Winner of the American Association for State and Local History's Excellence in History Award

Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Winter 2023 Vol. 12, No. 2 Editor Emerita Lynne Liberato Editor-in-Chief Hon. John G. Browning

Columns

Message from the President

By Hon. Ken Wise

Hon. Ken Wise

I hope everyone had a blessed and happy holiday season. 2023 promises to be an active and important year for the Society. Read more...

Fellows Column

By David J. Beck

David J. Beck

About this time each year, the Fellows gather with the Justices of the Texas Supreme Court for a collegial dinner. Read more...

Editor-in-Chief's Column

By Hon. John G. Browning

Hon. John G. Browning

Short of fighting at the Alamo, William Pitt Ballinger seems to have been everywhere and known everyone in nineteenth-century Texas. Read more...

Leads

William Pitt Ballinger: The 'New South,' Railroads, and the Law

By John Moretta

William Pitt Ballinger

From the end of the Civil War to the beginning of the twentieth century, the United States experienced one of the most profound and rapid economic transformations any nation has ever witnessed. Read more...

The History of the Common Law Right to Privacy in Texas

By John C. Domino

Samuel Warren & Louis Brandeis, who argued for protection for the right to privacy

The right to privacy reflects a fundamental human need to be free from intrusion into the most personal and intimate matters. Read more...

Texans Shortlisted for the U.S. Supreme Court: Why Did Lightning Only Strike Once?

By Hon. John G. Browning

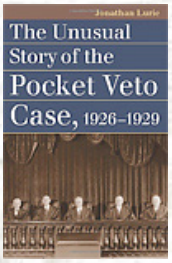
Justice Tom Clark, the only Texan ever on the U.S. Supreme Court

The full history of Texans who were shortlisted for possible nomination to the Supreme Court is both interesting and illuminating. Read more...

Book Reviews

Book Review – *The Unusual Story of the Pocket Veto Case, 1926-1929*

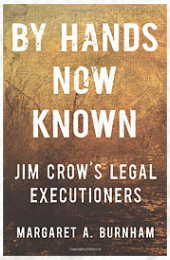
By Matthew Kolodoski



Weaving together history, politics, a bit of intrigue, and statutory and constitutional construction, Professor Jonathan Lurie's book is a vivid tapestry of the struggles faced by six Indigenous tribes to have their day in court. Read more...

Book Review – *By Hands Now Known: Jim Crow's Legal Executioners*

By Hon. John G. Browning



Margaret Burnham offers a searing indictment of the racial violence committed against Black Americans and the legal system's indifference, including the reluctance of federal authorities to interfere in local matters. Read more...

News & Announcements

Society Co-Sponsors the 16th Quadrennial Meeting of the Conference of International Mexican Historians

By Justice Gina Benavides

Conference logo

On behalf of the Society, I attended the XVI Reunion Internacional de Historiadores de Mexico in Austin held October 30 through November 2, 2022.

Read more...

Save the Date: March 2-4, 2023, to see the Society at the TSHA Annual Meeting

Story and photos by David A. Furlow

TSHA logo

Our Society's speakers will present a panel program, "Advancing the Rule of Law along Contested Frontiers."

Read more...

Journal Editor-in-Chief Presents at ASLH Annual Meeting

The subject of Browning's talk, Everett J. Waring

Former Justice John G. Browning recently presented a paper at the American Society for Legal History's 2022 Annual Meeting.

Read more...

Society Trustee Appointed to 5th Court of Appeals

Judge Emily Miskel

Gov. Greg Abbott has appointed Society Trustee, Judge Emily Miskel, to the Fifth District Court of Appeals, Place 13.

Read more...

Voila! The Society Goes International

Story and photos by David A. Furlow

The 1925 All-Woman Texas Supreme Court

The Society is sharing the story of the Texas Supreme Court's 1925 All-Woman Court with history-minded people in France, Germany, Denmark, Belgium, and Switzerland.

Read more...

Membership & More

Officers, Trustees & Court Liaison

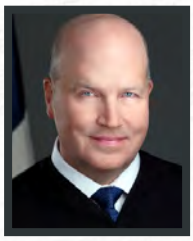
2022-23 Membership Upgrades

2022-23 New Member List

Join the Society

@SCOTXHistSocy

FB: Texas Supreme Court Historical Society



Hon. Ken Wise

Message from the President

Welcome to the Winter, 2023 issue of the *Journal*. I hope everyone had a blessed and happy holiday season. 2023 promises to be an active and important year for the Society.

In this issue we feature an in depth look at influential nineteenth century Texas lawyer William Pitt Ballinger in "William Pitt Ballinger: The 'New South,' Railroads, and the Law" by John Moretta. Ballinger was arguably one of the most important Texan lawyers of his time, and his practice is a window onto the rapid changes and challenges that faced our state in the 1800's.

We also have "Texans Shortlisted for the U.S. Supreme Court: Why Did Lightning Only Strike Once," by John G. Browning. Justice Browning recounts the stories of the Texans who were shortlisted for the US Supreme Court (including William Pitt Ballinger) and explores the question "why has Texas been underrepresented in the U.S. Supreme Court?" This article is timely given the examination of Texas' seemingly outsized influence in other areas of government, which has been the subject of several articles and books on national government.

John Domino, Professor of Political Science at Sam Houston State University, offers us Part one of a two-part account of "The History of the Common Law Right to Privacy in Texas." In this issue he gives a fascinating look at the common law origins of the right to privacy. A close look at the development of the right to privacy in Texan law will appear in our Spring '23 issue.

In this issue, you will also find Matthew Kolodoski's book review of *The Unusual Story of the Pocket Veto Case, 1926-1929* and John G. Browning's review of *By Hands Now Known: Jim Crow's Executioners.* There is also picture-rich coverage of the successful post-pandemic return of the annual Fellows Dinner.

As a reminder, please mark your calendars for the annual Hemphill Dinner on September 8, 2023. Plans are coming together, and I hope to have an announcement on our featured speaker very soon. Thank you for your continued interest and support of the Texas Supreme Court Historical Society.

Return to Journal Index

Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston

One of the benefits of being a Fellow is our exclusive event, the annual Fellows Dinner. About this time each year, the Fellows gather with the Justices of the Texas Supreme Court for a collegial dinner. We always try to choose a unique Austin venue, and the locations for past dinner have included the Blanton Museum of Art, the Texas Lieutenant Governor's private dining room in the State Capitol, the Bullock Texas State History Museum, the Frank Denius Family University of Texas Athletics Hall of Fame, and most recently the Bauer House. The attendees always comment on the dinner's elegance, uniqueness, and fellowship.

The 2023 Fellows Dinner was worth the wait. All of the Justices from the Texas Supreme Court joined the Fellows in January at the historic Bauer House for a wonderful evening of history, dinner, and conversation. The Bauer House is the official home of the Chancellor of the University of Texas System. Chancellor J.B. Milliken and his wife, Nana Smith, were gracious to open their home for us for the evening. The interior of the home is furnished and decorated with items from many priceless antique and art collections of the Harry Ransom Humanities Research Center and the Blanton Museum of Art. Our dinner was held in the home's Charmaine and Frank Denius Pavilion. For many of the Fellows, it was their first time in the Bauer House. We are grateful to Chancellor Milliken for providing this special venue for our dinner.

At the Fellows Dinner we have a tradition of having the wines for the evening provided by Fellows. I would like to thank Hon. Harriet O'Neill and Kerry Cammack, Larisa and Hon. David Keltner, Lauren and Warren Harris, and Randy Roach for providing the evening's special wines.

We appreciate Justice Bland, a Fellow and the Court's liaison to the Society, for coordinating the scheduling of the dinner so that the other members of the Court could attend. The photos below will give you some sense of the evening's elegance, uniqueness, and fellowship.

The Fellows are a critical part of the annual fundraising by the Society and allow the Society to undertake new projects to educate the bar and the public on the third branch of government and the history our Supreme Court. A major educational project of the Fellows is "Taming Texas," a judicial civics program for seventh-grade Texas History classes. The generosity of the Fellows has allowed us to produce three books for this project, with a fourth book, *Women in Texas Law*, to be released later this year. If you would like more information or want to join the Fellows, please contact the Society office or me.

FELLOWS DINNER

January 9, 2023 Photos by Mark Matson

Chief Justice Nathan Hecht, David J. Beck

Chancellor J.B. Milliken, Justice Brett Busby

Justice Debra Lehrmann

Chief Judge Priscilla Richman, Justice Jane Bland, Jennifer Hogan

Justice Jeff Boyd, Fred Hagans

Justice Rebecca Huddle

Chief Justice Nathan Hecht, Marianne M. Auld, Jimmy Coury

Justice Evan Young,
Chief Judge Priscilla Richman

Chief Justice Nathan Hecht, Fred Hagans,
Chief Judge Priscilla Richman, Justice John Devine

Richard P. Hogan, Jr., Warren W. Harris, Justice Jimmy Blacklock,
Lauren Beck Harris, Jennifer Hogan, Chancellor J.B. Milliken

Nubia Devine, Justice John Devine

Marcy Hogan Greer

Warren W. Harris, Jennifer Hogan

Greg Lehrmann, Nubia Devine

Randy Roach, Fred Hagans

David J. Beck

Charmaine and Frank Denius Pavilion

FELLOWS OF THE SOCIETY

Hemphill Fellows

($5,000 or more annually)

David J. Beck*
Joseph D. Jamail, Jr.* (deceased)
Thomas S. Leatherbury
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
Harry L. Gillam, Jr.
Marcy and Sam Greer
William Fred Hagans
Lauren and Warren Harris*
Thomas F.A. Hetherington
Jennifer and Richard Hogan, Jr.
Dee J. Kelly, Jr.*
Hon. David E. Keltner*
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* (deceased)
Reagan W. Simpson*
Allison Stewart
Cynthia K. Timms
Peter S. Wahby
Hon. Dale Wainwright
Charles R. Watson, Jr.
R. Paul Yetter*

*Charter Fellow

Return to Journal Index

Editor-in-Chief's Column

Hon. John G. Browning

The Ubiquitous *Mr. Ballinger*

If you spend any appreciable amount of time in the voluminous Ballinger Papers in the Center for American History at the University of Texas, it is hard not to come away with the impression that William Pitt Ballinger may have been the Forrest Gump of Texas legal history. Short of fighting at the Alamo, Ballinger seems to have been everywhere and known everyone in nineteenth-century Texas. He received the first law license issued by the new State of Texas in 1846; became one of the most successful lawyers of his time; helped negotiate terms of peace for Texas at the end of the Civil War; was offered but declined the Democratic nomination for governor; was nominated to, but later turned down, a seat on the Supreme Court of Texas; and was considered for appointment to the U.S. Supreme Court. Ballinger at times seems like a walking contradiction. He was an ardent Unionist who opposed secession, but once Texas seceded, he did everything he could to support the war effort, and at the end of the Civil War, he was asked to negotiate the terms of Texas' surrender. He cared deeply about public service and the public good, and even had the vision in 1875 to propose the building of Galveston's great seawall—yet he turned down the many offices offered him because of the financial sacrifice acceptance would mean for his family.

As one of the preeminent railroad attorneys in the United States, Ballinger took an active role in the transformation of American tort law in the late nineteenth century. That pivotal part is the subject of one of our articles in this issue, written by Professor John Moretta of Houston, the author of the definitive biography of Ballinger.[1] And as one of the most highly regarded lawyers of his day, Ballinger had a chance to sit on Texas' highest court and, very nearly, this nation's highest court. These fascinating chapters of Ballinger's life, along with the bigger question of why only one Texan has ever graced the U.S. Supreme Court bench, is examined in my article in this issue on "why lightning only struck once." But an equally fascinating chapter in Ballinger's life does not appear in this issue: the story of how Ballinger, a slaveowner, successfully represented Betsy Webster, an enslaved Black woman in 1857 Galveston who had not only been freed by her former master, David Webster, but to whom he'd also bequeathed his entire estate. It is a story worthy of

[1] John Anthony Moretta, "William Pitt Ballinger: Texas Lawyer, Southern Statesman, 1825–1888" (*Tex. State Hist. Ass'n* 2000).

reading about in greater detail, and it is related not only in Professor Moretta's fine book but in a wonderful law review article as well.[2]

David Webster had done well for himself, leaving an estate that included more than 5,000 acres of land throughout Texas as well as a home and multiple town lots in Galveston. He had never married a white woman; however, his neighbors had observed that with Betsy, "the connection between them was for a great number of years of the most intimate character."[3] Webster's will was contested in a suit filed in Galveston District Court in April 1857 by Martha Greenwood, a Webster cousin from New York. Greenwood's attorneys played hardball from the beginning; knowing of Texas' strict removal laws regarding freed Black people, they insisted that Betsy had to either leave the state or be considered a slave if she remained. Knowing that Ballinger had been hired on a contingency fee basis, they accused Ballinger of fraud and forgery for "conspiring" with Betsy to "swindle" Mrs. Greenwood out of her lawful inheritance.

Ballinger's defense of Betsy was not popular among his peers and neighbors, with many believing he had betrayed his "Southern principles." He received hate mail declaring him to be a "disgrace to both your race and your profession"—and worse. Yet Ballinger refused to be deterred by bigotry, confiding in his diary that he would "not permit the wretched thoughts and malevolent deeds of petty and dishonorable people prevent me from doing what I believe to be right."[4]

Ballinger focused his defense on the legitimacy of the will. He won the case and Justice Oran Roberts held that the will made Betsy "a free woman," "legally vested with the property devised to her."[5] Justice Roberts also stated that Ballinger should be vindicated as a "gentleman of the highest honor and integrity," observing that only someone "with highest honor and integrity," and only someone with Ballinger's "legal ability and tact," and "political and moral standing in the community" could have won the case for Betsy in the face of "such public opposition to making slaves free."[6]

Ballinger could have taken the easy way out and declined to champion Betsy Webster's cause. Instead, in the face of heated criticism and risking the loss of his reputation and standing, he chose to do the right thing. As he told his uncle James Love after the trial, "every lawyer, if he is worth his salt, needs to be challenged, legally, ethically, emotionally, and those who rise to meet those challenges at such levels are truly to be considered lawyers in every sense of the word & profession. I consider myself to have earned that distinction."[7]

We could all learn from Ballinger's example. We hope you enjoy all that this issue offers, including not only the contributions about Ballinger, but also John Domino's outstanding work on the history of Texas' common law right to privacy.

---

[2] Jason A. Gillmer, "Lawyers and Slaves: A Remarkable Case of Representation from the Antebellum South," 1 U. *Miami Race & Soc. Just. L. Rev*. 47 (2011).

[3] *Ibid.,* 52.

[4] Diary of William Pitt Ballinger, June 23, 1858 (William Pitt Ballinger Papers, Ctr. for Am. Hist.).

[5] *Webster v. Heard*, 32 Tex. 670, 680 (1858).

[6] *Ibid.,* 681.

[7] Letter of William Pitt Ballinger to James Love, Dec. 16, 1858.

Return to Journal Index

William Pitt Ballinger: The 'New South,' Railroads, and the Law

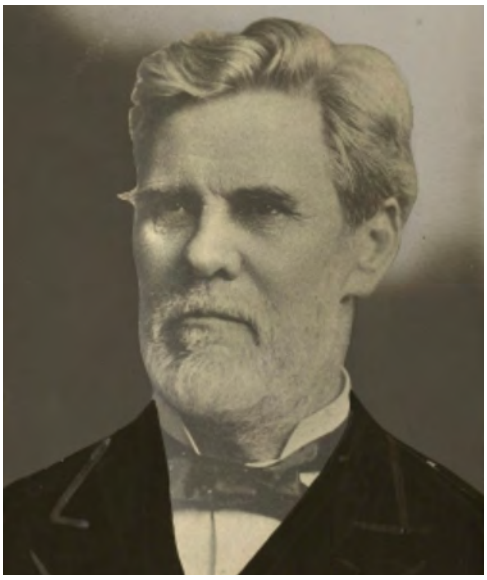
By John Moretta

From the end of the Civil War to the beginning of the twentieth century, the United States experienced one of the most profound and rapid economic transformations any nation has ever witnessed. Several factors contributed to this explosive material growth. One of the most important was the country's abundant possession of virtually every essential natural resource or raw material for industrial expansion. Equally important, thanks to massive southern and eastern European immigration, was a never-ending supply of labor. Add to these factors, an expanding market for manufactured goods and thanks to fortunes made during the Civil War, especially by Northern entrepreneurs, the prodigious availability of capital for investment. In addition, the federal government actively promoted industrial and agricultural development, with generous land grants to farmers wishing to move to the trans-Mississippi West as well as to railroad companies, along with the passing of high tariffs to protect US industry from foreign competition, and the brutal removal of Native Americans from western lands desired by homesteaders, mining companies, and most important, the "Iron Horse," the railroads.

Texas South-Eastern Railroad engine 4

The rapid expansion of factory production, mining, and railroad construction in all parts of the country except the South (excluding Texas), marked the end of the Jeffersonian ideal of a socio-economic egalitarian political culture of white, male independent yeoman farmers and artisans. Indeed, the second industrial revolution shattered the myth of economic independence. The 1880 census revealed that for the first time in the Republic's history, most of the workforce were engaged in non-farming jobs. By 1890, two-thirds of citizens worked for wages, rather than owning a farm, small business, or craft shop. Most important, a new urban working class was emerging, mostly created by the influx of immigrants and dispossessed native white workers. Indeed, between 1870 and 1920, 25 million immigrants arrived from overseas. Despite the manufacturing boom in these decades, the industry driving much of the second industrial revolution was the railroad,

which more than any other pre-1920 enterprise, dominated the nation's economy in virtually every facet of development. Spurred by private investment and massive land grants from federal, state, and local governments, the number of miles of railroad track in the US tripled between 1860 and 1880, and tripled again by 1920, opening vast new areas to burgeoning agribusiness, which was fast replacing the family farm, and creating a truly national market for manufactured goods. In 1886 railroads adopted a standard gauge (the distance separating the two iron then steel rails), making it possible for trains from one company to travel on another line's track. By the 1890s, five transcontinental networks spanned the nation, transporting products of western mines, farms, ranches, and forests to eastern markets while carrying finished goods to the West. The railroads reorganized time itself. In 1883, the major companies divided the US into four time zones still in use today. Indeed, the railroads' reign over the entire economy meant that when the companies experienced financial crises, usually caused by their own reckless speculation, ruthless competition, profiteering, fraud, and myriad other speculations the national economy suffered. Despite all the railroads' chicanery, the industry remained most vital to the nation's economy.[1]



William Pitt Ballinger

As noted above, the second industrial revolution primarily, if not exclusively occurred in the North and to a lesser degree in the West. As was true in the antebellum period, the South remained an overwhelmingly agricultural economy, albeit with some diversification as some new staples were introduced, and a rural society, with race relations between African Americans and whites, completely segregated by a viciously enforced apartheid called Jim Crow. So, in most instances, the myth of a "New South" was a fabrication, propagated mostly by the pre-war Southern white elite to appear more "modern" and "enlightened," when in reality, the South remained mired in an Old South/Lost Cause mentality that was just as racist and xenophobic as it had been before the secession crisis and rebellion. However, many white Texans, even former slaveholders, and ex-Confederate officials, such as Galveston attorney William Pitt Ballinger, believed that the war had discredited the Old Southern way of life, which included slavery. As he told one annoying, Lost Cause former secessionist, "that the right [to secede] did not exist—that all argum.t [sic] on the subject had been closed by the results of the war. The question of honor was were we truthful in that declaration or did we speak to deceive others if not ourselves."[2]

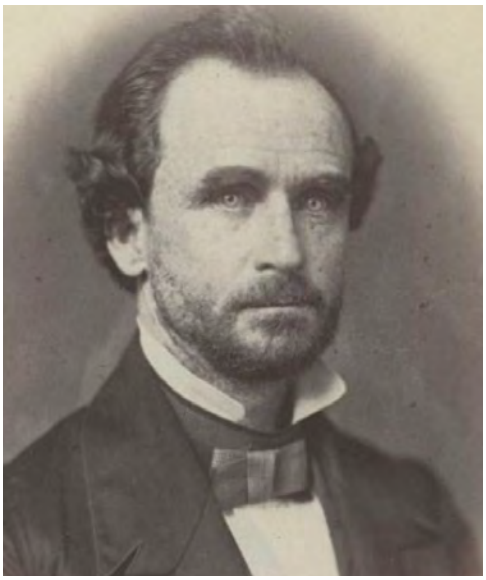
Prior to the war Ballinger and his brother-in-law, Thomas Jack, had one of the most successful law practices in Texas, specializing in realty law, but as was typical of most antebellum attorneys,

[1] For masterly syntheses of post-Civil War industrial development, see Walter Licht's *Industrializing America: The Nineteenth Century* (Baltimore: Johns Hopkins University Press, 1995), and Maury Klein's *The Genesis of Industrial America, 1870-1920* (New York: Cambridge University Press, 2007), and Alfred Chandler's *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA: Belknap Press, an imprint of Harvard University Press, 1993). For rise of the railroad industry, see Richard White's *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W.W. Norton and company, 2011); Albro Matin, *Railroad Triumphant: The Growth, Rejection, and Rebirth of a Vital American Force* (New York: Oxford University Press, 1992).

[2] William Pitt Ballinger to Guy Bryan, July 27-29, 1866, Bryan Papers (Dolph Briscoe Center for American History, University of Texas at Austin). Hereafter cited as (DBCAH).

Ballinger was a legal jack of many trades, taking cases that ranged from probate to divorce, to inheritances and to providing other legal services to his fellow islanders and mainlanders as well. He was a fervent Whig Unionist, who adamantly opposed secession, publicly denouncing the "fire-eaters," whom he believed, along with Northern abolitionists fanatics, were responsible for the secession crisis. However, once Texas seceded and joined the Confederacy, Ballinger pledged his loyalty to the CSA and during the war served as Texas' Receiver of Alien Enemy property, a vital position responsible for collecting or confiscating Northern held assets, whether it was land or a business, or a warehouse full of "Yankee" possessions. The sale of enemy property was a vital source of income to help sustain the rebel war effort. Prior to becoming Receiver, Ballinger with four other Texans went to Richmond to procure cannon for Galveston's defense in case of a Union attempt to take the city, which was one of the South's most important ports for exporting cotton to Europe. Suffice it to say, when Galveston fell in October 1861, Ballinger was shattered, as his beloved city remained under US occupation until January 1863.

Unlike many of his white peers, Ballinger accepted both the end of slavery and the need to provide freedmen with "special, extraordinary, active guardianship & protection. . .. They are entitled to our good faith efforts to all that our government [both local and state] can accomplish to make freedom do the most & best for them. It is in their best interest & ours. . .. We owe them that much for the years of faithful service they have rendered to us."[3] Ballinger thus opposed the Black Codes and eventual Jim Crow laws, and while participating in the 1875 Texas constitutional convention, opposed the poll tax, urging his compatriots to allow African Americans the right to vote and adequately provide funds for their education. Ballinger accepted both the 14th and 15th amendments as the legitimate law of the land and thus African Americans were to be treated and respected as full citizens of the United States, which meant the right to vote. As Ballinger told his brother-in-law Guy Bryan, it was time for white Southerners "to bury the past & move forward." White Texans had to accept "the fact of the negro's right to vote," and thus acts of "intimidation & violence toward freedmen must end."[4]



Guy Bryan

Few were surprised by Ballinger's post-war/Reconstruction magnanimity toward African Americans. Even as a slaveholder, Ballinger had a reputation on the island for "overly indulging" his slaves not only with solicitude for their physical wellbeing but making sure all his slaves were literate. Although a racist, regarding "the negro as inferior," Ballinger nonetheless believed African Americans were "neither to be disdained or to be considered weak & and incapable of rising above their present station." Ballinger used his legal talents to help slaves to remain on the island after their owners had died. For many Galveston slaves, their greatest nightmare was to end up on a mainland plantation, the result of having been sold or bequeathed in a last will and testament. One of Ballinger's most controversial antebellum cases was that of Betsy Webster, the

[3] William Pitt Ballinger to John Hancock, March 4, 1866, Ballinger Papers (DBCAH).

[4] William Pitt Ballinger to Guy Bryan, April 5, 1871, Bryan Papers (DBCAH).

slave mistress of David Webster, who in his last will and testament bequeathed to Betsy not only her freedom but his substantial Galveston property. After enduring weeks of public scorn, death threats, and other vile accusations and intimidations, Ballinger ultimately prevailed, securing both Betsy's freedom and her right to her "husband's" property. According to the Texas Supreme Court, "By the will of Webster the slave Betsy was made a free woman. Being a free woman she was so in toto, and legally vested with the property devised to her, to use it as she pleased. Being a woman, and not being under any disabilities requiring a guardian, neither her former master nor the court has any right to divest her of her person or property."[5]

Although individual slaveowners such as Ballinger believed themselves "enlightened" in their treatment of their bondsmen, their unstated assumptions contributed to African American dehumanization to which they were forced to adapt. No matter how benign or paternal the treatment was, slaves remained little more than valuable property in their master's mind. Many slaveholders such as Ballinger were willing to answer their bondsmen's call for decent treatment and respect; yet they could not respond to their slaves' most cherished request—freedom. From the black codes to the racist treatises pronouncing black inferiority, and to the supposed Biblical sanctification of slavery, nearly every Southern white man's vision of upward mobility depended on the presence of a large black population, but not on an understanding or association with them.

