ROBINSON V. CROWN: FORMULATION OF A NEW TEST FOR UNCONSTITUTIONAL RETROACTIVITY OR MERE RESTATEMENT OF CENTURY-OLD TEXAS PRECEDENTS?

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I. INTRODUCTION

Since the *DeCordova v. City of Galveston* decision in 1849,[1] the Texas Supreme Court has considered the issue of unconstitutional retroactivity numerous times without implementing a clear legal standard.[2] Recently, this uncertain analytical framework has led the Texas appellate courts to reach conflicting holdings in two cases regarding the same Texas statute[3] with nearly identical fact patterns.[4] The *Satterfield* and *Robinson* cases are simple asbestos cases against Crown Cork & Seal Company, Inc. (Crown).[5] Plaintiffs in these cases were diagnosed with mesothelioma years after working with asbestos-containing insulation products manufactured by Mundet Cork Corporation (Mundet).[6] In 1966, Mundet completely merged into Crown.[7] In both cases, the trial courts initially ruled that Crown was liable as successor to Mundet.[8] However, while these suits were pending, the Texas Legislature passed House Bill 4 (H.B. 4).[9] The Statute created a

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[1] *See* 4 Tex. 470, 480–82 (1849).

[2] *See* Robinson v. Crown Cork & Seal Co., 251 S.W.3d 520, 542–43 (Tex. App.—Houston [14th Dist.] 2006) (Frost, J., dissenting), *rev'd*, 335 S.W.3d 126 (Tex. 2010).

[3] TEX. CIV. PRAC. & REM. CODE ANN. §§ 149.001–.006 (West 2011), *invalidated only as applied by* Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126 (Tex. 2010)).

[4] *Compare* Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 195–97 (Tex. App.—Austin 2008, no pet.), *with Robinson*, 251 S.W.3d at 524–26 (majority opinion).

[5] *Satterfield*, 268 S.W.3d at 196; *Robinson*, 251 S.W.3d at 524.

[6] *Satterfield*, 268 S.W.3d at 196; *Robinson*, 251 S.W.3d at 524.

[7] *Satterfield*, 268 S.W.3d at 196; *Robinson*, 251 S.W.3d at 524.

[8] *Satterfield*, 268 S.W.3d at 197; *Robinson*, 251 S.W.3d at 524.

[9] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.01–.02, 2003 Tex. Gen. Laws 847, 892–95 (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 149.001–.006 (West 2011)), *invalidated*

new affirmative defense to successor liability for asbestos-related claims by limiting cumulative successor liability "to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation."[10] Thus, a successor corporation would not be responsible for successor asbestos-related liabilities exceeding this limitation.[11] The Statute applies to "a domestic corporation or a foreign corporation that has . . . done business in this state and that is a successor which became a successor prior to May 13, 1968."[12] The Statute was made effective immediately and retroactively applicable to all cases pending on its effective date.[13] Even though the sponsor of the bill maintained that the Statute was necessary to "[t]o eliminate [the] unfairness . . . [and] to save successor corporations from bankruptcy,"[14] the Legislature clearly sought to protect Crown through this Statute.[15]

Under this new law, Crown promptly moved for summary judgments in both cases.[16] Crown contended that its successor asbestos-related liabilities greatly exceeded the fair market value of Mundet's total gross assets.[17] In its motion for summary judgment in *Robinson*, Crown stated the fair market value of Mundet's total gross assets was $15 million in 1966 ($57 million inflation-adjusted in 2003), but it had already paid over $413 million in

only as applied by Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126 (Tex. 2010); *Satterfield*, 268 S.W.3d at 197; *Robinson*, 251 S.W.3d at 524.

[10] TEX. CIV. PRAC. & REM. CODE ANN. § 149.003(a) (West 2011), *invalidated only as applied by Robinson*, 335 S.W.3d 126.

[11] *Id.*

[12] *Id.* § 149.002(a).

[13] Ch. 204, § 17.02, 2003 Tex. Gen. Laws at 895.

[14] H.J. of Tex., 78th Leg., R.S. 6043 (2003) (statement of legislative intent on H.B. 4).

[15] *See* Hearings on the Proposed Senate Substitute for H.B. 4 Before the Senate Comm. on State Affairs, 78th Leg., R.S. 1783 (Apr. 30, 2003) (statement of Sen. Bill Ratliff) ("This, Members, is the . . . Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this, in this matter.") (archived audio available at http://www.Senate.state.tx.us/ram/archive/2003/apr/043003StAff.ram); Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 704 (Mar. 25, 2003) (statement of bill sponsor Rep. Joe Nixon) (stating, when asked which manufacturers in particular would be protected, that he was "advised that there's one in Texas, Crown Cork and Seal") (archived video available at http://www.house.state.tx.us/fx/av/chamber78/032503a.ram).

[16] Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 199 (Tex. App.—Austin 2008, no pet.); Robinson v. Crown Cork & Seal Co., 251 S.W.3d 520, 523, 526 (Tex. App.—Houston [14th Dist.] 2006), *rev'd*, 335 S.W.3d 126 (Tex. 2010).

[17] *Satterfield*, 268 S.W.3d at 199; *Robinson*, 251 S.W.3d at 526.

settlements.[18] Both trial courts granted Crown's motions for summary judgment and "severed [the plaintiffs'] claims against Crown."[19] On appeal, the court in *Satterfield* held that the Statute was unconstitutional because "the Statute retroactively destroy[ed] [the plaintiff's] *vested rights* in accrued common law tort claims against Crown."[20] However, the court in *Robinson* concluded that "the Statute was a valid exercise of the Legislature's police power . . . benefit[ing] the State as a whole," and therefore, the Statute was constitutional.[21] These cases were problematic not only because the courts reached different legal conclusions on the same facts, but also because these courts based their holdings on two completely different grounds—the *Satterfield* court emphasized the vested right of the plaintiff, while the *Robinson* court focused on the extent of police power of the Legislature.[22] These two incompatible legal conclusions evidenced the current state of conflict in implementing one uniform legal standard for determining unconstitutional retroactivity in Texas.

Then the Texas Supreme Court granted petition in *Robinson* and sought to resolve this ambiguity.[23] After a lengthy discussion of history and precedents, the court announced three factors to consider in determining whether a statute violates the express constitutional prohibition against retroactive laws: "[(1)] the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; [(2)] the nature of prior right impaired by the statute; and [(3)] the extent of the impairment."[24] Using this "three-factor" test, the court held that the Statute was unconstitutionally retroactive.[25] This pronouncement was rather remarkable because the court managed to announce this new test without expressly overruling any of its precedents.[26]

The purpose of this article is to analyze the court's formulation of this three-factor test and to provide practical guidance in challenging retroactive legislation in Texas. Part II reviews the general presumption against

[18] Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 129 (Tex. 2010).

[19] *Satterfield*, 268 S.W.3d at 199; *Robinson*, 251 S.W.3d at 526.

[20] 268 S.W.3d at 220 (emphasis added).

[21] 251 S.W.3d at 541.

[22] *Compare Satterfield*, 268 S.W.3d at 220, *with Robinson*, 251 S.W.3d at 541.

[23] *Robinson*, 335 S.W.3d at 135–36.

[24] *Id.* at 145.

[25] *Id.* at 145–50.

[26] *Id.* at 146 ("The results in all of our cases applying the constitutional provision would be the same under this test.").

retroactive legislation on the federal level and provides a constitutional basis for challenging the retroactivity of a statute. Part III traces the history and development of past legal standards used in determining unconstitutionality of a retroactive legislation in Texas. Part IV further examines the court's three-factor test in *Robinson*: Did the court implicitly overrule its precedents by announcing this three-factor test? Part V identifies unresolved issues with this new framework for challenging retroactive legislation in the future.

