



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2020 Vol. 9, No. 2 General Editor Lynne Liberato Executive Editor David Furlow

## Columns

### Message from the President

**By Dylan O. Drummond**

On January 13th, the Texas Supreme Court Historical Society celebrated its 30th anniversary.

[Read more...](#)



Dylan O. Drummond

### Executive Director's Page

**By Sharon Sandle**

The appointment of the first judicial commission in the Republic of Texas was a hasty affair.

[Read more...](#)



Sharon Sandle

### Fellows Column

**By David J. Beck**

I am pleased to report that our third Taming Texas book, entitled *The Chief Justices of Texas*, has been printed and will be available this Spring. [Read more...](#)



David J. Beck

### Executive Editor's Page

**By David A. Furlow**

In this issue of the *Journal*, we embrace change. We do so because the time and season for change has come. [Read more...](#)



David A. Furlow

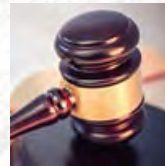
## Leads

### The History of Judicial Disqualification and Recusal in Texas, Part I

**By John C. Domino**

Judicial recusal—a judge's withdrawal from a legal case because of personal bias or prejudice—is a modern development in the history of Texas jurisprudence.

[Read more...](#)



### New England Roots Run Deep in Texas: A 400<sup>th</sup> Anniversary Salute, Part I

**By David A. Furlow**

This year marks the 400<sup>th</sup> anniversaries of the Pilgrims' *Mayflower* voyage and the founding of Plymouth Colony in 1620—a time to salute New Englanders who brought their ideas, institutions, and experience to Texas. [Read more...](#)



Plymouth's Forefathers Monument

## Features

### On the Road - Looking for San Felipe de Austin in Connecticut

**By Texas Historical Commission Staff**

Some of the best early Texas history archives outside of Texas are in the Western Americana collections of Yale University's Beinecke Library. [Read more...](#)



Historian Michael Moore

### GALVESTON, O GALVESTON!

### The Society Honors Trustee Jeff Brown on His Investiture as a U.S. District Judge and Delves Deep into Galveston

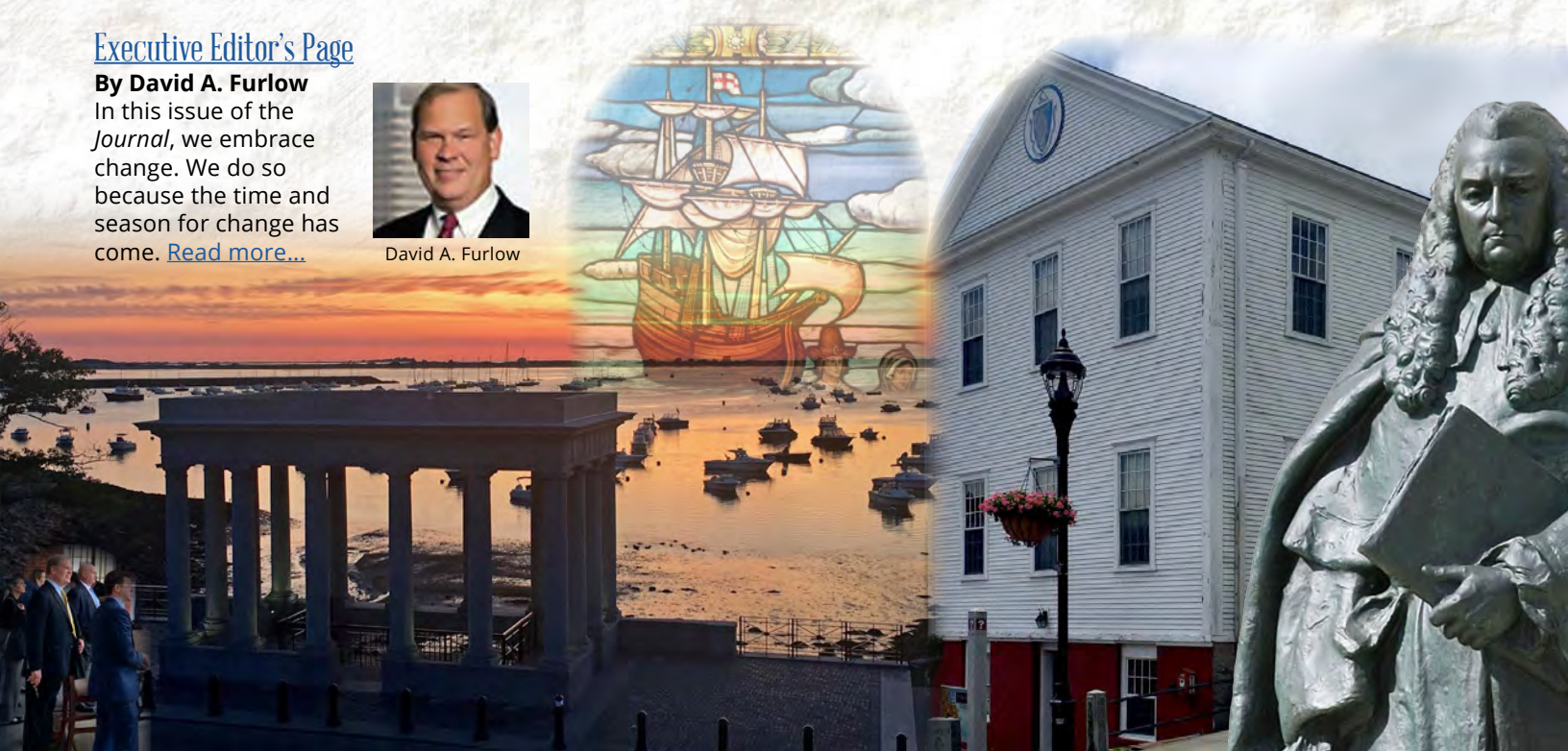
### and Texas History

**By Stephen Pate**

Galveston was recently the site of several events well attended by Texas Supreme Court Historical Society members. [Read more...](#)



Judge Brown's investiture





## News & Announcements

[Come See the Society's 2020 TSHA Program - Courting Trouble: Hard Cases, Historic Consequences](#)

**By David A. Furlow**

You're invited to attend the Society's legal history program at the 124th Texas State Historical Association Annual Meeting. [Read more...](#)



TSHA logo

## Supreme Court Notes

**By Dylan O. Drummond**

Justice Jane Bland and Judge Jeff Brown are in the news. [Read more...](#)



## [Dallas-Area Judges, Justices, and Attorneys Bring the Society's Taming Texas Curriculum to DISD School](#)

Several Dallas judges and attorneys presented the Society's Taming Texas curriculum to seventh graders at Robert T. Hill Middle School.. [Read more...](#)



Judge Audrey Moorehead

## [Calendar of Events](#)

## Membership & More


[Journal of the Texas Supreme Court Historical Society Index of Articles by Issue, Fall 2011 - Winter 2020](#)


[Officers, Trustees & Court Liaison](#)

[2019-20 Membership Upgrades](#)

[2019-20 New Member List](#)

[Join the Society](#)

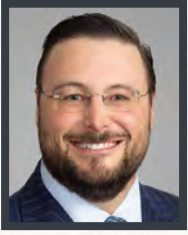
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Dylan O.  
Drummond

# Message from the *President*

Last month on January 13th, the Texas Supreme Court Historical Society celebrated its 30th anniversary. On the Sesquicentennial of the Texas Supreme Court's first session in 1840, three legendary Chief Justices—Hon. Robert Calvert, Hon. Joe Greenhill, and Hon. Jack Pope—established the Society in 1990. From its founding, the Society has worked hard to fulfill its mission to educate the public about the history and development of the Texas judicial branch, as well as to conserve the history and work of the Texas Supreme Court and the state's appellate courts.

The first of the Society's eighteen presidents (so far), Justice Jack Hightower, set the Society on the ambitious path it was to blaze in the coming years. He has been followed in that office by four other Justices, including Chief Justice Greenhill and Justices James Baker, Craig Enoch, and Dale Wainwright.

Over its 30 years, the Society has made scholarship highlighting the history of the Texas judiciary central to its educational charge. It has published six books, including the most complete history of the Court in nearly a century. It has also published the collected works of one of the Court's most celebrated Justices, former Chief Justice Jack Pope. The first book the Society published was a comprehensive collection chronicling the legal struggles African-Americans faced in Republic-era and confederate Texas. Most recently, the Society and its Fellows have been proud to publish three 7th-grade history textbooks in the *Taming Texas* series. The Society owes a debt of gratitude to the incomparable Marilyn Duncan who has either edited or authored each of these books.

In 2011, the Society also founded its quarterly journal, which has served as the main conduit for the publication of scholarly historical research on the Court and the Texas judiciary. From its founding by General Editor Lynne Liberato, Executive Editor David Furlow, and Managing Editor Marilyn Duncan, the *Journal* has grown to one of the most prominent historical publications in the country. Its stature was confirmed this past year when the American Association of State and Local History recognized the *Journal* with its Award of Excellence in History.

The year following the *Journal's* founding, then-Society President and Charter Fellow Warren Harris alongside Charter Fellow David Beck established the Society's Fellows program. The Fellows

have made possible numerous programs that have become staples of the Society, including: (1) the Society's *Taming Texas* textbook series and classroom judicial civics program; (2) the *History of Texas & Supreme Court Jurisprudence* TexasBarCLE course that has been held biennially since 2013; and (3) the reenactments of notable Texas appellate cases including *Sweatt v. Painter*, 339 U.S. 629 (1950), *Johnson v. Darr*, 272 S.W. 1098 (1925), and *Texas v. White*, 74 U.S.700 (1868).

The Society also owns and maintains the Court's judicial-portrait collection, and coordinates with the Court to host new portrait "hanging" ceremonies for retired Justices. In 2018, the Society and Court held a historic ceremony to dedicate the portraits of two Supreme Court judges from Texas's Reconstruction era—Chief Justice Wesley B. Ogden and Justice Colbert Coldwell.

Since 2015, the Society President has presented an award recognizing outstanding service to the Society. Notably, the only person to be awarded this honor twice is David Furlow, who has been indispensable in so many of the Society's initiatives—chief among which has been his tireless editorship of the *Journal*.

Beginning the following year, the Society stepped in to alleviate the burden on Court personnel to plan and host the annual BA Breakfast reunion of current and former Justices, briefing and staff attorneys, and judicial staff.

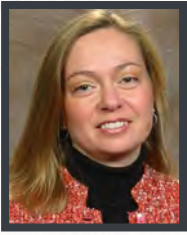
For the past eight years since 2011, the Society has worked with the Texas Bar Appellate Section to create and maintain the Texas Appellate Hall of Fame. Each year, the Society's President, along with the Section's Chair, appoint a slate of Hall of Fame Trustees who elect that year's honorees. Descendants of the enshrinees are invited to attend the investiture ceremony at the Texas Bar Advanced Appellate Course in the fall. Thus far, Texas Supreme Court enshrinees have included Chief Justices James Alexander, Robert Calvert, Joe Greenhill, John Hemphill, John Hill, Jack Pope, Thomas Rusk, and Hortense Ward, along with Justices James Baker and Will Garwood.

The Society's capstone event is the John Hemphill Dinner held each year in Austin. The dinner has been held annually for the past 24 years. Notable keynote speakers have included sitting and retired U.S. Supreme Court Justices, Chief Judges of the U.S. Circuit Courts of Appeals, U.S. Attorney Generals, U.S. Senators, White House Counsels, and Chief Justices of other states.

The one constant over the Society's first 30 years has been the steadfast and amazing dedication, enthusiasm, creativity, and support of our members, staff, Trustees, Fellows, and officers. On behalf of the Society, I extend our thanks to everyone over the past three decades who have worked so tirelessly to make the Society what it is today.

**DYLAN DRUMMOND** is an appellate litigator resident in the Dallas office of Gray Reed & McGraw LLP.

[Return to Journal Index](#)



Sharon Sandle

## Anniversaries, Accolades, *and New Initiatives*

The appointment of the first judicial commission in the Republic of Texas was a hasty affair. On April 3, 1836, the Texas warship *Invincible* seized the American ship *Pocket* near the mouth of the Rio Grande. The vessel was taken as a prize to Galveston, and the *Invincible* sailed to New Orleans, where the crew was arrested for piracy. The fledgling Texas government had not officially declared a blockade and had no court with jurisdiction to hear the matter. The Texas government quickly created a special judicial district, the “District of Brazos” with jurisdiction over admiralty cases, and before June 15, 1836, the Republic of Texas’s provisional president, David G. Burnet, appointed Benjamin Cromwell Franklin, a San Jacinto veteran, as its first judge to preside over the *Pocket* case.

Franklin was not Burnet’s first choice for the appointment. He first asked James Collinsworth to serve, but Collinsworth declined. And the legality of the appointment was doubtful. The constitution of the Republic specified that judges be elected by “joint ballot of both Houses of Congress.” Nevertheless, Franklin heard the *Pocket* case and ruled that the vessel was, indeed, taken as a lawful prize. Shortly after, Congress elected Franklin as a district judge, which also made him an *ex officio* member of Texas’s first Supreme Court.<sup>1</sup>

From these chaotic beginnings, the Texas courts have matured into one of the largest court systems in the nation. Texas has 3,210 judges, more than any other state, and Texas judges handle more than 8 million cases a year.<sup>2</sup> Unlike the hasty appointment of Benjamin Cromwell Franklin, the Texas Supreme Court welcomed its newest justice, Jane Bland, to the Court in a formal investiture held at the Texas Capitol on November 9, 2019. It was the second investiture of 2019, as just a month earlier, Justice Brett Busby’s investiture took place in the Capitol on September 6.

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<sup>1</sup> James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013). Also, Dylan O. Drummond, “San Jacinto Justice: The Republic Supreme Court Jurists Who Won Texas Independence,” presentation at the State Bar of Texas and Texas Supreme Court Historical Society’s History of Texas and Supreme Court Jurisprudence symposium, April 27, 2017.

<sup>2</sup> Chief Justice Nathan L. Hecht, “The State of the Judiciary in Texas,” address to the 86<sup>th</sup> Texas Legislature, February 6, 2019, Austin, Texas.



This year marks an important anniversary for the Texas Supreme Court Historical Society. It was just thirty years ago that the Society began its work. Established in January 1990 on the Sesquicentennial of the first session of the Supreme Court of the Republic of Texas, the Society's incorporation papers were filed with the Secretary of State by three former Chief Justices: Robert W. Calvert, Joe R. Greenhill, and Jack Pope. The founding president, Judge Jack Hightower, then serving as Justice on the Texas Supreme Court, enlisted the support of the Court for creating the Society and procured the cooperation and assistance of the State Bar of Texas. Since its inception, the Society has pursued its mission to raise public awareness about the judicial branch of government through a variety of initiatives, including the Judicial Oral History Project, the *Taming Texas* series of books, reenactments of notable Texas cases, and serving as conservator for the Court's judicial portrait collection.

This year the Society will undertake a new initiative. The Society will honor one of its past presidents, Larry McNeill, by awarding a fellowship in his name at the Texas State Historical Association Annual Meeting. McNeill contributed to the preservation of Texas history first as president of the Texas State Historical Association in 2005–06 and then as president of the Texas Supreme Court Historical Society in 2009–10. Among other accomplishments, McNeill's leadership led to the publication of *The Texas Supreme Court: A Narrative History, 1836–1986*. McNeill epitomizes the dedication of the men and women who volunteer their time and expertise to the Society, and the fellowship named after him will foster research and scholarship about the Texas courts and Texas legal history.

This issue of the *Journal* also marks a changing of the guard for the *Journal* staff. Executive Editor David Furlow has been at the helm of the *Journal* since 2011, but this marks his last issue as Executive Editor before moving on to other projects. His passionate interest in history and inexhaustible enthusiasm for developing new topics for the *Journal* has raised the stature of the publication and set a high bar for the future.

Just as important to the success of the *Journal* has been the work of Managing Editor Marilyn Duncan, who will also be retiring from the *Journal* staff with this issue. Marilyn has also been a crucial member of the *Journal* staff since 2011. Her work for the *Journal* often has no byline, but everyone associated with the *Journal* knows that her influence permeates the publication from beginning to end.

On behalf of the Society, I'd like to thank David and Marilyn for their exceptional work on the *Journal*, and on my own behalf I'd like to say that I'm so glad to have had the chance to work with them as colleagues and as friends.

**SHARON SANDLE**, in addition to serving as the Society's Executive Director, is Director of the State Bar's Law Practice Resources Division and of TexasBarBooks.

[Return to Journal Index](#)

# Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston



I am pleased to report that our third Taming Texas book, entitled *The Chief Justices of Texas*, has been published and will be available in this Spring. This latest book contains interesting stories about the twenty-seven Chief Justices of the Supreme Court of Texas, and will educate seventh-grade readers about the era in which each Chief Justice served and why their work at the time was so important to the Court.

Jim Haley and Marilyn Duncan, the authors of the three Taming Texas books, have already begun work on the fourth book in the series. The next book will be entitled *Women in the Law* and will feature stories about some of the important women in Texas legal history. We would

like to thank both Jim and Marilyn for their exceptional work on these great books.

As mentioned previously, the Taming Texas project is now expanding to additional cities. Fellow Ben Mesches is working with Dallas Bar Association President Robert Tobey to further expand our program in the Dallas schools. On December 6, 2019, Ben led a group of judges and lawyers in presenting Taming Texas to six classes at Robert T. Hill Middle School in the Dallas ISD. Ben reports that the program was a success: "The unique opportunity to reach history and journalism students at Hill Middle School was enriching for our members, but, most importantly, gave the students important practical insights into the history and structure of our legal system from local judges and practicing lawyers." The State Bar Judicial Section partnered with us to provide judges for our program and the Dallas Bar Association provided volunteer attorneys. A special thanks to Judge Andy Hathcock for coordinating the judges who participated. If you would like to volunteer to teach upcoming sessions in the Dallas-area schools, please contact Melissa Garcia at [mgarcia@dallasbar.org](mailto:mgarcia@dallasbar.org).

Additionally, Fellow Marcy Greer is working with Austin Bar Association President Todd Smith to implement the program in Austin schools. For the past four years, we have partnered with the Houston Bar Association to take the Taming Texas project into Houston-area schools, and we have now reached over 21,000 seventh graders. Taming Texas kicks off again in Houston in March 2020. Justice Ken Wise and Richard Whiteley lead the effort in Houston. Justice Brett Busby and Fellow Warren Harris are coordinating our Taming Texas statewide efforts and our expansion to other Texas cities.

The Fellows are a critical part of the annual fundraising by the Society, and allow the Society to undertake Taming Texas and other projects to educate the public on issues important

to Texas legal history. In addition to supporting our educational projects, Fellows are invited to the annual Fellows Dinner. We are finalizing plans now for this year's event. The dinner will be held on February 26, 2020 at a special venue in Austin. Further details will be sent directly to all Fellows.

Finally, we are in the process of considering future projects. Please share with us any suggestions you may have.

If you would like more information or want to join the Fellows, please contact the Society office or me.

**DAVID J. BECK** *is a founding partner of Beck Redden LLP.*

## FELLOWS OF THE SOCIETY

### Hemphill Fellows

(\$5,000 or more annually)

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

### Greenhill Fellows

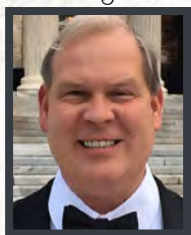
(\$2,500 or more annually)

Stacy and Douglas W. Alexander	Ben L. Mesches
Marianne M. Auld	Nick C. Nichols
S. Jack Balagia	Jeffrey L. Oldham
Robert A. Black	Hon. Harriet O'Neill and Kerry N. Cammack
Hon. Jane Bland and Doug Bland	Hon. Thomas R. Phillips
E. Leon Carter	Hon. Jack Pope* (deceased)
Kimberly H. and Dylan O. Drummond	Shannon H. Ratliff*
Michael Easton	Harry M. Reasoner
Harry L. Gillam, Jr.	Robert M. Roach, Jr.*
Marcy and Sam Greer	Leslie Robnett
William Fred Hagans	Professor L. Wayne Scott*
Lauren and Warren W. Harris*	Reagan W. Simpson*
Thomas F.A. Hetherington	Allison Stewart
Jennifer and Richard Hogan, Jr.	Kristen Vander-Plas
Dee J. Kelly, Jr.*	Peter S. Wahby
Hon. David E. Keltner*	Hon. Dale Wainwright
Thomas S. Leatherbury	Charles R. Watson, Jr.
Lynne Liberato*	R. Paul Yetter*
Mike McKool, Jr.*	

\*Charter Fellow

[Return to Journal Index](#)





David A. Furlow

# A Time for *Change*

***To every thing there is a season,  
and a time to every purpose under the heaven:  
A time to be born, and a time to die;  
a time to plant, and a time to pluck up that which is planted;  
A time to kill, and a time to heal;  
a time to break down, and a time to build up...***

— Ecclesiastes 3 (King James Version)

**T**his is a time of change. In this issue of the *Journal*, we embrace change. We do so because the time and season for change has come.

Our society's standard of fairness in the legal system has changed over time. Sam Houston State University Professor John C. Domino's lead article, "The History of Judicial Disqualification and Recusal in Texas: Part 1," addresses some of the most important issues any historian of law can face: how attorneys can ensure that their clients receive a fair trial—not a perfect trial, just a fair trial. Professor Domino examines the history of judicial disqualification from the Republic of Texas to the present day, analyzing Texas constitutional provisions, common law cases, and the evolution of recusal based on bias over time.

My two-part article, "New England Roots Run Deep in Texas: A 400<sup>th</sup> Anniversary Salute," examines changes over time as people cross borders and transcend limitations. Sometimes the change is geographic, for example, when the Puritans crossed the Atlantic from Old England to New England, and when a handful of immigrants brought New England energy, ideas, and institutions to Mexican Texas, then stayed to create the Republic of Texas and then the Lone Star State. We'll examine how the Mayflower Compact, John Adams's Massachusetts Constitution of 1780, and a small but extraordinarily influential group of New Englanders shaped Texas society, law, and history between 1820 and 1870.

This issue represents another kind of change—a changing of the guard. This is the last issue in which I will serve as the *Journal's* Executive Editor and Lynne Liberato as General Editor, as reflected in the masthead. Marilyn Duncan is also stepping down as Managing Editor.

It's time for change to come—to offer you new faces, new ideas, and new imagery. Not all at once, but incrementally, because this transition has been underway for many months. Our Executive Director Sharon Sandle, our President Dylan Drummond, and Production Editor David Kroll will continue navigating this ship into the future, ensuring smooth sailing as we transition from one *Journal* crew to the next one. Sharon, Dylan, and David will play important roles in a new Editorial Board, as will I, that will publish the *Journal* going forward.

Speaking of change, it's time to introduce two new members of the *Journal's* Editorial Board: Editor-in-Chief John Browning and Executive Articles Editor Stephen Pate. As a partner in Spencer Fane LLP in Dallas and as the author of many articles and several books on social media's impact on the law, John is frequently sought out by national and international media. He's as media savvy as anyone at the *Journal* could hope to find on the subject. An original thinker and a scholarly writer, he has authored or coauthored some of this *Journal's* finest articles in recent years. In addition, John has appeared on television, radio, and podcasts discussing social networking and the law, and has been quoted in such publications as *The New York Times*, *The Wall Street Journal*, *TIME* magazine, *Law360*, *the National Law Journal*, and the *ABA Journal*. John will make an excellent Editor-in-Chief.

Readers will recognize Stephen Pate from the many fine articles he has published about Texas state and federal legal history in past issues of the *Journal*. These include an examination of the career of Texas Governor and U.S. Judge Jimmy Allred and a multi-part series about the search for a new federal judge to serve in Galveston during the tumultuous aftermath of the Civil War. A member of the Cozen & O'Connor law firm in Houston, a fellow of the American College of Coverage and Extracontractual Counsel, and a member of the American Board of Trial Advocates, the American Law Institute, the Federation of Defense & Corporate Counsel, and Law360's Insurance Editorial Advisory Board, Stephen brings an extraordinary depth and breadth of experience to his role as the *Journal's* new Executive Articles Editor.

It has been eight-and-a-half years since our Society's then-President Lynne Liberato and I organized this *Journal* with the invaluable assistance of then-Executive Director Bill Pugsley during the summer of 2011. Managing Editor Marilyn Duncan, Deputy Executive Editor Dylan Drummond, and Production Editor David Kroll joined the team soon thereafter.

Over the years, we've worked with Society Executive Directors Pat Nester and Sharon Sandle, two energetic and innovative representatives of the State Bar of Texas who have made publishing this *Journal* a pleasure. We've enjoyed exploring the visions and accomplishing the goals of nine presidents of the Society. We've worked with dozens of authors and coauthors who have submitted innovative and informative stories and news items year after year after year.

It's been an extraordinary honor and privilege to work with every member of an exemplary team. We've worked long, hard hours together and had fun together.

We've exchanged and changed ideas, images, and insights together, always exploring ways to tell stories of law, courts, judges, justices, and attorneys, to provide readers with easy access to the unfolding legal history of Texas.

Thank you all for making it possible for this *Journal* to earn an Excellence in History Award from the American Association for State and Local History at its 2019 Annual Meeting in Philadelphia.

Now, let the adventure continue...

**DAVID A. FURLOW** is an attorney, historian, and archeologist.

[Return to Journal Index](#)



# The History of Judicial Disqualification and Recusal in Texas

## • Part 1<sup>1</sup> •

By John C. Domino



Judicial recusal—a judge’s withdrawal from a legal case because of personal bias or prejudice—is a modern development in the history of Texas jurisprudence. A judge’s decision to recuse from a case is based on a complex set of norms, codes, and procedures intended to promote impartiality. For most of the state’s history, however, the sole ground for the removal of a judge from a case was not recusal for bias but disqualification according to the conditions set out in the Texas Constitution.

Although the terms “disqualification” and “recusal” are often used interchangeably in Texas, the two concepts must be differentiated because the legal authority and grounds for each are fundamentally different. If disqualified from a case on constitutional grounds, a judge does not have jurisdiction in the case and any ruling or decree made has no effect.<sup>2</sup> Recusal from a case, on the other hand, occurs voluntarily if the judge’s impartiality might reasonably be questioned.<sup>3</sup> Refusal to recuse often results in the transfer of the case to another court or assignment of another judge to the case.<sup>4</sup>

This two-part article examines the foundations and emergence of the modern concept of judicial recusal in Texas. Part I begins with a historical examination of disqualification rulings of the Texas Supreme Court and lower appellate courts, in order to clarify early foundational thinking about the circumstances under which a judge should not hear a case. My primary purpose here, however, is to discuss the emergence of the body of rules and norms of behavior governing judicial recusal that arose in the late twentieth century. I hope to illustrate a shift from rigid constitutional grounds to a more fluid modern approach based on judicial interpretation of a code of conduct. Of course, the body of case law dealing with disqualification as well as recusal is substantial. A complete treatment is beyond the scope of a single article. The focus here will be on those rulings that have had a major precedential impact on the origins and development of the modern concept of recusal.

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<sup>1</sup> This is a revised version of an article by the author titled “The Origins and Development of Judicial Recusal in Texas,” *British Journal of American Legal Studies* 5 (2016).

<sup>2</sup> TEX. CONST. art. V, § 11.

<sup>3</sup> TEX. R. CIV. P. 18a (Recusal and Disqualification of Judges).

<sup>4</sup> See <http://www.txcourts.gov/rules-forms/rules-standards.aspx>.

## Constitutional and Common Law Origins

In 19th century Texas the grounds for the removal of a judge from a case were pecuniary interest and consanguinity,<sup>5</sup> based on the Texas Constitution and the common law. The 1836 Constitution adopted by the Republic of Texas reflected the old English common law rule that the only basis for disqualification of a judge was direct pecuniary interest—that is, financial interest in the outcome of the case.<sup>6</sup> There is no historical evidence that judicial bias as a ground for mandatory or self-disqualification was adopted by any court or governing body at that time. The standard of the time followed Sir Edward Coke's axiom that "no man shall be a judge in his own case,"<sup>7</sup> but it rejected the idea that "bias" as a state of mind in contrast to pecuniary interest would disqualify a judge.

Also controlling was William Blackstone's belief that a judge cannot be challenged or disqualified for the possibility of bias, only "interest."<sup>8</sup> The pecuniary interest standard applied



Left: John Payne's engraving of English jurist Sir Edward Coke, as he appeared in 1629, used as a frontispiece to the second edition of Coke's *Institutes of the Laws of England* (1648). Right: Statue of Sir William Blackstone in front of the Federal Courthouse in Washington, D.C. Images courtesy of Wikimedia Commons.

<sup>5</sup> The degree of affinity to parties in a lawsuit.

<sup>6</sup> John P. Frank, "Disqualification of Judges," *Yale Law Journal* 56 (1947): 609-10.

<sup>7</sup> See Sir Edward Coke, *Institutes of the Laws of England* 1 (19th ed., 1832), 141a.

<sup>8</sup> William Blackstone, *Commentaries on the Laws of England* 3, 361.



not only where the outcome of a case directly affected the judge's purse, but also where a judge might collect a monetary fine that he had the power to impose, or might benefit from indirectly, for example as a taxpayer. Of course the problem then was that if a judge could potentially be disqualified on the grounds of being a taxpayer, many lawsuits could not be decided, especially where there were few judges (or only one) in a sparsely populated area. Judicial disqualification in the Republic of Texas, however, was straightforward: judges were disqualified for financial interest but not for bias.

When Texas became a state in 1845, a new Constitution stated: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or where he shall have been counsel in the cause."<sup>9</sup> This language also appeared in the Constitutions of 1861, 1866, and 1869, and is repeated in the present Constitution, which was adopted in 1876. For over a century Texas courts held that the state's Constitution provided the *only* necessary guidance for removing a judge from a case. The few appellate court opinions from this period show that any attempt to diverge from this rule and thus remove or disqualify a judge for any other reason was generally rejected, and the language of the Constitution on this matter was interpreted narrowly.

