



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Spring 2020 Vol. 9, No. 3 General Editor Lynne Liberato Editor-in-Chief John G. Browning

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**By Dylan O. Drummond**

In its 30th year, the Society has been buffeted by extraordinary challenges arising from the onset of the COVID-19 pandemic. [Read more...](#)



Dylan O. Drummond

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When I was growing up, the terms "telework" and "working remotely" didn't exist because there wasn't much need to describe something that very few people did. [Read more...](#)



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The 2020 Annual Fellows Dinner was another success. All of the Justices from the Texas Supreme Court joined the Fellows in February for a wonderful evening. [Read more...](#)



David J. Beck

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As I embark upon the daunting task of helming this Journal, I see constant reminders of just how high the bar has been set by those who came before me. [Read more...](#)



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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

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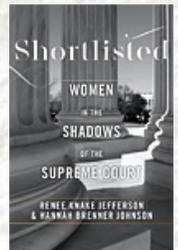
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**Book Review by John G. Browning**

U.S. Supreme Court Justice Ruth Bader Ginsburg once famously responded to the question of when there would be enough women sitting on our nation's court by saying "When there are nine."

[Read more...](#)



## News & Announcements

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Feature and photos by **David A. Furlow**

The Texas State Historical Association conferred its first-ever Larry McNeill Research Fellowship in Legal History during its Annual Fellows Luncheon and Awards Presentation. [Read more...](#)



Larry McNeill

### [The Society's 2020 TSHA Program](#)

#### [—Maybe the Best Ever](#)

By **David A. Furlow**

The Society's program—"Courting Trouble: Hard Cases, Historic Consequences"—at the 124<sup>th</sup> Annual Texas State Historical Association's Annual Meeting earned high praise. [Read more...](#)



TSHA logo

### [John Browning Wins Houston](#)

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TSCHS Trustee and this Journal's Editor-in-Chief was recently honored by the Houston Bar Foundation with its "Outstanding Legal Article" Award for 2019. [Read more...](#)



### [Save the Date:](#)

### [25th Annual John Hemphill Dinner](#)

Mark your calendar now to hear keynote speaker Hon. Priscilla R. Owen, Chief Judge of the United States Court of Appeals for the Fifth Circuit. [Read more...](#)



Hon. Priscilla R. Owen

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### [Historic Spring Board Meeting](#)

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The Alamo

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The Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas. [Read more...](#)

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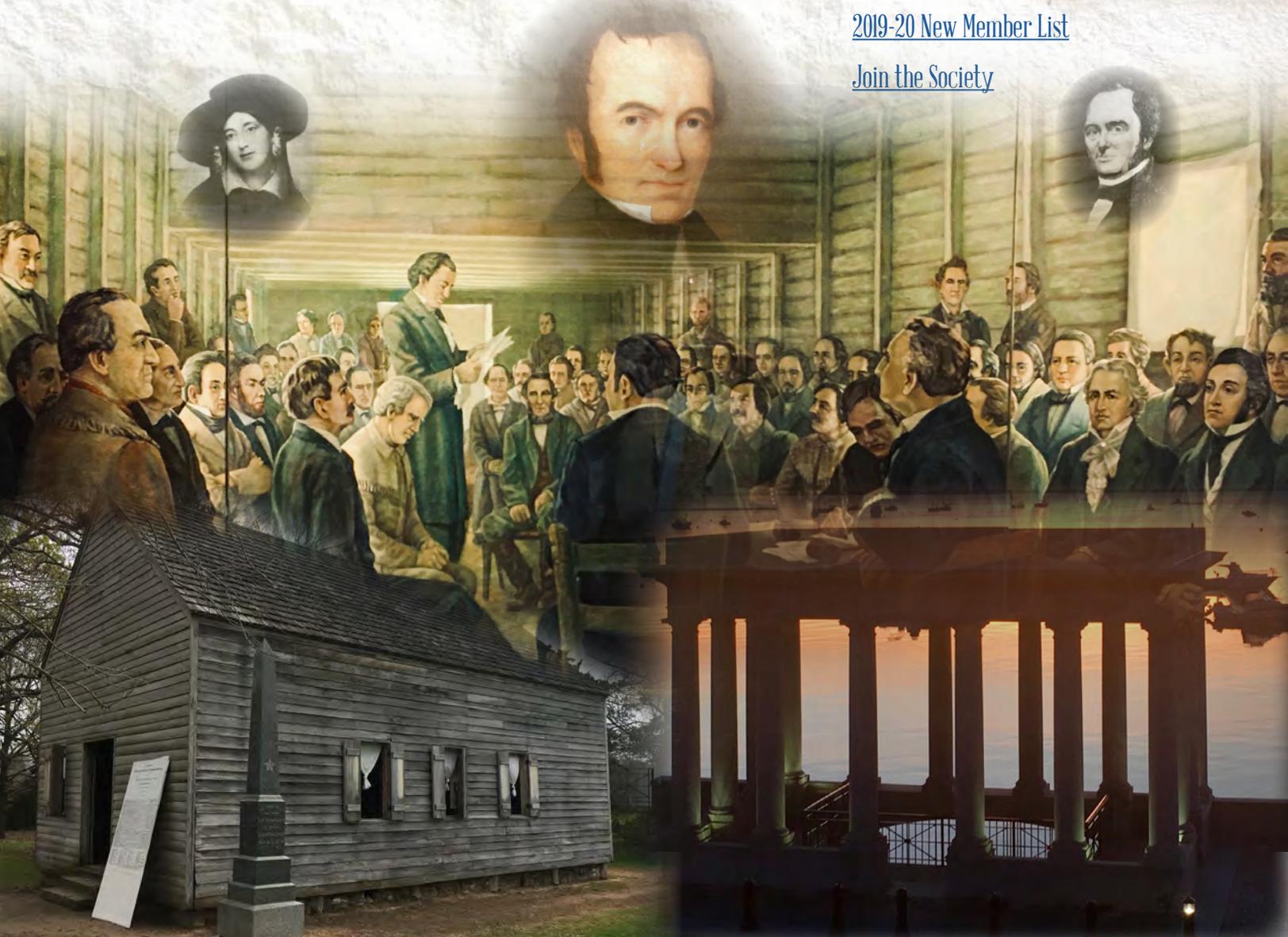
## Membership & More

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Dylan O.  
Drummond

# Message from the *President*

In its 30th year, the Society—like so many of its members, staff, officers, Trustees, Fellows, and donors—has been buffeted by extraordinary challenges arising from the onset of the COVID-19 pandemic. But due to the unparalleled dedication of the Society’s officers, Board of Trustees, Executive Director, and Administrative Coordinator, the Society has been able to ably navigate these choppy seas.

Charting the Society’s course during the coming years will be my outstanding successor, Cynthia Timms—herself a former Chair of the State Bar Appellate Section, as well as the estimable Tom Leatherbury as President-Elect, and acclaimed Fourteenth Court of Appeals Justice and noted historian Ken Wise as Vice-President. Joining this esteemed triumvirate in the officer corps will be our newly elected Treasurer and Secretary, longtime Trustees Rich Phillips and Lisa Hobbs. We are also excited to welcome four new Trustees to the Board, including: (1) former Texas Supreme Court Justice Don Willett—now a Judge on the U.S. Court of Appeals for the Fifth Circuit; (2) U.S. Western District Court Judge Xavier Rodriguez, who also formerly served as a Justice on the Supreme Court; (3) Senior Associate Justice Gina Benavides of the Corpus Christi-Edinburg Court of Appeals; and (4) past President and founding Fellow, Warren Harris. The combined insight and experience these justices, judges, and attorneys are able to bring to bear on behalf of the Society will ensure it is in good hands and on a steady path going forward for many years to come.

Most notable among the heretofore unimaginable decisions the Society has had to consider this year has been whether to host its annual Hemphill Dinner this fall in Austin as it has for the past quarter-century. To ensure the safety of our members, speakers, and guests, and only after much deliberation and with the unflinching cooperation from our longtime host for the dinner—the legendary Four Seasons Hotel—the Executive Committee voted to hold this year’s dinner virtually for the first time in the Society’s history. We are beyond excited that the Chief Judge of the Fifth Circuit, former Texas Supreme Court Justice Priscilla R. Owen, has accepted our invitation to keynote the dinner. She and Chief Justice Hecht will discuss her incredible path to become the first former Texas Supreme Court Justice to lead the Fifth Circuit as Chief Judge. They will also address the unprecedented challenges each of their courts have faced during the COVID-19 crisis, as well as how each bench has exhaustively worked to ensure that their courts continue to serve and safeguard the public throughout.

The Society's newly-installed Treasurer, Rich Phillips, has graciously agreed to serve as this year's dinner chair, and will be reaching out to our members and donors in the coming days and weeks regarding arrangements for this year's virtual dinner, which will be held Friday evening, September 11, 2020.

Despite the unprecedented challenges the Society has faced this year, it has nevertheless enjoyed several notable accomplishments:

- For the first time in its history, the Society was privileged to welcome a sitting United States Supreme Court Justice, Neil Gorsuch, as its keynote for the Hemphill dinner. Thanks to the tireless efforts of Immediate Past President Marcy Greer as well as Trustee Evan Young and his wife Tobi, this landmark event was one of the best attended Hemphill dinners in the Society's history and was a memorable night for all who were present;
- Thanks to the leadership and initiative of Warren Harris, the Society approved an arrangement with the First and Fourteenth Courts of Appeals to serve a similar role as it does with the Texas Supreme Court of acting as the custodian and conservator of the courts' historic portrait collection of its former justices. This model is one that the Society hopes to replicate with the state's other courts of appeals that may have need of such assistance;
- At the 2020 annual meeting of the Texas State Historical Association (TSHA), the Society awarded its inaugural Larry McNeill Fellowship to James Harkins and Brian Stauffer with the General Land Office. The Fellowship will support the publication of a series of five essays by noted historians throughout the state concerning some twenty-nine historical documents maintained by the GLO concerning the history and impact of slavery in Mexican Texas;
- For the first time since its founding in 2011, the reins of the Society's Journal were handed off from longtime Executive Editor David Furlow and Managing Editor Marilyn Duncan to their respective successors, Trustee John Browning and Karen Patton. Trustee and historian Stephen Pate has also come aboard as Executive Editor. Under David and Marilyn's unflagging leadership, the Journal became a nationally recognized and award-winning historical publication. I have no doubt that John and Karen will carry on the mantle of excellence established by their predecessors as they expertly guide the Journal into its next decade;
- In one of the best joint sessions the Society has hosted at TSHA's annual conference, Justice Ken Wise delivered a riveting presentation on the unofficial first court of the Republic of Texas, and Harris County MDL Judge Mark Davidson spoke on the fascinating history behind the five instances in which the Texas Supreme Court was called upon to decide the state's gubernatorial election. Harris County Historical Documents Room Curator Francisco Heredia served as the panel's commentator and discussed the amazing historical documents his office maintains;

- At the end of last year, former President Ben Mesches organized the first full-day teaching curriculum in Dallas as part of the Society's Teaching Texas judicial civics program. Presenters included Dallas Court of Appeals Justices Lana Myers, Erin A. Nowell, and Cory L. Carlyle, as well as Dallas County Criminal Court No. 3 Judge Audrey Moorehead and Dallas County Justice of the Peace Michael Jones, Jr. These jurists were joined by several local attorneys who spent the day teaching the entire student body of DISD's Hill Middle School about the history, structure, and operation of Texas courts;
- Along with the Texas Bar Appellate Section, the Society was proud to induct the 2019 class into the Appellate Hall of Fame. For the first time in the Hall's history, this year's class was comprised entirely of Chief Justices, including Texas Supreme Court Chief Justices John L. Hill, Jr. and Thomas J. Rusk, Supreme Court Special Chief Justice Hortense Sparks Ward, and Eastland Court of Appeals Chief Justice Austin McCloud;
- The Society was once again honored to host the Supreme Court's annual reunion for current and former Justices, clerks, staff attorneys, and staff—the B.A. Breakfast; and
- Society Trustee Stephen Pate organized an exclusive tour of Galveston's historic 1861 and 1937 federal courthouses, which was attended by former Texas Supreme Court Justice and now U.S. Southern District Judge Jeff Brown, U.S. Eastern District Judge Michael Truncale, U.S. Southern District Magistrates Andrew Edison and Christina Bryant, and Texas Court of Appeals Justices Ken Wise and Russell Lloyd.

As my year at the helm of the Society comes to a close, I want to extend special thanks to several people without whose unwavering commitment and devotion this year the Society would have been rudderless:

- The Society's indefatigable liaison to the Supreme Court for the past decade, Paul W. Green, as well as Supreme Court Justices J. Brett Busby and Jane Bland, who also serve the Society as Trustees;
- The Society's Executive Committee comprised of Justice Ken Wise, Marcy Greer, Tom Leatherbury, Rich Phillips, Todd Smith, and Cynthia Timms, who each devoted countless nonbillable hours to ensure the Society was able to fulfill its duties and obligations despite the havoc wrought by COVID-19; and
- Executive Director Sharon Sandle and Administrative Coordinator Mary Sue Miller, who steadfastly supported the Executive Committee and the Board of Trustees and enabled the Society to continue functioning virtually.

I can't wait to see what the next thirty years has in store for the Society!

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

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Sharon Sandle

## *Zooming Forward:* Technology's Impact on Work During a Pandemic

**W**hen I was growing up in Houston in the 70s and 80s, my dad worked out of an office in our home. At that time, it was quite unusual for a professional to work from a home office. The terms “telework” and “working remotely” didn’t exist because there wasn’t much need to describe something that very few people did. When my dad began working from home, he had very few of the resources that are available today to make it easier. In the beginning, he pretty much had a telephone and a typewriter. But over the years, my dad added technology as it became available to make his home office more efficient and his job easier and more successful. He had one of the first answering machines, then one of the first mobile phones, then a fax machine, and then a desktop computer. He embraced each piece of new technology enthusiastically, researching the options, reading the manuals, and experimenting until he made it work for him.

As of mid-March, 2020, working from home has become normal. I’ve been thinking about my dad over the past few weeks as I, along with much of the country, plunged into working from home in response to the coronavirus pandemic and the wave of shelter-in-place orders that swept the state and country. I have tried to follow some of the habits that I saw my dad use to make work feel like work and home feel like home. He had a space that was his office, and he used it for work and nothing else, except reading the occasional sailing magazine when things were quiet. Every morning, he dressed for work and went to the office at a set time. He took a break for lunch, and at the end of the day he shut the door of his office and changed clothes to relax for the evening. He let his answering machine take calls outside business hours, and then he made sure to return the calls the next day.

I think my dad would have embraced some of the opportunities that have come out of the current crisis. He would have enjoyed learning how to use Zoom to videoconference his colleagues. He would probably have ordered a nice webcam and a set of headphones to optimize the experience. He’d have researched apps for scanning, sharing, and signing documents remotely. He’d have experimented with productivity tools like Asana, Slack, Basecamp, and Office 365.

Similarly, the Texas legal profession as a whole has recently adapted to the need to work remotely with speed, creativity, and flexibility. The seismic shift in our work environment was sudden and unexpected, but it comes with historic opportunities. Across the state, Texas lawyers and judges have faced the challenges and have embraced the opportunities that have arisen from this crisis. Most notably, the Texas Supreme Court began conducting oral arguments by Zoom videoconference on April 8. When the plans for inducting new lawyers into the Bar were interrupted, Justice Brett Busby offered to swear in new lawyers by videoconference.

A lot of the work of the Texas Supreme Court Historical Society has been accomplished by those working remotely for quite some time. For instance, for many years the editorial work on the Society's Journal has been accomplished by editorial staff working remotely. The offices of the Society consist of a single office in the Texas Law Center in Austin. The transition to running the administrative aspects of the Society remotely was accomplished by the end of March, and the Society held its first virtual Board of Trustees meeting on April 17, 2020 with 33 members participating.

The Society will continue to adapt to this new working environment, and our activities for the coming year are still underway. The Journal will continue publication as usual; plans are proceeding for the Society's panel at the Texas State Historical Association Annual Meeting in the Spring where we also plan to award the second Larry McNeil Fellowship. And although it's unclear what format the 2020 Hemphill Dinner will take, there is no question that we will be taking an opportunity to celebrate the history of Texas law and the tremendous leaders who continue to volunteer their skill, innovation, and enthusiasm to continue the work of the Society.

We're working in uncharted territory, and it's likely that the Texas courts and the practice of law will never be the same again. That's probably a good thing. Adversity has always driven Texans, and Texas lawyers, to be creative, to find innovative solutions to the problems of the moment. The crisis we face is temporary, transitory; but the solutions we will find will help us move into the future.

**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.*

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# Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston



The 2020 Annual Fellows Dinner was another success. All of the Justices from the Texas Supreme Court joined the Fellows in February at the Frank Denius Family University of Texas Athletics Hall of Fame in Austin for a wonderful evening of history, dinner, and conversation. For many of the Fellows, it was their first time in this special venue. We appreciate Justice Green, the Court's liaison to the Society, for coordinating the scheduling of the dinner so that the other members of the Court could attend. This exclusive event is one of the benefits of being a Fellow. The attached photos will give you some sense of the evening's elegance, uniqueness, and fellowship.

I am pleased to announce that our third Taming Texas book, entitled *The Chief Justices of Texas*, was presented to the Court at the Fellows Dinner. 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. Copies of the new book were given to the Justices and the Fellows, and a copy autographed by the authors, Jim Haley and Marilyn Duncan, was presented to Chief Justice Hecht.

For the past four years, our acclaimed judicial civics and history books, *Taming Texas: How Law and Order Came to the Lone Star State* and *Law and the Texas Frontier*, have been taught in schools throughout Houston. In conjunction with the Houston Bar Association (HBA), we have reached over 21,000 seventh graders. We are saddened to report that because of the school closings we had to cancel this year's program. We certainly could not have achieved this success without the hard work of the HBA program chairs, and we would like to thank this year's co-chairs Justice Ken Wise and Richard Whiteley for all of their efforts before the cancellation. Last year the program was expanded to Dallas and we were expanding to Austin this year before the school closures.

The Fellows are a critical part of the annual fundraising by the Society and allow the Society to undertake new projects to educate the bar and the public on the third branch of government and the history of our Supreme Court. We are in the process of nominating the Fellows Class of 2020. If you are not currently a Fellow, please consider joining the Fellows and helping us with this important work.

Finally, we are in the process of considering future projects. So 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

Marianne M. Auld

S. Jack Balagia

Robert A. Black

Hon. Jane Bland and Doug Bland

E. Leon Carter

Kimberly H. and Dylan O. Drummond

Michael Easton

Harry L. Gillam, Jr.

Marcy and Sam Greer

William Fred Hagans

Lauren and Warren W. Harris\*

Thomas F.A. Hetherington

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.\*

Hon. David E. Keltner\*

Thomas S. Leatherbury

Lynne Liberato\*

Mike McKool, Jr.\*

Ben L. Mesches

Nick C. Nichols

Jeffrey L. Oldham

Hon. Harriet O'Neill and Kerry N. Cammack

Hon. Thomas R. Phillips

Hon. Jack Pope\* (deceased)

Shannon H. Ratliff\*

Harry M. Reasoner

Robert M. Roach, Jr.\*

Leslie Robnett

Professor L. Wayne Scott\*

Reagan W. Simpson\*

Allison Stewart

Kristen Vander-Plas

Peter S. Wahby

Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter\*

\*Charter Fellow

# Highlights of the Annual Fellows Dinner

The Frank Denius University of Texas Athletics Hall of Fame

Austin, Texas February 26, 2020



Photos by Mark Matson



Hon. Harriet O'Neill, Chief Justice Nathan Hecht, Kerry Cammack



Top: Chief Justice Nathan Hecht, Fred Hagans  
Bottom: Justice Eva Guzman, Justice John Devine, Judge Michelle Slaughter



Top: Justice Brett Busby, Fred Hagans, Justice Jeff Boyd  
Bottom: Warren Harris, Lynne Liberato, Justice John Devine



Top: Justice Brett Busby, Hon. Tom Phillips, Hon. Harriet O'Neill  
Bottom: Doug Bland, Hon. Dale Wainwright, Justice Jane Bland



Top: Justice Jimmy Blacklock, Jessica Blacklock  
Bottom: Stacy Alexander, Prof. Wayne Scott, Doug Alexander



Top: Ben Mesches, Chief Justice Nathan Hecht, Hon. Tom Phillips, David Beck  
Bottom: Judge Michelle Slaughter, Kimberly Drummond, Dylan Drummond, Sharon Sandle

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John G. Browning

# The Changing of the *Guard*

In his last Executive Editor's Page, longtime Journal Executive Editor and TSCHS stalwart David Furlow wrote of the impending changing of the guard, as he and Managing Editor Marilyn Duncan transitioned from their many years of tireless service to this Journal. As I embark upon the daunting task of following in such outsized footsteps joined by Executive Articles Editor Stephen Pate and Managing Editor Karen Patton, I see constant reminders of just how high the bar has been set by David and Marilyn. During their tenure, this Journal has embodied the vision of nine presidents of the Society in bringing the legal history of the Lone Star State to life. Under David and Marilyn's outstanding stewardship, this Journal has continued to thrive, delivering insightful and informative work about Texas law, judges, lawyers, and courts. This leadership and commitment culminated in the Journal receiving the prestigious Excellence in History Award from the American Association for State and Local History at its 2019 Annual Meeting in Philadelphia.

And what better way to continue along the trail blazed by David and Marilyn than to continue with projects they started? In this issue, we proudly include the second part of John Domino's article on the history of judicial disqualification and recusal in Texas. In *The History of Judicial Disqualification and Recusal in Texas, Part 2*, John Domino explores how this subject has continued to evolve over the last several decades. We also proudly bring the continuation of David Furlow's examination of New England's influence on Texas institutions and traditions with *New England Roots Run Deep in Texas: A 400<sup>th</sup> Anniversary Salute, Part 2*. In this installment, David focuses on the New England influences on the Austin family and other leading families in Texas' nascent days. Finally, we are also thrilled to feature Joseph W. Noel's and Mathew R. Steinke's *Sources of Texas Legal Oral History: A Selective Annotated Bibliography*.

During these challenging and uncertain times of the Covid-19 global pandemic, we are reminded of the importance of studying history and particularly of the words of Santayana, "Those who do not remember the past are condemned to repeat it." The importance and continuing relevance of this Journal and the Society's mission can be seen in the upcoming June issue of the *Texas Bar Journal*. It has a special focus on Texas legal history, and features articles by our own

David Furlow and Marilyn Duncan, Justice Ken Wise, and Jason Boatright. Perhaps no contribution to this stellar issue is more timely than Stephen Pate's *Law in a Time of Pandemic: How Texas Courts and Lawyers Responded to the Pandemic of 1918-1920*, which is running on the Texas Bar Blog right now. Long before our travails with "social distancing" and Zoom hearings, the Texas legal profession faced the "Spanish Flu" pandemic in 1918—an experience that resonates today.

So, saddle up for another issue of scholarly, interesting articles. But, wash your hands first.

**JOHN G. BROWNING** *is a partner in the Dallas office of Spencer Fane.*

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# The History of Judicial Disqualification and Recusal in Texas

## • Part II •

By John C. Domino



As discussed in the first part of this two-part series on judicial recusal in Texas, a judge's withdrawal from a legal case because of personal bias or prejudice is a modern development in the history of Texas jurisprudence. For most of our 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 two terms "disqualification" and "recusal" are often used interchangeably in Texas, the legal authority and grounds for each concept 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> Part I began with an historical examination of disqualification rulings of the Texas Supreme Court and lower appellate courts in order to understand early foundational thinking about the circumstances under which a judge should not hear a case. The primary purpose was to discuss the emergence of the body of rules and norms of behavior governing judicial recusal that arose in the late twentieth century. Part II in this series examines the impact of judicial politics and policy at the state and national level on disqualification and recusal jurisprudence in Texas as we move toward the second decade of the 21<sup>st</sup> century.

### **Disqualification, Recusal and Texas Judicial Politics**

Matters concerning the doctrinal subtleties, states of mind of judges, and norms inherent in recusal jurisprudence pale in comparison to the contentious issues of whether judges should be recused or disqualified if they engage in political activities or when they receive campaign contributions from law firms, corporations, and political action committees that have a direct stake, not merely in the partisanship or composition of a court, but in the decisions of individual

<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. Rule 18b.

judges and justices.<sup>4</sup>

In August 2002, just prior to the November general election, the Texas Supreme Court amended provisions of the Texas Code of Judicial Conduct that regulate the campaign conduct of state judicial candidates.<sup>5</sup> In doing so, it struck from the Code a provision that prohibited a candidate from making statements of opinion on issues that might come before the court to which the candidate sought election.

This major change followed *Republican Party of Minnesota v. White*<sup>6</sup> in which the United States Supreme Court declared that judicial candidates have a First Amendment right to announce their views on legal disputes or issues that might come before them as a judge. *White* was at first interpreted to mean that every code of conduct regulating judicial speech must be subject to strict scrutiny, and that state codes of judicial conduct would have to be rewritten so that they did not limit the political speech of judges. Of course, making political statements is not the same as making promises that would lead to a reasonable person doubting the judge's impartiality. So, in most instances campaign statements on "disputed legal issues" by judicial candidates cannot be grounds for disqualification.

*White* allows candidates for judicial office to raise as issues in their campaigns matters that may come before them if they are elected. This puts judges in a tough spot if, on the one hand, they wish to maintain their impartiality or independence, but, on the other, are engaged in a competitive election. The Texas Supreme Court also narrowed a blanket prohibition on any candidate making pledges or promises during a campaign but included the following language: "a statement made during a campaign for judicial office...may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal."<sup>7</sup>

Following *Republican Party v. White*, the Texas appellate courts have handed down only two influential rulings having an impact on motions to recuse or disqualify judges who are engaged in political activity: *Ex Parte Ellis*<sup>8</sup> and *In re Hecht*.<sup>9</sup>

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<sup>4</sup> Much has been written on the invidious relationship between campaign money and judicial independence. See generally the ongoing work of Professor Anthony Champagne, and specifically, Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 *FORDHAM URBAN L. J.* 907 (2002) and KYLE CHEEK & ANTHONY CHAMPAGNE, *JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS* (2005).

