THE TRIALS AND TRIUMPHS OF TEXAS ADMINISTRATIVE LAW

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CHAPTER 2
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THE TRIALS AND TRIUMPHS OF TEXAS ADMINISTRATIVE LAW

In 1975, the Texas legislature enacted the APA. The APA transformed Texas government. The Texas APA brought law – written uniform standards and processes – to Texas agency adjudications, agency rulemaking, and judicial review. The Texas APA changed Texas government more fundamentally than any amendment to the Texas constitution. My first goal here is to explain and celebrate this achievement.

What the Texas legislature enacts, Texas courts must construe and enforce. Since 1975, Texas courts have decided many important Texas APA and related administrative law issues. Others remain open. What one Texas legislature enacts, another can repeal or amend. Since 1975, Texas legislatures have made a number of significant statutory changes. My second goal here is to review and summarize key Texas APA and related administrative law judicial decisions and statutory changes.

Where do we go from here? My third goal is to highlight major challenges that change Texas administrative law.

For all three purposes, no forum is more appropriate than this, the annual Advanced Administrative Law seminar, sponsored by the administrative law section of the State Bar of Texas. American lawyers, in 30 years of effort through the ABA, are largely responsible for the federal Administrative Procedure Act, and the first model state Administrative Procedures Act. Texas lawyers, beginning through the State Bar, then led another 30 year struggle for the Texas APA. Texas lawyers and judges are largely responsible for the implementation of the Texas APA over the last 30 years. The work the Texas administrative law community has done is cause for great celebration. If we are lucky and diligent, members of this section will help the Texas Legislature’s future changes to Texas administrative law build on our predecessors’ achievements.

I. BETTER LATE: THE TEXAS ADMINISTRATIVE PROCEDURES ACT

How did we get here? The history of federal, model State APA, and Texas administrative law explains a lot about the law we have.

Texas came late to legislative enactment of uniform administrative law – nearly 30 years after Congress enacted the federal APA and after the first model state APA; nearly 15 years after the second model state APA. Texas took longer because Texas came earlier to, and deadlocked over, the core administrative law issue: how to provide judicial checks and balances upon politically unchecked agencies while avoiding judicial policymaking. Texas’ unique administrative law history affected the text and intent of the Texas APA, and continues to underlie Texas administrative law disputes. It was worth waiting. The Texas APA, though of course imperfect, is a better instrument than the federal APA and the model state APAs.

A. The Federal Administrative Law Movement

1. The administrative law problem

The federal Constitution and the constitutions of each state provide for three branches of government, and require separation of the legislative, executive and judicial powers as a key part of the checks and balances intended to protect freedom. The United States of America decided late in the 19th century to combine these three powers into agencies.

The practical reasons were compelling. Legislatures by their nature are responsible for every conceivable policy issue, composed of experts in none, and armed only with the broad blunt swords of legislation, taxation and spending. The complexities of industrial society require specialized continuous policymaking, enforcement and adjudication of issues peculiar to each key industry or problem. Legislatures cannot leave these issues to courts, which are composed of judges equally lacking in expertise and staffing and taught to avoid political entanglement.

The decision to create regulatory agencies that combine legislative, executive and judicial powers

forced new attention to the oldest question in government – who will govern the government?\(^2\) Administrative law developed to answer the question.

Elihu Root, in his presidential address to the American Bar Association in 1916, explained the problem:

“We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. [The creation of specialized regulatory agencies brings with it] great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect.”\(^3\)

There is nobody here but us chickens. The only possible answers to how to govern the government are structural answers. We must decide how to organize ourselves, our government, to reduce the risks that we will do ourselves, each other, oppression and wrong.

2. Constitutional checks and balances do not apply to agencies.

In grade school we were taught about constitutional checks and balances, and in law school about the doctrine of separation of powers. To understand why America needed to develop a system of administrative law, we should refresh our recollection of what these constitutional protections were and why they do not work with agencies.

The most familiar part is three separate branches. An elected legislature makes law by majority votes. An executive branch composed of an elected President and his appointees carries out law, negotiates treaties, and commands in war. A judiciary, as free of politics as appointment with lifetime tenure can make it, adjudicates facts and declares and interprets constitutional, statutory and common law. Where the application of the law turns on facts, those facts are determined by juries under common law rules of evidence.

The three branches check and balance each other by their separate responsibilities. The President cannot act without legislative authority and funding. The Congress cannot prosecute or spend except through the executive. The courts cannot themselves enforce the Constitution and laws, but must by their opinions persuade the other two branches. The three branches also check and balance each other more directly. The President can veto legislation, which can then be enacted only by 2/3 majority vote. The Senate must advise and consent to Presidential appointments, both of high executive branch officials and of federal judges. Congress controls taxation and appropriation of the funds necessary for the executive branch to carry out law, and (within Constitutional limits) the jurisdiction of the federal courts. The courts can declare statutes unconstitutional, and executive actions unconstitutional or contrary to statute.

Plaintly administrative agencies by their nature violate separation of powers. An agency combines in one government entity the most basic powers of each branch – the executive branch’s power to prosecute, the judicial branch’s power to adjudicate, and the legislative branch’s power to make law.

Perhaps more often forgotten or taken for granted are the checks and balances the Constitution of 1787 structured within the legislative branch. These are best explained by James Madison and Alexander Hamilton in the Federalist Papers, a collection of op-ed pieces and letters to the editor used in the successful campaign for ratification of the federal Constitution.

The authors of the American Constitution were especially worried about the great powers of Congress to make policy through legislation, taxation and spending. They feared that some faction (what we today would call an interest group) or temporary passion (for which the closest modern analogy might be an ideology) might win control of Congress, and do lasting harm to other interests and views. To reduce this risk, the Constitution of 1787 divided the legislative branch into two houses, structured differently.

All members of the house of representatives are elected every two years directly by the people of districts of equal population throughout what even in 1787 was a relatively large and geographically diverse country. The Senate, in contrast, consists of two Senators from each state, regardless of population, one-third of them chosen each two years to serve six year terms (and in the original constitution, chosen by their state legislatures).

Legislation, taxation and appropriation would therefore require majorities (2/3 majorities if necessary to overcome a Presidential veto) in each of these two very differently structured houses to agree. On any particular issue, the votes of many different factions, and of many representatives and Senators uncommitted

\(^2\) sed quis custodiet ipsos custodes? Decimus Junius Juvenal, Satires VI, l. 347.
\(^3\) Address of the President, 2 A. B. A. Journal 736, 749 (1916), quoted in Harris, *An Administrative Procedure Act for Texas*, 5 Sw. L. J. 125, 126 (1951).
to any faction, would be required to assemble these majorities. Assembling and holding two such majorities together would take time enough for any temporary passion to subside.

These crucial political/structural restraints that the founders built into lawmaking by Congress do not apply to policymaking by administrative agencies.

Many important federal agencies, such as EPA, Interior, or Agriculture, are headed by one appointee of one President, who serves at the President’s pleasure. The EPA Commissioner can unilaterally decide policy, with no need to compromise with any representatives of any factions, and she can change policy direction without waiting on any other policymakers to concur. Other important agencies such as the FCC are called “independent” because they are headed by a few (usually three or five) appointees, each serving limited and staggered terms. Even so, typically it takes a new President only two to four years to gain control. An independent agency’s decision requires only a majority vote of its commissioners. In all agencies, the level of detailed work needed for effective regulation requires a staff so large that most work, and many effective decisions, must be made by persons hired, without any advice and consent by the Senate, by those hired by those hired by those appointed by the President.

3. The federal APA of 1946

The New Deal underscored the political commitment of the nation, through the Congress and President, to regulatory agencies. It also underscored the risks, and focused the attention of bench, bar, academy, President and Congress, on the possible solutions. Federal administrative law evolved through federal court decisions on cases arising out of specific regulatory controversies under specific statutes. In a series of decisions in the 1930s and 1940s, the United States Supreme Court declared many of the administrative law doctrines we take for granted today.

A task force of the United States Attorney General and ABA then integrated the Supreme Court decisions and New Deal federal agency experiences, and reached a compromise consensus on the principal elements of what we today would call best administrative law practices.

Congress enacted this compromise as the Administrative Procedure Act of 1946. It was part of what has come to be seen, both by supporters and by critics, as a federal constitutional compromise, made without formal constitutional amendment. Even its critics accept the administrative constitutional revolution as subject only to future Congressional amendment. In the federal administrative law “constitution” of 1946, two achievements stand out – and so does one omission.

Agency adjudication and substantial evidence on the agency record review -- First, federal agencies will be permitted to adjudicate most fact disputes pertinent to their duties as assigned by Congress, and their adjudications will not generally be subject to de novo jury trial “review.” But federal agencies will be required to use formal adjudication procedures, with the appointed agency heads or their employees serving as judges holding bench trials. The agency’s fact decisions will be reviewed by courts on the record made in the agency hearing. The reviewing court will determine whether the facts found by the agency are reasonably supported by substantial evidence contained in the record considered as a whole.5

Courts will review the agency decision based on the explanation given when the decision is made -- Second, the Chenery doctrine. A court will review the explanation the agency gave in its decision for that decision, and will not consider “post-hoc rationalizations of appellate counsel” -- new theories, not stated in the decision, of why it is sound. If the agency explanation of its decision in its decision is inadequate, the federal court will remand to the agency, not just to come up with a better explanation, but to make a new decision, which may or may not be the same.6

Most agency rulemaking law came later -- One near omission also stands out. The federal cases of the 1930s and 40s and the federal administrative law compromise of 1946 said little about agency rulemaking and judicial challenges to agency rules. The cases suggested that courts would presume that facts existed to support an agency rule, as they do with a statute passed by the legislature.7 Although the federal APA provided in cryptic terms for notice and comment rulemaking, it also provided for formal rulemaking, using adjudicatory procedures to make rules, and its authors may have assumed that most rules would be made and reviewed under that model. For much of the next twenty years, important rules (such as natural gas price rules) were made in formal quasi-adjudicatory proceedings.

4. The second wave of federal administrative law – rulemaking

A second wave of federal regulation, including environmental and consumer health and safety regulation, began in the 1960s. It was conducted

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6 See Chenery.

largely by notice and comment rulemaking. Only then did federal administrative law on rulemaking and judicial checks on rulemaking begin to develop. Judicial decisions continuing into the 1980s made most of the federal administrative law on this subject.

Federal courts reversed themselves and stopped presuming that facts support agency rules. Instead, as the Supreme Court explained in the leading case of Motor Vehicle Manufacturers' Ass'n v. State Farm, they held the agency to the explanation stated in its order adopting the rule. An agency explanation will not properly support the rule, if the agency failed to "articulate a satisfactory explanation," including a "rational connection between the facts found and the choice made," or if the order shows the agency relied on statutorily irrelevant factors, failed to consider and important aspect of the problem, or offered an explanation that is "so implausible" that expertise cannot save it.

The Supreme Court specifically rejected the older approach that rulemaking review was like due process challenge to a statute. Federal courts require "more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause," and "do not view as equivalent" statutes, which are entitled to a presumption of validity, and rules.

If a federal court finds a federal agency's rulemaking explanation fails these tests, the rule will be remanded to the agency for a new try. 9

B. State APAs

1. States also needed agencies -- and new checks and balances

State constitutions generally also provide for three branches, usually for bicameral legislatures, and almost always require separation of powers, often in even stronger language than the federal constitution. State governments, like the federal government, faced the need to regulate more closely and flexibly than state legislatures can do directly by statute. Indeed, states often had a greater need for administrative agencies, because so many state legislatures meet only occasionally and briefly. States made the same decision to embrace government by administrative agency combining legislative and adjudicative powers with executive powers. States faced similar questions concerning how to regulate the regulators. States devised state administrative law answers, drawing on both the federal experience and their own.

