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 COMPANY, 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 WILLETT, joined by JUSTICE LEHRMANN, concurring.

Litigants in our adversarial system are hard-wired for certitude, adept at insisting the law "clearly" or "plainly" favors their side or, as here, labeling the controlling analysis "straightforward and simple." If only. Today's case is both complex and consequential, and fiendishly so. The facts are compelling; the law is unclear; and the stakes are high, not just for these parties but also for our constitutional architecture that both confers and constrains governmental power. I concur that chapter 149 is an invalid exercise of legislative police power that cannot surmount our Constitution's ban on retroactive laws. But I write separately to stress that this case, at heart, implicates issues far beyond whether Barbara Robinson can sue Crown Cork & Seal.

Every case that reaches this Court concerns real people buffeted by real problems in the real world. *This* dispute, however, possesses a transcendent quality, touching not only these parties but also building-block constitutional principles that belong to all Texans. In that sense, it affords a whetstone on which to sharpen our thinking on some bedrock notions of government and how the Texas Constitution assigns democratic responsibilities. More to the point, it teaches a vital lesson about diminished liberty stemming from government overreaching: The Legislature's police power cannot go unpoliced.

The Texas Constitution looks unkindly on retroactive laws, but as a constitutional matter, retroactive is not always retrograde.

While it is axiomatic that the Legislature, through budgeting and lawmaking, has primacy in setting State policy, that power, though unrivaled, is not unlimited. One constraint is the Texas Constitution's Bill of Rights, including article I, section 16's prohibition against retroactive laws.[1]

Retroactive legislation is disfavored because, as the Father of the U.S. Constitution explains, citizens deserve protection from the "fluctuating policy" of the legislature.[2] Robinson's position takes James Madison one leap further: Disfavored actually means disallowed, and "the police power may not be used to deprive citizens of their property retroactively by eliminating their vested rights in accrued claims." Robinson insists our Bill of Rights, including the Retroactivity Clause, is impregnable in this regard given this mandate from article I, section 29:

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[1] Tex. Const. art. I, § 16.

[2] THE FEDERALIST No. 44 (James Madison).

> 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 all laws contrary thereto . . . shall be void.[3]

This admonition naturally commands judicial respect, but it cannot bear the weight Robinson places on it. We long ago crossed the Rubicon of declaring the Retroactivity Clause non-absolute (despite article I, section 29's seeming absolutism), recognizing that some retroactive laws "may be proper or necessary, as the case may be."[4] Specifically — and this is one facet of retroactive-law analysis where a controlling principle (if not its application) is uncomplicated — such laws are constitutionally permissible if they are a "valid exercise of the police power by the Legislature to safeguard the public safety and welfare."[5] Retroactivity in and of itself is not fatal,[6] and nothing in the Bill of Rights handcuffs the Legislature from confronting urgent state priorities.

The notion that article I, section 29 hermetically seals off the Bill of Rights from all legislative attention invites myriad absurdities.[7] The "all laws contrary . . . shall be void" language may be facially inviolable, similar to the federal Bill of Rights' "Congress shall make no law"

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[3] Tex. Const. art. I, § 29.

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

[5] *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633-34 (Tex. 1996). *See also In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (citing *Barshop*, 925 S.W.2d at 633-34).

[6] *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) ("Mere retroactivity is not sufficient to invalidate a statute."). As we put it more recently, "not all statutes that apply retroactively are constitutionally prohibited." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002).

[7] Our Bill of Rights also says "no law shall ever be passed curtailing the liberty of speech or of the press," Tex. Const. art. I, § 8, but it is fundamental that such unequivocal language must yield to reasonable limits.

language, but it must accommodate legislation at the edges. The practical challenge for judges is to set that perimeter, and to do so in a principled, no-favorites fashion.

House Bill 4 was enacted against a backdrop of urgency, but with legislative police power, unfettered must never be unfretted.

As litigants often discover, in the Legislature a deal is sometimes a raw deal. But unfair does not always equal unconstitutional; even vested rights can be impinged if lawmakers have a good-enough reason.

Both the U.S. Supreme Court and this Court have lamented the "'elephantine mass of asbestos cases' lodged in state and federal courts,"[8] branding it a "crisis"[9] that "defies customary judicial administration."[10] In response, the bipartisan civil-justice reforms enacted in 2003's House Bill 4 effected a sea change in the Texas tort landscape;[11] likewise the omnibus asbestos-litigation reforms enacted in 2005's Senate Bill 15.[12] Both measures sought to address perceived flaws in

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[8] *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 166 (2003) (*quoting Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); *see In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) ("Our state trial courts have gained considerable experience in managing the thousands of claims asserted in asbestos litigation.").

[9] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 482 (Tex. 2008).

