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The Lasting Impacts of Mass Consumerism and the Disposable Culture: A Proposition for the Development of Plastic Shopping Bag Bans in Texas Law

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ARTICLE

THE LASTING IMPACTS OF MASS CONSUMERISM AND THE DISPOSABLE CULTURE: A PROPOSITION FOR THE DEVELOPMENT OF PLASTIC SHOPPING BAG BANS IN TEXAS LAW

DAVID BREWSTER*

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I. INTRODUCTION

For those who grew up in the 1980s and 1990s, the question “paper or plastic” might elicit fond memories of shopping for groceries with the family. For those who are younger, the question may appear quaint, or even entirely unfamiliar, as the presence of the plastic single-use shopping bag has solidified its place in American consumerism over the past thirty years.¹ This is rapidly changing, however, as the push for greater use of reusable bags, and even outright bans on plastic shopping bags, becomes more prolific in our society.² This change has not been easy, and there has been

1. See Rebecca Fromer, Comment, *Concessions of a Shopaholic: An Analysis of the Movement to Minimize Single-Use Shopping Bags from the Waste Stream and a Proposal for State Implementation in Louisiana*, 23 TUL. ENVTL. L.J. 493, 496 (2010) (“Not until the 1980s did plastic bags become a commonplace alternative to paper bags for consumers making purchases at retail and grocery stores.”).

2. See *id.* (describing the current trend in government is toward plastic bag bans through the use of reduction ordinances); see also Jessica Diaz, *Save the Plastic Bag Coalition v. City of Manhattan Beach: California Supreme Court Answers More Than “Paper or Plastic?” in Major Decision on Corporate Standing Under CEQA*, 39 ECOLOGY L.Q. 627, 627 (2012) (“Local governments across the United States have explored and implemented ordinances prohibiting grocers and other retail stores from offering customers plastic bags.”).

significant opposition from the plastics industry,³ which is now one of the largest industries in the United States.⁴

One study estimated that Americans used more than ninety billion plastic shopping bags in 2003,⁵ a number that has only grown.⁶ In 2009, it was estimated that over three hundred billion plastic bags had been used worldwide between January and August.⁷ Currently, “between five hundred billion to one trillion ‘petroleum-based plastic bags are used each year, . . . the production and use of which uses over 12 million barrels of oil.’”⁸ However, the vast majority of these bags are not disposed of properly—instead of being recycled, they are thrown away.⁹ This may be attributed to either consumer indifference about the effects of their actions or contamination by prior use before reaching the recycling plant.¹⁰

The bitter fight over bans on plastic shopping bags has arisen in the form

3. See Jennie R. Romer & Shanna Foley, *A Wolf in Sheep's Clothing: The Plastics Industry's "Public Interest" Role in Legislation and Litigation of Plastic Bag Laws in California*, 5 GOLDEN GATE U. ENVTL. L.J. 377, 378 (2012) (“The plastics industry has spent millions lobbying against local ordinances and for statewide preemption of local ordinances, engaged in epic public relations campaigns, and sued or threatened to sue virtually every California municipality that has recently taken steps to adopt a plastic bag ordinance.” (footnotes omitted)).

4. See Fromer, *supra* note 1, at 497 (observing the plastic bag manufacturing industry is the third largest in the country).

5. *Id.* at 494.

6. See, e.g., *Single-Use Plastic Bag Facts*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/programs/population_and_sustainability/expect_more_bag_less/facts.html [<https://perma.cc/52P8-P2GC>] (finding “Americans use 100 billion plastic bags a year”).

7. Jesse Greenspan, *Plastic Bag Bans Could Be the Next Wave*, LAW 360 (Aug. 5, 2009, 6:56 PM), <https://www.law360.com/articles/109752/plastic-bag-bans-could-be-the-next-wave> [<https://perma.cc/387G-2FZE>] (“Thus far this year, nearly 300 billion plastic bags have been consumed worldwide, according to reusablebags.com, a Web site that sells reusable bags.”).

8. Fromer, *supra* note 1, at 497 (quoting BERKELEY, CAL., MUN. CODE § 11.37.010(B)(1) (2009)).

9. See *id.* at 497–99 (“Although the advent of recycling programs throughout the country has reduced the tonnage of municipal solid waste entering United States landfills, the solid waste generated per person per day has only increased, greatly due to our ‘throwaway culture.’”).

10. See *id.* (“It is estimated that approximately 90% of single-use plastic bags that reach recycling facilities end up at landfills.”).

of multiple lawsuits¹¹ and has sparked fierce debate among lawmakers.¹² Now the fight has come to a head for the first time in Texas with the case of *City of Laredo v. Laredo Merchants Ass'n*¹³—the first successfully litigated appellate court case concerning plastic bag bans,¹⁴ and the first to be granted a petition to, and ruled upon by, the Supreme Court of Texas.¹⁵

11. See *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 589 (Tex. 2018) (challenging the Laredo plastic bag ban under a preemption theory); see also *Save the Plastic Bag Coal. v. City & Cty. of S.F.*, 166 Cal. Rptr. 3d 253, 256 (Cal. Ct. App. 2014) (holding the restrictions placed on plastic bag use were not in violation of the California Environmental Quality Act, and not preempted by the California Retail Food Code); *Schmeer v. Cty. of L.A.*, 153 Cal. Rptr. 3d 352, 354 (Cal. Ct. App. 2013) (disagreeing with the plaintiffs' argument that the plastic bag ban was a tax because the charge was retained by the retail store and not remitted to the county, and, therefore, validating the ordinance without the requisite voter approval); *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011) (bringing action to challenge the plastic bag ban, but concluding that the city's determination of no significant environmental impact was supported despite the failure to file an environmental impact report); Jess Krochtengel, *Dallas Ends 5-Cent Plastic Bag Fee After Manufacturer Suit*, LAW 360 (June 3, 2015, 6:42 PM), <https://www.law360.com/articles/663449/dallas-ends-5-cent-plastic-bag-fee-after-manufacturer-suit> [<https://perma.cc/PH35-EMML>] (discussing the lawsuit filed against the city of Dallas concerning its plastic bag fee and the resulting repeal of the plastic ban ordinance in Dallas); Jim Malewitz, *Paxton Sues Brownsville Over Fee on Plastic Bags*, TEX. TRIB. (Oct. 12, 2016, 6:00 PM), <https://www.texastribune.org/2016/10/12/paxton-sues-brownsville-over-buck-bag-policy/> [<https://perma.cc/77E2-GLHS>] [hereinafter Malewitz, *Paxton Sues Brownsville*] (“The lawsuit . . . is [Attorney General] Paxton’s first attempt to thwart city efforts to curb waste by charging for bags or banning them. He joins the Texas Public Policy Foundation, the powerful conservative group, in that broad effort.”).

12. See Tex. Att’y Gen. Op. No. GA-1078 (2014) (discussing whether local bag ordinances could be preempted by the Solid Waste Disposal Act); see also Malewitz, *Paxton Sues Brownsville*, *supra* note 11 (discussing actions being pursued by the Texas Attorney General against charges and bans on plastic bags by cities). As noted by a recent article in the Houston Chronicle:

Rather than respect these local issues, Texas Attorney General Ken Paxton has taken to suing Brownsville for its fee on the bags. Self-described tea party activist state Sen. Bob Hall, R-Edgewood, has introduced Senate Bill 103, which would enforce a statewide ban on bans. And Laredo is currently defending its local ordinance before the Texas Supreme Court.

Plastic Bag Bans; City Halls, Not Statewide Authorities, Should Write the Rules on Local Issues, HOUS. CHRON. (Dec. 14, 2016), <https://www.houstonchronicle.com/opinion/editorials/article/Plastic-bag-bans-10797061.php> [<https://perma.cc/Q4AH-SAKM>] [hereinafter *Plastic Bag Bans*].

13. *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586 (Tex. 2018).

14. Jim Malewitz, *Laredo Plastic Bag Ban Tossed by Court*, TEX. TRIB. (Aug. 17, 2016, 7:00 PM), <https://www.texastribune.org/2016/08/17/court-ruling-strikes-blow-laredo-bag-ban-local-con/> [<https://perma.cc/86BN-DSXC>] (“The lawsuit, filed by the Laredo Merchants Association, was the first to challenge such a ban to be heard in court.”).

15. See Petition for Review at 20, *Laredo Merchs. Ass'n*, 550 S.W.3d 586 (Tex. 2018) (No. 16-0748) (“Petitioner City of Laredo” petitioning the Texas Supreme Court to review and overturn the decision of the Fourth Court of Appeals). This petition to the Supreme Court of Texas was subsequently granted. Harvey Rice, *Galveston at Front of Bag-Ban Battle: City Ordinance that Would Prohibit Plastic Sacks Facing Fierce Opposition*, HOUS. CHRON., Dec. 12, 2016, at A3, A4.

The Texas Supreme Court heard oral arguments in the *Laredo Merchants Ass'n* case on January 11, 2018, and issued its opinion on June 22, 2018,¹⁶ making the need for a comprehensive discussion on the topic necessary. This Article will begin with Part II discussing the background of plastic bag bans regarding environmental impacts, the home-rule city, and the economic impacts of plastic bag use and legislation. This Article will then analyze the state of the law regarding plastic bags in Texas in Part III, including a comparison to the approaches of other states in an effort to discern the general direction in which the law is moving. In Part IV, this Article will discuss the background of the Texas Commission on Environmental Quality. Finally, in Parts V and VI, this Article will discuss the regulation and application, including agency deference, of plastic bag control.

II. BACKGROUND

A. *Impacts on the Environment*

One of the primary reasons such bans have become favored in public opinion is the perceived damage to the environment that results directly from improper disposal of single-use plastic bags, particularly in marine environments.¹⁷ When plastics, including plastic shopping bags, enter the ocean, they are broken down by sunlight into smaller particles called

16. *Laredo Merchs. Ass'n*, 550 S.W.3d at 586; *see also* Oral Argument at 0:45, *Laredo Merchs. Ass'n*, 550 S.W.3d 586 (Tex. 2018) (No. 16-0748), <http://www.texasbarcle.com/CLE/SCPlayer.asp?sCaseNo=16-0748> (argued on Jan. 11, 2018).

17. *See* John Schwartz, *Study Finds Rising Levels of Plastics in Oceans*, N.Y. TIMES, Feb. 12, 2015, at A4 (“Plastics have been spotted in the oceans since the 1970s. . . . The problem is more than an aesthetic one: Exposed to saltwater and sun, and the jostling of the surf, the debris shreds into tiny pieces that become coated with toxic substances like PCBs and other pollutants.”). Schwartz explains: “Research into the marine food chain suggests that fish and other organisms consume the bite-size particles and may reabsorb the toxic substances. Those fish are eaten by other fish, and by people.” *Id.* Furthermore, the clean-up process can be impractical at times, as only a portion of the waste floats, while the remaining waste either disappears or settles at the bottom of the ocean. *Id.* Schwartz indicates that any collection system that is able to capture smaller particles of waste would also cause substantial risks to marine life, making the best solution to “improve waste management ashore.” *Id.* To further complicate the matter, these dangers are not limited to the highly populated areas, but rather are widespread. *See id.* (“[M]asses of junk have been observed floating where ocean currents come together, and debris can be found on the remotest beaches and in arctic sea ice.”).

microplastics,¹⁸ which are then ingested by animals.¹⁹ These animals are then eaten by other animals or are caught and eaten by humans, wherein the toxins leached from the plastic enter the human food chain.²⁰ Fishermen and marine researchers alike are accustomed to cutting open dead fish or other animals only to discover that their stomachs are full of plastic.²¹ One animal that is especially at risk for this problem is the sea turtle. Sea turtles eat jellyfish—in fact, it is one of their favorite foods²²—which makes plastic bags floating in the ocean a particularly prevalent nuisance. The bags are

18. See Olga Goldberg, Note, *Biodegradable Plastics: A Stopgap Solution for the Intractable Marine Debris Problem*, 42 TEX. ENVTL. L.J. 307, 317 (2012) (discussing the process for biodegradation of plastics that have been disposed of in the ocean, and how the exposure to the ocean can slow the process of degradation); see also Fromer, *supra* note 1, at 498 (“Because the decomposition process for plastics utilizes solar radiation to ‘photo-degrade’ the plastic, or to continually corrode the plastic into small pieces, when plastic bags come to rest in marine ecosystems that lack direct sunlight, decomposition is nearly unattainable.”).

