Texas Public Policy Foundation

2015-16 Legislator's Guide *to the issues*

Texas Public Policy
FOUNDATION

Copyright ©2014 by the Texas Public Policy Foundation

Permission to reprint in whole or in part is hereby granted, provided the Texas Public Policy Foundation and the author are properly cited.

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute.

The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

TEXAS PUBLIC POLICY FOUNDATION
900 Congress Ave., Suite 400
Austin, TX 78701
(512) 472-2700 Phone (512) 472-2728 Fax
www.TexasPolicy.com

2015-16 Legislator's Guide *to the issues*

Edited by Bill Peacock & Nancy Druart
Texas Public Policy Foundation

Texas Public Policy
FOUNDATION

Table of Contents

Pamela Mann was a widow who loaned her oxen to the Texian army to pull two cannons, the Twin Sisters, as many Texians fled east in front of Santa Anna's army during the Runaway Scrape. She had been promised that her oxen would not be harmed.

When the army turned south toward San Jacinto and the dangers of battle, Mann demanded the return of the oxen to keep them safe. Sam Houston refused, but Mann pulled out her Bowie knife and cut the oxen out of their harnesses. No one was willing to try to take them back from her, so the Twin Sisters were pulled by hand the rest of the way.

Texans today still possess the same strong spirit as the Widow Mann, so it is no surprise that vigorous debate continues about many of the issues that the 84th Texas Legislature will take up in 2015. To help legislators make informed decision about these issues, the Foundation is publishing its 2015-16 edition of our Legislator's Guide to the Issues.

Texas' economic leadership in America today is a direct result of the Texas Model: low spending and taxes, a low level of regulation, a fair and accessible civil justice system, and a lack of reliance on federal funds. Our state's leadership in this area stems back to at least 2001. During this time, job creation in Texas has grown at almost five times the rate of the rest of the country. But it really goes back all the way to the arrival of Stephen F. Austin, Davy Crockett, and many others who indelibly stamped their belief in freedom on this great state.

Keeping our commitment to freedom is difficult, and at times we have lost our way. The Legislator's Guide is designed to make sense of the challenges we face today and define free-market policy recommendations to address them that legislators can offer as alternatives to the government-based "solutions" too often proposed in Austin.

Just like Pamela Mann, the Foundation is ready to stand up for what is right. We look forward to working with policymakers and all Texans in the effort to promote liberty, maintain a strong economy, and build a strong future for our state.

Turn the Tide on State and Local Government Spending

Spending

Spending

State Debt

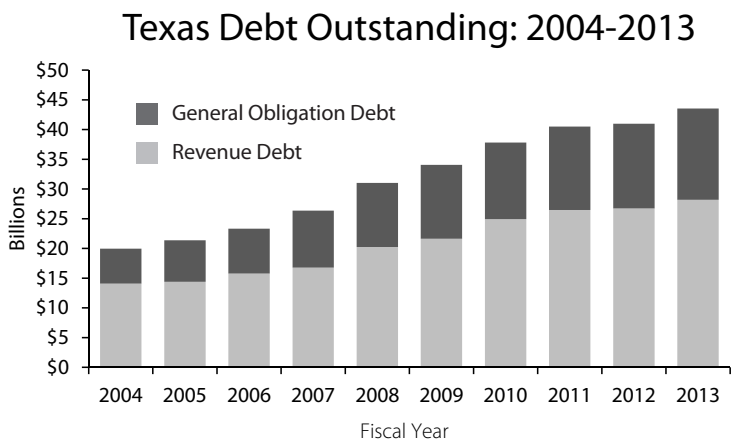
The Issue

Contrary to the massive budget deficits the federal government is able to accumulate, the Texas Constitution forces state legislators to be more frugal by adopting a balanced budget. Though legislators cannot spend more than expected revenue, they can issue debt through voter-approved bond proposals for such things as transportation projects, water projects, cancer research grants, and other initiatives.

Since all debt must be repaid from either the General Revenue (GR) fund or specific revenue sources, more state debt burdens Texans with higher tax rates and other fees either now or in the future. While new debt for these initiatives may be deemed necessary, legislators should limit increasing debt and make the cost more transparent so that Texans today will understand the level of burden it will have on current and future generations.

The Texas Comptroller has taken beneficial steps in this direction by providing valuable information on the Comptroller's website texastransparency.org. However, legislators should do more by passing legislation making it mandatory to include not only the principal cost of debt (debt outstanding) but also the total cost with interest payments (debt service outstanding).

From fiscal years 2004 to 2013, total state debt outstanding increased by an astounding 118% to $43.5 billion, according to the Texas Bond Review Board. Of this total, there are two types of debt: General Obligation (GO) debt and Non-General Obligation Debt—also known as Revenue debt (see chart below).



As defined by the Comptroller, "General Obligation (GO) debt is legally secured by a constitutional pledge of the first monies coming into the State Treasury not constitutionally dedicated for another purpose and must be approved by a two-thirds vote of both houses of the legislature and a majority of the voters. GO debt may be issued in installments as determined by the legislatively

appropriated debt service or by the issuing agency or institution and often has a 20 to 30 year maturity with level principal or level debt-service payments." Over the last decade, General Obligation debt increased by 161% to $15.3 billion.

Also noted by the Comptroller, "Revenue debt is legally secured by a specific revenue source(s), does not require voter approval, and usually has a 20 to 30 year final maturity depending on the project to be financed." Over the last decade, Revenue debt increased by 100.2% to $28.2 billion.

If these trends continue, Texans will be burdened with higher taxes and fees. A good metric of the debt burden on each Texan is debt-per-capita. Total debt-per-capita in Texas increased over the last decade from $1,085 to $1,646, a costly 52% increase potentially stifling future prosperity for every man, woman, and child in the Lone Star State.

Using the U.S. Census Bureau's 2011 state debt-per-capita levels (latest data for each state) to compare the 10 most-populous states, Texas had the ninth lowest state debt-per-capita burden of $1,479 per Texan. The three states with the highest debt burden in order of magnitude are New York, Illinois, and California. The state with the lowest debt burden is Georgia.

While Texas has done relatively well managing its debt principal, the debt service that includes the principal and interest over the life of outstanding debt is substantially higher than the $43.5 billion principal amount. The Texas Comptroller notes that if interest each year through 2019 and beyond is included, total debt service is $75.5 billion—almost two times the reported principal amount.

As a percentage of unrestricted General Revenue, the Constitutional Debt Limit (CDL) for debt service is 5%. Calculations by the Texas Bond Review Board show that debt service on outstanding debt (1.3%) and debt service on outstanding debt plus estimated debt service for authorized but unissued debt (3.0%) fell below the CDL at the end of FY 2013.

This relatively good management of state debt provided Texas' AAA rating from all three major rating agencies for the first time in 2013. Although things look good on the surface, debt service will cut into spending on other programs and may lead to higher taxes on Texans, slowing economic growth and individual prosperity in the process.

The Facts

- From FY 2004 to FY 2013, total state debt outstanding increased by 118% to $43.5 billion.
- Total debt-per-capita in Texas increased over the last decade by 52% from $1,085 to $1,646 per person.
- The Texas Comptroller notes that if interest each year through 2019 and beyond is included, total debt service is $75.5 billion.

continued

State Debt (cont.)

Recommendations

- Legislators should limit debt increases and provide more debt transparency to educate Texans on the true cost of bond proposals.
- Legislators should make it mandatory to include on ballots not only the total principal cost of debt but also the total cost with interest payments.
- House Bill 14 in the 83rd Legislative Session provides a good framework to provide greater financial disclosure of public finances.

Resources

Debt Affordability Study by Texas Bond Review Board (Feb. 2014).

Shining a Light on Local Spending and Debt: Testimony on HB 14 by James Quintero (Mar. 2013).

Debt at a Glance by Texas Comptroller of Public Accounts (Sept. 2013).

Your Money and Local Debt by Texas Comptroller of Public Accounts (Sept. 2012).

Budget Transparency & Zero-based Budgeting

The Issue

The Texas Legislature will likely be flush with cash in 2015 as the state's booming economy continues to grow and produce record revenues. Given this revenue-rich environment, it is critical that lawmakers take steps to increase budget transparency so that hard-working taxpayers can better understand how their tax dollars are being spent.

To better account for spent tax dollars, root out inefficiencies in the state budget, and make clear to taxpayers why each agency and program is necessary, lawmakers should change the state budget's layout from a strategic planning and budgeting-based system to a program-based budgeting format. They should also require a small subset of state agencies to undergo a routine zero-based budgeting process each biennium. Collectively, these vital steps will allow legislators to reevaluate core state agency priorities and provide Texans with a better understanding of the use of their tax dollars.

Today, the General Appropriations Act (GAA), the bill creating the state budget, is laid out in such a way that it's almost impossible for anyone—legislators and taxpayers alike—to track state spending by program. Program-level specifics are vital to the public's understanding of the fiscal prudence, or lack thereof, exhibited in each agency.

Fortunately, the Legislative Budget Board (LBB) recently took steps to create an online application on their website that displays the state budget by program. Now taxpayers can search for program-level spending information, a short explanation of the program, and its statutory authorization.

This application is a good first step, but currently the information provided is only informational and is not frequently updated, particularly as the GAA moves through the legislative process. Legislators could do more to educate the public by shifting to a program-based budgeting system that includes basic, easy to understand information about each program. This will help hold the state accountable for its spending practices and help educate and empower taxpayers in the process.

Another key step is to implement a zero-based budgeting system that requires a certain percentage of state agencies to undergo a complete review and build each one's operating budget from scratch. This will not only help increase transparency, but it will also help legislators exercise greater budget-writing control.

In addition to the lack of transparency, the current strategic and planning-based budgeting system assumes that all previous expenditures are justified and necessary going forward then adds automatic spending increases on the previous budget. This current services model is highly inefficient.

Zero-based budgeting does not make this assumption and starts a budget from zero. Since this method requires an in-depth analysis of each agency's line-item expenditures, it takes more time and effort—but the results are well worth the investment.

continued

Budget Transparency & Zero-based Budgeting (cont.)

In 2003, Texas faced a projected $10 billion shortfall. Governor Perry sent the Legislature a budget with zeros next to each agency's line item and publicly stated that he would be against any budget that included a tax increase. The Legislature was asked to do the hard work of taking a detailed examination at what had become traditional spending patterns. In the end, the Legislature bridged the $10 billion budget shortfall by rooting out inefficiencies within each agency and avoided raising taxes.

A key part of making zero-based budgeting a success includes reviewing all aspects of an agency or program, including its purpose and goals as well as the metrics used to gauge success or effectiveness.

This zero-based budgeting approach put Texas on a path of government restraint and lower taxes that set the stage for Texas' remarkable economic success.

The Facts

- The current strategic and planning-based budgeting system, which links appropriations to strategies and goals rather than programs, obscures how government agencies are spending money and why.
- The LBB increased budget transparency by developing an online application offering program-specific budget details.
- House Bill 98, proposed during the 83rd Regular Session, would have moved the state to zero-based budgeting by requiring one-third of all state agencies to undergo a zero-based budgeting process before the start of each legislative session. However, the bill was unsuccessful.
- Zero-based budgeting results in a more thorough analysis of the entire budget, rather than just considering the amount of spending above or below the baseline, making it time-consuming for both lawmakers and budget administrators. However, the method holds enormous promise as demonstrated in 2003 when state lawmakers, faced with a $10 billion budget shortfall, balanced the state budget without a tax increase.

Recommendations

- The Legislature should move from strategic planning and budgeting system to a program-based budgeting system. This will allow the budget layout to be more intelligible for legislators and taxpayers, making it easier for all to understand how state money is spent and for what purpose.
- The Legislature should adopt zero-based budgeting to ensure taxpayers get the most value of the programs and departments they fund.

- Because zero-based budgeting is more difficult than traditional budgeting, it is hard to sustain; therefore, lawmakers may want to consider applying this comprehensive tool to about one-third of the budget every biennium. For example, education in one session, health and welfare in the next, and then all other budget items.

Resources

Testimony before the House Committee on Appropriations Subcommittee on Budget Transparency and Reform Regarding House Bill 98 by Talmadge Heflin, Texas Public Policy Foundation (Apr. 2013).

Using Zero-Based Budgeting in Texas by Chuck DeVore, Texas Public Policy Foundation (May 2012).

Time to Make the Budget More Transparent for Texas Taxpayers and Lawmakers Testimony before the Senate Finance Committee by Talmadge Heflin, Texas Public Policy Foundation (Sept. 2012).

Spending Trends & Tax and Expenditure Limit

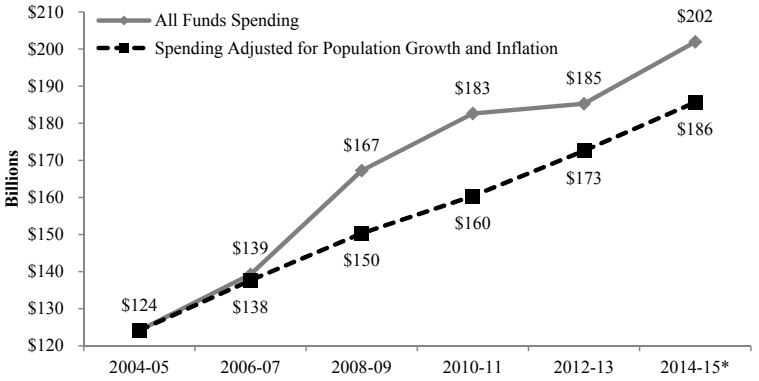
The Issue

With continued economic expansion and robust job growth, the 2015 legislative session will likely convene with the state's coffers full of cash. Current estimates suggest legislators will have at least $2.6 billion in excess revenue available for the 2016-17 biennium.

By strengthening the state's tax and expenditure limit (TEL) and keeping spending within these conservative caps, legislators will help reduce the government's footprint.

In fiscal 2004-05, state spending totaled $124 billion supporting the major functions of government. The Foundation estimates that total spending during fiscal 2014-15 will be $202 billion, an increase of 62.7% over the last 10-plus years.

Texas Total Spending Comparison



Source: Legislative Budget Board's *Fiscal Size-Up* and authors' calculations. *indicates estimate.

The spending total includes the voter approved constitutional amendment in November 2013 for water projects and the amendment up to voters on the November 2014 ballot for transportation projects.

The spending total excludes $6.1 billion in higher education funding related to patient income; but unlike the Legislative Budget Board numbers, our previous spending totals exclude this funding as well. In keeping with the general practice of legislators slightly underfunding Medicaid because of the uncertainty of its cost, we include an additional $1.5 billion that may be appropriated in 2015.

The rate of spending growth is substantially greater than the growth rate of population and inflation over this period. By comparison, state spending growth since 2004-05 is 8.8% greater than what would have been spent over this period if total spending grew at the pace of population and inflation.

If this spending trend continues, Texans will be burdened with paying higher taxes and fees to sustain elevated spending levels that will slow economic growth in the process.

A driving force behind this level of imbalance has been the ineffectiveness of the state's TEL, which can be traced back to several design flaws.

One of the most obvious flaws is the types of spending that is limited under the TEL. In Article VIII, Section 22(a) of the state's Constitution, the only appropriations subject to the spending limit are those derived from "state tax revenues not dedicated by this constitution," which generally make up about half the budget. The other half consists of funds appropriated from other revenue sources (i.e. federal funds and non-tax proceeds) not subject to the TEL.

Another flaw has to do with the measure used to establish the spending limit—personal income. Personal income is a poor measure to serve as a basis for restricting the growth of government spending because it stands to reason that as the state's residents become wealthier and their share of personal income grows, they should require less government assistance, not more.

With so many hindrances to budgetary prudence, it is easy to understand why Texas' TEL has failed to live up to expectations. However, with just a handful of modest changes, legislators can vastly restrain the growth of government spending.

The Facts

- Incoming lawmakers look to have at least $2.6 billion potential surplus for the 2016-17 biennium.
- State spending growth since 2004-05 is 8.8% greater than what would have been spent over this period if total spending grew at the pace of population growth and inflation.
- Effectively solving the state's budgeting difficulties will require bold leadership and vision guided by a principled approach, similar to the approach outlined in *The Real Texas Budget*.
- The TEL is ineffective because it excludes certain appropriations, is based on the estimated growth of personal income, and because of the ease with which lawmakers can get around it.

Recommendations

- Apply the TEL to all areas of Texas government spending.
- Base the limit on the growth rate of population plus inflation, personal income, or gross state product, whichever is less.
- Require a super majority vote of each chamber to exceed its limit rather than just a simple majority vote.

Resources

The Conservative Texas Budget by Talmadge Heflin and Vance Ginn, Texas Public Policy Foundation (July 2014).

The Real Texas Budget by Talmadge Heflin, Bill Peacock, and Vance Ginn (June 2014).

Strengthening Texas' Tax and Expenditure Limit by Talmadge Heflin and Katy Hawkins, Texas Public Policy Foundation (Oct. 2010).

Economic Stabilization Fund

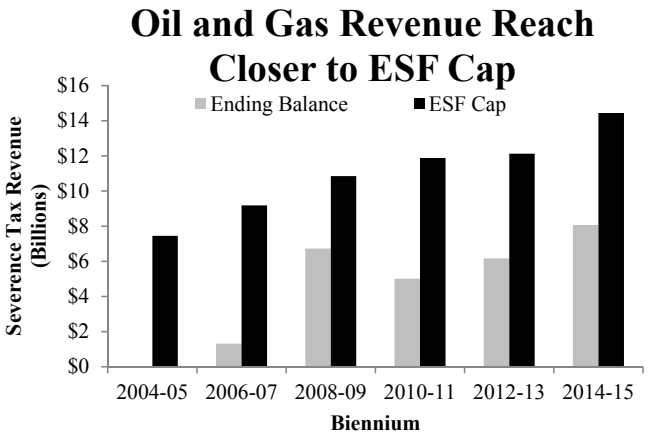
The Issue

With oil and gas production booming across the state, the Economic Stabilization Fund (ESF), broadly thought of as the state's "savings account," is expected to grow substantially by the 2015 Legislative Session.

Without using ESF dollars to pay for water and transportation projects, the Legislative Budget Board (LBB) estimated in April 2013 that the ESF would reach a monthly maximum ending balance of $11.8 billion by the end of fiscal year 2015.

However, with passage of the November 2013 ballot proposition and the likely passage of the amendment in November 2014, plus added ESF spending during the legislative session, new estimates in the LBB's *Fiscal Size-Up 2014-15 Biennium* show that the fund may reach $8.1 billion at the end of FY 2015.

Given what a critical one-time resource this is to the state, it is vital that lawmakers do not allow the ESF to grow government and instead use it for its intended purpose: emergencies.



Source: Legislative Budget Board

Last Session, $4 billion in ESF dollars were appropriated to fully fund education and Medicaid. Texans approved an amendment in November 2013 to take $2 billion from the ESF to pay for water projects and will vote on an amendment in November 2014 to use another roughly $1.4 billion to pay for transportation projects during the 2014-15 biennium.

It is highly likely that oil and gas severance taxes will continue to flow into the ESF because of the substantial increase in oil and gas production. Though the Eagle Ford Shale play will continue to be a revenue source, there are vast reserves in the Cline Shale play on the eastern shelf of the Permian Basin that will likely contribute to more ESF funds.

It is critical that lawmakers understand that this is a one-time resource to the state. If this money is spent each session, the ESF will quickly dwindle and the state's credit rating will be at risk.

Using one-time funds to pay for ongoing expenditures only delays needed difficult decisions, while simultaneously depleting one-time funds that should be saved for future emergencies or tax relief.

Put differently, no reasonable person would advise a household who is spending more than their monthly income to tap their savings account to pay for a lifestyle beyond their means. If we wouldn't advise that for a family, then why would we collectively, as a state, advise that for our government?

The Facts

- The ESF is expected to grow due to the substantial increase in oil and gas production across the state.
- If the fund reaches $8.1 billion as projected, the ending balance would be near a record high.
- Using one-time funds to pay for ongoing expenses is poor public policy.

Recommendations

- The ESF should only be spent on one-time emergency items or tax relief. The funds should not be spent to support ongoing expenses.
- At a minimum, even in the face of one-time emergencies, lawmakers should preserve an ESF balance equal to 5% of the general revenue and general revenue dedicated funds in the 2014-15 budget.
- Based on the 2014-15 Certification Revenue Estimate, the Comptroller estimates general-purpose revenue to be $98.9 billion, which would amount to a minimum ESF balance of $4.9 billion.

Resources

Fiscal Size-Up 2014-15 Biennium, Legislative Budget Board (Feb. 2014).

The 2014-15 Certification Revenue Estimate, Texas Comptroller (Jan. 2014).

Preserving Texas' Rainy Day Fund in These Uncertain Economic Times by Chuck DeVore, Texas Public Policy Foundation (Oct. 2012).

Real Texas Budget Solutions: 2013 and Beyond, Texans for a Conservative Budget (Mar. 2012).

Public Pension Reform

The Issue

Recent analyses documenting the imminent threat posed by unfunded state pension liabilities contributed to the 2013 Texas Legislature making several reforms, including raising the retirement age and increasing contribution rates, to the two largest state pension systems—Teachers Retirement System (TRS) and Employees Retirement System (ERS).

While these are positive first steps, ultimately these pension systems should be changed from defined benefit to defined contribution plans to make them sustainable for beneficiaries and not burden all Texans in the future.

For decades, state and local officials around the country have overpromised on and underfunded government-run retirement plans, resulting in the accumulation of trillions of dollars in unfunded liabilities, or debts owed for which there is no current funding available. In fact, one recent study pegged total unfunded pension liabilities for all systems nationwide at more than $4 trillion—or $13,000 per American.

In Texas, state and local governments employ roughly 16% of workers. Most of these workers have a defined benefit pension plan that promises a regular payment to retirees regardless of contribution.

Volatile annual rates of return and fewer contributors paying for more beneficiaries are exhausting these plans leaving them with mounting, unsustainable liabilities.

Total unfunded pension liabilities in Texas are estimated to be around $55 billion; other studies, including one by Joshua Rauh of Northwestern University, that include more realistic accounting practices provide a substantial amount of $188 billion, $7,200 per Texan. The aggregate funding ratio—all plans' current assets as a share of liabilities—dropped to slightly above 80%, down from 104% in 1999.

As state pensions continue to generate lower rates of return than their overly optimistic 8% projection, declining funding ratios will inevitably result in more taxpayer money allocated to pensions and away from other essential functions.

In 2013, TRS—the state's largest pension fund—had unfunded obligations totaling $28.9 billion, or $35,498 per member, and the second largest fund, ERS, had unfunded liabilities totaling $7.2 billion, or $53,673 per member. Assuming an unmatched 8% annual rate of return, the market funding ratio for TRS is 80.8% and ERS's is 77.4%—both are near the 80% threshold considered to be actuarially sound.

With new Governmental Accounting Standards Board (GASB) rules aimed at improving the accuracy of financial reporting taking effect in 2014 and 2015, funding ratios for these pension funds are expected to decline.

State pensioners have also been aging as baby boomers continue to retire. This situation of fewer contributors paying for more beneficiaries is known as generational accounting. According to the State Budget Crisis Task Force, the ratio

nationwide of active public employees to retirees has fallen from 7 to 1 in 1950 to less than 2 to 1 today, putting more pressure on pension investments. This same decline burdens Texas' pensions.

Lower rates of return and an aging population make pension reform in Texas vital. Modifications like those passed in 2013 have bought some time for the plans, but these adjustments do little to change the long-term cost trajectory. Much more substantive changes are needed to retain solvency and keep the state's pension system above water.

Moving Texas' public pension systems away from the defined benefit system and into a defined contribution model would go a long way to restoring sustainability in the system, benefitting both the taxpayers and state employees.

The Facts

- The state's two major retirement systems, TRS and ERS, have funding ratios near 80%—the threshold considered to be actuarially sound.
- Texas' retirement systems are legally liable to pay defined benefits totaling 10 to 20 times what state employees paid into the system—if investing returns drop or benefits are increased, taxpayers would be on the hook for the added exposure.
- Defined contribution systems are more sustainable than defined benefit plans because they are, by definition, fully-funded, which is why the private sector is moving in this direction.

Recommendations

- Freeze enrollment in the current defined benefit system and enroll newly hired or unvested employees in a 401(k)-style defined contribution pension plan.
- Implement either a hard or soft freeze of the system for vested employees.
- Replace current employee health care plans with Health Savings Accounts.

Resources

Keeping the Promise: State Solutions for Government Pension Reform by Senator Dan Liljenquist, American Legislative Exchange Council (Sept. 2013).

Reforming Texas' Public Pension Systems: Testimony before the Committee on Pensions, Investment, and Financial Services by Talmadge Heflin, Texas Public Policy Foundation (Apr. 2012).

Reforming Texas' State and Local Pension Systems for the 21st Century by Arduin, Laffer & Moore Econometrics, Texas Public Policy Foundation (Apr. 2012).

Your Money and Pension Obligations by The Comptroller of Public Accounts (Dec. 2012).

Reducing State Dependency on Federal Funds

The Issue

Texas' dependency on federal funds—including grants, payments, and reimbursements from the federal government to state agencies—has increased over the past few biennia. This is a dangerous trend threatening the state's financial stability and independence.

As a percentage of the 2014-15 budget, federal funds constitute approximately 34%, or $68.7 billion, of total appropriations. This marks an increase of $3.9 billion (or 6%) above federal aid for the 2012-13 budget.

Of the $68.7 billion in federal aid, Health and Human Services was the biggest recipient with an estimated $42.4 billion—or more than half the total. The state function with the largest percentage increase of 17.9% over the previous biennium was Business and Economic Development, which the $1.7 billion increase was driven primarily by an increase for the Highway Planning and Construction program.

A good way to measure the dependency of the state on federal funds is to consider the percentage of the budget from federal aid.

Federal aid went from 35% of the budget in 2004-05, declined to 32% in 2008-09, then increased to its current share of 34%.

This 7% increase in the share of federal aid just three biennia ago burdens state legislators with more red tape and less independence from the federal government burdening Texans in the process. Over the 2001 to 2012 period, this share averaged 35.5% in the Lone Star State, which the State Budget Solutions ranks Texas as having the 13th highest share in the nation.

Federal money per person went from $1,965 in 2004-05 to $2,522 in the current biennium, a 28% increase. It's one thing for taxpayers to fund legislation that is passed by state lawmakers, but it's another thing entirely when so many state functions are directed and funded by those in Washington, D.C.

As more federal aid makes legislators more dependent on national policies, these policies crowd out the ability for state lawmakers to enact legislation that affects Texans. Specifically, growing federal aid dependency drives more state spending as legislators try to maximize federal funds, handicaps state decisions as lawmakers focus on federally funded programs and lose control of the growth of the budget, and slows economic growth as private sector funds are redistributed, hurting job creation.

As Milton Friedman said, "There is no such thing as a free lunch." The common misconception that federal aid is free is not true. There are ample examples of ways that the federal government controls the choices made by the state and threatens fiscal federalism in the process.

With massive federal budget deficits and the national debt exploding, there is little doubt that Congress must find ways to slow spending. This change would likely affect how much states receive in federal aid. With over one-third of

Texas' total budget funded by federal aid, legislators could face a serious fiscal imbalance.

As written in the U.S. Constitution, states should be able to act as independent and sovereign entities. With more federal aid funding the state's budget, legislators lose their independence to act responsibly for their constituents causing all Texans to lose in the process.

The Facts

- Federal funds constitute approximately 34%, or $68.7 billion, of the 2014-15 budget. This marks an increase of $3.9 billion (or 6%) above federal aid for the 2012-13 budget.
- Federal funds per person went from $1,965 in 2004-05 to $2,522 in 2014-15, a 28% increase, burdening all Texans.
- Over the 2001 to 2012 period, the federal funds share of the budget averaged 35.5% in the Lone Star State, ranking Texas the 13th highest in the nation.

Recommendations

- Prepare for the next federal budget crisis by identifying and measuring the cost of the mandates attached to federal funds.
- Evaluate the economic and fiscal impacts of a rising share of federal funds when writing the budget and minimize any increase in federal aid or actually reduce it.
- Rising federal aid funding for transportation and other state-level projects suggest legislators should consider ways to return more state dollars to fund projects without strings attached.

Resources

Increased Federal Aid to States is a Long Term Trend by State Budget Solutions (Mar. 2014).

Budget Driver: Federal Funds by Talmadge Heflin, Texas Public Policy Foundation (Feb. 2010).

Transportation Infrastructure Development

The Issue

Texas' robust economy and rapid population growth have put pressure on the Lone Star State's transportation infrastructure. This has led some to suggest that more funding is needed to pay for roads. Some estimates show that this amount is in the ballpark of an additional $4 billion annually to the current annual transportation budget of about $11 billion.

The general narrative typically heard is that we are underinvesting in our roads and we must borrow funds, dip into the state's rainy day fund, or spend other funds to invest appropriately. Though concerns over the state's transportation infrastructure threaten Texas' economic vitality, legislators should consider alternatives to spending more by expanding public-private partnerships (PPP) and design-build procurements.

The Texas Department of Transportation's (TxDOT) 2014-15 budget of $22 billion is an increase of 17% over the previous biennium and includes the constitutional amendment proposed by SJR 1. This amount covers more than 12,000 employees and provides substantial resources to maintain and build roads.

However, there are indications of a lack of efficiency at TxDOT whereby they missed 30% of their design project planning deadlines and spent more than the design project budget 53% of the time in 2013. In addition, U.S. Census data show the average commute in Texas has shortened from 25.4 minutes in 2000 to 24.8 minutes in 2010. These factors show clearly that the state's transportation infrastructure can be provided more efficiently with lower cost.

According to 2011 data, Texas is 23rd in the nation in per capita highway spending when both state and federal funds are counted at $186.35 and above the national average of $169.85. When considering state funds alone, Texas ranks 27th with $66.94 in per capita spending—just 26 cents behind the national average.

A more applicable number than per capita spending is dollars spent per miles driven. Federal and state funds amount to $20.15 per 1,000 miles driven, ranking Texas near the middle of the pack at 20th in the nation and 12% above the national average. Regarding only state dollars per 1,000 miles driven, Texas spends $7.24, which ranks 26th and is 2% above the national average.

Over the past 25 years, Texas ranked number one nationally in saving money using public-private partnerships (PPP) and design-build procurements with nine contracts totaling approximately $10 billion in inflation-adjusted dollars—less than 3% of Texas' total transportation spending over this time.

Design-build differs from traditional design-bid-build contracting in that, in the former, a contractor is responsible for designing and building the project while in the latter, a different party, usually the government, designs the project and then bids it out to a contractor to build. Design-bid-build typically results in a longer, more expensive process.

In the past six years, TxDOT awarded five design-build contracts totaling $3.85 billion. This method of procurement is estimated to have saved Texas taxpayers some $1.08 billion, or 22% of the total spent.

But money isn't the only thing saved. According to a federal study, the national average time savings for a design-build contract versus a design-bid-build contract is approximately 14%. This yields real benefits for Texas commuters.

For example, the DFW Connector Project used design-build shaving 28 months off the expected timeline versus the traditional bidding process. This saved $43 million in construction inflation while allowing 180,000 cars to use the DFW Connector earlier than they otherwise would have, saving about $60 million in commuter costs.

Currently, the Transportation Code limits the use of design-build to no more than three per year. This statute expires in August 2015. However, with the substantial benefits of time and money saved by public-private partnerships and design-build contracts, these and other market-oriented reforms should be considered to save billions of transportation dollars per year—potentially equaling or exceeding the additional amount of money some claim we should spend.

The Facts

- The Texas Department of Transportation's (TxDOT) current biennial budget of $22 billion covers more than 12,000 employees and provides vast resources to maintain and build roads.
- Total dollars spent per 1,000 miles driven amounts to $20.15, ranking Texas near the middle of the pack at 20th in the nation and 12% above the national average.
- Design-build contracting is estimated to have saved Texas taxpayers 22% over the last six years and 14% more in time savings versus a design-bid-build method.
- In 2013, HB 22 would have freed TxDOT to achieve design-build savings by eliminating the restrictions on these contracts.

Recommendations

- Remove governmental restrictions on the development of innovative practices in the financing, design, building, and private ownership/operation of Texas' transportation infrastructure.
- Extend and expand design-build contracting after it expires in August 2015.

Resources

Fiscal Size-Up: 2014-15 Biennium by Legislative Budget Board (Feb. 2014).

TPPF Commends Direction of Current Transportation Bills by Arlene Wohlgemuth and Chuck Devore, Texas Public Policy Foundation (Aug. 2013).

2011 State Statistical Abstracts by Federal Highway Administration (2011).

The Sunset Process

The Issue

In 1977, Texas created the Sunset Advisory Commission (SAC) to make government more efficient.

As part of this process, each state agency has a sunset date, or a date whereby they are automatically "sunsetted" unless extended by the Texas Legislature. This was designed to eliminate unnecessary or outdated regulatory bodies, and streamlining regulatory processes.

In Texas, the 12-member SAC includes five members from the Senate, five members of the House, and two public members, appointed by the lieutenant governor and the Speaker of the House, respectively. This commission meets in every two-year cycle to review the agencies up for sunset and to conduct public hearings. After examining a particular agency, the Commission recommends to the Legislature whether the agency should be renewed, abolished, merged with another, or in some way made more efficient.

However, while early on the SAC was able to eliminate a lot of archaic or duplicative agencies, today few agencies are eliminated, or streamlined for that matter. Instead, the process is generally to grow government. The "must pass" nature of Sunset bills make them ripe for special interests to include provisions to increase government that never could pass on their own.

The Facts

- Since 1977, 78 agencies have been dissolved. Of these, 37 were completely abolished and 41 were abolished and transferred to existing or newly created agencies.
- More recently, the Sunset process has led to special interests being able to increase the size and scope of government, rather than make it more efficient.

Recommendations

- Eliminate the "must pass" provision of the statute by repealing Section 325.013 and Section 325.015 of the Texas Government Code. This new provision will help reduce the special interest policy initiatives and allow the Commission to concentrate on reducing the size, scope, reach, and cost of government.
- Focus the SAC on abolishing/eliminating agencies, committees, boards, and statutes. Reducing the Commission's ability to change the scope of agencies, will make their mission more about whether or not to eliminate or consolidate agency functions.
- Require all policy related legislation to go through the substantive, jurisdictional legislative committees. This would also allow the SAC staff and members to focus on reducing the size, scope, reach and cost of state agencies, as well as

eliminate the access point for those interested in subverting due legislative process.

- Consider assigning the Sunset review process of smaller agencies to the Senate Committee on Government Organization and House Committee on Government Efficiency & Reform. These committees will be responsible to work with the SAC staff to reduce the cost of government for agencies that are less than 1% of the biennium budget.

Resources

Sunset in Texas, Texas Sunset Advisory Commission (Jan. 2012).

Turn the Tide on State and Local Government Spending

Taxes

Taxes

Creating a Sales Tax Relief (STaR) Fund

The Issue

Texas' robust economy and limited government philosophy have led to strong job creation and vigorous investment contributing to substantial increases in tax revenue. Assuming this trend continues, there will potentially be a sizable state budget surplus at the end of FY 2015.

Instead of spending excess dollars, the Texas Legislature should create the Sales Tax Relief (STaR) Fund, a mechanism that legislators could direct surplus revenue to, either directly or indirectly, for the purpose of temporarily reducing the state sales tax rate and provide a highly-visible tax cut for all Texans.

After the STaR Fund is created, it would be funded in two ways: 1) Legislators shifting dollars from a surplus or saved dollars from less spending on state programs; and 2) Funds in excess of the Economic Stabilization Fund's cap would flow directly into the STaR Fund rather than back into General Revenue (GR).

