to Haley, the idea for the novel came directly from a prominent editor at G. P. Putnam's Sons Publishers in New York. Late in 2012, the editor confided to Haley's agent that "Putnam was considering an early American, tall ship sailing navy series of adventure novels, but they were holding back because they were unsure whether the U.S. Navy was actually doing anything between the War of 1812 and the Civil War." She went on to observe that "American literature has never had its Horatio Hornblower or Lucky Jack Aubrey, and [Putnam] sensed a pent-up market."[1]

[1] For the full story, see Haley's website at http://www.jameslhaley.com/tripoli.html.

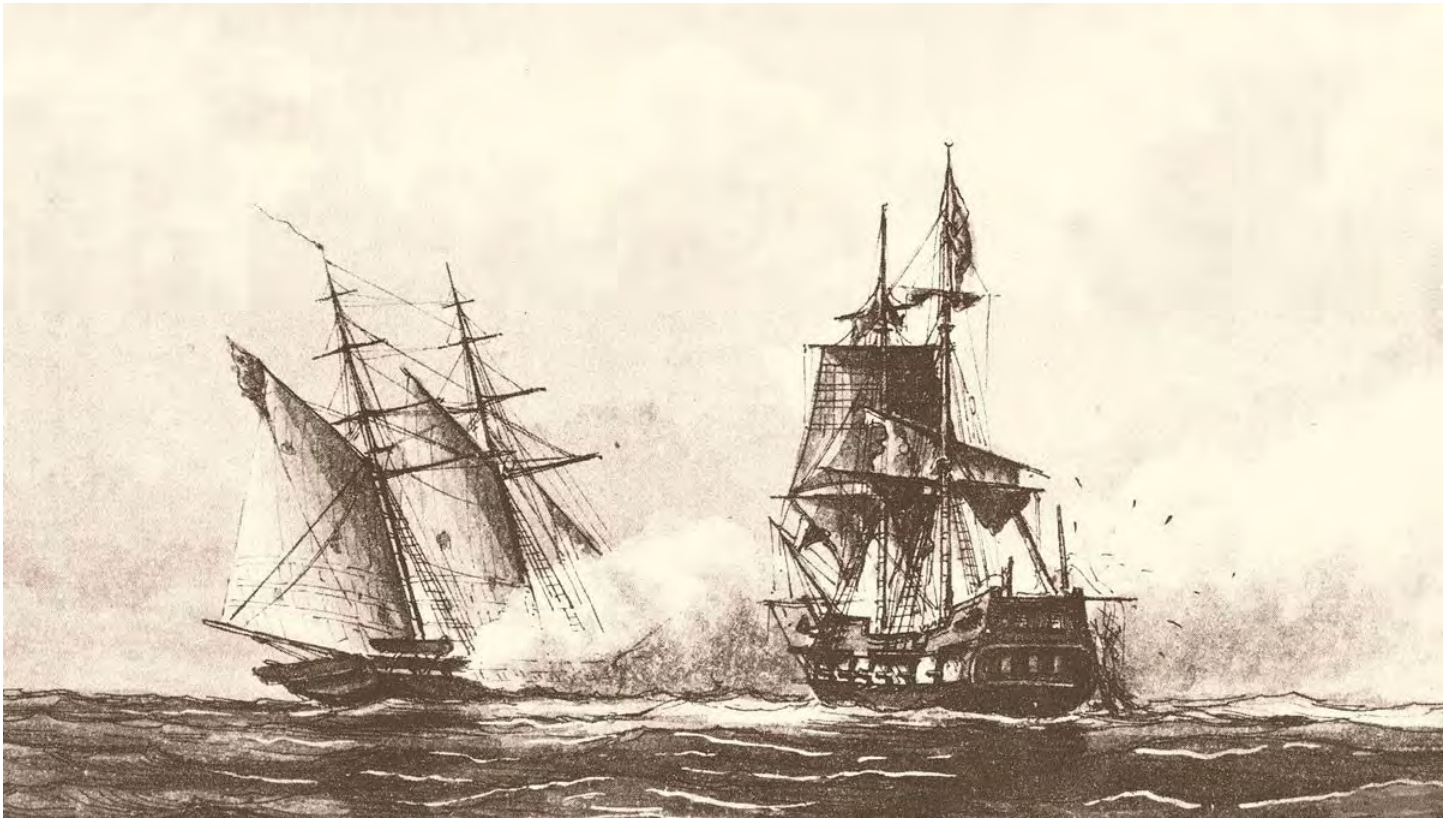
When Haley's agent suggested that he write a proposal for such a series, Haley sat down, and in his words, "forty-eight hours later, I sent off an outline for eight interlocking novels that followed the adventures of a juvenile midshipman in the Barbary War, through the War of 1812, perhaps chasing pirates in the Caribbean in 1818, with the missionaries in Hawaii in the 1820s, in the Texas Revolution in 1836, and so on to the Civil War, when he would be a white-haired old commodore."

The editor—and Putnam—loved his ideas and invited him to expand his proposal, which he did. Four years later, the first novel in the Bliven Putnam Naval Adventure series arrived on the shelves.

The Story...

It is 1801 and President Thomas Jefferson has assembled a deep-water navy to fight the growing threat of piracy, as American civilians are regularly kidnapped by Islamist brigands and held for ransom, enslaved, or killed, all at their captors' whim. The Berber States of North Africa, especially Tripoli, claimed their faith gave them the right to pillage anyone who did not submit to their religion.

