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The Storm Between the Quiet: Tumult in the Texas Supreme Court, 1911-21

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THE STORM BETWEEN THE QUIET: TUMULT IN THE TEXAS SUPREME COURT, 1911-21

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I. INTRODUCTION

On January 5, 1911, less than two weeks before leaving office, Governor Thomas Campbell made two appointments to the three-member Supreme Court of Texas.[1] T. J. (Thomas Jefferson) Brown replaced the resigning Reuben R. Gaines as Chief Justice, and William F. Ramsey, a long-time friend of Campbell's, took Brown's seat as an associate justice of the court.[2] These two appointments were the first changes to the court in over eleven years.[3] Two months later, Frank Williams, the third member of the court, resigned.[4] The new governor, Oscar Colquitt, appointed Joseph B. Dibrell to replace Williams.[5]

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1. *See Gaines-Colquitt Controversy Denied*, DALLAS MORNING NEWS, Jan. 7, 1911, at 1 (observing that the appointments came "just at the expiration of the Campbell administration").

2. *Texas Supreme Court Changes are Made*, DALLAS MORNING NEWS, Jan. 6, 1911, at 1; *see also* J. H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 239, 268 (1917) (noting Brown's elevation to chief justice and Ramsey's appointment by Governor Campbell in 1911). The appointments were controversial because Governor-elect Oscar Colquitt was less than two weeks from inauguration, and Gaines's resignation was expected to be given after the inauguration. *See Gaines-Colquitt Controversy Denied*, DALLAS MORNING NEWS, Jan. 7, 1911, at 1 (reporting a statement of the wife of Justice Gaines denying reports of a rift with Colquitt); *Texas Supreme Court Changes are Made*, DALLAS MORNING NEWS, Jan. 6, 1911, at 1 (including subheadings stating "Much Political Gossip" followed by "This Because of Belief Colquitt, as Next Governor, Would Get to Make Appointments").

3. *See* J. H. DAVENPORT, THE HISTORY OF THE SUPREME COURT OF THE STATE OF TEXAS 238-39 (1917) (noting that Justice Frank A. Williams served with Chief Justice Gaines and Associate Justice T. J. Brown from Williams's appointment in May 1899 to January 1911, when Gaines resigned); *Texas Supreme Court Changes are Made*, DALLAS MORNING NEWS, Jan. 6, 1911, at 1 (noting that "[t]he resignation gives the State of Texas the first change upon its Supreme Court bench since May 1899"). In 1905, in *City of Austin v. Cahill*, 99 Tex. 172, 88 S.W. 542 (1905), a wholly different three-member court sat in judgment in place of Gaines, Brown, and Williams, who recused themselves because, as residents of Austin, they had an interest in the case.

4. DAVENPORT, *supra* note 3, at 268.

5. *Id.*

In the decade following Gaines's resignation, nine men[6] filled the three seats on the Texas Supreme Court, one of whom, Nelson Phillips, served both as associate and chief justice.[7] After the appointment of C. M. Cureton as chief justice in December 1921, the triumvirate of Cureton, Thomas Benton Greenwood, and William Pierson remained the sole members of the court until Greenwood's resignation on December 31, 1934, a period of over thirteen years.[8]

The Cureton and Gaines court eras are the longest in Texas history in which the composition of the court remained unchanged.[9]

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6. T. J. Brown, Frank A. Williams, William F. Ramsey, Joseph Dibrell, Nelson Phillips, William E. Hawkins, James E. Yantis, Thomas Greenwood, and William Pierson. *See* The Supreme Court of Texas, Court History - From 1836-1945, http://www.supreme.courts.state.tx.us/court/1876.asp (last visited Mar. 18, 2007) (listing all of the chief and associate justices of the Texas Supreme Court along with their terms of service from 1876 to 1945) (on file with the *St. Mary's Law Journal*).

7. *See Justice Phillips was Picturesque Figure*, 2 TEX. B.J. 133, 133 (1939) (noting Phillips's service as an associate justice from 1912 to 1915). In November 1921, Nelson Phillips resigned as chief justice, and C. M. Cureton was appointed in his place, taking office on December 2, 1921. *Judge Cureton Served Longest*, 3 TEX. B.J. 190, 194 (1940).

8. *See* The Supreme Court of Texas, Court History - From 1836-1945, http://www.supreme.courts.state.tx.us/court/1876.asp (last visited Mar. 18, 2007) (recording that Chief Justice C. M. Cureton served with Associate Justices Thomas B. Greenwood and William Pierson from December 1921 to December 1934) (on file with the *St. Mary's Law Journal*). In the nearly two decades between the 1891 reorganization of the judiciary in Texas and 1911, membership in the Supreme Court of Texas was remarkably stable. From the death of Chief Justice John W. Stayton on July 5, 1894, to Chief Justice Reuben Gaines's resignation on January 5, 1911, only four persons sat on the Texas Supreme Court: Gaines (1886-1911), Thomas Jefferson Brown (1893-1915), Leroy G. Denman (1894-1899), and Frank A. Williams (1899-1911). *See id.* (listing all of the chief and associate justices of the Texas Supreme Court from 1876 to 1945 and their terms of service) (on file with the *St. Mary's Law Journal*). *See generally* DAVENPORT, *supra* note 3, at 237-39 (stating that Justice Denman joined Justices Gaines and Brown in 1894 and was replaced by Justice Williams following Denman's resignation in 1899).

9. *See* The Supreme Court of Texas, Court History - From 1836-1945, http://www.supreme.courts.state.tx.us/court/1876.asp (last visited Mar. 18, 2007) (indicating, from the dates given, the average term of service on the Court outside of these periods of stability was roughly four years) (on file with the *St. Mary's Law Journal*). In comparison, the longest period of time in which the membership in the Supreme Court of the United States remained constant was eleven years, seven months, from February 1812 to September 1823. *See* Supreme Court of the United States, Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Mar. 18, 2007) (listing no appointments to the Court between the swearing-in of Justice Story on February 3, 1812 and Justice Smith Thompson's judicial oath on September 1, 1823) (on file with the *St. Mary's Law Journal*). This comparison is slightly inapt, however, for the Supreme Court of the United States has, for most of its history, consisted of nine members (and consisted of seven members between 1812-1823) rather than the three that constituted the Texas Supreme Court during this time. *Id.*

Those eras brace a period in which instability in personnel was the norm. The contrast is striking and may offer some insight into the court's failures from 1911-1921. One apparent consequence of this difference between the Cureton and Gaines courts and the court of 1911-1921 is the extent of the published disagreements by the latter. The Gaines and Cureton courts rarely publicly disagreed, while the members of the 1911-1921 courts seemed to take pleasure in published concurring and dissenting opinions. A second consequence of the instability in personnel is that the Texas Supreme Court from 1911-1921 is best known not for the law it made or for the opinions it wrote, but for its failure to decide cases. Although the supreme court's difficulty in clearing its docket existed before 1911, the number of outstanding cases exploded during the second decade of the twentieth century. The eventual result was the legislature's creation of the Committee of Judges in 1917 and the Commission of Appeals in 1918 in an attempt to reduce the multi-year backlog of cases.[10] That Commission, designed to exist for just two years, remained in existence until the expansion of the membership of the supreme court to nine in 1945.[11]

This Article assesses the place of the 1911-1921 court in Texas history. The issue that hovers over the entire period is prohibition. As early as the resignation of Chief Justice Gaines, the *Dallas Morning News* framed the issue of the composition of the Texas Supreme Court in terms of prohibition:

> It is now pointed out that by the presence of Judge Ramsey on the bench of the Supreme Court a majority of its membership is prohibition in sentiment, Judge Brown being a pro. It was understood that Chief Justice Gaines was an anti and that Associate Justice Williams was of the same inclination, which would have made a majority anti in its views.[12]

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10. Committee of Judges Act, 35th Leg., R.S., ch. 76, 1917 Tex. Gen. Laws 142; Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch. 81, 1918 Tex. Gen. Laws 171 (creating the Commission of Appeals).

11. Margaret Waters, Commission of Appeals, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/CC/mdc5.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*); *see also* Tex. S.J. Res. 8, 49th Leg., R.S., 1945 Tex. Gen. Laws 1043 (amending the Texas Constitution, article 5, section 2 to increase the Texas Supreme Court to nine members from three).

12. *Gaines-Colquitt Controversy Denied*, DALLAS MORNING NEWS, Jan. 7, 1911, at 1.

I will argue that the issue of statewide prohibition and the divergent views held on that issue by members of the Texas Supreme Court was the driving force behind the disharmony and dysfunctionality of the court during this decade. Statewide prohibition explains why elections of candidates to the court were so fiercely contested, explains how the court's membership was shaped, and suggests why the court was unable to properly perform its work.

II. THE GATHERING STORM

A. *A Time of Change*

The second decade of the twentieth century was a tumultuous time in both the United States and Texas. In the presidential election of 1912, a sitting president, William Howard Taft, found himself challenged not only by his Democratic opponent, Woodrow Wilson, but by his predecessor and former supporter, Theodore Roosevelt, for whom Taft had served as vice president.[13] Wilson's New Freedom platform emerged victorious over Roosevelt's New Nationalism and Taft's more conservative nostrums.[14] Wilson's victory gave the Democratic Party its first successful nominee for president in twenty years, albeit with merely 42% of the popular vote.[15] The United States entered World War I in 1917 on the side of the victorious Allies, but the resulting effort to create a League of Nations, making World War I the "war to end all wars," failed.[16]

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13. *See generally* JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT, AND DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004) (chronicling the events that led up to the presidential election of 1912 as well as its aftermath).

14. *See generally id.* (recounting T. Roosevelt's gradual adoption of the reformist "New Nationalism" ideal and the influence of Louis Brandeis on Wilson's "New Freedom" platform).

15. *See id.* at 238-39 (observing that Wilson's 6.3 million votes (out of roughly 14.8 million cast) and 435 electoral votes not only won the presidency, but also helped the Democrats "take control of the Senate for the first time in 20 years").

16. *See id.* at 273 (noting that the election of Warren G. Harding in 1920 signaled the end of any further attempts to ratify the Treaty of Versailles and of the United States' participation in the League of Nations). The historian most closely linked to Woodrow Wilson is Arthur S. Link, who wrote a multi-volume biography of Wilson, and who was chief editor of Wilson's papers. *See, e.g.*, ARTHUR S. LINK, WILSON: THE ROAD TO THE WHITE HOUSE (1947) (detailing Woodrow Wilson's early life to his rise to the presidency); ARTHUR S. LINK, WILSON: CONFUSIONS AND CRISES: 1915-1916 (1964) (chronicling the events leading up to United States' involvement in World War I); *see also* ARTHUR S. LINK, WOODROW WILSON: A BRIEF BIOGRAPHY (1963) (condensing the author's multi-volume biography of Wilson).

Exhausted Americans accepted Republican Warren G. Harding's invitation to "return to normalcy" by making him president in the 1920 election.[17]

Progressivism was alive and well during this decade. The first workmen's compensation statute was adopted in New York in 1910, and by the end of the decade, forty-two states had adopted some type of compensation statute.[18] Several states looked to protect working men by adopting maximum hour and minimum wage legislation.[19] One federal law protecting the working populace was the Keating-Owen Act, adopted in 1916, which prohibited the use of child labor in several industries.[20] Congress also created the Federal Reserve System,[21] the Federal Trade Commission,[22] and adopted the Clayton Act,[23] a companion act to the Sherman Antitrust Act.

The decade was also a time of constitutional ferment. Four amendments[24] to the Constitution were ratified, including amendments involving prohibition and women's suffrage, the great moral crusades of the early twentieth century. Other than the time of the

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17. *See* CHACE, *supra* note 13, at 238-39 (identifying Harding's appeal to voters: "not heroism but healing, not nostrums but normalcy").

18. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 127 (2004). Half of those states adopted a workmen's compensation statute between 1911 and 1913. ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877-1920, 205 (1967). The Supreme Court held constitutional New York's workmen's compensation statute in *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1916). Texas first adopted a workmen's compensation act in 1913. Act of Apr. 16, 1913, 33d Leg., R.S., ch. 179, 1913 Tex. Gen. Laws 429.

19. *See, e.g.*, Bunting v. Oregon, 243 U.S. 426, 439 (1917) (upholding Oregon's maximum hour law). Texas adopted a maximum hour law (no more than fifty-four hours per week nor ten hours per day) for women in 1913. *See* Act of Apr. 16, 1913, 33d Leg., R.S., ch. 175, 1913 Tex. Gen. Laws 421 (regulating the working hours of women living in cities containing more than 5,000 people).

20. Keating-Owen Act, ch. 432, § 1, 39 Stat. 675 (1916), *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918).

21. Federal Reserve Act, ch. 6, § 1, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221-522 (2006)).

22. Federal Trade Commission Act, ch. 331, § 1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-45 (2000)).

23. Clayton Act, ch. 323, § 1, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (2002)).

24. In 1913, Congress was granted the constitutional power to levy an income tax, U.S. CONST. amend. XVI, and the election of senators was given to the people and taken from state legislatures, U.S. CONST. amend. XVII. In 1919, the prohibition amendment was added, U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI, § 1, and in 1920, women were granted the right to vote, U.S. CONST. amend. XIX.

adoption of the Bill of Rights, the decade from 1911 to 1920 was the time of greatest constitutional change in American history.

B. *The State of Texas, 1910*

In 1910, Texas remained more rural than the nation as a whole: "Two thirds of the 3,896,542 inhabitants in 1910 lived 'in the open country' as contrasted with a national figure of 44[%]."[25] Authors of a 1916 book about Texas noted, "Agriculture and stock raising are the overwhelmingly predominant occupations, absorbing the energies of 60[%] of all the workers."[26] By contrast, less than 2[%] of the working population was employed in industrial work.[27] The major crop in this agrarian and ranching state was cotton, cultivated on 10 million acres of land.[28] Because of its reliability and popularity, cotton was planted on more acres than all other crops combined.[29] Although the risk of a failed cotton crop was slight, the price of cotton dropped during the first two decades of the twentieth century, and the yield per acre regularly declined.[30]

Although a rural state in 1910, Texas was changing. Between 1910 and 1920, population growth was nearly ten times as great in

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25. LEWIS L. GOULD, PROGRESSIVES AND PROHIBITIONISTS: TEXAS DEMOCRATS IN THE WILSON ERA 29 (1973).

26. H. Y. BENEDICT & JOHN A. LOMAX, THE BOOK OF TEXAS 111 (1916); *see also id.* at 113-14 (noting the dependence of the Texas workforce on agriculture as compared to the nation, and also noting the decreasing percentage of workers employed in agriculture in the thirty-year period). Mr. Benedict was named president of the University of Texas in 1927, a position he held until his death ten years later. Margaret C. Berry, Benedict, Harry Yandell, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/BB/fbe48.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*); Wayne Gard, Lomax, John Avery, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/LL/flo7.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*).

27. GOULD, *supra* note 25, at 31; *see also* BENEDICT & LOMAX, *supra* note 26, at 115 (listing occupational categories of Texans as of 1910).

28. GOULD, *supra* note 25, at 31; *see also* BENEDICT & LOMAX, *supra* note 26, at 134 (providing a table with annual cotton crop acreages).

29. GOULD, *supra* note 25, at 31-32.

30. *See* RANDOLPH B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE 325 (2003) (noting that one important reason for this decline was the boll weevil, which entered Texas through Mexico in 1894); T. R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 637 (1983) (noting that cotton farmers were hurt by World War I: "Two-thirds of the Texas cotton crop was exported to Europe in 1913" and the war cut off foreign markets, causing the price of cotton and cattle to fall in the middle of the decade).

the cities as it was in the country.[31] The combined populations of Houston, Dallas, and San Antonio reached 15% of the total Texas population by 1919.[32] As had occurred slightly earlier in much of the rest of the nation, Texas was transforming itself from a rural, agrarian state to an urban, industrial state.[33] As in any transformation, many Texans were discontented and dislocated. Even though the great protests of the populist era were past, one expression of discontent available to rural Texas residents was the great moral crusade of prohibition.[34]

The tenor of these times in Texas is found in two political events: the 1911 referendum to amend the Texas Constitution to allow statewide prohibition, and the Democratic primary election of 1912. Both events had a marked impact on the Texas Supreme Court during the next decade.

C. *Prohibition, Circa 1910*

The movement to control or even prohibit the manufacture and consumption of liquor in the United States first gained substantial momentum shortly before the Civil War: "Between 1851 and 1855 thirteen states adopted prohibition."[35] This temperance effort faded but returned even stronger by the 1880s. The prohibition movement was a moral crusade. Alcohol brought greater crime, disease, and poverty to the lower classes; led to increased corruption of government by the liquor industry; and led to great "misery and suffering."[36]

Nationally, nineteenth-century prohibition efforts peaked in the late 1880s: "The 1889 adoption of prohibition in the Dakotas ended the second prohibition wave. No other state went dry for the next

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31. GOULD, *supra* note 25, at 249.

32. *Id.* at 250; *see also* CAMPBELL, *supra* note 30, at 327 (noting that in 1890, "Texas had no urban area with a population of 40,000" but by 1920, each of the four major cities had populations exceeding 100,000).

33. *See generally* ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877-1920 (1967) (detailing the national movement); STEVEN J. DINER, A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA 102-24 (1998) (discussing rural Americans and the rise of corporate capitalism).

34. GOULD, *supra* note 25, at 34.

35. RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920 20 (1995).

36. *See* JAMES H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT: 1900-1920 9, 16 (1963).

eighteen years."[37] By 1900, only five states had statewide prohibition laws, although four others used licensing laws to regulate commerce in, and consumption of, liquor.[38]

The roots of prohibition ran deep in Texas history. Prohibition efforts began in Texas while it was a republic, and the first statewide dry group was created shortly after the end of the Civil War.[39] The post-Reconstruction Texas Constitution adopted in 1876 made the issue of the lawfulness of the saloon business a matter for local decision.[40] Ten years later, the Texas Prohibition party ran a slate of candidates for office.[41] Although a referendum in 1887 to amend the Texas Constitution to permit the statewide prohibition failed in the late 1880s,[42] by amendment in 1891 "local" option moved to a smaller scale, to subdivisions of a county.[43]

After the hiatus during the last decade of the nineteenth century, the temperance movement gathered momentum during the first decade of the twentieth century, particularly in the South. Four southern states became dry in 1907-1908,[44] and by 1910, the crusade against alcohol was in full swing in Texas.

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37. HAMM, *supra* note 35, at 124.

38. *See* TIMBERLAKE, *supra* note 36, at 149 (listing Maine, Kansas, North Dakota, New Hampshire, and Vermont as statewide dry states, and Pennsylvania, Tennessee, Idaho and Nevada as licensing states).

39. K. Austin Kerr, Prohibition, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/PP/vap1.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*).

40. *See* TEX. CONST. art. XVI, § 20 (amended 1891) (discussing the lawfulness of saloons).

41. *See* K. Austin Kerr, Prohibition, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/PP/vap1.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*).

42. GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 747 (1977).

43. TEX. CONST. art. XVI, § 20 (amended 1891); RALPH W. STEEN, TWENTIETH CENTURY TEXAS 207 (1942).

44. *See* HAMM, *supra* note 35, at 135 (listing Alabama, Georgia, Mississippi, and North Carolina). In addition, the new state of Oklahoma adopted statewide prohibition in September 1907. TIMBERLAKE, *supra* note 36, at 150. The path to statewide prohibition was circuitous, however. Professor Jack Blocker notes that "eight states rejected statewide prohibition during 1909-13," and that other states repealed prohibition during this time. *See* JACK S. BLOCKER, RETREAT FROM REFORM: THE PROHIBITION MOVEMENT IN THE UNITED STATES, 1890-1913 216 (1976) (noting Alabama repealed its prohibition law of 1907 in 1911 and Ohio permitted licensing in 1912, while Oklahoma and Maine barely retained prohibition at the same time).

Shortly after the turn of the century, the Texas Brewers Association was formed to limit the continued "drying" of Texas counties and municipalities. Later in the decade, the Retail Dealers Association joined the Brewers Association in its efforts. Those Associations were opposed by the Texas Local Option Association, formed in late 1903, and the Anti-Saloon League, which entered the fray in 1907.[45] In 1908, prohibitionists began a campaign urging the legislature to allow the people to vote to amend the Texas Constitution to permit statewide prohibition. A slight majority of Democratic primary voters that year urged the legislature to place the issue before the voters.[46] The legislature failed to do so at its legislative sessions in 1909 and 1910, but it adopted a number of laws protecting dry counties and municipalities from the depredations of liquor.[47]

In 1910, Democratic primary voters again requested the legislature place the issue of statewide prohibition on the ballot, this time by a larger margin than in 1908.[48] The Thirty-Second Legislature agreed to place a statewide prohibition amendment on the July 1911 ballot.

The gubernatorial election of 1910 had also revolved around the issue of prohibition. Four Democratic candidates sought to succeed outgoing Governor Campbell. Oscar Colquitt and Attorney General Robert V. Davidson were the "anti" candidates, and Cone Johnson and William Poindexter were the "dry" candidates. Al-

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45. GOULD, *supra* note 25, at 43-44. For more on the history of the Anti-Saloon League, see K. AUSTIN KERR, ORGANIZED FOR PROHIBITION: A NEW HISTORY OF THE ANTI-SALOON LEAGUE (1985).

46. *See* TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1911 64 (A. H. Belo & Co. ed., 1911) (tallying an unofficial vote of 145,130 to 141,441 in favor of submitting a constitutional amendment permitting statewide prohibition for referendum); GOULD, *supra* note 25, at 44 (noting that requirements made the drys' attempts to amend the constitution difficult).

47. *See* Act of Apr. 15, 1909, 31st Leg., 2d C.S., ch. 15, 1909 Tex. Gen. Laws 284 (making the occupation of selling liquor in a dry territory a felony); Act of Aug. 19, 1910, 31st Leg., 3d C.S., ch. 15, 1910 Tex. Gen. Laws 33 (restricting shipments of alcohol into local option territory); Act of Aug. 19, 1910, 31st Leg., 3d C.S., ch. 16, 1910 Tex. Gen. Laws 35 (regulating sale of liquor in local option territory); Act of Aug. 19, 1910, 31st Leg., 3d C.S., ch. 13, 1910 Tex. Gen. Laws 27 (designating as nuisances places where alcohol was sold in local option territory).

48. *See* TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1911 64 (A. H. Belo & Co. ed., 1911) (tallying unofficial vote of 155,224 to 126,212 in favor of submitting for referendum a constitutional amendment permitting statewide prohibition).

though there were slight differences within each pair,[49] the race was between "wet" and "dry" (or "anti" and "pro") political forces. Under the Terrell election law of 1905,[50] the nominee of a political party winning more than 100,000 votes in a general election (i.e., the Democratic Party) was determined by a primary election rather than by the party's nominating committee.[51] Colquitt received 147,740 votes in the primary, out of 359,875.[52] Despite receiving just 41% of the votes in the primary, Colquitt was the winner, for the Terrell law did not require a run-off between the top two candidates if no one received a majority of the votes. For prohibitionists, the loss of the governor's race was tempered by the increased popular Democratic majority favoring a referendum on statewide prohibition.

D. *The Prohibition Referendum of 1911*

The prohibition campaign began in the spring of 1911. Governor Colquitt spearheaded the campaign against statewide prohibition. The "anti" campaign officially began at a gathering in Fort Worth.[53] One of the speakers joining Colquitt on stage was Nelson Phillips, a lawyer and former district judge who a year later would be appointed by Colquitt to the Texas Supreme Court.[54] Other

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49. *See id.* at 47-48 (noting the differences among the four main candidates). Colquitt was opposed to a referendum on statewide prohibition unless two-thirds of the legislative districts favored such a vote, while Davidson was an "anti" who trumpeted the right of the people to vote on statewide prohibition if they so voted in the 1910 primary. *Id.* Cone Johnson proposed statewide prohibition by constitutional amendment, or, if necessary, by legislation. *Id.* at 47. William Poindexter concluded that a statutory ban was unconstitutional, so a constitutional amendment was necessary, but suggested some legislative action to regulate the liquor trade if the constitutional amendment failed. *Id.*

50. Act of May 15, 1905, 29th Leg., 1st C.S., ch. 11, 1905 Tex. Gen. Laws 520; *see* RALPH W. STEEN, TWENTIETH CENTURY TEXAS 331 (1942) (noting the initial Terrell law was adopted in 1903). Steen notes the law was "radically changed in 1905." *Id.* at 332. *See also* O. Douglas Weeks, *The Texas Direct Primary System*, 13 SW. SOC. SCI. Q. 95, 96 (1932) (noting the history of election laws affecting Democratic primaries in Texas).

51. *See* O. Douglas Weeks, *The Texas Direct Primary System*, 13 SW. SOC. SCI. Q. 95, 96 (1932) (noting the history of election laws affecting Democratic primaries in Texas).

52. MIKE KINGSTON ET AL., THE TEXAS ALMANAC'S POLITICAL HISTORY OF TEXAS 203 (1992).

53. *State Anti-Pros Rally at Fort Worth*, DALLAS MORNING NEWS, June 6, 1911, at 1.

54. *See id.* (noting that Phillips spoke at the rally); *Colquitt to Address Antis*, DALLAS MORNING NEWS, May 19, 1911, at 16 (listing Nelson Phillips among the scheduled speakers); *T.N. Jones Addresses Fort Worth Audience*, DALLAS MORNING NEWS, July 19, 1911, at 11 (noting Jones's comments before a prohibitionist crowd that "Mr. Ousley and Nelson

"antis" included former Attorney General Charles K. Bell[55] and prominent lawyer Jacob F. Wolters.[56] Those supporting the statewide prohibition amendment included former Governor Campbell, Congressman and future Senator Morris Sheppard, Thomas B. Love, a political insider and early supporter of Woodrow Wilson for President, and University of Texas Law School Dean John C. Townes.