2. The model state APA movement

Much of state administrative law was worked out through a series of model state APAs drafted by the Commissioners on Uniform State Laws. Such model state laws are proposals for states to consider. It is up to each state to decide whether to enact such laws, and if so with what variations from the model. There have been three successive model state APAs. The first was issued in 1946, the same year as the federal APA, and drew on the experiences of the 1930s and 1940s and the work of the federal AG’s task force. The second, issued in 1961, is the basis for most state administrative procedure acts, including the Texas APA. A third, issued in 1985, has had less effect, but is the source of key reasoned justification language in the Texas APA.

3. Reasons state and federal administrative law differ

State answers questions of how to regulate administrative agencies can be and have been different, for two important sets of reasons.

First, a state is different from the United States, in ways that matter to administrative law.

A state is smaller in geographic scale and resulting stakes.

A state is different from the federal government in its place in the structure of governments, in two ways. One, each state is a unitary sovereign. 11 In contrast, the United States is a federal entity, composed of multiple more or less sovereign states. Two, each state is part of the federal United States, limited under the federal Constitution in its relationships with other states, with Indian tribes, with foreign nations, and with the federal government. In contrast, the United States is not part of a larger federal structure, and is a direct sovereign participant in a system of international law that rests most heavily on treaties.

States are both narrower and broader in scope than the federal government. States lack powers over war, foreign relations and interstate commerce. But states have responsibilities over, e.g., professional licensing, that have to some degree remained despite expansive readings of federal interstate commerce powers. Within their more limited sphere, states’ powers are not the limited powers conferred under the federal constitution upon the federal government, but all the powers of sovereignty.

The internal structure of each of the three branches of most state governments differs crucially from the internal structure of the federal government. The federal executive is unitary – entirely under the command, direct or indirect, of the President. Most

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8 463 U.S. 29, 43, 44n.9(1983).
9 Id. at 57n21(1983).
10 See Mega Child Care, 145 S.W.3d at 177-180.
11 In states like Texas, state constitutional provisions for home rule cities and for counties, limiting legislative power to regulate such entities, may be viewed as a partial exception, but the exception is not significant: the City of Austin and Travis County can do little that is not potentially subject to state legislation.
states have a divided executive, with separate elections for the Governor and at least some other key officials (e.g., the attorney general). The federal Congress is full-time, in more or less continuous session. Most states have part-time legislatures. Federal judges are appointed for life. Many states’ judges are elected, and most other state judges are appointed for fixed terms.

Second, each state has its own regulatory history. When America entered the industrial revolution and decided it needed administrative agencies, federal courts had a restrictive view of Congressional power over interstate commerce, and states took the lead in many regulatory ventures. State and federal courts at the same time had restrictive views of the extent of state regulatory powers, under substantive due process and contract constitutional doctrines. Thus, for many decades, state legislatures were adopting more regulatory statutes than Congress, and trying to find ways to do so that would pass muster with the courts. Because of differences among the states in natural resources, industry, politics and culture, their regulatory experiences vary widely. Each state’s unique regulatory experiences can and in many cases have affected its decisions as to how to regulate the regulators. This is especially true of Texas.

C. Texas: It Was A Whole Other Country

Texas encountered the problems that lead to regulatory agencies and require administrative law earlier, and for higher and more difficult stakes, than any other state or the federal government, and from a unique state constitutional perspective.

1. "Giant" – We were Number One

Texas was a pioneer in regulation of the first immensely powerful new industry, the railroads. Each railroad, once built, possessed monopoly power over transportation vital to the economic viability of the largest economic sector, farming, and of mining, and to the development of cities. Texas, because of its enormous physical size, and absence of river/canal alternatives, needed railroad rate regulation more than any state except perhaps California. With its populist background, Texas was among the first states to regulate railroad rates, amending its 1876 constitution in [year] to create the Railroad Commission.

The Railroad Commission was considered so important that a United States Senator resigned to become its first Chairman. The United States Supreme Court’s Shreveport Rate Case and other decisions relatively quickly took away the importance of state railroad rate regulation in favor of federal regulation through the first modern federal administrative agency, the Interstate Commerce Commission.

Most states’ administrative law development slowed, or shifted to workers’ compensation and wage, hour and safety issues. Not Texas. The Railroad Commission became even more important, because of a second major new industry – oil and gas. By early in the twentieth century, oil became a fuel that rivaled coal in industrial importance, and Texas the leading producing state. By the 1920s, with the development of the automobile, oil was beginning to pass coal as transportation fuel, and gaining in industrial uses. Texas, for a time in the 1930s, produced two-thirds of the oil in the world.

The Texas legislature quickly delegated the problem of regulating oil and gas production to the Railroad Commission. The problem was a classic illustration of the need for regulation. Production needed to be efficient, so that the maximum percentage of hydrocarbons in each newly discovered reservoir would ultimately be recovered. Production also needed to be fair, giving each owner of land or lease rights an opportunity to recover a fair share of the hydrocarbons under his property. The prevention of waste and the protection of correlative rights, as Texas law labeled these concepts, are highly fact-sensitive. To prevent waste and protect correlative rights in any given reservoir requires decisions based on the geological and petroleum engineering facts peculiar to that reservoir on the number of wells and their distance from each other, and the allowable rate of production from each. When a new reservoir is discovered, rules specific to it must be adopted immediately, with little geological and production information to go on, then revised and exceptions made as additional wells are completed and additional information becomes available. Accomplishing this by legislation was, on its face, impossible.

2. The Texas Bias Towards De Novo Review

For two reasons, Texas administrative law developed with a stronger bias towards de novo judicial review of agency decisions than federal courts or the courts of other states.

First, the Texas constitution of 1876 was a uniquely anti-government document. Its sponsors, Confederate veterans angry at Reconstruction government and fearful of government by their newly enfranchised former slaves, set out to reduce and split state executive power as much as possible. One means was the most strongly worded requirement of separation of powers imaginable. Another was to require elected judges, and the most strongly worded guarantees then imaginable, of jury trial, due process/due course of law, and open courts.

As a result, it is not surprising that, from the beginning of rate regulation by the Railroad Commission, the Texas legislature provided for de novo review – the case "shall be tried and determined
as other civil causes." The Texas Supreme Court responded by stating that such de novo review "may not be a wise policy ... but that question is for the legislative branch of the government, and not for the courts, to deal with." However, the Court held that it would remand rates found by the jury to be unreasonable rather than set the rates the Railroad Commission should have set.

Second, regulation of oil and gas was uniquely difficult. As stated by Justice Frankfurter in explaining one of the doctrines by which the federal courts took themselves out of the business of reviewing Railroad Commission oil and gas regulatory decisions, regulating oil and gas production was "a problem as has challenged the ingenuity and wisdom of legislatures," "beset with perplexities, both geological and economic." Though Justice Frankfurter was too discreet to say so, the same difficulties made the Commission's oil and gas regulatory decisions uniquely vulnerable to political pressure. Enormous amounts of money were at stake in each reservoir. Each Commission decision affected small numbers of identifiable landowners and producers. All of the landowners and many of the producers were their constituents, and everyone was a potential campaign contributor. The scientific/engineering merits were inherently uncertain, even speculative.

3. The Texas Answer: "Substantial evidence de novo"

Against this background, Texas adopted a unique compromise form of judicial review – "Texas substantial evidence" or "substantial evidence de novo", then Texas Supreme Court Justice (now senior Fifth Circuit Justice) Tom Reavley dubbed it. The trial court would conduct a jury trial on the agency’s decision, under the statutory standards applicable to that agency's decisions on the issue in question. The jury would decide whether substantial evidence admitted in court supported the decision the agency had made on some other basis -- whether a reasonable person, if he were presented with the court evidence, could rationally reached the decision that the agency had made.

"Substantial evidence de novo" was less crazy than it seems to us.

(1) For the Railroad Commission and most other agencies, the Legislature did not provide for agency proceedings and records, the Legislature had not seen fit to require formal agency proceedings and records of such proceedings. No one had much experience with agency adjudications, and doubts concerning their constitutionality, particularly where correlative rights among private property owners were concerned, continued to hang over the concept. With elected Railroad Commissioners who did not need to be lawyers, it was hard to see how to require bench-trial procedure and evidence. Most importantly, legislators, lawyers, and powerful political forces with first-hand experience of Railroad Commission decisionmaking doubted whether agency proceedings and records would make much difference to, or reflect the true basis of, the agency’s actual decisions.

(2) The Legislature kept trying to insist on true de novo review. Courts could not review an agency decision on the agency record because no such record existed. Precisely because the Legislature had more confidence in the impartiality of the courts than of the Railroad Commission, it wanted true de novo review.

(3) If the courts continued to refuse to accept de novo review responsibilities, substantial evidence de novo would at least face the agency with the prospect that a court would reverse and remand a decision for which the winner could not show the jury a plausible possible explanation.

(4) From the beginning of railroad rate regulation, the Texas legislature had dealt with the risk of local jury prejudice by assigning judicial review to the trial courts of Travis County. In a town as small as Austin was then, with little economic base beyond state government and the University of Texas, every one of the handful of judges and potential jurors was likely to know what had "really" happened in a high-profile Railroad Commission case.

D. The Texas APA: We Did It Our Way

1. How Texas came to adopt its APA

Although understandable in context, substantial evidence de novo could and did lead to absurd results. Many Texas law professors, practitioners and judges criticized the absence of uniform Texas administrative procedures and standards as a problem in its own right, and criticized substantial evidence de novo review. They urged adoption of a Texas statute modeled on the
1946 state model APA. The State Bar by referendum in 1953 approved this approach, but the Legislature did not even consider it.

Instead, the Legislature kept passing statutes designed to force the courts to conduct true de novo review, and the courts kept construing them to avoid such review and its constitutional and practical problems. In 1958, 1959, and 1961, in a series of decisions the Texas Supreme Court ruled that de novo review was unconstitutional. This was not enough to secure prompt passage of a uniform Texas APA based on the 1961 state model APA, even when seconded with criticisms of substantial evidence de novo by, e.g., Justice Reavley.

The Texas legislature did, however, pass more regulatory statutes specific to various agencies and regulatory issues. These statutes often provided for formal agency adjudicatory proceedings, with evidence, hearings officers, findings of fact and conclusions of law, motions for rehearing, and judicial review on the agency record. They were agency-specific, but otherwise generally along the lines of the model state APA. These statutes worked – judges, lawyers, and some legislators gained confidence that this was, in fact, a better approach to government by, and of, administrative agencies. An example is then-Austin court of appeals' chief justice John Phillips' 1974 St. Mary's Law Journal article, "The Evolution of the Administrative Process Under the "New" Texas Saving and Loan Act."

Meanwhile, the Railroad Commission's oil and gas regulatory importance had shrunk dramatically by the 1970s. Oil and gas production shifted to other states, to offshore federal waters, and to the Middle East. Federal regulation of the interstate gas pipelines that bought most of the natural gas produced in the United States, combined with the United States' Supreme Court's Phillips decision deeming wellhead sales to such pipelines to be sales for resale in interstate commerce subject to federal regulation, shifted the regulatory focus from Austin to Washington, D.C. The giant oil and gas fields of Texas had been discovered, and developed, and their rules were relatively mature.

Despite all of these forces and trends, the dam of legislative opposition to a state APA did not break until after the Sharpstown scandal swept in a reform legislature in 1972. In the 1973, 1975 and 1977 sessions, the Texas Legislature enacted most of the administrative law structure we take for granted today – the APA, the Texas Register, the Open Meetings and Open Records statutes.

One key part of the story of the Texas APA remains to be told. It concerns the relationship between enactment of the APA and the other great regulatory agency development of the 1975 session – the Public Utility Regulatory Act, which created the PUC, the first statewide regulation of electric and gas utilities. Here is what I think the story was.

