



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Summer 2013 Vol. 2, No. 4 General Editor Lynne Liberato Executive Editor David Furlow

Columns

President's Page

By Warren W. Harris

The Texas Supreme Court's history takes center stage with a new book, a symposium, and important Society events you won't want to miss. [Read more...](#)



Warren W. Harris

Executive Director's Page

By Bill Pugsley

Most people ring in the New Year in January. My year begins in June. One has to keep a firm grip on the passage of time, or it will slip away. [Read more...](#)



Bill Pugsley

Fellows Column

By David J. Beck

A great group of Fellows, as well as seven Justices of the Texas Supreme Court, gathered in Austin for the first Fellows dinner. [Read more...](#)



David J. Beck

Features

George W. Paschal: Justice, Court Reporter, and Iconoclast

By Dylan O. Drummond

He was one of the most fascinating, colorful, feisty and accomplished court reporters ever to serve the Texas Supreme Court. [Read more...](#)

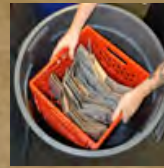


George W. Paschal

Preservation of the Texas Supreme Court's History Requires Preservation of Its Files

By Laura K. Saegert

In 1843 a case was filed with the Texas Supreme Court. Thanks to preservation efforts, the file speaks to us today. [Read more...](#)

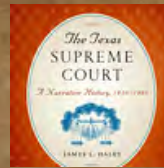


Preparing files for archiving

The Texas Supreme Court: A History of First Impression

By James L. Haley

The last time anyone wrote a history of the Texas Supreme Court, the U.S. was entering World War I. What I discovered was a history that crackled with drama. [Read more...](#)



Haley's new book

18th Annual John Hemphill Dinner: Justice Sandra Day O'Connor is Keynote Speaker

This year's dinner will feature a talk by the former U.S. Supreme Court Justice, as well as memorial tributes and a special annual award. [Read more...](#)



Justice O'Connor

2013 History Symposium a Success

The Society's major educational event of the year centered on the history of Texas Supreme Court jurisprudence. [Read more...](#)



Symposium Emcee
Lynne Liberato

New Texas Judicial History Series Will Open with a Collection of Writings by Chief Justice Jack Pope

The Society publishes the first volume of its own book series. [Read more...](#)



Chief Justice Pope

Retired Chief Justice Jack Pope is Honored by the State of Texas on His 100th Birthday

By all accounts, he is the oldest living chief justice in the United States and the first to hit the century mark. [Read more...](#)



Chief Justice Pope is escorted to the celebration

An Interview with Justice John Devine

By Will Feldman

Get to know the newest Justice of the Texas Supreme Court. [Read more...](#)



Justice Devine

Membership & More

Officers, Trustees & Court Liaison

2012-2013 Membership Upgrades

2012-2013 New Member List

Join the Society

George W. Paschal: Justice, Court Reporter, and Iconoclast

By Dylan O. Drummond

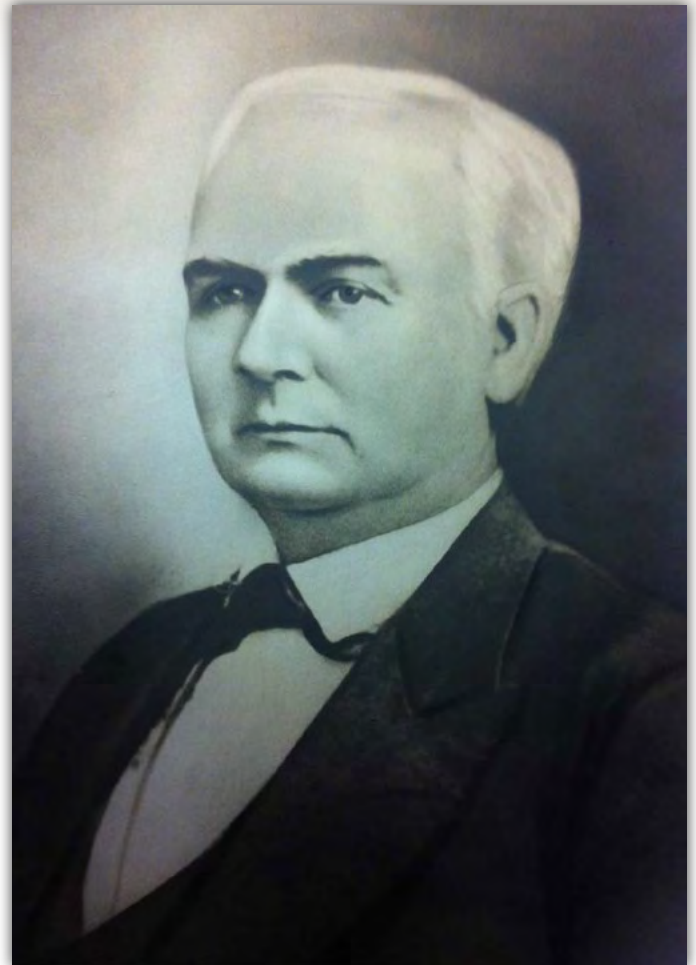
Certainly one of the most fascinating, colorful, feisty, and accomplished reporters ever to serve the Texas Supreme Court was George W. Paschal.¹ No other person to hold the post can lay claim to having: (1) served as a state supreme court justice; (2) successfully litigated before the U.S. Supreme Court both on behalf of and against his client—a sovereign state; (3) sued for peace against the United States, resulting in a ratified treaty; as well as (4) edited and published a state capital’s newspaper.

Paschal did all this and more, and it is certain that the jurisprudence of Texas would be far less developed and interesting if not for his seemingly limitless dedication to Texas and her laws.