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***"Judicial disqualification in the Republic of Texas ... was straightforward: judges were disqualified for financial interest but not for bias."***

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In *Taylor v. Williams* (1863),<sup>10</sup> the Texas Supreme Court rejected efforts to remove a judge solely on the grounds that before becoming a sitting judge he had been counsel in the case. The case arose when a disputed title to land was litigated before a judge who had appeared as counsel in similar cases dealing with the same title some years earlier. The Court recognized as settled under the common law that the slightest pecuniary interest in a cause would result in the judge's disqualification. However, nothing in the common law prevented a judge from hearing an appeal of a decision made while sitting as a trial judge or even serving as counsel.<sup>11</sup> The judge's "professional connection" with the case, by virtue of the fact that he was "counsel in the cause," would only apply if the judge stood to gain financially. *Taylor* is important because it rejected the attempt to "creat[e] in the mind of the judge a bias, prejudice or partiality" as a ground for disqualification unrelated to that found in the Constitution.<sup>12</sup> In a classic statement of judicial restraint the Texas Supreme Court wrote:

[W]e cannot undertake to say that his professional connection with a similar cause or one involving the same questions shall have that effect. If we depart from the plain language of the constitution [as grounds for disqualification], we shall be left without a rule for our guidance, and shall countenance a laxity of construction that *may prove both dangerous and inconvenient.* <sup>13</sup>

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<sup>9</sup> TEX. CONST. § 19 (1845).

<sup>10</sup> 26 Tex. 583 (1863).

<sup>11</sup> *Ibid.*, 586.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 586-87. Emphasis in original.

In *Slaven v. Wheeler* (1882),<sup>14</sup> the Texas Supreme Court ruled that Texas Constitution's provision that no judge shall sit in any case where he has been counsel included instances where the judge, acting as an attorney, gave advice about an issue in a dispute more than ten years before it ripened into a lawsuit, even though as attorney he had not charged his client for the advice. The fact that he had once been consulted professionally as counsel barred him from sitting. The case originated when Elizabeth Slaven sued her husband for selling their property without her knowledge. During the trial, Mrs. Slaven sought to disqualify the presiding judge on the grounds that he had served as her counsel in the case ten years earlier. On appeal, the Texas Supreme Court held that even though a decade had passed, the attorney-client relationship had continued, since Mrs. Slaven had never attempted to terminate the relationship. For this reason the judge was disqualified under the Texas Constitution and the judgment of the lower court was reversed. The Court ruled that the conclusion in *Slaven* was not at variance with *Taylor v. Williams* because in the latter case the judge had not been professionally connected as counsel with the parties to the suit.<sup>15</sup>

The Texas Supreme Court even refused to disqualify a judge whose property had been stolen by the defendant who was tried before him. Ross Davis was indicted in 1875 for stealing ten fence posts from Judge Daniel Claiborne. The value of the fence posts was two dollars and fifty cents. Counsel for the defendant petitioned to disqualify Judge Claiborne from sitting in the case. Both parties agreed, and the district attorney selected a local lawyer to be sworn in as a special judge.

The trial proceeded and Davis was convicted. Davis then appealed on the grounds that the special judge did not have authority to try the case. In *Davis v. State* (1876),<sup>16</sup> the Texas Supreme Court ruled against Davis, stating that the Texas Constitution prescribed for the selection of a special judge when a presiding judge was disqualified.<sup>17</sup> The Court concluded, however, that there was no need to disqualify Judge Claiborne in the first place. The judge might well have been furious with Davis for stealing his fence posts, and may have wanted to see him punished, but he was not constitutionally disqualified. It had not been shown that the judge was "interested," since he was neither a party in the lawsuit nor liable to suffer a loss or gain a profit from the outcome.<sup>18</sup>

In *Dailey v. State* (1900),<sup>19</sup> the Texas Supreme Court refused to disqualify a judge from hearing a lawsuit against a woman for keeping a "disorderly house," or brothel, even though the same judge belonged to an organization of local judges who met regularly to discuss strategies for closing down disorderly houses where prostitution and gaming took place.

In 1918, the Court of Criminal Appeals relied on *Davis v. State* when it ruled that evidence of a judge's overt prejudice toward bootleggers and persons who peddle whiskey did not constitute

<sup>14</sup> 58 Tex. 23 (1882).

<sup>15</sup> *Ibid.*, 26.

<sup>16</sup> 44 Tex. 523 (1876).

<sup>17</sup> TEX. CONST. art. V, § 11 (1869).

<sup>18</sup> *Davis*, 44 Tex. at 524.

<sup>19</sup> 55 S.W. 821 (Tex. Crim. App. 1900).





The three-Justice Texas Supreme Court occupied the Historic Supreme Court Courtroom on the third floor of the Capitol when it decided *Dailey v. State* in 1900. Photo by David A. Furlow.

grounds for disqualification. In *Berry v. State*<sup>20</sup> the court rejected an effort to remove a judge because “he ... had expressed his prejudice against the appellant” in an appeal from a conviction for the unlawful sale of liquor. The court argued that the state Constitution alone set out the circumstances under which a judge should be disqualified. While the Court of Criminal Appeals recognized that a few states had adopted statutes requiring disqualification on the ground of prejudice, it strictly adhered to the view that “[o]ur laws appear to proceed on the theory that prejudice against an accused does not disqualify the judge from trying the case....”<sup>21</sup> The logic was that any prejudice that the judge might have had toward the defendant was offset by the fact that defendant was still fully protected by the constitutional right to trial by an impartial jury and the right to appeal—a view that still influences judicial thinking on recusal to this day. The justices in *Berry* again rejected any considerations or evidence set out in a motion for disqualification beyond those specific and exclusive conditions covered by the constitutional provisions for removal.

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<sup>20</sup> 203 S.W. 901, 902-03 (Tex. Crim. App. 1918).

<sup>21</sup> *Ibid.*, 903.

That is not to say that early efforts to disqualify a judge were entirely without success. In *Nalle v. City of Austin* (1893),<sup>22</sup> the Supreme Court ruled that a judge who presided in a lawsuit seeking an injunction to block an assessment of property taxes in the City of Austin was properly disqualified because the judge was a taxpayer in Austin and therefore had a direct pecuniary interest in the outcome of the case. This ruling deviated from instances where the common law rule of “necessity” required the judge to sit in a case involving a taxpayers suit, even though

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***“In 1918, the Court of Criminal Appeals ... ruled that evidence of a judge’s overt prejudice toward bootleggers and persons who peddle whiskey did not constitute grounds for disqualification.”***

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the judge as a taxpayer would stand to benefit financially from the court’s ruling.<sup>23</sup> If a taxpaying judge could potentially be disqualified on the grounds of pecuniary interest, then many lawsuits could never be decided. The rule of necessity holds that when no substitute judge is available, the sitting judge is duty bound to hear a case. This rule was often invoked in rural areas where no substitute judge could be found. Even *if* the judge wished to be disqualified, appellate courts often ruled that the judge was required to sit in the case despite a potential bias or conflict of interest.<sup>24</sup>

Under the Texas Constitution, the doctrines of consanguinity and affinity,<sup>25</sup> as they applied to disqualification, refer to the degree of relationship between the judge and a party in a suit. The degree of consanguinity is based on the number of generations by which people are separated. Parents and children are related to each other in the first degree. A grandparent and grandchildren are related in the second degree. A husband and wife are (in most cases) related to each other not by consanguinity but by affinity in the first degree. So, for example, an attorney may not be involved in a case over which a judge is presiding if the attorney is related to the judge by one degree of consanguinity or affinity.<sup>26</sup>

In 1943, in *Postal Mutual Indemnity Co. v. Ellis*,<sup>27</sup> the Texas Supreme Court relied on earlier precedent to disqualify a judge whose son was an attorney for the plaintiff in a worker’s compensation suit over which the judge presided. The Court applied the Texas Constitution and a civil statute to disqualify the judge because the attorney son met the definition of “party” under both. The Court broadly construed the statute, reasoning that the word “party” was not restricted to litigants but to all persons who were interested in the outcome of the case.<sup>28</sup> *Ellis* extended application of the 1909 case of *Duncan v. Herder*,<sup>29</sup> where the trial judge, the Hon. L.W. Moore, was disqualified by reason of his relationship by affinity (within the third degree) to one of the parties in a dizzyingly complex probate case. Judge Moore’s daughter-in-law stood to gain

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<sup>22</sup> 22 S.W. 668 (Tex. 1893).

<sup>23</sup> Blackstone, *Commentaries*. See also Frederick Pollock, *First Book of Jurisprudence for Students of the Common Law* (6th ed., 1929), 270.

<sup>24</sup> The rule of necessity is said to have originated in England in the 15<sup>th</sup> century. The United States Supreme Court recognized the rule in *Evans v. Gore*, 253 U.S. 245, 248 (1920).

<sup>25</sup> TEX. CONST. § 19 (1845).

<sup>26</sup> See TEX. GOV. CODE ANN. §§ 573.023-573.025.

<sup>27</sup> 169 S.W.2d 482 (Tex. 1943).

<sup>28</sup> *Ibid.*, 484-85.

<sup>29</sup> 122 S.W. 904 (Tex. Civ. App. 1909).



as one of the heirs of the decedent, a Mr. Lenert. So even though Mrs. Moore was not named as a party to the suit, she was a party within the meaning of the term as used in the Constitution and statute.

In the 1920s and 1930s, no codes or rules were available to address ethical quandaries faced by sitting judges who were actively campaigning for office. Guidance on these matters would not exist until the first codes of judicial conduct were promulgated in the 1970s. In *Love v. Wilcox* (1930)<sup>30</sup> a candidate for governor sought a writ of mandamus from the Texas Supreme Court to compel the State Democratic Committee to put his name on the ballot in the primary election. The party officials refused his request because the aspiring gubernatorial candidate had once supported Republicans and worked against Democrats. The sitting Chief Justice of the Texas Supreme Court, Calvin Cureton, believed that he was disqualified to hear the case on appeal because he was a candidate for the Democratic Party's nomination for Chief Justice that same year. In a bold departure from precedent, he based his conclusion to self-disqualify not on Texas law, but rather on a holding of the Supreme Court of Colorado that addressed the question of whether a judge who was a candidate in a primary election was qualified by his direct interest in the primary to participate in a case related to the primary.<sup>31</sup>



When Chief Justice Calvin Cureton attempted to disqualify himself from a case in 1930, the Supreme Court ruled that he was not only qualified but obligated to sit on the case. Photo courtesy of Tarlton Law Library, Texas Jurists Collection.

Neither Texas case law nor statute provided guidance,<sup>32</sup> but the Supreme Court ruled that under the Texas Constitution the Chief Justice was not only qualified but duty bound to sit in the case.<sup>33</sup> The majority argued that the Colorado decisions had no bearing on the matters of disqualification of a Texas judge. In Texas, only the Constitution specified the grounds for disqualification. The Court held:

Under the Texas Constitution, it is the duty of the judge to sit save "in any case wherein he may be interested, or where either of the parties may be connected with him by affinity, or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case."<sup>34</sup>

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<sup>30</sup> 28 S.W.2d 515 (Tex. 1930).

<sup>31</sup> *Ibid.*, 517.

<sup>32</sup> *Ibid.*, 518.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

For forty more years after *Love v. Wilcox*, the Texas courts continued to maintain this view. In 1972, rejecting the entire notion of recusal for bias, the 7th Court of Civil Appeals–Amarillo ruled in *Maxey v. Citizens National Bank of Lubbock*<sup>35</sup> that

[w]hile delicate discretion might indicate a judge’s withdrawal from a case in a contentious situation, there is no compulsion to step aside when the judge is not legally disqualified; indeed, unless legally disqualified, it is the duty of the judge to preside....Because the constitutional and statutory grounds are *inclusive and exclusive*, mere prejudice and bias are excluded as a disabling factor.<sup>36</sup>

Today, it would be hard to imagine a judge publicly admitting that “mere prejudice and bias” are not grounds to consider disqualification.<sup>37</sup> But it would not be until *Shapley v. Texas Department of Human Resources*<sup>38</sup> in 1979 that a Texas appellate court recognized bias as a ground for judicial disqualification, and that the Code of Judicial Conduct expanded the grounds for disqualification beyond the constitutional grounds.

### **The Emergence of Recusal for Bias in Texas**

In 1974 the Supreme Court of Texas acted upon the recommendation of the American Bar Association and adopted the ABA Code of Judicial Conduct, Canon 3C(1), promulgated in 1972.<sup>39</sup> The idea of a code of ethics for judges was not new. The Canons of Judicial Ethics had been in existence since 1924, when an ABA committee led by the Chief Justice of the United States, William Howard Taft, drafted them as ethical guidance for judges. The Canons were eventually replaced by the 1972 ABA Code.

In 1977, three years after the ABA Code went into effect in Texas, a motion was filed to disqualify a trial judge in a case involving the termination of a parent-child relationship. The trial judge, seeing evidence of child abuse, overruled the district attorney’s office and ordered the investigation of the parent for possible criminal prosecution. The judge then went on to discuss the details of the case with the press, making statements to reporters about facts that were not

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<sup>35</sup> 489 S.W.2d 697, 702 (Tex. Civ. App. – Amarillo 1972).

<sup>36</sup> *Ibid.* Emphasis in original.

<sup>37</sup> In 1973, in *Williams v. State*, 492 S.W.2d 522 (Tex. Crim. App. 1973), the Court of Criminal Appeals reiterated the century-old rule that “Article V, Section 11, of the Constitution of Texas, provides for the circumstances under which a judge is disqualified....The constitutional grounds of disqualification are exclusive; that is, they specify all the circumstances that forbid a judge to sit.”

<sup>38</sup> 581 S.W.2d 250 (Tex. Civ. App. – El Paso 1979).

<sup>39</sup> ABA CODE OF JUDICIAL CONDUCT, Canon 3C(1), states that: “A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where:

- a) he has a personal bias at prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- b) he served as a lawyer in the matter of controversy, or as a lawyer with whom he previously practiced law, served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it...;
- c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter controversy or in a party to title proceeding, or any other interest that could be substantially affected by the outcome of the proceeding....”



reflected by evidence in the case, including the allegation that the child had been tortured.<sup>40</sup> Numerous newspaper articles reported the judge's allegations, which indicated animus toward the parents. The mother filed to disqualify the judge on two grounds: (1) under Article V, Section 11 of the Texas Constitution the judge's statements "put himself in the position of counsel..."; and (2) the judge had a personal bias that precluded a fair trial under the 1974 Judicial Code. The trial judge refused to disqualify himself.

However, on appeal in *Shapley v. Texas Department of Human Resources* (1979), the 8th Court of Civil Appeals–El Paso ruled that the trial judge acted unethically by ignoring the Code of Judicial Conduct in publicly stating his bias and prejudice to the media during an ongoing trial. Following the judge's public statements, the parties in the case no longer believed they would be treated fairly and impartially.<sup>41</sup> The court wrote:

Now under the Code, the subject of disqualification has been broadened and the direction has been made that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.<sup>42</sup>

*Shapley* represented a precedential shift of great magnitude. For the first time a Texas appellate court recognized: (1) bias as a grounds for judicial disqualification, and (2) that the Code expanded the grounds for disqualification beyond the constitutional grounds. Prior to the effective date of the Code, the grounds for disqualification enumerated by the Constitution were held to be both inclusive and exclusive. Mere bias and prejudice were not disabling factors.

The Court of Civil Appeals further explained that the ethical problem was not the comments made by the trial judge in court, but those he made to the media outside the courtroom during the course of a trial that was still ongoing. This was contrary to Canon 3A(6), which provided that a judge should abstain from making public comments about a pending or impending proceeding.<sup>43</sup> However, under the old "independent grounds" standard, the judge would not have needed to recuse himself after he reacted publicly to the evidence during trial because he developed this bias from information gleaned during the trial.<sup>44</sup>

Lastly, the court pointed out that the trial judge in refusing to disqualify himself had ignored Article 200a, Section 6, Tex. Rev. Civ. Stat. Ann. (Supp. 1978-1979), which outlined the procedure for the referral of a motion for disqualification to another judge or court.<sup>45</sup> Since the mother did

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<sup>40</sup> *Shapley v. Texas Department of Human Resources*, 581 S.W.2d 250.

<sup>41</sup> *Ibid.*, 253.

<sup>42</sup> *Ibid.* The Court of Appeals cites the 1975 case of *Chilicote Land Co. v. Houston Citizens Bank & Trust Co.*, 525 S.W. 2d 941 (Tex. Civ. App. – El Paso 1975), which simply recognizes without amplification that the 1974 adoption of the Code of Judicial Conduct Canon 3C broadened the grounds for disqualification beyond that set forth in the Texas Constitution.

<sup>43</sup> Canon 3A(6) stated: "A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

<sup>44</sup> *Shapley*, 581 S.W.2d 253.

<sup>45</sup> *Ibid.*

not raise this latter point, the court addressed the merits of her challenge to the district court's parental termination judgment. Prior to Article 200a, Section 6, if a judge's impartiality was challenged he or she made the call. If it was an incorrect decision, it could be reversed on appeal. *Shapley* was a transitional case bridging the old and new standard for disqualification. It was also the first substantive and authoritative interpretation of the new norms for recusal by a Texas court. The concept of judicial recusal had now emerged 143 years after the founding of the Texas Republic.

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***“Shapley was a transitional case bridging the old and new standard for disqualification.... The concept of judicial recusal had now emerged 143 years after the founding of the Texas Republic.”***

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In 1981 the Texas Supreme Court adopted Rule 18a, thus giving more specificity to recusal and disqualification rules by adding procedures and time limits.<sup>46</sup> The rule was amended a number of times, first in 1984, clarifying that it applied only to trial judges and not appellate courts of civil jurisdiction. A 1986 amendment to 18a excluded the Texas Court of Criminal Appeals.<sup>47</sup> So three rules now established the terms guiding the disqualification of judges: (1) Rule 18a, (2) Article 200a, and (3) Canon 3C of the Code of Judicial Conduct. The century-and-a-half-old axiom that the grounds for disqualification found in the Constitution were to be regarded as “inclusive and exclusive” had been augmented by a broad category of grounds for recusal.

In 1985 the Legislature repealed Article 200a, leaving only Rule 18a and the Code of Judicial Conduct. However, in 1988 the Legislature adopted Rule 18b, which provided specific grounds for disqualification and recusal. Judges were now guided by ethical canons, statutory requirements, and rules articulated by the courts responding to motions for recusal and disqualification based on “any disability of the judge.” Yet many trial judges, as well as appellate justices, still fought against the concept of recusal, maintaining that recusal and disqualification are two different concepts and that the only legitimate grounds for disqualification were those found in the Constitution.

One of the most important and frequently cited<sup>48</sup> Texas Supreme Court rulings in recusal jurisprudence is *In re Union Pacific Resources Co.*,<sup>49</sup> handed down in 1998. The case originated when plaintiffs sued the Union Pacific Resources Company for personal injury damages. They moved to recuse the trial judge (Judge Max Bennett) on the grounds that the attorney for the law firm representing Union Pacific was also currently representing Judge Bennett in an ongoing recusal hearing. Judge Bennett refused to recuse himself, and pursuant to Texas Rule of Civil Procedure 18a(d) forwarded the motion to recuse to the presiding judge for the administrative district.

The presiding judge then appointed Judge Robert Blackmon, a district judge, who held a hearing at which Judge Bennett testified. Judge Blackmon granted the recusal motion, but then

<sup>46</sup> 18a (as a rule of civil procedure) became effective in 1982 and was rewritten in 2011. See TEX. R. CIV. P. 18a (Recusal and Disqualification of Judges).

<sup>47</sup> See TEX. R. APP. P. 16 (Disqualification or Recusal of Appellate Judges).

<sup>48</sup> *Union Pacific* is cited by three subsequent Texas Supreme Court opinions, two Texas Court Criminal of Appeals opinions, and 118 Court of Appeals opinions (Westlaw and Lexis-Nexis searches, 8/22/19).

<sup>49</sup> 969 S.W.2d 427 (Tex. 1998).



after Judge Bennett wrote to Judge Blackmon requesting a rehearing on the recusal matter, Judge Blackmon reversed himself. Now frustrated, the plaintiffs suing Union Pacific sought a writ of mandamus from the 13<sup>th</sup> Court of Appeals–Corpus Christi to reverse Judge Blackmon.<sup>50</sup> *Union Pacific* raised a unique question: is recusal required of a trial judge when an attorney for a party (representing Union Pacific) in the judge’s court concurrently represents the same judge in recusal proceedings? Plaintiffs argued that the active participation by a challenged judge in a recusal proceeding must lead to the judge’s recusal.<sup>51</sup> The Court of Appeals conditionally issued a writ of mandamus ordering the trial court to vacate its order denying the recusal motion.<sup>52</sup>

In recusal jurisprudence, mandamus is used in extraordinary circumstances to require a trial court to act in a particular way, in this case to compel a judge to recuse. To seek a writ of mandamus is not to seek an appeal, but to initiate an original proceeding against a judge or court demonstrating that there is a clear abuse of discretion on the part of the judge for which there is no legal or constitutional remedy.<sup>53</sup> The party must show that there is real danger of permanently losing substantive rights.<sup>54</sup> Thus, a court will not issue a writ of mandamus absent “compelling circumstances.”<sup>55</sup>

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**“[I]n *Union Pacific*, ... Chief Justice Thomas Phillips set out the following rule: judges may be removed from a case because they are disqualified under the Constitution or by statute, or are recused by rules promulgated by the Texas Supreme Court.”**

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On appeal in *Union Pacific*, the Texas Supreme Court reversed the Court of Appeals’ decision to issue the writ of mandamus because the plaintiffs had “adequate remedy by appeal” and the appeals court abused its discretion by issuing the writ. Chief Justice Thomas Phillips set out the following rule: judges may be removed from a case because they are disqualified under the Constitution<sup>56</sup> or by statute,<sup>57</sup> or are recused by rules promulgated by the Texas Supreme Court.<sup>58</sup> The legal grounds for each type of removal are fundamentally different, he argued. When a judge refuses to recuse himself contrary to the Constitution, any orders or judgments issued by a judge in that instance are void and without effect. Similarly, any orders or ruling made by a judge who is disqualified under statute are void.<sup>59</sup> In both instances, a writ of mandamus is available to the parties to compel the judge’s disqualification without showing that the challenger lacks an adequate remedy by appeal.

However, in *Union Pacific*, the erroneous denial of a recusal motion by the presiding judge did not nullify the judge’s actions. A judgment rendered in such circumstances may of course be reversed on appeal, but not by writ of mandamus. If the appellate court determines that the

<sup>50</sup> *Monroe v. Blackmon*, 946 S.W. 2d 533 (Tex. App. – Corpus Christi 1997).

<sup>51</sup> *Ibid.*, 538.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

<sup>54</sup> *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex.1994).

<sup>55</sup> *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex.1996).

<sup>56</sup> TEX. CONST. ART. V, § 11.

<sup>57</sup> TEX. GOV’T CODE §74.053(d).

<sup>58</sup> TEX. R. CIV. P. 18a, 18b.

<sup>59</sup> § 74.053 (d).

judge presiding over the recusal hearing abused his or her discretion in denying the motion and the trial judge should have recused, then the appellate court can reverse the trial court's judgment and remand for a new trial with a new judge. In extraordinary instances, for example where a judge flagrantly refuses to follow procedural rules governing recusal, the writ of mandamus is appropriate.<sup>60</sup>

Justice Nathan Hecht, concurring in *Union Pacific*, made three very important points: "[j]udges should not inject themselves too far into recusal hearings," "a hearing on a motion to recuse is not a trial of the judge's character and should not be treated as such," and it may be necessary for the judge to testify about the facts contained in the motion to recuse but the judge should not testify on the issue of perceived impartiality or bias.<sup>61</sup> Judge Bennett had called himself as a witness, presented evidence, and given oral argument.<sup>62</sup> Justice Hecht concluded, "The less involved a judge is involved in recusal proceedings, voluntarily or involuntarily, the better."<sup>63</sup>

Would demonstrating a clear bias toward litigants or counsel be grounds for recusal? According to precedent, behavior that prompts the motion for recusal must be based on an "extrajudicial source."<sup>64</sup> This is a somewhat nebulous concept. Behavior or statements on the part of the judge made outside the courtroom prior to a case or made in another case that show that the judge is prejudiced or biased against one party in a pendant case *might* be grounds. The motion would need to show that the judge developed an opinion about the case or parties based on information other than that which the judge learned from participation in the case. The ruling in *Grider* stated: "[T]o require recusal, a judge's bias must be extrajudicial and not based on in-court rulings...."<sup>65</sup> Rulings or decrees by judges based on information gleaned during the course of a proceeding are not grounds for removal.<sup>66</sup>

Federal precedent supports this rule, as well. Responding to the question of whether during the course of a proceeding the trial judge's "impatience, disregard for the defense and animosity" are grounds for recusal, the United States Supreme Court ruled in *Liteky v. U.S.* that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion...."<sup>67</sup> The *Liteky* rule was adopted in *In re M.C.M.*,<sup>68</sup> where the 1<sup>st</sup> Court of Appeals–Houston ruled that recusal is warranted only if it is shown that the bias arises from "an extrajudicial source and not from actions during the pendency of the trial court proceedings, unless these actions during proceedings indicate a high degree of favoritism or antagonism...."<sup>69</sup>

This sounds very straightforward, but is far from being so. In *Norton v. State* (1988),<sup>70</sup> for

<sup>60</sup> *In re Union Pacific Resource Co.*, 969 S.W.2d 427, 428-29 (Tex. 1998).

<sup>61</sup> *Ibid.*, 428.

<sup>62</sup> *Monroe v. Blackmon*, 946 S.W.2d 533, 544.

<sup>63</sup> *In re Union Pacific*, 429.

<sup>64</sup> See *Grider v. Boston Co.*, 773 S.W.2d 338 (Tex. App.– Dallas 1989).

<sup>65</sup> *Ibid.*, 346.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Liteky v. U.S.*, 510 U.S. 540, 555 (1994).

<sup>68</sup> 57 S.W.3d 27 (Tex. App. - Houston 2001).

<sup>69</sup> *Ibid.*

<sup>70</sup> 755 S.W.2d 522 (Tex. App.—Houston 1988), rehearing denied.

instance, a trial judge made a statement in a fit of pique prior to going to trial, proclaiming that regardless of the State's argument or the jury's verdict, he would make his own decision regarding the defendant's punishment for credit card fraud.<sup>71</sup> When the judge was asked by counsel if he would accept a plea bargain of deferred adjudication he replied, "No, and if the jury gives her probation I'll give her jail time."<sup>72</sup> The Court of Appeals reversed the defendant's conviction and ordered a new trial stating that the trial judge's statement was an "arbitrary refusal to consider the entire range of punishment and constituted a denial of due process."<sup>73</sup> Thus, in *Norton* the court ruled that the judge should have recused, not because of extrajudicial information that caused him to be biased against the defendant, but because of a statement he made in anger even before the case went to trial.<sup>74</sup>

The question of whether a judge should explain the reasoning underlying a decision to recuse or disqualify himself or herself has generated debate. In *Thomas v. Walker* (1993)<sup>75</sup> the 10<sup>th</sup> Court of Appeals–Waco explained that the "mental processes rule" protects judges from being subjected to explaining their reasoning underlying a recusal decision, except in the "most extreme and extraordinary circumstances."<sup>76</sup> "[A]n inquiry into his or her mental processes [however messy] in arriving at his decision would be improper and would threaten the foundation of an honorable and independent judiciary."<sup>77</sup> For most of Texas legal history, courts had resisted the urge to look inside the judge's mind for signs of favoritism or signs of bias toward litigants or counsel, but by the end of the 20th century, courts were prepared to go "where no one had gone before."

Texas disqualification and recusal jurisprudence evolved incrementally since 1836 and can best be characterized as conservative and restrained. It is based on a narrow judicial interpretation of state constitutional provisions, statutes, and codes of conduct that are intended to promote impartiality and accountability, without creating a net loss to judicial discretion and the stability of the judicial process. At a minimum, it ensures that a judge's actions should not give rise to reasonable grounds to question the neutral and objective character of the judge's rulings or findings.

***Part 2 of this article will appear in the Spring 2020 issue of the TSCHS Journal.***

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<sup>71</sup> *Ibid.*, 523.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, 524.

<sup>74</sup> *Ibid.*

<sup>75</sup> 860 S.W.2d 579 (Tex. App. – Waco 1993).

<sup>76</sup> *Ibid.*

<sup>77</sup> *Tate v. State*, 834 S.W.2d 566, 569 (Tex. App. – Houston 1992).



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[Return to Journal Index](#)



# New England Roots Run Deep in Texas: A 400<sup>th</sup> Anniversary Salute, Part 1

By David A. Furlow

In his history *Of Plimmoth Plantation*, William Bradford, governor of the first successful English colony in New England, bestowed a now-familiar name on a group of religious dissidents who immigrated to America in 1620 aboard a ship called *Mayflower*: “So they left that goodly and pleasant city which had been their resting place near 12 years; but they knew they were pilgrims, and looked not so much on those things, but lift their eyes to the heavens, their dearest country, and quieted their spirits.”<sup>1</sup> This year marks the 400<sup>th</sup> anniversaries of the Pilgrims’ *Mayflower* voyage and the founding of Plymouth Colony in 1620.

This is the time to salute New Englanders who brought their ideas, institutions, and experience to Texas, including the seeds of self-government, regularly-conducted elections, constitutionalism, the rule of law, and revolution against tyrannical authority. They first planted those seeds in Stephen F. Austin’s colony in the 1820s and 1830s, when Texas was still the junior partner in the Mexican twin-state of Coahuila and Texas. Those seeds came to fruition during the Texas Revolution, the Republic of Texas, and the Lone Star State.