II. BACKGROUND

Generally, retroactive legislation is enacted when a legislative body adopts a new substantive rule that alters the legal consequences of the actions taken under a previously valid legislative rule.[27] For example, in *Robinson*, Crown initially did not object to its asbestos-related liability to the Robinsons prior to the passage of H.B. 4.[28] However, the retroactive nature of H.B. 4 altered the Robinsons' claim and seemingly extinguished Crown's liability.[29] As in *Robinson*, the operation of retroactive legislation "profoundly affect[s] the plans and expectations of private parties" who act in reliance on prior laws.[30] Furthermore, the retroactivity conflicts with the well-established "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."[31] Therefore, there exists the "judiciary's traditional dislike" of the principle of retroactivity.[32]

A. General Presumption Against "Retroactive Legislation"

The start of the judiciary's general presumption against retroactive legislation dates back to a highly influential nineteenth century case *Society for the Propagation of the Gospel v. Wheeler*.[33] Prior to this case, the

[27] Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 91 (1997).

[28] *Robinson*, 335 S.W.3d at 130.

[29] *Id.* at 132–33.

[30] Laitos, *supra* note 27, at 81.

[31] Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

[32] *See* Laitos, *supra* note 27, at 109.

[33] *Id.*; *see generally* Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156).

category of retrospective statutes was primarily limited to those with effective dates preceding their enactment.[34] However, the *Wheeler* case recognized that the focus of the constitutionality of retroactive legislation should rest upon whether the statute altered a preexisting legal interest rather than whether the statute took effect before its enactment.[35] Justice Story defined "retroactive legislation" in *Wheeler* as follows: "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ."[36] Justice Story's definition of "retroactivity" in *Wheeler* is perhaps the most frequently cited in the analysis of the constitutionality of retroactive legislation,[37] and this became the basis of federal[38] and state vested-right analysis.[39] The traditional principle invoked in determining the constitutionality of retrospective legislation is that a statute may not abrogate or impair "vested rights."[40] This prevailing notion of retroactivity played a central role in the constitutional protection of property and contract rights before the development of substantive due process.[41]

With the development of the substantive due process in the twentieth century, however, the judiciary moved away from the vested-rights analysis.[42] The courts criticized the vested-rights approach because the term "vested right" was conclusory—it has long been recognized that a right is vested only "when it has been so far perfected that it cannot be taken away by statute."[43] Therefore, under the traditional principle, the vested-rights test eventually came down to this obscure statement: a

[34] *See* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 103–04 (1993).

[35] *Wheeler*, 22 F. Cas. at 767.

[36] *Id.*

[37] Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 n.9 (1927).

[38] *See* Sturges v. Carter, 114 U.S. 511, 519 (1885) (stating that a retroactive law "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability'" (quoting *Wheeler*, 22 F. Cas. at 767)).

[39] DeCordova v. City of Galveston, 4 Tex. 470, 479–80 (1849).

[40] Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960).

[41] Kainen, *supra* note 34, at 103–04.

[42] Laitos, *supra* note 27, at 111–12.

[43] Hochman, *supra* note 40, at 696.

retroactive statute is unconstitutional "if it takes away what should not be taken away."[44] While the vested-rights test established a tangible standard for the courts to apply, the lack of certainty on what constitutes "vested rights" discouraged any continued use of the test.[45] Instead, "under the indefinite language of the due-process clause," the courts began sustaining a retroactive legislation if it was a reasonable exercise of legislative power to carry out its objectives.[46] Under this "reasonableness" standard, the level of scrutiny required on these retroactive legislations became "extremely deferential."[47] Thus, as long as the legislation was rationally related to a legitimate legislative purpose, then the retroactive legislation was upheld.[48] Because greater deference was given to the legislature, the judiciary's presumption against retroactivity diminished.[49]

Nonetheless, just when the presumption against retroactive legislation was seemingly fading away, the United States Supreme Court explicitly re-adopted Justice Story's definition of "retroactivity."[50] In *Landgraf v. USI Film Products*, the Court expressly set forth a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence[] and embodies a legal doctrine centuries older than our Republic."[51] Furthermore, in determining the retroactivity of a statute, the Court asks courts to examine whether the new law "attaches new legal consequences to events completed before its enactment."[52] Thus, the focus of the retroactivity test shifted back from "legitimate legislative purpose" under the deferential reasonableness standard to an impairment of vested rights.[53] Justice Scalia adamantly criticized the majority's re-adoption of the vested-rights approach.[54] He believed that the critical issue in retroactivity is not whether the law affects "vested rights," but rather what is the "relevant

[44] Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 143 (Tex. 2010).

[45] *See id.*

[46] Hochman, *supra* note 40, at 694–95.

[47] *See* Laitos, *supra* note 27, at 112.

[48] *Id.*

[49] *See id.* at 112–13.

[50] Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994) ("Though the formulas have varied, similar functional conceptions of legislative 'retroactivity' [of Justice Story] have found voice in this Court's decisions and elsewhere."); *see* Laitos, *supra* note 27, at 112, 121.

[51] 511 U.S. at 265.

[52] *Id.* at 269–70.

[53] *See id.*

[54] *Id.* at 290–92 (Scalia, J., concurring).

activity" that the rule regulates.[55] Regardless, this case firmly reestablished the judiciary's presumption against retroactive legislation.[56]

Today, this presumption against retroactivity puts a heavier burden on the legislature to protect the people's settled expectation.[57] However, "[m]ere retroactivity is not sufficient to invalidate a statute."[58] It is a well-settled principle that a statute can be invalidated for retroactivity only if the statute violates a specific provision of the Constitution.[59]

B. Constitutional Basis for Challenging Retroactive Legislation

"The United States Constitution does not expressly prohibit retroactive laws . . . ."[60] But the U.S. Supreme Court observed that "the antiretroactivity principle finds expression" in many provisions in the Federal Constitution.[61] Under the Federal Constitution, the constitutionality of retroactive legislation is determined according to five specific clauses: the Ex Post Facto Clause, the Bill of Attainder Clause, the Due Process Clause, the Contract Clause, and the Takings Clause.[62]

First, there are two ex post facto clauses in the Federal Constitution.[63] One located in Article 1, Section 9 pertains to the Congress, and the other one located in Article 1, Section 10 is directed at the states.[64] While these ex post facto clauses expressly prohibit retroactive legislation, they are only applicable to penal legislation.[65] Second, the Bill of Attainder Clauses—there are also two prohibitions on bills of attainder (one against the Congress and one against the states)—prohibit legislatures from "singling out disfavored persons and meting out summary punishment for *past*

[55] *See id.* at 291.

[56] *Id.* at 265 (majority opinion).

[57] *See id.* at 266.

[58] Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648 (Tex. 1971).

[59] Hochman, *supra* note 40, at 694.

[60] Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 137 (Tex. 2010).

[61] *Landgraf*, 511 U.S. at 266.

[62] *Id.* Article I, Section 9, Clause 3 states: "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. Article I, Section 10, Clause 1 states: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." *Id.* art. I, § 10, cl. 1.

[63] U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

[64] *See id.* art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

[65] Calder v. Bull, 3 U.S. (3 Dall.) 386, 397 (1798).

conduct."[66] Third, States are prohibited from passing any type of retroactive laws "impairing the Obligation of Contracts."[67] Written as the express prohibition against States, the Contract Clause limits the ability of state legislatures to retroactively impair contractual obligations that had settled economic interests.[68] Fourth, the Due Process Clause of the Fifth and Fourteenth Amendments "protects the interests in fair notice and repose that may be compromised by retroactive legislation."[69] This due process protection against retroactive legislation developed during the twentieth century in furtherance of considerations of fairness that dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.[70] Finally, the Takings Clause of the Fifth Amendment prevents Congress from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation."[71] In determining the constitutionality of retroactive legislation, the U.S. Supreme Court would ascertain whether the retroactivity is inconsistent with these constitutional provisions.[72]

However, the Texas Constitution, unlike the Federal Constitution, contains an express, independent anti-retroactivity provision.[73] The applicable text of the Texas Constitution appears in Section 16 of the Texas Bill of Rights: "No bill of attainder, ex post facto law, *retroactive law*, or any law impairing the obligation of contracts, shall be made."[74] A state constitution may confer guarantees more extensive than those in the Federal Constitution,[75] and the Texas Constitution "posses[es] independent vitality, separate and apart from the guarantees provided by the United States

[66] *Landgraf*, 511 U.S. at 266 (emphasis added).

