



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2017 Vol. 6, No. 2 General Editor Lynne Liberato Executive Editor David Furlow

## Columns

### Message from the Incoming President

**By Macey Reasoner Stokes**

The Society has exciting plans for 2017, including social, educational, and volunteer opportunities that I hope will draw your interest.

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Macey Reasoner Stokes

### Executive Director's Page

**By Pat Nester**

We are always looking to motivate lawyers to add to the narrative of how the law and courts have evolved in the labyrinthine history of Texas. [Read more...](#)



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The second book in the Taming Texas series is an exciting addition to the Society's judicial civics and court history project. [Read more...](#)



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This issue of the *Journal* examines the history of family law from love through marriage to the baby carriage and, in many instances, divorce court. [Read more...](#)



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### A Tribute to Professor Joseph W. McKnight, Father of Texas Family Law

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**"Spanish Concepts in Texas Law of the Family, Succession, and Civil Procedure" by Joseph W. McKnight**

Prof. McKnight was an acknowledged expert on the law of matrimonial property, homestead, and creditors' rights—certainly *the* expert on the history of it in Texas. One example is the article that follows. [Read more...](#)



Chief Justice Hecht

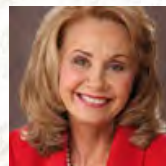
### Mediation as a Protective Tool in Custody Disputes:

#### The Legacy of *In re Lee*

**By Justice Debra H. Lehrmann**

Today, mediation is the norm, with proven results. But this was not always the case. Years ago, only visionaries saw this potential.

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Justice Lehrmann

### Tracing Commingled Funds in Divorce: Development of the Law and the Practice

**By Richard R. Orsinger**

In the last forty years, the law and practice of tracing has followed the trail blazed by creative lawyers.

[Read more...](#)



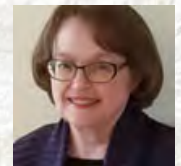
Richard R. Orsinger

### Women and the Origins of Texas Family Law

**By Elizabeth York Enstam**

Women's progress toward equal rights and the origin of family law in Texas have developed within a complex history of social customs, cultural traditions, and law.

[Read more...](#)



Elizabeth York Enstam



## Features

### [A Texas Case in the U.S. Supreme Court](#)

**By Jani Maselli Wood**

*Moore v. Texas* is a convoluted case. I wrote a portion of the original writ. And I flew to Washington, D.C. to hear the case go to oral argument. [Read more...](#)



Jani Maselli Wood in D.C.

### [Thechass to Texas: The History of Our Word](#)

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The term *thechass*, or *techass*, was a Hasinai Indian word that meant friends or allies. [Read more...](#)



Jason Boatright

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### [Andrew J. Torget's \*Seeds of Empire: Cotton, Slavery, and the Transformation of the Texas Borderlands, 1800-1850\*](#)

**By James P. Beville**

The evolution of cotton farming in Texas and the southern United States gives the reader an intriguing look at one of the primary economic drivers behind the colonization of early Texas. [Read more...](#)



### [William Dusingberrie's \*Slavemaster President: The Double Career of James Polk\*](#)

**By Patrick Judd**

Polk's direct ties to cotton growing and his personal intimacy with the peculiar institution have long been ignored or downplayed by historians. That no longer is the case. [Read more...](#)



### [My Beloved World, by Sonia Sotomayor, Associate Justice, U.S. Supreme Court](#)

**By Lauren Brogdon**

This memoir provides readers with a glimpse into an unguarded, self-reflective, and vulnerable side of the woman known as "one wise Latina." [Read more...](#)



### [Carol Dawson and Roger Allen Polson's \*Miles and Miles of Texas: 100 Years of the Texas Highway Department\*](#)

**By David A. Furlow**

Dawson and Polson examine a solid century of Texas's road-building and road-dwelling culture, incorporating top-notch research, gorgeous photos, and vivid writing. [Read more...](#)



## News & Announcements

### [Society Members: Register for This Special CLE Event!](#)

Join us in Austin or by live webcast for a Society-cosponsored CLE event you'll long remember!

[Read more...](#)

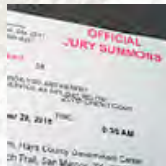


Texas Law Center

### [High Court Justice Serves on Hays County Jury](#)

**By Dylan O. Drummond**

Just after Thanksgiving 2016, Texas Supreme Court Justice Jeff Brown was summoned to serve on a Hays County jury. He did. [Read more...](#)



The summons

### [Texas Court of Criminal Appeals Turns 125](#)

**By Dylan O. Drummond**

Senate Joint Resolution No. 16 called for amendments to the Texas Constitution to include the creation of the first such court of its kind in the world.

[Read more...](#)



### [Ali James Celebrates Capitol-ism at Fall Board Meeting](#)

**By David A. Furlow**

The Curator of the Texas State Capitol and Director of Visitor Services at the State Preservation Board presented a fascinating exploration of the Capitol's history to the Society's Trustees and lunch guests. [Read more...](#)



Ali James

### [State Law Library Digitizes Historical Texas Statutes](#)

**By Dylan O. Drummond**

The State Law Library website now has available to the public for free some twenty-three digitized volumes of the Revised Civil Statutes, beginning in 1879 and ending with the 1966 supplement. [Read more...](#)



Cover of 1879 Revised Statutes

## Membership & More

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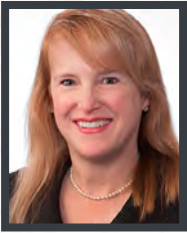
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Macey Reasoner  
Stokes

# Message from the *President*

**T**he Society has several exciting events planned for 2017 that I hope you will attend:

**Spring 2017 Board and Members Meetings.** Our Spring 2017 meeting will occur on Texas Independence Day, Thursday, March 2, 2017, at the offices of Baker Botts, One Shell Plaza, 910 Louisiana Street, Houston (phone: 713.229.1234). Trustees should arrive by 10:00 a.m. to attend the Board of Trustees Meeting, which will begin promptly at 10:15 a.m. Non-trustee members of the Society are encouraged to attend the Members Meeting, which will begin at 11:30 a.m. at the same location. See <http://www.bakerbotts.com/offices/houston> for directions and nearby parking.

**Lunch presentation by J.P. Bryan.** At noon, following the Members Meeting, all trustees and members, as well as members of the judiciary, are invited to enjoy a free, catered lunch. Our speaker will be James Perry "J.P." Bryan, Jr., founder of the J.P. Bryan Museum in Galveston and former C.E.O. of Torch Energy Advisors.

Mr. Bryan has created one of Texas's best collections of rare historic artifacts. See <https://www.thebryanmuseum.org/index>. The Bryan Museum contains 70,000 items filling a vast, two-story Renaissance Revival building, the Galveston Orphans' Home that survived the Great Hurricane of 1900. Mr. Bryan devoted two years to restoring the building and opened it as a museum in 2015. It includes 20,000 rare books (including a 1542 first edition of Spanish explorer Cabeza de Vaca's *La Relación*, recounting his travels across Texas); 30,000 historical records in Spanish, German, French, and English; religious, folk, and fine art; a scale model of the Battle of San Jacinto; the sword used to capture Santa Anna at the Battle of San Jacinto; and enough six-shooters, Bowie knives, and long rifles to fill an armory. If you'd like to attend the lunch, you must RSVP to [dafurlow@gmail.com](mailto:dafurlow@gmail.com) by February 28, 2017.

**Panel program at the TSHA Annual Meeting.** Following the lunch, the Society will present a panel program from 2:00 to 3:30 p.m. at the Texas State Historical Association's 2017 Annual Meeting at the Hyatt Regency Downtown Houston. The program is titled "Semicolons, Murder, and Counterfeit Wills: Texas History through the Law's Lens."

We appreciate our panel presenters, Judge Mark Davidson, Bill Kroger of Baker Botts LLP, and Chief Justice (Ret.) Wallace Jefferson of Alexander Dubose Jefferson Townsend, for volunteering. If you would like to attend, please RSVP to [dafurlow@gmail.com](mailto:dafurlow@gmail.com) by February 23, 2017.



(Left to right): J.P. Bryan, Jr. (photo from the J.P. Bryan Museum webpage); exterior of the museum; the museum's Grand Staircase; large-scale model of a Spanish caravel in the Spanish Colonial Era Gallery (onsite photos by David A. Furlow).

**Call for Teach Texas judicial and attorney volunteers.** We are seeking volunteer lawyers and judges to teach Texas judicial history to seventh graders in the Houston area, under the supervision of the Houston Bar Association Teach Texas Committee. Teaching opportunities are available on these days:

- Albright Middle School in the Alief ISD on February 16–17, 2017; and
- O'Donnell Middle School in the Alief ISD on April 7 and 11, 2017.

If you would like to volunteer, please contact HBA Director of Education Ashley Gagnon Steininger at [ashleyg@hba.org](mailto:ashleyg@hba.org) or 713-759-1133 or David Furlow at [dafurlow@gmail.com](mailto:dafurlow@gmail.com).

**History of Texas and Supreme Court Jurisprudence program.** Lynne Liberato and Richard Orsinger will present this year's jurisprudence symposium in Austin on Thursday, April 27 at the Texas Law Center in Austin. See details elsewhere in this issue.

**22<sup>nd</sup> Annual John Hemphill Dinner.** Scheduled for Friday, September 8, 2017, the dinner will again be held in the Grand Ballroom of the Austin Four Seasons Hotel. We are honored to have as our keynote speaker Chief Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit. More details, including sponsorship opportunities, will follow later this Spring.

Finally, 2017 will see the publication of the second book in the Taming Texas educational series funded by our Fellows. This book is entitled *Law and the Texas Frontier* and focuses on the development of the law and the courts during the frontier period. Chief Justice Nathan L. Hecht has written the foreword.

Thank you for your continued support of the Society. I hope to see you at one of these events.

**MACEY REASONER STOKES** is a partner with Baker Botts LLP in Houston and heads the firm's appellate section.

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Pat Nester

## Where We Are Depends on *Where We've Been*

**O**ur Society is always looking for opportunities to motivate suitably inclined and scholastically provisioned lawyers to add to the historical narrative of how the law and the courts have evolved in the labyrinthine history of Texas.

One of the best examples of such motivation is a CLE program that will be staged on April 27 entitled "History of Texas and Supreme Court Jurisprudence." The event will be presented live at the Texas Law Center and, for the first time in its history, will be webcast simultaneously statewide for those who can't make it to Austin.

Led by course directors Lynne Liberato and Richard Orsinger, this year's program sweeps broadly—from the grand history of Texas child custody litigation by Joan Jenkins, to a lapidary treatment of the Texas Petition Clause by Chad Baruch.

For those of you who missed it at the State Bar's Annual Meeting last June, the course will feature a repeat performance, by modern luminaries, of the oral arguments in *Johnson v. Darr*, the Woodmen of the World case presided over by the first and only all woman Texas Supreme Court in 1925, all the regular male members of the Court having recused themselves because of their affiliation with the Woodmen.

A blue ribbon panel including the Hon. Priscilla Owen, Larry Cotton, Wayne Fisher, and Mike Hatchell will dissect the 1995 landmark case *duPont v. Robinson*. This case established the standard for expert testimony in Texas, a mountain spring at the time that has now become a mighty river in its impact on Texas case law. See the full program on page 73 of this issue.

Two prior installments of this course in 2015 and 2013 created an extensive body of literature for the historically inclined, all of which is accessible on TexasBarCLE's Online Library (<http://www.texasbarcle.com/CLE/OLHome.asp>).

There you can find Dylan Drummond's account of "The Alamo Bar Association," the six lawyers who gave all for Texas independence at the Alamo; an award-winning treatise on the role of Texas courts in the rise of modern American contract law by Mr. Orsinger; Prof. Dorsaneo's history of Texas civil procedure; and a fascinating account of the Supreme Court of the Texas

Republic by David Furlow.

At the April event, Ben Mesches and Marilyn Duncan will give special attention to Chief Justice Jack Pope's influence on material changes in the processes and outlook of the Supreme Court. Judge Mark Davidson, Colbert Coldwell, and Bill Ogden will discuss the often reviled Reconstruction Semicolon Court, giving Mr. Ogden the opportunity to reassess the role of an ancestor of his, Justice Wesley B. Ogden, who served on that court.

Many in our Society believe that today's courts, law, and procedure can be fully understood only by reference to historical trends that laid the groundwork for everything we see today. CLE programs that give the historical context are rare. So please help support the April program by attending if you can.\* Appellate lawyers may register for a companion program the following day entitled "Practice Before the Supreme Court."

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\* Special pricing has been established for this program, but lawyers in good standing who have any issue with the price may qualify for an instant scholarship. See <http://www.texasbarcle.com/CLE/site/helpfiles/Scholarship%20Form.pdf>

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# Fellows Column

By David J. Beck, Chair of the Fellows

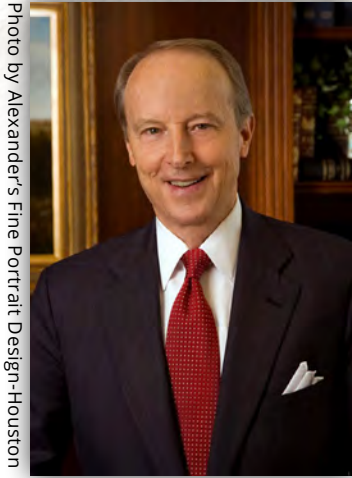


Photo by Alexander's Fine Portrait Design-Houston

I want to update the Fellows on our latest book. The second book in the Taming Texas series is an exciting addition to the Society's judicial civics and court history project. The first book, *Taming Texas: How Law and Order Came to the Lone Star State*, was published in January 2016 and became the centerpiece of the judicial civics curriculum presented to almost 10,000 seventh-grade Texas history students in the Houston area that spring. The Houston rollout of the Taming Texas project took 32 judges and 134 attorneys into classrooms in eight school districts. The response by teachers and students was overwhelmingly positive, and we plan to expand the program even more in the coming years.

While the first *Taming Texas* book covered the evolution of our state's legal system from the colonial era through the present day, the second book, *Law and the Texas Frontier*, focuses on how life on the open frontier was shaped by changing laws. The historical photographs are enhanced by a large number of original drawings, giving the new book a dramatic and attractive look. Taken together, the two books offer a colorful, educational, and sometimes surprising picture of the legal heritage of Texas. We are pleased that Chief Justice Hecht has again written the foreword for the book. Coauthor and editor Marilyn Duncan is putting the finishing touches on *Law and the Texas Frontier*, and we plan to publish it in Spring 2017.

We are currently launching our Spring Taming Texas program, in partnership with the Houston Bar Association. Justice Brett Busby, Judge Debra Mayfield, and Fellow David Furlow, the co-chairs of the HBA committee implementing the project, are recruiting the judges and lawyers to volunteer to teach the program with the newly revised classroom curriculum. We encourage you to participate. You can access the new materials under the Resources tab at [www.tamingtexas.org](http://www.tamingtexas.org).

The Society's Fellows program continues to grow. We have recently added Harry M. Reasoner as a new Fellow, bringing the total number of Fellows to 40. They are all listed below.

I want to express once again our appreciation to the Fellows for their support of programs such as our Taming Texas judicial civics and court history project and our historic oral argument reenactments. If you are not currently a Fellow, please consider joining the Fellows and supporting this important work. If you would like more information or want to become a Fellow, please contact the Society office or me.



## FELLOWS OF THE SOCIETY

### Hemphill Fellows

(\$5,000 or more annually)

David J. Beck\*

Joseph D. Jamail, Jr.\* (Deceased)

Richard Warren Mithoff\*

### Greenhill Fellows

(\$2,500 or more annually)

Stacy and Douglas W. Alexander

Marianne M. Auld

S. Jack Balagia

Robert A. Black

Elaine Block

E. Leon Carter

Tom A. Cunningham\*

David A. Furlow and

Lisa Pennington

Harry L. Gillam, Jr.

Marcy and Sam Greer

William Fred Hagans

Lauren and Warren Harris\*

Thomas F.A. Hetherington

Allyson and James C. Ho\*

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.\*

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\*

Shannon H. Ratliff\*

Harry M. Reasoner

Robert M. Roach, Jr.\*

Leslie Robnett

Professor L. Wayne Scott\*

Reagan W. Simpson\*

S. Shawn Stephens\*

Peter S. Wahby

Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter\*

\*Charter Fellow

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David A. Furlow

# Let's Get *Familiar*

Let's begin by talking about a garden, Adam and Eve, and the pernicious consequences of a serpent's seductive ways.

First, let's take a look at the garden. That's frontier Texas. Rough-hewn Davy Crockett said it best in his January 9, 1836 letter to his daughter Margaret and her husband Wiley Flowers:

I must say as to what I have seen of Texas it is the garden spot of the world. The best land and the best prospects for health I ever saw, and I do believe it is a fortune to any man to come here. There is a world of country here to settle.

Texas was a garden all right, but a savage one when nature took its course.

Two couples, the Adams and Eves of our story, settled in an Eden known as Gonzales County. That county's marriage records reflect that the first pair, William Hill and his wife Emiline, bound themselves to one another in 1835 under the "existing custom of the Country, by bond," which the couple then solemnized "according to the laws and forms established by the Republic of Texas" through a formal ceremony in 1838. William left his mother and father, and cleaved unto his wife Emiline, who "ever demeaned herself as a virtuous and loyal wife, performing on her part all of the duties incumbent on her as such and at all times exercising toward her husband, the said William Hill, the utmost kindness, constance and care..."

Our other Adam and Eve, Mark W. Dikes and Mary West, entered that same Gonzales County Garden of Eden. Caught up in the sudden passions of the Revolution's Runaway Chase, they eloped on April 6, 1836 and entered into the bonds of



Plaintiff Emiline Hill's petition for divorce against Defendant William Hill, *Gonzales County Marriage Records*, Volume 1, 486-87. Photo by David A. Furlow.

64  
 District Court March 16<sup>th</sup> 1843  
 Come the parties by their Attorneys  
 & you to wit: B B Robinson A H Chisholm  
 C L Wenzel & A Haldeman  
 C L Wenzel & A Haldeman  
 K W Boston A M Cunningham & B R Rice  
 J D Clements who being placed under  
 and sworn well and truly to try the issue  
 joined on this 16<sup>th</sup> day for the plaintiff  
 and of full the sum of One hundred and  
 nine dollars the amount claimed in plaintiff's  
 petition with interest thereon at five per  
 cent from the seventh day of June  
 A D 1838 until paid and costs. It is  
 therefore considered by the Court that  
 the plaintiff recover & c.

Final A D 1843

Mark W Dikes v Sarah Dikes  
 Robinson atty  
 Gray atty  
 Republic of Texas In the District Court in  
 Gonzales County Texas 1841  
 To the Hon A Haldeman Judge of the  
 2<sup>d</sup> Judicial District. The petition of  
 Mark W Dikes respectfully represents that on the  
 fifth day of April A D 1839 Eight  
 hundred and thirty six your petitioner  
 and Sarah Dikes entered into the bonds  
 of matrimony in due form and your  
 petitioner and his said wife Sarah Dikes  
 together about fourteen months and  
 while your petitioner was absent for a  
 few weeks to the town of Matamoros  
 for the purpose of business and while

36  
 for himself and his said wife she refused to be  
 bed and board & totally abandoned your peti-  
 tioner & on your petitioners return he tried to  
 vain to induce his said wife to cohabit with him  
 but to do so, the attorney refused & still refused  
 now resides apart from your petitioner, and  
 your petitioner is well persuaded that him  
 and his wife must remain separated, as your  
 petitioner has been informed & has reason to believe  
 and does verily believe that during your peti-  
 tioners absence from his said home, that his  
 said wife was on sundry occasions and on  
 sundry times guilty of having sexual con-  
 junction with several men, to the disgrace  
 of your petitioner & his said wife & thereby  
 rendering her an unfit companion for  
 any reputable man, & your petitioner  
 has been further informed & believes that  
 his said wife is now married and resides  
 in Robinson County in this Republic in  
 a state of adultery and in open violation  
 of, and against, the laws & public morals  
 of your petitioner prays that his said wife  
 may be made defendant to this petition  
 and required to answer this petition at the  
 next term of the District Court in & for  
 the County of Gonzales & that your petitioner  
 pray why the marriage of said Sarah shall  
 not be dissolved absolutely & forever, for  
 the causes aforesaid, & that the said Sarah  
 forever have of either Dower or Alimony  
 five as much as his said wife took  
 with her all his property at the time of  
 her departure, that your petitioner  
 have all that he has since so acquired &  
 never more to have hereafter

Plaintiff Mark W. Dikes' petition for divorce against Defendant Sarah Dikes, Gonzales County Marriage Records, Volume 1, 564-65. Photos by David A. Furlow.

holy matrimony. They pledged their troth two weeks and a day shy of when Sam Houston won Texas its independence on the San Jacinto Battlefield, beginning their family while a new world was a-borning into the Lone Star Republic.

But lo, that sly serpent slipped into that garden spot, Gonzales County. In that guise Satan hissed wrathful words in William Hill's ear, encouraging him to abuse, as she later pled:

On or about the twenty-first day of August last [1840], and at various other times previous to that day, the said William Hill cruelly and barbarously beat, mangled and burned your Petitioner and in a fiend-like manner threatened to stab and kill her that in consequence of the violence of the said husband she was compelled to abandon his home and seek protection and safety in the kinship and safety of her neighbors.

In 1841, Emiline Hill hired an attorney, threw herself on the mercy of the Honorable Judge Anderson Hutchinson of the Fourth Judicial District, centered in San Antonio de Bexar, and sued for a decree of divorce and an award of alimony.

Similarly, that Great Deceiver seduced Mary Dikes, and on more than one occasion. While her husband was away in Natchitoches purchasing supplies, Mary entertained men to whom she was not betrothed. So on July 26, 1841, Mark pled that,

[Y]our Petitioner has been informed...and does verily believe that during your petitioner's absence from his said home, that his said wife was on sundry occasions and on sundry times guilty of having sexual connections to the disgrace of your petitioner...

Mark petitioned Judge Hutchinson to grant him a divorce.

Judge Hutchinson granted Emiline Hill a divorce because William Hill proved himself to be Mars, while he dissolved Mark Dikes' marriage after Sarah showed herself to be Venus. Judge Hutchinson signed those divorce decrees under an 1841 statute the Republic's Congress enacted to authorize courts to end marriages not made in Heaven. As Don Marquis wrote in his "Roach of the Taverns" essay in 1927's *Archy and Mehitabel*,

I would rather start a family than finish one  
Blood will tell but often  
It tells too much.

Faded nineteenth century ink tells sad tales, but at least they are more peaceful tales of family life than those previously written in blood.

Whether partners are named Adam and Eve, Adam and Steve, or Eve and Liv, family law governs the creation, preservation, and dissolution of Texas families. This issue of the *Journal* examines the history of family law in its progression from love through marriage to the baby carriage and, in too many instances, divorce court. To those who insist that all marriages lead either to divorce court or the grave, let us remember what President Thomas Jefferson wrote to his friend Francis Willis, Jr. on April 18, 1790:

The happiest moments of my life have been the few which I have pas[sed] at home in the bosom of my family...[P]ublic emolument contributes neither to advantage nor happiness. It is but honorable exile from one's family and affairs.

This issue's contributors agree with Jefferson's sanguine view of what brings happiness to life.

Texas Supreme Court Chief Justice Nathan Hecht opens this issue by discussing how his Southern Methodist Law School teacher and mentor Professor Joe McKnight, a participant in this Society's scholarly enterprise, recognized that Spaniards, Mexicans, and Tejanos created the strong legal foundation on which subsequent generations of Anglo-American settlers, judges, and legislators erected the constitutional, common law, and statutory structures of Texas family law. Readers can evaluate Professor McKnight's unique contributions by reading relevant excerpts of an article he prepared for the State Bar of Texas: "Spanish Concepts in Texas Law of the Family, Succession, and Civil Procedure."

Texas Supreme Court Justice Debra Lehrmann brings us back to the twenty-first century with her article analyzing the way the Legislature and the courts have learned to use Alternative Dispute Resolution to protect the lives and rights of the most vulnerable members of a family: children. Her article, “Mediation as a Protective Tool in Custody Disputes: The Legacy of *In re Lee*,” explores the history of ADR, particularly mediation, from 1995 through the present, while focusing in depth on the issues that culminated in the Texas Supreme Court’s ruling, four years ago, in *In re Lee*, 411 S.W.3d 445 (Tex. 2013).



Photo by David A. Furlow.

In “Women and the Shaping of Texas Family Law,” independent scholar and author Elizabeth York Enstam applies a broad base of knowledge and insights she developed while studying the rise of women in Dallas to positions of prominence and power. Ms. Enstam explores how women shaped Texas family law over the past two centuries from frontier to modern urban times.

San Antonio bar leader and legal scholar Richard Orsinger then leads us on a one-and-a-half-century journey from the Republic of Texas to the present in his magisterial overview of the evolving Texas law of community and individual property during and after marriage. Mr. Orsinger’s article “Tracing Commingled Funds in Divorce: The Development of the Law and the Practice” shows how a series of judicial opinions have enabled courts to trace the proceeds of marital and estate property to determine what properly belongs to whom in the vast multitude of cases where partners disagree about how to divide *mine* from *thine*.

This issue presents two special features, one set squarely in the present, and the other offering fresh perspectives on Texas’s distant past. Public Defender Jani Maselli Wood shares her recent experience of “Attending Oral Argument in the U.S. Supreme Court in a Texas Case on

Appeal.” Ms. Wood attended that November 29, 2016 oral argument in *Moore v. Texas*, Cause No. 15-797 in the U.S. Supreme Court, with Texas Court of Criminal Appeals Judge Elsa Alcala, who wrote the dissenting opinion in that case. Ms. Wood’s article conveys a vivid sense of what it’s like to see and hear oral argument in a U.S. Supreme Court appeal concerning a death penalty decision in Texas.

Recently-appointed Dallas Court of Appeals Justice Jason Boatright then breaks fresh ground by showing how the word “Texas” first came to appear on Spanish maps. His fascinating discussion of how a trans-Atlantic vision quest led to the creation of Spain’s frontier province of Texas proved so interesting that it led me to visit the superb Coastal Bend Museum in Victoria, which displays artifacts excavated from France’s abortive Fort St. Louis and other items that bring to life the Spanish colony that arose soon afterwards.

Finally, this issue offers a cornucopia of scholarly book reviews. Jim Bevill, author of the economic history *The Paper Republic: The Struggle for Money, Credit and Independence in the Republic of Texas*, discusses the importance of Andrew J. Torget’s book *Seeds of Empire: Cotton, Slavery, and the Transformation of the Texas Borderlands, 1800–1850* and the light it sheds on the role cotton and slave labor played in shaping Texas and leading to the Civil War.

Independent scholar Pat Judd casts an inquiring eye at an important but often overlooked biography, William Dusingberre’s *Slavemaster President: The Double Career of James Polk*, to assess President Polk’s critical role in bringing Texas into the United States.

Lauren Brogdon then shares her insights about U.S. Supreme Court Associate Justice Sonia Sotomayor’s extraordinary life by scrutinizing the critical life-decisions that led to her service as the first Latina member of the U.S. Supreme Court.

