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Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

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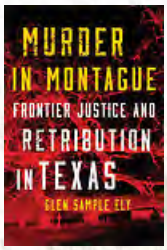
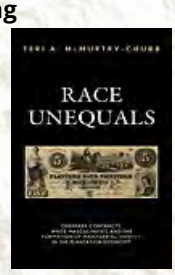


If crime podcasts existed in 1876, this case would have set new audience records. Glen Sample Ely weaves a compelling, intricate tapestry that is part legal history, part whodunit, and part human tragedy.
Read more...

Book Review—*Race Unequals: Overseer Contracts, White Masculinities, and the Formation of Managerial Identity in the Plantation Economy* by Teri A. McMurtry-Chubb

By Hon. John G. Browning



As Prof. McMurtry-Chubb reveals, examination of employment contracts between plantation owners and their overseers reveals that the white male identity of the South was hardly as monolithic as it is often depicted. Read more...

News & Announcements

Our Society Presents the "Lives and Legacies of Texas' Earliest Black Lawyers" at TSHA's 126th Annual Meeting on Saturday, February 26, 2022

By David A. Furlow

The Society will present a special panel-program at the Texas State Historical Association's 126th Annual Meeting.
Read more...

The Hemphill Dinner: A Season and a Time for Every Purpose

By David A. Furlow

Chief Justice Nathan Hecht at the podium

Due to Covid-19, the Society postponed the Dinner from September to December. But the silver lining was a cool outdoor reception on the Four Seasons' patio.
Read more...

Welcome to the New Villa de San Felipe de Austin

Article and photos by David A. Furlow

The ribbon-cutting ceremony at the opening

The Texas Historical Commission and the Friends of the Texas Historical Commission hosted a Grand Opening of their new Villa de Austin Townsite Exhibit on November 12, 2021.
Read more...

President of TSCHS Earns Prestigious Yale Award

Screenshot from the virtual ceremony

In December, Tom S. Leatherbury was awarded the coveted Yale Medal, the highest honor presented by the Yale Alumni Association.
Read more...

TACTAS Honors Former TSCHS President, Lynne Liberato, with its Lifetime of Excellence In Advocacy Award

Lynne Liberato at the event

The Texas Association of Civil Trial and Appellate Specialists gave the award before a packed audience at a November 18, 2021 dinner at the Houstonian Hotel in Houston. Read more...

Investiture of Justice Rebeca Huddle

Justice Huddle at the investiture

On December 10, Gov. Greg Abbott swore-in Supreme Court of Texas Justice Rebeca Huddle at an investiture ceremony at the State Capitol.
Read more...

Membership & More

Officers, Trustees & Court Liaison
2021-22 Membership Upgrades
2021-22 New Member List
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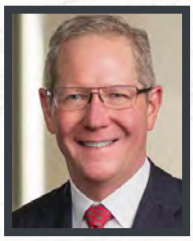

Thomas S. Leatherbury

Message from the President

Welcome to the Winter 2022 issue of the Texas Supreme Court Historical Society Journal. This issue looks at the constant and complicated journey our state has taken from "Rough Justice" towards an agreed upon rule of law.

Professor Sharon Murphy's article "Gone to Texas: Deadbeat Debtors and Their 'Enslaved Property'" examines Texas's role as a safe-haven for slave-owning debtors wishing to escape the laws of their own states.

Josh Morrow's "Ratifying the Texas Constitution" examines the debate over the authority of various versions of the Texas Constitution.

"Murder in Montague" brings Dr. Glen Sample Ely's look at the saga of an 1876 murder trial, chronicling a North Texas case that highlights the struggle to rapidly establish a reliable and trustworthy legal system statewide in the face of vigilantism.

In addition, former Justice John Browning has written a feature article on the Litchfield Law School's influence on Texas, as well as book reviews on both Dr. Ely's book, *Murder in Montague,* and Teri McMurty-Chubb's *Race Unequals: Overseer Contracts, White Masculinities, and the Formation of Managerial Identity in the Plantation Economy*.

We also feature coverage of the Hemphill Dinner last December and news about the upcoming Texas State Historical Association Conference.

What a wonderful night the Hemphill Dinner was! It was so good to see so many friends in person after so long. Kudos to immediate past-president Cynthia Timms for skillfully interviewing our entertaining speaker, Lisa Blatt of Williams & Connolly. And who will forget the tribute to the late Judge Tom Reavley spearheaded by Judge Elrod and Justice Boyd? We all owe our thanks and gratitude to our Dinner Chair, Alia Adkins-Derrick, who has more patience and persistence than anyone else I know, and to our talented staff, particularly Executive Director Sharon Sandle and Administrative Coordinator Mary Sue Miller, for hanging in there, moving us forward, and getting a very successful event over the finish line!

At the Texas State Historical Association's Annual Meeting, the Society will be well-represented, particularly at the Awards and Fellows Lunch on Friday, February 25, when the Larry McNeill Fellowship will be presented, and on the morning of Saturday, February 26, when former Dallas Court of Appeals Chief Justice Carolyn Wright and former Justice John Browning will present "We Stand on Their Shoulders: The Lives and Legacies of Texas' Earliest Black Lawyers," a truly inspiring program. Please read the articles devoted to the Hemphill Dinner and the TSHA Annual Meeting for further details on both events.

In perusing the TSHA Annual Meeting program, among the many panels that caught my eye, one stood out - "Teaching History in the Post-Truth Era: Patriotic Education and Anti-racist Pedagogy in the Social Studies Classroom." The panelists chose a thought-provoking title, certainly, for complex subjects, especially in light of the troubling push to ban books from school libraries. One North Texas school district pulled 130 titles from its shelves to review their suitability, according to multiple news reports. Another North Texas school district has asked the *anonymous* members of its book review committee to sign confidentiality agreements, according to school district committee reports obtained by *The Dallas News* under the Texas Public Information Act. The current censorship controversy only spotlights how important it is for the Society to provide thoughtful content in its publications and its programs so that we can shed more light on important aspects of our State's history and the development of its legal system. "Murder in Montague" speaks to historical efforts to achieve and to promote the rule of law. The current censorship controversy reminds us that vigilantism comes in many guises.

I hope you enjoy this issue and that you will support the Society by becoming a member or renewing your membership.

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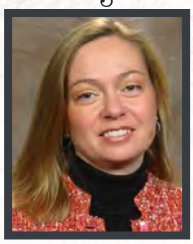

Sharon Sandle

Celebration at Last

Cleave ever to the sunnier side of doubt!

— Alfred, Lord Tennyson

If you're like me, you've experienced disappointment over the past year or more. Plans that you've made fell through. Events you looked forward to with anticipation were cancelled. Friends that you hoped to visit had to remain distant. Although I've felt a lot of disappointment lately, the evening of December 3, 2021 was not one of those times. On that day I felt relief, celebration, gratitude, and not an ounce of disappointment.

Relief

There were so many times during the past several months when it seemed unlikely that we would be able to meet in person for the Hemphill Dinner as planned. Circumstances in September made it necessary to postpone the dinner to December. We had to improvise when the change in date made it impossible for our planned keynote speaker Lisa Blatt to attend in person and COVID concerns made it impossible for the Hon. Ann Crawford McClure (ret.) to travel to Austin to accept the Chief Justice Jack Pope Award for Professionalism. As the dinner approached the Society's leadership held their breath to see whether a rise in COVID cases would again disrupt our plans. When the day of the dinner arrived and we began to assemble and greet each other, I believe many of us breathed a sigh of relief that the dinner was finally underway.

Celebration

After more than a year of lockdown, distancing, and virtual events, it felt like such a celebration to greet old friends and sit down together for an evening of fellowship. In many ways, the Society's function is to celebrate the Texas courts. This function was in evidence at the Hemphill Dinner as colleagues reconnected in person. We celebrated Chief Justice McClure's distinguished career as she accepted the Pope Award. And we celebrated the life of Judge Thomas Reavley who influenced Texas law as a Fifth Circuit Judge and as a Justice on the Texas Supreme Court and who influenced the lives of the Texas lawyers who were his colleagues and friends. The dinner was also an opportunity to celebrate the successes of the Society over the past year.

Despite facing many challenges, the Society has emerged stronger. The Society ended the year in a very favorable financial position, and the Board of Trustees worked hard on improvements to the Society's bylaws and financial policies to ensure that the Society operates efficiently and that its operations are transparent and responsible. We have a lot to celebrate.

Gratitude

Once the dinner had been served and the program had ended, my next thought was to feel gratitude. There are so many people who devote their time, energy, and skills to the Society. I want to thank the leadership of the Society for their persistence in working through the challenges that we faced in making the dinner happen. In particular, I'm grateful for our indomitable Immediate Past President Cynthia Timms, who flew to Washington D.C. on just a few days' notice to record the keynote interview with Lisa Blatt that was a highlight of the dinner. Our 2021 Hemphill Dinner Committee, led by Chair Alia Adkins-Derrick, had no idea when they agreed to serve what challenges they would be asked to work through or that their service would last several months longer than originally anticipated. Their patience, optimism, and persistence were crucial to the success of the dinner, and I'm so grateful for their work. And we were fortunate to have gracious colleagues at the DC Bar Association, who at very short notice agreed to film our keynote address at their beautiful facility in Washington D.C. Thank you to my friend and colleague Dennis Cuevas, the director of CLE for the DC Bar Association, and to Eric Nicholas and his video team at the DC Bar for stepping in to help us make our keynote happen. Last year our colleague Paul Burks, director of video production for TexasBarCLE, was called upon to help us create an entirely virtual Hemphill Dinner. This year, Paul filmed Justice McClure's acceptance of the Pope Award, which was a beautiful tribute to her career and service. And Paul seamlessly orchestrated the many visual components on the night of the dinner so that the experience for attendees was not just professional but entertaining, funny, and moving.

On the evening of the dinner, one of my colleagues asked me what I was looking forward to in 2022. I was caught off guard. I hadn't thought much beyond that evening! But there are actually many things for me to look forward to, and for the Society as well. First on the horizon is the Texas State Historical Association Annual Meeting in Austin. Last year's TSHA conference was held virtually, but this year we will be there in person to sponsor a panel entitled "We Stand on their Shoulders: The Lives and Legacies of Texas' Earliest Black Lawyers," and to award the Society sponsored Larry McNeill Fellowship in Texas Legal History. In April, the Board of Trustees hopes to return to meeting in person. Keep an eye on the Society's website for details on the date and location for our spring Board of Trustees and General Membership meetings. And planning for the Hemphill Dinner in September of 2022 is already underway.

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Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston

The Fellows Program is celebrating its tenth anniversary during the Society's 2021-22 fiscal year. It is a significant milestone, representing more than a decade of support for projects that have served the Society's educational mission in a variety of important ways. I have described these projects in previous columns over the years, but I would like to highlight them here as part of the Fellows' own historical record.

Landmark Court Case Reenactments: To make our state's legal history come alive, the Fellows sponsored courtroom reenactments of *Texas v. White*, *Johnson v. Darr*, and *Sweatt v. Painter*. The reenactments were well attended by the bar and videotaped for viewing on the Society's Hemphill YouTube Channel.

Archive Support: To supplement the Society's archival holdings, the Fellows purchased an original copy of the seminal *History of the Supreme Court of the State of Texas* (1917) by Harbert Davenport. The historic book was presented to the Court at the inaugural Fellows Dinner.

Taming Texas Judicial Civics and Court History Classroom Project: In Spring 2016, the Fellows launched an innovative judicial civics program that sent attorneys and judges to seventh-grade classrooms to teach an innovative curriculum on the history and workings of the Texas court system. Since then, the program has reached 21,000 students in the Houston and Dallas areas.

Taming Texas Book Series: The Fellows have sponsored an illustrated legal history book series as part of the judicial civics course materials. Coauthored by Jim Haley and Marilyn Duncan, the series includes *Taming Texas: How Law and Order Came to the Lone Star State* (2016); *Law on the Texas Frontier* (2018); *The Chief Justices of Texas* (2020); and *Women in Texas Law* (forthcoming in 2022-23). Copies of the hardback books are donated to the classrooms that participate in the judicial civics program.

As you see from these projects, the Fellows undertake new projects to educate the bar and the public on the third branch of government, and the history of our Supreme Court. The Fellows are also a critical part of the annual fundraising by the Society. If you are not currently a Fellow, please consider joining the Fellows and helping us with this important work.

The Houston Bar Association (HBA) is currently preparing to again use our Taming Texas materials to teach seventh-grade students in the Houston area. The HBA is recruiting schools and

volunteers and will coordinate in-person Teach Texas presentations this Spring. If you would like to participate in this important program, please contact the HBA.

Our exclusive event, the annual Fellows Dinner, is one of the benefits of being a Fellow. At the dinner each year, the Fellows gather with the Justices of the Texas Supreme Court for a wonderful evening of history, dinner, and conversation. We are working on plans now for this year's event at a unique Austin venue. Further details will be sent to all Fellows.

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

FELLOWS OF THE SOCIETY

Hemphill Fellows
($5,000 or more annually)

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

Greenhill Fellows
($2,500 or more annually)

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

*Charter Fellow

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Editor-in-Chief's Column

Hon. John G. Browning

Pursuing History Across Borders

As a journal devoted to Texas legal history, it's tempting to fall into a Texas-centric mindset. But as some of the articles of this issue remind us, much of what influenced the Texas legal system and legal profession originated from outside our state's borders. For example, Dr. Sharon Murphy's article *Gone to Texas: Deadbeat Debtors and Their "Enslaved Property"* examines Texas' status as a legal haven for slave owning debtors from neighboring states. And my own article on how America's first law school helped train some of Texas' pre-Republic lawyers also demonstrates this cross-border influence.

In fact, I've been the beneficiary of some "cross-border collaboration" as well. The work we do here at this Journal has put us on the radar of other legal historical societies. I was invited to, and did, publish an article in the California Supreme Court Historical Society's highly regarded journal on that state's first Native American lawyer. Similarly, my research into Ely S. Parker, a Tonawanda Seneca leader who trained as a lawyer in the late 1840s but who was prevented from becoming a member of the New York bar on racial grounds, opened the door to new friendships at the Historical Society of the New York Courts and a standing invitation to publish in its journal. One of our issues on Latino/Latina legal trailblazers enabled me to provide some assistance to Clare Cushman, Director of Publications at the Supreme Court Historical Society in Washington, D.C., and that led to an invitation to tell the story of the first African American lawyer to argue before the U.S. Supreme Court in the pages of the *Journal of Supreme Court History*.

But I've been particularly gratified by the cross-border friendships forged at the Alabama Bench and Bar Historical Society. While spending time in Montgomery, Alabama as a visiting professor at Faulkner University's Thomas Goode Jones School of Law, I was fortunate to make the acquaintance of Tim Lewis, founder and president of the ABBHS, who also serves as Alabama's State Law Librarian. When I shared with Tim that I had been researching and writing about the history of early Black lawyers in multiple states—including Texas, Oklahoma, Colorado, Maine, and South Carolina—he shared with me that there were conflicting accounts about the identity of Alabama's first African American lawyer. Tim very generously shared his research with me, and I was able to build upon that with considerable research of my own, including digging into the

history of Howard University Law School's first graduating class, courtesy of the digital archivists at the Moorland-Spingarn Research Center in Washington, D.C. The end result was the definitive story of Alabama's first Black lawyers, published in the January issue of *The Alabama Lawyer*, and answering the question "who was Alabama's first African American lawyer?"

How does one repay such kindness? Well, for starters, I became a member of the ABBHS. I also contributed an article for the current issue of the Society's newsletter, sort of a companion piece to the *From Litchfield to Lone Star* article that appears in this issue. With about 25% of Litchfield law students hailing from the South, it wasn't hard to find graduates of that school who went on to prominent legal and political careers in early Alabama. In addition, I'll be the guest speaker at an upcoming event for the ABBHS, presenting on the topic of early Black lawyers in Alabama and beyond.

In fact, the ABBHS has reminded me of the many common threads between Alabama and Texas legal history. Visit Washington-on-the-Brazos State Historical Park, where Texans declared their independence on March 2, 1836, and you'll see an exhibit at the visitor center honoring Richard Ellis. Ellis, a lawyer, was not only elected as a delegate to the first Texas Constitutional Convention that met at Washington-on-the-Brazos, but he was also unanimously elected president of the convention and signed the March 2 Declaration of Independence as president. After continuing to serve while the convention stayed in session and adopted a Constitution for the Republic of Texas, Ellis served as a senator in the first four Texas congresses from 1836 to 1840. Ellis County was named for him.

Just before becoming a Texan, Ellis had moved to the Arkansas Territory in February 1834, and was elected a delegate to Arkansas' first Constitutional Convention in 1835. But before that, Ellis was an Alabama lawyer, having settled in Franklin County in 1817. In 1818, he was elected a delegate to the Alabama Constitutional Convention. He later became an associate Justice on the first Alabama Supreme Court, serving from 1820 to 1831. So, this former Alabama Supreme Court Justice, who became one of the architects of Texas Independence, holds a unique distinction in American history: being an elected delegate to the first constitutional conventions of three states: Alabama, Arkansas, and Texas.

The story of Richard Ellis is just one of the many examples of the shared history between Texas and Alabama. In an upcoming issue, we'll have an article discussing the checkered legal career of William Barrett Travis, a career that began with Travis' admission to the Alabama bar in 1829. Years before he entered the annals of history for the heroic stand at the Alamo, Travis left Alabama in disgrace and failure.

Like our own Society, the ABBHS is dedicated to preserving its state's legal history, promoting a better understanding of its court system and judiciary, and preserving legal historical artifacts. I cherish the friends I've made there, as well as at the legal historical societies of other states. Researching and writing about legal history is ultimately about sharing: sharing what has been uncovered about a chapter from the past and what lessons can be deduced from it about our present and future.

Many lawyers, judges, and historians—scholars one and all—have shared their work with our Journal. In this issue, in addition to my previously mentioned article about Litchfield Law School and its legal impact on early Texas, and Prof. Sharon Murphy's article *Gone to Texas: Deadbeat Debtors and Their "Enslaved Property,"* other scholars have shared their work. We're proud to include Josh Morrow's *Ratifying the Texas Constitution*, a look at the proliferation of purported Texas Constitutions that seeks to answer the question "Just what *is* the authoritative version of the Texas Constitution?" We're also proud to bring you Dr. Glen Sample Ely's look at the saga of an 1876 north Texas murder trial, *Murder in Montague*, and the lessons it has as Texas' legal system grudgingly made the transition from the "rough justice" of the frontier to an established system honoring the rule of law. And of course, we hope you enjoy our other features and news, including a recap of another successful Hemphill Dinner.

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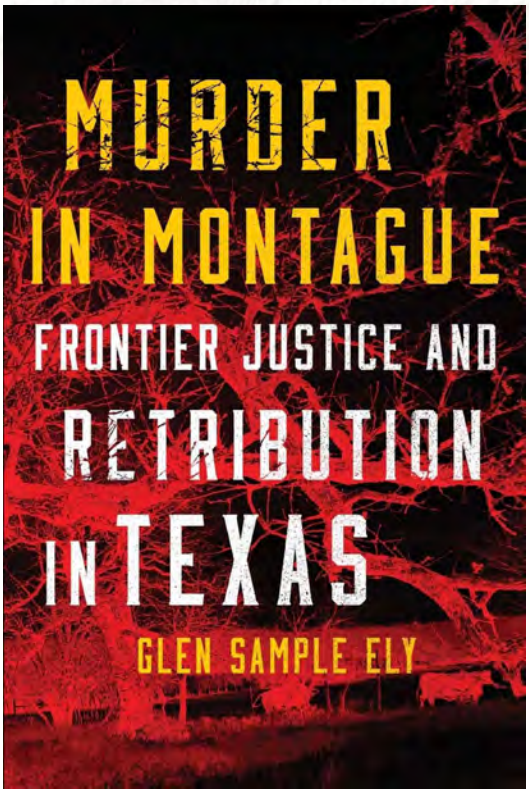
Murder in Montague

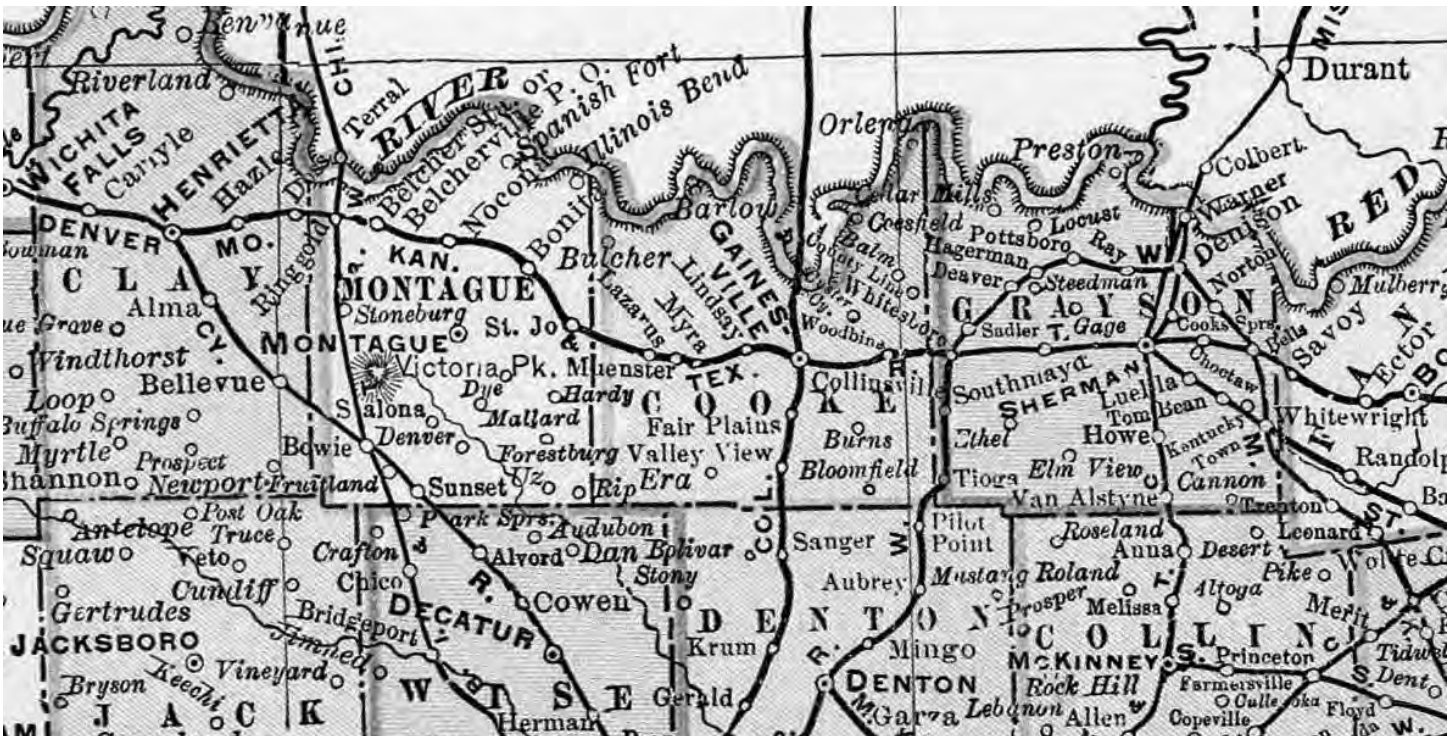
By Glen Sample Ely, Ph.D.

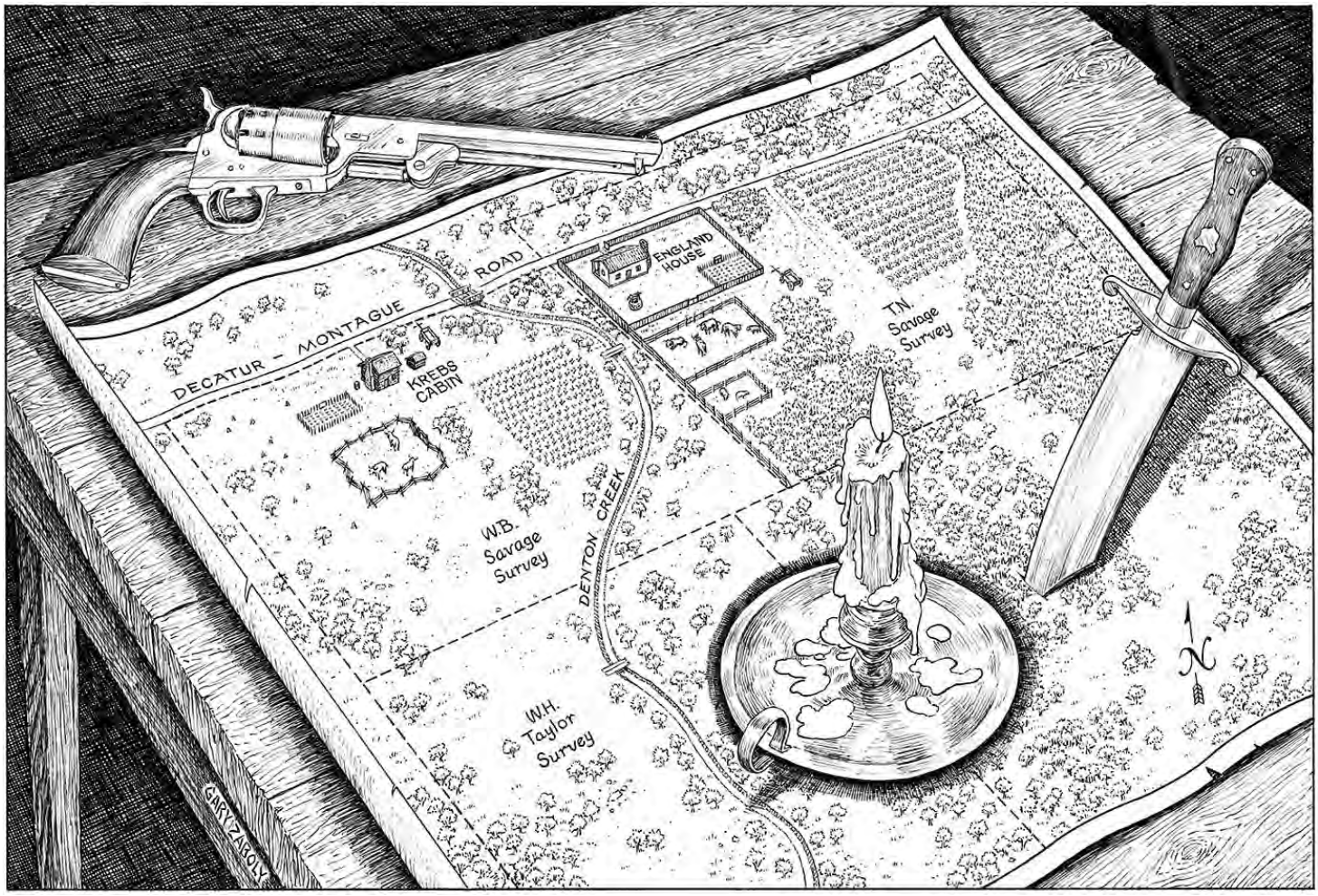
On a sweltering summer night in 1876, Methodist minister William England, his wife, Selena, and two of her children were brutally slaughtered in their North Texas home. Acting on Selena's deathbed testimony, a neighbor, his brother-in-law, and a friend were arrested and tried for the murders. *Murder in Montague: Frontier Justice and Retribution in Texas* tells the story of this gruesome crime and its murky aftermath. Blending true crime reporting, social drama, and legal history, this most unusual and compelling story offers a vivid snapshot of justice and retribution in Texas following the Civil War.



The sheer brutality of the murders terrified settlers already traumatized by decades of chaos, violence, and fear, from the deadly raids of Comanche and Kiowa Indians to the terrors of vigilantes, lynchings, and Reconstruction lawlessness. But the crime's aftermath, spanning two decades and involving five Texas governors, five trials at Montague and Gainesville, and five appeals to the Texas Court of Appeals, offered little in the way of reassurance or resolution. Combining the long view of history and the intimate detail of true crime reporting, *Murder in Montague* captures a pivotal moment in Texas's legal history, as vigilante justice grudgingly gave way to an established system of law and order.

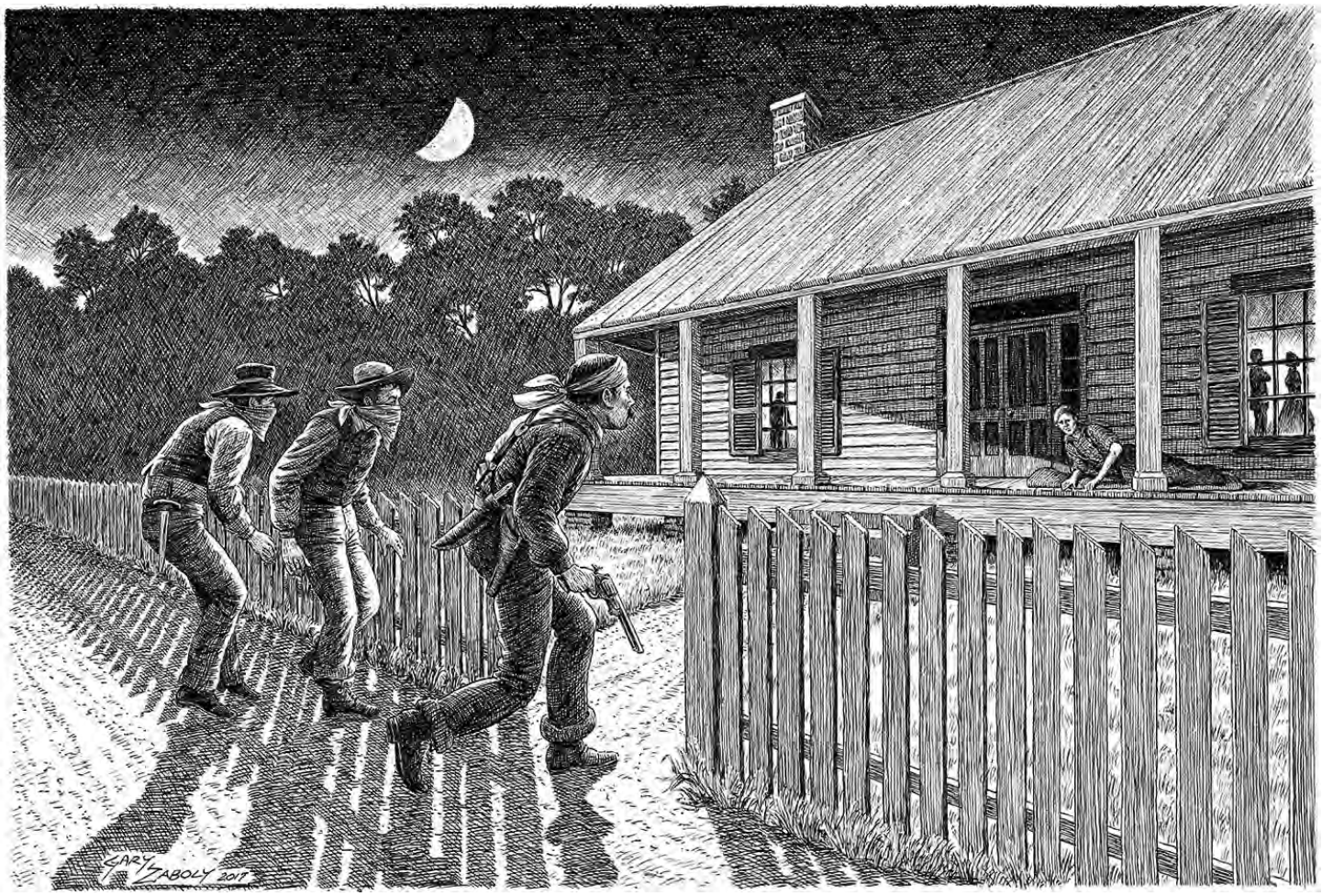
Since I first discovered this extraordinary case in 2006, I have been fascinated by several related legal aspects. These intriguing facets include vigilantism, the anemic condition of Texas's judicial system during Reconstruction, the admissibility of dying declarations in court, forensic science in the nineteenth century, the appeals process in Texas, and the governor's issuance of commutations and pardons. This article touches on some of those key issues. My fascination with these topics inspired further research before I was finally ready to write the book. In addition, I sought out sage advice from a preeminent scholar of Lone Star legal history whose input proved most helpful.





Top: Detail of Rand McNally 1897 Texas map showing North Texas-Red River region. Courtesy David Rumsey Historical Map Collection. Bottom: Map of Krebs-England properties six miles south of Montague, Texas. Courtesy of author. Illustration by Gary Zaboly.

For some background on the England murders, on the night of August 26, 1876, three masked men brutally attacked William England, his wife Selena, and three children from her first marriage in their home six miles south of Montague, Texas. The killers slit William England's throat and shot him with a Colt Navy revolver. Two of the children, Isaiah and Susie, were gunned down outside the home while trying to flee. A third, Harvey, escaped. The murderers mortally wounded Selena in the attack but she lingered for a day and a half before finally succumbing to her injuries. Prior to her passing, Selena gave several deathbed interviews during which she insisted that one of the killers was her neighbor Ben Krebs.



The three killers approach the England home on August 26, 1876.
Courtesy of author. Illustration by Gary Zaboly.

Twenty-four-year-old Montague County Attorney Avery Lenoir Matlock immediately arrested Krebs, who vehemently protested his innocence. Matlock also arrested two others, Krebs's friend and former neighbor James Preston, and Krebs's brother-in-law, sixteen-year-old Aaron Kendrick Taylor, both of whom had spent the night of the murder at Krebs's home. Matlock reasoned that if three men committed the crime and Krebs was one of them, then it followed that Preston and Taylor must be the other two killers.

It should be noted that at the time of the England murders, Krebs was facing an aggravated assault charge in Montague County Court. A month prior to the killings, the Englands had filed

charges against Krebs after a confrontation between the neighbors concerning a fence separating their properties. Apparently, the Englands' hogs had repeatedly slipped through the fence and ruined Krebs's corn crop. During the altercation, Krebs cursed Reverend England and menaced him with a fence post. After the Englands filed charges, Krebs was upset over the possibility of going to prison and was heard in public threatening to injure and kill them. Matlock reasoned that Krebs's ill will toward the Englands gave him a strong motive for committing the murders.

In their investigation of the crime scene, Montague County authorities found three sets of tracks leading from the England home to a field within fifty yards of Krebs's home. Matlock measured the size of all three footprints. He then measured the suspects' shoes and declared them to be a match. Matlock's opinion, however, was only conjecture as the young prosecutor neglected to make cast molds or impressions of the footprints he discovered in the field.

Avery Lenoir Matlock

During a subsequent search of Krebs's house, investigators found a bloody shirt and a Colt Navy revolver, a common firearm of the period. Krebs, his wife Rhoda, and their children provided conflicting and garbled accounts regarding the shirt and revolver. Krebs's son said the gun was his and that he had fired it the day

Old rock-lined well and artifacts from the England homestead. Courtesy of author.

of the murders while out hunting turkeys. Krebs stated that the blood on the shirt was from cleaning and dressing several turkeys that his son had brought home. While potentially damning, the evidence was far from conclusive. Authorities could not determine if pistol balls recovered from the crime scene had been fired from the son's revolver, nor could they state whether the blood on Krebs's shirt was animal or human. Forensic science, including blood type analysis and ballistics testing, was unknown on the Texas frontier in 1876.

Despite these inconsistencies and the complete lack of motive for Krebs's alleged accomplices James Preston and Aaron Taylor, North Texas juries convicted all three men during 1876 and 1877. Krebs and Preston were sentenced to hang. Since Taylor was a teenager when the crime was committed, he was sentenced to life at hard labor at Huntsville. While Montague County citizens applauded the convictions, they remained anxious and on edge, suspicious that the sentences would actually be implemented.

