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The Meaning of Inaction: Legislative Acquiescence in Texas Law

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I. Introduction[1]

Legislative acquiescence is a concept that attempts to draw meaning from analysis of the space between the branches of government and the intersection of their roles. It is inextricably linked with the doctrine of separation of powers, and, thus, its reach will always be limited by the countervailing tension of Constitutional grants of power to the various branches.

Broadly speaking, acquiescence refers to the acceptance of a practice by one branch of government that implicates the role of another branch. This paper will focus on the intersection of the judicial and legislative branches, though legislative acquiescence, by definition, also encompasses acquiescence to the actions of the executive branch.

Within the abstract concept of legislative acquiescence, the most specific type is generally referred to as "legislative acceptance," which requires the following conditions: (1) the court of last resort (or proper administrative officer) has construed a statute; (2) the statute was ambiguous; and (3) the Legislature has re-enacted the statute without substantial change. If these circumstances exist, the operative presumption is that the Legislature is familiar with the court's interpretation and has adopted it. *See, e.g*., *Tex. Dep't of Protective and Regulatory Svs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 195-96 (Tex. 2004). Within the case law, the terminology includes legislative acquiescence, legislative acceptance, and legislative silence, often used interchangeably.

In short, legislative acquiescence is a default presumption that draws substantive meaning from the legislature's failure to directly engage with issues implicated by prior court opinions. Despite the precision of this definition, the boundaries of the concept have been more fluid in

[1] The opinions expressed herein are solely those of the author and should not be attributed to the State Office of Administrative Hearings.

practice. Parties propose, and courts consider, applications of this concept that do not fit neatly into the paradigm, and the weight granted to this presumption has varied over time and from case to case.

II. Scholarly Analysis

This subject has drawn the interest of various academics and practitioners. *See* Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411 (2012). The *Historical Gloss* article includes an exploration of the broader concept of acquiescence in the context of historical practice and separation of powers doctrine and identifies certain markers to consider. It focuses on acquiescence in the federal system, but the resulting analysis has broader application, and it provides a useful framework for considering the concept in context.

The authors define "institutional acquiescence" as, fundamentally, a practice by one branch of government that implicates the prerogatives of another branch where the other branch has acquiesced in the practice over time. The authors further delineate the concept of institutional acquiescence into various types, including acquiescence by *agreement* (in which the acquiescing branch agrees that the actions of the other branch are lawful, such as the agreement set out in the 1973 War Powers Act Resolution regarding the President's authority to use military force) versus acquiescence by *waiver* (in which one branch has engaged in a certain practice over time without resistance, thus giving rise to certain expectations and reliance). *Id.* at 433-36.

Bradley and Morrison posit that, in order for institutional acquiescence to be constitutionally significant: (1) the custom must consist of acts, not merely assertions of

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