And I offer my own take on the vital role law has played in shaping the roads and highways that take Texans from one part of the Lone Star State to another as I review Carol Dawson’s and Roger Polson’s 2016 book *Miles and Miles of Texas: 100 Years of the Texas Highway Department*. This new book, hot off the Texas A&M University Press, proves that in Texas, the roads go on forever, while the parties never end.

Cutting-edge news of the Society, the State Bar, and Texas courts, as well as the most recent calendar of coming events, enable readers to plan out what they will see and do in 2017.

I highly and heartily recommend this special issue to anyone interested in learning more about the living, breathing history of Texas family law.

**DAVID A. FURLOW** is a historian, lawyer, journalist, and sometimes archaeologist who lives in Houston and Wimberley.



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# A Tribute to Professor Joseph W. McKnight, Father of Texas Family Law



## **Introduction**

by Nathan L. Hecht, Chief Justice, Supreme Court of Texas

Journeys past should guide the way ahead. So when SMU Law Professor Joseph McKnight sat down to help draft the 1970 Texas Family Code,<sup>1</sup> or many of its revisions since, or the 1980 amendment to the Texas Constitution's provision on separate and community property,<sup>2</sup> or the Texas Constitution's homestead protections,<sup>3</sup> or any number of other statutory and constitutional provisions, he was guided by his vast knowledge of how we've come to where we are, of the unique combination of forces—English, Spanish, Mexican, and American pioneering—that have influenced the development of Texas law. He was an acknowledged expert on the law of matrimonial property, homestead, and creditors' rights—maybe *the* expert of his day. He was certainly *the* expert on the history of that law in Texas. One example is the article that follows, *Spanish Concepts in Texas Law of the Family, Succession, and Civil Procedure*.

Professor McKnight was a prolific writer, but unlike many prolific writers, he was actually cited as authority. His preferred medium seems to have been law review articles. The first *Annual Survey of Texas Law* published in 1967 in the *Southwestern Law Journal* (now the *SMU Law Review*), contained Professor McKnight's article on

<sup>1</sup> Act of June 2, 1969, 61st Leg., R.S., § 1, 1969 Tex. Gen. Laws 2707. See *Ramirez v. Ramirez*, 524 S.W.2d 767, 769 (Tex. App.—Corpus Christi 1975, no writ); Joseph W. McKnight, *Husband & Wife— The Texas Family Code Symposium: Texas Family Code & Commentary*, 5 TEX. TECH L. REV. 281, 337 (1974).

<sup>2</sup> TEX. CONST. art. XVI, § 15. See James W. Paulsen, *The Unsecured Texas Creditor's Post-Divorce Claim to Former Community Property*, 63 BAYLOR L. REV. 781, 822 (2011) ("Professor Joseph McKnight of the SMU Law School was the principal drafter of the 1980 constitutional amendment.").

<sup>3</sup> TEX. CONST. art. XVI, § 50.

matrimonial property,<sup>4</sup> and for the next forty years, every *Annual Survey* contained his views on the latest developments. After a one-year hiatus, he was back.

Courts do not often rely on law review articles for authority. I've found thirty-five cases that cited Professor McKnight's articles and other writings, too many to list here. His most-cited article—nine times by my count—was his 1990 contribution to the *Annual Survey*, observing that it is harder to prove common-law marriage “[i]n a society in which non-marital cohabitation for extended periods of time is far more common than it once was”—a dry comment if ever there was one.<sup>5</sup> In one case, the Supreme Court of Texas cited the article, over a dissent I joined, also citing it, reversing the court of appeals, which had also cited it.<sup>6</sup> He was also cited as authority by both sides of the Court's debate over the proper roles of state and federal constitutional analysis.<sup>7</sup> That opposing sides would claim him for their own reminds me of the time he asked me, a law student, what the class had thought of one of his lectures. I replied we were all a little confused. “Splendid,” he said, genuinely complimented.

I first met Professor McKnight in 1971, when I started law school at SMU. I stopped by his office occasionally to chat, drawn perhaps by his careful organization of thousands of pages of notes, articles, research, and drafts for the various projects he was working on at the time into piles on the floor and furniture. Not fully appreciative of his stature, I felt we could become friends, and we did. He was the best kind of friend to have: supportive, but frank. After I came to the Supreme Court of Texas, I would often drop by the SMU Law Library, where I'd find him invariably working in the Rare Books Room. “Come in,” he'd say, almost immediately followed by, “I was just reading your opinion in [the latest family law case], and I greatly fear you got it exactly wrong.” Then we'd argue awhile, not sharply, as people do now, but as if he'd just come from San Angelo, where he grew up, or from Oxford, which he loved so dearly.



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<sup>4</sup> Joseph W. McKnight, *Matrimonial Property*, 21 Sw. L.J. 39 (1967).

<sup>5</sup> Joseph W. McKnight, *Family Law: Husband and Wife*, 44 Sw. L.J. 1, 2–3 (1990).

<sup>6</sup> *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993), reversing 838 S.W.2d 909, 913 (Tex. App.—Beaumont 1992); *ibid.* at 936 (Gonzalez, J., joined by Hecht, J., dissenting).

<sup>7</sup> *Compare Ex parte Tucci*, 859 S.W.2d 1, 29 n.30 (Tex. 1993) (Phillips, C.J., concurring) (quoting Joseph W. McKnight, *Stephen Austin's Legalistic Concerns*, 89 Sw. Hist. Q. 239, 265 (1986): “most of the 1833 Constitution was an amalgamation of the Tennessee, Missouri, and Louisiana constitutions”), with *Davenport v. Garcia*, 834 S.W.2d 4, 7 n.2 (Tex. 1992) (opinion by Doggett, J.) (citing the same article for authority that Stephen F. Austin was an advocate of a strong state constitution).



## ***Spanish Concepts in Texas Law of the Family, Succession, and Civil Procedure***<sup>8</sup>

by Joseph W. McKnight

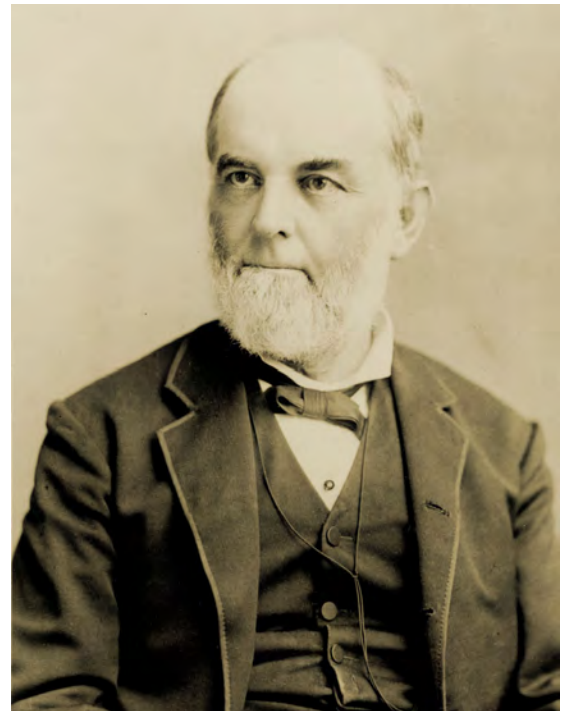
Hispano-Mexican law has played a significant role in the development of Texas's legal system in the fields of judicial procedure and family law. Several of these rules of law have given a flavor to Texas jurisprudence that make it peculiarly Texan. The exposure to Hispano-Mexican law permitted early colonists greater breadth in determining the particular rules and procedures to be followed as Texas evolved from a Hispano-Mexican province to republic to a state of the Union.

The nature and extent of Hispanic legal influence in our legal system is sometimes attributed to a notion that particular rules of Hispanic law (in place from the mid-eighteenth century) had become so much a part of the local culture that they would not be ousted by the great influx of Anglo-Americans with their predilection for Anglo-American laws a century later.

The true picture is fundamentally different: though Hispanic rules had long been established in some areas of Texas, the persistence of Hispanic legal institutions of general application were almost wholly the result of laws passed by the Congress of the Republic of Texas which kept certain selected rules in effect. As Chief Justice A. H. Willie put it: "It is natural that a State passing successively under different systems of laws, should, when it came to adopt a code for itself, retain some of the rules and provisions of its former laws, such as experience had shown to be wise and beneficial."<sup>9</sup>

The significant fact was that there were lawyers among the Anglo-American colonists who educated themselves in the subsisting legal system which in some respects they and the rest of the settlers found consistent with their situation. The fact that there were lawyers in practice among the Anglo-American colonists during the earliest period of settlements may seem an almost trivial circumstance at first glance, but it was this fact that distinguished Texas legal history from that of the rest of the states on the western frontier.

The important period of Hispanic legal dominance spanned the first four decades of the nineteenth century. The period of 1800–1810 was the most significant decade of Spanish legal administration under European sovereignty. During the next ten years Texas, like the rest of



Chief Justice Asa H. Willie led the Texas Supreme Court from 1882 to 1888.  
Photo courtesy of the Texas State Library and Archives.

<sup>8</sup> Excerpts from an unpublished paper prepared for the State Bar of Texas Professional Development Program on the Influence of Spain on the Texas Legal System, June 1992. This article includes only the portions of the paper that relate to Texas family law.

<sup>9</sup> Report of W. L. Prather, George W. Davis, and Lewis R. Bryan to the Texas Bar Association, reprinted as *The Blending of Law and Equity*, 30 AM. L. REV. 813, 814–15 (1896).

New Spain, was embroiled in revolutionary activity that culminated in Mexico's independence (1821) from her old-world sovereign. During the 1820s Texas received her first big wave of Anglo-American settlers, bringing with them new ideas of American society. To those arriving during the 1820s and '30s, it was obvious that the law in force was a foreign system. The terminology of the law was Spanish, and the rules governing such vital institutions as land ownership, marriage, and inheritance were clearly different from those that prevailed in the United States.

Though Stephen F. Austin and other empresarios had limited law-making powers as a part of their administrative functions, they (like their colonists) perceived the law as strictly territorial. Since the territorial sovereign adhered to the Spanish legal system, the empresarios did not see themselves as having the power to establish permanent rules that might be contrary to Hispanic traditions. From 1820 to 1840 the general principles of the civil law were recognized as the law of Texas.<sup>10</sup>

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During the 1820s and 1830s, Stephen F. Austin's settlers applied Spanish law in the Austin Colony's capital at San Felipe de Austin. Photo by David A. Furlow.

<sup>10</sup> *Ibid.* at 814.

## ***Family Law and Succession***

The most considerable substantive residue of Hispano-Mexican law is in the fields of family law and succession. With respect to the strict formalities of marriage required by Spanish law, the Hispanic impact on the development of modern Texas law was negative but nonetheless significant. The difficulty of complying with clerical formalities in a land unsupplied with clerics created an early dilemma in complying with such requirements and generated a favorable attitude toward informality in marriage that still persists.

In spite of its generally rigid approach to the formal requisites of marriage, Spanish law also recognized that when a marriage had been entered into in good faith, many of the legal consequences of a valid marriage should follow, even if the marriage later proved to be invalid. This ameliorative doctrine of putative marriage was, therefore, perpetuated in Texas law to achieve a fair division of what would have been community property of a valid marriage and to make children of the invalid union legitimate.

Although the related continental principle of legitimation had been enacted in Virginia, from which Texas law on that subject was derived, the Spanish tradition of adoption contributed to Texas's enactment of an adoption statute in 1850. Apart from Mississippi, where an adoption statute was enacted in 1846, Texas was the first Anglo American state to institute adoption generally and permanently.<sup>11</sup> The law had a particularly Spanish ring ("to adopt as an heir") as at that time Texas still had the Spanish doctrine of forced heirship, that is, the rule that descendants could not be [disinherited, and an adopted child thereby became an heir. C]hildren adopted under Texas law can now be disinherited along with actual children (as has been the rule since 1856), [but] an adopted child maintains his Spanish right to inherit from his actual parents unless the court of adoption specifically denies that right.<sup>12</sup>

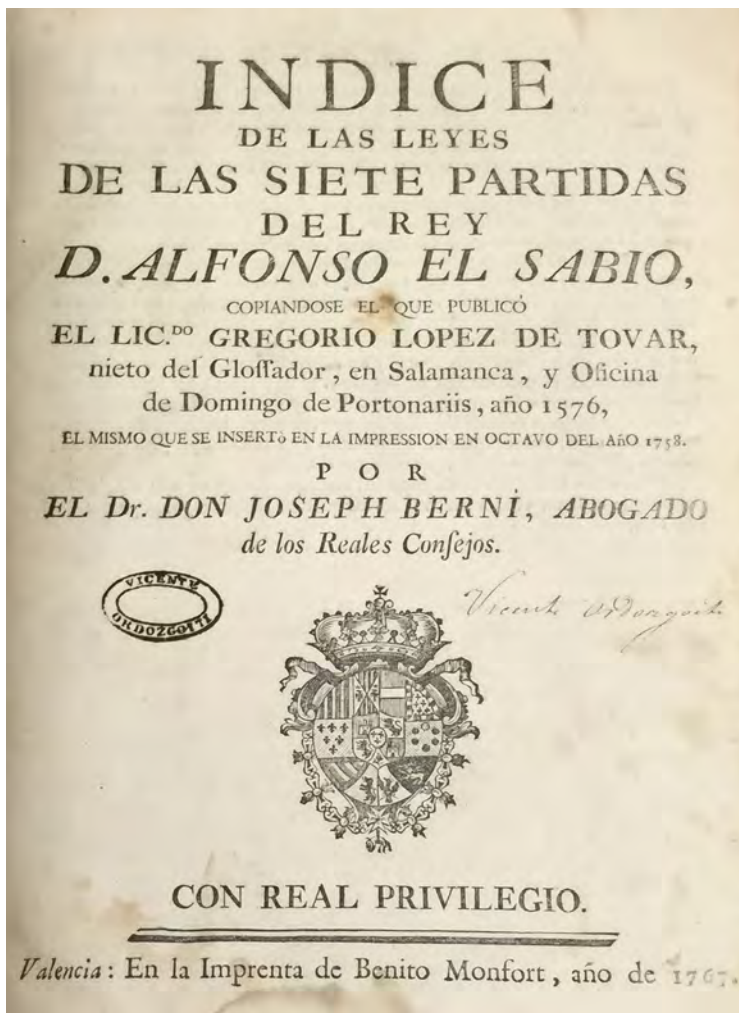
The Texas marriage contract law enacted in 1840 also took forced heirship into account: As borrowed from the law of Louisiana, the statute was carefully worded so that marriage contracts could not be used as a means of circumventing the rule against disinheritance. When the rule against disinheritance was repealed in 1856, however, the Legislature overlooked the cross reference to it in the marriage contract law, and it was not until 1967 that the reference to forced inheritance was removed so that marriage contracts could be more effectively drawn.

Our most significant Hispanic institution in the field of family law and succession is the doctrine of community property: the principle that a husband and wife share the gains of marriage equally between them. On their arrival in this new land the Anglo-American colonists realized that this principle of Spanish family law was particularly responsive to the needs and realities of frontier life. Just as each spouse shared equally in the struggle against the forces of nature and hostile Indians, each spouse shared in the gains of marriage.

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<sup>11</sup> For a general account of the survival of Hispanic principles of legitimation and adoption in the Spanish borderlands, see Joseph W. McKnight, "Legitimation and Adoption on the Anglo-Hispanic Frontier of the United States," *Legal History Review* 53 (1985).

<sup>12</sup> Several words were missing in the copy of the original text; Chief Justice Hecht and Professor Jim Paulsen supplied a wording that seems close to what Professor McKnight intended.



Index to *Las Siete Partidas* (*Seven Parts of the Law*) (1767). Baker Botts Archival Collection; photo by David A. Furlow.

This principle was very different from that of the law under which those colonists had been nurtured in English-speaking communities in the United States. The prevailing American rule was that borrowed from the English: that during marriage the husband and wife were one, and, to use Blackstone's phrase, "the husband was the one." Under the Anglo-American scheme of marital property law, all of the wife's earnings, all the income from her lands, indeed ownership of all her property except land, belonged to her husband. After her husband's death, a wife still owned the land which she brought into marriage or which she might have inherited during marriage, but otherwise she was protected only by getting a life interest in a third of her husband's lands. That these rules were unjust had been widely recognized, but there was no effective movement for change in the Anglo-American states until the mid-nineteenth century. The Anglo-American colonists in Texas saw in the Spanish marital property system a vast improvement over the law as they had known it, and in 1840 they specifically excepted the law of matrimonial property from the general reception of English common law.

Other formerly Hispanic territories in the Southwest have also perpetuated community property law, and by borrowing from the law of Texas and Louisiana and perpetuation of Hispanic traditions, the principle has long been in force in New Mexico, Arizona, California, Nevada, Washington, and Idaho and has recently been adopted in Wisconsin.<sup>13</sup> From the Hispanic principle of community property the joint income tax in our federal tax structure ultimately developed. So out of the southwest and from one of our ancient Castilian institutions, a nationwide institution has been fashioned.

Another concept that has received wide acceptance is rooted in the Hispanic principle of protection of certain vital properties from the claims of creditors. From the thirteenth century onward, particular types of property of various classes of Castilians were privileged from seizure. Apart from these, there were other general exemptions: ordinary clothing, implements, beasts of husbandry, tools of trade, and household furnishings for daily use.

<sup>13</sup> For an extensive account of the succession-related elements of Spanish community property in the United States, see Joseph W. McKnight, "Spanish Law for the Protection of Surviving Spouses in North America," *Anuario de Historia del Derecho Español* 57 (1987): 365, 373.

Relying on this Spanish tradition and its enactment by the Mexican state of Coahuila y Texas in 1829, Texas enacted the first American homestead law in 1839.<sup>14</sup> In 1845 this rule protecting the home from the claims of creditors was given constitutional status along with doctrine of community property. Almost all other states (with more or less liberality) have now adopted the concept of homestead protection.

## **Conclusion**

The legacy of Hispanic law to the law of Texas is a significant one. It is a most striking sociological phenomenon when a people of their own free will abandon the institutions on which they have been reared in favor of foreign rules generally available only in a foreign tongue. But that is what happened in the Texas Republic. It speaks well for the foresight of those pioneers that those Spanish institutions which they found preferable to Anglo-American ones have proved so durable.

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<sup>14</sup> See Joseph W. McKnight, "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle," *Southwestern Historical Quarterly* 86 (1983): 369, 381-93.



**JOSEPH W. MCKNIGHT** was Professor Emeritus of Law and Larry and Jane Harlan Faculty Fellow Emeritus at SMU Dedman School of Law at the time of his death in November 2015. He was a founding member and trustee of the Texas Supreme Court Historical Society and head of the Society's Supreme Court History Book Project.



**NATHAN L. HECHT** is the 27th Chief Justice of the Supreme Court of Texas. He has been elected to the Court six times, first in 1988 as a Justice, and most recently in 2014 as Chief Justice. He is the longest-serving Member of the Court in Texas history and the senior Texas appellate judge in active service.

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# Mediation as a Protective Tool in Custody Disputes: The Legacy of *In re Lee*

By Justice Debra H. Lehrmann

***“Discourage litigation.  
Persuade your neighbors to compromise  
whenever you can.”***

**– Abraham Lincoln**

## **Introduction: The Importance of Alternative Dispute Resolution in Family Law Disputes.**

Today, mediation—a process that is known to offer diplomatic resolutions for countless litigants—is the norm, with proven results. But this was not always the case. Years ago, only visionaries saw this potential. Perhaps more than in any other area of the law, alternative dispute resolution (ADR) provides a crucial mechanism to assist litigants in child-custody proceedings. However, only the most forward-thinking saw the possibilities in the early 1980s, and the Family Law Bar was at the forefront of the movement. Both statewide and nationally, the Family Law Bar and the judiciary have embraced and promoted ADR for over thirty years.<sup>1</sup> This article examines the history of ADR in the context of Texas family law cases.

Undoubtedly, ADR methods such as mediation, arbitration, and collaborative law practice are less contentious and more cooperative than traditional litigation. The availability of these critical tools helps minimize the emotional harm that a child may experience when his or her parents are involved in family law litigation. This early and energetic support of family law ADR has protected countless children from needless suffering and trauma.

Nothing is more important than protecting the safety and welfare of our children, and most parents who seek custody of their children believe that their efforts are directed at their child’s best interests. But custody litigation has enormous emotional and financial costs, and its harmful effect on children is well documented.<sup>2</sup> Children exposed to high-conflict custody cases can experience lifelong emotional turmoil, depression, financial troubles, difficulty in school, and alienation from their parents.<sup>3</sup>

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<sup>1</sup> See Association of Family and Conciliation Courts, Foreword to the Model Standards of Practice for Family and Divorce Mediation, Mediate.com (August 2000), <http://www.mediate.com/articles/afccstds1.cfm> (chronicling the American Bar Association’s involvement in producing model standards for family law mediation).

<sup>2</sup> See, e.g., David Mechanic and Stephen Hansell, “Divorce, Family Conflict, and Adolescents’ Well-Being,” *Journal of Health and Social Behavior* 30 (1989): 105 (explaining that “[h]igher levels of family conflict were associated with increases in adolescents’ depressed mood, anxiety, and physical symptoms over time”).

<sup>3</sup> Linda D. Elrod, *Reforming the System to Protect Children in High-Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 497 (2001).



Tarrant County Family Law Courts. [tarrantcounty.com](http://tarrantcounty.com)

Much of this suffering can be reduced or avoided in a typical family law scenario.<sup>4</sup> In truth, the vast majority of custody disputes arise between two adequate parents, both whom want what is best for their children.<sup>5</sup> But these parents are frequently afraid of losing their children to the other parent, and in reaction, escalate the conflict by attempting to demean each other.<sup>6</sup> In turn, this escalation negatively impacts the subject children. Therefore, the *process* of litigation, by adding conflict to an already contentious situation, often causes greater trauma to children than the conflict that led to the underlying dispute.<sup>7</sup> This is only compounded by the time and expense involved in litigation, which can further tax the emotional and financial resources of the families involved.<sup>8</sup>

ADR, especially mediation, can help prevent conflicts from

needlessly escalating. Mediation typically fosters a more collaborative process that is less harmful to children than traditional litigation. By encouraging deals that both parents voluntarily agree to, such as mediated settlement agreements (MSAs), this process helps shift the focus from “winning” and proving that one parent is “best” to a cooperative goal of finding a way for the children to continue their relationships with both parents. Such a focus is preferable in the majority of custody disputes where both parents are willing and able to provide adequate care

<sup>4</sup> See *ibid.* at 522 (“The vast majority of low conflict cases can be steered to non-adversarial channels through mediation and collaborative divorce but may benefit from general educational programs and other services.”).

<sup>5</sup> Most divorces are not described as “high-conflict” cases. See, e.g., Elrod, *Reforming the System*, at 498 (stating that a small number of parents escalate to high-conflict methods, and citing numerous studies estimating such divorces as between 10 percent and 25 percent of divorces overall).

<sup>6</sup> See Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 *FAM. LAW QUARTERLY* 659, 659–60 (noting that 71 percent of divorcing parents reported that the “court process escalated the level of conflict and distrust ‘to a further extreme’”).

<sup>7</sup> See Deborah A. Luepnitz, “Which Aspects of Divorce Affect Children?,” *Family Coordinator* 28 (Jan. 1979): 79 (examining a group of college students who were the children of divorced parents, with 83 percent of respondents reporting “feeling stress during at least one phase of the divorce,” and half of the sample experiencing greater stress pre-divorce and a third experiencing greater stress during or after the divorce).

<sup>8</sup> Elizabeth Alterman, “Divorce Can Cost You Over and Over,” *CNBC* (May 4, 2011, 9:45 AM), <http://www.cnn.com/id/42767466>.

to the children. The process is also typically cheaper and faster than litigation.<sup>9</sup> By reducing the expense in both time and money, as well as the emotional toll, ADR can reduce the lasting negative effects of what are tellingly referred to as “custody battles.”

When a custody dispute involves two adequate parents and a subject child is not in danger, deciding which parent is “best” is of little concern. Yet parties frequently get wrapped up in trying to prove that each parent is better than the other, when the real focus should be finding the best way for the subject children to maintain a relationship with *both* parents. Over the course of two decades, I interviewed hundreds of children in my chambers, seeking their preferences and opinions regarding custody disputes. Many of these children expressed an interestingly similar desire—they desperately wanted the fighting to stop. They routinely expressed their love for both parents and their desire to maintain a relationship with each. Rarely did a child express a “preference” for one parent over the other. This underscores how essential reducing conflict in custody disputes really is.

Pursuing less contentious methods of dispute resolution can reduce the stress involved in the process and can foster greater opportunities for the family to work together cooperatively after the finalization of the lawsuit. Obviously, this focus does not exist in a vacuum—courts should not stand idly by while children are placed in dangerous situations. But for most custody cases, an MSA will result in less trauma for the children than an extended process involving formal litigation. This helps to explain why family law practitioners have taken up mediation and ADR with such enthusiasm and support. While mediation was unheard of in family courts just a few decades ago, it is now the preferred form of dispute resolution in almost all family law cases, and depending on the location, between 40 percent and 80 percent of divorces are resolved through MSAs.<sup>10</sup>

The Texas Legislature was an early adopter of mediation and other forms of ADR to be used in custody disputes; it formally recognized ADR as a method of resolving suits affecting the parent-child relationship in the Texas Family Code. Section 153.0071 lays out the procedures to be used in arbitration and mediation, and provides requirements for the enforcement of binding MSAs.<sup>11</sup> The 74<sup>th</sup> Texas Legislature enacted the first version of the statute in 1995, then amended



The Texas Legislature pioneered the use of ADR in Texas family law cases.  
Photo by David A. Furlow

<sup>9</sup> Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 13 (1995).

<sup>10</sup> Ver Steegh, *Family Court Reform* at 662.

<sup>11</sup> TEX. FAM. CODE § 153.0071.



and supplemented it in 1997, 1999, 2005, and 2007.<sup>12</sup>

The current text of section 153.0071 reads as follows:

- (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.
- (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.
- (c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.
- (d) A mediated settlement agreement is binding on the parties if the agreement:
  - (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
  - (2) is signed by each party to the agreement; and
  - (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
- (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
- (e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:
  - (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
  - (2) the agreement is not in the child's best interest.
- (f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is

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

held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. This subsection does not apply to suits filed under Chapter 262.

- (g) The provisions for confidentiality of alternative dispute resolution procedures under Chapter 154, Civil Practice and Remedies Code, apply equally to the work of a parenting coordinator, as defined by Section 153.601, and to the parties and any other person who participates in the parenting coordination. This subsection does not affect the duty of a person to report abuse or neglect under Section 261.101.

Under the current statute, an MSA is binding and not subject to revocation if the following requirements are met: it contains a prominent statement that the agreement is not subject to revocation, it is signed by each party, and it is signed by any party's attorney who is present at the time the agreement is signed.<sup>13</sup> The statute also provides a narrow exception allowing a court to decline to enter judgment on MSAs if "(1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and (2) the agreement is not in the child's best interest."<sup>14</sup> By making it difficult to undermine the binding nature of these agreements, the Legislature has played a key role in protecting and upholding ADR as a preferred method of resolving custody disputes.