However, there were white exceptions, and Ballinger often proved to be one of them, and his singularity became more apparent after the war and Reconstruction. As he had told Guy Bryan, it was time "to bury the past [The Lost Cause] & move forward," and for Ballinger that implied not only accepting the end of slavery and recognition of African American civil rights (albeit not necessarily equality or integration), but also the embracing of a "New South" creed that emphasized the benefits of economic growth—railroad expansion, urbanization, and industrialization, and free labor—the sort of progress that would remake Texas into a Northern replica, a region of the country Ballinger had personally admired since the 1850s for its economic vitality, advanced education, and overall cultural and intellectual sophistication. However, Ballinger knew, as did many other white Texan New South supporters, many of whom were close associates and friends of the attorney, that if the Lone Star state's claim of being a "New South" mecca was to be credible, all vestiges of the state's slave past and planter class power and provincialism had to be erased, replaced by a "free labor" ideology and system that accepted both Northern investment and emigration. To Ballinger and his peers, the best way to show outsiders that progressive Texans had moved beyond the Lost Cause mentality, was to assimilate African Americans as much as was possible into mainstream Texas society while encouraging many to leave the land and become the state's new, free labor workforce essential for economic diversification. That is not to suggest that New South advocates wanted to destroy the state's agricultural community for the sake of modernization, but that if the goal was to industrialize Texas, then the requisite labor was in plentiful supply in the form of African Americans and needed to be used. This shift in African American labor would also help break the planters' stranglehold of black labor solely for staple production and thus the state's continued dependency on cash crops for survival. In short, in Ballinger's view, African Americans were to become the requisite labor needed to catapult Texas into its "New South" status. Although

---

[5] John Anthony Moretta, *William Pitt Ballinger: Texas Lawyer, Southern States, 1825-1888* (Austin: Texas State Historical Association, 2000), 112-119.

Texas' population boomed in the aftermath of war and Reconstruction, it experienced nothing like the massive European immigration inundating the Northeast at the time, providing capitalists there with the key labor supply for the "second industrial revolution."

That Ballinger should become one of Texas' most fervent post-war boosters of modernization surprised few of his peers. Before the war Ballinger was a noted, passionate Whig nationalist, who strongly believed in the nation's, as well as the South's need for economic diversification. To Ballinger, progress meant industrialization and urbanization not only for the South's benefit but for the nation as well. Ballinger wholeheartedly agreed with "the genius" of Henry Clay's American System, especially its emphasis on US economic self-sufficiency. The essential ingredient to achieve that status was to create a national infrastructure, or transportation network of what were called in the antebellum period, "internal improvements:" roads, canals, bridges, turnpikes, and eventually railroads, to establish a nationally integrated economy. Unfortunately, Ballinger's pre-war Whig pleas for economic development fell mostly on deaf ears. Ballinger had little difficulty convincing fellow Galvestonians to support his ideas. Since the city's founding in the late 1830s, the ruling elite had always been keen on ideas and projects that would promote their vision of Galveston becoming the Gulf's "Queen City," eventually replacing New Orleans as the South's premier entrepot. Indeed, by the 1850's Galvestonians had acquired quite the reputation for being haughty, self-serving, pretentious, aristocratic snobs, with little in common with the mainland planter slavocracy, most of whom they looked down upon as country rubes. In comparison to their mainland counterparts, Galvestonians were a far more urbane, cosmopolitan, well-educated, tolerant, forward-looking citizenry, who identified with fellow sophisticates in New Orleans, Mobile, and Charleston. Moreover, many of the city's ruling oligarchy, of which Ballinger was an integral member, had developed strong Northern commercial and professional ties, and to escape Texas' oppressive summer heat, Ballinger, and many of the attorney's peers, would take their families and often their slaves, and "summer at the North." However, Galvestonians were an isolated elite, and whether they liked it or not, real power in antebellum Texas rested in the hands of the mainland plantation slavocracy, who identified with their slave state brethren to the east. They adamantly opposed giving up their "peculiar institution" which defined "the Southern way of life" for both whites and African Americans, a society and culture based on cotton cultivation and human bondage.

In the aftermath of war and reconstruction, thousands of new immigrants, mostly dispossessed white Southerners, came to Texas, many of whom were willing to absolve themselves of their nostalgia for the Old South, believing their futures lied in helping Texas to become the vanguard of a "New South." Thanks to the influx of immigrants, Texas' population grew from 818,579 in 1870 to over 3 million by 1900. The latter figure includes African Americans, European ethnics such as Germans and other eastern Europeans, who came in even greater numbers than during the antebellum period, and Mexicans, who eventually replaced the Germans as the largest foreign-born people in Texas. Taken together these immigrant groups helped Texas recover more rapidly from the war, a conflict that minimally affected Texas, cut off as it was by US control of the Mississippi River by 1862. Other than a few skirmishes here and there along Texas' borders, and as noted above, the temporary US occupation of Galveston in late 1861, Texans suffered very little during the four-year conflict. Thus, unlike much of the eastern South, Texas emerged from the war unscathed and thus Lone Star leaders such as Ballinger were ready to help transform Texas

into the leader of a "New South." Ballinger was not alone in believing that Texas was the natural leader of a New South. The editor of the *Dallas Herald* was equally enthusiastic and confident in the promise of Texas. "The live town of Dallas seems determined to do all it can in the way of improvement. Several large, substantial, tastefully designed buildings are steadily going up, others in contract, and in almost every direction is heard the inspiring music of trowel, saw, forge, foundry, and mill."[6] The editor needed to only add the sound of a train whistle to have completed the New South sound and vision.

Indeed, from the 1870s to 1900, railroad construction defined the New South ideal in Texas. In those twenty-years Texas laid 8,000 miles of track and connected every city of 4,000 habitants or more, except Brownsville. One of the first major roads to renew construction after the war was the Houston and Texas Central, which had laid 80 miles of track by 1860. By 1872, the H&TC had reached Dallas and Dennison the next year. At Dennison the line connected with the Missouri, Kansas, and Texas railroad, giving the Lone Star state its first rail link with St. Louis and the eastern US. Operating under a unique 1871 federal government charter, The Texas & Pacific Railroad began laying track in that year, reaching Dallas in 1873, Fort Worth in 1876, and Sierra Blanca, 92 miles east of El Paso in 1881. At El Paso it joined with the Southern Pacific, giving Texas a line all the way to San Diego, California. By 1890 Texas' several roads combined with some interstate lines, most notably, the International and Great Northern and the Santa Fe, giving Texans access to anywhere they wanted to go in the United States. Texans fell in love with the railroad, seeing "the Machine in the Garden," despite its destructive nature, as providing essential transportation and communication links otherwise unavailable. Because of their railroad mania, Texans showered railroad companies with whatever resources they might need, especially generous land grants. By 1882, Texas railroads had received more than 32 million acres in compensation for lines built. As rail lines stretched across the vast Texas hinterland connecting scattered towns and nascent cities, the Texas economy was dramatically reordered. By the close of the 1880s, Texas was no longer an isolated, little-developed region of small farmers. Ambitious railroad construction had transformed the state into one of the fastest-growing commercial economies in the country.[7]

Houston and Texas Central Railway flier

[6] *Dallas Herald* editor quoted in Randolph Campbell, *Gone To Texas: A History of the Lone Star State* (New York: Oxford University Press, 2018), 282-283.

[7] Campbell, *Ibid*., 283; T. R. Fehrenbach, *Lone Star: A History of Texas and Texans* (New York: MacMillan, 1998), 604-605; John Spratt, *The Road to Spindletop: Economic Change in Texas, 1875-1901* (Austin: University of Texas Press, 1970, 1983), 190-220; Ira B. Clark, *Then Came the Railroads: The Century From Steam to Diesel in the Southwest* (Norman, OK: University of Oklahoma Press, 1958); For background on Southern railroads in general, including Texas, see John Stover, *The Railroads of the South, 1865-1900: A Study of Finance and Control* (Chapel Hill, NC: University of North Carolina Press, 1955).

Unlike traditional businesses, railroads would require more capital and more sophisticated levels of coordination, thus raising a host of new legal issues in the areas of finance and corporate organization. Also, as interstate enterprises railroads would generate new regulatory questions. Law firms responding to railroads' legal needs soon found their establishments moving rapidly away from a traditional to a more specialized operation. In short, railroads stimulated the growth of corporate law, which in the prewar years, particularly in Texas, was virtually non-existent. In this sense, railroads transformed Ballinger's practice as they reshaped the Texas economy.[8]

At first Ballinger served his railroad clients much as he did his other patrons. Railroad owners were just one more group of local businessmen easily added to his ongoing client list with problems in real estate, probate, collection, and other matters. However, railroads did not long remain like other enterprises. Beginning in the 1870s and going forward, the powerful eastern railroad barons came to Texas, searching for local lines to buy to further consolidate their national networks. As the panic of 1873 swept across the Lone Star state, one by one the small, undercapitalized railways running through Texas fell into receivership. As Texas roads fell into the hands of the "robber barons" they came to symbolize the power "foreigners" had over the local economy.[9]

As state governments became more determined to end the railroads' abuses, the lines' owners increasingly looked to local attorneys for counsel. It fell to lawyers to interpret the new laws and resolve the many complex issues stemming from broadly worded regulations. This sort of work, combined with the new areas of corporate finance and organization, made railroads an ambitious lawyer's most important clients. Even before the war, Ballinger saw this great potential for his practice. Long an advocate of infrastructure as the key to economic development, Ballinger admonished himself to become "more thorough in Railroad law. Our State will soon be covered with lines & there will arise a no. of legal matters which we must be able to answer. RR's are the wave of the future & I must be prepared for their business."[10]

Although long a passionate proponent of economic progress, Ballinger nonetheless worried about the socio-political impact industrialization, manifested in the railroad industry, would have upon the nation and the law. Ballinger saw his railroad counsel as serving justice by making the law fit new circumstances, all for the greater good of the commonweal. Ballinger had always believed that power was to be used to create order, and thus it was essential that those with power—such as himself—use it to impose order. Only then, Ballinger believed, could there be morality. In the past, accepted traditions of political and social behavior imposed order on individuals and society. These traditions, he recognized, depended heavily on material conditions which were changing rapidly in the late nineteenth century. Ballinger welcomed the change, seeing more strength than danger in the new industrial order. But it demanded concomitant legal changes whose contours tradition could not draw. Strong laws could be used to define and enforce the resolution of socio-

---

[8] Lawrence Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 389-395; Gabriel Kolko, *Railroads and Regulation, 1876-1916* (Princeton, NJ: Princeton University Press, 1965, 10-105; Robert Wiebe, *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967), 52-54.

[9] Harry N. Schreiber, "Federalism, the Southern Regional Economy, and Public Policy Since 1865," in David J. Bodenhammer and James W. Ely, Jr., eds., *Ambivalent Legacy: A Legal History of the South* (Jackson, MS: University of Mississippi Press, 1964), 69-105; Spratt, *The Road to Spindletop,* 13-25.

[10] William Pitt Ballinger, Diary, June 23, 1860 (Ballinger Papers, Rosenberg Library, Galveston, Texas). Hereafter cited as (RL).

economic conflicts in an orderly manner. Social relations had changed "far more rapidly since the end of war that in the preceding two centuries." As Ballinger further told Guy Bryan, "The chief breakdown is in dealing with the new relations that have arisen from the economic changes of our time. Every new social relation begets a new type of wrong-doing—of sin, to use an old fashioned word—and years pass by before society is able to consider this sin a crime which can be effectively punished by law."[11] Ballinger hoped his work for the railroads would help create a legal environment favorable to industry while simultaneously prescribing the rules for its operation which would help prevent abuses of power by the private sector adversely affecting the public good, which could lead to social upheaval. In short, industrial combinations such as railroads, susceptible as they were to temptations of unbridled power, had to be made responsible through law to the whole people.

Ballinger's most controversial and protracted cases involved the new body of judge-made law of torts, which before the industrial revolution were virtually nonexistent. In the antebellum period common law had little to say about personal injury actions based on the negligence of another. As the nation industrialized in the postwar years, it was that area of tort law that witnessed the most rapid changes. By the late nineteenth century, few Americans doubted that the railroad was the key to economic development. Yet, trains were like wild beasts, rampaging through the countryside, killing livestock, pedestrians, and innocent children as they played near the roadbed, setting fire to crops, smashing freight, and belching black smoke and shaking homes to their foundations as they roared through crowded urban neighborhoods at all hours of the day. In a sense, tort law and railroad "grew up" together, becoming symbiotic by the late nineteenth century.

The key link between tort law and railroad law was that they were both interpreted as laws of negligence, of carelessness—the inflicting of harm, not intentionally but because of some lapse in diligence or judgment. Liability for negligence was not absolute; it was based on fault. As tort-railroad law evolved, fault meant breach of duty to the public, meaning that the defendant—the railroad—had not done what was considered reasonable to protect the public welfare. Although public hostility toward the excesses of industrial capitalism was on the rise by the late nineteenth century, the legal system typically avoided any extremist position toward the new order. If key enterprises such as railroads had to pay for all damage done by "accident," lawsuits would soon drain them of their economic blood. Thus, prudence and caution became the order of the day as judges carefully limited damages to some moderate measure. In short, the judicial system's prevailing attitude was to protect capital as much as was possible from popular outrage while allowing the people a modicum of redress for the harm done them by the plutocracy's machines.[12]

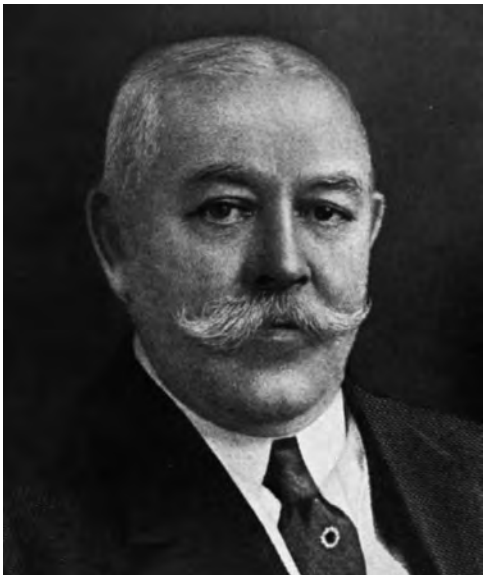
During his two decades of railroad work, Ballinger spent most of his time defending his clients for alleged negligence. Suits against the lines ranged from damage to passengers' luggage, transporters' cotton, cattle, lumber, crates of melons, and barrels of apples, to engine sparks setting fire to grass and pasture land, to the construction of bridges, water-towers and stations that encroached upon or destroyed private property, to locomotives that killed cattle and horses, as well as children and other pedestrians or bystanders, to employees suing for injuries sustained

[11] William Pitt Ballinger to Guy Bryan, August 17, 1882, Bryan Papers (DBCAH).

[12] Charles O. Gregory, "Trespass to Negligence to Absolute Liability," *Virginia Law Review,* Vol. 37 (1951), 359-379.

while at work, and finally to urban homeowners and businessmen complaining of noise, smoke, dirt, and fire from engine sparks as trains roared through busy downtown areas.[13]

In the early, formative years of tort law, railroads rarely hesitated to pay damages. Railroad owners were no different than their industrial counterparts in that they too wanted to avoid litigation. If suits against the lines could be kept out of the courts, companies would not only be saved money, but more importantly, precedents could not be established. Regardless of the type or degree of harm inflicted, most lines instructed their attorneys either to pay the full amount sued for or try to reach an out-of-court settlement. As Oscar G. Murray, general freight and passenger agent of the Galveston, Houston and Henderson Railroad informed Ballinger in 1878, it was the line's "desire to avoid all litigation, and to adjust, by agreement of parties, all legal liabilities without trouble, or expense of claimants." Ballinger was to go to court only if "you have evidence established on the most thorough investigation, that claimant was completely in the fault." If Ballinger did go to trial and then lost, he could appeal only if he was certain the judgment against the company was "erroneous, or amount of recovery can be reduced on appeal." Based on these specific instructions, Ballinger usually recommended to Murray that the GH&H "pay out at once."[14]



Oscar G. Murray

Although handling a variety of claims for his railroad clients, over 50 percent of his cases involved the killing or maiming of livestock. For example, in the year 1877-1878, Ballinger paid out over five thousand dollars in settlements to stock owners whose cattle were killed by the railroad. On many occasions Ballinger wanted to contest the claim, believing he could prove negligence on behalf of the stock owner. The company, however, instructed him to either pay the claim in full or negotiate a settlement. All that changed in late 1878 when a Georgia court ruled in *Uriah Bartley v. The Georgia Railroad and Banking Company,* that henceforth Georgia railroads were no longer liable for stock killed or injured on the track "when there is no carelessness or neglect on the part of the employes [sic]." As Judge Paul Gibson of the Superior Court of Richmond County, Georgia, further decreed, "When it is conceded that there was no neglect on the party of the employes [sic] of the roads, and every diligence used to prevent the damage or injury, I cannot conceive of how it can be possible for the courts of justice to give damages for injuries to stock on the roads."[15] This was the precedent Ballinger and other railroad attorneys had long been anticipating. For several years railroad companies had been paying out thousands of dollars annually to the owners of injured or killed stock, believing they were at fault. Now, with one simple ruling, the burden of negligence shifted dramatically from defendant to plaintiff, giving attorneys much more room to negotiate, or contest outright, claims against their railroad clients.

---

[13] William Pitt Ballinger and Associates, Files and Papers for the years 1873-1878 (Houston Metropolitan Research Center, Houston Public Library, Houston, Texas.) Hereafter cited as (HMRC).

[14] Oscar G. Murray to WPB, April 16, 19, 1878, WPB & Assoc. (HMRC); WPB to Murray, May 12, June 7, July 21, 26, 1879, *Ibid*.

[15] Newspaper article explaining the Georgia court's ruling found in WPB & Assoc. Papers for the year 1878 (HMRC).

As more and more state courts followed the Georgia precedent, it became apparent that the judicial system was more enterprise-minded than business owners and attorneys originally thought. Indeed, from the late 1870s on, courts invented new and more cunning traps for the injured plaintiffs. One of these traps—implicit in the Georgia decision—was the concept of contributory negligence. Another was the fellow-servant rule and the concomitant assumption of risk. As the number of railroad accidents proliferated, judges throughout the land became alarmed by juries' tendency to almost find for the plaintiff automatically. This was especially true when individuals were either maimed or killed by trains. Judges then used contributory negligence as a sort of "brake" on such popular "excesses." The fundamental idea of contributory negligence was simple: if it could be proven that the plaintiff was even remotely negligent himself, then damages could not be recovered from defendant.[16]

The doctrine of assumption of risk was almost as devastating a blow to personal-injury victims as contributory negligence. Plaintiffs could not recover if they willingly put themselves in positions of danger. Employers found assumption of risk especially applicable in cases of injured workmen; miners, railroad men, and factory workers could be said to assume the ordinary risks of employment merely by accepting their jobs, and thus could not recover damages from their employer for injury received while performing their work.[17]

The fellow-servant rule evolved simultaneously with assumption of risk. According to this mandate, an employee (servant) could not sue his employer (master) for injuries caused by another employee. He could recover from his employer if it could be proven that the employer's negligence had cause the harm through "negligent misconduct." However, this right meant nothing in a factory or railroad yard. The employer was a rich entrepreneur or a soulless corporation. In a coupling, turntable, or switching accident, it was a fellow servant who was negligent, if anybody. According to the law, the fellow servant was of course liable; but it would have been utterly senseless for one poor worker to sue another, equally impoverished. Combined with the assumption of risk, the fellow-servant rule left injured workmen with little recourse.[18]

Armed with such an arsenal of new legal weapons, Ballinger and other railroad attorneys were now capable of defeating virtually any suit against their clients. The new doctrines of contributory negligence and assumption of risk made even protracted trials worth the time and effort, for in the end Ballinger knew that most judges would either dismiss the case or at the very least, lower the amount awarded considerably. Even appeals were worth Ballinger's attention, for higher court judges were more likely than their lower court counterparts to invoke contributory negligence and either reverse the lower court's decision or throw it out altogether.[19]

[16] Friedman, *A History of American Law,* 412.

[17] *Ibid*., 413.

[18] *Ibid*.

[19] Between 1870 and 1900 some state supreme courts behaved as if their primary function was to reverse decisions of their lower courts for supposed "technical errors." This seemed particularly true in Texas. An 1887 article in the *American Law Review* noted that the Texas Court of Appeals (a sort of auxiliary of the state supreme court) "seems to have been organized to overrule and reverse. At least, since its organization that has been its chief employment." To support its contention, the *Review* cited a rather revealing fact: during the twelve years of the court's existence, it had reversed 1,604 cases, and affirmed only 802—a margin of almost two to one. In one volume of reports, there were five reversals to every single affirmance. Further investigation uncovered a more relevant statistic: Over 60 percent of the cases reversed involved railroad accidents or other suits against the lines for negligence. "Overruled

There were of course cases Ballinger could not settle, or win by going to trial, or on appeal. Ballinger's legal files and court records indicate that there were certain types of personal-injury cases which tugged at the heartstrings of even the most conservative judges. Even the most persistent and cleverest of lawyers had difficulty reversing or getting dismissed cases involving the death or maiming of children by trains. Plaintiffs even refused Ballinger's settlement offers which sometimes were significantly more than the original claim. When it came to the death or crippling of their children, parents were determined to have the fullest redress of their grievances against the railroads.[20]

Throughout his long career Ballinger prided himself on his devotion to truth, justice, and doing what was morally right regardless of personal consequences. However, Ballinger's "railroad work," as he liked to refer to his employment by the lines, slowly forced him to inure himself to the abuse his clients often inflicted on individuals. Ballinger was aware that his railroad employers were "a troublesome lot." Nonetheless, he believed it was his "duty to find out what the law was & tell my client what rule of life to follow. That was my job. If the rules changed, well & good, but until they did, I served my client to the best of my abilities & ensured his best interest." Such a callous statement seemed contrary to Ballinger's inherently ethical, protective nature. No doubt, at a personal level, Ballinger remained a principled man. However, after twenty years of railroad work, his professional persona had changed; he had become a realist—shrewd, practical, matter of fact. He still wanted to right a wrong whenever it was in his power to do so, but he did not go out of his way in search of cases of injustice to combat. Nor did he unduly defend the weak and oppressed from the ruthlessness of the powerful. Yet, it was often hard for Ballinger to suppress his compassion. In 1883 he represented the Missouri Pacific against an old family friend who sued to prevent tracks being laid six feet from his kitchen door. "Poor old fellow," Ballinger wrote, "it's a hard sort of law at the best that a railroad corporation can carve right through someone's property. I confess I am having great difficulty presenting a very vigorous showing [defense]." A few months later, he felt "very distressed" when the same line insisted he force the sale of a widow's property under the terms of an earlier, unfavorable agreement. Ballinger's sensitivity and fairness usually enabled him to escape ill will: out of his own pocket he paid the widow "Just compensation for her land," which ended up being almost twice as much as the railroad had intended giving her. Despite atoning for his client's indifference, Ballinger brooded, "The lawyer must steel himself like the surgeon to think of the subject before him & not the pain his knife may cause."[21]

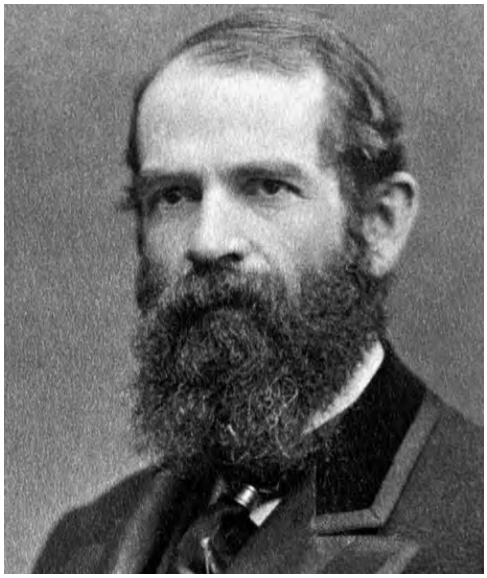
As Texas roads came under the control of national networks, the lines' attorneys soon found themselves involved in the machinations of the railroad giants. Working for the Galveston, Houston & Henderson and the Gulf, Colorado & Santa Fe put Ballinger in contact with the most

by Their Judicial Superiors," *American Law Review,* Vol. 21 (1887), 610; Roscoe Pound, *Appellate Procedure in Civil Cases* (Boston: Little, Brown, and Company, 1941), 260-261. For Texas cases, see note 82, Chapter 9. Knowing most courts to be on the side of railroads, fewer and fewer individuals were willing to take their cases to trial, thus allowing Ballinger the upper hand in negotiated settlements. On only about 30 percent of his cases did he have to pay claims in full. In all the rest he convinced claimants to accept compensation that frequently lowered their original charge by as much as 60 percent. WPB & Assoc., Files and Papers for the years 1880-1886 (HMRC).

[20] For examples of the various cases Ballinger defended his railroad clients against a child's death caused by the line, as well as for other examples of assumption of risk, contributory negligence, and fellow-servant rule, in which Ballinger lost such claims, see Moretta, *William Pitt Ballinger, Texas Lawyer, Southern Statesman,* 237-239.

