LONE STARE DECISIS: PRECEDENT AND AUTHORITY IN TEXAS COURTS

Mark E. Steiner[*]

ABSTRACT

No one disputes that lawyers argue and courts decide. These arguments and decisions are supported by citations to authority. But determining what counts as authority has been overlooked. This Article provides a comprehensive overview of what legal sources are considered authoritative or persuasive in Texas.

This Article first examines the doctrine of stare decisis, which makes precedent matter, and the factors used by Texas courts when considering whether to overrule precedent. It not only explains the precedential significance of the notations used by Texas high courts when denying or refusing applications or petitions for review; it also discusses the precedential authority of the lower appellate courts in Texas in terms of both horizontal and vertical stare decisis. It then addresses when federal case law is authoritative or persuasive in state courts. Finally, it looks at secondary sources as persuasive authority and establishes which sources courts find particularly impactful and which sources are underused by advocates.

* Professor of Law Emeritus, South Texas College of Law Houston. B.A., University of Texas at Austin; J.D., University of Houston Law Center; Ph.D. (History), University of Houston. The author thanks Derek Fincham and James W. Paulsen for their comments.

TABLE OF CONTENTS

ABSTRACT 39
I. INTRODUCTION 41
II. PRECEDENT AND STARE DECISIS 41
A. Standing by Things Decided 41
B. Not Standing by Things Decided 43
C. Rule of Decision 48
D. Dicta 52
III. THE NOTATION SYSTEM IN THE TEXAS SUPREME COURT 53
A. No Place But Texas 53
B. Refused 54
C. Refused N. R. E. 62
D. Denied 63
E. Getting the Right Notations 64
F. Per Curiam Opinions on Applications and Petitions 65
IV. PRECEDENTIAL AUTHORITY OF LOWER TEXAS COURTS 69
A. Texas Commission of Appeals 69
B. Panel Decisions 69
C. Decisions of Coordinate Courts 71
D. Transferred Appeals 73
E. Precedent and Publication 76
V. FEDERAL AND OUT-OF-STATE AUTHORITY IN TEXAS COURTS 79
VI. SECONDARY SOURCES 84
A. Texas Pattern Jury Charges 85
B. Dictionaries 88
C. Texas Supreme Court Advisory Committee Minutes 91
D. Texas Attorney General Opinions 92
E. Treatises and Law Review Articles 93
F. Restatements of the Law 103
G. Legislative History 110
VII. CONCLUSION 117

I. INTRODUCTION

Historians are fond of quoting the opening line of L.P. Hartley's *The Go-Between*: "The past is a foreign country: they do things differently there."[1] In our common-law system, we cling to the belief that this is not true.[2] Lawyers and judges take great pains to connect their arguments and decisions with precedent.[3] Accordingly, most legal disputes are guided by the past.[4] Lawyers and judges also turn to secondary authorities for support and guidance.[5]

This Article examines what legal sources are authoritative in Texas. It first examines the doctrine of stare decisis, which makes precedent matter, and the factors used by Texas courts when considering whether to overrule precedent.[6] It explains the precedential significance of the notations used by Texas high courts when denying or refusing applications or petitions for review.[7] Unlike other jurisdictions, these notations may affect the weight given to intermediate court opinions.[8] It discusses the precedential authority of the lower appellate courts in Texas in terms of both horizontal and vertical stare decisis.[9] It addresses when federal case law is authoritative or persuasive in state courts.[10] Finally, it looks at secondary sources as persuasive authority and establishes which sources courts find particularly authoritative and which sources are underused by advocates.[11]

II. PRECEDENT AND STARE DECISIS

A. Standing by Things Decided

Authority is important because Texas courts are stare decisis courts.[12] As the Texas Supreme Court has explained in an often-cited opinion:

---

1. L.P. HARTLEY, THE GO-BETWEEN 17 (NYRB Classics 2002); DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY—REVISITED (2d ed. 2015).

2. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455–56 (2015).

3. *See infra* notes 53, 55–57 and accompanying text (providing examples of a court supporting its argument with precedent).

4. *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 9–10 (2016) (explaining the value of courts looking to precedent to guide their decisions).

5. *See infra* Part VI (explaining how Texas courts apply stare decisis).

6. Mitschke v. Borromeo, 645 S.W.3d 251, 257–58, 263 (Tex. 2022).

7. *See infra* Part III (explaining Texas courts' notation practices).

8. *See generally* Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89 (2007) (explaining the types of subsequent history notations in Texas appellate opinions and their precedential weight).

9. *See infra* Part IV (discussing the presidential authority of Texas appellate courts).

10. *See infra* Part V (explaining the weight Texas courts give to federal case law).

11. *See infra* Part VI (explaining secondary sources and their authoritative weight).

12. On precedent and stare decisis, *see generally* HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS (1912) and GARNER ET AL., *supra* note 4.

> After a principle, rule or proposition of law has been squarely decided by the Supreme Court, or the highest court of the [s]tate having jurisdiction of the particular case, the decision is accepted as a binding precedent by the same court or other courts of lower rank when the very point is again presented in a subsequent suit between different parties.[13]

For compelling reasons, the Supreme Court can overrule its earlier decisions, but it generally adheres to its own precedents for reasons of efficiency, fairness, and legitimacy.[14] In *Weiner*, the Court explained the basis for the doctrine of stare decisis:

> First, if we did not follow our own decisions, no issue could ever be considered resolved. The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy. Secondly, we should give due consideration to the settled expectations of litigants . . . who have justifiably relied on the principles articulated in [earlier caselaw]. Finally, under our form of government, the legitimacy of the judiciary rests on large part upon a stable and predictable decision making process that differs dramatically from that properly employed by the political branches of government.[15]

In a recent decision, the Texas Supreme Court tied stare decisis to economic and social stability:

> Commercial and financial decisions would be far more challenging without confidence that courts would honor the legal framework within which those decisions are made. The same is true of any decision involving calculations about risk—decisions in virtually every corner of life, ranging from property, to family, to employment, and beyond. No society could flourish if its people's investments—in capital, or labor, or any other resource—were not backed by force of law. *Stare decisis* amounts to a judicial commitment to precedent, which is an essential ingredient in the rule of law itself.[16]

Stare decisis most often applies to "black letter law"—"the type of holding that has, among its main virtues, historical familiarity, ease of application, long-standing reliance, predictability, and precision."[17]

---

13. Swilley v. McCain, 374 S.W.2d 871, 874 (Tex. 1964).

14. Weiner v. Wasson, 900 S.W.2d 316, 320 (Tex. 1995). These are standard justifications for the doctrine of stare decisis. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–601 (1987) (noting that precedential constraint is justified by the virtues of fairness, predictability, and strengthened decision making, which includes decision-making efficiency).

15. *Weiner*, 900 S.W.2d at 320.

16. Mitschke v. Borromeo, 645 S.W.3d 251, 256 (Tex. 2022) (emphasis in original).

17. *Ex parte* Lewis, 219 S.W.3d 335, 376 (Tex. Crim. App. 2007) (Cochran, J., concurring).

Under the doctrine of vertical stare decisis, courts of appeals must follow the precedent of the Texas Supreme Court.[18] The courts of appeals are constrained by high court precedent: "An intermediate court is duty-bound to follow the Texas Supreme Court's authoritative expressions of the law and to leave changes in the application of common law rules to that court."[19] Trial courts also are duty-bound to follow the precedents of the higher courts in their jurisdiction.[20]

Dissenting opinions are not precedential.[21] As Chief Justice Wallace Jefferson explained (in a dissent), "A dissent does many things—it pinpoints perceived faults in the Court's opinion, it speaks to a future Court, it may suggest a legislative fix—but it is not the law."[22] Judges most often cite dissenting opinions when they are dissenting.[23]

B. Not Standing by Things Decided

A couple of years ago several members of the Texas Supreme Court discussed, among other things, overruling precedent.[24] Justice Jeff Boyd said the Court had "a fairly mainstream view among American courts" toward overruling precedent.[25] The Court is "pretty dedicated to the concept of stare decisis and the importance of precedent" because of "the need for consistency and predictability in the law."[26] If the precedent is "clearly wrong," then the Court has an obligation to reconsider it.[27] But often a "wrong" decision has become so "foundational in the understanding of the law by the public" that overruling it would "be doing more harm than good."[28] There is no "mathematical formula" for making this determination, which means it has to be done on a "case-by-case basis."[29] Justice Debra Lehrmann could only

---

18. *Mitschke*, 645 S.W.3d at 256.

19. Lumpkin v. H&C Commc'ns, Inc., 755 S.W.2d 538, 540 (Tex. App.—Houston [1st Dist.] 1988, no writ). *See* Lubbock Cnty., Tex. v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 585 (Tex. 2002) (explaining that Texas Supreme Court decisions are binding precedent on Texas courts); Nueces Cnty. v. San Patricio Cnty., 683 S.W.3d 559, 569 (Tex. App.—Corpus Christi–Edinburg 2023, pet. filed) (explaining that vertical stare decisis requires Texas appellate courts to follow Texas Supreme Court precedent).

20. Rice v. Rice, 533 S.W.3d 58, 61–62 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

21. Sw. Bell Tel. Co., L.P. v. Mitchell, 276 S.W.3d 443, 449 (Tex. 2008) (Jefferson, C.J., dissenting).

22. *Id.*

23. *See In re* Paul, No. 23-0253, 2024 WL 1122520 (Tex. Mar. 15, 2024) (Bland, J., dissenting from denial of petition) (citing Donziger v. United States, 143 S. Ct. 868 (2023) (Gorsuch, J., dissenting) and Robertson v. United States *ex rel.* Watson, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting)) (providing examples of dissenting judges citing other dissents).

24. Texas Supreme Court, *An Evening with the Texas Supreme Court*, YOUTUBE (Dec. 14, 2020), https://www.youtube.com/watch?v=Am33s7W4n6g&t=1218s.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

recall one time the Court had overruled a precedent; in that case, which involved the admissibility of evidence on nonuse of seatbelts,[30] the scientific literature in the intervening forty years was now "so far at odds with our precedent that we felt that we had to overturn that precedent."[31] She concluded that "[I]t's going to be very difficult to convince us to overturn a precedent unless there's just a really, really good reason."[32] Then-Justice Eva Guzman agreed with her colleagues about stability being critical because it "instills confidence in the justice system."[33] Instead of asking the Court to overrule precedent, she advised advocates to consider her "preferred approach"—advocates should argue for an "interpretation of that prior precedent in a way that's either more broad or more narrow."[34] While it is difficult for advocates to convince the Court to overrule precedent, the alternative approach of arguing for a broader or narrower interpretation of precedent had been "successful in a number of cases."[35]

Because adhering to precedent is "the touchstone of a neutral legal system that provides stability and reliability," overruling precedent "must be carefully considered and should be rare."[36] It is not enough that the precedent is clearly wrong and has long been subject to criticism.[37] Courts are willing to stand by things decided.[38] As the Supreme Court recently noted, "After all, the doctrine exists to protect wrongly decided cases. We hardly need *stare decisis* to adhere to precedents that we regard as correct; we would do that anyway."[39] When the Supreme Court considers whether to overrule a precedent, it must consider "whether doing so serves—or instead undermines—the underlying purposes of *stare decisis*."[40] Those purposes are "efficiency, fairness, and legitimacy."[41] The Court of Criminal Appeals also considers several factors when considering whether to overrule precedent:

---

30. Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 566–67 (Tex. 2015) (overruling Carnation Co. v. Wong, 516 S.W.2d 116, 117 (Tex.1974)). The court noted how changes "rendered our prohibition on seat-belt evidence an anachronism. The rule may have been appropriate in its time, but today it is a vestige of a bygone legal system and an oddity in light of modern societal norms." *Nabors*, 456 S.W.3d at 555.

31. Texas Supreme Court, *supra* note 24.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Mitschke v. Borromeo, 645 S.W.3d 251, 263 (Tex. 2022).

37. Henry Campbell Black noted that a court of last resort must abide by its former decisions unless it is convinced that "they were wrongly decided" and "less mischief will result from their overthrow than from their perpetuation." BLACK, *supra* note 12, at 10.

38. Weiner v. Wasson, 900 S.W.2d 316, 320 (Tex. 1995).

39. *Mitschke*, 645 S.W.3d at 260 (emphasis in original). *See* Am. Nat'l Ins. Co. v. Arce, 672 S.W.3d 347, 361 (Tex. 2023) (Young, J., concurring) ("Even *conclusively* establishing the wrongness of that choice would be, in and of itself, insufficient to overcome *stare decisis.*") (emphasis in original).

40. *Mitschke*, 645 S.W.3d at 263 (emphasis in original).

41. *Weiner*, 900 S.W.2d at 320.

> (1) that the original rule or decision was flawed from the outset,
> (2) that the rule's application produces inconsistent results,
> (3) that the rule conflicts with other precedent, especially when the other precedent is newer and more soundly reasoned,
> (4) that the rule regularly produces results that are unjust, that are unanticipated by the principle underlying the rule, or that place unnecessary burdens on the system, and
> (5) that the reasons that support the rule have been undercut with the passage of time.[42]

In *Mitschke v. Borromeo*, the Texas Supreme Court addressed whether it should overrule an admittedly terrible precedent, *Philbrook v. Berry*, which had held that, after the plaintiff had severed a default judgment under a new cause number, the defendant filing a motion for new trial under the original cause number did not extend the appellate timetable.[43] The court acknowledged that *Philbrook* was decided in an era of hyper-technicalities and procedural traps.[44] It then considered whether overruling *Philbrook* advanced "efficiency, fairness, and legitimacy."[45] Since courts had restricted and distinguished *Philbrook* since its issuance, it hardly constituted "clear and settled law."[46] A precedent that "becomes less useful over time and continues to generate confusion among parties and the judiciary" is not efficient.[47] Since there are not the same reliance interests with cases involving procedural and evidentiary rules, it would not be unfair to overrule *Philbrook*.[48] Finally, while respecting precedent "conveys to the public that the courts are neutral and disciplined," sticking with precedent that is "egregiously wrong or that has lost its underpinnings" does not advance legitimacy.[49]

"[S]tare decisis has its 'greatest force' in matters" involving statutory construction.[50] If the Court misinterprets a statute, then the legislature can rectify the mistake—"and if the Legislature does not do so, there is little

---

42. Grey v. State, 298 S.W.3d 644, 646 (Tex. Crim. App. 2009).

43. Philbrook v. Berry, 683 S.W.2d 378, 379 (Tex. 1985), *overruled by Mitschke*, 645 S.W.3d at 265–66.

44. *Mitschke*, 645 S.W.3d at 261.

45. *Id.* at 263–66.

46. *Id.* at 263–64.

47. *Id.* On the other hand, efficiency concerns do not support overturning a longstanding, albeit wrongly decided, "precedent that is clear and easily administrable." Am. Nat'l Ins. Co. v. Arce, 672 S.W.3d 347, 361 (Tex. 2023) (Young, J., concurring).

48. *Mitschke*, 645 S.W.3d. at 264–65.

49. *Id.* at 265–66.

50. Worsdale v. City of Killeen, 578 S.W.3d 57, 68–69 (Tex. 2019); Febus v. State, 542 S.W.3d 568, 575–76 (Tex. Crim. App. 2018); Moss v. Gibbs, 370 S.W.2d 452 (Tex. 1963). *See* GARNER ET AL., *supra* note 4, at 333–37 (explaining that stare decisis is uniquely strong in statutory interpretation because the legislature can rewrite statutes if it disagrees with judicial interpretation of those statutes).

reason for the Court to reconsider whether its decision was correct."[51] The Texas Supreme Court also has long been reluctant to overrule decisions affecting property and contractual rights.[52] The court in 1895 observed:

> When a decision has been recognized as the rule of property, and conflicting demands have been adjusted, and contracts have been made with reference to and on faith of it, greater injustice would be done to individuals, and more injury result to society, by a reversal of such decision, though erroneous, than to follow and observe it.[53]

Texas courts continue to assert that stare decisis should be strictly followed when there are such reliance interests present.[54]

Advocates are hesitant to argue that a case should be overruled and seem more inclined to follow Justice Guzman's advice to argue instead for narrowing or broadening precedent.[55] In *Mitschke v. Borromeo*, the Texas Supreme Court overruled *Philbrook v. Berry*, a 1985 decision by the Texas Supreme Court that had been restricted and distinguished almost immediately after its issuance by both the Supreme Court and the courts of appeals.[56] The petitioner did not expressly ask that the court overrule *Philbrook*.[57] The petitioner instead argued that the case had already been implicitly overruled, calling respondents' reliance on the case an attempt at resurrection and arguing that the case reflected a "policy of a bygone era."[58] Respondents argued that *Philbrook* created "very specific, bright-line deadlines" and the many cases distinguishing *Philbrook* could be distinguished.[59] The court noted that it had "repeatedly cast doubt on 'whether *Philbrook* was correctly decided'" and that it had in earlier cases had praised lower courts for limiting its application.[60] It "could again distinguish" the facts in this case from *Philbrook* as it had done the past; however, "ever finer distinctions at some

---

51. Sw. Bell Tel. Co., L.P. v. Mitchell, 276 S.W.3d 443, 447 (Tex. 2008). *See* Ferrer v. Almanza, 667 S.W.3d 735, 744 (Tex. 2023) (highlighting that statutory interpretation bolsters the strength of stare decisis because of the ability of legislatures to rewrite statutes if they disagree with judicial interpretation).

52. Higgins v. Bordages, 31 S.W. 803, 804–05 (Tex. 1895).

53. *Id. See* GARNER ET AL., *supra* note 4, at 421–39 (explaining the heightened stare decisis with regard to property law).

54. *See* Env't Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414, 419 (Tex. 2015). *See also Mitschke*, 645 S.W.3d 251, 264 (elaborating that the Court's reluctance to overrule precedent "is particularly acute in property and contract cases—indeed, anywhere 'parties are especially likely to rely on such precedents when ordering their affairs.'') (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 457 (2015))).

55. *See* Petitioner's Brief on the Merits at 10–11, *Mitschke*, 645 S.W.3d 251 (No. 21–0326) (providing an example of a petitioner arguing to narrow rather than reverse precedent).

56. *Mitschke*, 645 S.W.3d at 26.

57. Petitioner's Brief on Merits, *supra* note 55, at 9–12.

58. *Id.* at 1, 7.

59. Response to Petition for Review 5, *Mitschke*, 645 S.W.3d 251 (No. 21–0326).

60. *Mitschke*, 645 S.W.3d at 259 (quoting Tex. Instruments, Inc. v. Teletran Energy Mgmt., Inc., 877 S.W.2d 276, 278 (Tex. 1994).

point undermine respect for precedent more than they advance it. Distinguishing *Philbrook* yet again, while purporting to leave it intact, may reasonably convey a sense that we are sporting with that case rather than honoring it."[61]

Some advocates take a third approach to adverse precedent. Rather than ask the Court to overrule the precedent or argue that it is distinguishable, they ignore it.[62] Judge Richard Posner once observed that "the ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless."[63] Lawyers have a duty to cite to adverse authority.[64] While the Texas Disciplinary Rules require advocates to disclose adverse "authority in the controlling jurisdiction," courts expect more than that.[65] Judges would think an advocate was misleading them if the lawyer accurately stated that the legal issue was a matter of first impression in that court of appeals but failed to inform the Court of adverse decisions from the other courts of appeals.[66]

An argument that requires overruling must be directed to the right audience. One panel of a court of appeals should not be able to overrule another panel.[67] The court of appeals should have to sit en banc to overrule one of its own opinions.[68] Nor should a court of appeals overrule a Texas Supreme Court opinion.[69] The Texas Supreme Court has quoted with approval from the United States Supreme Court: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the lower court should follow the case which directly

---

61. *Id.* at 260.

62. Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931, 934 (7th Cir. 2011).

63. Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1198 (7th Cir. 1987).

64. *See generally* David L. Hudson, Jr., *Even If It Hurts Your Case*, 105 ABA J. 24 (June 2019) (emphasizing a lawyer's duty to disclose); Mark E. Steiner, *Grit Your Teeth and Cite It: The Duty to Disclose Adverse Authority*, 5 APP. ADVOC. 3 (Winter 1998–99) (highlighting the importance of disclosing adverse authority).

65. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 (a)(4), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

66. *Hill*, 814 F.2d at 1198.

67. *See, e.g.*, Cody Tex., L.P. v. BPL Expl., Ltd., 619 S.W.3d 735, 742 (Tex. App.—San Antonio 2019, pet. denied) (providing an example of when a court has the power to overturn their initial decision); Davis v. Covert, 983 S.W.2d 301, 304 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.) (noting that the Court's opinion stemmed from en banc consideration).

68. *See, e.g.*, *Cody Tex., L.P.*, 619 S.W.3d at 735 (discussing a court's power to overturn decisions).

69. *In re* Smith Barney, Inc., 975 S.W.2d 593, 596 (Tex. 1998); W.W. Rodgers & Sons Produce Co. v. Johnson, 673 S.W.2d 291, 295 (Tex. App.—Dallas 1984, writ denied). Some courts of appeals apparently believe that they have the authority to overrule Supreme Court precedent if it is really old. When asked to overrule a 1904 Supreme Court decision, the Tyler Court of Appeals noted that "[t]he doctrine of *stare decisis* does not stand as an insurmountable bar to overruling precedent," apparently forgetting that a lower court cannot overrule a higher one. Fain v. Great Spring Waters of Am., Inc., 973 S.W.2d 327, 329–30 (Tex. App.—Tyler 1998), *aff'd sub nom.* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75 (Tex. 1999). The court nonetheless reached the right result, although for the wrong reason; it concluded that it was "more appropriate for the legislature" or Supreme Court to "fashion a new rule." *Id.* at 330.

controls, leaving to this Court the prerogative of overruling its own decisions."[70] Courts of appeals are free to suggest that the higher courts reexamine their precedents.[71]

C. Rule of Decision

Section 5.001 of the Texas Civil Practice and Remedies Act declares that "[t]he rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state."[72] This provision dates to the Republic of Texas.[73] The 1836 Constitution provided that Congress shall introduce by statute "the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision."[74] In 1840, the Texas Congress passed an act adopting "the Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) together with such acts shall be the rule of decision in this Republic."[75] While the 1836 constitutional provision was not carried forward in any of Texas's subsequent constitutions, the statutory

---

70. *In re Smith Barney*, 975 S.W.2d at 598 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)). *See In re* Fort Apache Energy, Inc., 482 S.W.3d 667, 669 (Tex. App.—Dallas 2015) (orig. proceeding) (explaining the circumstance for when the Supreme Court can overrule a case).

71. Scott v. West, 594 S.W.3d 397, 414 n.24 (Tex. App.—Fort Worth 2019, pet. denied); Levin v. Espinosa, No. 03-14-00534-CV, 2015 WL 690368 (Tex. App.—Austin Feb. 13, 2015, no pet.) (mem. op.) (Field, J., concurring).

72. TEX. CIV. PRAC. & REM. CODE § 5.001. When state representative Jeff Leach, chair of the House Judiciary and Civil Jurisprudence Committee, introduced a bill in the 86th Legislature that would have added a section on the American Law Institute's Restatements of Law, he also proposed clarifying language to the "rule of decision" section. The proposed language stated: "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitutions [~~constitution~~] of this state and of the United States, [~~and~~] the laws of this state, and case law precedents set by a court of this state." Tex. H.B. 2757, 86th Leg. R.S. (2019). While the new section declaring the Restatements as "not controlling" became law, the clarifying language on "the rule of decision" did not. It is unclear whether the Texas Senate had a problem with the United States Constitution or case law precedents being recognized as part of the "rule of decision."

73. Repub. Tex. Const. of 1836, art. IV, § 13, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897* (Austin, Gammel Book Co. 1898).

74. *Id.* The draft of this provision provided: "All proceedings in courts of justice shall be in conformity to the common law, as is applicable to the situation of the republic, and not inconsistent with this constitution, shall be the common law of the land, but no penalty shall be inflicted under said law, except fine and imprisonment; but congress may, from time to time, alter or abolish such portions of said common law as they may think proper." *Journals of the Convention of the Free, Sovereign, and Independent People of Texas, in General Convention, Assembled*, *in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822–1897, at 865 (Austin: Gammel Book Co. 1898).

75. An Act to Adopt the Common Law of England—to Repeal Certain Mexican Laws, and to Regulate the Marital Rights of Parties, *in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822–1897, at 177–78 (Austin: Gammel Book Co. 1898) [hereinafter AN ACT TO ADOPT THE COMMON LAW OF ENGLAND].

"rule of decision" provision has survived to this day.[76]

Texas's statutory adoption of the common law in 1840 was similar to the reception statutes passed by the original states during the Confederation period.[77] Elizabeth Gaspar Brown has noted that "between 1776 and 1784, eleven out of the thirteen original states made, either directly or indirectly, some provision for the use of the common law and British statutes."[78] Regardless of the wording of the various reception statutes, "the rule developed, which was sooner or later to be repeated in practically every American jurisdiction, that only those principles of the common law were received which were applicable to the local situation."[79] In the early republic, states had to decide "what parts of English law would remain in force."[80] Modifications in English common law already had begun in colonial America.[81] As United States Supreme Court Justice Joseph Story observed in 1829, "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."[82]

When the newly independent states "received" the common law, they were keeping in place a legal system subject to modifications appropriate for their circumstances.[83] When the Republic of Texas received the common law, it also had to decide which portions of Mexican civil law it wanted to retain.[84] It somewhat surprisingly retained a lot of civil law.[85] The 1840 reception statute excluded, "[L]aws as relate exclusively to grants and the colonization

---

76. TEX. CIV. PRAC. & REM. CODE § 5.001.

77. ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776–1836, 24 (1964).

78. *Id.*

79. Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 805 (1951).

80. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 67, 69 (3d ed. 2005); *see* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE IN MASSACHUSETTS SOCIETY, 1760–1830 (1975) (showcasing the transformation of common law).

81. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 5 (3d ed. 2005); Hall, *supra* note 79, at 796–97.

82. Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829).

83. *Id.*

84. Ford W. Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEX. L. REV. 801, 806 (1950) [hereinafter Hall, *Common Law by Texas*].

85. *See generally* Hans W. Baade*, The Historical Background of Texas Water Law—A Tribute to Jack Pope*, 18 ST. MARY'S L.J. 1 (1986); Joseph W. McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 SW. HIST. Q. 369 (1983); Joseph W. McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24 (1959); Joseph W. McKnight, *Texas Community Property Law—Its Course and Development*, 8 CAL. W. L. REV. 117 (1971); Joseph W. McKnight, *The Spanish Watercourses of Texas*, *in* ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 373–86 (Morris D. Forkosch, ed. 1966); JEAN STUNTZ, HERS, HIS, AND THEIRS: COMMUNITY PROPERTY LAW IN SPAIN AND EARLY TEXAS (2d ed. 2010); Jean Stuntz, *Spanish Laws for Texas Women: The Development of Marital Property Law to 1850*, 104 SW. HIST. Q. 543 (2001) (providing examples showcasing the retention of civil law in Texas).

of lands" and retained community property principles.[86] Two weeks after the Texas Congress passed the reception statute, it also clarified that Texas adopting the common law did not mean it also adopted "the common law system of pleading."[87] Instead of the complexities of common-law pleading, Texas civil proceedings would use petition and answer.[88] The Texas Congress also passed additional legislation that year that rejected the common law in favor of the civil law, including laws of succession and "laws rejecting the common-law formalities of conveying real property, and laws rejecting common-law rules related to mortgages."[89]

The parameters of the adoption of common law in 1840 remain relevant.[90] A recent dispute before the Texas Supreme Court turned on the meaning of the term "navigable stream," which, in turn, depended upon whether a 1837 statute incorporated the civil-law meaning of the term.[91] The majority noted that when Texas adopted the common law, it "did so insofar as 'not inconsistent with the Constitution or the acts of Congress then in force.'"[92] Because the passage of a "navigable stream" statute in 1837 predated the adoption of the common law that statute incorporated the civil-law meaning of navigable stream and the adoption of the common law "did not alter the meaning of navigable stream."[93]

The Texas Supreme Court declared in 1913 "that the common law of England" referred to in the 1840 act "was that which was declared by the courts of the different states of the United States."[94] Chief Justice Brown, writing for the Court, reasoned "that the lawyer members of that Congress, who framed and enacted that statute, had been reared and educated in the United States, and would naturally have in mind the common law with which they were familiar."[95] The Texas Supreme Court in its earliest reported cases "turned principally to decisions of the U.S. Supreme Court, opinions of the courts of other states, and various doctrinal treatises, particularly those of Kent and Story" and not English decisions.[96]

Moreover, the effect of the 1840 act was not to introduce the entire "body of the common law, but to make effective the provisions of the common law, so far as they are not inconsistent with the conditions and

---

86. An Act to Adopt the Common Law of England, *supra* note 75.

87. *Id.* at 262.

