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Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts - Or Does It Comment.

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PRINCIPLES OF GOVERNMENTAL IMMUNITY IN TEXAS: THE TEXAS GOVERNMENT WAIVES SOVEREIGN IMMUNITY WHEN IT CONTRACTS—OR DOES IT?

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I. INTRODUCTION

Imagine that a potential client walks into your office seeking your help. You listen as she describes the damages she has incurred. As she continues to explain the circumstances surrounding the unfortunate event, you realize that her case involves a clear breach of contract. Thoughts of quick recovery run through your mind until she reveals who is responsible for her injuries—the government.

When the government causes injury through negligence or by breaching a contract, the injured party must face the obstacle of governmental

immunity.[1] The doctrine of governmental immunity can act as a total bar to recovery,[2] and is not an easy obstacle to hurdle, especially in Texas.[3]

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1. *See, e.g.*, United States v. Mitchell, 445 U.S. 535, 538 (1980) (stating basic proposition that government is immune from suit); United States v. Lee, 106 U.S. 196, 204 (1882) (justifying and reaffirming principles of governmental immunity); Texas Highway Dep't v. Weber, 147 Tex. 628, 630, 219 S.W.2d 70, 71 (Tex. 1949) (reiterating that state is immune from torts committed by its officers and noting that immunity principles are so "uniformly recognized that it is trite to repeat them"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984) (evaluating law of governmental immunity and recognizing that immunity protects all levels of government from legal action). Despite technical differences in origin and proper usage, the phrases "governmental immunity" and "sovereign immunity" are often used interchangeably. *See* Ross v. Consumers Power Co., 363 N.W.2d 641, 649–50 (Mich. 1984) (recognizing confusion of phrases and attempting to distinguish concepts). *Compare* Peavler v. Board of Comm'rs, 528 N.E.2d 40, 42 (Ind. 1988) (explaining that theory of governmental immunity applies to both municipalities and states in certain situations) *and* Layton v. Quinn, 328 N.W.2d 95, 98 (Mich. Ct. App. 1983) (referring to immunity that protects state agencies as governmental immunity) *and* Provo City Corp. v. State, 795 P.2d 1120, 1122 (Utah 1990) (examining whether state and its entities are entitled to protection from governmental immunity) *with* Strait v. Pat Harrison Waterway Dist., 523 So. 2d 36, 39 (Miss. 1988) (examining Sovereign Immunity Act and referring to immunity that protects state entities as sovereign immunity), *overruled by* Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900 (Miss. 1993) *and* State v. Mason, 796 S.W.2d 621, 624 (Mo. 1990) (enforcing Missouri's Sovereign Immunity Act and identifying state immunity as sovereign immunity) *and* Goad v. Cuyahoga County Bd. of Comm'rs, 607 N.E.2d 878, 879–80 (Ohio Ct. App. 1992) (discussing doctrine of sovereign immunity as it applies to state and its agencies).

2. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (concluding that governmental immunity is not just immunity from liability but "immunity from suit"); University of Tex. Medical Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994) (declaring that absent legislative waiver, governmental immunity protects state from its negligent conduct); Janell M. Byrd, Comment, *Rejecting Absolute Immunity for Federal Officials*, 71 CAL. L. REV. 1707, 1707 (1983) (noting virtual impossibility for injured parties to recover damages for constitutional violations of government); *see also* Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990) (holding that even if government's conduct is illegal, governmental immunity can still protect government officials); John S. Aldridge, *Differences in Liability of Local Governmental Entities and Individual Defendants Under State Tort Laws* (illustrating different government positions in Texas that enjoy absolute immunity), *in* STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, SUING AND DEFENDING GOVERNMENTAL ENTITIES, X, X–4 (1991).

3. *See* City of Lancaster v. Chambers, 883 S.W.2d 650, 656 (Tex. 1994) (creating very high standard that plaintiff must meet to avoid harsh effects of governmental immunity); John C. Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 815 (noting that sovereign immunity presents daunting obstacle to plaintiff bringing suit against government); *see also* Dawn L. Carmody, *Individual Immunity: State and Federal Standards* (noting recent increase in use of governmental immunity defense in Texas), *in* STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, SUING AND DEFENDING GOVERNMENTAL ENTITIES, J, J–1 (1995). *But cf.* Douglas R. Larson, *Pleading the Plaintiff's Case: Overcoming Defense Motions* (exploring limited ways to overcome immunity defense in Texas), *in* STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, SUING AND DEFENDING GOVERNMENTAL ENTITIES, K, K–4 to K–5 (1993).

Governmental immunity principles are deeply rooted in American law, and have been recognized in Texas since 1847.[4] Over the years, however, governmental immunity increasingly has faced attack from courts and commentators.[5] Some states, including Texas, have revised the common-law doctrine, allowing the government to be sued in certain situations.[6] Other states have attempted to abrogate the doctrine altogether.[7] As a

4. *See* Hosner v. DeYoung, 1 Tex. 764, 769 (1847) (recognizing doctrine of governmental immunity in Texas). For a detailed analysis of the history of governmental immunity in American law, see Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1–22 (1924).

5. *See* Buchanan v. State, 89 S.W.2d 239, 240 (Tex. Civ. App.—Amarillo 1936, writ ref'd) (criticizing governmental immunity doctrine); Leslie L. Anderson, *Claims Against States*, 7 VAND. L. REV. 234, 245 (1954) (concluding that it is long overdue for all governments to waive immunity in tort); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1–2 (1924) (criticizing unsound policies upon which governmental immunity is predicated); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 494 (1953) (describing doctrine of governmental immunity as "confus[ing], conflict[ing], . . . unsound, and undesirable"). In *Buchanan*, the Amarillo Court of Appeals noted that the phrase "The King can do no wrong" is "as false in many cases as it is ancient." *Buchanan*, 89 S.W.2d at 240. Moreover, one commentator who has attacked the doctrine of governmental immunity asserted that the public is in a better position than the victim to bear the costs of the government's wrongs. Walter E. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 HARV. L. REV. 1532, 1556 (1972).

6. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-557(n) (West 1991) (imposing liability for negligent acts committed within scope of employment); DEL. CODE ANN. tit. 10, § 4012 (Supp. 1994) (waiving immunity in situations involving motor vehicles, public buildings, and toxic materials); KAN. STAT. ANN. §§ 75.6103–.6104 (1984) (waiving governmental immunity generally, but listing 17 exceptions); N.H. REV. STAT. ANN. § 507 B:2 (Supp. 1995) (abolishing immunity as to ownership, occupation, maintenance, or operation of motor vehicles and public premises); OKLA. STAT. tit. 51, § 153 (1988) (allowing liability for negligent conduct within scope of employment if private person would be liable in same situation under laws of state); S.C. CODE ANN. § 15-78-40 (Law. Coop. Supp. 1996) (waiving immunity for general tortious acts, but listing exceptions to general waiver); TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986) (waiving judicially created doctrine of governmental immunity in limited circumstances). *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1044–47 & nn.27–31 (5th ed. 1984) (outlining different positions states have taken on doctrine of governmental immunity).

7. *See, e.g.*, N.Y. CT. CL. ACT § 8 (McKinney 1989) (waiving common-law doctrine of governmental immunity); WASH. REV. CODE ANN. § 4.92.090 (West 1988) (removing governmental immunity legislatively); Stone v. Arizona Highway Comm'n, 381 P.2d 107, 112 (Ariz. 1963) (abrogating substantive defense of governmental immunity); Colorado Racing Comm'n v. Brush Racing Ass'n, 316 P.2d 582, 585–86 (Colo. 1957) (eliminating governmental immunity and noting that ancient immunity is "proper subject for discussion by students of mythology"); Smith v. State, 473 P.2d 937, 943 (Idaho 1970) (abrogating common-law doctrine of governmental immunity); Rice v. Clark County, 382 P.2d 605, 606 (Nev. 1963) (removing governmental immunity for counties and county officials); Ayala v. Philadelphia Bd. Pub. Educ., 305 A.2d 877, 878 (Pa. 1973) (eliminating doctrine of governmental immunity); Holytz v. City of Milwaukee, 115 N.W.2d 618, 625 (Wis. 1962) (abrogating rule of governmental tort immunity).

result, governmental immunity has caused "'confusion not only among the various jurisdictions, but almost always within each jurisdiction.'"[8]

In Texas, specifically, principles of governmental immunity are often misconstrued.[9] The Texas law of governmental immunity is a confusing maze of common-law principles and statutes.[10] Which principles of governmental immunity apply to a particular situation in Texas depends on whether the defendant is a state entity or an official employee, whether the cause of action arose under state or federal law, and whether the wrong committed constitutes a tort or breach of contract.[11] The general

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8. *Ayala*, 305 A.2d at 884 (quoting KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.07, at 460 (1958)); *see* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1044–45 (5th ed. 1984) (illustrating different sovereign immunity laws in various jurisdictions); Mary S. Hack, Note, *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, 58 MO. L. REV. 743, 746–47 (1993) (explaining history of sovereign immunity and noting significant differences between states); *see also* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS, app. 3, at 206 (1983) (discussing doctrine of sovereign immunity in state courts).

9. *See* Glenn Callison, Note, Floyd v. Willacy: *Hospital Policy Prognosis—Complications Caused by TTCA and Equal Protection*, 39 BAYLOR L. REV. 573, 580 (1987) (commenting on confusion in Texas concerning sovereign immunity doctrine). One commentator has noted that changing philosophies over time have left a trail of conflicting cases. Carey E. Smith, *Suits Against the State—Differences Between Immunity Against Suit and Immunity from Liability*, *in* STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, SUING AND DEFENDING GOVERNMENTAL ENTITIES, U, U–2. Although many cases are accurate, they are so narrowly written that the reader is often misled. *Id.* at U–3; *see* Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 458 (Cal. 1961) (explaining that there has been "misstatement, confusion and retraction" concerning governmental immunity in United States); Bale v. Ryder, 286 A.2d 344, 345 (Me. 1972) (describing how governmental immunity has been misconstrued and misapplied in United States).

10. *See* Dawn L. Carmody, *Individual Immunity: State and Federal Standards* (identifying different standards applied to common-law doctrine of governmental immunity in Texas and noting extreme differences in standards), *in* STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, SUING AND DEFENDING GOVERNMENTAL ENTITIES, J, J–1 (1995); *cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986) (waiving governmental immunity if negligence arises from operation or use of motor vehicles, or from defective condition or use of real or tangible personal property); *York*, 871 S.W.2d at 177 (noting that Texas Tort Claims Act was enacted to waive immunity only in certain instances and restating basic rule that principles of sovereign immunity protect state from suit). *Compare* Boozier v. Hambrick, 846 S.W.2d 593, 596 (Tex. App.—Houston [1st Dist.] 1993, no writ) (determining that police cannot be liable for injuries resulting from negligently filing criminal activity reports) *with* Browning v. Graves, 152 S.W.2d 515, 519 (Tex. Civ. App.—Fort Worth 1941, writ ref'd) (determining that sheriffs and jailers may be liable for injuries inflicted while caring for prisoners).

