FORCED SUBORDINATIONS OF LIENS TO LEASES: IS TEXAS PROPERTY CODE CHAPTER 66 AN UNCONSTITUTIONALLY RETROACTIVE LAW?

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In 2015, the Texas Legislature enacted a law that benefits oil and gas producers, but retroactively affects (and potentially harms) lenders. Chapter 66 of the Texas Property Code alters traditional expectations regarding the effects of foreclosures on oil and gas leases. Due to its impact on previously executed mortgages, the law could be deemed unconstitutional.

Lenders that issue security interests often rely on foreclosure sales or future transactions to recover the balance of an unpaid obligation. Historically, a foreclosure terminated subsequently executed, or "junior," encumbrances (such as mineral leases) that covered mortgaged property. Purchasers, who would then acquire a greater interest in the property, would ideally offer a higher price for it. In turn, lenders had a greater possibility of recovering their initial loan. However, as of January 1, 2016, Chapter 66 protects junior leases from termination by foreclosure, and retroactively applies to mortgages that were issued years earlier. Unfortunately, due to the recently volatile energy market, some junior leases may significantly decrease property values. Therefore, lenders that issued mortgages with the expectation that foreclosures would remove junior leases may be less likely to recoup their outstanding debt.

This Article describes the nature of Chapter 66, and explores Texas jurisprudence surrounding retroactive laws. It then analyzes the statute under the Supreme Court of Texas's 2010 Robinson v. Crown Cork & Seal Co. *decision, and explains how a Texas court may find that Chapter 66 is unconstitutionally retroactive.*

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I. INTRODUCTION

Throughout history, the legal community has largely viewed retroactive laws with disdain.[1] Such policies are said to punish citizens without notice and ignore man's free will as a moral actor.[2] These laws are unjust because they are created "with the knowledge of the precise conditions to which they are to apply" and therefore "expose the lawgiver to greater temptation to partiality and corruption."[3] Philosophers have analogized retroactive laws to disciplining pets, in the sense that "[w]hen your dog does anything you want to break him of, you wait until he does it, and then beat him for it."[4] Even children comprehend the injustice of changing the rules after the game has been played.[5] In this regard, the Texas Legislature arguably enacted an unconstitutionally retroactive law in efforts to promote oil and gas production.

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1. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (recognizing a "deeply rooted" presumption against retroactive laws in American jurisprudence, as well as in earlier civilizations); LON L. FULLER, THE MORALITY OF LAW 53 (1964) ("[A] retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose."); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 311 (2nd ed. 1904) ("The injustice of permitting laws to have retroactive effect by relation is so manifest that it has not had much countenance in the United States."); AILEEN KAVANAGH & JOHN OBERDIEK, ARGUING ABOUT LAW 183 (2009); Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 109 (1997) (recognizing a "traditional dislike" of retroactive laws). *See generally*, Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (1927) (exploring how Texas courts in particular have handled retroactive laws).

2. DANIEL E. TROY, RETROACTIVE LEGISLATION 18 (1998); *see* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 225 (1960) ("[N]othing seems more basic to the existence of a legal order than the ability to rely upon the actions of others, including the government, with some assurance.").

3. Bryant Smith, *Retroactive Laws and Vested Rights*, 6 TEX. L. REV. 409, 417 (1928); *see* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart* 71 HARV. L. REV. 630, 650–51 (1958).

4. Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 63–64 (2013) (citing Jeremy Bentham, *Truth* Versus *Ashhurst; or, Law As It Is, Contrasted With What It Is Said To Be*, *in* 5 THE WORKS OF JEREMY BENTHAM 235 (John Bowring ed., 1843)).

5. *Id*. at 63-64; Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 139 (Tex. 2010).

On June 15, 2015, Governor Greg Abbott signed House Bill No. 2207 into law.[6] The statute amended the Texas Property Code by adding Chapter 66, titled "Sale of Property Subject to Oil or Gas Lease."[7] Before the law was enacted, oil and gas leases that were executed subsequent to a security interest (such as a mortgage) were deemed inferior to the mortgage.[8] These "junior" leases would terminate in the event of a foreclosure,[9] unless the lender agreed to subordinate his lien to the lease by a separate agreement.[10]

Chapter 66 forcibly subordinates security interests to later-executed leases, so that such leases would continue in spite of a foreclosure.[11] A controversial aspect of Chapter 66 is that it retroactively applies to mortgages that were issued prior to the law's creation.[12]

Proponents of Chapter 66 primarily include oil and gas companies.[13] They support the law because it promotes statewide energy production by shielding mineral leases from termination due to foreclosure.[14] Chapter 66 also benefits lessees named in leases (usually energy companies), by removing the need for them to incur "substantial time, effort, and cost" to obtain subordination agreements from security interest holders.[15]

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6. Texas Legislature Online, Actions – H.B. 2207, 84th Leg. R.S. (Tex. 2015), http://www.legis.state.tx.us/BillLookup/Actions.aspx?LegSess=84R&Bill=HB2207 (indicating that House Bill No. 2207 was "Signed by the Governor" on June 15, 2015).

7. TEX. PROP. CODE ANN. § 66.001 (West 2016).

8. RICHARD HEMINGWAY, ET AL., OIL AND GAS LAW AND TAXATION 198 (4th ed. 2004); Robert Kratovil, *Mortgages – Problems in Possession, Rents, and Mortgagee Liability*, 11 DEPAUL L. REV. 1, 9–10 (1961). Throughout this article, terms such as "security instrument," "lien" and "mortgage" will be used interchangeably.

9. "Generally, a valid foreclosure of an owner's interest in property terminates any agreement through which the owner has leased the property to another." Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 915 (Tex. 2013) (citing B.F. Avery & Sons' Plow Co. v. Kennerly, 12 S.W.2d 140, 141 (Tex. Comm'n App. 1929)); Arnold v. Eaton, 910 S.W.2d 181, 184 (Tex. App. 1995).

10. "A subordination agreement is a contractual modification of lien priorities which establishes different lien priorities than those provided under the statutory or common law rules." TITLE STANDARDS JOINT EDITORIAL BD., ET AL., TEX. TITLE EXAMINATION STANDARD 15.90, Comment (2009).

11. TEX. PROP. CODE ANN. § 66.001(b) (West 2016).

12. "[Chapter 66] not only applies to mortgages executed in the future, but also undertakes to limit retroactively the rights of mortgage holders under existing mortgages." Carl Glaze, John Holden, Jr., Peter Hosey, & Jackson Walker, *Texas Legislature Imposes Statutory Subordination of Real Estate Mortgages to Oil and Gas Leases*, JD SUPRA BUSINESS ADVISOR (Aug. 20, 2015), http://www.jdsupra.com/legalnews/texas-legislature-imposes-statutory-29296.

13. *Id.*; Jesse Tyner Moore, *Existing Security Interests in Mineral Estates Undermined by New (and Potentially Unconstitutional) Texas Law*, DYKEMA BANKING BLOG (September 28, 2015), http://www.banking-lawblog.com/Existing-Security-Interests-in-Mineral-Estates-Undermined-by-New-and-Potentially-Unconstitutional-Texas-Law-09-28-15.

14 Gloria Leal, *Texas 84th Legislative Session Wrap-Up*, SHALE MAG. (July 17, 2005), http://shalemag.com/texas-84th-legislative-leal.

15. Glaze et al., *supra* note 12.

Conversely, lien owners, including many in the lending industry, are skeptical of Chapter 66.[16] The policy disrupts the traditional notion that liens enjoy priority over subsequently created encumbrances, such as oil and gas leases.[17] Some lenders claim Chapter 66 unfairly allows energy companies to secure leases across Texas without regard to a landowner's relationship with its lender.[18]

A further concern is the law's effect on property value. If a landowner defaults on his obligation, security interest holders rely on foreclosure sales, or subsequent transactions, to recover the unpaid balance of their loan.[19] Prior to the creation of Chapter 66, lenders issued mortgages with the expectation that a foreclosure would terminate junior leases.[20] Thus, foreclosed property would be sold with fewer encumbrances, which would increase its value because a future purchaser would receive a greater interest in the land at issue.[21]

However, under Chapter 66, such expectations have largely changed. Given the plummeting prices of oil and gas, a junior lease could decrease the value of the property it covers, which would lower the price a future purchaser would offer for it.[22] Depending on the situation, these concerns may compel lenders to challenge

16. *See* Moore, *supra* note 13 (noting that House Bill No. 2207 was enacted because "the mineral lessee lobby—a well-funded and important interest—apparently grew tired of having to actually bargain for subordination agreements, and convinced the Legislature to up-end this well-established system"). Throughout this article, terms such as "lien owner," "security interest holder," "lender," and "mortgagee" will be used interchangeably.

17. *See* Regold Mfg. Co. v. Maccabees, 348 S.W.2d 864, 865 (Tex. App. 1961) (discussing the priority of a previously executed lien to subsequent encumbrances).