88. An Act to regulate the proceedings in Civil Suits, in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822–1897, at 262 (Austin: Gammel Book Co. 1898).

89. MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 18–19 (2011).

90. *See, e.g.*, Bush v. Lone Oak Club, LLC, 601 S.W.3d 639, 646 (Tex. 2020) (focusing on a statute from 1837).

91. *Id.*

92. *Id.* at 651 (quoting Motl v. Boyd, 286 S.W. 458, 465 (1926)).

93. *Id.*

94. Grigsby v. Reib, 153 S.W. 1124, 1125 (1913).

95. *Id.*

96. Hall, *Common Law by Texas*, *supra* note 84, at 811.

circumstances of our people."[97] In 1975, the Texas Supreme Court noted that "this Court has not regarded the legislative adoption of the common law as installing all of the prior rules of English courts with statutory authority."[98] Instead, the Court would look to "the courts of the several states to determine the body of common law in 1840, and that this should be effectuated only so far as not inconsistent with the conditions and circumstances of the people of this state."[99]

The Beaumont Court of Appeals recently referred to English common law when determining the parameters of a joint tenancy, specifically citing Blackstone's *Commentaries on the Laws of England*.[100] The court relied upon the first edition of Blackstone's *Commentaries*, the second volume of which was published in 1768.[101] There are several problems with this approach.

The *Grigsby* decision suggests that Texas courts should look first to American precedent to determine "English common law."[102] And it would make more sense to look at American treatises such as Kent's *Commentaries on American Law* rather than Blackstone's *Commentaries*.[103] As Timothy Walker observed in 1837, "[w]e have innovated upon the institutions of our English ancestors, with an unsparing hand; and not merely in minute details, but also in fundamental principles. We cannot therefore find in Blackstone, an accurate outline of American law."[104]

Even using the first edition of Blackstone's *Commentaries* is problematic.[105] Kunal M. Parker has shown that "the *Commentaries* were viewed, very soon after their appearance, in both England and America, as being out of date, even as out of step with the movement of history."[106] By the time of the 1840 Texas reception statute, there had been eighteen updated editions of the *Commentaries* published in England.[107] Moreover, by 1840

---

97. *Grigsby*, 153 S.W. at 1125.

98. Davis v. Davis, 521 S.W.2d 603, 608 (Tex. 1975)

99. *Id. See* El Chico Corp. v. Poole, 732 S.W.2d 306, 310–11 (Tex. 1987) (reexamining the concept of "duty" in a torts case to stay consistent with new advances).

100. Fogal v. Fogal, 671 S.W.3d 753, 758 (Tex. App.—Beaumont 2023, no pet.).

101. *Id.* For the last twenty years, the Texas Supreme Court, with one exception where it cited to the fourth English edition, has cited to the first edition of Blackstone. *See, e.g.*, Boozer v. Fischer, 674 S.W.3d 314, 327 (Tex. 2023) (citing the first edition of Blackstone). The lone exception was BankDirect Cap. Fin., LLC v. Plasma Fab, 519 S.W.3d 76, 86 n.73 (Tex. 2017).

102. *Grigsby*, 153 S.W. at 1125.

103. *See, e.g.*, JAMES KENT, COMMENTARIES ON AMERICAN LAW (4th ed. New York: E.B. Clayton 1840) (providing an example of a leading American law book); Daniel J. Hulsebosch, *Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377 (2009); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993) (describing Kent's influence as a treatise writer).

104. TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 13 (1837), *quoted in* Mark E. Steiner, *Abraham Lincoln and the Rule of Law Books*, 93 MARQ. L. REV. 1283, 1306 (2010).

105. Kunal M. Parker, *Historicizing* Blackstone's Commentaries on The Laws of England *in* LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE 23 (Angela Fernandez & Markus Dubber eds. 2012).

106. *Id.*

107. *Id.* at 24.

there had been twenty American editions of Blackstone, including "Americanized" ones such as St. George Tucker's 1803 edition and the *Pennsylvania Blackstone*.[108] Texas courts have only cited to these Americanized versions occasionally.[109]

D. Dicta

A basic proposition about precedent is the holding in a case is binding while dictum in a case is not. Parsing what is the holding and what is dictum is beyond the scope of this article. "Obiter dictum" means "something said in passing."[110] Obiter dictum is "in the nature of a peripheral, off-the-cuff judicial remark."[111] "Such dictum will not create binding precedent under stare decisis."[112] The Texas Supreme Court once defined dictum as "a mere expression of opinion on a point or issue not necessarily involved in the cases which does not create binding precedent under stare decisis."[113]

Sometimes it seems that dictum is just the part of a prior opinion that a party or a court does not like.[114]

Obiter dictum should not be confused with judicial dictum. Judicial dictum is defined as an opinion of the "court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision. . . ." One court defined judicial dictum as a statement " deliberately made for the guidance of the bench and bar upon a point of statutory construction not theretofore considered by the Supreme Court." Courts consider judicial dictum binding.[115]

There is some question about whether material contained in footnotes is necessarily obiter dictum. Some courts have concluded that footnotes are given full precedential effect. Some judges' concerns about the precedential effect of footnotes has led to concurring opinions that contain statements like: "I do not join footnote #3 of the majority opinion." While some jurisdictions may find footnotes precedential, it isn't hard in Texas to find dismissive comments about "dicta in footnotes" when a court of appeals is rejecting a party's argument. In criminal appeals, some Texas courts have stated flatly that footnotes in opinions are dicta. These courts have relied upon *Young v.*

---

108. CATHERINE SPICER ELLER, THE WILLIAM BLACKSTONE COLLECTION IN THE YALE LAW LIBRARY: A BIBLIOGRAPHIC CATALOGUE, YALE LAW LIBRARY PUBLICATIONS, No. 6 (June 1938).

109. Marcus Cable Assocs., LP v. Krohn, 90 S.W.3d 697, 700 (Tex. 2002) (citing St. George Tucker's 1803 edition); State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 292 (Tex. 1975) (citing John L. Wendell's 1847 edition); *In re* Sun Coast Res., Inc., 562 S.W.3d 138, 157–58 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (citing St. George Tucker's 1803 edition).

110. Mark E. Steiner, *Lone Stare Decisis: Authority and Ethics in Texas Courts*, TXCLE ADV. CONSUMER & COM. L. 2020, ch. 20, at 13 (internal citations omitted).

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* Travelers Indem. Co. of Ill. v. Fuller, 892 S.W.2d 848, 852 (Tex. 1992).

115. Steiner, *supra* note 110 (internal citations omitted).

State, a court of criminal appeals case that dismissed a footnote from a prior opinion by saying, "As is generally true with footnotes, we regard this footnote as dictum." Of course, that statement appeared in a footnote.[116] That has led to parties relying on *Young*'s footnote as authority to argue that courts may ignore statements found in other footnotes as dicta.[117]

Whether a particular statement is dictum does not end the inquiry. A court still could be guided by such dictum. The Beaumont Court of Appeals once noted that "if this holding is mere dicta or obiter dicta (as appellee's counsel maintains), it is pretty good plain, straight, clear dicta." Decisions about whether comparative negligence applies in a non-subscriber case provide different judicial reactions to dictum. The Texas Supreme Court had noted that "an injured employee pursuing the common law remedy must still prove that the employer was negligent and that he or she was not more than 50 percent negligent." The Amarillo Court of Appeals later rejected an injured employee's argument that this statement was dictum. The court reasoned that "the challenged proposition is a clear and carefully considered statement by the Supreme Court." Assuming that the statement from *Garcia* was dictum, the Court would not "ignore, disregard or refuse to follow it." Even if the statement was not a binding rule of law, it was "entitled to respect as a serious, carefully considered and carefully made comment" about an element of the worker's non-subscribed cause of action.

When faced with the same sentence from *Garcia*, the Tyler Court of Appeals rejected it as "clearly dicta and noncontrolling." The Tyler Court analyzed the Texas Supreme Court's statement in *Garcia* and concluded that the court was "merely entertaining a fiction" by considering common-law remedies available to the injured worker without regard to the worker's compensation act. If its analysis was incorrect, then the statement in *Garcia* "was not essential to the outcome of the case, nor did comparative negligence constitute even a minor issue in that case."[118]

III. THE NOTATION SYSTEM IN THE TEXAS SUPREME COURT

A. No Place But Texas

The notation practice of the Texas Supreme Court is unlike any other high court. The hallmark of a high court in a three-tiered system is that the high court's discretionary decision not to review adds nothing to the precedential authority of the intermediate court's opinion. The leading text on United States Supreme Court practice states: "A simple order denying a petition for writ of certiorari is not designed to reflect the Court's views either

116. *Id.*
117. State v. Ingram, No. 12-18-00329-CR, 2020 WL 90915 (Tex. App.—Tyler Jan. 8, 2020, no pet.).
118. Steiner, *supra* note 110, at 2 (internal citations omitted).

as to the merits of the case or as to its jurisdiction to hear the matter. A denial order merely expresses the Court's discretionary decision not to review the judgment below." The denial of a petition for a writ of certiorari is not a ruling on the merits. Justice Stevens has pointed out that "sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."

A "petition refused" notation from the Texas Court of Criminal Appeals is similar to "cert. denied." The Court of Criminal Appeals has explained that "the summary refusal of a petition for discretionary review by this Court is of no precedential value." The court stated, "The Bench and Bar of the State should not assume that the summary refusal of a petition for discretionary review lends any additional authority to the opinion of the Court of Appeals." In actual practice, the meaning of PDR refusals has turned out to be a little more complicated.

Because of the *Erie* doctrine, the notation system of the Texas Supreme Court has special significance when federal courts apply Texas law. The *Erie* doctrine requires federal courts to apply the law as interpreted by the state's highest court. If the state's highest court has not addressed the issue, then things get a little more complicated. The federal court then makes an "*Erie* guess" and attempts to determine what the highest court of the state would decide. In making an *Erie* guess in the absence of a ruling from the state's highest court, the Fifth Circuit typically treats the decisions of intermediate appellate state courts as the "strongest indicator of what a state supreme court would do." If there is no high court opinion, the United States Supreme Court has held that federal courts "must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State."

The various writ and petition notations may affect the precedential weight of intermediate appellate opinions. Consequently, the Fifth Circuit has noted that the "decisions of the intermediate Texas courts with their writ histories are relevant to the determination of controlling decisions of the Texas Supreme Court."[119]

B. Refused

Over 4,000 Texas Supreme Court opinions are cleverly disguised as court of appeals opinions. These opinions were "writ refused" by the Supreme Court. These cases have the same precedential effect as supreme court opinions. For the past forty years, the Texas Supreme Court has rarely "refused" an application of writ of error (or, now, the petition for review). Because of the small number of recent refusals, lawyers sometimes overlook the continued significance of the "refused" notation.

---

119. *Id.* at 5-6 (internal citation omitted).This section is substantially based upon my 2020 CLE article.

The Texas Supreme Court's "refused" notation is unlike a "cert. denied" from the United States Supreme Court or a "pet. ref'd" from the Court of Criminal Appeals. When the supreme court "refuses" review, the court adopts the court of appeals' opinion and judgment as its own. The supreme court has stated that a refusal of a writ of error gives full approval to the court of appeals opinion and makes the opinion as authoritative as one of its own opinions. This matters a lot.

From 1892 until June 14, 1927, the supreme court also used a "refused" notation, but the meaning was quite different. Until June 14, 1927, a "writ refused" did not mean that the supreme court approved the reasoning of the court of civil appeals' opinion; it meant only that the supreme court approved of the result in the case. The opinion in an early "refused" case might have been "wholly right or wholly wrong or even somewhat of both." One commission of appeals justice explained that "the truth is that in no instance does a refusal by the Supreme Court of a writ of error necessarily or conclusively carry an approval by that court of the opinion of the Court of Civil Appeals." "The first version of "writ refused" has caused some confusion with the latter one. One court of appeals had to reject an appellant's erroneous suggestion that an 1895 "writ refused" opinion had the weight of a supreme court opinion.[120]

These earlier "writ refused" opinions are binding in subsequent appeals in that court of appeals until overruled by that court or the Texas Supreme Court; however, they are not binding precedent to other courts of appeals.[121]

In 1927, the meaning of a "writ refused" notation was changed by the Texas Legislature. The legislature pronounced that the Texas Supreme Court would "refuse" the application for writ of error where "the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined." This change was intended "to give more authenticity to sound opinions of Courts of Civil Appeals and to afford the Bench and Bar the benefit and advantage of a more numerous body of authoritative pronouncements." Because this change went into effect in the middle of 1927, the exact date a case was refused that year is essential for determining its precedential value. It wasn't until October 1927 that cases were first given the new "refused" stamp. One court of appeals mistakenly stated that the "approval and imprimitur [sic] of the Supreme Court" attached to a 1927 "writ refused" opinion when it was refused on May 25, before the change went into effect.

In *Hyundai v. Vasquez*, the Texas Supreme Court held that a trial court doesn't abuse its discretion in refusing to allow a voir dire question that "previews relevant evidence and inquires of prospective jurors whether such

120. *Id.* at 6.

121. Taylor-Made Hose, Inc. v. Wilkerson, 21 S.W.3d 484, 488 n.1 (Tex. App.—San Antonio 2000, pet. denied).

evidence is outcome determinative," reversing the court of appeals. The supreme court noted that the court of appeals was the first appellate court to hold otherwise. The supreme court also noted it had twice "refused the writ from appellate decisions upholding trial courts that rejected such inquiries." In a footnote, the court explained the difference between these two identical notations. The 1931 writ refused case "carries the imprimatur of Texas Supreme Court precedent." The 1919 case was writ refused in "an amorphous time in our writ practice." Two early cases had interpreted the refusal of a writ as signifying the court of appeals' opinion was binding precedent, but the supreme court in later cases "noted that writ refusals during that era signified an agreement with the judgment of the court of appeals, but not adoption of the opinion."[122] Courts often cite this explanation of the meaning of "writ refused."[123]

The definition of "refused" has gone essentially unchanged since 1927. For example, Rule 133 of the former rules of appellate procedure stated that "where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Texas Supreme Court will refuse the application with the docket notation 'Refused.'"

When the Texas Supreme Court changed from a writ of error system to a petition for review system, it not only kept the "refused" notation, but it also clarified its meaning. The new appellate rule kept the "judgment correct and legal principles announced in the opinion are correct" language, but added, "[t]he court of appeals' opinion in the case has the same precedential value as an opinion of the Supreme Court."

The number of "refused" cases has declined steadily over the years. I once counted 4,157 "refused" opinions. There were approximately 3,000 "refused" cases in the first twenty years, another 871 in the next twenty, and only 182 in the last thirty years. "Refused" cases first appear in volume 293 of South Western Reporter; there are 120 "refused" opinions in the last eight volumes of South Western Reporter, First Series. There are 1,855 "refused" cases in the first one hundred volumes of South Western Reporter, Second Series; 1,129 in volumes 100–199; 614 in volumes 200–299; 257 in volumes 300–399; eighty-seven in volumes 400–499; forty-three in volumes 500–599. According to Texas Judicial Council statistics, forty-one cases were refused from 1981 to 1990. From 1991 to 2000, the Texas Supreme Court "refused" only nine cases.[124] I have been unable to find a court of appeals opinion that was "refused" this century.

"A 'refused' case requires six votes from the justices. The recent cases

122. Steiner, *supra* note 119, at 6. (internal citations omitted).

123. *See* Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 698 n.3 (Tex. 2021); Brooks v. Auros Partners, Inc., No. 07-18-00354-CV, 2020 WL 1943449 (Tex. App.—Amarillo Apr. 22, 2020, no pet.); Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124 (Tex. App.—Fort Worth 2011, pet. denied).

124. Steiner, *supra* note 119, at 7 (internal citations omitted).

that are refused 'tend to involve short single-issue decisions.' The appeals that were 'refused' between 1991 and 2000 fit that profile."[125]

Because a "writ refused" opinion is as authoritative as a Texas Supreme Court opinion, it takes the supreme court to overrule it.[126] The Austin Court of Appeals correctly noted that any reexamination of an issue in a "refused" opinion lies solely within the province of the Texas Supreme Court.[127]

A 1993 decision by the San Antonio Court of Appeals provides a powerful example of the precedential effect of a "writ refused" case. The issue on appeal was whether the doctrine of forum non conveniens applies where a foreign corporation had a permit to conduct business in Texas. The court of appeals was constrained by a 1941 "writ ref'd" case that had held that foreign corporations having a permit to do business in Texas had a statutory right to sue another foreign corporation having a permit to do business in Texas. The court had no choice but to follow *Rouw*; it noted that the power to abrogate that decision was within the power of the Texas Supreme Court or the legislature.

Justice Peeples, in a concurring opinion, stated that "this panel has reluctantly followed a poorly reasoned but binding precedent." He explained, "I agree that *Rouw* cannot be honestly distinguished and it has the status of a 1941 opinion by the supreme court itself . . . Because this panel takes seriously its duty to follow binding precedent and is unwilling to engage in unabashed sophistry to avoid *Rouw*, we must reverse the forum non conveniens dismissal." Justice Peeples concluded, "This intermediate court is obligated to follow supreme court precedents, but the Texas Supreme Court is not so restricted. I urge the court to reexamine *Rouw* and disapprove it. The

---

125. *Id.* (citing Faulder v. Tex. Bd. of Pardons & Paroles, 990 S.W.2d 944 (Tex. App.—Austin 1999), *pet. ref'd with notation*, 42 Tex. Sup. Ct. J. 722 (June 10, 1999) (ruling that Texas law does not require board to meet as body to address request for clemency); Comdisco, Inc. v. Tarrant Cnty. Appraisal Dist. & Appraisal Rev. Bd. of Tarrant Cnty., 927 S.W.2d 325 (Tex. App.—Fort Worth 1996, writ ref'd) (holding that the Tax Code permits "appraisal review board to correct the appraisal roll for" an owner's clerical errors); Jones v. Nightingale, 900 S.W.2d 87 (Tex. App.—San Antonio 1995, writ ref'd) (stating that res judicata applies to voluntarily withdrawn claims when withdrawn with prejudice); Zuniga v. Groce, 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd) (holding an assignment of legal malpractice claim invalid); Conaway v. Lopez, 880 S.W.2d 448 (Tex. App.—Austin 1994, writ ref'd) (explaining that when a defendant's Monday appearance day is a legal holiday, Tex. R. Civ. P. 4 extends "the deadline to the end of the next day that is not a Saturday, Sunday, or legal holiday"); Milam v. Miller, 891 S.W.2d 1 (Tex. App.—Amarillo 1994, writ ref'd) (finding the answer timely filed under the mailbox rule); Danesh v. Hous. Health Clubs, Inc., 859 S.W.2d 535 (Tex. App.—Houston [1st Dist.] 1993, writ ref'd) (finding the petition timely filed under the mailbox rule); Soto v. First Gibralter Bank, FSB San Antonio, 868 S.W.2d 400 (Tex. App.— San Antonio 1993, writ ref'd) (ruling that a bank can "offset funds in a revocable, nontestamentary trust account against a debt the settlor-trustee owes" the bank); Bergenson v. Hartford Ins. Co. of the Midwest, 845 S.W.2d 374 (Tex. App.—Houston [1st Dist.] 1992, writ ref'd) (explaining that the insured could not "stack" underinsured motorist and liability provisions of policy); Styers v. Harris Cnty., 838 S.W.2d 955 (Tex. App.—Houston [14th Dist.] 1992, writ ref'd) (finding the statute of repose does not extend the two-year statute of limitations).

126. San Diego Indep. Sch. Dist. v. Cent. Educ. Agency, 704 S.W.2d 912, 915 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

127. *Id.*

legislature did not compel the result in *Rouw*, and if it remains the law in Texas, we will not be only the Courthouse for the world but the laughing stock of the legal world as well." The Texas Supreme Court later overruled *Rouw*.[128]

The Texas Supreme Court seemingly has shown a greater awareness of the meaning of the "ref'd" notation as it has progressively moved to discretionary jurisdiction. After the San Antonio Court of Appeals held that "an assignment of a legal malpractice action arising from litigation is invalid," the Texas Supreme Court refused the writ of error. Two years later, the Supreme Court discussed the *Zuniga* opinion as if it was a supreme court opinion; its lengthy discussion of the case was punctuated by such phrases as "we considered," "we observed," "we acknowledged," "we concluded," and "we held."[129] In other instances, the court has been more restrained when referring to a "refused" opinion, saying merely "the court of appeals held (and we agreed)" or noting in a footnote the court of appeals opinion "has the weight of our own precedent."[130]

"At other times, the Texas Supreme Court and the courts of appeals have not shown such a keen awareness of the meaning of a 'refused' notation."[131] The Texas Supreme Court once "refused" a case in a per curiam opinion after noting that the court of civil appeals' opinion had involved many questions, but only one question had been presented to the supreme court.[132] Because the court of civil appeals correctly stated the law on this one issue, the application was refused.[133] But refusing the writ should have meant that the court of civil appeals correctly stated the law in the entire opinion, not just the portion complained of in the application for writ of error.[134]

In a 1992 appeal, the Texas Supreme Court dismissed a petitioner's argument because it was merely supported by "a series of court of appeals opinions."[135] "The ten 'court of appeals opinions' included *Sherwood v. Medical & Surgical Group, Inc.* That case was not just another court of appeals opinion;" the application for a writ of error had been refused by the supreme court.[136]

The Dallas Court of Appeals did not follow a "writ refused" opinion because it thought the case was wrongly decided, and apparently didn't notice

---

128. Mark E. Steiner, *Not Fade Away: The Continuing Relevance of "Writ Refused" Opinions*, 12 APP. ADVOC. 3, 4–5 (Feb. 1999) (internal citations omitted).

129. *Id.* at 5 (internal citations omitted).

130. Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 698 (Tex. 2021) (citing San Antonio Conservation Soc'y v. City of San Antonio, 250 S.W.2d 259, 259 (Tex. App.—Austin 1952, writ ref'd)); Yancy v. United Surgical Partners Int'l, Inc., 236 S.W.3d 778, 786 n.6 (Tex. 2007).

131. Steiner, *supra* note 128, at 5.

132. Mims Bros. v. N.A. James, Inc., 141 Tex. 554, 175 S.W.2d 74, 74 (1943) (per curiam).

133. *Id.*

134. *Id.*

135. Keetch v. Kroger, 845 S.W.2d 262, 265 (Tex. 1992).

136. Steiner, *supra* note 128 (citing Sherwood v. Medical & Surgical Group, Inc., 334 S.W.2d 520, 520 (Tex. Civ. App.—Waco 1960, writ ref'd)).

that it was a "refused" case. The appellee UPG had argued in a cross-point that it was entitled to prejudgment interest compounded on a daily basis and cited *City of Houston v. Wolfe* for that proposition.[137]

The court of appeals stated that "UPG's reliance upon *Wolfe* is almost as misguided as is the *Wolfe* court's interpretation of *Cavnar*."[138] According to the Dallas court, the *Wolfe* court had contravened the language of *Cavnar* and had contravened the applicable statutes.[139] The Dallas court would not have anything to do with this misguided decision.[140]

Three years later, the Dallas Court of Appeals noticed its earlier mistake and overruled it.[141] It noted: "By designating the petition for writ of error 'Refused,' the supreme court adopted the court of appeals opinion as its own . . . .Thus, although we were free to criticize or distinguish *Wolfe*, we were not free to reject it any more than we could reject any opinion issued by the supreme court."[142]

The *Zuniga* case itself provides vivid examples of the courts of appeals not fully appreciating the significance of a "refused" notation.[143] For example, the Dallas Court of Appeals, one year after *Zuniga* was writ refused, stated: "Because we agree with . . . the reasoning set forth in *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App.—San Antonio 1994, writ ref'd), we hold that legal malpractice claims are not assignable."[144] The Dallas court overlooked the obvious: it did not matter whether it agreed with *Zuniga*'s reasoning, because it was bound to follow *Zuniga*.[145] *Zuniga* was not persuasive authority—it was binding.[146] The Fort Worth Court of Appeals similarly erred.[147] In discussing the survivability of a legal malpractice claim, the court stated that it "agree[s] with *Zuniga* in that a legal malpractice claim is not assignable; however, although a cause of action must survive to be assignable, not every action that survives is assignable."[148] Two cases from the Fourteenth Court of Appeals that explicitly noted *Zuniga*'s "refused" status also stated their "agreement" with its reasoning.[149] In *Izen,* the Fourteenth Court of Appeals said it had "adopted" the *Zuniga* holding in

---

137. *Id.* (citing OKC Corp. v. UPG, Inc., 798 S.W.2d 300, 308 (Tex. App.—Dallas 1990, writ denied)).

138. *Id.*

139. *Id.*

140. *See id.*

141. Spangler v. Jones, 861 S.W.2d 392, 399 n.3 (Tex. App.—Dallas 1993, writ denied) (en banc).

142. *Id.* (citations omitted).

143. *See* City of Garland v. Booth, 895 S.W.2d 766, 769 (Tex. App.—Dallas 1995, writ denied).

144. *Id.*

145. *See id.*

146. *See id.*

147. *See* Traver v. State Farm Mut. Auto. Ins. Co., 930 S.W.2d 862, 871 (Tex. App.—Fort Worth 1996), *rev'd on other grounds*, 980 S.W.2d 625, 625 (Tex. 1998).

148. *Id.* at 871.

149. Izen v. Nichols, 944 S.W.2d 683, 684 (Tex. App.—Houston [14th Dist.] 1997, no pet.); McLaughlin v. Martin, 940 S.W.2d 261, 262 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

McLaughlin.[150] The Fourteenth Court of Appeals did not "adopt" the holding in *Zuniga*; it was an opinion that the Fourteenth Court of Appeals was duty-bound to follow.[151] In all these cases, the courts followed *Zuniga*, but it is not immediately obvious that they realized they had to.[152]

An opinion from the First Court of Appeals provides the most embarrassing misunderstanding of an opinion's subsequent history. The court was considering the constitutionality of Houston's air-quality ordinance.[153] It cited a Fort Worth opinion, *Unger v. State*, to support the proposition that "when the Legislature gives an administrative agency extensive authority to regulate a given subject-matter, a municipal ordinance that establishes a parallel registration, licensing, and/or permitting program is not necessarily preempted."[154] The court then triumphantly noted that "*Unger* is 'writ refused' and has the same precedential value as a Texas Supreme Court opinion."[155] "Game over," thought the Court.

There was one problem. *Unger* was a criminal case and it was a petition for discretionary review—refused by the Court of Criminal Appeals.[156] While on its way to reversing the court of appeals decision, the Texas Supreme Court noted the court of appeals' reliance on *Unger*.[157] The court explained:

> The court of appeals mistakenly termed *Unger* a "writ refused" case and therefore incorrectly concluded that the case had the precedential value of a [Texas] Supreme Court case. *Unger* was not reviewed by this Court, as the court of appeals stated, but by the Court of Criminal Appeals. A refused petition by the Court of Criminal Appeals does not carry the same precedential weight as a writ or petition refused by this Court. *Compare* TEX. R. APP. P. 69.1 ("If four judges [of the Court of Criminal Appeals] do not vote to grant a petition for discretionary review, the . . . petition is refused."), with TEX. R. APP. P. 56.1(c) ("If the Supreme Court determines . . . that the Court of appeals' judgment is correct and that the legal principles announced in the opinion are likewise correct, the Court will refuse the petition[,] . . . [and] [t]he court of appeals' opinion . . . has the same precedential value as an opinion of the Supreme Court."); *see Sheffield v. State*, 650 S.W.2d 813, 814 (Tex. Crim. App.1983) (per curiam) (emphasizing "that the summary refusal of a petition for discretionary review by [the Court of Criminal Appeals] is of no

150. *Izen*, 944 S.W.2d at 684.

151. *See id.*

152. *See City of Garland*, 895 S.W.2d at 769; *Traver*, 930 S.W.2d at 871; *Izen*, 944 S.W.2d at 684; *McLaughlin*, 940 S.W.2d at 262.

153. *See* City of Hous. v. BCAA Appeal Group, Inc., 485 S.W.3d 444, 455–56 (Tex. App.—Houston [1st Dist.] 2013), *aff'd in part, rev'd in part*, 496 S.W.3d 1 (Tex. 2016).

154. *Id.* at 455.

155. *Id.*

156. Unger v. State, 629 S.W.2d 811, 812–13 (Tex. App.—Fort Worth 1982, pet. ref'd).

157. *See* BCCA Appeal Group, Inc., v. City of Hous., 496 S.W.3d 1, 19 (Tex. 2016).

