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John L. Hill

David C. Kent

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ADMINISTRATIVE LAW

by

John L. Hill and David C. Kent***

THE state and federal courts in Texas resolved several significant issues relating to administrative law in the past year. As in previous Surveys, this Article discusses the decisions in three broad areas: constitutional considerations, administrative adjudications, and judicial review.

I. CONSTITUTIONAL CONSIDERATIONS

A. Notice and Hearing

A fundamental tenet of procedural due process is that a person must have notice and an opportunity for a hearing before the government may deprive him of life, liberty, or property.[1] The nature of the requisite notice and hearing varies, however, with the facts of each case.[2] During the survey period Texas courts generally held that parties raising due process arguments received all the notice and hearing to which they were entitled.

In *Tarrant County v. Ashmore*[3] the Supreme Court of Texas discussed the rights of public officeholders in retaining their offices and distinguished the notice and hearing requirements that apply to determinations of legislative facts from those that apply to determinations of adjudicative facts.[4] In 1980 the Tarrant County commissioners court redrafted the boundary lines for justice of the peace and constable precincts and abolished the existing justice and constable offices. Three incumbent justices and one constable sued the commissioners for declaratory and injunctive relief and for damages. They asserted a property interest in their offices and claimed that the commissioners could not remove them from office prior to the expiration of their elected terms without first affording them a full adversary hearing. The trial court entered a judgment for the plaintiffs and the court of appeals affirmed, holding that the commissioners court proceedings deprived the plaintiffs of a property interest without due process, and

* B.A., LL.B., University of Texas. Attorney at Law, Hughes & Hill, Austin, Texas.
** B.A., J.D., Baylor University. Attorney at Law, Hughes & Hill, Dallas, Texas.

1. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.
2. Cafeteria & Restaurant Workers Union v. McElroy, 367 US. 886, 894-95 (1961).
3. 635 S.W.2d 417 (Tex. 1982).
4. *See infra* notes 48-52 and accompanying text.

that the plaintiffs could therefore recover from the county the salaries and benefits they would have received had they remained in office.[5]

The supreme court reversed, holding that the plaintiffs were not entitled to a trial-type proceeding and the attendant procedural safeguards.[6] The decision rested on the court's distinction between "legislative" and "adjudicative" facts. Legislative facts, which concern matters of policy and administrative discretion, affect individual parties only indirectly through such parties' involvement in the general legislative scheme.[7] Adjudicative facts, however, affect individual parties directly; such facts answer questions of "who did what, where, when, how, why, with what motive or intent."[8] Determinations of adjudicative facts therefore call for the full procedural safeguards of a trial-type proceeding, while legislative fact-finding may take place in a nonadversarial setting.[9]

In *Ashmore* the supreme court held that the redistricting order was a legislative or quasi-legislative act involving resolution of essentially political issues.[10] Because the commissioners court hearings did not involve a determination of adjudicative facts, a trial-type proceeding was not necessary to protect the plaintiffs.[11] Moreover, because the commissioners court issued its order abolishing the plaintiffs' offices only after extensive public hearing and debate, and because each of the plaintiffs actually attended at least one hearing, the supreme court held that the plaintiffs received as much protection as they were due.[12]

Under certain circumstances a person is not entitled to notice of an administrative proceeding and opportunity to appear even though the proceeding involves a determination of adjudicative facts. This issue arose in *In re M.G.*,[13] a paternity suit instituted by the Texas Department of Human Resources (TDHR). The trial court declared Juan Castro the father of the child in question and ordered him to pay child support. Castro's complaint concerned not the paternity suit itself, in which Castro fully participated, but rather a prior administrative hearing determining the mother's eligibility to receive financial assistance in the Aid to Families with Dependent Children (AFDC) program. Castro received no notice of the AFDC proceeding and did not participate in it. As a direct result of the determination at the AFDC hearing, the TDHR instituted the paternity suit seeking child support payments from Castro. Castro therefore

5. 624 S.W.2d 740, 745-46 (Tex. Ct. App.—Fort Worth 1981).
6. 635 S.W.2d at 423.
7. *Id.*
8. *Id.* (citing K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12:3 (2d ed. 1978)).
9. 635 S.W.2d at 423.
10. *Id.* The court based this holding on the fact that TEX. REV. CIV. STAT. ANN. art. 2351½ (Vernon 1971 & Supp. 1982-1983), was a grant of authority from the people and the legislature to the commissioners to redraft precinct lines and abolish existing offices. 635 S.W.2d at 423.
11. 635 S.W.2d at 423.
12. *Id.* at 424. During the survey period the supreme court also upheld a taxing statute against due process claims alleging inadequate notice and hearing. Shaw v. Phillips Crane & Rigging, 636 S.W.2d 186, 188 (Tex. 1982).
13. 625 S.W.2d 747 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).

asserted that the failure to provide him notice and opportunity to contest the mother's eligibility for benefits violated due process.

Although it acknowledged the connection between the two proceedings, the court of appeals nevertheless held that Castro was not entitled to notice of the AFDC hearing.[14] An adversarial proceeding "presupposes a compulsory attendance of parties at a judicial or quasi-judicial proceeding and forfeiture of some right for failure to attend."[15] The AFDC hearing lacked these qualities because it determined only the mother's right to receive AFDC benefits without affecting Castro's property rights. Only the paternity suit affected Castro's rights, and Castro received notice and all other procedural safeguards required by law for that proceeding. Accordingly, the court rejected the due process challenge.[16]

Notice must not simply inform a person of a scheduled proceeding, but must also give him an opportunity to prepare for the proceeding. If a person thinks the notice he receives is inadequate, he must voice his complaint in a timely manner in order to preserve error. In *Sabine Bank v. State Banking Board*[17] the appellant claimed that it did not receive adequate notice of a hearing before the State Banking Board because the notice did not state the law regarding the issues that the Board would decide.[18] The evidence indicated that during the three months between the notice and the hearing the appellant failed to request either a bill of particulars or a postponement of the hearing to enhance its ability to prepare for the proceeding, and that the appellant nevertheless fully litigated the issues it said should have been stated in the notice. The court held that these facts clearly demonstrated that the notice neither surprised nor misled the appellant as to issues of fact and law, and, therefore, that the notice was adequate.[19]

B. Vagueness

In *Browning-Ferris, Inc. v. Texas Department of Health*[20] the appellant attacked the Texas Department of Health's municipal solid waste management regulations on the grounds that they were unconstitutionally vague. The Department had denied Browning-Ferris's application for a solid waste disposal permit because the proposed landfill would constitute an "improper land use," a ground contained in the Department's regulations for refusing an application. Browning-Ferris argued that because the regulations did not define the terms "land use" and "improper land use," they

14. *Id.* at 749.
15. *Id.*
16. *Id.* at 750.
17. 630 S.W.2d 523 (Tex. Ct. App.—Austin), *writ dism'd per curiam*, 639 S.W.2d 303 (Tex. 1982).
18. 630 S.W.2d at 525. The hearing concerned a bank's application to change its domicile within a city. The appellant contended that the rule of Citizens Bank v. First State Bank, 580 S.W.2d 344 (Tex. 1979), regarding the standards for granting such an application, must be set out in the notice. 630 S.W.2d at 525.
19. 630 S.W.2d at 526.
20. 625 S.W.2d 764 (Tex. Ct. App.—Austin 1981, writ ref'd n.r.e.).

failed to furnish adequate guidelines or standards for the denial or granting of a permit and so were void for vagueness.

