HIGH COURT STUDY

A JUDGE IN FULL: WALLACE JEFFERSON OF TEXAS

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During his eight years as Chief Justice of the Texas Supreme Court, Wallace Jefferson has written a number of deeply engaging opinions that illustrate his command of the work required of an appellate judge.[1] These opinions are both thorough and thoughtful, and neither obtuse, nor shallow. They mark a judge well-versed in jurisprudence and in the ongoing debates about how judges construct and interpret statutes, the common law, and the constitution. His opinions indicate both his confidence in his conclusions and a humility cognizant of his fallibility. His opinions have also occasionally generated objections, as Texas law has changed during the past decade. Chief Justice Jefferson's opinions reflect a judge in full; one who possesses a deep knowledge of law and the peculiarities and particularities of the state and the people he serves.

This essay discusses the work of Chief Justice Jefferson. His work should be understood in light of the unusual division of appellate power in Texas, as well as the shifting but exclusively Republican composition of the membership of the Supreme Court of Texas since during his service there.[2]

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[1] *See Chief Justice Wallace B. Jefferson*, SUP. CT. TEX., http://www.supreme.courts.state.tx.us/court/justice_wjefferson.asp (last updated Sept. 13, 2011) (noting that Chief Justice Wallace Jefferson was appointed on September 14, 2004).

[2] *See* MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 210 (2011) (noting that since 1999 the Texas Court of Criminal Appeals has been made up of Republicans); *Justices of the Court: The Supreme Court of Texas*, SUP. CT. TEX., http://www.supreme.courts.state.tx.us/court/justices.asp (last updated June 13, 2011) (listing the nine justices who make up the composition of the Texas Supreme Court); *Texas Supreme Court, Leadership Directory*, REPUBLICAN PARTY TEX., http://www.texasgop.org/texas-supreme-court (last visited Mar. 15, 2012) (listing the same nine justices of the Texas

I. INTRODUCTION

A. Background

Wallace Jefferson was born on July 22, 1963, in Tacoma, Washington, the second youngest of six children.[3] When he was four his parents moved to San Antonio, where Jefferson was raised.[4] After graduating from high school, Jefferson attended and graduated from Michigan State University with a degree in philosophy.[5] His older brother Lamont recommended he consider attending the University of Texas School of Law.[6] Jefferson took his brother's advice, graduating from the University of Texas Law School in 1988.[7] He practiced law in the San Antonio firm of Groce, Locke & Hebdon, and with two other appellate lawyers, created the firm of Crofts, Callaway & Jefferson, also in San Antonio.[8] Among his appellate cases were two appearances before the Supreme Court of the United States.[9] In March 2001, at just thirty-seven-years-old, he was appointed associate justice of the Texas Supreme Court by fellow Republican Governor Rick Perry.[10] In late 2004, Perry appointed him chief justice.[11] As required by the Texas Constitution, he ran in the next election to serve the remainder of his predecessor's term.[12] He was re-elected to a full six-year term as chief justice in the November 2008 elections.[13] As is almost always

Supreme Court as members and leaders of the Republican Party).

[3] *Biography: Chief Justice Wallace B. Jefferson*, PROJECT VOTE SMART, [hereinafter *Biography*], http://www.votesmart.org/candidate/biography/59079/wallace-jefferson (last visited May 15, 2012) (stating that Chief Justice Jefferson was born on July 22, 1963); Kevin Priestner, Profile, *Wallace Jefferson*, 66 TEX. B. J. 405, 406 (2003).

[4] Priestner, *supra* note 3, at 406.

[5] *The Honorable Wallace B. Jefferson*, *Law School Foundation*, U. TEX. SCH. L., http://www.utexas.edu/law/about/foundation/trustees/jefferson.html (last visited May 15, 2012); *see* Priestner, *supra* note 3, at 406.

[6] *See* Priestner, *supra* note 3, at 406.

[7] *The Honorable Wallace B. Jefferson*, *Law School Foundation*, *supra* note 5; *see* Priestner, *supra* note 3, at 406–07.

[8] *Jefferson Named Chief Justice of the Texas Supreme Court*, 67 TEX. B.J. 732, 732 (2004); Priestner, *supra* note 3, at 405.

[9] *Chief Justice Wallace B. Jefferson*, *supra* note 1; Priestner, *supra* note 3, at 405.

[10] *Biography*, *supra* note 3 (noting that Chief Justice Jefferson was born on July 22, 1963, therefore making him thirty-seven as of March 2001); *Chief Justice Wallace B. Jefferson*, *supra* note 1 (noting that Jefferson was appointed in March 2011 by Governor Perry); *Statewide Officials*, REPUBLICAN PARTY TEX., http://www.texasgop.org/statewide-officials (last visited May 15, 2012) (listing Governor Rick Perry as a member of the Republican Party).

[11] *Chief Justice Wallace B. Jefferson*, *supra* note 1.

[12] *See* TEX. CONST. art. V, § 28(a); *Chief Justice Wallace B. Jefferson*, *supra* note 1.

[13] *See Chief Justice Wallace B. Jefferson*, *supra* note 1 (noting that his current term ends December 21, 2014).

stated in articles about Jefferson, he is the first African-American justice (as well as chief justice) in the history of the Texas Supreme Court.[14] He is currently the Texas Supreme Court's second-longest serving member, to Justice Nathan Hecht's twenty-three-plus years.[15]

B. Texas Appellate Court System

Since Texas adopted its 1876 Constitution, the Texas Supreme Court's jurisdiction has been limited to civil matters.[16] From that year through 1891 all criminal matters were appealed to the Texas Court of Appeals,[17] a court that became a national laughingstock for its astounding rate of reversals of convictions[18] and its decision to chastise the Supreme Court of the United States.[19] The members of the convention drafting the Texas Constitution separated appellate jurisdiction to remedy a persistent problem in Texas legal history: too few appellate judges (and courts) to hear and decide appeals in a timely manner.[20] This initial division of authority failed to solve the problem.[21] An 1891 amendment created the Court of Criminal Appeals, which possessed jurisdiction in all criminal cases, "with such exceptions and under such regulations as may be provided in

[14] *See, e.g.*, Anita Davis, *Wallace Jefferson Takes Oath of Office*, 64 TEX. B. J. 580, 580 (2001) (noting that Jefferson was the first African-American judge on the Texas Supreme Court); *Jefferson Named Chief Justice of the Texas Supreme Court*, *supra* note 8, at 732. The first African American to serve on one of Texas' two co-equal supreme courts, the Texas Supreme Court, and the Court of Criminal Appeals was Morris Overstreet, who began his service on the Court of Criminal Appeals in 1990. ARIENS, *supra* note 2, at 210. In 2002, Dale Wainwright, also black, was elected to the Supreme Court of Texas. *Justice Dale Wainwright Biography*, REELECTDALEWAINWRIGHT.COM, http://www.reelectdalewainwright.com/biography (last visited May 15, 2012).

[15] *See Chief Justice Wallace B. Jefferson*, *supra* note 1 (noting that Chief Justice Jefferson was appointed to the court in 2001); *Justices of the Court: The Supreme Court of Texas*, *supra* note 2 (showing the years each current justice of the court was appointed, including Justice Hecht, appointed in 1988).

[16] TEX. CONST. art. V, § 3(a).

[17] TEX. CONST. art. V, § 6, *amended by* TEX. CONST. art. V, § 5(a).

[18] *See* ARIENS, *supra* note 2, at 55–56; *Overruled Their Judicial Superiors*, 21 AM. L. REV. 610, 610–11 (1887).

[19] *See Overruled Their Judicial Superiors*, *supra* note 18, at 610 (explaining that the Texas Court of Appeals overruled a Supreme Court decision, believing that it was not well-decided and was an example of the Supreme Court usurping constitutional authority that it was never intended to have).

[20] *Fifty-Eighth Day, Thursday, November 1, 1875*, *in* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 421, 422 (Seth Shepard McKay ed., 1930); *see* ARIENS, *supra* note 2, at 48.

[21] ARIENS, *supra* note 2, at 48; *see Overruled Their Judicial Superiors*, *supra* note 18, at 610–11 (arguing that the creation of the Texas Court of Appeals should have resulted in more affirmances of criminal appeals rather than reversals, and that there is "something strongly defective" when the opposite result is occurring).

this Constitution or as prescribed by law."[22] The Texas Court of Appeals was re-named the Texas Court of Civil Appeals and was given jurisdiction to hear and decide initial appeals in civil matters, thus partly sheltering the Texas Supreme Court from an avalanche of appellate writs.[23]

C. Today's Texas Supreme Court

The Texas Supreme Court consists of nine Republicans.[24] Two of its members are African-American, two are Hispanic, including one of the court's two female members, and five are Anglo.[25] Once a one-party state in which membership in the Republican Party served as a disqualifying factor for those interested in serving in the judiciary,[26] Texas is presently a one-party state dominated by Republicans in state offices.[27] Since 1850, with a notable exception during Reconstruction,[28] all Texas judges are elected, and elected

[22] TEX. CONST. art. V, § 5(a).

[23] *Id.* § 6. For the text of the amendment, see S.J. Res. 16, 22nd Leg. (Tex. 1891), *available at* http://www.lrl.state.tx.us/scanned/sessionLaws/22-0/SJR_16.pdf, at 198–99. The 1891 amendment also failed to meet the goal of clearing the court's docket. By 1915, the court was five years behind its docket. Michael Ariens, *The Storm Between the Quiet: Tumult in the Texas Supreme Court, 1911–21*, 38 ST. MARY'S L.J. 641, 688–89 (2007).

[24] *See* Andrew Kreighbaum, *One Open Supreme Court Seat, and Six Candidates*, TEX. TRIB., Feb. 26, 2010, http://www.texastribune.org/texas-courts/texas-supreme-court/one-open-supreme-court-seat-and-six-candidates/.

[25] *See Justices of the Court: The Supreme Court of Texas*, *supra* note 2 (providing profiles and pictures of each of the justices of the court).

[26] *See* Bancroft C. Henderson & T.C. Sinclair, *The Selection of Judges in Texas*, 5 HOUS. L. REV. 430, 467 tbl.14, 468 tbl.15 (1967).

[27] All Texas officials currently serving in statewide political and judicial positions are Republicans. *See* Ross Ramsey, *In Their Election Drought, Texas Democrats Find Solace in the G.O.P.'s Past Struggles*, N.Y. TIMES, Jan. 28, 2012, http://www.nytimes.com/2012/01/29/us/politics/texas-democrats-find-solace-in-past-gop-struggles.html (noting that in Texas there has not been a statewide elected Democrat since 1994); *Statewide Officials, supra* note 10 (listing the current Texas governor, lieutenant governor, attorney general, state comptroller, land commissioner, agriculture commissioner, and railroad commissioners as members of the Republican National Party); *Texas Supreme Court*, *Leadership Directory*, *supra* note 2 (listing the nine justices of the Texas Supreme Court as members and leaders of the Republican Party); *Political Parties*, *The One-Party State of Texas?*, TEX. POL., http://texaspolitics.laits.utexas.edu/4_4_2.html (discussing the rise of the Republican Party in Texas). In a number of pockets in Texas, Democrats control many or all of the local, countywide, and regional political and judicial offices. *See People*, TEX. DEMOCRATIC PARTY, http://www.txdemocrats.org/ (last visited May 15, 2012) (listing the elected democratic officials in the Texas House of Representatives, Texas Senate, State Board of Education, Court of Appeals, and District Courts); Ramsey, *supra* ("Some of the state's biggest counties—Dallas, Harris, Travis and Bexar—already elect Democrats to county office, in some cases after years of electing Republicans.").

[28] HOUSE RESEARCH ORG., TEX. HOUSE OF REPRESENTATIVES, JUDICIAL SELECTION: OPTIONS FOR CHOOSING JUDGES IN TEXAS 1 (1997) [hereinafter TEX. HOUSE OF REPS.], *available at* http://www.hro.house.state.tx.us/focus/jud-sel.pdf.

through party affiliation.[29]

The last Democratic Party member on the Texas Supreme Court was defeated in the November 1998 elections.[30] Thus, for over thirteen years the Texas Supreme Court has consisted solely of Republican Party members.[31] This uniformity of party affiliation may mean something less than it appears. When Texas political and judicial offices were controlled by members of the Democratic Party, factions within the party made for highly contested primary elections (most notable, of course, was the 1948 primary race for the Democratic Party nomination for Senator between Lyndon Baines Johnson and Coke Stevenson).[32] Factions within the current Republican Party increase the number of contested primary races.[33] Although no current member of the Texas Supreme Court views his or her commission in broad, sweeping terms, the limitations of party affiliation are found in the number of dissents registered annually in the court.[34]

The Texas Supreme Court has disposed of between 109 and 164 causes each year since Jefferson has served as Chief Justice.[35] Similar to many earlier iterations of the court, it has had difficulty clearing its docket.[36] It was newsworthy that in fiscal year 2009, the number of continuing causes was at a nearly-decade low of sixty-two.[37]

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[29] ARIENS, *supra* note 2, at 202; Chris Klemme, *Jacksonian Justice: The Evolution of the Elective Judiciary in Texas, 1836–1850*, 105 SW. HIST. Q. 429, 430 (2002) (discussing the rise of the popular election of the judiciary in Texas); TEX. HOUSE OF REPS., *supra* note 28, at 1 (explaining the rise of the popular election system for judges in Texas).

[30] *See* ARIENS, *supra* note 2, at 209–10.

[31] Kreighbaum, *supra* note 24.

[32] *See, e.g.*, ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT xxxi–ii, 265–67 (1990). *See generally* Dale Baum & James L. Hailey, *Lyndon Johnson's Victory in the 1948 Texas Senate Race: A Reappraisal*, 109 POL. SCI. Q. 595, 596 (1994) (analyzing the victory of Lyndon B. Johnson for the U.S. Senate seat over Coke Stevenson in 1948 when Texas was a "one-party state").

[33] *See* R.A. Dyer, *Republicans See More Contested Primary Races*, FORT WORTH STAR-TELEGRAM, Feb. 16, 2006, http://www.redorbit.com/news/politics/394502/republicans_see_more_contested_primary_races/ (discussing the competing factions in the Republican Party in 2006).

[34] *Texas Supreme Court Unofficial Statistics*, DOCKETDB.COM, http://docketdb.com/stats (last visited May 15, 2012) (listing eighteen dissenting opinions in 2006, eighteen in 2007, twenty-nine in 2008, twenty-seven in 2009, twelve in 2010, and twenty-seven in 2011).

[35] CARL REYNOLDS, OFFICE OF COURT ADMIN., ANNUAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2010, at 25 tbl. (2010).

[36] *See id.* at 23, 25 (showing that the increases in cases added outnumber the amount disposed); *see also* ARIENS, *supra* note 2, at 48 (discussing the "massive" number of cases pending before the Texas Supreme Court in 1875 and subsequently in 1876, even after the court was "stripped" of its ability to hear criminal appeals).

[37] REYNOLDS, *supra* note 35, at 25.

II. CHIEF JUSTICE JEFFERSON'S OPINIONS

Chief Justice Jefferson rarely speaks explicitly of his jurisprudential views, requiring the inquisitive to construct his interpretive manner and style through an evaluation of his implicit assumptions. I will argue that the best evidence of those views is found not in his opinions for the court, but in his dissenting and concurring opinions. His opinions for the court, particularly when the court is divided, reflect an overriding consideration of the body for which he writes. In majority opinions, the Chief Justice effects changes in Texas law incrementally and modestly. In contrast, his concurring and dissenting opinions are free from the constraints of representing others. Those relatively "free" opinions offer some insight into Chief Justice Jefferson's structural understanding of the role of the judiciary in a democratic society.