With population growth and urbanization, air conditioning, and global communications, electric and telephone utilities were of enormous and growing regulatory importance. Regulation by individual city councils, subject to substantial evidence de novo court cases, was dysfunctional. Consumers were up in arms over utility rates. Utilities also had reasons to need or at least not oppose statewide regulation. Texas electric utilities, in particular, were making unprecedented investments in nuclear power plants. Electric utilities needed decisions on certification of new power plants as in the public interest, convenience and necessity that could not be second-guessed. All types of utilities needed uniform service-area-wide rates that could not be second-guessed.

The Legislature created the PUC largely along the 30-year old federal and model state APA model: certificate and rate case decisions would be made by the PUC on review of proposals for decision by hearings officers in contested cases, with judicial review for substantial evidence on the agency record. The Legislature tried to make one exception: the constitutional inadequacy of rates would be reviewed de novo, by a preponderance of the evidence. The Texas Supreme Court wasted no time in holding this "inoperative and void."

2. The Texas APA is very different from the federal APA

Though we can trace it back to the federal APA and New Deal federal court caselaw, the Texas APA looks nothing like the federal APA.

At the most basic level, the Texas APA focuses almost exclusively on two decision-making modes, adjudication and rulemaking. In contrast, the federal APA has four – it divides both adjudication and rulemaking into formal and informal versions.

While formal adjudication under the federal APA and contested case adjudication under the Texas APA are conceptually very similar, Texas, drawing on the state model APAs and its own experience with e.g., savings and loan regulation, spells out the steps required at the hearing officer, agency and court levels in much greater detail.

Texas has relatively detailed notice, reasoned justification and related requirements for agency rulemaking, and explicit provisions for related judicial decisions in suits for declaratory judgments concerning the validity or applicability of agency rules. The federal APA has only the most barebones provisions for notice-and-comment rulemaking and for related

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16 John Hill parens patriae case.
17 Southwestern Bell Telephone v. PUC, 571 S.W.2d 503, 510-12 (Tex. 1978).
judicial review. Federal courts have had to develop the necessary standards by generous extrapolation from the terse text, and from structural necessity.

In general, federal courts conduct "hard look" judicial review of the agency's explanation of its rulemaking choices, as set out in the Federal Register order adopting the rule. Major federal agency rules are routinely remanded, at least in substantial part, because the agency failed to show that it had grappled with some policy choice or some alternative proposed by commenters. With these stakes, affected industry groups and environmental and consumer organizations submit detailed comments, backed by detailed studies, on every issue.

The federal APA's formal rulemaking category has no equivalent under the Texas APA. Although at least one agency, the Railroad Commission, does make some important rules by contested case procedures, the Texas Supreme Court's decision in WBD Oil & Gas has put an end to my speculation that such rules could be challenged in a Texas rule validity or applicability dispute.

The federal APA's "informal adjudication" category is a catchall category that has no counterpart in the Texas APA. Authorization for federal court review of "informal adjudications" is crucial in the federal law system. Many federal agency decisions are not made by any form of evidentiary hearing nor by any formal public process such as notice and comment rulemaking, but have enormous economic and other importance – consider a listing of a species as endangered, or designation of its critical habitat, or its recovery plan. Subject to specific Congressional provisions otherwise, and to a host of judicial gatekeeper doctrines, these decisions are reviewable by federal district courts as "informal adjudications". But the federal APA says almost nothing about how federal courts are to conduct such review, and the federal courts have struggled to work out answers that meaningfully check agencies without substituting judicial judgment.

Because Texas has no catchall "informal adjudication" category, when the agency decision is neither the result of a contested case nor the result of a rulemaking, affected persons most often seek judicial relief, instead, using two types of declaratory judgment actions and injunctive relief. The Texas declaratory judgment act, discussed later, authorizes declaratory relief to resolve uncertainty and declare rights and duties including by construction of statutes. The Texas APA provision for declaratory judgment concerning the "validity or applicability" of an agency rule, discussed later, often provides for declaratory relief even when there is no dispute over the statute.

3. The Texas APA, though closely based on the 1961 model state APA, differed from it in significant respects. The Texas APA's basic structure is the same as the 1961 model state APA – contested cases, with substantial evidence on the agency record judicial review, and notice and comment rulemaking, with declaratory judgments to determine rule validity or applicability. Many specific differences were identified by Dudley McCalla, who had played a leading role in the work of the Administrative Law Committee of the State Bar that led to the Texas APA, in his 1976 Baylor Law Review article.

Dudley's focus, like that of the Texas APA itself, was on contested cases and judicial review of contested case decisions, not on rulemaking and related declaratory judgments (the latter occupied two of the article's 51 pages). I want to focus on two contested case/review differences that Dudley highlighted in 1976.

First, the Texas APA defined a "contested case" proceeding differently from the 1961 model state APA. The definition of "contested case" matters. Only proceedings that fit the definition are by virtue of the APA subject to the APA's detailed requirements for contested case proceedings, from notice through discovery, hearing, proposal for decision, final order with findings and conclusions, and motion for rehearing. Only proceedings that fit the definition are thereby subject to the APA's entitlement to judicial review. In other words, unless the agency proceeding fits the APA contested case definition, a person has no general statutory right either to contested case protections in the proceeding or to contested case judicial review of the agency decision. Her process and judicial rights then depend either upon other statutes (such as the agency-specific regulatory statute) or upon the constitutions.

The Texas APA deleted "required by law" from the model state definition and adding "adjudicative", as follows: "in which the legal rights, duties, or privileges of a person are required by law to be determined after an opportunity for adjudicative hearing." Dudley argued that the Texas Legislature intended to "expand 'contested cases' " beyond those proceedings "in which agencies were required specifically by statute and to include all instances in which agencies in fact determine legal rights, duties, or privileges of parties even though no hearing was required by statute." UT Law Professor Robert Hamilton and a co-author argued against this

18 104 S.W. 3d 69 (Tex. 2003).
20 28 Baylor L. Rev. at 448.
interpretation. The Austin court of appeals has so far sided with Professor Hamilton, but the Texas Supreme Court has not ruled on the issue, so it remains unsettled.

Second, under the Texas APA, Texas substantial evidence de novo is out of favor, but not dead. The Texas APA provides that its substantial evidence on the agency record form of judicial review applies "if the manner of review authorized by law for the decision in the contested case is other than by trial de novo." Clearly the Legislature intended to make substantial evidence on the agency record the rule for judicial review of agency adjudications. Equally clearly, the Legislature contemplated that, for specific agencies and types of cases, it reserved the right to keep on trying to compel Texas courts to conduct trial de novo review. Even if the courts continue to reject true de novo review, the Legislature could reasonably hope for "substantial evidence de novo" review.

This APA provision sometimes does come into play. Under the Workers' Compensation Act, now part of the Labor Code, judicial review of the agency's decision on the compensability of a worker's injury or income or death benefits are decided by contested case appeals go to the district court of the worker's residence at the time of injury or death. Labor Code § 2403, 508 (Tex. 1978).

4. In Texas administrative law, Austin rules

The Texas APA funnels almost all Texas contested case judicial review and all Texas rule validity or applicability declaratory judgment actions to district court, not to direct to an appellate court, and specifically to the district courts of Travis County.

E. Celebrate the Texas APA's "Far-Reaching Consequences"

The ink was scarcely dry on the enrolled version of the statute before the Texas Supreme Court reversed the Austin court of appeals for failure "to recognize the far-reaching changes intended by the adoption of the [Texas] Administrative Procedure Act."

It is even harder for us now to appreciate these changes worked by the Texas APA. We have lived under the Texas APA so long that we take it for granted. It is worth pausing to reflect on how profound, and beneficial, its changes have been.

Before the APA, you got whatever hearing the agency chose to give you, and the decision may well have been based upon private conversations between commissioners relying on facts not offered at the hearing. Now, hundreds of agencies adjudicate thousands of matters every year under uniform procedures that require notice, discovery, open hearings, usually before an administrative law judge, and a decision, including written findings and conclusions, limited to the record.

Before the APA, if you had any right of judicial review of an agency's adjudicative decision, it was to trial de novo before a trial court. You and the AG were not litigating the question of whether the agency had some reasonable basis for deciding the case as it did, but instead the question of whether the agency would have been crazy to rule as it did, if it had known what the jury knows. Now you have a right of judicial review, and both sides, you and the agency, are fighting about whether the agency's decision, as the agency made it and wrote it up, satisfies stated criteria for reasonableness, including substantial evidence support in the record considered as a whole.

Before the APA, if the agency wanted to make a rule, the agency could do so with no input from anyone, and no explanation at all, and keep the rule in its files where only the insiders even knew of its existence. Now, an agency must publish a notice that meets detailed statutory standards; must provide a meaningful opportunity for interested persons to comment on the proposed rule, its bases, and alternatives; and must explain, in its order adopting the rule, its reasoned justification for the rulemaking choices it made, including why it rejected the comments it rejected.

Before the APA, if you could challenge the agency rule in court at all, your challenge was treated like a constitutional challenge to a statute passed by the legislature. The reviewing court would make up (presume) facts as needed to support the rule, unless you proved that only a crazy person could have thought the rule was a good idea.

Now you have a right to a determination of the validity of the rule, and the reviewing court will not presume facts support it. Instead, the agency must defend its reasoned justification for the rule as stated in the order adopting the rule.

Before the APA, unless you could establish a right to injunctive relief based on violation of rights vested under the constitution, you had to await agency enforcement action even to dispute the applicability or interpretation of the agency rule to you. Now you have a right to a determination of the applicability of the rule if its threatened application merely threatens to
impair a privilege, even if agency proceedings are pending at the same time.

II. TOP TEXAS ADMINISTRATIVE CASES AND STATUTORY CHANGES SINCE 1975

Administrative law serves the same role that a written constitution serves – it structures government decisionmaking to promote efficiency, fairness, and wise policy, to protect individual rights, and to foster other shared values. Administrative law arguments and decisions therefore resemble constitutional arguments and decisions. But the APA or any specific regulatory statute is easier to amend than a constitution, either to cure a perceived error by the courts, or to address a new problem. Thus, administrative law issues may be decided by the courts, or by the legislature -- or by both.

I select for discussion here a few especially key administrative law cases and statutory changes of the last 30 years. My law partner Robin Melvin has recently and most ably reviewed the Texas APA amendments and cases more comprehensively for a rival seminar.

A. The Fourth Dimension -- Agencies in Their Place

1. The Non-Delegation Doctrine and Other Constitutional Challenges to Agency Statutory Authority

Administrative agencies are clearly in the executive branch. Long before any APA, courts in Texas as elsewhere rejected constitutional challenges to statutes delegating to administrative agencies legislative and adjudicative powers. After the APA, the Texas Supreme Court has reaffirmed these rejections of constitutional challenges, sometimes relying on the "full panoply of procedural safeguards" that the APA provides.

The legislature may delegate legislative power to an agency so long as the statute "contains sufficient guidelines or standards for the exercise of such authority." Broad standards like prevention of discrimination and waste and protection of correlative rights are sufficient.

The Texas Supreme Court revived interest in non-delegation arguments in the context of legislative delegation to private entities, in the Boll Weevil case. Private entities are by their nature even less subject than administrative agencies or other public entities to general legal and political constraints. Legislative delegations to private entities are therefore subject to "more searching scrutiny," using an eight-part test. These non-delegation arguments have generally, but not always, failed.

To take advantage of this stricter scrutiny, creative counsel have tried to cast the private parties who make up one side of heavily regulated transactions as recipients of government powers subdelegated by the agency. These arguments have been rejected on the grounds that there was no delegation at all.

The legislature may generally confer the power to adjudicate upon an administrative agency, even where the administrative remedies substitute for common law remedies, despite open courts constitutional guarantees. The question is whether its reason for doing so "outweighs" the constitutional right, and its substitute is "adequate", meaning "reasonable" in the constitutional sense. The test is whether the legislature's action has a rational basis – whether a rational (non-crazy) person could have believed what the legislature must have believed when it adopted the statute. For this purpose, it is irrelevant that testimony supports trial court findings that the legislature's decision is not, in fact, reasonable.