Prohibitionists created the Statewide Prohibition Amendment Association to generate votes for the prohibition cause. The wets also created an organization urging a "no" vote on statewide prohibition, prosaically called the Anti-Statewide Prohibition Association. Drys argued that the amendment did not bar consumption of alcohol; it would merely end liquor traffic and the manufacture of liquor for sale.[57] Wets spoke rarely about alcohol and often about the principle of local government.[58]

The vote to add a statewide prohibition amendment to the Texas Constitution failed by 6,000 votes.[59] Over 468,000 votes were cast, which at the time was the largest turnout of voters in any election in Texas history.[60] Drys were outraged at the defeat. Shortly after the election, drys met in Fort Worth and resolved to request the legislature open an investigation into the role of the liquor associa-

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Phillips are my friends, but they have been misled and deceived by the liquor traffic of this State," and warning "they will soon come to see a light").

55. *See* Anne W. Hooker, Bell, Charles Keith, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/BB/fbe34.html (last visited Mar. 18, 2007) (noting Bell's participation in the Anti-State-Wide Prohibition Association) (on file with the *St. Mary's Law Journal*).

56. David S. Walkup, Wolters, Jacob Franklin, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/WW/fwo5.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*).

57. RALPH W. STEEN, TWENTIETH CENTURY TEXAS 218 (1942).

58. *Id.* at 218-19.

59. TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1912 45 (A.H. Belo & Co. ed., 1912). The vote was 231,096 for statewide prohibition (49.33%) and 237,393 against (50.67%), a difference of 6,297. *Id.*

60. *Id.* By comparison, the number of voters in the Democratic Party primary in the race for governor the previous year totaled slightly less than 360,000, approximately 78% of the prohibition amount. MIKE KINGSTON ET AL., THE TEXAS ALMANAC'S POLITICAL HISTORY OF TEXAS 203 (1992). Voting in general elections was generally less than in the Democratic primary. For example, in the general election in 1910, the *Dallas Morning News* noted that "[o]f the 620,000 qualified voters 358,000 voted in the Democratic primaries in last July. Only 230,000 voters of all parties voted in the general election on Tuesday." *See Election Estimates Need No Change*, DALLAS MORNING NEWS, Nov. 10, 1910, at 1.

tions in the referendum. Prohibitionists were suspicious that the liquor interests had unlawfully paid the poll taxes of minority voters who then voted wet. They were also convinced that the liquor interests had unlawfully spent money to influence the election. Although no prohibitionist took up Colquitt's offer to pay a $50 reward to anyone who brought information leading to the arrest and conviction of any person violating the poll tax law, both the Texas House and Senate investigated alleged irregularities in the election.[61] The five-man committee in the senate included four prohibitionists and used the services of two lawyers, Cullen Thomas[62] and future supreme court Justice William E. Hawkins, both of whom volunteered their time.[63] The four dry members concluded that the money used to defeat the statewide prohibition amendment unlawfully came from the brewers and liquor dealers, and that some of that money was used to pay the poll taxes of minority voters, who then voted against statewide prohibition.[64] A minority report was written by the lone wet on the investigating committee, Senator H.B. Terrell.[65] Terrell complained that he did not have the services of a lawyer to aid him and was denied the opportunity to examine witnesses.[66] He concluded no evidence of election corruption existed.[67] Instead, Terrell concluded the investigation existed solely for the future political advantage of prohibitionists.[68] In the heated campaign for governor in 1912, the prohibitionist campaign again raised the thinly-veiled racist claim

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61. STEEN, *supra* note 57, at 221.

62. Robert Bruce Blake, Thomas, Cullen Fleming, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/TT/fth6.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*).

63. STEEN, *supra* note 57, at 222. The Texas House also created an investigating committee. *Id.* Hawkins testified before the House investigating committee about voting irregularities in Brownsville. *See Brief Session Held by House Committee*, DALLAS MORNING NEWS, Aug. 23, 1911, at 2 (reporting Hawkins's testimony regarding rumors of voting irregularities, including improperly naturalized people being allowed to vote and the probability of "extensive fraud in the payment of poll tax receipts").

64. STEEN, *supra* note 57, at 222-23.

65. *Senate Committee Denies Antis Counsel*, DALLAS MORNING NEWS, Aug. 16, 1911, at 3.

66. *See id.* (noting request by Senator Terrell and rejection of request); *Anti Representation Debated in Senate*, DALLAS MORNING NEWS, Aug. 17, 1911, at 3 (noting Terrell's reintroduction of his resolution for the appointment of an attorney in the committee representing the anti-prohibitionists).

67. STEEN, *supra* note 57, at 223.

68. *Id.*

that Negro and Mexican voters were bribed or duped into voting against the proposition,[69] and declared the brewers had illegally funded the anti-prohibition campaign.[70]

During the legislature's investigation of the anti-prohibitionist campaign, Jacob Wolters, the manager of the anti-statewide prohibition campaign, was called to testify before the House Investigating Committee.[71] He refused to answer some questions and was held in contempt.[72] Accompanying him to the Texas Court of Criminal Appeals was Nelson Phillips.[73] Phillips was also present as the House Investigating Committee questioned others supporting the anti-statewide prohibition effort,[74] and was counsel of record for Wolters when his contempt citation was heard by the court of criminal appeals.[75]

In addition to testifying before the House Investigating Committee and serving as voluntary counsel to the Senate Investigating Committee, Hawkins burnished his prohibitionist credentials by urging prohibitionists at a meeting in September to continue the fight to prevent the Democratic Party from being controlled by the

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69. GOULD, *supra* note 25, at 90.

70. *See* 1 ANTI-SALOON LEAGUE, BREWERS AND TEXAS POLITICS 221, 609 (1916) (expounding on the belief that minority voters were used to aid the "wet" cause); STEEN, *supra* note 57, at 211, 219-20 (noting beliefs of prohibitionists). Four years after the election, the brewers pled guilty to violating the state's anti-trust laws and misusing assets in electoral affairs. *Id.* The charters of several breweries were forfeited and they were fined a total of $281,000. *Id.* at 227. The evidence gathered by Attorney General Benjamin Looney in his investigation of the breweries was published, in two volumes, by the Anti-Saloon League in 1916. *See generally* ANTI-SALOON LEAGUE, BREWERS AND TEXAS POLITICS (2 vols., 1916) (reporting the findings of the investigation). By 1916, of course, the anger of many Americans regarding German actions in World War I adversely affected the largely German brewers in Texas. In 1918, while discussing and supporting the federal Espionage Act, Texas Bar Association President C. K. Lee wrote, "[s]urely we have full reason to hate the Huns who have made this kind of legislation necessary." C. K. Lee, *President's Annual Address*, 37 PROC. TEX. B. ASS'N 15, 17 (1918).

71. *Brief Session Held by House Committee*, DALLAS MORNING NEWS, Aug. 23, 1911, at 2; *Held in Contempt, Wolters Makes Bond*, DALLAS MORNING NEWS, Aug. 26, 1911, at 1.

72. *Held in Contempt, Wolters Makes Bond*, DALLAS MORNING NEWS, Aug. 26, 1911, at 1.

73. *Id.*

74. *Brief Session Held by House Committee*, DALLAS MORNING NEWS, Aug. 23, 1911, at 2.

75. *Ex parte* Wolters, 64 Tex. Crim. 238, 144 S.W. 531, 533 (1912). Wolters's petition for a writ of habeas corpus was granted. *Id.*

liquor lobby.[76] In his letter, he urged the people of Texas to "elect a State-wide prohibitionist for Governor" and noted that prohibitionists needed the support of those who did not vote for statewide prohibition but "who are opposed to the domination of the liquor interests and saloons in our politics."[77]

Nelson Phillips and William Hawkins were on opposite sides of the statewide prohibition amendment, and each was actively involved in both the campaign and its aftermath.[78] They would compete in 1912 for separate seats on the Texas Supreme Court.[79]

E. *The Election of 1912*

1. The Race for Governor

By 1910, the Texas Democratic Party had defeated the Populist Party's challenge to its power and was the state's only major political party.[80] Like American presidents, Texas governors customarily served two terms in office, although such terms were for two years rather than four.[81] Since Oran M. Roberts's election in 1878, each of the eight governors before Colquitt served two terms.[82] Prohibitionists were unwilling to accede to this custom, such was their anger toward the sitting governor.[83] Colquitt was so despised by prohibitionists for leading the defeat of the statewide prohibition amendment that he would need to defeat a prohibitionist candidate in the Democratic primary to serve a second term.[84]

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76. *See* Tom Finty Jr., *To Be No Contest; Name No Ticket*, DALLAS MORNING NEWS, Sept. 17, 1911, at 1 (noting Hawkins's role in a mass meeting of Democratic prohibitionists).

77. *Id.*

78. *Id.*

79. M.T. Lively et al., Advertisement, *To the Democratic Voters of Texas*, DALLAS MORNING NEWS, July 24, 1912, at 5.

80. *See* Nancy Beck Young, Democratic Party, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/DD/wad1.html (last visited Mar. 18, 2007) (noting that between 1836 and 1952, the Texas Democratic party was the state's main political party) (on file with the *St. Mary's Law Journal*).

81. TEX. CONST. art. IV, § 4 (amended 1972).

82. *See* Legislative Reference Library of Texas, Governors of Texas, 1846–Present, http://www.lrl.state.tx.us/legis/leaders/govbio.html (last visited Mar. 18, 2007) (listing past governors and their terms in office) (on file with the *St. Mary's Law Journal*).

83. TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1911 47-48 (A. H. Belo & Co. ed., 1911).

84. CAMPBELL, *supra* note 30, at 346; *see also* Tom Finty Jr., *To Be No Contest; Name No Ticket*, DALLAS MORNING NEWS, Sept. 17, 1911, at 1 (noting the likelihood that Su-

The prohibitionists chose William F. Ramsey as their candidate.[85] As noted above, Ramsey had been appointed to the Texas Supreme Court by his friend and outgoing Governor Campbell, a pro, in January 1911.[86] Before joining the supreme court, Ramsey had served on the Texas Court of Criminal Appeals, making him the only person to serve on both of Texas's highest courts.[87] Ramsey announced his entry into the gubernatorial race on September 19, 1911, just days after the mass meeting of Democratic prohibitionists.[88] Ramsey did not, however, resign from the supreme court until March 25, 1912.[89] He began his campaign at the end of the month. Ramsey opened his gubernatorial race with a personal attack on Colquitt,[90] and the race was bitterly contested.[91]

Ramsey immediately injected prohibition into the campaign, for as Lewis Gould notes, "[p]rohibition was the only serious issue separating the gubernatorial rivals."[92] Even this difference seemed exaggerated. The 1911 Texas Bar Association annual meeting was held in Waco on July 4th and 5th, less than three weeks before the prohibition referendum and only two months before Ramsey declared his candidacy.[93] The formal dinner of the Bar Association on July 5th ended with several toasts. One of the persons sched-

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preme Court Justice William Ramsey was to announce gubernatorial ambitions within a few days).

85. Tom Finty Jr., *To Be No Contest; Name No Ticket*, DALLAS MORNING NEWS, Sept. 17, 1911, at 1.

86. *Id.*

87. *See* Brian Hart, Ramsey, William Franklin, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/RR/fra27.html (last visited Mar. 18, 2007) (noting that Ramsey began serving on the Texas Court of Criminal Appeals in 1908) (on file with the *St. Mary's Law Journal*).

88. *See Announces Candidacy for Governor*, DALLAS MORNING NEWS, Sept. 20, 1911, at 1 (announcing Ramsey's intention to run for Governor of Texas); *Ramsey Outlines Views on Issues*, DALLAS MORNING NEWS, Oct. 15, 1911, at 28 (quoting one of Ramsey's addresses to the Democratic party).

89. *Ramsey Resigns Place on Bench*, DALLAS MORNING NEWS, Mar. 26, 1912, at 1; *Ramsey's Judgeship and Candidacy*, DALLAS MORNING NEWS, Jan. 21, 1912, § 3, at 6.

90. *See Poor Politics*, SAN ANTONIO LIGHT, Apr. 5, 1912, at 4 (noting that "[h]is address, from end to end, was filled with personal abuse of Gov. O. B. Colquitt"); CAMPBELL, *supra* note 30, at 346 (reporting that Ramsey's campaign harshly attacked Colquitt's performance as governor).

91. *Judge Ramsey Makes Speech at Hillsboro*, DALLAS MORNING NEWS, Apr. 7, 1912, at 1.

92. GOULD, *supra* note 25, at 90.

93. *See generally* 30 PROC. TEX. B. ASS'N 1 (1911) (recording the 1911 Texas Bar Association meeting); *Announces Candidacy for Governor*, DALLAS MORNING NEWS, Sept.

uled to make a toast was Joseph Dibrell, the newest member of the Texas Supreme Court.[94] Dibrell left Waco before the closing dinner, however, and William Ramsey was asked to speak in Dibrell's stead.[95] At the end of his brief toast, Ramsey, noting his service on the court of criminal appeals, joked, "At least, I have done some good for my country. I have decreed that we may play baseball on Sunday, and that a club such as this may furnish to its own members such intoxicating liquors as may be convenient."[96] Coming just two weeks before the exhaustive and divisive statewide prohibition vote, Ramsey's language supporting private drinking clubs was careless at best and callous at worst.[97] The Colquitt campaign was able to use Ramsey's public record on prohibition against him, and other missteps by Ramsey aided Colquitt's campaign. Colquitt won the 1912 gubernatorial primary by nearly 40,000 votes.[98]

2. The Supreme Court Elections, 1912

The resignations of Gaines and Ramsey and the elevation of Brown to chief justice, all since the general election of 1910, meant that each of the three seats on the Texas Supreme Court was on the Democratic primary ballot in July 1912.[99] Ordinarily, the vote of

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20, 1911, at 1 (announcing Ramsey's intention to run for Governor of Texas as of September 19, 1911).

94. *See* Allan Sanford, *The Toastmaster (Introduction)*, 30 PROC. TEX. B. ASS'N 237, 237 (1911) (claiming that Dibrell would have given the "From the Bar to the Bench" toast had he not had to leave the session early); DAVENPORT, *supra* note 3, at 268 (noting that Dibrell began serving as a Texas Supreme Court associate justice beginning in 1911).

95. Sanford, *supra* note 94, at 237.

96. William Ramsey, *From the Bar to the Bench*, 30 PROC. TEX. B. ASS'N 237, 240 (1911). The cases referenced by Ramsey were *Ex parte Roquemore*, 60 Tex. Crim. 282, 131 S.W. 1101 (1910) (holding that the law prohibiting places of public amusement from operating on Sunday did not prohibit playing of baseball games) and *State v. Duke*, 104 Tex. 355, 137 S.W. 654 (1911) (declaring that the sale of intoxicating liquors in a private club was not included within the law barring a person from engaging in the occupation or business of selling intoxicating liquors).

97. *See* Ramsey, *supra* note 96, at 237-40 (relating Ramsey's statements in support of private drinking clubs).

98. *See* KINGSTON ET AL., *supra* note 52, at 203 (reporting that Colquitt received 219,808 votes to Ramsey's 180,237 votes).

99. *See* TEX. CONST. art. V, § 2 (amended 1891) (stating the requirements for election of members to the Supreme Court of Texas); *Discusses Plan for Election of Judges*, DALLAS MORNING NEWS, Oct. 15, 1911, at 34 (decrying, in a letter to the editor, the possibility of complete change in court personnel in the 1912 election); *Three Supreme Court Places to Be Filled*, DALLAS MORNING NEWS, Feb. 3, 1912, at 7 (noting that the Texas Constitution requires that appointed judges must stand for election at the next general election).

the people was a mere ratification of the governor's appointment. As Chief Justice T. J. Brown noted during a toast to the Texas Bar Association shortly before the elections in 1912, "Since the organization of the court in 1846 to this time but two judges of the Supreme Court have been defeated for re-election. If the offices had continued to be filled by appointment I believe that would not have been the case."[100] However, the rancor occasioned by the fight concerning prohibition had seeped into the supreme court, and the routine re-election of justices was absent in 1912. Brown, reportedly a pro and a member of the court since 1893, was unopposed in his effort to win election as chief justice. A comment from J. W. Terry at the 1912 annual meeting of the Texas Bar Association epitomized Brown's reputation within the legal community: "Among the members of that great tribunal, in my humble opinion, there have been none who have exceeded in ability and devotion to duty our honored Chief Justice [Brown], who is with us tonight, and his immediate predecessor, Chief Justice Gaines."[101] Unlike Brown, however, each of the two sitting associate justices found himself in a contested election, and prohibition was the reason for these contested races.

Ramsey's decision in September to run for governor led to a scramble by several men to announce their intention to run for Ramsey's seat.[102] Just one day after Ramsey announced he was running for Governor, Second Court of Civil Appeals Judge Ocie Speer[103] announced he would run to replace Ramsey.[104] At the

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100. T. J. Brown, *Our Supreme Court*, 31 PROC. TEX. B. ASS'N 251, 253 (1912). *See* JAMES D. LYNCH, THE BENCH AND BAR OF TEXAS 296, 313 (1885) (noting that Chief Justice Robert S. Gould, who was appointed to the court in 1881, lost the nomination to Asa Willie in 1882). It appears Alexander Walker was denied the nomination by the Democratic Party in 1899 after having been appointed to the Supreme Court in March of that year.

101. J. W. Terry, *Proceedings at Banquet*, 31 PROC. TEX. B. ASS'N 249, 250-51 (1912).

102. *See Candidate for Supreme Bench*, DALLAS MORNING NEWS, Sept. 21, 1911, at 9 (announcing Ocie Speer's intention to run for Supreme Court Justice); *For Supreme Bench*, DALLAS MORNING NEWS, Oct. 14, 1911, at 8 (announcing that John C. Townes intended to run for a position on the Texas Supreme Court); *Judge R.A. Pleasants Announces Candidacy*, DALLAS MORNING NEWS, Nov. 21, 1911, at 3 (announcing R. A. Pleasants's intent to run for Supreme Court Justice).

103. Nowlin Randolph, Speer, Ocie, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/SS/fsp6.html (last visited Nov. 19, 2006) (on file with the *St. Mary's Law Journal*). *See generally Judge Ocie Speer*, 8 TEX. B.J. 209 (1945) (discussing the life of Judge Ocie Speer); *Ocie Speer: 67 Years at the Bar*, 20 TEX. B.J. 517

end of the month, Speer's colleague on the Second Court of Civil Appeals, Sam J. Hunter, announced he would also run for Ramsey's seat.[105] In October, John C. Townes, Dean of the University of Texas Law School, announced his candidacy,[106] and in mid-November, First Court of Civil Appeals Judge R. A. Pleasants announced he would run to succeed Ramsey.[107]

When Ramsey finally resigned from the court on March 25th, Colquitt immediately appointed Nelson Phillips as his successor.[108] Phillips's appointment was a clear rebuke to prohibitionists, for Phillips had been intimately involved in the anti cause in the 1911 prohibition referendum and defended anti leader Jacob Wolters from senatorial contempt charges. Beginning in September 1911, the prohibitionists had worked to find a "pro" to challenge Joseph Dibrell, appointed by Colquitt to the court in April 1911.[109] The announced candidates for the seat occupied by Phillips were well regarded. Townes was a devout Baptist and adamant prohibitionist.[110] He was also highly regarded by his former students, who urged him to run for office.[111] Pleasants had been an appellate court judge since 1899, succeeding his father.[112] Speer, an appel-

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(1957) (recognizing Speer's sixty-seventh year as an attorney and providing some background on his life); *Memorials, Ocie Speer*, 22 TEX. B.J. 545 (1959) (memorializing Speer's life via an obituary).

104. *Candidate for Supreme Bench*, DALLAS MORNING NEWS, Sept. 21, 1911, at 9.

105. *See Would Succeed Ramsey*, DALLAS MORNING NEWS, Oct. 1, 1911, at 10 (announcing that Hunter would run for supreme court justice and noting through Hunter's announcement that he served on the Court of Civil Appeals for the Second District). Hunter later changed his mind and ran for a seat in the legislature. *Candidacies for 33rd Legislature*, DALLAS MORNING NEWS, June 23, 1912, at 3.

106. *For Supreme Bench*, DALLAS MORNING NEWS, Oct. 14, 1911, at 8.

107. *Judge R.A. Pleasants Announces Candidacy*, DALLAS MORNING NEWS, Nov. 21, 1911, at 3; *Official List of Candidates is Announced*, SAN ANTONIO LIGHT, June 14, 1912, at 9.

108. *Ramsey Resigns Place on Bench*, DALLAS MORNING NEWS, Mar. 26, 1912, at 1.

109. *See Many Politicians Gather in Dallas*, DALLAS MORNING NEWS, Oct. 28, 1911, at 5 (noting "[t]he pros appear to want to have a contestant against Judge Dibrell").

110. *See, e.g.*, Letter from John C. Townes to Editor of The Statesman (July 28, 1911), *available at* John C. Townes Papers, Box I114, Folder 11, University of Texas School of Law Archives (excoriating editor on prohibition); J.C. Towns [sic], *The New Prohibition Laws*, *available at* John C. Townes Papers, Box I114, Folder 12, University of Texas School of Law Archives (advocating for enforcement of prohibition at a local level).

111. *See generally* John C. Townes Papers, Box I114, Folder 12, University of Texas School of Law Archives (containing papers noting support of Townes by former students).

112. *See generally* George W. Graves, *Galveston's Chief Justice Retires*, 2 TEX. B.J. 9 (1939) (discussing the appointment of Robert A. Pleasants as justice).

late judge since 1902, was a progressive who strongly supported women's suffrage.[113] K. R. Craig was a lawyer in Dallas whose partner years earlier was T. J. Brown. His minimalist campaign was based on his status as an outsider.[114]

Joining Speer in announcing early for the court was prohibitionist William E. Hawkins.[115] Hawkins's announcement on September 21 was made less than a week after the contentious mass meeting of prohibitionists concerning whether to challenge the results of the prohibition referendum. At that meeting, Hawkins demanded that prohibitionists fight to keep the Democratic Party out of the hands of the liquor interests, and when his amendment to require the Democratic committee to report back to another mass meeting was defeated, said, "This won't be the first time I've ever gone down in defeat when I was right."[116] Further, the announcement came just one day after his statement to the *Dallas Morning News* urging the people of Texas to "elect a State-wide prohibitionist for Governor."[117]

Hawkins's announcement carefully avoided noting which seat he would seek, stating, "I will be a candidate before the next State Democratic primary for nomination for the office of Associate Justice of the Supreme Court of Texas."[118] He further noted, "Believing that this high judicial office should be kept free from factional and machine politics, I make this announcement simply as a Democrat upon my own initiative."[119] Although Ramsey had already announced he would abandon his court seat at some point while

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113. Nowlin Randolph, Ocie Speer, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/SS/fsp6.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*). *See generally Judge Ocie Speer*, 8 TEX. B.J. 209 (1945) (describing the career of Ocie Speer); *Memorial, Ocie Speer*, 22 TEX. B.J. 545, 545-46 (1959) (memorializing Ocie Speer); *Woman's Suffrage Bill is Indorsed Here*, DALLAS MORNING NEWS, Feb. 20, 1915, at 9 (noting Speer's brief remarks in support of suffrage as an inalienable right); *Ocie Speer: 67 Years at the Bar*, 20 TEX. B.J. 517 (1957) (describing Speer's career as one of Texas's leading lawyers).

114. *See* DALLAS MORNING NEWS, July 26, 1912, at 4 (asserting his qualification to office, and noting he "has had neither a campaign fund nor a campaign committee").

115. *W.E. Hawkins Candidate*, DALLAS MORNING NEWS, Sept. 23, 1911, at 8.

116. *See* Tom Finty Jr., *To Be No Contest; Name No Ticket*, DALLAS MORNING NEWS, Sept. 17, 1911, at 1 (discussing a mass meeting regarding prohibition).

117. *See Hawkins Explains Position*, DALLAS MORNING NEWS, Sept. 20, 1911, at 5 (addressing confusion which arose during the Dallas mass meeting the prior week).

118. *W.E. Hawkins Candidate*, DALLAS MORNING NEWS, Sept. 23, 1911, at 8.

119. *Id.*

running for Governor, Hawkins had not committed to seeking that seat. Shortly after Dean Townes announced he would run for Ramsey's seat, joining both Speer and Hunter as candidates for that position, Hawkins announced for purposes of clarification that he was seeking the seat held by Joseph Dibrell.[120] He then followed that statement with another at the end of October, noting that he was the only announced candidate for Dibrell's seat other than the incumbent.[121] Hawkins stated:

> "it is but fair to say that I learn two others have the matter of announcing for this office under advisement and that they may decide to enter the race. That would almost inevitably result in the nomination of the incumbent. I have believed and still hope that I will have an open field against Judge Dibrell."[122]

Hawkins's announcement urging others to stay out of the race appears designed to promote him as the candidate around whom pros could rally. One lawyer writing to the *Dallas Morning News* implied this was the case, for he noted that because all three seats were up for election, "there is great inducement to political combinations," and "the pushing man may secure undue prominence over the abler but more modest candidate and an unseemly political scramble for a high judicial office may take place."[123]

> [This] danger of a political scramble for a judicial place is necessarily increased where there is some exciting political issue dominating the minds of the voters, for then a candidate's real qualifications are not so much considered as the extent of his partisan adhesion to one or the other side of the issue.[124]

That issue was prohibition; as the letter writer noted: "A candidate who bases his claims to a high judicial position upon his record as a prohibitionist or anti-prohibitionist is unfit to fill the place."[125] Despite this admonition, the pros had decided that, because Dibrell was an appointee of Colquitt's, he was an anti and

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120. *See Hawkins Makes Statement*, DALLAS MORNING NEWS, Oct. 18, 1911, at 6 (announcing that he desires the seat occupied by Dibrell).

121. *See Seeks Judge Dibrell's Place*, DALLAS MORNING NEWS, Oct. 31, 1911, at 5 (quoting Judge W. E. Hawkins) (discussing Hawkins's candidacy to unseat Dibrell).

122. *Id.*

123. Thomas H. Franklin, Letter to the Editor, *Discusses Plan for Election of Judges*, DALLAS MORNING NEWS, Oct. 15, 1911, at 34.