My assessment of his work is based on a review of sixty-seven of his signed majority opinions,[38] twelve concurring opinions,[39] and nineteen dissenting opinions[40] written as Chief Justice through 2011. In this essay, I concentrate on his opinions for the court when it is substantially divided (in other words, with at least two dissents or two concurrences that disagree substantially with the court's reasoning).[41]

[38] Search Terms in LexisNexis: Texas Federal & State Cases, Combined: OPINIONBY(Jefferson) and JUDGES (Jefferson). The search results were only within the specified time period defined above, September 14, 2004 to December 31, 2011. The members of the court are also responsible for *per curiam* opinions. BLACK'S LAW DICTIONARY 1201, 1251 (9th ed. 2009) (noting that *per curiam* opinions are decisions authored by an entire appellate court as opposed to a single judge). The court does not reveal the name of the technical author of *per curiam* opinions. *Id.* at 1201.

[39] Search Terms in Lexis Nexis: Texas Federal & State Cases, Combined Judge! (JEFFERSON) and Dissent! (Jefferson); JUDGE! (Jefferson) and CONCUR! (Jefferson). The search results were only within the specified time period defined above, September 14, 2004 to December 31, 2011.

[40] Search Terms in Lexis Nexis: Texas Federal & State Cases, Combined Judge! (JEFFERSON) and Dissent! (Jefferson); JUDGE! (Jefferson) and CONCUR! (Jefferson). The search results were only within the specified time period defined above, September 14, 2004 to December 31, 2011. He has also joined dissenting opinions, written by others in twenty-seven cases through 2011. In several cases, the Chief Justice is concurring in part and dissenting in part. I have used my judgment to categorize these opinions as either concurring or dissenting opinions.

[41] Chief Justice Jefferson wrote the unanimous opinion (one member did not participate) in *In re Commitment of Fisher*. 164 S.W.3d 637, 639 (Tex. 2005). The court upheld Texas's Civil Commitment of Sexually Violent Predators Act against several constitutional challenges. *Id.* at 639, 644–45, 656. It held that the statute was civil, not criminal, and therefore a mentally incompetent person was not denied due process because the hearing occurred during his incompetency. *Id.* at 653, 656. *Fisher* has been cited favorably by a number of courts in other states. *See, e.g.*, Moore v. Superior Court, 237 P.3d 530, 544 (Cal. 2010); *In re* Commitment of Weekly, 956 N.E.2d 634, 651 (Ill. App. Ct. 2011) (agreeing with the Texas Supreme Court

A. Introduction

The majority opinions written by Chief Justice Jefferson are concentrated in the following subject areas: civil procedure, governmental immunity, insurance law, real property (including zoning and takings cases), and will/probate cases.[42] He has also written two majority opinions on the appropriate standards of attorney conduct.[43] Approximately three-quarters of his majority opinions are unanimous or joined by one concurring opinion.[44]

The following three subsections address Chief Justice Jefferson's opinions for the court, in concurrence, and in dissent.[45] I reach the following conclusions about his work: (1) his opinions reflect a wide knowledge of the law. Most are studded with well-considered references to secondary sources, including law review articles, treatises, and various restatements of the law, as well as to relevant case law from other jurisdictions; (2) he is particular about the procedural framework through which the case has reached the Texas Supreme Court. This fastidiousness is not indicative of a legal formalism interested solely in the niceties of the law, but of a reluctance to overreach. Any substantive legal conclusions are reached only when the case is properly before the court. His reluctance to overreach can lead to a categorical conclusion, a type of neo-formalism, largely borne of a respect for the other branches of state government. However, Chief Justice Jefferson's jurisprudence may best be characterized as consonant with the legal process school that flourished in the mid-twentieth century;[46] (3) his

that the proceedings were civil in nature and thus no due process violation occurred).

[42] *See, e.g.*, Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth., 320 S.W.3d 829, 832, 834–35 (Tex. 2010) (governmental immunity and takings); Holmes v. Beatty, 290 S.W.3d 852, 853 (Tex. 2009) (will/probate law); *In re* E.A., 287 S.W.3d 1, 2 (Tex. 2009) (civil procedure); City of White Settlement v. Super Wash, Inc., 198 S.W.3d 770, 771–72 (Tex. 2006) (zoning law); Old Am. Cnty. Mut. Fire Ins. Co. v. Sanchez, 149 S.W.3d 111, 112–13 (Tex. 2004) (insurance law).

[43] In addition to *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006), discussed *infra* Part II.B and *infra* text accompanying notes 49–111, the Chief Justice wrote the court's opinion in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.* 192 S.W.3d 780, 782 (Tex. 2006) (holding that a personal representative of an estate may maintain a legal malpractice claim on behalf of the estate against decedent's estate planners). Because Texas is one of just nine states to hold that a beneficiary of a will or trust may not bring a malpractice claim against the attorney who drafted the will or trust, the court's decision in *Belt* was significant. *Id.* at 783.

[44] Search Terms in Lexis Nexis: Texas Federal and State Cases: JUDGE! (Jefferson) AND OPINIONBY(Jefferson) (showing seventy-one total opinions authored by Chief Justice Jefferson with forty-eight unanimous opinions and five opinions joined by one concurring opinion). The search was limited to September 14, 2004–December 31, 2011.

[45] *See infra* Part II.B–D.

[46] For an intellectual history of legal process (also called reasoned elaboration), see NEIL

opinions for a divided court indicate both a pragmatism and a willingness to view the common law more broadly than his dissenting colleagues; and (4) his concurring and dissenting opinions are fully realized jurisprudential efforts, which prepare a path on which a future court may travel.

B. Majority Opinions

The number of contested majority opinions written by Chief Justice Jefferson were few in number in his first several years on the court. From late 2004–2007, Chief Justice Jefferson wrote the majority opinion in cases in which at least two justices dissented just four times.[47] Of these four cases, the court's decision in *Hoover Slovacek LLP v. Walton* generated the most intense and challenging dissent.[48]

A six-person majority[49] held a law firm's contingency fee contract contrary to public policy because it included a provision that upon discharge before termination of the matter, the law firm was immediately due "a fee equal to the present value of the attorney's interest in the client's claim."[50] Because the payment-upon-discharge provision was contrary to public policy, it was unenforceable.[51] The law firm was hired by John B. Walton, Jr. to recover unpaid royalties from companies extracting oil and gas from Walton's 32,500-acre ranch.[52] Walton authorized the law firm to settle the dispute for $8.5 million.[53] The firm's initial settlement demand in January 1997 was for $58.5 million.[54] Opposing counsel testified that, after hearing that offer, he "quit listening."[55] The

DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205–99 (1995).

[47] Search Terms in LexisNexis: Texas Federal & State Cases, Combined: OPINIONBY(Jefferson) and JUDGE! (Jefferson). The search was limited to September 14, 2004–December 31, 2007. *See Walton*, 206 S.W.3d at 559, 566; Kroger Tex. Ltd. P'ship v. Suberu, 216 S.W.3d 788, 791, 797 (Tex. 2006); *In re* Burlington Coat Factory Warehouse of McAllen, Inc., 167 S.W.3d 827, 828, 832 (Tex. 2005); J. Hiram Moore, Ltd. v. Greer, 172 S.W.3d 609, 610, 616 (Tex. 2005).

[48] *See Walton*, 206 S.W.3d at 566–72 (Hecht, J., dissenting) (providing the dissent of Justice Hecht, joined by Justices Medina and Willett); *see infra* text accompanying notes 79–108.

[49] *See Walton*, 206 S.W.3d at 559 (majority opinion) (indicating that the court's opinion, delivered by Chief Justice Jefferson, was also joined by Justice O'Neill, Justice Wainwright, Justice Brister, Justice Green, and Justice Johnson).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

next month, an offer of $6 million was made to Walton's attorney; an offer that settled all of Walton's claims, but also purchased some surface estates, acquired easements, and secured Walton's royalties.[56] Walton authorized a settlement of the royalty dispute for $6 million, but refused to sell any property.[57] In March, Walton discharged the law firm.[58] His subsequent lawyers settled for $900,000.[59] Before that settlement, Hoover Slovacek sent Walton a bill for $1.7 million (28.66%, the final contingent fee percentage, multiplied by $6 million).[60] Walton refused to pay Hoover Slovacek, and the latter's claim was severed from the $900,000 settlement and subsequently tried before a jury.[61] Walton claimed he possessed good cause to fire Hoover Slovacek and that the firm's fee was unconscionable. The jury did not find in favor of Walton on either claim.[62] It "awarded Hoover $900,000."[63] The court of appeals reversed, holding that the "fee agreement was unconscionable as a matter of law."[64]

The statement closest to a rhetorical flourish is, "[i]n Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients."[65] The Chief Justice shortly thereafter quoted Benjamin Cardozo's declaration that a fiduciary "is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[66] The opinion for the court held that the payment-upon-discharge provision violated Texas law on compensation for discharged lawyers working on a contingent fee basis in several ways: (1) the payment-upon-discharge provision violated Texas case law because it imposed an "undue burden on the client's ability to change counsel";[67] (2) prior case law barred an attorney receiving compensation pursuant to a contingent fee agreement from receiving compensation in excess of the client's

[56] *Id.*
[57] *Id.*
[58] *Id.* at 560.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* (footnote omitted).
[63] *Id.*
[64] *Id.* (citing Walton v. Hoover, Bax & Slovacek LLP, 149 S.W.3d 834, 837 (Ct. App. Tex. 2004), *rev'd*, 206 S.W.3d 557 (Tex. 2006)).
[65] *Walton*, 206 S.W.3d at 560.
[66] *Id.* at 561 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.)); *see also* FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 410 (1993) (quoting *Meinhard*, 164 N.E. at 545).
[67] *Walton*, 206 S.W.3d at 563.

"actual recovery";[68] and (3) the payment-upon-discharge provision violated Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct because it granted the law firm "a proprietary interest in the client's claim by entitling him to a percentage of the claim's value without regard to the ultimate results obtained."[69]

Although Chief Justice Jefferson only occasionally uses law and economics analysis,[70] in *Walton* he also evaluated the manner in which the contract allocated risk, and thus incentives, between lawyer and client.[71] The court noted that the benefits of the payment-upon-discharge provision inured to the law firm, while the client remained responsible for the accompanying risks.[72] The contingent fee contract in *Walton* did not, like most such contracts, "encourage[] efficiency and diligent efforts [by the lawyer] to obtain the best results possible."[73] Instead, it created perverse incentives for the lawyer to escape the contingency, which increases the possibility of ancillary litigation between the client and the discharged law firm over the contract.[74] Finally, the contingent fee agreement failed to state who determined the "present value of the attorney's interest in the client's claim."[75] The common law imposed upon the attorney the duty to clarify the manner in which the fee was to be calculated, and the law firm's failure to do so contributed to the court's legal conclusion that the contract was unconscionable.[76]

The dissent written by Justice Nathan Hecht, and joined by Justices David Medina and Don Willett,[77] argues the considerations

[68] *Id.* (quoting Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95 (Tex. 2001)).

[69] *Walton*, 206 S.W.3d at 564; *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04 (1984).

[70] *But see* F.F.P. Operating Partners L.P. v. Duenez, 237 S.W.3d 680, 694 (Tex. 2007) (Jefferson, C.J., dissenting) (noting the "perverse incentive" created by a prior decision on the Dram Shop Act and concluding the legislature could not have intended it to allow as a defense to a civil liability claim made pursuant to the act "proof that the [bar] made a sale that the dram shop statute quite sensibly forbids").

[71] *Walton*, 206 S.W.3d at 561.

[72] *Id.* at 564.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 559, 565.

[76] The court agreed with the Texas Court of Appeals that Hoover Slovacek failed to present evidence of the reasonable value of its services, and thus held no quantum meruit claim continued. *Id.* at 565–66. However, Texas law permitted Hoover Slovacek to recover on its contract if it was discharged without good cause and the jury held Walton lacked good cause to fire the firm. *Id.* at 566. But Walton's appeal to the Texas Court of Appeals claimed this finding lacked legal and factual sufficiency, a claim the court ignored because it concluded the entire fee was unreasonable. *Id.* at 565–66. The matter was thus reversed in part and remanded to the court of appeals. *Id.* at 566.

[77] *Id.* (Hecht, J., dissenting).

of the court are largely irrelevant or inconsequential.[78] Though not couched in such terms, the dissent focuses on two factors about which it and the court disagree: (1) Contracts between attorneys and clients, or at least the contract between sophisticated clients such as Walton and Hoover Slovacek, should be read as ordinary contracts.[79] The court's citation to Cardozo's demand that the fiduciary (attorney) act beyond the morals of the marketplace, with a "punctilio of an honor," is unconvincing to the dissent;[80] and (2) Walton's sophistication should bar the court from concluding that provision is unconscionable.[81] The possibility that a similar contract involving other types of parties was unconscionable was insufficient to lead to the court's conclusion.[82]

The dissent begins by stating that "[n]o rational plaintiff changes lawyers midway through a case in order to recover less, and John B. Walton, Jr. was not irrational."[83] This statement allows the dissent to argue that Walton rationally calculated at the time he retained the law firm that, if he needed to discharge Hoover Slovacek, "it would be to maximize recovery."[84] The assumption that Walton was a rational maximizer of his needs (a classic first-generation law and economics assumption) leads to a second assumption: Walton was rationally calculating his economic interests at the time he contracted with Hoover Slovacek.[85] Those two assumptions lead to the conclusion that Walton was able to calculate rationally (and compare) the monetary value of the payment-upon-discharge provision with existing law providing discharged contingent fee lawyers a claim for compensation if discharged without good cause.[86] In *Mandell & Wright v. Thomas*, the Texas Supreme Court held that a lawyer hired on a contingent fee contract and discharged without good cause could recover a fee based on either quantum meruit or on the contract itself.[87] If the lawyer was discharged for good cause, the lawyer was prohibited from suing to collect a fee

[78] *See id.* at 568–70 (listing the dissent's summary of the seven reasons the majority gave for its decision, which they view as irrelevant and uncertain examples of how the contract could possibly be unconscionable under hypothetical circumstances other than the ones present in this case).
[79] *See id.* at 567–68.
[80] *See id.* at 561, 567–68 (majority opinion) (Hecht, J., dissenting).
[81] *See id.* at 566 (Hecht, J., dissenting).
[82] *See id.* at 568, 570.
[83] *Id.* at 566.
[84] *Id.*
[85] *See id.*
[86] *Id.* at 566–69.
[87] Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969).

based on the contingent fee contract.[88]

What *Mandell & Wright* did not decide was whether a lawyer hired on a contingent fee contract and discharged for good cause could collect a fee based on quantum meruit.[89] The dissent is well aware of the uncertain status of the law.[90] In noting the possibilities available to Walton when he rationally considered the value of the payment-upon-termination provision, the dissent stated that if the law firm was discharged for good cause, "it might have the right to be paid the value of its services."[91] That statement was followed by a reference to footnote one.[92] Footnote one cited three cases, two of which were irrelevant.[93] The third cited case, *Rocha v. Ahmad*, was a decision by the Texas Court of Appeals.[94] It held a lawyer hired on a contingent fee contract and discharged for good cause could attempt to recover a fee under quantum meruit.[95] If *Rocha v. Ahmad* states the law, then why did the dissent use the language, "might have the right"?[96] It used "might" because the Texas Supreme Court has not decided a case similar to *Rocha*. And since *Rocha* was decided in 1984,[97] the American Law Institute had issued its *Restatement (Third) of the Law: The Law Governing Lawyers*.[98] In section 40(2) of the *Restatement*, titled *Fees on Termination*, a lawyer may recover the proportion of compensation due the lawyer provided by contract only if "the discharge or withdrawal is not attributable to misconduct of the lawyer."[99]