Mediation provides parents with more authority to decide how their child will be raised and what arrangements will be made. This furthers a fundamental guiding policy of family law—specifically that the liberty interests of parents "in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court of the United States]."<sup>15</sup> Parents make decisions regarding the care and control of their children every day, and it is generally presumed that "the natural bonds of affection lead parents to act in the best interests of their children."<sup>16</sup> In the vast majority of cases, parents make better caregivers than the court system. Absent a significant reason to deviate from this policy, it makes sense to use the same reasoning when dealing with custody disputes.

### **The *In re Lee* Ruling Reshapes Texas Law.**

In 2013, the Supreme Court of Texas faced a key issue regarding the future of ADR in family law cases. *In re Stephanie Lee*<sup>17</sup> presented the Court with the question of whether trial courts have discretion to set aside MSAs to protect a child on *best interest grounds*.<sup>18</sup> Importantly, the parties did not present or argue the issue of whether courts err by failing to enforce MSAs on

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<sup>13</sup> *Ibid.* § 153.0071(d).

<sup>14</sup> *Ibid.* § 153.0071(e-1).

<sup>15</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>16</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

<sup>17</sup> 411 S.W.3d 445 (Tex. 2013).

<sup>18</sup> *Ibid.* at 447.

*endangerment grounds*. For the first time in recorded history, the State Bar of Texas Family Law Council filed an amicus brief with the Texas Supreme Court, and argued for the enforcement of this MSA.<sup>19</sup> The Council stressed that injecting uncertainty into the enforceability of these types of agreements would jeopardize the use of ADR in custody disputes across the board.

In *Lee*, a father sought modification of a preexisting order adjudicating parentage, alleging that the child's mother had relinquished care of the child to him for at least six months and that the mother had placed the child in danger.<sup>20</sup> Before trial on the merits, the parties entered into a properly executed MSA modifying the 2007 order by giving the father the exclusive right to establish the child's primary residence.<sup>21</sup> This agreement met all of the requirements enumerated in section 153.0071 that would make the agreement binding and irrevocable.<sup>22</sup> Although the child's mother's current husband was a registered sex offender, the father agreed during mediation that the mother would have periodic access to and possession of the child. Significantly, the mother agreed to an injunction that prohibited the mother's husband from being within five miles of the child.<sup>23</sup> To help the father track the mother's husband and enforce the injunctive location restrictions while the child was in the mother's possession, the mother's husband was required to keep the father informed about his whereabouts and the make and model of his car.<sup>24</sup>

Although the father initially requested the associate judge to enter the MSA, his support for the agreement waned after his first court appearance.<sup>25</sup> The associate judge who was asked to enter judgment on the agreement refused to do so on the grounds that it was not in the child's best interest. The mother then filed a motion to enter judgment on the MSA in district court, but after a hearing on this motion, the district judge also refused to enter judgment, concluding that the agreement was not in the child's best interest.<sup>26</sup> In spite of the injunctive language that the parties agreed upon to protect the child from potential harm, both judges were concerned about the mother's husband's sex-offender status.<sup>27</sup> The mother then filed a mandamus petition in the court of appeals, asking the court to order the district judge to enter judgment on the agreement.<sup>28</sup> After the court of appeals refused to issue mandamus, the mother petitioned the Supreme Court of Texas, arguing that the trial court judge had abused his discretion by refusing to enter judgment on the agreement based on the child's best interests.<sup>29</sup>

The Court construed section 153.0071 of the Family Code to determine whether a trial court is authorized to refuse entry on an otherwise binding mediation agreement pursuant to a broad-based best interest inquiry.<sup>30</sup> This consideration had far-reaching ramifications. The Court struggled with the balance between two important interests: first, ensuring that the

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<sup>19</sup> Brief of the State Bar of Texas Family Law Council as Amicus Curiae at 1, *In re Lee*, 411 S.W.3d 445 (Tex. 2013) (No. 11-0732).

<sup>20</sup> *Lee*, 411 S.W.3d at 447.

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

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

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at 447-48.

<sup>25</sup> *Ibid.* at 448.

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

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 449.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* at 458.

subject child in *Lee* was not placed in harm's way and, second, encouraging the enforcement and promotion of MSAs in child custody proceedings. While the Court's decision was divided, ultimately the MSA was enforced. In the end, *Lee* stands for two imperative principles: 1) the Family Code recognizes the importance of mediation in family law cases now and in the future, and 2) courts *must always* take protective action towards children who are endangered.

While the Texas Supreme Court made it clear that trial courts are required to take protective action in certain circumstances, the more precise question at issue involved whether trial courts are authorized to refuse to enforce an MSA on best interest grounds or whether an endangerment finding is required. And even more pointed: whether a court that has determined that protective action is necessary to safeguard a subject child can refuse to enter an order pursuant to an MSA as a means to protect the child, or whether other protective action must be utilized. Ultimately, the Court's decision was split among three separate writings: a majority opinion (J. Lehrmann), a concurrence (J. Guzman), and a dissent (J. Green).<sup>31</sup> The decision broke down as follows: four Justices did not reach the issue of whether refusal is appropriate on endangerment grounds because the subject child in *Lee* was not in danger due to the injunctive language;<sup>32</sup> four Justices opined that refusal to enter judgment on an MSA is a tool at the trial court's disposal when the child is endangered;<sup>33</sup> and one Justice wrote that refusal is a tool at the trial court's disposal upon a finding of endangerment, but that the child in *Lee* was not at risk because of the injunction.<sup>34</sup>

The end result: (1) a majority held that a trial court abuses its discretion when it refuses to enter an MSA on best interest grounds; (2) the Court unanimously held that protective action is required when a trial judge determines that such action is necessary to safeguard a child; (3) a majority held that refusal to enter an MSA is a tool available to a trial court to protect a child when the child faces endangerment; and (4) a majority found that the child in *Lee* was not in danger. The five Justices that held that the child in *Lee* was not in danger did so because the MSA expressly provided that the child was not to have any contact with the mother's husband and contained provisions to ensure that the mother would not allow such contact to occur, including an injunction requiring that the husband maintain a five-mile radius away from the child.<sup>35</sup> While a different five-Justice majority indicated that refusal is a tool available to judges under statutory endangerment grounds,<sup>36</sup> *Lee* makes it clear that the standard for refusal requires more than a broad-based best interest inquiry whereby a court attempts to substitute its own judgment for the agreement of the parents.

More importantly, *Lee* protects the far-reaching policy determination made by the Texas Legislature, and promoted by the Family Law Bar for many years, that mediation is a valuable tool that should be encouraged and embraced. Because protecting children encompasses more than insulating children from the negative consequences that are sometimes associated with the reconfiguration of the family structure—it also involves shielding them from high-conflict custody litigation.<sup>37</sup>

<sup>31</sup> *Ibid.* at 445.

<sup>32</sup> *Ibid.* at 459.

<sup>33</sup> *Ibid.* at 466.

<sup>34</sup> *Ibid.* at 466–67.

<sup>35</sup> *Ibid.* at 447–48, 458, 465.

<sup>36</sup> *Ibid.* at 466–67.

<sup>37</sup> *Ibid.* at 461 n. 24.

## Conclusion

Visionaries indeed. The Family Law Bar, the Texas Legislature, and the judiciary deserve praise for their commitment to putting ADR at the forefront of family law litigation. At the annual meeting of the American Bar Association in 1984, United States Supreme Court Chief Justice Warren Burger observed, “The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. Doctors, in spite of astronomical medical costs, retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers?”<sup>38</sup>

For over thirty years, the Family Law Bar has embraced this philosophy by successfully utilizing less adversarial methods to resolve disputes. And the Texas Legislature has responded in kind. The resulting positive impact on families is palpable. Trial judges regularly see the trauma and distress that children involved in litigious “custody battles” face when parents are not able to reach agreement on family law matters. When ADR is successful, children are not forced into the uncomfortable position of choosing between parents or facing ongoing litigation. A faster, cheaper, less emotionally draining process undoubtedly protects children from unnecessary damaging conflict and long-term injury.

Family law attorneys and other legal scholars have heroically stepped up to the plate for many years. These heroes who have championed the cause are now promoting ADR to address other societal challenges. For example, ADR can be used to increase the availability of legal assistance for indigent litigants by providing interesting opportunities for lawyers seeking pro bono work. Transactional lawyers who have spent their careers in boardrooms, and may not be comfortable representing parties in the courtroom, may be open to volunteering to offer limited-scope representation during the mediation phase. This has the added benefit of fulfilling President Lincoln’s support for compromise and Chief Justice Burger’s vision of a more healing and less litigious legal landscape for all people regardless of their ability to retain counsel. Innovation, creativity, foresight: our past, our legacy, our future.

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<sup>38</sup> Donald L. Swanson, “How the Mediation Profession Began: From Chief Justice Warren E. Burger,” 1984, *Mediatbankry* (October 15, 2016), <https://mediatbankry.com/2016/10/13/how-the-mediation-profession-began-from-chief-justice-e-warren-burger-1984-part-1-of-2/>.



**JUSTICE DEBRA H. LEHRMANN** *has served on the Supreme Court of Texas since June 21, 2010; prior to her appointment, she served as a family law trial judge for twenty-three years. As a trial judge, she presided over the 360th District Court, a general jurisdiction court that is charged with the duty to give priority to family law cases. Justice Lehrmann serves as the Supreme Court’s liaison to the Texas Attorney-Mediator Coalition, the State Bar Family Law Section, the Family Law Council, the Board of Disciplinary Appeals, the Commission for Lawyer Discipline, and the Texas Association for Court Administration.*

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# Tracing Commingled Funds in Divorce: Development of the Law and the Practice

By Richard R. Orsinger

Under Texas law, separate property is property owned or claimed before marriage, or acquired during marriage by gift, devise, or descent, or set aside as a spouse's separate property by premarital or post-marital agreement.<sup>1</sup> Separate property maintains its identity as separate, despite changes in form, as long as the property can be "traced" through its mutations.<sup>2</sup> In a Texas divorce, separate property of a spouse must be set aside to that spouse in the property division.<sup>3</sup> For this reason, determining the character of property is an important part of divorce. Many divorces (and some probate cases) present the problem of tracing separate property through mutations that occurred during the marriage. Tracing has its roots in early decisions by the Texas Supreme Court, but the modern process of tracing separate property funds was invented by lawyers and their experts, adapting general principles from appellate court decisions. In the last forty years, the law and practice of tracing has followed the trail blazed by creative lawyers.

Tracing began early in the antebellum Lone Star State. This article describes the most important cases showing how that doctrine developed since the 1849 case of *McIntyre v. Chappell*,<sup>4</sup> in which Justice Royall T. Wheeler, writing for the Texas Supreme Court, acknowledged that Louisiana applied the Spanish law that everything purchased during marriage "fell into the common stock of gains."<sup>5</sup> But an exception existed for "things which may be received by either [spouse] in payment of money due to them on their separate and individual right,"<sup>6</sup> and the Supreme Court applied the exception in that case.

In 1851, in *Love v. Robertson*,<sup>7</sup> Justice Wheeler noted Spanish law that held that property purchased with the wife's separate



Texas Supreme Court  
Associate Justice, later Chief  
Justice, Royall T. Wheeler.  
University of Texas Tarlton  
Law Library, *Justices of Texas*  
1836-1986.

<sup>1</sup> TEX. CONST. art. XVI, §15; TEX. FAM. CODE §§ 3.001, 4.003, 4.102, 4.103.

<sup>2</sup> *McIntyre v. Chappell*, 4 Tex. 187 (1849); *Love v. Robertson*, 7 Tex. 6 (1851); *Rose v. Houston*, 11 Tex. 324 (1854).

<sup>3</sup> *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139-40 (Tex. 1977).

<sup>4</sup> 4 Tex. 187 (1849).

<sup>5</sup> *Ibid.* at 198-99.

<sup>6</sup> *Ibid.* at 199.

<sup>7</sup> 7 Tex. 6 (1851).

property cash remained separate. He also mentioned the rule adopted in *McIntyre v. Chappell*, that separate property retained its identity in barter exchanges, and saw no reason why the law should treat barter and purchases differently. The Court thus held that items purchased using separate property cash would be separate.<sup>8</sup> Justice Wheeler presciently noted in his Opinion in *Love v. Robertson*:

In the case of a purchase made during the marriage, it will, in general, be more difficult to prove the individual ownership of the money, from what source it was derived, and whose money was really employed in making the acquisition, than in the case of the mere exchange of one article for another.<sup>9</sup>

Nonetheless, he wrote, the “very cogent” presumption that all property owned by spouses during marriage is community property can be repelled by “clear and conclusive proof.”<sup>10</sup>

Justice Wheeler took a leading role in shaping the commingling doctrine in the antebellum Texas Supreme Court. In 1854, in *Rose v. Houston*,<sup>11</sup> Wheeler, again writing for the Supreme Court, ruled that a promissory note received as consideration for the sale of the wife’s separate property was the wife’s separate property. Justice Wheeler said that, “to maintain the character of separate property, it is not necessary that the property . . . should be preserved in specie, or in kind. It may undergo mutations and changes, and still remain separate property; and so long as it can be clearly and indisputably traced and identified, its distinctive character will remain.”<sup>12</sup>

In 1855, in *Chapman v. Allen*,<sup>13</sup> Justice Wheeler held that the evidence was insufficient to establish that the property in question had been purchased with separate property. He repeated his language from *Love v. Robertson* that, where separate property has undergone mutations, it must “be clearly and indisputably traced and identified.”<sup>14</sup> The rule of mutation was again recognized by the Supreme Court in the 1859 case of *DeBlane v. Hugh Lynch & Co.*<sup>15</sup>

Thirty years later, in 1888, the Texas Supreme Court again addressed the commingling of funds. In *Continental National Bank of N.Y. v. Weems*,<sup>16</sup> a New York bank had purchased and presented for payment outstanding commercial paper of a Texas bank. Upon receipt of the paper from the New York bank, the Texas bank physically segregated funds in its vault for the account of the New York bank. The Texas bank became insolvent, and the legal issue arose as to whether the New York bank had a preferential claim to those segregated funds, as against other creditors of the bank.

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<sup>8</sup> *Ibid.* at 11.

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

<sup>10</sup> *Ibid.*

<sup>11</sup> 11 Tex. 324, 326 (1854).

<sup>12</sup> *Ibid.* at 326.

<sup>13</sup> 15 Tex. 278, 283 (1855). In this case, the testimony did not identify the property in dispute as being the same as that which was purchased with separate property, and this testimony contradicted the deed, which recited consideration of valuable services and “one dollar in hand paid.” *Ibid.* at 279, 283.

<sup>14</sup> *Ibid.* at 283.

<sup>15</sup> 23 Tex. 25 (1859).

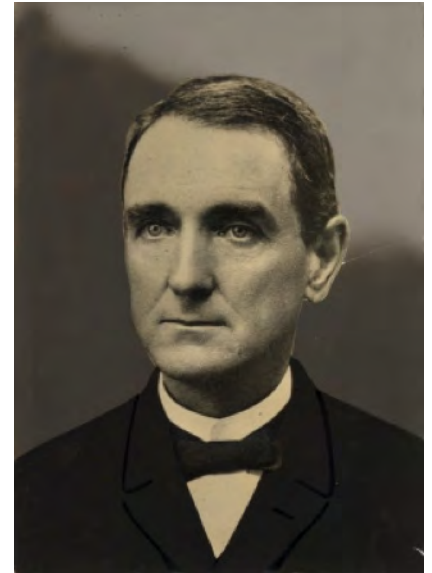
<sup>16</sup> 69 Tex. 85 (1888).

Justice Reuben Reid Gaines, writing for the Court, recognized the rule of trust law that, where a trustee has commingled money held in trust with other funds, those funds would belong to the *cestui que trust*, if that person can be identified.<sup>17</sup> A *cestui que trust* is a person for whose benefit a trust is created—in short, a beneficiary. Although legal title of the trust remains vested in the trustee, the *cestui que trust* is the beneficiary who is entitled under the law to all benefits from a trust. Justice Gaines wrote that, if the total of the mixed funds never dropped below the amount held in trust, it didn't matter if the specific dollars held in trust had been "paid out by the bank to its utmost farthing," since "every dollar so expended left its representative and exact equivalent in the vault."<sup>18</sup>

In addition, Justice Gaines noted an analogous rule allowing a wife to trace her separate funds in the hands of her husband, citing *Love v. Robertson*, *Rose v. Houston*, and *Chapman v. Allen*, saying that "[t]his results from an application of the doctrine of constructive trusts to the separate property of the wife."<sup>19</sup> He added that, "where the trustee mingles the trust money with his own, whenever he pays out (leaving enough to cover the trust fund) he is presumed to pay out his own money."<sup>20</sup>

Texas courts continued developing the tracing doctrine early in the twentieth century. In *Thomas v. Thomas*,<sup>21</sup> a 1925 decision, the husband "indiscriminately intermingled" separate property funds with community property funds in various banks during eighteen years of marriage. The Beaumont Court of Civil Appeals wrote that "the degree of proof required in tracing and identifying . . . separate property is between a preponderance of the evidence and evidence beyond a reasonable doubt."<sup>22</sup>

In 1940, in *Smith v. Buss*,<sup>23</sup> the Supreme Court ruled that unresolved issues of commingling must be resolved in favor of the community: "[g]enerally speaking, it is the law that a bank account consisting of separate and community funds commingled in such a manner that neither can be distinguished from the other must be regarded as a community account."<sup>24</sup> In 1944, in *Davila v. Salas*,<sup>25</sup> the San Antonio Court of Civil Appeals said that where a minor child's money had been commingled with community property funds, the burden of showing what money belonged to the minor was on the party responsible for the commingling.



Texas Supreme Court  
Associate Justice, later Chief  
Justice, Reuben Reid Gaines.  
University of Texas Tarlton  
Law Library, *Justices of Texas*  
1836–1986.

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<sup>17</sup> *Ibid.* at 497–98.

<sup>18</sup> *Ibid.* at 498.

<sup>19</sup> *Ibid.* at 499.

<sup>20</sup> *Ibid.* at 500.

<sup>21</sup> 277 S.W. 210 (Tex. Civ. App.—Beaumont 1925, writ dismissed w.o.j.).

<sup>22</sup> *Ibid.* at 212.

<sup>23</sup> 144 S.W.2d 259 (Tex. 1940).

<sup>24</sup> *Ibid.* at 573.

<sup>25</sup> 178 S.W.2d 294, 295 (Tex. Civ. App.—San Antonio 1944, no writ).



In the 1946 case of *Moore v. Moore*,<sup>26</sup> the husband proved that he deposited \$1,550 in separate property funds in a savings account. The banker testified to four more deposits, and then a withdrawal of nearly all funds to purchase a promissory note. The Fort Worth Court of Civil Appeals affirmed the trial court's finding that the separate property flowed into the note.<sup>27</sup> Tracing was upheld in the 1951 case of *Farrow v. Farrow*,<sup>28</sup> where the husband deposited \$3,000 of separate property into a bank account which subsequently saw numerous deposits, withdrawals, and inter-account transfers. At no time did the account balance drop below \$3,000. The Austin Court of Civil Appeals agreed that the \$3,000 was separate property, saying that "[o]ne dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by each claimant is known."<sup>29</sup>

While *Moore* and *Farrow* allowed tracing of commingled funds on fairly simple facts, it may be said that the modern era of tracing commingled separate and community property funds began with the Dallas Court of Civil Appeals' 1955 decision in *Sibley v. Sibley*.<sup>30</sup> In *Sibley*, separate property funds of the wife and of the husband were commingled in a joint account with community funds. There were numerous deposits, and funds were withdrawn to pay living expenses, and then a check was written to purchase a farm.<sup>31</sup> The trial court found 89 percent of the farm to be wife's separate property. The appellate court affirmed, invoking the rule of trust law that "where a trustee draws checks on a fund in which trust funds are mingled with those of the trustee, the trustee is presumed to have checked out his own money first." The appellate court significantly went on to say:

The community moneys in joint bank account of the parties are therefore presumed to have been drawn out first, before the separate moneys are withdrawn ..., and since there were sufficient funds in the bank, at all times material here, to cover [the wife's] separate estate balance at the time of the divorce, such balance will be presumed to be her separate funds.<sup>32</sup>

Under this rule, the funds in the account when the check was written to buy the farm were 89 percent wife's separate property, so the farm was 89 percent wife's separate property. In 1976, in *Horlock v. Horlock*,<sup>33</sup> the 14th District Court of Civil Appeals said that "*Sibley* stands for the proposition that where a bank account contains both community and separate monies, it is presumed that community monies are drawn out first."<sup>34</sup>

In 1976, as a first year lawyer, the author was privileged to assist San Antonio family law attorney James D. Stewart in a divorce case in Laredo, involving separate property gas royalties that were commingled with community property funds over a long marriage. Armed with bank

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<sup>26</sup> 192 S.W.2d 929 (Tex. Civ. App.—Fort Worth, 1946, no writ).

<sup>27</sup> *Ibid.* at 931.

<sup>28</sup> 238 S.W.2d 255 (Tex. Civ. App.—Austin 1951, no writ).

<sup>29</sup> *Ibid.* at 257.

<sup>30</sup> 286 S.W.2d 657 (Tex. Civ. App.—Dallas 1955, writ dismissed).

<sup>31</sup> *Ibid.* at 658–59.

<sup>32</sup> *Ibid.* at 659.

<sup>33</sup> 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ dismissed).

<sup>34</sup> *Ibid.* at 58.

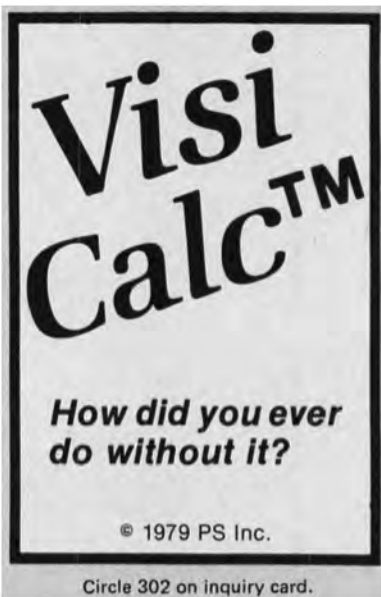
records from nearly all months of marriage, Stewart took from *Farrow v. Farrow* the idea that “a dollar is a dollar,” and from *Sibley v. Sibley* “the community-out-first rule,” and fashioned what he called “tracing sheets,” which were paper spreadsheets that listed in chronological order, the date and amount of every deposit and every withdrawal from each of the parties’ bank accounts, with source or use identified.

In these tracing sheets James Stewart kept a running balance of the amount of separate and community funds in the account after each transaction, and these two subtotals, when added together, always matched the total in the bank account at the end of each day. If a deposit could be identified as a separate property gas royalty payment, or an asset that was otherwise husband’s separate property, it was added to the separate property balance. All other deposits were added to the community property balance. Using the “community-out-first rule,” withdrawals were taken from the community funds until they were exhausted, and then withdrawals were taken from the separate funds until more community property funds were deposited, when the withdrawals would revert to the community funds until they were exhausted again, and so on.



James Darb Stewart, Sr.  
Obituary photo, Porter Loring  
Mortuary.

This tracing effort predated personal computers and the advent in 1979 of the electronic spreadsheet VisiCalc (the “killer app” that made personal computers useful to mainstream users), so the tracing took months of using pencil, paper, especially eraser, along with an electronic calculator, to construct running balances on multiple accounts for this lengthy marriage. At trial, the tracing sheets were sponsored by the client’s accountant, as expert work product and summaries of voluminous materials, but an objection was made and the exhibits were excluded. Stewart tried to authenticate the tracing sheets again and again, but each time was rebuffed until the trial judge<sup>35</sup> said: “Mr. Stewart, if you offer that exhibit into evidence one more time, the court is going to hold you in contempt.” During a recess we resolved to offer the tracing sheets through the client as business records of his “gas business.” Upon that predicate, the trial judge said: “Mr. Stewart, I can see that we will never finish this trial unless I admit your exhibit, so your exhibit is admitted.” In announcing his ultimate decision, the trial judge found a substantial portion of the estate to be the husband’s separate property, meaning that the tracing sheets had done their job.



VisiCalc’s first ad.  
Image from the Atari 8  
Bit Productivity Podcast,  
[https://inverseatascii.  
info/2015/01/13/s1e8-  
visicalc/](https://inverseatascii.info/2015/01/13/s1e8-visicalc/)

Because of the hostile reception to the introduction of tracing sheets in their first trial, Stewart undertook to build a consensus regarding tracing sheets based on running balances of separate and community property using the community-out-first rule. He

<sup>35</sup> The trial judge was the retired Bexar County District Judge Walter Lochridge.

did this by attaching sample tracing sheets to his CLE articles on how to trace commingled funds, and having his lawyer friends do the same. At the State Bar of Texas's 1987 Advanced Family Law Course in San Antonio, for example, Stewart and a forensic CPA conducted tracing workshops, in competition with the main lecture, to overflow crowds.

Over time, Stewart's methodology gained general acceptance. The use of tracing sheets based on the community-out-first rule sustained a concerted attack (brought by the author) in the 1990 case of *Welder v. Welder*.<sup>36</sup> In that case spreadsheets were used to provide "a daily tracing of all deposits, expenditures and purchases of assets" for a thirty-two-year period, "based on a review of all the ledgers, cash disbursement and cash receipts journals, deposit slips, and the cash receipts analysis" prepared by the husband's accountant.<sup>37</sup> The appellate court affirmed the admissibility of the tracing sheets as summaries of voluminous records. Today the use of tracing sheets to reconstruct line-item accounting based on the community-out-first rule is commonplace.

The forensic accounting community understandably embraced the development of tracing sheets, which can sometimes take thousands or even hundreds of thousands of dollars of effort to complete. Some preferences developed, such as sequencing transactions on the day they cleared the account rather than the date on the check or deposit slip, so that the tracing sheet more accurately mirrored the bank account statement.<sup>38</sup> Also, the common convention now is to recognize all deposits on a particular day before recording any withdrawals, to avoid "imaginary overdrafts." When the financial account actually goes into overdraft, the funds withdrawn are usually treated as community property funds obtained on credit. It is considered acceptable to ignore the community-out-first rule for particular transactions and instead match a particular deposit with a particular withdrawal, where they are close in time and amount and are supported by direct or circumstantial evidence of intent to use the specific funds for that particular purpose.

Tracing can become quite complex with brokerage accounts, involving cash, securities, margin debt, short sales, puts and calls, partial sales of blocks of securities, and other complications. Most tracing experts follow a standard set of protocols used in the tracing community, to strengthen the credibility of the tracing effort and avoid a methodology challenge under *E.I. du Pont de Nemours v. Robinson*,<sup>39</sup> and *Gamill v. Jack Williams Chevrolet*.<sup>40</sup> Appellate courts have been stringent in requiring that there be supporting evidence to support claims of separate property. However, appellate courts have not closely examined the particulars of doing a line-item tracing, and trial and appellate lawyers, as well as appellate courts, seem to treat disputes over tracing methods as going to the sufficiency and not the admissibility of the

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<sup>36</sup> 794 S.W.2d 420 (Tex. App.—Corpus Christi 1990, no writ).

<sup>37</sup> *Ibid.* at 428–29.

<sup>38</sup> Sequencing by the date-cleared rather than the date-written is possible only if account statements are available. When they are not, the tracing is done based on a checkbook register, general ledger, or accounting software used by the party, or in certain circumstances based on circumstantial evidence (like the date a dividend was declared) or based on estimates.

