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INTRODUCTION

As frightfully corpulent as the subsequent history notation system currently is in Texas, the purpose of this article is to reveal that it is actually much worse than anyone imagined.

Citation to Texas civil case authority has long been a vexing problem for lawyers in this state. We attorneys are simultaneously governed by the Ivy League edicts of the "Bluebook,"[1] as well as by the bovine mandates of the "Greenbook."[2] We are bound by the varying jurisdictional frameworks buttressing our appellate courts[3] and by the unique sovereign history of our state.[4]

Because of the complexity inherent to our court system as it has developed, it has been the natural tendency of the bar to simplify our citational approach so that no lawyer need be conversant in decades of legal arcana in order to simply cite a case. Alas, this urge to streamline our approach to citation may have had the unintended effect of reducing our collective comprehension of what is truly precedential in Texas in the first place.

In order to resolve the many discrepancies and oversights that have arisen, it is the author's intent to collect the disparate and thoughtful writings of jurists and lawyers from years past and to present them in a concise and manageable framework from which the proper precedential weight that should be accorded Texas authority may be easily gleaned.

PURPOSE OF THE PROPOSED ORDER OF CITATION

This proposed precedential organization no doubt contains much more detail than the average practitioner would ever need, much less care, to know. Therefore, it is aimed more squarely at the civil appellate lawyer in Texas who wishes to distinguish the case authority in an opposing party's brief or winnow weaker cases from one's own arguments.

For example, under the framework outlined below, any type of case discussed in Part I—be it a petition-refused court of appeals opinion, an adopted opinion of the Texas Commission of Appeals, or a per curiam Texas Supreme Court opinion—has precisely the same precedential weight for any given point of law. However, the difference between these subsets lies in the shades of precedential persuasiveness inherent to each type of opinion. When reading the Order of Citation below at Appendix A, it is organized so that all cases under Part I control over those in Part II, which in turn, control over those in Part III. However, within each of these sections, while the cases under Part A are generally more authoritative than those in Part B and so on, they do not necessarily control over the latter-listed opinions. For example, a signed Texas Supreme Court opinion is generally[5] a fraction more persuasive than is a per curiam Court[6] opinion

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[1] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005); *see* Marian O. Boner, Simplified Guide to Citation Forms 18 (1971) (unpublished manuscript on file with the author) (noting several defects regarding citation to Texas authority present in the Bluebook).

[2] TEXAS RULES OF FORM (Texas Law Review et al. eds., 11th ed. 2006) (commonly referred to as the "Greenbook" due to its green-hued cover) [hereinafter GREENBOOK].

[3] *See* Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417, 439-70 (2006).

[4] *See* James W. Paulsen, *If at First You Don't Secede: Ten Reasons Why the "Republic of Texas" Movement is Wrong*, 38 S. TEX. L. REV. 801, 804 & n.16 (May 1997) (explaining that Texas was different from any other state that claimed to have been sovereign because Texas was recognized by the leading nations of the world at the time—including the United States, Great Britain, and France—as an independent nation) [hereinafter *Ten Reasons*].

[5] *See* discussion *infra* Part I (noting the pertinent dates attendant to each of these types of opinions).

[6] Fully cognizant that an article opining on correct citation should not itself appear to be ignorant of citational

(see discussion under Parts I.A and B), and a per curiam Court opinion is slightly more persuasive than an either an adopted opinion of the Commission of Appeals (see discussion under Part I.C.1) or a petition- or writ-refused intermediate appellate opinion (see discussion under Part I.C.2).[7]

Similarly, another overarching caveat to this listing is that the precedential weight of any case is, of course, viewed from the perspective of the purpose for which it is cited. For example, in land title cases, modern courts may have a "duty to know and follow" the law of a sovereign which would not otherwise be as persuasive to a current-day determination.[8] Moreover, just because a decision is not technically precedential "does not mean that a later court will not find it persuasive anyway."[9]

Another purpose of this proposed Order of Citation is that, while the derivation of the various and numerous subsequent history notations affixed to the opinions of Texas's intermediate appellate courts has been exhaustively examined over the years by intellects more keen than the author's, the precedential impact of a particular notation as it relates to other Texas authority—with the sole exception of the "writ ref'd n.r.e." notation[10]—has not been examined at depth.[11] This article seeks to remedy that oversight.

It should be noted here as well that this is not the first attempt at cataloguing the proper order of citation of Texas authority. The Tenth Edition of the Greenbook included Rule 24.1,[12] which laid out a cogent and logical order of case citation with which—for the most part—the author does not quibble.[13] Accordingly, this revised Order of Citation expands upon the broadly-defined categories of that ordering with a few substantive changes as well.

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mandates, the author readily admits his provincial bias in insisting upon capitalizing references to the Texas Supreme Court (both of the Republic and of the State), even though such an upper-case honorarium is traditionally reserved only for references to the U.S. Supreme Court. *See, e.g.*, BLUEBOOK, *supra* note 1, at R. 8, p. 77; MANUAL ON USAGE AND STYLE, R. 3.9, at 29 (Texas Law Review et al. eds., 10th ed. 2005). Here, however, the improper usage will also hopefully serve to distinguish which of the many Texas courts to which the author is referring.

[7] Because there is no measurable precedential distinction between adopted opinions of the Commission of Appeals and petition- or writ-refused intermediate appellate opinions since June 14, 1927, they are both denoted in the Order of Citation at Part I.C.

[8] *See State v. Sais*, 47 Tex. 307, 318 (1877); *State v. Cuellar*, 47 Tex. 295, 305 (1877) (explaining that "it is the business of the courts of Texas to know and expound the laws pertaining to the rights to land situated in Texas, and here in suit, whether the laws, upon which the rights to the land depend, were laws made by the State of Texas, by the Republic of Texas, by the State of Tamaulipas as part of Mexico, or by Spain").

[9] *See* Jim Paulsen & James Hambleton, *Confederates and Carpetbaggers: The Precedential Value Of Decisions From the Civil War And Reconstruction Era*, 51 TEX. B.J. 916, 918-19 (Oct. 1988) [hereinafter *Confederates and Carpetbaggers*].

[10] *See generally*, *e.g.*, Hon. Ted Z. Robertson & James W. Paulsen, *Rethinking the Texas Writ of Error System*, 17 TEX. TECH L. REV. 1 (1986) [hereinafter *Rethinking Writs*]; Hon. Ted. Z. Robertson & James W. Paulsen, *The Meaning (If Any) Of an "N.R.E.,"* 48 TEX. B.J. 1306 (Dec. 1985) [hereinafter *Meaning of N.R.E.*]; *see also* Hon. Zollie Steakley, *What the Heck in Two Respects*, 30 TEX. B.J. 697, 697-98 (Sept. 1967); Hon. Gordon Simpson, *Notations on Applications for Writ of Error*, 12 TEX. B.J. 547, 572-73 (Dec. 1949).

[11] *See*, *e.g.*, Hon. Frank M. Wilson, *Hints on Precedent Evaluation*, 24 TEX. B.J. 1037, 1090-91 (Nov. 1961); Hon. James P. Hart, *The Appellate Jurisdiction of the Supreme Court of Texas*, 29 TEX. L. REV. 285, 290-92 (1951); Simpson, *supra* note 10, at 570-75.

[12] Rule 24.1 and its contents were not included in the current, Eleventh Edition of the Greenbook.

[13] *But see* TEXAS RULES OF FORM R. 24.1, at 90 (Texas Law Review et al. eds., 10th ed. 2003) (see, *exempli gratia*, erroneously labeling opinions of the Texas Courts of Civil Appeals as "not precedential").

EXPLANATION OF THE PROPOSED ORDER OF CITATION

I. Texas Supreme Court equivalent

A. Authored majority Texas Supreme Court opinions (either on a cause or original proceeding) issued from January 1840 (Dallam 357) through 1867 (30 Tex. 374), and from 1871 (33 Tex. 585) to the present[14]

In the abstract, mandatory Texas Supreme Court authority encompasses opinions issued from January 1840, page 357 of Dallam's digest,[15] through volume 30, page 374 of the Texas Reports published in 1867, and from decisions published in 1871 in volume 33, page 585 of the Texas Reports to the present.[16]

The beginning date for this period is affixed by the approximate date upon which the inaugural term of the Supreme Court of the Republic of Texas (the "Republic Court") handed down it's first opinion in January 1840.[17] While, at first blush, it might seem logical for decisions of the sovereign Republic to be regarded as merely persuasive authority by subsequent State courts,[18]

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[14] *See* TEX. CONST. art. V, §§ 1, 3; TEX. GOV'T CODE ANN. § 22.001(a) (Vernon 2004); *see also Confederates and Carpetbaggers*, *supra* note 9, at 920.

[15] *See* JAMES WILMER DALLAM, A DIGEST OF THE LAWS OF TEXAS: CONTAINING A FULL AND COMPLETE COMPILATION OF THE LAND LAWS; TOGETHER WITH THE OPINIONS OF THE SUPREME COURT (Baltimore, John D. Toy 1845). At the ripe, young age of twenty-six, James Wilmer Dallam undertook to compile and publish a digest of the opinions of the Supreme Court of the Republic of Texas. Bowen C. Tatum, Jr., *A Texas Portrait: James Wilmer Dallam*, 34 TEX. B.J. 257, 257 (March 1971) (noting Dallam's birth in 1818); James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 275 (1986) [hereinafter *Short History*] (describing how Dallam began to compile his digest of Republic Court opinions in 1844). All but one majority decision of the Republic Court issued between the Court's initial term in January 1840 to its June 1844 term are reported in Dallam's single-volume digest. *See Short History*, at 276 (identifying the missing decision as *Hall v. Aldridge*, (Tex. 1841), 65 TEX. L. REV. 429 (Paulsen rep. 1986)); Daffan Gilmer, *Early Courts and Lawyers of Texas*, 12 TEX. L. REV. 435, 449 (1934) (noting the Republic Court's 1844 term convened in June). The decisions of the December 1845 term went largely unreported for 141 years until December 1986, when now-Professor Jim Paulsen was appointed by the Court to compile and publish the missing opinions. *See* James W. Paulsen, *The Missing Cases of the Republic: Reporter's Introduction*, 65 TEX. L. REV. 372 (1986) (the Court's order appointing Paulsen as Reporter for the 1845 term appears in the unnumbered preceding pages of issue). Sadly, Dallam died of yellow fever just two years after his digest was published in 1845. Tatum, at 258, 260.