The court of appeals stated that a regulation violates due process "if it requires the doing of an act so vague that persons of common intelligence must guess at its meaning and differ as to its application."[21] The court admitted that the term "land use" was broad, but held that it was no more general than other standards which had withstood vagueness challenges.[22] The court noted that the regulations listed several considerations to guide the Department's determinations. These factors imposed parameters on the meaning of the term "improper land use," thus precluding a finding of vagueness as to that term.[23] Comparing the regulations to other environmental laws that draw their effectiveness from broad and flexible standards, the court stated that if the regulations were too precise, they would provide "easy escape for those who wish to circumvent the law."[24] The court thus upheld the regulations and the Department's denial of Browning-Ferris's application.[25]

C. Equal Protection

One of the inherent powers and fundamental purposes of government is to regulate business and control the use of property within its borders when necessary for the health, safety and general welfare of its citizenry.[26] This police power includes the authority to classify and regulate business entities according to the organization and purpose of their business.[27] Unless a classification distinguishes on a suspect basis (such as race, religion, or alienage) or affects a fundamental personal right, it generally will be upheld. States thus have wide latitude to regulate their local economies, and an economic classification normally withstands constitutional scrutiny if it is rationally related to a legitimate state interest.[28] The survey period presented two interesting cases applying these principles.

Prudential Health Care Plan, Inc. v. Commissioner of Insurance[29] in-

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21. *Id.* at 765.

22. *Id.* at 767 (citing Jordan v. State Bd. of Ins., 160 Tex. 506, 334 S.W.2d 278 (1960) ("not worthy of the public confidence"); Texas Pet Foods, Inc. v. State, 529 S.W.2d 820 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (definition of air pollution in Texas Clean Air Act, TEX. REV. CIV. STAT. ANN. art. 4477-5 (Vernon 1976 & Supp. 1982-1983)); Morgan v. Texas Alcoholic Beverage Comm'n, 519 S.W.2d 250 (Tex. Civ. App.—Texarkana 1975, no writ) ("based on general welfare, health, peace, morals, and safety of the people, and on the public sense of decency"); Martinez v. Texas State Bd. of Medical Examiners, 476 S.W.2d 400 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.) ("grossly unprofessional conduct, or a character which in the opinion of the Board is likely to deceive or defraud the public")).

23. 625 S.W.2d at 766-67.

24. *Id.* at 767-68.

25. *Id.*

26. Lombardo v. City of Dallas, 124 Tex. 1, 9-10, 73 S.W.2d 475, 478 (1934).

27. Hurt v. Cooper, 130 Tex. 433, 440-41, 110 S.W.2d 896, 900-01 (1937); Texas Co. v. Stephens, 100 Tex. 628, 640-41, 103 S.W. 481, 484-85 (1907).

28. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). If the classification affects a fundamental personal right or relies on inherently suspect distinctions, it is subject to much stricter scrutiny. *Id.*

29. 626 S.W.2d 822 (Tex. Ct. App.—Austin 1981, writ ref'd n.r.e.).

volved an attack upon the taxation of health maintenance organizations (HMOs) under the Texas Insurance Code. Section 20A.33(a) of the Insurance Code[30] imposed a tax upon corporate HMOs but not upon noncorporate HMOs, thereby effectively placing on the corporate HMOs all costs of administering the Texas Health Maintenance Organization Act.[31] Prudential Health Care Plan, Inc. claimed that article 20A.33(a) denied it equal protection of the laws. The court of appeals agreed and ordered a refund to Prudential of over $70,000 in taxes Prudential had paid under protest.[32]

The court first determined that the charge article 20A.33(a) imposed was a regulatory fee rather than a revenue tax.[33] This finding rested on the article's express purpose "[t]o defray the expense of carrying out the provisions of this Act."[34] Because the exaction was not a tax, it was not subject to the requirement of the Texas Constitution that taxes be "equal and uniform."[35] The court held, however, that the distinction between corporate and noncorporate HMOs was not a reasonable basis for unequal taxation because the business of every HMO is the same regardless of its form of organization.[36] The court noted that all other sections of the Health Maintenance Organization Act treated corporate and noncorporate HMOs substantially the same.[37] Finally, the court held that the fact that the Insurance Commissioner had assessed an identical charge against the only noncorporate HMO in Texas did not cure the defect in article 20A.33(a); the court stated that the commissioner could not remedy by administrative action the constitutional infirmities of the statute.[38]

Maceluch v. Wyson[39] involved a less successful equal protection challenge to the refusal of the Texas State Board of Medical Examiners to permit two osteopathic physicians to identify themselves with the initials "M.D." rather than the initials "D.O." because their diplomas read "Doctor of Osteopathy." The board relied on a statute providing that physicians whom the Board licenses on the basis of Doctor of Osteopathy degrees must use the initials "D.O.," while only persons licensed on the basis of Doctor of Medicine degrees may use the term "M.D."[40] The

30. 1975 Tex. Gen. Laws, ch. 214, § 33, at 530-31. The legislature amended article 20A.33 after the occurrences giving rise to this action. TEX. INS. CODE ANN. art. 20A.33 (Vernon 1981). The court noted that the amendment cured the constitutional defects in the statute. 626 S.W.2d at 825 n.5.

31. TEX. INS. CODE ANN. art. 20A.01-.35 (Vernon 1981).

32. 626 S.W.2d at 832-33.

33. *Id.* at 829.

34. *Id.*

35. TEX. CONST. art. VIII, § 1.

36. 626 S.W.2d at 830.

37. *Id.* at 830-31.

38. *Id.* at 832. The court upheld the constitutionality of art. 20A.33(b) of the Insurance Code, which imposes a gross premiums tax on corporate HMOs only. The rationale for the holding was that the tax is a substitute for the state franchise tax, which does not apply to HMOs and other insurance companies. 626 S.W.2d at 832.

39. 680 F.2d 1062 (5th Cir. 1982).

40. TEX. REV. CIV. STAT. ANN. art. 4590e, § 3 (Vernon 1976) (Healing Art Identification Act).

plaintiffs contended that the D.O. designation tarnished their public image and was less favorable in the eyes of the public than an M.D. designation and argued that this distinction in terminology constituted a denial of equal protection.

The osteopaths first argued that they received virtually the same training as medical doctors and should therefore enjoy identical treatment. The court noted, however, that the plaintiffs' training differed significantly from that of medical doctors, and therefore the legislature could rationally distinguish the two groups on the basis of those differences.[41] The osteopaths next argued that the statute treated them unfairly because it allowed graduates of foreign medical schools to use the initials "M.D." even though their degrees did not read "Doctor of Medicine" or "Doctor." The court also rejected this argument, holding that the training of an osteopath differed from that of graduates of foreign medical schools just as it differed from the training of graduates of American medical schools.[42] Finally, the plaintiffs argued that because the public understands the term "M.D." to indicate a qualified licensed physician, preventing osteopaths from using that term would confuse the public as to the true nature of an osteopath's profession and training. The court stated, however, that this very perception of the term "M.D.," whether right or wrong, was a rational basis for the legislature's distinction between osteopaths and medical doctors, because it prevented deception of those persons who knew the difference between the two groups.[43]

D. *Life, Liberty, and Property Interests*

Due process protections come into play only when a case involves a life, liberty, or property interest. *Pope v. City of Dallas*[44] forcefully demonstrates this principle. Pope alleged that a decision by the Chief of Police demoting Pope from the position of Assistant Chief to Captain violated his property rights in his job. The court held, however, that Pope had no property right in his position, and that being a police officer is a privilege involving no constitutional right.[45] Pope also claimed that the demotion impaired his liberty because it damaged his reputation, honor, and com-

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41. 680 F.2d at 1066-67.

42. *Id.* at 1068.

43. *Id.* at 1069. In upholding the statute the court concluded:

> This court does not sit *de novo* as a legislative body, nor will it do so under the cloak of equal protection. A federal court decree is clean, swift, and difficult to overturn. Its powers attract those who have lost in the rough and tumble of legislative politics, but its power is undemocratic and antimajoritarian. Accordingly, the rationale for the exercise of judicial power requires, at the least, that the "constitutional" interest impinged by the legislature be one traceable to the Constitution. The Court has no veto. That belongs to the governor. And saying it is the Constitution that vetoes does not make it so.