The statute creating the STaR Fund would authorize the Texas Comptroller to temporarily lower the sales tax rate for a certain period based on the amount in the STaR Fund. To calculate how much to reduce the sales tax rate over a chosen period, the Comptroller would use the previous year's sales tax revenue. After the desired period, the sales tax rate would automatically revert to its original level.

Since the 2008-09 biennium, more Texans have used their hard-earned dollars to purchase goods and services contributing to a 28% increase in sales tax revenue. With sales tax revenue representing an estimated 55% of total tax collections in FY 2014-15, the increased sales tax revenue contributed to a 25% rise in total tax revenue over this period (see figure next page).

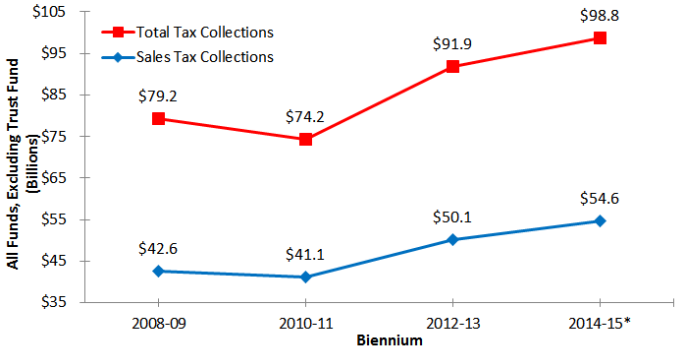
Another growing source of state revenue is severance tax collections from the oil and gas sector. A portion of this revenue is transferred into the state's Economic Stabilization Fund (ESF), subject to a cap set in the Texas Constitution. If the cap is reached, these excess dollars flow into GR and are typically spent.

For the 2014-15 biennium, the Texas Comptroller calculates an ESF cap of $14.4 billion. Though the balance will likely fall below the cap at roughly $8.1 billion by the end of FY 2015 from water projects and highway diversions, the meteoric rise in oil production across the state means there is a good probability this balance will be much higher, raising the likelihood it will reach the cap in coming years.

With extra dollars likely in state coffers next session, this presents legislators with a major challenge in restraining size and scope of government. A better choice than spending these excess funds is restraining government spending and providing sales tax relief. The difficulty for legislators to attempt to do this starts in the appropriations process.

A way to reduce spending levels through the appropriations process is to include taxpayers as one of the funding constituents. With a booming economy and energy sector leaving more revenue in the state's coffers, a priority must be to restrain the growth of government spending to support a robust economy and lower the sales tax rate through the STaR Fund.

Rising Tax Collections Support Creation of the Sales Tax Relief Fund



*Source: Texas Comptroller, *indicates estimate*

The Facts

- Between the 2008-09 and 2014-15 biennia, economic growth and job creation contributed to a 28% increase in sales tax revenue and a 25% rise in total tax revenue. Initial estimates in the Legislative Budget Board's *Fiscal Size-Up 2014-15* show a potential $2.6 billion surplus for the 2014-15 biennium.
- The Texas Comptroller projects that the ESF will be roughly $8.1 billion by the end of fiscal 2015. Rising oil production across the state means it is likely the ESF balance will reach its cap in coming years.
- By including taxpayers as a funding constituent, more revenue from a booming economy and energy sector makes spending restraint and tax relief high priorities.

Recommendations

- Legislators should create the STaR Fund to provide a mechanism to temporarily reduce the state sales tax rate for all Texans.
- By shifting dollars that were earmarked for spending into the STaR Fund, legislators can reduce the bottom line of the budget and let taxpayers keep more of their money.

Resources

Protecting Texas Taxpayers: the Sales Tax Relief Fund by Talmadge Heflin and Vance Ginn, Ph.D., Texas Public Policy Foundation (Apr. 2014).

Fiscal Size-Up 2014-15, Legislative Budget Board (Feb. 2014).

Biennial Revenue Estimate 2014-15, Texas Comptroller of Public Accounts (Jan. 2013).

Economic Stabilization Fund, Legislative Budget Board (Apr. 2013).

The 2014-15 Certification Revenue Estimate, Texas Comptroller of Public Accounts (Dec. 2013).

Property Tax-Sales Tax Swap

The Issue

Texas' property tax burden—ranked 15th highest nationally by the Tax Foundation—weighs heavily on homeowners and businesses across the state; but research suggests that relief may be only a few modest reforms away.

According to the Texas Public Policy Foundation's updated study, *Enhancing Texas' Economic Growth through Tax Reform*, Texas can eliminate its property tax burden entirely by replacing its revenue with a reformed sales tax.

By reasonably adjusting the state sales tax base and rate, the Foundation's study identifies the following two scenarios to produce a revenue neutral swap:

- 15.7%, if the current sales tax base is used including real estate; and
- 11%, if all services that are taxed in at least one state are taxed in Texas including real estate.

Repealing all property tax and replacing the revenues with one of the above sales tax reforms would provide meaningful tax relief for property owners, and would also have the added benefit of strengthening the state's economy by encouraging capital investment—the primary driver of economic growth and job creation.

If this property tax-sales tax swap happened, the Foundation estimates that personal income in Texas might increase by as much as $3.7 billion in the first year alone. Over a five-year period, if property taxes were replaced dollar-for-dollar with a higher sales tax rate, personal income could, on a cumulative basis, increase between $22.85 billion and $63 billion—an increase of 1.8% to 4.7% higher than it would have been otherwise.

Spurred by stronger economic growth, the number of jobs created in the state would also increase. Over a five-year time horizon, estimates from the study show that Texas would benefit from a net gain in the range of 124,900 and 337,400 new jobs compared with no tax reform.

Perhaps the greatest incentive for property tax reform has nothing to do with tax relief, creating wealth, or adding new jobs; it has to do with liberty.

So long as Texas' property tax remains in place, no man or woman who owns a home, operates a business, or has property of any kind, will ever truly own any of these. Right now, all of us effectively rent from the government, indefinitely.

Of all the major taxes, a consumption tax (or sales taxes) is the most preferable for three reasons: they are simple, transparent, and levied only at the end-user.

In terms of simplicity, the tax is among the easiest for taxpayers to understand and pay since the rate is generally known beforehand and levied automatically at the time of purchase. This is a unique feature that sets the sales tax apart from most other taxes laden with time-consuming paperwork and other compliance costs.

The evidence supports the case for replacing property taxes with a broad-based sales tax; now all that is left to do is to find the political will to enact such a prosperity-generating reform.

The Facts

- Repealing property taxes and replacing the revenue with a reformed sales tax would provide meaningful tax relief, generate wealth, spur job creation, and protect the rights of property owners.
- In the first year after tax reform is implemented, personal income in Texas might increase about $3.7 billion. After a five-year period, personal income may increase by an estimated $22.8 billion to $63 billion—approximately 1.8% to 4.7% higher than under the current tax structure.
- Over a five-year period, the Foundation's property tax reform proposal would help create between 124,900 and 337,400 net new jobs compared with no tax reform.

Recommendations

- Abolish property taxes and replace them with a reformed state sales tax that includes an adjusted tax rate and base.
- Ideally, the reformed state sales tax would closely resemble the option with an 11% sales tax rate and an adjusted base that includes all services taxed in at least one other state, including the sale of property.

Resources

Enhancing Texas' Economic Growth through Tax Reform by Arduin, Laffer & Moore Econometrics, Texas Public Policy Foundation (Aug. 2012).

Texas Property Tax Challenge: The True Cost of Owning Property in Texas by Talmadge Heflin and James Quintero, Texas Public Policy Foundation (Aug. 2008).

The Case for Converting from Property Taxes to Sales Taxes by Talmadge Heflin, Texas Public Policy Foundation (Mar. 2008).

The Margin Tax

The Issue

In 2006, the Texas Legislature—under pressure from a Texas Supreme Court ruling declaring the state's school finance system unconstitutional—overhauled the state's corporate franchise tax and created the revised franchise tax, or "margin tax." While every tax comes with a cost, Texas' margin tax causes the most harm for each dollar raised and should be phased out and ultimately eliminated.

This new margin tax expanded the tax base to include all businesses enjoying state liability protection. It also introduced an entirely new method for calculating an entity's tax liability based on an entity's "taxable margin," calculated as the lowest of revenue minus the cost of goods sold, revenue minus compensation, or revenue times 70%.

Under these reforms, wholesalers and retailers, businesses that typically operate on a low profit margin, are subject to a rate half that of other businesses' 1% rate. This picks winners and losers through the tax code and it also creates tax "pyramiding"—business receipts taxed multiple times as they move through the economic chain—making the margin tax a very complex system.

In addition, the margin tax is a form of a gross receipts tax, meaning the tax is levied regardless of profitability such that business owners must still pay taxes even if they lose money. For obvious reasons, this can have a particularly damaging effect on small businesses.

Overall, the state's newly revised franchise tax is a poor and inefficient mechanism for generating state revenues and represents a tremendous burden for entrepreneurs and small businesses.

From these costly effects, the margin tax has not fulfilled its expectation among business and lawmakers to boost state revenues by about $3 billion per year, create a simpler tax, and deliver meaningful property tax relief. This tax accounts for less than 10% of total state revenue yet has done untold economic damage by making it harder to run a business and more expensive once they are successful.

Studies modelling the dynamic fiscal and economic effects of repealing the margin tax find substantial economic benefits. These include tens of thousands of net new jobs created, billions in net new investment and personal income across Texas, increasing sales tax revenue that will more than make up the revenue loss from eliminating the margin tax.

Last session legislators took a good first step by passing HB 500 that provided about $714 million in tax relief by making the $1 million exemption for small businesses permanent and phasing in temporary cuts to the rates that expire in 2016.

Voters say legislators should do more. On the primary election ballot in March 2014, Proposition 3 asked voters whether legislators should "abolish the franchise tax to encourage business growth." Voters supported this measure by 9 to 1.

The margin tax is an inefficient form of taxation that presents both a financial and compliance burden on small businesses and the Texas economy. To further get the government off the backs of business and provide pro-growth measures, legislators should acknowledge this overwhelming voter approval and eliminate the margin tax.

The Facts

- Texas' margin tax is complex, costly, and difficult to comply with, giving rise to a less competitive business climate in the state.
- The margin tax has consistently underperformed. Collections have fallen below expectations in most years since its inception, partially resulting from legal tax avoidance strategies, a common issue with complex tax schemes.
- Texas does not have a revenue problem. From the 2004-05 to the 2014-15 biennia, the state's estimated total revenue growth is 71%, much faster than the 50% growth rate of population and inflation.

Recommendation

- Use the budget surplus to quickly buy down and eliminate the margin tax.

Resources

Conservative Coalition Letter to Governor Perry by Conservative Coalition, Texas Public Policy Foundation (May 2013).

The Texas Margin Tax & Its Impact on the State's Economic Competitiveness by Talmadge Heflin, James Quintero, and Robert McDowall, Texas Public Policy Foundation (Sept. 2012).

"Fixing" the Texas Margin Tax by Talmadge Heflin and Chuck DeVore, Texas Public Policy Foundation (Oct. 2012).

The Margin Tax Debunked: Dispelling Three Common Myths About Texas' Restructured Business Tax by Talmadge Heflin, James Quintero, and Lauron Fischer, Texas Public Policy Foundation (Nov. 2011).

Income Tax

The Issue

Although no one likes to pay taxes, they are an inevitable part of funding core government functions. As such, a policymaker's challenge is to develop an efficient tax system that provides necessary revenue while doing the least economic harm. A policymaker should take care, however, as not all methods of raising revenue are created equal.

While each tax affects behavior and distorts choices differently, the income tax is among the most pernicious because, as a tax on an individual's earnings, it negatively affects earnings, productivity, and wage gains. As a consequence of these adverse effects, people are generally not able to save and consume as much as they would have otherwise.

What's more, an income tax requires a particularly large bureaucratic apparatus for tax collection purposes. Much more so than, say, for the collection of sales taxes. With more bureaucracy comes more costs for taxpayers. This means higher taxes and fees.

There are other ways to raise revenue without incurring such harmful economic effects or enlarging the bureaucracy with an income tax. And to its credit, Texas is one of only nine states without an income tax.

While some argue that a broad-based personal income tax is needed to improve the state's overall outlook, this raises the question: How has Texas' economy performed without an income tax?

According to the latest Tax Foundation data, Texas' state and local tax burden ranks 45th nationally, placing it among the very best states for taxpayers. As a result of the state's comparatively friendly tax environment, Texas' private sector economy is surging forward, outperforming the nation as a whole in a number of key areas, such as:

- Texas' economy is growing faster than the national average. In 2013, Texas' real gross domestic product grew by 3.7%, more than twice as fast as the national average of just 1.9%;
- Texas' labor market is adding jobs at a faster rate than the rest of the nation. From December 2012 to December 2013, Texas' employment grew by 2.7% and U.S. employment increased by only 1.7%;
- Texas replaced all of the jobs it lost during the recession by September 2011; however, there remain 1.7 million fewer Americans employed in December 2013 than before the recession; and
- Despite a large increase in the state's labor force relative to the nation, Texas' unemployment rate, 6% in December 2013, has been at or below the national average for 84 consecutive months, or 7 years.

In *How Big Government Hurts the Economy*, the Foundation compares the past economic performance of the nine states without a personal income tax (including Texas) to the nine with the highest marginal income tax rates (including California) and the 50-state average. The study's results show clear differences.

In every category analyzed—including Gross State Product, Personal Income, Non-Farm Payroll Employment, Population, and State and Local Tax Revenue—the states without a personal income tax performed better than the states with the highest marginal personal income tax rates. Not only that, but the nine states without an income tax also outperformed the national average in every category, often by a wide margin (see chart below).

9 Zero Personal Income Tax States vs. 9 Highest Personal Income Tax Rate States: 10-Year Growth
(tax rates as of 1/1/2013, growth rates 2001 to 2011 unless otherwise noted)

State	Top Marginal Personal Income Tax Rate	Gross State Product	Nonfarm Payroll Employment	Population	State and Local Tax Revenue***
Alaska	0.00%	85.2%	13.2%	14.0%	166.8%
Florida	0.00%	48.9%	12.5%	16.5%	57.0%
Nevada	0.00%	64.9%	18.1%	29.8%	74.0%
New Hampshire	0.00%	42.2%	4.2%	5.0%	53.1%
South Dakota	0.00%	59.1%	12.4%	8.7%	48.9%
Tennessee	0.00%	45.1%	5.5%	11.3%	46.8%
Texas	0.00%	71.5%	20.5%	20.4%	65.6%
Washington	0.00%	54.2%	8.9%	14.1%	42.9%
Wyoming	0.00%	100.7%	18.9%	14.9%	131.3%
9 Zero Personal Income Tax Rate States*	**0.00%**	**63.54%**	**12.68%**	**14.98%**	**76.26%**
50-State Average**	**5.69%**	**51.41%**	**7.62%**	**9.54%**	**49.79%**
9 Highest Personal Income Tax Rate States**	**10.23%**	**45.90%**	**5.30%**	**6.50%**	**47.74%**
Kentucky	8.20%	41.6%	5.0%	7.4%	35.4%
Ohio	8.43%	26.5%	-2.5%	1.4%	26.8%
Maryland	8.95%	53.9%	9.5%	8.4%	53.5%
Vermont	8.95%	37.7%	4.5%	2.3%	57.5%
New Jersey	9.97%	33.4%	5.2%	3.9%	55.6%
Oregon	10.61%	73.1%	6.5%	11.6%	39.5%
Hawaii	11.00%	57.5%	10.2%	12.1%	60.9%
New York	12.70%	43.1%	7.2%	2.0%	56.8%
California	13.30%	46.2%	2.2%	9.3%	43.8%

* equal-weighted average, NH and TN tax only "unearned" (dividend and interest) income only
** equal-weighted average, does not include D.C.
*** 2000-2010 due to data release lag

Source: Laffer Associates, Bureau of Economic Analysis, U.S. Census Bureau

continued

Income Tax (cont.)

Based on this empirical data, Texas' economic prospects as well as its citizens are best served by its current low-tax, pro-growth approach rather than a new income tax.

The Facts

- Texas is one of nine states without an income tax.
- Income taxes damage a state's economy more than any other tax because they disincentivize savings, investment, productivity, job creation, and economic expansion.
- Short-term revenue gains from a new personal income tax are outweighed by the long-term economic damage the tax creates.
- The nine states without an income tax outperformed the nine states with the highest marginal income tax rates in nearly every key economic indicator from 2001 to 2011.
- In addition, the nine states without an income tax also outperformed the national economy.

Recommendations

- Never create a personal income tax in Texas.
- Encourage economic growth by keeping taxes low and adopting pro-growth reforms.

Resources

How Big Government Hurts the Economy by Laffer, Drinkwater, DeVore, and Moore, Texas Public Policy Foundation (Nov. 2013).

Supermajority Requirement to Raise Taxes

The Issue

Since Texas does not have a problem with revenues and an increase in taxes would burden all Texans, the Legislature should only raise taxes unless there is a broad consensus. With the state's coffers potentially overflowing next session—meaning taxpayers are being overtaxed, taxpayers would benefit from a mechanism that slows the growth in revenues.

The challenge is to develop a tax system that generates sufficient revenue to pay for essential government services while doing the least economic harm to consumers and employers.

The state's current tax system is expected to collect 71% more total tax revenue in 2014-15 compared with 2004-05. By comparison, the growth rate of population and inflation over this period is only 50%. Clearly, the tax system is bringing in more than enough revenue to pay for essential services.

According to the Foundation's study, *How Big Government Hurts the Economy,* the 10-year economic performances of the nine states without an income tax clearly outperform the nine states with the highest income tax rate in growth rates of gross state product, nonfarm employment, population, and state and local tax revenue.

Legislators should adhere to prudent policy and pass legislation requiring a two-thirds supermajority of the Legislature to raise taxes instead of the current system's simple majority requirement. Texas should be leading the way on this issue; instead, it lags behind 18 states that have some form of this requirement, according to the Washington Policy Center.

Last session, Senate Joint Resolution (S.J.R.) 27 would have achieved the goal of requiring a supermajority vote "for passage of a bill that imposes a new state tax or increases the rate of an existing state tax above the rate in effect on the date the bill was filed."

Considering that taxes affect us all and with so much at stake—jobs, the economy, and Texans' financial well-being—it is not too much to ask that certain, simple requirements are in place before the Legislature can raise taxes, or pass a new tax. It is prudent public policy and the right thing to do.

The Facts

- The state's current tax system is expected to collect 71% more total revenue in 2014-15 compared with 2004-05.
- Texas does not have a problem with revenues and an increase in taxes would burden all Texans.

continued

Supermajority Requirement to Raise Taxes (cont.)

- Low taxes contribute to the economic success of the Texas Model.

Recommendations

- State and local governments should continue to rely on consumption taxes as their main revenue generators.
- Legislators should pass a bill to require a supermajority (two-thirds of membership) vote to raise taxes.

Resources

Testimony Regarding Senate Joint Resolution 27 by Talmadge Heflin, Texas Public Policy Foundation (Apr. 2013).

How Big Government Hurts the Economy by Laffer, Drinkwater, DeVore, and Moore, Texas Public Policy Foundation (Nov. 2013).

Enhancing Texas' Economic Growth Through Tax Reform by Arduin, Laffer, and Moore Econometrics, Texas Public Policy Foundation (Aug. 2012).

Gambling

The Issue

It has often been suggested that Texas expand state-controlled gambling to increase state revenue in order to address the funding priorities de jour.

For instance, one group in 2012 suggested that gambling is a good way to "generat[e] more tax revenue for the state" in order to "rectify the anticipated budget imbalance."

However, this approach is wrong on two counts.

First, raising revenue to keep up with calls for increased spending is not the right answer. Instead, Texas should restrain government spending at a level to keep it within available revenue. This approach of "living within one's means" is simple, and is very similar to the practice that most Texas families put into practice every day.

Yet even this seemingly fiscally conservative approach to spending doesn't leave any room for savings. So while Texas has restrained the growth of spending better than most other large states, it still has plenty of room for improvement.

For instance, between 1990 and 2010, the sum of population growth plus inflation in Texas totaled 115%. During the same time, however, state spending increased by more than 300%, roughly two-and-a-half times that amount.

The same is true when it comes to public education spending. Total Texas public school expenditures increased 334% from 1987 to 2007, an increase of 142% when adjusting for inflation. On a per-pupil basis, Texas' costs increased from $3,659 in 1987 to $11,024 in 2007, a 66% increase per-pupil when adjusted for inflation.

Whether the increased revenue in these examples comes from expanding an existing tax like the margin tax, from instituting a new tax like a tax on gambling, or from expanded economic growth, the result is the same: more government.

The ultimate measure of government's ability to regulate the industrious pursuits of its citizens is how much it spends. The more it spends, the more it must tax. The more it spends, the more it can regulate. We will not have a "wise and frugal Government" if our default is to spend every penny we can squeeze out of the economy.

The Texas Model, i.e., low spending and taxes; a predictable, low level of regulation and strong property rights protection; a sound civil justice system; and minimal dependence on/interference from the federal government, has helped make Texas the nation's runaway leader in job creation over the last decade. It has also helped us successfully meet past budget shortfalls without increasing taxes on hardworking Texans.

continued

Second, a significant body of research has shown that gambling expansion does not increase state revenues to the level suggested by proponents. As the Foundation noted in a 2005 study:

> The economic impacts of gambling have been examined by a large body of national and international research; however, the research findings are mixed. While there is general agreement that gambling can provide large state revenues and that there are socioeconomic costs attached to these revenues, researchers disagree about the dollar value assigned to these costs and whether the net fiscal impact is positive or negative. …
>
> Costs associated with expanded gambling include: (1) a reduction of approximately 10% in state lottery revenues; (2) an investment of approximately 10% of revenues in regulatory costs for gambling; (3) criminal justice costs underwriting an 8% to 13% increase in crime; (4) lost state and local revenue resulting from diversion of spending from goods and services to gambling; and (5) lost jobs resulting from decreased spending on non-gambling goods and services. …

According to some research, the economic impact of gambling is positive—however, most of these studies acknowledge limited or no calculation of costs…. Other research, however, indicates the economic costs associated with gambling cancel out the revenues with net-zero financial gains or result in an overall financial loss at the end of the day. For example, research conducted by Florida's Office of Planning and Budgeting concluded in 1994 that Florida would experience a significant deficit if the state expanded gambling; although tax revenues were projected to reach almost $500 million annually, gambling costs were projected to total at least $2 billion annually.

Rather than turn to gambling or other sources for new revenue, Texas should instead address whatever budget shortfall we may face through reducing wasteful or unnecessary government spending.

The Facts

- Many researchers have found that the economic costs associated with gambling cancel out the revenues with net-zero financial gains or result in an overall financial loss.
- Costs associated with gambling include:
  - reduction of state lottery revenues,
  - increased regulatory costs for gambling,
  - criminal justice spending to counter an 8% to 13% increase in crime,
  - lost state and local revenue resulting from diversion of spending from goods and services to gambling, and
  - lost jobs resulting from decreased spending on non-gambling goods and services.

Recommendations

- Do not expand or further legalize gambling in Texas.
- To address any potential budget shortfalls, Texas policy makers should reduce wasteful or unnecessary government spending.

Resources

VLTs — What Are The Odds Of Texas Winning? by Chris Patterson, Texas Public Policy Foundation (Mar. 2005).

Gambling in America: Costs and Benefits by Professor Earl L. Grinols, Cambridge University Press (2009).

Gambling Economics: Summary Facts by Professor Earl L. Grinols, Baylor University (Mar. 2004).

Turn the Tide on State and Local Government Spending

Local Governance

Local Governance

Local Government Spending

The Issue

Over the past decade, local government spending in Texas has risen sharply. In fiscal year (FY) 2002, cities, counties, school districts, and special districts spent a combined $77.1 billion, according to the U.S. Census Bureau. Ten years later, aggregate local government spending had risen to $125.8 billion, equating to a 63% increase over the period.

Per capita local spending also rose during the same period. In FY 2002, local spending per capita totaled $3,552. By FY 2011, local spending per capita had grown to $4,902, representing a 38% increase.

While some measure of growth is to be expected—especially in a fast-growing state like Texas—the trajectory of local government spending growth—both adjusted and unadjusted for inflation—is cause for concern as it outstripped important metrics like population and inflation.

Consider that from 2002 to 2011, statewide population grew from 21.7 million to 25.6 million, an increase of 18.3%. Meanwhile, the Bureau of Labor Statistics' Consumer Price Index (U.S. All items, 1982-84) indicates that inflation experienced only a nominal increase of 25%.

With spending out-running Texas' growth in population, there is the potential for instability over the long-run—a public policy outcome that calls for serious change in local spending trajectory.

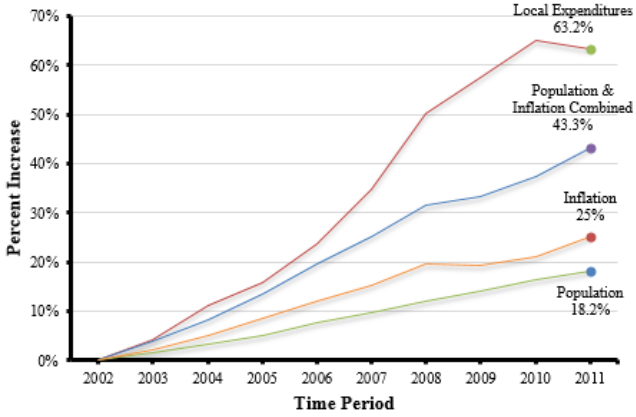
A feasible solution could be expanding the state's constitutional Tax and Expenditure Limit (TEL) to include all levels of government in Texas (cities, counties, school districts, etc.). Right now, Texas' TEL is relatively weak and only applies to certain types of state spending; however, with modest changes, the state's spending limit could be strengthened and reformed to not only control the growth of state spending but also local spending. Relevant reforms would include applying the spending limit to all funds, and basing the limit on population growth and inflation, the growth in personal income, or growth in gross state product—whichever is less. Other local spending reforms that lawmakers should consider include: enhancing financial transparency (most local governmental entities should have a website and provide basic financial information); encouraging the use of zero-based budgeting; and improving economic development transparency.

With just these simple reforms in place, legislators could do much to slow the growth of local spending.

The Facts

- Local government spending for fiscal year 2011 was approximately $125.8 billion (about $5,000 per capita), the same annual amount spent by Texas state government in FY 2011. Education is the biggest category of spending, constituting more than 40% of all local expenditures.

Growth Comparison: Local Spending, Population, and Inflation



Source: U.S. Census Bureau, Bureau of Labor Statistics

- There has been a 63% increase in local spending from 2002 to 2011, the largest percentage increases come from public safety, and social services and welfare. This is outgrowing the rate of population (18% growth) and inflation (25% growth).
- These changes increase the cost of government per person, higher taxes, more fees, and overall more bureaucracy.

Recommendation

- To slow the growth of local government spending, state and local policy makers should reform Texas' tax and expenditure limit, improve financial and economic development transparency, and encourage local governments to embrace the zero-based budgeting concept.

Resources

Update: Trends in Texas Government—Local Government Spending by James Quintero, Texas Public Policy Foundation (Aug. 2014)

Trends in Texas: Local Government Spending by James Quintero, Texas Public Policy Foundation (Nov. 2013)

Local Government Debt

The Issue

Local government debt in Texas has reached alarming levels. According to the Texas Bond Review Board (BRB), Texas' local governments—including cities, counties, school districts, and special districts—had accumulated outstanding debts totaling $200.2 billion as of FY 2013. That marks an increase of $4.4 billion since FY 2012 and a surge of $39.9 billion since FY 2008.

On a per person basis, the rate of local debt growth is equally concerning. In fiscal 2013, Texas' local debt per capita—ranked as the 2nd highest among the top 10 most populous states in a September 2012 Texas Comptroller report—totaled more than $7,500 per Texan. That marks a local debt increase of nearly $1,000 per person since fiscal 2008, coming in spite of the state's significant population growth in recent years.

Now for the bad news: Texas taxpayers are actually on the hook for much more than the figures above would suggest. That's because those figures only refer to the principal amount owed, and don't account for the interest owed.

While the BRB has not yet published the total debt service outstanding (principal plus interest) owed for FY 2013, estimates for FY 2012 project that the total amount needed to fully service Texas' local debt totals $323.1 billion. On a per person basis, Texas' total local debt burden equates to more than $12,500 per Texan.

Without major changes to the *status quo*, Texans can be sure that local property taxes will remain necessarily high to help service the debt. Thus, the Lone Star State could be headed down the same profligate path of places like Detroit and Stockton. So the key question is: How can we begin reversing course?

First, the Legislature should require a minimum level of local debt transparency at the ballot box so that voters can make informed decisions about the direction of their community. Providing basic financial information—such as the projected total cost of a proposition; the amount of existing debt; and the tax increase or decrease that might result from the proposal's passage—at the voting booth is a no-brainer.

Second, any governing body that has the power to tax and borrow should be required to create and maintain a website that features its budget, financial statements, and a check register. It's surprising, and somewhat disheartening, that in today's day-and-age there are still local governments who operate without some or all of this, but it's a relatively straightforward fix in the next legislative session.

Next, Texans should demand an end to the use of exotic public financing instruments that enable local governments, and particularly school districts, to get around existing debt limits. One particularly devious device that merits a ban, or at least severe curtailment, are capital appreciation bonds (CABs).

CABs permit local governments to borrow now and defer principal and interest payments until the bond matures, which is oftentimes decades later. According

to the Legislative Budget Board, this buy-now, pay-later approach can result in "crippling repayment obligations," with as much as $10 being owed for every $1 borrowed. Clearly, this kind of borrowing, of which Texas leads the nation, is exacerbating an already difficult debt situation.

Finally, Texans in "home-rule" cities should begin looking at ways to amend their city's charter to include new or stronger debt limitations. Seeing as one-third of all local debt is incurred by cities, this is a direct and effective way for certain local taxpayers to address the issue of local debt head-on.

The Facts

- As of FY 2012, local government debt service outstanding (principal plus interest) totaled $323.1 billion. No estimate for FY 2013 has yet been provided.
- Texas' local debt per capita ranked as the 2nd highest among the top 10 most populous states.
- Of the debt owed, approximately one-third can be attributed to cities, one-third to school districts, and the remaining one-third to counties and special districts.
- From FY 2000 to FY 2009, local debt outstanding increased by 144.4% while population and inflation increased by just 44.9%.

Recommendations

- Provide Texas voters with basic financial information at the ballot box, such as the projected total cost of a bond proposition; the amount of existing debt owed by the asking entity; and the possible resulting tax increase or decrease in the event of a proposition's passage.
- Require local governments to submit to basic standards of financial transparency, including the creation and regular maintenance of an official website featuring the entity's operating budget, financial statements, and check register.
- Ban the issuance of capital appreciation bonds.

Resources

A Profile in Runaway Debt: Frisco ISD's $775 Million Bond Proposal by Jess Fields, Texas Public Policy Foundation (Mar. 2014).

Shining a Light on Local Spending and Debt: Testimony to the House Appropriations Sub-Committee on Budget Transparency and Reform by James Quintero, Texas Public Policy Foundation (Mar. 2013).

Red Ink Rising: Local Debt in the Lone Star State by James Quintero, Texas Public Policy Foundation (Aug. 2013).

Ballot Box Transparency

The Issue

Cities, counties, school districts, and special districts in Texas have amassed an alarming amount of debt. In fiscal year 2012—the latest data available online—local debt service outstanding (meaning the remaining principal and interest to be paid) totaled $323.1 billion, or roughly $12,500 owed per Texan.

Local government debt is not only staggering in size, but it is also growing at an alarming rate.

From fiscal years 2003 to 2013, local debt outstanding has grown from $102.6 billion to $200.2 billion, representing an increase of 95% over the period. By contrast, population and inflation increased over the same period by just 46%. Figures for local debt service outstanding over a similar period were unavailable at the time of publication.

The girth and growth of local government debt in Texas represents one of the state's most pressing public policy problems moving forward. In the absence of meaningful reform, the *status quo* is sure to produce higher taxes, lower credit ratings, and slower economic growth in communities around the state.

There is no silver bullet solution for Texas' evolving local government debt crisis. The problem is complex and multi-faceted, and requires more than a simple measure to solve. However, an important first step toward addressing the issue is to begin educating the public at the ballot box.

Currently, the voting public has only very little information about a proposition when deciding on its merits at the ballot box. That limited information consists of two items: the amount that a local governmental body proposes to borrow and a brief explanation of its purpose. Absent is any information on existing debt levels, anticipated tax impact, per capita debt estimates, or total debt service repayment projections.

Arming Texans with basic financial information at the voting booth—of the same variety that individuals and families rely on to make intelligent household spending decisions—is critical to ensuring that sound public investment decisions are being made.

To that end, the Legislature should require all local governments seeking to issue bonds to provide a short list of simple facts along with each proposition. Added information could include:

- The total principal and interest amount required to pay all outstanding debt obligations of the asking entity;
- The estimated combined principal and interest required to pay the proposed bonds on time and in full;

- The estimated rate of interest t
- The estimated increase in the tax levy, if any, assuming that the measure is approved.

While legislators should take care not to overwhelm voters with too much information, there is no better place to educate voters than at the ballot box.

The Facts

- The most recent data available estimates local debt service outstanding (principal and interest) at $323.1 billion for fiscal 2012.
- From fiscal years 2003 to 2013, local debt outstanding grew by 95%. Over the same period, population and inflation increased just a combined 46%.

Sample of Ballot Box Transparency

CITY OF BETA

BOND ELECTION - NOVEMBER 06, 2012

	DEBT OUTSTANDING PRINCIPAL	REMAINING INTEREST	TOTAL DEBT SERVICE PAYMENT	DEBT OUTSTANDING PER CAPITA
AUG. 31, 2012	$65,030,343	$42,742,000	$107,772,343	$1,400.76
PROPOSED ISSUE	$25,795,000	$18,200,000*	$43,995,000*	$555.63

EXISTING ANNUAL DEBT TAX RATE	$0.18 per $100	EXISTING AVERAGE RESIDENTIAL DEBT SERVICE TAX LEVY**	$274.97
PROPOSED NEW RATE IF BOND PASSES	$0.22 per $100	NEW DEBT SERVICE TAX LEVY IF BOND PASSES	$336.08
% INCREASE	22.2%	% INCREASE	22.2%

*** Estimated interest and total payment.**

**** Average debt service tax is calculated on the average 2012 residential property value in the city of $152,760.**

PROPOSITION

THE ISSUANCE OF **$25,795,000 ROAD CONSTRUCTION BONDS** FOR THE CONSTRUCTION, ACQUISITION AND EQUIPMENT OF HIGHWAYS AND BRIDGES (INCLUDING THE REHABILITATION, RENOVATION AND IMPROVEMENT THEREOF) AND THE PURCHASE OF THE NECESSARY RIGHT OF WAY, AND THE LEVYING OF THE TAX IN PAYMENT THEREOF:

☐ **FOR**

☐ **AGAINST**

Source: Texas Comptroller of Public Accounts, "Texas, It's Your Money."

- In 2012, the Texas Comptroller ranked Texas' local debt per capita as the 2nd highest burden in the nation, behind only New York.
- Texas voters are not fully informed at the ballot box of the propositions that they are being asked to approve or reject.

Recommendation

- Require local governments seeking to issue bonds to provide voters with basic financial information about the proposition being decided upon.

Resources

Improving Financial Transparency at the Ballot Box by James Quintero, Texas Public Policy Foundation (Aug. 2014).

