



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Spring 2012

Vol. 1, No. 3

## “The Separation of Texas from the Republic of Mexico was the Division of an Empire”:

The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court,  
Part II: 1821-1836, *Out of Many, One*

by David A. Furlow

**T**he Castilian legal system evolved most rapidly in Texas from 1821 to 1845, in the quarter century when Mexico won its independence from Spain and Texas achieved its freedom as the Lone Star Republic. Of many contributions Castilian law brought to Texas, the Texas Supreme Court, and American law, the most important was the creation of a unified jurisprudence that ended traditional distinctions between equity and common law jurisprudence first in the Lone Star Republic, then in other states, and, eventually, throughout the United States.

In an autumn 2011 article in the HOUSTON LAWYER, ‘*Preserved from the Wreck*’: *Lingering Traces of Hispanic Law in Texas*, attorney/historian James W. Paulsen observed that,

Spain and Mexico were civil law jurisdictions, so the English distinction between law and equity was unknown. Pleadings also were simple—petitions and answers. A fair number of Anglo settlers had acquired some experience with, and appreciation for, Mexican courtroom procedures before the [1836] Revolution. So, just two weeks after the Republic adopted the common law, lawmakers provided that “the proceedings in all civil suits shall, *as heretofore*, be conducted by petition and answer,” and that legal and equitable claims could be raised and decided in a single lawsuit.

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As “*heretofore*”? What was going on before Lorenzo D. Zavala, William B. Travis, and Sam Houston began the Revolution of 1836? Did the basic procedure governing trials in Mexican Texas in 1835 continue afterwards in courts of the Republic and of the Lone Star State?

In the 1820s, Moses Austin’s and Stephen F. Austin’s colonists introduced the first elements of Anglo-American law to Spanish Tejas and then to Mexican Texas. During the 1830s, three distinctly different currents of law – Castilian Spanish, Mexican, and Anglo-American – converged into a common law of simple jurisprudence suitable to an unstable and often violent frontier. Using English-language court records from Brazoria County, in what was in 1832 part of *empresario* Stephen F. Austin’s colony, in the Precinct of Victoria, in the Mexican State of Coahuila and Texas, we will examine how a small group of Anglo-American lawyers, Tejanos, and Mexican officials laid the foundation of modern jurisprudence.

**A**nglo-American jurisprudence involved an equity/common law duality, along with jury trials to check tyranny, before Mexico gained independence from Spain in 1821.

The Anglo-American lawyers who came to Texas in the 1820s and 1830s were accustomed to litigating in a dual system of common law and equity, with constitutional protection of the right to a jury trial. That system evolved over hundreds of years after the Norman Conquest resulted in the creation of a law “common” to all England. When the barons of medieval England forced King John I to limit his law-making authority by signing the *Magna Carta* in 1215, they compelled his judges to conduct courts at “a certain place,” bringing regularity and order to the judiciary. A small number of judges shaped a tightly-centralized, rigid “common law” jurisprudence, while subjects petitioned their sovereign to override that common law. The Lord Chancellor developed equitable procedures to render justice through his Court of Chancery.

In the early seventeenth century, Sir Francis Bacon and other Englishmen viewed judges as “lions under the throne,” *i.e.*, servile creatures who lapped milk at the king’s feet only to roar and bare their teeth at the people. Puritans and political theorists noted that judges held their sinecures at the Stewart kings’ pleasure, resulting in a strong bias favoring the monarchy. After the Glorious Revolution of 1688, English juries became a bulwark against tyranny, leading William Blackstone to observe that a jury was “the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.”

By the time Blackstone wrote his *COMMENTARIES ON THE LAWS OF ENGLAND*, common law and equity were distinctly different bodies of law. Specific performance and injunctive relief were available only in equity. A plaintiff suing in trespass had to plead key words lest a judge dismiss it with prejudice. Justice thus depended on the adroit use of “magic words.” But a system based on magic words is only as widespread as its priesthood. In America, where trained attorneys and judges, the law’s priesthood, were rare, the Rule of Law remained uncertain.

English judges won independence from the Crown in the Act of Settlement in 1701. But colonial judges still served at the king’s pleasure, and it did not please King George III to maintain juries in Massachusetts Bay and other truculent American colonies. The king’s abolition of jury trial led to the American Revolution; patriots such as Thomas Jefferson and John Adams charged King George III with “depriving us in many instances, of the benefit of Trial by Jury” when they published the Declaration of Independence on July 4, 1776.

When the Framers drafted the Constitution a few years later, they sought to end arbitrary judicial abuses. Thomas Tredwell, a representative at New York’s Ratifying Convention of July 2, 1788, wanted no courts like those used by “[King] Philip in the Netherlands, in which life and property were daily confiscated without a jury, and which occasioned as much misery and a more rapid depopulation of the province.” To preserve

American liberty, the Framers amended the Constitution to include the Seventh Amendment's guarantee of jury trial:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

As age creeps in, an artificial and arbitrary system gets hardened arteries. By 1832, the Seventh Amendment's distinction between common law and equity was growing sclerotic.

**T**he unitary judiciary and simple, civil law pleadings and practice of Mexican Texas served early colonists along an uncertain frontier. Castilian law contained neither England's historical distinction between equitable and common law nor the right to a jury trial. Instead, Spanish and Mexican authorities vested judicial power in the municipal *alcalde*, an elected official who held executive, legislative and judicial duties.

Mexican courts in Texas dispensed a rough-hewn justice from 1821 until 1827. In the Austin Colony, for example, *empresario* Stephen F. Austin administered justice in conformity with Mexican law from 1828 until the Congress of Coahuila and Texas permitted the colonists' *Ayuntamiento* to evolve into the Municipality of Brazoria on April 28, 1832. Under Article 1 of the March 11, 1827 Constitution of the State of Coahuila and Texas, all Texans became Coahuiltecos. Under Articles 155-159, male Coahuiltecos not disqualified from voting under Articles 18 to 22 elected their *Ayuntamiento* a/k/a *Ayuntamiento* (Town Council), including *Alcaldes* (mayors), *Sindicos* (trustees), and *Regidores* (judges). Hispanics and Anglo-American settlers met annually on the first Sunday in December to elect *Ayuntamiento* councils, whose investitures occurred the following Sunday. Those home-grown courts protected the interests of Texas citizens until Mexican authorities imposed military garrisons in the 1830s.

Lawmakers in the State of Coahuila and Texas organized the municipality of Brazoria, with Brazoria as its capital and Port Brazoria as its maritime entrepot. The Precinct of Victoria Guadalupe governed the lower half of Stephen F. Austin's colony after 1829. Alexander Hodge served as Commissioner in 1829, while other precinct commissioners included Asa Bringham and Henry Smith. Soldiers from Mexico City oversaw construction of Fort Velasco on the eastern side of the Brazos River and Fort Quintana on the western shore. Courts administered justice until state officials imposed a more formal *Alcalde* court on Brazoria's settlers in 1834.

In civil cases, plaintiffs had to certify that they tried to settle their dispute before suing. *Alcaldes* acted as conciliators to encourage arbitration. *Alcalde* Magistrates had to keep orderly dockets and registers, review written petitions before suits could be filed, issue summons, render judgments, and order executions on property. The law required judges, who wore a white sash with gold tassels, to act in a solemn, dignified manner. Criminal trials about minor infractions could occur in a system of three ranks: *verbal* sessions for minor infractions, a *summario* hearing for investigation and arrest of a person charged with a more serious offense, and a *plenario* proceeding where an *Alcalde* framed a Castilian indictment, conducted a formal trial, and imposed punishment. Defendants could confront witnesses and participate in selecting a jury of twelve freemen. A party could file an appeal of "nullity" in the State's Supreme Court.

Anglo-American lawyers like William B. Travis, James Fannin, and Sam Houston soon found work representing settlers in their native English tongue. They litigated before juries of Anglo-American settlers in Mexican trials in the Precinct of Victoria, in the Municipality of Brazoria. Experience showed that a simple system

of claims and answers dispensed with the intricacies of Anglo-American courts and its distinctions between common law and equity.

**The 1832 Battle of Velasco in Brazoria County's court records.** During 1831 and 1832, the outbreak of civil war in Mexico, declarations of martial law by Mexican military commanders, and the collection of unpopular taxes and custom duties by Mexican officers provoked widespread unrest in Texas. The June 25-26, 1832 Battle of Velasco resulted in the first major bloodshed between settlers and Mexican troops occupying the coast.