> precedential value"). Thus*, Unger* does not dispose of this issue.[158]

In other cases, one of the parties did not understand what a "writ refused" meant.[159] The appellants in *Damian v. Bell Helicopter Textron* argued that the Fort Worth Court of Appeals was not precluded from holding that an equitably adopted child has standing to sue under the Wrongful Death Act because the Texas Supreme Court had not yet ruled on the issue.[160] There was a case directly on point—*Goss v. Franz*—that held that an equitably-adopted child was not entitled to sue for wrongful death.[161] The Fort Worth Court of Appeals explained the significance of the fifty-five-year-old writ notation:

> *Goss*, decided by the Amarillo Court of Appeals in 1956, is a "writ refused" case. "Writ refused" cases decided after 1927 have "'equal precedential value with the Texas Supreme Court's own opinions.'" Thus, by refusing the writ in *Goss*, the supreme court essentially addressed the very issue Appellants present in this appeal. Therefore, *Goss'*s holding that an equitably-adopted child may not bring a wrongful death claim is binding precedent that we as an intermediate appellate court are obligated to follow.[162]

A lawyer citing an opinion that was "refused" by the Texas Supreme Court probably should note what a "ref'd" notation means. Quoting the language from Rule 56.1 would explain that "the court of appeals' opinion in the case has the same precedential value as an opinion of the Supreme Court."[163] The Greenbook also has two handy appendices that explain the various meanings of the notations used on petitions for review and applications for writs of error.[164] A court overlooking the significance of a "refused" case is the fault of the party who cites the case.[165]

---

158. *Id.* (internal citations omitted).

159. Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124, 139 (Tex. App.—Fort Worth 2011, pet. denied).

160. *See id.*

161. Goss v. Franz, 287 S.W.2d 289, 290 (Tex. Civ. App.—Amarillo 1956, writ ref'd).

162. *Damian*, 352 S.W.3d at 139 (internal citations omitted).

163. TEX. R. APP. P. 56.1(c).

164. TEXAS RULES OF FORM: THE GREENBOOK apps. D, E (Tex. L. Rev. Ass'n., 14th ed. 2018). Courts have cited the *Greenbook*'s explanations of writ notations. *See, e.g.*, Ferreira v. Butler, 575 S.W.3d 331, 335 n.29 (Tex. 2019) (explaining the application of writs of error); Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 754 n.52 (Tex. 2006) (describing the application of refused); Hill v. Allstate Fire & Cas. Ins. Co., 652 S.W.3d 516, 523 (Tex. App.—Houston [14th dist.] 2022, no pet.) (Jewell, J., dissenting) (describing the application of no error); Estate of Gomez, No. 02-21-00290-CV, 2022 WL 2840109 (Tex. App.—Fort Worth July 21, 2022, no pet.) (describing the application of no petition).

165. *See* BCCA Appeal Group, Inc., v. City of Hous., 496 S.W.3d 1, 19 (Tex. 2016).

C. Refused N. R. E.

"'[N].r.e.' stands for 'no reversible error.'"[166] The "writ ref'd n.r.e." notation is the subject of an excellent law review article by former Texas Supreme Court Justice Ted Z. Robertson and professor James W. Paulsen.[167] Like the post-1927 "refused," the notation "refused n.r.e." also is a statement on the merits of the appeal and lends precedential weight to the court of appeals' opinion.[168] The Texas Supreme Court was to deny the writ of error application "Refused[,] No Reversible Error" in all cases "where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal . . . ."[169] Unfortunately, the significance of an "n.r.e." is seldom clear.[170] The Fifth Circuit has termed an "n.r.e." as an "often cryptic writ notation."[171]

Courts have recognized that "an 'n.r.e.' stamp is in every sense a decision on the merits of the appeal, and it can have great influence upon whether a court of appeals decision is later cited as authority and followed."[172] At the very least, the Texas Supreme Court found that no error was presented in the application for writ of error.[173] If the "n.r.e." notation means that no error was presented in the application, then the key to a case's precedential significance lies in the application.[174] Some courts have dug deep and studied the writ of error application filed in the Texas Supreme Court to decide whether a particular holding had been approved by the court with its "n.r.e." stamp.[175]

Several other notations are roughly similar to the "no reversible error" notation. The original "writ refused" meant that the Texas Supreme Court approved the result, but not necessarily the reasoning of the court of civil appeals.[176] The "writ refused, want of merit" case is not controlling authority.[177] A "w.o.m." notation meant the court was not satisfied that the opinion of the court of civil appeals in all respects correctly declared the law,

---

166. Ted Z. Robertson & James W. Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH L. REV. 1, 2 (1986).

167. *See id.*

168. *Id.* at 3.

169. El Paso Elec. Co v. Pub. Util. Comm'n of Tex., 727 S.W.2d 283, 287 (Tex. App.—Austin 1987, no writ).

170. Ted Z. Robertson & James W. Paulsen, *The Meaning (If Any) of an "N.R.E.,"* 48 TEX. BAR J. 1307, 1308 (Dec. 1985).

171. Helms v. Sw. Bell Tel. Co., 794 F.2d 188, 194 n.14 (5th Cir. 1986).

172. Wylie Indep. Sch. Dist. v. TMC Found., Inc., 770 S.W.2d 19, 22 (Tex. App.—Dallas 1989, writ dism'd).

173. Robertson & Paulsen, *supra* note 166, at 34–35.

174. *See Wylie Indep. Sch. Dist.*, 770 S.W.2d at 22.

175. *See id.*

176. *See* Robertson & Paulsen, *supra* note 166, at 10–11.

177. Tex. & Pac. Ry. v. Wood, 211 S.W.2d 321, 322 (Tex. Civ. App.—El Paso 1948, writ ref'd n.r.e.).

but the judgment of the court of civil appeals was correct.[178]

D. Denied

In 1988, the notation "denied" replaced "refused n.r.e."[179] The new notation accommodated the Texas Supreme Court's "recently acquired discretionary review powers."[180] New language about the "importance to the jurisprudence of the [s]tate" was added to Rule 133; this language signaled the addition of discretionary jurisdiction in the Texas Supreme Court.[181]

The Texas Supreme Court has indicated that "[t]he denial or dismissal of a petition does not give any indication of this Court's decision on the merits of the issue."[182] In another case, the supreme court noted that a denial of writ "is no indication that this court approved the opinion of the court of appeals."[183] The Amarillo Court of Appeals explained that "denying a petition for discretionary review carries no precedential weight. That is, the decision to forego such a review cannot be deemed as indicating that the Supreme Court approved of what the intermediate court did."[184] The San Antonio Court of Appeals noted that "the court's denial of an application for a writ of error does not necessarily reflect the court's approval or even its consideration of the merits of the case."[185] Nor does a "denied" notation change the precedential effect of an opinion from another court of appeals.[186]

Judges and lawyers continue to get this wrong. A dissenting judge argued that the Texas Supreme Court had "twice affirmatively declined to adopt" the inherent risk standard for sports injuries by denying review.[187] The majority opinion had to explain that that is not how it works: "The high court's denial of review does not give any indication as to its view regarding the merits of the issues decided by the courts of appeals. . . .Therefore, these denials of review do not constitute decisions in which the Texas Supreme Court has declined to adopt the inherent-risk doctrine."[188] In another appeal, the lawyers for Bell County argued that since an opinion from another court of appeals was "petition denied," it had "precedential value from the Texas

178. *Id.* at 322–23.

179. Elaine A. Carlson & Roland Garcia, Jr., *The New Discretionary Review Powers of the Texas Supreme Court*, 50 TEX. BAR J. 1201, 1201 (Dec. 1987).

180. *Id.*

181. Peterson v. Reyna, 920 S.W.2d 288, 288 (Tex. 1996) (citing TEX. R. APP. P. 133(a) (repealed)).

182. Loram Maint. of Way, Inc. v. Ianni, 210 S.W.3d 593, 596 (Tex. 2006).

183. Matthews Constr. Co. v. Rosen, 796 S.W.2d 692, 694 n.2 (Tex. 1990).

184. Jackson Walker, LLP v. Kinsel, 518 S.W.3d 1, 12 (Tex. App.—Amarillo 2015), *aff'd sub nom.* Kinsel v. Lindsey, 526 S.W.3d 411 (Tex. 2017).

185. Alamo Cmty. Coll. Dist. v. Obayashi Corp., 980 S.W.2d 745, 749 (Tex. App.—San Antonio 1998, pet. denied).

186. Lambert v. Affiliated Foods, Inc., 20 S.W.3d 1, 7–8 (Tex. App.—Amarillo 1999, no pet.).

187. Chrismon v. Brown, 246 S.W.3d 102, 119 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (Edelman, J., dissenting).

188. *Id.* at 112 n.11.

Supreme Court."[189] The court pointed out, "A case in which the Texas Supreme Court denies the petition for review does *not* have the force of Texas Supreme Court precedent."[190]

E. Getting the Right Notations

The key to using writ and petition notations is looking them up. Do not assume that the notation given in a brief or even in an opinion is correct.[191] There are several ways to get a case's writ or petition history. The easiest method used to be using the hardcopy *West's Subsequent History Tables*, but it has not been published since 2014.[192] To get subsequent histories since 2014, you must check online.[193]

An undependable method is to just rely on the histories given in court opinions.[194] Every year tens of thousands of cases are cited by appellate courts. Because of inevitable mistakes, a lawyer cannot depend on courts to obtain the correct writ or petition history for every case cited in their opinions. Mistakes in writ histories appear in both published and unpublished opinions.[195] I once found forty-seven "writ ref'd" notations given in opinions issued in one year; twelve of the notations were wrong.[196] Fortunately, the most common error is relatively harmless: courts giving "writ ref'd" notations to criminal "pet. ref'd" cases. Other errors could cause real problems for any lawyer or judge who did not double-check the notations. For example, courts have downgraded the status of cases from a binding "refused" to a non-binding "denied."[197] Do not assume the subsequent histories given in cases are correct.

---

189. D.M. v. Texas Dep't of Fam. & Protective Serv., No. 03-17-00137-CV, 2017 WL 2628949, 4 n.5 (Tex. App.—Austin June 13, 2017, no pet.).

190. *Id.*

191. *See infra* note 196 and accompanying text (discussing mistakes found in court opinions).

192. TEXAS SUBSEQUENT HISTORY TABLE (W. Publ'g Co., 2014).

193. TEXAS RULES OF FORM: THE GREENBOOK, *supra* note 164, at 106–13.

194. *See generally infra* note 196 and accompanying text (discussing the errors found in court opinions regarding "to writ" or petition history).

195. *See, e.g.*, Int'l Paper Co. v. Signature Indus. Servs., LLC, 628 S.W.3d 541, 577 n.14 (Tex. App.—Corpus Christi–Edinburg 2020), *aff'd in part, rev'd in part*, 638 S.W.3d 179 (Tex. 2022) (citing State v. Luby's Fuddruckers Rests., LLC, 531 S.W.3d 810 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.)) (cited as "pet. ref'd"). The appellant cited *State v. Luby's* correctly as "no pet." in its brief. Amended Brief of Appellant International Paper Co. at x, *Luby's Fuddruckers Rests., LLC*, 531 S.W.3d 810.

196. *See generally id.*; *infra* note 197 and accompanying text (discussing incorrect notations and opinions).

197. *See, e.g.*, Burton v. State Farm Mut. Auto. Ins. Co., 869 F. Supp. 480, 487 (S.D. Tex. 1994) (Bergensen v. Hartford Ins. Co., 845 S.W.2d 374 (Tex. App.—Houston [1st Dist.] 1992, writ ref'd) (cited as "writ denied").

F. Per Curiam Opinions on Applications and Petitions

Although the point of the Texas system of writ notations was to eliminate the need for the Texas Supreme Court to write opinions about cases that were not granted review, the court nonetheless has written opinions even when it did not grant review.[198] These opinions cannot be overlooked. These per curiam opinions may affect the precedential value of the court of appeals opinions.[199] The Texas Supreme Court has written four kinds of per curiam opinions on the application or petition: (1) opinions expressing disapproval of a specific holding in the court of appeals opinion; (2) opinions expressing approval of a particular portion of the opinion; (3) opinions that expressly do neither; and (4) opinions expressly reserving issues.[200]

On rare occasions, the Texas Supreme Court has expressly approved the holding of a court of appeals opinion without a "writ refused" notation.[201] In *City of Dallas v. Holcomb*, the court in a per curiam opinion "n.r.e.'d" the writ of error, but expressly approved the holding of the court of civil appeals that the trial court erred in refusing full cross-examination.[202] In another per curiam opinion refusing an application "no reversible error," the Texas Supreme Court approved the holding of the court of civil appeals on damages available to an employee where the employer wrongfully breached a contract of employment.[203] The court noted that it approved the holding "for the reasons stated by the Court of Civil Appeals in its opinion, although it is contrary to statements made" by other appellate courts (including the Texas Supreme Court itself).[204]

More frequently, the Texas Supreme Court has expressly disapproved either language or a specific holding in the court of appeals opinion while rejecting the application.[205] While still relatively rare, this was a

198. *See e.g.*, City of Dallas v. Holcomb, 383 S.W.2d 585, 586 (Tex. 1964) (refusing application for writ of error, despite the opinion being written, because of no reversible error); Dixie Glass, Inc. v. Pollak, 347 S.W.2d 596, 596 (Tex. 1961) (per curiam) (denying review because there was no reversible error, but the court still issued an opinion).

199. *See infra* text and accompanying notes 202–37 (discussing per curiam opinions and their impact on appellate courts).

200. *See infra* notes 202–37 (providing examples of different kinds of per curiam opinions).

201. *See Holcomb*, 383 S.W.2d at 586.

202. *Id.*

203. *Dixie Glass, Inc.*, 347 S.W.2d at 596 (per curiam).

204. *Id.*

205. *See, e.g.*, *In re* L.S.R., 92 S.W.3d 529, 530 (Tex. 2002) (per curiam); Judwin Props., Inc. v. Griggs & Harrison, 11 S.W.3d 188, 188–89 (Tex. 2000) (per curiam); Peña v. Peña, 8 S.W.3d 639, 639 (Tex. 1999) (per curiam); Runnels v. Firestone, 760 S.W.2d 240, 240 (Tex. 1998) (per curiam); Cent. Power & Light v. Sharp, 960 S.W.2d 617, 618 (Tex. 1997) (per curiam); Lester v. Logan, 907 S.W.2d 452, 452 (Tex. 1995) (per curiam); Hagler v. Procter & Gamble Mfg Co., 884 S.W.2d 771, 772 (Tex. 1994) (per curiam); Schafer v. Conner, 813 S.W.2d 154, 155 (Tex. 1991) (per curiam); Pecos Dev. Corp. v. Hydrocarbon Horizons, Inc., 803 S.W.2d 266, 267 (Tex. 1991) (per curiam); Pleasant Homes, Inc. v. Allied Bank of Dall., 776 S.W.2d 153, 154 (Tex. 1989) (per curiam); Inpetco, Inc. v. Tex. Am. Bank, 729

long-standing practice.[206] In one notable instance, the court stated that it approved the judgment entered by the court of civil appeals, but was not satisfied that the court's opinion had correctly declared the law.[207] It then explained:

> Normally that conclusion would call for no other action on our part than the stamping of the application for writ of error, "Refused. No Reversible Error". . . . But some of the general holdings of the Court of Civil Appeals, express and implied, which we regard as erroneous are so far-reaching that we deem it wise to disapprove them specifically lest they be regarded by lawyers, trial judges and judges of the Courts of Civil Appeals as having our tacit approval.[208]

The supreme court then delineated four errors made by the court of civil appeals about either the preservation of complaints for erroneously admitted evidence or the harmless error rule.[209]

The court once disapproved of a single sentence in an opinion where the court of appeals suggested that a Texas Supreme Court decision had "gone a step further than some jurisdictions."[210] In another example, the Texas Supreme Court disapproved the court of appeals' pronouncements about Texas Rule of Evidence 704, but denied the application because the court of appeals' judgment could be sustained under another point.[211] In another case, the court denied review of a legal malpractice case where a law firm had been sued for negligently disclosing a former client's confidential information in the law firm's suit to collect its fee.[212] In denying review, the court disapproved of language that Texas Rule of Evidence 503 (d)(3) (which provides an exception to the attorney-client privilege where there is a "[b]reach of [d]uty [b]y a [l]awyer or [c]lient") conclusively disproved the duty element of the former client's claim.[213] In another case, the court disapproved of language in an opinion that suggested that an oral motion to strike was not presented during a "hearing" under Texas Rule of Civil Procedure 21.[214] Sometimes, the court believed it was necessary to note that

---

S.W.2d 300, 300 (Tex. 1987) (per curiam) (demonstrating examples where an application for writ has been denied, but the court has addressed specific language or a holding).

206. Capps v. Deegan, 50 S.W. 1117, 1117 (Tex. 1899); Wallace v. First Nat'l Bank, 65 S.W. 180 (Tex. 1901); St. Louis Sw. Ry. v. Pruitt, 80 S.W. 72, 72 (Tex. 1904).

207. Bridges v. City of Richardson, 354 S.W.2d 366, 367 (Tex. 1962).

208. *Id.*

209. *Id.* at 367–68.

210. Am. Chrome & Chems., Inc. v. Benavides, 907 S.W.2d 516, 517 (Tex. 1995) (per curiam).

211. Louder v. De Leon, 754 S.W.2d 148, 149 (Tex. 1988) (per curiam).

212. Judwin Props., Inc. v. Griggs & Harrison, 11 S.W.3d 188, 188–89 (Tex. 2000) (per curiam).

213. *Id.*

214. Palo Pinto Cnty. v. Lee, 988 S. W.2d 739, 739 (Tex. 1998) (per curiam).

its refusal of the writ did not mean that it approved the opinion.[215] This practice may have ended. I have been unable to find any of these per curiam opinions disapproving specific language or portions of the court of appeals opinions since 2002.[216]

The Texas Supreme Court also has issued per curiam opinions in which the court says that it neither approves nor disapproves of the court of appeals opinion when it denies the application or petition.[217] This practice apparently began in the 1960s and peaked in the 1990s.[218] Except for a handful of these opinions about a provision in the Family Code that appeared in 2008, these "neither approves nor disapproves" per curiam opinions denying petitions for review have disappeared.[219]

At first glance, these "neither approves nor disapproves" opinions would appear to be pointless and would add nothing to the precedential weight of the case. Some judges, however, apparently believe that the "neither approve nor disapprove" language means something.[220] Justice Patricia Richman Owen, in a dissent joined by Justice Hecht, once stated that the "precedential value" of a court of appeals case was "in doubt" because the Texas Supreme Court had "denied the school district's motion for rehearing in that case in a per curiam opinion, noting that [it] neither approve[d] nor disapprove[d] of the court of appeals' opinion."[221] Justice Owen did not explain why the precedential value of the case was in doubt.[222]

One court of appeals seemed to criticize a party because it cited a case yet failed to mention that the Texas Supreme Court had said that it neither liked nor disliked that opinion when it denied review.[223] That court also seemed to suggest that when the Texas Supreme Court goes to the trouble of

---

215. Com. Standard Ins. Co. v. YMCA of Metro. Ft. Worth, 563 S.W.2d 246, 247 (Tex. 1978) (per curiam) ("Our action should not be interpreted, however, as approving the opinion of the court of civil appeals on motion for rehearing in which it stated that neither the covenant not to execute nor stipulations concerning it were binding on the minor, Johnny Howle. These issues were not urged upon the court by any party and cannot support its judgment."); Chick v. Cravens, 531 S.W.2d 319, 319 (Tex. 1975) (per curiam) ("In taking such action, we do not necessarily approve the holding that the testamentary nature of the codicil to the will was a question of fact.").

216. *In re* L.S.R., 92 S.W.3d 529, 530 (Tex. 2002) (per curiam).

217. *See, e.g.*, Am. Honda Motor Co. v. Dupriest Auto., Inc., 10 S.W.3d 673, 673 (Tex. 2000) (per curiam); Catterson v. Martin, 2 S.W.3d 249, 249 (Tex. 1999) (per curiam); Klein Indep. Sch. Dist. v. Lett, 978 S.W.2d 120, 120 (Tex. 1998) (per curiam); State Bar of Tex. v. Leighton, 964 S.W.2d 944, 944 (Tex. 1998) (per curiam) (demonstrating the Court's denial of application but failure to take a stance on the court of appeals' opinion).

218. *See, e.g.*, Campbell v. Campbell, 445 S.W.2d 513 (Tex. 1969) (per curiam) (providing an example of an opinion that participated in the early days of this practice).

219. *In re* G.B., 264 S.W.3d 742 (Tex. 2008) (per curiam); *In re* D.W., 260 S.W.3d 462 (Tex. 2008) (per curiam); *In re* K.W., 260 S.W.3d 462 (Tex. 2008) (per curiam); *In re* J.J., 260 S.W.3d 461 (Tex. 2008) (per curiam); *In re* S.K.A., 260 S.W.3d 463 (Tex. 2008) (per curiam).

220. City of Garland v. Dall. Morning News, 22 S.W.3d 351, 377 (Tex. 2000) (Owen, J., dissenting).

221. *Id.*

222. *See id.*

223. Henderson v. Cent. Power & Light Co., 977 S.W.2d 439, 444 (Tex. App.—Corpus Christi–Edinburg 1998, pet. denied).

saying that it neither approves nor disapproves of the court of appeals opinion, it is suggesting that it really disapproves.[224]

Perhaps this cryptic language did mean something. In April 1999, the Texas Supreme Court issued a per curiam opinion denying a petition for review in a nonsubscriber case.[225] At that time, opinions from the courts of appeals in Amarillo and Tyler conflicted over whether comparative negligence was an element of a nonsubscriber lawsuit.[226] The court in its opinion stated that it "neither approve[d] nor disapprove[d] [of the Amarillo court's] dictum that 'comparative negligence [was] an element.'"[227] One year later, the court affirmed the Tyler court's view that comparative negligence was not an element of a nonsubscriber case.[228] The "neither approve nor disapprove" language in the per curiam opinion may have been intended to suggest tacit disapproval.[229] In other per curiam opinions, the court has said it is not expressing an opinion or is expressly reserving a question.[230]

While per curiam opinions that expressly approve or disapprove court of appeals opinions affect precedential weight, opinions that merely reserve questions do not.[231] The Austin Court of Appeals rejected the argument that its earlier holding was not controlling because the Texas Supreme Court expressly had reserved the question when it noted "no reversible error."[232] The "n.r.e." notation still meant that the supreme court neither approved nor disapproved of the holding; the reservation "only points to the part of our opinion which remained open to question in the supreme court's view."[233] In a footnote, the court of appeals addressed this:

> "Reserving" the question only causes the parties to argue the effect of that reservation and to waste time speculating about what the [Texas] Supreme Court might hold were it forced to write an opinion on the issue. The effect of the notation on the writ is unchanged by such a practice.[234]

---

224. *Id.*
225. Byrd v. Cent. Freight Lines, 992 S.W.2d 447, 448 (Tex. 1999) (per curiam).
226. *See id.*; Kroger Co. v. Keng, 23 S.W.3d 347, 347 (Tex. 2000).
227. *Byrd*, 992 S.W.2d at 488.
228. *Kroger Co.*, 23 S.W.3d at 352.
229. *See id.*
230. *See, e.g.*, Engelman Irrigation Dist. v. Shields Bros., 989 S.W.2d 360, 360 (Tex. 1998) (per curiam) (denying the petition and refusing to express an opinion).
231. El Paso Elec. Co. v. Public Util. Comm'n, 727 S. W.2d 283, 287 (Tex. App.—Austin 1987, no writ).
232. *Id.*
233. *Id.*
234. *Id.* at 287 n.6.

IV. PRECEDENTIAL AUTHORITY OF LOWER TEXAS COURTS

A. Texas Commission of Appeals

The Texas Commission of Appeals existed from 1918 until 1945 to assist the then three-judge Texas Supreme Court with its docket.[235] The court could (1) adopt the commission's opinion, (2) approve the holding, or (3) approve the judgment.[236] The precedential authority of a commission of appeals opinion depends upon which action the court took.[237] Commission opinions adopted by the court are given the same force, weight, and effect as Texas Supreme Court opinions.[238] If the court approved the holding or adopted the judgment, the precedential value is limited.[239] The court has explained the following:

> There are, however, a great many opinions of the commission which appear in the Southwestern Reporter that were not adopted or approved by the Supreme Court. These opinions are not binding on the court in the same sense that the approved and adopted opinions are, but they are given great weight by us, and the courts of civil appeals and all lower courts should feel constrained to follow them, until they are overruled by the Supreme Court. Of course, where an unapproved opinion of the commission is in conflict with an opinion of the Supreme Court, or with an approved or adopted opinion of the commission, the unapproved opinion of the commission should yield to the opinion of the court, or to the approved or adopted opinion of the commission, as the case may be.[240]

On occasion, the Texas Supreme Court also has adopted opinions from the courts of appeals while affirming the judgment of those courts.[241]

B. Panel Decisions

In 2022, the Texas Supreme Court formalized horizontal stare decisis for three-judge panels in the courts of appeals: "[T]hree-judge panels must follow materially indistinguishable decisions of earlier panels of the same

---

235. Catherine K. Harris, *A Chronology of Appellate Courts in Texas*, 67 TEX. B.J. 668, 671 (2004); *Nine-Judge Court Amendment to be Voted on August 25*, 8 TEX. B.J. 329, 329 (1945).

236. *Nine-Judge Court Amendment to be Voted on August 25*, supra note 235.

237. Graves v. Diehl, 958 S.W.2d 468, 471 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

238. Jordan v. Parker, 659 S.W.3d 680, 685 n.20 (Tex. 2022); City of Blue Mound v. Sw. Water Co., 449 S.W.3d 678, 687 n.7 (Tex. App.—Fort Worth 2014, no pet.); Ayeni v. State, 440 S.W.3d 707, 713 n.3 (Tex. App.—Austin 2013, no. pet.).

239. *Graves*, 958 S.W.2d at 471.

240. Nat'l Bank of Com. v. Williams, 84 S.W.2d 691, 692 (Tex. 1935).

241. *See, e.g.*, Valmont Plantations v. State, 355 S.W.2d 502, 503 (Tex. 1962) (adopting the opinion of Court of Civil Appeals). There, the Texas Supreme Court noted that "[t]he opinion of Mr. Justice Pope of the Court of Civil Appeals is exhaustive and well documented." *Id.*

court unless a higher authority has superseded that prior decision."[242] The type of higher authority that would supersede a prior panel decision would include decisions from the U.S. Supreme Court, the Texas Supreme Court, the Court of Criminal Appeals, an en banc decision of the court of appeals itself, or an intervening and material statutory or constitutional change.[243] The 2022 decision arose from an appeal originally filed with the Austin Court of Appeals and subsequently transferred to the Amarillo Court of Appeals.[244] A question arose about whether a motion for new trial filed under the wrong cause number extended the appellate deadline.[245] Because this was a transferred case, the Amarillo Court of Appeals was bound to follow the Austin Court of Appeals' precedent.[246] There it ran into a problem: earlier cases from the Austin Court of Appeals excused such an error, while more recent cases held that the mistake was fatal.[247] The Amarillo Court of Appeals, while noting that its own precedent would have permitted the appeal, held that the appeal was untimely because the motion for new trial did not extend the appellate timetable, assuming that the Austin Court of Appeals would follow its more recent precedent.[248] The Texas Supreme Court held that the Austin Court of Appeals was bound by its earlier panel decisions as they had not been overruled by the court en banc.[249]

The Texas Supreme Court noted that the requirement of horizontal stare decisis that it was formalizing was "hardly novel."[250] Most courts of appeals already had accepted the principle that subsequent panels of a particular court of appeals are bound by an earlier panel decision unless that earlier panel decision is overturned en banc.[251] An oft-quoted proposition was that "[a]bsent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding

242. Mitschke v. Borromeo, 645 S.W.3d 251, 256 (Tex. 2022).

243. *Id.* at 256–57.

244. *Id.* at 254.

245. *See id.* at 254–55.

246. TEX. R. APP. P. 41.3.

247. *Mitchske*, 645 S.W.3d at 255.

248. *Id.*

249. *See id.* at 258. If the Austin Court of Appeals had consisted of three judges only, the later cases would control. *See generally* Moss v. Gibbs, 370 SW 2d 452, 458 (Tex. 1963) (stating that later cases ordinarily modify earlier holdings when there is conflict between the two); Serv. Mut. Ins. Co. of Tex. v. Blain, 168 S.W.2d 854, 858 (Tex. 1943) (stating that a more recent opinion has the effect of overruling statements made before).

250. *Mitschke*, 645 S.W.3d 251 at 256.