When creating rights and duties with no counterparts at common law as of 1876, the legislature is free to do so within analogous due course of law bounds.

2. City of Sherman -- Agencies Have Only Statutory Powers

The judiciary has nearly abandoned constitutional limits on the Legislature's delegations to administrative agencies. This makes judicial enforcement of statutory limits on agencies, the limits set by the Legislature, all the more essential.

The key case is Texas Supreme Court's 1983 City of Sherman v. PUC decision. The PUC was holding contested case hearings concerning the effects of the city's groundwater pumping on a water utility regulated by the PUC. Without waiting for exhaustion of administrative remedies, Travis County district judge Pete Lowry granted the City injunctive relief. The Austin court of appeals reversed, but the Supreme Court reversed the court of appeals and affirmed Judge Lowry.

Two related City of Sherman holdings stand out.

First, although the general rule for judicial review of agency adjudications is exhaustion of administrative remedies, there are exceptions. When the agency is alleged to be acting outside its jurisdiction, "then the doctrine of exhaustion of administrative remedies is not applicable." As Texas administrative lawyers we are more familiar with Justice John Powers' more detailed gloss on this concept (adding that new and additional powers, no matter how convenient, will not be implied) in Sexton v. Mt. Olivet Cemetery Association, adopted by the Texas Supreme Court in PUC v. GTE-SW.

3. The Uniform Declaratory Judgment Act, and Leeper

In 1985, the Legislature adopted, with modifications, a new version of another model state statute – the Uniform Declaratory Judgment Act, now ch. 37 of the Civil Practice & Remedies Code. Though Texas had first adopted a declaratory judgment statute in 1943, Texas courts were long reluctant to issue declaratory judgments. The 1985 enactment appears to have gone a long way toward overcoming this reluctance.

Among the purposes for which the Texas Legislature has authorized the remedy of declaratory judgment, one is important to administrative law -- to resolve questions of statutory construction. Any person "whose rights, status, or other legal relations are affected by a statute … may have determined any question of construction or validity arising under the statute … and obtain a declaration of rights, status, or other legal relations the reuder." Until the agency finishes by ordering a penalty, perhaps levying a fine, and sues to collect or enforce its penalty, the only other remedy available to a litigant like the City of Sherman against an agency acting outside its statutory authority is injunctive relief. Injunctive relief against an administrative agency presents an array of difficulties, traceable back to centuries-old equity doctrines, and aggravated by often-understandable judicial reluctance to interfere in ongoing agency proceedings. Declaratory relief is less disruptive and often sufficient. When declaratory relief is not sufficient, the litigant can seek temporary injunctive relief pending declaratory judgment.

The Texas Supreme Court in Leeper held that the Texas UDJA abrogates sovereign immunity. It is easy to find cases saying that the UDJA is merely procedural and does not create a cause of action, but this is sloppy and inaccurate. "A suit under the UDJA is not confined to cases in which the parties have a cause of action apart from the Act itself." What is meant is that the addition of the declaratory judgment remedy does not change the jurisdiction of the courts. Courts still may not decide cases that do not present a justiciable controversy. They still may not render advisory opinions.

If a dispute over construction of an agency statute does meet constitutional thresholds for a justiciable controversy and the declaratory judgment will resolve the uncertainty, then as the Austin court of appeals held in PUC v. City of Austin, the district court is "duty-bound to declare the rights of the parties".

The Texas Legislature added a fee-shifting provision to the model state UDJA. Leeper held that fees may be awarded against state agencies. The UDJA is broader than Government Code § 2001.038, the APA declaratory judgment provision for

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37 643 S.W.2d 681 (Tex. 1983).
38 Id. at 683, quoting from Westheimer ISD v. Brockett, 567 S.W.2d 780,785 (Tex. 1978).
39 Id. at 686.
40 729 S.W.2d 129, 137-38 (Tex. App. –Austin 1986, writ ref'd n.e.)
41 901 S.W.2d 401, 407 (Tex. 1997).
44 Texas Education Agency v. Leeper, 893 S.W.2d 432, 445-46 (Tex. 1994).
45 Texas Department of Public Safety v. Moore, 985 S.W.2d 149, 153 (Tex. App. –Austin 1998).
46 Id. The Uniform Declaratory Judgment Act does not do away with constitutional limits on the jurisdiction of courts – they are still not empowered to issue advisory opinions. State v. Morales, 869 S.W.2d 941, 947 (Tex. 1994).
47 728 S.W.2d 907,910 (Tex. App. –Austin 1987, writ ref'd n.r.e.)
rule validity or applicability disputes – the UDJA applies to any statutory construction dispute, whether or not reflected in a rule dispute.

The Austin court of appeals has held that fees may be awarded against a state agency when declaratory judgment is sought both under the UDJA and under Government Code § 2001.038, if the relief obtained includes statutory construction as well as the validity or applicability of a particular agency rule.48

4. Agency Statutory Construction Is Not Binding on Texas Courts

Texas courts give some deference to, but are not bound by, an agency's statutory construction. This is true even as to a reasonable agency interpretation of an ambiguous statute interpreted by the agency in carrying out its delegated rulemaking or adjudication duties. The Texas court is free to adopt a different statutory construction that it considers more reasonable.

The Texas Supreme Court will only "consider the agency's interpretation of its own powers only if that interpretation is reasonable and not inconsistent with the statute." 49

Even if the statute is "unclear" and the agency interpretation is a reasonable one, the Texas Supreme Court will give only "some deference" to the agency interpretation. 50 A reasonable agency interpretation of an ambiguous statute is entitled to "serious consideration". 51 But even a plausible agency reading of an ambiguous statute is "not controlling". 52

This doctrine predates the Texas APA. Sixty years ago the Texas Supreme Court held that an agency's interpretation of an ambiguous statute is "worthy of serious consideration" and entitled to "great weight". Stanford v. Butler, 181 S.W.2d 269 (Tex. 1944).

Thus, the Court will analyze the merits of a statutory construction dispute for itself, and adopt an interpretation that is different from even a plausible agency interpretation, if it is sufficiently more reasonable than the agency's interpretation. 53

Many Austin court of appeals' decisions track the Texas Supreme Court's holdings on the degree of deference due agency statutory construction. For instance, in one case, the Austin court held that the agency's interpretation of an ambiguous statute should be given respect, due weight, and serious consideration. "We are not bound, however, by the [agency's] interpretation." 54 Similarly, "we are not bound by the Commission's construction of a statute," even though it is entitled to serious consideration. 55

Some Austin court of appeals' decisions, however, use language that cannot be reconciled with the Texas Supreme Court's decisions on statutory construction. Most of these are traceable back to one case involving the Comptroller under a specific statutory provision stating that the Comptroller's interpretation of one statutory issue was controlling. 56

Sixty years of Texas Supreme Court cases, from the 1940s to the 21st century, ought to be enough to demonstrate that Chevron 57 is not the law in Texas. But unless and until the Texas Supreme Court uses the words 'Chevron is not the law in Texas', it seems likely that assistant Attorneys General will sometimes cite the minority Austin cases in hopes of winning a case and changing Texas law. For this reason, a brief review of what Chevron is, and isn't, and what Chevron does and does not do, followed by a brief review of reasons why Texas should not adopt Chevron, is in order.

The Chevron doctrine applies only when a federal court is considering a federal agency's interpretation of a statute the federal agency is charged with implementing. It does not apply to the federal agency's decision of other law, such as a statute that another agency is charged with implementing.

The Chevron doctrine applies only if the agency's interpretation is provided in the course of the agency itself officially implementing that statute – normally, in a rulemaking or an adjudication. Federal courts do not give Chevron deference to interpretations by agency employees, or even by the agency itself in less official and formal contexts – policy statements, manuals, opinion letters, and so forth. Those interpretations, as the United States Supreme Court recently reaffirmed in United States v. Mead Corp., 533 U.S. 218 (2001), are subject to the much older Skidmore doctrine. The degree of deference the federal court should pay such agency (or employee) interpretations depends upon a variety of factors, including how technical the issue is, how consistent and high-level the agency interpretation

56 All originated with Hammerman & Gainer, Inc. v. Bullock, 791 S.W.2d 330, 332-33 (Tex. App. – Austin 1990, no writ). The court was interpreting the scope of the phrase "insurance services", and the Legislature had stated that the Comptroller had "exclusive jurisdiction" to interpret that phrase.
is, how thorough the process that led to the agency interpretation was, and how persuasively reasoned the agency interpretation is.

Where *Chevron* does apply, a federal court conducts a two-step analysis. In step one, the federal court asks, has Congress spoken in the statute directly to the question at issue? If so, that is the end of the matter, because the agency has no power to amend the statute by interpretation. If not, the federal court goes to step two, and ask: is the agency's interpretation of the ambiguous statute reasonable? If so, the agency is deemed to be making a policy choice that Congress, by its failure to express itself clearly, has delegated to it.

*Chevron* was offered as solution to the difficult problems of statutory construction, a substitute for traditional canons of statutory construction, but the Supreme Court quickly changed its mind about that. As for step one, over the strenuous objections of Justice Scalia it was immediately held that federal courts will use all the traditional canons of statutory construction, including legislative history, at step one, to determine whether or not a statute is ambiguous. The United States Supreme Court often splits badly on and reverses court of appeals' decisions holding that a federal regulatory statute is (or is not) ambiguous.

For example, in *Maislin Industries, U.S. v. Primary Steel, Inc.*, the Court divided on whether an ICC interpretation of its statute was permissible. Rejecting the views of four different federal courts of appeal, the majority held the ICC interpretation inconsistent with the statute, and did not even reach the question of whether it was reasonable. In *MCI Telecommunications v. AT&T*, the Court split 5-3 over whether the word "modify" in the phrase "modify any requirement" was ambiguous for purposes of whether to defer to an FCC decision relieving nondominant long distance carriers of tariff filing obligations. The majority (in an opinion by Justice Scalia) held that "modify" was not ambiguous. Both sides argued from dictionaries, the structure of the statute, and later related statutes.

As for step two, there never has been and never will be an agreed standard for what counts as a "reasonable" agency interpretation. Split decisions on whether the agency interpretation is reasonable may also be found. Justices are quite willing to declare their colleagues guilty of unreasonable interpretation.

In other words, exactly as Justice Frankfurter said long ago, statutory construction remains "the art of interpretation", not a science. A conscientious judge must investigate all the relevant statutory construction merits, giving each the weight they are due in that specific case. "The final rendering of the meaning of a statute is an act of judgment." 61

*Chevron* was controversial from the beginning, and remains so. Even informed observers of federal administrative caselaw who are supporters of *Chevron* concede it offers only an illusion of certainty – the cases invoking *Chevron* reflect a lack of clarity, impossible to rationalize or integrate. 62 Despite *Chevron* there remains no way, short of actual litigation, to forecast whether a particular federal agency statutory interpretation will or will not be upheld, and as a result many urge its abandonment. 63

For two reasons, whatever the arguments for federal court deference to federal agencies in the federal structure, they are weaker for Texas courts and Texas agencies in the Texas structure.

First, federal courts can have greater confidence than Texas courts in political checks and balances on agency statutory interpretation. Every federal agency is subject to much closer executive and legislative control than any Texas agency.

The President appoints the heads of every federal agency, including the Attorney General who represents the federal agencies in court. Many important Texas agencies are headed by separately elected officials (Comptroller, Land Commissioner, Board of Education) and the Attorney General who represents them is separately elected.

Congress sits in continuous session, with standing committees and subcommittees, composed of fulltime legislators with large staffs, overseeing each aspect of each agency from every conceivable perspective. The Texas legislators, part-timers with little staff, meet five months every other year.

Second, federal courts can afford to be more deferential to agency statutory construction than Texas courts because they take a "hard look" at the federal agency's rulemaking order, explaining its policy choices, and remand a high percentage of federal agency rulemaking decisions. In six month periods in the middle of each of three decades, less than half of federal rulemakings appealed were affirmed. 64 Texas courts, as discussed below, have only reversed a

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handful of agency rules for lack of reasoned justification.

