"UNPRECEDENTED": HOW THE FIFTEENTH COURT OF APPEALS WILL IDENTIFY ITS PRECEDENT

BY DAVID COALE

WITH APOLOGIES FOR THE PUN, the Fifteenth Court of Appeals faces an "unprecedented" situation.

The Legislature created the first three intermediate courts of appeal in 1892. During the Twentieth Century, it created eleven more. For each of those new courts, the Legislature carved out (or in the case of Houston, duplicated) the new court's jurisdiction from within the jurisdiction of a pre-existing court.[1]

Similarly, the U.S. Court of Appeals for the Eleventh Circuit began operations in 1981 with jurisdiction over several states carved out from the pre-existing Fifth Circuit.[2]

As a result, each of these new courts started with a well-established body of precedent, inherited from their predecessor courts.

But the Fifteenth Court of Appeals has no predecessor. The Legislature gave it statewide jurisdiction over specific kinds of cases, as opposed to general jurisdiction over cases from a particular geographic area. As a result, that court does not start with an "inherited" body of precedent.

The Fifteenth Court thus faces a novel—and fundamental—question: what is its precedent?

This article examines five sources of insight for answering that question: (1) English common law (as defined by a Texas statute dating back to the Republic); (2) "vertical" precedent, as described by a 2022 supreme court case; (3) federal practice about the *Erie* doctrine; (4) generally recognized conflicts-of-laws principles; and (5) historical examples from the 1840s, when the Supreme Court of the Republic of Texas confronted a similar problem with a lack of precedent.

1. English common law

In 1836, the Republic of Texas faced a similar problem to the one faced today by the Fifteenth Court. Newly independent from Mexico, the young country had no law of its own.

The Congress of the Republic solved that problem with a statute that made a wholesale adoption of English common law.[3] A materially identical statute remains in force today, modified only to reflect the obvious fact that Texas is no longer a country:

> "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state."[4]

The supreme court has explained that this statute does not literally adopt the English case law of 1840, but rather, common-law principles as generally understood and "declared by the courts of the different states of the United States."[5]

Accordingly, under this statute, the Fifteenth Court begins operations with the "generally understood" principles of the common law as precedent.

2. "Vertical" precedent

In its 2022 opinion of *Mitschke v. Borromeo*,[6] the Texas Supreme Court carefully described the two kinds of precedent in Texas courts.

One, called "horizontal stare decisis," involves "the respect that a court owes to its own precedents."[7] This is the technical name for the challenge now faced by the Fifteenth Court, which has no precedents of its own.

The other, called "vertical stare decisis," stands for the "commonplace and uncontroversial" principle that "that lower courts must follow the precedents of all higher courts."[8]

As an intermediate appellate court, the Fifteenth Court is bound by precedents from the Texas Supreme Court and, where applicable, the U.S. Supreme Court and Texas Court of Criminal Appeals.

The principle of "vertical stare decisis" means that the Fifteenth Court inherits the precedent of higher courts, in addition to the "generally understood" principles of common law.

3. Federal practice

While the Fifteenth Court does not begin empty-handed, the question remains—how should it approach the many questions that are not answered by supreme-court precedent or general common-law principles? Federal practice, combined with the unusual jurisdiction of the Fifteenth Court, provides a constructive framework for an answer.

The Fifteenth Court's statewide jurisdiction is intended to create uniformity on the substantive areas within its jurisdiction. That's closely analogous to the Texas Supreme Court's jurisdictional mandate to consider "question[s] of law that [are] important to the jurisprudence of the state."[9]

Given those similar objectives, it would be fair to say that when the Fifteenth Court decides an issue, it's making an educated guess about how the supreme court would resolve the point. That's exactly what federal courts do, in cases where subject-matter jurisdiction arises from diversity of citizenship, when they must resolve an unsettled point of state law. A federal court makes an "*Erie* guess" to predict how the highest court of the state would decide that issue.

Within the Fifth Circuit, to make such a "guess," a federal court works its way down through a hierarchy of resources: (1) decisions of the state supreme court in analogous cases, (2) the rationales and analyses underlying state supreme court decisions on related issues, (3) dicta by the state supreme court, (4) lower state court decisions, (5) the general rule on the question, (6) the rulings of courts of other states to which the relevant state's court would likely look, and (7) other available sources, such as treatises and legal commentaries.[10]

That framework is a productive starting point for the Fifteenth Court. It is also trying to anticipate how the Texas Supreme Court will resolve a particular issue. The resources identified by the Fifth Circuit for making an *Erie* guess, and the order of importance attached to them, fit well with the Fifteenth Court's mandate.

4. Conflicts

The unusual statewide jurisdiction of the Fifteenth Court could present some issues that are traditionally associated with conflict-of-laws analysis. For example, what if Texas law is silent on a particular question — other than the Dallas Court of Appeals answering it "yes" while the San Antonio Court of Appeals says "no" — and the parties are from San Antonio?

In a traditional conflict-of-laws analysis, the parties' location would carry weight, particularly if that location carries with it what the *Restatement (Second) of Conflicts of Law* calls "justified expectations" about the controlling law (i.e., the precedent of the local court).[11]

But the Fifteenth Court's analysis of precedent isn't a traditional conflict-of-laws analysis. That Court isn't deciding whether to enforce a choice-of-law provision that may give another state's law priority over Texas. It's determining the substance of its own precedent—even though expectations may have varied throughout the state when the court was created. Indeed, the very reason for the Fifteenth Court's statewide jurisdiction is to encourage uniformity on certain issues.