251. *See, e.g.*, *In re* Estrada, 492 S.W.3d 42, 48 (Tex. App.—Corpus Christi–Edinburg 2016) (no pet.); Taylor v. First Cmty. Credit Union, 316 S.W.3d 863, 869 (Tex. App.—Houston [14th Dist.] 2010, no pet.); MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. of N. Tex., L.P., 260 S.W.3d 561, 566 (Tex. App.—Dallas 2008, no pet.) (providing examples of courts of appeals accepting that particular courts would be bound by earlier panel decisions unless overturned en banc).

of another panel of this court."[252] The Texas Supreme Court has explained the rationale for doing so:

> If one appellate panel decides a case, and another panel of the same court differently resolves a materially indistinguishable question in contravention of a holding in the prior decision, the second panel has violated the foundational rule of *stare decisis*. Affording *stare decisis* authority to the second case would be tantamount to eliminating *stare decisis* altogether, as nothing would stop a third panel from returning to the initial outcome, or going yet another way. For our legal system, the result would not be order and stability, but chaos and unpredictability. Every day would be a new day in the life of the law; every case would present an opportunity to refashion settled principles and a temptation both for parties and courts to disregard disliked precedent. The very concept of "settled principles" would eventually be eroded.[253]

The court has stated: "Unless a court of appeals chooses to hear a case en banc, the decision of a panel constitutes the decision of the whole court."[254] The court has counseled that "[a] court of appeals sitting en banc does not need to accord deference to a panel opinion. If the en banc court is considering the validity of an en banc precedent, however, it should exercise the same caution that this Court exercises before overruling one of its own precedents . . . ."[255]

The problem of panel precedent is faced by nine of the current fourteen courts of appeals.[256] These courts have more than three judges and, consequently, sit as three-judge panels.[257] The newly established Fifteenth Court of Appeals initially will have three justices; however, it will expand to five justices in September 2027.[258]

C. Decisions of Coordinate Courts

The opinion of one court of appeals does not bind the other courts of appeals.[259] The Dallas Court of Appeals noted that "[a]lthough [it] look[s] to decisions of the lower federal courts and other state courts, only decisions of

---

252. Medina v. Tate, 438 S.W.3d 583, 588 (Tex. App.—Houston [1st Dist.] 2013, no. pet.) (quoting *Taylor*, 316 S.W.3d at 869).

253. *Mitschke*, 645 S.W.3d at 257–58 (emphasis in original).

254. O'Connor v. First Ct. of Appeals, 837 S.W.2d 94, 96 (Tex. 1992).

255. *Mitschke*, 645 S.W.3d at 263 n.22.

256. *See generally* TEX. GOV'T CODE § 22.216 (listing the make-up of each of the fifteen courts of appeals in Texas).

257. TEX. GOV'T CODE §§ 22.216, 22.222.

258. TEX. GOV'T CODE § 22.216 (n-1)–(n-2). The Texas Supreme Court has upheld the constitutionality of the legislation creating the new state-wide court. In re Dallas Ctny, 67 Tex. Sup. Ct. J. 1535 (Aug. 23, 2024) (orig. proceeding).

259. *Ex parte* Fairchild-Porche, 638 S.W.3d 770, 791 (Tex. App.—Houston [14th Dist.] 2021, no pet.); Johnson v. Simmons, 597 S.W.3d 538, 545 (Tex. App.—Fort Worth 2020, pet. denied).

the United States Supreme Court, the Texas Supreme Court, and prior decisions of [its own court] are binding precedent."[260] "[T]he decisions of sister [courts of appeals] may be persuasive but are not binding" on other courts of appeals.[261] "[T]he various [c]ourts of [a]ppeals are free to differ among themselves on a question of law that remains undecided" by the Texas high courts.[262]

In twelve of fourteen intermediate court of appeals districts, following binding precedent is a relatively easy task for the bench and bar.[263] The lawyers and trial judge involved in a lawsuit filed in a civil district court in, say, Dallas County, know that the Dallas Court of Appeals and the Texas Supreme Court could review what happens in that case and, under horizontal stare decisis, they are bound by precedent from those two courts.[264] But judges and lawyers in ten counties face some "vexing problems inherent in the unique jurisdictional scheme governing Texas's intermediate [courts of appeals]."[265] Appeals from those ten counties could end up in either the First or Fourteenth Court of Appeals.[266] Somehow, Texas is "the only court system in the United States that has intermediate appellate courts whose geographical jurisdiction overlaps."[267] If a split of authority exists between these two courts, luck determines the outcome on appeal.[268] Justice Kem Thompson Frost has described the lamentable consequences of this jurisdictional anomaly:

> As long as a conflict persists between these two appellate courts, serious and recurring problems abound for trial courts in the ten counties within the geographical jurisdiction of these courts, as well as for the lawyers and parties who litigate in this region. The most troubling consequence of Texas's peculiar jurisdictional regime is the difficult burden it places on litigants and their lawyers who, at times, must make important and costly litigation or settlement decisions on pending cases in which the outcome

---

260. Roe v. Ladymon, 318 S.W.3d 502, 510 n.5 (Tex. App.—Dallas 2010, no pet.). *See* Lambert v. Affiliated Foods, 20 S.W.3d 1, 8 (Tex. App.—Amarillo 1999, no pet.) (op. on reh'g); Malone v. Foster, 956 S.W.2d 573, 582 (Tex. App.—Dallas 1997), *aff'd*, 977 S.W.2d 562 (Tex. 1998); Eubanks v. Mullin, 909 S.W.2d 574, 576 n.1 (Tex. App.—Fort Worth 1995, no writ) (stating that courts are not bound by the decisions of their sister courts—only those of higher courts).

261. Dowell v. Quiroz, 462 S.W.3d 578, 585 n.6 (Tex. App.—Corpus Christi–Edinburgh 2015, no pet.).

262. Barstow v. State, 742 S.W.2d 495, 501 n.2 (Tex. App.—Austin 1987, writ denied).

263. *See generally* Tucker v. Thomas, 405 S.W.3d 694, 716 (Tex. App.—Houston [14th Dist.] 2011), *rev'd in part*, 419 S.W.3d 292 (Tex. 2013) (Frost, J., concurring) (discussing the jurisdiction of the First and Fourteenth Courts of Appeals in Houston).

264. Mitschke v. Borromeo, 645 S.W.3d 251, 256 (Tex. 2022).

265. *Tucker*, 405 S.W.3d at 716 (Frost, J., concurring).

266. TEX. GOV'T CODE §§ 22.201 (b), (o). The ten counties are Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington. *Id.*

267. *Tucker*, 405 S.W.3d at 716.

268. TEX. GOV'T CODE § 22.202 (h). Random assignment by the clerk of the trial court determines which appellate court has jurisdiction. *Id.*

> likely will turn entirely on the appellate court to which the appeal is randomly assigned. Rather than make decisions based on an evaluation of the strength of the case, litigants caught in split-of-authority cases must proceed blindly with the hope that their case will randomly fall in the court that has the more favorable rule.

The trial judges face a similar dilemma. In cases involving an issue upon which there is an unresolved disagreement between the Houston-based courts of appeals, there is no apparent basis for determining which precedent is binding on the trial court under the doctrine of vertical stare decisis. Despite at least two prior opinions from the courts of appeals in whose district the trial court sits, the trial court has no mandatory precedent to apply and no clear basis for determining which of the two conflicting rules to follow. The trial judge's ruling will be held to be correct or incorrect based on which court of appeals is called upon to review the case, a critically important fact not known to the trial judge or the litigants until after the decisions are made. If the trial judge guesses wrong and the court of appeals to which the case is assigned determines that the error was harmful, then the trial court will be reversed, and the case may be remanded for retrial. When the two courts with coterminous jurisdiction are on opposite sides of an issue, parties, counsel, and trial judges are forced to play appellate roulette.[269]

This problem is exacerbated by the sheer number of splits of authority by these two courts of appeals.[270] The only solution would be to consolidate the two courts of appeals, which would allow conflicts to be resolved by the en banc process.[271]

D. Transferred Appeals

Because the courts of appeals have unequal caseloads, the Texas Supreme Court uses its authority to transfer cases to equalize the dockets.[272] Once cases started being transferred, the question arose: which precedent would the court of appeals now hearing the case follow—its own, or that of

---

269. *Tucker*, 405 S.W.3d at 716–17 (Frost, J., concurring).

270. *Compare, e.g.*, City of Houston v. Mejia, 606 S.W.3d 901 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (denying the city's affirmative defense of immunity in a case involving collisions with police vehicles) *with* Lara v. City of Hempstead, No. 01-15-00987-CV, 2016 WL 3964794 (Tex. App.—Houston [1st Dist.] July 21, 2016, pet. denied) (granting the city's plea to the jurisdiction confirming government immunity in a case about collision with police vehicles). Justice Frost noted in her dissent in *City of Houston v. Mejia* that "the majority's effort to distinguish these [First Court of Appeals] cases is not convincing, and today's opinion creates a split of authority among the courts of appeals and a conflict between the two Houston-based courts of appeals, which have the same ten-county jurisdiction." *Mejia*, 606 S.W.3d at 912 (Frost, J., dissenting). For further examples of conflicts between the Houston courts of appeals, see Yvonne Y. Ho et al., *Percolating Conflicts Among the Texas Appellate Courts: Challenges for Trial Advocacy*, STATE BAR OF TEX., ADV. CIV. TRIAL COURSE Ch. 21 (July 21, 2017).

271. *Tucker*, 405 S.W.3d at 718 (Frost, J., concurring).

272. Miles v. Ford Motor Co., 914 S.W.2d 135, 137 (Tex. 1995) (per curiam).

the transferor court?[273] After some years of conflicting approaches by the courts of appeals, the issue was settled by rule.[274] Texas Rule of Appellate Procedure 41.3 states:

> In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. The court's opinion may state whether the outcome would have been different had the transferee court not been required to decide the case in accordance with the transferor court's precedent.[275]

The comment to this 2008 rule change says that "[t]he rule requires the transferee court to 'stand in the shoes' of the transferor court so that an appellate transfer will not produce a different outcome, based on application of substantive law, than would have resulted had the case not been transferred."[276] In 2018, the Texas Supreme Court further clarified how the transferee court should approach the precedent of the transferor court.[277]

In an appeal transferred from Austin to El Paso, the El Paso Court of Appeals noted that the Austin Court of Appeals' interpretation of particular statutory language bound the El Paso court: "Whether we agree with that proposition or not, it is precedent of the transferor court that binds us, the transferee court . . . ."[278] However, while the appeal was pending before the El Paso Court of Appeals, the Austin Court of Appeals issued another opinion that should have controlled the outcome in the El Paso appeal.[279] The El Paso Court of Appeals did not consider the Austin Court of Appeals' opinion to be binding precedent because a motion for rehearing was still pending.[280] While noting that the conclusion of the El Paso Court of Appeals did not affect the outcome of the case, the Texas Supreme Court nonetheless pointed out that a pending motion for rehearing "does not change the status of [an

---

273. *See id.* at 138 (providing the case's challenge to the doctrine of dominant jurisdiction).

274. *See* Lisa Hobbs, *Transferred Appeals: How Did I Get Here? What Law Applies? And Can I Please Go Back Home?*, STATE BAR OF TEX., ADV. CIV. APP. PRAC. COURSE Ch. 21 (2008). For a survey of the problems with precedent and transferred appeals before the rule change, see Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger* Stare Decisis, 37 ST. MARY'S L.J. 417, 457–65 (2006).

275. TEX. R. APP. P. 41.3.

276. TEX. R. APP. P. 41.3 cmt. to 2008 change. *See* Caddell v. Caddell, 597 S.W.3d 10, 12 n.1 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (quoting the text of the rule).

277. *See* Mitschke v. Borromeo, 645 S.W.3d 251, 254–58 (Tex. 2022).

278. Brazos Elec. Power Coop., Inc. v. Tex. Comm'n on Env't Quality, 538 S.W.3d 666, 688 n.15 (Tex. App.—El Paso 2017), *rev'd*, 576 S.W. 3d 374 (Tex. 2019).

279. *Id.* at 710 (Palafox, J., dissenting).

280. *Id.* at 688 n.14.

opinion] as binding precedent."[281]

The new Fifteenth Court of Appeals will present a new wrinkle in precedent in transferred cases.[282] This court will handle appeals from across the state involving "matters brought by or against the state or a board, commission, department, office, or other agency in the executive branch" and matters brought by or against officers and employees of those entities (with many exceptions).[283] The court also will have exclusive jurisdiction of appeals from the new business courts.[284]

While the bill creating the Fifteenth Court of Appeals does not state any legislative findings or a purpose behind the court's establishment, the House Bill Analysis asserts that the existing courts of appeals have "varying levels of experience with the complex legal issues involved in cases of statewide significance, resulting in inconsistent results for litigants."[285] State Senator Joan Huffman, the sponsor of the bill, argued that the court will allow its judges "to apply specialized precedent in subject areas important to the entire state."[286] Critics charge that the new court's purpose is to wrest jurisdiction from Democratically-controlled courts of appeals, particularly the Austin Court of Appeals.[287]

While no case or proceeding filed in the new court can be transferred to another court of appeals for docket equalization purposes, other appeals will be transferred to and from the Fifteenth Court of Appeals.[288] Moreover, "[o]n September 1, 2024, all cases pending in other courts of appeal[s] that were filed on or after September 1, 2023, and of which [the Fifteenth Court of Appeals] has exclusive intermediate appellate jurisdiction" will be transferred to the Fifteenth Court of Appeals.[289]

As currently written, Texas Rule of Appellate Procedure 41.3 would require the Fifteenth Court of Appeals to "decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the

---

281. *Brazos Elec. Power Coop., Inc.*, 576 S.W. 3d at 383 n.6 (quoting United States v. Espinosa, 327 F. App'x 848, 850 (11th Cir. 2009).

282. TEX. GOV'T CODE § 22.220(d).

283. *Id.*

284. TEX. GOV'T CODE § 25A.007.

285. Bill Analysis Tex., S.B. 1045, Senate Research Center, 88th Leg., R.S. (2023). *See* Bill Analysis C.S.S.B. 1045, House Judiciary & Civil Jurisprudence Committee Report, 88th Leg., R.S. (2023).

286. Zach Despart, *Bills to Create New Texas Courts Would Likely Reverse Democratic Gains, Restore GOP Dominance*, TEX. TRIB. (Apr. 19, 2023, 5:00 AM), https://www.texastribune.org/2023/04/19/legislature-create-courts-republican-bills/.

287. Reese Oxner, *The Texas Senate Has Approved a New Statewide Appeals Court. Critics Contend It's Another Attempt to Limit Democrats' Power*, TEX. TRIB. (Apr. 14, 2021, 3:00 PM), https://www.texastribune.org/2021/04/14/texas-appeals-court-statewide-senate/ (discussing a similar predecessor bill); Despart, *supra* note 286.

288. TEX. GOV'T CODE §§ 73.001(b), (c).

289. Court of Appeals for the Fifteenth Court of Appeals, 88th Leg., R.S., ch. 459 § 1.15(b), 2023 Tex. Sess. Law Serv. (S.B. 1045).

precedent of the transferor court."[290] The Texas Supreme Court was charged by the Legislature to adopt rules about transferring cases to and from the Fifteenth Court of Appeals.[291] Chief Justice Hecht referred the matter to the Texas Supreme Court Advisory Committee (SCAC) on June 23, 2023.[292] The Fifteenth Court of Appeals subcommittee submitted its report on October 2, 2023.[293] It mentioned the issue of transferor precedent only in the context of appeals transferred on September 1, 2024, where an opinion had been issued but the rehearing was still pending.[294] It asked: "In reconsidering the opinion, should the Fifteenth Court of Appeals apply the precedent of the transferor court or develop its own precedent?"[295] It did not suggest an answer.[296] The SCAC discussed the subcommittee report during its October 13, 2023, meeting; however, it did not address the issue of transferor precedent.[297]

E. Precedent and Publication

In civil appeals, the Texas courts of appeals no longer have "published," which are precedential, and "unpublished" opinions, which are not precedential.[298] Texas Rule of Appellate Procedure 47.7 establishes standards for designating opinions in civil cases as either an "opinion" or a "memorandum opinion," both of which are precedential.[299] The default designation is a memorandum opinion.[300]

An opinion must be designated a memorandum opinion unless it does any of the following:

> (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

---

290. TEX. R. APP. P. 41.3.

291. The Honorable Nathan Hecht to Charles L. "Chip" Babcock, Referral of Rules Issues, at 3 (June 23, 2023), *available at* https://scac.jw.com/wp-content/uploads/2023/06/36453016_1_2023-06-03-SCAC-Referral.pdf.

292. *Id.*

293. *Memorandum on Proposed Amendments to the TRAP Rules for the Fifteenth Court of Appeals (SB 1045) and June 3, 2023, Referral Letter, Fifteenth Court of Appeals Subcommittee* (Oct. 2, 2023), 47–50, https://scac.jw.com/wp-content/uploads/2023/11/SCAC-Meeting-Materials-Oct.-13-2023.pdf [hereinafter *Memorandum on Proposed Amendments*].

294. *Id.* at 49.

295. *Id.*

296. *Id.*

297. M*eeting of the Supreme Court Advisory Committee (Friday Session)*, SUP. CT. ADVISORY COMM. (Oct. 13, 2023), https://scac.jw.com/wp-content/uploads/2023/11/scac23-10-13.pdf.

298. Oddly, the Court of Criminal Appeals still issues unpublished opinions. TEX. R. APP. P. 77.2. These unpublished opinions "have no precedential value and must not be cited as authority by counsel or by a court." TEX. R. APP. P. 77.3. Courts can cite an unpublished opinion of the Court of Criminal Appeals to show the procedural history of the case. *Ex parte* Fairchild-Porche, 638 S.W.3d 770, 791 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

299. TEX. R. APP. P. 47.7(b).

300. TEX. R. APP. P. 47.3, 2008 cmt.

> (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
> (c) criticizes existing law; or
> (d) resolves an apparent conflict of authority.[301]

All opinions must be made available "to the public and must be made available to public reporting services, print or electronic."[302] The comment to the 2008 change to Rule 47 says, "[a]ll opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value."[303]

Before 2003, opinions in civil cases were designated "published" or "do not publish."[304] These opinions were not to be cited.[305] When the "do not publish" designation ended in 2003, the comment to the rule change stated that the previously unpublished cases have "no precedential value but may be cited."[306] The 2008 comment stated that "opinions issued prior to the 2003 amendment and affirmatively designated 'do not publish' should be considered 'unpublished' cases lacking precedential value."[307] The courts of appeals rarely cite such opinions favorably in civil appeals.[308] The court of appeals in a civil case is more likely to dismiss the unpublished opinion cited by a party as "nonprecedential."[309]

The rule on citing unpublished criminal opinions by the courts of appeals remains unchanged: such cases "have no precedential value but may be cited with the notation, '(not designated for publication).'"[310] Courts, while recognizing that these opinions are not precedential, "may take guidance from them 'as an aid in developing reasoning that may be

---

301. TEX. R. APP. P. 47.4.

302. TEX. R. APP. P. 47.3.

303. TEX. R. APP. P. 47.3, 2008 cmt.

304. *Id.*

305. Union Pac. Res. Co. v. Aetna Cas. & Sur. Co., 894 S.W.2d 401, 406 (Tex. App.—Fort Worth 1994, writ denied).

306. TEX. R. APP. P. 47.3, 2002 cmt.

307. TEX. R. APP. P. 47.3, 2008 cmt. *See* Just Energy Tex. I Corp. v. Tex. Workforce Comm'n, 472 S.W.3d 437, 443 (Tex. App.—Dallas 2015, no pet.).

308. *See, e.g.*, Asplundh Tree Expert Co. v. Abshire, 517 S.W.3d 320, 338 n.9 (Tex. App.—Austin 2017, no pet.) (finding analyses from unpublished cases persuasive). I ran a search on Westlaw for the phrase "not designated for publication," since that notation is required by rule when a court cites a pre-2003 unpublished opinion. Since January 2000, there were 280 cases where that phrase appeared—and they were all criminal appeals. *See generally* "not designated for publication," WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22not%20designated%20%23for%20publication%22&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Oct. 5, 2024) (showing the search results for "not designated for publication" on Westlaw).

309. LMP Austin Eng. Aire, LLC v. Lafayette Eng. Apartments, LP, 654 S.W.3d 265, 288 (Tex. App.—Austin 2022, no pet.); *In re Guardianship of* Chang, 635 S.W.3d 444, 447 n.3 (Tex. App.—Houston [14th Dist.] 2021, pet. denied); *Guardianship of* A.S.K., No. 14-15-00588-CV, 2017 WL 3611845, at *4 n.7 (Tex. App.—Houston [14th Dist.] Aug. 22, 2017, pet. denied) (mem. op.).

310. TEX. R. APP. P. 47.7(a).

employed.'"[311] Appellate courts will also cite "unpublished" opinions in criminal cases where the "unpublished" cases establish that court's prior practice on a particular issue.[312] That looks like the courts are citing the cases for their precedential value.[313] In some criminal appeals involving post-conviction relief, the unpublished opinion cited by the court is the prior appeal that affirmed the underlying conviction.[314] If you are relying upon an "unpublished" opinion, it might be prudent to be clear that you are citing it for its persuasive reasoning, not as precedent.[315]

Oddly, the Court of Criminal Appeals still issues unpublished opinions.[316] This is an unusual practice for a high court.[317] These unpublished opinions "have no precedential value and must not be cited as authority by counsel or by a court."[318] Courts may cite an unpublished opinion of the Court of Criminal Appeals to show the procedural history of the case.[319] In *Jones v. State*, the Court of Criminal Appeals wrote a lengthy opinion sustaining the constitutionality of the Texas "revenge porn" statute; however, the court chose not to publish the opinion.[320] Several courts of appeals in subsequent cases adopted the unpublished *Jones* opinion while one court "essentially tracked the Court of Criminal Appeals' *Jones* opinion and its cited authority, without citing *Jones* itself."[321] The Dallas Court of Appeals noted the *Jones* opinion had no precedential value, but that its analysis should draw from the uncitable case.[322] It resolved this dilemma by following the courts of appeals

311. Rhymes v. State, 536 S.W.3d 85, 99 n.9 (Tex. App.—Texarkana 2017, pet. ref'd) (quoting Carrillo v. State, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd)).

312. *See, e.g.*, Romo v. State, No. 02-23-00197-CR, 2024 WL 1100790 (Tex. App.—Fort Worth Mar. 14, 2024, no pet. h.) (mem. op. not designated for publication) (citing previous opinions on evidentiary requirements for assessing reparations as punishment); Johnson v. State, No. 05-22-00294-CR, 2024 WL 1045924 (Tex. App.—Dallas Mar. 11, 2024, no pet. h.) (mem. op. not designated for publication) (citing a prior opinion which held that a single witness can be sufficient to support a conviction).

313. *See, e.g.*, *Johnson*, 2024 WL 1045924, at *5 (citing to an unpublished case).

314. *See, e.g.*, *In re* Perez, No. 13-21-00234-CR, 2021 WL 3354184 (Tex. App.—Corpus Christi–Edinburg, Aug. 2, 2021, no pet.) (mem. op. not designated for publication) (citing the unpublished opinion of the underlying conviction).

315. *See* TEX. R. APP. P. 47.7(a).

316. TEX. R. APP. P. 77.2.

317. K. K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 402 (2001). The author notes, "Because of their status as law-defining cases, all United States Supreme Courts opinions are published. Similarly, virtually all state supreme court opinions are published." *Id.*

318. TEX. R. APP. P. 77.3.

319. *Ex parte* Fairchild-Porche, 638 S.W.3d 770, 791 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

320. *Ex parte* Jones, No. PD–0552–18, 2021 WL 2126172, at *3–17 (Tex. Crim. App. May 26, 2021) (per curiam) (not designated for publication).

321. *Ex parte* Mills, No. 05-22-00814-CR, 2023 WL 3220939, at *2 n.1 (Tex. App.—Dallas May 3, 2023, no pet.) (not designated for publication) (citing *Ex parte Fairchild-Porche*, 638 S.W.3d at 770); *Ex parte* Mora, 634 S.W.3d 255, 256 (Tex. App.—Houston [1st Dist.] 2021, pet. ref'd*); Ex parte* McGregor, No. 01-18-00346-CR, 2021 WL 6067349 (Tex. App.—Houston [1st Dist.] Dec. 23, 2021, no pet.) (mem. op.) (not designated for publication).

322. *Ex parte Mills*, 2023 WL 3220939, at *2 n.1.

that had already followed *Jones* and by referring generically to "Texas courts" in its opinion.[323]

V. FEDERAL AND OUT-OF-STATE AUTHORITY IN TEXAS COURTS

Texas courts, like other state appellate courts, strongly favor citing their own precedent.[324] But Texas courts, like other state appellate courts, will have occasion to cite both federal and out-of-state authority.[325]

The only opinions from a federal court that are binding precedent to a state court are United States Supreme Court opinions.[326] As the *Barstow* court noted, "[o]n questions of federal law—such as the proper interpretation of a federal statute—all courts in every state owe obedience to the Supreme Court of the United States."[327] This does not prevent justices from writing concurring opinions that lambaste United States Supreme Court opinions for creating a "nebulous, multi-factored, judge-created test," "a vexing, multi-factored, judicial test," which resulted in the Texas Supreme Court compounding "the sin by relying exclusively on an imprecise, fabricated test to implement a made-up doctrine."[328]

The Texas Supreme Court has noted that when it decides issues of federal law, it has "the unique role—as a court of last resort on all other issues within our jurisdiction—of an intermediate appellate court, anticipating the manner in which the United States Supreme Court would decide the issue presented."[329]

The decisions from federal courts of appeals and district courts are not binding on state courts; however, these decisions are received (mostly) with "respectful consideration."[330] State courts are not bound by lower federal

---

323. *Id.*

324. John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 394 (1978); John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 652–53 (1954); Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 797–98 (1981).

325. Friedman et. al., *supra* note 324.

326. Barstow v. State, 742 S.W.2d 495, 501 n.2 (Tex. App.—Austin 1987, writ denied).

327. *Id.*

328. ETC Mktg., Ltd. v. Harris Cnty. Appraisal Dist., 528 S.W.3d 70, 90–92 (Tex. 2017) (Brown, J., concurring). Justice Brown, joined by Justice Willett, followed Justice Scalia both doctrinally and stylistically in his concurring opinion. *Id.* Chief Justice Hecht, in his dissenting opinion noting that the concurring justices echoed Scalia's criticism of the United States Supreme Court's Commerce Clause jurisprudence, admitted that he shared those concerns, but noted that "an epithet-laced rebuke of that Court by Justices on this one [was] disrespectful." *Id.* at 93 n.5 (Hecht, C.J., dissenting).

329. City of Lancaster v. Chambers, 883 S.W.2d 650, 658–59 (Tex. 1994). *See* Wal-Mart Stores, Inc. v. Xerox State & Loc. Sols., Inc., 663 S.W.3d 569, 569 (Tex. 2023); *In re* Morgan Stanley & Co., 293 S.W.3d 182, 189 (Tex. 2009) (no pet.) (answering federal questions).

330. Sugar Land Props., Inc. v. Becnel, 26 S.W.3d 113, 121 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

courts even when a federal question is involved.[331] As the Texas Supreme Court explained, "Texas should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, but should never feel compelled to parrot the federal judiciary."[332] The Austin Court of Appeals elaborated:

> [I]n creating the various United States Courts of Appeals, Congress limited their jurisdiction to appeals taken from the final decisions of federal district courts. Consequently, the decisions of one federal Court of Appeals on a question of law do not bind any other federal Court of Appeals under the doctrine of *stare decisis*. Nor do they bind any Texas court, even on federal questions, although they are of course received with respectful consideration[.] While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely, the Supreme Court.[333]

Fifth Circuit precedent is not binding on state courts merely because Texas is within the geographical limits of the Fifth Circuit.[334] Texas courts, however, generally pay "particular attention" to Fifth Circuit precedent.[335] The El Paso Court of Appeals recently acknowledged that one party was correct to say the court is not bound by decisions from the Fifth Circuit.[336] "Yet we may still find cases from the Fifth Circuit to be persuasive authority. And here, we find the reasoning of *Burton*'s author, Judge Reavley who was formerly a Justice on the Texas Supreme Court, to be persuasive."[337]

The particular attention paid to the Fifth Circuit does not guarantee that the Texas court will follow its lead.[338] The Texas Supreme Court once reversed the Beaumont Court of Appeals' decision because it had "looked only to the sole Fifth Circuit precedent on the precise issue" of whether punitive damages are available in an unseaworthiness action brought under general maritime law.[339] The Texas Supreme Court faulted the court of appeals for overlooking the implications of a United States Supreme Court case and the "weight of intervening federal court decisions from other

---

331. Mitchell v. Amarillo Hosp. Dist., 855 S.W.2d 857, 864 (Tex. App.—Amarillo 1993, writ denied).

332. Davenport v. Garcia, 834 S.W.2d 4, 20 (Tex. 1992).

333. Barstow v. State, 742 S.W.2d 495, 501 n.2 (Tex. App.—Austin 1987, writ denied) (citations omitted) .

334. *Id.* at 501.