18. *Id.*

19. Anthony Pennington-Cross, *The Value of Foreclosed Property*, 28 J. REAL EST. RES. 193, 200 (2006); Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure – An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 863 (1985). Because a mortgagee is often the purchaser at a foreclosure sale, he will likely sell the property to a subsequent purchaser at a later date. *See* Kratovil, *supra* note 8, at 8.

20. *See id.*; Moore, *supra* note 13.

21. *See* Kimberly Luff Wakim & Justin C. Harding, *The Legal and Business Risks of Developing an Oil and Gas Leasehold Interest Without Obtaining Lien Subordination Agreements*, 19 E. MIN. L. INST. 37, 63–64 (1999) ("If . . . a parcel of land is subject to an existing oil and gas lease, the buyer of the land receives something less than the entire bundle of rights associated with the land, which is less valuable than the entire bundle of rights").

22. *See infra* Part IV(B); *see also* Slawson, *supra* note 2, at 21 (discussing legal retroactivity, and providing the example of parties who invested in the liquor business prior to the creation of the eighteenth amendment). If the lender acquires the property pursuant to the foreclosure sale, it will usually sell the property to a third party at a later time. In that case, any decreased property value reflected by an existing lease will likely affect the property's subsequent sale price. *See* Harvey S. Jacobs, *Thinking of Buying at a Foreclosure Auction? Better Do Your Research*, WASH. POST (Oct. 14, 2011), http://wpo.st/7QAN1 (noting that many foreclosure sales will generate no bids, and therefore the lender will take possession of the foreclosed property).

Chapter 66 as an unconstitutional retroactive law based on precedent from the Supreme Court of Texas.[23]

Part II of this Article explains Chapter 66 and its effect on oil and gas leases. Understanding that the law retroactively affects the rights of parties under certain security instruments, Part III of this Article explores the jurisprudence of retroactive laws, and explores a 2010 Supreme Court of Texas decision, *Robinson v. Crown Cork & Seal Co.*, which clarified the review of such policies. With this framework in mind, Part IV analyzes Chapter 66 in the context of such jurisprudence, and discusses whether it would survive a constitutional challenge. Part V of this Article concludes that, given the correct set of circumstances, Chapter 66 may be deemed an unconstitutionally retroactive law, as applied to a lender that issued a mortgage prior to the policy's creation.

II. TEXAS PROPERTY CODE SECTION 66

Chapter 66 applies to leases that cover the mineral estate underlying certain property.[24] Also, it affects leases that are subject to (i.e., executed after) a security instrument,[25] and are filed of record prior to a foreclosure sale affecting the property.[26] Leases executed prior to a security instrument are not terminated by a foreclosure, and are thus not affected by Chapter 66.[27]

Under the law, a junior lease largely remains in effect after a foreclosure sale, unless it has ended by its own terms (e.g., an expiration of the primary term without production).[28] The foreclosure sale purchaser acquires the right to receive royalty amounts, or other payments, under the lease.[29] However, Chapter 66 provides that a foreclosure sale "terminates and extinguishes any right granted under the oil or gas lease for the lessee to use the surface of the real property."[30] Thus, a future purchaser and the lessee named in the lease may be required to negotiate additional terms, should the lessee wish to use the surface estate.

Chapter 66 indicates that an agreement, such as a subordination agreement, executed between the lessee named in a lease, and

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23. *See generally*, Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 145 (Tex. 2010) (establishing a recent framework for analyzing retroactive laws).

24. TEX. PROP. CODE ANN. § 66.001(a)(3) (West 2016).

25. *Id.* § 66.001(b).

26. *Id.*

27. *See* Regold Mfg. Co. v. Maccabees, 348 S.W.2d 864, 865 (Tex. App. 1961); Kratovil, *supra* note 8, at 8-9.

28. TEX. PROP. CODE ANN. § 66.001(b) (West 2016).

29. *Id.*

30. *Id.* § 66.001(c).

either the mortgagee or foreclosure sale purchaser, will control over the terms of the law.[31] Thus, lessees who are concerned about their surface rights would be wise to immediately obtain such agreements, regardless of the law's protections.

Chapter 66 took effect on January 1, 2016.[32] The law applies to situations where either notice of a foreclosure sale is given on or after that date, or a judicial foreclosure action commences after that date.[33] Therefore, the statute retroactively affects security instruments that were issued before January 1, 2016.[34]

A. Reaction to Chapter 66

Prior to the creation of Chapter 66, a lessee named in a junior lease could protect the lease from a foreclosure sale termination by securing a subordination agreement from the security instrument's owner.[35] This subordination would, in effect, treat the lease as though it was executed prior to the security instrument, and would bind a foreclosure sale purchaser to the lease terms.[36] Many lenders welcomed such subordinations, as the royalties generated by a profitable lease represented additional income which borrowers could use to repay their loans.[37] Some security instruments require that landowners advance such payments towards their debt.[38]

However, due to recent industry trends which saw massive increases in residential mineral leases, energy companies became increasingly unable,[39] or unwilling,[40] to secure subordination

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31. *Id.* § 66.001(d).

32. *Id.*

33. *Id.*

34. *See* Glaze et al., *supra* note 12 ("[Chapter 66] not only applies to mortgages executed in the future, but also undertakes to limit retroactively the rights of mortgage holders under existing mortgages.").

35. RICHARD HEMINGWAY ET AL., OIL AND GAS LAW AND TAXATION 198 (4th ed. 2004).

36. *See id.*; Vahlsing Christina Corp. v. First Nat'l Bank of Hobbs, 491 S.W.2d 954, 958 (Tex. App. 1973) (holding that "a subordination agreement is nothing more than a contractual modification of lien priorities").

37. Kratovil, *supra* note 8, at 10-11; Glaze et al., *supra* note 12; Moore, *supra* note 13 ("Most lenders will happily agree to subordination for reasonable, economically efficient leases—if foreclosure becomes necessary, lenders typically prefer to foreclose on income producing property.").

38. *See* Hemingway, *supra* note 35 (noting that, in return for a mortgagee's execution of a subordination agreement, a mortgagor usually "executes an assignment of some or all of the economic benefits from the lease to the mortgagee").

39. Glaze et al., *supra* note 12.

40. *See* John McFarland, *Texas Legislature – Bills of Interest to Mineral Owners*, OIL AND GAS LAWYER BLOG (June 3, 2015), http://www.oilandgaslawyerblog.com/2015/06/texas-legislature-bills-of-interest-to-mineral-owners.html ("Operators who obtain oil and gas leases from [homeowners in urban areas of the Barnett Shale, near Fort Worth] don't try to obtain subordinations from the homeowners' mortgage company."); Moore, *supra* note 13 ("But the mineral lessee lobby—a well-funded and important interest—apparently grew

agreements from security interest holders. Some lessees claimed that in their haste to secure leases in popular drilling areas, they did not have time to secure subordinations before a lien was foreclosed upon.[41] In these cases, some lessees simply "didn't anticipate the worst-case scenario that involved tens of thousands of foreclosures."[42] Also, many mortgages issued by local banks were sold to large financial service companies that were unfamiliar with the oil and gas industry, and refused to execute subordinations.[43] Other lenders' internal procedures resulted in a lengthy delay before a subordination agreement could be acquired.[44]

As a result, lessees named in junior leases faced significant risk if a landowner defaulted on his obligation.[45] Lessees were likewise hesitant to conduct operations under such leases, as a foreclosure may render their efforts meaningless.[46] This scenario no doubt stifled mineral production throughout the state.[47] Chapter 66 was welcomed by many in the Texas oil and gas industry as an added protection to lessees, and a law that promotes energy production.[48]

On the contrary, some lenders are weary of the "somewhat convoluted"[49] aspects of Chapter 66. Though oil and gas leases may provide additional funding to landowners, such contracts convey property rights to third parties and are viewed as encumbrances

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tired of having to actually bargain for subordination agreements . . . . ").

41. Max B. Baker, *Texas Lawmaker to Push Bill on Foreclosed Gas Leases*, FORT WORTH STAR-TELEGRAM (Nov. 27, 2014), http://www.star-telegram.com/news/business/barnett-shale/article4356411.html.

42. *Id.*

43. Glaze et al., *supra* note 12.

44. Moore, *supra* note 13 ("Getting hundreds of different residential mortgage companies to execute subordination agreements through their myriad servicers is all but impossible.").

45. Glaze et al., *supra* note 12.

46. *See* Baker, *supra* note 41 (noting that an energy company whose lease has been extinguished by a foreclosure "essentially trespasses on the property if it continues to extract gas and other minerals").

47. Analysis of a similar bill that was vetoed in 2013 suggested that many in the energy industry were concerned that properties burdened by superior mortgages would not be developed, due to uncertainty regarding foreclosure sale terminations. *See* Texas House Energy Resources Committee Report, C.S.H.B. 2590, http://www.legis.state.tx.us/tlodocs/83R/analysis/pdf/HB02590H.pdf.