Let’s explore the deep New England roots of Texas law, legal history, and courts. The first part of this article examines ideas, institutions, and experience that led New Englanders to begin their lives anew in Texas. The second part reveals how a few important New Englanders shaped and reshaped Texas.

**New England’s seeds of self-government, constitutionalism, and law.** What ideas, institutions, or experiences enabled these New Englanders to confront so many challenges and accomplish so much? To answer that question, we must, as social commentator Malcolm Gladwell declared, “go back into the past—and not just one or two generations...[but] two or three hundred years, to a country on the other side of the ocean, and look closely at what exactly the people in a very specific geographic area...did for a living.”<sup>2</sup> We must explore the intertwined history of Old England, New England, and Texas.

As Pilgrim scholar Jeremy Dupertuis Bangs has observed, the Pilgrims packed the ideas,

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<sup>1</sup> William Bradford, *Of Plymouth Plantation: Along with the full text of Pilgrims’ journals for their first year at Plymouth*, ed. Caleb Johnson (Bloomington, Ind.: Xlibris Corp., 2006): 91–92.

<sup>2</sup> Malcolm Gladwell, *Outliers: The Story of Success* (New York: Little, Brown & Co., 2008), 170. See generally David A. Furlow, “The Lone Star Republic’s Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Traditions—Part 1: Material Differences in Legal Culture,” *Journal of the Texas Supreme Court Historical Society*, vol. 3, no. 1 (Fall 2013): 9–22, [https://www.texascourthistory.org/Content/Newsletters//TSCHS\\_Journal\\_Fall\\_2013.pdf](https://www.texascourthistory.org/Content/Newsletters//TSCHS_Journal_Fall_2013.pdf).

ideals, and experience of self-government, regularly-conducted elections, constitutionalism, law, and resistance against tyranny in the intellectual baggage they carried with them to America aboard the *Mayflower*.<sup>3</sup> Plymouth Colony's leaders fostered their spread and development as 20,000 Puritan English settlers poured into New England during the Great Migration from 1630 to 1641. New England's constitutional, legal, and military institutions matured in the seventeenth, eighteenth, and nineteenth centuries. When New Englanders carried those ideas, institutions, and experience to Texas, they came into conflict and competition with other religions, forms of government, and ways of life native to Texas Indians, or introduced by Spanish, Mexican, Tejano, Chesapeake, and Scots-Irish immigrants already in Texas.<sup>4</sup>

**The seed theory of culture and *Albion's Seed*.** Herbert Baxter Adams of Shutesbury, Massachusetts nurtured the seed theory of cultural change in the majestic groves of academe. A descendant of East Anglian Puritan and Bay Colony immigrant Thomas Hastings who crossed the Atlantic to come to the Bay Colony in 1634, Adams traced Anglo-American jurisprudence back to the tiny acorns of customary law, tribal self-government, and neighboring-farmer jury trials in the sylvan glades of Saxony, then argued that Anglo-Saxon invaders carried those saplings across the North Sea to the British Isles and from there across the Atlantic to transplant them in America.<sup>5</sup>

In 1989, Brandeis University Professor David Hackett Fischer published *Albion's Seed: Four British Folkways in America*. It examined how four English-speaking cultures<sup>6</sup> crossed the Atlantic between 1629 and 1775 and grew into four cultural traditions in America:

1. a Puritan exodus who left eastern England (Essex, Suffolk, Norfolk, Lincolnshire, and Cambridgeshire) to settle New England from 1629 to 1641;
2. a Royalist cavalier elite and large numbers of their indentured servants from southern and western England who populated the Chesapeake from 1642 to 1675;
3. a Quaker-dominated influx from England's northern Midlands and Wales that combined with Dutch, Swedish, and German settlers to fill the Delaware River Valley between 1675 and 1725; and
4. successive waves of Scots-Irish immigrants from the English, Scottish, and Irish border county who settled in America's Southern back country between 1723 and 1773.<sup>7</sup>

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<sup>3</sup> Jeremy Dupertuis Bangs, Intellectual Baggage speech presented at Pilgrim Hall, April 22, 2019 (author's copy, emailed after the speech in which I introduced Dr. Bangs to the audience). See Jeremy Dupertuis Bangs, *New Light on the Old Colony: Plymouth, the Dutch Context of Toleration, and Patterns of Pilgrim Commemoration* (Leiden: Koninklijke Brill N.V., 2020), 101–02.

<sup>4</sup> See, e.g., James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* (Austin: University of Texas Press, 2013); Randolph B. Campbell, *Gone to Texas: A History of the Lone Star State* (Oxford and New York: Oxford University Press, 2003); Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011).

<sup>5</sup> J. M. Vincent, et al., *Herbert B. Adams: Tributes of Friends, with a Bibliography of the Department of History, Politics, and Economics of the Johns Hopkins University, 1876–1901* (Baltimore: Johns Hopkins University Press, 1902).

<sup>6</sup> David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (New York and London: Oxford University Press, 1989), 8–9. Certain folkways are useful in analyzing a cultural group's legal norms: work ways, rank ways, social ways, order ways, power ways, and freedom ways. *Ibid.*

All four British immigrant groups spoke English, worshipped in Protestant churches, and defended distinctly different understandings of Britain’s law, liberty, and mission in America.

From 1820 until 1870, immigrants who represented each of Fischer’s four cultures entered Texas and interacted with residents who preserved long-standing Spanish, Mexican, and Tejano traditions. Stephen F. Austin, Sam Houston, and John Hemphill introduced Chesapeake and Scots-Irish back-country culture to Texas during the 1820s, 1830s, and 1840s. New Englanders brought their traditions, too, including knowledge of the Mayflower Compact, the Battles of Lexington and Concord, and John Adams’s Massachusetts Constitution of 1780.



Plymouth’s Forefathers’ Monument celebrates memories of the Pilgrims while venerating the rule of law. Photos by David A. Furlow.

**Re-envisioning the Mayflower Compact’s signing.** To assess the Compact’s impact and inspiration, let’s travel back in time to November 11, 1620 and the lee side of Cape Cod, where sandy bluffs and stands of wind-bent pines encompass a small, overcrowded vessel in a calm bay. The ship has sailed across the Atlantic Ocean carrying Captain Christopher Jones, a crew of 15, and 102 passengers. It rocks gently in a “good harbor and pleasant bay, circled round, except in the entrance...about four miles over from land to land, compassed about to the very sea with oaks, pines, juniper, sassafras, and other sweet wood...wherein 1,000 sail of ships may safely ride.”<sup>8</sup>

The bay looks idyllic, yet offers no safe haven. In the distance, passengers and crew behold

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<sup>7</sup> *Ibid.*, 6–7. See also Furlow, “Lone Star Republic’s Supreme Court—Part 1” (Hispanic traditions), [https://www.texascourthistory.org/Content/Newsletters//TSCHS\\_Journal\\_Fall\\_2013.pdf](https://www.texascourthistory.org/Content/Newsletters//TSCHS_Journal_Fall_2013.pdf); and David A. Furlow, “The Lone Star Republic’s Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Legal Traditions—Part 2,” *Journal of the Texas Supreme Court Historical Society*, vol. 3, no. 4 (Summer 2014): 27–34 (applying Fischer’s Chesapeake and Scots-Irish folkways analysis to Texas), [https://www.texascourthistory.org/Content/Newsletters//TSCHS\\_Journal\\_Summer\\_2014.pdf](https://www.texascourthistory.org/Content/Newsletters//TSCHS_Journal_Summer_2014.pdf).

<sup>8</sup> Edward Winslow and William Bradford, *Mourt’s Relation: A Journal of the Pilgrims at Plymouth*, ed. Dwight B. Heath (Cambridge: Applewood Books, 1986), reprinted in Bradford, *Of Plymouth Plantation*, 437–487, at 447–48.



a “hideous and desolate wilderness, full of wild beasts, and wild men....”<sup>9</sup> Their spirits lowered by skies as grey as slate, their bodies reeking of old sweat, unwashed for months by anything but salt spray and rainstorms, the passengers thank their Lord, and Captain Jones, for bringing them across the ocean. But some grumbled about what they had endured since boarding the *Mayflower*. Crowded below decks between dirty sheets dividing family groups, all endured wretchedness.<sup>10</sup> Thirsty for fresh spring water, they long for land. But their leaders refuse to let anyone off the boat until they resolve their differences.

In his history of the colony *Of Plimmoth Plantation*, their later governor William Bradford described how the *Mayflower*'s arrival outside of their (allegedly) intended destination, the Hudson River, resulted in the rise of a potentially rebellious faction aboard ship. “Occasioned partly by the discontented and mutinous speeches that some of the Strangers amongst them, had let fall from them in the ship: that when they came ashore they would use their own liberty; for none had power to command them, the patent they had being for Virginia, and not for New England, which belonged to another government with which the Virginia Company had nothing to do.”<sup>11</sup>

Those “mutinous” Strangers were no fools. When they said that “none would have the power to command them,” they began New England history with a legal argument. Some discontented passengers were arguing that their arrival in New England, rather than in Virginia, meant that their Separatist leaders were engaging in *ultra vires* (Latin for “beyond the powers of” those in command) actions “[u]nauthorized” by the patent granted for the Pilgrims’ settlement and, thus, “beyond the scope of power allowed or granted by a corporate charter or law.”<sup>12</sup>

Before leaving their refuge, the Pilgrims’ leaders in Leiden and the Adventurers (seventy London investors, merchants, and craftsmen who funded the *Mayflower*'s voyage) obtained a land-patent for a colony in the New World. But that instrument, the first Pierce Patent, only authorized them to found a colony in northern Virginia, in the northern part of the vast realm England claimed in North America. Their patent enabled them to settle as far north as the Hudson River—as far north as modern New York City—but no farther. Blown off course by autumn storms, Captain Jones dropped anchor off Cape Cod rather than where they intended. Once in New England, the *Mayflower* and her passengers were outside their legal bounds.<sup>13</sup>

Most passengers hoped to build a town where they could practice a simple Christian faith without surplices (rich vestments Anglican ministers wore in England) and centuries of church traditions they despised as papist superstition. Most were Puritan “Separatists” who separated

<sup>9</sup> Bradford, *Of Plymouth Plantation*, 112.

<sup>10</sup> John Smith, *New England's Trials* (London, 1622).

<sup>11</sup> Bradford, *Of Plymouth Plantation*, 112.

<sup>12</sup> Bryan A. Garner, ed., *Black's Law Dictionary* (St. Paul, Minn.: West Pub., 9<sup>th</sup> ed., abridged, 2010), 1311–12 (“*ultra vires*”). Texas courts address the same legal issues in the twenty-first century. See, e.g., *Pruett v. Harris County Bail Bond Board*, 249 S.W.3d 447, 452–55 (Tex. 2008), *partially reversing and partially affirming* 177 S.W.3d 260 (Tex. App.—Houston [1st Dist.] 2005). “In England an *ultra vires* contract is treated as absolutely void because such a contract is regarded as contrary to law.” Note, “*Ultra Vires* Acts of Corporations,” *Columbia Law Review*, vol. 5, no. 3 (March 1905): 235–36, [https://www.jstor.org/stable/1109189?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/1109189?seq=1#metadata_info_tab_contents).

<sup>13</sup> Eugene Aubrey Stratton, *Plymouth Colony: Its History and People, 1620–1691* (Salt Lake City: Ancestry Publishing, 1986), 19–21 and 393–97, Appendix A, Pierce Patent (named for John Pierce); John Smith, *Generall Historie of Virginia, New-England, and the Summer Isles* (London, 1624), vol. 2, 143.

from Henry VIII's Anglican Church because it included Catholic traditions that could never be purified; that was what distinguished them from the Puritans who sought to reform England's churches from within. Yet there were also "Strangers" among the passengers who did not share their views. Some were Dutch.<sup>14</sup> Some came only because their expertise or skills could prove valuable.<sup>15</sup> Some were there because their money paid for the voyage.<sup>16</sup>

As excited as they were to reach land, the passengers worried. Despite their deep faith in providence, Captain Jones had missed their intended destination by hundreds of miles. Since Cape Cod fell far outside the patent, some thought they no longer owed any duty to the wealthy Londoners who ventured mere money, but not their lives, for the colony. Perhaps they should cast aside their covenants, throw off their indentures, and proclaim their rights as Englishmen.

*Or could they?* On a desolate, wind-slashed coast without shelter, on the eve of winter, confronting armed attack by Indians who lived there, and with many passengers beginning to sicken, what would a small company of 102 passengers do if they did not cleave together? And they knew that their creditors, the Adventurers in London, would refuse to send resupply ships to colonists who had broken faith with them. Matthew 12:22-28 warned them: "But Jesus knew their thoughts, and said to them, 'Every Kingdome divided against itself is brought to nought, and every citie or house divided against itself shall not stande.'"<sup>17</sup>

Time was short. Division and dissent were luxuries neither the Pilgrim Separatists nor the Strangers among them could afford on the eve of a bleak New England winter. If they divided into camps, there would not be enough men and arms to protect either group. If they fell to fighting, the colony might collapse into starvation, murder, and even cannibalism, as happened during the Jamestowne colony's first years. While the passengers began falling into factions, their leaders crafted a compromise based on mutual consent and shared values. They balanced competing ideas and contending interests to create a congregational commonwealth.

The Separatists and the Strangers had to live together, so they memorialized a bond that had arisen since Pastor John Robinson joined them together in a shared life based on faith. By 1620, the threat of a Spanish Catholic attack on the Protestant Netherlands, fear that their children were becoming Dutch while forgetting English ways, and dread of Dutch moral laxity convinced the Pilgrims to sail to the New World. They left the fortified city of Delftshaven aboard the *Speedwell* and *Mayflower*. After the *Speedwell* leaked too much to cross the ocean, they turned back to England, returned to sea only in the *Mayflower*, and sailed sixty-six days before reaching

<sup>14</sup> Stratton, *Plymouth Colony*, 19 (the Strangers were those "not of their faith with whom they had to travel to in order to get [financial] support for their venture."); Bangs, *Strangers and Pilgrims*, 615-16 (it is "possible that when Bradford explained the origins of the Mayflower Compact he referred to Dutch or Walloon passengers on the *Mayflower*. Francis Cooke (Franchoy Coucke) was there. Conceivably some of the people who joined the group under [Christopher] Martin's leadership, while coming from Essex or London, were in fact strangers in the sense of refugees.").

<sup>15</sup> See generally George F. Willison, *Saints and Strangers: Being the Lives of the Pilgrim Fathers & Their Families with Their Friends & Foes; & an Account of Their Posthumous Wanderings in Limbo, Their Final Resurrection & Rise to Glory and The Strange Pilgrimages of Plymouth Rock* (Alexandria, Va.: Time-Life Books, 1945), 129-44.

<sup>16</sup> *Ibid.*

<sup>17</sup> *The Geneva Bible: A facsimile of the 1599 edition with undated Sternhold and Hopkins Psalms* (Ozark, Mo.: L.L. Brown Pub., 2000).



When the *Mayflower* sailed inside of Cape Cod in November 1620, its passengers saw a vast harbor encircled by eroding bluffs. The bluffs are still there behind the swivel-gun on the replica seventeenth-century Swedish warship *Kalmar Nyckel*. Photo by David A. Furlow.

Cape Cod on November 11, 1620.<sup>18</sup>

The Pilgrims recalled how Pastor John Robinson told them they should “knit [themselves] together as a Body, in most strict and sacred Bond and Covenant of the Lord, of the violation whereof we make great conscience, and by virtue whereof, we hold ourselves strictly tied to all care of each other’s goods, and of the whole.”<sup>19</sup> Robinson told them to become a “body politic” by crafting a civil compact to govern themselves in America:

Lastly, whereas you are become a body politic, using amongst yourselves civil government, and are not furnished with any persons of special eminence above the rest, to be chosen by you into office of government; let your wisdom and godliness

<sup>18</sup> The Pilgrims used the traditional Julian Calendar adopted during Julius Caesar’s rule of Rome. Pope Gregory replaced that calendar with his Gregorian Calendar, which added ten days, during the sixteenth century. The English and their New England descendants did not adopt the Gregorian Calendar until the mid-eighteenth century.

<sup>19</sup> Jacob Bailey Moore, *Lives of the Governors of New Plymouth, and Massachusetts Bay, from the Landing of the Pilgrims at Plymouth in 1620, to the Union of the Two Colonies in 1692* (Boston: C.D. Strong Pub., 1851), 24 n.5. See also Nathaniel Philbrick, *Mayflower: A Story of Courage, Community, and War* (New York: Viking/Penguin 2006), 41 (“Written with crystalline brevity, the Compact bears the unmistakable signs of Robinson’s influence...”).



appear, not only in choosing such persons as do entirely love and will promote the common good, but also in yielding unto them all due honour and obedience in their lawful administrations.<sup>20</sup>

The sea-going members of Robinson's Leiden congregation joined the worldly people who boarded the *Mayflower* in London, elected a governor, organized a framework of law, and created a society based on consent rather than royal prerogative, grounded in civil law rather than theocratic command.<sup>21</sup> They read the freshly quilled words aloud:

**"IN THE NAME OF GOD, AMEN.** We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King *James*, by the Grace of God, of *Great Britain, France, and Ireland*, King, *Defender of the Faith, &c.*

"Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of *Virginia*; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.

**"IN WITNESS** whereof we have hereunto subscribed our names at *Cape-Cod* the eleventh of November, in the Reign of our Sovereign Lord King *James*, of *England, France, and Ireland*, the eighteenth, and of *Scotland* the fifty-fourth, *Anno Domini*; 1620."<sup>22</sup>

Edward Winslow, one of their leaders, "thought good there should be an association and agreement, that we should combine together in one body, and to submit to such government and governors as we should by common consent agree to make and choose."<sup>23</sup>

**Is a painting a mirror?** Many paintings, prints, and posters depict the signing of the

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<sup>20</sup> David Beale, *The Mayflower Pilgrims, Roots of Puritan, Presbyterian, Congregationalist, and Baptist Heritage* (Greenville, N.C. and Belfast, N. Ireland: Emerald International, 2000), 126–27, quoted in Bangs, *Strangers and Pilgrims*, 620.

<sup>21</sup> Philbrick, *Mayflower*, 41 ("In his farewell letter, Robinson had anticipated the need to create a government based on civil consent rather than divine decree. With so many Strangers in their midst, there was no other way. They must become a 'body politic, using amongst yourselves civil government,' *i.e.*, they must all agree to submit to the laws drafted by their duly elected officials...a civil covenant would provide the basis for a secular government in America."); Nick Bunker, *Making Haste from Babylon: The Mayflower Pilgrims and Their World, A New History* (New York: Alfred A. Knopf, 2010), 286.

<sup>22</sup> See "Mayflower Compact, 1620. Agreement Between the Settlers at New Plymouth, 1620," Avalon Project, Yale Law School, in Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* (Washington, D.C.: Government Printing Office, 1909).

<sup>23</sup> Dwight B. Heath, ed., *Mourt's Relation: A Journal of the Pilgrims at Plymouth* (Bedford, Ma.: Applewood Books, 1961), 17; Bunker, *Making Haste*, 281.

Compact, but all are fictional, composed centuries after the event. One of the best, Edward Percy Moran's *Signing of the Compact in the Cabin of the Mayflower*, dramatizes the moment the passengers began to sign their charter of self-government.<sup>24</sup> On display at Pilgrim Hall in Plymouth, the painting combines a romantic, nineteenth-century imagination with seventeenth-century realities. Edward Moran's iconic image shows a cabin just after a nine-week journey across heaving waves, slashing lightning, and glowering storms. Lamps swing from the ceiling. Signers have begun affixing their names. A strict hierarchy governs the order of signing. Some have distinguished ancestors, but none is an aristocrat and none holds office under King James.

John Carver, the man wearing the broad-brimmed leather hat, sits at a wooden table stroking his chin. A merchant of renown in his fifties, he is accustomed to balancing pros, cons, and costs.<sup>25</sup> Entrusted by Pastor Robinson in Leiden to negotiate with King James's Council for Virginia, he has paid the Pilgrims' debts for three years.<sup>26</sup> Addressed as "Master John Carver" and praised as a "godly and well approved amongst them," he is about to be elected Plymouth's first governor.<sup>27</sup>

The Pilgrims' spiritual leader William Brewster presides over the signing. Loose-leaved volumes of law and literature lie on the cabin floor. The books belong to Brewster, a "gentleman of paper and wax" in an Elizabethan meritocracy clasping the lowest rung of England's social ladder.<sup>28</sup> The son of an archbishop's bailiff, Brewster attended Cambridge University.<sup>29</sup> He worked for Queen Elizabeth's Secretary of State during England's intervention in Holland against Spain. Later, he secured an office and salary as Postmaster of Scrooby Manor, in Nottingham.<sup>30</sup> A man of humble origin, Brewster had made himself a learned man.

Carver watches as William Bradford quills his name to the Compact. Thirty-six years old, an earnest middle-aged man born in rural Yorkshire,<sup>31</sup> Bradford wears a cape that cloaks him

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<sup>24</sup> William Bradford (Caleb Johnson, ed.), *Of Plymouth Plantation: Along with the full text of Pilgrims' journals for their first year at Plymouth* (Bloomington, Indiana: Xlibris Corp., 2006), 125.

<sup>25</sup> Susan E. Roser, *Mayflower Passenger References* (from contemporary records and scholarly journals) (Ontario: Stewart Pub. & Printing, 2011), 55 (illustration), 163–64.

<sup>26</sup> *Ibid.*, 169; letter, November 12, 1617, from Sir Edwyn Sandys, Virginia Company, to John Robinson and William Brewster.

<sup>27</sup> Roser, *Mayflower Passenger References*, 171, citing Rev. William Hubbard, *A General History of New England From the Discovery to MDCLXXX* (Cambridge: 1815, written pre-1682), 66 and Thomas Prince, *Chronological History of New-England In the Form Of Annals...* (Boston: 1736, Part I, 1755, Part II), reprinted in Boston, 1826), 162.

<sup>28</sup> Bunker, *Making Haste*, 130–31, using a term of art coined in Brewster contemporary Sir John Ferne, *The blazon of gentrie: deuided into two parts. The first named, The glorie of generositie. The second, Lacyes nobilitie. Comprehending discourses of armes and of gentry. Wherein is treated of the beginning, parts, and degrees of gentlenesse, with her lawes: of the bearing, and blazon of cote-armors: of the lawes of armes, and of combats. / Compiled by Iohn Ferne Gentleman, for the instruction of all gentlemen bearers of armes, whome and none other this worke concerneth*, (London: Printed for John Vindet for Andrew Maunfell, 1586), <https://luna.folger.edu/luna/servlet/detail/FOLGERCM1~6~6~867991~157409:The-blazon-of-gentrie--deuided-into>, 3, 7, 13–14, and 89–96 (identifying a suspect class of gentry arguably entitled to claim membership in the lowest rank of the 23 ranked orders of gentry Ferne identified).

<sup>29</sup> Bunker, *Making Haste*, 132; Anderson, *Pilgrim Migration*, 67–68.

<sup>30</sup> Bunker, *Making Haste*, 136–44.

<sup>31</sup> Roser, *Mayflower Passenger References*, 55 (illustration), 92, 163–64, 92; Bunker, *Making Haste*, 144.



*The Signing of the Compact in the Cabin of the Mayflower*, by Edward Percy Moran (1862–1935), circa 1900. Image courtesy of Pilgrim Hall website.

against the bone-chilling cold of the Little Ice Age, a time of global cooling.<sup>32</sup> A scabbarded sword hangs at his waist. Bradford, a strong leader utterly sure of himself and his salvation, will exercise executive power as a governor elected by the people. Plymouth's Militia Captain Myles Standish wears his steel soldier's helmet while observing the birth of civilian self-government.

Dr. Jeremy Dupertuis Bangs, director of the Pilgrim American Leiden Museum and the leading expert on the Pilgrims' lives in Leiden, questions the accuracy of Moran's painting:

Why should anyone be wearing so much armor in a ship at anchor in a peaceful harbor? Why are the books strewn on the floor?...What's that fellow thinking about, resting his chin on his hand as if he had just escaped from a painting by Frans Hals? Moran imagines for us a major event in the ancient origins of the modern American empire, combining touching domesticity on the right with a group of impressive

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<sup>32</sup> Geoffrey Parker, *Global Crisis: War, Climate Change and Catastrophe in the Seventeenth Century* (New Haven, Ct.: Yale University Press, 2014).



men doing something important around a sort of table...What makes us think the women should just be pretty, over there taking care of children or sewing...? Is that what women do while men are busy changing human history?<sup>33</sup>

Jeremy, a friend, offered those droll observations on the night I introduced him to speak about the Pilgrims during a Pilgrim Hall fundraiser to restore that very painting in Pilgrim Hall.

**The Compact's four-part structure.** The elegance and power of Dr. Bangs's analysis, the result of nearly four decades of research, writing, and publication in the Netherlands and in New England, merit *verbatim* quotation:

**First**, it identified the signers as loyal subjects of King James, thus binding the foreigners to follow English law, while the English-born acknowledged their natural duty to show loyalty to their king.

**Second**, it described the purpose of their voyage and intended colony as an undertaking for the glory of God, the advancement of the Christian religion, and the honor of king and country.

**Third**, the signers stated that they "solemnly and mutually in ye presence of God, and one of another, [to] covenant and combine our selves together in a civill body politick..."

**Fourth**, the signers agreed "by vertue hereof to enacte lawes, ordinances, acts constitutions, & offices, from time to time, as shall be thought most meet and convenient for ye generall good of ye Colonie..."<sup>34</sup>

Plymouth governor William Bradford referred to this instrument as an "association and agreement." By 1793 it came to be known by its modern name, the "Mayflower Compact," the name this article will use.<sup>35</sup>

**How significant was the Compact?** If we wish to understand the roles New Englanders and their ideas, ideals, and institutions played in nineteenth century Texas, we should ask some open-ended questions. Did the Compact memorialize a group of religious dissidents' creation of a new nation? Was it a stopgap to address a short-term absence of authority beyond the legal limits of a patent? Or was it something bold, the result of ordinary people taking law into their own hands? Did later generations transform an expedient into an exemplar of democracy? Nearly four centuries after the Compact's signing, reasonable minds still disagree about it.

While preparing a presentation about the Compact for the Back Roads of the South Shore Symposium in Plymouth's Spire Center, I asked two of Plymouth's most respected and beloved

<sup>33</sup> Bangs, Intellectual Baggage speech, April 22, 2019 (author's copy). See Bangs, *New Light on the Old Colony*, 101-02.

<sup>34</sup> Bangs, *New Light on the Old Colony*, 13 (verbatim quotation).

<sup>35</sup> Gilbert Matthews. "The Term Pilgrim Fathers," *Transactions of the Colonial Society of Massachusetts, 1913-1914* (Boston: Colonial Society of Massachusetts, 1915), vol. 17, 1915, 295. I'm grateful to Jim Baker for sharing this citation and for giving me an original copy of this publication.

historians, James W. “Jim” Baker and his wife Peggy MacLachlan Baker, to share their insights about the Compact’s history. Jim is the Plymouth-born former director of research at Plimoth Plantation and, later, curator of the Alden House Historic Site. Jim’s *Mayflower* ancestors, of which there are many, arrived in Plymouth nearly 400 years ago and never left. His encyclopedic knowledge encompasses Plymouth’s art, architecture, archives, and oral traditions.<sup>36</sup>

Although not born in Plymouth, Peggy Baker is a researcher for the General Society of Mayflower Descendants *Silver Books Project*, an Honorary Life Member of the Massachusetts Society of Mayflower Descendants, and Director Emerita of both the Pilgrim Society and Pilgrim Hall Museum.<sup>37</sup> Both shared important ideas and insights about the Compact, including assessments of evidence that will soon appear in a forthcoming book many plan to buy, the General Society of Mayflower Descendants’ history of Plymouth Colony, *Made In America*.

**Was the Compact an emergency stopgap measure of no lasting significance?** “The insignificance of the Plymouth Colony in the colonial era is one [issue] upon which almost all historians are agreed,” wrote Samuel Eliot Morison, a Harvard University professor of American history for forty years. “[T]he unpleasant tribe of professional historians refuses to find in the Compact anything more than what Bradford says it was, ‘a combination made by them before they came ashore [...] occasioned partly by the discontented and mutinous speeches that some of the strangers amongst them had let fall....”<sup>38</sup> Morison won Pulitzer prizes for a biography of Christopher Columbus, *Admiral of the Ocean Sea*, and for *John Paul Jones: A Sailor’s Biography*, as well as Bancroft Prizes, and the Presidential Medal of Freedom.<sup>39</sup>

“I believe the Compact had no perceptible influence on American polity until after its rediscovery in the Revolutionary era,” Jim Baker told me, “and then only as retrospective inspiration, not as an active agent for change.”<sup>40</sup> The Compact supplemented a limited grant of authority King James bestowed on the colony by approving the Great Patent of New England, which authorized the Council of New England to organize colonies.<sup>41</sup> Essentially, the Compact arose from a patent

<sup>36</sup> Rich Harbert, “Jim Baker’s new book takes us on a stroll,” *Wicked Local—Plymouth* website (April 16, 2008), <https://plymouth.wickedlocal.com/article/20080416/NEWS/304169793>. Baker has published many books about his hometown. See, e.g., James W. Baker and Jonathan Keith, *Plymouth Through Time (America Through Time)* (England: Fonthill Media, LLC, 2014); James W. Baker, *A Guide to Historic Plymouth* (Charlestown, S.C.: History Press, 2008); James W. Baker, *Thanksgiving: The Biography of an American Holiday* (Durham, N.H.: University of New Hampshire Press, 2009).