Id. at 1070. For another equal protection case from the survey period, see Colony Mun. Util. Dist. v. Appraisal Dist., 626 S.W.2d 930 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.) (right of equal protection extends to persons only, not to political subdivisions).

44. 636 S.W.2d 244 (Tex. Ct. App.—El Paso 1982, no writ).

45. *Id.* at 246.

munity standing. Pope did not allege, however, that the department made public any of the reasons for his demotion. Thus, no deprivation of liberty occurred because "[l]iberty is not infringed by derogatory information in confidential personnel files."[46] Accordingly, the court rejected Pope's due process claims.[47]

The Texas Supreme Court made a similar point in *Tarrant County v. Ashmore*,[48] in which constables and justices of the peace sued for their salaries for the remainder of their elected terms after the county commissioners' redistricting order prematurely removed them from office. One of the plaintiffs' theories was that their removal from office was an unconstitutional taking of their property without compensation.[49] The supreme court held, however, that the plaintiffs had no property interest in their employment, because public office is a position of trust or responsibility rather than a right.[50] While public officers have a financial interest in their positions that merits protection against interference by private parties, this qualified interest is not property in the constitutional sense.[51] Justice Pope, writing for the court, stated: "[E]very public officeholder remains in his position at the sufferance and for the benefit of the public, subject to removal from office by edict of the ballot box at the time of the next election, or before that time by any other constitutionally permissible means."[52] The commissioners court issued its redistricting order pursuant to a valid statute;[53] the fact that the order prevented some county officials from serving out their elected terms did not infringe upon a constitutionally protected property right.

II. ADMINISTRATIVE ADJUDICATIONS

A. *Exhaustion of Remedies*

The doctrine of exhaustion of remedies concerns the timing of judicial review of agency actions and the efficient and orderly administration of justice. Courts generally prohibit a party from seeking judicial relief until he has pursued all internal administrative avenues. For example, in

46. *Id.* For Pope to allege due process arguments was important, because he had resigned from the police force prior to completion of the administrative review of his demotion. By resigning, he forfeited his right to any further administrative action and eliminated the chance of developing a record to take before the district court for review under the substantial evidence rule. Accordingly, he retained no effective right to judicial review of the administrative action. *Id.* at 247.

47. *Id.* at 246.

48. 635 S.W.2d 417 (Tex. 1982); *see supra* notes 3-12 and accompanying text.

49. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without compensation."); TEX. CONST. art. I, § 17 ("No person's property shall be taken . . . without adequate compensation . . . .").

50. 635 S.W.2d at 420.

51. *Id.* at 422.

52. *Id.* at 421; *see* Taylor v. Beckham, 178 U.S. 548, 577 (1900) ("[P]ublic offices are mere agencies or trusts, and not property as such . . . . [T]he relation of a public officer to the public is inconsistent with either a property or a contract right.").

53. TEX. REV. CIV. STAT. ANN. art. 2351½ (Vernon 1971 & Supp. 1982-1983).

Springfield v. Aetna Casualty & Surety Insurance Co.[54] the plaintiffs brought a class action against several automobile insurers challenging the validity of a policy endorsement prescribed by the State Board of Insurance. The Insurance Code provided policyholders a mechanism for presenting to the Board grievances relating to endorsements the Board approved or disapproved.[55] The plaintiffs had failed, however, to avail themselves of this remedy. The supreme court, stating that exhaustion of administrative remedies is a prerequisite to judicial review, held that the plaintiffs could not challenge the endorsement in the courts without first having sought the administrative review.[56]

In *Texas Catastrophe Property Insurance Association v. Miller*[57] a policyholder sued the Texas Catastrophe Property Insurance Association for denial of liability without first appealing the denial to the State Board of Insurance as the Insurance Code prescribes.[58] The plaintiff's insurance policies did not refer to the adminisrative hearing requirement. The policyholder claimed that this omission exempted him from the provisions of the statute, and that compliance with all policy provisions entitled him to sue the association immediately. The court of appeals ruled against the insured, holding that the statutory provisions were mandatory and jurisdictional and could not be waived in the insurance policy.[59] The court therefore directed the trial court to dismiss the case for want of jurisdiction.[60]

An exception to the exhaustion of remedies doctrine arises when the agency is powerless to provide the relief sought and when the agency acts beyond the scope of its authority.[61] *Roskey v. Texas Health Facilities Commission*,[62] a suit to declare void an exemption certificate the Texas Health Facilities Commission had issued, illustrates this exception. The trial court dismissed the suit in part because it found that the plaintiffs had not exhausted their administrative remedies before the commission. The court of appeals held, however, that the exhaustion doctrine did not apply be-

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54. 620 S.W.2d 557 (Tex. 1981).

55. TEX. INS. CODE ANN. art. 5.11 (Vernon 1981). The statute confers a right of appeal to the courts of an adverse decision by the board at any such hearing. *Id.*

56. 620 S.W.2d at 559.

57. 625 S.W.2d 343 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ dism'd w.o.j.).

58. TEX. INS. CODE ANN. art. 21.49, § 9 (Vernon 1981) (Catastrophe Property Insurance Pool Act). The legislature created the association in 1971. The association consists of all property insurers authorized to do business in Texas. *Id.* § 3(k). Section 9 provides for a hearing before the State Board of Insurance to resolve disputes between policyholders and the association, and it explicitly creates a right of appeal to the courts from the board's decision. *Id.* § 9.

59. 625 S.W.2d at 347. "The right to appeal from an administrative order to the courts is not a natural right but one that may be granted or withheld at the discretion of the legislature . . . . When the legislature prescribes a method for judicial review of administrative action, the method must be followed to confer jurisdiction on the court." *Id.*

60. *Id.*

61. Foree v. Crown Petroleum Corp., 431 S.W.2d 312, 316 (Tex. 1968); Glen Oaks Utils. Inc. v. City of Houston, 161 Tex. 417, 420, 340 S.W.2d 783, 785 (1960). These exceptions apply equally to the primary jurisdiction doctrine. *Foree*, 431 S.W.2d at 316.

62. 630 S.W.2d 844 (Tex. Ct. App.—Austin), *rev'd on other grounds*, 639 S.W.2d 302 (Tex. 1982).

cause the Texas Health Planning and Development Act,[63] which authorized issuance of the certificate, contained no provisions for reopening the administrative hearing or voiding an exemption certificate upon the application of a person in the plaintiffs' position.[64] Pursuit of an internal administrative appeal would thus have been a futile act and was therefore unnecessary. Moreover, the plaintiffs based their cause of action on the theory that the commission lacked statutory authority to issue the certificate. In such a case, the court held, the doctrine of exhaustion of administrative remedies is inapplicable.[65]

B. Primary Jurisdiction

The doctrine of primary jurisdiction is closely related to the exhaustion of remedies rule, in that both concern the timing of judicial action. The difference between the two doctrines is that primary jurisdiction inquires whether the court or the agency should have initial jurisdiction of a proceeding, while exhaustion inquires whether or not agency action is ripe for judicial review. The primary jurisdiction doctrine finds support in the notion that allowing an administrative agency the first opportunity to deal with a problem leads to consistency and uniformity in policy administration and takes advantage of the agency's expertise in handling technical and complex issues.

