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I. INTRODUCTION

> A car with four Texans sped down a dead-end road, and mistakenly ran off the end of the road. The car crashed into a dirt pile and fence, and injured the four passengers. The passengers brought separate lawsuits in two different Texas courts. Both cases raised the same legal issue—whether the city of Houston should have erected a barrier to prevent such accidents. Although both cases raised the identical legal issue, the cases resulted in diametrically opposed conclusions. In one case, the passenger was prohibited from bringing suit against the city of Houston; in the other case the passengers were allowed to bring suit against the city of Houston.[1]

Did this really happen? Did the Texas appellate justice system really allow for the unequal treatment of identically situated Texas litigants? Unfortunately, it did happen and the unequal treatment of similarly situated Texas litigants remains a significant problem with Texas's appellate "justice" system. This inconsistent decision-making violates a cardinal principle of appellate justice—the "uni-

1. *Compare* Montes v. City of Houston, No. 14-99-00174-CV, 2000 WL 1228618, at *1, *4 (Tex. App.—Houston [14th Dist.] Aug. 31, 2000) (not designated for publication), *and supplemental op. on reh'g*, 2000 WL 1562355, at *1 (Tex. App.—Houston [14th Dist.] Oct. 19, 2000) (not designated for publication) (barring the passenger from suing), *pet. denied*, 66 S.W.3d 267, 267 (Tex. 2001), *with* Reyes v. City of Houston, 4 S.W.3d 459, 462 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (allowing the passengers to sue). *See also infra* notes 96-103 and accompanying text (explaining the two Houston cases in greater detail).

form and coherent enunciation and application of the law."[2] Further, it frequently makes it impossible for Texas lawyers, litigants, and trial courts to ascertain precisely what law governs any particular dispute. The resulting uncertainty increases litigation, wastes judicial resources, and leads to unfair appellate forum shopping.

Several Texas Supreme Court Justices have recently criticized Texas's appellate justice system for its failure to provide consistency and the unfairness it produces. Texas Supreme Court Justice Nathan Hecht has long noted how Texas litigants are treated differently under identical factual circumstances.[3] Former Chief Justice Thomas Phillips, on behalf of the Texas Supreme Court, recently urged the Texas Legislature to restructure the intermediate courts because these "courts are not for judges, and not for lawyers, but for the public, who deserve predictability and current dockets regardless of where they live."[4] Justice Scott Brister agreed that the Texas Supreme Court's proposal to restructure the Texas courts of appeals "would alleviate many of the anomalies of the Texas appellate court system without changing its basic organization . . . [and] would better reflect the Texas of today."[5] Despite these warnings, the Texas Supreme Court and Texas Legislature have done little to rectify the lack of uniform justice received by Texas litigants. Curiously, most of the proposals to reform the unfairness in Texas's appellate justice system have focused exclusively on structural changes to the unique appellate court structure in Texas, i.e., changes in the number of intermediate appellate court districts, changes in the counties within each appellate district, and changes in the number of justices serving in each intermediate appellate

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2. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 11 (1976); *see also* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) (noting that uniformity is "the most basic principle of jurisprudence"); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1424-25 (1987) (stating that "[u]niformity promotes the twin goals of equity and judicial integrity"). The JUSTICE ON APPEAL treatise has been described as a "masterful work" which "is the foundation for our contemporary understanding of modern appellate courts." THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 15 (1994).

3. *Montes*, 66 S.W.3d at 267 (Hecht, J., concurring).

4. Thomas Phillips, State of the Judiciary Address, 78th Leg. 6 (Mar. 4, 2003), http://www.supreme.courts.state.tx.us/Advisory/SOJ.pdf (on file with the *St. Mary's Law Journal*).

5. Scott Brister, *Is It Time to Reform Our Courts of Appeals?*, 40 HOUS. LAW. 22, 27 (2003).

court. Although these structural changes could, without question, help reduce the inconsistent "justice" produced and magnified by Texas's unique appellate court structure, these structural reforms fail to address the main substantive problem—Texas's weak adherence to stare decisis. In contrast to these structural reform proposals, this Article proposes an entirely different solution—stronger stare decisis.[6]

Surprisingly, only one law review article has ever explored how stare decisis, one of the most fundamental and important concepts in American jurisprudence,[7] operates within Texas's judicial system.[8] Although stare decisis is a relatively straightforward concept when applied in a basic three-tiered court system (consisting of trial courts, one intermediate court of appeals, and one high or supreme court),[9] the application of stare decisis becomes considera-

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6. The doctrine of stare decisis requires courts "to abide by, or adhere to, [previously] decided cases." BLACK'S LAW DICTIONARY 1261 (5th ed. 1979). Thus, if a case before the court has similar facts and raises issues similar to those of a previously decided case, the present case should be decided in the same manner as the earlier case. *See* Neff v. George, 4 N.E.2d 388, 390-91 (Ill. 1936) ("[T]he doctrine of stare decisis expresses the policy of the courts to stand by precedents and not to disturb settled points."), *overruled in part on other grounds by* Tuthill v. Rendleman, 56 N.E.2d 375 (Ill. 1944); State v. Mellenberger, 95 P.2d 709, 718-20 (Or. 1939) (reiterating that a prior decision on a question of law acts as precedent and binds both courts of equal and lesser rank), *overruled in part on other grounds by* Hungerford v. Portland Sanitarium & Benevolent Ass'n, 384 P.2d 1009 (Or. 1963); Horne v. Moody, 146 S.W.2d 505, 509-10 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgm't cor.) (acknowledging that stare decisis acts as both precedent and authority).

7. In the Federalist Papers, Alexander Hamilton emphasized the importance of precedent and stare decisis when he explained that "[t]o avoid arbitrary discretion in the courts, it is indispensable that they [the courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Even the ancient Babylonian King Hammurabi's Code provided:

> If a judge has given a verdict, rendered a decision, granted a written judgment, and afterward has altered his judgment, that judge shall be prosecuted for altering the judgment he gave and shall pay twelvefold the penalty laid down in that judgment. Further, he shall be publicly expelled from his judgment-seat and shall not return nor take his seat with the judges at a trial.

C.H.W. JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS (1904), *available at* http://www.commonlaw.com/Hammurabi.html.

8. *See generally* James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514 (1943) (discussing the importance of the Supreme Court and stare decisis).

9. In such a basic three-tier system, trial courts are bound under principles of stare decisis to follow decisions of the high court and the intermediate court of appeals, and the intermediate court of appeals is bound to follow decisions of the high court. *See* Swilley v.

bly more complicated when a court system employs multiple intermediate appellate courts. Texas, for instance, has fourteen intermediate appellate court districts, more than any other intermediate appellate court system (including the entire federal appellate court system),[10] and many questions pertaining to the precedential value accorded to these different Texas intermediate appellate district decisions arise. For example, is a decision made by one of Texas's intermediate appellate districts binding upon a different intermediate appellate district? Is a trial court situated in one intermediate appellate district bound by a decision from a "foreign" intermediate appellate district? Does the result differ if the trial court's own intermediate appellate district has issued a decision that conflicts with a "foreign" intermediate appellate district's decision? When intermediate appellate decisions conflict and result in the nonuniform application of the law, is the high court required to resolve these conflicts?

This Article explores the answers to these questions and explains how Texas's weak adherence to stare decisis, coupled with its unique appellate court structure, has led to the nonuniform, inconsistent, unequal, unfair, and confusing justice system. In so doing, the Article is divided into six sections. The first section introduces problems with Texas's appellate court system. The second section explores the intricacies of stare decisis in a multi-tiered court system. Its primary purpose is to explain the various models of vertical and horizontal stare decisis and to examine how these models

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McCain, 374 S.W.2d 871, 875 (Tex. 1964) (expressing that a decision by the state's highest court binds all courts below it); Sauceda v. Kerlin, 164 S.W.3d 892, 910 (Tex. App.—Corpus Christi 2005, no pet.) (reiterating that courts of equal and lesser rank are bound by the principles of stare decisis).

10. Other large states have multiple intermediate appellate districts. New York, for example, has four appellate districts. New York State Unified Court System, Appellate Divisions, http://www.courts.state.ny.us/courts/appellatedivisions.shtml (last visited Nov. 3, 2005). Florida and Illinois each have five appellate districts. Florida State Courts, District Court of Appeals, http://www.flcourts.org/courts/dca/dca_description.shtml (last visited Nov. 3, 2005); Official Site of Illinois Courts, Appellate Court, http://www.state.il.us/court/AppellateCourt/Map.htm (last visited Nov. 3, 2005). California has six appellate districts. California Court System, Courts of Appeal, http://www.courtinfo.ca.gov/courts/courtsofappeal (last visited Nov. 3, 2005). Ohio has twelve appellate districts. The Supreme Court of Ohio, District Courts of Appeals, http://www.sconet.state.oh.us/District_Courts (last visited Nov. 3, 2005). Finally, the federal appellate court system is currently divided into thirteen intermediate appellate circuits. U.S. Courts, United States Courts of Appeals, http://www.uscourts.gov/courtsofappeals.html (last visited on Nov. 3, 2005).

operate in a complex appellate court system. The third section explains the unique structure of Texas's court system and then focuses upon how stare decisis operates within that system. Its primary purpose is to explain how stare decisis operates within each of Texas's fourteen intermediate appellate court districts and upon the trial courts in the state. Moreover, it focuses upon the lack of uniformity created by Texas's weak adherence to stare decisis and the high court's failure to resolve conflicts among the fourteen courts of appeals. The fourth section explains how two other aspects of Texas's unique appellate structure, overlapping appellate districts and unequal dockets, magnify the problem of nonuniform and inconsistent decisionmaking created by Texas's weak adherence to stare decisis. The fifth section focuses upon some recent changes, and proposed structural changes, to Texas's court system. Although these structural changes would remedy some of the unfairness in Texas's justice system, they still fail to address the substantive problem plaguing Texas's justice system. Finally, the sixth section focuses on the substantive problem—the weak adherence to stare decisis—and proposes an alternative to the restructuring of Texas's appellate courts. Instead of changing the structure of Texas's appellate courts, either the Texas Supreme Court or the Texas Legislature should mandate stronger stare decisis rules. Such rules would dramatically improve Texas's judicial system by ensuring that all Texans receive uniform justice regardless of locale.

II. Two Models of Stare Decisis: Vertical Stare Decisis and Horizontal Stare Decisis

Stare decisis is one of the most basic and fundamental principles of the American legal system.[11] In its simplest form, stare decisis requires courts to adhere to prior case precedents in deciding new cases—"[t]he previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y* if and when *X* again occurs."[12] This adher-

11. The modern theory of stare decisis began gradually in the 1800s with the establishment of stricter appellate court hierarchies and the standardization of case law reporting. Theodore F.T. Plucknett, A Concise History of the Common Law 350 (5th ed. 1956).

12. Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 571 (1987).

ence to prior court precedent is frequently justified on several basic grounds: judicial economy, predictability, fairness/equality, and judicial legitimacy.[13]

First, adherence to prior decisions promotes judicial economy because courts do not have to reconsider each case anew.[14] Instead, courts can use prior decisions as the basis for new rulings without having to rethink the law in every case. As Justice Benjamin N. Cardozo once noted that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[15] Without adherence to prior precedent created by stare decisis, an incredible strain would be placed on judicial resources.

Adherence to prior decisions also promotes predictability and certainty in the law. Predictability allows individual and corporate litigants to plan their affairs because they know how their actions will be adjudged in future legal proceedings.[16] By comparison, if a court can easily abandon or ignore prior decisions, the ability of litigants to predict the future legal consequences of their actions is significantly eroded.[17] Thus, the predictability inherent in stare decisis induces action based on reliance upon the law, rather than inaction based upon uncertainty surrounding the law. Likewise, a court's failure to adhere to prior decisions can produce extreme

13. This is not an exhaustive list, but only the most commonly set forth justifications for stare decisis. The doctrine of stare decisis, of course, is not without its criticisms. Most notably, stare decisis deprives the law of adaptability and flexibility. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992) ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete."). Stare decisis also gives "undue weight to the first case" to resolve a particular issue, and this is especially problematic if the lawyers and the court have not done an adequate job fully developing the issue. *See* Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001) (discussing both positive and negative effects of courts adhering to case precedent).

14. Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2238 (1997).

15. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

16. Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988).

17. *Id.*

hardships on those who have justifiably relied upon prior rulings, based upon stare decisis principles.[18]

Adherence to prior decisions also ensures that different litigants with similar problems will be treated equally. In short, like-cases will produce like-results, regardless of when the disputes are litigated, and this ensures a sense of fairness in the justice system.[19] Finally, by producing these consistent results, the overall reputation and legitimacy of the legal system is enhanced because the public justifiably recognizes that the law is uniformly applied and is not subject to the whims of individual judges.[20]

Justice John M. Harlan aptly summarized these four justifications for stare decisis as follows:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.[21]

Adherence to prior case precedent occurs in two directions: vertically and horizontally. The first direction, known as vertical stare decisis, requires lower courts within a particular court system to adhere to higher court decisions within that system. This form of stare decisis stems from the hierarchical nature of our court systems and is designed to allow higher court decisions to control lower court decisions.[22] The second direction of stare decisis,

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18. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572-75 (1987) (discussing the effect of prior decisions on future cases).

19. *See* Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2243 (1997) (noting that independent of time and place, similar cases should have similar results).

20. *See* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 371 (1970) (contending that adherence to stare decisis fosters impartiality and certainty, while limiting the impact of judges "on the shape of the law").

21. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

22. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 820-23 (1994) (describing the "doctrine of hierarchical precedent"); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994)

known as horizontal stare decisis, requires courts to adhere to prior decisions from co-equal or coordinate courts.[23] This form of stare decisis recognizes the importance of stability within the law and is designed to deter co-equal courts from deciding the law differently from other co-equal courts.[24] Despite the relative simplicity of these basic definitions of vertical and horizontal stare decisis, the actual application of these doctrines is fraught with intricacies depending upon the structure and goals of the individual court system which applies these doctrines.

A. *Vertical Stare Decisis*

The most widely accepted, and probably least controversial, model of stare decisis is vertical stare decisis. Most American jurisdictions, including the federal court system and most state court systems, have three hierarchical tiers—a high court, an intermediate court of appeals, and trial courts.[25] In these systems, two versions of vertical stare decisis can exist: (1) lower courts adhering to prior high court precedent (i.e., high court vertical stare decisis), and (2) trial courts adhering to prior intermediate appellate court precedent (i.e., intermediate appellate court vertical stare decisis).[26] All jurisdictions apply high court vertical stare decisis in a

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(describing vertical stare decisis); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 436-37 (1992) (addressing the distinction between horizontal and vertical stare decisis).

23. *See* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 58 (2002) (acknowledging that while vertical stare decisis is an obligation, horizontal stare decisis is viewed only as policy).

24. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024-25 (1994) (describing horizontal stare decisis as a court following its own precedents); Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 845 n.171 (2003) (defining horizontal stare decisis as "the 'binding' effect of precedent on later decisions of the same court").

25. While most jurisdictions have three tiers of courts, some jurisdictions, like Montana, have only two tiers—trial courts and a high court. *See generally* JUDICIARY OF THE STATE OF MONTANA, ANNUAL REPORT (2004), *available at* http://www.montanacourts.org/Supreme/reports/2004rpt.pdf.

26. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824-25 (1994) (providing that a trial court must follow precedent set by the court of last resort and intermediate appellate courts); Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 422 (1992) ("*Stare decisis* . . . demand[s] that lower courts abide by the pronouncement of their superiors.")

uniform and consistent manner. The high court decisions bind all of the lower courts within the jurisdiction. Such a system recognizes the lawmaking function of the high court and allows for the orderly and uniform administration of justice in a hierarchical fashion. It also recognizes that the entire court system functions more efficiently and uniformly when lower courts are bound by high court decisions. More problematic and less uniform, however, is the extent to which intermediate appellate court decisions are binding on trial courts. Depending on the precise model of intermediate appellate court vertical stare decisis embraced by a jurisdiction, a decision by the intermediate appellate court (or a district court within the appellate court's jurisdiction) can have three different effects upon the trial courts of that jurisdiction:

> (1) Under a weak model, a decision made by an intermediate appellate court is not binding on any trial court within the jurisdiction,
> (2) Under a strong model, a decision made by an intermediate appellate court binds all trial courts within the jurisdiction,
> (3) Under a hybrid model, a decision made by an intermediate appellate court district or division binds only the trial courts within the same geographic boundaries as that appellate court district or division.