19. See Schwartz, *supra* note 17, at A4 (reporting fish and other marine life ingest plastics); see also Greenspan, *supra* note 7 (“Sea turtles, for example, have been known to suffocate after mistaking plastic bags for jellyfish, their favorite food.”). But see Goldberg, *supra* note 18, at 322 (“[T]here is lingering doubt, and a dearth of research, about the harmful effects this ingestion has on the animals’ health.”). In a study conducted regarding the effects on sea turtles when they ingest waste, Peter Lutz stated: “No clear evidence of ill effects from plastic ingestion was found in this set of experiments though it should be noted that the turtles were only allowed to consume very small amounts.” Peter L. Lutz, *Studies on the Ingestion of Plastic and Latex by Sea Turtles*, in PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE ON MARINE DEBRIS 719, 730 (R.S. Shomura & M.L. Godfrey eds., 1990). However, the study concluded:

[W]hen hungry, sea turtles will actively consume plastic and latex material. Except for possible interference in energy metabolism (declining blood glucose levels), at the levels allowed in this study ingestion produced no measurable changes in the physiological parameters that were measured. However, the observation that pieces of latex can gather up in the gut and remain there for considerable periods of time should be viewed with some concern and certainly needs more detailed investigation.

Id. at 733. This suggests that there may be substantial effects on the health of marine life, especially when there is ingestion at high levels.

20. Schwartz, *supra* note 17, at A4.

21. This problem is not new, as noted in a 1984 article from the New York Times:

Edward J. Carpenter, a biological oceanographer at the Marine Sciences Research Center at Stony Brook, L.I., who has studied the effects of plastic pollution on animals in the North Atlantic, the Sargasso Sea and the Mediterranean, said he had found that [thirty] percent of all fish had plastic spherules in their stomachs.

Bayard Webster, *Deadly Tide of Plastic Waste Threatens World's Oceans and Aquatic Life*, N.Y. TIMES, Dec. 25, 1984, at 33, 34.

22. Greenspan, *supra* note 7 (acknowledging jellyfish are one of sea turtles’ favorite foods, making them particularly prone to ingest plastic bags floating in the ocean).

similar enough in appearance to jellyfish that some sea turtles mistakenly eat them, leading to fatal consequences.²³

B. *Impacts on Urban Development: The Home-Rule City*

Under the Texas Constitution, cities that have a population of over five-thousand individuals are eligible to become home-rule cities.²⁴ Once it has been designated as such, a home-rule city's powers are not granted by the state; instead, they can only be limited by acts of the state legislature.²⁵ The exercise of home-rule authority has been illustrated in numerous widely-publicized issues such as plastic bag bans, fracking bans, and protections for members of the LGBTQ community.²⁶ There has also been a great deal of backlash from the legislature on these same issues.²⁷ In the last several years, the Texas legislature has attempted to limit home-rule cities through explicit preemption of issues by passing highly targeted and narrow bills designed for this purpose.²⁸

23. *See id.* (“[I]housands of marine mammals die every year from plastic entanglement.”).

24. TEX. CONST. art. XI, § 5(a). The Texas Local Government Code also expands this authority slightly:

The authority granted by this section for the protection of recharge, recharge areas, or recharge features of groundwater aquifers may be exercised outside the municipality's boundaries and within the extraterritorial jurisdiction provided the municipality exercising such authority has a population greater than 750,000 and the groundwater constitutes more than 75[%] of the municipality's source of water supply.

TEX. LOC. GOV'T CODE ANN. § 551.002(c).

25. *See* Garrett Mize, Comment, *Big Cities in a Bigger State: A Review of Home Rule in Texas and the Cities That Push the Boundaries of Local Control*, 57 S. TEX. L. REV. 311, 316 (2016) (“The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.” (quoting *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948))).

26. *See id.* at 312–13 (“Recently, Texas cities have exercised home rule in banning or limiting single-use plastic bags, protecting lesbian, gay, bisexual, transgender, queer/questioning (LGBTQ) people from discrimination, and prohibiting hydraulic fracturing (fracking) within city limits.” (footnotes omitted)).

27. *See generally id.* at 338–44 (discussing the volatile nature of home-rule cities and their relationship to the Texas Legislature).

28. *See id.* at 338 (“The significant number of bills filed in the past two legislative sessions seeking to preempt home rule is indicative of a state not hesitant to use its power to set public policy.”); *see also* Tex. H.B. 2416, 83d Leg., R.S. (2013) (attempting to preempt municipalities' plastic bag bans). While House Bill 2416 attempted to preempt these bans, the proposal never proceeded out of the House Committee on Urban Affairs for a vote by the Texas House of Representatives; therefore, it was never enacted. *Bill Stages for H.B. 2416*, TEX. LEG. ONLINE, <http://www.legis.state.tx.us/billlookup/BillStages.aspx?LegSess=83R&Bill=HB2416> [https://perma.cc/EU4G-BWYW]. A

It is well-settled law in Texas that “[a] home-rule city ordinance that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it is inconsistent with the state statute.”²⁹ However, “[m]erely because the Legislature has enacted a law addressing a particular subject matter does not automatically mean all of the subject matter is completely preempted.”³⁰ In fact, when a statute and a city ordinance appear to conflict, courts endeavor to interpret them so that both can be enforced if such a reasonable construction can be found.³¹

The impact home rule has on urban development is that municipalities are virtually in charge of their own destiny, so long as they do not try to supersede the authority of the state legislature or constitution.³² It places the power to govern in the hands of the lowest rung of government, as close to the people as possible, so that people can have a more direct impact on their own communities.³³ Home rule also permits cities to regulate their own resources, allocate spending where they believe it is necessary, and to direct policy in ways that may address their own particular issues that are far

successful preemption statute was passed in Missouri to preempt plastic bag bans. *See* MO. ANN. STAT. § 260.283 (West 2017) (forbidding local governments and political subdivisions from enacting plastic bag bans).

29. *Laredo Merchs. Ass'n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *3 (Tex. App.—San Antonio Aug. 17, 2016) (citing *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016)), *aff'd*, 550 S.W.3d 586 (Tex. 2018); *see also* *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016) (“[A] home-rule city’s ordinance is unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter.” (citing *Dall. Merch.’s & Concessionaire’s Ass’n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993))); *Dall. Merch.’s & Concessionaire’s Ass’n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993) (citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982)) (asserting a home-rule ordinance is preempted to the extent it conflicts with a state statute).

30. *Laredo Merchs. Ass’n*, 2016 WL 4376627, at *3 (citing *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 5 (Tex. 2016)).

31. *Id.* (citing *BCCA Appeal Grp.*, 496 S.W.3d at 7); *see also* *BCCA Appeal Grp., Inc.*, 496 S.W.3d at 7 (“[B]oth will be enforced if that be possible under any reasonable construction . . .” (quoting *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. 1927))).

32. Mize, *supra* note 25, at 316.

33. TEX. MUN. LEAGUE, HANDBOOK FOR MAYORS AND COUNCILMEMBERS 12 (2017) (“Home rule assumes that governmental problems should be solved at the lowest possible level, closest to the people.”); *see also* Ross Ramsey, *Analysis: When Local Control is Remote*, TEX. TRIB. (Mar. 12, 2015, 1:00 PM), <https://www.texastribune.org/2015/03/12/analysis-local-control-sometimes/> [<https://perma.cc/3S42-VVPC>] (“[T]he mayors and county commissioners on the other end of the conversation sound an awful lot like the state politicians in Austin who raise their middle fingers to the federal government and chant, “[t]he government that governs best is the one closest to the people it governs.”).

superior to the state government.³⁴ However, as previously noted, this freedom is sometimes perceived as a thorn in the side of the legislature, especially when businesses are involved.³⁵ The Austin bag ban inspired a bill specifically designed to preempt it in 2013—a bill which later died in committee but still sent the message that the state would not favor attempts to create bag bans and bag fees at the municipal level.³⁶ A similar hot-button issue that ended quite differently was the ban on fracking.³⁷ That ban inspired a bill in the legislature designed to preempt any municipality from passing fracking bans,³⁸ which passed and subsequently chipped away at the authority that home-rule cities had over their resources and communities.

There is an obvious tension between home-rule cities and the state legislature—a tension which has existed since the inception of home-rule jurisprudence.³⁹ This conflict, however, has always leaned heavily in favor of the state.⁴⁰ Favoring the state is not inconsistent with public policy because, as noted by one commentator: “[M]unicipalities should not be able

34. See TEX. MUN. LEAGUE, *supra* note 33 (“[T]he principle is simple: home rule is the right of citizens at the grassroots level to manage their own affairs with minimum interference from the state.”); see also Ramsey, *supra* note 33 (observing how municipalities have passed ordinances concerning a variety of issues while the state legislature has been ineffective at passing laws to address those same issues).

35. See Mize, *supra* note 25, at 328 (discussing Governor Abbot’s criticism of home rule in Texas).

36. *Id.* at 327–28 (“Despite the fact that cities in Texas have been banning or discouraging single-use plastic bags for years, it was Austin’s ban that finally pushed the legislature to react with the so-called ‘Shopping Bag Freedom Act.’ . . . The ‘Shopping Bag Freedom Act’ was discarded and left hanging in committee.” (footnote omitted)).

37. *Id.* at 318–20 (exploring the treatment of fracking bans in Denton that inspired specific preemption legislation). While Denton attempted to ban fracking, the city was ultimately forced to repeal “the ordinance because it had been rendered unenforceable by [the legislature].” *Id.* at 320 (quoting Max B. Baker, *Denton City Council Repeals Fracking Ban*, STAR-TELEGRAM (June 16, 2015, 11:10 AM), <http://www.star-telegram.com/news/business/barnett-shale/article24627469.html> [<https://perma.cc/V5QC-T9E4>]).

38. *Id.* at 327 (“In no uncertain terms, HB 40 expressly preempts municipal regulation of oil and gas operations.”).

39. *Id.* at 314 (expressing the opinion that the amendments to the statutes regarding home-rule jurisprudence were “compromise[s] between those who desired unlimited home rule and those who favored continued legislative control of municipal affairs.” (quoting *Berent v. City of Iowa City*, 738 N.W.2d 193, 196 (Iowa 2007))).

40. *Id.* (“The laws of Texas seek to strike such a balance, but it is not a delicate balance as it leans clearly in favor of the state. . . . [T]he state always has the upper hand.”). “Home rule cities may pass an ordinance not ‘inconsistent with the [c]onstitution of the [s]tate, or of the general laws enacted by the [l]egislature of this [s]tate.’ Thus, the state may always preempt a city ordinance by constitutional amendment or by general law.” *Id.* at 314 n.19 (citations omitted) (quoting TEX. CONST. art. XI, § 5).

to supersede their superior state, much like the states cannot supersede the federal government.”⁴¹ Mize provides us with a useful illustration to understand why municipalities should not be able to supersede the state government, while also emphasizing why it is important that they have some degree of independence through home-rule authority:

A finger, after all, cannot exist without a hand. A finger derives its power of movement and its very existence from the hand to which it is bound. The hand's arteries provide sustenance to the fingers, and it is from the hand that the finger grew—not the contrary. However, the beauty of this arrangement is that the finger, or perhaps more importantly the fingers, can move independently of the hand and from one another. This is what allows the hand, and the human to whom it is bound, to do so many wondrous things.⁴²

Bag bans, in particular, have had a tremendous impact in locations where they have been implemented. The cities of Austin, Laredo, and Brownsville saw a massive decrease in the amount of plastic bags sold and thrown away when their bans were instituted, resulting in less litter and fewer problems with clogging storm drains, which had previously resulted in flooding.⁴³ The City of Washington, D.C. has also seen a great decrease in plastic bag usage.⁴⁴ Perhaps the greatest success story is the bag fee implemented in Ireland, which resulted in a ninety-percent drop in plastic bag usage while the revenue generated by the bag fee was allocated to environmental initiatives.⁴⁵ The prospect of a nationwide regulation like Ireland's, however, is virtually nonexistent and even unworkable for the United States. The local bans which exist are already controversial enough at the state level,

41. *Id.* at 314.