124. *Id.*

125. *Id.*

needed to be defeated. The only way a pro could win, Hawkins implied, was if the race was a two-man race. Making sure that the discerning reader understood that Hawkins was a pro, his brother A.S. Hawkins noted to the *Dallas Morning News* in mid-October 1911 that although he was not a candidate for lieutenant governor, he would speak in support of the candidacies of his brother and Ramsey.[126]

Hawkins thus became the first primary challenger to a sitting supreme court justice. He also made it clear that he intended to *run* for the office: "It is my purpose to make an active canvass of the State, and in doing so I will urge various important reforms in laws governing trials in civil and criminal cases."[127] This was contrary to custom, as nearly all judicial candidates (and lawyers) saw active campaigning as breaching the divide between law and politics.[128]

Before joining the prohibitionist cause, Hawkins practiced law in Dallas and then served as First Assistant Attorney General for the state of Texas from 1905-1909.[129] When Thomas B. Love resigned as Commissioner of Insurance and Banking at the end of 1909, Hawkins was appointed by Governor Campbell as Love's replacement. Within months, Hawkins had earned the ire of Campbell. When the State Fire Rating Board (Board) acted to suspend a rate increase in fire insurance, Hawkins claimed the Board was acting extralegally.[130] Governor Campbell supported the Board's decision and demanded Hawkins's resignation.[131] Although Hawkins

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126. A.S. Hawkins, Letter to the Editor, *Hawkins Not Candidate*, DALLAS MORNING NEWS, Oct. 14, 1911, at 1.

127. *Seeks Judge Dibrell's Place*, DALLAS MORNING NEWS, Oct. 31, 1911, at 5.

128. *See, e.g.*, *Judge Yantis Quits Supreme Court Bench*, DALLAS MORNING NEWS, Mar. 3, 1918, at 4 (quoting the resignation statement of Justice J.E. Yantis, "I was nominated in the Democratic primary to this position, without making a single speech or giving a line of interviews to any newspaper on [sic] my behalf"). Yantis was challenged for the nomination in the 1916 Democratic Party primary. *See* F.M. Etheridge, Letter to the Editor, *Scores Jenkins and Hall for Campaigning*, DALLAS MORNING NEWS, July 21, 1916, at 11 (alleging opposing candidate, R.W. Hall, had violated norms of judicial office in campaigning for a seat in the 1916 Democratic Party primary). The letter was written by a lawyer.

129. Hawkins, William E., The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/HH/fhabb.html (last visited Mar. 18, 2007) (on file with the *St. Mary's Law Journal*).

130. *Texas Governor Defied: Insurance Commissioner's Resignation Demanded After Clash Over Fire Rates*, N.Y. TIMES, June 14, 1910, at 1.

131. *Id.*

rejected the Governor's demand, he resigned under pressure shortly thereafter.[132] Hawkins then made the curious decision to practice law with Frank Pierce in Brownsville, a part of the state in which Hawkins had not lived before.[133]

Thus, both of Colquitt's appointees to the Texas Supreme Court were opposed by candidates who had supported the statewide prohibition movement in 1911. Phillips, appointed to the court only four months before the primary,[134] faced a formidable array of candidates, which appears to have aided him. Phillips received 101,875 of 336,260 votes cast,[135] just 30% of the total. Despite this relatively poor showing, because he received more votes than any of the other four candidates, he won the primary under the Terrell primary election law rules.[136] The wide array of candidates for the seat held by Phillips also appears to have helped him by reducing the number of votes in his election race. T. J. Brown, running unopposed for the position of chief justice, polled 378,173 votes,[137] 41,913 more than cast in the race for the seat held by Phillips.

Hawkins ran as a "progressive" Democrat and accused Dibrell of being a "reactionary."[138] Hawkins's claim to the mantle of progressivism was a subtle but clear reminder to voters of his support of statewide prohibition. In response, Dibrell's supporters alleged

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132. *See* FRANK W. JOHNSON, 4 A HISTORY OF TEXAS AND TEXANS 2120 (1914) (noting, in a dramatic understatement, that Hawkins "retained that office until July, 1910, when he moved to Brownsville, Texas").

133. *See generally* EVAN ANDERS, BOSS RULE IN SOUTH TEXAS (1987) (detailing Hawkins's life after the Texas Supreme Court). Although Pierce had been raised in part of Brownsville and had spent much of his adult life in Brownsville, Hawkins had no apparent connections to the city, which was then a small, poor city bordering a country engaged in a civil war. *Id.* It was also the home of James B. Wells, a lawyer and the boss of Cameron County. *Id.*

134. He took office on April 3, 1912. *See Department Heads Take Oath*, DALLAS MORNING NEWS, Apr. 2, 1912, at 11 (noting that Phillips was to come to Austin on Wednesday, April 3 and qualify for office that day). The primary election took place on July 27, 1912. Phillips announced he would run for his seat on April 13. *Candidate for Supreme Court*, DALLAS MORNING NEWS, Apr. 14, 1912, § 1, at 10; *see also* Nelson Phillips File, Center for American History, University of Texas at Austin (housing election pamphlets listing the endorsements of Phillips in the 1912 primary) (on file with author).

135. TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1914, at 50 (A.H. Belo & Co. ed., 1914). Townes received 90,812 votes, Speer 64,159, Pleasants 43,119, and Craig 36,295. *Id.*

136. *See id.* (summarizing the election results).

137. *Id.*

138. M.T. Lively et al., Advertisement, *To the Democratic Voters of Texas*, DALLAS MORNING NEWS, July 24, 1912, at 5.

that Hawkins had run as an independent in the general election of 1898 and had not supported the Democratic nomination of William Jennings Bryan for president in 1896.[139] The newspaper advertisement supporting Dibrell closed by asking "whether this looks as if Mr. Hawkins is in fact a progressive Democrat fighting for the cause of the people against special interests, or merely riding the present wave of public sentiment in his own special interest."[140] In spite of the efforts of Dibrell's friends, Hawkins soundly defeated Dibrell, 208,217 to 127,843.[141] Hawkins received more votes than William Ramsey, the pro's candidate for governor.[142] Dibrell thus became the first sitting member of the Supreme Court of Texas to lose a primary election.[143]

Although one Colquitt appointee survived, it appears that neither would have remained on the court had Nelson Phillips not attracted so many challengers. Phillips's vulnerability actually worked to his benefit. Phillips's seat was more attractive than Dibrell's seat because the winner would serve for four years rather than two before going through another election.[144] Although Dibrell came from central Texas (Seguin), an area of the state less supportive of statewide prohibition than Phillips's north Texas, Dibrell's opinions on the court did not include any prohibition re-

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139. *Id.*

140. *Id.*

141. TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1914, *supra* note 135, at 50. The total number of votes in this race was 336,060, nearly identical to the total cast in the race for the seat held by Phillips. *Id.*

142. KINGSTON ET AL., *supra* note 52, at 283.

143. Before the Terrell law mandated primary elections, it appears that only Robert J. Gould and Alexander S. Walker failed to receive a nomination by the Democratic Party to stand for election to the court after appointment. *See* LYNCH, *supra* note 100, at 313 (discussing Gould's unsuccessful candidacy in 1882); Walker, Alexander Stuart, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/WW/fwa14.html (last visited Mar. 18, 2007) (noting A.S. Walker's appointment to the Supreme Court in 1888, and his resignation on January 1, 1889) (on file with the *St. Mary's Law Journal*). J. Harbert Davenport's 1917 history of the Supreme Court of Texas suggests a custom of appointment and then "retention" election of appointed judges. *See generally* DAVENPORT, *supra* note 3 (demonstrating the "appointment/retention" pattern in several biographical sketches of the justices); *see also* O. Douglas Weeks, Election Laws, The Handbook of Texas Online, http://www.tsha.utexas.edu/handbook/online/articles/EE/wde1.html (last visited Mar. 18, 2007) (describing the development of election laws in Texas) (on file with the *St. Mary's Law Journal*).

144. *See* TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1914, *supra* note 135, at 50 (noting the term for each supreme court position).

lated cases.[145] Thus, unlike Phillips, a wet who had worked to defeat statewide prohibition in 1911, Dibrell was vulnerable on the issue of prohibition only because he was appointed by Colquitt. Hawkins exploited that fact to gain the prohibitionist vote when running against Dibrell, a tactic that worked quite well.

Despite the fact that the primary voters in the supreme court election of 1912 retained two incumbents, only T. J. Brown had any substantial appellate judging experience.[146] Phillips had briefly held the office of district judge of the Eighteenth Judicial District.[147] Hawkins had no judicial experience.[148] And Phillips and Hawkins were on opposite sides of the prohibition fence, a divide that threatened continued court harmony.

III. Reform and Reform Again

A. *Justice Delayed*

At the annual meeting of the Texas Bar Association in July 1911, the Committee on Jurisprudence and Law Reform reported its concerns regarding the burgeoning docket of the Texas Supreme Court:

> When the Supreme Court met in October, 1910, there were one hundred applications for writs of error on file which had not been acted on, since then three hundred and sixty-eight additional applications have been filed, making four hundred and sixty-eight in all requiring the attention of the court. Of this number the court has disposed of four hundred and forty-eight by refusing three hundred and one, granting one hundred and three, dismissing forty-four, refusing in part and dismissing in part two, and leaving eighteen pending; thus acting on at the rate of nearly two applications per day for every working day during the period. Besides this, the court has actually decided one hundred and four cases, which includes eight manda-

145. *But see* Eppstein v. State, 105 Tex. 35, 143 S.W. 144 (1912) (reporting the only opinion written by Dibrell even tangentially related to the "liquor question"). The issue in *Eppstein* was whether a liquor wholesaler was required to pay a quarterly occupation tax on all of his sales, even if some of the sales were on credit, and thus uncollected. *Id.* at 145. The court, per Justice Dibrell, affirmed the lower court decision supporting the state's position that the tax applied to all sales, whether for cash or credit. *Id.* at 146. This opinion supported the interests of moderate prohibitionists. *See id.* (imposing the stricter outcome of two possibilities on liquor wholesalers).

146. Davenport, *supra* note 3, at 217.

147. *Justice Phillips was Picturesque Figure*, 2 Tex. B.J. 133, 133 (1939).

148. Davenport, *supra* note 3, at 273-75.

> muses awarded, seven refused, and nineteen certified questions answered.
>
> Notwithstanding this extraordinary exertion, there were on June 23rd, 1911, one hundred and eleven cases pending that had been neither submitted nor set for submission, leaving the court about one year behind in its work.
>
> [The report then provided data concerning the workload of the six courts of civil appeals.] . . .
>
> This demonstrates, to say the very least of it, that the judges of these courts have neither eaten nor had an opportunity to eat any idle bread. In truth, they, as well as the judges of the Supreme Court, have been working like dray horses under great pressure in an effort to stem the growing tide of work.[149]

The concern regarding the appellate workload was echoed by one of the Texas Bar Association's main speakers, William Hodges, who noted "[it] is generally conceded that our appellate system demands the most urgent attention."[150]

The overcrowded docket was a common theme in the history of the Texas Supreme Court. The inability of the court to keep current with its docket had led, twenty years earlier, to the amendments to the constitution creating courts of civil appeals and a reconstituted court of criminal appeals separate from the supreme court.[151] To further foster efficiency in the Texas Supreme Court, the constitutional amendment of 1891 limited the court's jurisdiction to questions of law.[152] Still, these changes had not solved the problem of a backlog of cases to decide.

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149. Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 30 PROC. TEX. B. ASS'N 12, 15-16 (1911).

150. William Hodges, *Judicial Reform in Texas*, 30 PROC. TEX. B. ASS'N 169, 173 (1911); *see Seeks Judge Dibrell's Place*, DALLAS MORNING NEWS, Oct. 31, 1911, at 5 (quoting Hawkins's statement: "The lack of such reform in our laws relating to trial and appeal of civil cases is keeping capital out of Texas and hurting business"); Op-Ed., *For More Judges and Higher Salaries*, DALLAS MORNING NEWS, July 7, 1911, at 6 (criticizing the Texas Bar Association for lack of judicial reform).

151. *See* TEX. CONST. art. V (amended 1891) (creating the appellate courts and criminal appellate courts); *see also* John C. Townes, *Sketch of the Development of the Judicial System of Texas, Part II*, 2 Q. TEX. ST. HIST. ASS'N 134, 150-51 (1898)), *available at* http://www.tsha.utexas.edu/publications/journals/shq/online/v002/n2/article_3.html (last visited Mar. 18, 2007) (discussing 1891 amendments to the constitution creating a court of criminal appeals and civil courts of appeals) (on file with the *St. Mary's Law Journal*). Oklahoma is the only other state that has separate criminal and civil courts of final resort. *See* OKLA. CONST. art. VII, § 1 (establishing a court of criminal appeals, separate from other courts).

152. TEX. CONST. art. V, § 3 (amended 1891). It states:

The court fell further behind in its docket in its 1911 and 1912 terms due to the judicial inexperience of its appointees. In the October 1909 term (October 1909–June 1910),[153] the supreme court issued opinions in 112 cases.[154] The next year Ramsey and Dibrell joined the court. It issued 107 opinions, nearly the same number as the previous year. The court during the October 1911 term, however, issued 96 opinions,[155] and the court during the October 1912 term issued just 75 opinions.

The most prominent item debated at the annual meeting of the Texas Bar Association in July 1911 was the reform of the Texas court system, particularly its appellate court system. The Committee on Jurisprudence and Law Reform suggested increasing the number of judges from three to five or more, and increasing the pay of supreme court justices from the "parsimonious" amount of $4,000.[156] The Committee on Judicial Administration and Reme-

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> The Supreme Court shall have appellate jurisdiction only, except as herein specified, which shall be coextensive with the limits of the state. Its appellate jurisdiction shall extend to questions of law arising in cases of which to Courts of Civil Appeals have appellate jurisdiction, under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law, or where a statute of the State is held void.

Id.

153. The supreme court's term was set by the Texas Constitution. *See* TEX. CONST. art. V, § 3 (amended 1891) (stating that "[t]he Supreme Court shall sit for the transaction of business from the first Monday in October of each year until the last Saturday of June in the next year, inclusive").

154. Any matter before the supreme court in which an opinion was written was counted as a "case." Thus, a motion for rehearing in a case in which the court had written an opinion constituted a second case if one justice wrote an opinion on the motion for rehearing.

155. The numbering includes all written opinions from the supreme court during the term, including opinions written on motions for rehearing, motions to dismiss the writ of error, and in cases in which the opinion was merely an opinion concurring in the judgment. This number differs slightly from the numbers listed occasionally by the supreme court itself. For example, Chief Justice Brown reported to the Texas Bar Association that the court "wrote eighty-three opinions during last term." Special Committee on Judicial Reform, *Report of Special Committee on Judicial Reform*, 31 PROC. TEX. B. ASS'N 13, 14 (1912) (reporting on the court's workload during the October 1911 term).

156. Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 30 PROC. TEX. B. ASS'N 12, 18 (1911); *see also* Brown, *supra* note 100, at 253 (reporting the speech of Chief Justice Brown indicating that Williams resigned due to an inadequate salary). The $4,000 amount had been set twenty years ear-

TABLE 1-TOTAL OPINIONS ISSUED BY THE TEXAS SUPREME COURT, BY YEAR

1907 (October 1907-June 1908)	139
1908	126
1909	112
1910	107
1911	96
1912	75
1913	46
1914	73

dial Procedure also commented on a proposed bill altering the supreme court's jurisdiction, drafted by former Justice Frank A. Williams. In particular, the committee focused on subsection 6, which as proposed, stated:

> Those [cases] in which, by proper application for writ of error, it is made to appear that the Court of Civil Appeals has, in the opinion of the Supreme Court, erroneously declared the law of the State in such way as materially to injure its jurisprudence, in which case the Supreme Court may, in its discretion, take jurisdiction for the purpose of correcting such error.[157]

Subsection 6 of the bill was amended by the body to state: "Those [cases] in which, by proper application for writ of error, it is made to appear that the Court of Civil Appeals has erroneously declared the substantive law of the State."[158] Future Justice William E. Hawkins proposed the creation of a bar committee to evaluate the judicial system in Texas, including judicial salaries, numbers of supreme court justices, and jurisdiction of the supreme

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lier by constitutional amendment. *See* TEX. CONST. art. V, § 2 (amended 1891) (stating that each justice shall "receive an annual salary of four thousand dollars until otherwise provided by law"); *see also* Op-Ed., *For More Judges and Higher Salaries*, DALLAS MORNING NEWS, July 7, 1911, at 6 (criticizing the Texas Bar Association for lack of action on judicial reform). The legislature raised the salary of supreme court justices to $5,000 in 1913. Act of Apr. 7, 1913, 33d Leg., R.S., ch. 155, § 1, 1913 Tex. Gen. Laws 329.

157. *July 4, 1911—Afternoon Session*, 30 PROC. TEX. B. ASS'N 21, 24 (1911).

158. *Id.* at 27 (emphasis deleted); *see also* Special Committee on Judicial Reform (1912), *supra* note 155, at 37 (approving the amendment to the supreme court's jurisdiction after voting to amend subsection 6 of the proposed bill as quoted).

court, including subsection 6. After a lengthy discussion, Hawkins's proposal for the creation of a special committee was adopted.[159]

By the time of the July 1912 primary election, the supreme court was two years behind on its docket.[160] Although the Texas Bar Association approved in July 1911 the appointment of a special committee to evaluate the Texas judicial system, that committee did not meet until June 1912. Chief Justice Brown, the chairman of the special committee, reported that because it had not met until just one month before the annual meeting of the Texas Bar Association, the shortness of time led it to recommend the association appoint another committee to present the 1911 proposal of Justice Williams to the legislature for adoption. After a lengthy discussion mirroring the discussion of a year earlier, the membership, by a vote of twenty-eight to sixteen, voted to approve the Williams proposal, including controversial subsection 6. During the discussion of the Williams proposal, Chief Justice Brown disparaged any efficiencies created by expanding the court to five members[161] and seemed decidedly cool to any proposed increase in the salary paid to Texas judges. He did, however, float a proposal turning the supreme court into a two-division six-member body.[162]

However, several members of the Texas Bar Association, which met just three weeks before the contentious July 1912 Democratic primary, disagreed with Brown concerning the pay of appellate judges and a three-member court. Toastmaster J. W. Terry opined that the court would never become current on its docket if continuity was lacking in the court's membership and suggested that one reason for a lack of continuity was the low salary paid to supreme court and other judges.[163] The Texas Bar Association's Committee on Jurisprudence and Law Reform recommended the bar urge the legislature to increase the salary of a supreme court justice from $4,000 to $7,500, and it proposed a constitutional amendment increasing the membership in the Texas Supreme

159. *July 5, 1911—Afternoon Session*, 30 PROC. TEX. B. ASS'N 101, 115 (1911).

160. Special Committee on Judicial Reform (1912), *supra* note 155, at 18.

161. *Id.* at 19.

162. *Id.* at 20.

163. *See id.* at 250 (stating that "I believe it is the duty of every member of the Texas Bar to interest himself in securing adequate salaries for our judges from the Supreme Court down").

Court from three to five.[164] Both suggestions were designed to stem the increase in the case backlog.

B. *Success and Failure*

The 1913 Texas Legislature largely adopted the Williams proposal "limiting" the jurisdiction of the Texas Supreme Court and adopted word-for-word the revised subsection 6 proposed by the Texas Bar Association.[165] This legislative assistance, however, came too late to assist the court during its October 1912 term. For the third year in a row, the court welcomed a new member. William E. Hawkins joined the court in January 1913, having defeated incumbent Joseph Dibrell in the July 1912 primary.[166] The court

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164. Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 30 PROC. TEX. B. ASS'N 12, 14 (1911); *cf.* Act of Apr. 7, 1913, 33d Leg., R.S., ch. 155, § 1, 1913 Tex. Gen. Laws 329 (increasing pay to $5,000).

165. Act of Mar. 28, 1913, 33d Leg., R.S., ch. 55, § 1, art. 1521, 1913 Tex. Gen. Laws 107. As amended, article 1521, detailing the Texas Supreme Court's jurisdiction, stated:

> The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, which shall extend to questions of law arising in civil causes in the courts of Civil Appeals in the following cases when same have been brought to the courts of Civil Appeals by writ of error, or appeal, from final judgments of the trial courts:
>
> (1) Those in which the judges of the courts of Civil Appeals may disagree upon any question of law material to the decision.
>
> (2) Those in which one of the courts of Civil Appeals holds differently from a prior decision of its own, or of another court of Civil Appeals, or of the Supreme Court upon any such question of law.
>
> (3) Those involving the validity of Statutes.
>
> (4) Those involving the revenue laws of the State.
>
> (5) Those in which the Railroad Commission is a party.
>
> (6) Those in which, by proper application for writ of error, it is made to appear that the Court of Civil Appeals has, in the opinion of the Supreme Court, erroneously declared the substantive law of the case, in which case the Supreme Court shall take jurisdiction for the purpose of correcting such error.

Id.

Years later, when the Texas Bar Association was again discussing judicial reform, Court of Civil Appeals Judge Charles H. Jenkins noted that his arguments against the creation of subsection 6 had been in vain in 1911 and 1912, and declared that less than a year after the provision was adopted by the legislature, Chief Justice Brown admitted to Jenkins that Brown had been mistaken in supporting the adoption of subsection 6 because it increased the court's caseload. *See Saturday Afternoon, July 3, 1920*, 39 PROC. TEX. B. ASS'N 156, 167 (1920) (quoting the comments of Judge Jenkins).

166. *See State Board Issues Election Returns*, DALLAS MORNING NEWS, Dec. 31, 1912, at 3 (noting the entire slate of Democrats won in the general election and listing over 233,000 votes for each Democrat nominated to the supreme court, with approximately 16,000 and 23,000 votes given to Progressive and Republican candidates to the court, respectively).

issued just seventy-five opinions between October 1912 and June 1913, fewer than in any term during the previous decade, and by the end of the term, the number of cases pending in the supreme court constituted a two to three year backlog.[167] The situation became dramatically worse in the following year, however, when the court issued just forty-six opinions between October 1913 and June 1914.[168] The supreme court was in crisis.

C. *Work and Workload*

During his toast to the assembled members of the Texas Bar Association on July 4, 1912, Chief Justice Brown said, "There has been no discord in the Supreme Court since I have had the honor to serve upon it."[169] The record of the supreme court during Brown's stay supports his statement. Between the October 1902 and October 1909 terms, a total of four dissenting opinions were written. The court issued over 800 opinions during this eight-year period, which means dissents occurred in less than 0.5% of all cases. This number increased slightly after the resignation of Chief Justice Reuben R. Gaines in January 1911. In the October 1910 term, the court issued three dissenting opinions (one each from Brown, Ramsey, and Dibrell) out of 107 published opinions, and during the October 1911 term, while a declared candidate for governor, Justice William Ramsey wrote three dissenting opinions (out of fifty-two cases in which he participated) before resigning from the court to begin his campaign.

Two related reasons exist for this paucity of dissents during the first decade of the twentieth century. First, as a matter of supreme court history, the 1893 case of *Jones v. Lee*[170] represented a cautionary tale.[171] Two members of the court, including then-Associ-

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167. *See* Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 33 PROC. TEX. B. ASS'N 22, 24-26 (1914) (reporting the work of the supreme court in the October 1913 term in tabular form); Robert W. Stayton & M. P. Kennedy, *A Study of Pendency in Texas Civil Litigation*, 21 TEX. L. REV. 382, 392 (1943) (noting in graphic form the docket pendency and delay by 1913).

168. Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 33 PROC. TEX. B. ASS'N 22, 26-27 (1914).

169. Brown, *supra* note 100, at 253-54.

170. 86 Tex. 25, 22 S.W. 386 (1893), *rev'd on rehearing*, 86 Tex. 25, 22 S.W. 1092 (1893).

171. Jones v. Lee, 86 Tex. 25, 22 S.W. 386 (1893), *rev'd on rehearing*, 86 Tex. 25, 22 S.W. 1092 (1893).

ate Justice Reuben Gaines, reversed a decision in favor of a plaintiff in a title case, over the objection of Chief Justice Stayton.[172] The opinion of the two-to-one majority was contrary to the judgments of both the court of civil appeals and the district court, which tried the case as the finder of fact.[173] After the resignation of Justice John Henry, the author of the majority's opinion in *Jones*, and the appointment of T. J. Brown, the court agreed to rehear the case. On rehearing, it unanimously reversed itself.[174] The initial decision in *Jones* was decided just two years after the constitutional restructuring of the Texas judiciary, a restructuring caused in part by the supreme court's inability to clear its docket. The 1891 changes created a court of civil appeals and constitutional limitations on the supreme court's jurisdiction.[175] These alterations were designed, if flawedly, to eliminate the court's congested docket. If, however, a litigant knew that by persuading two justices of the supreme court that the conclusions of the trial court, intermediate appellate court, and one supreme court justice were wrong, that litigant might be given a strong incentive to continue to litigate a matter. This consequence would minimize any efficiencies a court of civil appeals would otherwise provide. The decision to rehear and unanimously reverse itself in *Jones* was intended to reduce, if not eliminate, the incentive of the loser in the court of civil appeals to file a petition for a writ of error (or to move for rehearing) with the supreme court. Gaines remained on the court until 1911, and the experience in the *Jones* case clearly seared him,

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172. *Id.* at 392.

173. *Id.*

174. Jones v. Lee, 86 Tex. 25, 22 S.W. 1092, 1094 (1893); *see* Committee on Jurisprudence and Law Reform, *Report of Committee on Jurisprudence and Law Reform*, 33 PROC. TEX. B. ASS'N 22, 23 (1914) (noting "[s]eldom thereafter for a great many years did any member of the Supreme Court file a dissenting opinion").

175. TEX. CONST. art. V, § 3 (amended 1891). It states:

> The Supreme Court shall have appellate jurisdiction only, except as herein specified, which shall be coextensive with the limits of the state. Its appellate jurisdiction shall extend to questions of law arising in cases of which to Courts of Civil Appeals have appellate jurisdiction, under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law, or where a statute of the State is held void.