The first model of intermediate appellate court vertical stare decisis, a weak or even nonexistent model of stare decisis, occurs when the intermediate appellate court decisions are not binding on any of the jurisdiction's trial courts. Instead, the function of intermediate appellate court decisions is to assure justice in each individual case, without regard for the future implications of such decisions. This version is used by the Oklahoma court system. In that system, the decisions of the Oklahoma Court of Civil Appeals are not binding on any trial court and may not be cited as precedent unless a majority of the justices of the Oklahoma Supreme Court approve the opinion for publication.[27] Under this model, the intermediate appellate court plays no role in the overall development of the jurisdiction's law. Instead, the high court has the exclusive authority to create binding precedents.[28] This system places

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27. *See* OKLA. STAT. ANN. tit. 20, § 30.5 (West 1996) ("No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter.").
28. *Id.*

an enormous stress upon the high court and is only appropriate or feasible in a jurisdiction with a low volume of judicial business.

In contrast to this weak model of intermediate appellate court vertical stare decisis, the second strong model affords the greatest lawmaking power to the intermediate appellate courts. Under this model, intermediate appellate court decisions bind all of the trial courts within the jurisdiction.[29] This strong model is the norm whenever a jurisdiction has only one intermediate appellate court. This strong model, however, is occasionally used in jurisdictions with multiple intermediate appellate court districts or divisions. For example, California, Florida, and New York have intermediate appellate courts divided into multiple districts and each appellate district hears appeals only from a certain geographic region of the state.[30] Despite only hearing appeals from a certain geographic region, the decisions by any one of these appellate districts is binding upon all of the state's trial courts.[31] Under this model, the decision

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29. For example, decisions by the Wisconsin and Utah Courts of Appeals bind all trial courts in those states. *See* WIS. STAT. ANN. § 752.41(2) (West 2000) (providing that "[o]fficially published opinions of the court of appeals shall have statewide precedential effect"); Renn v. Utah State Bd. of Pardons, 904 P.2d 677, 681 (Utah 1995) (holding that a rule of law pronounced by the Court of Appeals binds "all courts of lower rank").

30. *See generally* California Court System, Courts of Appeal, http://www.courtinfo.ca.gov/courts/courtsofappeal (last visited Nov. 3, 2005) (describing the California intermediate appellate court system and the six districts in which the courts sit) (on file with the *St. Mary's Law Journal*); Florida State Courts, District Court of Appeals, http://www.flcourts.org/courts/dca/dca_description.shtml (last visited Nov. 3, 2005) (providing the basic structure of the five appellate courts) (on file with the *St. Mary's Law Journal*); New York State Unified Court System, Appellate Divisions, http://www.courts.state.ny.us/courts/appellatedivisions.shtml (last visited Nov. 3, 2005) (listing the four courts of appeals and the counties they serve) (on file with the *St. Mary's Law Journal*).

31. Since intermediate appellate court decisions are binding on all of the trial courts, this model can produce problems when two intermediate appellate districts have made conflicting decisions. Such conflicting decisions can occur when a state uses a weak intermediate appellate court horizontal stare decisis model whereby one intermediate appellate court district has the freedom to disregard decisions made by other intermediate appellate court districts. *See* Schramer v. Tiger Athletic Ass'n of Aurora, 815 N.E.2d 994, 996-97 (Ill. App. Ct. 2004) (holding that intermediate appellate courts "are not inescapably bound by our own previous decisions"); People v. Primm, 745 N.E.2d 13, 29 (Ill. App. Ct. 2000) (holding that the Illinois First District Court of Appeals did not have to follow a prior precedent from the First District because "*stare decisis* does not bind courts to follow decisions of equal courts"). The conflicting intermediate appellate decisions pose a problem unless the trial court has been given specific guidance regarding which of the two conflicting intermediate appellate districts' decisions is binding. Fortunately, California, Florida, and New York have provided such guidelines, and an orderly and uniform system of stare decisis has developed. For example, trial courts in these jurisdictions must follow a prece-

of any intermediate appellate district binds all of the state's trial courts thereby promoting the uniform application of the law in the state's trial courts and the overall development of the jurisdiction's law.[32]

The final model of intermediate appellate court vertical stare decisis, a hybrid model sometimes known as geographic or territorial stare decisis, applies in some jurisdictions with an intermediate appellate court that has been subdivided into districts or divisions. In these jurisdictions, each intermediate appellate district hears appeals only from trial courts within a certain geographic region and a decision made by each intermediate appellate district is only binding on the trial courts within that geographic region (i.e., the appellate decisions are *not* binding upon all of the jurisdiction's trial courts). The federal intermediate appellate court system provides the classic example of this model. Each of the thirteen federal circuits, with the exception of the United States Court of Appeals for the Federal Circuit, hears appeals from a certain geographic region (e.g., the Fifth Circuit hears appeals from federal trial courts located in Louisiana, Mississippi, and Texas).[33] Because

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dent in any appellate district until the trial court's "home" appellate district decides otherwise. *See, e.g.*, Heymach v. Cardiac Pacemakers, Inc., 698 N.Y.S.2d 837, 840–41 (Sup. Ct. 1999) ("The rule in New York is that a trial court must follow an Appellate Division precedent in its own Department, and, . . . [absent] . . . [a] decision in its own Department, a trial court is bound [by] applicable decisions in another Department of the Appellate Division, until its own Appellate Division decides otherwise."). Also, when two or more appellate districts have made conflicting decisions and the trial court's "home" appellate district has not spoken, neither of the conflicting appellate districts is binding on the trial court. *See, e.g.*, Reyes v. Sanchez-Pena, 742 N.Y.S.2d 513, 518 (Sup. Ct. 2002) (asserting, "where the Court of Appeals [New York's highest court] has not spoken and there is no applicable Appellate Division decision in its own Department, *conflicting decisions* in the other Departments *are not binding* on an inferior court; and it is then free to fashion a decision which it deems . . . appropriate").

32. Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985) (holding that intermediate appellate court decisions from all four districts applied statewide and "represent the law of Florida unless and until they are overruled by this [Florida Supreme] Court"); Straman v. Lewis, 559 N.W.2d 405, 406 (Mich. Ct. App. 1996) (holding that "the publication of an opinion of . . . [the Michigan] Court [of Appeals] creates binding precedent statewide").

33. The Court of Appeals for the Federal Circuit has subject matter, rather than geographic, jurisdiction. Rather than hearing all appeals from a certain geographic region, the Federal Circuit has nationwide subject matter jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims. *See* U.S. Court of Appeals for the Federal Circuit, About the Court, http://fedcir.gov/about.html (last visited Nov. 3, 2005) (detailing the jurisdiction of the federal circuit appellate court) (on file with the *St. Mary's Law Journal*).

the Fifth Circuit only hears appeals from a certain geographic region, its decisions only bind the federal trial courts in that region (i.e., the federal trial courts in Louisiana, Mississippi, and Texas). The primary advantage of this vertical stare decisis model is that it produces less confusion for the trial court and its litigants. Since the trial court in any geographic region is only bound by its own "home" appellate court district, the trial court and litigants do not need to reconcile conflicting intermediate appellate district decisions. The result, however, is that the law becomes more territorial and less uniform because the trial courts can ignore many "foreign" appellate district decisions (i.e., appellate decisions from outside the trial court's geographic region), even though those decisions are based upon the same law. As a result, a federal law can mean one thing in New York and the opposite in Texas.[34]

B. *Horizontal Stare Decisis*

Compared to the more widely accepted vertical stare decisis, many scholars have criticized the application of horizontal stare decisis. Critics like Oliver Wendell Holmes have spoken of courts being enslaved to prior decisions, noting that "[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[35] In its strongest form, horizontal stare decisis operates as "a refusal to correct errors."[36] In such a strong horizontal stare decisis model, a

34. *See infra* notes 108-11 and accompanying text (discussing the lack of uniformity at the federal level due, in large part, to unresolved conflicts amongst the federal courts of appeals). This problem, known as a circuit split, can only be resolved by the United States Supreme Court. Despite its best intentions, the United States Supreme Court has allowed such circuit splits to splinter the meaning of federal law. *See generally* Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605 (2003) (proposing a plan to increase uniformity to dispense with intercircuit conflicts that undermine the legitimacy of the federal court system); William H. Rehnquist, Address at Saint Louis University, A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System (Apr. 7, 1983), *in* 28 ST. LOUIS U. L.J. 1, 1-10 (1984) (exploring problems that arise in federal courts when the Supreme Court cannot adjudicate every single case); Byron R. White, Symposium, *Dedication (Fifth Circuit Survey: July 1982 - June 1983)*, 15 TEX. TECH L. REV., at ix (1984) (noting that, due to the high volume of appeals filed in circuit courts and the Supreme Court, the circuit courts typically are the final word on certain legal issues within their geographically designated area).

35. Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

36. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 82 (1990).

court is absolutely bound by its own prior decisions. By contrast, in a hybrid horizontal stare decisis model, a court considers itself more loosely bound by its own prior decisions. Under this hybrid model, a court can overrule its own prior decisions, but only when compelling circumstances justify a change in the law. In a weak horizontal stare decisis model, a court is not bound by its own prior decisions.

Most high courts use a hybrid model of horizontal stare decisis. The United States Supreme Court, for instance, has acknowledged that strict adherence to prior decisions is a wise policy because, in most matters, "it is more important that the applicable rule of law be settled than it be settled right."[37] The Court has also recognized that strict adherence to stare decisis is "not an inexorable command."[38] Instead, stare decisis is "a principle of policy and not a mechanical formula of adherence to the latest decision."[39] Whenever its prior decisions have proved unworkable or badly reasoned, the Supreme Court "has never felt constrained to follow precedent."[40] Most state high courts have employed similar horizontal stare decisis principles. For example, the Texas Supreme Court has noted:

> [T]he doctrine of stare decisis does not stand as an insurmountable bar to overruling precedent. Stare decisis prevents change for the sake of change; it does not prevent any change at all. It creates a strong presumption in favor of the established law; it does not render that law immutable. Indeed, the genius of the common law rests in its ability to change, to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly.[41]

Similar to the Texas and United States Supreme Courts, most other state high courts, although somewhat reluctant to discard their own prior decisions, recognize limited circumstances where the growth and development of the law outweigh the goals of a more strict adherence to prior precedent. Most scholars have like-

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37. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

38. *Id.* at 828.

39. *Id.* (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

40. *Id.* at 827 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)). The Supreme Court even recognized that in recent years it has overruled itself, in whole or in part, almost twice per term. *Id.* at 828.

41. Gutierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979).

wise recognized that, at least under some limited circumstances, courts should abandon a strict adherence to precedent and thereby ensure that our laws are not ruled by the "dead hand of the past."[42]

In contrast to the near-uniform application of horizontal stare decisis at the high court level, a greater divergence in approach has accompanied horizontal stare decisis at the intermediate appellate level. Depending on the precise model of horizontal stare decisis embraced by a jurisdiction, a decision by an intermediate appellate court can have three different effects upon other intermediate appellate courts of the jurisdiction:

(1) Under a strong model of horizontal stare decisis, a decision made by an intermediate appellate court binds all other intermediate appellate courts within the jurisdiction.[43]

(2) Under a hybrid model of horizontal stare decisis, a decision made by an intermediate appellate court binds all other intermediate appellate courts within the jurisdiction until:

(a) an en banc panel of the intermediate appellate court overrules the prior decision,[44]

(b) another intermediate appellate court from within the jurisdiction overrules the prior decision by finding clear error, manifest injustice, or some other grave problem with the prior decision,[45] or

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42. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998).

43. North Carolina and Wisconsin use such models. *See* Cole v. Triangle Brick, 524 S.E.2d 79, 81 (N.C. Ct. App. 2000) ("Where a panel of [this Court] 'has decided the same issue, albeit in a different case, a subsequent panel is bound by that precedent, unless it has been overturned by a higher court.'" (quoting *In re* Appeal from Civil Penalty, 379 S.E.2d 30, 37 (N.C. 1989))); State v. Seeley, 567 N.W.2d 897, 901-02 (Wis. Ct. App. 1997) (reiterating that "a decision by the court of appeals is binding and must be followed as precedent by all other intermediate courts, even if wrongly decided" (citing Cook v. Cook, 560 N.W.2d 246, 256 (Wis. 1997))).

44. The federal appellate circuits use such a model. *See* Latham v. Office of Att'y Gen. of Ohio, 395 F.3d 261, 269 (6th Cir. 2005) (holding, "only our Circuit *en banc* or the Supreme Court may overrule a decision of a panel of this Court"); United States v. Wright, 22 F.3d 787, 788 (8th Cir. 1994) (recognizing, "a panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting en banc" (citing Yates v. United States, 753 F.2d 70 (8th Cir. 1985))).

45. Colorado and Indiana use such a model. *See* Denver Fire Reporter & Protective Co. v. Dutton, 736 P.2d 1255, 1256 (Colo. Ct. App. 1986) (holding that "if manifest injustice would result from one [appellate] division being bound by an earlier ruling of another [appellate] division, then the earlier ruling need not be followed"); Badger v. State, 754 N.E.2d 930, 935 (Ind. Ct. App. 2001) ("'A court has the power to revisit prior decisions . . . in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and

(c) another intermediate appellate court from within the jurisdiction certifies a potentially conflicting decision for supreme court review.[46]

(3) Under a weak model of horizontal stare decisis, a decision by an intermediate appellate court is not binding on other intermediate appellate courts within the jurisdiction.[47]

III. TEXAS'S UNIQUE COURT SYSTEM AND STARE DECISIS WITHIN THAT SYSTEM

To fully understand how stare decisis operates in Texas's court system, it is first necessary to have a basic understanding of that system. Today, the Texas court system has two courts of last resort (the Texas Supreme Court for civil matters and the Texas Court of Criminal Appeals for criminal matters), fourteen courts of appeals, and thousands of trial courts.[48] Although this sounds like a relatively simple court system, the most recent comprehensive study of this system stated that "it is difficult, perhaps impossible, to describe the Texas judiciary as a 'court system' or a 'judicial system.' There is no real, overall coordination, harmony or order."[49] In-

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would work manifest injustice.'" (quoting State v. Huffman, 643 N.E.2d 899, 901 (Ind. 1994))), *abrogation recognized by* Stites v. State, 829 N.E.2d 527 (Ind. 2005).

46. Ohio uses such a model. *See* OHIO CONST. art. IV, § 3(B)(4) ("Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."); Bourquin v. KeyBank, N.A., 741 N.E.2d 584, 586 (Ohio Ct. App. 2000) (recognizing a conflict between the appellate courts and certifying the case to the Ohio Supreme Court).

47. Illinois uses such a model. *See* Schramer v. Tiger Athletic Ass'n of Aurora, 815 N.E.2d 994, 996-97 (Ill. App. Ct. 2004) (holding that intermediate appellate courts "are not inescapably bound by our own previous decisions"); People v. Primm, 745 N.E.2d 13, 29 (Ill. App. Ct. 2000) (holding that an Illinois First District Court of Appeal did not have to follow a prior precedent from the First District because "*stare decisis* does not bind courts to follow decisions of equal courts").

48. Texas Judiciary Online, Court Structure of Texas, http://www.courts.state.tx.us/publicinfo/crt_stru.htm (last visited Nov. 3, 2005) (on file with the *St. Mary's Law Journal*). Texas trial courts have three basic levels: (1) district courts, (2) county courts, which include both constitutional and statutory courts, and (3) small claims courts which include both justice of the peace and municipal courts. *Id.* Unfortunately, as a general rule rather than as an exception, these trial courts have overlapping jurisdiction. In some counties, the district courts share jurisdiction with the county courts. *Id.* The problems created by this overlapping trial court jurisdiction are beyond the scope of this Article.

49. TEXAS RESEARCH LEAGUE, TEXAS COURTS, A STUDY BY THE TEXAS RESEARCH LEAGUE, REPORT TWO—THE TEXAS JUDICIARY: A PROPOSAL FOR STRUCTURAL-FUNC-

stead, "Texas' courts are fragmented without a central focus and are going along in their own direction and at their own pace."[50] This recent report noted that the system has only worsened since a scathing assessment in 1924 suggested that:

> In the course of the years [the judiciary] has become very intricate and cumbersome. . . . Statute has been piled upon statute—conflicting decisions have increased the confusion. Each succeeding legislature has attempted repairs and additions which frequently have not only failed either to remedy an existing evil or to provide some new capacity, but have even upset such concord that did exist. An artificial and arbitrary system, as age creeps on, gets hardened arteries.[51]

A. *Texas's Appellate Courts: The Texas Supreme Court, The Texas Court of Criminal Appeals, and the Texas Courts of Appeals*

Texas remains one of two states with both a civil and criminal high court: the Texas Supreme Court is the high state court for civil appeals and the Texas Court of Criminal Appeals is the high state court for criminal appeals.[52] The dockets of both high courts are directly affected by Texas's appellate court structure. Texas's fourteen courts of appeals handle most of the state's civil and criminal appeals from the state's trial courts; the Court of Criminal Appeals handles all of the criminal appeals beyond the courts of appeals, and the Texas Supreme Court handles all of the civil appeals beyond the courts of appeals.[53]

TIONAL REFORM 3 (1991), *available at* http://www.courts.state.tx.us/oca/tjc/publications/rpt_2.pdf. The study was requested by then Texas Supreme Court Chief Justice Thomas R. Phillips and was conducted by the Texas Research League, a nonprofit, educational corporation engaged in the objective analysis of Texas government. *Id.* at v. The problem is not merely a function of Texas's size because other similarly sized states, most notably California and New York, have unified court systems. *Id.* at 3.