The Supreme Court of Texas applied this rationale in *State v. Associated Metals & Minerals Corp.*[66] to prevent a district court from interfering with administration of state air pollution control laws. The suit originated in 1975 when the state brought an enforcement action against Associated Metals & Minerals Corporation for violation of the Texas Clean Air Act[67] in the operation of its tin smelting plant. In 1977 Associated Metals applied to the Texas Air Control Board for a permit to build new smelting facilities. These proceedings culminated in the granting of the permit and in an agreed judgment in 1978 in the enforcement action ordering Associated Metals to comply with the Clean Air Act in operating the new facility. In 1979 and 1980 Associated Metals informally requested the board to agree to a modification of the 1978 judgment allowing use of different pollution control devices. When the board refused to consent to the change, Associated Metals petitioned the trial court to modify the judgment. The court granted this request, prescribing the specific emission standards and pollution control methods that Associated Metals was to follow. The supreme court reversed the trial court judgment, holding that Associated Metals's proper course of action was a formal application to the board for modification of the company's operating permit.[68] The court held that the trial court's role was not to grant or deny permits or to set emission levels,

63. TEX. REV. CIV. STAT. ANN. art. 4418h (Vernon Supp. 1982-1983).
64. 630 S.W.2d at 845.
65. *Id.*
66. 635 S.W.2d 407 (Tex. 1982).
67. TEX. REV. CIV. STAT. ANN. art. 4477-5 (Vernon 1976 & Supp. 1982-1983).
68. 635 S.W.2d at 411.

but only to review the board's actions.[69] In this case the trial court did not merely supervise the enforcement of its own judgment. Instead, it actively implemented the Clean Air Act, which the court held was a responsibility the legislature gave exclusively to the board.[70] Thus the board, and not the trial court, had primary jurisdiction to determine whether the company could alter its pollution control devices.

Another case invoking the primary jurisdiction rule was *Lake Country Estates, Inc. v. Toman*,[71] in which a real estate developer sued the directors of a municipal utility district, alleging that they had engaged in illegal and ultra vires acts for the purpose of destroying the plaintiff's business. Most of the plaintiff's allegations related directly to the defendants' responsibilities as directors in making decisions affecting the district's operation. As such, the defendants' actions were subject to the supervision and control of the Texas Water Board.[72] In determining who had primary jurisdiction, the court noted that the question was "not whether some parts of the case are within the exclusive jurisdiction of the courts but whether some parts of the case are within the exclusive jurisdiction of the agency."[73] Because most of the issues in this case concerned matters within the jurisdiction of the Texas Water Board, the court held that the board should first determine such matters.[74]

In contrast, the court of appeals in *Singer v. Clayton Brokerage Co.*[75] refused to apply the primary jurisdiction rule. In *Singer* the plaintiff sued his commodities broker and brokerage house, alleging fraud and deceptive trade practices in connection with purchases of silver futures the plaintiff made on his broker's advice. The defendants argued that the Commodity Futures Trading Commission (CFTC) possessed either exclusive or primary jurisdiction with respect to transactions in commodity futures contracts. The defendants relied on section 2 of the Commodity Exchange Act, which provides that "the Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery."[76]

The court rejected the defendant's contention, noting that the Act also provided that "[n]othing in this section shall supersede or limit the juris-

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69. *Id.* at 410.
70. *Id.*
71. 624 S.W.2d 677 (Tex. Ct. App.—Fort Worth 1981, writ ref'd n.r.e.).
72. TEX. WATER CODE ANN. §§ 12.081, 54.024 (Vernon Supp. 1982-1983).
73. 624 S.W.2d at 681 (quoting K. DAVIS, ADMINISTRATIVE LAW TEXT § 19.07 (1950)).
74. 624 S.W.2d at 681. The fact that the Board could not award the plaintiff the damages it sought did not sway the court because the Board had authority to make findings of fact essential to the subsequent judicial award of damages. *Id.* at 681. Neither did the plaintiff's allegation that the defendants acted illegally persuade the court because such an allegation involved the complex and technical aspects of managing the utility district, matters the Board was more competent than the court to decide. *Id.* at 681-82. The court held, however, that the trial court could retain jurisdiction of the portion of the lawsuit involving allegations of slander and tortious interference with contract because these causes of action were severable from the claims in which the Board had primary jurisdiction. *Id.* at 682.
75. 620 S.W.2d 720 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).
76. 7 U.S.C. § 2 (Supp. V 1981).

diction conferred on courts of the United States or any State."[77] The court concluded that the statute created exclusive federal jurisdiction to regulate futures trading, but did not preempt the courts' jurisdiction to adjudicate claims that were inherently judicial in nature although they related to futures trading.[78] Moreover, the CFTC itself had adopted the position that resolution of actions for damages for violations of the Act rarely required the Commission's expertise and thus lent themselves to judicial rather than administrative determination. The court therefore held that the plaintiff's suit was maintainable in the Texas courts.[79]

C. Investigatory Powers

One of the great burdens associated with complex commercial litigation is the pretrial discovery process of producing documents for inspection and copying. A discovery request for the production of every conceivable document in the opposing party's possession, however remotely related to the subject matter of the suit, is a standard practice. The same burden is often associated with administrative proceedings in which the private litigant can be confronted with a burdensome administrative subpoena.

An administrative agency's subpoena power is broad and is generally subject to only two limitations: (1) the subpoena must be for a lawfully authorized purpose; and (2) it must seek information relevant to the agency's inquiry.[80] Courts, however, are not lax in enforcing these two limitations. For example, in *Sunshine Gas Co. v. United States Department of Energy*[81] the court vigorously examined the subpoena the Department of Energy had issued. The Department had subpoenaed virtually all of the company's records for a six-year period in connection with its investigation of petroleum price overcharges. The court focused on the requirement that the information sought be relevant to the agency's inquiry and held that in order for the court to determine relevance, the agency had to state the purpose behind its subpoena.[82] As the court explained:

> The function of this court is to determine if the agency has given reasoned consideration to all material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of critical facts, a course which assures the agency's policies effectuate general standards, ap-

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77. *Id.*

78. 620 S.W.2d at 724.

79. *Id.*

80. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 313 (1978); United States v. Powell, 379 U.S. 48, 57 (1964); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946). Additionally, the agency must not already possess the information and must follow the required administrative steps for issuance of the subpoena. *LaSalle Nat'l Bank*, 437 U.S. at 313-14; *Powell*, 379 U.S. at 57-58. Some courts have removed these last two restrictions. *See, e.g.*, United States v. Bell, 564 F.2d 953, 959 (Temp. Em. Ct. App. 1977) (additional requirements too restrictive); United States v. Security State Bank & Trust, 473 F.2d 638, 641 (5th Cir. 1973) (subpoena must meet the two primary requirements).

81. 524 F. Supp. 834 (N.D. Tex. 1981).

82. *Id.* at 838. "The agency's order should only be affirmed if a rational basis exists, but such must be supplied by the agency, not the court." *Id.*

plied without unreasonable discrimination.[83]

The Department of Energy was able to cite only possible or potential involvement on the part of Sunshine Gas Company in the price overcharging scheme. The court held this was an insufficient justification for such a sweeping subpoena.[84] While recognizing that it was placing a much heavier burden on the government than most courts would, the court concluded that equity demanded that the government bear such a burden.[85]

An additional ground for refusing to enforce an administrative subpoena is agency failure to follow the required procedural steps in issuing it. This was the situation presented in *Hunt v. United States Securities & Exchange Commission*.[86] This case derived in part from the Securities & Exchange Commission's (SEC) investigation of the Hunt brothers' involvement in the "silver crises" in the commodities futures market. The Hunts had sought to obtain injunctive relief preventing the SEC from obtaining financial information from some of their banks in violation of the Right to Financial Privacy Act.[87] The district court granted the requested relief based on its finding of numerous instances in which the SEC acted with reckless disregard for the plaintiffs' rights under that Act.[88] In defending itself, the SEC argued that injunctive relief was inappropriate because it had never received any information in response to its illegal subpoenas and, therefore, had not actually harmed the Hunts. The court rejected this argument and held that the entire purpose of the Act would be "gutted" if a plaintiff could not enjoin the improper disclosure of protected information.[89] Hopefully, bizarre fact situations such as this one do not characterize the government's use of administrative subpoenas.