<sup>5</sup> Approval of Amendments to the Texas Code of Judicial Conduct, Misc. Docket No. 02-9167 (Tex. Aug. 22, 2002) [hereinafter Texas Amendments] (amending Canons 3, 5 and 6 of the Texas Code).

<sup>6</sup> 536 U.S. 765 (2002).

<sup>7</sup> Canon 5 prohibits a judge from engaging in inappropriate political activity, such as making pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge... It also states that a judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10); however "A statement made during a campaign for judicial office, whether or not prohibited by this Canon may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal."

<sup>8</sup> 275 S.W.3d 109 (Tex.App. —Austin 2008)

<sup>9</sup> 213 S.W.3d 547 (Tex. Rev. 2006).

*Ex parte Ellis*<sup>10</sup> originated when the State of Texas<sup>11</sup> filed a motion to recuse Court of Appeals (Austin) Justice Alan Waldrop from an ongoing criminal case. Defendants James Ellis and John Colyandro were charged with election code violations and money laundering. Both men worked for former U.S. House majority Leader Tom DeLay, who ultimately would be convicted for federal conspiracy and money laundering charges.

The recusal motion stated that while Waldrop was engaged in private practice before his 2005 appointment to the court of appeals, he served as counsel for an organization called Texans for Lawsuit Reform (TLR). TLR's members regularly attended campaign strategy sessions with Colyandro. As counsel, Waldrop filed a number of pleadings in a civil case on TLR's behalf that involved legal issues similar to those raised in the Ellis/Colyandro criminal appeal that was currently before Justice Waldrop.<sup>12</sup> The State's motion to recuse was based entirely on statements Waldrop made as an attorney in a civil suit and not on anything he said or wrote as a justice on the court of appeals.<sup>13</sup>

The plaintiffs (Democrats) in this earlier civil suit attempted to serve TLR with a subpoena seeking documents and records of TLR's communications with another group called Texans for a Republican Majority Political Action Committee (TRMPAC). Jim Ellis and John Colyandro were affiliated with TRMPAC.<sup>14</sup> In his successful effort to fight the subpoena, Waldrop, then serving as TLR's attorney, signed and filed pleadings on behalf of TLR referring to the case as a "politically motivated lawsuit" without merit and simply a means of harassing a political opponent. The State in its petition for Justice Waldrop's recusal argued that although the plaintiffs in the civil suit are not parties in the current case Justice Waldrop should recuse from this case because his "politically motivated" comment as a private attorney clearly demonstrated biases about the nature of the charges being challenged before the court of appeals.<sup>15</sup> After the State filed the motion to recuse, Justice Waldrop certified the matter to the full Court.

The court of appeals ruled 3-2 against the motion to recuse, arguing that when the basis for a recusal motion originates from events occurring from a judge's legal career before appointment to the bench, it must be recognized that when representing clients lawyers are required to express the beliefs of their clients and advocate their clients' interests. Therefore, statements made by a lawyer representing a client, without more, "can only rarely serve as legitimate reasons for excluding a judge from fulfilling his sworn duties."<sup>16</sup> Were the rule otherwise, then judges would be recused from all cases that present issues similar to the ones that they confronted in their prior careers as advocates. Paradoxically, such a rule would lead to the view that the more expansive a judge's prior law practice was, the more limited his judicial role could be.

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<sup>10</sup> *Ex parte Ellis; Ex parte Colyandro, Wasylina v. State* 275 S.W.2d 109 (Tex. Crim. App. 2009).

<sup>11</sup> Travis County District Attorney Ronny Earle and Assistant District Attorney Holly Taylor filed the motions.

<sup>12</sup> *Ex parte Ellis* and *Ex parte Colyandro*, at 113.

<sup>13</sup> The State cited Tex. R. Civ. P. 18b(2)(a) which states that a "judge shall recuse himself in any proceeding in which... his impartiality might reasonably be questioned," and 18b(2)(b) which provides that a "judge shall recuse himself in any proceeding in which...he has a personal bias or prejudice concerning the subject matter...".

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, 114.

<sup>16</sup> *Ibid.*, 113.

Justice Patterson, dissenting in *Ex Parte Ellis*, concluded that Justice Waldrop should have recused himself from further participation in any appeals by Ellis and Colyandro. Waldrop's conduct as a private litigator in related civil proceedings was more than sufficient to cast reasonable doubt on his impartiality in these appeals. He represented a group that worked with, was ideologically aligned with, and had similar goals as the two defendants.<sup>17</sup> The rules and judicial canons not only require judges act with absolute impartiality, but that judges also... "*appear to be impartial*, so as to not call into question the fairness or integrity of the court..." Rules of recusal do not require legal proof that a judge engaged in biased or prejudicial conduct, but do "require the judge to recuse himself if "his impartiality *might* reasonably be questioned."<sup>18</sup>

The second major post-*Republican Party v. White* case, *In re Hecht*,<sup>19</sup> did not involve a motion for recusal but, instead, an alleged violation of the Code of Judicial Conduct based on political activity. This unusual and highly visible case shed light on the extent to which judges are able to support other candidates without needing to worry about disqualification, recusal, or even sanctions. The case originated in 2005 when the State Commission on Judicial Conduct voted to initiate an investigation of long-serving Texas Supreme Justice Nathan Hecht. The Commission based the investigation on Justice Hecht's statements as reported by the *New York Times* and *Texas Lawyer* supporting his friend Harriet Miers. Ms. Miers was nominated by President George W. Bush in 2005 to replace retiring Associate Justice Sandra Day O'Connor.

The Commission informed Justice Hecht of the investigation and requested that he answer a questionnaire about the articles and his actions preceding and during Miers' nomination to the U.S. Supreme Court. Justice Hecht fully answered the questions and voluntarily appeared at a hearing before eight members of the Commission. The Commission determined that Justice Hecht had violated Canons 2B and 5(2) of the Texas Code of Judicial Conduct and issued a public admonition. Canon 2B states that "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others..." Canon 5(2) states that "A judge shall not authorize the public use of his or her name endorsing another candidate for any public office..."<sup>20</sup> At the time, Justice Hecht was facing reelection to the Texas Supreme Court.

Justice Hecht and Harriet Miers had known each other for 35 years and had practiced in the same law firm from 1976-1981. Miers became White House Counsel to President Bush. Miers ultimately withdrew her name from further consideration for the U.S. Supreme Court after it became clear that her confirmation by the Senate Judiciary Committee was uncertain.<sup>21</sup>

After the Commission's public admonition, Justice Hecht requested a *de novo* review of the decision.<sup>22</sup> Texas Supreme Court Chief Justice Wallace Jefferson then appointed (by random selection) members of a Special Court of Review to review the Commission's decision.<sup>23</sup> The Special

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<sup>17</sup> *Ibid.*, 136-37.

<sup>18</sup> *Ibid.*, citing Gammage J. in *Rogers v. Bradley*, 909 S.W.2d 872. (Tex. 1995).

<sup>19</sup> 213 S.W.3d 547 (Tex. Rev. 2006).

<sup>20</sup> *Ibid.*, 551-52.

<sup>21</sup> <https://www.congress.gov/nomination/109th-congress/978>

<sup>22</sup> *Ibid.*

<sup>23</sup> TEX. GOV'T CODE ANN. § 33.034(c) (Vernon 2004).

Court conducted an evidentiary hearing, calling Justice Hecht as the sole witness. Expert testimony was given by a range of experts, including former Chief Justice Tom Phillips, a well-respected expert on judicial ethics. The Special Court overturned the Commission's ruling and vindicated Justice Hecht.<sup>24</sup>

Writing for the Majority of the Special Court of Review, Justice Kerry P. Fitzgerald recognized that, contrary to the Commission's allegation, there was no evidence that Justice Hecht "authorized" the public use of his name in endorsing Miers. Canon 8A encouraged "reasonable and reasoned application of the text," so Justice Fitzgerald construed the language in Canon 5(2) in the same manner—narrowly. Thus, Justice Hecht may have "supported" Harriet Miers' nomination, but he did not "authorize" his name to be used in support of it. In its 1990 amendments, the Texas Supreme Court did not reinstate the 1974 "endorsement" prohibition. It deleted "endorse" and added "authorize."<sup>25</sup> So if Justice Hecht *wasn't* authorizing the use of his name and position to support Miers, what constituted an authorization? When does a judge cross the line?

In *Public Admonition of Justice of the Peace Torres* the Commission on Judicial Conduct stated that a judge is in violation of the Canon 5(2) if he or she gives the candidate express permission to include said judge's name on a publicly distributed list of persons endorsing the candidate.<sup>26</sup> Justice Hecht may have anticipated his name being used as the person who gave the interview, if the media chose to identify him, but he did not authorize the media to use his name to publicly endorse Miers.

In his testimony Justice Hecht stated that "of course you're endorsing in the sense that you're supportive, but that's not what the canon means."<sup>27</sup> The intent of the canon was to limit the roles sitting judges and justices would play in lower court elections. The Special Court concluded that Justice Hecht's statements did not constitute an "endorsement" and that judges are permitted to speak out on political matters without fear of disqualification, the need to recuse, or a violation of ethics.<sup>28</sup>

The Commission's second charge alleged that Justice Hecht diminished the prestige of his public office to advance the interests of his friend Harriet Miers in violation of Canon 2B, which provides that "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others..."<sup>29</sup> The Special Court disagreed with the Commission's conclusion that Harriett Miers was pursuing private interests as opposed to public service. A judge campaigning or supporting another candidate is engaged in protected political speech and is not advancing a private interest even if a judicial candidate receives compensation, and in the case of Harriet

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<sup>24</sup> 213 S.W.3d 547, 580 (Tex. Rev. 2006).

<sup>25</sup> *Ibid.*, 562-565.

<sup>26</sup> *Public Admonition of Justice of the Peace Torres, No. 00-0689 - JP (Comm'n Jud. Conduct, Aug. 16, 2000).*

<sup>27</sup> Justice Hecht testified that he was present on the Supreme Court when the canons were amended in 1990: "[T]here was not the slightest thought that it would ever apply to comments made in respect to a nomination to the United States Supreme Court. That was not a concern, it never crossed anybody's mind, and it hasn't since until this case," 213 S.W.3d 547, 560-563.

<sup>28</sup> *Ibid.*, 575-576.

<sup>29</sup> TEX. CODE JUD. CONDUCT, 2B.

Miers, employment for life.<sup>30</sup>

Justice Ann Crawford McClure, the third member of the Special Court, held that Justice Hecht *had* violated both Canon 5(2) and Canon 2B. She believed that the record showed that Justice Hecht endorsed Miers and voluntarily authorized the public use of his name and office and the prestige of his office to support his friend, which amounted to “willful and persistent” violations of Article V, Section 1-a(6) of the Texas Constitution and Canon 2B of the Texas Code of Judicial Conduct. Nevertheless, Justice McClure concluded that the Canons intruded into a judge’s private life and were unconstitutional<sup>31</sup> under *Republican Party of Minnesota v. White*.<sup>32</sup> In sum, the important rule that emerged from *In re Hecht* was that no solid legal grounds for disqualification or motions to recuse exist when a judge or judicial candidate campaigns or makes a statement of support for another candidate even when doing so has the effect of revealing his or her own political philosophy, views on specific issues, or assessments of the motivations of parties who bring suit.

### **“Court Wars” and Recusal**

By the early 1990s judicial candidates felt increasing pressure to make campaign promises, run negative ads about their opponents, and spend a disproportionate amount of their time and energy raising money.<sup>33</sup> Political Actions Committees (PACs) began to exert power in judicial campaigns. In *Rogers, et al. v. Bradley*<sup>34</sup> the Texas Supreme Court heard a motion to recuse filed by a patient, Rogers, suffering from complications from a liposuction procedure. Rogers and other injured plaintiffs won a \$9 million jury award in a malpractice suit filed against Dr. Brian Bradley, who performed the procedure. The court of appeals reversed the trial court’s judgment and the appellants filed a writ of error in the Texas Supreme Court to reverse the court of appeals. The appellants also filed a motion to recuse several justices on the Court, including Justices Hightower, Hecht, Cornyn, and Enoch because of a nineteen-minute video.<sup>35</sup> The origins of the video can be traced back to 1992 when TEX-PAC, supported by the Texas Medical Association, began a concerted effort to counter the influence of trial lawyers on the Texas Supreme Court. TEX-PAC produced “Court Wars III,” a parody of *Star Wars*. In the video, Texas trial lawyers were analogized with Darth Vader’s evil empire, bringing endless unwarranted medical malpractice suits against honest and caring doctors. The TEX-PAC video supported incumbent Justice Jack Hightower, Fifth Court of Appeals Chief Justice Craig T. Enoch’s challenge to incumbent Justice Oscar Mauzy, and incumbent Justice Eugene A. Cook’s reelection campaign against 131<sup>st</sup> District Court Judge Rose Spector. Clips featuring all five of the named favorite candidates appeared in the video. However, none of the candidates were filmed expressly for the video nor authorized TEX-PAC to use their image or words from the various events for the campaign spot. The video also contained brief

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<sup>30</sup> *In re Hecht*, 213 S.W.3d at 575-577.

<sup>31</sup> *Ibid.*, 580-581.

<sup>32</sup> 536 U.S. 765 (2002).

<sup>33</sup> For data on campaign spending see the Texas Ethics Commission website, [https://www.ethics.state.tx.us/resources/judicial/JCOH\\_guide.php](https://www.ethics.state.tx.us/resources/judicial/JCOH_guide.php); Texans for Public Justice, <http://www.tpj.org/>; and Frontline: Reform Efforts in Texas and Other States, <https://www.pbs.org/wgbh/pages/frontline/shows/justice/howshould/>.

<sup>34</sup> 909 S.W.2d 872 (Tex. 1995).

<sup>35</sup> *Ibid.*, 873.

comments by two incumbents not on the ballot in 1992, Justices Cornyn and Hecht. Dr. Bradley, who was appealing the \$9 million medical malpractice verdict, appeared in the video and made an emotional plea for a “fair” court. The campaign video was not merely a plea to voters to support particular judicial candidates whom TEX-PAC deemed friendly to the medical profession, but an elaborate and not so thinly veiled plea to sitting justices and judicial candidates to consider Dr. Bradley’s unfair jury verdict. While the video cynically spoke of fair and independent justices, the obvious point was that particular justices were allies to the medical profession and that Dr. Bradley’s fate was inextricably tied to the presence of particular justices on the court whom TEX-PAC supports.<sup>36</sup>

Responding to the motion for recusal brought by Rogers, Justice Bob Gammage<sup>37</sup> argued for the recusal of all justices, including himself, based on the fact that the video made a direct and express association between support for certain candidates and the probable result in a pending case. At that time recusal law stated that “...a judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>38</sup> Gammage argued that recusal law—which was silent on the matter of campaign ads run by a third party—*should* be understood as follows: A judge should recuse from participation in a pending or impending case under Rule 18b(2)(a) if a person or entity has sought to engender support, financial or otherwise, for a judicial candidate or group of candidates that would preside in that case and this effort is made through a medium which is intended to be widely circulated and where that effort ties the success of the person’s or entity’s chosen candidates to the probable result of that case. The recusal law applies not only to judges who have engaged in obvious biased or prejudicial conduct but also to judges whose “impartiality might reasonably be questioned” regardless of the circumstances giving rise to the question of impartiality even though the circumstances “may be beyond the judge’s volition or control.”<sup>39</sup>

Justice Craig Enoch responded that he saw no basis for Gammage’s or any other justice’s recusal and he took issue with Gammage’s “declaration,” as Enoch called it. If Gammage’s reasoning were followed, all nine of the current justices would need to recuse solely on the basis of the political speech of a third party, he argued. Recusal would then be required even where there is no questionable conduct on the part of the judge but solely because of a political action committee’s endorsement of or opposition to sitting justices on the Court. Gammage reasoned that TEX-PAC was not merely engaged in political speech, but it was attempting to use the ongoing case as part of its strategy to elect certain kinds of judges, including the ones currently serving on the Court. However, Enoch argued that nothing in state or federal law required recusal of any justice in this case<sup>40</sup> and inferred that Gammage was attempting to rewrite recusal law. In the end, the full court rejected the motion to recuse,<sup>41</sup> with the exception of Gammage who used the opportunity

<sup>36</sup> *Ibid.*, 874-875.

<sup>37</sup> Robert A. “Bob” Gammage served as a justice on Third Court of Appeals at Austin from 1982 to 1990 and on the Texas Supreme Court from 1990 to 1995. See John C. Domino, *The Jurisprudence of Texas Supreme Court Justice Robert A. “Bob” Gammage: A Legacy of Civil Rights & Liberties*. 55 S. TEX. L. REV. 27 (2013).

<sup>38</sup> TEX. R. APP. P. 15a, TEX. R. CIV. P. 18b.

<sup>39</sup> *Rogers*, 909 S.W.2d at 874.

<sup>40</sup> See TEX. R. APP. P. 15a (incorporating by reference Rule 18b which states “A judge shall recuse himself in any proceeding in which ... his impartiality might reasonably be questioned...” TEX. R. CIV. P. 18b(2)(a)).

to set forth a broad recusal philosophy. For him these kinds of campaigns constituted another form of attack on the independence of the judicial branch. Many factors weaken independence, ranging from judicial candidates promising a particular kind of outcome in civil or criminal cases, to large expensive campaigns that send the message to judges that they cannot win office without the support of a powerful group or cartel of professional interests, to third party attack ads of the “Court Wars” variety that erode confidence in the judiciary by either driving home the point that justice is for sale or motivating the wealthy voter to join in and try to buy justice. Gammage argued that judges in certain circumstances should recuse themselves because of the actions of third parties, especially when there were no laws or rules addressing the role of PACs in judicial elections.

In *Rogers*, Justice Enoch went on record that while he personally deplored the system under which Texas judges are selected<sup>42</sup> no justice should be expected to recuse because TEX-PAC or any other PAC seeks to raise campaign funds to support or contest the election of justices. Justice Gammage’s reasoning would “totally disrupt the efficient administration of justice in Texas” because under his reasoning only justices who faced no election opposition would be able to carry out their responsibilities without regularly recusing themselves. If the written or electronic statements of a PAC—or clips of justices’ speeches used by a PAC—are grounds for recusal because they compromise the perceived impartiality of justices, then few judges would remain on the bench. Enoch concluded that the problem was with the method by which Texas selects judges and called on the legislature to reform the system.<sup>43</sup>

Gammage’s recusal philosophy in *Rogers v. Bradley*, which focuses not only on the judge but on those with a disproportionate influence on the outcome on judicial elections, foreshadowed the United States Supreme Court’s ruling *Caperton v. A.T. Massey Coal Co.*<sup>44</sup> In this case, the Court found that while traditionally matters of judicial recusal and disqualification are settled by statutes and codes of conduct and do not normally pose a constitutional question, the millions of dollars in campaign contributions spent by Massey Coal to elect a state supreme court justice supportive of their cause violated the U.S. Constitution’s due process guarantee of a fair tribunal.<sup>45</sup>

As in the Texas case of *Rogers v. Bradley*, the question in *Caperton* was whether the action of a third party—Blankenship and his PAC—rather than the actions of a judge demands recusal. The Court answered in the affirmative and reversed the ruling of the Supreme Court of Appeal of West Virginia. *Caperton*, like *Rogers v. Bradley*, raises an issue not addressed in past precedents or codes of conduct: does the behavior of a wealthy campaign contributor who is instrumental in electing a judge presiding in a case that will benefit said contributor create a constitutionally

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<sup>41</sup> When a party files a motion to recuse a justice on the Texas Supreme Court he or she must either recuse from participation in the case or certify the question to the rest of the court sitting en banc, which then decides the disqualification question by majority vote. TEX. R. APP. P. 16.3. If a justice is disqualified the chief justice will certify to the governor who can appoint a replacement justice. TEX. GOV’T CODE ANN. SEC. 22.005. <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.22.htm>

<sup>42</sup> See Craig Enoch, *1995 Annual Survey of Texas Law: Foreword*, 48 S.M.U. L. REV. 723 (1995).

<sup>43</sup> 909 S.W. 2d 872 (Tex. 1995).

<sup>44</sup> 556 U.S. 868 (2009).

<sup>45</sup> *Ibid.*, 876 citing *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948).

intolerable probability of actual bias of the judge.<sup>46</sup> The inquiry in *Caperton* was not into Justice Benjamin’s “subjective assessment” of his own impartiality—whether he perceived himself to be biased. No one knows what was in Justice Benjamin’s mind. There was no evidence of a bribe or statements that indicate bias. He believed he could remain impartial. However, Justice Anthony Kennedy reasoned that the guarantee of due process does not require proof of actual bias but that given an objective “appraisal of psychological tendencies and human weakness,” there is a risk of actual bias or prejudgment. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires recusal, but “objective and reasonable perceptions” show there is a risk of bias “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”<sup>47</sup> Justice Kennedy stated that traditionally matters of judicial recusal and disqualification are settled by state statutes and codes of conduct and do not usually pose a constitutional question, however in this case the millions of dollars spent by Massey Coal to elect a state supreme court justice violated the Constitution’s guarantee of a fair tribunal. Even in cases where the bias is less glaring, Kennedy added, codes of judicial conduct should be more strictly enforced.

Texas law currently maintains that a judge is neither disqualified nor subject to recusal because of campaign contributions. *Caperton* is not understood as stating that every campaign contribution by a litigant or an attorney necessitates recusal, unless circumstances produce a violation of due process or an unconstitutional probability of bias amounting to the denial of due process. In sum, campaign contributions cannot serve as independent grounds for recusal.<sup>48</sup>

### **The Impact of *Caperton* on Texas Courts**

Post-*Caperton*, the Texas Supreme Court Advisory Committee (SCAC) proposed reforms to recusal standards under Rules 18a and 18b of the Texas Rules of Appellate Procedure.<sup>49</sup> Minor changes were made by the Court, but nothing substantive that directly addresses the issues raised in *Caperton* was adopted. Nor has the Texas Supreme Court either cited or discussed *Caperton*<sup>50</sup> in any published opinion. *Caperton* has been cited in appeals from adverse recusal motions heard by the Court of Criminal Appeals in *Gaal v. State* in 2011<sup>51</sup> and in seven Texas Court of Appeals decisions: *Villareal v. State* in 2011,<sup>52</sup> *Celis v. State* in 2011,<sup>53</sup> *Black v. 7-Eleven Convenience Stores* in

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<sup>46</sup> *Ungar v. Sarafite*, 376 U.S. 575 (1964).

<sup>47</sup> *Caperton*, 556 U.S. at 884.

<sup>48</sup> *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App. San Antonio 1983); *Delgarmo v. State*, 922 S.W.2d 256 (Tex. App.—Houston (14th District) 1996); *River Road Neighborhood Association v. South Texas Sports, Inc.*, 673 S.W. 2d 952, 953 (Tex. App.—San Antonio 1984); *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984).

<sup>49</sup> Texas Supreme Court Advisory Comm., Meeting of the Texas Supreme Court Advisory Comm. 20301, 20314-15, 20320, 20391 (2010), available at <https://www.txcourts.gov/scac/meetings/>. See also Seana Willing, *Post-Caperton Recusal Reform in Texas. Is it Needed?*, 51 S. TEX. L. REV. 1143 (2010).

<sup>50</sup> (Westlaw and LexisNexis searches, August 22, 2019).

<sup>51</sup> 332 S.W.3d 448 (Tex. Crim App. 2011).

<sup>52</sup> 348 S.W.3d 365 (2011).

<sup>53</sup> 348 S.W.3d 7 (2011).

2014,<sup>54</sup> *McIntosh v. Texas State Bd. of Dental Examiners* in 2014,<sup>55</sup> *Barfield v. Texas* in 2015,<sup>56</sup> *In the Estate of Nunu*,<sup>57</sup> in 2017, and *AVPM Corp. v. Childers* in 2018.<sup>58</sup>

In *Gaal*, the Court of Criminal Appeals reversed the decision of the Court of Appeals that denied a motion to recuse a judge in a driving while intoxicated case. *Gaal* simply reiterated the existing grounds for recusal in Texas, but in a single footnote cited *Caperton* as setting out three situations that violate the Due Process Clause of the Fifth Amendment: First, when a judge has a financial interest in the case. Second, when the judge acted as a “one-man grand jury” to bring charges in the case he is trying. Third, “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”<sup>59</sup> Similarly, in each of the seven Court of Appeals cases above, appellants raised due process concerns under *Caperton* along with the recognized grounds for recusal. In *Villareal* the court of appeals rejected a recusal motion alleging the trial judge harbored a prejudice against the defendant contrary to a ground for recusal established by *Caperton*: that the “probability of actual bias on the part of the judge... is too high to be constitutionally tolerable.”<sup>60</sup> In *Celis* the appeals court ruled that a defendant found guilty in a trial court of 23 counts of falsely holding himself out as a lawyer did not establish bias under *Caperton* merely because of the judge’s unpleasant demeanor towards him and the fact that the judge rushed the jury to reach a verdict. In *Black*<sup>61</sup> the court ruled that the trial judge did not abuse his discretion by denying Black’s recusal motion because it was not established that the judge’s alleged biases arose from an extrajudicial source or that Black was denied due process under the *Caperton* standard.<sup>62</sup> In *McIntosh* the court of appeals held that a judge’s mere disagreement with a party’s legal position did not demonstrate a bias or prejudice amounting to a violation of due process and requiring recusal.<sup>63</sup> In *Barfield* the court ruled that displaying a Mother’s Against Drunk Driving (MADD) plaque in the courtroom did not violate the Code of Judicial Conduct, thus casting doubt on the impartiality of the judge amounting to a denial of due process under *Caperton*.<sup>64</sup> Counsel in *Nunu* unsuccessfully moved to recuse a county probate judge for bias on the grounds that opposing counsel’s law firm contributed to the judge’s political campaigns. The court of appeals found that the contributions totaling \$3,500 for two separate campaigns by the judge was not enough to establish bias under *Caperton*. Lastly, in *APVM v. Childers* the court rejected as “frivolous” a motion to recuse two justices of the court of appeals because they accepted campaign contributions. The motion based on *Caperton* was, according to the court, an attempt “to exploit the very nature of an elected judiciary...,” thus prompting Chief

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<sup>54</sup> No. 03-12-00014-CV, 2014 Tex. App. LEXIS 2641.