But just because the parties' settled expectations about precedent don't control, doesn't make them irrelevant. In determining what a rule of law should be for all of Texas, the Fifteenth Court can and should consider the prevailing state of the law and try to avoid undue disruption to the parties' expectations when it can. Towards that end, the *Restatement*'s lists of factors that can guide various choice-of-law decisions can be helpful references for the Fifteenth Court, even if those factors do not directly control the specific issue at hand.

5. Historical examples

Two examples of how the Republic's supreme court dealt with a lack of precedent are instructive—not for their specific holdings, which became moot long ago—but for the general approaches that court brought to the issues.

In the first case, *Carr v. Wellborn* from 1844,[12] an Alabama court resolved a property-ownership dispute in favor of the guardian of an incompetent individual. The defendant resisted enforcement of that judgment in Texas on several complex grounds, causing the supreme court to observe: "[W]e find names eminent in the science of the law enrolled on opposite sides … that the mind rests suspended in doubt as to a correct conclusion."[13]

The threshold issue—the ability of a guardian appointed in

Alabama to sue in Texas—presented not only a question of first impression, but one where civil-law and common-law authority differed, and that raised matters of "international law, public polity, and general comity between nations," since the United States was a foreign country at the time.[14]

Despite the flowery start, the supreme court's holding was direct. It followed the most relevant American decision available—a New York case about a bankruptcy estate—and concluded that the guardian could sue. The supreme court explained:

> "Organized as our system is on the principles of the common law, both reason and prudence should lead us to adopt decisions of courts whose system is the same; especially when supported by the authority of reason and the dignity of names eminent for their proficiency in science and wisdom and their elucidation of the principles of the common law. … [W]e should follow in the beaten track, guided by the lights which they have shed, to conclusions correct in principle, guarded by precedent, and just in their effects."[15]

That explanation largely anticipates the modern framework for an *Erie* guess. In much the same way that the framework encourages, the supreme court reasoned that a factually analogous opinion, from a similar jurisdiction grounded in the same general principles as Texas, was the best case to choose as its precedent.

But in the second example, the Republic's supreme court took a near-opposite approach, focusing on general principles about structure rather than analogous precedent. The 1841 case of *Republic of Texas v. Smith*[16] arose from a criminal prosecution for running a gambling operation in a part of Bastrop County that later became Travis County. The defendant argued that he could not be prosecuted in Travis County since it did not exist at the time of the offense.

The threshold question, under the law at the time, was whether the supreme court could consider factual matters on appeal. The supreme court held that it had the power to do so.

The court observed that "we search in vain in the common law for an instance of an appellate court retrying the cause upon the facts," and acknowledged that the Republic's constitution adopted the "common law as the rule of decision in criminal proceedings." Nevertheless, reasoned the court, "[w]e cannot believe" that the Republic's constitutional convention intended to deny it that power, since the constitution made several (unrelated) additions to common-law criminal practice.[17] Those changes compelled a more active role for the supreme court than in a traditional common-law setting.

A cynic would say that the supreme court made up a justification for a power grab. But a fairer summary is that the court did its best with what it had. Texas chose "the common law" as its legal foundation, but with significant changes on matters such as the right to compel witness attendance. Rather than simply follow common-law precedent, the supreme court made a judgment about how those specific changes affected the overall structure of the Texas courts.

Conclusion

The Fifteenth Court of Appeals begins with no precedent. But it doesn't begin empty-handed. It inherits all opinions of higher courts, as well as the collective general wisdom of "the common law." From that starting point, the Fifth Circuit's framework for an Erie guess, augmented by the choice-of-law factors identified by the *Restatement (Second) of Conflict of Laws*, provide further guidance for specific issues. Historical examples from the Supreme Court of the Republic of Texas show that the Fifteenth Court will have to examine specific precedents and general structural principles to develop the body of law that it will need to draw upon for future cases.

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1 *See* "History of the Appellate Courts," https://www.txcourts.gov/5thcoa/about-the-court/history/ (last visited Jan. 3, 2024).

2 *See* "U.S. Court of Appeals for the Fifth Circuit - Legislative History," https://www.ca5.uscourts.gov/about-the-court/circuit-history/ (last visited Jan. 3, 2024).

3 *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 365 (Tex. 1990).

4 Tex. Civ. Prac. & Rem. Code § 5.001(a).

5 *Moreno*, 787 S.W.2d at 365 (quoting *Grigsby v. Reib*, 153 S.W. 1124, 1225 (Tex. 1913)).

6 645 S.W.3d 251 (Tex. 2022)

7 *Id.* at 256 (cleaned up).

8 *Id.* (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring).

9 Tex. Gov't Code § 22.001(a).

[10] *E.g.*, *Terry Black's Barbecue, LLC v. State Automobile Mut. Ins. Co.*, 22 F. 4th 450, 454 (5th Cir. 2022) (applying *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

[11] *See generally* Restatement (Second) Conflicts of Law § 6 (1971) (examining "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, [and] (e) the basic policies underlying the particular field of law").

[12] Dallam 624 (1844).

[13] *Id*. at 626.

[14] *Id*. at 627.

[15] *Id*.

[16] Dallam 407 (1841)

[17] *Id*. at 410-11.