[16] When citing to volumes 34 and 35 of the Texas Reports, note that two non-precedential Military Court cases are published in volume 34 (*Kottwitz v. Knox*, 34 Tex. 689 (1869) and *Bird v. Montgomery*, 34 Tex. 714 (1870)), and one non-precedential Military Court decision is published in volume 35 (*McArthur v. Henry*, 35 Tex. 801 (1869)). *See Confederates and Carpetbaggers*, *supra* note 9, at 920 n.3.

[17] The first recorded opinion of the Republic Court is *Texas v. McCulloch*, Dallam 357 (Tex. 1840) (cause number "I," ironically dismissing the first appeal ever brought before the Court for lack of jurisdiction). Although the Republic Congress formally established the Republic Court on December 15, 1836, the Republic Court did not convene its first session until 1840. *Short History*, *supra* note 15, at 248-52 (explaining, at length, the possible explanations for this delay).

[18] The formal transition from Republic to State transpired as follows: (1) U.S. President John Tyler signed a joint resolution of the U.S. Congress on March 1, 1845 authorizing the annexation of the Republic of Texas as a State of the Union; (2) the Texas Congress accepted the United States' joint resolution of annexation on June 18, 1845; (3) the voters of Texas accepted the United States' joint resolution of annexation as well and ratified the new State Constitution on October 13, 1845; and (4) U.S. President Polk signed a subsequent joint resolution of the U.S. Congress recognizing the admission of the State of Texas into the Union on December 29, 1845). *See* Ralph H. Brock, *"The Republic of Texas is No More:" An Answer to the Claim That Texas Was Unconstitutionally Annexed to the United States*, 28 TEX. TECH L. REV. 679, 691-693 (1997). The December 29, 1845 date is also recognized by the U.S. Supreme Court as the date upon which "Texas was admitted into the Union." *See E.P. Calkin & Co. v. Cocke*, 55 U.S. 227, 235-36 (1852) (clarifying that, on that date, "Texas was admitted into the Union," and from that day "the laws of the United States were declared to be extended over, and to have full force and effect within, the State," so that "the old system of [Republic] government, so far as it conflicted with the federal authority, became abrogated immediately on her admission as a State"), *overruling*, *Cocke v. E.P. Calkin & Co.*, 1 Tex. 542, 560 (1846) (holding that certain sections of article 13 of the newly-ratified state constitution postponed the operation of the

article 13, section 3 of the first State Constitution of 1845 contained a savings clause that expressly mandated "[a]ll laws and parts of laws now in force in the Republic of Texas . . . shall continue and remain in force as the laws of this State."[19]

The intermediate and terminal dates for this mandatory period are defined by the four distinct periods of history that directly impact the precedential value of Court opinions. These periods include the Confederate Court (1861-65; volumes 26 and 27 of the Texas Reports),[20] the Presidential Reconstruction Court (1866-67; volumes 28 through 30, page 874 of the Texas Reports), the Military Court (1867-70; volume 30, page 375 through volume 33, page 584 of the Texas Reports), and the Semicolon Court (1870-73; page 585 of volume 33 through volume 39 of the Texas Reports).[21] The precedential weight of cases issued from each of these eras is derived from the degree of constitutional authority under which the Court in question operated. All of these periods are girded by constitutional authority save for the Military Court, which was installed at the whim of General P.H. Sheridan in mid-1867.[22] Accordingly, only Court opinions issued by the Military Court are without precedential value in Texas.[23]

However, while decisions issued by the Semicolon Court are fully precedential because that Court sat under the authority of the 1869 Constitution, the last opinion handed down by the Court cast a jurisprudential pall over the whole of its tenure.[24] The infamous decision of *Ex Parte Rodriguez* was prompted by an original habeas corpus proceeding brought by a jailed voter who was arrested for voting twice in the gubernatorial election.[25] The makeweight reputation of the *Rodriguez* Court springs from its invalidation of an entire statewide election on the basis of the placement of a semicolon in article 3, section 6 of the Constitution of 1869,[26] and the resulting impression amongst the bar that the "whole case

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laws of the Union until such time as a state government was organized on February 16, 1846).

[19] *See* Hon. Bill Aleshire, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187, 206 n. 76 (2000) (quoting TEX. CONST. of 1845, art. XIII, § 3). The State of Texas has (thus far) operated under five constitutions (1845, 1861, 1866, 1869, and 1876). *See* GREENBOOK, *supra* note 2, at R. 9.1, p. 38, app. F.1, p. 105.

[20] Even though the Texas judiciary operated under a different constitution during the Civil War than it did during Reconstruction, the author does not recommend the relegation of decisions of the Confederate Court to persuasive status because, as the U.S. Supreme Court held just three years after the Civil War ended, Texas "did not cease to be a State, nor her citizens to be citizens of the Union" during the conflict. *See Texas v. White*, 74 U.S. 700, 726 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476, 496 (1885) (holding that "the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null"). It may be noted that George W. Paschal, who also served as the Court's official reporter from 1866-69 for volumes 28-31 of the Texas Reports, also represented Texas before the U.S. Supreme Court in *White*. *See White*, 74 U.S. at 717; Robert B. Gilbreath, *Slaves, Reconstruction, and The Supreme Court of Texas*, APP. ADVOC., Fall 2006, at 9; Robert B. Gilbreath, *The Supreme Court of Texas and the Emancipation Cases*, 69 TEX. B.J. 946, 953 n.16 (Nov. 2006).

[21] *See Confederates and Carpetbaggers*, *supra* note 9, at 920 (describing in fascinating detail the varying eras of Texas Supreme Court history); *see also* CRAWFORD C. MARTIN, OFFICE OF THE ATTORNEY GENERAL OF TEXAS, UNIFORM CITATIONS FOR OPINIONS, CORRESPONDENCE AND BRIEFS 11 (1967); Hon. Joe Greenhill, *Uniform Citations for Briefs: With Observations on the Meanings of the Stamps or Markings Used in Denying Writs of Error*, 27 TEX. B.J. 323, 385-86 (May 1964). While the Semicolon Court began its term in 1870, the first published decision from that Court did not issue until 1871. *See Johnston's Adm'r v. Shaw*, 33 Tex. 585 (1871).

[22] *Confederates and Carpetbaggers*, *supra* note 9, at 916-17.

[23] *See Peck v. San Antonio*, 51 Tex. 490, 492 (1879) (adopting Chief Justice Moore's majority opinion explaining that, because the Military Court was installed "by virtue of military appointment" instead of "by virtue of the [Texas] Constitution," the decisions of that Court are not authoritative).

[24] *Confederates and Carpetbaggers*, *supra* note 9, at 919.

[25] 39 Tex. 706, 773-76 (1873); Robert W. Higgason, *A History of Texas Appellate Courts: Preserving Rights of Appeal Through Adaptations to Growth, Part 1 of 2: Courts of Last Resort*, 39 HOUS. LAW. 20, 23 (Apr. 2002).

[26] *See* TEX. CONST. OF 1869 art. III, § 6, *reprinted in* 7 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, 393, 399 (Austin, Gammel Book Co. 1898); *see also Confederates & Carpetbaggers*, *supra* note 9, at 919.

was a trumped-up affair to get the court to pass upon the legality of the election."[27] Accordingly, decisions from the Semicolon Court—while fully precedential—are frequently not respected.[28]

There is another subset of authored majority opinions that requires examination herein, even though the author is aware of only one instance in which such an opinion was actually issued. The 1992 decision in *American Centennial Insurance Co. v. Canal Insurance Co.* does not, on its face, appear to be comprised of anything more consequential than a typical majority opinion with an attached concurrence.[29] However, a closer examination of the votes cast in favor of each opinion reveals the "concurring" opinion by Justice Nathan Hecht was, in fact, a second majority opinion joined by four Justices, not including now-Congressman Lloyd Doggett, who was the putative majority's author.[30] Congressman Doggett's "majority" opinion was joined by all members of the concurrence save for Justice Eugene Cook.[31] Even though Justice Hecht's "majority concurrence" was handed down labeled only as a concurring opinion, because a majority of the Court joined in its issuance, its holdings and reasoning must be accorded the same precedential weight as any other majority opinion of the Court.[32]

B. Texas Supreme Court per curiam opinions[33]

Per curiam opinions issued by the Texas Supreme Court have precisely the same weight of authority as do signed Court opinions. That said, because per curiam opinions have traditionally been used to correct clear error,[34] among other objectives,[35] signed opinions are a comparatively—if only slightly—more authoritative source for a given proposition. The remedial nature of most per curiam opinions is evidenced by a summer 2001 draft of the Rules of Appellate Procedure (which was not ultimately adopted), where Rule 47.2 was proposed to refer to per curiam opinions as an alternative to a memorandum opinion.[36] Rule 47.4 reserves memorandum opinions for cases in which "the issues are settled," and the "basic reasons" for the opinion do not establish any new rule of law, implicate any constitutional issue,

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[27] Hon. James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 285 (1959).

[28] *Confederates & Carpetbaggers*, *supra* note 9, at 919-20.

[29] 843 S.W.2d 480 (Tex. 1992).

[30] *Id.* at 485 (Hecht, J., majority concurrence) (listing the four concurring Justices as Chief Justice Thomas R. Phillips, Justices Raul A. Gonzalez and Eugene A. Cook, as well as now-Senator John Cornyn).

[31] *Id.* at 480 (listing the four Justices joining the majority opinion as Chief Justice Phillips and Justices Gonzalez, Hecht, and Cornyn).

[32] *See* TEX. CONST. art. V, § 2 (noting "the concurrence of five [Texas Supreme Court Justices] shall be necessary to a decision of a case").

[33] *See* TEX. R. APP. P. 59.1, 59.2.

[34] *See* Hon. Craig T. Enoch and Michael S. Truesdale, *Issues and Petitions: The Impact on Supreme Court Practice*, 31 ST. MARY'S L. J. 565, 568 (2000) (theorizing that, with the advent of the new Rules of Appellate Procedure, the Court would issue less "pure error-correct[ing]" per curiam opinions); Hon. Robert H. Pemberton, *One Year Under the New TRAP: Improvements, Problems and Unresolved Issues in Texas Supreme Court Proceedings*, *in* State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course B, B-18 (1998) (associating per curiam opinions with "cases requiring relatively straightforward error correction"); *see also* David M. Gunn, *"Unpublished Opinions Shall Not Be Cited as Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 117 (1992) (describing how, beginning in 1925, the Texas Supreme Court began to increase its issuance of per curiam opinions, "perhaps as a corrective device").