Young Bliven Putnam, great-nephew of Revolutionary War hero Israel Putnam, is bound for the Mediterranean and a desperate battle with the pirate ship Tripoli*. He later returns under legendary Commodore Edward Preble on the* Constitution*, and marches across the Libyan desert with General Eaton to assault Derna—discovering the lessons he learns about war, and life, are not what he expected.*



U.S.S. Enterprise capturing the Tripolitan schooner *Tripoli*, 1801. From a drawing (circa 1878) by U.S. Navy Captain William Bainbridge Hoff. Image courtesy of Wikimedia Commons.

An Excerpt…

1. The Morning Watch

June 6, 1801

Before he went to sea, Bliven Putnam had wondered why men personify ships, name them, ascribe temperaments to them, refer to them in the feminine. It took only one day at sea in a stiff blow to understand it. When the sails of the *Enterprise* bellied out and the masts bent before the wind, when the ship buried herself in a trough and then vaulted to surmount a swell, she took on the life of the most spirited filly. A ship at sea—you ask things of her, sometimes difficult things, tricky things, and she responds, although not always in the affirmative. She becomes your home and your safety—your only safety—in the middle of an ocean. And she not only crosses that ocean, but does so with a grace and touch that is nothing if not feminine. To seamen this relationship with their vessel becomes embedded in their nature. Those who do not go to sea cannot understand it; they accept it readily enough, and they mimic the sailors' reference to a ship as "she," but they do not comprehend it, really. That is the seamen's bond alone.

The Response…

Reviews of *Shores of Tripoli* began appearing in the weeks leading up the book's official release date on November 1, 2016, and even traditionally hard-to-please reviewers (the Mikeys of the book world) gave it a thumbs up. *Kirkus Reviews* praised the book's "page-turning action…. Haley's deck-by-deck tour of the legendary frigate is fascinating." Also early on, the Historical Novel Society came out with a resoundingly positive review:

"An award-winning historian who also writes fiction can be expected to deliver excellence, and Haley doesn't disappoint…. With poignant echoes of today's horrors with terrorism, the book sadly reminds us this conflict is not new…. The novel concludes with a dramatic, event-filled ending which brilliantly sets the stage for the following books in this new series. This wonderful book is, in historian Barbara Tuchman's words, 'a distant mirror.' An absolute must read."

The *Wall Street Journal*'s reviewer was equally effusive:

"Mr. Haley's research has been so completely absorbed as to be unobtrusive. He has mastered the politics of the period and the business of sailing a ship….There is much charm and humor, as well….Meanwhile this is a book that, like so much of the best fiction, makes you both think and feel….

"The history is thoroughly researched, the fiction inventive, the style at once easygoing and rapid…. This is a marvelous and richly enjoyable novel, and the intended series to follow promises to do for the American Navy and the Marines

what C. S. Forester and Patrick O'Brian did for the Royal Navy. It is that good.... More, please."[2]

Other great reviews followed. Here is a representative sample:

"It's a rare novelist who has a commanding grasp of history, and it's a rare historian who has an intuitive understanding of how to bring fictional characters to life. Fortunately for us readers of the *Shores of Tripoli*—and (please!) of the next book about Lieutenant Bliven Putnam—James L. Haley fuses historian and novelist into a spellbinding storytelling whole. There could be no better captain to sail this ship."—Stephen Harrigan, best-selling author of *The Gates of the Alamo* and *A Friend of Mr. Lincoln*

"It's no surprise that Haley's command of historical detail here is superlative, and his adrenaline-inducing descriptions of cannon-fueled sea battles are also first-rate." —*Booklist*

"Rich with historical detail and cracking with high-wire action, *The Shores of Tripoli* brings this amazing period in American history to life with brilliant clarity." —BookReporter.com

Assessment from a Reader Closer to Home...

Society Executive Director Pat Nester, an avid reader of historical fiction and adventure novels, quietly added his review to the Amazon.com reviewers' page, and he captures the spirit of the book perfectly:

"A real barn burner of a historical novel. Lots of action, lots of real history. It shows a young and relatively poor United States wrestling with whether and how to use military force against Arab navies of northern Africa after the turn of the nineteenth century. We now call them Barbary pirates, but by their own code, they were accumulating wealth and power in the name of, and for the glory of, their religion with explicit scriptural writings to support them.

"The United States and the seafaring nations of Europe had for many years paid tribute to North African potentates or they risked their ships being stolen and their sailors imprisoned. President Jefferson had had enough. Young Lieutenant Putnam, one of the few fictional characters in the book, is a winning protagonist—a naval officer but still a precocious teenager, hard to fathom but apparently the navy was so hard up for officers that they allowed 14 year olds as midshipmen. I guess we won the struggle—sort of. The diplomacy and military action were going in different directions much of the time.

[2] *Wall Street Journal*, quoted online at the Penguin Random House website at http://www.penguinrandomhouse.com/books/316560/the-shores-of-tripoli-by-james-l-haley/9780399171109/. Excerpts from the other reviews are also available on the website.

"But the best news is that this novel is planned to be the first of a series. I can't wait to read about Lt. Putnam's adventures in the 1812 war against mighty Britannia, which in those bold days really did rule the waves, with massive 'ships of the line,' not puny frigates like the Americans."[3]

Author Jim Haley.
Photo by Mark Matson.

The Bottom Line…

Having worked closely with Jim Haley for almost ten years, I find it difficult to be entirely objective in writing about something he wrote. I remember well his excitement about producing a proposal for the Navy series and his subsequent full-steam-ahead approach to getting the first book written. To clarify: for Jim, "full steam ahead" means racing down several tracks at once. During that period he was dividing his time between writing the novel, promoting the newly released narrative history of the Texas Supreme Court,[4] collaborating on the Society's Taming Texas series,[5] and handling frequent speaking engagements. His relentlessly diverse schedule makes *Shores of Tripoli* an even more miraculous creation.