Id.

for he wrote just one dissenting opinion during his final seventeen and a half years on the court.[176] A second reason, likely related to the first, for the absence of dissenting opinions during the tenure of the Gaines court was suggested by Chief Justice Brown's comments in 1912 to the Texas Bar Association concerning the manner of the court's work. Unlike the practice in a number of appellate courts, Brown noted:

> "When cases are submitted we do not divide them out, and give so many to each judge, but each man does all the work he can, and before any opinion is written we all get together, go over every question in the case again, and pass upon it, and agree upon it."[177]

This near unanimity did not survive the departure of Gaines. As Table 2 indicates, the Texas Supreme Court saw a rise in both dissenting and concurring opinions and at the same time it decided fewer and fewer cases:

TABLE 2-CONCURRING AND DISSENTING OPINIONS, BY TERM YEAR

Year (October-June)	Opinions	Concurrences	Dissents
1902	117	0	0
1903	119	0	3
1904	112	0	0
1905	112	0	0
1906	120	0	0
1907	139	1	0
1908	126	1	1
1909	112	0	0
1910	107	2	3
1911	96	4	4
1912	75	0	2
1913	46	2	2
1914	73	4[1]	5

176. Galveston & Houston Inv. Co. v. Grymes, 94 Tex. 609, 63 S.W. 860, 862-63 (1901) (Gaines, J., dissenting).

177. Special Committee on Judicial Reform (1912), *supra* note 155, at 19 (noting opposition by C.J. Brown to expansion of Texas Supreme Court from three to five members).

TABLE 2 (CONTINUED)

Year (October-June)	Opinions	Concurrences	Dissents
1915	66	4	3
1916	66	3	6
1917	29[2]	1	2
1918	61	6	6[3]
1919	82	4	5
1920	43	1	0
1921	39	0	0
1922	34	0	0
1923	34	0	0
1924	42	0	0
1925	41	0	0

[1] St. Louis Sw. Ry. v. Griffin, 106 Tex. 477, 171 S.W. 703, 707 (1914) (including a statement from Justice Hawkins that he intended to file a separate opinion at a later time, however, no such opinion was filed, and thus no additional concurring (or dissenting) opinion is listed).

[2] *In re* Subdivision Six of Supreme Court Jurisdiction Act of 1917, 201 S.W. 390 (Tex. 1918) (Hawkins, J.). My count does not include Justice Hawkins's opinion in this proceeding, because it is not an opinion to a docketed case.

[3] In *Washer v. Smyer*, 109 Tex. 398, 211 S.W. 985, 991 (1919), Justice Hawkins stated he would file an opinion later. None was filed. *Allen v. Pollard*, 109 Tex. 536, 212 S.W. 468, 469 (1919), includes a statement by Justice Hawkins. However, that statement was not included in my count.

The vast majority of concurring and dissenting opinions between 1913 and 1920 were written by Justice William E. Hawkins. Chroniclers of Texas history, when discussing Judge Hawkins, have noted his "strong personality"[178] and that he was possessed of "mental breadth and strength."[179] In 1914, Hawkins's judicial talents were described in the following way: "As a jurist his decisions have indicated a strong mentality, careful analysis and a thorough knowledge of the law . . . . He possessed that self-control so requisite to the true judicial temperament, the power to put aside all personal feelings and prejudices in order that he may impartially dispense justice."[180] In a 1917 book, J. Harbert Davenport lavishly, though vaguely, praised then-sitting Justice Hawkins:

178. 1 FRANK CARTER ADAMS, TEXAS DEMOCRACY: A CENTENNIAL HISTORY OF POLITICS AND PERSONALITIES OF THE DEMOCRATIC PARTY, 1836-1936, at 514 (1937).

179. L. E. DANIELL, TEXAS: THE COUNTRY AND ITS MEN 649 (1924).

180. 4 FRANK W. JOHNSON, A HISTORY OF TEXAS AND TEXANS 2120 (1914).

> Justice Hawkins is one of the ablest judges who has served upon the Supreme Court of Texas in recent years. The numerous opinions written by him disclose the superior judicial attainments, clear analysis, careful and painstaking research, forceful, convincing reasoning, and mature judgment which have characterized the learning of the greatest jurists who have served in that exalted tribunal.[181]

Davenport's language suggests that he found it difficult as an insider to understand Hawkins's published record. By avoiding comparing Hawkins with any particular justice, Davenport avoids having to justify his conclusion. The reference to "numerous opinions" both hides Hawkins's paucity of decisions written for the court and illuminates the fact that many of Hawkins's writings consisted of concurring and dissenting opinions. The reference to "careful and painstaking research" is a nod both to the plethora of citations found in many of Hawkins's opinions and the length of those opinions. The remainder appears to be a complimentary bouquet to a judge whose presence on the court might affect the author. Despite these encomia, Hawkins's contribution to the court is found almost wholly in his dissents.

As Table 2 indicates, the number of concurring and dissenting opinions during the years 1911-1921 were much higher than either before or after that period. Table 2 also demonstrates the decline in the number of published opinions after the October 1910 term, the last year when the court issued more than 100 opinions (107).

This backlog of cases was due to several factors, both internal and external. The restructuring of the Texas court system in 1891 was designed to lessen the supreme court's workload by reducing its jurisdiction.[182] The most important aspect of this 1891 jurisdictional scheme was to limit the court to deciding questions of law, leaving issues of fact to the lower courts.[183] However, in *Choate v.*

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181. DAVENPORT, *supra* note 3, at 275.

182. TEX. CONST. art. V, § 3 (amended 1891).

183. *See id.* (limiting the appellate jurisdiction of the court to questions of law). "The [S]upreme [C]ourt shall have appellate jurisdiction co-extensive with the limits of the state, which shall extend to questions of law arising in all civil cases of which the courts of civil appeals have appellate but not final jurisdiction." Act of Apr. 13, 1892, 22d Leg., 1st C.S., ch. 14, §1, art. 1011, 1892 Tex. Gen. Laws 19, 20; *see also* Marshall & E. Tex. Ry. Co. v. Petty, 107 Tex. 387, 180 S.W. 105, 108 (1915) (Hawkins, J., dissenting) (explaining that the authority of the court to inquire into fact issues is limited, quoting article 1590 of the 1911 Texas Revised Statutes).

San Antonio & Aransas Pass Railway Co.,[184] the supreme court declared, "[I]t is elementary that whether there be any evidence or not to support an issue is a question of law, and not of fact, and it follows that the decision of the court of civil appeals upon such a question is subject to review by this court."[185] Chief Justice Gaines's opinion for the court making a "no evidence" petition one which raised a question of law dramatically increased the court's jurisdiction and was the subject of debate among lawyers and lower court judges.[186] The manner in which the Gaines court undertook its work led to unanimity and good feeling among the members of the court, but that approach later limited the court's ability to dig out from its backlog. Additionally, the court was to some extent a victim of the sheer numbers of cases available for review.[187] The 1891 constitutional amendment allowed the Texas Legislature to create three "supreme judicial districts, and thereafter . . . such additional districts as the increase of population and business may require, and [it] shall establish a court of civil appeals in each of said districts."[188] The legislature continued to increase the number of courts of civil appeals during the next twenty years.[189] By mid-1911, eight courts of civil appeals existed, and each released a torrent of cases.[190] The courts of civil appeals issued an average of over 1,500 opinions each year between 1910 and 1920. In its most

184. 91 Tex. 406, 44 S.W. 69 (1898).

185. Choate v. San Antonio & Aransas Pass Ry. Co., 91 Tex. 406, 44 S.W. 69, 69 (1898).

186. *See, e.g.*, Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 30 PROC. TEX. B. ASS'N 12, 33 (1911) (reporting comments by Court of Civil Appeals Judge I.W. Stephens criticizing the decision during the debate by the Texas Bar Association to determine how to reduce the court's backlog by limiting its jurisdiction).

187. *See generally id.* (noting the problems of overcrowded dockets faced by the supreme court).

188. TEX. CONST. art. V, § 5 (amended 1891).

189. *See* James T. Worthen, *The Organizational and Structural Development of Intermediate Appellate Courts in Texas, 1892-2003*, 46 S. TEX. L. REV. 33, 35-36 (2004) (noting in Table 1 the years in which the various courts of civil appeals were created). Five courts of civil appeals were established by 1893. *Id.* The Sixth Court of Civil Appeals was established in 1907, and the Seventh and Eighth in 1911. *Id.*

190. *See generally id.* at 36 (illustrating via table that the legislature created three courts of civil appeals in 1892, in Galveston, Fort Worth, and Austin, respectively and that when the Texas legislature went into regular session in January 1911, six courts of civil appeals existed; by the end of the session, two more courts of civil appeals had been created).

productive term during the first quarter of the twentieth century, the supreme court issued 139 opinions, and during the first decade of that century averaged slightly more than 110 opinions per year.[191] Even in 1910, before the addition of two more courts of civil appeals, 368 petitions for writ of error were filed, many more than the court could profitably act upon.[192]

Externally, the supreme court's docket was affected by changes in the Texas economy.[193] For example, in volumes 138 and 139 of the Southwestern Reports, which cover cases published during the October 1910 term, 51 of 234 cases, or 21%, decided by the courts of civil appeals involved railroads (or streetcars). As one lawyer commented, partly in jest, in 1917 at the annual meeting of the Texas Bar Association, "[W]hile the damage suit lawyer may be responsible for a good many things, the railroad lawyer is responsible for many, too, and he is responsible, I expect, for fifty per cent [sic] or more of the appeals that are prosecuted in Texas today."[194]

D. *Breakdown*

During his three months of service during the October 1912 term, lame duck Justice Joseph Dibrell wrote eleven opinions for the court. His replacement, William Hawkins, wrote just six opinions during the last six months of the term. Chief Justice Brown wrote thirty-eight opinions and Justice Nelson Phillips wrote twenty opinions that year. The next year Brown and Phillips wrote twenty-four and seventeen opinions, respectively. Meanwhile, Hawkins wrote just five opinions for the court from October 1913 through June 1914.[195] That term, in which the court issued just forty-six opinions, made it all but impossible to winnow its case backlog. Indeed, when Chief Justice Brown gave his report on the

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191. Table 1, *supra* page 668.

192. *See* Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 30 PROC. TEX. B. ASS'N 12, 15 (1911) (noting the number of recent applications to the supreme court).

193. *See id.* at 14 (correlating the expansion of wealth, business, and population to the growing volume of litigation).

194. Committee on Judicial Administration and Remedial Procedure, *Report of the Committee on Judicial Administration and Remedial Procedure*, 36 PROC. TEX. B. ASS'N 16, 32 (1917).

195. Hawkins also wrote two dissenting opinions among the forty-four cases in which he participated.

state of the supreme court to the Texas Bar Association in July 1914, he concluded:

> But we have fully three years' work on hand, I believe more than that, and it is useless to read these statements in the newspapers saying that we are nearly up and that we will soon be rid of them, for simply the men who write it do not know what they are writing about or they do not care, one or the other.[196]

Brown continued: "[W]e are at least forty cases further behind today than we were last year when we began . . . ."[197]

For Brown, two solutions presented themselves. First, the legislature could create a commission of appeals.[198] The difficulty with that solution was the likelihood that the creation of any commission with the authority to issue final opinions would violate the Texas Constitution.[199] If a commission's decisions were not final, its existence would not make the supreme court a more efficient body, for then the court would spend much of its limited time examining the decisions of the commission rather than deciding cases.[200] The second solution was for the legislature to permit each member of the court to employ a law clerk.[201] The latter solution would not be adopted for twenty years.[202] Finally, in what appeared to be a nod toward Hawkins, Brown noted, "it is not necessary to write a dissertation on the law in every case . . . . [Instead,] make it brief so as to enable us to dispatch more business."[203]

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196. Special Committee on Judicial Reform, *Report of the Special Committee on Judicial Reform*, 33 PROC. TEX. B. ASS'N 17, 18 (1914).

197. *Id.*

198. *Id.*

199. *Id.*

200. *See id.* at 17, 19 (summarizing Judge Stayton's comments on the previous commission system).

201. Special Committee on Judicial Reform (1914), *supra* note 199, at 17, 19.

202. Act of Mar. 31, 1933, 43d Leg., R.S., ch. 57, § 1, 1933 Tex. Gen. Laws 113, 118. In 1935, an appropriation referred to clerks at the supreme court as "briefing clerks." *See* Act of May 30, 1935, 44th Leg., R.S., ch. 355, § 3, 1935 Tex. Gen. Laws 908, 913 (referring to both "law clerks" and "briefing clerks").

203. Special Committee on Judicial Reform (1914), *supra* note 199, at 21. These comments were echoed, in slightly more pointed form, three years later at the July 1917 annual meeting, by John Parker:

> Another thing, I do not believe in dissents.
>
> Especially do I not believe in them when they are written after the main opinion has been filed, and weeks have elapsed, and when the dissent then filed is an essay and not an opinion . . . .

The Committee on Jurisprudence and Law Reform took a slightly different tack. Unlike Brown, who in 1912 rejected the suggestion to amend the constitution increasing the number of supreme court justices from three to five or seven, the committee concluded that an increase in court membership "will add not only working capacity but strength and dignity to the court."[204] In addition, the committee recommended that all Texas judges "be selected by a nominating convention and thus as far as possible that the judiciary be kept out of politics and that the selection of our judges be relieved as far as possible from the disastrous consequences to the judiciary of the primary election system."[205] This latter recommendation was a clear, if oblique, reference to Justice Hawkins, who was the only member of the supreme court not to arrive initially through gubernatorial appointment. He was also apparently one obstacle to the court's effort to clear its docket.

As shown below in Table 3, during his eight years on the court, Hawkins's opinions for the court never exceeded six, and during

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Every question that goes to the Supreme Court need not be resolved with reference to posterity.

Committee on Judicial Administration and Remedial Procedure, *Report of the Committee on Judicial Administration and Remedial Procedure*, 36 PROC. TEX. B. ASS'N 16, 33 (1917). This was a pointed, if indirect, accusation of the work done by Justice William Hawkins, who in the October 1916 term wrote one opinion of the court, three concurring opinions, and four dissenting opinions.

204. Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 33 PROC. TEX. B. ASS'N 22, 24 (1914). The committee's reasons also appear to include an inferiority complex: The increase would also "place Texas in company with the great States of the Union in this respect, instead of with the small States of Arizona, Idaho, Nevada, New Mexico, Utah and Wyoming, each of which has a Supreme Court composed of only three judges." *Id.*

205. *Id.* The committee's second recommendation was amended to create a special committee to report in 1915 on the mode of selection of judges. *Id.* The request to divorce the judiciary from politics was made when, in 1913, Judge Isaac W. Stephens declared, "I believe the principal cause of the trouble [with the judicial system] lies in the use of the primary election system in the selection of our judges." Committee on Jurisprudence and Law Reform, *Report of the Committee on Jurisprudence and Law Reform*, 32 PROC. TEX. B. ASS'N 22, 33 (1913). This suggests a nod toward the election of 1912, with its contested seats in the Democratic Party primary. In 1917, Judge R. A. Pleasants, who ran against Nelson Phillips in the 1912 election and lost, declared, "In my opinion the greatest need in this State today is to divorce the selection of our judges from politics, and not have the judiciary elected at political primaries." Committee on Legal Ethics and Admission to the Bar, *Report of the Committee on Legal Ethics and Admission to the Bar*, 36 PROC. TEX. B. ASS'N 43, 47 (1917).

the entire October 1916 term, Hawkins wrote just one opinion for the court.

TABLE 3-MAJORITY OPINIONS, BY TERM YEAR, 1912-1920[1]

Year	Opinions	Brown	Dibrell	Phillips	Hawkins	Yantis	Greenwood
1912	75	38	11	20	6	—	—
1913	46	24	—	17	4	—	—
1914	73	27	—	43	2	—	—
1915	66	—	—	36	4	24	—
1916	66	—	—	41	1	22	—
1917	29	—	—	13	5	0	8
1918	61	—	—	25	3	—	30
1919	82	—	—	35	6	—	40
1920	43	—	—	19	0[2]	—	17

[1] The numbers are taken from counts in the Southwestern Reports and on LexisNexis. They may vary from official totals reported by the Supreme Court to the Texas Bar Association for several reasons. I have included as opinions *per curiam* opinions, and cases in which the Court may have denied a petition for a writ of error (or overruled a motion for rehearing) in which some opinion was written. Thus, the number of total opinions may differ from the number of opinions written by the Justices during several terms.

[2] After Hawkins lost his bid for re-election in 1920, he remained on the court until the end of his term in early January 1921. The court released just three decisions from October 1920 through January 1921, and Hawkins did not write an opinion for the court in any of the three cases. His successor, Justice William Pierson, wrote seven opinions of the court between January and June 1921.

Table 3 also shows that Justice Hawkins wrote the fewest majority opinions of any member of the court in each of his eight full terms. He did, however, write the most dissenting and concurring opinions during that same period, as shown in Table 4:

TABLE 4-CONCURRING/DISSENTING OPINIONS, BY TERM YEAR, 1912-1920

Year	Opinions	Brown	Dibrell	Phillips	Hawkins	Yantis	Greenwood
1912	75	0/0	0/0	0/0	0/2	—	—
1913	46	1/0	—	1/0	0/2	—	—
1914	73	2/0	—	0/0	2/5	—	—
1915	66	—	—	0/0	4/3[1]	0/0	—
1916	66	—	—	0/1	3/3	0/1	—
1917	29	—	—	0/0	1/2	0/0	0/0
1918	61	—	—	0/1	5/5[2]	—	1/0
1919	82	—	—	2/2	2/3	—	0/0
1920	43	—	—	1/0[3]	0/0	—	0/0

[1] These numbers do not include Justice Hawkins's "addendum" to his opinion for the Court in *Spence v. Fenchler*, 107 Tex. 443, 180 S.W. 597 (1915), which no other justice joined.

[2] In *Washer v. Smyer*, 109 Tex. 398, 211 S.W. 985 (1919), the report notes that Hawkins was to submit his views on the case at a later date. There is no record of any opinion from Hawkins in *Washer*, and thus no concurrence or dissent is included. In addition, Hawkins filed a "statement" in *Allen v. Pollard*, 109 Tex. 536, 212 S.W. 468 (1919), which is not counted.

[3] Phillips dissented in part in *Westerman v. Mims*, 111 Tex. 29, 227 S.W. 178 (1921). The dissent concerned whether to issue a writ of mandamus to the secretary of state requiring him to place on the general election ballot, as an Independent, the name of a losing candidate in the Democratic Party primary, who had pledged when voting in that primary to support the primary winner. *Id.* at 183.

The total number of concurrences and dissents by the Justices from the October 1912 through the October 1920 terms is shown in Table 5:

TABLE 5-TOTAL NUMBER OF CONCURRENCES AND DISSENTS, BY JUSTICE, 1912-1920

	Brown	Dibrell	Phillips	Hawkins	Yantis	Greenwood
Concurrences	3	0	4	18	0	1
Dissents	0	0	4	25	1	0

Hawkins dissented twenty-five times during his eight years on the court. During that same time, Nelson Phillips dissented in four cases, and the other four justices to serve with Hawkins together dissented just once. In the October 1918 term, for example, Hawkins wrote three opinions of the court, five concurring opinions, and five dissenting opinions. Each of Hawkins's concurrences that

year responded to a majority opinion written by Phillips.[206] Phillips's sole dissent was to an opinion written by Hawkins,[207] and Greenwood's sole separate opinion, a concurrence, was also written in response to that opinion by Hawkins.[208]

Hawkins's first two dissents may be instructive in understanding his tenure on the court. His first dissent was released on June 11, 1913, in *Smith v. Wortham*.[209] *Smith* concerned the secretary of state's refusal to grant a corporate charter to the Dallas Automobile Club Building Association.[210] Subdivision 36 of article 1121 of the Revised Statutes of 1911 authorized the forming of corporations "[t]o support and maintain bicycle clubs, and other innocent sports."[211] The secretary of state refused to grant the charter, and before the supreme court made three arguments: First, the court should apply the rule of *ejusdem generis*[212] in construing the statute.[213] Second, if the rule of *ejusdem generis* is inapplicable, the law unconstitutionally delegates legislative power to the secretary of state,[214] and third, the purpose for creating the corporation is stated in such a vague way as to prevent the secretary of state from determining whether the charter should be granted.[215]

The majority rejected the first two arguments of the secretary but fastened on the third to deny the club its requested writ of mandamus.[216] In dissent, Hawkins felicitously rephrased the majority's conclusions and dissented solely from its last conclusion.[217] Hawkins referred to the general rule of "courts" and "text-writ-

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206. Hedeman v. Newnom, 109 Tex. 472, 211 S.W. 968 (1919); Dallas County Levee Dist. No. 2 v. Looney, 109 Tex. 326, 207 S.W. 310 (1918); Red River Nat'l Bank v. Ferguson, 109 Tex. 287, 206 S.W. 923 (1918); Atchison, Topeka, & Santa Fe Ry. Co. v. Stevens, 109 Tex. 262, 206 S.W. 921 (1918); Atchison, Topeka, & Santa Fe Ry. Co. v. Ayers, 109 Tex. 270, 206 S.W. 922 (1918).

207. *See* Goldstein v. Union Nat'l Bank, 109 Tex. 555, 213 S.W. 584, 594 (1919) (containing Hawkins's sole majority and Philips's sole dissent of the term).

208. *Id.* at 593 (Greenwood, J., concurring).

209. 106 Tex. 106, 157 S.W. 740 (1913).

210. Smith v. Wortham, 106 Tex. 106, 157 S.W. 740, 740-41 (1913).

211. *Id.*

212. *See* BLACK'S LAW DICTIONARY 464 (5th ed. 1978) (defining "ejusdem generis" as "[o]f the same kind, class, or nature").

213. *Smith*, 157 S.W. at 741.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See id.* at 742 (Hawkins, J., dissenting) (restating the majorities arguments).

ers," "that a substantial compliance with general incorporation acts, and particularly with provisions thereof requiring that the charters shall state the 'purpose' of the proposed corporation, is all that is necessary."[218] Hawkins then continued:

> So I think that fair and reasonable rather than a harsh and rigorous interpretation and construction should be given to this word 'purpose,' and thus conclude that the purpose clause of the proposed charter substantially meets the requirements of law; while my [a]ssociates, in determining the force and meaning of the word 'purpose,' resort to what seems to me to be a very strict and entirely too technical rule of construction, and thus they conclude that the purpose clause of said charter is not sufficiently specific to meet the demands of said subdivision.[219]

Finally, Hawkins noted:

> After a diligent and painstaking search which has embraced all accessible authorities, I am unable to find that any court or text-writer in the United States has ever before held that a general incorporation law should be construed so strictly; and no such authority has been cited in the exhaustive brief of the Attorney General, or in the argument at bar, or in the majority opinion.[220]

Hawkins's first dissent is notable for the following reasons: First, it is substantially longer than the majority's opinion, which foreshadowed his inability to write other than prolix opinions. Second, Hawkins makes several mentions of other courts and text-writers,[221] an appeal to authority ignored by the majority in *Smith* and used rarely by the court at that time. In an era before briefing attorneys,[222] Hawkins was responsible for the research he discussed in detail in his opinions. The other justices rarely littered their opinions with citations to text-writers or to decisions from courts in other states. Third, Hawkins's opinion assesses more thoroughly than the majority the purpose of the general incorpora-

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218. *Smith*, 157 S.W. at 742.

219. *Id.* at 742.

220. *Id.* at 743.

221. *See, e.g.*, *id.* at 743 (stating that "I am unable to find that any court or text-writer . . . has ever before held that a general incorporation law should be construed so strictly").

222. *See* Act of Mar. 31, 1933, 43d Leg., R.S., ch. 57, § 1, 1933 Tex. Gen. Laws 113, 118 (authorizing, in 1933, salaries for law clerks and deputy clerks). In 1935, an appropriation referred to clerks at the supreme court as "briefing clerks." *See* Act of May 30, 1935, 44th Leg., R.S., ch. 355, § 1, 1935 Tex. Gen. Laws 908. In Texas today, law clerks are known as briefing attorneys.

tion statutes. This assessment of legislative purpose, Hawkins writes, is part of an effort to assess the statute in a "fair and reasonable" fashion rather than in a "harsh and rigorous" or "very strict and entirely too technical" manner.[223] This dialectic would become part of his style of opinion writing: set up a thesis in the majority's opinion to which Hawkins would write an antithesis.[224]

Hawkins's second dissent was in *State v. Texas Brewing Co.*[225] The Texas Brewing Company, located in Fort Worth, sent circulars in the mail to residents of Clay County, a dry county, offering to sell them beer.[226] The state and Clay County sued the company for failure to pay taxes for "pursuing the business of selling and offering for sale intoxicating liquors by soliciting and taking orders therefor in said Clay [C]ounty, Tex."[227] The court held that the mailing of circulars did not constitute doing business in Clay County, and thus the Texas Brewing Company was not liable for any taxes.[228] Hawkins dissented, but unlike *Smith*, did not write an opinion explaining his dissent.[229] By dissenting, Hawkins retained his prohibitionist credentials, important to a new judge running for re-election in the next year. By choosing not to explain his dissent, Hawkins also avoided the difficulty of dissenting in a case in which the law was relatively clear and reasonably applied by the majority.[230]

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223. *See* Smith v. Wortham, 106 Tex. 106, 157 S.W. 740, 742 (1913) (Hawkins, J., dissenting) (supporting the "fair and reasonable" interpretation of statutes).

224. This particular opinion sounds strongly in the language of anti-formalist thinking, which was consonant with the efforts of legal progressives of the era. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 101 (1908) (disparaging rigid and technical judging as mechanical jurisprudence). On Pound and the legal progressive movement of the early 20th century, see generally N. E. H. Hull, *Roscoe Pound & Karl Llewellyn: Searching for an American Jurisprudence* (1997).

225. 106 Tex. 121, 157 S.W. 1166 (1913).

226. State v. Tex. Brewing Co., 106 Tex. 121, 157 S.W. 1166, 1166 (1913).

227. *Id.*

228. *Id.*

229. *See id.* at 1168 (Hawkins, J., dissenting) (dissenting without writing an opinion).

