CONSTITUTIONAL CHALLENGES TO STATE STATUTES AND RULES

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State Bar of Texas
17TH ANNUAL ADVANCED ADMINISTRATIVE LAW COURSE
September 22-23, 2005
Austin

CHAPTER 16

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CONSTITUTIONAL CHALLENGES TO STATE STATUTES AND RULES

I. Introduction[1]

"The right to judicial review of acts of legislative and administrative bodies affecting constitutional or property rights is axiomatic." *City of Houston v. Blackbird*, 394 S.W.2d 159, 162 (Tex. 1965). Although curbed by many qualifications and circumscribed by many conditions, the right of a person whose constitutionally protected rights are affected by a state statute or an agency rule to judicially challenge that statute or rule is firmly established and is an important fundamental check on governmental power.

II. Threshold Issues: Standing, Justiciability, Ripeness and Joinder

To challenge the constitutionality of a statute, a plaintiff must have standing, a necessary component of the court's subject matter jurisdiction. Standing requires a real controversy between the parties that will be actually determined by the judicial declaration sought. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (quoting *Board of Water Engrs v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955).

> Thus, to challenge a statute, a plaintiff must first suffer some actual or threatened restriction under that statute. Second, the plaintiff must contend that the statute unconstitutionally restricts the *plaintiff's* rights, not somebody else's.

Texas Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 517-18 (1995) (citing *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d at 445 (emphasis in original). To show actual or threatened restriction under a statute, it is typically sufficient for plaintiffs to show that they are subject to the statute in question and in circumstances in which the statute is likely to be enforced against them in a way that will affect rights or privileges they enjoy. *See e.g., Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626-27 (Tex. 1996).

A person to whom a statute may constitutionally be applied may not challenge the statute on grounds that it could be applied unconstitutionally to others. *Garcia*, 893 S.W.2d at 518. However, an association may sue on behalf of its members if the members would have standing to sue in their own right, and protection of the member interests at issue is germane to the organization's purpose. *Garcia*, 893 S.W.2d at 518 (association has standing to challenge Workers Compensation Act on behalf of members "a large majority of" which are covered under the workers' compensation system and may be assumed to have suffered a compensable injury under the Act); *Tex. Ass'n of Business*, 852 S.W.2d at 447 (business association alleging some of its members subjected to administrative penalties assessed under challenged statute and others at substantial risk of penalty held to have standing).

A statute may be challenged even though a state agency has not yet imposed a penalty or sanction under the statute. A plaintiff may present justiciable controversies addressable by the courts upon a showing that an injury *"is likely to occur."* *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex. App.–Austin 2000, pet denied). (Emphasis added.) If action has previously been taken or threatened, unless the agency officials make a "binding admission or [take] extrajudicial action that would prevent a recurrence of the challenged action," a declaratory judgment action remains justiciable. *Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 849 (Tex. App.–Austin 2002, pet. denied).

Statutory challenges, however, must still meet traditional standards of ripeness. "A court cannot pass on the constitutionality of a statute unless the facts have matured, forming the concrete basis against which the statute may be applied." *Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 857 (Tex. App.–Austin 2004, no pet.). In *Atmos*, natural gas sellers sued the Attorney General, asserting that a state ceiling-price statute purporting to set the price of natural gas sold to agricultural users did not apply to them or, if it did, the statute violated due process and was void and unenforceable. The Attorney General filed a plea to the jurisdiction, asserting that he was not currently enforcing the statute against the plaintiff and had no plans to do so. The Attorney General also argued that it was not proper

[1]Special thanks to summer associates Mary Wommack Barton and Abby Wells for their research and writing assistance on this paper and to our legal assistant Pat Jeans, for her excellent work.

to permit litigation against the Attorney General regarding the validity and applicability of the statute when Atmos was litigating the application of the statute in two separate private-party lawsuits in West Texas. The court did not reach the latter ground, but agreed that the suit should be dismissed on ripeness grounds. The court evaluated the ripeness issue on the basis of two considerations: "(1) the fitness of the issues for judicial decision; and (2) the hardship occasioned to a party by the court's denying judicial review." *Id.* at 858. The court found that the applicability of the statute to the plaintiff was a fact-intensive inquiry and that there was no hardship to the plaintiff because a violation of the statute carried with it no state sanction or penalty.

The Austin Court of Appeals reached the opposite result on justiciability in *Juliff Gardens, L.L.C. v. Texas Commission on Environmental Quality*, 131 S.W.3d 271 (Tex. App.–Austin 2004, no pet.). In that case, an applicant for a permit to build and operate a landfill brought a declaratory judgment action against TCEQ, asserting that legislation passed while his application was pending and mandating denial of his application constituted an unconstitutional local or special law. At the agency, the applicant also filed a request to amend its permit to move the location of the landfill and avoid application of the statute. While the court ultimately upheld the statute against the constitutional challenge, it rejected the trial court's determination that the issue was not justiciable. Applying the same two considerations as were applied in *Atmos*, the court reasoned that a determination that the statute was constitutional "is unquestionably an issue fit for judicial review" because the agency had no authority to determine the constitutionality of the statute. *Id.* at 278. The court further found that refusing to decide the issue imposed a hardship on the plaintiff because it would be forced to expend resources defending its permit application against a statute that might ultimately be held unconstitutional. *Id.*

The court also rejected the agency's argument that it had exclusive or primary jurisdiction to determine whether to issue the permit and that the courts should not address the constitutionality issue until the agency had ruled on the permit. The court reasoned that the Commission had no statutory authority to determine the constitutionality of the statute, and the declaratory relief requested regarding the validity of the statute "does not infringe on the Commission's permitting power." *Id.* at 279.

Justiciability of challenges to penal statutes are governed by the standards set out in *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994), in which the Supreme Court held that the constitutionality of the state's sodomy statute could not be decided because (1) the state attorney general had represented that the statute had not and probably would not be enforced against consenting adults acting in private and (2) no vested property rights were alleged to be affected by any enforcement of the statute. The basic standards for jurisdiction are set out in *Robinson v. Jefferson County*, 37 S.W.3d 503, 507-508 (Tex. App.–Texarkana 2001, no pet.):

> Because Texas has a bifurcated system of civil and criminal jurisdiction, the authority of a civil court to declare a criminal statute unconstitutional and enjoin its enforcement is limited to situations where there is evidence that (1) the statute at issue is unconstitutionally applied by a rule, policy, or other noncriminal means subject to a civil court's equity jurisdiction, and irreparable injury to property or personal rights is threatened; or (2) the enforcement of an unconstitutional statute threatens irreparable injury to property rights. *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994).

Robinson involved an action by the owner of a sexually oriented business to obtain a declaratory judgment and injunction against the enforcement of a county regulation that criminalized possession or consumption of alcoholic beverages on the premises of sexually oriented businesses. The court held that these standards of *State v. Morales* were met but nevertheless dismissed the case for lack of jurisdiction because of the failure to join an indispensable party, the criminal district attorney authorized to enforce the regulations. *Id.* at 511.

The absence of a state agency responsible for enforcement of a civil statute may also result in dismissal of a lawsuit. In *Motor Vehicle Board v. El Paso Independent Automobile Dealers Association, Inc.*, 37 S.W.3d 538, 541 (Tex. App.–El Paso 2001, pet. denied), the court dismissed a constitutional challenge to the state's "blue law" prohibiting sales of motor vehicles on consecutive Saturdays and Sundays because of failure on the part of plaintiffs to sue the Motor Vehicle Board, the state agency with authority to enforce the law. Plaintiffs *had* sued local officials who also had authority to enforce the statute, particularly its criminal penalties. The court reasoned that joinder of these officials was not

sufficient to confer jurisdiction, particularly in light of the fact that the local officials had not attempted to enforce the statute and did not defend its constitutionality in the courts. *See id.*

III. Nuts and Bolts

A. Procedural Vehicles to Challenge the Constitutionality of a Texas Statute

The most common procedural vehicle for challenging a Texas statute is the Declaratory Judgments Act, codified in chapter 37 of the Texas Civil Practice and Remedies Code. The Texas Supreme Court has construed the Texas DJA to constitute not only a waiver of sovereign immunity for suits regarding the construction or validity of statutes, but also to authorize recovery of attorneys' fees incurred in seeking that declaratory relief. *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d at 281. The court's general jurisdictional authority under Article V, § 8 of the Texas Constitution and Tex. Gov't Code § 24.011 is properly invoked by the filing of a declaratory judgment action challenging the constitutionality of a statute.

If an agency is attempting to apply an unconstitutional statute to a party, the agency or its officials may be sued. In state court, a direct suit against the agency is generally permitted, regardless of whether a statutory right of appeal from an agency order is available. *See, e.g., EnRe Corp. v. Railroad Comm'n*, 852 S.W.2d 661, 663 (Tex. App.–Austin 1993, no writ) (holding that party need not preserve constitutional challenge to statute in motion for hearing filed at the agency because agency is not empowered to determine constitutionality of a statute).[2] The right directly to challenge a state agency that is enforcing an unconstitutional statute exists because the agency action "adversely affects a vested property right or otherwise violates a constitutional right." *Texas Dep't of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172 (Tex. 2004), citing *Continental Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 397 (Tex. 2000). *See* TEX. CIV. PRAC. & REM. CODE §37.006(b).

If a challenge to the constitutionality of a state statute is initiated in federal court, the suit should ordinarily be brought against state officials rather than the state or its agencies, as the Eleventh Amendment generally bars a direct action against the state. *See McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407. 412 (5th Cir. 2004) ("The Eleventh Amendment has been interpreted by the Supreme Court to bar suits by individuals against nonconsenting states."). Even when the Eleventh Amendment bars an action directly against the state, the *Ex parte Young* doctrine permits federal courts to enjoin state officials to conform their future conduct to the requirements of federal law. *Id*. The officials should be sued in their official capacity; such a suit "is not a suit against the official but rather is a suit against the officials' office" and the "real party in interest is the [governmental] entity." *Id*. at 414.