11. *See, e.g.*, *Chambers*, 883 S.W.2d at 656 (discussing qualified immunity doctrine as it applies to federal claims); *York*, 871 S.W.2d at 177 (noting that sovereign immunity protects state from negligent conduct of its employees); Whitehead v. University of Tex., 854 S.W.2d 175, 179 (Tex. App.—San Antonio 1993, no writ) (declaring that official immunity,

rule with regard to governmental immunity in Texas is that the state and its officers are immune from liability unless the state consents to be sued or otherwise waives its immunity.[12] An exception exists, however, when the state enters into a contract: governmental immunity will not protect the state from wrongful actions taken in a contract situation because the state is deemed to have waived its immunity.[13]

In recent years, a few Texas courts have created an exception to the contract exception by holding that while the state waives immunity from liability when it contracts, it does not waive immunity from suit.[14] This subtle and technical distinction has led to confusion among Texas courts.[15] In 1994, the Texas Supreme Court granted writ of error in

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unlike sovereign immunity, protects employees from liability when they are sued in their personal capacity); HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 6.18 (3d ed. 1992) (stating that principles of sovereign immunity can be treated differently depending on status of defendant); Susan L. Smith, *Government Immunity Issues: Can the King Do No Wrong?*, NAT. RESOURCES & ENV'T, Summer 1991, at 17 (discussing differences between official and sovereign immunity).

12. *See* Duhart v. State, 610 S.W.2d 740, 743 (Tex. 1980) (announcing that state is not liable for torts committed by its employees); Lowe v. Texas Tech Univ., 540 S.W.2d 297, 301 (Tex. 1976) (reiterating basic rule that sovereign is immune from liability for torts); Gerald T. Wetherington & Donald I. Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 FLA. L. REV. 1, 8 (1992) (asserting that state governments are immune from tort liability unless immunity is waived); *see also* Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 513 (Tex. App.—Texarkana 1988, writ denied) (restating that state is not liable for torts committed by its officers and agents unless statutory provisions allow for liability).

13. *See, e.g.*, Fristoe v. Blum, 92 Tex. 76, 79, 45 S.W. 998, 999 (1898) (establishing that law of sovereign immunity does not apply when state becomes contracting party); Texas Dep't of Health v. Texas Health Enters., 871 S.W.2d 498, 506 (Tex. App.—Dallas 1993, writ denied) (allowing remedy against state agency by holding that immunity does not apply when state contracts); Ferris v. Texas Bd. of Chiropractic Examiners, 808 S.W.2d 514, 518 (Tex. App.—Austin 1991, writ denied) (following general rule that sovereign immunity does not bar citizen's right to enforce contractual obligations); Industrial Constr. Management v. DeSoto Indep. Sch. Dist., 785 S.W.2d 160, 163 (Tex. App.—Dallas 1989, no writ) (holding that sovereign immunity does not apply to contracts made by state).

14. *See* Texas S. Univ. v. Federal Sign, 889 S.W.2d 509, 511 (Tex. App.—Houston [14th Dist.] 1994, writ granted) (refusing to waive sovereign immunity when state contracts and barring remedy against state university); Green Int'l v. State, 877 S.W.2d 428, 432 (Tex. App.—Austin 1994, writ dism'd by agr.) (finding waiver of immunity from liability, but no waiver of immunity from suit); Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592–93 (Tex. App.—Austin 1991, writ denied) (rejecting established rule that sovereign immunity does not apply when state contracts and declaring that state is still immune from suit).

15. *Compare Federal Sign*, 889 S.W.2d at 511 (distinguishing between immunity from suit and immunity from liability, and protecting state from breach of contract claim) *and Green Int'l*, 877 S.W.2d at 432–33 (applying exception to exception when state contracts and barring remedy against state even though state failed to pay part of total cost for prison) *with Texas Health Enters.*, 871 S.W.2d at 506 (allowing claim against state and determining that sovereign immunity does not apply when state contracts) *and Ferris*, 808

Green International v. State[16] to help alleviate some of the confusion; however, the case was settled only days before the scheduled date for oral argument. Nonetheless, on November 9, 1995, the Texas Supreme Court granted writ in *Texas Southern University v. Federal Sign*,[17] another case involving governmental immunity, the resolution of which may resolve the courts' confusion.

This Comment sorts through some of the various immunity principles that have evolved in Texas and evaluates whether sovereign immunity should apply when the state contracts with a private citizen. Part II of this Comment examines the archaic but deeply rooted values that ultimately drive governmental immunity in Texas. Part III discusses the subtle distinctions between sovereign, official, and governmental immunity generally, as well as the exception created in contract situations in Texas and other states. Part III also analyzes the growing trend in Texas toward defeating this exception by applying an exception to the contract exception. Finally, Part IV argues that the exception to the exception should be abrogated in Texas because protecting the government when it contracts results in unconstitutional takings and runs afoul of important public policy.

II. GOVERNMENTAL IMMUNITY IN GENERAL

A. *English Roots*

The doctrine of governmental immunity began with William Blackstone's infamous phrase, "The King can do no wrong."[18] This legal fiction, used to describe the principles behind sovereign immunity in

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S.W.2d at 518 (stating that "sovereign immunity does not stand as a bar to a citizen's right to enforce contractual obligations entered into by the state or any of its agencies").

16. 877 S.W.2d 428 (Tex. App.—Austin 1994, writ dism'd by agr.).

17. 889 S.W.2d 509 (Tex. App.—Houston [14th Dist.] 1994, writ granted).

18. 1 WILLIAM BLACKSTONE, COMMENTARIES *238; *see, e.g.*, Stone v. Arizona Highway Comm'n, 381 P.2d 107, 109 (Ariz. 1963) (discussing Blackstone's theory); Corum v. University of N. Carolina, 413 S.E.2d 276, 291 (N.C. 1992) (noting Blackstone's phrase); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1929) (relating how Blackstone's phrase became popular); Janell M. Byrd, *Rejecting Absolute Immunity for Federal Officials*, 71 CAL. L. REV. 1707, 1709 (1983) (tying origin of governmental immunity to Blackstone's phrase); Mary S. Hack, Note, *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, 58 MO. L. REV. 743, 746 (1993) (noting that sovereign immunity is based on Blackstone's maxim); Susan L. Smith, *Governmental Immunity Issues: Can the King Do No Wrong?*, NAT. RESOURCES & ENV'T, Summer 1991, at 16–17 (examining reliance of American courts on aphorism "The King can do no wrong"). *But see* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (arguing that governmental immunity is not based on illogical English maxim, but rather on practical ground that "there can be no legal right as against the authority that makes the law on which the right depends").

eighteenth-century England, was strictly adhered to by American colonists.[19] Today, sovereign immunity is encompassed by the broader doctrine of governmental immunity, which is applied in nearly every state[20] even though the survival of the doctrine remains something of a riddle.[21] As one commentator explained, the doctrine of governmental immunity "rests [on an English principle], which without sufficient understanding

19. *See* Bertrand v. Board of County Comm'rs, 872 P.2d 223, 225 (Colo. 1994) (recognizing that governmental immunity has become fixture of American jurisprudence); *see also* Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 458 (Cal. 1961) (criticizing immunity doctrine as based on misreading of ancient phrase, "The King can do no wrong"); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 5–9 (1972) (examining colonists' application of sovereign immunity doctrine); *cf.* THE FEDERALIST No. 81, at 548 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (suggesting that sovereign nature is to resist nonconsensual suits by individuals).

20. *See, e.g.*, Grant v. Davis, 537 So. 2d 7, 8 (Ala. 1988) (acknowledging that "discretionary function immunity" in Alabama is immunity from tort liability afforded to public officials); Williams v. Horvath, 548 P.2d 1125, 1127 (Cal. 1976) (paraphrasing California's government code, which created statutory sovereign immunity doctrine); Everton v. Willard, 468 So. 2d 936, 937 (Fla. 1985) (discussing how discretionary authority of state entity or officer is protected from tort liability by sovereign immunity); Lawton v. City of Pocatello, 886 P.2d 330, 334 (Idaho 1994) (summarizing Idaho's position on sovereign immunity doctrine); Collins v. Heavner Properties, 783 P.2d 883, 886 (Kan. 1989) (examining and applying Kansas's governmental immunity doctrine); Commonwealth v. Elm Medical Lab., 596 N.E.2d 376, 380 (Mass. App. Ct. 1992) (discussing both statutory and common-law principles of governmental immunity in Massachusetts); Ross v. Consumers Power Co., 363 N.W.2d 641, 649–52 (Mich. 1984) (noting that sovereign immunity applies to state and its entities); Security Inv. Co. v. State, 437 N.W.2d 439, 441 (Neb. 1989) (evaluating Nebraska Tort Claims Act and noting that common-law doctrine of governmental immunity will only be waived when expressly provided); Garcia v. Albuquerque Pub. Sch. Bd., 622 P.2d 699, 701 (N.M. Ct. App. 1980) (explaining that New Mexico Legislature reinstated governmental immunity after doctrine was judicially abolished); Slade v. Vernon, 429 S.E.2d 744, 746 (N.C. Ct. App. 1993) (invoking North Carolina rule that state is immune from suit under doctrine of sovereign immunity unless it consents to be sued); DeWitt v. Harris County, 904 S.W.2d 650, 652 (Tex. 1995) (attempting to clarify common-law sovereign immunity principles in Texas).

21. *See* Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1043–44 (1994) (reporting Supreme Court Justice Wilson's criticism that "sovereign immunity was philosophically antithetical to any form of government, pragmatically antithetical to a democracy, and clearly not contemplated by the words of the Constitution"); *see also* Langford v. United States, 101 U.S. 341, 343 (1879) (noting that application of English sovereign immunity doctrine is illogical in American society); *Stone*, 381 P.2d at 110 (opining that "[t]he doctrine of English common law seems to have been wind blown across the Atlantic as were the pilgrims on the Mayflower and landed as if by chance on Plymouth Rock"); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 2 (1972) (discussing changes in governmental immunity over years in America and noting that confusion has generally masked these changes).

was introduced with the common law into this country, and has survived mainly by reason of its antiquity."[22]

In England, suits brought against the King were disfavored because the existence of a court with jurisdiction over the Crown implied that the King was inferior.[23] English sovereign immunity was based on the theory that because the King was the source of all laws, no legal right against the King could exist.[24] However, English sovereign immunity, unlike the American version, did not dictate that governmental wrongs always escape remedy.[25] In fact, by 1789, it was well established in England that sovereign immunity did not completely bar relief.[26]

B. *Assimilation into American Law*

Application of the English governmental immunity doctrine in the United States "is one of the mysteries of legal evolution."[27] Not long

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22. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924).

23. *See* Bale v. Ryder, 286 A.2d 344, 346 (Me. 1972) (explaining that in English court system, no court was above King); Cooper v. Rutherford County, 531 S.W.2d 783, 786 (Tenn. 1975) (noting that King was not answerable to any court); *see also* W.S. Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141, 142 (1922) (noting that King was immune because "no Lord could be sued in his own court"); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963) (noting that King was immune from suit because one could not issue writ against oneself).

24. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 625 (8th ed. 1988).

25. *See Langford*, 101 U.S. at 343 (explaining that English immunity of King did not imply that government could do no wrong); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 3 (1972) (examining different "effective machinery" that Englishmen used to redress wrongs committed by King); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963) (discussing various claims that could be pursued against Crown). For a detailed analysis of the various remedies against the King in early England, see W.S. Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141, 141–64 (1922).

26. *See* Feather v. The Queen, 122 Eng. Rep. 1191, 1205 (Q.B. 1865) (discussing situations in which recovery could be sought against Crown under early English law, including suits arising out of contract with sovereign); *see also* Thacker v. Board of Trustees, 298 N.E.2d 542, 556 (Ohio 1973) (Brown, J., dissenting) (discussing petitions and other special remedies available at common law to recover from sovereign); *Muskopf*, 359 P.2d at 458 (noting that in England, substantial relief was allowed against King and compensation was rarely denied); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 3 (1972) (noting that petitions of right allowed citizens redress against King in early England); Jeremy Travis, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. REV. 597, 604–05 (1982) (tracking various ways injured party could petition King for relief).

27. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924); *see* Jones v. Knight, 373 So. 2d 254, 259 (Miss. 1979) (Bowling, J., dissenting) (discussing riddle behind governmental immunity in America and quoting Borchard's famous phrase); *see also* Dixon v. Picopa Constr. Co., 755 P.2d 421, 428 (Ariz. Ct. App. 1987) (Lacagnina, C.J.,

after ratification of the Constitution, the United States Supreme Court addressed the issue of governmental immunity in *Chisholm v. Georgia*.[28] Looking for guidance in answering the question of whether governmental immunity existed in the United States, the Court found no answers in early legal precedent.[29] The Court also looked to the Constitution, but found nothing in its text barring suits against the states or the federal government.[30] Consequently, the Court determined that governmental immunity had no place in American society.[31]

The *Chisholm* decision sent a shockwave throughout the states.[32] In response came the Eleventh Amendment, which prohibits the United States judiciary from exercising jurisdiction in any suit "commenced or

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dissenting) (recognizing that even though Americans overthrew English King, immunity doctrine somehow became entrenched in American law), *vacated on other grounds*, 772 P.2d 1104 (1989); Thacker v. Board of Trustees, 298 N.E.2d 454, 553 (Ohio 1973) (Brown, J., dissenting) (arguing that immunity doctrine had no place in American society after Revolution because "sovereignty could not reside in deposed King").

28. 2 U.S. (2 Dall.) 419, 421–25 (1793); *see also* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 7 (1972) (noting that just six years after signing of Constitution, Supreme Court was squarely faced with issue of sovereign immunity); Jeremy Travis, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. REV. 597, 608–09 (1982) (explaining that sovereign immunity was one of first issues Supreme Court faced).

29. *See Chisholm*, 2 U.S. (2 Dall.) at 424–45 (delving into history of foreign countries looking for answers regarding proper scope of governmental immunity).

30. *See id.* at 428 (stating that Constitution vests jurisdiction in Supreme Court over state as defendant in suit brought by private citizen of another state). *But cf.* Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 6 (1924) (noting that one dissenting Justice in *Chisholm* advocated that sovereign immunity doctrine is fundamental common-law notion of supreme power resting with King).

31. *See Chisholm*, 2 U.S. (2 Dall.) at 432 (relying on Article III, § 2 of Constitution to find that consent of state to be sued is not required in controversies between one state and citizens of another state); *see also* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 7 (1972) (reviewing *Chisholm* and noting that Supreme Court determined that Article III's language, "controversies between a state and citizens of another state," meant state could be sued without consent); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19 (1963) (explaining how *Chisholm* was based on Article III of Constitution); *The Sovereign Immunity of the States: The Doctrine and Some of Its Recent Developments*, 40 MINN. L. REV. 234, 236 (1956) (criticizing Supreme Court for contradicting Founding Fathers by determining that state could be sued by one of its citizens).

32. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890) (explaining that *Chisholm* decision created such "a shock of surprise throughout the country" that 11th Amendment was quickly passed); Mary S. Hack, Note, *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, 58 MO. L. REV. 743, 747 (1993) (stating that *Chisholm* decision created small national crisis and led to adoption of 11th Amendment); *The Sovereign Immunity of the States: The Doctrine and Some of Its Recent Developments*, 40 MINN. L. REV. 234, 236 (1956) (describing storm of protest following *Chisholm* decision).

prosecuted against one of the United States by Citizens of another State."[33] Thereafter, in *Cohens v. Virginia*,[34] the Supreme Court interpreted the Eleventh Amendment to mean that an individual could no longer sue a state *eo nomine* in federal court, and governmental immunity has existed ever since.[35]

The doctrine of governmental immunity was well established across the United States by the time Texas adopted it in 1847.[36] For almost a century, if the government committed a wrong, it needed only assert governmental immunity to escape liability.[37] In 1946, however, Congress passed the Federal Tort Claims Act (FTCA),[38] which waives governmental immunity for the federal government in certain instances.[39] The FTCA marked the beginning of the end of the idea that governmental immunity

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33. U.S. CONST. amend. XI. The Eleventh Amendment was ratified on February 7, 1795, and states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens of Subjects of any Foreign State." *Id.*

34. 19 U.S. (6 Wheat.) 264 (1821).

35. *See Cohens*, 19 U.S. (6 Wheat.) at 411 (determining that 11th Amendment bars suits in federal court by citizens against individual states); *see also Hans*, 134 U.S. at 11 (extending immunity doctrine further than in *Cohens* and finding that state cannot be sued in federal court by any citizen without state's consent); *The Sovereign Immunity of the States: The Doctrine and Some of Its Recent Developments*, 40 MINN. L. REV. 234, 236 (1956) (noting that *Hans* decision completed immunity doctrine by barring any suit in federal court against state by citizens when state has not consented); *cf.* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–3 (1963) (analyzing *Cohens* decision and noting its effects on governmental immunity in suits against United States government).

36. *See Cohens*, 19 U.S. (6 Wheat.) at 411 (establishing governmental immunity in suits against individual states); Hosner v. DeYoung, 1 Tex. 764, 769 (1847) (establishing governmental immunity in Texas); *cf.* Ayala v. Philadelphia Bd. of Educ., 305 A.2d 877, 885 (Pa. 1973) (determining that governmental immunity is judicially created doctrine, which can be judicially abolished). The *Hosner* court did not cite any precedent for its recognition of governmental immunity. *See Hosner*, 1 Tex. at 769 (discussing immunity for entities performing governmental function, but failing to cite authority for such assertions).

37. *See* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (allowing governmental immunity to shield government from liability and asserting that governmental immunity is based on practical ground that there can be no legal right against authority on which that right depends); Rambo v. United States, 145 F.2d 670, 671 (5th Cir. 1944) (protecting government from liability based on governmental immunity), *cert. denied*, 324 U.S. 848 (1945); *see also* Langford v. United States, 101 U.S. 341, 343 (1879) (attempting to justify harsh doctrine of governmental immunity).

38. Pub. L. No. 601, ch. 753, §§ 401–424, 60 Stat. 842, 842–47 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–80 (1988)); *see* Jordan v. United States, 170 F.2d 211, 213 (5th Cir. 1948) (discussing Congress's passage of Federal Tort Claims Act in August 1946).

39. *See* 28 U.S.C. § 2674 (1994) (providing for general waiver of immunity in tort claims against United States government); *see also id.* § 1346(b) (establishing exclusive federal jurisdiction in cases involving injury or loss of property, personal injury, or death re-

totally bars recovery.[40] After Congress passed the FTCA, the growing trend among the states was to modify the common-law doctrine, or to abolish it altogether.[41] Texas, however, struggled with its own immunity doctrine, and although strong support existed for weakening the harsh rule of governmental immunity, Texas was unsure about whether to enact this change judicially or statutorily.[42]

C. *Governmental Immunity in Texas*

Texas courts took the first step toward lowering the immunity shield by creating a distinction between governmental and proprietary functions.[43] "Governmental" functions, which government agents perform in furtherance of the general law to benefit the public at large, continued to fall under the umbrella of immunity.[44] In contrast, "proprietary" functions,

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sulting from negligent acts of federal government employees if private individual would be liable to claimant in accordance with law where act occurred).

40. *See* Joe R. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, by Whom?*, 31 TEX. B.J. 1036, 1069 (1968) (explaining that passage of FTCA basically ended immunity for federal government); Glen A. Majure et al., *The Governmental Immunity Doctrine in Texas: An Analysis and Some Proposed Changes*, 23 SW. L.J. 341, 341 (1969) (noting that FTCA signaled retreat from strict adherence to doctrine of governmental immunity); *see also* Winston v. United States, 305 F.2d 253, 270 (2d Cir. 1962) (applying FTCA liberally and allowing individual to bring suit for damages sustained while incarcerated).

41. *See* Myers v. Genesee County Auditor, 133 N.W.2d 190, 192 (Mich. 1965) (recognizing that county did not enjoy governmental immunity defense with respect to negligent acts of county general hospital staff); Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 795, 803 (Minn. 1962) (abolishing governmental immunity as applied to school district); Harry A. Austin, Case Comment, Boyle v. United Technologies Corporation: *A Questionable Expansion of the Government Contract Defense*, 23 GA. L. REV. 227, 234 (1988) (noting erosion of sovereign immunity, which began with passage of FTCA). *But cf.* Gossler v. City of Manchester, 221 A.2d 242, 244 (N.H. 1966) (refusing to abolish sovereign immunity and listing reasons for refusal, such as catastrophic financial costs and flood of litigation).

42. *See* Joe R. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, by Whom?*, 31 TEX. B.J. 1036, 1070–72 (1968) (discussing various reasons why changes to Texas governmental immunity doctrine should take place statutorily and, conversely, listing reasons to change doctrine judicially). *Compare* Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978) (deferring any waiver of governmental immunity to legislative action) *with* Adams v. Harris County, 530 S.W.2d 606, 609 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (suggesting that any abolition of sovereign immunity should take place in Texas Supreme Court or Texas Legislature).

43. *See* City of Amarillo v. Ware, 120 Tex. 456, 465–66, 40 S.W.2d 57, 60 (1931) (noting distinction between governmental and proprietary functions and state's corresponding immunity, as evidenced by early decisions of Texas courts).