42. *Id.* (illustrating how municipalities are simultaneously dependent on their state government and yet require a degree of independence from it in order to grow and be successful).

43. *See id.* at 322 (examining the effects of Austin's ban, noting that, “[i]n total, the ordinance led to a reduction of approximately 75% of plastic bag consumption”); Romer & Foley, *supra* note 3, at 385 (“Washington D.C.’s charge has been a great success and reduced plastic bag consumption by at least 80% . . .”).

44. *See, e.g.,* Jennie R. Romer & Leslie Mintz Tamminen, *Plastic Bag Reduction Ordinances: New York City's Proposed Charge on All Carryout Bags as a Model for U.S. Cities*, 27 TUL. ENVTL. L.J. 237, 247 (2014) (detailing the effects of the bag fee on Washington, D.C. and the dramatic drop in plastic bag consumption following adoption of the fee ordinance).

45. *See* Fromer, *supra* note 1, at 501 (“Ireland was the first country to introduce [a plastic bag] tax, and its effect was immediate: within a year plastic bag use dropped by 90%. Ireland increased the tax to [twenty-five] cents per bag in 2007. The tax raised 109 million pounds in revenue, earmarked for expenditure on environmental measures.” (footnotes omitted)).

and efforts by the plastics industry to halt any further curtailing of their business,⁴⁶ coupled with economic factors of such a large industry,⁴⁷ are sure to keep plastic bags in the United States for the foreseeable future.

C. *Impacts on the Economy*

Plastic bag bans and bag fees have had a significant impact on the economies of the municipalities that have adopted them.⁴⁸ The most significant impacts are the cost savings from collecting litter and the added revenue from bag fees, which are usually allocated to public environmental improvement funds.⁴⁹ These additional sources of revenue have benefited the communities that enacted them, and have assisted in cleaning up the environment. Plastic bag manufacturers, however, have fought a great deal to keep their products on the market, spending millions of dollars on campaigning, lobbying, and public relations to ensure the good image of plastic bags remains in the American psyche.⁵⁰ As one of the largest industries in the United States, it goes without saying that these manufacturers are large employers. In a tense political climate, such as the one the nation is currently suffering from, destroying jobs would likely cause a large public backlash, as was the case with other broad environmental regulations released under the Obama administration.⁵¹

46. See Romer & Foley, *supra* note 3, at 380 (“In an attempt to preserve its livelihood, the plastics industry is fighting tooth and nail and spending millions to defeat (or at least slow down) strict regulation of its products.”).

47. See Fromer, *supra* note 1, at 97 (asserting the plastic bag manufacturing industry is one of the largest industries in the United States).

48. See, e.g., Romer & Foley, *supra* note 3, at 385–86 (noting Washington D.C.’s bag ban “generated \$1,068,100 for the Anacostia River Cleanup Protection Fund in six months alone”).

49. See *id.* at 385 (reporting the revenue gains from the Washington, D.C. bag fee and ban were allocated between the business (retaining one or two cents) and the Anacostia River Cleanup Protection Fund); see also Fromer, *supra* note 1, at 500–01 (discussing the revenue brought in by Ireland’s bag ban in 2002 (raised by twenty-five cents in 2007), stating that, “[t]he tax raised 109 million pounds in revenue, earmarked for expenditure on environmental measures”).

50. See Romer & Foley, *supra* note 3, at 384–85 (reviewing Seattle’s failed attempt at passing a ban, noting that the efforts against the ban raised tremendous support and cash contributions).

51. See, e.g., Coral Davenport & Gardiner Harris, *Obama to Unveil Tougher Climate Plan With His Legacy in Mind*, N.Y. TIMES (Aug. 2, 2015), <https://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html> [https://perma.cc/857J-A6TR] (“The anticipated final climate change regulations have already set off what is expected to be broad legal, legislative and political backlash as dozens of states, major corporations and industry groups prepare to file lawsuits challenging them.”).

III. CASE LAW

A. *Texas*

The most current case in Texas concerning plastic bag bans is the *Laredo Merchants Ass'n* case, which the Supreme Court of Texas decided on June 22, 2018. In *Laredo Merchants Ass'n*, the Laredo Merchants Association (Merchants Association) sued the City of Laredo (the City), seeking an injunction and a temporary restraining order against the City to halt enforcement of a ban against plastic shopping bags.⁵² The Merchants Association argued that the City's ban was preempted by the Texas Solid Waste Disposal Act of 1993, specifically under Section 361.0961 of the Act.⁵³ This section states that “[a] local government or other political subdivision may not adopt an ordinance, rule, or regulation to . . . prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law”⁵⁴ The Merchants Association argued that the terms “container” and “package,” which are not explicitly defined in the Act,⁵⁵ were intended by the drafters to include plastic single-use shopping bags, thus preempting the City's authority as a home-rule city to pass an ordinance banning the bags.⁵⁶

The majority of the Fourth Court of Appeals ruled in favor of the Merchants Association, finding, first, that a single-use plastic shopping bag was a “container” or “package” as defined in Section 361.0961 of the Texas Health and Safety Code;⁵⁷ second, that the Texas Legislature unmistakably

52. *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 591 (Tex. 2018).

53. *Id.*

54. TEX. HEALTH & SAFETY CODE ANN. § 361.0961.

55. *See Laredo Merchs. Ass'n*, 550 S.W.3d at 591 (explaining the Merchant Association's cross motion for summary judgment argued that the terms should be given their plain and ordinary meaning); *see also Laredo Merchs. Ass'n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *6 (Tex. App.—San Antonio Aug. 17, 2016) (“Neither section 361.0961 nor the Act define the terms ‘container’ or ‘package’”), *aff'd*, 550 S.W.3d 586 (Tex. 2018).

56. *Laredo Merchs. Ass'n*, 550 S.W.3d at 591. Specifically, the Merchants Association argued:

[A] “bag” is a “container” within the plain and ordinary meaning of the statutory term; nothing in the Solid Waste Disposal Act supports the City's circumscribed construction of “solid waste management purpose”; the Ordinance's purpose, both stated and effective, is to systematically control the generation of a particular form of solid waste, which is a “solid waste management purpose[]”; and whether the City was exercising its police powers in enacting the Ordinance is irrelevant to the preemption inquiry.

Id.

57. *Laredo Merchs. Ass'n*, 2016 WL 4376627, at *6.

expressed in the Act its desire to preempt ordinances like the City of Laredo's;⁵⁸ and third, that the effect of the ordinance was adopted for a solid waste management purpose, which is prohibited under the statute.⁵⁹ The dissent objected to the statutory interpretation given to Section 361.0961, warning that the majority had taken that portion of the Act out of context.⁶⁰ As a result, the majority's definitions of "container" and "package" would have yielded absurd results in this context,⁶¹ which is contrary to accepted statutory interpretation precedent.⁶² The dissent also

58. *See id.* (contending the plain language of the Act did not limit the words, but rather the plain meaning supported a conclusion that the legislature intended to ban such ordinances).

59. *See id.* at *7 ("When considering these purposes, we conclude the Ordinance was adopted to control the generation of solid waste as produced by litter resulting from discarded checkout bags.?).

60. *Id.* at *8 (Chapa, J., dissenting). Justice Chapa argued that the court was required to interpret "the statute as a whole, not just as specific provisions in isolation." *Id.* (quoting BCCA Appeal Grp., Inc. v. City of Houston, 496 S.W.3d 1, 12 (Tex. 2016)).

61. Justice Chapa argued:

"[Absent] language clearly indicating a contrary intent, a word or phrase used in different parts of a statute is presumed to have the same meaning throughout, and where the meaning in one instance is clear, this meaning will be attached in all other instances." A court should "avoid ascribing [to] one word a meaning so broad that it is incommensurate with the statutory context."

Id. (first quoting Sw. Props., L.P. v. Lite-Dec of Tex., Inc., 989 S.W.2d 69, 71 (Tex. App.—San Antonio 1998, pet. denied); and then quoting Greater Hous. P'ship v. Paxton, 468 S.W.3d 51, 61 (Tex. 2015)). In its petition to the Texas Supreme Court, the City of Laredo reiterated the importance of context when interpreting the terms of the Act:

The court of appeals' definition of "container" or "package"—"a container of flexible material with an opening at the top, used for carrying things"—casts too wide a net for its context, leading to numerous unintended consequences. For example, that definition includes an expensive purse, a student's school backpack, and an inexpensive checkout bag. The appellate court failed to recognize the importance of statutory context and instead relied on a dictionary definition that leads to absurd consequences.

Petition for Review, *supra* note 15, at 3 (citation omitted).

62. The dissent stressed that the terms "container" and "package" needed to be defined in a way that made sense with uses in previous sections of the statute. *See Laredo Merchs. Ass'n*, 2016 WL 4376627, at *9 (Chapa, J., dissenting) ("[O]ne provision will not be given a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone." (quoting *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978))). Specifically, the dissent argued that when seen in context with other parts of the Act, the language seemed to suggest that the legislature meant packages or containers used for the purposes of waste management—e.g., trash bags used to contain refuse in curbside pickup services. *See id.* at *12 (arguing the legislature used the term "container" in the Act to mean containers holding solid waste, not the solid waste itself; therefore, the same definition should be applied throughout the Act). Justice Chapa also asserted: "Construing 'container' in section 361.0961 as *any* container that might become solid waste is out of harmony and

asserted that the practical effect of the majority's interpretation of Section 361.0961 yielded a result that was contrary to the stated purpose of the Solid Waste Disposal Act, namely the proper regulation and elimination of waste.⁶³

This was not the only case in Texas to deal with the issue of the legality of municipal plastic bag bans, but it was the first to be litigated and ruled upon.⁶⁴ Other cases have been filed in Texas regarding other cities' bans, but those have been limited in their scope and have often settled.⁶⁵ A prime example is a suit that was filed in Dallas by a plastic bag manufacturer.⁶⁶ The manufacturer sought a declaratory judgment against the city of Dallas, challenging Dallas's plastic bag ban under the same section of the Texas Health and Safety Code as the Merchants Association in *Laredo Merchants Ass'n*.⁶⁷ The case ended up not going to court. In order to avoid

inconsistent with the manner in which the legislature used 'container' in all other instances in subchapter C." *Id.* at *12. Therefore, the proper definition of "container," according to Justice Chapa, is "limited to *solid waste containers* used to store, transport, process, or dispose of solid waste." *Id.*

63. *Id.* at *8 ("This construction is unreasonable because it contradicts 'the state's goal, through source reduction, to eliminate the generation of municipal solid waste.'" (quoting TEX. HEALTH & SAFETY CODE ANN. § 361.022(a))). The dissent essentially asserted that by construing "container" in isolation—as solid waste itself—"the majority [erroneously] construes 'container' by referring to dictionary definitions and does not address subchapter C's provisions that demonstrate 'a different meaning is apparent from the context.'" *Id.* at *13 (quoting *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 8 (Tex. 2016)).

64. See Malewitz, *supra* note 14 (reporting the *Laredo Merchants Ass'n* case was the first to be heard by a court, which triggered briefs from twenty different Texas lawyers).

65. See Krochtengel, *supra* note 11 (describing the lawsuit against Dallas over its bag ban); Isabelle Taft, *Laredo's Bag Ban Becomes Flashpoint in Debate Over Local Control*, TEX. TRIB. (June 28, 2016, 2:00 PM), <https://www.texastribune.org/2016/06/28/laredos-bag-ban-becomes-flashpoint-debate-over-loc/> [<https://perma.cc/S3VU-QT74>] (noting that in 2013 Austin was sued over its bag ban but the suit was later withdrawn).