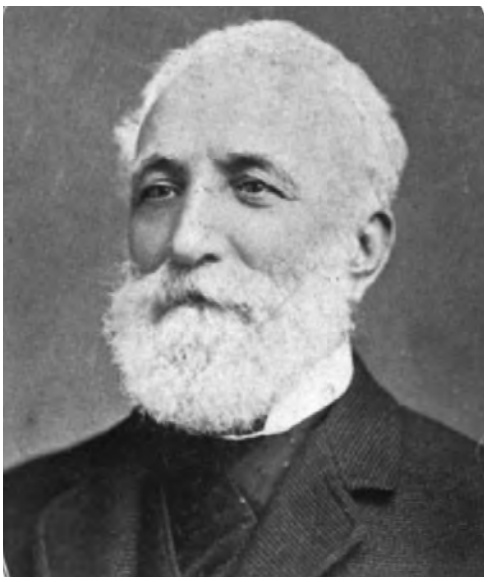
[21] WPB, Diary, March 13, 1883 (RL); WPB to son, October 14, 1886, Ballinger Mills Papers (Private Collection); WPB to Marcus Mott, law partner in Ballinger & Jack, May 1, 1883, WPB & Assoc. (HMRC); WPB, Diary, August 5, 18, 1883.

legendary Gilded Age railroad magnate, Jay Gould. For nearly thirty years Gould was perhaps the most excoriated man in America. He was perceived by many, even those engaged in the same nefarious activities, as the archvillain, epitomizing the worst excesses of that wanton era. Every phase of Gould's business career was fraught with controversy. In his business dealings and ethical standards Gould was no more extraordinary than the rest of his peers. He simply was more brilliant and unwilling to conceal his activities behind a façade of social respectability or moral hypocrisy. He knew the game better than most and never deceived himself or others about it.[22]



Jay Gould

By the time Gould's empire extended into the Lone Star state, he had already emerged in the East as the master of financial and corporate manipulation, especially when it came to railroads. For a time, he controlled the Union Pacific, Wabash, Kansas Pacific, and numerous other, small Eastern trunk lines. But the infamous financier also had ambitions as a builder. In Texas his objective was to integrate some of the state's more important roads into the national system he was building. One of the first lines Gould was interested in was the GH&H, in which, as a result of Ballinger's counsel, he acquired controlling interest in 1881.[23]

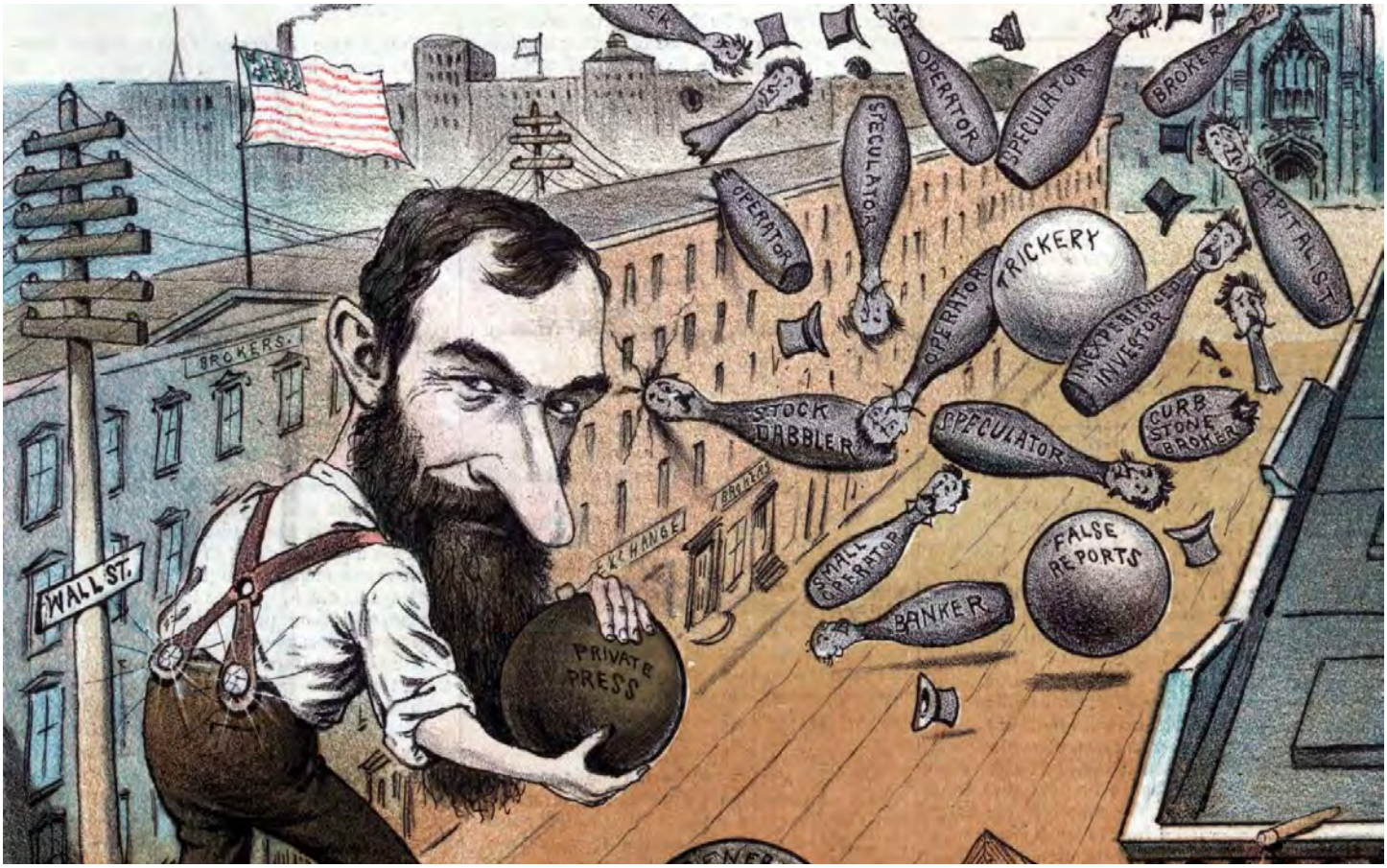


Paul Bremond

Soon after taking over the GH&H, Gould acquired the much more important Texas & Pacific Railroad (T&P), incorporating it into his new line, the International & Great Northern Railroad Company (I&GN). Control of this road would provide Gould with an essential link in Texas for his growing transportation empire in the middle of the nation to the Pacific. But the T&P would be of little value to Gould's grand design if its most important trunk line, the Houston Tap & Brazoria (HT&B) did not come with it. Command of this road would allow Gould access to the rich time and ore deposits of East Texas all the way to the Red River. Acquisition of the Houston Tap proved to be more difficult than either the GH&H or the T&P, for the road was originally the brainchild of one of Texas' most dogged railroad entrepreneurs, Houstonian Paul Bremond. Bremond had built most of the state's early lines, but like most his associates ran out of money to finish his projects, making his line easy prey for corsairs such as Gould. Bremond, however, was determined to prevent his line's takeover. He accused Gould and the I&GN's directors of "the unauthorized and wrongful appropriation" of the company's stock, which Gould typically greatly devalued, which was always part of his "hostile

[22] On Jay Gould, see Maury Klein's biography, *The Life and Legend of Jay Gould* (Baltimore: Johns Hopkins University Press, 1986). Also see Milton Rugoff, *America's Gilded Age: Intimate Portraits from an Era of Extravagance and Change, 1850-1890* (New York: Henry Holt and Company, 1989), 52-54, 58-67.

[23] Donovan Hofsommer, "Texas Railroads," in *Texas: A Sesquicentennial Celebration,* 244; S.G. Reed, *A History of Texas Railroads* (Houston: St. Clair Press, 1941), 569-574; Spratt, *The Road to Spindletop,* 13-15.



"Jay Gould's private bowling alley" by Frederick Burr Opper.

takeover" strategy, and that once the lines were consolidated, "the directors by breach of trust" reneged on their agreement with Bremond to buy him out for one hundred thousand dollars. Instead, Bremond received only forty-three thousand, which Gould's directors said his stock, franchises, and property in the line were now worth because of the road having to be "reorganized."[24] Bremond's claim of having been denied his just compensation was probably accurate. He sought to win his company back by challenging Gould's right to acquire the Houston Tap in the first place. Like most builders Bremond knew that the state constitution explicitly prohibited outside control of Texas-chartered lines.

Gould initially had hired the Houston firm of Baker & Botts to handle the case, but much to Gould's chagrin, the Houstonians lost the Bremond case at the trial court level in 1879. A frustrated Gould now wanted his New York firm of Shearman & Sterling to find him the best railroad lawyer in Texas, one "who would win this damn thing for me." Few in the Texas legal profession at the time believed there was anyone better than Ballinger, and Shearman & Sterling agreed, telling Ballinger that "Mr. Gould, our largest stockholders in New York, as well as our purchasing committee all feel that there is presently no better trial lawyer in Texas, whose record in winning appeals is more successful than yourself." Gould was confident Ballinger could "put together a most vigorous and elaborate argument on our behalf."[25] Indeed, he did, as a little over a year later, the trial court, after "reexamining all the new evidence and testimony," awarded Gould

[24] *International & Great Northern v. Paul Bremond,* 47 *Texas Reports,* 98-101.

[25] Shearman & Sterling to WPB, February 4, 5, 1880; Baker & Botts to WPB, February 14, 1880, WPB& Assoc. (HMRC).

the HT&B. Ballinger cinched the case by presenting the minutes of an HT&B stockholders meeting, which Bremond initially denied attending, but actually did, and at the meeting Bremond and the stockholders voted overwhelmingly to consolidate with the I&GN. Ballinger never doubted the outcome, telling his law partner Marcus Mott that "the decisions of the [Texas] Supreme Bench relative to railroads, corporations &.c have become fiat—no lower courts will dare oppose them, for if they do they will be considered great nuisances & obstructions to the advance of progress & popular as well as legal opinion will turn against them." The lower court did, however, order the I&GN to pay Bremond an additional seven thousand dollars as result of "further inquiry into the amount of compensation originally awarded to Mr. Bremond when he sold the HT&B." Ballinger did not argue the amount awarded, for as he told Jay Gould, "It is a mere drop in the bucket when compared with the amount of business profit you will make on the merger once the lines have become fully operational." Gould agreed with his Texas counselor, and once again praised Ballinger for most "expeditious & adroit handling of my affairs." Thirty days later Gould received Ballinger's bill for the Galvestonian's services: $2500, which would translate into today's dollar value of just over $73,000. From the beginning Gould had told Ballinger that he wanted "a lawyer with great ability and nerve." Ballinger's victory in the GH&H case convinced Gould of Ballinger's ability and the size of the attorney's bill convinced him that Ballinger had the nerve.[26]

As seen through the personal and professional life, thoughts, and experiences of Galveston attorney William Pitt Ballinger, in the aftermath of war and Reconstruction, many Texans, wanted to put both travails behind them and move the Lone Star state into a new era, to become the leader of a "New South," which had buried its ignominious past of slavery and rebellion and was ready to "move on" and embrace new vistas of technological change and social progress. Progressives like Ballinger believed wholeheartedly that Texas had all the requisite raw essentials for such a transformation, from Gulf ports, to key mineral deposits, an abundance of timber, cattle, and other livestock, and of course incredible agricultural capacity to grow virtually any staple. All that was needed was the right mindset, one that would embrace the dynamics of modernity—industrialization, urbanization, and railroad expansion, the last, literally the gateway to material advancement. Railroads were the nation's most vital, consummate industry from the 1870s to after WWI. They were the essential infrastructure that made both the industrial and agricultural revolutions of the late nineteenth century possible. However, as seen in this article, the "Machine in the Garden" created a multitude of issues and abuses, few Americans could have imagined in the antebellum period. As reflected in Ballinger's legal practice, railroads brought into existence corporate law, an entirely new jurisprudence that became increasingly more complex as the industrial revolution accelerated. Perhaps most important was the impact such rapid economic change had upon society and politics. For New South boosters such as Ballinger, the railroad became the key symbol of the transformation of the Old South to the New South, as it provided the vital socio-psychological, cultural, and intellectual link to the larger, more progressive areas of the nation, most notably the Northeast. The railroads would literally become the engines for change in the South, hopefully helping to end the South's isolation and provincialism, providing white Southerners in particular, the means to "connect" with the rest of the country. Finally, as seen in Ballinger's career as a railroad attorney, the industry forced many practitioners to not only change their view of the law and who it was to serve, and how it was to serve the new plutocracy and their enterprises, which Ballinger believed were good for the nation's progress,

[26] WPB to Marcus Mott, April 10, 1881, WPB & Assoc. (HMRC); WPB to Jay Gould, May 1, 1881, *Ibid*; Jay Gould to WPB, May 12, 1881, *Ibid*.; Gould to WPB, April 29, 1881, WPB & Assoc, *Ibid*.

but how to simultaneously protect the commonweal from these new industries' destructive tendencies? This became for Ballinger one of his personal and professional life's most perplexing moral conundrums, which he never fully reconciled. Ballinger was an interesting combination of privilege tempered by a pragmatic acceptance of the democratic realities of his time.

JOHN MORETTA *attended Santa Clara University in Ca. on a baseball scholarship. After teaching high school history and Spanish at Jesuit HS in Portland, Oregon, he got an MA in History at Portland State Univ. and earned a Ph.D. at Rice University in 1985. He has taught US History to college students for 40 years and has published numerous articles, books and textbooks on a wide range of topics.*

Return to Journal Index

The History of the Common Law Right to Privacy in Texas

By John C. Domino[1]

Introduction

The right to privacy reflects a fundamental human need to be free from intrusion into the most personal and intimate matters. Encompassing much more than the right to be let alone, privacy protects reputation and self-identity, it gives us a modicum of control over the disclosure of personal information and guards from theft of our name and likeness. Privacy is the right to live our lives without undue interference, to associate with whomever we please, and – in the broadest sense of the right – to make autonomous choices with respect to sexuality, reproduction, and even death.[2]

This article discusses the extent to which these fundamental interests are protected by the right to privacy in Texas. Examining a large corpus of privacy caselaw[3] over a period of more than six decades I explore the origins and emergence of the right to privacy in Texas, beginning when the state's courts had not yet recognized the common law tort doctrines that allow recovery for intrusion into the private affairs of individuals and culminating with the Texas Supreme Court and lower state appellate courts adopting a robust right to privacy in groundbreaking cases such as *Billings v. Atkinson*[4] in 1973, *Kimbrough v. Coca-Cola/USA* [5] in 1975, *Industrial Foundation of the South v. Texas Industrial Accident Board* in 1976,[6] and *Texas State Employees Union (TSEU) v. Texas Department of Mental Health & Mental Retardation*[7] in 1987.

Part I of this article is a foundational discussion of the common law origins of the major doctrines adopted by the courts of other states in the nation as early as 1900, over seventy years before Texas recognized privacy as an independent right. The basis of the right to privacy in Texas are *four* common law tort doctrines that were originally adopted by a small number of state courts outside of Texas in the early to mid-20th century: (1) intrusion or invasion into a person's private

---

1 Professor of political science and legal studies, Sam Houston State University. Email: jcd@shsu.edu.

2 For a jurisprudential or philosophical treatment of the many dimensions of privacy see Ferdinand D. Schoeman, editor, *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984).

3 Westlaw search on January 5, 2022, of the term "privacy" for all reported civil cases (1,988) in Texas since 1900. The first privacy case in the state's history was handed down in 1973 in *Billings v. Atkinson*, 489 S.W. 2d 858 (Tex. 1973).

4 *Billings v. Atkinson*, 489 S.W. 2d 858, 861 (Tex. 1973).

5 *Kimbrough v. Coca-Cola/USA*, 521 S.W. 2d 719 (Tex. Civ. App. – Eastland 1975, writ ref'd n.r.e).

6 *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 672 (1976).

7 *Texas State Employees Union (TSEU) v. Texas Department of Mental Health & Mental Retardation* 46 S.W.2d 203 (1987).

affairs, seclusion, or solitude[8], (2) public disclosure of private information, (3) appropriation[9] of name of likeness for value or commercial gain; and (4) disclosure of false communication about a person, or what came to be known as the "false light" doctrine. These four tort doctrines in aggregate form an independent right to privacy – a right to be free from intrusion into our private affairs and to maintain control over our identity and reputation. For over a century, state courts applied these tort doctrines to allow for actionable claims for invasion of privacy; together they provide the grounds for legal action against private persons, corporate entities, or the government.

In Part II, I turn to the primary focus: the adoption by Texas courts of a constellation of common law tort doctrines[10] and state constitutional provisions that constitute the right to privacy in its present form. Of course, the corpus of judicial decisions in Texas dealing with privacy claims is quite substantial, going beyond the scope of a single article. The emphasis here will be on those appellate court rulings based on tort doctrines in civil cases that in my assessment have had the most profound impact on the origins and development of the right to privacy in the state. Lastly, Part III is a summation of findings and a final look at the definition and scope of the right to privacy -- as well as an assessment of the degree to which the right protects Texas in the second decade of the 21st century.

I. Common Law Origins of the Right to Privacy

The origin of the right to privacy as a cause of action in the United States is attributed to the first published argument for a broader common law protection by two Boston lawyers, Samuel Warren and Louis Brandeis in a famous essay published in the *Harvard Law Review* in 1890.[11] The Warren and Brandeis article is arguably the most well-known and often cited law review article in American legal history, remaining one of the most trenchant articulations of the interests warranting protection by a privacy right. Their essay has been cited in hundreds of privacy cases handed down by courts at the state and federal level in Texas as well as other states. Warren and Brandeis did not believe that they were creating the right to privacy from whole cloth but argued that the existing body of case law at that time already contained the necessary elements for what they believed to be a broader, more comprehensive right of


Samuel Warren


Louis Brandeis

[8] As we will see, the terms "intrusion" and "invasion" are often used interchangeably.

[9] Also referred to as misappropriation.

[10] William L. Prosser's original four tort doctrines. See William Prosser's seminal "Privacy," *California Law Review* 48 (1960).

[11] The article can be found by searching most law-content or social science databases; or see Samuel D. Warren, and Louis D. Brandeis, *The Right to Privacy*, with a forward by Steven Alan Childress (New Orleans: Quid Pro Books), *Legal Legends Series* (2010).

privacy—a "right to be let alone." The essay was written out of concern about a trend of overzealous journalists prying into the private affairs of prominent families, Warren's family being among those subjected to this profitable "yellow journalism," of their day involving eavesdropping and disclosure of private and intimate images and facts. The two lawyers believed that the established tort of defamation fell short of the protection that was needed to guard against what they believed to be an intrusive press, much like today's social media sites where personal information and images are posted and shared. To that end, they advocated civil liability for those who publish even truthful stories if such coverage entered the realm of family and private matters that were traditionally believed to be off limits by social mores of the nineteenth century. Of course, they had broader concerns and wrote of the importance of privacy in civilized societies, arguing that the invasion of privacy constituted an independent tort, or injury, because it violated not only the space physically inhabited by a person but also one's dignity and identity, as well. Privacy was not a property right, such as that which is violated by trespass or theft, but a personal right, the violation of which adversely affects a person's sense of independence, self-esteem, and impugns their dignity and integrity, Warren and Brandeis maintained. Based on the privacy interests that protect "corporeal property," such as one's home or papers, arose rights afforded to the protection of "incorporeal property," such as one's reputation, peace of mind, and the products and processes of the mind.[12]


Professor William Prosser

Warren and Brandeis's article may very well be the most widely read and cited law review article in the United States, but it is difficult to prove cause and effect, to discern the impact on the eventual legal recognition of the right of privacy. An analysis of the earliest state court cases debating this issue sheds light on the subject. Professor William Prosser[13] uncovered an unpublished 1890 case that cited the famous *Harvard Law Review* article by the New York Superior Court.[14] In that case, the court enjoined the publication of an unauthorized photograph of an actress who appeared on stage in tights. The court argued that the publication of the photograph constituted an invasion of the woman's privacy because the newspaper exploited, or "appropriated," the actress's fame or notoriety without her permission.[15] This concept of privacy went beyond protecting the actress from a snooping photographer who surreptitiously captured her image though an open window but extended the right to privacy to the unauthorized publication, or theft, of her image. Privacy protects a person from intrusion into one's personal domain broadly defined.

---

[12] *Ibid*.

[13] William Prosser had a profound impact on the development of privacy tort law in the United States. Building upon Warren and Brandeis's notion of a right to be left alone, Prosser, a law professor at the University of Minnesota, wrote extensively on four privacy torts: intrusion, public disclosure, false light, and appropriation.

[14] See William Prosser's classic "Privacy," *California Law Review* 48 (1960). Also see William L. Prosser, "Privacy," *California Law Review* 48:338 (1960). The development of privacy in the United States owes much to Prosser, whose name and work is cited in nearly every privacy case. Yet, some scholars are critical of Prosser as well for stunting the development of privacy. See Neil M. Richards and Daniel J. Solove, "Prosser's Privacy Law: A Mixed Legacy", 98 Cal. L. Rev. 1887 (2010).

[15] *Ibid*.

This newly recognized doctrine of appropriation was adopted in three early cases that followed in the New York court system, two involving the unauthorized use of names for the purpose of commercial gain, and one case dealing with the erection of a statue of a deceased person.[16] Many court opinions show that there was frequently cross pollination – that is, judges citing or acknowledging privacy doctrine adoptions in other state court systems. However, there was not unanimity among the states, as in the instance of an 1899 Michigan high court refusal to recognize the right to privacy in a case involving the sale of a cigar brand bearing the name of a Mr. Atkinson, a deceased public official.[17] Although the early cases had at best a regional impact (mostly in the Northeast) on nascent privacy caselaw, two cases that do stand out in the debate over the existence of the right to privacy found a broader audience. One case is the well-known *Roberson v. Rochester Folding Box Company* in 1902[18] which involved the unauthorized use of a young woman's photograph to sell flour. The advertisement next to the picture contained an awful pun about "the flour of youth." In denying relief under an asserted appropriation doctrine of privacy to the family of the unfortunate young woman, the New York Court of Appeals went to great lengths to strenuously reject Warren and Brandeis's argument that an independent and very broad right of privacy existed. The court based its decision on the grounds of lack of precedent, the purely psychological nature of the alleged privacy violation, the danger to freedom of the press, the problem of discerning the line between private and public persons, and the problem of the immense volume of litigation that would ensue if such a right were recognized. The "so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence,"[19] an argument that mirrors the refusal to recognize the right by the majority of Texas judges in early privacy claims.

Advertisement at the center of the *Roberson* case

Pavesich v. New England Life Insurance Company[20] in 1905 was a case involving the unauthorized use of the plaintiff's name and photograph for the purpose of selling life insurance. An advertisement in the *Atlanta Constitution* displayed a photograph of a well-dressed Paolo Pavesich juxtaposed with a photo of an ill-dressed sickly-looking man. Under Pavesich's photo was a fictitious testimonial lauding the benefits of life insurance. Reversing an adverse ruling, the Supreme Court of Georgia held that the advertisement constituted a trespass upon Pavesich's right of privacy caused by breach of confidence and trust by the photographer and the insurance company. Writing for the majority Justice Cobb boldly argued that the absence of a precedent for an asserted right to privacy does not mean that the right does not exist. He wrote that this right is derived from the natural law and falls within the rights of personal security and liberty; it enables us

16 *Ibid.,* 338.

17 *Ibid*., 338.

18 *Roberson v. Rochester Folding Box Co.,* 64 N.E. 442 (1902).

19 *Ibid*.

20 *Pavesich v. New England Life Insurance Company*, 122 Ga. 190 (Ga. 1905).

Advertisment at the center of the *Pavesich* case

to enjoy life according to our disposition, temperament, and individual lawful desires.[21] He gave an exhaustive and often philosophical opinion, citing Roman law's conception of justice, Blackstone's exhaustive account of the rights of individuals, and, of course, the Warren and Brandeis article. It is not merely the plaintiff's name that is at issue here, but a photo as a symbol of identity.[22] In a rare appropriation case in the 1930s, a state court extended a kind of post-mortem right to privacy after an "undertaker" published in a newspaper, without the decedent's family's consent, a photograph of a corpse being removed from an airplane as an advertisement for his business.[23]

[21] *Ibid.*, 191.

[22] See *Fairfield v. American Photocopy Equip. Co.,* 138 Cal. App. 2d 82 (1955).

[23] *Fitzsimmons v. Olinger Mortuary Association* 1 Colo. 544, 17 P.2d 535 (1932).

Celebrities earn a living in the public eye (many are famous simply for being famous) but they can still recover damages for appropriation of their likeness because a celebrity's right to publicity, as it came to be called, is considered a form of property right by the courts.[24] In *Spahn v. Julian Messner, Inc.,* [25] a case cited by state courts across the country, the New York Court of Appeals held that the fictitious biography of a well-known baseball player constituted an unauthorized exploitation of his personality for purposes of trade and was therefore an invasion of his privacy. Appropriation may involve images, photos, or depictions of the injured party for the purpose of commercial gain.[26] The doctrine of appropriation differs from the other three privacy doctrines in that it deals with the proprietary nature of the tortious action.[27]

Perhaps the most important privacy doctrine is intrusion. In its early 1900s tort law form, intrusion was instrumental to the development of modern privacy doctrines, understood as a common law remedy for eavesdropping and characterized as follows: each person possesses a right to privacy and may maintain an action for a wrongful invasion thereof.[28] In 1908 an Indiana appellate court adopted the doctrine in an action involving spying through the windows on the private activities in the home.[29] Extending beyond physical invasion,[30] intrusion includes electronic eavesdropping on private and personal conversations,[31] and comings and goings in one's home. It is an intentional – not negligent -- tort analogous to both trespass and battery in protecting personal integrity.[32] Harassment or torment can constitute an actionable invasion of privacy if carried out in such a manner as to cause outrage or mental suffering, shame, or humiliation to a person or ordinary sensibilities.[33] By the late 1960s, the intrusion doctrine had become a catch-all legal concept for a myriad of privacy actions.