The battle occurred because Captain Juan Bradburn, the arrogant Kentucky-born commander of the garrison at Anáhuac, a Mexican fort in northeastern Galveston Bay, arrested two settlers, William B. Travis and Patrick Jack. A settler named John Austin (no relation to Stephen F. Austin or Moses Austin) organized ninety militiamen to free Travis and Jack. John Austin planned to march some of his men to the Gulf and to sail the others south down the Brazos River with three cannons on the schooner *Brazoria* to free the prisoners at Anáhuac.

To reach Galveston Bay with cannon strong enough to storm Captain Bradburn's Anáhuac fortress, John Austin gathered 160 Anglo-American insurgents to march toward the Gulf. The *Brazoria's* master sailed her down the Brazos toward the guns Colonel Domingo de Ugartechea commanded at Fort Velasco, a log customs house surrounded by a double wall. Unwilling to permit militia to attack a Mexican garrison, Colonel Ugartechea and his 100-man garrison stood to arms as the *Brazoria's* captain and some forty militiamen tried to sail by.

John Austin responded by ordering his men to rake Fort Velasco's walls with deadly fire from their Kentucky long rifles. While William J. Russell ordered the schooner *Brazoria's* sailors to anchor 150 yards from the fort, his men pounded its walls with cannon shot and stood behind cotton bales on deck to pour volley after volley on the Mexican parapets. Colonel Ugartechea's soldados shot the vessel's mooring lines, caused her to run aground, and peppered her with musket fire. A Mexican cannon ball crashed through the *Brazoria*, killed the ill-fated ship's mate, who had gone below decks to protect himself, and rendered the vessel incapable of carrying its three cannon to Anáhuac.

Meanwhile, the militia John Austin arrayed along the shore shot down the Mexican defenders at their posts. Austin's and Russell's militia steadily inflicted casualties on the Mexicans until a shortage of ammunition compelled Colonel Ugartechea to surrender his stronghold. John Austin permitted the colonel and his soldados to leave the fort "with their arms, ammunition, and baggage" and to board a vessel bound for Matamoros, across the Rio Grande.

The Battle of Velasco took the lives of five Mexican soldiers and resulted in the wounding of another sixteen. Seven Texas militiamen died and another fourteen suffered serious wounds. If Mexican authorities had not been preoccupied with yet another revolution at home, and if Stephen F. Austin had not made one last valiant effort to avert war, an Anglo-American rebellion against Mexican military authority might have occurred in 1832.

Just as John Austin was organizing his forces to march by land on Anáhuac, he learned that Colonel Don José de las Piedras, commander of the 350-man garrison at Nacogdoches, negotiated a resolution of the settlers' demands and released the captive Texans to civilian authorities. When the hated Captain Bradburn resigned in protest, much of the reason to rebel passed. Texas militiamen returned to their farms and fields. John Austin soon died of illness, perhaps one he contracted while in a downpour on the second day of the battle.

The military struggle at Velasco was over, but there was one last battle to be fought: ship-master John G.

Rowland's claim to recover money damages for the harm Mexican shot and shell had wreaked on his schooner *Brazoria*. The resulting, English-language legal battle in a Mexican court of Texas left its mark on Brazoria County's courthouse records, as shown below:

Brazoria June 29<sup>th</sup> 1832      No. 30

By this publick instrument of protest, be it known that on the 29<sup>th</sup> day of June in the year of our Lord [1832], before me, Asa Brigham[,] Comisario for the Precinct of Victoria in the Jurisdiction of Austin, State of Coahuila and Texas, Republic of Mexico. – Personally came and appeared John G. Rowland, Master of the American Schooner *Brazoria* of New York, of the Burthen of [79,869] fifts, Tons, or thereabouts, John B. Tinker Daniel Betts and Richard Grosbick seamen of the said Schr *Brazoria*, who...declare that the sd Schr being laden with a cargo of sundries, on the tenth day of the present month of June, they...set sail on Board the said Schr from the port of New Orleans...for this port of Brazoria, and arrived on the fourteenth day of said month at said port without accident.

– That on the twentieth day of said month of June, the afore said Capt Jno G Rowland left the Schr for the Town of San Felipe de Austin in this Jurisdiction for the purpose of collecting freight money and attending to the unsettled business of the said Schr *Brazoria*, and on the following day the [21<sup>st</sup>] day of the present month an order was issued for the seizure of the said Schr *Brazoria* – of the following tenor viz to witt:

John G. Rowland, Captain of the Schr *Brazoria*,

You are hereby commanded to hold yourself and vessel in readiness to start to Anahuac at eight oclock on Friday the Twenty second Inst – we regret being compelled to take the seemingly arbitrary course, but necessity compels it, and we pledge ourselves to endemnify the owners of the Vessel for all damages she may sustain by detention..., dated Brazoria June [21<sup>st</sup> 1832], signed John Austin Commander of the Military forces at this place,

– And by and in virtue of the foregoing order the said Schr *Brazoria* was taken into posession by the aforesaid officer's orders, on the twenty second day of this present month and guns mounted on her, and she was actualy taken into action, and in said action materally damaged, so much so that she was considered unseaworthy without considerable repairs, which could not be done at this place without great loss of time and verry considerable expense, -- Now therefore I . . . Jno G. Rowland do declare and protest against all and every damage loss or determents that may have happened to said vessel, are and ought to be bourn by the interested parties or whomsoever it shall or may concern the same having occurred as before mentioned and not by or through the negligence or inattention of the Master or any of the Crew of the afore said vessel all of which acts done and subscribed at the Town of Brazoria in the Jurisdiction of Austin – and State Coahuila and Texas. This [29<sup>th</sup>] day of June in the year of our Lord [1832].

John G. Rowland  
John B. Tinker  
Daniel W. Betts  
Richard Grousbeck

By the public endorsement of the said vessel  
 on the 21st day of June in the year of our Lord  
 one thousand eight hundred and thirty two, before me the  
 Brazoria Comandante for the District of Victoria in the State  
 of Coahuila & Texas, Republic of Mexico, personally came and appeared John G.  
 Rowland, Captain of the American Schooner *Brazoria*  
 of last make of the Brazoria of twenty seven and eighty  
 six nearly fifty Tons or thereabouts, the Captain  
 Daniel W. Bates and Richard Gonsbach owners of the said  
 Schooner *Brazoria*, who severally declare that the said vessel  
 being laden with a cargo of sundries on the tenth day  
 of the present month of June, they the said applicants  
 set out on board the said Schooner from the port of New  
 Orleans in the United States of North America bound  
 directly for the port of Brazoria and arrived on the  
 fourteenth day of said month at said port without  
 accident & that on the twentieth day of said month of  
 June the afore said Capt. G. Rowland left the Schooner  
 for the town of San Felipe de Austin in the jurisdiction  
 for the purpose of collecting people money and attending  
 to the unsettled business of the said Schooner  
 and on the following day the twenty first day of the  
 present month an order was issued for the seizure of  
 the Schooner *Brazoria* of the following tenor to wit  
 John G. Rowland, Captain of the Schooner *Brazoria* upon  
 an hourly command to take yourself and vessel in  
 command to start to Anahuac at eight o'clock on Friday  
 the twenty second inst. but regret being compelled to  
 take the seemingly arbitrary course but necessarily compelled  
 in and no delays made to endanger the service  
 of the vessel for all damages she may sustain by all  
 actions or otherwise which in our hands date *Brazoria*  
 from twenty first one thousand eight hundred and thirty  
 two. Signed John Austin Comandante of the Military

11130  
 found at this place. And by and in virtue of  
 the foregoing order the said Schooner *Brazoria* was taken into  
 possession by the aforesaid Officer's order, on the twenty  
 second day of the present month and found mounted  
 on her, and she was actually taken into action, and  
 in said action materially damaged, so much so that  
 she was considered unseaworthy without considerable  
 repairs, which could not be done at this place without  
 great loss of time and very considerable expense.  
 Now therefore I the aforesaid J. G. Rowland  
 do declare and protest against all and every dam-  
 age loss or detriments that may have happened to  
 said vessel, are and ought to be borne by the entire  
 interested parties or whomsoever it shall or may concern  
 the same having occurred as before mentioned and not  
 by or through the negligence or inattention of the  
 Master or any of the crew of the aforesaid vessel  
 All of which acts did and subscribed at the Town  
 of Brazoria in the jurisdiction of Victoria and State  
 of Coahuila & Texas. This twentieth day of  
 June in the year of our Lord one thousand eight  
 hundred and thirty two.  
 John G. Rowland  
 John B. Tinker  
 Daniel W. Bates  
 Richard Gonsbach

**A copy of the records of proceedings in Brazoria City, in Brazoria County, then in the Precinct of Victoria, in the State of Coahuila and Texas, June 29, 1832**

Brazoria County’s courthouse records tell a remarkable story of their own. They reveal how Anglo-American citizens used a simple plea to present a simple maritime claim. Those plaintiffs did not worry that they might forfeit their claim by failing to invoke admiralty jurisdiction or by neglecting to use necessary but technical terms of art. They neither strove to plea their case under common law nor calculated how to restate it in equity. They simply sought relief from an Anglo-American presiding over a Mexican court and transacting important legal business in English rather than Spanish.