44. *See* City of Houston v. Shilling, 150 Tex. 387, 389, 240 S.W.2d 1010, 1011 (1951) (stating that when municipality acts as arm of state in performing strictly governmental function, it is immune from liability); *see also Ware*, 120 Tex. at 465–66, 40 S.W.2d at 60

which government agents undertake primarily for the benefit of those within the city limits, no longer received protection.[45] Problems arose, however, in actually distinguishing between these two functions.[46]

Courts attempting to make sense of the distinction between governmental and proprietary functions only created more confusion, arbitrarily allowing recovery in some instances and barring relief in others.[47] For

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(declaring that "a municipality is exempt from liability when it performs a duty imposed upon it as the arm or agent of the state in the exercise of a strictly governmental function solely for the public benefit"); Meska v. City of Dallas, 429 S.W.2d 223, 224 (Tex. Civ. App.—Dallas 1968, writ ref'd) (noting that it has "long been the law" for city governments to be immune from liability for torts that arise from actions that constitute government functions).

45. *See Shilling*, 150 Tex. at 390, 240 S.W.2d at 1011–12 (distinguishing between acts that are done for benefit of public at large and those done for benefit of citizens within city limits); Lawrence v. City of Wichita, 906 S.W.2d 113, 116 (Tex. App.—Fort Worth 1995, n.w.h.) (noting that "'[p]roprietary' functions are voluntarily assumed activities primarily benefitting those within the corporate boundaries, as opposed to those activities considered 'governmental,' which benefit the public as a whole"); *cf.* WATERMAN L. WILLIAMS, THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT: TREATING FULLY MUNICIPAL LIABILITY FOR NEGLIGENCE 17 (1901) (explaining that all ministerial duties undertaken by city governments must be performed with reasonable care). The distinction between governmental and proprietary functions has been further explained as follows:

> [G]overnmental functions are those functions enjoined upon a municipality by law and are given by the state as part of its sovereignty. . . . When a municipality acts, but not in connection with duties imposed upon it under powers conferred to it as a legal agency of the State, or as the representative of the State's sovereignty, its acts are proprietary, and it is liable for torts committed by its officers or agents in performing them.

Joseph E. Abercrombie Interests v. City of Houston, 830 S.W.2d 305, 308–09 (Tex. App.—Corpus Christi 1992, writ denied).

46. *See* City of Corsicana v. Wren, 159 Tex. 202, 219, 317 S.W.2d 516, 527 (1958) (Calvert, J., concurring) (attempting to set forth test to determine whether function is governmental or proprietary and determining that if function is for benefit of local citizens, it is proprietary); Crow v. City of San Antonio, 157 Tex. 250, 253, 301 S.W.2d 628, 630 (1957) (noting that street construction is usually protected by governmental-function rule, but refusing to apply confusing law to protect government); Bennett v. Brown County Water Improvement Dist. No. 1, 153 Tex. 599, 601, 272 S.W.2d 498, 499–500 (1954) (struggling with distinction between proprietary and governmental functions as applied to city water district). The court in *Bennett* found that irrigation of water is a proprietary function, and allowed suit against the state even though a water district is defined as a "government" agency. *Bennett*, 153 Tex. at 601, 272 S.W.2d at 499.

47. *Compare* Dancer v. City of Houston, 384 S.W.2d 340, 344 (Tex. 1964) (removing governmental immunity when prisoner was injured on bus on way to work in city park after determining that, although maintaining prisoners is governmental function, cleaning up city park is proprietary function) *and* City of Austin v. Daniels, 160 Tex. 628, 630–35, 335 S.W.2d 753, 755–58 (1960) (allowing cause of action against state when motorist was injured by construction, reasoning that although regulating traffic is governmental function, maintaining streets in reasonably safe condition is proprietary function) *with* Whitfield v. City of Paris, 148 Tex. 431, 435, 19 S.W. 566, 567 (1892) (upholding governmental

example, in *Gotcher v. City of Farmersville*,[48] the Texas Supreme Court held that operating and maintaining a sanitation sewer system is a governmental function, and denied recovery for a family whose son had drowned in a cesspool negligently operated by the city.[49] The plaintiffs directed the court's attention to other cases in which recovery was allowed for injuries involving storm sewers,[50] but the court distinguished these cases and refused to waive governmental immunity.[51]

In contrast, in *Dilley v. City of Houston*,[52] the Texas Supreme Court held that operating and maintaining a storm sewer constitutes a proprietary function.[53] Accordingly, the *Dilley* court allowed the plaintiffs to recover damages for the drowning of a young boy that resulted from the City of Houston's improper maintenance of a storm sewer.[54] In reaching its decision, the court reasoned that operation of a storm sewer is a proprietary function because the construction and maintenance of storm sewers benefits the public within the city limits.[55]

Following *Gotcher* and *Dilley*, the confusion continued. First, in *Meska v. City of Dallas*,[56] the Dallas Court of Appeals determined that a city is immune from liability for injuries sustained by individuals who are struck by garbage trucks operated by the city.[57] The court reasoned that the collection, removal, and disposal of garbage had long been considered a governmental function.[58] Next, however, in *City of Houston v. Shilling*,[59] the Texas Supreme Court held that the repair of brakes on garbage trucks is not a governmental function and, therefore, that a city is not immune from liability for negligently maintaining the brakes of its garbage trucks.[60] The plaintiff in *Shilling*, who was injured when the automobile she was driving was hit by a city garbage truck, was thus allowed to re-

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immunity and barring remedy against government when individual was negligently shot by policeman trying to shoot dog) *and* City of Abilene v. Woodlock, 282 S.W.2d 736, 738 (Tex. Civ. App.—Eastland 1955, writ ref'd) (denying injunction to stop city ordinance that prohibited parking on street and noting that regulating traffic is governmental function).

48. 137 Tex. 12, 151 S.W.2d 565 (1941).

49. *Gotcher*, 137 Tex. at 14, 151 S.W.2d at 566.

50. *Id.*

51. *Id.*

52. 148 Tex. 191, 222, 222 S.W.2d 992 (1949).

53. *See Dilley*, 148 Tex. at 196, 222, 222 S.W.2d at 995 (holding that defendant was liable because maintaining storm sewer was proprietary function).

54. *Id.*

55. *Id.*

56. 429 S.W.2d 223 (Tex. App.—Dallas 1968, writ ref'd).

57. *Meska*, 429 S.W.2d at 224.

58. *See id.* at 223–24 (denying recovery for plaintiff who was run over in alley by city-owned garbage truck).

59. 150 Tex. 387, 240 S.W.2d 1010 (1951).

60. *Shilling*, 150 Tex. at 390, 240 S.W.2d at 1013.

cover.[61] Therefore, under *Meska* and *Shilling*, while the disposal of garbage was a governmental function, repair and maintenance of city vehicles was a proprietary function.[62] This combination meant that if a citizen was hit by a garbage truck, the citizen could only recover if the truck was defective; if the driver simply failed to apply his brakes, governmental immunity precluded relief.[63]

As a result of such sporadic decisions, the law of governmental immunity in Texas was in disarray.[64] Despite judicial dissatisfaction with the common-law doctrine, however, governmental immunity in Texas continued to shield the government's wrongs.[65] Finally, in 1969, the Texas Legislature passed the Texas Tort Claims Act (TTCA), which took effect on January 1, 1970.[66] The TTCA generally waives governmental immunity

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61. *Id.*

62. *See id.* (establishing that maintenance of garbage truck is not governmental function); *Meska*, 429 S.W.2d at 224 (holding that collection and disposal of refuse is governmental function).

63. *Compare Shilling*, 150 Tex. at 390, 240 S.W.2d at 1013 (allowing recovery for individual hit by city-owned garbage truck because brakes were defective) *with Meska*, 429 S.W.2d at 224 (shielding government from liability when city-owned garbage truck injured individual while performing governmental duty of collecting garbage).

64. *See* Joe R. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, by Whom?*, 31 TEX. B.J. 1036, 1066–72 (1968) (discussing reasons for abolition of governmental immunity, listing reasons to retain governmental immunity, and asserting that governmental immunity must be re-examined because of confusion it has caused); Joe R. Greenhill & Thomas V. Murto, III, *Governmental Immunity*, 49 TEX. L. REV. 462, 463 (1971) (indicating that Texas law is in quandary regarding governmental immunity and distinction between proprietary and governmental functions); James L. Hartsfield, Jr., *Governmental Immunity from Suit and Liability in Texas*, 27 TEX. L. REV. 337, 347–48 (1949) (noting that proprietary/governmental distinction can result in inconsistent holdings); *cf.* Glen A. Majure et al., *The Governmental Immunity Doctrine in Texas: An Analysis and Some Proposed Changes*, 23 Sw. L.J. 341, 359–72 (1969) (discussing other states' treatment of governmental immunity doctrine and proposing changes to help alleviate confusion in Texas).

65. *See, e.g.*, Arseneau v. Tarrant County Hosp. Dist., 408 S.W.2d 802, 804 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.) (denying recovery for employee who sustained injuries on job at state hospital because state hospital performs government functions); Russell v. Edgewood Indep. Sch. Dist., 406 S.W.2d 249, 251 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.) (determining that school systems perform governmental function and, therefore, protecting school district from wrongful discharge claim); Bean v. City of Monahans, 403 S.W.2d 55, 57 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.) (barring remedy against government when city garbage truck driver was injured while trying to dislodge his vehicle); *see also* Joe R. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, by Whom?*, 31 TEX. B.J. 1036, 1066 (1968) (admitting that some Texas Supreme Court decisions regarding proprietary/governmental distinctions appear quite silly).

66. Act of May 14, 1969, 61st Leg., R.S., ch. 292, 1969 TEX. GEN. LAWS 874, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 TEX. GEN. LAWS 3322 (current version at TEX. CIV. PRAC. & REM. CODE § 101.021 (Vernon 1986)). Initially, Governor

for personal injuries and death.[67] More specifically, the TTCA waives immunity for injuries resulting from the use of motor vehicles or from conditions on or the use of property, if the responsible government employee would otherwise be personally liable to the claimant under Texas law.[68]

Since 1970, the Texas doctrine of governmental immunity has consisted of deeply rooted principles of common law, modified by newly created statutory waivers. Although some victims have obtained relief through the TTCA's limited waivers,[69] the common-law doctrine of governmental immunity often protects the government from liability for its wrongs.[70] Twenty-six years after passage of the TTCA, the principles of governmental immunity in Texas, evolving from a previously confused state, have created a difficult maze that can leave anyone daring to enter hopelessly lost.

III. Sovereign Immunity

A. *In General*

1. Distinguished from Governmental Immunity

Part of the confusion among courts dealing with sovereign immunity in Texas has been caused by the misuse of certain key terms.[71] Such confu-

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Smith vetoed the bill for the TTCA, fearing its "broad" and "all-encompassing" scope; however, the legislature modified the bill to quell Governor Smith's objections, and the TTCA took effect on January 1, 1970. *See* H.J. of Tex., 61st Leg., R.S. 1621 (1969) (Message from Governor Smith) (quoting Governor Smith's explanation of why he vetoed first Texas Tort Claims Act); Jordan M. Parker & Francisco Hernandez, Jr., *Use and Non-Use of Tangible Personal Property in Public Hospitals Under Section 101.021 of the Texas Torts Claim Act*, 24 Tex. Tech L. Rev. 131, 140 (1993) (noting modifications to original bill before Governor Smith signed bill into law).

67. Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1) (Vernon 1986).

68. *Id.* § 101.021.

69. *See, e.g.*, Lowe v. Texas Tech Univ., 540 S.W.2d 297, 298–300 (Tex. 1976) (allowing suit against state because furnishing defective equipment to football players fell within TTCA's "use of property" provision); City of Baytown v. Townsend, 548 S.W.2d 935, 940 (Tex. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (finding that net post on tennis court maintained by city constituted "use of property" within provision of TTCA when boy lacerated arm on bolt protruding from post).

70. *See, e.g.*, Diaz v. Central Plains Regional Hosp., 802 F.2d 141, 143 (5th Cir. 1986) (finding exception to TTCA to deny claim when state hospital failed to admit patient who later died); Beggs v. Texas Dep't of Mental Health & Mental Retardation, 496 S.W.2d 252, 253–54 (Tex. App.—San Antonio 1973, writ ref'd) (finding no waiver within TTCA for state employee who was injured when doused with lighter fluid and set on fire by another state employee).

71. *Cf.* Michelle L. Hirschauer, Casenote, 72 U. Det. L. Rev. 685, 690–96 (1995) (referring sporadically to immunity doctrine as governmental immunity and then sovereign immunity); Susan L. Smith, *Government Immunity Issues: Can the King Do No Wrong?*,

sion has led to unnecessary litigation and inappropriate pleading by parties in cases in which a governmental unit is defending its actions or omissions.[72] In addition, litigants asserting or defending against claims of sovereign immunity are often unclear as to the burden of proof in such cases because of the misapplication of terms.[73] Over the years, the terms "governmental immunity" and "sovereign immunity" have been used interchangeably, but the terms actually have two distinct meanings.[74] Sovereign immunity has a narrow definition limited in application to the state and its entities.[75] In contrast, governmental immunity is an expansive

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NAT. RESOURCES & ENV'T, Summer 1991, at 17 (attempting to distinguish between different forms of governmental immunity). *Compare* Texas S. Univ. v. Federal Sign, 889 S.W.2d 509, 511 (Tex. App.—Houston [14th Dist.] 1994, writ granted) (referring to immunity of state as "sovereign immunity," and asserting that "sovereign immunity consists of two basic principles of law") *with* Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592 (Tex. App.—Austin 1991, writ denied) (labeling state's immunity "sovereign immunity" and stating that "governmental immunity" consists of two basic principles).

72. *See* Green Int'l v. State, 877 S.W.2d 428, 437 (Tex. App.—Austin 1994, writ dism'd by agr.) (rejecting plaintiff's claim that governmental immunity was waived because plaintiff failed to properly plead state's consent to be sued).

73. *See id.* (dismissing plaintiff's claim as to sovereign immunity for failing to properly carry burden of proof).

74. *See* Ross v. Consumers Power Co., 363 N.W.2d 641, 649–50 (Mich. 1984) (attempting to distinguish between sovereign immunity and governmental immunity and noting that both terms have been used interchangeably in decisions); *see also* Madsen v. Borthick, 658 P.2d 627, 629 (Utah 1983) (explaining scope of Utah's "Governmental Immunity" act and determining that it includes altered version of common-law doctrine of sovereign immunity); Kenton K. Pettit, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?*, 10 ALASKA L. REV. 363, 369 (1993) (referring to immunity doctrine in one sentence as "sovereign immunity" and in next sentence as "governmental immunity"). *Compare* Guillory v. Port of Houston Auth., 845 S.W.2d 812, 813 (Tex. 1993) (stating that Port Authority, as state entity, is entitled to "governmental immunity") *with* Lynch v. Port of Houston Auth., 671 S.W.2d 954, 954 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (stating that Port Authority, as state entity, is entitled to "sovereign immunity").

75. *See, e.g.*, *Federal Sign*, 889 S.W.2d at 511 (defining elements of sovereign immunity in terms of suits against state only); *Green Int'l*, 877 S.W.2d at 432 (listing principles of sovereign immunity and asserting that state, as sovereign, is protected from liability and suit); Whitehead v. University of Tex. Health Science Ctr., 854 S.W.2d 175, 180 (Tex. App.—San Antonio 1993, no writ) (stating that state agency is shielded from sovereign immunity as arm of state); Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 513 (Tex. App.—Texarkana 1988, writ denied) (recognizing that state agency is immune from liability for negligence of its officers unless statutorily waived); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405, 412 (1993) (explaining that sovereign immunity extends to state and all of its agencies and departments); Gerald T. Wetherington & Donald I. Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 FLA. L. REV. 1, 5 (1992) (noting that sovereign immunity doctrine shields agencies from tort liability); *cf.* Gonzalez v. Avalos, 866 S.W.2d 346, 349 (Tex. App.—El Paso 1993, writ dism'd w.o.j.) (recognizing that when official is sued personally,

term including all governmental subdivisions and their officials, each of which might enjoy the immunity defense.[76] Therefore, sovereign immunity, properly defined, simply falls under the much broader umbrella of governmental immunity.[77]

2. Who and What Sovereign Immunity Protects

Under the doctrine of sovereign immunity in Texas, the state is not liable for the negligent acts of its agents or officers unless the state consents to be sued or immunity has been statutorily waived.[78] Sovereign immunity not only protects the state, but all arms of state government, including boards, universities, and hospitals.[79] Thus, all entities that are

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he is only entitled to official immunity defense, rather than sovereign immunity defense); Baker v. Story, 621 S.W.2d 639, 643 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.) (explaining that when suit concerns liability of government officer individually, rather than liability of sovereign, issue is that of official immunity, rather than sovereign immunity).

76. *See Ross*, 363 N.W.2d at 649–50 (distinguishing between meaning of governmental immunity and sovereign immunity); *see also* Peavler v. Board of Comm'rs, 528 N.E.2d 40, 41 (Ind. 1988) (concluding that municipalities are protected by governmental immunity); Maryland-National Capital Park & Planning Comm'n v. Kranz, 521 A.2d 729, 731 (Md. 1987) (establishing that commissions are protected by governmental immunity); Peterson v. Board of Educ., 855 P.2d 241, 243 (Utah 1993) (including school boards in application of governmental immunity defense). *See generally* Susan L. Smith, *Government Immunity Issues: Can the King Do No Wrong?*, NAT. RESOURCES & ENV'T. Summer 1991, at 16 (discussing various immunity principles, such as sovereign immunity, intergovernmental immunity, and official immunity).

77. *See* Myers v. Genesee County Auditor, 133 N.W.2d 190, 192 (Mich. 1965) (addressing different forms of governmental immunity enjoyed by municipalities and stating that "'sovereign' immunity has been transmogrified into 'governmental' immunity and made applicable to 'inferior' divisions of government"); Joe R. Greenhill & Thomas V. Murto, III, *Governmental Immunity*, 49 TEX. L. REV. 462, 464–73 (1971) (analyzing different principles of governmental immunity in Texas and referring collectively to all principles as "governmental immunity"); *cf.* DeWitt v. Harris County, 904 S.W.2d 650, 653 (Tex. 1995) (discussing various subsets of governmental immunity doctrine in attempt to distinguish between "sovereign" immunity and "official" immunity); *Dillard*, 806 S.W.2d at 592 (analyzing sovereign immunity issue, but referring generally to doctrine as "governmental immunity").

78. *E.g.*, Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208, 211 (Tex. 1989); Lowe v. Texas Tech Univ., 540 S.W.2d 297, 298 (Tex. 1976); Texas Highway Dep't v. Weber, 147 Tex. 628, 630, 219 S.W.2d 70, 71 (1949); *Russell*, 746 S.W.2d at 513; *see* CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 2.13, at 31 (Wesley H. Winborne et al. eds., 1982) (stating that scope of sovereign immunity extends to state's divisions, agencies, and officers); Glenn Callison, Note, Floyd v. Willary: *Hospital Prognosis—Complications Caused by TTCA and Equal Protection*, 39 BAYLOR L. REV. 573, 576 (1987) (explaining that state is not liable for torts committed by its agents or officers).

79. *See, e.g.*, Kassen v. Hatley, 887 S.W.2d 4, 13 (Tex. 1994) (applying sovereign immunity doctrine to state hospital); State Dep't of Highways & Pub. Transp. v. Dopyera, 834 S.W.2d 50, 52 (Tex. 1992) (holding that sovereign immunity protects departments of state);

subdivisions of the state generally can escape liability for the negligent acts of their employees.[80]

This definition of sovereign immunity has led many government officials to assert the defense of sovereign immunity when they are sued individually for their negligent acts.[81] Sovereign immunity, however, generally does not shield government officials because it is limited in application to the state and its entities.[82] Nevertheless, an exception exists to this general rule: courts have held that a suit against a state employee in his official capacity is the same as a suit against the state itself.[83] In

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Harrison v. Texas Bd. of Pardons & Paroles, 895 S.W.2d 807, 809 (Tex. App.—Texarkana 1995, writ denied) (applying sovereign immunity doctrine to state parole board); Sparks v. Texas S. Univ., 824 S.W.2d 328, 330 (Tex. App.—Houston [1st Dist.] 1992, no writ) (recognizing that universities are entities of state and protected by sovereign immunity doctrine); Jennifer D. Brandt, *The Plague of Medical Malpractice Public Hospitals—Texas Adopts a New Standard for Determining Whether a Doctor Has Official Immunity*: Kassen v. Hatley, *887 S.W.2d 4 (Tex. 1994)*, 26 TEX. TECH L. REV. 959, 962 (1995) (explaining that sovereign immunity means that governmental unit is not liable for negligence of its officers).

80. *See* University of Tex. Medical Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994) (determining that suit against state and its entities is generally precluded by sovereign immunity); *Lowe*, 540 S.W.2d at 298 (concluding that state and state agencies are protected from liability by sovereign immunity); *see also Federal Sign*, 889 S.W.2d at 511 (noting that sovereign immunity bars suit against state unless state consents to be sued).

81. *See* Tyrrell v. Mays, 885 S.W.2d 495, 496–97, 499 (Tex. App.—El Paso 1994, writ dism'd w.o.j.) (denying protection for nurses employed at government hospital who argued defense of sovereign immunity because doctrine does not apply to individuals); *Gonzalez*, 866 S.W.2d at 349, 352–53 (denying sheriff's entitlement to sovereign immunity and noting confusion surrounding sovereign immunity doctrine); CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 2.22, at 44 (Wesley H. Winborne et al. eds., 1982) (explaining that sovereign immunity applies only to "state agencies, boards, commissions, departments, and institutions"); *cf.* Harris County v. DeWitt, 880 S.W.2d 99, 100 (Tex. App.—Houston [14th Dist.] 1994) (concluding that sovereign immunity and official immunity are independent from one another and noting that when official is immune, county is not automatically immune), *aff'd*, 904 S.W.2d 650 (Tex. 1995).