Your Money and Local Debt, Texas Comptroller of Public Accounts (Sept. 2012).

Local Property Tax Reform

The Issue

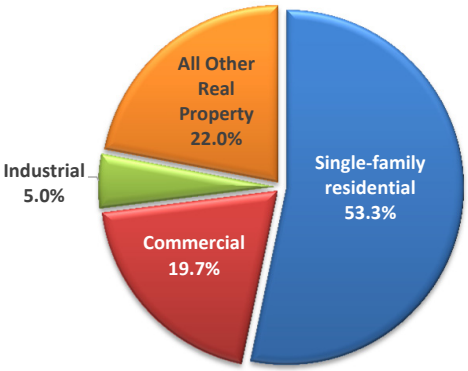
Texas' property tax system is among the most burdensome in the nation. According to the Tax Foundation's latest national rankings, the Lone Star State's local governments collected "approximately $1,557 per person in property taxes [in 2010], which ranks 15th highest nationally." That figure is up from $1,393 collected per capita in 2008 when the Tax Foundation ranked Texas' property tax system ranked as the 17th most burdensome in the U.S.

In addition to Texas' comparatively high property tax burden, Texans also contend with a real estate tax that is growing quickly compared to traditional measures like population and inflation. Consider that from 1992 to 2010, the state's population grew by more than 40% and U.S. inflation increased by 55%; yet over that same period local property tax levies jumped by 188%, according to the Texas Comptroller's *Texas, It's Your Money* series.

Rising property tax bills negatively affect all Texans by discouraging economic activity, distorting investment decisions, and affecting employment creation. But one category of property taxpayer is affected by the state's burdensome tax system more than others—that is, the Texas homeowner.

Homeowners in Texas have the greatest degree of exposure to the state's property tax system. As compared to other real property taxpayers—i.e. commercial, industrial, and others—single-family residences comprise the largest share of "taxable value" in Texas, which when combined with tax rates determines the total taxes that a property owner must pay. In 2011, single-family residential properties constituted more than half, or 53.3%, of school districts' total taxable value while commercial and industrial properties were a much smaller percentage of the overall total. School districts levy more than 60% of all property taxes in the state.

Who Bears the Burden?
2011 Taxable Value Totals Statewide



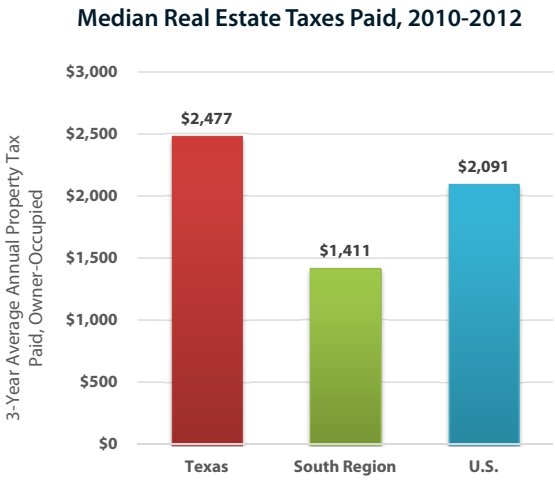
Source: Texas Comptroller of Public Accounts

In dollar terms, the 2010-12 average annual property tax paid by an owner-occupied dwelling in Texas was $2,477, according to the U.S. Census Bureau. This compares poorly to the surrounding area (i.e. the South Region) and the nation where homeowners paid a 3-year average annual tax of $1,411 and $2,091, respectively.

One public policy reform that state and local officials should consider is enacting a hard-limit on the amount of increased tax revenue that can be collected by a local governmental entity over the

previous fiscal year. Such a reform could be tailored to require local voter approval for property tax rates that result in an increase in local property tax revenue in excess of 5% or population growth plus inflation, whichever is less.

Under a proposal such as this, current homeowners stand to benefit from a more restrained tax environment that decelerates the growth of the local property tax; prospective homeowners stand to benefit from a more affordable housing market; and the economy stands to benefit from a more robust labor market and increased business interest as companies seek out pro-growth friendly states.



Source: U.S. Census Bureau's American Community Survey

The Facts

- Texas' property tax system is among the most punitive in the nation.
- According to the Tax Foundation, Texas' property tax system ranks as the 15th most burdensome nationally.
- According to the U.S. Census Bureau, the 2010-2012 average annual property tax paid by an owner-occupied dwelling in Texas was $2,477. By comparison, homeowners in surrounding area (i.e. the South Region) and the nation paid a 3-year average annual tax of $1,411 and $2,091, respectively.
- Rising property tax bills discourage investment and create a drag on the state's economic performance.

Recommendation

- Require local voter approval for property tax rates that result in an increase in local property tax revenue in excess of 5% or population growth plus inflation, whichever is less.

Resources

Homeowners and the Texas Property Tax by James Quintero, Texas Public Policy Foundation (Aug. 2014).

Local Economic Development

The Issue

In 1979, the Legislature passed the Development Corporation Act of 1979, allowing municipalities to create nonprofit economic development corporations to support economic growth. Because the Texas Constitution barred localities from using public monies to support private entities, these corporations were privately funded.

Then in 1987, voters passed Proposition 4, amending the state constitution to allow the use of public money to fund private entities. With that, the floodgates opened. In 1989 Chapter 380 was added to the Local Government Code, allowing for virtually unlimited use of public funds to support private development by requiring nothing more than a "public purpose" for such expenditures. Other state statutes, such as Chapter 312 and 313 of the Tax Code, were also passed permitting other types of economic development policies to be enacted, such as tax abatements for cities, counties, and special districts and limitation of appraised value for school districts.

Over time, economic development incentives have become the rule instead of the exception for localities seeking to attract new businesses and investment. According to the Texas Comptroller, there were just 336 economic development corporations (EDC) in existence in 1997. By 2011, the number of EDCs jumped by 107% to 697, even as many cities had maxed out their local sales tax caps.

Tax abatement agreements have also experienced much growth. From 2006 to 2011, a total of 758 tax abatement agreements were entered into by local governments in Texas, an average of 126 per year. The most used agreement period is 10 years, and as a result, a large number of these agreements are still in effect. Interestingly enough, the size of the business that is on the receiving end of the agreement is getting smaller.

For example, in 2006, 14% of businesses benefitting from tax abatement were classified by the Comptroller as "micro," meaning that they had 19 or fewer employees, but by 2009 that had grown to 37.7%. Businesses employing fewer than 100 people made up 46.5% in 2006. By 2009, that had grown to 77.4%, according to the Texas Comptroller.

The trends suggest that instead of pursuing the more effective strategy of lowering taxes and eliminating barriers to job creation, many of Texas' local governments have instead turned to offering public incentives.

While some incentives are minimal, such as waiving permitting fees and streamlining processes, others are far greater, such as when cities backstop loans for private development or offer upfront cash grants to private companies. But while the details of each instance may vary, the net effect is the same: local governments end up picking winners and losers.

Additionally, most incentive deals offered by local governments to businesses are deliberated upon in closed session, because since 1999 section 551.087 of the Texas Open Meetings Act has exempted discussions related to economic development. Economic development agreements may be passed after the

governing body emerges from closed session, without any further posting or public notice requirement.

Local governments' growing reliance on often-opaque economic development policies is a ripe issue for the Legislature to consider in the legislative session, particularly from the viewpoint of encouraging greater government transparency.

The Facts

- The Texas Open Meetings Act exempts deliberations regarding economic development activities from the public meetings requirement in section 551.087.
- Smaller and smaller businesses have been offered incentives in recent years, raising questions about the effectiveness of economic development tools.
- Chapter 380 of the Local Government Code offers virtually unlimited authority to localities to pursue economic development for the broad definition of meeting an undefined "public purpose."
- The economy is most prosperous when government stays out of the way, including when government purports to direct resources better than the market can. The substantial weight of history's evidence has shown that central economic planning fails, and fails completely.

Recommendations

- Require local governments to create an economic development policy that clearly lays out the incentives that its governing body is willing to offer business prospects as part of its economic development negotiations.
- Allow a public comment and review period for all economic development agreements before the final vote on passage; at least two weeks after agreement is reached.
- Require that local governments maintain active economic development agreements on the entity's website that are accessible to all.
- Consider restricting or repealing Section 551.087 of the Texas Open Meetings Act.

Resources

Improving Transparency and Accountability in Economic Development by Jess Fields, Texas Public Policy Foundation (Jan. 2014).

An Overview of Local Economic Development Policies in Texas by Jess Fields, Texas Public Policy Foundation (Feb. 2014).

Texas Government Code Chapter 551: Open Meetings

Special Purpose Districts

The Issue

Special purpose districts (SPDs) are independent governmental bodies that exist at the local level and form the most basic unit of local government. Usually, these districts are created to fulfill a particular public purpose and examples often include: hospital districts, crime control districts, library districts, and water and wastewater districts, to name a few.

Generally speaking, special purpose districts are granted significant authority by the Legislature that can include: the power to impose and collect taxes; to issue bonds and borrow money; to contract with other entities; to sue and be sued; and to acquire, purchase, sell, or lease real or personal property. Depending on the district's purpose, it is often afforded the ability to impose a property tax, a sales tax, or in some cases both.

While the concept of special purpose districts originated as a means to address inadequacies associated with urban sprawl, many of these districts today are, arguably, being created in areas that make them duplicative to the mission of the surrounding city or county. As a consequence, SPDs are increasingly becoming just another layer of bureaucracy and taxation—no small matter considering their rate of creation.

From 1992 to 2010, the number of local taxing authorities that levied a property tax grew from 3,426 to 4,017. Of the increase, special purpose districts accounted for 87% of the growth, adding more than 500 taxing authorities over the period, according to the Texas Comptroller.

Perhaps not coincidentally, local property tax levies, or the total amount to be raised from the tax, have been growing much faster than population and inflation. From 1992 to 2010, local property tax levies increased by 188% compared to 97% for population and inflation combined.

In terms of the local sales tax, there were nine districts that imposed a sales and use tax in 1993. By 2011, the number of special purpose districts levying a sales tax had jumped to 193, accounting for an increase in excess of 1,900%, according to the Texas Comptroller.

Much like local property tax levies, local sales tax collections have been fast-outpacing inflation and population growth. From 1992 to 2010, local sales tax collections grew by 160% while inflation and population growth combined increased by only 97%.

Though the quantity and burden of special purpose districts is growing undeniably, many Texans, consumed with their day-to-day living, remain unaware of these entities, in part, because there are not yet commonsense transparency requirements in place to make them aware of their smallest of local governments. These reforms should encompass everything from requiring special

purpose districts to maintain a website to posting basic financial information like budgets and check registers to identifying its board of directors.

It's not only important that the Legislature take steps to better educate Texans on SPDs, but also create formal review process to make sure that these entities are still fulfilling their original purpose.

The Facts

- Today, there are 241 special purpose districts that levy a local sales and use tax and there are 1,886 SPDs that impose a local property tax.
- More than 500 special purpose districts were created between 1992 and 2010, accounting for 87% of the growth of local property taxing entities.
- From 1992 to 2010, local property tax levies increased by 188% compared to 97% for population and inflation combined.
- The number of special purpose districts levying a local sales and use tax has skyrocketed by more than 1,900% from 1993 to 2011.
- From 1992 to 2010, local sales tax collections grew by 160% while inflation and population growth combined increased by only 97%.

Recommendations

- Require a certain level of financial transparency from special purpose districts that could include: maintaining a website; posting budgets and check registers; and listing its board of directors.
- Create a formal review process to assess the current purpose and function of each SPD to determine whether it is still fulfilling its original mission.

Resources

Your Money and the Taxing Facts, Texas Comptroller of Public Accounts (Aug. 2012).

Local Pension Reform

The Issue

Municipalities in Texas are granted a great deal of authority and flexibility as to their governance by state law. However, in the area of public pensions, local control is lacking for some of Texas' largest municipalities.

Twelve local retirement systems in seven major Texas municipalities are enabled by state statute, meaning that these systems' retirement benefits, contribution levels, and board compositions are statutorily defined. There is no local control in the traditional sense for taxpayers, reformers, and others in these municipalities since they are not able to make substantive changes without first passing legislation at the statehouse. This matter is further complicated by the fact that the Texas Legislature convenes every 2 years for 140 days, providing a narrow timeframe in which to achieve critical reforms.

The 12 local retirement systems that are governed by state law include:

Retirement System	Active Members	Unfunded Actuarial Accrued Liability (UAAL)	UAAL Per Active Member	Funded Ratio	Amort. Period
Austin Employees' Retirement Systems	8,387	$1,070,656,825	$127,657	63.93%	27
Austin Fire Fighters Relief & Retirement Fund	955	$94,585,998	$99,043	87.32%	20.91
Austin Police Officers' Retirement Fund	1,709	$298,101,183	$174,430	65.20%	29.4
Dallas Police & Fire Pension System	5,400	$1,063,181,047	$196,885	78.12%	23
El Paso Firemen's Pension Fund	794	$108,582,531	$136,754	79.88%	76
El Paso Police Pension Fund	1,044	$174,514,074	$167,159	78.21%	Infinite
Fort Worth Employees' Retirement Fund	6,278	$1,077,422,249	$171,619	63.26%	36
Galveston Emp. Retirement Plan for Police	127	$25,694,496	$202,319	46.90%	53.5
Houston Firefighters' Relief & Retirement Fund	3,745	$532,645,292	$142,228	86.56%	30
Houston Municipal Emp. Pension Systems	11,781	$1,746,998,000	$148,289	57.70%	67.1
Houston Police Officers' Pension System	5,364	$939,010,000	$175,058	81.26%	Infinite
San Antonio Fire & Police Pension Fund	3,955	$232,888,694	$58,885	91.75%	7.25

Note: Actuarial valuations data current as of May 2014. Source: Texas Pension Review Board

The 12 local retirement plans governed by the state total almost 50,000 active members and around 90,000 active and retired members. All of the plans listed above feature defined benefit (DB) systems.

As is common with DB systems, many of the local retirement systems governed by the state are in poor fiscal condition. To begin, 10 of the 12 systems have significantly unfunded liabilities totaling $100 million or more. Unfunded liabilities per active member exceed $100,000 in each system except for two, the Austin Fire Fighters Relief and Retirement Fund and the San Antonio Fire and police Pension Fund.

What's more, two-thirds of the plans listed above have funded ratios below 80%, the threshold that generally signifies a fiscally sound plan.

In the absence of true local control, state-governed local pension plans have come to be characterized by a general state of disrepair. Texas' largest municipalities should not be shackled by statutory restrictions that disallow them from being good stewards of tax money, and should be allowed local control in the area of retirement benefits.

The Facts

- Twelve local retirement systems in Texas have their contribution and benefit levels defined in state statute. These systems are located in Austin, Dallas, El Paso, Fort Worth, Galveston, Houston, and San Antonio.
- Texans living in municipalities whose pensions are defined by statute have no local control over major elements of their plans, which include contribution rates and benefit levels. Instead, important plan changes must be at state legislature which is complicated by the state's biennial system.
- Ten of 12 local retirement systems governed by the state have unfunded liabilities totaling more than $100 million.
- Two-thirds of the local retirement systems governed by the state have funded ratios below 80%, which is an indicator that the plans could be fiscally unsound.

Recommendations

- The Legislature should remove from state statute all state mandates over local retirement systems and allow municipalities to have control of them.
- The Legislature should not place any new retirement systems not presently in the statute under state control.

Resources

Overview of Local Retirement Systems Under State Governance by Talmadge Heflin and James Quintero, Texas Public Policy Foundation (Jan. 2013).

The 80% Pension Funding Standard Myth by the American Academy of Actuaries (July 2012).

Health Care and Pension Benefits Reform in San Antonio by James Quintero and Jess Fields, Texas Public Policy Foundation, and Lance Christensen, Reason Foundation.

Annexation Reform

The Issue

Annexation is the process by which cities are able to bring additional property into their city boundaries. Texas currently allows a regular process of annexation by cities only. Counties have fixed boundaries and school districts may only annex if another adjacent school district detaches its territory.

Municipal annexation has a storied history in Texas. In the early 20th century, cities wielded virtually unlimited authority to annex property, as long as the annexation was contiguous to current city boundaries. Not long after Houston's rapid territorial expansion and subsequent boundary war with surrounding cities stirred citizen concern for property rights in the 1960s, the annexation process was reformed to include what is now known as the Extra-Territorial Jurisdiction (ETJ). Thereafter, a city had virtually unlimited annexation authority, but how much annexation could take place at once was constrained to the limits of the ETJ.

In the mid-1990s, Houston again sparked controversy with annexation by rushing through the annexation of Kingwood, a large suburb north of Lake Houston, northeast of George Bush Intercontinental Airport, and far away from the then-city limits of Houston. It justified the expansion by arguing that Kingwood was within its ETJ, even though it was far away from the city limits. Because Kingwood was then isolated as an island of higher property values in that part of Harris County, Houston used what is now referred to as "shoestring annexation" to draw a line up Highway 59 to create a contiguous area for annexation purposes.

In the wake of this event, and the outrage that was stirred up as a result, the Texas Legislature moved to take basic action to ensure that annexations could not be rushed through without certain requirements being met. This new "fast-track" or "exempt" annexation could take place within a 90-day period, but only with a given population in the area. For most annexations, the process was extended to a two-year period.

These annexation reforms made a significant difference in limiting some of the more dangerous parts of annexation authority generally, but do not go far enough in addressing the basic problems with municipal annexation.

The most significant problem posed by present annexation law in Texas is that citizens in an area to be annexed are not able to have a say on their annexation. The process of annexation should consider the property rights of landowners and allow those in an area to be annexed to have a say.

The Facts

- Texas does not require any kind of vote during the normal course of annexation, and exempt annexations are allowed by statute for areas that meet certain requirements.

- The majority of states (28) allow for some kind of formal election process by those in an area to be annexed.
- Current statutory authority allows for annexations to occur in as little as 90 days with limited citizen participation and few checks or balances.

Recommendations

- Abolish the exempt annexation process for all but voluntary annexations by petition, and review the petition process to ensure that citizens of an area to be annexed are adequately protected against fast-track annexation of their property.

- Create a process by which residents of an area to be annexed may formally participate in the normal two-year annexation process, through a petition to hold an election on whether or not to become joined with the municipality.

Resources

Annexation: Its Past, Present, and Future in the Lone Star State by Jess Fields, Texas Public Policy Foundation (Sept. 2014).

Improve the Quality, Access, and Affordability of Health Care in Texas

Health Care

Health Care

Holding the Line on Medicaid Expansion

The Issue

In the 83rd legislative session, state lawmakers came under intense pressure to expand Medicaid under the Affordable Care Act (ACA) but in the end refused to do so. Expansion would add an estimated 1.5 million Texans to the program, extending eligibility to non-disabled adults, both with and without dependents. The groups pushing for expansion hoped to pull down billions in federal funding, which would have reimbursed the state at 100% of the cost of coverage for the expansion population until 2017, then gradually reduced the rate to 90% by 2020.

Proponents argued that expansion would be an economic boon for the state by helping to reduce uncompensated care costs for hospitals that treat uninsured and underinsured patients. These costs are paid primarily through local property taxes, and many hospitals claimed that Medicaid expansion would alleviate this tax burden by shifting the cost of covering the uninsured to the federal government.

Opponents of expansion, including the Texas Public Policy Foundation (TPPF), argued that previous Medicaid expansions in other states did not reduce uncompensated care costs or the uninsured rate, but instead exceeded cost and enrollment projections, increased uncompensated care costs, and had little or no effect on the uninsured rate. TPPF and others instead pushed for reform of the current Medicaid program, arguing that program spending is on an unsustainable trajectory and will soon overwhelm other budget priorities, such as education and infrastructure, if steps are not taken to control cost growth.

Expanding the program would exacerbate this problem and also strain an already fragile safety net of Medicaid providers in the state, making it more difficult for current Medicaid enrollees—whom the program was originally meant to serve—to access care. By adding 1.5 million Texans to the Medicaid rolls, lawmakers would expand coverage without providing adequate access to care, thereby weakening an already dysfunctional program with sub-standard health outcomes.

Some lawmakers argued for a "Texas Solution" that would expand Medicaid in exchange for certain reforms to the program such as requiring cost-sharing on a sliding scale based on income, the use of health savings accounts, and a trigger to opt out of expansion if federal funding drops off. However, none of these reforms are possible under current federal law or under the terms of a waiver from the Centers for Medicare and Medicaid Services (CMS). Furthermore, the proposed bill would have directed state officials to abandon them if it was necessary to secure federal expansion dollars. TPPF therefore opposed the "Texas Solution" as nothing more than Medicaid expansion under the ACA disguised to look like conservative Medicaid reform.

During the debate, some called for Texas to expand Medicaid with a waiver similar to the waiver granted to Arkansas, which opted to cover the Medicaid expansion population by enrolling eligible individuals in private coverage through the health insurance exchange created by the ACA. Since Arkansas began its so-called "private option," total cost overruns have exceeded $7.5 million and could be as high as $30 million to $45 million by the end of 2014, depend-

ing on enrollment. The program exceeded monthly per person caps on spending, which were a requirement of the waiver, in January 2014—the first month of the program—and have exceeded the cap in every month since then.

The Facts

- According to the Congressional Budget Office (CBO), federal spending on Medicaid will more than double over the next decade, increasing from $265 billion to $572 billion. The CBO estimate confirms TPPF projections from 2010 that show Medicaid spending will double every decade on the state and federal level.
- Medicaid spending as a share of state budget has steadily increased, from about 20% in 2000 to nearly 30% in the 2014-15 All Funds budget ($58.5 billion).
- In General Revenue (GR) spending, the 2014-15 budget is $95.6 billion. Of this, about $28.6 billion is for Medicaid (excluding an estimated $1.5 billion shortfall in Medicaid funding). This represents 30% of the GR budget, up from 14% in 2001.
- Medicaid expansion is estimated to cost the state $8.8 billion over 10 years. According to projections from expansion proponents, expansion would cost $3.74 billion in state matching funds for the years 2014-17.
- According to a Texas Medical Association poll, only 31% of Texas physicians would accept all new Medicaid patients in 2012, down from 67% in 2000.
- Total Medicaid enrollment in Texas is rising because of other provisions in the ACA. Enrollment is currently about 3.7 million and is expected to continue to rise in 2015.

Recommendations

- Lawmakers should resist calls to expand Medicaid under the ACA and instead focus on improving the existing program.
- Any consideration of a "private option" or a "Texas Solution" for Medicaid expansion should be evaluated in light of waiver programs for expansion in other states, especially Arkansas, Indiana, and Michigan.

Resources

Save Texas Medicaid: A Proposal for Fundamental Reform by James Capretta, Arlene Wohlgemuth, John Davidson, Texas Public Policy Foundation (Mar. 2013).

Preliminary Medicaid Enrollment by Month-April, Texas Health and Human Services Commission (accessed June 2014).

Texas Medicaid and CHIP in Perspective, 9th Ed., Texas Health and Human Services Commission (Jan. 2013).

Presentation to the House Appropriations Committee by Kyle Janek, Texas Health and Human Services Commission (8 Mar. 2013).

Medicaid Block Grant

The Issue

Medicaid was created by Congress in 1965 and came to Texas two years later. The program was designed to provide health benefits to specific groups—initially, to recipients of certain cash assistance programs. Since then, eligibility has gradually expanded and caseload growth has made Medicaid the single largest program in the state budget. In 2001, Medicaid consumed 20% of the All Funds (AF) budget but now accounts for about 30% of the 2014-15 budget.

Medicaid spending in Texas is experiencing steady, long-term growth. Program spending did not exceed $2 billion until 1987 but now totals $23.3 billion in state funds, with an estimated $1.5 billion shortfall that will have to be added in supplemental spending.

This growth in spending mirrors steady caseload growth in recent decades. Between 1999 and 2005, Medicaid added about one million clients and then grew by roughly one million more by 2010. Total enrollment in Texas now stands at about 3.7 million. The Affordable Care Act (ACA) will increase enrollment as some of those currently eligible but not enrolled join the program. Apart from the health care law, the aged, blind, and disabled Medicaid population (ABD), which accounts for most the spending, will continue to grow as the Baby Boom generation ages.

Although the program is administered by the state, the rules are dictated largely by the federal Centers for Medicare and Medicaid Services (CMS) in Washington, D.C. Any changes to the program must be approved by CMS through a waiver process, and major reforms to eligibility, benefits, and cost-sharing restrictions are constrained both by federal law and CMS. The only tool states have to control cost growth is reducing provider reimbursement rates, which in Texas are about half what private insurance pays. This has created an access problem for many Medicaid enrollees because a growing number of physicians refuse to accept Medicaid patients, citing low reimbursement and bureaucratic red tape.

The federal matching payment structure of Medicaid incentivizes the state to spend more on Medicaid, not less. Medicaid is jointly financed with federal and state tax revenue according to the Federal Medical Assistance Percentage (FMAP), which varies between states and changes year to year. In Texas, the FMAP is currently about 58%, which means the state pays roughly 42% of Medicaid costs and the federal pays the rest.

Such a funding structure makes it extremely difficult to cut spending. For example, a $100 reduction in state spending would mean a loss of about $250 from the overall Medicaid budget. Instead, state and local officials have an incentive to "pull down" federal Medicaid dollars by including as many state health programs as possible in Medicaid, thereby growing the program's budget.

The Facts

- For the 2012-13 biennium, the Legislature appropriated $39 billion in All Funds for the Medicaid program alone. In the current biennium, that figure is about $58.5 billion—a 50% increase.

- Children have increased as a percentage of total Medicaid enrollment due to economic factors and provisions of the ACA that are causing children to move from the Children's Health Insurance Program (CHIP) into Medicaid. The ABD population in Medicaid is also expected to increase consistently as the Baby Boom generation ages.
- Rising Medicaid costs largely account for the growth in health and human services spending, which in the upcoming biennium could surpass education spending in the state budget.
- States must adhere to strict federal rules about how much Medicaid enrollees are allowed to contribute to the cost of care and what benefits they are entitled to receive. As long as the state participates in the program, Texas must provide medically necessary care to all eligible individuals, regardless of whether the enrollee needs or wants those benefits.
- States are not allowed to use federal Medicaid dollars to pay for private coverage for Medicaid-eligible individuals unless the state pays for wrap-around benefits not covered by the private plan.

Recommendations

- The state should continue to pursue a block grant for Medicaid in order to give the state greater flexibility to reform the program and greater certainty in the Medicaid budget from year-to-year. This includes petitioning the state's Congressional delegation to pursue block grant legislation in Washington, D.C.
- The Legislature should pass a Medicaid block grant act that would serve as a trigger if and when block grant funding is passed by Congress. Such a bill would send a strong message nationwide that Texas has developed a detailed plan for how to amend its state plan and enact fundamental Medicaid reform if it were given the opportunity to do so.

Resources

Save Texas Medicaid: A Proposal for Fundamental Reform by James Capretta, Arlene Wohlgemuth, John Davidson, Texas Public Policy Foundation (Mar. 2013).

Preliminary Medicaid Enrollment by Month-April, Texas Health and Human Services Commission (accessed June 2014).

Texas Medicaid and CHIP in Perspective, 9th Edition, Texas Health and Human Services Commission (Jan. 2013).

Summary of Senate Bill 1 Conference Committee Report, Appropriations for the 2014–15 Biennium, Legislative Budget Board (June 2013).

Self-insurance as an ObamaCare Alternative

The Issue

The Patient Protection and Affordable Care Act (ACA) requires most Americans to have health insurance by March 31, 2014, or else pay a penalty. Those not insured through an employer-sponsored health plan must obtain individual coverage, which must comply with a host of regulations and include certain essential health benefits (EHBs), whether they are sold on or off the Health Insurance Marketplaces (exchanges) created by the ACA. Carriers on the individual market must offer coverage without regard to health status or gender, and are restricted in their ability to vary rates based on age.

These regulations have driven up the cost of individual and small group coverage significantly, both in Texas and nationwide. Prior to the ACA, a 27-year-old man in Dallas, for example, could find catastrophic coverage for about $69 a month. But now, the lowest-cost catastrophic coverage available in the Dallas area on the federal exchange is $173 a month—a 150% increase.

Proponents of the ACA claim these higher costs are offset by subsidies, and while that is true for those with low incomes, people in their 20s and 30s who earn more than about 250% of the federal poverty limit (FPL)—about $29,000 a year—are not eligible for subsidies and must pay the entire cost of the premium out-of-pocket.

This presents a problem for uninsured working young people and also for many small firms that employ fewer than 50 people and do not offer health insurance (the ACA's employer mandate requires firms with 50 or more employees to offer their workers affordable health insurance beginning in 2015 or 2016, depending on the size of the employer). Small companies tend to have younger employees, who will face significant premium costs if forced to purchase individual coverage on the exchanges.

The Facts

- Those who fail to obtain ACA-compliant coverage must pay a fine. In 2014, the fine is $95 or 1% of income per person. The fine increases to $325 or 2% of income in 2015, and to $695 or 2.5% of income in 2016.

- The ACA authorizes the Department of Health and Human Services (HHS) to regulate health insurance issuers, which it defines as, "an insurance company, insurance service, or insurance organization (including a health maintenance organization, as defined in paragraph (3)) which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance." Therefore, if a state licenses an entity as a "health insurance issuer," the federal government is generally obliged to recognize the entity as such.

- The Texas House passed HB 2732 in the 83rd legislative session but the bill failed to pass the Senate. The bill would have created a mechanism for individuals to self-insure as "dedicated personal insurers" by authorizing a savings-based approach to health insurance that satisfied the ACA's individual mandate.

Recommendations

- The Legislature should pass an amended version of HB 2732 that requires a self-insurer to deposit funds equal to at least 8% of their adjusted gross income annually up to $60,000, after which no further deposits are required. These funds would be used to pay medical bills, and self-insurers would be issued a certificate of authority (COA) by the Texas Department of Insurance (TDI), thereby fulfilling the ACA's individual mandate.

- The state should establish a reinsurance program to encourage uninsured individuals to self-insure. The program would offer low-cost reinsurance to all those opting to self-insure, and could be funded with past and ongoing revenue previously dedicated to the Texas Health Insurance Pool (high-risk pool).

- For low-income individuals, the state could lower the 8% threshold for self-insurance on a sliding scale based on income and offer a partial state match to encourage the uninsured to participate.

Resources

The High Cost of ObamaCare Mandates in Texas' Individual Health Insurance Market by John Davidson, Texas Public Policy Foundation (Oct. 2013).

"Understanding the Dedicated Personal Insurer Act," Self Insured Americans, Inc. (Nov. 2013).

42 USC 300gg-91.

Scope of Practice for Nurse Practitioners

The Issue

In November 2013, New Mexico Governor Susana Martinez launched a campaign to actively recruit nurse practitioners (NPs) to her state as part of a broad effort to deal with a shortage of primary care physicians. Because NPs in New Mexico are allowed independent practice and prescriptive authority, Gov. Martinez highlighted neighboring states with more restrictive scope of practice laws, including Texas, where NPs are not allowed to run their own clinics or practice without physician oversight.

Texas is among a dozen states with relatively restrictive scope of practice regulations for NPs and advanced-practice registered nurses (APRNs). Unlike in neighboring New Mexico, Texas requires NPs and most other APRNs to practice with some form of supervision, delegation, or team-management by a physician (this varies based on the site and type of practice). Currently, 17 states allow APRNs and NPs to evaluate patients, diagnose, initiate and manage treatments, and prescribe medications—all under the authority of the state board of nursing.

For years, Texas has struggled with physician shortages, especially in rural areas. State lawmakers took steps to address the physician shortage in the 2013 legislative session by approving two new medical schools in Austin and the Rio Grande Valley. However, simply graduating more primary care physicians will not necessarily mean increased access to primary care in Texas. Graduating medical students can always move elsewhere. Indeed, beginning in 2014, Texas medical schools will graduate an estimated 28 more medical students than available first-year residency positions. In 2015, the number is expected to grow to 137.

Physician shortages will likely worsen with the implementation of the Patient Protection and Affordable Care Act (ACA), which will expand access to care by subsidizing coverage for low-income Texans and subsequently increase demand for primary care. Without an expansion and greater utilization of providers throughout the state, many of the newly-insured will face difficulties accessing care—just as those who currently have coverage face access problems in many areas of the state.

The Facts

- According to the U.S. Department of Health and Human Services (HHS), 126 of Texas' 254 counties do not have enough primary care physicians and are designated Health Professional Shortage Areas (HPSA), roughly defined as areas with a doctor-patient ratio of about one per 3,000 residents.
- Texas has 295 Medically Underserved Areas (MUA), more than any other state in the country.
- The U.S. Department of Health and Human Services (HHS) estimates that without expanding Medicaid, as many as 2.8 million Texans could gain coverage in 2014.

- SB 406, designed to expand scope of practice, kept in place numerous state regulations, including a prohibition on NPs collecting reimbursement by Medicaid managed care organizations (MCOs) if the supervising physician does not accept Medicaid or have a contract with the patient's MCO.
- The utilization of nurses as primary care providers is an emerging trend nationwide. The number of Medicare patients who received primary care from NPs rose 15-fold between 1998 and 2010.
- A survey of 37 articles published between 1990 and 2009 on the quality, safety, and effectiveness of primary care provided by NPs compared to physicians found that outcomes were comparable across all categories.
- Basic health care services provided by NPs in retail clinics have been shown to be associated with lower costs per visit, and eliminating scope of practice restrictions could have a large effect on cost savings that NP-operated clinics are able to achieve.

Recommendations

- To remain competitive with other states and fill persistent gaps in health care delivery, Texas lawmakers should expand scope of practice laws for APRNs—including NPs, certified registered nurse anesthetists, certified nurse midwives, and clinical nurse specialists.
- Texas law should mirror the most liberal scope of practice laws in the country, similar to those in New Mexico, such that APRNs are given prescriptive and diagnostic authority, the ability to operate independent on-site clinics, and serve as primary care providers.
- SB 406 should be revisited and legislation passed to enable NPs to be reimbursed by MCOs regardless of whether the supervising physician is contracted with the MCO.

Resources

An Update on Graduate Medical Education in Texas by Stacey Silverman, Ph.D., Texas Higher Education Coordinating Board, Presentation to the House Appropriations Subcommittee on Education (22 Feb. 2013) 8.

Medically Underserved Areas/Populations (MUA/P) State Summary of Designated MUA/P, Health Resources and Services Administration Data Warehouse, U.S. Department of Health and Human Services (accessed 12 May 2014).

The Eligible Uninsured in Texas: 6 in 10 Could Receive Health Insurance Marketplace Tax Credits, Medicaid or CHIP by Emily R. Gee, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (26 Mar. 2014).

"States With The Least Restrictive Regulations Experienced The Largest Increase In Patients Seen By Nurse Practitioners," by Yong-Fang Kuo, Figaro L. Loresto, Jr., Linda R. Rounds and James S. Goodwin, *Health Affairs,* 32, no. 7 (2013): 1236-1243.

State Supported Living Centers (SSLCs)

The Issue

State Supported Living Centers (SSLCs), formerly known as state schools, are an increasingly inefficient and ineffective system of care for those with intellectual and developmental disabilities. The current state-run, institutional system is a Medicaid-funded program that suffers from higher provider rates but lower quality of care than privately-run facilities in the community. Past efforts to address these problems have yet to yield substantive reform.

Even before federal intervention arising from the *Olmstead* decision in 1999, states had been closing their state institutions and moving toward community care—the result of a movement by parents begun in the 1940s. Today, 12 states and Washington, DC, have closed their large public institutions—Alabama, Alaska, Hawaii, Maine, Michigan, Minnesota, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and West Virginia. While the Department of Aging and Disability Services (DADS) has made tremendous progress in moving individuals to community care, consolidation of the facilities has not occurred in Texas, primarily because of legislative opposition. The resulting lower census per facility has increased costs per resident and aging structures require high maintenance costs.