Thus, a sophisticated client such as Walton would also have known (or been charged with knowing) when the contingent fee contract was made that the state of the law regarding fees due upon termination for good cause was unclear.[100] It was possible that the lawyer would receive nothing[101] or the full amount of a quantum

[88] *Walton*, 206 S.W.3d at 566–67 (Hecht, J., dissenting).
[89] *See Mandell & Wright*, 441 S.W.3d at 843, 847.
[90] *See Walton*, 206 S.W.3d at 568 (Hecht, J., dissenting).
[91] *Id.* at 566.
[92] *Id.* at 566–67 & n.1.
[93] *Id.* at 567 n.1 (citing Royden v. Ardoin, 331 S.W.2d 206, 209 (Tex. 1960); Rocha v. Ahmad, 676 S.W.2d 149, 156 (Tex. App. 1984); Kelly v. Murphy, 630 S.W.2d 759, 761–62 (Tex. App. 1982)).
[94] *Walton*, 206 S.W.3d at 567 n.1 (Hecht, J., dissenting) (citing *Rocha*, 676 S.W.2d 149).
[95] *Rocha*, 676 S.W.2d at 156 (citing Howell v. Kelly, 534 S.W.2d 737, 739 (Tex. Civ. App. 1976); Willis & Conner v. Turner, 25 S.W.2d 642, 648 (Tex. Civ. App. 1930)).
[96] *Walton*, 206 S.W.3d at 566 (Hecht, J., dissenting).
[97] *Rocha*, 676 S.W.2d at 149.
[98] RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS (2000).
[99] *Id.* § 40(2). Section 37 of the *Restatement* declares all or part of a lawyer's fee forfeited if the lawyer engaged in "clear and serious violation of duty to a client." *Id.* § 37.
[100] *See Walton*, 206 S.W.2d at 566–69 (Hecht, J., dissenting).
[101] *See* RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 40(2) (2000).

meruit claim.[102] How this legal uncertainty might affect a rational maximizer of his own interests seems impossible to say. The dissent concludes that a client and law firm may agree to a termination provision "that avoids wrangling over whether discharge was with or without cause, given the intrinsic uncertainties in that issue."[103] This conclusion is true enough, but insufficient. It masks both the disparity in legal knowledge between lawyers and the most sophisticated client, and the disparity in intensity of desire. Although a sophisticated client may possess the knowledge that discharge for good cause creates the possibility of a different measure of damages than a discharge without good cause, even the court is uncertain ("might") whether an attorney discharged for cause may recover on quantum meruit.[104]

The dissent twice characterizes the contract as "fair"[105] and once as "rather innocuous,"[106] on each occasion with little elaboration. These conclusions appear premised on the dissent's disagreement with the court about the role the courts should play in evaluating attorney-client contracts.[107]

What *Hoover Slovacek LLP v. Walton* signals is an apparent shift in Texas law on attorney fees.[108] *Mandell & Wright* is unusual among the states because it allows a discharged lawyer in a contingent fee matter to recover on either quantum meruit or on the contingent fee contract itself.[109] The majority rule limits a lawyer's recovery to quantum meruit.[110] Chief Justice Jefferson's opinion for the court retains a traditional understanding of the ethical duties a lawyer owes her clients.[111]

A recent decision written by Chief Justice Jefferson that suggests

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[102] *See Rocha*, 676 S.W.2d at 156 (citing Howell v. Kelly, 534 S.W.2d 737, 739 (Tex. Civ. App. 1976); Willis & Conner v. Turner, 25 S.W.2d 642, 648 (Tex. Civ. App. 1930)).

[103] *Walton*, 206 S.W.3d at 568 (Hecht, J., dissenting).

[104] *See id.* at 566.

[105] *Id.* at 567, 568.

[106] *See id.* at 567.

[107] *See id.* at 568, 570.

[108] *See* Tiffanie S. Clausewitz, Recent Development, *On the Trail to Increased Client Protection: Attorney Contingent Fee Contract Termination in Light of* Hoover v. Walton, 39 ST. MARY'S L.J. 539, 541, 571 (2008).

[109] Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969) (internal citations omitted); *see, e.g.*, Auguston *ex rel.* Auguston v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658, 662–63 n.6 (5th Cir. 1996).

[110] *See* Rocha v. Ahmad, 676 S.W.2d 149, 156 (Tex. App. 1984) (citing Howell v. Kelly, 534 S.W.2d 737, 739 (Tex. Civ. App. 1976); Willis & Conner v. Turner, 25 S.W.2d 642, 648 (Tex. Civ. App. 1930)); *see also Auguston*, 76 F.3d at 663 n.6 (stating that the majority of jurisdictions limit the lawyer's "recovery to quantum meruit").

[111] *See Walton*, 206 S.W.3d at 560–61 (quoting Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 866–68 (Tex. 2000)).

a significant shift in Texas law is *Sharyland Water Supply Corp. v. City of Alton*.[112] Sharyland Water Supply Corporation is a non-profit corporation that supplies water to the residents of Alton and elsewhere.[113] In a water supply agreement with the city of Alton, Sharyland agreed to supply potable water to the city's residents, and in exchange was given title to the existing Alton water system.[114] In the 1990s, Alton hired several companies to build a sewer system.[115] According to Sharyland, part of the sewer system was negligently constructed, causing harm to Sharyland.[116] This negligence, Sharyland claimed, breached its agreement with the city of Alton, and it won a verdict of over one million dollars.[117] The court of appeals held that Sharyland's negligence claim was barred by the economic loss rule.[118] This rule, in general, states that a party that suffers only a pecuniary loss due to negligence by another may not recover in some tort law claims.[119]

In a careful review of Texas precedents, Chief Justice Jefferson noted that the economic loss rule had been applied "only in cases involving defective products or failure to perform a contract."[120] It had never applied the rule more broadly as prohibiting the recovery of economic damages in a tort claim.[121] Chief Justice Jefferson then took an approach he has regularly applied in his opinions: he avoided deciding issues that the court did not need to decide. The extent to which the economic loss rule applied was irrelevant to resolving the case "because the court of appeals [had] erred in concluding that Sharyland's water system [in Alton] had not been damaged."[122] Because the water system had once conformed to state law and now did not, Sharyland was required by its agreement with Alton to remedy this compliance failure.[123] That meant

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[112] Sharyland Water Supply Corp. v. City of Alton, 354 S.W.3d 407, 409 (Tex. 2011).

[113] *Id.* at 410.

[114] *Id.*

[115] *Id.* (citing City of Alton v. Sharyland Water Supply Corp., 277 S.W.3d 132, 139 (Tex. App. 2009)).

[116] *Sharyland*, 354 S.W.3d at 410 (citing *City of Alton*, 277 S.W.3d at 140).

[117] *Sharyland*, 354 S.W.3d at 411.

[118] *Id.* (citing *City of Alton*, 277 S.W.3d at 155).

[119] *See generally* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 525–26 (2009) (stating that one cannot recover economic losses in a negligence suit without a showing of personal or property damage). As the court notes, several economic loss rules exist, not just one. *See Sharyland*, 354 S.W.3d at 415 (quoting Johnson, *supra*, at 534–35).

[120] *Sharyland*, 354 S.W.3d at 418.

[121] *See id.*

[122] *Id.* at 420 (citing *City of Alton*, 277 S.W.3d at 154).

[123] *Sharyland*, 354 S.W.3d at 420.

expending significant funds, for which the jury awarded damages.[124]

Since 2008, Chief Justice Jefferson has written several majority opinions for the court from which two or more justices either dissented or merely concurred with the majority opinion, including three 2011 opinions in which the court split five–four.[125] These cases often raise issues of first impression and, more importantly, raise issues of the court's role in interpreting statutes, regulations, and the path of the common law. Many of these cases contain substantial procedural components, while others require close statutory and constitutional interpretation.

In *In re Brookshire Grocery Co.*,[126] *Badiga v. Lopez*,[127] *In re E.A.*,[128] *University of Texas Southwestern Medical Center at Dallas v. Estate of Arancibia ex rel. Vasquez-Arancibia*,[129] and *Texas A & M University-Kingsville v. Yarbrough*,[130] Chief Justice Jefferson writes an opinion for the court concerning aspects of the law of civil procedure and practice, both court-generated rules of civil procedure and statutes regulating the civil process.[131] In each case at least two justices dissented from or merely concurred with the court's holding.[132] Chief Justice Jefferson's opinions are written in a clear, concise, and uncluttered fashion, and exemplify his approach to the structural role of the courts.

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[124] *Id.*

[125] Search Terms in LexisNexis: Texas Federal & State Cases, Combined: OPINIONBY(Jefferson) and JUDGE! (Jefferson). The search was limited to January 1, 2008–December 31, 2011. *See, e.g.*, Tex. A & M Univ.-Kingsville v. Yarbrough, 347 S.W.3d 289, 289, 292 (Tex. 2011) (dividing the justices in a five–four vote); Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers L.P., 343 S.W.3d 112, 113, 121 (Tex. 2011) (splitting the justices in a five–four vote); City of Dall. v. Stewart, No. 09-0257, 2011 WL 2586882, at *1, *13 (Tex. July 1, 2011), *withdrawn*, 361 S.W.3d 563 (Tex. 2012) (splitting the justices in a five–four vote); City of Dall. v. VSC, LLC, 347 S.W.3d 231, 233, 240 (Tex. 2011); Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex., 354 S.W.3d 336, 337, 349 (Tex. 2010); Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia *ex rel.* Vasquez-Arancibia, 324 S.W.3d 544, 546, 552 (Tex. 2010); *In re* E.A., 287 S.W.3d 1, 2, 6 (Tex. 2009); Badiga v. Lopez, 274 S.W.3d 681, 682, 685 (Tex. 2009); Fed. Ins. Co. v. Samsung Electronics Am., 268 S.W.3d 506, 507–08 (Tex. 2008); Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.3d 487, 488, 501–02 (Tex. 2008); *In re* Brookshire Grocery Co., 250 S.W.3d 66, 73 (Tex. 2008).

[126] *In re Brookshire Grocery Co.*, 250 S.W.3d at 66.

[127] *Badiga*, 274 S.W.3d at 681.

[128] *In re E.A.*, 287 S.W.3d at 1.

[129] *Univ. of Tex. Sw. Med. Ctr. at Dall.*, 324 S.W.3d at 544.

[130] *Tex. A & M Univ.-Kingsville*, 347 S.W.3d at 289.

[131] *Id.* at 290; *Univ. of Tex. Sw. Med. Ctr. at Dall.*, 324 S.W.3d at 547–52 (discussing a party's right to interlocutory appeal and the notice requirements when a potential claim against the government is to be filed); *In re E.A.*, 287 S.W.3d at 2; *Badiga*, 274 S.W.3d at 682; *In re Brookshire Grocery Co.*, 250 S.W.3d at 67.

[132] *Tex. A & M Univ.-Kingsville*, 347 S.W.3d at 289, 292; *Univ. of Tex. Sw. Med. Ctr. at Dall.*, 324 S.W.3d at 546, 552; *In re E.A.*, 287 S.W.3d at 2, 6; *Badiga*, 274 S.W.3d at 682, 685; *In re Brookshire Grocery Co.*, 250 S.W.3d at 66, 73.

Brookshire Grocery concerned whether the plenary power of the trial court had already expired when it granted the defendant's motion for a new trial.[133] Brookshire Grocery was a defendant in a tort action.[134] The jury issued a verdict in favor of the plaintiff.[135] Before the trial court issued its judgment, the Grocery moved for "Judgment Notwithstanding the Verdict and in the Alternative Motion for New Trial."[136] The trial court issued judgment for the plaintiff and a day later signed an order denying both the motion for a judgment notwithstanding the verdict and the motion for a new trial.[137] "On January 7, 2005, twenty-nine days after [the] judgment" was signed, Brookshire Grocery filed a motion for a new trial.[138] This motion was granted by the trial court on February 1.[139] The issue was whether Brookshire's January 7 motion for a new trial was filed in a timely manner as required by Texas Rule of Civil Procedure 329b(e).[140] If the motion was not filed in a timely manner, the court's plenary power to grant a new trial had expired.[141] Chief Justice Jefferson's opinion for the court held the January 7 motion was not timely filed.[142] It noted that Rule 329b(b) allowed an amended motion for a new trial if (1) "no preceding motion for a new trial had been overruled," *and* (2) the motion was filed thirty days before judgment.[143] Chief Justice Jefferson's opinion additionally noted "'[a]nd' is conjunctive."[144] Because the trial court had denied a prior motion for a new trial, Brookshire could meet only the second element of the test of the Rule.[145]

In reaching its conclusion, the court looked at the history of the Rule, particularly the reason for its amendment in 1981, and noted several options available to counsel even after a motion for a new trial had been denied.[146] The court's opinion also responded to the dissent's claim that the motion should have been understood as a motion to modify the judgment.[147] The court noted the caption of

[133] *In re Brookshire Grocery Co.*, 250 S.W.3d at 67.
[134] *Id.* at 68.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 69; *see* TEX. R. CIV. P. 329b(e).
[141] *In re Brookshire Grocery Co.*, 250 S.W.3d at 69.
[142] *Id.* at 72.
[143] *Id.* at 69.
[144] *Id.*
[145] *Id.* at 72.
[146] *See id.* at 70–72.
[147] *Id.* at 72–73.

the motion and the relief requested both asked for a new trial.[148] Finally, the court explained that conflating a motion for a new trial with a motion to modify, correct, or reform a judgment, did violence to the structure and text of the Rules of Civil Procedure.[149] Not only did Rule 329b treat a motion for a new trial differently than a motion to modify, correct, or reform a judgment, Rule 5's limitations on the length of time trial courts possessed to take action were evaded if the dissent's approach were adopted.[150] This was not, as claimed by the dissent, merely one of those "meaningless technicalities" of civil procedure that invoked a mindless formalism.[151]

In an underlying medical malpractice action, the issue before the court was an interpretation of a provision of the Civil Practices and Remedies Code concerning when a medical provider may prosecute an interlocutory appeal.[152] As part of its alteration of the rules of medical malpractice actions, the Texas legislature required a medical malpractice plaintiff to submit an expert report to the defendant within 120 days after suit is filed.[153] The trial court "must grant" a motion to dismiss if the plaintiff failed to file a report.[154] If a report is filed in a timely fashion but is deficient, the trial court may grant one thirty-day extension.[155] In the former case, the failure by the trial court to grant the motion to dismiss could be appealed immediately, but a decision to grant a thirty-day extension was not subject to an interlocutory appeal.[156] In *Badiga v. Lopez*, the plaintiff failed to timely serve defendant an expert report.[157] The defendant moved to dismiss.[158] The district court denied the motion to dismiss and at the same time granted plaintiff a thirty-day extension to file the expert report.[159] The defendant then filed an interlocutory appeal.[160] The court held that, when no expert report had been made, the decisions to deny the motion to dismiss and to grant the extension were separable, and thus the

[148] *Id.*
[149] *See id.* at 73.
[150] *Id.*
[151] *Id.* at 78 (Hecht, J., dissenting).
[152] Badiga v. Lopez, 274 S.W.3d 681, 682–83 (Tex. 2009); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b) (West 2012).
[153] *Badiga*, 274 S.W.3d at 683.
[154] *Id.* at 682.
[155] *Id.*
[156] *Id.*
[157] *Id.* at 682–83.
[158] *Id.* at 682.
[159] *Id.*
[160] *Id.*

appellate court possessed jurisdiction to hear and decide the appeal of the order denying the motion to dismiss.[161]

A year earlier, the court had held a decision of the trial court to deny a motion to dismiss and grant a thirty-day extension to cure a deficient, but timely, expert report unappealable. The dissent, noting this decision,[162] argued that the statute's plain reading applied to all orders granting extensions of time.[163] The court's response was to look at the purpose of the statute.[164] The reason for a ban on interlocutory appeals of a denial of a motion to dismiss when a thirty-day extension is granted to cure a deficient report is judicial efficiency.[165] The only reason to ban appeals when no expert report is served is to give the plaintiff additional time, unreviewable by an appellate court, which harms the interests of defendants.[166]

Chief Justice Jefferson's opinion for the court in *In re E.A.* also addressed an amended civil procedure provision.[167] Emilio, the father of two minor children, petitioned the district court to modify the order granting the mother, Norma, the exclusive right to determine the children's primary residence.[168] The parties agreed that Norma had received notice of this petition.[169] Emilio later filed an amended petition demanding more relief.[170] The amended petition lacked a certificate of service, but Emilio claimed he sent Norma the petition via certified mail, as permitted by amended Rule 21a of the Texas Rules of Civil Procedure.[171] After three attempts, the post office was unable to deliver the certified petition.[172] After Emilio was granted a default judgment, "Norma moved to set aside the default judgment" and requested other relief.[173] "The trial court denied [the] motions" and "[t]he court of appeals affirmed."[174] The supreme court held the father failed to

161 *Id.* at 685.