50. *Id.* at 1.

51. Rhodes S. Baker, *The Bar Association's Legislative Program—Judicial Control of Procedure*, 2 TEX. L. REV. 422, 429-30 (1924).

52. Texas Judiciary Online, Court Structure of Texas, http://www.courts.state.tx.us/publicinfo/crt_stru.htm (last visited Nov. 3, 2005) (on file with the *St. Mary's Law Journal*). Oklahoma also has two high courts—one for civil matters and one for criminal matters. The Oklahoma State Courts Network, The Oklahoma Court System, http://www.oscn.net/applications/oscn/start.asp?viewType=COURTS (last visited on Nov. 3, 2005) (on file with the *St. Mary's Law Journal*).

53. The two Texas high courts also promulgate rules of civil procedure, evidence, appellate procedure, and court administration for the entire Texas court system. TEX. CONST.

1. The Texas Supreme Court

The Texas Supreme Court's docket can be broken down into three main categories: (1) determining whether to grant review of a final judgment made by the courts of appeals (i.e., whether to grant or deny petitions for review); (2) dispositions of regular causes (i.e., cases where a petition for review has been granted, cases where a petition for writ of mandamus or habeas corpus has been granted, cases where a certified question from the federal appellate court has been accepted, cases where a parental notification appeal has been accepted, and cases involving direct appeals);[54] and (3) dispositions of motions.

The losing party in the courts of appeals usually has the right to petition for Texas Supreme Court review,[55] so the court does not have control over the number of petitions for review that are filed and must be considered. Much of the court's time is spent determining which petitions for review will be granted, and thereby receive the court's full attention.[56] In recent years, the Texas Supreme Court has reviewed approximately 1000 petitions for review per year and has granted full review to between 50-100 cases per year.[57] According to the rules of appellate procedure, the decision to grant review is a matter of judicial discretion.[58] Most im-

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art. V, § 31; TEX. GOV'T CODE ANN. § 74.021 (Vernon 2005); *see also* HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL § 101.02, at 3 (7th ed. 2005) (acknowledging the cooperative effort by both the Texas Supreme Court and the Texas Court of Criminal Appeals in drafting the rules of evidence).

54. Most regular causes are orally argued in open court and disposed of by a written and signed opinion. However, if six justices of the Texas Supreme Court vote accordingly, the court may grant a petition and issue an unsigned per curiam opinion without the benefit of oral argument. TEX. R. APP. P. 59.1.

55. In some limited circumstances, a party cannot petition for review by the Texas Supreme Court, meaning the court of appeals' decision is final. James W. Paulsen & Ted Z. Robertson, *The Meaning (If Any) of an "N.R.E."*, 48 TEX. B.J. 1306, 1306 (1985) (addressing the process used by the Texas Supreme Court in determining which review petitions will get the court's full attention).

56. *Id.* at 1308.

57. OFFICE OF COURT ADMINISTRATION, SUMMARY OF REPORTED ACTIVITY FOR STATE FISCAL YEARS 1994 THROUGH 2003, *available at* http://www.courts.state.tx.us/oca/PublicInfo/AR2003/activity/statewide_activity_summary.pdf (last visited Jan. 4, 2006) (on file with the *St. Mary's Law Journal*). The Court also receives approximately 2000 additional miscellaneous writs and motions per year. *Id.*

58. The Texas Supreme Court exercises its discretion by considering the following factors when deciding whether to grant a petition for review:

(1) whether the justices of the court of appeals disagree on an important point of law;

portant, for stare decisis purposes, the Texas Supreme Court has discretionary review power whenever "there is a conflict between the courts of appeal[s] on an important point of law."[59]

The Texas Supreme Court also has the unique power to fully adopt and endorse a decision of a court of appeals without fully reviewing the case, through briefs and oral argument. This power is exercised when the Texas Supreme Court issues a "petition refused" to a case seeking review. According to the rules of appellate procedure, "[i]f the [Texas] Supreme Court determines—after a response has been filed or requested—that the court of appeals' judgment is correct and that the legal principles announced in the opinion are likewise correct, the Court will refuse the petition with the notation 'Refused.'"[60] The Texas Supreme Court's issuance of such a petition refused means that court of appeals decision has "the same precedential value as an opinion of the Supreme Court."[61] Thus, an opinion from a Texas court of appeals can become the functional equivalent of a Texas Supreme Court opinion without a complete review of the case by the Texas Supreme Court.[62] Without addressing the merits, or lack thereof, of this petition system, which allows the Texas Supreme Court to fully endorse a court of appeals decision without issuing a separate supreme court opinion, the Texas Supreme Court's ability to endorse such opinions should make it easier to resolve conflicting decisions from Texas's intermediate appellate districts—one of the problems with Texas's current stare decisis model. In recent years,

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(2) whether there is a conflict between the courts of appeals on an important point of law;
(3) whether a case involves the construction or validity of a statute;
(4) whether a case involves constitutional issues;
(5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
(6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

TEX. R. APP. P. 56.1(a).

59. *Id.* 56.1(a)(2).

60. *Id.* 56.1(c).

61. *Id.*

62. By contrast, the Texas Court of Criminal Appeals does not have the power to fully endorse and adopt a court of appeals' opinion. Although the Court of Criminal Appeals can issue a petition refused notation, all "[p]etition history notations do not indicate the [c]ourt's approval or disapproval of the lower court's decision and do not have any precedential effect." TEXAS LAW REVIEW, TEXAS RULES OF FORM 25 (10th ed. 2003).

however, the court has rarely used the petition refused power and has not used it as a conflicts resolution mechanism.[63]

2. The Origins of the Texas Court of Criminal Appeals and Texas's Intermediate Appellate Courts

The Texas Constitution of 1876 created what is now known as the Texas Court of Criminal Appeals. At that time, the criminal appellate court was known as the Texas Court of Appeals. This court was created in an effort to lessen the docket backlog in the Texas Supreme Court, and it had exclusive jurisdiction over criminal appeals and limited jurisdiction over certain civil appeals.

In 1891, in an effort to further lessen the docket backlog in the Texas Supreme Court, the Texas Constitution was amended and the Texas Court of Appeals officially became the Texas Court of Criminal Appeals, with exclusive and final jurisdiction over criminal appeals.[64] At the same time, the legislature created the Texas Court of Civil Appeals. The new intermediate appellate courts had exclusive jurisdiction over civil appeals and were located in three geographic districts.[65] Over time, because of the explosion of judicial business, these intermediate courts of appeals expanded from three districts to fourteen districts.[66] This expansion created a situation whereby Texas now has more intermediate appellate districts than any other jurisdiction, including the entire federal appellate system. The expansion in the number of appellate districts was the direct result of a state constitutional provision that limited each court of appeals to *three justices*—a chief justice and two associate justices.[67] The rigidity of this constitutional provision, which pro-

63. The Texas Supreme Court could easily resolve conflicts via the "petition refused" system because issuing this elevates one of the conflicting court of appeals' decisions to the functional equivalent of a Texas Supreme Court precedent. TEX. R. APP. P. 56.1(c).

64. TEX. CONST. art. V, §§ 1, 5; *see also* W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX B.J. 269, 269 (1962) (quoting the Texas Constitution and detailing the 1891 amendments).

65. *See* W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 269, 324-25 (1962) (noting that the three courts of civil appeals were located in Galveston, Fort Worth, and Austin).

66. *See Courts of Civil Appeals*, 37 TEX. B.J. 315, 316 (1974) (providing a brief summary of the additional appellate courts); W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 269, 324-25 (1962) (detailing the addition of eleven courts of appeals, bringing the total number to fourteen).

67. GEORGE D. BRADEN ET. AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 398 (1977).

hibited any court of appeals from having more than three justices, led to the creation of fourteen appellate court districts, including two coterminous appellate districts (the First and Fourteenth Courts of Appeals) serving the state's most populated region—the Houston area. Ironically, in 1978, the constitution was amended to allow the Texas Legislature to increase the number of justices per court of appeals. This constitutional amendment did not mandate a specific number of appellate districts, but it did allow each appellate district to be staffed by a chief justice and *at least two other justices.*[68] Rather than re-evaluate the appellate court structure and reduce the number of intermediate appellate districts, the legislature decided to add justices to the First, Fifth, and Fourteenth Courts of Appeals, located in the state's two most populated cities of Houston and Dallas.[69]

Subsequently, in 1981, in an effort to lessen the backlog in the Texas Court of Criminal Appeals, the jurisdiction of the Texas Court of Civil Appeals was expanded to include criminal matters. This change in the intermediate appellate courts' jurisdiction also necessitated a name change from the Texas Court of Civil Appeals to the Texas Court of Appeals. Thus, since 1981, Texas's intermediate courts of appeals have handled both civil and criminal matters, and the Texas Court of Criminal Appeals has been the state's highest court for criminal appeals.[70] Interestingly, even after ex-

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68. TEX. CONST. art. V, § 6.

69. *See* Carl E.F. Dally & Patricia A. Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment,* 13 ST. MARY'S L.J. 211, 214 (1981) (writing that the number of justices in the First, Fifth, and Fourteenth Districts was increased from two associate justices to five); Clarence A. Guittard, *Unifying the Texas Appellate Courts*, 37 TEX. B.J. 317, 318 (1974) (advocating increasing the number of judges on the then-existing appellate courts rather than increasing the number of appellate courts).

70. TEX. CONST. art. V, §§ 5, 6; TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon 2005). The jurisdiction of the Texas Court of Criminal Appeals is comprised of a mixture of discretionary and mandatory matters. The Court of Criminal Appeals has discretionary jurisdiction over appeals from the courts of appeals in criminal cases, after a petition for discretionary review has been filed. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. ANN. art. 4.04 (Vernon 2005); *see also* Carl E.F. Dally & Patricia A. Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 ST. MARY'S L.J. 211, 217 (1981) (reviewing the jurisdiction of the Court of Criminal Appeals). Also, upon its own motion, the court may review any court of appeal decision pertaining to a criminal matter. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. ANN. art. 4.04 (Vernon 2005). Further, any case that results in the death penalty is automatically appealed directly from the trial court to the court of criminal appeals. TEX. CONST. art. V,

panding the jurisdiction of the intermediate appellate courts to include criminal matters, the Texas Legislature again decided against restructuring the courts of appeals and instead continued to add justices to each of the appellate districts, ultimately adding twenty-eight new justices to the various appellate court districts.[71]

Presently, each court of appeals has jurisdiction over appeals from the trial courts in its geographic district. As shown in the chart below, the fourteen courts of appeals have between three and thirteen justices, and are located in thirteen geographic regions (Houston occupies both the First and Fourteenth Districts):

Appellate District	Location	Date Established	Number of Judges
First	Houston[72]	1892	9
Second	Fort Worth	1892	7
Third	Austin	1892	6
Fourth	San Antonio	1893	7
Fifth	Dallas	1893	13
Sixth	Texarkana	1907	3
Seventh	Amarillo	1911	4
Eighth	El Paso	1911	4
Ninth	Beaumont	1915	3
Tenth	Waco	1923	3
Eleventh	Eastland	1925	3
Twelfth	Tyler	1963	3
Thirteenth	Corpus Christi	1963	6
Fourteenth	Houston	1967	9

During the fiscal year of 2004, the number of new cases filed in the courts of appeals was 10,443.[73] This represents an approximately twenty percent increase in filings since 1987 (in fiscal year

§ 5; TEX. CODE CRIM. PROC. ANN. art. 4.04 (Vernon 2005). Finally, a significant portion of the court's workload involves the mandatory review of applications for post-conviction habeas corpus relief in felony cases where the death penalty is not imposed. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 2005) (detailing the procedures after a conviction of a felony imposing a sanction other than the death penalty).

71. Carl E.F. Dally & Patricia A. Brockway, *Changes in Appellate Review in Criminal Cases Following the 1980 Constitutional Amendment*, 13 ST. MARY'S L.J. 211, 217-18 (1981).

72. The First District Court of Appeals was originally located in Galveston; it was moved to Houston in 1957. *Courts of Civil Appeals*, 37 TEX. B.J. 315, 315 (1974).

73. OFFICE OF COURT ADMINISTRATION & TEXAS JUDICIAL COUNCIL, ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM 30 (Fiscal Year 2004), at 30, *available at* http://www.courts.state.tx.us/oca/PublicInfo/AR2004/ar_jsa/Annual%20Report%202004%20Final.pdf (last visited Jan. 6, 2006). Criminal cases comprised fifty-two percent of filings (5444 cases) and civil cases comprised forty-eight percent of filings (4999 cases). *Id.*

1987, there were 7857 new cases filed in the courts of appeals).[74] This significant increase in the number of appeals has increased the likelihood of conflicts between the appellate districts, decreased the ability of the Texas Supreme Court to review a large percentage of cases decided by the appellate courts, and created unequal dockets among the appellate districts because the larger districts have experienced the greater increase in case filings. Each of these problems has contributed to the failure of the Texas courts to provide uniform and equal justice to its citizens.

B. *The Main Problem with Texas's Court System: A Lack of Uniformity Caused by Stare Decisis, Texas Style*

Although the Texas Legislature and high courts have given surprisingly little definitive guidance on the precise contours of stare decisis in the Texas court system, most Texas courts recognize seven basic stare decisis principles. The first two principles involve the application of vertical stare decisis and the last five principles involve the application of horizontal stare decisis:

(1) Texas's two high courts bind all other Texas courts (i.e., a decision by the Texas Supreme Court or the Texas Court of Criminal Appeals is binding on all fourteen intermediate appellate court districts and all Texas trial courts),[75]

(2) Texas's fourteen intermediate appellate districts only bind the lower courts within the geographic region of that appellate district (i.e., a decision by the Fifth Court of Appeals (Dallas) is only binding upon trial courts in the Dallas-area counties),[76]

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74. Office of Court Administration, Summary of Reported Activity Fiscal Years 1987 through 2003, at 1, *available at* http://www.courts.state.tx.us/oca/PublicInfo/ar96/tx10yr96.pdf (last visited Nov. 17, 2005) (on file with the *St. Mary's Law Journal*).

75. *See* Shook v. State, 244 S.W.2d 220, 221 (Tex. Crim. App. 1950) (emphasizing that "[i]t is rudimentary that courts are not bound by the decisions of other courts of equal jurisdiction. . . . [and] the power to establish precedent is lodged in courts of superior jurisdiction"); Barstow v. State, 742 S.W.2d 495, 501 n.2 (Tex. App.—Austin 1987, writ denied) (noting that "[t]he doctrine of *stare decisis* requires that all courts adhere, as a general rule, to the principles and rules laid down on a question of law by any court *to which obedience is owed in the matter*"); *see also* TEX. CONST. art. V, §§ 3, 5 (discussing the jurisdiction of the Texas Supreme Court and the Texas Court of Criminal Appeals); TEX. GOV'T CODE ANN. § 22.001 (Vernon 2005) (describing the appellate jurisdiction of the Texas Supreme Court).

76. The vast majority of Texas trial courts are geographically located in one court of appeals district. *See* TEX. GOV'T CODE ANN. § 22.201(b), (o) (Vernon 2005) (providing each county's corresponding court of appeals location). Some Texas trial courts are lo-

(3) The Texas Supreme Court is bound by its own prior decisions unless "a timeworn rule no longer serves the needs of society,"[77]
(4) The Texas Court of Criminal Appeals is bound by its own prior decisions unless experience shows that the original rule was wrong,[78]
(5) To the extent necessary, decisions made by the Texas Supreme Court are binding upon the Texas Court of Criminal Appeals, and decisions made by the Texas Court of Criminal Appeals are binding upon the Texas Supreme Court,[79]

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cated within overlapping appellate districts. *See id.* (listing the counties located within each court of appeals district). The counties of Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington are in both the First and Fourteenth Courts of Appeals (Houston). *Id.* The counties of Gregg, Rusk, Upshur, and Wood are in both the Sixth District (Texarkana) and Twelfth District (Tyler). *Id.* Finally, Hunt County is in both the Fifth Court of Appeals (Dallas) and the Sixth Court of Appeals (Texarkana). *Id.* The legislature recently removed the overlapping jurisdiction of Burleson, Trinity, Walker, Hopkins, Kaufman, Panola, and Van Zandt counties. Tex. H.B. 1077, 79th Leg., R.S. (2005).

77. Gutierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979). In a more recent case, the Texas Supreme Court stated that "[g]enerally, the doctrine of stare decisis dictates that once the [Texas] Supreme Court announces a proposition of law, the decision is considered binding precedent. . . . However, circumstances occasionally dictate reevaluating and modifying prior decisions. This [c]ourt may modify judicially created doctrines." Lubbock County v. Trammel's Lubbock Bail Bonds, 80 S.W.3d 580, 585 (Tex. 2002) (citation omitted). The Texas Supreme Court has also addressed the delicate balance inherent in stare decisis:

> There are few matters more deeply troubling to a judge of a court of last resort than how to contend with precedent she believes to have been incorrectly decided. On the one hand, the law must have stability and predictability so that people may order their conduct and affairs with some rationality. On the other hand, the judge must consider the harm of compounding error by reflexively applying a clearly erroneous decision . . . .

Tex. Dep't of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680, 689 (Tex. 1992) (Cornyn, J., concurring).

78. The Texas Court of Criminal Appeals stated:

> Under the doctrine of *stare decisis,* it is often "better to be consistent than right." This doctrine "promotes judicial efficiency and consistency, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." However, overruling precedent is acceptable under certain circumstances. Some factors that support overruling precedent are: (1) when the original rule is flawed from the outset, (2) when the reasons underlying the precedent have been undercut with the passage of time, and (3) when the rule consistently creates unjust results or places unnecessary burdens upon the system.

Vega v. State, 84 S.W.3d 613, 625 (Tex. Crim. App. 2002) (footnotes omitted).

79. *See Ex parte* Rhodes, 974 S.W.2d 735, 740 (Tex. Crim. App. 1998) (noting that the Texas Court of Criminal Appeals is "bound by Texas Supreme Court precedent"). Because the Texas Supreme Court handles exclusively civil matters and the Texas Court of Criminal Appeals handles exclusively criminal matters, it is very infrequent that one of

(6) Texas's fourteen intermediate appellate districts are not binding on the other appellate districts (i.e., a decision by the Third Court of Appeals (Austin) is not binding on the Fifth Court of Appeals (Dallas)),[80]
(7) One intermediate appellate district decision is binding upon that same appellate district in a future case (i.e., a decision by the Fourteenth Court of Appeals (Houston) is binding upon a later Fourteenth District case).[81]

1. Texas's Weak Stare Decisis Produces a Lack of Uniformity

Although these may seem like relatively benign stare decisis principles, this very weak model of stare decisis produces a lack of adherence to prior decisions and results in nonuniform justice—different Texans receive different treatment in Texas courts under identical Texas laws. This lack of uniformity is the direct result of two particularly weak stare decisis principles: the vertical stare decisis principle binding only trial courts within an intermediate appellate court's geographic region (2 above) and the horizontal stare decisis principle allowing each intermediate appellate district to treat other intermediate appellate courts as nonbinding (6 above). Unfortunately, the operation of these weak stare decisis principles

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these courts has squarely addressed an issue that the other court must later resolve. This minimizes the potential for stare decisis issues between these courts. *See* Card v. Souter, 52 S.W.2d 268, 269 (Tex. Com. App. 1932) ("Upon questions of criminal law which might arise in the [Texas] Supreme Court[,] that court will bow to the decisions of the Court of Criminal Appeals, and upon those of civil law the latter will accept the rulings of the [Texas] Supreme Court." (citing State v. Schwarz, 103 Tex. 119, 124 S.W. 420 (1910); State v. Savage, 105 Tex. 467, 151 S.W. 530 (1912))).

80. *See* Lambert v. Affiliated Foods, Inc., 20 S.W.3d 1, 8 (Tex. App.—Amarillo 1999) (noting that the Texas Court of Appeals Seventh District (Amarillo) is not bound by a decision from the Texas Court of Appeals Fourth District (San Antonio)), *aff'd sub nom.* Lawrence v. CDB Servs., Inc., 44 S.W.3d 544 (Tex. 2001); Mitchell v. John Wiesner, Inc., 923 S.W.2d 262, 264 (Tex. App.—Beaumont 1996, no writ) (holding, "[t]he opinions of a sister court of appeals are not precedent that bind other courts of appeals"); Barstow v. State, 742 S.W.2d 495, 501 n.2 (Tex. App.—Austin 1987, writ denied) (stating that "the various [c]ourts of [a]ppeals are free to differ among themselves on a question of law that remains undecided by the two courts to which they owe obedience"). Despite the uniformity in these decisions, the Texas high courts have not accepted or rejected this stare decisis principle.

81. Alawad v. State, 57 S.W.3d 24, 27 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (Yates, J., concurring) (emphasizing, "[u]ntil we are told otherwise, we are bound by our prior opinions"). It is worth noting that surprisingly few cases have addressed this stare decisis principle.

allows for two similarly-situated litigants to receive opposite results under the same Texas law.

Two cases involving the distribution, upon divorce, of one spouse's personal injury award show the divergent results that have occurred in Texas courts on an identical issue. In Beaumont, upon divorce, proceeds from a spouse's personal injury settlement are presumptively community property rather than separate property.[82] The Ninth Court of Appeals (Beaumont) held that, in order to treat these proceeds as separate property, the injured spouse must overcome the presumption of community property. By contrast, in a later decision, the First Court of Appeals (Houston) found the exact opposite—damages from a spouse's personal injury are *not* presumptively community property; instead, such damages are that injured spouse's separate property unless proven otherwise.[83] The First Court of Appeals (Houston) specifically held that "[t]here is no presumption that a potential recovery for personal injuries to the body of a spouse is community property."[84] Instead, "personal injuries to the body of a spouse is [the] separate property of that spouse."[85]

These cases provide a classic example of how Texas's weak stare decisis model allowed the same Texas law to be applied inconsistently in different Texas courts and allowed similarly situated litigants to be treated differently under the same law. In the first case, the law allowed a wife to enjoy the presumption of community property with respect to her husband's personal injury award. In the second case, the law did not allow a wife to enjoy the presumption of community property with respect to her husband's personal injury award. Although these cases provide only one example of inconsistent decisionmaking by the intermediate appellate courts,

82. Kyles v. Kyles, 832 S.W.2d 194, 198 (Tex. App.—Beaumont 1992, no writ).

83. Osborn v. Osborn, 961 S.W.2d 408, 414 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

84. *Id.*

85. *Id.*

other conflicts have developed in the civil[86] and criminal law contexts.[87]

Some scholars have justified this inconsistent decisionmaking, and found it a necessary means by which conflicts can percolate at the intermediate appellate level prior to the supreme court of a

86. *See In re* Schneider, 134 S.W.3d 866, 870 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding [mand. denied], no pet.) (Frost, J., concurring) (recognizing a conflict between the courts of appeals on the question of whether mandamus relief is appropriate as a means to compel a trial judge to dismiss claims with prejudice based on the plaintiff's failure to provide proper expert reports); Williams v. State, 114 S.W.3d 703, 709 n.4 (Tex. App.—Corpus Christi 2003, no pet.) (noting "that there has been some conflict among the courts of appeals as to the nature of the defect in a summary-judgment affidavit that does not demonstrate it was based on personal knowledge"); *see also* Rizkallah v. Conner, 952 S.W.2d 580, 585 (Tex. App.—Houston [1st Dist.] 1997, no writ) (declining to follow the holding of the Fifth Court of Appeals that a defendant's failure to object that a plaintiff's affidavit was based on personal knowledge is a defect in substance, not form); Tex. Dep't of Pub. Safety v. Raffaelli, 905 S.W.2d 773, 776 n.2 (Tex. App.—Texarkana 1995, no writ) (declining to follow the holding of the Third Court of Appeals that an agency record may not be considered by a court of appeals if omitted from the statement of facts, even if filed with the clerk pursuant to the statute); Bellnoa v. City of Austin, 894 S.W.2d 821, 825 (Tex. App.—Austin 1995, no writ) (declining to follow the holding of the Thirteenth Court of Appeals that a sign displaying a correct, but negligently raised, speed limit gives rise to municipal liability under the Tort Claims Act).

87. For example, the courts of appeals have issued diametrically opposed interpretations of what standard of review applies in reviewing a motion to quash the charging instrument. The Third Court of Appeals (Austin) applies a de novo standard. State v. McCoy, 64 S.W.3d 90, 92 (Tex. App.—Austin 2001, no pet.). In contrast, the Thirteenth and Fifth Courts of Appeals (Corpus Christi & Dallas, respectively) apply an abuse of discretion standard when reviewing a challenge to a motion to quash the charging instrument. Hankins v. State, 85 S.W.3d 433, 436 (Tex. App.—Corpus Christi 2002, no pet.); State v. York, 31 S.W.3d 798, 801 (Tex. App.—Dallas 2000, pet. ref'd). The courts of appeals have made similar opposing interpretations in other areas of the law. *See* Blakeney v. State, 911 S.W.2d 508, 516 n.5 (Tex. App.—Austin 1995, no writ) (declining to follow the holding of the Second Court of Appeals that evidence of homosexuality is properly admissible in child sexual assault case); Carroll v. State, 911 S.W.2d 210, 222 (Tex. App.—Austin 1995, no writ) (deciding not to follow the holding of the Fourth Court of Appeals that criminal evidence obtained illegally by a law enforcement officer is inadmissible, regardless of the violated statute's purpose); Blackwell v. Harris County, 909 S.W.2d 135, 139 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (declining to follow the holding of the Fifth Court of Appeals that the presence of a legal duty "should not define course of employment" in assessing workers' compensation eligibility and instead following the Supreme Court of Virginia). This inconsistent application of the law in a criminal context is even more problematic than an inconsistent application of the law in a civil context, given the more serious nature of criminal law sanctions. It has even been suggested that such inconsistencies could violate equal protection and other constitutional rights. Justices on the United States Supreme Court have warned that the outcome of a criminal prosecution should not depend upon where the case is tried. Tomala v. United States, 504 U.S. 932, 933 (1992) (White, J., joined by Thomas, J., dissenting).

particular jurisdiction resolving these contradictory decisions.[88] These scholars believe that the ultimate legal resolution is benefited by this percolation process because it allows the supreme court to receive the full benefit of several courts of appeals decisions before finally resolving the matter.[89] Many other scholars, however, believe that individual litigants deserve better than to be a part of this percolation process. Chief Justice Rehnquist, referring to the federal judiciary, stated that "[i]t is of little solace to the litigant who lost years ago in a court of appeals decision to learn that his case was part of the 'percolation' process which ultimately allowed the Supreme Court to vindicate his position."[90] More importantly, "nowhere does the Constitution give the Supreme Court the authority to experiment with the legal rights of citizens. The common denominator of these rationalizations is a kind of institutional myopia that focuses on abstractions and ignores the impact of the law on real people."[91]

In addition to these hardships caused to real people, (i.e., actual litigants) the lack of uniformity and certainty in the law produces a more systemic problem—it increases litigation and thereby wastes judicial resources.

> The absence of [a] definitive decision, equally binding on citizens wherever they may be, exacts a price whether or not a conflict ulti-

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88. *See, e.g.*, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) (suggesting that percolation allows lower courts to experiment with the meaning of a legal rule or law, thereby providing the Supreme Court with valuable information on which to finally rule).

89. Hart v. Massanri, 266 F.3d 1155, 1173 (9th Cir. 2001). In *Hart*, Judge Kozinski noted that:

> [t]his ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of "percolation" within the lower courts. Indeed, the Supreme Court sometimes chooses not to grant certiorari on an issue, even though it might deserve definitive resolution, so it will have the benefit of a variety of views from the inferior courts before it chooses an approach to a legal problem.

Id. (citation omitted); *see also* McCray v. New York, 461 U.S. 961, 963 (1983) (respecting the denial of petitions for writs of certiorari, Justice Stevens wrote "it is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court").

90. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986).

91. Walter V. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983).

> mately develops. That price may be years of uncertainty and repetitive litigation, sometimes resulting from the unwillingness of a [litigant] to acquiesce in an unfavorable decision, sometimes from the desire of [litigants] to take advantage of the absence of a [universally]-binding authoritative precedent.[92]

In essence, uncertainty in the law breeds litigation, whereas certainty breeds settlement and a conservation of judicial resources.

2. The Texas Supreme Court's Failure to Resolve Appellate Conflicts Magnifies the Lack of Uniformity

The lack of uniformity in the decisionmaking by Texas's intermediate appellate districts, caused by the lack of horizontal stare decisis, has been magnified by the Texas Supreme Court's failure to adequately resolve these conflicts when they develop. Since 1891, the Texas Legislature has given the Texas Supreme Court the jurisdiction to resolve conflicting decisions made by different Texas intermediate appellate districts. Currently, this so-called "conflicts jurisdiction" can be exercised whenever two courts of appeals "hold differently" (i.e., conflict) with respect to a legal issue arising in two cases.[93] The legislature granted this conflicts jurisdiction so that the Texas Supreme Court could resolve disputes among the courts of appeals and thereby ensure that Texas law is not one thing for litigants in one appellate district and another thing for litigants in another appellate district.[94] The legislature conferred this power upon the Texas Supreme Court in recognition that a higher court authority was needed to resolve disputes when the appellate districts disagreed. Despite the legislature's good intentions, the Texas Supreme Court has failed to meaningfully exercise its conflicts jurisdiction. Instead, Justice Hecht of the Texas Supreme Court has described the conflicts jurisdiction as "conflicts

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92. Commission on Revision of the Federal Court Appellate System Structure and Internal Procedure: Recommendations for Change, *reprinted in* 67 F.R.D. 195, 207 (1975).

93. TEX. GOV'T CODE ANN. §§ 22.001(e), 22.225(e) (Vernon 2005). The Texas Government Code sets forth the "holds differently" test for conflicts jurisdiction. Under this test, "one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.*

94. *See* Wagner & Brown v. Horwood, 53 S.W.3d 347, 349 (Tex. 2001) (Hecht, J., dissenting) (arguing that the Texas Supreme Court's view of conflicts jurisdiction has been so narrow as to disregard "the obvious, prudential, and entirely salutary purpose of the power granted by the [l]egislature").

non-jurisdiction" because of the court's "hypertechnically narrow" and "jurisdiction avoidance" application, which has failed to resolve conflicts among the court of appeals districts.[95]

The related cases of *Montes v. City of Houston*[96] and *Reyes v. City of Houston*[97] illustrate the failure of Texas's weak stare decisis model and the Texas Supreme Court's conflicts jurisdiction jurisprudence.[98] In these two remarkable cases, the Fourteenth Court of Appeals' (Houston) decision directly conflicted with a First Court of Appeals' (Houston) decision even though the two cases involved "not only the identical legal issue *but the exact same occurrence.*"[99] As a result, in two separate lawsuits stemming from the same deadly one-car collision, only three of four people were allowed to sue the city of Houston; the fourth person was prohibited from suing the city. The two lawsuits arose after four men driving in a car became lost and mistakenly sped down a dead-end road, and crashed into a fence and a dirt pile. The driver and two of the passengers died; one passenger (Montes) survived. The first lawsuit, *Reyes*, was a wrongful death action brought against the city of Houston asserting that the city should have erected a barricade to prevent such accidents. The First Court of Appeals (Houston) held that "immunity for discretionary acts under the [Texas Tort Claims Act] does not apply to claims arising from the absence of a warning device if the government knew of the problem and failed to act within a reasonable time."[100] The Texas Supreme Court denied the petition for review and thereby allowed the case to proceed to trial.

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95. *Id.*

96. No. 14-99-00174-CV, 2000 WL 1228618, at *1, *4 (Tex. App.—Houston [14th Dist.] Aug. 31, 2000) (not designated for publication), *and supplemental op. on reh'g*, 2000 WL 1562355 (Tex. App.—Houston [14th Dist.] Oct. 19, 2000) (not designated for publication), *pet. denied*, 66 S.W.3d 267 (Tex. 2001).

97. 4 S.W.3d 459 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

98. *Compare* Montes v. City of Houston, 66 S.W.3d 267, 268 (Tex. 2001) (Hecht, J., concurring) (recognizing that declaring the city of Houston immune from liability under the Tort Claims Act directly contradicts the First Court of Appeals), *with* Reyes v. City of Houston, 4 S.W.3d 459, 462 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (holding that immunity for discretionary acts under the Tort Claims Act "does not apply to claims arising from the absence of a warning device if the government knew of the problem and failed to act within a reasonable time" (quoting Harris County v. Demmy, 886 S.W.2d 330, 336 n.1 (Tex. App.—Houston [1st Dist.] 1994, writ denied))).

99. *Montes*, 66 S.W.3d at 267 (Hecht, J., concurring) (emphasis added).

100. *Reyes*, 4 S.W.3d at 462.