230. Justice Hawkins took the same route at the end of the decade in *Country Club v. State*, 110 Tex. 40, 214 S.W. 296 (1919). The case concerned whether a golf club furnishing liquor to its members was engaged in a prohibited "sale" of liquor. Based on *State v. Duke*, 104 Tex. 375, 137 S.W. 654 (Tex. 1911), the supreme court held that the club's action did not constitute a sale. Hawkins dissented without opinion, as he had in *Texas Brewing Co.*

During the October 1913 term, a similar pattern emerged, as the court fell further behind in its work.[231] Hawkins wrote a total of four opinions of the court. One opinion for the court overruling a motion for a rehearing was effectively an opinion concurring in the judgment of the court.[232] In another of those four opinions of the court, Hawkins's elaborate opinion filled 21 pages of the Texas Reports.[233] In that case, Oscar Green took out a life insurance policy and named his parents as his beneficiaries.[234] He later married Clara Green but did not make her the beneficiary of his life insurance before his death.[235] The issue was whether an 1899 statute, which listed the payment of death benefits to "families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member at the time of his death," constituted an order of descent without regard to the named beneficiary.[236] Hawkins's exhaustive opinion, which cites a number of cases from across the United States, led him to conclude that the statute simply listed the permissible beneficiaries and did not create a statute of descent.[237] Thus, Oscar Green's parents, the named beneficiaries, rightly received the death benefit.[238]

The entire concurring opinion by Brown and Phillips stated, possibly with tongue firmly in cheek:

> We prefer to confine this decision to what we regard as the sole question presented by the certificate; that is, whether the effect of the act of 1899 was to deny to a member of a fraternal beneficiary association the right to designate a beneficiary, within the classification of persons enumerated in section 1, for the payment of death benefits,

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231. Committee on Jurisprudence and Law Reform, *supra* note 167, at 24-26; *see also* W. C. Morrow, *Judicial Reform in Texas*, 32 PROC. TEX. B. ASS'N 150, 155 (1913) (noting that, as of the end of the October 1912 term, one Texas lawyer estimated the court was two years behind in its docket). That appears in retrospect to have been an overly optimistic view.

232. *See* Missouri, K.T. Ry. Co. v. Beasley, 106 Tex. 160, 160 S.W. 471, 471 (1913) (adhering to a former conclusion of the court).

233. Green v. Grand United Order of Odd Fellows, 106 Tex. 225, 163 S.W. 1071 (1914).

234. *Id.* at 1072.

235. *Id.*

236. *Id.* The second issue certified was which claimant was entitled to the death benefit. *Id.* The answer to the first question ineluctably led to the answer to the second: the parents as named beneficiaries. *Green*, 163 S.W. at 1083.

237. *Id.*

238. *Id.*

without reference to other questions discussed in the opinion of Mr. Justice Hawkins.

We concur in the view that it had no such effect, since the provision in section 11 that the benefits to be paid by such an association should not be subject to the debts of "any beneficiary named in such certificate" was a clear recognition of such right.[239]

Hawkins also dissented in two cases during the October 1913 term: *Dallas County v. Lively*[240] and *Pecos & North Texas Railway Co. v. Thompson*.[241] Hiram Lively served as *ex officio* Dallas County judge.[242] He was initially paid $100 per month.[243] After the county commissioners rescinded this pay, Lively continued to serve as county judge.[244] After nine months of serving without any official pay, the commissioners agreed to pay Lively $75 per month for those services rendered.[245] The county attorney urged Dallas County to sue Lively for repayment on the ground that the payment violated Article III, section 53 of the Texas Constitution, which stated: "The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer . . . after service has been rendered or a contract has been entered into, and performed in whole or in part."[246] A statute permitted county commissioners to give the county judge a salary "as may be allowed him by order of the commissioners' court."[247] The court held the payment after the fact for Lively's services did not constitute extra compensation, and thus held against the county.[248]

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239. *Id.* at 1071.

240. 106 Tex. 364, 167 S.W. 219 (1914).

241. 106 Tex. 456, 167 S.W. 801 (1914).

242. Dallas County v. Lively, 106 Tex. 364, 167 S.W. 219, 219 (1914). Although a county judge initially was considered a judicial officer, today that person is viewed as the highest political officer of a county. The county judge "shall be well informed of the law of the State," see TEX. CONST. art. V, § 15, and, together with county commissioners, "shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed." TEX. CONST. art. V, § 18(b).

243. *Lively*, 167 S.W. at 219.

244. *Id.*

245. *Id.*

246. *Id.* at 220 (quoting TEX. CONST. art. III, § 53).

247. *Id.* (quoting Rev. Stats. Art. 3852).

248. *Lively*, 167 S.W. at 219.

Hawkins's dissent begins by announcing his "profoundest respect for the views and opinions of my Associates," and the "great reluctance" to perform his duty and dissent.[249] He then launches into a densely packed exegesis on "extra," looking at its meaning as used in the Texas Constitution, in general in law, and as interpreted in prior cases.[250] His conclusion follows many pages later, after a search through the law of other states.[251] In Hawkins's view, no compensation could be paid after the fact because any compensation constituted extra compensation.[252] Article 3852 prohibited payments for services already performed.[253] If the law was interpreted to permit payment for such services, then the statute was unconstitutional.[254]

Chief Justice Brown, writing for the majority, withheld publication of the opinion until after Hawkins wrote his dissent, for he concluded the opinion of the court by stating:

> Justice Hawkins has made a laborious and extensive search into the authorities; but we believe he has found no case which reaches the distinguishing feature of this, that is, additional compensation, not for the same service, but for a distinct service, so recognized and characterized in the statute, and therefore clearly not within the scope of the duties covered by other compensation, which failure on the part of our honored Associate we consider to be a reliable support to our conclusion.[255]

The pattern was thus set. The court began to write fewer and fewer opinions, even as its workload grew. Beginning in January 1913, Brown and Phillips wrote nearly all of the court's opinions; Hawkins contributed an occasional opinion for the court, but offered his views more often in dissents and concurrences.

By the October 1914 term, Brown was suffering from stomach cancer and other ailments, and he died on May 26, 1915.[256] De-

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249. *Id.* at 220.

250. *Id.* at 221-28. Justice Hawkins had a disconcerting habit of using legalese such as using "said" to indicate "this." *Id.*

251. *Id.*

252. Dallas County v. Lively, 106 Tex. 364, 167 S.W. 219, 221-28 (1914).

253. *Id.*

254. *Id.*

255. *Id.* at 220.

256. F.A. Williams, *In Memory of Judges Gaines and Brown*, 34 PROC. TEX. B. ASS'N 75, 75 (1915).

spite his condition, Brown wrote 28 opinions for the court during his last eight months as chief justice. Nelson Phillips wrote 43 opinions, including 15 of the last 16 issued, and all 9 issued after Brown's death and the appointment of James E. Yantis. Hawkins wrote two opinions of the court during the year.[257] One was a case in which Phillips was disqualified from participating in, and in which Brown wrote a brief opinion concurring in the denial of the motion for rehearing.[258] The other, *Mabee v. McDonald*,[259] concerned whether the plaintiff properly obtained jurisdiction by serving the defendant by publication.[260] In a laborious opinion, Hawkins's opinion for the court reversed the decision of the court of civil appeals, which had reversed the decision of the county court. Phillips and Brown concurred, limiting their agreement to the facts of the case. *Mabee* was then reversed by the Supreme Court of the United States, in an opinion by Justice Holmes.[261] Hawkins also wrote two concurrences and five dissenting opinions that year.[262]

When the Texas Bar Association met in July 1915, President Allen Sanford reported that the claim that the Texas Supreme Court

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257. Tyler Bldg. & Loan Ass'n v. Biard & Scales, 106 Tex. 554, 171 S.W. 1200 (Tex. 1915); Mabee v. McDonald, 107 Tex. 139, 175 S.W. 676 (1915), *rev'd*, 243 U.S. 90 (1917).

258. *Tyler Bldg. & Loan*, 171 S.W. at 1200. On a motion to rehear the case, Chief Justice Brown made the unusual decision to write an opinion concurring in the denial of the motion. *Id.* Brown only issued two other concurrences that term. In *Mabee v. McDonald*, 107 Tex. 139, 175 S.W. 676 (1915) *rev'd*, 243 U.S. 90 (1917), discussed below, he and Phillips jointly concurred. In *Cole v. State ex rel. Colobini*, 106 Tex. 472, 170 S.W. 1036, 1038 (1914), written by Phillips, Brown merely stated, "[u]pon a full and thorough examination of the questions involved in the foregoing opinion, I fully concur with the reasoning and the conclusions expressed therein." Hawkins is noted as declaring his intention to file his opinion later, although no such opinion was filed. In the related case of *McFarland v. Hammond*, 106 Tex. 579, 173 S.W. 645 (1915), however, Hawkins filed a lengthy dissent attacking Phillips's interpretation of the statutes regulating supreme court jurisdiction. He states that he was temporarily absent from the court during its consideration of *Cole*. *McFarland*, 173 S.W. at 648.

259. 107 Tex. 139, 175 S.W. 676 (1915), *rev'd*, 243 U.S. 90 (1917).

260. Mabee v. McDonald, 107 Tex. 139, 175 S.W. 676, 676 (1915), *rev'd*, 243 U.S. 90 (1917).

261. McDonald v. Mabee, 243 U.S. 90 (1917).

262. In addition, the court in *St. Louis S.W. Ry. Co. v. Griffin*, 106 Tex. 477, 171 S.W. 703 (1914) declared Texas's Blacklisting Law, which required corporations to provide the "true cause" for the discharge of an employee, unconstitutional on liberty of contract grounds. *Griffin*, 171 S.W. at 707. Hawkins wrote that he had not had the time fully to digest the issues and would file an opinion later. *Id.* No opinion was ever filed.

was five years behind in its docket "is not true nor nearly true."[263] Although Sanford acknowledged the court was behind in its cause docket, he reported it was not due to laziness on the part of the members of the court: "[T]he writer of this knows from investigations made by him that the members of the court have worked from twelve to eighteen hours per day in order to keep the work of the court from getting farther [sic] behind even than it is, and in the past members of the court have worked through the whole summer vacation season of the court and had no rest or vacation at all."[264] But the court had agreed to grant writs of error in 271 cases (cases on its "cause" docket), and 342 applications for a writ of error (the "application" docket) remained pending.[265] At its then-existing pace, it was at least four years behind, and that was without any additional work reaching the court during that time!

The unwillingness of the other members to give opinions to Hawkins, or Hawkins's inability quickly to draft opinions for the court, continued after Brown's death in May 1915. Nelson Phillips was appointed by Governor James E. Ferguson as chief justice, and James Yantis was appointed to take Phillips's seat.[266] During Yantis's first full term on the court, he wrote twenty-four opinions for the court. Phillips wrote thirty-five, while Hawkins wrote just seven. By issuing just sixty-six opinions during the October 1915 term, however, the court fell even further behind in its cause docket.

In 1943, University of Texas law professor Robert Stayton published an article discussing the case backlog of the Supreme Court of Texas during the twentieth century.[267] Stayton's article suggested the backlog of the supreme court between 1910-20 reached as high as 1,800 days, or nearly five years behind on its cause docket.[268]

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263. Allen Sanford, *Annual Address of the President*, 34 PROC. TEX. B. ASS'N 15, 17 (1915).

264. *Id.*

265. *Statement of Work Done in Supreme Court from October 5th, 1914, through June 26th, 1915, and Condition of Dockets in June*, 34 PROC. TEX. B. ASS'N 20, 20 (1915).

266. *See To Appoint Judge Phillips*, DALLAS MORNING NEWS, May 27, 1915, at 2.

267. Robert W. Stayton & M. P. Kennedy, *A Study of Pendency in Texas Civil Litigation*, 21 TEX. L. REV. 382 (1943).

268. *Id.* at 392 & plate 5.

E. *The Committee of Judges and the Commission of Appeals*

1. Creating the Committee of Judges

The court's backlog demanded the Texas Legislature's attention during its biennial session beginning in January 1915. Although a Texas House joint resolution proposing a constitutional amendment reorganizing the court failed,[269] as did several bills proposing legislative amendments to the court's jurisdiction,[270] the legislature agreed to send to the voters a resolution amending Article V, section 2 to allow for four associate justices rather than the two mandated by the constitution.[271] The effort to increase the size of the court, held on Saturday, July 24, failed miserably, despite widespread support from the bar[272] and Governor Ferguson.[273] Also on this off-year ballot were five other constitutional amendments, including one to separate "the Agricultural and Mechanical College from the University of Texas."[274] All failed. The result, however,

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269. *See* Tex. H.J. Res. 35, 34th Leg., R.S., 222 (1915) (stating that the bill was "[p]roposing an amendment to the Constitution of the State of Texas reorganizing and constituting the Supreme Court"). The resolution proposed amending the Constitution by increasing the number of supreme court justices to sixteen, and providing for their election. *Id.* The state was to be divided into eight Supreme Court Judicial Districts, and two judges were to be elected from each district. *Id.* Those judges would elect a chief justice. *Id.* Finally, the amendment authorized the Texas Legislature to alter the number of judges as it deemed proper. *Id.*

270. *See* Texas H.B. 99, 34th Leg., R.S., 97 (1915) (proposing "[a]n Act to amend Articles 1521, 1522 and 1544 of the Revised Civil Statutes of 1911, as amended by an act of the Thirty-third Legislature, approved March 28, 1913, defining the appellate jurisdiction of the Supreme Court and regulating practice therein"); *see* Texas H.B. 411, 34th Leg., R.S., 338 (1915) (proposing "[a]n Act to amend Articles 1521, 1522, 1543, 1544 and 1526 of the Revised Civil Statutes of 1911, defining the original and appellate jurisdiction of the Supreme Court and regulating practice therein"). Both bills were sent to committee, and both died in committee.

271. *See* Tex. S.J. Res. 3, 34th Leg., R.S., 1915 Tex. Gen. Laws 278 (proposing an amendment to the Texas Constitution to provide for four associate justices if approved by plebiscite).

272. *See Resolution of the Tex. State Bar Ass'n*, 34 PROC. TEX. B. ASS'N 16, 19 (1915) (submitting resolution of the Texas Bar Association's President to "increase the number of judges to the Supreme Court to five members"). The president's resolution, upon a motion to adopt, was "unanimously adopted." *Id.* at 27.

273. *See Ferguson Returns to Austin*, DALLAS MORNING NEWS, July 27, 1915, at 3 (noting Ferguson's support of all amendments except for separation of colleges); *Five Amendments Snowed Under by Voters of Texas*, DALLAS MORNING NEWS, July 25, 1915, at 1 (noting decisive vote against five out of six amendments presented).

274. *Five Amendments Snowed Under by Voters of Texas*, DALLAS MORNING NEWS, July 25, 1915, at 1.

led the Texas Bar Association and the University Law Association to attempt to craft a different solution.

The University Law Association (ULA) was an organization of "Former Law Students of the University of Texas," founded in 1914.[275] It listed as its first goal "aiding the profession."[276] At its annual meeting on June 13, 1916, the ULA invited Justice William Hawkins to speak on the issue of law reform.[277] A year earlier, Hawkins had supported the constitutional amendment to expand the membership in the supreme court to five.[278] Hawkins's speech first challenged the assertion that the court was five years behind on its docket; instead, concluded Hawkins, the court was only two and a half years behind.[279] The solution to eliminating this modest delay was fourfold: 1) enforce the rules of court; 2) amend some rules of the court; 3) amend the rules concerning practice and procedure before the court; and 4) amend the state constitution.[280] Hawkins then offered thirteen different reform proposals, some of which consisted of several subparts, and many of which concerned issues of judicial reform beyond the congestion found in the Texas Supreme Court.[281] Most importantly for purposes of the court's docket, Hawkins elaborated his view of the purpose of the supreme court:

> [T]he great purpose and function of the Supreme Court should be to determine correctly and finally all controverted questions of substantive law and all questions of law involving the operation of the State Government. To make its jurisdiction less is to sacrifice some of the essentials of sound jurisprudence upon the altar of expediency. Such sacrifice should be as slight as possible and as far as possible consistent with the due dispatch of its business the appellate jurisdiction of

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275. *University Law Association*, DALLAS MORNING NEWS, May 23, 1914, at 4.

276. *Id.*

277. *Changes Suggested in Judicial System*, DALLAS MORNING NEWS, June 25, 1916, at 5.

278. *See Judiciary Reform Urgently Demanded*, DALLAS MORNING NEWS, July 3, 1915, at 7 (urging "the adoption on July 24, 1915, of the proposed amendment to the judiciary article of the Constitution . . . , increasing the membership of the Supreme Court from three to five").

279. *See Changes Suggested in Judicial System*, DALLAS MORNING NEWS, June 25, 1916, at 5 (suggesting University Law Association "President Kimbrough . . . cut in two his estimate that the Supreme Court's docket is five years behind time").

280. *Id.*

281. *Id.*

> the Supreme Court should extend to all cases of the classes above mentioned, regardless of the court of their origin.[282]

For Hawkins, getting it right, and deciding "all controverted questions of substantive law," required an expansion of the court's jurisdiction, and questions of "expediency" were largely irrelevant to the court's work.[283] As an abstract proposition, Hawkins's claim made sense: getting decisions right—even if some delay was entailed—was a sound idea. But crafting correctness and efficiency as opposites was an old parlor trick used to justify glacially-paced decision-making.

The ULA also published a bulletin on legal reform, which it offered to the Texas Bar Association for consideration at the latter's July 1916 annual meeting.[284] W. H. Kimbrough's report concluded that quality in judging was missing in Texas appellate courts because the courts lacked both adequate time and qualified judges.[285] The remedy, according to Kimbrough, "must be radical and far-reaching."[286] This radical solution included creating a fifteen-member appellate court hearing all appeals, working twelve months a year (with each judge given a month of vacation), given a twelve-year term, with six judges popularly elected, six appointed by the legislature, and three appointed by the governor.[287] Additionally, salaries for appellate judges would be raised to a figure between $7,500-$10,000.[288]

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282. *Id.*

283. *Id.*; *accord* Nelson Phillips, *Remarks by Chief Justice Nelson Phillips*, 34 PROC. TEX. B. ASS'N 24, 25 (1915) (stating that "I have never, myself, craved the reputation of being a swift judge. I would much prefer to have associated with my service the number of cases I had disposed of right, than simply the number I had gotten off the docket").

284. *See* Univ. Law Ass'n, *Appendix to the Report of the Committee on Jurisprudence and Law Reform*, 35 PROC. TEX. B. ASS'N 94, 94 (1916) (reprinting three reports by members of the ULA).

285. W. H. Kimbrough, *Reforms in the Texas Judiciary*, 35 PROC. TEX. B. ASS'N 95, 99 (1916).

286. *Id.* at 100.

287. *Id.* at 100-01; *see also* William M. Key, *A Proposed Constitutional Amendment*, 35 PROC. TEX. B. ASS'N 126 (1916) (supporting and restating failed 1913 effort to amend constitution to provide for fifteen-member supreme court, divided into criminal and civil divisions, eliminating court of civil appeals, and raising salaries of members of the supreme court to $6,000 plus $5 per day for circuit riding, required of each supreme court justice during one month of the year).

288. W. H. Kimbrough, *Reforms in the Texas Judiciary*, 35 PROC. TEX. B. ASS'N 95, 100 (1916).

When the Texas Bar Association met three weeks after Hawkins's speech to the ULA, it looked not at Hawkins's proposals but turned to former Texas Supreme Court Justice Frank A. Williams for solutions to the crisis concerning the supreme court's docket.[289] When the Texas Bar Association did the same thing in 1911, Williams suggested legislation altering the court's jurisdiction.[290] The legislature complied, largely adopting Williams's proposal as drafted.[291] As some lawyers noted then, Williams's solution was no solution at all. By 1916, Williams estimated the court's backlog was three years, if no other cases were heard during that time.[292] Although long-range solutions included expanding the membership of the court, further restricting its jurisdiction, and altering the writ of error system, all suggestions propounded by Hawkins and others, Williams focused on near-term solutions. He subtly undermined the suggestions made by the ULA and Hawkins, and proposed legislation allowing the chief justice, or the majority of the court should the chief justice refuse or be unable to act, to appoint three members of the court of civil appeals to decide whether to grant an application for a writ of error.[293] Williams told the members of the Bar Association that he had spoken with the members of the supreme court, "and while I asked no judge to commit himself to the constitutionality of the proposed plan, nor to commit himself finally to its expediency, . . . they expressed themselves cordially and with the best of feeling, . . . and a majority of the justices of the supreme court favored this plan."[294] Williams also polled the chief justices of the nine courts of civil appeals, and of the seven who responded, five supported his proposal.[295] Williams's statement concerning a majority of the supreme court was

289. F.A. Williams, *What Can Be Done to Aid the Supreme Court*, 35 PROC. TEX. B. ASS'N 14, 14 (1916) (presenting Judge Williams's proposals for the Texas judicial system).

290. *See July 4, 1911—Afternoon Session*, 30 PROC. TEX. B. ASS'N 21, 24 (1911) (discussing Williams's proposal).

291. *See* Act of Mar. 28, 1913, 33d Leg., R.S., ch. 55, 1913 Tex. Gen. Laws 107 (amending Article 1521 of the Revised Statutes of 1911).

292. Williams, *supra* note 289, at 15. Although this claim was close to Hawkins's view that the Court was two and a half years behind, it is clear in hindsight that Williams's (and Hawkins's) view was overly optimistic.

293. *Id.* at 16-17.

294. *Id.* at 24.

295. *Id.* at 24-25. Williams noted the two who opposed his proposal supported a law reducing the supreme court's jurisdiction. *Id.* at 25.

telling, for during the discussion following the presentation of Williams's paper, Justice William Hawkins spoke at length casting doubt on the constitutionality of the proposal creating a committee of judges to decide whether to grant writs of error. Hawkins began, "It is always with extreme diffidence that I find myself not concurring in the views of my associates, . . . and one whose wisdom is known to all of you, our good friend, Judge Williams."[296] For Hawkins, Williams's proposal failed to address the root of the problem—reform in the trial courts. As for the proposal itself, any decision to give the job of granting writs of error to a body other than the supreme court might be both unconstitutional and ineffective.[297] As Hawkins noted, "if the Courts of Civil Appeals have the time to do the work suggested in the paper of Judge Williams, it is proof positive that some of the [c]ourts of [c]ivil [a]ppeals ought to be abolished on the ground that there are more than are necessary."[298] Although Chief Justice Phillips did not attend the meeting, Justice Yantis was present. He spoke only briefly, and stated, "I approve the project very heartily, except I do not express any opinion upon the constitutionality of it, as that might come before the court for decision."[299] A majority of the association voted to urge the legislature to adopt Judge Williams's Committee of Judges proposal. On March 15, 1917, the legislature adopted it.[300]

The act became effective immediately. On March 28, Chief Justice Nelson Phillips appointed three members of the court of civil appeals to determine whether to grant selected claims for writs of error.[301] In *San Antonio & Aransas Pass Railway Co. v. Blair*,[302] the defendant (and plaintiff-in-error) railway company applied for

296. *Id.* at 16.

297. *See* San Antonio & Aransas Pass Ry. Co. v. Blair, 108 Tex. 434, 196 S.W. 502, 506 (1917) (addressing, and ultimately affirming, the constitutionality of the act creating the Committee of Judges over dissent by Hawkins); Scott v. Shine, 109 Tex. 412, 202 S.W. 726, 726 (1918) (Hawkins, J., dissenting) (reiterating dissent in *Blair*). Hawkins was not alone in questioning the constitutionality of the law. Judge John Townes, Dean of the University of Texas Law School, spoke at the 1916 annual meeting of the Texas Bar Association questioning the constitutionality of Williams's proposal. *See* Williams, *supra* note 289, at 26-31 (reporting comments of Townes during discussion of Williams proposal).

298. Williams, *supra* note 289, at 42.

299. *Id.* at 40.

300. Act of Mar. 15, 1917, 35th Leg., R.S., ch. 76, 1917 Tex. Gen. Laws 142.

301. *Blair*, 196 S.W. at 503 (1917).

302. 108 Tex. 434, 196 S.W. 502 (1917).

a writ of error, which the Committee of Judges denied.[303] The company then filed a writ of error with the supreme court alleging the Act of 1917 was unconstitutional.[304] A majority of the court held the law constitutional, declaring that the Texas Constitution imposed no bar on the legislature's revision of the court's jurisdiction or manner of granting jurisdiction to reach the supreme court.[305] *Blair* was issued at the end of the court's October 1916 term, on June 27, 1917.[306] As I discuss in section F below, Justice Hawkins filed his dissenting opinion in *Blair* in mid-August 1917, nearly two months after the court recessed for the summer.[307]

In addition to creating the Committee of Judges, the 35th Legislature also amended subsection six of Article 1521 in an attempt to reduce the court's jurisdiction.[308] That amendment, of course, had little short-term effect.[309]

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303. San Antonio & Aransas Pass Ry. Co. v. Blair, 108 Tex. 434, 196 S.W. 502, 503 (1917).

304. *Id.*

305. *Id.*

306. *Id.*

307. San Antonio & Aransas Pass Ry. Co. v. Blair, 108 Tex. 434, 196 S.W. 1153 (1917) (Hawkins, J., dissenting).

308. Act of Mar. 15, 1917, 35th Leg., R.S., ch. 76, 1917 Tex. Gen. Laws 140. As amended, subsection six now read:

> 6. In any other case in which it is made to appear that an error of law has been committed by the Court of Civil Appeals of such importance to the jurisprudence of the state, as in the opinion of the Supreme Court requires correction, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute. Upon the showing of such an error the Supreme Court may, in its discretion, grant a writ of error for the purpose of revising the decision upon such question alone, and of conforming its judgment to the decision thereof made by it. Until otherwise provided by rule of the Supreme Court the application for writ of error in such a case shall immediately after the title of the cause and the address to the court, concisely state the question decided by the Court of Civil Appeals in which error is asserted, in order that the Supreme Court may at once see that such a question is presented as is contemplated by this provision. *Id.*

This amendment allowed the supreme court the sole discretion to determine whether to grant a petition for a writ of error under Subdivision Six. The statutory provision had earlier been written as requiring ("shall") the court to take jurisdiction in cases claiming an error of law of importance to the jurisprudence to the state. *Id.* The legislature also amended subsection 3 of Article 1521 granting the court jurisdiction over cases involving the construction of statutes, not just their validity. *See In re* Subdivision Six of Supreme Court Jurisdiction Act of 1917, 201 S.W. 390, 390 (1918) (Hawkins, J.) (noting the change in law).

309. *See In re Subdivision Six*, 201 S.W. at 390, (Hawkins, J.) (arguing change in the law was unconstitutional).