[35] Per curiam opinions have also been used to announce the judgment of the Court in situations where the Court is divided as to the reasoning for the judgment and has splintered into many concurring and dissenting camps. *See* Charles G. Orr, *Appellate Oddities*, *in* State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course ch. 19, p. 7-8 (2002) (describing the convoluted holdings of *In re Dallas Morning News*, 10 S.W.3d 298 (Tex. 1998) (per curiam), and *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001) (per curiam)).

[36] *See* Jennifer Adams, *Law Today; Gone Tomorrow*, 53 BAYLOR L. REV. 659, 664 (Summer 2001).

criticize any existing law, or involve any apparent conflict of authority.[37]

An example of the somewhat lesser precedential weight accorded per curiam as opposed to authored Court opinions is exemplified by three recent decisions examining the "sue and be sued" language nonchalantly used by the Legislature in "[s]cores of Texas statutes."[38] Both per curiam opinions in *Lamesa Independent School District v. Booe* and *Satterfield & Pontikes Construction, Inc. v. Irving Independent School District* refer to the "reasons explained in" the Court's seminal decision *Tooke v. City of Mexia* holding that "sue and be sued" language in a public entity's organic statute is not necessarily a clear and unambiguous waiver of sovereign immunity.[39] Therefore, it is somewhat less precedential to cite to a per curiam opinion that merely parrots the holding of an authored Court opinion, than to simply refer to the authored opinion itself.

Although six votes are required to issue a per curiam opinion as opposed to merely five to issue an authored opinion,[40] the precedential value of an authored opinion is not necessarily determined by the number of votes required to issue it. If it were otherwise, writ-[41] or petition-refused cases would be more precedential than an authored Court opinion merely because six votes are required to refuse an intermediate appellate opinion.[42]

[37] TEX. R. APP. P. 47.4.

[38] *Tooke v. City of Mexia*, 197 S.W.3d 325, 328 (Tex. 2006).

[39] *See Satterfield & Pontikes Const., Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390, 391 (Tex. 2006) (per curiam) (citing *Tooke*, 197 S.W.3d at 325); *see also Lamesa Indep. School Dist. v. Booe*, 235 S.W.3d 710 (Tex. 2007) (per curiam) (citing *Tooke*, 197 S.W.3d at 325).

[40] *See* Andrew Weber, *Internal Procedures of the Texas Supreme Court*, *in* State Bar of Tex. Prof'l Dev. Program, Practice Before the Texas Supreme Court ch. 12, p. 3 (2004).

[41] Issued since June 14, 1927. TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[42] *See* Weber, *supra* note 40, at 3.

C.1 Adopted opinions, or approved opinions[43] of the Texas Commission of Appeals issued from February 9, 1881[44] through August 31, 1892,[45] and from April 3, 1918[46] through August 24, 1945[47]

In order to reduce the backlog of cases pending at the Texas Supreme Court and the Court of Appeals,[48] the Texas Commission of Appeals (the "Commission") was created and sat at two different times during Texas's history:[49] first from 1879[50] to 1892, and again from 1918 to 1945.[51] Between 1879 and 1881, the cases referred to the Commission were done so only with the parties' consent, and therefore are not

[43] *Compare Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935) (discussing "*adopted* or *approved*" Commission opinions) (emphasis added), *with* GREENBOOK, *supra* note 2, at R. 5.2.1, p. 28 (discussing "[o]pinion [*a*]*dopted*" opinions) (emphasis added).

[44] *See* Act of Feb. 9, 1881, 17th Leg., R.S., ch. 7, 1881 Tex. Gen. Laws 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 96, 96-97 (Austin, Gammel Book Co. 1898) (effective upon passage on February 9, 1881).

[45] *See* Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892, and eliminating the Commission by providing for reorganization of the Texas Supreme Court, and defining its jurisdiction under amended article 5 of the Constitution).

[46] *See generally* Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch. 81, 1918 Tex. Gen. Laws 171 (made effective April 3, 1918, and reestablishing the Commission).

[47] *See* Tex. S.J. Res. 8, 49th Leg., R.S., 1945 Tex. Gen. Laws 1043 (adopted at election held Aug. 25, 1945 eliminating the Commission).

[48] *See* discussion *infra* Part I.D.

[49] Michael S. Ariens, *The Storm Between the Quiet: Tumult in the Texas Supreme Court, 1911-21*, 38 ST. MARY'S L. J. 641, 697 (2007); F.A. Williams, *History of the Texas Judicial Machine and Its Growth*, 5 TEX. L. REV. 174, 178 (1927).

[50] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin, Gammel Book Co. 1898) (establishing the Commission of Appeals, and made effective October 7, 1879).

[51] *See supra* notes 45-47.

precedential.[52] However, after a legislative amendment in 1881 that stayed in effect until 1892, cases could be transferred to the Commission without the parties' consent.[53] The Court later adopted all Commission opinions issued between 1881 and 1892,[54] as well as on or after March 21, 1934.[55] However, several opinions issued by the Commission between 1918 and March 20, 1934 were neither adopted nor approved.[56] These remaining cases have been disposed of by the Court in several ways, including adopting, approving, or affirming the judgment,[57] approving the holding,[58] taking no express action at all,[59] or some combination of any of the above.[60]

The precedential value of a particular Commission case hinges upon how it was disposed of by the Court.[61] Commission opinions which the Court has expressly adopted or approved are "given the same force, weight, and effect as the opinions written by the members of the [Texas] Supreme Court itself."[62]

C.2 Petition-refused, or writ-refused intermediate appellate opinions issued from June 14, 1927 through the present[63]

A refusal of an application for writ of error or petition for review is the "strongest possible vote of confidence" the Texas Supreme Court can proxy to a lower court opinion.[64] This is because a "writ ref'd" or "pet. ref'd" notation "has the same precedential value as an opinion of the [Texas] Supreme Court."[65]

However, one caveat to the imprimatur of this notation is that the precedential weight it wields differs depending upon *when* the intermediate appellate opinion to which it is affixed was so designated.[66] Only after article 1728 of the Revised Civil Statutes was amended and made effective ninety days after the legislative session adjourned on March 16, 1927 (falling on June 14, 1927), was "a decision by a Court of Civil Appeals to which the Supreme Court refuses a writ of error . . . as binding as a decision of the Supreme Court itself."[67]

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[52] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin, Gammel Book Co. 1898) (effective October 7, 1879); *see State & County Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292-93, 19 S.W.2d 297, 299 (1958); Williams, *supra* note 49, at 178; GREENBOOK, *supra* note 2, at 97, app. C.2.

[53] Williams, *supra* note 49, at 178.

[54] L.M., Note, *Courts—Opinions of the Texas Commission of Appeals*, 12 TEX. L. REV. 356, 356 (1934).

[55] *Id*. at 358 (quoting the order of the Court issued March 21, 1934); *see Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

[56] Wilson, *supra* note 11, at 1091.

[57] *See id*.; *see also Humble Oil & Ref. Co. v. Davis*, 296 S.W. 285, 288 (Tex. Comm'n App. 1927, judgm't affirmed as recommended) ("In all other respects, judgements [sic] of the Court of Civil Appeals and district court affirmed, as recommended by the Commission of Appeals.").

[58] *See* GREENBOOK, *supra* note 2, at R. 5.2.2, p. 29; *see, e.g., Gueringer v. St. Lous, B. & M. Ry.*, 23 S.W.2d 704, 704 (Tex. Comm'n App. 1930, holding approved).

[59] GREENBOOK, *supra* note 2, at R. 5.2.4, p. 29; *see, e.g., Express Publ'g Co. v. Keeran*, 284 S.W. 913, 913 (Tex. Comm'n App. 1926).

[60] *See, e.g., Charles v. El Paso E. R. Co.*, 254 S.W. 1094, 1094 (Tex. Comm'n App. 1922, holding approved, judgm't adopted); *Young v. Blain*, 245 S.W. 65, 67 (Tex. Comm'n App. 1922, holding approved, judgm't adopted).

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

[62] *Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

[63] *Meyers v. Gulf Coast Minerals Mgmt. Corp*., 361 S.W.2d 193, 196 (Tex. 1962) ("by refusing the application for writ of error . . . this [C]ourt adopted the opinion in each case as its own").

[64] T.C. Sinclair, *The Supreme Court of Texas*, 7 HOUS. L. REV. 20, 52 (1969).

[65] Hon. Robert W. Calvert, *The Mechanics of Judgment Making in The Supreme Court of Texas*, 21 BAYLOR L. REV. 439, 447 (1969).

[66] *See* Simpson, *supra* note 10, at 574-75.

[67] TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927); *Ohler v. Trinity Portland Cement Co*., 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ).

D. Texas Court of Appeals opinions issued from April 18, 1876[68] through August 31, 1892[69]

The adoption of the Constitution of 1876 established the State of Texas's second appellate court after the Texas Supreme Court, deceptively named the Texas Court of Appeals.[70] Its name was misleading in that it was not an intermediate appellate court as its name might lead one to believe, but instead possessed original appellate jurisdiction in all civil matters under one thousand dollars, as well as in all criminal appeals.[71] More important to this Order of Citation, however, is that the Court of Appeals was the court of last resort for these matters until it was abolished by the massive judicial restructuring undertaken in 1892.[72]

Because this court was the final arbiter over all civil matters regarding relatively costly disputes (for the late 1800s), it must be accorded precedential weight comparative with the other equivalent judicial forums of last resort in Texas.[73] However, because it had the most limited jurisdiction of any of the final appellate forums, it is precedentially the weakest of the grouping.

II. Texas Commission of Appeals equivalent (from February 9, 1881 through August 31, 1892 and from April 3, 1918 through August 24, 1945)[74]

A. Holding-approved[75] opinions of the Texas Commission of Appeals

As explained above in Part I.C.1, the precedential value of a particular Commission case is determined by what manner in which the case was disposed of by the Texas Supreme Court.[76] In contrast to Commission opinions which the Court has adopted or approved as its own, a holding-approved Commission opinion indicates the Court "approved the judgment and adopted each specific holding of the Commission, but did not necessarily approve its reasoning."[77] Some Commission opinions contain the double notation, "holding approved, judgm't adopted," or the inverse thereof.[78] If a Commission opinion

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[68] *See* TEX. CONST. OF 1876, *reprinted in* 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, 779, 779-834 (Austin, Gammel Book Co. 1898) (effective April 18, 1876); *see also Bass v. Albright*, 59 S.W.2d 891, 892 (Tex. Civ. App.—Texarkana 1933, writ ref'd).