48. *See* McFarland, *supra* note 40 ("The law will allow the lease to continue, and the mortgage company will acquire the royalty interest in the foreclosure.").

49. Ellen Wied, *First National Title Insurance Company, Underwriting Bulletin: 2015-02* (Aug. 27, 2015), http://www.fnti.com/docs/Underwriting%20Bulletins/Underwriting%20Bulletin%202015-02%20New%20Legislation.pdf.

on the land they affect.[50] Thus, forced subordination laws have been criticized as unfairly burdening subsequent purchasers with agreements they did not negotiate.[51]

Some feel that Chapter 66 "reward[s] lessees for . . . willfully disregard[ing] the obligation to obtain a subordination agreement,"[52] which was previously "standard" in many cases because properties are commonly burdened by mortgages.[53] The Legislature has been criticized for "drastically undermin[ing] the property rights of all lenders with security interests in mineral estates."[54] Other lenders suggest the law could encourage defaulting landowners to bind foreclosure sale purchasers to leases that contain unfavorable terms.[55]

Interestingly, the Texas Legislature passed a similar law in 2013, which was referred to as House Bill No. 2590.[56] This legislation was almost identical to House Bill No. 2207, but provided that a lessee must indemnify a foreclosure sale purchaser and mortgagee from actual damages resulting from the lessee's operations.[57] Though Governor Rick Perry agreed with the overall intent of the law, he vetoed it.[58] The governor noted that the bill would have benefitted parties located in urban areas, but was "less well suited to leases in rural areas, where the bill's prohibition on entering onto the land [might] make the lease impossible to utilize."[59] He also feared the law would be misinterpreted to allow lawsuits against lessees for drilling operations occurring before a foreclosure, which would "have a serious chilling effect on the production

50. GRANT NELSON ET AL., REAL ESTATE FINANCE LAW 1130 (6th ed. 2015).

51. Ian D. Ghrist, *House Bill 2590 (Continuation of Oil and Gas Leases After Foreclosure) Would Reward Wrongful Conduct*, GHRIST LAW (Apr. 4, 2014), http://www.ghristlaw.com/blogs/mineralrights/hb2590.

52. *See id.* (criticizing a previously vetoed law which is almost identical to House Bill No. 2207).

53. Christopher Helman, *Chesapeake Energy: What's Up with These Lawsuits?* FORBES (Jan. 21, 2011), http://www.forbes.com/sites/christopherhelman/2011/01/ 21/chesapeake-energy-whats-up-with-these-lawsuits (indicating that subordination agreements are standard because "almost every parcel of property has a mortgage on it.").

54. Moore, *supra* note 13.

55. *See id.* (noting that, under Chapter 66, "the foreclosure purchaser will be stuck with the mineral lease, good or bad," and that "[Chapter 66] may primarily benefit lessees who have obtained below-market leases.").

56. H.R. 2590, 2013 Leg., 83d Reg. Sess. (Tex. 2013).

57. *Id.*

58. TEX. H.R. HOUSE RESEARCH ORG., VETOES OF LEGISLATION, H.R. 83-6, 83d Sess., at 22–32 (2013).

59. *Id.*

of oil and gas" across Texas.[60] Some commentators have suggested that the Bill was vetoed at the request of large energy producers who wanted more favorable terms.[61]

B. Subordination Agreements Under Chapter 66

Before discussing the retroactive nature of Chapter 66, it is interesting to note one of the law's shortcomings. The statute does not address situations where a lessee named in a junior lease has begun drilling operations prior to a foreclosure sale. Before the creation of Chapter 66, such lessees would forfeit the right to continue their operations.[62] Now, however, the lease will remain in effect, though disputes regarding existing surface use may remain. Texas law grants lessees deference in efforts to access minerals.[63] Nonetheless, a foreclosure sale purchaser could stifle a lessee's existing operations under Chapter 66 by refusing to accommodate specific surface provisions set forth in the lease.[64] Thus, while lessees are legally allowed to retrieve minerals, their means of doing so may be subject to future negotiation, or even litigation.

To mitigate a foreclosure's effect on surface operations, Chapter 66 allows a lessee and a mortgagee to execute an agreement, such as a subordination agreement, which "controls over any conflicting provision of [Chapter 66]."[65] However, securing this agreement may prove difficult. As previously mentioned, many lenders have already demonstrated an unwillingness to execute subordination agreements with lessees.[66] Also, even if a lessee were to find a cooperative lender, he may be required to draft a more detailed subordination agreement in order to protect his surface rights.

Texas courts strictly construe contracts such as subordination agreements.[67] Yet, traditional agreements used by many drillers simply identify the lease and the security instrument at issue, and include general language whereby the lienholder agrees to subor-

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60. *Id.*

61. Karen Neeley, *The 2013 Legislative Session: Action and Inaction*, 17-18 (June 2013), http://www.ibat.org/files/PDFs/2013_Legislative_WP.pdf.

62. Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 915 (Tex. 2013).

63. "The mineral owner, as owner of the dominant estate, has the right to make any use of the surface which is necessarily and reasonably incident to the removal of the minerals." Moser v. U.S. Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984).

64. TEX. PROP. CODE ANN. § 66.001(c) (West 2016).

65. *Id.* § 66.001(d).

66. *See* Glaze et al., *supra* note 12.

67. IT Diversified Credit Corp. v. First City Capital Corp., 737 S.W.2d 803, 804 (Tex. 1987) (noting that a subordination agreement "must be construed according to the expressed intention of the parties and its terms").

dinate her lien to the mineral lease.[68] The problem with using such a form going forward is that Chapter 66 already subordinates security instruments to leases.[69] Also, Chapter 66 allows subordination agreements to supersede only *conflicting* provisions of the law.[70] Thus, lessees who wish to maintain their surface rights under Chapter 66 may be forced to abandon traditional subordination agreements in favor of instruments that unambiguously reserve their surface rights in the event of a foreclosure.[71]

Regardless of its shortcomings, perhaps the most controversial aspect of Chapter 66 is its application to security instruments that were executed prior to the law's creation.[72] In this sense, Chapter 66 retroactively alters the rights of mortgagors who issued loans with the expectation that a foreclosure would terminate junior leases.[73] The remainder of this article will examine whether Chapter 66 could survive a legal challenge on such grounds.

III. RETROACTIVE LAWS AND ROBINSON V. CROWN CORK & SEAL CO.

Legal scholars have traditionally frowned upon laws that retroactively affect parties' rights.[74] Courts have similarly echoed a "presumption against retroactive legislation" which "embodies a legal doctrine centuries older than our Republic."[75] While the United States Constitution does not guarantee that one's reliance on civil laws will be protected, commentators have recognized that,

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68. *See* Kimberly Luff Wakim & Justin C. Harding, *The Legal and Business Risks of Developing an Oil and Gas Leasehold Interest Without Obtaining Lien Subordination Agreements*, 19 E. MIN. L. INST. 37, 72-74 (1999) (describing subordination agreements and setting forth language that can be used in such instruments); *Subordination Agreement*, LANDMEN.NET, http://www.landmen.net/clausesforms/subordination.html.

69. TEX. PROP. CODE ANN. § 66.001 (West 2016).

70. *Id.* § 66.001(d).

71. *First City Capital*, 737 S.W.2d at 804; *see* Vahlsing Christina Corp. v. First Nat'l Bank of Hobbs, 491 S.W.2d 954, 958 (Tex. App. 1973) (discussing the contractual nature of subordination agreements).

72. *See* TEX. PROP. CODE ANN. § 66.001(a)(2) (West 2016); Glaze et al., *supra* note 12.

73. *See* Glaze et al., *supra* note 12.

74. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265, 114 S. Ct. 1483, 1522 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 78 (2013) (noting that antipathy to retroactive legislation by the framers of the United States Constitution helped frame various provisions of the document).

75. *Landgraf*, 511 U.S. at 265.

to a large extent, an orderly society must be able to depend on the notion that laws will remain consistent.[76]

Thus, for example, Article I, Sections 9 and 10 of the United States Constitution expressly prohibit retroactive penal legislation, Bills of Attainder (which punish individuals for past conduct), and laws that interfere with contractual obligations.[77] The Texas prohibition against such laws is more specific. Article I, Section 16 of the Texas constitution expressly provides that "[n]o bill of attainder, ex post facto law, *retroactive law*, or any law impairing the obligation of contracts, shall be made."[78]

Historically, judicial interpretation of retroactive laws has been far from clear.[79] Commentators have noted that various United States Supreme Court decisions which addressed retroactivity, are "rife with separate opinions" and "reflect a variety of conflicting and confusing approaches."[80] Similarly, Texas courts have given deference to various factors when analyzing such policies.[81] The confusion stems partly from the reality that almost all laws have some impact on past rights and expectations.[82] Thus, invalidating all policies that affect prior matters is impossible.[83]

Accordingly, the Supreme Court of Texas sought to clarify the analysis of retroactive laws in 2010 in *Robinson v. Crown Cork & Seal Co.,*[84] as well as in subsequent decisions that relied on similar reasoning.[85]

A. Background of Robinson

Barbara Robinson's husband, John Robinson, suffered mesothelioma from asbestos exposure.[86] In 2002 the couple sued a number of plaintiffs, including Crown Cork & Seal Co. ("Crown").[87]

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76. *See* Slawson, *supra* note 2, at 225-26.