For area residents, the nighttime slaughter of the England family rekindled deep-seated traumas, vivid, painful memories of numerous Indian raids on local ranches and farms. During Reconstruction, Comanches and Kiowas assaulted North Texas counties near the Red River at will and without warning. Besides widespread Indian depredations, assaults and murders by people of all ethnicities during this period contributed to the pervasive violence in North Texas. Maintaining any semblance of law and order on the frontier proved a daunting task. Compounding the problem were lackluster law enforcement agencies and a fledgling criminal justice structure that had not yet firmly taken root. As a result, citizens had little faith that guilty parties would be apprehended, tried, convicted, and sent to prison. Some settlers decided that their only recourse was to take the law into their own hands. One historian estimated that fifty-two vigilante groups were active in Texas, the most in the nation.[1]

Amidst this swirling chaos were unresolved civil and judicial problems related to Reconstruction that hampered the restoration of city and county governments. An excellent illustration is District Judge William Weaver's circuit tour of North Texas in the spring of 1867. During his rounds of the various courts within his district, Weaver dealt with raiding Indians and vigilante mobs that had been terrorizing the region. In his report to Governor J. W. Throckmorton, Weaver stated that he had journeyed first to Jack County, where he found the local government "almost disorganized."[2]

On the way to his next stop in Decatur in Wise County, Weaver found the area "full of Indians. . . . All the country was in a state of Alarm—I had no [armed military] escort—The Indians came down and returned by the Jacksboro Road in open day." Following this incursion, the judge felt it would be unwise to continue the court session. Moreover, he found scant semblance of government in Wise County, which still lacked a county court and a district clerk. Furthermore, the judge observed that "no competent men can be got to hold office."[3]

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1 Richard Maxwell Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* (New York: Oxford University Press, 1975), 96, 101, 112.

2 Dorman H. Winfrey and James M. Day, eds., *The Indian Papers of Texas and the Southwest, 1825–1916* (Austin: Texas State Historical Association, 1995), 4:216 (quotation).

3 Winfrey and Day, *Indian Papers of Texas,* 216 (quotation 1), 217 (quotation 2).

Weaver next rode to Montague County, where he encountered depressingly similar problems. He was able to organize a grand jury but could not convene a petit jury. The judge spent two days "in fruitless efforts to make a jury . . . it was deemed useless . . . to make further effort—Court will adjourn today." Closing his report to the governor, Judge Weaver said, "I still hope for better times after Reconstruction."[4]


Judge William Weaver

In his report, Weaver mentioned not having an armed military escort, something that a number of Texas jurists insisted upon during this period. Judge Moses B. Walker of the Fourth Judicial District, Judge B. F. Barkley of Fort Worth, and Judge Hardin Hart of the Seventh Judicial District (Weaver's successor) all had soldiers guarding them. During one of the England family murder trials in 1876, a detachment of Texas Rangers guarded District Judge J. A. Carroll's Montague courtroom. Judges and courtrooms were vulnerable not only to Indian raids but also to vigilantes who opposed judicial proceedings or verdicts. Lawless mobs frequently circumvented North Texas's nascent criminal justice system. Throughout the England murder trials, Montague County citizens repeatedly threatened Ben Krebs, James Preston, and their loved ones with violence, eventually forcing the Krebs and Preston families to relocate north of the Red River in Indian Territory.[5]


Judge J. A. Carroll

There have been no detailed studies of lynching and criminal justice in North Texas during this period, but William Carrigan's work on central Texas offers some excellent parallels. Carrigan found a direct correlation between increases in competency of local courts and citizens' trust in the legal process, and a decrease in lynching. Prior to 1890, 68 percent of all grand jury murder indictments never went to trial—often because sheriffs and constables were unable to locate indicted suspects or the witnesses against them.[6]

As Texas legal historian Michael Ariens notes, "Violent crime in Texas, including murder, was rampant in the 1870s, and the clearance rate was quite low. That helps explain the rise of vigilance committees." Because of the "extraordinary instability" during this period and the dearth of law and order, the public had little faith in the Texas legal system. Even in large cities such as

[4] Winfrey and Day, *Indian Papers of Texas,* 217 (quotations); Brett J. Derbes, "William Thomas Green Weaver," in *Handbook of Texas Online,* https://tshaonline.org/handbook/online/articles/fwe90 (accessed April 17, 2019). Five months after Weaver filed this report, Union commanders removed him as district judge of the Seventh Judicial District and replaced him with Hardin Hart. Weaver died in 1876 at his home in Gainesville from an overdose of chloral hydrate, a hypnotic sedative.

[5] William L. Richter, *The Army in Texas during Reconstruction, 1865–1870* (College Station: Texas A&M University Press, 1987), 148.

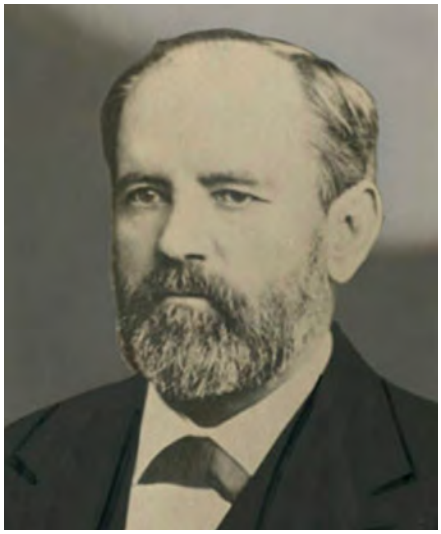
[6] William D. Carrigan, *The Making of Lynching Culture: Violence and Vigilantism in Central Texas, 1836–1916* (Urbana: University of Illinois Press, 2004), 107. Law enforcement officials' inability to locate suspects and witnesses figured prominently in the England family murder case.

Dallas, residents expressed frustration. In September 1875, the *Dallas Weekly Herald* reported, "The people—the bone and sinew of the country—are losing confidence in the courts and justice. This leads to mob violence and lynch law."[7]

In a before-and-after comparison, Carrigan documents criminal justice improvements in central Texas in the years following Reconstruction. He found that the bleak state of law and order in the region improved significantly after 1890. By that date two-thirds of all grand jury indictments went to trial. The conviction rate also rose to almost 60 percent, and juries more often meted out harsh sentences, including death penalties and life sentences.[8]

In sum, Carrigan found that after 1890, several significant changes were taking root: More cases went to trial, juries convicted more lawbreakers, the sentences were longer, and more criminals were sent to the state penitentiary. Taken together, "these changes undermined the intellectual defense of mob violence [that many had previously used]. The charge of an ineffective legal system no longer had the same resonance." Once again, Carrigan's conclusions regarding central Texas during this period are applicable to North Texas.[9]

In November 1877, the Texas Court of Appeals threw out James Preston's first conviction. Presiding Justice Matthew Duncan Ector wrote the court's opinion and made clear that overturning a murder conviction such as Preston's should not be commonplace. The justice recognized how important it was for the verdicts of local juries to be upheld and for the courts to adhere firmly to Texas laws. Ector wrote that it was paramount for citizens to understand they would be punished if they broke the law. This certainty of punishment was essential in safeguarding society. If authorities failed in their responsibilities to prosecute and convict lawbreakers, then those who had been injured or wronged would lose faith in the criminal justice system and resort to vigilantism.[10]



Justice Matthew Duncan Ector

These points notwithstanding, Ector noted the law also required that before a person was executed, he must receive a just and unprejudiced trial and be legally convicted. If, upon appeal, it was shown that a defendant had been denied his rights, then the appeals court had no choice but to overturn his sentence and grant him a new trial. Without a fair appeals process, there would be no check against errors made by judges and juries. "God forbid that the prisoner should be sent to pray of the mercy of the executive [Governor of Texas] a reprieve for an offense of which he has not been legally convicted."[11]

[7] Michael Ariens, email to the author, September 11, 2019 (quotation 1); Ariens, interview with the author, San Antonio, TX, August 20, 2015 (quotation 2); Wayne Gard, *Frontier Justice* (Norman: University of Oklahoma Press, 1949), 278 (quotation 3).

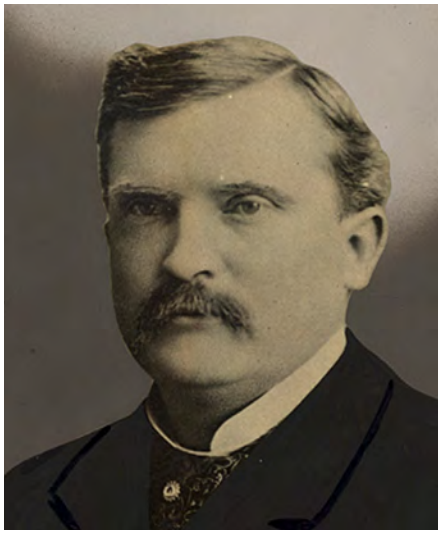
[8] Carrigan, *Lynching Culture,* 108.

[9] Carrigan, *Lynching Culture,* 108 (quotation).

[10] *James Preston v. The State*, 1878," in A. M. Jackson and A. M. Jackson Jr., *Cases Argued and Adjudged in the Court of Appeals of the State of Texas* (St. Louis, MO: Gilbert Book Co., 1879), 4:201–2.

[11] "*James Preston v. The State*, 1878," 202.

In November 1879 George W. Clark replaced Matthew Duncan Ector, who had died the preceding month, as presiding justice of the court. During James Preston's second appeal to the Court of Appeals in February 1880, it was clear that Clark viewed the England case very differently than his predecessor. Beginning with Krebs's involvement, Clark felt that no impartial person could read the trial transcript and not conclude that Ben Krebs "was present at the assassination of the England family and a guilty participant . . . murdering with his own hands two helpless and inoffensive women [Selena and her daughter Susie]." Clark noted that Susie, "when pursued and mortally wounded by the relentless assassin, . . . with her dying breath fixed the identity of Krebs." Clark concluded that although Selena England was unable to identify the other two attackers, she stated on several occasions and to multiple witnesses that she clearly recognized Krebs as the man chasing her and Susie with a pistol.[12]


Judge George W. Clark

Selena's deathbed statements were spoken "with vivid recollection and exactness and convey to the mind at once a profound impression of the honesty and certainty of her convictions." Justice Clark opined that "murder will out" and that the "murdered women testify that Krebs was there, although their lips are sealed in death." Clark claimed that it was impossible for Selena to have mistaken Krebs, "His voice as it uttered its horrid curses, his beard, his hat, and her immediate proximity to him, so close that she could have put her hand upon him."[13]

Regarding Preston's involvement, Justice Clark concluded there was no doubt that Preston was with Krebs on the night of the murders as Preston had acknowledged spending the night with the Krebs family at their home. Since Preston admitted that he was with Ben Krebs all night, it followed that if Krebs was present at the England home when the murders took place, then Preston was there too. Clark attempted to downplay the most glaring weakness in the case against Preston; namely, that he had no motive to kill the Englands and was in fact on friendly terms with them. The justice agreed that the prosecution had not proven a motive for Preston's involvement but insisted that having a motive was not essential in securing a conviction.[14]

As a substitute for lack of motive, Justice Clark proffered his personal perspective on human nature and psychology: "Who with mortal ken can fathom the human heart and expose all its mysterious promptings? Crimes, the most horrible are often committed without apparent motive save an insatiate deviltry which mocks at social restraint and recklessly defies the laws of God and man." Clark suggested that Preston was influenced, seduced, or contaminated by

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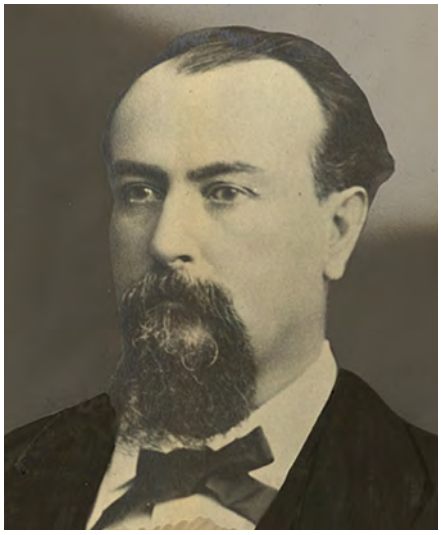
[12] "*James Preston v. The State*, 1880," in A. M. Jackson and A. M. Jackson Jr., *Cases Argued and Adjudged in the Court of Appeals of the State of Texas* (St. Louis, MO: Gilbert Book Co., 1880), 8:34 (quotation 1), 34–35 (quotation 2), 35 (quotation 3); "Chronological Index of Texas Court of Criminal Appeals," *Tarlton Law Library*. George W. Clark served less than a year on the court of appeals before resigning in October 1880 to return to his private law practice in Waco. Ironically, his successor on the court was none other than James Mann Hurt, one of Preston's defense attorneys. Hurt became presiding justice of the court of appeals in 1892.

[13] "*James Preston v. The State*, 1880," in Jackson and Jackson, *Cases Argued and Adjudged*, 8:35.

[14] "*James Preston v. The State*, 1880," 35, 36, 38 (quotations 1–3, respectively).

Krebs's "evil and malicious heart" to participate in the murders.[15]

During Ben Krebs's second appeal to the Court of Appeals in February 1880, Justice John Preston White authored the court's opinion. In explaining the justices' decision, White failed to address key testimony from the sole survivor of the England killings, Selena's son Harvey; and specifically, that Harvey was certain neither Krebs nor Aaron Taylor were the murderers. White also discounted assertions by potential witnesses who were unable to testify at Krebs's second trial due to scheduling conflicts. These witnesses were prepared to testify that the morning after the murders, they spoke with three other men who had bragged openly about killing the Englands. Krebs's defense attorneys had requested a continuance so that the witnesses could have time to travel to Gainesville and testify, but District Judge Carroll had denied the motion. Justice White wrote that regarding these witnesses, "if they had been present [at the trial], they would not have been permitted to testify to . . . statements and declarations [they heard], because such testimony would have been hearsay and inadmissible."[16]


Justitce John Preston White

Here then, are three eyewitnesses who had compelling proof that the state may have convicted the wrong men, but White was not interested in other possible suspects. Ironically, White rejected this evidence out of hand as hearsay while accepting hearsay testimony from witnesses who had paraphrased Selena England's deathbed statements. This contradiction raises an important point regarding hearsay testimony. The hearsay rule in general did not allow statements made outside of court to be introduced as evidence in a trial. Texas legal historian Michael Ariens notes, however, that the hearsay rule "was riddled with many exceptions, so a number of out-of-court statements were admitted as evidence. The justifications for admitting hearsay evidence were either reliability or necessity."[17]

One exception to the hearsay rule was the dying declaration. Dying declarations such as Selena England's were admissible in court, providing that they adhered to established legal criteria. For example, if a person knew their death was at hand, made a statement regarding the circumstances of their death, and later died, a witness to that dying declaration could testify as to what they heard. Such statements were only admissible in murder trials. Michael Ariens says that in reality the application of this criterion was uneven. In some cases, "it appears that dying declarations were admitted as evidence because greater stress was placed on the necessity of their admission, rather than their reliability."[18]

The admissibility of dying declarations has its roots in a 1789 case, *The King v. Woodcock*. It

[15] "*James Preston v. The State*, 1880," 38 (quotation 1), 39 (quotation 2).

[16] "*Ben Krebs v. The State*, 1880," in A. M. Jackson and A. M. Jackson Jr., *Cases Argued and Adjudged in the Court of Appeals of the State of Texas* (St. Louis, MO: Gilbert Book Co., 1880), 8:2 (quotation),16, 21–22, 27; "Chronological Index of the Texas Court of Appeals, 1836–1986," *Tarlton Law Library* (accessed August 5, 2018); Montague County Deed Record Book F, February 11, 1878, 417–18.

[17] Michael Ariens, email to author, September 11, 2019.

[18] Michael Ariens, email, September 11, 2019.

was assumed that someone on their deathbed, who had no hope of life and believed death was imminent, would not lie knowing they were about to meet their maker. In a dying person, "every motive to falsehood is silenced, . . . the mind is induced by the most powerful considerations to speak the truth." Persons making dying declarations would be afraid of "heaven's ultimate punishment for false testimony— [for violating] . . . one of the Ten Commandments."[19]

Of course, this hearsay exception assumes that a person making a dying declaration would not maliciously lie, because they believe in God, hell, and an afterlife. But what about someone who is not religious? Or someone who is amoral and has no conscience? Knowing they were going to die and could not be charged with perjury, they could seek revenge upon others by making false statements. In fact, many courts made "no attempt to ascertain the belief system of the declarant. Without the belief in eternal damnation, the main guarantor of trustworthiness is gone."[20]

In Selena England's case, her dying declarations were likely viewed as unimpeachable. After all, she and her family were the victims of a terrible crime and there was considerable sympathy for her. In addition, people assumed that as the wife of a minister, she must be a devout person. But what if she had made a mistaken identification? Or what if in fact she was a vindictive woman who deliberately lied in order to get revenge on Ben Krebs for their July 1876 fence-line confrontation? Authorities never delved into her background, religious convictions, or belief system. In summing up his review of Krebs's second appeal, Texas Court of Appeals Justice John Preston White had no doubts about Selena's dying declarations, confidently stating that the jury could have reached no other verdict but guilty and that the appropriate punishment for anyone guilty of such a crime was death.

At this point, Krebs and Preston had each been tried and convicted by two separate juries. The Texas Court of Appeals had reviewed their cases twice. During this period, the appeals court reversed on average 65 percent of all convictions. These reversals were largely based on three types of errors: indictments, trial evidence, and jury instructions. In their first round of appeals, Krebs and Preston secured conviction reversals largely because of legal errors. By the time of their second appeals, however, all critical mistakes and technicalities had, in the minds of the justices, been resolved.[21]

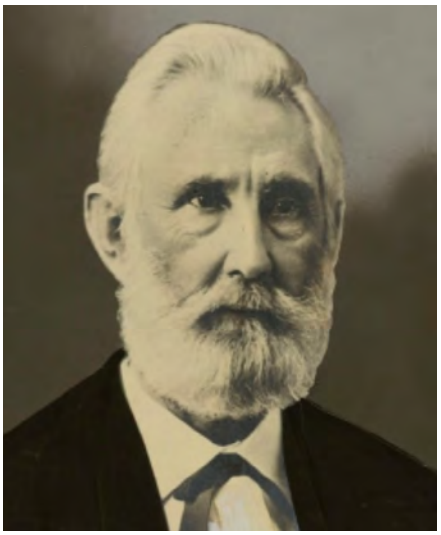
Generally, in the Anglo-American criminal justice system, authority is divided between judge and jury. The judge rules on any legal issues that arise during a trial, while the jury, in its verdict, decides questions of fact. Despite evidence that could have given pause to some, the Texas Court of Appeals refused to seriously consider other credible scenarios or suspects in the England family

[19] Aviva A. Orenstein, "Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence," *Maurer School of Law Digital Depository*, Indiana University, https://www.repository.law.indiana.edu/facpub/6 (accessed March 13, 2019), 1416 (quotations 1 and 2); Timothy T. Lau, "Reliability of Dying Declaration Hearsay Evidence," *American Criminal Law Review*, Vol. 55:373 (2018), 375; Robert H. Klugman, "Some Factors Affecting the Admissibility of Dying Declarations," *Journal of Criminal Law and Criminology*, Vol. 39 (Issue 5, 1949), https://scholarlycommons.law.northwestern.edu/jclc (accessed March 13, 2019), 646.

[20] Orenstein, "Her Last Words," 1425–26, 1427 (quotation).

[21] Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 219–20; *James Preston v. State of Texas*," Cause 664, February 14, 1880, and *Ben Krebs v. State of Texas*," Cause 665, February 14, 1880, both in Texas Court of Appeals Minutes, Volume 211–027, Tyler 1876–1882, 362, Accession 1993/088 Records, TSLAC.

murders. Michael Ariens, an expert on Texas's nineteenth-century legal system, points out that, "One institutional aspect that you have to be careful of [at that time], appellate judges in particular are loath to disturb the factual findings of a jury, even if they have harbored doubts, unless there is something that shows that this is against the great weight of the evidence. Even if they say they have doubts they will not overturn a verdict."[22]


Governor Oran Milo Roberts

On April 24, 1880, Texas Governor Oran Milo Roberts upended the England murder case by commuting Krebs's and Preston's death sentences to life sentences at hard labor in the state penitentiary. In all criminal cases excluding treason or impeachment, the Texas Constitution gave the governor the power to grant commutations and pardons. Roberts, who was himself an attorney and former chief justice of the Texas Supreme Court, had made a careful and deliberate study of the England family murders.

Ironically, the primary impetus for Roberts's intervention in the Krebs and Preston cases came from District Judge Joseph Alexander Carroll, the judge who had presided over all five trials of Ben Krebs, James Preston, and Aaron Taylor in Montague and Cooke Counties. Judge Carroll worried that a terrible, irreversible wrong was about to occur if authorities executed Krebs and Preston. On April 5, 1880, the judge penned a letter to Governor Roberts, asking him to commute their sentences to life in prison. Carroll wrote that if he were persuaded beyond a reasonable doubt that Krebs and Preston were guilty, he would support their death sentences. The judge noted that the England case had been before him numerous times during the last four years. He had studied the evidence and the testimony of various witnesses with great interest. Carroll felt it his duty to convey his reservations to the governor before it was too late.[23]

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[22] Michael Ariens, interview with author, August 20, 2015, San Antonio, TX (quotation). Regarding the reluctance of appellate judges in overturning jury verdicts, Ariens explains,

> "Only a guilty verdict could be appealed, and appellate courts rarely second-guessed the factual findings implicitly made in assessing a verdict of guilty. What appellate courts of the late nineteenth century regularly second-guessed were the legal rulings made by trial courts, including errors in the admission of evidence and providing jury instructions, to errors in the indictments and verdict form. And the Texas Court of Appeals, with its 65 percent reversal rate, was one of the most exacting and demanding appellate courts in the nation. Because it was rare for trial courts to conduct trials without making some legal error, a good lawyer could usually find some way to give the Texas Court of Appeals a legal reason to reverse the conviction. After Krebs and Preston were convicted a second time, they again appealed. Although some legal errors might remain from the first conviction, the opportunity given the trial court of a second chance to conduct the trial lessened the likelihood that the trial court would make some reversible legal error. Even when an appellate court was offered some compelling evidence of innocence, evidence that would give an objective observer pause, the Texas Court of Appeals was unlikely to look seriously at other credible scenarios or suspects. That was the job of the jury, as informed by the lawyers for the accused. The adversary system gave significant authority and responsibility to the lawyers for the state and the accused to bring evidence and alternate scenarios to the jury for its assessment whether the prosecution had proved the guilt of the defendants beyond a reasonable doubt. Even when an appellate court expressed doubts about the defendant's guilt it was rare for it to overrule a jury and conclude the defendant could not as a matter of law be guilty of the crime charged." (Michael Ariens email to author, September 11, 2019)

[23] Governor O. M. Roberts, proclamations commuting Krebs's and Preston's death sentences, April 24, 1880, Krebs and

One important unanswered question regarding Carroll's letter is why the judge waited so long to act. Why did he not intercede earlier, when he was overseeing the five murder trials? It appears that Carroll waited until the last possible minute, when his conscience told him that Krebs and Preston would die unless he helped them. Texas legal historian Michael Ariens explains, "The presiding judge is permitted to say in a criminal case, 'You, the prosecution, have not shown sufficient evidence as a matter of law that the jury could find this person guilty. I am simply acquitting the defendant as a matter of law.'" But as Ariens points out, "this is very unusual because of the double jeopardy provision. Once the judge does that you can't try the defendant again. And remember that the judge is an elected figure. If the judge does that contrary to the members of the community, he's not going to get re-elected." Indeed, the intense backlash that Carroll experienced after he wrote Governor Roberts may well have been the motivating factor in his January 1881 decision not to seek re-election.[24]

Although Roberts's actions on behalf of Krebs and Preston generated considerable controversy at the time, if one examines the governor's record on commutations and pardons during his tenure, it is clear he followed an established pattern of executive clemency typical for the period. While he was governor, Roberts commuted ten murder-in-the-first-degree death sentences, including those of Krebs and Preston, to life in prison. He also pardoned ten life sentences for murder. Never once did he take the full step of pardoning someone convicted of murder in the first degree who had been sentenced to death. There was always a two-step process: death to life in prison, and life in prison to pardon. Many of those serving life sentences for murder were not pardoned by Roberts until they had served ten to twenty years and had clearly demonstrated good behavior and a record of rehabilitation.[25]

Following their commutations, Krebs and Preston languished in the state prison system for years, all the while insisting they were innocent. Their pleas fell on deaf ears. Finally, in 1893 Texas Governor James Hogg ordered the Board of Pardon Advisors to review their cases. The advisors, Judge L. D. Brooks and former governor Francis Lubbock, believed that Krebs was largely convicted

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Preston Case File No. 614/971, Box 323, Cooke County District Court, Criminal Cases; Gov. O. M. Roberts's reasons for commuting Krebs's and Preston's sentences, April 24, 1880, Krebs and Preston Executive Clemency File, Texas Secretary of State, TSLAC (KPCF). Regarding commutations and pardons, the Texas legislature created the Texas Board of Pardon Advisors in 1893 to help the governor manage the increasing number of applications for executive clemency. The board made recommendations to the governor, but up until 1936, the governor had sole discretion in the awarding of executive clemency. After much controversy about pardon abuses by several governors, voters in 1936 amended the state constitution, stripping the governor of this power and giving it to the Texas Board of Pardons and Paroles, a politically independent body. See TSLAC, "Pardons and Paroles," https://www.tsl.texas.gov/exhibits/prisons/inquiry/pardons.html (accessed February 4, 2019); Stuart A. MacCorkle, "Pardoning Power in Texas," *Southwestern Social Science Quarterly* 15, no. 3 (December 1934), 219; Texas Board of Pardons and Paroles, *Handbook on Parole*, *Mandatory Supervision*, *and Executive Clemency* (Austin: Texas Board of Pardons and Paroles, 1978), 5; Yen Bui and Jeanette L. Jordan, "Amnesty and Pardon," *Encyclopedia of Criminology and Criminal Justice*, January 2014, https://onlinelibrary.wiley.com/doi/full/10.1002/9781118517383.wbeccj056 (accessed February. 4, 2019).

[24] Michael Ariens, interview with author; Aragorn Storm Miller, "Joseph Alexander Carroll," in *Handbook of Texas Online*, https://tshaonline.org/handbook/online/articles/fcafd (accessed August 9, 2018); "The Exchange National Bank of Denton, Texas," in *The History of Denton County*, *Texas*, http://www.dentonhistory.net/page93/ (accessed August 10, 2018). After leaving the bench, Joseph Alexander Carroll became president of the Exchange National Bank in Denton, TX. He served as president from 1881 until his death in October 1891.

[25] Governor Oran Milo Roberts Pardon Register, Microfilm Rolls 12 and 15, Executive Record Books, 1835–1917, TSLAC.

on the dying declarations of Selena England. In the years since the trials, new evidence cast doubt on Selena's reputation for veracity. Brooks and Lubbock also criticized Matlock's methods, saying that the young county attorney had placed too much importance upon the three sets of tracks he had found leading from the England home toward the Krebs cabin.[26]


Governor James Hogg

The advisors acknowledged that criminals sometimes did stupid things that later incriminated them, but it was nonetheless hard to believe that if Krebs, Preston, and Aaron Taylor were indeed the murderers, they would be stupid enough to walk straight back to the Krebs home through recently plowed fields, leaving their tracks for all to see. Brooks and Lubbock offered an alternative scenario. One of the killers knew that both Selena and her daughter Susie suspected Krebs of being the man who pursued them firing his pistol, because Susie had called out Krebs's name repeatedly during the pursuit. The murderers may have deliberately tried to cast further suspicion on Krebs by walking directly from the England home across the plowed fields toward the Krebs home.[27]


Governor Francis Lubbock

Brooks and Lubbock also noted it was significant that the murderers did not kill Selena. If Ben Krebs were one of her attackers, why would he not have finished her off, silencing her forever, instead of just wounding her, leaving her alive to identify him as her murderer? It was plausible the killers deliberately chose not to kill her so that she would implicate Krebs and thus divert suspicion from them. That Krebs would leave Selena to identify him then head straight home across freshly turned earth, leaving a clear, incriminating trail seemed doubly ludicrous. The advisors asked, "Does this conduct comport with our knowledge and observation of criminals trying to hide the evidence of their crime, . . . or rather, is it not flatly contra to all our knowledge and observation on the subject?"[28]

After pointing out how ridiculous such a scenario was, Brooks and Lubbock then zeroed in on a more likely explanation: that the killers wanted to frame Krebs for the murders. Common sense dictated that if Krebs, Preston, and Taylor had been the guilty parties, they would have taken a far different, more discreet route when returning to the Krebs home, and would have been more careful of leaving incriminating footprints. The advisors next addressed the nature of the offense, a "wholesale indiscriminate and cowardly butchery of an inoffensive, helpless family, [a crime that was] . . . well calculated to arouse and did arouse even to frenzy, the righteous indignation of that outraged community to the degree of intensity that the people, in their eagerness and

[26] Brooks and Lubbock to Hogg, December 23, 1893, KPCF.

[27] Brooks and Lubbock to Hogg, December 23, 1893, KPCF.

[28] Brooks and Lubbock to Hogg, December 23, 1893, KPCF.

determination to punish the perpetrators of that appalling crime, were incapable of considering dispassionately the facts and circumstances that seemed to them at the time to point to these men as the guilty perpetrators of this great crime."[29]

Brooks and Lubbock noted that it was common in the heat of the moment for individuals to jettison a calm and rational perspective and jump to conclusions, seizing upon convenient facts that appeared incriminating while ignoring other equally valid evidence that might exonerate a suspect. People see what they want to see. Often in a rush to judgment, suspicion is focused on innocent parties, allowing the guilty to escape justice. The advisors concluded, "There existed against these men at the time of their trials such an inflamed state of passion and prejudice as to make it impossible for them to have a fair and impartial trial."[30]

In addition to the pardon board's review, Governor Hogg authorized an independent investigation of the case which unearthed some startling new discoveries. An affidavit to Hogg from Louis Fisch, a well-respected longtime resident of Montague County, contained several important revelations. In his statement, Fisch said it was paramount that several examples of the "old prejudice or as I may term it, rascality of old, may be brought to light." Vital evidence was suppressed during the trials and several individuals, fearful of violent retribution, refused to testify because "of the excited and prejudiced feeling then existing . . . [among] county officials and other citizens of this county against said Krebs and Preston."[31]

Fisch next leveled a serious accusation against Montague County Attorney Avery Lenoir Matlock. He said that when Matlock and Sheriff Lee Perkins arrested Krebs, Preston, and Taylor, Fisch thought the trio was innocent. He offered to help Matlock prove this. Fisch stated, "My services were contemptuously refused by Hon. A. L. Matlock with the reply, 'Fisch we've got the party we want and don't want any others and if you speak in favor or in any way try to get them clear, I will get the Vigilantes (then operating in our county) to attend to you.' *A fine county attorney and a very fine champion of democracy*!" (emphasis in original). Here, then, is the county attorney, sworn to uphold the laws of Texas, allegedly admitting to Fisch that he actively cooperated with a group of vigilantes in Montague County and threatening to have Fisch lynched by these vigilantes if he interfered.[32]

Concluding his affidavit, Fisch said, "I will state again that the feeling in this county against . . . Krebs and Preston was vindictive and bitter without cause and that it was very unsafe for a person to utter one word in favor or about . . . Krebs and Preston, as in fact at those times our county was infested with cutthroats on one hand and vigilantes on the other and intimidating, unscrupulous officers of the peace between, so that the timid and law-abiding citizen had to take the background." Considering these circumstances, it was inevitable that Krebs, Preston, and Taylor were convicted. They never stood a chance of receiving fair and impartial trials. On November 28, 1894, after two years of considering the case, Governor Hogg pardoned Ben Krebs and James Preston.[33]

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[29] Brooks and Lubbock to Hogg, December 23, 1893, KPCF.

[30] Brooks and Lubbock to Hogg, December 23, 1893, KPCF.

[31] Louis Fred Fisch Affidavit, Montague, TX, October 23, 1894 (quotations), KPCF; Douglass to Hogg, October 30, 1894, KPCF.

[32] Louis Fred Fisch Affidavit, October 23, 1894, KPCF.

[33] Louis Fred Fisch Affidavit, October 23, 1894, KPCF; Gov. James S. Hogg, Ben Krebs and James Preston Pardon, Austin, TX, November 28, 1894, KPCF.

Ultimately, when considering who the guilty parties in the England family murders were, we are left with a wide divergence of opinion. Some attorneys who prosecuted the case were immovable in their declarations of Ben Krebs's, James Preston's, and Aaron Taylor's guilt. Others were just as strongly persuaded of their innocence and pointed to three other suspects that were later identified. A third group, including Governors Roberts and Hogg, largely believed Krebs, Preston, and Taylor to be innocent, but were never completely sure.

While some doubts linger, one thing is certain. No matter one's perspective on the England murder case, it was both a human tragedy and a miscarriage of justice. The legal aftermath involved five Texas governors, five trials at Montague and Gainesville, and five appeals to the Texas Court of Appeals. For anyone interested in Texas and its legal history, *Murder in Montague* presents a realistic, unflinching portrait of a Lone Star criminal justice system in transition following the Civil War.

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Gone to Texas:
Deadbeat Debtors and their Human Property

By Dr. Sharon Ann Murphy

1830 engraving depicting the U.S. slave trade

The potential for debtor fraud has always been a risk in credit relationships. While many frauds involved the illegitimate or pretended sale of property, enslaved individuals could be physically moved and hidden from creditors. The relocation of mortgaged enslaved people was a problem throughout the antebellum period. Slaveholders moving to different jurisdictions not only made it difficult for new creditors to research the existence of prior mortgage liens, trust deeds, or bills of sale, but also enabled debtors to hide enslaved people bodily from creditors. The Planters' Bank of Vicksburg, Mississippi, thus specifically stipulated in its mortgages that if the debtor "shall at any time attempt to remove the said property or any part thereof from the said county" or if the creditor "shall have just cause to believe that the said property or any part thereof is about to be removed from the county," that would justify the immediate seizure and sale of the enslaved individuals to satisfy the mortgage.[1] Operating under the same principle, in November, 1841, the Montgomery branch of the Bank of Alabama "received information that Allen B. Knowles is about to run certain Negroes Mortgaged to this Institution." To prevent this, the branch president authorized "some person to take possession of said Negroes & convey it to this place."[2]

[1] February 2, 1835 mortgage, Mandeville (Henry D.) Family Papers, #491, 535, Correspondence, 1833-1873 The Planters Bank of Mississippi Records, Indentures 1835-1839, Folder 72, Box 7, Louisiana and Lower Mississippi Valley Collections, Louisiana State University Libraries, Baton Rouge, La. [hereafter *LSU*.]