[67] *Id.*

[68] *See* 2 JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 15.8(b) (4th ed. 2007).

[69] *Landgraf*, 511 U.S. at 266.

[70] *See id.* at 265–66.

[71] *Id.*; *see* E. Enters. v. Apfel, 524 U.S. 498, 534 (1998) (explaining that the Coal Industry Retiree Health Benefit Act would violate Takings Clause because it would have retroactively imposed "liability on Eastern and the magnitude of that liability raise[s] substantial questions of fairness").

[72] *See* Laitos, *supra* note 27, at 112.

[73] Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 203 (Tex. App.—Austin 2008, no pet.).

[74] TEX. CONST. art. I, § 16 (emphasis added).

[75] *See* Mellinger v. City of Houston, 3 S.W. 249, 252 (Tex. 1887) (stating that Section 16 of the Texas Constitution places further restrictions on the legislature than the U.S. Constitution).

Constitution."[76] The Texas Supreme Court in *Mellinger* specifically reasoned that there is a presumption that the framers of the Texas Constitution carefully selected the language to represent the will of the people.[77] Thus, every distinct provision in the Texas Constitution must be given a separate meaning.[78] In other words, the specific prohibition against "retroactive law" shows the intent of the framers "to give protection . . . against the arbitrary exercise of some power not forbidden by the other clauses of the constitution."[79] Accordingly, the Texas Supreme Court has concluded that Section 16 gives additional protection against retroactive lawmaking unlike its federal counterpart.[80] Thus, in Texas, the issue narrows down to whether the legislation at issue violates the prohibition against retroactive laws in the Texas Bill of Rights.[81]

III. DEVELOPMENT OF MULTIPLE LEGAL STANDARDS IN TEXAS

Every version of the Texas Constitution contained Section 16's specific prohibition against retroactive laws.[82] Texas jurisprudence repeatedly sought to establish an analytical framework to evaluate the constitutionality of a statute challenged under this plain language against retroactive laws.[83] However, the task proved to be difficult. The federal constitutional guidance on this issue was little help because the Texas Constitution provided an additional protection against retroactive legislation.[84] Over the past 160 years, the legal standard for determining the constitutionality of retroactive legislation has constantly changed.[85] After nearly two centuries of Texas jurisprudence, the issue still cannot be easily answered.[86]

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[76] City of Sherman v. Henry, 928 S.W.2d 464, 473 (Tex. 1996).

[77] *Mellinger*, 3 S.W. at 252.

[78] *See id.*

[79] *Id.*

[80] *Id.* at 252–53.

[81] *See id.*

[82] *See* TEX. CONST. art. I, § 16; TEX. CONST. OF 1869, art. I, § 14; TEX. CONST. OF 1866, art. I, § 14; TEX. CONST. OF 1861, art. I, § 14; TEX. CONST. OF 1845, art. I, § 14.

[83] *See infra* Part III.A–F.

[84] *See* City of Sherman v. Henry, 928 S.W.2d 464, 473 (Tex. 1996) ("[T]he Texas Constitution has been recognized to possess independent vitality, separate and apart from the guarantees provided by the United States Constitution . . . ."); *Mellinger*, 3 S.W. at 253.

[85] *See supra* Part II.A.

[86] *See infra* Part IV.

A. DeCordova v. City of Galveston*: Genesis of the Vested-Rights Analysis*

DeCordova is the first Texas Supreme Court case concerning the express retroactivity provision of the Texas Constitution.[87] The dispute arose from contracts for promissory notes that were executed on August 27, 1840.[88] On that date, the City of Galveston (City) issued three promissory notes payable in 1842, 1843, and 1844.[89] At the time of *formation* of these contracts, there was no statute of limitations restricting the enforcement of the notes.[90] A new statute of limitations was enacted on February 9, 1841—by this time, the cause of action had accrued because the City failed to pay the interest on these notes in January.[91] The City, nonetheless, promptly asserted the statute of limitations defense, and the lower court held for the City.[92] The plaintiffs argued that the enforcement of this statute of limitations to the cause of action already accrued, before the passage of the act, was unconstitutional.[93]

To answer this question, the court examined the scope and breadth of the prohibition provided by the Constitution that declared, "'no retrospective or *ex post facto* law, or law impairing the obligation of contracts, shall be made.'"[94] The court found that the complaint clearly did not fall within the technical definition of an ex post facto law or a law impairing the obligation of contracts.[95] However, the court observed that "there may be retrospective laws which are not necessarily *ex post facto*, or which do not impair the obligation of contracts."[96] The court thus recognized "retrospective law" as a separate prohibition apart from ex post facto laws or laws impairing the obligation of contracts.[97] The court necessarily proceeded to define what a "retrospective law" is under the

[87] Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 138 (Tex. 2010).

[88] DeCordova v. City of Galveston, 4 Tex. 470, 470–71 (1849).

[89] *Id.* at 470–71.

[90] *Id.* at 471.

[91] *Id.* at 471–72.

[92] *Id.* at 471.

[93] *Id.* at 473.

[94] *Id.* (quoting TEX. CONST. OF 1845, art. 1, § 14).

[95] *Id.*

[96] *Id.* at 474.

[97] *See id.* ("[B]y the use of the term 'retrospective' cases were, doubtless, intended to be included, not within the purview of the two former classes [(ex post facto laws and impairment of obligation of contracts)] of laws.").

meaning and intent of the Texas Constitution.[98] Chief Justice Hemphill first cautioned giving the term "retrospective" its literal meaning without regard to the intent because it would have such a broad reach—implying that not all retrospective laws should be prohibited.[99] Instead, the court adopted Justice Story's definition of "retroactivity" in *Wheeler*.[100] The court then set out a rule that a statute is unconstitutional if its "retrospective operation destroy[s] or impair[s] vested rights, or rights to 'do certain actions or possess certain things, according to the laws of the land.'"[101] Equally significant was the court's distinction between rights and remedies.[102] The court went on to state: "[L]aws which [only] affect the remedy, merely, are not within the scope of the [retrospective] inhibition . . . ."[103] The court affirmed, eventually holding for the City because the statute of limitations, as a matter of law, was only remedial in character.[104]

Regardless of the holding, the significance of this case to the history of Texas retroactive analysis is threefold.[105] First, the court recognized that the prohibition against "retrospective law" is a separate category of constitutional protection available in Texas.[106] Second, this was the introduction of the vested-rights analysis in Texas jurisprudence.[107] However, because the court did not reach whether there was a vested right or not—by holding that the statute was only remedial in nature—the court fatally failed to define what constituted a "vested right."[108] Finally, by attempting to distinguish between a right and a remedy, the court seemingly operated on the false premise that a law that impairs a remedy does not impair a right.[109] This rather bright-line distinction further obscured the application of the vested-rights analysis. Later, however, the court would concede that "[w]hile our precedents recognize and apply the distinction

[98] *See id.* at 475–82.

[99] *Id.* at 475–76.

[100] *Id.* at 478–82.

[101] *Id.* at 479–80 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798)).

[102] *See id.* at 480.

[103] *Id.*

[104] *Id.* at 480, 482.

[105] *See id.* at 473–80.

[106] *See id.* at 473–74.

[107] *Id.* at 479–80.