<sup>39</sup> 923 S.W.2d 549 (Tex. 1995).

<sup>40</sup> 972 S.W.2d 713 (Tex. 1998).

evidence.<sup>41</sup>

Tracing commingled funds using line-item tracing and the community-out-first rule<sup>42</sup> has not gone without criticism. Joseph W. McKnight, the widely-revered professor at SMU School of Law who in many respects is the father of modern Texas family law, in his 2002 review of family law decisions, condemned the whole line of community-out-first rule decisions as “the inequitable bastard-descendants of *Sibley*,” and criticized one appellate decision for its “simplistic reliance on the bastard line of cases, which are contrary to all principles of equity.”<sup>43</sup> That sentiment notwithstanding, the ability to trace commingled separate and community property now securely rests on the two principles envisioned by Jim Stewart back in 1976, that “a dollar is a dollar” and that, when a withdrawal is made from commingled funds, you take community out first.



<sup>41</sup> See generally, e.g., *Maier v. Maier*, No. 01-14-00106-CV (Tex. App.—Houston [1st Dist.] August 30, 2016, no pet.) (mem. op.); *Hinton v. Burns*, 433 S.W.3d 189, 195 (Tex. App. Dallas 2014, no pet.); *Richard v. Towery*, No. 01-011-00132-CV, \*7-12 (Tex. App.—Houston [1st Dist.] April 18, 2013, no pet.) (mem. op.); *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied); *Zagorski v. Zagorski*, 116 S.W.3d 309 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); cf. *Perez v. Perez*, No. 09-06-00521-CV (Tex. App.—Beaumont May 22, 2008, pet. denied) (mem. op.) (reversing a finding of community property when the bank records establish separate property).

<sup>42</sup> There are other recognized methods of tracing commingled funds, such as the “minimum balance method,” the “clearinghouse method,” the presumption that community funds pay family living expenses, the presumption that separate funds are withdrawn to pay for improvements or repairs on separate property, etc. These methods are discussed in various continuing legal education papers on tracing. See, e.g., Richard R. Orsinger, *Different Ways to Trace Separate Property*, in State Bar of Tex. Prof. Dev. Program, Advanced Family Law Course, ch. 25 (2014), available at [http://www.orsinger.com/PDFFiles/tracing\\_article\\_2014.pdf](http://www.orsinger.com/PDFFiles/tracing_article_2014.pdf).

<sup>43</sup> Joseph W. McKnight, *Family Law: Husband and Wife*, 55 SMU L. Rev. 1035, 1048 n.87 (2002).



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# Women and the Origins of Texas Family Law<sup>1</sup>

By Elizabeth York Enstam



*Texas Pioneer Woman* statue near the State Capitol. Sculpted by Linda Sioux Henley, erected in 1998 by the Daughters of the Republic of Texas, District VIII. Photo by David A. Furlow.

**W**omen's progress toward equal rights and the origin of family law in Texas have developed within a complex history of social customs, cultural traditions, and law. The Lone Star State was at first a rural society based on farming and ranching, and its legal system reflected the outlook of a traditional, family-centered, agricultural population. As the state became more urbanized after 1900, the economy drew growing numbers of women into the marketplace. By taking jobs, entering the professions, and operating their own companies, women brought unprecedented legal questions to business, industry, politics, and government that required lawmakers to consider the needs of women as individuals and not merely as members of families.

Before Texas women gained equal rights, marriage was the most significant influence on their legal status. From the time of the early Republic, a single woman (*feme sole*) enjoyed basic civil liberties. Although she could not vote or serve on juries, she had the right to make contracts, to sue and be sued, to choose her domicile, to own and control property, and, if widowed, to have custody of her children. A matron (*feme covert*), by contrast, bore many of the legal disabilities of a minor.

The laws regulating property and contractual rights most clearly defined the married woman's legal status in Texas. By continuing the Spanish practice of giving limited, specific rights to married women, Texans avoided the English common law practice of vesting the wife's legal identity in her husband. Indeed, Anglo-American law confined married women more than the Hispanic system, and a Texas statute enacted in 1840 guaranteed rights that women

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<sup>1</sup> This article is an updated and illustrated version of the author's article "Women and the Law," in the *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/jsw02>. It is used by permission of the Texas State Historical Association.

have had ever since: to own separate property (the personal effects, real estate, and stocks and bonds possessed at the time of marriage) and to share equally with their husbands the wealth amassed during marriage. Also in keeping with the Hispanic law was a statute enacted in 1856, which allowed anyone “of sound mind” to make a last will and testament. Even though she could not witness the will of another person, a matron had the right to leave her separate property, as well as her share of the community property, to whomever she chose.

While securing the wife’s rights to ownership, Texas statutes and court rulings gave to the husband the management of both her separate and their community property, with the justification that such control helped him fulfill his legal duty to support her and the family. The law allowed him to bring suit

to protect or enforce his wife’s separate interests, as well as those of the community property. In addition, her earnings were, like his, community property; as such, they also were under his control. Until 1967 and the enactment of the marital-property section of the Family Code, Texas law put a wife’s salary, bonuses, and wages under her husband’s control to the extent that technically only he could “contract her services to another.” In other words, an employer who wished to comply strictly could not hire a woman without consulting her husband.

Despite her disabilities, however, the wife was not without legal rights. Without her permission her husband could not sell any of her property, and though she needed his agreement to sell her real estate or stocks and bonds, she could “by oral consent” give away any of her personal goods. She also had a limited right to defend her separate property by appealing to the county court if her husband mismanaged it or used its proceeds for anything other than the family’s support. Such a review of the husband’s management could persuade the court to give control of her property to the wife.

As a general rule, then, the husband served as the family’s financial and economic agent. But whenever necessary the wife could assume familial responsibilities as guardian, trustee, administratrix, executrix, or receiving agent. Indeed, by vesting limited property rights in married women through separate and community property, Texas law protected families from husbands who were careless, wasteful, or victims of economic depression.

Control of their own property came slowly to married women, creeping through five acts



Woman, child, and husband from the bronze statuary group *Tejano Monument*, sculpted by Armando Hinojosa, erected on the grounds of the Texas State Capitol in 2012. Photo by David A. Furlow.



Houston attorney Hortense Sparks Ward led the struggle to enact a comprehensive married woman's property rights statute. Photo provided by her descendant Linda Hunsaker.

of legislation passed over more than fifty years. In 1913 Houston attorney Hortense S. Ward, one of the first three women admitted to the Texas bar, led the campaign to win a law intended to enlarge married women's rights regarding their separate property. Because of numerous hasty revisions to placate critics of the original bill, the statute collided with existing property laws, and court rulings consequently sheared away some of its intended benefits.

Although the new law retained the husband as sole manager of the community property, the wife acquired control of the rents and other income from her real property holdings, as well as the income from her stocks and bonds. Her husband still had to agree to the sale of her separate property, but she gained exclusive control of bank accounts in her own name. Before 1913 a husband could write checks on his wife's account and even withdraw money that she had deposited before marriage. While the wages of employed women remained under their husbands' control as community property, women of the middle and upper classes—those most likely to own real estate and stocks and bonds—benefited from the provisions of the 1913 law.

Three later statutes, passed in 1921, 1957, and 1963, dealt with married women's legal status without effectively improving it. Change in the marital property law in 1921 added nothing to a married woman's rights, though it did exempt her separate property from creditors in contracts that she made jointly with her husband. Creditors could, in such cases, claim reimbursement only from the couple's community property.

Thirty-six years later, in 1957, another law allowed married women aged twenty-one and over the choice of whether to accept complete control of their separate property, as well as to contract freely without their husbands' signatures. For a matron who chose not to take these rights and responsibilities, the provisions of earlier statutes remained: her husband had to "join in any encumbrance of her lands" and in the sale of her stocks and bonds. Because married couples on numerous occasions had used the wife's covert status to avoid paying debts, the 1957 law expressly stated that marriage would not excuse a wife from her obligations or from suits and court actions in connection with her contracts. Although the measure enacted in 1963 stated that married women had the contractual rights of men and single women, it made little difference. Numerous other statutes contained provisions which, in effect if not by intent, curtailed women's rights.

Historically, Texas lawmakers were more concerned with protecting the interests of families than of individuals. Of all the state's laws intended to protect the family, those relating



The William Johnson Cabin in Luling, Texas, built on Tenney Creek in the 1870s, exemplifies the homesteads early lawmakers sought to protect through Texas's liberal family homestead laws.  
Photo by David A. Furlow.

to the homestead probably carried the most real benefits for wives without marketable skills, whether they lived in urban or rural areas. Enacted as a statute in 1839 and first written into the state's constitution in 1845, the Texas homestead exemption law gave wife and husband virtually identical rights regarding the homestead, except that only he could choose it and decide when to leave it. Her interests, like his, were protected by the guarantee that the surviving spouse had a life estate in the family homestead, and certain provisions of the law gave her the right, under defined circumstances, to block her husband's decisions regarding the homestead.

Even if the actual holdings defined as the homestead were the husband's separate property and as such would pass beyond the immediate family upon his death, his widow and single daughters (but not single sons) had the right to live on the homestead for as long as they wished. Passage in 1967 of the Marital Property Act (later part of the Texas Family Code) perpetuated these homestead provisions by giving either surviving spouse the right of lifetime use and occupancy of the homestead.

Long before 1967, however, much more than the homestead laws needed to be changed. Legal measures originally intended to strengthen the family and protect women became hindrances to business as the Texas economy expanded and the state grew more urbanized. For example, the requirement of the wife's separate agreement, apart from her husband and in



the presence of a notary, to the sale of the homestead might well preserve her ownership rights from her spouse's misjudgment or coercion. But along with its patronizing implications that married women lacked the business knowledge or the good sense to make practical decisions, this "protection" complicated property agreements. Mishandled or ignored, the provision could enable married couples to evade the terms of agreements, avoid payment of debts, and on occasion, even renege on legal obligations.

Genuine control of property required the right to make contracts, and in this respect Texas law remained discriminatory for many years. In 1840 the Texas Congress adopted the common law practice of barring a married woman from making contracts, and afterward the legislature enacted statutes to define specific conditions within which she could do so. In general terms, the law allowed a married man to make any contract except those expressly forbidden, while a married woman could make only those expressly allowed. If her husband failed in his legal duty to provide for her and their children, for example, the wife could draw on his separate property and pledge his credit to buy "necessaries." She had considerable latitude for such purchases, for the courts defined "necessaries" not merely as food, clothing, shelter, and medical care, but also "such things as are suitable to their condition and station in life."

From frontier times the laws regulating a married woman's property and contractual rights directly affected her earning power, especially if she wished to operate a business. Both the English and the Spanish sources of Texas law were products of preindustrial societies whose trade and commerce depended at least as much on agriculture as on manufacturing. Although Texas was initially agrarian, the state's citizens increasingly earned their living in nonagricultural pursuits. Even in the frontier villages, married women earned money with dressmaking and millinery, not only in their homes, but also in shops and stores. Larger numbers operated boardinghouses and schools. In small towns where people knew and associated frequently with each other, day-to-day agreements about sewing orders or a child's lessons depended more on personal trust and shared values than on law or the courts.

But as urban areas grew, the variety of businesses run by matrons increased rapidly, and their clients and customers expanded beyond friends and neighbors to include larger numbers of strangers. In 1900 the United States census listed 531 women in Texas who were merchants and dealers, about one-third of whom were married. A decade later the figures had more than doubled, and this count did not include the married women who operated small businesses in their homes.

At last lawmakers realized that married women who owned and ran businesses needed wider contractual rights, from which their customers and creditors also would benefit. In 1911 the legislature passed a statute giving matrons a way to remove "the disability of coverture for mercantile and trading purposes." By applying, with her husband, in writing to the district court in the county where she intended to operate her business, a married woman could regain the status of feme sole specifically for the purpose of engaging in trade. The law made no provision for appealing the judge's decision, but if he agreed, she had the rights to contract freely and to sue and be sued "as in any other cases." With all her contracts now binding, her separate property became liable for her debts and obligations. Without this license to trade as a single

woman, a matron could not be held to her contracts, and she could, in fact, void her agreements at will.

Despite the law's obvious benefits, the courts interpreted the 1911 statute in ways that left married female merchants with several problems. Allowed to invest only her separate money in her business, a wife had to be able to prove that whatever funds she put into the firm were indeed hers and neither her husband's nor community property. In addition, at all times she must avoid mingling her goods with those purchased with her husband's credit or with community property. The joint holdings of her marriage could not go into her venture, though as manager of the community property, her husband could draw upon them at will.

More problematical to her prospects for expanding her business was the fact that Texas laws defined her profits as community property, automatically subject to her husband's control and management. For this reason, a wife could not legally invest her profits in her company, and as community property her profits were liable for her husband's debts. Nonetheless, whatever the statutes stated and the courts ruled, city directories listed hundreds of married women operating businesses in their own names. Only with the enactment of the Marital Property Act in 1967 did such women gain equal contractual powers and the right to control those portions of the community property that they earned. Married women at last were equipped with the legal rights enabling them to build multi-million-dollar firms in Texas.

The Family Code carried benefits for women in addition to those affecting property. After 1967 both spouses had the right to select their respective domiciles, and in the event of separation or divorce, mothers retained equal rights with fathers regarding custody of the children. As parents, each had the legal duty to support their children. For the first time the wife, if employed, acquired the responsibility of providing for a husband unable to support himself; a housewife was not, however, required by law to take a job. The law also recognized the wife's right to retain her birth name after marriage. The Spanish law required a married woman to take her husband's name, but from the earliest days of the Republic of Texas the practice was never mandatory: the changing of a bride's name was always more a matter of custom than of law.

As a group, Texas lawmakers were never friendly to ideas about equality for women, but sometimes legislators inadvertently wrote measures that allowed both married and single women rights normally reserved for men. The Constitution of 1876 required males or "qualified electors" for fewer than a half dozen public offices, an omission which meant that, technically at least, women could hold such elected positions as governor, lieutenant governor, secretary of state, United States senator and representative (though not state senator or representative), and county or state judge.

Although Texas women could not vote at any level of government until passage of the primary suffrage law of 1918, years before that date women had served on school boards in Wills Point, Denison, and Dallas. In 1917 the male voters of Marble Falls elected a woman mayor. After the Nineteenth Amendment to the United States Constitution took effect in 1920, women were eligible to serve in any office for which they were otherwise qualified.



International Film Service

**SPEAKER GILLETT SIGNING THE SUFFRAGE BILL**

The bill providing for a Constitutional Amendment granting the suffrage to women throughout the Nation was signed, as shown above, by the Speaker of the House of Representatives after it had been passed by the Senate

The Women's Suffrage movement resulted in women obtaining the vote in Texas in 1919.  
Wikimedia Commons.

Similarly, women sometimes acquired rights through the application of federal laws. For example, in a series of important decisions the United States Supreme Court applied the due-process clause of the Fourteenth Amendment to business interests and ruled that a corporation could exercise the rights of an individual before the law. Although a married woman in Texas could not make contracts, one effect of the court's rulings was to allow a married woman member of an incorporated organization to enter into contracts for the corporation, as well as to bring suits and manage property. In 1886 the Texas Legislature issued a charter to the Dallas German Ladies Aid Society, almost all of whose members were married women. The charter enumerated the basic civil liberties of a corporate body and stated the society's right to exercise them.

In other situations, too, federal law expanded individual rights and activated protections that state law failed to provide or state officials neglected to enforce. Organized labor law in Texas, for example, was rarely effective until overridden by federal regulations and statutes.

More than the property laws and specified rights to contract, the state's criminal code recognized a matron's separate identity, and, in contrast to the common law idea of husband-wife "oneness," assumed her general responsibility before the law as if she were "sole, or a man." The Texas Criminal Code of 1856 recognized a few situations in which marriage could cause mitigating circumstances for a woman if, for example, she was involved in a crime "by the command or persuasion of her husband." Such modest protections, however, could not balance a married woman's lack of civil liberties, for particularly by handing down penalties after convictions, jurors had opportunities to punish women for violating accepted customs or to reward women for observing social expectations.

In all aspects of the law, social attitudes leaked through the most objective of statutes—in the drafting of bills by legislators, the rulings and interpretations of judges, and the applications by juries during trials. Probably no area of the law so much reflected customs, mores, and outright prejudices as that pertaining to divorce. When Texas was part of Mexico, the canon law regulated divorce. In 1838 the Congress of the Republic of Texas passed a law allowing the district courts to grant legal separations and divorces when "satisfied of the justice of the application, or

[when they found]...it reasonable and proper that the application should be granted." In 1841 the Congress tightened the law by defining the causes justifying divorce: "adultery, abandonment, cruel treatment, and outrages from one toward the other such as render their living together insupportable."

STATE OF TEXAS  
COUNTY OF HARRIS.  
Hortense Malsch  
VS  
Albert Malsch .

No. 39806  
IN THE DISTRICT COURT OF HARRIS COUNTY,  
TEXAS.

To the Honorable Judge of said Court:

Your petitioner, Hortense Malsch, hereinafter styled plaintiff, and a resident citizen of Harris County, Texas, complaining of Albert Malsch, hereinafter styled defendant, also a resident of Harris County, Texas, and for cause of action plaintiff represents to the Court as follows:

That she is an actual bona fide inhabitant of the State of Texas, and she has resided in Harris County for more than six months next preceding the filing of this suit;

That on or about the 4th day of January, 1891, in Edna, Texas, plaintiff was lawfully married to defendant, Albert Malsch, and since said time has continued to live with him as his wife, and by said marriage she has had three children- all girls, Mary Louise, age 14 years Margurite age 12 years, and Hortense, age 6 years .

Plaintiff alleges that she is a woman of refinement, tenderly reared, and is treated with the greatest respect and kindness by all who know her, and is loved most tenderly by her children; that she, with her said children live with her mother at Houston, Heights, Texas, and that defendant lived with her at said place until the 28th day of April, 1906; that on said day defendant left her, saying that he intended to quit her and not return, and he has not been back said date.

Plaintiff alleges that defendant is lazy and of no account, and that he works only about half of the time, and contributes very little toward his children's and her support, leaving the burden of providing for herself almost entirely upon plaintiff; plaintiff alleges that by reason of this neglect she is compelled to work and does work, and that she clothes herself, and clothes and educates her said children, one of them now being off at school at plaintiff's expense.

Hortense Malsch filed suit against her husband for divorce in 1906. She would later remarry, becoming Hortense Ward. Copy of divorce petition provided by Francisco Heredia, Curator of the Historical Documents Room, Harris County District Clerk's Office.

From that time until 1967, virtually the only objective criteria for ending a marriage were, first, the provision that either spouse was entitled to a divorce after being abandoned by the other for three years; and second, the fact that wife and husband had lived apart without cohabitation for seven years. All other grounds were evaluated by juries, and in this way community values affected each divorce petition. Juries decided which actions constituted "excesses," "cruel treatment," and "outrages," and whether such behavior made continuation of the marriage "insupportable."

Although commentators considered the divorce laws more favorable to wives than to husbands, these laws demonstrated a clear acceptance of a double standard of personal and sexual behavior. A husband, for example, could win a divorce because of his wife's "amorous or lascivious conduct with other men, even short of adultery," or if she was "taken in adultery" even once. A wife could succeed with this charge only if her husband "*lived* [italics added] in adultery with another woman." On the other hand, his discovery after marriage of her "premarital unchastity, even though concealed," would not win his freedom.

A husband's violence against his wife was not adequate reason for a divorce unless it was a "serious" danger and might happen again. Moreover, the jury was likely to deliberate on whether she had behaved "indiscreetly" or had somehow "provoked" her husband. His transmission of a venereal disease was grounds for divorce, as were "false and wicked imputations of a depraved and foul husband aspersing the good name of his wife." A wife's refusal of sexual intercourse might not be a cause for divorce, depending on the jury's opinions about "her condition of health, probable ill effects of childbirth, [or] the husband's age, health, virility, and the like." Consideration for the circumstances of each case undoubtedly produced decisions resulting from contemporary notions about race and class, for juries had the discretion to examine "the habits and character of the parties; their previous training and their standing in society." Clearly, some women were judged worthy of protection from violent husbands, and others were deemed deserving of harsh treatment. Many women undoubtedly suffered the brunt of jurors' prejudices regarding their "station" in life or their "place" in society.

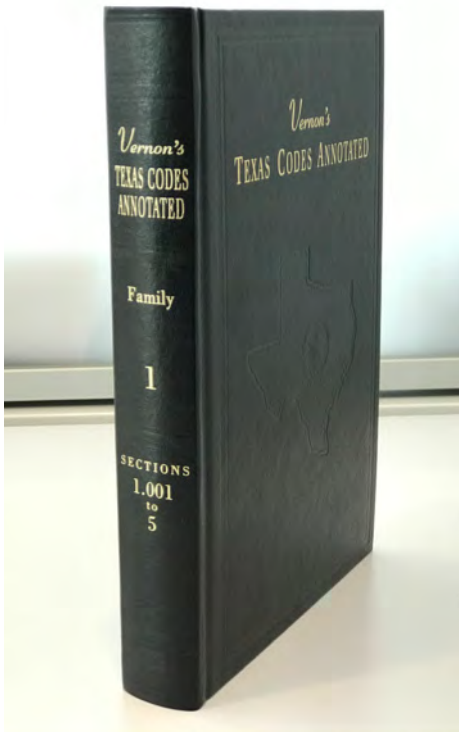
Legal disabilities worked equally against all married women in Texas, but minority women also faced the bias and discrimination endured by men of their racial and ethnic groups. By requiring each voter in primary elections to pay a poll tax, for example, the Terrell Election Laws of 1903 and 1907 barred many African and Mexican Americans, as well as poor whites, from the elective process. Another law passed in 1923, three years after the Nineteenth Amendment enfranchised women, denied to all black citizens the right to vote in Democratic primaries. In a one-party state, the primaries were as important as the regular elections.

For all Texas women, major gains in civil liberties came as slowly as property and contractual rights. In March 1918, twenty-two years after the state's first suffragists organized, the legislature passed the law allowing women to vote in primary elections and party nominating conventions. In June 1919, Texas became the ninth state to ratify the Nineteenth Amendment to the United States Constitution, which took effect on August 26, 1920, and fully enfranchised American women. More than thirty years later, in 1954, Texas women first served on juries.

Despite the 1963 law granting equal contractual rights with men, a total of forty-four legal disabilities continued to plague married women. However reassuring this statute appeared, without the amendment or rescission of dozens of other laws, its actual effects were severely limited. For example, it left intact the 1911 law that gave matrons equal contractual rights for trade, but failed to mention married women in the professions. A married woman attorney could not sign a client's bond, and married women physicians also wondered if they actually had the right to perform various procedures required by their medical practices. Restrictions remained throughout the state's judicial rulings and statutes.

After years of hard work, Dallas attorney Hermione Tobolowsky succeeded in 1971 in persuading the legislature to enact the Texas Equal Rights Amendment, which the voters ratified in 1972. The amendment established the principle of equality within the state's constitution, but any constitution is, by nature, a passive instrument of government. Its provisions become active only when its principles are applied to the writing of new statutes or used to challenge existing laws in the courts.

Thus, of more real and immediate significance than the Equal Rights Amendment was passage in 1967 of the Marital Property Act, which two years later became a section of the Texas Family Code. The Marital Property Act was a comprehensive set of statutes which, though aimed specifically at families, amended the laws regarding virtually every aspect of life in Texas, including insurance, banking, real estate, deeds, contracts, divorce, choice of domicile, child custody, and property rights. Led by attorney Louise B. Raggio as Chair of the Texas Bar Association's Family Law Council and by legal scholar Joseph W. McKnight as Project Director, this revision of the state's laws amounted to a virtual revolution for women in Texas. Its major—and still largely unappreciated—effect was to give married women equal legal rights. (Single women have always enjoyed equal property and contractual rights, and in 1920 and 1954, along with married women, they also acquired equal political rights.) Enacted in three sections between 1967 and 1974, the Texas Family Code was the first family code in the United States. As of January 1994 no provision of the code had ever been ruled unconstitutional.



Texas's Family Code was the first codified law governing families in the U.S.

Just as women bore disabilities under the law, so did they face strong prejudice within the profession of law. Unlike medicine and teaching, which have always borne certain indelible relationships to age-old female roles, law remained more securely ensconced within the "male realm." For many years widely accepted assumptions about their "place" in society discouraged women from studying law, the most direct way to affect the passage of legislation as well as its interpretation and application in the courts.

In 1900 the federal census listed no female attorneys in Texas, and in 1910, only three. During the subsequent



Almost one hundred years ago, Texas's Bench and Bar was overwhelmingly male, as this roster of Houston bench and bar members indicates. Photo by David A. Furlow.

decades the numbers of women lawyers grew slowly, to only seventy-five among the state's 6,651 by 1930, and more than forty years passed before the first two minority women attorneys began practicing in Texas. Charlye O. Farris, the state's first black woman lawyer, graduated from Howard University Law School in 1953; two years later Edna Cisneros became the first Hispanic woman to be licensed in Texas as an attorney. As late as 1986, women were still a mere 14 percent of the state's practicing lawyers.

The situation changed rapidly during the following decade. By 1990, 789 women received just over 40 percent of the J.D. degrees awarded by Texas law schools, and three years later nearly 13,000 female attorneys comprised 23 percent of the State Bar of Texas. By 1994, 88.1 percent of those women lawyers were Caucasian, 5.4 percent black, 4.7 percent Hispanic, 1 percent Asian, and 0.3 percent American Indian. The remaining 0.5 percent were "other."

Despite their apparent progress during the years of the suffrage campaign and their success in winning passage of legislation during the decade afterwards, women's advance into lawmaking positions evaporated. In 1925 Governor Pat M. Neff appointed three woman attorneys to hear a single case, from which the sitting justices had disqualified themselves. Though making national news, the All-Woman Supreme Court remained a curiosity rather than the beginning

of a new development. Women's progress onto the judicial bench remained glacial, even after Sarah T. Hughes was appointed the state's first female judge in 1931.

Forty years later, two women held state district judgeships, two were domestic-relations judges, and one was a county judge. As late as 1981 only 11 of 330 district judges were women, and by 1990 their numbers had grown to 41 of 361, a percentage increase from 3 to 11. Despite this modest progress on the state bench, women continued to lag behind as district attorneys, advancing from 4 of 329 statewide in 1980 to only 7 in 361 by 1990.

The appointment of women to the federal courts in Texas was equally slow. After nearly thirty years as a state district judge, Sarah Hughes became a federal district judge in 1961, but remained more a token than an example. In both 1980 and 1990 Texas had only three woman United States district judges, and seven others served in the state's appellate courts.

Women were also slow to claim the right to help make Texas laws. In 1931 four women sat in the state House of Representatives and only one in the Senate. During the next forty years those figures changed very little: in 1973 five women were state representatives, one a senator. In 1981–82 eleven women were members of the Texas House, but still only one served in the Senate. In 1989–90 the figures were little changed at fourteen and three, respectively. Modest though noticeable improvement came suddenly, however, and by 1993 the 73rd Legislature included 25 women among 150 representatives and 4 women among 31 senators.

During 2016, 29 women served in the Texas House of Representatives, according to the National Conference of State Legislatures, while 7 served in the Texas Senate. Altogether, 19.9 percent of the Texas Legislature was female. Perhaps such slow advances must also be sure progress, which in the future can assure women of stronger and more secure roles in Texas life and public affairs.