Law Practice in Georgia and Engagement with the Cherokee

Lorenzo Columbus George Washington Paschal² was born just after the outbreak of the War of 1812 in the elegantly-named Skull Shoals, Georgia.³ Before he reached the age of 20, Paschal was admitted to the Georgia Bar in July 1832 after studying law in Lexington, Georgia.⁴ He later described his oral examination for admittance to the bar as being shortened because of his preference to respond to the examining judges in Latin.⁵ At some point during his time in Georgia (it is unclear whether this was before or after his admittance to the Georgia Bar), Paschal also worked as both a schoolteacher and a bookkeeper.⁶

After practicing law in Georgia for four years—during which time he associated with former U.S. Vice President John C. Calhoun—Paschal was ordered to serve as the aide-de-camp to General John E. Wool with the Georgia Militia in order to quell a Cherokee uprising.⁷ It was during this effort that Paschal met and married the daughter of one of the Cherokee chiefs—Major Ridge—against whom he was militarily engaged.⁸ The culmination of the military campaign was the execution of the Treaty of New Echota with the United States in 1835,⁹ under which Cherokees exchanged their eastern land for land west of the Mississippi River.¹⁰ This diplomatic agreement led to the infamous “Trail of Tears,” during which approximately 4,000 Cherokees died on the journey from Georgia to what is now Oklahoma and Arkansas.¹¹



Service on the Arkansas Supreme Court and the 1846 Treaty with the Cherokee

In 1837 Paschal and his family moved to Arkansas so that his wife, Sarah Ridge, could be closer to her relocated family.¹² Almost immediately upon his settlement in Benton County, Paschal began a successful law practice and met future Texas Supreme Court Associate and then Chief Justice Royall T. Wheeler, with whom he jointly represented clients.¹³

Just two years after the Paschals relocated to Arkansas, Sarah's father, brother, and cousin were assassinated in 1839 by Cherokees angry with the Ridges for their support of the Treaty of New Echota.¹⁴ Despite this loss, the Paschals remained in Arkansas for several more years. This decision proved to be prescient as Paschal—who was 30 at the time—was elected in 1843 by the Arkansas Legislature as an Associate Justice on the state's Supreme Court.¹⁵ Of note, Paschal's ascension to the Arkansas Supreme Court came just a year before Wheeler assumed the corollary post on the Texas Republic's Supreme Court in 1844.¹⁶

After serving just one term (January 1843) on the supreme court, Paschal resigned on August 1, 1843 in order to represent the Cherokee in their claims against the United States.¹⁷ The Cherokee prevailed in the effort, culminating in the ratification of the Treaty with the Cherokee in 1846, which awarded reparations to the Cherokee and specifically named the heirs of Major Ridge as indemnitees.¹⁸

Immigration to Texas and Editorship of the *Southern Intelligencer*

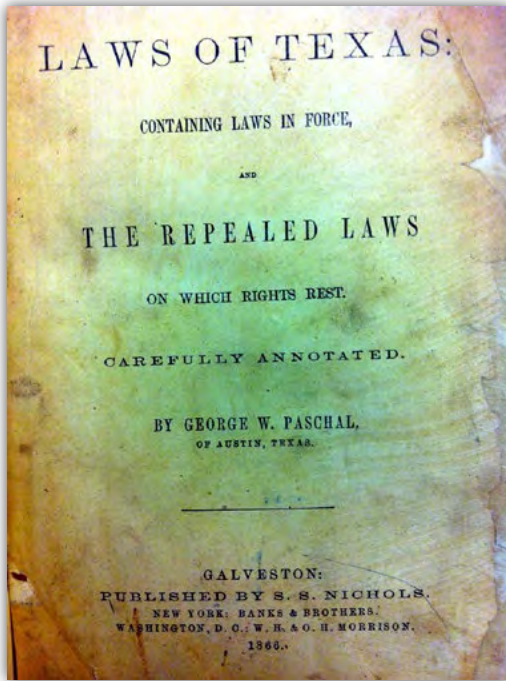
Following his successful prosecution of the Cherokee nation's legal claims against the United States, Paschal and his family moved again, this time to Texas in 1846.¹⁹ Paschal was admitted to the Texas Bar in December 1847.²⁰ By 1848 the Paschals had moved to Galveston, where they built a home at the corner of 14th Street and Avenue H.²¹ Using medical lore from her upbringing as a Cherokee, Sarah opened up their home in 1850 to treat Galvestonians suffering from yellow fever.²² Perhaps in part due to this undertaking, the Paschals divorced a day before New Year's Eve that same year.²³

Soon thereafter in 1852, Paschal moved to Austin, where he remarried in March of that year.²⁴ Not content with merely practicing law, Paschal began editing and publishing in 1856 one of the two newspapers vying to serve the growing state capital—the *Southern Intelligencer*.²⁵ The *Intelligencer* officed on Eighth Street and carried as its motto: “Nothing extenuate nor set down aught in malice.”²⁶ The professional rivalry between the *Intelligencer* and its chief competitor, the *Texas State Gazette*, grew deadly in 1859 when challenges for duels were exchanged arising from a dispute over state printing.²⁷ The fight ended soon thereafter when Paschal, along with one of his sons, appeared on Congress Avenue armed with double-barreled shotguns.²⁸ Somewhat unsurprisingly, Paschal resigned his post at the *Southern Intelligencer* the following year.²⁹