[108] *See id.*

[109] *See id.*

[between a remedy and a right], they also recognize that the two terms are often inseparable."[110]

B. Mellinger v. City of Houston*: Fortification of the Vested-Rights Analysis*

The next significant Texas Supreme Court case involving a retroactive law was *Mellinger v. City of Houston*, in which the court attempted to clarify what constituted a "vested right."[111] In *Mellinger*, the appellant taxpayer purchased a lot in the city in 1881 and was levied taxes on the lot for six years prior to his purchase—1875 through 1880.[112] It was undisputed that one who has purchased property encumbered with a lien for taxes should be deemed, as to such taxes, a delinquent tax payer—thus, liable for those taxes in years prior to one's purchase.[113] However, the taxpayer pleaded the statute of limitations had run for taxes owed for the years 1875 and 1876.[114] In return, the City relied on the Act of July 4, 1879 to defend the case.[115] The relevant section of the Act provided: "[N]o delinquent tax-payer shall have the right to plead in any court, or in any manner rely upon, any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state, or any county, city, or town."[116] The taxpayer argued that the two-year statute of limitations had run on the delinquent taxes for 1875 and 1876 by the time the Act was passed in 1879.[117] The lower court held that the statute of limitations was inapplicable to the City because of the Act.[118] The issues in this appeal were whether the Act was unconstitutionally retroactive as applied to the taxpayer and whether the right to assert that a claim is barred by the statute of limitations was a "vested right."[119]

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[110] Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648–49 (Tex. 1971).

[111] *See* 3 S.W. 249, 252–53 (Tex. 1887).

[112] *Id.* at 249.

[113] *Id.* at 251.

[114] *Id.* at 249–50.

[115] *Id.* at 251.

[116] *Id.* (quoting Act approved July 4, 1879, 16th Leg., 1st C.S., ch. 17, § 16, 1879 Tex. Gen. Laws 12, 15, *reprinted in* 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 44, 47 (Austin, Gammel Book Co. 1898)) (internal quotation marks omitted).

[117] *Id.*

[118] *Id.* at 250.

[119] *Id.* at 250–55.

As in *DeCordova*, the *Mellinger* court began its analysis with the importance of the express prohibition of retroactive laws in the Texas Constitution.[120] The court equated the presence of such an express declaration as "a *further* restriction" than the Federal Constitution provides.[121] The court then defined the scope of this broader Texas constitutional protection against the retroactive legislation: the Texas Constitution protects every well-founded claim, "which may accrue under existing laws prior to the passage of any [act], which, if permitted a retroactive effect, would take away the right."[122] The court further specified that a vested right is a "state of facts" that becomes fixed by the operation of existing law.[123] Therefore, according to the *Mellinger* court, a plaintiff would have a vested right when an event has occurred to create an accrued or pending cause of action recognized by the law.[124] Under this definition, the court concluded that the taxpayer's right to assert a statute of limitation defense became a vested right that was beyond the reach of the Act of July 4, 1879 because the Act passed after the expiration of the limitation period.[125] Therefore, the City's claim for taxes due in 1875 and 1876 was barred.[126]

While the *Mellinger* court resolved one ambiguity by defining what a vested right was, it sparked another debate: does a right become vested when the cause of action accrues or when there is a final judgment on that cause of action?[127] The court in *Mellinger* seemingly endorsed vesting at accrual by using the existence of "a state of facts" as evidence of a vested right.[128] However, while an accrued cause of action qualifies as an

[120] *Id.* at 252 ("The people of this state have, however, provided, in all the state constitutions . . . protection to rights, by prohibiting the enactment of retroactive laws, which the constitution of the United States does not give in terms.").

[121] *See id.* at 253 (emphasis added).

[122] *Id.*

[123] *See id.* ("When, however, such a state of facts exists as the law declares shall entitle a plaintiff to relief in a court of justice on a claim which he makes against another, or as it declares shall operate in favor of a defendant as a defense against a claim made against him, then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation, if there be a constitutional prohibition of such laws.").

[124] *See id.*

[125] *See id.* at 251–53.

[126] *Id.* at 251, 255.

[127] *See* Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 171 (Tex. 2010) (Wainwright, J., dissenting); *Mellinger*, 3 S.W. at 253.

[128] *See* 3 S.W. at 253.

"entitlement" worthy of constitutional protection,[129] it does not appear to be "entitlement *to relief*" under the *Mellinger* court's definition.[130] Thus, the proponents of vesting upon final judgment continue to argue that there is no true "entitlement to relief" until the rendition of final judgment.[131] Without the final resolution of the lawsuit, it cannot be said that the law "entitle[s] a plaintiff to relief" or "operate[s] in favor of defendant" because the parties do not know whether the lawsuit will prove or refute a claim to recover.[132] This issue of vesting is still at the heart of the retroactivity doctrine dispute.[133]

C. Texas Water Rights Commission v. Wright*: Deviation from the Vested-Rights Analysis*

The Texas Supreme Court exclusively used the vested-rights analysis to determine if a given statute constitutes an unconstitutional retroactive law until 1971.[134] In 1971, the Texas Supreme Court for the first time articulated the inconsistencies of the vested-rights analysis and outlined several alternatives to this analysis.[135] In *Wright*, the plaintiffs challenged the cancellation of their water permits.[136] These water permits were issued under the previous permit system, which provided that water permits would be revoked when water use was "'willfully abandoned during any three successive years.'"[137] Thus, prior to Article 7519a, the permits could only be revoked with the proof of specific intent to abandon.[138] Article 7519a authorized the cancellation of water permits upon proof of ten continuous years of non-use—even without the intent to abandon.[139] Relying on the Article 7519a, the Texas Water Rights Commission cancelled the plaintiffs'

[129] *Robinson*, 335 S.W.3d at 155 (Medina, J., concurring).

[130] *Mellinger*, 3 S.W. at 253.

[131] *See id.*

[132] *Robinson*, 335 S.W.3d at 171 (Wainwright, J., dissenting).

[133] *See id.*

[134] *See, e.g.*, Middleton v. Tex. Power & Light Co., 185 S.W. 556, 560–62 (Tex. 1916) (holding that a statute was not an unconstitutional retroactive law using the vested-rights analysis).

[135] Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648–50 (Tex. 1971).

[136] *Id.* at 644.

[137] *Id.* (quoting Act of Mar. 19, 1917, 35th Leg., R.S., ch. 88, § 46, 1917 Tex. Gen. Laws 211, 222).

[138] *See id.*

[139] *Id.* at 645.

water permits.[140] The plaintiffs argued that the removal of this subjective intent requirement under Article 7519a made it a retroactive legislation.[141] They contended that the Article impaired their vested rights because the intent requirement as the basis for the cancellation was a permanent part of their water rights.[142] Initially, the *Wright* court recognized that Article 7519a has a retroactive effect because it has "a definite impact on rights created" under the existing law.[143] The Article seemingly divested (what the court called) the *vested* right to appropriate water from the state under previously valid law.[144] However, the court concluded that "the retroactive effects of the statute do not require [Article 7519a's] invalidation" for three main reasons.[145] First, the owners "could reasonably expect" that their rights would be subject to certain "conditions" attached by the state.[146] The court concluded that the state granted the permits with "the implied condition subsequent that the waters would be beneficially used."[147] Second, under Article 7519a, "the affected parties were afforded a reasonable time to protect their interests."[148] Here, the court believed a period of ten years was reasonable time and constituted fair notice for the plaintiffs to protect their rights.[149] Finally, according to the court, Article 7519a was not unconstitutional because it was a legitimate use to fulfill the state's "constitutional duty to conserve water."[150] In conclusion, the court held that the Article 7519a did not require invalidation because the state properly instituted the proceeding to enforce its duty "after fair opportunity and the failure . . . of the permittees to protect their rights."[151]

While the *Wright* court did not indicate that the vested-rights analysis should be discarded, the court certainly deviated from the traditional analysis.[152] Previously under the traditional vested-rights analysis, the

[140] *Id.* at 644.
[141] *Id.* at 644, 648.
[142] *See id.* at 644.
[143] *Id.* at 648.
[144] *See id.*
[145] *Id.* at 649.
[146] *See id.*
[147] *Id.*
[148] *Id.* at 648.
[149] *Id.* at 649.
[150] *Id.* at 648.
[151] *Id.* at 649.
[152] *See id.* at 648–49.