Reports of deaths in the Lubbock SSLC and abuse in other facilities led to an investigation by the U.S. Department of Justice (DOJ) in 2005. The State of Texas entered into a settlement with the DOJ in 2009 that would ensure the standards in the SSLCs adhered to generally accepted standards of care, that protections were in place, and that residents would be given the choice to transition to community services. Despite significant reforms and increased expenditures, none of the 13 facilities have yet to achieve more than 40% substantial compliance with the provisions of the settlement.

The Facts

- Institutional care for persons with developmental disabilities in Texas is provided through SSLCs. These institutions were initially fully funded by the state and called state schools. In 1971, Congress authorized a new optional benefit to Medicaid—Intermediate Care Facilities for the Mentally Retarded (now referred to as ICF/IID facilities)—that brought federal funding for institutional services that are matched by state dollars.
- A 2013 brief by the Legislative Budget Board stated, "Texas continues to operate SSLCs despite 40-year nationwide trends of deinstitutionalization and expansion of community services, as well as ongoing quality of care concerns at the SSLCs highlighted by the Department of Justice."
- DADS operates 12 SSLCs across the state—Abilene, Austin, Brenham, Corpus Christi, Denton, El Paso, Lubbock, Lufkin, Mexia, Richmond, San Angelo, and San Antonio—and contracts for IDD services at the Rio Grande State Center for a total of 13 sites, each of which is named in state statute.

- Texas maintains the highest number of SSLCs in the nation. California and Florida each operate five state facilities. Michigan operates none.
- The average monthly census in the facilities has declined 74% from 1973 to 2013 (from 13,700 to about 3,600). The last SSLC closure was in 1996, yet despite a 42% decline in census since that time, all 13 facilities remain open.
- The DADS operating budget indicates the average monthly cost per individual served in a SSLC for FY 2011 was $17,521 compared to a community ICF-IID rate of $4,813. FY 2014 budget increases the SSLC cost 26%.
- Cost per individual in SSLCs excludes repair and renovation of more than $6.4 million in FY 2013 and $49 million in FY 2014. Capital costs are not reimbursed separately in community care and are instead included in the rate.
- The DADS operating budget also anticipates 514 confirmed incidents of abuse, neglect, or exploitation (ANE) at SSLCs in FY 2014.

Recommendations

- The number of SSLCs should be reduced through consolidation and closure from 13 to no more than 5 over the next two biennia.
- Ultimately, only forensic facilities should remain, and only in areas with adequate access to behavioral health specialists in the community.
- The movement toward services provided in the community will continue to decrease the census in the state's 13 SSLCs. Yet DADS is unable to adequately respond without clear legislative direction.
- Criteria should be established for closure based on factors such as census, ability of staff to achieve substantial compliance with the DOJ settlement, survey of private sector interest in adding capacity in the area, and the condition of SSLC facilities.

Resources

Privatize State Supported Living Centers by Arlene Wohlgemuth and Spencer Harris, Texas Public Policy Foundation (2010).

The Case for Inclusion: An Analysis of Medicaid Outcomes for Americans with Intellectual & Developmental Disabilities, United Cerebral Palsy (2013).

DOJ Monitoring Reports, Disability Rights Texas (2013).

Downsizing of the State Supported Living Center System, Legislative Budget Board Staff Issue Brief (Jan. 2013).

Rider 28 Cost Comparison Report, Texas Dept. of Aging and Disability Services (2011).

Parallels in Time: A History of Developmental Disabilities, The Minnesota Governor's Council on Developmental Disabilities (2006).

State Employee Health Benefits

The Issue

The Employees Retirement System of Texas (ERS) oversees state employees' retirement and insurance benefits. ERS provides health care benefits through their Group Benefit Program (GBP).

In 2009, Texas was one of only 14 states to fully fund employee health benefits. Steadily rising health care costs have made it difficult for many private employers to fully fund employee coverage, and now states are feeling the strain. Since 2004, total annual health care costs for a typical family of four covered by an employer-sponsored plan has increased 107%. Last year, average costs increased 5.4%.

Given these rising costs, it is reasonable to ask state employees to contribute to the cost of their health insurance—and they have been. Individual state employees have seen an increase in their exposure to risk through higher co-insurance and co-payments. In addition, lawmakers passed reforms in 2003 that increased employee cost-sharing and implemented a 90-day waiting period for new hires. In 2013, lawmakers addressed the doubling of retirees since 1995 by passing a tiered contribution strategy for retirees that requires at least 20 years of service in order to qualify for 100% member contribution from the state, 50% for 10-15 years, and 75% for 15-20 years of service.

Nevertheless, appropriations for employer contributions for state employee health benefits have increased 49.0% over the last decade, an average biennial increase of 9.8% that's been driven by an increase in cost and an increase in the number of state employees. Individual state employees are not required to contribute to their health insurance premiums, and 50% of dependent coverage is paid by the state.

In addition to legislative changes, ERS has made improvements in cost containment in the GBP over the last few years, and it is in better condition than many other state employee health benefit funds across the nation. The GBP could be further strengthened through new choices for state employees.

A 2009 monograph by the American Academy of Actuaries on health savings accounts (HSAs) indicated that savings in the first year were 12 to 20% and there was a rate of inflation in subsequent years of 3 to 5%—roughly half of that in traditional plans. While ERS has indicated no immediate savings from implementing HSAs, experience in the private sector and other state governments has been in line with the Actuaries report. In Indiana, state employees were offered the option of HSAs in 2006. That year, only 4% enrolled in the plan. By 2010, 70% were enrolled, and by 2012, enrollment reached 92%. Indiana state employees averaged $1,800 in their individually-owned accounts in 2012 for a combined total of $55 million. The state saved $15-25 million per year on its employee health care expenses.

The Facts

- In FY 2015, ERS will provide insurance benefits to more than a half million state employees, retirees, and dependents.
- The FTE cap in FY 2015 in the General Appropriations Act was 218,367 compared to the FTE cap in FY 2013 of 235,047, a decrease of 16,720 due to the

removal of patient income as an appropriated method of finance.

- Nevertheless, the appropriation for the ERS Health increased $533.2 million over the amount expended in 2013, a 20.5% increase.
- The cost of compliance with the Affordable Care Act in 2015 is estimated to be $121.2 million.
- Texas pays the full cost of the premium for state employees and half the cost of the premium for an employee's dependents, a total appropriation of about $3 billion for the 2014-15 biennium.
- Texas is among only a handful of states that cover the full cost of health insurance for state employees. Employees also have the option of participating in the TexFlex program—a Flexible Spending Account to which they make pre-tax savings deposits for out-of-pocket health and child care expenditures. The maximum contribution to TexFlex was cut in half to $2,500 in 2013 by the Affordable Care Act.
- In Plan Year 2004, the premium for employee-only benefits was $300 per month; for Plan Year 2013, the average monthly cost was $416.
- ERS commissioned a Milliman study on the offering of an HSA to state employees. The state has long past the recommended start date of September 1, 2009. Had the state begun offering the HSA as an option, we would now be seeing the slower cost growth that HSAs have been shown to afford; their growth is roughly half the rate of traditional health insurance.
- Many states make large contributions—$2,750 annually in Indiana's case—to employee HSAs, and yet still realize significant cost savings.

Recommendations

- Readjust cost-sharing for state employees, requiring them to pay a portion of the monthly premium.
- Offer state employees the option of a high deductible health plan (HDHP) with an HSA to control costs.
- Fund a significant portion of the HSA for employees who choose a HDHP to incentivize enrollment in the HSA option.

Resources

"Fiscal Size-Up" 2014-15 Biennium, Legislative Budget Board.

Putting Citizens in Control of their Healthcare: Indiana's Nationally-Recognized Consumer-Driven Approach to Healthcare Reform, Sagamore Institute (June 2013).

Cost Management and Fraud Report 2013.

State Employee Benefits, National Council for State Legislatures (Jan. 2012).

2012 Comprehensive Annual Financial Report, Texas Employees Retirement System.

Provide Greater Choice and Efficiency in Texas Education

K-12 Education

K-12 Education

Constitutional Efficiency of Texas Schools

The Issue

Article VII of the Texas Constitution states: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

The education we provide to our children reflects not only who we are as Texans, it also shapes our future as a state. If we do not educate our children today, they will be ill-equipped to defend their liberties and rights tomorrow. This is why, as the Texas Supreme Court has said, the focus must be on results.

Since 1989, the Texas Supreme Court has ruled six times on school finance. In *Edgewood I,* the Court defined efficiency: "Efficient conveys the meaning of effective or productive of results … with little waste." The Court has repeated this definition in subsequent decisions, indicating that efficiency is defined by the relationship between inputs and outcomes.

Unfortunately, money has been the recurring theme when the Legislature deals with education because that has been the focus of the press, public, and interest groups. Additionally, all past litigation efforts by plaintiffs have focused only on money and how it is allocated among districts. Litigants have ignored a more fundamental problem. "Pouring more money into the system," concludes the Court in *West Orange Cove*, "may forestall those challenges, but only for a time." The solution to the fundamental problem is one which the Legislature—not the Court—must address. The solution is to shift the focus away from the details surrounding school finance and toward the educational benefits Texas children would be given through a system of competition.

The Court expressed a desire to address competition, but admitted that judicial constraint limited it from doing so: "It is true that the plaintiffs and intervenors here have focused on funding, but parties to a lawsuit are entitled to choose the issues to be raised. We cannot dictate how the parties present their case or reject their contentions simply because we would prefer to address others. Perhaps, as the dissent contends, public education could benefit from more competition, but the parties have not raised this argument, and therefore we do not address it." The Court then explained that "The Legislature may well find ways of improving the efficiency and adequacy of public education—ways not urged by the parties to this case—that do not involve increased funding."

Although the focus of all past school finance litigation has been on adequacy and equity, the court has specifically noted that these are only "implicit" constitutional requirements whereas efficiency is an "explicit" requirement of the constitution. The issue of real efficiency is now before the court for the first time. Currently it is virtually impossible to measure efficiency due to the lack of financial data which would enable meaningful cost benefit analysis and rational

resource allocation decisions. Failure to collect and use financial data in an effective manner to maximize productivity is inherently inefficient.

In addition to the financial accountability problem, many state mandates and laws force districts to allocate resources in manners which fail any rational efficiency test. For example the one-size-fits-all mandates in Chapter 21, and other sections of the education code, force every district to misallocate resources which they might have been able to use more productively if given the freedom to do so.

The Texas Supreme Court, which has dealt with school finance reform for the last 30 years, has repeatedly encouraged the Legislature to make structural reforms to the system. These reforms should offer Texas children the lasting promise of an excellent education.

The Facts

- Although the state constitution requires public funding for education, it does not require that educational services be delivered by school districts, nor any other public entity.
- In Texas public schools, academic research shows no relationship between spending levels and student achievement levels.
- Only 78.9% of high school students in Texas' public schools graduated 4 years after they began high school.
- Although student scores have improved on state tests, scores have remained relatively flat on nationally normed tests, such as the SAT & ACT, over the past several decades.
- The "Instructional Spending" category accounts for the largest section of the education budget: 57% in 2012-13, and is a very broad category including items such as teacher salaries, classroom supplies, vehicles used for instructional purposes, and all costs associated with these items.
- No adequate financial accountability system is in place, to accurately determine how billions of dollars are allocated, from a production management point of view.
- It is impossible to know if current funding levels are either equitable or adequate because no one can determine if available resources are being allocated in effective and productive manners to achieve the intended result.
- Mark Hurley, a Dallas venture capitalist, testified in the school finance trial that if a publicly traded company were to report its finances the way our schools do, then the executives would be subject to both criminal and civil penalties.
- Chapter 21 of the education code forces districts to allocate resources in less efficient manners than they could if allowed to make local choices.

continued

Constitutional Efficiency of Texas Schools (cont.)

- The Cost of Education Index is based on 1989 data and woefully out of date. It acts as a multiplier for all formula funding and therefore allocates hundreds of millions of dollars inaccurately and inefficiently.
- Investments in new facilities have outpaced enrollment in recent years, signaling inefficiency. According to the Comptroller's Office, debt service rose by 103% while enrollment grew by 19%.

Recommendations

- Commission an independent third party to study the efficiency and productivity of K-12 education.
- Enact comprehensive school choice legislation, allowing money to follow a child, rather than institutions.
- Redefine the state's responsibility for education under the Constitution.
- Revamp the financial accountability system so that decision makers have better access to meaningful data to maximize value in the allocation of limited resources.
- Review all state mandates and remove those which drive inefficiency.
- Sunset Chapter 21 of the Education Code.
- Update the Cost of Education Index and establish a mechanism to assure it is perpetually updated to accurately allocate scarce resources without waste.

Resources

Texas Education: Original Intent of the Texas Constitution by Kent Grusendorf, Texas Public Policy Foundation (July 2014).

Putting the Student First: School Finance in Texas by James Golsan, Texas Public Policy Foundation (July 2014).

The Mumford Model: Better School Districts Through Efficiency by Jess Fields, Texas Public Policy Foundation (May 2014).

Public School Construction Costs by Susan Combs, Texas Comptroller of Public Accounts (June 2014).

Finding Real Efficiency in Texas Public Schools by James Golsan, Texas Public Policy Foundation (Jan. 2012).

No Financial Accountability by Mark Hurley, Texas Education Accountability Project (Mar. 2012).

What Keeps Texas Schools from Being as Efficient as They Could Be? by Dr. Paul Hill (July 2012).

Report for the Efficiency Interveners by Eric Hanushek (July 2012).

Educational Freedom & School Choice

The Issue

Every Texan should have the freedom to select the best school for their child. In Texas, 94.4% of school students attend a public school. This gives the government a virtual monopoly over K-12 education. There is a remarkable difference between Texas' K-12 schools and its higher education system. In the latter, colleges and universities must compete for enrollment by meeting student needs. Ultimately, the choice is in the consumer's hands.

In the K-12 system, on the other hand, students are assigned to a school based on their zip code. Such a system leaves students with little choice over their education. A family's only alternatives are to move to a different neighborhood, send their child to a private school, or homeschool. All three of these alternatives require an extraordinary time or financial commitment from parents. For example, homeschooling is exceptionally difficult for a single working parent. Similarly, private school tuition is difficult to afford for a low-income or large family.

Why shouldn't all families have freedom of choice, especially if allowing them to do so would provide taxpayers with huge savings? Some parents, rich or poor, have children who do not feel safe at their assigned school. Some students have special needs which might be best met with a different setting. Some parents may have religious concerns over what is being taught. Freedom demands that individuals make individual choices. It would be irrational to demand that every Texan purchase their groceries at HEB, and pay for them even if you didn't eat them.

In economic terms, it is very difficult to address diverse needs with a uniform product: how difficult would it be for automobile manufacturers, restaurants, hairdressers, and barbers to satisfy all of their clients with a single, uniform product or service? Fundamentally, preserving freedom and liberty is the very purpose of public education as it is established in Article VII, Section 1 of Texas' Constitution. It would be contradictory if the education established to protect freedom and liberty eroded both.

Texas teachers also deserve greater freedom. An often heard complaint is that teachers are not treated as professionals. Just as students are trapped in a one-size-fits-all system, teachers are too. A more robust choice system would enable greater freedom for teachers to practice their profession in environments which they choose. In addition, teachers could earn considerably more money if universal school choice were adopted in Texas. As several experts testified in the 2013 trial, districts now have monopsony power over the teacher labor market and therefore keep salaries artificially low. With additional competition for their services teachers would earn more. In fact, Dr. Jacob Vigdor, an expert witness hired by the school districts that are suing the state for more money, testified that Texas should not pass school choice because then school districts would have to pay teachers higher salaries.

continued

Educational Freedom & School Choice (cont.)

The empirical evidence is overwhelming: With school choice traditional public schools would improve, students would be better served, teachers would make more money and enjoy better working conditions, the Texas overall economy would receive a major boost, Texas' system of public free schools would be more efficient, and depending on how the choice program were structured, taxpayers could save billions. A focus on these principles could make Texas the national leader in K-12 education.

Two ways to achieve this objective are **Taxpayer Savings Grants** and **Taxpayer Savings Credits.**

Taxpayer Savings Grants would make Texas the nation's education leader. Herbert Walberg, a Harvard economist, has said that this plan "may be the last, best hope for American K-12 education." The voluntary program would allow parents to seek out a school beyond the one to which their child is assigned. In accordance with Article VII, Section 1 of the Texas Constitution, by which the state has the duty to provide the public with an education, parents would be given a grant for their child's education.

As proposed by SB 1575 and HB 3497 in the 82nd Texas Legislature, the grant would provide 60% of the state average Maintenance & Operation (M&O) expense. With the most recent average M&O expenditure at $8,276 per student, parents would receive about $5,000 per child. Based on the most aggressive participation rates, the program would roughly offset current public school enrollment growth.

The Taxpayer Savings Grant program would also provide significant savings to the state. Using the best projections, the savings would be about $2 billion in the first biennium. Using more moderate participation rates from TEA and LBB, the savings would still be substantial. Per the TEA projections, $2 billion could be saved over about five years, and with the most conservative participation estimates of the LBB, $2 billion would be saved over about seven years.

Taxpayer Savings Credits are another alternative to provide Texas children the ability to search out and enroll in a school that meets their particular needs. This credit would allow parents or businesses to claim a credit against their tax bill if they pay for tuition or provide financial assistance to fund scholarships. Parents who don't pay enough property taxes to get an adequate credit would then be able to draw on these funds by applying for scholarships for their child.

Like the Taxpayer Savings Grant, the maximum scholarship could be set at 60% of M&O expenditures, or about $5,000. Some combination of a corporate and individual tax credit has been adopted in 13 states: Alabama, Arizona, Florida, Georgia, Indiana, Iowa, Louisiana, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Virginia. The credits in these states have led to the establishment of scholarship funds totaling about $550 million in the 2013-14 school year. These scholarship tax credit programs give families greater access to high-quality schools by providing incentives for businesses and individuals to get involved in education reform.

The Facts

- Teachers now earn less than they could due to the monopsony power districts have over the labor force. Additional competition for teachers' services will positively impact teacher pay.
- Studies indicate that where school choice has been implemented public schools have improved. Additionally, school choice will offset public schools' enrollment growth.
- The purpose of the education clause in the Texas Constitution is the preservation of the liberties and rights of the people.
- School choice has the potential to save taxpayers billions while at the same time providing superior educational opportunities to Texas students.
- At present, Texas has very few policies that encourage competition and efficiency in its public schools.
- With passage of either the Taxpayer Savings Grant or Taxpayer Savings Credit the financial effect on a public school will be exactly the same as if a student moves out of the district.

Recommendations

- Assure that every Texas child can choose schools that best meet that individual child's needs.
- Maximize parental freedom and educational opportunity for all Texas students.
- Enact the Taxpayer Savings Grant Program.
- Enact the Taxpayer Savings Credit Program.

Resources

School Choice for Texas: Empowering Parents & Improving the Futures of Texas Students by James Golsan, Texas Public Policy Foundation (Jan. 2013).

Expert Witness Report of Allan Parker for Efficiency Interveners (Oct. 2012).

Budget Impact of the Texas Taxpayers' Savings Grant Program by Joseph Bast, et. al., The Heartland Institute (Apr. 2011).

How Teachers in Texas Would Benefit from Expanding School Choice by Joseph Bast, et. al., The Heartland Institute (Apr. 2011).

Education Vouchers Benefit Edgewood Students by John Merrifield, The National Center for Policy Analysis (Mar. 2010).

Should Texas Adopt a School Choice Program? by John Diamond, Texas Public Policy Foundation (Mar. 2007).

Innovation in Choice

The Issue

In 23 states across the nation, there have been 10 distinct programs allowing school choice: Scholarship Tax Credits, School Vouchers, Charter Schools, Education Savings Accounts, Homeschooling, Virtual Schools, Individual Tuition Tax Credits, Magnet Schools, Public School Choice, and Course Choice. These programs promote opportunities for children who would otherwise not have choices in their education.

Texas is behind these states in school choice. Neighbors to the North and East have outpaced Texas. In 2010, the Oklahoma state legislature established the Lindsey Nicole Henry Scholarship Act, a program that would allow special needs children to receive a grant that would follow them to the school of their parent's choice. The grant is valued at either 100% of the state and local public school funding for each child or the tuition and fees of the private school in which the child becomes enrolled. In Louisiana, two broader programs were enacted in 2008 and 2010. In 2008, the state created a program that allowed students who are 1) from low-income families or 2) who attend a school rated C, D, or F or 3) who are entering kindergarten, to receive funding to attend the school of their choice. Funding is equal to the lesser of state and local per-pupil funding or the tuition and fees of the new school. The program has proved popular, with enrollment increasing from 640 children in 2008 to 6,775 children in 2013. In 2010, Louisiana created a program similar to Oklahoma's, which allows special needs children to transfer to the school of their choice. In both programs, all schools comply with nondiscrimination laws.

Our neighbors to the West are also expanding their school choice programs. Arizona is leading the educational choice movement with a variety of options for parents, including Tuition Tax Credit Scholarships, open enrollment charter schools, and Empowerment Scholarship Accounts. (ESAs) An ESA, which is unique to Arizona, allows parents to customize their child's education according to how they learn. ESAs were established in 2011, and give more freedom to parents than any other educational choice program in the entire country. There is not a specific funding appropriation. Rather, parents are given funds by the state to pay for private school tuition, online curriculum, home schooling, tutors, or therapists. The cap on Scholarships is equal to 90% of the charter school per-pupil base funding. Approximately 5,500 new students can receive an ESA each year. ESAs are currently available to students with special needs, children in failing schools, foster children, and children from active duty military families. ESAs are also available to students who were attending public school and then transferred to a qualified private school. Several other eligibility expansion proposals are being considered by Arizona legislators, including eligibility by income and automatically qualifying children of first responders. This would open up the ESA program to half of Arizona's student population. The program is now being considered by legislators in Oklahoma, Iowa, and Mississippi.

The Facts

- 83% of principals and 78% of teachers identify addressing the individual needs of diverse learners as challenging or very challenging, according to a 2013 national survey of educators.
- Since 1990, 18 states, Washington D.C., and Douglas County in Colorado, have established private school choice programs for a total of 23 states which now have some form of private school choice.
- Since 2000, enrollment in school choice programs has increased from 29,003 students to 308,560 students.
- A total of $1.2 billion has been expended for private school choice programs: $662 million for Vouchers, $551 million for Scholarship Tax Credits, $10.2 million for ESAs, and $275 million for Special Needs Scholarship Programs.
- The average scholarship amount to private school choice programs is $3,780. However, the average cost differs by program: for Vouchers it's $6,210; for Scholarship Tax Credits it's $2,282; for ESAs it's $13,000; for Special Needs Scholarships it's $7,025.

Recommendations

- Consider all forms for expansion of private school choice in order to better serve Texas students and make the system of public free schools more efficient.
- Commission an independent third party to study the efficiency and productivity of K-12 education, with a focus upon gains that can be won through greater competition and supply side change.

Resources

School Choice Yearbook 2013-14: Hope. Action. Results by Matt Frendewey, et. al., Alliance for School Choice (2014).

Oklahoma May Become Second State to Offer Education Savings Accounts by Kathlyn Shirley, The Heartland Institute (Apr. 2014).

The MetLife Survey of the American Teacher: Challenges for School Leadership by Dana Markow, et. al., MetLife, Inc. (Feb. 2013).

The Education Debit Card: What Arizona Parents Purchase with Education Savings Accounts by Lindsey Burke, The Friedman Foundation (Aug. 2013).

Education Savings Accounts: Questions and Answers by Jonathan Butcher, Goldwater Institute (Mar. 2012).

How Teachers in Texas Would Benefit from Expanding School Choice by Joseph Bast, et. al., The Heartland Institute (Apr. 2011).

Charter Innovation

The Issue

One major possible way of increasing the efficiency of the education system is through expansion of the charter system. Charters provide the choice and competition needed to drive improvements to better meet consumer demand. However, charter schools are greatly restricted from growing naturally. This is true primarily due to resistance from traditional school leaders and system stakeholders. These groups fear change and have a vested interest in the *status quo*. Texas should remove the restrictions inhibiting educational innovation and act in the best interest of the students and taxpayers.

At a minimum, Texas should allow greater student participation in the charters and authorize two new categories of charters as follows.

Professional Charter Academies
In every other profession (law, medicine, accounting, engineering, etc.), professionals are afforded the opportunity to control their professional activities and reap the rewards of their individual talents through management of their own professional enterprise. A lawyer can begin his own firm, a doctor, his own practice. However, because of the way the legislature has structured and funded education in the past, most educators do not have that same opportunity.

The average elementary school class size is 18 students; in high schools, the average class size is 27. We spend about $215,000 on each elementary school class and about $325,000 on each high school class. Yet teachers are only paid a fraction of that, averaging $48,110.

At the same expenditure levels, a small group of teachers could rent a house or other suitable facility, cover all expenses and still potentially double their take home pay. Under the professional charter plan, experienced educators would be able to start their own schools and receive state funding like other charter holders. Then, great teachers would be fairly rewarded for their efforts and talents.

Educators with five years of experience and proficient appraisals would be entitled to be issued a professional charter. No students would be assigned to their schools; however, any Texas student would be eligible to attend. The state would reimburse the professional charter holder at the end of the school year.

Universal Charter Schools
Allowing universal charter schools would expand upon Texas' tradition of successful charter schools, permitting any student, regardless of income, school, or geography to attend a charter school of their choice. This would give parents and students increased choice, and give charter schools more freedom, for example, to operate in public or private buildings, or through virtual education online.

Universal charter schools would be freed of state restrictions except for basic education requirements, and health and safety requirements.

This would provide schools with the flexibility needed to meet the requirements of a diverse student population. Greatly expanded choice will also allow parents to find the schools most capable of fulfilling their child's individual needs. Accountability will be increased because, as with our university system, schools would compete for students by meeting their needs. Overall, universal charter schools would provide the ultimate in choice for the students of Texas.

The Facts

- Education is still primarily delivered through an assembly line institutional system designed over a century ago.
- Many school administrators oppose expansion of student and teacher choice due to self-interest.
- Educators are professionals who are not given the same opportunities as other professionals.
- Many great teachers leave the profession with frustration.
- According to NEA polls, teachers are not feeling trusted or respected by their administrators.
- Restricting supply side change has protected the status quo at the expense of Texas students, taxpayers, and teachers.
- Artificial restrictions on the number of Open Enrollment Charter Schools prohibit many students from exercising their freedom of educational opportunity. Over 100,000 children are on charter school waiting lists.

Recommendations

- Amend the charter school laws to allow teachers to form Professional Charter Academies, giving them the respect that they have requested.
- Implement Universal Charters so that every Texas student has the option to select a better school.
- Remove the artificial cap limiting the number of Open Enrollment Charter Schools and otherwise allow for supply side change.
- Lower the restrictions on charters to allow market forces to shape standards.

Resources

What Keeps Texas Schools from Being as Efficient as They Could Be? by Dr. Paul Hill (July 2012).

Expert Witness Report by Allan Parker Jr. (July 2012).

"Would School Choice Change the Teaching Profession?" by Caroline Hoxby, *Journal of Human Resources* (Fall 2002).

Education Technology

The Issue

Over the past few decades, technology has dramatically changed most every profession and every enterprise. In doing so, technology has greatly improved productivity in most human endeavors. However, the education system operates in basically the same style as it did a century ago.

Technology has vast potential to improve educational quality and efficiency. Virtual learning is just one particular application in a field of possible improvements. Additionally, technology provides massive opportunities in areas such as student assessment, teacher feedback, remediation, and many other areas.

Today, when you check-out at Wal-Mart or HEB, the item is scanned. That scan not only tracks your purchase, it provides important backlog and production feedback. The vendor knows immediately which items need to be replaced on the market shelf and which are remaining. In education, the teacher does not receive feedback on student test results for weeks or months. In fact, too often in education we use multiple-choice questions to simplify the process, whereas with technology, more in-depth answers could still be evaluated quickly. With the use of technology, questions could require actual answers rather than just simple multiple-choice questions, especially in courses like math or history. Teachers could receive immediate performance feedback along with remediation recommendations for their students.

No one knows the full array of possibilities that could be achieved in education with improved technology. Currently, because we have a top-down government-run system, statutory restrictions frequently inhibit innovation. Stakeholders in the *status quo* lobby to keep and implement rules and regulations that protect the current system at the expense of the students and taxpayers.

Virtual learning is education's newest frontier. Although its full potential is still unknown, one thing is certain: we have only scratched the surface in unleashing the enormous potential recognizable within education technology. Great benefits await Texans, both students and taxpayers, in the form of greater efficiency, higher productivity, improved learning, and lower dropout rates.

Despite the fact that Texas has made some minimal progress in technological advances through the Texas Virtual School Network, the state's general policies in this arena remain far too restrictive. Most of these restrictions are promoted and held in place by pressure from stakeholders of the current system. They believe it is in their interest to protect the *status quo* at the expense of Texas students. If virtual education and innovation is to flourish in Texas, the state must not only remove restrictions which inhibit the use of new technology, but it must also remove policies that add needless red tape and expense to technological expansion in Texas classrooms.

The Facts

- Texas regulations restrict virtual learning and technological innovation in the education system.
- Texas trails behind other states in technological innovation, especially Florida and South Carolina.
- Analysis performed by the U.S. Department of Education found that online students perform more highly than traditionally educated students overall.
- Virtual education is rapidly growing across the nation and action is needed to prevent Texas from being further eclipsed.

Recommendations

- Remove restrictions to virtual learning and allow greater innovation.
- Fund education and schools by course rather than by average daily attendance (ADA).
- Accelerate implementation of interactive online administration of state assessments.
- Encourage the use of blended learning as a teaching tool in Texas classrooms.
- Allow every public school to run their own virtual education shop, rather than running through the red tape of the virtual school network process.
- Allow greater freedom for private providers of virtual education.
- Allow more flexibility for private and homeschooled students to be involved in publicly provided virtual education in Texas.

Resources

Virtual Education and the Future of Texas Education by James Golsan, Texas Public Policy Foundation (Mar. 2012).

Virtual Schools: The Future is Now by James Golsan, Texas Public Policy Foundation (Mar. 2011).

Virtual Learning Across the Nation by James Golsan, Texas Public Policy Foundation (Aug. 2011).

Report for Texas Efficiency Litigation by Terry Moe (July 2012).

What Keeps Texas Schools from Being as Efficient as They Could Be? by Dr. Paul Hill (July 2012).

Teacher Quality and Compensation

The Issue

Nothing besides a student's family is more important to educational success than a great teacher. Therefore, we must return to a focus on campus leadership because it is important for policymakers and the public to learn from those who are closest to the classroom.

Likewise, children must be the focus of any conversation about school budgets. The first questions that should be asked: "How much of our spending gets to the students in the classroom?" Texas spends $12,106 per student each year. In Texas, the average elementary school class size is 18 students; in high schools, the average class size is 27. Therefore, Texas spends about $215,000 per elementary school class and about $325,000 per high school class. However, the average Texas teacher's salary is only $48,110.

A particular roadblock to empowering principals and local school boards is Chapter 21 of the Education Code. Meria Carstarphen, former superintendent of the Austin ISD, provided insight on this. She was formerly superintendent of St. Paul Public Schools in Minnesota, which is not a Right to Work state. Yet, she testified that Texas labor laws make it more difficult to manage labor than the union states she previously worked in. She found that Texas' Chapter 21 labor laws add up to $80,000 to each dismissal process. These labor laws harm the teaching profession, and force misallocation of resources.

California, not exactly a free market leader on labor issues, recently had a court rule that its tenure laws deprive students of their constitutional rights. The court said: "Substantial evidence presented makes it clear to this court that the challenged statutes disproportionately affect poor and/or minority students. The evidence is compelling. Indeed, it shocks the conscience."

Teachers must be allowed to take on leadership roles. Teacher leadership has the potential to translate big challenges into opportunities if teachers are allowed to serve in hybrid roles that give them the power over their own professional growth and job satisfaction. Throughout recent budget cuts, teachers have emphasized that collaboration with their colleagues is most helpful. The annual MetLife survey of teachers concluded, "In 2009, nine in 10 teachers agreed that other teachers contribute to their success in the classroom."

With this in mind, we propose that educators who wish to take on leadership roles should be fully supported by the Legislature: a group of professional educators should be entitled to their own professional academy. Teachers who have been rated "proficient" for five years should be eligible to apply for a Professional Charter. Upon receiving a charter, these professional educators would be entitled to open a school. Funding per student would be equivalent to the state average funding per student for open-enrollment charter schools. Then, just as doctors and lawyers can establish their own professional practice and share in their own success, so could professional teachers.

The Facts

- Becoming a teacher in Texas requires a lengthy certification process that makes it difficult for otherwise qualified individuals to enter the teaching profession.
- Texas' state salary schedule requires school districts to give annual raises to all instructors in the district based on longevity within the profession.
- Advanced degrees do not correlate with higher student achievement, yet they usually lead to higher pay.
- Educators in Texas are generally granted "term contracts." However, the state Term Contract Nonrenewal Act has the same effect as teacher tenure provides in other states.
- It is extremely difficult to dismiss ineffective teachers in Texas. Labor laws protect employees at the expense of good teachers, taxpayers, and students.
- Teachers are paid less than market rates due to the monopsony power of school districts.
- Texas teachers in metropolitan areas could earn another $12,000 annually if universal school choice were adopted.

Recommendations

- Lower the barriers to entry for potential teachers by allowing individuals with strong credentials to more easily become teachers.
- Empower local school principals to determine teacher pay by eliminating Texas' minimum salary schedule which acts as a one-size-fits-all template and inhibits common sense resource allocations to the detriment of good teachers.
- Repeal Chapter 21 of the Texas Education code, which hurts the careers of great teachers by protecting the teachers that are demonstrably poor.
- Enable teachers to take on leadership roles by establishing a Professional Charter Program.
- Enact universal school choice to improve teacher pay and job satisfaction.

Resources

The MetLife Survey of the American Teacher: Challenges for School Leadership by Dana Markow, et. al., MetLife, Inc. (Feb. 2013).

No Financial Accountability by Mark Hurley, Texas Education Accountability Project (Mar. 2012).

Report for the Efficiency Interveners by Eric Hanushek (July 2012).

Expert Witness Report by Allan Parker Jr. (July 2012).

Provide Greater Choice and Efficiency in Texas Education

Higher Education

Higher Education

Higher Education Quality

The Issue

Texas higher education is in a crisis. Studies show that too many students learn too little. This deficit cannot help but have profound, destructive effects—both on workforce competitiveness and democratic deliberation.

While this is a Texas problem, it is far from Texas' alone. The academic world was rocked by the 2011 publication of the landmark study of collegiate learning, *Academically Adrift*. *Adrift* tracked a national cohort of college students for four years, measuring their fundamental academic skills—critical thinking, complex reasoning, and clear writing—in both their freshman and senior years, using the Collegiate Learning Assessment (CLA). The results are alarming: *Adrift* found that 36% of college students nationally show little to no increase in fundamental academic skills after four years invested in college.

We in Texas should be concerned that our students, too, have been cast "adrift." In March 2012, the *Washington Post*, through a freedom of information request, found that the University of Texas at Austin scores in the lowest quartile (the 23rd percentile) among peer institutions on the CLA; that is, 77% of UT's competitors scored higher. None of this denies that Texas boasts some of the most prestigious universities in the world, UT-Austin among them. Nevertheless, we can and must do better if Texas graduates are to compete effectively in our increasingly competitive global market.