Ex Parte Coupland and Paschal's Confederate Imprisonment

A staunch Unionist,³⁰ in 1862 Paschal represented a captured conscript named F. H. Coupland who had failed to present himself for muster with the Confederate Army.³¹ Paschal soon managed to obtain a writ of habeas corpus from his old friend from a quarter century before in Arkansas—Texas Supreme Court Chief Justice Royall T. Wheeler—which ordered the army to show cause justifying Coupland's detention.³² Before the writ could be served, however, Coupland was drafted into the army and released from detention, though he subsequently disappeared and never reported to his regiment.³³ For his trouble, as well as for his “subversive”³⁴ and “intemperate denunciation of martial law”³⁵ in the case, Paschal was arrested and jailed by Confederate authorities, apparently and surprisingly with the acquiescence of Chief Justice Wheeler.³⁶ Following Wheeler's suicide in 1864, Paschal—perhaps not entirely objectively—attributed the Chief Justice's demise, at least in part, to guilt arising from his imprisonment of Paschal.³⁷

Paschal's Digest of the Laws of Texas, Annotated Constitution of the United States, and Digest of Decisions



When civil legal practice in Texas greatly diminished during the Civil War—particularly for a publicly-avowed anti-secessionist like Paschal in Confederate Texas—Paschal turned his keen legal mind to other pursuits.³⁸ Namely, he undertook the preparation of his seminal *Digest of the Laws of Texas*, which, while generally following the arrangement of statutes utilized by earlier digests, arranged statutes in analytical rather than chronological order, and contained historical notes and analysis in addition to the statutes and case annotation themselves.³⁹ Texas Supreme Court Associate Justice James P. Hart later remarked that Paschal's annotations in his *Digest* "far excel the very brief citations or notes in the earlier digests."⁴⁰

In 1865, after the death of his second wife, Paschal left Austin for Washington, D.C. to publish his *Digest*, and there he largely remained following the Civil War.⁴¹ The *Digest* was published in 1866, followed by his *Annotated Constitution of the United States* in 1868, and his *Digest of Decisions* in 1872.⁴²

Paschal's Role in *Texas v. White*⁴³

The boundaries of Texas did not always conform to the now-iconic shape we recognize as uniquely Texan.⁴⁴ Prior to the early 1850s, Texas laid claim to territory now contained within the borders of New Mexico up into Montana.⁴⁵ Between 1850 and 1851 the United States issued some \$10 million in bonds to Texas in exchange for Texas's claim over the land in modern-day New Mexico, Colorado, and Montana.⁴⁶

The bonds—10,000 in number and each denominated \$1,000—paid an annual interest rate of 5% and were redeemable after December 31, 1864.⁴⁷ Fully half of the bonds (some 5,000) were delivered to Texas while the remaining 5,000 were retained by the United States.⁴⁸ While the bonds were made payable to Texas, the Legislature subsequently promulgated a law requiring the Governor's endorsement before any other entity could claim ownership of the bonds—though it later repealed this requirement in 1862 after Texas seceded from the Union.⁴⁹ On the day of





the repeal, the Legislature created a military board to sell the bonds to help pay for the Confederate war effort.⁵⁰

Perhaps not coincidentally, the same year Paschal was jailed by Confederate troops in Austin in 1862, he took it upon himself to notify the U.S. Secretary of Treasury of Texas's plans to utilize these Union bonds to finance the Confederate war effort.⁵¹ Alarmed, the U.S. Treasury refused to pay Texas's bonds that had not been endorsed by any of the rebel province's former State governors.⁵²

In early 1865, the Confederate military board in Texas delivered 135 unendorsed bonds to George White and John Chiles—worth some \$156,000—in exchange for various military and medicinal supply services, which White and Chiles never provided.⁵³ The Civil War formally concluded in May of that year, and former Texas Congressman and Union General Andrew Jackson Hamilton was appointed by U.S. President Andrew Johnson the following month as provisional governor of Texas.⁵⁴ Upon learning of the deal with White and Chiles, Hamilton appointed Paschal as Texas's agent in the matter.⁵⁵ By October 1865, both Paschal and Governor Hamilton published notices in the *New York Herald* and *New York Tribune* cautioning consumers and the financial sector not to be snookered by the unendorsed bonds.⁵⁶

After failing to effect service on either White or Chiles in Texas court, the State of Texas sought original redress before the U.S. Supreme Court on February 15, 1867.⁵⁷ Oral argument was held a year later in February 1868, and the preliminary jurisdictional question regarding whether Texas had standing to sue while in open rebellion against the United States became the “definitive ruling on the constitutionality of secession.”⁵⁸ The Supreme Court declared that:

Considered as transactions under the [C]onstitution, the ordinance of secession adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of her legislature, intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The state did not cease to be a state, nor her citizens to be citizens of the union.⁵⁹

Indeed, the Court continued, the “[C]onstitution, in all its provisions, looks to an indestructible union, composed of indestructible states.”⁶⁰ The High Court concluded that, not only did the state of Texas have standing to sue, but the contract between the Confederate military board and White and Chiles was unenforceable.⁶¹

Incredibly, this historic decision by the U.S. Supreme Court did not end the affair.⁶² A fee dispute later arose between the State and Paschal, culminating in an unsuccessful attempt by Texas before the U.S. Supreme Court to compel and hold in contempt Paschal until he remitted the disputed sums.⁶³ The Supreme Court declined to do so, reasoning that Paschal should be permitted to retain any money or client documents because he possessed a “fair

and honest set-off, which ought in equity be allowed by the complainant.”⁶⁴ The High Court further revealed that its decision was at least in part influenced by Paschal’s inability to sue the State in Texas court because of the bar imposed by sovereign immunity.⁶⁵