77. U.S. CONST. art. I, §§ 9, cl. 3, 10, cl. 1; *see Landgraf*, 511 U.S. at 266.

78. TEX. CONST. art. I, § 16 (emphasis added).

79. *See* Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 138–45 (Tex. 2010).

80. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) (discussing the Supreme Court's recognition that retroactivity analysis has lacked depth and explaining the concept of equilibrium theory).

81. *Robinson*, 335 S.W.3d at 139. *See also* Hyeongjoon David Choi, *Robinson v. Crown: Formulation of a New Test for Unconstitutional Retroactivity or Mere Restatement of Century-Old Texas Precedents?*, 64 BAYLOR L. REV. 309, 317–30 (2012) (explaining the standards used in various Texas Supreme Court decisions which analyzed retroactive laws).

82. Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648 (Tex. 1971).

83. *Id.*

84. *Robinson*, 335 S.W.3d at 126.

85. Union Carbide Corp. v. Synatzske, 438 S.W.3d 39, 55–60 (Tex. 2014); Tenet Hosps., Ltd. v. Rivera, 445 S.W.3d 698, 706-09 (Tex. 2014).

86. *Robinson*, 335 S.W.3d at 129.

87. *Id.*

Crown never manufactured asbestos-related products.[88] Its liability stemmed from a 1966 acquisition of a smaller company, the Mundet Cork Corporation ("Mundet"), which produced asbestos insulation.[89] Crown purchased Mundet for about $7 million; however, it had paid over $413 million in asbestos injury settlements as of 2003.[90]

Crown initially conceded that under New York and Pennsylvania law (which governed its corporate predecessors) it succeeded to Mundet's liability for asbestos exposure.[91] A Texas trial court granted partial summary judgment for the Robinsons on that issue.[92] However, around the time the order was issued, the Texas Legislature enacted Chapter 149 of the Texas Civil Practice and Remedies Code, which was part of a statewide tort reform effort.[93]

The law capped successor corporations' liability for asbestos-related claims,[94] and was specifically intended to protect an "innocent successor" such as Crown.[95] Chapter 149 also included a choice-of-law provision, which required Texas courts to use Texas law in successor asbestos-related liability cases.[96] This provision ensured that plaintiffs such as the Robinsons could not sue Crown in Texas under New York or Pennsylvania law.

Interestingly, evidence suggests Chapter 149 was enacted entirely for Crown's benefit.[97] During a debate, the Bill's sponsor specifically named Crown as a Texas company that would be protected from the law.[98] Also, a Texas Senate committee chair referred to

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Robinson,* 335 S.W.3d at 129-30.
93. *Id.* at 130.
94. *Id.* Chapter 149 applied to "a domestic corporation or a foreign corporation that has . . . done business in this state and that is a successor which became a successor prior to May 13, 1968' — a date by which, the Legislature appears to have thought, the dangers of asbestos should have been commonly known." *Id.* Chapter 149 also limited a defendant's asbestos-related liabilities to the fair market value of its total gross assets. *Id.* This amount was determined as of the time the defendant merged or consolidated with a company that produced asbestos products. *Id*. Also, the limitation included the aggregate coverage under a defendant's insurance policy that was related to asbestos-related injuries. *Id.* In this case, Mundet's aggregate insurance coverage was $3.683 million. *Id.* at 129-30.
95. *Id.* at 132. The history supporting Chapter 149 included a statement of intent that explained that the law was intended to protect larger corporations that acquired smaller asbestos manufacturers. *Id.* Without such policy, "a much larger successor [could] easily be bankrupted by the asbestos-related liabilities it innocently received from a much smaller predecessor with which it merged [many] decades ago." *Id*.
96. *See Robinson,* 335 S.W.3d at 147.
97. *Id.* at 131-32. *See also* Tenet Hosps., Ltd. v. Rivera, 445 S.W.3d 698, 707 (Tex. 2014) (noting that Chapter 149 "was enacted solely to benefit a single company by reducing its liability in asbestos litigation").
98. *Robinson*, 335 S.W.3d at 131.

Chapter 149 as "the Crown Cork and Seal asbestos issue," and noted that the contents of the Bill are "what [he understood] to be an agreed arrangement between all of the parties in this matter."[99]

Chapter 149 took effect immediately upon its creation on June 11, 2003.[100] Soon after the law was enacted, Crown moved for summary judgment, and the trial court granted the motion.[101] John Robinson died days later.[102]

B. Appeal

On appeal, Barbara Robinson argued that Chapter 149 was an unconstitutional retroactive law because it extinguished her vested rights (i.e., her cause of action against Crown).[103] The 14th Texas Court of Appeals disagreed, and noted that the jurisprudence of retroactive laws was unclear as to whether Chapter 149 was valid.[104]

The appeals court reasoned that a retroactive law's validity did not depend on whether it affected a vested right.[105] Rather, its constitutionality hinged on whether the law was an appropriate use of the Legislature's police power.[106] The court asserted that a valid exercise of such power depends on (1) whether a law is appropriate and reasonably necessary to accomplish a purpose within the scope of such power, and (2) whether a law is reasonable by not being arbitrary and unjust, or whether the effect on individuals is unduly harsh and out of proportion to the means it seeks to accomplish.[107]

The court found that Chapter 149 was enacted to protect the financial viability of Texas businesses, which was a lawful use of Legislative authority.[108] Also, it noted that the law limited any detrimental impact on plaintiffs, such as the Robinsons, because it allowed them to collect from many other potential defendants.[109] Thus, the court upheld the summary judgment ruling.[110]

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99. *Id.* at 132.

100. *Id* at 131. The Court also noted that the Texas Legislature was well aware that Chapter 149 would specifically benefit Crown. *Id.* at 131-32.

101. *Id.* at 132-33.

102. *Id.* at 133.

103. *Id.*

104. *Robinson,* 335 S.W.3d at 133.

105. *Id.*

106. *Id.* at 133-34 (citing Robinson v. Crown Cork & Seal Co., 251 S.W.3d 520, 526 (Tex. App. 2006); Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 633–34 (Tex. 1996)).

107. *Robinson*, 335 S.W.3d at 134.

108. *Id.*

109. *Id.*

110. *Id.* However, the dissent argued that the analysis of Ms. Robinson's claim should

C. Supreme Court of Texas Review

Upon appeal to the Supreme Court of Texas, Ms. Robinson argued that the appeals court should have found Chapter 149 unconstitutional because it eliminated her vested right to sue.[111] Conversely, Crown maintained that the appeals court correctly deemed Chapter 149 a reasonable exercise of police power.[112] Both arguments were supported by Texas case law.[113]

1. Prior Analyses of Retroactive Laws

The majority began its analysis by attempting to reconcile the muddled jurisprudence surrounding retroactive laws.[114] It described a legal history that generally disfavored retroactive laws, as has been recognized by the country's highest court.[115] Traditionally, this "solid foundation of American law" views such policies as "generally unjust," and "neither accord with sound legislation nor with the fundamental principles of the social compact."[116]

However, retroactive laws must be carefully scrutinized, as a broad rejection of policies that affect prior issues would be unworkable.[117] The term "'retroactive' simply means '[e]xtending in scope or effect to matters which have occurred in the past; retrospective', and 'retrospective', even more simply, means '[d]irected to, contemplative of, past time.'"[118] Thus, prohibiting all laws that impose a retroactive or retrospective effect would "embarrass legislation on existing or past rights and matters, to such an extent as to create inextricable difficulties."[119]

The Court explained that the traditional presumption against retroactive laws has two purposes: protecting society's reasonable

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have relied on the fact that Chapter 149 extinguished her vested right to sue Crown. *Id.* at 134–35. It claimed that, "[b]ecause Mrs. Robinson's claims accrued and were pending in the trial court when [Chapter 149] took effect, Mrs. Robinson held vested rights in these claims that could not be destroyed." *Id.* at 134.

111. *Id.*

112. *Id.* at 136.

113. *Robinson,* 335 S.W.3d at 136.

114. *See id.* ("We conclude that the history and purpose of the constitutional provision [regarding retroactive laws] require a fuller statement of its proper application than we have previously given.").

115. *Id.*

116. *Id.* (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring)).

117. *Id.* at 138.

118. *Id.* (citing 13 THE OXFORD ENGLISH DICTIONARY 796, 801 (2nd ed. 1989)).