<sup>55</sup> No. 07-12-00196-CV, 2014 WL 931260.

<sup>56</sup> No. 14-13-00518-CR, 2015 WL 1544790.

<sup>57</sup> 542 S.W.3d 67 (Tex. App. —Houston 2017).

<sup>58</sup> No. 05-17-00372-CV, 2018 WL 4870931.

<sup>59</sup> 332 S.W.3d 448, 453 n. 10 (Tex. Crim. App. 2011).

<sup>60</sup> *Ibid.*, 372, 373.

<sup>61</sup> No. 03-12-00014-CV; 2014 Tex. App. LEXIS 2641.

<sup>62</sup> *Ibid.*, 15.

<sup>63</sup> No. 07-12-00196-CV, 2014 WL 931260.

<sup>64</sup> No. 14-13-00518-CR, 2015 WL 1544790.

Justice Carolyn Wright to state that “Whether favored by judges or not, Texas selects its judges by popular election and requires they finance the process.” “The mere receipt of campaign funds, in and of itself, without the indication of communication about, or coordination of, the handling of a case, is not a basis for recusal.”<sup>65</sup>

As discussed in this article, Texas disqualification and recusal jurisprudence is conservative and restrained. Whether this will continue unchanged in a post-*Caperton* era remains to be seen. The *Caperton* probability of bias standard has become part of the dialogue on recusal and disqualification in Texas, however the actual impact of *Caperton* in the state has been limited by several factors. The fact that recent motions for recusal based on *Caperton* were viewed skeptically and ultimately denied with little or no discussion by appellate courts suggests continued resistance to judicially driven changes in the state’s recusal jurisprudence. A presumption exists that the state’s code of judicial conduct offers more protection against judicial bias than the *Caperton* standard requires. This would explain the reluctance of Texas Supreme Court to use its rule-making authority to re-write recusal guidelines. In addition, in a state that elects its judges, state recusal precedent still adheres to the position that campaign contributions *alone* do not create grounds for recusal, nor necessarily are the actions of a powerful PAC or contributor *automatic* grounds for disqualification of a judge presiding in that case unless the circumstances created by the campaign contributions give rise to an unconstitutional probability of bias. Texas’ Judicial Campaign Fairness Act of 1995<sup>66</sup> thus tempers the impact of *Caperton* because it imposes a strict \$300,000 ceiling as the maximum donation from a political action committee to a candidate for statewide judicial office. This is the highest contribution permitted from any category of donor in Texas—well below the \$3 million spent by Don Blankenship and his PAC to elect Brent Benjamin to the West Virginia Court of Appeals in the *Caperton* case.

*Caperton* challenges are unlikely to prevail in the near future because many members of the bench and bar share the belief that the state’s judicial campaign contribution restrictions and recusal jurisprudence create a firewall against violations of the Due Process Clause. However, continued resistance to change may further erode confidence in existing ethical safeguards. Texans hold a deep-seated lack of confidence in the fairness of the judicial system since the days of “Court Wars” and the million-dollar judicial elections in the early 1990s. Concerns that wealthy donors continue to exercise disproportionate influence on the judiciary have not yet been assuaged.

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<sup>65</sup> No. 05-17-00372-CV, 2018 WL 4870931, 2.

<sup>66</sup> TEX. ELEC. CODE ANN. Section 253.15 (Vernon Supp. 2002). Specific limits are found on the Texas Ethics Commission’s Campaign Finance Guide for Judicial Candidates and Officeholders, [https://www.ethics.state.tx.us/resources/judicial/JCOH\\_guide.php](https://www.ethics.state.tx.us/resources/judicial/JCOH_guide.php).



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# New England Roots Run Deep in Texas: A 400<sup>th</sup> Anniversary Salute, Part 2

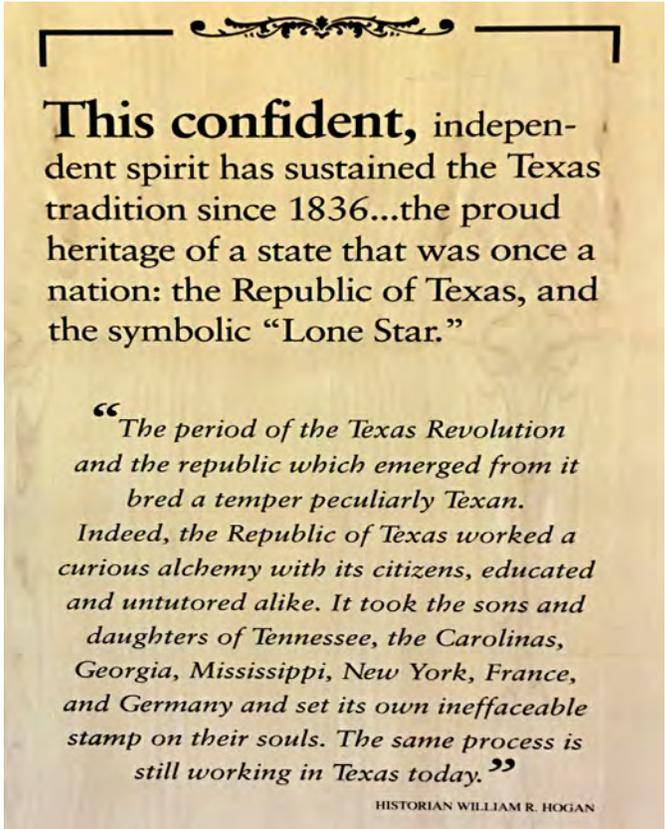
By David A. Furlow

In Monty Python's comedy *The Life of Brian*, Matthias, an anti-Roman resistance fighter in Jerusalem asked his fellow revolutionaries a question: "What have the Romans ever done for us?" His colleagues offered a few quick answers, leading the suddenly exasperated guerrilla warrior to rephrase his question: "All right, all right... but apart from the sanitation, the medicine, education, wine, public order, irrigation, roads, the freshwater system, and public health... what have the Romans ever done for us?" The Romans had done little—except just about everything.

## ***What have New Englanders done for us?***

Next to nothing, you might conclude if you rely on historian William Ransom Hogan's statement quoted on a prominent signboard at the Star of the Republic Museum at Washington-on-the-Brazos:

"The period of the Texas Revolution and the republic which emerged from it bred a temper peculiarly Texan," Hogan declared. "Indeed, the Republic of Texas worked a curious alchemy with its citizens, educated and untutored alike. It took the sons and daughters of Tennessee, the Carolinas, Georgia, Mississippi, New York, France and Germany and set its own indelible stamp on their souls. The same process is working in Texas today."<sup>1</sup> Hogan, a Louisiana archivist and professor of history at Tulane from 1947 until 1971, authored *The Texas Republic: A Social and Economic History*, "an authoritative account of early Texas history and a standard source of information on the republic," according to the Texas State Historical Association. He knew Texas history. Yet Professor Hogan did not mention the sons and daughters of New England when discussing those who dreamed of Texas.<sup>2</sup>



**This confident,** independent spirit has sustained the Texas tradition since 1836...the proud heritage of a state that was once a nation: the Republic of Texas, and the symbolic "Lone Star."

*"The period of the Texas Revolution and the republic which emerged from it bred a temper peculiarly Texan. Indeed, the Republic of Texas worked a curious alchemy with its citizens, educated and untutored alike. It took the sons and daughters of Tennessee, the Carolinas, Georgia, Mississippi, New York, France, and Germany and set its own ineffaceable stamp on their souls. The same process is still working in Texas today."*

HISTORIAN WILLIAM R. HOGAN

Historic signboard quoting Texas historian William Ransom Hogan at the Star of Texas Museum in Washington-on-the-Brazos.  
Photo by David A. Furlow.

<sup>1</sup> William Ransom Hogan, *The Texas Republic. A Social and Economic History* (Norman, Okla.: University of Oklahoma Press, 1946), 197.

<sup>2</sup> Texas State Historical Association, "Hogan, William Ransom," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fho1>.

*Ayuh*, did no Texans come from *Yankeeland*? Did no one start out as a *Nutmegger* born in the Constitution State (Connecticut)? Or the Bay State (Massachusetts), the Pine Tree State (Maine), the Granite State (New Hampshire), the Ocean State (Rhode Island), or the Green Mountain State (Vermont)? Based on the signboard and its source, you'd reasonably believe that New Englanders contributed nothing important to Mexican Texas, the Texas Revolution, the Republic of Texas, antebellum Texas, or Civil War Texas. But if you think that New Englanders contributed nothing significant to Texas history, you'd be mistaken.

*So, what have New Englanders done for Texas?* They merely brought the seeds of self-government, regular elections, constitutionalism, revolutionary action to preserve inalienable rights, and the rule of law from New England, planted them in Texas's rich soil, and cultivated them until they grew to prodigious heights.<sup>3</sup> Contrary to most people's assumptions, New Englanders played critical roles in cultivating nineteenth century Texas life and law, enabling later generations to reap rich harvests—for which we should give thanks.

This second part of this three-part article celebrates the 400<sup>th</sup> anniversary of the *Mayflower* Voyage in 2020 by showing how the sons and daughters of New England brought traditions and built institutions that affect Lone Star lives to this day. To reveal the intricate New England patterns interwoven into the fabric of Texas law and life, the first part of this article analyzed Brandeis University Professor David Hackett Fischer's *Albion's Seed: Four British Folkways in America*.<sup>4</sup> Professor Fischer developed Herbert Adams' theory<sup>5</sup> to argue that four important groups of British immigrants crossed the Atlantic between 1620 and 1775, each of which brought a distinctly different package of cultural "seeds" to America:

1. a Puritan Great Migration from eastern and southern England to New England in the eleven years from 1629 to 1640;
2. the inflow of a small Royalist cavalier elite and large numbers of indentured servants from southern and western England to Virginia in the years 1642–1675;
3. the arrival of a Quaker-dominated influx from England's northern Midlands and Wales (plus the Netherlands and Germany) to the Delaware River Valley from 1675–1725; and
4. successive tsunami waves of Scots-Irish immigrants from the border country of northern England, Scotland, and Northern Ireland between 1723 and 1773.<sup>6</sup>

Part 1 of this article examined important aspects of life and law that arose in New England

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<sup>3</sup> See David A. Furlow, "New England Roots Run Deep in Texas: A 400<sup>th</sup> Anniversary Salute, Part 1," *Journal of the Texas Supreme Court Historical Society*, vol. 9, No. 2 (Winter 2020): 22-44, <https://www.texascourthistory.org/Content/Newsletters/TSCHS%20Winter%202020.pdf>.

<sup>4</sup> (Oxford and New York: Oxford University Press, 1988), 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.*, 8-9.

<sup>5</sup> See generally 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: John Hopkins University Press, 1902).

<sup>6</sup> *Ibid.*, 6-7.

from the Great Migration of Pilgrims and Puritans between 1620 and 1641. Those New England traditions began with the Mayflower Compact on November 11, 1620 and continued with congregational Christian communities, town-hall government, a Puritan religious ethic anchored by the Geneva Bible, strong educational values exemplified by Harvard and Yale universities, entrepreneurial institutions that expanded worldwide, and the organization of common law courts that used jury trials, mediation and arbitration to resolve disputes.

When confronted by an English king and parliament intent on requiring Americans to pay for the costs of the French and Indian War by imposing the Stamp Act and sending Redcoat Regulars to occupy Boston, New Englanders resisted with the Boston Tea Party. When punished by Parliament's Intolerable Acts, New England patriots became Minutemen who gave their lives for their country at Lexington, Concord, and Bunker Hill. Blood shed during those three battles culminated in the American Revolution, the Declaration of Independence, and John Adams' drafting of the Massachusetts Constitution of 1780. This part of the article traces those threads of New England culture to Texas and reveals how New Englanders wove those tailor-made traditions into Texas life and law.

Now let's retrace the trail from Texas to New England to rediscover the lives of those New Englanders who contributed so much to the Lone Star State's history and heritage.

## **Moses Austin of Durham, Connecticut (1761–1821), the Grandfather of Texas and Connecticut-Educated Stephen F. Austin (1793-1836), the Father of Texas**

**The Austins' Great Migration from England to New England.** Moses Austin, the first man to obtain permission to bring Anglo American settlers into Spanish Texas, is the first New Englander who played a major role in shaping Texas history. Since Stephen F. Austin is by general agreement the "Founder of Texas," or at least the organizer of Anglo American Texas, we should consider his father Moses Austin to be the Grandfather of Texas.<sup>7</sup> The founder of the American lead industry, Moses Austin helped turn Texas from an embattled frontier province of the Spanish Empire borderlands into a mecca of Anglo American immigration. Born in Durham, Connecticut on October 4, 1761 to Elias and Eunice (Phelps) Austin, Moses Austin was a Connecticut scion of the Austin family.<sup>8</sup>

The Austin family's progenitor, Richard Austin, a tailor, was born in 1598 in Tichfield, Hampshire County, England to Richard Austin (also spelled Asten) of Tenterden, Kent, and his wife Anne Agnes. Together with his wife Elizabeth Betsy Austin, their sons Richard and Anthony, and a servant, Richard Austin the progenitor left Bishopstoke, Hampshire, a town near Southampton, on May 12, 1638. He sailed aboard the 150-ton vessel *Bevis of Hampton* to Boston in the Massachusetts Bay Colony. Richard left King Charles I's England because William Laud, the Archbishop of Canterbury, was marshaling the power of the Anglican Church and English state

<sup>7</sup> Gregg Cantrell, *Stephen F. Austin: Empresario of Texas* (Austin: Texas State Historical Association, 2<sup>nd</sup> ed., 2016), 2; David B. Gracy II, "Austin, Moses," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fau12>; Eugene C. Barker, *Moses Austin: His Life* (San Antonio: Trinity University Press 1987), 5; Eugene C. Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fau14>.

<sup>8</sup> Cantrell, *Stephen F. Austin*, 18-42; Gracy, "Austin, Moses," *Handbook of Texas Online*.



Left: The passenger-list of the archival records lists Richard Austin as a passenger on the vessel *Bevis* (May 1638). Public domain. Right: Elias Austin's Austin Family Coat-of-Arms, courtesy of contributor Glasshouse, Wikimedia Commons.

to oppress Puritan dissenters, and because New England offered opportunities for economic advancement not found in England.<sup>9</sup>

The rocky soil of New England sustained the Austin family as it prospered and grew. Richard and his family settled in Charlestown, Massachusetts, a port next to Boston, in 1638.<sup>10</sup> Richard's son Anthony became the new village of Suffield, Connecticut's first town clerk in 1674—an office he held for the next 27 years.<sup>11</sup> Members of the Austin family worked as artisans, merchants, and farmers while serving as magistrates, first in the Bay Colony, then in Connecticut.<sup>12</sup> Richard Austin's great-grandson Elias Austin, the father of Moses Austin and grandfather of Stephen F. Austin, moved from Massachusetts to Durham, Connecticut in 1740 to run a tavern, an enterprise that honed his skills in buying, selling, and interacting with customers.<sup>13</sup>

Elias's advance from agriculture into commerce mirrored New England's economic transformation from an agrarian to an entrepreneurial society. His success in tending bar led him to purchase a coat of arms—a mark of gentility—for the Austin family.<sup>14</sup> He and his wife Eunice

<sup>9</sup> Edith Austin Moore and William Allen Day, *The descendants of Richard Austin of Charlestown, Massachusetts, 1638* (St. Petersburg, Fla.: Higginson Book Co., 1968), 9-10.

<sup>10</sup> Samuel G. Drake, "The Founders of New England: Passengers from Southampton, April 1635 to April and May 1638," *New England Historical and Genealogical Register and Antiquarian Journal*, XIV, No. 4 (October 1840): 333-337, 336; Paul R. Austin, *Austins to Wisconsin* (Wilmington, Del.: W.N. Cann, 1964), 1; "Richard Austin, Sr.," *Find-A-Grave* website, <https://www.findagrave.com/memorial/27389561/richard-austin>.

<sup>11</sup> Eugene C. Barker, *The Life of Stephen F. Austin, Founder of Texas, 1793-1836: A Chapter in the Westward Movement of the American People* (Austin: University of Texas Press, 1929, 3<sup>rd</sup> paperback printing, 1985), 3.

<sup>12</sup> Cantrell, *Stephen F. Austin*, 18.

<sup>13</sup> *Ibid.*

<sup>14</sup> Mrs. Harry Joseph Morris, "Heraldry in the Republic of Texas Era of the United States of America," in John Matthews, *Matthews' American Armoury and Blue Book* (London, 1907, reprint, New York: Crest Publishing Co, 1962).

Phelps Austin then set about raising a family of nine children. The youngest would revolutionize American industry and take the first steps that led to Texas's independence from Mexico.

**Moses Austin of Durham, Connecticut and the transformation of the American lead industry.** Eunice gave birth to Elias's youngest son, Moses Austin, on October 4, 1761.<sup>15</sup> When he reached twenty-one, Moses Austin left behind his father's occupations of tailor, farmer, and tavern-keeper to become an international entrepreneur. He began his Horatio Alger rags-to-riches story by opening a dry-goods business in Middletown, Connecticut.

Three years after John Adams penned the Massachusetts Constitution of 1780, Moses moved to Philadelphia. Moses joined his brother, Stephen, in a business importing British goods into the revolutionary capital Redcoat soldiers had occupied only six years before.<sup>16</sup> "With the strong family bonds inherited from their Puritan ancestors," Texas Christian University Professor of Texas History Gregg Cantrell noted, "the Austins took it as a given that business affairs would be family affairs."<sup>17</sup>



A portrait of Moses Austin, of disputed authenticity, allegedly painted before his death in 1821.

While in Philadelphia, Moses Austin met and in 1785 married Mary Brown, daughter of an iron-mining magnate. Later, Moses moved his wife and business to Richmond, Virginia, the new city that had replaced Williamsburg as Virginia's capital. After an acrimonious end to his partnership with his brother Stephen Austin, Moses established Moses Austin and Company. He soon won a contract to roof Virginia's capitol building in Richmond with lead, brought experienced miners and smelterers from England to improve the efficiency of his operation.

He founded a new town in Wythe County, in southwestern Virginia, that he named Austinville. It became the headquarters of Austin's Virginia mining empire in 1792. Soon after, Mary gave birth to Stephen Fuller Austin, Moses's oldest son, at his father's lead mines, on November 3, 1793. Other children arrived later but only two survived to maturity: Emily Margaret Austin (Perry), who helped found Austin College after moving to Texas, and James Elijah Brown Austin, who settled in Brazoria County.<sup>18</sup>

Mounting debt and business difficulties led Moses Austin to rehabilitate his fortune in the greener pastures of Spanish Upper Louisiana. After visiting his Louisiana mines during the winter of 1796–97, Moses diversified by purchasing a partial interest in Mine à Breton at modern Potosi, Missouri. Two years later, in 1798, he organized the first Anglo American settlement west of the Mississippi River. "Imbued with the New England Calvinist belief that to those most able to manage

<sup>15</sup> Gracy, "Austin, Moses," *Handbook of Texas Online*.

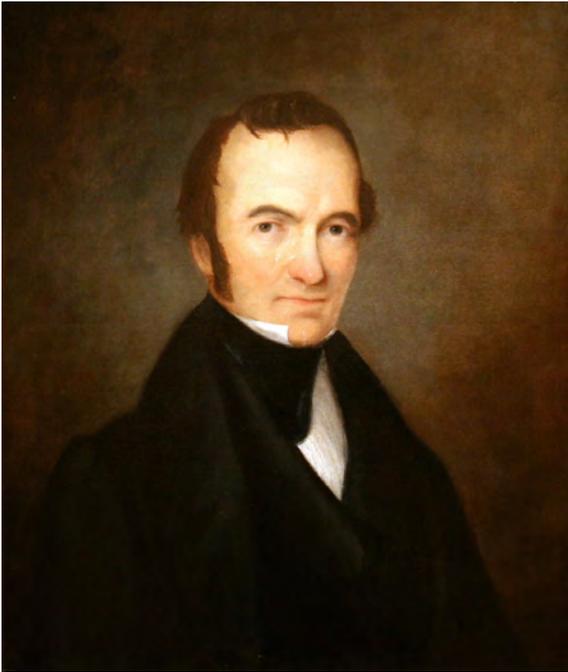
<sup>16</sup> Cantrell, *Stephen F. Austin*, 19.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*; Light Townsend Cummins, *Emily Austin of Texas: 1795-1851* (Fort Worth: Texas Christian University Press, 2009).

assets should go the lion's share of them," Eugene Barker observed, "Austin sought aggressively to expand his holdings."<sup>19</sup>

By introducing the reverberatory furnace into American commerce, Moses Austin revolutionized the lead mining and smelting industry, acquired control of the Missouri lead industry, and amassed a fortune of \$190,000.<sup>20</sup> Governor William Henry Harrison continued the Austin family's history of serving as magistrates when he appointed Moses a justice on the Court of Common Pleas and Quarter Sessions for the Ste. Genevieve District.<sup>21</sup>



Portrait of Stephen F. Austin, public domain, image courtesy of the Texas State Library and Archives Commission.

### **Stephen F. Austin's New England education.**

An emerging industrialist and a Missouri magistrate, Moses Austin built a massive, two-and-one-half-story plantation-style mansion in Missouri, just south of his Mine à Breton, to house his family and enhance his social status. He called it Durham Hall, after the Connecticut town his grandfather Elias chose as his home. "The house stands as an ideal metaphor for the complex influences that would shape [Stephen F.] Austin's personality: a southern mansion, bearing a Yankee name, situated on a very western frontier."<sup>22</sup>

Although Moses Austin left New England at twenty-one, he had imbibed New England's educational values while growing up in Connecticut. After first sending his oldest son to a French language grammar school in St. Genevieve, on the Mississippi, and after continuing his education at home, Moses sent eleven-year-old Stephen east with Moses' cousin Daniel Phelps with instructions to enroll him in "the best school in your Country" and to "take great Care...that he forms

no Improper Connections that may have a tendency to Corrupt his Ideas of propriety." Moses and Mary sought to ensure that their son would receive a New England education that would prepare him to take his rank in society as a "Young Gentl<sup>n</sup>."<sup>23</sup>

When Daniel Phelps suffered financial reverses, he turned young Stephen over to the Pennimans, who were close friends of the Austin family. The Pennimans, probably after consulting with Moses, enrolled Stephen at Bacon Academy in Colchester, Connecticut. Moses Austin made it clear what kind of education Stephen should have:

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<sup>19</sup> Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*; Cantrell, *Stephen F. Austin*, 21-23.

<sup>20</sup> Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*.

<sup>21</sup> Gracy, "Austin, Moses," *Handbook of Texas Online*.

<sup>22</sup> Cantrell, *Stephen F. Austin*, 27.

<sup>23</sup> Cantrell, *Stephen F. Austin*, 31 and 389, n.20; letter, Moses Austin to Daniel Phelps (undated), in Eugene C. volume 1 (Austin: University of Texas, 1927), 92-93.

I have a disposition Stephen should go through the Classicks. In short, I wish to make him a scholar. Yet...I have for many years disapproved of spending months and years on the Greek and Hebrew. I never have thought either of these languages of much advantage to a man of business, and as I do not wish my son to make devinity [sic] his study...If his talents will justify I wish him for the Barr, but I have so many times in my life blamed Fathers for pressing on their sons a profession nature never intended them for that I shall make of him what Nature has best calculated him to be. I want him to enter Yale as soon as he is prepared...I have a great desire he should write well... A Correct mode of thinking both Religious and Political is of consequence and ought to be early implanted in the mind of man. I do not wish my son [to be] a Bigot in either.<sup>24</sup>

Bacon Academy, one of the first academies in America, was the right place for Stephen to receive a first-rate New England education. It had opened its doors to two hundred select students only one year before Stephen began classes. The trustees hired a Yale graduate, John Adams (not the former President) as headmaster; he later led Phillips Academy in Andover, Massachusetts to the greatness that made it one of the most esteemed preparatory schools in New England. The headmaster took the young man under his wing, housing him in his home while ensuring that he received the strict upbringing his father demanded. There was much for a young man to learn. As Stephen F. Austin's biographer Gregg Cantrell noted, "Courses included English grammar and writing, logic, rhetoric, belles lettres, mathematics, natural philosophy, astronomy, moral philosophy, geometry, geography, and at least a taste of Latin and Greek."<sup>25</sup>



Photo of Bacon Academy in Colchester, Connecticut from an 1896 article in *Connecticut Magazine*. Public domain, Wikimedia Commons.

Bacon Academy's students studied hard, beginning at 7:00 a.m. in the winter and at 5:30 a.m. in the summer (when the sun rose) and continuing until the late afternoon. After leading students in a morning invitational, Bacon Academy's headmaster presented lectures on the "studies, morals, and deportment of the scholars." Students delivered public declamations about philosophy and the issues of the day. When Stephen finished his course of instruction, he had received as fine of a New England liberal arts education as any father could find and fund. After three years of school at Bacon Academy, headmaster John Adams commended young Stephen as

<sup>24</sup> Cantrell, *Stephen F. Austin*, 32 and 389 nn.21 and 23; letter, Moses Austin to Stephen F. Austin (December 16, 1804), in Eugene C. Barker, ed., *The Austin Papers* (3 vols., Washington: Government Printing Office, 1924-28), vol. I, 95-96; Moses Austin to an undesignated recipient (undated, circa autumn 1804), *ibid.*, vol. I, 95; Gracy, *Moses Austin*, 115-16.

