IN THE SUPREME COURT OF TEXAS

NO. 06-0714

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED, PETITIONER,

v.

CROWN CORK & SEAL CO., INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued February 7, 2008

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE LEHRMANN joined.

JUSTICE MEDINA filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion, in which JUSTICE LEHRMANN joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE JOHNSON joined.

JUSTICE GUZMAN did not participate in the decision.

The issue we address in this case is whether a statute that limits certain corporations' successor liability for personal injury claims of asbestos exposure violates the prohibition against

retroactive laws contained in article I, section 16 of the Texas Constitution[1] as applied to a pending action. We hold that it does, and therefore reverse the judgment of the court of appeals[2] and remand the case to the trial court.

I

In 2002, petitioner Barbara Robinson ("Robinson") and her husband, John, Texas residents, filed suit alleging that John, age 63, had contracted mesothelioma from workplace exposure to asbestos products. As often happens, John had used several such products over the course of his life, and the Robinsons sued twenty-one defendants, including respondent Crown Cork & Seal Co., alleging that they were all jointly and severally liable. With respect to Crown, the Robinsons claimed that during John's service in the United States Navy from 1956 to 1976, he worked with asbestos insulation manufactured by the Mundet Cork Corporation, and that when Crown and Mundet merged, Crown succeeded to Mundet's liabilities.

Crown has never itself engaged in the manufacture or sale of asbestos products.[3] It manufactures metal bottle-caps, known in the industry as "crowns", and other packaging for consumer goods. Crown and its affiliates have over 20,000 employees around the world, about

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[1] TEX. CONST. art. I, § 16 ("No . . . retroactive law . . . shall be made.").

[2] 251 S.W.3d 520 (Tex. App.–Houston [14th Dist.] 2006).

[3] Robinson argued in the lower courts that Mundet's asbestos business was still in operation when Crown became Mundet's majority shareholder, and that Crown should be held to have operated the business for several weeks before it was sold, 251 S.W.3d at 539, but she does not make that argument here.

1,000 of whom work in Texas at facilities in Conroe, Sugar Land, and Abilene. In 2009, the parent company reported $1.193 billion gross profit on $7.938 billion net sales.[4]

In November 1963, Crown's predecessor, a New York corporation with the same name, which was then the nation's largest manufacturer of crowns, acquired a majority of the stock in Mundet, another New York corporation, which besides insulation, also manufactured crowns. Within ninety days, in February 1964, Mundet sold all its assets related to its insulation business. Two years later, in February 1966, the companies merged. In 1989, Crown's predecessor was reincorporated as Crown, a Pennsylvania corporation.

Crown acknowledges that under New York and Pennsylvania law, it succeeded to Mundet's liabilities, which, as pertaining to Mundet's asbestos business, have been hefty. Over the years, Crown has been named in thousands of lawsuits claiming damages from exposure to asbestos manufactured by Mundet. While Crown acquired Mundet for only about $7 million, by May 2003 Crown had paid over $413 million in settlements, and Crown's parent company estimated in its 2003 Annual Report that payments could reach $239 million more.[5] Mundet's aggregate insurance coverage totaled $3.683 million.[6]

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[4] CROWN HOLDINGS, INC., 2009 ANNUAL REPORT (FORM 10-K) iii, 51, 88, 96, 104 (Mar. 1, 2010) (annual reports are available online at http://investors.crowncork.com/phoenix.zhtml?c=85121&p=irol-reports, and Form 10-K filings are available at http://www.sec.gov/cgi-bin/browse-edgar?CIK=0001219601&action=getcompany).

[5] CROWN HOLDINGS, INC., 2003 ANNUAL REPORT (FORM 10-K) 9, 39 (Mar. 12, 2004) (the Company estimated that its probable and estimable liability for pending and future claims would range between $239 and $406 million). Crown's parent's 2009 Annual Report estimates future payments through 2019 of $230 million. CROWN HOLDINGS, INC., 2009 ANNUAL REPORT 13, 23, 64.

[6] Prior to 1998, amounts paid to claimants were covered by a fund of $80 million resulting from a 1985 settlement with carriers insuring Crown Cork through 1976, when Crown Cork became self-insured. CROWN HOLDINGS, INC., 2002 ANNUAL REPORT 15, 34 (Mar. 19, 2003).

At first, Crown did not contest its successor liability to the Robinsons for any compensatory damages; consequently, the trial court granted the Robinsons' motion for partial summary judgment on that issue. But about the same time, the Texas Legislature enacted Chapter 149 of the Texas Civil Practice and Remedies Code, which limits certain corporations' successor liability for asbestos claims.[7] Chapter 149 applies (with exceptions not relevant here) to "a domestic corporation or a foreign corporation that has . . . done business in this state and that is a successor which became a successor prior to May 13, 1968"[8] — a date by which, the Legislature appears to have thought, the dangers of asbestos should have been commonly known.[9] For a covered corporation (again with some exceptions not relevant here), "the cumulative successor asbestos-related liabilities . . . are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation",[10] including "the aggregate coverage under any applicable liability

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[7] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.01, 2003 Tex. Gen. Laws 847, 892-896.

[8] TEX. CIV. PRAC. & REM. CODE § 149.002(a). "Successor" is defined as "a corporation that assumes or incurs, or has assumed or incurred, successor asbestos-related liabilities", *id*. § 149.001(4), defined broadly as "any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, that are related in any way to asbestos claims that were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation", *id*. § 149.001(3). Asbestos claims include any claim for property damage or personal injury "wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos". *Id*. § 149.001(1).

[9] Although there was growing awareness of the dangers of exposure to asbestos before the mid-1960s, Dr. Irving J. Selikoff is widely credited with publicizing those dangers in his 1965 article, *The Occurrence of Pleural Calcification Among Asbestos Insulation Workers*, 132 ANN. N.Y. ACAD. OF SCI. 351 (1965). On May 13, 1968, the American Conference of Governmental Industrial Hygienists reduced the recommended workplace limit for asbestos in the air. This was, according to the legislative record, "[t]he earliest date after Selikoff's warnings when even a quasi-governmental organization in the United States suggested a tighter standard for asbestos in the workplace". H.J. of Tex., 78th Leg., R.S. 6044 (June 1, 2003) (statement of legislative intent by Rep. Nixon on amendments concerning successor asbestos-related civil liabilities arising from certain mergers) (Journal available at http://www.journals.house.state.tx.us/hjrnl/78r/html/home.htm).

[10] TEX. CIV. PRAC. & REM. CODE § 149.003(a).

insurance that was issued to the transferor . . . collectable to cover successor asbestos-related liabilities".[11] This cap does not apply to a successor that continued in the asbestos business after the consolidation or merger.[12] By restricting application of the cap to a corporation that had never engaged in selling asbestos products itself and had succeeded to another's liability for asbestos claims at a time when the extent of that liability was not fully appreciated, the supporters of Chapter 149 intended to protect only what they called the "innocent successor".

Chapter 149 contains a choice-of-law provision, making it applicable, "to the fullest extent permissible under the United States Constitution, . . . to the issue of successor asbestos-related liabilities" in Texas courts.[13] Furthermore, the Legislature made Chapter 149 applicable to all actions:

> (1) commenced on or after the effective date of this Act; or
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> (2) pending on that effective date and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that effective date.[14]

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[11] *Id*. § 149.004(c).