D. Standing

The law of standing continues to be something of a conundrum in Texas. Traditionally, one possessed standing to sue only if he had a "special injury," some damage in fact, peculiar to himself and not commonly shared by the public at large.[90] With the *City of Houston v. Public Utility*

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83. *Id.* at 839.

84. The court held that the mandatory "articulation of purpose" was not satisfied by a mere suspicion on the part of the agency. *Id.*

85. *Id.* at 841.

86. 520 F. Supp. 580 (N.D. Tex. 1981).

87. 12 U.S.C. §§ 3401-3422 (Supp. V 1981).

88. 520 F. Supp. at 608. The Act requires that an agency send a copy of its administrative subpoena to the person whose financial records are being requested. 12 U.S.C. § 3045(2) (Supp. V 1981). In this case the SEC deliberately sent incomplete and excised copies of the subpoenas to the Hunts and deliberately failed to inform the Hunts of other subpoenas, conduct the court found to be "simply beyond rational explanation." 520 F. Supp. at 608.

89. 520 F. Supp. at 607. "To make unlawful disclosure of the customer's financial records a prerequisite to injunctive relief would turn traditional principles of equity on their head." *Id.*

90. *See* Harding v. Commissioners' Court, 95 Tex. 174, 175, 66 S.W. 44, 45 (1902); *cf.* Devorsky v. La Vega Indep. School Dist., 635 S.W.2d 904, 909 (Tex. Ct. App.—Waco 1982, no writ) (residency in district gives plaintiff standing to sue school district).

Commission[91] and *Hooks v. Texas Department of Water Resources*[92] decisions, however, the supreme court examined the special injury requirement. It appeared that the special injury requirement had perhaps been eliminated,[93] yet many questions remained.

The Austin court of appeals sought to answer some of these questions in *Texas Industrial Traffic League v. Railroad Commission*,[94] an appeal of a Commission order increasing motor carriers' service rates. The question presented was whether or not a trade association representing the users of motor carriers' services had standing to appeal the Commission's order on behalf of its members. The Commission's order did not harm the trade association since the association itself did not utilize the services of motor carriers; only its members utilized such services and only they were the parties injured by the higher rates. Although no one raised the issue of standing in the trial court, the court of appeals viewed it as a matter of fundamental error and addressed the subject at length.[95] After an exhaustive analysis of the development in Texas of the law of standing, the court of appeals concluded that the case needed to be remanded to the trial court to receive evidence on the issue of whether the rate increase would in fact harm the association's members.[96] If so, the association could serve as a representative party for all of its members.[97] The Supreme Court of Texas, in a rather pointed opinion, reversed the judgment of the court of appeals, holding that the issue of standing did not rise to the level of fundamental error and was therefore waived as a point of appeal when not presented to the trial court.[98]

Although the appellate court judgment was reversed, the opinion is nevertheless notable for its discussion of standing, particularly since the supreme court did not reach that issue. Most importantly, the court of appeals concluded that the special injury requirement for standing is no longer the law in Texas; the test is "whether the one seeking judicial review is adversely affected, in fact, by the agency decision."[99] The court emphasized that only some adverse impact, even if relatively slight, is required for a person to have standing.[100] The complaining party still must have a

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91. 610 S.W.2d 732 (Tex. 1980).

92. 611 S.W.2d 417 (Tex. 1981), *rev'g* 602 S.W.2d 389 (Tex. Civ. App.—Austin 1980).

93. *See* Hill & Kent, *Administrative Law, Annual Survey of Texas Law* 36 Sw. L.J. 527, 536-38 (1982) [hereinafter cited as Hill & Kent, *1982 Survey*]; Hill & Kent, *Administrative Law, Annual Survey of Texas Law*, 35 Sw. L.J. 465, 473-76 (1981) [hereinafter cited as Hill & Kent, *1981 Survey*]; Spears & Sanford, *Standing to Appeal Administrative Decisions in Texas*, 33 BAYLOR L. REV. 215, 224 (1981).

94. 628 S.W.2d 187 (Tex. Ct. App.—Austin), *rev'd per curiam*, 633 S.W.2d 821 (Tex. 1982).

95. 628 S.W.2d at 189.

96. *Id.* at 205-06.

97. *Id.* at 205.

98. 633 S.W.2d 821, 823 (Tex. 1982). The court held that the court of appeals "erred in writing on this issue [of standing] at all" and noted that the court had failed to write on any of the points of error actually raised by the parties. *Id.* The case was remanded to the court of appeals for a decision on the merits. *Id.*

99. 628 S.W.2d at 200-01.

100. *Id.* at 201.

personal stake in the outcome of the suit and cannot complain of purely abstract or theoretical harm.[101] While noting a trend in Texas towards a liberal view of standing, the court rejected the notion that any private citizen would have standing on behalf of the public at large to challenge any official agency action. It stated that Texas law has "limited the opportunity for standing to some discreet [sic] segment of the public or an individual having a special interest in the subject matter of the suit, coupled with some slight [personal] impact, in circumstances that presented a public issue of some importance."[102] The law of standing will continue to develop in Texas and the court of appeals opinion in *Texas Industrial Traffic League* will probably play an important role in that development.

Meanwhile, the case of *County Commissioners Court v. Williams*[103] gives some indication of the broad limits of the rule. A Dallas County attorney filed suit contesting a county commissioners court order allocating and assigning courtroom space in the county buildings, which he claimed was arbitrary, capricious, and discriminatory. The commissioners court argued that the plaintiff attorney lacked standing because he could demonstrate no special injury personal to himself and distinct from that suffered by the public at large. The court of appeals disagreed and held that the plaintiff attorney, by virtue of his special interest in his own profession, had standing to challenge action that was damaging to the profession.[104] This holding is questionable because the adverse impact upon the attorney appears to be remote, especially when measured by his allegations that the commissioners court's order would prejudice the "plaintiff's rights, the rights of his clients, the citizens of Dallas County and our system of justice."[105] This declaration sounds like a complaint of the public at large. Nevertheless, the allegations were sufficient to confer standing upon the individual attorney to bring suit.[106] Perhaps they meet the tests suggested by the *Texas Industrial Traffic League* opinion as an outer limit of the concept of standing.[107]

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101. *Id.* "[S]omething more than a legal error by the agency is required for access to the courts, that is, some effect in fact upon the plaintiff is required; one is not entitled to judicial review merely because he was allowed to participate as a party in the agency proceedings." *Id.*

102. *Id.* at 203 n.8.

103. 638 S.W.2d 218 (Tex. Ct. App.—Eastland 1982, no writ).

104. *Id.* at 221.

105. *Id.*

106. The court also held that other attorneys had standing as resident taxpayers to attack the legality of a commissioners court order concerning the operation of the county law library. 638 S.W.2d at 222; *cf.* Devorsky v. La Vega Indep. School Dist., 635 S.W.2d 904, 909 (Tex. Ct. App.—Waco 1982, no writ) (resident taxpayers have standing to sue to enjoin alleged illegal expenditures of school district bond issue proceeds).

107. *See supra* note 102 and accompanying text. The Eastland court of appeals also relied upon the authority of Touchy v. Houston Legal Found., 432 S.W.2d 690 (Tex. 1968), that private attorneys had standing to institute suit on behalf of "the interest of the legal profession, as well as the interest of the public" to enjoin "conduct of non-lawyers which is demeaning to the legal profession and harmful to the plaintiffs." *Id.* at 695. In *Texas Indus. Traffic League* the Austin court of appeals seems to be critical of the *Touchy* opinion. *See* 628 S.W.2d at 194-95.