I'm not sure Jim really has a niche—he's good at everything he puts his mind and pen to—but historical fiction, especially when it's filled with high adventure and romance (young Bliven Putnam's relationship with the lovely and strong-minded Clarity Marsh is deftly done), just might be the strongest of his strong suits. The book is a great read, as its successors will surely be, and no one will be surprised if the series eventually finds its way to Hollywood a la *Master and Commander*. I second the *Wall Street Journal* review—it's that good…

[3] Pat's review is available online at https://www.amazon.com/Shores-Tripoli-Lieutenant-Barbary-Pirates/dp/1524702137, under Customer Reviews.

[4] Haley is the author of the Society-sponsored *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013).

[5] The Society published the first book in the series, *Taming Texas: How Law and Order Came to the Lone Star State*, in January 2016.

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U.S. Seventh Circuit Chief Judge Diane P. Wood Will Keynote Hemphill Dinner

The Honorable Diane P. Wood, Chief Judge of the United States Court of Appeals for the Seventh Circuit, will be the principal speaker at the Texas Supreme Court Historical Society's Twenty-Second Annual John Hemphill Dinner. The dinner, which is the Society's main fundraising event, is scheduled for Friday, September 8, 2017, at the Four Seasons Hotel in Austin.

Judge Wood has a strong connection with Texas. In 1968, she graduated as valedictorian from Westchester High School in Houston. She graduated from the University of Texas's Plan II Honors Program in 1971 with highest honors and special honors in English. She earned her J.D. with highest honors from UT Austin in 1975 after serving as Notes and Comments Editor of the *Texas Law Review* and after winning the Outstanding Senior Law Student Award. After graduation, she clerked for Judge Irving L. Goldberg of the Fifth Circuit and for Justice Harry A. Blackmun of the U.S. Supreme Court. She was among the first women to clerk at the Supreme Court.

From 1993 until 1995, Judge Wood served as deputy assistant general in the Antitrust Division of the U.S. Department of Justice with responsibility for the Division's International, Appellate, and Legal Policy matters. Before her appointment by President Bill Clinton as Judge of the U.S. Court of Appeals for the Seventh Circuit in 1995, she was the Harold J. and Marion F. Green Professor of International Legal Studies at the University of Chicago Law School. She remains a Senior Lecturer at the UC Law School.

Judge Wood, a noted legal scholar, has written extensively in many areas of the law. The titles of her articles offer a glimpse at her interests: *Deconstructing the Foreign Trade Antitrust Improvement Act (FTAIA)* (2016), *The Changing Face of Diversity Jurisdiction* (2009), *The Bedrock of Individual Rights in Times of Natural Disaster* (2008), *"Original Intent" Versus "Evolution"* (2005), and *Our 18th Century Constitution in the 21st Century World* (2005). Outside the legal realm, she has played the oboe and English horn as a member of the Chicago Bar Association Symphony for more than two decades.

Macey Reasoner Stokes, 2016–17 Society President, will preside over the evening program at the Hemphill Dinner, which will include a memorial to the late Chief Justice Jack

Pope and a presentation by the Texas Center for Legal Ethics of the Ninth Annual Chief Justice Jack Pope Professionalism Award. The award recognizes a Texas appellate lawyer or judge who demonstrates the highest level of professionalism and integrity.

For ticket information, visit the Society's website at http://www.texascourthistory.org/hemphill or email tschs@sbcglobal.net.

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Bluebonnets in Austin Memorial Park, March 2017. Photo by David Kroll.

The Society's TSHA Annual Meeting Program Was a Standing-Room-Only Success

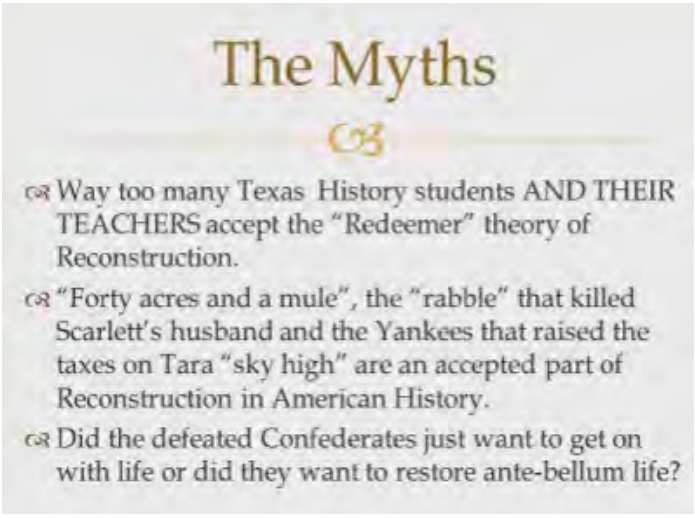
By David A. Furlow

The Society presented a superb program at the Texas State Historical Association's 2017 Annual Meeting on March 2, 2017. The "Semicolons, Murder, and Counterfeit Wills: Texas History through the Law's Lens" panel featured Judge Mark Davidson, Bill Kroger of Baker Botts LLP, and Chief Justice (Ret.) Wallace Jefferson of Alexander Dubose Jefferson Townsend, who presented papers at the Hyatt Regency Hotel in downtown Houston. Members of the audience filled every chair in the room, forcing late arrivals to stand at the back and along the walls.

Above: Macey Stokes opened the TSHA panel program. Below: In his Semicolon Court presentation, Judge Mark Davidson challenged popular myth-conceptions of Texas Reconstruction. Photos by David A. Furlow.

Society President Macey Stokes began the panel presentation by discussing the Society's history of preserving, protecting, and sharing the rich history of Texas law, courts, and judges. She introduced each of the speakers and told the audience about the background and experience each brought to the panel.