<sup>37</sup> “Finding Your Ancestors Genealogy Lecture: Peggy Baker,” General Society of Mayflower Descendants website, <https://www.themayflowersociety.org/blog/item/433-finding-your-ancestors-genealogy-lecture-peggy-baker>.

<sup>38</sup> Samuel Eliot Morison. *The Pilgrim Fathers, Their Significance in History* (Concord, N.H.: Society of Mayflower Descendants in the State of New Hampshire, 1937), 9.

<sup>39</sup> Samuel Eliot Morison, *Admiral of the Ocean Sea* (Boston: Little, Brown and Company, 2 vols., 1942); Samuel Eliot Morison, *John Paul Jones: A Sailor’s Biography* (Boston: Little, Brown and Company, 1959). In addition, Morison authored *The Oxford History of the United States* (Oxford and New York: Oxford University Press, 2 vol., 1927 and 1930) and *The History of United States Naval Operations in World War II* (Boston: Little, Brown and Company, 15 vols., 1947–1962). Jim Baker quotes Morison’s conclusion in his own writings. See Baker, “As Time Will Serve,” *Old Time New England*, 52.

<sup>40</sup> Jim Baker, personal communication with the author, November 10, 2019.

<sup>41</sup> In pertinent part, the patent’s operative language reads: “And further, of our especial grace, certain knowledge, and mere motion, for us, our heirs, and successors, we [King James] do, by these presents, give and grant full power and authority to the said council, and their successors, that the said council...may, from time to time, nominate,

in the same way that King James granted limited self-government to Virginia's planters to organize a legislature, the General Assembly, and elect representatives in 1619.<sup>42</sup>

Jim Baker rejects hagiographic celebration of Plymouth's founders to insist on gathering the facts, plain and simple. "I have long seen the 'Compact' as just a stop-gap measure intended primarily to sustain the agreement made between the adventurers and the passengers; that they would abide by their contract (and not wander hither and thither on their own) both to insure survival and not renege on their responsibility to their partners, both the other passengers and the merchant adventurers, nor endanger the financial support without which the colony would certainly fail."<sup>43</sup>

If you want to see the long-term legal foundations of Plymouth Colony, Jim Baker advises, look not to the Compact but to Plymouth's patents. "The Compact remained (and remains) an inspiration and perpetual reminder of the political unity Plymouth colonists initially achieved," he explained, "but it was the patents with their apparent assignment of limited colonial self-governing rights (there have been debates whether the Council of New England could legally delegate their rights of governance to individual plantations, although they did so anyhow on the 'particular plantation' principle...) that were considered the basis for Plymouth Colony's political legitimacy."

The "particular plantation" strategy, Baker explains, arose from an effort by the Virginia Company of London to populate its Virginia colony by organizing semi-independent "plantation" estates exemplified by the Martin's Hundred, Berkeley, and Flowerdew settlements in Virginia. Virginia Company leaders voted in favor of colonists' autonomy on February 2, 1619, before Captain Jones set sail on the *Mayflower*, so there was a legal basis for the Pilgrims to believe that they enjoyed the right to organize their own little government.<sup>44</sup>

"When the Plymouth Colony laws were first published by William Brigham in 1836," Baker noted, "the introductory documents were the Great Patent of New England (November 3, 1620),

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*make, constitute, ordain, and confirm, by such name or names, style or styles, as to them shall seem good, and, likewise, to revoke and discharge, change and alter...governors, officers, and ministers, which hereafter shall be by them thought fit and needful to be made or used, as well to attend the business of the said company here, as for the government of the said colony and plantation."* William Brigham. *The Compact with the Charter and Laws of the Colony of New Plymouth* (Boston: Dutton and Wentworth, 1836), 8 (emphasis supplied). King James authorized the Council of New England to conduct and supervise colonial elections. It permitted colonists to enact laws for themselves, because it took two to three months to travel from England to America. *Ibid.*

<sup>42</sup> Virginia's General Assembly was America's first legislature. David Furlow, "The Old Dominion's New Domain—Texas," *Journal of the Texas Supreme Court Hist. Soc.*, vol. 9, no. 1 (Fall 2019): 51–71, <https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Fall%202019%20final.pdf>. The Virginia House of Burgesses' home-rule authority remained limited because colonists did not elect a governor chosen by Virginia Company leaders in London; the Burgesses' enactments and resolutions also required approval in London to become law. *Ibid.*

<sup>43</sup> Jim Baker, personal communication, November 10, 2019.

<sup>44</sup> Susan Myra Kingsbury, ed., *The Records of the Virginia Company of London* (Washington, D.C.: Library of Congress, 1906), vol. I, 303 ("Itt was ordered allso by generall Consent that such Captaines or lead[ers] of Perticulerr Plantacons that shall goe there to inhabite by vertue of their Graunts and Plant themselves...in Virginia, shall have liberty till a forme of Gourment be settled for them, Associatinge vnto them divers of the gravest & discreetes of their Companies, to make Orders, Ordinances and Constitucons for the better orderinge and dyrectinge of their Servants and business[,] Prouided [those laws] be not Repugnt to the Lawes of England.").



the Compact and the Bradford/Warwick Patent (January 13, 1629/30)—and not the Pierce Patent of 1621, as it was the Great Patent and the Warwick Patent that had actual legal standing.”<sup>45</sup>

Jim Baker ends his assessment by quoting his college professor at Boston University, Dr. Robert Moody. “The Mayflower Compact was not a constitution or a framework of government,” Moody wrote. “It was not an ingenious invention of shrewd men trained in politics. It had no great influence upon the course of American governmental development. It was a straightforward practical solution on an immediate problem which confronted the founders of the Plymouth Colony—how to prevent factionalism and to promote the common welfare....Though they abhorred the idea of democracy, which to them meant chaos, there was within this simple plantation the seed of the idea of self-government.”<sup>46</sup>

Baker’s vision of the Compact is simple, persuasive, and in depth. But, as is often the case in New England, other scholars see this protean instrument differently.

**An important milestone or an instrument of religious oppression?** George Willison, author of *Saints and Strangers*, hailed the Compact as “an extraordinary document, a remarkable statement of revolutionary new principles, an important milestone in our long, hard, and often bloody ascent from feudalism, from that degrading ‘aristocratic’ system of power and privilege for the few which had held Europe in irons for centuries, vestiges of which still remain to plague us.” Willison first compliments the Compact, then condemns it. “It is also the fashion, as every school child knows, to hail the compact in the most extravagant terms as the very cornerstone of American democracy, which it most certainly was not.”<sup>47</sup>

According to Willison, Leiden’s Separatists, the sad, sour, self-styled “Saints,”<sup>48</sup> crafted the Compact to control the sensual, secular Strangers, the largely irreligious Elizabethan rabble who boarded the *Mayflower* in London to make money and acquire land in the New World.<sup>49</sup> “The covenant was first signed by those who had the right or assumed the privilege of using the title of ‘Mr.’—then pronounced ‘master,’ and often written so. Relatively the aristocrats of the company, there were twelve of this group, with Saints and Strangers equally represented.”<sup>50</sup>

Willison then offered a Hegelian story of colonial class conflict: with a Separatist thesis-group of Calvinist congregationalist protagonists, a Mammon-chasing antithesis of Stranger antagonists, and a synthesis that merged monotheism and materialism in Plymouth Colony. Willison’s Pilgrims resolved their conflict by creating a cash-based congregational community through force, duplicity, and sham democracy.<sup>51</sup> “As the circumstances of its birth reveal, [the

<sup>45</sup> *Ibid.*

<sup>46</sup> Robert E. Moody. “The Mayflower Compact,” *Old South Leaflets*, No. 225 (Boston: The Old South Association, undated), 2 (noting that the Compact accomplished little, but symbolized much).

<sup>47</sup> Willison, *Saints and Strangers*, 152-53. Compare Jeremy Dupertuis Bangs, “Mayflower Compact—A Dissenting View, Part Two,” *New England Ancestors*, vol. 4, no. (Fall 2003): 54; *Records of Plymouth Colony, Laws 1623-1682* (1861): 20-24, citing Willison, *Saints and Strangers*.

<sup>48</sup> Willison, *Saints and Strangers*, 35, 58-61, 87-88, 110-12, 127-28, 467, 511-12.

<sup>49</sup> *Ibid.*, 207-209, 214-15, 225-26, 245, 281-82, 341-43, 371, 387.

<sup>50</sup> *Ibid.*, 152.

<sup>51</sup> Bangs, *New Light on the Old Colony*, 17, 21-22, 60-61, 103, 191 n. 20; Baker, *Thanksgiving*, 155.

Compact] was conceived as an instrument to maintain the status quo on the *Mayflower*, to show inferiors in general and servants in particular their place and keep them where they belonged—*i.e.*, under the thumbs of their masters.”<sup>52</sup>

Jeremy Bangs argues that recent research in the Netherlands and England has shown that a slight majority of the *Mayflower* passengers were members of Leiden’s Separatist congregation and that Christopher Martin, the leader of the group from England who had not lived in Leiden, shared the Separatist views of Pastor Robinson’s Congregation.<sup>53</sup> If so, the Compact did not reflect a fanatical minority’s suppression of a grumbling Stranger majority.<sup>54</sup>

Second, according to Dr. Bangs, the word “stranger” did not connote a London rabble of non-Leiden, non-Separatist Englishmen, but, instead, meant “foreigners,” and referred to a few Dutch people who sailed aboard the *Mayflower*.<sup>55</sup> This may or may not have been the case. As George Willison points out, similar “mutinous speeches” almost led to *Mayflower* Pilgrim Stephen Hopkins’ execution in Bermuda eleven years earlier, when the crash of the *Sea Venture* on Bermuda’s shore led to a brief rebellion based on that ship’s arrival outside of its patent.<sup>56</sup>

Third, writes Dr. Bangs, Willison’s class-conflict analysis bore little relationship to the realities of Cape Cod on the eve of winter during the Little Ice Age. Separatist Saints could neither co-opt nor coerce the Strangers when everyone’s survival was at stake. Necessity compelled them to work together.<sup>57</sup>

**Underlying precedent, borough democracy, and revolution?** Other researchers hail the Compact as a democratic reform that made a real and lasting difference for Plymouth’s settlers. In *Making Haste from Babylon: The Mayflower Pilgrims and Their World, A New History*, London financial reporter Nick Bunker, a trans-Atlantic colleague who has shared research and PowerPoints about Virginia and the Compact, suggested that William Brewster based the Compact on democratically-inclined experiments in the recent municipal charters of towns the Pilgrims knew well: Harwich, Essex; Doncaster, Yorkshire; and Blyth and Retford, Nottinghamshire.<sup>58</sup>

In 1594, the *Town Book of Blyth* reveals that the aldermen of this Northumberland County town three miles from William Brewster’s Scrooby Manor, were chosen “by the consent of all the inhabitants...” The number of males who could vote widened from 11 voters in the 1570s to 92 in 1590s. But that was still only 30 percent of the adult male population.<sup>59</sup> In contrast, the

<sup>52</sup> Willison, *Saints and Strangers*, 153. Compare Jeremy Dupertuis Bangs, “Mayflower Compact—A Dissenting View, Part Two,” *New England Ancestors*, vol. 4, no. (Fall 2003): 54; *Records of Plymouth Colony, Laws 1623–1682* (1861): 20–24, citing Willison, *Saints and Strangers*.

<sup>53</sup> Bangs, *New Light on the Old Colony*, 21; Jeremy D. Bangs, *Strangers and Pilgrims, Travellers and Sojourners: Leiden and the Foundations of Plymouth Plantation* (Plymouth: General Society of Mayflower Descendants, 2009), 610-626.

<sup>54</sup> Bangs, *New Light on the Old Colony*, 21.

<sup>55</sup> *Ibid.*, 11.

<sup>56</sup> Willison, *Saints and Strangers*, 148-152.

<sup>57</sup> *Ibid.*, 1–13.

<sup>58</sup> Bunker, *Making Haste from Babylon*, 284–86.

<sup>59</sup> *Ibid.*, 285; *Town Book of Blyth, 1560-1694*, Clifton Papers, CL M 62, in University of Trent, Nottinghamshire Special Collections.

Compact enabled 90 percent of the adult males to vote. Charters of towns such as Blyth set precedent for the Pilgrims through recent expansions of the voting franchise, institutionalization of annual elections, and creation of frameworks of self-government based on law. If their fellow Englishmen could experiment with empowering voters in existing English townships, the Pilgrims could do so when creating their own little town in New England.

In addition, Queen Elizabeth's Bond of Association offered the Pilgrims' Elder, William Brewster, an example of how Englishmen could associate together for mutual defense. Mary Queen of Scots' claim to the throne threatened Elizabeth and her Protestant religious settlement; the Throckmorton Plot against her in 1583 and a Catholic fanatic's assassination of William of Orange in 1584 revealed that the Pope was using violent regime-change to restore realms to Roman Catholicism. Lord Burghley and Francis Walsingham responded by drafting Elizabeth's Bond of Association, a covenant thousands of Englishmen signed in 1584 to insist that only a Protestant should ascend England's throne. Pilgrim leader William Brewster witnessed the birth of this agreement to preserve a Protestant realm through a quasi-republican covenanted agreement in the 1580s, providing him with inspiration for drafting the Compact in 1620.<sup>60</sup>

A few of the Pilgrims recognized, early on, that taking power into their own hands could even lead them into revolution against the crown. William Brewster's library contained four books by David Pareus, a Calvinist Professor of Theology at the University of Heidelberg. Those books reinterpreted Scripture in a revolutionary way important for New England and America. As Bunker explains, "In a famous passage [in the New Testament's Book of Romans], Saint Paul told Christians to obey their rulers, the powers that be, because they were divinely ordained. Pareus re-read this to mean that Christians had a duty to overthrow a tyrant, especially an irreligious one, because such a man was an enemy of God."<sup>61</sup>

"Obedience hath certaine limits," Pareus wrote. "When tyrants go about to force their subjects to manifest idolatry, or to some wickednesse, against the express word of God; in this case the scripture commands us, that in no wayes we obey such tyrannical Edicts, but that every man, according to the condition of his calling, make resistance."<sup>62</sup> King James's Archbishop of Canterbury deemed Dr. Pareus's ideas "seditious, scandalous, and contrary to the Scriptures" and ordered his books burnt.<sup>63</sup> But no fire could extinguish Dr. Pareus's fiery message. Its embers remained to reignite during the English Civil War—and later, at Lexington and Concord.

As Nick Bunker observed, "[t]he Pilgrims drew up the [Compact] in a new location, at the moment of creation of a new colony. They did so in terms that, two decades later, could be used as a rationale for outright resistance to the Crown. This, the right of disobedience, existed within the language of the Mayflower Compact from the very start. Most radically of all, they produced a document that nearly every man signed, including those who in England were only laborers. This was all very new indeed, as new and different as a school of pilot whales [the Pilgrims saw in

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<sup>60</sup> Bunker, *Making Haste from Babylon*, 286.

<sup>61</sup> *Ibid.*, 283–84 and 453 n.8; British National Archives at Kew, SP 14/130/106; David Pareus, "In divinam ad Romanos S. Pauli apostoli Epistolam," in *Theological Miscellanies of David Pareus*, translation (London: James Young, 1645), 735.

<sup>62</sup> Bunker, *Making Haste from Babylon*, 284.

<sup>63</sup> *Ibid.*, 283.



the waters off Cape Cod].”<sup>64</sup>

**Canons of subsequent contractual construction.** Let’s take the Compact’s story forward from 1620 until the colony’s merger with the Massachusetts Bay Colony in 1692. In *Making Haste from Babylon*, Nick Bunker rejected Samuel Eliot Morison’s, Robert Moody’s, and Jim Baker’s opinions that the Compact was “no more than a short-term, temporary measure, drawn up in a hurry, containing nothing new and nothing original....If it had simply been a short-term fix, the compact would have ceased to matter in 1630, when Plymouth Colony obtained a definitive new patent from the Earl of Warwick, as president of the Council of New England. Instead, [Governor William] Bradford and [Pilgrim leader Edward] Winslow made it plain that the Compact remained very much alive.”<sup>65</sup>

As Jeremy Bangs emphasizes, Leiden’s Separatist Pilgrims did not begin their experiment in participatory democracy by writing the Compact but, instead, by organizing a congregational church in Leiden where the faithful elected their ministers. Since the Bible permitted them to elect their ministers, they reasoned, they could also elect godly Christian leaders as governors in the New World.<sup>66</sup> After extensive discussion of the pros, cons, costs, and alternatives, the Separatist Pilgrims voted to leave Leiden and move to America: “After many other particular things answered, and alleged on both sides,” William Bradford wrote, “it was fully concluded by the major part [majority vote] to put this [voyage to America] design to execution; and to prosecute it by the best means they could.”<sup>67</sup>

The Separatists’ and Strangers’ election of John Carver as Plymouth’s first governor at Cape Cod on November 11, 1620 resulted from a vote among all freemen, Separatist and Stranger alike (as well as three servants, but no women or children). It was the first time that the governed elected a governor in colonial North America.<sup>68</sup> “[T]hey chose, or rather confirmed, Mr. John Carver (a man godly and well approved among them) their governor for that year [1620].....[A]s time would admit they met and consulted of laws, and orders, both for their civil, and military governments, as the necessity of their condition did require, still adding thereto as urgent occasion in several times, and as cases did require.”<sup>69</sup>

The Pilgrims published the Compact in the first book they sent back to England, *Mourt’s Relation*, in 1622.<sup>70</sup> Annual elections and general courts—both legislative assemblies and judicial bodies—evolved over time into New England town-hall government, statutory codification, the rule of law, and democracy. Instead of treating the Compact as a superseded stopgap, English kings, Pilgrims, and London creditors treated it like a charter.

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<sup>64</sup> *Ibid.*, 282.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, 18–19.

<sup>67</sup> Bradford, *Of Plymouth Plantation*, 58; Bangs, *New Light on the Old Colony*, 22.

<sup>68</sup> Jeremy D. Bangs, “Mayflower Compact—A Dissenting View,” *New England Ancestors*, vol. 4, no. 4 (Fall 2003): 56; *Recs. of Plymouth Colony, Laws 1623–1682* (1861): 20–24.

<sup>69</sup> Bradford, *Of Plymouth Plantation*, 127; Bangs, *New Light on the Old Colony*, 23.

<sup>70</sup> Winslow and Bradford, *Mourt’s Relation* in Bradford, *Of Plymouth Plantation*, 447–48.

The Pilgrims' Second Pierce Patent of 1621 augmented and ratified the Compact. Nine years later, Pilgrims, their creditors and Charles I enlarged that grant in the January 13, 1630 Warwick Patent. It was also known as the Bradford Patent because the Earl of Warwick issued it to "William Bradford, his heirs, associates and assigns" through the Council of New England "in the county of Devon for the planting, ruling, ordering, and governing of New England in America."<sup>71</sup> It affirmed that Pilgrim leaders could act "with liberty to them and their successors from time to time to frame, and make orders ordinances and constitutions as well for the better governmente of their affairs here and the receavinge or admittinge any to his or their society, as also for the better government of his or their people and affair in New England..." Each new patent erected new legal structures atop the Compact's sturdy foundation and ratified its importance as the Colony's fundamental law.<sup>72</sup>

When Governor Bradford and Plymouth's leaders codified the colony's rules into a new *Book of Laws* in 1636, they memorialized the Compact as "a solemne & binding combinacon," treating it and the 1630 Warwick Patent as the colony's legal foundations. "If one or the other could claim seniority, then it was the Compact, not the patent. This was because the Compact depended on the vote of the governed, while [Robert Rich, the Earl of] Warwick issued his patent under authority delegated from King Charles." Their 1636 *Book of Laws* reflected the Pilgrims' contemporaneous construction of the Compact, as did an additional paragraph that specified that they created their colony "as freeborne subjects of the state of England," who could not be compelled to accept any "imposicon[,] law or ordnance," including any tax, except "by consent according to the free liberties of the state & Kingdome of Engl. & no otherwise."<sup>73</sup>

When they enacted their *Book of Laws* in 1636, it was still necessary for the Pilgrims to swear fealty to their sovereign, Charles I. Their law specified that every man who sought freeman status to participate in elections and hold office must not only pledge "to advance the growth & good of the severall plantations" but also to swear to be "truly loyall to our Sovereign Lord King Charles." That would change a few years later, during the English Civil War, when Charles I made war on Parliament, Puritanism and the people. An anonymous Plymouth Colony leader neatly crossed out the pledge of fealty to the king, essentially making Plymouth into a self-governing congregational commonwealth.<sup>74</sup>

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<sup>71</sup> *Records of Plymouth Colony, Laws 1623-1682* (1861), 20-24.

<sup>72</sup> Bangs, *New Light on the Old Colony*, 20. The Warwick/Bradford Patent of 1630 expressly incorporated the Compact's terms, albeit without sign-boarding that source of authority: "Also it shall be lawful and free for the said William Bradford his associates his heires and assigns at all times hereafter *to incorporate by some usual or fit name or title, him or themselves or the people there inhabiting under him or them with liberty to them and their successors from time to time to frame, and make orders ordinances and constitutions as well for the beter [sic] government of his or their people or affairs in New England or of his and their people at sea in going thither, or returning from thence, and the same to be put in execution or cause to be put in execution by such officers and ministers as he and they shall authorize and depute*: Provided that the said laws and orders be not repugnant to the laws of England, or the frame of government by the said president and council hereafter to be established." Bradford, *Of Plymouth Plantation*, 551-56 at 554 (emphasis supplied). Unfortunately, another widely available version of this important patent, Yale University Law School's *Charter of the Colony of New Plymouth Granted to William Bradford and His Associates* (1629), [https://avalon.law.yale.edu/17th\\_century/mass02.asp](https://avalon.law.yale.edu/17th_century/mass02.asp), does *not* include the quoted language as a result of some accident or inadvertence.

<sup>73</sup> Bunker, *Making Haste from Babylon*, 282-83.

<sup>74</sup> *Ibid.*, 283.

The preambles of Plymouth's statutory codifications of 1633, 1634, 1658, and 1685 referred to the Compact and the patents that memorialized and incorporated it, treating it as a *de facto* constitution.<sup>75</sup>

**Differing views but persuasive precedent.** "Everyone does indeed have differing viewpoints on the Compact," Peggy MacLachlan Baker noted late last year. She emphasizes practical considerations that resulted in the signing of the Compact. "The large percentage of men in Plymouth Colony who signed the Compact might have been due less to democratic principles than to the practical imperative of getting everyone to buy in—in a community of that small size and in those dire circumstances, they couldn't afford to have any dissidents if they were to survive."<sup>76</sup>

Like Jim, Peggy views the Compact as a signpost along the road to democracy. "[T]he Compact incorporates some guiding democratic principles that eventually—but only after the Enlightenment and its extraordinary influence in changing men's ideas about rights, etc.—were incorporated into the Constitution...The Compact's power is not that it was the 'first' or that it originated or invented democracy (springing full-fledged out of nowhere in the Pilgrims' minds). Its power is that it expresses, in a concise and simple and relatable way, certain basic democratic principles held by the Pilgrims that still resonate today."<sup>77</sup> I could not put it better.

**A Puritan ethic, educational values, and constant commerce.** During the late sixteenth century, England and its Protestant allies in Germany and the Low Countries sought to stop the advance of the Catholic Counter-Reformation in the Netherlands, in Germany, in the Americas, and at sea. Both Puritanism and its Separatist Pilgrim offshoot arose from fear of a Roman Catholic revival in England. For over a century, Protestants and printing shops made John Foxe's *Actes and Monuments*, or *Foxe's Book of Martyrs*, the second most popular book in England after the Bible.<sup>78</sup>

Puritanism rejected Catholic and Anglican traditions in favor of Jean Calvin's ideas. Calvin advocated rule by magistrates, as opposed to the Pope; vernacular services in English, Dutch, German, etc. in contrast to Latin; plain churches in place of ornate ones; an absence of iconic images and saintly statues; long sermons based on the Bible rather than lengthy masses; direct knowledge of God through reading the Bible as opposed to relying on Catholic priests; and beliefs in predestination, the salvation of the "elect," and justification by grace (faith) alone.<sup>79</sup> Like the Pilgrims, the Puritans who founded Massachusetts Bay Colony, New Haven Colony, and Connecticut Colony rejected the King James Version and used the Geneva Bible.<sup>80</sup>

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<sup>75</sup> Bangs, *Pilgrim Edward Winslow*, 133.

<sup>76</sup> Peggy Baker, personal communication, November 6, 2019.

<sup>77</sup> *Ibid.*

<sup>78</sup> John Foxe offered readers woodcut-illustrated stories of how Queen Mary Tudor, "Bloody Mary," fought their faith with fire and fury, driving eight hundred Protestants to the Continent and another three hundred to the stake. See John Foxe, *Actes and Monumentes of these latter and perilous dayes, touching matters of the Church, wherein are comprehended and described the great persecution and horrible troubles that have bene wrought and practised by the Romishe Prelates, speciallye in this Realme of England and Scotlande...etc.* (London: George Virtue, 1851, 3 vols., reprinting the 1583 ed.); Gordon Blackwood, *Tudor & Stuart Suffolk* (Lancaster: Carnegie Pub., 2001), 317–19.

<sup>79</sup> Fischer, *Albion's Seed*, 46–48. Presbyterians, Baptists, and Congregationalists brought similar Calvinist faiths to Texas, renewing centuries-old conflicts between Catholics and Protestants.

<sup>80</sup> David A. Furlow, "Isaac Allerton, His Book: The Allerton/Brewster Bible in the Massachusetts Historical Society,"



Torn and tattered, Isaac Allerton's Geneva Bible may have traveled to America aboard the *Mayflower*.<sup>81</sup> It includes marginal notes that pointed toward a republican form of government. Its translators, who worked in Jean Calvin's Geneva republic, referred to kings as "tyrants."<sup>82</sup> King James hated it because it challenged his notion of hierarchical, top-down, divine-right rule<sup>83</sup> and used the word "tyrant" to describe kings of Israel and Judah. When his scholars created the King James Version, they deleted "tyrant" in favor of "king" and excised the marginal notes as "very partial, untrue, seditious, and savoring too much of dangerous and traitorous conceits."<sup>84</sup>

A faith whose adherents read the Bible and cross-referenced passages requires literacy, generates scholarship, and opens colleges. On November 13, 1637, the Bay Colony's General Court approved construction of a college outside of Boston, at "Newtowne," soon renamed Cambridge.<sup>85</sup> The Bay Colony paid the lion's share of establishing Harvard College, but Plymouth, Connecticut, and the New Haven Colony contributed funds for "Schollers." The result was Harvard College (later, University).<sup>86</sup>

In 1647, Isaac Allerton, a Pilgrim leader, sent his youngest son Isaac Allerton, Jr. to Harvard.<sup>87</sup> To earn a spot in that institution, young Isaac, Jr. first had to master the classics under the tutelage of his grandfather, Plymouth's Elder, William Brewster. Harvard's standards were rigorous:

When any Schollar is able to understand *Tully* [Cicero], or such like classically Latine Authore *extempore*, and make and speake true Latine in Verse and Prose, *suo ut aiunt Marte* ["as they say, by his own ability"]. And decline perfectly the Paradigm's of *Nounes* and *Verbes* in the Greek tongue. Let him then and not before be capable of admission into the Colledge.<sup>88</sup>

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*Mayflower Descendant*, vol. 57, no.2 (Summer 2008): 97–100.

- <sup>81</sup> Editor, "Quart[erly] [Meeting]," *Proceedings of the Massachusetts Historical Society*, vol. 1 (Jan. 1798): 113 and 113 fn.
- <sup>82</sup> Adam Nicholson, *God's Secretaries: The Making of the King James Bible* (New York: Perennial/Harper Collins, 2004), 58 ("The word 'tyrant,' for example, which is not to be found in the King James Bible, occurs over 400 times in the Geneva text.").
- <sup>83</sup> At the January 14, 1604 conference he called to consider the "Millenary Petition" of Puritan ministers and scholars, King James emphasized the importance of bishops: "I approve the calling and use of bishops in the church and it is my aphorism, 'No bishop, no king'; nor intend I to take confirmation from the bishops." See G. P. V. Akrigg, *Jacobean Pageant: The Court of King James I* (Boston: Harvard University Press, 1962), 305 and 414, citing Thomas Fuller, *The Church History of Britain* (Oxford: Oxford University Press, 1845), vol. V, 280.
- <sup>84</sup> The word "tyrant" is found three times in one edition of the King James Version, in *Apocrypha*. See, e.g., King James Version, Wisdom 12:14; 2 Maccabees 4:25, and 2 Maccabees 7:27.
- <sup>85</sup> See generally Samuel Eliot Morison, *Harvard College in the Seventeenth Century* (Cambridge: Harvard University Press, 2 vols., 1936); Samuel Eliot Morison, *The Founding of Harvard College* (Cambridge: Harvard University Press, 1968), 179.
- <sup>86</sup> Peggy M. Baker, "Josiah Winslow, Harvard Man," *Mayflower Journal: A Magazine of Genealogy, History, Literature, and the Arts in Colonial New England*, vol. 3, no. 1 (Spring 2018): 8.
- <sup>87</sup> John L. Sibley, *Biographical Sketches of Graduates of Harvard University in Cambridge, Mass.* (Cambridge, Harvard University Press, 1873), vol. 1, 253–56, 590.
- <sup>88</sup> Harvard College, *New England's first fruits: in respect, first of the conversion of some, conviction of divers, preparation of sundry of the Indians 2. Of the progresse of learning, in the colledge at Cambridge in Massachusetts bay* (London, 1643), 26, quoted in Baker, "Josiah Winslow, Harvard Man," 10.



The Isaac Allerton Bible at Boston's Massachusetts Historical Society exemplifies the Bibles Separatist Pilgrims and Puritans brought to New England. Photo by David A. Furlow.