Feeding on and fostering the student-learning crisis is the scandal of college grade inflation. Research reveals that, in the early 1960s, 15% of all college grades awarded nationally were A's. But today, 43% of all grades are A's. In fact, an A is the most common grade given in college today. Moreover, 73% of all grades now are A's or B's. Grade inflation is a cancer, devouring standards and disincentivizing student effort. As monetary inflation devalues the dollar, so grade inflation debases the currency of higher education—student transcripts.

Another area in which universities need to improve is the study of civics. In 2007, the Intercollegiate Studies Institute (ISI), a non-profit educational organization, issued a study that found Texas undergraduates fail at civics. Nationwide, 50 universities were surveyed, three of them in Texas—Baylor University, West Texas A&M, and the University of Texas at Austin. Nearly 1,000 Texas freshmen and senior students were given a 60-question test on American history and institutions. Texas students performed worse than their peers nationwide.

More troubling, the survey found that only 2.9% of students' civic knowledge is acquired in the college classroom. Texas' comparative deficiency in knowledge of civics is likely explained by another of the study's findings: undergraduates at these three Texas universities were below the national average in the number of history, government, and economics courses taken during college. In addition, a recent study demonstrates that UT-Austin and Texas A&M allow students to take Special Topics courses to satisfy the state requirement of two college American History classes. This undermines the 1955 law mandating these two classes. The law aims to require survey courses, not Special Topics courses, for Texas students, the overwhelming majority of whom are not History majors; thus, these two courses will

likely be their only introductions to collegiate-level American History.

The Facts

- Thirty-six percent of college students nationally demonstrate little to no increase in fundamental academic skills after four years in college.
- College grading standards have become so lax that, today, an A is the most common grade awarded.
- Texas students gain only 2.9% of their civic knowledge during college.
- Undergraduates at Texas universities are below the national average in the number of history, government, and economics courses taken during college.

Recommendations

- Institute reforms that tie university funding to student success results such as learning outcomes (as measured by, e.g., the Collegiate Learning Assessment or the Collegiate Assessment of Academic Proficiency), and employment outcomes five years after graduation.
- Simultaneous with the above, encourage university regents to institute measurements of learning outcomes at the freshman and senior years.
- Pass legislation requiring "Honest Transcripts," which provide, alongside the grade each student received for his/her class, the average grade given by the professor for the entire class.
- Encourage university regents and other administrators to institute reforms that place more focus on teaching students basic American history, government, economics, and Western Civilization.
- Building on the foundation laid last year by HB 1296, improve information systems by giving accessible data on student academic performance, graduation rates, post-graduate earnings, percentage of classes taught by part-time faculty, and evidence of post-graduate earnings (from sites like PayScale.com, etc.).

Resources

Combating the "Other Inflation" by Thomas K. Lindsay, Texas Public Policy Foundation (Aug. 2014).

(Not) Cheaper by the Dozen: 12 Myths about Higher Education's Cost and Value by Thomas K. Lindsay, Texas Public Policy Foundation (Dec. 2013).

Toward Strengthening Texas Public Higher Education: 10 Areas of Suggested Reform by Thomas K. Lindsay, Texas Public Policy Foundation (Dec. 2012).

Academically Adrift by R. Arum and J. Roksa (Chicago: University of Chicago Press, 2011).

Grade Inflation: A Crisis in Higher Education by Valen E. Johnson (New York: Springer-Verlag, 2003).

Texas Undergraduates Fail at Civics: ISI's American Civic Literacy Survey Results by Gary Scott, Texas Public Policy Foundation (Mar. 2007).

Higher Education Affordability

The Issue

In Texas, and nationwide, we face a crisis in higher-education affordability. Over the past quarter-century, college tuition and student-loan debt have escalated at unsustainable rates: According to one study, average tuition over this period has jumped 440%—four times the increase in general inflation and twice that of health care costs. To pay for these historic price increases, students and their parents have amassed historic debt. Student-loan debt now stands at $1.2 trillion, for the first time ever surpassing total national credit-card debt.

Between 2003 and 2009, the cost of attending Texas public universities rose 72% in constant dollars. Moreover, as reported by the Institute for Research on Higher Education, Texas "students and their families, already burdened by tuition hikes, have been forced to assume more responsibility for funding financial aid, too, through set-asides from tuition increases." The surge in tuition is pricing our top public universities out of the reach of middle-class families.

Fueled by easy money in the form of federally-subsidized student loans, decreased teaching and increased administrative spending serve as cause and effect of the affordability crisis. Massy and Zemsky's study finds the decline in teaching loads to be a natural response to incentives. Faculty promotion and prestige are based in large part on publications, which enhance a school's place in the *U.S. News* Best Colleges rankings, the holy grail of academic status.

More virulent is the explosion in administrative budgets. Benjamin Ginsberg's 2011 *The Fall of the Faculty* finds that "forty years ago, U.S. colleges employed more faculty than administrators. But today, teachers make up less than half of college employees." From 1947 to 1995, "overall university spending increased 148%. Administrative spending, though, increased by a whopping 235%. Instructional spending, by contrast, increased only 128%." Senior administrators have done particularly well. From 1998 to 2003, deans' and vice presidents' salaries increased as much as 50%, and "by 2007, the median salary paid to a president of a doctoral degree-granting institution was $325,000."

The public's anger over the affordability crisis has grown keen. A national Pew survey finds 57% of prospective students believe a college degree no longer provides value equal to its cost, and 75% deem college simply unaffordable. Baselice and Associates conducted a survey of Texas voters that was commissioned by the Texas Public Policy Foundation. It finds 71% of voters believe universities can improve teaching while reducing costs. When asked how schools should address shortfalls, voters' top three choices were reducing administrative overhead, delaying new facilities, and requiring professors to teach more. Raising tuition or taxes were the least favorable options, garnering 6 and 10% respectively.

The Facts

- In the last two years, a dozen Texas universities have launched $10,000 Bachelor's degrees. As a result, the governor of Florida recently called on his state's universities to do likewise.

- THECB reports that from 2003-09, statewide average academic charges for a student taking 15 semester credit hours at a public university increased 72%.
- "Forty years ago," reports Benjamin Ginsberg, "U.S. colleges employed more faculty than administrators. But today, teachers make up less than half of college employees."
- According to the Higher Education Employment Report, "colleges and universities continued to focus more on hiring administrators and executives over faculty in Q1 2012, although the rate of change has slowed."

Recommendations

- Require all Texas public university systems to institute a 10% cut in their administrative budgets.
- Require all Texas public universities to submit to THECB feasibility studies for crafting $10,000 degrees in their four most popular degree plans as well as for all degrees they offer in STEM subjects.
- Expand the online-degree rider that was added to HB 1 in 2011. The rider requires colleges and universities to submit cost studies of the four most popular degree plans that can be offered online. These studies should be expanded to include all STEM courses not covered by the first study, plus all lecture courses in all fields.
- Place a two-year moratorium on all new building projects in light of the increasing popularity of online courses.
- Require all non-Tier I public institutions to submit to THECB feasibility studies for changing the academic calendar to three semesters a year. Employing campus facilities year-round will reduce the relative per-student cost.

Resources

Anatomy of a Revolution? –The Rise of the $10,000 Bachelor's Degree by Thomas K. Lindsay, Texas Public Policy Foundation (Sept. 2012).

(Not) Cheaper by the Dozen: 12 Myths about Higher Education's Cost and Value by Thomas K. Lindsay, Texas Public Policy Foundation (Dec. 2013).

Toward Strengthening Texas Public Higher Education: Ten Areas of Suggested Reform by Thomas K. Lindsay, Texas Public Policy Foundation (Dec. 2012).

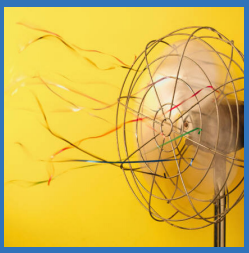
Hard Choices Ahead: Performance and Policy in Texas Higher Education by J. Finney, L. Perna, and P. Callan, Institute for Research on Higher Education (Apr. 2012).

The Fall of the Faculty: The Rise of the All-Administrative University and Why it Matters by Benjamin Ginsberg, Oxford University Press (2011).

Tuition Deregulation Overview, Texas Higher Education Coordinating Board (Apr. 2010).

"Faculty Discretionary Time: Departments and the 'Academic Ratchet,'" by W. Massy and R. Zemsky, *Journal of Higher Education* 65: 1 (1994).

Rely on Market Competition to Improve Texas' Economy and Environment



Electricity

Electricity

Regulation of the Texas Electricity Market

The Issue

Today's low prices are the result of many factors, such as the low price of natural gas. But there are also many instances where prices are artificially lowered through government interference. For example, renewable energy subsidies have artificially lowered the price of electricity thanks to supporting wind power. However, consumers still pay for the electricity generated by wind, meager compared to the demand for power, through higher taxes.

Investment in new electrical generation has slowed as price signals, i.e., low prices, have caused companies to shy away from Texas. Critics blame the lack of new generation on the market. However, the market is not the problem.

Another external source leading to reduced investment has been various forms of price regulation. Despite the obvious benefits of the Texas market, some still feel that the ability for prices to shift will hurt consumers. Levying a variety of charges against energy companies, such as market power abuse, and based on the theory that making profit off energy is somehow wrong, a variety of measures were used to control prices, up to a hard price cap that exists today.

The problem with the cap for example is that it reduces prices at times of peak demand, when electricity is the most expensive to produce. If generators can't sell electricity at a profit at times of peak demand, they won't build generation plants that will supply electricity when we need it most

Calls to "fix" Texas' electricity market with more government and ending our "energy only," i.e., free-market, approach to generating electricity won't help—in fact, they will make electricity more expensive for consumers. The solution to Texas' energy issues is not to regulate the market more, but to regulate it less.

There are real challenges facing Texas' competitive electricity market. First, the market has become more efficient, especially after the move to nodal, so profits are harder to come by. Second, on top of this, we have greater government intervention in the market, largely in the form of wind energy (which has increased significantly since deregulation began), wholesale price caps, and interventions in the real time/non-spin markets. All three have pushed prices and profits artificially low and created significant regulatory risk.

The question is whether a few policymakers and regulators in Austin can somehow make better decisions about how to deal with those challenges than the collective and cooperative decisions of millions of producers and consumers in the marketplace. If we let it work, the world-class Texas electricity market will power Texas' future.

The Facts

- Regulations such as price caps distort market forces; those distortions lead to more regulation, unless the cycle is consciously stopped.

- Renewable energy subsidies only benefit investors; consumers are forced to pay for the discounts in energy with higher taxes.
- Texas' electricity market has helped the state become the best environment for business in the nation.

Recommendations

- Eliminate wholesale price caps.
- Eliminate the ability of the PUC to disgorge revenue.
- Eliminate the PUC's emergency cease and desist authority.
- Define more clearly the concept of market power and market power abuse.
- Eliminate Renewable Portfolio Standard and support elimination of the federal production tax credit.

Resources

Texas' Electricity Market Can Power Our Future by Bill Peacock, Texas Public Policy Foundation (July 2012).

Competition in the Texas Electricity Market by Bill Peacock, Texas Public Policy Foundation (Mar. 2011).

HB 2133: Don't Ruin the Texas Electricity Market by Bill Peacock, Texas Public Policy Foundation (May 2011).

Texas' Renewable Energy Experiment by Bill Peacock, Texas Public Policy Foundation (Dec. 2010).

Renewable Energy & Energy Mandates

The Issue

Wind, water, biomass, and the sun are the oldest energy sources used by mankind. The inherent limitations of these sources motivated people to seek more efficient and reliable fuels to power society.

The peak use of windmills was in the 1930s and 1940s. Farmers stopped using them because rural electrification provided electric power far more reliable and often less expensive than wind. Yet today, we are turning back to this expensive and inefficient energy source because of government mandates and subsidies, which are driving up electricity costs for Texas consumers.

In 1999, Texas adopted a Renewable Portfolio Standard mandating that the state's competitive electric providers buy a minimum 2,000 MW of qualifying energy by 2009. In 2005, the Texas Legislature increased the RPS to 10,000 MW by 2025. Texas met the RPS target for installed wind capacity in 2010, a full 15 years ahead of schedule. Subsidies from the RPS flow to generators through renewable energy credits (RECs).

In addition to the Texas' RPS, generous federal subsidies and favorable wind conditions in the vast open plains of west Texas have encouraged wind production. In fact, the federal tax credits for renewable energy may be the driving force behind the rapid growth of Texas' wind generation; when the federal credits briefly lapsed, new wind installation in Texas dried up, despite the fact that no change had been made in Texas' RPS.

Texas' wind farms are concentrated in the panhandle region. While this makes sense insofar as this is where there is the most wind to capture, this area is far from the focus of Texas' electrical demand, which lies along the I-35 corridor. The long distance of wind generation from population centers has led to large subsidies through the constructions of the Competitive Renewable Energy Zone (CREZ) transmission lines. The CREZ lines are Texas' largest subsidy for renewable energy. The cost to build the CREZ lines will be directly added to the bill of every electric consumer in ERCOT.

The total cost of subsidies for wind in tremendous. They are expected to total $12.9 billion for the ten year period 2006-15. The CREZ lines should run about $6.5 billion, the federal PTC about $4.1 billion, and the state's RECs about $560 million. All of these costs are borne by citizens in their roles of consumers or taxpayers.

For wind and solar power, the difference between installed capacity and actual net generation is often substantial, because of the intermittent nature of those energy sources (the sun doesn't shine at night or when it is cloudy, and the wind does not blow hard enough or often enough to utilize a turbine's full capacity.

In addition, wind tends to blow hardest at night and during off peak months, when there is less overall demand, and not as much during the high demand summer months. For these reasons, ERCOT estimates that actual net generation for wind power in Texas is only around 8.6% of installed capacity.

Another major cost of wind is the integration of renewables into the electrical grid. Because they are intermittent, use of wind and solar power requires continual back-up generation to replace this electricity on the grid at a moment's notice. Typically natural gas-fired generating units are used in an interruptible mode similar to idling a car. The cost of back-up generation is a hidden and wasteful cost of renewable energy.

A major problem with all of these costs is that they are not paid for by the investors in wind generation—as in the case of generation from traditional sources, and thus traditional market incentives cannot operate.

The Facts

- Subsidies for renewable energy in Texas are expected to total $12.9 billion for the 10-year period 2006-15.
- Subsidies for CREZ lines should run about $6.5 billion, the federal PTC about $4.1 billion, and the state's RECs about $560 million.
- The Texas Renewable Portfolio Standard (RPS) mandates 10,000 MW of renewable capacity by 2025, of which 500 MW must be from non-wind sources.
- The backup generation and grid-related costs of wind energy could increase ERCOT's system production costs by $1.82 billion per year.

Recommendations

- Eliminate the Renewable Portfolio Standard.
- Support elimination of the federal production tax credit.
- Require all electrical generators to meet the same standards, including renewable energy sources.
- Eliminate the 50% natural gas mandate.

Resources

Setting the Record Straight on Renewable Energy Subsidies by Bill Peacock, Texas Public Policy Foundation (Feb. 2013).

The Broken Promise of Renewable Energy Subsidies by Kathleen Hunker, Texas Public Policy Foundation (Nov. 2013).

Learning from Others' Mistakes: What Europe's Experience with Renewable Mandates and Subsidies Can Teach Texas by Josiah Neeley, Texas Public Policy Foundation (Feb. 2012).

The Cost of the Production Tax Credit and Renewable Energy Subsidies in Texas by Bill Peacock and Josiah Neeley, Texas Public Policy Foundation (Nov. 2012).

Texas Wind Energy: Past, Present, and Future by Drew Thornley, Texas Public Policy Foundation (May 2010).

Disgorgement

The Issue

In 2011, HB 2133 granted the Public Utility Commission of Texas the power to disgorge revenue from electric companies if the revenue in question is determined to have been derived from "market power abuse" or other violations of the Utilities Code.

However, no evidence exists that market power abuse or similar anticompetitive behaviors has taken place in the Texas electricity market; in fact, the competitive nature of Texas' energy market is one of the features that makes it work so well, and ultimately has kept power affordable and reliable for Texans.

Texas' electrical market helps keep Texas going, both in terms of energy provision and in terms of economic benefits. The investment that deregulation brings not only keeps our energy secure, but also generates new jobs for Texans. In addition, the rates are affordable—far more so than when government regulation controlled the price at the turn of the century.

The threat of disgorgement, however, threatens to stifle the advantages of competition. Rather than allowing the market to self-correct, the changes brought by HB 2133 increase the type of regulation that keep electricity prices high in New York, California, and other regulation-heavy states. This regulatory risk has also reduced the incentives to invest in new generation in Texas and contributed to the concerns over reliability in Texas' competitive electricity market.

Texas' continuing economic success depends on limiting excessive regulation of its energy markets—both the exploration and production of oil and gas and the generation and sale of electricity. Disgorgement threatens the success of Texas' competitive electricity market, and threatens the success of Texas as a result.

The Facts

- Texas' electric markets have helped to lower overall prices without government intervention, and have led to increased investment in our electrical infrastructure.
- Disgorgement powers granted by HB 2133, passed in 2011, threaten the health of Texas' electrical markets.
- No evidence exists of the existence of any market power abuse or similar anticompetitive behavior in the Texas power market.
- Disgorgement is a solution in search of a problem.

Recommendation

- Repeal the provisions added by HB 2133 that allow for the PUC to exercise disgorgement authority.

Resources

A Tale of Two Markets: Telecommunications and Electricity by Bill Peacock, Texas Public Policy Foundation (Mar. 2013).

HB 2133 and 2134: Solutions in Search of a Problem by Bill Peacock, Texas Public Policy Foundation (Mar. 2011).

Don't Ruin the Texas Electricity Market by Bill Peacock, Texas Public Policy Foundation (May 2011).

Capacity Markets

The Issue

Texas has the most competitive electricity market in the country. Nevertheless, there has been an ongoing debate at the Public Utility Commission (PUC) of Texas on whether it should replace the current energy-only market with a centralized capacity market. Making such a change would reregulate the market unnecessarily and shift the costs (and risks) of new investments to consumers.

A capacity market operates by giving electricity generators yearly subsidies in exchange for a promise that they will use the guaranteed revenue to invest in new capacity. These payments are not for the electricity that generators produce, but for the amount of electricity that they could theoretically produce if their operations were running at peak efficiency and, most important, were that energy needed.

Even if successful, a capacity market would be a very expensive way to meet Texas' energy needs. Studies repeatedly show that the capacity payments alone would cost Texas consumers somewhere between $3 and $5 billion per year—an assessment that does not include design, implementation, and litigation expenses. The most recent Brattle Report calculated that these hard costs would come to an annual $3.2 billion.

That money would not be offset by ensuing benefits to the state's economy. Although capacity market supporters suggest that reregulation would result in an eventual savings by eliminating future blackouts, these speculated reimbursements only arise under a straw man scenario that assumes the energy-only market will reach a long-run reserve margin of 8%. Supporters provide no independent justification for that assumption. ERCOT's energy-only market has never reached that low of a reserve margin, and current forecasts show a capacity supply substantially above the suggested amount.

In addition, there is no evidence that a centralized capacity market boosts a region's energy capacity, much less helps avoid future blackouts. Capacity payments in PJM—the regional transmission organization serving the mid-Atlantic—yielded less investment in new generation than Texas' energy-only market not only in terms of sheer megawatts but also as a percentage of the region's installed capacity, despite costing PJM consumers over $50 billion during that timeframe.

One reason for this lackluster result is that most of the funds never went to finance new generation but instead found their way into subsidizing the operational costs of existing resources. For example, more than 93% of the money paid by PJM customers went to existing generation; only 1.8% found its way to new or "reactivated" generation sources. Additionally, the bulk of capacity payments subsidized base load generation plants even though there was no shortage of investment in base load generation and even though those plants can recoup their fixed costs from energy sales alone.

Finally, capacity markets suffer from a severe design flaw that damages the grid's overall reliability and may make the market more prone to blackouts. Capacity markets interpret reliability as being dependent on the amount of capacity alone. They,

therefore, offer all generators uniform payments regardless of the plant's efficiency and ignore those characteristics that ensure that grid operators can convert and transport installed capacity to consumers. This has the consequence of eliminating price signals and discouraging investors from building plants where and when they are needed most—a perverse incentive that hurts ERCOT's overall operational reliability.

The Facts

- In 2013, competitive price offers were an average 21% lower than the 2001 regulated price. This means that Texas consumers paid less in real dollars under the energy-only market than they did before competition.
- Numerous studies predict that a capacity market will cost Texas consumers an additional $3 to $5 billion per year, not including the market's design, implementation, and litigation expenses. The most recent Brattle report estimated that these hard costs would come to an annual $3.2 billion.
- The Brattle Report claims that, even assuming the optimal scenario, where a Texas capacity market delivers on its promises and offsets some of its hard costs, capacity payments would have an annual net cost of at least $400 million.
- PJM spent $50 billion in capacity payments between 2007 and 2011 and added 7,000 megawatts of new generation, about 4% of its total install capacity. During that same period, Texas' energy-only market added 10,000 megawatts of new generation, about 12% of its installed capacity, with zero extra cost to consumers.
- In September 2013, PJM suffered a series of rolling blackouts due to unusually high temperatures in combination with mechanical issues and plants being taken offline for season maintenance. The blackouts occurred despite a fully mature capacity market and over $54 billion spent in capacity payments.

Recommendations

- Preserve Texas' energy-only electricity market.
- Reject all proposals that implement a mandatory reserve margin or capacity market.
- Clarify that the PUC of Texas does not have the statutory authority to restructure and reregulate the electricity market under any form of capacity market.

Resources

A Texas Capacity Market: The Push for Subsidies by Kathleen Hunker, Texas Public Policy Foundation (Sept. 2013).

Capacity Markets Represent a Bad Bargain for Texas Consumers by Kathleen Hunker, Texas Public Policy Foundation (Oct. 2013).

Reforming Texas Electricity Markets: If You Buy the Power, Why Pay for the Power Plant? by Andrew Kleit and Robert J. Michaels (Summer 2013)

Money for Nothing in the Power Supply Business by the American Public Power Association (Mar. 2012).

Resource Adequacy

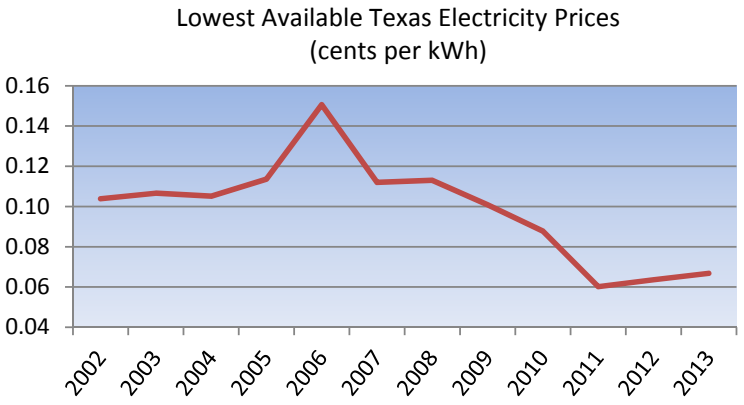
The Issue

Forecasts in 2012 of diminishing resource adequacy set the stage for a push by generators and the Public Utility Commission of Texas (PUC) to vastly increase government intervention in Texas' world-class electricity market. A more accurate assessment of the data since then has debunked the notion that Texas needs to adopt a capacity market with subsidies to generators as high as $4 billion a year—on top of what Texans pay for electricity.

The push away from competition and toward a capacity market was based on an overreaction to 2012's faulty projections about the reliability of the market. Despite the past trend of underestimating resource adequacy in official projections, new numbers from the Electric Reliability Council of Texas (ERCOT) show that Texas has adequate resources to power Texas' growing economy for at least the next five or six years. The Foundation's research substantiates the underlying reason for future resource adequacy; new investment in generation is generally profitable and sufficient to keep up with increased demand.

ERCOT February 2014 Reserve Margin Forecast				
2014	2015	2016	2017	2018
16.0%	15.42%	14.11%	12.84%	13.43%

ERCOT's February 2014 forecast of increased reserves confirmed that there is no need to impose a capacity market, supported by a $3.2 billion electricity tax, onto Texas consumers. A capacity market would provide consumers no appreciable benefit. Texas' competitive market has reliably supplied ERCOT with the energy it has needed, and more government intervention, especially in the form of a capacity market, will not improve reliability.



The PUC has backed away from its efforts to adopt a capacity market and to make the projected reserve margin mandatory. This is as it should be; the Legislature—rather than the PUC—is the proper place to make the final call on a policy that would undo 20 years of movement toward competition in the Texas electricity market. As lawmakers deliberate this issue in 2015, the facts will show that Texas' competitive electricity market is working. In fact, the low electricity prices in Texas today are the best evidence that Texas has an adequate supply of electricity; the law of supply and demand tells us the low prices are the result of excess supply over demand.

All is not perfect, though, in the electricity market—renewable energy subsidies and excessive regulation continue to negatively impact the reliability of the market. But by following along the path that has made the electricity market in the Electric Reliability Council of Texas (ERCOT) region so successful—letting competitors compete and reducing intervention in the market—Texas can build on its strong foundation and ensure sufficient generation of electricity for years to come.

The Facts

- Texans use about 360 million megawatt hours of electricity each year; reliability issues involves perhaps only 1.3 million megawatt hours, 0.36% of annual use.
- Peak use is slowing, diverging from economic growth because of market innovation in demand response.
- Texas' competitive market is already maintaining resource adequacy and improving reliability, both on the supply and demand sides.
- Proponents of a capacity market are asking Texas consumers to pay to assuage the fears of generators and policymakers.
- There is no evidence that capacity markets boosts capacity; from 2007-2011, capacity payments in PJM (the mid-Atlantic grid) funded only about a 4% increase in generation while generation in Texas' energy-only market grew about 12%.
- A capacity market in Texas would result in an "electricity tax" on Texas consumers of about $3.2 billion annually.
- Payments from consumers through the electricity tax would mainly be used to increase the profitability of electricity generators and Wall Street investment firms, not to fund new generation.
- The path to improved reliability lies through increased market efficiency and decreased government intervention.

continued

Resource Adequacy (cont.)

Recommendations

- The PUC should eliminate the high system-wide offer cap.
- The PUC and ERCOT should more closely evaluate the ability of current and potential market driven demand response to handle peak load strains on the system.
- The Texas Legislature should prohibit a capacity market in statute.
- The Texas Legislature should reevaluate both the broad structure of ERCOT and the PUC's reach into ERCOT's operations.
- The Texas Legislature should reorient/eliminate the Independent Market Monitor and the regulation of market power abuse.
- The Texas Legislature should reduce the PUC's excessive regulatory authority.
- The Texas Legislature should eliminate the Texas Renewable Portfolio Standard.
- Texas policymakers should oppose the reinstatement of the federal Production Tax Credit.

Resources

Electricity in Texas: Markets, not Manipulation by Bill Peacock, Texas Public Policy Foundation (Jan. 2014).

Texas' Competitive Capacity Market by Robert Michaels, Ph.D., Texas Public Policy Foundation (Jan. 2014).

Debunking the Myth: Texas is Not Running out of Electricity—The Generators by Bill Peacock, Texas Public Policy Foundation (Feb. 2014).

The Reliable Texas Electricity Market: Resource Adequacy Hype Doesn't Fit the Facts by Bill Peacock, Texas Public Policy Foundation (Oct. 2014).

Does Competitive Electricity Require Capacity Markets? The Texas Experience by Andrew Kleit, Ph.D. and Robert Michaels, Ph.D. (Feb. 2013).

Competition is Working in the Texas Electricity Market by Bill Peacock, Texas Public Policy Foundation (Sept. 2013).

A Texas Capacity Market: The Push for Subsidies by Kathleen Hunker, Texas Public Policy Foundation (Sept. 2013).

Capacity Markets Represent a Bad Bargain for Texas Consumers by Kathleen Hunker, Texas Public Policy Foundation (Oct. 2013).

There and Back Again: The High Transition Costs of Electricity Regulation by Kristin Cavin and Bill Peacock, Texas Public Policy Foundation (Oct. 2013).

Rely on Market Competition to Improve Texas' Economy and Environment

Environment

Environment

Climate Policy

The Issue

Whether called global warming, climate change, or climate disruption, the concept of greenhouse gas (GHG) emissions leading to catastrophic levels of warming has been used as a justification for a wide range of interventions in the economy, ranging from carbon caps to taxpayer funding for alternative energy. While justified on the basis of "science," these policies are in fact a matter of political judgment. To accept the case for drastic government action based on climate change, one must simultaneously believe that climate change 1) is occurring, 2) primarily as the result of human activity, and 3) will have serious net negative impacts that 4) can be prevented 5) at a reasonable cost. Some of these claims are scientific conclusions supported by physical evidence. Others are matters of speculation, or rely on economic and political assumptions divorced from the province of climate science.

In the summer of 2009, the U.S. House of Representatives narrowly passed the 1,500 page Waxman-Markey (W/M) cap-and-trade bill. With 1,000 new rules implemented by 21 federal agencies and new spending of $825 billion, the W/M legislation would have forced reduction of fossil fuel use to a level not seen since the late 19th century. Growing awareness of the staggering cost, job loss, government growth, and ineffectiveness stalled action on the bill in the U.S. Senate.

Ironically, rejection of government command and control solutions has gone hand in hand with a reduction in GHG emissions due to the workings of the free market. In October 2013, the Energy Information Administration (EIA) announced that energy-related emissions of CO_2 decreased 3.7% in 2012, the lowest emission level of CO_2 since 1994. Indeed, CO_2 emissions in the U.S. are falling faster than in countries under mandates such as the European Union's Emissions Trading System or in countries like Germany that have most aggressively pursued renewable energy.

The United Nations run Intergovernmental Panel on Climate Change (IPCC)'s Fifth Assessment Report has drawn back from a number of alarmist conclusions in previous reports, lowering its estimate of climate sensitivity and downgrading the likelihood of a link between recent warming and extreme weather events.

Despite this, the Environmental Protection Agency has begun to enact many of the regulations included in the rejected Waxman/Markey bill through executive action. EPA's increasing regulations to reduce greenhouse gases (GHG)—namely carbon dioxide (CO_2)—pose the greatest threats to the energy-intensive Texas economy. EPA's proposed New Source Performance Standards (NSPS) for CO_2 emissions from existing power plants mandate that the state completely re-design Texas' electricity market and generating system—a federal mandate that violates state law and is far beyond the regulatory authority of the TCEQ or PUC.

Now called EPA's Clean Power Plan (CPP), the CO_2 standards would force fuel switching from coal to natural gas on a vast scale and assumes a 150% increase in generation from renewable sources. Although Texas' 12,000 Megawatts (MW) of installed generation leads the nation and most countries, none of this wind capacity counts in EPA's rule. EPA projects that the CPP rule will force early closure of over 16,500 MW of coal-fired generation by 2020—roughly 15% of the state's total 110 gigawatts (GW) of electric power. This rule imposes a steeply disproportionate burden

on Texas compared to all other states. Although Texas generates 11% of the nation's total electricity, EPA would impose on Texas 20% of the national obligation to reduce CO_2. Texas would have to reduce emissions of CO_2 by 42%—three times more than the next state (Florida).

Although EPA's Clean Power Plan carries multi-billion dollar costs and risks to electric reliability, EPA admits that the envisioned 30% reduction of CO_2 from power plants would only reduce predicted global warming by 0.01 degrees Celsius. In out of court settlements, EPA had agreed to promulgate these same CO_2 standards on refineries, pulp and paper, metals and agriculture.

The Facts

- Over the last 150 years, the amount of CO_2 in the atmosphere has roughly doubled, to 390 parts per million, and, at current rates, is projected to more than double again over the next century.
- Average global temperatures have risen about 0.8 degree Celsius over the same period, much less than the change that models would predict.
- Global average temperatures have not risen over the last 17 years.
- The last several years have seen growing discrepancies between observations and climate model projections, evidence of lower climate sensitivity to increases in CO_2, increasing Antarctic sea ice extent, and evidence that recent sea level rises are no more than in some previous periods.
- For the U.S. to achieve an 85% reduction in GHG emissions—the global reduction promoted by the IPCC to avert dangerous interference with the climate—emissions would have to be reduced to a level not seen since the 19th century.
- EPA's proposed restrictions on GHGs are expected to increase the cost of a vehicle $3,100 by 2025, and, if successful, would prevent only 0.01 degree Celsius of the expected warming, according to EPA's own estimates.

Recommendations

- Urge federal policymakers to establish an independent, rigorous review of IPCC science.
- Suspend state programs that require or incentivize GHG reduction.
- Eliminate EPA regulation of CO_2 emissions.

Resources

Statement to the Committee on Environment and Public Works of the U.S. Senate by Judith A. Curry (16 Jan. 2014).

Global Warming: How to Approach the Science by Richard S. Lindzen (22 Feb. 2012).

Coalition for Responsible Regulation, et al, v. Environmental Protection Agency, No. 09-1322 (D.C. Cir. Filed 16 Feb. 2010).

Global Warming: What Should Texas Do? by Ian Murray, Texas Public Policy Foundation (Apr. 2007).

Regulatory Impact Analysis

The Issue

The basic purpose of regulation in our state and federal constitutional scheme is to implement the laws enacted by popularly elected representatives—no more and no less. The legislature creates and delegates to agencies the authority to promulgate and enforce regulation. These are very broad powers which can—but should not—authorize regulation not clearly authorized by specific law. As an example of a sweeping grant of authority to a regulatory agency, the Texas Commission on Environmental Quality (TCEQ)'s general powers provide authority "necessary and convenient" to carry out the agency's statutory mission to protect health, safety, and the environment.

If limited government is the guiding principle, state regulation must come under specific and limited—not general—authority. Regulation issued solely by the general powers of an agency should be the exception and only exercised under heightened justification. Although agencies often prefer more general statutes granting broad discretionary authority, clear statutory language stipulating regulatory goals and mechanisms reduces regulatory "creep," i.e., regulations exceeding authorizing statutes.

The number, scope, and cost of environmental regulations have dramatically increased in the last 20 years. TCEQ now implements and enforces roughly 6,000 rules, the majority of which are dictated by federal law. Although multiple benefits to health, safety, and the environment may flow from these rules, there is no accessible mechanism for tracking their cost and effectiveness.

The federal government has long required cost-benefit analysis of proposed rules. Texas, by contrast, has no similar requirement. The Texas Administrative Procedures Act (TAPA), governing all state rulemaking, requires an assessment of fiscal implications of new regulations on state and local government but not of impacts on the private sector. The General Government Code "Regulatory Analysis of Major Environmental Rules" (Section 2001.0225) does require this analysis of cost to the private sector for a limited number of "major" rules. However, a "major" environmental rule includes only rules: 1) exceeding an express requirement of federal or state law; 2) adopted solely under the agency's general powers; or 3) exceeding a requirement of a delegation agreement. The formal Regulatory Impact Analysis (RIA) required in these provisions has only been included in one rulemaking over the 14 years since enactment. The current statutory definition of "major rule" has been effectively interpreted to exclude all rules promulgated.

Court decisions seem to validate this interpretation of current law. In *Brazoria County v. Texas Com'n on Environmental Quality* (App. 3 Dist. 2004)128 S.W.3d728, the court held that TCEQ's rules implementing requirements for vehicle inspection and lawn-maintenance did not trigger the statutory requirement for a Regulatory Analysis for a Major Environmental Rule since the TCEQ was attempting to meet, not exceed, a relevant standard set by federal law.