66. See Jess Krochtengel, *Plastic Bag Manufacturers Sue Dallas Over 5-Cent Fee Law*, LAW 360 (May 1, 2015, 6:30 PM), http://www.law360.com/articles/650595/plastic-bag-manufacturers-sue-dallas-over-5-cent-fee-law?article_related_content=1 [<https://perma.cc/P6DH-WB3A>] (discussing the lawsuit filed against the city of Dallas by a group of plastic manufacturers).

67. *Id.*

litigation, Dallas voluntarily repealed the bag ban in 2015.⁶⁸

1. Statutory Interpretation in Texas Courts

In the *Laredo Merchants Ass'n* cases, the court of appeals and supreme court laid out the statutory interpretation analysis for Texas statutes. The court of appeals stated: “When construing a statute, we must give effect to the Legislature’s intent. To determine the Legislature’s intent, we start with the plain language of the statute and view the statute as a whole as opposed to viewing isolated provisions.”⁶⁹ However, the court also noted that in determining the legislature’s intent, they “do not consider statements made during the legislative process as evidence of the Legislature’s intent.”⁷⁰ The court concluded that “[w]hen a statute is unambiguous, ‘we adopt the interpretation supported by [its] plain language unless such an interpretation would lead to absurd results.’”⁷¹ This approach also formed the basis for the supreme court’s opinion, though not in so many words.⁷²

These standards of statutory review are consistent with Texas precedent.⁷³ The one that may seem odd—that of not considering the statements made during the legislative process—has a sound public policy justification on its face. If such statements were to be given a great deal of weight, then it could be possible for one or two members of the legislature to influence how a particular statute is interpreted, skewing the

68. See Krochtengel, *supra* note 11 (discussing the end of the ban in the face of litigation because the city council members “had been advised the city was unlikely to win the lawsuit”); Taft, *supra* note 65 (asserting the repeal of the bag fee ordinance occurred following the lawsuit by the bag manufacturers).

69. *Laredo Merchs. Ass’n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *4 (Tex. App.—San Antonio Aug. 17, 2016) (citing *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 8 (Tex. 2016)), *aff’d*, 550 S.W.3d 586 (Tex. 2018).

70. *Id.* (citing *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011)). The court agreed that “the Legislature expresses its intent by the words it enacts and declares to be the law.” *Id.* (quoting *Molinet*, 356 S.W.3d at 414 (Tex. 2011)).

71. *Id.* (quoting *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)).

72. *City of Laredo v. Laredo Merchs. Ass’n*, 550 S.W.3d 586, 589 (Tex. 2018) (“The wisdom or expediency of the law is the Legislature’s prerogative, not ours.’ We must take statutes as they were written, and the one before us is written quite clearly.”).

73. See *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 20 (Tex. 2016) (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)) (determining well-settled principles of statutory construction require courts to interpret statutes beginning with the statutory language itself).

understanding of a statute towards one which was not voted upon by the members as a whole.⁷⁴

The standards discussed by the Fourth Court of Appeals and supreme court, however, are not the only procedures used in Texas. The Texas Legislature has also spoken on the issue of statutory interpretation by passing a statute on the subject.⁷⁵ The statute reads as follows:

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.⁷⁶

This statute lays out a nonexclusive list of items that the legislature feels are important enough to garner the attention of courts when interpreting intent on ambiguous issues.⁷⁷ Interestingly enough, legislative history was mentioned, indicating that the legislature sees some utility in examining the statute's history in order to clarify ambiguities; although, to be certain, this end might be accomplished through analysis of the other factors listed. It does beg the question, however, whether it was appropriate for the court in *Laredo Merchants Ass'n* to so quickly dismiss the legislative history arguments advanced by the City.⁷⁸

74. See Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 69–70 (1999) (explaining the bias inherent in such statutory interpretations). Bell asserts:

The documents that comprise traditional legislative history contain the statements and views of few members of Congress—for any particular bill, most legislators do not participate in committee proceedings and remain silent during floor debate. Thus, using legislative history to discern intent introduces a bias toward the views of representatives who express their views in a certain narrow range of documents.

Id. at 69. This is one of the primary reasons why courts are reluctant to rely on individual statements of legislators to support a statutory interpretations—because they hardly represent the majority intent.

75. TEX. GOV'T CODE ANN. § 311.023.

76. *Id.*

77. *Id.*

78. See *Laredo Merchs. Ass'n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *6 (Tex. App.—San Antonio Aug. 17, 2016) (disregarding the City's reliance on statements “by the bill's sponsor that the bill was intended to prohibit municipalities from adopting rules regulating ‘wasteful packaging, Styrofoam cups and bottle returns’”), *aff'd*, 550 S.W.3d 586 (Tex. 2018).

2. Was *Laredo Merchants Ass'n* Correctly Decided?

Having established what is considered precedent in Texas for reviewing statutes and municipal ordinances, the question arises: Did the courts in *Laredo Merchants Ass'n* get it right? This question is easier asked than answered and depends greatly on the reader's interpretation of the relevant statutes and the ordinance. The Fourth Court's dissenting opinion offers an intriguing argument about the context, or lack thereof, under which the relevant section of the Act was reviewed—an argument which was repeated in the City's petition to the Texas Supreme Court.⁷⁹

The question of whether the courts got it *right* is perhaps not the correct question to be asking. The courts may have interpreted the law correctly, but perhaps a better question is, Whether they laid down a fair decision for future precedent and for public policy? This issue—of what public policy should be laid out in the future—will be addressed later in this Article.⁸⁰

On November 7, 2016, the City of Laredo filed a petition for review with the Supreme Court of Texas,⁸¹ which was granted. The court heard oral arguments on January 11, 2018,⁸² and issued its opinion on June 22, 2018. The petition renewed the City's argument that its ordinance was not preempted under Section 361.0961 of the Solid Waste Disposal Act,⁸³ and clarified arguments that were made in the lower courts. The arguments made in the petition highlighted issues that the Fourth Court's opinion could create were it to be left intact—such as the overbroad definitions of “container” and “package”—leading to absurd or unintended applications of the law.⁸⁴ The City specifically used the example that the definitions are broad enough that the state could, under such an interpretation of the section, regulate “an expensive purse, a student's school backpack, and an inexpensive checkout bag.”⁸⁵

79. See Petition for Review, *supra* note 15, at 7 (observing the legislature placed the section in the “Permits” subchapter of the Solid Waste Disposal Act, calling into question the context under which the court of appeals made their interpretation).

80. See discussion *infra* Part V.B.

81. See Petition for Review, *supra* note 15, at 20 (seeking to reverse the judgment of the Fourth Court of Appeals).

82. See generally Oral Argument, *supra* note 16, at 0:45.

83. Petition for Review, *supra* note 15, at 5 (“The Association has failed to show, much less show with ‘unmistakable clarity’, that section 361.0961 preempts the Ordinance . . .”).

84. *Id.* at 7 (“The Association’s assertion, adopted by the court of appeals, that essentially any portable item, that could be used to contain other items and could end up in a landfill, cannot be regulated locally is nonsensical.”).

85. *Id.* at 3.

The arguments presented in the City's petition raised some very interesting points about statutory interpretation and the context in which specific portions of laws are viewed.⁸⁶ It also once again brought to the court's attention the struggle and tension existing between home-rule cities and the state legislatures.⁸⁷ A decision in favor of the City would have done a great deal in home-rule jurisprudence to protect the power of municipalities. One argument in particular, which was not explicitly addressed in the Fourth Court of Appeals' decision, and that is convincing for the City, arises under both the Texas Civil Practice and Remedies Code⁸⁸ and the Local Government Code.⁸⁹ The City asserted such an argument in its petition for review, contending "a city can be [held] liable for damage caused by the city's sewer system, including damages caused by the backup of the sewer system."⁹⁰ The City argued that "[i]t would be an absurd result that a city could be held liable for damages, but not have any authority to act to prevent such damage."⁹¹ This point was raised briefly by counsel for the City during oral arguments before the Supreme Court of Texas.⁹² The supreme court, however, dismissed this argument in its opinion, discussed further below.

86. The City first argued that the plain language of the statute supported a conclusion that there was no intention to preempt such ordinances. *Id.* at 10. The City essentially asserted that the Act refers to a container in the form of a closed or sealed vessel and this interpretation should apply throughout the entire Act, not just one subsection. *Id.* According to the City, since single-use checkout bags are not sealed or wrapped vessels, they should not be considered a container under the City's allegedly proper interpretation. *Id.* at 11.

87. See Mize, *supra* note 25, at 338 (analyzing the uncertainty of home-rule jurisprudence in Texas as the landscape becomes more competitive and more fights arise).

88. The Texas Civil Practice and Remedies Code provides:

A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including . . . sanitary and storm sewers . . . [and] water and sewer service

TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.0215(a)(9), (32).

89. The Texas Local Government Code provides: "A municipality . . . may pay actual property damages caused by the backup of the municipality's . . . sanitary sewer system regardless of whether the municipality . . . would be liable for damages under Chapter 101, Civil Practice and Remedies Code." TEX. LOC. GOV'T CODE ANN. § 552.912(a).

90. Petition for Review, *supra* note 15, at 17 (citing LOC. GOV'T § 552.912(a); CIV. PRAC. & REM. §§ 101.0215(9), (32)).

91. *Id.* at 17–18.

92. Oral Argument, *supra* note 16, at 14:07.

At oral argument, counsel for the City of Laredo spent a significant amount of time arguing that the ordinance does not regulate waste, but rather encourages source reduction, which is separate and distinct from “waste management.”⁹³ The City illustrated this by analogizing to the Resource Conservation and Recovery Act’s definition of “waste management.”⁹⁴ The City argued that what mattered was the relevant time in the producer’s life at which regulation began—if it was not yet being disposed of then it could not be waste—therefore, regulating the product could not be considered waste management.⁹⁵ To argue otherwise would imply that any regulation of a product that may become waste at some point in the future is automatically waste management, which would not be a reasonable interpretation of the Act.⁹⁶ The City concluded by mentioning that the legislature had introduced bills specifically to preempt the kind of ordinance at issue, and that the legislature knows how to preempt and obviously chose not to in this case.⁹⁷

The Merchants Association focused the majority of their argument on the phrase “solid waste management,” emphasizing that the purpose of the ordinance was to reduce trash and suggesting that the City’s argument characterized such trash as solid waste management.⁹⁸ The Association argued that if the “container language” in the Solid Waste Disposal Act did not apply in the broad sense, then the clause would be rendered meaningless; and they argued it was unreasonable to think that the legislature would pass a provision they knew was meaningless.⁹⁹

On the whole, the Justices’ questions were fair and even-handed across the board, demonstrating no discernable bias towards either party¹⁰⁰—a much welcome surprise, given how the court has otherwise handled

93. *Id.* at 7:12.

94. *Id.* at 6:53.

95. *Id.* at 7:18.

96. *Id.* at 9:08.

97. *Id.* at 16:44.

98. *Id.* at 30:09.

99. *Id.* at 24:13.

100. *See generally id.* at 5:34 (referring to the questions posed by the Texas Supreme Court during oral arguments, all of which tended to be even-handed toward each party).

previous questions of this kind.¹⁰¹

The supreme court's opinion was released on June 22, 2018, holding for the Merchants Association and finding that the Solid Waste Disposal Act clearly preempted the Ordinance.¹⁰² In explaining the court's holding, Justice Hecht reasoned that the Ordinance's primary goal was to control solid waste, which was specifically prohibited by the Act, unless such regulation was in a manner authorized by the Act.¹⁰³ The court specifically honed in on the word "manner", finding that the Act required any manner of regulation to be specifically permitted under the law, and not merely implied from a grant of general authority given to home-rule cities.¹⁰⁴ Addressing the storm drain dilemma, the court found that no purpose of any such ordinance could excuse the primary goal of regulating solid waste.¹⁰⁵ Thus, the court found that unless a municipality could point to a specific authorized manner of regulation, such ordinances must be held to be preempted.¹⁰⁶ This ruling was, in effect, the final death-knell in home-grown municipal bag ordinances, as no specific manner has ever been legislatively approved to date.¹⁰⁷

3. In the Law

The Supreme Court of Texas is not the only entity to address the issue of plastic bag bans. The topic has been an issue for a number of years, and some of the State's highest officers have taken the time to weigh in on the

101. It is no secret that Texas generally favors business interests over regulations, especially where it would hurt industry in any form or fashion, and it is readily apparent how the overall atmosphere of Texas's politics might overshadow an impartial decision in this case. *See, e.g.,* Mize, *supra* note 25, at 328–30 (providing several examples of Texas's general inclination toward promoting business interests).