[12] *Id*. § 149.002(b)(5) ("The limitations in Section 149.003 shall not apply to . . . a successor that, after a merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured, distributed, removed, or installed by the transferor . . . .").

[13] *Id*. § 149.006.

[14] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.02, 2003 Tex. Gen. Laws 847, 895.

Because the Act of which Chapter 149 was part, House Bill 4, passed by more than a two-thirds vote in both the House and Senate,[15] it took effect immediately on approval by the Governor,[16] which occurred on June 11, 2003.

House Bill 4 was massive tort reform legislation, of which Chapter 149 was a very small piece — two pages of a 52-page bill.[17] Chapter 149 was not included in the bill as filed but was added when the bill came to the House floor by an amendment offered by the bill's sponsor. When asked which manufacturers "in particular" would be protected, the sponsor replied that he was "advised that there's one in Texas, Crown Cork and Seal".[18] Although House debate on the whole

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[15] The vote in each chamber was well over two-thirds, 114 yeas to 32 nays in the House, H.J. of Tex., 78th Leg., R.S. 6041-6042 (June 1, 2003), and 27 yeas to 4 nays in the Senate, S.J. of Tex., 78th Leg., R.S. 5008 (June 1, 2003).

[16] TEX. CONST. art. III, § 39 ("No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals."). *See Mann v. Gulf States Utils. Co.*, 167 S.W.2d 557, 560 (Tex. Civ. App.–Austin 1942, writ ref'd) ("[W]here a statute is passed with the emergency clause by the required vote when approved by the Governor, it becomes effective and immediately operative.").

[17] Among other things, House Bill 4 limited attorney fees in class actions (§ 1.01), provided for an offer-of-judgment procedure that could result in the shifting of attorney fees and expenses (§ 2.01), created a multidistrict litigation panel and provided for the transfer of cases for consolidated and coordinated pretrial proceedings (§ 3.02), tightened venue statutes (§§ 3.03-.04), provided for joinder of responsible third parties (§ 4.04), revamped proportionate responsibility among joint tortfeasors (§§ 4.06-.07), restricted recovery in product liability cases (§§ 5.01-.02), limited the amounts required for supersedeas bonds (§ 7.02), rewrote statutes limiting health care liability claims (§ 10.01), limited the liability of volunteer fire fighters, teachers, and other government employees (§§ 11.01, 11.05, 15.02-.05, 19.01-.02), and further limited recovery of exemplary and noneconomic damages (§§ 13.02-.09). Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

[18] Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. (Mar. 25, 2003) (statement of Rep. Joe Nixon) (archived video available at http://www.house.state.tx.us/media/chamber/78.htm) (video time 5:04:24-40).

bill took days, debate on Chapter 149 lasted just over an hour.[19] Four unfriendly amendments,[20] one of which would have made Chapter 149 inapplicable to "successor asbestos-related liabilities that were assumed or incurred before [its] effective date",[21] all failed by wide margins. In the Senate, Chapter 149 was significantly revised but drew only one brief comment in that chamber, this observation by the committee chair as hearings commenced: "This, members, is the Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this matter."[22]

No legislative findings or statement of purpose accompanied Chapter 149. But after the conference committee report on House Bill 4 was adopted in the House, the sponsor inserted a "statement of legislative intent" in the House Journal, which did not mention Crown and explained the policy basis for Chapter 149 as follows:

> A corporation is currently liable up to its total value for all injuries it causes. If that corporation merges with a much larger corporation, however, the successor corporation is liable for the injuries caused by its predecessor (even though not caused in any way by the successor) up to the successor's much higher value. In the case of long-tailed and unknown asbestos-related liabilities, a much larger successor

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[19] *Id*. at 4:52:40 - 6:09:50.

[20] Amendments 7, 9, 10, and 11 to Amendment 6 to Committee Substitute for House Bill 4 were tabled. H.J. of Tex., 78th Leg., R.S. 818-819 (Mar. 25, 2003) (text of amendments available at http://www.capitol.state.tx.us/Search/AmendSearchResults.aspx?Leg=78&Sess=R&Bill=HB4&Hse=1&Sen=0&Auth=All&2nd=1&3rd=1&Type=All&Action=All&Dateon=&Srch=simple&All=&Any=&Xact=&Xclude=&Custom=&ID=hlQCrLY8x).

[21] Amendment 9 to Amendment 6 to Committee Substitute for House Bill 4 (available at http://www.capitol.state.tx.us/tlodocs/78R/amendments/pdf/HB00004H29.PDF).

[22] Hearings on the Proposed Senate Substitute for H.B. 4 Before the S. Comm. on State Affairs, 78th Leg., R.S. (Apr. 30, 2003) (Statement of Sen. Bill Ratliff, Chairman, S. Comm. on State Affairs) (archived video available at http://www.senate.state.tx.us/avarchive/ and http://www.senate.state.tx.us/75r/Senate/commit/c570/c570_78.htm) (video time 19:00- 19:23)).

> can easily be bankrupted by the asbestos-related liabilities it innocently received from a much smaller predecessor with which it merged [many] decades ago.
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> To eliminate that unfairness — and even to save successor corporations from bankruptcy — some have proposed a new rule limiting liability especially for asbestos-related successor liabilities acquired solely through a merger. The successor would be liable only up to the entire gross asset value of the predecessor from whom it received the asbestos-related liabilities.[23]

The statement described Chapter 149 as a "new concept" that was being tested "by taking one step at a time and providing realistic relief to those innocent successor corporations most at peril financially without limiting every type of asbestos liability."[24] According to the statement, Chapter 149's restrictions had been crafted to ensure that "the benefits of this legislation should be limited . . . to those successor corporations who were the most innocent about the potential hazards of asbestos" and "were also at the greatest financial peril, especially those threatened with bankruptcy".[25]

Crown promptly moved for summary judgment under the new law, requesting that the prior order establishing its successor liability to the Robinsons be vacated and that their claims for asbestos exposure be dismissed. Crown asserted that the summary judgment evidence established that its merger with Mundet occurred before May 13, 1968, that it had never engaged in Mundet's insulation business, and that its successor asbestos-related liabilities, already more than $413 million, greatly exceeded the fair market value of Mundet's total gross assets determined as required by the

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[23] H.J. of Tex., 78th Leg., R.S. 6042-6043 (June 1, 2003).

[24] *Id*. at 6043.

[25] *Id*.

statute[26] — about $15 million in 1966 (some $57 million in 2003 dollars). Thus, Crown contended, Chapter 149 barred the Robinsons from recovering on their claims. In response, the Robinsons argued that the record did not establish the applicability of Chapter 149,[27] or if it did, the statute violated several provisions of the Texas Constitution.[28]

The trial court granted Crown's motion. Days later, John Robinson died.[29] Barbara Robinson amended her petition to assert statutory wrongful death[30] and survival actions[31] against Crown and the other defendants still remaining in the case. (Several defendants had settled for amounts totaling $859,067 and been dismissed.) Without addressing these statutory actions, Crown moved to sever the summary judgment to make it final and appealable,[32] and the trial court granted the motion. The court also stayed proceedings in Robinson's case against the other defendants.