2. Creating the Commission of Appeals

Even before Hawkins's dissent in *Blair* was filed and published in August 1917, members of the Texas Bar Association demanded something else be done, for the system, in the words of one, was "absolutely broken down."[310] An initial proposal by Edward Harris, building on earlier proposals to increase membership in the supreme court, suggested one supreme court consisting of "at least" twenty-four judges, each paid an annual salary of $10,000, and elected for ten year terms.[311] Harris also proposed eliminating the courts of civil appeals.[312] The association adopted Harris's proposal, then reconsidered it, then generally re-adopted it with the caveat that a new committee make its own recommendations the following day. The next morning, July 6, the committee made a number of suggestions, including increasing the number of supreme court justices to seven or nine, allowing appeals to the supreme court as of right, and eliminating the writ of error system.[313] The result of the long-winded discussion was to appoint a committee to report at the 1918 annual meeting to propose legislation to the legislature.[314] But before the association met next, the legislature offered another solution, a Commission of Appeals.

The impeachment and removal from office of Governor James "Pa" Ferguson in the summer of 1917 elevated Lieutenant Governor William Hobby to the governorship.[315] Shortly after becoming Governor, Hobby called the legislature into special session. At its

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310. Edward F. Harris, *Letter to President of Tex. Bar Ass'n*, 36 PROC. TEX. B. ASS'N 10, 10 (1917).

311. *Id.* Harris's proposal also required experience at the bar totaling eight years. This proposal was similar to the Vaughan amendment which passed the Senate in 1913, but failed in the House. *See* William M. Key, *A Proposed Constitutional Amendment*, 35 PROC. TEX. B. ASS'N 126, 126 (1916) (recounting and supporting proposal).

312. Harris, *supra* note 310, at 11. This was also the suggestion of W. H. Kimbrough and William M. Key, who both presented reports to the association in 1916. *See* W. H. Kimbrough, *Reforms in the Texas Judiciary*, 35 PROC. TEX. B. ASS'N 95, 100 (1916) (suggesting a remedy for the judicial system); Key, *supra* note 311 (explaining the proposal to abolish existing courts and reorganizing the judicial system).

313. H.M. Garwood et al., *Letter to President of Tex. Bar Ass'n*, 36 PROC. TEX. B. ASS'N 63, 65 (1917). In addition, the committee urged amendment of Article 1521, particularly subsection six, which had been created in 1911 at the urging of former Justice Frank Williams. *Id.* at 65-66.

314. *Id.* at 65.

315. *See* CAMPBELL, *supra* note 30, at 352 (summarizing the impeachment of Ferguson).

fourth called session,[316] which largely concerned prohibition[317] and a guarantee of women's suffrage in primary elections,[318] the legislature also addressed reform of the supreme court. On April 3, 1918, the legislature adopted the law creating the Commission of Appeals.[319]

The Commission of Appeals was not a new idea. Between 1879 and 1892, a Commission of Appeals existed to reduce the supreme court's case backlog.[320] That commission was eliminated in the judicial restructuring of 1891 and 1892.[321] The Texas Bar Association called for a new commission in July 1913,[322] a call repeated by Chief Justice Brown in 1914.[323] In 1915, Oklahoma, the only other state to send appeals in civil cases to a supreme court and appeals in criminal cases to a court of criminal appeals, had created a com-

316. A "called session" is a special session of the legislature called by the Governor. The Governor "shall state specifically the purpose for which the Legislature is convened." TEX. CONST. art. IV, § 8 (a) (2004).

317. *See* Act of Mar. 21, 1918, 35th Leg., 4th C.S., ch. 24, 1918 Tex. Gen. Laws 37 (prohibiting the manufacture of intoxicating liquors throughout the state). During the Fourth Called Session, the legislature adopted five additional laws regulating the sale and transportation of intoxicating liquors. *See* chs. 5, 6, 7, 12 and 31 of the 1918 Texas General Laws. It also ratified the 18th Amendment to the U.S. Constitution, the prohibition amendment. Tex. H.R.J., Res. 1, 35th Leg., 4th C.S., 1918 Tex. Gen. Laws 200.

318. *See* Act of Mar. 26, 1918, 35th Leg., 4th C.S., ch. 34, 1918 Tex. Gen. Laws 61 (granting women the right to vote in primary elections and in nominating conventions).

319. Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch. 81, 1918 Tex. Gen. Laws 171.

320. Act of July 9, 1879, 16th Leg., 1st C.S., ch. 34, 1879 Tex. Gen. Laws 30. This law was amended two years later. Act of Feb. 9, 1881, 17th Leg., R.S., ch. 7, 1881 Tex. Gen. Laws 4.

321. *See* Act of Apr. 13, 1892, 22d Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 21 (providing for reorganization of the supreme court, and defining its jurisdiction under amended article 5 of the Constitution).

322. Committee on Jurisprudence and Law Reform, *Report of Committee on Jurisprudence and Law Reform*, 32 PROC. TEX. B. ASS'N 90, 92-93 (1913). One member of the Committee on Jurisprudence and Law Reform, W. S. Holman, made the 1913 Texas Bar Association meeting. He recommended, on behalf of the Committee, among other things, the creation of a commission of sitting lower court judges to ease the Supreme Court's docket: "These Judges should digest and pass upon all cases assigned them and the majority opinion of said Court should become the opinion of the Supreme Court when approved by two members of the Supreme Court at regular opinion days of the Supreme Court." *Id.* Holman's suggestions were declared "radical," and the proposal was sent to a committee for review, where it died. *Id.* at 99, 108-09.

323. T. J. Brown, *Tuesday, July 7—Afternoon Session*, 33 PROC. TEX. B. ASS'N 16, 19 (1914).

mission of appeals to reduce the backlog in its supreme court.[324] It was not, however, an approach favored by most Texas lawyers.[325]

During the spring of 1918, while the legislature was enacting the bill creating the Commission of Appeals, a committee of the Texas Bar Association was drafting a proposed constitutional amendment of Article 5 of the Texas Constitution, the judiciary article. The result of this work was the Dabney Report, which proposed a complete restructuring of the judiciary in Texas.[326] Returning to both the failed 1913 effort in the legislature to amend the judiciary article (the Vaughan amendment) and the proposal by W. H. Kimbrough of the ULA, the Dabney Report proposed a fifteen-member supreme court.[327] The court would operate in panels, occasionally sitting en banc, and would be elected for ten-year terms at an increase in pay.[328] Moreover, the report proposed to abolish the court of criminal appeals and the court of civil appeals, but

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324. *See Report of Supreme Court*, DALLAS MORNING NEWS, July 3, 1915, at 5 (noting the creation of the Supreme Court Commission effective April 1, 1915, and reporting "that the court is making rapid headway with the assistance of the commission in clearing the docket").

325. *See, e.g.*, Committee on Jurisprudence and Law Reform, *Report of Committee on Jurisprudence and Law Reform*, 33 PROC. TEX. B. ASS'N 22, 28 (1914) (noting remarks by Judge W. M. Key: "[O]nce they tried the commission, and that did not relieve the Supreme Court and the increase of business"); Nelson Phillips, *Morning Session—July 1, 1915*, 34 PROC. TEX. B. ASS'N 5, 23 (1915) (reporting statement of Chief Justice Phillips in opposition to creation of a Commission of Appeals, saying, "I frankly told the legislature that I thought that method would operate as a delusion, so far as affording the people of this State the relief they desire and need upon this question"). Judge Key was one of two candidates seeking to defeat incumbent Justice William Hawkins in the 1920 Democratic Party primary. The winner was Judge William Pierson. *See Official Vote is to be Canvassed*, DALLAS MORNING NEWS, Aug, 9, 1920, at 3 (noting vote in primary was Hawkins 139,760, Pierson 161,920 and Key 93,124). In the run-off, Pierson defeated Hawkins. *See Neff Now Leads with 72,657 Votes*, DALLAS MORNING NEWS, Aug. 30, 1920, at 4 (noting vote in primary run-off was Hawkins 134,954 and Pierson 181,644).

326. *See* Samuel Dabney, *Proposed Amendment to the State Constitution, Amending Article 5 of the Constitution Relating to the Judicial Department of the State Government by Adopting in Lieu Thereof the Following Joint Resolution*, 37 PROC. TEX. B. ASS'N 150 (1918) (hereinafter Dabney Report) (recommending several changes to the Texas judiciary system). As happened with nearly every committee created by the Texas Bar Association at this time, the members of the Committee on Reform in Court Organization were not able to meet during the year between the annual meetings of the association. As stated by Samuel B. Dabney, "That committee never was altogether gotten together. Mr. Garwood and myself only of that committee make a report." *Morning Session—July 5, 1918*, 37 PROC. TEX. B. ASS'N 143, 144 (1918).

327. *Id.* at 150.

328. *Id.* at 152.

divide the supreme court into civil and criminal divisions.[329] It also reorganized the trial and probate courts and eliminated county courts.[330] The debate at the annual meeting of the Texas Bar Association in 1918 about the Dabney Report was ferocious; the association spent nearly all of July 5, 1918 on the report. H. L. Moseley made the populist argument that the reorganization of the judiciary was a matter for legislative purview.[331] R. H. Ward praised its flexibility in effecting docket relief for the supreme court, and J. W. McClendon offered a substitute.[332] Justice Hawkins, after noting that he had a drafted proposal to reorganize the judiciary, suggested that the Dabney Report and all other ideas be given to a committee to investigate and report.[333] Samuel Dabney correctly noted that the McClendon and Hawkins suggestions were nothing more than "indefinite postponement," which meant the association would again do nothing to resolve this crisis.[334] The debate ceased for lunch and began again at 2:00 p.m. The session began with remarks from Roscoe Pound, Dean of the Harvard Law School, who spoke the previous day on "Judicial Organization."[335] Although Pound must have been surprised at being thrust in the middle of this nearly interminable debate, he chose to support the self-proclaimed reformers, for he believed its "conservative radicalism" was just the remedy for Texas.[336] The association then agreed to split thirty minutes between the two sides to the question, and vote.[337]

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329. *Id.* at 152-54.

330. *See id.* at 155-57 (expounding upon the reorganization of the probate and trial courts).

331. *Dabney Report*, *supra* note 326, at 167-70.

332. *Id.* at 171.

333. *Id.* at 198-99.

334. *Id.* at 199.

335. *Id.*; *see also* Roscoe Pound, *Judicial Organization*, 37 PROC. TEX. B. ASS'N 69 (1918) (recording Pound's remarks).

336. Roscoe Pound, *Address*, 37 PROC. TEX. B. ASS'N 204, 205 (1918). Pound also declared that,

> everything considered, it seems to me that you have here before you an admirable project, and I should feel, if you were successful in your efforts to put that upon the law books of the state, that you could congratulate yourselves on paving the way for the best judicial organization in this country, and an organization that would compare well with organizations anywhere. *Id.* at 215-16.

337. *Id.* at 216.

Speaking for those opposed to the Dabney Report was Justice Hawkins. After concurring in the belief that the supreme court should avoid the technicalities of the law which work to subvert justice,[338] Hawkins made his position exquisitely clear: The expansion of the supreme court to fifteen members, combined with the abolition of the court of criminal appeals and court of civil appeals, consisting then of thirty members, "will be the most disastrous judicial system that Texas ever knew."[339] Although the court was behind in its work, in Hawkins's view, this had little to do with the structure of the Texas judiciary.[340] Requests for writs of error from decisions of the court of civil appeals were denied at least 80% of the time, on the ground that the court of civil appeals had gotten the issue of substantive law "essentially" correct.[341] Thus, the court of civil appeals was an effective body providing substantive justice in the majority of its cases. Hawkins obliquely referred to his suggested reformation of the judiciary, but then demurred, noting that "no gentleman seems to think [it] of enough importance to justify him in seconding my substitute."[342] He concluded by reiterating

338. *See id.* at 218 (recording Hawkins's statement: "[I]f you gentlemen will look over the reports of the Supreme Court for the last few years, you will find that that court almost invariably has set its face like flint against technicalities, and in favor of a practical application of common sense construction, which will result in the enforcement of actual and practical justice, rather than in technical refinements and distinctions, too often subversive of justice."); Roscoe Pound, *The Causes of Popular Dissatisfaction in the Administration of Justice*, 29 A.B.A. REP. 395 (1906) (outlining the reasons for dissatisfaction with the administration of justice).

339. *Afternoon Session—July 5, 1918,* 37 PROC. TEX. B. ASS'N 204, 220 (1918).

340. *Id.* at 220-21.

341. *Id.* at 221. Justice Hawkins used this same percentage in his August 1917 dissent, at 196 S.W. 1153, 1197 (1917), to the Court's decision in *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S.W. 502 (1917). *See also Changes Suggested in Judicial System*, DALLAS MORNING NEWS, June 25, 1916, at 5 (reporting speech of Justice Hawkins to University Law Association in which he claims "about 80 [percent] of the decisions of the Courts of Civil Appeals from which appeals are taken is unquestionably correct").

342. *Afternoon Session—July 5, 1918*, 37 PROC. TEX. B. ASS'N 204, 223 (1918). Justice Hawkins's first paper proposing reorganization of the judiciary was given to the University Law Association on June 13, 1916 and later reported in the *Dallas Morning News*. *See Changes Suggested in Judicial System*, DALLAS MORNING NEWS, June 25, 1916, at 5 (printing a synopsis of Justice Hawkins's proposed changes to judiciary). He then drafted a revision of the judiciary article of the Texas Constitution for a legislative investigating committee in early 1918. *See Reforms in Courts of Texas Outlined*, DALLAS MORNING NEWS, Jan. 8, 1918, at 4 (reprinting portions of Justice Hawkins's revised draft).

the defects he saw in the Dabney Report, but his efforts were in vain, and the Dabney Report was approved in principle.[343]

Given that momentum, the association resolved to petition the legislature for a number of requests: to repeal the 1917 amendment to Article 1521, which expanded the supreme court's jurisdiction; to create a committee to promote the constitutional amendment of the judiciary article with the legislature and with the people; and to print sufficient copies of Pound's address and the Dabney Report.[344] In response to the association's petition, the legislature created the Commission of Appeals in April 1918 without drawing any comment from the Texas Bar Association at its annual meeting three months later.

The Commission of Appeals consisted of six members, each appointed by the Governor with the consent of the senate, and was divided into two sections.[345] The commission was to remain in existence for two judicial terms, beginning October 1918 and running through June 1920.[346] The Commission of Appeals was given jurisdiction in two types of cases: first, it was given jurisdiction over cases in which the parties consented to commission review and decision; second, it was given jurisdiction of those cases the supreme court designated the commission to hear.[347]

During its first two full years of operation, the Commission of Appeals decided over 250 cases. By the end of the court's October 1919 term, Justice Greenwood was able to report that the court had reduced its backlog to 274 cases, "with 450 pending applications for writs of error."[348] Although the creation of the commission reduced the court's backlog of cases, it remained several years behind schedule.

Much of the problem was due to the court's use of the Commission of Appeals. In *McKenzie v. Withers*,[349] the court held that it would review the decisions of the Commission of Appeals for cor-

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343. *See Afternoon Session—July 5, 1918*, 37 PROC. TEX. B. ASS'N 204, 221-228 (1918) (analyzing the various defects found in the Dabney Report).

344. *Id.* at 228-34.

345. Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch. 81, 1918 Tex. Gen. Laws 171.

346. *Id.*

347. *Id.* at 172.

348. Thomas Greenwood, *Aid to the Supreme Court from Lawyers*, 39 PROC. TEX. B. ASS'N 135, 141 (1920).

349. 109 Tex. 255, 206 S.W. 503 (1918).

rectness, thus lessening the efficiencies generated by the creation of the commission.[350] This necessitated the court's review of the record, which is why the number of cases remaining on the docket as of July 1920 represented about four years of cases, based on the court's average number of opinions written during the 1910s. Meanwhile, the Texas Bar Association continued to urge constitutional reform of the judiciary.

The meeting of the Texas Bar Association in 1919 was complete with recriminations. One of the duties of Cecil Smith, the president of the association, was to survey the legal landscape and report on any topographical changes. Smith noted the dramatic changes to the law, including ratification of prohibition and women's suffrage. He also took note of a law that had not been enacted—reorganization of the judicial branch:

> Speaking of laws enacted, it will not be out of order to refer to the fact that the recommendation of the Association for a change in our court machinery, and for a simplification of our procedure, was not enacted by the Legislature. That there will be a change in these things I entertain no doubt; but I fear that the change will not be made by lawyers, but that laymen will make it.[351]

Instead of reforming the structure of the judiciary, the Texas legislature increased the pay of members of the supreme court justices from $5000 to $6500.[352] It also adopted legislation regulating admission to the practice of law.[353]

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350. *See* McKenzie v. Withers, 109 Tex. 225, 206 S.W. 503 (1918) (announcing that "[t]he Act does not in [the court's] opinion require the Supreme Court's approval of the [c]ommission's opinion in causes referred to it" and acknowledging that such review would be time consuming, but deciding to review the commission's decision anyway); *see also Finding of Appeals Commission Approved*, DALLAS MORNING NEWS, Nov. 13, 1918, at 5 (noting policy).

351. Cecil Smith, *President's Annual Address: Miscellaneous General Laws*, 38 PROC. TEX. B. ASS'N 18, 24 (1919). *See* Tom Finty, *The Lawyer and the Press*, 38 PROC. TEX. B. ASS'N 172 (1919) (remarking during toast on a potential reason why the association's ideas of judicial reform have not been enacted into law). At the closing dinner of the association, during the toast, one lawyer suggested that the failure of the association's plan for judicial organization was "that the name was against it." *Id.* at 174.

352. Act of Mar. 3, 1919, 36th Leg., R.S., ch. 32, § 1, 1919 Tex. Gen. Laws 54; *see also* Smith, *supra* note 351, at 21 (noting adoption of the law increasing the supreme court justices' salaries).

353. Act of Mar. 7, 1919, 36th Leg., R.S., ch. 38, 1919 Tex. Gen. Laws 63. *See* Smith, *supra* note 351, at 21-22 (noting adoption of the law regulating attorney's admission to the practice of law).

Smith's lament was due in part to the division within the Texas Bar Association concerning reorganization of the judiciary. For example, the Committee on Jurisprudence and Law Reform offered no report at the 1919 meeting of the association, apparently because its chairman thought he was under a duty to support the Dabney Report in the legislature, to which he objected.[354] In addition, Justice Hawkins continued to suggest other changes to remedy the court's congested docket. At the same 1919 meeting of the Texas Bar Association, Hawkins spoke for assistance from the bar to revise the procedural rules of the court.[355]

F. *End of an Era*

In 1992, the Texas Supreme Court, in a 5-4 decision, held that a court of appeals did not abuse its discretion in temporarily prohibiting the press from viewing trial exhibits while it considered a pending appeal.[356] Chief Justice Tom Phillips wrote a separate opinion criticizing the dissent's "opinion dissenting from the Court's decision not to grant leave to file a petition for writ of mandamus."[357] Chief Justice Phillips was disturbed in part that the opinion allowed a member to circumvent the court's own rule, which required a vote of five to grant leave to file a petition for a writ of mandamus.[358] He continued, "this tyranny of the minority is particularly unwelcome at a time when some justices publicly assert that the court is not timely disposing of the cases it does accept."[359] Chief Justice Phillips then turned to a historical example to press his point:

> Only once before in the history of our Court have such opinions been issued with any frequency. Between 1916 and 1919, Associate Justice William E. Hawkins issued a number of dissenting or concurring opinions to decisions of the Court not to grant application for writ of error. These opinions ended when Hawkins lost to William

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354. Cecil Smith, *President's Annual Address: Miscellaneous General Laws,* 38 PROC. TEX. B. ASS'N 18, 52 (1919).

355. *Afternoon Session—July 2,* 1919, 38 PROC. TEX. B. ASS'N 132, 144 (1919).

356. Dallas Morning News v. Fifth Court of Appeals, 842 S.W.2d 655, 655 (Tex. 1992).

357. *Id.* at 660.

358. *Id.* at 662.

359. *Id.* Phillips then cited two opinions written by Justice Doggett, the dissenting justice in *Dallas Morning News. Id.*

> Pierson in 1920, becoming the first [sic] member of our Court to be denied re-election by the voters.[360]

Chief Justice Phillips does not state that Hawkins's dissents occurred at another time in Texas history when the court was criticized for falling far behind in its docket. However, his telescoping of events, particularly his opinion that dissents and concurrences to denials of petitions for writs of error led to Hawkins's loss in the 1920 primary elections, though too facile, is largely accurate.

The relationships Justice Hawkins had with the local bar associations, as well as with the Texas Bar Association, became more and more brittle during the last half of the 1910s. Although Hawkins spoke regularly during discussions of the annual meeting of the Texas Bar Association and was a member of several committees, his influence was slight. His dissent to the Williams proposal on creating the Committee of Judges was given little weight by the association and was dismissed by the legislature.[361] His revenge was his dissent in *Blair*,[362] issued in August 1917, shortly after the annual meeting of the Texas Bar Association, and his "opinion" issued March 6, 1918 in *In re Subdivision Six of Supreme Court Jurisdiction Act of 1917*.[363]

As early as the 1913 annual meeting of the Texas Bar Association, during a discussion of W. C. Morrow's paper *Judicial Reform in Texas*, Morrow himself commented that he was not criticizing the supreme court:

> On the contrary, I entertain for some of the members of that body the utmost affection, and for all of them the greatest respect. . . . I have not a closer neighbor and more intimate friend in the State of Texas than Judge Phillips. Judge Brown, who has been on the bench for years, is a man who has commanded my respect and reverence, and does yet.[364]

Hawkins's name was conspicuous by its absence. At the 1917 annual meeting, John Parker declared:

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360. *Id.* As noted above, Hawkins was the second sitting justice to lose a primary election, having been the first challenger to win an election against a sitting justice, Joseph Dibrell. I suppose here is the place to note that what goes around, comes around.

361. *Reforms in Courts of Texas Outlined*, *supra* note 342.

362. San Antonio & Aransas Pass Ry. Co. v. Blair, 108 Tex. 434, 196 S.W. 1153 (1917) (Hawkins, J., dissenting).

363. 201 S.W. 390 (1918).

364. *Tuesday, July 1—Afternoon Session*, 32 PROC. TEX. B. ASS'N 18, 23-24 (1913).

> Another thing, I do not believe in dissents.
>
> Especially do I not believe in them when they are written after the main opinion has been filed, and weeks have elapsed, and when the dissent then filed is an essay and not an opinion. . . .
>
> Every question that goes to the Supreme Court need not be resolved with reference to posterity.[365]

Without naming him, both speakers were pointing their fingers at Hawkins. Hawkins's opinions, particularly his dissenting opinions, were monumental in length.[366] With but two exceptions, both arising during the October 1916 term, the only dissents on the court between the October 1913 and October 1916 terms came from Hawkins.[367] Furthermore, all belated dissents came from Hawkins's pen. A month after Parker's statement, and nearly two months after the majority's opinion was issued, Hawkins issued his dissenting opinion in *Blair*, an opinion that consisted of over 60,000 words, possibly the longest opinion in the court's history.[368]

In 1914, Hawkins was re-elected to the supreme court without opposition, although the *Dallas Morning News* indicated that Court of Civil Appeals Judge William Key had been urged to run against him.[369] In the 1920 Democratic primary, Hawkins was opposed by both Key and William Pierson.[370] Hawkins finished second in the primary and lost the run-off.[371] How did Hawkins

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365. *Afternoon Session—July 3*, 36 PROC. TEX. B. ASS'N 9, 33 (1917). Three years earlier, in his 1914 address to the Texas Bar Association, Chief Justice Brown complained, about both lawyers and judges, "It is not necessary to write a dissertation on the law in every case. . . . [Instead,] make it brief so as to enable us to dispatch more business." *Tuesday, July 7—Afternoon Session*, 33 PROC. TEX. B. ASS'N 16, 21 (1914).

366. *See Dallas Morning News*, 842 S.W.2d at 662 n.1 (stating that "[Hawkins] authored frequent, sometimes lengthy dissents, . . . and relationships among the justices became strained").

367. Table 4, *supra*.

368. *Blair*, 196 S.W. at 1153 (Hawkins, J., dissenting).

369. *See Key Will Not Oppose Hawkins*, DALLAS MORNING NEWS, May 19, 1914, at 3 (stating that "Judge Key has been importuned from many parts of the State to make the race, but will not accede to these requests").

370. *See Judge Pierson Candidate for Justice of the Supreme Court*, DALLAS MORNING NEWS, Jan. 1, 1920, at 18 (noting that William Pierson announced his candidacy for supreme court justice in opposition to Justice Hawkins); *Key Seeks Place on Supreme Court*, DALLAS MORNING NEWS, Jan. 11, 1920, § 1, at 5 (stating Key's intentions to run for supreme court justice against Hawkins).

371. *See Neff Now Leads With 72,657 Votes*, DALLAS MORNING NEWS, Aug. 30, 1920, at 1 (reporting Hawkins's loss by over 47,000 votes).

become the second supreme court justice to lose a primary election?

The beginning of the end may have been the death of Chief Justice Brown in May 1915, and the subsequent appointment of Justice Nelson Phillips to chief justice from associate justice. Before Brown's death, Hawkins's concurring and dissenting opinions were occasional, and although he published more such opinions than either Brown or Phillips, those opinions usually were relatively short. Beginning with the October 1915 term, Hawkins began publishing longer dissenting opinions and began issuing concurring and dissenting opinions to denials of petitions for writs of error.[372] On a personal level, Hawkins's estrangement from his colleagues is suggested by a report of a banquet held in Waco for James Yantis in honor of his appointment to the court. Although Nelson Phillips attended and spoke at the banquet, Hawkins was absent.[373] Hawkins was not even listed as one of the prominent members of the bar sending their regrets.[374] With the issue of prohibition again dominating the Texas political scene, it seems likely that Yantis's long and close friendship with the wet Governor, James "Pa" Ferguson, led to Hawkins's absence.[375]

Hawkins's first dissenting opinion during the October 1915 term was in *Marshall v. E. T. Railway Co.*[376] J. M. Petty was riding his horse at a walk during the day, and while passing under the defendant's railroad bridge, hit his head on the timbers of the railroad.[377] Petty was about six feet tall, 79 years old, and suffered from poor eyesight.[378] The distance between the floor of the underpass and the timbers was six feet.[379] The jury found in his favor, which judg-

372. *See Ex parte* Mitchell, 109 Tex. 11, 177 S.W. 953, 954 (1915) (Hawkins, J., dissenting) (writing a short dissent); Diamond v. Duncan, 107 Tex. 256, 177 S.W. 955, 957 (1915) (Hawkins, J., dissenting) (writing a brief dissent to the court's decision denying a motion for rehearing). These two dissenting opinions were the only short dissents published during the October 1915 term, after the death of Chief Justice Brown.