[69] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892).

[70] Higgason, *supra* note 25, at 24; Williams, *supra* note 49, at 177.

[71] Hon. James T. "Jim" Worthen, *The Organizational and Structural Development of Intermediate Appellate Courts in Texas, 1892-2003*, 46 S. TEX. L. REV. 33, 35 (Fall 2004).

[72] Higgason, *supra* note 25, at 24.

[73] This Order of Citation does not address courts of last resort in Texas whose subject matter jurisdiction is narrowly limited to only certain types of disputes. *See* TEX. GOV'T CODE ANN. § 33.034 (Vernon 2004) (governing the appeal of sanctions issued by the State Commission on Judicial Conduct (SCJC)); Jim Paulsen & James Hambleton, *Who Was That Masked Court? An Introduction to Texas' New Special Court of Review*, 56 TEX. B.J. 1133, 1133 (Dec. 1993); GREENBOOK, *supra* note 2, at R. 8.2, p. 36 (describing the Texas Review Tribunal, which reviews recommendations by the SCJC "for the removal or forced retirement of a judge"). Similarly, this Order of Citation does not address either the current or former types of disputes expressly excluded from the Texas Supreme Court's jurisdiction under Texas Government Code section 22.225 because the Court could (and still can) exert jurisdiction over any excluded type of case on dissent, conflict, or error of law grounds. *See* TEX. GOV'T CODE ANN. § 22.225(c) (Vernon Supp. 2007); *Stafford v. Stafford*, 725 S.W.2d 14, 15 (Tex. 1987).

[74] *See supra* notes 44-47.

[75] *See* GREENBOOK, *supra* note 2, at R. 5.2.2, p. 29; *see, e.g.*, *Gueringer v. St. Lous, B. & M. Ry.*, 23 S.W.2d 704, 704 (Tex. Comm'n App. 1930, holding approved).

[76] *See Grave v. Diehl*, 958 S.W.2d 468, 471 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *see also* discussion, *supra* Part 1.C.1.

[77] GREENBOOK, *supra* note 2, at RR. 5.2.1-2.2, pp. 28-29.

[78] *Compare City of Keller v. Wilson*, 168 S.W.3d 802, 823 n.118 (Tex. 2005) (citing *Charles v. El Paso E. R. Co.*, 254 S.W. 1094, 1094-95 (Tex. Comm'n App. 1922, holding approved, judgm't adopted)), *with Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (citing *Young v. Blain*, 245 S.W. 65, 67 (Tex. Comm'n. App. 1922, judgm't adopted, holding approved)).

contains such a hybrid notation, it should be accorded the precedential weight attendant to the most authoritative notation in the opinion. Moreover, citations to all such hybrid Commission opinions should list the most authoritative notation first.[79]

B. Judgment-adopted, judgment-approved, or judgment-affirmed opinions of the Texas Commission of Appeals[80]

While holding-approved opinions of the Commission indicate the Texas Supreme Court approved of the holdings, but not necessarily the reasoning of Commission opinion, judgment-adopted opinions connote the Court approved neither the holdings nor the reasoning of the Commission opinion.[81] Therefore, judgment-adopted opinions are less precedential than are holding-approved opinions.

When defining judgment-*adopted* opinions, the Court actually quoted to an earlier definition it had provided for a judgment-*approved* opinion.[82] Therein, the Court explained that judgment-*approved* opinions are to "be understood as having no further effect than simply . . . adopt[ing] the view of the Commission as to the determination to be made of the cause."[83]

Because the judgment itself is the repository of a court's determination of a cause, there is no meaningful jurisprudential difference between a judgment-adopted or -approved Commission opinion.[84] Accordingly, to the extent that judgment-adopted and -approved Commission opinions merely affirm the judgment recommended by the Commission, there is also no substantive difference between judgment-adopted, -approved, or -affirmed Commission opinions.[85]

For several editions now, the Greenbook has incorrectly conflated holding-approved and judgment-adopted Commission opinions as having the same precedential value.[86] However, it is clear that, because holding-approved opinions not only approve of the Commission's judgment, but also adopt the holdings of the Commission opinion, a holding-approved opinion is more authoritative than a judgment-adopted, -approved, or -affirmed Commission opinion.

The Eleventh Edition of the Greenbook contains a new section in Chapter 5—section 5.2.4—which describes a category of Commission opinions upon which the Court took no action.[87] The one opinion referenced by the Greenbook authors in this section does indeed fail to include any typical notation regarding the Commission's opinion, holding, or judgment.[88] However, Chief Justice Calvin M. Cureton's comment at the top of the opinion decrees an identical judgment to that recommended by the Commission.[89] Therefore, the Commission's judgment was, in fact, adopted by the Court, even if Chief Cureton's notation did not expressly state the familiar refrain of adoption, approval, or affirmance.[90]

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79 *But see Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) (citing *Young v. Blain*, 245 S.W. 65, 67 (Tex. Comm'n. App. 1922, judgm't adopted, holding approved)).

80 *See, e.g.*, *Humble Oil & Ref. Co. v. Davis*, 296 S.W. 285, 288 (Tex. Comm'n App. 1927, judgm't affirmed as recommended) ("In all other respects, judgements [sic] of the Court of Civil Appeals and district court *affirmed*, as recommended by the Commission of Appeals") (emphasis added); *McKenzie v. Withers*, 109 Tex. 255, 256, 206 S.W. 503, 503 (1918) (discussing judgment-*approved* opinions); GREENBOOK, *supra* note 2, at R. 5.2.3, p. 29.

81 GREENBOOK, *supra* note 2, at RR. 5.2.2-2.3, p. 29.

82 *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 167, 254 S.W.2d 290, 291 (1923) (explaining that judgment-*adopted* opinions are "not authoritative[] because the [Texas] Supreme Court adopted only the judgment") (quoting *McKenzie*, 109 Tex. at 256, 206 S.W. at 503 (discussing judgment-*approved* opinions)).

83 *McKenzie*, 109 Tex. at 256, 206 S.W. at 503.

84 *See* TEX. R. APP. P. 43.2, 60.1.

85 *See Humble Oil*, 296 S.W. at 288.

86 GREENBOOK, *supra* note 2, at R. 5.2.3, p. 29; TEXAS RULES OF FORM R. 6.2.3, at 29, R. 24.1, at 90 (Texas Law Review et al. eds., 10th ed. 2003).

87 GREENBOOK, *supra* note 2, at R. 5.2.4, p. 29.

88 *See Express Publ'g Co. v. Keeran*, 284 S.W. 913, 913 (Tex. Comm'n App. 1926).

89 *Id.*

90 However, the author notes that were there a Commission opinion that did not include any notation

III. Intermediate appellate court equivalent[91]

A. Writ-refused or –denied[92] **(before February 20, 1916),**[93]

writ-dismissed[94] **(from September 1, 1892**[95] **through June 30, 1917,**[96] **and from June 14, 1927**[97] **through June 19, 1987,**[98]

writ dismissed for want of jurisdiction[99] **(from September 1, 1892 through June 30, 1917, and from June 14, 1927 through June 19, 1987,**[100]

writ dismissed for want of jurisdiction—correct judgment,[101]

writ refused for want of merit,[102] **and**

writ refused for no reversible error intermediate appellate opinions issued before June 20, 1987[103]

After the voters of Texas adopted Senate Joint Resolution 16, which drastically amended article V of the 1876 Constitution,[104] Texas's first intermediate appellate courts were established on September 1, 1892.[105]

From this date through February 28, 1939,[106] only three subsequent history notations existed, and among these, the first notation developed was the

whatsoever by the Court, it would indeed qualify as a distinct subset of Commission opinion. The author believes that such an opinion would be less precedential than a Commission opinion in which the Court had at least adopted the judgment but still more precedential than any intermediate court opinion save for those refused as equivalent Court authority. *See Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935); *see also* discussion *supra* Part I.C.2.

[91] TEX. CONST. art. V, § 1; TEX. GOV'T CODE ANN. § 22.220 (Vernon 2004).

[92] The "writ ref'd," notation was sometimes termed "writ denied" in some early writ tables. *See Rethinking Writs*, *supra* note 10, at 10 & n.44; *see also, e.g.*, 29 S.W. xix (1895).

[93] *See Brackenridge v. Cobb*, 85 Tex. 448, 450, 21 S.W. 1034, 1035 (1893); *see also Terrell v. Middleton*, 108 Tex. 14, 16-21, 191 S.W. 1138, 1139-41 (1917) (Hawkins, J., concurring in refusal of application for writ of error).

[94] GREENBOOK, *supra* note 2, at 102, app. E; Simpson, *supra* note 10, at 575.

[95] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892).

[96] Act of March 15, 1917, 35th Leg., R.S., ch. 75, § 1, 1917 Tex. Gen. Laws 140, 140-41 (effective July 1, 1917).

[97] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[98] Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)).

[99] TEXAS RULES OF FORM 92 app. A. (Texas Law Review et al. eds., 10th ed. 2003); Simpson, *supra* note 10, at 575; *see also Bain Peanut Co. v. Pinson*, 282 U.S. 499, 500 (1931).

[100] *See supra* notes 95-98.

[101] *Rep. Ins. Co. v. Highland Park Ind. Sch. Dist.*, 133 Tex. 545, 546, 125 S.W.2d 270, 270 (1939) (per curiam).

[102] Simpson, *supra* note 10, at 574.

[103] *See* TEX. R. CIV. P. 483 (amendments effective February 1, 1946); Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* Simpson, *supra* note 10, at 572; Elaine A. Carlson & Roland Garcia, Jr., *Discretionary Review Powers Of the Texas Supreme Court*, 50 TEX. B.J. 1201, 1202-03 (Dec. 1987).

[104] Tex. S.J. Res. 16, 22d Leg., 1st C.S., 1892 Tex. Gen. Laws 21 (adopted at election held Aug. 11, 1891); *see also* TEX. CONST. art V, §§ 1, 3; Hon. W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 269 (Apr. 1962).

[105] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898) (effective September 1, 1892, and eliminating the Court of Appeals in favor of establishing the intermediate Courts of Civil Appeals).