82. *See DeWitt*, 904 S.W.2d at 653 (distinguishing between sovereign immunity and official immunity and noting that official immunity protects individual officials while sovereign immunity protects state entities); *Kassen*, 887 S.W.2d at 8 (stating that official immunity protects government officials from personal liability while sovereign immunity protects government entities from liability); *see also Baker*, 621 S.W.2d at 643 (explaining that when issue concerns liability of officer rather than sovereign itself, problem is one of official immunity, not sovereign immunity); *cf.* Copeland v. Boone, 866 S.W.2d 55, 58 (Tex. App.—San Antonio 1993, writ dism'd w.o.j.) (limiting application of official immunity defense to government officers); Chris DeMeo, Note, City of Lancaster v. Chambers: *Official Immunity and the Special Problem of High Speed Chases*, 47 BAYLOR L. REV. 551, 552 (1995) (explaining that official immunity is doctrine that shields officials from liability in certain circumstances).

83. *See, e.g.*, Hafer v. Melo, 502 U.S. 21, 25 (1991) (finding that suit against state official acting in his official capacity is suit against state); *Tyrrell*, 885 S.W.2d at 499 (acknowledging that suits against state officials in their official capacity constitute suits against

these situations, the official is allowed to assert the defense of sovereign immunity.[84] This exception is premised on the idea that a suit is against the sovereign if the judgment sought would deplete the state treasury, interfere with governmental functions, restrain government from acting, or compel it to act.[85]

3. Distinguished from Official Immunity

In addition to the sovereign immunity exception, a government employee often can erect the shield of official immunity to a suit brought against the employee individually. In recent years, Texas courts have made a clear distinction between official immunity and sovereign immunity—terms that are often confused.[86] Both are common-law doctrines, but official immunity protects individual officials from personal liability, while sovereign immunity protects the state and its entities.[87] In other

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state); Pickell v. Brooks, 846 S.W.2d 421, 424 (Tex. App.—Austin 1992, writ denied) (reiterating basic principle that suit against government agent in his official capacity is suit against state); *cf. Gonzalez*, 866 S.W.2d at 349 (describing how employee is personally liable for judgment if sued in his individual capacity, but that if sued in his official capacity, adverse judgment is paid by state).

84. *See Hafer*, 502 U.S. at 25 (stressing that when official is sued in his official capacity, suit is against state and immunities available to state are available to official); *Tyrrell*, 885 S.W.2d at 499 (concluding that government agent sued in his official capacity is entitled to sovereign immunity defense).

85. *See, e.g.*, Land v. Dollar, 330 U.S. 731, 738 (1947) (explaining instances in which suits are actually suits against government that would interfere with government functioning); Simons v. Vinson, 394 F.2d 732, 736 (5th Cir. 1968) (quoting *Land* court in attempting to determine whether suit against officer is actually suit against state); Helton v. United States, 532 F. Supp. 813, 818 (S.D. Ga. 1982) (holding that pursuing suit against officer in official capacity is pursuing suit against state); Robinson v. McAlister, 310 F. Supp. 370, 373 (N.D. Miss. 1970) (determining that judgment against officer is one against state if decree would operate against state); *see also* Sheri S. Weinman, Comment, *Supervisory Liability Under 42 U.S.C. Section 1983: Searching for the Deep Pocket*, 56 MO. L. REV. 1041, 1045–47 (1991) (explaining differences between suing state and suing official and noting that suing official in his official capacity is attempt to deplete state funds).

86. *See Kassen*, 887 S.W.2d at 8 (distinguishing between official and sovereign immunity doctrines and determining that sovereign immunity protects state, while official immunity protects individual officers); Jennifer D. Brandt, *The Plague of Medical Malpractice in Public Hospitals—Texas Adopts a New Standard for Determining Whether a Doctor Has Official Immunity*: Kassen v. Hatley, *887 S.W.2d 4 (Tex. 1994)*, 26 TEX. TECH L. REV. 959, 962 (1995) (noting that concepts of sovereign immunity and official immunity are two distinct concepts); *see also Baker*, 621 S.W.2d at 643 (noting that when issue concerns liability of officer rather than sovereign itself, issue is one of official immunity).

87. *See DeWitt*, 904 S.W.2d at 653 (explaining that official immunity doctrine protects individual officers from personal liability); *Kassen*, 887 S.W.2d at 8 (defining official immunity as doctrine that protects individual employees from personal liability); *Whitehead*, 854 S.W.2d at 179 (reiterating basic principle that official immunity shields individual government agents from personal liability); Chris DeMeo, Note, City of Lancaster v. Chambers:

words, the key difference between official and sovereign immunity is the capacity in which one is sued. If a public officer is sued in his individual or personal capacity, official immunity applies and can protect the official from liability.[88] On the other hand, if an officer is sued only in his official capacity, the suit is treated as one against the state, and the public employee is entitled to raise the sovereign immunity defense.[89]

Official Immunity and the Special Problem of High Speed Chases, 47 BAYLOR L. REV. 551, 553 (1995) (noting that official immunity protects officials in some cases).

88. *See Gonzalez*, 866 S.W.2d at 349 (noting that when officer is sued in individual capacity, he can raise defense of official immunity); *see also DeWitt*, 904 S.W.2d at 653 (applying official immunity defense to government agent sued in his official capacity); CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 6.3, at 231 (Wesley H. Winborne et al. eds., 1982) (explaining that public official is protected from personal liability if sued in his official capacity and that this immunity is distinct from theory of sovereign immunity); Dawn L. Carmody, *Individual Immunity: State and Federal Standards* (tracing development of official immunity and noting that although it was rarely used several decades ago, official immunity is increasingly used as defense for government officials today), *in* STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, SUING AND DEFENDING GOVERNMENTAL ENTITIES, J, J-2 (1995). *But see Copeland*, 866 S.W.2d at 58 (misapplying basic rule and stating that no other immunity than official immunity shields government officers who are sued in their official capacity). The Texas Supreme Court has explained that the purpose behind official immunity is not to protect the negligent conduct of officials, but rather to promote efficiency within bureaucratic institutions so that employees do not waste time defending frivolous charges. *See Kassen*, 887 S.W.2d at 8 (noting that subjecting public officials to litigation leads to inefficient service to general public); *see also* Elizabeth K. Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Roll of Sovereign Immunity*, 5 ADMIN. L.J. 203, 204–05 (1991) (noting that purpose of governmental immunity is to prevent stoppage of governmental duties and functions); *cf.* CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 6.5, at 232–33 (Wesley H. Winborne et al. eds., 1982) (attempting to explain justifications for harsh doctrine of official immunity and listing one reason as avoiding inhibition of officials' discretion). The actual effect of official immunity is to encourage public officials to perform their duties without fear of personal liability for negligent or improper performance. *See Tyrrell*, 885 S.W.2d at 497 (justifying official immunity doctrine on ground that officials must be free to exercise duties without fear of suits that would consume time and energy and only inhibit efficient administration); Harris County v. Ochoa, 881 S.W.2d 884, 887 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (basing official immunity on public policy encouraging public officials to perform duties without fear of liability for their actions); *see also* Elizabeth K. Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L.J. 203, 209 (1991) (explaining that governmental immunity exists to encourage officials "to take bold, decisive action").

89. *See Hafer*, 502 U.S. at 25 (showing that because official-capacity suit seeks to impose liability on state, official is able to raise any defense available to state, including sovereign immunity); *see also* Simons v. Vinson, 394 F.2d 732, 736 (5th Cir. 1968) (illustrating that to determine when suit is actually against sovereign, it is important to determine whether judgment will be paid by state); *Gonzalez*, 866 S.W.2d at 349 (explaining that when agent is sued in official capacity, judgment is paid by state, so it is considered suit against state); *Tyrrell*, 885 S.W.2d at 499 (noting that suit against official in his official

B. *Is Sovereign Immunity Waived When the Government Contracts?*

1. An Important Exception When the State Enters into a Contract

Aside from the problems associated with the misuse of the terms governmental and official immunity in place of the term sovereign immunity, there has been much confusion among Texas courts as to whether sovereign immunity is waived when the government contracts. Almost a century ago, the Texas Supreme Court established an exception to the general rule that the state is protected by sovereign immunity.[90] The exception mandates that the state waives its immunity when it enters into a contract.[91] In 1898, the Texas Supreme Court stated in *Fristoe v. Blum*[92]:

> It is well settled that so long as the state is engaged in making or enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen; but when it becomes . . . a party to a contract with a citizen, the same law applies to it as under like conditions governs the contracts of an individual.[93]

Thus, *Fristoe* recognized an important distinction between the state as a "sovereign" and the state as a "contracting party."[94]

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capacity is suit against state); *cf.* CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 2.28, at 54 (Wesley H. Winborne et al. eds., 1982) (stating that plaintiff cannot defeat governmental immunity simply by characterizing suit as "one form of action instead of another").

90. *See* Fristoe v. Blum, 92 Tex. 76, 79, 45 S.W. 998, 999 (1898) (explaining that when state is performing normal governmental functions, it is protected from liability, but when it enters into contract, it falls under exception to sovereign immunity rule).

91. *See id.* (explaining that sovereign immunity does not apply when state becomes contracting party); *see also* Cooke v. United States, 91 U.S. 389, 398 (1875) (stating that "[i]f [a government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there"); CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 3.20, at 141 (Wesley H. Winborne et al. eds., 1982) (expounding on general rule that when state contracts, it consents to be sued if it breaches contract causing damage to other party).

92. 92 Tex. 76, 45 S.W. 998 (1898).

93. *Fristoe*, 92 Tex. at 79, 45 S.W. at 999.

94. *See id.* (concluding that state, when performing governmental functions, should be regarded as sovereign, but that when state contracts with citizen, it lays aside its sovereign attributes); *see also* Industrial Constr. Management v. DeSoto Indep. Sch. Dist., 785 S.W.2d 160, 163 (Tex. App.—Dallas 1989, no writ) (noting distinction between state as sovereign and state as contracting party).

Fristoe is still followed by Texas courts today.[95] For example, in *Industrial Construction Management v. DeSoto Independent School District*,[96] the Dallas Court of Appeals relied on *Fristoe* to find that a contractual claim against a state agency was not barred by sovereign immunity.[97] The court determined that sovereign immunity does not apply to contracts made by the state or any of its agencies, rejecting the contention that the state's consent is required before a contract claim can be filed against it.[98] Citing *Fristoe*, the court explained that the state's "contracts are interpreted as the contracts of individuals are, and the law which measures individuals' rights and responsibilities measures . . . those of a state."[99] Other Texas courts, also relying on *Fristoe*, appear to have solidified the rule that when a legal contract exists, the state is obligated to perform its end of the bargain and will not be protected by sovereign immunity when it fails to do so.[100]

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95. *See, e.g.*, Texas Dep't of Health v. Texas Health Enters., 871 S.W.2d 498, 506 (Tex. App.—Dallas 1993, writ denied) (holding that state lays aside its sovereign attributes when it contracts with private citizen); Ferris v. Texas Bd. of Chiropractic Examiners, 808 S.W.2d 514, 518 (Tex. App.—Austin 1991, writ denied) (restating rule that sovereign immunity does not bar citizen's right to enforce contractual obligations against state); *Industrial Constr. Management*, 785 S.W.2d at 163 (following rule set forth in *Fristoe* that sovereign immunity doctrine does not apply to contracts made by state); Bache Halsey Stuart Shields, Inc. v. University of Houston, 638 S.W.2d 920, 931 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (citing *Fristoe* and following general rule that when state enters contract, sovereign immunity does not apply). *But see* Texas S. Univ. v. Federal Sign, 889 S.W.2d 509, 511–12 (Tex. App.—Houston [14th Dist.] 1994, writ granted) (barring contract cause of action against state university upon finding that sovereign immunity applied); Green Int'l v. State, 877 S.W.2d 428, 432 (Tex. App.—Austin 1994, writ dism'd by agr.) (preventing contract claim against state based on sovereign immunity principles).