Federal court jurisdiction of a suit that asserts a state statute violates the U.S. Constitution rests on the Supremacy Clause and the federal question jurisdiction under 28 U.S.C. §1331. While most federal court suits challenging state officials' application of unconstitutional state statutes are brought under 42 U.S.C. §1983, they need not be. The Fifth Circuit, along with a number of other circuits, has "recognized an implied cause of action to bring preemption claims seeking injunctive and declaratory relief even absent an explicit statutory claim." *Planned Parenthood of Houston and Southeast Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005). Thus, when §1983 is not available to challenge a statute because the party affected by the statute is not a party intended to be protected by the federal constitutional provision at issue,[3] federal court jurisdiction nevertheless exists and the plaintiff may simply assert an implied right of action based on the Supremacy Clause.

If suit is brought against the state or state agency in state court and the government removes the case to federal court, it waives its Eleventh Amendment immunity. *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 242 (5th Cir. 2005). This decision reflects a recent

[2]The Supreme Court, however, has recently expanded the grant of judicial review of agency orders, holding that Tex. Gov't Code § 2001.171 of the APA provides an independent right to judicial review of contested case decisions when an agency enabling statute neither specifically authorizes nor prohibits judicial review, abrogating numerous prior decisions to the contrary. *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 173 (Tex. 2004).

[3]*See, e.g., Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 924-25 (5th Cir. 2000) (holding that a health care provider could not sue under § 1983 because the federal Medicaid law that the provider contended the state official was violating was not intended to benefit the provider).

change in the law by the U.S. Supreme Court's decision in *Lapides v. Board of Regents*, 535 U.S. 613, 122 S.Ct. 1640 (2002), which holds that a state waives its Eleventh Amendment immunity when it voluntarily invokes the jurisdiction of the federal courts. Removal, however, will not necessarily waive a state's immunity from liability. In *Meyers*, the Fifth Circuit recognized that "state sovereign immunity consists of two separate and different kinds of immunity, immunity from suit and immunity from liability." 410 F.3d at 254. In other words, "the Constitution guarantees a state's prerogative, by its own law, to treat its immunity from liability as separate from its immunity from suit for purposes of waiver or relinquishment." *Id.* at 255. Whether a state waives immunity from liability for damages, then, will turn not on the forum waiver created by removal to federal court but on the state's substantive law. *Id.*

B. Procedural Vehicles to Challenge the Constitutionality of an Agency Rule.

The most common procedural vehicle for challenging the constitutionality of an agency rule is Tex. Gov't Code § 2001.038, which authorizes the filing of a declaratory judgment action in a district court in Travis County to determine the validity or applicability of any rule adopted by an administrative agency. Challenges to the validity of a rule encompass challenges to their constitutionality. *Eldercare Props., Inc. v. Department of Human Servs.*, 63 S.W.3d 551, 558 (Tex.App.-Austin 2001, pet. denied). Jurisdiction exists under § 2001.038 "if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." This requirement is met upon a showing that implementation of the rule is likely to "'affect'" the party challenging it. *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 797 (Tex. App.–Austin 1982, writ ref'd n.r.e.) (applying predecessor statute). Challenges to a rule's validity are not restricted to parties against whom the agency seeks to apply the rule. *Cf. Eldercare Props., Inc. v. Texas Dep't of Human Servs.*, 63 S.W.3d at 558 (adjudicating merits of challenge to the validity of rule being applied to competitor of the plaintiff).

In *Hospitals v. Continental Casualty Co.*, 109 S.W.3d 96, 100 n.9 (Tex. App.–Austin 2003, pet. denied), the Austin Court of Appeals stated that § 2001.038 was not the exclusive vehicle to challenge the validity or applicability of a rule, reasoning that the statute merely states that such a challenge "may" be determined in an action for declaratory judgment. In an unpublished opinion from the same panel, the court has subsequently stated the opposite. *See Local Neon Co. v. Strayhorn*, No. 03-04-00261-CV, 2005 WL 1412171 at *6 (Tex. App.–Austin June 16, 2005, no pet.) (mem. opinion) (stating that § 2001.038 "is the exclusive remedy for testing the validity of an administrative rule"). What the court apparently meant in *Hospitals* is that a party may challenge the rule in a proceeding before the agency, including a pending contested case proceeding, and, therefore, is not restricted to filing a declaratory judgment action.

These apparently conflicting statements can be reconciled by concluding that, absent an initial challenge commenced at the agency itself in either a contested case proceeding or some other proceeding, a challenge may be lodged in the courts only pursuant to §2001.038. This analysis is consistent with those cases recognizing that parties may include challenges to agency rules in the context of contested case proceedings. It is also consistent with *Lopez v. Public Utility Commission*, 816 S.W.2d 776, 782 (Tex. App.–Austin 1991, writ denied), which holds that a party may not utilize § 2001.038 to challenge the validity of an agency rule applied in a contested case if the party fails to perfect an appeal of the agency's final order in the contested case.[4] Because an agency *would* have the authority to determine the constitutionality of its own rules, the doctrine in *EnRe Corp. v. Railroad Comm'n*, 852 S.W.2d 661, 663 (Tex. App. – Austin 1993, no writ), which permits a party to challenge the constitutionality of a statute even though the issue of constitutionality was not presented to the agency in the contested case proceeding, would presumably not apply.

If a challenge is made in federal court to the constitutionality of a state statute and the State or one of its agencies is not joined as a party, the Texas Attorney General should be notified. Under 28 U.S.C. § 2403, in any such action "wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is

[4]The court reasoned: "Rule 21.62(g) purports to be effective only within the context of an appeal to the Commission under PURA § 26(c), and the controversy within that appeal is now at an end because the plaintiffs did not file the motion for rehearing necessary to sue for judicial review of the Commission's final order, and therefore did not take the only step that could have vacated the final order." *Id.* at 782.

otherwise admissible in the case, and for argument on the question of constitutionality." It will stand you in good stead with the Court if you have already provided this notification to the AG.

C. Recovering the costs of litigating: availability of attorneys' fees.

Shifting the costs of litigation to the State is often a critical factor in challenging a state statute or rule. It is also often a hot-button issue for agencies. Many private entities make the political decision not to seek recovery of fees from an agency that will continue to regulate them under other statutes and rules.

When 42 U.S.C. § 1983 is available because a state statute or rule violates federal laws designed to protect the plaintiff, a plaintiff who invokes 42 U.S.C. §1988 and prevails is generally entitled to recovery of reasonable attorneys' fees. *See Southwestern Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 551 (5th Cir. 1993). In fact, attorney's fees may be awarded under § 1988 even if the § 1983 claim is not decided, "provided that 1) the § 1983 claim of constitutional deprivation was substantial; and 2) the successful pendant claims arose out of a 'common nucleus of operative facts.'" *Id.* To qualify as a prevailing party under § 1988, the plaintiff must "(1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement." *Id.*

The Texas Supreme Court has held that "by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the DJA necessarily waives governmental immunity for such awards." *Texas Educ. Agency v. Leeper*, 893 S.W.2d at 446. Since *Leeper*, courts have routinely held that attorneys' fees may be recovered under the Texas UDJA when the validity or construction of a statute is at issue. *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 305 (Tex. App. –Austin 2000, pet. denied) (affirming fee award against Texas Comptroller and holding that legislative authorizations of declaratory judgment and fees are "mutually dependent and together make up the legislative intent"); *City of San Antonio v. TPLP Office Park Props., Ltd.*, 155 S.W.3d 365, 378-79 (Tex. App. – San Antonio 2004, pet. filed)("Like the supreme court in *Leeper*, we conclude that by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the Declaratory Judgment Act necessarily waives governmental immunity for such awards."); *Texas Workers' Comp. Comm'n v. Texas Builders Ins. Co.*, 994 S.W.2d 902, 909 (Tex. App. – Austin 1999, pet. denied)(affirming fees under TEX. CIV. PRAC. & REM. CODE §37.009 against the Commission); *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 157-58 (Tex. App.–Austin 1998, no pet.) (affirming fees under §37.009 against the Department).

Pursuant to Texas Civil Practice & Remedies Code § 37.009 of the Texas UDJA, a court in any such proceeding may award "costs and reasonable and necessary attorney's fees as are equitable and just." This provision is unique to Texas. The model state Uniform Declaratory Judgment Act contains no provisions expressly authorizing awards of attorneys' fees but, instead, merely provides only that "[i]n any proceeding under this act the court may make such award of costs as may seem equitable and just." Uniform Declaratory Judgments Act §10 (1922). *See also* 12A Uniform Laws Annotated, UDJA, §10 at 414 (1996). Award of fees under this statute, however, is discretionary with the Court and may, in unusual circumstances, even be awarded to a non-prevailing party. *See Brazoria County v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d 728, 744 (Tex. App. – Austin 2004, no pet.); *J.C. Penny Life Ins. Co. v. Heinrich*, 32 S.W.3d. 280, 290 (Tex. App. – Austin 2000, pet. denied).

Recovery of attorneys' fees in a case that merely challenges the constitutional validity of a rule under Texas Gov't Code § 2001.038 is not permitted. *Texas State Bd. Of Plumbing Exam'rs v. Associated Plumbing-Heating-Cooling Contractors of Tex., Inc.*, 31 S.W.3d 750, 753 (Tex. App.–Austin 2000, pet. dism'd by agr.) (holding that when a party "files a proceeding that *only* challenges the validity of an administrative rule, the parties are bound by the APA and may not seek relief under the UDJA because such relief would be redundant"). (Emphasis added.)

When, however, a rule challenge also includes requests for construction of a statute, recovery of attorneys' fees under the Texas UDJA may be permitted. *See, e.g., Howell v. Texas Workers' Comp. Comm'n*, 143 S.W.3d 416, 442-43 (Tex. App.– Austin 2004, pet. denied) (holding that parties were entitled to seek attorney's fees under the Texas UDJA because, in addition to rule challenge, they "sought a declaration concerning the exhaustion of administrative remedies in medical payment disputes"); *Texas Dep't. of Pub.*

Safety v. Moore, 985 S.W.2d at 157-58) ("Since we have held that the trial court had jurisdiction to construe section 411.007(b) and that the trial court's construction of that statute favors Moore, Moore has achieved a declaration of rights entitling him to seek the additional relief of attorney's fees."); *Texas State Bd. of Plumbing Exam'rs v. Associated Plumbing-Heating-Cooling Contractors of Tex., Inc.*, 31 S.W.3d at 754 ("Because the proceeding was not solely a challenge to the Board's revision of its rules, we hold that the district court did not abuse its discretion in ordering the Board to pay [the plaintiff's] attorney's fees."). *See also Texas Mun. Power Agency v. Public Util. Comm'n*, 100 S.W.3d 510, 516 n.5 (Tex. App.–Austin 2003, pet. denied).