The record of an insurance company’s payments, GALES & SEATON’S REGISTER, tells a different story under a June 21, 1832 heading, “Claims of Mexico.” The insurance company memorialized claims the *Brazoria*’s owners filed while their ship was in Texas: “Schooner *Brazoria* seized and used in the Mexican service.” The insurer’s file explains that,

On the 21st of June, 1832, whilst the vessel was lying in the port of Brazoria, she was seized by John Austin, the Mexican military commandant in that quarter, and employed to make an attack upon Anahuac. During the attack she was so much injured that the owners abandoned her to the underwriters, who claim the amount specified of the Mexican Government.

John Austin was no rebel but a “Mexican” commander who seized the *Brazoria*.

Perhaps the news of coup and counter-coup in central Mexico made it impossible for the insurers to distinguish an Anglo-American militia leader from the regular soldiers who shot up a schooner based in New York. The vessel suffered so much damage that her owner, John G. Jackson, abandoned her to the Jackson Marine Insurance Company. The Jackson Marine insurers claimed that the Mexican Government owed them \$7,215 for damages to her.

**A tragic slavery-story in the 1832 court records.** This time the Mexican court in the Precinct of Victoria conducted a jury trial to determine whether a free African-American, William Chephas, had committed a theft warranting temporary enslavement as his punishment. The court records below tell the terrifying tale of Mr. Chephas' visit to Texas:

Brazoria Sept 8<sup>th</sup>, 1832

No. 51

Personally came and appeared before me Asa Brigham Comisario, J. Piedras and entered complaint against a negro man named William Chephas. Said Piedras stated that about fifty dollars had been stolen from him, from on board of the Schooner Comet, and he had every reason to believe that the said William was the thief, and wished him apprehended.

Brazoria County Sept 8<sup>th</sup> 1832

Asa Brigham  
Comisario

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*State of Coahuila & Texas*  
*Vs.*  
*William Chephas*

To Edwin Richison[:]

You are hereby required to apprehend and take into custody, a negro man, called William Chephas, to answer the complaint of J. Piedras, and bring him forthwith before me. In this you will fail not and in case you may want assistance to put this order into execution you may require the aid of any number of good citizens of this Precinct that might be necessary. Given under my hand this 8<sup>th</sup> Sept 1832.

Asa Brigham, Comisario

\*\*\*\*\*

*State of Coahuila & Texas*  
*vs*  
*William Chephas*

The prisoner in this case being brought into court by the proper Officer, the Comisario appointed a jury of three viz. A. Calvit, John W. Cloud and J. G. McNeel three good citizens

of this Precinct, who after hearing all the Testimony do say on their oaths that in their opinion the prisoner was guilty of the charge, the comisario therefore ordered him tried by the proper officer and required that the aforesaid jury should see that proper means was used to obtain the money stolen, which was promptly attended to and the prisoner was returned to the Comisario together with twenty six dollars thirty seven cents of the money stolen, the Comisario considered it necessary that two persons should be added to the former jury, viz. J. H. Bell and C. G. Cox two good citizens of this precinct who being placed on their oaths, do say as follows.

We the Jury find the prisoner guilty as in manner and form indicated and also say that he is personally accountable for all expenses and deficiency of amt stolen, and that the Comisario has the right of disposing of said defendant until such cash and charges are paid. A. Calvit, J. H. Bell, J. G. McNeel, C. G. Cox & J. W. Cloud.

Paid over to Col. Piedras \$26.37/100  
Brazoria 8<sup>th</sup> Sept 1832

Asa Brigham  
Comisario

\* \* \* \* \*

*State of Coahuila & Texas*

vs.

*William Chephas*

To Edwin Richison

You are hereby authorized to advertise William Chephas a man of couler (who calls himself free) and sell at publick auction the time of the prisoneas will make the sum of twenty four dollars sixty two cents. In this you will fail not, and make return to me of your proceedings on the 13<sup>th</sup> day of the present month. Given under my hand this 9<sup>th</sup> day of Sept 1832.

Asa Brigham  
Comisario

\* \* \* \* \*

Recd of E. Andrews \$7.00

Executed the above order by selling at Publick Sale the time of the said William Chephas, from this date to the last day of December next, at the rate of seven dollars per month to Edmund Andrews.

Brazoria Sept 13<sup>th</sup> 1832

Edwin Andrews

Asa Brigham Comisario, continued, p. 68....



\* \* \* \* \*

*State of Coahuila and Texas*

vs.

*William Chephas*

[To:] Mr. Brigham

Dear Sir,

They have come and taken William which I hired of you from me, and this is to serve as information that I no longer hold myself as responsible for the delivery of him nor for the payment of the note. I wish to see you on the subject.

Yours

Edmund Andrews

Oct 19<sup>th</sup> 1832

On receiving this note I made immediate enquiry and was informed that Thomas Bradby (then acting as Sheriff) had taken said William. On inquiring of said Bradby by what authority he took the negroe he replied that John Austin (then acting as second constitutional alcolade) had given him the order.

Brazoria Oct 20<sup>th</sup> 1832

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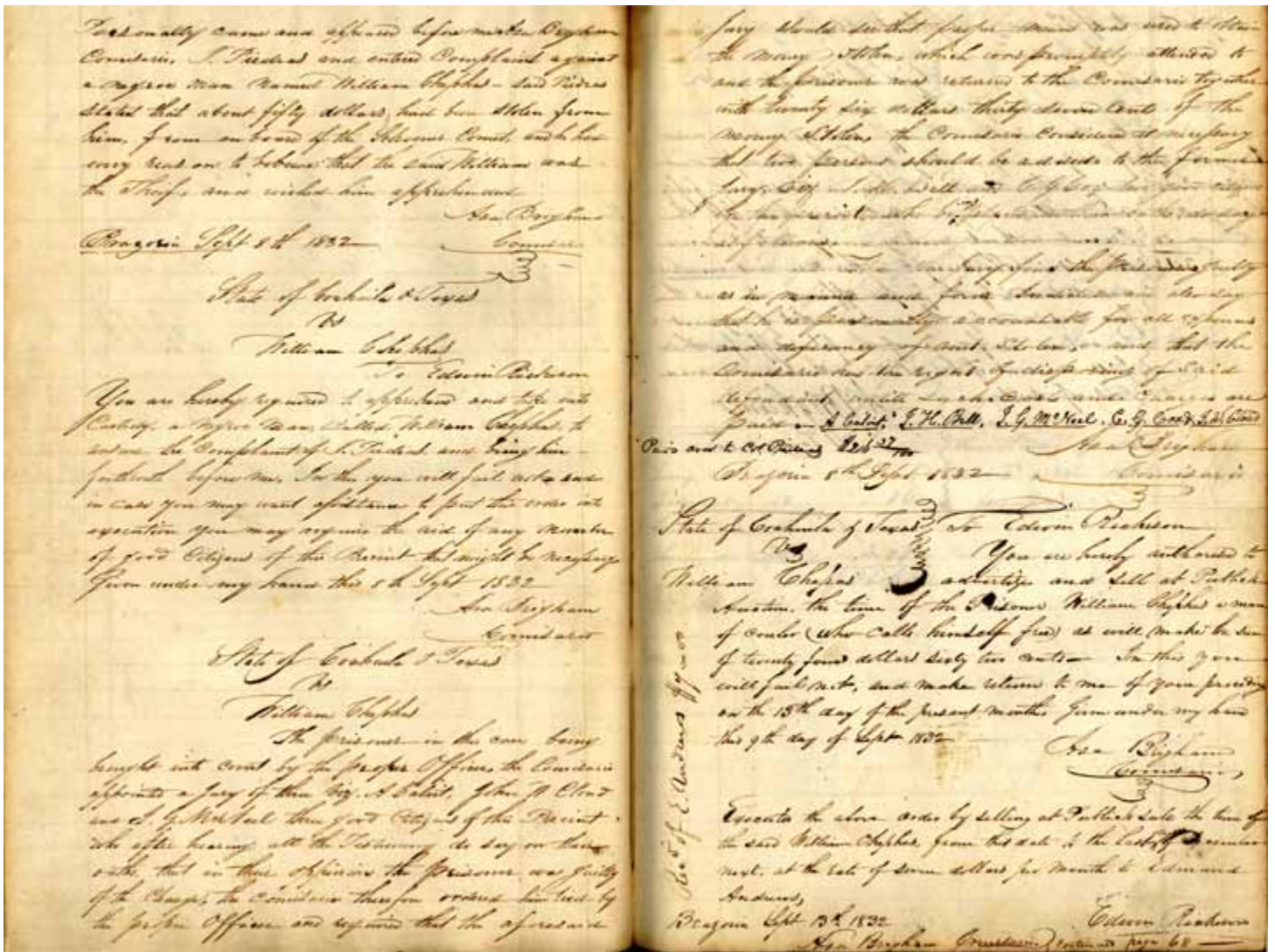
Asa Brigham's Mexican court conducted its business in English, convened a jury to decide the facts, and calculated damages in American dollars. Born in Massachusetts around 1790, Brigham brought his wife, two sons, a daughter, and a son-in-law to Texas in April 1830. In December 1830 voters of the *Ayuntamiento* of San Felipe de Austin elected him *síndico procurador* for the precinct of Victoria (Brazoria); in December 1831, they elected him *comisario*. He managed a plantation and, for a while, held slaves. Ironically, Asa later signed petitions on behalf of free African-Americans. He signed the Texas Declaration of Independence, served as the Republic's first treasurer and was elected mayor of Austin.