96. 785 S.W.2d 160 (Tex. App.—Dallas 1989, no writ).

97. *See Industrial Constr. Management*, 785 S.W.2d at 163 (holding that sovereign immunity does not apply to contracts made by state).

98. *Id.*

99. *Id.* at 163–64.

100. *E.g.*, *Ferris*, 808 S.W.2d at 518; *Industrial Constr. Management*, 785 S.W.2d at 163–64; *Bache Halsey Stuart Shields, Inc.*, 638 S.W.2d at 931; *see also* Green v. State, 14 P. 610, 611–12 (Cal. 1887) (noting that state may waive sovereign immunity by voluntarily contracting with private party); Carr v. State *ex rel.* Du Coetlosquet, 26 N.E. 778, 779 (Ind. 1891) (determining that by entering into contract, state lays aside its sovereign attributes and is not protected by sovereign immunity); State v. Dennis, 18 P. 723, 726 (Kan. 1888) (introducing exception to sovereign immunity in Kansas when state contracts with citizen); Peter G. Chronis, *City Acts to Parry Bond Suits*, DENV. POST, Apr. 8, 1995, at A1 (relating that sovereign immunity is inapplicable to breach of contract); *Review & Outlook: Dealing with the 'Honest Person,'* WALL ST. J., Aug. 25, 1995, at A8 (stating general rule that sovereign immunity does not apply to contractual acts of government). Relying on a string of early Texas cases, the *Bache Halsey Stuart Shields, Inc.* court considered the contract exception "well settled." *See Bache Halsey Stuart Shields, Inc.*, 638 S.W.2d at 931 (collecting cases that recognized contract exception to doctrine of sovereign immunity).

2. Creating an "Exception to the Exception"—A Mutant Contractual Immunity Doctrine

Despite the *Fristoe* court's creation of an exception to the sovereign immunity doctrine for situations in which the state enters into a contract, an "exception to the exception" has evolved whereby a dual sovereign immunity theory is applied to the contractual immunity waiver: first, the state is immune from liability unless liability is waived; and second, even if the state waives immunity from liability, sovereign immunity protects the state from suit.[101] This subtle distinction means that an injured party must hurdle two obstacles to obtain relief from the state in a contract situation, for even if immunity from liability is waived, immunity from suit still adheres.[102]

Dillard v. Austin Independent School District[103] was one of the first Texas cases to apply this exception to the exception in a contract setting.[104] The underlying dispute in *Dillard* arose after the Austin Independent School District voted to negotiate with the plaintiff for the purchase of land to be used for a new school.[105] The school district eventually purchased a different tract of land, despite the costs the plaintiff expended platting and developing the original tract in anticipation of a

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101. *See, e.g.*, *Federal Sign*, 889 S.W.2d at 511 (noting that after state waives immunity when entering contract, state retains other facets of sovereign immunity); *Green Int'l*, 877 S.W.2d at 432–33 (recognizing that even if state waives immunity from liability, it remains immune from suit); Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592–93 (Tex. App.—Austin 1991, writ denied) (denying relief while refusing to pierce governmental immunity); Glenn Callison, Floyd v. Willacy: *Hospital Policy Prognosis—Complications Caused by TTCA and Equal Protection*, 39 BAYLOR L. REV. 573, 578 (1987) (dividing doctrine of sovereign immunity into immunity from suit/immunity from liability dichotomy). It is important to note that many commentators break the sovereign immunity doctrine into two separate issues: immunity from suit and immunity from liability. *See* CIVIL ACTIONS AGAINST STATE GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 201 (Wesley H. Winborne et al. eds., 1982) (explaining that issues of government liability and immunity from suit are two distinct issues); *see also* JOHN J. FARLEY, III, U.S. DEP'T OF JUSTICE, IMMUNITY OF FEDERAL EMPLOYEES IN PERSONAL DAMAGES ACTIONS 63 (1985) (illustrating that under modern immunity principles, officials are not only protected from liability, but also from burdens of litigation).

102. *See Federal Sign*, 889 S.W.2d at 511 (conceding difficulty in piercing sovereign immunity); Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 514 (Tex. App.—Texarkana 1988, writ denied) (recognizing barriers preventing finding of liability against government entities); *see also Dillard*, 806 S.W.2d at 595–96 (denying relief because immunity was not pierced); *Texas Journal: Court Forecast*, Dow Jones News Serv., Sept. 20, 1995 (reviewing *Green International* case to illustrate that state uses sovereign immunity to defeat contract claims), *available in* Westlaw, TXNEWS Database.

103. 806 S.W.2d 589 (Tex. App.—Austin 1991, writ denied).

104. *Dillard*, 806 S.W.2d at 594–95.

105. *Id.* at 591.

sale.[106] In *Dillard*, the Austin Court of Appeals determined that the *Fristoe* exception to governmental immunity only waives immunity from liability.[107] Thus, the *Dillard* court concluded that although the state consents to liability when it contracts, it remains immune from suit.[108] Consequently, the court applied the exception to the *Fristoe* exception to the claim brought against the Austin Independent School District and denied recovery to the plaintiff.[109] To support its application of this exception to the exception, the *Dillard* court relied on *Missouri Pacific Railroad v. Brownsville Navigation District*,[110] a 1970 Texas Supreme Court case that made only a passing reference to the immunity from suit/immunity from liability distinction.[111]

Three years after *Dillard*, the Austin Court of Appeals revisited its exception to the exception in *Green International v. State*.[112] In *Green International*, the Texas Department of Criminal Justice had contracted with Green International to build three prison units.[113] Green International substantially performed all terms under the contract and the state appropriated the prison units for its use.[114] However, when the state failed to pay the full amount due under the contract, Green International quickly brought suit.[115] Subsequently, the trial court dismissed the plaintiff's claims and the Austin Court of Appeals affirmed, determining that the exception to the exception rendered the state immune from suit.[116] Although the Texas Supreme Court granted writ of error in *Green Inter-*

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106. *Id.*

107. *See id.* at 592 (interpreting *Fristoe* as waiving only immunity from liability when state contracts).

108. *See Dillard*, 806 S.W.2d at 592 (concluding that even though there is no dispute as to state's liability, state remains immune from suit).

109. *See id.* at 593 (reasoning that state, as sovereign, is not amenable to process of courts without consent). Interestingly, the court that rendered the decision in *Dillard* was the same court that only 14 days earlier, in *Ferris*, allowed a claim against a state agency declaring that "[s]overeign immunity does not . . . bar . . . a citizen's right to enforce contractual obligations" against the state. *Ferris*, 808 S.W.2d at 518.

110. 453 S.W.2d 812 (Tex. 1970).

111. *See Missouri Pac. R.R.*, 453 S.W.2d at 813 (stating that "[i]t is necessary to distinguish between two different governmental immunities: (1) immunity from suit without consent even though there is no dispute as to liability of the sovereign; and (2) immunity from liability even though consent to the suit has been granted").

112. 877 S.W.2d 428 (Tex. App.—Austin 1994, writ dism'd by agr.).

113. *Green Int'l*, 877 S.W.2d at 431.

114. *Id.*

115. *Id.*

116. *Id.* at 432–33.

national to consider the newly created exception to the exception, the parties settled just days before the case was to be heard.[117]

Meanwhile, in *Texas Southern University v. Federal Sign*,[118] the Houston Court of Appeals for the Fourteenth Judicial District followed the Austin court's "exception to the exception" reasoning and denied a plaintiff the right to enforce contractual obligations against Texas Southern University (TSU).[119] In *Federal Sign*, the plaintiff submitted a bid to TSU for the delivery and installation of a basketball scoreboard to be used in TSU's Health and Physical Education Facility.[120] After almost three months of negotiating, TSU accepted Federal Sign's proposal in writing and requested that work on the scoreboard begin immediately.[121] Seven months later, however, Federal Sign received a letter from TSU stating that it had found Federal Sign's bid unacceptable and subsequently entered into a new contract with another company to provide the scoreboard.[122]

Sustaining an economic loss of over $90,000, Federal Sign brought suit against TSU for breach of contract.[123] In denying Federal Sign the right to sue TSU, the Houston court first cited *Fristoe* and recognized that when the state becomes a party to a contract, the same law that governs the contracts of individuals applies to the state.[124] However, the court also concluded that the state, while waiving immunity from liability, retains its immunity from suit.[125] Thus, the Houston Court of Appeals extended the line of cases adopting the exception to the exception based on a slippery distinction between liability and suit—a distinction that has prevented many victims from obtaining relief when a state agency breaches a contract.[126]

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117. Fearing the issue involved in *Green International* may not be resolved, prison contractor lobbyists have suggested organizing a private panel to determine awards in prison-contract disputes. *See Dispute Resolution/Sensible Process Should Be Set up for Contractors*, HOUS. CHRON., Apr. 15, 1995, at A28 (arguing against proposed panel, but recognizing that if contractors are wronged by state, they should have recourse).

118. 889 S.W.2d 509 (Tex. App.—Houston [14th Dist.] 1994, writ granted).

119. *See Federal Sign*, 889 S.W.2d at 511 (interpreting *Green International* as barring contract claims against state unless state expressly consents to be sued).

120. *Id.* at 510.

121. *Id.* at 510–11.

122. *Id.* at 511.

123. *Federal Sign*, 889 S.W.2d at 511.

124. *Id.*

125. *Id.*

126. *See, e.g., id.* (rejecting idea that sovereign immunity does not apply to contracts and barring contract cause of action against state accordingly); *Green Int'l*, 877 S.W.2d at 432–33 (using immunity from suit/immunity from liability distinction to bar contract claim against state); *Dillard*, 806 S.W.2d at 592–93 (protecting state from contract claim by deter-

Of this new line of Texas cases, *Missouri Pacific Railroad* appears to be the case cited most often to support the immunity from suit/immunity from liability distinction.[127] However, although *Missouri Pacific Railroad* was the first case in Texas to actually discuss the dual theory, the case did not involve a contract cause of action against the state.[128] Consequently, the Texas Supreme Court opinion devoted just one sentence to the distinction, citing only a *Texas Law Review* article for authority.[129]

Another case that has been cited to support the exception to the exception is *Haden Co. v. Dodgen.*[130] *Haden* is similarly weak authority, though, because it dealt with a permit issue, rather than a contract issue.[131] Additionally, although the *Haden* court referred to sovereign immunity as "immunity from suit,"[132] the court did not expressly distinguish between immunity from suit and immunity from liability.[133] Thus, neither of the cases most often cited in support of the exception to the exception provides a solid basis for departing from the well-established *Fristoe* rule.