A second lawsuit, *Montes*, was brought against the city of Houston by the sole survivor of the accident.[101] Contrary to the ruling by the First Court of Appeals (Houston) in the first lawsuit, the Fourteenth Court of Appeals (Houston) ruled in favor of the city and dismissed the action.[102] This decision, which directly contradicted the earlier ruling by the First Court of Appeals (Houston) on the same legal issue, only occurred because of the lack of horizontal stare decisis amongst the courts of appeals. Thus, under the same exact statutory provisions of the Texas Tort Claims Act, even though the First Court of Appeals (Houston) had previously found that the city *was not immune* from suit, the Fourteenth Court of Appeals (Houston) subsequently found that the city *was immune* from liability. As expected, the sole survivor of the accident petitioned the Texas Supreme Court for review, urging the Court to exercise its conflicts jurisdiction and resolve the two conflicting courts of appeals decisions. Despite the assertion of a conflict between the two courts of appeals, the Texas Supreme Court denied the petition for review and thereby prohibited the second case from proceeding to trial. The result left four car accident victims, involved in the same exact car accident and making the same exact legal arguments, at opposite ends of the legal spectrum–three of the victims were allowed to proceed to trial while the fourth victim was barred.

The Texas Supreme Court's failure to rectify the conflict exhibited by the *Reyes* and *Montes* decisions is not an isolated occurrence. Instead, it reveals a significant problem with Texas's weak horizontal stare decisis model and the Texas Supreme Court's conflicts jurisdiction jurisprudence. As Justice Hecht has noted, such cases typify the court's "mulish aversion" to resolve conflicts of law

101. Montes v. City of Houston, No. 14-99-00174-CV, 2000 WL 1228618, at *1, *4 (Tex. App.—Houston [14th Dist.] Aug. 31, 2000) (not designated for publication), *and supplemental op. on reh'g*, 2000 WL 1562355 (Tex. App.—Houston [14th Dist.] Oct. 19, 2000) (not designated for publication), *pet. denied*, 66 S.W.3d 267 (Tex. 2001).

102. *Id.* Both suits were brought in Houston trial courts. As a result of the overlapping appellate jurisdiction, appeals from Houston trial courts are randomly assigned to either the First or Fourteenth Courts of Appeals (Houston). TEX. GOV'T CODE ANN. §§ 22.202(h), 22.215(e) (Vernon 2005); *see supra* notes 64-69 and accompanying text (explaining the creation of the Fourteenth Court of Appeals, which led to overlapping appellate jurisdiction between the First and Fourteenth Districts).

among the courts of appeals.[103] This failure "cannot be attributed to the lack of disagreements among the appellate courts; rather, it is attributable to [the Texas Supreme Court's] refusal to resolve those disagreements."[104] In fact, the court's exercise of conflicts jurisdiction has been described as "more rare than a blue moon (5 in the last 10 years), a total eclipse of the sun (6 in the past decade), or the birth of a Giant Panda in captivity (18 in 1999 alone, 15 of which survived)."[105]

Because each district of the Texas Courts of Appeals is not bound by the decisions of other districts, Texas can have one uniform law (for all Texans) only if the intermediate appellate courts more strongly adhere to horizontal stare decisis or the Texas Supreme Court resolves the conflicts that occur in the courts of appeals. Fortunately, for the purpose of maintaining uniformity in Texas law, the Texas Supreme Court's jurisdiction allows for the review of conflicting courts of appeals decisions. Unfortunately, because of the docket growth experienced in the courts of appeals and the Texas Supreme Court's failure to resolve conflicts between the courts of appeals, Texas law has become nonuniform. The result is that Texans are not being treated uniformly under Texas law. Instead, Texans are being treated differently depending upon the law of their particular appellate district. The importance of uniformity cannot be overstated, as it has been described as one of the "imperatives of appellate justice."[106] "A legal system which tolerates needless disuniformity and incoherence is not keeping faith with those who are subject to its dominion, for it has forsaken its commitment to even-handed decision-making."[107]

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103. *See Montes*, 66 S.W.3d at 267 (Hecht, J., concurring) (chastising the Texas Supreme Court for its allowance of pointless litigation, confusion in the law, and waste of time and money).

104. Wagner & Brown v. Horwood, 53 S.W.3d 347, 351 (Tex. 2001) (Hecht, J., joined by Owen & Abbott, JJ., dissenting) (dissenting from the denial of a rehearing motion for a petition for review).

105. *Id.* at 350; *see also* Collins v. Ison-Newsome, 73 S.W.3d 178, 193 (Tex. 2001) (Hecht J., dissenting) (noting that "confusion and waste" are the "hallmarks of the [c]ourt's 'conflicts jurisdiction' jurisprudence" because the court dances around conflicts and thereby costs the public time and money).

106. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 147 (1976).

107. *Id.* at 12. Perfect uniformity, of course, is neither attainable nor desirable. "Perfection would require that all legal decisions be made by one ageless being who forgot nothing and never changed his or her mind, whatever the influences of advocacy or external reality." *Id.* at 11.

This same problem occurs at the federal level whenever the United States Supreme Court fails to adequately resolve conflicts between the federal courts of appeals.[108] In recent years, several Supreme Court Justices have recognized that the Court's inability to review a higher percentage of cases has led to a lack of uniformity in federal law. For example, Chief Justice Rehnquist explained how the docket explosion at the federal courts of appeals level, coupled with the limited docket of the United States Supreme Court, makes it difficult to review and resolve conflicts:

> The [Supreme] Court cannot review a sufficiently significant portion of the decisions of any federal court of appeals to maintain the supervisory authority that it maintained over the federal courts fifty years ago; it simply is not able or willing, given the other constraints upon its time, to review all the decisions that result in a conflict in the applicability of federal law.[109]

In addition, Justice White has noted that the Supreme Court reviews "only a small percentage" of all decisions issued by the federal courts of appeal and thus these courts of appeals are "for all practical purposes, the final expositor of the federal law within [their] geographical jurisdiction."[110] Justice White also cautioned about the problems created by the Supreme Court's failure to resolve conflicting decisions issued by the federal courts of appeals:

> [D]enying review of decisions that conflict with other decisions of the Courts of Appeals or State Supreme Courts results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice, or an unreasonable search and seizure in one place is not a crime, an unfair labor practice or illegal search in another jurisdiction.[111]

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108. *See generally* Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605 (2003) (arguing that inter-circuit conflicts undermine the legitimacy of a federal court system and proposing a plan to increase uniformity).

109. William H. Rehnquist, Address at Saint Louis University, A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System (Apr. 7, 1983), *in* 28 ST. LOUIS U. L.J. 1, 1-10 (1984).

110. Byron R. White, Symposium, *Dedication (Fifth Circuit Survey: July 1982 - June 1983)*, 15 TEX. TECH L. REV., at ix (1984).

111. Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400, 1409 (1987) (quoting *Establishing an Intercircuit Panel: Hearings on S. 704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 147-48 (1985) (quoting Justice Byron R. White) (prepared statement of A. Leo Levin)).

This same problem is occurring in Texas because the fourteen Texas courts of appeals have frequently issued conflicting rulings and the Texas Supreme Court, by either choice or lack of resources, has failed to resolve these conflicts.[112] The issuance of conflicting Texas courts of appeals decisions, without Texas Supreme Court resolution, has left Texas law meaning one thing for some Texas residents (e.g., Dallas residents) and something different for other Texas residents (e.g., Houston residents).

IV. Two Other Aspects of Texas's Appellate Court Structure Which Further Magnify the Problems with Texas's Weak Stare Decisis Model: Overlapping Appellate Districts and Unequal Dockets

The lack of uniformity created by Texas's weak stare decisis model and the Texas Supreme Court's failure to resolve conflicts is further magnified by two other unique aspects of Texas's appellate court structure—overlapping appellate districts and unequal dockets in the courts of appeals. First, fifteen counties are located in two appellate districts (i.e., two appellate courts have jurisdiction over appeals from the trial courts in these counties). Such appellate overlap produces uncertainty regarding the binding law at the trial level and also unfairly allows for forum shopping upon appeal. Second, the unequal dockets in the fourteen appellate districts have required the increasing transfer of cases between the appellate districts. These transfers have led to trial courts and appellate courts applying different interpretations of the law to the same case.

A. *Problems Created by Trial Courts in Multiple Appellate Districts: Conflicting Law and Forum shopping*

Unlike any other intermediate appellate court system in the country, many Texas trial courts are simultaneously in two different intermediate appellate districts.[113] Although the Texas Legisla-

112. *See infra* notes 159-69 and accompanying text (detailing conflicts that have developed in Texas Courts of Appeals).

113. Currently, the First, Fifth, Sixth, Twelfth, and Fourteenth Courts of Appeals have some counties that overlap into other intermediate appellate court districts. *See* Tex. Gov't Code Ann. § 22.201 (Vernon 2005) (listing the counties assigned to the fourteen appellate court districts). These overlapping appellate districts are unlike any other appel-

ture has recently taken some action to minimally alleviate this problem,[114] fifteen counties currently remain in overlapping intermediate appellate districts.[115] Most of these overlaps occurred as a result of the expansion of the courts of appeals and political compromise.[116] In 1963, for example, the Twelfth Court of Appeals was established in Tyler and seventeen counties were added to its jurisdiction. Eight of these seventeen counties were added to the Twelfth Court of Appeals' (Tyler) jurisdiction, but were never removed from their previous intermediate appellate court district. The trial courts in these eight counties remained in both the Twelfth Court of Appeals (Tyler) and one other intermediate appellate district.[117]

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late court system. *See* Miles v. Ford Motor Co., 914 S.W.2d 135, 139 (Tex. 1995) (recognizing that the court has "been unable to find any other state in the union which has created geographically overlapping appellate districts"). *See generally* State Funding for Texas' Appellate Courts: A Report of the Committee on the Equalization of Appellate Court Funding Submitted to the Texas Judicial Counsel (2002), *available at* http://www.courts.state.tx.us/oca/tjc/publications/state_funding.pdf (addressing how Texas is unique because trial decisions from one county are being funneled into multiple appellate districts).

114. As recently as a few years ago, twenty-two counties were in two appellate districts and Brazos County was in three appellate districts. In 2003, the legislature removed the overlapping jurisdiction of Brazos County, which is now exclusively in the Tenth Court of Appeals (Waco). Act of May 15, 2003, 78th Leg., ch. 44, § 1, 2003 Tex. Gen. Laws 81 (codified at TEX. GOV'T CODE ANN. § 22.201(b), (o)). In 2005, the legislature removed the overlapping jurisdiction of Burleson, Trinity, Walker, Hopkins, Kaufman, Panola, and Van Zandt counties. Act of June 17, 2005, 79th Leg., ch. 542, § 1, 2005 Tex. Sess. Law Serv. 1466, 1467 (Vernon) (to be codified as an amendment of TEX. GOV'T CODE ANN. § 22.201(b), (f), (k), (m), and (o)).

115. TEX. GOV'T CODE ANN. § 22.201 (Vernon 2005). The counties of Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington are in both the First and Fourteenth Courts of Appeals (Houston). *Id.* The counties of Gregg, Rusk, Upshur, and Wood are in both the Sixth Court of Appeals (Texarkana) and Twelfth Court of Appeals (Tyler). *Id.* Finally, Hunt County is in both the Fifth Court of Appeals (Dallas) and the Sixth Court of Appeals (Texarkana). *Id.*

116. *See* James T. Wortham, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas, 1892-2003*, 46 S. TEX. L. REV. 33, 63-66 (2004) (discussing the development of the overlapping districts and the politics that allowed them to occur).

117. Gregg, Hopkins, Panola, Rusk, Upshur, and Wood counties remained in the Sixth Court of Appeals (Texarkana) as well as the Twelfth Court of Appeals (Tyler), while Kaufman and Van Zandt Counties remained in the Fifth Court of Appeals (Dallas) as well as the Twelfth Court of Appeals (Tyler). Act of May 7, 1963, 58th Leg., R.S., ch. 198, § 1, 1963 Gen. Laws 539, 540 (repealed 1985) (current version at TEX. GOV'T CODE ANN. § 22.201 (Vernon 2005).

The other appellate court expansion that created overlap occurred in 1967, when the Texas Legislature established the Fourteenth Court of Appeals in Houston. Even though the First Court of Appeals already served the trial courts for the Houston-area counties, the population and litigation growth in the Houston area created the need for more appellate court resources. Because a state constitutional provision limited each appellate court to three justices, the Texas Legislature could not expand the number of judges on the First Court of Appeals (Houston) and therefore created the Fourteenth Court of Appeals (Houston). Rather than dividing the Houston-area counties between the two courts of appeals (by placing some counties in the First Court of Appeals and other counties into the Fourteenth Court of Appeals), the legislature placed all of the Houston-area counties into both the First and Fourteenth Courts of Appeals. Thus, appeals from trial courts in the fourteen Houston-area counties went to either the First Court of Appeals or the Fourteenth Court of Appeals. Even after the state constitution was amended in 1978 to allow for more than three justices in an intermediate appellate district,[118] Houston's trial courts remained in overlapping intermediate appellate courts. The First and Fourteenth Courts of Appeals (Houston) currently retain concurrent appellate jurisdiction over ten Houston-area counties.

Because of the lack of intermediate appellate court stare decisis, these overlapping intermediate appellate districts create two distinct problems. First, in all of the counties sitting in two intermediate appellate districts, the trial court and its litigants cannot be certain about the controlling legal authority because it could be the law of either appellate district. Second, in the counties where the appellant can choose the intermediate appellate district for the appeal, the litigants can unfairly forum-shop the appeal. Both of these problems are due, in part, to the weak model of horizontal stare decisis used at the Texas courts of appeals, whereby one intermediate appellate district is not bound by a decision from a different intermediate appellate district.

The overlapping intermediate appellate court districts first create an unworkable situation because the litigants and trial court often

118. TEX. CONST. art. V, § 6.

do not know what legal authority is binding. Under Texas's geographic vertical stare decisis principles, all trial courts are bound by decisions from the two high courts and the decisions from the intermediate appellate court where the trial court is located. For instance, all trial courts in Austin-area counties are bound by decisions from the two Texas high courts and from the Third Court of Appeals (Austin). This logically follows because the trial court should be bound by the appellate courts to which the appeal might flow. However, whenever a trial court decision can flow into two different intermediate appellate court districts because of overlapping appellate districts, the trial court and its litigants do not know which intermediate appellate district will handle the potential appeal because the appellate district is determined in one of two ways: (1) for counties sitting in the Houston area, the appeal is randomly assigned to either the First or Fourteenth Court of Appeals,[119] and (2) for all other counties sitting in two intermediate appellate districts, the appellant can choose to file the appeal in either of the intermediate appellate districts.[120] These two procedures make it impossible for the trial court and its litigants, during the trial court phase of a case, to know which intermediate appellate district will hear the appeal. Whenever these two appellate districts have issued conflicting decisions, a situation made possible by Texas's weak horizontal stare decisis model at the intermediate appellate level, the trial court and the litigants have absolutely no idea which appellate district's law to follow. The trial court and the

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119. TEX. GOV'T CODE ANN. § 22.202(h) (Vernon 2005). The Texas Government Code describes the assignment of cases to the First and Fourteenth Courts of Appeals as follows:

> All civil and criminal cases directed to the First or Fourteenth Court of Appeals shall be filed in either the First or Fourteenth Court of Appeals as provided by this section. The trial clerk shall write the numbers of the two courts of appeals on identical slips of paper and place the slips in a container. When a notice of appeal or appeal bond is filed, the trial court clerk shall draw a number from the container at random, in a public place, and shall assign the case and any companion cases to the court of appeals for the corresponding number drawn.

Id.; see also Time Warner Entm't Co. v. Hebert, 916 S.W.2d 47, 49 (Tex. App.—Houston [1st Dist.] 1996, no writ) (setting forth the First and Fourteenth Districts' docket equalization order).

120. *See* 6 MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 7.9 (2d ed. 2003) (discussing the ability of an appellant to choose an appellate forum when appealing from a trial court that lies in multiple appellate districts).

litigants can only guess which law should be applied in the trial court.

The uncertainty over which intermediate appellate district's law governs is best illustrated by examining the quandary faced by Houston trial courts and its litigants. Because of the overlapping appellate districts and Texas's vertical stare decisis rules, these trial courts and litigants are bound by the decisions of both the First and Fourteenth Courts of Appeals. Under Texas's weak horizontal intermediate appellate court stare decisis rules, however, the First and Fourteenth Courts of Appeals are not bound by each other's decisions. As a result, whenever these two intermediate appellate districts make conflicting decisions,[121] litigants and the trial courts are unable to make rational decisions in the trial court. The overlapping intermediate appellate districts create a situation requiring litigants (and trial courts) to guess about what law controls when conflicts exist between these overlapping intermediate appellate districts. For example, whenever First and Fourteenth District decisions conflict, trial courts and litigants in the Houston area cannot possibly know under which law the case should proceed. If the trial court applies the First District's ruling, this decision will be deemed correct if the appeal is randomly assigned to the First Court of Appeals, but incorrect if the appeal is randomly assigned to the Fourteenth Court of Appeals. Likewise, if the trial court applies the Fourteenth District's ruling, this decision will be deemed correct if the appeal is randomly assigned to the Fourteenth District, but incorrect if the appeal is randomly assigned to the First District. This example reveals the extreme arbitrariness and lack of consistency—a problem created by Texas's overlapping appellate districts and its weak stare decisis model.