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[26] *See* TEX. CIV. PRAC. & REM. CODE § 149.004.

[27] The Robinsons disputed Crown's valuation of Mundet's total gross assets and, as noted above, Crown's assertion that Mundet had ceased its insulation business before Crown acquired its stock, so that Crown never engaged in that business, even as Mundet's majority stockholder. Robinson raised the latter argument in the court of appeals. 251 S.W.3d at 539-540. Robinson does not make either argument in this Court.

[28] The Robinsons argued that Chapter 149 as applied violates Texas Constitution art. I, § 13 ("All courts shall be open, and every person for an injury done him . . . shall have remedy by due course of law."); art. I, § 16 ("No . . . retroactive law, or any law impairing the obligation of contracts, shall be made."); art. I, § 17 ("No person's property shall be taken . . . without adequate compensation . . . ."); art. I, § 19 ("No citizen of this State shall be deprived of . . . property . . . except by the due course of the law . . . ."); and art. III, § 56 ("The Legislature shall not . . . pass any . . . special law . . . .").

[29] After John died, Robinson asserted the additional argument on motion for new trial that Chapter 149 violated art. XVI, § 26 of the Texas Constitution ("Every . . . corporation . . . that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving . . . widow . . . .").

[30] *See* TEX. CIV. PRAC. & REM. CODE §§ 71.002, 71.009.

[31] *See id*. § 71.021.

[32] The Robinsons had asserted claims against Crown that were not disposed of by the summary judgment, but they were later nonsuited and dismissed.

On appeal, Robinson contends that Chapter 149 is a retroactive law prohibited by article I, section 16 of the Texas Constitution. The law is well-settled, she asserts, that the Legislature has no authority to extinguish vested rights, and that her accrued cause of action against Crown is a vested right. A majority of the court of appeals did not "find the law on vested rights to be as consistent and lucid as Mrs. Robinson claims"[33] and concluded that it provides "no clear answer" to whether Chapter 149 is an invalid retroactive law.[34] Relying on this Court's decision in *Barshop v. Medina County Underground Water Conservation District*,[35] the court decided that whether a law is unconstitutionally retroactive depends not on whether it infringes upon a vested right but on whether it is a "'valid exercise of the police power by the Legislature to safeguard the public safety and welfare'".[36] Whether an exercise of the police power is valid, the court of appeals determined, depends on

> (1) whether the act is appropriate and reasonably necessary to accomplish a purpose within the scope of the police power, and (2) whether the ordinance is reasonable by not being arbitrary and unjust or whether the effect on individuals is unduly harsh so that it is out of proportion to the end sought to be accomplished.[37]

The court found that "the purpose for which [Chapter 149] was enacted — the financial viability of the State and businesses in the State — is a valid exercise of police power."[38] The court

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[33] 251 S.W.3d 520, 526 (Tex. App.–Houston [14th Dist.] 2006).

[34] *Id*. at 527.

[35] 925 S.W.2d 618 (Tex. 1996).

[36] 251 S.W.3d at 523 (quoting *Barshop*, 925 S.W.2d at 633-634).

[37] *Id*. at 532.

[38] *Id*.

further found that the restrictions in the statute left "the pool of potential defendants as large as possible for claimants having valid claims for damages resulting from asbestos products",[39] thereby limiting the "detrimental impact on plaintiffs such as the Robinson so that [it] was not out of proportion to the end sought".[40] Concluding that deference must be given to the Legislature in the exercise of its police power, the court held that Chapter 149 is not unconstitutionally retroactive because it is "(1) within the Legislature's police power and (2) narrowly tailored (a) to protect the most innocent corporations hard hit by asbestos litigation but (b) to leave the potential pool of asbestos defendants as large as possible."[41] Accordingly, the court affirmed the summary judgment.[42]

The dissent disagreed with the majority's approach to assessing unconstitutionality. It argued that "the Legislature has no police power to enact retroactive laws in violation of section 16", even if reasonably exercised.[43] *Barshop* notwithstanding, the dissent insisted, "the weight of precedent . . . requires the use of the vested-rights analysis."[44] The dissent contended that "an accrued cause

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[39] *Id*. at 532-533.

[40] *Id*. at 532.

[41] *Id*. at 533.

[42] 251 S.W.3d at 541. The court rejected Robinson's other two arguments, that Chapter 149 is a special law prohibited by article III, section 56 of the Texas Constitution, and that Crown has not established the factual predicate for applying Chapter 149 in this case. *Id*. at 535-540. Robinson makes the former argument in this Court, but we do not reach it.

[43] *Id*. at 541.

[44] *Id*.

of action is a vested right",[45] rejecting some caselaw that "an accrued claim is not vested until it is reduced to a judgment final by appeal".[46] Thus, the dissent reasoned, "[b]ecause Mrs. Robinson's claims accrued and were pending in the trial court when [Chapter 149] took effect, Mrs. Robinson held vested rights in these claims that could not be destroyed",[47] irrespective of the fact that Chapter 149 "does not bar all of Mrs. Robinson's remedy for the claimed injuries because she can sue other companies not protected".[48] Without assessing the reasonableness of the Legislature's action, the dissent concluded that Chapter 149 is unconstitutionally retroactive because the "Legislature created a new substantive defense to successor liability and made it immediately effective in all pending cases, destroying Mrs. Robinson's vested rights in her accrued tort claims against Crown".[49]

We granted Robinson's petition for review.[50] Another court of appeals, also divided, has since reached the opposite result from the court of appeals in this case.[51]

II

As a threshold matter, it is important to note the precise issue before us. The Robinsons' pleading on which Crown moved for summary judgment asserted common-law causes of action for

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[45] *Id*. at 549.

[46] *Id*. at 550.

[47] *Id*.

[48] 251 S.W.3d at 550.

[49] *Id*. at 551.

[50] 51 Tex. Sup. Ct. J. 292 (Jan. 11, 2008).

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

negligence and strict liability, and claimed compensatory and punitive damages.[52] For herself, Barbara claimed damages for John's medical expenses that she had incurred, as well as her loss of consortium and mental anguish, and punitive damages. Had John lived, the summary judgment would have disposed of all the Robinsons' claims against Crown.

But John died a few days after summary judgment was granted, and Robinson amended her petition to add statutory wrongful death and survival actions. The record does not reflect that Crown moved for summary judgment on Robinson's statutory claims, or that the trial court ever disposed of them specifically. The trial court and parties appear to have assumed, correctly, that the summary judgment was nevertheless final because Robinson's statutory claims are wholly derivative of John's common-law claims, and the adjudication of the latter effectively disposed of the former.[53]

But even though the summary judgment was final, an analysis of the retroactive effect of Chapter 149 on common-law claims and statutory claims presents different considerations. As we discuss more fully below, Crown argues that in determining whether the constitutional prohibition against retroactive laws applies in this case, it is significant that successor liability is a creature of statute. The same argument could be made to Robinson's wrongful death and survival claims,

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[52] The Robinsons also asserted a claim for conspiracy, but it was later nonsuited.