119. *Robinson,* 335 S.W.3d at 138 (citing DeCordova v. City of Galveston, 4 Tex. 470, 475-76 (1849)).

expectations regarding laws, and safeguarding against abuses of legislative power.[120] It noted that constitutional provisions that limit retroactive laws should support these aims.[121] However, past application of such principles has not resulted in consistent rulings.[122]

In its 1849 *DeCordova v. City of Galveston* decision, the Texas Supreme Court reasoned that retroactive laws were unconstitutional when they "destroy or impair" a vested right.[123] It further clarified that a law that impairs a *remedy* does not necessarily impair a *right*.[124] Chief Justice Hemphill explained that

> unless the remedy be taken away altogether, or encumbered with conditions that would render it useless or impracticable to pursue it. Or, if the provisions regulating the remedy, be so unreasonable as to amount to a denial of right . . . or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred; such legislation would be retrospective within the intent of the prohibition, and would therefore be wholly inoperative.[125]

Conversely, in 1971 the court reasoned that "[r]emedies are the life of rights" and that "the two terms are often inseparable."[126] This inconsistency highlighted a challenge with analyzing retroactive laws solely based on whether they affect a vested right.[127]

In two subsequent decisions, the court upheld retroactive laws that impaired vested rights because such policies were valid exercises of the State's police power.[128] In *Barshop v. Medina County Underground Water Conservation District*, the court reviewed a law that restricted citizens' ability to extract water from the Edwards Aquifer.[129] Prior to the policy's creation, landowners enjoyed unlimited use of such water.[130] However, the law retroactive

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120. *Id.* at 139.
121. *Id.*
122. *See id.* at 139-45.
123. *Id.* at 139-40 (citing *DeCordova,* 4 Tex. at 479).
124. *Id.* at 140 (citing *DeCordova,* 4 Tex. at 480).
125. *Robinson,* 335 S.W.3d at 140 (quoting *DeCordova*, 4 Tex. at 480).
126. *Id.* (quoting Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648-49 (Tex. 1971).
127. *Id.*
128. *Id.* at 143 (citing Barshop v. Medina Cnty. Underground Water Conservation District, 925 S.W.2d 618 (Tex. 1996); In re: A.V., 113 S.W.3d 355 (Tex. 2003)).
129. *Id.* (citing *Barshop*, 925 S.W.2d at 624).
130. *Id.* (citing *Barshop*, 925 S.W.2d at 634).

ly impaired citizens' interests by establishing water access based on historic use, and without providing an opportunity for individuals to preserve their rights.[131]

Nonetheless, the court reasoned that the Texas constitution did not absolutely prohibit such laws.[132] The Legislature's authority to promote public safety (i.e., access to water) can often prevail over a claim that a law is unconstitutionally retroactive.[133] Moreover, the *Robinson* majority emphasized that the statute at issue in *Barshop* was supported by legislative findings that limitations on water access were necessary to protect aquatic life, domestic and municipal water supplies, the operation of existing industries, and Texas's economic development.[134]

In another case, *In re A.V.*, the court upheld a statute that allowed termination of parental rights if a parent knowingly engaged in criminal conduct and was incarcerated for two or more years.[135] It analyzed whether the law was unduly retroactive, as applied to a parent who was incarcerated before the law was enacted.[136] The Majority cited *Barshop*, and explained that the Legislature's authority to safeguard the public, such as by protecting children of incarcerated parents, justified the policy.[137] Further, the court explained that a retroactive law is not unconstitutional if it "does not upset a person's settled expectations in reasonable reliance upon [it]."[138] In other words, incarcerated parents cannot reasonably expect that the government would fail to protect their children while they are imprisoned.[139]

2. Review of Chapter 149

The court utilized this analysis in addressing whether Chapter 149 was unconstitutional solely because it impaired Robinson's vested right to sue Crown.[140] However, following such logic, Robinson's right to sue would receive protection, while the State's ability to regulate groundwater and protect children would not.[141] Such

131. *Robinson,* 335 S.W.3d at 143 (citing *Barshop*, 925 S.W.2d at 624).
132. *Id.* (citing *Barshop*, 925 S.W.2d at 633-34).
133. *Id.* (citing *Barshop*, 925 S.W.2d at 634).
134. *Id.* at 143–44. (citing *Barshop*, 925 S.W.2d at 634).
135. *Id.* at 144. (citing *In re A.V.*, 113 S.W.3d at 355).
136. *Id.* (citing *In re A.V.*, 113 S.W.3d at 360).
137. *Robinson,* 335 S.W.3d at 140 (citing *Barshop*, 925 S.W.2d at 361).
138. *Id.* (citing *In re A.V.*, 113 S.W.3d at 361).
139. *Id.*
140. *Id.* at 148-49.
141. *Id.* at 144-45.

a difficult proposition, the majority noted, established the fundamental failure of analyses that rely solely on whether a law impairs a vested right.[142]

On the other hand, affording heavy deference to the Legislature's police power is also a flawed framework.[143] While the Legislature deemed *Barshop*'s groundwater policy and *A.V.*'s child-care law necessary, "necessity alone cannot justify a retroactive law."[144] Instead, the majority explained that the statutes reviewed in *Barshop* and *A.V.* were upheld because they did not unduly affect citizens' settled expectations regarding water rights or child welfare.[145]

Given the difficulty of utilizing standards which prioritize either vested rights or legislative power, the Court found that an evaluation of retroactive laws must consider three factors: "[(1)] the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; [(2)] the nature of the prior right impaired by the retroactive statute; and [(3)] the extent of the impairment" of the right.[146] The court also cautioned that

> [t]here must be a compelling public interest to overcome the heavy presumption against retroactive laws. To be sure, courts must be mindful that statutes are not to be set aside lightly. . . . But courts must also be careful to enforce the constitutional prohibition [against retroactive laws] to safeguard its objectives.[147]

Under this framework, laws which "merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive."[148] Nonetheless, the court warned that a constitutional analysis of such laws must consider all three of the aforesaid factors.[149]

The majority first analyzed Chapter 149 by examining the nature of Ms. Robinson's impaired rights, as well as the law's impact on them.[150] The policy did not directly restrict Ms. Robinson's

142. *Id.* at 145.
143. *Robinson,* 335 S.W.3d at 145.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 146.
148. *Id.*
149. *Robsinon,* 335 S.W.3d at 146.
150. *Id.* at 147.

action regarding asbestos injuries.[151] Instead, it mandated that Texas courts apply Texas law to successor asbestos injury cases, and also limited a defendant's liability.[152] In sum, Chapter 149 prevented Ms. Robinson from suing Crown in Texas, a cause which she had a substantial basis for bringing.[153]

Crown asserted that the Robinsons could not have reasonably expected a company such as Mundet to pay all asbestos claims, or to merge with a larger company like Crown.[154] However, the majority rejected this argument, reasoning that the prohibition against retroactive laws does not seek to protect such expectations.[155] The Robinsons could have reasonably assumed that a law allowing their recovery would not be amended after they filed their initial lawsuit.[156]

The court also dismissed Crown's assertion that the Robinsons sued many defendants, and would likely recover all of their damages from such parties.[157] It refused to speculate as to other settlements, and noted that Chapter 149 "disturbs settled expectations" by either reducing Ms. Robinson's recovery, or forcing other defendants to absorb Crown's liability.[158] Therefore, the majority found that Chapter 149 substantially impacted Ms. Robinson's interest in her well-recognized cause of action.[159]

The court then analyzed whether Chapter 149 served a public interest, based on the Legislature's findings.[160] Crown claimed the law provided necessary relief to Texas companies that have been bankrupted by asbestos litigation.[161] However, the Legislature did not recognize such a benefit when it enacted Chapter 149.[162] The court found that lawmakers identified this advantage with regard to *other policies*; however, the legislative history surrounding Chapter 149 indicated that it was created to help Crown, and no other company.[163]

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151. *Id.*
152. *Id.*
153. *Id.* at 148. "[C]laims like the Robinsons' have become a mature tort, and recovery is more predictable, especially when the injury is mesothelioma, a uniquely asbestos-related disease. . . . Their right to assert them was real and important, and it was firmly vested in the Robinsons." *Id.*
154. *Id.*
155. *Robinson,* 335 S.W.3d at 148.
156. *Id.*
157. *Id.*
158. *Id.* at 148-49.
159. *Id.* at 149.
160. *Id.*
161. *Robinson,* 335 S.W.3d at 149.
162. *Id.*
163. *Id.*

The majority conceded that Texas would benefit from reduced employer liability in situations such as these.[164] However, it emphasized that the Legislature "made no findings to justify Chapter 149."[165] Even the statement by the statute's House sponsor "fails to show how the legislation serves a substantial public interest."[166] Moreover, the court reasoned that any benefit realized by Chapter 149 would not equate to the public interests addressed in *Barshop* and *A.V.*[167]

The court additionally noted that under Chapter 149, the burden faced by the Robinsons was light, as compared to the large financial benefit realized by Crown.[168] Under the law, asbestos victims could still seek retribution from a host of defendants, while Crown received protection from potentially debilitating lawsuits.[169] However, as the majority explained, "an important reason for the constitutional prohibition against retroactive laws is to preempt this weighing of interests absent compelling reasons."[170] Therefore, the Court found that the public interest served by Chapter 149 was slight.[171] Under its new framework, the majority held that Chapter 149, as applied to the Robinsons' common-law claims, was unconstitutionally retroactive.[172]

IV. ANALYSIS OF CHAPTER 66

At first glance, a retroactivity challenge to Chapter 66 seems daunting. The Texas Supreme Court has invalidated such laws in only four cases.[173] Further, any analysis of Chapter 66 will presume that the law is constitutional.[174] However, given the correct set of facts, a security interest holder may be able to demonstrate that Chapter 66 is an unconstitutionally retroactive law under *Robinson*.