The emergence of the independent Republic of Texas greatly exacerbated this problem. Whereas Texas had served as a haven for debtors throughout the 1810s and 1820s, slavery was technically illegal there under Mexican law. Southerners wishing to migrate with their human property needed to exploit a legal loophole that permitted long-term indentured servitude contracts. Yet upon declaring independence in 1836, the new nation enshrined the system of slavery into its constitution. When the Panic of 1837 and ensuing depression set off a wave of foreclosures throughout the United States, debtors flocked to Texas where land was cheap and extradition treaties were nonexistent. And unlike their mortgaged land and homes which had to be left behind, debtors could abscond with their valuable enslaved people.[3]

Bank Mortgaging of Enslaved Lives

Credit relationships do not necessarily require financial intermediaries like banks, and many—if not most—credit transactions in the colonial period and early republic happened outside of formal institutions, appearing as entries in merchant ledger books or agreements between neighbors.[4] Since enslaved individuals constituted a significant proportion of southern wealth even in the colonial period, mortgages involving enslaved lives were common.[5] Yet the legal designation of human property mattered greatly for these contracts.[6] Throughout the history of slavery in North America, colonies and then states struggled with the how to define enslaved people. Whereas legal (*de jure*) definitions had significant weight, the treatment of enslaved lives in day-to-day (*de facto*) interactions sometimes contradicted the law. For example, bondspeople were almost universally defined as property. As George Stroud summarized in his *Sketch of the Laws Relating to Slavery* in 1827, "the cardinal principle of slavery—that the slave is to be regarded as a thing,—is an article of property,—a chattel personal,—obtains as undoubted law in all of these states."[7] Yet some nineteenth century life insurers routinely underwrote enslaved people as lives, where they would never underwrite valuable horses or livestock (which were also, arguably, living property).[8] In legal historian Katharina Pistor's words, "property rights…are negotiated case by

[2] November 3, 1841, Branch Bank at Montgomery Minute Book, 1838-1843, SG4069, Bank of the State of Alabama, Government Records Collections, Alabama Department of Archives and History, Montgomery, Ala. [hereafter *Alabama.*]

[3] Mark E. Nackman, "Anglo-American Migrants to the West: Men of Broken Fortunes? The Case of Texas, 1821-46," *Western Historical Quarterly*, vol. 5, No. 4 (Oct. 1974): 448-450.

[4] Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy 1607-1900* (Madison: Historical Society of Wisconsin, 1974); Winifred Rothenberg, *From Market-Places to a Market Economy: The Transformation of Rural Massachusetts, 1750-1850* (Chicago: University of Chicago Press, 1992); Bonnie Martin, "Neighbor-to-Neighbor Capitalism: Local Credit Networks and the Mortgaging of Slaves," in Sven Beckert and Seth Rockman, (Eds.), *Slavery's Capitalism: A New History of American Economic Development* (Philadelphia: University of Pennsylvania Press, 2016): 107-21; Peter A. Coclanis, *The Shadow of a Dream: Economic Life and Death in the South Carolina Low Country, 1670-1920*, (New York: Oxford University Press, 1991), 104.

[5] In 1774, 48.6% of southern wealth consisted of land, and 35.6% consisted of enslaved people, with various types of personal property accounting for the remaining sixth. See Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," 120 *Harvard Law Review* (December 2006): 418.

[6] On the coding of various assets as capital, see Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).

[7] George M. Stroud, *Sketch of the Laws Relating to Slavery in Several States of the United States of America*, (Philadelphia: Kimber and Sharpless, 1827), 11.

[8] Sharon Ann Murphy, "Securing Human Property: Slavery, Life Insurance, and Industrialization in the Upper South," 25 *The Journal of the Early Republic* (Winter 2005): 620-21.

case by matching actual practices to legal concepts....the fashioning of property rights in law is a complex process that is pregnant with value judgments and power."[9] This question of personhood versus property would later form the core of many of the debates over abolition.[10]

Even if most southern whites agreed that enslaved bodies were legally property, the precise type of property was more debatable. Were they "real" or "personal" property? "moveable" or "immoveable" property? The answers to these questions were less obvious than they might first appear and shifted from location to location and across time. As one major historian of southern law summarizes:

> In Virginia from 1705 to 1792 slaves were defined as real estate for some purposes. South Carolina tried to characterize slaves as real estate in 1690, when it followed the Barbadian code, but this was disallowed by the English Privy Council. In Louisiana slaves were designated as "immoveables," although sometimes the phrase "real estate" was used. They were defined as realty for some purposes in Kentucky from 1798 to 1852 and in Arkansas from 1840 to 1843. But that does not end the list. Some judges analogized slaves to land and adopted rules reflecting that correspondence. For one reason or another rules of real property law were applied to slaves in some instances in over one-third of the jurisdictions that made up the slave South.[11]

While this distinction between realty and personalty was irrelevant for the day-to-day life experiences of the enslaved themselves, legal definitions mattered greatly for the financialization of slavery since the laws surrounding realty differed from the laws surrounding personalty, especially in two instances: questions of inheritance and the property rights of wives and widows.

In English law, the real property of a person who died intestate (without a will) passed directly to his heirs, while personal property could be used by the executors of the estate to pay off any unsecured debts—meaning debts not backed by specific property as collateral—and then divided equally among the heirs. Even without debts, if land descended to the eldest son (under the law of primogeniture) but human property was divided amongst the other heirs, "the plantation might sit idle, potentially forever, while [the eldest son] gathered enough funds either to purchase his father's slaves from his siblings or to purchase new slaves. Thus, inherited land was of little value if slaves were personal property."[12] A 1668 law in Barbados tried to solve this issue by classifying enslaved individuals as realty, tying them to the land and thus keeping them out of the hands of the executors. The Virginia legislature modeled its 1705 law on this Barbadian statute. "The primary objective was to assure that those who received the land of a slaveowner would also receive the slaves necessary to work the land." Continuing this logic, when enslaved lives were not directly connected to a plantation, their legal status remained as personal property.[13] With the Debt Recovery Act of 1732, British creditors pushed back against this classification of the enslaved

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9 Pistor, *Code of Capital*, 28.

10 For example, see Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996), 61-62.

11 Morris, *Southern Slavery and the Law*, 64.

12 Priest, "Creating an American Property Law," 387-388; 419 (quotation).

13 Morris, *Southern Slavery and the Law,* 66.

as realty, since it made it more difficult for them to foreclose on the property of delinquent debtors in the colonies.[14] For the purposes of debt collection, the 1732 act required that both landed and human property be treated as personalty. "The Act abolished the legal distinctions between real property, chattel property, and slaves in relation to the claims of creditors. Under the Act, land and slaves could be seized and sold to satisfy any type of debt, including many widely used forms of unsecured debt."[15] However, sheriffs typically had to sell off non-enslaved personal property first, then enslaved individuals, before seizing and selling landed property in the recovery of debts.[16]

As the states attempted to create viable governing regimes during and after the American Revolution, most concluded that "the Debt Recovery Act subjected landowners to an undesirable level of financial risk" in that the failure to pay one's debts could result in the loss of one's landed property.[17] Each state needed to consider what balance to strike between creditors and debtors. Virginia's law of 1792 defined enslaved individuals as personalty in most instances, while Kentucky's law of 1798 defined them as realty for the purposes of inheritance, but personalty in cases of debt. By 1852, Kentucky reclassified human property as personalty in all cases, however the new statute directed that creditors first claim non-enslaved personal property before seizing and selling enslaved lives. The laws of Louisiana, which derived from its Spanish and French ancestry rather than the British tradition, defined property in terms of movable and immovable property (which were similar but not equivalent to the British terms of personalty and realty). While the French *code noir* had initially defined enslaved lives as movable property, the law of 1770 reclassified them as "immovables for the purposes of sale and mortgage." With its entrance into the United States, Louisiana's 1806 *code noir* declared that "Slaves shall always be reputed and considered real estates, shall be, as such, subject to be mortgaged, according to the rules prescribed by law, and they shall be seized and sold as real estate."[18] As commercial banks emerged in the South and began accepting enslaved individuals as collateral, these conflicting and confusing legal definitions remained problematic.

Crossing the Shared Border

Although absconders came from all parts of the United States, it was certainly easiest for debtors from the neighboring state of Louisiana to slip over the border. During the late 1820s, Philip Minor Cuny helped his widowed mother to manage his family's cotton plantation "Clio" near Alexandria, Louisiana, with its forty-five enslaved workers. Cuny's grandfather had been one of the original settlers in what became the Parish of Rapides in central Louisiana. In 1831, the twenty-four-year-old purchased a nearby plantation on the right bank of the Bayou Rapides with its twenty-three enslaved workers.[19] Less than a decade later, Cuny abandoned this property and

[14] Priest, "Creating an American Property Law," 418-419.

[15] Priest, "Creating an American Property Law," 389 (quotation); Marylynn Salmon *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 152-153; Pistor, *Code of Capital*, 39.

[16] Priest, "Creating an American Property Law," 428-429.

[17] Priest, "Creating an American Property Law," 448.

[18] Morris, *Southern Slavery and the Law,* 71-74. See also Judith Kelleher Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State University Press, 1994), 8.

[19] Douglas Hales, *A Southern Family in Black and White: The Cuneys of Texas* (College Station: Texas A&M University Press, 2003), 4; Fifth Census of the United States, 1830, Rapides Parish, Louisiana, Manuscript Census Returns, National Archives Microfilm Series; all census documents accessed through http://www.familysearch.org [hereafter *Census (MCR)*,] 102, M-19, reel 44; "Acceptation de l'Hypothèque de Philip M. Cuny et son épouse," October 22, 1838,

Philip Minor Cuny

migrated to Texas, becoming a successful cotton planter and powerful state politician.[20] One historian of the family speculates that he made this move to pursue his political ambitions, seek new wealth opportunities, and mend a broken heart.[21] The more likely explanation was that he was running from his creditors.

Following the death of Cuny's first wife in 1834 after less than a year of marriage, the young man began piling up significant debts.[22] In 1834, he borrowed $3,000 from the New Orleans Canal and Banking Company, offering a tract of land (not his Bayou Rapides plantation) and some enslaved individuals as collateral. He then sold the same property to his sister-in-law (wife of his eldest brother), who soon resold the property. It is unclear if his sister-in-law knew that the property was under mortgage, and the debt remained unpaid in 1847.[23] In 1836, another brother purchased a tract of land for $6,350, payable to the seller in three equal instalments. Cuny endorsed these promissory notes, which the seller then discounted at the Citizen's Bank where he was a stockholder; by 1845 neither brother had repaid these debts.[24]

In 1837, Cuny and his new wife Eliza Ware purchased two hundred shares of stock in the Citizens' Bank, mortgaging his Bayou Rapides plantation and enslaved workers.[25] Simultaneously, he jointly purchased another tract of land and enslaved lives for $60,000 (about $1.7 million in 2021). Cuny and his partner promised to pay the full amount over six years, offering their promissory notes and securing the property with a mortgage.[26] However, when the Citizens' Bank learned of this additional $60,000 mortgage, it rescinded its stock sale.[27] Cuny tried to back out of

Theodore Seghers, Notary Public, Vol. 29, No. 381, New Orleans Notarial Archives, New Orleans, La. [hereafter *NONA*.] Near the end of the eighteenth century, Caesar Archinard had received a large grant of land from the Spanish government to help settle the region of El Rapido, which became the Parish of Rapides in central Louisiana. Documents Legislative and Executive of the Congress of the United States, from the second session of the eleventh to the third session of the thirteenth Congress, (Washington: Gales and Seaton, 1834), No. 217, 1st session, 13th Congress, Land Claims in Louisiana, June 22, 1813, 775. In 1794, Archinard set up his stepson Richard E. Cuny (or Cuney) on a cotton plantation called "Clio" near Alexandria, where Cuny raised six sons before his death in 1824. In the records, the last name is spelled both Cuny and Cuney. I use Cuny for consistency, since that is how Philip Minor Cuny appears in most of the records. Hales, *A Southern Family*, 4.

20 Thomas W. Cutrer, "Cuney, Philip Minor," *Handbook of Texas Online,* accessed January 6, 2021, https://www.tshaonline.org/handbook/entries/cuney-philip-minor.

21 Hales, *A Southern Family*, 5-6.

22 Hales, *A Southern Family*, 6.

23 *Lynch v. Kitchen*, 2 La.Ann. 843 (L.A., 1847) at 844-845.

24 *Citizens' Bank v. Cuny*, 12 Rob. 279 (L.A., 1845) at 280; "Hypothèque par Littleton Bayley," July 11, 1838, Theodore Seghers, Notary Public, Vol. 29, No. 268, *NONA*.

25 "Acceptation de l'Hypothèque de Philip M. Cuny et son épouse," October 22, 1838, Theodore Seghers, Notary Public, Vol. 29, No. 381, *NONA*. Both Hales and Cutrer state that Cuny married Eliza Wales in 1842 after his arrival in Texas. However, she appears in the notarial records of 1837 and 1838 as Cuny's wife. Hales, *A Southern Family*, 6; Thomas W. Cutrer, "Cuney, Philip Minor."

26 *Duncan v. Elam*, 1 Rob. 135 (L.A., 1841) at 137-138.

27 "Acceptation de l'Hypothèque de Philip M. Cuny et son épouse," October 22, 1838, Theodore Seghers, Notary Public, Vol. 29, No. 381, *NONA*.

the new deal and convey his portion of the property back to the seller, but the seller had already discounted some of the promissory notes worth $10,500. In return for canceling the remaining obligation, Cuny agreed to retain seven of the enslaved individuals and repay $10,500 to the seller. As of 1841, he was still in arrears.[28]

In 1838, the Cunys returned to the Citizens' Bank, successfully purchasing (now) 250 shares of stock in exchange for a mortgage on the Bayou Rapides plantation and enslaved workers.[29] The following year, Cuny purchased some more property from the estate of a local widow, offering three promissory notes of an undisclosed amount. The creditors sued the endorsers of these notes for nonpayment in 1844.[30] Cuny also jointly purchased a plantation with another sister-in-law, for which he owed $42,000 to the firm of Burke, Watt & Co. At least one brother and a sister-in-law were still disputing their obligations to pay Cuny's debts in 1845.[31]

By the middle of the depression in 1840, Cuny was deeply in debt both as a primary debtor and as an endorser of several other obligations, and his creditors were pressing him for payment. It was under these circumstances that in November Cuny and his wife "absconded to Texas taking the slaves mortgaged to the [Citizens'] Bank with him." The Citizens' Bank resolved quickly "that his mortgage be forthwith foreclosed and his plantation & stock sold to liquidate his debt to the Bank."[32] In less than three months, the Bank had sold the Bayou Rapides plantation as well as the 244 shares of bank stock to an existing stockholder who was one of Cuny's cousins. The new buyer secured the stock with a mortgage on the plantation and twenty additional enslaved people.[33]

While the claims of the Citizens' Bank were relatively straightforward, Cuny's other debts had been discounted and sold multiple times and his other creditors were now bogged down in court. In most cases, it was easier for them to sue intermediate owners of the notes rather than trying to track down Cuny himself in another country.[34] Cuny, for his part, literally got off scot free. With his enslaved workers, he established a cotton plantation in southeastern Texas known as "Sunnyside." In 1843, he was elected to the Texas House of Representatives, beginning a long political career. By 1850, his brother Stephen had joined his Texas household, possibly also running from creditors. Stephen listed himself on the 1850 census as a 52-year-old lawyer with $6,931 in real property, but by 1860 he reported being a cowhand with no wealth. Cuny, on the other hand, was one of the richest men in the county, reporting real estate worth $293,900 and

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28 *Duncan v. Elam*, 1 Rob. 135 (L.A., 1841) at 137-138.

29 "Acceptation de l'Hypothèque de Philip M. Cuny et son épouse," October 22, 1838, Theodore Seghers, Notary Public, Vol. 29, No. 381, *NONA*.

30 *Flint v. Franklin*, 9 Rob. 207 (L.A., 1844) at 208.

31 *Cuny v. Brown*, 12 Rob. 82 (L.A., 1845) at 82-83.

32 November 12, 1840, Citizens' Bank of Louisiana, Minute Book, Vol. 3, Citizens' Bank of Louisiana Minute Books and Records, 1833-1868, New Orleans, Louisiana collections # 26 and # 539 (Howard-Tilton Memorial Library, Tulane University), *Records of Ante-Bellum Southern Plantations from the Revolution through the Civil War*, Series H [hereafter *Citizens' Bank*], microfilm reel 14.

33 February 24, 1841, Citizens' Bank of Louisiana, Minute Book, Vol. 3, "Citizens' Bank of Louisiana Minute Books and Records, 1833-1868," *Citizens' Bank*, reel 14; Citizens' Bank 1847 ledger, Canal Bank Records #25, Volume 58, Howard-Tilton Memorial Library, Tulane University.

34 *Duncan v. Elam*, 1 Rob. 135 (L.A., 1841); *Flint v. Franklin*, 9 Rob. 207 (L.A., 1844); *Cuny v. Brown*, 12 Rob. 82 (L.A., 1845); *Citizens' Bank v. Cuny*, 12 Rob. 279 (L.A., 1845); *Lynch v. Kitchen*, 2 La.Ann. 843 (L.A., 1847).

personal property of $31,100 in 1860 (about $10.7 million total in 2021).[35] Before his death in 1866, he had fathered three children with Eliza, five children with his third wife Adeline Spurlock, and (overlapping these marriages) another eight with his enslaved domestic servant Adeline Stuart.[36]

But whereas in this case the Citizens' Bank was able to recoup Philip Cuny's debt through the foreclosure of his landed property and bank stock without pursuing his human property, it was often necessary for banks to take even more drastic measures to recover lost enslaved lives taken to Texas. During the summer of 1841, the life of James Forbes of East Baton Rouge began to spiral out of control. Although he was listed in the 1840 census as owning eleven enslaved individuals, he was now deeply in debt.[37] His wife successfully sued him for a separation of property in July 1841, to protect herself from "the embarrassed condition of her husband's affairs." She was granted the right to "retain and continue to administer her property as a feme sole," along with a judgment for $2,700.[38] When Forbes failed to pay this judgment by October, the court seized and sold his horses, cattle, hogs and oxen on her behalf.[39] To settle a suit with another creditor, the court in November seized and sold "all the corn which is on the plantation where the defendant now resides and also three stacks of fodder."[40] Reflecting the complicated web of debt in early America, Forbes also received a favorable court judgment in July of 1841 as the aggrieved creditor, taking possession of an enslaved family in payment.[41] The Citizens' Bank, who possessed a mortgage on his plantation and enslaved workers, decided to foreclose on the land (but not the enslaved individuals) in February of 1842. When the landed property did not sell immediately for cash, the bank changed the terms to allow twelve months credit to the buyer.[42] While it is unclear if it intended to foreclose on the human property as well, the Citizens' Bank learned in December of 1842 that James Forbes had fled with six of his mortgaged lives to Texas. Unlike the case of Cuny, this time the Board resolved "to take such measures as may tend to the recovery of said slaves, and to enter into such contract for reward with David Hayden as may be necessary to secure the same."[43] Hayden was not successful. By 1845, the bank's directors were still pursuing Forbes in Texas, in addition to three other debtors.[44]

During the winter of 1844, stockholder Joseph R. Thomas sold his plantation in West Feliciana Parish and nineteen enslaved lives—valued at $25,000—to George H. Patillo.[45] Patillo was already a stockholder with the Citizens' Bank, having obtained two hundred shares in 1837

[35] Seventh Census of the United States, 1850, Austin County, Texas, *Census (MCR)*, p. 49, M-432, reel 908; Eighth Census of the United States, 1860, Hempstead Precinct, Austin County, Texas, *Census (MCR)*, p. 22, M-653, reel 1287.

[36] Thomas W. Cutrer, "Cuney, Philip Minor," *Handbook of Texas Online,* accessed January 6, 2021, https://www.tshaonline.org/handbook/entries/cuney-philip-minor.

[37] Sixth Census of the United States, 1840, East Baton Rouge Parish, Louisiana, *Census (MCR)*, p. 86, M-704, reel 129.

[38] Nancy Collins "State of Louisiana," *Baton Rouge Gazette*, July 17, 1841, 2.

[39] "State of Louisiana," *Baton Rouge Gazette*, October 23, 1841, 1.

[40] "State of Louisiana," *Baton Rouge Gazette*, November 20, 1841, 2.

[41] "State of Louisiana," *Baton Rouge Gazette*, July 24, 1841, 2.

[42] "State of Louisiana," *Baton Rouge Gazette*, February 12, 1842, 2; "State of Louisiana," *Baton Rouge Gazette*, March 19, 1842, 2; "State of Louisiana," *Baton Rouge Gazette*, June 18, 1842, 2.

[43] December 20, 1842, Citizens' Bank of Louisiana, Minute Book, Vol. 5, *Citizens' Bank*, reel 15.

[44] March 27, 1845, Citizens' Bank of Louisiana, Minute Book, Vol. 5, *Citizens' Bank*, reel 15.

[45] January 16, 1845, Citizens' Bank of Louisiana, Minute Book, Vol. 5, *Citizens' Bank*, reel 15; Citizens' Bank 1847 ledger, Canal Bank Records #25, Volume 58, Howard-Tilton Memorial Library, Tulane University.

and another fifty in 1839, in exchange for a mortgage on his West Feliciana cotton plantation and eighteen enslaved individuals.[46] As was the norm with property mortgaged to the Citizens' Bank, Patillo agreed to assume the mortgage and bank loans in return for Thomas' 244 shares of bank stock. After the sale (but before the bank stock and loan obligations had been legally transferred) Patillo "had taken off the Slaves [from the plantation] and it was supposed had gone with them to Texas." The bank informed Thomas that he was still liable for the mortgage debt and "demanded of him other Security in the place of the Slaves." The Board also directed the bank's attorney "to have [the enslaved people] pursued, and use every possible means to have them apprehended, authorising him to incur any necessary reasonable expense in the matter."[47]

As the person most knowledgeable about the missing enslaved individuals and with the most to gain if found, Thomas volunteered to pursue them himself "free of Charge," only asking for "an advance of Two Hundred Dollars" from the bank to "defray the Expense attending the journey." Thomas "offer[ed] also to undertake to claim for the Bank any other Slaves mortgaged to it and now in Texas, for a reasonable and just compensation in proportion to his success in Securing and bringing them back into the possession of the Bank." The bank president agreed to these terms, advancing Thomas $200 and allotting an additional $250 for Thomas to draw on "as may be required for conveyment [of the enslaved individuals] to this City." The bank granted him a power of attorney to act on its behalf to find "any Slave or slaves mortgaged to the Citizens Bank by G. H. Patillo, Robert Pool, George Dougherty and James Forbes, now in the Republic of Texas, or wherever they may be found."[48] The board made no further mention of this venture, and as of 1847, the bank still listed Thomas's human property as "run off to Texas."[49]

Another of the absconding debtors pursued by Thomas was Robert Pool who owned a plantation on Richland Creek in the parish of East Feliciana. Between 1820 and 1840, his enslaved workforce grew from four adults and two children to eighteen people; eleven were actively engaged on his plantation and the remaining seven were children under the age of ten. While the extent of his financial troubles is unclear, by the early 1840s Pool's wife was gone (she was no longer listed after the 1830 census), and this man in his mid-sixties decided to start anew with his enslaved workforce in Texas.[50] When Thomas failed to locate Pool in 1845, another resident of East Feliciana (presumably someone who knew Pool) volunteered to pursue him on behalf of the Citizens' Bank. This petitioner was already "engaged in a similar transaction for the Union Bank." He thus offered to seek out Pool as well, "upon condition that in case of success to secure said Slaves or any of them, or the recovery of the value thereof, he should receive one fourth of the amount thus recovered." The board agreed to these terms, granting him a power of attorney on behalf of the bank and up to $50 to defray his expenses.[51] By June of the following year, the bank

[46] "Acceptation par la Banque des Citoyens de l'hypotheque de George H. Patillo & son épouse," August 30, 1837, Theodore Seghers, Notary Public, Vol. 24, No. 387; and "Acceptance by the Citizens' Bank of Geo. H. Patillo's mortgage," February 2, 1839, Theodore Seghers, Notary Public, Vol. 34, No. 12; *NONA*.

[47] January 16, 1845, Citizens' Bank of Louisiana, Minute Book, Vol. 5, *Citizens' Bank*, reel 15.

[48] March 27, 1845, Citizens' Bank of Louisiana, Minute Book, Vol. 5, *Citizens' Bank*, reel 15.

[49] Citizens' Bank 1847 ledger, Canal Bank Records #25, Volume 58, Howard-Tilton Memorial Library, Tulane University.

[50] Fourth Census of the United States, 1820, Rich Land Creek, East Feliciana Parish, Louisiana, *Census (MCR)*, p. 58, M-33, reel 31; Fifth Census of the United States, 1830, East Feliciana Parish, Louisiana, *Census (MCR)*, p. 204, M-19, reel 43; Sixth Census of the United States, 1840, East Feliciana Parish, Louisiana, *Census (MCR)*, p. 272, M-704, reel 130, page 272.

[51] February 4, 1847, Citizens' Bank of Louisiana, Minute Book, Vol. 6, *Citizens' Bank*, reel 15-16.

had recovered at least one of Pool's slaves, "Jim aged about 45 years," whom it sold for $400.[52] More of Pool's enslaved people arrived by December 1848, with their recoverer—it is unclear which of the bank's representatives had succeeded—to receive "25% on the proceeds of Sale of the slaves…after delivery of said Slaves to the Bank in New Orleans."[53]

With many of these cases remaining unresolved well into the late 1840s and even 1850s, debtors had the extended benefit of their enslaved laborers even if the bank ultimately prevailed. Josiah Stafford migrated from Woodville, Mississippi, to Rapides, Louisiana, early in the 1830s. In 1832, the twenty-four-year-old married fourteen-year-old Jeannetta Kirkland. The very young couple began accumulating property in Louisiana. In 1837, they obtained a $45,000 loan from the Union Bank, secured by their plantation and 102 enslaved individuals. The following year, they refused to pay, asserting that Jeannetta was still a minor and thus not legally able to contract with the bank. After several years of negotiation, the Stafford's reached a new mortgage agreement with the bank in 1841, which they were to pay off in instalments between 1844 and 1851.[54]

The couple had a separate mortgage on forty-eight of the same enslaved people to secure a $10,000 loan with the New Orleans Canal and Banking Company. When the Canal Bank foreclosed on these enslaved individuals in 1844, the sheriff could not find any buyers willing to bid for at least two-thirds of the appraised value, as required by law.[55] In such cases, "according to the usual course of proceeding," the property was "again offered for sale on a credit of one year….to the highest bidder." In this way, Stafford's younger brother purchased the people at the sheriff's sale for $12,853.[56] Averaging $267 per enslaved person, this purchase reflected the depression nadir in the market value of human property.[57] Despite this formal sale, the court later noted that "Notwithstanding the complication of mortgages, sales, and transfers of the slaves now in question, it must be observed, that they have never been out of the possession of the respondents," Josiah and Jeannetta Stafford. At the end of the year, the younger Stafford failed to pay the purchase price on the enslaved lives who remained in possession of his elder brother.[58]

With payments due to both banks in 1845, the couple had run out of delay tactics. In February, they took the mortgaged enslaved lives to Texas "for the purpose of evading the payment of this and other debts." Although Texas remained independent at this point, by December of 1845 Congress admitted it as a state. Josiah Stafford thus also "threatened to remove them out of that state to Mexico if such a step should be necessary to prevent them from being seized to satisfy his debts." The bank quickly sold the mortgaged land that remained behind in Louisiana, but "the amount for which the lands sold did not satisfy the first instalment of the principal of the mortgage."[59] Fearing that the Staffords intended "to scatter and secrete" the enslaved people "for

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[52] May 23, and December 18, 1848, Citizens' Bank of Louisiana, Minute Book, Vol. 6, *Citizens' Bank*, reel 15-16.

[53] December 18, 1848, Citizens' Bank of Louisiana, Minute Book, Vol. 6, *Citizens' Bank*, reel 15-16.

[54] Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851).

[55] Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851); New Orleans Canal & Banking Co. v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 343 (1851).

[56] Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851) at 339.

[57] Roger L. Ransom, and Richard Sutch, "Capitalists Without Capital: The Burden of Slavery and the Impact of Emancipation," *Agricultural History* 62 (3) Summer 1988: Table 1A, 150-51.

[58] Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851) at 342.

the purpose of evading the just claims" of the banks, the Union Bank received a court order to seize the people.[60] "A receiver was appointed by the court, and....a part of the slaves have been taken into his possession with much difficulty and at great expense." While the parties disputed their claims in court, the receiver hired out the enslaved workers—apparently to the Staffords themselves.[61] In the 1850 census for Houston, Texas, Stafford listed himself as a planter with no real estate wealth and only nine enslaved people that he owned outright.[62]


Josiah Stafford


Jeannetta Stafford

The Staffords tried to use every defense at their disposal to defeat the claims of the banks—from Jeanneatta's youth to Texas's very pro-debtor statute of limitations—and they initially received a positive ruling in the Texas district court. The banks appealed, and the cases reached the U.S. Supreme Court in 1851, where these arguments were less successful. Although Jeannetta had been a minor when she contracted for the first mortgage, she was "of full age" when she signed the revised mortgage. Nor could she successfully claim that the property fell under her dower rights, since the charter of the Union Bank clearly stated that "it shall be lawful for the wife...to bind and oblige herself jointly and *in solido* with [her husband]; and in such case, the property and right of the wife, whether dotal or of any other description, shall be affected by the said contracts or obligations." In signing the mortgage contract, Jeannetta agreed to these terms.[63]

The couple also tried to use Texas's "liberal construction of their statutes of limitations" which were "in favor of debtors, for the purpose of encouraging immigration" to circumvent the banks' claims. Yet the Supreme Court ruled that, in the case of mortgages, "whether the slaves in question be considered either as personalty or realty," the statute of limitations did not start running until the contract had fully expired; the Staffords had contracted to pay instalments through 1851, and only then would the clock on the statute of limitations start ticking. Additionally, the court ruled that "although a species of realty is movable, and may be carried away or fraudulently concealed from the pursuit of the mortgagee, such acts cannot" be used to "defeat the lien of a creditor" through the statute of limitations. The court could "not permit a party to plead his own fraud to defeat the equity of the complainant" by switching to a more debtor-friendly jurisdiction. The Supreme Court remanded the case back to the district court in 1851, where it ordered the lower court to rule in favor of the banks.[64]

[59] Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851) at 337 (first and second quotation), at 339 (third quotation).

[60] New Orleans Canal & Banking Co. v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 343 (1851) at 344.

[61] Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851) at 337.

[62] Seventh Census of the United States, 1850, Houston, Harris County, Texas, *Census (MCR)*, p. 20, M-492, reel 911; Seventh Census of the United States, 1850, Houston, Harris County, Texas, *Census (Slave Schedule)*, p. 583, M-492, reel 917.

[63] Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851) at 338.

Unfortunately for the banks, the district court was not scheduled to meet again until July 1853. In the meantime, the enslaved individuals remained in the hands of the receiver, who hired them out to work for the Staffords. They paid $25,379.39 in hiring fees, which they wished the bank to credit to their debt, and then again appealed for a one-year reprieve to pay the balance of the claim. The court finally settled the matter in the December 1854 term, ordering the sale of the people for the benefit of the banks. The only advertisement located for these individuals was the sale of thirty-four-year-old Mary Jake in November 1855.[65] By 1860, Stafford still listed himself in the census as a planter, and had accumulated a modest $5,000 in real property and $4,000 in personal property including enslaved lives; he died in 1862.[66] By 1870, Jeannetta was living with her adult children in Galveston; none of them listed any wealth, although the 1873 tax rolls valued her Houston property at $3,000 in 1873.[67] Upon her death in September 1870, the *Galveston Daily News* described Jeannetta as "one of the early settlers at Houston, and a lady beloved and respected in this community for her many noble virtues and generous attributes of character."[68] Another paper noted that "an omnibus filled with colored people who had been her servants in time past, and who were still devoted to her as friends...followed her remains weeping to the grave, and wept over her as though she had been their mother instead of their mistress." The writer concluded, "with all the wrong and evil of slavery, happy is the master or mistress who can leave behind such a testimony as this to their gentleness and excellence."[69] No mention was made of her role in transporting human property to Texas to evade the claims of her creditors.

Absconding from Arkansas and Alabama

Although fleeing to Texas was particularly a problem for Louisiana banks, since the state shared a long border with the Republic, banks in other southern states likewise encountered the problem of debtors going to Texas. Among the debtors to the Real Estate Bank of the State of Arkansas in 1840 were thirty-two-year-old Thomas J. Curl and his younger brother Henry Curl. Thomas was sheriff of St. Francis County, located just across the Mississippi River from Memphis, Tennessee, and a prominent member of the local Democratic party.[70] The brothers had each discounted several notes with the bank in 1839 and 1840, with Thomas's debts totaling at least $5,786.50 and Henry's totaling at least $3,157.31.[71] Thomas was additionally listed as a security on at least six other discounted notes totaling $17,900. The bank renewed these notes every six to nine months, as long as the principal borrower continued to pay the accrued interest.[72] During the spring of 1840, the bank began protesting several of these notes for nonpayment, including an

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64 Union Bank of Louisiana v. Josiah Stafford and Jeannetta Kirkland, 53 U.S. 327 (1851) at 340 (first and second quotation), at 341 (third, fourth, and fifth quotation).

65 "Marshal's Sale" Galveston *Weekly Confederate*, October 20, 1855, 2.

66 Eighth Census of the United States, 1860, Houston Ward 4, Harris County, Texas, *Census (MCR)*, p. 155, M-653, reel 1296.

67 Ninth Census of the United States, 1870, Galveston Ward 4, Galveston, Texas, *Census (MCR)*, p. 10, M-593, reel 1586.

68 "Died," *Galveston Daily News*, September 25, 1870, 2.

69 "Death of Mrs. J. K. Stafford," as posted in https://www.findagrave.com/memorial/65208085/jeannetta-stafford.

70 "$30 Reward," Little Rock *Arkansas Gazette*, December 25, 1833, 4; "Negro in Jail," Little Rock *Weekly Arkansas Gazette*, February 7, 1838, p. 4; "Democratic Meeting in St. Francis," Little Rock *Weekly Arkansas Gazette*, April 22, 1840, 2.

71 General Ledger 1839-1846, box 8 item 11, p. 36, Real Estate Bank of Arkansas financial records, 1838-1855, Arkansas State Archives, Little Rock, Ark. [hereafter *Arkansas*.]

72 Discount and Credit Book 1838-1852, box 19, item 29, *Arkansas*.

$1,800 note of Thomas and another $4,320 which had been endorsed by both of the Curl brothers.[73]

By September 18, the bank had attained a court ruling in its favor but the cashier of the Helena branch was sufficiently concerned about the status of the Curls' property that he dispatched an agent to "proceed to St. Francis County and take possession, as agent of the Real Estate Bank of the State of Arkansas, of the following named property, and guard and protect the same from loss or removal, by any means whatsoever." The property included Thomas's 320-acre farm "with all the improvements, buildings and hereditaments thereunto belonging" as well as eleven of his sixteen enslaved workers, all of his livestock, "all the houshold [*sic*] and kitchen furniture, farming utensils and personal property of all and every nature whatsoever," and the "standing crop of corn and other produce." The bank similarly instructed the agent to secure Henry's adjacent farm, with three enslaved children. The agent could, however, "suffer and permit the said Curl to remove such portion of the produce and stock as they may prepare to ship to New Orleans, advising me of the readiness of the same for shipment and awaiting further instructions from me."[74] The bank advanced the agent $20 to cover his expenses.[75]

The cashier was correct to be concerned, for another creditor had also attained a court order against Henry, whose land "is advertised for sale by the sheriff of St. Francis County"—presumably by Thomas Curl, who remained sheriff. The bank immediately wrote to the local circuit court judge (who was also a bank stockholder), requesting that he "please examine the records and ascertain which [claim] has the priority of date." If the other creditor did indeed have the prior claim, the judge was to "examine the proceedings and ascertain if there is a positive defect therein, sufficient for the Bank to recover the Land." On the other hand, if the other creditor's claim was valid and unassailable, the cashier wanted him to "buy the land in for the Bank, making arrangements with the sheriff to allow you sufficient time, for me to send up such funds as may be demanded," with the caveat "that the amount for which the land may be sold, shall not be so large, as to place the Bank in a worse position by the payment thereof, than it now stands or in which it would stand by permitting the land to be sold."[76]

Meanwhile, the agent reported back "that being accidently at Madison Court[house]," the county seat, "he there to his surprise found H[enry] H Curls three Negroes and all his land about to be sold for the sum of $300," presumably to satisfy the claim of the competing creditor. Luckily for the bank, "there being some defect in the execution it was thrown out of Court, but leaving the land still bound under it." The agent warned that "he thinks Curl is disposed to act otherwise than right." Upon arriving at the scene, the judge decided to become "responsible for the Amount of Execution ($300) and is in possession of the [enslaved] property." The bank president quickly issued a power of attorney to one of its bank directors; the cashier, "who is now sick and confined to his bed," instructed the director "to go immediately to St. Francis and act with your best judgment for the benefit of the Bank" to secure the landed and human property of the Curls and a third debtor in payment of

[73] Instruments of Protest 1838-1841, box 23, item 38, *Arkansas*.