In a case filed in state court and successfully removed by the defendant to federal court, consideration should be given to adding a 42 U.S.C. § 1983 claim to the suit, including a request for attorney's fees under § 1988, if it is not already pled. Some Fifth Circuit precedent holds that the Texas UDJA's provision authorizing an award of attorneys' fees is "procedural" and cannot provide a basis for recovering attorneys' fees once the case is removed to the federal court. *See Olander v. Compass Bank*, 363 F.3d 560, 567-68 (5th Cir. 2004). For those who have not included or are unable to proceed under § 1983, the great weight of authority is contrary to this decision. *See Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 687 (5th Cir. 1991); 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2669 at 256-57 (1998).

IV. "Facial" versus "As Applied" Constitutional Challenges

A litigant may challenge a statute or rule as unconstitutional either on its face or as applied. A facial challenge is a claim that the statute is unconstitutional by its terms, as written, not only when applied to a particular person or in specific circumstances. A party making a facial challenge to the constitutionality of a statute has the heavy burden of demonstrating that the statute, by its terms, operates unconstitutionally in all its applications-that is, that there is no set of circumstances under which the statute would be constitutional. See *Barshop v. Medina County Underground Water Conservation Dist*., 925 S.W.2d at 626.

In *Barshop*, landowners challenged the statute authorizing the Edwards Aquifer Authority to regulate the use of underground water, in a suit brought before the act was implemented. Plaintiffs challenged the act on its face, "arguing that the act will, under all circumstances, deprive them of their property rights in underground water." *Id*. at 628. The Court held that the plaintiffs failed to sustain their burden of establishing that "the statute, by its terms, always operates unconstitutionally," *id.*, and, specifically, that the plaintiffs failed "to establish that the Act will always operate to deprive them of their property without due course of law," *id*. at 633. The case did not present the question of whether the act was "unconstitutional when applied to a particular landowner," *id*. at 623, and the Court, rejecting the facial challenge to the act, concluded that it was not required to reach the question of "the point at which water regulation unconstitutionally invades the property rights of landowners," *id*. at 626.

In *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440 (Tex. 1993), the Court held plaintiffs did meet their burden of proving the challenged statutes to be facially unconstitutional. The statutes authorized administrative agencies to levy fines for environmental law violations, and imposed forfeiture of any right to judicial review unless bond or a deposit in the full amount of the penalty assessed was paid in 30 days. The Texas Supreme Court held that those statutes, as written, placed an unreasonable restriction on access to the courts, in violation of the open courts provision of the Texas Constitution, Article. I, Section 13. *Id*. at 448-450.

In an "as applied" challenge, the plaintiff argues that a statute, which may be constitutional on its face (that is, capable of being applied constitutionally in general or at least in some cases), operates unconstitutionally as to the plaintiff, in particular existing circumstances. *See Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995) (in an "as applied" challenge, "the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances.") . Thus, in an as-applied constitutional challenge, the court "must evaluate the statute as it operates in practice against the particular plaintiff." *Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377 (Tex. 2002). For example, in *Nelson v. Krusen*, 678 S.W.2d 918, 922 (Tex. 1984), the court held that a two-year statute of limitations on medical malpractice actions was unconstitutional under the open courts provision of the Texas Constitution, as applied to a plaintiff who could not have discovered the injury that was the subject of her malpractice claim during the two-year period. The Court distinguished its holding from other "as applied" challenges in which the

constitutionality of statutes of limitations was upheld: "The statutes of limitation were not unconstitutional as applied to the parties in Sax and Robinson; hence, there was no reason to strike down the statutes merely because they might operate in an unconstitutional manner in another case." 678 S.W.2d at 923.

V. Challenges Based on the Texas Constitution

There are numerous grounds for challenging statutes and rules as violative of the Texas Constitution. This paper provides a sampling of some of the provisions in prevalent use today.

A. Prohibition Against Retroactive Laws

The Texas Constitution prohibits the passage of retroactive laws. TEX. CONST. art. I, § 16 ("No . . . retroactive law . . . shall be made.").[5] Like other provisions that, read literally, would invalidate a host of statutes, this provision has been substantially limited. The courts have held that it applies only to "vested rights" and have been careful to limit the rights recognized as "vested." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). Rejecting the argument that the rights affected by a statute were "vested," two recent decisions have rejected challenges that statutes were impermissibly retroactive. In *Williams v. Houston Firemen's Relief & Retirement Fund*, 121 S.W.3d 415, 431 (Tex. App.–Houston [1st Dist.] 2003, no pet.), the court held that the Fund was entitled, pursuant to statute, to reduce pension benefits by denying prior service credit as a result of employment with other fire departments. The court reasoned: "A participant in a statutory pension plan does not have a vested right to receive currently unvested benefits; he has merely an expectancy based on the anticipated continuance of existing law; and this expectancy is subordinate to the right of the Legislature to abolish the pension system or to diminish the benefits of pensioners thereunder." *Id.*

The Houston 14th Court of Appeals handed down a similar rejection of a retroactivity claim in *Johnson v. Davis*, No. 14-04-00206-CV, 2005 WL 1772075 at *5 (Tex. App.–Houston [14th Dist.] July 26, 2005, no pet.). In *Johnson*, the plaintiff, a prison inmate, argued that a statute permitting collection of a blood sample from him for purposes of DNA testing and inclusion in the state's DNA database was an impermissible retroactive law because the crime for which he was incarcerated occurred prior to the passage of the DNA statute. The court rejected the argument that application of the statute to Mr. Johnson was retroactive, reasoning that the statute "does not retroactively criminalize acts performed by Johnson before its enactment," even though the statute authorized prison officials to deny Mr. Johnson parole eligibility for his crime if he refused to submit to the DNA sampling. *Id.* This case addresses and rejects numerous other constitutional challenges as well, holding that the following constitutional rights and provisions are not infringed by the statute: right against unreasonable search and seizure, prohibition against self-incrimination, right of privacy, doctrine requiring separation of powers of the three branches of government, and prohibition against Bills of Attainder. *3-*6.

B. Right to Trial by Jury

Article I, § 15 of the Texas Constitution provides that the "right of trial by jury shall remain inviolate." Courts have interpreted the right to trial by jury to exist only "for those actions, or analogous actions, tried by jury when the Constitution was adopted in 1876." *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d at 526. In addition, Article V, § 10 of the Texas Constitution – which is part of the Judiciary Article – provides that "[i]n the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury." Not all adversary proceedings, however, are "causes" within the meaning of the Judiciary Article. In particular, an appeal from an administrative decision is not. 893 S.W.2d at 527.

In *TWCC v. Garcia*, the Court held that the right to trial by jury was not impaired under the workers' compensation scheme because of the modified de novo review scheme, which permits jury trials on the issues that were the substitutes for the common law causes of action for negligence. *Id.* The Court reasoned: "Although legislation altering or restricting a cause of action is subject to scrutiny under the open courts doctrine, this substantive change does not implicate the right to jury trial, as long as the relevant issues under the modified cause of action are decided by a jury." *Id.*

In contrast, the Austin Court of Appeals recently reversed an order of the Department of Agriculture Produce Recovery Fund Board on the ground that the agency, by awarding contract damages, had violated a

[5]The U.S. Constitution has a similar prohibition. *Carmell v. Texas*, 529 U.S. 513, 552, 120 S.Ct. 1620, 1643 (2000).

produce buyer's right to a jury trial on the grower's breach of contract action. *McManus-Wyatt Produce Co. v. Texas Dep't of Agriculture Produce Recovery Fund Bd.*, 140 S.W.3d 826 (Tex. App.–Austin 2004, pet. denied). In *McManus*, a carrot grower filed a breach of contract complaint against a carrot buyer, who was licensed by the Board. The carrot buyer filed an action for breach of contract in the district court in Hildago County, and the grower counterclaimed and requested a jury trial, thereby triggering both parties' right to a jury. The Board awarded the grower $35,000 to be paid from the Produce Recovery Fund and further ordered the buyer to pay the grower an additional $103,439.74. The buyer appealed, asserting that the Board's order violated its right to a jury trial. The relevant statutory provisions authorized the Board to award the $35,000 from the fund and to adjudicate the *total* damage claim. *Id.* at 829. If the buyer refused to pay the amount awarded, the Board is to issue an order cancelling the buyer's license to purchase produce. The statutory scheme did not permit the buyer to bring his own cause of action for breach of contract before the Board: "[t]he only capacity in which a license holder may appear is as a defendant." *Id.* at 830. If the license holder loses, his only remedy is substantial evidence review.

The buyer argued that the Board violated its own rule – 4 Tex. Admin. Code § 14.10(a)(2), which prohibits the Board from considering "claims for which a complainant has filed suit in a court of competent jurisdiction." *Id* at 828.

The court did not expressly rule on the validity or applicability of the agency rule or the constitutionality of the statute. Instead, it focused solely on the Board's order, which it held violated the buyer's right to a jury trial under the Texas Constitution. *Id.* at 833. The court distinguished the *McManus* case on the ground that, unlike in *Garcia*, the right to jury trial was completely abrogated under the state administrative scheme at issue: only the Board could adjudicate the contract dispute, and judicial review was not *de novo* but, instead, was a trial to the court under the substantial evidence rule. *Id.* at 832-33.

This decision, which the Supreme Court declined to review, is somewhat difficult to square with the Supreme Court's decision in *Barshop*, 925 S.W.2d at 636. In that case, the Court held that the Edwards Aquifer Act, which adjudicated property rights subject to judicial review under the substantial evidence rule, did not violate the constitutional right to trial by jury. The Court there reasoned that "[a]ppeals from administrative decisions . . . are not 'causes'" within the meaning of the Texas Constitution. *Id.* Yet the Court also acknowledged that adjudications of property rights were matters for the judicial branch and permitted the initial agency adjudication only because judicial review was available. *Id*. at 635. The question arises as to how a cause that would, prior to the passage of the Edwards Aquifer Act, have been adjudicated only in the courts can lose the right to jury trial simply because the Legislature decided to impose an intervening administrative proceeding. The Court reasoned that "there was no governmental scheme in 1876 to regulate natural resources such as the Edwards Aquifer." *Id.* But common law property rights in water *did* exist in 1876, making the Court's reasoning somewhat perplexing, since the landowners' argument was that their property rights were being unconstitutionally impacted.