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[Return to Journal Index](#)

# A Texas Case in the U.S. Supreme Court

By Jani Maselli Wood

**M**oore v. Texas, Cause No. 15-797 in the U.S. Supreme Court, is a Texas capital punishment case, the latest in a long line of cases reviewed by the Court. This one is different, though. I wrote a portion of the original writ. I know the client well. I am a friend to his supporters. So, I have a vested interest in the outcome of the case. And I flew to Washington, D.C. to hear the case go to oral argument.

## *A brief history of the case*

Procedurally, *Moore v. Texas* is a convoluted case. First convicted of committing a capital murder while in the course of committing a robbery in 1980, Bobby James Moore received a new punishment hearing by the Fifth Circuit in 1999.<sup>1</sup> After he was again given the death penalty, his case was appealed and a writ of habeas corpus was filed. Fast forward many years until Pat McCann from Houston handled the hearing on the state writ of habeas corpus.

The sole issue at the habeas hearing concerned whether the degree of intellectual disability suffered by Mr. Moore was sufficient to preclude execution based on the Supreme Court case of *Atkins v. Virginia*.<sup>2</sup> The trial court considered the latest medical science regarding intellectual disabilities. In reviewing the entirety of the evidence, the trial court made findings that Mr. Moore was not eligible for execution based upon his intellectual disability.

Judicial review began when the Clerk of the 185<sup>th</sup> Judicial District Court of Harris County forwarded findings to the Texas Court of Criminal Appeals. The Court of Criminal Appeals rejected the trial court's findings as well as the trial court's use of current medical standards to determine the extent of Mr. Moore's intellectual disability.<sup>3</sup> The Court of Criminal Appeals held that the disability standard that must be used is the 1992 American Association on Mental Retardation's<sup>4</sup> definition as well as the factors the Court of Criminal Appeals delineated in *Ex parte Briseno*.<sup>5</sup>

Texas Court of Criminal Appeals Judge Elsa Alcalá wrote the sole dissent in the most recent decision in the case. Since May 2011, Judge Alcalá has served as one of the nine judges of the Court of Criminal Appeals, the court of last resort for state criminal appeals. A Republican,

<sup>1</sup> *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

<sup>2</sup> 536 U.S. 304 (2002).

<sup>3</sup> *Ex Parte Moore*, No. WR-13,374-05 (Tex. Crim. App. Sept. 16, 2015) (J. Johnson), on application for writ of habeas corpus in Cause No. 314483-C in the 185<sup>th</sup> Judicial District Court of Harris County, <http://www.scotusblog.com/wp-content/uploads/2016/04/1EB.pdf>.

<sup>4</sup> In 2007, the American Association on Mental Retardation leaders renamed it the American Association on Intellectual and Developmental Disabilities (AAIDD).

<sup>5</sup> *Ex parte Moore*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

a graduate of the University of Texas School of Law, and a former Justice on the First Court of Appeals for nine years, Judge Alcala was appointed to Place 8 on the bench by then Governor Rick Perry, when Charles Holcomb stepped down to seek election to the United States Senate in 2012. In her dissent, Judge Alcala observed that,

As recommended by the habeas judge, it is time for Texas to reevaluate the decade-old, judicially created standard in *Ex parte Briseno* in light of a shift in the consensus of the medical community regarding what constitutes intellectual disability, and in light of the Supreme Court's recent holding in *Hall v. Florida* indicating that courts are required to consider that consensus in assessing intellectual disability claims.<sup>6</sup>

Judge Alcala's dissent squarely raised an important issue of constitutional law that affected not just Texas but every state that imposes the death penalty.

Petitioner Bobby James Moore's counsel of record Clifford M. Sloan filed a petition for *certiorari* to the U.S. Supreme Court on December 15, 2015.<sup>7</sup> The State of Texas filed its response brief on March 18, 2016.<sup>8</sup> The Supreme Court's Justices discussed the case during their April 22 and 29, 2016 conferences and requested the Record from the Court of Criminal Appeals.<sup>9</sup> The Supreme Court's Clerk received the Court of Criminal Appeals' electronic record on May 6, 2016.<sup>10</sup> The Clerk distributed it to the Justices, who used it in the Court's May 12, May 19, May 26, and June 2, 2016 conferences.<sup>11</sup>

On June 6, 2016, the Supreme Court granted *certiorari* on one and only one issue:

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

The Court then published a schedule that governed the filing of each side's briefs on the merits, as well as a joint appendix. Other groups filed *amici curiae* briefs.

### ***Planning on attending argument***

The Court scheduled oral argument for November 29, 2016. The Court did not issue this date until October 21, 2016, so that left relatively little time to make reservations. It was also the Tuesday after Thanksgiving, making Monday travel difficult and expensive.

<sup>6</sup> *Ex parte Moore*, 470 S.W.3d 481, 528 (Tex. Crim. App. 2015) (Alcala, J., dissenting), *cert. granted in part sub nom. Moore v. Texas*, — U.S. —, 136 S. Ct. 2407, 195 L. Ed. 2d 779 (2016).

<sup>7</sup> *Moore v. Texas*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/moore-v-texas/>.

<sup>8</sup> *Ibid.*

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

<sup>10</sup> *Ibid.*

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



Photo of the U.S. Supreme Court on November 29, 2016, the day of oral argument, courtesy of Jani Maselli.

I had tried to watch a Supreme Court oral argument about two decades ago. I waited in line and the Marshalls let in the first forty-three inside. I was Number Forty-Five.

This time I left nothing to chance. I am a member of the Supreme Court bar so I knew there was a special “lawyer’s line.” Lawyers get to sit inside the bar, which is very close to the litigants and justices. But, I had no idea how many lawyers would show up. So I hired a “line stander” for the public line. Line standers are not allowed in the lawyer line and are probably not popular for the public line. My line stander showed up at midnight. I showed up at the Court at 6:00 a.m. The public line was already forty deep. There was no one in the lawyer line. I ended up being number one for the lawyer line and number one for the public line. I stayed in the lawyer line because I knew that seat would be significantly closer.

When going to the Supreme Court, be prepared to stand. And stand. And wait. Around 8:00 a.m., security marched each of the two lines in through separate court

entrances. Once in, we went through. Then all visitors were directed to put all their coats, scarves, purses, and cellphones in a locker. (Remember to bring a quarter.) Then, all spectators went through security again.

Once in the Court, the Marshall Service directed each of the spectators to the exact seat where they wanted them to sit. I was directed to one of the two open seats in the front row between reserved seats. The chairs were touching side by side. They are straight-backed and not comfortable at all. But I had no complaint. I was less than three feet from the Texas Solicitor General. I was barely six feet from Justice Sotomayor. It is the closest I have ever seen a spectator sit to any bench, let alone the Supreme Court.

People with reserved seats sat outside the bar. Special guests of the Justices sat on one side of the Court, in what look like very comfortable chairs. On the other side of the Court were chairs with desks, and the press sat there. I recognized National Public Radio’s Nina Totenberg immediately in the best seat in the courtroom—near the front with her own desk.

Without fail, everyone working at the Court was courteous and professional. At least a

couple of the clerks were wearing their morning suits with tails and a vest. The U.S. Marshalls were strict. They admonished the whispering spectators to quiet down.

The Courtroom is very formal. It is ornate and majestic. At 10:00 a.m., almost to the second, the court gavel banged and the Oyez intro was made. The Justices appeared quickly and simultaneously through curtains behind the bench. Unlike the Texas Court of Criminal Appeals, where the judges file in, this was a dramatic entry.

Before argument began, Justice Ginsburg read an opinion from the bench.<sup>12</sup> She was tiny and seemed frail—but she read the opinion beautifully. It was very exciting to hear. The Court then heard from movants offering lawyers to membership in the Supreme Court bar. And then finally, the Court called the case to be heard.

One thing that struck me was how quickly Clifford Sloan, the attorney for Bobby Moore, got to the podium. Chief Justice Roberts had barely finished calling the case and Mr. Sloan was standing and beginning. Mr. Sloan spoke for just over a minute before the Chief Justice challenged him regarding the wording of the cert. petition. It was a very aggressive beginning and the remainder of the argument remained just as lively.

Except for Justice Clarence Thomas, who asked no questions, the Justices asked pointed questions that displayed amazing preparation. Justice Elena Kagan impeached the Texas Solicitor General with references to his own brief. Justice Sonia Sotomayor discussed intricacies from the testimony at the writ hearing. The level of argument was unlike any I have ever seen or participated in. It was exhilarating.<sup>13</sup>



John L. Manno's 2007 photo of the interior of the U.S. Supreme Court Courtroom showing its Siena marble columns. Wikimedia Commons, courtesy of John L. Manno (Weatherman1126).

### ***Judge Alcala in attendance***

Judge Alcala attended the argument. I do not speak for her, but she made some observations about the Court on her Facebook page which she agreed that I might share:

I debated whether to post about the oral argument that I watched at SCOTUS today. I wrote the dissent in *Moore* that was the subject of the oral argument and I was interested in hearing the higher court's assessment of the case. We decided to combine a college visit with the oral argument to hit two birds with one stone.

<sup>12</sup> *Bravo-Fernandez v. United States*, 15-537, 2016 WL 6952648 (Nov. 29, 2016).

<sup>13</sup> Anyone interested in oral argument in the case can listen to it on the Oyez IIT Chicago-Kent College of Law website at <https://www.oyez.org/cases/2016/15-797>.

I will not discuss the substance of the case. Instead, I'll refer you to the SCOTUSblog<sup>14</sup> and to the *Texas Tribune*,<sup>15</sup> both of which have written detailed stories that set out a lot of what happened as well as some legal analysis. I will describe the other miscellaneous stuff that you see in person but don't get from listening to an audio recording or from reading a transcript.

Justice Thomas leaned way back in his chair a lot of the time and said nothing.

Justice Ginsburg was tiny, hoarse, and I could hardly see or hear her but she still seems very sharp.

Justice Kagan was like a surgeon striking with precision. She was strong and brilliant.

Justice Stephen Breyer was forceful in his questions, seemed to give a speech at one point, and very pragmatic.

Justice Sotomayor was extremely prepared and familiar with the law and record. She was very confident with a lovely demeanor.

Chief Justice John Roberts was concerned about procedure and whether the defense attorney was exceeding the scope of the issue that had been granted.

My daughter, a couple of lawyers, and I were all seated in different areas of the courtroom and each of us said afterwards that we thought Justice Samuel Alito was looking at us. We joked that he was like the Mona Lisa painting with his eyes seeming to look at you no matter where you were. *Ha*. Justice Alito asked good questions.

I can't remember what Justice Anthony Kennedy asked. But he seemed very formal, reserved, and engaged in the discussion.

The eight officers present in the Courtroom were extremely strict. They told a lawyer to put her glasses away or on her face but not to have them hooked on her blouse. My daughter said that when she started closing her eyes, the marshals would stare her down. There were three marshals patrolling, walking back and forth in front of the audience during oral argument and they took shifts looking us up and down.

We had to put everything in lockers and take nothing into the courtroom. We did a lot of standing in lines and waiting. We went through security screening as we walked into the building and then more security screening to get into the courtroom. Argument lasted one hour—thirty minutes per side—and was totally formal.

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<sup>14</sup> SCOTUSBLOG, MOORE V. TEXAS, <http://www.scotusblog.com/case-files/cases/moore-v-texas/>.

<sup>15</sup> Jolie McCullough, "Justices Debate How to Define Intellectual Disability in Texas Death Row Case," *Texas Tribune*, Nov. 29, 2016, available at <https://www.texastribune.org/2016/11/29/supreme-court-split-texas-case-intellectual-disabi/>.

The Justices seemed physically small, like regular people, unlike how larger than life they seem on TV. Their bench is lower than the Court of Criminal Appeals' courtroom in Austin and seemed more approachable. The Court of Criminal Appeals' courtroom is made of marble and is very high, while the Supreme Court's is made of wood and is counter-height. The lawyers' podium is very close to their bench, maybe 2-3 feet. There are rows of lawyer chairs for the Supreme Court's licensed attorneys right next to and behind the lawyer tables and in front of the regular pews.

Before the oral argument I heard Justice Ginsburg orally read the holding of her opinion that was issuing that day. The bench had only eight chairs spread out along the entire bench so they had extra elbow room.

I was glad I went. Hope this was not too long but I will probably forget all the details by tomorrow!



Texas Court of Criminal Appeals Judge Elsa Alcalá, left, and Public Defender Jani Maselli Wood, right. Photo courtesy of Jani Maselli Wood.



Public Defender Jani Maselli Wood, courtesy of Ms. Wood.

### *I recommend everyone attend*

I was not certain that the trip would be worth it. I almost rationalized myself right out of the trip by telling myself I could hear the argument on Oyez.org.<sup>16</sup> But being there was dramatically different. Being intimately familiar with the case was an added bonus. The Justices are animated and the level of discourse is in-depth. The Courtroom was beautiful and ornate and just what any visitor would hope our Supreme Court looks like. If you get an opportunity to watch an oral argument in the U.S. Supreme Court, it is worth the trip.

<sup>16</sup> OYEZ, MOORE V. TEXAS, <https://www.oyez.org/cases/2016/15-797>.



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# Thechas to Texas: The History of Our Word

By Justice Jason Boatright

Rumors swirled around the Court in Madrid. Alarming reports shot through the Viceroyalty in Mexico. Frenchmen, it seemed, had landed somewhere along the coast of northern New Spain.

The year was 1689. Spanish explorers had been sailing past or wandering around the vast region just northwest of the Gulf for 170 years, but not a single Spanish fort, church, or settlement had been built. Now, Spain feared, there was nothing to stop the French from taking the land for themselves.<sup>1</sup> The French had to be beaten and banished, but first they had to be found, so the Viceroy of New Spain sent an expedition to look for them.

The Crown spared no expense. Hundreds of soldiers were gathered from forts throughout the northern frontier and assembled at Monclova, the capital of Coahuila. Immense pack trains—721 horses and mules—laden with weapons, gifts, and other supplies, were assembled.<sup>2</sup> The Governor of Coahuila himself, Alonso De León (1639–91), led the expedition. It was a very serious undertaking.

The Spaniards marched northeast for weeks, meeting dozens of Indian tribes, asking whether any of them had seen the French. Eventually, the Spanish did find a handful of poor, dirty, lonely Frenchmen scattered among a few Indian villages. They were the only survivors of a French colony that was now a total failure. Their leader, René-Robert Cavalier, Sieur de La Salle, had been murdered, their fort abandoned, their ships sunk, their supplies looted or burned.<sup>3</sup> This was colossal news. France, the expedition learned, was no threat at all.

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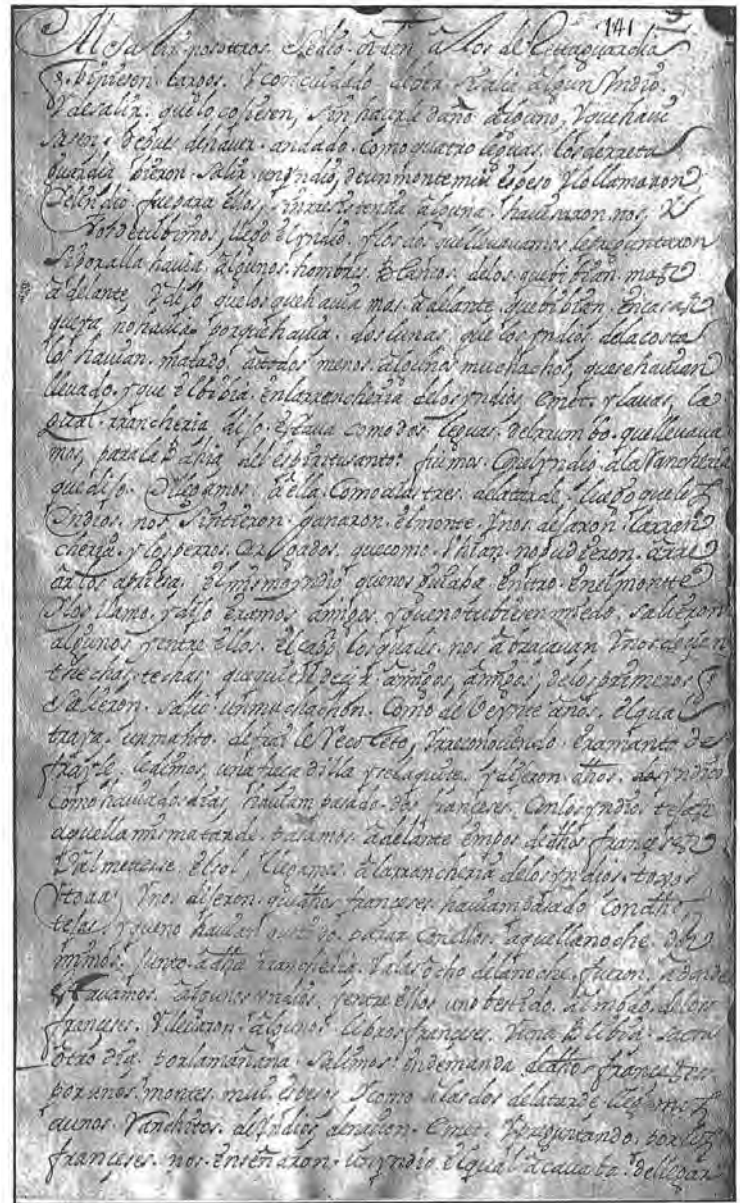
<sup>1</sup> For a thorough discussion of the anxiety Spanish officials felt over the French threat in New Spain, see Elizabeth A. H. John, *Storms Brewed in Other Men's Worlds* (Norman: University of Oklahoma Press, 1996), 156–85; Robert S. Weddle, *The French Thorn: Rival Explorers in the Spanish Sea 1682–1769* (College Station: Texas A&M Press, 1991), 40–61; and William Edward Dunn, *Spanish and French Rivalry in the Gulf Region of the United States, 1678–1702: The Beginnings of Texas and Pensacola* (Charleston, NC: Nabu Press, 2013), 59–80, reprinted from University of Texas Bulletin No. 1705, Studies in History No. 1 (Austin: University of Texas, 1917).

<sup>2</sup> Familia González Díaz and Pilar Lázaro de la Escosura (curators), *The Threads of Memory / El Hilo de la Memoria* (Exhibition / Exposición) (Santa Fe, NM: New Mexico History Museum, et al., 2011), 170–73. See also Juan Bautista Chapa, *Texas and Northeastern Mexico, 1630–1690*, ed. William C. Foster (Austin: University of Texas Press, 1997), 122–25.

<sup>3</sup> "Carta de Don Damian Manzanet á Don Carlos de Sigüenza," *Quarterly of the Texas State Historical Association* 2, no. 4 (April 1899): 258. Recent archeological excavation of LaSalle's flagship the *La Belle* and his abandoned Fort St. Louis supplement French and Spanish primary sources about this French colonial disaster. See, e.g., James E. Bruseth, *La Belle: The Ship That Changed History* (Austin: Texas A&M University Press for the Bob Bullock State Museum, 2014); James E. Bruseth and Toni S. Turner, *From a Watery Grave: The Discovery and Excavation of La Salle's Shipwreck La Belle* (College Station: Texas A&M University Press, 2005); William C. Foster, ed., *The La Salle Expedition to Texas: The Journal of Henri Joutel, 1684–1687* (Austin: Texas State Historical Association, 1998).



Two detailed first-person accounts were written about the expedition and submitted to the high officials of New Spain.<sup>4</sup> One of those accounts was written by a Spanish priest named Father (Fray) Damián Massanet. His report quotes a word that seems a little out of place:<sup>5</sup> *thechas, techas*.



Fray Damián Massanet's report, from the Portal to Texas History. The close-up below focuses on line 21 of the report.<sup>6</sup>



<sup>4</sup> *Ibid.* See also Lino Gómez Canedo, "Auto levantado por Alonso de León acerca del establecimiento francés en la costa de Texas; Cercanía de la Bahía del Espíritu Santo, 22 de Abril de 1689)," *Primeras Exploraciones y Poblamiento De Texas (1686-1694)* (Monterrey, Mexico: Instituto Tecnológico y de Estudios Superiores, 1968), 105.

<sup>5</sup> "Carta de Don Damian Manzanet," 258. See also Díaz and Lázaro de la Escosura, *Threads of Memory*, 173.

<sup>6</sup> "Carta de Don Damian Manzanet." For the close-up of line 21 above, see University of North Texas Libraries, Portal to Texas History, <https://texashistory.unt.edu/ark:/67531/metaph101011/m1/262/>. It remains uncertain whether this report appears in Fray Damián's hand, but on balance the evidence supports authenticity. First, the report uses seventeenth-century Spanish punctuation and abbreviations. Second, the report appears in records of the Secretary of State for Mexican Emperor Maximilian in 1865, a place one would expect to find a 1690 letter to a court favorite. <https://texashistory.unt.edu/ark:/67531/metaph101011/m1/257/>. Third, historians of Spanish and Mexican history have treated it as an original. Still, some doubts arise because it is signed "Mançanet" <https://texashistory.unt.edu/ark:/67531/metaph101011/m1/284/>, not "Massanet," the usual spelling. <https://texashistory.unt.edu/ark:/67531/metaph101040/m1/109/>. Yet different spellings are not dispositive, for sixteenth-, seventeenth-, and eighteenth-century writers placed little to no value on uniform spelling of words or names. See, e.g., David J. Harvey, *The Law Empryted and Englysshed: The Printing Press as an Agent of Change in Law and Legal Culture 1475-1642* (Oxford and Portland, OR: Hart Press, 2015), 8 and 8, n. 36; David Hackett Fischer, *Liberty and Freedom: A Visual History of America's Founding Ideas* (Oxford: Oxford University Press, 2005), 754 n. 100. Writers frequently spelled their own names different ways in the same document. Furthermore, Massanet came from Majorca in the Balearic Islands, part of the old Kingdom of Aragon, where Spanish was heavily influenced by Catalonia (and earlier Moorish kingdoms). Use of the letter ç was and is extremely common in Catalan; it would have been natural for a native Catalan speaker who moved to Spain, then New Spain, to use different letters to make the sound denoted by ç over time.

The term *thechas*, or *techas*, was a Hasinai Indian word that meant friends or allies.<sup>7</sup> The word had nothing to do with finding the Frenchmen, and it did not give the expedition any other kind of useful information. Nor was it spoken by a tribe that the Spanish considered important or interesting. Instead, it was simply a greeting extended to the Spaniards by a band of Indians the expedition passed along the way, and would not mention again.<sup>8</sup> Why, then, did Fray Damián think the word was important enough to record? The answer to that question explains how Texas got its name.

### ***How thechas became Texas.***

Fray Damián intentionally presents the word *thechas* or *techas* phonetically, exactly as he heard it, rather than how it was spelled by others.<sup>9</sup> His use of the letters “th” to spell the first version of the word and “t” to spell the second may seem strange, but “th” and “t” sound much more similar to one another in Spanish than they do in English.<sup>10</sup> His use of “ch” is also notable. In 1689, “ch” was a single letter of the Spanish alphabet, and had a sound like the English digraph “ch,” but with a soft, quick “t” added to the front of it to make a [tch] sound.<sup>11</sup> This is slightly different from the sound of the Spanish letters “x” and “j,” which typically replaced the letter “ch” in the word, rendering its common spellings of “texas” and “tejas.” Until around 1600, the [ch] sound in Spanish—which is different from the [tch] sound of the old Spanish letter “ch”—was written with the letter “x”.<sup>12</sup> The sound of the letter “j” had the sound of the first letter in French “jour” [ʒ] and Italian “giorno” [j]. However, both “x” and “j” came to have the same sound after 1600, and they were soon used interchangeably to make the [ch] sound.<sup>13</sup> Thus, “texas” in 1689 would have sounded exactly like “tejas.” Neither, however, would have sounded exactly like *thechas* or *techas*, and Fray Damián’s use of the letter “ch” instead of the usual “x” or “j” informs the reader that the word he heard sounded different from the usual “tejas” or “texas.”

But why would he bother to inform the reader about that at all? Why would he go to the trouble of spelling the word phonetically? For the same reason he quoted the word in the first place: because the word was evidence of something that was immensely important to him.

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<sup>7</sup> John Swanton, *Source Material on the History and Ethnology of the Caddo Indians* (Washington, D.C.: U.S. Government Printing Office, 1942), 4.

<sup>8</sup> It was spoken by members of the “emet. y lavas” tribe. (“Carta de Don Damian Manzanet,” 258.) Apparently, these were Emet and Cavas bands of Tonkawa Indians. William W. Newcomb, Jr., *The Indians of Texas* (Austin: University of Texas Press, 1961; rep.1999).

<sup>9</sup> His consistent and frequent reference to the Tejas Indian tribe by the usual Spanish name for them—“los yndios tejas”—suggests that he was accustomed to the usual spelling, and this, in turn, suggests that his ingenuous use of “thechas” or “techas” was an departure from the norm for some rhetorical purpose. See “Carta de Don Damian Manzanet,” 258. Thechas or techas was also spelled as texas, texias, tejas, tejias, teysas, and techan. Swanton, *Source Material*, 4.

<sup>10</sup> There are four ways to pronounce the letter “t” in Spanish. Robert M. Hammond, *The Sounds of Spanish: Analysis and Application* (Sommerville, MA: Cascadilla Press, 2001), 176. An “aspirated [tʰ]” pronunciation “obligatory whenever the phoneme /t/ occurs in syllable-initial or word-initial position before non-reduced vowels.” *Ibid.*

<sup>11</sup> This is called a prepalatal voiceless affricate, and its sound has remained unchanged from medieval times to the present. Ralph Penny, *A History of the Spanish Language* (New York: Cambridge University Press, 1991, 2002), 96.

<sup>12</sup> *Ibid.* at 109.

<sup>13</sup> Robert K. Spaulding, *How Spanish Grew* (Berkeley: University of California Press, 1967), 159–60.

***The expedition was looking for the French, but Fray Damián was investigating a miracle.***

Fray Damián moved from Spain to the frontier of New Spain in 1683 to investigate the old stories of Mother María de Jesús, who, earlier that century, had been the abbess of a convent in Agreda on the border of Castile and Aragon.<sup>14</sup> She claimed to have traveled telepathically to lands that are now in East New Mexico and West Texas dozens of times between 1620 and 1631. While there, she said, she taught several Indian tribes—among them a tribe she called the “Jumanas”—the rudiments of Christianity.<sup>15</sup> In the late 1620s, she told her stories to a priest in Agreda, who sent a letter about them to the Archbishop of New Mexico.