<sup>25</sup> Cantrell, *Stephen F. Austin*, 33 and 389, n.25; Aram Damarjian, "Bacon Academy History," in *Bacon Academy Alumni Beacon* (1953), pamphlet in Cragin Memorial Library, Colchester, Connecticut, 12-28.

an “obedient and studious” young man ready to move forward with his education.<sup>26</sup>

Moses and Mary Brown Austin intended to send him to Yale to attend college in New England—but, because of financial reversals, lacked the means to do so. They sent their oldest son, instead, to Transylvania University in Lexington, Kentucky, from which he graduated in 1810. After finishing his studies in Kentucky, Stephen began reading law so he could become a lawyer. At age 21, he won election to and served in the Missouri Territory’s legislature. As a member of the territorial legislature, Stephen was “influential in obtaining a charter for the struggling Bank of St. Louis.”<sup>27</sup>

**Missouri and Manifest Destiny.** Moses Austin’s financial fortunes ascended and descended as business opportunities, the long-term unprofitability of his lead-roofing contract with the Commonwealth of Virginia, and a recession following the War of 1812 confronted him with challenges he was unable to overcome. He transferred the Potosi mine to his oldest son Stephen F. Austin to give his son an opportunity to save it. To increase the availability of credit on the Missouri frontier, Moses Austin founded and became the principal shareholder in the Bank of St. Louis in 1816.<sup>28</sup>

Meanwhile, Stephen F. Austin was putting his education to good use, making a name for himself as a visionary young man with a future. At twenty-six, Stephen commended the attention of hundreds of friends, family members, and supporters when he presented an Independence Day address at the Potosi Hotel in Potosi, Missouri on July 4, 1818. Admiring followers published it in the *Missouri Gazette and Public Advertiser* on July 31, thus preserving it for later generations to marvel at its foreshadowing of Stephen’s future in Texas. Janus-like, that speech revealed not only the future, but the ways Stephen F. Austin’s Puritan English and New England ancestry and education weighed on his mind as he looked forward to the future.

“Already is the tide of civilization rolling on from the East like a flood, prostrating forests, driving back and reclaiming barbarism, and clothing the whole face of nature with the beautiful and diversified garb of industry and civilization.” Rarely has anyone portrayed the extractive industries of lead-mining and smelting in as positive a light. “Settlements, Villages, Towns, Cities, and States are springing up by magic as it were amidst the western wilds. In a few years we shall see magnificent buildings, surrounded by extensive and productive farms, occupying the ground that is now overshadowed by the impenetrable woods...”<sup>29</sup>

Stephen F. Austin had learned the story of American progress at his parents’ knees, Bacon Academy, and Transylvania University, hearing how it unfolded in the New England for his ancestors during the past two centuries. Like his father, mother, and instructors, he believed in the power of education to improve society and edify lives: “[W]e shall see seminaries of learning and institutions of literature and the polite arts flourish where now the savages hold their midnight revels and

<sup>26</sup> Cantrell, *Stephen F. Austin*, 33-35 and 389, n. 31-32; Certificate of Scholarship and Conduct (January 7, 1808), *Austin Papers*, vol. 1, 144.

<sup>27</sup> Cantrell, *Stephen F. Austin*, 35-36.

<sup>28</sup> Gracy, “Austin, Moses,” *Handbook of Texas Online*.

<sup>29</sup> Paul N. Spelman, *Old 300: Gone to Texas* (Charleston, S.C.: Paul N. Spelman, 2015), 62; Leo F. Kaiser (ed.), “Stephen F. Austin’s Oration of July 4, 1818,” *Southwestern Historical Society Quarterly*, 64, no. 1 (1960): 71-79.

yell their demonic orgies; we shall see the fair daughters of Columbia surrounded by a celestial halo of their native charms, those dazzling beauties and mental accomplishments that seize upon the heart, enchain the senses, feast the understanding, and enrapture the soul, walking securely amidst shady retirements where now the wolf prowls and the panther crouches for the moment to pounce upon its prey..."<sup>30</sup>

Stephen foresaw an American future—and within a few years, the future of Texas—unfolding in the context of his family's Puritan English and New England past: "All this, fellow citizens, we may calculate will be realized within the present century, within a few years. And the *same spirit* that will achieve this herculean work, the same spirit that near two centuries ago tore our forefathers from the bosom of their unnatural mother country and wafted them over the boisterous coast of the Atlantic to find repose amidst the desolate wilds and barbarous savages... will also flash across the Gulph of Mexico and over the western wilderness that separates independent America from the enslaved colonies of Spain, and darting the beams of intelligence into the benighted souls of their inhabitants awake them from the stupor of slaves to the energy of freemen, from the degradation of vassals to the dignity of sovereigns."<sup>31</sup>

By July 4, 1818, Stephen F. Austin foresaw that the energetic, intelligent, and enterprising spirit of New England—"the *same spirit*"—would transform the lives of Spain's colonial subjects "within a few years." When he brought New England traditions of migration, revolution, and law to the Mexican twin-state of Coahuila y Texas in 1821, Austin would soon prove that a visionary transforms dreams into practical realities. But first Stephen F. Austin had to confront the challenges arising from the collapse of his father's Bank of St. Louis during the Panic of 1819. Its failure swallowed up Moses Austin's fortune and left the entire family heavy in debt.<sup>32</sup> But all was not yet lost.

**Moses hands the Texas Project to Stephen.** "The West tugged like a magnet," Pulitzer Prize winning Marquis James wrote in *The Raven*, his biography of Sam Houston. "On the seaboard from Maine to Georgia men were on the move. Few had rolled farther, or gathered as much moss with each roll, than a certain Connecticut Yankee, as astute as he was restless. Moses Austin had tried Pennsylvania and Virginia. Now he was in Missouri working lead mines in a wilderness and listening with a shrewd squint to the tales trapper and traders brought from beyond the Sabine. Already Moses Austin's roving eye was on Texas. With him was a son named Stephen, born in Virginia the same year Sam Houston was."<sup>33</sup>

At this time, Great Britain's textile mills were substituting cotton for wool to supply markets for textiles throughout Britain's worldwide empire. To pay his debts and rebuild the family's fortunes, Moses Austin devised a plan in 1819 for creating a "Mississippi in Mexico," that is, for settling an American colony similar to the cotton kingdom of Mississippi—but within Spanish Texas rather than in the United States.<sup>34</sup> After the Adams-Onís Treaty resolved the long-standing border

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<sup>30</sup> Spelman, *Old 300*, 63.

<sup>31</sup> *Ibid.*, 64.

<sup>32</sup> Spelman, *Old 300*, 63.

<sup>33</sup> Marquis James, *The Raven: A Biography of Sam Houston* (Austin: University of Texas Press, 1929, 8<sup>th</sup> ed., 2008), 10.

<sup>34</sup> Andrew J. Torget, *Seeds of Empire: Cotton, Slavery, and the Transformation of the Texas Borderlands, 1800-1850* (Chapel Hill, N.C.: University of North Carolina Press, 2015), 48-52.

dispute between the United States of America and the Spanish Empire, Moses Austin journeyed to San Antonio de Bexar, the capital of the province, where he arrived on December 23, 1820. Moses sought to make a presentation to Governor Antonio María Martínez, but the governor, alarmed at the threat that American filibusterers posed to the Spanish province's security, refused to meet him.<sup>35</sup>

Later that day, Moses Austin happened upon the suddenly familiar face of San Antonio resident and Dutch merchant Philip Hendrick Nehring Bogel, the self-styled Baron de Bastrop, in San Antonio's plaza.<sup>36</sup> Moses' glance of an old colleague resulted in one of the most important impromptu meetings in the history of the Southwest. Austin and Bastrop stepped forward to meet each other because of a previous encounter in New Orleans. While catching up on the events of each other's lives, Moses presented his colonization plan to Bastrop. Austin's can-do spirit and practical plan made sense to Bastrop, who accompanied Austin to the governor's office, introduced Martínez and Austin, and vouched for Moses Austin. Governor Martínez decided to forward Austin's plan to attract cotton-planters from the American South to his superiors in Mexico with a recommendation that it proceed.<sup>37</sup> Martínez's superiors in Mexico approved Moses Austin's proposal, and the plan moved forward. Texas was on its way to becoming a cotton economy—but one where economic growth and planter prosperity depended on slavery.

Moses Austin started on the road back to Missouri in triumph. But wet and cold weather sickened him while he was still in Texas. Pneumonia exhausted Austin, and a diet consisting only of roots and berries weakened him. Then word reached Moses in his Missouri home that Spanish authorities were permitting the colonization project to proceed. By the time he learned that permission for the colony had been granted, his health was failing. Growing ever weaker, he still moved forward with the planning of his "Texas Venture."

Two days before he died, Moses called his wife Mary to his bedside. "After a considerable exertion to speak," Mary Brown Austin wrote to Stephen, "he drew me down to him and with much distress an difficulty of speech...begeed [*sic*] me to tell you to take his place and if God in his wisdom thought best to disappoint him in the accomplishment of his wishes and plans formed for the benefit of his family, he prayed him to extend his kindness to you and enable you to go on with the business in the same way he would have done had not sickness, and oh dreadful to think of perhaps death, prevented him from accomplishing."<sup>38</sup> Moses Austin died on June 10, 1821, at the home of his daughter, Emily Bryan, who buried him in her husband's Bryan family cemetery.<sup>39</sup>

**The Father of Texas—and of Texas Slavery.** After securing a loan to fund his father's colonization enterprise, Stephen learned that his father had died. He hurried to San Antonio to save the enterprise and arrived there in August of 1821.<sup>40</sup> Authorized by Governor Antonio

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<sup>35</sup> *Ibid.*, 98-99; Cantrell, *Stephen F. Austin*, 85.

<sup>36</sup> Richard W. Moore, "Bastrop, Baron de," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fbaae>.

<sup>37</sup> Spelman, *Old 300*, 98-99; Cantrell, *Stephen F. Austin*, 85-86.

<sup>38</sup> Spelman, *Old 300*, 110; Letter, Mary Brown Austin to Stephen F. Austin (June 8, 1821).

<sup>39</sup> Moses Austin's death certificate, *Austin Papers*, 394-396; Gracy, "Austin, Moses," *Handbook of Texas Online*.

<sup>40</sup> Jason Boatright, "Alcaldes in Austin's Colony, 1821-1835," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 3 (Spring 2018): 25-50, 35.

María Martínez to carry on the colonization enterprise under his father's grant, Austin reached agreement about the administration of the colony and then traveled to the area between the San Antonio and Brazos rivers to scout a site for the prospective colony.

Stephen F. Austin secured Governor Martínez's authorization to offer vast amounts of land to colonists under easy terms: 640 acres to the head of a family, 320 acres for his wife, 160 acres for each child, and 80 acres for each slave. Austin returned to New Orleans, advertised Governor Martínez's terms, and promoted his colony between the rivers Brazos and Colorado to settlers. Colonists began to arrive by land and sea in December of 1821.<sup>41</sup> Difficulties arose when the Governor notified Austin that Mexico's provisional, post-independence government refused to uphold Spain's grant of land to Moses Austin and that Mexican authorities sought to control the settlement of Texas through a general immigration law.

Stephen, a young man coming into his prime as a businessman, went straightaway to Mexico City and, through untiring efforts, convinced Emperor Agustín de Iturbide's rubber-stamp legislature, the *junta instituyente*, to approve a federal colonization law Iturbide signed on January 3, 1823.<sup>42</sup> Mexican Emperor Iturbide's abdication nullified the power of his empresario law, yet Stephen F. Austin navigated the cross-currents of Mexican politics to convince Mexico's Congress to authorize his empresario contract to bring 300 colonists to Texas. Mexican federal authorities soon passed an immigration statute that ratified Austin's empresario Stephen F. Austin's administration of his colony, bringing waves of Anglo American settlers to Texas, most from the American South. Under Austin's sagacious leadership, those settlers and their African and African American slaves created an Anglo American state within the Mexican twin-state of Coahuila y Texas—and their success made Stephen F. Austin the Father of Texas.<sup>43</sup>

Austin applied his education, experience, and legal training to create his colony's legal system and, by example and substantive precept, to promulgate the law that governed the Republic of Texas and the Lone Star State afterwards.<sup>44</sup> He followed the precedent set by the *Mayflower* Pilgrims when they combined themselves into a "civil Body Politick, for our better Ordering and Preservation... [to] 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..." in the Mayflower Compact on November 11, 1620.<sup>45</sup> Austin's Alcalde Code and the simplified pleadings he adopted in Mexican Texas modernized civil and criminal procedure in

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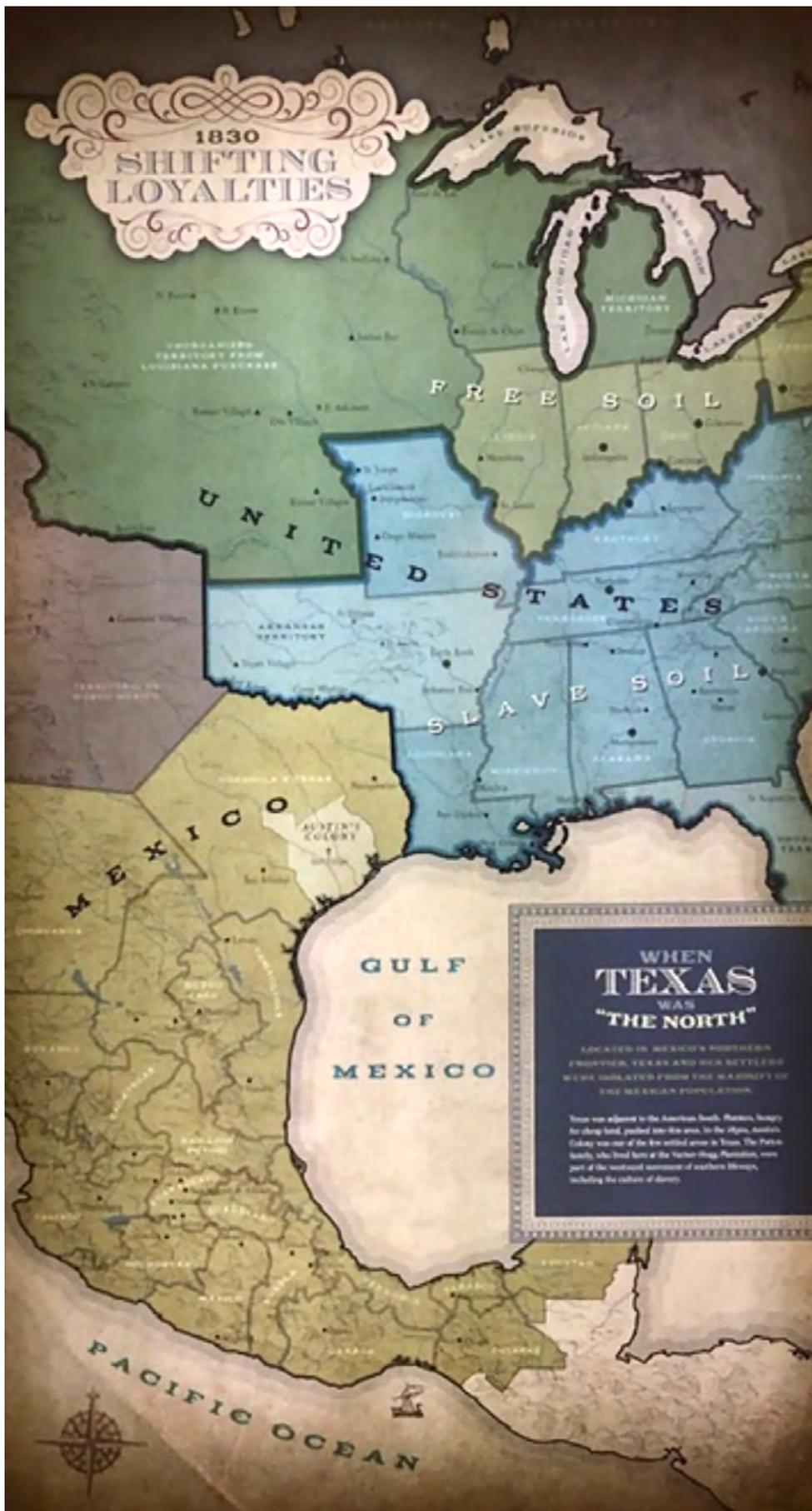
<sup>41</sup> Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*; Gracy, "Austin, Moses," *Handbook of Texas Online*.

<sup>42</sup> Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*; Boatright, "Alcaldes in Austin's Colony," 36.

<sup>43</sup> Cantrell, *Stephen F. Austin*, 110-135; Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*.

<sup>44</sup> James L. Haley, *The Texas Supreme Court: A Narrative History, 1836-1986* (Austin: University of Texas Press, 2013), 11-14; Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 7-13; Boatright, "Alcaldes in Austin's Colony, 1821-1835," 36-46; Cantrell, *Stephen F. Austin*, 142-46; Joseph W. McKnight, "Stephen Austin's Legalistic Concerns," *Southwest Historical Quarterly* 89 (1986), 243-44; Eugene Barker, "The Government of Austin's Colony, 1821-1831," *Southwest Historical Quarterly* (1918), 225.

<sup>45</sup> See "Mayflower Compact, 1620. Agreement Between the Settlers at New Plymouth, 1620," *Avalon Project* website, 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).



Through its maps at the Varner-Hogg Plantation, Texas Historical Commission emphasizes the geographic context of Austin's Colony in Mexico's province of Coahuila y Texas in 1830. Public domain. Photo by David A. Furlow.

A close-up of THC's map emphasizes the vast size and geographic context of Austin's Colony in Mexico's province of Coahuila y Texas in 1830. Public domain. Photo by David A. Furlow.



the Republic, the Lone Star State, and, by example, other states.<sup>46</sup> The code ended the traditional division between common law and equity, beginning a legal trend that culminated, in 1938, in the promulgation of the Federal Rules of Civil Procedure.<sup>47</sup>

In addition, to create a legal framework for planters, Austin's law code institutionalized race-based slavery as the economic foundation of his colony.<sup>48</sup> Austin was of two minds about slavery—

<sup>46</sup> Boatright, "Alcaldes in Austin's Colony," 39.

<sup>47</sup> *Ibid.*, 48. See also David A. Furlow, "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," *Journal of the Texas Supreme Court Historical Society*, 1, no. 2 (Winter 2011): 1-18, at 6; David A. Furlow, "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," *Journal of the Texas Supreme Court Historical Society*, 1, no. 3 (Spring 2012): 1-16, at 1-4, 10-11.

<sup>48</sup> William S. Pugsley and Marilyn P. Duncan, compilers, Randolph B. Campbell, ed., *The Laws of Slavery in Texas: Historical Documents and Essays* (Austin: University of Texas Press, 2010), 3, 8, 10-11, 22-26. See also Target, *Seeds of Empire*, 59-64, 72-79, 86-87, 102-106, and 155-56.

as if his Northern ancestry and education was warring with his Southern upbringing in Virginia, Louisiana, and Missouri. On many instances he condemned the peculiar institution and sought to limit its expansion with his colony, especially early on, and then recognized after returning from imprisonment in Mexico in 1835, that “Texas must become a slave country” in order to achieve Americanization. In a lengthy letter dated June 16, 1830, for example, Austin advised Richard Ellis, George Sutherland, Anthony Winston, R.R. Royall, and other immigrants from Alabama that,

The reasons for a partial toleration of this evil [slavery] have now ceased; and the true prosperity and happiness of Texas require that an everlasting bar should be interposed to the further introduction of slaves....I am of the opinion that Texas will never become a slave state or country. I will be candid with you on this point, and I say I hope it never may.<sup>49</sup>

Austin had good reason to mean what he wrote. In 1827, leaders of Coahuila y Texas framed a state constitution that barred the entry by immigration of additional slaves, although the twin-state’s legislature enacted a law at Austin’s request that evaded that constitution’s intent legalizing Texas planters to continue entering into life-long indentured-servant “labor contracts” with nominally emancipated slaves.<sup>50</sup>

In addition to growing divisions between Mexican federal authorities and Anglo American settlers in Texas about the legality of slavery in Texas, Austin confronted Mexico’s Law of April 6, 1830. That law reflected a new Mexican federal policy of halting the colonization of Texas by additional settlers from the United States. As enacted, the law annulled general empresario contracts that had not yet been completed or begun and barred further settlement of immigrants in territory adjacent to their native countries—which meant the United States, since European states were no longer neighbors of Mexico.<sup>51</sup>

During a time of growing unrest inside Mexico and within the twin-state of Coahuila y Texas, many of Austin’s colonists signed a June 20, 1832 petition that memorialized their readiness to take arms to defend their rights and interests. That year’s Anahuac Disturbances, the Battle of Velasco at the mouth of the Brazos River, and the Turtle Bay Resolution made an Anglo American settler rebellion against Mexico appear imminent. Stephen F. Austin and other leaders avoided that rebellion only by aligning Texian settlers in Austin’s colony with then-liberal Antonio López de Santa Anna.<sup>52</sup>

The Varner-Hogg Plantation State Historic Site (formerly Varner-Hogg Plantation State Historical Park) on Farm Road 2852, two miles north of West Columbia in Brazoria County, exemplifies the plantation society Austin’s system of race-based slavery made possible in Brazoria County. Martin Varner, one of Stephen F. Austin’s Old Three Hundred colonists, purchased a 4,428-acre Mexican land grant and brought his family to Brazoria County in 1824. Varner soon erected a simple cabin on the creek bank, while at least two slaves worked under Varner’s direction. Varner

<sup>49</sup> Pugsley, Duncan, and Campbell, *Laws of Slavery in Texas*, 48.

<sup>50</sup> Randolph B. Campbell, “Slavery,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/yps01>; Barker, “Austin, Stephen Fuller,” *Handbook of Texas Online*.

<sup>51</sup> Barker, “Austin, Stephen Fuller,” *Handbook of Texas Online*.

<sup>52</sup> Margaret Swett Henson, “Anahuac Disturbances,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/jca01>.



**STEPHEN F. AUSTIN'S ORIGINAL TERMS**

*Pay 12.5¢ an acre and the following limits on how many acres:*

640 acres	<i>for Head of Each Family</i>
320 acres	<i>to a Man's Wife</i>
160 acres	<i>for each Child</i>
80 acres	<i>for each Slave</i>

These terms were later altered by the Mexican Government who gave each family a league (4,428 acres) at 4¢ an acre.

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Martin Varner's league cost him less than \$200.00

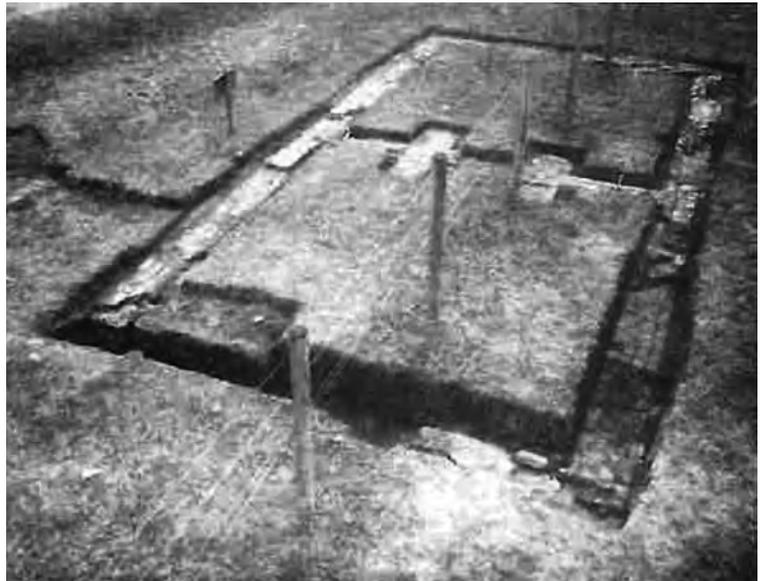
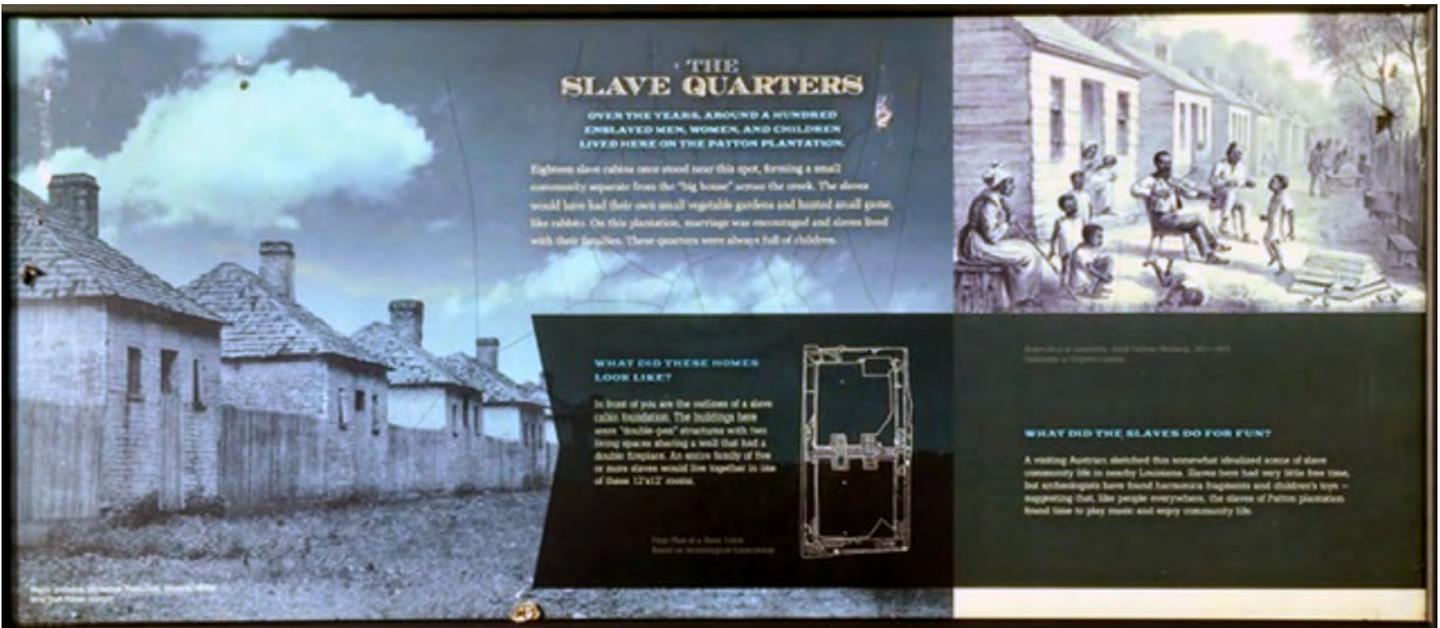
**AUSTIN'S COLONY**  
**-1825-**

**TOTAL POPULATION: 1,790 SLAVES: 443**

**OPPORTUNITY, FOR SOME**

In the 1820s, this land was cheap. Immigrant families had a chance to make a lot of money and build a prosperous community if they grew profitable, but labor-intensive, crops like sugar or cotton. Opportunity for some meant oppression for others. Slaves provided the labor that made Austin's Colony a success.