One way to distinguish the two cases is that *McManus* involved an action for damages for breach of contract, which has long been recognized as a common law cause of action for which there is a right to a jury trial. *Barshop*, on the other hand, is more akin to a regulatory taking for which there may be no constitutional right to jury trial. *See City of Houston v. Blackbird*, 394 S.W.2d 159, 162-63 (Tex. 1965) (holding property owners had no right to a jury trial in appeal of City's assessments for street improvements).

C. Violation of the Open Courts Provision.

The open courts provision of the Texas Constitution, part of Texas's Bill of Rights, provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. The provision ensures that Texas courts will remain operating and available and that the Texas Legislature will not restrict access to the courts by creating unreasonable financial barriers. 12A TEX. JUR. 3D *Constitutional Law* § 219 (2004). It also guarantees that no party seeking redress under a common law claim will be denied access to court unreasonably or arbitrarily. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). The Texas Legislature may not abrogate the right to assert a traditional common law cause of action unless the reasons for doing so outweigh the constitutional right of redress. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d at 227. To establish that a statute violates the open courts guarantee, a party must demonstrate (1) that it has a well established common

law cause of action that has been restricted by the statute and (2) the restriction is unreasonable or arbitrary when balanced against the purpose of the statute. *Owens Corning v. Carter*, 997 S.W.2d 560, 573 (Tex. 1999). There is a strong presumption that any valid legislative enactment is constitutional, so a party challenging a statute bears the burden of demonstrating that the statute violates its constitutional rights. *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 934 (Tex. 1996). In some cases, a statute can be facially constitutional yet still violate the open courts provision "*as applied to a particular category of people*" if the restriction of that group's access to the courts is unreasonable or arbitrary. *In re Hinterlong*, 109 S.W.3d 611, 631 (Tex. App.—Fort Worth 2003, orig. proceeding [mand. denied]) (emphasis in original).

A key case on the Open Courts provision is the Supreme Court decision upholding the Legislature's overhaul of the Texas Workers' Compensation Act in 1989. *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d at 521. In that case the Court weighed the reduced benefits available under the statutory scheme against the benefits gained by workers in not having to prove negligence or address, with limited exceptions, employer's potential defenses. "We believe this quid pro quo, which produces a more limited but more certain recovery, renders the Act an adequate substitute for purposes of the open courts guarantee." *Id.* The Court took a deferential approach to the Legislature's solution, which involved compromises for many different interests: "Our duty to enforce the open courts guarantee does not allow us to rewrite legislation merely to try to craft a remedy that we might believe to be more inclusive or equitable." *Id.* at 523.

The Open Courts provision has been successfully used to strike down a requirement that taxes be paid before they can be challenged. *Central Appraisal Dist. v. Lall*, 924 S.W.2d 686 (Tex. 1996). It has also been used to invalidate a requirement that a party seeking to appeal a penalty either pay the penalty or post a bond to cover it. *EnRe Corp. v. Railroad Comm'n*, 852 S.W.2d at 663-64. Recent statutory challenges under the Open Courts provision, however, have been largely unsuccessful.

In two recent cases, the Texas Supreme Court addressed the constitutionality of the statute of limitations set forth in the Medical Liability and Insurance Improvement Act.[6] In a previous case, the court found that this statute of limitations does not violate a plaintiff's open courts rights if the plaintiff "has had a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired." *Earle*, 998 S.W.2d at 889 (citing *Jennings v. Burgess*, 917 S.W.2d 790, 794 (Tex. 1996)). If a plaintiff has reasonable opportunity to file suit within the designated time period, the restriction on his common law cause of action is not unreasonable or arbitrary; therefore, the claim fails to satisfy the second prong of the open courts test. *Shah*, 67 S.W.3d at 842. In the two most recent cases to address this issue, *Earle* and *Shah*, the court conducted this very fact specific inquiry and determined that the plaintiffs had ample time to file suit. *Shah*, 67 S.W.3d at 847; *Earle*, 998 S.W.2d at 890. Therefore, their constitutional rights had not been violated. *Id.*

In *Earle*, the plaintiff, Ratliff, alleged that the statute of limitations violated his open courts rights because limitations ran long before he learned that his health problems could be a result of medical malpractice. *Earle*, 998 S.W.2d at 889. Earle performed back surgeries on Ratliff in November of 1991 and November of 1993, after which Ratliff's health deteriorated. *Id.* at 884. Ratliff filed a lawsuit against Earle in February of 1994 after watching a television program about the risks associated with the instrument that Earle surgically implanted in his back during the first surgery. *Id.* The court held that "[t]he record [established] that Ratliff had an opportunity to learn of any negligence by Earle in performing the 1991 surgery" much earlier than the day in 1994 when he watched the television program because Ratliff visited Earle's office many times, consistently experienced neck and back pain, and showed few signs of improvement. *Id.* at 890.

The Texas Supreme Court followed the same line of reasoning when addressing a similar statutory challenge in *Shah*. Shah treated Moss for persisting visual problems that eventually left Moss blind in his right eye. *Shah*, 67 S.W.3d at 839. He saw Moss in his office on many occasions and, among other things, performed two retinal surgeries on his patient. *Id.* Moss filed medical

[6] *Shah*, 67 S.W.3d 836; *Earle v. Ratliff*, 998 S.W.2d 882 (Tex. 1999); the statute at issue in both of these cases was Tex. Rev. Civ. Stat. Ann. art. 4590i § 10.01 (Vernon Supp. 1999), which has been replaced by Tex. Civ. Prac. & Rem. Code Ann. § 74.251(a) (Vernon 2005). The revised statute contains the same pertinent statutory language as the statute at issue in these cases.

malpractice claims against Shah after the two-year statute of limitations passed. *Id*. at 839, 845. The Court held that Moss had to demonstrate that he did not have a reasonable opportunity to discover the alleged wrong before the limitations period expired and that he used due diligence to sue within a reasonable time after discovering the alleged wrong. *Id*. at 846-47. Because Moss knew of the injury at least seventeen months before filing suit and could not explain why he waited so long to file his case, as a matter of law, he did not file his suit within a reasonable time after discovering the injury. *Id*. Therefore, the statute of limitations set forth in the Medical Liability and Insurance Improvement Act did not unconstitutionally restrict Moss's access to the courts. *Id*.

In another recent case, the Supreme Court declared that the Open Courts provision does not pertain to or protect plaintiffs who bring survival actions, because a survival action is statutory in nature. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 903 (Tex. 2000). Hary, a nursing home resident, filed a suit alleging that the nursing home was negligent and grossly negligent in failing to provide her with appropriate medical treatment. *Id*. at 890-91. Upon Hary's death, Auld, the administratix of Hary's estate, continued the case as a survival action and was awarded a substantial jury verdict. *Id*. at 891. The court applied a cap to the damages in accordance with a statutory provision in the Medical Liability and Insurance Improvement Act.[7] In 1988, the court found that this statutory cap violated the open courts provision as it applied to common law claims for personal injuries resulting from medical negligence. *Id*. at 902 (citing *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988)). Despite the fact that Auld's case was based on Hary's claims for negligence and gross negligence, two common law causes of action, the statutory cap did not violate the Open Courts provision because Auld's survival claim was statutory. *Id*. The Court emphasized that statutes violate the open courts provision only if they restrict access to court for a *common law* cause of action. *Id*. at 903.

In 2002, the Texas Supreme Court addressed an open courts challenge to the provision of the Texas Motor Vehicle Commission Code that grants the Texas Motor Vehicle Board exclusive jurisdiction to regulate the sale, distribution, and leasing of motor vehicles.[8] The plaintiff in *Subaru v. David McDavid Nissan, Inc.* ("McDavid"), sued Subaru of America, Inc. for refusing to allow the dealer to relocate its Subaru dealership after verbally consenting to the move. *Subaru*, 84 S.W.3d at 217. McDavid claimed the statute unconstitutionally restricted its access to the Texas court system because it required the dealership to exhaust all of its administrative remedies through the Texas Motor Vehicle Board before pursuing common law and statutory causes of action in court. *Id*. at 227. The court declared that "the [Motor Vehicle Code] sections providing that a dealer must obtain a license to operate a franchise at a certain location confer statutory rights on motor vehicle dealers that do not exist at common law." *Id*. Because the right to operate a car dealership is a statutory right, McDavid's claims constituted statutory, not common law rights, and, thus, were not protected by the open courts provision. *Id*. In other words, McDavid failed to establish the first prong of the open courts test because it could not demonstrate that it had a *common law* cause of action that had been restricted by a statute. *Id*. Therefore, McDavid's constitutional challenge failed. *Id*.

In 1999, the Texas Supreme Court rejected a claim that the Texas "borrowing statute" violated the open courts provision.[9] The borrowing statute provides that an out of state plaintiff whose personal injury claim arises in a state with a limitations period shorter than the Texas period must file suit within the time limitation provided by the other state's law. *Owens Corning*, 997 S.W.2d at 566 (citing Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a)(3)). In *Owens Corning*, out of state plaintiffs whose asbestos claims arose in Alabama and most likely would have been timely if governed by Texas law brought personal injury claims in Texas after the applicable Alabama statute of limitations expired. *Id*. at 572. They challenged the constitutionality of the borrowing statute, claiming that Alabama's statute of limitations for such cases did not provide a reasonable opportunity for asbestos victims to discover their injuries

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Id. The statute in question was Tex. Rev. Civ. Stat. Ann. art. 4590i, § 11.02(a), which has been replaced by Tex. Civ. Prac. & Rem. Code Ann. § 74.301 (Vernon 2005). However, this statutory change is not pertinent for the purposes of this article.

Id. The statute in question was Tex. Rev. Civ. Stat. Ann. art. 4590i, § 11.02(a), which has been replaced by Tex. Civ. Prac. & Rem. Code Ann. § 74.301 (Vernon 2005). However, this statutory change is not pertinent for the purposes of this article.

Owens Corning, 997 S.W.2d 560. The "borrowing statute" challenged in this case was Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a)(3) (Vernon 2004).

and file suit, arguing that the open courts provision should give them additional time to file their claims. *Id*. at 574. The Court found the borrowing statute to be a valid exercise of the state's police power in that it prevents out of state plaintiffs from gaining more rights in Texas courts than they would have in the state where the cause of action arose. *Id*. As such, the statute represses forum shopping and conserves Texas' judicial resources. *Id*. Therefore, the Court held that the Texas Legislature took reasonable action to alleviate a problem in the Texas court system when it enacted this statute and did not abrogate the plaintiffs' access to Texas courts in violation of the open courts provision. *Id*.