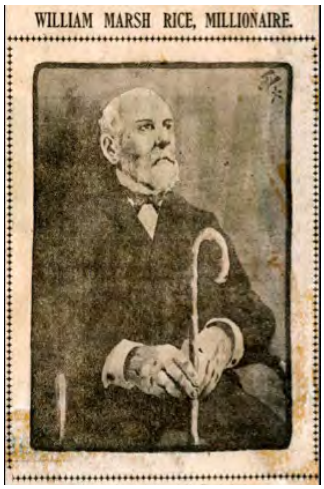
Judge Mark Davidson took the rostrum to defend the integrity of the much-maligned Reconstruction-era Texas Supreme Court panel known to history as the "Semicolon Court." He examined the popular myths about Reconstruction, tracing many of their origins to author Margaret Mitchell's best-



selling *Gone with the Wind*. He then examined the three periods of Reconstruction in Texas and showed how each one affected both Texas law and the Texas Supreme Court. By examining the origins of the brave men who served on the Texas Supreme Court, he refuted the myth that Northern carpet-baggers and knaves filled the Court's ranks, and showed that they were brave men who sought to protect the rights of freed slaves and followed not only the spirit but also the letter of the law.

In January 1874, that panel of the Texas Supreme Court ruled that Democratic Party gubernatorial candidate Richard Coke's election was void because it had been illegal. As a result of the Court's invalidation of the December 1873 gubernatorial election, Democrats supporting Richard Coke seized the second floor of the Capitol. The ex-Confederate Democrats' takeover of the Capitol resulted in Coke's investiture as Texas's first Democratic Party governor after the Civil War. He immediately appointed a new Supreme Court, and the members of the so-called Semicolon Court left office with a bad reputation based entirely on its last case.

Bill Kroger of Baker Botts then reported on the amazing life and infamous murder of William Marsh Rice, the founder of Rice University and client of Baker Botts. Beginning with observations about how the State of Texas has been uniquely hospitable to the growth of large cities, Kroger then turned to Rice, a man who only came to Texas in 1865 but soon won a Texas-size reputation not in battle, by cattle-raising, or through office-holding but as a merchant, banker, and philanthropist who helped make the City of Houston one of the most dynamic cities in America.



Bill Kroger commanded the attention of the TSHA Annual Meeting audience with stories of Houston philanthropist William Marsh Rice, a forged will, and the creation of Rice University. Photos of Bill Kroger and audience by David A. Furlow. Images from Bill Kroger's PowerPoint.

Bill Kroger presents his TSHA PowerPoint. Photo by Sharon Sandle.

Kroger described how Rice sought the best lawyers in the new city sprouting up along Buffalo Bayou to protect his diverse financial and property interests, including Peter W. Gray (later a Texas Supreme Court Justice), Walter Browne Botts, and Captain James A. Baker, all of whom worked for the same law firm: Gray & Botts, later Gray, Botts & Baker, and ultimately Baker Botts. Using photographs and records from the Baker Botts archival collection, Kroger traced the relationship between Rice and Baker Botts that lasts to this day, including Baker Botts' donation of $1 million in 2016 to the Baker Institute at Rice University.

A large audience watched the Society's TSHA panel program. Front row from right: Texas Supreme Court Chief Justice Wallace Jefferson (ret.), Society President Macey Stokes, panel speaker Judge Mark Davidson. Second row from right: Texas Supreme Court Justice Dale Wainwright (ret.), Society Executive Director Pat Nester. Photo by David A. Furlow.

Kroger's speech then focused on the pivotal role Captain James Baker played in protecting William Marsh Rice's legacy: the creation of Rice Institute, later known as Rice University. The historians, lawyers, judges, and TSHA members who attended the program leaned forward and listened as the story of Captain James Baker's investigation of the mysterious death of William Marsh Rice unfolded into the investigation of a murder perpetrated by Rice's New York lawyer and valet. Kroger showed how Captain Baker testified at the trial and helped secure Rice's dream of endowing a new university in Houston. It was just the kind of history TSHA members came to Houston to learn.

Former Chief Justice Wallace Jefferson served as the panel commentator. Photo by David A. Furlow.

In his commentary, Chief Justice Wallace Jefferson shared his insights about Judge Davidson's analysis of the Semicolon Court and Bill Kroger's story about how the Texas economy, William Marsh Rice's fortune, and Baker Botts' role expanded after the Civil War. Chief Justice Jefferson broadened the discussion to include the experience of the men and women who endured slavery, gained emancipation in the 1860s, secured freedom through Reconstruction-era constitutional amendments and legal reforms, and contributed to nineteenth and twentieth century Texas.

Chief Justice Wallace Jefferson reminded the audience of the amazing variety of narratives—from sometimes reprehensible to frequently remarkable—that comprise Texas history and the diversity of Texans who overcame all obstacles to bequeath to us the beautiful state we have today. He noted that his own ancestor Shedrick Willis had been owned by Judge N.W. Battle, a Waco district court judge. In *Westbrook v. Mitchell*, 24 Tex. (1859), the Texas Supreme Court affirmed Judge Battle's ruling that a former slave could not sell himself back into slavery before the Legislature enacted a statute on January 27, 1858 authorizing such transactions.

Bill Kroger and Robert Downie brought copies of Baker Botts' original partnership agreement to the TSHA Annual Meeting. Left: Photo by David A. Furlow. Right: Image of Captain James A. Baker from Bill Kroger's PowerPoint.

Left: Society members visited the TSHA booksellers' hall. Right: James Harkins' General Land Office sales booth after the Society's presentation. Photos by David A. Furlow.

TSHA historians and members who came to Houston to hear the Society panel's presentation lingered to examine original photos and records, including Baker Botts' original partnership agreement that Bill Kroger and Baker Botts librarian Robert Downie brought to the meeting from Baker Botts' archives.