335. Newth v. Adjutant Gen. Dep't of Tex., 883 S.W.2d 356, 359 (Tex. App.—Austin 1994, writ denied).

336. Schneider Elec. USA, Inc. v. Ramirez, 657 S.W.3d 157, 164 n.2 (Tex. App.—El Paso 2022, no pet.).

337. *Id.* (citation omitted).

338. *In re* Morgan Stanley & Co., 293 S.W.3d 182, 189–90 (Tex. 2009).

339. Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993).

jurisdictions."[340] The Texas Supreme Court explained:

> We disagree with both the court of appeals' result and what appears to be the methodology that led it to that result. The court of appeals' discussion of *Merry Shipping* [650 F.2d 622 (5th Cir. 1981)] and its cursory dismissal of contrary federal precedent from other jurisdictions suggests that the court felt bound by the pronouncements of the Fifth Circuit on federal law issues. This is not the case. While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court.[341]

Texas courts do pay close attention to federal decisions when the Texas statute or rule is based upon a federal one.[342] As the Dallas Court of Appeals noted, "When the legislature adopts a state or federal statute from another jurisdiction, it is presumed the legislature intended to adopt the construction of that statute given by the courts of that jurisdiction."[343] For example, Texas courts consider federal decisions construing the Freedom of Information Act to be instructive in interpreting our Open Records Act.[344]

Texas courts routinely turn to federal cases and statutes when reviewing appeals involving the Texas Human Rights Commission Act.[345] The act itself says that one of its purposes is "the execution of the policies of Title VII of the Civil Rights Act of 1964."[346] Texas courts, therefore, look at Title VII and the federal cases interpreting it for guidance.[347] The Texas Supreme Court has noted, "The statutory objective of maximizing consistency in federal and state law does not mean that the content of Texas law must yield to any statement made by federal authorities."[348] Federal authorities do not bind the court, but "they frequently assist [it] in [its] independent obligation to construe Texas law."[349] In a concurring opinion, Justice Blacklock expressed his concern that the court's "frequent reliance on federal law to aid

340. *Id.* (citation omitted).

341. City of Garland v. Dallas Morning News, 969 S.W.2d 548, 556–57 (Tex. App.—Dallas 1998), *aff'd*, 22 S.W.3d 351 (Tex. 2000).

342. *Id.*

343. *Id.*

344. *Id.*

345. El Apple I, Ltd. v. Olivas, 370 SW 3d 757, 760 (Tex. 2012).

346. TEX. LAB. CODE § 21.001(1). Although the Commission on Human Rights was replaced by the Texas Workforce Commission's civil rights division, courts continue to refer to the TCHRA and Chapter 21 interchangeably. Waffle House, Inc. v. Williams, 313 S.W.3d 796, 798 n.1 (Tex. 2010); S. Tex. Coll. v. Arriola, 629 S.W.3d 502, 505 n.1 (Tex. App.—Corpus Christi–Edinburg 2021, pet. denied).

347. *See, e.g.*, Fossil Grp., Inc. v. Harris, 691 S.W.3d 874, 884–86 (Tex. 2024) (looking to federal courts' interpretation of Title VIII); *Waffle House, Inc.*, 313 S.W.3d at 804 (looking to analogous federal law in applying the state Act).

348. Tex. Tech Univ. Health Scis. Ctr.—El Paso v. Niehay, 671 S.W.3d 929, 937 (Tex. 2023).

349. *Id.*

its interpretation of Chapter 21 may have given the wrong impression."[350] He downplayed the authoritativeness of federal authorities.[351] He was willing to accept federal authorities as "guidance" only if guidance meant that they were "guided by helpful ideas from federal sources just as [they] would be guided by helpful ideas from any other knowledgeable source, such as parties or amici curiae."[352]

The Texas Supreme Court addressed the use of federal caselaw to interpret the meaning of a Texas statute modeled on a federal one.[353] The case involved whether the agency memoranda exception in the Texas Public Information Act incorporated the deliberative process privilege.[354] The Texas law was modeled on the federal Freedom of Information Act.[355] Justice Baker, in the supreme court's plurality opinion, noted that courts presume that the legislature, when it adopts a federal statute, knew of the federal courts' construction of the federal statute and intended to adopt that construction.[356] A Texas court, however, does not have to blindly follow federal cases decided after the statute was enacted.[357] Justice Enoch, in a concurring opinion, explained how the court should treat federal authority:

> I cannot join the dissent because it treats federal cases as controlling the Texas Open Records Act, even though the Act does not purport to conform to federal law and even though the federal cases did not exist at the time the Act was passed. When state statutes are modeled on federal legislation, federal authority can be relevant to varying degrees. In some cases, federal law controls the interpretation of the state statute. These are cases in which either the state statute says that federal authority will control, or the federal authority says that it will control. Antitrust and Title VII cases are examples.

When a state statute is modeled on federal legislation but makes no statement about the relevance of federal authority, courts may look to analogous federal authority, but there is no mandate that they do so.[358]

Federal cases also are used to interpret Texas evidence and procedure rules based on federal ones.[359] Federal cases interpreting the Federal Rules of

---

350. *Id.* at 945 (Blacklock, J., concurring).

351. *Id.*

352. *Id.* at 945–46 (Blacklock, J., concurring). *See Fossil Grp., Inc.*, 691 S.W.3d 874, 887 (Tex. 2024) (Blacklock, J., concurring) (explaining that courts often look to federal sources for guidance).

353. City of Garland v. Dallas Morning News, 22 S.W.3d 351, 355 (Tex. 2000).

354. *Id.* at 354.

355. *Id*. at 355.

356. *Id.* at 360.

357. *Id*. at 366.

358. *Id*. at 368–69 (footnotes omitted).

359. *See* Ortega v. Cach, LLC, 396 S.W.3d 622, 630 n.4 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Evidence generally are persuasive in the interpretation of the state rules.[360] Texas courts, for example, have relied on federal case law when interpreting the Texas rule governing class actions.[361] The Fort Worth Court of Appeals has noted that the Texas Rule of Civil Procedure "is patterned after the federal class action rule and, therefore, reference to federal case law . . . is appropriate."[362] Texas courts also will consider federal decisions of procedural due process to inform their interpretation of the Texas due course of law guarantee.[363]

If Texas appellate courts are like other state courts, then the citation of out-of-state authority has declined relative to in-state citations.[364] Over 100 years ago, Henry Campbell Black suggested that out-of-state authority is cited for three purposes: (1) to confirm a legal principle, (2) to support overruling precedent, and (3) to examine what other jurisdictions have done when faced with a case of first impression.[365] Citations to out-of-state authority in Texas cases follow this pattern.[366]

Citations to out-of-state authority typically appear in cases involving common-law rules.[367] In a recent appeal involving "implied reciprocal negative easements," the Texas Supreme Court cited a Nebraska case that provided "a helpful discussion of the doctrine's historical context."[368] Caselaw from other jurisdictions is also helpful when analyzing the language of an insurance policy as that language is often similar if not identical.[369]

Texas courts will examine out-of-state authority in cases of first impression.[370] When deciding whether to adopt a new common-law duty, the Texas Supreme Court will look at, among other things, the law of other states.[371] In one recent case, the Texas Supreme Court addressed what damages, if any, parents may recover when medical negligence causes an

---

360. *See id.*

361. *See, e.g.*, Asplundh Tree Expert Co. v. Abshire, 517 S.W.3d 320, 337 (Tex. App.—Austin 2017, no pet.) (explaining that the Texas rule is based on its federal counterpart).

362. Adams v. Reagan, 791 S.W.2d 284, 287 (Tex. App.—Fort Worth 1990, no writ); *see also* RSR Corp. v. Hayes, 673 S.W.2d 928, 931–32 (Tex. App.—Dallas 1984, writ dism'd w.o.j.) (stating that the Texas rule is modeled after the federal class action rule).

363. Tex. S. Univ. v. Villarreal, 620 S.W.3d 899, 905 (Tex. 2021) (citing Univ. of Tex. Med. School at Hous. v. Than, 901 S.W.2d 926, 929 (Tex. 1995)).

364. Friedman et al., *supra* note 324, at 797–98; Merryman, *supra* note 324, at 400.

365. BLACK, *supra* note 12, at 401–02.

366. *See, e.g.*, Hous. Area Safety Council, Inc. v. Mendez, 671 S.W.3d 580 (Tex. 2023) (drawing on out-of-state authority).

367. *See id.*

368. River Plantation Cmty. Improvement Ass'n v. River Plantation Props., *LLC*, No. 22-0733, 2024 WL 2983168 (Tex. June 14, 2024) (citing Walters v. Colford, 900 N.W.2d 183, 193 (2017)).

369. *See, e.g.*, Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455, 459 (Tex. 1997) (analyzing other jurisdictional approaches to assessing ambiguity in an insurance context); Soledad v. Tex. Farm Bureau Mut. Ins. Co., 506 S.W.3d 600, 604 n.1 (Tex. App.—Austin 2016, pet. denied) (detailing cases showing the approaches of other jurisdictions).

370. *See, e.g.*, Boozer v. Fischer, 674 S.W.3d 314, 326 (Tex. 2023). There, the Court noted its conclusion "is consistent with longstanding precedent from other states' high courts." *Id.*

371. SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347, 351 (Tex. 1995).

unplanned pregnancy that results in the birth of a healthy child.[372] It accordingly looked at decisions from other jurisdictions, citing favorable decisions from Arkansas, Nevada, and New York.[373]

There is another instance where citing out-of-state authority is appropriate: a uniform act like the Uniform Commercial Code should be "construed to promote uniformity with other jurisdictions."[374] The Texas Government Code requires a uniform act included in a code to be "construed to effect its general purpose to make uniform the law of those states that enact it."[375]

VI. SECONDARY SOURCES

What counts as a secondary source worth citing changes over time. Legal writing professors warn their students not to cite to legal encyclopedias because courts frown upon such citations.[376] Nonetheless, Texas courts have cited to *Texas Jurisprudence* over 2,500 times.[377] But there have been only 349 such citations this century.[378] Lawyers and judges still occasionally cite to *Texas Jurisprudence* for statements of settled rules.[379]

---

372. Noe v. Velasco, 690 S.W.3d 1, 3–4 (Tex. 2024).

373. *Id.* at 8, n.8. The court also used a tentative draft of the Restatement (Third) of Torts to survey the different approaches to this issue by other jurisdictions. *Id.*

374. 1/2 Price Checks Cashed v. United Auto. Ins. Co., 344 S.W.3d 378, 391 (Tex. 2011). *See* Equistar Chems., LP v. ClydeUnion DB, Ltd., 579 S.W.3d 505, 517 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (construing the Uniform Commercial Code to make the law uniform in states that have enacted it).

375. TEX. GOV'T CODE § 311.028.

376. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1956 (2008).

377. Westlaw search conducted on March 26, 2024, yielded 2,559 results to the search term "Tex. Jur." *See generally* "Tex. Jur.", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22Tex.Jur.%22&isPremiumAdvanceSearch=False&jurisdiction=TX-S&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (displaying case law search results for "Tex. Jur." on Westlaw).

378. Westlaw search conducted on March 26, 2024, yielded 349 results to the search term "Tex. Jur." and "da (after 1/1/2001)." *See generally* "Tex. Jur." and "da (after 1/1/2001).", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22Tex.%20Jur.%22%20and%20DA%28after%201%2F1%2F2001%29&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing the case law search results for "Tex. Jur. and da (after 1/1/2001)" on Westlaw).

379. *See, e.g.*, Grant v. Heo, No. 07-23-00041-CV, 2023 WL 5340931 (Tex. App.—Amarillo Aug. 18, 2023, pet. denied) ("Although Grant may have desired to have a specific portion of the parent tract allotted to her, she has not shown that the partition was inequitable or unfair. *See* 57 TEX. JUR. 3d *Partition* § 28 (2016) ("That a party has asked to be allotted a described portion of the land does not, however, preclude the Court from setting apart another portion.")); Petition for Review, *In re* Estate of Helen Gayle Wells, No. 24-0048, 2024 WL 260981, at *18 (Tex. Jan. 18, 2024) ("The 'material possessions' under Helen's 'control' included Don's property in his residuary trust because her power gave her the 'authority to do an act which the owner granting the power might [himself] lawfully perform.' 59 TEX. JUR. 3d, *Powers* § 1 (2023)").

A. Texas Pattern Jury Charges

The Pattern Jury Charges (PJC) are a State Bar of Texas project that began in 1968 and published its first volume in 1969.[380] Judge Walter Jordan, chair of the first PJC Committee, explained that the committee wanted "to offer to the bench and the bar of this state suggested uniform issues which are understandable, unslanted and accurate."[381] The Beaumont Court of Appeals referred to the volumes as "practice books prepared and edited by knowledgeable authors to give practicing lawyers and busy judges with heavy dockets as much assistance as possible."[382] There are seven State Bar of Texas committees assigned to produce and revise jury charges for six areas of law.[383] They produce six volumes of PJCs, which are updated regularly.[384] The over 1,000 appellate citations to the pattern jury charges evidences their pervasive use.[385]

The Texas PJCs are used as both a sword and a shield on appeal.[386] Appellants sometimes will argue that the trial court committed charge error by not using PJC questions or instructions, and appellees will argue, in other cases, that the charge was proper because it was based on the PJC.[387] It is better to use the PJCs than not to use them.[388] Most of the time, they provide a safe harbor.[389] In a 2018 appeal, Wal-Mart complained about the jury charge not limiting the theory of liability to one Wal-Mart employee, criticizing the ambiguity of the question of liability and the definitions of

---

380. Dan Pozza, *Pattern Jury Charges: History*, 31 ADVOC. (TEXAS) 6, 6 (2005).

381. *Id.*

382. Westchester Fire Ins. Co. v. Lowe, 888 S.W.2d 243, 250 (Tex. App.—Beaumont 1994, no writ).

383. *Texas Pattern Jury Charges*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Consider_a_State_Bar_Committee&Template=/CM/HTMLDisplay.cfm&ContentID=47329 (last visited Sept. 4, 2024).

384. *Id.* The civil Texas PJC volumes include Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation (2022); Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment (2022); Texas Pattern Jury Charges—Oil & Gas (2022); Texas Pattern Jury Charges—Malpractice, Premises & Products (2022 ed.); Texas Pattern Jury Charges—Family & Probate (2024 ed.). *Texas Bar Books*, TEX. BAR PRAC., https://www.texasbarpractice.com/shop/?swoof=1&product_cat=texas-pattern-jury-charges.

385. Westlaw search of PJC or "pattern jury charge" on March 31, 2024 resulted in 1,204 cases. *See generally* "pattern jury charge", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=pattern%20jury%20charge&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 31, 2024) (providing the search results for "pattern jury charge" on Westlaw).

386. *See, e.g.*, Green Tree Fin. Corp. v. Garcia, 988 S.W.2d 776, 784 (Tex. App.—San Antonio 1999, no pet.) (showing that litigants use the PJC to argue on both sides of the dispute).

387. *Id.*

388. *See* 4 Roy W. MCDONALD & ELAINE A. GRAFTON-CARLSON, TEXAS CIVIL PRACTICE § 22:16 n.5 (2d ed. 2001) ("Pattern Jury Charges are a generally reliable source, second only to court-approved submissions.").

389. Westchester Fire Ins. Co. v. Lowe, 888 S.W.2d 243, 254 (Tex. App.—Beaumont 1994, no writ) ("The requested issues were definitely substantially correct inasmuch as they tracked the language of Texas Pattern Jury Charge 24.06.").

negligence and ordinary care.[390] The court of appeals rejected the argument.[391] The single liability question was limited to the acts of the named employee within the course and scope of employment and incorporated the term negligence as defined by the charge.[392] The court also noted that "the trial court defined 'negligence' and 'ordinary care' in accordance with the Texas Pattern Jury Charges."[393] The court concluded, "On this record, we cannot conclude the definitions of 'negligence' and 'ordinary care,' which are taken directly from the Texas Pattern Jury Charges, are so ambiguous that the jury would have been confused as to the meaning of the liability question or the basis of Walmart's alleged negligence."[394]

Although the Texas PJCs are not law, they are "heavily relied upon by both the bench and bar," as the San Antonio Court of Appeals has noted.[395] The Dallas Court of Appeals has observed, "The Texas Pattern Jury Charges are nothing more than a guide to assist the trial courts in drafting their charges; they are not binding on the courts."[396] "[T]he PJC is not the law," the Eastland Court of Appeals asserted; instead, they are "what a State Bar Committee perceived the law to be when the proposed charge therein was issued."[397] And the law continues to change.[398]

Many of the PJCs have been expressly adopted by the Texas Supreme Court.[399] In other cases, the court has been more cryptic. In a footnote to a per curiam opinion, the court noted that it did not necessarily approve of the PJC on borrowed servant but stated that the charge was not affirmatively incorrect.[400] Courts of appeals also have expressly approved some of the pattern jury charges.[401]

The use of the PJC does not *necessarily* make the charge appeal-proof. In rare cases, the Texas Supreme Court has disapproved of PJC

---

390. Wal-Mart Stores Tex., LLC v. Bishop, 553 S.W.3d 648, 662 (Tex. App.—Dallas 2018, pet. granted, judgm't vacated w.r.m.).

391. *Id.* at 674.

392. *Id.*

393. *Id.*

394. *Id.*

395. H.E. Butt Grocery Co. v. Bilotto, 928 S.W.2d 197 (Tex. App.—San Antonio 1996), *aff'd* 985 S.W.2d 22 (Tex. 1998).

396. Keetch v. Kroger Co., 845 S.W.2d 276, 281 (Tex. App.—Dallas 1990), *aff'd* 845 S.W.2d 262 (Tex. 1992).

397. Baron Aviation Services, Inc. v. Kitchen, 679 S.W.3d 330, 347 (Tex. App.—Eastland 2023, pet. denied).

398. *Id.* (citing THI of Tex. at Lubbock I, LLC v. Perea, 329 S.W.3d 548, 569 (Tex. App.—Amarillo 2010, pet. denied).

399. *See, e.g.*, Tex. Dept. of Hum. Res. v. E.B., 802 S.W.2d 647, 648 (Tex. 1990) (adopting a PJC); Placencio v. Allied Indus. Int'l, Inc., 724 S.W.2d 20, 22 (Tex. 1987) (adopting a PJC); Nicholes v. T.E.I.A., 692 S.W.2d 57, 58 (Tex. 1985) (per curiam) (adopting a PJC); Acord v. Gen. Motors Corp., 669 S.W.2d 111, 115 (Tex. 1984) (adopting a PJC); Select. Ins. Co. v. Boucher, 561 S.W.2d 474, 478 (Tex. 1978) (adopting a PJC).

400. Exxon Corp. v. Perez, 842 S.W.2d 629, 630 n.1 (Tex. 1992) (per curiam).

401. *See, e.g.*, Stoner v. Hudgins, 568 S.W.2d 898, 902 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.) (approving PJCs).

instructions.[402] In *State v. Williams*, the court disapproved of the use of the PJC instruction for premises liability where the plaintiff is a licensee.[403] In *Keetch v. Kroger Co.*, the court recommended different instructions to define negligence and ordinary care in a premises liability case.[404] The Court of Criminal Appeals similarly has "part[ed] ways" with the *Texas Criminal Pattern Jury Charges*'s suggested instructions because they constituted "improper comments on the weight of the evidence."[405]

Nor is the trial court's failure to use PJC forms necessarily error.[406] The Fort Worth Court of Appeals rejected the "unnecessarily rigid and impractical" argument that no additions to the PJCs are permitted.[407] The PJCs are not an "exhaustive list of issues and instructions" appropriate for all cases.[408] If trial courts were limited to the PJCs, then "they would remain silent" in cases where there is no appropriate pattern charge and would thus fail to carry out the mandate of Texas Rule of Civil Procedure 277.[409]

The Eastland Court of Appeals has also rejected the argument that any addition to the PJCs is error per se.[410] The court noted that a trial court does err when it alters a PJC that the Texas Supreme Court has adopted.[411] "However, the Pattern Jury Charges have not been adopted and approved in their entirety by the supreme court. Trial courts have broad discretion to add definitions to a Pattern Jury Charge that has not been declared the exclusive method of charging a jury in Texas."[412]

The Fort Worth Court of Appeals rejected the argument that the trial court's refusal to submit a requested instruction copied from the PJC was error.[413] The court noted that for some causes of action, the Texas Supreme Court has expressly approved of the PJC and has disapproved of adding "any other instructions in those actions, no matter how correctly they may state the law."[414] In all other cases, however, the forms in the Texas PJCs are "only a guide to assist a trial court in drafting its charges, and those forms do not bind

---

402. *See, e.g.*, St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 529–30, n.52 (Tex. 2002) (rejecting PJC instructions).

403. State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996).

404. Keetch v. Kroger, 845 S.W.2d 262, 266–67 (Tex. 1992).

405. Beltran De La Torre v. State, 583 S.W.3d 613, 622 n.7 (Tex. Crim. App. 2019).

406. T.E.I.A. v. Critz, 604 S.W.2d 479, 482 (Tex. 1980). *See* Dico Tire, Inc. v. Cisneros, 953 S.W.2d 776, 797 (Tex. App.—Corpus Christi–Edinburg 1997, pet. denied) (holding that failing to use the PJC is not necessarily error in criminal cases). This is also true for the criminal pattern jury charges. Williams v. State, No. 02-20-00104-CR, 2021 WL 5227167 (Tex. App.—Fort Worth Nov. 10, 2021, no pet.) (mem. op.).

407. T.E.I.A. v. Duree, 798 S.W.2d 406, 413 (Tex. App.—Fort Worth 1990, writ denied).

408. *Id.*

409. *Id.*

410. Whiteside v. Watson, 12 S.W.2d 614, 623 (Tex. App.—Eastland 2000, pet. denied).

411. *Id.*

412. *Id*. at 623–24.

413. Ishin Speed Sport, Inc. v. Rutherford, 933 S.W.2d 343, 349 (Tex. App.—Fort Worth 1996, no writ).

414. *Id.* at 350.

the court."[415] In *DeLeon v. Pickens*, the Corpus Christi Court of Appeals rejected a similar argument that the trial court's instruction was erroneous because it deviated from the PJC form.[416] The court noted that PJC 3.02 had not been specifically adopted by either the Texas Supreme Court or the Corpus Christi Court of Appeals.[417] While recognizing that "the pattern jury charge is a useful tool to aid practitioners and judges," the court did not presume that any variation from the PJC form "necessarily constitutes error."[418] The standard of review for charge error remains whether "the submitted instruction was a misstatement of the law as applied to the facts."[419]

B. Dictionaries

Most appellate courts are thirsty for dictionaries.[420] One commentator has noted that "more and more disputes about the meaning of statutes are greeted with citations to dictionaries."[421] Studies have shown that use of dictionaries in United States Supreme Court opinions has increased.[422] Texas appellate courts also appear to have increased their reliance on dictionaries in their opinions.[423] This increased reliance on dictionaries is tied to a shift toward textualism in statutory interpretation.[424]

Statutory interpretation cases typically begin with the court's observation that to determine a statutory term's common, ordinary meaning, it typically looks first to dictionary definitions.[425] Texas courts routinely use

---

415. *Id*.

416. DeLeon v. Pickens, 933 S.W.2d 286, 292 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied).

417. *Id.*

418. *Id.*

419. *Id.*

420. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013).

421. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71, 71–72 (1994).

422. Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 231 (1999); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438–39 (1994).

423. *See* Daniel J. Olds, *Ordinary Meaning, Context, and Textualism in Texas Statutory Interpretation*, 52 TEX. TECH L. REV. 485, 494 (2020).

424. Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L. J. 275, 278–80 (1998).

425. The cases are legion. *See, e.g.*, Freeport-McMoRan Oil & Gas, LLC v. 1776 Energy Partners, LLC, 672 S.W.3d 391, 397 n.10 (Tex. 2023) (utilizing a dictionary when the code provision at issue did not define the terms); City of Fort Worth v. Pridgen, 653 S.W.3d 176, 183 (Tex. 2022) (consulting a dictionary where the Texas Act did not define the word); City of Richardson v. Oncor Elec., 539 S.W.3d 252, 261 (Tex. 2018) (applying a definition in-line with the statutory schemes context when the word had various plain meanings). After first looking at dictionaries, courts will consider the term's usage in other statutes, court decisions, and similar authorities. Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self Ins. Fund, 642 S.W.3d 466, 474 (Tex. 2022). Courts will grant some deference to an administrative agency's reasonable interpretation of a statute; however, "the statute must

Webster's Third New International Dictionary (over 1200 citations) and *Black's Law Dictionary* (over 4000 citations) for statutory and contractual interpretation.[426] For example, the Texas Supreme Court recently used *Black's Law Dictionary* to interpret the meaning of cumulative remedies provided by a statute.[427] The use of a legal dictionary to help determine the common, ordinary meaning of a word seems misguided.[428] Justice Boyd in a recent concurring opinion criticized the Court's opinion for relying on select definitions from *Black's*.[429] He cautioned that "we must construe undefined words in a statute by applying their common, ordinary meaning, not a limited or obscure legal definition, so that ordinary citizens can rely on the statute's language to mean what it plainly says."[430] When interpreting otherwise undefined medical terms, courts have considered "a blend of standard and medical dictionaries . . . ."[431]

Commentators have criticized the use of dictionaries to settle questions of statutory interpretation.[432] These commentators argue that "dictionaries are not as authoritative, precise, or scholarly" as courts assume.[433] One commentator has noted, "One of the most significant flaws of dictionaries as

---

be ambiguous, the agency interpretation must be the result of formal procedures, and the interpretation must be reasonable." Combs v. Health Care Servs. Corp., 401 S.W.3d 623, 629–30 (Tex. 2013).

426. Westlaw searches conducted on March 20, 2024, yielded 1,201 results for "Webster's Third New International Dictionary" and 4,384 results for "Black's Law Dictionary." *See generally* "Webster's Third New International Dictionary", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=Webster%27s%20Third%20International%20dictionary&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited on Mar. 20, 2024) (displaying search results for "Webster's Third New International Dictionary" on Westlaw); "Black's Law Dictionary", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=black%27s%20law%20dictionary&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=MULTIPLECITATIONS&querySubmissionGuid=i0a89c2be000001925e37c6994f797986&startIndex=1&searchId= (last visited Mar. 20, 2024) (showing search results for "Black's Law Dictionary" on Westlaw). Antonin Scalia and Bryan A. Garner have called *Webster's Third New International Dictionary* "notoriously permissive." Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2D 419, 422 (2013).

427. BCCA Appeal Grp., Inc. v. City of Hous., 496 S.W.3d 1, 15 (Tex. 2016).

428. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 509–10 (2013).

429. *In re* J.S., 670 S.W.3d 591, 612 (Tex. 2023) (Boyd, J., concurring).

430. *Id.*

431. *In re* A.R.C., 685 S.W.3d 80, 84–85 (Tex. 2024) (to determine statutory meaning of "psychiatrist" the Court relied upon RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987), WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934); STEDMAN'S MEDICAL DICTIONARY (5th unabridged lawyer's ed. 1982); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011); and PSYCHIATRIC DICTIONARY (5th ed. 1981)).

432. *See generally* Aprill, *supra* note 424, at 275 (reviewing the Supreme Court of the United States' selection of dictionaries to define words in certain instances); Note, *supra* note 422, at 1445–46 (reviewing the increased usage of dictionaries in Supreme Court opinions); Lawrence Solan, *When Judges Use the Dictionary*, 68 *Am. Speech* 50, 52–55 (1993) (describing the challenges with defining words generally); James L. Weis, Comment, *Jurisprudence by Webster's: The Role of the Dictionary in Legal Thought*, 39 MERCER L. REV. 961, 962–63 (1988) (claiming that judges should not solely use dictionary definitions as the turning point in their analysis).

433. Aprill, *supra* note 424, at 277.

interpretive tools is the imperfect relationship of dictionaries to statutory context."[434] A dictionary cannot capture the "particular historical and textual framework of a statutory term."[435]

There is also a danger of "dueling dictionaries."[436] The courts' use of any particular dictionary appears to be haphazard.[437] The result in one court of appeals case interpreting whether a change in the Family Code was substantive or not depended upon which dictionary was used to define the word "preceding."[438] Courts, however, do not usually explain why they picked a particular dictionary or a particular definition:

> There are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word. The selection of a particular dictionary and a particular definition is not obvious and must be defended on some other grounds of suitability. This fact is particularly troubling for those who seek to use dictionaries to determine ordinary meaning. If multiple definitions are available, which one best fits the way an ordinary person would interpret the term? . . . Individual judges must make subjective decisions about which dictionary and which definition to use.[439]

Texas courts have begun to notice some of the problems with using dictionaries to settle questions of statutory interpretation.[440] In a recent case involving the meaning of "disapprove," the Texas Supreme Court admitted that it "must be cautious in relying on acontextual definitions."[441] Context "delineates the contours of a term's scope."[442] In a case where the court has to interpret the meaning of "report" in a statute, the court noted, "Common dictionary definitions of 'report' slightly vary, and, unsurprisingly, the parties each argue that the definition most favorable to their position controls."[443] The court declined "to arbitrarily choose between these definitions"; instead, the court used the definitions to establish the "outer boundaries" of what the word could, or could not, mean.[444]

The Austin Court of Appeals held that the existence of differing dictionary definitions did not prove that a term in an insurance policy was

---

434. Note, *supra* note 422, at 1449. *See* James W. Paulsen, *Family Law: Parent and Child*, 51 SMU L. REV. 1087, 1104 (1998) (claiming that the importance of defining words is in the context used).