B. Stick to The Story – Judicial Review of Agency Reasoning

Assume courts are holding each agency to the statutes. Then the question is -- what can courts properly do about agency decisions within their statutory authority? To what extent can a court review any other aspect of agency decisionmaking without substituting its judgment for the agency's judgment?

The most fundamental of all American administrative law doctrines answers this question. The answer is: the court has to make an agency stick to its story, and if the court holds that the agency's story won't support its decision, the court must remand for a new decision by the agency.

The reviewing court will only review an agency's decision on the grounds stated by the agency in its decision. Effective judicial review of the agency's decision requires that the agency not be allowed to make up a new story on appeal. If the reviewing court finds the agency's decision as reflected in the story it told when it made that decision to be inadequate (contrary to the governing substantive regulatory statute, or insufficiently grounded in evidence or insufficiently explained under the applicable administrative law process standards), then the agency's decision must be reversed, and the case must be remanded to the agency for a new decision.

It is true but no excuse to say, "well, on remand, the agency's decision might be the same and only the explanation different." The reviewing court cannot assume that an agency's decision will be the same when the proper standards are applied, without substituting its policy judgment. And in fact judicial remands of agency decisions where the explanations are legally inadequate often lead to different results, not just different stories.

Justice Frankfurter laid out this doctrine in the Chenery litigation, before enactment of the federal APA.

Like the federal APA, the Texas APA embodies the substance of Chenery both for agency adjudications and for rulemakings. The Texas APA requires findings of fact and conclusions of law in a contested case, and requires a reviewing court to reverse or remand when contested case findings or conclusions are erroneous for any of six reasons, including legal error, lack of evidence, or arbitrary and capricious reasoning, and the error prejudices the appellant. This is Chenery. The Texas APA requires reasoned justification for a rule, and authorizes declaratory judgment holding the rule invalid if the reasons stated in the four corners of the order adopting the rule do not meet reasoned justification standards. This is Chenery.

The Austin court of appeals endorsed the Chenery doctrine. It cited Chenery in a leading contested case appeal, Madden v. Texas Board of Chiropractic Examiners. Although the Austin court of appeals did not cite Chenery in its first important early reasoned justification case, the substance of its holding is Chenery.

There is, alas, some clearly erroneous dictum to the contrary (in the contested case context, to the effect that a reviewing court is not bound by the agency's reasons given, as long as substantial evidence supports some reasonable basis for the agency's action, and in the rulemaking context, to the effect that the court will presume facts exist to support the agency decision).

C. Agency Adjudication -- Agencies Instead of Courts

1. The APA gives a right to judicial review of agency adjudications.

On the agency adjudication side, Texas Prot. & Reg. Serv. v. Mega Child Care, 145 S.W.3d 170 (Tex. 2004) is the most important Texas judicial decision of the last 30 years.

The APA states that a person who has exhausted administrative remedies in a contested case and is aggrieved by the final decision is "entitled to judicial review under this chapter." Immediately after the APA was enacted, however, Professor Hamilton argued that the APA does not, however, provide an independent statutory right to such review. The Austin court of appeals quickly adopted Professor Hamilton's interpretation, and for many years held that no one is "entitled" to judicial review of a particular type of contested case decision unless the Legislature has separately provided for judicial review of the particular type of contested case decision in question, e.g., in the statute giving that agency its powers.

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65 In the leading case, the Motor Vehicle Manufacturers v. State Farm, the agency reversed its decision and required airbags. 49 Fed. Reg. 28,962. Professors Schuck and Elliott's empirical study indicates that 40% of remands result in changes favorable to the petitioners. 1990 Duke L. J. at 1049.


67 663 S.W.2d 622, 626n.3 (Tex. App. --Austin 1983, writ ref'd n.r.e.) See 47 Baylor L.J. at 1084-85.

68 Methodist Hosps. v. Texas IAB, 798 S.W.2d 651, 660-61 (Tex. App. --Austin 1990, writ dism'd w.o.j.)

69 See, e.g., Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984) and Bullock v. Hewlett-Packard, 628 S.W.2d 754, 756 (Tex. 1982).

70 54 Tex. L. Rev. at 289.

71 See, e.g., Motorola, Inc. v. Bullock, 586 S.W.2d 706, 708-09 (Tex. App. --Austin 1979, no writ); Southwest Airlines
The Texas Supreme Court in *Mega Child Care* rejected this view. The Texas Supreme Court held that the text of the APA means what it says. The APA itself does provide an independent statutory right of judicial review of contested case decisions -- unless Legislature has elsewhere, e.g., in the agency-specific statute, expressly prohibited judicial review, or unless the Attorney General identifies specific legislative history or other evidence of intent to prohibit judicial review.

For the Texas administrative law practitioner, the Texas Supreme Court's opinion in *Mega Child Care* is the "mother lode." At length (29 pages) and with care the Court discusses the history of the relevant Texas APA provision in relation to the model state APAs, commentators on the Texas APA provision and the model state APAs, Texas court of appeals' decisions directly on the issue and Texas Supreme Court opinions indirectly shedding light on the issue, amendments to the APA and provisions in other agency statutes relating to judicial review enacted after the Texas APA, leading federal cases on the federal presumption of judicial review, notably *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct., 1507 (1967).

In addition to the substance of the holding, and the usefulness of the opinion, I want to highlight two more aspects of *Mega Child Care*.

First, it ain't over 'til it's over. It may take decades for the Texas Supreme Court to get a case that holds to the contrary of the Austin court of appeals on an APA or other administrative law issue, or otherwise grants a petition for review. But until the Texas Supreme Court rules, the Texas APA issue is open, no matter how old or firmly held the Austin court of appeals' view of the matter.

For this reason, I urge practitioners to brief these issues, and even more importantly I urge Austin court of appeals' justices to consider these open issues with an open mind. Indeed, it may be crucial that an Austin court of appeals' justice dissent from joining in the rote repetition of an earlier but doubtful holding of that court, in order to give the Texas Supreme Court a chance to resolve the doubt, one way or the other.

Second, the Court in *Mega Child Care* took on the pragmatic argument the Austin court of appeals had relied upon for reading the APA phrase "entitled to judicial review" as meaning "not entitled, unless the Legislature says it again and in the specific agency statute." That argument is the "floodgate" argument -- unless the courts narrowly construe rights of agency process and judicial review, "an unknown and indeterminate number of agency proceedings" would be swept "into the contested case category," and "overwhelm the district courts of Travis county." The Texas Supreme Court noted correctly that the Legislature can, and does, deal with those possibilities by limiting judicial review when, as, and to the extent it deems appropriate.

2. If your legal rights, duties or privileges are to be determined by a fact-specific agency hearing, are you entitled to a contested case hearing?

As noted earlier, despite Dudley McCalla's arguments based on the differences between the Texas APA and the 1961 model state APA, Professor Hamilton also argued for a narrow construction of the "contested case" definition in the Texas APA. The Texas Supreme Court in *Mega Child Care* notes that the Austin court of appeals has at least since 1995 "refused to interpret broadly the term 'contested case.'" For at least two reasons, the Austin court of appeals' interpretation that the Texas APA contested case procedures do not generally apply to agency adjudicative proceedings unless and except to the extent the Legislature says so in another statute is at best doubtful.

First, constitutional requirements of due process and to make the separation of powers violations tolerable often do "require [adjudication] by law." If the agency decision turns on disputable facts that are specific to particular individuals and their situation, the constitution requires that an agency make its decision by adjudicative hearing, even if its organic statute does not provide for such a hearing, and subject to judicial review, even if the statute is silent. This doctrine dates back to Justice Holmes' opinion in *Bi-Metallic Investment Co.*, discussing *Londoner v. Denver*.

Second, under the logic of the Texas Supreme Court decision in *Mega Child Care*, the APA should be read to require contested case procedures whenever the agency is in fact making binding decisions involving particular individuals' rights and duties based on his or her individual facts. That is what the text says. Dudley McCalla is surely right that the deletion of "required by law" from the model state APA underscores the intent behind the text. *Mega Child* Co. v. Texas High-Speed Rail Auth., 867 S.W.2d 154, 158 (Tex. App. –Austin 1993, writ denied).


73 Id. discussing the various APA exemptions contained in the original APA or enacted in subsequent sessions.


Care’s rejection of the floodgate argument applies again here -- If the Legislature wants to try to allow or require a particular agency to make a particular type of binding decisions on particular individual rights without using contested case, it can say so, expressly, by amendment of the APA, or in that specific agency’s statute. (If the Legislature does try to authorize binding agency decisions on individual facts without adjudicative proceedings, the statute may fail due process or other tests).

3. **The State Office of Administrative Hearings.**

On the contested case side, the most important statutory change in the last 30 years, by far, was the creation of the State Office of Administrative Hearings in 1991, followed closely by 1997 amendments trying to reconcile SOAH ALJ independence with agency policy accountability.

SOAH is a separate state agency. Unlike all other state agencies, it does not have any substantive regulatory policy responsibilities at all. Instead, its job is to provide judges for most administrative adjudications. Its chief executive officer (chief administrative law judge) is appointed by the Governor for a two-year term. SOAH has 57 administrative law judges, and hears contested cases for nearly 60 different state agencies, either as required by statute or because the agency has voluntarily contracted with SOAH to refer matters to it.

Administrative law judges/hearings officers are the judges who, in almost all contested cases at almost all agencies, actually hear the evidence. SOAH was clearly created in an effort to make the ALJs more independent of agency policy-political pressure to “cut the cloth to fit the pattern” – to make findings that will support the results the agency heads prefer, and to avoid findings and conclusions that will make it difficult for the agency to sustain its desired results on judicial review. Legislative intent is reflected directly in the APA, which prohibits a state agency from attempting to influence the ALJ’s findings and application of law to facts “except by proper evidence and legal argument.”

A separate and independent agency for administrative hearings officers is an old idea. It dates back in Texas at least to the 1951 proposed administrative procedure act.

An inherent problem with an entity like SOAH is that the independence of the ALJs comes at a price. Independence separates the agency adjudicative function from the executive function of prosecution and the legislative function of policymaking. As we need to recall, combining them was considered essential when first we decided we need agencies.

The 1991 statute creating SOAH authorized the agency to change a finding of fact or conclusion of law or order "only for reasons of policy", stating the reason and legal basis for the change. As discussed in two articles by then-district judge Scott McCown and his briefing attorney.

The 1997 generic version requires an ALJ to "consider applicable agency rules or policies" and requires the agency to furnish the ALJ with a written statement of applicable rules or policies. It then authorizes the agency to change a finding or conclusion made by an ALJ, or vacate or modify an order issued by the ALJ, "only if the agency determines" (1) that the ALJ did not properly apply or interpret applicable law, agency rules, written policies provided by the agency to the ALJ, or prior agency decisions, (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or (3) to correct technical errors.

If the agency exercises this power, it must state in writing its specific reason and legal basis for the change. This requirement is another application of Chenery.

Precisely because SOAH is an administrative law judiciary, without substantive regulatory policy powers, its duties are those of efficient and fair administrative adjudication. In the crystal ball portion of this paper, I will take up the challenges SOAH confronts.

**D. Agency Rulemaking -- Agencies Instead of Legislatures**

The changes made by the Texas Legislature in rulemaking and judicial declarations concerning rules are just as important, and just as far-reaching, as the changes in agency adjudications and judicial review of contested case decisions.