162 *Id.* at 686 (Brister, J., dissenting) (citing Ogletree v. Matthews, 262 S.W.3d 316, 321 (Tex. 2007)).

163 *See Badiga*, 274 S.W.3d at 686.

164 *See id.* at 684.

165 *See id.*

166 *See id.* ("The purpose of the ban on interlocutory appeals for extensions is to allow plaintiffs the opportunity to cure defects in *existing* reports.").

167 *In re E.A.*, 287 S.W.3d 1, 2 (Tex. 2009); *see* TEX. R. CIV. P. 21a.

168 *In re E.A.*, 287 S.W.3d at 2.

169 *Id.* at 3.

170 *Id.* at 2–3.

171 *Id.* at 3.

172 *Id.*

173 *Id.*

174 *Id.*

serve notice in compliance with Rule 21a and concluded the record was insufficient to find constructive notice existed.[175] In reaching this conclusion, the court decided that notice in compliance with Rule 21a would be sufficient, altering Texas case law that required an additional citation upon filing an amended petition for more onerous relief.[176]

In *University of Texas Southwestern Medical Center at Dallas v. Estate of Arancibia ex rel. Vasquez-Arancibia*, the issue was whether the defendant medical center, a governmental entity, was given timely notice of a medical malpractice claim.[177] This required the court to determine whether a 2005 statute, amending the Government Code to make all prerequisites to suit jurisdictional, applied to the case, which arose before the amendment.[178] If the amendment applied, the court next had to determine whether the defendant received actual notice of the claim.[179] The court carefully assessed the reasons to apply the statute retroactively, and held it should be so applied.[180] It then held that the defendant medical center had received actual notice of the claim as required under the Texas Tort Claims Act.[181] The Chief Justice's opinion noted that the Government Code did not require formal notice under the Tort Claims Act if it received "actual notice that death has occurred."[182] Looking pragmatically at the evidence, the majority held the defendant "was subjectively aware of its fault."[183] The court noted the dissent's more stringent interpretation of actual notice would require "an unqualified confession of fault," a standard that would conflate an admission of liability with a claim of liability made by a plaintiff.[184] The court further noted that requiring formal notice to protect governmental entities from unfounded claims would add nothing to the actual notice already possessed by the defendant.[185]

The most recent contested procedural opinion written by Chief

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[175] *Id.* at 5–6.

[176] *Id.* at 6 ("Service of new citation is no longer required.").

[177] Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia *ex rel.* Vasquez-Arancibia, 324 S.W.3d 544, 546 (Tex. 2010) (granting petition for review to determine if the plaintiffs provided timely notice to the hospital regarding their medical malpractice claim).

[178] *Id.* at 546–47; *see* TEX. GOV. CODE ANN. § 311.034 (West 2012).

[179] *See Univ. of Tex. Sw. Med. Ctr. at Dall.*, 324 S.W.3d at 547.

[180] *See id.* at 547–48 (relying on the fact that retroactive application of a jurisdictional rule impacts a court's right to hear a case and not substantive rights).

[181] *Id.* at 548–50 (reasoning that a subjective awareness of fault constitutes actual notice in this case); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c) (West 2012).

[182] *Univ. of Tex. Sw. Med. Ctr. at Dall.*, 324 S.W.3d at 548 (quoting § 101.101(c)).

[183] *Univ. of Tex. Sw. Med. Ctr. at Dall.*, 324 S.W.3d at 549.

[184] *See id.* at 550.

[185] *Id.*

Justice Jefferson is *Texas A & M University-Kingsville v. Yarbrough*.[186] The issue was whether Yarbrough's legal claim, that a dismissal by the university of her grievance violated her rights under the Government Code, was moot.[187] Yarbrough, then an untenured professor, filed a grievance contesting a negative performance evaluation, an evaluation that would be used in part to determine whether she would be awarded tenure.[188] Yarbrough was subsequently awarded tenure.[189] She continued to press her claim on the ground that the failure by the university to change its grievance policies was a continuing violation of her right to present grievances.[190] The court held the controversy moot, finding no exceptions to the doctrine allowing her case to survive.[191] The court rejected the dissent's claim that, because the negative performance evaluation remained in her employment file, Yarbrough continued to suffer collateral legal consequences.[192] The dissent's conclusion exempted the suit from the mootness doctrine.[193] The possibility of "unspecified future harm" was insufficient to mean a "substantial controversy" existed.[194]

Ockham's Razor is a famous "principle of parsimony" in the history of philosophy.[195] Chief Justice Jefferson, who majored in philosophy,[196] is both undoubtedly aware of Ockham's Razor and an apparent believer in its application in law. Ockham's Razor suggests that persons should prefer a simpler explanation to a more complicated explanation.[197] His procedural opinions exemplify Ockham's Razor: cutting to the heart of the issue, avoiding needless digressions into matters not before the court, and interpreting

[186] Tex. A & M Univ.-Kingsville v. Yarbrough, 347 S.W.3d 289, 289 (Tex. 2011).

[187] *See id.* at 289–90 (concluding that there was no live controversy because the professor was granted tenure before filing suit); *see also* TEX. GOV'T. CODE ANN. § 617.005 (West 2012) (concluding that a collective bargaining chapter in the Government Code "does not impair" the privilege of public workers to file grievances).

[188] *Tex. A & M Univ.-Kingsville*, 347 S.W.3d at 289–90.

[189] *Id.* at 290.

[190] *Id.*

[191] *See id.* at 290–91 (holding that no exception to the mootness doctrine existed because the court found no evidence that Yarbrough would be precluded from seeking review of the policy in the future and no showing that the duration of the policy is not so short as to preclude review before the issue becomes moot, nor did the court find evidence that Yarbrough would again receive negative evaluations).

[192] *Id.* at 291.

[193] *See id.*

[194] *Id.* (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)).

[195] ROBERT C. SOLOMON & KATHLEEN M. HIGGINS, A SHORT HISTORY OF PHILOSOPHY 149 (1996).

[196] Priestner, *supra* note 4, at 406.

[197] SOLOMON & HIGGINS, *supra* note 195, at 149.

statutes and rules both plainly and purposively. In addition, the Chief Justice's procedural opinions avoid party or issue bias. The substantive issue in three of these five procedural cases is a tort claim,[198] and the Texas Supreme Court has been attacked as biased in favor of tort defendants.[199] These opinions are studiously indifferent to the underlying substantive claim, a measure of the Chief Justice's concern with effectuating the reasons for procedural rules. His opinions avoid both the fetish of legal formalism and the flabbiness of some forms of legal realism.

Two additional sets of majority opinions written by Chief Justice Jefferson also deserve some attention. In 2011, the court decided two takings decisions,[200] and two opinions balancing claims of individual privacy with disclosure of information of some public import.[201]

In *City of Dallas v. Stewart*,[202] following approximately seven months after the decision in *City of Dallas v. VSC, LLC*,[203] a divided court considered the processes by which the propriety of constitutional takings claims were adjudged.[204] In *Stewart*, the court held that using an administrative board to make "essentially conclusive" judgments about a takings claim failed to properly balance a person's constitutional right to property with the city's interest in abating a nuisance.[205] In *VSC, LLC*, a divided court held a company's decision to sue rather than use a statutory remedy to petition for the return of their claimed property left the trial court

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[198] *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia *ex rel.* Vasquez-Arancibia, 324 S.W.3d 544, 546, 550 (Tex. 2010) (medical malpractice tort claim); Badiga v. Lopez, 274 S.W.3d 681, 682 (Tex. 2009) (medical malpractice tort claim); *In re* Brookshire Grocery Co., 250 S.W.3d 66, 68 (Tex. 2008) (tort action).

[199] *See, e.g.*, David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 4–42 (2007) (attributing tort defendant victories to judges holding that there is no evidence to support a plaintiff's verdict, judges adopting procedural rules that benefit defendants, and judges interpreting statutes in favor of defendants); Caleb Rackley, *A Survey of Sea-Change on the Supreme Court of Texas and Its Turbulent Toll on Texas Tort Law*, 48 S. TEX. L. REV. 733, 735 (2007) (noting that until the 1970s tort law in Texas was skewed to the defendants).

[200] City of Dall. v. Stewart, No. 09-0257, 2011 WL 2586882, at *2–4 (Tex. July 1, 2011), *withdrawn*, 361 S.W.3d 562 (Tex. 2012) (real property takings decision); City of Dall. v. VSC, LLC, 347 S.W.3d 231, 233–34 (Tex. 2011) (motor vehicle takings decision).

[201] *See* Tex. Dep't. of Pub. Safety v. Cox Tex. Newspapers, L.P., 343 S.W.3d 112, 113 (Tex. 2011) (concerning the disclosure of a governor's travel expense vouchers); Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex., 354 S.W.3d 336, 337–38 (Tex. 2010) (regarding the privacy rights implicated in the disclosure of a state employee's date of birth).

[202] The court denied a motion for rehearing and substituted its July opinion for an opinion released on January 27, 2012. *Stewart*, 361 S.W.3d at 562.

[203] *See id.* at 563 (deciding the case on January 27, 2012); *VSC, LLC*, 347 S.W.3d at 231 (deciding the case on July 1, 2011).

[204] *See Stewart*, 361 S.W.3d at 562.

[205] *Id.*

without jurisdiction to hear the claim.[206]

Heather Stewart bought a house in the city of Dallas, and abandoned it in 1991.[207] In 2002, the city demolished the house.[208] In the interim, Dallas Code Enforcement personnel regularly visited the house.[209] After a hearing before the Dallas Urban Rehabilitation Standards Board, the board found the house was an "urban nuisance."[210] It denied Stewart's request for a rehearing, reaffirming its initial order.[211] Approximately one month later, after a Dallas inspector found Stewart's property had not been repaired, the city obtained a demolition warrant from a judge, and the house was demolished shortly thereafter.[212]

Stewart appealed the decision of the Board to a district court, but that "appeal did not stay the demolition order."[213] After demolition, she claimed the city had unconstitutionally taken her property.[214] The district court ordered a jury trial on the takings claim, and the jury found that Stewart's house was not a public nuisance and awarded her over $75,000.[215] The City appealed, claiming the board's decision that the house was a nuisance precluded any contrary finding by a jury.[216]

The court, noting that "[t]akings suits are thus, fundamentally, *constitutional* suits and must ultimately be decided by a court rather than an agency," held "that this "matter of constitutional right may [not] finally rest with a panel of citizens untrained in constitutional law."[217]

In *City of Dallas v. VSC, LLC*, issued on July 1, 2011,[218] the court dismissed a constitutional takings claim by VSC, which sued claiming the City had taken motor vehicles in which VSC possessed an ownership interest.[219] According to VSC, the City of Dallas "seized 326 vehicles . . . from VSC, a licensed vehicle storage facility."[220] Police officers testified that all of the confiscated

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[206] *VSC, LLC*, 347 S.W.3d at 233.
[207] *Stewart*, 361 S.W.3d at 563.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 565.
[217] *Id.* at 565, 567.
[218] City of Dall. v. VSC, LLC, 347 S.W.3d 231, 231 (Tex. 2011).
[219] *Id.* at 233.
[220] *Id.* at 233–34.

vehicles were either stolen or displayed some indicia that they had been stolen.[221] For forty-seven of the vehicles, VSC pursued its statutory remedy in municipal court.[222] For the other vehicles, instead of pursuing its statutory remedy, VSC sued, claiming an unconstitutional taking.[223] *Stewart* had held the Texas Constitution's Takings Clause self-executing.[224] Why was VSC barred from asserting its constitutional claim rather than the statutory remedy available to it?[225] The court first noted "[t]he [l]egislature's broad authority to prescribe . . . remedies for takings" claims, an authority subject only to constitutional requirements such as due process.[226] VSC claimed that the statutory remedy did not provide it with due process because the city is not required to notify claimants of those proceedings.[227] Relying on a 1999 decision of the Supreme Court of the United States, the court held that VSC possessed actual notice of the seizure of the vehicles, notice that was constitutionally sufficient because that remedial procedure was "easily discoverable."[228]

The same five justices who formed the majority in the five-to-four decision in *Stewart*[229] were joined by Justice Paul Green.[230] A lengthy and thorough dissent by Justice Dale Wainwright argued in part that the government failed to provide notice to VSC of its disposal of the vehicles, which violated VSC's rights.[231]

The Texas Supreme Court has also recently issued two important opinions balancing a person's right to privacy with the public's interest in information about public employees, both written by Chief Justice Jefferson.[232] In *Texas Comptroller of Public Accounts*

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[221] *Id.* at 234.

[222] *Id.* at 235.

[223] *Id.*

[224] City of Dall. v. Stewart, 361 S.W.3d 562, 567 (Tex. 2012) (citing Steele v. City of Hous., 603 S.W.2d 786, 791 (Tex. 1980)); *see* TEX. CONST. art. 1, § 17.

[225] *See* City of Dall. v. VSC, LLC, 347 S.W.3d 231, 233 (Tex. 2011) (precluding the constitutional claim).

[226] *Id.* at 236.

[227] *Id.* at 238.

[228] *Id.* at 238–39 (citing City of W. Covina v. Perkins, 525 U.S. 234, 241 (1999)).

[229] *Stewart*, 361 S.W.3d at 563 (noting that the majority consisted of Chief Justice Jefferson and Justices Hecht, Medina, Willett, and Lehrmann).

[230] *VSC, LLC*, 347 S.W.3d at 233 (adding Justices to the same Justices that formed the majority in *Stewart*, which were Chief Justice Jefferson and Justices Hecht, Medina, Willett, and Lehrmann).