E. Rulemaking

The enabling statutes that create administrative agencies always empower the agencies to promulgate the rules and regulations necessary to implement and administer the purposes of the statute. Controversies frequently arise as to whether or not an agency has been granted the legislative authority to promulgate the particular rule in issue. An agency can adopt only such rules as are authorized by and consistent with its statutory authority.[108] A reviewing court must be able to harmonize the rule with the general objective of the statute.[109]

These considerations were brought to bear in *Jackson v. Waco Independent School District*.[110] In order to implement effectively a federal court-ordered school desegregation plan, the Waco Independent School District (Waco ISD) adopted a residence requirement granting tuition-free education only to children in the district residing with their parent, guardian, or managing conservator. The plaintiffs failed to qualify for free education under this rule because they lived with their grandmother, who was not their legal guardian or managing conservator. The plaintiffs attacked the Waco ISD rule as violating the Texas Education Code's residency requirements, in which the only essential restriction is that the student not be residing in the district for the primary purpose of attending school.[111] The court upheld the Waco ISD rule against these attacks, holding that the school board had broad authority under the Education Code to manage and govern the schools and to adopt "such rules, regulations and by-laws as they may deem proper."[112] The court justified the residency rule as a means of complying with the federal court desegregation order and concluded that a school board has the power to make specific rules governing the operation of the schools even if these rules are in addition to specific statutory rules.[113]

In promulgating a rule, an administrative agency must not act arbitrarily or capriciously and must have a legitimate reason for the rule.[114] Beyond this, however, an agency is given broad powers in determining what rules to adopt.[115] *Bullock v. Hewlett-Packard Co.*[116] involved a rule of the Comptroller of Public Accounts for computing franchise taxes. The rule gave corporations an optional method for computing their taxes, but required them to notify the Comptroller by June 1 of their intent to use this method. Hewlett-Packard failed to make this election by June 1 and con-

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108. Kelly v. Industrial Accident Bd., 358 S.W.2d 874, 876-77 (Tex. Civ. App.—Austin 1962, writ ref'd).

109. Gerst v. Oak Cliff Sav. & Loan Ass'n, 432 S.W.2d 702, 706 (Tex. 1968).

110. 629 S.W.2d 201 (Tex. Ct. App.—Waco 1982, writ ref'd n.r.e.).

111. TEX. EDUC. CODE ANN. § 21.031(d) (Vernon Supp. 1982-1983). The Code allows residency to be based on either where the student lives or where his parent, guardian, or person having lawful control of him lives. *Id.* § 21.031(b)-(c).

112. 629 S.W.2d at 205; TEX. EDUC. CODE ANN. § 23.26 (Vernon 1972).

113. 629 S.W.2d at 205.

114. Gerst v. Oak Cliff Sav. & Loan Ass'n, 432 S.W.2d at 707.

115. *Id.* at 706.

116. 628 S.W.2d 754 (Tex. 1982).

sequently paid over $68,000 more in taxes than it otherwise would have paid. When the Comptroller refused to allow Hewlett-Packard to utilize the alternative computation method after June 1, the company filed suit to declare the rule invalid. Hewlett-Packard alleged that the rule was adopted merely to serve the convenience of the Comptroller and not in furtherance of any statutory purpose.[117] The supreme court upheld the validity of the rule because it "need not be, in the court's opinion, wise, desirable, or even necessary," so long as it is within the agency's grant of authority.[118] Even if the rule had no rationale behind it other than administrative convenience, this justification was sufficient to uphold its validity.[119]

Generally speaking, before an administrative agency may adopt a rule it must first publish a proposed draft to afford the public an opportunity to comment on the rule. The Administrative Procedure and Texas Register Act (APTRA) requires a minimum of thirty days notice before a proposed rule can be formally adopted.[120] *State Board of Insurance v. Deffebach*[121] raised the issue of how often an agency must republish a proposed rule that it has revised in response to public comments. The Board of Insurance published a proposed rule on December 25, 1979. After receiving public comment, the Board published a revised version of the proposed rule in February 1980. The Board again received public comments and again revised the rule, but this time only published a final rule in July 1980. Deffebach brought suit challenging the rule, arguing in part that the Board should have published the rule a third time for comment because of substantial changes it allegedly made. The district court agreed and invalidated the rule.[122]

The court of appeals reversed the judgment of the trial court and held that the Board met the publication requirements of the APTRA.[123] The court noted that the literal provisions of the APTRA require only one publication of a proposed rule, regardless of how much the rule in its final form has been changed in response to the public comments received.[124] The court held, however, that a more reasonable interpretation of the statute was required and enunciated a test for determining when republication of a proposed rule is necessary:

> After proper notice and hearing, should the agency incorporate public comments into the proposed rule and should such rule affect no other

117. The rule was, in fact, adopted for purposes of administrative convenience. "June 1 is fifteen days prior to the June 15 deadline for reporting corporate franchise taxes. The Comptroller needs to know, prior to that deadline, how many taxpayers need special treatment. [This] . . . helps the Comptroller plan his . . . activities so that he . . . can attempt to handle efficiently the avalanche of tax work which falls around [the filing deadline]." *Id.* at 756.

118. *Id.*

119. *See id.*

120. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 5 (Vernon Supp. 1982-1983).

121. 631 S.W.2d 794 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

122. *Id.* at 796.

123. *Id.* at 802.

124. *Id.* at 800.

> subject or person than those previously given notice, . . . no further purpose would be served by requiring republication of the proposed rules. Conversely, should the proposed rules, as originally published, be ignored and others adopted or should other subjects or persons be affected by the altered rule, a new round of notice and comment should be required.[125]

Applying this test to the rule in issue, the court determined that the final version of the rule did not regulate any new parties or affect any new subjects.[126] Consequently, no republication was necessary, and the rule was valid as promulgated.[127]

III. JUDICIAL REVIEW

A. *Availability of Review*

A common misconception is that any person aggrieved by agency action may as a matter of right obtain judicial review of such action. This notion is not the case at all. Rather, the prevailing Texas law is that there is no right to judicial review of agency action unless expressly authorized by the enabling statute creating the agency or unless constitutional rights or vested property interests are involved.[128] *Bank of Woodson v. Stewart*[129] presented an interesting situation in which the plaintiff's combination of constitutional and statutory rights led to perplexing results. A state-chartered bank headquartered in Throckmorton County brought suit in Travis County to enjoin the State Commissioner of Banking and the Federal Deposit Insurance Corporation from summarily closing and liquidating the bank. The bank alleged that the summary closing violated both its constitutional and statutory rights of notice and hearing. The State Banking Code provided, however, that the exclusive venue for a statutory appeal was the county of the bank's domicile, or Throckmorton County.[130] Based on this statutory provision, the Travis County district court dismissed the suit for want of jurisdiction.[131]

The Austin court of appeals affirmed that part of the district court's judgment dismissing the bank's causes of action based on alleged violations of the Banking Code.[132] The court relied on the rule that the legislature, having created the right, could control the remedy and held that the bank's statutory causes of action would have to be tried in Throckmorton County.[133] The court reached a different conclusion, however, with regard to the bank's causes of action alleging violations of its constitutional rights.

125. *Id.* at 801. The court acknowledged that the rule was very general and would have to be refined, but considered it sufficient for the present case. *Id.*

126. *Id.* at 802.

127. *Id.*

128. *See* Hill & Kent, *1981 Survey*, *supra* note 93, at 487-90.

129. 632 S.W.2d 950 (Tex. Ct. App.—Austin), *writ dism'd as moot per curiam*, 641 S.W.2d 230 (Tex. 1982).