[53] *Russell v. Ingersoll-Rand Co.,* 841 S.W.2d 343, 345-346 (Tex. 1992) ("The survival action, as it is sometimes called, is wholly derivative of the decedent's rights. The actionable wrong is that which the decedent suffered before his death. The damages recoverable are those which he himself sustained while he was alive and not any damages claimed independently by the survival action plaintiffs (except that funeral expenses may also be recovered if they were not awarded in a wrongful death action). Any recovery obtained flows to those who would have received it had he obtained it immediately prior to his death — that is, his heirs, legal representatives and estate. Defenses that could have been raised against a claim by the injured person may also be raised against the same claim asserted by the person's heirs and estate. . . . Wrongful death actions are also derivative of the decedent's rights." (citing TEX. CIV. PRAC. & REM. CODE § 71.003(a) ("This subchapter [creating a wrongful death cause of action] applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived or had been born alive.") (other citations omitted)).

though not to the common-law claims the Robinsons previously asserted. Also, Robinson argues that it is important for our constitutional analysis that the common-law claims barred by Chapter 149 had both accrued and were the subject of a pending lawsuit before the statute was enacted. But neither is true of her statutory claims.

The parties have not briefed — or even mentioned — any of these issues but have confined their arguments regarding whether Chapter 149 is an unconstitutionality retroactive law as applied to the common-law claims the Robinsons asserted before John's death, which were adjudicated by summary judgment. These arguments are the only ones we address. We intimate no view on whether Chapter 149 limits Robinson's statutory wrongful death and survival claims except insofar as they are derivative of the claims specifically adjudicated by the trial court.

III

Before we can decide whether Chapter 149 is unconstitutionally retroactive, we must first resolve the parties' dispute over the proper standards to be applied in making that determination. Robinson, like the dissenting opinion in the court of appeals, argues that the test is simply whether vested rights have been impaired, period; if so, the law is prohibited, regardless of the Legislature's reasons for enacting it. Crown counters that the majority opinion in the court of appeals was correct in focusing instead on the reasonableness of the Legislature's exercise of its police power; the prohibition against retroactive laws does not invalidate a proper exercise of that power despite its impairment of private rights.[54] As each position finds support in our case law, we begin by returning

[54] The following have submitted amicus curiae briefs in support of Crown: the State of Texas, Texas Civil Justice League, American Tort Reform Association, National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, Property Casualty

to first principles. We conclude that the history and purpose of the constitutional provision require a fuller statement of its proper application than we have previously given.

A

There exists in this country, as the United States Supreme Court observed in *Landgraf v. USI Film Products*, a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence[] and embodies a legal doctrine centuries older than our Republic. . . . [T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'"[55] In a concurring opinion in an earlier case, Justice Scalia noted that this principle

> was recognized by the Greeks, by the Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law. . . . Justice Story said that "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact."[56]

The United States Constitution does not expressly prohibit retroactive laws, but "the antiretroactivity principle finds expression" in its prohibitions of bills of attainder, ex post facto laws, and state laws impairing the obligation of contracts.[57] The thrust of each is easily stated:

Insurers Association of America, American Chemistry Council, National Association of Mutual Insurance Companies, 3M Company, Texans for Lawsuit Reform, and Product Liability Advisory Council, Inc.

[55] 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

[56] *Kaiser*, 494 U.S. at 855-856 (Scalia, J., concurring) (citations omitted).

[57] *Landgraf*, 511 U.S. at 266; *see also* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id*. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."); *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 17 n.13 (1977) ("The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly harsh and oppressive." (internal quotation marks omitted)).

> The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. . . . States [are prohibited] from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." . . . The prohibitions on "Bills of Attainder" in Art. 1 §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.[58]

But the application of each prohibition must be measured by the object to be obtained. Thus, while the bill of attainder originated as an English parliamentary act sentencing to death someone who had attempted to overthrow the government,[59]

> the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The . . . Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature.[60]

With respect to ex post facto laws:

> The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it.[61]

And as for the prohibition against laws impairing contract obligations, Chief Justice Marshall observed:

> Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and

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

[59] *United States v. Brown*, 381 U.S. 437, 441 (1965).

[60] *Id*. at 442.

[61] *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

> unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument, a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "*contract*" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that, since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.[62]

Texas Constitutions have contained these provisions as well as a general prohibition against retroactive or retrospective laws.[63] This prohibition against retroactive laws, like other constitutional bars, must be governed by its purpose, for "retroactive" simply means "[e]xtending in scope or effect

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[62] *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 628-629 (1819); *see U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 21 (1977) ("Although the Contract Clause appears literally to proscribe 'any' impairment, . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.'" (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934))).

[63] TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made."); TEX. CONST. OF 1869, art. I, § 14 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made; . . . nor shall any law be passed depriving a party of any remedy for the enforcement of a contract, which existed when the contract was made."); TEX. CONST. OF 1866, art. I, § 14 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made . . . ."); TEX. CONST. OF 1861, art. I, § 14 (same); TEX. CONST. OF 1845, art. I, § 14 (same); REPUB. TEX. CONST. OF 1836, DEC. OF RIGHTS § 16 ("No retrospective or ex post facto law, or laws impairing the obligations of contracts shall be made."). In the 1845 Constitutional Convention, the prohibition against retrospective laws was omitted from the first draft of the Bill of Rights, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF TEXAS 34 (1845), but one against retroactive laws was inserted just before final passage by floor amendment by Thomas Jefferson Rusk, formerly Chief Justice of the Supreme Court of Texas, *id*. at 264.

to matters which have occurred in the past; retrospective",[64] and "retrospective", even more simply, means "[d]irected to, contemplative of, past time".[65] In our first case construing the retroactivity clause, *DeCordova v. City of Galveston*, Chief Justice Hemphill cautioned that applying this prohibition without regard to the objects to be achieved would have

> a latitude of signification, which would embarrass legislation on existing or past rights and matters, to such an extent as to create inextricable difficulties, and, in fact, to demonstrate that it was incapable of practical application. A retrospective law literally means a law which looks backwards, or on things that are past; or if it be taken to be the same as retroactive, it means to act on things that are past. If it be understood in its literal meaning, without regard to the intent, then all laws, having an effect on past transactions or matters, or by which the slightest modification may be made of the remedy for the recovery of rights accrued, or the redress of wrongs done, are prohibited equally with those which divest rights, impair the obligation of a contract, or make an act, innocent at the time it was done, subsequently punishable as an offence.[66]

The constitutional prohibition was not intended to operate so indiscriminately. "Mere retroactivity is not sufficient to invalidate a statute. . . . Most statutes operate to change existing conditions, and it is not every retroactive law that is unconstitutional."[67]

The presumption against retroactivity has two fundamental objectives identified by the Supreme Court in *Landgraf*. First, it protects the people's reasonable, settled expectations.

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly;

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[64] 13 THE OXFORD ENGLISH DICTIONARY 796 (2d ed.1989).

[65] *Id.* at 801.

[66] 4 Tex. 470, 475-476 (1849).

[67] *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971); *accord Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) ("[N]ot all statutes that apply retroactively are constitutionally prohibited.").

> settled expectations should not be lightly disrupted. . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.[68]

In other words, the rules should not change after the game has been played. Second, the presumption against retroactivity protects against abuses of legislative power.