102. *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 589–90 (Tex. 2018).

103. *Id.*

104. *Id.* at 598.

105. *See id.* (explaining the Act only limits the manner in which a city can regulate, but does not affect its power). This statement entirely glosses over the argument that the City was making, and assigns responsibility back to the legislature to resolve the conflict in the law that the City complains of. The court's statement essentially boils down to "it is a problem, but not our problem."

106. *Id.* (holding "the preemption provision applies to local regulation when the manner is not authorized by state law").

107. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.0961 (failing to direct the reader to any statute authorizing a "manner" of approved regulation).

debate, including Governor Greg Abbott.¹⁰⁸ The debate has the potential to affect public policy in the future as the powers of home-rule cities become jeopardized by current legislative preemption practices.¹⁰⁹

B. *Plastic Bag Bans in Other Jurisdictions*

1. California

California has the greatest number of cases relating to plastic bag bans, primarily because the favorable requirements of the California Environmental Quality Act (CEQA) cause plastic-bag manufacturers to sue at a greater rate in California compared to other states.¹¹⁰ These lawsuits

108. In 2014, two years before the *Laredo Merchants Ass'n* decision, Greg Abbott, then Attorney General of Texas, weighed in on whether plastic bag bans might be preempted under the Solid Waste Disposal Act. He issued an advisory opinion in which he concluded that such bans might very well be preempted by the Act. See Tex. Att'y Gen. Op., *supra* note 12 (admitting a single-use plastic bag could be considered a container under the Act, but concluding that the government's intent for adopting such a ban is relevant to determining whether it is preempted). See also Jess Krochtengel, *Texas AG Says Plastic Bag Bans Likely Violate State Law*, LAW 360 (Sept. 2, 2014, 8:34 PM), <https://www.law360.com/articles/572678/texas-ag-says-plastic-bag-bans-likely-violate-state-law> [<https://perma.cc/UDM5-R56G>] (“[T]he opinion leaves room for courts to uphold bans and fees on single-use plastic bags, depending on why they were adopted.”). However, it is important to note that Abbott took a similar approach to that of the Fourth Court of Appeals in *Laredo Merchants Ass'n*, concluding that the phrase “container or package” was not defined in the Act and subsequently relying on the Webster's Dictionary definition for such terms. Tex. Att'y Gen. Op., *supra* note 12. This means that the Supreme Court of Texas' decision in the *Laredo Merchants Ass'n* case will be relevant if it decides to accept the City's arguments in its petition—which substantially mirror that of the dissent in the Fourth Court of Appeals case. See Petition for Review, *supra* note 15, at 10–11 (adopting the dissent's argument that “container and package” is defined in the Act and similar definitions should be utilized throughout the Act). These arguments are contrary to the analysis utilized by Abbott in his opinion. Compare *id.* at 10–11 (arguing the Act defines “container and package” in other portions of the Act and should be given the same meaning throughout), with Tex. Att'y Gen. Op., *supra* note 12 (giving the term “container or package” its dictionary definition). Abbott never decided whether the particular ban was preempted; however, he concluded that a factual inquiry regarding the intent for adoption of the ordinance was “beyond the scope of an attorney general opinion.” *Id.*

109. See Malewitz, *Paxton Sues Brownsville*, *supra* note 11 (“Plastic bags have become a flashpoint in a roiling debate over local control that has also touched on immigration, oil and gas drilling, and ride hailing, among other issues.”); Jim Malewitz, *Laredo Plastic Bag Ban Tossed by Court*, TEX. TRIB. (Aug. 17, 2016, 7:00 PM), <https://www.texastribune.org/2016/08/17/court-ruling-strikes-blow-laredo-bag-ban-local-con/> [<https://perma.cc/86BN-DSXC>] (reporting the effect of the Fourth Court's holding in *Laredo Merchants Ass'n* on the bag ban, and the repercussions of this decision to standing home-rule precedent).

110. See generally *Save the Plastic Bag Coal. v. City & Cty. of S.F.*, 166 Cal. Rptr. 3d 253, 263 (Cal. Ct. App. 2014) (challenging the San Francisco bag ordinance, asserting the City was preempted because they were not a regulatory body, but rather a legislative body); *Save the Plastic Bag Coal. v.*

tend to favor plastic bag bans and bag-fee ordinances.¹¹¹ The challenges often arise from either the requirement under CEQA to conduct an environmental assessment before approving ordinances,¹¹² or under the tax regulations of the California constitution.¹¹³

The cases in California are often filed by coalitions made up of plastic-bag manufacturers, such as Save the Plastic Bag Coalition.¹¹⁴ The plastics industry has been on the offensive in recent years, particularly in California, to protect their business interests.¹¹⁵ Their arguments under CEQA often focus on the idea that bans “could potentially have significant negative

City of Marin, 159 Cal. Rptr. 3d 763, 776 (Cal. Ct. App. 2013) (raising an argument that the City was not permitted to establish such a ban as a legislative, rather the regulatory, body); *Schmeer v. City of L.A.*, 153 Cal. Rptr. 3d 352, 354 (Cal. Ct. App. 2013) (holding a Los Angeles bag fee ordinance did not constitute an illegal tax under the California Constitution); *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011) (arguing the disposal of paper bags would be more harmful to the environment than disposal of plastic bags).

111. See *City & Cty. of S.F.*, 166 Cal. Rptr. 3d at 256 (claiming the San Francisco bag ordinance was categorically exempt from the CEQA); *City of Marin*, 159 Cal. Rptr. 3d at 766 (deciding the county's ordinance was valid as it was categorically exempt from the CEQA); *Schmeer*, 153 Cal. Rptr. 3d at 354 (upholding Los Angeles's bag ban and concluding the carryout charge was not a “tax” under California's constitution); *City of Manhattan Beach*, 254 P.3d at 1008 (concluding Manhattan Beach's bag ordinance was valid because it complied with the requirements of the CEQA).

112. See *City of Manhattan Beach*, 254 P.3d at 1008 (“[Plaintiff] claimed that the movement to ban plastic bags was based on misinformation and would increase the use of paper bags, with negative environmental consequences. . . . notifying] the city that it would sue if the ordinance was passed without a full CEQA review.”); see also *Romer & Tamminen*, *supra* note 44, at 242 (“From a legal perspective, plastics industry groups have filed numerous lawsuits claiming that a municipality is required to complete a full environmental impact report (EIR) under the California Environmental Quality Act (CEQA) before a plastic bag ban can be adopted.”).

113. See, e.g., *Schmeer*, 153 Cal. Rptr. 3d at 354 (contending the bag-fee ordinance constituted a tax which “was not approved by county voters”).

114. As stated by Jennie Romer and Shanna Foley:

The strategy to change the perception of plastic bags involved extolling the virtues of plastic bag recycling and marketing plastic bags as the environmentally superior choice, in part through forming groups with benign names like Coalition to Support Plastic Bag Recycling, Californians for Extended Product Responsibility, and Save the Plastic Bag Coalition.

Romer & Foley, *supra* note 3, at 381.

115. See *id.* at 380 (“In an attempt to preserve its livelihood, the plastics industry is fighting tooth and nail and spending millions to defeat (or at least slow down) strict regulation of its products.”). See also *Romer & Tamminen*, *supra* note 44, at 240 (observing plastics industry groups are spending a substantial amount of money in attempting to challenge these ordinances, primarily through public relations campaigns and lawsuits against the cities).

environmental impacts by spurring the increased use of paper bags.”¹¹⁶ The courts in California that have heard this argument lend it little to no weight—contrary to the hopes of plastics manufacturers—finding the statistics on the use of paper bags are too uncertain to provide solid legal footing to challenge ordinances.¹¹⁷ However, this argument is given consideration in a number of law review articles.¹¹⁸

During a recent election cycle, the most significant change for bag bans in U.S. jurisdictions occurred in California. On November 8, 2016, California voters approved Proposition 67,¹¹⁹ which approved of California’s S.B. 270,¹²⁰ which in turn created a statewide ban on single-use plastic shopping bags.¹²¹ This is the first statewide ban in the United States, and passed by a narrow majority of the state’s voting electorate—only fifty-two percent.¹²² The plastics industry campaigned strongly against the

116. Romer & Foley, *supra* note 3, at 379. See also *Cty. of Marin*, 159 Cal. Rptr. 3d at 768 (“Plaintiff argued that banning plastic bags may have significant negative impacts on the environment because the alternatives—either paper bags or reusable bags—are worse for the environment.”).

117. See *City of Manhattan Beach*, 254 P.3d at 1016 (addressing the adequacy of the City’s assessment of the potential environmental impacts from shifts towards paper bag usage and concluding an environmental impact analysis was unnecessary to determine such impact would be minimal).

118. See Fromer, *supra* note 1, at 500 (determining the environmental impact of paper bags is similar, and therefore the distinction should no longer be “paper versus plastic, but rather how single-use bags as a whole can be reduced from our waste stream”); Romer & Tamminen, *supra* note 44, at 242 (encouraging the adoption of charges for plastic bags rather than flat out bans “because customers will continue to require something with which to carry their purchases”); Romer & Foley, *supra* note 3, at 388 (“Plastic bag bans are often criticized for simply transitioning customers from plastic to paper bags. Thus, plastic bag bans are most effective if combined with a charge on paper bags, and even more so by instituting bag credits to further encourage the use of reusable bags.”); Chris Strobel, *Paper or Plastic? The Importance of Effective Environmental Review of Ordinances Regulating the Use of High Consumption Consumer Products*, 19 J. ENVTL. & SUSTAINABILITY L. 213, 213–14 (2012) (opining municipalities decide to implement plastic bag bans despite “clear evidence that increased paper bag use would result from the ban, and resulting negative effects from the increased paper bag use”).

119. Att’y Gen., *Proposition 67 Ban on Single-Use Plastic Bags Referendum*, in CALIFORNIA GEN. ELECTION, OFFICIAL VOTER INFORMATION GUIDE 110 (2016). “This measure prohibits most grocery stores, convenience stores, large pharmacies, and liquor stores in the state from providing single-use carryout bags.” *Id.*

120. S.B. 270, 2014 Leg., Reg. Sess. (Cal. 2014).

121. See S.B. 270, 2014 Leg., Reg. Sess. (Cal. 2014) (banning the use of plastic shopping bags statewide). See also Joshua Emerson Smith, *Nation’s First Statewide Plastic-Bag Ban Now in Effect Across California*, SAN DIEGO UNION TRIB. (Nov. 13, 2016, 8:30 AM), <http://www.sandiegouniontribune.com/news/environment/sd-me-plastic-bags-20161111-story.html> [https://perma.cc/XKKG4-59VZ] (discussing the newly enacted ban on plastic shopping bags in California).

122. Smith, *supra* note 121.

ban,¹²³ but to no avail. Only time will tell how effective the ban will be in reducing plastic waste, but if history is any indicator, it will likely be very successful in reducing the number of shopping bags consumed annually by California shoppers.¹²⁴

2. Other Jurisdictions

The Cities of Kauai and Maui have also chosen to ban plastic bags, a move which has been applauded by the EPA as efforts to reduce plastic in marine environments continues.¹²⁵ This is likely because the Hawaiian Islands are home to a large sea turtle population,¹²⁶ in addition to other sea creatures that could be jeopardized by the presence of plastic shopping bags in the marine ecosystem.¹²⁷ These bans provide further evidence of the growing approval of plastic bag bans among American cities and states.