[231] *Id.* at 255 (Wainwright, J., dissenting).

[232] TEX. GOV'T CODE ANN. § 552.001 (West 2004). The court also interpreted the Texas Public Information Act in *City of Dallas v. Abbott*, 304 S.W.3d 380, 381 (Tex. 2010). In that 6–2 decision, written by Justice O'Neill and joined by Chief Justice Jefferson, the court evaluated the timeliness of a governmental entity's request for an opinion from the attorney

v. Attorney General of Texas[233] and *Texas Department of Public Safety v. Cox Texas Newspapers, L.P.*,[234] the court interpreted the state's Public Information Act in ways that are less persuasive than the approach taken by the dissents.[235]

In both cases, media companies made a request for government information.[236] Under Texas's Public Information Act, a presumption favors disclosure of the requested information.[237] In both cases the Texas Supreme Court held that the requested information (or at least some of the requested information) did not have to be disclosed.[238] Both opinions are defensible but ultimately unpersuasive.

In *Texas Comptroller*, the Dallas Morning News sought a copy of the Texas Comptroller's payroll database.[239] The Comptroller provided all the information found in the database other than the dates of birth of the employees.[240] It withheld date of birth information based on section 552.101 of the Texas Government Code, which exempted from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."[241] Under section 552.102 of the Government Code, "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" is also exempted from disclosure.[242] The Comptroller then requested an opinion from the Attorney General asking whether she was

general. *Id.* It held that "timeliness . . . is measured from the date a party seeking public information responds to a governmental body's good-faith request for clarification or narrowing of an unclear or overbroad information request." *Id.* Justice Wainwright also dissented in *Abbott*, concluding that, because the Public Information Act stated that a governmental entity had ten days to request an opinion from the attorney general once the request was "received," a conclusion that the ten-day window did not begin until the request was "clarified" was contrary to the Act. *Id.* at 388 (Wainwright, J., dissenting); *see* TEX. GOV'T CODE ANN. § 552.301 (West 2012).

[233] Tex. Comptroller of Pub. Accounts v. Att'y Gen. of Tex., 354 S.W.3d 336 (Tex. 2010) (*reh'g denied*, Jan. 14, 2011).

[234] Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P., 343 S.W.3d 112 (Tex. 2011).

[235] *Id.* at 113–14 (interpreting the state's Public Information Act to determine whether it requires the production of travel vouchers for Governor Rick Perry's security detail even if it would put the governor in danger); *Tex. Comptroller*, 354 S.W.3d at 337–38 (deciding whether the Public Information Act requires disclosure of the birth dates of the state employees to the Dallas Morning News or whether this infringes on the employees' privacy rights).

[236] *Cox Tex. Newspapers*, 343 S.W.3d at 113 (requesting production of travel vouchers for Governor Rick Perry's security detail); *Tex. Comptroller*, 354 S.W.3d at 337 (showing that the Dallas Morning News requested the birth dates of all state employees).

[237] TEX. GOV'T CODE ANN. § 552.001(b) (West 2004).

[238] *Cox Tex. Newspapers*, 343 S.W.3d at 120; *Tex. Comptroller*, 354 S.W.3d at 338.

[239] *Tex. Comptroller*, 354 S.W.3d at 337.

[240] *Id.*

[241] *Id.* (citing TEX. GOV'T CODE ANN. § 552.101 (West 2011)).

[242] TEX. GOV'T CODE ANN. § 552.101.

required to disclose the dates of birth of state employees.[243] The Attorney General concluded Texas law prohibited the Comptroller from withholding information about employees' dates of birth.[244] The Comptroller was then in the unusual position of suing the Attorney General, while being represented by the Attorney General.[245] The Morning News intervened.[246] The district court and the court of appeals both held in favor of disclosure.[247]

On appeal to the Texas Supreme Court, the Comptroller reiterated her initial position that section 552.101 exempted birth dates from disclosure.[248] As was made clear by the dissent, the Comptroller expressly disclaimed any reliance on section 552.102.[249] Even so, the court, twice claiming the existence of "unique circumstances," held the Comptroller properly withheld date of birth information under section 552.102.[250]

Chief Justice Jefferson's argument is sophisticated but ultimately unpersuasive. He first noted that the state's employees possess a common law privacy interest as third parties, an interest that must be acknowledged by the court.[251] Though the Comptroller did not justify her actions under the personnel file exemption of section 552.102, the interests of those third parties plus the unique circumstances of the case led the Texas Supreme Court to expand the Comptroller's petition to include a section 552.102 argument.[252]

Section 552.102 stated personnel information that "would constitute a clearly unwarranted invasion of personal privacy" was exempt from disclosure.[253] This particular language, the court noted, was identical to language in the federal government's Freedom of Information Act's ("FOIA") exemption 6.[254] That FOIA exemption was interpreted by the Supreme Court in *Department of the Air Force v. Rose* as creating a balancing test weighing an

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[243] *Tex. Comptroller*, 354 S.W.3d at 337 (Tex. 2010) (citing TEX. GOV'T CODE ANN. § 552.301).

[244] *Tex. Comptroller*, 354 S.W.3d at 338.

[245] *Id.* at 338–39.

[246] *Id.* at 339.

[247] *Id.* at 338.

[248] *Id.* at 351 (Wainwright, J., concurring in part, dissenting in part) (citing TEX. GOV'T CODE ANN. § 552.101).

[249] *Tex. Comptroller*, 354 S.W.3d at 350–51 (citing TEX. GOV'T CODE ANN. §§ 552.101–02).

[250] *Tex. Comptroller*, 354 S.W.3d at 338, 340 (majority opinion).

[251] *Id.* at 339–41 (citing TEX. GOV'T CODE ANN. § 552.102) (holding that TEX. GOV'T CODE ANN. § 552.102 extends privacy protection to state employees as third parties).

[252] *Tex. Comptroller*, 354 S.W.3d at 339–41.

[253] *Id.* at 338 (quoting TEX. GOV'T CODE ANN. § 552.102).

[254] *Tex. Comptroller*, 354 S.W.3d at 340–42 (citing Freedom of Information Act, 5 U.S.C. § 552(b)(6) (West 2012); TEX. GOV'T CODE ANN. § 552.102).

individual's right of privacy with the public's interest in information about the workings of the government.[255] The court then held that, though a "balancing test is not required under section 552.101," because the Texas Public Information Act was "modeled" on the FOIA, it would adopt federal precedent and use the *Rose* balancing test to interpret section 552.102.[256]

In weighing this balance, the court found the privacy interests of the employees "significant" while concluding the public interest in employees' birth dates was "minimal."[257] The disclosure of birth dates enhanced the possibility of identity theft, which the court declared, "is becoming one of the fastest growing criminal and consumer offenses in the twenty-first century."[258] Similarly, if birth dates were disclosed, they would be disclosed, like the other information given to the Dallas Morning News, in a searchable form, increasing the possibility of identity theft.[259] The court then made a logical leap: because the legislature statutorily exempted from disclosure employees' social security numbers, home addresses, and personal family information, the failure of the *court* to exempt birth dates would render "meaningless" those statutory exemptions "because those dates, when combined with name and place of birth, can reveal social security numbers."[260] The court then cited to a story in the very same Dallas Morning News on the insecurity of social security numbers.[261] Thus, the privacy interests of the employees were substantial.[262]

In contrast, the court concluded that the disclosure of birth dates "reveal[ed] little or nothing about an agency's own conduct."[263] It then stated that once a substantial privacy interest existed, the party requesting information was required to identify "a sufficient reason for disclosure" of the information.[264] That reason, to use birth dates to learn whether governmental agencies employed sex

[255] Dep't Air Force v. Rose, 425 U.S. 352, 380–81 (1976).
[256] *Tex. Comptroller*, 354 S.W.3d at 341–42.
[257] *Id.* at 343, 347–58.
[258] *Id.* at 343 (citing 2006 Tex. Op. Att'y Gen. 01938, at 3).
[259] *See Tex. Comptroller*, 354 S.W.3d at 343–44, 347 (quoting *Goyer v. N.Y. State Dep't of Env'tl. Conservation*, 813 N.Y.S.2d 628, 639 (Sup. Ct. 2005)).
[260] *Tex. Comptroller*, 354 S.W.3d at 345.
[261] *Id.* (citing Bob Moos, *How Secure is Your Social Security Data?: Researchers' Claim About System's Vulnerability Underscores Worries That Identify Theft Threat Will Rise*, DALL. MORNING NEWS, Aug. 9, 2009, at 1D, *available at* 2009 WLNR 15470333).
[262] *Tex. Comptroller*, 354 S.W.3d at 345.
[263] *Id.* at 346 (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 750 (1989)).
[264] *Tex. Comptroller*, 354 S.W.3d at 346–47 (citing Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004)).

offenders or convicted persons, was insufficient to overcome the substantial privacy interests of all state employees.[265] It was insufficient because "mere allegations of the possibility of wrongdoing are not enough."[266] This standard, of course, could be flipped (and was by the dissent).[267] The privacy interest of state employees was largely based on the possibility of identity theft, a possibility the court failed to quantify, other than to note that an estimate by the Federal Trade Commission of 27.3 million cases of identity theft.[268]

The dissent by Justice Wainwright in *Texas Comptroller* focused on a structural disagreement with the court.[269] Justice Wainwright's conclusion was that the legislature had made its intentions on date of birth information clear, making the court's statutory interpretation invalid.[270] First, the legislature had chosen not to exempt birth dates from public disclosure.[271] Second, the reason for the request for birth dates was based on a legitimate use (to search for criminal convictions, and in part to distinguish among the subsets of the 2,000 state employees who shared the same name).[272] Third, the Texas legislature had: (a) passed the Identity Theft Enforcement and Protection Act to protect all Texans from identity theft; (b) chosen not to exempt birth dates from disclosure in the Public Information Act; and (c) continued to sell birth date information of Texas state employees (and others) to businesses without generating any problems with identity theft.[273]

The dissent also argued the court erred in ignoring its precedents on waiver to decide the case based on section 552.102, when the Comptroller disclaimed that basis for adjudication.[274] It then assessed the balancing test undertaken by the court.[275] Any privacy interest of state employees was limited to the information, not the derivative use of that information (combining date of birth

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[265] *See Tex. Comptroller*, 354 S.W.3d at 346–48.

[266] *Id.* at 346.

[267] *Id.* at 357–58 (Wainwright, J., concurring in part, dissenting in part).

[268] *Id.* at 343 (majority opinion) (citing 2006 Tex. Op. Att'y Gen. 01938, at 3).

[269] *See Tex. Comptroller*, 354 S.W.3d at 351–53 (Wainwright, J., concurring in part, dissenting in part) (explaining that the majority decided the case based on TEX. GOV'T CODE § 552.102, which advocated the balancing test, while the Comptroller limited her argument exclusively to § 552.101).

[270] *Id.* at 349–50 (Wainwright, J., concurring in part, dissenting in part).

[271] *Id.* at 349.

[272] *Id.* at 357.

[273] *Id.* at 349–50.

[274] *Id.* 351–53 (arguing that waiver rules exist to prevent "unfair surprise" of issues to the other party and to limit the courts' jurisdiction to "existing cases or controversies").

[275] *Id.* at 353.

information with other personal information to engage in identity theft).[276] Even if one were to look at the derivative use of that information, empirical evidence was lacking to support the court's claim that disclosure of date of birth information would lead to identity theft.[277] The reason the request of the Dallas Morning News for date of birth information was legally sufficient was because it allowed assessment of any criminal records of employees.[278] More telling, structurally, was Justice Wainwright's argument that, because the balancing standard had been acknowledged as the proper legal standard for the first time by the supreme court, "[w]e cannot expect a party to present evidence for a standard unknown, unargued, and unapplied below."[279]

Seven months later, the court issued its opinion in *Texas Department of Public Safety v. Cox Texas Newspapers, L.P.*[280] Pursuant to the Public Information Act, several Texas newspapers requested detailed information concerning travel vouchers related to Governor Rick Perry's security detail when he traveled outside the state.[281] The Department of Public Safety ("DPS") refused to provide detailed information and requested an opinion from the Attorney General.[282] The Attorney General concluded that disclosure of the requested information "would place the governor in imminent threat of physical danger."[283] Consequently, the information could be withheld pursuant to section 552.101.[284]

Because the travel expense information was characterized as "core" public information, that information was protected from disclosure only if it was "confidential under other law," that is, law other than the Public Information Act.[285] The court held that "other law" included a common law right to be free from physical harm, citing an 1843 Republic of Texas case and a Texas case citing the preeminent American tort law scholar William Prosser, and quoting the venerable English legal authority William Blackstone.[286] The

[276] *Id.* at 353–54.
[277] *Id.* at 354–55.
[278] *Id.* at 357.
[279] *Id.* at 358.
[280] Tex. Dept. of Pub. Safety v. Cox Tex. Newspapers, 343 S.W.3d 112, 112 (Tex. 2011) (decided July 1, 2011); *Tex. Comptroller*, 354 S.W.3d at 336 (decided Dec. 3, 2010).
[281] *Tex. Dept. of Pub. Safety*, 343 S.W.3d at 113.
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.* at 114 (emphasis omitted) (quoting *In re* City of Georgetown, 53 S.W.3d 328, 331 (Tex. 2001)).
[286] *Tex. Dept. of Pub. Safety*, 343 S.W.3d at 115 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125 (1769)) (citing Fisher v. Carrousel Motor

court noted that the common law right to be free from physical harm was "more . . . entrenched in our common law than the right [to] privacy."[287] Because the common law right to privacy was "other law" that protected documents from disclosure, the greater entrenchment of the right to be free from physical harm created a kind of transitive property effect. Thus, documents that infringed that right to be free from physical harm should also be protected from disclosure.[288]

The common law right to be free from physical harm led the court to adopt the standard allowing nondisclosure in cases in which there existed a "substantial threat of physical harm."[289] Because this was a newly created standard, the court remanded the case to the trial court for it to "closely examine each of the disputed documents."[290] It did nod in the direction of the DPS by stating that, in assessing security measures by looking at the vouchers reflecting expenses for prior trips, "we cannot agree that information from prior trips could not be used to inflict future harm."[291] This double negative requires some untangling. Of course some person could use information from prior trips possibly "to inflict future harm."[292] In other words, it is theoretically possible (or, to use more negative language, not impossible) that disclosure of this information could lead to physical harm. But the earlier-adopted standard was a "substantial" threat of physical harm,[293] a quantum certainly greater than a theoretical possibility.

Justice Wainwright concurred in the judgment, agreeing that the case should be remanded to the trial court.[294] He disagreed with the court's analysis. As also happened in *Texas Comptroller*, Justice Wainwright focused in part on the structural difficulties of the court's opinion: "The [c]ourt should not judicially create an exception to disclosure that contradicts the Legislature's expressed intent in the [Public Information Act]."[295] His second disagreement

Hotel, Inc., 424 S.W.2d 627, 629 (Tex. 1967); Benton v. Williams, Dallam 496, 496–97 (Tex. 1843).

[287] *Tex. Dep't of Pub. Safety*, 343 S.W.3d at 116.

[288] *See id.* at 115–16.

[289] *Id.* at 118. The court adopted identical statutory language from a 2009 amendment to the Public Information Act that was formally inapplicable to core public information. *Id.* at 114–15 (citing Act of June 3, 2009, ch. 283, 2009 Tex. Sess. Law Serv. 742 (codified as amended at TEX. GOV'T CODE ANN. § 552.151 (West 2012))).