Then, in 1629, a delegation of 50 Jumanos traveled from their lands in West Texas to the Franciscan convent at Isleta, near present-day Albuquerque, asking the Spanish to send missionaries to their homeland.<sup>16</sup> The Jumanos demonstrated some knowledge of Christianity and, when the Spanish asked them who had instructed them in religion, they said “the Woman in Blue.” A Franciscan priest living in New Mexico, Fray Alonso de Benavides, traveled to Spain and interviewed Mother María in 1631. He reported that she was wearing blue, and that she claimed to have traveled from “Quivira” to the Kingdoms of “Cillescas, Cambujos, and Jumanas,” and then to the very large and densely populated Kingdom of “Titlas,” which she visited most frequently of all. She added that the names she gave for the kingdoms were close to the real names, but were not quite the real names, because she did not know the languages of the natives.<sup>17</sup>

Just after Fray Damián arrived in New Spain in 1683, the Governor of New Mexico wrote a letter to the Viceroy of New Spain explaining that a Jumano Indian had just traveled far from his homeland in the east to ask the Governor to send missionaries to his tribe, and to a number of others tribes as well. Among the other tribes was as “gran Reyno de los Texas” which, the Jumano told the Governor, was a populous country ruled by a powerful king, situated next to Gran Quivira. The Governor asked the Viceroy for permission to send an expedition to this kingdom so that “another New World might be discovered and ‘two realms with two more crowns’ be added to the Lord’s dominions.”<sup>18</sup> An expedition was sent to the Jumanos and neighboring tribes, but it did not reach any Grand Kingdom of the Texas.

Fray Damián knew that the 1689 expedition to search for the French would come close to the area where the Grand Kingdom of the Texas was supposed to be. Now, he could finally investigate Mother María’s stories, something he was evidently very eager to do: he begins his report of the 1689 expedition by talking about her. He writes that she claimed to have traveled to Gran Quivira, west of the Kingdoms of “Ticlas,” “Theas,” and “Caburcol,” and that she thought

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<sup>14</sup> “Carta de Don Damian Manzanet,” 258.

<sup>15</sup> Dunn, *Spanish and French Rivalry*, 106–07.

<sup>16</sup> Donald E. Chipman and Harriet Denise Joseph, *Spanish Texas 1519–1821* (Austin: University of Texas Press, rev. ed., 2010), 58.

<sup>17</sup> Frederick Webb Hodge, George P. Hammond, and Agapito Rey, *Fray Alonso de Benavides’ Revised Memorial of 1834* (Albuquerque, NM: University of Mexico Press, 1945), 141–43. In 1830, Benavides had written a memorial that mentioned the Kingdoms of “Chillescas,” “Guismanes,” “Abucos,” and “Tidan.” *Ibid.* at 93.

<sup>18</sup> Herbert Eugene Bolton, *The Hasinai: Southern Caddoans as Seen by the Earliest Europeans* (Norman: University of Oklahoma Press, 2002), 55 (translating the Governor’s letter).

those names were similar to, but not the same as, the names of the real kingdoms she visited.<sup>19</sup> Note that Fray Damián adds a kingdom—Theas, which begins with a “th” digraph—that neither Mother María nor Fray Benavides had mentioned.

The expedition of 1689 eventually reached the Hasinai tribe. The Spanish saw that members of the tribe had sturdy houses, well-tended fields, and sophisticated social arrangements.<sup>20</sup> They were also allies of the Jumanos.<sup>21</sup> Indeed, they were part of an alliance of many tribes who, like the non-Hasinai Indians Fray Damián had quoted, used the Hasinai word for friend or ally—*thechas*, *techas*—which indicated the kind of political and cultural influence that one might expect a kingdom to have.<sup>22</sup> Accordingly, Fray Damián calls the Hasinai the “tejas” in his report, even though neither the Indians<sup>23</sup> nor the French did so.<sup>24</sup>

At the end of his account of the expedition, Fray Damián said that the most important event of the trip had been a request by the “governor” of the Tejas for blue cloth. The governor explained that a previous generation of his tribe had been visited by a woman in blue, and that the tribe wanted to be like her.<sup>25</sup> Fray Damián concluded that this was proof that Mother María had been there. The Tejas tribe was the Kingdom of Theas, or Ticlas—or some similar-sounding name—that Fray Damián believed Mother María had visited so many times.

Thus, Fray Damián carefully quoted the word “thechas, techas” because it linked the Kingdom of “Theas,” or “Ticlas,” with the Grand Kingdom of the Texas, and the woman who had traveled there; he quoted the word because he thought it was evidence of a miracle.

### ***Texas begins to grow.***

In 1690, Fray Damián founded the Mission San Francisco de los Tejas, or de los Texas, in lands controlled by the Hasinai.<sup>26</sup> This was the first mission the Spanish established in present-day Texas. The area around the mission was known as the “Provincia de los Tejas” or “de los Texas.”<sup>27</sup> The lands belonging to the province grew westward from the Hasinai lands over the next forty years.

Before the Spanish began referring to the region as “de los Tejas” or “de los Texas,” it had a series of short-lived names. Texas was part of a larger gulf coast region known as “Amichel”

<sup>19</sup> “Carta de Don Damian Manzanet,” 279–80. He adds the Kingdom of “Theas” to the list of kingdoms Mother María visited.

<sup>20</sup> Bolton, *The Hasinai*, 70, 92, 111.

<sup>21</sup> Nancy Parrott Hickerson, *The Jumanos: Hunters and Traders of the South Plains* (Austin: University of Texas Press, 2010), 165–66.

<sup>22</sup> Bolton, *The Hasinai*, 57.

<sup>23</sup> A possible exception is the Wichita Indians, who called the Caddo Indians, of which the Hasinai were a part, the “Dashí,” “Desa,” “Táshash,” and “Táwitskash.” Swanton, *Source Material*, 6. The Wichitas were relatives of the Hasinai and shared certain religious beliefs and architectural practices with them. Bolton, *The Hasinai*, 147.

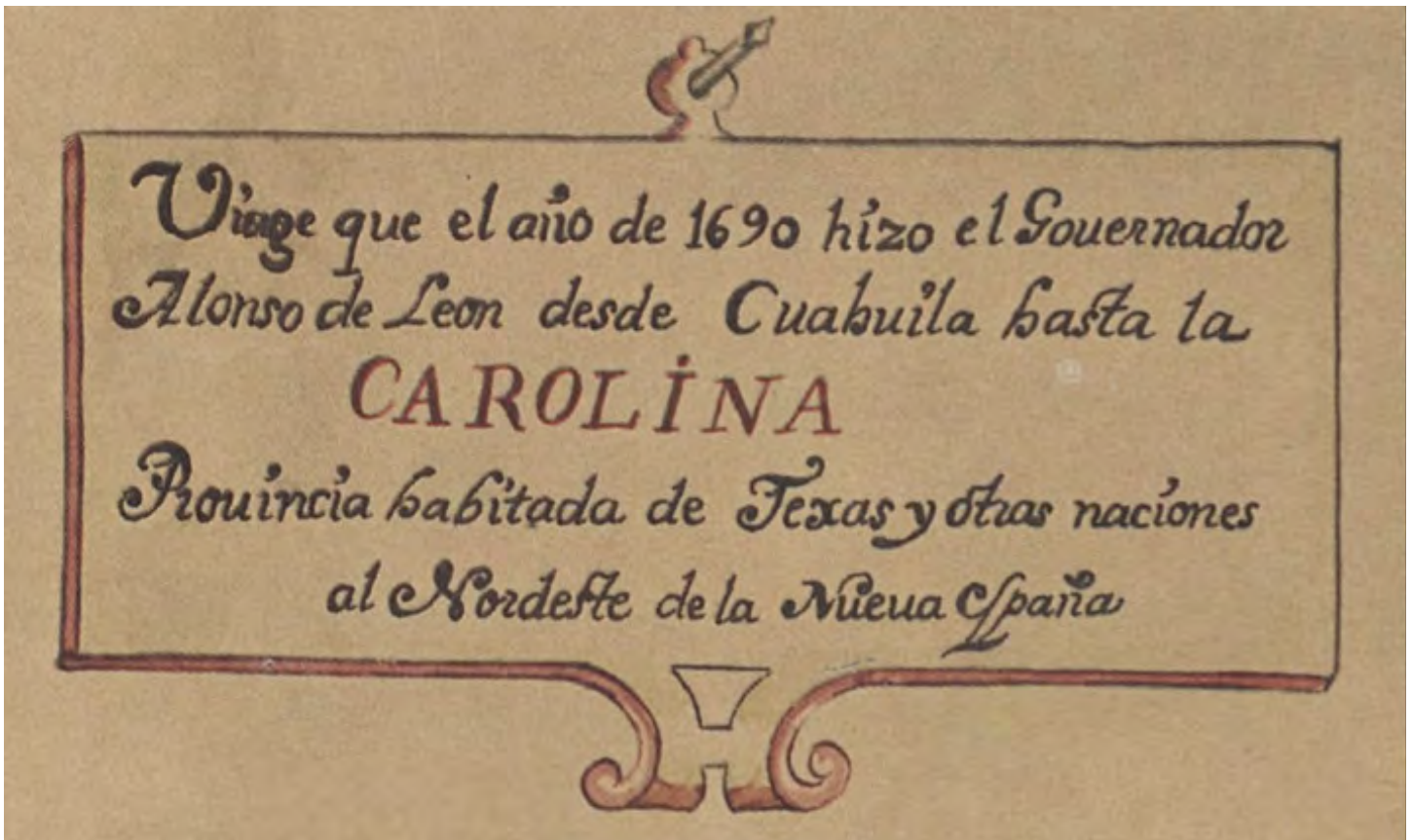
<sup>24</sup> The French called them “Cenis.” Bolton, *The Hasinai*, 59.

<sup>25</sup> “Carta de Don Damian Manzanet,” 280.

<sup>26</sup> Chipman and Joseph, *Spanish Texas*, 90–91. See also Díaz and Lázaro de la Escosura, *Threads of Memory*, 173.

<sup>27</sup> See, e.g., Canedo, *Primeras Exploraciones y Poblamiento de Texas*, “Alonso de León anuncia al virrey Conde de Galve su inmediata salida para Texas (Monclova, 26 de marzo de 1690),” 127.

in the sixteenth century.<sup>28</sup> Many maps of the seventeenth century appear to include parts of present-day Texas in "Florida" or "Floride."<sup>29</sup> In a hand-drawn pen and ink map accompanying the report written by the captain of the 1689 expedition forwarded to the Archivo General de Indias in Sevilla, Coahuila Governor Alonso de León, the land that is now Texas was labeled "Carolina" and referred to "the authorized province in Texas."<sup>30</sup> J. P. Bryant, former president of the Texas State Historical Association and the organizer of the J. P. Bryant Museum in Galveston, discovered the original map in the records of the Archivo General de Indias in Sevilla, Spain and had it copied by an artist before publicizing it as the first Spanish map of "Texas."<sup>31</sup>



Title inset to *Alonso De León's Last Expedition into Texas in 1690*, including his references to "Carolina" and "Texas."<sup>31</sup>

<sup>28</sup> Robert S. Weddle, *Wilderness Manhunt: The Spanish Search for La Salle* (College Station: Texas A&M University Press, 1999), 25.

<sup>29</sup> *Ibid.*, Maps.

<sup>30</sup> Chipman and Joseph, *Spanish Texas*, 87.

<sup>31</sup> *Alonso De León's Last Expedition into Texas in 1690*, map, date unknown (<http://texashistory.unt.edu/ark:/67531/metaph493023/m1/1/?q=alonso%20de%20leon2>), University of North Texas Libraries, *The Portal to Texas History*, crediting Hardin-Simmons University Library.



(left): Full-scale copy of *Alonso De León's Last Expedition into Texas in 1690* showing a seventeenth-century itinerary of Texas and the first version of El Camino Real.<sup>32</sup>  
 (right): *Trails Taken by Spanish Explorers into Texas*, Wikipedia.<sup>33</sup>

The first "Gobernador de los Texas," Domingo Terán de los Ríos, felt free to name it Nuevo Reyno de la Montaña de Santander y Santillana in 1691.<sup>34</sup> Even so, Governor Terán refers to the region as the "reino de los Texas" or the "provincial de Texas" throughout his diary.<sup>35</sup> Governors were not generally known as Gobernadores "de Tejas" or "de Texas" until around 1720, when the vast area from the Hasinai lands to Coahuila was called, simply, Tejas, or Texas.<sup>36</sup>

### Tejas or Texas?

The words "Tejas" and "Texas" were used interchangeably in seventeenth and early eighteenth century documents. For example, a single 1683 letter from the Governor of New Mexico to the Viceroy uses "el gran Reyno de los texas," "yndios de la nazon tejas," then "dicho nazon de los texas."<sup>37</sup> Similarly, one account of the 1689 expedition uses "los Tejas,"<sup>38</sup> while the other uses "los Texas."<sup>39</sup>

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

<sup>33</sup> Clark Wissler and Constance L. Skinner, "Spanish Expansion into Texas," *Pageant of America*, Vol. 1, *Adventures in the Wilderness* (New Haven: Yale University Press, 1925).

<sup>34</sup> Bolton, *The Hasinai*, 60.

<sup>35</sup> See *Primeras Exploraciones y Poblamiento de Texas*, "La gran esperanza fallida: expedición a Terán-Mazanet (1691–1692), Diario del general Domingo Terán de los Ríos en su expedición a Texas," 171.

<sup>36</sup> See Decree of Casafuerte to the Governor of Texas, 1727 (referring to Texas rather than the place of the Texas Indians), Bexar Archives Online, University of Texas at Austin, Briscoe Center for American History, [http://www.cah.utexas.edu/db/dmr/image\\_thumb/e\\_bx\\_000009\\_001.jpg](http://www.cah.utexas.edu/db/dmr/image_thumb/e_bx_000009_001.jpg).

<sup>37</sup> Letter from Domingo Gironza Petris Laguna Petris de Cruzate, to Conde de Paredes Marqués de la Laguna, Santa Fe, October 30, 1683. Archivo General de Indias, *Provincias Internas*, Tomo 35, University of New Mexico Archives, Center for Southwest Research, 972 M57, p. V.35. In the same letter, the governor called it "Gironza," "Xironza," and "Jironza."

<sup>38</sup> "Carta de Don Damian Manzanet," 255.

<sup>39</sup> Canedo, *Primeras Exploraciones*, 108.

By the eighteenth century, the letters “x” and “j” began to be pronounced as a kind of glottal [h], like “loch” in Scots English.<sup>40</sup> However, the Royal Academy of Spanish condemned the use of the letter “x” for the [h], or *jota*, sound in 1815,<sup>41</sup> so what had been Mexico or Mejico, Texas or Tejas, became Mejico and Tejas. This convention, however, was idiosyncratically observed at best. For example, the Mexican Constitution of 1824 refers to all of the “estados” of “la nación Mexicana,” including “Coahuila y Tejas,”<sup>42</sup> but the 1827 constitution of that state refers to “Coahuila y Texas.”<sup>43</sup> The records of Austin’s Colony—even the earliest ones, and even those written in Spanish and created by Mexican officials—usually referred to “Texas” rather than “Tejas.”<sup>44</sup> Today, the Royal Academy of Spanish recommends “Texas” rather than “Tejas,” and prescribes that the letter “x” be pronounced as an [h].<sup>45</sup>

### ***Texas is much more than the Friendship State.***

The Legislature decided long ago that Texas would be the Friendship State, reasoning that the name is derived from the “Indian word Tejas,” “meaning friendship,” and that friendship is emblematic of the universal spirit of the people of Texas.<sup>46</sup> However, “Texas” does not quite mean “friendship.” Fray Damián translates it as “amigos”—“friends.”<sup>47</sup> It describes allied people and tribes under the suzerainty of a kingdom; and not just any kingdom, but a Grand Kingdom that was said to have been visited by miracles. The Spanish intentionally named their first mission and province after this term, which, for the Hasinai, connoted an important social and political arrangement and, for the Spanish, connoted a political and religious aspiration. Which is to say that thechas meant much more than friendship; it meant *friends*.

<sup>40</sup> Penny, *History of the Spanish Language*, 103. See also Hammond, *Sounds of Spanish*, 227–29.

<sup>41</sup> Spaulding, *How Spanish Grew*, 161. Today, the Royal Academy recommends “Texas” and “Mexico.” Diccionario panhispánico de dudas, Real Academia Española, <http://lema.rae.es/dpd/srv/search?id=XWeC0sdHyD6QIMZHPb>.

<sup>42</sup> Constitución Federal de Estados Unidos Mexicanos, 1824, Tit. II, Secs. 4, 5, University of Texas, Tarlton Law Library, Texas Constitutions, <https://tarltonapps.law.utexas.edu/constitutions/mexican1824spanish>.

<sup>43</sup> Constitución Política del Estado Libre de Coahuila y Texas, 1827, University of Texas, Tarlton Law Library, Texas Constitutions, <https://tarltonapps.law.utexas.edu/constitutions/img/constitutions/coahuila1827spanish/preamble-a5.jpg>.

<sup>44</sup> See, e.g., Transcript of Letter from Antonio María Martínez to Stephen F. Austin, August 21, 1821, University of North Texas, Portal to Texas History, <https://texashistory.unt.edu/ark:/67531/metaph216434/>. See also League and Labor Grant, Texas General Land Office Archives, <http://www.glo.texas.gov/ncu/SCANDOCS/archives/webfiles/arcmeps/webfiles/landgrants/PDFs/1/0/2/8/1028064.pdf>.

<sup>45</sup> Diccionario panhispánico de dudas, Real Academia Española, <http://www.rae.es/recursos/diccionarios/dpd>.

<sup>46</sup> Act of Feb. 18, 1930, 41st Tex. Leg., 4th C.S., HCR 22.

<sup>47</sup> He writes, “deçian thechas, techas; que quiere deçir amigos, amigos”; “Carta de Don Damian Manzanet,” 258.



**JASON BOATRIGHT** was appointed by Governor Greg Abbott to the Fifth Court of Appeals at Dallas in January 2017. Previously, he was Director of the General Counsel Section at the Texas Railroad Commission, and Chairman of the Attorney General’s Opinions Division.

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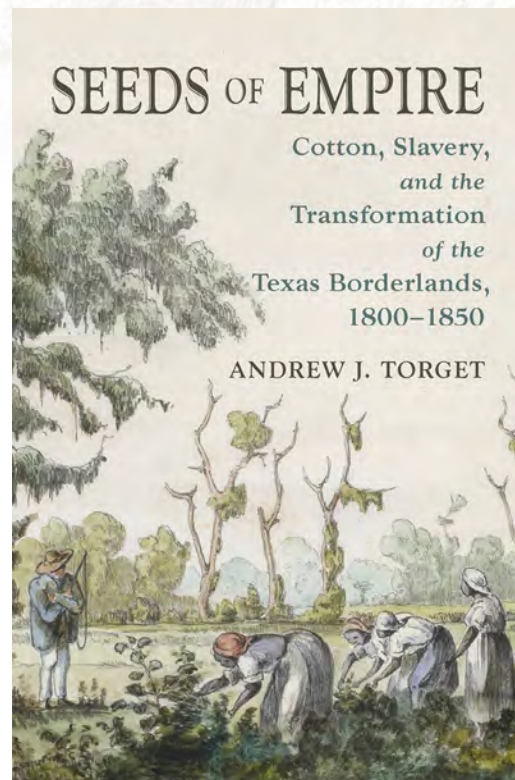
# Andrew J. Torget's *Seeds of Empire: Cotton, Slavery, and the Transformation of the Texas Borderlands, 1800-1850*

Book Review by James P. Bevill

The evolution of cotton farming in Texas and the southern United States gives the reader an intriguing look at one of the primary economic drivers behind the colonization of early Texas. Although the military side of the Texas story has been covered extensively by previous authors, Andrew J. Torget breaks new ground with this engaging narrative about the intense political drama that resulted from the confluences of social and economic forces created by cotton farming and the role of slave labor in the Texas borderlands. The story encompasses the highest levels of diplomatic circles in Spain, Mexico, Texas, the United States, Great Britain, and France in the first half of the nineteenth century.

Torget sets the stage by delving deeply into the Spanish dilemma of how to settle its sparsely populated northern territory. He highlights the inability of Tejanos to deal with the encroachments of hostile tribes of Indians in Texas following the military defeat of the Gutierrez-Magee expedition by the Spanish royalist forces at the Battle of Medina in 1813. The subsequent suppression of Tejano residents that had been implicated in the rebellion drove a wedge between these native-born Texans and their Spanish oppressors. In the years which followed, the Tejano leadership in San Antonio de Bexar more closely aligned their political and economic interests with those of the Anglo immigrants in Texas.

At about the same time, advances in technology created a tremendous demand for high-quality southern cotton used in the emerging textile industry in Great Britain. Most of this cotton was produced by a slave-based agriculture system in the southern United States. This, more than anything, accounted for the rapid growth in the populations of Louisiana, Mississippi, and Alabama in the first thirty years of the nineteenth century. The cotton farming boom in these southern states also created a great demand for field horses, resulting in horrific waves of violence as Texas Comanche Indians routinely raided the Spanish farms and ranches—



***Seeds of Empire: Cotton, Slavery, and the Transformation of the Texas Borderlands, 1800-1850***  
By Andrew J. Torget  
Durham: University of North Carolina Press, 2015  
<http://uncpress.unc.edu/books/13049.html>



stealing thousands of horses and driving them eastward in exchange for goods. The prospect of introducing Anglo-American emigration into Texas, as proposed by Moses Austin in late 1820, was viewed by officials in Mexico City as a logical solution: it would develop agriculture in the Texas borderlands as well as increase the non-Indian population.

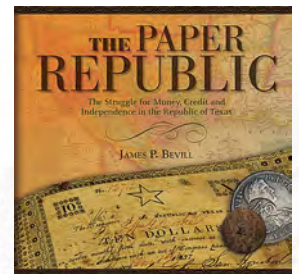
One of the greatest strengths of this book is its intricate discussion of Stephen F. Austin's political persuasion in regard to the introduction of slave labor in Texas and the efforts of Mexican political officials to abolish African slavery within their borders. Although the early colonists were allowed to bring their slaves into Texas through agreements with the new Mexican government, over time these agreements were placed in jeopardy. Austin tried to negotiate the sensitive economic issue of slavery with officials in Mexico City, but he was met with fierce opposition. It was only after his lobbying effort with Tejano allies—including Juan Antonio Padilla and José Antonio Navarro—that Navarro, then a representative in the Coahuila-Texas legislature, quietly slipped a piece of legislation honoring "any prior labor contracts for American immigrants" into the region in 1828. This created a technical loophole for the widespread use of slave labor in Texas.

Once this use of "indentured servants" was written into state law, it gave the political and legal protections to accelerate the American immigration plan into Texas, as potential settlers could rest assured that their slave-based agriculture system would be honored in Texas. The slave population in Texas rapidly increased over the next several years, contributing to the hardening of anti-American sentiment in Mexican politicians, many of whom called for a gradual or outright emancipation of slaves in Texas.

The book also chronicles the continuation of the slave-based labor system following the Texas Revolution in 1836 and the resulting negative political and economic backlash which factored into the first failed attempts at annexation, fund-raising, and early diplomatic recognition by the United States, Great Britain, and France. One of the surprises in this work is its intricate yet highly entertaining documentation and discussion of the political discourse regarding the cotton and slavery issues that took place between Texas diplomats, foreign governments, financiers, rabid abolitionists, and the cotton farming and manufacturing industries. This complicated but engaging story not only adds a new dimension to the story of early Texas, but it places the reader squarely into the time period. From here, we can begin to understand how this divisive institution of African slavery fit into the broader perspective of Texas independence and the subsequent expansion of the United States to include Texas.



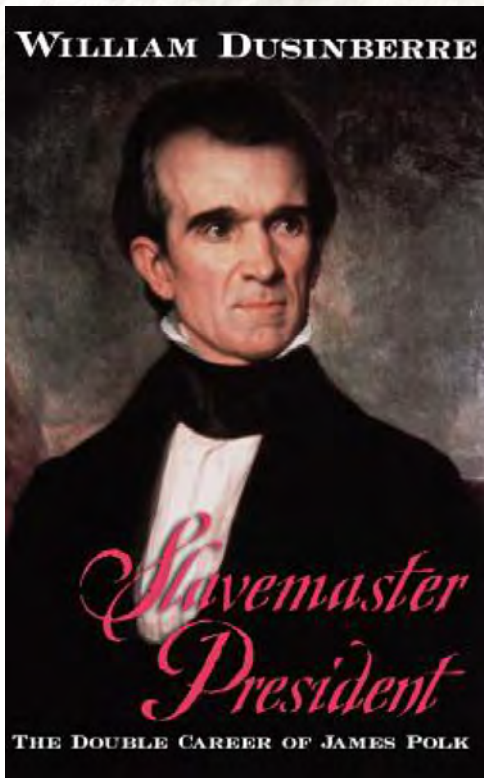
**JAMES P. BEVILL** is the author of *The Paper Republic: The Struggle for Money, Credit and Independence in the Republic of Texas* (Houston: Bright Sky Press, 2009). He is also a wealth management advisor, a former president of the Bellaire Coin Club, a former vice president of the Texas Numismatic Association, and an honorary member of the Sons of the Republic of Texas.



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# William Dusingberre's *Slavemaster President: The Double Career of James Polk*

Book Review by Patrick Judd



*Slavemaster President: The Double Career of James Polk*  
By William Dusingberre. New York:  
Oxford University Press, 2003

James K. Polk was one of America's last slave-owning Presidents. Polk's premature death at age fifty-six from cholera came only months after completing his single term in the White House. His prosperous 920-acre cotton plantation in northern Mississippi and his fifty-six slaves would be inherited by his childless wife, Sarah Polk. She would successfully manage the cotton plantation for the next fifteen years. Both the business and the slaves would burden every aspect of Sarah's life just as they had done to her husband.

Polk's direct ties to cotton growing and his personal intimacy with the peculiar institution have long been ignored or downplayed by historians. That no longer is the case. William Dusingberre's, *Slavemaster President: The Double Career of James Polk* is a deeply researched, insightful, and masterly account of the slave-owning career of the nation's eleventh president. Currently, only two other histories exist on American Presidents as slave owners. Both are by historian Henry Wiencek and both produced critical reinterpretations of their subjects, George Washington and Thomas Jefferson. William Dusingberre's study will no doubt do the same for the reputation of James K. Polk.

This book is divided into two parts. The first part is a finely detailed investigation of James K. Polk as a cotton-growing businessman and slave owner. The second part explores Polk the politician and his stance on slave-related issues while serving as a Congressman and President.

Polk emerges in this book as a meticulous, constantly occupied plantation owner deeply driven by profit motives. Dusingberre uses a wealth of primary sources to show that Polk was insensitive and almost always secretive in his management of his constantly growing slave labor force. Dusingberre details Polk's buying and selling of young slaves, brutally dealing with runaway slaves, and hiding his slave speculating. Polk owned thirty-eight slaves when he was elected President in 1844. He would surreptitiously buy another nineteen slaves while in the White House, using trusted agents to hide his ownership. According to Dusingberre, throughout his career as a cotton grower, Polk "was regularly buying as many new slaves as his revenues permitted." Natural procreation also augmented Polk's slave labor force: in a twenty-four-year

period a total of forty-eight slave children were born on his plantation; however, their mortality rate was 51 percent (higher than the 46 percent average rate in the South during the antebellum period).

Polk was from a long line of slave owners. His father owned fifty-three slaves and his grandfather owned twenty-four. With ownership came frustrating responsibilities. Dusiaberre's study is particularly insightful on Polk's constant grappling with the issue of runaway slaves. Ironically, many of his slaves fled to Polk's previous plantation located in western Tennessee. Here his former partner and brother-in-law, Silas Caldwell, would offer them refuge and kinder treatment. Most ran to avoid the grueling labor of clearing Polk's low-lying frontier Mississippi lands.