Paschal’s Service to and Feud with the Military Court

During Reconstruction, the formerly Confederate states were governed under a system of military rule, ordained by the U.S. Congress and organized by military district.⁶⁶ The Fifth District was comprised of Texas and Louisiana, and Major General Philip H. Sheridan was given command over it.⁶⁷ One of Sheridan’s first acts was to replace the sitting Texas governor as well as all Texas Supreme Court Justices who had been elected under the Texas Constitution of 1866.⁶⁸ It was this extra-constitutional act that has condemned that era of the Court—known derisively if accurately by the moniker, the “Military Court”—to little, if any, precedential weight.⁶⁹

It was Paschal’s misfortune and eventual downfall that his exacting and tenacious judicial temperament would be halted to the Constitutionally illegitimate Military Court. Paschal was first appointed as Court reporter at the outset of the 1868 term,⁷⁰ and he reported portions of the 1860, 1866, and 1869 terms, as well as the entirety of the 1867 and 1868 terms.⁷¹ His reports filled five volumes of the *Texas Reports* (25 Supp., 28–31).⁷²

Paschal’s reports are characterized by his sometimes polarizing, always frank, and consistently entertaining (and subsequently essential) historical asides contained in the prefaces to each volume.⁷³ It may also be noted that Paschal rarely missed an opportunity to prominently mention his other legal publications for sale to the public in the prefaces to the volumes of the *Texas Reports* he edited.⁷⁴

Next to his victorious representation of Texas before the U.S. Supreme Court in *Texas v. White* (which Paschal reported in the 25th supplemental volume of the *Texas Reports*), Paschal’s service as counsel (as well as reporter in the 31st volume) in the “Emancipation Cases” was particularly noteworthy.⁷⁵ A subsidiary issue in the case was upon what date former slaves gained their freedom in Texas: (1) January 1, 1863, when President Abraham Lincoln delivered the Emancipation Proclamation; (2) June 19, 1865, when Union General Gordon Granger issued his General Order No. 3 informing Texans of Lincoln’s Proclamation (and the date from which annual “Juneteenth” celebrations in Texas still trace their genesis); or (3) December 18, 1865, when the 13th Amendment to the U.S. Constitution outlawing slavery was ratified.⁷⁶ The five Justices on the Court returned three different positions on the question.⁷⁷ Writing for the majority, Chief Justice Morrill favored the date of ratification of the 13th Amendment because he asserted that President Lincoln’s war powers did not imbue him with the power to unilaterally amend the U.S. Constitution; concurring, Justice Livingston Lindsay reasoned that Juneteenth should govern; and in dissent, Justices Andrew Hamilton and Colbert Caldwell opined that the date the Emancipation Proclamation was delivered should control.⁷⁸

The close of his tenure as Court reporter was again marked by controversy, about which Paschal editorialized freely in the pages of the *Texas Reports*, as was his wont. Following the publication of the 29th volume of the *Texas Reports*, the Military Court ordered Paschal to no longer include a duplicative recitation of the facts of a case when a statement of the facts was already included in the opinion itself.⁷⁹ While perhaps reasonable by modern standards, such a request was radical in 1869 because the role of the Court reporter during that time was expanded; the reporter “was expected to make an independent study of the facts and decision of the lower court, as well as to summarize the briefs and arguments of counsel.”⁸⁰ Naturally, Paschal saw fit to publically comment upon the wisdom of such an order in the preface to the 30th volume, including reprinting the Military Court’s order in full.⁸¹

Not surprisingly, between the publication of the 30th volume of the *Texas Reports* and the issuance of the 31st, Paschal received another order from the Military Court, this time dismissing him as reporter—but only after he had completed his work on the 31st volume.⁸² In his final preface contained in the 31st volume, cloaked under the immunity granted by the Military Court’s directive to complete his work on that volume, Paschal let loose an unvarnished fullisade of rebuke that is still remarkable to read today.⁸³

He began by—what else—reprinting the exchange of correspondence between himself and the Military Court, almost as one would attach exhibits to a pleading today.⁸⁴ Except he was sure to note that at least one order, “printed just as written, shows what would have been the character of my books had this order been obeyed.”⁸⁵ Paschal continued, “Had I desired to retaliate, I should have printed these gentlemen’s opinions just as they wrote them, and have left them to take care of their own literary fame.”⁸⁶ But Paschal was only warming up: “I have a higher respect for their judgment as to the *quantity* [of pages in a given volume of the *Texas Reports*] than as to the *matter* which the reports should contain.”⁸⁷ The Military Court Justices, Paschal opined, “have been clothed ‘with a little brief authority,’ and it was necessary for them to cut some ‘high capers’ to save them from their approaching obscurity.”⁸⁸ Paschal concluded, “There must be laws, law books and lawyers, and these will live after the men of accident shall ‘strut their brief hour upon the stage.’”⁸⁹

Satisfied he had sufficiently impugned the intellects of the Military Court Justices, Paschal tacked his rebuttal towards his judgment that the Military Court’s order was absent any “legal authority for this interference.”⁹⁰ Paschal argued that Chief Justice Amos Morrill “ought to have known that his own powers expired with the adoption and acceptance of the state constitution,” before the Military Court’s issuance of its order removing Paschal on April 18, 1869.⁹¹ Paschal continued, “Their last order bears date after th[eir] authority had expired, by the acceptance of the new [C]onstitution and the annulment of the power which appointed them to office. The ‘provisionals’ have fallen, whether they knew how to surrender or not Farewell ‘provisionals.’ *Requiescat in pace.*”⁹²