[74] Chas W Adams cashier to Henry F Mooney Helena 18 Sept 1840, Letterbook 1839-1842, box 8, item 10, *Arkansas*; Sixth Census of the United States, 1840, St. Francis County, Arkansas, *Census (MCR)*, p. 194, M-704, reel 20.

[75] Invoice Book 1839-1841, box 10, item 16, *Arkansas.*

[76] Chas W Adams cashier to Hon W K Sebastian Helena 23 Sept 1840, Letterbook 1839-1842, box 8, item 10, *Arkansas*; "Sale of Lands for Taxes," Helena *Arkansas State Democrat*, October 23, 1840, 3; Ted R. Worley, "The Control of the Real Estate Bank of the State of Arkansas, 1836-1855," *The Mississippi Valley Historical Review,* v. 37, no. 3 (Dec., 1950), 417.

Henry's note of $3,000 and Thomas's note of $6,000—payment on both of which was overdue since July. Based on the agent's report, the cashier believed that "immediate action…is advisable."[77] The bank credited the agent with another $35.97 for his efforts.[78] At the end of November, the main branch in Little Rock reimbursed the judge for his $300 payment on behalf of the bank.[79]

Despite all of these efforts, in just under a month, Thomas Curl managed "clandestinely" to leave the county, "taking with him some twelve or fifteen negroes" belonging to himself and his brother and "making his way either to Texas or Missouri."[80] With the branch president absent in Little Rock, and unable to consult "the whole of the Directory," the cashier was "placed…in a position which left but two alternatives: either to suffer Mr. Curl to escape with the negroes, without an effort to retake them, and thus lose all the available security that the Bank had for the debts; or to execute to someone a power of attorney" in the name of the president. With the judge's advice, he chose the latter option, and granted a power of attorney to the bank agent "for the purpose of pursuing the said Curl and retaking the negroes and bringing them to this place to be disposed of." He hoped the president would "acknowledge the correctness of the act," advising him: "Do not delay rigorous action in relation hereto."[81]

The cashier simultaneously drafted a letter to his counterpart at the Washington branch bank (which was located at the opposite corner of the state near the Texas border), informing him that the agent "is to retake the negroes and bring them back to this place to be sold….and he may posibly [*sic*] have to pursue them as far as Texas." He hoped that the Washington branch cashier would "extend to [agent] Mr. Moony any aid and assistance that he may require. And also pay the check of Mr. Moony upon this Bank for such amount of money as he may need to defray his expenses." The agent was to keep this letter in his possession and present it to the Washington cashier, but this letter was never sent.[82] For the next ten days, the agent and another bank representative pursued Curl, but with no luck. Unable to recover the enslaved individuals, the bank proceeded with selling the land in St. Francis county.[83] The agent received an additional $239.03, which was the "bal[ance] of wages & traveling Expenses," while the second bank representative received $61 to defray his expenses.[84] By December, the bank had moved both protested notes to its "suspended" account.[85] Four years later, the bank finally obtained court permission to sell Thomas Curl's land, advertising it for sale in March 1845 unless Curl "appear before this court" by that date.[86]

[77] Jno H Draper, clerk to W F Moore Helena 30 Sept 1840, Letterbook 1839-1842, box 8 item 10, *Arkansas*; Jno H Draper, clerk to Henry F Mooney Helena 30 Sept 1840, Letterbook 1839-1842, box 8 item 10, *Arkansas*; *Report of the Accountants* (Little Rock: True Democrat Office, 1856), p. 28; "St. Francis County," *Encyclopedia of Arkansas* https://encyclopediaofarkansas.net/entries/st-francis-county-810

[78] Invoice Book 1839-1841, box 10, item 16, *Arkansas.*

[79] Invoice Book 1839-1841, box 10, item 16, *Arkansas.*

[80] Chas W Adams cashier to Cashier E Brittin, Helena 3 Nov 1840, and Chas W Adams cashier to Col H. L. Briscoe, President Helena 4 Nov 1840, Letterbook 1839-1842, box 8, item 10, *Arkansas.*

[81] Chas W Adams cashier to Col H. L. Briscoe, president Helena 4 Nov 1840 Letterbook 1839-1842, box 8, item 10, *Arkansas.*

[82] Chas W Adams cashier to Cashier E Brittin, Helena 3 Nov 1840, Letterbook 1839-1842, box 8, item 10, *Arkansas*; *Report of the Accountants* (Little Rock: True Democrat Office, 1856), 28.

[83] Chas W Adams cashier to Col. W. F. Moore Helena 14 Nov 1840, Letterbook 1839-1842, box 8, item 10, *Arkansas.*

[84] Invoice Book 1839-1841, box 10, item 16, *Arkansas.*

[85] Journal 1839-1844, box 7, item 8, *Arkansas.*

[86] "State of Arkansas, County of St. Francis," *Arkansas Weekly Gazette* (Little Rock), October 2, 1844, 3.

But Curl was long gone. With his wife, three children, four stepchildren (from his wife's first marriage), and enslaved community, he settled just over the border from Louisiana in Nacogdoches, Texas, near where his father-in-law and several brothers-in-law already resided in San Augustine. Like Philip Minor Cuny, Thomas Curl was able to make a fresh start in Texas, finding both wealth and respect. In the 1850 census, he reported $2,000 in real estate and twenty-five enslaved workers.[87] In 1853, he was selected as one of the delegates to represent Nacogdoches County at a convention regarding the building of a railroad.[88] In 1854, he was appointed a commissioner for inspecting the construction of local bridges and roads.[89] Later that year, the local paper commented favorably on the cotton grown on his plantation.[90] By 1860, the fifty-two-year-old reported $11,000 in personal wealth (likely the value of his twenty-five enslaved people), and $20,850 in real estate.[91] His eldest son had branched off into "merchandizing" and reported $5,000 of his own personal wealth.[92] His brother, Henry, also settled in nearby San Augustine, but with slightly less pecuniary success. Although he reported $420 in real estate and twelve enslaved lives in 1850, by 1860 he had relocated to Smith County where he was a "trader on notes" with $750 in total wealth, and no human property.[93]

Like the Real Estate Bank of Arkansas, the Bank of the State of Alabama also aggressively pursued absconding debtors as part of its efforts to liquidate the bank's affairs during the 1840s. Between 1836 and 1839, Joseph W. Tisdale had accumulated $18,439.46 in debt to the Mobile branch of the bank.[94] In response to the bank's demands for additional security on this substantial amount, on May 17, 1839, Tisdale and his wife Mary Amelia Wilson mortgaged several tracts of land, four horses, one mule, a carriage, one pair of harnesses, fifteen named enslaved adults, and two unnamed enslaved children.[95] He promised to repay the entire debt in four months' time, but failed to come up with the necessary funds.[96] As Tisdale grew worried of his inability to repay this debt, he sought the advice of his friend, Alfred Clinton Horton. Horton had been a prominent Alabama state legislator in the 1830s, until he joined the Texas revolution in 1835. Afterwards, he settled in Texas, serving as a state senator from 1836-1838 representing several counties south of Galveston, and presiding over a plantation valued at mid-century at $100,000 (about $3.5 million in 2021) plus over ninety enslaved individuals.[97] In all likelihood, Horton had visited Alabama in late 1839 or early 1840 when he met up with Tisdale. As Tisdale later reported

[87] Seventh Census of the United States, 1850, Nacogdoches County, Texas, *Census (MCR)*, p. 58, M432, reel 913; Seventh Census of the United States, 1850, Nacogdoches County, Texas, *Census (Slave Schedule)*, p. 176, M432, reel 918.

[88] "Proceedings of a Railroad Meeting," *Nacogdoches Chronicle*, October 4, 1853, 2.

[89] "Notice," *Nacogdoches Chronicle*, January 24, 1854, 3.

[90] [untitled], *Nacogdoches Chronicle*, June 20, 1854, 2.

[91] Eighth Census of the United States, 1860, Nacogdoches County, Texas, *Census (MCR)*, p. 74, M653, reel 1301; Seventh Census of the United States, 1850, Nacogdoches County, Texas, *Census (Slave Schedule)*, p. 19, M653, reel 1311.

[92] Eighth Census of the United States, 1860, Nacogdoches County, Texas, *Census (MCR)*, p. 82, M653, reel 1301.

[93] Seventh Census of the United States, 1850, San Augustine County, Texas, *Census (MCR)*, p. 74, M432, reel 914; Slave Schedule, Seventh Census of the United States, 1850, San Augustine County, Texas, *Census (Slave Schedule)*, p. 6, M432, reel 918; Eighth Census of the United States, 1860, Smith County, Texas, *Census (MCR)*, p. 97, M653, reel 1305.

[94] "State Branch Bank Report," *The Wetumpka Argus*, August 21, 1839, 2.

[95] Mortgage J. W. Tisdale & wife, Mortgage Deeds Mobile, SG3792, *Alabama*.

[96] Joseph W. Tisdale to the Bank, March 6, 1844, Branch Bank at Mobile Correspondence, SG2769, *Alabama*.

[97] Horton, Albert Clinton, *The Handbook of Texas Online*, Texas State Historical Association, https://tshaonline.org/handbook/online/articles/fho62 [accessed 2/12/2020].

their conversation, "I informed him of the whole transaction from begining [*sic*] to end, and of the mortgage of the negroes to the Bank." But Horton only increased Tisdale's anxiety about the debt by "several times....observ[ing] that the Bank could take the negroes when ever she found them in my possession." Horton thus "bargained" with Tisdale to place the enslaved individuals into his custody—it is unclear whether any money exchanged hands—and Horton then returned with them to Texas.[98] Tisdale himself might have considered absconding with his family and enslaved lives to Texas, as so many debtors did at the time. But having five children all under the age of ten, perhaps Tisdale (or his wife) did not see fleeing as a viable option.[99]

Albert Clinton Horton

In 1840, the bank sold Tisdale's mortgaged real estate and the three enslaved lives who remained in his possession, but this only repaid about half of his debt. Tisdale tried to negotiate a settlement of the remainder with the bank on several occasions in 1842 and 1843, but it "refused to treat with me."[100] Of course, by now the bank knew that he had fraudulently sent off the mortgaged human property to Texas, so he was hardly a sympathetic debtor. By 1843, the bank actively sought to go after the enslaved individuals in Horton's possession. The bank's attorney issued a lien of execution against the people and believed this claim should still apply even outside of the United States. But the bank decided to contact Judge Abner Lipscomb to confer on the matter, "enquiring how far it may be practicable to recover their debts."[101] Lipscomb had been Chief Justice of the Alabama circuit court until he resigned in 1835, entering private law practice in Mobile. In 1839, he also moved to Texas, where he served as Secretary of State during 1840.[102] As a lawyer familiar with both Alabama and Texas issues, he was the ideal counsel for the bank. Lipscomb concluded that the bank indeed had a valid claim and "that the property can be recovered with out any doubt," since Horton had knowingly—indeed fraudulently—removed mortgaged property from the state of Alabama.[103]

Judge Abner Smith Lipscomb

By 1844, Tisdale was ready to throw himself at the mercy of the bank to "bring my matters with the Branch Bank to a close, or as near to a settlement as the nature of circumstances will admit." Perhaps the bank was threatening to throw him into debtor's prison or deprive his family

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[98] Joseph W. Tisdale to the Bank, September 4, 1844, Branch Bank at Mobile Correspondence, SG3770, *Alabama*.

[99] Sixth Census of the United States, 1840, Franklin County, Alabama, *Census (MCR)*, p. 83, M-704, reel 2.

[100] Joseph W. Tisdale to the Bank, March 6, 1844, Branch Bank at Mobile Correspondence, SG3769, *Alabama*.

[101] Report of James F. Deas, Chair of the Real Estate Committee, September 8, 1843, Branch Bank at Mobile real estate settlements, SG2788, *Alabama*.

[102] Abner S. Lipscomb, *Alabama's Supreme Court Justices*, Alabama Department of Archives and History, https://archives.alabama.gov/judicial/lips.html [accessed 2/12/2020]

[103] Joseph W. Tisdale to the Bank, September 4, 1844, Branch Bank at Mobile Correspondence, SG3769, *Alabama*.

of a home. For whatever reason, he now decided to work on the institution's behalf to retrieve the enslaved individuals whom he had formerly "removed from the reach of the Bank." He admitted that "This request originates from no vain wish to reap the honor arising from the performance of an act of sheer justice, but in duty to myself to show the present Board and all succeeding ones that my intentions have been from the beginning of this transaction to act faithfully as it regarded the final payment of the debt." The bank agreed to pay Tisdale's upfront expenses to travel to Texas and retrieve the enslaved lives in question, although these expenses ultimately were tacked onto his debt and "embraced in the settlement." Once he delivered to the bank either the enslaved people "or their proceeds," he would "be released from all Liability on debts due by him to this b[an]k."[104]

As promised, Tisdale traveled with the bank's representative to Texas in 1844, where he identified for the representative the enslaved people in question as well as "a large waggon & a Horse" which presumably had also been part of the original mortgage lien. But Horton refused to hand over the enslaved lives and then the bank representative died on the return trip to Alabama, leaving Tisdale with $50 in unpaid expenses and no recovered people.[105] At this point, this portion of the historical record goes cold. It is unclear whether the bank ever filed any court claims in Texas or sent any further representatives to recover these enslaved individuals. By 1845, Tisdale had relocated with his family to St. Tammany Parish, Louisiana, where he died by 1848.

In 1848, his widow Mary Amelia Wilson filed a writ of sequestration in the fifth district court of New Orleans to gain possession of an enslaved woman named Louisa, her seven-year-old daughter Lydia, and her unnamed mulatto mother. Mrs. Tisdale claimed all three as her separate property by dowry from her father. "Mrs. Tisdale charges that, about seven years ago, her late husband took Louisa from her and led her to believe that the slave had been removed to Texas and sold." Whereas Louisa's mother "is in fact still in Texas, held by one Albert C. Horton," the widow Tisdale had recently discovered that her husband had deceived her regarding the status of the daughter Louisa. Rather than being sent to Texas, the enslaved woman had been "living as Joseph Tisdale's concubine and passing for a white free person" in New Orleans. Given the timing of this deception, it is highly likely that Joseph was also the father of seven-year-old Lydia. The widow Tisdale was petitioning "the court to declare them her property." Additionally, she sought "to gain ownership of Louisa's personal belongings, which include some furniture." The court "partially granted" this request, although it is unclear which part the widow received.[106]

The ability of the bank to navigate the complicated and expensive process of pursuing absconding debtors across state lines and retrieving enslaved individuals through various state court systems was even more apparent in another set of cases. Joseph McCarty and Robert Hazard (both postmasters in Washington County, Alabama) along with Ptolemy T. Harris (an Alabama circuit court judge) jointly discounted four notes with the Mobile branch of the Bank of Alabama. The first three, dated January and March 1843, totaled $10,912, while the fourth for $2,650 was discounted the following year in April 1844.[107] These men were three of the largest

[104] Joseph W. Tisdale to the Bank, March 6, 1844, Branch Bank at Mobile Correspondence, SG3769, *Alabama*.

[105] Joseph W. Tisdale to the Bank, September 4, 1844, Branch Bank at Mobile Correspondence, SG3769, *Alabama*.

[106] Records of the Fifth Judicial District Court, November 9, 1848, (Document #1,634, reel 6, Louisiana Collection, New Orleans Public Library, New Orleans, Louisiana), *Petitions* 20884846, New Orleans Public Library.

[107] Report of Crawford & Magee No 287, November 20, 1847, Branch Bank at Mobile Attorney's Report, SG3724, *Alabama*.

slaveholders in the county. In the 1840 census, McCarty listed fifty-six enslaved individuals and Hazard listed thirty-seven, making McCarty part of the top 1 percent of slaveholders in the county and Hazard part of the top 4 percent.[108] The bank partially secured these loans with a mortgage on eighteen of McCarty's enslaved workers. In the winter of 1845, when the three had defaulted on their payments, the bank foreclosed on the loan, obtaining a sheriff's order to seize and sell the eighteen enslaved individuals of McCarty specifically listed in the mortgage as partial payment of the debts. The sheriff sold these people, but before the sale could be finalized, they disappeared. McCarty had placed his forty-nine enslaved workers—including the eighteen from the mortgage—into the possession of John P. Hill, who was already on his way to Texas with them. In addition to the eighteen enslaved people specified in the mortgage, the bank also claimed the other thirty-one enslaved lives of McCarty (also in Hill's possession) as well as twenty-two of Hazard's people; Hazard had separately left the state with these enslaved individuals.[109]

In January 1846, the bank hired an agent to pursue and retrieve the human property of both debtors. The agent "overtook and attached the property of Jos. McCarty in Claiborne Parish Louisiana." He first claimed the eighteen enslaved people listed in the mortgage agreement, who were now "held by title derived under a sale made by the Sheriff of Washington County Ala." The bank also instructed the agent to seize McCarty's other enslaved people to fulfill the remainder of the debts. Although McCarty had not explicitly secured his debts with these individuals, all of his property was liable to seizure once he had defaulted. As a compromise, McCarty offered the bank seventeen of the remaining thirty-one enslaved individuals, in return for a full release from all of his debts. In consultation with an attorney, the agent determined that this deal was in the best interests of the bank:

> In as much as negroes in that State [Louisiana] were held as Real Estate and therefore could not be disposed of as perishable property, but would have to remain in the Custody of the Sheriff during the periodicy of the suit, that in case the suit went on and the Bank should finally succeed in making the thirty one negroes liable to the claims, that even then I could not be able to realize more out of the thirty one Negroes after deducting Costs and charges than what I could now realize out the Seventeen.

The agent thus compromised with McCarty on behalf of the bank and took possession of the seventeen enslaved individuals. He offered either to bring the bondspeople back to the bank, or to sell them on the bank's behalf "to the best advantage." In addition to paying the agent's expenses, he would also receive "25 per cent on the amount collected" for their sale, being paid either "in a portion of the Negroes" or in cash.[110]

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[108] Sixth Census of the United States, 1840, Washington County, Alabama, *Census (MCR)*, p. 271, M-704, reel 16. Harris was not listed in the 1840 census, but owned 34 slaves in the 1830 census. Fifth Census of the United States, 1830, Washington County, Alabama, *Census (MCR)*, p. 248, M19, reel 3.

[109] Report of William Magee Agent to pursue Negroes Run off by R. F. Hazard & J McCarty, March 4, 1846, Branch Bank at Mobile Attorney's Report, SG3724, *Alabama*. Although McCarty listed 57 slaves in the 1840 census, these 49 slaves appear to be the total of his enslaved property in 1845. Similarly, Hazard's total slave property appears to have been reduced from 37 to 22 enslaved individuals between 1840 and 1845. Given the ongoing depression in the country and their status as debtors, it is likely that they either sold off these missing slaves or sent them out of state prior to 1845.

[110] Report of William Magee Agent to pursue Negroes Run off by R. F. Hazard & J McCarty, March 4, 1846, Branch Bank at Mobile Attorney's Report, SG3724, *Alabama*.

Once the agent had successfully completed this portion of his mission and had "shipped the Negroes which I got from McCarty on Board of a Steam Boat at Monroe on the Ouachitta River," he went in pursuit of Hazard, catching up to him and his enslaved lives in Franklin Parish. Without the legal backing of a mortgage, it was more difficult for the bank to assert its claim over these enslaved individuals. Hazard was determined to retain possession and refused to reach any compromise with the agent. The agent was thus "compelled to go down to New Orleans and take out an attachment from the Circuit Court of the United States." The marshal seized the property and brought the enslaved individuals down to New Orleans. Yet the agent's attorney was "of the opinion that it was extremely doubtful whether that Court would have jurisdiction of the Case or not and advised the dismissing of the case in that court and the taking out an attachment in the State Court which was done." The agent left the enslaved people in the hands of the court in New Orleans, where they remained until the resolution of the suit.[111]

The agent's expenses for this trip—including travel, per diem, professional services, and court costs—totaled $842.80. Additionally, for their services in the Hazard case, the agent's attorneys in New Orleans needed to be paid "a commission of 1 ½ per cent to furnish security on the attachment Bond, and 2 ½ per cent on the amount collected if by compromise before the case comes to trial, or 5 per cent on the amount collected at the end of the suit." In case the lawsuit ended unsuccessfully, the bank merely owed them a flat $100 fee. Finally, the bank owed the agent 25 percent of the value of the seventeen enslaved people he recovered from McCarty.[112] Fourteen of these enslaved individuals were sold in April, and the remaining three in July to a second slaveholder, for a total of $4,600. The agent thus claimed $1,150 in commission in addition to his expenses.[113]

More than a year later, the court case between the bank and Hazard in New Orleans remained unresolved. In the bank attorney's report for November 1847, he noted that the claim on the twenty-one enslaved lives was on appeal to the Supreme Court of Louisiana, but that he believed the ultimate recovery of the individuals to be doubtful.[114] These enslaved people presumably remained in the possession of the court during this entire proceeding, their fate hanging in limbo as the legal process slowly unfolded.

★ ★ ★

Unlike individual creditors, large financial institutions had an advantage in navigating bankruptcy proceedings, challenging fraud, and retrieving enslaved lives. They had greater resources, legal knowledge, and experience which made successful pursuit more possible. They also possessed a wider portfolio of loans than most individual creditors, allowing them to spread the risk and expense of debt recovery across a wider array of contracts. Banks recognized that some fraction of loans would go bad, and tried to account both for the expense of recovery and the inevitable losses through their lending terms, interest rates, and requirements for endorsements

[111] Report of William Magee Agent to pursue Negroes Run off by R. F. Hazard & J McCarty, March 4, 1846, Branch Bank at Mobile Attorney's Report, SG3724, *Alabama*.

[112] Report of William Magee Agent to pursue Negroes Run off by R. F. Hazard & J McCarty, March 4, 1846, Branch Bank at Mobile Attorney's Report, SG3724, *Alabama*.

[113] Statement of the disposition made of Seventeen negroes Captured by Magee & Crawford, July 18, 1846, Bank of State of Alabama Mobile Account Sales Register, SG3682, *Alabama*.

[114] Report of Crawford & Magee No 287, November 20, 1847, Branch Bank at Mobile Attorney's Report, SG3724, *Alabama*.

and collateral. And yet, even banks faced an uphill, expensive battle in foreclosing on fraudulent and absconding debtors. The fugitive debtors, on the other hand, often suffered few consequences as a result of their actions. As promised by its boosters, Texas provided a safe haven and a fresh start to overburdened slaveholders. With the economic advantage of arriving with their human property, these slaveholders often rose to become prominent members of Texas's economic and social elite as it entered the United States.

Dr. Sharon Ann Murphy *is a professor of history and department chair at Providence College. She is the author of* Investing in Life: Insurance in Antebellum America *(2010, The Johns Hopkins University Press), winner of the 2012 Hagley Prize for the best book in business history, and* Other People's Money: How Banking Worked in the Early American Republic *(2017, The Johns Hopkins University Press). Her latest project, tentatively titled* Banking on Slavery: Financing Southern Expansion in the Antebellum United States *(forthcoming 2022/23 Chicago University Press), examines the relationship between commercial banks and the development of the southern frontier during the first half of the nineteenth century. She has been an associate editor of* Enterprise and Society: The International Journal of Business History *since 2011. She was a fellow of the American Council of Learned Societies in 2018-19, an NEH fellow at the American Antiquarian Society in fall 2019, and a National Endowment of the Humanities fellow in spring 2021.*

Return to Journal Index

Ratifying the Texas Constitution

By Josh Morrow[1]

To what document do the words "Texas Constitution" refer? Jason Boatright posed that "fundamental and important" question several years ago in these pages.[2] While the delegates to the Constitutional Convention of 1876 drafted one set of text, they signed and enrolled a second document that contained different text. The secretary of state certified a third document for distribution before the ratification vote. Newspapers distributed (at least) a fourth. Each of these copies differs from the others, but Texas courts have cited all of them. On top of that, the secretary of state also certified official, pre-ratification copies in Spanish, German, and Czech.

Convention delegates

The question has both theoretical and practical dimensions. At the theoretical level, one worries that the existence of multiple documents with a claim to authoritative status suggests that Texas has no constitution. And more practically—are the legislature's acts void for failing to include a Spanish-language enacting clause? May the state imprison citizens for debt, since the German Copy omits that protection from the bill of rights? Must the state provide a school system that is "rich" and "plentiful," as the Czech Copy requires? And how should a court choose between the copies when they produce irreconcilably different constitutional rules?

I set out to answer the question, concluding that the authoritative constitution is the manuscript copy that the delegates signed and enrolled—the copy that sits in the state's archives. A full-length presentation of that view appears in the *St. Mary's Law Journal*.[3] Here, however, I aim only to illustrate the problem with a few interesting examples and to summarize the arguments

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1 Josh Morrow is an attorney who practices at Lehotsky Keller LLP in Austin, Texas.

2 Jason Boatright, "No One Knows What the Texas Constitution Is," *Texas Supreme Court Historical Society*, vol. 4, no. 3 (Spring 2015): 37, (2015) *reprinting* Jason Boatright, "No One Knows What the Texas Constitution Is," *Texas Review of Law and Politics*, vol. 18, no. 1 (2013): 183 (identifying the argument that "Texas . . . might have as many as six constitutions, or no constitution at all, in effect right now"); *see also Ibid.*, 52 ("[C]orrectly interpreting the current constitution might be impossible without first determining what the text is. And determining what the text is might be impossible, too.").

3 This article presents with permission arguments and text that first appeared in Josh Morrow, "There Is Only One Texas Constitution," *Saint Mary's Law Journal* 52, no. 3 (2021): 765.

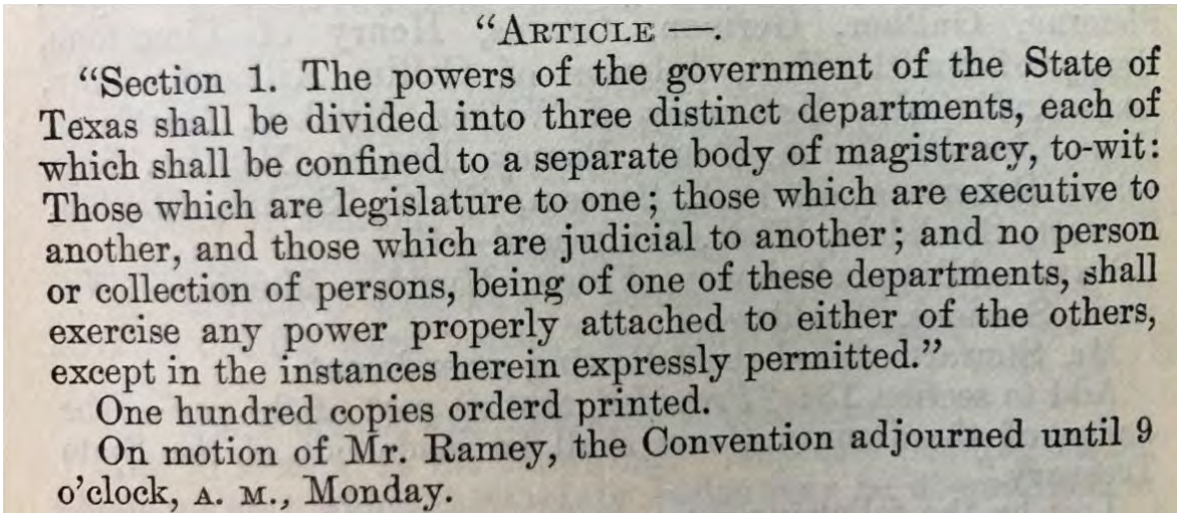
that favor the Enrolled Constitution. One upshot is that attorneys and judges should rely on—and quote—only the Enrolled Constitution. This goal will soon become much more attainable, as the Texas Legislative Council is now at work digitizing the text that appears in the Enrolled Constitution. A further conclusion is that courts should be free to use the other copies—including the foreign-language copies—to resolve uncertainties that appear in the enrolled text.

I. The Problem

The people of Texas ratified the current Constitution of 1876 on February 15 of that year. But what document did they ratify? There are several candidates, all of which were, to varying extents, available before the ratification vote. These copies differ in important respects.

A. Competing Copies

Journal Drafts. The convention's earliest surviving drafts appear in the *Journal of the Constitutional Convention of 1876* (the *Journal*).[4] The *Journal* is a record of the convention's day-to-day business. Among those records are reproductions of drafts of articles that delegates to the Convention proposed for inclusion in the constitution (the "Journal Drafts"). Draft articles were added to the proposed constitution only if they passed three readings. Articles were "engrossed"—or written on large paper in a special form—between the second and third readings, and the *Journal* records the text of many such engrossed drafts.[5] At least several hundred copies of the *Journal* were available before the ratification vote.



"ARTICLE —.

"Section 1. The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to-wit: Those which are legislature to one; those which are executive to another, and those which are judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

One hundred copies orderd printed.

On motion of Mr. Ramey, the Convention adjourned until 9 o'clock, A. M., Monday.

A copy of the text that would have appeared in the engrossed draft of article II.[6] The article is unnumbered because the articles were arranged only just before the convention adjourned. Photo: Author.

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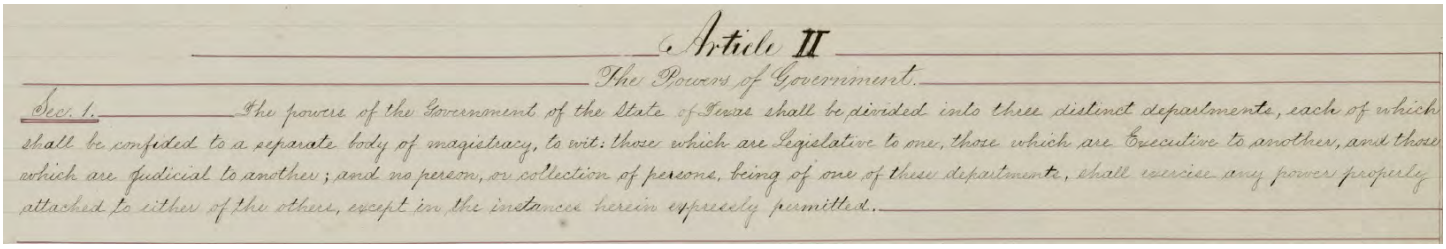
[4] *Journal Of the Constitutional Convention of the State of Texas: Begun and Held at the City of Austin Texas, Tex. State Libr. & Archives Comm'n* 16–22, http://tarlton.law.utexas.edu/constitutions/texas-1876-en/journals

[5] *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3d ed. 2011) 317. An "engrossed" document is an official intermediate copy, whereas an "enrolled" document is an official final copy. The term "engross" originates from the historic practice of writing a proposed enactment in "large" letters. *See* Noah Webster, *A Dictionary of the English Language* (1881) 144. The term "enroll" originates from the practice by which formal "records were kept in the shape of continuous rolls of parchment." Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* (1883) 445.

Enrolled Constitution. Upon passing a vote after a third reading, each article was then referred to the convention's committee on style and arrangement. That committee edited each article and arranged all the articles into the numbered order in which they now appear. The convention approved the final product on November 24, 1875. "The delegates present then came forward and signed the enrolled copy of the constitution" (the "Enrolled Constitution"), and the convention adjourned.[6]



Article II

The Powers of Government.

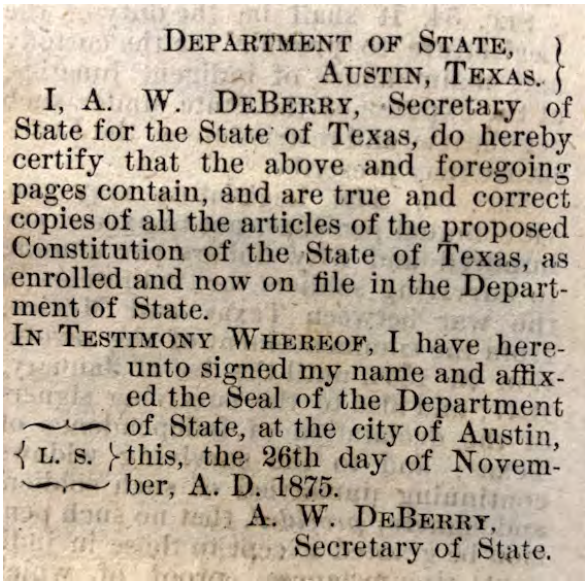
Sec. 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Article II as it appears in the Enrolled Constitution that the delegates signed. Photo: Texas Constitution, 1875, Texas Constitutional Convention of 1875 records, Courtesy of Texas State Library and Archives Commission.

English Copy. The new constitution required ratification, and that required printing. This task fell to the committee that the delegates had appointed to "supervise the printing of the constitution" and to "see that the work is done in accordance with the enrolled copy."[7] This committee supervised the printing of "[40,000] copies of the constitution" in English.[8] The printing process produced minor differences between the Enrolled Constitution and the version that actually appeared in print (the "English Copy").[9] And both of these differed from the Journal Drafts of individual articles. Most of the English Copies were distributed to voters, but two thousand were "deposited" with the secretary of state.[10]

Importantly, the English Copy included a seal from the secretary of state certifying that the printed text was a "true and correct" copy of the constitution "as enrolled."[11]

Translated Copy(s). The convention also voted to print the constitution in translation, because "many citizens of the State [were] unable to read the English language."[12] There were 5,000 copies printed in German, 3,000 in Spanish, and 1,000 in "Bohemian"



DEPARTMENT OF STATE,
AUSTIN, TEXAS.

I, A. W. DEBERRY, Secretary of State for the State of Texas, do hereby certify that the above and foregoing pages contain, and are true and correct copies of all the articles of the proposed Constitution of the State of Texas, as enrolled and now on file in the Department of State.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the Seal of the Department of State, at the city of Austin, this, the 26th day of November, A. D. 1875.

L. S.

A. W. DEBERRY,
Secretary of State.

The secretary of state's certification of the English Copy. Photo: Author.

[6] *Ibid.*, 820-21; *see* https://perma.cc/2ANL-6R4J [hereinafter *Enrolled Constitution*].

[7] *Journal of the Constitutional Convention,* 780.

[8] *Ibid.*, 800.

[9] *Tex. Const.*, https://perma.cc/4FR7-RXL9 [hereinafter *English Copy*].

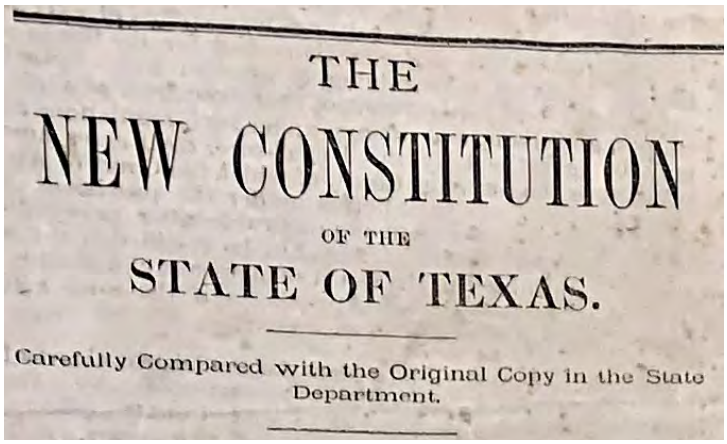
[10] *Journal of the Constitutional Convention,* 800.