Isaac Allerton paid his son's tuition, room, board, tutors' fees, and commencement costs with silver coin and sack wine<sup>89</sup> at a cost of 10 English pounds, 16 shillings, and 8 pence per year.<sup>90</sup> Plymouth historian Peggy Baker estimates the comparative cost of sending a son to Harvard. "In 1645, the cost of an average horse was about £3. Today, an average mid-sized car (according to Kelly's Blue Book) costs about \$25,000. Using that as the basis of conversion, [Josiah Winslow's] Harvard education cost his father about \$90,000 per year. Today, Harvard tuition, room, and board costs about \$100,000 per year."<sup>91</sup>

In 1650, Isaac Allerton, Jr. became one of the first English-speaking, native-born students to

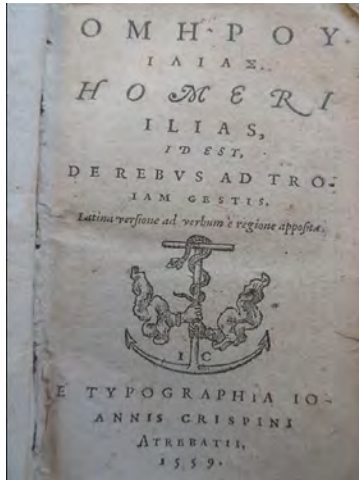
<sup>89</sup> Sibley, *Biographical Sketches*, 253, 256; Thomas Chesholme, (ed., Samuel E. Morison), "Chesholme's Steward's Book, 1651-1660," in *Publications of the Colonial Society of Massachusetts*, 31 (1935): 3-73; Martin H. Quitt, "The Mayflower Pilgrim and the Virginia Royalist: The Allertons, Father and Son," XLIV *Northern Neck of Virginia Historical Magazine*, XLIV (1994): 5152-5161, 5155, n.14; Samuel E. Morison, "Introduction" *Steward's Book*, XXXI *Publications of the Colonial Society of Massachusetts*, 9.

<sup>90</sup> Baker, "Josiah Winslow, Harvard Man," 13.

<sup>91</sup> *Ibid.*



graduate.<sup>92</sup> Instead of entering the ministry, as 73 percent of Harvard's graduates did, or going to Europe to study medicine, as another 12 percent did, Isaac, Jr. became a merchant, bought land from Machodoc Indians in Virginia, opened a tobacco plantation, and joined neighbors Augustine Washington and Richard Lee to become a "Lord of the Potomac."<sup>93</sup> He earned an officer's rank, won election as a justice of the peace, entered the Virginia House of Burgesses, and joined Charles II's Royal Council of Virginia. From 1650 through Barack Obama's presidency, Harvard graduates have litigated, legislated, reformed, interpreted, and enforced the law. Both Isaac Allerton, Jr. the son and Barack Obama the President exemplify New England's status as a place settled by people of the book.<sup>94</sup>



A student at Harvard during the 1640s would read Homer's *Iliad* and might pay for tuition with sack (prosecco) white wine. Above left: Homer's *Iliad*, 1559 edition, Catawiki; Above center, "Veritas," Wikimedia; Above right, "Sack" wine bottle, Bayou Bend Museum, Houston. photo by David A. Furlow; Bottom: "Old Harvard College from the Yard," *Order of the Founders and Patriots of America* website.

<sup>92</sup> *Ibid.*, 9.

<sup>93</sup> Mary-Agnes Brown Groover, "Mayflower Heritage Brought to Northern Neck by Isaac Allerton, Jr.," *Northern Neck of Virginia Historical Magazine*, vol. XXXI (2003): 3497-3507.

<sup>94</sup> As with his predecessors George H.W. Bush, George W. Bush, and such presidents as Teddy Roosevelt and Theodore Roosevelt, President Barack Obama traces one line of his family back to Plymouth Colony. Lane Lambert, "Obama's roots trace back to Plymouth," *The Patriot Ledger* (Jan. 10, 2009), <https://www.patriotledger.com/article/20090110/NEWS/301109803>.



“As early as 1642,” historian David Hackett Fischer observed, “the Massachusetts Bay Colony required that all children should be trained to read by their parents or masters.”<sup>95</sup> Puritan colonies followed the Bay Colony’s lead.<sup>96</sup> “Before the War of American Independence they founded four colleges—nearly as many as all of the other mainland colonies combined.... New England...was unique in its strong support for both common schools and higher learning.”<sup>97</sup> Bostonians built schools, colleges, and universities. Some of the young men who embraced education in New England brought their love of learning, books, and schools to Texas.

**Plymouth colonists pioneered mediation and arbitration.** Conciliation, mediation, and arbitration resolved legal disputes in the seventeenth-century Spanish, Dutch, and English empires.<sup>98</sup> Leaders often cited passages from the Bible, especially 1 Corinthians 6:1-8, to promote brotherly dispute resolution.<sup>99</sup> They fostered an extraordinarily strong faith in the rule of law.<sup>100</sup> Arbitration came on the *Mayflower* and grew stronger as John Winthrop led the Great Migration of twenty thousand Puritans to New England.<sup>101</sup>

More than two centuries later, during the Texas Constitutional Convention of July 1845, the Committee on General Provisions recommended arbitration whenever possible.<sup>102</sup> Additionally, the delegates drafted a constitutional provision stating that, “[i]t shall be the duty of the Legislature, to pass such laws as may be necessary and proper, to decide differences by arbitration, when the parties shall elect that method of trial.”<sup>103</sup> Texas’s first state legislature authorized conciliation and arbitration in 1846.<sup>104</sup>

**A shining city on a hill?** Massachusetts Bay Colony Governor John Winthrop introduced the communitarian concept to American law. Aboard the flagship of his fleet, *Arbella*, between the Isle of Wight in the English Channel and his arrival at the mouth of the River Charles in the Bay Colony, Winthrop described the society he sought to create in New England. Known as the *Model of Christian Charity*, Winthrop’s sermon was a Puritan lawyer’s concept of a Christian commonwealth. Winthrop believed that there was only one way to avoid a shipwreck of pride in the Bay Colony. He urged colonists to “follow the counsel of Micah: to do justly, to love mercy, to walk humbly with our God.”

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<sup>95</sup> Fischer, *Albion’s Seed*, 132.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, 133.

<sup>98</sup> See David A. Weir, *Early New England: A Covenanted Society* (Grand Rapids, Mich.: William B. Eerdmans Pub. Co., 2005), 73–190, 224–28.

<sup>99</sup> See 1 Corinthians 6:1-6, quoted in *ibid.*, 96–97.

<sup>100</sup> See, e.g., Cornelia Hughes Dayton, *Women before the Bar: Gender, Law and Society in Connecticut 1639–1789* (Chapel Hill: University of North Carolina Press, 1995), 29, 81–82.

<sup>101</sup> See Bradford, *Of Plymouth Plantation*, 399–403.

<sup>102</sup> Tasha Lea Willis, “Arbitration Comes to Texas—and Flourishes,” *Journal of the Texas Supreme Court Historical Society*, vol. 2, no. 3 (Spring 2013): 1, [https://www.texascourthistory.org/Content/Newsletters/TSCHS\\_Journal\\_Spring\\_2013.pdf](https://www.texascourthistory.org/Content/Newsletters/TSCHS_Journal_Spring_2013.pdf); John Cornyn, “The Roots of the Texas Constitution: Settlement of Statehood,” *Texas Tech Law Review*, vol. 26 (1995): 1089.

<sup>103</sup> Tex. Const. of 1845, art. VII, § 15.

<sup>104</sup> Act approved April 25, 1846, §§ 1-9, reprinted in 2 H.P.N. Gammel, *Laws of Texas 1822–97* (Austin: Gammel Book Co., 1898), 1433–35.

For this end, we must be knit together in this work as one man, we must entertain each other in brotherly affection, we must be willing to abridge ourselves of our superfluities, for the supply of others' necessities, we must uphold a familiar commerce together in all meekness, gentleness, patience and liberality, we must delight in each other, make others' conditions our own, rejoice together, mourn together, labor and suffer together, always having before our eyes our commission and community in the work, our community as members of the same body....

*For we must consider that we shall be as a city upon a hill: the eyes of all people are upon us, so that if we shall deal falsely with our God in his work we have undertaken, and so cause him to withdraw his present help from us, we shall be made a story and a by-word through the world....*<sup>105</sup>

One hundred and fifty years later, Winthrop's ideal echoed in the U.S. Constitution's Preamble:

We the people of the United States, in order to *form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity*, do ordain and establish this Constitution for the United States of America.

Winthrop's sermon continues to influence America.<sup>106</sup> John F. Kennedy stated that "I have been guided by the standard John Winthrop set...that 'we shall be as a city upon a hill.'"<sup>107</sup> Ronald Reagan referred to America as a "shining city on a hill" in his second inaugural address.<sup>108</sup> Sandra Day O'Connor quoted Winthrop's image at Reagan's funeral in 2004.<sup>109</sup>

**John Adams's Massachusetts Constitution of 1780.** Soon after the French and Indian War, parliamentary and royal encroachments on American rights resulted in the Stamp Act Crisis of 1765.<sup>110</sup> Resentment at taxation without representation escalated the estrangement. The Boston Tea Party led to Parliament's Intolerable Acts.<sup>111</sup> New Englanders reinterpreted Magna Carta to mean that no man, no king, and no parliament was above the law. They organized committees of public safety, trained Minute Men militias, and convened continental congresses to complain about violations of colonial rights.<sup>112</sup> Escalating fear, military miscalculations, and anger led to bloodshed at Lexington, Concord, and Bunker Hill, the Declaration of American

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<sup>105</sup> Kirsten Fischer and Eric Hinderaker, eds., *Colonial American History* (Malden, Mass.: Blackwell Pubs., 2002), 85–88 (emphasis added).

<sup>106</sup> Sarah Vowel, *The Wordy Shipmates* (New York: Riverhead/Penguin Books, 2008), 35–72.

<sup>107</sup> William Safire, *Safire's Political Dictionary* (New York: Oxford University Press, 2008), 126.

<sup>108</sup> Gary Scott Smith, *Faith and the Presidency: From George Washington to George W. Bush* (New York: Oxford University Press, 2006), 325–63.

<sup>109</sup> Vowel, *Wordy Shipmates*, 67–69.

<sup>110</sup> Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill, N.C.: Institute of Early American History and Culture at Williamsburg, Virginia, by the University of North Carolina Press, 1953), 14–17; H. Cushing, ed., *The Writings of Samuel Adams* (New York: G.P. Putnam's Sons, 1904–08), vol. 1, 67–68.

<sup>111</sup> Kevin Phillips, *1775: A Good Year for Revolution* (New York: Viking/Penguin, 2012), 9, 30–31, 21, 38, 48, 72, 153, 159.

<sup>112</sup> Mark A. Graber and Howard Gillman, *The Complete American Constitutionalism: Volume One—Introduction and the Colonial Empire* (Oxford and New York: Oxford University Press, 2015), 188–217.

Independence, and the American Revolutionary War.<sup>113</sup>

John Adams joined John Hancock, Roger Sherman, Robert Livingston, Benjamin Franklin, Thomas Jefferson, and other Patriots at Independence Hall in Philadelphia to sign the Declaration of Independence on July 2, 1776.<sup>114</sup> The Second Continental Congress encouraged citizens to begin writing constitutions for their states, so John Adams did that for Massachusetts.<sup>115</sup> The Massachusetts Constitution of 1780 inspired others, including Sam Houston's 1833 constitution for an independent state of Texas.<sup>116</sup> We'll explore the surprisingly strong connections between New England and Texas in the next issue of the *Journal*.

**Part 2 of this article will appear in the Spring 2020 issue of the Journal.**

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<sup>113</sup> Keith Stewart Thomson, *The Declaration of Independence: Four 1776 Versions* (Philadelphia: American Philosophical Society, 2014); Phillips, *1775: A Good Year for Revolution*, 231, 297, 253, 452–53, 497, 541; Brendan Morrissey, *Boston 1775: The Shot Heard Round the World* (Oxford, England: Osprey Military Publishing, Praeger Illustrated Military Series, 2004), 35–81.

<sup>114</sup> Thomson, *Declaration of Independence*. Although signed on July 2, the commemoration came to be known afterwards as the Fourth of July because of its publication date two days after the signing.

<sup>115</sup> Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, trans. Rita Kimber and Robert Kimber (Chapel Hill, N.C.: Institute of Early American History and Culture, Williamsburg, Virginia, by University of North Carolina Press, 1980), 63; Tony Williams, "The Massachusetts Constitution of 1780: John Adams and the Fundamental Liberties of the People," *Constituting America* website, <https://constitutingamerica.org/massachusetts-constitution-1780-john-adams-fundamental-liberties-of-the-people-guest-essayist-tony-williams/>. The Massachusetts Historical Society commemorates the signing every year on July 2.

<sup>116</sup> Eugene C. Barker, *The Life of Stephen F. Austin* (Austin: University of Texas Press, 2d ed., 1949), 361; Joseph L. Clark, *A History of Texas; Land of Promise* (Dallas: D. C. Heath and Co., 1st ed., 1939), 165–66; J.E. Ericson, "An Inquiry into the Sources of the Texas Constitution," Ph.D. thesis (1957), Texas Tech University, file:///C:/Users/dafur/Downloads/31295004529870.pdf, citing Henderson King Yoakum, *History of Texas from Its First Settlement in 1685* (New York: Redfield, 1855), vol. I, 311; Jodella Dorothea Kite, "The War and Peace Parties of Pre-Revolutionary Texas, 1832–1835," Master's thesis, Texas Tech University (1986), 16, <https://ttu-ir.tdl.org/bitstream/handle/2346/12776/31295004914171.pdf?sequence=1>. But see, in contrast, Joseph W. McKnight, "Stephen Austin's Legalistic Concerns," *Southwestern Historical Quarterly*, vol. 89 (1986): 263, 265; Robert E. Hall, "Remonstrance—Citizen's Weapon against Government's Indifference," *Texas Law Review*, vol. 68 (June 1990): 1409, 1417 n.55, citing Barker, *Life of Stephen F. Austin*, 361 n.30; Cornyn, "Roots of the Texas Constitution 1089, 1112).



**DAVID A. FURLOW**, an attorney, historian, and archaeologist, is a trustee of the Pilgrim Hall Museum in Plymouth that preserves Pilgrim artifacts. As a member of Plymouth's Old Colony Club he commemorates the founding of Plymouth every December 21 on Forefathers Day. David and his wife Lisa H. Pennington are recipients of a 2020 NSDAR (National Society Daughters of the American Revolution Historic) Historic Preservation Medal for their work preserving the 1747 Captain Isaac Doten House at 2 Carver Street in Plymouth.

[Return to Journal Index](#)



# On the Road

## Looking for San Felipe de Austin in Connecticut

By Texas Historical Commission Staff<sup>1</sup>

In July of 2015, San Felipe de Austin State Historic Site project historian Michael Moore spent a week at Yale University researching San Felipe resources in its archival collections. Surprisingly, some of the best early Texas history archives outside of Texas are in the Western Americana collections of Yale University's Beinecke Library. Yale's prominence as an archival home for Texana can be traced to two East Coast collectors and bibliographers.

Henry Raup Wagner graduated from Yale Law School in 1886. His professional life, however, shifted from law to mining, which brought him to Mexico and the American Southwest. He developed a passion for collecting books and manuscripts about American westward expansion and the Spanish borderlands, and published a bibliography on western topics. Wagner died in 1957. Yale University's Beinecke Library has some of his collections related to Texas and Mexico, with a particular focus on land grants during the Mexican era of Texas history.

Thomas W. Streeter graduated from Harvard Law School rather than Yale, but like Wagner also veered from law to business. His chairmanship of an oil company in the 1920s brought him frequently to Texas, and ignited a passion for collecting Texas history items. Streeter retired to his New Jersey home in 1939 to devote himself fulltime to collecting books and manuscripts, amassing the largest private Texana collection ever assembled. Not just content to collect private treasures, Streeter researched his holdings to understand them better, and ultimately shared his expertise in a five-volume *Bibliography of Texas, 1795-1845* published between 1955 and 1960. His *Bibliography* remains the authoritative work in the field.

Streeter donated a collection of Stephen F. Austin family papers to the University of Texas in 1944, but felt that the Texas libraries had not expressed sufficient interest in his other collections, and he sold them to Yale University in the 1950s. In addition to extensive manuscript documents, Streeter's collection includes many hundreds of printed documents that came off the two printing presses at San Felipe, including almost all of the surviving copies of the *Texas Gazette* and *Mexican Citizen* newspapers.

When Streeter acquired his collection of Austin papers from Beauregard Bryan, he also acquired a desk that had belonged to Stephen F. Austin. Although Streeter donated the Austin papers to the University of Texas in 1944, he kept the desk for some years until donating it to the Stephen F. Austin Park Association (now Friends of the San Felipe de Austin State Historic Site) in 1960. As part of the San Felipe de Austin visitor center project, the desk was conserved and

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<sup>1</sup> A version of this article was originally featured on the Texas Historical Commission blog in 2015; it has been updated for this publication. Explore similar stories by visiting <https://www.thc.texas.gov/blog>.



Two views of the Austin desk—inside the Thomas Streeter home in the 1950s (left) and on display at its new home at the San Felipe de Austin Visitors Center (right).

then loaned to the Bullock State History Museum in Austin until the new facilities at San Felipe de Austin were ready for installation. It has been a centerpiece of the new Visitors Center since it was opened by the Texas Historical Commission in 2018.

Michael wanted to do research in the Yale collections for many years in support of ongoing book projects on the history of San Felipe, the printing offices in the town, and a more general work on Austin's Colony. When this opportunity to visit New Haven presented itself, he jumped at the chance. Michael had made use of some of Yale's resources in his 2011 report for the Texas Historical Commission on the printing shops of San Felipe, but he had never personally reviewed Streeter's collections until this trip.

Anticipating the needs for exhibit support for the San Felipe Visitors Center, Michael volunteered while on his research trip to identify and request digital scans of documents that would be important to sharing these stories with visitors. The Friends of the San Felipe de Austin State Historic Site generously appropriated several thousand dollars in scanning fees to stockpile digital images from Yale in support of the exhibit design process. These digital images from documents actually printed in San Felipe's printing shops by Godwin Cotten, R. M. Williamson, and Gail Borden are now featured prominently in the new exhibits.

Because the Streeter and Wagner collections are so far from Texas, they have not been as extensively utilized in exhibits as the resources from archives in the state. The Yale collections of documents written and printed in San Felipe de Austin are proving very critical to the understanding of the town's history, and—thanks to this research effort—now feature prominently in the exhibits and programs of the new Visitors Center at the State Historic Site. The center is open from 9:00 a.m. to 5:00 p.m. every day (except major holidays) at the San Felipe de Austin State Historic Site. For more information go to [www.visitsanfelipedeAustin.com](http://www.visitsanfelipedeAustin.com) or call 979-885-2181.

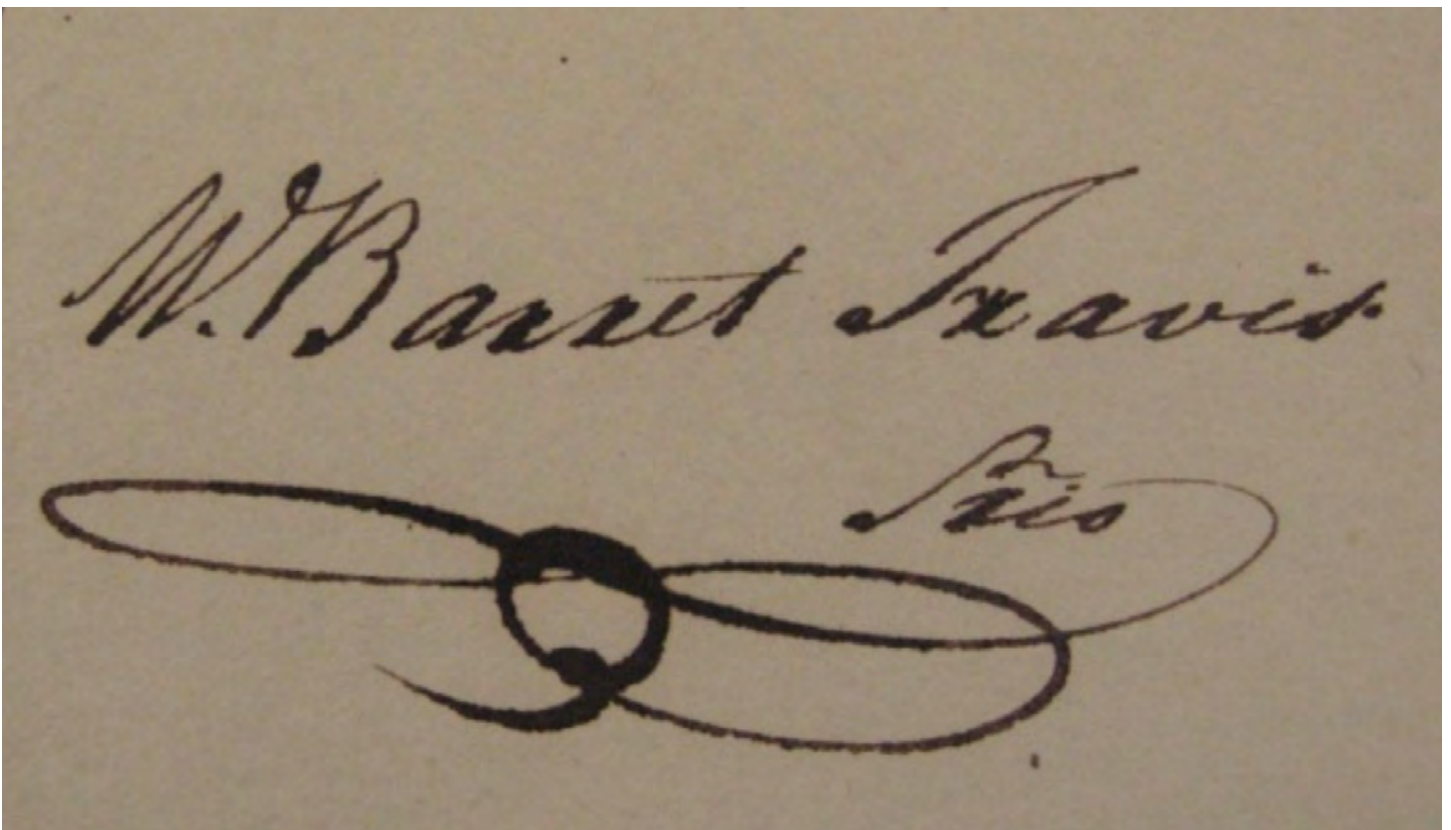


Left: Michael reviews an engraving of Stephen F. Austin based on a pencil sketch Austin made of himself while in Mexico in 1833.

Below: During Michael's visit in 2015 to Yale's Beinecke Library, the iconic modern 1963 building that houses the Western Americana collections was under renovation. Michael conducted his research in a temporary reading room in the Gothic-Revival Sterling Memorial Library, which looks more like a medieval cathedral than a library building. Photo by Michael Moore.







Top left: Seal of the *Juzgado* (Court) of Austin that Stephen F. Austin had sent to San Felipe from Mexico in 1831. Michael had previously found documents stamped with this seal in colonial records in Texas.

Top right: Michael's research indicated that Austin also sent another seal for the *Ayuntamiento* (Town Council) of San Felipe at the same time, but he had not found any examples of documents with that stamp. In the Wagner Collection, however, he found a couple of documents that were stamped with the seal of the council on a report of the *Ayuntamiento* to the Political Chief in Bexar in 1834.

Bottom: These reports that bear the *Ayuntamiento* stamp were written by the Council's secretary, William Barret Travis, who must have also been the custodian of the Council's seal.

Images courtesy of Yale University Beinecke Rare Book and Manuscript Library.

[Return to Journal Index](#)



# GALVESTON, O GALVESTON!

## The Society Honors Trustee Jeff Brown on His Investiture as a U.S. District Judge and Delves Deep into Galveston and Texas History

By Stephen Pate

**G**alveston was recently the site of several events well attended by Texas Supreme Court Historical Society members. First, on January 10, the historic city saw the formal investiture of Society Trustee and former Texas Supreme Court Justice Jeff Brown as the Federal District Judge for the Galveston Division. On January 16, in what Trustee Justice Ken Wise described as a “History-palooza,” six judges, both state and federal, along with some twenty others, toured the 1937 Federal Courthouse, listened to a speech from Trustee Judge Andrew Edison, toured the historic 1861 Federal Courthouse, and concluded the day with a special tour of the Bryan Museum.



U.S. District Judge Jeff Brown's investiture. Photo by David Springer at @TexasSpringer.

Judge Brown received his commission as a United States District Judge for the Southern District of Texas on September 4, 2019. His investiture served as the formal ceremony marking his taking the bench and introducing him to the legal community as a Federal Judge. The event was held in the Music Room in the historic 1911 Galvez Hotel.

Several current and former Trustees of the Society were present. Besides Judge Brown himself, Judge Andrew Edison, Justice Jane Bland (who succeeded Brown on the Texas Supreme Court), Justice Brett Busby, former Chief Justice Tom Phillips, Justice Ken Wise, former Society Presidents Warren Harris and Macey Stokes, and Trustee Stephen Pate were all part of the crowd.

Almost every judge on the Southern District Bench was at the investiture, including judges from Corpus Christi and Laredo. Both Texas Senators John Cornyn and Ted Cruz were present and spoke, with Senator Cruz remarking that the minute Judge Brown assumed the bench, he was neither a Republican nor Democratic judge—but simply a judge.

Justice Ken Wise, a longtime friend of Judge Brown's, was one of the two people who introduced Judge Brown, and spoke warmly of Judge Brown's service as an Eagle Scout as well as their shared love of Texas history.

Judge Brown was then "enrobed" by his wife Susannah Brown, and gave a short speech thanking his friends and relatives for attending. He noted that though he was not BOI—born on the Island—he and his wife had been warmly welcomed by the Galveston community, and were both committed to Galveston.

The following week, Judge Brown, along with new Eastern District Federal Judge Michael Truncale, Southern District U.S. Magistrates Andrew Edison and Christina Bryant, Texas Court of Appeals Justices Ken Wise and Russell Lloyd, Society President Dylan Drummond, *Journal* Executive Editor David Furlow, and many others, spent a busy day exploring history. Judge Edison and Judge Brown conducted a tour of the 1937 Art Deco Federal Courthouse and Post Office. Judge Brown showed the group the courtroom, graced with portraits of some of the Federal Judges who served there—Thomas Kennerly, James V Allred, James Noel, and Finis Cowan.

The group then toured the now vacant Post Office area, and saw a remarkable scene. Postal theft was a major problem when the building was constructed in the 1930s—and according to the Judges on the tour—it still is. To curb the problem, the Galveston Postmaster at the time constructed a wrap-around gallery above the main floor of the postal facilities where he and the supervisors could "spy" on the postal employees below through small slit-like windows. While not always manned, the thought that someone might be in the gallery looking down was enough to keep the employees on the straight and narrow. Several group members said the setup reminded them of "the eye in the sky" at Las Vegas casinos.

The tour members then repaired to the San Luis Resort (not historic, but built over a World War II gun emplacement) to join the Galveston County Bar Association at a luncheon. The honored guest and speaker was Judge Edison, who gave a presentation on "The Galveston Seven," the story of the two-year struggle to confirm a new United States District Judge for the Eastern District, sitting in Galveston, that occurred during Reconstruction.





Society trustees, judges, and court staff enjoyed Judge Brown's tour of the 1937 Federal Courthouse.  
Photo by David A. Furlow.

Judge Edison based his presentation on a series of articles by Stephen Pate that appeared in the *Texas Supreme Court Historical Society Journal*.<sup>1</sup> Judge Edison spoke of the seven actual nominees and many others who sought the judgeship in that troubled time. They included Bird W. Gray, who was actually confirmed for the position before his confirmation was revoked by the U.S. Senate; John Appleton, Union war hero from Maine who died before he could take the bench; and the hapless J.C.C. Winch, who served as judge for four months under a recess appointment before the Senate rejected him for a lifetime appointment. Most of the Galveston Bar members in attendance had never heard of the nominees or of Amos Morrill, the nominee who was eventually confirmed.

Next up was a tour of the historic 1861 Federal Courthouse and Post Office, the oldest federal building in Texas. This tour was given by Stephen Pate, who has studied the building's history for many years. Pate was joined by Steve Mataro of DSW Homes, the entity that currently owns the building, and has lovingly restored it.

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<sup>1</sup> See Stephen Pate, "Reconstruction Politics and the Galveston Seven: The Struggle to Appoint a Judge in the Eastern District of Texas, 1869-72, Part 1," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 2 (Winter 2018): 26-42, <https://www.texascourthistory.org/Content/Newsletters//Final%20Journal%20Winter%202018%20Vol%207%20No%202.pdf>; Stephen Pate, "Reconstruction Politics and the Galveston Seven: The Struggle to Appoint a Judge in the Eastern District of Texas, 1869-72, Part 2," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 3 (Spring 2018): 68-83 <https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Spring%202018.pdf>.



Judge Andrew Edison presents his "Galveston Seven" speech to the Galveston Bar Association.  
Photo by David A. Furlow.

Pate's recent research on the building revealed some new facts. For example, the original 1857 contract for the building was signed by Secretary of the Treasury Howell Cobb—great-grandfather of former Eastern District Judge Howell Cobb, former law partner of Judge Truncale. There has been much debate over whether the Federal Courthouse or Galveston's Ashton Villa was where the Emancipation Proclamation was first read in Texas on June 19, 1865. Pate, in consultation with other historians, now believes the Proclamation was never read at all, but was promulgated in a circular distributed from Union Army Headquarters located a few blocks from the Courthouse.