[106] *See Rep. Ins. Co. v. Highland Park Ind. Sch. Dist.*, 133 Tex. 545, 546, 125 S.W.2d 270, 270 (1939) (per curiam) (announcing the adoption of the "writ dism'd—cor. judgm't" notation on March 1, 1939).

"writ ref'd" designation.[107] Before Associate Justice William E. Hawkins's February 20, 1916 concurring opinion in *Terrell v. Middleton*,[108] a "writ ref'd" notation was understood to mean the Texas Supreme Court approved the "result" but not necessarily the "reasoning through which the conclusion of the court is reached."[109]

Another of the three original subsequent history notations was the "writ dism'd w.o.j." designation,[110] which was apparently so haphazardly employed by the Court prior to 1939 that it could indicate a writ was dismissed on actual jurisdictional grounds as the name suggests or that—although the Court possessed jurisdiction—the writ was dismissed because the Court agreed with the judgment below, if not the opinion.[111] The "writ dism'd" notation was also occasionally used during this time as well in place of the "writ dism'd w.o.j." designation.[112]

Adding to the confusion was the State's brief experiment with discretionary review at the Court during the ten-year period from July 1, 1917[113] through June 13, 1927.[114] In 1917, the Legislature amended subdivision six of article 1521 of the Revised Civil Statutes, granting the Court jurisdiction in any case "in which it is made to appear that an error of law has been committed by the Court of Civil Appeals, of such importance to the jurisprudence of the state, as in the opinion of the [Texas] Supreme Court requires correction."[115] The 1917 revisions expressly specified the Court could grant an application for writ of error "in its discretion,"[116] and the primary notation used to denote a case that had been dismissed under subdivision six was the "writ dism'd w.o.j." designation.[117] The Court's short-lived discretionary jurisdiction ended in 1927, "when the discretionary review language was removed from subdivision [six] and replaced by language substantially equivalent to the pre-1917 statute."[118] However, just as denial of review since the Court was *permanently* granted discretionary jurisdiction in 1987 cannot affect the precedential value of an opinion below,[119] so too a dismissal of an application for writ of error for want of jurisdiction while the Court *temporarily* possessed discretionary jurisdiction is also not a comment upon the merits of an intermediate appellate opinion.

The confusion regarding this notation reached its zenith when a 1929 "writ dism'd w.o.j." opinion was granted certiorari to the U.S. Supreme Court, whereupon Justice Oliver Wendell Holmes curtly remarked that the U.S. Supreme Court had been "misled by the form of the order dismissing the application for a writ of error 'for want of jurisdiction.'"[120]

The Court possessed obligatory jurisdiction over "all cases where the court of appeals committed

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[107] The other two notations were: (1) "writ granted;" and (2) "writ dism'd w.o.j." Simpson, *supra* note 10, at 572. The "first notation developed to substitute for a full opinion was '[w]rit ref['d].'" *See Rethinking Writs*, *supra* note 10, at 10.

[108] This concurrence was technically concurring with a written order and not a majority opinion, as no majority opinion was issued. *Terrell v. Middleton*, 108 Tex. 14, 16, 191 S.W. 1138, 1139 (1917) (Hawkins, J., concurring in refusal of application for writ of error).

[109] *See Brackenridge v. Cobb*, 85 Tex. 448, 450, 21 S.W. 1034, 1035 (1893); *see also* Simpson, *supra* note 10, at 548, 574.

[110] Simpson, *supra* note 10, at 572.

[111] *See Rethinking Writs*, *supra* note 10, at 21.

[112] *Id*. at 11, 15; Simpson, *supra* note 10, at 575.

[113] Act of March 15, 1917, 35th Leg., R.S., ch. 75, § 1, 1917 Tex. Gen. Laws 140, 140-41 (effective July 1, 1917).

[114] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[115] *See id*.; *see also Holland v. Nimitz*, 111 Tex. 419, 429-30, 239 S.W. 185, 187 (1922) (emphasis added).

[116] Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927) (emphasis added).

[117] *See Simpson*, *supra* note 10 at 571; *see also Nat'l Compress Co. v. Hamlin*, 114 Tex. 375, 385-87, 269 S.W. 1024, 1029 (1925); *see also supra* text accompanying note 112.

[118] *Rethinking Writs*, *supra* note 10, at 16.

[119] *See infra* text accompanying note 167.

[120] *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 500 (1931); *see also Bain Peanut Co. v. Pinson*, 19 S.W.2d 203 (Tex. Civ. App.—Eastland 1929), *writ dism'd w.o.j.*, 119 Tex. 572, 34 S.W.2d 1090 (per curiam), *aff'd*, 282 U.S. 499.

an error of substantive law, which affected the judgment" from September 1, 1892 through June 30, 1917, and from June 14, 1927 through June 19, 1987.[121] Therefore, as the bar observed as early as 1934, the "writ dism'd w.o.j." designation "involve[d] the obvious contradiction to declare . . . that the Court must first consider the case to determine its jurisdiction over it, and, after having determined that [the appellate opinion below] *has been correctly decided*, shall then 'dismiss the case for want of jurisdiction.'"[122] Accordingly, a "writ dism'd w.o.j." notation affixed to an intermediate appellate opinion while the Court possessed obligatory jurisdiction implicitly meant approval of the judgment below.

Taking heed of Justice Holmes's rebuke and the consternation of the appellate bar in general regarding the import of a "writ dism'd w.o.j." notation,[123] the Court promulgated Rule 5a on March 1, 1939, which introduced the notation, "writ dism'd w.o.j.—cor. judgm't," to the Texas citational lexicon.[124] This notation signified the "judgment of the Court of Civil Appeals is a correct one but the [Texas] Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law."[125]

After the Legislature surrendered the last vestiges of procedural rulemaking authority in May 1939,[126] the Court promulgated its first Rules of Civil Procedure, effective September 1, 1941.[127] Rule 483 eliminated the "writ ref'd w.o.j.—cor. judg't" notation and replaced it with the "ref'd w.o.m." designation without altering "the significance of the action" itself, only the terminology.[128] While in use from September 1, 1941 through January 31, 1946,[129] the "writ ref'd w.o.m." notation was used where the Court was convinced the judgment of the court of appeals was correct but the Court was not satisfied that the opinion correctly declared the law in all respects.[130]

When the Court amended the wording of former Rule 483 on February 1, 1946, it eliminated any reference to the notation "[r]efused for want of merit" and replaced it with the new notation, "'[r]efused, [n]o [r]eversible [e]rror."[131] Much has been written about the troublesome history of the "writ ref'd n.r.e." notation and just what, "[i]f [a]ny," precedential weight it carried.[132] In the most expansive examination of the topic, former Associate Justice Ted Z. Robertson and now-Professor James W. Paulsen concluded the "writ ref'd n.r.e." notation was, "in every sense[,] a decision on the merits of the appeal."[133] The explanation for this was eloquently articulated by former Chief Justice James W. McClendon of the Austin Court of Civil Appeals, when he reasoned that, because the "[Texas] Supreme Court had potential jurisdiction . . . of the case upon that

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[121] *See* Carlson & Garcia, *supra* note 103, at 1201 (quoting former TEX. GOV'T CODE ANN. § 22.001(a)(6)); *See supra* notes 95-98.

[122] *Rethinking Writs*, *supra* note 10, at 22 (quoting TEXAS LAW REVIEW, PROCEEDINGS OF THE FIFTY-THIRD ANNUAL MEETING OF THE TEXAS BAR ASSOCIATION 137, 139 (1934) (emphasis added)).

[123] *See Rethinking Writs*, *supra* note 10, at 22; Wilson, *supra* note 11, at 1090-91.

[124] *See Rep. Ins. Co. v. Highland Park Ind. Sch. Dist.*, 133 Tex. 545, 546, 125 S.W.2d 270, 270 (1939) (per curiam); 131 Tex. v-vi (1939). For the other, older, abbreviation variants of this notation, see Simpson, *supra* note 10, at 575.

[125] *Highland Park*, 133 Tex. at 546, 125 S.W.2d at 270.

[126] *See* Act of May 15, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201 (effective May 15, 1939) (codified as amended at TEX. GOV'T CODE ANN. § 22.004 (Vernon 2004)); *Rethinking Writs*, *supra* note 10, at 23.

[127] *See Rules of Civil Procedure*, 3 TEX. B.J. 522, 522 (1940) [hereinafter *1941 TRCP*]; *Rethinking Writs*, *supra* note 10, at 23; 136 Tex. 589 (1941).

[128] Simpson, *supra* note 10, at 572.

[129] Effective February 1, 1946, the Texas Supreme Court amended the wording of former Rule of Civil Procedure 483 to eliminate any reference to the notation "[r]efused for want of merit." *See* Simpson, *supra* note 10, at 572.

[130] *Id.*

[131] *Id.*

[132] *See*, *e.g.*, *Rethinking Writs*, *supra* note 10, at 1; *Meaning of N.R.E.*, *supra* note 10, at 1306; Steakley, *supra* note 10, at 697; Simpson, *supra* note 10, at 547.

[133] *Rethinking Writs*, *supra* note 10, at 26; *see also* Wilson, *supra* note 11, at 1090.

appeal," the "effect of the dismissal order constituted an adjudication by that [C]ourt that the judgment of this court was 'a correct one.'"[134] In fact, the Court had more than mere *potential* jurisdiction during most of the period of time when the "writ ref'd n.r.e." notation was used, it had *obligatory* jurisdiction over "all cases where the court of appeals committed an error of substantive law that affected the judgment"[135] until June 19, 1987.[136] Therefore, just as Chief Justice McClendon cautioned, a refusal of the writ for no reversible error was a de facto approval of the judgment below.

The jurisprudential "result" of a case is contained in the court's judgment. Accordingly, whether the Court approved the "result" of a lower opinion (as in refused opinions before February 20, 1916), approved the judgment of the lower court (as in refused for want of jurisdiction, refused for want of jurisdiction—correct judgment, and refused for no reversible error opinions before June 20, 1987), or was convinced the judgment of the lower court was correct (as in refused for want of merit opinions), all of these notations bear the equal precedential weight of the Court's approval of the judgment below.