Top: Columbus Patton built a wealthy home on the Varner-Patton plantation. Bottom: A Texas Historical Commission signboard in the Varner-Hogg Plantation's visitors' center explains the original terms of colonization that attracted settlers to Austin's colony. Photos by David A. Furlow.



Top: Texas Historical Commission signboards offer views of the plantation's slave quarters based on archaeological excavations and historic records. Photo by David A. Furlow.

Left: The Texas Historical Commission preserves the brick foundations of the two story Patton sugar mill and kettles used to collect, boil and process sugar at the Varner-Hogg Plantation. Photo by David A. Furlow.

Above right: THC provides access to its post-excavation photos of a brick foundation of the Varner-Hogg Plantation slave quarters.

and his slaves farmed corn, raised livestock, and, beginning in 1828, cultivated sugar cane. In 1829, Stephen F. Austin thanked Varner for giving him rum, which Austin called the first “ardent spirits” made in the colony, and possibly in Texas.<sup>53</sup>

John P. Austin of New Haven, the second alcalde of Brazoria and the commander of the successful Texian militia at the June 26, 1832 Battle of Velasco, a man either distantly related or unrelated to Stephen F. Austin,<sup>54</sup> called for a Texas-wide convention of delegates from Texas's leading communities.<sup>55</sup> In doing so, John Austin was essentially calling for a Texas-wide equivalent of the New England town meeting, a tradition that had been part of New Haven's Plymouth-inspired civic government since its founding in 1638.<sup>56</sup> During times of crisis involving town interactions with the mother colony, town leaders traditionally assembled the people to debate ideas and formulate a common communal course, as had happened during the colony's earliest years, during the Glorious Revolution, in response to the Stamp Act, and in reaction to word of patriot blood shed at Lexington and Concord.<sup>57</sup>

Fifty-five delegates from sixteen districts of Texas answered John Austin's summons and came to San Felipe de Austin to participate in the Convention of 1832. In session from October 1 through October 6, 1832, its delegates elected Stephen F. Austin to preside over the convention, which reflected the delegates' effort to avoid taking a confrontational stance toward Mexico's new, liberal government. The Convention passed measures requesting, *inter alia*, Mexican extension of tariff exemption to Texas for three years; modification of Mexico's Law of April 6, 1830 restricting immigration from the U.S.; appointment of a commissioner to issue land titles in East Texas; and donation of government lands to use in funding primary schools to be conducted in Spanish and English.<sup>58</sup>

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<sup>53</sup> James A. Creighton, *A Narrative History of Brazoria County, Texas* (Waco: Brazoria County Historical Commission, 4<sup>th</sup> ed., 1999), 20, 22-23, 37, 190, 373; Texas Historic Commission, “History of the Plantation,” *Varner-Hogg Plantation Visitors Guide* (August 2017), <https://www.thc.texas.gov/public/upload/publications/varnerhogg-visitorsguide.pdf>; Marie Beth Jones, “Varner-Hogg Plantation State Historic Site,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/ghv01>.

<sup>54</sup> Cantrell, *Stephen F. Austin*, 206, 247, 256-57, and 264. John P. Austin of New Haven the Brazoria alcalde and hero of the Battle of Velasco who died of Asian Cholera in Brazoria in 1833, should not be confused with another John P. Austin, born in New Haven on June 28, 1772, and a graduate of Yale University, who died while visiting his son in Brazoria County in 1834. See D. Hamilton Hurd, compiler, *History of New London County, Connecticut: With Biographical Sketches of Many of its Pioneers and Prominent Men* (Philadelphia: J.W. Lewis & Co., 1882), 364. Nor should he be confused with the John P. Austin of Brazoria County was a doctor whose 1836 correspondence shows that he outlived both of the men named John P. Austin above. Barker, *Austin Papers*, vol. III, 69, 407, 462, 475.

<sup>55</sup> E.G. Littlejohn, “Little Biographies of the Makers of Texas History,” *Texas School Journal*, XXII, No. 6 (December 1904): 258-260, [https://books.google.com/books?id=Uf8BAAAAYAAJ&pg=PA259&lpg=PA259&dq=%22John+P.+Austin%22+of+Brazoria+County&source=bl&ots=OKXt\\_6dOne&sig=ACfU3U0NchigzNbOHbCLmKyubs4RdbnsNQ&hl=en&sa=X&ved=2ahUKewiuq2ChOHoAhVQM6wKHbG\\_Dn8Q6AEwAHoECAsQKQ#v=onepage&q=%22John%20P.%20Austin%22%20of%20Brazoria%20County&f=false](https://books.google.com/books?id=Uf8BAAAAYAAJ&pg=PA259&lpg=PA259&dq=%22John+P.+Austin%22+of+Brazoria+County&source=bl&ots=OKXt_6dOne&sig=ACfU3U0NchigzNbOHbCLmKyubs4RdbnsNQ&hl=en&sa=X&ved=2ahUKewiuq2ChOHoAhVQM6wKHbG_Dn8Q6AEwAHoECAsQKQ#v=onepage&q=%22John%20P.%20Austin%22%20of%20Brazoria%20County&f=false).

<sup>56</sup> Charles M. Hoadly, *Records of the Colony and Plantation of New Haven, from 1638 to 1649, etc.* (Hartford, Ct.: Case, Tiffany & Co., 1857); Charles M. Hoadly, *Records of the Colony or Jurisdiction of New Haven, from May, 1653, to the Union together with the New Haven Code of 1656, Transcribed and Edited in Accordance with a Resolution of the General Assembly of Connecticut* (Hartford, Ct.: Case, Lockwood & Brainard, 1858).

<sup>57</sup> Dorothy Ann Lipson, “From Puritan Village to Yankee City, 1690 to 1860,” 29-30, 34-36, in Floyd Shumway and Richard Hegel, eds., *New Haven: An Illustrated History* (New Haven: New Haven Historical Society, 1981).

<sup>58</sup> Ralph W. Steen, “Convention of 1832,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mjc09>.

The Convention's leaders crafted a self-defense plan to create a militia and committees of vigilance, safety, and correspondence. It must have been an exciting time for Asa Brigham. It harkened back to what he must have learned in his early years in Massachusetts about Minute Men militias and the committees of vigilance, safety and correspondence Sam Adams, John Adams and Paul Revere organized in Lexington, Concord, and every town and village in the Bay Colony from 1774 and 1775.<sup>59</sup> The Convention's delegates courted controversy by approving a motion to request that Mexican authorities separate Texas from Coahuila—which pitted Texas against Coahuila and challenged federal authorities in Mexico City.<sup>60</sup>

Although La Bahia sent representatives to the 1832 Convention, none of the delegates came from San Fernando de Béxar (San Antonio) or Victoria, two of Texas's Tejano centers of population. The political chief of Coahuila and Texas, [Ramón Músquiz](#), decided that the convention lacked legitimacy, ruled that the meeting was unauthorized, and declared it void. Stephen F. Austin deemed the petition for statehood dangerous.<sup>61</sup> Santa Anna had not yet taken over the national government from [Anastasio Bustamante](#), so he ignored the petition.

The Convention of 1833 met at San Felipe on April 1, 1833 because residents of San Antonio and Victoria had refused to send delegates to the previous assembly. When Stephen F. Austin went to San Antonio to solicit Tejano cooperation, "War Party" leaders like Wharton called for a new convention. They did so on the day that General Antonio López de Santa Anna took control of the Mexican government. Delegates elected Asa Brigham's colleague William H. Wharton, rather than the more accommodating Austin, to preside over their convention. They also drew up a proposed Constitution for the State of Texas<sup>62</sup> that would divide the Mexican twin-state of Coahuila y Texas into its two component parts, resulting in Texas independence.<sup>63</sup>

During the critical Convention of 1833, New England constitutionalism played an important but overlooked role in Texas constitutional history—one that reverberates to this day. Delegates to the 1833 Convention voted in favor of Texas separating from Coahuila and voted in favor of a state constitution to take the place of the 1827 Constitution of Coahuila y Texas. Those delegates modeled their constitution on the Massachusetts Constitution of 1780, "which happened to be on hand," according to Texas scholar Jodella Doroethea Kite.<sup>64</sup> Historian S.S. McKay placed special emphasis on the New England origin of Texas's first constitution: "The proposed constitution was typically Anglo American, being modeled on the Massachusetts Constitution of 1780, which

<sup>59</sup> Kevin Phillips, *1775: A Good Year for Revolution* (New York: Viking/Penguin, 2012), 9, 30-31, 21, 38, 48, 72, 153, 159, 231, 297, 253, 452-53, 497, 541.

<sup>60</sup> *Ibid.*

<sup>61</sup> Jesús F. de la Teja, "Musquiz, Ramon," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fmu20>.

<sup>62</sup> *Constitution or Form of Government of The State of Texas: Made in General Convention, in the Town of San Felipe de Austin, in the Month of April, 1833* (New Orleans: Office of the Commercial Bulletin, 1833), in "Constitutions of Texas, 1824-1876," University of Texas Law School at Austin Tarlton Law Library website, 1, <https://tarlton.law.utexas.edu/c.php?g=819103&p=5845633>.

<sup>63</sup> Ralph W. Steen, "Convention of 1833," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mjc10>.

<sup>64</sup> Jodella Doroethea Kite, "The War and Peace Parties of Pre-Revolutionary Texas, 1832-1835," Master's Thesis in History, Texas Tech University (1986), 16, <https://ttu-ir.tdl.org/bitstream/handle/2346/12776/31295004914171.pdf?sequence=1>.

happened to be available.”<sup>65</sup> Texas historian J.E. Ericson recognized that delegates to the 1833 Convention based their Texas constitution not on a recent one from a southern state but, instead, on a Massachusetts constitution already 53 years old:

A comparison of the [Texas] Constitution of 1833 with the existing state constitutions of the time shows that it was closely modeled upon the Massachusetts Constitution of 1780, with “now and then an indication, however, that some clauses were inserted and some principles retained to please the Mexican ear,” especially in the preamble and in the sections dealing with citizenship.

The segment of this constitution which marked it indelibly as an Anglo-American instrument was its opening Bill of Rights of twenty-seven articles of which most can be traced directly either to the Massachusetts Constitution of 1780 or the United States Constitution. The right of trial by jury, the writ of habeas corpus, the right of petition, the freedom of the press, the freedom and equality of the suffrage, the right to “due process of law,” and many other typically Anglo-American civil rights were included. As a gesture to the Mexican government, the traditional right to freedom of religion was conspicuously absent.<sup>66</sup>

New England constitutionalism, which President John Quincy Adams traced back to the Mayflower Compact,<sup>67</sup> came to Texas in 1833 and has remained here ever since. To minimize the serious risk that Mexican federal authorities might view the conventions of 1832 and 1833 as preludes to an Anglo insurrection, engage in diplomacy that might improve Mexican/Texas relations, and discharge his duty of presenting the draft of an independent constitution to Mexican authorities, Stephen F. Austin undertook an exhausting journey to Mexico City.<sup>68</sup>

While in Mexico City, Austin met with Vice President Valentín Gomez Farías and petitioned for the changes both his Texian settlers and Tejano allies sought. But Vice President Farías refused to grant Austin’s petition for a separate state government and Texas constitution.<sup>69</sup> Frustrated by Mexican governmental inaction, Mexico’s increasingly chaotic politics, and disregard for Texas interests, Austin wrote a letter to Texas’s ayuntamientos (town councils) on October 2, 1833, to recommend that they establish their own Mexican Texas state authorities without waiting for Mexican federal authorization.

Fearing that Austin sought Texas independence as a prelude to rebellion, Mexican authorities arrested him in January 1834 in Saltillo, in Coahuila. Mexican authorities transported Austin to Mexico City where they imprisoned him for eleven months until December 1833. Even when

<sup>65</sup> S. S. McKay, “Constitution Proposed in 1833,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mhc09>.

<sup>66</sup> J.E. Ericson, “An Inquiry into the Sources of the Texas Constitution,” Ph.D. Thesis in Philosophy (1957), Texas Tech University, <https://ttu-ir.tdl.org/handle/2346/18360>, citing Henderson King Yoakum, *History of Texas from its First Settlement in 1685* (New York City: Redfield, 1855), vol. I, 311.

<sup>67</sup> Bangs, “Mayflower Compact—A Dissenting View, Part One,” *New England Ancestors*, 54.

<sup>68</sup> Steen, “Convention of 1833,” *Handbook of Texas Online*.

<sup>69</sup> Miguel Soto, “Gomez Farias, Valentin,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fgo06>.

Mexican officials released Austin, they required him to remain essentially under house arrest until they released him under a general amnesty of July 1835.<sup>70</sup>

While Austin was still imprisoned in Mexico City, on April 4, 1834, Martin Varner sold his Brazoria County plantation to Columbus R. Patton, as the representative of his father John D. Patton, for \$13,000. Members of the extended Patton family turned the site into a successful sugar plantation, with a fine mansion home, a two-story sugar house for distillation, slave quarters, a stable, and a barn. Like Pharaoh's Hebrews, slaves fashioned bricks from river mud—mud from the Brazos rather than the Nile—and used them to build their houses.

The Varner and Patton slaves' work exposed them to open fires, molten sugar, and distillation's buildup of carbon monoxide gases, leading to illness, injuries, and deaths.<sup>71</sup> Columbus Patton brought slaves with him from Kentucky; by 1833 sixty-six slaves were working the 13,500 acres of land. One, Rachel, became Columbus Patton's mistress—until his death and probate proceedings sent her back to the fields to labor.<sup>72</sup> Records of the Patton estate identify fifty-five people, slaves, by name, along with acreage, furniture, and livestock.<sup>73</sup>

Driven by the Industrial Revolution's worldwide economic expansion and the growth of sugar processing and cotton cultivation, slavery expanded rapidly in Brazoria County until half of the population was enslaved. There were 29 sugar mills in Brazoria County, each one run with slave labor.<sup>74</sup> Because of the sugar industry and cotton cultivation that slave labor supported, Brazoria County sugar and cotton production increased throughout the 1830s and the county became the wealthiest one in Texas during the 1840s and 1850s.<sup>75</sup>

Life was difficult for Brazoria County's slave laborers. "These African Americans endured forced breeding, harsh punishments for escape attempts, and year-round back-breaking labor planting and harvesting sugar, cotton and corn, as well as tending to the small plots of land often allocated to them to grow their own crops," Texas historian John R. Lundberg observed. "Life in the slave quarters reflected the realities of life for African Americans in Brazoria County. Although the slaves on the plantations generally seemed to have been well-fed, and the annual mortality rate only approached three percent, one former slave who lived on the Patton Plantation pointed out that even if your stomach was full and you had good clothes, 'dat bullwhip on your bare hide make you forgit the good part...'"<sup>76</sup>

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<sup>70</sup> Cantrell, *Stephen F. Austin*, 263-302; Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*.

<sup>71</sup> Frederick H. Smith, *Caribbean Rum: A Social and Economic History* (Gainesville, FL: University Press of Florida, 2005), 42-49 (describing the process of processing sugar into molasses and into rum) and 156-57 (discussing the deaths of slaves in the process).

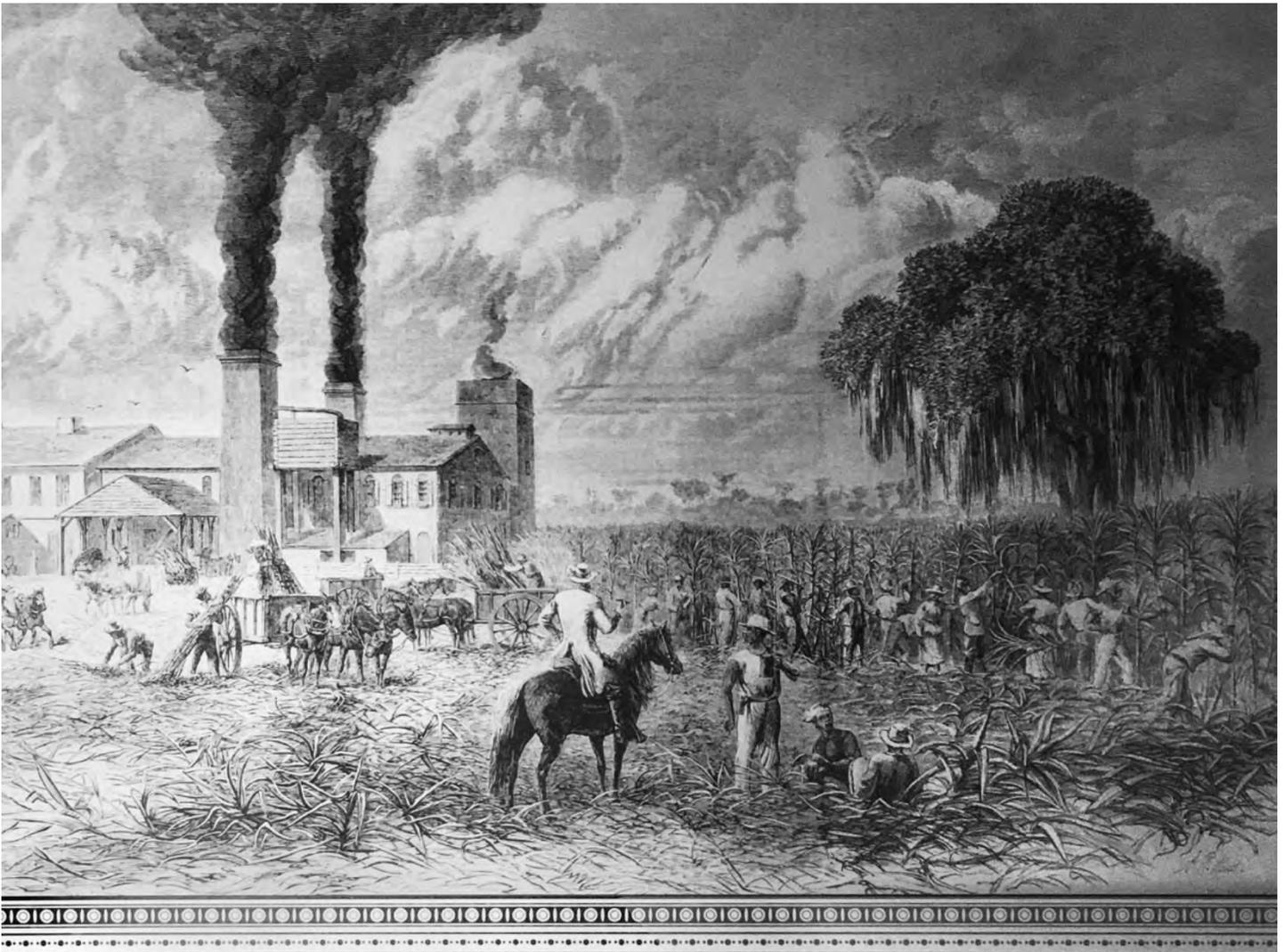
<sup>72</sup> "Columbus Patton and the Enslaved People of Patton Place," *Texas Historical Commission*, <https://www.thc.texas.gov/historic-sites/varner-hogg-plantation-state-historic-site/history/columbus-patton-and-enslaved>; Texas Historical Commission, "History of the Plantation," 2; Creighton, *Brazoria County*, 91, 127; Jones, "Varner-Hogg Plantation State Historic Site," *Handbook of Texas Online*.

<sup>73</sup> Texas Historical Commission, "Fifty-Five Names" signboard, Varner-Hogg Plantation Visitors Center.

<sup>74</sup> Texas Historical Commission, "Making Sugar Was Not Cheap and It Took a Lot of Labor" signboard, Varner-Hogg Plantation Visitors Center.

<sup>75</sup> Texas Historical Commission, "The Cost of Success" signboard, Varner-Hogg Plantation Visitors Center.

<sup>76</sup> John R. Lundberg, "'Texas Must Be a Slave Country': Slaves and Masters in the Texas Low Country 1840-1860," *East*



**MAKING SUGAR WAS NOT CHEAP  
AND IT TOOK A LOT OF LABOR.**

Sugarcane has a long growing season and must be processed in order to manufacture molasses and sugar. Patton slaves built a sugar mill — a kind of small factory complete with expensive machinery. Still, slave labor made sugar production profitable. There were 29 sugar mills in Brazoria County, making this area the center of sugar production in Texas.

Texas Historical Commission signboards at the Varner Hogg Plantation reveal the story of slavery in Brazoria County. Photo by David A. Furlow.

Enslaved labor enabled the Pattons to live lives of power, wealth, and influence. Three members of the family served in the Texas Army—including two who participated in Brazoria local politics, while Columbus, St. Clair, and William H. Patton served in the Revolution's Texian Army—William as Sam Houston's *aide-de-camp*. After the Battle of San Jacinto, William H. Patton was part of the guard who escorted Mexican Generalissimo Antonio López de Santa Anna to the nearby Orozimbo Plantation in Brazoria County and briefly held him prisoner at the Patton plantation.<sup>77</sup>

After Mexican authorities granted Stephen F. Austin an amnesty, he caught the first ship to New Orleans, arriving there on August 21, 1835. That day he wrote a letter to his cousin Mary Austin Holley to share opinions that resulted from his imprisonment in Mexico:

It is evident that the best interests of the United States require that Texas should be effectually, and fully, Americanized—that is, settled by a population that will harmonize with their neighbors on the East, in language, political principles, common origin, sympathy, and even interest....Texas must be a slave country. It is no longer a matter of doubt...A great immigration from Kentucky, Tennessee, etc., each man with his rifle or musket, would be of great use to us...very great indeed...<sup>78</sup>

An unlimited influx of settlers from the Scots Irish Appalachian Back Country would enable Texans to achieve their dream of autonomy—and, eventually, independence. "To conclude, I wish a great immigration from Kentucky, Tennessee, *everywhere*, passports or no passports, *any* how...This fall and winter will fix our fate—a great immigration will settle the issue."<sup>79</sup>

When Stephen F. Austin returned to Texas later in August 1835, he confronted a rapidly growing settler rebellion against Mexico's Centralist dictatorship. The uprising targeted Centralist General Santa Anna's nullification of Mexico's liberal Constitution of 1824, assumption of dictatorial powers, and ruthless suppression of dissent—both among Texians and Tejanos. Austin assumed the rank of colonel in the Texas militia and made clear his resistance to Santa Anna's dictatorship in his keynote address at a banquet at Jane Long's hotel in Brazoria County on September 8, 1835. "The constitutional rights and the security and peace of Texas—they ought to be maintained; and jeopardized as they now are they demand a general consultation of the people..."<sup>80</sup>

"War is our only resource," Stephen F. Austin announced in a circular he distributed in letters from San Felipe de Austin on September 19, 1835. "There is no other remedy but to defend our rights, our country, and ourselves by force of arms."<sup>81</sup> Fighting between Centralist Mexican

*Texas Historical Journal*, 53, No. 2, Art. 4 (2015): 29-47, at 32 and at 38, <https://scholarworks.sfasu.edu/ethj/vol53/iss2/4>. See also Alwyn Barr, *Black Texans: A History of African-Americans in Texas, 1528-1995* (Norman and London: University of Oklahoma Press, 2nd ed., 1996), 14-18.

<sup>77</sup> Jones, "Varner-Hogg Plantation State Historic Site," *Handbook of Texas Online*. After the Battle of San Jacinto, William H. Patton was part of the guard who escorted Mexican Generalissimo Antonio López de Santa Anna to the nearby Orozimbo Plantation in Brazoria County and briefly held him prisoner at the Patton plantation.

<sup>78</sup> Rebecca Smith Lee, *Mary Austin Holley, A Biography* (Austin: University of Texas Press, 1962), 260; Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*.

<sup>79</sup> *Ibid.*; Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*.

<sup>80</sup> Lee, *Mary Austin Holley*, 262 and 395, n.26; "Speech of Colonel Austin, delivered on the 8<sup>th</sup> of September, 1835, at a public dinner in Brazoria..." *Austin Papers*, vol. III, 116-119.

<sup>81</sup> Lee, *Mary Austin Holley*, 262 and 395, n.27; Circular, Stephen F. Austin to Columbia Committee, September 19, 1835,

troops from the San Antonio de Bexar presidio and Texas settlers began at the Battle of Gonzales on October 2, 1835, which was hailed at the time as the “Lexington” of the Texas Revolution—which reflects that the spark of New England’s rebellion against King George III’s Great Britain was foremost in settlers’ minds.<sup>82</sup>

Stephen F. Austin took command of Texian forces to prosecute the Siege of Béxar from October 12 to December 11, 1835, and led Texas forces to battlefield successes. When the Texas-wide Consultation occurred on November 3, 1835, Austin remained at the front in Bexar while notifying the Consultation’s delegates about the army’s pressing need for guns, ammunition, and supplies. Like his New England ancestors, Austin turned to revolution when peaceful remonstrance proved ineffective.<sup>83</sup>

The Republic’s Provisional Government appointed Austin, Branch Archer, and William H. Wharton as commissioners to the United States to enlist assistance and loans in December of 1835. Austin went to New Orleans to conduct his commission. While he was in Louisiana, Texans met at Washington on the Brazos to declare independence and hammer out a constitution for the fledgling republic.<sup>84</sup> Austin was in New Orleans on June 1836 when he learned of Sam Houston’s defeat and capture of Santa Anna during the Battle of San Jacinto on April 21, 1836.<sup>85</sup>

Since San Felipe de Austin was a burnt-out wreck marked by blackened chimneys where homes, inns, and businesses had once stood, Austin returned to his Brazoria County home at Peach Point. He announced his candidacy to become the first elected president of the Republic on August 4, 1836 and believed he would win until General Sam Houston threw his hat into the ring on August 20, 1836. After Houston’s victory at San Jacinto, the result was foreordained. General Sam Houston won 5,119 votes, Henry Smith won 743, and Stephen F. Austin placed third with 587 votes.<sup>86</sup>

After losing his campaign to become the Republic’s first elected president, Austin returned to the first capital at Columbia (now West Columbia), where he served as President Houston’s first Secretary of State—but only served for two months. In December 1836 a severe cold degenerated into pneumonia. He died at noon on December 27, 1836, unmarried and without children, yet confident in his accomplishments, at the home of his good friend George B. McKinstry, near Columbia, Texas. His last words were “The independence of Texas is recognized! Don’t you see it in the papers?”<sup>87</sup> Upon hearing of the former empresario’s death, President Sam Houston proclaimed that “[t]he Father of Texas is no more; the first pioneer of the wilderness has departed.” Relatives buried him at Gulf Prairie Cemetery in Brazoria County, Texas—until State officials moved his

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*Austin Papers*, vol. III, 128-29.