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.[69]

As James Madison argued, "retroactive legislation also offer[s] special opportunities for the powerful to obtain special and improper legislative benefits."[70]

Still, not all retroactive legislation is bad. *Landgraf* also notes:

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.[71]

Constitutional provisions limiting retroactive legislation must therefore be applied to achieve their intended objectives — protecting settled expectations and preventing abuse of legislative power.

B

In *DeCordova*, Chief Justice Hemphill wrote that "[l]aws are deemed retrospective and within the constitutional prohibition, which by retrospective operation, destroy or impair, vested

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[68] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-266 (1994) (text and citations omitted).

[69] *Id*. at 266.

[70] *Id*. at 267 n.20.

[71] *Id*. at 267-268.

rights".[72] For this formulation of the prohibition, he, like many judges since, cited Justice Story's statement in *Society for the Propagation of the Gospel v. Wheeler*, applying the New Hampshire constitution's prohibition against retroactive laws:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . .[73]

But as both cases explained, "impairs vested rights" has special meaning. "[A] statute merely regulating a remedy," Justice Story added, "and prescribing the mode and time of proceeding" does not impair vested rights.[74] Chief Justice Hemphill agreed,

> unless the remedy be taken away altogether, or encumbered with conditions that would render it useless or impracticable to pursue it. Or, if the provisions regulating the remedy, be so unreasonable as to amount to a denial of right, as, for instance, if a statute of limitations, applied to existing causes, barred all remedy or did not afford a reasonable period for their prosecution; or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred; such legislation would be retrospective within the intent of the prohibition, and would therefore be wholly inoperative.[75]

In other words, in applying the prohibition against retroactivity, a law that impairs a remedy does not impair a right, except sometimes. On further reflection, this Court conceded more than a century

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[72] 4 Tex. 470, 479 (1849).

[73] 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156); *see* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 n.9 (1927) ("Justice Story's definition of a retroactive law is perhaps the one most frequently cited.").

[74] *Id*. at 768.

[75] *DeCordova*, 4 Tex. at 480 (citations omitted).

later: "Remedies are the life of rights. While our precedents recognize and apply the distinction [between a remedy and a right], they also recognize that the two terms are often inseparable."[76]

The obscurity in the right/remedy distinction typifies the problems in using "impairs vested rights" as a test for unconstitutional retroactivity, as our cases illustrate. In *DeCordova*, we held that a statute of limitations on suits for debt enacted after the defendant executed notes payable to the plaintiff but before they matured merely limited the plaintiff's collection remedy and therefore was not unconstitutionally retroactive.[77] The idea that the debt had not been extinguished, only the means of collection, might be viewed by most creditors as a distinction without a difference. But the Court reasoned that the absence of a statute of limitations when the notes were executed did not give the plaintiff a vested right to sue forever. In *Texas Water Rights Commission v. Wright*, we upheld a statute authorizing forfeiture of a water permit after ten years of non-use, concluding that permit holders could reasonably expect enforcement of the "conditions inherently attached" to their permit, and that a permit included no right to be forever free of a remedy to enforce those conditions.[78] Moreover, a retroactive use requirement was valid for the State "to assert and protect its own rights and interests in the water."[79] In *City of Tyler v. Likes*, we held that a statute reclassifying a city's proprietary functions as governmental, thereby limiting liability, affected only a remedy, not a right,

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[76] 464 S.W.2d 642, 648-649 (Tex. 1971) (internal quotation marks omitted).

[77] 4 Tex. at 480-482.

[78] Wright, 464 S.W.2d at 649.

[79] *Id*.

even though a claimant would recover less or perhaps not at all.[80] And in *In re A.D.*, we held that a statute removing the limitations period for enforcing child support decrees by ordering withholding of wages affected only a remedy, even though it expanded enforcement of the debt.[81]

In each of these cases, significant interests were adversely impacted by changes in the law, yet the Court held that vested rights were not impaired. The results of the cases seem entirely reasonable in a very general sense, although the claimants in the cases doubtless had a different view, but it is not clear how they were driven by a concern for protecting vested rights. In a recent case, *Owens Corning v. Carter*, we did not mention the right/remedy distinction in upholding a law that required application of the statute of limitations of the plaintiff's state of residence, even though doing so barred pending actions in Texas courts.[82] We simply held that for a plaintiff who has not sued within the time permitted by the state in which he resides and in which the cause of action arose, barring suit in Texas "is not inequitable".[83] Nevertheless, the plaintiff in a pending case had a viable claim that the change in the law extinguished.

In three of these five cases, *DeCordova*, *Wright*, and *Likes*, it was important that, as it happened, the people involved had ample opportunity after the change in the law to protect their

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[80] 962 S.W.2d 489, 502 (Tex. 1997).

[81] 73 S.W.3d 244, 248-249 (Tex. 2002).

[82] 997 S.W.2d 560, 573 (Tex. 1999).

[83] *Id*.

interests: four years to sue in *DeCordova*,[84] seven years to resume pumping water in *Wright*,[85] and two months to sue in *Likes*.[86] But in the other two cases, *A.D.* and *Owens Corning*, the persons affected by changes in the law had no time to respond. We have since held that a change in the law need not provide a grace period to prevent an impairment of vested rights.[87]

"Statutes of limitations are procedural",[88] but sometimes a change may impair vested rights. In 1887, we stated in *Mellinger v. City of Houston* that when a law "shall operate in favor of a defendant as a defense against a claim made against him, then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation".[89] Thus, we said, a law extending a limitations period so as to resurrect barred claims would be unconstitutionally retroactive. But only two years earlier the United States Supreme Court had held in *Campbell v. Holt* that just such a law reviving claims did not offend due process under the United States Constitution because "no right is destroyed when the law restores a remedy which had been lost."[90] *Campbell*

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[84] The plaintiff sued on three promissory notes, all executed in 1840, and maturing in 1842, 1843, and 1844, respectively. The statute of limitations was passed in 1841, and the plaintiff did not sue until 1849. *DeCordova*, 4 Tex. at 470-471.

[85] The plaintiffs held permits issued in 1918 and 1928, but they stopped pumping water in 1954. The forfeiture statute was enacted in 1957, and forfeiture was not sought until 1967. *Wright*, 464 S.W.2d at 644.

[86] The plaintiff had seventeen months to sue before the statute was enacted and two months to sue after it was enacted and before it took effect. *Likes*, 962 S.W.2d at 502.

[87] *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996).

[88] *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999).

[89] 3 S.W. 249, 253 (Tex. 1887).

[90] 115 U.S. 620, 628 (1885).

arose out of Texas, and the Supreme Court cited this Court's 1870 decision in *Bender v. Crawford*,[91] which held that a retroactive suspension of limitations statutes during the aftermath of the Civil War was not a prohibited retroactive law, even though claims that would have been barred were not.[92] *Mellinger* cited *Campbell*, and "not wish[ing] to be understood as questioning its correctness", distinguished the due process guarantees in the state and federal constitutions from the prohibition of retroactive laws.[93] But while due process and antiretroactivity may protect vested rights differently, *Mellinger* did not explain why a limitations bar is a vested right in one context but not in the other. In other words, a law that is prohibitively retroactive might not also offend due process, but not because a vested right for one is not a vested right for the other. Nor did *Mellinger* cite *Bender*.