As Executive Director Pat Nester's column in this issue demonstrates, the Society's members discovered that TSHA's Annual Meeting provided them with a rich menu of choice historical fare. Dozens of panel programs covered every period of Texas history during the three days of the conference. A booksellers' hall and a TSHA auction offered every kind of map, book, and auction item they might desire. Awards ceremonies celebrated outstanding historical research and publications.

During TSHA's 2017 Annual Meeting, the Society's panel program again proved that lawyers and judges are historians who make history in Texas's courts and offer Texans a unique perspective on Texas history viewed through the lens of the law.

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Wimberley cactus flower. Photo by David A. Furlow.

TSHA Approves Society's TSHA 2018 Panel Proposal

Charles Nugent, Adult Program Manager of the Texas State Historical Association, shared the welcome news that TSHA's Program Committee has approved the Society's program session for the 2018 Annual Meeting in San Marcos, Texas, March 8–10.

Old Main on the campus of Texas State University.

Our session's title is *Laying Down Texas Law: From Austin's Colony through the Lone Star Republic.* Chairing the panel will be Society's 2017–18 President, the Hon. Dale Wainwright, former Justice of the Texas Supreme Court and now Chair of Texas Appellate Practice for Greenberg Traurig, LLP.

The first presentation will be *Alcaldes and Advocates in Stephen F. Austin's Colony, 1822 through 1835,* by Justice Jason Boatright of the Fifth Court of Appeals in Dallas.

The second presentation, titled *From the Alamo to San Jacinto to Austin: The Attorneys Who Fought in the Texas Revolution and Founded the Republic, 1835 to 1845,* will be given by Dylan O. Drummond of Squire Patton Boggs, (US) LLP, 2017–18 Society Vice President.

This *Journal*'s Executive Editor, David A. Furlow, will serve as the panel's commentator. Please save the date and join Justice Dale Wainwright, Justice Jason Boatright, Dylan Drummond, and David Furlow in San Marcos in the first week of March 2018.

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The Society's Spring 2017 Members' Meeting and Pat Nester's Award

By David A. Furlow

> *"We, therefore, the delegates with plenary powers of the people of Texas, in solemn convention assembled, appealing to a candid world for the necessities of our condition, do hereby resolve and declare, that our political connection with the Mexican nation has forever ended, and that the people of Texas do now constitute a free, sovereign, and independent republic..."*
>
> — Texas Declaration of Independence, March 2, 1836, Washington-on-the-Brazos.

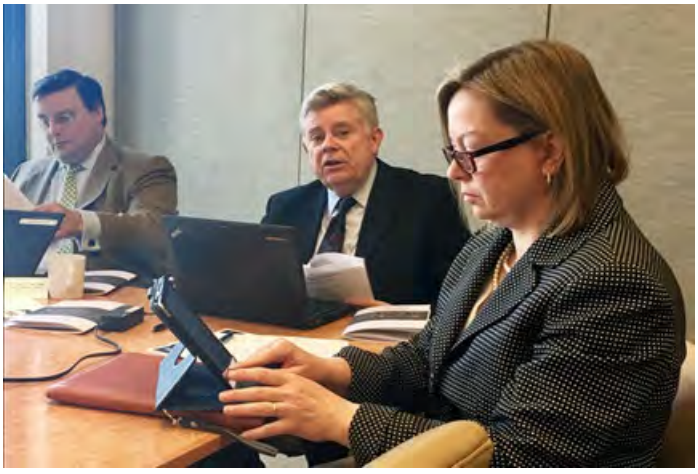
Our Society convened its Spring 2017 Board of Trustees and Members' Meeting on Texas Independence Day, March 2, 2017, at the Houston office of Baker Botts. Just as the Texas Declaration of Independence involved a transition from a Mexican state to an independent republic, the Spring 2017 Meeting marked a transition of leadership from one executive directorship to another.

After a series of reports before the Board demonstrated the vitality and strength of the Society's finances, membership, and projects, Society President Macey Stokes convened an exceptionally well-attended Members' Meeting. Over sixty people, including trustees, members, and a majority of the Justices of the First and Fourteenth Courts of Appeals, attended the meeting. They remained for a catered lunch to hear J.P. Bryan, Jr., the founder of the Bryan Museum in Galveston, present his PowerPoint program "Texas, Where the West Begins."

The Members' Meeting involved three memorable moments. The first came when the Members elected a new slate of officers and trustees.

The second occurred when retiring Executive Director Pat Nester introduced new Executive Director Sharon Sandle to those in attendance.

The third arrived with Society President Macey Stokes' recognition of Executive Director Pat Nester's service to the Society, unflagging leadership, and abundant optimism. The award thanks Nester for a job exceedingly well done. It reads:



Left to right: Dylan Drummond, Pat Nester, and Sharon Sandle review Society project reports during the Board of Trustees' Meeting. Photo by David A. Furlow.

In the name and by the authority of

The Supreme Court of Texas

Be it known that

Patrick A. Nester

served the Texas Supreme Court Historical Society as

Executive Director

With distinction and integrity from 2013 to 2017.
The Supreme Court of Texas honors and appreciates his dedication to the collection and preservation of information, papers, photographs, and significant artifacts relating to the Supreme Court and the appellate courts of Texas. He will be held in the highest esteem by those with whom he served.
In recognition of valuable services rendered, the Court has caused this certificate to be executed and presented.

Nathan Hecht

Chief Justice

President Macey Stokes recognized Pat Nester's service.
Photo by Mary Sue Miller.