In addition to creating unnecessary uncertainty about the controlling legal authority, the overlapping intermediate appellate districts sometimes allow for unfair appellate forum shopping. This problem occurs in the five counties where the appellant selects

121. *See generally* Curt Haygood, When Reasonable Judicial People Can Disagree: Express Conflicts Between the Respective Decisions of the Fourteenth and First Courts of Appeals (Sept. 25, 1996) (unpublished manuscript, on file with the *St. Mary's Law Journal*) (identifying and summarizing various civil and criminal conflicts between the Houston appellate courts).

which intermediate appellate district will hear the appeal.[122] The right of the appellant to select the appellate forum has led to a race to the appellate courthouse, frequently without regard to who ought to be the appellant and which court of appeals should hear the appeal.

This race to the appellate courthouse is best illustrated by the case of *Miles v. Ford Motor Company*,[123] where both parties sought to be the appellant in a case originally filed in Rusk County—a county that lies in both the Sixth (Texarkana) and Twelfth (Tyler) Courts of Appeals.[124] In that case, the family of a motorist who suffered severe injuries in a car accident, brought a products liability action and a consortium action against the car's manufacturer and the seller of the automobile.[125] The trial court dismissed the consortium claim, but the jury found the car manufacturer liable for $37.8 million while also finding the seller of the automobile not liable.[126] On the same day that the jury awarded $37.8 million to the accident victims, the victims perfected an appeal in the Sixth Court of Appeals (Texarkana).[127] This was an obvious attempt to ensure that the Sixth District, rather than the Twelfth Court of Appeals (Tyler), would hear all of the appeals in the case.[128] Thus, despite winning a $37.8 million judgment, the winning party appealed the trial court's summary judgment on the consortium claims and the take-nothing judgment against the seller of the automobile.

Later that same month, the car manufacturer (Ford) perfected an appeal in the Twelfth Court of Appeals (Tyler) challenging the

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122. Under current Texas rules, appeals from the First and Fourteenth Courts of Appeals (Houston) are randomly assigned into either the First or Fourteenth District. TEX. GOV'T CODE ANN. § 22.202(h) (Vernon 2005). In all other counties that overlap into two intermediate appellate districts, the appellant can choose the intermediate appellate district for the appeal.

123. 914 S.W.2d 135 (Tex. 1995).

124. Miles v. Ford Motor Co., 914 S.W.2d 135, 136 (Tex. 1995).

125. *Id.*

126. *Id.*

127. *Id.*

128. Because Rusk County lies within the jurisdiction of the Sixth and Twelfth Districts, the victims could have filed the appeal in either appellate court. TEX. GOV'T CODE ANN. § 22.201(g), (m) (Vernon 2005); *see also* TEX. GOV'T CODE ANN. §§ 22.207, 22.213 (Vernon Supp. 2005) (providing no procedure for the assignment of cases to the Sixth or Twelfth District from counties lying in both courts' jurisdiction).

$37.8 million verdict.[129] The accident victims sought to dismiss that appeal contending that the Sixth District (Texarkana) had already acquired dominant jurisdiction over the entire appeal. The car manufacturer filed a motion to transfer the appeal filed by the victims from the Sixth District (Texarkana) to the Twelfth District (Tyler). The Sixth Court of Appeals (Texarkana), after notifying the parties that it lacked the statutory authority to transfer the appeal to the Twelfth Court of Appeals (Tyler), forwarded the transfer motion to the Texas Supreme Court.

In resolving this issue of appellate forum shopping created by overlapping appellate districts, the Texas Supreme Court adhered to the rule that "'the court in which the [appeal] is *first* filed acquires dominant jurisdiction to the exclusion of other coordinate courts.' . . . This rule is grounded on the principles of comity, convenience, and the need for an orderly procedure in resolving jurisdictional disputes."[130] In making its ruling, the court rejected the car manufacturer's argument that its appeal was "primary" because it was an appeal of a $37.8 million judgment, whereas the accident victims' appeal of the denial of the consortium claim amounted to, at best, a small fraction of that amount.[131] The court also rejected the contention that the accident victims' appeal was merely a pretext to establish jurisdiction in the Sixth District (Texarkana) as opposed to the Twelfth District (Tyler).[132] The court also refused to transfer the entire appeal for good cause. Instead, the court found that the rule of dominant jurisdiction "promotes comity among the courts of appeal and is straightforward in its application."[133] The court thereby created a situation where an inevitable race to the appellate courthouse will occur whenever both parties can appeal a trial court's decision and the trial court sits in one of the counties with overlapping appellate districts where the appellant chooses the location of the appeal (rather than it being randomly assigned to one of the two overlapping courts of appeals). This appellate forum shopping problem, and the uncertainty in the

129. *Miles*, 914 S.W.2d at 139.

130. *Id.* at 138 (quoting Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974)) (emphasis added).

131. *Id.*

132. *Id.* at 138-39.

133. *Id.* at 139.

law in many Texas trial courts, is the direct result of overlapping appellate districts and Texas's weak horizontal stare decisis model.

B. *Problems Created by Unequal Dockets, Transfers, and Equalization*

Another problem created by the current structure of Texas's appellate court system and its weak stare decisis model involves the transfer of cases in an effort to equalize the dockets of the intermediate appellate districts. In recent years, the Texas courts of appeals have become increasingly composed of unequal populations and caseloads because of ill-drawn geographic boundaries. The result has been an increasing docket disparity in the courts of appeals.

In an effort to reduce disparity in caseloads among the fourteen appellate courts, the Texas Legislature authorized the Texas Supreme Court to equalize appellate dockets through the transfer of cases "from one court of appeals to another."[134] The main objective of docket equalization is to reduce or eliminate the disparity in the number of new cases filed per justice and thereby equalize the workload of intermediate appellate court justices.[135] To effectuate this system, appellate cases would be transferred from appellate districts with high filing rates per justice to appellate districts with lower filing rates per justice.[136] Each quarter, the Texas Supreme

134. TEX. GOV'T CODE ANN. § 73.001 (Vernon 2005); *see also* Tex. Sup. Ct., Policies for Transfer of Cases Between Courts of Appeals, Misc. Docket No. 96-9224 (Oct. 24, 1996) (setting forth the policy for the transfer of cases between the courts of appeals) (on file with the *St. Mary's Law Journal*); TEX. SEN. CONFERENCE COMM. REP., Tex. S.B. 1 (General Appropriations Act), 77th Leg., R.S., art. IV, at 2 (May 18, 2001), http://www.lbb.state.tx.us/Bill_Archive/Bill-77R_%2802-03%29_Final_0501.pdf (reiterating the Texas Legislature's desire for the Texas Supreme Court to equalize the courts of appeals' dockets) (on file with the *St. Mary's Law Journal*).

135. *See* Office of Court Admin., Annual Report—Courts of Appeals (2003), http://www.courts.state.tx.us/oca/PublicInfo/AR2003/coa/index.html (urging again that caseload disparity among the fourteen courts of appeals must be reduced through docket equalization) (on file with the *St. Mary's Law Journal*).

136. *See* TEX. SEN. CONFERENCE COMM. REP., Tex. S.B. 1 (General Appropriations Act), 77th Leg., R.S., art. IV, at 2 (May 18, 2001), *available at* http://www.lbb.state.tx.us/Bill_Archive/Bill-77R_%2802-03%29_Final_0501.pdf (stating that equalization of the appellate court dockets will be considered a success "if the new cases filed each year per justice are equalized by [ten] percent or less among all the courts of appeals") (on file with the *St. Mary's Law Journal*); Tex. Sup. Ct., Policies for Transfer of Cases Between Courts of Appeals, Misc. Docket No. 96-9224 (Oct. 24, 1996) (establishing that cases transferred to

Court would order the transfer of cases by using a formula that took into account the average filing in each appellate court district during the previous four quarters.[137]

This docket equalization program has effectively equalized the caseload per justice. Prior to the implementation of this transfer program, there was a state-wide average of 132 cases per intermediate appellate court justice, which ranged from a low of 55 cases per justice in the Eleventh District (Eastland) to a high of 194 cases per justice in the Ninth District (Beaumont).[138] After equalization, the average number of cases per justice fell within the range of 119 to 145 cases per justice (a range of plus or minus ten percent).[139] Thus, each intermediate appellate court justice currently has an approximately equal workload.

Although this docket equalization and transfer program has successfully equalized the workload of the intermediate appellate court justices, it created another problem by causing many appeals to be transferred from the "home" appellate district to a "foreign" appellate court district. For example, in fiscal year 2003, in order to achieve equalization, the Texas Supreme Court transferred 863 cases, nearly ten percent of all appellate case filings.[140] The Fifth Court of Appeals (Dallas), for example, transferred-out 318 appeals; the Eleventh Court of Appeals (Eastland) transferred-in 206 appeals.[141] Potentially even more telling, the Ninth Court of Appeals (Beaumont) transferred-out approximately 58 cases per justice, while the Eleventh Court of Appeals (Eastland) transferred-in 66 cases per justice.[142] An unfortunate consequence of this docket equalization is that litigants, in nearly ten percent of all cases that are appealed, cannot be certain which appellate court district will hear their appeal. This causes some appellants to have an ex-

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other appellate courts will be "based on the relative number of cases filed in each of the courts of appeals") (on file with the *St. Mary's Law Journal*).

137. *See* Tex. Sup. Ct., Policies for Transfer of Cases Between Courts of Appeals, Misc. Docket No. 96-9224 (Oct. 24, 1996) (promulgating the guidelines and policies for transferring cases between the appellate courts).

138. Office of Court Admin., Annual Report—Courts of Appeals (2003), http://www.courts.state.tx.us/oca/PublicInfo/AR2003/coa/index.html (on file with the *St. Mary's Law Journal*).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

tremely difficult time even deciding whether to appeal, since they do not know which appellate court district will hear their appeal because the transfer decision is not made until the appeal is filed. Because of the lack of horizontal stare decisis between the intermediate appellate courts, the appellant's success on appeal depends in part on which appellate district hears the appeal. Another unfortunate consequence is that a trial court may correctly follow the law of its own appellate court district, only to be reversed because the appeal is transferred to an appellate court district with a different interpretation of the law.

The case of *American National Insurance Co. v. International Business Machines Corp.*[143] illuminates the problems created by the transfer of cases between appellate districts using a weak horizontal stare decisis model.[144] In that case, the buyer of computer equipment brought both tort and contract actions against IBM and its subcontractor.[145] The trial court, located in the Houston area of Galveston County and therefore within the geographic ambit of both of Houston's courts of appeals (the First and Fourteenth Districts), dismissed the buyer's tort claims and an appeal ensued.[146] The appeal was randomly assigned, pursuant to a statute,[147] to the First Court of Appeals (Houston).[148] After the appellant filed its brief, the Texas Supreme Court, as part of docket equalization, ordered the appeal transferred from the First Court of Appeals (Houston) to the Fourth Court of Appeals (San Antonio).[149]

Although the main substantive issue on appeal was whether a buyer had an independent tort claim as opposed to solely a contract claim, the court also needed to decide what law to apply: the law of the trial court's "home" appellate district (Houston),[150] the

143. 933 S.W.2d 685 (Tex. App.—San Antonio 1996, writ denied).

144. *See generally* Am. Nat'l Ins. Co. v. Int'l Bus. Mach. Corp., 933 S.W.2d 685 (Tex. App.—San Antonio 1996, writ denied).

145. *Id.* at 685.

146. *Id.*

147. TEX. GOV'T CODE ANN. § 22.202(h) (Vernon 2005).

148. *Am. Nat'l*, 933 S.W.2d at 685.

149. *See id.* at 690 (Duncan, J., dissenting) (providing background information on the transfer of the appeal to the Fourth District).

150. Presumably, the law of the First Court of Appeals (Houston) will apply because the appeal was randomly assigned to the First District. However, even that remains unclear as the Galveston County trial court was within the geographic ambit of both the First and Fourteenth Courts of Appeal. *See* TEX. GOV'T CODE ANN. § 22.201(b), (o) (Vernon

law of the appellate district upon transfer (San Antonio), or the law of Texas. The Fourth District's decision recognized that the Houston-area trial court had dismissed the tort action based upon the correct application of the binding precedent from both the First and Fourteenth Courts of Appeals. The Fourth District (San Antonio) explicitly noted that the trial court had correctly recognized that such a tort action would have been inconsistent with authority from both binding appellate courts—the First and Fourteenth Courts of Appeals.[151] The dissent likewise noted that well-established binding precedent from both of Houston's Courts of Appeals had held that "a plaintiff who pleads a benefit-of-the-bargain measure of damages does not plead a cause of action sounding in tort; this rule applies even when the plaintiff pleads fraudulent inducement."[152] Despite the trial court's proper adherence to binding precedent, the Fourth Court of Appeals reversed the trial court's decision and found that Texas law would *allow* such a tort action.[153] Thus, instead of adhering to the precedent that bound the trial court (the First and Fourteenth Courts of Appeals from Houston) and would have governed the appeal without a transfer, the Fourth District (San Antonio) held that the "foreign" or receiving appellate court (i.e., the court receiving the transferred appeal) did not have to apply the law from the "home" appellate court (i.e., the court where the appeal would have been heard absent the transfer for docket equalization purposes).[154] The Fourth District (San Antonio) stated that "we are not to blindly apply either [the law of the transferee or transferring court], but are to reach our best conclusion as to what the law of the State of Texas is on this issue."[155] The Fourth Court of Appeals then acknowledged that problems can arise due to the transfer of a case to an appellate district "where the justices' views of what the law of Texas is may

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2005) (listing Galveston County as falling under the appellate jurisdiction of both the First and Fourteenth Districts).

151. *See Am. Nat'l*, 933 S.W.2d at 688 (recognizing that the tort action in question would be inconsistent with both the First District's decision in River Consulting, Inc. v. Sullivan, 848 S.W.2d 165 (Tex. App.—Houston [1st Dist.] 1992, writ denied), and the Fourteenth District's decision in Hebisen v. Nassau Dev. Co., 754 S.W.2d 345 (Tex. App.—Houston [14th Dist.] 1988, writ denied)).

152. *Am. Nat'l*, 933 S.W.2d at 690 (Duncan, J., dissenting).

153. *Id.* at 687.

154. *Id.*

155. *Id.*

differ from the [views of the] justices of the court from which the case arose."[156] The court concluded, however, that "the answer to those difficulties lies in an appeal to the Texas Supreme Court, in civil cases, or to the Texas Court of Criminal Appeals, in criminal cases, rather than in our application of the law to the facts presented us."[157]

The dissent, in an opinion labeled by the majority as "very thoughtful and scholarly," addressed many of the flaws in the majority's decision to abandon the precedent of the "home" appellate district—the precedent that had been binding upon the litigants and the trial court.[158] The dissent first noted that "while individual judges have recognized a conflict of laws issue in the transfer context, no court has enunciated choice of law rules with which to resolve such a conflict."[159] Incredibly, in the cases involving conflicts caused by transfers, the Texas Supreme Court and the Texas Court of Criminal Appeals have both avoided addressing the issue of which appellate court district's law applies.[160] As a result, the intermediate appellate districts have no binding guidance for determining what law to apply to appeals transferred from one appellate district to another appellate district.[161]

This failure by the Texas Supreme Court to provide guidance would be less problematic if these conflicts rarely occurred. However, due to Texas's weak horizontal stare decisis model, a potential conflict exists in every case transferred from one appellate district to another appellate district. In recent years, these transferred cases have amounted to nearly ten percent of all appellate cases.[162] Although the potential problem is eliminated when Texas's fourteen appellate districts have uniformly interpreted and

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156. *Id.* at 688.

157. Am. Nat'l Ins. Co. v. Int'l Bus. Mach. Corp., 933 S.W.2d 685, 688 (Tex. App.—San Antonio 1996, writ denied).

158. *Id.* at 690 (Duncan, J., dissenting).

159. *Id.*

160. *See* State v. Jaubert, 74 S.W.3d 1, 9-10 (Tex. Crim. App. 2002) (failing to respond to the issue regarding the applicable law between the appellate court districts).

161. *See* Tex. H.R. Con. Res. 88, 79th Leg., R.S. (2005) (urging the Texas Supreme Court to resolve the issue of which appellate court's precedent will control in transferred cases). The Texas Supreme Court has not yet acted on this resolution.