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77 See generally, SOAH Briefing Book, Fiscal Year 2004 and Selected Five Year Summaries.
80 See W. Harris, An Administrative Procedure Act for Texas, 5 Sw. L. J. 125, 134-35 (1951).
82 S. McCown & M. Leo, When Can an Agency Change the Findings or Conclusion of an Administrative Law Judge? 50 Baylor L. Rev. 65 (1998) and When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?: Part Two, 51 Baylor L. Rev. 63 (1999), the Legislature in 1997 returned to the issue and provided both a new standard for relationships between SOAH ALJs and agencies generally, and different standards for relationships between ALJs and certain specific agencies.
83 Sections 2001.058 (b), (c).
84 Section 2001.058(e).
Texas courts took longer to recognize the "far-reaching changes" made by the APA for rulemaking and challenges to agency rules and rulemaking. This was partly because the long struggle had been over de novo versus substantial evidence review of agency adjudications. It was partly because American agency rulemaking only began to surge in the 1960s. It was partly because the Legislature made key rulemaking changes in 1981.

1. Far-reaching APA changes in rulemaking and rulemaking review
Most legislative policy is now made by administrative agencies, not by legislatures. In 1977, Texas agencies made 700 rules. In 1992, they made more than 1400. For a more recent year the number would likely be far larger.

For these rules and rulemakings, the 1975 APA made two fundamental changes – it required agencies to follow uniform procedures of notice, comment and published rule and order adopting the rule, and it authorized any person threatened by the threatened application of a rule to obtain declaratory judgment specifically for the purpose of determining the "validity or applicability" of a rule.

2. Rule validity -- statutory construction is usually the issue
Most challenges to the validity of agency rules are challenges to the agency's statutory authority to adopt the specific rule it adopted. Almost all successful challenges to the validity of agency rules are of this type. Other grounds for challenge to the agency rules are constitutional, or reasoned justification.

In statutory construction challenges to Texas agency rules, the agency's interpretation is subject to the "some deference, but not binding" doctrine set out in Texas Supreme Court cases, discussed above.

3. Reasoned justification: 1981 APA amendments, four cases
The Texas Legislature amended the Texas APA in 1981 to require an explicit reasoned justification for the rule, regardless of whether any interested person had specifically requested one. The change was drawn directly from the 1981 revised model State APA.

This reasoned justification requirement touched off a struggle over how carefully reasoned the order adopting the rule has to be. Justice Powers, in the 1990 Methodist Hosp. case, took the first step. He held that the adequacy of the agency's reasoned justification had to be determined "from the face of the [agency] order finally adopting" the rule, not from whether the agency had other, unstated reasons that might have been valid. Although he did not cite Chenery, this is the substance of Chenery. Subsequent Texas cases have held that, with limited exceptions for common-sense necessity, reasoned justification is to be determined from the face of the rulemaking order. Justice Powers then held the IAB order in question failed the reasoned justification test, since it did not include two of the required components at all.

The next step was the Austin court of appeals' 1994 ARCO II decision. On rehearing, the court reversed itself and held the Railroad Commission's reasoned justification for an East Texas field rule amendment limiting wells to 86% of production capacity lacked reasoned justification. Justice Jones wrote that the reasons were so conclusory that they did not justify the rulemaking decision.

Next, in 1995, the Austin court of appeals held invalid for lack of a sufficiently reasoned justification the Texas Workers' Compensation Commission's 1992 hospital inpatient fee rule. The TWCC, the late Justice Mack Kidd wrote, was obliged and had failed to provide a penetrating analysis of the alternatives, including the facts justifying its change to a per diem reimbursement, and for setting the same three reimbursement levels (for medical admissions, for surgical admissions, and for ICU/CCU admissions) statewide, for all hospitals. In 1997, after the Supreme Court declined review, the Commission readopted the same per diem approach, with a much more detailed justification. The hospitals filed but abandoned suit, and the 1997 inpatient per diem rule is still in effect today.

Finally, in 1996, the Texas Supreme Court issued its only opinion holding an agency rule invalid for lack of a sufficiently reasoned justification. In NAI, the Court denied review, then on rehearing granted review. The Court summarized the purposes and importance of the Legislature's APA provisions for

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86 Id. at 658.
87 A challenger must be permitted to go outside the four corners of the agency rule to demonstrate that a comment not responded to in the rulemaking order was, in fact, submitted, or that a statement made in the order is a complete sham. Railroad Comm'n v. ARCO Oil & Gas Co., 876 S.W2d 473, 480 nn. 5-6 (Tex. App. –Austin 1994, writ denied).
89 See id. at 492-94.
92 The grant of review came after my Baylor law review article appeared.
rulemaking notice, comment and reasoned justification and related judicial review.\textsuperscript{93} The Court then held that the statute "has mandated that the reasoning an agency actually relied on appear in the order adopting the rule."\textsuperscript{94} The Court then held the agency's reasoning adopting two specific rules deficient, because it consisted entirely of "conclusory statements," none of which "sheds any light on the agency's rationale."\textsuperscript{95} Three justices concurred as to one rule, but dissented as to the other.

4. **Chill Out -- The 1999 Texas APA Rulemaking Amendments**

In 1999 (the first regular session after the denial of review of the Austin court of appeals' opinion holding the TWCC's justification for the 1992 per diem fee rule inadequate), the Legislature amended two rulemaking aspects of the APA.

First, in Gov't 2001.033(b) and 2001.035(c), the Legislature clarified that no additional analysis of alternatives not adopted, beyond what the APA expressly already required (e.g., the factual basis of the rule and its connection to the rule, and the reasons for rejecting interested persons' positions), is necessary, and that it is enough if the reasoned justification "demonstrates in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective."

In context, this set of 1999 word changes seems at most a response to the 1995 Austin court of appeals opinion, and in substance a codification of the NAII and ARCO II opinions, whose language closely tracks the United States Supreme Court's Motor Vehicle Manufact. Ass'n language.\textsuperscript{96} Austin court of appeals' 2003 and 2001 assessments that the 1999 statute "does not materially change reasoned justification analysis" and "the Legislature did not intend to effectuate a material change"\textsuperscript{97} seem closer to the mark than 1999 dicta\textsuperscript{98} suggesting a more significant change.

Second, in what is now sec. 200.035(a), the Legislature provided that a rule that is adopted without substantial compliance is "voidable," rather than void, and in sec. 2001.040 that the court could remand the rule to the agency to fix the reasoned justification and, in the meantime, either leave the rule in effect or, for good cause, hold it invalid. In context, this seems clearly aimed at the aftermath of the Austin court's 1995 opinion, final in 1997, holding the 1992 hospital inpatient fee rule void: the hospitals filed 20,000 claims for additional payments for inpatient services 1992-97.\textsuperscript{99}

"Reasoned justification" and related judicial review is important, for reasons stated by the Texas Supreme Court in NAII. Its disruptive effects have been greatly exaggerated. Almost all Texas rule invalidations are on statutory construction grounds. There are only four Texas appellate opinions invalidating rules on this basis. Most reasoned justification challenges fail. This may be because, warned by ARCO II and NAII, most Texas agencies are writing good-enough reasoned justifications. Or it may because Texas reasoned justification review is much gentler than the "hard look" federal courts give federal agency rulemaking decisions. In the federal courts, most major rules are remanded, at least in substantial part.\textsuperscript{100}

5. **Rule applicability declaratory judgments**

The Texas APA authorizes declaratory judgment to determine the validity "or applicability" of an agency rule. Although there have been several opinions determining the applicability of agency rules,\textsuperscript{101} there has been much detailed analysis yet on this use of declaratory judgments.

*State Board of Insurance v. Deffebach*\textsuperscript{102} is the lead case. Under the heading of standing to sue, Justice Bob Shannon, citing a 1982 law review article he and Jim Ewbank wrote on the APA, held that it is enough if the plaintiff can show an affirmative act by an agency to apply its rule to him that would adversely affect his rights or privileges. "Under [§ 2001.038], one is not required to wait until the rule is attempted to

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\textsuperscript{93} Id. at 669-670.

\textsuperscript{94} Id. at 670.

\textsuperscript{95} Id. at 671.

\textsuperscript{96} Compare NAII, 925 S.W.3d at 669 and ARCO, 876 S.W.2d at 492.

\textsuperscript{97} All Saints, 125 S.W.3d at 100 n.6; Reliant Energy v. PUC, 62 S.W.3d 833, 840 (Tex. App. --Austin 2001, no pet.)

\textsuperscript{98} Lower Laguna Madre Found., Inc. v. TNRCC, 4 S.W.3d 419, 425 n.9 (Tex. App. --Austin 1999, no pet.)

\textsuperscript{99} The Austin court of appeals in two later cases held most such claims time-barred, and the rest subject to a TWCC rule under which, when no fee rule sets fees, statutory standards control. *Hospitals v. Continental Casualty*, 109 S.W.3d 96 (Tex. App. --Austin 2003, pet. denied) and *All Saints*, 125 S.W.3d 96 (Tex. App. --Austin 2003, pet. denied). I represent one of the insurers in SOAH test case proceedings to address those issues.


\textsuperscript{101} E.g., *Hospitals v. Continental Casualty*, 109 S.W.3d 96, determining that TWCC's one-year rule applied and barred most claims, and *All Saints*, 125 S.W.3d 96, determining that TWCC's default statutory standards rule, not a prior expired percent of billed charges rule, applied to the non-time-barred cases.

\textsuperscript{102} 631 S.W.2d 794 (Tex. App. --Austin 1982) -- better known for another point, agency discretion to proceed by rulemaking or by adjudication.
be enforced against him before he may resort to declaratory relief.\textsuperscript{103}

As discussed below, ripeness is more often the issue than standing, and my crystal ball says APA rule applicability declaratory judgments are going to become important in the enforcement context.

6.  To what extent should courts defer to agency rule interpretation?

In order to declare the applicability of an agency rule, courts must construe the rule. If the construction of the rule is disputed, the question arises – to what extent should the court defer to the agency's interpretation of the rule?

Because an agency does not write statutes, but does write its rules, more deference to an agency's interpretation of its rule is appropriate than to its interpretation of a statute. The question is – how much more deference? The Texas Supreme Court and the Austin court of appeals sometimes say that Texas courts will follow the agency's interpretation of an ambiguous rule unless that interpretation is plainly erroneous.\textsuperscript{104} As a description of what Texas courts usually do, this may be correct, but it does not appear to be doctrine that the Texas Supreme Court considers itself duty-bound to follow. In \textit{Rodriguez v. Service Lloyds}\textsuperscript{105} the Court rejected the agency's interpretation of a rule that four justices considered ambiguous.

\section*{E.  When Can and Should Judges Judge Agencies?}

A variety of judge-made doctrines control when courts can and should review agency action or entertain a challenge to a threatened agency action. Some of these doctrines have been embodied in the APA and related administrative law statutes. Some have been limited or superseded by statute. All have been the subject of important Texas Supreme Court decisions in the last 30 years.

\subsection*{1. Exhaustion of Administrative Remedies and Its Exceptions}

The core doctrine of exhaustion of administrative remedies applies to judicial review of contested cases. Although originally judge-made, it is embodied in administrative procedure acts, including Texas Gov't Code § 2001.171: Only a person "who has exhausted all administrative remedies available within an agency and who is aggrieved by a final decision" is entitled to APA judicial review of a contested case decision. This overstates the reach of the doctrine in two important respects, and understates it in another important respect.

Despite § 2001.171, \textit{City of Sherman} holds that, under long-standing exceptions to exhaustion of administrative remedies, in a proper case a party may sue for injunctive relief against ongoing agency proceedings.

Under the Uniform Declaratory Judgment Act and the Government Code rule validity and applicability declaratory judgment provision as held in \textit{State Board of Insurance v. Deffebach}, a party need not await completion of agency proceedings or agency enforcement action in the courts to seek a construction of the relevant statute or determination of the validity or applicability of the rules, as long as the threatened application of the rule threatens his rights or privileges.

Indeed, Govt Code § 2001.038(d) specifically authorizes declaratory judgment "without regard to whether the plaintiff requested the state agency to rule on the validity or applicability of the rule in question." The combined effect is that the courts can and often should issue declaratory judgments concerning the construction, validity and/or applicability of statutes and rules. If, however, the facts in dispute are those specific to a particular plaintiff or specific claims, the court can declare the statute and rule standards, but the agency must apply them to those specific facts in contested cases.