<sup>82</sup> Miles S. Bennet, “The Battle of Gonzales: The ‘Lexington’ of the Texas Revolution,” *Quarterly of the Texas State Historical Association* 2 (April 1899); Stephen L. Hardin, “Gonzales, Battle of,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/qe>.

<sup>83</sup> Lee, *Mary Austin Holley*, 263; Barker, “Austin, Stephen Fuller,” *Handbook of Texas Online*.

<sup>84</sup> Ralph W. Steen, “Texas Declaration of Independence,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mjtce>.

<sup>85</sup> Cantrell, *Stephen F. Austin*, 329-348; Barker, “Austin, Stephen Fuller,” *Handbook of Texas Online*.

<sup>86</sup> Cantrell, *Stephen F. Austin*, 348-360; Barker, “Austin, Stephen Fuller,” *Handbook of Texas Online*.

<sup>87</sup> Cantrell, *Stephen F. Austin*, 360-64; Barker, “Austin, Stephen Fuller,” *Handbook of Texas Online*.

body to the Texas State Cemetery in 1910.

Stephen F. Austin's New England ancestry and education shaped his vision of Texas. Although Austin is often considered a Southerner because of his Virginia birth, Louisiana and Missouri upbringing, and introduction of race-based slavery to Texas, his New England schooling in logic, persuasion, and writing enabled him to craft the legal framework of his colony. His biographer Gregg Cantrell observed that,

Austin grew up in slaveholding areas but was not a product of the Deep South or of plantation society. His parents were raised in the northeast, and he spent several of his formative years attending prep school in New England when that section was first awakening to the evils of slavery. Coming from this background, he carried with him into adulthood conflicting attitudes toward slavery. Although he owned slaves, he accepted a handful of free blacks as colonists and granted them land in his colony on the same basis as whites. In 1831 he could describe slavery as "that curse of curses, and worst of reproaches, on civilized man; that unanswered, and unanswerable, inconsistency of *free* and liberal republicans." Then, two years later, he could state flatly that for economic reasons "Texas *must* be a slave country."

Although he could be critical of Mexico's backwardness and on rare occasions employed crude stereotypes in describing that backwardness, he maintained cordial relations with many Mexican elites; indeed, he probably had a closer friendship with Tejano Erasmo Seguin than he did with any of his Anglo associates. And there can be little doubt that he made sincere, sustained efforts to understand and accept the language, customs, and culture of his adopted country. Thus we find a man who in his racial views was neither typically southern nor northern, neither liberal nor reactionary...in the context of his times he was far less ethnocentric than the typical white southerner (or the typical white westerner, for that matter).<sup>88</sup>

Like his New England ancestors in the 1760s and 1770s, Austin petitioned and remonstrated on behalf of his settlers—Texians and Tejanos alike—while seeking relief from a government at first indifferent to and later hostile to their needs. When Santa Anna's Centralists seized control of Mexico and abrogated the Mexican Constitution of 1824, he followed his New England ancestors' example and rose in revolutionary rebellion, all the while creating institutions of self-government. He gave his all for Texas and helped win its independence.<sup>89</sup>

Professor George Pierce Garrison, Chair of the University of Texas History Department and one of the founders of the Texas State Historical Association,<sup>90</sup> aptly described the historical

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<sup>88</sup> William S. Pugsley and Marilyn P. Duncan, compilers, Randolph B. Campbell, ed., *The Laws of Slavery in Texas: Historical Documents and Essays* (Austin: University of Texas Press, 2010), 3, 8, 10-11, 22-26; Cantrell, *Stephen F. Austin*, 9 and 386 n.10 (quotation); letter, Stephen F. Austin to Mary Austin Holley (December 29, 1831), *Austin Papers*, II, 130 (first quotation); Stephen F. Austin to Wiley Martin (March 1833), *Austin Papers*, II, 981 (second quotation); Harold Schoen, "The Free Negro in the Republic of Texas," *Southwestern Historical Quarterly* 39 (April 1936): 292-301.

<sup>89</sup> Cantrell, *Stephen F. Austin*, 7-8; Barker, "Austin, Stephen Fuller," *Handbook of Texas Online*.

<sup>90</sup> Margaret C. Berry, "Garrison, George Pierce," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fga33>.

significance of New England born Moses Austin and New England educated Stephen F. Austin:

Of all of the men who have figured in American history, there are no other two who have attracted so little attention from their contemporaries and have yet done things of such vast and manifest importance, as Moses Austin and his son Stephen. Their great work consisted in the making of Anglo-American Texas, an enterprise planned and begun by one and carried into execution by the other.

The student will scarcely need to be reminded of the series of mighty effects, increasing in geometric ratio in magnitude and historical significance, that followed... Thus it runs: the Texas Revolution, the annexation of Texas, the Mexican War, and the acquisition of the Southwest below the forty-second parallel from the Rio Grande to the Pacific—a territory almost equal in extent to the Louisiana Purchase and which contains the bulk of the mineral wealth of the United States...[T]he profound and far-reaching nature of the influences set in operation by the Austins is evident.<sup>91</sup>

Moses and Stephen F. Austin's actions, institutions, and ideas profoundly shaped Texas society and legal culture during the critical fifteen years from 1821 through 1836.

### **John P. Austin of New Haven, Connecticut (1801-1833): Founder of Brazoria, Land Speculator, Activist, and Soldier**

Moses and Stephen F. Austin were not the only Austins to come to Texas in the 1820s. An unrelated or distantly related member of the extended Austin family who lived in New Haven, Connecticut, John Austin took to the sea as a young man and then volunteered to serve as a filibusterer in the disastrous Long Expedition. Captured, he survived Mexican captivity afterwards and came to Austin's colony. He presented a bond as a constable of District of San Felipe de Austin on January 26, 1824 and settled down in the colony. After borrowing capital from Stephen F. Austin, John P. Austin and Stephen F. Austin's younger brother James E.B. Austin (1803–1829) began Brazoria's first cotton gin.<sup>92</sup>

John P. Austin founded the town of Brazoria—and named it “Brassoria”—in 1828, on the Brazos River, “for the single reason that I know of none like it in the world.”<sup>93</sup> In 1832, John won election to become Brazoria Municipality's alcalde, where he construed, enforced, and administered Mexican, Coahuiltexan, and local law. He signed the Turtle Bayou Resolutions objecting to Mexican military abuses of settlers, fought in the Anahuac Disturbances, commanded Texian forces in their successful attack on Mexican forces at the Battle of Velasco, and won election as a brigadier general of the Texas militia.<sup>94</sup>

<sup>91</sup> George P. Garrison, “Connecticut Pioneers Founded Anglo-American Texas,” *Connecticut Magazine*, IX (July-September 1905), 512-17; Barker, *Stephen F. Austin: Founder of Texas*, 4. Cf. Cantrell, *Stephen F. Austin*, 8.

<sup>92</sup> Mary Austin Holley, *Mary Austin Holley: The Texas Diary, 1835–1838* (Austin: The University of Texas, 1965, paperback ed., 2014), 81; Charles A. Bacarisse, “Austin, James Elijah Brown,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fau08>.

<sup>93</sup> Anna Hallstein, “Brazoria, Tx,” *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/hgb10>.

<sup>94</sup> Creighton, *A Narrative History of Brazoria County*, 51-76.

John Austin smoothed over difficulties with Mexican authorities, represented by visiting Colonel Jose Antonio Mexia. John Austin aligned the Texian insurrectionists with the then-liberal Santa Anna's Plan of Veracruz—and its liberal defense of Mexico's Constitution of 1824. During a spectacular fandango banquet at the hotel of Mrs. Jane Long on July 18, 1832, just three weeks after he led Texians settlers to victory at the Battle of Velasco, Captain John Austin and his Brazoria County colleague William H. Wharton raised their glasses in tribute to Colonel Mexia and their mother country, Mexico:

*The Constitution and Laws.* Administered in the free spirit of Republicanism, they will receive the support of all good citizens.

*General Santa Anna.* He has started as the Washington of his country: may he continue to do so, to the end.

*Our guest, Col. Mexia.* We are proud of his cooperation, for the knowledge of his liberal and republican principles is not confined to the land of his nativity.

*Col. S.F. Austin.* Our faithful representative and valued fellow citizen.

Colonel Mexia responded in kind with his own toast: "*Brazoria*—the gallant defender of the Constitution and the Laws."<sup>95</sup> John P. Austin, a New Havener, could toast the 1824 constitution and laws of Mexico and Coahuila y Texas, just as his New England ancestors had toasted the constitution and laws of the new American republic.

Brazoria's times of celebration and reconciliation came to an end. In 1833, an epidemic of Asian Cholera swept across Brazoria County, claiming the lives of some eighty people. John P. Austin died at his Gulf Prairie plantation home on August 11, 1833, as did his two children.<sup>96</sup> A Texas Historic Commission sign in Brazoria, at Old Cemetery, at the intersection of Velasco and Marion, near the Masonic Oak, offers a remembrance of his life.<sup>97</sup>

John Austin's widow survived and married Thomas F. L. Parrott in 1834. She turned over the upper league of John Austin's 1824 two-league grant to his father. On August 26, 1836, she and her husband sold for \$5,000 the lower half of the John Austin league on Buffalo Bayou to Augustus C. and John K. Allen—the Allen Brothers, born in New York—to be used in the proposed township of Houston. She profited from the sale of the strategically located lands her late husband, a shrewd Yankee entrepreneur and seasoned speculator, had acquired along Buffalo Bayou. The Allen Brothers subsequently transformed those lands into the City of Houston in 1837, destined for future greatness as the entrepot of Texas.<sup>98</sup>

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<sup>95</sup> *Ibid.*, 69-72; J. Villasana Haggard, "Epidemic Cholera in Texas, 1833-1834," *Southwest Historical Quarterly*, Vol. 40, No. 3 (Jan., 1937): 216-230, at 223-24; letter, Miguel Arcienega to the Secretary of State (August 12, 1833), Robert Bruce Blake, *Blake Papers*, 1690-1959, 1969-1970, *Nacogdoches Archives*, transcripts, 1833, Vol. 66 at 85, at the Briscoe Center for U.S. History, Austin, Texas, <https://legacy.lib.utexas.edu/taro/utcah/00063/cah-00063.html>.

<sup>96</sup> Barker, *Stephen F. Austin*, 305; Cantrell, *Stephen F. Austin*, 271.

<sup>97</sup> Texas Historical Commission, "Site of the Home of John Austin," StoppingPoints.com website, <http://www.stoppingpoints.com/texas/sights.cgi?marker=Site+of+the+Home+of+John+Austin&cnty=brazoria>.

<sup>98</sup> Louis B. Aulbach, *Buffalo Bayou: An echo of Houston's wilderness beginnings* (Houston: Louis B. Aulbach, publisher,

Today few people know that the City of Houston began with a visionary acquisition of bayou-straddling land a New Haven Yankee, John Austin, purchased from Stephen F. Austin, the Colchester-educated son of Moses Austin of Durham, Connecticut.

### **Mary Austin Holley of New Haven, Connecticut (1784–1846): Journalist and Historian**

Mary Austin Holley, another Connecticut cousin of Stephen F. Austin, memorialized the life, law, and legal history of early Texas in her letters, books, and *Brazos Boat Song*. Her father was Elijah Austin, an American Revolutionary War veteran, the oldest son of Elias Austin of Durham, Connecticut, and a prominent New Haven merchant whose sailing ships sailed the sea-lanes to Europe, the West India, and China. Mary's mother was Esther Phelps Austin, a daughter of Judge John Phelps, who had been a member of the Hartford Convention that ratified the U.S. Articles of Confederation.

Born in New Haven, Connecticut on October 30, 1784, Mary grew up in a New England region, town, and family that emphasized education for young women as well as young men so that both men and women could enter the kingdom of heaven.<sup>99</sup> In 1642, New Haven's elders first established a "free school," one where settlers were free to school their children if they paid tuition.<sup>100</sup> Since 1656, New Haven's leaders had insisted that all parents send their children to school; when they made that rule a law, New Haveners followed the precedent first set by the Massachusetts Bay Colony in 1642 and followed by Connecticut Colony's leaders in 1650.<sup>101</sup> Yale University, chartered in 1701 and moved to New Haven in 1716 and renamed Yale College in recognition of a gift from British East India Company governor Elihu Yale, reflected the importance of education in New England and New Haven.<sup>102</sup>

"[Mary Austin Holley] attended an excellent school," her biographer Rebecca Smith Lee observed, "where she learned to write a neat, lady-like hand, and to spell very correctly, according to *Webster's New Spelling Book*," written by New Haven lexicographer Noah Webster. Mary followed in the steps of her mother Esther, who had been educated in a prestigious Boston boarding-school for girls.<sup>103</sup> Mary "read polite French, and studied composition and rhetoric so thoroughly that she wrote as well as if she were a boy. She practiced long hours on the pianoforte, and cultivated her sweet soprano voice. Someone gave her a guitar, a stylish and proper instrument for ladies at the

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2012), 411-414; Texas State Historical Association, "Austin, John," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fau09>.

<sup>99</sup> David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (Oxford and New York: Oxford University Press, 1989), 49, 83-87.

<sup>100</sup> Thomas J. Farnham, "New Haven, 1638 to 1690," 14, in Floyd Shumway and Richard Hegel, eds., *New Haven: An Illustrated History* (New Haven: New Haven Historical Society, 1981).

<sup>101</sup> *Ibid.*; Fischer, *Albion's Seed*, 132.

<sup>102</sup> See generally Vincent Scully, Catherine Lynn, Catherine, Erik Vogt, Erik and Paul Goldberger, *Yale in New Haven: Architecture & Urbanism* (New Haven: Yale Univ., 2004).

<sup>103</sup> Lee, *Mary Austin Holley*, 4-7, 9, and 25. See also James Perry Bryan, ed., *Mary Austin Holley: The Texas Diary, 1835-1838* (Austin: University of Texas Press, 1965). Curtis B. Dall, "Holley, Mary Austin," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fho32>.



Left: Mary Austin Holley. Public domain. Humanities Texas website.  
Right: *Brazos Boat Song* (1833), by Mary Austin Holley. Public domain.

time. On this she modestly accompanied herself and others in sacred and parlor songs."<sup>104</sup>

Mary married Rev. Horace Holley, a minister of Greenfield, Connecticut, on January 1, 1805—while Stephen F. Austin was attending Bacon Academy in Colchester, Connecticut. In July 1827, Holley died of yellow fever. Buried at sea, he never died in Mary's heart. Mary Holley embarked on a life in writing when she began preparing notes for a eulogistic biography of her late husband, *A Discourse on the Genius and Character of the Reverend Horace Holley* (1828).<sup>105</sup> Mary sought to change her fortunes by shifting her residence. She took a job as governess to the Hermogene Labranche family in Louisiana in April 1829.<sup>106</sup> Meanwhile, her cousin Stephen F. Austin's colony, a mecca for immigrants, drew her attention. Her brother Henry Austin made the pilgrimage to Stephen F. Austin's mecca, while Stephen reserved land-grants for her on Galveston Bay.

As a result of visiting her cousin's colony in October 1831 and staying there afterwards, she wrote *TEXAS: Observations, Historical, Geographical, and Descriptive, in a Series of Letters Written during a Visit to Austin's Colony, with a View to a Permanent Settlement in That Country in the Autumn*

<sup>104</sup> Lee, *Mary Austin Holley*, 25.

<sup>105</sup> Lee, *Mary Austin Holley*, 36-184; Dall, "Holley, Mary Austin," *Handbook of Texas Online*.

<sup>106</sup> Lee, *Mary Austin Holley*, 177-180 and 201; Dall, "Holley, Mary Austin," *Handbook of Texas Online*.

of 1831, which she published later that year in Baltimore.<sup>107</sup>

Mary Austin Holley began by describing her arrival on the Brazos, which she praised as “the most beautiful river scenery, which I have ever beheld,” noting her right to offer that opinion because,

I have travelled  
From Mexico to Lake Champlain,  
From Maine to Mississippi Shore...<sup>108</sup>

By 1831, John P. Austin’s town of Brazoria featured “about thirty houses, all of logs except three of brick and two or three framed,” while “several more were building,” Mary Austin Holley recorded.

An arrival in Brazoria is an event of some moment...The *port* was not crowded with shipping, nor would it be slander to allude to the *grass-grown* streets. We were safely moored among the tall masts (the only masts there) still flourishing in all their leafy honors. Not a *naked spar* there, save ours, was to be seen...Too much must not be expected of Brazoria....One street stretches along the bank of the Brazos., and one parallel with it further back, while other streets, with the trees still standing, are laid out to intersect these at right angles...Its arrangements, as well as its wealth and greatness, are all prospective...<sup>109</sup>

*Welcome to the frontier.* Mary also included first-person accounts of John Austin’s meetings with Colonel Jose Antonio Mexia and toasts at Mrs. Jane Long’s hotel on July 18, 1832.

During her first Texas visit she envisioned her next book, *Travels in Texas*, and composed a “Brazos Boat Song,” which she illustrated with a vignette of Bolivar House, her home across the bay from Galveston. Back in Louisiana Mary Holley continued her teaching and planned a biography of Stephen F. Austin. In 1833 Mary returned to Lexington, Kentucky. She did not get back to Texas until May 1835. She then turned her diary, family letters, and images into a manuscript that sought to arouse Americans’ sympathy during the Texas Revolution. She hastened to put the resulting book, *Texas, a history*, into publication by May 1836 and on the market by November 1836—and thus became the first history of Texas written in English.<sup>110</sup>

After the December 1836 death of her cousin Stephen F. Austin, Mary made herself an

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<sup>107</sup> (Baltimore: Armstrong & Plaskitt, 1833), <https://scholarship.rice.edu/bitstream/handle/1911/62630/texasobservation1833holl.pdf?sequence=1&isAllowed=y>. See also Lee, *Mary Austin Holley*, 344-45; Dall, “Holley, Mary Austin,” *Handbook of Texas Online*.

<sup>108</sup> *Ibid.*, 30-31.

<sup>109</sup> Letter of Mary Austin Holley, December 1831, published in Mattie Austin Hatcher, editor, *Letters of an Early American Traveler, Mary Austin Holley--Her Life and Her Works 1784-1846* (Dallas: Southwest Press, 1933), 113-117, as quoted in Gambrell, *Last President*, 37-38.

<sup>110</sup> Mary Austin Holley, *Brazos Boat Song* (Baltimore: John Cole, 1833?); Kevin E. Mooney, “Centennial Songs: Forging a Texas Tradition,” *South Central Music Bulletin*, VII, 1 (Fall 2008): 6-19 at 14-17, [http://www.scmb.us/SCMB\\_VII\\_1.pdf](http://www.scmb.us/SCMB_VII_1.pdf); Lee, *Mary Austin Holley*, 228, 232, and 251; Dall, “Holley, Mary Austin,” *Handbook of Texas Online*.

advocate for Texas annexation and struggled to disentangle her fortunes and property from Henry Austin's continuing financial losses. On her way to Galveston to seek income from her properties there in 1837, she memorialized important events in letters to her daughter and made pencil sketches of the Houston area that preserved the appearance of the Bayou City and its most prominent citizens' homes during the first year after its incorporation. She continued visiting parts of the Republic she had not seen before while preserving aspects of their history.<sup>111</sup>

During a last visit to Texas in 1843, she interviewed leading personalities of the day, including Archives War lady cannoneer Angelina Peyton Eberly, while researching her next book, a biography of Stephen F. Austin she intended to insert into her next edition of the *History of Texas*.<sup>112</sup> Two years later she returned to New Orleans to continue her previous service as governess to the Labranche family. Then a yellow fever epidemic struck the Crescent City, and she died there on August 2, 1846. Buried in the Donatien Augustine tomb in the St. Louis Cemetery at New Orleans, her greatest legacy consists of her compelling portrayals of Mexican Texas, the Texas Revolution, and the Republic.<sup>113</sup>

**But wait—there's more: join us for Part 3 in the *Journal's* Summer 2020 issue.** The rollcall of New England patriots who led Mexican Texas, the Revolution, the Republic, and the Lone Star State has not yet run its course. We'll re-examine the life of a forgotten founding father of Texas, Asa Brigham (1788-1844), a descendant of a Great Migration Puritan who came to Mexican Texas in 1830, served as an elected alcalde in Brazoria County, a founder of the Masonic movement in Texas, a revolutionary who sacrificed a son for Texas at the Battle of San Jacinto, the Republic's first auditor and treasurer, and the man whose Austin house served as the venue of the Texas Supreme Court's first session under Chief Justice Thomas Rusk.

And Anson Jones of Great Barrington, Massachusetts (1788-1858), an extraordinary descendant of English military genius Oliver Cromwell's sister who "drifted" (his word) to Austin's colony in October 1833, then rose in prominence and stature to lower the Republic's flag for the last time as last President of the Republic. And Elisa Marshall Pease (1812–1883) of Enfield, Connecticut, who came to Texas in 1835, served as a militia man during the Revolution, then won election as a Congressman and Governor of Texas, and was the first leader to bestow a school for the deaf and a school for the blind on Texas. And more...demonstrating that New Englanders played vital roles in early Texas. To learn more, join us in reading the next issue.

In the next issue we'll meet one of the Republic's most remarkable power couples—William Leslie Cazneau of Boston (1807–1876), soldier, politician, and diplomat, as well as his wife Jane Maria Eliza McManus Storms Cazneau of Troy, New York (1807–1878), U.S. Vice-President Aaron Burr's mistress, one of America's earliest and most compelling journalists, authors, and unofficial diplomats, who published under the pseudonyms Cora Montgomery and Corrine Montgomery.

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<sup>111</sup> James Perry Bryan, ed., *Mary Austin Holley: The Texas Diary, 1835–1838* (Austin: University of Texas Press, 1965); Dall, "Holley, Mary Austin," *Handbook of Texas Online*.

<sup>112</sup> DeJean Miller Melton, "Winning the Archive War: Angelina Eberly Takes Her Shot," *Journal of the Texas Supreme Court Historical Society*, 4, No. 4 (Summer 2015): 35-50, <https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Summer%202015.pdf>.

<sup>113</sup> Mattie Austin Hatcher, *Letters of an Early American Traveller, Mary Austin Holley, 1784–1846* (Dallas: Southwest Press, 1933). Mary Austin Holley Papers, Dolph Briscoe Center for American History, University of Texas at Austin.

In the meantime, let's celebrate New England and Texas history. This year marks the 400<sup>th</sup> anniversaries of the Pilgrims' *Mayflower* voyage and the founding of Plymouth Colony in 2020, while next year, on November 25, 2021, the nation observes the 400<sup>th</sup> anniversary of the first Thanksgiving. As we approach those dates, we should recall those momentous events not just as milestones of New England history, but as steppingstones to Texas independence and freedom.



**DAVID A. FURLOW**, an attorney, historian, and archaeologist, served as Executive Editor of this Journal since co-founding it with Lynne Liberato in 2011 and now serves as Emeritus Editor. As a trustee of Pilgrim Hall Museum in Plymouth, David contributed two short biographies of seventeenth century Pilgrim leaders to Dr. Jeremy Dupertuis Bangs' new book *Intellectual Baggage Catalogue: The Pilgrims and Plymouth Colony—Ideas of Influence* (Leiden: Leiden American Pilgrim Museum, 2020). David and his wife Lisa H. Pennington are recipients of a 2020 National Society Daughters of the American Revolution Historic Preservation Medal for their work preserving the 1747 Captain Isaac Doten House at 2 Carver Street in Plymouth.

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# Sources of Texas Legal Oral History: A Selective Annotated Bibliography

By Joseph W. Noel and Matthew R. Steinke

## Introduction

Oral histories seem to have grown exponentially in popularity and in number in recent years. They have won the Nobel Prize in Literature.<sup>1</sup> They have facilitated criminal prosecutions in foreign countries.<sup>2</sup> Oral histories, once inaccessible, have been rediscovered and presented in powerful ways.<sup>3</sup> Some “oral histories” have closely analyzed the most arcane points of popular culture.<sup>4</sup> Oral histories can preserve the feelings and recollections of powerful men and women who shaped the history of our country and the world that we live in today. Just as important, oral histories can create platforms that facilitate and preserve long meaningful discussions of the lives of ordinary people.<sup>5</sup>

The increasing availability of low-cost high-quality audio recording equipment, combined with the online availability of hosting platforms, has resulted in such an increase in oral histories that the “sheer quantity of oral history can be daunting.”<sup>6</sup> A researcher will find the oral history field crowded with individual oral histories and full oral history programs that range widely in quality and interest. In a way, oral histories are like podcasts; everyone seems to have one, but not all of them are worthwhile. It is a real problem if important first-hand accounts of historical events and lives get lost in the sea of content.

Many oral histories and oral history programs are hidden in library catalogs, on the internet on old websites, and in lightly trafficked archives. Some are not transcribed and posted online.

<sup>1</sup> *The Nobel Prize in Literature 2015*, THE NOBEL PRIZE (Dec. 9, 2019), <https://www.nobelprize.org/prizes/literature/2015/summary/> [<https://perma.cc/UF74-DDZR>].