[11] *English Copy*, 26.

[12] *Journal of the Constitutional Convention,* 109.

(*i.e.*, Czech).[13] Each "Translated Copy" contained a translated version of the secretary of state's seal and signature certifying that the pamphlet accurately reproduced the Enrolled Constitution's text. These copies were distributed to "delegates having constituents speaking said languages."[14]

Newspaper Copy(s). Finally, "over a hundred thousand copies" of the proposed constitution were printed in newspapers.[15] At least one survives, bearing the title "The New Constitution of the State of Texas, Carefully Compared with the Original Copy in the State Department."[16] Despite the promise of careful comparison, this "Newspaper Copy" matches neither the Enrolled Constitution nor any of the others.


THE
NEW CONSTITUTION
OF THE
STATE OF TEXAS.
Carefully Compared with the Original Copy in the State Department.

The Newspaper Copy, promising conformity to the Enrolled Constitution. Photo: Broadside Collection, camh-dob-006370, The Dolph Briscoe Center for American History, The University of Texas at Austin.

The people had about three months to examine these copies and to consider ratifying the new constitution, which they then did, "by a commanding margin of 2 to 1."[17] The next month, the governor issued a proclamation announcing that "the Constitution framed by the Convention . . . ha[d] been ratified and adopted by the people of Texas."[18] The Constitution of 1876 has governed ever since.

B. Differences in the English-Language Copies

The English-language copies differ foremost in the capitalization of various nouns, but also in punctuation such as commas, semicolons, and hyphens. Many of these differences are purely stylistic and do not affect the constitution's meaning. But it is not so easy to dismiss the punctuation.

Just a few years before the convention, the so-called "Semicolon Court" had earned that moniker by issuing *Ex parte Rodriguez*, a decision holding that the 1873 election was invalid due to a single semicolon that appeared in the 1869 Constitution.[19] The decision was and remains

[13] *Ibid.*, 108-09, 818 (ordering German translation); 215 (ordering Spanish translation); 281 (ordering Czech translation). The translations are available at: https://perma.cc/9MUA-T3VL [hereinafter *German Copy*]; https://perma.cc/L9Z2-NKPW [hereinafter *Spanish Copy]*, and; https://perma.cc/X26K-UELQ [hereinafter *Czech Copy*]. Bohemian is a "dialect[]" of Czech. Clinton Machann, "Czechs," 2 *Texas State Historical Association, New Handbook of Texas* 465 (1996).

[14] *Journal of the Constitutional Convention,* 780.

[15] S. S. McKay, *Seven Decades of the Texas Constitution of 1876, at 148* (1942). There is some reason to believe that this number is exaggerated. McKay's source is a letter to the editor in which a delegate to the convention reports to the people that elected him that he kept his "pledge" to "have the new Constitution printed in large numbers." *See* John Henry Brown, "Letter to the Editor," *Dallas Daily Herald*, Dec. 16, 1875, 2, https://perma.cc/Y779-GC2V.

[16] "The New Constitution of the State of Texas, Carefully Compared with the Original Copy in the State Department," *Broadsides Collection*, Dolph Briscoe Center for American History, The University of Texas at Austin, Box BCOD1875; *see also Weekly Democratic Statesman*, Dec. 2, 1875, 2, https://perma.cc/CDF4-QA33.

[17] Janice C. May, *The Texas State Constitution* 17 (1996).

[18] "Proclamation By the Governor of the State of Texas," *Galveston Daily News*, Mar. 28, 1876, 2, https://perma.cc/3VUE-KSVB.

[19] 39 Tex. 705 (1873).

controversial. But the controversy perhaps owes more to the circumstances—some have argued that the case was feigned —and to the practical result, which undid a popular vote, than to the Court's reliance on "the rules of grammar [and] of good composition."[20] Regardless, the decision in *Ex parte Rodriguez* suggests that the delegates would have been mindful of semicolons and would have placed punctuation with care.

But the punctuation differences in the copies sometimes affect meaning. For example, as Boatright has identified, "the original versions of the double jeopardy clause differ from one another."[21] While a plain-text reading of the Enrolled Constitution's double-jeopardy clause "prohibits double jeopardy after a not-guilty verdict," the English Copy guarantees that "a person cannot be placed in double jeopardy, ever."[22] The difference "rests completely on the presence, or absence, of a single semicolon."[23]

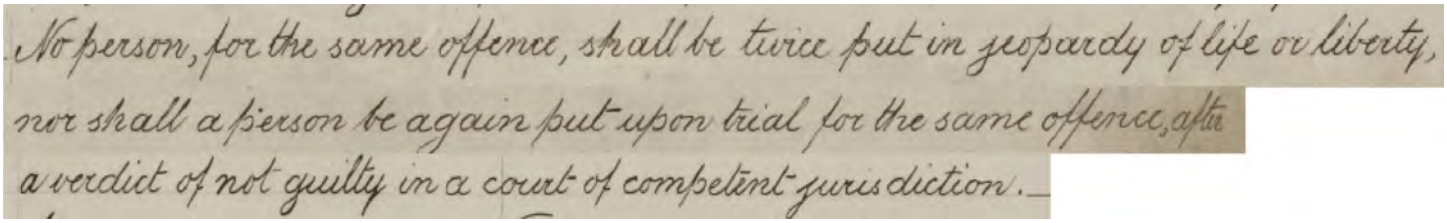
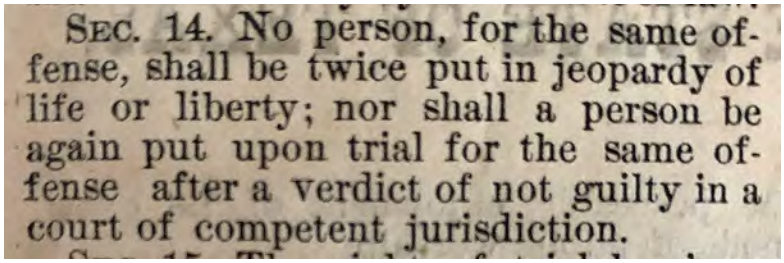

No person, for the same offence, shall be twice put in jeopardy of life or liberty,
nor shall a person be again put upon trial for the same offence, after
a verdict of not guilty in a court of competent jurisdiction.

Photo above: Texas Constitution, 1875, Texas Constitutional Convention of 1875 records, Courtesy of Texas State Library and Archives Commission.

Photo at right: Author.


SEC. 14. No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction.

There are also differences in the words that the copies contain. While the Enrolled Constitution requires the legislature to prohibit both "lotteries" and "evasions involving the lottery principle," the Journal Drafts would require the legislature to prohibit only the former.[24] The cases discussing this prohibition would have come out differently if the courts that decided them had relied on the Journal Drafts (which expressly prohibit lotteries, but not "evasions").[25]

Nor is it the case that each subsequent copy introduced only clarifying differences. For instance, the Enrolled Constitution's article XI, section 7 contains "a glaring grammatical error" in that it allows coastal counties to collect taxes "for construction of sea walls, breakwaters, or sanitary purposes."[26] The section ought to say that a county may collect taxes *for* sanitary purposes, but by omitting "for," it allows a county to collect these taxes only for "constructi[ng] . . . sanitary

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[20] *Ibid.*, 776; *see* James R. Norvell, "Oran M. Roberts and the Semicolon Court," 37 *Texas Law Review*, 279, 292 (1959) ("Rather obviously, the court's reliance on the semicolon . . . cannot justly be regarded as unjudicial or even unusual.").

[21] Jason Boatright, "No One Knows," 49.

[22] *Ibid.*, 50.

[23] *Ibid.*

[24] *Compare Enrolled Constitution*, *Journal of the Constitutional Convention,*504.

[25] *E.g. City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701–02 (Tex. Civ. App. 1936).

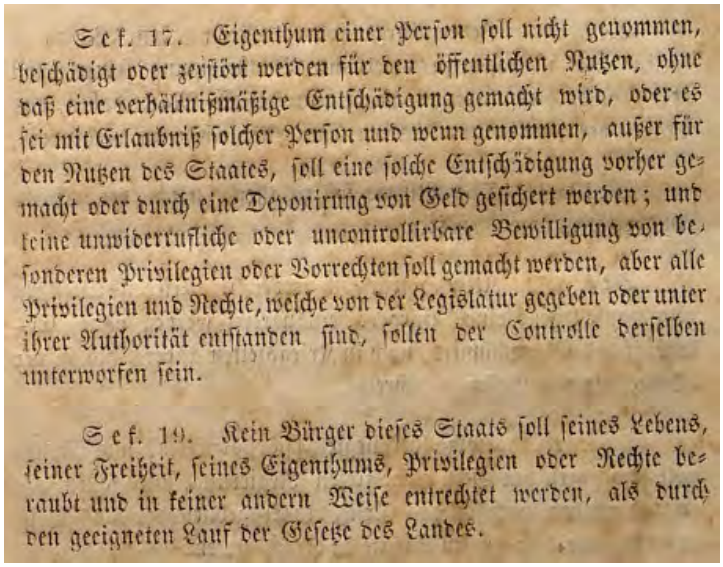
[26] 2 George R. Braden et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 692 (1977).

purposes." The omitted word is a classic scrivener's error. By including the word "for," the Journal Drafts would rescue coastal counties from having to determine what it means to "construct a sanitary purpose.

C. Differences in the Translated Copies

The Translated Copies, of course, use foreign words, and a tour through a few of the state's familiar constitutional provisions shows how these differences could be significant. While the various English copies of the constitution allow the legislature to regulate "the wearing of arms,"[27] the Spanish Copy allows regulations to reach "el uso de armas"—literally the "use" of arms.[28] Next, while government takings require "adequate" compensation according to the English copies,[29] the German Copy requires compensation that is "verhältnißmaßig," which means "proportionate."[30] And in place of an "efficient"[31] school system, the Czech Copy requires a system that is "výdatné"—*i.e.*, "fruitful," or perhaps even "effective; rich, plentiful."[32] If these words are part of the state's constitutional firmament, they have been underutilized by courts and litigants.

There are aspects of the Translated Copies that could be of even greater consequence. Every such copy contains its own version of article III, section 29, which in English requires that "[t]he enacting clause of all laws shall be: 'Be it enacted by the Legislature of the State of Texas.'"[33] Texas courts have strictly construed this requirement.[34] But the legislature has yet to author an act that begins "Budiž uzavřeno zákonodárstvím státu Texas," as the Czech Copy requires.[35] The Translated Copies are also more prone to error. The German Copy, for instance, entirely omits article I, section



Sect. 17. Eigenthum einer Person soll nicht genommen, beschädigt oder zerstört werden für den öffentlichen Nutzen, ohne daß eine verhältnißmäßige Entschädigung gemacht wird, oder es sei mit Erlaubniß solcher Person und wenn genommen, außer für den Nutzen des Staates, soll eine solche Entschädigung vorher gemacht oder durch eine Deponirung von Geld gesichert werden; und keine unwiderrufliche oder uncontrollirbare Bewilligung von besonderen Privilegien oder Vorrechten soll gemacht werden, aber alle Privilegien und Rechte, welche von der Legislatur gegeben oder unter ihrer Authorität entstanden sind, sollen der Controlle derselben unterworfen sein.

Sect. 19. Kein Bürger dieses Staats soll seines Lebens, seiner Freiheit, seines Eigenthums, Privilegien oder Rechte beraubt und in keiner andern Weise entrechtet werden, als durch den geeigneten Lauf der Gesetze des Landes.

The German Copy, omitting article 18 from the bill of rights. Published with permission of the Tarlton Law Library, Jamail Center for Legal Research, University of Texas School of Law.

[27] Tex. Const. art. 1 § 23.

[28] *Spanish Copy*, 7; Edward R. Bensley, *A New Dictionary of the Spanish and English Languages, Spanish–English* 618 (1895). The Spanish word "uso" includes the English sense "wearing," but it is much broader, for it also includes the senses "use," "employment," "service," and "enjoyment," among many others. *Ibid.*

[29] *Tex. Const.* art. 1 § 17.

[30] *German Copy*, 7; Ig. Emanuel Wessely, *Thieme-Preusser: A New and Complete Critical Dictionary of the English and German Languages,* 532 (1886).

[31] *Tex. Const*. art. 7 § 1.

[32] *Czech Copy*, 32; an Váña, *New Pocket-Dictionary of the English and Bohemian Languages,* 415 (1920) (omitting entry for "výdatné," but defining "vydatný" as quoted); V. A. Jung, *A Dictionary of the English and Bohemian Languages,* 448 (2d ed. 1911).

[33] *Tex. Const*. art. III § 29.

[34] *E.g.*, *Am. Indem. Co. v. City of Austin*, 246 S.W. 1019, 1023 (Tex. 1922).

[35] *Czech Copy*, 11.

18, the section of the constitution that in English guarantees that "[n]o person shall ever be imprisoned for debt."[36]

Among the several English- and foreign-language copies, there are doubtless myriad other differences that could give a creative litigant colorable grounds to argue that some law is or is not constitutional. More worrisome is the argument that the existence of multiple copies means that perhaps *no* copy can rightfully claim authoritative status. A century-and-a-half of legislative, executive, and judicial function at every level of the state's government indicate that this argument cannot possibly be sound. The next part explains why it isn't.

II. The Solution

Determining which copy governs the state requires answering two questions: Which copy did the convention frame? And did the people vote to ratify that copy?

The convention framed the Enrolled Constitution. The delegates adopted rules designed to ensure the orderly drafting of a single document embodying their final product, and they followed those rules to produce the Enrolled Constitution. They also relied on approved "parliamentary practice" as the tiebreaker for contested procedural points, and the contemporary authorities on such practice all agreed that an enrolled document was controlling. Even if these points were not dispositive, courts should look to the enrolled-bill rule to validate the Enrolled Constitution. Under this rule, courts accept as conclusive a legislative body's affirmation that a given enactment conformed with the body's governing rules.

The people also ratified the Enrolled Constitution. This conclusion follows from the first principle that the state's "constitution does not derive its force from the convention which framed [it], but from the people who ratified it."[37] It was, after all, "the people" of Texas who did "ordain and establish" the state's constitution.[38] So, in determining which copy of the constitution governs the state today, "the intent to be arrived at is that of the people."[39] Not only did the convention intend to offer the Enrolled Constitution to the people for a vote, but it is also that copy that the people would have expected—and thus intended—their votes to ratify. Contemporaneous case law reinforces this conclusion. The Enrolled Constitution is therefore both the only copy that the convention framed and the only copy that the people voted to ratify.

A. The Convention Framed Only One Constitution.

The rules that the convention adopted to govern the constitution's drafting show that the Enrolled Constitution is authoritative. Of the many votes that the convention held on the drafts of

[36] *Tex. Const*. art. I § 18.

[37] Thomas M. Cooley, *Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 66 (2d ed. 1871); *see* Ellis Paxson Oberholtzer, *The Referendum in America* 72 (1912) ("There has never been the slightest doubt in the minds of publicists who have written of our institutions as to where sovereignty resides. It resides with the people. They are the original source of the government's authority; it is with them as the object of its activities that the state exists.").

[38] *Tex Const.* pmbl.

[39] Cooley, *Constitutional Limitations,* 66.

articles, only the final vote could have created a final constitution. Until that final vote, all votes in favor of the constitutional text were cast in anticipation of further changes to the working drafts of each article. The convention also vigorously debated the process for overriding any changes that arose between the drafts of individual articles and the final text as it appeared in the Enrolled Constitution.[40] If the earlier drafts were final, this debate would have been pointless. Next, the convention's rules also refer only to the Enrolled Constitution as the "whole constitution."[41] And the convention directed that printed copies be produced "in accordance with the Enrolled Constitution."[42] The delegates would not have voted to print thousands of copies of a document that they believed incomplete.

The convention also adopted a backstop rule to govern procedural disputes: "The President of the [c]onvention shall decide all questions not provided for by the standing rules and orders of the [c]onvention, according to parliamentary practice, as laid down by approved modern authors . . . ."[43] The parliamentarians of the time agreed, as do authors today, that an enrolled document supersedes earlier drafts, including earlier engrossed drafts. Thomas Jefferson's *Manual of Parliamentary Practice* made clear that, in the legislative context, the President was to sign an enrolled bill and to deposit the same "among the rolls in the office of the [S]ecretary of [S]tate " as the authoritative copy.[44] Luther Cushing's *Lex Parliamentaria Americana* gave the same rule.[45] Law and other dictionaries, too, made clear that an enrolled document is the "official record."[46] Because the authorities agreed, the delegates would have viewed the Enrolled Constitution as the copy that it framed—even if its own rules did not expressly establish that fact.

The enrolled-bill rule provides a final argument in favor of the Enrolled Constitution. In the legislative context, this rule prohibits the consideration of "[j]ournals" and other "extrinsic evidence" in determining whether a bill's enactment was procedurally sound.[47] The rule's justifications apply with at least equal force to the framing of a constitution.

Structural considerations suggest that a court lacks authority to second-guess the positive statements of the convention whose work established the court's jurisdiction. At least two committees of the convention examined the constitution and found it "correctly enrolled," a conclusion that was proper only for an article that had passed "under the foregoing rules" of the convention.[48] Each committee thus affirmed that the constitution conformed to the convention's rules. The delegates accepted this affirmation when they "came forward and signed" the Enrolled

[40] S. S. McKay, *Debates in the Texas Constitutional Convention of 1875*, 322–24 (1930).

[41] *Journal of the Constitutional Convention,* 501.

[42] *Ibid.*, 780.

[43] *Ibid.*, 22.

[44] Thomas Jefferson, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States 121* (1801). At least one state convention adopted the manual itself to govern the proceedings. *See* John Alexander Jameson, *The Constitutional Convention: Its History, Powers, and Modes of Proceeding,* 275 (3rd ed. 1873).

[45] Luther Stearns Cushing, *Lex Parliamentaria Americana: Elements of the Law and Practice of the Legislative Assemblies in the United States of America,* 917–18 (1856).

[46] "Engross" and "Enroll" *Black's Law Dictionary* (1st ed. 1891); *see also* John Bouvier, *A Law Dictionary,* 591 (15th ed. Philadelphia, J. B. Lippincott Co. 1883) (giving similar definitions); Rapalje & Lawrence, 444–45.

[47] *Ass'n of Tex. Pro. Educators v. Kirby*, 788 S.W.2d 827, 829 (Tex. 1990).

[48] *Journal of the Constitutional Convention,* 501, 816–17.

Constitution.[49] A court that ignores these affirmations violates the "respect due" to the constitutional convention to at least the same degree that a court errs by inquiring into equivalent legislative affirmations.[50]

Practical considerations should also prevent a court from conditioning a constitution's validity on drafting events other than the drafters' final assent.[51] If a court must examine a journal to determine what a constitution means, then so must everyone else. This requirement would reduce certainty, increase litigation expense, and undermine the finality of judgments.[52] These overlapping concerns already protect legislation from attacks based on procedural irregularities. They should apply with even greater weight in favor of a constitution, without which legislation would be impossible. The constitution is the state's foundational instrument. Its validity cannot depend on a court's centuries-later examination of whether the drafting process was perfect in every procedural respect.

While the Texas Supreme Court has stated an exception to the enrolled-bill rule, that exception does not apply to the constitution. In the legislative context "when the official legislative journals, undisputed testimony by the presiding officers of both houses, and stipulations by the attorney general . . . conclusively show the enrolled bill signed by the governor was not the bill passed by the legislature, the law is not constitutionally enacted."[53] The case that announced this exception involved an error in the enrolling process, the result of which was that the bill the Governor signed "was definitely not the version passed by the Senate."[54] But unlike bicameralism and presentment, there is no higher law that requires a constitution to conform to a convention's journal. Moreover, the differences between the Journal Drafts and the Enrolled Constitution might just as well be the result of intentional editing than of clerical error. Even if the exception could apply, relying on it would require "undisputed testimony" from officers who are no longer alive to give it.

And while scholars have criticized the enrolled-bill, the critiques are not persuasive in the constitutional context. Some criticisms argue that the rule undermines the separation of powers, for example, by violating the nondelegation doctrine.[55] But in the constitutional context, the rule does not seize power from another branch. Rather, it merely denies the judiciary power to second-guess the actions of an adjourned convention. Other criticisms argue that the rule is no longer

[49] *Ibid.*, 820.

[50] *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892).

[51] This analysis might be different if it were alleged that the printing errors were intentional or malicious, but there is no indication that either description applies to the discrepancies that this article discusses. Intentional changes are possible, however. *See* William M. Treanor, "The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution," 120 *Michigan Law Rev.* 1, 7 (discussing "covertly made substantive changes" in the drafting process of the U.S. Constitution).

[52] *See United States v. Munoz-Flores*, 495 U.S. 385, 409 (1990) (Scalia, J., concurring) (describing the enrolled-bill rule as a "salutary principle [that] is also supported by the uncertainty and instability that would result if every person were 'required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate, and approved by the governor, is a statute or not.'") (citations omitted) (quoting *Marshall Field & Co.*, 143 U.S. at 677)).

[53] *Kirby*, 788 S.W.2d at 829.

[54] *Ibid.*, 828.

[55] *E.g.*, Ittai Bar-Siman-Tov, "Legislative Supremacy in the United States?: Rethinking the 'Enrolled Bill' Doctrine," 97 *Geo. L.J.* 323, 357 (2009).

practical because it is a negative incentive for Congress.[56] But unlike legislative sessions, constitutional conventions are rare, and there is no reason to think that the prospect of later judicial inquiry would provide a greater check against fraud or error than would contemporaneous attention.

Scholars have also questioned the rule's evidentiary basis, arguing that the rule is unnecessary because recent "technological developments . . . make it easier to reconstruct what actually happened in the legislative process."[57] But this is not an argument against applying the rule to an era that preceded modern innovations or to a constitution that is approaching its 150th anniversary. Both of the state's high courts still apply the enrolled-bill rule to statutes.[58] The reasoning behind these decisions shows that the rule should also apply to constitutions. The enrolled-bill rule thus provides additional grounds to conclude that the convention framed only the Enrolled Constitution. That conclusion would be the end of things if the printed copies were accurate. But they weren't.

B. The People Ratified the Framed Constitution

The convention assembled only because the people of Texas, in a popular vote, decided that it should and chose its delegates. These actions were an exercise of the people's sovereign power. Because the 1869 Constitution did not discuss constitutional conventions, the power that resides in the people is the only source that could have authorized the convention. The delegates thus spoke for the people. That is why the convention's ordinances (directives which, among other things, established the timing and manner of ratification) all begin with the phrase: "Be it ordained by the People of Texas, in convention assembled."[59]

Among the nearly 200,000 Texans who visited the polls on February 15, 1875, there were likely few, if any, who actively contemplated whether their vote would apply to a manuscript enrolled in Austin as opposed to one of the printed copies that circulated throughout the state. That is no cause for concern. The differences in the English Copy were relatively minor, and there is no evidence that they were introduced through subterfuge or malice. Each copy in every language included text indicating that the Enrolled Constitution was the authoritative document. Any voter who did actively consider the subject could have come to but one conclusion about which document their vote would apply to.

First, each copy that the state printed and designated "official"—whether printed in English or otherwise—included a paragraph certifying that the text contained "true and correct copies of all articles of the proposed Constitution of the State of Texas, as enrolled and now on file in the Department of State."[60] This certification followed immediately after the proposed constitutional text, and it affirmatively established that the copies were just that—"copies." Of greater importance, however, is the fact that the certification appeared at all. If the copy itself were proposed for

[56] *E.g.*, David Sandler, Note, *Forget What You Learned in Civics Class: The "Enrolled Bill Rule" and Why It's Time to Overrule* Field v. Clark, 41 *Colum. J.L. & Soc. Probs*. 213, 248 (2007).

[57] *E.g.*, Matthew D. Adler & Michael C. Dorf, "Constitutional Existence Conditions and Judicial Review," *Virginia Law Review 89, no. 6 (2003)*:1105, 1180.

[58] *Kirby*, 788 S.W.2d 827; *Maldonado v. State*, 473 S.W.2d 26, 28 (Tex. Crim. App. 1971).

[59] *English Copy*, 35.

[60] *Ibid.*, 26.

ratification, then a certification of conformance to some other document would have been entirely unnecessary. Indeed, it would have been downright confusing. The certification showed that the copies matched the Enrolled Constitution, and in so doing, it also confirmed that the Enrolled Constitution was the document to be ratified.

The Newspaper Copy included a similar explanation, stating conspicuously at the top of the first column on the first page that the text that followed was "carefully compared with the original copy in the state department." This "original copy" must have been the Enrolled Constitution. The description is significant because it shows that the printer—assumedly a private citizen—regarded the Enrolled Constitution as authoritative, not the English copies. There were many such copies in circulation, and it would have been much easier for the printer to certify that the Newspaper Copy conformed to one of these "official" copies if they were indeed authoritative. The Newspaper Copies outnumbered the English copies two to one, but a voter reading either would see unmistakable evidence that the Enrolled Constitution was authoritative.

Second, and in particular regarding the English Copy, voters would have expected that the printed copies—even those designated "official"—might contain typographical errors, but voters would not have expected these errors to become binding through ratification. The state's constitutional history would have been one source of this expectation. For example, the pre-ratification printed copy of the 1869 Constitution was distributed with a supplemental "errata" sheet correcting more than two dozen errors that appeared in the printed copy.[61] Copies of earlier constitutions contained similar inconsistencies, though not always errata sheets.[62] None of these errors became binding law. Instead, minor errors inevitably crept into documents—and even into copies of constitutions—that were printed in an era that relied on human typesetters.

Third, although foreign-language copies of Texas Constitutions had existed for almost fifty years, only one was positive law in a language other than English. The 1827 Constitution was authoritative in both English and Spanish, but only because it was both drafted and "read in full" in both original languages and enrolled in "two original copies [that] were signed by all representatives" who were members of the drafting body.[63] What happened at the convention of 1875 was hardly similar. Rather than drafting in multiple languages simultaneously, the delegates simply voted to print copies in foreign languages, delegating the translation to the printers themselves. The 1827 Constitution is thus the "only instrument of its kind promulgated simultaneously in Spanish and English."[64]

Fourth, curious voters who turned to contemporary legal sources would have concluded that their votes would apply only to the Enrolled Constitution. In the statutory context, "[w]hen there is a discrepancy between the printed statute and the enrolled act, all the authorities agree

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[61] *Tex. Const. of* 1869, *Errata*, https://tarlton.law.utexas.edu/c.php?g=812156&p=5795226.

[62] Rupert N. Richardson, *Texas: The Lone Star State* 216 n.73 (2d ed. 1958) (noting "considerable difference in punctuation" in copies of the 1836 Constitution); Kathryn Garrett, "The First Constitution of Texas, April 17, 1813," 40 *Sw. Hist. Q.* 290, 308 n.2 (1937) (noting "several" inconsistencies in copies of the 1813 Constitution).

[63] Manuel González Oropeza & Jesús F. de la Teja, *Proceedings of the Constituent Congress of Coahuila and Texas* 25 (2016).

[64] *Ibid.*, 30.

that the latter controls."[65] The Texas Supreme Court announced the same rule in 1870—just six years before the ratification vote. In that case, *Central Railway Co. v. Hearne*, the printed copy of a statute allowed a railroad company to charge a rate not to exceed "fifty cents per hundred pounds *and* twenty-five cents per foot" of freight.[66] But the enrolled statute used the conjunction "*or*," and the plaintiff argued that the printed copy should control.[67] The district court agreed and refused to admit evidence of the enrolled statute's text. The Texas Supreme Court reversed, holding that "the enrolled bill [i]s the best evidence of the terms and meaning of the law as it passed the legislature."[68]

High courts in other states have reached the same conclusion.[69] Federal courts, too, have stated the same rule, albeit in dicta. For example, in *Pease v. Peck*, the U.S. Supreme Court acknowledged "as a general rule, that the mistake of a transcriber or printer cannot change the law; and that when the statutes published by authority are found to differ from the original on file among the public archives, that the courts will receive the latter as containing the expressed will of the legislature in preference to the former."[70] And while riding circuit, Justice McLean noted that a court could "receiv[e] the original enrolled bill to correct an error" in a printed copy.[71]

This does not mean that the voters could not trust the copies that were available for examination. Instead, the conclusion reflects the common-sense view that the Enrolled Constitution would control in any case that turned on the difference between it and the printed copies. Because it is clear that the people would have expected their vote to apply to the Enrolled Constitution, it is equally clear that the people intended to ratify that document by voting for it. Respect for popular sovereignty requires acknowledging that the people's intent is controlling, and thus that the Enrolled Constitution is currently in effect.

III. Alternative Solutions Rejected

An additional path leads to the same conclusion. It would defy popular sovereignty to conclude that procedural defects (if any) in the original ratification render moot all that has come since, so the 1876 Constitution must be in effect. And if any doubt exists about whether the Enrolled Constitution is the controlling copy, considering the other possibilities removes it. The English Copy was neither framed nor ratified, and in any event, it stands on no better ground than the Translated Copies. Nor is the possibility of a multi-lingual constitution convincing. The

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[65] 1 J. G. Sutherland, *Statutes and Statutory Construction,* 123–24 (1904).

[66] 32 Tex. 546, 562 (1870) (emphasis added).

[67] *Ibid.,* 561 (emphasis added). The consequence of the difference was not whether the railroad company could assess *both* rates against a single shipment, and it had not attempted to do so. *Ibid.* Rather, the issue was whether the railroad company had an obligation to impose a charge using only the *lower* of the two rates. For if the railroad's charge could not exceed a certain rate by the "pound" *and* also could not exceed a certain rate by the "foot," then the total rate could not exceed whichever rate was lower.

[68] *Ibid.*

[69] *E.g.*, *State v. Marshall*, 14 Ala. 411 (1848); *Sedgwick Cnty. Comm'rs v. Bailey*, 13 Kan. 600, 608–09 (1874); *Greer v. State*, 54 Miss. 378, 381 (1877); *Bruce v. State*, 48 Neb. 570, 570 (1896).

[70] 59 U.S. 595, 596–97 (1855). The statement was dicta because the Court held (over a dissent) that the purported errors in the printed copy had later "received the sanction of the [state] legislature." *Ibid.*, 596.

[71] *Reed v. Clark*, 20 F. Cas. 433, 433 (C.C.D. Mich. 1844). The statement was dicta because the court refused leave for the defendant to late-file the plea that brought to light the differences between the printed and enrolled copies. *Ibid.*

delegates drafted in English, with translation little more than an afterthought, and no Translated Copy was ever enrolled. These observations confirm that the Enrolled Constitution is controlling.

A. No Constitution at All?

The arguments that Texas does not have a constitution come in several guises, but among them are at least the following.

First is an argument along these lines: (a) Texas has a constitution only if a single instrument was framed by the convention and ratified by the people; (b) no single instrument meets these criteria; (c) therefore, Texas does not have a constitution. The previous section showed why the second premise is false, but this argument fails because it is impossible to square with the principle of popular sovereignty. The people voted to ratify the constitution in 1876, they have since approved more than five hundred amendments to that constitution. Similarly, voters in the 1970s approved an amendment that called for the creation of a commission to revise the constitution.[72] Although voters ultimately rejected the commission's proposals, everyone involved agreed that the 1876 Constitution then governed. So, too, has every citizen to ever cast a vote for a candidate running for an office created under the constitution's terms, or to recognize the authority of the laws issuing from those offices.

A second argument might, while affirming the constitution's theoretical existence, point to the imperfections in the printing and ratification process as reasons for concluding that the constitution's text is fixed but impossible to exhaustively determine. Still, the argument goes, the various copies are strong evidence of what that text is. On this view, the constitution cannot be pulled from a shelf, but a curious citizen can—by examining the various copies—come close enough to determining what the true constitution actually says. Again, this argument's appeal is only superficial. A constitution is valuable chiefly because it is written.[73] If the constitution's full written text is impossible to determine, then the constitution cannot serve its most important function.

A third argument refines the point even further, and it comes closest to describing the rule that Texas courts appear to use. Broadly, the third argument holds that the constitution's full text can be determined, but that this text consists only of the words and punctuation that appear in every English-language copy. There are several reasons to reject this argument. This "collective constitution" was neither framed nor ratified. Worse, if the only way to arrive at a single, valid constitution is to build it out of several invalid parts, then there is a logical argument that the better course is to instead reject every part. After all, that is how the law treats a bill that passes both houses in different forms. Concluding that every constitution governs is arguably, then, just another way of saying that none does.

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[72] *See generally* Braden, 827–37.

[73] *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (discussing "the greatest improvement on political institutions—a written Constitution"); *see also ibid.,* 176–77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution is written. . .. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently . . . an act of the legislature, repugnant to the [C]onstitution, is void. This theory is essentially attached to a written constitution . . . .").

The idea of a collective constitution also fits uneasily with the inclinations that place a constitution near the center of the state's political identity and affairs. A charter with such lofty functions ought best to consist of a single document and, and it ought not to depend so heavily on nuance and technicality for its very existence. Finally, the "collective constitution" theory gives no answer to what courts ought to do when a conflict *does* arise between copies. Thus, while perhaps useful as a descriptive account of what Texas courts have done, combining the English copies into a collective constitution merely sidesteps the question of which copy actually controls.

B. The Certified Copy Printed in English?

There are a few reasons to think that the convention framed the English Copy. The convention appointed a committee to supervise the English Copy's printing. Perhaps this committee had independent authority to conform the draft to its own liking. And perhaps in exercising this authority, it spoke for the convention as a whole. Next, unlike the Translated Copies, the English Copy was filed with the secretary of state. The English Copy might thereby have superseded the Enrolled Constitution that was previously filed in the same manner. And even if these facts are not concrete evidence that the English Copy is formally authoritative, they might still show that the convention at least intended the English Copy to be the final embodiment of its work.

Several further observations critically undermine this line of reasoning. The printing committee did not have authority to approve changes to the constitution. Instead, the committee's job was to ensure that the English Copy matched the Enrolled Constitution. The printing committee had, at most, authority to make changes to the copies of the framed constitution—it did not have authority to frame a new one. Next, the two thousand English copies "deposited" with the secretary of state are hardly evidence of a formal filing. The sheer volume shows that the delegates intended the copies for use as copies rather than as a formal record. More importantly, the convention made no provision to duly enroll or have the English Copy signed by "the President of the Convention, [and] countersigned by the Secretary" —the convention's normal procedure for authenticating final copies of binding instruments and ordinances.[74] The delegates intended the English Copy to reflect the Enrolled Constitution that the convention framed, but not to supersede it.

But framing is not the end of the story. Rather: "All political power is inherent in the people. . . . [T]hey have at all times the inalienable right to alter, reform or abolish their government in such a manner as they may think expedient."[75] The people's sovereign power would allow them to dispense with a convention altogether if they wished. In other words, it is possible the people ratified a constitution that the convention did not frame. The people's sovereign power is surely sufficient to ratify the discrepancies that crept in at the printing office. Even so, this argument is underwhelming. The textual evidence all favors the Enrolled Constitution. But even ignoring the textual evidence does not lead to the conclusion that the English Copy controls. Instead, that route creates a new problem: how to decide among the English Copy, the Translated Copies, and the Newspaper Copy.

It might be tempting to choose the English Copy based on printed volume. When the

[74] *E.g.*, *Journal of the Constitutional Convention,* 799.