A generation later, we held in *Wilson v. Work* that "it is the settled law that, after a cause has become barred by the statute of limitation, the defendant has a vested right to rely on such statute as a defense."[94] We repeated that view more recently in *Baker Hughes, Inc. v. Keco R. & D., Inc.*[95] The earlier confusion may be attributable to the time in which the issues arose. *Bender* offered this insight:

> [T]hey who talk about vested rights in the bar of limitations should at least remember the times in which we have been living; and those who think our constitution is not

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[91] *Id*. at 629-630.

[92] 33 Tex. 745, 759-760 (1870).

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

[94] 62 S.W.2d 490, 490 (Tex. 1933) (per curiam) (permission to file mandamus petition denied).

[95] 12 S.W.3d 1, 4 (Tex. 1999).

> republican, nor in accordance with the great republican conception of our institutions, should remember that from the second of March, 1861, to the twenty-ninth of March, 1870, we had no republican government in Texas. Four years of that period were one of bloody and unrelenting war. From 1865 to 1870 we were a military government; he who gained a vested right in the statute of limitations during at least a portion of that period, gained it only because *inter arma leges silent.* Vultures and wolves gain vested rights when armies are slaughtered, if these *be* vested rights.[96]

Bender dared to speak plainly: there are vested rights and then there are vested rights, and not all laws which may fairly be said to retroactively impair vested rights are constitutionally prohibited. The problem is not confined to the aftermath of the Civil War. Many years ago, one commentator lamented:

> One's first impulse on undertaking to discuss retroactive laws and vested rights is to define a vested right. But when it appears, as soon happens, that this is impossible, one decides to fix the attention upon retroactive laws and leave the matter of definition to follow rather than precede the discussion, assuming for the purpose that a right is vested when it is immune to destruction, and that it is not vested when it is liable to destruction, by retroactive legislation. The simplification of the task which this plan seems to involve, turns out to be something of an illusion, however, when it appears, as also soon happens, that one's preconceived notions of retroactive laws are irreconcilable with the data with which one has to deal.[97]

What constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity.

This can hardly be more vividly demonstrated than in today's opinions by JUSTICE WAINWRIGHT and JUSTICE MEDINA. The arguments and authorities ably marshaled in each show a deep division over whether a retroactive restriction on a cause of action impairs vested rights. Of course it does, if a claim, no matter how flimsy, is a vested right; or not, if a claim, even a strong one,

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[96] *Bender*, 33 Tex. at 759.

[97] Bryant Smith, *Retroactive Laws and Vested Rights,* 5 TEX. L. REV. 231, 231 (1927) (footnote omitted).

must be reduced to judgment before it becomes a vested right. The dispute over whether to call something a vested right appears driven not so much by what the words mean as by the consequence of applying the label — that its impairment is prohibited. Or as one commentator has put it: "it has long been recognized that the term 'vested right' is conclusory — a right is vested when it has been so far perfected that it cannot be taken away by statute."[98] The "impairs vested rights" test thus comes down to this: a law is unconstitutionally retroactive if it takes away what should not be taken away.

C

In two cases this Court has held that retroactive laws were not constitutionally prohibited, despite their impairment of vested rights, because they were each a valid exercise of the Legislature's police power. The first, *Barshop v. Medina County Underground Water Conservation District*,[99] involved a facial challenge to the Edwards Aquifer Act.[100] Before the Act, withdrawal of groundwater from the Aquifer was unrestricted. The Act created an Authority to regulate groundwater withdrawals, capped annual withdrawals, required that wells be operated under permits, gave preference to existing users, and restricted withdrawals under a permit based on the owner's historic use.[101] The Act operated retroactively in basing the right to groundwater on historic use and gave landowners no opportunity to preserve their prior right to unlimited water, but we stated that

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

[99] 925 S.W.2d 618 (Tex. 1996).

[100] Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350.

[101] *Barshop*, 925 S.W.2d at 624.

"article I, section 16 does not absolutely bar the Legislature from enacting such statutes."[102] Acknowledging that "retroactive laws affecting vested rights that are legally recognized or secured are invalid",[103] we nevertheless held that "[a] valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive."[104] The Legislature had included in the Act findings that the Authority was necessary "'to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state'"[105] and that "the aquifer was 'vital to the general economy and welfare of this state.'"[106] "Based on these legislative findings," we concluded that the Act was "necessary to safeguard the public welfare of the citizens of this state" and therefore the Act's retroactive effect did not "render it unconstitutional" on its face.[107]

The second case, *In re A.V.*,[108] involved section 161.001 of the Texas Family Code, which lists several grounds for terminating parental rights. An amendment had added subsection (1)(Q) to the list, thus providing for termination when a parent "has knowingly engaged in criminal conduct for which the parent is incarcerated and unable to care for the child 'for not less than two years from

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[102] *Id*. at 634.

[103] *Id*. at 633.

[104] *Id*. at 633-634.

[105] *Id*. at 634 (quoting Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.01, 1993 Tex. Gen. Laws 2350, 2350-2351).

[106] *Id*. (quoting Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.06(a), 1993 Tex. Gen. Laws 2350, 2355).

[107] *Barshop*, 925 S.W.2d at 634.

[108] 113 S.W.3d 355 (Tex. 2003).

the date of filing the petition'".[109] The issue was whether the amendment was unconstitutionally retroactive as applied to a parent convicted before it was enacted. The amendment, we noted, was primarily prospective, focusing on "the parent's future imprisonment and inability to care for the child, not the criminal conduct that the parent committed in the past."[110] But to the extent the amendment had a retroactive effect, we held it was not unconstitutional. Recognizing that "a parent's constitutionally-protected relationship with his or her children [is] a right that presumably cannot be altered through retroactive application of law",[111] we stated, quoting *Barshop*, that a "'valid exercise of the police power by the Legislature to safeguard the public safety and welfare' is a recognized exception to the unconstitutionality of retroactive laws."[112] Given the Legislature's declaration that "'[t]he public policy of this state [is to] provide a safe, stable, and nonviolent environment for the child'", we concluded that public policy justified the statute's retroactive effect.[113] Furthermore, we said, "[a] law that does not upset a person's settled expectations in reasonable reliance upon the law is not unconstitutionally retroactive."[114] In our view, a person "could not reasonably expect that the State would not act to provide a safe environment for his children while he was imprisoned."[115]

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[109] *Id*. at 356 (quoting TEX. FAM CODE § 161.001(1)(Q)).

[110] *Id*. at 360.

[111] *Id*. at 361.

[112] *Id*. (quoting *Barshop*, 925 S.W.2d at 633-634).

[113] *Id.* (quoting TEX. FAM. CODE § 153.001(a)(2)).

[114] *A.V.*, 113 S.W.3d at 361.

[115] *Id*.