Even though a convincing argument may be made that the same action taken by the Court in adopting, approving, or affirming the judgment of a Commission opinion is precedentially indistinguishable from the action the Court employed in refusing or denying writs prior to February 20, 1916, refusing writs for want of jurisdiction, refusing writs for want of merit, and refusing writs for no reversible error, the Court made clear in 1935 that "the Courts of Civil Appeals and all lower courts should feel constrained to follow" *all* Commission opinions regardless of whether they are adopted or approved.[137] Therefore, even less authoritative Commission opinions enjoy precedential superiority over all intermediate appellate opinions with the exception of "writ ref'd" or "pet. ref'd" intermediate appellate opinions issued from June 14, 1927 to the present, which carry the same force and effect of a Court opinion.[138]

B. Writ-refused[139] (from February 20, 1916[140] through June 13, 1927),[141]

writ refused for no reversible error (from June 20, 1987[142] through December 31, 1987),

writ dismissed by agreement,[143]

writ granted without reference to merits,[144]

writ-denied[145] **(from January 1, 1988**[146] **through August 31, 1997),**[147]

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[134] *Fisher v. City of Bartlett*, 88 S.W.2d 1068, 1069 (Tex. Civ. App.—Austin 1935, writ dism'd) (quoting former Revised Civil Statute article 1728).

[135] *See* Carlson & Garcia, *supra* note 103, at 1202 (quoting former TEX. GOV'T CODE ANN. § 22.001(a)(6)).

[136] After the Legislature granted discretionary jurisdiction to the Texas Supreme Court on June 20, 1987, the "writ ref'd n.r.e." notation became obsolete. *See* Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* discussion *infra* Part III.B.

[137] *Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

[138] *See* discussion *supra* Part I.C.2.

[139] *See* Simpson, *supra* note 10, at 574.

[140] *Terrell v. Middleton*, 108 Tex. 14, 16-21, 191 S.W. 1138, 1139-41 (1917) (Hawkins, J., concurring in refusal of application for writ of error).

[141] TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927).

[142] *See* TEX. R. CIV. P. 483 (amendments effective February 1, 1946); Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* Simpson, *supra* note 10, at 572; Carlson & Garcia, *supra* note 103, at 1202-03.

[143] TEXAS RULES OF FORM 92 app. A. (Texas Law Review et al. eds., 10th ed. 2003); *see also* Greenhill, *supra* note 21, at 386.

[144] TEX. R. CIV. P. 483; GREENBOOK, *supra* note 2, at 103, app. E; Simpson, *supra* note 10, at 574.

[145] GREENBOOK, *supra* note 2, at 103, app. E.

[146] *See* TEX. R. APP. P. 133(a), *reprinted in Court Order*, 50 TEX. B.J. 1044, 1049 (Oct. 1987) [hereinafter

petition-denied,[148]

petition-struck,[149]

petition-dismissed,[150]

petition granted and judgment vacated without reference to the merits,[151]

petition dismissed by agreement of the parties,[152]

petition dismissed for want of jurisdiction,[153]

petition-withdrawn,[154]

petition-abated,[155] **and**

petition-filed intermediate appellate opinions[156]

The one precedential element common to all the remaining subsequent history notations addressed in this section is that none indicate the Texas Supreme Court has reviewed or commented upon the merits of the petition or application, either because of procedural reasons or because the Court lacked jurisdiction to consider the case.[157] That said, some of these notations warrant more examination in these pages than the others, and they are explored below.

After Justice Hawkins' *Terrell* opinion was issued on February 20, 1916, a "writ ref'd" notation no longer automatically meant the Court approved the result, if not the reasoning, of the court below.[158] Instead, Justice Hawkins's opinion revealed the notation now could mean no more than:

> that[,] in no instance[,] does a refusal by the [Texas] 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, or even of any one or more of the grounds or reasons given in its opinion in support of its decision and judgment.[159]

This distinction lasted until article 1728 of the Revised Civil Statutes was amended effective June 14, 1927, when the "writ ref'd" notation was made to indicate that "a decision by a Court of Civil Appeals to which the Supreme Court refuses

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1988 TRAP].

147 *See* TEX. R. APP. P. 56.1(b)(1), *reprinted in Texas Rules of Appellate Procedure*, 60 TEX. B.J. 878, 936 (Oct. 1997) [hereinafter *1997 TRAP*].

148 TEX. R. APP. P. 56.1(b)(1); GREENBOOK, *supra* note 2, at 98, app. D.

149 TEX. R. APP. P. 53.9; GREENBOOK, *supra* note 2, at 99, app. D.

150 TEX. R. APP. P. 60.6; GREENBOOK, *supra* note 2, at 99, app. D.

151 TEX. R. APP. P. 56.2; GREENBOOK, *supra* note 2, at 99, app. D.

152 GREENBOOK, *supra* note 2, at 100, app. D.

153 TEX. R. APP. P. 56.1(b)(2); GREENBOOK, *supra* note 2, at 100, app. D.

154 GREENBOOK, *supra* note 2, at 100, app. D.

155 TEX. R. APP. P. 8.2; GREENBOOK, *supra* note 2, at 100, app. D.

156 TEX. R. APP. P. 53.7; GREENBOOK, *supra* note 2, at 101, app. D. It should be noted that this designation only refers to petitions whose merits have not yet been reviewed by the Court. *See* GREENBOOK, *supra* note 2, at 101, app. D (citing TEX. R. APP. P. 53.7). However, there is currently no defined notation for a cause in which briefing on the merits has been ordered. *See* TEX. R. APP. P. 55.1-55.4. For this type of opinion, the author encourages the use of the notation, "pet. pending," which it appears the Texas Supreme Court may already favor. *See, e.g.*, *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 239 S.W.3d 236, 241 (Tex. 2007). Even though a "pet. pending" notation would differ from the other designations discussed in this section because a "pet. pending" notation would indicate the Court has reviewed the merits of the petition, because the Court now has discretionary review powers, the Court's examination of the merits of a cause—and even its subsequent decision to deny the petition—is not a comment upon the merits of the petition similar to that described in Part III.A.

157 *See* GREENBOOK, *supra* note 2, at 98-101, app. D; TEXAS RULES OF FORM 92-93 app. A. (Texas Law Review et al. eds., 10th ed. 2003).

158 *Compare Brackenridge v. Cobb*, 85 Tex. 448, 450, 21 S.W. 1034, 1035 (1893), *with*, *Terrell v. Middleton*, 108 Tex. 14, 16-21, 191 S.W. 1138, 1139-41 (1917) (Hawkins, J., concurring in refusal of application for writ of error); *see also* Simpson, *supra* note 10, at 548, 574.

159 *Terrell*, 108 Tex. at 16-21, 191 S.W. at 1139-41 (Hawkins, J., concurring in refusal of application for writ of error); *see also* Simpson, *supra* note 10, at 570, 574.

a writ of error . . . is as binding as a decision of the [Texas] Supreme Court itself."[160]

By its order of April 10, 1986, which became effective on September 1, 1986, the Court promulgated the state's first Appellate Rules of Procedure.[161] Therein, the Court adopted former Rule of Civil Procedure 483 as new Rule of Appellate Procedure 133(a) without any major substantive change.[162] However, after discretionary review powers were permanently granted to the Court in 1987 by the passage of Senate Bill 841,[163] the "writ ref'd n.r.e." notation became superfluous and was replaced by the designation "writ denied" by order of the Court made effective January 1, 1988.[164]

Although the Court was granted discretionary jurisdiction on June 20, 1987, the Court did not promulgate appellate rules commensurate with its new powers until some six months later on January 1, 1988.[165] As explained in Part III.A, because the "writ ref'd n.r.e." notation was based upon former subdivision six of Government Code section 22.001 giving the Court obligatory jurisdiction in all cases "in which it appears that an error of substantive law that effects the judgment has been committed by the court of appeals," the notation was a de facto approval of the intermediate appellate court judgment to which it was affixed.[166] However, this version of subdivision six was superseded by that enacted in 1987 giving the Court discretionary jurisdiction in cases "in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction."[167]

Therefore, while the statutory underpinnings of the "writ ref'd n.r.e." notation were removed as of June 20, 1987, there was nonetheless no other notation in existence to reflect the Court's newfound discretionary powers until Rule 133(a) was revised effective January 1, 1988.[168] However, because the Court's refusal for no reversible error during this time period could only be based upon the newly-enacted version of subdivision six regarding error "of such importance to the jurisprudence of the state" as to require correction, any comment upon the judgment of the court below that would have existed under the Court's former obligatory jurisdiction was removed.[169]

The eventual addition of discretionary language to Rule 133(a) allowing an application for writ of error to be denied (as opposed to refused or dismissed) based upon the discretionary powers granted the Court in the new section 22.001(a)(6), confirmed that a "writ denied" notation was not a comment upon the merits of the judgment below.[170]

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[160] TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927); *see Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ).

[161] *See Appellate Procedure*, 49 TEX. B.J. 558, 558 (June 1986) [hereinafter *1986 TRAP*].

[162] *Id.* at 554, 587.

[163] Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)).

[164] *See* TEX. R. APP. P. 133(a), *reprinted in 1988 TRAP*, *supra* note 146, at 1049; Carlson & Garcia, *supra* note 103, at 1202.

[165] *See* TEX. R. CIV. P. 483 (amendments effective February 1, 1946); Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)); *see also* Simpson, *supra* note 10, at 572; Carlson & Garcia, *supra* note 103, at 1202-03.

[166] *See* Carlson & Garcia, *supra* note 103, at 1202 (quoting former TEX. GOV'T CODE ANN. § 22.001(a)(6)).

[167] Act of June 20, 1987, 70th Leg., R.S., ch. 1106 § 1, 1987 Tex. Gen. Laws 3804, 3804 (effective June 20, 1987) (codified at TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)).

[168] *See* Carlson & Garcia, *supra* note 103, at 1202-03.

[169] *See id.*

[170] TEX. R. APP. P. 133(a), *reprinted in 1988 TRAP*, *supra* note 146, at 1049 ("In all cases where the Supreme Court . . . is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require

With the massive overhaul of the Texas Rules of Civil Procedure by order of the Court effective September 1, 1997, by which the application for writ of error system was supplanted by the current petition for review process, former Rule 133(a) was re-adopted as Rule 56.1(b)(1).[171] Rule 133(a) was not substantively amended by its re-adoption, but—due to the elimination of writs of error—the notation, "writ denied," was replaced by the suffix, "pet. denied."[172]

C. Published memorandum intermediate appellate opinions issued from September 1, 1941[173] through August 31, 1986,[174] and from September 1, 1997[175] through the present

Just as per curiam opinions issued by the Texas Supreme Court are fractionally less authoritative than signed Court opinions,[176] so too are published memorandum intermediate appellate opinions slightly less precedential than non-memorandum opinions.