Archeological excavations of Brazoria County's Levi Jordan and Peach Point plantations reveal the cruel brutality of Asa Brigham's degrading sentence and the harsh life William Chephas lived during the time of his enslavement. While Asa Brigham and his colleagues were preparing to fight for their freedom, William Chephas lost his freedom and his dignity.

While William Chephas served out his sentence, Stephen F. Austin sought to avoid war and independence-minded settlers convened a political convention in San Felipe on April 1, 1833, to create a Texas constitution. Nacogdoches representative Sam Houston chaired a committee that based a Texas constitution on Massachusetts' constitution of 1780. Sam and other Texans sought to guarantee their right to jury trials, habeas corpus, freedom of the press, freedom of religion, and universal suffrage.

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Photographic images of William Chephas' courthouse records:



Events in Mexico soon overshadowed Texans' efforts to draft a new constitution. On the same day the Convention of 1833 convened (April 1, 1833), Antonio López de Santa Anna assumed power as the President of the Mexican Republic. In 1834, the Mexican Congress reacted to concern about the loyalty of Texas' Anglo-American immigrants by creating a "Superior Judicial Court in Texas" and authorized regular troops to collect taxes and customs duties. The Brazos, Bexar, and Nacogdoches Circuits comprised three departments, each of which included a Superior Judge, a Secretary, and a Sheriff. The *Ayuntamiento* divided each colony into several precincts to assist in the swift, local administration of justice and appointed a *Comissario* (a magistrate, the equivalent of a modern justice of the peace) to serve in each.

General Santa Ana's seizure of dictatorial power edged Texans ever closer to war with Mexico. On October 2, 1835, armed conflict began at Gonzalez, when settlers defeated soldiers sent to seize the cannon parked beneath a "Come and Take It" banner. Running battles erupted in San Antonio, as Ben Milam seized the Alamo and sent Santa Ana's brother-in-law General Martín Perfecto Cós back to Mexico, setting the stage for the Revolution in 1836. When Constitutional Convention President Richard Ellis, Lorenzo de Zavala of Harrisburg, General Sam Houston, and the other forty-nine delegates of the people of Texas signed the Texas

Declaration of Independence in Washington City (Washington on the Brazos) on March 2, 1836, they invoked memories of Thomas Jefferson, John Adams, and Ben Franklin's July 4, 1776 Declaration. The Texas delegates declared that,

The Mexican Government, by its colonization laws, invited and induced the Anglo-American population of Texas to colonize its wilderness, under the pledged faith of a written constitution, that they should continue to enjoy that constitutional liberty and republican Government to which they had been habituated in the land of their birth, the United States of America . . . [but] the Mexican nation has acquiesced in the late changes made in the Government by General Antonio Lopez de Santa Ana, who, having overturned the Constitution of his country, now offers us the cruel alternative, either to abandon our homes, acquired by so many privations, or submit to the most intolerable of all tyranny, the combined despotism of the sword and the priesthood.

It hath sacrificed our welfare to the State of Coahuila, by which our interests have been continually depressed, through a jealous and partial course of legislation, carried on at a far-distant seat of Government, by a hostile majority, in an unknown tongue...

The delegates charged that Santa Ana "refused to secure...the right of trial by jury, that palladium of civil liberty and only safe guarantee for the life, liberty, and property of the citizen." In contrast, the Republic's Bill of Rights expressly guaranteed a right to jury trial:

Fourth. Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege. No law shall ever be passed to curtail the liberty of speech or of the press; and in all prosecutions for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and fact, under the direction of the court.

Lorenzo de Zavala, who signed Mexico's Constitution of 1824 and served as the Lone Star Republic's first Vice President, ensured in 1836 that the Lone Star Republic's Constitution and Texas laws would appear in Spanish so all citizens could read the law in their own language.

Two weeks after the Fourth Congress adopted English common law as the law of Texas, it declared through its Act of February 5, 1840 that "proceedings in all civil suits shall, *as heretofore*, be conducted by petition and answer..." All legal and equitable claims could thus be raised in a single lawsuit. Texas' Congress thus codified the unitary judicial system used by Mexico's courts before 1836 – a statute that lives on today as Texas Rule of Civil Procedure 51(a). That law made the Republic the first English-speaking country to adopt a complete unitary system of judicial administration. Others soon realized that less complexity means more justice. The U.S. Supreme Court and U.S. Congress followed Texas' example of merging common law and equity into one law by adopting the Federal Rules of Civil Procedure in 1938.

Texans can truly say that what starts here changes the world.

If you'd like to learn more about Texas' vibrant Castilian law heritage, please read the *Journal's* last issue just before the John Hemphill Annual Dinner on Friday, June 1, 2012....

## Authorities Consulted

I'm grateful to Michael Bailey, Curator of the Brazoria County Historical Society and Museum for the images and transcripts of the trials of 1832 as well as keen insights about the Battle of Velasco and William Chephas. The Society and Museum are located at 100 E. Cedar St., Angleton, Texas, 77515 (979-864-1208), which is also the site of the Brazoria County Historical Museum. I also thank Bill Pugsley, Marilyn Duncan, Lynne Liberato, Dylan Drummond, and David Kroll for their support, incisive editing, and assistance.

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

By Gary M. Lavergne

*Editor's Note: The following article by Gary M. Lavergne is drawn from his book by the same name that looks at Sweatt v. Painter, the 1950 case that sought to desegregate the University of Texas Law School. The book was written with the cooperation of former Chief Justice Joe R. Greenhill, who represented the State of Texas. As Lavergne notes, the Court's answers to Sweatt's questions about the "factually undeniable inequality of separate, segregated institutions that perpetuated Jim Crow in Texas and across the nation" pointed the way to the end of segregation four years later in Brown v. Board of Education.*



Heman Marion Sweatt

**T**he *Merriam-Webster Dictionary* defines “social science” as “a branch of science that deals with the institutions and functioning of human society and with the interpersonal relationships of individuals as members of society.”<sup>1</sup> Sociology can be considered the study of human society in all its forms and, of course, this vast domain encompasses dozens of subject areas. Clashes between two of those social sciences frequently take place in courtrooms. The 1950 U.S. Supreme Court case *Sweatt v. Painter*, 339 U.S. 629, provides a wonderful example of the battle between history and sociology for preeminence in the American judiciary. History is embraced by the “Originalists,” while sociology is embraced by the “Activists.”