373. *Judge Yantis Given Banquet by Waco Bar*, DALLAS MORNING NEWS, June 14, 1915, at 5.

374. *Id.*

375. *See Sketch of Judge Yantis*, DALLAS MORNING NEWS, May 29, 1915, at 3 (noting a twenty-year friendship between Ferguson and Yantis).

376. 107 Tex. 387, 180 S.W. 105 (1915).

377. *Id.* at 105.

378. *Id.*

379. *Id.*

ment was reversed by the court of civil appeals.[380] A second trial was held, and the jury again found for Petty.[381] This time the court of civil appeals affirmed the judgment.[382] The supreme court reversed, declaring; "This, to our minds, is a plain case of an injury directly caused by the plaintiff's own negligence."[383] Justice Hawkins's lengthy dissent first concluded that the assignments of error by the railway were insufficient to give the court jurisdiction.[384] He next concluded that the case was not one of contributory negligence as a matter of law, and thus the court erred in reversing the judgment for the plaintiff.[385] The opinion is carefully reasoned and larded with citations to authorities within and outside Texas.[386] The challenge to the majority arises at the end of the dissenting opinion:

> The views of the two district judges, and of twenty-four jurors, and of the three members of the Court of Civil Appeals, and of this writer are, of course, not of controlling effect as against the views of a majority of this court; but I venture to respectfully suggest that, when contrasted therewith, said views at least indicate the existence of a difference of opinion among reasonable minds upon the question of plaintiff's alleged contributory negligence.[387]

Shortly thereafter, Justice Hawkins wrote the opinion for the court in *Spence v. Fenchler*.[388] The case concerned the issuance of an injunction against "bawdyhouses."[389] The court held that it had jurisdiction to hear the case, that the jurisdiction granted to it by the legislature was constitutional, and that the plaintiffs' request

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380. *Id.*

381. *Marshall*, 180 S.W. at 105.

382. *Id.*

383. *Id.*

384. *Id.* at 106 (Hawkins, J., dissenting).

385. *Id.* at 107.

386. *Marshall*, 180 S.W. at 106.

387. *Id.* at 114. Although he did not cite it, Hawkins's complaint was reminiscent of *Jones v. Lee*, 86 Tex. 25, 22 S.W. 386, *rev'd on rehearing*, 86 Tex. 25, 22 S.W. 1092 (1893), in which the court was criticized for an initial ruling in which two justices of the court held contrary to decisions by the trial court and court of civil appeals, a ruling that was overturned on rehearing and which set the stage for an absence of dissents for more than fifteen years. *See generally* Jones v. Lee, 86 Tex. 25, 22 S.W. 386, *rev'd on rehearing*, 86 Tex. 25, 22 S. W. 1092 (1893) (criticizing the court for an initial ruling in which two justices of the court held contrary to decisions by the trial court and court of civil appeals).

388. 107 Tex. 443, 180 S.W. 597 (1915).

389. Spence v. Fenchler, 107 Tex. 443, 180 S.W. 597, 609 (1915).

for an injunction should be granted.[390] What makes the case interesting is that Justice Hawkins also wrote an "addendum" to which only he subscribed.[391] Even more strangely, Hawkins wrote in the third person: "He believes that the logic or reasoning of the majority opinion in [*McFarland v. Hammond*[392]] . . . is as applicable in this district court case."[393] *McFarland* was decided in February 1915, while Chief Justice Brown was still alive, and Hawkins had dissented in that case.[394] It too concerned the jurisdiction of the court regarding interlocutory appeals, and in *McFarland* the court held it lacked the jurisdiction to hear the case.[395] Although Hawkins claimed to pledge fealty to the holding in *McFarland*, his addendum suggested the court lacked an elementary understanding of its jurisdictional authority.

The next unusual step taken by Hawkins was to concur in the refusal to rehear the defendant's application for a writ of error in *El Paso & Southwestern Co. v. La Londe*,[396] issued by the court in April 1916.[397] The plaintiff, Angela La Londe, sued the El Paso & Southwestern Company in Texas for negligence involving the death of her husband in New Mexico, who worked for the company's railroad.[398] The jury held the railroad negligent and awarded the plaintiff the quite substantial amount of $13,750.[399] The court of appeals affirmed the judgment, and the supreme court denied the application for a writ of error.[400] The court also denied the motion for rehearing, to which Hawkins concurred.[401] The tradition of the court was not to write opinions concerning the granting or denying of applications, a tradition that Hawkins acknowledged: "I feel in duty bound to state my individual views herein, although, with some exceptions, the rule in this court has been not to write in

390. *Id.*
391. *Id.*
392. 106 Tex. 579, 173 S.W. 645 (1915).
393. *Fenchler*, 180 S.W. at 609. Hawkins's use of the third person when speaking about his views is odd and disconcerting.
394. McFarland v. Hammond, 106 Tex. 579, 173 S.W. 645, 645 (1915) (Hawkins, J., dissenting).
395. *Id.* at 645 (majority opinion).
396. 108 Tex. 67, 184 S.W. 498 (1916).
397. El Paso & Sw. Co. v. La Londe, 108 Tex. 67, 184 S.W. 498 (1916).
398. *Id.* at 498 (Hawkins, J., concurring).
399. *Id.*
400. *Id.*
401. *Id.*

granting or in refusing applications for writs of error."[402] His opinion delved in great detail into whether New Mexico law or federal law, as opposed to Texas law, should apply, and his opinion was both lengthy and thoughtful. The self-proclaimed duty-bound Hawkins acknowledged the pressing problem of the court's docket: "I regret that press of other work has prevented me from giving this case more careful consideration and briefer and more satisfactory treatment."[403] He apparently believed, however, that an opinion concurring in a denial of a motion for a rehearing after declining to grant a writ of error was the highest use of his time.

Despite his acknowledgment of the press of time, Hawkins dissented from another denial of a request for a rehearing of an application for a writ of error just two weeks later. In *Beaty v. Missouri, K. & T. Railway Co.*,[404] the plaintiff sued for personal injuries after jumping from a railway car he erroneously believed was about to collide with another railway's train.[405] The trial court ordered the jury to return a verdict in favor of the defendant, which it did, and the judgment was affirmed on appeal to the court of civil appeals.[406] As he had in both *Marshall* and *First State Bank v. Jones*,[407] Hawkins dissented on the ground that the plaintiff's right to a jury determination of the facts had been abrogated by a court making the question one of law.[408]

For the entire October 1915 term, the court's first fall term without Brown, Hawkins wrote four opinions of the court, six concurring opinions, and three dissenting opinions. Phillips wrote thirty-five opinions of the court, and Yantis, the newest member of the court, wrote twenty-four opinions. Thus, Hawkins wrote just 6.3% of the sixty-three signed opinions of the court. For their hard work that year, both Yantis and Phillips received challenges to their seats in the 1916 Democratic Party primary election.

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402. *La Londe*, 184 S.W. at 498.

403. *Id.* at 502.

404. 108 Tex. 82, 185 S.W. 298 (1916).

405. Beaty v. Mo., K. & T. Ry. Co., 108 Tex. 82, 185 S.W. 298, 298 (1916).

406. *Id.*

407. 107 Tex. 623, 183 S.W. 874 (1916).

408. *Marshall*, 107 Tex. at 387, 180 S.W. at 110 (Hawkins, J., dissenting); First State Bank v. Jones, 107 Tex. 623, 183 S.W. 874, 878 (Hawkins, J., dissenting).

As was the case in 1912 and 1914,[409] the primary election in 1916 was fought over the issue of prohibition. The Anti-Saloon League that year issued its two-volume report on the machinations of the brewers in defeating the prohibition vote in 1911, and the brewers had agreed to a fine of $281,000 for violating campaign finance laws.[410] The Democratic primary voters were asked to decide whether to submit for a vote a constitutional amendment creating statewide prohibition.[411] The six Democratic candidates for senate looked for votes in the pro and the anti camps,[412] and the gubernatorial race was between the incumbent, controversial Governor James "Pa" Ferguson, a wet, against a challenge from Charles Morris, a political neophyte promoted by the prohibitionists. All of the other statewide positions, including Texas Attorney General and Railroad Commissioner, were contested, and prohibition was a prominent issue in several of those races.[413]

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409. *See* Editorial, *In Which Prohibition Is the Paramount Issue*, DALLAS MORNING NEWS, Mar. 10, 1914, at 8 (declaring in an editorial that statewide prohibition unfortunately had become "the paramount issue in the politics of Texas"); Clarence DuRose, *Submission Will Go On Primary Ballot*, DALLAS MORNING NEWS, June 9, 1914, at 1 (noting that drys successfully managed to add to the Democratic Party primary ballot a vote on whether to request that the legislature submit to the voters an amendment creating statewide prohibition); JAMES A. CLARK WITH WELDON HART, THE TACTFUL TEXAN: A BIOGRAPHY OF GOVERNOR WILL HOBBY 49 (1958) (noting that in the 1914 primary in which Hobby ran for Lieutenant Governor, a candidate's stand on prohibition became the criterion for judging whether he was fit for office). *But see Ferguson Majority Probably More Than 35,000; Submission Defeated by 20,000 or More*, DALLAS MORNING NEWS, July 27, 1914, at 1 (noting that the submission measure had been defeated).

410. 2 ANTI-SALOON LEAGUE, BREWERS AND TEXAS POLITICS 1595 (1916); *see also Six Breweries Agree to Penalties of $276,000*, DALLAS MORNING NEWS, Jan. 25, 1916, at 1 (reporting a fine of $276,000 plus costs).

411. *See Word "Submission" Omitted on Ballot*, DALLAS MORNING NEWS, July 11, 1916, at 1 (reporting issues with the ballot being used in the Democratic primary).

412. *See Yantis Is Leading for Supreme Court*, DALLAS MORNING NEWS, July 24, 1916, at 1 (reporting that the vote in different counties was falling on opposite sides of the issue); *Culberson Gains Steadily Over Brooks*, DALLAS MORNING NEWS, July 25, 1916, at 1 (noting two of the largest plurality of votes given to former Governor Oscar Colquitt and incumbent Senator Charles Culberson, both wets).

413. *See Woods Reviews Work of Attorney General*, DALLAS MORNING NEWS, July 9, 1916, at 9 (noting conclusion of candidate for Attorney General John Woods that, although he was a prohibitionist, "prohibition has no proper place in the Attorney General race"); *see also Culberson Gains Steadily Over Brooks*, DALLAS MORNING NEWS, July 25, 1916, at 1 (reporting the results of the 1916 election and how prohibition issues affected the result). This was also true in the 1914 Democratic Primary. *See* Editorial, *In Which Prohibition Is the Paramount Issue*, DALLAS MORNING NEWS, Mar. 10, 1914, at 8 (highlighting that prohibition was also a key topic at the 1914 Democratic Party primary); JAMES A. CLARK WITH WELDON HART, THE TACTFUL TEXAN: A BIOGRAPHY OF GOVERNOR WILL HOBBY 49

In addition, the drys offered candidates challenging both incumbent supreme court justices appointed to their positions by Ferguson. Charles H. Jenkins, a long-time Democratic stalwart and ally of former Governor Tom Campbell, a dry, ran against Nelson Phillips for the position of chief justice. Associate Justice Yantis was challenged by R.W. Hall. Contrary to custom, Jenkins actively campaigned for the position.[414] Jenkins gave stump speeches and challenged the tradition that offices for judicial seats were not contested.[415] Jenkins's approach to campaigning was to invoke the name of the governor often and the name of his opponent only occasionally.[416] When forced to defend his efforts, Jenkins claimed he was "not making the race against Governor Ferguson, but against his appointee."[417] Of course, this reference to Phillips as an "appointee" was misleading, for after his appointment by Governor Colquitt, Phillips had been elected associate justice in 1912, and was appointed chief justice by Ferguson only because of the death of T. J. Brown in 1915.[418] However, both governors who had appointed Phillips were wets, and Phillips had campaigned against statewide prohibition as a lawyer in 1911. Phillips did not campaign, for Ferguson led the campaign against Jenkins.[419] Ferguson used his bully pulpit to attack Jenkins, claiming that Jenkins and Hall "maliciously denounced me personally, and denounced the

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(1958) (noting that in the 1914 primary in which Hobby ran for Lieutenant Governor a candidate's stand on prohibition became the criterion for judging whether he was fit for office).

414. F.M. Etheridge, Letter to the Editor, *Scores Jenkins and Hall for Campaigning*, DALLAS MORNING NEWS, July 21, 1916, at 11.

415. *Id.*

416. *Not Running Against Governor*, DALLAS MORNING NEWS, July 10, 1916, at 4 (quoting Jenkins).

417. *Id.*

418. *See* Nelson Phillips, *Chief Justice Makes Reply to Jenkins*, DALLAS MORNING NEWS, July 17, 1916, at 8 (responding to Jenkins's assertion that he was merely an appointee).

419. *See Jenkins' Reply to Governor*, DALLAS MORNING NEWS, June 28, 1916, at 2 (stating that Governor Ferguson had denounced Jenkins's candidacy five times); *Not Running Against Governor*, DALLAS MORNING NEWS, July 10, 1916, at 4 (stating that the Governor's reason for opposing Jenkins was Jenkins's refusal to state how he would rule on the tenant act); *see also Jenkins Replies to Governor's Charges*, DALLAS MORNING NEWS, July 14, 1916, at 11 (detailing the assertions Governor Ferguson made against Jenkins and Jenkins's response to those assertions).

land tenant plank and the plank for country education."[420] Shortly before the election, Jenkins was accused by one lawyer of bringing the judiciary into disrepute by campaigning for the seat as if it were a political position.[421] Phillips won his race with about 60% of the vote; in the less reported race between Yantis and the unknown Hall, Yantis won with about 54% of the vote.[422]

When the court reconvened in October 1916, it was at least five years behind in clearing its docket of cases,[423] and two of its three members had suffered from an ill-tempered and bruising campaign on an issue only rarely before the court. In March 1917, the Committee of Judges Act was adopted to assist the court in reducing its backlog of cases.[424] During this entire term, from the beginning of October 1916 through the last day of June 1917, Justice Hawkins wrote exactly one majority opinion. The opinion in *White v. White*[425] was issued at the end of the court's term, June 30, 1917, and Justice Yantis did not participate in the case.[426] *White* concerned the constitutionality of Texas's lunacy statute.[427] Lillie White was declared insane by a commission of six doctors, sent to a state asylum, and eventually released to the care of her husband.[428] White found a lawyer who sued on the ground that the act was unconstitutional. The court held that the law violated White's right to trial by jury in having the commission decide the question of her sanity.[429] The opinion was a model Hawkins opinion: maddeningly

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420. *Jenkins Replies to Governor's Charges*, DALLAS MORNING NEWS, July 14, 1916, at 11.

421. *See* F.M. Etheridge, Letter to the Editor, *Scores Jenkins and Hall for Campaigning*, DALLAS MORNING NEWS, July 21, 1916, at 11 (arguing that by campaigning for judicial seats the aspirants brought disrepute on those seats).

422. *See Culberson Gains Steadily Over Brooks*, DALLAS MORNING NEWS, July 25, 1916, at 1 (reporting preliminary tallies of Phillips with 175,545 votes against 115,907 for Jenkins, and Yantis with 155,940 votes against 142,272 for Hall).

423. *Changes Suggested in Judicial System*, *supra* note 277.

424. Act of Mar. 15, 1917, 35th Leg., R.S., ch. 76, 1917 Tex. Gen. Laws 142.

425. 108 Tex. 570, 196 S.W. 508 (1917).

426. *See* White v. White, 108 Tex. 570, 196 S.W. 508 (1917) (issuing decision without the participation of Justice Yantis); Moore v. Chamberlain, 109 Tex. 64, 195 S.W. 1135 (1917) (having been issued on June 20, 1917, it was the last opinion written by Justice Yantis). On that day, while having his tonsils removed, Yantis suffered a stroke. *Judge Yantis Quits Supreme Court Bench*, DALLAS MORNING NEWS, Mar. 3, 1918, at 4 (announcing Justice Yantis's resignation from the court effective March 31, 1918).

427. *White*, 196 S.W. at 509.

428. *Id.*

429. *Id.* at 515.

long, overly discursive, and intelligent. And, as he had the previous term, Hawkins wrote an "addendum" to which only he signed on. The addendum had to do with questions "not essential to a disposition of this appeal,"[430] but recurring and thus of interest to Hawkins.[431]

In addition to his one opinion for the court, Hawkins wrote three concurring opinions and three dissenting opinions. In *Terrell v. Middleton*,[432] Hawkins wrote separately to explain why he concurred in the decision to deny the petition for a writ of error.[433] His first reason for writing was to discuss "the legal effect of an order of the Supreme Court refusing a writ of error."[434] The answer, concluded Hawkins, depended on whether the "essential questions of law have been fully presented in the application for writ of error."[435] If the essential questions of law were fully presented, then a refusal of the writ traditionally was assumed to mean the supreme court had concluded the decision of the court of civil appeals was substantially correct.[436] If the essential questions of law were not properly preserved, the refusal of the application for the writ of error meant only that the court lacked the power to hear and decide the question of law.[437] So far, so good. Why write a concurrence then? Because the court's decision "leaves every material issue in this case in nubibus, in so far as the opinion and views of this court of last resort, and of its members, are concerned. With that, for my own part, I cannot rest content."[438]

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430. *Id.*

431. Those questions concerned notice and judicial power. Although notice was not explicitly required by the state's lunacy act, Hawkins construed the act to require notice to comport with constitutional and common law precedent. As for judicial power, Hawkins concluded the act, in placing power in the commission rather than a "court," made it entirely unconstitutional.

432. 108 Tex. 14, 191 S.W. 1138 (1917).

433. *See* Terrell v. Middleton, 108 Tex. 14, 191 S.W. 1138, 1139 (1917) (Hawkins, J., concurring) (referencing his notation in the previous order to file "a statement of [his] own views on the law of [that] case").

434. *Id.*

435. *Id.*

436. *See id.* (Hawkins, J., concurring) (adding that when a judgment is sound and correct, it should not be disturbed).

437. *See id.* (commenting that when error is not properly preserved, refusing the writ amounts to holding that appellant has waived the argument, and nothing more).

438. *Terrell*, 191 S.W. at 1140. Hawkins also used "nubibus" in *In re Subdivision Six of Supreme Court Jurisdiction Act of 1917*, 201 S.W. 390, 392 (1918) (Hawkins, J.). The word is used rarely in judicial opinions today. It is used almost exclusively in maritime

This statement was followed by an exhaustive treatment of law regarding the constitutionality of appropriations for amounts incurred allegedly in operation of the governor's mansion.[439] Following his dissent three years earlier in *Dallas County v. Lively*,[440] Hawkins concluded that the statute allowing the legislature to adopt a deficiency appropriation was unconstitutional.[441] Five weeks later, the court denied the motion for rehearing of the application for a writ of error.[442] Now, two of the three members of the court wrote opinions. Hawkins again concurred and stated that he had not planned to write but did so in order to respond to Justice Yantis's dissent. Yantis's dissent arose because he had changed his mind about the constitutionality of the act appropriating funds to pay debts incurred by former Governor Colquitt.[443] After *Middleton*, Hawkins wrote two more opinions: he dissented in *San Antonio & Aransas Pass Railway Co. v. Blair*,[444] and wrote the court's opinion in *White v. White*,[445] noted above.[446]

Thus, Hawkins's written contributions to the court's caseload between October 1916 and August 1917 (the court's term was complete at the end of June, but the dissent in *Blair* was not filed until mid-August) totaled one majority opinion (to which he added a sole addendum), one concurring opinion, two opinions concurring in the denial of a petition for a writ of error, and two dissenting opinions.[447] The cause of Hawkins's meager output was his astonishing dissent in *Blair*.

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cases or wills and estates matters, and is intended to describe an issue left undecided, hanging "in the clouds."

439. *See Terrell*, 191 S.W. at 1140-50 (concluding that the Texas constitution provides the governor with an annual salary, occupation, and use of the mansion's grounds, and nothing more whatsoever).

440. 106 Tex. 364, 167 S.W. 219 (Tex. 1914).

441. Dallas County v. Lively, 106 Tex. 364, 167 S.W. 219 (1914). *See Terrell* 193 S.W. at 1141 (citing *Dallas County* as a case in harmony with *Middleton*, in which the same court interpreted the legal effect of the Texas Constitution).

442. *Terrell*, 193 S.W. at 139.

443. *See id.* at 142 (Yantis, J., dissenting) (writing also that the parties should be able to argue their case as justice requires).

444. San Antonio & Aransas Pass Ry. Co. v. Blair, 108 Tex. 434, 196 S.W. 502, 506 (1917).

445. 108 Tex. 570, 196 S.W. 508 (1917).

446. *Blair*, 196 S.W. 502, 506, 1153; White v. White, 108 Tex. 570, 196 S.W. 508, 509 (1917).

447. Hawkins's third dissent was without opinion. Marshall v. Robison, 109 Tex. 15, 191 S.W. 1136 (1917).

The *Blair* dissent is remarkable. In an opinion released June 27, 1917 the Texas Supreme Court held that the Committee of Judges Act was constitutional.[448] Justice Hawkins's dissent was released on August 18, 1917.[449] It is the longest opinion written by any justice of the supreme court during this era, approximately 60,000 words in length.[450]

The Committee of Judges Act, or Relief Act, was the brainchild of former Associate Justice Frank Williams, and his proposal had been the subject of much debate at the 1916 meeting of the Texas Bar Association.[451] Justice Hawkins was on record at that meeting as skeptical of its constitutionality,[452] and *Blair* was his opportunity to explain why he so thought. In summary, Hawkins concluded the law was unconstitutional on separation of powers grounds,[453] and because it "depriv[ed] litigants of cherished valuable and Constitution-given rights."[454] The remainder of this dissenting opinion decries, over and over and over again, the action of the legislature in adopting this law, and the action of the majority of the court in holding it constitutional.[455] The dissent is tedious and overwrought, yet makes a plausible though not definitive case against the statute. If the death of Chief Justice Brown was the beginning of the end of this court, *Blair* suggested the end of Justice Hawkins. It was all well and good for Justice Hawkins to stand on principle and to state that he was doing so "regardless of the effect upon said relief Act and our dockets."[456] But when he continued by declaring that "[t]he entire chapter is the most remarkable one in the

448. *Blair*, 196 S.W. at 502.

449. San Antonio & Aransas Pass Ry. Co. v. Blair, 108 Tex. 434, 196 S.W. 1153 (1917) (Hawkins, J., dissenting).

450. *See Blair*, 196 S.W. 1153 (Hawkins, J., dissenting). This may be the longest dissent in the history of the Texas Supreme Court, although I have not been able to verify that. To get a feel for its length, this essay is approximately 35,000 words, including footnotes. Its length was noted by the *Dallas Morning News* in a short report announcing its publication: "The dissenting opinions covers 147 typewritten pages." *Hawkins Dissents on Validity Supreme Court Relief Act*, DALLAS MORNING NEWS, Aug. 20, 1917, at 2.

451. F.A. Williams, *What Can Be Done to Aid the Supreme Court*, 35 PROC. TEX. B. ASS'N 14-58 (1916).

452. *Id.*

453. *Blair*, 196 S.W. at 1153 (Hawkins, J., dissenting).

454. *Id.*

455. *See generally id.* at 1153-98 (making his case against the Committee of Judges Act).

456. *Id.* at 1198.

annals of our court, and is without a parallel in history,"[457] he broke whatever bonds remained among the members of the court.

Although Justice Yantis remained a member of the court until his resignation on March 31, 1918, his ill health prevented him from writing any opinions during the October 1917 term.[458] After the first six months of the term, the rudderless court had issued opinions in twelve cases, including opinions in two cases in which the petition for a writ of error was denied, and one case in which a motion for rehearing was denied. Justice Hawkins spent at least some of his time working on a draft revision of the judiciary article of the Texas Constitution.[459] In addition, he addressed the committee and claimed his integrity and work ethic had been attacked in a committee report that noted the relative paucity of opinions written by Hawkins for the court.[460] Hawkins claimed to work more hours than any other member of the court and suggested looking at numbers of opinions written gave a false understanding of a member's contributions to the work of the court.[461] Hawkins's defense of himself drew a sharp rebuke from Senator Hopkins, who declared the speech "improper, undignified and unbecoming a member of the Texas Supreme Court."[462] As for Justice Hawkins's contributions to the court's opinions during this time, he wrote one opinion for the court,[463] one dissenting opinion from a denial of a motion for a rehearing,[464] and one of the most quixotic opinions

457. *Id.*

458. *See Judge Yantis Quits Supreme Court Bench*, DALLAS MORNING NEWS, Mar. 3, 1918, at 4 (quoting letter of resignation indicating that Yantis had suffered from a stroke while having his tonsils removed in the summer of 1917).

459. *See Reforms in Courts of Texas Outlined*, DALLAS MORNING NEWS, Jan. 8, 1918, at 4 (reporting particulars of Hawkins's proposal).

460. *State Supreme Court Defended by Hawkins*, DALLAS MORNING NEWS, Jan. 17, 1918, at 1; *see also Reports on Work Done by Supreme Court*, DALLAS MORNING NEWS, Jan. 27, 1918, § 4, at 4 (listing report of clerk of Supreme Court to legislative request for number of opinions written by members of Court for last five years, and since October 1, 1917).

461. *State Supreme Court Defended by Hawkins*, DALLAS MORNING NEWS, Jan. 17, 1918, at 1.