In a nineteen-year period a total of forty flights took place involving twenty-five male slaves. Woman slaves absconded as well. The situation seemed to be spinning out of control: one slave ran away ten times, another ran seven times, and a handful of others ran from three to five times each. Upon capture some were severely whipped while others were sold away, destroying the unity of their families. Many slaves had "abroad" marriages and had run or "laid out" in order to visit wives and kids for a short period on a neighboring plantation. Polk was constantly exasperated reading overseer reports and letters detailing the loss of his financial investment. Amazingly, no Polk slave ever permanently escaped.



Image of a July 1837 runaway slave advertisement in Wilbur Henry Siebert's *The Underground Railroad from Slavery to Freedom*, Albert Bushnell Hart Edition, 1898. Wikimedia Commons.

Dusiaberre does show a benevolent side to President Polk. He credits Polk with sometimes uniting separated slave family members through periodic purchases and even paying slaves for their self-grown crops. Nevertheless, he cites numerous incidents of Polk buying and selling slaves as young as nine years old. Polk used six different overseers to run his plantation business. Two overseers were fired after each had administered whippings so severe they prompted other Polk slaves to run away.

The second half of Dusiaberre's book delineates Polk's political career, focusing strongly on slavery-related issues. Regarding various national controversies centered on slavery, Dusiaberre points out Polk's firm defense of the gag rule, his opposition to greater international cooperation on enforcing the ban on the African slave trade, and his staunch belief that the federal government "must never interfere anywhere with slavery," whether that be in a state, a district, or a federal territory.

Dusiaberre indicates that Polk's diplomacy over the annexation of Texas was aggressive and provocative: "in annexing Texas, Polk was impelled by the wish to expand

slavery." Polk was by no means neutral when it came to either Texas or the expansion of slavery: caught up in the cotton boom of the 1830s as a frontier grower, he would directly benefit from a renewal of the boom by acquiring Texas and in doing so "secure his own financial position."

Interestingly, Polk also had personal ties to Texas by way of two cousins who had fought in the Texas Revolution as well as a great uncle who emigrated there prior to the fall of the Alamo. Polk was adamant about upholding the Southern slave-owners' right to bring their slaves into the new territorial lands acquired from Mexico. His ardent States Rights ideology proscribed any federal interference with the South's social system based on slavery.

Polk became in many ways the definitive spokesman for large Southern planters, pro-slavery advocates, state rights enthusiasts, and small-scale planters and entrepreneurs who would benefit from slavery's continued expansion. This study of James K. Polk as slavemaster is thorough, fascinating, and even chilling. One can only hope historians will get around to writing similarly focused studies on the slave-owning careers of James Madison, Zachary Taylor, and Andrew Jackson.



**PATRICK JUDD** *graduated from the University of Texas at Austin (M.A., 1983) and taught American history for twenty-nine years in the Austin Community College History Department.*

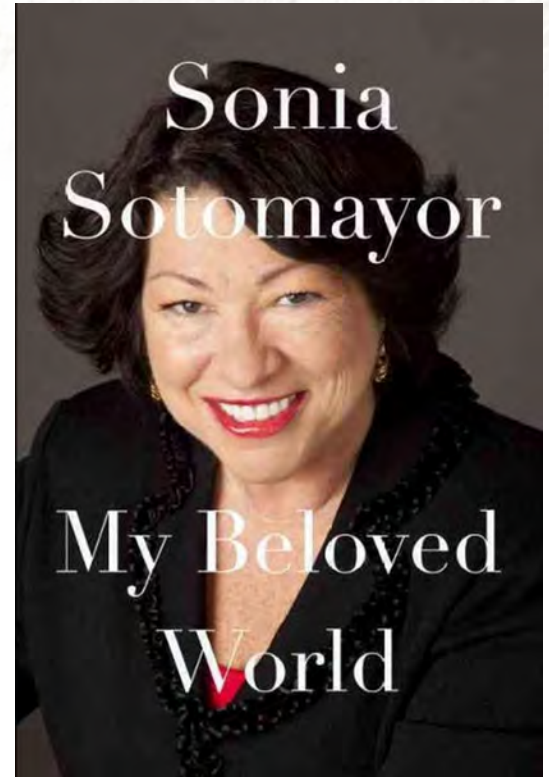
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# *My Beloved World*, by Sonia Sotomayor, Associate Justice, U.S. Supreme Court

Book Review by Lauren Brogdon

In many ways, Justice Sonia Sotomayor's memoir, *My Beloved World*, is precisely what one would expect from a chronicle of a Supreme Court Justice's early life: it details her school days in the Bronx, her experiences in college and law school, and the early stages of her legal career. Expectedly, it does not reveal her personal insights into the law or opinions about cases that have come before the Court. But it does provide readers with a glimpse into an unguarded, self-reflective, and vulnerable side of the woman known as "one wise Latina."

Justice Sotomayor speaks candidly about her struggle with Type 1 Diabetes, her father's alcoholism and death, her divorce from her childhood sweetheart, and the professional insecurities that have plagued her throughout her career. Most poignantly, she discusses the unshakeable sense that every major event in her life led to her appointment to the Supreme Court and the simultaneous feeling that, for a woman from her circumstances, the dream of becoming a judge seemed far-fetched, even impossible, until it actually happened. The Justice actually cautions against chasing particular goals, writing, "You cannot value dreams according to the odds of their coming true. Their real value is in stirring within us the will to aspire. That will, wherever it finally leads, does at least move you forward. And after a time you may recognize that the proper measure of success is not how much you've closed the distance to some far-off goal but the quality of what you've done today." At the same time, her memoir provides salient lessons that, in retrospect, provide a roadmap of sorts for those seeking professional success and satisfaction like her own.



## **Be self-reliant...**

Growing up in an impoverished neighborhood in the Bronx, Sotomayor's childhood was plagued by her father's alcoholism and subsequent death, and her mother's physical and emotional absence due to a demanding work schedule and depression. While she found solace in the guidance and friendship of her grandmother, her childhood was largely consumed by her parents' constant fighting. But the Justice admits that she has "been shaped by various

circumstances in [her] early life, especially the ones that didn't naturally promise success."

When she was diagnosed with Type 1 Diabetes, for example, she learned, out of necessity, to become self-reliant. As a child, she taught herself to sterilize her needles and syringes, inject herself daily with insulin, and regulate her diet. Being able to take care of herself in this regard gave her a control and self-sufficiency that served her well in her future endeavors.



Wikimedia: Slides from a WhiteHouse.gov slide show, "Sotomayor Bio: Pictures from throughout Judge Sotomayor's Life."

### **But also depend on others.**

Although Justice Sotomayor's self-reliance served her well from a young age, she also maintains a grateful and humble attitude towards those who have helped her along her path to the Supreme Court. She writes, "at every stage of my life, I have always felt that the support I've drawn from those closest to me has made the decisive difference between success and failure."

In school, a young Sotomayor struggled to grasp various concepts and did not receive good grades, at least initially. But she soon learned the value of seeking help from those around her: she approached the smartest girl in her class and asked her how to study. Then applying the girl's study habits, she was able to adapt her methods and grow as a student. Sotomayor continued seeking out guidance from others through college, law school, and her career as a lawyer and judge. She advises, "don't be shy about making a teacher of any willing party who knows what he or she is doing," and she recognizes the "importan[ce of] that pattern:... soaking up eagerly whatever that friend could teach me."

Mentorship also played a large role in Sotomayor's personal and professional development, although some of her most significant mentor relationships arose almost accidentally. For example, tagging along with law school friends to lunch, she met José Cabranes, who offered her a summer research position after knowing her for just three hours. He later became her mentor and eventual colleague on the Second Circuit Court of Appeals. In law school, after meeting former New York District Attorney Robert Morgenthau at an event that Sotomayor admits having attended only because of the free food, he offered to interview her for a position at the DA's office; after she began work there, he sought her out for challenging cases that would stretch her limits both personally and professionally. And she credits her long-time secretary, Theresa Bartenope, with being able to keep her grounded: "She's the one who holds a mirror up when she notices me getting intimidating or too abrupt, an effect only amplified by the trappings of my current office. When I am too wrapped up in something, she pulls me up for air and reminds me to be kind."

### **Seek opportunities to learn.**

In addition to seeking mentors, Sotomayor pursued opportunities and experiences in which she could develop professionally. Knowing from a young age that she wanted "to be a lawyer—or, who knows, a judge," she realized the importance of "learn[ing] to speak persuasively and confidently in front of an audience." Accordingly, she volunteered to do the Bible reading at her church on Sundays, embracing the "opportunity to test [her]self" and develop the skills she had identified as vital to her future career.

In high school, Sotomayor continued to seek such opportunities, joining the Forensics Club, where she learned a "different way of listening, more formal than my own intuitive skill." In college, law school, and as a lawyer, she continued this pattern of being the "happy sponge" and, even now, considers herself a "student for life."

### **Embrace your roots...**

There is no doubt that, throughout her career, Sotomayor has honored and sought to protect what she considers to be her community. As a young lawyer in the New York DA's office, standing before a jury almost every day, she "felt...a part of the society [she] served," finding "the confidence that came of recognizing [her] personal background as something better than a disadvantage to be overcome."

In college and law school, she joined groups such as Acción Puertorriqueña y Amigos and PRLDEF, which honor her Puerto Rican heritage and seek to protect the rights of Latinos.

### **But do not self-segregate.**

At the same time, Sotomayor says she "had no wish to confine [her]self to a minority subculture and its concerns." She felt anchored in the Latino culture, at college in particular, but also recognized the danger of isolation from "the full extent of what Princeton had to offer, including engagement with the larger community."

Pointedly, she advises readers to draw strength from their roots but not to the exclusion of other opportunities and perspectives. She writes, “look outward as well as inward. Build bridges instead of walls.”

### **Abandon the myth of “having it all.”**

Despite her struggles with her mother, Sotomayor credits the woman who raised her with being a “powerful example...as a working woman.” However, the Justice rejects the oft-cited notion of women “having it all,” writing, “that is a myth we would do well to abandon, together with the pernicious notion that a woman who chooses one or the other [career or a family] is somehow deficient.”

Sotomayor’s own life is a reminder of the difficulties women face in trying to maintain perfection both at home and at work, without sacrificing either: although she has reached inarguable success professionally, she blames her divorce, in part, on her grueling work schedule at the New York District Attorney’s Office. She has never remarried or had children. For her, the issue seems to be one of time management: “there was already too little time to accomplish the things I envisioned.” With a tone of regret, she writes, “could I have managed to negotiate this culture as well as the crushing caseload with a child tugging at my awareness in the background of every moment? I thought not.”



United States Supreme Court Building. Wikimedia.

Although Justice Sotomayor has only just begun the role for which she undeniably will be most well-known, her memoir provides insights into her personal and professional experiences that suggest much more distance and reflection than one might expect. While her path is, in many ways, unconventional for a Supreme Court Justice, it is precisely the unusual nature of her ascent to the country’s highest court that makes her memoir so rich, so engaging, and so full of lessons for those hoping to follow her example.



**LAUREN BROGDON** is an associate in the Houston office of Norton Rose Fulbright. Lauren’s practice focuses on energy, environmental, and complex commercial litigation in state and federal court, including class action and multi-district litigation. Lauren has defended energy clients in many kinds of oil and gas disputes. She is a graduate of Columbia Law School and Rice University.

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# Carol Dawson and Roger Allen Polson's *Miles and Miles of Texas: 100 Years of the Texas Highway Department*

Book Review by David A. Furlow

*"On the road again  
Just can't wait to get  
on the road again  
The life I love is making  
music with my friends..."*

What better way to begin a history of the Texas Highway Department—and by extension the highways that link Texas's past to its present—than with a foreword by "on the road" troubadour Willie Nelson? And why not? As Willie explains in this book's Foreword,

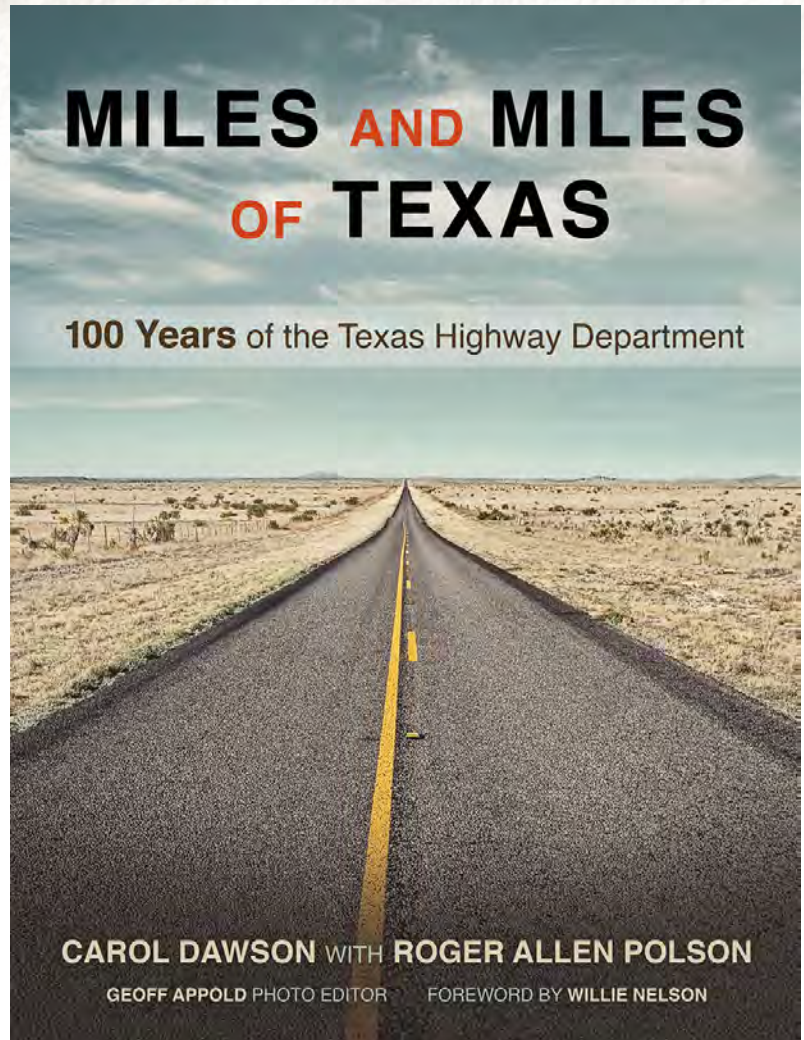
Over the years, my bands and I have driven a million miles playing music from Amarillo to Brownsville, El Paso to Nacogdoches, and from Austin to the rest of the world. These highways have taken me far, but I always come home to Texas.

Like Willie, *Miles and Miles of Texas* calls the Lone Star State home.

It should come as little surprise that the story of highways is as old as civilization. As early as 449 B.C., the seventh table of Republican Rome's Twelve Tables laid down the law governing roads on bronze plaques that neither the Senate nor Rome's emperors ever repealed:

## TABLE VII: Rights Concerning Land

The width of a road extends to eight feet where it runs straight ahead, sixteen round a bend...



***Miles and Miles of Texas:  
100 Years of the Texas Highway Department***

By Carol Dawson and Roger Allen Polson  
College Station: Texas A&M University Press, 2016

<http://www.tamupress.com/product/Miles-and-Miles-of-Texas,8581.aspx>

Persons shall mend roadways. If they do not keep them laid with stone, a person may drive his beasts where he wishes...

Today we might describe such legal precision as an example of statutory construction. Beginning with the Appian Way (*Via Appia*), all roads led to Rome because highways have underlain the structure of civilized society. As in Rome, so, too, in the New World. *Miles and Miles of Texas* begins with surprising images of a thousand-year-old *sacbe*, a sacred Mayan road in the Yucatan built out of large dressed limestone blocks layered with a fill of smaller rocks and surfaced with a pale limestone topping.

As was true for Rome's road-builders, the story of the Texas Highway Department has been inextricably interwoven with the history of Texas law. The Legislature created it nearly a century ago, in 1917, "to get the farmer out of the mud." Back then, there were only about 200,000 trucks and cars, almost all of them some shade of black, chugging along and breaking down on the sides of just about a thousand miles of paved roads. Now, a century later, over 25 million vehicles of every kind and size clog 80,000 miles of paved, state-maintained roads.

*Miles and Miles of Texas* examines a solid century of Texas's road-building, road-dwelling culture, but equally important, it *shows* even more. The gorgeous, often never-seen-before photos with which photo editor Geoff Appold splashes this volume qualify it for coffee-table status, even as top-notch research and vivid writing lift it far above that genre. Sepia-toned reproductions of Stephen F. Austin's first maps, of stagecoaches at Manchaca Springs near Onion Creek, and of the construction, in 1910, of the Congress Avenue Bridge over the Colorado River bring to life the pioneering years of Texas transportation.

That last photo of Austin's most famous bridge is the first in a series that ends with a Technicolor panorama where thousands of tiny black bats fly up like smoke ascending over a brilliant orange sunset. A "Gallery of Bridges" one third of the way through the book takes readers from Corpus Christi's harbor bridge to the roadway crossing the South Llano River near Junction to the gleaming white, ultra-modern latticework of the Margaret Hunt Hill Bridge that spans the Trinity River in West Texas.

Century-old black-and-white images of Model T's plowing through mud in East Texas and early cars competing with horse-drawn buggies along Austin's Congress Avenue in 1905 demonstrate the reasons the Legislature created the Highway Department. Or, as George A. Duren, a Texas state highway engineer declared while quoting Dallas Morning News writer Jerry Debenport on October 4, 1917, "[a]n East Texas road can be defined as 'a ditch with a fence on each side, along the bottom of which we have to travel.'"

Coauthors Carol Dawson and Roger Allen Polson descend from the muck of East Texas to the mire of those years from 1917 through 1936 when Governor James Edward "Pa" Ferguson and his wife Miriam Amanda Wallace "Ma" Ferguson were erecting the Highway Department on a firm foundation of scandal, graft, and corruption. They offer new insights about Governor "Pa" Ferguson's impeachment, trial, and conviction, a story historian Horace Flatt analyzed in his article "*Ferguson v. Maddox: Impeachment, Politics, and the Texas Supreme Court*," in the Fall 2016 issue of this journal. Dawson and Polson confirm the accuracy of Marcus Yancey, a former deputy executive director of the Texas Department of Transportation, who observed that, "The

Texas Highway Department was born in corruption.”

Dawson and Polson do more than share the stories of governors, legislators, and law officers. They explore the workaday worlds of engineers, designers, bridge-builders, and maintenance crews whose combined efforts enable Texans to avoid driving on highways to Hell. Most of the time, that is. Neither they nor TxDOT’s planners seem to have any solutions for the parking-lot gridlock of Austin’s MoPac, Houston’s Katy Freeway, or, worst of all, the never-ending cycles of construction and demolition that brings wailing and gnashing of teeth to those motorists condemned by cruel fate to crawl along I-35 between Round Rock and Waco.

Born in corruption, TxDOT’s highways have been silent witnesses to sin for a century. Texas Department of Public Safety officers, sheriff’s deputies, constables, and municipal police officers write millions of tickets a year to motorists. A pictorial gallery two thirds of the way through the book recounts tales of highway crime, from bootleggers to serial killers to weed-smugglers. Bonnie Parker playfully points a shotgun at the belly of her lover Clyde. And the authors relate stories of Bonnie and Clyde’s modern descendants, the administrators of the Lone Star State’s burgeoning toll roads.

Novelist, writing coach, and artist Carol Dawson knows the caliche back roads and Farm to Market byways that appear as thin blue lines on maps, as well as the interstate highways that beckon people not fortunate enough to call Texas their home. She calls Austin her home, but her roots reach deep back into the soil and subsurface geologic structures of Corsicana, a town suspended by I-45 and the concrete ropes of roads extending out from Dallas to Fort Worth to Houston. She honed her skills as writer-in-residence at the College of Santa Fe, then won admission to the Texas Institute of Letters and brought classes in narrative nonfiction to aspiring writers in rural Texas through Tocker Foundation grants and Writers’ League of Texas programs.

Roger Allen Polson has lived the life of a modern highwayman without resorting to armed robbery. A former executive assistant to the deputy executive director of the Texas Department of Transportation, he has the state employee background in bureaucratic politics to expose long-hidden truths and agendas that go far beyond connecting hole-in-the-wall villages to metropolitan centers. The American Association of State Highways and Transportation Officials, the American Association of Motor Vehicle Administrators, and United Press International have called on him when they needed to put the pedal to the metal for writing, video, and radio productions.

The next time you go out on the road again, you might want to bring a copy of *Miles and Miles of Texas* with you. If your car, truck, bus, or motorcycle breaks down, you’ll have a great read while you wait for the AAA tow-truck.



**DAVID FURLOW** spends much of his time driving on Texas highways and roads.

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## Society Members: Register Now for This Special CLE Event!

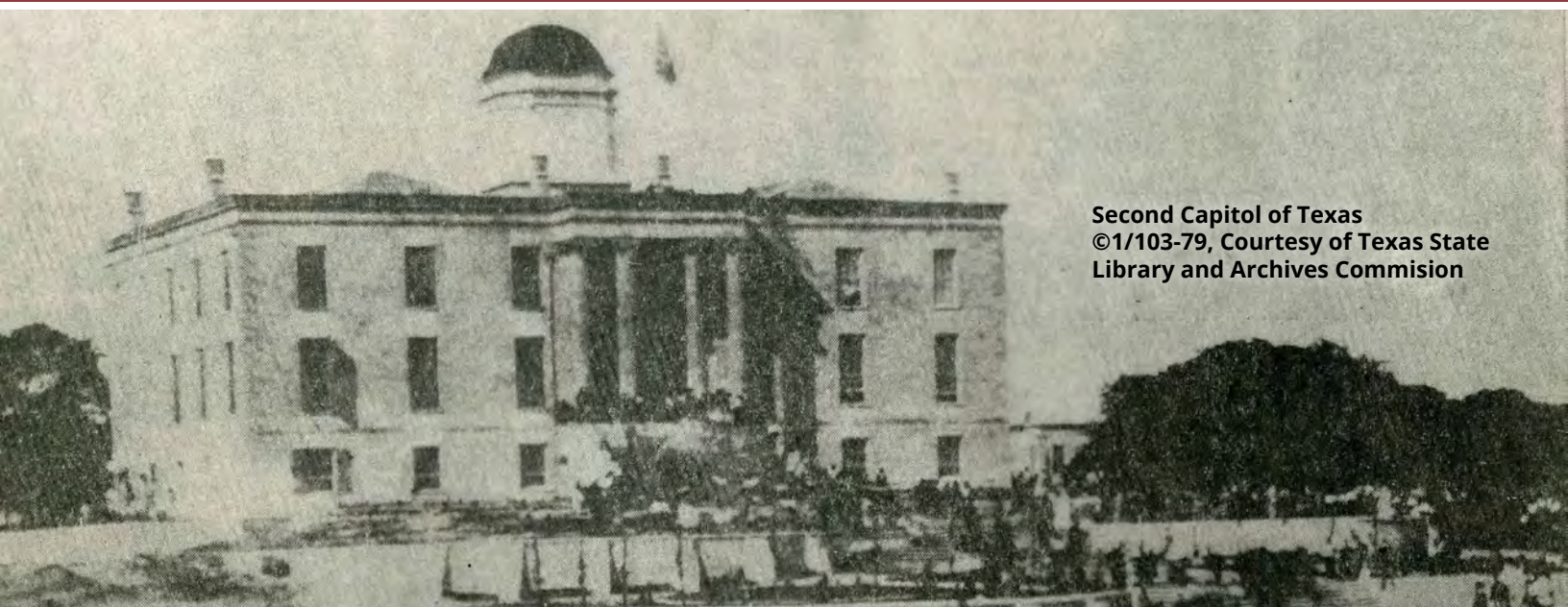
TexasBarCLE presents

# History of Texas and Supreme Court Jurisprudence

Cosponsored by the Texas Supreme Court Historical Society



At the Texas Law Center



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Attend **LIVE** in Austin

**April 27, 2017**

Texas Law Center

Half-off for attorneys licensed 5 years or less!

-or-

Watch from your computer or mobile device  
via **LIVE WEBCAST**

**April 27, 2017**

### MCLE CREDIT

7 hours (1.5 ethics)

MCLE Course No. 901367912

Applies to the Texas Bar College and to the Texas Board of Legal Specialization in Civil Appellate Law and Civil Trial Law.

### Thursday, April 27

7 MCLE hours including 1.5 ethics

- 8:00 **Registration;  
Coffee & Pastries Provided**
- 8:55 **Welcoming Remarks Course Co-Director**  
Lynne Liberato, *Houston*  
Haynes and Boone  
**Course Co-Director**  
Richard R. Orsinger, *San Antonio*  
Orsinger Nelson Downing & Anderson
- 9:00 **History of the Texas Petition Clause .5 hr**  
Chad Baruch, *Dallas*  
Johnston Tobey Baruch
- 9:30 **SCOTX Justices Fighting in the Texas Revolution .5 hr**  
Dylan O. Drummond, *Dallas*  
Squire Patton Boggs

(cont'd next page)

- 10:00 **Networking Break**
- 10:15 **duPont v. Robinson: A Retrospective by Those Who Were There When Expert Testimony Changed Forever** 1 hr  
 Hon. Priscilla R. Owen, *Austin*  
 Judge, U.S. Fifth Circuit Court of Appeals  
 Former Justice, Supreme Court of Texas  
 Larry E. Cotten, *Fort Worth*  
 Cotten Schmidt & Abbott  
 Wayne Fisher, *Houston*  
 Fisher Boyd Johnson & Huguenard  
 Michael A. Hatchell, *Austin*  
 Locke Lord
- 11:15 **Theodora Hemphill's Guide to the Texas Constitution** .75 hr (.5 ethics)  
 David A. Furlow, *Houston*  
 The Law Office of David A. Furlow
- 12:00 **Break - Lunch Provided**
- 12:15 **Luncheon Presentation: All Woman Court - Woodmen of the World Case Mock Argument** 1.25 hrs  
**Judicial Panel**  
 Hon. Jennifer Elrod, *Houston*  
 Judge, U.S. Fifth Circuit Court of Appeals  
 Hon. Debra Lehrmann, *Austin*  
 Justice, Supreme Court of Texas  
 Hon. Harriet O'Neill, *Austin*  
 Justice, Supreme Court of Texas (ret.)  
 Law Office of Harriet O'Neill  
**Advocates**  
 Douglas Alexander, *Austin*  
 Alexander Dubose Jefferson & Townsend  
 Hon. David E. Keltner, *Austin*  
 Justice, Texas Court of Appeals (ret.)  
 Kelly Hart & Hallman  
**Moderator**  
 David A. Furlow, *Houston*  
 The Law Office of David A. Furlow
- 1:30 **Break**
- 1:45 **Chief Justice Jack Pope's Influence on Jurisprudence** .5 hr (.25 ethics)  
 Marilyn P. Duncan, *Austin*  
 Consulting Editor  
 Texas Supreme Court Historical Society  
 Benjamin L. Mesches, *Dallas*  
 Haynes and Boone
- 2:15 **Taming Texas** .5 hr (.25 ethics)  
 Warren Harris, *Houston*  
 Bracewell
- 2:45 **Break**
- 3:00 **First Judges in Texas** .5 hr  
 Hon. Ken Wise, *Houston*  
 Justice, 14th Court of Appeals
- 3:30 **The History of Child Custody Litigation in Texas** .5 hr  
 Joan Jenkins, *Houston*  
 Jenkins & Kamin
- 4:00 **The Reconstruction Texas Supreme Court - An Honorable Court** 1 hr (.5 ethics)  
 Hon. Mark Davidson, *Houston*  
 Judge, Multi-District Litigation Civil Court  
 Colbert N. Coldwell, *El Paso*  
 Guevara Baumann Coldwell & Reedman  
 William W. Ogden, *Houston*  
 Ogden Broocks & Hall
- 5:00 **Adjourn**

- ▶ **Register to attend History & Jurisprudence LIVE:**  
<http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&ID=15181>
- ▶ **Register for the History & Jurisprudence WEBCAST:**  
<http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&ID=15207>

Stay for a second day and also attend  
**Practice Before the Texas Supreme Court**  
 April 28, 2017 LIVE or WEBCAST (separate registration required)

Learn more/register for Practice LIVE: <http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&ID=15182>  
 Learn more/register for Practice WEBCAST: <http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&ID=15208>

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# High Court Justice Serves on Hays County Jury

By Dylan O. Drummond

**E**ach Texan has an “inviolable ... right of trial by jury.” TEX. CONST. art. 1, § 15. To ensure this right is guaranteed in practice, every Texan with a valid driver’s license not otherwise disqualified from service may be summoned to serve on a jury. TEX. GOV’T CODE § 62.001.