court held that impairment or destruction of a vested right would invalidate retroactive laws.[153] The court was only concerned with the extent of the plaintiff's right affected by the alleged retroactive legislation.[154] However, the *Wright* court's incorporation of "reasonableness" and "fairness" introduced three new elements to this analysis.[155] These three elements would be used to prove that "[m]ere retroactivity is not sufficient to invalidate a statute."[156] First, the court now must consider the *reasonable expectation* of the party asserting the claim.[157] If the plaintiff could reasonably expect an adverse effect to his vested right, then the court may find that the statute need not be invalidated even if the statute is clearly retroactive in nature.[158] Second, the court must consider whether the plaintiff had a *fair notice* and *fair opportunity* to protect the rights.[159] Thus, if a *grace period* to prevent an impairment of vested rights were given, then the court is not likely to find the law unconstitutionally retroactive.[160] Interestingly, while the *Wright* court cited *DeCordova* as the authority for this fair notice and fair opportunity element, there is no language pertaining to the fairness analysis in *DeCordova*.[161] Finally, the court must consider the state's interest in enforcing the statute.[162] Any legitimate state interest would be used to offset any adverse effect on the plaintiff's rights.[163] In effect, the court created *conditional* vested rights for these plaintiffs—the plaintiffs had the vested right to appropriate water only for beneficial use.[164] This conditional vested right is subject to divestment through retroactive legislation whenever the court can justify its constitutionality through these

[153] *See, e.g.*, Middleton v. Tex. Power & Light Co., 185 S.W. 556, 559–60 (Tex. 1916); Mellinger v. Houston, 3 S.W. 249, 252–55 (1887).

[154] *See Middleton*, 185 S.W. at 559–60; *Mellinger*, 3 S.W. at 254 (quoting DeCordova v. City of Galveston, 4 Tex. 470, 479–80 (1849)).

[155] *See* 464 S.W.2d at 649.

[156] *Id.* at 648.

[157] *See id.* at 649.

[158] *See id.*

[159] *See id.*

[160] *See id.*

[161] *Id.* (citing DeCordova v. City of Galveston, 4 Tex. 470, 480 (1849)).

[162] *Id.* at 648.

[163] *See id.*

[164] *See id.*

three factors.[165] The court's creation of this new conditional vested right further obscured the application of the vested-rights analysis.

This holding marked the demise of the traditional vested-right analysis.[166] After the *Wright* case, many lower courts began to use overriding public interest to justify the retroactivity of the statute.[167] Implicitly, the focus of the court's retroactivity analysis became finding legislative justification for the retroactive laws—irrespective of any impairment of individual's vested rights.[168] Consistent with the development of the doctrine of substantive due process at that time on the federal level, the Texas judiciary began to give much deference to the Texas Legislature.[169]

D. Barshop v. Medina County Underground Water Conservation District*: Establishment of the Police-Power Analysis*

Fifteen years later, the Texas Supreme Court adopted even more deferential standard in *Barshop v. Medina County Underground Water Conservation District*.[170] In *Barshop*, the plaintiffs claimed that the Edwards Aquifer Act violated the Texas constitutional prohibition of a retroactive law.[171] The Act established the Edwards Aquifer Authority (Authority) to regulate underground withdrawals.[172] The Act also placed an aquifer-wide cap on water withdrawals and restricted overall withdrawals under the permit system.[173] Prior to the passage of the Act, the withdrawal

[165] *See id.*

[166] *See, e.g.*, Tex. State Teachers Ass'n v. State, 711 S.W.2d 421, 424 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (stating that the rule against retroactive laws is "not absolute and must yield to a state's right to safeguard the public safety and welfare"); Ismail v. Ismail, 702 S.W.2d 216, 222 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (holding that an "overriding public interest" justified the retroactive application of a special class of marital property); Kilpatrick v. State Bd. of Registration for Prof'l Eng'rs, 610 S.W.2d 867, 871 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (stating that concern for public safety and welfare can override retroactive law prohibition).

[167] *See supra* note 166.

[168] *See supra* note 166.

[169] *See supra* note 166.

[170] *See* 925 S.W.2d 618, 633–34 (Tex. 1996).

[171] *Id.* at 623, 633.

[172] *Id.* at 624.

[173] *Id.*

of groundwater from the Aquifer was unrestricted.[174] In their constitutional claims, the plaintiffs argued that the Act was unconstitutionally retroactive because the Act divested the plaintiffs of vested water-appropriation rights.[175] They alleged that the Act was unconstitutionally retroactive because it considered the "historical use"—actions taken before the passage or effective date of the Act.[176] However, concluding that "[a] valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive,"[177] the *Barshop* court did not address whether there was vested rights for the plaintiffs.[178] Instead, the court adopted a single-factor public-interest test.[179] The court upheld the Act because the Edwards Aquifer Authority was necessary to "'protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state.'"[180] Based upon these legislative findings, the court did not invalidate the Act without regards to the plaintiffs' vested right and their fair opportunity to protect their rights.[181] The court simply reasoned that the prohibition against retroactive laws does not "preclude[] the Legislature from enacting statutes that are necessary to safeguard the public safety and welfare."[182] It is even more shocking that the court actually stated that the Legislature's determination of how to safeguard the public safety and welfare can "prevail over a finding that a law is unconstitutionally retroactive."[183]

The *Barshop* court's test for unconstitutional retroactivity, while pretending to adopt the *Wright* court's test, is different for few reasons. In *Wright*, the public interest was merely one of three considerations, which could be offset by the plaintiffs' reasonable expectation and fair opportunity

[174] *See id.* at 623–24.

[175] *Id.* at 633.

[176] *See id.* at 624, 634.

[177] *Id.* at 633–34.

[178] *See id.*

[179] *See id.* at 634 ("Based on these legislative findings, we conclude that the Act is necessary to safeguard the public welfare of the citizens of this state.").

[180] *Id.* (quoting Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.01, 1993 Tex. Gen. Laws 2350, 2350–51).

[181] *See id.*

[182] *Id.*

[183] *Id.* at 633–34.

arguments.[184] However, in *Barshop*, the public interest was the court's sole consideration.[185] Additionally, there is a complete lack of consideration of the plaintiffs' right.[186] In *Wright*, the court's holding was at least partially based on the fact that the plaintiffs' water rights were "usufructuary" in nature.[187] On the other hand, the *Barshop* court's opinion does not contain any discussion of the plaintiffs' right.[188] If the *Wright* case was characterized as a *deviation* from vested-rights analysis, this case established a new police-power analysis in the Texas retroactivity jurisprudence.[189]

E. Owens Corning v. Carter*: Reverting Back to the* Wright *Standard?*

After adopting the police-power analysis in *Barshop*, the Texas Supreme Court seemingly returned to the legal standard announced in *Wright*.[190] In *Owens Corning v. Carter*, numerous Alabama asbestos plaintiffs challenged as retroactive a borrowing statute enacted to require out-of-state plaintiffs suing in Texas to satisfy both Texas's and their own state's statute of limitations.[191] Before that statute's enactment, out-of-state plaintiffs could sue in Texas for injuries using whichever statute of limitations date came later: Texas's own limitations date or that of their home state.[192] As a result, Texas was a favorite jurisdiction for out-of-state plaintiffs whose claims had already gone stale under their own state's shorter statute of limitations.[193] The Legislature determined that the crush of cases from opportunistic out-of-state asbestos plaintiffs had clogged the courts.[194] The Legislature responded by requiring out-of-state plaintiffs bringing suit in Texas to satisfy both Texas's statute of limitations and their

[184] Tex. Water Rights Comm'n. v. Wright, 464 S.W.2d 642, 648–49 (Tex. 1971).

[185] *Barshop*, 925 S.W.2d at 633–34.