[290] *Tex. Dep't of Pub. Safety*, 343 S.W.3d at 118.

[291] *Id.* at 119.

[292] *Id.*

[293] *Id.* at 118.

[294] *Id.* at 121 (Wainwright, J., concurrence).

[295] *Id.*; *see* Tex. Comptroller of Pub. Accounts v. Atty. Gen. of Tex., 354 S.W.3d 336, 351–53

was one of statutory interpretation. A 1999 legislative amendment to the Public Information Act required disclosure of core public information "unless [it is] expressly confidential under other law."[296]

C. Concurring Opinions

Chief Justice Jefferson's concurring opinions offer significant evidence of his jurisprudence. He has written approximately twelve concurrences since he became Chief Justice,[297] at least two in the first two years as Chief Justice,[298] four in 2008,[299] and six from 2009 through 2011.[300] These opinions arise in relatively disparate areas of law, but all suggest his pragmatic approach to interpreting law.

For example, one of his first concurrences concerned interpretations of contract law.[301] In *1464-Eight, Ltd. v. Joppich*, the majority adopted section 87(1)(a) of the *Restatement (Second) of Contracts*.[302] Section 87(1)(a) declared the false recital of nominal

(Tex. 2010) (Wainwright, J., concurring in part, dissenting in part).

[296] *Tex. Dep't of Pub. Safety*, 343 S.W.3d at 123 (Wainwright, J., concurring) (quoting TEX GOV'T CODE ANN. § 552.022 (West 1995) (amended 2011)).

[297] Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and CONCUR! (Jefferson); Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and DISSENT! (Jefferson). The search results were only within the specified time period defined above, September 14, 2004 to December 31, 2011. *See, e.g.*, Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 435 (Tex. 2011) (Jefferson, C.J., concurring); R.R. Comm'n v. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 633 (Tex. 2011) (Jefferson, C.J., concurring); Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658, 666 (Tex. 2010) (Jefferson, C.J., concurring in part, dissenting in part); Trammell Crow Cent. Tex., Ltd. v. Gutierrez, 267 S.W.3d 9, 17 (Tex. 2008) (Jefferson, C.J., concurring); Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 855 (Tex. 2005) (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment), 1464–Eight, Ltd. v. Joppich, 154 S.W.3d 101, 110 (Tex. 2004) (Jefferson, C.J., concurring).

[298] Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and CONCUR! (Jefferson); Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and DISSENT! (Jefferson). The search results were only within the specified time period defined above, September 14, 2004 to September 14, 2006. *See, e.g.*, *Diversicare*, 185 S.W.3d at 842 (majority opinion) (deciding the case Oct. 14, 2005); *Joppich*, 154 S.W.3d at 101 (majority opinion) (deciding the case Dec. 31, 2004).

[299] Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and CONCUR! (Jefferson); Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and DISSENT! (Jefferson). The search results were only within the specified time period defined above, January 1, 2008 to December 31, 2008. *See, e.g.*, *Trammel*, 267 S.W.3d at 9 (majority opinion) (deciding the case in 2008).

[300] Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and CONCUR! (Jefferson); Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and DISSENT! (Jefferson). The search results were only within the specified time period defined above, January 1, 2009 to December 31, 2011. *See, e.g.*, *Ojo*, 356 S.W.3d at 421 (majority opinion) (decided May 27, 2011); *R.R. Comm'n*, 336 S.W.3d at 619 (majority opinion) (decided May 27, 2011); *Marks*, 319 S.W.3d at 658 (majority opinion) (decided Aug. 27, 2010).

[301] *See Joppich*, 154 S.W.3d at 102.

[302] *Id.* at 110; *see* RESTATEMENT (SECOND) OF CONTRACTS § 87(1)(a) (1979).

consideration was sufficient to make an offer irrevocable in an option contract.[303] Chief Justice Jefferson's concurrence urged the court to take another step toward the reform of contract law and hold that promises for an option in a commercial matter should be enforceable without proof of any consideration.[304] Quoting the authors of a leading treatise, the Chief Justice advocated the end of consideration in such matters because such a rule avoided "fictional charades [that] should not be a part of a mature legal system."[305] The concurrence noted his proposed view was "hardly novel," having been adopted by the English judge, Lord Mansfield in commercial matters in late eighteenth century England, and proposed by the National Conference of Commissioners on Uniform State Laws in 1925.[306] The "dogged insistence" on requiring a recital of consideration was a harmful formalism that served no purpose in commercial options contracts.[307]

In *Trammel Crow Central Texas, Ltd. v. Gutierrez*, the issue was the duty of landowners to protect invitees from criminal acts by third parties.[308] The majority held that the no-duty rule applied to the facts and reversed the court of appeals.[309] Luis Gutierrez and his wife, Karol Ferman, were walking toward their car at the Quarry Market in San Antonio after leaving a movie theater.[310] Luis was shot four times and died.[311] His widow and mother sued on their own behalf as well as in behalf of his five children, claiming the owner negligently failed to provide adequate security.[312] A jury returned a verdict in favor of the plaintiff and awarded $5 million in damages.[313] Plaintiffs offered testimony that the shooting was a consequence of a robbery, and to prove their theory, offered evidence that the police collected several items at the scene but not Luis's wallet.[314] The defense claimed Luis was deliberately targeted and killed for providing police information about several burglaries in

[303] *See* RESTATEMENT (SECOND) OF CONTRACTS § 87(1)(a) (1979).
[304] *See Joppich*, 154 S.W.3d at 111 (Jefferson, C.J., concurring).
[305] *Id.* (quoting 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.17 (rev. ed. 1995)).
[306] *Joppich*, 154 S.W.3d at 112 (citing Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 401 n.314, 439 (1996)).
[307] *See Joppich*, 154 S.W.3d at 112–14.
[308] Trammell Crow Cent. Tex., Ltd. v. Gutierrez, 267 S.W.3d 9, 10–11 (Tex. 2008).
[309] *Id.* at 11.
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.* at 12.
[314] *Id.* at 11–12.

which he had been involved.[315] Using a five-factor test, the court held that Luis's murder was not foreseeable, and thus the defendant lacked any duty to Luis to protect him from harm by third parties.[316]

In his concurrence for four members of the court, Chief Justice Jefferson concluded the crime was foreseeable.[317] The plaintiffs offered evidence of ten instances of violent crime at the Quarry Market, all of which were robberies, in "the two years preceding Gutierrez's death."[318] Though the crime was foreseeable, that did not give rise to a duty by the defendant to protect Gutierrez.[319] A duty to protect persons from the criminal actions of third parties arose only if the risk of criminal conduct was unreasonable.[320] The inquiry into the number of prior similar incidents to determine whether it was unreasonable that an invitee could suffer harm at the hands of a third party was misplaced.[321] Chief Justice Jefferson instead urged the adoption of a balancing test that weighed the possibility of the risk and likelihood of harm against the attendant burdens on landowners.[322] In his weighing, the number of violent incidents was "relatively few" and the burden upon landowners to prevent a "brazen attack" was "tremendous."[323] Thus, the defendant did not owe plaintiff a duty in law.[324]

Marks v. St. Luke's Episcopal Hospital, released in August 2010, was another tort law case, once again requiring the court to interpret the now-superseded Medical Liability and Insurance Improvement Act ("MLIIA").[325] Irving Marks was injured while attempting to get out of a hospital bed.[326] He sued, claiming the footboard of the bed was negligently assembled and maintained, causing him to fall.[327] The trial court held that Marks's claim was a

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[315] *Id.* at 12.

[316] *See id.* at 12, 15, 17 (explaining that in order for the owner of the premises to have a duty of care to protect people from criminal acts of third parties, the risk of harm must be foreseeable, and in this case it was not, therefore no such duty existed).

[317] *Id.* at 18 (Jefferson, C.J., concurring).

[318] *Id.*

[319] *Id.* at 18–19.

[320] *See id.* at 18.

[321] *See id.* at 18–19.

[322] *Id.* at 18.

[323] *Id.* at 19.

[324] *Id.*

[325] Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658, 658, 660 (Tex. 2010); *see* Medical Liability and Insurance Improvement Act of Texas, ch. 817, 1977 Tex. Gen. Laws 2039 (repealed 2003) (codified as amended TEX. REV. CIV. STAT. ANN., art. 4590i, § 1.01 (West 2012)).

[326] *Marks*, 319 S.W.3d at 660.

[327] *Id.*

health care liability claim as defined by the MLIIA.[328] Because Marks failed to meet the requirements of the MLIIA (he failed to file an expert report in a timely manner), his claims were dismissed.[329] The court of appeals reversed, holding Marks's claim was not an MLIIA healthcare liability claim.[330] In a *per curiam* opinion, the Texas Supreme Court remanded the matter to the court of appeals to evaluate the case in the light of the supreme court's opinion in *Diversicare General Partner, Inc. v. Rubio*.[331] In *Diversicare*, the issue was whether a resident of a nursing home, who was sexually assaulted by another resident of the home, could make claims of negligent supervision and failure to provide reasonably safe premises outside of the MLIIA.[332] The supreme court held the claim was covered by the MLIIA, and the case was dismissed because the claim was made after the two-year statute of limitations window.[333] It did, however, conclude that premises-liability claims that are "separable" from medical care liability claims were not subject to the MLIIA.[334]

On remand, a divided court of appeals affirmed the trial court.[335] The case then returned to the supreme court, and in 2009 it held Marks's claim was not a healthcare liability claim, but a premises-liability claim.[336] That opinion was withdrawn,[337] and the court

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[328] *Id.* The MLIIA defined a "[h]ealth care liability claim" as:

> [A] cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

Medical Liability and Insurance Improvement Act of Texas, TEX. REV. CIV. STAT. ANN., art. 4590i, § 1.03(a)(4) (West 2012) (repealed 2003).

[329] *Marks*, 319 S.W.3d at 661.

[330] *Id.* at 660.

[331] Marks v. St. Luke's Episcopal Hosp., 193 S.W.3d 575, 575 (Tex. 2006) (per curiam) (citing Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842 (Tex. 2005)), *remanded to* 229 S.W.3d 396 (Tex. App. 2007), *aff'd*, 319 S.W.3d 658 (Tex. 2010)).

[332] *Diversicare*, 185 S.W.3d at 844–45.

[333] *Id.* at 855.

[334] *See id.* at 845, 851, 854 (noting that plaintiff's premise-liability claims were actually healthcare liability claims, and that the court would not allow someone to portray their healthcare liability claim as a premise-liability claim to avoid the statute of limitation requirements of the MLIIA).

[335] *See Marks*, 229 S.W.3d at 398.

[336] *Marks*, 319 S.W.3d app. at 676–77 (Jefferson, C.J., concurring in part, dissenting in part); Marks v. St. Luke's Episcopal Hosp., No. 07-0783, 2009 WL 2667801, at *1 (Tex. Aug. 28, 2009), *withdrawn*, 319 S.W.3d 659. The withdrawn opinion is attached to Chief Justice Jefferson's opinion in *Marks*. 319 S.W.3d at 676 (Jefferson, C.J., concurring in part, dissenting in part).

[337] *Marks*, 2009 WL 2667801, at *1, *withdrawn*, 319 S.W.3d 659 (withdrawing opinion on grant of rehearing Aug. 27, 2010).

mulled the case for another year.[338] A plurality of the court held, "[b]ecause the provision of a safe hospital bed was an inseparable part of the health care services provided during Marks's convalescence from back surgery, we conclude that his cause of action for injuries allegedly caused by the unsafe bed is a health care liability claim."[339]

Chief Justice Jefferson's opinion concurring in part and dissenting in part in *Marks* was brief and to the point: *Marks* inserted "discord" rather than "consistency" into Texas law.[340] It did so because it both kept the initial conclusion in *Marks* that the MLIIA was implicated "only if the underlying claim directly relates to a patient's care and treatment" and abandoned the initial conclusion that the hospital bed was separable from treatment.[341]

The plurality, the Chief Justice noted, was required by the *Diversicare* standard to "explain how a piece of wood at the end of a bed is integral to medical care."[342] The plurality had difficulty meeting that duty because the 2009 withdrawn opinion had "describe[d] in great detail why the footboard was *not* integral to St. Luke's delivery of health care services to Marks."[343] He then made a classic slippery-slope argument, noting that Marks could have fallen and injured himself from sitting on a defective chair in his room, or a bedside table.[344] "What if Marks fell down a 'rickety staircase' while perambulating for the first time after surgery?"[345]

The ability to distinguish harms suffered because of a fall from a rickety staircase from harms suffered when falling as a result of a faulty footboard created both a formalism (what was integral to medical care and what was incidental to a patient's care) that lacked the clarity of categorical standards and a contextual standard that used "overlapping" factors, making any assessment more difficult.[346] Because the court had applied the *Diversicare*

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[338] *Marks*, 319 S.W.3d at 658–60 (majority opinion) (withdrawing the Aug. 28, 2009 opinion and re-deciding the issues on Aug. 27, 2010).

[339] *Id.* at 666.

[340] *Id.* at 675 (Jefferson, C.J., concurring in part, dissenting in part).

[341] *Id.* at 674.

[342] *Id.* at 675.

[343] *Id.*

[344] *Id.* ("The footboard could as easily have been a chair in his room or a bedside table.").

[345] *Id.* (quoting Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 854 (Tex. 2005)). The reference to the rickety staircase was an example given by the majority in *Diversicare* in response to Chief Justice Jefferson's opinion. *See Diversicare*, 185 S.W.3d at 854. The *Diversicare* court used this example to suggest why it adopted a rule allowing premises liability claims for injuries separable from health care liability claims. *See id.*

[346] *See Marks*, 319 S.W.3d at 675–76 (Jefferson, C.J., concurring in part, dissenting in part) (quoting *Marks*, 319 S.W.3d app. at 680 (Jefferson, C.J., concurring in part, dissenting

standard, he would as well, concluding that, based on that standard, the footboard was not "integral to or inseparable from the health care services" the defendant provided to Marks.[347]

The Chief Justice's opinion in *Marks* echoed his opinion in *Diversicare*. As was true in *Marks*, he concurred in part and dissented in part.[348] His separate opinion in *Diversicare* proposed another path. A health care liability claim was defined as "a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety."[349]

The legislature failed to define "safety," but provided that any legal term should be interpreted consistently with the common law.[350] The common law meaning of safety meant, "not exposed to danger [and] not causing danger."[351] To be free from danger was, in his opinion, "without limitation."[352] That meant free from the danger of a sexual assault by another resident of the nursing home, making Rubio's claim in *Diversicare* a healthcare liability claim under the MLIIA.[353] "While it may be logical to read into the statute a requirement that a safety related claim also involve[s] health care," neither the implicit meaning of safety in the common law, nor the explicit text of the MLIIA allowed such a reading.[354] Because courts "take statutes as they find them"[355] any complaints about the expansive reach of the MLIIA were to be directed to the legislature.

in part); Marks v. St. Luke's Episcopal Hosp., No. 07-0783, 2009 WL 2667801 (Tex. Aug. 28, 2009), *withdrawn*, 319 S.W.3d 659).