Before we begin this analysis, it is important to note that many security interests include intricate terms.[175] Mortgages "have be-

164. *Id.*
165. *Id.*
166. *Id.*
167. *Robinson,* 335 S.W.3d at 149.
168. *Id.* at 150.
169. *See id.*
170. *Id.* ("Indeed, it is precisely because retroactive rectification of perceived injustice seems so reasonable and even necessary, especially when there are few to complain, that the constitution prohibits it.").
171. *Id.*
172. *Id.*
173. Tenet Hosps., Ltd. v. Rivera, 445 S.W.3d 698, 706-09 (Tex. 2014).
174. Union Carbide Corp. v. Synatzske, 438 S.W.3d 39, 55 (Tex. 2014).
175. *See* PHILLIP T. KOLBE, GAYLON E. GREER, & HENRY G. RUDNER, III, REAL ESTATE FINANCE 106-07 (2003) (listing examples of some common mortgage contract terms).

come complex documents whose legal import is camouflaged by archaic wording and by diverse statutory provisions."[176] Such provisions may, for instance, forbid property owners from executing leases, or require a lienholder's consent prior to the execution of a lease.[177] In these cases, Chapter 66 may have little, if any, effect on a foreclosure. Therefore, any possible challenge to the law will depend on the specific terms of the security instrument at issue.

A. Nature of the Right Affected by Chapter 66

Assuming a security instrument does not prohibit leasing, a constitutional challenge to Chapter 66, as applied to a security interest holder, would examine the nature of the right impaired by the law.[178] Chapter 66 has the potential to make a lien, which is a legally protected property interest,[179] significantly less valuable.[180] A lender who issued a mortgage prior to the creation of the law may argue that a junior lease diminished the value of mortgaged property, and prevented him from recovering his interest pursuant to a foreclosure, or a later sale.

Stated differently, lenders may assert that the retroactive impact of Chapter 66 on some liens is exactly the type of harm that courts have sought to protect against.[181] The law disturbed lenders' reasonable expectation that a foreclosure would terminate subsequently executed leases, and was an overreach of legislative authority.[182] Thus, a court may find that such an impact is worthy of review under *Robinson*.

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176. *Id*. at 106.

177. *See* DANIEL F. HINKEL, ESSENTIALS OF PRACTICAL REAL ESTATE LAW 178 (5th ed. 2011) (noting that a "mortgage may contain . . . numerous other provisions designed to protect the lender in every conceivable situation"); Roger E. Beecham, *Minerals, Transfers and Encumbrances*, SHANNON GRACEY (2009), http://www.shannongracey.com/component/content/article/102 (describing how many deeds of trust include provisions which prevent the leasing of mineral interests). For instance, a standard term in a Fannie Mae or Freddie Mac mortgage prohibits a borrower from leasing the mortgaged property without the prior approval of the lender. DAVID H. CARPENTER, CONG. RESEARCH SERV., 7-5700, HOW FANNIE MAE AND FREDDIE MAC TYPICALLY HANDLE REQUESTS TO CREATE OIL, GAS, OR MINERAL LEASES ON RESIDENTIAL PROPERTIES 2-3 (2011).

178. *Robinson*, 335 S.W.3d at 145.

179. Sec. State Bank & Trust v. Bexar Cnty., 397 S.W.3d 715, 721 (Tex. App. 2012), *pet. for rev. denied*; Nikmaram v. Sec. State Bank & Trust, 2013 Tex. LEXIS 668 (Tex. 2013), *reh'g for rev. denied*, 2014 Tex. LEXIS 72 (Tex. 2014) (citing Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983)); Sadeghian v. City of Denton, 49 S.W.3d 403, 406 (Tex. App. 2000), *rev. denied*, 2001.

180. *See infra* Part IV(B).

181. *See Robinson*, 335 S.W.3d at 139.

182. *See id.*

However, a roadblock for security interest holders is the *Robinson* majority's somewhat ambiguous discussion of vested rights and remedial laws. The court found that the right affected by an unconstitutionally retroactive law need not be a *vested* right.[183] It explained that a focus on vested rights is "too much in the eye of the beholder to serve as a test for unconstitutional retroactivity."[184] Nonetheless, the court did not specify which rights are worthy of protection from retroactivity.[185]

Moreover, the Majority frequently emphasized that Ms. Robinson's ability to sue Crown was a vested right.[186] The court described Ms. Robinson's "firmly vested" right to assert her "mature tort," which had a "substantial basis in fact," and provided for a "predictable" recovery.[187] Therefore, given the somewhat speculative nature of property values and foreclosure sales,[188] a court that reviews a Chapter 66 challenge may find that a lien interest in foreclosed property is not a right that *Robinson* was intended to defend.[189]

Furthermore, the *Robinson* court suggested that under its framework, "changes in the law that merely affect remedies or procedure . . . are usually not unconstitutionally retroactive."[190] Though the court reasoned that remedies and rights are often intertwined,[191] the court recognized that laws that merely regulate remedies do not necessarily impair rights.[192]

In this regard, Chapter 66 still allows security interest holders to receive funds from a foreclosure sale, albeit under different circumstances. Also, lenders have the option to file a deficiency judgment action against a homeowner if a foreclosure sale yields

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183. *Id.* at 143.

184. *Id.*; *see also* JANICE C. MAY, THE TEXAS STATE CONSTITUTION 73 (2011) ("[C]ourts have ruled that a retroactive law is invalid if it impairs or destroys a 'vested right.' But they have been unable to define 'vested right' as an objective or independent concept.").

185. Hyeongjoon David Choi, Robinson v. Crown: *Formulation of a New Test for Unconstitutional Retroactivity or Mere Restatement of Century-Old Texas Precedents?*, 64 BAYLOR L. REV. 309, 334 (2012).

186. *Id.*

187. *Robinson*, 335 S.W.3d at 148.

188. *See* Anthony Pennington-Cross, *The Value of Foreclosed Property*, 28 J. REAL EST. RES. 193, 197-99 (2006) (discussing various reasons why foreclosed property may sell at a discount).

189. *See* Garrett Operators, Inc. v. City of Houston, 461 S.W.3d 585, 597-98 (Tex. App. 2015) (denying a billboard operator's retroactivity challenge to Houston's sign code, partially because the operator failed to secure a necessary permit and thus did not have a "vested interest" in converting his sign).

190. *Robinson*, 335 S.W.3d at 146.

191. *Id.* at 140.

192. *Id.* ("[I]n applying the prohibition against retroactivity, a law that impairs a remedy does not impair a right, except sometimes.").

an amount lower than a landowner's outstanding debt,[193] though such suits often have a very low success rate.[194] Therefore, a court may find that Chapter 66 is primarily remedial, and immune from a retroactivity challenge.

Such analysis finds support in Texas case law. For instance, in *Rey v. Acosta*,[195] a case decided nine years prior to *Robinson*, the El Paso Court of Appeals reviewed a situation which is comparable to a foreclosure under Chapter 66. In 1985, the Reys purchased land from Acosta, a real estate broker who financed the transaction.[196] In connection with the purchase, the Reys executed a $45,000 lien note and agreed to make monthly payments to Acosta.[197] The note expressly waived notice of acceleration in the event of default.[198]

When the Reys failed to make several payments, Acosta immediately declared the note due, and successfully sued the Reys for breach of contract.[199] On appeal, the Reys argued that Texas Property Code Section 51.002, which became effective in 1988 (three years after they executed their lien note), entitled them to notice and a 20-day period to cure their default.[200] They claimed the statute voided the waiver of notice provision contained in their note.[201] Thus, the court analyzed whether the statute applied to a contract that was executed prior to the law's effective date.[202]

The court recognized the Texas Constitution's prohibition on retroactive laws.[203] However, it cautioned that remedial laws that do not disturb vested rights may be applied retroactively.[204] The court explained that litigants have no vested rights in remedies, and "[r]emedial legislation not entirely eliminating a preexisting remedy applies retroactively from the effective date of the statute and is not an infringement on vested rights."[205]

The court also reasoned that section 51.002 was permissible because it did not prevent Acosta from accelerating her note, but merely altered her procedural means of enforcing it.[206] There-

193. PlainsCapital Bank v. Martin, 459 S.W.3d 550, 555 (Tex. 2015).

194. Kimbriell Kelly, *Lenders Seek Court Actions Against Homeowners Years After Foreclosure*, WASH. POST (June 15, 2013), http://wpo.st/mbvD1.