Many judges attended the Members' Meeting. (At left, left to right:) Fourteenth Court of Appeals Justice Kevin Jewell, Dallas Court of Appeals Justice Jason Boatwright, Fourteenth Court of Appeals Justice Ken Wise, and Texas historian Jody Ginn. (At right, left to right:) Fourteenth Court of Appeals Chief Justice Kem Frost and First Court of Appeals Justice Rebecca Huddle. Photos by Mary Sue Miller.

Pat Nester mused that the Louvre's treasures were no match for TSHA Annual Meeting presentations and *Journal* Editorial Board dinners. Photo provided by David Furlow.

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J.P. Bryan, Jr.'s West Began at the Society's Spring 2017 Board Meeting

By David A. Furlow

In 1917, Arthur Chapman wrote "Out Where the West Begins," a poem that includes the oft-quoted lines,

> ***Out where the handclasp's a little stronger,***
> ***Out where the smile dwells a little longer,***
> ***That's where the West begins;***
> ***Out where the sun is a little brighter,***
> ***Where the snows that fall are a trifle whiter,***
> ***Where the bonds of home are a wee bit tighter,***
> ***That's where the West begins.***

Close, Arthur, but no cigar.

"The West begins in Texas," the Society's special guest speaker, J.P. Bryan, Jr. proudly proclaimed to more than sixty people, including Justices of the First and Fourteenth Courts of Appeals, trial judges, Texas historians, and Society trustees, officers, and staff, enjoying a catered lunch Baker Botts generously provided to everyone who attended the Society's Spring 2017 Board of Trustees and Members Meeting.

Fourteenth Court of Appeals Justice Ken Wise, a trustee of the Society and the host of the "Wise about Texas" series of Texas history podcasts, introduced Mr. Bryan, his long-time friend and collaborator on projects involving the history of Stephen F. Austin's colony, its "Old 300" colonists, and the town of San Felipe. Justice Wise discussed Bryan's success in bringing Texas history alive and encouraged those in attendance to visit the Bryan Museum in Galveston, which he described as "one of the finest history museums in Texas." High praise, indeed, from someone who knows and loves Texas history.

Bryan spoke without notes for nearly forty minutes in a uniquely evocative speech representing the culmination of a remarkable career. He began life in Freeport, the son of James P. Bryan, Sr., a famous historian, Texana collector, and president of the Texas State Historical Association. The Bryans' roots ran even deeper, for J.P. Bryan, Jr. is the great-great-great-grandson of Emily Austin Bryan Perry, the sister of Stephen F. Austin.

J.P. Bryan, Jr. began his collection while nine years old, when he bought an 1859 .22-caliber derringer. After becoming an attorney and handling finance in New York City, he returned to the Lone Star State to found Torch Energy Advisors. Yet his heart remained in collecting the most important books, maps, and artifacts of the Southwest. His PowerPoint contained the best and most memorable of the seventy thousand items in the Bryan Museum, a vast, two-story

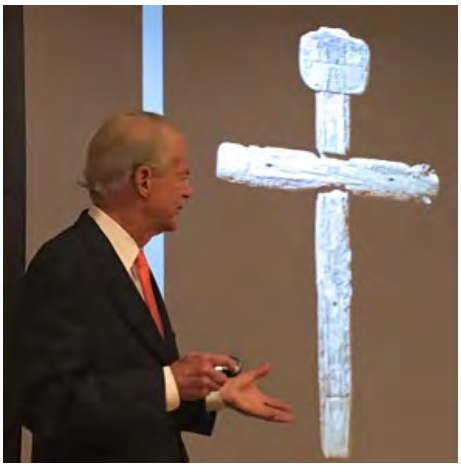
Renaissance Revival building—the Galveston Orphans' Home that survived the Great Hurricane of 1900.

Top:
Justice Ken Wise introduced J.P. Bryan.

Middle:
Bryan discusses objects from the Bryan Museum's collections.

Bottom:
J.P. Bryan's PowerPoint discussed the Bryan Museum's scale model of the Battle of San Jacinto. Bryan Museum PowerPoint slide.

Photos of Justice Wise and J.P. Bryan, Jr. by David A. Furlow.



Bryan's speech ended with an appeal to Lone Star pride. "Texas: there's no other state with a history like ours," he observed. "Come on down to Galveston, to the Bryan Museum, so I can show you where the West begins."

The Bryan Museum's PowerPoint slides showcased the museum's extensive collections. Bryan Museum slide.

The Spring 2017 Members' Meeting drew to a close as Macey Stokes, Pat Nester, and Sharon Sandle led a group of members to the Hyatt Regency Downtown to attend the Texas State Historical Society's Annual Meeting. J.P. Bryan, Jr. earned the Society's gratitude for delivering a speech spoken from the heart of an extraordinary man who loves Texas history. Society President Macey Stokes and Baker Botts deserve a special thanks for making their offices available and for providing an excellent meal to all in attended. Bryan's speech ended a great Spring 2017 Meeting on a beautiful, blue-sky day that began with the Society's celebration of the 1836 Declaration of Independence and ended where the West begins.

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Texas Women Judges' Day Celebrated at Texas Capitol

By Dylan O. Drummond

Photo courtesy of TxCourts@Twitter.

On April 4, 2017 the Capitol welcomed back women judges and justices from all over the state for the second Texas Women Judges' Day.

First celebrated during the 84th Legislative Session in 2015, this year's event again recognized women serving in the Texas judiciary. The same day, the Senate passed a resolution commemorating the occasion, as well as Texas's uniquely long and storied history of women serving on the bench.

Specifically, the Senate resolution noted the Texas Supreme Court's landmark 1925 case of *Johnson v. Darr*, in which Governor Pat Neff appointed Justices Hortense Sparks Ward, Hattie

Leah Henenberg, and Ruth Virginia Brazzil to adjudicate a case from which all the male members of the Court had recused themselves due to their membership in a fraternal organization implicated in the dispute. *See generally, Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925).