162. Office of Court Admin., Annual Report—Courts of Appeals (2003), at 3, http://www.courts.state.tx.us/oca/PublicInfo/AR2003/coa/index.htm (on file with the *St. Mary's Law Journal*).

applied Texas law, an abundance of conflicts among the appellate court districts exist. These conflicts are an inevitable consequence of Texas's large appellate court structure and its lack of horizontal stare decisis. This system emphasizes the competency of each appellate district to interpret Texas law and allows for conflicts to develop. Unfortunately, the Texas Supreme Court has failed to exercise its conflicts jurisdiction, and this has resulted in some conflicts existing for many years while some are never resolved.[163] For example, a conflict about the admissibility of scientific evidence took nine years to resolve,[164] and a conflict about the admissibility of an employer's negligence in a worker's compensation case took six years to resolve.[165] Many other conflicts have never been resolved, including conflicts over the burden of proof on the appeal of a charge of racial discrimination in jury selection,[166] the admissibility of evidence obtained illegally by a law enforcement officer,[167] the issue of whether the state waives sovereign immunity against a contract claim when it enters into a contract,[168] and the circumstances under which a borrower qualifies as a consumer for pur-

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163. *See supra* notes 159-62 and accompanying text; *infra* notes 164-69 and accompanying text (providing examples of conflicts that have developed in the intermediate appellate courts).

164. *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 554 (Tex. 1995) (resolving conflicts dating from 1986 about the admissibility of scientific evidence).

165. *See* Dresser Indus., Inc. v. Lee, 880 S.W.2d 750, 751 (Tex. 1993) (resolving conflicts dating from 1987 in the admissibility of an employer's negligence in a worker's compensation case).

166. *Compare* Moss v. State, 877 S.W.2d 895, 898 (Tex. App.—Waco 1994, no pet.) (stating that appellate review of *Batson* challenges requires deciding whether the trial court's ruling is supported by the record), *with* Roberson v. State, 866 S.W.2d 259, 261 (Tex. App.—Fort Worth 1993, no pet.) (holding that substantiating evidence must be offered into the trial court record to substantiate a *Batson* strike).

167. *Compare* State v. Hobbs, 824 S.W.2d 317, 319 (Tex. App.—San Antonio 1992, pet. ref'd) (suppressing evidence on grounds that police officers violated Texas Penal Code section 30.05(c) by criminally trespassing, and noting that the legislature did not expressly exclude law enforcement from this particular penal provision), *with* Rosalez v. State, 875 S.W.2d 705, 715-17 (Tex. App.—Dallas 1993, pet. ref'd) (disagreeing with the San Antonio court and holding that law enforcement was excluded from criminal trespass violations under other provisions of the Texas Penal Code), *and* Carroll v. State, 911 S.W.2d 210, 222 (Tex. App.—Austin 1995, no pet.) (finding no violation of section 30.05(c) of the Texas Penal Code by police officers).

168. *Compare* Courtney v. Univ. of Tex. Sys., 806 S.W.2d 277, 284 (Tex. App.—Fort Worth 1991, writ denied) (holding that a "suit upon a contract claim against the state still requires permission from the state to be maintained"), *with* Indus. Constr. Mgmt. v. DeSoto Indep. Sch. Dist., 785 S.W.2d 160, 163-64 (Tex. App.—Dallas 1989, writ denied) (asserting that when a state enters into a contract with one of its citizenry, the state is

poses of an action against a lender under the Deceptive Trade Practices Act.[169]

Other intermediate appellate districts have uniformly adopted a "choice of law" rule that allows the receiving appellate district (i.e., the district to which the appeal is transferred) to apply its own law or the law of Texas, rather than the law of the "home" intermediate appellate district where the case was tried.[170] This "choice of law" rule is unfair to litigants, their counsel, and the trial courts. The unfairness occurs when the appellate court receiving the transferred case ignores the binding precedent from the trial court's "home" appellate district after the trial court applied the rules of geographic vertical stare decisis and correctly followed the binding precedents from the two Texas high courts and that trial court's "home" appellate district. This is precisely what occurred in the *American National* case. The parties and the trial court tried the case under the law enunciated by the two Houston courts of appeals. The record reflects that counsel for the parties briefed and argued the case on the basis of the binding precedent from the two Houston courts of appeals.[171] In one particularly telling passage, counsel noted that the other side had relied upon a decision from the Corpus Christi appellate district that "was a departure from the rule followed by the Fourteenth District Court of Appeals."[172] On the basis of the strength and consistency of the two Houston courts of appeals precedent, the trial court granted the motion for sum-

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governed by the general law of contracts as if the state was a private citizen), *overruled by* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401 (Tex. 1997).

169. *Compare* Cent. Tex. Hardware, Inc. v. First City, Texas—Bryan, N.A., 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (holding that appellant's loan did not qualify it as a consumer under the Deceptive Trade Practices Act), *with* Briercroft Serv. Corp. v. De Los Santos, 776 S.W.2d 198, 206-08 (Tex. App.—San Antonio 1988, writ denied) (looking to the "inextricable intertwining" doctrine to determine whether a borrower constitutes a consumer under the Deceptive Trade Practices Act).

170. *See* Jaubert v. State, 65 S.W.2d 73, 75 (Tex. App.—Waco 2000) (explicitly rejecting the notion that it is required to apply the "law of the court from which the case was transferred"), *rev'd on other grounds*, 74 S.W.3d 1 (Tex. Crim. App. 2002); Perez v. Murff, 972 S.W.2d 78, 85-86 (Tex. App.—Texarkana 1998, pet. denied) (stating that an appellate court is to apply the law of the state as it has interpreted it to be, and if a conflict arises between appellate courts, it is for the Texas Supreme Court to resolve); Am. Nat'l Ins. Co. v. Int'l Bus. Mach. Corp., 933 S.W.2d 685, 687-89 (Tex. App.—San Antonio 1996, writ denied) (discussing which appellate court's law to apply, and ultimately applying its own precedent).

171. *Am. Nat'l*, 933 S.W.2d at 693.

172. *Id.*

mary judgment and dismissed the tort claims. Additionally, absent a fortuitous transfer, either of the two Houston courts of appeals would have affirmed this result based upon the prior binding precedents from those courts. The Fourth Court of Appeals (San Antonio), however, decided to ignore the binding law from the Houston courts of appeals, despite the reliance of the litigants and the trial court on the rules as enunciated in those "home" appellate districts.[173]

Another unfortunate consequence of the "foreign" appellate court's decision to ignore the law of the trial court's "home" appellate district is that an appellate court with no connection to the underlying action can bind the litigant, the future "home" trial court on remand, and even the "home" appellate court district upon a subsequent appeal (under the "law of the case" doctrine). Thus, the appellate court that receives the transferred case can freely ignore the binding law of the "home" appellate district, the place where the transaction or event that led to the litigation took place, and the place where the case was ultimately filed and tried. Furthermore, this "foreign" appellate district decision, under the law of the case doctrine, will bind the "home" trial court upon remand and the "home" appellate court district upon appeal. This occurs even though the "foreign" appellate court district lacked any real connection to the underlying action. Justice Larsen, on the El Paso Court of Appeals, noted that "it seems to me that people of Harris County [Houston], who elect judges to the First and Fourteenth Courts of Appeals [in Houston], might not appreciate that appellate judges [in other appellate districts] are deciding question[s] of statutory interpretation peculiar to metropolitan Houston," especially when those other appellate judges are not even considering the reasoning of the "home" appellate court in reaching their decisions.[174] In *Kaufman v. State*,[175] Judge Larsen further asked, "must trial judges resign themselves to potential reversal even where they follow the established authority of their ju-

173. *Id.* at 688.

174. Kaufman v. State, 901 S.W.2d 653, 656 (Tex. App.—El Paso 1995, pet. ref'd) (Larsen, J., concurring) (stating, "[i]t seems appropriate that we at least consider the reasoning of this 'home court' in reaching our conclusions").

175. 901 S.W.2d 653 (Tex. App.—El Paso 1995, pet. ref'd).

risdiction?"[176] Even more important, litigants should not bear the cost of re-litigating issues because their case was fortuitously transferred and the receiving appellate court applied a different law than the law properly used by the trial court.

V. MOVEMENTS TO REFORM THE TEXAS APPELLATE COURT SYSTEM

As these problems highlight, if Texas wants to comply with the main "imperative of appellate justice"—uniformity[177]—its appellate system needs reform. Primarily for this reason, in 1989, then Texas Supreme Court Chief Justice Thomas R. Phillips requested an in-depth study of the Texas judiciary.[178] The study was conducted by the Texas Research League, a nonprofit educational company engaged in the objective analysis of Texas government.[179] Chief Justice Phillips specifically asked for an analysis of "the current judicial organization with an eye toward identifying major defects or problems that exist and to suggest possible alternatives that could lead to improvements."[180]

The Texas Research League issued three reports[181] relevant to the appellate court structure in Texas. The second report gave a comprehensive overview of the Texas court system and found that "Texas did not really have a real court system; rather it found that the courts tended to function independently from one another with no real central focus."[182] The second report also contained recom-

176. Kaufman v. State, 901 S.W.2d 653, 657 (Tex. App.—El Paso 1995, pet. ref'd) (Larsen, J., concurring).

177. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 147 (1976).

178. TEXAS RESEARCH LEAGUE, TEXAS COURTS, A STUDY BY THE TEXAS RESEARCH LEAGUE, REPORT TWO—THE TEXAS JUDICIARY: A PROPOSAL FOR STRUCTURAL-FUNCTIONAL REFORM, at v (1991), *available at* http://www.courts.state.tx.us/oca/tjc/publications/rpt_2.pdf.

179. *See generally* TEXAS RESEARCH LEAGUE, TEXAS COURTS, A STUDY BY THE TEXAS RESEARCH LEAGUE, REPORT TWO—THE TEXAS JUDICIARY: A PROPOSAL FOR STRUCTURAL-FUNCTIONAL REFORM (1991), *available at* http://www.courts.state.tx.us/oca/tjc/publications/rpt_2.pdf.

180. *Id.* at v, *available at* http://www.courts.state.tx.us/oca/tjc/publications/rpt_2.pdf.

181. The Texas Research League also issued a third report which dealt exclusively with changes to the Texas trial courts. This third report does not apply to the problems with stare decisis and the Texas Courts of Appeals.

182. TEXAS RESEARCH LEAGUE, TEXAS COURTS, A STUDY BY THE TEXAS RESEARCH LEAGUE, REPORT TWO—THE TEXAS JUDICIARY: A PROPOSAL FOR STRUCTURAL-

mendations for improving the Texas judiciary.[183] The report seemed most concerned with the growing imbalance between the dockets in the fourteen courts of appeals and the growing need to transfer cases from larger to smaller appellate districts in order to equalize the workload between the appellate districts.[184] In order to alleviate this growing problem, the Texas Research League included a proposal to reconfigure the fourteen courts of appeal into one intermediate court of appeals composed of multiple divisions.[185] This revived an earlier proposal to create a unified court of appeals.[186] Such a unified court of appeals would ensure greater uniformity in decisionmaking by the intermediate appellate courts and thereby prevent similarly situated Texas litigants from receiving unequal justice.

The Texas Supreme Court has also steadfastly adhered to the view that "overlaps in appellate districts are disfavored."[187] In fact, the court noted that "[t]he primary recommendation of the Court at this time is to eliminate the current jurisdictional overlaps that occur between two or more Courts of Appeals in ten counties, and in one instance, in three counties."[188] The court has further wrote that "[n]o county should be in more than one appellate district."[189]

In December 2002, the Texas Supreme Court issued a comprehensive plan for restructuring the entire intermediate appellate court system. This plan was the result of the Texas Government Code's requirement that the Texas Supreme Court: (1) "access the need for adding, consolidating, eliminating, or reallocating existing

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FUNCTIONAL REFORM, at v (1991), *available at* http://www.courts.state.tx.us/oca/tjc/publications/rpt_2.pdf.

183. *Id.* at 13, 20, 23, 27, 34.

184. *See generally* TEXAS RESEARCH LEAGUE, TEXAS COURTS, A STUDY BY THE TEXAS RESEARCH LEAGUE, REPORT TWO—THE TEXAS JUDICIARY: A PROPOSAL FOR STRUCTURAL-FUNCTIONAL REFORM (1991), *available at* http://www.courts.state.tx.us/oca/tjc/publications/rpt_2.pdf (analyzing various problems with the structure of Texas's court system).

185. *Id.* at v, xxii.

186. *See generally* Clarence A. Guittard, *Unifying the Texas Appellate Courts*, 37 TEX. B.J. 317 (1974) (discussing various concerns and problems that confronted the Constitutional Convention, in 1974, in deciding whether the Texas court system should be unified).

187. Miles v. Ford Motor Co., 914 S.W.2d 135, 140 (Tex. 1995).

188. *See id.* (quoting the 1995 Report of the Texas Supreme Court to the Texas Legislature Regarding Appellate Courts).

189. *See id.* (quoting the 1993 Report of the Texas Supreme Court to the Texas Legislature Regarding Appellate Courts).

appellate courts"; (2) "promulgate rules, regulations, and criteria to be used in assessing those needs"; and (3) recommend to the legislature "any needed changes in the number or allocation of those courts."[190] In complying with this statutory duty, the Texas Supreme Court recommended a fairly extensive redistricting of the Texas courts of appeals.[191] The highlights of the plan included the following:

- placing every county in one intermediate appellate district, thereby eliminating all overlapping appellate jurisdiction,
- consolidating the First and Fourteenth Courts of Appeal (Houston) into just the First Court of Appeal (Houston), thereby eliminating the situation whereby Houston-area appeals are randomly assigned to one of the two courts of appeal,
- increasing the number of counties in some intermediate appellate districts and reducing the number of counties in other intermediate appellate districts in an effort to equalize the number of "filings per justice" in each intermediate appellate district,
- increasing the number of justices in some intermediate appellate districts and reducing the number of justices in other intermediate appellate districts in an effort to equalize the number of "filings per justice" in each intermediate appellate district.[192]

This comprehensive plan, set forth by the Texas Supreme Court, addressed the two main problems caused by the current intermediate appellate court structure—the overlapping appellate districts and the transfers resulting from unequal dockets. Former Texas Supreme Court Chief Justice Thomas Phillips foreshadowed that the legislature would meet "strong local resistance" to some of these changes, but noted that courts are to serve for the betterment of the public and not the personal interests of judges or lawyers.[193]

Despite the significant merits of this redistricting plan, only limited action was taken by the 2003 Texas Legislature—one county was redistricted to eliminate its overlap into multiple appellate districts, five counties were reassigned from one appellate district to

190. TEX. GOV'T CODE ANN. § 74.022 (Vernon 2005).

191. Tex. Sup. Ct., Recommendations for Reallocation of Courts of Appeals, Misc. Docket No. 02-9232 (Dec. 17, 2002) (on file with the *St. Mary's Law Journal*).

192. *Id.*

193. Thomas Phillips, State of the Judiciary Address, 78th Leg. 6 (Mar. 4, 2003), http://www.supreme.courts.state.tx.us/Advisory/SOJ.pdf (on file with the *St. Mary's Law Journal*).

another, one justice was added to one appellate district, and one justice was eliminated from a different appellate district.[194] These relatively modest changes still left twenty-two counties in overlapping appellate districts and only minimally addressed the problem of unequal dockets. If anything, this modest improvement once again proved that the boundaries of intermediate appellate courts are to a great extent the result of politics and political compromise.[195] As one Texas legislator has commented, "whenever you start reducing judicial strength in certain areas, that is where you draw opposition."[196]

Even more recently, in April of 2004, the Council of Chief Justices of the Courts of Appeals identified two problems with Texas's appellate structure: (1) counties with concurrent or overlapping appellate jurisdiction (i.e., counties sitting in more than one appellate district) and (2) the transfer of appeals from one court of appeals to a different court of appeals in an effort to equalize the dockets of the appellate courts.[197] In the Council of Chief Justices' proposal to the Texas House Redistricting Committee, the chief justices proposed:

- retaining concurrent and overlapping jurisdictions for the counties in the First District (Houston) and Fourteenth District (Houston),
- retaining concurrent and overlapping jurisdiction for five additional counties (Gregg, Rusk, Upshur, and Wood counties would remain in both the Sixth District (Texarkana) and the Twelfth District (Tyler); and Hunt County would remain in both the Fifth District (Dallas) and the Sixth District (Texarkana)),

194. *See* Act of June 20, 2003, 78th Leg., ch. 662, § 1, 2003 Tex. Gen. Laws 2081, 2082 (codified at TEX. GOV'T CODE ANN. § 22.201(i), (ii)) (eliminating Ector, Gaines, Glassock, Martin, and Midland counties from the Eighth Court of Appeals district and placing the aforementioned counties in the jurisdiction of the Eleventh Court of Appeals); Act of May 15, 2003, 78th Leg., ch. 44, § 1, 2003 Tex. Gen. Laws 81 (codified at TEX. GOV'T CODE ANN. § 22.201(b), (o)) (removing Brazos County from both the First and Fourteenth Courts of Appeals).