In *Hinterlong*, the Fort Worth Court of Appeals found a provision of the "crime stoppers" statute unconstitutional as it applied to a very limited set of circumstances.[10] Hinterlong was a senior at Arlington Martin High School ("AMHS") when a crime stoppers "tipster" called a teacher to report that Hinterlong was hoarding alcohol in his car. 109 S.W.3d at 616. When a school official searched his trunk, she found a water bottle with a very small amount of what appeared to be alcohol inside. *Id*. at 617. Because of the school's zero tolerance policy for alcohol, AHMS expelled Hinterlong and placed him in an alternative school. *Id*. at 619. Hinterlong was eventually acquitted for his minor in possession charge. *Id*. Hinterlong claimed the tipster had called in the crime stoppers tip maliciously and had planted or had someone else plant the water bottle in his car. *Id*. He sought to assert the common law claims of defamation, malicious prosecution, and negligence against a school official, the tipster, and the person or persons who allegedly planted the water bottle in his car. *Id*. However, the crime stoppers statute protected the identity of the tipster. *Id*. at 623. The court applied the two prong open courts test and determined that the statute violated the open courts provision in these circumstances. *Id*. at 633. It restricted Hinterlong's common law cause of action because he could not successfully file suit for his common law claims without knowing the identity of the tipster. *Id*. at 630. Furthermore, the restriction proved arbitrary and unreasonable when balanced against the legislative purpose of the statute under these circumstances. *Id*. at 631. The protection of the identity of crime stoppers tipsters is meant to encourage legitimate tips concerning criminal activities, which is clearly a valid state interest. *Id*. However, in the setting of public schools with zero tolerance programs, the court found that protecting the identity of tipsters encourages illegitimate tips and setup situations. *Id*. at 632. To resolve the constitutional violation the court adopted an in camera review procedure in which the trial court would review the protected information and provide as much information to Hinterlong as necessary for him to establish his claims. *Id*. at 634.

In recent years, the Texas Supreme Court has not found any statute unconstitutional under the open courts provision. Challenges to the constitutionality of the medical liability statute of limitations in *Earle* and *Shah* failed because plaintiffs had reasonable opportunity to discover the alleged wrongs and file suit within the limitations period. In *Horizon/CMS Healthcare* and *Subaru*, constitutional challenges failed because the challengers' causes of action had statutory, not common law roots. The challenge to Texas's borrowing statute in *Owens Corning* failed because the legislative purpose behind the statute was reasonable when balanced against the restriction it imposed on the plaintiffs. Finally, the challenge to the Texas crime stoppers statute was successful in the Texas Court of Appeals in Fort Worth because it unreasonably restricted the plaintiff's common law cause of action. These cases shed light on the prospects for future open courts challenges. Based on these recent opinions, it appears as though Texas courts, especially the Texas Supreme Court, have been reluctant to strike state statutes for violating the open courts provision.

D. Unconstitutional Takings

The police power includes the authority of the government to regulate, restrict, control, or prohibit the conduct of any business that affects the health, safety, morals, comfort, or general welfare of the public. The right to engage in any lawful business, occupation, or profession is therefore not absolute, but is subject to whatever reasonable restrictions and regulations the protection of the public may require. To the extent that such restrictions and regulations effect an uncompensated transfer or destruction of vested property rights, however, they are subject to challenge as an unconstitutional governmental taking or destruction of private property without compensation or due process.

Article I, Section 17 of the Texas Constitution provides, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate

[10] *Hinterlong*, 109 S.W.3d at 632-633; the challenged statute in the case was Tex. Gov't Code Ann. § 414.008 (Vernon 2004).

compensation being made. . . ." TEX. CONST. art. I, § 17. This provision has been construed as the equivalent of the takings clause of the Fifth Amendment to the U.S. Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

Article I, Section 19 of the Texas Constitution provides, "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. The Texas Constitution's "due course of law" provision parallels the due process clause of the Fourteenth Amendment to the U.S. Constitution, which provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. Like the federal due process clause, the Texas due course of law provision contains both a procedural component and a substantive component. *Barshop v. Medina County Underground Water Conservation Dist*., 925 S.W.2d 618 (Tex. 1996).

The takings clauses apply most obviously in the context of governmental takings of real property by eminent domain. This is a topic of great current interest and vast discussion possibilities, but one that will not be treated here. The takings and due process clauses have also been invoked as the basis for constitutional challenges to statutes and rules that affect other property rights and interests, including the right to engage in lawful activities and occupations that are subject to state regulation.

For example, the constitutionality of government-set rates and governmental price controls on regulated services and commodities is subject to challenge if the rates are "confiscatory" – that is, if they "result in a 'deprivation of property without due process of law or the taking of private property for public use without just compensation.'" *City of Corpus Christi v. Public Util. Comm'n*, 51 S.W.3d 231, 241 n.34 (Tex. 2001) (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51, 56 S.Ct. 720 (1936)). Constitutional due process requires that a government-set rate allow a regulated entity to "operate successfully;" that is, to earn a reasonable return on its investment, a profit sufficient to assure confidence in the ongoing financial integrity of the enterprise and attract capital. *See Railroad Comm'n v. Houston Natural Gas Corp*., 155 Tex. 502, 523, 289 S.W.2d 559, 572 (Tex. 1956); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281 (1944); *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 692-93, 43 S.Ct. 675, 676, 679 (1923). While acknowledging the constitutional limitations on government price controls, the courts define a "broad zone of reasonableness" within which a government-set rate is constitutionally permissible, and, in testing the rate for validity, balance the constitutionally protected property interests of public utility investors with the legitimate public purpose of protecting consumers from exploitative rates. *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770, 88 S.Ct. 1344, 1361 (1968).

The constitutionality of a government-set rate is most likely to arise in the appeal of an order issued in a contested case conducted under a rate ordinance or statute the constitutionality of which is not contested. *See, e.g., City of Corpus Christi v. PUC*, 51 S.W.3d 231 (involving both evidentiary-based and constitutional challenges to rates). However, ratesetting is essentially a legislative function, and a statute or regulation that, on its face or as applied, results in confiscatory rates is subject to challenge by an affected party. One such challenge is currently pending before the Third Court of Appeals. *Montemayor v. State Farm Lloyds*, No. 03-05-0057-CV (Tex. App.-Austin, filed Feb. 9, 2005) (district court struck down as confiscatory, on its face and as applied, an insurance rate statute that by its terms allowed commissioner to affirm an agency-set rate with no provision for profit, absent proof by insurer that rate would cause insolvency). *See also Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990) (Nevada statute mandating across-the-board auto insurance rate rollback, with no mechanism for relief from resulting confiscatory rates, declared unconstitutional on its face); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247 (1989) (provision in California statute permitting relief from statutorily rolled-back, frozen rates only if insurer "substantially threatened with insolvency" struck down as facially unconstitutional).

E. Restrictions on Abortions and the Texas Constitution's Equal Rights Amendment, Equal Protection Clause and Right to Privacy

In *Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002), the Supreme Court addressed Texas constitutional challenges of abortion funding restrictions. The federal Medicaid program provides matching funds

to states that provide health services to the indigent. The Hyde Amendment to that federal legislation limits the use of federal matching funds for abortions. The Texas Legislature created a mechanism to utilize the federal Medicaid funding through the Texas Medical Assistance Act (TMAP). TMAP prohibits the provisioning of any service under the state program unless federal matching funds are available. Thus, TMAP incorporates the Hyde Amendment with respect to the use of state funds. In *Bell*, physicians and clinics sought a declaratory judgment that TMAP violated the Texas Constitution's equal rights amendment, equal protection clause, and rights of privacy. *Id.* at 255.

In a unanimous decision, the Supreme Court rejected all challenges. While the Court agreed that the legislation denied equality to women because virtually all medically necessary services were provided to indigent men, the Court concluded that the classification was not impermissibly sex based. The Court relied, in part, on federal court standards in disparate impact cases for reaching this conclusion but also recognized that the Texas equal rights amendment has no federal counterpart and "was intended to enlarge upon the federal equal protection guarantees" by "elevating sex to a suspect class and subjecting sex-based classifications to heightened strict-scrutiny review." *Id.* at 262. The Court determined, however, that the strict scrutiny test was inapplicable because "we do not believe the discouragement of abortion through funding restrictions can, by itself, be considered purposeful discrimination against women as a class." *Id.* at 263. The legislation easily passed the rational-basis standard of review. *Id.* at 264. The Court also relied heavily on federal precedent in rejecting the right of privacy issue, distinguishing between governmental action prohibiting abortion and "the government's decision to encourage childbirth as a policy matter." *Id.* at 265. Finally, the Court followed the federal rational-basis standard in reviewing the legislation under the equal protection clause.

While the case had a predictable outcome, it is instructive in the extent to which the Supreme Court is willing to rely on federal authority for evaluating constitutional issues.

F. Unlawful Delegation of Legislative Authority to State Agencies and Private Entities

Over the last several years, numerous constitutional challenges have been made to statutes on the ground that the statute unlawfully delegates the authority of the Legislature to a state agency or a private entity. Two Texas constitutional provisions are relevant: Article II, Section 1 and Article III, Section 1. Article II, Section 1 is a "direct prohibition of the blending of the legislative, executive, and judicial departments" – *i.e.*, a separation of powers provision. *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998). Article III, Section 1 addresses where the legislative power lies, vesting it in the Senate and House of Representatives. "Article II and Article III both apply when the constitutionality of the Legislature's delegation of power to another branch of state government, such as an administrative agency, is challenged. Article II is not relevant, however, to a legislative delegation of authority to an entity that is not a part of state government." *Proctor v. Andrews*, 972 S.W.2d at 733. Thus, the provision at issue with respect to delegations of legislative authority to private entities is Article III, Section 1. *Id.*

1. Unlawful delegation to other governmental entities

Under these constitutional provisions, the Legislature may delegate its powers to agencies and other governmental bodies to carry out its legislative purposes "as long as it establishes 'reasonable standards to guide the entity to which the powers are delegated.'" *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (citations omitted). Because of the practical necessity of permitting delegation of authority to governmental bodies to implement state statutes, courts are reluctant to strike statutes on the ground of unlawful delegation to a public entity. Thus, while there have been recent challenges to the delegation of authority to public entities, they have been generally unsuccessful.