195. 860 S.W.2d 654 (Tex. App. 1993).

196. *Id.* at 656.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 656-57.

201. *Rey*, 860 S.W.2d at 656-57.

202. *Id.* at 657.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 657-58.

fore, the law did not alter any substantive right, and Acosta was required to abide by the stature in her foreclosure proceeding.[207]

Nonetheless, while Chapter 66 may primarily affect a lender's remedy, a court that follows *Robinson* must balance this factor with the extent of the law's impairment, as well as its public benefit.[208] These factors have the potential to heavily favor security interest holders.

B. Extent of the Law's Impairment

If a subsequent purchaser considers a junior lease to be a benefit, any harm caused by Chapter 66 may be difficult, or impossible, to articulate.[209] A producing lease coupled with a lucrative energy market may bring much added value to the property it affects. If leased property is part of a pooled unit, landowners may receive royalty payments without having to endure drilling operations on their property.[210] Also, a lease may soon expire after a foreclosure sale, and thus a prospective purchaser may have little cause for concern.

On the contrary, a lease maintained under Chapter 66 could significantly decrease property value, and accordingly, the amount a potential purchaser would offer for the land.[211] Such a scenario would surely threaten a mortgagee's ability to recoup the value of their security instrument pursuant to a foreclosure sale.[212]

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207. *Rey*, 860 S.W.2d at 658.

208. Under the *Robinson* test, remedial statutes are "usually not unconstitutionally retroactive"; however, such consequence "cannot substitute for the test itself." Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 146 (Tex. 2010); *see* Tenet Hosps., Ltd. v. Rivera, 445 S.W.3d 698, 708 (Tex. 2014) (noting that, despite finding that a statute provides a compelling public interest, the Court must balance such factor against the nature of the prior right and the extent to which the law impairs that right).

209. *See, e.g.*, Kratovil, *supra* note 8, at 10-11.

210. *See* JOSEPH SHADE, PRIMER ON THE TEX. LAW OF OIL AND GAS 117, 117-29 (14th ed. 2012) (defining "pooling," and explaining various instances where tracts may be included into a pooled unit).

211. *See* Nat. Gas Pipeline of Am. v. Pool, 124 S.W.3d 188, 192 (Tex. 2002) ("In Texas it has long been recognized that an oil and gas lease is not a "lease" in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee's/grantee's interest is "determinable" because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that the lease specifies will cause termination of the estate."); Kimberly Luff Wakim & Justin C. Harding, *The Legal and Business Risks of Developing an Oil and Gas Leasehold Interest Without Obtaining Lien Subordination Agreements*, 19 E. MIN. L. INST. 37, 63-64 (1999) ("If . . . a parcel of land is subject to an existing oil and gas lease, the buyer of the land receives something less than the entire bundle of rights associated with the land, which is less valuable than the entire bundle of rights.").

212. Kimberly Luff Wakim & Justin C. Harding, *The Legal and Business Risks of De-*

Oil and gas operations can lower a property's appeal. Anyone familiar with drilling rigs is aware that they are large and noisy, as they operate "numerous pieces of enormous equipment."[213] Such activity often occurs 24 hours a day, in all types of weather.[214] Residents living near areas where mineral operations are common have complained of exposure to "toxic chemicals and noxious odors . . . constant traffic, dust, and noise" which "radically altered" the character of their property.[215] In relation to the equipment and manpower necessary for drilling operations,[216] individuals located in the vicinity of drill sites have complained about issues such as large trucks damaging nearby roads and endangering local residents.[217]

Recently, Texas plaintiffs have successfully proven that such operations can considerably lower property values. In April 2014, a Dallas jury awarded a family $3 million in damages, including $275,000 for decreased property value, regarding oil and gas operations near their 40-acre ranch.[218] Also, a 2010 study of residential property near Flower Mound, Tex., concluded that land normally valued at $250,000 or more could experience a three to fourteen percent decrease in value if it is located near an oil or gas well.[219] Moreover, in 2010, a Wise County, Tex., family saw the appraised value of their home and 10-acre property fall over seventy percent (from $257,330 to $75,240) as a result of drilling operations on the property.[220]

Given the current energy market, landowners may also receive paltry royalty payments, which would further affect the desirability of leased property.[221] New drilling advances have greatly in-

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veloping an Oil and Gas Leasehold Interest Without Obtaining Lien Subordination Agreements, 19 E. MIN. L. INST. 37, 62 (1999).

213. PAUL BOMMER, A PRIMER OF OILWELL DRILLING 1 (2008).

214. *Id.* at 37.

215. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, 615 (Tex. App. 2015).

216. BOMMER, *supra* note 213, at 93 (explaining procedures for transporting and assembling rig components).

217. R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 622 (Tex. 2011).

218. Mica Rosenberg, *Texas Judge Upholds $3 Million Fracking Verdict*, REUTERS (July 15, 2014), http://reut.rs/W8goB2.

219. Integra Realty Resources, *Flower Mound Well Site Impact Study*, Aug. 17, 2010, at 9, http://www.flower-mound.com/DocumentCenter/View/1456.

220. Peggy Heinkel-Wolfe, *Drilling Can Dig into Land Value*, DALL. MORNING NEWS (Sept. 18, 2010), http://www.dallasnews.com/incoming/20100918-Drilling-can-dig-into-land-value-9345.ece.

221. James Osborne, *As Oil and Gas Prices Shrivel, Texans' Royalties are Drying Up Too*, DALL. MORNING NEWS (Sept. 11, 2015), http://www.dallasnews.com/business/energy/20150911-as-oil-gas-prices-shrivel-royalties-are-drying-up-too.ece; *see* Jennifer Hiller, *Oil Skewing Mineral Values; City, County Budgets Feel Pinch of Dropping Prices*, SAN ANTONIO EXPRESS NEWS (Feb. 8, 2015) (describing how property values in many Texas counties have

creased the availability of natural gas, which has decreased in value by about fifty percent since 2010.[222] Similarly, oil has consistently sold for less than $50 per barrel in 2015, whereas the five-year average in 2014 was about $93 per barrel.[223] Thus, if a lease provides for a three-sixteenths (18.75%) royalty, a landowner loses roughly $0.19 per barrel of oil produced, each time the price of oil falls by one dollar per barrel.[224] If an oil well produces 5,000 barrels a year, each $1 price decrease subjects a mineral owner to a $950 annual loss.[225] With some analysts predicting oil prices reaching $20 per barrel in 2016,[226] prospective purchasers may find that any royalty received under an existing lease is not worth the hassle of tolerating nearby drilling operations.

Chapter 66 may further encourage defaulting landowners to secure leases containing unfavorable terms.[227] Under Chapter 66, lessees and landowners know that oil and gas leases will survive foreclosure sales.[228] This knowledge may provide defaulting property owners with an opportunity to execute leases that provide for a high upfront bonus payment, but a low royalty.[229] The property owner (who has little incentive to bargain for favorable lease terms) would receive a substantial one-time payment, while a potential foreclosure sale purchaser will be bound by low royalty payments throughout the lease term.[230]

Additionally, Chapter 66 may impose future legal obligations on potential purchasers. As discussed previously in this article, the statute dictates that a foreclosure sale will terminate surface provisions under an existing lease, while the lease itself survives the sale.[231] Also, Chapter 66 does not address situations where mineral operations have begun prior to the foreclosure sale.[232] However, Texas law allows lessees to access the mineral estate underlying

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decreased due to the falling price of oil).

222. Osborne, *supra* note 221; *see* Clifford Krauss, *Low Oil Prices Pose Threat to Texas Fracking Bonanza*, N.Y. TIMES (Aug. 14, 2015), http://nyti.ms/1IQTfV6.

223. Osborne, *supra* note 221.

224. *Id.*

225. *See id.*

226. Jonathan Chew, *Oil Prices Could Drop to $20 a Barrel Next Year*, FORTUNE (Nov. 23, 2015), http://fortune.com/2015/11/23/oil-prices-20-barrel.

227. *See* Moore, *supra* note 13 ("The purchaser at the foreclosure sale—usually the foreclosing lender—must take the land subject to the lease, regardless of the terms of that lease.").

228. *See* TEX. PROP. CODE ANN. § 66.001 (West 2016).

229. *See* Moore, *supra* note 13 ("[T]he foreclosure purchaser will be stuck with the mineral lease, good or bad.").

230. *See id.*

231. *See* TEX. PROP. CODE ANN. § 66.001(c) (West 2016).

232. *See Id.* § 66.001.

leased property.[233] Thus, future surface use provisions may be the subject of negotiation, or litigation, between subsequent purchasers and lessees.