During an interview for my book *Before Brown: Heman Sweatt, Thurgood Marshall and the Long Road to Justice*, retired Texas Supreme Court Chief Justice Joe Greenhill, who represented the state as Assistant Attorney General in *Sweatt*, told me that at the time of the litigation both he and Thurgood Marshall thought they were “arguing *Brown*.”<sup>2</sup> To represent his client, Greenhill took the historical approach and researched the original intent of Congress as it related to school

segregation and the passage of the Fourteenth Amendment of the U.S. Constitution. The product of his inquiry easily represented the best legal work presented by the Attorney General’s office in the entire record of the *Sweatt* litigation.

In his briefs and oral arguments Greenhill reminded the Court that in 1862, Congress segregated schools in the District of Columbia—the only political jurisdiction in which it had complete control—and they remained segregated throughout the Civil War and Radical Reconstruction and were still segregated in 1950 as *Sweatt* was being argued. He pointed out that the civil rights guaranteed by the Fourteenth Amendment and the Civil Rights Act of 1866 never included school integration. He further showed that during the May 1866 debates over the Fourteenth Amendment, Congress donated land to segregated Negro schools, and in July of that year they addressed the method of tax support.<sup>3</sup>

Greenhill's brief also reported that in the late 1860s and early 1870s, when the Radical Republicans held tight control over Congress, Massachusetts Senator Charles Sumner had made repeated attempts to insert the integration of schools in legislation, but had been defeated each time. Congress was able to require the southern states to ratify the Fourteenth Amendment in order to be readmitted to the Union, but no evidence existed that school desegregation was connected with that compliance. Indeed, eleven of the northern and border states that ratified the Fourteenth Amendment maintained white and non-white school systems—as did all the former Confederate states.

To reinforce his client's history-based Originalist view, Greenhill added legal precedent. He pointed out that at least five state courts outside the south had ruled that the Fourteenth Amendment did not mandate integrated schools.<sup>4</sup> During oral arguments he listed precedent supporting states' rights. He noted that *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), held that “the education of the people in schools maintained by taxation is a matter belonging to the respective states.” *Chesapeake & Ohio Railway Co. v. Kentucky*, 179 U.S. 388 (1900) upheld the constitutionality of racially segregated intrastate commerce. In *Berea College v. Kentucky*, 211 U.S. 45 (1908), the Supreme Court denied a challenge to a 1904 Kentucky law making it illegal to educate white and black students in the same institution. He also presented *Chiles v. Chesapeake*, 218 U.S. 71 (1910), which upheld regulations of a private carrier that segregated passengers by race.<sup>5</sup>

Acting as an advocate duty-bound to zealously argue his client's case, Greenhill argued that the law supported Texas' defense of segregation at the University of Texas Law School. For seventy-five years after the Civil War and Reconstruction Congress had done nothing to attach school desegregation as a condition for any service or money provided by the federal government: Greenhill showed that to be an historical fact. He went on to cite federal regulations explaining how money should be divided among the races, such as the “A&M” money provided for in the Morrill Acts, and housing units paid for by federal funds.<sup>6</sup>

Alexander M. Bickel, U.S. Supreme Court Justice Felix Frankfurter's law clerk, validated Joe Greenhill's research and conclusions later during the 1952 term. After months of researching the Fourteenth Amendment's legislative history, Bickel reported that it was “impossible” to establish any connection between school desegregation (and any other racial separation) and Congress' intent in enacting the Fourteenth Amendment. He added that Congress had not foreseen the abolition of school segregation.<sup>7</sup>

Greenhill's documentation and logic compelled Thurgood Marshall to concede that the history and intent of the Fourteenth Amendment could be used to support *either* side of the school integration argument. So, as Heman Sweatt's attorney, Thurgood Marshall limited his argument to the undeniable assertion that Congress intended the amendment to guarantee full citizenship rights to African-Americans—a fundamental civil right Texas sought to deny Sweatt and other African-Americans.<sup>8</sup>

History might not have been on the side of Thurgood Marshall, but sociology was. The Sociological Approach, largely the brainchild of Thurgood Marshall's assistant Robert L. Carter, argued that a comprehensive measure of educational equality should include available social and cultural capital (the accoutrements of privilege). Racial separation in schools meant that whites had access to a social network not available to African-Americans, producing a false sense of superiority in whites and an equally false sense of inferiority in African-Americans. Sociological research supported the notion that segregation thus harmed African-Americans. As a result, inequality could never be remedied by merely duplicating and separating inanimate objects like buildings, books, teacher-pay, and money. Since separation of the races was *per se* harmful to African-Americans, separation made equality impossible, so the only logical and constitutional remedy was the end of segregation and the integration of schools.<sup>9</sup>

Criticism of the Sociological Argument in court was not limited to segregationists such as Attorney General Price Daniel of Texas. In his memoirs, Robert Carter recalled that, “[t]he proposed use of social scientists’ testimony came under fierce attack from the outset. A number of the most influential members of the NAACP’s advisory committee on legal strategy scorned social science data as without substance, since it was not hard science, proved by tests in the laboratory, but merely the reactions of a group of people.” Professor Thomas R. Powell of Harvard, a pre-eminent lawyer and political scientist at the time, called the idea of presenting sociological studies in court the “silliest thing he had ever heard of.”

Carter and Marshall responded that if segregation was to be directly attacked, as they were doing for the first time in *Sweatt*, it had to be proven to be an unreasonable and irrational practice, and that its sole purpose was to subjugate one race to another—a harmful public policy that violated the Equal Protection clause of the Fourteenth Amendment of the Constitution.<sup>10</sup>

Both Price Daniel and Joe Greenhill argued that sociological evidence had been appropriately ignored by Texas courts because, if such data were to be evaluated at all, it was the job of state and local legislators and executives to do so. It was not the job of any court to formulate policy for a state. The question before the Supreme Court, as Joe Greenhill and Price Daniel presented it, was whether Texas had the right, as a state, to control its schools. They argued that Texas’ defense of its position was supported by the federal and Texas constitutions, history, case law precedent, and the social order of the time.<sup>11</sup>

Chief Justice Fred Vinson wrote the *Sweatt v. Painter* opinion for a unanimous Supreme Court. He made clear the Court was not yet ready to address the inherent constitutionality of racial segregation with a sweeping ruling: “To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? *Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court*” (emphasis added).

Chief Justice Vinson then added that “*much of the excellent research and detailed argument presented in [Sweatt] is unnecessary to [its] disposition*” (emphasis added). So, neither the NAACP’s activist Sociological Argument nor Joe Greenhill’s originalist historical research regarding Congressional intent was dispositive.<sup>12</sup> Instead, Chief Justice Vinson avoided choosing between the social sciences and implicitly overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896), by emphasizing the undeniable reality of an honest comparison of the educational resources available at the University of Texas Law School in Austin and the new, separate law school the Legislature had just approved for African-Americans in Houston: “Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State.”<sup>13</sup>

In *Sweatt*, neither history nor sociology prevailed, nor even mattered, because the makeshift law school in Houston the State of Texas provided for Heman Sweatt was so obviously unequal in educational resources and opportunities when compared with the University of Texas School of Law in Austin. Even before *Brown*, undeniable evidence of obviously unequal treatment violated every concept of justice, even the “separate but equal” justice meted out by *Plessy*. In *Sweatt*, the U.S. Supreme Court dared ask the question earlier courts failed to address: the factually undeniable inequality of the separate, segregated institutions that perpetuated Jim Crow in Texas and across the nation. The Court’s answer to Sweatt’s questions pointed the way to the Court’s end to segregation four years later in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

(Endnotes)