The "false light" doctrine involves the communication of information that portrays individual to the public in a false and offensive manner.[34] False light is different than the tort of public disclosure because it requires some element of untruth, whereas the public disclosure is applicable regardless of whether the information is true or false. The injuries sustained can range from economic harm to a ruined marriage. In the 1952 case *Gill v. Curtis Publishing Co.*[35], the California Supreme Court found for a married couple against the *Ladies Home Journal* after the magazine ran a candid photo of the married couple showing affection to illustrate an article about how "love at first sight" is a risky basis for a marriage. The court stated that "It is not unreasonable to believe that such would be seriously humiliating or disturbing to the plaintiffs' sensibilities...

[24] See Kent R. Middleton & Bill F. Chamberlin, *The Law of Public Communication*, (White Plains, N.Y.:Longman).

[25] 18 N.Y.2d 324 (N.Y. 1966).

[26] See *Fergerstrom v. Hawaiian Ocean View Estates*, 441 P.2d 141 (1968).

[27] Prosser, "Privacy," 406.

[28] See the Ohio case of *McCormick v. Haley*, 307 N.E.2d 34 (1973) which references early intrusion cases.

[29] *Pritchett v. Board of Commissioners*, 42 Ind. App. 3 (1908).

[30] See *Walker v. Whittle*, 83 Ga. App. 445 (1951).

[31] See *McDaniel v. Atlanta Coca-Cola Bottling Co.,* 60 Ga App. 92 (1939).

[32] *LeCrone v. Ohio Bell Tel. Co.*, 120 Ohio App. 129 (1963); and *McCormick v. Haley*, 37 Ohio App. 2d 73, 307 N.E. 2d 34, 38 (1973).

[33] See *McDaniel v. Atlanta Coca-Cola Bottling Co.,* 60 Ga App. 92 (1939).

[34] Restatement (Second) of Torts sec. 652E.

[35] 239 P.2d 630 (Cal. 1952).

especially when we consider it deals with the intimate and private relationship between the opposite sexes and marriage."[36]

The "false light" that shined upon the aggrieved party does not necessarily need to be defamatory, though it must be objectionable to a reasonable person. However, defamation law is central to the evolution of the doctrine of false light invasion of privacy because many of the judicial standards of proof, liability, and damages employed in false light cases overlap the law of libel and slander. Prosser wrote that the tort made its first appearance in 1816, when an English court enjoined the circulation of a poem of poor quality that was attributed to Lord Byron's hand.[37] The doctrine's earliest known adoption in the United States came in several cases in the 1920s in which the falsity of information about an individual was held to constitute an invasion of privacy that outweighed the publisher's freedom of the press. If a person is portrayed in a distorted light that person suffers a loss of self-respect or dignity. Being falsely depicted as a witness to a crime or appearing in a weekly "rogues gallery" of infamous criminals constitute false light invasion of privacy.[38] As a mean-spirited strategy to collect a debt, an agent of the creditor made calls to the debtor's family suggesting an illicit sexual relationship with the debtor.[39] The Alabama Supreme Court ruled that the false light in which the debtor was placed constituted an invasion of his privacy – an intrusion into the intimate relationship of husband and wife.[40]

The doctrine of public disclosure of private information, can best be understood as a right to exert control over one's most personal information. The issues and questions that fall under its rubric are diverse, ranging from the release of candid photos or videos of celebrities to the unauthorized release of medical records. According to Prosser, the general intent of the doctrine is to protect a person's self-image and reputation.[41] The plaintiff must suffer from some form of emotional distress from the release of private information, much like in libel and slander actions. One of the earliest adoptions of the public disclosure doctrine was in a 1927 Kentucky case in which the defendant painted a sign on his garage door announcing to all passersby that the plaintiff in the lawsuit owed him money for services rendered. The court ruled that public disclosure of private facts about a person even if true, constitutes an actionable invasion of his privacy. In an early California public disclosure case in 1931, a Hollywood film production company revealed the identity of a retired prostitute who was living a respectable life in obscurity.[42] Warren and Brandeis differentiated invasion of privacy, which causes hurt feelings or emotional distress, from public disclosure of private facts which deals with embarrassment, damage to self-image and reputation and the person's relationship with the community in which he or she lives.[43]

Although privacy did not become an actionable legal claim in Texas until the 1973 landmark case of *Billings v. Atkinson* (discussed in detail in Part II of this article) privacy claims were heard in

[36] *Ibid.*, 632.

[37] Prosser, "Privacy," 338, 339.

[38] See *Leverton v. Curtiss Publishing Co.,* 78 F. Supp. 305 (D.D.C. 1948); and *Gill v. Curtiss Publishing Co.*, 38 Cal. 2d 273 (1952).

[39] *Norris v. Moskin Stores, Inc.*, 132 So.2d 321 (1961).

[40] *Ibid*.

[41] Prosser, "Privacy."

[42] *Melvin v. Reid,* 112 Cal. App. 285, 297 (1931).

[43] Samuel D. Warren, and Louis D. Brandeis, "The Right to Privacy", 4 *Harvard Law Rev*. 193, 197 (1890).

the state's courts in earlier cases. Pre-*Billings* privacy cases reveal that many Texas judges were cognizant of other states' adoption of privacy doctrines, and cited many of these cases in their opinions, but they also often agonized over whether to recognize that privacy is distinctive in itself -- not incidental to some other right or tort-- and whether it is an actionable legal claim in the state. A prominent pre-*Billings* case -- *U.S. Life Insurance Co. v. Hamilton*[44] in 1951 refused to recognize the right to privacy as a cause of action in a case alleging that a plaintiff's name and signature was appropriated by the defendant in the promotion of his business. The insurance company produced a form letter promoting a health insurance plan that bore a facsimile of the signature of a former employee, E.B. Hamilton. While employed, similar letters bearing his signature were mailed to prospective customers, but the mailings continued after he had been terminated from the company. Hamilton claimed that he suffered emotional distress because the letters bearing his signature were still being mailed after it was common knowledge that he had been terminated from his position. The Texas Court of Civil Appeals (Waco) clearly acknowledged that in *other* states invasion of privacy for the appropriation of ones' signature was a cause of action but ruled that in Texas the unauthorized use of a signature was a violation of a property right, not an intrusion upon one's privacy. Justice Hale wrote:

> "The right to privacy as an independent and distinctive legal concept stems from the publication of a law review article written by Warren and Brandeis (later Justice Brandeis)...Its development affords a striking illustration of the healthy manner in which the great body of American law grows in meeting the demands of new conditions as they arise in the expanding social order. While we know of no case in which any court has directly passed upon the question as to whether or not an action for damages on account of injury resulting from a wrongful invasion of the right to privacy is cognizable in the courts of Texas, we are inclined to view that the courts of this State should and would, under appropriate circumstances, recognize damages as a proper remedy for the wrongful invasion of that right."[45]

Notwithstanding Justice Hale's foray into the realm of sociological jurisprudence or legal realism, he concluded that the courts of the state "should and would," under the right circumstances, recognize the right to privacy.

---

[44] 238 S.W. 2d 289 (Tex. Civ. App. – Waco 1951, writ ref'd n.r.e.).

[45] 238 S.W. 2d 289 (Tex. Civ. App. – Waco 1951, writ ref'd n.r.e.).

Part II "Adoption of Privacy Doctrines in Texas" will appear in the Spring '23 issue of the TSCHS Journal.

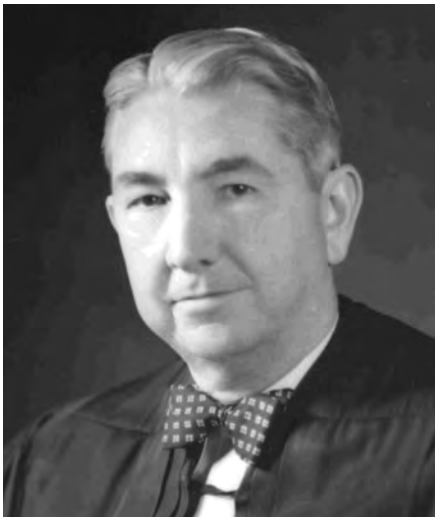
JOHN C. DOMINO, PH.D., *is Professor of Political Science at Sam Houston State University, where he teaches constitutional law and judicial politics. He is the author of* Texas Supreme Court Justice Bob Gammage: A Jurisprudence of Rights and Liberties *(Lexington, Mass.: Lexington Press, 2019) and* Civil Rights and Liberties in the 21st *Century (New York: Routledge, 2018). His article "The History of Judicial Disqualification and Recusal in Texas" appeared in the Winter and Spring 2020 issues of* The Journal of the Texas Supreme Court Historical Society.

Return to Journal Index

Texans Shortlisted for the U.S. Supreme Court: Why Did Lightning Only Strike Once?

By Hon. John G. Browning

As a student at the University of Texas School of Law in the late 1980s, I used to walk past the portrait of one of the school's most distinguished alumni, U.S. Supreme Court Justice Tom C. Clark, and wonder why has only one Texan been chosen to serve on our nation's highest court?[1] Given the size of our state and the outsized role it has played in American politics (including producing presidents like Lyndon B. Johnson, George H.W. Bush, and George W. Bush), why has lightning only struck once? In our Fall 2022 issue, University of Houston Law Professor Renee Knake Jefferson contributed a wonderful article on the Texas women who were considered and even "shortlisted" for the U.S. Supreme Court, including Fifth Circuit judges like Edith Jones and Priscilla Richman (formerly Priscilla Richman Owen). Professor Jefferson's article also detailed the nomination (later withdrawn) of former White House Counsel Harriet Miers.[2] However, the full history of Texans who were shortlisted for possible nomination to the Supreme Court is just as interesting and illuminating.



Justice Tom C. Clark

The demographics of the Court have always engendered considerable debate. Long before President Biden announced that he was restricting his search for retiring Justice Stephen Breyer's replacement to a Black female (ultimately selecting Justice Ketanji Brown Jackson), concerns have been voiced about the Court's ethnic, religious, and racial diversity. For decades, presidents were mindful of a so-called "Jewish seat" on the Court after the nomination of Justice Louis Brandeis in 1916. And seventy-seven years before the media proclaimed Justice Sonia Sotomayor the first Hispanic justice, Justice Benjamin Cardozo, a Sephardic Jew of Spanish and Portuguese descent was appointed in 1932. But before the twentieth century, the geographic diversity of Supreme Court candidates was a major concern for U.S. presidents seeking to maintain some semblance of regional balance. Some states have enjoyed what might be called "over-representation," in light of early history's smaller number of states from which justices could be appointed. For example,

---

1 Some observers claim Justice Sandra Day O'Connor as the second Texan on the Court, by virtue of her El Paso birthplace and the time she spent during her childhood with her maternal grandmother there. However, Justice O'Connor has always publicly identified as a proud Arizona native, where she served as a judge and legislator.

2 Beyond her article for this Journal, please see Renee Knake Jefferson & Hannah Brenner Johnson, *Shortlisted: Women in the Shadows of the Supreme Court* (N.Y. University Press 2020).

New York has produced fifteen justices, while Ohio has furnished ten, with Massachusetts and Virginia adding nine and eight, respectively.

Yet here again, the relegation of Texas to the bottom tier of justice-producing states is curious.[3] More justices were born in England than hailed from Texas (Justice James Iredell, who served from 1790–1799, was from Lewes, while Justice George Sutherland whose tenure ran from 1922 to 1939, was born in Buckinghamshire). Have modern presidential administrations displayed an anti-Texas bias?

The truth is somewhat more complicated. Going back to President Herbert Hoover in 1931, Texan jurists have routinely appeared on the presidential radar and been shortlisted but have rarely made it as far as the nomination stage. Supreme Court scholar Christine L. Nemacheck made a detailed study of presidential Supreme Court nominations, drawing upon a wealth of primary source material that included personal correspondence and papers from presidential libraries and government archives.[4] Some sources were detailed lists with supporting memoranda and even investigatory notes about candidates who'd undergone preliminary vetting, while others were brief lists featuring a president's handwritten notes. Nemacheck's work, however, is more of an overview of the dynamics at work in the selection process (including Congressional reactions and approval), rather than a nuanced examination of each of the nominations themselves.

Nevertheless, it is a valuable resource. Beginning with President Herbert Hoover in 1930, the book's appendix features the short lists for every Supreme Court vacancy through the George W. Bush administration. Hoover had to replace Justice Edward Terry Sanford after Sanford's death in 1930.[5] Before ultimately choosing John J. Parker (who was not confirmed), Hoover had narrowed the field down to a short list of ten candidates, including Parker. It was an impressive list that included jurisprudential icons like Judge Learned Hand and Judge (and future Justice) Benjamin Cardozo. But it also included a Texan, Judge Joseph Chappell Hutcheson.

Judge Joseph Chappell Hutcheson

Judge Hutcheson was born in Houston in 1879. After earning his bachelor's degree from the University of Virginia, Hutcheson attended the University of Texas School of Law. He graduated first in his class in 1900 and was admitted to the State Bar of Texas the same year.[6] After practicing with his father's law firm, Hutcheson was named chief legal advisor for the City of Houston in 1913. In 1917, he was elected mayor of Houston. In

[3] Like Texas, Wyoming, Utah, Maine, Missouri, Mississippi, and Kansas have only produced one justice. Nineteen states have no boast to a Supreme Court justice native son or daughter.

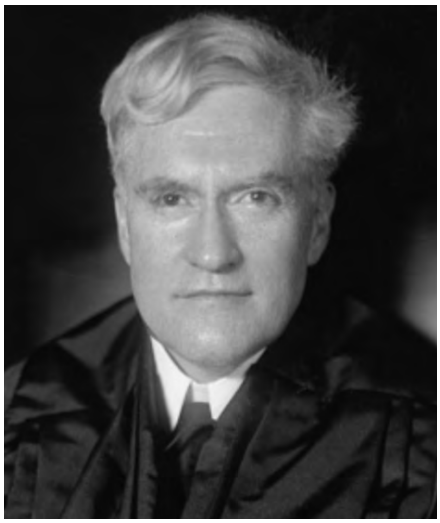
[4] Christine L. Nemacheck, *Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover Through George W. Bush* (University of Virginia Press, 2007).

[5] Justice Sanford has an interesting claim to fame as the last sitting district court judge to be elevated directly to the Supreme Court; he served on the U.S. District Court for the Middle District of Tennessee until his 1923 nomination to the U.S. Supreme Court.

[6] "Joseph Chappell Hutcheson, Jr. *(1879*–1973)," *Handbook of Texas Online* (Texas State Historical Ass'n).

Judge John J. Parker

Owen J. Roberts



Justice Benjamin Cardozo

1918, President Woodrow Wilson appointed the rising star U.S. district judge for the Southern District of Texas. Judge Hutcheson had a transformative impact on that federal district as southeast Texas grew in economic, social, and political importance.[7]

On December 20, 1930, Judge Hutcheson was nominated by President Hoover to a newly created seat on the United States Court of Appeals for the Fifth Circuit; he was confirmed by the Senate on January 13, 1931. But even before that, Hutcheson's growing reputation had placed him in august company, as his spot on Hoover's short list reflects. Justice Sanford had died on March 8, 1930. Seeking to move quickly, Hoover bypassed Hutcheson, Hand, Cardozo, and others on his list in favor of Judge John J. Parker of the U.S. Court of Appeals for the Fourth Circuit. Parker, however, had baggage. He was vigorously opposed by the American Federation of Labor due to his role in a controversial decision involving the United Mine Workers and so-called "yellow dog" contracts (contracts in which an employee agrees, as a condition of employment, not to join a labor union). Parker's nomination also sparked opposition from the NAACP, over remarks Parker had made while a candidate for North Carolina governor in 1920. Parker had described Black participation in politics as "a source of evil and danger to both races and is not desired by the wise men in either race, or by the Republican Party of North Carolina."[8] Parker's nomination was rejected in a 41–39 vote—the Senate's only rejection of a Supreme Court candidate during the seventy-four years between 1894 and 1968.[9]

Stung by the rejection, Hoover went back to his list, choosing the considerably less controversial Owen J. Roberts. Once again, legal luminaries like Cardozo and Hand were passed over, just like the up-and-coming Texan, Joseph C. Hutcheson. In fact, neither Hand nor Hutcheson made the eight-person list from which Hoover chose Roberts (Cardozo was on both lists). And when Hoover would get his next opportunity to fill a vacancy (that of the retiring Justice Oliver Wendell Holmes, Jr.), Hutcheson once again did not make the short list. Benjamin Cardozo was instead chosen and confirmed.

7 An excellent look at Judge Hutcheson's pivotal role is discussed in Charles Zelden's article in Houston's history magazine, *The Houston Review*. Charles Zelden, "Regional Growth and the Federal District Courts: The Impact of Judge Joseph C. Hutcheson, Jr. on Southeast Texas, 1918–1931," 11:2 *The Houston Review* . 79–94 (1989).

8 *Senate Rejects Judge John J. Parker for Supreme Court*, U.S. Senate (May 7, 1930), https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm.

9 *Ibid.*

Even without the chance to serve on the nation's highest court, Joseph C. Hutcheson's judicial career was nothing short of stellar. He rose to Chief Judge of the Fifth Circuit in 1948 and continued to serve in that capacity until 1959.[10] In 1945, he was named United States chairman of the Anglo-American Committee on Displaced Persons, and played an important role in persuading Great Britain to significantly increase the number of Jewish refugees allowed to settle in what was then Palestine.[11] Hutcheson took senior status on November 4, 1964. He continued his judicial service until his death on January 18, 1973.


Vice President Henry Wallace

President Franklin Delano Roosevelt filled a staggering nine vacancies on the Supreme Court during his lengthy tenure. However, none of the successful nominees hailed from Texas, and FDR's short lists are similarly devoid of anyone from the Lone Star State. It would fall to Roosevelt's successor, Harry S. Truman, to finally appoint a Texan to the Supreme Court when he filled his third vacancy with his then-Attorney General, Tom C. Clark. Yet Clark's nomination was not without controversy. As Professor Vincent Johnson has noted, Clark was "caricatured as the president's lackey, a lawyer incapable of demonstrating the independence and judgment that is expected on the nation's highest tribunal."[12] Critics like former Vice President Henry Wallace assailed Clark for his role while head of the Justice Department in compiling lists of subversive organizations as part of President Truman's loyalty program. Wallace accused Clark of using "spies in labor unions" and of overseeing "the whole dirty business of wire-tapping."[13] Another former Cabinet member, Harold Ickes, maintained that Truman's elevation of Clark to the Court merely degraded the Court to Clark's level of mediocrity.


Harold Ickes

However, as Professor Johnson has observed, Justice Clark was "an important voice in a judicial revolution that transformed American society through an expansive recognition of individual rights and a broad construction of the commerce clause."[14] Clark's service, which lasted from 1949 to 1967, included the peak years of the Warren Court (which lasted from 1953 to 1969). The initial controversy over his appointment soon evaporated, and Clark was confirmed by a vote of 73 to 8. Clark not only demonstrated his judicial independence by voting against Truman's attempt to seize the steel mills for the Korean War effort in the *Steel Seizure Case*,[15] he wrote the majority opinion in the

---

[10] "Joseph Chappell Hutcheson, Jr. *(1879*–1973)," *Handbook of Texas Online*.

[11] *Ibid.*

[12] Vincent R. Johnson, "The Kavanaugh Controversy has Texas Precedent," *San Antonio Express News* (Sept. 13, 2018), https://www.mysanantonio.com/opinion/commentary/article/The-Kavanaugh-controversy-has-Texas-precedent-13227916.php.

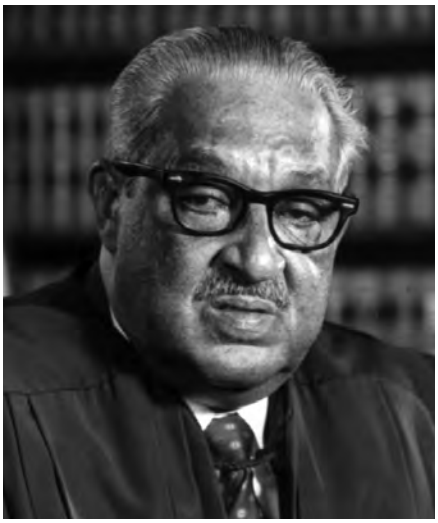
[13] *Ibid.*

[14] *Ibid.*

[15] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Justice Abe Fortas

Ramsey Clark



Justice Thurgood Marshall

landmark Fourth Amendment case of *Mapp v. Ohio*[16] and voted to end segregation in *Brown v. Board of Education*.[17] The Dallas-born jurist's contributions on the Court are worthy, indeed.[18]

Clark, however, would remain the Court's lone Texan until his departure in 1967. Neither Presidents Dwight D. Eisenhower nor John F. Kennedy nominated or considered any Texans for the Supreme Court. And when a Texan finally arrived in the White House in the form of Lyndon B. Johnson, he filled his first vacancy with Abe Fortas, his longtime attorney. No Texans were among the twelve distinguished lawyers, judges, and legal academics on LBJ's initial short list. In fact, President Johnson was responsible for the departure of Clark, the Court's only Texan. Eager to create a vacancy so that he might appoint the first Black justice to the Supreme Court, Johnson held a phone conversation in 1967 with then-Deputy Attorney General Ramsey Clark. In it, Johnson asked whether Justice Clark could remain on the Court in the event that his son became Attorney General. While Ramsey Clark indicated that there would be no conflict of interest, Johnson disagreed, arguing "if [Clark] became Attorney General, [his father] would have to leave the Court. Every taxi driver in the country, he'd tell me that the old man couldn't judge 'em fairly if his own boy's sending 'em up."[19] President Johnson did, of course, appoint Ramsey Clark as Attorney General, prompting Justice Clark's resignation from the Court—thus clearing the way for Johnson's historic appointment of Thurgood Marshall.

To Johnson's credit, he did attempt to place another Texan on the Supreme Court—Austin-born Homer Thornberry of the Fifth Circuit. Born January 9, 1909, to deaf parents who were both teachers at the Texas School for the Deaf, William Homer Thornberry grew up dirt poor. After graduating from Austin High School in 1927, Thornberry worked his way through both the University of Texas and its law school as a deputy sheriff. He earned his bachelor's degree in 1932 and his law degree in 1936 and was even elected to the Texas legislature while still in law school (Thornberry served in the House of Representatives from 1937 to 1941). He served as Travis County District Attorney from 1941 to 1942, and in World War II as a U.S. Navy lieutenant commander.[20]

---

16 367 U.S. 643 (1961).

17 347 U.S. 483 (1954).

18 For a comprehensive look at Justice Clark's career, see Mimi Clark Gronlund, *Supreme Court Justice Tom C. Clark: A Life of Service* (Austin: University of Texas Press, 2010).

19 Nemacheck, *Strategic Selection,* 18.

20 "William Homer Thornberry," *Biographical Directory of Federal Judges (Fed. Judicial Ctr.),* https://www.fjc.gov/history/judges/thornberry-william-homer.

Thornberry was a friend and longtime political ally of Lyndon Johnson, winning election to Johnson's former Congressional seat (the 10th Congressional District) in 1948 just as LBJ won a seat in the U.S. Senate. Thornberry served in the U.S. House of Representatives until 1963, when he was nominated by President John F. Kennedy to the federal bench (Thornberry was even present on Air Force One and witnessed Johnson being administered the oath of office following the assassination of President Kennedy, and received his commission as a federal judge on December 17, 1963, from new-President Johnson). Two years later, Johnson appointed his old friend Thornberry to the Fifth Circuit; Thornberry was confirmed on July 1, 1965.[21]


Homer Thornberry

Foreshadowing future battles over judicial nominations, the direction of the Supreme Court, and the Senate's role in providing "advice and consent" to the president on Supreme Court nominees, President Johnson's attempt to cement his legacy on the Court was contentious. In late June 1968, Johnson announced that Chief Justice Earl Warren intended to retire at "such time as a successor is qualified."[22] Johnson planned to name Justice Abe Fortas as chief justice, while naming Homer Thornberry to Fortas' seat as associate justice. Johnson's dual nominations were not greeted warmly. Republican senators felt that lame duck Johnson and Warren were plotting to deny the next president (expected to be a Republican) the chance to pick a new chief justice and howled at what they saw as cronyism at its worst. Meanwhile, Southern Democrats upset with Justice Fortas' liberal rulings were not keen on seeing him at the helm of the Court.

The Senate Judiciary Committee opened hearings on July 11, with the Committee primarily fixated on Fortas.[23] The days-long hearings ended without a vote before Congress' summer recess. After Congress resumed, the hearings were re-opened; this time, the focus was on Fortas' receipt of a $15,000 stipend to teach a course at American University Law School. The stipend had been paid for with donations by two department store moguls, two directors for Braniff Airways, and the chairman of the New York Stock Exchange—which had senators claiming that conflicts of interest abounded. All told, the rough and tumble hearings ran for eleven days, a far cry from the three hours it had taken to confirm Fortas just three years earlier.