[10] *Ayers*, 538 U.S. at 166; *see also CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) ("[T]he state expends a large amount of its limited judicial resources resolving these massive [asbestos] controversies. Under these circumstances, a trial on the merits would further overtax the state's judicial resources."). At least recently, Texas led the nation in asbestos-related litigation. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1(e), 2005 Tex. Gen. Laws 169. The 2005 Legislature that enacted SB 15's extensive reforms for handling asbestos and silica cases included findings in the statutory text describing in detail how the "crush of asbestos litigation has been costly to employers, employees, litigants, and the court system." *Id.* § 1(g).

[11] Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 1.01-23.03, 2003 Tex. Gen. Laws 847.

[12] Act of May 16, 2005, 79th Leg., R.S., ch. 97, §§ 1-12, 2005 Tex. Gen. Laws 169.

asbestos-related litigation — HB 4 by limiting so-called "innocent successor" liability (immediately and retroactively),[13] and SB 15 via more sweeping reforms for asbestos and silica claims.[14]

In upholding a retroactive water regulation in *Barshop*, we expressly relied on formal and extensive findings that the Legislature made part of the statutory text itself: "Based on these legislative findings, we conclude that the Act is necessary to safeguard the public welfare of the citizens of this state. Accordingly, the retroactive effect of the statute does not render it unconstitutional."[15] Chapter 149's enacted text includes no such findings. Instead, Crown Cork relies on the legislative record, contending it amply underscores an urgent public need: protecting imperiled-but-nonculpable companies in order to safeguard the livelihoods of endangered-but-innocent employees, pensioners, and local economies.[16]

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[13] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 17.01, 2003 Tex. Gen. Laws 847, 892 (codified at TEX. CIV. PRAC. & REM. CODE § 149.003(a)).

[14] Act of May 16, 2005, 79th Leg., R.S., ch. 97, §§ 1-12, 2005 Tex. Gen. Laws 169. SB 15 was not immediately effective, unlike HB 4's successor-liability provision, but most of SB 15's provisions were quasi-retroactive, affecting pending claims that had not yet begun trial. *See id.* §§ 2, 9, 12.

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

[16] Though rummaging around in legislative minutiae for extratextual clues is an exercise prone to contrivance and manipulation, *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 469–75 (Tex. 2009) (Willett, J., concurring in part and in the judgment); *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 649–50 (Tex. 2008) (Willett, J., concurring), I am mindful in today's narrow police-power context that the U.S. Supreme Court (including its most ardent legislative-history skeptics) has assessed a statute's constitutionality under the Commerce Clause by seeking "even congressional committee findings," *United States v. Lopez*, 514 U.S. 549, 562 (1995) (citing *Preseault v. ICC*, 494 U.S. 1, 17 (1990)). It merits mention, though, that chapter 149's legislative history illustrates the sort of cherry-picking that often taints such forays. As the Court notes, a comment in the Senate chamber describes the law as an "agreed arrangement" involving "Crown Cork and Seal," while a "statement of legislative intent" inserted by the House sponsor discusses the liabilities of "a corporation" without mentioning Crown Cork at all. ___ S.W.3d. ___.

Nobody disputes "the authority of the Legislature to make reasoned adjustments in the legal system."[17] But lawmakers aiming to statutorily prescribe what is constitutionally proscribed must make a convincing case. As the Court carefully explains, the sparse record underlying chapter 149 falls short of what must be shown before someone is made to surrender a constitutional right.

This case concerns high-stakes issues far beyond chapter 149, principally how the Texas Constitution allocates governing power.

Today's case is not merely about whether chapter 149 singled out Barbara Robinson and unconstitutionally snuffed out her pending action against a lone corporation. Distilled down, it is also a case about how Texans govern themselves.

Delimiting the outer edge of police-power constitutionality has bedeviled Texas courts for over a century. The broader issue of a citizen's relationship with the State has confounded for centuries longer.

- From 1651: "For in a way beset with those that contend on one side for too great Liberty, and on the other side for too much Authority, 'tis hard to passe between the points of both unwounded."[18]

- From 1851: "It is much easier to perceive and realize the existence and sources of [the police power] than to mark its boundaries, or prescribe limits to its exercise."[19]

- From 1907: The question whether a law can stand as a valid exercise of the police power "may be involved in mists as to what police power means, or where its boundaries may terminate. It has been said that police power is limited to enactments having reference to the comfort, safety, or the welfare

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[17] *Owens Corning v. Carter*, 997 S.W.2d 560, 574 (Tex. 1999).

[18] THOMAS HOBBES, LEVIATHAN xiii (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).

[19] *Commonwealth v. Alger*, 61 Mass. 53, 85 (Mass. 1851).

> of society, and usually it applies to the exigencies involving the public health, safety, or morals."[20]

Gauzy definitions such as these — and laments over such imprecision — offer scant comfort in this enterprise. The issue is elemental, but not elementary. Fortunately, we are not entirely without guidance.