Paschal’s inflamed emotion may have clouded somewhat his constitutional analysis, however. While the Constitution of 1869 was indeed adopted by the Constitutional Convention of 1868 in February 1869—before Chief Justice Morrill issued the order dismissing Paschal in April 1869—the 1869 Constitution was not ratified by the people of Texas and was therefore without legal effect until December 1869.⁹³

After Paschal noted in the preface to the 31st volume of the *Texas Reports* that he had not been paid for his reportage of volumes 29, 30, or 31,⁹⁴ the 1874 Legislature authorized the Governor to remit payment to Paschal for his work on these volumes—after deducting attorney fees Texas still claimed Paschal owed it (even though the U.S. Supreme Court had rejected this contention in *In re Paschal*).⁹⁵ However, no Governor ever apparently exercised this authority.⁹⁶

Paschal’s Final Days

Paschal ended his illustrious legal career in Washington, D.C., where he married for a third time.⁹⁷ There, he was instrumental in founding Georgetown University Law School and served on the law faculty there, teaching property, evidence, and civil procedure courses.⁹⁸ Paschal passed away on February 16, 1878 and was buried in Rock Creek Cemetery in Washington, D.C.⁹⁹

In Sum

Texas Supreme Court Justice James P. Hart—who to date has recorded the most comprehensive portrait of Paschal—framed Paschal’s unique blend of ambition and talent most aptly:

The impression which we get from considering Paschal's life as a whole is that he was a man of very high ability, approaching genius, who never seemed to find himself, as we would say today, well adjusted to his environment. As a lawyer and legal author, he seems to have been universally respected. He was, however, almost continuously involved in violent controversy.

* * *

As it was, he led an exciting, fearless and industrious life, and we are indebted to him for enlightening many pages of Texas legal history which would otherwise be dull and obscure.¹⁰⁰

Of the many adjectives that could perhaps be used to circumscribe Paschal and his legal contributions to Texas, "dull and obscure" are surely omitted from the list! Of course, Paschal's own words best encapsulate his contribution to Texas jurisprudence: "The *Reporter* feels no fear that his Texas books will not live. His only fear is that he may have failed to preserve much which ought to have been chronicled."¹⁰¹



DYLAN DRUMMOND is a civil appellate attorney practicing in Austin, Texas. He currently serves as a Trustee of the Texas Supreme Court Historical Society, is rated AVTM by Martindale Hubbell®, and has been selected as a Rising Star in appellate practice the past five years by Thomson Reuters and Texas Monthly.

¹ Hon. James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23, 23 (1949); Robert B. Gilbreath, *Slaves, Reconstruction, and the Supreme Court of Texas*, APP. ADVOC., Fall 2006, at 8 [hereinafter *Slaves & Reconstruction*].

² Hart, 28 TEX. L. REV. at 23. Lest anyone think Paschal's name was unusually long, two of his brothers were named Isaiah Addison Sanders Goode Paschal and Franklin Lafayette Warren Greene Paschal. *Id.*

³ *Id.*

⁴ *Id.* at 24.

⁵ *Id.*

⁶ JAMES L. HALEY, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986*, 268 n.38 (Univ. Tex. Press 2013).

⁷ Hart, 28 TEX. L. REV. at 24.

⁸ *See id.*; HALEY at 268 n.38. Major Ridge was said to be a friend of Sam Houston's. TEXAS STATE HISTORICAL ASSOCIATION, HISTORICAL MARKER NO. 9130, SARAH RIDGE PASCHAL PIX (erected 1979) [hereinafter RIDGE MARKER].

⁹ TEXAS STATE HISTORICAL ASSOCIATION, SARAH RIDGE PIX (Kevin Ladd, ed.), <http://www.tshaonline.org/handbook/online/articles/fpi30> (last visited Apr. 16, 2013) [hereinafter RIDGE PIX].

¹⁰ RIDGE PIX; RIDGE MARKER.

¹¹ RIDGE MARKER; RIDGE PIX.

¹² *See* Hart, 28 TEX. L. REV. at 24; RIDGE PIX.

¹³ *See* Hart, 28 TEX. L. REV. at 24; James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 361 (Dec. 1986) [hereinafter *Short History*].