- 1 See MERRIAM WEBSTER DICTIONARY ONLINE, “social science,” at m-w.com, <http://www.merriam-webster.com/medical/social%20science> (checked Feb. 17, 2012).
- 2 The author’s interview with Joe Greenhill, the former First Assistant Attorney General in the *Sweatt* case, and later Chief Justice of the Texas Supreme Court, on September 9, 2005.
- 3 See the Joe Greenhill Papers, provided to the author in November of 2005, and Joe Greenhill to Bill Pugsley, November 20, 2003. Texas Wesleyan University Law School.
- 4 The states were Ohio (1870), New York (1872), Pennsylvania (1873), California (1874), and Indiana (1874); Joe Greenhill, an oral history interview by H. W. Brands, for the University of Texas Law School, dated February 10, 1986; Michael J. Klarman, “Why *Brown v. Board of Education* was a Hard Case,” *The Judge’s Journal*, vol. 43, no. 2 (Spring 2004), pgs. 6-14; *ibid.*
- 5 Joe Greenhill very kindly provided this author with a copy of his U.S. Supreme Court briefing in *Sweatt v. Painter* (1950).
- 6 Joe R. Greenhill, oral history interview by H. W. Brands for the University of Texas Law School, February 10, 1986, <http://www.houseofrussell.com/legalhistory/sweatt/docs/goh.html> (checked Feb. 17, 2012); Milton R. Konvitz, “The Extent and Character of Legally-Enforced Segregation,” *Journal of Negro Education*, vol. 20, no. 3 (Summer 1951), pgs. 425-435.
- 7 Michael J. Klarman, “Why *Brown* Was a Hard Case,” *Judges’ Journal*, vol. 43, no. 2 (Spring 2004), pgs. 6-14.
- 8 John Q. Barrett, “Teacher, Student, Ticket,” *Yale Law and Policy Review*, vol. 20, no. 2 (2002), pg. 316.
- 9 Mark V. Tushnet, *The NAACP’s Legal Strategy*, Chapel Hill: University of North Carolina Press, 1987, pg. 119; For a brief discussion of human and cultural capital in the context of college admissions see my commentary, “College Admissions as Conspiracy Theory,” first published in *Chronicle of Higher Education Review*, November 9, 2007, <http://www.garylavergne.com/CollegeAdmissionsConspiracyTheory-Lavergne.pdf>.
- 10 Robert L. Carter, *A Matter of Law*, New York: New Press, 2005, pg. 99; Thurgood Marshall, “Tribute to Charles H. Houston,” *Amherst Magazine*, in Mark V. Tushnet, *Thurgood Marshall*, Chicago: Lawrence Hill, 2001, pg. 501. In this article Marshall called Thomas Powell an “old mossback.”
- 11 Gale Leslie Barchus, *The Dynamics of Black Demands and White Responses for Negro Higher Education in the State of Texas, 1945-1950*, Master’s thesis, University of Texas at Austin, 1970, pgs. 60-64.
- 12 *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).
- 13 *Id.* at 633.

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*Lynne Liberato*

# Telling History by *Telling Stories*

**O**f all the stories my grandfather told me, the one that stands out most concerned sharks. When I tell you the story, you will understand why.

The story he told was of how crew members got rid of sharks that gobbled up snappers from their lines as they fished far off the Florida coast. As a young man in his teens, my grandfather and other fishermen, mostly Sicilian immigrants, spent a month at sea on large sailing schooners called “smacks.” To rid themselves of the sharks who trailed their smack, the crew would slit the belly of a large snapper, pack it with lye wrapped in the tin liner of a cigarette pack, and sew the fish back up. Then they would toss the booby-trapped snapper back into the Gulf water and wait until a shark snapped it up.

When the lye was released in the shark’s stomach, the other sharks would attack him as he thrashed in the water and, in turn, they would swallow more lye. In a chain reaction, many of the sharks would die from the poison or from being attacked by the other sharks. The survivors were sated by fresh meat. Meanwhile, the smack and its quarry escaped the sharks’ attention for days.

In today’s consciousness, it’s hard not to be horrified by this gruesome treatment of animals. But in the early part of the 20th century, killing sharks on a commercial fishing trip made the difference between whether fishermen could catch fish or not—whether they could feed their families or not.

Fishing smacks are such an important chapter of Pensacola history that its museum dedicates a permanent exhibit to them. Stories of the smacks, the fishermen and their techniques are part of the larger history of immigration in the early twentieth century.

The shark tale was one of the stories Grandpa Frank told me when I interviewed him on tape in the early 1980s. At the time, I had never heard of such a thing as an oral history. I did know that I wanted to capture stories from the lives of the four people I loved most, my grandparents. Those interviews are among my most precious possessions.

There is a story of another grandfather elsewhere in this issue. It is the story of Herbert W. Green, Justice Paul Green’s grandfather. Mr. Green was a World War I veteran who through pluck and determination graduated from UT Law School and began a three-generation legal legacy culminating with his grandson becoming a justice on the Texas Supreme Court. When Justice Green spoke of his grandfather, it was not only with understandable pride but also with the relish of someone retelling a good story.

Whether it involves aspiring lawyers from Hearne or fishermen from Pensacola, history is best told through stories of real people living their lives. Telling stories is the approach that James Haley takes in writing our history

of the Texas Supreme Court. As yet unnamed, the book will be published in the Spring of 2013. Certainly it will be one of the Society's proudest accomplishments. In his draft preface, Haley promises stories of a kidnapped justice, a justice who was assassinated, and other justices who found themselves in shootouts with hostile Indians. To use his words, the book will "unfold the story as a tale told." It is a "history not of the law," he writes, "but of the Court, of the men and women who ascended to it." This will be a story of men and women we will want to know.

Another big project for us is the establishment of the Texas Supreme Court Historical Society Fellows. David Beck will be the first chair of the Fellows, members who donate \$2,500 or more to the Society each year. The force behind this endeavor is president-elect Warren Harris. Warren secured our compelling speaker, Mayor Rudy Giuliani, for our annual dinner, which will be held at the Austin Four Seasons Hotel on June 1, 2012. I hope you can make it.

While there are benefits to joining the Fellows and attending our annual dinner, the purpose of these projects is to raise money to support our mission of conserving for posterity the lives and work of the appellate courts of Texas. I can think of no greater way to carry out this mission than through the publication of a book on the history of our Supreme Court. These are great stories: both the stories told in the book and the story of the members of the Texas Supreme Court Historical Society who are making history happen.

— **Lynne Liberato**  
Haynes and Boone, L.L.P.

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

**W**ere it not for the tenacity of his grandfather, Justice Paul Green likely would not be a lawyer.

Fresh from the French battlefields of World War I, Hubert W. Green was working for the railroad in Hearne. Influenced by a family friend who was a lawyer, he traveled to Austin to ask the dean of the UT Law School to allow him to enroll. Dean John Charles Townes pointed out that not only did he lack a college degree, he was a high school dropout.

So, Mr. Green went to business school in San Antonio for a year and returned to report to the dean that that he had made all “A’s” in typing, shorthand, and spelling. According to Justice Green, who is the Supreme Court liaison to the Historical Society, the dean probably admitted him because of his eagerness, while calculating that he would not go far in competition with the college boys. But Hubert Green proved the dean wrong.

Readers can find Mr. Green’s name in Volume 1, Number 1 of the Texas Law Review, where he was one of the organizing editors. A play on his initials, he earned the nickname of “Hard Working” Green from another law school dean. He carried that nickname throughout his life as a successful litigator, leading his own firm in San Antonio—a practice Justice Green’s father, Hubert W. Green, Jr., inherited and developed, and where Justice Green practiced for 17 years before going onto the bench. Justice Green’s lawyer brother, David Green, also carries on the family’s legacy.

Thus, the pluck and determination of a young war veteran—who did not know what he did not know—led to three generations of Texas lawyers and a Supreme Court justice.



Justice Paul Green (right) stands with his attorney brother, David Green, and their attorney father, the late Hubert W. Green. Grandfather Hubert W. Green is pictured in the background.

— Lynne Liberato

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# Mayor Rudy Giuliani to Speak at 2012 Hemphill Dinner



**F**ormer New York City Mayor Rudy Giuliani will be the keynote speaker at the Society's Hemphill Dinner. Mr. Giuliani is a named partner in the law firm of Bracewell & Giuliani LLP.

The annual dinner will be held at the Austin Four Seasons Hotel at 6:30 p.m. on Friday, June 1. Also included in the night's events will be the swearing-in of the Society's new president, Warren Harris, the recognition of the Founding Fellows of the Society by David Beck, and a memorial to Judge William L. Garwood.

The head of this year's dinner committee, Marie Yeates, has already achieved a record-setting participation level and table sales. Table sponsorships are available for \$10,000 (Hemphill Sponsorship, seats 20), \$5,000 (Pope Sponsorship, seats 10), and \$2,500 (Advocate Sponsorship, seats 10). Individual tickets are \$200.

Those wishing to buy a table or to attend can do so by downloading and returning the order form that follows.