Appropriately weighty principles guide our course. First, we recognize that police power draws from the credo that "the needs of the many outweigh the needs of the few." Second, while this maxim rings utilitarian and Dickensian (not to mention Vulcan[21]), it is cabined by something contrarian and Texan: distrust of intrusive government and a belief that police power is justified only by urgency, not expediency. That is, there must exist a societal peril that makes collective action imperative: "The police power is founded in public necessity, and only public necessity can justify its exercise."[22] Third, whether the surrender of constitutional guarantees is necessary is a legislative call in terms of desirability but a judicial one in terms of constitutionality. The political branches decide if laws pass; courts decide if laws pass muster. The Capitol is the center of policymaking gravity, but the Constitution exerts the strongest pull, and police power must bow to constitutional commands: "as broad as [police power] may be, and as comprehensive as some legislation has

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[20] *Jordan v. State*, 103 S.W. 633, 634 (Tex. Crim. App. 1907).

[21] *See* STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982). The film references several works of classic literature, none more prominently than *A Tale of Two Cities*. Spock gives Admiral Kirk an antique copy as a birthday present, and the film itself is bookended with the book's opening and closing passages. Most memorable, of course, is Spock's famous line from his moment of sacrifice: "Don't grieve, Admiral. It is logical. The needs of the many outweigh . . ." to which Kirk replies, "the needs of the few."

[22] *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921).

sought to make it, still it is subsidiary and subordinate to the Constitution."[23] Fourth, because the Constitution claims our highest allegiance, a police-power action that burdens a guarantee like the Retroactivity Clause must make a convincing case.[24] Finally, while police power naturally operates to abridge private rights, our Constitution, being inclined to freedom, requires that such encroachments be as slight as possible: "Private rights are never to be sacrificed to a greater extent than necessary."[25]

If judicial review means anything, it is that judicial restraint does not allow everything. Yes, courts must respect democratically enacted decisions; popular sovereignty matters. But the Texas Constitution's insistence on limited government also matters, and that vision of enumerated powers and personal liberty becomes quaint once courts (perhaps owing to an off-kilter grasp of "judicial activism") decide the Legislature has limitless power to declare its actions justified by police power. At that constitutional tipping point, adjudication more resembles abdication.

Whatever the police power's amorphous boundaries, we know these two things: (1) the Legislature may ask for private sacrifice, and receive it — provided the private rights sacrificed are outweighed in public good, burdened as little as possible, and amply justified on public-necessity grounds; and (2) the Legislature's police power is not infinitely elastic, able to extinguish constitutional liberties with nonchalance. Texans long ago and since have embraced constitutional,

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[23] *Jordan*, 103 S.W. at 634.

[24] *See Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 286 (Tex. 2010) (an exercise of legislative police power "is not sustained when it is arbitrary or unreasonable") (footnote, citation omitted).

[25] *Spann*, 253 S.W. at 515.

meaning limited, government. The judiciary thus has a superseding obligation to disapprove certain encroachments on liberty, no matter the legislative vote-count. Put another way, judicial review sometimes means thwarting today's majority from thwarting yesterday's supermajority — the one that ratified our solemn Constitution.[26]

Legislative police power is not constitutional carte blanche to regulate all spheres of everyday life; preeminence does not equal omnipotence.

The Texas Bill of Rights — enshrined to recognize and establish "the general, great and essential principles of liberty and free government"[27] — declares an emphatic "no" to myriad government undertakings: no religious test for office, no double jeopardy, no self-incrimination, no curtailment of free speech, etc. It is, like its federal counterpart, irrefutably framed in proscription. And, like its federal counterpart, its limitations are not exception-free; desperate times permit desperate measures (to a point). But we should steadfastly resist defining desperation down. Exceptions to constitutional guarantees are real but also rare, just like modern citations to *Marbury v. Madison*: "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[28]

The "danger that liberty should be undervalued" necessarily implicates "the adjustment of the boundaries between it and social control."[29] There must remain judicially enforceable constraints

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[26] *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 143 (2002).

[27] Tex. Const. art. I.

[28] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

[29] JOHN STUART MILL, *On Liberty*, *in* THE BASIC WRITINGS OF JOHN STUART MILL: ON LIBERTY, THE SUBJECTION OF WOMEN, AND UTILITARIANISM 3, 58 (The Modern Library 2002) (2d ed. 1863).

on legislative actions that are irreconcilable with constitutional commands. If legislators come to believe that police power is an ever-present constitutional trump card they can play whenever it suits them, overreaching is inexorable.

To be sure, constitutional analysis is nuanced and not prone to doctrinaire absolutes. It is easy to say the sovereign's shield must never become a sledgehammer, but it is more difficult — and every bit as important — to discern the moment at which it threatens to become a scalpel, carving quietly yet critically away at cherished rights.