[347] *Marks*, 319 S.W.3d at 674; *Diversicare*, 185 S.W.3d at 855. Two student comments discuss the problems arising from these two decisions. *See* Jonathan D. Nowlin, Comment, *Scalpel, Please: Why the Definitions of "Health Care Liability Claim" in Chapter 74 of the Civil Practices and Remedies Code is Not as Clean-Cut as It Could Be*, 43 TEX. TECH L. REV. 1247, 1269–70 (2011) (discussing how the Texas Supreme Court's interpretation of Article 4590i in *Marks* and *Diversicare* offered guidance for the interpretation of Chapter 74); David R. Schlottman, Note, *In Critical Condition:* Diversicare General Partner, Inc. v. Rubio*,* Marks v. St. Luke's Episcopal Hospital*, and the State of Health-Care-Liability Claims in Texas*, 63 BAYLOR L. REV. 526, 527–28 (2011) (discussing the problems arising from *Diversicare* and *Marks*, including the inherent difficulties in distinguishing health-care liability claims from premises-liability claims).

[348] *Diversicare*, 185 S.W.3d at 855 (Jefferson, C.J., concurring in part, dissenting in part).

[349] Medical Liability and Insurance Improvement Act of Texas, TEX. REV. CIV. STAT. ANN., art. 4590i, § 1.03(a)(4) (West 2012) (repealed 2003).

[350] *See Diversicare*, 185 S.W.3d at 860–61.

[351] *See id.* (quoting BLACK'S LAW DICTIONARY 1362 (8th ed. 2004)).

[352] *Diversicare*, 185 S.W.3d at 861.

[353] *See id.*

[354] *Id.*

[355] *Id.* (quoting Simmons v. Arnim, 220 S.W. 66, 70 (Tex. 1920)).

The *Diversicare* court rejected this option,[356] which is why Chief Justice Jefferson had joined the majority in the 2009 withdrawn opinion in *Marks*.[357] Now, it appeared, the court had changed its mind to declare the footboard was "integral" or "inseparable" from healthcare services.[358] This, he prophesied, would lead to inconsistent results.[359] And at least two Texas court of appeals opinions issued since *Marks* have appeared to limit its applicability, generating additional uncertainty.[360]

The withdrawn 2009 opinion in *Marks* was decided by a 5–4 court.[361] It was written by Justice Medina, and joined by Justices Harriet O'Neill, Scott Brister, Paul Green, and Chief Justice Jefferson.[362] The 2010 *Marks* decision was also written by Justice Medina.[363] His opinion was joined only by Justice Hecht.[364] Parts I and IV of Medina's opinion were joined by Justices Wainwright, Johnson, and Willett, each of whom had dissented in the 2009 opinion.[365] Between August 2009 and August 2010, Justices Brister and O'Neill had left the court, replaced by Justices Eva Guzman and Deborah Lehrmann, respectively.[366] The two new justices effectively took the same position as their predecessors. Thus, the

[356] *See Diversicare*, 185 S.W.3d at 854–55.

[357] *See* Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658 app. at 676–77 (Tex. 2010) (Jefferson, C.J., concurring in part, dissenting in part) (noting in the withdrawn opinion that the majority held the claim was a premises-liability claim instead of a healthcare liability claim); Marks v. St. Luke's Episcopal Hosp., No. 07-0783, 2009 WL 2667801, at *1 (Tex. Aug. 28, 2009), *withdrawn*, 319 S.W.3d 659.

[358] *Marks*, 319 S.W.3d at 664 (majority opinion).

[359] *See id.* at 675 (Jefferson, C.J., concurring in part, dissenting in part).

[360] *See* Nexus Recovery Ctr., Inc. v. Mathis, 336 S.W.3d 360, 370 (Tex. App. 2011) (holding that claims against a treatment center for failure to inquire of its counselor's history of sexually exploiting patients and failing to halt or prevent such exploitation of a former patient were not healthcare liability claims); Cardwell v. McDonald, 356 S.W.3d 646, 649–50 (Tex. App. 2011) (holding that a claim that a psychiatrist deceptively engaged in "marriage counseling" sessions with plaintiff to gain evidence harmful to her in divorce litigation with her husband was not a healthcare liability claim).

[361] *Marks*, 319 S.W.3d app. at 676 (Jefferson, C.J., concurring in part, dissenting in part) (demonstrating a 5–3 decision, with Justices Medina, O'Neill, Brister, Green, and Chief Justice Jefferson in the majority, and Justices Johnson, Hecht, Wainwright, and Willett making up the minority in the withdrawn 2009 opinion); *Marks*, 2009 WL 2667801, at *1, *withdrawn*, 319 S.W.3d 659.

[362] *Marks*, 319 S.W.3d app. at 676 (Jefferson, C.J., concurring in part, dissenting in part) (showing that Justices Medina, O'Neill, Brister, Green, and Chief Justice Jefferson were in the majority, while Justices Johnson, Hecht, Wainwright, and Willett made up the minority in the withdrawn 2009 opinion); *Marks*, 2009 WL 2667801, at *1, *withdrawn*, 319 S.W.3d 659.

[363] *Marks*, 319 S.W.3d at 659.

[364] *Id.*

[365] *Id.*; *Marks*, 319 S.W.3d app. at 676; *Marks*, 2009 WL 2667801, at *1, *withdrawn*, 319 S.W.3d 658.

[366] *See Marks*, 319 S.W.3d at 663; *Marks*, 319 S.W.3d 658 app. at 676; *Marks*, 2009 WL 2667801, at *1, *withdrawn*, 319 S.W.3d 658.

only person whose vote changed was Justice David Medina.[367] The decision by Chief Justice Jefferson to include the 2009 opinion as an appendix to his separate opinion subtly informs the reader whose (Justice Medina) opinion has shifted.[368] Chief Justice Jefferson's opinion remains resolutely professional, and offers a sense of the Chief Justice's attention to the tensions and necessities of small-group decision-making.

As seen in the *Diversicare/Marks* cases, the Texas Supreme Court is regularly engaged in constructing and interpreting statutes. Its members generally lean toward "originalist" approaches to statutory interpretation, using dictionaries to fix the meaning of words left undefined by statute, largely relying on plain meaning interpretation and downplaying purposive statutory construction.[369] Chief Justice Jefferson generally follows this approach, as he did in *Diversicare* and *Marks*.[370] However, his approach to statutory interpretation, on occasion, is both narrower and broader than that taken by his colleagues. Two concurrences offer a sense of his overarching understanding of statutory interpretation.

In *Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, the statutory phrase that required interpretation was "public interest."[371] The Railroad Commission of Texas was required by the Texas Water Code "to weigh the 'public interest'" in determining whether to issue a permit for an oil and gas injection well.[372] The court held the Commission's interpretation of "public interest" "was reasonable and in accord with the plain language of the statute," and thus should be given deference by the judiciary.[373] Specifically, the question was whether the Commission unreasonably interpreted "public interest" by failing to consider

[367] *See Marks*, 319 S.W.3d at 659, 666 (showing Medina affirmed the court of appeals opinion); *Marks*, 319 S.W.3d app. at 676–77 (showing that Justice Medina's opinion in 2009 reversed the court of appeals opinion); *Marks*, 2009 WL 2667801, at *1, *withdrawn*, 319 S.W.3d 658.

[368] *See Marks*, 319 S.W.3d at 676 *et seq.* (Jefferson, C.J., concurring in part, dissenting in part).

[369] A study of the interpretive approaches taken by the two highest Texas courts is found in Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1780, 1787–91 (2010).

[370] *See Marks*, 319 S.W.3d at 675 (Jefferson, C.J., concurring in part, dissenting in part) (assigning the word "safety" a common meaning to help interpret its use in the statute); Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 863–64 (Tex. 2005) (Jefferson, C.J., concurring) (interpreting the term "health care liability claim").

[371] R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 621 (Tex. 2011).

[372] *Id.*

[373] *Id.* at 621.

public safety concerns, including traffic safety, in deciding whether to issue the permit.[374] Texas Citizens for a Safe Future and Clean Water opposed issuance of the permit because, it argued, trucks carrying away waste-water would damage roads used by area residents.[375] The Commission issued the permit.[376] It concluded, adopting the conclusion of its hearing examiners, that the public interest was met because issuing the permit would increase the amount of oil and gas recovered in the area and serve as an economical way to dispose of salt water.[377] The court of appeals held that the Commission abused its discretion by interpreting "public interest" by considering just "the conservation of natural resources."[378]

The Texas Supreme Court concluded that if "a statutory term is subject to multiple understandings [the court] should defer to an agency's reasonable interpretation."[379] Not only was "public interest" left undefined by the legislature, the phrase was "anything but clear and unambiguous."[380] Because the Commission reasonably interpreted public interest by limiting itself to consider "only . . . matters within its expertise," its unwillingness to consider traffic safety was reasonable under the statutory scheme set forth in the Water Code.[381]

It was the majority's conclusion that "public interest" was subject to "multiple understandings" that led Chief Justice Jefferson to write separately.[382] Although "public interest" was "ambiguous as to some conceivable set of facts,"[383] it was not ambiguous in every reading, and certainly not in this case.[384] The Water Code's text and context prohibited the Commission to consider traffic safety.[385] Thus, no deference was to be given to the Commission's interpretation of the statute.[386]

[374] *Id.* at 623–24.
[375] *Id.* at 622.
[376] *See id.* at 623–24.
[377] *Id.* at 622–23.
[378] *Id.* at 623 (citing Tex. Citizens for a Safe Future & Clean Water v. R.R. Comm'n of Tex., 254 S.W.3d 492, 503 (Tex. App. 2007)).
[379] R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 628 (Tex. 2011) (citing Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747–48 (Tex. 2006)).
[380] *R.R. Comm'n of Tex.*, 336 S.W.3d at 628.
[381] *Id.* at 630 (emphasis omitted).
[382] *Id.* at 628 (majority opinion); *id.* at 633 (Jefferson, C.J., concurring).
[383] *Id.* at 633 (Jefferson, C.J., concurring).
[384] *See id.* at 634.
[385] *See id.* ("[P]ublic interest, in the context of the statute . . . is limited to the consideration of factors consistent with the chapter's purpose . . . .").
[386] *Id.*

Chief Justice Jefferson's mention of text and context illuminates his concurring opinion two months later in *Ojo v. Farmers Group, Inc.*[387] The certified question from the United States Court of Appeals for the Ninth Circuit was whether the Texas Insurance Code prohibited an insurance company from pricing insurance based on "a credit-score factor that has a racially disparate impact."[388] The court held that race-based credit scoring violated the Code, but race-neutral credit scoring that generated a racially disparate impact did not violate the Code.[389]

The Chief Justice's concurring opinion begins: "Legislative history is not always a villain."[390] This introduction allows Chief Justice Jefferson to explain both why the courts are "text-centric," and why courts occasionally adopt extrinsic aids to statutory construction.[391] This introduction leads to several eloquent statements about the goals and purposes of a written legal opinion.[392] He initially writes that an appellate opinion is "one part of a dialogue between parties, citizens, legislators, and judges—a dialogue that provides a historical record of the relevant controversy."[393]

This dialogue, he continues, is presented to make the court's opinion "more approachable to our readers and more easily integrated into our social fabric."[394] And that is because judges are both "storytellers and historians."[395] In one of his most trenchant declarations, he writes, "[w]e tell these stories because doing so is crucial to our legitimacy."[396] Because judgments of the court are enforced through the "threat of state authority,"[397] a narrative by courts best legitimizes its actions. Citations to extrinsic aids tell the reader "why," even when "why" is irrelevant to the court's conclusion. The irrelevance of the legislature's intent to the court's interpretation of the Insurance Code has relevance in another way: "The inclusion of this history gives notice to those who feel wronged

[387] *See* Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 35 (Tex. 2011) (Jefferson, C.J., concurring).
[388] *Id.* at 422 (majority opinion); *see* Ojo v. Farmers Grp., Inc., 600 F.3d 1201, 1202–03 (9th Cir. 2010).
[389] *Ojo*, 356 S.W.3d at 422.
[390] *Id.* at 435 (Jefferson, C.J., concurring).
[391] *Id.* at 435–36.
[392] *Id.* at 436–37.
[393] *Id.* at 436.
[394] *Id.* at 437.
[395] *Id.*
[396] *Id.* at 437.
[397] *Id.* For a discussion on the violence inherent in the "threat of state authority" see Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609–10, 1613 (1986).

by the statute."[398] It offers a contextual history to buttress "engagement in the political process" by those who "feel wronged."[399]

D. Dissenting Opinions

As is true of his concurring opinions, Chief Justice Jefferson has dissented in a greater number of cases more recently than in his earliest years as Chief Justice. After dissenting six times between 2004 through 2007,[400] he has dissented thirteen times from 2008 through 2011.[401] A significant number of these dissents may be broadly categorized as tort matters.[402] Others concern practice and procedure and statutory interpretation, or a combination of practice and procedure in an underlying tort matter.

An early dissent demonstrates Chief Justice Jefferson's insistence on the importance of process. In *In re Allied Chemical Corporation*, a 5–4 court[403] held the issue before the court was not moot, and

[398] *Ojo*, 356 S.W.3d at 437 (Jefferson, C.J., concurring).

[399] *Id.* at 439.

[400] *See, e.g.*, HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd., 235 S.W.3d 627, 661 (Tex. 2007) (Jefferson, C.J., concurring in part, dissenting in part); *In re* Allied Chem. Corp., 227 S.W.3d 652, 663 (Tex. 2007) (Jefferson, C.J., dissenting). Search Terms in LexisNexis: Texas Federal & State Cases, Combined: JUDGE! (Jefferson) and DISSENT! (Jefferson) Federal & State Cases, Combined: JUDGE! (Jefferson) and CONCUR! (Jefferson). The search was limited to January 1, 2004–December 31, 2007.

[401] *See, e.g.*, Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 13 (Tex. 2008) (Jefferson, C.J., dissenting); DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299 (Tex. 2008) (Jefferson, C.J., dissenting); Search Terms in LexisNexis: Texas Federal & State Cases, Combined: OPINIONBY (Jefferson) and DISSENT! (Jefferson); Federal & State Cases, Combined: OPINIONBY (Jefferson) and CONCUR! (Jefferson). The search was limited to January 1, 2008–December 31, 2011.

[402] I include product liability, medical malpractice, and class action matters, as well as two cases that implicate First Amendment claims. *See, e.g.*, *Pleasant Glade*, 264 S.W.3d at 2, 5–6 (involving an intentional tort and First Amendment claim); *Inman*, 252 S.W.3d at 300, 302 (regarding a class action product liability matter); *HEB Ministries*, 235 S.W.3d at 642 (litigating a First Amendment claim); *In re Allied Chem. Corp.*, 227 S.W.3d at 653 (describing a class action tort claim). Chief Justice Jefferson's dissents include MCI Sales & Serv., Inc. v. Hinton, 329 S.W.3d 475, 505 (Tex. 2010) (Jefferson, C.J., dissenting in part); Jelinek v. Casas, 328 S.W.3d 526, 541 (Tex. 2010) (Jefferson, C.J., dissenting in part); Garcia v. Gomez, 319 S.W.3d 638, 644 (Tex. 2010) (Jefferson, C.J., dissenting); Spectrum Healthcare Res., Inc. v. McDaniel, 306 S.W.3d 249, 254 (Tex. 2010) (Jefferson, C.J., dissenting); Hernandez v. Ebrom, 289 S.W.3d 316, 322 (Tex. 2009) (Jefferson, C.J., dissenting); *Pleasant Glade Assembly of God*, 264 S.W.3d at 13 (Jefferson, C.J., dissenting); *Inman*, 252 S.W.3d 299 (Jefferson, C.J., dissenting); *HEB Ministries, Inc.*, 235 S.W.3d at 661 (Jefferson, C.J., concurring in part, dissenting in part); *In re Allied Chem. Corp.*, 227 S.W.3d at 663 (Jefferson, C.J., dissenting); F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 694 (Tex. 2007) (Jefferson, C.J., dissenting); Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 913 (Tex. 2004); Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 855 (Tex. 2005) (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment); Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658, 658, 674 (Tex. 2010) (Jefferson, C.J., concurring and dissenting).