Thus, the Austin court of appeals declared which TWCC rules govern hospital claims for additional reimbursement, but declined to rule on the merits of their claims for more money. "We cannot evaluate the merits of the Hospitals' claims until they have exhausted their administrative remedies by completing the SOAH proceedings and properly bringing an administrative appeal for judicial review."\textsuperscript{106}

\subsection*{2. Exhaustion and Exclusive Jurisdiction}

On the other hand, if the agency has exclusive jurisdiction over a claim, the exhaustion doctrine requires not just the completion of agency proceedings, but their initiation and completion. For example, because of the Texas Workers' Compensation Commission's jurisdiction, Texas courts cannot consider a worker's claim for bad-faith handling of workers' compensation benefits unless and until the worker has presented the underlying benefit claim to the TWCC and the agency has ruled on that claim. \textit{American Motorists Insurance Co. v. Fodge}, \textit{63 S.W.3d} 801 (Tex. 2001).
3. Primary Jurisdiction--Subaru and Cash America.

Often an agency has jurisdiction, but it is not exclusive – it overlaps with the jurisdiction of the courts. Then the question is, which has primary jurisdiction, the court or the agency? Pre-APA Texas cases, drawing on early federal cases, confused the two doctrines, holding that the test for primary jurisdiction was whether some parts of the controversy were within the exclusive jurisdiction of the agency.\(^\text{107}\)

The Texas Supreme Court recently straightened out the confusion, in *Cash America* and *Subaru*.\(^\text{108}\)

Primary jurisdiction is not really jurisdictional at all – it is prudential. The court should consider whether and to what extent the agency has expertise in the specific factual issues and/or can provide a uniform interpretation that is important in light of relevant regulatory policies, and decide whether to get the agency's views before proceeding.

The price of primary jurisdiction is delay in court proceedings over which the court does have jurisdiction. Justice delayed can be justice denied. Texas appellate courts have not yet ruled on the array of techniques federal courts use for getting the agency's views with minimal delay. *Subaru* only refers to the most drastic option, "abate the lawsuit and suspend finally adjudicating the claim until the agency has an opportunity to act on the matter."\(^\text{109}\)

Federal courts, seeking a faster resolution, sometimes invite an amicus brief from the agency, and/or set a time limit on abatement pending agency action or briefing.

4. Standing

The 1993 TAB case\(^\text{110}\) is one of the leading Texas administrative law cases of the last 30 years. Several of its holdings are important, including two on standing.

First, the Texas Supreme Court held that a plaintiff's standing is a constitutionally required component of the court's jurisdiction, required under separation of powers to prevent advisory opinions, and because under the open courts provision "every person" can go to court "for an injury done him." As an immediate result, lack of standing cannot be waived, but can be raised for the first time on appeal, and even *sua sponte*. As later cases explained, standing facts can be disputed and must be decided by the trial court, which cannot merely accept the plaintiff's allegations.

Second, the Texas Supreme Court said it will look to federal law on standing, which stems from the analogous federal constitutional "case or controversy" requirement. As later cases explained, this means (1) injury in fact, (2) directly traceable to the defendant, and (3) redressable by the court.

Standing will rarely, however, prove an obstacle to an otherwise proper case concerning an agency action. More than a century ago, the Texas Supreme Court said that "it is within the legislative prerogative to specify the kind and nature of review [of agency action] to be employed by the courts so long as constitutional safeguards and requirements are not transgressed," and that within those constitutional limits, who can seek judicial review is a question of "wise policy," which is "for the legislative branch of the government, and not for the courts, to deal with."\(^\text{111}\)

The legislature cannot deprive an injured person of access to the court, but can largely specify the means of access. The legislature cannot authorize advisory opinions, but can define "injury" broadly, to include violation of rights, or privileges, it has created. And generally the Texas APA defines injury – broadly – it includes not only vested property rights, but any "legal right or privilege."

5. Ripeness and Mootness

Ripeness, not standing, is usually the relevant gatekeeper doctrine. Another of the most important Texas administrative law cases of the last 30 years is the Texas Supreme Court's leading ripeness case, *Patterson v. Planned Parenthood of Houston*.\(^\text{112}\) There the Texas Supreme Court held *Planned Parenthood's* challenge to a budget rider unripe, because the Texas Department of Health had not yet chosen between two plans for implementation, one of which would not violate federal laws and forfeit federal funding.

The Texas Supreme Court reached conclusions similar to those federal courts have adopted. Ripeness is in part a question of jurisdiction – is there enough of a case or controversy for the court's decision to amount to more than an advisory opinion? But ripeness is also in part a question of pragmatic prudence – would it be better to postpone court action until the factual and policymaking dust has settled at least somewhat more, so it is easier to see the issue and there is less risk of disrupting policymaking?

The *Patterson* Court did not finish the job, however. It did not explain how courts are to make the pragmatic determinations. The United States Supreme Court has done so, in the leading administrative law case of *Abbott Labs. v. Gardner*.\(^\text{113}\) The Abbott Labs

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\(^{107}\) See, e.g., *Foree v. Crown Central Petroleum Corp.*, 431 S.W.2d 312 (Tex. 1968).


\(^{109}\) 84 S.W.3d at 221.

\(^{110}\) *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 475 (Tex. 1993).

\(^{111}\) *Railroad Comm'n v. Houston & T.C.R. Co.*, 38 S.W. 750, 756 (Tex. 1897).

\(^{112}\) 971 S.W.2d 439 (Tex. 1998).

\(^{113}\) 387 U.S. 136, 148 (1967).
test is simple. Ripeness depends on (1) the fitness of the issue for judicial review and (2) the hardship to the parties of withholding a judicial decision.

Declaratory judgments in general reflect legislative decisions to relax ripeness standards as far as the constitutional prohibitions on advisory opinions will allow. There "need not be a 'fully ripened cause of action.' " Instead, it is enough if the facts 'manifest the ripening seeds of a controversy.' "114 In general, if the core issue in dispute is really a legal issue (the validity or construction of a statute, or the validity or applicability of a rule), and it is clear enough what the legal issue is, the very point of declaratory judgment statutes is that a party should not have to await enforcement before finding out who is right on the law.

Mootness is simply ripeness in reverse. If the agency has taken a position that, if enforced, would threaten Seton hospital's rights or privileges under statute, the agency should not be able to moot the controversy by saying, we're not going to enforce it against you this time. Unless the agency makes a binding admission or otherwise cannot raise the issue again, the hospital should not have to be fined, before it can find out whether fines are $10,000 per late annual report, as it reads the statute, or $10,000 per day the annual report is late, as the agency reads the statute.115

6. You can litigate jurisdictional facts –Bland ISD v. Blue and Miranda
Texas lawyers used to think that trial courts had to accept plaintiffs' jurisdictional pleadings as true, unless the defendant proved the pleadings were fraudulent. That is not the law. Instead, the Texas Supreme Court held in Bland ISD v. Blue116 and in Texas Dept of Parks & Wildlife v. Miranda,117 if the jurisdictional facts are disputed, the court can and to the extent necessary must hear evidence to decide them.

This of course does not mean you always have to try the jurisdictional facts. You can tee up the jurisdictional issue on motion for summary judgment, and find out if the facts material to jurisdiction really are disputed or not.

III. PEERING INTO THE CRYSTAL BALL
Administrative law is about the structure and process of administrative agencies, internally, in relation to each other, and in relation to the three traditional branches of government, especially the courts. What changes in the structure and process of Texas agencies and the courts can we are likely or worth considering?

A. SOAH – Fourth generation of judging?
Anglo-American law has seen three successive systems for adjudicating disputes: common law, equity, and administrative adjudication. Each system developed not as a substitute for but as a supplement to its predecessor, in response to concerns that its predecessor was insufficiently flexible, efficient, fair and sensible. Each new system then had to confront its own challenges.

SOAH and similar state ALJ central panel agencies (28 states have them) look like a fourth generation approach to judging. Its ALJs are intended to be specialists in regulatory adjudications, where the facts range from traditional adjudicative facts (what did this particular power plant cost?) to legislative facts (what is a reasonable range of return on equity?). SOAH rests on the assumption that, by specialization and the absence of juries, ALJs can decide a large volume of regulatory adjudication cases rapidly and sensibly.

In addition to the intrinsic substantive tension between ALJ independence and agency policy control, SOAH faces an enormous challenge in its core function because of limits on its procedural powers. Unlike agencies, SOAH has no substantive regulatory rulemaking power, and so cannot identify a regulatory issue as one of general applicability and deal with it, at least prospectively, in one stroke, by rulemaking. Does SOAH have the powers that courts have, to deal with such issues by declaratory judgment, or by class action, in which a handful of persons are deemed (often quite fictionally) to represent hundreds, thousands, or millions of others more or less similarly situated, and bound by the decision unless they opt out?

If SOAH cannot make rules nor issue declaratory judgments nor decide class actions, how then can SOAH deal with issues presented in hundreds or thousands of contested cases? We are in the early days of the answer. SOAH sometimes, on parties' motions, consolidates a few cases for hearing and decision or for threshold issues, using them as "test cases", and hoping that the answers will give the litigants the information and incentive to settle all the rest. SOAH sometimes abates the rest of the contested cases involving the issue, pending the test case outcome.

If this approach is not efficient enough, and/or not fair enough, we'll need to put on our thinking caps and come up with amendments to the APA and SOAH's statute, and/or to specific agency statutes under which massive numbers of difficult-to-process disputes arise.

116 34 S.W.3d 547 (Tex. 2000).
117 133 S.W.3d 217 (Tex. 2004).
B. Enforcement

After a long period in which political forces were hostile to administrative enforcement, the tide may be turning. Reports like the Dallas Morning News report on the State Board of Medical Examiners' failure "in the last five years to revoke the license of a single doctor for committing medical errors", even the license of Dr. Eric Scheffey\(^\text{118}\) caused the Legislature to fund, authorize, and encourage the agency to act. Legislative actions taking away local prosecutorial power over pollution has had the effect of increasing pressure on TCEQ to enforce, and to take the economic value to the polluter of the violation into account in the fines. Even the Railroad Commission has begun to respond to concerns over abandoned wells and tanks, potentially anti-competitive gas gathering practices, etc. with stronger action.

If so, administrative lawyers, ALJs and courts will soon confront a wave of enforcement issues at the agencies, in SOAH contested cases, in Attorney General court enforcement actions, and in preenforcement declaratory and injunction cases. Among these will certainly be the jurisdictional and prudential ripeness standards for UDJA and Govt Code rule applicability declaratory judgment actions.

C. Administrative Law under Regulatory Policy Pressure

Although administrative law is about structure, process and procedure, it is designed to serve, and must bend to accommodate changes in, the substantive regulatory policies that agencies are supposed to pursue.

One key change in substantive regulatory policy is the rise of economics. "Deregulation" usually is a misnomer. What the Legislature really means, in most instances, is: keep regulating, but stop assuming that the regulated entities are monopolies. Instead, assume they are or can be made competitive, and regulate to promote competition.

This is not deregulation, but it is a drastic change in regulation. It poses a real challenge for administrative law, especially for Texas administrative law, and lawyers, ALJs and courts. Competition policy uses antitrust economic analysis. Antitrust economics is perhaps the most sophisticated and difficult discipline the law has ever attempted to absorb.

At the federal level, there is an antitrust regulatory agency (the Federal Trade Commission) and the United States Department of Justice has major competition policy responsibilities and activities. Does Texas need counterparts? How would this work? The President can make sure that the U.S. Attorney General, FTC and, say, the FCC or the FERC are all on the same page of competition policy. But the Governor cannot make the Texas AG agree with the Texas PUC on communications or electricity competition policy, and he cannot make either the Texas AG or the Railroad Commission agree on gas gathering competition policy.