[75] *Tex. Const*. art. I, § 2.

ratification vote occurred, there existed 40,000 English copies and only one Enrolled Constitution. But if volume alone were sufficient, then the Newspaper Copy—of which there were "over a hundred thousand" printed—ought to be controlled.[76] Perhaps, in the alternative, the secretary of state's certification is dispositive. But this route requires acknowledging that the Translated Copies are also binding law. And any argument that the English Copy is binding because it is written in English cannot distinguish between the other copies written in that language. A voter could not have known how many copies were printed and certified without reviewing the *Journal*. By contrast, every pre-ratification copy of the constitution contains explicit textual evidence recognizing the Enrolled Constitution's authority.

C. A Multi-Lingual Constitution?

A constitution in more than one language would hardly be novel. In Texas, for example, the 1827 Constitution governed the state in both English and Spanish. Nor would the innovation be the first of its kind among American states. In 1849, California adopted a constitution that remained authoritative in both English and Spanish even after that territory became a state.[77] Bi- and multi-lingual constitutions also exist in the modern era—Ireland and South Africa being two examples.[78] Canada, too, has a bilingual legal tradition.[79] From these and other sources spring a wealth of interpretative principles explaining how to harmonize enactments that are authoritative in more than one language. A multi-lingual constitution for Texas, then, would not be unprecedented and would not necessarily create any insurmountable interpretative obstacles. But the idea of a multi-lingual constitution does not survive serious consideration.

The convention did not frame the Translated Copies. The delegates conducted their proceedings entirely in English and signed only the Enrolled Constitution (in English) rather than multiple copies (in other languages). By contrast, the delegates who framed the state's bilingual 1827 Constitution drafted it in both languages and signed enrolled copies in both languages.[80] Next, the *Journal* does not record any discussion about the Translated Copies other than that they were to be printed, and there is no evidence that any delegate to the convention had anything to do with translating or printing the Translated Copies. If the convention intended the Translated Copies to become law, the delegates would have shown greater care regarding printing and translation.

Nor did the people ratify the Translated Copies. For the people to ratify the same articles in four different languages, the convention would have needed to distribute pamphlets that contained *every* article in *every* language rather than distributing different pamphlets that contained each article in only one language. By analogy, consider the result had the convention distributed 40,000 copies of article I, 5,000 copies of article II, 3,000 copies of article III, and 1,000 copies of the remaining articles. Now imagine that each copy claimed to contain the entire constitution. Would a popular vote in favor of the constitution then be enough to ratify every article, even though

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[76] McKay, *Seven Decades*, 148.

[77] *Cal. Const*. 1849, https://perma.cc/QSE3-UJX2.

[78] *Constitution of Ireland* 1937 art. 8, https://perma.cc/UNR9-QYJZ; S. Afr. Const., ch. 1 § 6, https://perma.cc/BL6E-QTZ4.

[79] *See* Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 55 (U.K.).

[80] Oropeza & de la Teja, *Proceedings of the Constituent Congress of Coahuila and Texas* 25, 30.

most citizens had seen no more than a fraction of the entire text and had no way to know that the other articles even existed? Surely not. It is the same with the English, German, Spanish, and Czech copies distributed in these exact numbers. Because the Translated Copies were not distributed as a single constitution, voters would not have expected a vote in favor of the constitution to ratify all four copies.

Recognizing a multi-lingual constitution also would not solve the underlying question of what to do when the copies conflict. Many of the world's multi-lingual constitutions include a backstop provision stating that a particular language governs in case of conflict, but the Translated Copies of the Texas Constitution contain no such provision.[81] A multi-lingual constitution would also call into doubt the status of prior judicial decisions interpreting the constitution. If the constitution is authoritative in four languages, then the decisions construing it have so far only used one-quarter of its text. These practical problems are an additional reason to embrace the conclusion that the constitution exists only in English and that the Enrolled Constitution is the authoritative version.

IV. Conclusions

The people did not receive a perfect copy of the constitution that the convention framed, but every copy that they did receive contained unmistakable textual evidence that the ratification vote applied only to the Enrolled Constitution. This evidence shows that the people's majority vote was "for" the Enrolled Constitution, and considering the alternatives reinforces this position. Popular sovereignty prohibits concluding that the state lacks a constitution, and no other copy has a sound basis for claiming authoritative status. According to both the textual evidence and the process of elimination, then, the Enrolled Constitution now governs the state and is controlling as against discrepancies that appear in any other copy. Before closing, it is worth addressing two points that follow from this conclusion.

First, Texas courts should work to end the inconsistency that prevails in their choice of constitutional text. Courts can achieve consistency by grounding interpretations only in the authoritative text that appears in the Enrolled Constitution. This is especially important for novel or seldom invoked sections of the constitution. Courts should also be wary of quoting from or relying too heavily on secondary sources of the constitution's text. Annotations and reprints often include deviations from the authoritative text that the twin advances of technology and textualism would no longer tolerate. Even Braden's celebrated annotation, impeccable in other regards, includes discrepancies that do not appear in any pre-ratification copy of the constitution.[82] Litigants should also pay close attention to their choice of text, especially when the differences between the Enrolled Constitution and the various copies could affect how a court decides a case.

The Texas Legislative Council is presently at work preparing a digital copy of the constitution that will make consistency a much easier goal to achieve. In compliance with the Uniform Electronic

[81] *E.g.*, *Constitution of Ireland* 1937 art. 25 ("In case of conflict between the texts of any copy of this Constitution enrolled under this section, the text in the national language [i.e., Irish] shall prevail."); *S. Afr. Const.,* 1996, ch. 14 § 240 ("In the event of an inconsistency between different texts of the Constitution, the English text prevails.").

[82] *E.g.*, Braden, 89 (adding a semicolon after the first instance of "another" in article II). Though sensible as a stylistic matter, the semicolon does not appear in the engrossed drafts, the Enrolled Constitution, or the English Copy.

Legal Materials Act, "the council has undertaken the task of proofreading its current version of the constitution by comparing it to images of the signed, enrolled version of the 1876 constitution and images of the signed, enrolled version of each amendment to the constitution."[83] The fruits of that extensive labor are expected by "January 2022."[84] An authoritative digital constitution will be a helpful tool for courts, litigants, and the public.

Second, courts can use the non-authoritative, pre-ratification copies to help clarify ambiguities that appear in the Enrolled Constitution's text. One example has already been discussed: the Journal Drafts are useful to correct the Enrolled Constitution's omission of the word "for" in article XI, section 7—an obvious scrivener's error.[85] The Translated Copies could also be useful. These copies are of unique value because they a both "exhaustively restate every term and phrase" in the constitution and "represent those terms and phrases in context."[86] The Translated Copies are, in essence, contemporary, full-length commentaries on the constitution's original public meaning.[87]

The Texas Supreme Court's decision in *Wentworth v. Meyer* is one example.[88] Jeff Wentworth was a state senatorial candidate. His term as a senator "would overlap, by twenty-one days," with his previous term of appointment to a different statewide office. But article III, section 19 prohibits a person from serving in the legislature "during the *term* for which he is . . . appointed" to another state office.[89] Wentworth had resigned his previous appointment five years before becoming a senatorial candidate, and he argued that his previous "term" had therefore expired. Fred Meyer, the party chairman, disagreed, and he declared Wentworth ineligible as the Republican nominee. Wentworth sought mandamus relief in an original proceeding at the Texas Supreme Court.

At issue was whether the word "term" referred to the entirety of Wentworth's prior appointment, or instead, only to the portion of the appointment that he had served before resigning. If the former, then Wentworth was eligible for the legislature; if the latter, he was not. Eight justices wrote opinions—one plurality, five concurring, and two dissenting. Only Justice Hightower participated without writing an opinion.[90]

A majority of justices agreed that the constitutional text was ambiguous as to the meaning of "term." The plurality opinion then turned to the section's "purpose" and to the rule that the constitution "must be strictly construed against ineligibility."[91] In the end, five justices agreed with

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[83] Texas Legislative Council, *Implementation Plan for Publishing the Constitution of the State of Texas in Compliance with the Uniform Electronic Legal Material Act* 5 (Sept. 1, 2020), https://tlc.texas.gov/docs/TLC_UELMA.pdf.

[84] *Ibid.*

[85] *See supra* Part I.B.

[86] Christina Mulligan et al., *Founding Era Translations of the Constitution*, 31 *Const. Comment*. 1, 3 (2016).

[87] *Ibid.*, 11 ("On this point, there is virtually unanimous consensus among textual scholars and linguists who compose the field of translation studies: no substantive epistemological difference exists between a commentary and a translation.").

[88] 839 S.W.2d 766 (Tex. 1992).

[89] *See Tex. Const*. art. III § 19 (emphasis added).

[90] *Wentworth*, 839 S.W.2d at 772 (Hecht, J., concurring) (summarizing the various opinions).

[91] *Ibid.,* 767.

Wentworth that the word "term," as it appears in article III, section 19, refers only to *actual* time in office rather than *potential* time in office.[92]

The Spanish and German copies support the plurality's conclusion.[93] Whereas the section in English uses "term,"[94] the Spanish Copy uses "tiempo" ("time")[95] and the German Copy uses "Amtsdauer" ("employment duration").[96] Importantly, these copies elsewhere use cognates for "term."[97] Thus, while sections 18 and 19 of article III both use the word "term" in English, these same sections in Spanish and German use cognates for "term" in section 18 ("termino," "Termins"[98]) but use different words in section 19 ("tiempo," "Amtsdauer"[99]). These differences indicate that the German and Spanish translators understood sections 18 and 19 to refer to different periods, and thus that the plurality was correct in concluding that Wentworth was eligible for the legislature.[100]

The pre-ratification copies, then, including the Translated Copies, could play a helpful role in constitutional interpretation. Like other extrinsic sources, these copies are useful only when an uncertainty exists in the English text of the Enrolled Constitution. They can be used to help explain an uncertainty, but never to introduce one.

★ ★ ★

One constitution governs Texas: the Enrolled Constitution that the delegates signed. This conclusion follows foremost from the pre-ratification copies that circulated throughout the state, each of which included express textual evidence that the ratification vote applied only to the Enrolled Constitution. Popular sovereignty requires treating this evidence as conclusive. And even if the evidence were not conclusive, the Enrolled Constitution is the only copy with a sound claim to authoritative status. No longer should any court cite a pre-ratification copy as law, but courts can use those copies to help dispel any ambiguities in the ratified text. Every Texan should—and now can—know what the Texas Constitution is.

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[92] *Ibid.*, 772 (Hecht, J., concurring) ("To summarize the Court's decision, five Members of the Court . . . hold that article III, section 19 of the Texas Constitution does not prohibit an officeholder who resigns his position from serving in the Legislature during a time when he would otherwise have remained in his former office.").

[93] The Czech Copy's apparent translation of the word "term" requires more than a dictionary to parse and is thus not addressed here. *Czech Copy*, 9.

[94] Tex. Const. art. III § 19; Enrolled Constitution, 5.

[95] Spanish Copy, 11; *see* Bensley, 594.

[96] *German Copy*, 13; Wessely, 25, 114.

[97] *See Spanish Copy*, 11 (translating article III, section 18's "term" as "termino"); *German Copy*, 13 (translating article III, section 18's "term" as "Termins").

[98] Bensley, 593; Wessely, 25.

[99] *Spanish Copy*, 11; *German Copy*, 13.

[100] Wentworth won the primary, and the race, and he served in the Texas senate for the next two decades. *Jeff Wentworth*, *Ballotpedia,* https://perma.cc/7NPY-X65A.

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From Litchfield to Lone Star: America's First Law School and Its Impact on Early Texas

By Hon. John G. Browning

House of Tapping Reeve, founder of the first American law school, a National Historic Landmark, in 2010.

I. INTRODUCTION

The true birthplace of American legal education is not some ivy-covered building at a prestigious, instantly recognizable name like Harvard or Yale. Instead, it is an unassuming, 20 X 22-foot single story colonial building in Litchfield, Connecticut. The Litchfield Law School, founded in 1774 by attorney, judge, and law professor Tapping Reeve, educated more than a thousand aspiring lawyers before it closed in 1833. It was arguably America's first law school.[1] A contemporary observer called Litchfield a "nursery of

[1] In 1966, the Tapping Reeve House and Law School became registered national historic landmarks. In the citation, the National Park Service recognized Litchfield as the first law school in the nation. The College of William and Mary disputed that claim, pointing to George Wythe's 1779 appointment as a professor of law at the college, and arguing that Litchfield began not with Tapping Reeve's instruction of Aaron Burr in 1774, but with the opening of a building not his home in 1784. The Park Service later amended its citation to describe Litchfield as "the first in the United States not associated with a college or university."

eminent men,"[2] and indeed its influence during its short existence is virtually unparalleled. Among its alumni were two U.S. Vice Presidents (Aaron Burr and John C. Calhoun); 28 U.S. Senators; 100 members of the U.S. House of Representatives; 6 Cabinet members; 3 U.S. Supreme Court Justices; 15 governors; 15 chief justices of state supreme courts; and many others who distinguished themselves in politics, the legal profession, and business.[3] Litchfield was notable not only for its innovative curriculum, but for creating "a nationally expansive network of advice, information, and patronage," and for "bringing elites together across state, regional, and sometimes partisan lines, expanding the networks of students and their families in new ways."[4]

Judge Tapping Reeve

Aaron Burr

While some scholars have noted Litchfield's success and influence on a national level (although the majority of its students came from New England and the rest of the northeast, more than 25 percent of Litchfield's alumni came from southern states), no one has yet examined the influence of those Litchfield-educated lawyers who eventually emigrated to what would become Texas. This article seeks to address this gap in the scholarship. But before we look at those Litchfield alumni who made their way to Texas and played a part in shaping that early Republic, let's first briefly examine what made Litchfield a precursor to modern American legal education.

During the 18th century (and well into the 19th century), most lawyers received their legal education through "reading the law" while apprenticing with a local attorney. After studying in a law office for periods of time that varied from a year and a half to three years, the aspiring attorney would then present himself to a local judge for an examination to gain admission to the bar. In 1774, Princeton graduate and Connecticut attorney Tapping Reeve began training his first apprentice (who was also his brother-in-law) Aaron Burr. Despite Burr's studies being interrupted by service in the American Revolution, Reeve soon developed a reputation as a very effective teacher. As demand for his services grew, in 1784 Reeve built a one-room schoolhouse in which he could conduct more formal lectures.[5] When he began serving as a judge for the Superior Court of Connecticut (what we would now call a Supreme Court), Reeve took on a protégé, James

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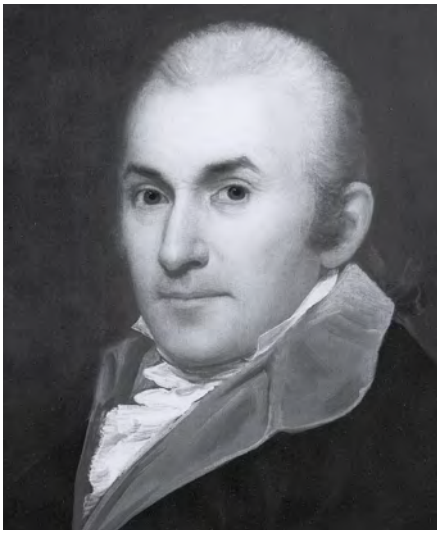
[2] Mansfield Edward Deering, *Personal Memories, Social, Political, and Literary: With Sketches of Many Noted People, 1803–1843*, 124–25 (1879).

[3] David R. Papke, "America's First Law School," *Marquette U. L. School Blog* (Sept. 5, 2016), https://law.marquette.edu/facultyblog/2016/09/americas-first-law-school.

[4] Mark Boonshoft, "The Litchfield Network: Education, Social Capital, and the Rise and Fall of a Political Dynasty, 1784–1833," 34:4 J. *Early Republic* 563, 570 (Winter 2014).

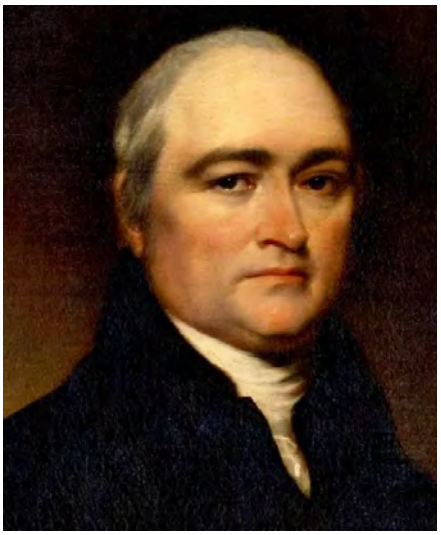
[5] Paul DeForest Hicks, *The Litchfield Law School: Guiding the New Nation,*12 (2019).

Gould, to help him in running the Litchfield Law School. As Reeve's health declined after he lost his position as Chief Justice of the Connecticut Supreme Court (Reeve would retire from teaching in 1820, and passed away in 1823), Gould became the primary lecturer for the school. However, with enrollment declining since Reeve's departure and with universities like Harvard and the University of Virginia adding law courses, the Litchfield Law School ultimately closed its doors in 1833.[6]


James Gould

What made Reeve's approach to legal instruction what one editor of a contemporary law journal called "the most perfect of its kind, of any that has ever yet been established"?[7] In 1823, Yale president Timothy Dwight summed up Tapping Reeve's innovative approach:

> Law here is taught as a science, and not merely nor principally as a mechanical business; not as a collection of loose, independent fragments, but as a regular, well-compacted system. At the same time the students are taught the practice by being actually employed in it. A [moot] court is constituted; actions are brought and conducted through a regular process; questions are raised; and the students become advocates in form. Students resort to this school from every part of the American Union.[8]


Timothy Dwight

Reeve sought to create a course of study that was intellectually rewarding while at the same time professionally practical, and one which could be economical for students when compared to a typical law office apprenticeship. His curriculum was based on a series of lectures delivered by William Blackstone at Oxford, and was designed to be completed in fourteen months (some students, however, stayed for shorter or longer periods of time). As of the 1820s, students paid $100 for the first year and $60 for the second.[9] The lectures examined the common law from a national perspective and were updated as legal principles evolved. Students took detailed notes during lectures, which they later copied and had bound into leather volumes. One student described a typical day:

> At nine o'clock we students walked to the lecture-room, with our note-books under our arms. We had desks, with pen and ink, to record the important principles and authorities. The practice [of the professor] was to read the principle from his own manuscript twice distinctly, pausing between, and repeating in the same manner

[6] *Ibid.,* 204.

[7] James Gould, "Law School at Litchfield" (Editor's Introduction), Boonshoft, "The Litchfield Network," 569.

[8] Timothy Dwight, *IV Travels in New England and New York*, 295 (1823).

[9] Hicks, *The Litchfield Law School,* 13.

> the leading cases. Then we had time to note down the principle and cases . . . After the lecture we had access to a law library to consult authorities. The lecture and references took about two hours. Those of us who were in earnest, of whom I was one, immediately returned home, and copied out into our lecture-books all the principles and cases.[10]

The curriculum was organized into thirteen main divisions, with subjects including contracts, real property, domestic relations, "municipal law," and criminal law (constitutional law was later added but considered a minor subject). Strategically, Reeve and Gould chose not to publish their lectures, so as to keep students incentivized to pay tuition and attend class. And the notebooks kept by students would prove valuable in practice, essentially becoming a kind of practice manual at a time when relatively few legal treatises and reports existed.

In addition to their times attending lectures, transcribing notes, and reading law books, Litchfield featured weekly moot court competitions as well, allowing students the opportunity to apply their knowledge of the legal principles they covered in lectures to actual fact patterns and thus demonstrate their analytical and advocacy skills.[11] Students also had opportunities to attend actual court sessions at the nearby courthouse in Litchfield, where they could see Reeve, Gould, and other leading members of the bar in action. When Reeve was on the bench, students could also observe and learn.

Litchfield's formalized curriculum and national perspective, well-developed law library, and organized pre-professional activities like moot court helped it attract a geographically diverse and intellectually accomplished student body. As Harvard Law School professor Joel Parker would later remark in 1871,

> Probably no law school has had—perhaps I may add never will have—so great a proportion of distinguished men on its catalogue, if for no other reason, because attendance upon a Law School was then the rare exception, an advantage obtained in general only by very ambitious young men.[12]

Despite Litchfield's achievements and influence, change was inevitable. It was hastened not just by Tapping Reeve's retirement, but also by competition. By the mid-1820s, students had more options for legal education, as both Harvard and Yale offered a law curriculum similar to Litchfield's. The University of Virginia had established a "department" of law in 1819, creating an alternative for the Southerners who had comprised a significant percentage of Litchfield's student body. And with Litchfield alumni helping to found the Cincinnati Law School in 1833, students in the Ohio Valley and points further west had an alternative. Another factor for Litchfield's decline was increased proliferation of legal treatises and printed court reporters beginning in the late 1820s and early 1830s. Finally, for many aspiring lawyers, the traditional path of an apprenticeship simply made more economic sense and offered the opportunity for becoming socialized into the culture of the local bar where they would be practicing.

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[10] Deering, *Personal Memories,* 127–28.

[11] Hicks, *The Litchfield Law School,* 40–49.

[12] Joel Parker, *The Law School of Harvard College* 8 (1871).

Lacking the resources and support that affiliation with a university would have provided, and without any succession plan that extended beyond Tapping Reeve and his protégé James Gould, Litchfield shut down in 1833. However, its mark upon the American legal profession as well as politics had been indelibly etched, and as we shall see, its alumni would even have an impact on the birth of the Republic of Texas.

II. GONE TO TEXAS

As it was for so many others from all walks of life, the territory that would become Texas represented a land of unparalleled opportunity for the handful of Litchfield law graduates who chose to seek their fortune out west.[13] For Stephen Cleaveland of Vermont, Texas was a means of long-distance enrichment. Cleaveland, born in 1792 to a blacksmith/Revolutionary War veteran also named Stephen and his wife Hannah (Huntingdon) Cleaveland, fought in the War of 1812. Cleaveland attended Litchfield in 1816 and 1817 before apprenticing with Judge George Bloom of Poughkeepsie, New York. By 1818, Judge Bloom and the young lawyer from Vermont had formed a partnership.

The firm prospered and its clientele eventually included the governor of New York, a Vice President of the United States, and a U.S. Supreme Court Justice. By 1830, Cleaveland's ventures had expanded to include journalism, and he became the owner and editor of the *Poughkeepsie Gazette*. But Cleaveland saw that the real money was to be made in land speculation, particularly in Texas. In 1834, Cleaveland and several partners[14] organized the Trinity Land Company, a venture aimed at colonizing an area near the Trinity River. With the help of their land agent—Sam Houston—Cleaveland and his partners acquired 142 leagues of land (approximately 620,000 acres) from the Mexican government.[15] Cleaveland and his partners then sold certificates to individual subscribers. These "scrips" entitled the bearer to take possession of an undefined parcel of land. The result was a bubble that enriched Cleaveland and his fellow organizers of the Trinity Land Company, as prospective settlers anticipated a rise in land value if Texas were to someday gain its independence.

As it turns out, Cleaveland was wise not to personally join the expedition of those subscribers who purchased parcels from the Trinity Land Company. On May 28, 1834, a party of seventy-two men, women, and children sailed from New York to Galveston Bay on the small schooner *Climax*. After landing at Anahuac, the colonists journeyed over a hundred miles inland up the Trinity to what is now Polk County in search of their future farming tracts. Disease, coastal fevers, and other dangers of the arduous trek exacted a fearsome toll, and by fall, only nine of the would-be pioneers survived.[16]

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[13] Alumni information and geographical data is based on the Litchfield Historical Society's *Litchfield Ledger*, which permits researchers to "browse students by name; dates of attendance; hometown; later residence(s); or profession." It contains information on 936 individuals.

[14] These partners included Gilbert Thompson, James Prentiss, Henry Bowdoin Prentiss, and James' son, James Henry Prentiss. Andreas V. Reichstein, *Rise of the Lone Star: The Making of Texas* (Jeanne R. Wilson, trans. 1989); Margaret S. Henson, *Trinity Land Company*, *Handbook of Texas Online*., https://www.tshaonline.org/handbook/entries/trinity-land-company.

[15] Hicks, *The Litchfield Law School,* 141.

[16] *Ibid.,* 142.

James Prentiss and other investors made claims under the terms of the Convention of 1839 between Mexico and the United States to settle debts owed to residents of each nation for property injuries due to governmental action. It is unclear whether Cleaveland was a party to this, but in 1841, Prentiss retained attorney Richard S. Coxe to present an inflated claim for $1,315,416 for attempting to place 125 people on the 142 leagues of land. Although that claim was denied, in 1851 a different commission awarded the sum of $63,559. Stephen Cleaveland, however, never saw any of that money. On January 3, 1847, he died in Poughkeepsie, New York—never having set foot in Texas.

For other Litchfield law graduates who did make it to Texas, the hazards of the frontier were very real, indeed. Epaphras Wells Bull of New Milford, Connecticut attended Litchfield just as his father had, completing his studies in 1826 at the age of 21. By age twenty-five, wanderlust led him to leave his Connecticut law practice and head south. Although it is unclear when Bull arrived in Texas, it is known when his days ended. According to Litchfield's alumni records, Bull was killed by Native Americans there in 1840.[17]

Eli Harris Baxter, Sr.

Eli Harris Baxter, Sr. took a more circuitous path to Texas, but left more of a legacy. Born in Georgia in 1799, Baxter attended the Litchfield Law School in 1818 before returning to his home state and embarking upon a legal career. He also entered politics, serving in the Georgia House of Representatives in 1823–1824, and in the Georgia Senate from 1832 to 1834. Baxter married Julia Richardson, and in 1837, they had a son, Eli Harris Baxter, Jr. The senior Baxter later became a judge, serving on the Northern Circuit Court of Georgia from 1849 to 1853. He returned to politics after leaving the judiciary, resuming his seat in the Georgia Senate from 1855 to 1856. His son Eli entered the U.S. Military Academy at West Point in 1853, but left after a year and later enrolled in law school at the University of Virginia.

Eli Harris Baxter, Jr.

By 1857, both father and son had decided to move to Texas. They purchased a plantation in Cherokee County. In 1858, Eli Harris Baxter, Jr. established a law practice in Marshall (Harrison County).[18] The following year, he won election to the state legislature. Baxter was initially against secession from the Union, but after the decision to secede had been made, he swore loyalty to the Confederacy. After continuing his service in the legislature in 1861, Baxter accepted a captain's commission with the 28th Texas Cavalry in May 1862.

[17] Epaphras Wells Bull, "Litchfield Ledger," *Litchfield Historical Society*, https://ledger.litchfieldhistoricalsociety.org/ledger/students/461.

[18] Aragorn Storm Miller, "Eli Harris Baxter, Jr. (1837–1868)," *Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/baxter-eli-harris-jr.

Baxter rose to the rank of colonel and soon took command of the regiment. He commanded the 28th Cavalry for the duration of the war, seeing action in Texas, Arkansas, and Louisiana. After the unit's surrender in Austin in May 1865, Baxter moved to Houston and resumed the practice of law. Earlier that year, in January, Baxter, Sr. passed away at the age of sixty-six. Eli Harris Baxter, Jr. would not be so long-lived; in December 1868, Baxter died in Belleville at the age of thirty-one. He is buried at Glenwood Cemetery in Houston.

Eli Harris Baxter, Sr. used his Litchfield education as a springboard to a distinguished legal and judicial career in Georgia. In the twilight of his career, and at the dawn of his son's, Baxter moved to Texas. There, in a career cut short by war and an early death, Eli Harris Baxter, Jr. followed in his father's footsteps as both a lawyer and legislator.

III. HORATIO BIGELOW, THE LONG EXPEDITION, AND THE FIRST TEXAS REPUBLIC

On May 30, 1790, Abraham Bigelow and his wife Hepsibeh welcomed the birth of a son, Horatio. Young Horatio was afforded every privilege, spending his prep school days at Exeter before graduating from Harvard in 1809. He went on to complete his legal studies at Litchfield in 1810. In 1812, Bigelow married Anna Maria Ripley, with whom he would have two children. Despite his legal education, Bigelow eschewed the practice of law for a career in journalism. In 1813, he became editor of *The Boston Daily Advertiser*, the first successful daily newspaper in Boston.[19]

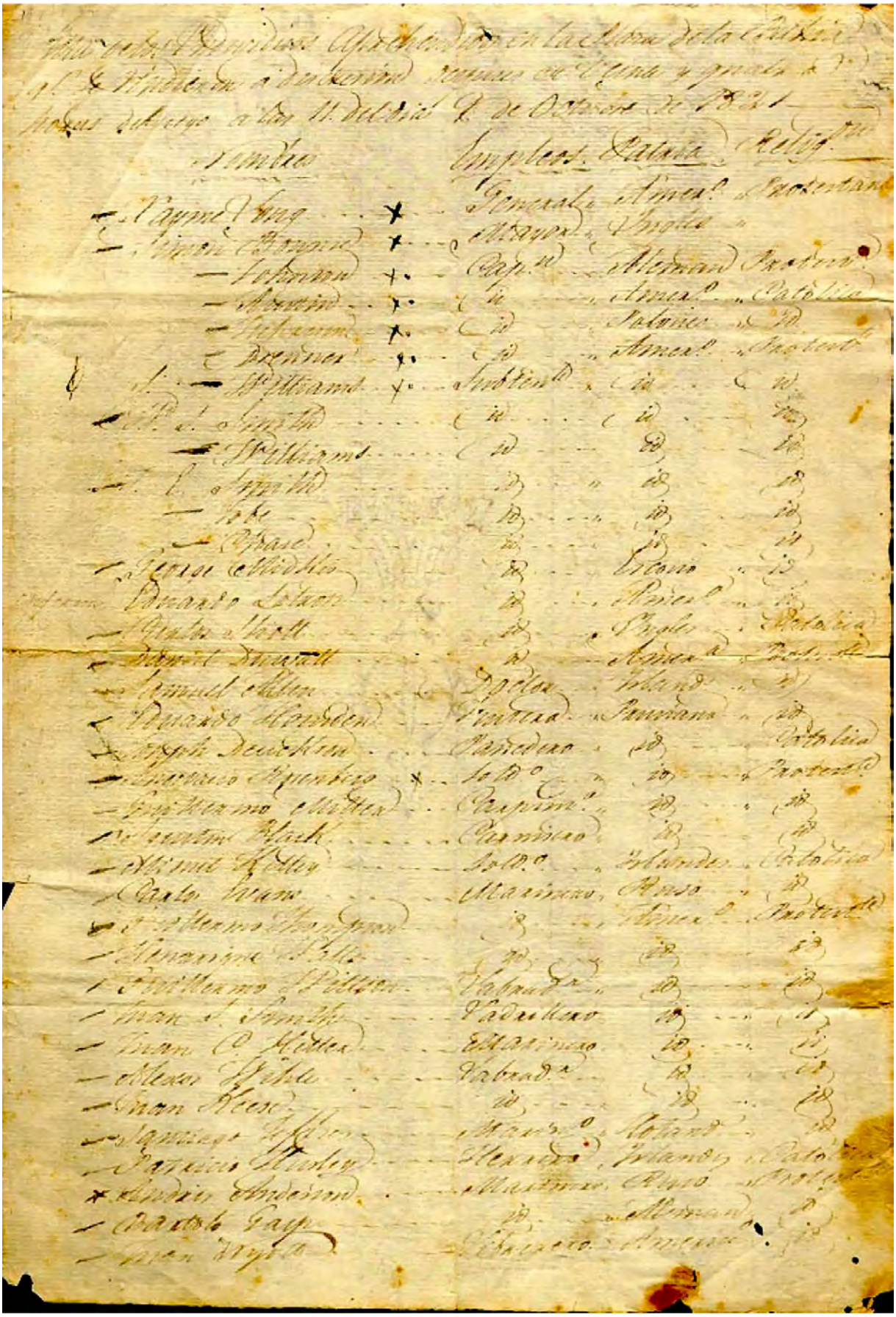
But in 1816, tragedy struck. Anna Bigelow died, and the young widower was left emotionally adrift, with two children to raise. Despondent, Bigelow relocated his family to New York. There, from 1817 to early 1819, he worked with Orville Holley editing the *American Monthly Magazine and Critical Review*. Soon, however, the restless Bigelow found a new challenge as he joined the latest in a series of "filibustering" expeditions to Texas—the Long Expedition.

Beginning in 1800, various groups of Americans attempted "filibustering," or freebooting, expeditions into Texas to seize land. The United States and Spain attempted to end these bloody clashes with the negotiation of the Adams–Onis Treaty in 1819, which finally settled the border between the United States and Spanish Texas. However, there were still many who were displeased with the treaty, viewing it as a concession to the wishes of a foreign power. Natchez, Mississippi was a hotbed for those opposed to the treaty, and there a group formed that would mount one last filibustering campaign—the short-lived "Long Expedition" that would set up a "Republic of Texas."[20]

The expedition was led by Dr. James Long, a Natchez doctor and merchant who was married to the niece of General James Wilkinson (who had been involved with previous border disputes between the United States and Spain). Financed with the aid of subscriptions promising a league of Texas land to each soldier, the expedition initially attracted about two hundred recruits. An advance force of 120 men led by Eli Harris arrived in Nacogdoches after crossing the Sabine River on June 8, 1819. Long arrived on June 21 with another eighty men; the ragtag force would eventually total roughly three hundred soldiers.

[19] Horatio Bigelow, "Litchfield Ledger," *Litchfield Historical Society*, https://ledger.litchfieldhistoricalsociety.org/ledger/students/297.

[20] *See, e.g.*, John Henry Brown, *Long's Expedition* (1930); Harris Gaylord Warren, *The Sword Was Their Passport: A History of American Filibustering in the Mexican Revolution* (1943).



James Long Expedition list

Flag of the Long Expedition

Under Long's leadership, the filibustering Americans based in Nacogdoches declared an independent "Republic of Texas" on June 23, 1819.[21] Long formed a provisional government with himself as President and Commander of the Army, aided by a "Supreme Council" of advisers. This "Supreme Council" included José Bernardo Gutiérrez de Lara (a veteran revolutionary who had previously commanded the Republican Army of the North); Vicente Tarin (another anti-Spanish resistance leader in Texas); Stephen Barber; John G. Burnet; Hamilton Cook; J. Child; Pedro Procella; W.W. Walker; Peter Samuel Davenport (a wealthy partner in the trading cartel that held a Spanish-sanctioned monopoly on trade with Texas Native American tribes, and who had also been the chief quartermaster of an earlier filibuster, the Gutiérrez-Magee expedition); and Dr. John Sibley, the longtime U.S. Indian agent in the region whose correspondence with Thomas Jefferson helped shape U.S. government policy regarding Texas.[22]

The "Supreme Council" also included the Litchfield-trained Horatio Bigelow, a newspaperman now seeking his fortune in Texas. The extent of the role played by Bigelow is unclear, although he was an original signatory to the fledgling government's Declaration of Independence. He also took part in the Supreme Council's vote to award ten parcels of land to each private in Long's "army" and to sell other parcels of land. Perhaps the most significant contribution Bigelow made was to publish the *Nacogdoches Texas Republican*, believed to be the earliest newspaper established in Texas.[23] It began publishing on August 14, 1819, but the newspaper was short-lived; it ceased publication sometime in September. Indeed, no copies of this newspaper survive, and historical knowledge of it is limited to records and accounts from contemporary New Orleans and St. Louis newspapers. In its brief existence, the *Nacogdoches Texas Republican* and its editor Horatio Bigelow performed a vital role for the infant "Republic of Texas." It conveyed the amounts of land available and the pay offered to those willing to serve in Long's army, along with vivid descriptions of Texas life, natural resources, terrain, and wildlife.