Texas environmental agencies generally avoid most of the excesses and inefficiencies typical of the federal agencies. The state's far more hands-on knowledge and practical understanding of real-world effects tend to accelerate, rather than delay, meaningful environmental protections. And TCEQ has wisely striven to resist unwarranted, counter-productive, unlawful dictates of federal agencies. Yet, the state of Texas,

whose population is larger than many countries and whose economy is larger than most countries, has a regulatory purview that is, indeed, vast. However well-honed now, efforts to streamline regulatory design and to measure effectiveness should remain a constant focus of Texas state agencies.

Straightforward RIA should help regulators design the most efficient regulation: targeted and effective at the least cost to the state, regulated entities, and Texans. Proposed rules with extremely high cost and minimal or immeasurable environmental effect should send the rule maker back to the drawing board to design a more efficient rule. Alternative definitions of standards, requirements, and methods of compliance can yield greater environmental outcomes or effect at lower cost. With over 80 steps in TCEQ's internal rulemaking process, this straight-forward cost-effectiveness analysis of a select few "major" rules need not add time or expense to the agency's work.

The Facts

- Texas does not currently require state agencies to estimate the compliance costs of proposed regulation or to perform a cost-benefit analysis for new regulations in most circumstances.
- A current requirement that regulatory impact analysis be performed for "major" new environmental rules has been invoked only once in 14 years.
- During the 82nd Legislative Session, Rep. Ken Legler introduced HB 125, which would have required regulatory impact analysis for new TCEQ regulations. HB 125 passed the House, but did not make it to the Senate floor in time for passage. During the 83rd Legislative Session, Senator Glen Hegar's SB 467 to require a similar regulatory analysis passed the Senate but did not leave committee in the House.

Recommendations

- Prior to imposing new regulations, all Texas agencies should be required to do a three-step regulatory impact analysis that: (1) identifies the problem the rule is intended to address, (2) estimates the rule's environmental effectiveness, and (3) estimates the financial cost directly on regulated entities and indirectly on Texas citizens.
- In conducting this analysis, actual monitored data (credible, representative measures of actual air quality) should trump modeled data (computer simulations of projected air quality).
- Performance measures for regulatory agencies should include measured outcomes (i.e., measurable improvement in air quality, water quality) and not merely outputs (i.e., number of permits, enforcement actions).

Resources

Who Regulates the Regulator? Cost-Effectiveness Analysis in Texas State Agency Rulemaking by Kathleen Hartnett White and Josiah Neeley, 14 *Tex. Tech Admin. L. J.* 401 (2013).

Regulatory Transparency is Good Governance by Kathleen Hartnett White, Texas Public Policy Foundation (Nov. 2012).

EPA's Impact on Texas

The Issue

Over the last few years, the Environmental Protection Agency has embarked on what *The Wall Street Journal* calls "a regulatory spree unprecedented in human history." And while these rules pose a danger to the overall American economy, Texas —as the energy powerhouse of the country—sits in the crosshairs of EPA's regulatory initiative.

Among these rules, EPA's ever-tightening National Ambient Air Quality Standards (NAAQS) for ozone pose a severe threat to Texas' continued economic growth. On March 27, 2008, EPA lowered the primary and secondary eight-hour ozone NAAQS from 85 parts per billion (ppb) to 75 ppb. In 2012, EPA designated two areas and 18 Texas counties as being in nonattainment of this new standard (Brazoria, Chambers, Collin, Dallas, Denton, Ellis, Fort Bend, Galveston, Harris, Johnson, Kaufman, Liberty, Montgomery, Parker, Rockwall, Tarrant, Waller, and Wise). Counties in the Dallas area are listed as moderate nonattainment, while the Houston area counties are designated as being in marginal nonattainment.

After decades of effective reduction of ozone precursor emission state regulation, now only a fraction of the remaining emissions come from industrial sources. Mobile source emissions (cars, trucks, construction equipment) now are the largest sources of remaining ozone precursors. Further regulation of mobile sources is federally preempted by federal law. Although the states' hands are tied, federal law still requires the state to attain the standard on pain of serious sanctions.

A recent EPA policy assessment indicates that the agency is considering lowering the ozone NAAQS again to between 60 and 70 ppb. Under an ozone standard as low as 60-70 ppb, as many as 650 U.S. counties would be in nonattainment, with as many as 12 nonattainment areas in Texas.

Also a matter of concern is the Cross-State Air Pollution Rule (CSAPR). Texas alone accounts for a quarter of all mandated reductions of SO_2 emissions, even though the state has already reduced emissions by 33% since 2000.

ERCOT, the operator of Texas' electric grid, which carries 85% of the state's electric load, concluded that "had the EPA rules been in effect [during the record hot temperatures in the summer of 2011] Texans would have experienced rolling outages and the risk of massive load curtailment."

Although vacated by the Fifth Circuit Court of Appeals, CSAPR was ultimately upheld by United States Supreme Court in the spring of 2014.

EPA's Utility MACT Rule, also known as the "Mercury Rule," would impose multi-billion dollar expenditures for many Texas power plants effective in 2016. This rule could lead to closure of coal-fired plants and pose significant challenges to Texas' electrical reliability. The Mercury Rule is the most expensive rule in EPA history, with costs estimated by EPA itself at $10.9 billion per year. Despite the name, only 0.004% of the claimed benefits of the rule come from reductions in mercury, with the rest based on dubious calculations of harm caused by fine particulates.

Texas' and over 20 other state's challenge to the Mercury Rule was denied by the D.C. Court of Appeals. Appeal to the U.S. Supreme Court is expected.

The Facts

- EPA's Cross-State Rule requires Texas to reduce its SO_2 emissions by nearly half, far beyond its own contribution to interstate pollution.
- All six of the criteria pollutants regulated under the Clean Air Act have fallen substantially in recent decades. Ambient levels of carbon monoxide fell 82% between 1980 and 2010. SO_2 fell 76% and NO_2 fell 52%.
- Over 60 planned industrial projects in Texas have been waiting more than a year for GHG permits from the EPA.

Recommendations

- Texas must continue to develop State Implementation Plans and permitting mechanisms based on rigorous science and local circumstances.
- Texas should continue to lawfully resist EPA air quality standards unjustified by science or law.

Resources

The Cross-State Air Pollution Rule: What American Lung Association v. EME Homer City Generation Means for Texas by Josiah Neeley, Texas Public Policy Foundation (Dec. 2013).

EPA's Pretense of Science: Regulating Phantom Risks by Kathleen White, Texas Public Policy Foundation (May 2012).

EPA's Approaching Regulatory Avalanche by Kathleen White, Texas Public Policy Foundation (Feb. 2012).

Texas vs. Environmental Protection Agency by Josiah Neeley, Texas Public Policy Foundation (Apr. 2012).

Endangered Species Act

The Issue

Unlike some states, Texas law does not create regulatory authority for an endangered species protection program. Several state statutes do prohibit the killing, hunting, or trapping of any species on the state's Nongame, Exotic, Endangered, Threatened & Protected Species list, but violation is a misdemeanor offence with a modest fine of a couple hundred dollars. These few statutory provisions do not give the Texas Parks and Wildlife Department (TPWD) regulatory authority to impose land use restrictions on landowners to protect habitat on private land.

By contrast, the regulatory terms of the federal Endangered Species Act (ESA) are vastly more restrictive. The decision whether to list a species as endangered must be "based solely on the best scientific and commercial data available." This means that 1) economic considerations can play no role in the listing process, and 2) listing decisions may be made based on incomplete or low quality scientific data if no better data is available. Listing can result in broad regulatory land use authority on private land by the federal government.

The ESA is increasingly being used in Texas by environmental activists to long-established land use and to limit development. On March 11, 2013, the federal district court in Corpus Christi ruled that Texas had violated the federal Endangered Species Act by causing harm to the endangered Whooping Cranes who winter in San Antonio bay and the estuary of the Guadalupe River basin. According to the judge, Janis Jack, the state's past actions and inactions reduced freshwater inflows and thus reduced the main food source of the Cranes. Rare among ESA rulings, the judge held that Texas' implementation of state water law made the state liable for the deaths of some 23 whooping cranes during the severe drought of 2008-09 and imposed federal oversight of state surface water allocation in the Guadalupe River Basin.

The court's decision sunders the state's long-recognized authority to allocate water within its borders through the issuance of water rights for beneficial use without federal interference. Such a primary state authority is recognized in most federal laws but not in the ESA. Unless reversed, this decision could make state efforts to meet Texas' growing water demand all but impossible to achieve. The case is currently before the Fifth Circuit Court of Appeals, with a ruling expected soon.

The whooping crane, however, is only the beginning of Texas' ESA problems. Concern over the endangered Houston Toad impeded recovery efforts after the 2011 Bastrop fires. The discovery of a single endangered spider, called the Braken Bat Cave meshweaver, immediately halted construction of the last 1,500 feet of a six mile $11 million pipeline to convey water to the west side of San Antonio. Completion of the last leg remains in limbo. The meshweaver is one of 90 endangered or threatened species in Texas. As a result of an out of court settlement with environmentalist groups, FWS has agreed to make final listing decisions on 100 additional species in Texas.

In 2012, the potential listing of the dune sagebrush lizard threatened to shut down significant oil and gas operations in the Permian Basin of west Texas. While the federal government ultimately agreed not to list the lizard, future listings could similarly imperil the state's oil and gas boom. A decision on whether to list the Lesser Prairie Chicken, which could potentially impact over three million acres of Texas land, is expected in March.

In 2009, the state Legislature created the Interagency Taskforce on Economic Development and Endangered Species, which conducts research into the economic impacts of potential listings and coordinates strategy for protecting species without harming economic growth.

During the last legislative session, a controversial bill (HB 3509) to empower the Texas Parks and Wildlife Department (TPWD) to deal with the federal ESA actions in the state passed but was then vetoed by the governor. TPWD's authority has historically been limited to voluntary wildlife stewardship programs on private land. Texas needs to resist expanding TPWD's authority to include implementation of federal land use controls imposed by habitat conservation plans under the ESA. Texas would be wise to develop proactive strategies emphasizing the development of rigorous science and voluntary programs.

ESA is a politically weaker law than many realize. Congress has refused to authorize the law for over 20 years. Congress annually appropriates funds without an authorizing bill because less than half of Congress supports the ESA in its current form. The Endangered Species Act Congressional Working Group, a coalition of geographically diverse House members, recently released a report detailing problems with the current ESA and making recommendations for reform.

Limiting the unjustified and unnecessary harms of endangered species listings will require a variety of different tactics and plans. Instead of relying on a single, centralized approach, Texas needs to provide more flexibility for individuals, groups, and regions to use different methods to reach the common goal of protecting Texas property and sovereignty. Texas should not underestimate the power of the ESA.

The Facts

- Less than 2% of species have been removed from the ESA's endangered list in 40 years.
- Nearly 100 species in Texas are set for potential listing by 2017.
- The ESA's protection of a tiny fish in California called the Delta Smelt in the middle of acute water shortages caused by an historic drought—California was forced to flush three million acre feet of water allocated for human use into the ocean.

Recommendations

- Avoid a top-down state-centralized program for Texas response to ESA listings.

continued

Endangered Species Act (cont.)

- Encourage landowner and local choice on ESA strategies.
- Enhance current program to assist local government, land owners and business to challenge listings and minimize adverse impacts from ESA conservation plans.
- Resist transforming TPWD into regulatory agency implementing ESA regulation in Texas.
- Reform the ESA to prevent abuse of citizens' lawsuits and curb taxpayer funding of ESA attorneys' fees.
- Support Texas Congressional member's efforts to reform the ESA.

Resources

Fiscal Size-up: 2012-13 Biennium, Legislative Budget Board (Jan. 2012).

Report, Findings, and Recommendations, Endangered Species Act Congressional Working Group (Feb. 2014).

Analysis of the Science: The Whooping Crane Decision by Lee Wilson, Texas Public Policy Foundation (May 2013).

The Endangered Species Act: An Opportunity for Reform by Hon. John Shadegg and Robert Gordon, The Heritage Foundation (Aug. 2012).

Rely on Market Competition to Improve Texas' Economy and Environment

Water

Water

Water Supply

The Issue

Providing an adequate supply of water is an increasingly urgent challenge for Texas. The 2012 State Water Plan issued by the Texas Water Development Board estimates that our state will need an additional 8.3 million acre-feet of water per year by 2060 to meet the demands of a population projected to increase from 25.4 million in 2010 to 46.3 million. Increasing growth in the economy and the population as well as acute, persistent drought in much of Texas increases the urgency of expanding the water supply available in Texas.

Nearly two decades have passed since enactment of SB 1 in 1997. This landmark water legislation has led to nationally-acclaimed regional and state water supply plans. However, regulatory and financial constraints stymie timely implementation of projects to increase water supply.

As required by SB 1, Texas has completed detailed water plans measuring available water supply, future demand, and identifying strategies to increase supply. The 16 Regional Water Planning Groups have developed comprehensive plans which the Texas Water Development Board (TWDB) compiled into the official State Water Plan. TWDB issued its first State Water Plan in 2002, with revised versions published in 2007 and 2012. In addition, Regional Water Plans identify hundreds of strategies to augment available supply by 9 million acre-feet of water by 2060.

According to an assessment in the 2012 State Water Plan, only 28% of the nearly 500 planned projects had reported some form of progress, and only 13% were fully operational. The prolonged delay in completing significant water supply projects increases, year by year, the challenge of meeting demands even in the near term. By law, Texas plans for enough water to meet demand during a drought of record, and that model may need revising. The drought of record refers to hydrologic conditions averaged over the decade of the 1950s. Droughts of the last few years, particularly the drought of 2011, had worse hydrological conditions than most years in the 1950s.

Although the Regional Water Planning Group members, water purveyors, and local governments have worked effectively, project implementation has been delayed, in large measure, by state regulatory issues and funding. Indeed, following passage of SB 1 in 1997 the Legislature has, perhaps inadvertently, passed legislation which complicates—rather than facilitates—new water supply projects. SB 2 in 2001 and HB 1763 in 2005 enlarged the authority of Groundwater Conservation Districts which is now often exercised to limit or block private development of groundwater. In 2007, SB 3 established a multi-layered process leading to the Texas Commission of Environmental Quality (TCEQ) adoption of Environmental Flow Standards. Water supply projects based on development of groundwater and new surface water right permits are delayed by these new groundwater and environmental flow statutes.

Other regulatory issues complicate the completion of water supply projects. The "junior rights" provisions required for inter-basin water transfers remain an impasse for some, and unresolved issues about water rights amendments and indirect reuse of water delay many others.

The landmark legislation known as SB 1 stipulated that "voluntary redistribution" of existing water supply would create much of the water needed for growing demand. Such redistribution assumes a well-functioning water market which facilitates change of use (e.g. from irrigation to municipal use) and water transfers. Markets depend upon defined property rights and predictable regulatory decisions. Except in a few areas, water marketing in Texas is far more limited than anticipated.

The Facts

- The 2012 State Water Plan estimates Texas will need an additional 8.3 million acre-feet of water a year until 2060 to meet demand under drought conditions.
- Implementation of the water supply strategies in the 16 Regional Water Plans has an estimated capital cost of $53 billion.
- Voluntary redistribution of existing water supply through water marketing is constrained by state and local district regulations.
- Water conservation strategies could generate nearly 2.2 million acre-feet of additional supply per year by 2060, according to the State Water Plan.
- Surface water strategies in the State Water Plan are estimated to produce about 3 million acre-feet of additional supply per year by 2060. The State Water Plan recommends construction of 26 new reservoirs, which would add 1.5 million acre-feet of new supply annually.

Recommendations

- Remove legal barriers to private investment in water supply projects.
- Amend Texas law to simplify TCEQ approval of water right amendments.
- Simplify requirements for bed and banks authorization for indirect reuse of water and reform the "junior rights" restrictions on inter-basin water transfers.
- Amend SB 3 to clarify that the policy objectives for Environmental Flow Standards are critical flows during a drought of record.
- Clarify whether the TWDB's statutory authority in Regional Groundwater Management Areas to establish desired future conditions is consistent with the landowner's right to groundwater in place, as recognized by the Texas Supreme Court in *Edwards Aquifer Authority v. McDaniel*, and the Texas legislature in SB 332.

Resources

Texas Water Policy Options by Josiah Neeley, Texas Public Policy Foundation (Mar. 2013).

2012 State Water Plan, Texas Water Development Board (Jan. 2012).

Liquid Assets: The State of Texas' Water Resources, Texas Comptroller (Feb. 2009).

Science Advisory Committee Report on Water for Environmental Flows, prepared for Study Commission on Water for Environmental Flows (26 Oct. 2004).

Solving the Texas Water Puzzle: Market Based Allocation of Water by Ronald A. Kaiser, Texas Public Policy Foundation (Mar. 2005).

Groundwater Rights

The Issue

Groundwater has long provided a major portion of the Texas water supply. Scientific assessment of the undeveloped groundwater indicates groundwater resources can help meet growing demand for water in Texas.

Texas has two distinct legal systems governing water: groundwater and surface water. Surface water in Texas is owned by the state, which grants water rights to use specific volumes of water for beneficial uses. A surface water right in Texas is a "usufructuary" right, or a right to use. The Texas Water Code recognizes surface water rights issued in perpetuity as private rights that can be bought and sold.

In contrast, under Texas common law and statute, landowners hold a vested private property right in the groundwater beneath their land. This principle has recently been reaffirmed by both the Texas Legislature and courts. During the 82nd Legislative Session, Texas passed SB 332, which clearly stated that "a landowner owns the groundwater below the surface of the landowner's land as real property." A landowner's ownership of groundwater in place was also vindicated by the Texas Supreme Court in *Edwards Aquifer Authority v. McDaniels*. The Court held that the rule of capture is not inconsistent with ownership of groundwater in place, noting that "the landowner is regarded as having absolute title in severalty to the oil and gas in place below his land. The only qualification is that it must be considered in connection with the law of capture and is subject to police regulation … [This rule] correctly states the common law regarding the ownership of groundwater in place."

The landowner's property right in groundwater is often confused with the rule of capture. The right of capture is corollary to the landowner's ownership right. The rule of capture does not define the groundwater rights but explains the means by which a landowner may exercise the property right in groundwater.

Like fee title ownership of land, "absolute" ownership of groundwater is subject to reasonable regulation. Since 1949, local Groundwater Conservation Districts (GCDs) have been the main regulator of groundwater in Texas. In 1995, the powers of GCDs were expanded to include pumping limits on wells and tract size, and in 2001, SB 2 enlarged GCD authority including preservation of historic uses and creation of Groundwater Management Areas (GMAs) based on regionally shared aquifers. In 2005, HB 1763 significantly enlarged the scope of groundwater regulation through provisions about Desired Future Conditions (DFCs) of an aquifer and Managed Available Groundwater (MAGs) determined and overseen by the Texas Water Development Board (TWDB). The regulatory authority created in HB 1763 expands the state's role in groundwater regulation and is being used to limit or deny groundwater permits at GCDs.

Yet while GCDs are recognized in law as the state's "preferred method of groundwater regulation" (TWC 36:0015), the system does not always function optimally. GCDs sometimes lack the resources and scientific expertise to make informed permitting and regulatory decisions. District boundaries are often based more on politics than hydrology, with the result that actions in one GCD can affect

landowners outside the district boundaries. GCDs are exempt from many of the conflict of interest rules applicable to other government officials and regulators. In some cases, GCDs have imposed moratoria on groundwater development.

Beginning with the *McDaniel* decision, Texas courts have begun to recognize that excessive regulation of groundwater can amount to a taking of property for which compensation is owed. Several features of the law governing GCDs make it difficult to mount a successful challenge to burdensome regulation. GCDs are not subject to the record keeping requirements of the state's Administrative Procedures Act, which can complicate judicial review. And if a landowner's challenge to GCD regulation fails in court, he must pay the GCD's attorneys fees in addition to his own. Despite these disincentives, challenges to GCD regulations are increasing.

The Facts

- By 2060, water demand in Texas is projected to increase by 22%, while available water supply is expected to decrease by 10%.
- Texas has abundant groundwater resources: 9 major aquifers and 21 minor aquifers. Total groundwater supplies were approximately 8 million acre-feet in 2010.
- Total groundwater in Texas aquifers is estimated at 17.1 billion acre-feet.
- Texas has 99 local groundwater districts covering all or part of 174 counties.

Recommendations

- Remove legal impediments to the private development of new groundwater supplies and to proper functioning water markets in Texas.
- Review the operations of Groundwater Conservation Districts and Groundwater Management Areas to see what progress has been made in securing proper groundwater regulation, and seek adjustments as needed.
- Reform the rules governing GCD record keeping and conflict of interest to promote greater uniformity of regulation.

Resources

2012 State Water Plan, Texas Water Development Board (Jan. 2012).

Edwards Aquifer Authority v. McDaniel, 55 Tex. Sup. J. 343 (2012).

Houston and Texas Centennial Railway Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

Solving the Texas Water Puzzle: Market Based Allocation of Water by Ronald A. Kaiser, Texas Public Policy Foundation (Mar. 2005).

Surface Water Rights

The Issue

Unlike groundwater, which is owned by the landowner as a vested property right, surface water in Texas is legally owned by the state. Specifically, Texas owns the corpus of the surface water but allocates this water through the issuance of rights for beneficial use of the water. Most Texas surface water rights are held in perpetuity and can only be cancelled for non-use over an extended period of time. (TWC 11.0235(a)) Such usufructuary rights are recognized as private rights and entitle the owner to a given amount of water from a particular diversion point for a particular use. Additionally, such rights can be bought and sold with little state involvement if the purpose of use is not changed in the transaction.

Like most western states, Texas has adopted the prior appropriation system to allocate quantities of surface water for specific beneficial uses. Texas' prior appropriation system operates under the principle of "first in time, first in right," meaning that older or "senior" rights are given precedence over newer or "junior" rights in times of water shortage. An exception to the prior appropriation system is the landowner's qualified riparian rights for domestic and livestock use.

The current 2012 State Water Plan (SWP) includes water supply strategies to produce 4.4 million acre-feet of new surface water by 2060. Surface water accounts for more than a third of new water anticipated from strategies in the 2012 SWP. Many of these projects, however, are being hindered by state and federal regulatory impediments. Legal questions about water right amendments, indirect reuse authorizations, environmental flows, and federal endangered species protection now delay and could preclude key surface water projects.

In 2007, enactment of SB 3 established a program to protect environmental flows. The law created a multi-layered process leading to the Texas Commission on Environmental Quality's (TCEQ) adoption of Environmental Flow Standards for instream flows (rivers) and freshwater inflows (bays and estuaries). SB 3 stipulated a bottom-up process with five layers: 1) Bay/Basin Stakeholder Groups and 2) Bay/Basin Science Teams for each river basin, 3) an Environmental Flow Advisory Group appointed by the Governor, 4) a statewide Science Advisory Group, and finally, 5) TCEQ adoption of Environmental Flow standards in rule.

Some models involve greater volumes for environmental flows than anticipated in the State Water Plans and existing law. For example, a key strategy for the DFW region involves a transfer of 600,000 acre-feet of water from Toledo Bend Reservoir on the Sabine River. The Science Team in the Sabine Bay/Basin group recommends environmental flow requirements which would decrease water available for this transfer, undermining this source of new supply for DFW. Science Team reports have prompted federal authorities to interfere with Texas water decisions.

Environmental flows and human needs can both be met but should be legally integrated within the same process. In a state with widely varying rainfall and thus flows in our rivers, streams, and estuaries, environmental flows should be estimated to protect critical flows under drought conditions.

Restrictions on interbasin transfers also pose obstacles to the completion of water supply projects. Interbasin transfers are a key strategy for certain regions of the state, particularly in the area surrounding Dallas-Fort Worth. SB 1, however, added a new section to the Texas Water Code providing that "any proposed transfer of all or a portion of a water right [in an inter-basin transfer] is junior in priority to water rights granted before the time application for transfer is accepted for filing." The junior rights provision thus creates a situation where the act of transferring a water right from a seller to a buyer erases much of the value of that right. This has the potential to be a major disincentive to interbasin transfers.

The Facts

- Texas surface water resources: 191,000 river miles running through 23 river basins, 9 major and 20 minor aquifers, 7 major and 4 minor bays and estuaries, and 2,125 miles of shoreline along the Gulf of Mexico.
- Most of the state's existing surface water supply is stored in reservoirs.
- Surface water strategies in the SWP expect to provide 9 million acre-feet per year in additional water supplies.

Recommendations

- Legally integrate the Regional Water Planning process with the now separate Bay/Basin Environmental Flow process. Assert the priority of human need for water.
- Establish policy objectives for environmental flow regimes to protect critical flows during drought and minimum standards for scientific rigor.
- Clarify the "Four Corners Provision" (TWC 11.122(b)) that a water right amendment for only a change or addition of use is not subject to an administrative hearing.
- Simplify the requirements for indirect re-use of water in TWC 11.042 and 11.046.
- Articulate policy reinforcing the value of water marketing for efficient and timely implementation of water supply strategies in the SWP.
- Repeal the junior rights provision relating to interbasin transfers.

Resources

2012 State Water Plan, Texas Water Development Board (Jan. 2012).

Rights to Use Surface Water in Texas, Texas Commission on Environmental Quality, GI-228.

Science Advisory Committee Report on Water for Environmental Flows, prepared for Study Commission on Water for Environmental Flows (26 Oct. 2004).

Solving the Texas Water Puzzle: Market Based Allocation of Water by Ronald A. Kaiser, Texas Public Policy Foundation (Mar. 2005).

Rely on Market Competition to Improve Texas' Economy and Environment

Property Rights

Property Rights

The "Buy-back" Provision

The Issue

While steps have been made to restore property rights that have been eroded through years of court rulings up through the *Kelo* decision, there are still problems that need to be addressed. The 82nd Texas Legislature's SB 18 was the latest attempt by the Texas Legislature to protect private property rights.

Most of the provisions of SB 18 were well-founded and will move eminent domain law in the right direction. However, SB 18's "buy-back" provision—while well intentioned—did nothing to advance the cause of property rights in Texas.

One of the problems in eminent domain law has been that once a property has been condemned, it can be used for just about any purpose—the condemnor is not required to use it for the purpose it was taken. This would seem to be contrary to the U.S. and Texas constitution's requirement that property be taken only for a public use. The buy-back provision in SB 18 was supposed to fix this, but instead it will be completely ineffective.

Under SB 18, a condemnor is required to meet two of seven criteria within ten years of the taking that are supposed to demonstrate that the entity has made "actual progress … toward the public use" for which the property was taken. However, the seven criteria that a condemnor must meet to keep the land are so easily achieved that any government entity will be able to keep all the land it takes without ever using one parcel for the use specified in the condemnation proceedings.

For instance, if a city simply acquires two tracts of land then applies for state or federal funds to develop the tracts for the purported public use, the city will have met the criteria. It makes no difference whether or not the city ever gets the funds or the permit. Or another government entity could just meet one criteria such as applying for a federal permit then avoid the second criteria altogether by adopting a resolution stating that it "will not complete more than one action … within 10 years of acquisition of the property."

The Facts

- Though the Texas Constitution allows property to be taken only for a public use, Texas law allows the government to take property and use it for any purpose.
- The San Antonio Water System acquired approximately 2,500 acres under the threat of eminent domain for the "Applewhite Reservoir." The reservoir was never built, and much of that land today is being used for a Toyota truck manufacturing plant and a land heritage preserve.

- SB 18 from the 82nd Texas Legislature was supposed to solve this problem, but instead its "buy-back" provision is completely ineffective.

Recommendations

- Grant property owners the right to repurchase their property if the initial use of a property acquired from them through eminent domain is not the public use for which the property was acquired.
- Ban the initial use of property acquired through eminent domain for any use other than the use for which it was acquired.

Resources

The Initial Use Requirement: HB 1250 & SB 829 by Bill Peacock, Texas Public Policy Foundation (Mar. 2013).

The Buyback Provision by Bill Peacock, Texas Public Policy Foundation (Apr. 2013).

Senate Bill 18: The "Buy-back" Provision by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (Feb. 2011).

What's Next for Senate Bill 18? by Bill Peacock, Texas Public Policy Foundation (Apr. 2011).

Property Rights in Texas: Heading in the Right Direction by Bill Peacock, Texas Public Policy Foundation (Oct. 2011).

Regulatory Takings

The Issue

In 1995, the Legislature passed the Texas Real Private Property Rights Preservation Act (RPPRPA), providing compensation to property owners for loss of value due to new regulations on land use. Authors sought a method of protection and a deterrent against local government regulations that would damage the value of someone's property. Unfortunately, the act exempts municipalities. Since cities, due to re-zoning activities, are the largest condemnors, this exemption practically renders the act ineffective.

Additionally, even when a condemnor is not a municipality, the condemnor does not have to compensate a private real property owner for the taking, unless a court decides that the land has been devalued by at least 25% of its original fair market value. This tells property owners to expect losses of almost a quarter of the value of their property due to regulatory impacts. For the last two legislative sessions, bills have been filed attempting to address some of the above issues. However, the bills have stalled in committee. The problems remain.

The Facts

- Article I, Section 17, of the Texas Constitution states, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."

- The Texas Real Private Property Rights Preservation Act does not apply this constitutional protection to municipal actions—like zoning—that result in a reduction of property value, i.e., a taking. Section 2007.003(a) exempts the actions of municipalities from the provisions of the Act.

- The Texas Real Private Property Rights Preservation Act, in Section 2007.002, excludes from the compensation requirement any government action that reduces the market value of private property up to 25%.

- Texas case law also makes it very difficult for property owners to receive compensation for regulatory takings. The Texas Supreme Court has stated that property owners do not acquire a constitutionally protected vested right in property uses.

- Dallas opted to re-zone around Ross Avenue to increase the number of luxury condominiums and improve the aesthetic beauty of its eastern gateway to downtown. The practical effect was to prevent many of the property owners already working on Ross from continuing to operate their businesses. One operator was allowed to continue operating his auto body shop, but at a cost of close to $100,000 in legal fees and property modifications.

Recommendations

- The Texas Real Private Property Rights Preservation Act should be amended to apply to municipalities.
- The numerical threshold of what qualifies as a taking under the Act—a 25% reduction of the market value of the affected private real property—is an arbitrary number that should be reduced or eliminated.
- Condemnors should have the ability to issue waivers as an alternative to financial compensation. Those waivers should specifically mention which property rights are being reinstated per the waiver. Doing so will allow the waiver to "run with the land" for future owners, as well as prevent municipalities from spending more.

Resources

Regulatory Takings: The Next Step in Protecting Property Rights in Texas by Ryan Brannan, Jay Wiley, and Bill Peacock, Texas Public Policy Foundation (July 2010).

Private Real Property Rights Preservation Act Guidelines, Attorney General of Texas Greg Abbott (2011).

Article 1, Section 17, Texas Constitution (1876).

Texas Private Real Property Rights Preservation Act (1995).

City of University Park v. Benners, 485 S.W.2d 773 (Tex.1972).

Public Use vs. Public Purpose

The Issue

According to the United States and Texas constitutions, eminent domain can only be used for a public use. Specifically, Article 1, Sec. 17 of the Texas Constitution says, "No person's property shall be taken, damaged, or destroyed for or applied to public use…"

However, in most cases, Texas statutes refer to "public purpose" or simply "purpose" when authorizing the use of eminent domain. For instance, here is the statute granting eminent domain authority to the University of Texas System:

> Sec. 65.33. EMINENT DOMAIN. (a) The board has the power of *eminent domain* to acquire for the use of the university system any land that may be necessary and proper for carrying out its ***purposes*** in the manner prescribed by Chapter 21, Property Code.

Then in subsection (c), the Legislature declares the purposes of the University of Texas System to be for the use of the state:

> (c) The taking of the property is declared to be for the use of the state.

In other words, the Legislature declares that whatever purpose the University of Texas System may have for a piece of property it takes from an owner becomes a public use simply through the exercise of eminent domain. The courts need not worry about the facts.

Texas courts also have fallen into using purpose when referring to property takings. Here is language from one Texas Supreme Court opinion:

> In any event, a mere declaration by the Legislature cannot change a private ***use*** or private ***purpose*** into a public ***use*** or public ***purpose***.

The good news here is that the Supreme Court's decision stands opposed to the Legislature's declaration about the University of Texas System's exercise of eminent domain. The bad news, though, is that the Court also confuses use and purpose.

Until 2011, all grants of eminent domain authority revolved around purpose rather than use. The 82nd Texas Legislature recognized the problem with this language and began to address it in SB 18 by changing the language in the authorizing statutes for cities, counties, and school districts from public purpose to public use.

Some have questioned the need to make such changes. However, clarity in law is crucial, as can be seen in cases like *Kelo* where the U.S. Supreme Court said that "public purpose" can include such things as economic development and increased tax revenue. Because the Texas Legislature and Texas courts have closely followed the national trend of blurring the distinction between public use and public purpose, it is important to restore clarity in Texas law by restoring constitutional language in Texas statute.

The next step is to finish the process by making the change from "purpose" to "use" in all places in statute where eminent domain is authorized. This includes authorizations for entities such as universities, state agencies, municipal utility districts, hospital districts, common carriers, etc. With these changes made, it will be clear that all subdivisions of the state and all private entities are granted the power of eminent domain to take property only for a public use.

The next step is to finish the process by making the purpose to use change in all places in statute where eminent domain is authorized for use. This includes authorizations for entities such as universities, state agencies, municipal utility districts, hospital districts, common carriers, etc. With these changes made, it will be clear that all subdivisions of the state and all private entities are granted the power of eminent domain to take property only for a public use.

The Facts

- Both the United States and Texas constitutions authorize the use of eminent domain only for a "public use."
- Most grants of eminent domain authority by the Texas Legislature, however, allow takings for "public purposes."
- Last session, the Texas Legislature began to reverse this in SB 18 by authorizing the use of eminent domain for cities, counties, and school districts only for a public use.

Recommendation

- Change all references to in statute to "public purposes," "public purpose," or simply "purpose" when authorizing the use of eminent domain to "public uses" or "public use."

Resources

Senate Bill 18: Public Use vs. Public Purpose by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (Feb. 2011).

Property Rights in Texas: Heading in the Right Direction by Bill Peacock, Texas Public Policy Foundation (Oct. 2011).

Eminent Domain: Balancing the Scales of Justice by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (May 2010).

Property Rights and the Texas Courts

The Issue

In the wake of the 2005 *Kelo v. New London* decision, Texas courts have made significant headway in the direction of protecting property rights, and correcting weaknesses in the protection thereof.

For example, in *Laws v. Texas*, a couple sought to prove that a tract of land condemned by the state was, in fact, capable of being divided into several self-sustainable economic subunits, whose value collectively was greater than the value viewed in the greater unit by the state. The Supreme Court, examining this situation, agreed that the Lawses, and by extension anyone else whose land is under government scrutiny, could provide evidence in court that their property is more valuable than the state estimates. The courts still make final decisions, but the state cannot constrain evidence in such proceedings.

In another important case, the city of Dallas declared Heather Stewart's long-vacant home a public nuisance, demolished it, and refused to pay compensation due to its prior declaration. However, the courts determined that she was, in fact, due compensation because the condemnation was based only on facts presented by the city exercising its taking powers. The Supreme Court determined that the "protection of property rights … cannot be charged to the same people who seek to take those rights away."

In another case, the Supreme Court continued to re-emphasize the importance of private rights to property over supposedly public interest. In *Texas Rice Land Partners v. Denbury*, Denbury received permission from the Railroad Commission to claim land for a CO_2 pipeline as a common carrier, and argued that such permission precluded a court case. However, the Supreme Court disagreed, saying that, in fact, just "checking the right boxes" to become a common carrier doesn't provide protection from suits to determine if the use is public rather than private.