In early October, the full Senate voted. After four straight days of debate, senators voted 45–43 in favor of a cloture petition to end debate.[24] Recognizing that he was well short of the two-thirds majority needed to compel a vote, and facing a filibuster, Fortas asked President Johnson to withdraw his name from contention. With Thornberry's nomination now moot, his name was also withdrawn by the White House without a vote. Fortas would later resign in 1969 over a separate financial scandal. Thornberry continued serving on the Fifth Circuit and took senior status on

---

[21] *Ibid.*

[22] Meredith Hindley, "Supremely Contentious: The Transformation of 'Advice and Consent'", 30:5 *Humanities* (Sept./Oct. 2009), https://www.neh.gov/humanities/2009/septemberoctober/feature/supremely-contentious.

[23] *Ibid.*

[24] *Ibid.*

December 21, 1978. He died on December 12, 1995.[25]

After President Richard Nixon took office in 1969, he would have the chance to fill four Supreme Court vacancies: the seats of Chief Justice Warren (replaced by Warren E. Burger); Justice Fortas (ultimately replaced by Harry Blackmun); Justice Hugo Black (replaced by Lewis F. Powell); and Justice John M. Harlan II (replaced by William Rehnquist). Nixon did not choose any Texans, and only one figure from the Lone Star State even made it onto the president's short list.

That Texan was legendary University of Texas law professor Charles Alan Wright, whose name appeared on a twelve-person list of potential replacements for Justices Hugo Black and John Marshall Harlan II in 1971.[26] Once called "a Colossus standing at the summit of our profession" by Justice Ruth Bader Ginsburg, Wright was a Texan by choice rather than birth. Born in Philadelphia in 1927, Wright was educated in Connecticut, earning his undergraduate degree from Wesleyan University in 1947 and his law degree from Yale in 1949. After clerking for Judge Charles Clark on the Second Circuit, Wright taught at the University of Minnesota Law School from 1950 to 1955.[27]


Charles Alan Wright

In 1955, Wright began teaching at the University of Texas School of Law, a position he held until his death in 2000. Widely considered to be the preeminent scholar in the United States on constitutional law and federal courts, Wright was perhaps best known as a scholar for co-authoring (with Professor Arthur Miller of Harvard) the 54-volume treatise *Federal Practice and Procedure* and *Wright & Miller on Federal Courts*. Wright would have undoubtedly felt right at home had he been chosen for the Supreme Court; he argued before the Court thirteen times (winning eleven of those), and throughout his remarkable career, he was on a first-name basis with virtually all the serving justices. But Professor Wright was an amazing figure in the classroom as well. As intimidating as his perfect recall of case citations (down to the page number) could be, Professor Wright was unfailingly kind to his students outside the classroom.[28] Wright's commitment to sports was equally impressive. Not only did he serve on the NCAA Infractions Committee from 1973 to 1983, Wright took particular pride in his coaching of the Legal Eagles intramural football team, which won 330 games during his forty-five-year tenure.

Although Wright's stature as a universally respected legal scholar had put him on President Nixon's radar even before 1971, he will be forever remembered for his service to Nixon as special counsel on constitutional issues during the Senate's 1973 investigation of the Watergate break-in. After the infamous "Saturday Night Massacre" and the ensuing impeachment proceedings, Nixon

[25] Michael Barnes, "Homer Thornberry: Austin's Congressman, Judge and Supreme Court Nominee," *Austin Am. Statesman* (Feb. 1, 2017), https://www.statesman.com/story/news/2017/02/02/homer-thornberry-austins-congressman-judge-and-supreme-court-nominee/10115526007/.

[26] Nemacheck, *Strategic Selection,* 151. Professor Wright's name is misspelled "Charles Allen Wright" in this source).

[27] "Charles Alan Wright," *UT News* (July 7, 2000), https://news.utexas.edu/2000/07/07/charles-alan-wright/.

[28] As a University of Texas School of Law graduate (Class of 1989) who had the privilege of having Charles Alan Wright as a professor, the author can personally attest to this.

and his counsel Wright parted ways. By early 1974, Nixon was represented by James St. Clair, and Wright had returned to teaching.

After Nixon's resignation, his successor Gerald R. Ford also had a chance to put a Texan on the Court but failed to do so. In weighing possible replacements for ailing Justice William O. Douglas, President Ford's short list (which was eventually narrowed down to successful nominee John Paul Stevens) included a Texan named Malcom R. Wilkey.[29] Although Wilkey was then serving as a judge on the U.S. Court of Appeals for the District of Columbia Circuit, the Tennessee-born, Kentucky-raised, and Harvard-educated jurist actually began his career in Texas. Wilkey was in private practice in Houston from 1948 to 1954 (and taught at the University of Houston Law Center during the same period). In 1954, Wilkey was tapped to become the United States Attorney for the Southern District of Texas, a post he held until 1958. After stints in Washington, D.C. at the Office of Legal Counsel and as Assistant Attorney General at the Department of Justice's Criminal Division, Wilkey returned to private practice in Texas in 1961. By 1963, Wilkey had gone in-house as General Counsel of Kennecott Copper Corporation. In 1970, President Nixon nominated him to Warren Burger's vacated seat on the D.C. Circuit.[30]

Malcolm R. Wilkey

A. Kenneth Pye

Although he was not selected by Ford, Judge Wilkey was highly regarded on the influential D.C. court, and he was once again shortlisted by President Ronald Reagan for the seat vacated by Justice Potter Stewart. Of course, history was made when Sandra Day O'Connor was nominated instead. Wilkey's service on the D.C. Circuit continued until November 8, 1985, when he retired. President Reagan appointed him U.S. Ambassador to Uruguay, a post that he held until his retirement in 1990. Judge Wilkey and his Chilean-born wife of thirty-one years moved to Santiago, Chile in 1990. He died there on August 15, 2009.[31]

Judge Wilkey was not the only person with ties to Texas to be shortlisted by President Reagan. On the same list from which Sandra Day O'Connor was chosen was the name A. Kenneth Pye.[32] While Pye was at the time best known as a renowned law professor and dean at Duke University's law school (Pye also served as Duke's chancellor and acting president), in 1987, he would become Southern Methodist University's president. Pye led SMU in the aftermath of its football program's scandal, and he only left the university shortly

---

[29] Nemacheck, *Strategic Selection,* 152.

[30] "Malcolm Richard Wilkey," *Biographical Directory of Federal Judges (Fed. Judicial Ctr.),* https://www.fjc.gov/history/judges/wilkey-malcolm-richard.

[31] *Ibid.*

[32] Nemacheck, *Strategic Selection,* 152.

before his death from cancer in 1994.[33]

When contemplating a replacement for the retiring Justice Lewis Powell in 1987, President Reagan had two Texans on his short list. One, as Professor Renee Knake Jefferson has already noted, was Judge Edith H. Jones of the Fifth Circuit—who would become a perennial "shortlister" for Republican presidents, appearing on the short lists of Presidents George H.W. Bush and George W. Bush.[34] The other was Judge Jones' colleague on the Fifth Circuit, Judge Patrick E. Higginbotham.[35] Born in McCalla, Alabama on December 16, 1938, Higginbotham attended the University of Alabama on a tennis scholarship and completed college and law school in just five years. Following his graduation in 1961, Higginbotham served as a JAG officer in the U.S. Air Force until 1964. He was in private practice in Dallas in 1975 when he was appointed by President Ford to the U.S. District Court for the Northern District of Texas—making him the youngest sitting federal judge in the country.[36]


Judge Edith H. Jones

On July 1, 1982, Judge Higginbotham was nominated by President Reagan to the U.S. Court of Appeals for the Fifth Circuit and was confirmed unanimously just twenty-six days later.[37] In 1987, with Justice Powell's resignation looming, President Reagan initially turned to another mainstay of his judicial short list who had been considered for both of the previous vacancies on the Court filled by Justice William Rehnquist and Justice Antonin Scalia, respectively. That ill-fated choice was Judge Robert Bork, whose nomination was rejected by the Senate 58–42 in a highly publicized and contentious hearing on October 23, 1987. While the Bork nomination was floundering, speculation was rife about a potential replacement candidate drawn from the president's short list. Higginbotham's name was prominently mentioned as the logical choice, and even garnered early support from Democratic senators such as Lloyd Bentsen of Texas and Dennis DeConcini of Arizona.[38] The Reagan administration, however, declined to nominate Higginbotham.


Judge Patrick E. Higginbotham

President Ronald Reagan initially announced his intention to nominate Judge Douglas Ginsburg on October 29, 1987. But after revelations about Ginsburg's past use of marijuana

[33] "A. Kenneth Pye, 62, S.M.U. President Who Restored Sports," *N.Y. Times* (July 12, 1994), https://www.nytimes.com/1994/07/12/obituaries/a-kenneth-pye-62-smu-president-who-restored-sports.html.

[34] Nemacheck, *Strategic Selection,* 153–54.

[35] *Ibid.*

[36] "Patrick Errol Higginbotham," *Biographical Directory of Federal Judges (Fed. Judicial Ctr.),* https://www.fjc.gov/history/judges/higginbotham-patrick-errol.

[37] *Ibid.*

[38] Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*, 67 (2007).

surfaced in the media, Ginsburg withdrew his name from consideration. Less than two weeks later, President Ronald Reagan formally nominated Judge Anthony Kennedy, who was confirmed in early February 1988. Judge Higginbotham continued his distinguished service on the Fifth Circuit, assuming senior status on August 28, 2006.[39]

With the arrival of another Texan in the White House in George H.W. Bush, one might expect that lightning might strike twice and place a second Texan on the high court. Indeed, President Bush had Judge Edith Jones "shortlisted" for his first chance to fill a vacancy and replace Justice William Brennan, but he ultimately chose Judge David Souter.[40] With his second opportunity to replace a trailblazing member of the Court, Justice Thurgood Marshall, Bush considered the chance at another historic nomination by naming Judge Emilio Garza of the Fifth Circuit.[41]

Judge Emilio Garza

Judge Garza would have made history as the first Mexican American on the Supreme Court. Born August 1, 1947, in San Antonio, Garza earned both a bachelor's and master's degrees from the University of Notre Dame by 1970. Following service as an officer in the U.S. Marine Corps, Garza enrolled at the University of Texas School of Law, graduating in 1976. After a ten-year stint in private practice in San Antonio, Garza served as a state court judge in Bexar County from 1987 to 1988. In February 1988, Garza was nominated by President Reagan to the U.S. District Court for the Western District of Texas. He was confirmed by the Senate on April 19, 1988.[42]

Justice Priscilla Owen

Less than three years later, President George H.W. Bush nominated Garza to the U.S. Court of Appeals for the Fifth Circuit. He was confirmed by the Senate on May 24, 1991.[43] When the time came to choose Justice Marshall's successor, President Bush interviewed both Judge Garza of the Fifth Circuit and Judge Clarence Thomas of the D.C. Circuit. On July 1, 1991, Bush announced Thomas as his choice to replace the civil rights icon. Thomas' formal confirmation hearing began on September 10, 1991. The high-profile hearing became contentious with Anita Hill's accusations of sexual harassment, but on October 15, 1991, Thomas was confirmed by a 52–48 vote—the slimmest margin for approval to the Court since 1886. Judge Garza continued to serve faithfully on the Fifth Circuit. He took senior status on August 1, 2012. On January 5, 2015, Judge Garza retired.[44]

---

[39] "Patrick Errol Higginbotham," *Biographical Directory of Federal Judges (Fed. Judicial Ctr.),*36.

[40] Nemacheck, *Strategic Selection,* 154.

[41] *Ibid.*

[42] "Emilio M. Garza," *Biographical Directory of Federal Judges (Fed. Judicial Ctr.),* https://www.fjc.gov/history/judges/garza-emilio-m.

[43] *Ibid.*

[44] *Ibid.*

During President Bill Clinton's tenure and filling of two vacancies on the Court, no Texans were shortlisted, much less nominated. But with the arrival of yet another Texan in the White House, President George W. Bush, it is hardly surprising that judicial candidates from Texas figured prominently in his plans for the Court. As noted by Professor Jefferson, those plans included, at least initially, female prospects like Judges Edith Jones and Priscilla Owen from the Fifth Circuit, along with his unsuccessful nominee Harriet Miers. However, Bush's initial plans for replacing Justice Sandra Day O'Connor in 2005 involved a list that included not only eventual nominee John G. Roberts, but also a holdover from his father's administration, Judge Emilio Garza.[45]

Harriet Miers

Alberto A. Gonzales

However, Judge Garza was not the only candidate for a history-making Latino justice. Also on Bush's short list was his friend, former White House counsel, and then-80th U.S. Attorney General Alberto R. Gonzales.[46] Gonzales, the highest-ranking Latino to serve in the executive branch, had the president's trust as a longtime adviser dating back to Gonzales' tenure as General Counsel to then-Governor Bush. Born August 4, 1955, in San Antonio, Gonzales had served in the Air Force before earning his undergraduate degree from Rice University (1979) and his law degree from Harvard (1982). He was in private practice in Houston until 1994, when his ties to Bush led to serving first as the governor's General Counsel, then Texas Secretary of State, and finally on the Supreme Court of Texas. When Bush was elected president, Gonzales resigned from the court and joined the Bush administration as White House Counsel.

After President Bush announced Gonzales on November 10, 2004, as his nominee for U.S. Attorney General, speculation mounted that Gonzales might be Bush's choice for a future Supreme Court vacancy. Some conservative groups and individuals even proclaimed their opposition to such a potential nomination, based on their perception of Gonzales as supporting abortion rights based on his vote in one of several parental notification decisions issued by the Texas Supreme Court in 2000.[47] Yet while he was on the short list for the vacancy for which Harriet Miers (and eventually Samuel Alito) was nominated, Gonzales continued in his capacity as Attorney General. Controversy over his role in the allegedly politically motivated firings of several U.S. attorneys ultimately resulted in Gonzales' September 17, 2007, resignation from the office of Attorney General. In 2011, Gonzales entered legal academia as a professor at Belmont University School of Law in Nashville, Tennessee, and was later named dean—a position he currently holds.

[45] John Roberts was not confirmed for Justice O'Connor's seat because the intervening death of Chief Justice Rehnquist provided Bush with the opportunity to name Roberts as the new Chief Justice instead. Following the withdrawal of Harriet Miers' nomination for the O'Connor spot, President Bush chose Judge Samuel Alito as his nominee.

[46] Nemacheck, *Strategic Selection,* 154–55.

[47] These decisions began with *In re* Doe 1, 19 S.W. 3d 249 (Tex. 2000).

Chief Justice Wallace Jefferson

Justice Don Willett

Judge james C. Ho

No Texans are known to have been considered by President Barack Obama for the two Supreme Court vacancies he filled with Justices Elena Kagan and Sonia Sotomayor. However, with President Obama's nomination of Judge Merrick Garland to fill the seat of the late Justice Antonin Scalia stalled by the Republican-controlled Senate, then-Democratic presidential nominee Hilary Clinton had a contingency plan that included at least one Texan. Following the WikiLeaks release of Clinton's emails in 2016, Clinton's campaign chief John Podesta confirmed the veracity of an email entitled "Scalia replacement" that floated a number of potential candidates.[48] One of them was Wallace Jefferson, former chief justice of the Supreme Court of Texas from 2004 to 2013, and now an appellate attorney in private practice with Alexander Dubose Jefferson Townsend. Although a surprising choice for such a list because he was elected and re-elected as a Republican, observers like TCU Professor James Riddlesperger were quick to point out that Jefferson was seen as "a moderate force" and "never a controversial judge."[49]

Meanwhile, Clinton's Republican opponent for the presidency, Donald J. Trump, made no secret of his regard for certain Texans as prospective Supreme Court justices. Even before his 2020 election, Trump released (and later added to) a list of potential nominees to the Court. Although the list included those he eventually chose to fill vacancies on the Court—Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—it also included several Texans. Some, like former Texas Supreme Court justice Don Willett and former Texas Solicitor General James C. Ho, were widely respected conservative stalwarts who would be appointed to the Fifth Circuit by Trump after he became president. But the list also grew to include three sitting U.S. senators, including Trump's former primary opponent, Senator Ted Cruz of Texas. Senator Cruz, a graduate of Princeton and Harvard Law School and former law clerk to Chief Justice Rehnquist, made the following statement in response to his public shortlisting:

> I am grateful for the president's confidence in me and for his leadership in nominating principled constitutionalists to the federal bench over the last four years. As a member of the Senate Judiciary Committee, I've been proud to help confirm to the

[48] Alex Daugherty, "WikiLeaks Reveals Clinton Considered a Texas Republican for the Supreme Court," *McClatchy, Wash. Bureau* (Oct. 24, 2016), https://www.mcclatchydc.com/news/politics-government/election/article1100149702.html.

[49] *Ibid.*

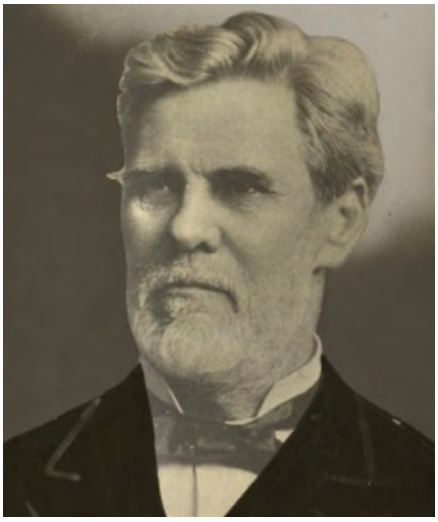
bench over 200 of President Trump's judicial nominees, including two to the Supreme Court. It's humbling and an immense honor to be considered for the Supreme Court. The High Court plays a unique role in defending our Constitution, and there is no greater responsibility in public service than to support and defend the Constitution of the United States.[50]


Sen. Ted Cruz

Whether they appear on public short lists like President Trump's or private ones that are only revealed through later research, Texans have been a staple for presidential consideration for the Supreme Court for roughly the past hundred years. Despite this, only Justice Tom C. Clark has ascended to this legal Olympus. The lack of Texas representation has troubled at least one prominent Texan, U.S. Senator John Cornyn. The Texas Republican and Judiciary Committee member stated in 2018 that the Court "ought to represent different regions" and that he was troubled by the scarcity of high court nominees from Texas.[51]

Just what would it take for lightning to strike twice? We may never know, given the ever-shifting winds that shape the American political landscape. The fortunes of those Texans considered for the Court over the last century offer some limited insight. But we can also gain an additional—and rare—perspective by examining the only known nineteenth century instance of a Texan shortlisted for the U.S. Supreme Court. That Texan was none other than William Pitt Ballinger, the Galveston lawyer chronicled by Professor John Moretta in another article in this issue.

Ballinger's representation of the railroad industry not only helped fuel Texas' growth but also helped transform tort law. That aspect of Ballinger's remarkable career is thoroughly described by Ballinger's biographer, Professor John Moretta, elsewhere in this issue. But Ballinger is also noteworthy because his professional reputation was such that he was offered a seat on the Supreme Court of Texas, came incredibly close to a nomination to the U.S. Supreme Court, and ultimately remained with his practice in Texas. At a time in our modern history when critics label the current Supreme Court as too susceptible to outside political influences, the story behind how Ballinger almost became a Supreme Court justice offers insight into the role that politics—and even the maneuverings of sitting justices themselves—once played in determining the makeup of the nation's highest court.


William Pitt Ballinger

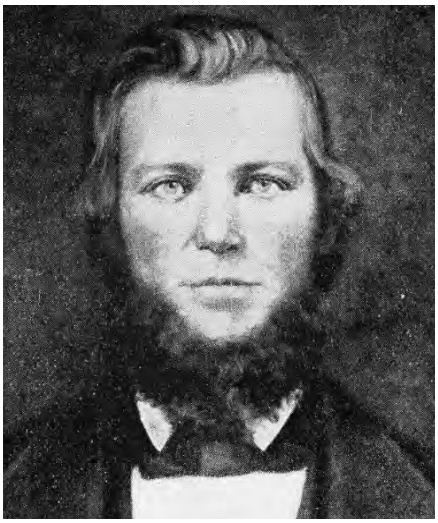
[50] Cory McCord, *Sen. Ted Cruz Named by President Trump as Potential SCOTUS Nominee*, KHOU.COM (Sept. 9, 2020), https://www.khou.com/article/news/politics/sen-ted-cruz-named-as-potential-scotus-nominee/285-1c0def19-a1be-42ae-9f2d-e032a2bb13e1.

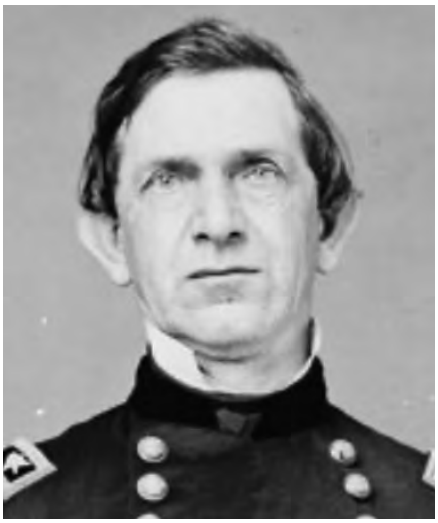
[51] Ken Stickney, "Cornyn: Would Love to See More Texans as Court Nominees," *Port Arthur News* (Aug. 2, 2018), https://www.panews.com/2018/08/02/cornyn-would-love-to-see-more-texans-as-court-nominees/.

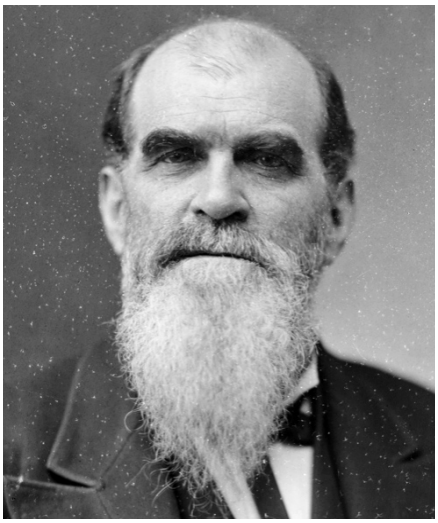
No account of any aspect of Ballinger's life is complete without acknowledging the significance of Professor Moretta's masterful biography of the man: *William Pitt Ballinger: Texas Lawyer, Southern Statesman, 1825–1888*.[52] Born in Kentucky on September 25, 1825, Ballinger moved to Texas at the age of eighteen to "read the law" in the Galveston office of his uncle, Judge James Love. After a sojourn serving in the Mexican War, Ballinger was admitted to the bar in 1847 and promptly began practicing in his uncle's firm—then the largest in Galveston. Young Ballinger was a rising star, and in 1850, he was appointed as the United States Attorney for the District of Texas. Ballinger became one of the leading attorneys in Texas, attracting clients from not only the rest of the state but from Boston, Philadelphia, New York, New Orleans, and Mobile as well. By 1860, Ballinger enjoyed considerable success, and had an annual income of nearly $10,000—an impressive sum for the time.[53]

Then the Civil War broke out. Ballinger was opposed to secession, but once it became reality, he supported the Confederate cause. He served as receiver of alien enemy property, helping fill the Confederacy's coffers through the sale of confiscated Northern-owned property. Once the war ended, Ballinger was asked by Governor Pendleton Murrah to help negotiate terms of Texas' surrender with Union General Edward Canby. In the conflict's aftermath, Ballinger traveled to Washington to receive his pardon; as the consummate practitioner, he also handled pardon requests for a number of clients, earning at least $7,500.[54] By 1866, Ballinger was as prosperous as he had ever been, and his professional reputation continued to grow.

Such was Ballinger's reputation that by January 1874, newly elected Governor Richard Coke asked to see the Galveston attorney "on a matter of upmost urgency."[55] They met on January 23, 1874, and Governor Coke stated his desire to appoint Ballinger to the Supreme Court of Texas,


Gov. Pendleton Murrah


Union Gen. Edward Canby


Gov. Richard Coke

[52] John Anthony Moretta, *William Pitt Ballinger: Texas Lawyer, Southern Statesman, 1825–1888* (Tex. St. Hist. Ass'n 2000). Some scholars discussing Ballinger have incorrectly claimed that he was offered, and turned down a nomination to the U.S. Supreme Court. As Professor Moretta's book and this article make clear, no such offer was made, much less declined.

[53] Kenneth R. Stevens, "William Pitt Ballinger: Galveston's Reluctant Rebel," 40:1 *E. Tex. Hist. J*. 37 (2002).

[54] *Ibid.,* 41.