This reality poses a problem for security interest holders, as many potential foreclosure sale purchasers (often the lender itself, or other lenders) have little interest in negotiations regarding mineral leases.[234] Commentators have identified this issue as a "serious problem" under leases covering large tracts of land, or any tract where wells have been drilled. [235]

In sum, leases affected by Chapter 66 have the potential to dissuade purchasers from acquiring certain property. Thus, lenders who issued mortgages with the expectation that junior leases will be extinguished by a foreclosure may have a strong argument that Chapter 66 significantly affects their lien interests.

C. Public Benefit of Chapter 66

The *Robinson* court explained that, "[t]here must be a compelling public interest to overcome the heavy presumption against retroactive laws."[236] To that effect, a retroactivity analysis must consider "the nature and strength of the public interest served by the statute *as evidenced by the Legislature's factual findings*."[237]. Thus, the majority examined the Legislature's rationale, or lack thereof, regarding the public benefit of Chapter 149.[238] The Legislature's relative lack of support regarding the public interest served by Chapter 66 also suggests that the law may not provide a substantial public benefit.[239]

House Bill No. 2207 was placed on the local and uncontested calendar, which allowed it to progress through the House of Representatives without being debated on the House floor.[240] In addition

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233. Texas law has long recognized that under oil and gas leases, lessees have the right to reasonably use the surface estate for the purpose of developing minerals. JOSEPH SHADE, PRIMER ON THE TEX. LAW OF OIL AND GAS 28 (14th ed. 2012); *see* Charles Sartain, *Vetoed Foreclosure Bill Will Return*, ENERGY AND THE LAW (July 26, 2013), http://www.energyandthelaw.com/2013/07/26/vetoed-foreclosure-bill-will-return (indicating that in certain circumstances under the provisions in House Bill No. 2590, which was almost identical to Chapter 66 and was vetoed in 2013, the loss of a lessee's surface rights may run contrary to the mineral estate's dominance).

234. *See* Glaze et al., *supra* note 12.

235. *Id.*

236. *Robinson*, 335 S.W.3d at 146; *see also* Union Carbide Corp. v. Synatzske, 438 S.W.3d 39, 57 (Tex. 2014).

237. *Robinson*, 335 S.W.3d at 145 (emphasis added).

238. *Id.* at 149-50.

239. *See id.*

240. H.B. 2207, 84th Leg. Reg. Sess. (Tex. 2015) (indicating that House Bill No. 2207 was "placed on [the] local & uncontested calendar" on May 20, 2015); Tex. Legis. Council,

to the lack of debate regarding the legislation, both the House Energy Resources Committee and the Senate Natural Resource and Economic Development Committee provide the following vague rationale for Chapter 66:

> Interested parties note that while the mineral estate is generally dominant in state law, in certain instances where the surface estate is severed from the mineral estate a foreclosure on a surface property can cause surface estate interests to subjugate the mineral estate. The parties further note that in these instances the lien holder of the surface estate can act to terminate a legal oil and natural gas lease for the mineral estate.[241]

House Bill No. 2207 amends current law relating to the foreclosure sale of property subject to an oil or gas lease. The legislative reports do not provide any further evidence of the law's public purpose. Assuming such analysis was intended to indicate that foreclosure sale terminations negatively impact energy production, the proffered rationale for Chapter 66 does not specify how the policy will benefit mineral owners, producers, or the Texas economy. Therefore, a court that analyzes Chapter 66 under *Robinson* may find that such legislative evidence "fails to show how the legislation serves a substantial public interest."[242] A court may also determine that the absence of legislative support regarding Chapter 66 prevents it from weighing how the law affects various parties.[243]

It is interesting to note that the rationale surrounding House Bill No. 2590, which was similar to Chapter 66, but was vetoed in 2013, contained a much more detailed description of legislative intent.[244] The Bill Analysis from the House Committee on Energy Resources explained that parties involved in oil and gas leasing and production were concerned about a foreclosure's effect on certain land.[245] Lessees who attempted to operate on foreclosed prop-

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Guide to Texas Legislative Information (Revised), S. 84, at 7 (2015) (explaining the consideration of local and noncontroversial legislation, which is expedited because such legislation is usually not debated and floor amendments are prohibited).

241. Tex. H.R. Energy Res. Comm. Rep., C.S.H.B. 2207, S. 84-84R21670, Reg. Sess., at 1 (Tex. 2015).

242. *See Robinson*, 335 S.W.3d at 149 ("Even the statement by [Chapter 149's] principal House sponsor fails to show how the legislation serves a substantial public interest.").

243. *See id.* at 150.

244. Tex. H.R. Energy Res. Comm. Rep., C.S.H.B. 2590, S. 83-83R26599, Reg. Sess., at 1 (Tex. 2013).

245. *Id.*

erty often risked trespass actions.[246]

The committee's analysis also noted that wells proposed on mortgaged property may not be developed and produced because banks or federal agencies, which typically purchase property through foreclosure sales, are rarely interested in leasing land.[247] Because such entities can own foreclosed property for many years, Texas mineral producers faced growing uncertainty regarding their operations.[248] The analysis also explained that the law was necessary to protect neighboring mineral owners whose land may be included within the same pooled unit as the foreclosed property.[249]

Nonetheless, just as the *Robinson* court refused to consider the public benefit of Chapter 149, which the Legislature addressed in other contexts,[250] a review of Chapter 66 will likely refrain from considering the analysis of a vetoed law. Though the Texas economy, as well as mineral producers and landowners, may benefit from an increase in mineral production under Chapter 66, the Legislature's failure to articulate such advantages may persuade a court to ignore these matters.[251]

On the other hand, the *Robinson* majority frequently emphasized the fact that Chapter 149 was enacted solely to benefit Crown.[252] If a court broadly interprets the Legislature's findings regarding Chapter 66, it may find the law was enacted to improve the Texas economy by promoting mineral exploration and development. If so, it may find that such effect significantly distinguishes Chapter 66 from Chapter 149.[253]

For instance, in *Tenet Hospitals, Ltd. v. Rivera*, the Texas Supreme Court analyzed a retroactivity challenge to the statute of repose set forth in the 2003 Medical Liability Act. In reviewing the law's public benefit, the majority noted that it was enacted as part of comprehensive legislation that sought to make healthcare affordable and accessible for Texans, without unduly restricting a claimant's rights.[254] The court cited legislative hearings and evidence that a spike in healthcare lawsuits affected malpractice

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Robinson*, 335 S.W.3d at 149.
251. *See id.* at 150 ("[W]e think that an important reason for the constitutional prohibition against retroactive laws is to preempt [a] weighing of [public] interests absent compelling reasons.").
252. *Id.* at 131-32, 149.
253. *See* Tenet Hosps., Ltd. v. Rivera, 445 S.W.3d 698, 706-09 (Tex. 2014).
254. *Id.* at 707.

insurance coverage, which ultimately affected medical care statewide.[255] The majority found that, unlike Chapter 149, the law was not intended to benefit a particular company, but benefitted many citizens and industries by increasing healthcare access.[256] Therefore, in contrast to Chapter 149, the court found that the statute promoted a "compelling public interest."[257]

It appears that the rationale surrounding Chapter 66 is subject to wide interpretation. The Legislature failed to explain why it enacted the law, which may persuade a court to find that it serves little public benefit under *Robinson*. However, unlike Chapter 149, there is no evidence to suggest that Chapter 66 was drafted to benefit a particular entity. Thus, if a fact-finder broadly interprets the Legislature's proffered rationale in enacting the law, it may find that Chapter 66 serves a worthy public goal.

V. CONCLUSION

Retroactive laws have been mistrusted throughout history. Traditional presumptions against such policies seek to defend the public's expectations regarding laws and safeguard against legislative abuses. However, these matters must be scrutinized, as many laws that affect past matters are necessary for an effective society. Chapter 66 has the potential to harm security interest holders who issued mortgages prior to the law's creation, and who expected that a foreclosure would terminate subsequently executed mineral leases. Nonetheless, the statute may not be considered an unconstitutionally retroactive law under the framework established by *Robinson*.

A successful constitutional attack of Chapter 66 will largely depend on the facts a security interest holder can demonstrate. One may be able to conclusively prove (i) that her impaired right to the value of her security interest is worthy of review, (ii) that a subsequently executed mineral lease has significantly lowered the value of mortgaged property, and (iii) that the legislative reasoning behind Chapter 66 fails to articulate a legitimate public benefit. If so, a Texas court may find that Chapter 66 is unconstitutionally retroactive.

On the other hand, a court may determine (i) that Chapter 66 is a primarily remedial statute, (ii) that a junior lease's effect on property value was minimal, or unable to be fully realized, or (iii)

255. *Id.*
256. *Id.*
257. *Id.*

that the Legislature's sparse findings supporting the law were nonetheless more persuasive than the reasoning examined in *Robinson*. In that event, security interest holders may have no choice but to accept Chapter 66 as settled law, and seek other methods of protecting their property rights.