[186] *See id.*

[187] *See Wright*, 464 S.W.2d at 649 (discussing that the State had rights as the owner of the water and the State granted the plaintiffs only usufructuary rights to the State's water).

[188] *See Barshop*, 925 S.W.2d at 633–34.

[189] *See id.*

[190] Owens Corning v. Carter, 997 S.W.2d 560, 572–73 (Tex. 1999).

[191] *Id.* at 564.

[192] *Id.* at 565.

[193] *See id.* at 565–66.

[194] *Id.*

own state's.[195] This law applied not only to accrued claims, but also to cases that were already pending—just like the case in *Robinson*.[196] The court in *Owens Corning* upheld the law.[197] In doing so, the court reaffirmed the principle that "the Legislature can pass legislation . . . without violating [an express constitutional prohibition against a retroactive statute], if it affords a reasonable time *or* fair opportunity to preserve a claimant's rights under the former law."[198] Then the court basically readopted the three-factor test articulated in *Wright*.[199] However, the court did not *apply* the test accurately. In *Wright*, each element was a separate consideration: (1) whether there was a reasonable expectation; (2) whether there was fair notice to protect the right; and (3) whether there was any state's interest in enforcing retroactive statutes.[200] Following this precedent, the trial court held that the borrowing statute was unconstitutional on the sole ground that the Legislature did not provide a grace period.[201] Yet, the Texas Supreme Court reversed because the plaintiffs' settled expectations were "insufficient" to require any grace period.[202] Thus, the court put settled expectations of the parties above the other two elements.[203] Under this standard, the State would only need to show insufficient settled expectation to uphold a retroactive statute.[204] This new "settled-expectation" test seems problematic because it relied heavily on the U.S. Supreme Court's decision in *Landgraf v. USI Film Products*.[205] However, in adopting the U.S. Supreme Court's legitimate-expectations standard, the court did not consider whether it aligns with a more stringent standard under the Texas Constitution.[206]

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[195] *Id.* at 566.

[196] *Id.*

[197] *See id.* at 584.

[198] *Id.* at 572 (emphasis added).

[199] *See id.* at 572–73.

[200] Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648–50 (Tex. 1971).

[201] *Owens Corning*, 997 S.W.2d at 572.

[202] *See id.* at 573.

[203] *See id.*

[204] *See id.*

[205] *Id.* at 572 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)) ("The prohibition against retroactive laws derives largely from the sentiment that such laws *unfairly* deprive people of *legitimate* expectations." (emphasis added)).

[206] *See id.* at 572–73; *see also* Mellinger v. City of Houston, 3 S.W. 249, 252 (Tex. 1887) (stating that Section 16 of the Texas Constitution places further restrictions on the Legislature than the U.S. Constitution).

Curiously, the consideration of the legitimate state interest was not a part of the retroactivity analysis in this case.[207] Instead, the court separately examined whether this borrowing statute was "rationally related to a legitimate state interest"—establishing a rather lenient rational-basis test.[208] The court concluded that the Legislature reasonably believed that Texas's resources were better spent by having the borrowing statute because non-Texas cases created a backlog of cases that denied Texas residents access to Texas courts.[209] Thus, while this settled-expectation test incorporates all three elements of the *Wright* standard, its application seems to be a clear departure from the *Wright* precedent.[210] In other words, the *Owens Corning* court seemed to have combined these two tests to create a new test.[211]

F. In re A.V.*: What Is the Correct Legal Standard?*

Prior to the *Robinson* case, the most recent Texas Supreme Court case which dealt with the constitutional retroactivity of a statute was *In re A.V.*[212] In *In re A.V.*, the plaintiff challenged the constitutionality of Section 161.001 of the Texas Family Code, which terminated parental rights for knowingly engaging in criminal conduct that results in the parent's imprisonment and inability to care for the child for not less than two years from the date of filing the petition.[213] Plaintiff was arrested and convicted for a federal drug offense.[214] After his incarceration, the Texas Department of Protective and Regulatory Services filed a petition to terminate the plaintiff's parental rights based on the Section.[215] The plaintiff argued that the Section was unconstitutionally retroactive because the two-year time period under the Section extended approximately a year and a half before the effective date of the statute.[216] The issue was whether Section 161.001(1)(Q) of the Texas Family Code as applied to a parent who was incarcerated before the effective date of this Section was an

[207] *See Owens Corning*, 997 S.W.2d at 581.

[208] *Id.* at 580–82.

[209] *See id.* at 582.

[210] *See id.* at 572–73, 580–82.

[211] *See id.*

[212] 113 S.W.3d 355, 356 (Tex. 2003).

[213] TEX. FAM. CODE ANN. § 161.001(1)(Q) (West 2008); *In re A.V.*, 113 S.W.3d at 357.

[214] *In re A.V.*, 113 S.W.3d at 357.

[215] *Id.*

[216] *Id.* at 357–59.

unconstitutional retroactive law.[217] The Texas Supreme Court held that the Section was not unconstitutionally retroactive, but the court managed to further obscure the legal standard for evaluating a retroactive law.[218] First, the court stated, quoting *Barshop*, that a "'valid exercise of police power by the Legislature to safeguard the public safety and welfare' is a *recognized exception* to the unconstitutionality of retroactive laws."[219] Instead of directly adopting the police-power test from *Barshop*, however, the court framed it as an *exception*.[220] Second, the court, citing *Landgraf*, recognized a second exception that "[a] law that does not upset a person's settled expectations in reasonable reliance upon the law is not unconstitutionally retroactive."[221] The recognition of these two exceptions along with the extensive discussion regarding "the rights of parenthood" seemingly implies that the vested-rights analysis is the general rule.[222]

The adoption of *Landgraf* rule is once again problematic. In *Landgraf*, the U.S. Supreme Court dealt with the U.S. Constitution, which does not contain the express prohibition against retroactive laws.[223] Earlier Texas precedents repeatedly held that the presence of this express prohibition in the Texas Constitution affords people in Texas greater protection than the Federal Constitution.[224] By adopting the legal standard under the U.S. Constitution, the Texas Supreme Court failed to give effect to the express prohibition against the retroactive laws in the Texas Constitution.

IV. PROMULGATION OF A NEW THREE-FACTOR TEST

As illustrated in the previous Part, the lack of a clear legal standard to determine whether a retroactive law is unconstitutional led the courts of appeals in *Satterfield* and *Robinson* to reach opposite judgments on

[217] *See id.* at 358–59.

[218] *See id.* at 361–62.

[219] *Id.* at 361 (emphasis added) (quoting Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 633–34 (Tex. 1996)).

[220] *See id.*

[221] *Id.* (citing Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994)).

[222] *See id.*

[223] Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994); *see infra* Part II.B.

[224] *See* Mellinger v. City of Houston, 3 S.W. 249, 252 (Tex. 1887) ("The people of this state have, however, provided in all the state constitutions . . . protection to rights, by prohibiting the enactment of retroactive laws, which the constitution of the United States does not give in terms.").

identical fact patterns.[225] Thus, in *Robinson*, the Texas Supreme Court sought to end the ambiguity with the promulgation of a new three-factor test.[226] The court concluded that "[n]o bright-line test for unconstitutional retroactivity is possible."[227] The court further held that "the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power."[228] Once again, these three factors are: "[(1)] the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; [(2)] the nature of prior right impaired by the statute; and [(3)] the extent of the impairment."[229] The Texas Supreme Court did not expressly overrule any of the earlier precedents mentioned in previous section.[230] Rather, the court tried to justify its precedents using both the vested-rights analysis and police-power analysis.[231] However, the issue remains whether this three-factor test is actually compatible with all Texas precedents.