[55] Moretta, *William Pitt Ballinger,* 206.

saying "the People of Texas, as well as this office, would be greatly honored by your presence on the Bench. There would be no greater service that you could perform for the People of this State."[56] Ballinger, while flattered, waffled due to the uncertainty of his "pecuniary condition."[57] After all, he was a highly successful, handsomely compensated attorney with a thriving private practice; in contrast, justices on the Supreme Court of Texas were not well paid. The *Dallas Herald* would later report that

> no individual with as distinguished and as lucrative a practice as Mr. Ballinger would willingly accept a salary of $4,500, which is about the compensation of a first-class clerk. Few men who are worthy of the position earn less than $8,000 to $12,000 per annum, and it is as unnecessary as it is absurd to assume the greatest responsibilities of the State at a personal sacrifice and possible personal embarrassment.[58]

Still, many in Ballinger's inner circle wanted him on the court—including his brother-in-law Guy Bryan, Speaker of the House of the Texas legislature. Bryan assured Governor Coke that Ballinger would accept the appointment out of civic duty. The Texas Senate officially confirmed Ballinger, prompting the governor to write the Galveston lawyer again and argue that "Justice to the People of Texas" demanded that Ballinger make the financial sacrifice and enter public service "as an Associate Justice of the Supreme Court."[59] Ballinger seemed inclined to accept the judgeship, confessing in his diary that it would be "entirely to my taste—it would fill to the full the measure of my ambitions . . . This is the very point in time for useful service to the State."[60] But after discussing the matter at length with his wife Hally and hearing her concerns about the cut in pay, Ballinger declined. He wrote Governor Coke that he could not accept because the judicial salary would "not afford me that exemption from pecuniary embarrassment which should be the condition, above all men, of a judge upon the bench."[61] Ballinger made sure to inform the governor that it was "not a question with me of gain, but of adequate support of my family."[62]

Reluctantly, Governor Coke honored Ballinger's request and removed his name from nomination. The *Austin Democratic Statesman* lamented Ballinger's decision, expressing "great regret" because "very few men in Texas" had the "requisite virtues for a position on the Supreme Bench, a position which, we feel assured he would have adorned."[63] But not everyone was sad to see Ballinger turn down a seat on the state supreme court. Besides Guy Bryan, Ballinger had another prominent brother-in-law: U.S. Supreme Court Justice Samuel F. Miller, who had married Ballinger's sister Lucy in 1842.[64] In a March 21, 1874 letter to Ballinger, Justice Miller made it clear

---

[56] *Ibid.*, 207.

[57] *Ibid.*

[58] *Dal. Herald*, Feb. 6, 1874. Interestingly, in Article V of the 1876 Texas Constitution, the salary of an associate justice is set at only $3,550.00.

[59] Moretta, *William Pitt Ballinger,* 208.

[60] *Ibid.* (quoting Ballinger's diary entry for Jan. 23, 1874).

[61] *Ibid.*, 209 (quoting Ballinger's Feb. 3, 1874 letter to Governor Coke).

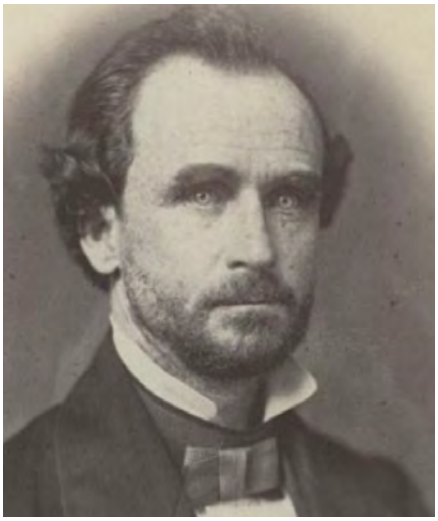
[62] *Ibid.*

[63] *Austin Democratic Statesman*, Feb. 5, 1874.

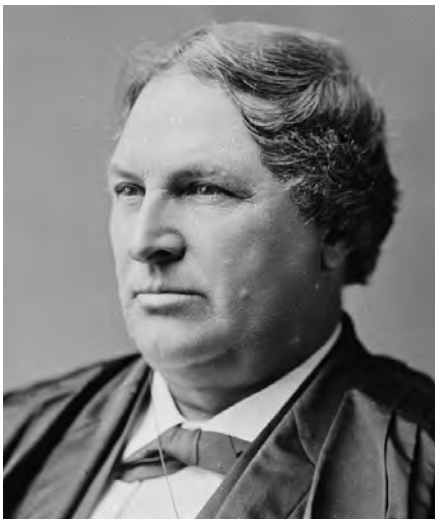
[64] Interestingly, William Pitt Ballinger (at 17) was serving as deputy clerk of the Knox County (Kentucky) Court at the time, and in fact issued the happy couple's marriage license.

he felt the Galveston lawyer was better suited for a bigger legal stage. He wrote:

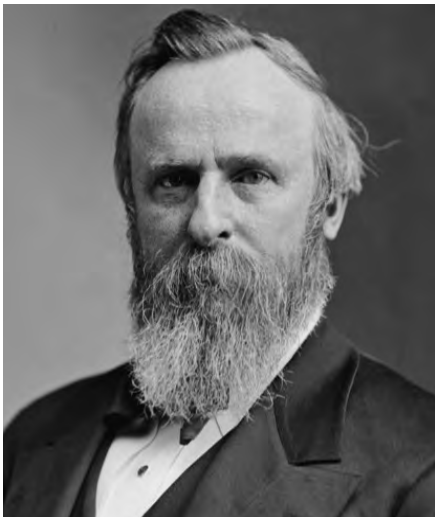
> I think you acted very wisely in declining the judgeship. Yet I fully appreciate your desire for the highest honor of the profession. I was myself willing to accept the same position in the Iowa courts.
>
> I know now how very unwise it would have been to do so. For I should have been struggling through old age with very limited means for the demands of my family. I am well satisfied that there is as much honor, as much respect and esteem of the kind you and I both value in being recognized as the first, or among the few that are first in the profession in a State as to be a judge of its highest court . . .
>
> I hope yet to see you in our Court. If ever the republican party is overthrown or divided, events which are far from improbable, those who succeed to power must recognize the right of the South to representation on our bench. The first requisite for such a place is the knowledge of that peculiar system of local law of which Louisiana and Texas are the principle examples.[65]



Speaker Guy Bryan



Justice Samuel F. Miller



President Rutherford B. Hayes

Clearly, Miller envisioned a future Court whose makeup would be more representative of the United States itself, and he saw his brother-in-law as part of that future. Just three years later, his wish seemed about to come true. With the "Compromise of 1877" and the installation of Rutherford B. Hayes as president, many in the South expected that the new president would, as a conciliatory gesture, appoint a number of prominent Southerners to key public offices. Texans especially had a right to be hopeful, since one of Hayes' closest friends was a classmate of his from Kenyon College (class of 1842)—Guy M. Bryan, Texas' Speaker of the House and Ballinger's brother-in-law. But first there had to be a vacancy on the Court. That problem resolved itself at the beginning of President Hayes' term, when Justice David Davis

---

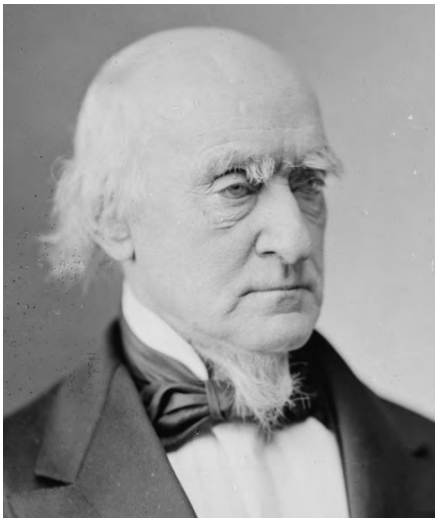
[65] Unless otherwise indicated, all references to the correspondence between Justice Miller and William Ballinger, and Ballinger's diary entries related to same, are to the Library of Congress's Manuscript Division collection, *Samuel Freeman Miller Correspondence and William Pitt Ballinger Diaries, 1854–1887*, ID No. MSS65919 (Mar. 21, 1874) (Library of Congress catalog record https://lccn.loc.gov/mm88065919) [hereinafter MBC].

(who'd been appointed to the Court by Abraham Lincoln in 1862) left the Court to take office as a U.S. senator from Illinois.

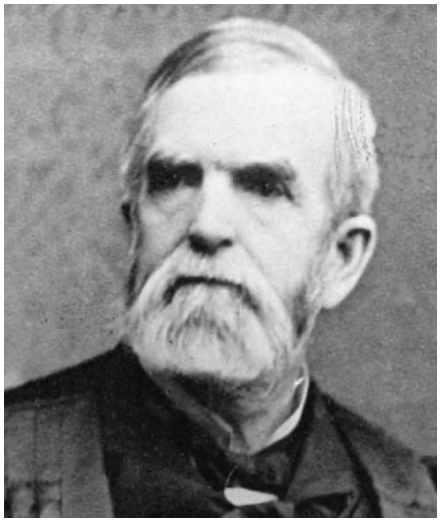
Now, the stars had apparently aligned, and prominent Texans—including Governor Coke and multiple former governors—began lobbying for Ballinger's appointment. And although Ballinger had asked his brother-in-law not to "exert the slightest influence upon the President" fearing that he would be viewed as presumptuous, Bryan ignored Ballinger and repeatedly pitched the Galveston lawyer in letters to his dear friend "Rud" Hayes. A letter dated March 13, 1877, was typical:

> Dear Rud: I have seen it stated that you will not appoint Democrats, South. If such be your action, you are wrong. Appoint as many Democrats as you can well do, the more the better. Adhere to your resolution in regard to the Su-preme Bench from Texas; the one we spoke of is your man above all others. Texas is opening her mind and heart to you; no appointment that you could make would commend you more to the judgment of both parties here, than that of Ballinger.[66]

A week later, Bryan was writing "Rud" again, reminding the president that Ballinger was "recognized as the Lawyer of Texas, the peer in learning and character of any man whose claims can be considered by the president, and is eminently qualified to be Judge Davis' successor."[67] Whispering in President Hayes' other ear was Ballinger's *other* brother-in-law, Justice Miller. As he had done with Bryant, Ballinger had asked Miller not to intervene on his behalf. He had even written to the jurist suggesting other candidates whom Ballinger considered better choices, such as former Supreme Court Justice John A. Campbell, who had resigned from the Court in 1861 to join the Confederacy. Ballinger wrote that Campbell was "the right man to appoint" and that putting Campbell back on the bench "would electrify the South."[68] Ballinger also suggested to Miller that a southern Republican like Fifth Court Judge William B. Woods would "meet with strong approval here."[69]



Justice John A. Campbell



Judge William B. Woods

But Miller would have none of it, responding in a March 18, 1877 letter that Ballinger's reluctance was "very unsatisfactory" and "wanting in common sense."[70] Miller was quick to point out that his motivation was not simply friendship and familial ties, but concern about the aging members of the Court:

---

66 Ernest W. Winkler, "The Bryan-Hayes Correspondence," 27 *Southwestern Hist. Quarterly* 72–73 (July 1923).

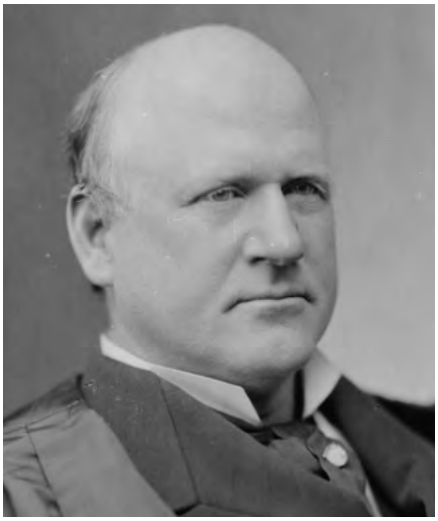
67 *Ibid.*

68 MBC, *supra* note 65 (Mar. 15, 1877) (letter from Ballinger to Miller).

69 *Ibid.*

70 MBC, *supra* note 65 (Mar. 18, 1877) (letter from Miller to Ballinger).

Judge John Bruce



Justice John Marshall Harlan

Benjamin H. Bristow

> There is no man on the bench of the Supreme Court more interested in the character and efficiency of its personel (sic) than I am . . . Within five years from this time three other of the present Judges will be over seventy. Strong is now in his sixty ninth, Hunt in his sixty eighth, and broken down with gout, and Bradley in feeble health and in his sixty sixth year. In the name of God what do I and Waite and Field all men in our sixty first year want with another old, old man on the Bench.[71]

Miller went on, noting that John A. Campbell was not only old (Campbell was born June 24, 1811), and "looks five years older," but that "if an old man was appointed we should have within five years a majority of old imbeciles on the bench, for in the hard work we have to do no man ought to be there after he is seventy."[72] But Miller's opposition to Campbell was not just age based. He also felt that Campbell's service to the Confederacy was disqualifying. Miller stated "I think his course in resigning and giving to the rebellion the full influence and support of his name and character and services should forbid it."[73] To Miller, Campbell had violated his convictions "to aid in overthrowing a government he had sworn to support and in whose service he held one of the highest posts of honor his country had to give."[74] Moreover, unlike other former Confederates whose post-war activities had been more conciliatory, Miller felt Campbell had shown "all the evidences of a discontented and embittered old man."[75]

Miller went on to share some inside information with his brother-in-law, observing that while other prospective nominees had been suggested to President Hayes and even interviewed by him (including Judge John Bruce of Alabama, a Grant appointee just two years earlier to the Southern District of Alabama), the president "was hesitating between [John Marshall] Harlan of Kentucky or possibly Bristow."[76] "Bristow," of course, was Benjamin H. Bristow, a Kentucky native and former Union Army officer who had served in the Grant administration—initially as the first Solicitor General of the United States, and later as

---

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

Secretary of the Treasury. But the difficulty in finding "a real Southern man" for the job, in Miller's view, was that "all the men who before the rebellion had made high reputation as lawyers are either dead or too old for the place."[77]

Miller strongly felt that the vacancy should be filled "with a lawyer familiar with the civil code system of Louisiana and Texas," and urged Ballinger to abandon his self-deprecation, saying "Where can a man be found more suitable under the circumstances than yourself?"[78] Miller continued to press his case, listing his brother-in-law's qualifications beyond simply his professional reputation, and legal acumen:

> You are about the right age with I thank God a fair hope of such health and vigor as gives promise of good service. You are from the right geographical quarter and familiar with the civil codes I have named. You have not been an active politician and did nothing to promote secession. You have shown no disposition to foster animosities of the late war.[79]

Justice Miller concluded his letter by urging Ballinger to express his interest and allow others to wield their influence on his behalf. He reminded his brother-in-law that

> The thing is within possible reach if you or your friends will do what is necessary and what I take the liberty of saying is in these times not indelicate, or improper . . . A place in the Supreme Court is so much more important, besides being a life office, than anything Colonel Bryan could possibly get that I see no reason why one should stand in the way of the other.[80]

On April 23, Justice Miller wrote to Ballinger again, and conveyed the results of a meeting Guy Bryan had with President Hayes. Bryan had suggested Ballinger as "the proper man" for the vacancy, and reported that the president was not only familiar with Ballinger, but that Hayes had even remarked that "it seemed wrong that so large a part of the Union should be without a representative in that Court."[81] At the same time, however, Miller tempered his enthusiasm by passing on a conversation he had with the Attorney General in which the latter had expressed doubts about the chances for any candidate "who had not always been a Union man."[82]

A few weeks later, on May 6, 1877, Miller wrote to Ballinger again to report on his progress in advocating for his brother-in-law, since "the ball is in motion."[83] Miller had met with President Hayes and conveyed the many letters of support from Governor Coke and others. Miller shared his impressions that the vacancy should be filled with someone who was not old, was a "true Southern man," and who was familiar with the law "which entered so largely into the jurisprudence

---

77 *Ibid.*

78 *Ibid.*

79 *Ibid.*

80 *Ibid.* Guy Bryan was simultaneously lobbying for an ambassadorship for himself.

81 MBC, *supra* note 65 (Apr. 23, 1877) (letter from Miller to Ballinger).

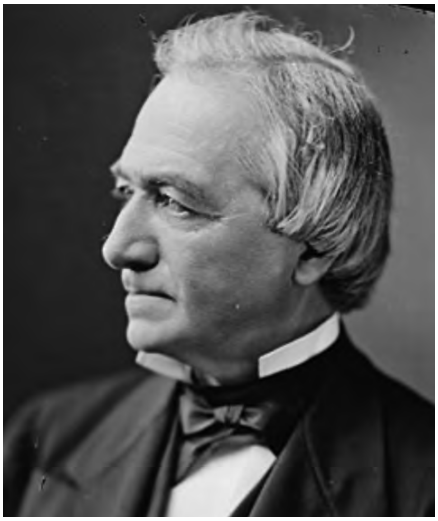
82 *Ibid.*

83 MBC, *supra* note 65 (May 6, 1877) (letter from Miller to Ballinger).

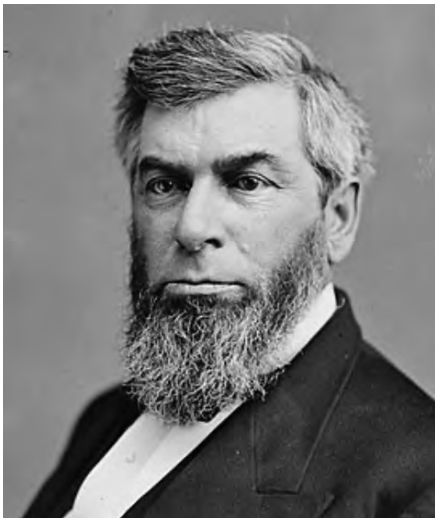
of Louisiana and Texas."[84] Miller then formally recommended Ballinger for the opening. According to Miller, the president then discussed several other candidates he was considering, including William H. Hunt of New Orleans as well as the two Kentuckians, Benjamin Bristow and John Marshall Harlan. Hayes felt that Bristow's presidential aspirations "were to be feared" (during the 1876 presidential election, Bristow had made an unsuccessful attempt at winning the Republican nomination that went to Hayes).[85]


William H. Hunt

But Hayes also made it clear to Miller that he "had been very favorably impressed" with Ballinger. Hayes admitted a reservation, that "his judgment might be unduly influenced by his great friendship for Bryan."[86] The president was concerned about the chance that any nomination of Ballinger would be criticized as motivated by favoritism. Miller went on to update Ballinger on other efforts being made on his behalf. Miller's back room lobbying for Ballinger included talking him up to certain colleagues on the Court, including Justice Joseph Bradley and Chief Justice Morrison Waite. Miller reported that the Chief was "decidedly opposed to all three" of Ballinger's primary rivals—Hunt, Bristow, and Harlan.[87] Waite considered Hunt "not up to the mark in ability," while he thought it "impolitic" to fill the vacancy with a candidate from a circuit that had two members on the Court already (Waite and Justice Swayne were both from Ohio, in the same judicial circuit as Kentucky).[88] Miller also lobbied Cabinet members like Secretary of War McCrary and Secretary of State Evarts.


Justice Joseph Bradley

After riding circuit that summer, Justice Miller reported the latest developments to Ballinger upon his return to Washington in the fall. Writing on October 8, 1877, Miller conveyed a mixed bag of news. Miller stated that he had called upon the president the previous Saturday "intending to talk with him about the judgeship," but since Hayes was absent, Miller instead had "a long and confidential conversation" with the president's secretary, W.K. Rogers (also Hayes' former law partner).[89] Rogers confirmed that while the candidacies of Harlan and Wood had been the subject of intense lobbying (Rogers said they were "pressed very much"),


Chief Justice Morrison Waite

[84] *Ibid.*

[85] *Ibid.*

[86] *Ibid.*

[87] *Ibid.*

[88] *Ibid.*

[89] MBC, *supra* note 65 (Oct. 8, 1877) (letter from Miller to Ballinger).

the president was not "much inclined to Hunt," the Louisiana prospect.[90] Rogers also purportedly volunteered to Miller that "he believed the President's personal preferences lay between Harlan and [Ballinger]."[91] Miller went on to report that he had suggested to Rogers several disqualifying factors against Harlan's potential nomination: "that his appointment would make three Judges on our Court from one circuit"; "[t]hat the appointment would be of no concession to the Southern men and would be a marked offence to Judge Davis' circuit as Harlan lived out of the circuit and in a State which never seceded"; and "[t]hat it would embarrass the President in the probable event of Judge Swayne's retirement during his administration."[92]

Miller shared no additional insights from his visit with Rogers but he did pass along some "inside intel" from Secretary of War McCrary, who, while he was "also of the impression that the President is hesitating between you and Harlan," made it clear that Hayes had "a personal inclination to appoint Harlan."[93] Rogers related to Miller that "if any one not a republican was appointed he believed it would be you," but that the harsh reality was that "the Cabinet did not favor the appointment of a democrat."[94] Miller's letter continued in a tone that tried to be upbeat, saying "I have still strong hopes of success" and that while he believes the president "wishes to [nominate Harlan]" then "[i]f not Harlan then there is much hope for you."[95] Miller acknowledged that Hayes' track record "thus far in making appointments shows the strong perhaps too strong influence of his personal wishes," though he added hopefully "Next to Harlan I think his wishes are in your favour."[96]

Miller's conclusion to this letter to his brother-in-law makes it clear that he was aware that the nomination campaign had become an uphill struggle, but that if nothing else it might lay a foundation for some future effort on Ballinger's behalf: "We shall make a good fight. We may succeed. If we do not we shall have so presented your name that it will be one to be considered on some future occasion."[97]

But just five days later, Justice Miller struck a markedly more defeated tone in writing Ballinger. Miller stated "I believe that if at any time [President Hayes] had made up his mind to appoint a Democrat he would have taken you."[98] Miller went on to share the latest from Secretary McCrary, who was convinced that since Ohio's October 9, 1877 election (in which Democrats were elected to all vacant state offices), Hayes "will not have the courage to appoint any one but a recognized Republican" to the Court's vacant seat, and that McCrary believed "Harlan's name will be sent in early next week."[99]

---

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 MBC, *supra* note 65 (Oct. 13, 1877) (letter from Miller to Ballinger).

99 *Ibid.*

Indeed, just days later on October 16, 1877, President Hayes formally nominated John Marshall Harlan of Kentucky. Miller was bitterly disappointed, and in an October 28, 1877 letter to Ballinger he made no effort to disguise it:

> While any judgment approves of what the President *wishes to do*, I am disgusted with the *method* he adopts to accomplish these purposes . . . I have fairly paid the party to whom I owe my place by honest and conscientious service to the country for that place . . . I have rendered fifteen years of faithful irreproachable service. We are quits . . .[100]

Miller went on to add that he felt a certain guilt for prodding the reticent Ballinger into pursuing the nomination, adding with a note of hope that it could only help his brother-in-law's chances for a future judicial vacancy:

> The failure to secure your appointment weighs on me more than I expected, for I never really believed in success though I had come to hope for it. I feel myself responsible *to you* for the effort that has been made for I think without any urging it on you it would never have been made. But it has done you no harm unless it be that a hope was inspired to be disappointed . . . you have been brought prominently before the country in a most creditable manner . . . If additional circuit judges are made . . . I see no one now who can rival you for one of the places.[101]

In truth, Ballinger—whether due to excessive humility or his reading of the political landscape—never got his hopes up. In the summer of 1877, he confessed in his diary that "I no longer believe my name [should] be considered & will tell Bryan & Miller to cease at once their advocacy."[102] Ballinger wrote Guy Bryan that he feared that even if he were nominated and confirmed, his lack of "judicial reputation and experience" would relegate him to the status of being "a third or fourth rate Judge, which does not greatly attract me."[103] Ballinger seemed content to be a big fish in a smaller pond, telling Bryan that since his "place" in Texas' legal community was "among the highest of any lawyer in the state, it would be folly to take a position on the Supreme Bench."[104] Ballinger also reminded Bryan that he had always been the type to devote himself to his legal work, seeking advancement through individual success rather than "office-seeking." Ballinger reminded his brother-in-law that his turning down the Texas Supreme Court appointment had been done "with a very fixed feeling that I should adhere throughout to the pursuit of my profession and to private life as an independent gentleman and wholly a non-office-seeker."[105]

Justice Miller was not alone in his disappointment with Harlan's nomination. Prominent Chicago lawyer Melville W. Fuller (who would later join the Court himself as Chief Justice) called the appointment "a disagreeable surprise," adding that feelings would be different if President Hayes

---

[100] MBC, *supra* note 65 (Oct. 28, 1877) (letter from Miller to Ballinger).

[101] *Ibid.*

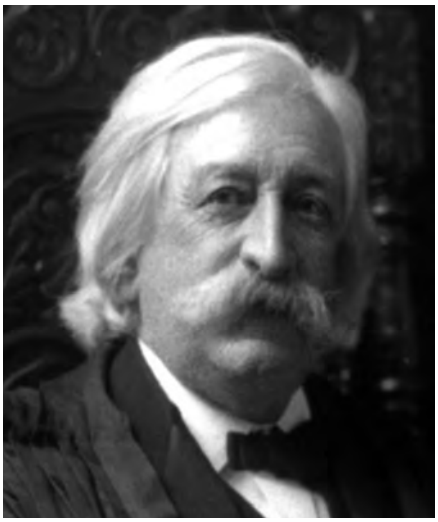
[102] MBC, *supra* note 65 (May 28, 1877) (Ballinger diary entry).

[103] Ernest W. Winkler, "The Bryan-Hayes Correspondence," 27 *Southwestern Hist. Quarterly* 246–49 (Apr. 1924).