Proof of this mandate’s reach was evident just after Thanksgiving 2016, when Texas Supreme Court Justice Jeff Brown was summoned to serve on a Hays County jury.



Justice Brown’s Hays County jury summons.

In part because the case was a criminal one that cannot be reviewed by his own Court (which is jurisdictionally limited to review of civil matters), Justice Brown was eventually selected to serve on the district court's jury.

The trial lasted two days, after which Justice Brown elected to donate his juror pay to the Hays County Veterans Court.

The Hays County District Clerk issues jury certificates to jurors, which they may present to their employers to explain their absence from work. Despite his having somewhere north of 25 million employers, Justice Brown nevertheless dutifully presented his jury certificate as directed.

For more about Justice Brown's experience as a juror, visit the *Austin American-Statesman* online at <http://www.mystatesman.com/news/for-days-texas-supreme-court-judge-was-known-juror/bcF9ktpBFkPv9JW6xvXIZM/>.



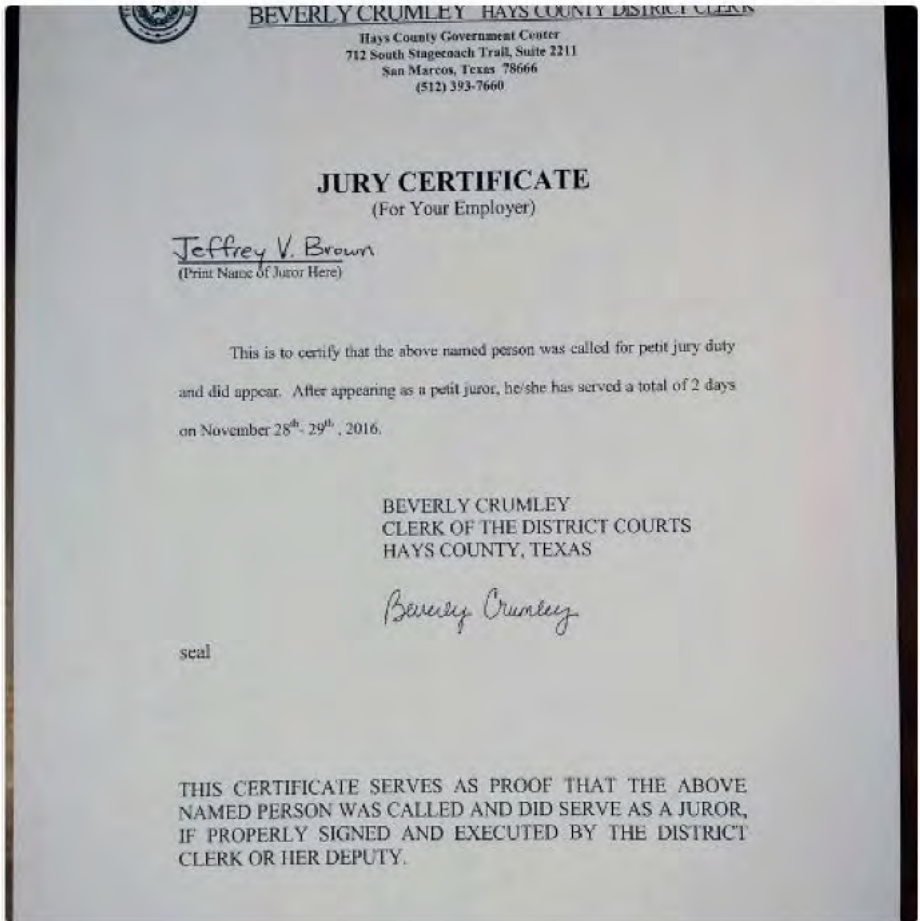
57 Justice Jeff Brown  
@judgejeffbrown



Following

Dear People of Texas,

I served on a jury two days this week and was told I should give this certificate to my employer. So here you go.



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# Texas Court of Criminal Appeals Turns 125

By Dylan O. Drummond

September 22, 2016 marked one hundred twenty-five years since Governor Jim Hogg issued a proclamation declaring that the people of Texas had ratified Senate Joint Resolution No. 16. That resolution called for amendments to the Texas Constitution to include the creation of a court to be known as the “Court of Criminal Appeals” (the “Court” or “CCA”).

The Court would have “final appellate jurisdiction ... in all criminal cases of whatever grade.” TEX. CONST. art. 5, § 5. It was the first such court of its kind in the world. England created a similar court, the “Court of Criminal Appeal,” some sixteen years later in 1907. One year after that, Oklahoma created its own “Criminal Court of Appeals” in 1908.



In recognition of the 125th anniversary of its creation, the Court was called to order on September 22, 2016 to hear remarks on its history from current Presiding Judge Sharon Keller, as well as former Presiding Judges Jack Onion and Mike McCormick. Presiding Judge Keller noted that, at the time of the Court’s founding in 1891, then-Governor Hogg was the state’s first native-born chief executive. Presiding Judge Keller recognized current CCA Judge Kevin Yeary for conceiving of and helping to organize the Court’s celebration of its anniversary. It was the first such anniversary the Court has ever formally recognized.

Also in attendance were Texas Supreme Court Chief Justice Nathan Hecht, former CCA Judge and current senior Fifth Circuit Judge Pete Benavides, former CCA Judge Morris Overstreet, Third Court of Appeals Chief Justice Jeff Rose, Fourteenth Court of Appeals Chief Justice Kem Frost, Texas Courts Administrator David Slayton, Texas Bar President Frank Stevenson, and Governor Greg Abbott’s General Counsel Jimmy Blacklock.

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# Ali James Celebrates Capitol-ism at Fall Board Meeting

By David A. Furlow

Last October 20, Alicia “Ali” James, Curator of the Texas State Capitol and Director of Visitor Services at the State Preservation Board, presented a fascinating, photo-rich exploration of the Capitol’s history to the Society’s Trustees and lunch guests. Ms. James’ fast-moving visual feast of Austin stories chronicled the 22-acre Capitol Square at the center of Texas lawmaking since the days of the Republic.

As one amazing image after another cascaded across the room, Ms. James told how a rough-hewn frontier river-crossing called Waterloo during the Republic of Texas grew first into President Mirabeau B. Lamar’s log cabin capital, then into the Lone Star State’s railroad entrepot during Reconstruction, then expanded into one of the state’s busiest metropolitan areas during the twentieth century as it evolved into twenty-first century Austin.

Ms. James came to the meeting with the background, training, and expertise to share new insights with trustees and staff who had lived in the Austin area for decades. A Jawhawk as an undergraduate and in graduate school, she earned a bachelor’s degree in history in 1989 and a master’s degree in historical administration and museum studies in 1991. She garnered practical experience at the Watkins Community Museum in Lawrence, Kansas, and at the Kansas Museum of History in Topeka before moving to Austin and beginning her service at the State Preservation Board in 1991.

Initially hired as a Curatorial Assistant, Ms. James took charge of inventorying, assessing, and preserving historic artifacts, records, maps, and photos during the 1990s Capitol Restoration Project, then helped organize the Capitol Visitors Center that opened in 1994. She now serves as Curator of the Capitol, while administering the Capitol Information and Tour Guide Service and the Capitol Visitors Center.

Focusing on maps, surveys, and architectural designs, Ms. James told how surveyors L. J. Pilie and Charles Schoolfield worked under the direction of Edwin Waller to design and build a new city on many hills. She showed how a modern city arose out of fourteen-block grid extending north to “Capitol Square” and divided by Congress Avenue. This became the rough frontier town where Thomas Jefferson Rusk would preside over the first session of the Texas Supreme Court as Chief Justice before those responsibilities were transferred to John Hemphill.

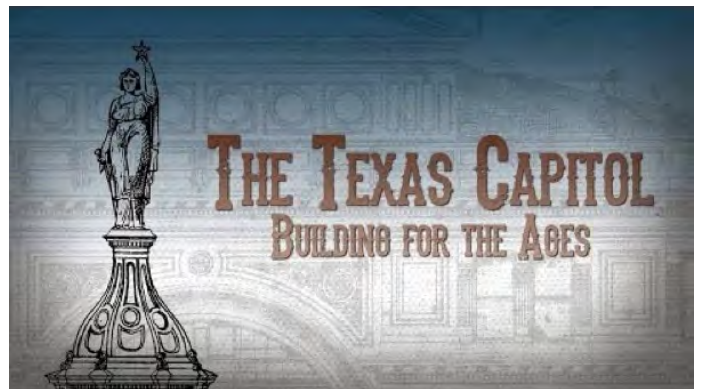


Ali James in her State Preservation Board office



(left): PowerPoint slide presented at the Fall 2016 Meeting. (right): Ali James's presentation offered many long-time residents of Austin an opportunity to learn more about the State Capitol. Photos by David A. Furlow.

As Ms. James limned the Capitol's life story, poet-adventurer Mirabeau B. Lamar first came to the city he would make the capital during an 1838 buffalo hunt along the Colorado River. A lush realm of limestone, rolling hills, oaks and scrub, the areas along the river attracted the hunters' eyes. Lamar decided he would make this part of the western frontier the site of a new city that would not bear his hated rival Sam Houston's name. Lamar chose to create a capitol in central Texas because of his faith that he and his fellow Texans would expand from the Gulf Coast by conquering the rough, hilly lands to the west.



A history of the Capitol appears on the State Preservation Board's website.

In October 1839, four months after construction of the Capitol began, Lamar arrived in the new frontier settlement with forty ox-wagon loads containing the Republic's archives, treaties, other papers, and office furniture from Houston. He chose a magnificent, 640-acre stretch of land along the Colorado River between Waller Creek on the east and Shoal Creek on the west to house a new City of Austin and the Capitol Complex. He told the soldiers, officials, and citizens around him that his new capital would one day "overshadow the ancient magnificence of Mexico." But first there would be many trees to chop, boards to cut, and stumps to remove.

Ms. James described the building of the first wooden-stockaded Capitol, the construction of the Second Stone Capitol and its fiery demise in 1881, and the planning, erection, and development of the current Capitol completed in 1888. Flash forward almost a century to February 6, 1983, when another fire sparks in the apartment of Lieutenant Governor William P. Hobby. That conflagration resulted in the Capitol's latest expansion, which added a new underground wing that doubled the square footage of space available to the building's occupants without changing the Capitol's distinctive profile. The underground extension was completed in 1993.

The Society's trustees, officers, and staff thanked Ms. James with a standing ovation and a



(left): The Stone Capitol of Texas, erected in 1853. Wikimedia Commons.  
(right): the 1888 Capitol as it appeared in 2010, courtesy of LoneStarMike and Wikimedia Commons.

contribution to the Texas State Preservation Board paid in lieu of the individual honorarium our speaker declined. The Society thanks Ali James and the State Preservation Board for a compelling story of the Capitol at the heart of Texas's legal system since Mirabeau B. Lamar served as the Republic's second president.

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# State Law Library Digitizes Historical Texas Statutes

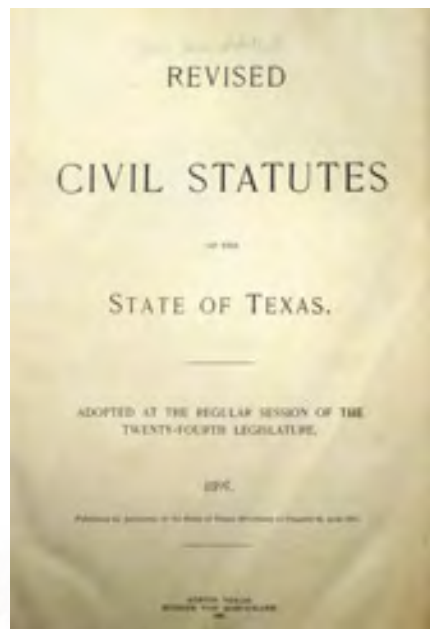
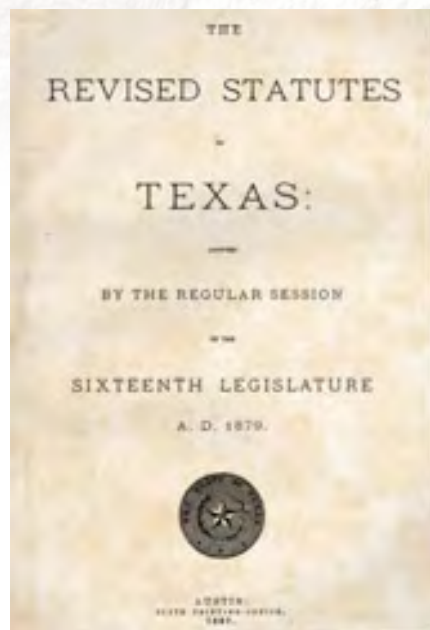
By Dylan O. Drummond

In 1854, the Texas Legislature authorized a commission to codify existing laws. The civil statutes were codified twenty-five years later in 1879. Subsequent revisions and recodifications followed in 1895 and 1911. In 1925, there was a reorganization of the statutes that constituted a complete reenactment of Texas law. These were the Texas Revised Civil Statutes. To this day, the Revised Civil Statutes still contain all statutes that have not yet been codified into the twenty-seven subject-matter codes.

Recently, the State Law Library debuted an exciting new feature on its website whereby it has digitized numerous historical volumes of the Revised Civil Statutes— <https://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/>. Indeed, the State Law Library has digitized and made available to the public for free some twenty-three of these tomes, beginning in 1879 and ending with the 1966 supplement. The State Law Library enables e-patrons to view the historical statutes in their browser via an interface similar to that used by the Texas Bar for the *Texas Bar Journal*. The materials may be downloaded directly as pdfs as well.

In addition, patrons who have registered with the State Law Library (again, a free and painless process) may also access a broader Digital Collection— <https://www.sll.texas.gov/library-resources/collections/digital-collection/>. This collection includes free access to *HeinOnline's* invaluable library of older law reviews not otherwise accessible through traditional pay services like *Westlaw* or *Lexis*. It also includes access to *HeinOnline's* vast legal classics collection (5,000 titles), as well as its federal legislative history library.

Together, these two digital collections further the State Law Library's crucial and unique role of providing the people of Texas access to a comprehensive and unparalleled collection of Texas and national legal materials just steps from the State Capitol.



Back to the future: the nineteenth century now begins at the door of the Texas State Law Library—and on its website.

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# Calendar of Events

**Society-related events (highlighted in yellow) and other events of historical interest**

Current through 2017

**The “La Belle: The Ship That Changed History” exhibition continues in the Bob Bullock Museum of Texas History’s first floor Texas History Gallery.** The hull of the sunken *La Belle* is open for viewing. <http://www.thestoryoftexas.com/la-belle/the-exhibit>.

**The “Mapping Texas” exhibition continues in the Bob Bullock Museum of Texas History.** Significant historic maps available through the Texas General Land Office will interest Society members. <https://www.thestoryoftexas.com/visit/exhibits/mapping-texas>.

Jan. 27 - Oct. 8, 2017

**The Houston Museum of Natural Science hosts an exhibition of Texas General Land Office maps in “Mapping Texas: From Frontier to the Lone Star State” exhibition.** Featuring maps dating from 1513 to 1920, the special exhibition traces more than 400 years of Texas history. The museum is at 5555 Hermann Park Dr., Houston, Texas 77030, (713) 639-4629. The exhibition is in the Hamill Gallery and features maps dating between 1513 and 1920. The works come from the archival collection of the Texas General Land Office, Houston map collectors Frank and Carol Holcomb, the Witte Museum in San Antonio, and the Bryan Museum in Galveston. For more information, <http://www.hmns.org/exhibits/upcoming-exhibitions/mapping-texas-from-frontier-to-the-lone-star-state/>.

Feb. 2 - April 24, 2017

**The Museum of the Coastal Bend** displays important collections of French, Spanish, Mexican, and Texas artifacts, as well as artifacts from the French warship *La Belle* and the French cannons that once guarded La Salle’s Fort St. Louis. It is located on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. See <https://www.thebryanmuseum.org/exhibitions-upcoming>.

Feb. 2 - April 24, 2017

**The Bryan Museum’s galleries offer artifacts and records from all periods of Texas and Southwestern history.** J. P. Bryan, Jr., a descendant of Moses Austin and a former Texas State Historical Association President, founded this museum at 1315 21<sup>st</sup> Street,

Galveston, Texas 77050, phone (409) 632-7685. Its 70,000 items span 12,000 years. <https://www.thebryanmuseum.org/>. Two special exhibitions—"Forgotten Gateway: Coming to America Through Galveston Island" and "The 'Stranger's Disease': Experiencing Yellow Fever in Galveston, 1837-1897"—consider the importance of place in the immigrant experience by tracing the history of Galveston Island from a small Republic of Texas harborage for sailing vessels to the wealthiest city on the Texas coast without shying away from the disease that often made it the final destination for immigrants coming to Texas. <https://www.thebryanmuseum.org/exhibitions-upcoming>

Feb. 15 - May 2017

**The Houston Bar Association Teach Texas Committee will conduct Taming Texas judicial civics classes** in Houston area seventh-grade history classes.

Feb. 15, 2017

**The Star of the Republic Museum at Washington-on-the-Brazos focuses on March 1836 with its exhibition "Legacy of Leadership: The Signers of the Texas Declaration of Independence."** The exhibit is at 23200 Park Rd 12, Washington, Texas 77880. <http://www.starmuseum.org/exhibits/#featured>

Feb. 24, 2017

**Steven Gonzales of El Camino Real de los Tejas National Historic Trail Association presents *El Camino Real de los Tejas: Past and Present (Lunch and Learn)* at Mission Dolores State Historic Site.** The program will cover the history of the "Royal Road of the Tejas Indians," which runs through Mission Dolores State Historic Site. As part of the City of San Augustine tricentennial celebration, Mission Dolores will hold similar lunchtime programs once a month throughout 2017, addressing topics related to East Texas history. See <http://www.thc.texas.gov/news-events/events/el-camino-real-de-los-tejas-past-and-present-lunch-and-learn>.

10:15 a.m. - 1:00 p.m.  
March 2, 2017 (Texas Independence Day)

**The Texas Supreme Court Historical Society will conduct its Spring 2017 Board of Trustees and Members Meeting at Baker Botts**, One Shell Plaza, 910 Louisiana Street, Houston, Texas 77002-4995, 713.229.1234. Trustees should arrive by 10:00 a.m. to attend the Board Meeting, which will begin promptly at 10:15 a.m. and last until 11:30 a.m. The Members' Meeting will follow until 11:45 a.m. Mr. J. P. Bryan, Jr., founder of the Bryan Museum in Galveston, will speak about Texas history. Baker Botts will provide a free catered lunch. Anyone who wishes to attend the lunch should send an RSVP to David Furlow at [dafurlow@gmail.com](mailto:dafurlow@gmail.com) by 5 p.m. on February 28, 2017.

2:00 - 3:30 p.m.  
March 2, 2017 (Texas  
Independence Day)

**The Texas Supreme Court Historical Society will join with the Texas State Historical Association in presenting the panel program “Semicolons, Murder and Counterfeit Wills: Texas History through the Law’s Lens” at TSHA’s 2017 Annual Meeting at the Hyatt Regency Downtown Houston, 1200 Louisiana Street, Houston, Texas 77002, 713.654.1234.**

Judge (Ret.) Mark Davidson will speak on “The “Semicolon Court”: An Honorable Texas Supreme Court,” Bill Kroger of Baker Botts LLP will present “Captain James A. Baker, the Murder of William Marsh Rice, and the Flowering of Rice University,” and Chief Justice (Ret.) Wallace Jefferson of Alexander Dubose Jefferson Townsend will comment on those two papers. Seating may be limited. TSHA registration is available at <https://www.tshasecurepay.com/annual-meeting/registration/>.

Those who wish to attend should send an RSVP email to [dafurlow@gmail.com](mailto:dafurlow@gmail.com) seven days in advance of March 2, 2017.

March 2-4, 2017

**The Texas State Historical Association will conduct its 121st annual meeting at the Hyatt Regency Houston Downtown Hotel in Houston, Texas. See <https://tshasecurepay.com/annual-meeting/>.**

March 3, 2017

**The curators of the Alamo present an educator’s workshop in the Alamo’s Legends of Texas series: “Antonio Lopez de Santa Ana: Misunderstood Patriot or Ruthless Dictator?”** This free program will last from 9 a.m. to 1 p.m. at Alamo Plaza, San Antonio, Texas 78205, (210) 225-1391 ext. 169 or [mmcclenny@thealamo.org](mailto:mmcclenny@thealamo.org) to register. The Alamo curatorial staff designs all workshops around TEKS curriculum standards and allows educators to earn CPE credit hours. Workshops are filled on a first-come, first-served basis.

March 23, 2017

**The Museum of the Coastal Bend will present its John W. Stormont lecture, “Mystic Sails, Texas Trails” at 5:30 p.m.,** featuring authors and speakers Mickey Herskowitz and Bob Davant. The museum is on the campus of Victoria College at 2200 East Red River, Victoria, Texas, at the corner of Ben Jordan and Red River. See <https://www.thebryanmuseum.org/exhibitions-upcoming>.

April 6, 2017

**The Civil/Appellate Bench Bar Conference will be held at the Historic 1910 Courthouse in Houston. See <https://www.hba.org/cle/>.**

April 26-28, 2017

**The University of Texas Law School Center for Women in Law conducts the 2017 Women's Power Summit on Law and Leadership.** Speakers, including publisher Tina Brown, Senator Olympia Snowe, writer Gloria Steinem, and U.S. Ambassador-at-Large for Global Women's Issues (2009–2013) Melanie Verveer will discuss the history and future prospects of women in the practice of law. The conference will take place at the Center for Women in Law, 727 East Dean Keeton Street, Austin, Texas 78705, 512.471.4632. See <https://law.utexas.edu/cwil-power-summit/>.

April 27-28, 2017

**The Texas Supreme Court Historical Society and the State Bar of Texas will present their 2017 *History of Jurisprudence and Practice Before the Supreme Court* courses** at the Texas Law Center, 1414 Colorado, Austin, Texas 78701, (512) 427-1463. A special rate of \$189.00 per night is available at the Sheraton Austin Hotel at the Capitol at 512-478-1111. <http://www.texasbarcle.com/materials/Programs/3412/Brochure.pdf>.

June 12, 2017

**Democrats of Harris County will conduct its annual Juneteenth Day CLE program** at the Hotel ZaZa, 5701 Main Street, Houston, Texas 77005 from 11:00 a.m. until 5:30 p.m., including a reenactment of the Texas Supreme Court's All Woman Court in the 1925 *Johnson v. Darr* case.

June 22-24, 2017

**The State Bar of Texas will conduct its Annual Meeting** at the Hilton Anatole Hotel at 2201 North Stemmons Freeway, Dallas, Texas, 75207, 214.748.1200. [https://texasbar.com/AM/Template.cfm?Section=Annual\\_Meeting\\_Home&Template=/CM/HTMLDisplay.cfm&ContentID=30096](https://texasbar.com/AM/Template.cfm?Section=Annual_Meeting_Home&Template=/CM/HTMLDisplay.cfm&ContentID=30096).

Aug. 5, 2017

**The Alamo presents an educator's workshop in the Alamo's Legends of Texas series: "From Mission to Shrine 1519-1836: An Overview of the Spanish Missions and the Texas Revolution."** This free program will last from 9 a.m. to 1 p.m. at Alamo Plaza, San Antonio, Texas 78205, (210) 225-1391 ext. 169 or [mmcclenny@thealamo.org](mailto:mmcclenny@thealamo.org) to register.

Aug. 12, 2017

**The Alamo presents an educator's workshop in the Alamo's Legends of Texas series: "Prominent Texas Women: Unsung Heroes of Texas."** This free program will last from 9 a.m. to 1 p.m. at Alamo Plaza, San Antonio, Texas 78205, (210) 225-1391 ext. 169 or [mmcclenny@thealamo.org](mailto:mmcclenny@thealamo.org) to register.



Sept. 8, 2017

**The Texas Supreme Court Historical Society holds its Annual John Hemphill Dinner** at the Grand Ballroom of the Four Seasons Hotel, 98 San Jacinto Blvd, Austin, Texas 78701, with a special 6:00 p.m. Invitation-Only Reception with the dinner speaker, Chief Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit, followed by a 6:30 p.m. general reception and dinner at 7:00 p.m.

Sept. 16, 2017

**The Texas General Land Office will conduct its *Save Texas History Symposium*** at the Commons Learning Center on UT Austin's J.J. Pickle Research Campus in far north Austin. The Society is a sponsor of the event.

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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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# 2016-17 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2016, the beginning of the membership year.

## **GREENHILL FELLOW**

Harry M. Reasoner

## **TRUSTEE**

Evan A. Young

## **CONTRIBUTING**

Robert Truitt

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# 2016-17 New Member List

The Society has added 14 new members since June 1, 2016,  
the beginning of the membership year.

## **TRUSTEE**

Hon. Cindy Olson Bourland

Robert Higgason

Clyde J. "Jay" Jackson III

Richard B. "Rich" Phillips, Jr.

Hon. Sue Walker

## **CONTRIBUTING**

Roy Brantley

John G. Browning

Fred Jones

## **REGULAR**

Roger Bartlett

Sharon McCally

Stephen Pate

Barbara Radnofsky

Sharon Sandle

Kenna Seiler

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# Membership Benefits & Application

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

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

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

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

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

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

## **Patron Membership** \$500

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

## **Contributing Membership** \$100

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

## **Regular Membership** \$50

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



## Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, 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 \_\_\_\_\_

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

Email (required for eJournal delivery) \_\_\_\_\_

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|---------------------------------------------|---------------------------------------------------|
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| <input type="checkbox"/> Patron \$500       | <input type="checkbox"/> Greenhill Fellow \$2,500 |
| <input type="checkbox"/> Contributing \$100 |                                                   |
| <input type="checkbox"/> Regular \$50       |                                                   |

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