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TEXAS SUPREME COURT HISTORICAL SOCIETY  
The Seventeenth Annual John Hemphill Dinner  
**FACT SHEET**

- WHEN:** Friday, June 1, 2012
- WHERE:** Grand Ballroom, downstairs  
Four Seasons Hotel (San Jacinto and Cesar Chavez Streets)  
Austin, Texas
- TIME:** 6:00 p.m. Invitation-Only Reception with dinner speaker  
6:30 p.m. Reception with Host Bar  
7:30 p.m. Dinner  
9:30 p.m. Finish
- TICKET PRICES:** \$10,000 – Hemphill Sponsorship (seats 20)  
\$8,400 is a tax deductible contribution to TSCHS  
\$5,000 – Pope Sponsorship (seats 10)  
\$4,200 is a tax deductible contribution to TSCHS  
\$2,500 – Advocate Sponsorship (seats 10)  
\$1700 is a tax deductible contribution to TSCHS  
\$200 – Individual ticket  
\$120 is a tax deductible contribution
- Wine service during dinner included in price  
Free parking for guests at tables purchased before May 1
- DRESS:** Business suits and dinner dress
- SPEAKER:** Hon. Rudy Giuliani  
former mayor of New York City
- PROGRAM:** Memorial to Justice William L. Garwood  
Presentation of Chief Justice Jack Pope Professionalism Award  
For more program information visit our website:  
[www.texascourthistory.org](http://www.texascourthistory.org)
- INVITATIONS:** Formal invitations will be mailed in mid-April.
- GUESTS:** Members of the Court and their spouses are guests of the Society.
- QUESTIONS:** Contact TSCHS Office (512) 481-1840  
Bill Pugsley, Executive Director  
[tschs@sbcglobal.net](mailto:tschs@sbcglobal.net)

The Seventeenth Annual John Hemphill Dinner

**TABLE RESERVATION FORM**

TSCHS is an approved 501(c)(3) non-profit organization.  
IRS confirmation letter will be provided if needed. **Table reservation deadline Thursday, March 15, 2012.**

Firm Name: \_\_\_\_\_ City \_\_\_\_\_

Contact Person: \_\_\_\_\_

Direct Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Please indicate number of tables:

\_\_\_\_\_ Hemphill Sponsorship --- \$10,000

- Seating for 20 guests at 2 tables (10 guests at each) with priority placement for both tables
- Tickets for 20 guests to invitation-only reception with the speaker
- Wine service at dinner
- Recognition in Society publications and at the dinner

\_\_\_\_\_ Pope Sponsorship --- \$5,000

- Seating for 10 guests at 1 table with priority placement
- Tickets for 10 guests to invitation-only reception with the speaker
- Wine service at dinner
- Recognition in Society publications and at the dinner
- 

\_\_\_\_\_ Advocate Sponsorship --- \$2,500

- Seating for 10 guests at 1 table
- Wine service at dinner
- Recognition in Society publications and at the dinner

Payment options:

- Check enclosed
- Check by separate cover

Amount: \$ \_\_\_\_\_

Mail check payable to Texas Supreme Court Historical Society to:

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

So that preprinted nametags will be ready, firms will be asked to e-mail, by May 15, 2012, a complete list of attendees to: [tschs@sbcglobal.net](mailto:tschs@sbcglobal.net).

Names of attendees need not be provided at the time payment is made.

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# South Western Reporter Factoids



**Q. How long does it take to fill a series of the South Western Reporter?**

**A. It depends on which series is examined.**

A little over 40 years elapsed between the first Texas case published in the first series of the South Western Reporter (*Poole v. Jackson*, 66 Tex. 380, 1 S.W. 75 (1886)) and the first Texas case published in the second series (*Sovereign Camp W.O.W. v. Boden*, 117 Tex. 229, 1 S.W.2d 256 (1927)), and just over 70 years between *Boden* and the first Texas case published in the third series—*Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (1999). Compare *Poole*, 1 S.W. 75, *Boden*, 1 S.W.2d 256, with *Sipriano*, 1 S.W.3d 75.

Put another way, between pages 75 of the first and third series of the South Western Reporter over 11 decades passed. *Id.* As of this past fall, the most recent Texas case published in the third series of the South Western Reporter is *Imagine Automotive Group, inc. v. Boardwalk Motor Cars, LLC* in the 356th volume. 356 S.W.3d 716 (Tex. App.—Dallas 2011, no pet.).

Therefore, in just under 12 years, a little over a third of the current series of the South Western Reporter has been filled. While it took 70 years for Texas jurisprudence to consume the second series of the South Western Reporter, it appears that the third series, if it keeps up with its current pace, will exhaust itself in about half that time.

— Dylan O. Drummond

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



**Chief Justice Salmon P. Chase**

**T**he Society will cosponsor a reenactment of the U.S. Supreme Court oral argument in the case of *Texas v. White* at the 2012 State Bar Annual Meeting in Houston in June. This case centered on U.S. bonds issued to the State of Texas in payment for the 1850 boundary adjustments that were sold to George White by the Confederate State of Texas during the Civil War. Chief Justice Salmon P. Chase ruled in 1869 that actions taken by the Texas Legislature regarding the bonds were null and void because Texas never left the Union, as the Union was perpetual and could not be broken “except through revolution or through consent of the States.”

David Beck, of Beck, Redden and Secrest, will represent the State of Texas and our president, Lynne Liberato, of Haynes and Boone, will represent George White. The program will be held in the 1910 Civil Courts Courthouse on June 15 from 2 to 4 p.m. with a reception following from 4 to 5 p.m.

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# David J. Beck Appointed Chair of Fellows

**D**avid J. Beck has been appointed as the first Chair of the Fellows of the Texas Supreme Court Historical Society. He is already actively recruiting new Fellows to support and expand the Fellows program. His leadership is certain to have a real impact on not only the Fellows program, but also the Society.

A founding partner of Beck, Redden & Secret, LLP, Beck has been named by the *National Law Journal* as one of the top 10 trial lawyers in America. In 2004, Chief Justice William Rehnquist appointed him to the prestigious Judicial Conference Standing Committee on Rules of Practice and Procedure. In 2007, Chief Justice John Roberts reappointed him to a 3-year term on the Standing Committee.

The Fellows are members of the Society who contribute \$2,500 or more. The new program will raise funds for special projects, which will be announced as they are developed. In addition, there will be special events for the Fellows, likely including dinners and special recognition at all Society events.

“I consider it a great honor to lead the Fellows program,” said David. “There are important projects that will preserve the history of our appellate courts that could not happen were it not for the support and leadership of the Fellows.”

Beck served as President of the American College of Trial Lawyers in 2006-07 and as President of the State Bar of Texas in 1995-96. He is the author of *Legal Malpractice in Texas*, currently in a second edition. He also coauthored the 1999 through 2011 versions of *O'Connor's Annotated Civil Practice and Remedies Code*.



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# 2012 Greenhill Fellows List

Established in 2011 and named in honor of the late Chief Justice Joe R. Greenhill, Greenhill Fellows contribute to the Society and its programs at the highest level, donating \$2,500 or more each year.

## **Greenhill Life Fellows for 2011-12**

**David J. Beck**

**Lauren and Warren Harris**

**Allyson and James C. Ho**

**Lynne Liberato**

**Chief Justice Jack Pope (Ret.)**

**Robert M. Roach, Jr.**

**Reagan W. Simpson**

**R. Paul Yetter**

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# Trustees to Meet in Houston's Historic 1910 Courthouse

**T**he Society's Board of Trustees will meet in Houston on Friday, March 2, in the restored 1910 Harris County Courthouse. The meeting will take place in the courtroom of the 14th Court of Appeals. Justices on the 1st and 14th Courts of Appeals will be the Society's special guests at the luncheon, during which Judge Mark Davidson will talk about historic documents found in the archives of the Harris County District Court.

The meeting is being held in conjunction with the Texas State Historical Association Annual Meeting being held at the Omni Hotel in Houston. This year's joint session sponsored by the Society will feature papers discussing the late Chief Justice Joe R. Greenhill's contribution to Houston area. (See related story on the TSHA joint session.)

For the past 16 years, the Society has held its Board meetings in Austin. Trustees from Houston are excited about hosting the meeting in their city.



**1910 Harris County Courthouse**

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# History Book Publication Process Underway

**T**he University of Texas Press has begun work on the Society's history of the Texas Supreme Court book, with publication scheduled for January or February 2013.

The book covers the period 1836 to 1986, a 150-year span that takes the Court from its origins in the Republic of Texas to the beginning of the modern era. Written for the Society by historian James L. Haley, the volume will be illustrated with more than 50 photographs, most of them historical images from various archives around the state. It will also include a chronology of the Supreme Court's organization and operations as well as a detailed list of justices from 1836 to 2012.