Another state which is attempting to regulate plastic bags is Florida. Recently, a Florida state representative refiled a bill proposing a pilot program that would allow small communities to ban plastic bags from 2018

123. *Id.* (“Industry groups . . . criticized the ban as an unnecessary tax on low-income shoppers that will have little impact on reducing overall pollution. The largely out-of-state industry poured \$6.1 million into the campaign to overturn the law, compared with the \$1.6 million spent by environmental groups to save it.”).

124. Historically, cities which have enacted bans or taxes on plastic shopping bags have seen an almost immediate drop in their use, which is especially important given how many bags California is estimated to use on an annual basis. *See id.* (estimating Californians use roughly thirteen billion plastic bags per year). *See also* Fromer, *supra* note 1, at 501 (claiming the effects were immediate when Ireland instituted the first bag ban with almost a 90% reduction in use); Mize, *supra* note 25, at 322 (“A June 2015 study found that ‘since the implementation of the single use bag ordinance, and all other considerations being the same, the City of Austin has reduced their yearly single use bag consumption by more than 197 million bags per year.’” (quoting AARON WATERS, ENVIRONMENTAL EFFECTS OF THE SINGLE USE BAG ORDINANCE IN AUSTIN, TEXAS 13 (2015))); Romer & Foley, *supra* note 3, at 385 (observing Washington, D.C.’s 80% drop in plastic-bag consumption following its adoption of the plastic-bag ordinance).

125. Press Release, Env’tl. Prot. Agency, U.S. EPA Applauds Maui and Kauai for Decision to Ban Plastic Shopping Bags (Jan. 27, 2011) (2011 WL 242924).

126. *See Hawaiian Sea Turtles*, HAW. WILDLIFE FUND, <http://wildhawaii.org/marinelife/turtles.html> [<https://perma.cc/GG42-GWUE>] (“Hawai’i is the home to five species of sea turtles . . . Olive ridleys, loggerheads and leatherbacks are usually only encountered in deep offshore waters. But it’s common for snorkelers and divers on all the islands to see the *honu* (green sea turtle) in near shore waters.”).

127. *See* Press Release, Env’tl. Prot. Agency, *supra* note 125 (approving the recent ban on plastic bags in Hawaii and predicting its expected positive impact on the environment).

to 2020.¹²⁸ This was the third time this bill had been filed since 2008.¹²⁹ The bill was unsuccessful.¹³⁰ In 2008, the Florida Legislature prohibited all local governments from banning plastic bags, demonstrating how controversial these types of regulations can be.¹³¹ However, a number of municipalities have attempted to pass bag regulations, but have voluntarily withdrawn them under threat of litigation.¹³² At least one lawsuit regarding plastic bag bans is currently moving through the Florida court system,¹³³ but more detailed discussions of these cases are currently beyond the scope of this Article.

IV. BACKGROUND OF THE TCEQ

The Texas Commission on Environmental Quality (TCEQ) was established in its current form in 2001, under a special session of the Texas State Legislature—H.B. 2912—which mandated the name be changed to TCEQ.¹³⁴ In 2011, legislation was passed to continue the agency until 2023.¹³⁵ The TCEQ states on its website its mission: “[T]o protect [Texas’s] public health and natural resources consistent with sustainable economic development. [TCEQ’s] goal is clean air, clean water, and the safe management of waste.”¹³⁶

128. Isadora Rangel, *State Bill to Ban Plastic Bags Introduced 3rd Time by Rep. David Richardson*, TCPALM (Dec. 15, 2016, 7:58 PM), <http://www.tcpalm.com/story/news/local/indian-river-lagoon/politics/2016/12/15/banning-plastic-bags-aim-florida-rep-david-richardsons-bill/95464786/> [<https://perma.cc/W3ZT-7BKC>].

129. *Id.*

130. Julia Ingram, *Cities are stymied in banning plastics—and the state is doing nothing about it, they say*, MIAMI HERALD (Aug. 22, 2019, 7:00 AM), <https://www.miamiherald.com/news/local/environment/article234158642.html> (reporting the bill had previously been introduced three times but had not been successful getting out of the legislature).

131. *Id.*

132. *Id.*

133. *Id.*

134. *History of the TCEQ and Its Predecessor Agencies*, TEX. COMM’N ON ENVTL. QUALITY, <https://www.tceq.texas.gov/about/tceqhistory.html> [<https://perma.cc/N95H-JCWZ>] [hereinafter *History of the TCEQ*] (“Sunset legislation passed by the Texas Legislature in 2001 continued the agency and changed its name to the Texas Commission on Environmental Quality.”).

135. *Id.*

136. *Mission Statement and Agency Philosophy*, TEX. COMM’N ON ENVTL. QUALITY, <https://www.tceq.texas.gov/about/mission.html> [<https://perma.cc/3FTR-TBDV>].

The TCEQ—in its most recent iteration—was established as the Texas Natural Resource Conservation Commission in 1993;¹³⁷ as noted above, the change in name came in 2001. The TCEQ now handles virtually all environmental enforcement and sustainability initiatives created by state legislation, including the Solid Waste Disposal Act.¹³⁸

V. ANALYSIS OF WHICH AGENCY SHOULD REGULATE PLASTIC BAGS

A. *Based on Statute*

Under the Solid Waste Disposal Act, the Texas Commission on Environmental Quality (TCEQ) is tasked with the regulation of solid waste,¹³⁹ including packaging and containers, which may become waste under the relevant provision in question—Section 361.0961. This delegation of power grants to the TCEQ the authority and discretion to interpret and enforce the Act in the same tradition as federal agencies charged with enforcing an act of Congress.¹⁴⁰

B. *Based on Public Policy*

As a matter of public policy, it is preferable that municipalities should have the authority to regulate their own affairs. Texas is home to a wide variety of ecosystems and an even greater variety of people; it should be for the municipalities to decide what is best for their communities, which was one of the original intents of home-rule authority. What works for the City of Austin may not necessarily work for Houston or

137. *History of the TCEQ*, *supra* note 134. This change in name was accompanied by an expansion of their authority: “The history of natural resource protection by the State of Texas is one of gradual evolution from protecting the right of access to natural resources (principally surface water) to a broader role in protecting public health and conserving natural resources for future generations of Texans.” *Id.*

138. *See History of the TCEQ*, *supra* note 134 (marking the passing of the Resource Conservation and Recovery Act (RCRA), which governed the disposal of solid and hazardous waste in 1976).

139. The City of Laredo noted in its petition: “Texas passed the Solid Waste Disposal Act to ‘safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste’ In other words, the SWDA enables the Texas Commission on Environmental Quality to regulate where Texans can leave their trash and how it gets there.” Petition for Review, *supra* note 15, at 8 (quoting TEX. HEALTH & SAFETY CODE ANN. § 361.002(a)).

140. *History of the TCEQ*, *supra* note 134.

El Paso,¹⁴¹ not just because each city sits in a different type of ecosystem, but because their respective citizenries may be different.

One of the original policy arguments presented at the time of the adoption of the Solid Waste Disposal Act was that the legislature wished to preempt home-rule powers to pass ordinances that would result in a “patchwork” of different ordinances;¹⁴² the argument was revived in the *Laredo Merchants Ass’n* case by the Merchants Association.¹⁴³ This argument, however, fails to recognize that there are already ordinances that vary from town to town, such as local zoning laws,¹⁴⁴ and that bag ordinances have already existed in Texas for many years.¹⁴⁵ Adding to the

141. For example, a writer for the Houston Chronicle recently noted that legislators in Austin may not be connected well enough with local issues to understand them and be able to effectively address them.

Houstonians know that the oil and gas—and plastics—industry serves as a pillar of our own local economy, and we’re sympathetic to the industry’s case. But we also know that unique circumstances in places like Galveston or Fort Stockton inform their local decisions—experiences that may be ignored by out-of-town politicians.

Plastic Bag Bans, *supra* note 12. This was the sentiment reflected in the creation of home-rule cities, which is also important to environmental efforts.

142. See Appellee’s Brief Ex. 2, at 4, *Laredo Merchs. Ass’n*, 2016 WL 4376627 (No. 04-15-00610-CV) (“The bill is not overly restrictive of local governments. It would be impossible for companies to deal with a patchwork of regulations, different in every city in Texas, regarding solid waste. [The Act] would help avoid this patchwork approach to waste management, which could hurt the flow of goods and services in the state.” (citing House Research Organization, Bill Analysis, Tex. S.B. 963, 73d Leg., R.S. (1993))).

143. See Brief of Appellant at 12, *Laredo Merchs. Ass’n*, 2016 WL 4376627 (No. 04-15-00610-CV) (arguing that the legislature intended to preclude patchwork, inconsistent ordinances through the adoption of this bill).

144. See Ramsey, *supra* note 33 (“Texas has survived decades of peculiar local laws and ordinances. Its largest city, Houston, has a loose idea of planning and zoning, for instance. Dallas used to have its own movie ratings and was an early adopter of a ban on smoking in public places.”).

145. The first bag ban was passed in Brownsville in 2010, with other ordinances following in quick succession, but efforts to begin curtailing the use of plastic bags in Austin began as early as 2007. See Brownsville, Tex., Code of Ordinances ch. 46, art. II, § 46–48 (2017) (banning the use of plastic shopping bags in Brownsville for environmental and beautification purposes); Mize, *supra* note 25, at 321 (“As early as 2007, ‘the City Council adopted a resolution directing the City Manager to evaluate and recommend strategies for limiting the use of non-compostable plastic bags and promoting the use of compostable and reusable bags.’” (quoting *Short History of Single-Use Bags in Austin*, AUSTINTEXAS.GOV, https://austintexas.gov/sites/default/files/files/Trash_and_Recycling/Short_History_of_Single-use_Bags_in_Austin.pdf [https://perma.cc/VB2G-FHLN])). It is worth noting the scope of the Brownsville plastic bag ban, which expressly renders the ban inapplicable to solid waste containers as regulated under the Solid Waste Disposal Act. Brownsville, Tex., Code of Ordinances ch. 46, art. II, § 46-49 (2017). Considering this

discourse, the supreme court, in its *Laredo Merchants Ass'n* opinion, stated that “[d]eciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature’s prerogative.”¹⁴⁶ This places responsibility for change squarely in the legislature’s jurisdiction, further showing that change is needed.

VI. APPLICATION TO TEXAS LAW

A. *What Can Be Done?*

In Texas, the issue of plastic bag bans is governed by the Solid Waste Disposal Act of 1993.¹⁴⁷ It was under this Act that plastic bag ordinances both have been challenged in *Laredo Merchants Ass'n*¹⁴⁸ and *Hilex Poly Co. v. City of Dallas*,¹⁴⁹ and have been considered by the Texas Attorney General.¹⁵⁰ It is this Act which will continue to control the analysis in Texas. Therefore, it is imperative to understand what precisely that analysis looks like and what change, if any, needs to be made in order to secure the future of Texas environments.

The specific clause of the Solid Waste Disposal Act under which all challenges come is Section 361.0961, which states in relevant part that:

A local government or other political subdivision may not adopt an ordinance, rule, or regulation to . . . prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized

amendment was made following the *Laredo Merchs. Ass'n* case, it may be an attempt to preempt any argument similar to that made by the merchants in that case.

146. *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 592–93 (Tex. 2018).

147. TEX. HEALTH & SAFETY CODE ANN. § 361.0961.

148. See generally *Laredo Merchs. Ass'n*, 550 S.W.3d 586 (reviewing and ultimately deciding the ordinance was inconsistent with and therefore preempted by the Texas Solid Waste Disposal Act).