462. *Id.*

463. Ford v. Robison, 109 Tex. 126, 201 S.W. 401 (1918).

464. Henningsmeyer v. First State Bank, 109 Tex. 116, 201 S.W. 652 (1918).

ever written in the history of the Texas Supreme Court, *In re Subdivision Six of Supreme Court Jurisdiction Act of 1917*.[465]

In re Subdivision Six was not a case. No cause number attached to *In re Subdivision Six*, no opinion of the court would ever issue, and the opinion was never printed in the Texas Reports. The matter was Justice Hawkins's attempt to again raise the issue of the constitutionality of the Committee of Judges Act and the concomitant amendment in 1917 of Subdivision Six of article 1521 of the Revised Statutes of Texas (Subdivision Six), which concerned the court's jurisdiction.[466] As noted above, the original Subdivision Six was adopted by the Texas Legislature in 1913, at the behest of former Justice Frank Williams and the Texas Bar Association. The goal of Subdivision Six was to reduce the Texas Supreme Court's jurisdiction and harmonize the jurisprudence of the state. In 1917, the legislature decided to create the Committee of Judges and amend Subdivision Six. Again, the goal of these efforts was to reduce the court's docket (both cause and application).

The original Subdivision Six allowed the court to take jurisdiction if, "the Court of Civil Appeals has, in the opinion of the Supreme Court, erroneously declared the substantive law of the case."[467] The amended Subdivision Six required the "error of law" to be "of such importance to the jurisprudence of the state" as to require correction, excluding "those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute."[468] Additionally, the 1917 amendment to Subdivision Six created the requirement that the petitioner "concisely state the question decided by the Court of Civil Appeals . . . in order that the Supreme Court may at once see that such a question is presented as is contemplated by this provision."[469] Hawkins noted that, in referring matters to the Committee of Judges, the Texas Supreme Court had to decide two preliminary questions: was Subdivision Six constitutional, and if so, was it permissible for petitions for writs of error

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465. *In re* Subdivision Six of Supreme Court Jurisdiction Act of 1917, 201 S.W. 390 (1918) (Hawkins, J.).

466. *Id.*

467. *See id.* at 390 (quoting the original version of subdivision 6 of article 1521). Justice Hawkins starts his opinion by reproducing the statute, subdivisions 1-6 of article 1521, which prescribe the appellate jurisdiction of the Texas Supreme Court. *Id.*

468. *See id.* (quoting 1917 version of subdivision 6 of article 1521).

469. *In re Subdivision Six*, 201 S.W. at 390.

based on Subdivision Six to be sent to the Committee of Judges?[470] The majority implicitly answered both questions in the affirmative by giving the Committee of Judges cases in which petitioner claimed an error existed that violated Subdivision Six.[471] Additionally, the majority of the court decided that, when the Committee of Judges determined that a case properly met the requirements of Subdivision Six, the court would "recall" the case and determine for itself whether this conclusion was accurate.[472] *In re Subdivision Six* was Hawkins's dissent to those conclusions.

First, the 1917 amendment to Subdivision Six was "clearly and hopelessly unconstitutional."[473] By adding the restrictive language "of such importance to the jurisprudence of the state," the amendment was "too indefinite" to be law, and thus made Subdivision Six subject only to the "will or whim of the Supreme Court in the particular case."[474] Further, the amendment violated separation of powers, by giving the court the legislature's power to determine the appellate jurisdiction of the court.[475] Next, the majority of the court erred in giving any cases to the Committee of Judges in which the plaintiff in error claimed a Subdivision Six error, because, Hawkins concluded, the amendment required the supreme court to conclude that the error be "of such importance to the jurisprudence of the state."[476] In Hawkins's view, no subdivision of the court was permitted to conclude that a decision from a court of civil appeals had committed an error of "importance" to the jurisprudence of the state.[477] Additionally, even though the legislature provided three specific exceptions to the delegation of writ petitions from the Texas Supreme Court to the Committee of Judges, and though a petition claiming jurisdiction through Subdivision Six

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470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *In re Subdivision Six*, 201 S.W. at 391. How this comported with Hawkins's desire to avoid "a very strict and entirely too technical rule of construction," *Smith v. Wortham*, 106 Tex. 106, 157 S.W. 740, 742 (1913) (Hawkins, J., dissenting), which was the lynchpin of his first ever dissent, remained unclear.

475. *In re* Subdivision Six of Supreme Court Jurisdiction Act of 1917, 201 S.W. 390, 390 (1918) (Hawkins, J.).

476. *Id.* at 396.

477. *See id.* at 391 (arguing that only the Supreme Court of Texas could make decisions concerning whether an error was of importance to the jurisprudence of the state).

was not one of those exceptions, Hawkins concluded the legislature implicitly barred the Texas Supreme Court from delegating Subdivision Six cases to the Committee of Judges.[478] Finally, because the Committee of Judges Act permitted the committee to "grant[ ], refus[e] or dismiss[ ]" the applications,[479] the Texas Supreme Court had no authority to "recall" cases granting Subdivision Six applications.[480]

Justice Hawkins's opinion is a monstrosity. It is cavalier in its consistency in statutory interpretation. It arrogantly castigates the legislature for failing "fully and ultimately and definitely to exercise its own powers."[481] It petulantly takes to task two members of the supreme court for allegedly acting beyond the constitutionally and legislatively limited jurisdictional boundaries, and it does so by issuing an "opinion" without a case.[482]

One day after the release of *In re Subdivision Six*, a bill creating the Commission of Appeals was introduced.[483] Within three weeks, the Texas Legislature created the Commission of Appeals, which greatly lessened the need for a Committee of Judges.

Although it is possible that the opinion in *In re Subdivision Six* had some practical impact, Hawkins claimed his reason for writing

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478. *Id.* at 397.

479. *Id.* at 399 (quoting 1917 version of subdivision 6 of article 1521).

480. *See In re Subdivision Six*, 201 S.W. at 391 (asserting that the Texas Supreme Court lacked authority to recall cases by granting a subdivision 6 application).

481. *Id.*

482. Within eighteen months of his opinion in *In re Subdivision Six*, a case raising the issue of the constitutionality of the 1917 Act was heard. *See* Decker v. Kirlicks, 110 Tex. 90, 216 S.W. 385 (1919) (examining the constitutionality of the 1917 Committee of Judges Act amending the supreme court's jurisdiction). Justice Hawkins dissented in *Decker*. *Id.* But with no cause before him, why was Justice Hawkins's opinion not an impermissible advisory opinion? *See* Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641, 645-46 (1933) (declaring advisory opinions outside of the court's jurisdiction). Although the Supreme Court of the United States has, since the late eighteenth century, refused to issue advisory opinions, the Texas Supreme Court did not directly declare itself without jurisdiction to offer advisory opinions until 1933. *Id.*

483. *See Bill for Supreme Court Relief is Introduced*, DALLAS MORNING NEWS, Mar. 8, 1918, at 7 (reporting that a bill creating the Commission of Appeals was introduced in the Texas House and Senate). Although it's possible Hawkins's opinion led to the introduction of this bill, it appears that the bill was largely agreed upon by the time it was introduced. *Id. See also* Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch 34, 1918 Tex. Gen. Laws 61 (creating the Commission of Appeals).

was principle, not its instrumental value.[484] The impact of his stand on principle to his relations with the other members of the court and with the bar are difficult to determine in the absence of any private papers. By the time of Hawkins's frolic in *In re Subdivision Six*, he had been a member of the court for over five years.[485] For professionals paying attention to the court, as well as the legislature, Hawkins's record was dismaying.[486] He wrote few opinions of the court, he wrote the most and longest dissenting and concurring opinions,[487] and contrary to the custom of the court, he had recently begun to draft opinions to decisions denying petitions for writs of error and motions for rehearing.[488] He surely must have been seen as a dilettante, and worse for a politician, weak; for in the 1920 Democratic Party primary, Hawkins faced not just one but two challengers for his judicial seat.[489]

Justice Thomas Greenwood joined the Texas Supreme Court on April 1, 1918,[490] which led to a slight uptick in the number of opinions issued during the three months remaining in the court's term. Hawkins wrote one long substantive opinion of the court, and two opinions for the court denying motions for leave to file a petition

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484. *In re* Subdivision Six of Supreme Court Jurisdiction Act of 1917, 201 S.W. 390, 391, 400 (1918) (Hawkins, J.).

485. TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 1914, *supra* note 135.

486. *See Reports on Work Done by Supreme Court*, DALLAS MORNING NEWS, Jan. 27, 1918, at 4 (listing the report of the clerk of the supreme court to a legislative request for the number of opinions written by members of the court for last five years and since October 1, 1917).

487. *See, e.g.*, Carroll v. Williams, 109 Tex. 155, 202 S.W. 504, 504 (1918) (concurring with the court at great length).

488. *See, e.g.*, Home Inv. Co. v. Strange, 109 Tex. 342, 204 S.W. 314, 314-15 (1918) (denying a motion for rehearing, and accompanied by an opinion written by Justice Hawkins).

489. *See Judge Pierson Candidate for Justice of the Supreme Court*, DALLAS MORNING NEWS, Jan. 1, 1920, at 18 (reporting that Judge Pierson announced that he would seek to become an associate justice of the Supreme Court of Texas); *Key Seeks Place on Supreme Court*, DALLAS MORNING NEWS, Jan. 11, 1920, at 5 (reporting that Judge Key was seeking the position of associate justice of the Supreme Court of Texas). That both judges declared their candidacy by early January for a July primary suggests both knew Hawkins was a weak candidate.

490. *Judge T. B. Greenwood Will Succeed Yantis*, DALLAS MORNING NEWS, Mar. 17, 1918, at 1. Justice Greenwood was challenged for his seat in the 1918 Democratic primary by J. D. Harvey of Harris County; Greenwood won the primary with sixty percent of the vote. *See Official Returns Are Certified to Convention*, DALLAS MORNING NEWS, Sept. 5, 1918, at 5 (showing Greenwood with 344,262 votes and Harvey with 220,438 votes). Chief Justice Phillips was also up for re-election but was not challenged. *See id.*

and for rehearing.[491] Chief Justice Phillips wrote three opinions of the court.[492] The newest member, Justice Greenwood, wrote eight opinions.[493] Justice Hawkins also wrote two concurring opinions, including one denying a motion for rehearing[494] and a dissenting opinion in *Scott v. Shine*,[495] in which he raised again the issues of the constitutionality of the Committee of Judges Act, due to the change in the membership of the Texas Supreme Court.[496]

The brief dissent in *Shine* again shows Hawkins's obdurateness and lack of social (or political) acumen. That Hawkins wished to revisit the issue decided contrary to his views, just a year earlier, was unusual for the time, but not unheard of. But his decision to state his desire by publishing such as a dissent is not just puzzling, but unwise. Surely, he could have asked to meet with Justice Greenwood or asked the entire court to revisit the issue. Hawkins was well aware of the passage of the Commission of Appeals Act earlier that month.[497]

The illness of Yantis, the dalliances of Hawkins, and the apparent fatigue of Phillips led the court to its nadir in clearing its docket. Including opinions in cases in which a motion for rehearing or petition for a writ of error was denied, the court issued just twenty-nine opinions from October 1917 through June 1918. The passage of the law creating the Commission of Appeals was an absolute necessity by April 1918.

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491. Westchester Fire Ins. Co. v. Redditt, 109 Tex. 211, 204 S.W. 106 (1918); Underwood v. Robinson, 109 Tex. 228, 204 S.W. 314 (1918); *Carroll*, 202 S.W. at 504.

492. Hess & Skinner Eng'g Co. of Tex. v. Turney, 109 Tex. 208, 203 S.W. 593 (1918); Houston Oil Co. of Tex. v. Vill. Mills Co., 109 Tex. 169, 202 S.W. 725 (1918); Stockwell v. Robinson, 109 Tex. 137, 201 S.W. 1156 (1918).

493. State v. Yturria, 109 Tex. 220, 204 S.W. 315 (1918); Harle v. Harle, 109 Tex. 214, 204 S.W. 317 (1918); Reasoner v. Gulf, Colo. & Santa Fe Ry. Co., 109 Tex. 204, 203 S.W. 592 (1918); Houston Belt Terminal Ry. Co. v. Stephens, 109 Tex. 185, 203 S.W. 41 (1918); Cagle v. Sabine Timber & Lumber Co., 109 Tex. 178, 202 S.W. 942 (1918); Moorman v. Terrell, 109 Tex. 173, 202 S.W. 727 (1918); Liquid Carbonic Co. v. Dilley, 109 Tex. 140, 202 S.W. 316 (1918); Halsell v. Ferguson, 109 Tex. 144, 202 S.W. 317 (1918).

494. Houston Oil Co. of Tex. v. Village Mills Co., 109 Tex. 169, 226 S.W. 1075 (1918).

495. 109 Tex. 412, 202 S.W. 726 (1918).

496. Scott v. Shine, 109 Tex. 412, 202 S.W. 726 (1918).

497. *Denies Court Is Seven Years Behind in Work*, DALLAS MORNING NEWS, Nov. 22, 1918, at 10; *Supreme Court Has Docket About Clear*, DALLAS MORNING NEWS, Mar. 21, 1919, at 5 (reporting optimistically that the Supreme Court of Texas was close to clearing the docket).

The creation of the Commission of Appeals was the legislature's penultimate act concerning the Texas Supreme Court.[498] It raised the salary of the justices the next year, its second raise for members of the court in six years, but to $6,500, less than the amount advocated by the Texas Bar Association and the University Law Association.[499]

Although the Commission of Appeals did not begin its work until September 1918,[500] and though the "temporary" nature of the commission was regularly extended, its existence was a tremendous help to the court. So too was the addition of Justice Greenwood. In both the October 1918 and October 1919 terms, Justice Greenwood wrote the most opinions of the court, and the court's overall productivity was higher than it had been in number of years.[501] Justice Hawkins, meanwhile, issued five concurring opinions[502] and five dissenting opinions during the October 1918 term,[503] in addition to three opinions of the court.[504] Two of the dissents were

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498. *See* Act of Apr. 3, 1918, 35th Leg., 4th C.S., ch. 34, 1918 Tex. Gen. Laws 61 (creating the Commission of Appeals).

499. Act of Feb. 27th, 1919, 36th Leg., R.S., ch. 32, 1919 Tex. Gen. Laws 54.

500. *See Commission of Appeals Organizes for Work*, DALLAS MORNING NEWS, Sept. 20, 1918, at 11 (reporting on the start of the Commission of Appeals). The first opinion issued by the Commission of Appeals was on November 13, 1918. *Finding of Appeals Commission Approved*, DALLAS MORNING NEWS, Nov. 14, 1918, at 5. The first case was *McKenzie v. Withers*, 109 Tex. 255, 206 S.W. 503 (1918).

501. Chief Justice Phillips probably did not produce much work product because his son and namesake caught the deadly 1918 influenza virus while engaged in military service in New York in October 1918, and Phillips traveled there to offer his assistance, thereby missing most of the October court days. *Lieutenant Phillips Recovering from Influenza*, DALLAS MORNING NEWS, Oct. 10, 1918, at 10 (reporting Lieutenant Phillips' illness); *Lieutenant Phillips Recuperates*, DALLAS MORNING NEWS, Oct. 29, 1918, at 11 (reporting Lieutenant Phillips' return to Texas).

502. Hedeman v. Newnom, 109 Tex. 472, 211 S.W. 968 (1919); Dallas County Levee Dist. No. 2 v. Looney, 109 Tex. 326, 207 S.W. 310 (1918); Red River Nat'l Bank v. Ferguson, 109 Tex. 287, 206 S.W. 923 (1918); Atchinson, Topeka & Santa Fe Ry. Co. v. Ayers, 109 Tex. 270, 206 S.W. 922 (1918); Atchinson, Topeka & Santa Fe Ry. Co. v. Stevens, 109 Tex. 270, 206 S.W. 921 (1918).

503. Am. Type Founders' Co. v. Nichols, 110 Tex. 4, 212 S.W. 301 (1919); State Nat'l Bank of San Antonio v. E. Coast Oil Co. S.A., 109 Tex. 510, 212 S.W. 621 (1919); Hicks v. Faust, 109 Tex. 481, 212 S.W. 608 (1919); Roaring Springs Town-Site Co. v. Paducah Tel. Co. 109 Tex. 452, 212 S.W. 147 (1919).

504. Goldstein v. Union Nat'l Bank, 109 Tex. 555, 213 S.W. 584 (1919); McKneely v. Armstrong, 109 Tex. 363, 210 S.W. 192 (1919); Martin v. Granger, 205 S.W. 725 (1918). In addition, Hawkins indicated an intent to later file his views in two more cases: *Washer v. Smyer*, 109 Tex. 398, 211 S.W. 985, 991 (1919) and *Allen v. Pollard*, 109 Tex. 536, 212 S.W. 468, 469 (1919). No such opinions were ever filed.

written in response to denial of petitions for a writ of error and concomitant motions for rehearing.

At the closing dinner of the July 1919 meeting of the Texas Bar Association, Judge Thomas Franklin substituted as speaker for Chief Justice Nelson Phillips, which Franklin declared "a very trying ordeal."[505] Franklin praised Phillips as "a gentleman who not only in the short time that he was on the Bench in Texas graced that Bench with distinguished honor, but who [also] has endeared himself personally to the lawyers who have appeared before him."[506] Hawkins was present at the annual meeting of the association in 1919, as he had been for most of the decade.[507] Although it is unclear whether Hawkins was present at the closing dinner, during his time on the court no encomia of praise concerning Hawkins were ever recorded, and unlike all other justices who served during this time, he never spoke (or was invited to speak and was unable to do so) at the closing dinner of the Texas Bar Association.[508]

By the 1920 primary election, which took place less than a month after the close of the October 1919 term, Hawkins found himself challenged by two opponents for his seat, both of whom had announced their intentions by early January.[509] William Pierson, who had failed to win a seat in the Texas Court of Criminal Appeals in 1918, gained the endorsements of eighty-two local and regional bar associations.[510] Hawkins claimed that he did not attempt to obtain the endorsement of any bar association as a matter of principle and

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505. Thomas H. Franklin, *Jean Lafitte*, 38 PROC. TEX. B. ASS'N 186, 186 (1919).

506. *Id.*

507. *See generally* 38 PROC. TEX. B. ASS'N (1919) (recording Hawkins's participation in various meetings).

508. *Id.* The Texas Bar Association did not record the names of those who attended the closing dinner, although references were commonly made during the proceedings indicating that one or more members were to depart before the dinner. No reference was made to Justice Hawkins's presence or absence at the 1919 closing dinner. *Id.*

509. *See Judge Pierson Candidate for Justice of the Supreme Court*, DALLAS MORNING NEWS, Jan. 1, 1920, at 18 (reporting Judge Pierson's candidacy); *Key Seeks Place on Supreme Court*, DALLAS MORNING NEWS, Jan. 11, 1920, at 5 (reporting Judge Key's candidacy). That both judges declared their candidacy by early January for a July primary suggests both knew Hawkins was a weak candidate. Interestingly, in 1918 Hawkins helped kill a bill allowing for the nomination of judges instead of their election. *See Bill to Nominate Judges by Conventions Killed*, DALLAS MORNING NEWS, Mar. 16, 1918, at 4 (reporting Hawkins's testimony to the House Committee on Privileges and Elections). For a later announcement, see *Judge Key Will Run*, SAN ANTONIO LIGHT, May 16, 1920, at 3A.

510. *Judicial, Not Political*, SAN ANTONIO LIGHT, July 22, 1920, at 4; *Judicial, Not Political*, HOUSTON POST, July 18, 1920, at 7.

was left the options of disparaging such endorsements,[511] and lamenting the distortions of his record by others.[512] "Long and silently have I submitted to misrepresentation of my judicial record until patience has ceased to be a virtue."[513] He further retreated to claims that he was due a second full term as a matter of party custom, a custom he had not respected when challenging Joseph Dibrell in 1912.[514]

Due to a change in the law governing primaries, if no person garnered a majority of the primary vote, a second primary was held between the two top vote getters.[515] Finishing second in the primary, Hawkins faced William Pierson.[516] In the run-off, Pierson defeated Hawkins.[517]

Hawkins remained on the court until the end of his term in early January 1921, writing no opinions during his last three months on the court.[518] By the end of 1921, Chief Justice Nelson Phillips resigned.[519] The newly-formed triumvirate of Pierson, Greenwood and Chief Justice C. M. Cureton formed a harmonious and productive group for thirteen years.

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511. *See Associate Justice William E. Hawkins of the Supreme Court of the State of Texas Seeks a Second Full Term*, THE STATESMAN (Austin), July 22, 1920, at 4. In this ad urging voters to re-elect him, Hawkins writes, under the heading "Bar Endorsements," "Never have I requested (or permitted my friends to request) any lawyer who has or may have cases pending for decision before a court of which I am a member to endorse my candidacy for a judicial office. However, this is not intended as a disparagement of such expressions from members of my profession, or as a criticism of judges who seek, or of lawyers who sign, such endorsements." *Id.* A July 18 advertisement urging a vote for Judge William Pierson noted Pierson was "endorsed by 82 leading bars of Texas." *Judicial, Not Political*, HOUSTON POST, July 18, 1920, at 7.

512. *Measure of Judge Is Not Opinions*, DALLAS MORNING NEWS, Aug. 22, 1920, at 12.

513. *Id.*

514. *See Hawkins Discusses Supreme Court*, DALLAS MORNING NEWS, Aug. 10, 1920, at 12 (quoting Justice Hawkins).

515. Act of Apr. 10, 1918, 35th Leg., 4th C.S., ch. 90, 1918 Tex. Gen. Laws 191.

516. *See Official Vote Is to Be Canvassed*, DALLAS MORNING NEWS, Aug. 9, 1920, at 3 (noting vote in primary was Hawkins 139,760, Pierson 161,920 and Key 93,124).

517. *See Neff Now Leads with 72,657 Votes*, DALLAS MORNING NEWS, Aug. 30, 1920, at 4 (noting unofficial vote in primary run-off was Hawkins 134,954 and Pierson 181,644).

518. The only cases decided in that period were: *Westerman v. Mims*, 111 Tex. 29, 227 S.W. 178 (1921); *W. Union Tel. Co. v. Johnson*, 111 Tex. 1, 226 S.W. 671 (1921); and *Shroyer v. Chicago*, 111 Tex. 24, 226 S.W. 140 (1920). The court issued a revised judgment in *Houston & T.C.R. Co. v. Diamond Press Brick Co.*, 111 Tex. 18, 226 S.W. 140 (1920).

519. *Justice Phillips Was Picturesque Figure*, *supra* note 7.

Both Phillips and Hawkins ended up practicing law with their sons after leaving the court. In the archives of the Center for American History at the University of Texas at Austin, there is a printed speech given in 1923 by Lyndsay D. Hawkins, the son of William E. Hawkins.[520] The speech is an argument to the United States District Court for the Northern District of Texas. Its title is "In Defense of His Two Law Partners on a Rule to Show Cause Why They Should not be Held in Contempt."[521] One of those subject to the contempt citation is William E. Hawkins. The show cause order was issued by Judge Wilson after Hawkins and another lawyer allegedly violated an order to give assets of the bankrupt California Petroleum Company to the federal trustee.[522] Instead of transferring the assets, California Petroleum Company owner J. W. Mingus had his lawyers, including William E. Hawkins, make an application to a state court for instructions.[523] Lyndsay Hawkins's perorations included:

> Did Your Honor ever think that a lawyer may be a martyr, as well as a missionary? I realize that they might ridicule a statement like that in this Court. But suppose that a man is actuated by the highest motives that ever inspired a member of an honorable profession to arrive at what the law is, and acted only in accordance with those motives, and without any consideration of any reward. If that is true, *then it is a profanation to prosecute this complaint!*[524]

Lyndsay Hawkins later urged the court not to hold his father in contempt, noting "if a man has been an independent judge, as this respondent has been, he cannot be expected, on retiring from the bench to take up the practice of law, to lay aside his independence."[525]

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520. Lyndsay D. Hawkins, Speech in Defense of His Two Law Partners on a Rule to Show Cause Why They Should Not Be Held in Contempt (Nov. 20, 1923) (on file with the *St. Mary's Law Journal*).

521. *Id.*

522. *See Two Held in Contempt of Federal Court*, DALLAS MORNING NEWS, Nov. 23, 1923, at 20 (reporting that "J.W. Mingus a banker . . . and William E. Hawkins, an attorney of that place, were adjudged in contempt of Federal court by District Judge James C. Wilson").

523. *Id.*

524. Speech of Lyndsay D. Hawkins, Center for American History, University of Texas at Austin, at 6 (on file with the *St. Mary's Law Journal*).

525. *Id.* at 13-14.

The claims that William Hawkins was both martyr and missionary, that he chose to retire from the bench "to take up the practice of law," and that he was a model of "independence" in the bar, fit the story Hawkins created for himself during his tenures as Insurance Commissioner and Supreme Court Justice of Texas. The court, however, shrugged off the son's plea and held William Hawkins in contempt.[526]

The final judgment on Hawkins comes from a fellow prohibitionist, Thomas B. Love. In 1910, when Hawkins was Commissioner of Insurance and Banking, Love, his predecessor in that post, sent a letter to Lee Wolfe, in which he commented on Hawkins's behavior: "The truth of it is — Judge H. has developed a very peculiar and slavish devotion to unimportant technicalities and to weird and fantastic constructions of the Law, which, while he and I continue to be friends, in my opinion, has utterly destroyed his usefulness."[527]

IV. CONCLUSION

The story of the Texas Supreme Court from 1911-1921 is one of failure, not success. The overarching issue was prohibition, which hovered over the court throughout the decade. Other reasons, however, existed for this failure: the Texas economy was rapidly changing, social divisions were widening, and the sheer number of cases churned out by the increasing numbers of courts of civil appeals all overwhelmed a court ill-equipped to maintain its pace of opinion writing. The internal divisions of the court, exemplified by the inability of the members to work together to reduce the court's docket, and by their differences in legal thought, contributed substantially to the view that the Texas appellate judicial system was broken.

Only after the election of William Pierson did the court begin to repair its reputation, although that had little, if anything, to do with Pierson. The resignation from the court of Chief Justice Nelson Phillips in November 1921 formally closed this chapter of the history of the Texas Supreme Court.

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526. *See Two Held in Contempt of Federal Court*, DALLAS MORNING NEWS, Nov. 23, 1923, at 20 (noting also that Mingus was held in contempt, but the charge against Walter David, the other lawyer, was dismissed).

527. Letter of Thomas B. Love to Lee J. Wolfe (June 17, 1910), *in* THOMAS B. LOVE PAPERS (Dallas Hist. Soc'y) (on file with the *St. Mary's Law Journal*).