In *Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency*, 112 S.W.3d 234, 240 (Tex.App.-Austin 2003, no pet.), an advocacy group for disabled children and their parents challenged a TEA rule establishing a one-year limitations period for administrative hearings to challenge a disabled child's individualized education plan and an additional rule imposing a 90-day time limit to appeal a TEA decision regarding such a plan. This case reflects an unusual use

of the separation of powers provisions in Article II, Section 1. Texas Advocates argued that, because TEA exceeded its authority in promulgating the rules, the agency had violated this constitutional provision. While the court noted that it was "not necessarily incorrect" to rely on the separation of powers doctrine, "the normal practice is to challenge agency action as being in excess of its statutory authority without making explicit reference to separation of powers." *Id.* at 237 n.1.

Texas Advocates also made the more traditional separation of powers argument that the delegation of power to TEA to promulgate a limitations period was void for lack of reasonable standards to guide TEA. *Id.* at 240. Texas Advocates did not challenge the sufficiency of the legislative standards for the statewide design to educate disabled children consistent with a federal law addressing these matters. Instead, it argued that the Legislature was required to give detailed guidelines for establishing a limitations period for administrative hearings challenging a plan. *Id.* The court rejected this argument, reasoning that establishing the limitations period was an integral part of the design and the legislature had prescribed sufficient standards to guide TEA's discretion. *Id.* In other words, no particular guidelines for establishing a limitations period were constitutionally required.

The court, however, upheld the trial court's determination that TEA exceeded its statutory authority in imposing a 90-day limitations period for filing suit for judicial review on federal preemption grounds. The federal law that TEA was required to implement, and that authorized, judicial review of TEA decisions did not impose a limitations period for judicial review. The federal courts had determined that the appropriate limitations period for judicial review under the federal law was Texas' two-year limitations period for tort actions. *Id.* at 241. The court of appeals further indicated that there was nothing in the state statute indicating any intent to confer authority on the agency to develop procedures for judicial review of its own decisions. *Id.*

Ex parte Smalley, 156 S.W.3d 608, 610 (Tex.App.-Dallas 2004, pet. granted), is a case to watch, as the Court of Criminal Appeals has granted review. Pursuant to Chapter 243 of the Local Government Code, municipalities have been delegated authority to regulate certain sexually oriented businesses to promote the public health, safety or welfare. In *Smalley*, a cabaret dancer, fined for touching a customer while exposing a portion of her breast, challenged the authority of a city ordinance to regulate sexually oriented businesses. *Id.* at 609. The Dallas Court of Appeals rejected the argument that the statutes unlawfully delegated legislative authority to municipalities, finding that the statutes contained sufficient reasonable guidelines. Those guidelines were fairly minimal, basically authorizing cities only to adopt regulations that are necessary to promote the public health, safety, or welfare and limiting each city's authority to its corporate limits. Finding these general guidelines sufficient, the court reasoned that "[t]he standards for regulation may be broad where conditions must be considered that cannot be conveniently investigated by the legislature." *Id.* at 611. There is some question as to whether municipalities already have the authority to regulate these businesses and, therefore, the ordinance does not need the state statute in order to be upheld. It may be that the court will affirm the decision on that basis.

In *Texas Building Owners and Managers Ass'n, Inc. v. Public Utility Commission*, 110 S.W.3d 524, 530-31 (Tex.App–Austin 2003, pet. denied), the Austin Court of Appeals rejected an unlawful delegation challenge to authority given the Public Utility Commission to settle disputes between private parties and telecommunications utilities regarding access to or across private property to provide service. These disputes typically arise in buildings with multiple tenants who choose providers different from those preferred by the landlords. Several landowners challenged the statute claiming that (1) the statute was an unconstitutional taking, (2) the PUC did not have delegated power to determine compensation for access, and (3) if the Legislature did delegate the power to determine compensation, the delegation was unconstitutional. "According to the Building Owners, the precise mode and method for determining compensation must be written into the Statutes." *Id.* at 536.

The court held that the statute gave the PUC the power to determine compensation and rejected the argument that there were insufficient statutory standards for determining compensation. The court reasoned that the express authority given to the PUC to enforce the statute and its general authority to engage in rulemaking were sufficient to meet the requirement of reasonable guidelines. "Here, the government–acting through the Commission–has relied on an express enforcement provision in the Statutes to adopt detailed rules that provide a process for obtaining compensation. Thus, on their face, the Statutes provide for the existence of a reasonable, certain and adequate provision for obtaining compensation." *Id.* at 537 (citation omitted).

The court's reasoning suggests that the only constitutionally required standard was the basic standard that the agency "enforce" the statute, with the statute itself requiring reasonable compensation. It is difficult to imagine how any statute could fail this delegation test. But the court's decision reasonably reflects the practicalities of legislation. It is easy enough for the courts to protect property owners' rights by limiting judicial review to ascertaining whether the agency actually implements the constitutional requirement of just compensation. Here, because the challenge was a facial one, the court did not reach the issue of whether any individual property owner had been denied its rights either procedurally or substantively. "Because a lack of adequate procedures to establish compensation is a necessary element to establish a claim under the takings doctrine, the Building Owners cannot have a takings claim until they have availed themselves of the Commission's procedures and have been denied just compensation." *Id.* a 537-38.

2. Unlawful delegation to private entities

The key case for evaluating the constitutionality of statutes delegating powers to private entities is *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 465 (Tex.1997). In *Boll Weevil*, the Supreme Court held that the delegation of authority to a private foundation to operate a boll weevil eradication program and assess growers for the cost of the program was unconstitutional. The statute at issue required the Commissioner of Agriculture to establish and select a Foundation board and promulgate some of the Foundation's rules. *Id.* However, once established, the Foundation was not subject to review or dismissal by the Commissioner of Agriculture. *Id*.

As the Court noted in *Boll Weevil*, private delegations raise "more troubling constitutional issues than their public counterparts." *Id.* at 469. A private delegate "may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government." *Id*. Determining that private delegations require a "more searching scrutiny," the Court developed eight factors to consider in determining whether a private delegation is constitutional. The eight factors are:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?

2. Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process?

3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?

4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?

5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?

6. Is the delegation narrow in duration, extent, and subject matter?

7. Does the private delegate possess special qualifications or training for the task delegated to it?

8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

Id. at 472.

The Court emphasized that a private delegation need not satisfy all eight of the factors. The foundation in *Boll Weevil* failed factors 1, 3, 4, 7 and 8. *Id*. at 473-75. The Court concluded that "the Act as a whole represents an overly broad delegation of legislative authority to a private entity, violating a majority of the eight factors we have set forth. Therefore, the Act cannot stand." *Id.* at 475.

The Supreme Court has addressed the issue of delegation to private entities several times since *Boll Weevil*, applying the 8-factor test. In *Proctor v. Andrews*, 972 S.W.2d 729 (Tex. 1998), Lubbock police officers who were suspended because of violation of civil service rules elected to appeal their suspensions pursuant to a statute providing for arbitration services. The City refused to comply on the ground that the statute was an unconstitutional delegation of authority to a private entity. Finding that the first factor was not satisfied because the selection of the arbitrators was not subject to any meaningful governmental review, the Court nevertheless

upheld the statute because it satisfied all of the seven other factors. *Id.* at 737-38.

In *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000), the Court struck a provision in the Water Code permitting certain private landowners to create "water quality protection zones" in certain cities' extraterritorial jurisdictions. The Court found that the statute failed factors 1, 2, 4, and 6 and that factors 7 and 8 weighed neither for nor against the delegation. The Court indicated that it placed particular weight on factors 1 – the existence of meaningful governmental review of the delegates' actions – and 4 – the existence of a conflicting private or pecuniary interest by the delegate. *Id.* at 875. The Court concluded that "the delegation here presents the very concerns this Court identified in *Boll Weevil*." *Id.* at 877. The Court expressed particular concern that the statute gave the landowners the authority to exempt themselves from municipal regulations, the landowners were not elected by the people or appointed by the government, and had a pecuniary interest that could be inconsistent with the public interest. *Id.*

These successful uses of the unlawful delegation doctrine apparently spawned an unsuccessful attempt to characterize an agency rule requiring participation by the private entities regulated as a delegation of the agency's authority to those entities. In *Texas Workers' Compensation Commission v. Patient Advocates of Texas*, 136 S.W.3d 643 (Tex. 2004), a patient organization and provider of health care to injured workers ("PAT") challenged the validity of health care reimbursement rules promulgated by the Commission. PAT argued that the Dispute and Audit Rules, which granted insurance carriers the right to gather additional information from health care providers for purposes of paying or denying a medical claim, unlawfully delegated authority to the carriers. *Id.* at 655. The Court found that this authorization did not delegate *any* legislative authority: the carriers had no power to set public policy or to perform the Commission's audit reviews and no authority to determine the controlling law. *Id.* The Court also rejected PAT's argument that the rules delegated the Commission's fee-setting authority to the carriers because it permitted the carrier to develop a methodology to determine reimbursement amounts. *Id.* The Court concluded there was no delegation of fee-setting authority at all: the Commission made the decision on the proper payment, subject to judicial review, and the carriers were required to follow agency rules in establishing their methodologies. *Id.* at 656-57.

G. Unlawful Delegation of Powers Vested in the Judicial Branch to State Agencies

The separation of powers doctrine established in Article II, Section 1 of the Texas Constitution also prohibits the Legislature from interfering with the powers vested in the judicial branch. In *Barshop v. Medina Underground Water Conservation District*, 925 S.W.2d at 635,[11] landowners challenged the Edwards Aquifer Act as violative of the separation of powers doctrine on the ground that the statute allowed the Authority to determine the nature and extent of landowners' property rights to water beneath their land. While the Court acknowledged that "the power to determine controverted rights to property by means of binding judgment is vested in the judicial branch," the Court nevertheless rejected the challenge. *Id.* The Court reasoned that "[t]his principle does not bar administrative agencies of the executive branch of government from working in tandem with the judicial branch to administer justice under appropriate circumstances." *Id.* The Court relied heavily on the fact that the Authority's determinations were subject to judicial review under the APA. *Id.*

H. Constitutional Prohibition Against Gratuitous Payment of Public Money to Individuals, Associations or Corporations

The Texas Constitution has two provisions prohibiting gratuitous payments of public monies.
Article III, section 51 of the Texas Constitution provides:

> The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.