[104] *Ibid.*

[105] *Ibid.*

"had selected Mr. Hunt of New Orleans or any other well known lawyer in the extreme South and particularly where the Civil law prevails . . . I hope the nomination will fail of confirmation."[106] Naturally, the reaction from prominent Texans was equally disapproving. Ballinger did his best to assuage these feelings, publicly announcing that President Hayes had "graciously complied" with Ballinger's desire to withdraw his name from nomination and calling Harlan "a man of great integrity" and an "eminent jurist" who would "serve the Bench honorably and faithfully."[107]


Chief Justice Melville W. Fuller

On November 29, 1877, the Senate confirmed Harlan's nomination.[108] He would go on to serve nearly thirty-four years on the Supreme Court; "the Great Dissenter" had one of the most distinguished careers in the Court's history, and would author memorable dissents in *Plessy v. Ferguson*, *The Civil Rights Cases*, *Giles v. Harris*, and others. From a purely political standpoint, it is not difficult to see why Hayes chose Harlan. Harlan was "Southern enough," but in addition to being a well-regarded lawyer, he was a Republican from a state that had not seceded. Equally important, he had (after initially supporting fellow Kentuckian Benjamin Bristow) campaigned for Hayes' presidential nomination in 1876, and had served the president loyally as a member of the much-maligned "Louisiana Commission" in early 1877.[109]

As for William Pitt Ballinger, while this episode marked the closest he would come to a federal judgeship, it was not the last vacancy for which he was considered. When Chief Justice Waite approached his colleague Miller twice in 1878 about whether Ballinger would accept an appointment to the Court of Claims, Ballinger replied to his brother-in-law that he was not interested. Once again, financial security was Ballinger's primary concern, as he wrote in his diary: "Salary $4,500—too little to support my family—a judge of all men ought to be independent pecuniarily."[110] In the waning days of the Hayes administration, another Supreme Court seat became vacant, that of Justice William Strong. Once again, Justice Miller advocated on behalf of his brother-in-law in Texas, but to no avail; Judge William B. Woods of the Fifth Circuit was nominated by President Hayes on December 15, 1880, and he was confirmed six days later. And while Woods was the first person to be named to the Court from a former Confederate state (Alabama) since 1853, Woods had moved to Alabama in 1866. That was after the Ohio-born and bred Woods had served in the Union Army during the Civil War, rising to the rank of brigadier general.

---

[106] Willard King, *Melville Weston Fuller: Chief Justice of the United States, 1888–1910*, 132 (1950). For a comprehensive account of Harlan's appointment and the reaction to it, see Ellwood W. Lewis, "The Appointment of Mr. Justice Harlan," 29:1 *Indiana L.J.* (Fall 1953).

[107] *Galveston News*, Nov. 2, 1877.

[108] Lewis, "Mr. Justice Harlan," 74. For an overview of Justice Harlan's career leading up to his elevation to the Court, see David G. Farrelly, "A Sketch of John Marshal Harlan's Pre-Court Career," 10 *Vanderbilt L. Rev*. 209 (1957).

[109] Lewis, "Mr. Justice Harlan," 74. In fact, after the Republican convention's seventh ballot had eliminated all candidates except Rutherford Hayes and James Blaine, Harlan swung the Kentucky delegation's votes to Hayes, in effect deciding the outcome.

[110] MBC, *supra* note 65 (Jan. 23, 1878) (letter from Ballinger to Miller).

There was one last gasp for Justice Miller in landing a federal judgeship for Ballinger. In 1883, Judge Amos Morrill, the U.S. District Court judge for the Eastern District of Texas (then located in Galveston) had expressed his intention to retire. Miller asked President Chester A. Arthur to nominate Ballinger, and even enlisted the support of colleagues like Justice Bradley. Ultimately, however, Arthur nominated Chauncy B. Sabin—a transplanted New Yorker who had served as a state court judge and city attorney in Galveston—on March 25, 1884; he was confirmed by the Senate on April 5, 1884.


Judge Chauncy B. Sabin

Ballinger was no more interested in these later opportunities than he had been in the Supreme Court vacancy that went to John Marshall Harlan. In response to the Galveston district bench opportunity, Ballinger once again told Miller that such a move was financially out of the question. Writing to his brother-in-law in 1883, he stated that a judicial appointment "this late in life was supremely foolish from a practical and financial standpoint. The pecuniary needs of my family prevent me from accepting it. A salary of $5,000 annually is impossible for my needs."[111] Lest his brother-in-law think him ungrateful, Ballinger added "Tho' I am eternally in your debt for the kindness you [have] shown me over the years, *please* cease all efforts on my behalf."[112] Ballinger continued to work as one of Texas' most successful and highly regarded attorneys until his death in 1888. Justice Miller continued serving on the Supreme Court until his death on October 13, 1890. And while Miller may have been frustrated by what he perceived as his brother-in-law's steadfast refusal "to rise above your present status," the two remained close to the end of their days.[113]

William Pitt Ballinger came as close as any Texan (other than Tom C. Clark) to serving on the U.S. Supreme Court. Because of Justice Harlan's stature, it is difficult to argue that the Court and the nation would have been better served with the Texan Ballinger on the Court instead. But the story behind Ballinger's shortlisting reveals realities behind the nomination process that still resonate today. Partisan politics played as dominant a role in 1877 to a country still polarized and healing from the Civil War as it does in 2022. And while concerns about geographic representation in the makeup of the Court have largely been supplanted by questions about a prospective justice's ideology and judicial philosophy, Ballinger's experience with the rollercoaster that vetting and judicial selection entail at the highest level shows that some things never change. Considerations about judicial candidates' past political affiliations and predictions about their likely future voting record were as prevalent in Ballinger's time as they are today. It also remains as true today as it was for Ballinger that the financial sacrifice that judicial service represents for many of the most qualified candidates continues to dissuade prospective judges.

Why has lightning only struck once for a Supreme Court candidate from Texas? Given the variety of individual backgrounds and philosophies for both potential nominees and the presidents

---

[111] MBC, *supra* note 65 (May 21, 1883) (letter from Ballinger to Miller).

[112] *Ibid.*

[113] Moretta, *William Pitt Ballinger,* 229.

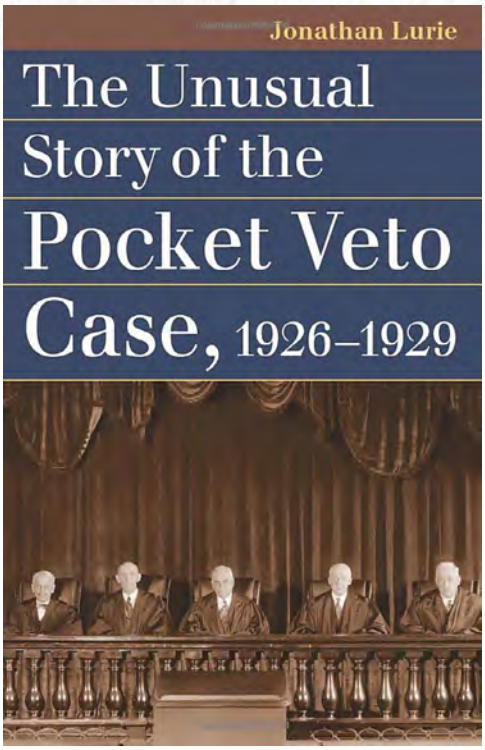
nominating them, there may not be a readily discernible, "one size fits all" answer to that question. Those actually nominated from Texas have been greeted with criticism, accusations of cronyism, and attacks on their credentials; in the case of Tom C. Clark, the hostility proved unsuccessful while in the case of Harriet Miers, it led to a withdrawn nomination. Even when the stars have aligned to put a Texan (of either party) in the White House with the likely support of the Senate, priorities that dwarf state pride have intervened—in the case of Lyndon B. Johnson, an opportunity to bolster a political agenda while making history, or in the examples of both George H.W. Bush and George W. Bush, a chance to build or add to a conservative ideological bloc on the Court. At the end of the day, lightning is no more likely to strike in the Court's near future than it was in 1877.

Return to Journal Index

Book Review — *The Unusual Story of the Pocket Veto Case, 1926-1929*

By Matthew Kolodoski

Seamlessly weaving together history, politics, a bit of intrigue, and statutory and constitutional construction, Professor Jonathan Lurie's *The Unusual Story of the Pocket Veto Case, 1926-1929* is a vivid tapestry of the struggles faced by six Indigenous tribes to have their day in court. Beginning with an examination of the lack of available forums to persons seeking redress for claims against the federal government, Professor Lurie traces the history of the creation of the Court of Claims and its early struggles. Notably, as recounted by Professor Lurie, it has been argued that the Court of Claims was "the keeper of the nation's conscience." But the Court of Claims initially had no authority to enforce its own findings, and the final decision and payment had to be approved by Congress. Through examining the history of the Court of Claims, Professor Lurie identifies a Congress seeking to find solutions to a problem without abdicating control to an independent tribunal.



The Unusual Story of the Pocket Veto Case, 1926-1929, by Jonathan Lurie, (University Press of Kansas, 2022), 172 pages.

Professor Lurie's work focuses on the tribes' attempt to obtain compensation from the federal government for the seizure of their ancestral lands without any compensation. As examined by Professor Lurie, the statute creating the Court of Claims had a unique aspect that ultimately affected the tribes' case. Namely, based on the bill creating the Court of Claims, it was unable to hear cases brought by Indigenous tribes without a specific mandate from Congress through a special jurisdiction act. Professor Lurie examines how the tribes successfully obtained bills multiple times from Congress, only to face resistance from the Bureau of Indian Affairs and ultimately President Calvin Coolidge.

Professor Lurie's work (and the underlying dispute) takes a turn from a substantive examination of the merits of the tribes' claims to a procedural matter related to the validity of the so-called pocket veto by President Coolidge. A pocket veto occurs when a president does not sign a bill within ten days of receiving it, but the bill cannot be returned to Congress because it adjourned during that period. This procedure thus, permits a president to veto a bill through mere inaction.

A pocket veto has the added benefit to the president of depriving Congress of the opportunity to override the veto, since it was never returned. The validity of the pocket veto is the central issue of Professor Lurie's work and what forms the core struggle for the tribes and their counsel.

As Professor Lurie's compelling work recounts, after the pocket veto by President Coolidge, the tribes' attorney William Lewis nevertheless pushed forward with a case before the Court of Claims. In doing so, Lewis took the position that there was not a legal adjournment of Congress at the end of the session and, therefore, the tribes had a proper mandate to proceed before the Court of Claims. Notably, Lewis relied on the work of Congressman Hatton Sumners of Texas to formulate his arguments. Despite the powerful arguments put forth by Lewis, the Court of Claims unanimously sided with the federal government and dismissed the tribes' case. It also denied a petition for rehearing and new trial.

Ultimately, the case percolated up to the U.S. Supreme Court. While the U.S. Supreme Court was considering the matter, Congressman Sumners submitted an amicus brief on behalf of the House Committee on the Judiciary, arguing the importance of the case to Congress and their conclusion was that the bills became law. Professor Lurie outlines how the U.S. Supreme Court considered Lewis's and Congressman Sumners's arguments but ultimately upheld the decision of the Court of Claims. He then examines in detail how subsequent matters involving pocket vetos have been addressed by the U.S. Supreme Court and other courts in subsequent cases.

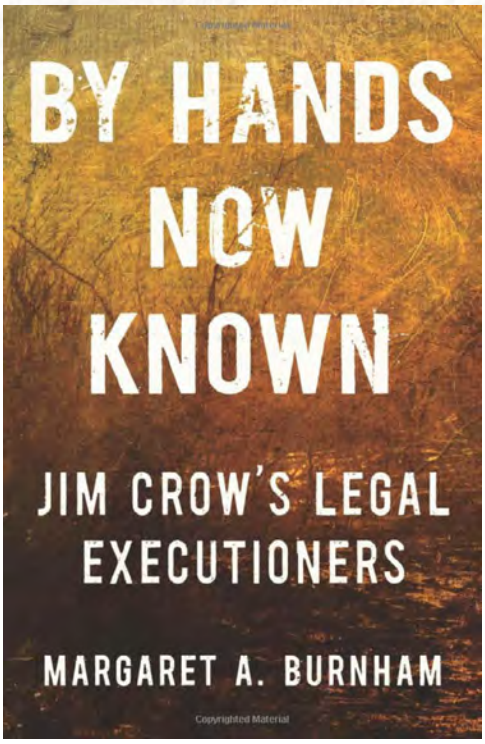
Professor Lurie's work is the definitive look at the history of the pocket veto in the United States. It is important for providing the history behind the creation of the Court of Claims. His work is also important, however, because it tells the history of the struggles faced by several Indigenous tribes to have their day in court. Although that day never came, their lengthy struggle to receive compensation for the seizure of their ancestral lands is worth remembering. *The Unusual Story of the Pocket Veto Case, 1926-1929* is a worthwhile read for any attorney and judge.

Return to Journal Index

Book Review – *By Hands Now Known: Jim Crow's Legal Executioners*

By Hon. John G. Browning

On April 18, 1939, in Arlington, Tennessee, a twenty year-old Black sharecropper named Jesse Lee Bond had the audacity, when purchasing seed and planting supplies from a local white merchant, to ask for a receipt. Angered when he learned of such temerity, Charles R. Wilson (one of the store's owners) and several other white men confronted Bond in the town square. They shot him multiple times, castrated him, and dragged his body behind a truck to the nearby riverbed, where they staked him to the bottom. Authorities "found" the body five days later, and the local coroner wrote that Bond "fell into the Hatch River and was accidentally drowned." Although the Black community demanded justice, records show that two white men (Charles Wilson and William Johnson) were charged with first-degree murder only to be quickly acquitted by an all-white jury a few months later.



By Hands Now Known: Jim Crow's Legal Executioners, by Margaret A. Burnham (WW. Norton & Co., 2022), 352 pages

Bond's story is not in *By Hands Now Known: Jim Crow's Legal Executioners* by Margaret Burnham, but it is typical of the stories related in her book of Black people killed with impunity thanks to the complicity of white law enforcement and a white-dominated legal system. In her impressive work, Burnham—the director of Northeastern University Law School's Civil Rights and Restorative Justice Project—addresses how everyday acts of violence fundamentally shaped the Jim Crow era. Drawing upon painstaking research—the Project's archive contains nearly 1,000 cases of under- or undocumented racial homicides between 1930 and 1955—Burnham offers a searing indictment of this racial violence committed against Black Americans and the legal system's indifference, including the reluctance of federal authorities to interfere in local matters.

Burnham shares the lost voices and lives of the victims she focuses on through newspaper accounts, coroners' reports, and interviews with surviving family members, witnesses, and clergy. There is a powerful eloquence to this. While Burnham also does an admirable job of exhaustively examining Jim Crow laws and how they gained legitimacy from federal courts beginning with the

Plessy v. Ferguson decision, these aspects of the book are nowhere near as profoundly moving as the human tragedies she shares.

One representative case in *By Hands Now Known* is that of Edwin Clifford Williams. In 1943, the Black resident of Algiers, Louisiana was stabbed to death by a nineteen year-old white sailor in front of Williams' wife and sons as they walked home from church. An all-white jury took only fifty-five minutes to acquit the sailor of manslaughter charges. Embittered by how the legal system failed to deliver justice (although the NAACP considered it a measure of progress that a white man had even been indicted for such a crime in 1943), Williams' widow Lillian buried the incident from her children as they grew up. Lillian passed away in 2012, and when Northeastern law students researching Williams' murder reached out to surviving family members about the work they had done on the case, it was a revelation. They learned for the first time about the testimony from Lillian and another Black witness about how Edwin had been slashed repeatedly with a broken beer bottle; the sailor's cap found at the scene; the forensic report that corroborated Lillian's account; and how Thurgood Marshall had unsuccessfully petitioned to get the Department of Justice to take up the case.

Unfortunately, the last portion of Burnham's otherwise powerful book awkwardly shifts from historical narrative to polemic. Burnham pokes and probes her way through arguments for reparations, apologies, and truth and reconciliation proceedings that would further delve into the history she addresses. However, here her narrative loses its emotional power and resonance; instead, it gets bogged down in pseudo-intellectual babble and the murky reasoning of the reparations movement. Consider, for example, this head scratching statement: "Acknowledging the hold of the past on the present elucidates the profound obduracy of social death."

Burnham's work is an important one, and it is at its best when putting human faces on how Jim Crow laws transported the norms of slavery into the American criminal justice system. Yet Burnham's book is a flawed one as well. Nevertheless, anyone interested in race, justice, and legal history will find *By Hands Now Known* both moving and illuminating.

And as for the legacy of Tennessee lynching victim Jesse Lee Bond? His great-granddaughter, Kyra Harris Bolden, learned of this tragic chapter in her family's history while studying to be a psychologist. Pivoting to the law, Bolden said "I had to be involved in the justice system because of the injustice that happened with my family." Bolden became a lawyer, a state legislator, and on January 1, 2023, was sworn in as the first Black woman to serve as a justice on the Michigan Supreme Court.

Return to Journal Index

Society Co-Sponsors the 16th Quadrennial Meeting of the Conference of International Mexican Historians

By Hon. Gina Benavides

On behalf of the Society, I attended the XVI Reunion Internacional de Historiadores de Mexico in Austin held October 30 through November 2, 2022. The theme of the meeting was *Federalisms in the History of Mexico and Mexico-Texas*. Even though my Spanish was challenged, the topics and speakers were excellent. Many of the academics were glad to have a non-academic in the audience and I, for one, enjoyed presentations by non-lawyers.

As the topic was Mexico-Texas history, the border of Mexico-Texas and its effect on both the country of Mexico and state of Texas was noted throughout many of the topics and presentations. For example, it was mentioned several times that "Austin, Texas" is occupied Mexican territory. It is undeniable that there is a lack of historical education about the Mexican American Texas wars in our education system which was crucial to the forming of the United States. I recommend reading this article which focuses on this topic: https://www.washingtonpost.com/outlook/2021/07/22/every-american-needs-take-history-mexico-class/

In the session called: "Inmigracion Y Ciudadania en Mexico y Estados Unidos," a presentation was given about racism in immigration including a review of the Program of Bracero or its official title the Mexican Farm Labor Program which was a series of agreements between the United States and Mexico to allow temporary laborers to work legally in the United Stated. However, these programs led to discriminatory acts and laws such as the "White-Only" Immigration Laws. Many of the remnants of these discriminatory laws still exist in our current systems.


Braceros arriving in Los Angeles in 1942


Lorenzo Zavala

Many notable characters who formed the history of Mexico and Texas were introduced in the presentations. An example is Lorenzo Zavala, a physician who was closely involved in drafting the constitution for the First Federal Republic of Mexico in 1824. Then later in his life, he helped Mexico's rebellious enemy and joined the Republic of Texas, assisting in drafting its constitution.

Another session had a review of the violence that forms the history of the frontier. We discussed the case of Gregorio Cortez whose

story exemplifies the violence against Mexicans after the revolution. This assessment not only included his manhunt but the brutalization of his family, including his wife and children. The overview would not have been complete without a discussion of the Texas Rangers and their part in the violence. We once again assessed the Canales trial. In 1918, Texas state representative José T. Canales of Brownsville launched an investigation into the conduct of the Texas Rangers during the border wars and filed nineteen charges of misconduct against the Rangers. After two weeks of testimony, the Rangers were absolved of wrongdoing although it supported findings that there were "gross violation of both civil and criminal laws."

Gregorio Cortez

José T. Canales

The conference would not be complete without a program called "Mujeres" which included Josephina Velazquez de Leon, Anita Brenner and so many more artists and authors. Also of interest was a session called "New Directions on the Study of Markets, Vendors and Urban Politics", again from a historical perspective. The presentation explored street vendors from the past to street vendors in a virtual and modern Mexico. The background of the tequila family industry makes the drinking of tequila very interesting.

Alameda Theatre

Also examined was pop culture from a historical perspective. The discussion included Cantinflas, Speedy Gonzalez, Zorro and The Cisco Kid. From this perspective it was argued that Zorro was actually the first superhero since he made his first cinematography appearance in 1919. This discussion of pop culture included Alameda Theatre in San Antonio which was the Mexican American cultural center of its time.

Josephina Velazquez de Leon

Anita Brenner

Since the conference occurred during the "Dia de Los Muertos", we were invited to the Cemetery of San Jose (a community cemetery) where we were entertained by musicians and artist celebrating the culture. We then joined the community in the "lighting of the cemetery" and ended the evening with "pan de muerto" and hot chocolate.

Return to Journal Index

Save the Date: March 2-4, 2023, to see the Society at the TSHA Annual Meeting

Story and photos by David A. Furlow

"The Society sponsors scholarship relating to the history of the Texas judiciary," our Society's "About Us" web-page declares, "and furthers efforts to raise public awareness about the judicial branch of government and its role in the development of Texas." Our Mission Statement states that, "Through research and scholarship, the Society educates the public about the judicial branch and its role in the development of Texas." One of the most important ways the Society fulfills its educational mission is by presenting panel programs at Texas State Historical Association (TSHA) annual meetings. This is your invitation to watch the Society in action at TSHA's 127th Annual Meeting on March 2-4 in El Paso.

Our Society's "Advancing the Rule of Law along Contested Frontiers" 2023 panel-program

Our Society's speakers will present the first panel program, "Advancing the Rule of Law along Contested Frontiers," at 9:00 a.m. on Friday, March 3, 2023 at the Marriott Hotel Paso Del Norte in El Paso. The program focuses on ways courts advanced the rule of law in the nineteenth and twentieth centuries. Sharon Sandle, our Executive Director, will introduce the audience to the Society by describing what we do and by introducing the speakers.

Sharon Sandle

Justice Ken Wise, one of the Society's two principal speakers at the 2019 TSHA Annual Meeting in Austin, discussed the District of Brazos court.

The Hon. Ken Wise, Justice of the Texas Court of Appeals for the Fourteenth District and the Society's President, will provide the first speech: "Trials on the Prairie, the American Legal System, and the Plains Indian Wars." Judge Wise will describe how Americans modified the Anglo-American legal system to provide jury trials for Native Americans indicted for crimes arising out of their raiding and resistance during the settlement of the frontier. In addition to his legal experience, Justice Wise brings knowledge of Texas history he gained while researching, scripting, and hosting the *Wise about Texas* podcast.

The Hon. Gina M. Benavides, Justice of the Thirteenth Court of Appeals and a trustee of the Society, will speak about "Gustavo 'Gus' Garcia, a Life of Service,

and *Hernandez v. State of Texas*: The Lawyer Who Desegregated Texas Juries." The Supreme Court addressed one issue: "Is it a denial of the Fourteenth Amendment equal protection clause to try a defendant of a particular race or ethnicity before a jury where all persons of his race or ancestry have, because of that race or ethnicity, been excluded by the state?" The U.S. Supreme Court held that exclusion of Hispanics from criminal court juries violated the Constitution. Justice Benavides will offer insights about *Hernandez* lead counsel Gus Garcia's military service, his consular background, and the unique contributions to the landmark case *Hernandez v. State of Texas,* 347 US 475 (U.S.: 1954). She recently published two articles in our *Journal* profiling Texas Supreme Court Justice Eve Guzman and Court of Criminal Appeals Judge Elsa Alcala, the two first Latinas on the Texas highest courts.

Justice Gina Benavides, Thirteenth Court of Appeals website.

Gus Garcia, photo courtesy of the *Huffington Post*.

Colbert N. Coldwell, an independent scholar, El Paso historian, and law partner, is the author of a forthcoming biography of Texas Supreme Court Justice Colbert Coldwell, who served on the Court during the Reconstruction era. He has spoken at several Society events in recent years.

Trial lawyer and historian Colbert Coldwell spoke about his Reconstruction era ancestor, Texas Supreme Court Associate Justice Colbert Coldwell, during the Society's April 2017 hanging of Justice Coldwell's portrait. Photo by Mark Matson.

But wait, there's more. Those who attend TSHA's annual meeting can watch another TSHA panel address an important aspect of Texas legal history: *The Mexican State that Never Was: Perspectives on the Constitution of 1833.* Our Society's President, the Hon. Justice Ken Wise, will chair this special program. That program will also occur on Friday, March 3rd, but it will begin at 2:00

p.m. Members of our Society can watch one program in the morning, enjoy a leisurely lunch, and return in time to watch the second program in the afternoon.

Judge Manuel González Oropeza, the Judge of Mexico's Federal Election Court, and his colleague Rodrigo Galindo, a constitutional and criminal lawyer associated with the Universidad Nacional Autónoma de México, will present "The Last Mexican Constitution in Texas." An esteemed scholar at the Universidad Nacional Autónoma de México, Judge Oropeza is the former Chief Justice of the Mexican Federal Election Court. He and Professor Jesús Francisco "Frank" de la Teja, served as editors of *Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827*: *Primera Constitución bilingüe, a/k/a, Proceedings of the Constituent Congress of Coahuila and Texas, 1824–1827: Mexico's Only Bilingual Constitution* (Mexico City: Federal Election Court, 2016). Chief Justice

Judge Manuel González Oropeza and his co-editor Jesús F. de la Teja, TSHA's C.E.O., authored a comprehensive analysis of the 1827 Constitution in 2017. They stand on the front row right. Mark Smith, then Executive Director of the Texas State Library and Archives, stands at far left. David Furlow is at back row center, while Mark Lambert, Deputy Director, Archives & Records Division of the Texas General Land Office stands on the back row, right.