Jean Laffite

Long's "Republic of Texas," like Bigelow's newspaper, was short-lived. Long had grandiose plans and traveled to Galveston in hope of enlisting military and naval support from pirate leader Jean Laffite. Laffite's reaction was lukewarm at best, even though the Supreme Council, on October 8, 1819, proclaimed Laffite the "governor" of Galveston Island. The Council also declared Galveston a port of entry and authorized the construction of a fort at Point Bolivar.[24] However, without the tangible support he'd sought

[21] Wallace L. McKeehan, "Last Filibuster into Spanish Texas—Dr. Colonel James Long," *Sons of Dewitt Colony, Tex.*; http://www.sonsofdewittcolony.org/Spain3.htm.

[22] *Ibid.*

[23] *See, e.g.*, Joe B. Fuantz, *Newspapers of the Republic of Texas* (unpublished master's thesis, University of Texas, 1940); Marilyn M. Sibley, *Lone Stars and State Gazettes: Texas Newspapers Before the Civil War* (1983).

[24] Brown, *Long's Expedition*, 182.

from Laffite, Long had little choice but to divide his forces as they foraged for food. By late September, Spanish Governor Antonio Maria Martinez sent five hundred men under the command of Colonel Ignacio Pérez to drive the Americans out. The Spanish column moved slowly, destroying small outposts of Long's forces on the Brazos and Trinity rivers and scattering or capturing the survivors. Pérez and his soldiers pressed on inexorably, reaching Nacogdoches on October 28, 1819, and driving the American would-be colonists from east Texas by the end of November. Pérez followed a "scorched earth" strategy, destroying all traces of settlement. According to one of Pérez's reports, "I burned 30 habitations . . . They left large crops of corn, potatoes, pumpkins, and various other vegetables, gangs of hogs, and flocks of fowls . . . I left nothing which might possibly serve in [the] future."[25]


Antonio Maria Martinez

Long fled to New Orleans, desperate for help and support. In New Orleans, Long and his Supreme Council lured former U.S. Army General Eleazar W. Ripley out of retirement with the promise of being named the Republic's new president and commander-in-chief. Ripley apparently went to work with the pen rather than the sword, drawing up detailed plans for trade, manufacturing, agriculture, roads, bridges, canals, and even culture. However, Ripley never came to Texas (his son did, eventually fighting for Texas independence and dying in the Goliad Massacre in 1836). Long was also introduced to others resisting Spanish rule, including people like José Felix Trespalacios, Ben Milam, and John Austin.[26]


Eleazar W. Ripley

Long established a base of operations at Point Bolivar near Galveston. In 1820, he made another change in the aspiring republic's leadership, naming José Trespalacios (then exiled in Cuba) president of the Republic of Texas and Bernardo Gutiérrez vice president. Long's relationship with Trespalacios did not last, however. Long and a force of fifty-two men sailed to Matagorda Bay and traveled inland, capturing La Bahía (Goliad) in the fall of 1821. There, Long learned that Mexico had declared its independence from Spain. Long's victory at La Bahía was short-lived; within a matter of days, he and his men were captured by Spanish forces under the command of Colonel Pérez.


Agustín de Iturbide

After being marched to San Antonio as prisoners, Long and his men were eventually transferred to Mexico City. There, they were held captive for six months, as Emperor Agustín de Iturbide assumed control of Mexico after signing the Treaty of Cordoba on

[25] McKeehan, "Last Filibuster," 21.

[26] *Ibid.*

August 24, 1821, and formalizing Mexico's independence from Spain. Long, however was shot and killed by a Mexican guard under unusual circumstances (official Mexican government accounts call the shooting accidental, but some evidence points to the involvement of Long's former ally Trespalacios, who had been named governor of Texas and who likely viewed Long as a threat).[27]

At least one historian identifies Horatio Bigelow as a member of Long's Goliad force who was captured with him, imprisoned in Mexico City, and eventually released. That same source mistakenly claims that Bigelow returned to Nacogdoches, where by 1829 he became involved with the publication of another early Texas newspaper, the *Nacogdoches Mexican Advocate*. However, there are significant problems with this theory. The first is that Horatio Bigelow's name is conspicuously absent from a Spanish language document in the Nacogdoches Archives which lists all of those captured at La Bah*í*a, by name ("nombre"), rank or occupation ("empleo") country of origin ("patria") and religion.[28] The second problem is that the *Nacogdoches Mexican Advocate*, which began publishing on September 4, 1829, was actually established by Milton Slocum, identified as "a native of Massachusetts, but late of Louisiana, and a printer by profession," who was twenty-six years old.[29]

The third and probably most significant problem with the theory that Horatio Bigelow was captured with Dr. James Long in October 1821 and later started a newspaper in 1829 is that it's impossible. Sometime in 1820 (likely coinciding with the success of Spanish forces pushing members of the Long Expedition out), Bigelow moved to New Orleans, where he published *The Literary and Political Register*. According to Litchfield alumni records and other sources, Bigelow remained in New Orleans until his death in March 1824.[30]

The failure of the Long Expedition signaled the end of the filibustering era in Texas history. The fleeting creation of a "Republic of Texas" in 1819 has been relegated to the dustbin of history, as historical scrutiny of the birth of Texas has been largely devoted to Mexican control over the colonization efforts and the success of Moses Austin and his son Stephen in using the empresario system to establish the first successful Anglo American colony in Texas. The contributions of Horatio Bigelow, Harvard graduate and a Litchfield-trained lawyer, transcend his participation as a member of Long's "Supreme Council" and his scrawled signature on a "Declaration of Independence" that is a pale harbinger of the document that Texas' founders would sign at Washington-on-the-Brazos in March 1836. Bigelow's place in state history as the first to publish a newspaper in Texas is secure, and worthy of greater recognition.

IV. HERMAN B. MAYO AND THE FREDONIAN REBELLION

Horatio Bigelow was not the only Litchfield graduate to help ignite the spark of Texas independence. Herman B. Mayo was born in South Carolina in 1804, but shortly thereafter his parents relocated to the north. Mayo received most of his education in Philadelphia, but deciding

[27] *Ibid.*

[28] "Lista delos Yndividuos Aprehendidos en la Plaza de la Bahía, q. se ríudieron a discrecion despues de veinte y quatro horns de fuego a las 11 del dia 9 de Octobre de 1821," *Nacogdoches Archives Transcripts, Tex. St. Library & Archives* (James Long Expedition List, Oct. 9, 1821).

[29] Eugene C. Barker, "Notes on Early Texas Newspapers, 1819–1836," 21:2 *Southwestern Hist. Quarterly* 129–30 (Oct. 1917).

[30] Horatio Bigelow, "Litchfield Ledger," ; *see also New Orleans: A Literary History* (T.R. Johnson ed. 2019).

to make the law his career, he then attended the Litchfield Law School. While the records are unclear as to his specific dates of attendance (one introduction says he may have begun his studies at the age of thirteen, which seems doubtful), we do know that he completed his studies in 1821.[31]

After Litchfield, Mayo returned to Philadelphia to practice with a prominent attorney (and future Congressman) Horace Binney. But Mayo soon moved on, relocating to New Orleans to study the civil code. His two years of practice in Louisiana were so fruitful that he was appointed as judge of a local state court. However, due to declining health, Mayo decided to leave both his judicial office and the state itself, and so he moved to Texas in 1825, either together with his brother John Mayo or joining him there.[32]

Horace Binney

Texas would prove life-changing for the young Litchfield-educated lawyer. There he met the woman who became his wife, Elizabeth Turner Edwards. Elizabeth's father was Haden Edwards, an empresario who had received a land grant from the Mexican government on April 15, 1825. The boundaries of his grant included "south to within ten leagues of the Gulf of Mexico, east to twenty leagues west of the Sabine River, fifteen leagues north of Nacogdoches, and west to the Navasota River."[33] While the land was attractive to settlers, to the north were Cherokee Indians displaced from their ancestral lands in the southeastern United States. Along the grant's southwest border was Stephen F. Austin's colony. The contract with the Mexican government called for Edwards to organize a militia, personally settle at least one hundred families before petitioning the government for a land commission to distribute land titles, and to respect all existing land titles and governmental positions.[34] This included the elected alcalde and ayuntamiento in Nacogdoches. Per additional terms of the contract, Edwards stood to profit considerably if he were able to introduce eight hundred families. He would have received 184,320 acres of land, as well as roughly $440,000 in administrative fees—a potential profit of over $1.3 million. To realize this incentive, however, Edwards had to achieve this eight hundred family milestone within six years.[35]

Haden Edwards

From the beginning, Edwards experienced problems with his land grant, including tensions with the alcalde in Nacogdoches and questions about land ownership within the granted area. Concerned that the alcalde of Nacogdoches, Luis Procela, and its

[31] Herman B. Mayo, "Litchfield Ledger," *Litchfield Historical Society*, https://ledger.litchfieldhistoricalsociety.org/ledger/students/7863.

[32] *Ibid.*

[33] Joe Ericson & Carolyn Ericson, *Personalities on the East Texas Frontier: Brief Narratives of Their Lives and Times* (1998).

[34] Haden Edwards Colonization Contract, Apr. 15, 1825, in the Robert Bruce Blake Research Collection, Vol. XI, 23–25 (Special Collections, U. Tex. at Arlington).

[35] *Ibid.*

síndico (clerk) José Antonio Sepulveda, were forging land titles, Edwards sought to influence the next round of local elections for militia captain and alcalde. Edwards was dealt a blow when Sepulveda was elected captain of the militia. However, in the election for alcalde, Edwards' handpicked choice, Chichester Chaplin (an Irish immigrant married to another of Edwards' daughters) won a disputed (and possibly rigged) election over Samuel Norris. Both candidates claimed victory, though Chaplin moved quickly to take control of the office and the town archives. In reality, many of the votes cast for Chaplin were by recent settlers who were not yet eligible to vote, and Edwards lacked the legal authority to call an election for a new alcalde.[36]

Chaplin's election was overturned by Mexican authorities and Norris was installed as alcalde.[37] On March 3, 1826, Edwards—determined to do something about at least one of the recent elections—called for a new election of the captain of the militia, hoping to oust Sepulveda.[38] At the same time, friction continued to escalate as Edwards and Norris continued to clash over the resolution of land ownership disputes. The bitter dispute eventually reached Victor Blanco, governor of the state of Coahuila y Tejas. Swayed by Norris' reports blaming Edwards for the unrest and accusing Edwards of fomenting revolution against Mexico, on October 2, 1826, Governor Blanco informed Edwards that his contract had been cancelled and that he and his brother Benjamin had been ordered to leave the country.[39]

Edwards, believing the authority he had been promised had been usurped, did not go quietly. On November 22, 1826, a group of thirty-six armed men loyal to Edwards rode into Nacogdoches and arrested Samuel Norris, José Antonio Sepulveda, and several others.[40] As a prelude to trying Norris and Sepulveda, a "Committee of Arraignments" was formed, consisting of Will Liyon, John Frith, and the trained lawyer and former judge, Herman B. Mayo.[41] The court was convened, with Martin Parmer serving as presiding judge, and Burrell Thompson, John S. Roberts, William Jones, and John W. Mayo serving as the panel. Oddly, Herman Mayo—seemingly the logical choice as judge due to his legal training and judicial experience—only served in the capacity of "trial clerk."[42] It is quite possible that the court members were chosen more for their perceived loyalty to Haden Edwards than any other quality, but it is still odd that the colonist arguably best suited for the role of judge (and who was also Edwards' son-in-law) did not play a larger role.

The charges against Norris included oppression and corruption, extortion, treachery, inciting murder, and exceeding his authority. Sepulveda faced charges of forgery, theft, treachery, swindling, and "possessing a character of notorious infamy."[43] On November 26, the court found both men guilty and "worthy of death," but commuted the sentences to denying each man the ability

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[36] Joe Ericson & Carolyn Ericson, *Spoiling for a Fight: John S. Roberts and Early Nacogdoches*, 34 (1989).

[37] *Ibid.,* 65.

[38] Notice by Haden Edwards, Mar. 3, 1826; manuscript in the Haden Edwards Papers, Box 5, Folder 9 (East Tex. Research Ctr., Stephen F. Austin St. U., Nacogdoches, Texas).

[39] Ericson & Ericson, *Spoiling for a Fight*, 70.

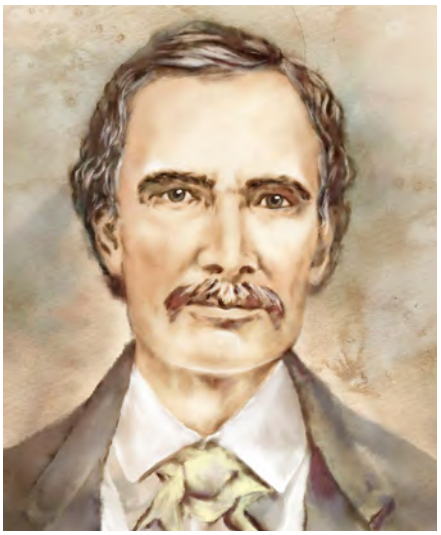
[40] John Wesley Strunc, *Independence, Liberty, and Justice: The Birth, Life, and Death of Haden Edwards' Fredonian Rebellion* 40 (unpublished master's thesis, U. Tex. at Arlington, 2009).

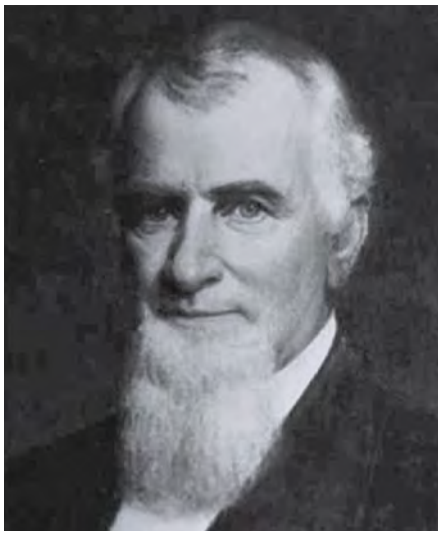
[41] *Ibid.,* 42.

[42] *Ibid.*

[43] *Ibid.*

to ever hold public office again. Joseph Durst, another Edwards ally, was temporarily appointed alcalde. And so, the Fredonian Rebellion began—not with gunfire, but with a legal proceeding of dubious authority. On December 16, 1826, Benjamin Edwards rode into Nacogdoches at the head of another armed group, and raised a white and red flag while proclaiming "Independence, Liberty, and Justice." Believing that the best way to salvage his investment was to break with the Mexican government that had revoked his contract, Haden Edwards declared himself commander-in-chief of the new Republic of Fredonia. On December 21, the fledgling government signed a treaty of alliance with the Cherokee; on behalf of the Republic of Fredonia, the treaty was signed by not only its leader Haden Edwards, but by attorney Herman B. Mayo as well.[44] Stephen F. Austin was appalled at the alliance, finding it shocking that Edwards and his followers would "league with barbarians and join a band of savages in a war of murder, massacre, and desolution [sic]."[45]


Martin Parmer


Benjamin Edwards


Stephen F. Austin

On December 25, 1826, the rebellious colonists issued a Declaration of Independence, accusing the Mexican government of "repeated insults, outrages, and oppressions" directed against "white and red immigrants from the United States."[46] Among the members of the Committee of Independence who signed this Declaration were Cherokee leaders—a surprising and historic development. Herman B. Mayo, Litchfield-trained lawyer and former Louisiana judge, was also one of the signatories.

The Mexican government wasted no time in assembling and dispatching troops. Stephen F. Austin attempted to act as peacemaker and intermediary, urging friends in Nacogdoches to renounce the rebellion. After a peace delegation failed, Austin realized that remaining on the sidelines much longer could endanger the standing of other Texans in the eyes of the Mexican authorities. On January 22, 1827, Austin issued a proclamation to his colony, accusing Edwards of inciting the local Indians and ordering that the militia be called up to aid Mexican forces in putting down the rebellion.[47]

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[44] *Ibid.,* 50.

[45] Stephen F. Austin to Burrell J. Thompson, Dec. 24, 1826, *in The Austin Papers*, Vol. 1, 1539 (Eugene C. Barker ed. 1924).

[46] Joe Ericson, *The Nacogdoches Story: An Informal History*, 42 (2000).

[47] Owen P. White, *Texas: An Informal Biography*,58 (1945).

Knowing that support from outside the Nacogdoches area would be needed, Herman B. Mayo and Benjamin Edwards embarked upon a letter-writing campaign—the 1827 equivalent of a media blitz—seeking to rally support and arguing that the Fredonians were as justified in their revolt as the patriots of the American Revolution against Great Britain. And fresh from a year marking the 50th anniversary of the Declaration of Independence, that message resonated with some U.S. newspapers, who published some of the open letters that played on patriotic sympathies and characterized the Mexican government as oppressive and unjust.

But close to home, the response to Edwards' call for support was underwhelming, perhaps due to fears of Mexican reprisal or discomfort with the alliance with Native Americans. Settlers in other colonies, including Austin's, adopted resolutions denouncing the Fredonian rebellion and re-affirming their loyalty to the Mexican government. Shortly thereafter, Austin and others were successful in convincing the Cherokee leaders and other Native Americans to abandon the alliance with Edwards and the Fredonians. A force of armed settlers from the Ayish Bayou region defeated a group of Fredonian rebels in January, taking one hundred prisoners in the process. Realizing the Cherokee alliance had been broken, other settlers were rising up against them, and the Mexican military was advancing, Haden Edwards and a small group of remaining followers abandoned Nacogdoches and headed toward Louisiana. On February 1, 1827, loyalist settlers regained control of Nacogdoches, and they were joined a week later by around 360 Mexican troops and an additional 150 volunteers from the Ayish Bayou region.[48]

Stephen F. Austin convinced Mexican authorities to offer amnesty to all rebels except for Haden and Benjamin Edwards, Martin Parmer, and Adolphus Sterne (who had supported the uprising). Civil authority was reinstated, Samuel Norris was restored as alcalde (although he was removed from office six months later), but Mexican troops remained in Nacogdoches until March. They would later return on a permanent basis. Only nine Anglo Americans were ever arrested for supporting the rebellion, one of whom was Mayo's brother John. But only one person (not Mayo) was ever tried, and that defendant's death sentence was commuted. Haden Edwards eventually returned to Texas in 1835, and promptly resumed land speculation. He died in Nacogdoches on August 14, 1849.[49]


Adolphus Sterne

Herman Mayo initially relocated to Jackson, Mississippi, where he became a newspaper editor. In 1831, he moved to Ohio. In 1849, he moved into education, co-founding the Oxford Female Institute. After returning to Philadelphia for a period of time, Mayo resumed his law practice and in the 1860s even served as a probate judge. He died in McArthur, Ohio on March 5, 1877.[50]

Interestingly enough, the Fredonian Rebellion in which Mayo had actively taken part as a young lawyer helped bring about the Texas Revolution that occurred only nine years after Haden

[48] Strunc, *Independence, Liberty, and Justice*, 62.

[49] *Ibid.,* 71.

[50] Herman B. Mayo, "Litchfield Ledger."

Edwards' ill-fated effort was quelled. Despite the loyalty of Austin and others, Mexican trust of Anglo Americans in Texas had been severely damaged. Although the armed rebellion had quickly collapsed, the Mexican government realized that a better armed and organized effort would have been harder to defeat. Mexican authorities began dispatching more troops, cavalry, and artillery units to Texas. And in its Law of April 6, 1830, the Mexican government adopted measures intended to tighten its grip on Texas, including increased oversight over the empresarios, increasing Mexican settlement in the region, banning the importation of slaves into Texas, and prohibiting settlers from adjoining countries into any province bordering that country.[51] That last measure, while not naming the United States, was clearly aimed at restricting American immigration. While it was probably too late—by 1835, there was an estimated 30,000 colonists from the United States in Texas, as opposed to just 7,800 from Mexico—the Law of April 6, 1830, only fanned the flames of the colonists' distrust of Mexico. That simmering distrust would boil over as the Texas Revolution approached.

V. CONCLUSION

As other scholars have noted, the ranks of the heroes of Texas' revolution and the architects of the Republic of Texas included many lawyers.[52] Most of these lawyer/revolutionaries had followed the then-conventional path to the legal profession, in which formal legal education was absent and knowledge was gained through an apprenticeship steeped in "reading the law." And while historians have acknowledged the role that filibustering campaigns like the Long Expedition and efforts at open revolt like the Fredonian Rebellion played in paving the way for what would happen in 1836, until now, the participation of lawyer/colonists had gone unnoticed. Not only did these lawyers share a legal acumen and revolutionary spirit that those who followed in 1836 would display, but people like Horatio Bigelow and Herman Mayo received their legal training under the same system that produced leaders like Aaron Burr and John C. Calhoun. In its brief existence, Litchfield Law School was a training ground for not only a young nation's most accomplished lawyers, but for two Vice-Presidents, fifteen governors, twenty-eight U.S. Senators, one hundred members of the U.S. House of Representatives, and three U.S. Supreme Court Justices as well. Litchfield also nurtured and launched the legal careers of men who would make their mark on what would eventually become the Republic of Texas, men who helped light the torch of rebellion and who helped draft and sign the "Declarations of Independence" long before a similar declaration would be signed at Washington-on-the-Brazos.

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[51] *Documents of Texas History 66–67* (Ernest Wallace & David Vigness eds. 1960).

[52] *See, e.g.*, Dylan O. Drummond, "The Toughest Bar in Texas: The Alamo Bar Association, Est. 1836," *Texas Supreme Court Historical Society Journal*, (Winter 2014).

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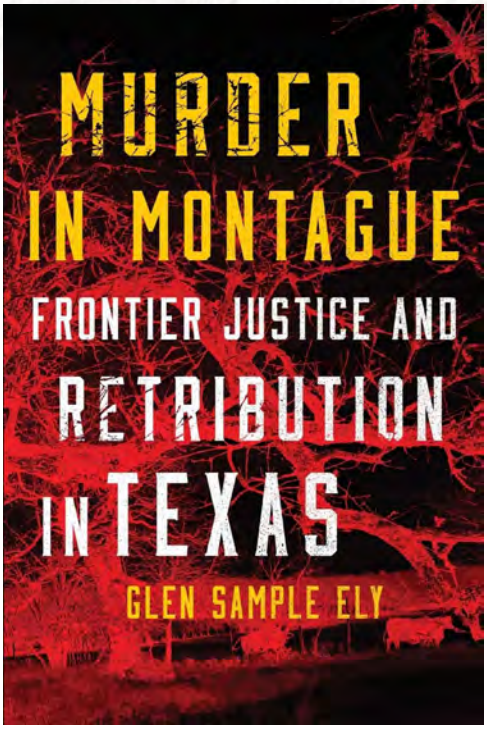
Book Review—*Murder in Montague: Frontier Justice and Retribution in Texas* by Glen Sample Ely

By Hon. John G. Browning

If the true crime podcasts that are currently all the rage existed in 1876, the case of the murder of Montague minister William England and his family would set new audience records. In his book *Murder in Montague: Frontier Justice and Retribution in Texas*, award-winning author and historian Glen Sample Ely weaves a compelling, intricate tapestry that is part legal history, part whodunit, and part human tragedy. In a relatively slim (108 pages, apart from notes and bibliography) volume, Ely recounts how these murders spawned a legal saga that would eventually involve five trials (at Montague and Gainesville), five trips to the Texas Court of Appeals, and five Texas governors. In doing so, Ely's book provides a revealing look at a Texas case that bridged the transition from post-Civil War days of frontier justice and vigilantism to a modern criminal justice system.



Murder in Montague: Frontier Justice and Retribution in Texas by Glen Sample Ely (University of Oklahoma Press, 2020), 151 pages

The book begins with the brutal murders on August 26, 1876, of William England, his wife Selena, and two of Selena's three children from her first marriage, thirty-three-year-old Isaiah Taylor and twenty-one-year-old Susie Taylor (a third child, twenty-seven-year-old Harvey Taylor, escaped) by three masked assailants. A mortally wounded Selena lingered for more than a day before succumbing to her wounds and gave several deathbed interviews in which she identified one of the attackers as a neighbor, Ben Krebs. Krebs seemed as likely a suspect as any, since a month before the killings, he had a threatening altercation with Rev. England over the England's hogs allegedly ruining Krebs' crops. The altercation had escalated, and England filed aggravated assault charges. Krebs was arrested for the murders along with his sixteen-year-old brother-in-law Aaron Kendrick Taylor and a friend James Preston. An investigation revealed circumstantial evidence—three sets of tracks leading from the England residence to a field fifty yards from Krebs' home, a bloody shirt found at Krebs' home, along with a Colt Navy revolver recovered there as well. However, with forensic science being virtually nonexistent at the time and no apparent motive for Krebs' purported accomplices, the case was far from rock solid. Nevertheless, between 1876 and 1877, all three defendants were convicted; Krebs and Preston

were sentenced to death, while the teenaged Taylor was sentenced to life at hard labor.

In an exhaustively researched work that draws upon everything from courthouse records and trial transcripts to government archives and contemporary newspaper accounts, Ely reconstructs the case's path through the Texas court system. Along the way, he enlightens the reader about the vigilante "justice" of Texas' bloody past, the evolution of the law governing dying declarations, the uncertainties of judicial decision-making, and even a young, ambitious district attorney (named Matlock, but lacking the downhome charm and savvy of the television counterpart) who may very well have courted favor with a vigilante group. In pointing to other potential suspects, Ely isn't quite able to solve the crime, but he raises some serious doubt about the convictions he describes as a miscarriage of justice.

Glen Ely's *Murder in Montague* captures a Texas in transition from the days of frontier justice and is raw and unflinching in its portrayal. It is a worthy addition to the bookshelf of any student of the Lone Star State's complicated legal history.

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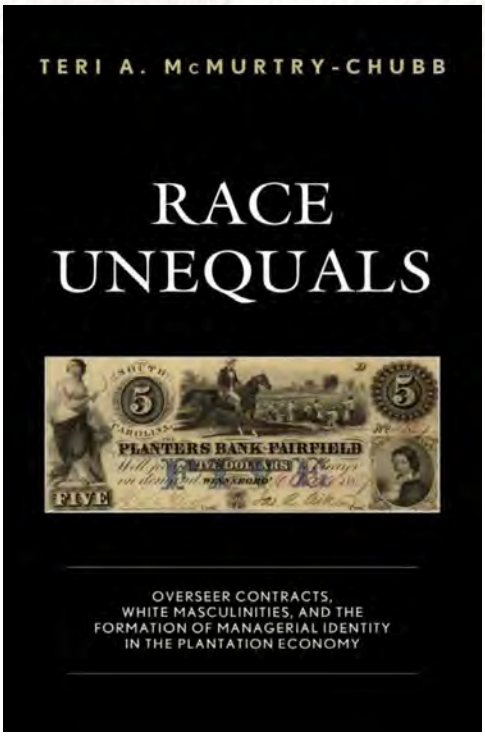
Book Review—*Race Unequals: Overseer Contracts, White Masculinities, and the Formation of Managerial Identity in the Plantation Economy* by Teri A. McMurtry-Chubb

By Hon. John G. Browning

Legal historians have drawn upon a seemingly endless variety of primary source materials in the course of their research. I recently read of a historian in Maryland whose discovery of forgotten steamship passenger ticket receipts from the late 19th century yielded valuable insight into early efforts at challenging the discriminatory policies of common carriers in that state. In her groundbreaking work *Race Unequals*, University of Illinois-Chicago Law School Professor Teri McMurtry-Chubb mines a rich and overlooked vein for her observations about the public and private law framework that governed the antebellum South's plantation economy: the employment contracts between plantation owners and their overseers. As Prof. McMurtry-Chubb reveals, examination of these contracts reveals that the white male identity of the South was hardly as monolithic as it is often depicted, but rather was constantly being contested, reshaped, and compromised. These contracts provide a lens through which we witness how one of this country's first classes of managerial-level workers came to be, and how plantation owners carefully cultivated and controlled the upward mobility of this class of people as though they were a cash crop.



Race Unequals: Overseer Contracts, White Masculinities, and the Formation of Managerial Identity in the Plantation Economy by Teri A. McMurtry-Chubb (Lexington Books, 2021), 148 pages

Though slim at 148 pages, Prof. McMurtry-Chubb's work is meticulously researched. One particular revelation is the extensive body of statutory law (particularly legislation passed by governing bodies in Mississippi, Georgia, and Alabama) that governed the duties owed by enslavers to those they enslaved, purporting to ensure "some measure of humanity" as they governed treatment and punishment. The contracts held by the overseers themselves, as well as court cases involving alleged breaches of them, are equally illuminating: as the author observes, plantation owners used these contracts to "perpetuate the myth of paternalism, because overseers took on statutory and contractual obligations that allowed them to be punished for the mistreatment of the enslaved." In one case that reached the Arkansas Supreme Court, for example, the court balanced an overseer's claims for unpaid wages against the owner's defense that he was entitled to damages for the value of a slave killed by the overseer. As Prof. McMurtry-Chubb explains:

> Courts sanctioned the everyday violence of plantation management, necessary for cotton production and the continuance of the global plantation economy. Civil lawsuits to recover damages for injury to or for the deaths of enslaved were decided in favor of overseers, as long as their punishment of the enslaved was not in excess of punishments common on plantations.

Prof. McMurtry-Chubb draws upon not only the overseer contracts and pertinent court records, but also contemporary plantation management manuals, as she skillfully shines a light onto the "plantocracy" of antebellum Southern plantations. Yet in revealing the complexities of the past, she does not neglect the present—deftly drawing parallels between the managerial position of the overseer (and the "fear of violence, surveillance, and degradation" it evoked in enslaved persons) and the overseer imagery and language that is still invoked today by African American plaintiffs in employment discrimination litigation.

Race Unequals is elegantly written, thoroughly researched, and incisive in its analysis. Beyond that, it is revelatory even for those steeped in antebellum Southern history.

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Our Society Presents the "Lives and Legacies of Texas' Earliest Black Lawyers" at TSHA's 126th Annual Meeting on Saturday, February 26, 2022

By David A. Furlow

The Society will present a special panel-program at the Texas State Historical Association's 126th Annual Meeting. It will begin promptly at 9:00 a.m. and end at 10:15 a.m. on Saturday, February 26, 2022 in Room #101 of the AT&T Executive Education and Conference Center. Members of the Society are welcome to attend. Anyone who wishes to attend should (1) email Society Administrator Mary Sue Miller at tschs@sbcglobal.net by Friday, February 18 to request a TSHA panel-program registration and (2) arrive by 8:30 a.m. at the AT&T Conference Center, Room #101 by 8:50 a.m. The conference center is at 1900 University Ave, Austin, Texas 78705, at the south entrance to The University of Texas at Austin.

Our Society's program will be an important part of the annual meeting. Activities will begin on Wednesday, February 22nd and continue through Saturday the 26th. Our Society's session title is "We Stand on Their Shoulders: The Lives and Legacies of Texas' Earliest Black Lawyers." The Society encourages members to register for the conference at: https://am.tsha.events/

Tom Leatherbury, the Society's President, will introduce the panel using an introductory PowerPoint. The Hon. John G. Browning will serve as the panel's first speaker. His presentation will be "William A. Price: From a Legacy of 'Firsts' to a Civil Rights Milestone." The Hon. Carolyn Wright, the former Chief Justice (ret.) of the Texas Fifth District Court of Appeals in Dallas, will then present her program "John N. Johnson: Texas' First Civil Rights Lawyer." I will present a short Commentator's PowerPoint to comment on those two presentations and direct audience questions to the speakers. The Society will provide additional information, during the weeks before the conference begins. *See* https://am.tsha.events/sessions/we-stand-on-their-shoulders-the-lives-and-legacies-of-texas-earliest-black-lawyers/

The program will occur in the AT&T Center. Photo courtesy of TSHA.

A wide variety of panel programs about every aspect and era of Texas history are scheduled to occur from Thursday morning, February 24 through Saturday afternoon, February 26, 2022. In addition to our Society's session, TSHA's annual meeting features the Women in Texas History Luncheon at noon on Thursday, February 24 (https://am.tsha.events/sessions/women-in-texas-history-lunch/), the President-Elect's Reception Honoring Lance Lolley at 6:30 p.m. that same night (https://am.tsha.events/sessions/president-elect-reception-honoring-lance-lolley/), a Book Lovers and Texana Collectors Breakfast at 7:30 a.m. on Friday, February 25 (https://am.tsha.events/sessions/book-lovers-and-texana-collectors-breakfast/).

The 2022 Texas State Historical Association Awards and Fellows Lunch will be held at noon on Friday, February 25, 2022 (https://am.tsha.events/sessions/2022-texas-state-historical-association-awards-and-fellows-lunch/). An award of the Larry McNeill Research Fellowship in Texas History (https://www.tshaonline.org/awards/larry-mcneill-research-fellowship-in-texas-legal-history) will occur during the 2022 Awards and Fellows Lunch.

Anyone interested in booking a room at the AT&T Hotel and Conference Center can do so by visiting https://book.passkey.com/go/TSHAMT0222. There are two parking areas available, at the AT&T Conference Center and across the street at the Bob Bullock State History Museum.

Please come join us for what's going to be an exciting and important program about the legal history this Society preserves, protects, and shares with the world.

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The Hemphill Dinner:
A Season and a Time for Every Purpose

By David A. Furlow

Fans of the 1960s musical group the Byrds, may recall the lyrics of the 1965 song *Turn! Turn! Turn!* Pete Seeger wrote for the group.

> *To everything (turn, turn, turn)*
> *There is a season (turn, turn, turn)*
> *And a time to every purpose, under heaven.*

For the first time, members of the Society walked past a North Pole Village before they descended the Four Seasons' staircase to attend the Society's annual showcase event. The Hemphill Dinner's time came at last on Friday, December 3, as autumn turned into the holiday season.

Four Seasons gingerbread architecture.
Photo by David A. Furlow.

This past year, waves of the Covid-19 virus's Delta variant compelled the Society to postpone the Hemphill Dinner from its traditional first Friday in September to the first Friday in December. But the silver lining was a cool outdoor reception on the Four Seasons' patio.

Left: Chief Justice Wallace Jefferson (ret.) mingled with Society members. Right: Texas Supreme Court Justice Paul Green (ret.) and Society Trustee Mark Trachtenberg enjoyed the patio reception.
Photos by David A. Furlow.