149. *Hilex Poly Co. v. City of Dall.*, No. DC-15-04967 (44th Dist. Ct., Dallas County, Tex. dismissed June 11, 2015). In *Hilex*, the plaintiffs argued in their petition: “The Ordinance provides, in part, ‘If single-use carryout bags are provided to a customer, a business establishment shall charge the customer an environmental fee of \$0.05 per bag.’ This provision of the Ordinance is in direct conflict with § 361.0961 of the Texas Health & Safety Code.” Plaintiff’s Original Petition for Declaratory and Injunctive Relief at 6, *Hilex Poly Co.*, (DC-15-04967) (citations omitted) (quoting Dallas, Tex., Code of Ordinances ch. 9C, § 9C-4(b)(1) (repealed 2015)).

150. See, e.g., Tex. Att’y Gen. Op., *supra* note 12 (deciding whether the Solid Waste Disposal Act preempted the city ordinance concerning single-use plastic bags, but concluding it was beyond the scope of the opinion to determine the city’s intent in adopting that ordinance).

by state law . . . [or] assess a fee or deposit on the sale or use of a container or package.¹⁵¹

This provision is the heart of the argument against plastic bag bans in Texas.¹⁵² Considering the analysis of this provision by the Texas Supreme Court in *Laredo Merchants Ass'n*,¹⁵³ in addition to the arguments advanced by the Merchant's Association,¹⁵⁴ it is difficult to find an interpretation that does not preempt municipal bag ordinances. The key phrase is the "solid waste management purpose" language that many Texas bans have attempted to circumvent by stating a variety of alternative purposes;¹⁵⁵ even Greg Abbott's opinion as Texas Attorney General noted that bans could be held valid if they were not enacted for "solid waste management purposes."¹⁵⁶ Language to this effect, however, appears elusive at best and nonexistent at worst. As argued by the Merchants Association in their brief,

151. HEALTH & SAFETY § 361.0961.

152. See *Laredo Merchs. Ass'n*, 550 S.W.3d at 598 (determining the city of Laredo's plastic bag ban ordinance was preempted by the Solid Waste Disposal Act); Plaintiff's Original Petition for Declaratory and Injunctive Relief, *supra* note 149, at 8 (claiming the Dallas plastic bag ordinance was preempted by Section 361.0961 and was, thus, invalid); Tex. Att'y Gen. Op., *supra* note 12 (noting the likelihood that courts would find municipal plastic bag ordinances preempted by Section 361.0961).

153. The Fourth Court of Appeals held that the a checkout bag under the ordinance at issue was a container or package under the Texas Solid Waste Disposal Act. *Laredo Merchs. Ass'n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *6 (Tex. App.—San Antonio Aug. 17, 2016), *aff'd*, 550 S.W.3d 586 (Tex. 2018). Furthermore, the court held that:

[T]he Ordinance identifies discarded checkout bags as litter, which is naturally understood as "refuse or rubbish," which in turn is a type of "solid waste" as defined by the Act. The Ordinance then goes on to state it seeks to prevent the generation of litter—a type of management activity.

Id. (citations omitted) (first citing *Laredo*, Tex., Code of Ordinances ch. 33, art. VIII, § 33-504 (2015); and then citing HEALTH & SAFETY § 361.003 (18), (34)). The supreme court echoed this finding, stating that "[t]he Ordinance's stated purposes are to reduce litter and eliminate trash—in sum, to manage solid waste, which the Act preempts. The Ordinance cannot fairly be read any other way." *Laredo Merchs. Ass'n*, 550 S.W.3d at 595.

154. See Brief of Appellant, *supra* note 143, at 17–18 (arguing the stated purposes in the ordinance were in effect and were enforced as solid waste management initiatives).

155. See *Laredo*, Tex., Code of Ordinances ch. 33, art. VIII, § 33-501 (2014) (stating that the purposes of the ordinance were to "promote the beautification of the city," to "reduce costs associated with floatable trash controls," and to "protect life and property from flooding that is a consequence of improper stormwater drainage attributed in part to obstruction by litter from checkout bags"); Port Aransas, Tex., Ordinance 2014-15 (Dec. 20, 2014) (declaring the purpose of the ordinance was to protect wildlife, and to improve the aesthetic of the city).

156. Tex. Att'y Gen. Op., *supra* note 12, at 3 (suggesting there must be an analysis of whether the ordinance was adopted for a preempted purpose, which requires looking to the intent of the city in adopting such bans).

virtually all purposes stated by the Laredo ordinance, which are mirrored in other ordinances throughout the state,¹⁵⁷ essentially boil down to a solid waste management purpose.¹⁵⁸ The supreme court solidified the validity of this argument.¹⁵⁹ How, then, can municipalities ever hope to maintain their bans? The short answer, based on the holding and arguments presented in *Laredo Merchants Ass'n*, is that they likely cannot.

What, then, might the options be moving forward? Under the current statutory language of Section 361.0961 and the *Laredo Merchants Ass'n* decision, bag bans presumably cannot be upheld because all stated alternative purposes can eventually be reduced to an implied solid waste management purpose.¹⁶⁰ This leaves municipalities and the state with three potential options that could be sought as a means of addressing the issue of plastic bag pollution. First, the legislature could amend the Solid Waste Disposal Act to authorize municipalities to choose the manner in which they regulate single-use plastic bags. This would leave existing bans in force, but such a move is virtually certain not to occur given both the legislature's already demonstrated hostility to home-rule bag ban ordinances,¹⁶¹ and the myriad of arguments in favor of the existing construction found in *Laredo Merchants Ass'n* and in Greg Abbott's advisory

157. See Laguna Vista, Tex., Ordinance 2012-23 (2012) (banning plastic bags to prevent contamination of the marine environment); Fort Stockton, Code of Ordinances ch. 12, art. I, § 12-9 (2011) *repealed by* Fort Stockton, Tex., Ordinance 18-135 (Sept. 25, 2018) (prohibiting plastic shopping bags for environmental purposes and to alleviate the costs associated with bag processing and cleanup).

158. Brief of Appellant, *supra* note 143, at 17 ("Laredo's alternate goal of protecting the environment, property, livestock, and agriculture are also impermissible bases for a bag ban because, in fact, they all have a solid waste management purpose.").

159. The supreme court favored this argument, stating that "[a]ll of these salutary objectives pertain to the ancillary effects of reducing the generation of solid waste, which is a solid waste management purpose. The Ordinance's solid waste management cannot avoid preemption merely because it has other purposes." *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 595 (Tex. 2018).

160. See *id.* at 598 (holding the Laredo ordinance regulation of plastic bags was for a waste management purpose preempted under the Act). See also TEX. HEALTH & SAFETY CODE ANN. § 361.0961 (stating municipalities cannot regulate containers and packaging for solid waste management purposes).

161. See Mize, *supra* note 25, at 327–28 ("Despite the fact that cities in Texas have been banning or discouraging single-use plastic bags for years, it was Austin's ban that finally pushed the legislature to react with the so-called 'Shopping Bag Freedom Act.' . . . The 'Shopping Bag Freedom Act' was discarded and left hanging in committee." (footnote omitted)).

opinion,¹⁶² which have eliminated the need for preemption bills on this issue, likely to the delight of some legislators. The second option, short of changing the law, would be for municipalities to ask the state for additional funding to cope with plastic bag pollution, including clearing storm drains and the cost of collecting and processing plastic bags which have become litter. This is equally unlikely because the State of Texas is currently in a state of reduced spending.¹⁶³ Additionally, due to the current political climate, the legislature in Texas is not likely to allocate what little excess funding may be available to environmental initiatives; such initiatives are already generally disfavored under Republican leadership.¹⁶⁴

The third option is perhaps the most viable and would help environmental and infrastructural maintenance efforts without increasing spending from already stretched state funds: the law could be changed with compromise language. The language of Section 361.0961 could be amended by the legislature to include an exception for the regulation of single-use plastic shopping bags by municipalities under their home-rule authority within certain parameters dictated by the legislature. This is perhaps not ideal, but it is a far more viable option under bipartisan efforts, including those not discussed in this Article. The provision could be constructed as a set of guidelines or boundaries within which the cities could operate, choosing for themselves whether to “opt in,” as it were, and enact the state’s approved regulatory structures.¹⁶⁵ Texas is host to the largest variety of

162. See Tex. Att’y Gen., *supra* note 12, at 1–3 (assessing whether plastic bag ordinances regulate “containers” or “packages” as defined under Section 361.0961, as well as discussing what a “solid waste management purpose[]” might be and what authority is given to home-rule cities for the purpose of examining whether such ordinances are otherwise permitted under state law and thus not in conflict with the Act).

163. See Patrick Svitek, *State Leaders Ask Agencies to Cut Budgets by 4 Percent*, TEX. TRIB. (July 1, 2016, 8:00 AM), <https://www.texastribune.org/2016/07/01/state-leaders-ask-agencies-cut-budgets-4-percent/> [https://perma.cc/2UAW-TFT4] (“Texas’ top elected officials are asking state agencies to scale back their budget requests by 4 percent, seeking to further rein in state spending for the [2018–2019] cycle.”).

164. See *id.* (reiterating the process for distributing funds under the current process would require a thorough review of all programs, with a priority given to “public schools, border security, Child Protective Services and mental health resources”).

165. To expound further on this idea, the legislature could create its own bipartisan compromise as to what extent or manner of regulation would be permissible for home-rule cities to adopt. This would provide home-rule cities with the option to control their own destiny and decide whether regulation is best for them, while keeping the particulars of the regulation uniform statewide. While this is not the ideal that environmentalists would like, as it would likely place strict limits on customized provisions tailored to specific ecosystems and biomes, it is certainly a better option than having no

ecosystems among any of the contiguous states,¹⁶⁶ from wetlands and coastal regions to mountains and deserts. Giving the power to municipalities to decide for themselves what policies best suit their needs and best serve the public interest would, of course, be the most ideal solution.¹⁶⁷ For example, a policy designed for El Paso likely will not work for Corpus Christi or Houston. Each city has unique needs that only custom tailoring under home-rule authority can provide. However, a limited prescribed power to regulate is still better than a blanket preemption on any attempt to mitigate environmental damage and municipal liability.

B. *The Administrative Argument*

1. The General Approach

A final Hail-Mary argument which was not addressed in *Laredo Merchants Ass'n*, yet merits consideration, rests in federal jurisprudence concerning judicial deference to administrative interpretations of statutes and regulations. The argument would be that the TCEQ, the agency charged with interpreting and executing the Solid Waste Disposal Act, has not acted to prevent municipalities from passing bag-ban ordinances, and has not enforced the Solid Waste Disposal Act in a manner that would suggest an agency interpretation consistent with the assertions of the Merchants Association in *Laredo Merchants Ass'n*. It could be argued that such inaction constituted an implied interpretation by the TCEQ sufficient to have asked for deference by the courts, which would have left the municipal ordinances intact. The implied interpretation would have been that the Solid Waste

power whatsoever. This would address environmentalists' desire to take action and business' desire for uniformity, with each side giving a little to help reach an amicable solution to plastic pollution.

166. *Texas Ecoregions*, TEX. PARKS & WILDLIFE, <https://tpwd.texas.gov/education/hunter-education/online-course/wildlife-conservation/texas-ecoregions> [https://perma.cc/KD46-36X6] (establishing Texas is unique among the states due to its size and location). Specifically:

A large area of land will usually have a great deal of variation in climate and landscapes, factors influencing habitat diversity. . . . Generally, Texas is divided into [ten] natural regions or ecoregions: the Piney Woods, the Gulf Prairies and marshes, the Post Oak Savannah, the Blackland Prairies, the Cross Timbers, the South Texas Plains, the Edwards Plateau, the Rolling Plains, the High Plains, and the Trans-Pecos.

Id.

167. Mize, *supra* note 25, at 314 (“Likewise, cities cannot supersede the state, but they should be provided with maximum freedom to accomplish that which our laws say they should. Cities should be free to allow the people to control their own affairs as locally as possible.”).