Pate also believes he knows the origin of the story about a cannonball embedding itself in the building during the Battle of Galveston. Neither Pate nor Mataro have found evidence of that cannonball. However, Pate has now found a November 1865 letter from an inspector who examined the building after the war and reported that shot and shell had damaged the roof. Pate also told of how the Courthouse served as a refuge during the 1900 Galveston Storm, though the roof was torn off and the storm waters reached eight feet inside.

The Courthouse was built in 119 days, using prefabricated wrought iron manufactured in New York and shipped to Galveston. Much of the wrought iron present today is original, and





The 1861 Federal Courthouse and Post Office has a fascinating history that continues to be discovered.  
Photo by Dylan O. Drummond.

the group viewed the magnificent iron “stairs.” The Courthouse was remodeled in 1917, and the second floor turned into a courtroom and judges’ chambers. The group visited the high-ceilinged old chambers, and went out to the balcony for a still remarkable view of old Galveston.

Finally, the group moved on to the Bryan Museum, established by famed Texas oilman J.P. Bryan, descendant of Moses Austin and 19<sup>th</sup> century Congressman Guy Bryan. The museum is



housed in the 1895 Galveston Orphans Home (this was the Protestant Orphanage; the Catholic Orphanage was the one that was so tragically destroyed during the 1900 storm).

The Bryan Museum contains a collection of 70,000 documents, artifacts, maps, and works of art pertaining to the history of Texas and the American West, all collected by J.P. Bryan over a lifetime. This tour was conducted by Justice Wise, who serves (along with Steve Mataro) as a “Delagado” for the museum, or in other words a member of the Museum’s Advisory Board.



Society Trustee Justice Ken Wise, also a trustee of the Bryan Museum, arranged for a special tour.  
Photo by David A. Furlow.

Justice Wise led the group through the collection, which is organized in chronological order from the history of Spain in the region up until the 1930s. He spoke about the more than 250 antique firearms, some magnificent western saddles, and such items as John Wesley Hardin’s business card, touting Hardin’s skill as a lawyer. The group was able to study the wonderful diorama of the Battle of San Jacinto, made up of figures hand-crafted by famed British toy soldier maker King and Country. Justice Wise also pointed out the three Andy Warhol portraits of Western figures that now adorn the collection.





# Come See the Society's 2020 TSHA Program

## Courting Trouble: Hard Cases, Historic Consequences

By David A. Furlow

You're invited to attend the Society's special legal history program, "Courting Trouble: Hard Cases, Historic Consequences," at the 124th Texas State Historical Association Annual Meeting on Friday, February 28, at 2:00 p.m. in Austin. Our panel session will take place at the AT&T Executive Education and Conference Center on the University of Texas campus.



Society President Dylan Drummond will open the session and introduce our distinguished panel of speakers.

The Hon. Ken Wise, Justice of the Texas Court of Appeals for the 14th District in Houston, a trustee of the Society, and the creator of the "Wise about Texas" history podcast, will speak on the topic "District of Brazos: The Republic's Secret Court." As background, in April 1836 the Texian Navy captured the *Pocket*, an American ship bound for Mexico. The U.S. demanded her return. After San Jacinto, the Republic's Interim President David Burnet had to act, but how? Texas had neither law nor courts. Burnet took matters into his own hands and created the Court of the District of Brazos through an executive order. He appointed a San Jacinto veteran and Georgia lawyer as judge. But this court did much more than adjudicate the emergency admiralty case. Justice Wise will examine the records that remain and will analyze the jurisprudence of the Court of the District of Brazos.

The Hon. Mark Davidson, Multi-District Litigation Judge, a trustee of the Society, and a judicial historian, will present "Who Will Be Governor? The Texas Supreme Court Decides." Judge Davidson will examine three important cases—*Ferguson v. Maddox* (1924), *Sterling v. Ferguson* (1930), and *Looney v. Baum* (1972)—in which the Supreme Court of Texas determined the outcome of a gubernatorial race. These three cases reveal the interaction of the judicial and executive branches and ways Texas's highest court has evolved over time in its handling of high-profile election cases.

Francisco Heredia, Team Leader and Curator of the Harris County District Clerk's Office Historical Documents Room, will serve as commentator. He will discuss how Harris County preserves courthouse legal history and how archival records enable historians to reconstruct the history of Texas courts from the Republic to the present.

This year the Texas State Historical Association will confer the Society-funded Larry McNeill Research Fellowship in Legal History during TSHA's Annual Fellows Luncheon and Awards Presentation. The luncheon program begins at noon and ends at 1:30 p.m. on Friday, February





The AT&T Executive Education and Conference Center on the University of Texas campus.

28, immediately prior to the Society's 2:00 p.m. panel session. Anyone wishing to attend must pre-register for a ticket. Seating fills quickly.

The Society presents scholarly programs at TSHA annual meetings as part of its mission to gather and preserve the history of the Texas Supreme Court and the state's appellate courts as well as to educate the public. We urge members to attend the three-day historical conference, as well as special events and sessions, which are listed at: <https://www.tshasecurepay.com/annual-meeting/2020-events-sessions/>.

Registration for the full conference is available online at <https://tsha.events/annual-meeting/>. Those who wish to attend only the Society's Friday afternoon session can register on-site on the day of the session.

Hotel reservations for the AT&T Conference Center are available on the web at <https://book.passkey.com/gt/217544719?gtid=d44d032ff8052009db6a39913b739de4>. The AT&T Center provides valet parking and public lots are available nearby.

[Return to Journal Index](#)

# Supreme Court Notes

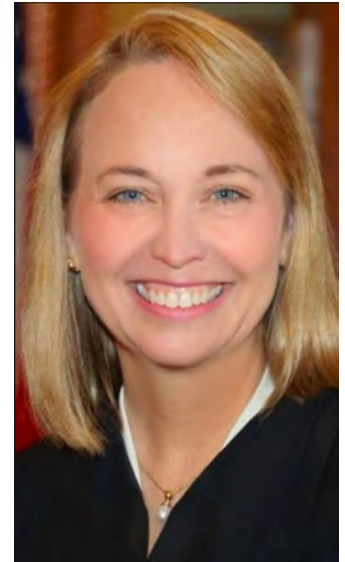
By Dylan O. Drummond

## ***Justice Jane Bland Formally Sworn-in to Texas Supreme Court in November***

This past November, the newest member of the Texas Supreme Court, Justice Jane Bland, was formally sworn-in to the bench by former Texas Supreme Court Justice and current 5th Circuit Chief Judge Priscilla R. Owen.

Prior to her elevation to the Court, Justice Bland served for fifteen years on the 1st District Court of Appeals, and for over six years on the 281st District Court in Harris County. After law school, she clerked for Fifth Circuit Judge Thomas Gibbs Gee. A member of the American Law Institute, Justice Bland also chairs the Oversight Committee for the Texas Pattern Jury Charges.

Justice Bland was appointed to succeed Justice Jeff Brown, now Judge of the Southern District of Texas, who was “sworn out” at the same ceremony by Chief Justice Nathan Hecht. Notably, both Justice Bland and Justice Brown succeeded the Chief Justice in Place 6, which he held for a quarter century.



Justice Jane Bland

## ***Southern District of Texas Judge Jeff Brown Invested in Galveston in January***



Judge Jeff Brown

Former Texas Supreme Court Justice Jeff Brown’s formal investiture as Southern District of Texas Judge was held January 10 at the Hotel Galvez in Galveston, Texas.

Judge Brown was sworn-in to preside over the oldest federal court in Texas, the first session of which was held on June 1, 1846. The court was originally the only federal district court in Texas, then later the Eastern District of Texas court, then finally the first court in the Southern District of Texas. The seat is now the only Southern District of Texas court located in Galveston.

Southern District of Texas Chief Judge Lee Rosenthal presided over the ceremony. Judge Brown was introduced by Fourteenth Court of Appeals Justice Ken Wise and former Harris County District Judge Grant Dorfman. He was sworn-in on the famed Sam Houston Bible (courtesy of

Chief Justice Nathan Hecht) by Fifth Circuit Judge Gregg Costa. (See related story on page **x** of this issue of the Journal.)

Before being elevated to the federal bench, Judge Brown served on the Texas Supreme Court for six years from 2013 to 2019. Prior to that, he served as a Justice on the 14th District Court of Appeals in Houston and, before that, as a judge on the 55th District Court in Harris County. Judge Brown is also one of only four former Texas Supreme Court clerks who went on to serve as a Justice on the Court. Judge Brown clerked both for the inaugural president of the Society, Jack Hightower, as well as current Governor Greg Abbott when he was on the Court.

[Return to Journal Index](#)



# Dallas-Area Judges, Justices, and Attorneys Bring the Society's Taming Texas Curriculum to DISD School



Dallas County Judge Audrey Moorehead (left) and Dallas Court of Appeals Justice Erin Nowell present the Taming Texas curriculum to Dallas middle school students. Photo by Joshua Ault, Hill Middle School.

**T**his past December, several Dallas judges and attorneys took time away from their busy schedules and dockets to present the Society's Taming Texas curriculum to seventh graders at Robert T. Hill Middle School.

Former Society President and current Fellow and Trustee Ben Mesches organized the program, which featured sitting judges, justices, and practicing attorneys teaching history and civics to nearly 300 middle schoolers. Helping to spread the word to recruit speakers was the Chair of the State Bar Judicial Section, Travis County Associate Judge Andy Hathcock.

The Society was honored to have several current and former Justices from the Dallas Court of Appeals present, including Justices Lana Myers, Erin Nowell, Cory Carlyle, and Society Trustee Jason Boatright. Dallas County trial judges Audrey Moorehead and Mike Jones, Jr. taught as well. Among the private attorneys to teach were Society Trustee Alia Adkins-Derrick and President, Fellow, and Trustee Dylan Drummond.



Among others who taught the Taming Texas curriculum were (left to right) Dylan Drummond, Alia Adkins-Derrick, Justice Lana Meyers, and former Justice Jason Boatright. Photo courtesy of Dylan O. Drummond

[Return to Journal Index](#)



# Calendar of Events

## **Society-related events and other events of historical interest**

Winter/Spring 2020

**The Bob Bullock Texas History Museum's "La Belle: The Ship That Changed History" exhibition continues in the Museum'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>. The museum is located at 1800 Congress Ave., Austin, Texas 78701.

Through March 2020

**The Witte Museum in San Antonio presents "How the West was Fun! Circus, Saddles and the Silver Screen."** Wild West Shows and their performers led large international audiences to the silver screen, where old, new, dishonest and true stories of the West are still told today. <https://www.wittemuseum.org/how-the-west-was-fun/>.

Throughout 2020

**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/>.

Throughout 2020

**The Texas Historical Commission's Museum and Visitor Center at San Felipe de Austin State Park's galleries present the story of the capital of Stephen Fuller Austin's colony in Texas.** The San Felipe de Austin site is located at 15945 FM 1458, in San Felipe, Texas, about a mile north of I-10. For more information go to [www.visitsanfelipedeAustin.com](http://www.visitsanfelipedeAustin.com) or call 979-885-2181.

February 15-16, 2020

**The Texas Archaeological Society will conduct its annual Geoarchaeology Academy at Victoria College in conjunction with the Museum of the Coastal Bend.** *Recognizing and Evaluating the Archeological Potential of the Landscape: An Introduction to Geoarchaeology* is a two-day Texas Archeology Academy that explores how geological and soil formation processes affect archeological sites, and how investigators use this information to reconstruct both the human and natural histories of an area. Museum of the Coastal Bend, 2200 E Red River St., Victoria, Texas 77901. Registration information is available at <https://www.txarch.org/academy01>.



February 25, 2020

**The Alamo presents a “Weapons of the Alamo” tour** from 11:30 a.m. to 12:30 p.m. at 300 Alamo Plaza, San Antonio, Texas 78205. For more information, call 210-225-1391. Registration is required. <https://www.facebook.com/events/2786978291358986/>.

February 26, 2020

**The Fellows of the Texas Supreme Court Historical Society will hold their annual dinner** at a special venue in Austin. Further details will be sent directly to all Fellows.

February 27-29, 2020

**The Texas State Historical Association conducts its Society-sponsored Annual Meeting at the AT&T Center**, 1900 University Avenue, Austin, Texas 78705. Members can register by contacting Angel Baldree, TSHA Annual Meeting Event Coordinator, at (512) 471-2600 or [angel.baldree@tshaonline.org](mailto:angel.baldree@tshaonline.org). Registration is also available online at <https://tsha.events/annual-meeting/>.

February 28, 2020

**The Texas State Historical Association (TSHA) presents the first Larry McNeill Research Fellowship in Texas Legal History from noon to 1:30 p.m. at the AT&T Center in Austin.** The presentation will take place during the Fellows Luncheon and Awards Presentation at the Texas State Historical Association Annual Meeting at the AT&T Conference Center, 1900 University Avenue, Austin, Texas 78705.

February 28, 2020

**The Society presents its panel in Session 29 at the Annual Meeting of the Texas State Historical Association (TSHA) at the AT&T Center in Austin from 2:00 to 3:30 PM.** The panel consists of Society President Dylan Drummond, Special Court Judge Mark Davidson, Fourteenth Court of Appeals Justice Ken Wise, and Harris County Clerk’s Office Historic Documents Room Custodian Francisco Heredia. The session will take place at the AT&T Conference Center, 1900 University Avenue, Austin, Texas 78705. <https://www.tshasecurepay.com/annual-meeting/2020-events-sessions/>.

March 1, 2020

**The Alamo presents “The Immortal 32 Arrive” to commemorate volunteers from Gonzales who joined the defenders of the Alamo on March 1, 1836.** The event lasts from 11:00 a.m. until noon at the Alamo, 300 Alamo Plaza, San Antonio, Texas 78205. For more information, call 210-225-1391. <https://www.facebook.com/events/522351068404178/>.

March 2, 2020

**The Alamo presents “Texas Independence Day” to celebrate the Declaration of Texas Independence on March 2, 1836.** The event lasts from 11:00 a.m. until noon at the Alamo, 300 Alamo Plaza, San Antonio, Texas 78205. For more information, call 210-225-1391. <https://www.facebook.com/events/1519766881503836/>.

March 6, 2020

**The Alamo presents “Dawn at the Alamo” to commemorate the 1836 battle.** The event lasts from 6:00 a.m. to 7:00 a.m. at the Alamo, 300 Alamo Plaza, San Antonio, Texas 78205. For more information, call 210-225-1391. <https://www.facebook.com/events/522351068404178/>.

March 23, 2020

**The Texas Historical Commission History at Night 2020 series presents “Wise about Texas” at San Felipe de Austin Museum and Visitor’s Center.** Society Trustee Ken Wise, Justice of the Texas Court of Appeals for the 14th District in Houston and organizer of “Wise about Texas” podcasts, will present a program about the history of San Felipe de Austin. The event, from 7:00 to 9:00 p.m., will occur at the San Felipe de Austin Historic Site, 220 Second Street, San Felipe de Austin, Texas, 77473, 979-885-2181, one mile north of I-10. <https://www.thc.texas.gov/historic-sites/san-felipe-de-austin-state-historic-site>.

March 28, 2020

**The Backroads of the South Shore Conference** will examine the history of the many towns along the South Shore of Massachusetts. **Backroads** is a collaboration of historical organizations operating important historic sites in many towns along the South Shore of Massachusetts. Society Trustee David Furlow will examine the role of the Mayflower Compact in the history of Plymouth Colony, the New Netherland Colony, and early America at the Spire Center for Performing Arts at 25 1/2 Court St, Plymouth, MA 02360. For more information, contact the Spire Center at 508-746-4488.

April 4, 2020

**The Texas State Historical Association conducts its annual San Jacinto Symposium.** This year’s theme is “Myths, Mysteries, and Misunderstandings of San Jacinto.” The symposium will take place from 8:15 a.m. (registration) until 3:30 p.m. (adjournment) at the University of Houston Downtown, One N. Main St., Houston, Texas 77002. A schedule of presentations is available, <https://tshaonline.org/sanjacintosymposium/program>, as is a list of speakers, <https://tshaonline.org/sanjacintosymposium/speakers>. Registration is required: <https://tshaonline.org/san-jacinto-symposium/event-registration.php>.

April 17, 2020

**The Society’s Board of Trustees gathers for the Society’s Spring 2020 Board Meeting at the Alamo** in San Antonio, Texas at 10:00 a.m. The Members’ Meeting begins at 11:50 a.m. Lunch will be served from noon until 1:00 p.m. A guided tour of the Alamo will occur from 1:30 p.m. until 2:30 p.m., 300 Alamo Plaza, San Antonio, Texas 78205.

April 18, 2020

**The annual reenactment of the Battle of San Jacinto will occur at the San Jacinto Festival and Battlefield Reenactment** from 10:00 a.m. to 5:00 p.m. at the San Jacinto Battlefield and Monument, 1 Monument Cir., La Porte, TX 77571. [https://www.sanjacinto-museum.org/About\\_Us/News\\_and\\_Events/Upcoming\\_Events/2020\\_Festival\\_and\\_Reenactment/](https://www.sanjacinto-museum.org/About_Us/News_and_Events/Upcoming_Events/2020_Festival_and_Reenactment/).

April 23, 2020

**The Texas Historical Commission's History at Night 2020 series presents Dr. Bruce Winders at San Felipe de Austin Museum and Visitor's Center.** Dr. Winders, author of a history about the 1836 siege and battle at the Alamo, and the Alamo's curator for many years, speaks about the Texas Revolution. The event, from 7:00 to 9:00 p.m., will occur at the San Felipe de Austin Historic Site, 220 Second Street, San Felipe de Austin, Texas, 77473, 979-885-2181, one mile north of I-10. <https://www.facebook.com/SanFelipedeAustin/photos/gm.3289253554480651/3636105023073800/?type=3&theater>.

May 28, 2020

**The Texas Historical Commission's History at Night 2020 series presents Dan Utley and the "History of the Green."** Dan Utley is a historian of the Texas Rangers. The event, from 7:00 to 9:00 p.m., will take place at the San Felipe de Austin Historic Site, 220 Second Street, San Felipe de Austin, Texas, 77473, 979-885-2181, one mile north of I-10. <https://www.facebook.com/events/975393962844023/>.

June 25-26, 2020

**The State Bar of Texas will conduct its annual meeting** at the Hilton Anatole Hotel in Dallas, Texas. [https://www.texasbar.com/Content/NavigationMenu/Events/AnnualMeeting/Future\\_Dates/default.htm](https://www.texasbar.com/Content/NavigationMenu/Events/AnnualMeeting/Future_Dates/default.htm).

[Return to Journal Index](#)



*Journal of the Texas Supreme Court Historical Society*  
**Index of Articles by Issue, Fall 2011 - Winter 2020**

**Fall 2011, Vol. 1, No. 1**

**The Legendary Life and Tumultuous Times of Chief Justice John Hemphill**

By David A. Furlow  
pp. 1-4

**President's Page: On Making History**

By Lynne Liberato  
p. 5

**The Mission of the Texas Supreme Court Historical Society, Part 1**

By Bill Pugsley, Executive Director  
p. 6

**Winter 2011, Vol. 1, No. 2**

**"The Separation of Texas from the Republic of Mexico Was the Division of an Empire": The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court; Part I: Spanish Texas, 1541-1821**

By David A. Furlow  
pp. 1-18

**President's Page: On Making History**

By Lynne Liberato  
p. 19

**Executive Director's Page: Looking Forward: The Mission of the Texas Supreme Court Historical Society, Part 2**

By Bill Pugsley  
pp. 20-21

**Society Honors Judge Greenhill at 2012 TSHA Session**

p. 22

**TCLE Makes Donation to Pope Book Project**

p. 23

**Judge Jack Pope Pens Book [My Little United Nations]**

p. 24

**Texas Supreme Court History Book Approved for Publication**

p. 25

**Twitter Image Has History**

p. 26

**Board Welcomes Justice Green at Fall Meeting: Numerous Items on Its Agenda**

p. 27

**Group photo of TSCHS Board and Staff**

p. 28

**Spring 2012, Vol. 1, No. 3**

**"The Separation of Texas from the Republic of Mexico Was the Division of an Empire": The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court; Part II: 1821-1836, Out of Many, One**

By David A. Furlow  
pp. 1-18

**Before *Brown*: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice**

By Gary M. Lavergne  
pp. 19-20

**President's Page: Telling History by Telling Stories**

By Lynne Liberato  
pp. 21-22

**Hubert W.: The Beginning of a Green Family Tradition**

By Lynne Liberato  
p. 23

**Mayor Rudy Giuliani to Speak at 2012 Hemphill Dinner**

p. 24

**South Western Reporter Factoids**

By Dylan O. Drummond  
p. 27

**Society and State Bar Cosponsor *Texas v. White* Reenactment**

p. 28

**David J. Beck Appointed Chair of Fellows**

p. 29

**Trustees to Meet in Houston's Historic 1910 Courthouse**

p. 31

**History Book Publication Process Underway**

p. 32

**Annual Meeting of Society Members to be Held March 2 in Houston**  
p. 33

**March 2 TSHA Joint Session Looks at CJ Greenhill's Houston Legacies**  
p. 34

**Summer/Annual Dinner Issue 2012, Vol. 1, No. 4**

**Methods for Common Law Judges**  
By the Hon. Jack Pope  
pp. 1-6

**The Best People in Texas Are Dying to Get In: Justices in the Texas State Cemetery, Part I**  
By Will Erwin  
pp. 7-8

**The Mystery of the Sam Houston Bible**  
By Tiffany Shropshire  
pp. 9-10

**Justice Guzman Speaks at Tejano Monument Dedication**  
By Bill Pugsley  
p. 11

**President's Message: Taking Stock**  
By Lynne Liberato  
pp. 12-13

**Executive Director's Page: An Uncommon Judge**  
By Bill Pugsley  
pp. 14-16

**Fellows Column: A Successful First Year of the Fellows**  
By David J. Beck  
p. 17

**2012 Hemphill Dinner Highlights Include Mayor Giuliani Keynote, Judge Garwood Memorial, Pope Awards**  
p. 19

**Board Elects Officers for 2012-13**  
p. 20

**Four New Members Elected to the Board of Trustees**  
p. 21

**History of Supreme Court Now in Press**  
p. 22

**Portrait Ceremony Will Honor Justice Harriet O'Neill**  
p. 23

**Fall 2012, Vol. 2, No. 1**

**Alexander's Waterloo: The Fight for Padre Island and the Texas Supreme Court Intersects, Part 1—Background**  
By Judge Mark Davidson  
pp. 1-6

**The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court, Part III: 1845 to the Present—The Castilian Law Heritage Today**  
By David A. Furlow  
pp. 7-12

**The Tragic Case of Justice William Pierson: Justices in the State Cemetery, Part 2**  
By Will Erwin  
pp. 13-15

**President's Page: On Making History**  
By Warren W. Harris  
p. 16

**Executive Director's Page: Lessons with an Appeal**  
By Bill Pugsley  
pp. 17-19

**Fellows Column: Charter Fellows Recognized at Hemphill Dinner**  
By David J. Beck  
p. 20

**Texas Historical Foundation to Assist in Preserving Republic and Early Statehood-Era Supreme Court Case Files**  
By Dylan O. Drummond  
p. 21

**Justice Robert A. Gammage, 1938-2012**  
p. 22

**Photo Gallery: Images from the Judicial Portrait Dedication and 17<sup>th</sup> Annual Hemphill Dinner, June 1, 2012**  
Photos by Mark Matson  
pp. 23-26

**Texas Wins Again—In Reenactment of Historic Case**  
p. 27

**Date Set for 18<sup>th</sup> Annual John Hemphill Dinner**  
p. 28

**CJ John Hemphill Inducted into Texas Appellate Hall of Fame**  
p. 29

**Winter 2012, Vol. 2, No. 2**

**Governor Dan Moody and Judicial Reform in Texas During the Late 1920s**  
By Josiah M. Daniel, III  
pp. 1-9

**Alexander's Waterloo: The Fight for Padre Island and the Texas Supreme Court Intersects, Part 2—The Case Unfolds**

By Judge Mark Davidson  
pp. 10–15

**President's Message: Another Hemphill Dinner You Won't Want to Miss**

By Warren W. Harris  
p. 16

**Executive Director's Page: History Is a Living Thing**

By Bill Pugsley  
pp. 17–18

**Fellows Column**

By David J. Beck  
p. 20

**An Interview with the Fifth Joe Greenhill**

By Bill Pugsley  
pp. 21–22

**Justice J. Dale Wainwright Resigns from Court**

p. 23

**In Memoriam: Justice William W. Kilgarlin, 1932–2012**

By Judge Mark Davidson  
p. 24

**Ramsey Clark Tours Court Building**

p. 25

**Fall Board Meeting Welcomes New Trustees, Enjoys Pope Tribute**

p. 26

**2013 TSHA Session to Highlight History of the Supreme Court**

p. 27

**Society to Cosponsor Symposium in April 2013**

p. 28

**Former U.S. Supreme Court Justice Sandra Day O'Connor Will Be 2013 Hemphill Dinner Speaker**

p. 29

**[Spring 2013, Vol. 2, No. 3](#)**

**Arbitration Comes to Texas—and Flourishes**

By Tasha Lea Willis  
pp. 1–7

**Dallam's Digest and the Unofficial First Reporter of the Supreme Court of Texas**

By Dylan O. Drummond  
pp. 8–14

**President's Page: On Making History by the Book**

By Warren W. Harris  
pp. 15–16

**Fellows Column**

By David J. Beck  
p. 17

**Long-Awaited History of the Texas Supreme Court Published in February**

p. 18

**Court Holds Book Presentation Ceremony in Historic Courtroom (Photo Essay)**

pp. 21–24

**April 11 Symposium Features All-Star Cast of Speakers, Outstanding Program, CLE Credit**

pp. 25–26

**18<sup>th</sup> Annual John Hemphill Dinner: Justice Sandra Day O'Connor is Keynote Speaker**

p. 27

**Investiture for Incoming Justices Jeff Boyd and John Devine (Photo Essay)**

p. 30

**Meet Justice Jeff Boyd**

By David A. Furlow  
pp. 31–32

**An Interview with Former Justice Dale Wainwright: Insights on His Service on the Texas Supreme Court**

By Amy Saberian  
pp. 33–34

**Abel Acosta Appointed Clerk of Texas Court of Criminal Appeals**

p. 35

**Carol Vance Speaks at March Board Meeting**

p. 36

**Society Acquires 300 Copies of Hemphill Biography**

p. 37

**Haley and Phillips Headed Society Session at 2013 TSHA Conference**

p. 38

**[Summer 2013, Vol. 2, No. 4](#)**

**President's Page: On Making History by the Book**

By Warren W. Harris  
pp. 1–2

**Executive Director's Page: That Time of Year**

By Bill Pugsley  
pp. 3–4

**Fellows Column**

By David J. Beck  
pp. 5–6



**George W. Paschal: Justice, Court Reporter, and Iconoclast**  
By Dylan O. Drummond  
pp. 7–17

**Preservation of the Texas Supreme Court's History Requires Preservation of Its Files**  
By Laura K. Saegert  
pp. 18–21

**The Texas Supreme Court: A History of First Impression**  
By James L. Haley  
pp. 22–24

**18<sup>th</sup> Annual John Hemphill Dinner: Justice Sandra Day O'Connor is Keynote Speaker**  
p. 26

**2013 History Symposium a Success (Photo Essay)**  
pp. 27–30

**New Texas Judicial History Series Will Open with a Collection of Writings by Chief Justice Jack Pope**  
pp. 31–33

**Retired Chief Justice Jack Pope is Honored by the State of Texas on His 100<sup>th</sup> Birthday**  
p. 34

**An Interview with Justice John Devine**  
By Will Feldman  
pp. 35–36

**Dinner Issue 2013, Vol. 2, Special Edition**

**Executive Editor's Page: We'd Like to Print Your Stories of the Texas Supreme Court**  
By David A. Furlow  
p. 1

**18<sup>th</sup> Annual John Hemphill Dinner Draws Record Attendance: Justice Sandra Day O'Connor Was Keynote Speaker (Photo Essay)**  
Photos by Mark Matson  
pp. 2–9

**Fall 2013, Vol. 3, No. 1**

**President's Page: A New Year and a New Era for the Society**  
By Douglas W. Alexander  
pp. 1–2

**Immediate Past President's Page**  
By Warren W. Harris  
pp. 3–4

**Executive Director's Page: First Impressions**  
By Pat Nester  
pp. 5–6

**Fellows Column**  
By David J. Beck  
p. 7

**The Lone Star Republic's Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Traditions—Part 1: Material Differences in Legal Culture**  
By David A. Furlow  
pp. 8–21

**170 Years of Texas Contract Law—Part 1**  
By Richard R. Orsinger  
Abridged for the *Journal* by Dylan O. Drummond  
pp. 22–31

**In Memoriam: Justice Jack E. Hightower, 1926–2013**  
By Justice Jeff Brown  
pp. 32–34

**Book Review: *Lone Star Law: A Legal History of Texas* by Michael Ariens**  
By S. Shawn Stephens  
pp. 35–36

**Chief Justice Jefferson Leaves the Court: Justice Hecht is Appointed Chief Justice**  
p. 37

**Justice Jeff Brown Appointed to the Texas Supreme Court**  
p. 38

**Pope Common Law Judge Book Now in Press**  
pp. 39–40

**Texas Appellate Hall of Fame Inducts Hon. John R. Brown**  
By Thomas Allen  
p. 41

**Winter 2013, Vol. 3, No. 2**

**President's Page: Celebrating Our Common Law Judge**  
By Douglas W. Alexander  
pp. 1–2

**Fellows Column**  
By David J. Beck  
p. 3

**170 Years of Texas Contract Law—Part 2: The Texas Experience**  
By Richard R. Orsinger  
Abridged for the *Journal* by Dylan O. Drummond  
pp. 4–11