Robinson does not argue that *Barshop* and *A.V.* were wrongly decided but nevertheless insists that the test for unconstitutional retroactivity is not whether a law is a reasonable exercise of the Legislature's police power but whether it impairs vested rights. In her view, rights may be "vested for different purposes depending on the context",[116] thereby affecting the constitutional provision's operation, and thus prohibiting retroactive laws limiting liability for asbestos claims but not laws preserving groundwater and protecting children. Stated differently: the right to sue is protected from retroactive impairment while the rights to groundwater or one's children are not. One might view this as backwards, that a parent's right to a child, which is "fundamental",[117] "'one of constitutional dimensions'",[118] and "'far more precious than any property right'",[119] would be more deserving of protection from impairment by retroactive laws than a claim of injury that might not even result in recovery. But regardless of the three rights' relative importance, Robinson's argument that they are somehow vested differently for purposes of determining unconstitutional retroactivity establishes the fundamental failure of the "impairs vested rights" test.

We agree with Robinson, however, that *Barshop* and *A.V.* do not except a retroactive law from the constitutional prohibition merely because there was a rational basis for its enactment, or even because, on balance, it is likely to do more good than harm. The Legislature found the water-

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[116] Petitioner's Reply Brief at 15.

[117] *In re Chambless*, 257 S.W.3d 698, 700 (Tex. 2008) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion)).

[118] *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 622 (Tex. 2004) (quoting *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976)).

[119] *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982)).

permitting scheme established in the Edwards Aquifer Act to be necessary to discharge its constitutional duty to conserve groundwater,[120] and the necessity of providing for the welfare of children of incarcerated convicts is too obvious to require justification. But necessity alone cannot justify a retroactive law. The retroactive laws in *Barshop* and *A.V.* were not unconstitutional because they did not defeat the objectives of the constitutional prohibition. There can be no settled expectation that a limited resource like groundwater, affected by public and private interests, will not require allocation, or that a person unable to care for his children has greater rights if his inability is due to prolonged incarceration than for other reasons. And in both cases, the Legislature acted for the general public good.

D

We think our cases establish that the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power; it protects settled expectations that rules are to govern the play and not simply the score, and prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment. No bright-line test for unconstitutional retroactivity is possible. Rather, in determining whether a statute violates the prohibition against retroactive laws in article I, section 16 of the Texas Constitution, courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest served by

[120] TEX. CONST. art. XVI, § 59 ("The conservation and development of all of the natural resources of this State . . . [is] hereby declared [a] public right[] and dut[y]; and the Legislature shall pass all such laws as may be appropriate thereto.").

the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.[121] The perceived public advantage of a retroactive law is not simply to be balanced against its relatively small impact on private interests, or the prohibition would be deprived of most of its force. There must be a compelling public interest to overcome the heavy presumption against retroactive laws. To be sure, courts must be mindful that statutes are not to be set aside lightly. This Court has invalidated statutes as prohibitively retroactive in only three cases, all involving extensions of statutes of limitations.[122] But courts must also be careful to enforce the constitutional prohibition to safeguard its objectives.

Under this test, changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive. But these consequences of the proper application of the prohibition cannot substitute for the test itself. The results in all of our cases applying the constitutional provision would be the same under this test. The cases that considered only whether the challenged statute impaired vested rights implicitly concluded that any impairment did not upend settled expectations and was overcome by the public interest served by the enactment of the statute. And the cases that focused on the propriety of the

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[121] *See* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697 (1960) ("[T]he constitutionality of [a retroactive] statute is determined by three major factors, each of which must be weighed in any particular case. These factors are: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters."); *see also Owen Lumber Co. v. Chartrand*, 73 P.3d 753, 755 (Kan. 2003); *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 357 (Minn. 1969).

[122] *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 5 (Tex. 1999); *Wilson v. Work*, 62 S.W.2d 490 (Tex. 1933) (per curiam) (original proceeding); *Mellinger v. City of Houston*, 3 S.W. 249, 254-255 (Tex. 1887).

Legislature's exercise of its police power implicitly concluded that the exercise was not merely reasonable but was compelling, notwithstanding the statute's effect on prior rights.

The test the court of appeals distilled from the cases focuses too much on the reasonableness of legislative action and does not give full voice to the concerns addressed by the prohibition against retroactive laws. The court believed that one consideration in applying the prohibition is whether a statute is "appropriate and reasonably necessary to accomplish a purpose within the scope of the police power".[123] But the necessity and appropriateness of legislation are generally not matters the judiciary is able to assess. In *Barshop*, for example, we did not undertake to determine whether the regulation scheme fashioned by the Legislature in the Edwards Aquifer Act was the only, the best, or even a good way to conserve and allocate groundwater among those claiming a right to it. The important considerations were that the Act discharged the Legislature's constitutionally mandated duty to conserve public resources, that some regulation was entirely to be expected, and that the burden of its retroactive effect in basing future withdrawals on historic use was shared by all those claiming a right to groundwater.

The second factor in the court of appeals' test was whether a statute is unreasonable, arbitrary, unjust, unduly harsh, or disproportionate to the end sought to be accomplished.[124] But the intent of the prohibition against retroactive laws is to foreclose these kinds of considerations to the Legislature in enacting laws and to the judiciary in reviewing them. A retroactive law is not permissible merely because the end seems to justify the means. The presumption is that a retroactive

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[123] 251 S.W.3d 520, 532 (Tex. App.–Houston [14th Dist.] 2006).

[124] *Id*.

law is unconstitutional without a compelling justification that does not greatly upset settled expectations.

Robinson would go further. She argues that because the prohibition against retroactive laws is part of the Texas Constitution's Bill of Rights, it is absolute, and any weighing of the government's interest in enacting a retroactive law is precluded by article I, section 29 of the Texas Constitution, which states:

> To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

But Robinson's argument begs the question. We do not disagree that the constitutional prohibition is absolute when it applies, as are the right to worship, the right to free speech, the freedom from unreasonable search and seizure, the guaranty of due course of law, and the other protections of the Bill of Rights. But section 29 does not determine whether and how the Bill of Rights' provisions apply. What Justice Oliver Wendell Holmes observed about all rights applies to the right to be free from retroactive laws:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line . . . are fixed by decisions that this or that concrete case falls on the nearer or farther side.[125]

[125] *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

IV

Using the standards we have set out, we must now determine whether chapter 149 is unconstitutionally retroactive as applied to Robinson.

A

We first consider the nature of the rights claimed by the Robinsons and Chapter 149's impact on them. Chapter 149 does not directly restrict the Robinsons' common law action for personal injuries due to exposure to asbestos in the workplace. Rather, it supplants the usual choice-of-law rules for determining what state's successor liability law should apply in asbestos cases in Texas by mandating Texas courts to apply Texas law, then for the first time prescribes limits on that liability, even if, as here, successor liability arose under the law of another state. Crown argues that by allowing for an expansion of liability beyond the tortfeasor to include a successor by merger, successor liability is largely remedial in nature, and in any event, is a creature of statute in which there can be neither right nor expectation. Crown cites *Dickson v. Navarro County Levee Improvement District*, where we gave immediate effect to a statute that repealed a special, statutory cause of action.[126] Crown analogizes this case to *Owens Corning*, which upheld the change in Texas law to allow a plaintiff no more time to sue here than he would have had in his state of residence.[127]

But the successor liability in this case is not a creature of Texas law; the parties agree that without Chapter 149, New York or Pennsylvania law would apply, and that under the law of those states, Crown's successor liability is unquestionable. So this is not a case like *Dickson*, in which the

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[126] 139 S.W.2d 257 (Tex. 1940).