435. Note, *supra* note 422, at 1449. *See* Scalia & Garner, *supra* note 426.

436. Paulsen, *supra* note 434.

437. Note, *supra* note 423, at 1446.

438. Paulsen, *supra* note 434.

439. Note, *supra* note 423, at 1449.

440. *See* Morath v. Lampasas Indep. Sch. Dist., 686 S.W.3d 725, 735 (Tex. 2024).

441. *Id.*

442. *Id.* (citing Brown v. City of Hous., 660 S.W.3d 749, 754 (Tex. 2023)).

443. City of Fort Worth v. Pridgen, 653 S.W.3d 176, 183 (Tex. 2022).

444. *Id.* at 183–84 (citing Philip A. Rubin, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 191 (2010)).

ambiguous.[445] The court's comments about the problems with using dictionaries are well worth quoting:

> While dictionaries may be helpful to the extent they set forth the ordinary, usual meaning of words, they provide an inadequate test for ambiguity. To allow the existence of more than one dictionary definition to be the sine qua non of ambiguity would eliminate contextual analysis of contractual terms; any time a definition appeared in a dictionary of whatever credibility or usage, that definition could be said to be "reasonable" and thus render many, if not most, words ambiguous. Dictionaries define words in the abstract, while courts must determine the meaning of terms in a particular context, here a specific insurance policy. Dictionary definitions alone can therefore be accorded little weight in determining ambiguity. The fact that different people reading different dictionary definitions of the same word might reach different interpretations of that word does not make each reading and interpretation reasonable. We agree with those courts holding that such definitions provide no significant help in determining whether a term has two reasonable meanings.[446]

C. Texas Supreme Court Advisory Committee Minutes

Courts, particularly the courts of appeals, have been receptive to citations to the transcripts of Texas Supreme Court Advisory Committee meetings when appeals involve the interpretation of rules.[447]

The function of the committee is to consider complaints, suggestions, and proposed changes to rules; draft proposed amendments; and forward its recommendations to the Supreme Court.[448] Transcripts of the meetings begin with the May 31, 1985 meeting.[449] The transcripts are available at the State Law Library in Austin and are indexed by rule number.[450] Some transcripts are now available at the Texas Supreme Court website.[451]

Courts have relied on the "legislative history" of the rules in at least fifty appeals.[452] The use of the transcripts has not yet been challenged on textualist

---

445. Gulf Metals Indus., Inc. v. Chicago Ins. Co., 993 S.W.2d 800, 805–06 (Tex. App.—Austin 1999, pet. denied).

446. *Id.* (emphasis omitted).

447. The last time the Texas Supreme Court cited the minutes of the Supreme Court Advisory Committee was in 2008. *In re* Brookshire Grocery Co., 250 S.W.3d 66, 71 (Tex. 2008).

448. Sarah B. Duncan, *Rules Changes*, *in* STATE BAR OF TEX., APP. PRAC. FOR LAWYERS AND LEGAL ASSISTANTS V-3 (1995).

449. LYDIA M. V. BRANDT, TEXAS LEGAL RESEARCH 494 (1995).

450. *Id.*

451. Supreme Court Advisory Committee, https://www.txcourts.gov/scac/meetings/ (last visited Sept. 4, 2024).

452. *See, e.g.*, Hibernia Energy III, LLC v. Ferae Naturae, LLC, 668 S.W.3d 771, 776 n.6 (Tex. App.—El Paso 2022, no pet.) (Referencing the Texas Supreme Court Advisory Committee's intent in rule drafting); Guillory v. Dietrich, 598 S.W.3d 284, 290 (Tex. App.—Dallas 2020, pet. denied) (recognizing

grounds.[453] The San Antonio Court of Appeals used the minutes of the Supreme Court advisory committee to aid its decision that motions for rehearing under Texas Rule of Appellate Procedure 19.1(b) included motions for reconsideration en banc.[454] The Fourteenth Court of Appeals found that objections on factual insufficiency grounds to the submission of jury questions violated Texas Rule of Civil Procedure 279, relying on the discussion of the amended rule by the Texas Supreme Court advisory committee.[455] The court concluded, "Despite the clear language of the new rule, its legislative history demonstrates unambiguously that no change was intended."[456] The San Antonio Court of Appeals found that Texas Rule of Civil Procedure 200 required that the party must give notice that its expert will attend the deposition of the opposing party's expert witness.[457] The court relied on both the plain language of the rule and the advisory committee transcripts.[458] The Texas Supreme Court has relied upon the Advisory Committee's Notes to the Federal rules when interpreting a Texas rule that is similar to the federal one.[459]

D. Texas Attorney General Opinions

The Attorney General of Texas has a constitutional duty to "give advice in writing to the Governor and other executive officers, when requested by them . . . ."[460] Attorney General opinions are available on the Internet in a searchable database.[461]

While Attorney General opinions may be persuasive authority, they are

---

the attention the present issue had at the Committee level); Cruz v. Ghani, 593 S.W.3d 376, 378 (Tex. App.—Dallas 2019, no pet.) (op. on motion for en banc reconsideration) (comparing amended versions of the applicable rule). A Westlaw search on March 20, 2024, for "supreme court" /s "advisory committee" yielded 67 hits, some of which were just passing references to the committee. *See generally* supreme court /s advisory committee", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20supreme%20court%20%2Fs%20advisory%20committee&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 20, 2024) (showing search results for "supreme court /s advisory committee" on Westlaw).

453. Antonin Scalia criticized the United States Supreme Court's use of Notes of the Advisory Committee for the Federal Rules of Procedure. Krupski v. Costa Crociere S. p. A., 560 U.S. 538, 557 (2010) (Scalia, J., concurring in part). *See* Paul Carrington, *Commentary: Showing disdain for official legislative history*, NATIONAL L. J. ONLINE (Aug. 11, 2010) (analyzing Justice Scalia's stance).

454. Yzaguirre v. Gonzalez, 989 S.W.2d 111, 112 (Tex. App.—San Antonio 1999, pet. denied).

455. Smith v. Christley, 755 S.W.2d 525, 528–29 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

456. *Id.* at 528.

457. Burrhus v. M & S Supply, Inc., 933 S.W.2d 635, 640 (Tex. App.—San Antonio 1996, writ denied).

458. *Id.*

459. Bradley v. State *ex rel.* White, 990 S.W.2d 245, 248–49 (Tex. 1999). *But see In re* Silver, 540 S.W.3d 530, 537 (Tex. 2018) (noting that federal sources can very helpful—except when they are not).

460. TEX. CONST. art. IV, § 22.

461. *See* Attorney General Opinions, ATT'Y GEN. TEX. https://www.texasattorneygeneral.gov/attorney-general-opinions (last visited Sept. 4, 2024).

not binding on Texas courts.[462] The Texas Supreme Court consistently has held that Attorney General opinions are persuasive, but not controlling, authority.[463] Courts will give "due consideration to attorney general opinions where appropriate . . . ."[464] An Attorney General opinion "cannot alter the pre-existing legal obligations of state agencies or private citizens."[465]

E. Treatises and Law Review Articles

Courts rely upon secondary sources such as treatises and law reviews for support and explanation.[466] For example, in one opinion, the Texas Supreme Court noted: "We are hardly alone in recognizing nominal damages for breach of contract; so do the First and Second Restatements, Williston, Corbin, and *Black's Law Dictionary*."[467] The citations to the Restatements and the contracts treatises buttressed the court's holding; its precedent became more authoritative when presented as well within the mainstream.[468] The citations to secondary sources were endogenous; they came from the court itself.[469] That is probably typical as lawyers underutilize secondary sources in briefs. Secondary sources are not always cited for support or guidance.[470] At times, courts will cite articles to point out that they are either moot or wrong.[471]

---

462. Hous. Chron. Pub. Co., v. City of Hous., 531 S.W.2d 177, 185 (Tex. App.—Houston [14th Dist.] 1975, writ refused n.r.e., 536 S.W.2d 559 (Tex. 1976)).

463. *See, e.g.*, Hartzell v. S.O., 672 S.W.3d 304, 317–18 (Tex. 2023) (recognizing the opinion's persuasive nature, but disagreeing with its analysis); Farmers Grp., Inc. v. Geter, 620 S.W.3d 702, 712 (Tex. 2021) (agreeing with a supportive Attorney General opinion); Cadena Com. USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318, 333 (Tex. 2017) (stating that even directly similar language in an Attorney General opinion would not bind to the Court); Comm'rs Court of Titus Cnty. v. Agan, 940 S.W.2d 77, 82 (Tex. 1997) (finding the Attorney General's conclusions on the issue incorrect and holding no authoritative weight).

464. Sw. Tex. State Univ. v. Enriquez, 971 S.W.2d 684, 687 (Tex. App.—Austin 1998, pet. denied). *See* Corsicana Indus. Found., Inc. v. City of Corsicana, 685 S.W.3d 171, 180 n.4 (Tex. App.—Waco 2024, pet. filed) (restating the notion that Attorney General opinions may be persuasive, yet do not control).

465. *In re* Abbott, 645 S.W.3d 276, 281 (Tex. 2022) (orig. proceeding).

466. *See* Schauer, *supra* note 376, at 1947–50.

467. MBM Fin. Corp. v. Woodlands Operating Co., L.P., 292 S.W.3d 660, 664 (Tex. 2009) (footnotes omitted) (italics added).

468. *See* Schauer, *supra* note 376 at, 1947–50.

469. On endogenous citations, *see* Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. APP. PRAC. & PROC. 61 (2019).

470. *See, e.g.*, Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 499–500 (Tex. 2019) ("Some commentators have opined that our willingness to apply the lodestar method to any situation in which an attorney testifies to reasonable hours multiplied by reasonable rates—as we did in *Long* and *Montano*—renders *El Apple*'s two-step process invalid. *See, e.g.*, Mark E. Steiner, *Will* El Apple *Today Keep Attorneys' Fees Away?*, 19 J. CONSUMER & COM. L. 114, 117 (2016) . . . To the contrary, both *Long* and *Montano* analyzed the issue of whether the evidence was sufficient under our precedent dealing with the lodestar method—based on *El Apple*.").

471. *See, e.g.*, Grunsfeld v. State, 843 S.W.2d 521, 537 n.21 (Tex. Crim. App. 1992) ("We thus make moot the premise underlying consequential considerations and conclusions in Comment, *Bringing Light to the Non-Capital Felony Punishment Phase: Article 37.07, Section 3a and Evidence of Unadjudicated Extraneous Offenses*, 44 BAYLOR L. REV. 101 (1992), particularly Parts II and III, at 109 ff.")

Lawyers, with some exceptions, seemingly underuse secondary sources in their appellate briefs. My impression from reading briefs and opinions while preparing this Article is that the secondary sources cited by courts generally were not cited by the lawyers.[472] The exceptions are oil and gas disputes where lawyers are quite adept at citing dictionaries, treatises, and law review articles.[473] Similarly, lawyers involved in contract disputes where a lot is at stake also utilize secondary sources.[474] But, overall, lawyers fail to use secondary sources to support their arguments or to provide context to the underlying dispute.[475] For writing briefs, a Texas lawyer would be wise to heed Bun B's admonition to "read a book" and "step up yo' vocab."[476]

After the adoption of the Uniform Bar Exam (UBE) in Texas, there is another important reason for lawyers to cite secondary sources: education.[477] Briefing attorneys, in all likelihood, will be the initial readers of appellate briefs.[478] And, in all likelihood, those same briefing attorneys (unlike their predecessors) will not have taken any Texas-specific courses.[479] It is extremely doubtful that these briefing attorneys will have taken any Texas procedure courses, as Texas procedure is no longer meaningfully tested on the Texas Bar Exam.[480] Lawyers should assume that these recent law school graduates did not learn a couple of things that would have been useful for their jobs: (1) Texas procedural law and (2) Texas substantive law.[481] This situation should improve in 2028 when the Texas bar examination reintroduces a Texas law component to ensure that those seeking admission to the Texas bar "have sufficient knowledge of important aspects of Texas law."[482]

The New York experience with the UBE is instructive as New York adopted the UBE several years before Texas did.[483] There, a New York State Bar Association task force discovered that "many of the New York-based law

472. *See infra* notes 542–51 and accompanying text (regarding the sparse use of secondary sources by appellate lawyers, leaving the courts to find their own).

473. *See, e.g.*, Nettye Energy, LP v. BlueStone Nat. Res. II, LLC, 639 S.W.3d 682, 685, 692, 695 (Tex. 2022) (citing two dictionaries, two law review articles, and a treatise on oil and gas law, all of which were cited in briefs submitted by the petitioner, respondent, or amicus).

474. *See infra* notes 491–93 and accompanying text (discussing contract lawyers and their use of secondary sources).

475. *See infra* notes 537–46 (noting statistics of rare use of secondary sources in briefs).

476. JAY-Z, *Big Pimpin*' (feat. UGK), *on* VOL. 3… LIFE AND TIMES OF S. CARTER (Roc-A-Fella/Def Jam 1999).

477. *See, e.g.*, Angela Morris, *The Bar Exam of the Future Offers Plenty to Be Excited About*, TEX. LAW. (Dec. 28, 2018) (describing the UBE's perspective on testing over research and the use of secondary sources).

478. *See id.*

479. *See id.*

480. *Id.*

481. *See* Supreme Court of Tex., *Order Regarding the NextGen Bar Exam and the Texas Law Component and Seeking Public Comments*, Misc. Docket No. 24-9040 (June 25, 2024).

482. *See id.*

483. TASK FORCE ON THE NEW YORK BAR ASSOCIATION, REPORT OF THE NEW YORK STATE BAR ASSOCIATION, TASK FORCE ON THE NEW YORK BAR ASSOCIATION 2–4 (Apr. 2020).

schools, in adjusting to the UBE, have ceased offering courses in New York law and students have similarly stopped enrolling in the courses that are offered."[484] Enrollments in "New York law specific courses are dropping like a rock . . . ."[485] The UBE is ill-suited for lawyers practicing in New York: "[u]nlike many other American jurisdictions, New York has its unique and complex court structure as well as its own unique codes and governing procedure in the various courts." [486] Texas's experience with the UBE should mirror New York's: our court structure and procedural rules are as byzantine as New York's, and course enrollment in Texas procedure classes has plummeted since the adoption of the UBE.[487] That means that briefing attorneys will need help understanding the arguments made by appellate advocates.[488] A "*see generally*" citation to a useful secondary source will certainly help.

"Texas courts often consider such treatises as *Prosser and Keeton on Torts* or *Corbin on Contracts* for statements on what the law is or what it should be."[489] Treatises also can even be used to establish the meaning of terms in statutes.[490] The most cited contracts treatises are *Corbin on Contracts* and *Williston on Contracts*.[491] Samuel Williston (1861–1963) was a professor at Harvard Law School and was the reporter for the *Restatement of Contracts*; his treatise was first published in 1920.[492] Arthur Corbin (1874–1967) was a professor at Yale Law School and was the first reporter for the *Restatement (Second) of Contracts*. Courts have cited the various editions of *Williston on Contracts* over 600 times.[493] Citations to Williston apparently

---

484. *Id.*

485. *Id.* at 62. Katryna L. Kristoferson & David Paul Horowitz, *How Did We Get Here? A Look at New York Practice Changes*, N.Y. L. J. (May 15, 2023 11:27 AM), https://www.law.com/newyorklawjournal/2023/05/15/how-did-we-get-here-a-look-at-new-york-practice-changes/?slreturn=20240816105311 ("A likely unintended consequence of the adoption of the UBE was the near total extirpation of New York practice from law school curriculums.").

486. TASK FORCE ON THE NEW YORK BAR ASSOCIATION, *supra* note 483, at 6.

487. *See id.*

488. *See id.*

489. Steiner, *supra* note 110, at 20.

490. Powell v. City of Hous., 628 S.W.3d 838, 843–44 (Tex. 2021); Rachal v. Reitz, 403 S.W.3d 840, 845 (Tex. 2013) (citing 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:3, at 13–14 (4th ed.1990) on the meaning of "agreement").

491. No other contracts treatise comes close. *Farnsworth on Contracts* has only been cited 27 times by Texas courts and has not been cited for ten years. Westlaw search "Farnsworth /s Contracts" conducted on March 26, 2024. *See generally* "Farnsworth /s Contracts", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20Farnsworth%20%2Fs%20Contracts&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing search results for "Farnsworth /s Contracts" on Westlaw).

492. Steiner, *supra* note 110, at 20.

493. Westlaw search conducted on March 26, 2024, yielded 627 results for the search "Williston /s Contracts." *See generally* "Williston /s Contracts", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20Williston%20%2Fs%20Contracts&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (displaying search results for "Williston /s Contracts" on Westlaw).

have increased.[494] The treatise was cited 127 times by Texas courts from 2004 through 2023 and only sixty-two times in the preceding twenty-year period.[495] Lawyers cited Williston 737 times in appellate briefs from 2004 through 2023.[496] In one recent Texas Supreme Court opinion on implied revocation, the Court cited *Williston on Contracts* sixteen times.[497] The lawyers had cited to Williston fourteen times in their briefs.[498] Texas courts have cited *Corbin on Contracts* over 390 times.[499] This treatise also is given some deference.[500] The Texas Supreme Court quoted the supplement to *Corbin on Contracts* that had criticized the very court of appeals opinion under review and then agreed with the supplement that "the court of appeals' opinion could have far-reaching adverse effects on well-established forms of

494. *See* Steiner, *supra* note 114, at 20.

495. Westlaw searches conducted on March 26, 2024, yielded 127 cases for the search "Williston /s Contracts & DA (aft 1/1/2004 & bef 1/1/2024)"; Westlaw searches conducted on March 26, 2024, yielded 62 cases for the search "Williston /s Contracts & DA (aft 1/1/1984 & bef 1/1/2004). *See generally* "Williston /s Contracts & DA (aft 1/1/2004 & bef 1/1/2024)", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20Williston%20%2Fs%20Contracts%20%26%20DA%28aft%201%2F1%2F2004%20%26%20bef%201%2F1%2F2024%29&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing search results for "Williston /s Contracts & DA (aft 1/1/2004 & bef 1/1/2024)" on Westlaw); "Williston /s Contracts & DA (aft 1/1/1984 & bef 1/1/2004)", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20Williston%20%2Fs%20Contracts%20%26%20DA%28aft%201%2F1%2F1984%20%26%20bef%201%2F1%2F2004%29&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing search results for Williston /s Contracts & DA (aft 1/1/1984 & bef 1/1/2004)" on Westlaw).

496. Westlaw searches conducted on March 26, 2024, yielded 737 briefs for the search "Williston /s Contracts & DA (aft 1/1/2004 & bef 1/1/2024)." *See generally* "Williston /s Contracts & DA (aft 1/1/2004 & bef 1/1/2024)", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20Williston%20%2Fs%20Contracts%20%26%20DA%28aft%201%2F1%2F2004%20%26%20bef%201%2F1%2F2024%29&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing search results for "Williston /s Contracts & DA (aft 1/1/2004 & bef 1/1/2024)" on Westlaw).

497. *See* Angel v. Tauch, 642 S.W.3d 481 (Tex. 2022). For example, the Court stated: "[w]e must acknowledge, as does Williston's contract treatise, that there can be 'theoretical and practical difficulties' with 'allowing an effective revocation to be made by anyone other than the offeror.'" *Id.* at 501 (citing 1 WILLISTON ON CONTRACTS, § 5:8.).

498. Response to Petition to Review at 13, 18, *Angel*, 642 S.W.3d 481 (No. 19–0793); Reply in Support of Petition for Review at 1, 7, 8, *Angel*, 642 S.W.3d 481 (No. 19–0793); Petitioner's Brief on the Merits at 20, 23, *Angel*, 642 S.W.3d 481 (No. 19–0793); Brief on the Merits of Respondent at 22, 24, 26, 39, 43, 60, *Angel*, 642 S.W.3d 481 (No. 19–0793); Reply Brief on the Merits at 9, *Angel*, 642 S.W.3d 481 (No. 19–0793).

499. Westlaw search conducted on March 26, 2024, yielded 625 results for the search "Corbin /s Contracts." *See generally* "Corbin /s Contracts", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20Corbin%20%2Fs%20Contracts&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing search results for "Corbin /s Contracts" on Westlaw).

500. *See, e.g.*, Foreca, S.A. v. GRD Dev. Co., Inc., 758 S.W.2d 744, 745 (Tex. 1988) ("Professor Corbin's writing is instructive on this question."); Cantu v. Cent. Educ. Agency, 884 S.W.2d 565, 567 (Tex. App.—Austin 1994, no writ) (discussing the Treatise's stance on the mailbox rule).

compensation."[501] However, in another case, the court referred to Corbin's "influential treatise on contracts" and then disagreed with Corbin's position.[502] Treatises are often useful for establishing "a well-settled body of law."[503] The Texas Supreme Court referred to a matter as settled law that a check "is a formal contract, a rule established not only in treatises but also the common law of this state and other states," and then cited to three contracts treatises and the *Restatement of Contracts*.[504] The various editions of *Prosser (and Keeton) on Torts* has been cited over 600 times by Texas courts.[505]

The most-cited Texas legal treatise is *McDonald's Texas Civil Practice*, which has been cited hundreds of times by Texas courts.[506] However, "[t]he number of citations to *McDonald's* has declined in recent years."[507]

While most citations to books are either to dictionaries or multi-volume treatises, Antonin Scalia and Bryan Garner's *Reading Law: The Interpretation of Texts,* published in 2012, already has been cited 168 times in appellate opinions and 555 times in briefs.[508] While the turn to textualism predated the publication of this book, textualist judges have found it to be a handy—and authoritative—source.[509] Fifty-nine Texas Supreme Court

---

501. Vanegas v. Am. Energy Servs., 302 S.W.3d 299, 303–04 (Tex. 2009) (quoting 1 JOHN E. MURRAY, JR. & TIMOTHY MURRAY, CORBIN ON CONTRACTS § 1.17 (Supp. Fall 2009)).

502. Shields Ltd. P'ship v. Bradberry, 526 S.W.3d 471, 484 & n.42 (Tex. 2017) (disagreeing with "3A Arthur L. Corbin, CORBIN ON CONTRACTS § 763 (1960) (most recent version at 8 Catherine M.A. McCauliff, CORBIN ON CONTRACTS § 40.13 (rev. ed. 1999)").

503. *See, e.g.*, Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 336 (Tex. 2011) (citing 7 Joseph M. Perillo, CORBIN ON CONTRACTS § 28.21 (rev. ed. 2002)).

504. 1/2 Price Checks Cashed v. United Auto. Ins. Co., 344 S.W.3d 378, 383 n.13 (Tex. 2011) (citing RESTATEMENT (SECOND) OF CONTRACTS § 6 (1981); RESTATEMENT OF CONTRACTS § 7 (1932); 22 Richard A. Lord, WILLISTON ON CONTRACTS § 60:1 (4th ed. 2002); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 16 (4th ed. 2001); 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 10.21 (rev. ed.1996)).

505. Westlaw search conducted on March 26, 2024, yielded 624 results for the search "Prosser /s Torts." *See generally* "Prosser /s Torts", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20prosser%20%2Fs%20torts&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing search results for "Prosser /s Torts" on Westlaw). *See, e.g.*, Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 604 (Tex. 2016) (citing to *Prosser and Keeton on Torts*).

506. *See generally* Beltran v. Brookshire Grocery Co., 358 S.W.3d 263, 268 (Tex. App.—Dallas 2011, pet. denied) (citing *McDonald's* several times).

507. *See* Steiner, *supra* note 110, at 20.

508. Westlaw search "Scalia /s Garner & Da (after 1/1/2012 & before 1/1/2024)." *See generally* "Scalia /s Garner & DA (after 1/1/2012 & before 1/1/2024)", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20Scalia%20%2Fs%20Garner%20%26%20DA%28after%201%2F1%2F2012%20%26%20before%201%2F1%2F2024%29&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 26, 2024) (showing search results for "Scalia /s Garner & Da (after 1/1/2012 & before 1/1/2024)" on Westlaw) [hereinafter Scalia /s Garner Westlaw Search]. Sixty-one of the citations in cases appear to be courts citing a case that cited Scalia & Garner.

509. *See* Jay Wexler, *Justices Citing Justices*, 26 GREEN BAG 2d 209, 213 (Spring 2023).

opinions have cited *Reading Law* through 2023.[510] Interestingly, the most citations from current members of the Court are from the three justices who had no prior judicial experience: Jimmy Blacklock (eight opinions), Jeff Boyd (eight opinions), and Evan Young (nine opinions).[511] Justice Devine is the outlier as the only justice with prior judicial experience who has cited Scalia and Garner at least five times.[512] The appreciation of *Reading Law* book sometimes has a fanboy aspect: the Supreme Court in citing one of its precedents has parenthetically noted three times that the case was cited in *Reading Law*.[513] Advocates seem to understand that the appellate courts are receptive to arguments buttressed by citations to *Reading Law*: citations to the book have appeared in 342 supreme court briefs and 199 court of appeals briefs.[514]

It has been over thirty years since Judge Harry T. Edwards complained of "impractical" scholars at law schools who produce "[a]bstract scholarship that has little relevance to concrete issues . . . ."[515] Consequently, Judge Edwards lamented, the bench and bar has "little use for much of the scholarship" produced by law professors.[516] More recently, Chief Justice John G. Roberts, Jr. asserted, "What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law."[517] A 1998

---

510. *Id.* A study of citations by United States Supreme Court justices of their colleagues' books and articles found a similar pattern. *Id.* The "one obvious, overarching result" of the study was that the majority of citations were to the Scalia & Garner book; nearly 60% of all cases involving a citation by a justice to another justice involved at least one citation to *Reading Law*. *Id.*

511. Jimmy Blacklock was Governor Greg Abbott's general counsel; Jeffrey Boyd was Governor Rick Perry's chief of staff; and Evan Young was in private practice and clerked for Justice Scalia. Ross Ramsey, *Perry Taps Chief of Staff for Texas Supreme Court*, TEX. TRIB. (Nov. 26, 2012, 11:00 AM) https://www.texastribune.org/2012/11/26/perry-taps-boyd-supreme-court/; Patrick Svitek, *Gov. Greg Abbott to Appoint General Counsel to Texas Supreme Court*, TEX. TRIB. (Nov. 27, 2017, 4:00 PM) https://www.texastribune.org/2017/11/27/abbott-appoint-general-counsel-replace-willett/; Patrick Svitek, *Evan Young, Former Clerk to Conservative U.S. Supreme Court Justice Antonin Scalia, Appointed to Texas Supreme Court*, TEX. TRIB. (Nov. 1, 2021, 11:00 AM) https://www.texastribune.org/2021/11/01/evan-young-texas-supreme-court/.

512. Robert Downen, *In Leaked Audio, Supreme Court Justice John Devine Railed Against "Brainwashed" GOP Colleagues*, TEX. TRIB. (Feb. 27, 2024, 5:00 AM) https://www.texastribune.org/2024/02/27/john-devine-texas-supreme-court-conservatives/.

513. Garofolo v. Ocwen Loan Servicing, L.L.C., 497 S.W.3d 474, 481 (Tex. 2016); Hebner v. Reddy, 498 S.W.3d 37, 41 (Tex. 2016); Zanchi v. Lane, 408 S.W.3d 373, 382 n.11 (Tex. 2013) (Hecht, J., concurring).

514. Westlaw search "Scalia /s Garner & Da (aft 1/1/2012 & bef 1/12024)." *See generally*, Scalia /s Garner Westlaw Search, *supra* note 508 (showing search results for "Scalia /s Garner & Da (after 1/1/2012 & before 1/1/2024)" on Westlaw).