It merits repeating that this Court and the U.S. Supreme Court have long permitted legislative bodies to burden constitutional freedoms upon a strong public-welfare showing. The reason chapter 149 offends the Retroactivity Clause is because it lacks that showing. Indeed, if chapter 149's meager record were sufficient, there would be scant defense against future police-power incursions — incursions that, while ostensibly well-meaning, shrink the sphere of protected liberty and erode bit by bit the notion of limited government. "Experience is the oracle of truth,"[30] wrote Madison, and history teaches this is a ratchet that clicks only one way.

Robinson's case provides a real and important reminder of the limits of legislative power and the scope of judicial review. But after her case has come and gone, I hope what Edmund Burke

[30] THE FEDERALIST No. 20 (James Madison).

called a "fierce spirit of liberty"[31] will help steer a course with senses heightened to constitutional guardrails.

Police power is an attribute of sovereignty, but sovereignty ultimately rests in "the people of the State of Texas."[32]

The Texas Constitution places limits on government encroachments, and does so on purpose. Our Bill of Rights is not mere hortatory fluff; it is a purposeful check on government power. Everyday Texans, and the courts that serve them, must remain vigilant, lest we permit boundless police power, often couched in soaring prose, to abridge our Constitution's enduring "principles of liberty and free government."[33] As Justice Brandeis warned in his now-celebrated *Olmstead* dissent: "Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent."[34]

Shortly after the Federal Constitution was approved in September 1787, Thomas Jefferson wrote James Madison from Paris, advocating a Bill of Rights and also voicing confidence that the people would be the best sentries against overreaching government: "[I am] convinced that on their

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[31] EDMUND BURKE, *Speech on Moving His Resolutions for Conciliation with the Colonies, Mar. 22, 1775*, *in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 189 (Peter J. Stanlis ed., 2009) ("In this character of the Americans a love of freedom is the predominating feature which marks and distinguishes the whole: and as an ardent is always a jealous affection, your colonies become suspicious, restive, and untractable, whenever they see the least attempt to wrest from them by force, or shuffle from them by chicane, what they think the only advantage worth living for. This fierce spirit of liberty is stronger in the English colonies, probably, than in any other people of the earth . . . .").

[32] Tex. Const. pmbl.

[33] Tex. Const. art. I.

[34] *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967). Or, as 18th-century philosopher David Hume cautioned, "It is seldom that liberty of any kind is lost all at once." Rather, suppression "must steal in upon [people] by degrees, and must disguise itself in a thousand shapes in order to be received." David Hume, *Of the Liberty of the Press* 1, 262 n.4, *in* HUME: POLITICAL ESSAYS (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1741).

good senses we may rely with the most security for the preservation of a due degree of liberty."[35] Jefferson was right. We are our own best lookouts against invasions, however well-intentioned, that siphon our "due degree of liberty" — siphoning that often occurs subtly, with such drop-by-drop gentleness as to be imperceptible.

To be sure, Members of the Texas Legislature have sworn to "preserve, protect, and defend the Constitution and laws of the United States and of this State,"[36] and they doubtless believe their enactments honor basic constitutional guarantees. I never second-guess the Legislature's motives and goodwill (and have never needed to); we are blessed with 181 lawmakers who serve Texas with full hearts.[37] But where the Constitution is concerned, the judiciary's role as referee — confined yet consequential — must leaven big-heartedness with tough-mindedness.

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Summing up: Judges are properly deferential to legislative judgments in most matters, but at some epochal point, when police power becomes a convenient talisman waved to short-circuit our constitutional design, deference devolves into dereliction. The Legislature's policymaking power

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[35] Letter from Thomas Jefferson to James Madison, Paris (1787), *in* THE JEFFERSON CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 277 (John P. Foley ed., 1900).

[36] Tex. Const. art. XVI, § 1.

[37] My dissenting colleagues' meticulous analysis shows that today's difficult case has several moving pieces, each seemingly weightier and more perplexing than the one before. This is "a Supreme Court case" in every sense and one that has occupied our attention for a long time, arriving at the Court before our two newest Justices. So reasonable judicial minds can certainly differ (and on this Court they frequently do). But an important point must be made: There is a profound difference between an activist judge and an engaged judge. I am honored to serve with none of the former and eight of the latter. Nothing in this concurrence should be distorted into criticism of either lawmakers who passed chapter 149 or judges who passed upon it. My cautions today about unconstrained police power are entirely forward-looking, speaking to what *can* happen if judges, while not activist are also not properly active, instead preferring to leave police power unpoliced, thus inviting the other branches to flex ever-broader powers. My concerns are less centered on this case than on future ones.

may be vast, but absent a convincing public-welfare showing, its police power cannot be allowed to uproot liberties enshrined in our Constitution.

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Don R. Willett
Justice

OPINION DELIVERED: October 22, 2010