130. TEX. REV. CIV. STAT. ANN. art. 342—805 (Vernon 1973).

131. 632 S.W.2d at 953.

132. *Id.* at 955, 960.

133. *Id.* at 955.

Banks have vested property rights in their charters and, therefore, have an inherent right to judicial review of agency action impairing those rights, irrespective of the Banking Code provisions for judicial review.[134] Accordingly, the bank had the right to seek adjudication of its constitutional claims wherever it saw fit to do so, including Travis County, and the Travis County district court improperly dismissed the constitutional claims for want of jurisdiction.[135] The court of appeals therefore remanded the constitutional claims to the Travis County district court and created the need for two lawsuits in two counties between the same parties litigating the same fact, although on different theories.[136]

In an effort to harmonize the inevitable conflict between the two suits, the court held that the Travis County court, having acquired jurisdiction first, could determine the constitutional claims without interference from the Throckmorton County court.[137] If the Travis County court ruled in the bank's favor, the ruling would obviate the need for the Throckmorton County suit. At the same time, however, the Travis County court would not be allowed to issue orders during the pendency of its suit to disturb the assets of the bank, which were within the jurisdiction of the Throckmorton County court as part of the liquidation proceeding.[138] Recognizing that this still presented an awkward situation, the court of appeals suggested that the parties consider transferring and consolidating the cases into one proceeding in Throckmorton County.[139]

Contrary to Texas law, there is a general presumption at the federal level in favor of the availability of judicial review.[140] Even there, however, not all agency action is reviewable. Although the federal Administrative

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134. Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427, 433 (Tex. 1963).

135. *See* 632 S.W.2d at 959. The court of appeals analogized to the statute formerly conferring exclusive jurisdiction on Travis County courts of all contests of Railroad Commission orders, TEX. REV. CIV. STAT. ANN. art. 6049c, § 8 (Vernon 1962) (repealed 1977) (current version at TEX. NAT. RES. CODE ANN. §§ 85.241-.243 (Vernon 1978)). 632 S.W.2d at 958. According to the court, that statute was consistently interpreted to control jurisdiction only of statutory causes of action and not common law causes of action, such as breach of contract, negligence, trespass, etc., which exist independently of the statute but may be tangentially connected with it in a particular case. *Id.* By the same token, the bank's constitutional rights exist independently of the Banking Code and, therefore, cannot be controlled by the jurisdictional provisions of the Code.

136. 632 S.W.2d at 960.

137. *Id.*

138. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 342—806 (Vernon 1973) (assets in custody of court of domicile).

139. 632 S.W.2d at 960. The result should be compared to that reached in Texas Employment Comm'n v. Norris, 636 S.W.2d 248 (Tex. Ct. App.—Beaumont 1982, writ dism'd w.o.j.). The trial court in *Norris* issued a temporary injunction compelling the Texas Employment Commission (TEC) to pay unemployment benefits to the plaintiff during the pendency of his suit contesting the TEC's administrative denial of his application for such benefits. *Id.* at 249. The court of appeals vacated the injunction, holding that while the trial court properly had subject matter jurisdiction over the appeal of the TEC's order, it had no jurisdiction to compel the TEC to pay the unemployment benefits during the pendency of the suit. *Id.* at 252. The appellate court held that the plaintiff could only enjoy such rights as were conferred on him by statute, and since the statute did not authorize injunctive relief of the type involved here, no such relief was available to the plaintiff. *Id.* at 251-52.

140. B. SCHWARTZ, ADMINISTRATIVE LAW § 148 (1976).

Procedures Act generally grants aggrieved parties a right to judicial review,[141] it nevertheless exempts from judicial review administrative action that is "committed to agency discretion by law."[142] The meaning of this exception was analyzed in *Suntex Dairy v. Block*.[143] An order of the Secretary of Agriculture merged six milk marketing orders in Texas into one single new order that regulated the former six-market area and additional previously unregulated counties. To issue a milk marketing order, the Secretary of Agriculture must make three findings. The first finding must be preceded by and based upon an evidentiary hearing, but the latter two findings are not required to be preceded by or based upon a hearing.[144] The complaining party argued that none of the three findings in this instance was supported by substantial evidence and that all three were arbitrary, capricious, and an abuse of discretion.

The Fifth Circuit upheld the order because the Secretary's first finding was supported by substantial evidence and valid, and the last two findings were committed to agency discretion and were not reviewable.[145] The court recognized that the "agency discretion exception" is narrow and is generally limited to three types of cases:

> (1) the statute in question is "drawn in such broad terms that in a given case there is no law to apply, [and] courts . . . have no statutory question to review." . . . ; (2) the courts are simply "ill-equipped" through a lack of expertise to review the decision in question . . . ; and (3) the agency action involves decisions relating to areas, such as national defense, that "lie outside sound judicial domain in terms of aptitude, facilities and responsibility."[146]

The milk marketing order fell within the first two categories.[147] The court placed great emphasis on the fact that the Secretary only had to conduct an evidentiary hearing for the first required finding, but was allowed to make the second and third required findings without benefit of a hearing.[148] Because of the "Byzantine nature of milk marketing regulation," the Fifth Circuit concluded it lacked the expertise to second-guess the Secretary's findings that were made without benefit of an evidentiary hearing and record.[149] Accordingly, the court held that the findings were committed to the Secretary's discretion and were therefore nonreviewable.[150]

141. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1976).

142. *Id.* § 701(a).

143. 666 F.2d 158 (5th Cir.), *cert. denied*, 103 S. Ct. 59, 74 L. Ed. 2d 62 (1982).

144. The statutory scheme is explained in the court's opinion, 666 F.2d at 160-61.

145. *Id.* at 162-63.

146. *Id.* at 163-64 (citations omitted).

147. *Id.* at 164-65.

148. *Id.*

149. *Id.* at 166.

150. *Id.* at 167. The court did hold that the plaintiffs were free to raise questions of procedural irregularity or fraud in the manner in which these nonreviewable discretionary findings were made. *Id.* None of these questions, however, were present in this case.

B. Method of Review

Since the passage of the APTRA and the supreme court's decision in *Southwestern Bell Telephone Co. v. Public Utility Commission*,[151] the assumption is commonly made that only two methods of judicial review of agency action exist: trial de novo or substantial evidence confined to the agency record.[152] This assumption has not always proven to be the case, since an agency's specific enabling statute may affect the method of review. One recurring problem involves judicial review of Texas Employment Commission (TEC) orders. The TEC originally was subject to the judicial review provisions of the APTRA, which limited review to the agency record.[153] In 1979, however, the TEC was exempted from those provisions of the APTRA, thus returning it to a trial de novo review.[154] In *Texas Employment Commission v. Bell Helicopter International, Inc.*,[155] the amendment took effect after the TEC proceeding but prior to the judicial review hearing. Apparently, the parties did not adduce new evidence at the judicial hearing, but relied only on the agency record. On appeal, therefore, the court of appeals had no statement of facts by which it could review the judgment of the trial court. The court held that the 1979 amendments were procedural in nature and became applicable at the time of their enactment.[156] Accordingly, since the court had no statement of facts to review, it affirmed the trial court's judgment on the presumption that all evidence necessary to support the judgment was presented at the trial court hearing.[157]

An unusual method of review is found in the Texas Water Rights Adjudication Act.[158] The Act was passed for the purpose of determining riparian rights[159] and created a two-step procedure for that determination. First, the Texas Water Rights Commission makes a final determination of the water rights claims brought before it.[160] The final determination is then filed with a district court,[161] and the court conducts hearings on exceptions to the final determination filed with the court.[162] The court may base its resolution of any exception solely on the administrative record, take additional evidence, or remand the exception to the agency for further

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151. 571 S.W.2d 503 (Tex. 1978).