D. Technology

We are now in 25 years into the computer age. The Internet makes the cost of information almost zero, and its global transmission instantaneous. Personal computers and cheap software make it possible for tens of thousands of people, perhaps millions, to access and analyze masses of data at their desktops in ways that, until now, all the King's horses and all the King's men could not have done.

This technology is bound to transform regulation and administrative law, as it is transforming every aspect of the world.

Two possible specifics. Electronic rulemaking should do away with the one notice, one set of comments, one order adopting a rule approach to rulemaking. Instead, there should be a series of notices, comment cycles, and response comment cycles, and at least two waves of rulemaking orders, a proposed and a final. Video teleconferencing should eliminate the need for in-person participation in adjudications.

E. Federal Preemption

Congress keeps federalizing areas once thought reserved to the states. But most often Congress does not simply wipe out the state role and take over full responsibility. Instead, Congress offers funding carrots and uses preemption sticks to get states to regulate using federal agencies' substantive standards and, sometimes, processes. Think energy, telecommunications, air and water pollution, Medicaid, No Child Left Behind, even insurance (the proposed SMART bill).

The result is that state regulation morphs into a hybrid of both state and federal regulation. More Texas administrative law practitioners and judges will confront, and many will need to master, federal administrative law, preemption doctrines. More and more of us more and more often will confront the even more arcane (not to say bizarre) rules that determine when a matter may be moved from the state courts to the federal courts.

F. A Bigger Role for Certain Constitutional State Officials?

1. The Texas Governor

Without constitutional amendment, the Texas Governor has little power. But his constitutional powers include ones that, with additional statutory

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\(^{118}\) Quoted in S. Gwynne, "Dr. Evil", Texas Monthly (9/2005).
authority and/or funding, could be made to play a larger role in administrative government.

The Governor's constitutional powers include the power to require reports of other state officials, including other separately elected state-wide officials. With suitable statutory authority and funding, the Governor could be empowered to create a counterpart to the federal Office of Management and Budget with its component office of information and regulatory analysis. The President uses this entity to evaluate all proposed federal agency rulemakings for compliance with an array of statutes requiring cost-benefit analysis, economic impacts, etc. and, one suspects, for consistency with the party line. There is enormous debate over whether this has A Good Thing or A Bad Thing.

The Governor's powers include appointment of the Secretary of State, who already has important administrative law responsibilities through the Texas Register. Perhaps the Secretary of State could by statute be made the person in charge of regulatory analysis, or even of administrative practice and procedure.

2. The Comptroller

The Comptroller is also a separately-elected statewide official of constitutional status. Unlike the Governor, the Comptroller already has substantial oversight responsibilities and capabilities, for budget projection and budget bill certification, and for auditing. As a matter of structure (not current politics), the Comptroller could be entrusted with the OMB/OIRA functions if Texas decided we should have such functions but not allow the Governor to control them.

3. The LBB

In partial recognition of the constitutional and political reality that the Lieutenant Governor is more powerful than the Governor with respect to the state budget and spending, and that the Speaker is at least equally powerful, we have long had a Legislative Budget Board that operates quietly but with great power in these areas. As a matter of structure (and maybe also politics), perhaps the LBB could be entrusted with OMB/OIRA functions, if we decided to have them.

4. The Attorney General

The wild card in the Texas governmental deck is the Texas AG.

Unlike the Governor or any other single state elected official, the Texas AG has real power over every state agency – the power to say what the State's legal position is. Unlike the Governor or any other state elected official, the Texas AG's powers are directly relevant in all state regulatory litigation. Texas could, if we wanted, make the Texas AG responsible for initiating certain kinds of regulatory action, or participating in certain kinds of regulatory proceedings. For example, where else in Texas government could we possibly hope to create and fund a meaningful office of competition policy (as opposed to communications competition policy, or utility competition policy)?

This would require statutory authorization. There are precedents for special statutes assigning the Texas AG structural duties in the Texas administrative law system, like the Insurance Code provision that gives the Texas AG certain class action powers, and the open records and opinion duties.

G. Direct Appeals to the Third Court? A Specialty Court for Texas Administrative Law?

We may also decide to revisit the Travis County funnel. Two ideas are on the table. First, direct appeals from the agencies to the Third Court of Appeals. Second, replacing the Third Court of appeals with a special administrative appellate court.

Statutes increasingly provide for direct appeals to the Third Court; the most notable is the 1999 utility restructuring legislation provision for challenges to competition rules. In the past, the Third Court of Appeals has been unsympathetic to such provisions. Indeed, all courts of appeals have looked with disfavor on general efforts (not limited to administrative law contexts) to provide for interlocutory appeals, bypassing district court final judgments, even on controlling legal issues, even when the parties and the district court agree this will speed up the case. The Legislature keeps moving in this direction. In 2005, it amended the civil practice and remedies code to take away the court of appeals' discretion not to accept such appeals. Thus, the possibility of more direct appeals to the Third Court in some or all categories of administrative law cases is a real one.

Interest in a specialty court of administrative appeals dates far back. Now-retired Justice John Powers, for many years the leading specialist in administrative law on the Third Court of Appeals, has taken a particular interest in this possibility. He discussed many important pros and cons, and much of the Texas constitutional legal background, at length in a 1996 Texas Administrative Law Journal article. Recently, Third Court of Appeals' interest in the concept has reportedly revived.

No case has yet been made that the existing system is broken enough to need fixing in either of these ways. It is hard to imagine what constituency is

both powerful enough and dedicated enough to the idea to push such a change through. In case support for such a change does grow, here are some thoughts to add to Justice Powers’ thoughts. Mine focus on the structural differences between Texas courts and federal courts, and the resulting systems of judicial review of administrative agency actions and decisions.

The Texas judicial review structure differs sharply from the federal judicial review structure, in two ways that are enormously important.

First, the federal APA does not funnel all federal administrative law cases to district courts. Instead, many major regulatory statutes provide for appeals from agency decisions direct to United States Courts of Appeals. Under those statutes, review of agency rulemaking decisions or agency adjudications has to be conducted appellate-style, and on the agency record, whether or not the statute says so specifically, for practical reasons – the appellate court is not set up to hold trials. The federal appellate court must likewise decide disputes over, e.g., ripeness, on the papers, and whether to grant relief pending judicial review under the law of appellate stays rather than, as in Texas, temporary injunction. If Texas moves in this direction, we will lose some of the fact-sensitive and speedy attention to temporary injunction relief now available in Travis County district courts.

Federal judicial review of federal agency decisions that are in the important catch-all category of “informal adjudication” are generally not covered by federal regulatory statutes. Such suits may be initiated in federal district court, like any other federal court lawsuit resting on federal question jurisdiction. Texas deals with these issues by declaratory judgment and/or injunction suits. If we move administrative law cases directly to the Third Court or to a new administrative appellate court, we need to carve these cases out.

The federal APA does not funnel all federal administrative law cases to the courts of Washington, D.C. The major regulatory statutes that provide for direct appeals to the U. S. Courts of Appeal generally allow appeals to be filed in the D.C. Circuit, where the agency is, and in any court of appeals in which the appellant is based. For “informal adjudication” judicial review, suit can be filed in any district court in the United States, subject to general federal venue requirements.

Federal judges are appointed for life. Texas judges are elected for relatively short terms. Federal courts are courts of limited jurisdiction, and although diversity brings many other matters into federal courts, the heart of their jurisdiction is federal question jurisdiction over questions arising under the Constitution and laws of the United States – federal statutes and agency rules and decisions. Texas trial courts have jurisdiction over all common law matters, and their caseload is dominated by family and common law tort and contract matters.

The combination of elected Texas judges, family and common law caseloads and the Texas Travis County district court funnel is very different from the federal combination of a nationwide judiciary appointed for life with mainly statutory and constitutional responsibilities. Let me highlight three of the multiple consequences, for good and ill, of the differences.

First, workload. The Travis County civil district courts, however numerous and important their administrative law caseload, are trial courts of general original jurisdiction, over everything at law and in equity, including family law, personal injury and business tort law, and contract law. The Third Court of Appeals has civil appellate duties of comparable breadth, and criminal appellate jurisdiction as well.

As Travis County has grown in population and its economy has diversified from government and University base, administrative law cases sometimes seem as extra burdens on the judges of these courts – they must do everything their counterparts in other parts of the state do, plus administrative law.

In contrast, federal courts are courts of limited jurisdiction, and except for diversity jurisdiction cases, their dockets are largely limited to federal question cases, including administrative law. The administrative law part of the federal court burden is spread widely around the country, all district judges and all circuits. Only the D.C. Circuit and D.C. district courts see more than a pro rata share of administrative law cases, and those courts see fewer other cases.

Second, specialization in administrative law and regulatory policy. Travis County district judges, Third Court of Appeals justices, and Texas Supreme Court justices have rarely practiced administrative law before being elected (or before being appointed to a vacancy, then elected). Most have to learn administrative law by doing it. Texas judicial elections do not turn on administrative law and regulation views, if indeed they can be said to be issue-based at all. Texas judicial tenures tend to be short (perhaps due to the failure of judicial salaries to keep pace with lawyer income), so Texas court turnover is very rapid. Only Justice Hecht was a member of the Texas Supreme Court in 1997. Upon Justice Bea Ann Smith serving out the end of her present term, the senior justice of the Third Court, Justice Patterson, will have six years experience. These two are, fortunately, able justices who are interested in administrative law, and of course a conscientious judge who is new to the court can write a leading administrative law opinion, as Justice Stephen Smith did in Mega Child Care. But short tenures and limited administrative law backgrounds mean that, in every case, the basics must be briefed, not taken for granted.
In the federal system, in contrast, all the courts of appeals must learn federal administrative law. Even more fundamentally, because D.C. has more than its pro rata share of administrative law cases and less than its pro rata share of other cases, the D.C. Circuit specializes in administrative law. For that reason, and because administrative and regulatory law is so important in the federal court system, and because federal judges are appointed for life, Presidents chose the D.C. Circuit justices largely for their backgrounds in administrative law – and/or for their views on regulatory policy. Similarly, a crucial part of the docket of the United States Supreme Court is federal administrative and regulatory law, and views on such matters are often important to Presidential appointments. Currently two Supreme Court justices (Scalia and Breyer) are former professors of federal administrative law, and each has more than twenty years of federal appellate experience in administrative law cases.

Third, administrative law finality. Only the Supreme Court of Texas can settle a state administrative law question with finality, and only the United States Supreme Court can settle a federal administrative law question. That makes the path from courts of appeals to the Supreme Court important. Because of the Travis County funnel, the Austin court of appeals is often the only Texas court of appeals to decide an administrative law issue. Conflicts among Texas courts of appeals on administrative law issues are therefore rare. Combined with the Texas Supreme Court's own understandable focus on family law, tort and contract cases, and its more debatable narrow view of its conflicts jurisdiction (a problem that may have been resolved by 2003 amendments to the Civil Practices & Remedies Code, relaxing the definition of "conflict" for purposes of Supreme Court jurisdiction), the Travis County funnel has made it hard to get Texas administrative law issues to the Texas Supreme Court.

The D.C. Circuit, in contrast, only "sets the table" on major administrative law issues for the United States Supreme Court. The D.C. Circuit's word is often the first and always well-informed, but the United States Supreme Court quickly has the last word. Although first among equals, the D.C. Circuit does not have the Austin court of appeals' near monopoly on administrative law cases, so conflicts among federal circuits on administrative law issues arise much more easily and often than in Texas. Moreover, the United States Supreme Court is far less likely than its Texas counterpart to make the existence or absence of a circuit court conflict important in deciding whether to take an administrative law issue. The United States Supreme Court's main duties are federal constitutional and statutory construction, and the Court gives those factors great weight in deciding which petitions for certiorari to grant.

All of these experiences, Texas and the very different federal experiences, will need to be searched closely before we make any important changes in the Travis County funnel.

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He lives outside Austin, Texas, with his family. Excerpt. © Reprinted by permission.

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