Disposal Act either does not conflict with the ordinances or that the Act does not give the TCEQ regulatory authority over the subject matter. This argument would rest on the deference doctrines established in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*,¹⁶⁸ and *Skidmore v. Swift*.¹⁶⁹ While Texas has not yet adopted *Chevron* explicitly, it does apply the same principle of deference to agency actions.¹⁷⁰

2. The Levels of Deference

There are two levels of deference that are frequently cited by the courts: *Chevron* and *Skidmore*-level deference.¹⁷¹ Both arise out of federal Supreme Court cases, and since its decision, *Chevron* has become the most frequently cited Supreme Court opinion to date.¹⁷² *Chevron* is the more deferential of the two standards, but both have been limited in their application, blended over time, and inconsistently applied even by the Supreme Court.¹⁷³ *Chevron* deference essentially asks (1) whether the language of the statute is clear or ambiguous; and if it is ambiguous, (2) whether the agency's interpretation is reasonable.¹⁷⁴ If the interpretation is reasonable, then the

168. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

169. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

170. See Locke Liddell, Sapp LLP, *An Overview of Agency Deference in Statutory Interpretation*, 13 NO. 6 TEX. ENVTL. COMPLIANCE UPDATE (2004), Westlaw, 13 No. 6. SMTXENVCU 3 (“Texas courts rarely apply to state statutory language the *Chevron* doctrine, which applies to federal statutes. In practice, however, such application does occur from time to time, even in examination of state administrative regulations.”); see also Manuel H. Hernandez, Comment, *Running Out of Gas: Why Texas Must Distance Itself Completely from the Chevron Doctrine of Administrative Deference*, 14 TEX. TECH ADMIN. L.J. 225, 231–32 (2012) (“The Texas Supreme Court’s subsequent pronouncement on [deference] did not cite . . . *Chevron* but in effect adopted the same standard expressed therein.”).

171. Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1295–97 (2016) (discussing the *Chevron* and *Skidmore* deference doctrines).

172. Dudley D. McCalla, *Deference (and Related Issues)*, 14 TEX. TECH ADMIN. L.J. 363, 365 (2013) (“Professor Pierce notes that *Chevron* is one of the most important decisions in the history of administrative law, and courts cite and apply it more than any other Supreme Court decision in history.”).

173. See *id.* (analyzing inconsistencies in the application of the *Chevron* doctrine, with powerful effects in some circumstances, and no effect in others); see Pierce, *supra* note 171, at 1299 (“[T]he two doctrines became intertwined in 2000. Circuit courts immediately began to apply *Chevron* in 1984 In contrast to the treatment of the *Chevron* doctrine by circuit courts, the Supreme Court has never consistently applied the *Chevron* doctrine.” (footnote omitted)).

174. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); see also Locke Liddell, Sapp LLP, *supra* note 170 (“The first step of that process looks to see if [there’s] a clear

court typically defers to the agency's interpretation.¹⁷⁵ *Skidmore*, by comparison, merely accounts for the agency's interpretation in construing the statute without finding it to be controlling, instead considering the agency's position to be persuasive only as a body of experience to inform the court's decision and not to control it.¹⁷⁶

3. Is Deference Even Applicable?

The *Chevron* and *Skidmore* doctrines may have been of little help to the City of Laredo, however, because they have historically been applied to agency regulations and adjudications.¹⁷⁷ Stated another way, the doctrines historically apply to agency actions, not agency inaction.¹⁷⁸

There is also a great deal of uncertainty as to the future of the deference doctrines,¹⁷⁹ in part because of the erratic and inconsistent application they

statutory pronouncement. . . . If the statute is found to be ambiguous, then the court must determine if the [agency's] interpretation is based on a permissible statutory construction.”)

175. See *Chevron*, 467 U.S. at 845 (“If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” (quoting *United States v. Shimer*, 367 U.S. 374, 382–83 (1961))).

176. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that an agency's interpretations act only as guidance for courts and litigants, and that the weight of consideration will vary from case to case depending on the relevant issues).

177. See *Locke Liddell, Sapp LLP*, *supra* note 170 (“The Supreme Court has since clarified the process outlined in its *Chevron* decision, requiring in 2001 that the agency *action* in question be analyzed for proper delegation.” (emphasis added)).

178. This point was made by Attorney General Ken Paxton in a recent advisory opinion, responding to a request for clarification on how deference standards are applied in Texas, in which he stated:

Texas state courts consider deferring to an agency's interpretation of a statute *only when the agency adopts the construction as a formal rule or opinion after formal proceedings*. Even when the agency has formally adopted a construction, a state court will defer to that construction only upon finding that ambiguity exists in the statute at issue and that the agency's construction is reasonable and consistent with the statute's plain language.

Tex. Att'y Gen. Op. No. KP-0115 (2016) (emphasis added); see also *Locke Liddell, Sapp LLP*, *supra* note 170 (“Citing the *Chevron* ruling, the court acknowledged its duty to determine whether the [agency's] *decisions* regarding the allowance were based on a permissible interpretation of the rules.” (emphasis added)).

179. See *Pierce*, *supra* note 171, at 1308–09 (foreshadowing the future repeal or weakening of the deference doctrines based on past applications of the doctrine); see also *Hernandez*, *supra* note 170, at 233–36 (contending that, under the original reasoning of the Supreme Court for the creation of the *Chevron* doctrine, it is inappropriate for state courts to apply this type of deference, which was created under the unique circumstances of federal governance).

have received.¹⁸⁰ The uncertainty that this has yielded calls into question the utility of such doctrines in an era of increasing agency action.¹⁸¹ There are those who have called for an end to the use of *Chevron*-level deference in Texas, instead advocating for policies more in line with *Skidmore*, or coming to a compromise by permitting the lower courts to apply *Chevron*, but excepting the Texas Supreme Court from such unwavering deference standards. In his Comment, Manuel Hernandez asserts: “Agency expertise in a particular area may assist in determining the likely consequences of an interpretation; however, the question of which is truest to the legislature’s intent and has the better policy implications should remain within the sound discretion of a disinterested court.”¹⁸²

Considering the Texas courts’ inconsistent treatment of the deference doctrine,¹⁸³ and the differences between state and federal agencies and judges,¹⁸⁴ there may be adequate reason for some to question whether deference should be continued. Hernandez, in particular, argues:

The Texas Supreme Court and some commentators have recently expressed support for application of *Chevron*-like doctrines in Texas; however, this only makes it more important for the state to become aware of the negative consequences that may come with accepting the trend. . . . Taking account of how formal an agency opinion is does not guard against the possibility of a self-serving agency interpretation. Relying on *Chevron*’s agency expertise factor does not account for the agency resource and expertise differential at the state level. . . . Texas should deal with these potentially negative

180. Pierce, *supra* note 171, at 1299; *see also* Hernandez, *supra* note 170, at 233 (“Texas courts are without clear guidance, as shown by the contradictions not only among precedent but also within cases themselves.”).

181. *See* Pierce, *supra* note 171, at 1302 (explaining the lower courts have also contributed to the confusion as they continue to follow the Supreme Court’s lead and apply the *Chevron* doctrine inconsistently); *see also* Hernandez, *supra* note 170, at 238 (“[D]espite such a deferential standard, there were very few recent instances in which Mississippi courts had the opportunity to exercise the rule because ‘nearly a century of a consistently announced deferential standard’ may have had the effect of discouraging challenges to agency interpretations.” (quoting Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 992 (2008))).

182. Hernandez, *supra* note 170, at 234–35.

183. *See id.* at 233 (recognizing the lack of clear guidance for Texas courts, which has resulted in additional complications in the application of the deference doctrine in Texas).

184. *See id.* at 243–44 (warning of the dangers associated with state-level adoption of the *Chevron* standards, which are particularly suited for federal application).

consequences, either by statute or court opinion, by simplifying the analysis and applying independent review of all agency interpretations of statutes.¹⁸⁵

However, the trend at the moment is still towards a type of *Chevron* deference.¹⁸⁶ As stated previously, the TCEQ has never enforced the Solid Waste Disposal Act to preempt municipal plastic bag regulations. The legislature, in deciding whether to amend the Act, should carefully consider this precedent as evidence that plastic bag regulations can exist in Texas in harmony with its other laws and economy. Although the argument was not presented to the Texas Supreme Court, the legislature should consider the possibility of some deference to the interpretation and enforcement practices that the agency tasked with such has provided since its charge in 1993.

VII. CONCLUSION

There can be little doubt that plastic bags are harmful to the environment, and it is obvious that these debates and discussions about how best to handle them are quickly coming to a head.¹⁸⁷ This is a complex problem that requires a great deal of careful consideration. However, in today's greener society, and given what is known about how plastics have become not only a nuisance but a danger to the health of the planet,¹⁸⁸ it is clear that single-use plastic shopping bags are quickly losing their place in the world. Texas may not be ready for a statewide ban like California, but it is important to preserve the home-rule municipalities' right to control their resources.

185. *Id.* at 244 (footnotes omitted).

186. *See id.* at 231 (“Although the trend towards an adoption of *Chevron* in Texas began before *Phillips*, the state’s high regard for the administrative law opinions of the Austin Court of Appeals arguably tips the scales in favor of its adoption.”).

187. *Romer & Foley*, *supra* note 3, at 380. *Romer and Foley* illustrate the potential reach of the movement:

It seems that the plastics industry realizes that as soon as it is commonplace to ban or place a charge on plastic bags, forbidding the free flow of plastic water bottles and fast food containers may well be next. The fight over plastic bag ordinances in California is just one small part of a larger movement against single-use plastics that is gaining momentum around the globe.

Id.

188. *See Fromer*, *supra* note 1, at 497 (approximating the amount of plastic bags used world-wide as “[b]etween five hundred billion to one trillion”).

As discussed above, there is a great deal of ambiguity as to the meaning of Section 361.0961 as it pertains to municipal plastic bag bans,¹⁸⁹ but ultimately the spirit of home-rule must prevail. Texas likely will not give municipalities money to repair and maintain their storm drains or to clean up their beaches,¹⁹⁰ and the state is not liable if flooding damages a resident's property as a result of a blockage in the drains.¹⁹¹ If the municipality is to be held liable for those damages, then it should have the power to address the cause, not merely the symptom of the problem. The legislature does not always move quickly enough to address these local issues,¹⁹² and it is difficult to find a one-size-fits-all solution considering all the variables at work. The Texas Legislature, therefore, must uphold the power of home-rule cities to regulate plastic bags until a more comprehensive solution, if one exists, can be crafted. Even permission within a limited, agreed capacity would be a step in the right direction.

However, despite the ruling of the Texas Supreme Court in *Laredo Merchants Ass'n*, it may not matter in the long run. The world is going green, and public opinion is beginning to turn the tides of industry. Regardless of the holding in *Laredo Merchants Ass'n*, plastic bags are inevitably on their way out—it is only a matter of time. Eventually, public opinion may induce the legislature to amend the Solid Waste Disposal Act; *Laredo Merchants Ass'n* could be overruled; or companies may quit carrying plastic bags according to the demands of the market, making bans unnecessary altogether. Based on the evidence presented, it is only a question of when this will occur.

189. See, e.g., *Laredo Merchs. Ass'n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *4–6 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted) (mem. op.) (outlining how one might interpret the meaning of Section 361.0961), *aff'd* 550 S.W.3d 586 (Tex. 2018).

190. See, e.g., Svitek, *supra* note 163 (exploring how state leaders are restricting budgets and encouraging spending reductions).

191. Cf. Petition for Review at 17–18, *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586 (Tex. 2018) (No. 16-0748) (illustrating the absurdity of precluding a city from acting to protect residents when it can be held liable for any damages resulting from such inaction).

192. See Editorial, *Plastic Bag Bans: City Halls, Not Statewide Authorities, Should Write the Rules on Local Issues*, HOUS. CHRON. (Dec. 14, 2016) <https://www.houstonchronicle.com/opinion/editorials/article/Plastic-bag-bans-10797061.php> [<https://perma.cc/Q4AH-SAKM>] (arguing the unique characteristics of municipalities justifies many decisions being made at the local level, where the most is known about the peculiarities of the municipality).