More recently, the Texas Supreme Court issued its decision in *Severance v. Patterson*, in which the state of Texas was claiming that a rolling easement to beach access can eliminate a property owners right to use her own property in the case of a rapid erosion event, such as a hurricane.

However, the Court determined there was simply no evidence in the record of an easement by prescription or dedication on such land, nor has the public had a "continuous right" to use it. Based on this, the Court ruled (twice) that while the public has acquired the right to access many beaches over time, it does not suddenly acquire the right to access private property that becomes the beach because of a major storm. Unfortunately, the Texas Legislature changed the law in 2013 to reduce the protection of property rights under *Severance*. This might ultimately lead to another lawsuit in time.

The most recent property rights action by the court involves the seizure of property though civil asset forfeiture. In *El-Ali v. Texas*, the Court denied a petition for review from a citizens whose Chevrolet pickup truck had been

seized because someone else had used it in a crime. The truck owner, Zaher El-Ali, claimed that honest property owners should not be burdened with proving their innocence to recover property used by others in the commission of a crime.

There is still much more to be done in the sphere of property rights. However, these decisions help protect those rights from executive and legislative abuse of takings powers, and the discussion of these rights and the threats to them —such as takings powers and taxation—is essential for moving our state and country forward economically.

The Facts

- Property rights are essential for economic prosperity and development.
- The Supreme Court of Texas has made many strides of late in protecting property rights from abuse by executive agencies and legislative acts, and has turned away from strict deference to the Legislature.

Recommendations

- Amend statute to shift the burden of proof in all property rights cases from the land owner to the condemnor.
- Reduce judicial deference to the decisions of executive agencies and local governments.
- Restore the constitutional right to both own and use property. Current case law, as held by the Texas Supreme, says, "Property owners do not acquire a constitutionally protected vested right in property uses."

Resources

Senate Bill 18: Presumption by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (Feb. 2011).

Amicus Brief in Beach Access Case by Vikrant P. Reddy, Texas Public Policy Foundation (June 2011).

Property Rights in Texas: Heading in the Right Direction by Bill Peacock, Texas Public Policy Foundation (Oct. 2011).

Rely on Market Competition to Improve Texas' Economy and Environment

Consumers

Consumers

Local Right-of-Way Fees

The Issue

For years, Texas municipalities have imposed franchise fees upon telecom and utilities providers to provide revenue that supports general city expenditures. These fees are much higher than needed to support the use of the city rights-of-way by these companies. Ostensibly charged as a form of "rent" for use of public right-of-way to benefit taxpayers of a city, these fees are simply a tax charged to those citizens in their role as consumers.

In 2013, the cost of the right-of-way (ROW) fees to consumers and businesses in the 10 largest Texas cities was nearly $512 million. Since 2008, the cost to consumers has totaled more than $3 billion. Rather than serving as a benefit to taxpayers, these excessive fees represent a major cost to consumers, as well as a bar to new competitive entrants into these markets.

The problem is not in the charging of fees for use of public land, but that the revenue generated far exceeds what is necessary to maintain the ROWs. Instead, the money becomes a general use fund for the cities, at the consumers' ultimate expense, and acts as a tax on those who pay for the services that use ROWs.

Despite municipality claims to the contrary, "rent" is an inaccurate way to describe the function of franchise fees. Governments are not private landlords, whose obligation is to extract the maximum rent from users. They are defenders of the public interest.

The public ROW is not created like private development, which comes about through personal investment and a good deal of risk. The ROW is created usually through the police power of the government, solely for the benefit of the community. It is harmful for a municipality to maximize franchise fees at the expense of its own citizens, making them pay more to use their own property, disrupting the efficiency of the ROW, and obstructing the entry of new consumer technologies.

Today's excessive franchise fees stymie competition and strain consumer budgets. Charging a fee to cover the cost of providing ROW access is appropriate; charging Texas consumers over $3 billion since 2008 to essentially use their own property is not.

The Facts

- Since 2008, Texas municipalities have charged $3 billion dollars in franchise fees to companies for right-of-way access, a burden ultimately borne by consumers.
- The fees raised far exceed the cost for ROW maintenance.
- The revenue obtained by these fees often goes to entirely unrelated projects.

Recommendation

- ROW fees should be significantly reduced, limited to recouping the marginal cost of using the ROW.

Resources

The Municipal Right-of-Way Fee: A Heavy Burden on Texas Consumers by Bill Peacock and John Di Pietro, Texas Public Policy Foundation (July 2012).

Local Franchise Fees Generate Hundreds of Millions for Cities by Bill Peacock and Jordan Brownwood, Texas Public Policy Foundation (Jan. 2011).

Telecommunications

The Issue

Texas has recently been one step ahead of the rest of the country in telecommunications, passing major telecom reform legislation in both 1995 and 2005. Thanks to a bill passed by the 79th Legislature—SB 5—local telephone service for more than 15 million Texans was significantly deregulated as of January 1, 2006. This was a major step forward in reducing costs and bringing new technologies and services to millions of Texans.

Texas again took the lead in 2011. The Legislature passed SB 980, an omnibus telecommunications deregulation bill. This legislation allows new technology and innovation such as VoIP, broadband, and cable to compete in the market. The law ended specific tariffing requirements and removed monopoly relic regulation. Ultimately, it will increase competition in the marketplace and lower costs for Texas consumers.

But there is still room for improvement. Texas consumers are particularly burdened with high tax rates on telecommunications services. The taxes and fees that consumers pay include state and local sales taxes, municipal franchise fees, and charges for the Texas Universal Service Fund (USF).

Texans pay higher tax rates on the purchase of most telecommunications services (except satellite) than they do on fireworks and hard liquor. In fact, only cigarettes are taxed at a higher rate.

The Facts

- Wireless telephone customers pay an average tax rate of 17.97%; the sales tax for other goods and services is 8.25% at most.
- The current Texas Universal Service Fund is 4.3% of taxable communications receipts, which altogether adds approximately 2.7% onto wireless services.
- Upon deregulation, interstate long distance rates fell 68% from 1984 to 2003, while intrastate rates fell 56%. The slower decline of intrastate rates is due largely to state regulators who have kept intrastate access charges artificially high in order to maintain subsidies of local phone rates.
- The dual system in Texas of deregulated urban markets and regulated rural markets could create a "digital divide" between urban and rural customers.

Recommendations

- Eliminate the "tax on a tax" aspect of the state and local sales taxes.
- Municipal Franchise Fees. Restructure these fees to reflect the marginal costs of providing services through the right-of-way.

- Universal Service. Do not expand Universal Service Fund subsidies or fees to new services or technologies, e.g., broadband, VoIP. Examine ways to further reduce the Universal Service Fund.

Resources

Telecommunications Taxes in Texas by Bill Peacock and Chris Robertson, Texas Public Policy Foundation (Apr. 2009).

Testimony Presented to the House Committee on Regulated Industries: Regarding Telecommunications Taxes and Technology Deployment by Bill Peacock, Texas Public Policy Foundation (June 2008).

Taxes and Fees on Telecommunications Services in Texas by Paul Bachman, Sarah Glassman, and David G. Tuerck, Ph.D., Texas Public Policy Foundation (Apr. 2007).

Q&A on the Texas Universal Service Fund by Bill Peacock, Texas Public Policy Foundation (Aug. 2006).

Texas Telecommunications Taxes: An Overview by Bill Peacock, Texas Public Policy Foundation (Feb. 2006).

Texas Telecommunications: Everything Is Dynamic Except the Pricing by Robert W. Crandall and Jerry Ellig, Texas Public Policy Foundation (Jan. 2005).

Consumer Choice and Telecommunication Contracts by Chris Robertson, Texas Public Policy Foundation (Apr. 2009).

Testimony Regarding the NFL Network Dispute by Bill Peacock, Texas Public Policy Foundation (Dec. 2007).

Texas Telecom Deregulation by Bill Peacock, Texas Public Policy Foundation (Apr. 2006).

Texas Telecommunications: The Road Ahead by Bill Peacock, Texas Public Policy Foundation (Oct. 2005).

A Telecommunications Policy Primer by Dianne Katz, Texas Public Policy Foundation (Jan. 2005).

Homeowners' Insurance

The Issue

Reform of the Texas homeowners' insurance market in 2003 called for a file-and-use regulatory system. However, in 2009, the Sunset Review Commission's Staff Report on the Texas Department of Insurance (TDI) rightly concluded that the "Legislature cannot judge the success of the shift to file-and-use rate regulation because the system has not been fully implemented." Conditions have little improved since the report was issued.

One reason for the incomplete implementation is TDI's use of both pre-market and post-market regulatory tools—the Insurance Code grants TDI authority to reject rates both before and after being used in the marketplace. Failure to implement file-and-use is a problem because pre-market regulation hinders timely entry of rates into the marketplace and disrupts market pricing.

The price disruption is aggravated by Texas' non-renewal law, which prohibits insurers from non-renewing high claims policies, even when the damage was a product of the policyholders' own negligence. This forces insurers to base their coverage and rates on non-actuarial principles and discourages insurers from establishing specialized markets to cover high-risk areas.

A related problem is TDI's focus on "affordability." Ultimately, a regulatory stance focused on affordability reduces investment, hinders competition, and puts insurers at risk of insolvency. An example of the danger of focusing on affordability—rather than solvency—is the failure of Texas Select Lloyds in 2006, at a time when TDI was committing significant resources to pursuing legal actions against two major insurance companies for excessive rates.

Furthermore, statutory calls for rates neither "excessive" nor "inadequate" are at odds with each other, creating regulatory uncertainty. This conflicting statutory guidance stands in the way of true file-and-use rate regulation in the Texas homeowners' insurance market.

The Facts

- Senate Bill 14 (2003) called for a transition to a file-and-use regulatory system for homeowners' insurance, with the intention of having a file-and-use system in place as of December 1, 2004.
- Texas' system of rate regulation for homeowners insurance includes pre-market and post-market regulatory tools, where rates can be rejected before or after they are first used in the marketplace. This prevents insurers from basing rates on actuarial principles and reduces competition in the marketplace.
- TDI's belated implementation of a 1997 provision allowing insurers to use national forms, along with lawsuit abuse, caused premiums to rise dramatically. This delay ultimately cost consumers more than $900 million. After TDI al-

lowed insurers to use non-standard forms in 2002, mold claims plummeted and rates stabilized.

Recommendations

- Adopt a true file-and-use system allowing the Commissioner to disapprove only rates in use.
- Shift the focus from blocking "excessive" rates to guarding against inadequate or discriminatory rates.
- Implement a true file-and-use system for policy forms, and focus policy-form regulation on the wording and clarity of an insurance form rather than the content of a form.
- Allow the Commissioner to place under prior approval only those companies whose financial positions warrant increased supervision in order to maintain solvency.
- Permit insurers to non-renew, or add a premium surcharge to, high claim policies, especially where those claims were a product of negligence or misuse of the claims process.

Resources

Non-Renewing Costly Policies in Texas' Homeowners' Insurance Market, by Kathleen Hunker, Texas Public Policy Foundation (2014).

More Intervention in the Insurance Marketplace: SB 871 by Bill Peacock, Texas Public Policy Foundation (Mar. 2011).

Freedom of Contract Creates Regulatory Certainty and Lower Insurance Rates by Ryan Brannan, Texas Public Policy Foundation (Mar. 2011).

Consumers, Competition, and Homeowners' Insurance by Bill Peacock, Texas Public Policy Foundation (May 2010).

Homeowners' Insurance: The Problem with Prior Approval by Bill Peacock, Texas Public Policy Foundation (May 2009).

Windstorm Insurance

The Issue

The Texas Windstorm Insurance Association (TWIA) provides windstorm and hail coverage in the 14 coastal counties and a few other specially-designated areas. All property insurers in Texas must participate in TWIA and must help pay losses. Although TWIA is thought of as a program to provide windstorm insurance coverage only to those who could not purchase insurance in the voluntary market, it is no longer an insurer of last resort.

TWIA's unrealistically low rates have made TWIA an unbeatable competitor that is crowding out the private market. TWIA's market share along the coast grew from 17.9% in 2001 to 57.2% in 2010. Similarly, in 2001 TWIA had 68,756 policies in-force. By February 2014, that had grown to 270,487.

Not surprisingly, the artificially low rates that make TWIA an unbeatable competitor do not result in sufficient reserves to pay for the most likely claims caused by a major hurricane. At the start of the 2014 hurricane season, TWIA had around $211 million in the Catastrophe Reserve Trust Fund to pay claims. Claims along the coast for large storms could range from $4.7 billion in Galveston and $3.9 billion in Corpus Christi to $598 million in Brownsville. Altogether, TWIA's direct liability exposure was $ 76.9 billion.

This inefficient and inadequate funding scheme presents a risk to all Texans in the event of a catastrophe. TWIA policyholders have policies with no definite funding source. Private insurers remain vulnerable to large assessments. And average consumers and taxpayers could see an increase in their homeowners insurance rates or be forced to subsidize losses with tax dollars.

The Facts

- TWIA's market share along the coast grew from 17.9% of all residential properties in 2001 to 63.35% in 2012.
- Here is the exposure for TWIA in three areas of the coast:
  - Galveston: $23.3 billion
  - Corpus Christi: $13.8 billion
  - Brownsville: $5.1 billion
- In the case of a strike by a Class 4 hurricane, here is the average projected loss in each area:
  - Galveston: $4.7 billion
  - Corpus Christi: $3.9 billion
  - Brownsville: $598 million
- At the start of the 2014 hurricane season, TWIA had somewhere around $211 million in the Catastrophe Reserve Trust Fund to pay claims.

- The number of TWIA policyholders increased from 68,756 in 2001 to 270,487 at the end of February 2014.

Recommendations

- Eliminate the Texas Windstorm Insurance Association.
- Replace TWIA with a true provider of last resort, much like the Texas FAIR plan for automobile insurance policies.
- Require that the new windstorm rates be actuarially sound.
- Require that the new windstorm rates be higher than any competing private sector offers.

Resources

Texas' Windstorm Insurance System Still Does Not Work by Bill Peacock, Texas Public Policy Foundation (Mar. 2013)

Next Steps to Reforming Texas Windstorm Insurance by Bill Peacock and Ryan Brannan, Texas Public Policy Foundation (Nov. 2010).

Consumers, Competition, and Homeowners' Insurance: A Sunset Report on the Texas Department of Insurance and the Office of Public Insurance Counsel by Drew Thornley and Bill Peacock, Texas Public Policy Foundation (Aug. 2008).

Texas' Windstorm Challenge: Unprepared for the Worst by Bill Peacock, Drew Thornley, and Machir Stull, Texas Public Policy Foundation (Dec. 2007).

A Better Homeowners' Insurance Market Awaits by Drew Thornley, Texas Public Policy Foundation (June 2008).

"Can't Compete," Letter to the Editor by Drew Thornley, Texas Public Policy Foundation, *Corpus Christi Caller-Times* (Apr. 2008).

Q&A on Homeowners' Insurance Regulation in Texas by Drew Thornley and Bill Peacock, Texas Public Policy Foundation (Feb. 2008).

Missing the Big Picture in Homeowners' Insurance Debate by Drew Thornley, Texas Public Policy Foundation (Mar. 2008).

Homeowners' and Windstorm Insurance in Texas, PowerPoint presentation by Bill Peacock, Texas Public Policy Foundation (Oct. 2007).

Short-term Consumer Lending

The Issue

In the wake of the 2008 financial crisis, lenders and consumers alike have had many concerns regarding the state of the credit market. Traditional banks have tightened restrictions on lending, making it more difficult to obtain credit, especially when the need arises very suddenly and unexpectedly.

For consumers who don't meet banks' lending criteria, options are limited, especially when the necessary funds are too "small" for the bank, and when borrowers don't have proper credit ratings and can't obtain credit cards. One option for these individuals is payday lending, especially after being rejected by a traditional bank. Contrary to popular opinion, the individuals seeking such lending are not undereducated or unemployed; rather, they are normal individuals who needed a short-term loan to tie them over after an unexpected expense. Often, these individuals are renters, and thus aren't able to use home equity to help them cover their needs.

Oftentimes, credit service organizations (CSOs) will help loan-seekers locate third-party lenders for a fee; the lenders in turn deposit money in an individual's account against a future paycheck. However, these fees, and payday lending in general, are often targeted by governments. In the last session, at least 19 bills targeted the practice, including ones that would institute restrictions on charging fees.

The bills in question would have likely driven many payday lenders out of the business, as happened when New Hampshire created new regulations. Rather than protecting consumers, it likely would have dried up their last attempts at credit, making it more difficult for those with sudden needs to meet those needs, often at great personal cost.

Fortunately, no major regulatory bill passed. However, several key players have pledged to convince more Texas cities over the next year to adopt strong local payday and auto title ordinances. New regulations are bound to harm the market, and are unnecessary; consumers are able to make their own decisions as to whether the fees and costs are worth the utility of the loan. Calls for regulation also incorrectly assume that CSOs are unregulated, which is simply not true.

Those who need access to credit already face a hard challenge. New regulations of the market would make that challenge even more difficult, and in some cases could make it impossible. On the other hand, consumers benefit when they are able to secure credit in a timely fashion. Keeping short-term lenders open extends credit to all those who need it.

The Facts

- An estimated 40% of payday loan recipients seek such loans only after rejection by traditional lenders.
- Payday borrowers, contrary to popular belief, are educated and employed.
- Regulations in other states have forced many such lenders out of business, limiting credit options for those that the laws supposedly were designed to protect.

Recommendation

- No attempts should be made to add further barriers to payday lending and restrict access to capital for those in need of short-term loans.

Resources

Consumer Benefits of Access to Short-Term Credit by Ryan Brannan, Texas Public Policy Foundation (Mar. 2011).

Evaluating Consumer Access to Short-Term Lending by Ryan Brannan, Texas Public Policy Foundation (Apr. 2011).

Center for Economic Freedom: Review of the 82nd Session of the Texas Legislature by Bill Peacock and Ryan Brannan, Texas Public Policy Foundation (June 2011).

Tax Lien Transfers

The Issue

Every year thousands of Texas property owners find themselves in the unenviable position of falling behind on their property taxes either because of a temporary financial setback or some other lack in liquid capital.

Fortunately, the competitive market has stepped in to offer these property owners a way to satisfy their tax debt without having to trek through the delinquency process, whose penalties, fees, and interest can add close to 50% onto a property owner's final tax bill after just one year.

Called a tax lien transfer, this specialized lending practice offers Texas property owners a reasonable means to take control of their outstanding tax debt by negotiating a short-term loan with a licensed tax lender and then transferring the tax lien that the government automatically attaches to the property as collateral for the loan. This allows property owners to spread out their tax obligation over several years rather than paying in a lump sum as is typically demanded by state law.

Over the past few years, Texas taxpayers have expressed a strong demand for property tax lending services, driven in large part by sharp increases in Texas property taxes, which have risen almost three-times faster than household income. That demand will not dissipate so long as property taxes continue to overburden Texas taxpayers.

Nevertheless, despite the high demand for tax lien transfers, and despite their appreciable benefit to Texas taxpayers, an ensemble of special interests have incited fears over business practices within the tax lending market and have pushed for legislation that restricts, if not eliminates, taxpayers' access to much needed tax assistance.

The effort has had some success. The Texas Tax Code already puts up extra barriers for Texans with mortgaged properties, demanding that they wait until their taxes turn delinquent before initiating a tax lien transfer. Put differently, these Texans can only take action to resolve their tax debt after they start accumulating penalties and interest.

In addition, the Texas Legislature considered no less than nine bills last session aimed at curtailing tax lien loans, of which two passed. Although HB 1597 attempted to reduce demand by offering milder payment plans to qualified owners, SB 247 continued the legislature's usual practice of foisting additional restrictions on licensed lenders, distorting the market.

More troubling, proposed changes in SB 1449 would have eliminated the tax lien's superior priority over other secured interests. Had it been enacted, the amendment would have effectively ended tax lien lending as a sustainable commercial practice, denying Texas property owners a cost-effective means

of rectifying their tax debt. Such legislation would not help Texas property owners; it would simply force them to confront the penalties and foreclosure proceedings that accompany delinquency with no prospect for relief.

The Facts

- The Office of Consumer Credit Commissioner reports that 72 licensed lenders issued 14,526 property tax loans in 2012.
- Property taxes climbed 205% statewide from 1991 to 2010 or an average of 6.3% per year. Conversely, personal income increased by only 70% or an average of 2.7% per year.
- The delinquency rate in Travis County has jumped from 5.1% in 2000 to 10.6% in 2013.
- After one year of delinquency, a property owner will have added 12% in interest, 12% in late penalties, and somewhere between 15-20% in collection fees onto their original tax bill.
- The Finance Commission reports that a tax lien transfer could cost a taxpayer significantly less than remaining in delinquency, $13,156 as compared to $16,608 over five years.

Recommendations

- Amend §32.06(a-2) of the Texas Tax Code to eliminate its two-tier treatment of Texans with mortgaged properties, specifically the requirement that these property owners wait until their taxes have become delinquent before initiating a tax lien transfer.
- Make no attempt to eliminate or alter the tax lien's high priority status after it's been transferred to a third party.
- Refrain from enacting any additional barriers to tax lien lending that restricts and/or denies Texas property owners access to market-based tax relief.

Resources

Tax Lien Transfers: A Reasonable Means of Rectifying Property Tax Debt by Kathleen Hunker, Texas Public Policy Foundation (Aug. 2014).

Tax Lien Lending is a Cost-Effective Way to Manage Property Tax Debt by Bill Peacock, Texas Public Policy Foundation (May 2014).

Restore and Protect Our Justice System

Criminal Justice

Criminal Justice

Overcriminalization

The Issue

Criminal law is not just for criminals anymore—at least not criminals as traditionally defined. Texas lawmakers have created over 1,700 criminal offenses, including 11 felonies relating to harvesting and handling oysters. Moreover, the 1,700 figure does not include the countless criminal offenses that have been created through agency rulemaking pursuant to catch-all statutory provisions that make any violation of any agency rule a crime, as well as the more than 4,000 federal criminal offenses and myriad local criminal ordinances.

In many spheres of economic activity voluntary transactions have been criminalized. Some antitrust laws, for example, provide for criminal penalties for transactions to which both buyer and seller have voluntarily consented. Criminalization of activities of this sort should be eliminated.

Texans once lived under a criminal code that resembled the Ten Commandments. Now, the traditional criminal acts found in the Penal Code—from murder to many types of theft—account for less than 300 offenses. This leaves over 1,400 byzantine offenses scattered outside of the Penal Code. Many of these are "regulatory offenses"—those relating to ordinary, non-fraudulent business activities in fields such as agriculture, health care, natural resources, and insurance.

Significant differences between criminal and civil law make criminal law an overly blunt instrument for regulating non-fraudulent business activities. Whereas administrative rulemaking and civil proceedings may utilize a cost-benefit analysis to evaluate the conduct at issue, no such balancing occurs in criminal proceedings, which is appropriate provided criminal law adheres to its traditional focus on conduct for which there is clearly no justification. Also, criminal law, because it is enforced entirely by state prosecution, tends to minimize the role of the victim. Indeed the prototypical "regulatory" offense, such as not filing the correct paperwork with a state agency, does not include anyone actually being harmed as an element of the offense. Finally, civil law and criminal law have traditionally been distinguished by the requirement that a criminal must have a guilty state of mind, expressed in the Latin term *mens rea*. An increasing number of regulatory offenses nevertheless dispense with the *mens rea* requirement or require merely criminal negligence rather than intentional, knowing, or reckless conduct.

The Facts

- Occupations Code Section 165.151 makes it a Class A misdemeanor (punishable by up to one year in jail) to violate a rule of a professional licensing board covered under this chapter.
- Parks and Wildlife Code Section 66.023 makes it a third degree felony (punishable by up to 10 years in prison) to lie in a fishing tournament in which the prize money is valued at over $10,000.
- Chapter 26.3574(s)(16) of the Water Code makes it a second degree felony (punishable by up to 20 years in prison) not to "remit any fees collected by any person required to hold a permit under this section."

Recommendations

- Refrain from creating new criminal offenses, especially those regulating non-fraudulent business activities.
- Avoid licensing new occupations, and revise laws to eliminate criminal penalties associated with many occupational licensing violations.
- Do not criminalize voluntary economic transactions using either civil or criminal law.
- Repeal excessive and unnecessary offenses and narrow the scope of overly broad offenses. Eliminate criminal offenses based on voluntary economic transactions involving legal products and services. (Fraudulent transactions, meaning those that involve coercion, would not be included in this category.)
- Ensure that an appropriate culpable mental state is included for all non-traffic offenses and that it applies to each element of the offense.
- Strongly codify the Rule of Lenity, a rule of statutory interpretation instructing a court to resolve in favor of the defendant any ambiguities concerning whether the business-related conduct at issue is criminally prohibited.
- Narrow the scope of catch-all statutes allowing agencies to create rules that carry criminal penalties. Offenses should be limited to statutory violations, and non-compliance with rules should be enforced by civil penalties and the revocation of permits and licenses.
- Eliminate the possibility of jail time for first-time conviction of a regulatory misdemeanor, unless the person does not comply with the fine or probation conditions.
- Require that each bill creating an offense specify in the caption and improve fiscal notes so that they state the full cost of the bill, including prosecutorial and judicial expenditures and the appointment of counsel for indigent defendants.
- Amend the Code of Criminal Procedure to allow for citation without arrest for additional misdemeanors and prohibit arrest for regulatory Class C misdemeanors, unless the defendant does not respond to a court summons.

Resources

Overcriminalization in the States by Vikrant Reddy, Texas Public Policy Foundation (Nov. 2013).

Engulfed by Environmental Crimes: Overcriminalization on the Gulf Coast by Marc Levin and Vikrant Reddy, Texas Public Policy Foundation (Dec. 2012).

12 Steps for Overcoming Overcriminalization by Marc Levin and Vikrant Reddy, Texas Public Policy Foundation (May 2012).

Analyze Before You Criminalize: A Checklist for Legislators by Marc Levin, Texas Public Policy Foundation (Apr. 2011).

Empowering & Restoring Crime Victims

The Issue

In modern criminal procedure, the State has come to be viewed as the central victim of illegal activities. This paradigm is an affront to the individual who lost property, a loved one, or were injured due to the callous actions of another. Restorative justice programs offer an opportunity to empower the true victims of crime through an increased stake in the criminal process.

Rooted in Biblical tradition, these programs center on the return of property or value to the injured party. Over the course of history, this approach has been "crowded out" of the formalized justice system as centralized governments grew larger. As such, it is only ubiquitously practiced among small, native societies. However, as victims feel increasingly marginalized in today's mechanical criminal process, these programs have enjoyed a renewed interest.

Restorative justice programs are not intended to usurp the formalized criminal justice system, offer a lenient, punishment-free sanction to the offender, or add another layer of government bureaucracy. To the contrary, these programs are complementary, impose strict punishment, and are handled less formally than the traditional criminal process, all while providing greater levels of satisfaction, ensuring the victim obtains restitution, and offering the offender a chance to atone for his or her misdeeds.

In 2013, the Legislature amended the Code of Civil Procedure to allow the use of Alternate Dispute Resolution (ADR) procedures, rather than criminal procedures, upon referral from the prosecutor. Victim-offender mediation/conferencing are among the methods of criminal ADR used around the world and that are now expressly authorized by Texas statute. In addition to clarifying that such programs are permissible, the statute also allows a nominal offender fee to be collected to cover the cost of the program, which is anticipated to make it more likely that counties will pursue this approach. Restorative justice approaches such as mediation must be chosen not only by the victim, but also by the offender, as the offender thereby waives his right to trial and appeal, which is one reason these approaches are far more efficient than the traditional method of processing cases.

Even with the strides already made towards victim empowerment, more can be done to ensure the harm inflicted on victims of crimes is remedied. In addition to prosecutors, victims and law enforcement should be empowered to refer minor property offense cases to criminal ADR, with the assent of the offender. There are also opportunities to give willing victims a larger stake in plea negotiations. These reforms will allow Texas to solidify a reputation of putting her citizens first, versus heaping insult upon injury when one is victimized.

The Facts

- Studies have shown that victims are decidedly more satisfied following participation in restorative justice programs compared to the formal justice system, with as much as 96% reporting being pleased with the process.
- Mediation also benefits the public safety and, by extension, the offender. One study has found that juveniles, having been confronted with the harm they had caused and made to remedy it, were 32% less likely to reoffend than their similar peers in the traditional criminal justice system.

Recommendations

- **Reform ADR Referral Process.** Rather than burdening prosecutors with the need to refer cases to ADR processing, allow the victim or police (with victim consent) to make this decision. This will allow those more intimately familiar with the case to decide its handling. Cases that are not successfully mediated in ADR will revert to the traditional process. Further, data collected on cases diverted to ADR from the court and handled successfully should reflect this, not count as a dismissal for the prosecutor.
- **Empower Victims in Plea Decisions.** Since the harm caused by crime is almost fully borne by the victims, they should in turn be allowed to contribute to the plea process. Texas can require that prosecutors involved in plea negotiations be required to solicit victim input and inform the presiding judge of the victim's position before a plea can be accepted.
- **Recognize Importance of Property Crime Victims.** Under current law, victim status is only conferred on those who fall prey to a violent crime. This negates the harm done to property crime victims, who comprise over 89% of all crime victims in Texas. Many of the same statutory provisions, such as requiring that they be given notice of developments in the case and an opportunity to provide input, should apply to property crime victims as well.

Resources

Reviving Restorative Justice: A Blueprint for Texas by Derek Cohen, Texas Public Policy Foundation (Dec. 2013).

Giving Victims a Voice: Victim Offender Conferencing in Texas by Jeanette Moll and Marc Levin, Texas Public Policy Foundation (Apr. 2013).

Victim-Offender Mediation and Plea Bargaining Reform in Texas by Marc Levin, Texas Public Policy Foundation (Apr. 2006).

Restorative Justice in Texas: Past, Present & Future by Marc Levin, Texas Public Policy Foundation (Sept. 2005).

Parole & Reentry

The Issue

In 2013, 72,019 inmates were released from Texas prisons and state jails, along with nearly all of the approximately 1 million individuals annually received into county jails. Approximately 20% of released state prison inmates and 30% of jail inmates are re-incarcerated within three years, either for a new offense or for violating the rules of their parole supervision.

Nearly 41,000 of those released from state prisons and jails were placed on parole. Another 30,108 were released without supervision. Another 5,739 were placed on probation for the remainder of their sentence, nearly all of whom were inmates incarcerated in the state's Substance Abuse Felony Punishment Facilities (SAFPs).

The bulk of the prison population is governed by Discretionary Mandatory Supervision (DMS), as mandatory supervision was abolished prospectively in 1996. Constitutionally, the early release of offenders is within the sole discretion of the Board of Pardons and Paroles (BPP).

All but 127 of the 22,784 inmates released from state jails in 2012 were discharged without supervision. Before 2011, state jail inmates served a flat sentence of up to two years. In the 82nd Session, however, the law was changed to award diligent participation credits to state jail offenders who make progress in educational, vocational, and treatment programs that can result in up to a 20% reduction in time served behind bars.

As of August 2012, some 113,374 Texans were under parole supervision. The Board uses several factors in making its decisions, including a risk assessment process that scores inmates based on their individual risk factors, such as offense history and severity. Each of the more than 2,000 felonies in Texas law is classified by the BPP as low, medium, high, or extremely high severity. Institutional parole officers interview each candidate for parole and DMS, and write a report, which becomes part of the file reviewed. The public, including district attorneys and victims who are automatically notified (and family, friends, ministers, and others who know the candidate) may submit written comments to the board.

In recent years, the number of parolees convicted of new crimes has been declining. This success may be due to recent strengthening of parole supervision and treatment. For example, prior to 2007, drug tests were sent to a laboratory, creating a delay of a few weeks. Now, results are instant, and most parolees with drug problems admit to it before being tested. Violators who do not pose a public safety risk are immediately referred to outpatient treatment. Also, parolees who repeatedly violate the rules or commit a misdemeanor are often sent to an Intermediate Sanctions Facility (ISF) for approximately 75 days, in lieu of being revoked to prison. Some parolees at ISF's receive drug treatment along with follow-up counseling upon release. In fiscal year 2010, TDCJ placed 9,097 offenders in ISFs.

Immediately upon reentering society, ex-inmates face challenges such as obtaining employment and housing and establishing positive associations. Evidence shows ex-offenders who are employed are less likely to offend and those in higher-paying jobs, which are more likely to be licensed, re-offend at the lowest rate.

In 2013, the Legislature passed several important bills aimed at facilitating reentry. For example, HB 1188 immunizes employers from being sued for negligent hiring in most circumstances when they hire ex-offenders. A similar bill, HB 1659, prohibits occupational licenses from being suspended, revoked, or denied to ex-offenders who have (1) completed deferred adjudication, and (2) gone an additional five years with a clean record. As an important safeguard, licenses could still be denied to sex offenders and those uniquely "unfit for the license."

The Facts

- In 2012, parole cost $3.63 per day per offender, compared to $50.04 a day per prison inmate.
- The most dangerous Texas sex offenders are ineligible for parole. The most seriously violent inmates serve 85% of their sentences and those incarcerated for indecency with a child serve 91.7%. Yet more than two-thirds of offenders enter state lockups for a nonviolent offense.

Recommendations

- Continue to strengthen parole supervision and treatment programs that reduce recidivism and revocations.
- Require split sentencing for certain state jail felons so that they are discharged from state jail on to probation supervision.
- Revise the 2011 state jail earned time credit law so that TDCJ can administratively credit the time earned unless the sentencing court affirmatively decides otherwise.
- Reinstitute mandatory supervision for most drug possession offenders convicted of possessing four grams or less who do not have a prior violent or sex offense.
- Allow ex-offenders who have proven successful on probation for a non-violent state jail felony and paid all required restitution to petition the sentencing court to reduce the offense to a Class A misdemeanor.
- Require nonviolent parolees revoked for technical violations, not new crimes, be sent to an ISF rather than prison, provided they have not been to an ISF within the last two years, and cap initial revocations of nonviolent parolees for a misdemeanor at one year.
- Immunize landlords from being sued for renting to ex-offenders.

Resources

The Role of Parole in Texas by Marc Levin and Vikrant Reddy, Texas Public Policy Foundation (May 2011).

Texas Criminal Justice Reforms: Lower Crime, Lower Cost by Marc Levin, Texas Public Policy Foundation (Jan. 2010).

Working with Conviction: Criminal Offenses as Barriers to Entering Licensed Occupations in Texas by Marc Levin, Texas Public Policy Foundation (Nov. 2007).

Adult Probation

The Issue

Over 400,000 Texans are on probation, including approximately 230,000 felony probationers. Revoked probationers account for 37% of prison intakes and 41% of state jail intakes. The 24,186 probationers revoked in 2013 are projected to serve an average of 2.5 years at a cost of $50.04 a day, resulting in an annual cost of $442 million.

The 83rd Legislature continued to fund incentive-oriented probation funding that was first authorized by the 79th Legislature in 2005. Departments are eligible for the incentive funding if they adopt graduated sanctions and pledge to reduce technical revocations. Graduated sanctions involve utilizing graduated measures such as increased reporting, community service, curfews, electronic monitoring, mandatory treatment, and even shock-nights in county jail prior to revoking a probationer to prison for technical violations. A technical violation is conduct that contravenes the terms of probation (such as missing an appointment) but which is not a new crime.