Article III, section 52(a) of the Texas Constitution provides:

> [T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State

[11] *Barshop* involved numerous constitutional challenges. A review of it for possible grounds for challenging a statute is recommended.

> to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever.

The first prohibition is a prohibition against the Legislature making these prohibited payments itself. The second prohibition prevents the Legislature from requiring its political subdivisions to make such payments. The Texas Supreme Court has interpreted these provisions to permit payments that serve a public purpose with a "clear public benefit received in return." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 720 (Tex. 1995). In other words, the prohibition is only against "gratuitous" payments. *See Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d at 383. A payment is not "gratuitous" if the government receives consideration in return for the payment. *Id.*

The Supreme Court has articulated a three-part test to determine whether a statute has a public purpose:

> [T]he Legislature must: (1) ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit.

Id.

The Court has been generally disinclined to strike legislation as violative of either of these provisions. In *City of Corpus Christi v. Public Utility Commission*, 51 S.W.3d at 254, the Court held that the provisions were inapplicable to charges that the Legislature had authorized the PUC to order paid by ratepayers to utilities for their investment in generation plant and equipment that would become uneconomic or "stranded" after the State transitioned to a competitive electric market. The Court side-stepped the public purpose distinction altogether, reasoning that the required payments were nothing more than a continuation of PUC ratemaking and did not involve the use of state or public funds to pay the charges. *Id.*

In *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, 74 S.W.3d 377 at 384, the Court rejected a challenge that a state statute requiring compensation carriers to pay unclaimed death benefits into the Subsequent Injury Fund violated Section 52(a) with respect to application to the risk pool, which was a joint insurance fund consisting of 1600-member cities that elected to self-insure for purposes of workers' compensation liability. The Court first held that the constitutional provision was not even applicable because the Fund was neither an individual, association or corporation under Section 52(a) but was, instead, an account in the State treasury. Recognizing that the Fund, however, ultimately disbursed the contributed monies to individuals, the Court concluded that payments to individuals were not unconstitutional here because the cities received some consideration in exchange for the required payment. *Id.* at 384. "Specifically, the TWCC's statutory obligation to pay lifetime benefits from the Fund to any Risk Pool member city's employee who suffers a subsequent injury and qualifies for these benefits is consideration." *Id.* at 385. Finally, the Court concluded that payment of these unclaimed death benefits to the Fund "accomplishes a legitimate public purpose." *Id.*

I. Constitutional Prohibition Against "Local" or "Special" Laws.

Article III, Section 56 of the Texas Constitution prohibits the Legislature from enacting local or special laws regarding a variety of matters, ranging from interest rates and liens to cemeteries and divorces. While the provision appears at first glance to constitute a viable mechanism to challenge a variety of statutes, its recent use has been largely unsuccessful. *See, e.g., Zaragoas v. Chemetron Invs., Inc.*, 122 S.W.3d 341, 347 (Tex. App.–Fort Worth 2003, no pet.) (unsuccessful challenge to 15-year statute of repose for products liability suits against manufacturers and sellers of equipment); *Thomas v. Bush*, 23 S.W.3d 215, 219 (Tex. App.–Beaumont 2000, pet. denied) (failed challenge to statute prohibiting inmates from filing *pro se* suits unless they filed affidavit identifying prior suits). A "local law is one limited to a specific geographic region of the state, while a special law is limited to a particular class of persons distinguished by some characteristic other than geography." *Juliff Gardens*, 131 S.W.3d at 281. Laws targeting specific geographic regions or class of people, however, are not *per se* unconstitutional. "The primary and ultimate test of whether a law is general or special [so as to be unconstitutional] is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class." *Maple Run*

at Austin Mun. Util. Dist. v. Monaghan, 931 S.W.2d 941, 945 (Tex. 1996).

In *Juliff Gardens*, an applicant for a landfill permit challenged a state law requiring denial of his application as an unconstitutional local or special law. The plaintiff argued that the legislative history of the statutory amendment at issue, passed while his landfill application was pending, established that the amendment specifically targeted his application and, as such, was unconstitutional. 131 S.W.3d at 283. The Austin Court of Appeals rejected the argument, reasoning that the constitutional analysis focused on "the reasonableness of the statute's classifications" rather than "the precipitating forces that led to its enactment." *Id.* The court upheld the statute "because the classifications within the section are reasonable, and because the law operates equally on all within the class." *Id.* at 285.

VI. Challenges Based on the U.S. Constitution

Pursuant to the Supremacy Clause of the U.S. Constitution, State statutes and agency rules are always subordinate to either federal statutes or constitutional provisions with which they conflict. U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land" and that "the Judges in every State shall be bound thereby." *Id.* The Clause has been interpreted to require state laws to yield to federal law when they "interfere with, or are contrary to the laws of Congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

There are three basic types of federal preemption: express, field, and conflict preemption. *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275 (1990). Express preemption occurs when Congress explicitly defines the extent to which its enactment preempts state law. *Id.* at 78, 110 S.Ct. at 2275. While express preemption may sound like the easiest, clearest form of preemption, cases turning on express preemption are often split decisions, suggesting that it is not always altogether clear just what Congress has "expressed." *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992). Field preemption occurs when "Congress intends federal law to 'occupy the field.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 2293 (2000). Conflict preemption occurs when "it is impossible for a private party to comply with both state and federal law" and when the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" 530 U.S. at 372-73, 120 S.Ct. at 2294. These categories are helpful in an analysis of preemption issues, but it should be kept in mind that they are not "rigidly distinct" and a statute may fall into more than one category. *English v. General Elec. Co.*, 496 U.S. at 79 n.5, 110 S.Ct. at 2275 n.5.

A. Challenges Under the Dormant Commerce Clause

A couple of recent decisions have involved challenges to the constitutionality of state statutes under the dormant Commerce Clause. The "dormant" or "negative" Commerce Clause of the U.S. Constitution "prohibits states from engaging in economic protectionism." *International Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004).

In *International Truck*, a truck manufacturer challenged as violative of the dormant Commerce Clause the Texas Occupations Code section that bars a truck manufacturer from operating as a dealer of used trucks. *Id.* at 724. As a prohibition against acting as a dealer, the statute effectively prohibits manufacturers from selling used vehicles because, in making the sale, the manufacturer would be "acting as a dealer." *Id.* at 719. The manufacturer argued that such a prohibition was discriminatory and impermissibly burdened the out-of-state economic interests of manufacturers and benefited the local interests of in-state car and truck dealers. The court rejected the argument, finding that the statute did not discriminate between similarly situated in-state and out-of-state interests *at all*. *Id.* at 726. The court reasoned that there was nothing in the legislative history of the statute "to suggest that the Texas Legislature intended to discriminate between similarly situated interests" and that the statute did not discriminate because it applied to "motor vehicle manufacturers, whether Texas-based or not." *Id.* The court also found no discrimination against dealers based on out-of-state status because "any non-manufacturer, whether Texas-based or not, could receive a dealer license." *Id.*

In *Home Interiors & Gifts, Inc. v. Strayhorn*, No. 03-04-00600-CV, 2005 WL 178480 (Tex. App.–Austin 2005, July 28, 2005, no pet.), a taxpayer challenged the constitutionality of the Texas corporate franchise tax under the dormant Commerce Clause. To survive a challenge under the Commerce Clause, a state tax must be fairly apportioned so as to ensure that no state taxes more than its fair share of an interstate transaction. *Id.* at *5. The tax must be "internally consistent" – *i.e.*, the

tax must result in fair apportionment under a hypothetical scenario in which every state imposes a tax identical to the one at issue. *Id.* at *6. The court held that the franchise tax flunked this test because an interstate corporation would be liable for franchise taxes on its net taxable capital in all states in which it did business, while a corporation doing business only in Texas would not. *Id.* at *8. This rendered the Texas tax internally inconsistent because the interstate corporation would be taxed on its net taxable earned surplus in Texas and would pay franchise tax on its net taxable capital in all other states. *Id.* The majority expressed reluctance to reach this result because the risk of such a nationwide tax scheme was purely theoretical but concluded that the U.S. Supreme Court precedent compelled the result. *Id.* at *10.

B. Preemption When a State Agency Misapplies the Federal Law It Implements

Congress often passes federal laws and standards in a regulated area but leaves to the states the implementation of much of the federal program. Preemption issues often arise when the state attempts to interpret the federal law.

1. The federal Telecommunications Act of 1996

In 1996, Congress passed legislation that was designed to bring competition to the local telephone market. State commissions implement much of the applicable laws, but the FCC also regulates in the area and conflicts often arise with respect to state regulation that impacts telecommunications providers who operate on an interstate basis. In *AT&T Corp. v. Public Utility Commission*, 373 F.3d 641 (5th Cir. 2004), the Fifth Circuit struck down a state regulation that required all carriers providing intrastate service to pay a percentage of their total telecommunications revenue originating in the state into a state universal service fund. The FCC had a similar fund for interstate services, and the state funding system would have required payment on the basis of interstate calls that originated in Texas. The Court agreed with the district court's ruling that the state's "assessment of revenues derived from both interstate and intrastate calls was inequitable and discriminatory because it burdened multijurisdictional carriers more harshly than their pure interstate competitors." *Id.* at 645. The Court concluded that the state scheme conflicted with the federal law that restricted the State's authority to create a universal service fund to actions that were not inconsistent with the federal scheme. *Id.* at 647. Since the FCC's fund assessed fees on the basis of interstate revenues, the state was precluded from doing so.

2. The federal Medicaid laws

Another area with the potential for conflicts between state and federal law is the states' implementation of federal Medicaid benefits. In *Comacho v. Texas Workforce Commission*, 408 F.3d 229 (5th Cir. 2005), the Fifth Circuit invalidated a TWC rule that required termination of Medicaid benefits if recipients failed to ensure their children's immunizations, wellness check-ups, school attendance, or failed to avoid substance abuse. Federal law establishes various standards for both the federal-state Temporary Assistance for Needy Families ("TANF") and the federal Medicaid Act. States are given relatively broad authority with respect to the operation of the TANF program, including authority to terminate TANF assistance for a variety of social and policy reasons such as the TANF recipients' refusing to work, failing to keep their children in school or failing to avoid substance abuse. Much less discretion is given the states with respect to terminating Medicaid benefits, and a federal statute expressly limits termination of Medicaid benefits to TANF recipients who are having their TANF benefits "because of refusing to work." 42 U.S.C. § 1396u-1(b)(3).