**Interview with Former Texas Supreme Court Chief Justice Wallace B. Jefferson—Part 1**  
By William J. Chriss  
pp. 12–17

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

By Lynne Liberato  
pp. 18–20

***Journal of the Texas Supreme Court Historical Society, Index of Articles by Issue***

Compiled by Marilyn P. Duncan  
pp. 21–25

***Journal of the Texas Supreme Court Historical Society, Index of Articles by Author***

Compiled by Marilyn P. Duncan  
pp. 26–30

**Significant Dates in the History of the Supreme Court of the Republic of Texas**

pp. 31–32

**Hecht, Brown Take Oath of Office During Ceremonial Investiture**

pp. 33–34

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

By Marilyn P. Duncan; photos by Hannah Kiddoo  
pp. 35–37

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

By Dylan O. Drummond  
p. 38

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

By Marilyn P. Duncan  
p. 39

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

By Marilyn P. Duncan  
p. 40

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

By Marilyn P. Duncan  
p. 41

**Calendar of Events**

p. 42

**[Spring 2014, Vol. 3, No. 3](#)**

**President's Page: Springing Forward**

By Douglas W. Alexander  
pp. 1–2

**Fellows Column**

By David J. Beck, Chair of the Fellows  
p. 3

**The Enduring Legacies of Judge R.E.B. Baylor, Part 1**

By Thomas R. Phillips and James W. Paulsen  
pp. 4–12

**Letters from Exile, 1864–1865: A Family View of Judge Wesley Ogden**

By William W. Ogden  
pp. 13–20

**Setting the Record Straight: Colbert Coldwell's Quest for Justice**

By Colbert N. Coldwell  
pp. 21–26

**Interview with Former Texas Supreme Court Chief Justice Wallace B. Jefferson—Part 2**

By William J. Chriss  
pp. 27–33

**Non-Trivial Pursuits: Little-Known Facts about the Texas Supreme Court**

p. 34

**Special Book Announcement: *Common Law Judge***

By Marilyn P. Duncan  
p. 35

**Ambassador Ron Kirk Will Speak at This Year's Hemphill Dinner**

p. 36

**Murder and Mayhem on the Texas Supreme Court: TSHA Session Announced**

p. 37

**Chief Justice Hecht: A Record for Texas**

p. 38

**Benson Wins Southwestern Historical Quarterly Award for Best Article**

By Dylan O. Drummond  
p. 39

**Calendar of Events**

pp. 40–41

**[Summer 2014, Vol. 3, No. 4](#)**

**President's Page: Thanks for a Great Year!**

By Douglas W. Alexander  
pp. 1–2

**Executive Director's Page: Why You Should Go to a Texas State Historical Association Conference**

By Pat Nester  
pp. 3–4

**Fellows Column: Annual Fellows Dinner, An Evening to Remember (with photo gallery)**

By David J. Beck  
pp. 5–11

**The Enduring Legacies of Judge R. E. B. Baylor, Part 2**  
By Thomas R. Phillips and James W. Paulsen  
pp. 12–26

**The Lone Star Republic's Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Traditions, Part 2**  
By David A. Furlow  
pp. 27–34

**An Interview with Texas Supreme Court Chief Justice Nathan Hecht**  
By Jacqueline M. Furlow  
pp. 35–43

**Appellate Oddities**  
By Charles G. "Chip" Orr  
pp. 44–53

**Significant Summer Dates in the History of the Texas Supreme Court, 1837–1982**  
By Marilyn P. Duncan  
pp. 54–55

**19<sup>th</sup> Annual John Hemphill Dinner Will Feature Keynote by Ambassador Ron Kirk, Memorial to Justice Jack Hightower, Pope Awards**  
pp. 56–57

**"Murder and Mayhem" Program Earns High Marks at the Texas State Historical Association's 2014 Annual Meeting**  
Story and photos by David A. Furlow  
pp. 58–60

**Former Chief Justice Wallace Jefferson is Named 2014 Pope Professionalism Award Recipient**  
p. 61

**Richard Orsinger Doubly Honored: State Bar College Franklin Jones Best CLE Article Award and Texas Bar Foundation Price Memorial Award**  
pp. 62–63

**Warren Harris Will Receive State Bar's 2014 Gene Cavin Award**  
p. 64

**In Memoriam: J. Chrys Dougherty, III, May 3, 1915–February 20, 2014**  
By Marilyn P. Duncan  
pp. 65–67

**The Court Takes a Historic Trip to Hillsboro**  
By Dylan O. Drummond  
p. 68

**SCOTX Takes SXSW!**  
By Dylan O. Drummond  
p. 69

**Society President Sports Gnarly Board**  
By Dylan O. Drummond  
p. 70

**Chief Justice Jack Pope Celebrates His 101<sup>st</sup> Birthday**  
pp. 71–72

**Calendar of Events**  
p. 73

## **Fall 2014, Vol. 4, No. 1**

**President's Page**  
By Marie R. Yeates  
p. 1

**Executive Director's Page: State Bar's 75<sup>th</sup> Is Cause for Celebration**  
By Pat Nester  
pp. 2–3

**Fellows Column: Highlights from the Reenactment of *Sweatt v. Painter*, June 27, 2014 (photo gallery)**  
By David J. Beck  
pp. 4–6

**Executive Director's Page: Help Us Save and Share History**  
By David A. Furlow  
pp. 7–8

**Election Hustle: The Flimflam, Fraud, and Flight of Justice Yarbrough**  
By Judge Mark Davidson  
pp. 9–19

**Murder and Mayhem on the Texas Supreme Court: The Shocking Death of Justice William Pierson and the Evolution of the Insanity Defense in Texas**  
By Gary M. Lavergne  
pp. 20–29

**On Trial: Reasonable Doubt and the Rights of the Juvenile Offender**  
By Rachel Palmer Hooper  
pp. 30–37

**The Making of a Hemphill Dinner**  
Narrative and photos by David A. Furlow  
pp. 38–41

**An Evening in Pictures: Scenes from the Nineteenth Annual John Hemphill Dinner**  
Compiled by Marilyn P. Duncan  
pp. 42–47

**Hard Times: A Short List of Violent Episodes in the Life of the Texas Supreme Court**  
By Marilyn P. Duncan  
pp. 48–49



**For the Record: Significant Autumn Dates in the History of the Nineteenth Century Texas Supreme Court**  
p. 50

**Historian James Haley Speaks at State Bar Annual Meeting**  
By Marilyn P. Duncan  
p. 51

**Phillips Elected to Texas State Historical Association Board**  
By Marilyn P. Duncan  
p. 52

**Former Chief Justice Wallace Jefferson Will Receive Texas Applesseed's Good Apple Award**  
By Marilyn P. Duncan  
p. 53

**The Hon. James A. Baker and the Hon. William L. Garwood Are Inducted into the Texas Appellate Hall of Fame**  
By Marilyn P. Duncan  
p. 54

**Calendar of Events**  
pp. 55-56

## **[Winter 2014, Vol. 4, No. 2](#)**

**President's Page**  
By Marie Yeates  
pp. 1-2

**Fellows Column**  
By David J. Beck  
p. 3

**Executive Editor's Page: The Republic of Texas Lives On...**  
By David A. Furlow  
pp. 4-6

**The Toughest Bar in Texas: The Alamo Bar Association, Est. 1836**  
By Dylan O. Drummond  
pp. 7-18

**The Constitution of the Republic of Texas**  
By William J. Chriss  
pp. 19-22

**The Lone Star Republic's Supreme Court Wove the Fabric of Texas Law from the Threads of Three Competing Legal Traditions—Part 3: The Scotch-Irish, Born Fighting**  
By David A. Furlow  
pp. 23-44

**Bi-Annual Historical Society Course Set for May**  
By Lynne Liberato  
pp. 45-46

**Calendar of Events**  
pp. 47-48

**Chronological Index of Articles by Issue, Fall 2011—Fall 2014**  
pp. 49-57

**Index of Articles by Author, Fall 2011—Fall 2014**  
pp. 58-65

## **[Spring 2015, Vol. 4, No. 3](#)**

**President's Page**  
By Marie Yeates  
p. 1

**Fellows Column**  
By David J. Beck  
pp. 2-3

**Executive Editor's Page: Learning from the Constitution**  
By David A. Furlow  
pp. 4-5

**Magna Carta at 800: How a Medieval Charter Shaped American Law**  
By Justice Eva Guzman and Andrew Buttarro  
pp. 6-15

**On Thursday, June 18, 2015, TSCHS's Panel of Judges and Historians Will Examine Magna Carta's Rule of Law Legacy in Its 800th Year**  
By David A. Furlow  
pp. 16-17

**Six Constitutions Over Texas: Law and Political Identity in Texas, 1845-1861**  
By William J. Chriss  
pp. 18-29

**Texas in Mexico's Constitutional Order**  
By Jesús F. de la Teja  
pp. 30-36

**No One Knows What the Texas Constitution Is**  
By Jason Boatright  
pp. 37-52

**Law and Order in Texas**  
By Rachel Palmer Hooper  
pp. 53-58

**Introduction to Researching Texas Constitutional History Online**  
By Justice Michael Massengale  
pp. 59-60

**Interview with First Court of Appeals Justice Michael Massengale about the Texas Constitution History Blog**  
By David A. Furlow  
pp. 61-64

**Supreme Court History Course Expands Subject Matter - Society-Sponsored Seminar Set for May**  
By Lynne Liberato  
pp. 65-66

**Society's March 6 TSHA  
Joint Session Will Explore  
the History of Texas School  
Prayer Litigation**

By David A. Furlow  
pp. 67-69

**Members Are Invited to  
Attend H.W. Brands Talk  
and Ransom Center Tour on  
March 27**

By David A. Furlow  
pp. 70-71

**Reenactment of *Johnson v.  
Darr* Marks the Ninetieth  
Anniversary of the Historic  
All-Woman Texas Supreme  
Court**

By Elizabeth Furlow  
pp. 72-75

**Former Texas Supreme Court  
Justice Greg Abbott Sworn-In  
as 48th Governor of Texas**

By Dylan O. Drummond  
p. 76

**Chief Justice Hecht Delivers  
His First State of the Judiciary  
Address**

By Dylan O. Drummond  
p. 77

**Justice Debra Lehrmann and  
the Court Host the Uniform  
Law Commission**

By Dylan O. Drummond  
p. 78

**Lone Star Legal Aid  
Establishes Hall of Heroes**

By Dylan O. Drummond  
p. 79

**Beck Appointed to UT Board  
of Regents**

By Dylan O. Drummond  
p. 80

**Calendar of Events**

pp. 81-83

**Summer 2015, Vol. 4, No. 4**

**Letter from the Outgoing  
President**

By Marie R. Yeates  
pp. 1-2

**Message from the 2015-16  
President**

By Ben L. Mesches  
pp. 3-4

**Executive Director's Page:  
Why You Should Go to a Texas  
State Historical Association  
Conference**

By Pat Nester  
pp. 5-6

**Fellows Column**

By David J. Beck  
pp. 7-8

**Photo Highlights from the  
Third Annual Fellows Dinner  
- May 7, 2015 - Blanton  
Museum of Art, Austin, Texas**

Photos by Mark Matson  
pp. 9-14

**Executive Editor's Page:  
Five Centuries of Evolving  
Women's Rights in Texas**

By David A. Furlow  
pp. 15-17

**Reflections on the Texas  
Equal Rights Amendment**

An Essay by Lynne Liberato  
pp. 18-19

**No Pawn in a Game of  
Thrones: Queen Isabella  
of Castile Set a Lasting  
Precedent for Texas Women**

By David A. Furlow  
pp. 20-24

**Peter Gray: The Difference  
One Person Can Make**

By Laura Gibson  
pp. 25-34

**Winning the Archive War:  
Angelina Eberly Takes Her  
Shot**

By DeJean Miller Melton  
pp. 35-50

**Family Remembrances and  
the Legacy of Chief Justice  
Hortense Sparks Ward**

By Linda C. Hunsaker  
pp. 51-61

**They Would Not Be Denied:  
The Texas State Archives  
Preserves the History of  
the Struggle for Women's  
Suffrage**

By Anna M. Reznik  
pp. 62-72

**Remembering the  
Remarkable Judge Sarah T.  
Hughes**

By Judge Elizabeth Ray  
pp. 73-76

**Excerpts from *Rough Road to  
Justice: The Journey of Women  
Lawyers in Texas***

By Betty Trapp Chapman  
pp. 77-84

***Ad Astra per Aspera*  
("A Rough Road Leads to the  
Stars")**

**Book review: *Rough Road to  
Justice: The Journey of Women  
Lawyers in Texas***

By Judge Sylvia A. Matthews  
pp. 85-86

**Jury Service: A Milestone for  
Women's Rights in Texas**

By Sarah A. Duckers  
pp. 87-90

**Sandra Day O'Connor Set a  
Precedent**

By Sharon E. Beck  
pp. 91-95

**Preserving the Oral History of State Bar Leadership**

By JoAnn Storey  
p. 96

**Hortense Sparks Ward's Spirit Shines on Through the University of Texas Center for Women in Law**

By Linda Bray Chanow  
pp. 97-102

**Archaeologists, Archivists, Assistant District Clerks, and Historians: An Executive Editor's Gratitude**

By David A. Furlow  
pp. 103-105

**U.S. Senator John Cornyn Will Keynote Society's Twentieth Annual John Hemphill Dinner on September 11**

By Marilyn P. Duncan  
pp. 106-107

**Society Hosts Second Biennial Symposium on the History of Texas Jurisprudence**

By Dylan O. Drummond  
Photos by David C. Kroll  
pp. 108-109

**SCOTX Justices Eva Guzman and Debra Lehrmann Join Chief Justice Nathan Hecht in Celebrating Texas Female Judges' Day at the Capitol**

By Dylan O. Drummond  
pp. 110-111

**The Society's Program "Magna Carta's Eight Hundred Year Legacy" Filled the Conference Hall at the State Bar Annual Meeting**

By David A. Furlow  
pp. 112-113

**Society Debuts YouTube Channel, Posts Never-Before-Seen Court Content**

By Dylan O. Drummond  
pp. 114-115

**Texas Legislature Funds the Texas Digital Archive**

By David A. Furlow  
p. 116

**The *Journal* Grants Reprints and Provides Speakers**

By David A. Furlow  
pp. 117-118

**Perhaps for the First Time Ever, Court Clears Its Docket**

By Dylan O. Drummond  
p. 119

**2015 BA Breakfast**

By Dylan O. Drummond  
p. 120

**Calendar of Events**

pp. 121-125

**[Fall 2015, Vol. 5, No. 1](#)**

**Letter from the President**

By Ben L. Mesches  
p.1

**Executive Director's Page: Bon Voyage to a Top-Flight Professional**

By Pat Nester  
pp. 2-3

**Fellows Column**

By David J. Beck  
pp. 4-5

**Executive Editor's Page: A Fire Bell in the Night: Slavery in Texas**

By David A. Furlow  
pp. 6-7

***Essay: In Texas, History of Slavery Unique—But Not "Brief"***

By Daina Ramey Berry  
pp. 8-10

**Legacies of Justice: Shedrick Willis, Nicholas Battle, and the Rule of Law**

By Wallace B. Jefferson, Chief Justice (ret.)  
pp. 11-13

**Theodora Hemphill's Guide to the Texas Constitution, Part 1**

By David A. Furlow  
pp. 14-26

**The Justices Devine**

By Lynne Liberato  
pp. 27-29

**Slavery and the Texas Revolution**

By William J. Chriss  
pp. 30-35

**Celia's Manumission and the Alcalde Court of San Felipe de Austin**

By Michael Rugeley Moore  
pp. 36-48

**Slaves, Reconstruction, and the Supreme Court of Texas**

By Robert B. Gilbreath  
pp. 49-53

**John N. Johnson: Crusader for Justice**

By John G. Browning  
pp. 54-56

**Book Review: *Joe, the Slave Who Became an Alamo Legend***

By Bryan McAuley  
pp. 57-58

**Reintroducing a Gem of Antebellum Texas History: *The Laws of Slavery in Texas***

By Marilyn P. Duncan  
pp. 59-62



**20th Annual John Hemphill  
Dinner: Senator John Cornyn  
Was the Featured Speaker**

By Marilyn P. Duncan  
pp. 63-68

**“Knowledge is Power”:  
Chief Justice Nathan Hecht  
Celebrates the Centennial of  
the Harris County Law Library**

By David A. Furlow  
pp. 69-76

**Haley Spoke at the Star of the  
Republic Museum October 24**

By David A. Furlow  
p. 77

**Haley Speaks at General Land  
Office SAVE TEXAS HISTORY  
Symposium November 14**

By David A. Furlow  
pp. 78-80

**Frank de la Teja to Speak at  
October 28 Board Meeting**

By David A. Furlow  
pp. 81-83

**Texas State Historical  
Association Annual Meeting  
First Announcement**

By David A. Furlow  
pp. 84-85

**The Society Rides the Circuit  
with Its Magna Carta Program**

By David A. Furlow  
pp. 86-87

**Texas Digital Archive Will  
Include Texas Supreme Court  
1841-1870 Records**

By David A. Furlow  
p. 88

**Calendar of Events**

pp. 89-92

**Winter 2016, Vol. 5, No. 2**

**Letter from the President**

By Ben L. Mesches  
pp. 1-2

**Executive Director’s Page:  
Introducing Our New  
Archivist Extraordinaire**

By Pat Nester  
pp. 3-4

**Fellows Column**

By David J. Beck  
pp. 5-6

**Executive Editor’s Page: Oil  
and Gas: A *Giant* Impact on  
Texas Law**

By David A. Furlow  
pp. 7-9

**Busted: A History of  
Bankruptcy and Insolvency in  
the Oil and Gas Industry**

By Charles A. Beckham, Jr.  
pp. 10-24

**How Texas Law Promoted  
Shale Play Development**

By Bill Kroger, Jason Newman,  
Ben Sweet, and Justin Lipe  
pp. 25-36

**The Texas Railroad  
Commission —The First OPEC**

By Mitchell E. Ayer  
pp. 37-45

**The History of Mexican  
Oil and Gas Law from the  
Conquistadors’ Conquest  
until 1914**

By Vincent R. Ryan, Jr.  
pp. 46-56

**Theodora Hemphill’s Guide to  
the Texas Constitution, Part II**

By David A. Furlow  
pp. 57-71

**Unraveling a Mystery: Who  
Was Texas’s First African-  
American Attorney?**

By John G. Browning and Chief  
Justice Carolyn Wright  
pp. 72-81

**In Memoriam: Joseph D.  
Jamail, Jr., 1925-2015**

By Marilyn P. Duncan  
pp. 82-83

**Beck Recognized for Lifetime  
of Excellence in Advocacy**

By Charles B. McFarland  
pp. 84-86

**Supreme Court Establishes  
Texas Commission to Expand  
Civil Services**

By Dylan O. Drummond  
p. 87

**Texas History Podcasts Offer  
Listeners Another Great Way  
to Learn about Texas’s Past**

By Dylan O. Drummond  
pp. 88-89

**Jim Haley Shares Supreme  
Court Stories at the GLO *Save  
Texas History* Symposium**

By David A. Furlow  
pp. 90-93

**Fall 2015 Board Meeting  
Featured a Talk by Dr. Frank  
de la Teja and Tour of the  
Texas State Cemetery**

By David A. Furlow  
pp. 94-97

**What Wings They Were: The  
Case of Emeline**

By Laura Gibson  
pp. 98-101

**This March, the Society  
Examines the Restatement  
and Reformation of Texas Law**

By David A. Furlow  
pp. 102-103

**Update: Texas State Library and Archives' Texas Digital Archive Continues to Grow**

By David A. Furlow  
pp. 104-106

**The Houston Bar Association Teach Texas Committee Seeks Volunteers to Teach the Taming Texas Project**

By Warren W. Harris  
pp. 107-108

**Calendar of Events**

pp. 109-114

**[Spring 2016, Vol. 5, No.3](#)**

**Letter from the President**

By Ben L. Mesches  
pp. 1-2

**Executive Director's Page: My Annual "You Should Go" Column**

By Pat Nester  
pp. 3-4

**Fellows Column**

By David J. Beck  
pp. 5-6

**Executive Editor's Page: Procedure, Progress, and Plurality of Opinion**

By David A. Furlow  
pp. 7-10

**Judge Benjamin Cromwell Franklin, the First Judge in the Republic of Texas**

By Justice Ken Wise  
pp. 11-19

**Answering the Call in the Wilderness:**

**Establishment of the Texas Office of Court Administration**

By David Slayton  
pp. 20-25

**Stephen F. Austin's Alcalde Codes: The Surprising Origin of Texas Law**

By Jason Boatright  
pp. 26-36

**The History of Texas Civil Procedure**

By William V. Dorsaneo, III  
pp. 37-46

**Odious Blots upon the Pure and Exalted Judicial Annals: Revisiting Texas Supreme Court Precedent by Historical Era**

By Dylan O. Drummond  
pp. 47-58

**Theodora Hemphill's Guide to the Texas Constitution, Part III**

By David A. Furlow  
pp. 59-66

**A Tribute to Harry Reasoner**

By Barrett H. Reasoner  
pp. 67-70

**In Memoriam: Joseph W. McKnight, 1925-2015**

By Marilyn P. Duncan  
pp. 71-72

**Ivy-League Edicts and Bovine Mandates: A Quick History of the *Bluebook* and the *Greenbook***

By Dylan O. Drummond  
pp. 73-76

**"Returning Now to Yesteryear"— McCarthy's Historical Musings**

p. 77

**History on Demand: Modern Technology Brings Historic Works Within Reach**

By Dylan O. Drummond  
pp. 78-79

**Taming Texas Book and Judicial Civics and History Project Launched This Spring**

By Marilyn P. Duncan  
pp. 80-83

**Reenactment of Oral Argument before the All-Woman Texas Supreme Court: *Johnson v. Darr***

By David A. Furlow  
pp. 84-86

**Former U.S. Solicitor General Paul Clement Will Keynote Hemphill Dinner**

By Marilyn P. Duncan  
p. 87

**2016 TSHA Annual Meeting: Distinguished Panel Examines Restatement and Revolution**

By David A. Furlow  
pp. 88-90

**Baker Botts's History and Archives Spotlights at the Society's Spring 2016 Meeting**

By David A. Furlow  
pp. 91-95

**Harry Reasoner Honored with Anti-Defamation League's Jurisprudence Award**

p. 96

**Texas Supreme Court Holds Argument at Baylor Law School**

p. 97

**Calendar of Events**

pp. 98-101

**[Summer 2016, Vol. 5, No. 4](#)**

**Immediate Past President's Farewell**

By Ben L. Mesches  
p. 1

**Message from the Incoming President**

By Macey Reasoner Stokes  
pp. 2-3

**Executive Director's Page:  
In Praise of History's Legal Guardians**

By Pat Nester  
pp. 4-6

**Fellows Column**

By David J. Beck  
pp. 7-8

**Executive Editor's Page: The Rules of the Game**

By David A. Furlow  
pp. 9-11

**Clearing the Docket**

By Chief Justice Nathan L. Hecht  
pp. 12-15

**The American Law Institute:  
Stating, Restating, and  
Shaping American Law Since  
1923**

By Justice Evelyn Keyes  
pp. 16-23

**"Justice for All Men": Clarence  
Borel v. Fibreboard Paper  
Products Corporation, the  
Landmark Case in Asbestos  
Litigation**

By Robert J. Robertson and  
Robert Q. Keith  
pp. 24-33

**A Brief History of the Texas  
Supreme Court Clerk's Office**

By Tiffany S. Gilman and Blake  
Hawthorne  
pp. 34-41

**The Evidence Playbook**

By Rachel Hooper  
pp. 42-50

**Theodora Hemphill's Guide to  
the Texas Constitution, Part  
IV**

By David A. Furlow  
pp. 51-67

**Book Review: Edmund J. Davis:  
Civil War General, Republican  
Leader, Reconstruction  
Governor**

By Patrick Judd  
pp. 68-69

**Andrea White's Book *Emeline*  
Tells a Wonderful Story**

By Laura Gibson  
pp. 70-72

**Texas's Constitutional History  
Begins Not in 1836 But in 1824  
A review of Manuel González  
Oropeza's and Jesús Francisco  
de la Teja's *Actas del Congreso  
Constituyente de Coahuila y  
Texas de 1824 a 1827***

By David A. Furlow  
pp. 73-78

**In Memoriam: Karen R.  
Johnson, 1944-2016**

p. 79

**Former U.S. Solicitor General  
Paul Clement Will Keynote  
Hemphill Dinner**

pp. 80-81

**All-Woman Court Ruled the  
State Bar Annual Meeting**

By David A. Furlow  
pp. 82-89

**DAR Honors Judge Mark  
Davidson's Preservation of  
Texas's Courthouse History**

By David A. Furlow  
pp. 90-93

**Justice Bob Gammage's Son  
Sworn-In to the Bar**

p. 94

***Miranda*: More than Words—  
the Fiftieth Anniversary of  
the Ruling in *Miranda v. State  
of Arizona***

By Carmen Roe  
pp. 95-97

**HBA President Gibson  
Recognizes Teach Texas  
Committee Leaders**

pp. 98-100

**Houston Bar Receives State  
Bar's Star of Achievement  
Award for Teach Texas**

By Lynne Liberato  
pp. 101-102

***Barbarians Rising*: Interview  
with David Furlow**

By TSCHS Journal Staff  
pp. 103-108

**Calendar of Events**

pp. 109-112

**[Fall 2016, Vol. 6, No. 1](#)**

**Message from the President**

By Macey Reasoner Stokes  
pp. 1-2

**Fellows Column**

By David J. Beck  
pp. 3-4

**Executive Editor's Page: "On  
a Sea without a Compass":  
Election, Politics, War and  
Legal History**

By David A. Furlow  
pp. 5-10

**The Colonel Versus the Judge**

By Judge Mark Davidson & Kent  
Rutter  
pp. 11-21



**Revisiting Historic Election Law in a Modern Constitutional Challenge: *Cotham v. Garza*, 805 F. Supp. 389 (S.D. Tex. 1995)**  
By W. Mark Cotham  
pp. 22-37

***Ferguson v. Maddox: Impeachment, Politics, and the Texas Supreme Court***  
By Horace P. Flatt  
pp. 38-47

**In Memoriam: Justice Barbara Culver Clack, 1926-2016**  
By Osler McCarthy  
pp. 48-50

**In Memoriam: Hans Wolfgang Baade, 1929-2016**  
By Marilyn P. Duncan  
pp. 51-52

**Many Thanks to Our Summer Archives Intern, Victoria Clancy!**  
By Caitlin Bumford  
pp. 53-54

**We're All Coahuiltexanos Now**  
By David A. Furlow  
pp. 55-61

**On the Road Again, from El Paso to Houston**  
By David A. Furlow  
pp. 62-66

**Thank You, Mary Sue Miller**  
By David A. Furlow  
p. 67

**The Journey of the American Ulysses: A Review of H. W. Brands's Biography, *The Man Who Saved the Union: Ulysses Grant in War and Peace***  
By Marie R. Yeates and John F. McInerney  
pp. 68-72

**William J. Boyce and John H. Torrison with John DeMers: *Miss Fortune's Last Mission: Uncovering a Story of Sacrifice and Survival***  
Book review by David A. Furlow  
pp. 73-76

**21st Annual John Hemphill Dinner: Hon. Paul Clement Was the Featured Speaker**  
By Marilyn P. Duncan  
Photos by Mark Matson  
pp. 77-82

**Bill Chriss Receives the 2016 Chief Justice Pope Award for Integrity, Professionalism**  
By Marilyn P. Duncan  
pp. 83-84

**BA Breakfast Brings Court Colleagues Together for Annual Reunion**  
By Amy Warr  
pp. 85-86

**2016 Inductees to Texas Appellate Hall of Fame Announced**  
By Jackie Stroh  
pp. 87-88

**GLO's Save Texas Symposium Remembers the Alamo in a New Light**  
By Pat Nester  
pp. 89-93

**Harris County Law Library Awarded for Centennial Historical Program**  
By David A. Furlow  
p. 94

**Haley Shares History of Texas Law and Courts at AAAL Annual Meeting**  
p. 95

**Calendar of Events**  
pp. 96-99

## Winter 2017, Vol. 6, No. 2

**Message from the President**  
By Macey Reasoner Stokes  
pp. 1-2

**Executive Director's Page: Where We Are Depends on Where We've Been**  
By Pat Nester  
pp. 3-4

**Fellows Column**  
By David J. Beck  
pp. 5-6

**Executive Editor's Page: Let's Get Familiar**  
By David A. Furlow  
pp. 7-11

**A Tribute to Professor Joseph W. McKnight, Father of Texas Family Law**  
Introduction by Chief Justice Nathan L. Hecht • "Spanish Concepts in Texas Law of the Family, Succession, and Civil Procedure" by Joseph W. McKnight  
pp. 12-18

**Mediation as a Protective Tool in Custody Disputes: The Legacy of *In re Lee***  
By Justice Debra H. Lehrmann  
pp. 19-26