Most of the state's 121 probation departments, including most of those covering the most populous counties, have participated in the incentive funding plan and implemented graduated sanctions to respond to technical violations, and these departments reduced their technical revocations by 13.4% from 2005 to 2012 while non-participating departments increased technical revocations by 5.9%. Had all departments increased their technical revocations by 5.9% over this period, total technical revocations would have risen 797 instead of a net decline of 1,470. Had the difference, which amounts to 2,267 probationers been revoked to prison, the cost would have been $104.4 million based on the average time served of 2.5 years. Departments receiving the funding used most of it to reduce caseloads from 150 to about 110 probationers per supervising officer. Overall, the Texas felony probation revocation rate has fallen 2.8% from 2005 to 2013.

The Facts

- To avoid spending two billion dollars on building and operating new prisons, the 80th Legislature strengthened probation, including adding 1,400 beds at probation and parole intermediate sanctions facilities. These "ISFs" are typically located in major urban areas, such as one across from Minute Maid Park in Houston, have average stays of 60 days, and primarily house probationers and parolees who would otherwise be revoked for technical violations or misdemeanors.
- Probation costs $2.99 per day, about 54% of which is paid for by offenders in probation fees. Prison costs $50.04 per day, all of which is paid for by taxpayers.

Recommendations

- **Require probation with mandatory treatment for first-time, low-level drug possession offenders with no prior violent, sex, property, or drug delivery crimes.** This could apply to offenders convicted of possessing less

than four grams of drugs such as cocaine. Those convicted of drug delivery were excluded, as were drug possession offenders who had a previous conviction for any offense other than drug possession or a traffic violation. Those covered would be sentenced to mandatory probation and treatment, which they would have to pay for. The judge would determine whether the offender would go to a residential facility, which could be the state's six month secure Substance Abuse Felony Punishment Facilities (SAFPFs), or day treatment, or a combination. The bill specifically included faith-based treatment programs that meet state standards.

- **Revise probation funding formula.** Currently, state basic adult probation funds are distributed based solely on the number of individuals under direct supervision in that department. Distributing funding based on the number of adult probationers provides an incentive to keep probationers who have been compliant for many years, pose no risk to public safety, and are fully paying their fees on probation longer than necessary. Also, because the current funding formula does not incorporate risk, there is a disincentive to put individuals on probation in lieu of prison who could be safely supervised but only with a lower caseload, specialized treatment, electronic monitoring, and/or other interventions that are costly, though far less so than prison. In 2015, the Legislature should require implementation of a formula that includes factors such as: 1) the number of felony probation referrals; 2) an incentive for early termination of compliant probationers who have fulfilled all of their obligations and do not pose a risk to public safety; 3) adjusted funding based on risk level of the caseload; and 4) an incentive to reduce technical revocations so long as new crimes by probationers either remain the same or decline.
- **Enhance use of problem-solving courts.** Evidence has established that drug courts, mental health courts, DWI courts, and other problem-solving courts can reduce recidivism and lower costs to taxpayers by diverting appropriate offenders from incarceration while still holding them accountable. State funding and oversight for these courts should be consolidated into one agency, focus on felony offenders, and be based on guidelines that ensure the lowest-risk, low-level drug possession offenders who can succeed with basic probation do not take up slots in problem-solving courts that could be better used to divert offenders who might otherwise be incarcerated.

Resources

Incentivizing Stronger Probation in the Texas Budget by Marc Levin, Texas Public Policy Foundation (Mar. 2013).

Public Safety and Cost Control Solutions for Texas County Jails by Marc Levin, Texas Public Policy Foundation (Mar. 2012).

Juvenile Justice

The Issue

Juvenile offenders are particularly impressionable and have the most years ahead of them. This raises the stakes for both success and failure when it comes to future public safety and taxpayer costs. Sentencing youth to ineffective, inappropriate programs and facilities could place a one-time nonviolent offender on a path of persistent wrongdoing; essentially making the youth a lifetime siphon of resources rather than contributor.

One of the simplest reforms for ensuring juvenile offenders are placed in the most appropriate setting would be to raise the age of the jurisdiction of the juvenile court from 16 to 17 years of age for misdemeanants and give adult courts the discretion to transfer certain 17 year-old nonviolent felony offenders. These individuals are likely to have committed a minor infraction that would warrant probation; juvenile probation is much better situated to engage parents, who have no right to participate in the adult system, to strengthen the family's capacity to provide structure and discipline. Moreover, juvenile probation typically works with the youth's school to ensure the youth is attending school and exhibiting appropriate behavior. Further, prosecutors can continue to ask that the court certify any youth to stand trial as an adult if charged with a violent or sex offense, and even some drug and property offenses.

Adjudicated youth are more likely to find gainful employment in their adult lives if they are not dogged by a persistent criminal record. Many youth who do run afoul of the law and complete their punishment still carry a record with no understanding of how to seal it. By erecting statutory provisions that mandate the automatic sealing of juvenile records after 1) an established period of time has passed, 2) no subsequent offenses were committed, and 3) the initial offense was nonviolent, these young adults are better positioned to contribute to the workforce. These records would not be expunged and still available to law enforcement authorities to assist in arrest and charging decisions.

It costs some $366.88 per youth per day to house youth in state lockups operated by the Texas Juvenile Justice Department (TJJD), the agency that was created in 2011 with the merger of the Texas Juvenile Probation Commission and Texas Youth Commission (TYC). However, the growing per-youth cost partly stems successful efforts to reduce the population in these facilities from about 5,000 in 2005 to 1,300 today, which has led to a drop in total costs of 25%. As fewer kids are being committed to TJJD facilities, the statewide system inherently becomes less efficient as economies of scale are lost. However, as these trends continue, more facility closures may be possible, thereby representing wholesale reductions in system costs.

The Facts

- There were 141,734 juvenile arrests in Texas in 2005. In 2012, there were only 92,164 juvenile arrests. Arrests of juveniles for murder and manslaughter with a culpable mental state greater than negligence fell from 54 to 27.

- Largely due to a two-thirds drop in the number of youths in TJJD lockups, the TJJD facilities budget for 2014-15 is $319 million, less than the $427 million appropriated to TYC in 2006-07.
- In a recent study, youth who had their records sealed were nearly twice as likely to be employed after two years as those who had not. These youth were also less likely to abuse substances.

Recommendations

- Raise the jurisdiction of the juvenile court to cover 17 year-old misdemeanants. This will increase public safety due to the lower recidivism rates in the juvenile system and save taxpayer dollars. These savings will compound over time as fewer youth return to the criminal justice system in their adult years.
- Empower adult criminal court judges with the authority to transfer 17 year-old nonviolent felons to the juvenile court. This will allow courts to examine each case in light of factors such as the maturity of the 17 year-old, prior record (if any), and assessed risk level, all of which will help the court determine whether the more intensive rehabilitative programming and smaller caseloads in the juvenile system would benefit that offender.
- Pass statutory provisions that automatically seal the records of nonviolent youth offenders under established criteria. Doing so will lower the burden that formal proceedings place on the court, establish a uniform standard for the sealing of records, and prevent minor youthful indiscretions from hampering future prospects of employment.
- Expand use of specialized caseloads with specially trained supervision officers for medium to high-risk mentally ill youths on juvenile probation and parole, in light of evidence that such programs as the Front End Diversionary Initiative (FEDI) substantially reduce recidivism and revocations.

Resources

A Critical Look at Juvenile Offenders with Mental Illnesses: What We Know, What We Don't, and Where We Go from Here by Jeanette Moll, Texas Public Policy Foundation (2012).

Out for Life: Pathways to More Effective Reentry for Texas Juvenile Offenders by Jeanette Moll, Texas Public Policy Foundation (2012).

Ten Truths about Juvenile Justice Reform by Jeanette Moll, Texas Public Policy Foundation (Dec. 2011).

School Discipline & Delinquency Prevention

The Issue

During the 83rd Legislature, great strides were made in diverting disruptive youth from the criminal court. Prior to the passage of Senate Bills 393 and 1114, children who misbehaved in school were liable to be issued a Class C misdemeanor ticket or referred to a Juvenile Justice Alternative Education Program. This package of reforms suggested a graduated sanction model of school discipline, allowing infractions to be met with increasingly severe punishments should they persist.

Currently, Class C citations can still be issued for Failure to Attend School (FTAS), which includes absences and cumulative tardiness. Depending on jurisdiction, this is often processed through justice of the peace (JP) or municipal courts. Conviction can impose additional burdens such as a $500 fine, a criminal record, and any additional requirements imposed by the court on the student.

Truancy enforcement in the courts is problematic for three primary reasons: 1) it does not address underlying problems motivating the behavior, 2) it fails to effectively deter the behavior, and 3) it imposed unwarranted, costly burdens on the court.

Truancy is also punished doubly. Not only are the children themselves liable for a $500 fine if found guilty of FTAS under Section 25.094 of the educational code, parents are liable to be charged with contributing to nonattendance—another Class C misdemeanor—under the preceding subsection.

Special truancy courts, such as the one established in Dallas, offer dubious effectiveness measures and questionable incentive structures. Nearly half of those processed through these courts re-offend. Further, these courts are subject to more pressure to collect fines from largely indigent families to cover their costs rather than to achieve successful educational and disciplinary outcomes.

The foundational problem behind truancy is that, by missing school, a child falls behind in the educational material. Effectively addressing truancy matters requires keeping the child in school and avoiding interventions such as out-of-school suspension. To that end, schools should also be empowered to implement restorative justice programs, reserving the courts for juvenile delinquents.

Texas must seek further improvement in school discipline. Simple, effective, and low-cost in-school disciplinary measures have been forgone for more expensive justice system interventions—such as the frequent use of Class C Misdemeanor tickets and referrals to Juvenile Justice Alternative Education Programs (JJAEP). These expend valuable court resources, overfill dockets of municipal court judges, squander precious district funds, and overburden taxpayers. Several alternative programs have arisen that seek to prevent children from falling behind academically while promoting school safety and educational efficiency.

The Facts

- In the 2012 fiscal year, FTAS made up the nearly 34% of all Class C misdemeanor citations issued in the state.
- In that same year, roughly one-third of all FTAS charges were filed in Dallas County's truancy court; a county that contains under 10% of the state's population.
- Under current law, students can be issued a limitless number of three-day out-of-school suspensions with no recourse.

Recommendations

- Remove the criminalization of FTAS from section 25.094 of the Texas Education Code and allow individual schools and districts to handle truancy matters internally. If legislators wish to retain the criminal/financial penalty, the burden should be kept on the parent or guardian under 25.093.
- Mandate that school districts handle all non-criminal disciplinary matters with interventions that do not involve court referrals.
- Change suspension and expulsion decisions from mandatory to discretionary.
- Study the effectiveness of alternative truancy and delinquency prevention programs, such as those in place in Williamson County ISD, Fort Bend County ISD, and Arlington ISD. Incentivize the use of programs that are effective in keeping youth in school and preventing delinquency.
- Prioritize restorative justice-oriented programs such as peer mediation over formalized case handling for minor school-based offenses.
- Repeal state law allowing out-of-school suspension as a punishment for truancy. Allow students and parents to appeal truancy-oriented suspicion decisions after six cumulative days.

Resources

Reviving Restorative Justice: A Blueprint for Texas by Derek Cohen, Texas Public Policy Foundation (Dec. 2013).

Ten Truths about Juvenile Justice Reform by Jeanette Moll, Texas Public Policy Foundation (Dec. 2011).

The Right Prescription for Juvenile Drug Offenders by Marc Levin, Texas Public Policy Foundation (Feb. 2009).

The ABC's Before TYC: Enhancing Front-End Alternatives in the Juvenile Justice System by Marc Levin, Texas Public Policy Foundation (Feb. 2008).

Corrections Budget & Prison Operations

The Issue

Texas has the fifth highest incarceration rate in the nation and the most prisoners of any state. Today, Texas has approximately 150,500 prison inmates, about half of whom are nonviolent offenders. Two key budgetary strategies adopted in 2005 and 2007 enabled Texas to avoid building more than 17,000 new prison beds, which the Legislative Budget Board (LBB) had projected would be needed by 2012. Most importantly, the state's crime rate has fallen over this time, surpassing the national decline.

The first strategy involved appropriating $55 million in 2005 for probation departments that agreed to target 10% fewer prison revocations and to implement graduated sanctions—issuing swift, sure, and commensurate sanctions (e.g. increased reporting, extended term, electronic monitoring, weekend in jail, etc.) for rules violations such as missing meetings rather than letting them pile up and then revoking that probationer to prison.

The second strategy, in 2007, was the appropriation of $241 million for a package of prison alternatives enacted in 2007 that included more intermediate sanctions and substance abuse treatment beds, drug courts, and substance abuse and mental illness treatment slots. All told, the 2008-09 budget added 4,000 new probation and parole treatment beds, 500 in-prison treatment beds, 1,200 halfway house beds, 1,500 mental health pre-trial diversion beds, and 3,000 outpatient drug treatment slots.

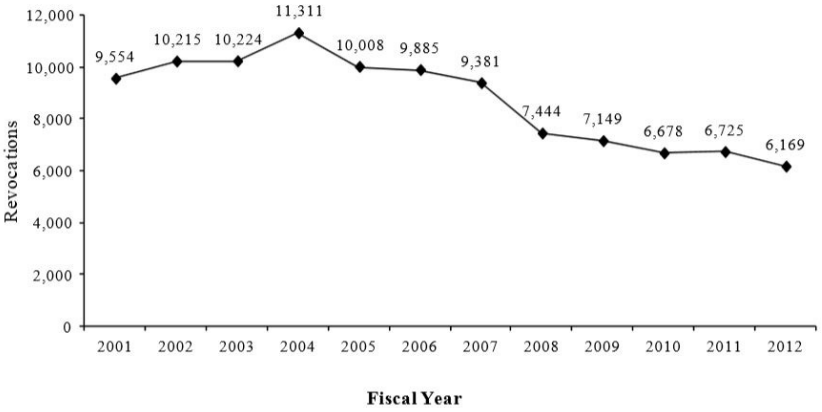
Although the LBB has traditionally assumed an annual 6% increase in the number of offenders sentenced to prison due to population growth and other factors, sentences to prison actually declined 6% in 2009 while more nonviolent offenders went on probation.

In addition to the impact of sentencing decisions, probation and parole revocations together account for approximately half of the annual prison intakes, and both have declined over the last several years as supervision has been strengthened. From 2005 to 2013, the share of probationers revoked to prison for technical violations—failure to comply with probation rules rather than conviction of a new offense—fell 9%.

Similarly, during the last several years, parole offices have improved supervision by expanding the use of graduated sanctions, implementing instant drug testing, and restoring the parole chaplaincy program. Thus, despite there being more parolees, the number of new crimes committed by parolees declined 8.5% from 2007 to 2010, contributing to a sharp reduction in parole revocations.

Capitalizing on Texas' recent success, the Legislature in 2011 followed the recommendation of both the Texas Public Policy Foundation and Governor Rick Perry in ordering the closure of the Sugar Land Central Unit, the first such prison closure in Texas history, which is saving taxpayers approximately $20 million over the biennium in operating costs while yielding even more in one-time proceeds from the sale of the property. Moreover, two state jails were closed through the budget approved in the 2013 session.

Texas Parole Revocations to Prison Fall By Nearly Half Since 2004



Source: Legislative Budget Board; Texas Department of Criminal Justice

The Facts

- Prisons cost Texas taxpayers $50.79 per inmate per day, which is $18,538 per year and below the national average.
- Each new state prison bed costs more than $60,000 to build.
- Probation costs $3.40 per day, of which the offenders pay 54% of that in fees, resulting in a taxpayer cost of less than half of that.
- TDCJ's budget increased from $793 million in 1990 to $3.1 billion in 2014.

Recommendations

- **Implement Senate Bill 1055 to incentivize lower costs and less recidivism.** A provision is needed in the next budget authorizing TDCJ to implement SB 1055 by reallocating to participating counties some of the savings from prison closures achieved through the implementation of the local commitment reduction plans described in the legislation. In 2010—the first fiscal year of Texas' Juvenile Commitment Reduction Program—juvenile commitments to state lockups fell 36%, saving taxpayers at least $114 million, while juvenile crime continued to decline. SB 1055 provides that counties can use the share of the state's savings that they receive for community-based programs, which include drug courts, specialized probation caseloads, and residential programs, including short-term use of the county jail to promote compliance.

continued

- **Cap maximum time nonviolent revoked probationers can serve for technical violations.** Although technical revocations have declined, there were still 12,094 technical revocations in fiscal year 2011. Such revocations account for more than half a billion dollars in annual prison costs. Given that research shows that the swiftness and sureness of punishment is more important than the length of stay and that there is less of a need to incapacitate nonviolent offenders, technical revocations of nonviolent offenders who have not previously been revoked should be capped at 18 months with eligibility for parole occurring no earlier than 6 months.
- **Incorporate virtual education into prison education.** Blended learning approaches could incorporate the state's existing virtual school network with appropriate firewalls. Evidence indicates this could better address the challenge of inmates who are at very different baseline levels and learn at very different paces than relying on traditional classroom instruction alone.

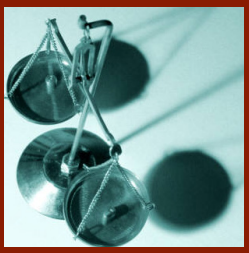
Resources

Unlocking the Adult Corrections Budget by Marc Levin, Texas Public Policy Foundation (May 2011).

The Role of Parole in Texas by Marc Levin & Vikrant Reddy, Texas Public Policy Foundation (May 2011).

Incentivizing Lower Crime, Lower Costs to Taxpayers, and Increased Victim Restitution by Marc Levin, Texas Public Policy Foundation (Apr. 2011).

Restore and Protect Our Justice System



Civil Justice

Civil Justice

Statutory Construction

The Issue

In 1963, the Texas Legislature directed the Texas Legislative Council to effect a permanent statutory revision of state law to "clarify and simplify the statutes and to make the statutes more accessible, understandable, and usable." The Council was instructed not to "alter the sense, meaning, or effect of [a] statute." In *Fleming Foods v. Rylander*, it was deemed that one of these non-substantive changes in fact did alter the intent of the statute. The Texas Supreme Court determined that in those instances, the newly re-written version of the statute controls.

In *Fleming Foods*, the Texas Supreme Court held that prior law and legislative history cannot be used to modify the express terms of a statute when the meaning is clear. The Court understood the law should be clear, certain, and accessible to ordinary citizens. They reasoned that if a prior law were supplanted by the codification process—yet still given effect—no provision could be relied upon by citizens to clearly understand what the law actually is, and "anyone wanting to know what the law of Texas required would have to consult not only the existing law, but the former, repealed law and then compare the new with the old." In other words, the law ought to mean what the law says today, not what it said 50 years ago.

Because the law's effect on citizens is often determined by how courts interpret lawmakers' intent, it is important that the intent be based on clear statutory language. If the courts are forced to review multiple versions of statutory provisions, they will be tempted to divine the "true" intention from a variety of sources outside the actual text of the law. For instance, they may rely on legislative history. However, the legislative history of many statutes is so extensive that support could be found for any of the competing interpretations of its meaning.

The Facts

- The 1999 *Fleming Foods* decision was based on Texas legal precedent. The Texas Supreme Court has held since 1922 that "to say that the citizen, in order to know that law by which his rights are to be determined, must go through the many volumes of session laws … and examine the original acts, including the captions and repealing acts and clauses, is not to be seriously considered … The session laws are for all practical purposes inaccessible to the average citizen, and the task of searching through them to ascertain the law an insurmountable one."

- In 2001, the 77th Legislature passed HB 2809, which provided for statutory revision and construction in giving non-substantively codified statutes the same meaning that was given the statute before its codification. That legislation effectively gave courts the authority to interpret statutes outside of their purview of interpreting and applying the plain meaning of the statute. Governor Perry vetoed the bill.

- In 2009, the 81st Legislature passed nearly identical legislation which was again vetoed by Governor Perry.
- Under the vetoed legislation, citizens seeking to understand their rights and responsibilities under Texas law would be consigned to long-defunct regulations and obscure floor debates between legislators to discern the lawmakers' intentions.
- Additional legal research into the previous versions of law, as well as legislative activities, would result in skyrocketing attorney fees and make Texas law less accessible to average citizens.

Recommendations

- Avoid legislation that complicates the plain meaning of statutes. The very purpose of the codification process is to solidify public policy and make Texas law more accessible to its citizens.
- Prevent legislation that gives non-substantively codified statutes the same effect and meaning that was or would have been given the statute before its codification.

Resources

Tex. Govt. Code Annotated Sec. 323.007.

Fleming Foods of Texas, Inc. v. Rylander, 6 S.W. 3d 278 (Tex. 1999).

American Indemnity Co. v. City of Austin, 112 Tex. 239, 246 S.W. 1019 (1922).

"The Rise and Fall of Textualism" by Jonathan T. Molot, 106 *Columbia Law Review* 1, 3 (2006).

Mesothelioma

The Issue

In 1973, the standard for causation in asbestos-related cases was lowered and Texas became the number one state for asbestos related litigation. Eventually, the Texas Legislature responded by enacting litigation reform legislation that established medical criteria for filing asbestos and silica cases. The result was to help restore fairness to the system.

In its 2007 *Borg-Warner* decision, the Texas Supreme Court established that plaintiffs claiming an asbestos-related injury must provide scientifically reliable evidence regarding the dose—or amount—of the product that allegedly caused his or her disease. The Court noted that "substantial factor" tests alone were insufficient to eliminate guesswork in court rooms, showing that different courts have come to wildly different conclusions when dose is not the determining factor. The *Borg-Warner* test merely clarifies the "substantial factor" test just like it is used in other Texas tort cases, and provides guidance about what is necessary to fulfill existing evidence standards.

Scientific studies agree that mesothelioma is a dose-responsive disease and that not every dose causes disease. Without requiring a dose standard, any exposure to asbestos will be sufficient for liability. Asbestos is in the air. We all breathe it every day. If the standard for causation of mesothelioma was simply any exposure, the number of asbestos-related cases would rise again, and our court rooms would be as full and unpredictable as they were prior to Texas' 2003 tort reform laws.

The implications of including defendants who do not belong in litigation reach farther than the immediate parties involved—when businesses are financially burdened by multi-million dollar verdicts, employees are affected in the form of job losses, and consumers are affected by higher prices. There is no sound reason for exempting asbestos-related claims from the same standard of causation and exposure thresholds required in every other toxic exposure case in Texas.

The Facts

- Asbestos inhalation has been linked to mesothelioma, a form of malignant cancer that develops, over time, in the tissue surrounding the lungs.
- The amount of asbestos exposure determines whether the defendant's product caused the disease.
- In 1973, the standard for causation in asbestos-related cases was lowered.
- By the 1990s, plaintiff's attorneys were beginning to re-tool the asbestos litigation practice in response to growing efforts by Congress to stem the tide of costly judgments.
- Asbestos litigation has remained a profitable venture for many plaintiff's attorneys, costing the United States more than $800 billion annually, or greater than 2% of our GDP.

- From 1988 to 2000, Texas was home to more asbestos-related claims than any other state.
- In *Borg-Warner Corp. v. Flores*, the Texas Supreme Court established the evidentiary standard plaintiffs must meet in asbestos-related claims. Plaintiffs must show that the defendant's asbestos-related product was a "substantial factor" in their illness, and that mere exposure to asbestos should not be enough to establish a valid claim for awards.
- The *Borg-Warner* test does not require mathematical precision. A plaintiff merely needs to show defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, and evidence that the dose was a substantial factor in causing the asbestos-related disease.
- Asbestos and related fibers are among the most studied toxins worldwide. Scientists have reported extensively on the dosage necessary to cause asbestos-related disease, including mesothelioma.
- Legislation was introduced in the 81st Legislature lowering the causation threshold in asbestos-related litigation so that more defendants could be held civilly liable for enormous sums without plaintiffs firmly linking their illness to the defendant's product.

Recommendations

- The current causation standards for asbestos-related claims should remain at the same level as all other toxic exposure claims.
- A measurable standard for how plaintiffs prove negligence is key to preventing needless strain on our economy.

Resources

Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973).

Borg-Warner Corp. v. Flores, 232 S.W. 3d 765 (Tex. 2007).

Agency for Toxic Substances and Disease Registry, "Asbestos: Health Effects," WebMD (10 Apr. 2009).

Asbestos Exposure and Cancer Risk, National Cancer Institute Fact Sheet.

Multi-district Litigation

The Issue

In 2003, the Texas Legislature passed significant civil justice reforms designed to improve the efficiency and effectiveness of our state courts. The Multi-District Litigation (MDL) system was a key part of that reform and has generally proven successful. The purpose of the MDL system is to improve the efficient administration of justice and promote settlement.

The 81st session saw the introduction of legislation designed to limit the application of multi-district litigation to product liability cases involving pharmaceutical products, and tort claims involving asbestos and silica cases. This legislation would narrow the kind of cases the MDL system would handle, undermining the entire system and returning more mass tort litigation cases back to the complex and inefficient previous system.

When lawsuits involving products with widespread use are consolidated, efforts to resolve the dispute are less likely to be duplicated, and the application of the law is more likely to be consistent. This consistency reduces the risk of judicial error at the trial court level and, consequently, reduces the number of appeals that weigh down our appellate courts. Additionally, removing pretrial matters to an MDL judge in a different geographical location also ensures a fair application of the law by removing local biases.

The Facts

- In 2003, the Texas Legislature instituted the Texas MDL system as part of a package of strong civil justice reforms. Prior to the 2003 reforms, plaintiff's attorneys often sought to keep federal mass tort suits in state courts—free from federal MDL jurisdiction.
- The 2003 Texas MDL system consists of a five-judge panel that consolidates lawsuits involving the same basic facts and assigns them to one judge for the purpose of handling pre-trial matters such as discovery and other motions.
- The Texas MDL panel has remained true to the Act, which specifies that transfers are only to be made by the MDL panel when the determination is made that the transfer serves the "convenience of the parties and witnesses; and promote(s) the just and efficient conduct of the actions."
- In 1968, the U.S. Congress enacted MDL for federal cases, chiefly in response to a massive government antitrust prosecution involving more than 25,000 individual claims.
- The Federal MDL system showed immediate results, consolidating the nearly 2,000 separate suits filed in 36 different courts down to nine trials, only five of which went all the way to judgment. As U.S. Chief Justice Earl Warren stated in 1967, if not for consolidation, "the district court calendars throughout the country could well have broken down."

- Since 1967, more than 179,000 separate federal civil actions have been consolidated in pretrial proceedings.

Recommendations

- Do not narrow the scope of litigation managed through the Multi-District Litigation system in Texas.
    - The system prior to MDLs is not a good fit for these kinds of mass tort cases because it scatters litigants across the state and saddles parties seeking justice with unnecessarily costly and burdensome pre-trial maneuvering. A return to such a system for mass tort cases does not serve the interests of justice and is not an efficient use of taxpayers' dollars.
- The MDL system is efficient and effective. To limit its scope is at odds with the interests of justice. Slowing down Texas' civil justice system is exactly the wrong course.

Resources

U.S. Tort Costs: 2004 Update by Tillinghast-Towers Perrin (2005).

"Is Multi-district Litigation a Just and Efficient Consolidation Technique?" by Danielle Oakley, 6 *NVLJ* 494 (2005).

"Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements" by L. Elizabeth Chamblee, 65 *Louisiana Law Review* 157, 209 (2004).

The Next Step: Strengthening Texas Courts by Texans for Lawsuit Reform (Nov. 2005).

"Federal Jurisdiction Expanded For Mass Tort Litigation by the Multiparty, Multiforum Trial Jurisdiction Act of 2002," a presentation by Carlton Fields, Attorney At Law.

In re Delta Lloyds Ins. Co. of Houston, 2008 WL 5786888 (5 Sept. 2008) [Unpublished opinion available on Westlaw.] Sec. 74.162, Government Code.

Paid or Incurred

The Issue

Limiting medical and health care expense recovery in a civil action to the amount actually paid or incurred, by or on behalf of the claimant, was one of the significant civil justice reforms passed in 2003. Prior to 2003, plaintiffs were allowed to recover the full billed amount, including the "phantom" charges that were never paid because the bills were reduced—a common practice in medical care.

However, the 81st Legislature introduced a pair of bills aimed at allowing a plaintiff to recover the entire billed amount, whether or not the amount was actually incurred or intended to be paid. In other words, the proposed legislation would have required taxpayers to reimburse phantom medical expenses in personal injury lawsuits that were never paid.

Under Section 41.0105 of the Texas Civil Practice and Remedies Code, plaintiffs are entitled to recover only medical expenses "actually paid or incurred." Thus, not only must the fees at issue be reasonable and necessary to be recovered, they must also have been actually paid or incurred by the plaintiff—not just billed. In determining what expenses were incurred, the issue is whether or not "discounts" such as "write-offs" and/or contractual "adjustments" constitute medical expenses "incurred" by the plaintiff.

Medical billing is unique to other types of billing. Medical providers commonly bill patients at higher rates than what is actually paid or owed by the patient. The charges are never fully paid, and amount to a "markup" within the health care industry. The reasoning is that doctors often agree with insurers to reduce the cost of procedures in exchange for being an "in-plan provider." The full billing amount is used for negotiation with doctors and insurance providers, and is never intended to be fully paid.

The legislation proposed in the 81st session applied only to recovery for medical expenses, so it creates a double standard whereby lawsuits regarding medical care would be subject to greater damage awards while other kinds of suits would still be restricted by the "paid or incurred" limitation in the Act.

If plaintiffs are allowed to recover damages for medical costs they did not actually incur, settlements would be inflated and windfall damage awards would result. Businesses and health care providers would pass those additional litigation costs on to consumers, patients, and taxpayers. Unraveling Texas' successful tort reform measures would be done at the expense of patients, medical providers, and taxpayers.

The Facts

- The Texas Supreme Court has ruled that medical expenses are incurred at the time the services are rendered to the patient. Black's Law Dictionary defines the term "incurred" to mean "when one suffers or brings on oneself a liability or expense."
- Section 41.0105 of the Texas Civil Practice and Remedies Code has been interpreted to "trump" the Collateral Source Rule in that it allows the court to look at evidence to determine what has actually been paid or incurred in medical or health care expense recovery cases.
- This interpretation has become accepted as good legal precedent. In *Mills v. Fletcher*, the 4th Court of Appeals found that plaintiffs cannot recover medical bills that have been adjusted or written off. A federal district court in Houston agreed, holding that the *Mills* opinion "is a reasonable interpretation of the statute and [we] will follow [it]." The "paid or incurred" provision assures that plaintiffs recover actual out-of-pocket medical expenses.

Recommendation

- The "paid or incurred" provision in the Act should remain intact. Unraveling Texas' successful tort reform measures would be done at the expense of patients, medical providers, and taxpayers.

Resources

Texas Civil Practices & Remedies Code, §41.0105.

Mills v. Fletcher, 229 S.W. 3d 765. (Tex. App. 2007).

Black's Law Dictionary, p. 782 (8th ed. 2004).

Black v. American Bankers Ins. Co., 478 S.W. 2d 434 (Tex. 1972).

2009 Legislative Session Summary, Texas Civil Justice League, 2009 Session.

Experts

Michael Barba, *Policy Analyst, Center for Education Freedom*
mbarba@texaspolicy.com AREAS OF EXPERTISE: K-12 Education Growth, Increasing Public School Efficiency, Education Choice

Derek Cohen, *Policy Analyst, Center for Effective Justice*
dcohen@texaspolicy.com AREAS OF EXPERTISE: Juvenile Justice Reform, Victims' Rights, Overcriminalization, Constitutional Limitations on Corrections

The Honorable Chuck DeVore, *VP of Policy; Senior Fellow for Fiscal Policy*
cdevore@texaspolicy.com AREAS OF EXPERTISE: Tax and Fiscal Policy, Elections, Foreign Affairs, Military Affairs, Energy and Environmental Policy

John Davidson, *Senior Policy Analyst, Center for Health Care Policy*
jdavidson@texaspolicy.com AREAS OF EXPERTISE: Health Care, Health Insurance Reform, ACA, First Amendment

The Honorable Jess Fields, *Senior Policy Analyst, Center for Local Governance*
jfields@texaspolicy.com AREAS OF EXPERTISE: Local Government Policy, Economic Development, Annexation, Planning and Zoning, Regulatory Issues, Local Debt, Transparency

Vance Ginn, Ph.D., *Economist, Center for Fiscal Policy*
vginn@texaspolicy.com AREAS OF EXPERTISE: State Budget and Tax Reform, National and State Labor Market Trends, Tax and Expenditure Limits, Energy Markets and Policy

The Honorable Kent Grusendorf, *Director, Center for Education Freedom*
kgrusendorf@texaspolicy.com AREAS OF EXPERTISE: K-12 Education Growth, Increasing Public School Efficiency, Education Choice

The Honorable Talmadge Heflin, *Director, Center for Fiscal Policy*
theflin@texaspolicy.com AREAS OF EXPERTISE: State Budget and Taxation, Economic Stabilization Fund, Local Government Spending, Pension Reform, Federal Funds

Kathleen Hunker, *Policy Analyst, Center for Economic Freedom*
khunker@texaspolicy.com AREAS OF EXPERTISE: Electricity Markets & Renewable Energy, Insurance, Tort Reform, Property Rights, Economic Development, Consumer Issues

Marc Levin, *Director, Center for Effective Justice*
mlevin@texaspolicy.com AREAS OF EXPERTISE: Adult Corrections, Juvenile Justice, Overcriminalization, Victim Empowerment & Restitution, Law Enforcement, School Discipline

Thomas Lindsay, Ph.D., *Director, Center for Higher Education*
tlindsay@texaspolicy.com AREAS OF EXPERTISE: Higher Education, Culture Wars (Political correctness, cultural decline, etc.), America's Founding Principles, Online Learning

Karen Lugo, *Director, Center for 10th Amendment Action*
klugo@texaspolicy.com AREAS OF EXPERTISE: Tenth Amendment, Constitutional Law, Environment, Energy

Josiah Neeley, *Policy Analyst, Center for Energy & the Environment*
jneeley@texaspolicy.com AREAS OF EXPERTISE: Constitutional Law, Environment, Energy

Bill Peacock, *VP of Research; Director, Center for Economic Freedom*
bpeacock@texaspolicy.com AREAS OF EXPERTISE: Electricity Markets & Renewable Energy, Insurance, Technology and Telecommunications, Tort Reform, Property Rights, Economic Development, Consumer Issues

James Quintero, *Director, Center for Local Governance*
jquintero@texaspolicy.com AREAS OF EXPERTISE: Budgets, State and Local Spending, Debt, Taxes, Transparency, Pensions

Vikrant P. Reddy, *Senior Policy Analyst, Center for Effective Justice*
vreddy@texaspolicy.com AREAS OF EXPERTISE: Adult Corrections, Juvenile Justice, Overcriminalization, Victim Empowerment & Restitution, Law Enforcement, School Discipline

The Honorable Kathleen Hartnett White, *Distinguished Senior Fellow-in-Residence; Director, Center for Energy & the Environment*
khwhite@texaspolicy.com AREAS OF EXPERTISE: EPA Regulation, Energy and Environmental Policy, Endangered Species Act, Water Rights, Free Market Environmental Policies

The Honorable Arlene Wohlgemuth, *Executive Director; Director, Center for Health Care Policy*
arlene@texaspolicy.com AREAS OF EXPERTISE: Health Care, Health Insurance Reform, ACA, First Amendment

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

900 Congress Ave., Ste. 400, Austin, Texas 78701 | 512.472.2700 phone 512.472.2728 fax
www.TexasPolicy.com