515. Harry T. Edward, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (internal quotations omitted).

516. *Id.*

517. *Interview with Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEG. WRITING 5, 37 (2010). In a 2011 interview, Chief Justice Roberts continued in this vein with the hyperbolic comment: "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it but isn't of much help to the bar." *Quoted in* Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2d 251,

study found a decline in citation of law reviews in judicial opinions as "persuasive evidence that the bar is finding legal scholarship less relevant to the practice of law."[518] While judges and lawyers rarely cite to law reviews, it is not because they have found law reviews to be of no use; it is because they have assumed this to be true.[519] Most Texas law reviews still regularly publish articles that could be highly useful to the bench and bar.[520]

Texas courts apparently cite law review articles more than other appellate courts, which probably says more about the other courts than it does about Texas ones.[521] Federal circuit courts, for example, appear to cite law review articles infrequently.[522] One 1996 study analyzed whether courts and scholarly journals cite the same law review articles.[523] The authors identified the ten articles published in 1989, 1990, and 1991 that garnered the most judicial citations.[524] These articles then were compared to the most cited articles in law reviews.[525] The results were not surprising: courts and law professors do not appear to cite the same articles.[526] What was somewhat surprising to the authors was the "Texas phenomenon": four of the thirty most-cited articles discussed principles of Texas law.[527] The authors

---

251 n.1 (2015). Justice Stephen G. Breyer in 2009 made a similar remark, noting that "there is evidence that law review articles have left terra firma to soar into outer space." *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33–34 (2009). But Justice Breyer also argued that the legal profession works best when law professors write articles that lawyers would read and cite to courts: "I do worry about the academic world losing touch with the profession. I believe the profession functions best when large numbers of law professors see part of their job as familiarizing themselves with judicial opinions as well as statutes, organizing that mass of legal materials, and criticizing the legal material with an eye towards reform. I believe the profession functions best when the practicing lawyers read what the professors write, when they read the treatises and the law reviews, and when (and as in the interests of their clients) they make known to the bench the views of the professors. And I believe the profession works best when the judges, learning through the briefs and citations what the professors have found and viewing it in light of the lawyers' practical eye, take those reforming views into account. When these three branches of the legal profession work cooperatively in this way, the result is a body of law that is continuously modified so that it better reflects the needs of the public, those whom law is meant to serve." *Id.*

518. Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 660 (1998). *See* Brian T. Detweiler, *May It Please the Court: A Longitudinal Study of Judicial Citation to Academic Periodicals*, *in* ROLE OF CITATION IN THE LAW: A YALE LAW SCHOOL SYMPOSIUM 460 (Michael Chiorazzi ed., 2022) (discussing the change in use of law review articles); Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court: An Empirical Analysis*, 4 DREXEL L. REV. 399 (2012) (discussing the use of law review articles by justices).

519. *See* McClintok, *supra* note 518.; Detweiler, *supra* note 518, at 460; Newton, *supra* note 518.

520. *See generally* City of Keller v. Wilson, 168 S.W.3d 802, 809 n.10 (Tex. 2005) (referencing three Texas law reviews in reasoning).

521. Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles*, 71 CHI.-KENT L. REV. 871, 886 (1996).

522. Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIA. L. REV. 1051, 1052 (1991).

523. Merritt & Putnam, *supra* note 521, at 872.

524. *Id.*

525. *Id.* at 890.

526. *Id.*

527. *Id.* at 886 (internal quotations omitted).

concluded "either that Texas courts cite law review articles more often than do courts in other states, or that they at least cite particular articles repeatedly."[528] The "heavy representation" of Texas articles was not merely a function of the number of reported Texas opinions; "courts of other populous states (such as New York and California) [did] not generate[] articles for [the] 'most-cited' lists."[529]

According to the *Chicago-Kent* article, the most cited Texas articles published in 1989–1991 were Judge David Hittner & Lynne Liberato's article on summary judgment practice, W. Wendell Hall's article on standards of review, Harold H. Bluff's article on separation of powers under the Texas Constitution, and William Powers, Jr. and Jack Ratliff's article on sufficiency of evidence challenges.[530] At one point, *St. Mary's Law Journal* ranked only behind the *Harvard Law Review* and *Columbia Law Review* in citations in judicial opinions, largely because of Wendell Hall's article on standards of review.[531]

The "Texas phenomenon" can be overstated.[532] At the time of the study, the four articles on Texas law totaled eighty-one citations by Texas courts out of the thousands of opinions issued by Texas appellate courts.[533] For example, in FY1994, the Texas appellate courts issued nearly 10,000 opinions, and that is just one of the survey years used in the study.[534] The updated totals for these articles remain relatively miniscule when compared to the number of opinions issued by Texas appellate courts.[535] The Powers and Ratliff article has been now cited over 180 times by Texas courts.[536] Bluff's article has been cited ten times by courts and thirty-six times in

528. *Id.*

529. *Id.* at 886 n.57.

530. *Id.* at 884 (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243 (1989); W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865 (1990); Harold H. Bluff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990); William Powers, Jr. & Jack Ratliff, *Another Look at 'No Evidence' and 'Insufficient Evidence*,' 69 TEX. L. REV. 515 (1991)).

531. Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 CONN. L. REV. 43, 54 (2006).

532. Merritt & Putnam, *supra* note 521.

533. *Id.* at 899–901.

534. *Texas Court Activity: Overview of Activity for Year Ended August 31, 1994*, TEX. JUD. BRANCH, https://www.txcourts.gov/All_Archived_documents/JudicialInformation/pubs/ar94/133.pdf (last visited Sept. 4, 2024). The Texas Supreme Court issued 229 opinions; the Court of Criminal Appeals, 468; and the courts of appeals, 9,301. *Id.*

535. *Id.*

536. Westlaw search conducted on March 20, 2024. *See generally* "*Another Look at 'No Evidence' and 'Insufficient Evidence*," William Powers, Jr. & Jack Ratliff, WESTLAW, https://1.next.westlaw.com/RelatedInformation/I616a9531652211dbbe1cf2d29fe2afe6/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.Search)&docSource=e341ce8809bb4d67a13989303953c246&rank=1&rulebookMode=false&ppcid= (last visited Mar. 20, 2024) (showing the number of times the Powers & Ratliff article has been cited by Texas courts).

appellate briefs.[537] Hall's six articles on standards of review have been cited over 265 times by courts and have been cited by practitioners 464 times in appellate briefs.[538] Hittner and Liberato's articles on summary judgments have been cited over 150 times.[539] Practitioners have cited Hittner and Liberato over 300 times in appellate briefs.[540] Because both the Hall article on standards of review and the Hittner and Liberato article on summary judgment are regularly redone, the most recent version should be used.[541]

To get a rough idea about the rarity of citations to law review articles in appellate opinions and briefs, I ran a Westlaw search using the dates for fiscal

---

537. Westlaw search conducted on March 25, 2024. *See generally* "*Separation of Powers Under the Texas Constitution*, Harold Bluff", WESTLAW, https://1.next.westlaw.com/RelatedInformation/I6c0f3af14a7811db99a18fc28eb0d9ae/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.Default)&docSource=af8f14b4a2f0484c9947edf32c4b8e45&rulebookMode=false&ppcid=be3f57b0c09c46a49f67255e4b5b2a9b (last visited Mar. 25, 2024) (showing the number of times the Bluff article has been cited by Texas courts).

538. Westlaw search conducted on March 20, 2024. *See* "*Standards of Appellate Review in Civil Appeals*, Wendell Hall", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=Standards%20of%20Appellate%20Review%20in%20Civil%20Appeals%2C%20Wendell%20Hall&jurisdiction=TX-CS&contentType=ANALYTICAL&querySubmissionGuid= (last visited Mar. 20, 2024) (showing the number of times the Hall article has been cited by Texas courts) [hereinafter *Standards of Appellate Review in Civil Appeals* Westlaw Search]. *See* Hall, *supra* note 530; W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045 (1993); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351 (1998); W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1 (2002); W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47 (2006); W. Wendell Hall et. al., *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3 (2010); W. Wendell Hall & Ryan G. Anderson, *Standards of Review in Texas*, 50 ST. MARY'S L.J. 1099 (2019) (referencing the six articles that have been cited continuously by courts).

539. A Westlaw search conducted on March 20, 2024 for all eleven versions of the summary judgment articles yielded 181 case citations. *See, e.g.*, "*Summary Judgments in Texas 1981 Annual Survey*, David Hittner", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=David%20Hittner%2C%20Summary%20Judgments%20in%20Texas%201981%20Annual%20Survey&jurisdiction=TX-CS&contentType=ANALYTICAL&querySubmissionGuid= (last visited Mar. 20, 2024) (showing search results for the number of times one of the eleven the summary judgment surveys was cited) [hereinafter *Summary Judgment Survey* Westlaw Search]. Westlaw does not have the first Judge Hittner article, which was published in 1981, in its database. HeinOnline provides that three cases have cited it. *See* David Hittner, *Summary Judgments in Texas 1981 Annual Survey*, 21 S. TEX. L.J. 1 (1981); David Hittner, *Summary Judgments in Texas*, 35 BAYLOR L. REV. 207 (1983); David Hittner, *Summary Judgments in Texas*, 22 HOUS. L. REV. 1109 (1985); David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243 (1989); David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 35 S. TEX. L. REV. 9 (1994); David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303 (1998); David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1 (2002); David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409 (2006); David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379 (2010); David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 52 HOUS. L. REV. 773 (2015); David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 60 S. TEX. L. REV. 1 (2019); David Hittner et. al., *Summary Judgments in Texas: State and Federal Practice*, 62 S. TEX. L. REV. 99 (2023).

540. A Westlaw search conducted on March 20, 2024 for eleven versions of the summary judgment articles yielded 305 references in appellate briefs. *See generally*, *Summary Judgment Survey* Westlaw Search, *supra* note 539 (showing the case citations for one of the eleven summary judgment articles).

541. *See* Hall & Anderson, *supra* note 538*;* Hittner & Liberato, *supra* note 539.

year 2022 and looked for "L. Rev." and "L.J."[542] The search terms are not perfect because there are law reviews that do not have "law review" or "law journal" in their titles; however, the results have some utility.[543] The search yielded eighty-five opinions and 378 appellate briefs that cited law review articles.[544] Those eighty-five opinions citing law reviews were out of 8,610 opinions issued—roughly one out of 100 opinions cited at least one law review article.[545] One reason that the appellate courts are not citing many law review articles is lawyers are not citing articles in their briefs.[546] The Westlaw search yielded 378 briefs citing law review articles, which certainly overcounts the actual number.[547] There were 187 briefs citing law review articles in the Texas Supreme Court, which is probably a relatively high number considering that that year the Court had 855 petitions for review, 369 other petitions and writs, and 123 regular causes.[548]

Citations alone do not tell the story. Law review citations often seem to be ornamental. Some law review articles, however, do appear to have helped guide the Court's reasoning.[549] The most-cited article is, of course, Robert W. Calvert's article on insufficient evidence and no-evidence points, which has been cited over 1500 times by Texas courts.[550] The influence of this seminal article appears to be waning, in part, because of the more recent articles by Ratliff and Powers and Hall.[551]

CLE papers should not be overlooked as sources for support.[552] As

---

542. I used "Da (after 9/1/2021 & before 9/1/2022) & 'L. Rev.' 'L.J.'" *See generally* "Da (after 9/1/2021 & before 9/1/2022) & 'L. Rev.' 'L.J.", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20DA%28after%209%2F1%2F2021%20%26%20before%209%2F1%2F2022%29%20%26%20L.%20Rev.%20L.J.&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 24, 2024). There are two problems with this search. It does not catch all law review citations, and the abbreviation "L.J" also provides cases of initials or parts of case names. The original search yielded ninety-nine cases, but I culled fourteen results from that list. *See id.*

543. *See Standards of Appellate Review in Civil Appeals* Westlaw Search, *supra* note 538; *Summary Judgment Survey* Westlaw Search, *supra* note 539.

544. *Id.*

545. *Annual Statistical Report of the Texas Judiciary*, TEX. JUD. BRANCH 38, 43, 48–49, 52 (2022), https://www.txcourts.gov/media/1456803/ar-statistical-fy-22-final.pdf.

546. *See id.* at 38.

547. The results consisted of 187 Supreme Court briefs, seven Court of Criminal Appeals briefs, and 184 court of appeals briefs. *See* Hall & Anderson, *supra* note 538*;* Hittner et. al., *supra* note 539. Based upon a sampling of twenty court of appeals briefs, the 184 number is probably 25% too high. *Annual Statistical Report of the Texas Judiciary*, *supra* note 545, at 38.

548. TEX. JUD. BRANCH, *supra* note 545, at 38.

549. *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960).

550. *Id.*

551. *See* Powers & Ratliff, *supra* note 530.

552. *See* Benbrook Econ. Dev. Corp. v. Nat'l Bank of Tex., 644 S.W.3d 871, 874 (Tex. App.—Fort Worth 2022, no pet.) (citing David Z. Conoly, *Foreclosure on a Collateral Transfer of Note & Lien*, STATE BAR OF TEX. PROF. DEV. PROGRAM, ADVANCED REAL EST. L. COURSE 26, 26.1 (2020)); Allen Drilling Acquisition Co. v. Crimson Expl. Inc., 558 S.W.3d 761, 778 n.12 (Tex. App.—Waco 2018, pet. denied) (citing Philip B. Berry, *Rights of Non-Operator Under the Joint Operating Agreement*, STATE

appellate courts were facing the then-new no-evidence summary judgment rule, a paper presented by Judge Hittner and Lynne Liberato at the 1997 Advanced Civil Trial Course was cited often.[553]

F. Restatements of the Law

The American Law Institute (ALI) was formed in 1923 by elite lawyers, judges, and law professors.[554] Its purpose was "progressive, pragmatic reform of the law."[555] Its founders decried uncertainty and complexity as the "two chief defects in American law."[556] They cause "useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense."[557] The ALI would combat these defects by producing restatements of the law that would summarize "legal principles and rules in a form similar to a code."[558] Unlike treatises or legal encyclopedias, the restatements would be "analytical, critical and constructive."[559] The Restatement project has been an enormous success.[560] The ALI continues its work with over 4,000 members drawn from the judiciary, law schools, and big law firms.[561] Seven justices of the current Texas Supreme Court and two judges on the Court of Criminal Appeals are members of the American Law Institute.[562] Chief Justice Nathan Hecht is currently a member of the ALI council.[563]

BAR OF TEX., ADVANCED OIL & GAS & ENERGY RES. L. COURSE (2011)) (providing examples of appellate courts citing CLE papers). Recent papers are available for downloading at the TexasBarCLE website, which has a searchable database. *See* TexasBarCLE, STATE BAR OF TEXAS http://www.texasbarcle.com (last visited Sept. 4, 2024).

553. *See, e.g.*, Milam v. Nat'l Ins. Crime Bureau, 989 S.W.2d 126, 130 (Tex. App.—San Antonio 1999, no pet.); Moritz v. Bueche, 980 S.W.2d 849, 853 (Tex. App.—San Antonio 1998, no pet.); Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied) (listing examples of cases referencing Hittner and Liberato's paper).

554. N. E. H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55, 56 (1990).

555. *Id.*

556. *Creation and Projects*, *About ALI*, AM. L. INST. https://www.ali.org/about-ali/ (last visited Sept. 4, 2024).

557. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, AM. L. INST. 6 (1923) [hereinafter *Report of the Committee*].

558. Hull, *supra* note 554, at 79.

559. *Report of the Committee*, *supra* note 557, at 14.

560. *Frequently Asked Questions*, AM. L. INST., https://www.ali.org/about-ali/faq/ (last visited Sept. 4, 2024).

561. *Id.*

562. *See Member Directory*, AM. L. INST., https://www.ali.org/members/member-directory/ (last visited Sept. 4, 2024). The seven Texas Supreme Court justices who are members are Jane Bland, Jeffrey S. Boyd, J. Brett Busby, Nathan L. Hecht, Rebecca Aizpuru Huddle, Debra H. Lehrmann, and Evan A. Young. *Id.* Barbara Parker Hervey and David C. Newell are the two ALI members on the Court of Criminal Appeals. *Id.*

563. *Council Members*, AM. L. INST., https://www.ali.org/about-ali/governance/officers-council/list-council-members/ (last visited Sept. 4, 2024). In a video posted on the ALI channel on YouTube, Justice

Texas appellate courts have cited the restatements of the law over 4,000 times.[564] Cited most often have been the Restatements on Torts (2,750 citations)[565] and the Restatement of the Law of Contracts (over 1,000 citations).[566] Citations of restatement provisions have long signaled that Texas courts were in the judicial "mainstream."[567] Accordingly, litigants have been advised to "pitch their arguments as consistent with the national majority view and the Restatement whenever possible."[568] Sometimes the Restatement shows how a Texas precedent is out of the mainstream and should be overruled.[569]

Hecht speaks appreciatively of the work done by the ALI: "As a judge, particularly a common-law judge, I deal a lot with what the law is, what it's been, and how it should develop; and knowing that from the ALI projects—both the Restatements and the Principles—helps me understand that dynamic as I go about my work. So typically judges work on the cases that are in front of them, and they don't get much of a chance to look back and say, 'Well, where's the law going here, and what's this really about, what have other states done? It's always very important to us what other states are doing, so the being in the ALI and being on council just forces me to do that which forces me to take the time to do it." AM. L. INST., *Texas Supreme Court Chief Justice Nathan L. Hecht on Common Law*, YOUTUBE (Aug. 5, 2021), https://www.youtube.com/watch?v=G24GHHESdyc.

564. Westlaw search "restatement /s law" conducted on March 29, 2024, yielded 4,556 case citations. *See generally* "restatement /s law", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20restatement%20%2Fs%20law&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 29, 2024) (showing the case law search results from searching "restatement /s law" on Westlaw). That search is both over- and underinclusive. It would include sentences where the court had given a restatement of the applicable law and would exclude citations to the Restatement of Torts or the Restatement of Contracts. *See id.*

565. Westlaw search "restatement /s torts" conducted on March 29, 2024, yielded 2,750 hits, with 450 opinions from the Texas Supreme Court and 2,287 from the intermediate courts of appeals. *See generally* "restatement /s torts", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20restatement%20%2Fs%20torts&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 29, 2024) (showing search results for "restatement /s torts" on Westlaw). The first Texas citation to the Restatement of Contracts was by the Austin Court of Civil Appeals, where it noted: "The elementary legal principles applicable to the fact situation presented in the petition are embodied in section 388, vol. 2 of the American Law Institute's Restatement of the Law of Torts . . . ." Nesmith v. Magnolia Petroleum Co., 82 S.W.2d 721, 723 (Tex. Civ. App.—Austin 1935, no writ).

566. Westlaw search "restatement /s contracts" conducted on March 29, 2024, yielded 1,043 hits, with 186 opinions from the Texas Supreme Court and 850 from the intermediate courts of appeals. *See generally* "restatement /s contracts", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20restatement%20%2Fs%20contracts&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 29, 2024) (showing search results for "restatement /s contracts" on Westlaw). That search is shakier than the one for the Restatement of Torts in terms of returning false positives. The first Texas citation to the Restatement of Contracts was also by the Austin Court of Civil Appeals where it referred to the relevant sections on implied contracts. Miller v. Miller, 292 S.W. 917, 918 (Tex. Civ. App.—Austin 1927, writ ref'd).

567. Pamela Stanton Baron, *The Texas Supreme Court's 1998–1999 Term*, *in* STATE BAR OF TEX. PROF. DEV. PROGRAM, ADV. CIV. APP. PRAC. COURSE (1999).

568. *Id.*

569. *See, e.g.*, Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 561 (Tex. 2015) (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 3 Reporter's Note, cmt. b (AM. L. INST. 2000) (discussing comparative responsibility)). The court noted that the precedent case was specifically cited by the Restatement as an example of the decisions whose rationale had been eviscerated by the advent of comparative fault. *Id.*

Texas courts, on occasion, have expressly adopted a Restatement rule.[570] On other occasions, the courts have used the Restatement for a convenient summary of a common-law rule.[571] A citation to the Restatement does not mean that the court accepted the Restatement's position.[572] For example, the Texas Supreme Court has refused to adopt comment j of Restatement (Second) of Torts § 402A.[573]

The *Restatement of the Law of Liability Insurance* (RLLI) was approved by the ALI in 2018 and published in 2019.[574] It engendered considerable opposition during the drafting process and after its approval.[575] This unprecedented resistance to an ALI Restatement came from the insurance industry, the National Council of Insurance Legislators (NCOIL), governors, and state legislators.[576] The criticism of the RLLI has varied. Yale Law School professor George L. Priest attacked the RLLI for its purported policyholder bias; this criticism was not repeated by politicians, probably because their constituents are policyholders.[577] Six governors—all Republicans—sent a joint letter to the ALI that criticized the December 2017 draft of the RLLI for going beyond restating black-letter law and for reinterpreting and purporting to modify existing insurance law, but they failed to provide any specifics.[578] They also condemned the RLLI for

---

570. *See, e.g.*, Barr v. Resol. Tr. Corp. *ex rel.* Sunbelt Fed. Sav., 837 S.W.2d 627, 631 (Tex. 1992) (adopting RESTATEMENT OF JUDGMENTS § 24(1)); Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985) (adopting RESTATEMENT (SECOND) OF TORTS § 414); Exxon Corp. v. Brecheen, 526 S.W.2d 519, 524 (Tex. 1975) (adopting RESTATEMENT (SECOND) OF TORTS § 455); Shoemaker v. Est. of Whistler, 513 S.W.2d 10, 16–17 (Tex. 1974) (adopting RESTATEMENT (SECOND) OF TORTS § 491) McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 788–89 (Tex. 1967) (adopting RESTATEMENT (SECOND) OF TORTS § 402A).

571. *See, e.g.*, Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987) (using the Restatement as a review tool).

572. *See* Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 328 (Tex. 1998).

573. *Id. See* Prather v. Brandt, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (demonstrating an instance where the Restatement rule on abnormally dangerous activities was not adopted); Rodriguez v. Spencer, 902 S.W.2d 37, 42–43 (Tex. App.—Houston [1st Dist.] 1995, no writ) (failing to adopt the Restatement rule on parental liability); DeLuna v. Guynes Printing Co., 884 S.W.2d 206, 209 (Tex. App.—Fort Worth 1994, writ denied) (holding that the Restatement rule on employer liability did not apply).

574. Richard. L. Revesz, *The Restatement of Liability Insurance in the Courts*, AM. L. INST. (Dec. 15, 2021) https://www.ali.org/news/articles/restatement-liability-insurance-courts/.

575. *Id.*

576. For summaries of the hostile reception to the RLLI *see* Lorelie S. Masters & Geoffrey B. Fehling, *The American Law Institute's Restatement of the Law, Liability Insurance: Scholarship and Controversy*, 27 CONN. INS. L. J. 116, 134 (2020); Jeffrey W. Stempel, *Hard Battles Over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance*, 69 CLEV. STATE L. REV. 605, 630 (2021).

577. George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Projec*t, 24 GEO. MASON L. REV. 635, 636, 652 (2017); *see also* Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance*, 24 GEO. MASON L. REV. 767, 773 (2017).

578. Letter from Governors Henry McMaster (S.C.), Kim Reynolds (Iowa), Paul R. LePage (Me.), Pete Ricketts (Neb.), Greg Abbott (Tex.), and Gary R. Herbert (Utah), to David F. Levi, President, AM. L. INST. (Apr. 6, 2018), https://ncoil.org/wp-content/uploads/2018/04/2018-04-062520Governors2520to

invading the "prerogative of our state legislatures."[579] "If the ALI does not significantly revise or rescind the Draft Restatement," the governors warned, "this implicit usurpation of state authority may require legislative or executive action."[580] NCOIL has been a vociferous critic of the RLLI project.[581] It too has criticized the RLLI for violating "the realm of legislative prerogative and depart[ing] from settled law."[582]

At least seven state legislatures since 2018 have passed laws that specifically proscribed or limited the use of the RLLI or restatements generally.[583] Ohio declared that the RLLI "does not constitute the public policy of this state and is not an appropriate subject of notice."[584] North Dakota proscribed any person or court from applying, giving weight to, or affording recognition to the RLLI "as an authoritative reference regarding interpretation of North Dakota laws, rules, and principles of insurance law."[585] Kentucky declared: "A statement or restatement of the law in any legal treatise, scholarly publication, textbook, or other explanatory text shall not constitute the law or public policy of the Commonwealth of Kentucky. No Kentucky court shall treat any such publication or text as controlling authority."[586] Like Kentucky, Oklahoma also targeted "[a] statement or restatement of the law of insurance in *any legal treatise, scholarly publication, textbook or other explanatory text*" except it limited the scope to insurance.[587] These publications do not "constitute the law or public policy of this state and shall not be authoritative if the statement of the law purports to create, eliminate, expand or restrict a cause of action, right or remedy, or if it conflicts with" the laws of Oklahoma.[588]

Three other states enacted statutes that said if there was a conflict between the RLLI and state law, then state law would control. Arkansas and Michigan merely forbade the use of any principle or rule in the RLLI if it was inconsistent with that state's statutes or case law.[589] Utah passed a law on the "[a]pplicability of restatement of law" that was based upon a model law

---

2520ALI2520re2520Draft2520Restatement-2-1.pdf.

579. *Id.*

580. *Id.* (italics omitted).

581. Email from Thomas B. Considine, Chief Exec. Off. Nat'l Conf. Ins. Legis., to Richard Revesz, Dir. Am. L. Inst. & Stephanie Middleton, Deputy Dir. Am. L. Inst. (May 5, 2017); Letter from Thomas B Considine, Chief Exec. Off. Nat'l Conf. Ins. Legis., to Thomas A. Balmer, Chief Just. Or. Sup. Ct. (Feb. 27, 2018).

582. Press Release, Nat'l Conf. Ins. Legis., NCOIL Voices Concerns with the America Law Institute's Proposed Liability Insurance Restatement; Violates "Legislative Prerogative" (May 8, 2017).

583. *See infra* notes 584–92 (showing Ohio, North Dakota, Kentucky, Oklahoma, Arkansas, Michigan, and Utah's statutory construction).

584. OHIO REV. CODE § 3901.82.

585. N. D. CENT. CODE § 26.1–02–34.

586. BALDWIN'S KY. REV. STAT. ANN. § 446.082.

587. OKLA. STAT. ANN. tit. 12, § 2411.1 (2021) (emphasis added).

588. *Id.*

589. ARK. CODE ANN. § 23-60-112; MICH. COMP. LAWS § 500.3032.

proposed by NCOIL.[590] Like the Arkansas and Michigan laws, Utah said that the Restatement of the Law of Liability Insurance "is not the law or public policy of this state if the statement of law is inconsistent or in conflict with" the laws of the state.[591] Utah added a provision that is not in NCOIL's model law: "Nothing in this section precludes a court from referencing or considering a restatement or other legal treatise."[592]

The Texas legislature also entered the fray, which was not surprising since Governor Abbott was one of the signatories of the 2018 letter criticizing the RLLI.[593] Two bills and a resolution that addressed the use of the Restatements in Texas courts were introduced in the 86th session of the Texas legislature.[594] Representative Tom Oliverson introduced a concurrent resolution that specifically condemned the Restatement of the Law of Liability Insurance and discouraged courts from relying on the Restatement "as an authoritative reference."[595] Representative Oliverson explained that "our case law is already developed" and "this Restatement is kinda out of bounds, [so] you shouldn't rely on it."[596] The resolution was reported favorably out of committee, but did not reach the House floor.[597]

Texas State Senator Larry Taylor, who worked in the insurance industry, introduced a bill in the Senate, and Jeff Leach introduced one in the House.[598] Taylor's version prohibited the use of any Restatements in Texas courts, stating that "a Restatement of the Law published by the American Law Institute shall not be considered in any action governed by the laws of this state."[599] That bill was referred to the State Affairs Committee where it mercifully died.[600]

---

590. UTAH CODE ANN. § 31A-22-205. *See NCOIL Adopts Model Act Concerning Interpretation of State Insurance Laws*, NAT'L COUNCIL INS. LEGISLATORS (July 25, 2019), https://ncoil.org/2019/07/25/ncoil-adopts-model-act-concerning-interpretation-of-state-insurance-laws/.

591. UTAH CODE ANN. § 31A-22-205 (1).

592. *Id.* § 31A-22-205 (2).

593. *See supra* note 578 and accompanying text (noting the letter's signatures).

594. *See* Tex. H.C.R. 58, 86th Leg., R.S. (2019).

595. *Id.*

596. Hearing before the H. Comm. on the Judiciary and Civ. Juris., 86th Leg., R.S. (Apr. 8, 2019) (statement of Tom Oliverson), (available at 86th Session Committee Broadcast Archives, https://www.house.texas.gov/videos/committees/86/R). The witness list for HCR 58 had representatives from Liberty Mutual Insurance, Texas Civil Justice League, Texas Coalition for Affordable Insurance Solutions, CAN Insurance, Texas Farm Bureau Insurance Companies, National Association of Mutual Insurance Companies, The Travelers Companies, Inc., Texans for Lawsuit Reform, U.S. Chamber Institute for Legal Reform, USAA, and American Property Casualty Insurance Association as "[r]egistering, but not testifying" in favor of the bill. Witness List for H.C.R. 58 during hearing before H. Comm. On Judiciary and Civ. Juris., 86th Leg., R.S. (Apr. 8, 2019) (available at Text, H.C.R. 58, TEX. LEGISLATURE ONLINE https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HCR58).