195. Walter V. Schaeffer, *Foreword: Stare Decisis and the "Law of the Circuit"*, 28 DEPAUL L. REV. 565, 568 (1979).

196. *See* Mary Alice Robbins, *Court Redistricting Plan Ready for Legislators' Consideration*, TEX. LAW. Dec. 23, 2002, at 6, (quoting State Senator Robert Duncan, of Lubbock).

197. TEX. HOUS. REDISTRICTING COMM., Materials to Accompany Testimony of Chief Justices of the Courts of Appeals, at 1-2, 78th Leg., 4th C.S. (Apr. 2004).

- ensuring that all appeals from counties with concurrent and overlapping jurisdiction are randomly assigned to either of the two appellate districts, using a process similar to the one used in the First and Fourteenth Districts,
- moving four counties with concurrent and overlapping appellate jurisdiction into a single appellate jurisdiction (Hopkins and Panola counties would be exclusively in the Sixth District (Texarkana); Kaufman County would be exclusively in the Fifth District (Dallas); and Van Zandt County would be exclusively in the Twelfth District (Tyler)),
- moving four counties from the overworked Houston and Beaumont appellate districts into smaller appellate districts (Burleson and Walker counties would move from the First and Fourteenth Districts (Houston) to the Tenth District (Waco); Trinity County would move from the First and Fourteenth Districts (Houston) to the Twelfth District (Tyler); and Angelina County would move from the Ninth District (Beaumont) to the Twelfth District (Tyler)),
- having the Texas Supreme Court issue a standing order determining which law would be applied in all transfer cases (i.e., the transfer order would state what law should be applied – the law of the transferring court's appellate district or the law of the appellate district where the appeal is transferred), and
- allocating $870,000/year in extraordinary budget funding to the Fifth District (Dallas) and the First and Fourteenth Districts (Houston) so that those courts could retain additional staff and thereby eliminate the need to transfer cases from those courts for docket equalization purposes.[198]

In addition to addressing some structural problems with overlapping and concurrent appellate jurisdiction, the proposal also addressed the potential problem of forum shopping.[199] In short, the proposal adopted the approach utilized by the First and Fourteenth Courts of Appeals: random assignment of cases that lie in counties with overlapping appellate jurisdiction.[200] Finally, the proposal urged the Texas Supreme Court to declare what law should apply

198. *Id.* at 4-5.

199. *Id.* at 1-2.

200. *See id.* at 2, 4 (explaining the assignment of appellate cases between the two Houston courts and adopting it for other instances of overlapping appellate jurisdiction); *see also* TEX. GOV'T CODE ANN. § 22.202(h) (Vernon 2005) (setting forth a procedure whereby all appeals are randomly assigned to either the First or Fourteenth Courts of Appeal).

to appellate cases transferred to another court of appeals.[201] Although these are important corrective measures, the new proposal would have cost an additional $870,000 per year, but still failed to address the underlying substantive problem—Texas's weak adherence to stare decisis.

Interestingly, the 2005 Texas Legislature only enacted some of the chief justices' proposal. The legislature moved seven counties with overlapping appellate districts into a single appellate district and moved one county from an overworked appellate district into an underworked appellate district.[202] The Texas Legislature also passed a resolution urging the Texas high courts to adopt two new rules.[203] The first recommended rule would eliminate the appellate forum shopping by litigants in overlapping appellate districts by requiring the courts to randomly assign the appeal to one of the two overlapping appellate districts.[204] The second rule would definitively decide which precedent applies in transfer cases if a conflict exists between the precedent of the two courts of appeals (i.e., should the court apply the law of the "home" appellate district or the law of the appellate district hearing the appeal).[205] Fortunately, the legislature did not allocate $870,000 to handle the overloaded appellate work in the First, Fifth, and Fourteenth Courts of Appeals,[206] a situation that could more easily and inexpensively be remedied by mandating a stronger adherence to stare decisis within Texas's appellate courts.

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201. TEX. HOUS. REDISTRICTING COMM., Materials to Accompany Testimony of Chief Justices of the Courts of Appeals, at 5, 78th Leg., 4th C.S. (Apr. 2004).

202. Tex. H.B. 1077, 79th Leg., R.S., at 1, 2 (2005) (removing Burleson, Trinity, Walker, Van Zandt, Kaufman, Hopkins, and Panola counties from overlapping appellate court districts, and moving Angelina County from the Ninth District (Beaumont) to the Twelfth District (Tyler)).

203. *See* Tex. H.R. Con. Res. 88, 79th Leg., R.S., at 1, 2 (2005) (urging the Texas Supreme Court to pass a rule for the random assignment of appeals for counties in overlapping appellate districts and a rule setting forth the law to be applied in cases transferred from one court of appeals to another court of appeals).

204. *Id.* at 1.

205. *Id.* at 1, 2.

206. *See generally* Tex. H.B. 1077, 79th Leg., R.S. (2005) (limiting appellate court restructuring to eliminating certain counties from overlapping appellate jurisdictions, without mention of any allocation of funds).

VI. A Modest Proposal for Providing Greater Uniformity in Texas Law: Stronger Stare Decisis

Surprisingly, all of these reform efforts have focused on structural, rather than substantive, changes to Texas's appellate system. Each of the enacted and proposed reforms focus mostly on preventing counties from sitting in multiple appellate districts and solving the unequal dockets that cause the transfer of cases between appellate districts. These unique structural aspects of Texas's appellate court system, however, are not the major flaws in Texas's appellate system. Instead, these structural anomalies merely magnify the major substantive problems—Texas's weak stare decisis model and the failure of the Texas high courts to resolve conflicts. Texas's weak stare decisis model promotes confusion and lack of uniformity, and it allows different litigants to receive different treatment for no other reason than that they live in different parts of the state. This nonuniformity is the inevitable consequence of an intermediate appellate court system with fourteen appellate districts adhering to a weak stare decisis model. Alexander Hamilton warned that such an appellate system would suffer from an excess of independence because it produces "independent courts . . . arising upon the same laws" which results in "nothing but contradiction and confusion."[207]

More recently, the leading scholars on appellate justice cautioned against the dangers inherent in a large appellate court system with a weak adherence to stare decisis:

> [It] promote[s] a form of territorialism which can be debilitating to the system. Territorialism is a problem both theoretical and practical. Its theoretical fault is that it is fundamentally inconsistent with the idea of law because it accepts differences resulting solely from differences in place with no basis in reason for such divergences. In a pure form, territorialism in the administration of the law is a denial of equal protection in the classical sense. . . . The practical disadvantages . . . of territorialism are notable. It rewards and encourages appellate forum-shopping. The possibility of forum-shopping, in

207. The Federalist No. 80, at 535 (Alexander Hamilton) (Jacob E. Cook ed., 1961). Although Alexander Hamilton was addressing the independence of the thirteen original states on matters of federal law, the same idea applies to Texas's fourteen appellate districts on matters of Texas law. Hamilton's complaint about the thirteen states functioning as separate sovereignties on issues of federal law is analogous to Texas's fourteen appellate districts functioning as separate sovereignties on issues of Texas law.

> turn, promotes uncertainty about the law applicable to particular transactions and thus discourages legal planning. It is economically wasteful and undermines the effectiveness of the law as a means of regulating conduct.[208]

This "pure form of territorial justice" would be akin to the Texas Legislature enacting legislation that treated citizens differently depending upon their location within the state. Just as a legislative body could violate constitutional rights by having statutes that treat different citizens differently, a court can "violate equal protection and other constitutional rights by its opinions."[209] Such unconstitutional discrimination can occur "when a court deliberately refuses to follow the earlier ruling of a court of coordinate authority" thereby subjecting "citizens to different rules of law depending solely upon the court in which the action is brought."[210] The Texas intermediate appellate courts should not have the autonomy to treat citizens differently depending upon their location within the state. Just as the Texas Legislature could not validly enact legislation that treated Texans differently based solely on their geographic location within Texas, the rules of stare decisis should not allow Texas law to treat Texans differently based solely on their geographic location within Texas.

The leading appellate justice scholars also made the following observations and recommendations regarding intermediate appellate courts:

> These numerous disadvantages of territorialism can be borne as long as there is abundant supervision of the regional intermediate courts by the highest court, sufficient to prevent any significant differences from materializing. As the amount of supervision diminishes, as the number of territorial units increases, or as the size of the regions decreases, the disadvantages are magnified. . . . Thus, it is important in maintaining an intermediate court system that the territories into which it is organized be reasonably large in area, reasonably few in number, and well-supervised by the highest court.[211]

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208. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 154-55 (1976).

209. Walter V. Schaeffer, *Foreword: Stare Decisis and the "Law of the Circuit"*, 28 DEPAUL L. REV. 565, 568 (1979).

210. *Id.*; *see also* Tomala v. United States, 504 U.S. 932, 933 (1992) (White J., dissenting) (noting that the outcome in two similar criminal cases should not depend on the location "in which the case is tried").

211. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 155-56 (1976).

In contrast to these sound recommendations, Texas's fourteen intermediate appellate districts are reasonably small in area, reasonably large in number, and not well supervised by the highest courts. These structural defects, when combined with the weak stare decisis used by Texas's courts, are the perfect recipe for a system that will distribute unequal, and potentially unconstitutional, justice. Interestingly, efforts to reform this appellate system have focused exclusively on fixing the structural anomalies of Texas's appellate system, rather than addressing the underlying substantive problem—the weak stare decisis model that has resulted in fragmented law across the state.

In order to better reform Texas's court system (and to prevent the unnecessary expenditure of $870,000 per year that is part of the chief justices' current proposal),[212] either the Texas Supreme Court or the Texas Legislature must address the underlying substantive problem and create a stronger stare decisis model. Two simple stare decisis rules could easily ensure a greater uniformity in the application of Texas law. First, a "horizontal stare decisis" rule could bind each intermediate appellate district to all prior intermediate appellate district decisions, regardless of district (i.e., the Third District (Austin) would be bound by a prior First District (Houston) decision). Second, a "vertical stare decisis" rule could bind each trial court in every geographic district to the decisions from any intermediate appellate court district (i.e., a Third District (Austin) trial court would be bound by a prior First District (Houston) appellate decision). By adopting these stronger stare decisis rules, the problems addressed in this Article, namely unequal justice, would disappear.[213] More specifically, these stronger stare decisis rules would:

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212. *See supra* notes 197-201 and accompanying text (detailing a recent proposal by the Council of Chief Justices of the Courts of Appeals that would cost $870,000, but still fail to establish a strong adherence to the principal of stare decisis).

213. In addition to setting forth these new stare decisis rules, the Texas Supreme Court or Texas Legislature would have to provide guidance on how to implement these new rules. The implementation would have to address two scenarios: (1) situations where the courts of appeals had issued harmonious decisions (i.e., no conflicts existed), and (2) situations where the Texas high courts had failed to resolve conflicting decisions from the courts of appeals (i.e., conflicts existed). In situations where no conflicts existed, the lone decision or harmonious decisions would bind future courts of appeals. In situations where conflicts existed, the next court of appeals to consider the conflicting decisions would de-

> (1) promote greater uniformity and consistency in the decisions made by all Texas courts, and thereby ensure that similarly situated Texas litigants are treated equally, regardless of locale within the state;
> (2) promote greater certainty and predictability in the law and thereby provide clearer guidance to all lawyers, litigants, and trial courts;
> (3) reduce or eliminate conflicts among the fourteen appellate courts, and thereby make it easier for the Texas Supreme Court to manage its docket and resolve any conflicts that do unintentionally occur;
> (4) eliminate problems associated with counties in multiple appellate districts by making the law uniform across all fourteen appellate districts and thereby eliminating the benefits of appellate forum-shopping; and
> (5) eliminate problems associated with the transfer of cases between appellate districts because the law of the "foreign" appellate district would be the same law as the "home" appellate district.

Any proposed change, of course, will have some potentially detrimental consequences upon the courts. Here, the intermediate appellate courts and the trial courts will become less autonomous. Intermediate appellate courts will no longer have the freedom to disregard a decision by a "foreign" intermediate appellate district. Likewise, all trial courts will no longer have the freedom to disregard a decision from a "foreign" intermediate appellate district (i.e., one from outside its geographic region). These new stare decisis rules would inevitably cause more judges and justices to disagree with their own rulings. This is nothing new; it is the inevitable consequence of stare decisis, which requires that judges lose some personal autonomy in deciding cases in order to promote a more consistent and uniform justice system. For instance, on issues of federal law, every judge is absolutely obligated to follow a 5-4 majority decision of the United States Supreme Court even when the judge strongly believes the case was wrongly decided.[214] Such is the function of the rule of law and vertical stare decisis. We have,

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finitively resolve the issue for the courts of appeals. The Texas high courts could, of course, review that "definitive" decision.

214. *See* Walter V. Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 455 (1983) (recognizing that a 5-4 decision by the United States Supreme Court is "nationally binding precedent"); *see also* Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) ("A [federal] district judge may not respectfully (or disrespectfully) disagree with his learned colleagues

after all, prided ourselves as "a nation of laws applying equally to all and not a nation of men who have few or no standards."[215] As a nation of laws, lower and intermediate court judges cannot consider and cast aside binding authority, even if the judges consider the binding precedent unwise or incorrect. These judges, of course, are free to express disagreement with any binding decision and its application to future cases.[216] This disagreement, however, should be expressed in the court opinion without fragmenting the law of the jurisdiction. Such disagreement, especially with a coordinate co-equal court decision, may prove beneficial, like the percolation process in a weak stare decisis model, to the high court's ultimate resolution of the matter.

The adoption of stronger stare decisis rules could also provide a mechanism for ensuring further review of decisions made exclusively for stare decisis reasons. For example, if a court of appeals followed a prior decision only because required to do so by stare decisis, the panel could be required to indicate and explain its disagreement with the prior decision. Such disagreement could immediately trigger further review by a special panel of chief justices from the courts of appeals.[217] Under such a model, the chief justices of the fourteen courts of appeals could be polled as to whether further review is necessary, given that a conflict would have existed "but for" the required adherence to stare decisis. If the Texas high court refused to hear the appeal and a majority of the court of appeals' chief justices agreed, a special panel of chief justices would be convened to resolve the conflict that would have occurred without the adherence to stare decisis.[218] This special panel could consist of chief justices from the fourteen courts of ap-

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on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court.").

215. Hamdi v. Rumsfield, 243 F. Supp. 2d 527, 536 (E.D. Va. 2002), *rev'd on other grounds*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

216. *See* Ortega v. United States, 861 F.2d 600, 603 n.4 (9th Cir. 1988) ("The majority agrees with the dissent that Dr. Bernard Ortega deserves better treatment from our Government. Unfortunately, legal precedent deprives us of discretion to do equity.").

217. Such a system would, in some ways, mirror how the federal appellate circuits handle intracircuit stare decisis. Under the law of the circuit approach used in all federal appellate circuits, only an en banc circuit can overrule prior circuit precedent. *See* FED. R. APP. P. 35(a)(1) (allowing en banc hearings when necessary to maintain uniformity in the court's decisions).

218. If the Texas Supreme Court decided to exercise its discretionary power to review the case, the need for a special panel decision would be negated.

peals.[219] The parties would be permitted to file supplemental briefs and the published special panel decision would bind all courts of appeals unless reversed or modified by either of the Texas high courts.[220]

An alternative model would allow a Texas intermediate appellate district, under very limited circumstances, to overrule a prior decision of a different appellate district. This model would improve upon the current weak stare decisis model because the later ruling would replace, at least temporarily, the earlier ruling. This would ensure that all Texans would be governed by the same case law, rather than the current system whereby some Texans are governed by one ruling and other Texans are governed by a contradictory ruling. In order to be effective, this model would have to significantly limit the circumstances under which an intermediate appellate court could overrule a prior coordinate appellate court decision and also provide a mechanism for a further review of the overruling. For example, the rule might allow an intermediate appellate court to overrule a prior coordinate appellate decision only when that prior decision is deemed to have produced a "manifest injustice." If applied correctly and judiciously, such a high standard would significantly limit the number of overrulings. This proposal would also need to provide a mechanism for quickly reviewing the overruling. Similar to the prior proposal, such a mechanism could include a rehearing before a special panel of chief justices (of the fourteen intermediate appellate districts) or a procedure for mandatory certification to the Texas Supreme Court or Texas Court of Criminal Appeals.

By implementing either of these two proposals for strengthening stare decisis, the new stare decisis rules would begin to ensure harmonious decisions throughout Texas's court system. The core judicial values of predictability, stability, consistency, and uniformity would also begin to flourish. Justice would not depend on location within the state; instead all Texas litigants would receive equal treatment and justice regardless of locale.

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219. The special panel could consist of seven, nine, eleven, or all fourteen of the chief justices of the Texas Courts of Appeals.

220. *See* MICH. COMP. LAWS § 7.215 (2003) (setting forth a procedure for resolving conflicts in the courts of appeals by convening a special panel of intermediate appellate judges).