The resolution also recognized legendary Judge Sarah T. Hughes, who became the first woman to hold a permanent position on a Texas bench in 1935 when Governor James Allred appointed her to preside over the 14th District Court in Dallas. After becoming the first woman judge elected in Texas, she went on to serve seven terms on that court. In 1961, President John F. Kennedy appointed Judge Hughes as the first female federal district judge in Texas. Just two years later, it tragically fell to Judge Hughes to administer the presidential oath of office to Lyndon Johnson on the tarmac in Dallas after President Kennedy's assassination.

Up from just over 1,000 women judges in 2015, now some 1,300 women preside over courts throughout Texas.

Judge Sarah T. Hughes (in foreground) administers the presidential oath of office to Lyndon Johnson on November 22, 1963. Photo courtesy of the Lyndon Baines Johnson Library and Museum.

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Texas Senate Passes Judicial Security Bill Named in Honor of District Judge Who Survived Assassination Attempt

By Dylan O. Drummond

Late one evening a few weeks before Thanksgiving in 2015, Travis County District Judge Julie Kocurek's son, Will, drove her home from a local "Friday Night Lights" high school football game. As they pulled up to their house, Will noticed a trash bag blocking the driveway, and got out to move it. Without warning, an assailant charged their car and shot at Judge Kocurek until Will courageously stepped between the would-be assassin and his mother to shield her.

Thirty-nine days and twenty-nine surgeries later, Judge Kocurek returned home from the hospital just before Christmas. Determined not to allow the cowardly attack on her life to deter the administration of justice, Judge Kocurek triumphantly returned to the bench in February 2016. Her assailant and two accomplices were indicted in the Western District of Texas in September 2016 and will face trial in October 2017.

After the attempt on Judge Kocurek's life, the Office of Court Administration (OCA) surveyed some 1,100 Texas judges. In response, 38% indicated they were concerned for their personal safety at least once while at work and 42% felt the same at least once while away from work during the preceding two years.

In his 2017 State of the Judiciary address, Chief Justice Nathan Hecht opened his remarks by recounting Judge Kocurek's and Will's steadfast courage that harrowing night in 2015. Chief Hecht also recommended that the Legislature pass the Judge Julie Kocurek Judicial and Courthouse Security Act of 2017 (the "Kocurek Act") containing the comprehensive recommendations to improve judicial security made by the Texas Judicial Council and authored by Councilmember and Senator Judith Zaffirini. The Kocurek Act creates the position of Director of Security and Emergency Preparedness at the OCA, requires local law enforcement to send reports to the OCA regarding any court security incidents, establishes local court security committees, requires court security training of judges and court personnel and imposes a $5 filing fee in civil cases to fund these efforts, and facilitates removal of judges' personal information from publicly available documents.

Fittingly, the Texas Senate passed the Kocurek Act on Texas Women Judges' Day, as well as a Senate Resolution recognizing and commending Will for his selfless courage in protection of his mother. The Kocurek Act is now pending before the Texas House Judiciary and Civil Jurisprudence Committee.

Left to right: Senator Kirk Watson, Judge Julie Kocurek, Will Kocurek, Senator Judith Zaffirini, Chief Justice Nathan Hecht, and OCA Director David Slayton. Photo posted @dodrummond, Twitter (Apr. 5, 2017, 7:06 AM), https://twitter.com/dodrummond/status/849594140799242240.

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Calendar of Events

Society-related events (highlighted in yellow) and other events of historical interest

Through the end of 2017

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

Through July 9, 2017

"Purchased Lives: The American Slave Trade from 1808 to 1865" exhibition continues in the Bob Bullock Museum of Texas History. The exhibition examines the lives of individuals intertwined in the domestic slave trade by exploring slavery's reach beyond New Orleans and Galveston, beyond Texas, beyond the South, and into the very fabric of America. http://www.thestoryoftexas.com/visit/exhibits/purchased-lives

The "Mapping Texas" exhibition continues in the Bob Bullock Museum of Texas History. Significant historic maps available through the Texas General Land Office will interest Society members. https://www.thestoryoftexas.com/visit/exhibits/mapping-texas.

Through October 8, 2017

The Houston Museum of Natural Science hosts an exhibition of Texas General Land Office maps in "Mapping Texas: From Frontier to the Lone Star State" exhibition. Featuring maps dating from 1513 to 1920, the special exhibition traces more than 400 years of Texas history. The museum is at 5555 Hermann Park Dr., Houston, Texas 77030, (713) 639-4629. The exhibition is in the Hamill Gallery and features maps dating between 1513 and 1920. The works come from the archival collection of the Texas General Land Office, Houston map collectors Frank and Carol Holcomb, the Witte Museum in San Antonio, and the Bryan Museum in Galveston. For more information, https://www.thestoryoftexas.com/visit/exhibits/mapping-texas.

Through Summer 2017

The Alamo presents a new kind of exhibit: Bowie: Man • Knife • Legend. The Alamo presents a brand new exhibition exploring the life of legendary Alamo defender James Bowie and his famous knife. James Bowie's transformation from mere mortal to enduring

legend began ten years before his death at the Alamo. The knife that bears his family's name cuts deeply through American history and culture, even today. http://www.thealamo.org/visit/exhibits/current/index.html

Through December 17, 2017

The Panhandle Plains Museum presents "The Great War and the Panhandle-Plains Region." Using artifacts (militaria, uniforms, souvenirs, weapons, photographs, archives, and etc.) from PPHM's collections, the exhibition will examine the before, during, and after lives of various soldiers, Marines, sailors, and nurses (there was no Air Force) from the Panhandle-Plains region who served in "The Great War." http://www.panhandleplains.org/p/collections-and-exhibitions/special-exhibitions/361

Through Fall 2017

The Museum of the Coastal Bend displays important collections of French, Spanish, Mexican, and Texas artifacts, as well as artifacts from the French warship *La Belle* and the French cannons that once guarded La Salle's Fort St. Louis. It is located on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. http://www.museumofthecoastalbend.org/exhibits

Through Summer 2017

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

Through May 2017

The Houston Bar Association Teach Texas Committee will conduct Taming Texas judicial civics classes in Houston area seventh-grade history classes.