597. Bill History, H.C.R. 58, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HCR58 (last visited Sept. 4, 2024).

598. Tex. S.B. 2303, 86th Leg., R.S. (2019).

599. *Id.*

600. Bill History, S.B. 2303, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB2303 (last visited Sept. 4, 2024).

Representative Leach's bill codified the obvious: "In any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute's Restatements of the Law are not controlling."[601] The bill was briefly discussed at a public hearing of the House Committee on the Judiciary and Civil Jurisprudence, which was chaired by Leach.[602] In introducing the bill, Leach explained that the Restatements could be used, read, and considered by Texas courts, but they were not "controlling law."[603] Brian Martin, a lawyer at Thompson Coe, was the only witness on the bill.[604] Martin briefly argued that Texas already had case law on every section of the *Restatement of the Law of Liability Insurance* because Texas had "the most developed insurance law . . . in the country."[605] If there *were* gaps in the law, then it would be a "different conversation."[606] That bill advanced and ultimately became law.[607] The bill analysis explained:

> The American Law Institute (ALI) is an organization that publishes the Restatements of the Law, which are often considered by courts as dependable descriptions of existing law. Recent concerns have been raised that the document may go beyond summarizing the state of current legal thinking and may be inaccurate or misleading. H.B. 2757 seeks to clarify the rule of decision in Texas courts and establish that the ALI Restatements are not controlling in any action governed by state law.[608]

Jay A. Thompson, another Thompson Coe lawyer, testified briefly in favor of the bill at a public hearing before the Senate Committee on State Affairs.[609] Thompson said that the bill would ensure that Texas lawyers would look at Texas case law and Texas statutes and apply those first.[610] Because "Texas courts have probably the most developed law in the United

---

601. Tex. H.B. 2757, 86th Leg., R.S. (2019) (as introduced).

602. Hearing before the H. Comm. on the Judiciary and Civ. Juris., 86th Leg., R.S. (Apr. 8, 2019) (statement of Jeff Leach), (available at 86th Session Committee Broadcast Archives) https://www.house.texas.gov/videos/committees/86/R.

603. *Id.*

604. Hearing before the H. Comm. on the Judiciary and Civ. Juris., 86th Leg., R.S. (Apr. 8, 2019) (statement of Brian Martin) (available at 86th Session Committee Broadcast Archives) https://www.house.texas.gov/videos/committees/86/R. Martin based his conclusion that Texas law had already covered every section of the new Restatement upon a recently published article in the *Journal of Texas Insurance Law* written by two other Thompson Coe attorneys. *See* Cyrus W. Haralson & Christina A. Culver, *Texas Law and the Restatement of the Law of Liability Insurance: An Initial Comparison of Blackletter Principles*, 17 J. TEX. INS. L. 3 (Spring 2019).

605. *Id.*

606. *Id.*

607. Bill History, H.B. 2757, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/billlookup/Text.aspx?LegSess=86R&Bill=HB2757.

608. H. Comm. on Judiciary and Civ. Juris., Bill Analysis, Tex. H.B. 2757, 86th Leg., R.S. (2019).

609. Hearing before the S. Comm. on State Affs., 86th Leg., R.S. (May 13, 2019) (statement of Jay A. Thompson) (available at 86th Session Senate Audio/Video Archive) https://senate.texas.gov/av-archive.php?yr=2019&lang=en (last visited Sept. 4, 2024).

610. *Id.*

States on all of the issues addressed by the Restatements, that is where Texas lawyers should look first."[611] The bill passed the Texas Senate unanimously and passed the House by a vote of 139 to 3.[612] This new provision was added to the Texas Civil Practice and Remedies Code as § 5.001(b).[613]

After the passage of § 5.001(b), Texas courts have continued to cite the various Restatements for guidance.[614] The Restatement is cited still as providing "blackletter law."[615] In a concurring opinion, Fourteenth Court of Appeals Justice Meagan Hassan noted that "[t]he *Restatement (Second) of Torts* is (at least) a respected and authoritative restatement."[616] In fact, Texas appellate courts have cited to the Restatements over five hundred times since § 5.001 (b) was enacted in 2019.[617] The dreaded *Restatement of the Law of Liability Insurance* has even been cited by the Texas Supreme Court.[618] And courts also have continued to find some provisions of the Restatements unpersuasive.[619]

In a few instances after the enactment of § 5.001(b), courts have seemed a little defensive about citing Restatement provisions and comments.[620] The Texas Supreme Court recently addressed whether a lawyer for one party could serve as the escrow holder for both sides in a dispute—an issue of first

---

611. *Id.*

612. S.J. of Tex., 86th Leg., R.S. 2297 (2019); H.J. of Tex., 86th Leg., R.S. 2101 (2019).

613. TEX. CIV. PRAC. & REM. CODE § 5.001(b).

614. *See, e.g.*, HNMC, Inc. v. Chan, 683 S.W.3d 373, 382–86 (Tex. 2024) (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 49, 54; RESTATEMENT (SECOND) OF TORTS §§ 315, 323, 328E, 364, 368, 371); Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, 675 S.W.3d 273, 281 (Tex. 2023) (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 72 reporter's note cmt. c); Freeport-McMoRan Oil & Gas LLC v. 1776 Energy Partners, LLC, 672 S.W.3d 391, 399 (Tex. 2023) (citing RESTATEMENT (SECOND) OF TORTS § 283 cmt. c); Schindler Elevator Corp. v. Ceasar, 670 S.W.3d 577, 584 n.12 (Tex. 2023) (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 17 cmt. a); Austin Trust Co. v. Houren, 664 S.W.3d 35, 50–51 (Tex. 2023) (finding persuasive RESTATEMENT (THIRD) OF TRUSTS § 97(b) cmt. e); Brown v. Freed, No. 03-21-00556-CV, 2023 WL 9007331, at *3 (Tex. App.—Austin Dec. 29, 2023, no pet.) (mem. op.) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27); BB FIT, LP v. EREP Preston Trail II, LLC, No. 05-22-00682-CV, 2023 WL 7401501, at *7 (Tex. App.—Dallas Nov. 9, 2023, rule 57.3 (f) motion granted) (mem. op.) (citing RESTATEMENT (SECOND) OF CONTRACTS § 261).

615. Angel v. Tauch, 642 S.W.3d 481, 483 n.1 (Tex. 2022) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 35, 36 to support the proposition that "an offer empowers the offeree to seal the bargain by accepting the offer").

616. HNMC, Inc. v. Chan, 637 S.W.3d 919, 946 (Tex. App.—Houston [14th Dist.] 2021) (Hassan, J., concurring), *rev'd*, 683 S.W.3d 373 (Tex. 2024).

617. *See supra* note 614 and accompanying text (providing examples of cases citing to Restatement citations).

618. *In re* Farmers Tex. Cnty. Mut. Ins. Co., 621 S.W.3d 261, 268 (Tex. 2021) (orig. proceeding).

619. *See, e.g.*, Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc., 659 S.W.3d 424, 437 n.95 (Tex. 2023) (declining to jettison long-standing precedent in favor of a cause of action based upon RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 cmt. a (2011)); *In re* Acad., Ltd., 625 S.W.3d 19, 31 (Tex. 2021) (rejecting RESTATEMENT (SECOND) OF TORTS § 390 cmt. a's application of the common-law negligent entrustment claim to sellers of chattels).

620. *See generally* Boozer v. Fischer, 674 S.W.3d 314, 326–27 (Tex. 2023) (showing the reasons for defensiveness by courts).

impression in Texas.[621] Justice Young, writing for the majority, turned to both the *Restatement (Third) of the Law Governing Lawyers* and decisions from other states for guidance.[622] The court's conclusion—that one party's attorney or agent may serve as the escrow holder as long as doing so presents no conflict with the client's interests—was consistent with "longstanding precedent from other states' high courts" and the Restatement.[623] Perhaps as a nod to § 5.001(b), Justice Young noted: "Neither the Restatement nor other states' courts are binding on us, of course, but they confirm that our understanding is based on shared and noncontroversial common-law premises."[624] When the Fourteenth Court of Appeals cited the *Restatement (Second) of Agency* to support a proposition, it added a footnote explaining it was "treating the cited Restatement section and comment as persuasive authority rather than controlling authority."[625]

Because § 5.001(b) did not really change anything, it has not given lawyers a new arrow for their quivers.[626] The Fort Worth Court of Appeals rejected the Texas Department of Transportation's apparent argument that it had violated § 5.001(b) by "improperly rel[ying] on Section 414 of Restatement (Second) of Torts" in its original opinion.[627] The court noted that it had cited "Texas cases—including two Texas Supreme Court opinions—that adopt and apply Section 414."[628] Consequently, the Court was merely following Texas precedent.[629]

G. Legislative History

The Texas Legislature has asked state courts to consider considering legislative history even when the statute is not ambiguous.[630] The Texas Code Construction Act provides: "In construing a statute, whether or not the statute is considered ambiguous on its face, a court *may* consider among other

621. *Id.* at 321.

622. *Id.* at 326–27.

623. *Id.* at 326.

624. *Id.* at 327.

625. James Constr. Grp., LLC v. Westlake Chem. Corp., 594 S.W.3d 722, 737–38 n.10 (Tex. App.—Houston [14th Dist.] 2019), *aff'd in part, rev'd in part*, 650 S.W.3d 392 (Tex. 2022). *See* Benson v. Forgie, No. 14-22-00519-CV, 2023 WL 5623568, at *4 n.5 (Houston [14th Dist.] Aug. 31, 2023, no pet.) (mem. op.) (noting that "[t]he supreme court regularly cites to the Restatement and relies on the Restatement for contractual concepts," after citing RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 72).

626. *See* Tex. Dep't of Transp. v. Self, 683 S.W.3d 62, 87 n.7 (Tex. App.—Fort Worth 2022) (mem. op. on reh'g) *(rev'd*, 690 S.W.3d 12, 17 (Tex. 2024)). The Texas Supreme Court adopted § 414 of the Restatement (Second) of Torts in 1985. Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985).

627. *Tex. Dep't of Transp.*, 683 S.W.3d at 87 n.7.

628. *Id.*

629. *Id.*

630. *See generally* Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 342, 370–73 (2012) (explaining that the Texas Legislature endorsed the courts looking at legislative histories when interpreting statutes following the passing of the Code Construction Act).

matters the . . . (3) legislative history."[631] Legislative history includes "the enactment history of a statute, . . . [the] actions taken and statements made during legislative consideration."[632] Legislative history includes floor debates, committee hearings, and bill analyses.[633]

The Texas Supreme Court once accepted this invitation and was willing to consider legislative history without first determining whether the statutory language was ambiguous.[634] In 2001, the Court noted:

> Even when a statute is not ambiguous on its face, we can consider other factors to determine the Legislature's intent, including: the object sought to be obtained; the circumstances of the statute's enactment; the legislative history; the common law or former statutory provisions, including laws on the same or similar subjects; the consequences of a particular construction; administrative construction of the statute; and the title, preamble, and emergency provision.[635]

While the legislature has told Texas courts that they could consider legislative history regardless of ambiguity, the Texas Supreme Court now consistently declines the invitation.[636] In 2011, Justice Green, writing for the majority, used legislative history when discussing a statute, noting that the Code Construction Act "allow[ed] courts to consider legislative history when construing statutes."[637] Two concurring opinions addressed this practice. Chief Justice Jefferson argued, "Legislative history is not always a villain."[638] The court's "general rule" is "extrinsic aids are inappropriate 'to construe' an unambiguous statute."[639] He tolerated the use of legislative history in the majority opinion because it was used to establish context, not to construe the statutory language.[640] Such use was not inappropriate.[641] Justice Willett was

---

631. TEX. GOV'T CODE § 311.023 (emphasis added).

632. Lee v. Mitchell, 23 S.W.3d 209, 213 (Tex. App.—Dallas 2000, pet. denied).

633. *Id.*

634. *See, e.g.*, City of Rockwall v. Hughes, 246 S.W.3d 621, 626 n.6 (Tex. 2008) ("We may also consider legislative history in construing a statute that is not ambiguous."); Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund, 212 S.W.3d 320, 327 (Tex. 2006) (citing the bill analysis); Marcus Cable Assocs., L.P. v. Krohn, 90 S.W.3d 697, 706 (Tex. 2002) (looking at legislative intent when construing statutes)*; In re* Canales, 52 S.W.3d 698, 702 (Tex. 2001) (stating that the court's goal when constructing a statue is determining legislative intent); Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 383 (Tex. 2000) ("When determining legislative intent, we look to the language of the statute, as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions.").

635. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001) (citing TEX. GOV. CODE. § 301.023; Ken Petroleum Corp. v. Questar Drilling Corp., 24 S.W.3d 344, 350 (Tex. 2000)).

636. *See* Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 430–31 (Tex. 2011). See Daniel J. Olds, *Ordinary Meaning, Context, and Textualism*, 52 TEX. TECH L. REV. 487 (2020).

637. *Id.* at 430.

638. *Id.* at 435 (Jefferson, C.J., concurring).

639. *Id.* at 436.

640. *Id.*

641. *Id.* at 435–36.

more critical.[642] He believed that the court unnecessarily cited "the flotsam and jetsam of legislative history."[643] He found this "roundabout detour [was] a little jarring given our forceful pronouncements over the years that unambiguous text equals dispositive text."[644]

Justice Willett won this argument. In a recent case, the court declared, "*legislative* history is generally useless to courts—indeed, it can be worse than useless because it is manipulable and relies on what *never* was the law."[645] In Texas, there is now what Professor Abbe R. Gluck calls "methodological stare decisis"; the Texas Supreme Court, like other state courts, gives "precedential effect to judicial statements about methodology," specifically on when it is appropriate to cite legislative history.[646] Consequently, advocates should avoid citing legislative history unless they are arguing the statutory language is ambiguous.[647] When a party asked the Supreme Court in 2018 to consider legislative history, it testily responded: "[a]s we have repeatedly explained, however, we do not rely on such extrinsic aids to construe unambiguous statutory language."[648] The party exhorted the Court to use legislative history because the Code Construction Act permits its use even when the statute is unambiguous; however, the court responded: "[a]lthough this section may grant us legal permission, not all that is lawful is beneficial."[649]

The Texas Supreme Court recently refused to consider a bill analysis, declaring: "[w]e, however, do not resort to extrinsic aides, such as legislative history, to interpret a statute that is clear and unambiguous, . . . because the statute's plain language 'is the surest guide to the [l]egislature's intent.'"[650] Justice Blacklock has recently suggested that legislative history "should play no role in statutory interpretation."[651] Justice Young has explained the distinction between "legislative history" (bad) and "statutory history" (good).[652] Courts should avoid legislative history because it is "generally

642. *Id.* at 439 (Willett, J., concurring in part).

643. *Id.* at 441.

644. *Id.* at 441–42. *See* Klein v. Hernandez, 315 S.W.3d 1, 9–11 (Tex. 2010) (Willett, J., concurring) ("As today's case can be decided without consulting legislative history, it should be decided without consulting legislative history."); Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 469–74 (Tex. 2009) (Willett, J., concurring).

645. Brown v. City of Hous., 660 S.W.3d 749, 755 (Tex. 2023).

646. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1754 (2010).

647. *See id.* at 1839.

648. Tex. Health Presbyterian Hosp. of Denton v. D.A., 569 S.W.3d 126, 135 (Tex. 2018).

649. *Id.* at 136.

650. Sullivan v. Abraham, 488 S.W. 3d 294, 299 (Tex. 2016) (quoting Prairie View A & M Univ. v. Chatha, 381 S.W.3d 500, 507 (Tex. 2012)).

651. Hegar v. Health Care Serv. Corp., 652 S.W.3d 39, 50 (Tex. 2022) (Blacklock, J., dissenting).

652. *See, e.g.*, Brown v. City of Hous., 660 S.W.3d 749, 755 (Tex. 2023) (Young, J., dissenting) (explaining the negative impact of using legislative history over statutory history in case decisions in a dissent joined by Justice Young) (emphasis omitted).

useless"; in fact, "it can be worse than useless because it is manipulable and relies on what *never* was the law."[653]

By contrast, "quite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration," which "form part of the context of the statute" that *is* the law. Statutory history is therefore probative and sometimes indispensable in statutory interpretation.[654]

But other Supreme Court justices still cite to legislative history.[655] Sometimes, though, its use comes with a disclaimer. After Justice Boyd cited to a bill analysis in a 2016 opinion, he explained the following in a footnote:

> While this legislative history of section 7.057(a–1) provides useful context and a ready example of the kind of law to which the provision applies, we need not and do not rely on legislative history to construe the statute.[656] The provision's meaning is plain on its face, and we construe it accordingly here.[657]

If the problem with legislative history is its use as an authoritative source on statutory meaning, perhaps a more limited use is palatable.[658]

The Court of Criminal Appeals seemingly suggested that the Code Construction Act unconstitutionally usurped its "law interpreting function."[659] In rejecting the Code Construction Act, it articulated its own rule for determining when to look at legislative history:

> If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then *and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such *extra*textual factors as executive or administrative interpretations of the statute or legislative history.[660]

Despite its hostility to the Code Construction Act, the Court of Criminal Appeals uses legislative history in determining statutory intent.[661]

---

653. *Id.*

654. *Id.* (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012)) (citation omitted). *See* Stredic v. State, 663 S.W.3d 646, 659 (Tex. Crim. App. 2022); *In re* J.S., 670 S.W.3d 591, 597–98 (Tex. 2023) (emphasizing the use of statutory history over legislative history).

655. City of League City v. Jimmy Changas, Inc., 670 S.W.3d 494, 512 n.8 (Tex. 2023) (Boyd, J., concurring); Hogan v. Zoanni, 627 S.W.3d 163, 177 n.4 (Tex. 2021) (Boyd, J., concurring).

656. Clint Indep. Sch. Dist. v. Marquez, 487 S.W.3d 538, 554 n.10 (Tex. 2016).

657. *Id.*

658. *See id.*

659. Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (emphasis in original).

660. *Id.* at 785–86.

661. For recent examples of the Court of Criminal Appeals citing legislative history, *see* Becerra v. State, 685 S.W.3d 120 (Tex. Crim. App. 2024), *reh'g denied* No. PD-0280-22, 2024 Tex. Crim. App.

The courts of appeals also continue to cite to extrinsic sources to interpret statutes.[662] Abbe R. Gluck has concluded that Texas's legislative rule on statutory construction "has resulted in at least three different judicial approaches: the criminal court (and the Fifth Circuit, generally) ignores it, the Texas Supreme Court evades it, and the lower state courts forthrightly find statutes ambiguous in order to accommodate both the rule and the highest courts' objection to it."[663]

Despite this predilection toward the plain-meaning approach, courts still cite legislative history, at least when the meaning is nor plain.[664] In the ten-year period from 2014 through 2023, the Texas Supreme Court cited bill analyses twenty-five times; the Court of Criminal Appeals, 44 times; and the courts of appeals, 277 times.[665] That is unfortunate because researching most Texas legislative history often is a painstaking process.[666] The Texas Legislative Reference Library has information on compiling legislative intent at its website.[667] The Court of Criminal Appeals also provided a guide to doing legislative history in an appendix to an opinion.[668]

More recent Texas legislative materials are available on the Internet.[669] The full text of the bill file from bills since the seventy-fourth legislature

---

LEXIS 245 (Mar. 27, 2024); State v. Green, 682 S.W.3d 253, 269 (Tex. Crim. App. 2024); Lira v. State, 666 S.W.3d 498, 506 n.20 (Tex. Crim. App. 2023).

662. *See, e.g.*, Neuman v. Hamilton, No. 13-23-00176-CV, 2024 WL 859530 (Tex. App.—Corpus Christi–Edinburg, Feb. 29, 2024, no pet. h) (mem. op.); Starside Constr., Inc. v. Childress Eng'g Servs., Inc., No. 05-23-00534-CV, 2024 WL 833440 (Tex. App.—Dallas, Feb. 28, 2024, no pet. h) (mem. op.); ASC Beverages, LLC v. Tex. Alcoholic Beverage Comm'n, No. 01-22-00297-CV, 2024 WL 628870 (Tex. App.—Houston [1st Dist.] Feb. 15, 2024, no pet. h.); *In re* Disney DTC, LLC, No. 05-23-00485-CV, 2024 WL 358117 (Tex. App.—Dallas, Jan. 31, 2024, orig. proceeding); *In re* Landersman, No. 08-23-00356-CV, 2024 WL 104358 (Tex. App.—El Paso, Jan. 9, 2024, orig. proceeding) (mem. op.) (citing Supreme Court of Texas cases and other sources to interpret the statutes in question).

663. Gluck, *supra* note 646 at 1791.

664. *See, e.g.*, Int. of G.X.H., 627 S.W.3d 288, 303 (Tex. 2021) (Guzman, J., concurring); Warner Bros. Ent. v. Jones, 611 S.W.3d 1, 18 n.6 (Tex. 2020); Energy Transfer Partners, L.P. v. Enter. Prod. Partners, L.P., 593 S.W.3d 732, 737 n.9 (Tex. 2020); *Warner Bros. Ent., Inc.*, 611 S.W.3d at 18 n.6 (Hecht, C. J., dissenting) (citing legislative history to determine statutory meaning).

665. Westlaw search "bill analysis & DA (after 1/1/2014 & before 1/1/2024)" conducted on March 28, 2024. *See generally* "bill analysis & DA (after 1/1/2014 & before 1/1/2024)", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20bill%20analysis%20%26%20DA%28after%201%2F1%2F2014%20%26%20before%201%2F1%2F2024%29&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 28, 2024) (showing the number of times specific Texas courts cited bill analyses).

666. *See* BRANDON D. QUARLES & MATTHEW C. CORDON, RESEARCHING TEXAS LAW 131–38 (4th ed. 2019). Justice Scalia pointed out that abandoning legislative history would save judges, lawyers, and clients "an enormous amount of time." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 36 (1997). When I taught legal research, my students all became textualists after doing only one legislative history exercise.

667. LEGIS. REFERENCE LIBR. OF TEX., https://lrl.texas.gov/ (last visited Sept. 4, 2024).

668. *See* Dillehey v. State, 815 S.W.2d 623, 627 (Tex. Crim. App. 1991).

669. *See* TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/.

(1995) is available at the Texas Legislature Online website.[670] There are a couple of compiled legislative histories.[671]

The bill analyses are the most-cited Texas legislative history materials.[672] House committee reports include a bill analysis that provides background information and a statement of the bill's purpose.[673] Texas appellate courts have cited these bill analyses over 1000 times.[674] The Texas Supreme Court once regularly cited bill analyses.[675] A good example is the Court's opinion in *Jones v. Fowler*.[676] There, the Texas Supreme Court reversed the court of appeals' holding that a change to the Family Code was substantive, finding "[t]he flaw in the court of appeals' reasoning is revealed in the history and purpose of the two House Bills at issue."[677]

Like Justice Scalia, Texas judges criticize legislative history not only because it is extratextual, but also because it is unreliable.[678] Chief Justice Hecht recently criticized the use of legislative history by a court of appeals interpreting the Equine Act.[679] While the court of appeals' interpretation was affirmed, Hecht noted that court's reliance on "the Equine Act's legislative history—statements made by participants in the legislative process who cannot speak for the legislative body—and specifically, a bill analysis prepared by legislative staff."[680] Hecht found "this reliance was misplaced," but "the court's interpretation of the statute was otherwise sound."[681] Justice Blacklock advised that a bill analysis only "indicates that, in the mind of the staff who wrote the bill analysis" what was the intent of the bill and warned that "skilled players of the legislative game" could affect legislation "without

---

670. *Id.*

671. *See* TEXAS TORT REFORM: LEGISLATIVE HISTORY, 1987 (Helen P. Burwell, comp. 1988); GREG ENOS & LAWRENCE HEIM, THE COMPLETE LEGISLATIVE HISTORY OF THE TEXAS COMMISSION ON HUMAN RIGHTS (1983).

672. Hegar v. Health Cave Serv. Corp., 652 S.W.3d 39, 50 (Tex. 2022) (Blacklock, J., dissenting).

673. BRANDT, *supra* note 449, at 338–39.

674. A search of the phrase "bill analysis" in Westlaw on March 20, 2024, yielded 1,087 case cites. *See generally* "bill analysis", WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22bill%20analysis%22&isPremiumAdvanceSearch=False&jurisdiction=TX-CS&saveJuris=False&contentType=CASE&querySubmissionGuid= (last visited Mar. 20, 2024) (showing the number of times "bill analysis" was cited by Texas courts). The overwhelming majority were from the courts of appeals (792) while the results from the Texas Supreme Court (139) and the Court of Criminal Appeals (140) were almost identical.

675. *See, e.g.*, Warner Bros. Ent., Inc. v. Jones, 611 S.W.3d 1 (Tex. 2020); Energy Transfer Partners, L.P. v. Enter. Prod. Partners, L.P., 593 S.W.3d 732, 737 n.9 (Tex. 2020); Degan v. Bd. of Tr. of Dall. Police & Fire Pension Sys., 594 S.W.3d 309, 315 (Tex. 2020) (citing bill analyses to interpret statutory language).

676. Jones v. Fowler, 969 S.W.2d 429, 431–32 (Tex. 1998) (per curiam).

677. *Id.*

678. *See* SCALIA, *supra* note 666, at 29–37.

679. Waak v. Rodriguez, 603 S.W.3d 103, 108 n.34 (Tex. 2020).

680. *Id.* at 108 n.54.

681. *Id.*

those who write the 'bill analysis' being any the wiser, which is one of the many reasons courts should give legislative history no weight."[682]

These critiques echo United States Supreme Court Justice Antonin Scalia's disdain of legislative history.[683] He particularly detested the use of committee reports.[684] In a 1989 concurrence, Scalia lamented how the Court relied upon the citation of three district court cases in a committee report to evidence the intent of Congress; the Court displayed "the level of unreality that our unrestrained use of legislative history has attained."[685] Scalia continued:

> I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports); and that *no* Member of Congress came to the judgment that the District Court cases would trump *Johnson* on the point at issue here because the latter was dictum. As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant (for that end *Johnson* would not merely have been cited, but its 12 factors would have been described, which they were not), but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.[686]

Scalia believed it was wrong for many reasons "to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of

---

682. Hegar v. Health Care Serv. Corp., 652 S.W.3d 39, 50 (Tex. 2022) (Blacklock, J., dissenting).

683. *See* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610 (2012); SCALIA, *supra* note 666, at 29–37.

684. *See* Scalia & Manning, *supra* note 683, at 1612.

685. Blanchard v. Bergeron, 489 U.S. 87, 98 (1989).

686. *Id.* 489 U.S. at 97–98 (Scalia, J., concurring in part). *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 617–22 (1991) (Scalia, J., concurring in judgment); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in judgment) (noting the unreliability of committee reports for interpreting statutes). Justice Blacklock also has suggested the possibility of manipulation in the creation of legislative history. *Hegar*, 652 S.W.3d at 50 (Blacklock, J., dissenting) ("Indeed, skilled players of the legislative game may find ways of making such things happen without those who write the 'bill analysis' being any the wiser, which is one of the many reasons courts should give legislative history no weight.").

Congress actually had in mind."[687] The Texas Supreme Court is fully aligned with this view.[688] Unless an advocate is citing legislative history as part of an argument based on the ambiguity of statutory language, relying on legislative history will weaken an appellate argument.[689]

VII. CONCLUSION

Obviously, citation to authority is the linchpin of legal arguments.[690] Without it, all is lost.[691] As shown in this Article, citing authority in Texas can be a little tricky.[692] Advocates must pay close attention to horizontal and vertical stare decisis and be especially mindful of writ and petition notations that affect the precedential value of intermediate court opinions.[693] Texas appellate courts are receptive to some persuasive authority and are likely to be unpersuaded by other authority.[694]

687. *Blanchard*, 489 U.S. at 97–98 (Scalia, J., concurring in part). *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34–35 (rev. ed. 2018) (discussing the unreliability of legislative history for the determination of statutory meaning and intent).

688. *See supra* note 634 and accompanying text (noting that the Texas Supreme Court evades statutory construction to forthrightly find them ambiguous).

689. *See supra* note 645 and accompanying text (stating that legislative history is generally useless to the court).

690. *See* discussion *supra* Section II.A (explaining the importance of stare decisis in Texas).

691. *See* discussion *supra* Section II.A (explaining the importance of stare decisis in Texas).

692. *See* discussion *supra* Sections II.A and V (discussing citing authority and statutory construction in Texas).

693. *See* discussion *supra* Sections III.A, and IV.B–C (explaining the application of horizontal and vertical stare decisis and reviewing the structure, application, and importance of writ and petition notations).

694. *See* discussion *supra* Section IV.C (discussing when authority in Texas is persuasive and how Texas courts view persuasive authority).