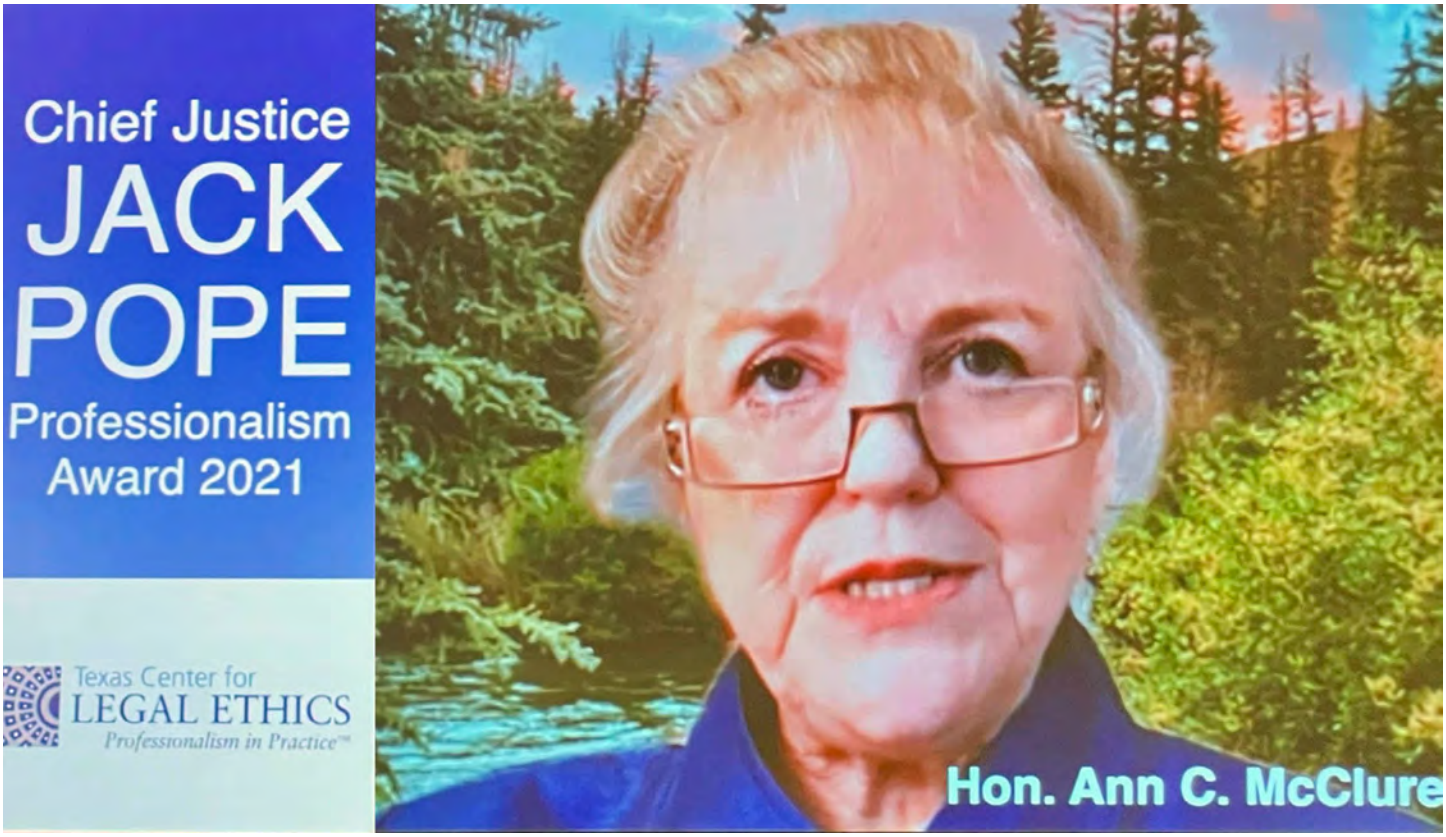
Left to right: Fifth Circuit Judge Jennifer Elrod, Judge Priscilla Owen, and Judge Carolyn King.
Photo by Mark Matson.

The evening opened as an honor guard brought an American and a Texas flag to the front of the banqueting hall. Fifth Circuit Judge and Society Trustee Jennifer Elrod opened the evening by presenting a rousing rendition of the National Anthem. Society President Cynthia Timms introduced the evening's guests, including Texas Supreme Court Chief Justice Nathan Hecht. Chief Justice Hecht introduced the two most recent members of the Court—the Hon. Justice Evan Young and the Hon. Justice Rebeca Huddle.

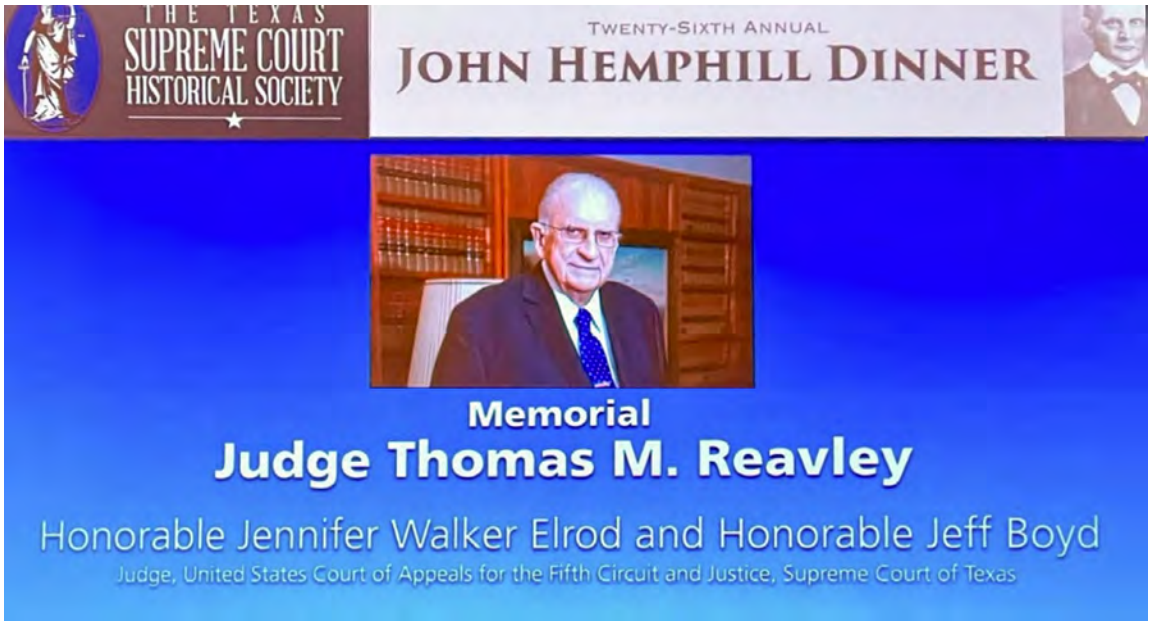
A mainstay of each Hemphill Dinner is the Texas Center for Legal Ethics' presentation of the Chief Justice Jack Pope Professionalism Award. The Center confers the award on the judge or attorney who best personifies the highest standards of professionalism and integrity in appellate law. This year, Jonathan Smaby, the Center's Executive Director, presented the award to former El Paso Court of Appeals Chief Justice the Hon. Ann Crawford McClure (ret.). Chief Justice McClure served on the committee that drafted the Texas Standards for Appellate Conduct, the first ethical guidelines in the U.S. promulgated to apply to appellate lawyers. As the only sitting appellate justice on that committee, she played an active role in drafting the guidelines. She then led the El Paso Court of Appeals to adopt those standards and authored the first appellate opinion citing them as legal authority. Because her health did not permit her to attend the Hemphill Dinner live, the Society played her pre-recorded acceptance speech. In that speech, Justice McClure shared valuable stories and insights. She also served as Chair of Texas's Council of Chief Justices.

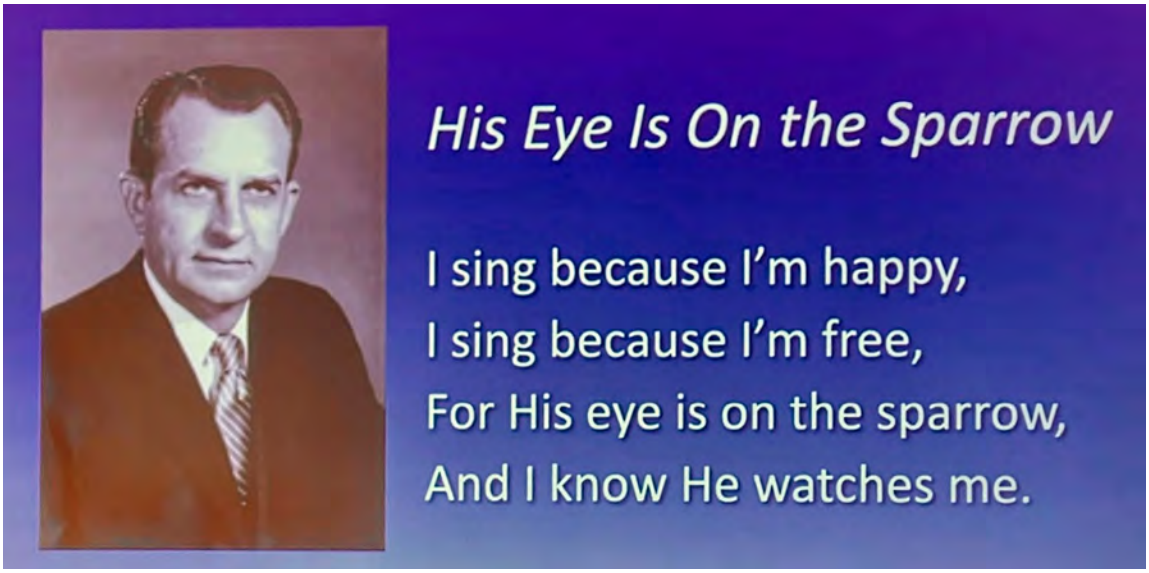
Clockwise from top left: Chief Justice Nathan Hecht, foreground, and Immediate Past President Cynthia Timms, background; Justice Rebeca Huddle; Jonathan Smaby, Executive Director, Texas Center for Legal Ethics; Society Trustee, and new Texas Supreme Court Justice, Evan Young. Photos by Mark Matson.

The Society posthumously saluted the lives of four distinguished Texas jurists by announcing their election to the Texas Appellate Hall of Fame during the Hemphill Dinner: the Hon. Royal H. Brin, Jr. (1919-2020): the Hon. Frank G. Evans, III (1928-2019); the Hon. Samuel D. Johnson, Jr. (1920-2002); and the Hon. Thomas Morrow Reavley (1921-2020).



Top: Former Chief Justice McClure addressed Hemphill Dinner attendees by video. Photo by David A. Furlow. Bottom: Fifth Circuit Judge Priscilla Owens and Texas Supreme Court Chief Justice Nathan Hecht watch Justice McClure's video-speech thanking the Society for awarding her the 2021 Chief Justice Jack Pope Professionalism Award.





The Society marked the passing of Judge Reavley who loved the hymn "His Eye Is on the Sparrow."

Photos of PowerPoint slides by David A. Furlow.

Born on June 21, 1921 in Quitman, Texas Tom Reavley earned a Bachelor of Arts degree from The University of Texas in 1942. He answered his nation's call by serving as a lieutenant in the U.S. Navy from 1942 through 1946, during the Second World War. He entered Harvard Law School afterwards and earned his Juris Doctorate in 1948. Reavley worked as a prosecutor in Dallas. He entered private practice in Nacogdoches, and in 1951 served as Nacogdoches County's County Attorney before practicing law in Lufkin and Jasper. He served as Texas Secretary of State, from 1955 through 1957. His judicial career began in 1964 when he first served as a district court judge in Austin. Governor John Connally appointed him to serve as an associate justice of the Texas Supreme Court; voters repeatedly re-elected him. He also served as a special judge on the Texas Court of Criminal Appeals. President Jimmy Carter nominated Reavley to a newly created judgeship on the U.S. Court of Appeals for the Fifth Circuit in 1979, where he served until taking senior status in 1990. Judge Reavley married Fifth Circuit chief judge Carolyn Dineen King in 2004; making them the first married couple ever to serve together on a federal appellate court.

President Lyndon Baines Johnson considered Judge Reavley a friend. Photo of PowerPoint slide by David A. Furlow.

A special highlight of this year's Hemphill Dinner was hearing Fifth Circuit Judge Jennifer Elrod and Texas Supreme Court Justice Jeff Boyd sing Judge Tom Reavley's favorite hymn "His Eye Is on the Sparrow." Judge Elrod told about how she sang that song to Judge Reavley every year on his birthday while they served together on the Fifth Circuit.


Justice Jeff Boyd and Fifth Circuit Judge Jennifer Elrod sing "His Eye Is on the Sparrow," in honor of his contributions to justice. Photo by Mark Matson.

This year's keynote speaker was "SCOTUS Legend" and veteran U.S. Supreme Court practitioner Lisa Blatt, who appeared through a video interview conducted by Immediate Past President Cynthia Timms. The Timms interview covered Lisa Blatt's experiences as an attorney advocating clients' cases in the U.S. Supreme Court and her personal reminiscences of clerking for Justice Ruth Bader Ginsburg, then serving on the U.S. Court of Appeals for the D.C. Circuit.

Lisa Blatt (left) interviewed on video by Cynthia Timms. Photo of the screen by David A. Furlow.

Warren Harris discussed the Society Fellows' Taming Texas program that has funded the publication of three textbooks for 7th Grade Texas History students. Those volumes chronicle the history of the Rule of Law and of the Texas judiciary. During the past six years, lawyers and judges serving as volunteers have taught 21,000 students about the Rule of Law and the Texas judiciary in Society-sponsored classes in Houston and Dallas.

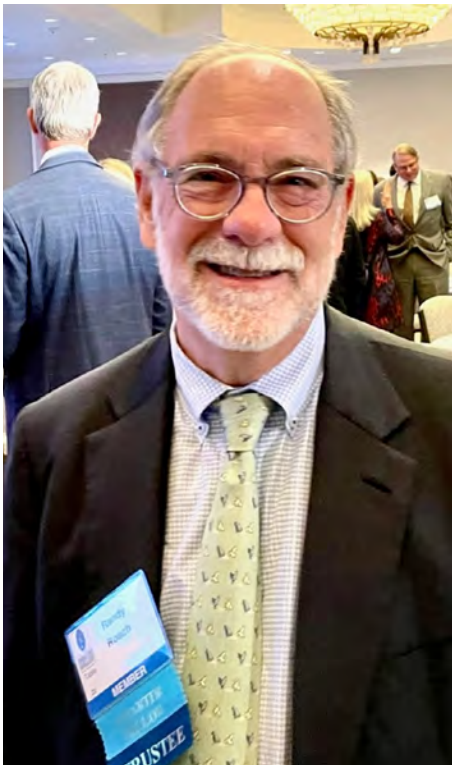
Every president of the Society receives an opportunity to recognize the person who has personally contributed most to the Society during the previous year. This year, Immediate Past President Cynthia Timms conferred the annual award on Stephen P. Pate in gratitude for his service as the Journal's Senior Articles Editor, his presentation on a 1928 Texas election scandal that went to the U.S. Supreme Court at the Texas State Historical Association's 2021 Annual Meeting, and his many publications of scholarly articles about Texas and federal legal history.

Warren Harris, a former President of the Society, shared news about the *Taming Texas* program during his Recognition of the Fellows. Photo by Mark Matson.

Cynthia Timms presents the 2021 President's Award to Society Trustee and *Journal* Executive Articles Editor Steve Pate. Photo by Mark Matson.

The evening ended with Texas Supreme Court Justice Jane Bland's investiture of Tom Leatherbury as the Society's new President. Photo by Mark Matson.

Top, left to right, Jennifer Freel, former Society President Marcy Hogan Greer, and Jane Webre. Bottom: Immediate Past President Cynthia Timms, Hemphill Dinner Chair Trustee Alia Adkins-Derrick, and Society's Executive Director Sharon Sandle celebrated the Hemphill Dinner's successful return. Photos by Mark Matson.



Clockwise from upper left: Houston Court of Appeals Conclave—Fourteenth Court of Appeals Justice and President-Elect Ken Wise and First Court of Appeals Justice April Farris; Society Trustee Randy Roach; Former Texas Supreme Court Justice Craig Enoch and his wife Kay; State Bar of Texas Director Lucy Forbes. Photos by David A. Furlow.

After the President's Award ceremony, the Hon. Texas Supreme Court Justice Jane Bland swore into office the Society's 2021-2022 President, Tom Leatherbury. Mr. Leatherbury, Director of the new First Amendment Clinic in Southern Methodist University's Dedman School of Law and a partner in Vinson & Elkins' Dallas Office.

After the end of the speeches and ceremonies, the Society's members took the opportunity to meet, break bread, catch up on each other's careers and children, and share ideas about cases, arguments, and vacations. During the previous twenty-one months of the Covid pandemic, the Society's judges, justices, attorneys, historians, and State Bar employees had come to miss the camaraderie that is the essence of the annual Hemphill Dinner. Vaccinations, boosters, and social distancing made it possible to get together again on the eve of the holidays. This past December, the beginning of the holiday season was the right time for 228 members of the Society to enjoy one another's company at one of the best Hemphill Dinners ever.

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Welcome to the New Villa de San Felipe de Austin

Article and photos by David A. Furlow

The Texas Historical Commission and the Friends of the Texas Historical Commission hosted a Grand Opening of their new Villa de Austin Townsite Exhibit on November 12, 2021. I attended the Grand Opening so I could report on a reconstructed village. The reconstruction of the Courthouse is complete. The entire Villa, or village, offers a wonderful venue to learn about Texas history. Like the on-site museum and visitors' center that preceded it, the Villa de Austin will prove invaluable in teaching students, lawyers, judges, and historians about one of the most important places in Texas' legal history.

Alamo defender William B. Travis practiced in a law office in Villa San Felipe de Austin. He tried cases in the original courtroom and represented Cecelia, a wrongfully-enslaved African American woman Travis sought to free through judicial manumission.[1] Cecelia had many descendants, including Bobby Byars, the mayor of San Felipe de Austin, who spoke about the importance of

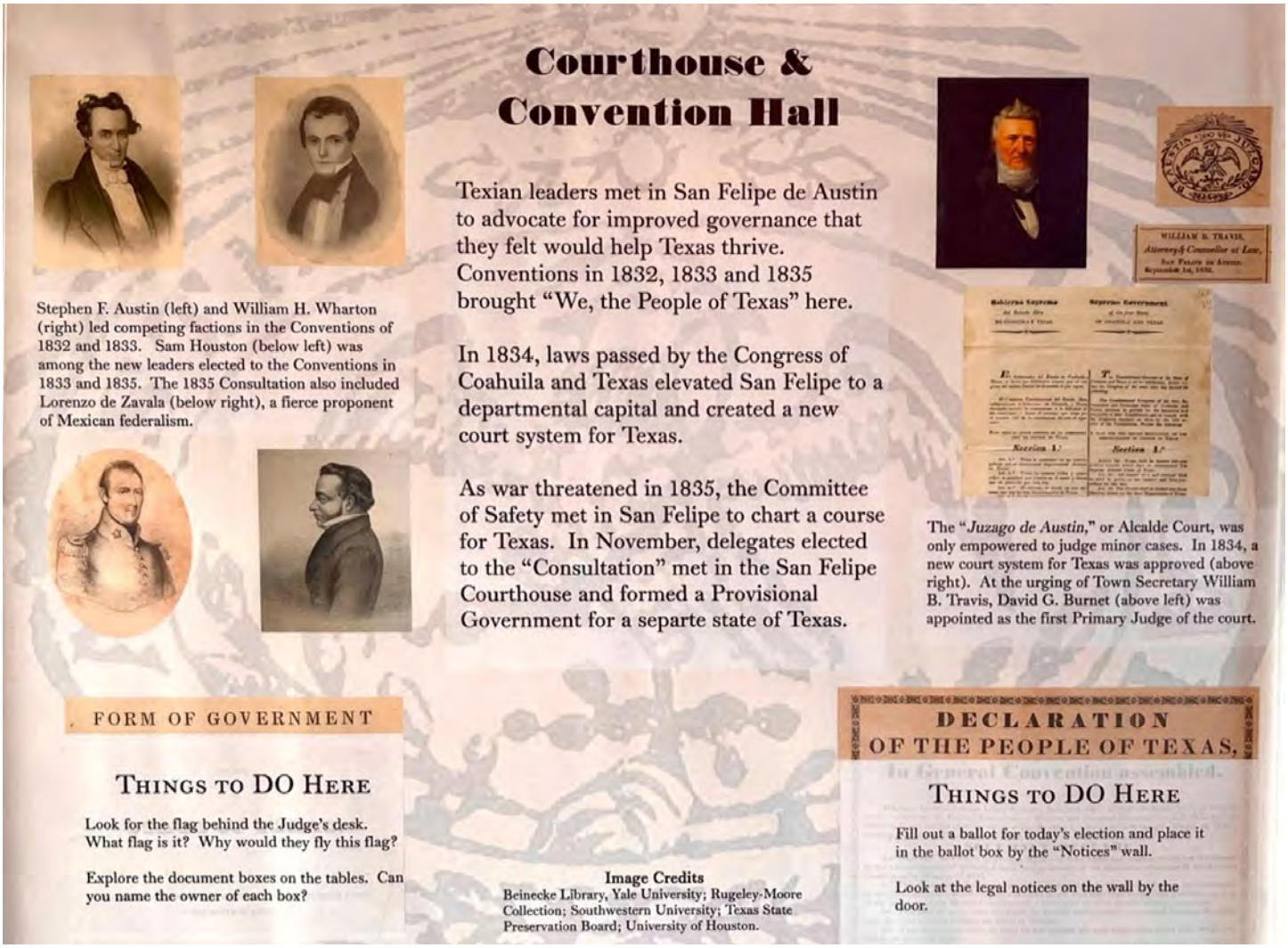
[1] Michael Rugley Moore, "Celia's Manumission and the Alcalde Court of San Felipe de Austin," *Journal of the Texas Supreme Court Historical Society*, vol. 5, no. 1 (Fall 2015): 36-48, https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Fall%202015.pdf.

the site at its Grand Opening. Another four San Felipe aldermen joined in the celebration, as did Austin County Judge Carolyn Bilski, many Texas Historical Commission officials, and a host of volunteers and donors from the Friends of San Felipe.

THC Site Manager Bryan McAuley began by thanking everyone who supported the project and reminded visitors that San Felipe is pronounced “San Philip.” He thanked TCH Commissioner John L. Nau, III for orchestrating the project on a state-wide level and for emphasizing that reconstruction of a historic site enables people to see and feel the Texas of a bygone era.

Texas State Senator Lois Kolkhurst celebrated the Grand Opening. “What a great day to celebrate Texas history…Sites like this are who we are.” She then turned to THC Historian Michael R. Moore. “Thank you for your perseverance.” She told how Moore left his job at the George

Top: Texas Historical Commission San Felipe de Austin Site Manager Bryan McAuley (light grey suit, center), THC Historian Michael R. Moore (navy coat and tan slacks), and others attended the ribbon-cutting ceremony that opened the Villa. Bottom left: Texas State Senator Lois Kolkhurst and, to her right, Michael R. Moore, spoke at the Grand Opening. Bottom right: Bobby Byars, Mayor of San Felipe, spoke about his family’s descent from Cecelia, the enslaved African American woman William B. Travis represented in a San Felipe de Austin alcalde court.



Museum over a decade before and organized Texas Parks and Wildlife volunteers. Senator Kolkhust hailed the life-long love of history and decade-long devotion that made possible Moore's opening of the Villa de San Felipe.

Michael Moore declared that the Villa reflects an effort to nurture buildings and a community of people who want to preserve these traditional buildings and other skills and make a new kind of "history-mindedness" possible. "The buildings are here now, and it looks like the project is over, like it's open, like we're finished. But in fact this is just the theater, this is just the stage. And what we're really preserving are stories, and experiences and skills, and traditions… *Either we as young children encounter history in tangible ways that stick with us—or we don't, and it doesn't.* I hope this is a place that children, young people, can come, get away from their phones, and their computers. And engage with the past, and hopefully it begins to let them see what the past was like, and experience it."

Because of San Felipe's importance to the history of Texas courts, law, and justice, this Society conducted its Spring 2018 Board and Members Meeting at San Felipe. Historic Site Director Bryan McAuley and Historian Michael R. Moore then spoke to Society members about the alcalde court cases tried in San Felipe. They revealed plans to reconstruct the Villa de San Felipe

de Austin township that opened this past November. Before and since that time, the Society and Trustees such as President-Elect Justice Ken Wise have worked closely with the Texas Historical Commission representatives to research and present Texas legal history at the site.[2] The museum, just three years old, offers historians, attorneys, judges, teachers, and students an opportunity to view historic artifacts from some of the first law offices, businesses, and printing presses in the Mexican twin-state of Coahuila y Texas.

The Courthouse and Convention Hall is central to the new Villa de Austin exhibition center. The most impressive structure in town, it shows how justice was administered in San Felipe de Austin between the town's founding and its burning on March 30, 1836. Much of the evolution of Anglo-Mexican alcalde law in Stephen F. Austin's Anglo American colony occurred in the Courthouse at Villa de San Felipe.[3] The Courthouse was central to the story told by the Hon. Jason Boatright, Justice of the Fifth Court of Appeals in Dallas and a Society trustee, in a *Journal* article and in his 2018 Texas State Historical Association presentation, "Alcaldes and Advocates in Stephen F. Austin's Colony, 1822 through 1835."[4] The Conventions of 1832 and 1833, David G. Burnet's Primary Court of 1834, and the Consultation of 1835 all occurred inside the original alcalde courthouse in San Felipe.[5] Those gatherings marked the rise of a distinctive Texian identity in Stephen F. Austin's colony and contributed to an independence-minded Tejano movement in San Antonio de Bexar. Texas's provisional government operated here in 1835-1836.

Visitors can also explore more of 1820s and 1830s Texas while walking through other historically accurate period buildings, including the Farmers' Hotel, and the *Texas Gazette* print office. Future events will include archaeologists, historians, and reenactors, as well as demonstrations of such frontier skills as blacksmithing and bread-baking in San Felipe de Austin almost 200 years ago. Bryan McAuley, THC's Site Manager, says that our Society is welcome to return and to conduct another meeting at the new Villa de San Felipe de Austin.

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2 Ken Wise, "New San Felipe de Austin Museum is a State Treasure," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 3 (Spring 2018): 119-23, https://www.texascourthistory.org/Newsletters.aspx?CategoryID=1&PageID=181&DocumentID=37.

3 *See, e.g.,* Jason Boatright, "Alcaldes in Austin's Colony, 1821-1835," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 3 (Spring 2018): 26-50, https://www.texascourthistory.org/Newsletters.aspx?CategoryID=1&PageID=181&DocumentID=37; David A. Furlow, "Texas Law and Courts in the Victorian Age," *ibid*., 9-25 at 9-14.

4 David A. Furlow, "Laying Down the Law at the 2018 TSHA Annual Meeting," *ibid*., 116-118.

5 Charles Christopher Jackson, "San Felipe de Austin, TX," *Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/san-felipe-de-austin-tx; David A. Furlow, "New England Roots Run Deep in Texas: A 400th Anniversary Salute, Part 2," vol. 9, no. 3 (Spring 2020): 27-57, https://www.texascourthistory.org/Content/Newsletters//TSCHS_Spring_2020.pdf

Top left: the burned Courthouse after the April 9, 2021 fire. Photo courtesy of the Texas Historical Commission. Top right: the new courthouse. Bottom: interior of the new building outfitted to resemble a courtroom

Historical re-enactors portray a gambler, above left, and a shopkeeper, above right, in the Villa de San Felipe de Austin's reconstructed Farmers' Hotel.

Left: Celia's Bake-Oven and Kitchen sheds light on the life of Celia, an enslaved woman who worked in a commercial cooking services partnership in the original Villa de San Felipe.

Below: The Austin Academy School represents one of the earliest buildings in Stephen F. Austin's colonial capital. Joseph Pilgrim ran its dirt-floor school.

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President of TSCHS Earns Prestigious Yale Award

On December 1, 2021, at 7:15 ET, our own Texas Supreme Court Historical Society President Tom S. Leatherbury was awarded the coveted Yale Medal. Since its inception, the Yale Medal, the highest honor presented by the Yale Alumni Association, has been presented to more than three hundred individuals who have shown extraordinary devotion to Yale's ideals and demonstrated their support through extensive, exemplary service to the university and its schools, institutes, and programs.

Screenshots from the Yale Medal ceremony

Leatherbury is being recognized for his important impact at Yale both on and off campus. As vice chair and then chair of the Alumni Fund, he directed fundraising priorities and strategy and energized alumni to become involved. He has served on both the Yale Law School Fund Board and the Law School's Executive Committee, as well as serving on multiple other alumni committees. President Leatherbury has advised Yale Law School students through the Media Freedom and Information Access Clinic and been the alumni mentor for the Senior Class Gift Campaign, showing students how they can remain engaged with Yale after their time on campus has ended.

Always a service-oriented leader, Leatherbury remarked, "I'm still finding new ways to serve Yale because Yale gave me and my family so much. And because Yale is such a terrific steward of its resources, truly changing lives all over the world every day."

Find out more about Leatherbury's accomplishments that inspired this prestigious award at the links below:

Yale Medal 2021 Award Page:
https://alumni.yale.edu/news/yale-alumni-qa-2021-yale-medal-honorees

Video of interview with Leatherbury and his colleagues commenting on the award:
https://vimeo.com/showcase/8975866/video/651769925

Q&A with Leatherbury and other recipients of the 2021 Yale Medal:
https://alumni.yale.edu/events/2021-yale-medal-celebration

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TACTAS Honors Former TSCHS President, Lynne Liberato, with its Lifetime of Excellence In Advocacy Award

The Texas Association of Civil Trial and Appellate Specialists (TACTAS) bestowed its "Lifetime of Excellence in Advocacy Award" upon Lynne Liberato, a former president of the Texas Supreme Court Historical Society (TSCHS), before a packed audience at a November 18, 2021 dinner at the Houstonian Hotel in Houston.

Ms. Liberato's exploits as an advocate, bar leader, and community volunteer were celebrated by the two speakers who introduced her: U.S. District Judge David Hittner and legendary trial lawyer Kenneth Tekell. Together, they highlighted Ms. Liberato's accomplishments as a founding member of Haynes & Boone, LLP's appellate section in Houston, her trailblazing contributions to the bar (as the first female president of the Houston Bar Association and the third female president of the State Bar of Texas), her prolific scholarship (for example, her co-authorship with Judge Hittner of "Summary Judgments in Texas"), and her volunteer work to make her community a better place (for example, serving as the chairperson of the board of the United Way of Greater Houston). As president of TSCHS in 2011-12, Ms. Liberato was also instrumental in elevating the profile and work of this organization, including establishing this Journal.

Left to right: Judge David Hittner, Lynne Liberato, Kenneth Tekell

During his introductory remarks, Judge Hittner relayed to the audience a story about how, during a 1993 United States Supreme Court argument, Ms. Liberato's quick-witted response to a jab from Justice Scalia left the justices—and the entire courtroom—in hysterics. Mr. Tekell followed by telling courtroom war stories about the cases he and Ms. Liberato have worked on together.

In her acceptance remarks, Ms. Liberato noted that while there were "virtually no women lawyers a generation above me," she "never suffered for want of mentors and champions," particularly Judge Hittner and Mr. Tekell. She also expressed pride in the great lawyers she has had an opportunity to work with and mentor.

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Investiture of Justice Rebeca Huddle

Left: Justice Huddle speaks at the investiture as Justice Jimmy Blacklock and Justice Jane Bland look on. Right: Justice Huddle and her husband Greg at the reception. Photos by Patricia McConnico.

On December 10, Gov. Greg Abbott swore-in Supreme Court of Texas Justice Rebeca Huddle at an investiture ceremony at the State Capitol. Gov. Abbot praised Justice Huddle's work ethic and keen legal mind: "A first-generation American with an accomplished career in private practice and public service, Rebeca embodies the spirit of Texas and inspires all of us to work hard and achieve our dreams."

Huddle, a native of El Paso, earned her undergraduate degree at Stanford University and her law degree from the University of Texas at Austin. In addition to serving as a Justice on the First Court of Appeals in Houston, she was a litigation attorney at Baker Botts LLC. Her remarkable depth of experience is complemented by her service to the community, her involvement with the bar, and commitment to mentoring young lawyers.

Justice Huddle replaces Justice Paul Green who retired from the bench in August of 2020.

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TSCHS President Receives Tony Mauro Media Lawyer Award

Texas Supreme Court Historical Society President Tom Leatherbury has received the 2022 Tony Mauro Media Lawyer Award from *The American Lawyer*. The award, created in 2019 to mark the retirement of noted legal journalist Tony Mauro (who covered the U.S. Supreme Court for nearly 40 years) was presented at *The American Lawyer* Industry Awards in New York City on December 2, 2021. Leatherbury was chosen for the award on the strength of his lengthy and distinguished career as a zealous advocate for the freedom of the press.

Tom Leatherbury

President Leatherbury's career as a nationally recognized champion of the First Amendment has spanned four decades. He regularly represents both traditional and digital publishers as well as broadcasters in all aspects of media litigation, encompassing libel, privacy issues, reporter's privilege, newsgathering, and access actions. In addition to leading Vinson & Elkin's Appellate Practice group, President Leatherbury gives back to the legal community by serving as the Director of the First Amendment Clinic at SMU Dedman School of Law. Leatherbury was also recently appointed to the Texas Access to Justice Commission. Of his work in clinical education, Leatherbury observed that "It's really important to me to train the next generation of lawyers, and in particular, to train them in First Amendment values which are so critical to our democracy."

President Leatherbury, who received both his undergraduate and law degrees from Yale, also recently received the Yale Medal for his longtime service to the university—the highest award presented by Yale's Alumni Association. Congratulations, President Tom Leatherbury!

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Editor-In-Chief Wins Award

TSCHS Trustee and Journal Editor-in-Chief John G. Browning recently received the State Bar of Texas Litigation Section's highest honor, the Luther (Luke) H. Soules III Award for Outstanding Service to the Practice. Named in honor of its first recipient, longtime San Antonio lawyer Luke Soules, the award is given annually to an attorney "who embodies excellence in the practice of law and exemplary service to the State Bar," and is designed to recognize Texas legal practitioners who demonstrate outstanding professionalism and community impact. The award was presented on January 14, 2022, at the Litigation Section's annual Litigation Update Institute in San Antonio. Past recipients include former Texas Supreme Court Justice Eva Guzman, U.S. District Judge Royal Furgeson, and Chair of the TSCHS Fellows and Charter Fellow David J. Beck.

Hon. John G. Browning

Letters nominating Browning pointed not only to his distinguished thirty-two years as a litigator and his service as an appellate justice on Texas' Fifth District Court of Appeals, but also to his lengthy career as a noted legal author and his dedication as a longtime bar leader and volunteer. In particular, several nominators pointed to Browning's work in the area of racial justice and honoring the legal history of members of underrepresented communities. In 2020, Browning led the effort that resulted in the posthumous bar admission of J.H. Williams, a Black man wrongfully denied a law license in 1882 on racial grounds. Browning has since been involved in other campaigns around the country to right similar wrongs.

A $1,500 stipend accompanying the award is provided to the charitable organization designated by the award's recipient. Justice Browning has chosen the Texas Equal Access to Justice Foundation to receive this bequest. Browning, a graduate of Rutgers University and the University of Texas School of Law, is a partner at Spencer Fane, LLP in Plano as well as a Visiting Associate Professor of Law at Faulkner University's Thomas Goode Jones School of Law in Montgomery, Alabama.

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THE TEXAS SUPREME COURT HISTORICAL SOCIETY

DISCLAIMER

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

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

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2021-22 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2021, the beginning of the membership year.

TRUSTEE

Kendyl Hanks

Rachel H. Stinson

Brandy Wingate Voss

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2021-22 New Member List

The Society has added 32 new members since June 1, 2021. Among them are 20 Law Clerks for the Court (*) who will receive a complimentary one-year membership during their clerkship.

TRUSTEE

Anthony Arguijo
Allyson Ho
Hon. Michael J. Truncale

CONTRIBUTING

Marshall Bowen
Perry Cockrell
Elizabeth Herrera

REGULAR

Phillip Allen*
Emily Bamesberger*
Sara Baumgardner*
Cece Burbach*
Zachary Carstens*
Randall Chapman
Jennifer Freel
Jackie Furlow
Stephan Hammer
Matthew Hines*
Charlotte Kelly*
Peter Koelling
Jessica Lee*
Travis Maples*
Jacob McIntosh*
Hannah Mery*
Evan Rios*
Katie Ritter*
Hannah Schiffman*
Kavid Singh*
Stephen Snow*
Kaylen Strench*
James Sullivan
Holden Tanner*
Chelsea Teague*
Cody Vaughn*

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Membership Benefits & Application

Hemphill Fellow $5,000

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

Greenhill Fellow $2,500

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

Trustee Membership $1,000

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

Patron Membership $500

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

Contributing Membership $100

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

Regular Membership $50

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

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Membership Application

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