- ¹⁴ RIDGE PIX.; RIDGE MARKER.
- ¹⁵ Hart, 28 TEX. L. REV. at 25; ARKANSAS JUDICIARY, JUSTICES OF THE SUPREME COURT OF THE STATE OF ARKANSAS, POSITION TWO (1843), <https://courts.arkansas.gov/courts/supreme-court/historical-society/background-pg-2> (2013). Elsewhere, it has been reported that Paschal served as Chief Justice of the Arkansas high court, but the author cannot locate verification of this. *Contra, e.g.*, HALEY at 268 n.38.
- ¹⁶ Compare Hart, 28 TEX. L. REV. at 25, with *Short History*, 65 TEX. L. REV. at 361 (noting Justice Wheeler sat during the December 1845 term of the Republic Court, and was then selected as one of the first Justices of the new State’s Court) and HALEY at 29, 54, 236 (same).
- ¹⁷ Hart, 28 TEX. L. REV. at 25; HALEY at 268 n.38.
- ¹⁸ Treaty with the Cherokee, 9 STAT. 871, 874 (1846).
- ¹⁹ Hart, 28 TEX. L. REV. at 25.
- ²⁰ *Id.*
- ²¹ *Id.*; RIDGE PIX.
- ²² RIDGE PIX.
- ²³ *Id.*
- ²⁴ Hart, 28 TEX. L. REV. at 24–25.
- ²⁵ *Id.* at 26.
- ²⁶ *Id.*
- ²⁷ *Id.* at 27; *Slaves & Reconstruction*, APP. ADVOC. at 9.
- ²⁸ Hart, 28 TEX. L. REV. at 27; *Slaves & Reconstruction*, APP. ADVOC. at 9.
- ²⁹ Hart, 28 TEX. L. REV. at 27.
- ³⁰ Hon. James R. Norvell, *The Supreme Court of Texas Under the Confederacy—1861–1865*, 4 HOUS. L. REV. 47, 48 (1966); see also Jim Paulsen & James Hambleton, *Brother, Can You Spare a Cite? Robard’s Texas Conscript Cases, The Official Texas Reporter That Has Never Been Cited*, 50 TEX. B.J. 1256, 1257 (Dec. 1987) [hereinafter *Can You Spare a Cite?*].
- ³¹ HALEY at 68.
- ³² *Id.* There is apparently some debate whether Chief Justice Wheeler issued the writ (*Compare Ex Parte Coupland*, 26 Tex.386, 388, Robards 5 (1862) (noting the writ issued before the Court issued its opinion in the matter, and HALEY at 68, with MICHAEL ARIENS, LONE STAR LAW 33–34 (Tex. Tech Univ. Press 2011) (stating that Chief Justice Wheeler initially denied the writ until the Court granted it *en banc*). Regardless, Paschal framed his motivation in taking the case so as to bring the matter “before the [C]hief [J]ustice to test the constitutionality of this declaration of military power over a State [(i.e., conscription)], in which there was not one soldier hostile to the Confederate cause.” ARIENS at 33.
- ³³ HALEY at 68.
- ³⁴ *Id.*
- ³⁵ DAVENPORT at 71; Hart, 28 TEX. L. REV. at 29.
- ³⁶ DAVENPORT at 71; HALEY, at 68; Hart, 28 TEX. L. REV. at 29; see also *Preface*, 28 Tex. at vii, 9. When the Court’s opinion in the case issued later that year, Paschal was either still imprisoned or Coupland had retained other counsel, as the decision notes Coupland was represented by the law firm of Hancock & West. *Ex Parte Coupland*, 26 Tex. at 388. *But see* ARIENS at 34 (recounting that Paschal was released shortly after his initial imprisonment). Another explanation for this omission is that *Ex Parte Coupland* was the first decision printed in *Robard’s Texas Conscript Cases*, and although Paschal is not listed as counsel of record in the *Texas Reports* reprinting of the case, he is so noted in the original *Robard’s* report. *Can You Spare a Cite?*, 50 TEX. B.J. at 1258 (explaining that *Robard’s* was a reporter containing Confederate conscript cases from 1862–65, which had the utilitarian misfortune to be published the same year—1865—that the Civil War ended).

Paschal himself describes the breach in his friendship with Chief Justice Wheeler the *Coupland* case caused, “Our respective positions separated two men who had been intimate friends, and entertained many opinions in common, for over twenty years.” 28 Tex. at vi, 8. Interestingly, and perhaps indicative of the schism that developed between Paschal and the three members of the

Court—particularly Chief Justice Wheeler—as a result of the affair, Paschal is not mentioned anywhere in the majority, concurrence, or dissent. *See id.* at 386–435; *see also* ARIENS at 35 (explaining the affair ended the long friendship between Paschal and Chief Justice Wheeler); DAVENPORT at 71.

³⁷ *Preface*, 28 TEX. at vii, 9; *see also Short History*, 65 TEX. L. REV. at 361 (noting Chief Justice Wheeler’s death by his own hand in Washington County on April 9, 1864); HALEY at 73 (recording that Chief Justice Wheeler was only 54 years of age at the time of his death). In fascinating detail, Paschal consumes nearly all of the *Preface* to volume 28 of the *Texas Reports* to publically wrestle with the legacy of his old friend. *Preface*, 28 TEX. at vii–xiii, 7–10. While framing Chief Justice Wheeler’s reputation as being more known as a “declaimer before juries than as an accurate lawyer,” Paschal also hails the Chief Justice as a “pure and good man” with a “moral character . . . spotlessly pure , and above all reproach.” *Id.* at vi–vii, 8–9.

Paschal movingly described the secessionist fervor he attributed as morally corrupting Chief Justice Wheeler:

In this crisis, the conviction that our liberties were being lost was intensified when I saw such a law student as Chief Justice Wheeler bow to the storm and abdicate the civil law. He only proved unable to resist the current which was dashing the people into a yawning abyss. The whole southern mind had been seized with one of those moral contagions, which no philosophy or ethics can explain and no reason can control.

Id. at vi, 8.

³⁸ *See, e.g., Preface*, 25 TEX. Supp. at vii (“The courts of justice were entirely suspended, and neither the few members of the bar who remained in their profession, nor the officers or people, had use for judicial precedents.”), *cited in Can You Spare a Cite?*, 50 TEX. B.J. at 1257, ; Hart, 28 TEX. L. REV. at 32, 32 n.47 (quoting *Parker v. State*, 26 TEX. 204, 207 (1862) (recounting that, during the Civil War, a “lawyer’s office may, also, and in times like the present many doubtless are, very private and quiet and undisturbed places at all hours”)).

³⁹ Hart, 28 TEX. L. REV. at 32–33.

⁴⁰ *Id.* at 33 n.52; DAVENPORT at 314 (calling Paschal’s *Digest* “excellent”).

⁴¹ Hart, 28 TEX. L. REV. at 24 n.7, 32–33.