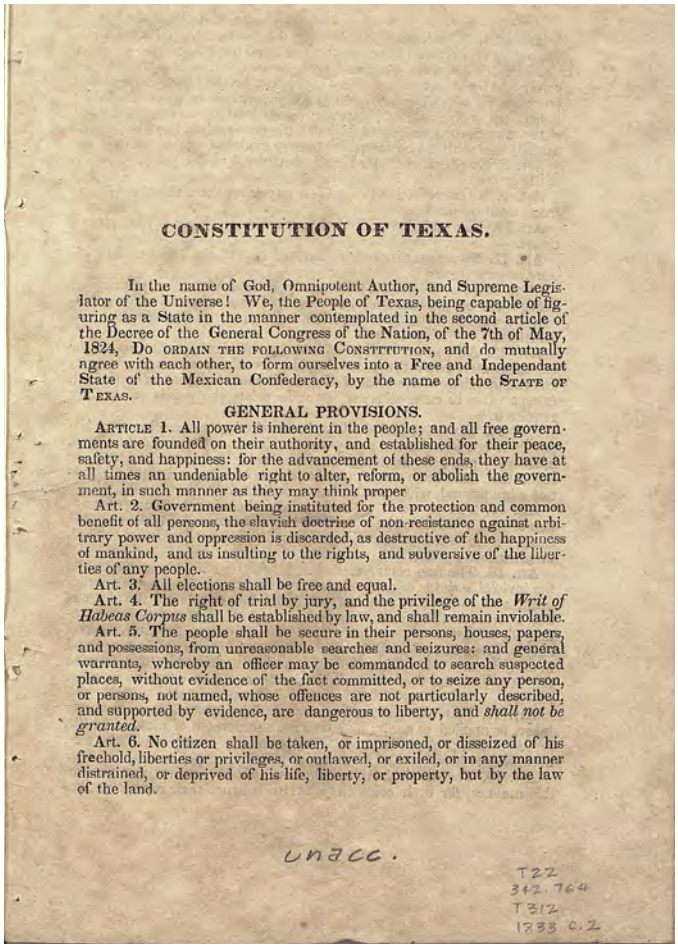
Oropeza will discuss the 1827 Constitution of the Mexican twin-state of Coahuila y Tejas and the legal and administrative framework it created.

I will then present "The Legal Origins of Sam Houston's 1833 Draft Constitution for an Independent Mexican State of Texas." Did another state's constitution serve as a model for Houston's draft constitution? If so, was it the Coahuiltecan Twin-State Constitution of 1827? Or was it, instead, John Adams' Massachusetts Constitution of 1780? Did Houston rely on one or more constitutions from other states, namely, Tennessee, Louisiana, or Arkansas? Or did his constitution represent a blending of the best provisions from each of those legal authorities?

TSHA's 2023 Annual Meeting: Dates, a Richly Historic City, and a Conference Hotel

The 2023 Annual Meeting will be held at the El Paso Convention Center March 2-4, 2023. TSHA's Annual Meeting is the largest gathering of its kind for Texas history enthusiasts and scholars. More than 700 historians, lawyers, and members of the public regularly attend the meeting and another 170,000 TSHA members and nonmembers are reached through email and social and traditional media about the event.

El Paso is a vibrant, richly historic city of 678,815, according to 2020 U.S. Census Department records, making it the 23rd-largest city in the United States, the sixth-largest city in Texas, and the second-largest city in the Southwestern United States behind Phoenix, Arizona. It is the second-largest majority-Hispanic city in the United States. Humans have lived in the area for 10,000 to 12,000 years, as evidenced by Folsom points found nearby at Hueco Tanks. When the Spanish arrived, the Manso, Suma, and Jumano tribes populated the region, as did Mescalero Apaches. Sixteenth century Spaniards explored the area while noting the presence of two mountain ranges rising out of the desert divided by a deep chasm



CONSTITUTION OF TEXAS.

In the name of God, Omnipotent Author, and Supreme Legislator of the Universe! We, the People of Texas, being capable of figuring as a State in the manner contemplated in the second article of the Decree of the General Congress of the Nation, of the 7th of May, 1824, Do ordain the following Constitution, and do mutually agree with each other, to form ourselves into a Free and Independant State of the Mexican Confederacy, by the name of the State of Texas.

GENERAL PROVISIONS.

Article 1. All power is inherent in the people; and all free governments are founded on their authority, and established for their peace, safety, and happiness: for the advancement of these ends, they have at all times an undeniable right to alter, reform, or abolish the government, in such manner as they may think proper

Art. 2. Government being instituted for the protection and common benefit of all persons, the slavish doctrine of non-resistance against arbitrary power and oppression is discarded, as destructive of the happiness of mankind, and as insulting to the rights, and subversive of the liberties of any people.

Art. 3. All elections shall be free and equal.

Art. 4. The right of trial by jury, and the privilege of the *Writ of Habeas Corpus* shall be established by law, and shall remain inviolable.

Art. 5. The people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures: and general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person, or persons, not named, whose offences are not particularly described, and supported by evidence, are dangerous to liberty, and *shall not be granted.*

Art. 6. No citizen shall be taken, or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner distrained, or deprived of his life, liberty, or property, but by the law of the land.

unacc.

T22
342.764
T312
1833 c.2

Top: Wikimedia map of the Mexican state of Coahuila and Texas in 1827. Bottom: The draft Texas Constitution of 1833, courtesy of the University of Texas School of Law's Tarlton Law Library.

Painter Jose Cisneros depicted the “first Thanksgiving” celebration in North America, when Spanish colonists broke bread with the Mansos, a tribe native to present-day El Paso. Image Courtesy of the University of Texas at El Paso Library, on the *KUT* website.

between. They erected a settlement at a site they named El Paso del Norte (the Pass of the North), the future location of two border cities—Ciudad Juárez on the south or right bank of the Rio Grande, and El Paso, Texas, on the opposite side of the river. The city has been a continental crossroads; a north-south route along a historic *camino real*, a royal highway, during the Spanish and Mexican periods, and an east-west highway, I-10, during the late twentieth and twenty-first centuries.

Álvar Núñez Cabeza de Vaca, author of the famous *Relacion* chronicle of his travel across North America from the Texas coast to the Pacific, and his three companions, probably passed through the El Paso area in 1535 or 1536. Spanish conquistador and later New Mexican Juan de Oñate, leading a major colonizing expedition, passed through El Paso on his way north. On April 30, 1598, he conducted a claiming ceremony, *La Toma*, recently referred to as the “real first Thanksgiving,” by which he took formal possession of the entire territory drained by the Río del Norte (the Rio Grande) at San Elizario Mission.

Downtown El Paso offers a vibrant scene of community arts. Above left, sculptor John Houser's statue *Fray Garcia de San Francisco* commemorates the founder of the Mission Nuestra Señora de Guadalupe. Above right, sculptor Luis A. Jiminez, Jr.'s sculpture *Los Lagartos* memorializes the alligators that were a popular attraction in El Paso's early twentieth century downtown area.

In the late 1650s Fray García founded the mission of Nuestra Señora de Guadalupe on the south bank of the Rio Grande; it still stands in downtown Ciudad Juárez. The Pueblo Indian Revolt of 1680 sent Spanish colonists and Tigua Indians of New Mexico fleeing southward to take refuge at the pass. On October 12, 1680, midway between the Spanish settlement of Santísimo Sacramento and the Indian settlement of San Antonio, the first Mass in Texas was celebrated at a site near that of present Ysleta, which was placed on what is now the Texas side by the shifting river in 1829; some historians therefore argue that Ysleta is the oldest town in Texas. By 1682 five settlements had been founded in a chain along the south bank of the Rio Grande—El Paso del Norte, San Lorenzo, Senecú, Ysleta, and Socorro.

In short, El Paso is a wonderful city to visit. TSHA will make a block of hotel rooms available to speakers and TSHA members who sign up for the conference at discounted rates. The conference hotel will be the Marriott Paseo del Norte, 10 Henry Trost Court, El Paso, Texas, 79901. TSHA will release additional reservation information soon. In the meantime, *save the date*—this will be a great conference.

Top: The Marriott Hotel Paso Del Norte, https://www.wotif.com/El-Paso-Hotels-Hotel-Paso-Del-Norte.h12389.Hotel-Information. Bottom: A 1913 postcard depicting the hotel interior.

Return to Journal Index

Journal Editor-in-Chief Presents at ASLH Annual Meeting

Hon. John G. Browning, James Feldman, and Prof. Christopher Brooks as the panel on the ASLH program

Former Justice John G. Browning, Society Trustee, and Journal editor-in-chief, recently presented a paper at the American Society for Legal History's 2022 Annual Meeting, held November tenth through twelfth, 2022, at the Chicago Grand Sheraton Hotel. Justice Browning organized and chaired the program *Forgotten Firsts: Lives and Legacies of the First Black Supreme Court Advocates*, which featured not only him but two other scholars presenting on the first Black lawyers to practice before the United States Supreme Court. Joining Justice Browning were Prof. Christopher Brooks of East Stroudsburg University in Pennsylvania and longtime Supreme Court advocate and Washington lawyer James Feldman.

Browning's presentation focused on Everett J. Waring, the first Black lawyer in Maryland (admitted in 1885) and the first Black lawyer to argue a case before the U.S. Supreme Court. In 1890, Waring defended several Black laborers on murder charges stemming from their "uprising" in 1889 on Navassa, a "guano island" thirty miles west of Haiti that had been claimed by the U.S. government for the mining of phosphate from the island's vast deposits of guano. Making arguments that resonate today, Waring challenged the government's jurisdiction, since Navassa had never been made part of the United States. Although he was unsuccessful in the case, *Jones v. United States*, the outpouring of public sentiment towards Waring's clients led to their death


Everett J. Waring


John Swett Rock


Cornelius Jones

sentences being commuted by President Benjamin Harrison. Newspapers hailed the fact that thirty-four years after the infamous *Dred Scott* decision, a Black lawyer was arguing before the nation's highest court. Justice Browning's article, *A Forgotten First: Everett J. Waring, First Black Supreme Court Advocate, and the Case of* Jones v. United States, has been published in Volume 47, No. 3 of *Supreme Court History*, the journal of the Supreme Court Historical Society.

Prof. Brooks' presentation, *John S. Rock, The Supreme Court Bar's First Black Member*, centered on the rocky road to admission of John Swett Rock in 1865. Not long after the death of Chief Justice Roger Taney (author of the *Dred Scott* opinion), Massachusetts Senator Charles Sumner pressed the new Chief Justice, Salmon P. Chase, for the admission of Rock. On the same day as the final passage of the Thirteenth Amendment, Sumner presented Rock to the Court for admission. In one sentence, the Court granted the motion for Rock's historic admission; as one historian would later note, "The grave to bury the *Dred Scott* decision was in that one sentence dug."

James Feldman's presentation was on *Cornelius Jones, Forgotten Black Supreme Court Advocate and Fighter for Civil Rights in the Plessy Era*. In it, Feldman related the story of Cornelius Jones, born into slavery and later one of Mississippi's first Black lawyers. As a legislator, he fought against that state's virulently racist Constitution of 1890. As one of the earliest Black Supreme Court advocates, he argued a series of cases before the high court beginning in 1896 on issues that ranged from the exclusion of Black people from juries to Black disfranchisement and reparations. Mr. Feldman's wonderful work on this trailblazing Black advocate was recently published in Vol. 47, Issue 2 of *Supreme Court History*.


Dean Risa Goluboff

The ASLH is one of the most prestigious gatherings of legal historians in the country. This year's annual Meeting featured a plenary address by Dean Risa Goluboff of the University of Virginia School of Law. And amid many fine offerings from legal scholars from across the country, it was an honor to represent the Texas Supreme Court Historical Society.

Return to Journal Index

Society Trustee Appointed to 5th Court of Appeals

On December 20, 2022, Governor Greg Abbott appointed Texas Supreme Court Historical Society Trustee, Judge Emily Miskel, to the Fifth District Court of Appeals, Place 13, for a term set to expire on December 31, 2024, or until her successor is duly elected and qualified.

Since 2015, now Justice Miskel has been serving as judge of the 470th Judicial District Court in Collin County. She is board certified in Family Law and Child Welfare Law by the Texas Board of Legal Specialization. She previously served as an Associate Attorney at Thompson & Knight L.L.P., KoonsFuller, P.C., and as an Adjunct Professor of Family Law at the University of North Texas Dallas College of Law. Justice Miskel is the 2020 recipient of the William H. Rehnquist Award for Judicial Excellence. She is the Chair of the Civil Justice Committee of the Texas Judicial Council, a member of the Supreme Court Advisory Committee, Vice-Chair of the Pattern Jury Charge Oversight Committee for the State Bar of Texas, and a council member for the State Bar of Texas Computer & Technology Section. Justice Miskel is a member of the Federalist Society, Eastern District of Texas Bar Association, Collin County Bar Association, Dallas Bar Association, and Texas Academy of Family Law Specialists. She is also a Life Fellow of the Texas Bar Foundation, Fellow of the Texas Bar College, a Director for the National Center for State Courts, Vice Chair of the Texas Supreme Court Remote Proceedings Task Force, and a Master for the Henderson American Inn of Court.

Justice Miskel earned her B.S. in Mechanical Engineering from Stanford University and her J.D. from Harvard Law School. Congratulation, Justice Miskel!

Return to Journal Index

Voila! The Society Goes International

Story and photos by David A. Furlow

Voila! The Society has gone international—in French, German and Texian English—to share the story of the Texas Supreme Court's 1925 All-Woman Court with history-minded people in France, Germany, Denmark, Belgium, and Switzerland. A European television show now features several members of the Society telling the story of Texas law.

The events that led up to this broadcast began when former Society President Lynne Liberato received a phone call from Tam Melâacca, a French television journalist seeking a story about the Texas Supreme Court. She works for *Invitation au Voyage,* a magazine program aired daily on *Arte*, the Franco-German cultural television channel. Its objective is to let viewers discover destinations around the globe through the eyes of historic cultural figures. She came to the right place when she came to Texas.

Ms. Melâacca reached out to the Society in April of last year. Lynne was preparing for oral argument at the time, and referred Ms. Melâacca to me with a request that I return her call and answer her questions. When I did so, I learned that she sought uniquely Texas stories to a European audience unfamiliar with Texas. Our talk turned to "Texas firsts," and our Society. And then I told Ms. Melâacca that the Texas Supreme Court was the first tribunal in the Anglo-American world to convene an all-female appellate panel, in 1925, in *Johnson v. Darr*.[1]

Ms. Melâacca and I then discussed how our Society has shared the All-Woman Court story in depth with an English-speaking public on several occasions. First when the Society published James L. Haley's book *The Texas Supreme Court: A Narrative History, 1836-1986.*[2] Again in a special, Summer 2015 issue of the *Journal of the Texas Supreme Court Historical Society* devoted to the history of advancing women's rights in Texas over five centuries.[3] Yet again when the Society's trustees joined with Texas Supreme Court Chief Justice Nathan Hecht, Fifth Circuit Judge Jennifer

---

1 114 Tex. 516, 272 S.W. 1098 (1925).

2 (Austin: University of Texas Press, 2013), 146.

3 Linda C. Hunsaker, "Family Remembrances and the Legacy of Chief Justice Hortense Sparks Ward," *Journal of the Texas Supreme Court Historical Society*, Vol. 4, No. 4 (Summer 2015): 51-61; Linda Bray Chanow, "Hortense Sparks Ward's Spirit Shines on Through the University of Texas Center for Women in Law," *Journal of the Texas Supreme Court Historical Society*, Vol. 4, No. 4 (Summer 2015): 97-102, https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Summer%202015.pdf.

Elrod, Texas Supreme Court Justice Eva Guzman, and Texas Supreme Court Justice Debra Lehrman, and four of the Society's trustees to re-enact the All-Woman Court at the 2016 State Bar of Texas Annual Meeting.[4] And a fourth time when several *Journal* editors told the story of Hortense Sparks Ward, the Special Chief Justice of the All-Woman-Court, and other women who made important contributions to Texas law in a specially co-produced Summer 2019 issue of *Texas Heritage Magazine*.[5]

Ms. Melâacca read the *Journal* articles and called back to ask if the Society might share the All-Woman Court story with viewers in Europe who spoke French or German. I told her that Sharon Sandle, the Society's Executive Director, and Fourteenth Court of Appeals Justice Ken Wise, the Society's President-Elect, had already approved that very idea. She then requested copies of original photos, judgments, and appellate materials, so that the documentary crew could present the story accurately. She then asked the Society to provide several women judges or attorneys to represent the Special Justices. And that is exactly what the Society did in the Historic Supreme Courtroom in late May of 2022.

Paige Hestor, Justice Jane Bland, and Director Sharon Sandle re-enacted oral argument.

Texas Supreme Court Justice and Society Liaison Jane Bland volunteered to help present the story as soon as we made a request for volunteers. The task proved challenging because of a conflicting State Bar conference in Galveston that same day. Society Executive Director Sharon Sandle volunteered, as did Texas State Preservation Board Curator Paige Hestor; Justice Wise came to help with logistics and film production.

Four months later, the result of this first-ever international collaboration was an accurate, twelve-minute program. It informed non-English-speaking European audiences about an important aspect of Texas legal and courthouse history—while showing them the Capitol and the Supreme Courtroom. You can use this link to watch the documentary about the All Woman Court. The story is toward the end of the show, beginning

[4] David A. Furlow, "All-Woman Court Ruled the State Bar Annual Meeting," *Journal of the Texas Supreme Court Historical Society*, Vol. 8, No. 4 (Summer 2016): 82-89, https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Summer%202016%20Vol%205%20No%204.pdf.

[5] David A. Furlow, "*TSCHS Journal* Joins Texas's Heritage," *Journal of the Texas Supreme Court Historical Society*, Vol. 8, No. 4 (Summer 2019): 78-82, https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Summer%20Journal%202019rev.pdf.

around the 36 minute 45 second mark: https://app.frame.io/presentations/fdaea5cc-8101-4eaa-9262-73010da0b8b2

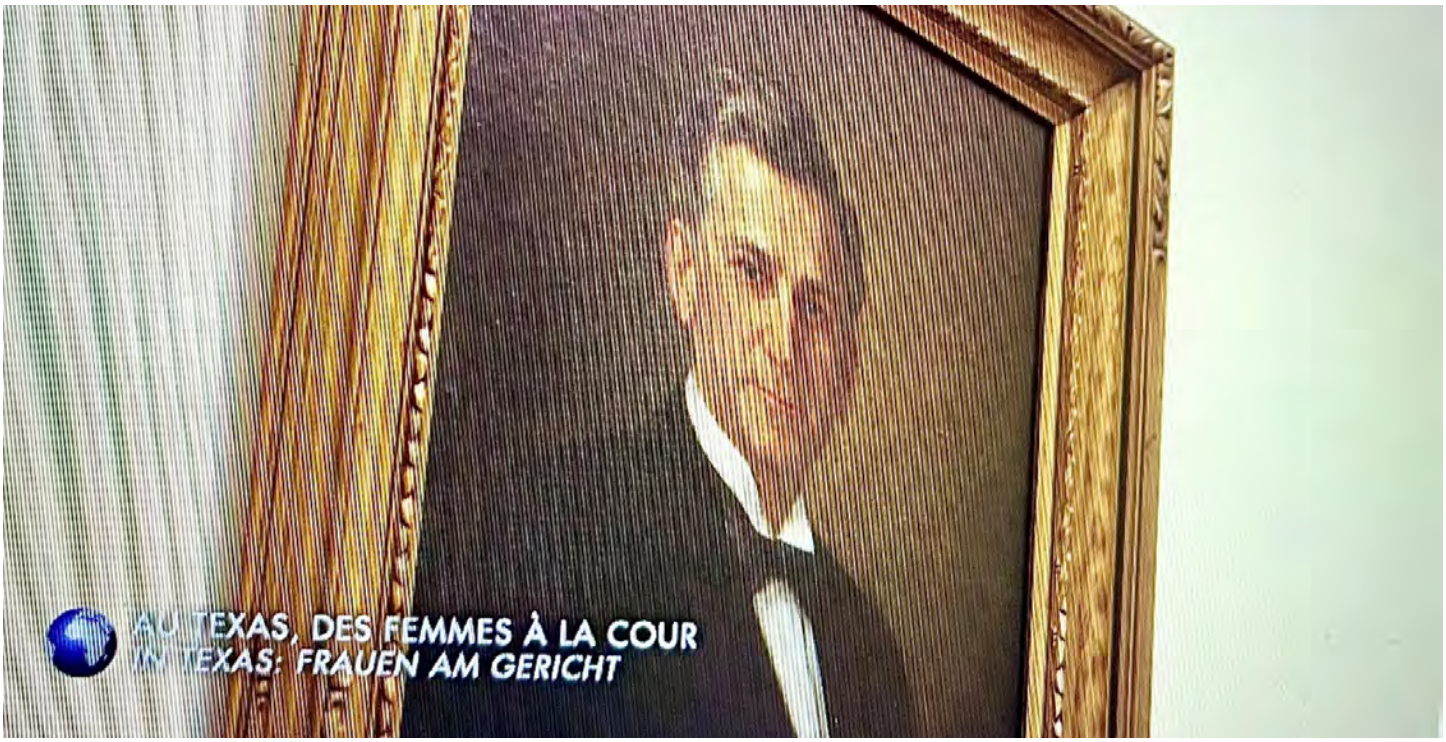
The show began with a producer's overview of the Capitol and the background facts.

Screenshots from "Au Texas, Des Femmes a la Cour," *Invitation au Voyage.* include the producer's introduction, Justice Wise, and Justice Bland.

President-Elect Justice Ken Wise and Texas Supreme Court Justice Jane Bland met the documentary film-crew to discuss the program and the legal history of Texas. The documentarians told the story of the three male justices who recused themselves because they owned *Woodman of the World* insurance policies.

Screenshots from "Au Texas, Des Femmes a la Cour" tell how Texas Supreme Court Chief Justice C.M. Cureton and associate justices Thomas B. Greenwood and William Pierson recused themselves in 1924, leading to the appointment of the All-Woman Court.

The *Invitation au Voyage* film crew and producer told the complicated story of Texas Governor Ma Ferguson's election following the governorship of Pat Neff. Governor Neff's appointment of the All-Woman Court showed that a progressive governor could do more for Texas women than the wife of Pa Ferguson, the state's most corrupt governor, ever.



The "Au Texas, Des Femmes a la Cour / In Texas: Frauen Am Gericht" ("In Texas, Women on the Court") program is a meticulously accurate depiction of the steps that resulted in Governor Neff's appointment of the All-Woman Court, with stories about his initial choices and final decision. The producers provide French and English translations of English-language interviews.

The Franco-German team focused on Hortense Sparks Ward, originally of Edna, later of Houston. She was a path-founder: in 1910 as the first woman to pass the State Bar examination; 1911 as the author of the influential pamphlet, *Property Rights of Married Women in Texas*; in 1913 as the principal advocate for the Thirty-Third Texas Legislature's enactment of the Married Woman's Property Rights Law; in 1915 as the first Texas woman admitted to practice before the U.S. Supreme Court; as the drafting author of the Texas primary-suffrage bill, which the Legislature passed in 1918 to grant women the right to vote in primaries; and in 1919 as the first woman to register to vote in Harris County. But the producers did not neglect the stories of her Special Associate Justices Hattie Leah Henenberg, and Ruth Virginia Brazzil. The program does justice to the complicated history of one of the Texas Supreme Court's most well-known cases.[6]

A screenshot from "Au Texas, Des Femmes a la Cour" reflects the *Invitation au Voyage* team's use of contemporaneous 1925 newspaper headlines to tell the story of the All-Woman Court.

---

[6] University of Texas School of Law Tarlton Law Library, "Hortense Sparks Ward (1875-1944)," *Justices of Texas 1836-1986* website, https://tarltonapps.law.utexas.edu/justices/profile/view/112.

The original photo of the All-Woman court.

Volunteers re-enacted the All-Woman Court for the documentary: (left to right) Paige Hestor, Curatorial Department, Texas State Preservation Board; Texas Supreme Court Justice Jane Bland; Society Executive Director Sharon Sandle.

The film crew offered a new perspective on the re-enacment during oral argument.

I had the honor of sharing Texas legal history with a European audience.

The news magazine ended the program by focusing on Lady Liberty, another woman who has come to symbolize the important roles women have played in Texas law.

Return to Journal Index

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.

Return to Journal Index

2022-23 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2022, the beginning of the membership year.

TRUSTEE

Kirsten Castañeda

CONTRIBUTING

Kelley Clark Morris

Return to Journal Index

2022-23 New Member List

The Society has added 26 new members since June 1, 2022. Among them are 19 Law Clerks for the Court (*) who will receive a complimentary one-year membership during their clerkship.

TRUSTEE

Jennie C. Knapp
Ryan Luna
Kirk Pittard

CONTRIBUTING

Hon. Staci Williams

REGULAR

Alexa Acquista*
Laura Bach*
Haley Bernal*
Hunter Bezner*
Rachel Brown*
Misty Coné
Bill Davis
Jim Dedman
Gary Dreyer*
Catherine Frappier*
Samantha Garza*
Jacob Hadjis*
Eric Hudson
Tatum Lowe*
Luke Maddox*
Erin Moore*
Alexandria Oberman*
Carter Plotkin*
Daniel Rankin*
Laine Schmelzer*
Kelly Schlitz*
Seth Smitherman*
Mark Stahl*

Return to Journal Index

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

eJnl appl 2/23

Membership Application

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

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

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

Name _____

Firm/Court _____

Building _____

Address _____ Suite_____

City _____ State_____Zip _____

Phone (_____)_____

Email (required for eJournal delivery) _____

Please select an annual membership level:

- ☐ Trustee $1,000
- ☐ Patron $500
- ☐ Contributing $100
- ☐ Regular $50
- ☐ Hemphill Fellow $5,000
- ☐ Greenhill Fellow $2,500

Payment options:

- ☐ Check enclosed, payable to **Texas Supreme Court Historical Society**
- ☐ Credit card (see below)
- ☐ Bill me

Amount: $_____

Credit Card Type: ☐ Visa ☐ MasterCard ☐ American Express ☐ Discover

Credit Card No._____Expiration Date _____CSV code_____

Cardholder Signature _____

Please return this form with your check or credit card information to:

Texas Supreme Court Historical Society
P. O. Box 12673
Austin, Tx 78711-2673

eJnl appl 2/23