152. *See id.* at 507-09; TEX. REV. CIV. STAT. ANN. art. 6252—31a, § 19 (Vernon Supp. 1982-1983). For a general introduction to the substantial evidence rule, see B. SCHWARTZ, *supra* note 140, § 210; Hill & Kent, *1982 Survey*, *supra* note 93, at 539-40.

153. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19 (Vernon Supp. 1982-1983).

154. *Id.* § 21(f).

155. 627 S.W.2d 524 (Tex. Ct. App.—Fort Worth 1982, writ ref'd n.r.e.).

156. *Id.* at 526.

157. *Id.* A similar problem arose with the same result in Texas Employment Comm'n v. City of Houston, 616 S.W.2d 255 (Tex. Civ. App.—Houston [1st Dist.]), *writ ref'd n.r.e. per curiam*, 618 S.W.2d 329 (Tex. 1982).

158. TEX. WATER CODE ANN. §§ 11.301-.341 (Vernon Supp. 1982-1983).

159. *Id.* § 11.302.

160. *Id.* § 11.315.

161. *Id.* § 11.317.

162. *Id.* § 11.319.

evidence.[163] The Act provides that the court, in passing on the exceptions, "shall determine all issues of law and fact independently of the commission's determination" and that "the substantial evidence rule shall not be used."[164] The Act makes no mention of a trial de novo.

None of this review procedure fits very neatly with the provisions of the APTRA, and consequently, the court in *In re Adjudication of Upper Guadalupe River Segment*[165] was left to determine the meaning of these provisions on its own. The court observed that three methods of judicial review of agency action exist: (1) "Minimum Review," through which the court confines itself to a determination of whether or not the agency record contains substantial evidence supporting the agency's decision; (2) "Intermediate Review," through which the court makes its own independent judgment based on the agency record; and (3) "Maximum Review," through which the court "ignores the agency record" and makes its own independent judgment based on the evidence adduced before it.[166] Of course, the APTRA was supposed to eliminate the "intermediate review" stage. The court determined, however, that the Act appeared to specify the "intermediate review" method.[167] The court held that the reviewing court could exercise its own independent judgment on the facts and the law, but that the Commission's order was entitled to a presumption of validity and that the complaining party had the burden of demonstrating the order was contrary to the weight of the evidence.[168]

C. Scope of Review

Prior to the passage of the APTRA, courts reviewing orders of administrative agencies tended to equate the "substantial evidence" standard of review with the "arbitrary and capricious" standard of review. Section 19(e) of the APTRA specifically lists the two standards as separate grounds for reversal of an agency decision,[169] and the arbitrary and capricious rule is now established as an independent ground for reversal.[170] The real meaning of the term is, however, left unclear.

The Austin court of appeals addressed this point in *Community Savings & Loan Association v. Vandygriff*,[171] an appeal of an order approving an application for a savings and loan association branch office. The appellant claimed that the agency order constituted an abuse of discretion because the agency failed to evaluate properly the evidence presented. The court of appeals observed that the substance of these arguments was simply that

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163. *Id.* § 11.321.
164. *Id.* § 11.320.
165. 625 S.W.2d 353 (Tex. Civ. App.—San Antonio 1981), *aff'd sub nom. In re* Adjudication of Water Rights of Upper Guadalupe Segment, 642 S.W.2d 438 (Tex. 1982).
166. 625 S.W.2d at 363.
167. *Id.*
168. *Id.* at 364.
169. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(e) (Vernon Supp. 1982-1983).
170. Starr County v. Starr Indus. Servs., Inc., 584 S.W.2d 352, 355 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).
171. 630 S.W.2d 457 (Tex. Ct. App.—Austin 1982, no writ).

the agency chose not to believe or be persuaded by the appellant's evidence and was not directed to any particular agency action that could be identified as arbitrary or capricious.[172] The court concluded that it could not evaluate under the "arbitrary and capricious" standard the agency's subjective mental processes in weighing the evidence; it would have to rely instead on the substantial evidence standard.[173] Under this standard the court upheld the order as valid.[174] The court concluded that the arbitrary and capricious standard was meant to be a "safety net" to cover agency action that should be reversed, but did not fit neatly into any of the other statutory grounds for reversal.[175] The court refused to define precisely the meaning of the rule, stating: "A pristine and all-inclusive definition of what constitutes a violation of the stricture against administrative action implied in subsection (6) [arbitrary and capricious] is inherently impractical of statement, beyond saying that it is an action unreasonable in all the circumstances of the particular case under judicial review."[176]

Some direction may be gleaned from the federal practice, in which the Administrative Procedures Act proclaims unlawful agency action that is "arbitrary, capricious, [and] an abuse of discretion."[177] This provision is viewed as a narrow standard of review by which the court may only consider whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[178] The Fifth Circuit held that "judicial review may focus only on the factors considered and the existence of an obvious error in judgment."[179] The APTRA, however, provides a somewhat broader standard than the federal statute, since it proscribes agency action that is "arbitrary *or* capricious *or* characterized by an abuse of discretion *or* clearly unwarranted exercise of discretion."[180] This language, patterned after that in the Revised Model State Administrative Procedure Act, is intended to reach "*unjustified use*, as well as *abuse*, of discretion."[181]

One writer has categorized certain types of actions as falling within the arbitrary and capricious standard. Not intended as an all-inclusive list, it sets forth the following "categories of abuse": "(1) improper purpose; (2) erroneous and extraneous considerations; (3) erroneous legal or factual foundation; (4) failure to consider relevant considerations; (5) inaction or delay; and (6) departure from established precedents or practice."[182] The few Texas cases interpreting the arbitrary and capricious provision of the

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172. *See id.* at 458.
173. *Id.*
174. *Id.* at 462.
175. *Id.* at 459 n.3.
176. *Id.*
177. 4 U.S.C. § 706(2)(A) (1976).
178. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).
179. Suntex Dairy v. Block, 666 F.2d 158, 166 (5th Cir.), *cert. denied*, 103 S. Ct. 59, 74 L. Ed. 2d 62 (1982).
180. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(e)(6) (Vernon Supp. 1982-1983) (emphasis added).
181. 2 F. COOPER, STATE ADMINISTRATIVE LAW 756 (1965) (emphasis in original).
182. B. SCHWARTZ, *supra* note 140, § 218.

APTRA fit within these categories.[183] One such case decided in the survey period was *Public Utility Commission v. South Plains Electric Cooperative, Inc.*,[184] an appeal from an order of the Public Utility Commission (PUC) granting a dual certificate to a municipally owned utility. Although the underlying facts were "overwhelmingly" against the granting of the certificate, the PUC nevertheless granted it based on the perception that a municipally owned utility was entitled to preferential treatment in obtaining the right to serve the people within its boundaries.[185] The Public Utility Regulatory Act[186] makes no particular distinction in this respect between private and municipally owned utilities. Yet, this nonstatutory ground was the motivating factor for the PUC's decision. The Austin court overturned the PUC's order and held that "an agency's consideration of a non-statutory standard amounts to arbitrary and capricious action requiring reversal."[187]

183. *See* Cameron County Good Gov't League v. Ramon, 619 S.W.2d 224, 229-30 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (abuse of discretion in failure to comply with competitive bidding statute); Texas Alcoholic Beverage Comm'n v. Good Spirits, Inc., 616 S.W.2d 411, 414-15 (Tex. Civ. App.—Waco 1981, no writ) (arbitrary and unreasonable departure from prior practice); Starr County v. Starr Indus. Servs., Inc., 584 S.W.2d 352, 355-56 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (arbitrary and capricious consideration of extraneous factors).

184. 635 S.W.2d 954 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

185. *Id.* at 956.

186. TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon 1980 & Supp. 1982-1983).

187. 635 S.W.2d at 957.