⁴² *Id.* at 33. By way of example, the prefaces to volumes 25 Supplement and 28–31 are all penned from Washington, D.C. *See Preface*, 31 TEX. at ix, 11 (July 15, 1870); *Preface*, 30 TEX. at ix (Feb. 20, 1870); *Preface*, 29 TEX. at vi, 8 (Dec. 1, 1869); *Preface*, 28 TEX. at x, 12 (July 30, 1869); *Preface*, 25 TEX. Supp. at xi (June 24, 1869).

⁴³ For the most comprehensive treatment of *Texas v. White*, the author recommends perusing Professor Michael Ariens’ excellent account of the matter in *Lone Star Law*. ARIENS at 42–44. In addition and likely owing to Paschal’s dual service as both counsel for Texas and Texas Supreme Court reporter, *Texas v. White* is reported in both the *Texas Reports* and the *United States Reports*—the only case ever to be so reported. James W. Paulsen, *If At First You Don’t Secede: Ten Reasons Why the “Republic of Texas” Movement is Wrong*, 38 S. TEX. L. REV. 801, 808, 808 n.32 (May 1997) [hereinafter *If At First You Don’t Secede*]; *Compare Tex. v. White*, 74 U.S. (7 Wall) 700 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476 (1885), *with Tex. v. White*, 25 TEX. Supp. 465 (1868). Alarming, however, the reported text differs between that in the *United States Reports* and the *Texas Reports*. *Compare Tex. v. White*, 74 U.S. (7 Wall) at 702–43, *with* 25 TEX. Supp. at 465–621. Due to these textual differences and out of deference to Paschal in these pages, I will cite only to the *Texas Reports* version of the case.

⁴⁴ *See, e.g., How the States Got Their Shapes: How Texas Got Its Shape* (History Channel television broadcast), available at <http://www.history.com/shows/how-the-states-got-their-shapes/videos/how-texas-got-its-shape#how-texas-got-its-shape> (last visited Apr. 17, 2013).

⁴⁵ *See* TEXAS STATE HISTORICAL ASSOCIATION, COMPROMISE OF 1850 (Roger A. Griffin, ed.), <http://www.tshaonline.org/handbook/online/articles/nbc02> (last visited Apr. 17, 2013) [hereinafter COMPROMISE].

⁴⁶ ARIENS at 42; Hart, 28 TEX. L. REV. at 38; COMPROMISE (specifying Texas’s new territorial boundaries under the compromise as including: “all land north and west of a boundary beginning at the 100th meridian where it intersects the parallel of 36°30’, then running west along that parallel to the 103d meridian, south to the 32d parallel, and from that point west to the Rio Grande”); *see also Tex. v. White*, 25 TEX. Supp. 465, 492 (1868), ; *Texas v. White*, 74 U.S. 700, 726 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476, 496 (1885).

⁴⁷ ARIENS at 42.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Hart, 28 TEX. L. REV. at 38; *see also Tex. v. White*, 25 Tex. Supp. at 472.

⁵² *Tex. v. White*, 25 Tex. Supp. at 472.

⁵³ ARIENS at 42; *see also Tex. v. White*, 25 Tex. Supp. at 471–72.

⁵⁴ Jim Paulsen & James Hambleton, *Confederates and Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era*, 51 TEX. B.J. 916, 917 (Oct. 1988) [hereinafter *Confederates & Carpetbaggers*]; Hart, 28 TEX. L. REV. at 38; *see also Tex. v. White*, 25 Tex. Supp. at 473 (noting the disbanding of rebel forces on May 25, 1865 and the appointment of Hamilton as provisional governor of Texas on June 17, 1865); *Preface*, 25 Tex. Supp. at vii.

⁵⁵ ARIENS at 42–43; Hart, 28 TEX. L. REV. at 38; *If At First You Don't Secede*, 38 S. TEX. L. REV. at 808; *see also Tex. v. White*, 25 Tex. Supp. at 475.

⁵⁶ *Tex. v. White*, 25 Tex. Supp. at 472–73.

⁵⁷ Hart, 28 TEX. L. REV. at 38; ARIENS at 43. Paschal was reappointed as counsel in the case by Texas Governor Elisha M. Pease, who himself was appointed as Governor by Reconstruction General Phillip H. Sheridan. *Tex. v. White*, 25 Tex. Supp. at 475; Hon. R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 281 (1959) [hereinafter *Semicolon Court*]; Hart, 28 TEX. L. REV. at 38; ARIENS at 43.

⁵⁸ *If At First You Don't Secede*, 38 S. TEX. L. REV. at 808;

⁵⁹ *Tex. v. White*, 25 Tex. Supp. at 466.

⁶⁰ *Id.*

⁶¹ ARIENS at 43.

⁶² *See id.*; Hart, 28 TEX. L. REV. at 39.

⁶³ ARIENS at 43–44; Hart, 28 TEX. L. REV. at 39–40.

⁶⁴ *In re Paschal*, 77 U.S. (10 Wall) 483, 492 (1870); ARIENS at 43.

⁶⁵ *In re Paschal*, 77 U.S. at 493; ARIENS at 43–44; Hart, 28 TEX. L. REV. at 39–40.

⁶⁶ HALEY at 79; *Semicolon Court*, 37 TEX. L. REV. at 281.

⁶⁷ *Semicolon Court*, 37 TEX. L. REV. at 281; HALEY at 79.

⁶⁸ *Semicolon Court*, 37 TEX. L. REV. at 281; HALEY at 80. Sheridan's selection of Amos Morrill as Chief Justice of the Court was reportedly his second choice. HALEY at 80; *Semicolon Court*, 37 TEX. L. REV. at 281–82.