**Tracing Commingled Funds in Divorce: Development of the Law and the Practice**  
By Richard R. Orsinger  
pp. 27-33

**Women and the Origins of Texas Family Law**  
By Elizabeth York Enstam  
pp. 34-46

**A Texas Case in the U.S. Supreme Court**

By Jani Maselli Wood  
pp. 47- 52

**Thechas to Texas: The History of Our Word**

By Justice Jason Boatright  
pp. 53-60

**Andrew J. Torget's *Seeds of Empire: Cotton, Slavery, and the Transformation of the Texas Borderlands, 1800-1850***

Book review by James P. Bevill  
pp. 61-62

**William Dusinger's *Slavemaster President: The Double Career of James Polk***

Book review by Patrick Judd  
pp. 63-65

***My Beloved World*, by Sonia Sotomayor, Associate Justice, U.S. Supreme Court**

Book review by Lauren Brogdon  
pp. 66-69

**Carol Dawson and Roger Allen Polson's *Miles and Miles of Texas: 100 Years of the Texas Highway Department***

A book review by David A. Furlow  
pp. 70-72

**Society Members: Register for This Special CLE Event!**

pp. 73-74

**High Court Justice Serves on Hays County Jury**

By Dylan O. Drummond  
pp. 75-76

**Texas Court of Criminal Appeals Turns 125**

By Dylan O. Drummond  
p. 77

**Ali James Celebrates Capitalism at Fall Board Meeting**

By David A. Furlow  
pp. 78-80

**State Law Library Digitizes Historical Texas Statutes**

By Dylan O. Drummond  
p. 81

**Calendar of Events**

pp. 82-86

**[Spring 2017, Vol. 6, No. 3](#)**

**Message from the President**

By Macey Reasoner Stokes  
pp. 1-2

**Executive Director's Page: What Do Plutonium Pits, Hydrilla, and the Yellow Rose Have in Common? A Final Pitch to Sample TSHA's History Smorgasbord**

By Pat Nester  
pp. 3-4

**Fellows Column**

By David J. Beck  
pp. 5-6

**Executive Editor's Page: Coming in from the Chill: Cheers to the First Amendment**

By David A. Furlow  
pp. 7-11

**The Role of Juries in Libel Litigation under the Texas Constitution**

By Chip Babcock  
pp. 12-26

**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  
pp. 27-37

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

By JT Morris  
pp. 38-45

**A 21st Century Clash with Prohibition: The First Amendment Meets Texas's Arcane Alcohol Advertising Laws**

By Peter D. Kennedy  
pp. 46-55

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

By Stephen Pate  
pp. 56-66

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

By Marilyn P. Duncan  
pp. 67-79

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

p. 80

**Pat Nester: Looking Back, Moving On**

Interview by Marilyn P. Duncan  
pp. 81-83

**Case Update: *Moore v. Texas***

By Jani Maselli Wood  
pp. 84-86

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

By Warren W. Harris  
Photos by David A. Furlow  
p. 87

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

Book review by Terence L. O'Rourke  
pp. 88-89

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

Book review by Marilyn P. Duncan  
pp. 90-94

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

pp. 95-96

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

By David A. Furlow  
pp. 97-101

**TSHA Approves Society's TSHA 2018 Panel Proposal**

p. 102

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

By David A. Furlow  
pp. 103-105

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

By David A. Furlow  
pp. 106-108

**Texas Women Judges' Day Celebrated at Texas Capitol**

By Dylan O. Drummond  
pp. 109-110

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

By Dylan O. Drummond  
pp. 111-112

**Calendar of Events**

pp. 113-116

**Summer 2017, Vol. 6, No. 4**

**Immediate Past President's Farewell**

By Macey Reasoner Stokes  
pp. 1-2

**Message from the 2017-18 President**

By Dale Wainwright  
pp. 3-4

**Executive Director's Page: A Few Observations about Texas Legal History**

By Sharon Sandle  
pp. 5-6

**Fellows Column**

By David J. Beck  
pp. 7-8

**Executive Editor's Page: Remembering Rip-Roaring Rip Fors—and the Origins of TSHA Scholarship**

By David A. Furlow  
pp. 9-17

**The Last Reconstruction Texas Supreme Court Was an Honorable Court**

By Judge Mark Davidson and Landon Gerlich  
pp. 18-29

**William Marsh Rice and His Lawyers: Peter Gray, Walter Browne Botts, and Captain James Addison Baker**

By Bill Kroger  
pp. 30-41

**A Perfect Storm: FDR, Pappy O'Daniel, Huey Long's Ghost, and the Failed 5th Circuit Nomination of James V Allred**

By Stephen Pate  
pp. 42-68

**Society History Course Brings Law to Life**

By Lynne Liberato  
pp. 69-74

**On the Road with Texas History: Exploring German and B-Movie Texas**

By David A. Furlow  
pp. 75-82

**Wes Ferguson's *Blanco River* is a Treasure**

Book review by David A. Furlow  
pp. 83-85

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

pp. 86-87

**Nominations Welcomed for the Texas Appellate Hall of Fame**

p. 88

**Auld Lang Syne, Pat**

By the Journal staff  
p. 89

**Laurels: Warren W. Harris & Justice Elizabeth Lang-Miers**

pp. 90-91

**Calendar of Events**

pp. 92-95

**Fall 2017, Vol. 7, No. 1**

**Message from the President**

By Dale Wainwright  
pp. 1-2

**Executive Director's Page: In the Aftermath of a Historic Hurricane, Texas Courts and Lawyers Make Their Own History**

By Sharon Sandle  
pp. 3-5



### **Fellows Column**

By David J. Beck  
pp. 6-7

### **Executive Editor's Page: When Cold Spring Water Becomes Legal Hot Water**

By David A. Furlow  
pp. 8-11

### **It's the Law—*You* Own the Water under *Your* Land: The Evolution of Texas Groundwater Law**

By Edmond R. McCarthy, Jr.  
pp. 12-31

### **Texas Groundwater Law from Its Origins in Antiquity to Its Adoption in Modernity**

By Dylan O. Drummond  
pp. 32-52

### **A Brief History of the Short History of the State of the Judiciary in Texas**

By Osler McCarthy  
pp. 53-58

### **Texas Supreme Court and Court of Criminal Appeals Pass Emergency Relief Orders in Hurricane Harvey's Wake**

By Dylan O. Drummond  
pp. 59-60

### **22nd Annual John Hemphill Dinner: Chief Judge Diane P. Wood Was the Featured Speaker**

By Marilyn P. Duncan  
pp. 61-67

### **Retired Supreme Court Justice Scott Brister's Portrait is Unveiled**

By Dylan O. Drummond  
pp. 68-69

### **Appellate Legends Chief Justice Jack Pope, Professor Don Hunt, and Trailblazer Helen Cassidy Join the Texas Appellate Hall of Fame**

pp. 70-71

### **2017 Briefing Attorney Breakfast Brings Court Family Together**

By Mary Sue Miller  
pp. 72-73

### ***Over Here: Saving Texas History One War at a Time***

By David A. Furlow  
pp. 74-79

### **Sharing Judicial Civics Lessons with Fellow Legal History Professionals**

By David A. Furlow  
pp. 80-84

### **The Key of Life: A Review of David O. Brown's *Called to Rise***

Book review by Rachel Palmer Hooper  
pp. 85-87

### **A Review of *Bexar County, Texas, District Court Minutes 1838-1848***

Book review by David A. Furlow  
pp. 88-91

### **Society Members Nominated to the Fifth Circuit Court of Appeals**

By Dylan O. Drummond  
p. 92

### **Calendar of Events**

pp. 93-97

### **[Winter 2018, Vol. 7, No. 2](#)**

### **Message from the President**

By Dale Wainwright  
pp. 1-2

### **Executive Director's Page: TSHA Annual Meetings Have Tangible, Intangible Takeaways**

By Sharon Sandle  
pp. 3-4

### **Fellows Column**

By David J. Beck  
Fellows Dinner photos by Mark Matson  
pp. 5-12

### **Executive Editor's Page: The Theater of the Real**

By David A. Furlow  
pp. 13-17

### **A Practicing Lawyer's Tribute to Professor Joseph W. McKnight (1925-2015)**

By Josiah M. Daniel, III  
pp. 18-25

### **Reconstruction Politics and the Galveston Seven: The Struggle to Appoint a Judge in the Eastern District of Texas, 1869-72, Part 1**

By Stephen Pate  
pp. 26-42

### **From Outlaw to Attorney at Law: The Brief Legal Career of John Wesley Hardin**

By John G. Browning  
pp. 43-56

### **Celebrating Houston's Appellate History**

By David A. Furlow  
pp. 57-60

### **The "Friendly First," Texas's First Court of Appeals, 1892-2017**

By Hon. Terry Jennings  
pp. 61-66

**The Fourteenth at Fifty:  
Poised for Change, Prepared  
for Challenge, and Pointed  
Toward the Future**

By Hon. Kem Thompson Frost  
pp. 67-74

**In Memoriam: Justice Ted Z.  
Robertson, 1921-2017**

By Osler McCarthy  
pp. 75-76

**The Great Debate**

By Dylan O. Drummond  
pp. 77-78

**Dress (Your Writing) for  
Success: A Book Review of  
Typography for Lawyers**

By Jay Jackson  
pp. 79-81

**This Past Fall, Trustees  
Learned the History of a  
Giant Film**

Story and photos by David A.  
Furlow  
pp. 82-88

**TSHA Annual Meeting 2018:  
Laying Down Early Texas Law**

By David A. Furlow  
pp. 89-90

**Historic Portrait Ceremony  
Honors Reconstruction Judges  
Wesley Ogden and Colbert  
Coldwell**

Photos by Mark Matson  
pp. 91-92

**Come Join Us for the Spring  
2018 Members Meeting and  
Bush Presidential Center Tour**

By Cynthia Timms  
pp. 93-94

**Justice Jimmy Blacklock Joins  
the Texas Supreme Court in  
January**

p. 95

**Chief Justice Hecht and  
Florida Chief Justice Labarga  
Address Access to Justice  
in the Wake of Hurricanes  
Harvey and Irma**

By Dylan O. Drummond  
p. 96

**Grand Opening of a New  
Visitor's Center and Museum  
at San Felipe**

By David A. Furlow  
pp. 97-98

**Celebrating the Legacy of  
Heman Marion Sweatt**

Story and photos by David A.  
Furlow  
pp. 99-103

**Calendar of Events**

pp. 104-107

**[Spring 2018, Vol. 7, No. 3](#)**

**Message from the President**

By Dale Wainwright  
pp. 1-2

**Executive Director's Page:  
Gateways to Texas History  
Are Open to All**

By Sharon Sandle  
pp. 3-4

**Fellows Column**

By David J. Beck  
pp. 5-8

**Executive Editor's Page:  
Texas Law and Courts in the  
Victorian Age**

By David A. Furlow  
pp. 9-25

**Alcaldes in Austin's Colony,  
1821-1835**

By Jason Boatright  
pp. 26-50

**San Jacinto Justice: The  
Future Supreme Court Judges  
Who Won Texas Her Freedom  
at San Jacinto**

By Dylan O. Drummond  
pp. 51-67

**Reconstruction Politics and  
the Galveston Seven: The  
Struggle to Appoint a Judge in  
the Eastern District of Texas,  
1869-72, Part 2**

By Stephen Pate  
pp. 68-83

**Reconsidering James  
Collinsworth, the Texas  
Supreme Court's First Chief  
Justice: Reviewing Roy S.  
Newsom, Jr. and James B.  
Collinsworth, Jr., *Too Good to  
Be True: James Collinsworth  
and the Birth of Texas***

By James W. Paulsen  
pp. 84-105

**Jason Gillmer's *Slavery and  
Freedom in Texas: Stories from  
the Courtroom, 1821-1871***

Book Review by Daina Ramey  
Berry and Rachel E. Winston  
pp. 106-108

**A Double-Hitter at the Spring  
2018 Board Meeting: Harriet  
Miers and the George W. Bush  
Presidential Center**

By Cynthia K. Timms  
Photos by David A. Furlow  
pp. 109-111

**Supreme Spouses**

By Dylan O. Drummond  
pp. 112-113

***Law and the Texas Frontier  
Joins the Society's Taming  
Texas Series***

By Marilyn P. Duncan  
pp. 114-115

**Laying Down the Law at the 2018 TSHA Annual Meeting**

By David A. Furlow  
pp. 116-118

**New San Felipe de Austin Museum is a State Treasure**

By Ken Wise  
pp. 119-123

**U.S. Fifth Circuit Chief Judge Carl E. Stewart Will Keynote Hemphill Dinner**

By Marilyn P. Duncan  
p. 124

**MARK YOUR CALENDAR: The Society Will Commemorate the Great War on November 14**

By David A. Furlow  
pp. 125-128

**Nominations Welcomed for the 2018 Texas Appellate Hall of Fame**

By Jackie Stroh  
p. 129

**Calendar of Events**

pp. 130-132

**[Summer 2018, Vol. 7, No. 4](#)**

**Immediate Past President's Message**

By Dale Wainwright  
pp. 1-2

**Message from the 2018-19 President**

By Marcy Hogan Greer  
pp. 3-5

**Executive Director's Page: Recognizing the Paths and Accomplishments of Texas's African-American Judges**

By Sharon Sandle  
pp. 6-7

**Fellows Column**

By David J. Beck  
pp. 8-9

**Executive Editor's Page: Contributions of African-American Judges: From 1641 to Today, from Maryland to Texas**

By David A. Furlow  
pp. 10-20

**The Constitution Imparts Responsibilities as Well as Rights**

By Chief Justice Wallace B. Jefferson (ret.)  
pp. 21-25

**Texas Court of Criminal Appeals Judge Morris Overstreet**

By Michael Hurd  
pp. 26-29

**Chief Justice Carolyn Wright: A Profile in Excellence**

By John G. Browning  
pp. 30-33

**A Personal Remembrance of the Unforgettable Justice Henry Doyle**

By Hon. Murry B. Cohen  
pp. 34-37

**THE FIRST, THE LAST, THE ONLY: The Legend of Justice Henry Eman Doyle, the First African-American Associate Justice of a Texas Court of Appeals**

By Virgie Lemond Mouton  
pp. 38-47

**An Interview with Judge Kenneth M. Hoyt**

By Hon. Andrew M. Edison  
pp. 48-50

**An Interview with the Honorable Gabrielle Kirk McDonald**

By Melanie Bragg  
pp. 51-58

**The Lady on the Bus Stop**

By Hon. Evelyn P. McKee  
pp. 59-61

**Hon. Harriet M. Murphy: First Permanently Appointed African-American Woman Judge in Texas**

pp. 62-66

***There All the Honor Lies: A Memoir***

Book by Judge Harriet M. Murphy  
p. 66

**Reconstruction Politics and the Galveston Seven: The Struggle to Appoint a Judge in the Eastern District of Texas, 1869-72, Part 3**

By Stephen Pate  
pp. 67-88

**San Jacinto Justice: The Future Supreme Court Judges Who Won Texas Her Freedom at San Jacinto, Part 2**

By Dylan O. Drummond  
pp. 89-104

**The Time to Preserve Texas's Slave Case Records is Now**

By Bill Kroger  
pp. 105-106

**Chief Justice Carolyn Wright and John Browning Receive Legal History Award**

p. 107

**September 7 Hemphill Dinner Will Feature Address by U.S. Fifth Circuit Chief Judge Carl E. Stewart**

By Marilyn P. Duncan  
pp. 108-109



**GREAT WAR  
COMMEMORATION ON  
NOVEMBER 14, 2018 - The  
Society and Supreme Court  
Will Honor Judges and  
Governors Who Served**  
By David A. Furlow  
pp. 110-116

**Saving and Savoring San  
Antonio's 300-Year History**  
By David A. Furlow  
pp. 117-120

**Calendar of Events**  
pp. 121-123

**Fall 2018, Vol. 8, No. 1**

**Message from the 2018-19  
President**  
By Marcy Hogan Greer  
p. 1

**Executive Director's Page:  
The Great War Era: New  
Opportunities for Women**  
By Sharon Sandle  
pp. 2-5

**The Centennial of the  
Armistice—Why It Matters**  
By Judge Mark Davidson  
pp. 6-7

**Executive Editor's Page:  
Over Here and Over There:  
Honoring Texas Great War  
Veterans**  
By David A. Furlow  
pp. 8-18

**Training Our Finest: The Leon  
Springs Military Reservation  
and the Great War**  
By Hon. Ken Wise  
pp. 19-23

**Serving Nation, Bar, and  
Court: Justice Few Brewster**  
By David A. Furlow  
pp. 24-32

**Into the Trenches with Judge  
George Eastland Christian**  
By David A. Furlow  
pp. 33-48

**Frank P. Culver, Jr.,  
Artilleryman**  
By David A. Furlow  
pp. 49-58

**He Did His Duty: Alfred  
Jennings "A.J." Folley**  
By David A. Furlow  
pp. 59-63

**The Cavalryman: Wilmer St.  
John Garwood**  
By Hon. Andrew Edison and  
David A. Furlow  
pp. 64-72

**Meade Felix Griffin, First  
Officers Training Camp, and  
University of Texas History**  
By Hon. Russell Lloyd and David  
A. Furlow  
pp. 73-80

**Robert W. Hamilton, Student  
Scholar**  
By David A. Furlow  
pp. 81-88

**Justice Gordon Simpson's  
Great War**  
By Kent Rutter and David A.  
Furlow  
pp. 89-97

**Charles Stewart Slatton, U.S.  
Army Signal Corps**  
By Sarah A. Duckers and David  
A. Furlow  
pp. 98-110

**Jimmy Allred, the U.S. Navy,  
and the Great War**  
By Stephen Pate  
pp. 111-119

**Beauford H. Jester: A Profile  
in Courage**  
By Judge Mark Davidson  
pp. 120-126

**Dan Moody and the Great War**  
By Patricia Bernstein  
pp. 127-128

**The 370th Infantry Trained  
at Camp Logan, in Houston,  
Texas, Fought in France**  
By Louis F. Aulbach, Linda C.  
Gorski, & Robbie Morin  
pp. 129-133

**23rd Annual John Hemphill  
Dinner: Chief Judge Carl  
Stewart Was the Featured  
Speaker**  
By Marilyn P. Duncan  
Photos by Mark Matson  
pp. 134-139

**Saving Texas History at the  
Alamo**  
Story & symposium photos by  
David A. Furlow  
pp. 140-143

**Calendar of Events**  
pp. 144-147

**Winter 2019, Vol. 8, No. 2**

**Message from the President**  
By Marcy Hogan Greer  
pp. 1-2

**Executive Director's Page: A  
Thriving Educational Mission**  
By Sharon Sandle  
pp. 3-4

**Fellows Column**  
By David J. Beck  
pp. 5-6

**Executive Editor's Page:  
Petition and Remonstrance**  
By David A. Furlow  
pp. 7-13

**America's Forgotten Freedom: The Development, Meaning, and Significance of the Petition Clause**

By Chad Baruch  
pp. 14-38

**And Still He Rose: William A. Price, Texas's First Black Judge and the Path to a Civil Rights Milestone**

By John G. Browning and Hon. Carolyn Wright  
pp. 39-49

**Chief Justice Jack Pope: Common Law Judge and Judicial Legend**

By Marilyn P. Duncan and Benjamin L. Mesches  
pp. 50-65

**Embarking on a Journey of Research**

By Hon. Jason Boatright  
pp. 66-72

**Justice Phil Johnson Has Been a Guiding Light for Public Service**

By Hon. Jeff Brown  
pp. 73-75

**In Memoriam: Justice C. L. Ray, Jr., 1931-2018**

By Osler McCarthy  
pp. 76-77

**Great War Commemoration a Great Success**

By David A. Furlow  
pp. 78-96

**Texas Constitutionalism: TSHA 2019 Annual Meeting**

By David A. Furlow  
pp. 97-100

**Spring Board and Members Meeting to Be Held at San Felipe de Austin Museum**

By David A. Furlow  
pp. 101-104

**Society Cosponsors Supreme Court History and Procedure Course**

By Lynne Liberato and Richard Orsinger  
pp. 105-107

**Texas Appellate Hall of Fame Inducts Six New Members**

By Marilyn P. Duncan  
pp. 108-110

**Lynne Liberato Gives Keynote Address at Naturalization Ceremony**

pp. 111-112

**Calendar of Events**

pp. 113-116

**Spring 2019, Vol. 8, No. 3**

**Message from the President**

By Marcy Hogan Greer  
pp. 1-2

**Executive Director's Page: The Threads of Texas Legal History are Complex and Colorful**

By Sharon Sandle  
pp. 3-6

**Fellows Column**

By David J. Beck  
pp. 7-8

**Highlights of the Annual Fellows Dinner**

Photos by Mark Matson  
pp. 9-15

**Executive Editor's Page: Commemorating Texas Constitutionalism**

By David A. Furlow  
pp. 16-22

**Genesis of the Constitution of Coahuila and Texas: Debates and Agreement in the Construction of Its Only Magna Carta**

By Manuel González Oropeza  
pp. 23-37

**Six Constitutions over Texas, 1836-1876**

By William J. Chriss  
pp. 38-59

**The Number Nine: Why the Texas Supreme Court Has the Same Number of Justices as the United States Supreme Court**

By Josiah M. Daniel, III  
pp. 60-68

**The Spring Board Meeting at San Felipe de Austin Was a Runaway Success**

Story and photos by David A. Furlow  
pp. 69-79

**TSHA's 2019 Annual Meeting Panel: Texas Constitutionalism A to Z**

By David A. Furlow  
pp. 80-86

**New Legal History Fellowship Will Honor Former TSCHS and TSHA President Larry McNeill**

By Marilyn P. Duncan  
p. 87

**Society Trustee Justice Brett Busby Appointed to the Texas Supreme Court**

By Dylan O. Drummond  
p. 88

**Justice Jeff Brown and Former Supreme Court Clerk Brantley Starr Sit for Senate Judiciary Confirmation Hearing**

By Dylan O. Drummond  
p. 89

**Nominations Welcomed for the Texas Appellate Hall of Fame**

By Jackie Stroh  
p. 90

**Manuel González Oropeza's Gift of Law to the Harris County Law Library**

By David A. Furlow  
pp. 91-93

**A Court First: Texas and Arkansas Supreme Courts Sit Jointly in Texarkana**

By Dylan O. Drummond  
p. 94

**Recent Honors and Awards: Justice Eva Guzman, Justice Brett Busby, Judge Daryl Moore, Lynne Liberato, David Beck, Harry Reasoner, and Fred Hagans**

pp. 95-96

**Third Texas Women Judges' Day at the Texas Capitol**

By Megan LaVoie, Office of Court Administration; and Dylan O. Drummond  
pp. 97-98

**Calendar of Events**

pp. 99-101

**[Summer 2019, Vol. 8, No. 4](#)**

**Message from the President**

By Dylan O. Drummond  
pp. 1-2

**Executive Director's Page: Using Technology to Preserve Texas Legal History**

By Sharon Sandle  
pp. 3-4

**Fellows Column**

By David J. Beck  
pp. 5-6

**Executive Editor's Page: Honoring Legal Scholarship**

By David A. Furlow  
pp. 7-16

**The Civil Law Collection of the Texas Supreme Court**

By Michael Widener  
pp. 17-39

**From the Western Frontier to the Digital Frontier: A History of the State Law Library**

By Amy Small  
pp. 40-56

**State Bar of Texas Digital Archives Portal is Launched**

By Caitlin Bumford  
pp. 57-59

**Supreme Court of Texas Archive Update**

By Tiffany Gilman  
pp. 60-66

**Recent Books of Interest**

Compiled by Marilyn P. Duncan  
pp. 67-69

**U.S. Supreme Court Justice Neil M. Gorsuch Is Featured Speaker at the 24th Annual John Hemphill Dinner**

By Marilyn P. Duncan  
pp. 70-71

**National History Association Recognizes the *Journal's* Excellence**

By the TSCHS Journal staff  
pp. 72-77

***TSCHS Journal* Joins Texas's Heritage**

By David A. Furlow  
pp. 78-82

***Call for Applications: 2020 Larry McNeill Research Fellowship in Texas Legal History***

p. 83

***From Waterloo to Austin: Historian Jeff Kerr Will Speak at the Fall Board Meeting***

By David A. Furlow  
pp. 84-85

**X Marks the Spot: 10th Annual Save Texas History Symposium**

By David A. Furlow  
p. 86

**In Memoriam: Dr. Don Graham, Writer and Teacher**

Article and photos by David A. Furlow  
pp. 87-89

**Senators Cite Chief Justice Hecht for His 30 Years on the Court**

By Osler McCarthy  
p. 90

**Calendar of Events**

pp. 91-92

**[Fall 2019, Vol. 9, No. 1](#)**

**Message from the President**

By Dylan O. Drummond  
pp. 1-2

**Executive Director's Page: Some Thoughts on Our Individual and Collective Histories**

By Sharon Sandle  
pp. 3-4

**Fellows Column**

By David J. Beck  
pp. 5-6

**Executive Editor's Page: Poetry, Prose, & Pose**

By David A. Furlow  
pp. 7-12



**Justice James Hall Bell, Poet**  
By Diana G. Paulsen and James  
W. Paulsen  
pp. 13-50

**The Olde Dominion's New  
Domain: Texas**  
By David A. Furlow  
pp. 51-71

**Grapevine Revisited: Bonnie  
and Clyde and the Easter  
Sunday Murders**  
By Jody Edward Ginn, Ph.D., and  
John Fusco  
pp. 72-78

**East Texas Troubles: Governor  
Allred and His Rangers Defy  
Jim Crow**  
By Jody Edward Ginn, Ph.D.  
pp. 79-83

**24th Annual John Hemphill  
Dinner: U.S. Supreme Court  
Justice Neil M. Gorsuch Was  
Guest Speaker**  
By Marilyn P. Duncan  
Photos by Mark Matson  
pp. 84-90

***A Republic, If You Can Keep It*  
by the Hon. Neil M. Gorsuch**  
p. 91

**Texas Supreme Court  
Justice Bob Gammage: A  
Jurisprudence of Rights and  
Liberties**  
By John C. Domino  
p. 92

**Justice Brett Busby Formally  
Sworn into Office by U.S.  
Supreme Court Justice Neil M.  
Gorsuch**  
By Dylan O. Drummond  
pp. 93-94

**Justice Jane Bland Joins the  
Court**  
By Dylan O. Drummond  
p. 95

**Judge Jeff Brown Sworn-In to  
the Southern District of Texas**  
By Dylan O. Drummond  
p. 96

**Court Clerk Blake Hawthorne  
to be Honored with Appellate  
Justice Award • *Hawthorne  
Follows Justice Anthony  
Kennedy as Latest Recipient***  
By Osler McCarthy  
p. 97

**The *Journal* Honored with  
Prestigious Award of  
Excellence**  
By the TSCHS Journal Staff  
pp. 98-109

***"A Natural-Born Storyteller":  
Dr. Jeff Kerr and the Fall  
Board Meeting***  
Story and photos by David A.  
Furlow  
pp. 110-112

**Time Flew at the Tenth  
Annual *Save Texas Symposium***  
By David A. Furlow  
pp. 113-120

**Four Chief Justices  
Memorialized in Texas  
Appellate Hall of Fame**  
pp. 121-122

**Texas Courts News Notes:  
Hon. David Evans, Hon.  
Carolyn Wright, Judge Ada  
Brown, and Judge Brantley  
Starr**  
By Dylan O. Drummond  
pp. 123-124

**Calendar of Events**  
pp. 125-127

## **Winter 2020, Vol. 9, No. 2**

**Message from the President**  
By Dylan O. Drummond  
pp. 1-2

**Executive Director's Page**  
By Sharon Sandle  
pp. 3-4

**Fellows Column**  
By David J. Beck  
pp. 5-6

**Executive Editor's Page**  
By David A. Furlow  
pp. 7-8

**The History of Judicial  
Disqualification and Recusal  
in Texas, Part 1**  
By John C. Domino  
pp. 9-21

**New England Roots Run Deep  
in Texas: A 400<sup>th</sup> Anniversary  
Salute, Part 1**  
By David A. Furlow  
pp. 22-45

**On the Road - Looking for  
San Felipe de Austin in  
Connecticut**  
By Texas Historical Commission  
Staff  
pp. 46-49

**GALVESTON, O GALVESTON!  
The Society Honors Trustee  
Jeff Brown on His Investiture  
as a U.S. District Judge and  
Delves Deep Into Galveston  
and Texas History**  
By Stephen Pate  
pp. 50-56

**Come See the Society's 2020  
TSHA Program - Courting  
Trouble: Hard Cases, Historic  
Consequences**  
By David A. Furlow  
pp. 57-58

**Supreme Court Notes:  
Justice Jane Bland Formally  
Sworn-in; Southern District  
of Texas Judge Jeff Brown  
Invested**

By Dylan O. Drummond  
pp. 59-60

**Dallas-Area Judges, Justices,  
and Attorneys Bring the  
Society's Taming Texas  
Curriculum to DISD School**  
pp. 61-62

**Calendar of Events**  
pp. 63-66

***Journal of the Texas Supreme  
Court Historical Society***  
**Index of Articles by Issue,  
Fall 2011-Winter 2020**  
pp. 67-89

**This index will soon be available at [texascourthistory.org/journal](https://texascourthistory.org/journal)  
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[Return to Journal Index](#)



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[Return to Journal Index](#)



# 2019-20 Membership Upgrades

The following Society member has moved to a higher dues category since June 1, 2019, the beginning of the membership year.

## **GREENHILL FELLOW**

Kristen Vander-Plas

[Return to Journal Index](#)

# 2019-20 New Member List

The Society has added 40 new members since June 1, 2019, the beginning of the new membership year. Among them are 17 Law Clerks for the Court (\*) who receive a complimentary one-year membership during their clerkship.

## **GREENHILL FELLOW**

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[Return to Journal Index](#)

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- Complimentary Preferred Individual Seating & Recognition in Program at Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

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

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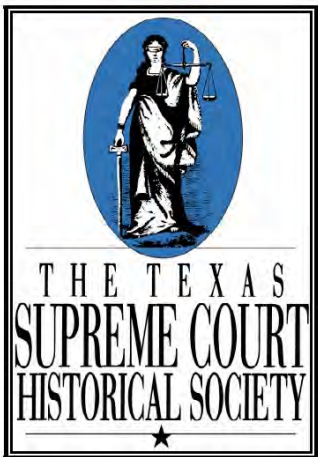
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