Thirty-eight individuals and law firms have contributed funds to the writing, publication, and marketing of the book, which will be part of the Texas Legal Studies Series. Individuals contributing at least \$500 and law firms contributing at least \$1,000 will be acknowledged on a separate donor acknowledgments page in the book. If you or your law firm are interested in donating, please contact the Society at [tschs@sbcglobal.net](mailto:tschs@sbcglobal.net) no later than April 15, 2012.

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# Annual Meeting of Society Members to be Held March 2 in Houston

**F**or the second time in six months, the general membership of the Society will call an annual meeting to elect nominees to the Board of Trustees. Changes in the bylaws passed at the October 2011 meeting called for the term of office to begin June 1 for both officers and trustees. This meant shifting the annual meeting to March, instead October.

The 2012 annual meeting will take place in Houston on Friday, March 2, immediately following the spring board meeting. The meetings will be held in the 1910 Harris County Courthouse in downtown Houston in the courtroom of the 14th Court of Appeals. (See Calendar for more details.)

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# March 2 TSHA Joint Session Looks at CJ Greenhill's Houston Legacies

**E**ach year the Society sponsors a joint session at the Annual Meeting of the Texas State Historical Society to spotlight a special theme or episode in the court's history.

This year's session, which takes place in Houston on the same day as the Society's board and membership meetings, will examine some of the judicial legacies of the late Chief Justice Joe R. Greenhill in relation to Houston universities.

Board President Lynne Liberato will preside over the session, which is called "An Education in Higher Justice: Chief Justice Joe R. Greenhill and Houston's Universities."

Trustee Steven Harmon Wilson, Associate Dean of Arts at Tulsa Community College and a graduate of Rice University, will present a paper titled "The Will to Change: The Legal Battle Over the Rice University Endowment."

The other presenter is Professor James Douglas of Texas Southern University's Thurgood Marshall School of Law, whose paper is called "Marshalling the Facts: AG Greenhill and the Case that Made Texas Southern University."

The session is scheduled for 2:30 p.m. in the Windsor Room of the Omni Hotel. Registration and program details are available at [http://www.tshaonline.org/sites/default/files/doc/annualmeeting/pdf/meeting2012\\_program.pdf](http://www.tshaonline.org/sites/default/files/doc/annualmeeting/pdf/meeting2012_program.pdf).

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# Spring 2012 Calendar of Events

March 2

10:15 a.m.-11:45 a.m.

**Spring Board of Trustees meeting**

1910 Harris County Courthouse  
301 Fannin, 14<sup>th</sup> Second Floor  
Court of Appeals Courtroom (Downtown)  
Houston, Texas 77002

11:45 a.m.-12:00 noon

**Annual Meeting, General Membership of Society,  
Houston Trustee election**

1910 Courthouse (same room as Board meeting)  
Houston

2:30-4:00 p.m.

**Joint Session with Texas State Historical Association  
TSHA Annual Meeting**

Omni Houston Hotel, Four Riverway, Galleria Area,  
Second Floor, Windsor Room [Session 32]  
Houston, Texas 77056

June 1

Time TBA (afternoon)

**Portrait dedication ceremony honoring  
Justice Harriet O'Neill**

Supreme Court of Texas Courtroom  
201 W. 14<sup>th</sup> St., Room 104  
Austin, Texas 78701

6:30 p.m.

**Reception**

7:30 p.m.

**17<sup>th</sup> Annual John Hemphill Dinner**

Four Seasons Hotel  
98 San Jacinto Blvd.  
Austin, Texas 78701

June 15

2:00-4:00 p.m.

**Joint Session with State Bar of Texas,  
State Bar Annual Meeting**

Reenactment of *Texas v. White*  
1910 Courthouse, Houston

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# New Member List

The Society added 15 new members between December 20, 2011, and February 16, 2012.  
They are as follows:

## **TRUSTEE**

Marcy Hogan Greer

## **CONTRIBUTING**

Barry Abrams

Michael Northrup

Laurie Ratliff

Peter S. Wahby

## **REGULAR**

Christopher Gibson Bradley

Don L. Davis

Melanie L. Fry

Martha Hill Jamison

Jonathan Mark Little

Ashely Presson

Matthew Clay Sapp

Bruce K. Thomas

Eric Walraven

H. Randolph Williams

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# 2012 Membership Upgrades

The following Society members moved to a higher dues category after the release of the winter issue of the e-Journal in December 2011.

## **TRUSTEE**

Macey Reasoner Stokes

## **PATRON**

Charles A. Babcock

John B. Holstead

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# TEXAS SUPREME COURT HISTORICAL SOCIETY

*To profit from the past, we must first preserve it.*

## **OFFICERS**

### **PRESIDENT**

Ms. Lynne Liberato

### **PRESIDENT-ELECT**

Mr. Warren W. Harris

### **VICE-PRESIDENT**

Ms. S. Shawn Stephens

### **TREASURER**

Mr. C. Andrew Weber

### **SECRETARY**

Mr. Douglas W. Alexander

### **IMMEDIATE PAST PRESIDENT**

Hon. Craig T. Enoch, Justice (Ret.)

### **CHAIR EMERITUS**

Hon. Jack Pope, Chief Justice (Ret.)

### **PRESIDENT EMERITUS**

Hon. Jack Hightower, Justice (Ret.)

## **BOARD OF TRUSTEES**

Justice Jeff Brown

Mr. Keith Calcote

Mr. William J. Chriss

Mr. R. Ted Cruz

Judge Mark Davidson

Mr. J. Chrys Dougherty

Mr. David A. Furlow

Mr. Robert B. Gilbreath

Ms. Marcy Hogan Greer

Mr. David F. Johnson

Mr. Peter M. Kelly

Mr. Christopher W. Martin

Prof. Joseph W. McKnight

Mr. Larry McNeill

Mr. W. Frank Newton

Hon. Harriet O'Neill, Justice (Ret.)

Mr. Richard R. Orsinger

Prof. James W. Paulsen

Mr. Richard Pena

Hon. Thomas R. Phillips, Chief Justice (Ret.)

Mr. Randall O. Sorrels

Ms. Macey Reasoner Stokes

Prof. Steven Harmon Wilson

Ms. Marie R. Yeates

## **COURT LIAISON**

Justice Paul W. Green  
Supreme Court of Texas

Bill Pugsley, Executive Director  
Phone: 512-481-1840  
Email: [tschs@sbcglobal.net](mailto:tschs@sbcglobal.net)

### **Mail Address:**

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

### **Physical Address:**

Texas Supreme Court Historical Society  
c/o Supreme Court Clerk's Office  
205 West 14th St., Room 104  
Austin, Texas 78701

[www.texascourthistory.org](http://www.texascourthistory.org)

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# Membership Benefits & Application

## **Regular Membership - \$50**

- \* Receive Quarterly *Journal of the 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

## **Contributing Membership - \$100**

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

## **Patron Membership - \$500**

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

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

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

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

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

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

- \* Complimentary Autographed hardback copy of Society Publications
- \* Complimentary Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- \* All benefits of Greenhill Fellow

(07/11)



# Membership Application

The Texas Supreme Court Historical Society is a nonpartisan, nonprofit organization that conserves for posterity the lives and work of the appellate courts of Texas through research, publication, preservation and education. Your dues will support activities such as maintaining the judicial portrait collection, the ethics symposia, the Judicial Oral History Project and Texas Legal Studies Series. Annual dues are tax deductible to the fullest extent allowed by law.

*Thank you*

Name: \_\_\_\_\_

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

Building: \_\_\_\_\_

Address: \_\_\_\_\_ Suite: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ ZIP: \_\_\_\_\_

Telephone: \_\_\_\_\_ Email: \_\_\_\_\_

Please select an annual membership level:

- |                                       |         |   |         |
|---------------------------------------|---------|---|---------|
| <input type="checkbox"/> Trustee      | \$1,000 | <input type="checkbox"/> Hemphill Fellow  | \$5,000 |
| <input type="checkbox"/> Patron       | \$500   | <input type="checkbox"/> Greenhill Fellow | \$2,500 |
| <input type="checkbox"/> Contributing | \$100   |   |         |
| <input type="checkbox"/> Regular      | \$50    |   |         |

Payment options:

- Check enclosed
- Credit card
- Bill me

Amount: \$ \_\_\_\_\_

Card Type (Circle):    Visa            MasterCard            Discover

Credit Card No: \_\_\_\_\_

Expiration Date: \_\_\_\_\_

Cardholder Signature: \_\_\_\_\_

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

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

(07/11)

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