⁶⁹ *Peck v. City of San Antonio*, 51 Tex. 490, 492 (1849) (the Military Court, “not having been organized under the Constitution and laws of the state, with all due respect to the members who composed that court as individuals, their opinions have not received the same authoritative sanction given to those of the court as regularly constituted”); *see, e.g., Confederates and Carpetbaggers*, 51 TEX. B.J. at 917–18 (quoting *Semicolon Court*, 37 TEX. L. REV. at 287 (“the ... Military Court ... had no Texas constitutional basis and hence its decisions do not operate as precedents under the rule of stare decisis”)); HALEY at 81.

⁷⁰ *Preface*, 25 Tex. Supp. at ix; Hart, 28 TEX. L. REV. at 34.

⁷¹ *See Preface*, 31 Tex. at i, 3; *Preface*, 30 Tex. at i; *Preface*, 29 Tex. at i, 3; *Preface*, 28 Tex. at i, 3; *Preface*, 25 Tex. Supp. at i. Under a provision first enacted in May 1846 and later amended in 1850 and 1851, the Court divided each of its annual terms into three sessions, each held in a different city: Austin in November, Galveston in February, and Tyler in April. DAVENPORT at 29; *see HALEY* at 54. Therefore, the title page to each of Paschal's *Texas Reports* indicates which session was reported. *See, e.g., 30 Tex. i* (“The Tyler and Austin Sessions, 1867, and Part of the Galveston Session, 1868”).

⁷² *See Preface*, 31 Tex. at i, 3; *Preface*, 30 Tex. at i; *Preface*, 29 Tex. at i, 3; *Preface*, 28 Tex. at i, 3; *Preface*, 25 Tex. Supp. at i.

⁷³ *See Preface*, 28 Tex. at vii–viii, 9–10 (“There may be those who think this brief notice out of place ...” But “I feel that I could not have been faithful to judicial history without this notice of one whose opinions will often be quoted, so long as the authority of judicial precedents shall endure in Texas.”); 25 Tex. Supp. at xi (“Indeed, as other history recedes, as other literature perishes, the history gleaned from judicial reports increases in interest. If there be those who find fault with the too frequent mention of the irreversible past in my books, let them understand that long years ago I vowed never to travel a mile without setting up a post to warn the people of the dangers of the forbidden walks which lead to disunion.”).

- ⁷⁴ See *Preface*, 31 Tex. at v, 7, viii–ix, 10–11; *Preface*, 29 Tex. at v, 7; 28, 489; *Preface*, Tex. at ix, 11; *Preface*, 25 Tex. Supp. at viii, x. To be fair, Paschal also went to great lengths to mention the contributions of his son, Col. George W. Paschal, as well. See *Preface*, 28 Tex. at x, 12; *Preface*, 25 Tex. Supp. at x. Indeed, this proclivity was pointed out by opposing counsel before the U.S. House Judiciary Committee, who remarked: “I think it is modest of you to cite your own book as authority.” Hart, 28 TEX. L. REV. at 40. To which Paschal curtly replied, “A gentleman who has prepared a book which his State has adopted, and which has received a national reputation, has a right to cite it.” *Id.*
- ⁷⁵ For a thorough examination of both the substance of and context surrounding these cases, please see Robert B. Gilbreath, *The Supreme Court of Texas and the Emancipation Cases*, 69 TEX. B.J. 946 (Nov. 2006) [*Emancipation Cases*]. See also *Slaves & Reconstruction*, APP. ADVOC., Fall 2006, at 7–10.
- ⁷⁶ *Emancipation Cases*, 69 TEX. B.J. at 950.
- ⁷⁷ *Id.* at 950–52. It is not known what position Justice Albert Latimer (himself a signer of the Texas Declaration of Independence) took in his concurring opinion to Chief Justice Morrill’s majority opinion because the Court clerk at the time lost Justice Latimer’s concurrence. *Id.* at 948, 951.
- ⁷⁸ *Id.* at 948, 951–52.
- ⁷⁹ *Preface*, 30 Tex. at vii; Hart, 28 TEX. L. REV. at 35.
- ⁸⁰ Hart, 28 TEX. L. REV. at 34.
- ⁸¹ *Preface*, 30 Tex. at vii–ix; Hart, 28 TEX. L. REV. at 35.
- ⁸² *Preface*, 31 Tex. at vi, 8; Hart, 28 TEX. L. REV. at 35
- ⁸³ *Preface*, 31 Tex. at v–ix, 7–11.
- ⁸⁴ *Id.* at v–viii, 7–10.
- ⁸⁵ *Id.* at vi, 8.
- ⁸⁶ *Id.* at vi–vii, 8–9.
- ⁸⁷ *Id.* at viii, 10.
- ⁸⁸ *Id.*
- ⁸⁹ *Id.* at ix, 11.
- ⁹⁰ *Id.* at vi, 8.
- ⁹¹ *Id.* at vii, 9.
- ⁹² *Id.* at viii, 10.
- ⁹³ JANICE C. MAY, *THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE* 11–12 (Greenwood Press 1996); see also *Peak v. Swindle*, 68 Tex. 242, 248, 4 S.W. 478, 479 (1887).
- ⁹⁴ *Preface*, 31 Tex. at ix, 11.
- ⁹⁵ See Hart, 28 TEX. L. REV. at 40; see also *In re Paschal*, 77 U.S. (10 Wall) 483, 492–93 (1870).
- ⁹⁶ *Id.*
- ⁹⁷ See *id.* at 24 n.7.
- ⁹⁸ *Id.* at 41.
- ⁹⁹ *Id.*
- ¹⁰⁰ *Id.* at 41–42.
- ¹⁰¹ *Preface*, 30 Tex. at ix.