The Fifth Circuit rejected TWC's argument that the beneficial activities such as keeping children in school and avoiding substance abuse could be characterized as work under the federally defined work activity of "job search and job readiness." The court held that both the plain language of the Medicaid Act and the rest of the Act rendered TWC's interpretation impermissible. *Id.* at 235. Concluding that TWC's definition of work fell outside the "range of permissible choices" granted to the State, the court also rejected TWC's argument that its interpretation should be accepted because the Medicaid Act is "designed to advance cooperative federalism." *Id.* at 236 (quotations and citations omitted). The court did not address the issue of whether TWC's interpretation of federal law should be given any deference, concluding that deference of any sort was inapplicable because where "the intent of Congress is clear, that is the end of the matter." *Id.* at 237.

3. Restrictions on Abortion Funding and Clinics

Like other states, Texas voluntarily participates in several federal programs that provide funds for family planning services. The Public Health Service Act, which provides federal grants to public and private agencies, and the Social Security Act, which provides states with block grants for social services, both prohibit use of federal funds to finance abortions. Planned Parenthood entities in Texas (collectively "Planned Parenthood") have long been a recipient of these funds for use in its family planning services. It has never used the funds for abortion services but has, instead, relied on private donations for that part of its services. In 2003, the Texas Legislature elected to take restrictions on abortion services a step further than the federal prohibition and passed legislation that no funds for family planning could be distributed to individuals or entities that perform elective abortion procedures. The Texas Department of Health ("TDH") interpreted the statute to prohibit payments to entities like Planned Parenthood. TDH sent letters to Planned Parenthood, requiring it to sign and return an affidavit that pledged that it would not perform elective abortion procedures and would not contract with or provide funds to individuals or entities that did.

In *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), Planned Parenthood sued the Commissioner of Health to enjoin TDH from implementing the statute on the ground that it imposed an unconstitutional condition on Planned Parenthood's eligibility for the funds. It argued that the state statute imposed an additional condition on eligibility for funds that was inconsistent with the federal requirements and, therefore, was in violation of federal Spending Clause legislation, and further argued that the state legislation imposed an unconstitutional burden on a woman's right to obtain an abortion. *Id.* at 328. The district court granted preliminary injunctive relief, which the Commissioner appealed.

TDH argued that the federal courts could not consider Planned Parenthood's suit because it was not seeking to vindicate any right or to enforce any duty running to it, the right to abortion resting with the female patients. *Id.* The Fifth Circuit rejected this argument, holding that the entity had stated a claim for Spending Clause preemption. *Id.* at 332-34. The court rejected TDH's argument that Planned Parenthood was required to establish a viable claim under 42 U.S.C. § 1983, which had the additional requirement that the federal law on which preemption was based be intended to confer individual rights on the plaintiff. The court further declined to reach the issue of whether Planned Parenthood could sue under § 1983. *Id.* at 335.

Neither affirming nor reversing the district court's injunction, the Fifth Circuit remanded, reasoning that the statute was ambiguous and could be interpreted to permit distribution of funds to Planned Parenthood as long as it created separate affiliates to perform the abortion services. The court stated, "The mere fact that a state program imposes an additional 'modest impediment' to eligibility for federal funds does not provide a sufficient basis for preemption." *Id.* at 336-37. The court directed that the district court dissolve the injunction unless Planned Parenthood "can show that the burden of forming affiliates in forthcoming years would in practical terms frustrate their ability to receive federal funds." *Id.* at 342.

Planned Parenthood is important in at least two respects. First, it recognizes an implied right of action under the Supremacy Clause to challenge a state statute as preempted by federal Spending Clause legislation. Second, it indicates that the state *can* impose some additional burdens and restrictions on a federal program, provided those burdens do not unduly frustrate the federal goals.

C. Comprehensive and Express Preemption (or Not)

1. The Broadest Preemption There Is– ERISA

Preemption issues arising out of the federal Employee Retirement Income Security Act ("ERISA"), which governs employee pension and benefit plans, have been a major source of preemption litigation since passage of ERISA in 1974. ERISA is an example of broad federal preemption as a result of comprehensive federal legislation. The most recent, significant case impacting Texas law is *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488 (2004). In *Aetna*, two individuals sued their respective health maintenance organizations (HMOs) for alleged failure to exercise ordinary care in handling coverage decisions, in violation of a duty imposed by the Texas Health Care Liability Act ("THCLA"). The Texas Legislature passed THCLA in response to public outcry over difficulties in obtaining treatment and coverage of claims by HMOs. The

Supreme Court held that the state legislation was preempted by ERISA.

The Court rejected the argument that THCLA fell within the purview of a provision in ERISA excepting from ERISA preemption state statutes that regulate insurance, an area traditionally the province of the states. The Court reasoned that "[a]llowing respondents to proceed with their state-law suits would 'pose an obstacle to the purposes and objectives of Congress.'" 124 S.Ct. at 2500.

In a concurring opinion, Justice Ginsberg noted and joined "'the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.'" *Id.* at 2503. She further noted, "Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the 'equitable relief' allowable under" the federal statute, a "regulatory vacuum" exists in which state law remedies are preempted but few federal substitutes are given. *Id.*

2. Importance of the Scope of the Federal Regulation – a FIFRA case

In contrast to the broad preemption rulings with respect to ERISA, the Supreme Court recently held that various common law claims as well as claims under the Texas Deceptive Trade Practices Act against an herbicide manufacturer for crop damages caused by its herbicide were not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Bates v. Dow Agrosciences LLC*, ___ U.S. ___, 125 S.Ct. 1788 (2005). FIFRA is a comprehensive regulatory statute that governs the use, as well as the sale and labeling, of pesticides and herbicides. A manufacturer seeking to register a pesticide must submit a proposed label to the EPA to ensure that its label complies with the federal statute's prohibition against misbranding. A pesticide is misbranded if its label has false or misleading statements or if its label does not contain adequate instructions for use or omits necessary warnings or cautionary statements. *Id.* at 1795. In approving proposed labels, the EPA essentially determines that there is no misbranding in the label.

The Court held that DTPA, breach of warranty, and fraud claims based on oral misrepresentations by sales agents were not preempted by FIFRA because oral representations are not a requirement for labeling or packaging under FIFRA. Similarly, the Court held that tort claims based on defective design and manufacture, negligent testing, and breach of express warranty were not preempted because state laws in these areas were similarly not requirements for labeling or packing. Finally, the Court held that state-law labeling requirements would not be preempted by FIFRA to the extent they were equivalent to and fully consistent with FIFRA's misbranding provisions.

The Supreme Court ruling reversed a Fifth Circuit decision and overruled several Circuit Court decisions. The Court based its decision on a narrow reading of the express preemption provision in the statute, finding that the statute preempted only requirements for labeling or packaging that were in addition to or different from those required under the federal law. *Id.* at 1798. The key focus was on the *"scope* of that pre-emption" and the Court concluded that rules about labeling and packaging do not encompass within their scope rules governing the design of a product. *Id.* Therefore, product liability standards regarding negligent or defective design are outside the scope of FIFRA.

Successfully characterizing a state statute or rule as addressing matters outside the "scope" of what a federal statutory scheme either expressly or comprehensively regulates appears to be the means to avoid federal preemption.

3. A Narrow Construction of Scope and Plain Language – a CERCLA Decision

A recent Fifth Circuit decision takes the concept of scope of preemption to a new level. This past summer, the Fifth Circuit held that the Texas statute of repose for products liability claims was not preempted by a provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that engrafted a discovery rule onto state statutes of limitations. *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co*, 419 F.3d 355, 364 (5th Cir. 2005). Burlington, a railroad that conducted emergency clean-up and restoration of its right-of-way after the rupture of above-ground chemical storage tanks, sued the seller of the tanks and others on the ground that the tanks were defective. Defendants moved for summary judgment, relying on a Texas statute of repose, which bars products liability claims against manufacturers from suits based on products sold more than 15 years prior to the filing of suit. The date of sale here occurred in 1988; suit was filed in 2004.

Burlington unsuccessfully raised state-law retroactivity and open courts arguments with respect to the Texas statute, which was passed in 2003. The company also argued that Section 9658 of CERCLA, which preempts state statutes of limitations in state law causes of action for personal injury or property damage arising from exposure to any hazardous substance released into the environment, also preempted Texas' statutes of repose. Section 9658 engrafts onto all state statutes of limitations a deferral of accrual of a cause of action "until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action." *Id*. at 362 (quoting statute).

Statutes of repose, like statutes of limitations, impose a time bar for suits. Statutes of limitations are often subjected to court-formulated discovery rules; statutes of repose are not. As the Fifth Circuit noted, statutes of repose are much broader than statutes of limitation:

> A statute of limitations extinguishes the right to prosecute an accrued cause of action after a period of time. It cuts off the remedy . . . . A statute of repose limits the time during which a cause of action can arise and usually runs from an act of a defendant. It abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued.

Id. at 363.

The Court observed that Congress, in passing Section 9658, had expressly addressed only state statutes of limitations and made "no mention of peremptory statutes or statutes of repose." *Id.* at 362. The court therefore concluded that it was bound "by that plain language, absent express congressional intent to the contrary," reasoning that its "interpretation comports with a fundamental principle of statutory construction–common sense." *Id.* at 364. The court further reasoned that Section 9658 was passed in response to concerns about long-latency diseases, not hazardous leaks from storage facilities. *Id.*

The court did not address traditional preemption analysis regarding the purposes of the federal legislation and whether the state statute would thwart those purposes. It is difficult to conceive how a statute of repose, which is even harsher than a statute of limitation, would not thwart a federal statute intended to permit suits timely filed after the plaintiff did or should have discovered the claim. This case is a significant one regarding the primacy of plain language. Under the reasoning in this case, if Congress expressly addresses a particular type of state statute being preempted and fails to mention other state statutes with similar purposes, the latter will survive a preemption challenge regardless of any undermining of the general purposes of the federal legislation.