Through February 16, 2018

The Star of the Republic Museum at Washington-on-the-Brazos presents its exhibition, "Heirloom Genealogy: Tracing your Family Treasures," beginning March 4, 2017, and continuing through February 16, 2018. Stories come to light as artifacts are examined in depth through lineage research. Documents reveal where the artifacts originated, who owned them, and how they got to Texas. Items in the exhibit include three year-old Edward Boylan's buckskin suit, Pleasant B. Watson's diary, Heinrich Tiemann's clog-making tools, and Clara Lang's grand piano, among others. The exhibit is at 23200 Park Rd 12, Washington, Texas 77880. http://www.starmuseum.org/exhibits/#featured

April 27-28, 2017

The Texas Supreme Court Historical Society and the State Bar of Texas presented their 2017 *History of Jurisprudence* and *Practice Before the Supreme Court* courses at the Texas Law Center, 1414 Colorado, Austin, Texas 78701, (512) 427-1463. http://www.texasbarcle.com/materials/Programs/3412/Brochure.pdf.

April 28-29, 2017

The Central Texas Historical Association's Annual Conference occurred at the Blinn College—Brenham Campus Student Center. http://media.wix.com/ugd/559069_4cd771ca893e48aeb2d173c913d8d62d.pdf. Among other panels, Saturday's "Iconic Personalities and Events in Early Texas Session" chaired and commented on by Nathan Giesenschlag, of Blinn College—Bryan includes Society historian James Haley's presentation "Sam Houston and Early Texas" and Texas General Land Office historian James Harkins' speech "The Other Side of the Archives War."

June 12, 2017

Democrats of Harris County will conduct its annual Juneteenth Day C.L.E. program at the Hotel ZaZa, 5701 Main Street, Houston, Texas 77005 from 11:00 a.m. until 5:30 p.m., including a reenactment of the Texas Supreme Court's All Woman Court in the 1925 *Johnson v. Darr* case.

Thursday–Saturday, June 22-24, 2017

The State Bar of Texas will conduct its Annual Meeting at the Hilton Anatole Hotel at 2201 North Stemmons Freeway, Dallas, Texas, 75207, 214.748.1200. https://texasbar.com/AM/Template.cfm?Section=Annual_Meeting_Home&Template=/CM/HTMLDisplay.cfm&ContentID=30096.

August 5, 2017

The Alamo presents an educator's workshop in the Alamo's Legends of Texas series: "From Mission to Shrine 1519-1836: An Overview of the Spanish Missions and the Texas Revolution." This free program will last from 9 a.m. to 1 p.m. at Alamo Plaza, San Antonio, Texas 78205, (210) 225-1391 ext. 169 or mmcclenny@thealamo.org to register.

August 12, 2017

The Alamo presents an educator's workshop in the Alamo's Legends of Texas series: "Prominent Texas Women: Unsung Heroes of Texas." This free program will last from 9 a.m. to 1 p.m. at Alamo Plaza, San Antonio, Texas 78205, (210) 225-1391 ext. 169 or mmcclenny@thealamo.org to register.

Friday, September 8, 2017

The Texas Supreme Court Historical Society holds its Annual John Hemphill Dinner at the Grand Ballroom of the Four Seasons Hotel, 98 San Jacinto Blvd, Austin, Texas, 78701, with a special 6:00 p.m. Invitation-Only Reception with the dinner speaker, Chief

Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit, followed by a 6:30 p.m. general reception and dinner at 7:00 p.m.

Saturday, September 16, 2017

The Texas General Land Office will conduct its *Save Texas History* Symposium at the Commons Learning Center on UT Austin's J.J. Pickle Research Campus in far north Austin. The Society is a sponsor of the event.

Fall 2017

The Museum of the Coastal Bend opens the exhibit *"Sunken History: Shipwrecks of the Gulf Coast."* The museum displays important collections of French, Spanish, Mexican, and Texas artifacts, as well as artifacts from the French warship *La Belle* and the French cannons that once guarded La Salle's Fort St. Louis. It is located on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. http://www.museumofthecoastalbend.org/exhibits

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THE TEXAS SUPREME COURT HISTORICAL SOCIETY

DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

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

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2016-17 New Member List

The Society has added 22 new members since June 1, 2016,
the beginning of the new membership year.

TRUSTEE

Hon. Jane Bland

Clyde J. "Jay" Jackson

Richard B. "Rich" Phillips, Jr.

Hon. Sue Walker

CONTRIBUTING

Hon. Robert Blackmon

Hon. Cindy Olson Bourland

Roy Brantley

John G. Browning

Robert Higgason

Fred Jones

REGULAR

Roger Bartlett

Melinda Brents

Cynthia Diggs

Cynthia Ericson

Joe Longley

Sharon McCally

David Morales

Stephen Pate

Karlene Poll

Barbara Radnofsky

Sharon Sandle

Kenna Seiler

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Membership Benefits & Application

Hemphill Fellow **$5,000**
- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow **$2,500**
- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of Society Publications
- Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- Recognition in All Issues of Quarterly *Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

Trustee Membership **$1,000**
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- Complimentary Admission to Society's Symposium
- All Benefits of Regular Membership

Patron Membership **$500**
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
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