[127] *Owens Corning v. Carter*, 997 S.W.2d 560, 573 (Tex. 1999).

Legislature abolished a cause of action it had itself created; Chapter 149 limits liability created under other states' laws. Nor is this a case like *Owens Corning*, in which the Legislature changed the statute of limitations so that a nonresident plaintiff would gain no advantage by suing in Texas rather than in his home state; Chapter 149 disadvantages Texas residents, as well as nonresidents, who sue Crown in Texas rather than New York or Pennsylvania. Nevertheless, Crown has a point that choice-of-law rules are purely procedural and subject to change, often by courts, but certainly by the Legislature if it chooses to do so.

However, Chapter 149 extinguishes the Robinsons' claim and all other such claims against Crown in Texas, and while it does so indirectly, extinction was the Legislature's specific intent. An interest in maintaining an established common-law cause of action is greater than an interest in choice-of-law rules. We have held that an unliquidated personal-injury claim was not a property interest under the common law,[128] but it is now assignable as other property interests.[129] The rights protected by the constitutional prohibition against retroactive laws are no more limited to those recognized at the time the prohibition was adopted than are the rights protected by due course of law. An unliquidated claim may have little or no value, as for example when the cause of action has not been recognized or the elements of recovery cannot be proved. But here, claims like the Robinsons' have become a mature tort, and recovery is more predictable, especially when the injury is mesothelioma, a uniquely asbestos-related disease. Discovery taken in the case shows that the

[128] *Graham v. Franco*, 488 S.W.2d 390, 395 (Tex. 1972).

[129] TEX. PROP. CODE § 12.014.

Robinsons' claims had a substantial basis in fact. Their right to assert them was real and important, and it was firmly vested in the Robinsons.

Crown argues that when Mundet was still selling the asbestos insulation to which John Robinson was exposed in ship boiler rooms, the Robinsons could not reasonably have expected Mundet to be able to pay all the claims that would eventually arise, or that the company would merge with a deeper pocket like Crown. But those are not the expectations the prohibition against retroactive laws protects. The Robinsons could well have expected, then as now, that a rule of law that permitted their recovery, and many others' before them, would not be changed after they had filed suit to abrogate their claim.

Crown argues that the Robinsons have alleged that all the defendants they have sued are jointly and severally liable and that they are likely to recover all their damages from those who have already settled and the others than remain. We refuse to speculate about what might happen. If Crown would otherwise be responsible for the Robinsons' injury, then by insulating Crown, Chapter 149 either reduces the recovery to which the Robinsons are entitled or requires the other defendants to pay Crown's share. Either way, the statute disturbs settled expectations.

We therefore conclude that Chapter 149 significantly impacts a substantial interest the Robinsons have in a well-recognized common-law cause of action.

B

We next consider whether Chapter 149 serves the public interest. Crown argues that the statute helps alleviate the asbestos litigation crisis that has already bankrupted many companies, resulting in lost jobs and a burden on the State's economy. The Legislature has recognized the

severity of that crisis in another context,[130] but it did not do so in enacting House Bill 4 and Chapter 149. On the contrary, the legislative record is fairly clear that chapter 149 was enacted to help only Crown and no one else. Crown itself has been unable to identify to us any other company affected by Chapter 149. There is evidence that Crown has about 1,000 employees in Texas and about the same number of former employees on retirement, and that it operates three facilities here. Crown asserts that it continues to be sued on asbestos claims in Texas, but the record is silent concerning the number of those claims or the amount of Crown's probable exposure.

The Legislature made no findings to justify Chapter 149. Even the statement by its principal House sponsor fails to show how the legislation serves a substantial public interest. No doubt Texas will benefit from reducing the liability of an employer and investor in the State, but the extent of that benefit is unclear on this record. And in any event, there is nothing to indicate that it rises to the level of the public interest involved in *Bastrop* and *A.V.*

Crown argues that the public interest has been recognized by other states' legislatures in enacting similar legislation. We are aware of ten other state legislatures that have enacted laws similar to chapter 149. In one state, Pennsylvania, the legislation was fully retroactive,[131] just as chapter 149 is, but the Supreme Court of Pennsylvania has held the statute to violate the Open Courts provision of the Pennsylvania Constitution.[132] Statutes adopted in three states — Florida, Indiana,

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[130] Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Gen. Laws 169 (finding an "asbestos litigation crisis" in Texas and throughout the country).

[131] 15 PA. CONS. STAT. ANN. § 1929.1 (West 2010).

[132] *Ieropoli v. AC&S Corp.*, 842 A.2d 919 (Pa. 2004).

and Wisconsin — apply to pending actions if trial has not commenced.[133] Statutes adopted in three other states — North Dakota, Ohio, and Oklahoma — have the same application *unless it is found to be unconstitutional*.[134] South Carolina's statute applies only to actions filed after the statute's effective date,[135] and Georgia's applies only to actions that accrue after the statute's effective date.[136] The effect of Mississippi's statute on accrued or pending claims is unclear from the text.[137] Other states' perception of the public interest served by retroactive legislation is at best ambiguous.

It is tempting to think that the real burden of Chapter 149 on the Robinsons and other plaintiffs in their shoes will be light compared to the benefit to Crown, its current and former employees, and the State. The Robinsons' case, and most others like it, involves many defendants and large settlements funded from many pockets. The impact of Chapter 149 on individual cases may be slight, relative to the cumulative impact on Crown without Chapter 149. But we think that an important reason for the constitutional prohibition against retroactive laws is to preempt this weighing of interests absent compelling reasons. Indeed, it is precisely because retroactive rectification of perceived injustice seems so reasonable and even necessary, especially when there are few to complain, that the constitution prohibits it.

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[133] FLA. STAT. ANN. §§ 774.001-.008 (West 2010); IND. CODE ANN. §§ 34-31-8-1 to -12 (West 2010); WIS. STAT. ANN. § 895.61 (West 2010).

[134] N.D. CENT. CODE § 32-46-06 (2010); OHIO REV. CODE ANN. § 2307.97 (West 2010); OKLA. STAT. ANN. tit. 76, §§ 72-79 (West 2010).

[135] S.C. CODE ANN. § 15-81-110 to -160 (2010).

[136] O.C.G.A. § 51-15-1 to -8 (2010) (see § 51-15-3, Chapter Note, Editor's Notes, on effective date and non-codified provisions); Ga. L. 2007, p. 4, §§ 2, 4 (text of SB 182, as passed, is available at http://www.legis.state.ga.us/legis/2007_08/fulltext/sb182.htm).

[137] MISS. CODE ANN. § 79-33-1 to -11 (2010).

Accepting the legislative record as indicating the reasons for its actions, we conclude that the public interest served by Chapter 149 is slight.

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For these reasons, we hold that Chapter 149, as applied to the Robinsons' common-law claims, violated article I, section 16 of the Texas Constitution. The court of appeals' judgment is reversed and the case is remanded to the trial court for further proceedings.

Nathan L. Hecht
Justice

Opinion delivered: October 22, 2010