However, the distinction between memorandum opinions and non-memorandum opinions is even more stark than the difference between per curiam and signed Court opinions. Memorandum opinions came into existence on September 1, 1941, when the state's first Rules of Civil Procedure were promulgated.[177] Newly-enacted Rule 452 described a "brief, memorandum opinion" as one "where the issues involved have been clearly settled by authority or elementary principles of law."[178] The last sentence of Rule 452 mandated that "[o]pinions shall be ordered not published when they present no question or application of any rule of law of interest or importance to the jurisprudence of the State."[179] Because it is at least possible that opinions disposing of only "clearly-settled" issues could nevertheless be "important[t] to the jurisprudence of the State," the assumption cannot be made that all memorandum opinions issued in the forty-five year span from September 1, 1941 through August 31, 1986 were not published.

When the Rules of Appellate Procedure were first enacted on September 1, 1986, the provisions of former Rule of Civil Procedure 452 were incorporated as amended in Rule of Appellate Procedure 90(a) and (c).[180] In subparagraph (a), the Rule provided that memorandum opinions "should not be published."[181] In addition, subparagraph (c) mandated that an opinion be published only if it:

> (1) establishes a new rule of law, alters or modifies an exiting rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.[182]

Upon the major revision to the Rules of Appellate Procedure in 1997, appellate Rule 90(a) was renumbered as Rule 47.1 requiring the issuance of a memorandum opinion in any instance "where the issues are settled," and the prohibition against publishing memorandum opinions was removed.[183] However, the standards for

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correction.").

171 TEX. R. APP. P. 56.1(b)(1), *reprinted in 1997 TRAP*, *supra* note 147, at 878, 936.

172 *Compare* TEX. R. APP. P. 133(a), *reprinted in 1988 TRAP*, *supra* note 145, at 1049, *with* TEX. R. APP. P. 56.1(b)(1), *reprinted in 1997 TRAP*, *supra* note 147, at 936.

173 *See* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 127, at 522, 596.

174 *See* TEX. R. APP. P. 90(a), *reprinted in 1986 TRAP*, *supra* note 161, at 558, 583.

175 *See* TEX. RR. APP. P. 47.1, 47.3, 47.4, *reprinted in 1997 TRAP*, *supra* note 147, at 878, 925.

176 *See* discussion *supra* Part I.B.

177 *See* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 127, at 522, 596.

178 *Id.* at 596.

179 *Id.*

180 *Compare* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 127, at 596, *with* TEX. R. APP. P. 90(a), (c), *reprinted in 1986 TRAP*, *supra* note 161, at 583.

181 TEX. R. APP. P. 90(a), *reprinted in 1986 TRAP*, *supra* note 161, at 583.

182 TEX. R. APP. P. 90(c), *reprinted in 1986 TRAP*, *supra* note 161, at 583.

183 *Compare* TEX. R. APP. P. 90(a), *reprinted in 1986*

publication first adopted in Rule 90(c), were also renumbered at Rule 47.4.[184] Therefore, while memorandum opinions could again be published, few "settled-issue" opinions qualified for publication.

When the Rules of Appellate Procedure were amended to removed the "publish and "do not publish" notations from intermediate appellate opinions in 2003,[185] the standards for publication from former Rule 47.4 were amended to govern instead the issuance of memorandum opinions.[186] The only substantive change made to the standards between the two versions of subparagraph (c) was the elimination of the "public interest" prong, which was replaced by language requiring a memorandum opinion be issued unless the decision involves issues of constitutional law important "to the jurisprudence of Texas."[187] Because memorandum opinions were already—at least in essence—limited to the four publication standards in former Rule 47.4(c), and issues of importance to the jurisprudence of the state and issues of public interest are virtually indistinguishable for purposes of citation, there is no meaningful precedential difference between published memorandum opinions issued from September 1, 1997 through August 31, 2003, and memorandum opinions issued on or after September 1, 2003.

D. Texas Supreme Court per curiam opinions explaining and / or modifying designated notations[188]

Some consternation has been caused by the Texas Supreme Court's curious and—thankfully—rare use of the mechanism of a per curiam decision to opine on the merits, or lack thereof, of a case in which it did not either grant the application for writ of error or the petition for review.[189]

In practice, these opinions have issued to comment upon or clarify precisely what level of approval or disapproval the Court felt compelled to bestow upon the lower court's opinion.[190] A precedential issue arises however when the notation the Court professes to attach to the opinion does not comport with the level of approval indicated in the opinion.

In the Court's 1964 per curiam opinion in *City of Dallas v. Holcomb*, the Court expressly refused for no reversible error the application for writ of error of the opinion below.[191] However, "[s]o that there may be no question as to the effect" of the its decision, the Court noted it also "approve[d] the holding" of the court below.[192] Of course, even though the "writ ref'd n.r.e." designation could only mean, at most, the Court approved the *judgment* of the court of appeals, the Court nevertheless approved the lower court's *holding*—which encompasses the judgment—as well. Just as a "holding approved" Commission opinion carries more precedential weight than does a mere "judgm't approved" Commission opinion, so too must a court of appeals opinion whose holding has been approved by the Court be

TRAP, *supra* note 161, at 583, *with* TEX. R. APP. P. 47.1, *reprinted in 1997 TRAP*, *supra* note 147, at 925.

184 *Compare* TEX. R. APP. P. 90(c), *reprinted in 1986 TRAP*, *supra* note 161, at 583, *with* TEX. R. APP. P. 47.4, *reprinted in 1997 TRAP*, *supra* note 147, at 925.

185 *See* Order of Aug. 6, 2002, Misc. Docket No. 02-9119, *reprinted in* 65 TEX. B.J. 686, 692 (Sept. 2002) (effective September 1, 2003) [hereinafter *2003 TRAP*]; *see also* TEX. R. APP. P. 47.3, *reprinted in 2003 TRAP*, at 692 (noting strikeout changes and underlined additions to Rule 47.3).

186 *See* TEX. R. APP. P. 47.4, *reprinted in 2003 TRAP*, *supra* note 185, at 692.

187 *See id.*

188 *See* TEX. R. APP. P. 59.1, *reprinted in 1997 TRAP*, *supra* note 147, at 878, 938.

189 *See* Mark E. Steiner & Pamela E. George, *The Use of Authority: Lone Stare Decisis Revisited: Ethics and Authority in Texas Appellate Courts in Light of Recent Rule Changes*, *in* State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course ch. 15, p. 16 (2003); *see also* TEX. R. APP. P. 59.1, *reprinted in 1997 TRAP*, *supra* note 147, at 878, 938.

190 *See* Steiner & George, *supra* note 189, at 16.

191 383 S.W.3d 585, 586 (Tex. 1964) (per curiam).

192 *Id.*

more precedential than one in which only the judgment was deemed to be correct.[193] Accordingly, the inescapable effect of *Holcomb* is to elevate the Dallas Court of Civil Appeals' opinion[194] to a status lying somewhere in the precedential ether between the judgment-approving notations described in Part. III.A and the opinion-approving effect of a writ-refused opinion on or after June 14, 1927.[195]

During its short, officially-sanctioned history, the "writ denied" designation was not always used in the most scrupulous fashion. One such example is the June 15, 1988 case of *Louder v. DeLeon*, in which the Court technically denied the writ for application of error but did so by way of a per curiam opinion that expressly "disapprove[d of] the court of appeals' pronouncements . . . and criticize[d] its reasoning."[196] However, as discussed above in Part III.B, a "writ denied" notation affixed to a lower court's opinion issued from January 1, 1988 through August 31, 1997 was not a comment upon the merits of the opinion below.[197] But here, the Court expressly held it disapproved of both the lower court's meritorious "pronouncements regarding Tex[as] R[ule of] Civ[il] Evid[ence] 704 . . . and . . . reasoning."[198] As in *Holcomb*, the Court's exposition in *Louder* impacts the precedential weight of the opinion below. Here, it affixes a nebulous kiss of precedential death to the Amarillo Court of Appeals' opinion as being somewhat disapproved of by the Court.[199]

The Court has utilized this peculiar per curiam practice at least two other times as well. In its 1998 opinion in *Palo Pinto County v. Lee*, the Court "disapprove[d]" of language in the opinion below, while at the same time denying review.[200] Two years later in *Judwin Properties, Inc. v. Griggs & Harrison*, the Court again held that, "[i]n denying this petition for review," it "disapprove[d] of" language in the opinion below.[201] In both *Palo Pinto* and *Judwin*, the Court made clear the "language" it found objectionable was that contained in specific holdings of the First and Eleventh District Courts of Appeals.[202] Just as in *Louder*, the effect of the Court's per curiam commentary is to relegate the opinions of the courts of appeals below to an undefined precedential latitude somewhere south of intermediate appellate opinions in which the Court has not reviewed the merits.[203]

As with hybrid notations affixed to Commission opinions,[204] so too should citations to the types of lower court opinions examined here list the most (or least, as it were) authoritative notation first.[205] However, these intermediate appellate court opinions should be only be accorded the

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[193] *Compare* discussion *supra* Part II.A., *with*, discussion *supra* Part II.B.

[194] *City of Dallas v. Holcomb*, 381 S.W.2d 347 (Tex. Civ. App.—Dallas 1964), *holding approved per curiam, writ ref'd n.r.e. by*, 383 S.W.2d 585, 586.

[195] *Compare* discussion *supra* Part III.A, *with*, TEX. REV. CIV. STAT ANN. art. 1728 (Vernon 1962); *see also* Act of March 16, 1927, 40th Leg., R.S., ch. 144, § 1, 1927 Tex. Gen. Laws 214, 215 (effective June 14, 1927); *see Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ).

[196] 754 S.W.2d 148, 149 (Tex. 1988) (per curiam).

[197] GREENBOOK, *supra* note 2, at 103, app. E; *see* discussion *supra* Part III.B.

[198] *Louder*, 754 S.W.2d at 149.

[199] Because of the Court's disapproval of the opinion below, *Louder* arguably occupies a dubious precedential position that makes it less authoritative than a normal court of appeals opinion in which the Court has not examined the merits, but not quite as non-precedential as a court of appeals opinion the Court has forthrightly reversed. *See DeLeon v. Louder*, 743 S.W.2d 357, 361-62 (Tex. App.—Amarillo 1987), *pronouncements and reasoning disapproved per curiam, writ denied by*, 754 S.W.2d at 149.

[200] 988 S.W.2d 739, 739 (Tex. 1998) (per curiam).