<sup>2</sup> See PATRICK RADDEN KEEFE, *SAY NOTHING: A TRUE STORY OF MURDER AND MEMORY IN NORTHERN IRELAND* (2019).

<sup>3</sup> See *THEY SHALL NOT GROW OLD* (WingNut Films 2018).

<sup>4</sup> See, e.g., Alyssa Bereznak, *The Oral History of Mary-Kate and Ashley's "Gimme Pizza,"* The Ringer (Aug 28, 2018), <https://www.theringer.com/movies/2018/8/28/17787586/gimme-pizza-mary-kate-and-ashley-oral-history> [<https://perma.cc/CG4Q-LVFO>]. Whether some of these popular oral histories articles are truly oral histories is certainly a matter of debate. See Troy Reeves, *What Is(n't) Oral History. Or, the Rise of the "Oral History of [Fill in the Blank]*, Humanities Booyah (Nov. 18, 2015), <https://www.wisconsinhumanities.org/dont-have-a-cow/> [<https://perma.cc/F5PV-62YR>]. However, the popularity of the term “oral history,” even if improperly used, helps to demonstrate the ubiquity of the concept today.

<sup>5</sup> See, e.g., DAVE ISAY, *LISTENING IS AN ACT OF LOVE: A CELEBRATION OF AMERICAN LIFE FROM THE STORYCORPS PROJECT* (2008). We have not attempted to include any StoryCorps oral histories in this bibliography due to the scope and nature of the StoryCorps project.

<sup>6</sup> Clifford Kuhn, *The Digitization and Democratization of Oral History*, Perspectives on History, (Nov. 1, 2013), <https://www.historians.org/publications-and-directories/perspectives-on-history/november-2013/the-digitization-and-democratization-of-oral-history> [<https://perma.cc/7B4-X9Y4>].

Even with the advantages of online searching enjoyed by today's researchers, some very good oral histories can be difficult to find through normal searching methods.

At the Tarlton Law Library at the University of Texas School of Law, we have our own oral history series featuring the life and work of prominent faculty and alumni. We know about the remarkable people who sit for our interviews. We also know the large amount of time and energy that it takes to produce a finished oral history. It pains us to think that there are great oral histories that are being underutilized because people may be unaware of them or unable to find them. With that in mind, we have produced this annotated bibliography in an effort to highlight some of the great work being done to capture legal history in the state of Texas and pay respect to the lives of those who have been involved and affected.

Annotated bibliographies may not be as popular as they once were due to the availability of internet searching and online resources. However, bibliographies remain valuable for gathering difficult to find sources together in one place and curating for quality. This bibliography covers oral histories that feature Texas lawmakers, lawyers, judges, and law professors. We have included oral histories from a wide variety of sources. Since oral histories do not follow state boundaries, we have also included a number of general oral history projects from outside of the state that have particularly interesting Texas aspects. We have included hyperlinks for resources when pertinent information is available in a free online source. Our hope is that researchers will be able to use this annotated bibliography to discover oral histories and learn about our history and the people who lived it so that we may continue to improve our legal system and gain insight into the lives and work that have come before us.

## **Bibliography**

**American Bar Association, Senior Lawyers Division and Commission on Women in the Profession, *Women Trailblazers in the Law Project*, <https://abawtp.law.stanford.edu/> [<https://perma.cc/SF4G-CWRM>].**

This nationwide project memorializes the stories of over a hundred prominent senior women in the legal profession. The women were chosen primarily based on their accomplishments and contributions to the field. The project is an effort to capture some of the unique challenges and dilemmas faced by this generation of women in the profession, including discrimination. Notable Texans include Carol Dinkins, the first female partner at a major law firm in Texas, and Judge Carolyn Dineen King of the Fifth Circuit Court of Appeals in Houston.

**Appellate Section of the State Bar of Texas, *Oral Histories of Court of Appeals Justices*, <https://vimeopro.com/user45474482/oralhistoryproject> [<https://perma.cc/PFT5-BRGU>].**

This collection contains interviews with over 60 Texas state appellate court judges. The collection is searchable and is available through the Appellate Section's website. Some of the videos contain the interviews in their entirety, while others feature shorter excerpts from the longer interview.

**Austin History Center, *Oral History Collection*, <https://library.austintexas.gov/ahc/oral-historyaudio> [<https://perma.cc/VJ3S-97JC>].**

Austin History Center staff and volunteers have collected over 400 oral histories with local Austin residents and public figures. Some audio samples are available online, while most interviews can be found in tape or transcript form at the Austin History Center. Interviews can be found through the subject guide posted online, which includes a category for lawyers who have been interviewed. The collection also includes the Emma S. Barrientos Mexican American Cultural Center (ESB-MACC) Oral History Project Collection. This collection includes an interview with trailblazing Latina attorney and activist, Maria Luisa “Lulu” Flores.

**Baylor University, *Institute for Oral History***, <http://cdm17178.contentdm.oclc.org/cdm/landing-page/collection/buioh> [<https://perma.cc/S6UX-VUG7>].

The Institute for Oral History has over 6,000 oral history interviews in its collection. The Institute has created transcripts for nearly all of the interviews, and almost 4,000 of these transcripts are freely available online. Audio files are also available for over half of the interviews. Baylor's collection includes many interviews with lawyers, legislators, and law faculty, and includes a massive 26 interview oral history series with former U.S. Congressman William Robert Poage.

**Columbia Center for Oral History, *Columbia Oral History Archives***, <https://library.columbia.edu/libraries/ccoh.html> [<https://perma.cc/6ACK-STYQ>].

The Columbia Oral History Archives are one of the largest collections of oral histories in existence. The collection contains over 10,000 interviews and is housed at the Rare Book & Manuscript Library in Columbia's Butler Library. Prominent Texas legal figures include Governor Allan Shivers and Fifth Circuit Judge Joe McDonald Ingraham.

**C-SPAN, *Oral Histories***, <https://www.c-span.org/series/?oralHistories> [<https://perma.cc/5TN3-C88W>].

The oral history collection includes interviews with famous Texans, including John Connally, Ramsey Clark, Ralph Hall, Justice Tom Clark, and others.

**Dallas Bar Association Senior Lawyers Committee, *DBA Oral History Project***, <https://vimeo.com/showcase/6038919> [<https://perma.cc/28X4-QQPQ>].

This ongoing oral history series preserves the history of the Dallas Bar Association through interviews with prominent members. The interviews are easily accessible and available to the public in video format through the Dallas Bar Association's website. The collection includes many prominent Dallas area lawyers, including Judge Harold “Barefoot” Sanders, who presided over the Dallas ISD school segregation case from 1981 to its conclusion in 2003.

**Dallas Public Library, *Oral Histories***, <https://dallaslibrary2.org/dallashistory/oralHistory/index.html> [<https://perma.cc/U733-CP4L>].

The oral history collection at the Dallas Public Library contains more than 300 oral histories of prominent members of the Dallas community. Many of the subjects interviewed for the series were members of the Texas legal community, including Judges Henry King, Harold “Barefoot” Sanders, W. Lew Sterrett, Annette Stewart, and William “Mac” Taylor, and attorneys, Alex Bickley, Van A. Hollomon, Henry Kucera, Wallace Savage, Hermine Tobolowsky, Frank W. Wozencraft. Some transcripts and audio clips can be downloaded from the library's website. Full audio-recordings are available through the Texas/Dallas History librarian.

Dolph Briscoe Center for American History at The University of Texas at Austin, *Sam Rayburn Papers*, <https://legacy.lib.utexas.edu/taro/utcah/00181/cah-00181.html> [<https://perma.cc/PB9Z-QD2X>].

Sam Rayburn went to the University of Texas School of Law and passed the Texas Bar in 1908 while serving in the Texas House of Representatives. He went on to serve 25 terms in the U.S. House of Representatives, including over 17 years as Speaker of the House. This collection includes dozens of oral histories with prominent politicians and Texas lawyers who knew and worked with Rayburn, including Judges Sarah Hughes and Harold “Barefoot” Sanders, and Attorney General of Texas Grover Sanders.

Dolph Briscoe Center for American History at The University of Texas at Austin, *Texas House Speakers Oral History Project*, <https://legacy.lib.utexas.edu/taro/utcah/01356/cah-01356.html> [<https://perma.cc/Q5CR-C28U>] and [http://av.cah.utexas.edu/index.php/Category:Texas\\_Speakers\\_Oral\\_History\\_Collection](http://av.cah.utexas.edu/index.php/Category:Texas_Speakers_Oral_History_Collection) [<https://perma.cc/CB9K-DX4G>].

From 2003 to 2005, the Dolph Briscoe Center for American History interviewed ten Texas House speakers. The project covered 1951 to the present era, and brought attention to the significance of the House Speaker in Texas. The Speakers interviewed were Reuben Senterfitt, Jim T. Lindsey, James “Jimmy” Turman, Ben Barnes, Gus Mutscher, Rayford Price, Bill Clayton, Gibson D. “Gib” Lewis, Pete Laney, and Tom Craddick.

Eisenhower Presidential Library, *Oral Histories*, <https://www.eisenhowerlibrary.gov/research/oral-histories> [<https://perma.cc/5TV4-WEZX>].

This collection contains the oral histories of people who held principal positions during the Eisenhower administration or who had a personal relationship with President Eisenhower. Included within this collection are U.S. District Court Judge Joe McDonald Ingraham, and Texas lawmakers, Edward T. Dicker and Allan Shivers. Most transcripts are only available at the Eisenhower Presidential Library, but a few are available electronically online.

Environmental Law Institute, *Celebrating Pioneers in Environmental Law*, <https://www.eli.org/celebrating-pioneers-in-environmental-law> [<https://perma.cc/D2KV-C97M>].

This collection includes 24 oral histories with some of the most prominent people in the environmental law movement in the United States in the last 50 years. Topics discussed include the rise in public concern around these issues and the creation of the Clean Air Act and the Clean Water Act. The interviewees also discuss strategies and approaches to these issues going forward. Prominent Texas lawyers include Pam Giblin and Kinnan Golemon.

Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-present*, <https://www.fjc.gov/history/judges/search/advanced-search> [<https://perma.cc/6L7A-8YNT?type=image>].

This directory is not an oral history collection, but its biographical entries for each judge identify relevant oral histories for each federal judge. The oral history information provided includes information such as title, location, length and format. There are over thirty judges in the directory from Texas federal district courts and the U.S. Court of Appeals for the Fifth Circuit who have oral histories listed in the directory.

Fight Back Texas, *The Filibuster Oral History Project*, available at: <http://fightbacktx.com/> [<https://perma.cc/ZA6N-RGRH>].

In 2013, Democratic lawmakers attempted to block abortion legislation in the Texas Legislature. This oral history collection includes 27 interviews with lawmakers, activists, and organizers who were there. The collection includes lawmaker and lawyer Wendy Davis, who filibustered on the Senate floor for 13 hours.

**Fred Parks Law Library, South Texas College of Law Houston, *Oral History Collection*, <https://stexl.stcl.edu/search/?searchtype=c&searcharg=Oral+History+Collection&sortdropdown=-&SORT=D&extended=1&SUBMIT=Search&searchlimits=&searchorigarg=cOral+History+Collection+1%2F03> [<https://perma.cc/JW9V-7LER>].**

The Fred Parks Law Library oral history collection consists of interviews with prominent figures in the history of the law school, including Mabel Welch, Frank T. Read, Harry L. Reed, William L. Wilks, and Harry P. Hutchens, Jr. Written transcripts of the interviews are available at the library. CD recordings of some of the interviews are also available.

**Haynes Boone, *Oral Histories of Texas Appellate Court Justices*, <https://catalog.sll.texas.gov/cgi-bin/koha/opac-search.pl?q=se,phr:%22Oral%20histories%20of%20Texas%20appellate%20court%20justices%22> [<https://perma.cc/NH94-Z7MP>].**

This oral history series is held by the Texas State Law Library. The following thirteen Texas appellate judges are interviewed for the series: Clyde Ashworth, John Cayce, William Cornelius, Raul Gonzalez, Wallace Jefferson, Alma Lopez, Austin McCloud, Paul Murphy, Thomas Phillips, Charles Reynolds, Robert Seerden, Bob Shannon, and Ron Walker. The interviews were published between 1998 and 2006. Some of the interviews are published as print transcripts, while others are available in CD or DVD format.

**HeinOnline, *An Oral History of Law Librarianship*, <https://www.youtube.com/playlist?list=PLTJD117gWw-AUrJBitNPYWieeqc336Rz> [<https://perma.cc/MSG2-YB5W>].**

The collection includes interviews with library directors and other leaders in the legal information profession. Included in the collection are interviews with Texas library professionals and academics Barbara Bintliff, Gail Murphy Daly, James E. Hambleton, Edward T. Hart, Jane Dizer Holland, Paula Howe, Gregory L. Ivy, Gregory R. Lambert, Riva Laughlin, Colleen C. Manning, Monica M. Ortale, Susan T. Phillips, Brandon Quarles, Bernard D. Reams, Jr., Jon Schultz, Mariann Sears, Spencer L. Simons, DeCarlous Y. Spearman, Robert L. Summers, Jr., Susan Mims Yancey, and Mon Yin Lung. The histories are available online in video format on HeinOnline for subscribers and are freely available on the HeinOnline YouTube channel.

**Houston Public Library, *Houston Oral History Project*, <http://www.houstonoralhistory.org/index.html> [<https://perma.cc/8BDA-QZSA>].**

The Houston Oral History Project is a collaboration among the Mayor's Office, the Houston Public Library, and the University of Houston. This includes multiple individual collections, including the Mayor Bill White Collection of over 100 interviews with political, business, and civic leaders. The collection includes interviews with lawyer, politician, and activist, Frances Tarlton "Sissy" Farenthold, former managing partner of Norton Rose Fulbright, Gibson Gayle, and former Thurgood Marshall School of Law professor and Dean, Otis King.

**LBJ Presidential Library, *LBJ Library Oral History Collection*, <http://www.lbjlibrary.net/collections/>**

[oral-histories/ \[https://perma.cc/V4NT-YW4A\]](https://perma.cc/V4NT-YW4A).

This large collection includes hundreds of interviews with people who were involved in the Johnson administration and many legal figures in Texas. Access varies depending on the interviewee, with some transcripts available online, while others are restricted in various ways. Texas legal figures include Judge Sarah Hughes, the first woman to serve as a federal judge in the state of Texas and the judge who administered the oath of office to Johnson aboard Air Force One, Justice Tom Clark, and Texas lawmakers John Connally and Barbara Jordan. This oral history collection was used by Robert Caro in writing his trilogy about Lyndon Johnson.

**Litigation Section of the State Bar of Texas, *Texas Legal Legends*, <http://www.litigationsection.com/DrawLegalLegendVideos.aspx?PageID=170#.XRKUhehKiUI> [<https://perma.cc/2PE4-AZ9T>].**

The goal of this project is to increase the understanding of the historical importance of lawyers and the importance of making a difference as a lawyer. It captures the stories of over 20 legends, including Justice Ruby Kless Sondock, the first woman to serve on the Texas Supreme Court, and well known trial lawyers, Joseph D. Jamail, Jr. and Harry M. Reasoner. This collection is easily accessible through videos on the Litigation Section's website.

**PJ Pierce, *"Let me tell you what I've learned": Texas Wisewomen Speak (2002)*.**

This is a collection of interviews conducted by PJ Pierce with 25 prominent Texas women. The collection includes Barbara Jordan, Kay Bailey Hutchison, Louise Raggio, Irma Rangel, Ann Richards, Judge Mary Lou Robinson, and Sarah Weddington.

**St. Mary's School of Law, *2016 Oral History Project*, <https://mediaspace.stmarytx.edu/category/Law%20School%20Oral%20History/53160542> [<https://perma.cc/ZE98-T68N>].**

This project includes oral histories of St. Mary's law school alumni, Texas Supreme Court Justice Rose Spector, and attorney Karl Rubinstein. Both histories are available online in video form.

**State Bar of Texas Appellate Section, *Past Chair Interviews*, <http://tex-app.org/DrawOnePage.aspx?PageID=16502> [<https://perma.cc/TK3J-GFLG>].**

This collection includes interviews with nine past chairs of the State Bar of Texas Appellate Section. These interviews require a member sign in for access.

**Tarlton Law Library, University of Texas School of Law, *Oral History Series*, <http://tarlton.law.utexas.edu/archives-and-special-collections/oral-history> [<https://perma.cc/2H95-QRjX>].**

The Tarlton Law Library's oral history series, containing over thirty interviews, includes individuals whose careers shaped the law school and the legal history of Texas. Texas Chief Justices Robert Calvert, Joe R. Greenhill, Sr., and Jack Pope are included in the collection. The collection also includes prominent University of Texas faculty members, such as W. Page Keeton and Robert O. Dawson, and well-known alumni, such as Joseph D. Jamail, Jr. and Harry M. Reasoner. The oral history of Gloria Bradford, the first African-American woman to graduate from the law school, is also included in the collection. The transcripts of these oral histories are generally available in the Tarlton Law Library, and most of the collection is available electronically to HeinOnline subscribers in the Spinelli's Law Library Reference Shelf collection.

**Texas Bar Historical Foundation, *Texas Bar Historical Foundation Oral History Collections*, <https://>**

[www.texasbar.com/AM/Template.cfm?Section=State\\_Bar\\_Archives](http://www.texasbar.com/AM/Template.cfm?Section=State_Bar_Archives) [<https://perma.cc/D4SD-Y9Q6>].

This collection is owned by the Texas Bar Historical Foundation and administered by the State Bar of Texas Archives Department. It includes two collections. The first collection features interviews with recipients of the Texas Bar Foundation Outstanding 50-Year Lawyer Award. This award honors lawyers who have practiced law for fifty or more years while adhering to “the highest principles and traditions of the legal profession and service to the public.” This series includes Judge Mary Lou Robinson of the United States District Court for the Northern District of Texas, and Albert Armendariz Sr., prominent civil rights attorney and a founder of the Mexican American Legal Defense and Educational Fund, among many others. This collection can be found in the archives of the Briscoe Center for American History at the University of Texas at Austin, the State Bar of Texas Archives, and at the Texas State Law Library. The second collection, which is only available through the State Bar of Texas Archives Department, is historian and writer Wanda Landrey’s oral history interviews with Texas lawyers, which were taken between 1989 and 2000.

**The HistoryMakers, *The HistoryMakers African American Video Oral History Collection***, <https://www.thehistorymakers.org> [<https://perma.cc/WUL2-BBBG>].

The HistoryMakers is an oral history project that interviews well known and not so well known African Americans in an effort to create a more inclusive record of American history. It is run by a 501(c)(3) non-profit research and educational institution, but does require a membership to see full video clips of the interviews. This enormous collection with over 3,000 interviews includes many prominent Texans, including lawyers and lawmakers, Sylvester Turner and Anthony W. Hall.

**The University of Texas at Austin – Moody College of Communications, *Voces Oral History Project***, <https://voces.lib.utexas.edu/> [<https://perma.cc/5WFJ-5PJK>].

Voces is the leading Latino oral history archive in the United States. It includes over 1,000 interviews, as well as other primary source documents and pictures. The project originally intended to capture Latinos and Latinas who had served in the military or on the home front during World War II. The project has since been expanded to include the Vietnam and Korean Wars, and political and civil engagement. The collection includes many lawyers, including Vilma Martinez, former president and general counsel of the Mexican American Legal Defense and Educational Fund, and Norma Cantu, Professor of Law at the University of Texas School of Law.

**The University of Texas at El Paso, *Institute of Oral History Collection***, [https://digitalcommons.utep.edu/oral\\_history/](https://digitalcommons.utep.edu/oral_history/) [<https://perma.cc/8N5Q-WHMP>].

The Institute of Oral History focuses on people who live in the US-Mexico borderlands. This collection of over 1,600 oral histories includes the Bracero Oral History Project, which looks at the Bracero Program, a guest worker program that brought millions of Mexican guest workers to the United States. It also includes the Women Attorneys of El Paso project.

**Texas After Violence Project, *Oral History Collection***, [http://av.lib.utexas.edu/index.php?title=Category:Texas\\_After\\_Violence\\_Project](http://av.lib.utexas.edu/index.php?title=Category:Texas_After_Violence_Project) [<https://perma.cc/EFR3-Q68U>].

The Texas After Violence Project includes over 60 oral history interviews with people directly affected by murder and the death penalty. This includes family and friends of victims, family

of people who have been executed, attorneys, prosecutors, judges, and others. Interviews can be found on the Texas After Violence Project website and through the University of Texas Libraries' Human Rights Documentation Initiative. The collection includes many notable lawyers, including Chris Tritico, who represented Timothy McVeigh, and George Parnham, who represented Andrea Yates.

**Texas Oil Industry, *Oral History of the Texas Oil Industry Collection*, <https://legacy.lib.utexas.edu/taro/utcah/00282/cah-00282.html> [<https://perma.cc/UU6Z-K73Z>].**

This project ran from 1952 to 1958 and collected interviews with people who had first-hand knowledge of the history or lore of the early oil industry in Texas. This included lawyers, judges, and politicians. All of the sound recordings were digitized and some are available on the Briscoe Center for American History's website, while other materials, including transcripts and other primary materials, are available at the Briscoe Center archive.

**Texas Tech University, *Southwest Collection/Special Collections Library Oral History Collection*, [https://swco.ttu.edu/ohc/index.php?title=Main\\_Page](https://swco.ttu.edu/ohc/index.php?title=Main_Page) [<https://perma.cc/PWQ3-KX4B>].**

This enormous collection of collections includes over 6,500 interviews. This includes the African American Oral History Collection, the Hispanic Oral History Project, and the Women's History Initiative. Included is Brian Jose Chavez, an Odessa lawyer and a former high school football player featured in H. G. "Buzz" Bissinger's book *Friday Night Lights*. Newer interviews can be viewed on their website, while older interviews can only be accessed in-person in the reading room of the Southwest Collection/Special Collections Library.

**Truman Presidential Library and Museum, *Oral History Interviews*, <https://www.trumanlibrary.gov/library/oral-histories> [<https://perma.cc/DFE4-CSL2>].**

The oral history interviews at the Truman Library are intended to supplement the written record of the life and times of President Harry S. Truman. Included within this collection are the oral histories of U.S. Supreme Court Justice Tom Clark, and former U.S. congressman and federal judge, Marvin Jones. The transcripts of these oral histories are available online and include subject indexes.

**University of North Carolina at Chapel Hill, *Oral Histories of the American South*, <https://docsouth.unc.edu/sohp/index.html> [<https://perma.cc/7BEZ-SL7Y>].**

This oral history collection is part of the Documenting the American South project. The collection includes interviews from Texas political figures, including Frances Tarlton "Sissy" Farenthold, Nancy Palm, Maury Maverick, and Margaret Carter.

**UNT Oral History Program, *UNT Oral History Collection*, <https://oralhistory.unt.edu/our-collection> [<https://perma.cc/UEU7-Q8SB>].**

This enormous collection includes many prominent Texas legal and political figures. The majority of these interviews are transcribed and available for use in the Willis Library and available to be photocopied for a fee. The collection includes notable figures including Kay Bailey Hutchinson, Sarah Weddington, and Henry Akin, and also many lesser known lawyers like Don Maison, who played an important role in the gay rights movement in Dallas.

UTSA Libraries Special Collections, *Oral History Collection*, <https://digital.utsa.edu/digital/collection/p15125coll4> [<https://perma.cc/KS6F-6H3W>].

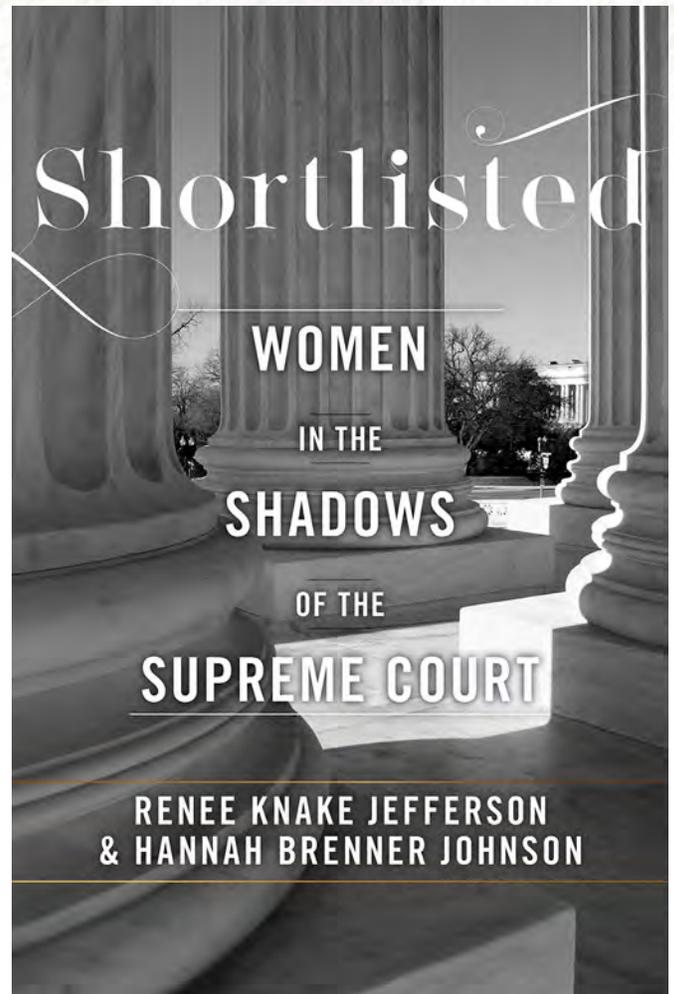
This collection includes over 1,000 oral histories, most of which come from The Institute of Texan Cultures Oral History Collection. Also included are the Archives for Research on Women and Gender Oral History Project, which includes Justice Rose Spector, the first woman to be elected to the Texas Supreme Court, and Hattie Elam Briscoe, the first African-American woman to practice law in Bexar County. The collection also features an interview with former lawyer Julian Castro.