A. Is This a Brand New Test or Mere Restatement of Old Precedents?

The court did not expressly overrule prior precedents.[232] In fact, the court protects its holding in the precedents.[233] However, the court's majority opinion explicitly called out "the fundamental failure of the 'impairs vested rights' test."[234] In addition, even the concurring opinion, as well as the dissenting opinions, showed strong opposition to "the [majority]'s disdain for traditional vested-rights analysis."[235] The

[225] *Compare* Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 196–97, 220 (Tex. App.—Austin 2008, no pet.), *with* Robinson v. Crown Cork & Seal Co., 251 S.W.3d 520, 524, 541 (Tex. App.—Houston [14th Dist.] 2006), *rev'd*, 335 S.W.3d 126 (Tex. 2010).

[226] *See* Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 145 (Tex. 2010).

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *See id.* at 146.

[231] *Id.* ("The results in all of our cases applying the constitutional provision would be the same under this test.").

[232] *Id.*

[233] *See id.*

[234] *Id.* at 145.

[235] *Id.* at 150 (Medina, J., concurring) ("I write separately because I do not share the Court's disdain for traditional vested rights analysis . . . ."); *id.* at 166, 171 (Wainwright, J., dissenting).

concurring and dissenting justices seem to take for granted that the traditional vested-rights analysis has been abrogated.[236] This leads to a rather convincing argument that the court, even though it states that the results would be the same under this three-factor test, has formulated a brand new retroactivity test. However, as illustrated in next section, the court seems to substantially deviate from its own precedents.

B. The Nature and Strength of the Public Interest as Evidenced by the Legislature's Factual Findings

In *Robinson*, the Texas Supreme Court acknowledged that the lower court's police-power test "focuses too much on the reasonableness of legislative action" and "[t]here must be a compelling public interest to overcome the heavy presumption against retroactive laws."[237] In this case, Crown argued that the Statute would help alleviate the asbestos litigation crisis and reduce the burden on the State's economy.[238] Applying this "compelling interest" standard, however, the court held that Chapter 149 of the Texas Civil Practice and Remedies Code did not serve the public interest.[239] While the Legislature recognized the severity of the crisis, the court also concluded Chapter 149 did not serve the public interest because it was enacted "to help only Crown and no one else."[240] More significantly, the court noted that the Legislature "made no finding[] to justify Chapter 149."[241] Thus, even though Texas may ultimately benefit from this Act, the public interest does not rise to the level overcoming the heavy presumption against the retroactivity.[242] This standard deviates from the Texas precedents in a few ways.

First, the court "preempt[s] [any] weighing of interests absent compelling reasons."[243] The court cautions that this should not be some kind of cost-benefit analysis.[244] However, this approach is inconsistent with recent Texas precedents where the court tried to weigh the strength of

[236] *See id.* at 150–51 (Medina, J., concurring); *id.* at 166 (Wainwright, J., dissenting).

[237] *Id.* at 146 (majority opinion).

[238] *Id.* at 149.

[239] *Id.* at 150.

[240] *Id.* at 149.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 150.

[244] *See id.*

the police-power justification and the need to safeguard the public welfare against the plaintiffs' settled expectations (if any).[245] By prohibiting any weighing of competing interests between parties absent a compelling public interest, the court seems to have reinstated a strong presumption of unconstitutionality for a retroactive legislation.[246]

Second, the adoption of the compelling interest standard seems to conflict with the language in *Wright*, *Barshop*, and *In re A.V.*[247] In those cases, the court merely sought "a valid exercise of the police power by the Legislature" to uphold retroactive legislation.[248] Requiring a *compelling* interest, especially only in legislative findings, arguably imposes a stricter standard and heavier burden on the defendant.[249] Previously, the highest level of scrutiny announced by a lower Texas court was "overriding public interest."[250] Also, the Texas Supreme Court in *Owens Corning* specifically announced that the new law only has to be "rationally related to a legitimate state interest."[251] Thus, this new "compelling interest" standard has departed from the language of its own precedents.

Furthermore, the language of the court's opinion seems to indicate that the court will only consider the evidence of public interest from "legislative findings" specific to the legislation in question.[252] In *Robinson*, the Legislature generally acknowledged the "asbestos litigation crisis" in Texas.[253] The court dismissed this as the reason to uphold the Chapter 149, however, because the Legislature did not put this in its legislative findings or statement of purpose.[254] Additionally, the court kept referring to how the "record is silent" on many of Crown's arguments.[255] The question remains

[245] *See In re* A.V., 113 S.W.3d 355, 361 (Tex. 2003).

[246] *See Robinson*, 335 S.W.3d at 150.

[247] *See In re A.V.*, 113 S.W.3d at 361; Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 633–34 (Tex. 1996); Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 649–51 (Tex. 1971).

[248] *See In re A.V.*, 113 S.W.3d at 361; *Barshop*, 925 S.W.2d at 633–34; *Wright*, 464 S.W.2d at 649–51.

[249] *Compare Robinson*, 335 S.W.3d at 149–50, *with In re A.V.*, 113 S.W.3d at 361, *and Barshop*, 925 S.W.2d at 633–34, *and Wright*, 464 S.W.2d at 649–51.

[250] Ismail v. Ismail, 702 S.W.2d 216, 222 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

[251] Owens Corning v. Carter, 997 S.W.2d 560, 580–81 (Tex. 1999).

[252] *See Robinson*, 335 S.W.3d at 132, 149.

[253] *See id.* at 149.

[254] *Id.*

[255] *See id.*

as to whether the defendants can show any legitimate purpose in the legislation to overcome the presumption against the retroactive laws.[256] Regardless, it is clear that the court once again deviated significantly from the Texas precedents in *Barshop* and *In re A.V.*[257]

C. The Nature of the Impaired Prior Right and the Extent of the Impairment

The Texas Supreme Court was not as clear in announcing what is required to prove the nature of impaired right and the extent of the impairment.[258] The court considered these two factors simultaneously, and concluded that "Chapter 149 significantly impacts a substantial interest the Robinsons have in a well-recognized common-law cause of action."[259] In doing so, the court seemed to consider whether the Robinsons had a vested right in their claim.[260] The court held that because the "recovery is more predictable" and the "claims had a substantial basis in fact," the rights were "firmly vested" in the Robinsons.[261] This inquiry seems equivalent to the traditional vested-rights analysis given in *Mellinger*.[262] While the court concluded that the Robinsons have a "substantial," "well-recognized," and "vested" claim, it did not set forth its rationale in concluding *why* Chapter 149 significantly impacted this right.[263] In other words, there is no criterion for judging the extent of the impairment—the court failed to provide what constitutes significant impact on the vested rights.[264] The court's discussion of settled expectation was nothing more than extended vested-rights analysis.[265] Therefore, the court has officially removed the fair notice and fair opportunity elements from the previous three-factor tests under *Wright*.[266] The holding in *Wright* would clearly have been different if this critical fairness analysis was removed from it.[267]

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[256] *See id.* at 146, 149.

[257] *Compare id.* at 149–50, *with In re* A.V., 113 S.W.3d 355, 361 (Tex. 2003), *and* Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 633–34 (Tex. 1996).

[258] *See Robinson*, 335 S.W.3d at 147–49.

[259] *Id.* at 149.

[260] *Id.* at 148.

[261] *Id.*

[262] *See id.*; Mellinger v. City of Houston, 3 S.W. 249, 253 (Tex 1887).

[263] *Robinson*, 335 S.W.3d at 148–49.

[264] *See id.*

[265] *Id.* at 151 (Medina, J., concurring).

[266] *Compare id.* at 145, 148–49 (majority opinion), *with* Tex. Water Rights Comm'n v.