[403] *See Allied Chem. Corp.*, 227 S.W.3d at 654, 659 (showing a 5–4 majority decision, written by Justice Brister and joined by Justice Hecht, Justice Medina, Justice Green, and

created a procedural rule that, as stated by the Chief Justice, "for the first time, creates an inactive docket for complex mass tort cases like this one."[404] The reason for the court's insistence may be found in its characterization of the plaintiffs' claim. Plaintiffs alleged "exposure to a 'toxic soup' of emissions in the air for many decades. As we recently noted, no such claim 'has ever been tried or appealed in Texas,' and thus 'the tort is immature.'"[405]

Chief Justice Jefferson's dissent concluded the matter before the court was moot.[406] Additionally, the Chief Justice suggested the majority used the claim for mandamus relief to effect reform in mass tort cases, a reform properly undertaken through either the court's rulemaking process or through legislation.[407] Asking a series of questions about the contours of this new rule, he concluded that the court's answers "will be made on an ad hoc basis, with little guarantee of predictability or uniformity."[408]

In another 5–4 case, *DaimlerChrysler Corp. v. Inman*, the court held the plaintiffs representing a class of millions lacked standing to sue.[409] The named plaintiffs claimed that it was too easy to unlatch the seatbelts on DaimlerChrysler vehicles, and demanded that the manufacturer replace these seatbelts with others more difficult to unlatch.[410] Because the likelihood of injury was remote, the majority held the plaintiffs lacked standing to bring this class action lawsuit.[411]

In dissent, Chief Justice Jefferson concluded the majority conflated the issues of standing and the substantive merits of the claim.[412] Because Texas "law on warranty claims based on unmanifested defects is unclear,"[413] and because Texas's law of standing required only a "real controversy . . . determined by the judicial declaration sought" by plaintiffs,[414] both of which existed in this case, the representatives of the class possessed standing to

Justice Willet and a dissenting opinion written by Chief Justice Jefferson and joined by Justice O'Neill, Justice Wainwright, and Justice Johnson).

[404] *Id.* at 664 (Jefferson, C.J., dissenting).

[405] *Id.* at 654 (quoting *In re* Van Waters & Rogers, Inc., 145 S.W.3d 203, 208 (Tex. 2004)).

[406] *Allied Chem. Corp.*, 227 S.W.3d at 664 (Jefferson, C.J., dissenting).

[407] *Id.* at 665–66.

[408] *Id.* at 666.

[409] *See* DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 307–08 (Tex. 2008).

[410] *Id.* at 300.

[411] *See id.* at 301, 307–08.

[412] *Id.* at 308 (Jefferson, C.J., dissenting).

[413] *Id.* at 309.

[414] *Id.* at 308 (quoting Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005)).

sue.[415]

Both decisions emphasize the importance of process, especially as an antidote to the rush to declare substantive law. *In re Allied Chemical Corporation* arose in deep south Texas,[416] which many Republicans and self-described tort reformers believe is one of the Texas "judicial hellholes" where defense lawyers fear to tread.[417] Like *Allied Chemical*, *Inman* was a mass tort case.[418] In both cases the majority viewed the claims with suspicion, or even disbelief.[419] But those substantive misgivings, the Chief Justice urged his readers, were irrelevant to the procedural decisions that needed to be made.[420]

Two additional dissenting opinions deserve some attention. Both cases concerned claims of religious liberty.[421] *HEB Ministries, Inc. v. Texas Higher Education Coordinating Board* is a prolix plurality opinion concerning regulation of the awarding of "degree[s]" by a "seminary."[422] *Pleasant Glade Assembly of God v. Schubert* concerns an intentional tort claim against a religious institution and several of its ministers, and a holding that significantly expands immunity from tort liability available to religious institutions.[423]

In *HEB Ministries*, the issue was the constitutionality of a Texas law requiring every post-secondary school to meet certain standards before they may issue "degree[s]," including "associate," "bachelor," "master['s]," and "doctor[al]" degrees.[424] The law also required certain standards be met before a school may call itself a "seminary."[425] The Texas Higher Education Coordinating Board is given the power to provide a "certificate of authority" to schools that

[415] *See DaimlerChrysler*, 252 S.W.3d at 308, 316.

[416] In re *Allied Chem. Corp.*, 227 S.W.3d 652, 654 (Tex. 2007).

[417] ARIENS, *supra* note 2, at 282 (quoting LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, PAC. RESEARCH INST., U.S. TORT LIABILITY INDEX: 2008 REPORT 21 (2008)).

[418] In re *Allied Chem. Corp.*, 227 S.W.3d at 653 (describing a class action tort claim); *Inman*, 252 S.W.3d at 300, 302 (regarding a class action product liability tort matter).

[419] *See* In re *Allied Chemical Corp.*, 227 S.W.3d at 654, 656–57; *Inman*, 252 S.W.3d at 306.

[420] *See* In re *Allied Chemical Corp.*, 227 S.W.3d at 664–65 (Jefferson, C.J., dissenting); *Inman*, 252 S.W.3d at 313.

[421] Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 2 (Tex. 2008) (involving the Free Exercise Clause of the First Amendment); HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd., 235 S.W.3d 627, 630 (Tex. 2007) (discussing the state requirements imposed on a private post-secondary school before they may be deemed a school involved in religious education and training).

[422] *HEB Ministries*, 235 S.W.3d at 630.

[423] *Pleasant Glade*, 264 S.W.3d at 5, 13 (majority opinion) (Jefferson, C.J., dissenting).

[424] *HEB Ministries*, 235 S.W.3d at 630.

[425] *Id.*

meet these standards.[426] A fractured court held the state unconstitutionally preferred "one kind of religious instruction over another" in violation of the Establishment Clause, favoring those who were certified against those that were not.[427] The plurality did not simply declare unconstitutional the state's action restricting the use of the word "seminary" to certified institutions.[428] It also concluded the state impermissibly endorsed certain religious institutions, allowing only those certified institutions to use the phrase "bachelor's" diploma.[429] In a part of the opinion joined by a majority, including Chief Justice Jefferson, the opinion also held restricting the use of the word "seminary" to certified religious institutions violated the Free Exercise Clause as interpreted by the Supreme Court of the United States in *Employment Division v. Smith*.[430] A fractured plurality also held unconstitutional, as violating of the Free Exercise Clause, the state's limitations on the use of the word "degree."[431]

As the Chief Justice notes, the plurality strains to make this an Establishment Clause case.[432] It can only do so by concluding that the Coordinating Board favors some "religious" entities, which prejudices HEB Ministries.[433] This, of course, would better fit an Equal Protection Clause argument. On the plurality's Free Exercise analysis and the state's restriction of the use of the word "degree," his dissent notes that state law is not motivated by religious animus, but is merely a neutral, generally applicable law constitutional under Supreme Court precedent.[434] Ockham's Razor works well here. The plurality, the dissent indicates, must engage in a "strained reading of the record and the case law"[435] to conclude the law restricts communication of religious beliefs, which allows it to call the case a "hybrid" case that returns the court to "compelling interest" analysis,[436] which *Employment Division v. Smith* so carefully cabined.[437] A simpler explanation is that the law was

[426] *Id.* at 631.
[427] *See id.* at 630, 645, 657 (displaying a "fractured" court also).
[428] *Id.* at 645, 657.
[429] *See id.* at 630, 632 (showing that the majority of the court shared this opinion).
[430] *See id.* at 630, 650, 654, 657 (citing Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990)).
[431] *HEB Ministries*, 235 S.W.3d at 630, 657–58, 661 (displaying that the court was fractured).
[432] *Id.* at 662, 665–66 (Jefferson, C.J., concurring in part, dissenting in part).
[433] *Id.* at 665–66 (quoting State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692, 695 (Tex. 1984)).
[434] *HEB Ministries*, 235 S.W.3d at 666.
[435] *Id.* at 667.
[436] *Id.* at 667–68.
[437] *Id.* (citing Emp't Div. v. Smith, 494 U.S. 872, 878–79, 881 (1990)).

designed to protect Texans from "diploma mills" and from confusion about which educational documents should be understood as reflecting a "degree" (whether an associate, bachelor's, master's, or doctoral).[438]

In *Pleasant Glade*, the court held the church was not judicially estopped from making an appeal on religious liberty grounds.[439] As it would be tried, the matter was "an ecclesiastical dispute over religious conduct that would unconstitutionally entangle the court in matters of church doctrine."[440] It dismissed the matter, holding it lacked jurisdiction.[441]

Everyone agreed that members of the church physically restrained the plaintiff, seventeen-year-old Laura Schubert, on two separate occasions.[442] Whether this touching was a forcible battery and false imprisonment was the factual question before the jury.[443] At the trial on her then-existing claims, the jury decided that question of fact in favor of the plaintiff and awarded her damages.[444] Before the trial, the church moved to dismiss the Schuberts's (her parents joined her as plaintiffs) suit on First Amendment grounds, claiming this was "a dispute regarding how services should be conducted within a church, including the practice of 'laying on of hands.'"[445] The trial court denied the motion.[446] In a mandamus proceeding before the court of appeals on that decision, all claims other than false imprisonment and assault (including, among others, professional negligence and intentional infliction of emotional distress claims) were dismissed as religious claims because they required an inquiry into the beliefs of the Pleasant Glade Assembly of God.[447] The church acknowledged that Laura's bodily injury claims were secular claims.[448]

After the decision of the court of appeals was rendered, the trial court issued a protective order prohibiting the plaintiffs from making any inquiry into the religious beliefs of the defendants, and ordered the parties to avoid speaking of any spiritual matters at

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[438] *HEB Ministries*, 235 S.W.3d at 668–69.
[439] Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 2 (Tex. 2008).
[440] *Id.* at 2.
[441] *See id.* at 2, 9.
[442] *See id.* at 3–4.
[443] *See id.* at 5.
[444] *Id.*
[445] *Id.*
[446] *Id.*
[447] *Id.* at 5–6.
[448] *Id.* at 7.

trial.[449] On appeal, defendants claimed that the judgment should be reversed on First Amendment grounds.[450] The court of appeals held the church was judicially estopped from making this argument based on its prior mandamus filing.[451] The Texas Supreme Court held judicial estoppel inapplicable because its allegedly inconsistent arguments were made in the same proceeding, not a prior proceeding, because the church gained no advantage from making the arguments it did, and, most importantly, because the church had consistently claimed a defense based on religious liberty grounds.[452]

Once judicial estoppel was out of the way, the court headed to the church's religious liberty claim. In the court's view, Laura Schubert's claim was "not about her physical injuries."[453] Her claim was essentially an intentional infliction of emotional distress claim, a claim that had already been dismissed.[454] Because the church espoused the practice of physically laying hands upon other congregants as part of its religious belief system, and because Laura's emotional injuries were entwined with the church's religious beliefs, the case had to be dismissed.[455]

The dissent of Chief Justice Jefferson, as expected, began with his assessment of the court's judicial estoppel analysis. He noted that because the court dismissed for a want of jurisdiction the judicial estoppel issue was beyond its mandate.[456] Second, the court's rejection of the judicial estoppel conclusion threatened judicial integrity, for it allowed a party to take inconsistent legal positions, suggesting a court was misled on at least one of those occasions.[457] And the court's insistence otherwise was formalistic.

On the religious liberty claim, the Chief Justice clarifies facts he believes were obfuscated by the court. First, Schubert claimed physical as well as emotional injuries.[458] Second, when she was initially physically restrained, congregants did so for two hours, not mere moments.[459] Third, Pleasant Glade did not ask that the court instruct the jury to segregate physical and emotional damages,

[449] *Id.* at 5.
[450] *Id.* at 6–7.
[451] *Id.* at 7.
[452] *Id.* at 6.
[453] *Id.* at 8.
[454] *Id.*
[455] *Id.* at 10–11.
[456] *Id.* at 14 (Jefferson, C.J., dissenting).
[457] *Id.*
[458] *Id.* at 15–16.
[459] *Id.* at 15.

which waived that issue on appeal.[460] As a legal matter, the court failed to explain how a submission of Schubert's emotional damages claims would inquire "into the truth or falsity of the religious beliefs" of the defendants.[461] Tort law allows an award for emotional damages "for [an] intentional tort[] involving [a] physical invasion[]."[462] Why this battery and false imprisonment case is analogized to an intentional infliction of emotional distress case is unclear to the dissent.[463]

The dissent does make clear that what the court is holding is that the First Amendment prohibits "claims for emotional damages arising from assault, battery, false imprisonment, or similar torts," a holding for which it can cite no other case in support.[464] The Chief Justice then cites a litany of cases stating that religious liberty does not exempt a defendant from a claim of physical assault.[465] Doing so in this case was not only making law, but making bad law.

IV. CONCLUSION

The jurisprudence of Chief Justice Jefferson follows the best traditions of judging. One of the nation's greatest judges, Benjamin N. Cardozo, gave the Storrs lectures at Yale Law School in 1921, published the same year, and entitled *The Nature of the Judicial Process*.[466] He was fifty-years-old, with a formidable reputation.[467] His goal was practical, to explain what judges do in making decisions.[468] The problem facing the judge, he wrote, was "in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die."[469] Two ways in which

[460] *Id.* at 15–16.

[461] *Id.* at 16.

[462] *Id.*

[463] *See id.* at 15–17.

[464] *Id.* at 17.

[465] *Id.*

[466] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 3, 6 (1921). A study of Cardozo's Storrs lectures is found in ANDREW L. KAUFMAN, CARDOZO 199–222 (1998).

[467] RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 80 fig. 1 (1990) (noting numbers of citations to opinions written by Cardozo and by other members of the New York Court of Appeals in 1914); *Benjamin N. Cardozo*, Judges, THE HIST. SOC'Y OF THE CTS. OF THE ST. OF N.Y., http://www.courts.state.ny.us/history/cardozo.htm (last visited May 15, 2012). Cardozo was born in 1870 in New York. *Id.*

[468] *See* CARDOZO, *supra* note 467, at 9–13 (explaining the process of judicial decision-making).

[469] *Id.* at 28.

principles were developed were history and philosophy.[470]

The opinions written by Chief Justice Jefferson meet both of Judge Cardozo's goals. They seek the "underlying principle" of the law and illuminate a path for that principle. Of course, much of the work of state appellate judges presently involves statutory interpretation, which Cardozo's lectures noted, but to which he paid relatively little attention.[471] Chief Justice Jefferson's opinions regularly interpret statutes and his explanations of the court's methodology and the social utility of such opinions is candid and considered.

Chief Justice Jefferson will turn forty-nine in summer 2012,[472] having already served on the Texas Supreme Court for eleven years.[473] He justifiably enjoys a strong reputation for sagacity and thoughtfulness. He is a judge in full.

[470] *Id.* at 30–31. The other two were custom, which Cardozo called the "method of tradition," and "the *mores* of the day," which he called the "method of sociology." *Id.*

[471] *See id.* at 69–70.

[472] *Biography*, *supra* note 3 (stating that Chief Justice Jefferson was born on July 22, 1963).

[473] *Chief Justice Wallace B. Jefferson*, *supra* note 1 (explaining that Jefferson was appointed to the court in March 2001 by Governor Perry).