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# Shortlisted: Women in the Shadows of the Supreme Court

Book Review by John G. Browning

**U**.S. Supreme Court Justice Ruth Bader Ginsburg once famously responded to the question of when there would be enough women sitting on our nation's court by saying "When there are nine." Yet, even with three female justices currently serving, neither historians nor the public itself seem to have paid much attention to women considered for the Supreme Court before the historic nomination of Justice Sandra Day O'Connor by President Ronald Reagan in 1981. But as the fascinating and painstakingly researched book *Shortlisted: Women in the Shadows of the Supreme Court* points out, at least nine women were considered for the Supreme Court by presidents going as far back as Franklin Delano Roosevelt. Authors Renee Knake Jefferson, a law professor at the University of Houston Law Center, and Hannah Brenner Johnson, a vice dean and law professor at California Western School of Law, bring a sadly overlooked chapter in our legal history to life while simultaneously giving us a new definition of what it means to be "shortlisted" – i.e., "qualified for a position but not selected from a list that creates the appearance of diversity but preserves the status quo."



*Shortlisted: Women in the Shadows of the Supreme Court*

Authors: Renee Knake Jefferson  
& Hannah Brenner Johnson

(New York University Press, 2020; 304 pages)

By poring over obscure documents in presidential archives, museums and historical society collections, and the personal papers of several of these trailblazing women, Jefferson and Johnson bring them to life, beginning with Florence Allen. Allen, the first woman to sit on a state court of last

resort and the first to be appointed to an Article III federal appellate court (the 6th Circuit) in 1934, was initially mentioned as a potential Supreme Court appointee under the Hoover administration. However, during FDR's lengthy tenure, Allen was officially shortlisted with support from numerous women's groups and Eleanor Roosevelt herself. Yet even as he reshaped the Court by filling an unprecedented eight vacancies during his time in office, Roosevelt passed on every opportunity to appoint Allen, as did his successor Harry Truman.

In the ensuing decades and numerous Supreme Court vacancies that elapsed between Florence Allen's shortlisting and O'Connor's 1981 nomination, eight more women would be officially considered for the Court. Sonia Mentschikoff, a distinguished legal scholar who taught at Harvard and the University of Chicago, made the shortlists of both John F. Kennedy and Lyndon Johnson. California Appellate Judge Mildred Lillie made Richard Nixon's shortlist, but was passed over due to an unfavorable rating by the all-male ABA committee (and Chief Justice Warren Burger's threat to resign if a woman were appointed to the Court). Sylvia Bacon was appointed by Nixon to the Superior Court of the District of Columbia in 1970, and she was formally considered for the D.C. Circuit, the Eighth Circuit and the Supreme Court as well. Bacon also appeared on a list of the Supreme Court candidates prepared for President Ford. Carla Hills, who served as HUD Secretary under Ford, also made his shortlist to replace Justice William O. Douglas. Cornelia Kennedy, the first woman to serve as chief judge of a U.S. district court, was named to the Sixth Circuit by Jimmy Carter in 1979, and made the shortlists of both Presidents Ford and Reagan.

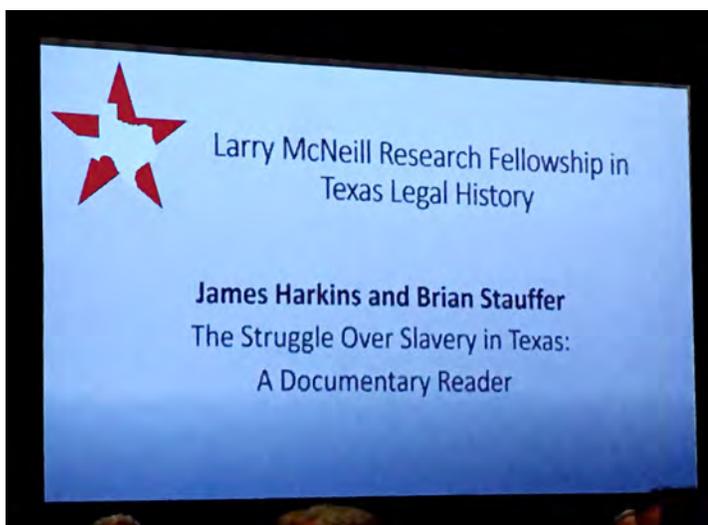
While *Shortlisted* goes into admirable detail about the personal and professional lives of all of its subjects, and also provides insightful analysis of Justice O'Connor's journey from nomination to confirmation and service, as well as of those women nominated after O'Connor, the book transcends mere historical chronicle. In an age in which women enter the legal profession in numbers equal to men yet are underrepresented in its highest ranks, *Shortlisted* is a wake-up call about the persistence of gender inequality. Part of the problem, the authors posit, rests with the gendered media coverage of female nominees; from the earliest contenders to even recent justices like Elena Kagan and Sonia Sotomayor, female nominees have been subjected to media scrutiny of their appearance, marital status, motherhood, and sexuality. This book represents an important step beyond shortlisting and tokenism toward true selection.

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# TSHA Awards 1<sup>st</sup> Larry McNeill Fellowship

Feature and photos by David A. Furlow

This year the Texas State Historical Association conferred its first-ever Larry McNeill Research Fellowship in Legal History during TSHA's February 28, 2020 Annual Fellows Luncheon and Awards Presentation. After first recognizing Larry McNeill's contributions to TSHA by recognizing him, TSHA Vice President Patrick Cox and TSHA C.E.O. Bill Ellis presented the fellowship to James Harkins and Brian Stauffer to use in funding their project to produce a collection of primary source materials to be published as *The Struggle over Slavery in Texas: A Documentary Reader*.



The Society's fellowship appeared prominently at TSHA's Awards Presentation.

James Harkins is the Director of Public Services for Archives and Records in the Texas General Land Office. Dr. Brian Stauffer is the Curator and Translator of the Spanish Collection in the Archives and Records Division of the G.L.O. They jointly proposed a project to publish a new book, *The Struggle Over Slavery in Mexican Texas: A Documentary Reader*, that will utilize and translate Spanish-language documents the G.L.O. preserved. These documents have not been widely accessible and will shed more light on the complex legal questions surrounding slavery and the colonization of Texas. See "Larry McNeill Research Fellowship in Texas Legal History," on the Society's website at <https://www.texascourthistory.org/McNeillFellowship/>

The project presents English translations of twenty-nine documents related to the institution of chattel slavery mostly drawn from the correspondence of the *jefe político* (political chief) of the Mexican Department of Texas between 1824 and 1831. Texas officials removed this correspondence from the historic archives of San Antonio de Béxar and presented it to the G.L.O. in 1846, where it forms part of the corpus of records described in GLO's published finding aid "Catalogue of the Spanish Collection Part II."

Christina M. Villarreal, a PhD candidate in the History Department at the University of Texas at Austin who served as an intern in the G.L.O.'s Archives and Records Division in the summer of 2018, translated the nineteenth century Spanish language records that comprise the heart



Larry McNeill, left, congratulated winners James Harkins, center, and Brian Stauffer, right.

of this collection. To place these unique historic documents in context and enhance their value, the editors commissioned analytical essays from five scholars in Texas history and the history of slavery:

- Professor Daina Ramey Berry, the Oliver H. Radkey Regents Professorship in History; Fellow of Walter Prescott Webb Chair in History and a Fellow of George W. Littlefield Professorship in American History at the University of Texas-Austin;
- Dr. Jesús F. “Frank” de la Teja, formerly Texas State Historian and Director of the Center for the Study of the Southwest at Texas State University;
- Andrew J. Torget, a historian of 19th century North America at the University of North Texas, where he directs the Digital History Lab, at the University of North Texas;
- Christina Marie Villarreal, a Ph.D. candidate at the University of Texas at Austin examining the political boundaries of northern New Spain and “border crossings” between Texas and Louisiana during the eighteenth century; and

- María Esther Hammack, a Ph.D. History candidate at the University of Texas at Austin researching little known histories of women freedom fighters who made journeys to escape enslavement and reach the Mexican border.

Last year, President Marcie Hogan Greer led the Society to establish the fellowship to honor attorney Larry McNeill. McNeill served as President of both the Society and TSHA. His service to TSHA included a term as its president in 2005-2006. One of his most important goals as TSHA's president was to establish the office of State Historian of Texas. Utilizing his contacts and legal expertise, Larry maneuvered a bill through the Legislature that created the office of Texas State Historian. A key element in the statute he proposed an official swearing-in ceremony for the Texas State Historian in the State Capitol to elevate the importance of history in state government.

Larry McNeill was serving as the Managing Partner of Clark, Thomas & Winters PC in Austin when he became the Society's President in 2009-2010, one decade ago. He agreed to serve for one year only—until then, the term had been two years. He correctly believed that much could be achieved in one year if he began putting his initiatives in place when he took office in June. A visionary and a master strategist, his inspirational leadership style had an immediate and a long-term impact on the Society.

McNeill personally visited every member of the Board, including those who lived in different cities, as soon as his presidency began. He appointed members of committees to get things done—then led them to success. He supported the June 2009 initiative to hire Texas historian James Haley to write a narrative history of the Texas Supreme Court, with Marilyn Duncan providing research and editorial support after the original idea of using attorney volunteers failed. McNeill mounted a statewide fundraising campaign that raised more than \$100,000 over the next ten months.

Envisioning that an annual or biannual symposium on legal history would stimulate interest in scholarly research, McNeill led the Society to sponsor the first such event in Houston in November 2009, setting a precedent for the Supreme Court Jurisprudence Symposia organized by Lynne Liberato and Richard Orsinger. McNeill instituted the practice of inviting guest speakers to present entertaining talks during post-meeting lunches at the Society's Board of Trustees meetings. The first speaker was State Historian Light Cummins, who spoke during the autumn of 2009. Every Board Meeting since then has followed that tradition.

Ten years ago, on January 13, 2010, during McNeill's term the Society celebrated its 20th anniversary—which also marked the 170th anniversary of the first session of the Texas Supreme Court. McNeill celebrated the anniversary in the Supreme Court Courtroom in the Tom Clark Building.

Larry McNeill oversaw publication of *The Laws of Slavery in Texas*, the first book in the Society's Legal Studies Series cosponsored by the Society and UT Press, in February 2010. As a lifelong historian and as a member of TSHA, McNeill turned the Society's sponsorship of joint sessions with TSHA at its annual meetings into an institution. He served as panel moderator for the 2010 session on Texas slave laws, which dovetailed with the release of *The Laws of Slavery in Texas* book, and again for the 2013 session on the history of the Texas Supreme Court, following the release of the long-awaited narrative history of the Texas Supreme Court.



Larry McNeill and Marilyn Duncan discussed McNeill's initiatives on behalf of the Society before TSHA's presentation of the first Larry McNeill Fellowship in Legal History. Marilyn Duncan's memories of McNeill's leadership of the Society played an important role in the Society's 2019 decision to create the fellowship.

McNeill's service did not end when his term of office did. He continued to serve as the Board's History Book Committee Chair and acted decisively to support and raise funds for publication of *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas*. He wrote the preface to the book as well as advising its editor Marilyn Duncan. Under McNeill's leadership, the Society became a scholarly institution.

TSHA judges the competition and awards the \$2,500 annual fellowship to an applicant who submits the best research proposal on some aspect of Texas legal history. The submission deadline was December 28, 2019. The competition was open to any applicant pursuing a legal history topic, including judges, lawyers, college students, and academic and grass-roots historians.

It is fitting, then, that the Society now honors Larry McNeill with a fellowship awarded to James Harkins and Brian Stauffer, two G.L.O. officers whose book project reflects their commitment to preserving and disseminating primary source materials essential to understanding the history of slavery in Texas. This year's award marks an auspicious beginning for one of the Society's most important recent initiatives.

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# The Society's 2020 TSHA Program—Maybe the Best Ever

By David A. Furlow

The Society's legal history panel program—"Courting Trouble: Hard Cases, Historic Consequences"—at the 124<sup>th</sup> Annual Texas State Historical Association's Annual Meeting earned high praise from all who watched the program. "Maybe the best ever," former Texas Supreme Court Chief Justice Tom Phillips, himself a historian, noted at the end of the program. "That was a very, very good presentation."



The Society's President, Dylan Drummond, opened the session by discussing the Society's history and commitment to preserving, protecting, and providing access to the history of the Texas Supreme Court and the Texas judiciary. He then introduced a distinguished panel of speakers on the annual meeting's second day on Friday, February 28, at the University of Texas's AT&T Executive Education and Conference Center.

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, spoke about the "District of Brazos: The Republic's Secret Court."

Justice Wise put the story of that "secret court" in its critical international context. He began the story in April 1836. "April 3, 1836 dawned with the Texian Navy schooner *Invincible* patrolling the mouth of the Rio Grande. Commanded by Captain Jeremiah Brown, the *Invincible* was blockading the port at Matamoros. A brig named the *Pocket* fell in with the *Invincible* but refused to show her papers when boarded by the Texans." Then the plot thickened.



"Captain Brown soon discovered that her cargo did not match her manifest. Her cargo included dispatches to Santa Anna with intelligence on Texian naval strength. A map of the entire Texas coast highlighting Texian vulnerabilities was also on board. The *Pocket* transported powder, ammunition and military stores for the Mexican Army. Brown seized the *Pocket* and sailed her to Galveston, where the

Provisional Government had located after fleeing the advancing Mexican army. The U.S. demanded her return. After the Battle of San Jacinto, the Republic's Interim President David Burnet had to act quickly to avoid a confrontation with the Republic's powerful neighbor."

What could be done to resolve that looming confrontation? Convene a court, of course, since courts exist to resolve conflicts. On April 9, 1836, prominent Texian Robert Triplett wrote to President David Burnet, encouraging him to issue a decree establishing an admiralty court. Triplett stressed the importance of making the capture seem legitimate, "according to the law of Nations..."

But 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 examined the court records and primary source records to bring to vivid life the jurisprudence of the Republic's Court of the District of Brazos. Justice Wise will share his research about Interim President David Burnet's unique contribution to the Republic of Texas's legal history in the *Journal's* Summer 2020 issue.



Justice Ken Wise explored the intersection of maritime, legal, and Texas history that shaped the Republic of Texas's first year.  
Photo by Karen Patton.



Historians, lawyers, judges, and history-minded members of the public filled the room.  
Photo by David A. Furlow.

The Hon. Mark Davidson, Multi-District Litigation Judge, a trustee of the Society, and a judicial historian, posed an important question to the audience: "Who Will Be Governor?" Just as quickly, Judge Davidson answered, "The Texas Supreme Court Decides."

"All of us remember the December, 2000 opinion of the United States Supreme Court in the case of *Bush v. Gore*," Judge Davidson began. "The justices were required to decide who would receive Florida's Electoral College votes, and become President, in a nation that was (and remains) evenly divided. The opinion was then and is today referred to as being 'unprecedented.'"

The room grew quiet and many members of the audience leaned forward to learn something few had thought about before.

"Scholars of the history of the Texas Supreme Court know that it is not unprecedented," Judge Davidson continued. "There have been five times in Texas history in which our Supreme Court has been called upon to decide the governor's election. In each case, the court acted quickly and decisively. In three of the cases, the Court clearly acted without regard to politics. In two others, it is possible that the reality of our judges being elected on the same ballot as other officials or knowing the candidates on a personal basis might have influenced some of the justices."

Judge Davidson then examined those five important cases in which the Supreme Court of Texas determined the outcome of a gubernatorial race. Those cases revealed 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. Judge Davidson will publish his paper in the Summer 2020 issue of this journal, giving everyone an opportunity to see the interaction of law and politics at the highest level.

Francisco Heredia, Team Leader and Curator of Harris County District Clerk Marilyn Burgess's Historical Documents Room, served as the panel's commentator. He discussed how Harris County



Judge Mark Davidson described what happens when courts must decide who becomes Texas's governor.  
Photo by Karen Patton.



Francisco Heredia discussed original records preserved in the Harris County District Clerk's Historical Documents Room.  
Photo by Karen Patton.

preserves courthouse legal history found nowhere else. His PowerPoint showed an attentive audience how archival records enable historians to reconstruct the history of Texas courts from the Republic to the present.

"In the late 1990's, one of my greatest duties as a preservationist was to inventory over 40,000 historical documents dating back to the Republic of Texas," Mr. Heredia told the audience. "This did not include another 1,200 court records of indices, case dockets, court fee dockets and court minutes. Most records were stored in un-aired conditioned warehouses. One was about 100 ft from Buffalo Bayou. This request came after Judge Mark Davidson made our District Clerk, Honorable Charles Bacarisse, aware that some of the oldest records were rotting and turning into confetti. We realized we had a BIG problem and had to take action, immediately. Looking back, these court records were not just old paper but in fact are valuable primary sources of Texas' and Houston's history."

Mr. Heredia began by showing slides of January 1836 judicial records from the twin-state of Coahuila y Texas's Department of the Brazos. He then described one of the most important records in the Harris County District Clerk's possession. "Filed on April 6th, 1839, this petition reads *Samuel Houston vs. Mirabeau B. Lamar, President*. The case was brought before the Honorable

CIVIL CASE NO. 20  
SAM HOUSTON  
VS  
MIRABEAU B. LAMAR  
DATE 1843

**HOUSTON VERSUS  
LAMAR: FILED 1839;  
DECIDED 1846, LAST  
CASE IN THE  
REPUBLIC'S  
SUPREME COURT**

GRACIOUSLY DONATED BY  
FRANCISCO HEREDIA REYES  
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Sam Houston

Mirabeau B. Lamar

Benjamin C. Franklin. Sam Houston, former president of the Republic of Texas, alleged that Lamar had damaged some of his furniture and had taken other personal possessions he had left in the “presidential mansion.”

Litigation resulted. “At one point, Lamar sought a delay because a key witness was on duty with the Texas Army in San Antonio, where the threat of a Mexican invasion seemed constant. In 1843, a jury in the City of Houston found for Sam Houston. On December 30, 1845, the day after Texas entered the Union as an American state, the Texas Supreme Court of the Republic of Texas affirmed the jury verdict.” The Texas Supreme Court’s original opinion is preserved in the file. “By the way,” Mr. Heredia stated, “I donated the funds to preserve this record.”

To learn more and see more examples of Texas judicial records that matter, please turn to the upcoming Summer 2020 issue of the *Journal*.

## HONORING DONORS WHO PRESERVE HISTORY BY NAME WITH BOOKS



**GOAL: PRESERVE THEM FOR 300 YEARS**

Harris County’s District Clerk solicits public-minded lawyers, law firms, and members of the public to preserve Harris County’s original courthouse records for up to 300 years. This slide comes from Francisco Heredia’s PowerPoint.



Judge Mark Davidson, left, Francisco Heredia, center, and Justice Ken Wise, right, answered questions from an audience interested in Texas's legal history. Photo by Karen Patton.

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# John Browning Wins Houston Bar Foundation Award

**T**SCHS Trustee and this Journal's Editor-in-Chief John G. Browning was recently honored by the Houston Bar Foundation with its "Outstanding Legal Article" Award for 2019. At its February 25, 2020 Annual Meeting and Luncheon, the Foundation installed new officers and presented a number of awards for service to the bar. John was honored for his February 2019 article in *The Houston Lawyer*, entitled *Undaunted: Houston's Earliest African-American Lawyers*. This legal history article examined the lives, achievements, and obstacles overcome by several of the first African American lawyers to practice in Houston. It represents just the latest in John's years-long research into Texas' earliest black lawyers—research which has spawned more than a dozen published articles (including in this Journal) and which has been featured in *The Dallas Morning News*, the *Austin American-Statesman*, *Texas Lawyer*, and Fox News.



John's article was the unanimous choice for "Outstanding Legal Article" by a selection team comprised of the deans of all three Houston law schools: Dean Mike Barry, Dean Leonard Baynes, and Dean John Bullock. Unfortunately, John was unable to accept the award in person due to being in trial in Oklahoma City. However, his prolific legal history research and writing continues with his forthcoming law review article, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*. This article examines recent posthumous bar admissions of Asian American and African American lawyers wrongfully denied admission to practice over a century ago solely on the basis of race.

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• *Save the Date* •  
25th Annual John Hemphill Dinner

**WHEN:** Friday, September 11, 2020, 7 p.m.

**WHERE:** *Online!*

**KEYNOTE SPEAKER:**



**Hon. Priscilla R. Owen**  
Chief Judge  
United States Court of Appeals  
for the Fifth Circuit

**QUESTIONS:** Richard B. Phillips, Dinner Chair  
(214) 969-1700, [rich.phillips@tklaw.com](mailto:rich.phillips@tklaw.com)

Dylan O. Drummond, President  
(214) 954-4135, [ddrummond@grayreed.com](mailto:ddrummond@grayreed.com)

Mary Sue Miller, Administrative Coordinator  
(512) 481-1840, [tschs@sbcglobal.net](mailto:tschs@sbcglobal.net)

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# Historic Spring Board Meeting During Unprecedented Pandemic

The 2020 Spring Board Meeting was unexpectedly unique. When it became clear the original plans to meet at the Alamo would be impossible due to restrictions on gathering during the Covid19 pandemic, the decision was made to hold the meeting virtually. As has become the norm for many during this time of social distancing, the Board came together in a Zoom meeting. The Society's president Dylan Drummond opened the meeting in front of a virtual Alamo back drop, joking that "If we couldn't be at the real Alamo, I thought I'd make it look like the virtual Alamo!"



The Board quickly turned to business and focused discussion on how the coronavirus pandemic may impact the Society in the coming year. The Board approved a budget for fiscal year 2020-21. Discussion of plans for the 2020 Hemphill Dinner included discussion of whether it will be possible to hold an in-person gathering in September 2020. Regardless of whether an in-person dinner can be held in 2020, the Board expressed a commitment to holding the annual Hemphill event and discussed the possibilities for alternative formats.

The Board meeting culminated in the election of the slate of officers for 2020-21. Cynthia K. Timms advanced to become the Society's new President effective June 1, when Dylan O. Drummond will transition to Immediate Past President. The remaining officers for the 2020-21 year will be Thomas S. Leatherbury, President-Elect; Justice Ken Wise, Vice-President; Richard B. Phillips, Treasurer; and Lisa Hobbs, Secretary.

The Board of Trustees was followed by the Annual Meeting of the Society's membership during which the slate of new and returning Trustees was approved. Trustees elected to a first term are: Hon. Gina M. Benavides, Warren W. Harris, Hon. Xavier Rodriguez, and Hon. Don Willett. Trustees returning for a second term are: Hon. Jane Bland, Hon. Jason Boatright (retired), Hon. Larry Doss, Hon. Jennifer Elrod, Todd Smith, and Mark Trachtenberg.

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# Nominations Welcomed for the Texas Appellate Hall of Fame

**T**he Appellate Section of the State Bar of Texas is now accepting nominations for the Texas Appellate Hall of Fame. The Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas.

Hall of Fame inductees will be honored at a luncheon presentation and ceremony held by the Appellate Section during the State Bar's Advanced Civil Appellate Practice course on Thursday, September 10, 2020. Nominations should be submitted in writing to [halloffametxt@outlook.com](mailto:halloffametxt@outlook.com) no later than Wednesday, July 15, 2020.

Please note that an individual's nomination in a prior year will not necessarily carry over to this year. As a result, if you nominated someone previously and would like to ensure his/her consideration for induction this year, you should resubmit the nomination and nomination materials.

Nominations should include the nominator's contact information, the nominee's bio or CV, the nominee's photo if available, and all the reasons for the nomination (including the nominee's unique contributions to the practice of appellate law in the State). The more comprehensive the nomination materials, the better. All material included with any nomination will be forwarded to the voting trustees for their consideration in deciding whom to induct as part of this year's Hall of Fame class.

Nominations will be considered based upon some or all of the following criteria, among others: written and oral advocacy, professionalism, faithful service to the citizens of the State of Texas, mentorship of newer appellate attorneys, pro bono service, participation in appellate continuing legal education, and other indicia of excellence in the practice of appellate law in the State of Texas.

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# Calendar of Events

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

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.

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

**CANCELED: The State Bar of Texas Annual Meeting** at the Hilton Anatole Hotel in Dallas, Texas. <https://www.texasbar.com/Content/NavigationMenu/Events/AnnualMeeting/default.htm>.

September 11, 2020

**25th Annual John Hemphill Dinner** at 7:00 p.m. CST featuring keynote speaker Hon. Priscilla Owen, Chief Judge, United States Court of Appeals for the Fifth Circuit. **Online event.** Details to follow.

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## DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal's* readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal's* endorsement of the views expressed therein.

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# 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 LaFreniere

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# 2019-20 New Member List

The Society has added 44 new members since June 1, 2019, the beginning of the new membership year. Among them are 18 Law Clerks for the Court (\*) who receive a complimentary one-year membership during their clerkship.

## **GREENHILL FELLOW**

Michael Easton

Kristen LaFreniere

## **TRUSTEE**

Alia Adkins-Derrick

Hon. Dennise Garcia

Jasmine Wynton

## **CONTRIBUTING**

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Daniel Rankin\*

David Vanderberg

Elizabeth Herrera

Dylan Russell

Kirstie Wallace\*

Stephen Jones

Jason Sharp

Ethan Womble\*

Henry Legg\*

Kelsey Smith\*

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# Membership Benefits & Application

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

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

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

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

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

- Historic Court-related Photograph
- All Benefits of Patron Membership

## **Patron Membership** \$500

- Discount on Society Books and Publications
- All Benefits of Contributing Membership

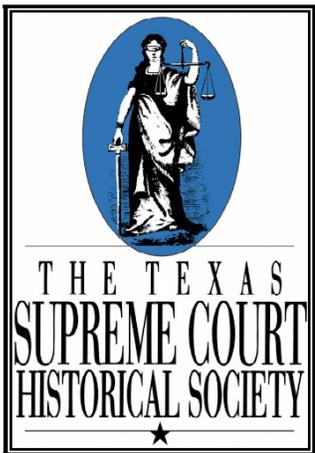
## **Contributing Membership** \$100

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

## **Regular Membership** \$50

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

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## Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, education outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

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

Join online at <http://www.texascourthistory.org/Membership/>.

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Firm/Court \_\_\_\_\_

Building \_\_\_\_\_

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City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone (\_\_\_\_) \_\_\_\_\_

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