V. FUTURE ISSUES OF THE NEW TEST

The Texas Supreme Court appears to have resolved one ambiguity regarding the definition of "vested rights." The predominant difficulty in applying the traditional vested-rights analysis was the lack of a clear and unambiguous definition of a "vested right."[268] The *Robinson* Court acknowledges this as the problem in the opinion.[269] As introduced in *Mellinger*, the dispute revolved around whether a vested right must be reduced to a final judgment.[270] In *Robinson*, the court implicitly adopted the *Mellinger* definition of "vested rights" with the use of the phrase "substantial basis in fact."[271] The court found that discovery showed that the Robinsons' claims had a substantial basis in fact and the recovery was *predictable*.[272] According to this standard, the claimant need not show that he is entitled to recovery; rather, the claimant only needs to show that he is likely to succeed in litigation—much like the "likelihood of success" factor in the preliminary injunction adjudication.[273] Therefore, the court tells us that in order for a right to be vested, it need not be reduced to a final judgment.[274]

However, apart from this simple clarification, there are many unresolved issues in the application of this test. Perhaps, the most evident shortcoming in the court's analysis seems to be its failure to show the level of entwinement among the three factors in ultimately deciding the constitutionality of a retroactive law. For example, what if one factor is relatively stronger than the other? What if two factors are equally strong? Is a greater extent of impairment sufficient to offset otherwise strong public interest? To answer these questions, the Texas Supreme Court embraces the dual objectives of prohibiting retroactive laws: to protect the settled,

Wright, 464 S.W.2d 642, 649 (Tex. 1971).

[267] *See generally* 464 S.W.2d 642.

[268] *See* Smith, *supra* note 37, at 231 ("One's first impulse on undertaking to discuss retroactive laws and vested rights is to define a vested right. But when it appears, as soon happens, that this is impossible . . . [and] turns out to be something of an illusion . . . .").

[269] 335 S.W.3d at 143 ("What constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity.").

[270] *See id.* at 148; Mellinger v. Houston, 3 S.W. 249, 253 (Tex. 1887).

[271] 335 S.W.3d at 148; *Mellinger*, 3 S.W. at 253.

[272] *Robinson*, 335 S.W.3d at 148.

[273] *See id.*; Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . .").

[274] *See Robinson*, 335 S.W.3d at 148.

reasonable expectation of people and to protect against the abuse of legislative power.[275] The court also made it clear that not all vested rights are protected from the exercise of the legislative police power through the enactment of retroactive laws.[276] Thus, there exists this inevitable dichotomy and incompatible interests that need balancing: protection of vested rights will inevitably take away the Legislature's police power. However, in *Robinson*, the court merely articulated whether there *was* an impaired vested right, and there *was* no public policy to justify such impairment.[277] Previously, at least, the court seemed to consider the vested-rights analysis as the general rule with the police-power analysis as an exception to it.[278] This was the approach taken in *Barshop* and *In re A.V.*[279] However, the new "three factor" test puts these two analyses on an equal footing. There is no longer a general rule and an exception; rather, these are just factors to be considered. To make matters worse, the court has explicitly stated that the weighing of interest should be prohibited when there is no compelling public interest.[280] There is no clear guidance given by the court on how to balance these factors in case of conflicts.[281] There is no clear guidance as to whether there even should be balancing among these three factors.[282] This makes the application of this test difficult and questionable at best.

The Hochman article, on which the court relied in formulating this test,[283] provides a detailed insight to the balancing approach.[284] Instead of answering these three factors in black-and-white fashion like the Texas Supreme Court, Hochman adopts a "sliding scale" approach.[285] While articulating the three factors similar to the court, Hochman finds that "not

[275] *Id.* at 139.

[276] *Id.* at 145.

[277] *Id.* at 148–150.

[278] *See In re* A.V., 113 S.W.3d 355, 361 (Tex. 2003) ("This 'valid exercise of the police power by the Legislature to safeguard the public safety and welfare' is a recognized exception to the unconstitutionality of retroactive laws." (quoting Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 633–34 (Tex. 1996))).

[279] *See id.*; *Barshop*, 925 S.W.2d at 633–34.

[280] *See Robinson*, 335 S.W.3d at 150.

[281] *See id.* at 145–50.

[282] *See id.*

[283] *See id.* at 145 n.121.

[284] Hochman, *supra* note 40, at 697–727.

[285] *See id.* at 727.

all retrospective statutes are unconstitutional, but only those which, upon a balancing of the consideration on both sides, are felt to be unreasonable."[286] For example, Hochman asserts that "the weaker the public interest served by the retroactive [law], the weaker is the case for the statute's constitutionality" and the strengths of other two factors do not need to be as strong.[287] This is a direct contradiction to the court's ruling that there cannot be weighing of interests absent a specific legislative finding showing compelling public interests.[288] In other words, this court's requirement to show compelling public interest—and its "all or nothing" approach—seems to conflict with Hochman's more lenient "sliding scale" approach.[289] Furthermore, instead of looking for a significant impact on well-recognized and vested claim,[290] Hochman maintains that "the greater the alteration of . . . legal incidents, the weaker is the case for the constitutionality of the statute."[291] Once again, under the court's new analysis, unlike Hochman's sliding scale approach, the lack of such significant impact may preclude the plaintiff from challenging the constitutionality of a retroactive law altogether.[292] It remains to be seen how the court will handle these factors in the future, but the Hochman approach at least provides a clearer guidance that the court needs to fairly balance these factors.[293] At the very least, the court must address the weight which it has given to each of the three factors.[294]

Moreover, there is an inherent danger in adopting the *Landgraf* decision by U.S. Supreme Court and the approach taken in the Hochman article. In *Robinson*, the court develops and ultimately holds that the Chapter 149 of the Texas Civil Practice and Remedies Code "violated article I, section 16 of the Texas Constitution."[295] In other words, in Texas, the constitutionality of Chapter 149 is presumably determined by the express prohibition against retroactive laws—which must afford greater protection against retroactive laws than the Federal Constitution based on the Texas

[286] *Id.* at 694–95.

[287] *Id.* at 703.

[288] *See Robinson*, 335 S.W.3d at 150.

[289] *Compare id.*, *with* Hochman, *supra* note 40, at 727.

[290] *Robinson*, 335 S.W.3d at 148–49.

[291] Hochman, *supra* note 40, at 712.

[292] *Robinson*, 335 S.W.3d at 148–49.

[293] Hochman, *supra* note 40, at 727.

[294] *Id.* at 697.

[295] 335 S.W.3d at 150.

precedents discussed above—*without* regard to the due process consideration.[296] Yet, the factors and objectives contained in *Landgraf* and Hochman are clearly based on due process considerations.[297] While the factors may successfully sort out many unconstitutionally retroactive laws, there is an inherent danger that the people in Texas may not be getting the proper level of protection that their Texas Constitution affords them.

Finally, as mentioned in the previous Part, some technical aspects of applying each factor need to be more refined. For example, in analyzing the public-interest factor, the court does not discuss whether: (1) the mere presence of a legislative finding is sufficient to justify the retroactivity of a statute or (2) how much deference is to be given to the legislative findings in determining the interest is compelling enough.[298] Furthermore, the court does not address how to measure the extent of the impairment and fails to provide a legal definition of "significant impact."[299]

VI. CONCLUSION

More generally speaking, this case is about defining the power of the Legislature and the constitutional limits on that power. This is about the allocation of power in our system of government. This struggle is evident from the judiciary's shift back and forth between the vested-rights analysis and police-power analysis during the past 160 years. However, its inconsistent application has led to much confusion in recent years. While the court sought to put an end to this ambiguity through the adoption of the new three-factor test in *Robinson*, this has led to greater concern for future application due to the lack of guidance from the court. For example, the court has adopted relatively novel compelling interest standard. The court also failed to address the question whether the Texas Constitution provides further protection from the retroactive legislation. Furthermore, the court's failure to employ a sliding scale approach to the new three-factor test undermines the effectiveness of the new test. The analyses of Texas precedents show a clear departure from them. In sum, until the precedents develop in this area, there may not be any definite answers as to what constitutes an unconstitutional retroactive law.

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[296] *See id.* at 147–50.

[297] Landgraf v. USI Film Prods., 511 U.S. 244, 267–69 (1994); Hochman, *supra* note 40, at 694, 697.

[298] *See Robinson*, 335 S.W.3d at 149–50.

[299] *See id.* at 148–49.