[201] 11 S.W.3d 188, 188-89 (Tex. 2000) (per curiam).

[202] *Judwin Props., Inc. v. Griggs & Harrison, P.C.*, 981 S.W.2d 868, 870 (Tex. App.—Houston [1st Dist.] 1998), *holding disapproved per curiam, pet. denied by*, 11 S.W.3d at 188-89; *Lee v. Palo Pinto County*, 966 S.W.2d 83, 85 (Tex. App.—Eastland 1998), *holding disapproved per curiam, pet. denied by*, 988 S.W.2d at 739.

[203] *See supra* note 199.

[204] *See* discussion *supra* Part II.A.

[205] For examples of both alternatives, see text accompanying notes 190, 195, and 198.

precedential weight attendant to the clearest indication of the Court's treatment of the opinion below.

Because these per curiam opinions issued by the Court contain minimal exposition beyond that which comments upon the opinion below, they possess little precedential weight as to their own merits,[206] but are instead primarily precedential as to the intermediate appellate opinions they critique.

IV. Non-precedential, but perhaps persuasive, authority

There are at least four categories of caselaw in Texas that are not precedential but that are often considered more authoritative than they truly are. If there is any distinction to be drawn between the shades of precedence inherent in each of these types of opinions (and that proposition is itself questionable), they are listed below in descending order of precedential weight.

A. Texas Commission of Appeals opinions issued from October 7, 1879[207] through February 8, 1881[208]

As is discussed in Part I.C.1, cases referred to the Commission between 1879 and 1881 were done so only with the parties' consent, and are therefore not precedential.[209] Even though a very defensible argument may be made that—prior to the establishment of the intermediate appellate court system in 1892—the Commission was the State's first attempt at creating an appellate buffer between the trial courts and the Texas Supreme Court and its opinions should therefore be accorded more precedential respect than an unpublished intermediate appellate opinion,[210] this argument fails in light of the Court's 1935 pronouncement that "the Courts of Civil Appeals and all lower courts should feel constrained to follow" *all* Commission opinions regardless of whether they are adopted or approved.[211]

B. Unpublished intermediate appellate opinions[212]

Although unpublished intermediate appellate opinions issued at any time have been expressly deemed as possessing "no precedential value" since the 2003 revisions to Rule of Appellate Procedure 47.7,[213] it was not always so. Originally, no comment was made until the 1986 enactment of the Rules of Appellate Procedure regarding either the citation of such unpublished opinions or the precedential weight of these decisions.[214] However, perhaps because of this ambiguity, the 2003 revisions to the Rules of Appellate Procedure inserted the phrase, "under these or any prior rules," into Rule 47.7's provisions deeming unpublished intermediate

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[206] There is no doubt, however, that these per curiam opinions carry just as much precedential weight as any other per curiam opinion issued by the Court. Their precedential value—if limited at all—is only reduced by the narrow scope of the holding in such opinions.

[207] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin, Gammel Book Co. 1898) (establishing the Commission of Appeals, and made effective October 7, 1879).

[208] *See* Act of Feb. 9, 1881, 17th Leg., R.S., ch. 7, 1881 Tex. Gen. Laws 4, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 96, 96-97 (Austin, Gammel Book Co. 1898) (effective upon passage on February 9, 1881).

[209] Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30, *reprinted in* 9 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 62, 62-64 (Austin, Gammel Book Co. 1898) (effective October 7, 1892); *State & County Mut. Fire Ins. Co. v. Kinner*, 159 Tex. 290, 292-93, 19 S.W.2d 297, 299 (1958); Williams, *supra* note 49, at 178; GREENBOOK, *supra* note 2, at 96, app. C.2; *see also* discussion, *supra* Part I.C.1.

[210] Act of Apr. 12, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 19, 19-25, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-97, at 383, 383-89 (Austin, Gammel Book Co. 1898).

[211] *Nat'l Bank of Com. v. Williams*, 125 Tex. 619, 623, 84 S.W.2d 691, 692 (1935).

[212] TEX. R. APP. P. 47.7, *reprinted in 2003 TRAP*, *supra* note 185, at 692.

[213] *Id.*

[214] *Compare* TEX. R. CIV. P. 452, *reprinted in 1941 TRCP*, *supra* note 127, at 596, *with* TEX. R. APP. P. 90(i), *reprinted in 1986 TRAP*, *supra* note 161, at 584.

appellate court opinions issued at any time as lacking any "precedential value."[215]

Both the 1986 and 1997 incarnations of Rule 47.7 contained a prohibition against the citation "as authority" of unpublished intermediate appellate opinions "by counsel or by a court," even though the intermediate appellate courts were required to label such opinions with the notation, "do not publish."[216] However, the 2003 revisions to the appellate rules eliminated this prohibition against citation, as long as the writer affixed the notation, "not designated for publication."[217]

C. Texas trial courts

Because trial courts are the initial point of judicial review for disputes in Texas, decisions from these courts cannot constitute precedential authority in the civil appellate context.[218]

D. Dissenting opinions from denial of review or application for writ of error at the Texas Supreme Court[219]

There is one other type of opinion that bears precedential examination, and that is the practice by some of the Justices on the Texas Supreme Court to write dissenting opinions from the denial of review or application for writ of error.[220] However, unlike the per curiam opinions described in Part III.D, or the "majority concurrence" described in Part I.A, because these opinions are not issued per curiam or even by a majority of the Court, they cannot affect the precedential value of the intermediate appellate opinion to which they pertain.[221] Accordingly, they must be accorded the same precedential import assigned any other dissenting or concurring opinion issued by a Justice of the Court.

CONCLUSION

A precedential ranking this detailed is far from necessary for most practitioners and mildly interesting to even less.[222] However, in those instances where a writer seeks to distinguish, discredit, or otherwise cast doubt upon the validity of a particular opinion, or random, academic curiosity triumphs over a lawyer's better sense, this comprehensive Order of Citation will hopefully prove instructive.

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[215] TEX. R. APP. R. 47.7, *reprinted in 2003 TRAP*, *supra* note 185, at 692.

[216] *Compare* TEX. R. APP. R. 47.3(b), 47.7, *reprinted in 1997 TRAP*, *supra* note 147, at 925, *with* TEX. R. APP. P. 90(e), (i), *reprinted in 1986 TRAP*, *supra* note 161, at 583-84.

[217] TEX. R. APP. R. 47.7, *reprinted in 2003 TRAP*, *supra* note 185, at 692.

[218] *See* TEXAS RULES OF FORM R. 24.1, at 91 (Texas Law Review et al. eds., 10th ed. 2003).

[219] *See* Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006, at 8 (cataloguing the practice from its inception in 1895 to the present).

[220] *Id.*

[221] One of these decisions, *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (Hecht, J., dissenting from denial of review), stands out because, although it is clearly marked in the Southwestern reporter as being a dissent, it has nonetheless been cited as a majority Court opinion by the Texas Review Tribunal, Texas federal district courts, the Fifth Circuit Court of Appeals, and every Texas intermediate appellate court save for the Eastland Court of Appeals. *See*, *e.g.*, *Joslin v. Pers. Invs., Inc.*, No. 03-40200, 2004 WL 436001, at *5 (5th Cir. March 8, 2004); *Meecorp Cap. Mkts., LLC v. Tex-Wave Indus., LP*, No. C-06-148 2006 WL 3813779, at *5 (S.D. Tex. December 27, 2006); *In re Rose*, 144 S.W.3d 661, 676 (Tex. Rev. Trib. 2004, no appeal); *see also* Orr, *supra* note 35, at 9-13.

[222] The author wishes to extend a note of thanks to Justice Hecht, Professors Jim Paulsen and Andrew Solomon at the South Texas College of Law, as well as Brandy Wingate at the Thirteenth Court of Appeals, who all graciously found this article interesting enough to ensure its accuracy transcended the limitations imposed upon it by the author.

APPENDIX A

Order of Citation

I. Texas Supreme Court equivalent

A. Authored majority opinions (Jan. 1840 (Dallam 357)-1867 (30 Tex. 374), 1871 (33 Tex. 585)-present)

B. (per curiam)

C.1 Adopted or approved opinions of the Tex. Comm'n App. (Feb. 9, 1881-Aug. 31, 1892, Apr. 3, 1918-Aug. 24, 1945)

C.2 (pet. ref'd) (writ ref'd) (June 14, 1927-present)

D. (Tex. Ct. App. 18__) (Apr. 18, 1876-Aug. 31, 1892)

II. Tex. Comm'n App. equivalent (Feb. 9, 1881-Aug. 31, 1892, Apr. 3, 1918-Aug. 24, 1945)

A. (Tex. Comm'n App. ____, holding approved)

B. (Tex. Comm'n App. ____, judgm't adopted)

(Tex. Comm'n App. ____, judgm't approved)

(Tex. Comm'n App. ____, judgm't aff'd)

III. Intermediate appellate court equivalent

A. (writ ref'd) (writ denied) (before Feb. 20, 1916)

(writ dism'd) (Sept. 1, 1892-June 30, 1917, June 14, 1927-June 19, 1987)

(writ dism'd w.o.j.) (Sept. 1, 1892-June 30, 1917, June 14, 1927-June 19, 1987)

(writ dism'd judg't cor.)

(writ ref'd w.o.m.)

(writ ref'd n.r.e.) (before June 20, 1987)

B. (writ ref'd) (Feb. 20, 1916-June 13, 1927)

(writ ref'd n.r.e.) (June 20, 1987-Dec. 31, 1987)

(writ dism'd by agr.)

(writ dism'd)

(writ granted w.r.m.)

(writ denied) (Jan. 1, 1988-Aug. 31, 1997)

(pet. denied)

(pet. struck)

(pet. dism'd)

(pet. granted, judgm't vacated w.r.m.)

(pet. dism'd by agr.)

(pet. dism'd w.o.j.)

(pet. withdrawn)

(pet. abated)

(pet. filed)

C. Published (mem. op.) (Sept. 1, 1941-Aug. 31, 1986, Sept. 1, 1997-present)

D. *holding / reasoning approved / disapproved per curiam*

IV. Non-precedential authority

A. (Tex. Comm'n App. 18__) (not precedential) (Oct. 7, 1879-Feb. 8, 1881)

B. (do not publish) (not designated for publication)

C. (___ Dist. Ct., ____ County, Tex. ____ __, ____)

D. (____, J., dissenting from denial of review) (____, J., dissenting from denial of application for writ of error)