Perhaps the true answer to the mystery of where this dual theory originated lies in the confusion of the courts themselves. While some courts refer to sovereign immunity as "immunity from suit," others de-

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mining that even if immunity from liability is waived when state enters contract, immunity from suit still adheres).

127. *See Federal Sign*, 889 S.W.2d at 511 (citing *Missouri Pacific Railroad* to support its ruling that sovereign immunity is two-fold theory); *Green Int'l*, 877 S.W.2d at 432 (citing to *Missouri Pacific Railroad* to support its contention that sovereign immunity is dual theory); *Dillard*, 806 S.W.2d at 592 (citing to *Missouri Pacific Railroad* for authority to support immunity from suit/immunity from liability distinction).

128. *See Missouri Pac. R.R. Co.*, 453 S.W.2d at 812–13 (involving question of whether governmental entity could assert immunity as defense against claims that it negligently caused railroad accident).

129. *See id.* at 813 (attempting to distinguish forms of governmental immunity (citing James L. Hartsfield, Jr., *Governmental Immunity from Suit and Liability in Texas*, 27 TEX. L. REV. 337 (1949))).

130. 158 Tex. 76, 308 S.W.2d 838 (1958); *see Federal Sign*, 889 S.W.2d at 511 (citing to *Haden* to support contention that state is still immune from suit even though it waives immunity from liability in contract); MDACC v. Imagents, Inc., No. 14-94-00693-CV, 1995 WL 557539, at *2 (Tex. App.—Houston [14th Dist.] Sept. 21, 1995, n.w.h.) (using *Haden* to support conclusion that exception to exception bars claim against state).

131. *Haden*, 158 Tex. at 76, 308 S.W.2d at 838. *Haden* involved a plaintiff's request for an injunction to prevent the Game and Fish Commission from raising fees due to an alleged contract between the Commission and the plaintiff. *Id.* at 838–39.

132. *See id.* at 839 (referring to immunity of state agency under Uniform Declaratory Judgments Act as "immunity from suit").

133. *See id.* (identifying state immunity as "immunity from suit," and never mentioning immunity from liability).

scribe it as "immunity from liability."[134] Interestingly, however, the Texas Supreme Court in *Fristoe* did not refer to sovereign immunity as either immunity from suit or immunity from liability; rather, the court broadly stated that sovereign immunity does not apply when the state contracts.[135]

3. How Other States Treat Sovereign Immunity When the Government Contracts

Despite the confusion among Texas courts, several other states, including one jurisdiction that cited *Fristoe* as authority, have completely abolished the doctrine of sovereign immunity for situations in which the state is a contracting party.[136] For instance, focusing on the unfairness of al-

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134. *Compare* Tyrrell v. Mays, 885 S.W.2d 495, 496 (Tex. App.—El Paso 1994, writ dism'd w.o.j.) (stating that government agencies are officially "immune from suit") *and* Garcia v. Maverick County, 850 S.W.2d 626, 628 (Tex. App.—San Antonio 1993, writ denied) (asserting that state and its agencies are immune from tort suits) *and* Lazaro v. University of Tex. Health Science Ctr., 830 S.W.2d 330, 332 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (labeling sovereign immunity as immunity from suit) *with* DeWitt v. Harris County, 904 S.W.2d 650, 652 (Tex. 1995) (identifying immunity of state agencies as "immunity from liability") *and* Bullock v. Regular Veterans Ass'n of United States, Post No. 76, 806 S.W.2d 311, 315 (Tex. App.—Austin 1991, no writ) (referring to sovereign immunity as "immunity from liability") *and* Perry v. Texas A&I Univ., 737 S.W.2d 106, 109 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (applying sovereign immunity principles and calling result "immunity from liability"). An example of the confusion created by the *Dillard* decision is illustrated by one commentator's use of *Dillard* to support the general rule that immunity is waived when government contracts. *See* David La Brec & D. Randall Montgomery, *The Spectre of Governmental Liability*, TEX. TRIAL LAW., Feb. 19, 1996, at 22, 26 (citing *Dillard* to support contention that sovereign immunity is waived when government contracts and asserting that contract is as binding upon government as it is upon ordinary citizen).

135. *Fristoe*, 92 Tex. at 79, 45 S.W. at 999.

136. *See* State v. Mobile & O.R. Co., 78 So. 47, 49 (Ala. 1918) (citing *Fristoe* to support finding that sovereign immunity does not protect state when it contracts with private citizens); *see also, e.g.*, GA. CONST. art. I, § II, cl. IX(c) (waiving defense of sovereign immunity for breach of any contract entered into by state or any of its agencies); LA. CONST. art. 12, § 10(A) (stating that "neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to personal property"); ARIZ. REV. STAT. ANN. 162, § 12-821 (West 1992) (listing legal process that one must undertake to file claims against state); NEV. REV. STAT. ANN. § 41.031 (Michie 1991) (waiving immunity from liability and applying same law to states that is applied to citizens of state); N.M. STAT. ANN. § 37-1-23 (Michie 1995) (protecting states from actions in contract, but waiving immunity to actions based on valid written contracts); Souza & McCue Constr. Co. v. Superior Court of San Benito County, 370 P.2d 338, 339 (Cal. 1962) (stating that "when the state makes a contract with an individual, it is liable for a breach of its agreement in like manner as an individual, and the doctrine of governmental immunity does not apply"); Ace Flying Serv. v. Colorado Dep't of Agric., 314 P.2d 278, 282 (Colo. 1957) (determining that contract constitutes waiver of sovereign immunity); Brown v. Wichita

lowing the state to repudiate an otherwise binding contract, the Indiana Supreme Court in 1891 stated:

> In entering into the contract [the state] laid aside its attributes as a sovereign, and bound itself substantially as one of its citizens does when he enters into a contract. . . . It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation.[137]

To date, approximately half of the states have created a constitutional or statutory right to bring contract actions against the state.[138] For example, Louisiana amended its constitution to read: "Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property."[139] Similarly, the Georgia Constitution explains that Georgia's "defense of sovereign immunity . . . is waived as to any action *ex contractu* for the breach of any written contract."[140] Moreover, New Mexico passed a statute stating that "government entities are granted immunity from actions based on contract, except actions based on a valid written contract."[141]

State Univ., 540 P.2d 66, 85 (Kan. 1975) (abolishing all governmental immunity, including contractual immunity, by declaring that doctrine only "destroys equality and creates special privileges"); State Highway Comm'n v. Wunderlich, 11 So. 2d 437, 438 (Miss. 1943) (reasoning that when state enters into contract, it takes on characteristics of private corporation and is liable for all damages that result from its breach of contract); V.S. DiCarlo Constr. Co. v. State, 485 S.W.2d 52, 54 (Mo. 1972) (explaining why contractual immunity does not make sense by stating that "[the General Assembly] could not have intended a contract completely lacking in mutuality—one obligating the contractor to live up to its promises but imposing no binding obligation or responsibility on the State"); State Bd. of Pub. Affairs v. Principal Funding Corp., 542 P.2d 503, 505 (Okla. 1975) (stating, "[W]e find no justifiable reason why the state should secure to itself the benefits of a contract without assuming the corresponding liabilities").

137. *Carr*, 26 N.E. at 779.

138. *E.g.* GA. CONST. art. I, § 2, para. 9(a); ALASKA STAT. § 09.50.250 (1993); ARIZ. REV. STAT. ANN. § 12-821.01 (1995); CONN. GEN. STAT. § 4-61(a) (1988); HAW. REV. STAT. § 661-1 (1995); ILL. REV. STAT. ch. 37, para. 439.8(b) (1993); MD. CODE ANN., State Gov't § 12-201(a) (1995); MINN. STAT. § 3.751 (1977); NEV. REV. STAT. ANN. § 41.031 (1978); N.H. REV STAT. ANN. § 491:8 (1993); N.M. STAT. ANN. § 37-1-23 (Michie 1978); N.Y. CT. CL. ACT § 8 (Consol. 1991); N.D. CENT. CODE § 32-12-02 (1976); OHIO REV. CODE. ANN. § 2743.02(A)(1) (Baldwin 1992); OR. REV. STAT. § 30.320 (1995); 72 PENN. CONS. STAT. § 4651-1 (1995); R.I. GEN. LAWS § 37-13.1-1 (1987); TENN. CODE ANN. § 9-8-307(a)(1)(L) (1994); UTAH CODE ANN. § 63-30-5 (1993); WASH. REV. CODE § 4.92.010 (1988); W. VA. CODE §§ 14-2-4, 14-2-13 (1982); WIS. STAT. § 18.13 (1986); WYO. STAT. § 1-39-104 (1995).

139. LA. CONST. art. 12, § 10(A).

140. GA. CONST. art. 1, § 2, para. 9(c).

141. N.M. STAT. ANN. § 37-1-23 (Michie 1995).

In addition to the states that have acted through their legislatures, many states have judicially abrogated the sovereign immunity doctrine as it applies to government contracts.[142] The Oklahoma Supreme Court, for example, could "find no justifiable reason why the state should secure to itself the benefits of a contract without assuming corresponding liabilities."[143] Further, the Kansas Supreme Court abolished sovereign immunity altogether, stating that "the doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone involved."[144]

Meanwhile, only three states—Arkansas, Vermont, and Kentucky—have uniformly upheld the sovereign immunity doctrine in contract actions against the state.[145] The minority states' position seems to be based on the idea that even in contract situations, the sovereign nature of state government outweighs a citizen's right to seek redress for a state's breach.[146] Although a few Texas courts of appeal have followed the minority approach, until settled by a definitive statement from the Texas Supreme Court, Texas's law concerning contract actions against the state is in flux, creating divergent outcomes and unjust results.[147]

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142. *E.g.*, State Hwy. Dep't v. Milton Constr., 586 So. 2d 872, 875 (Ala. 1991); *Ace Flying Serv.*, 314 P.2d at 282; Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4, 5 (Fla. 1984); Grant Constr. Co. v. Burns, 443 P.2d 1005, 1010 (Idaho 1968); *Carr*, 26 N.E. at 779); Kersten Co. v. Department of Social Serv., 207 N.W.2d 117, 119–20 (Iowa 1973); *Brown*, 540 P.2d at 85; Drake v. Smith, 390 A.2d 541, 543–44 (Me. 1978); J.A. Sullivan Corp. v. Commonwealth, 494 N.E.2d 374, 377–78 (Mass. 1986); W.H. Knapp Co. v. State, 18 N.W.2d 421, 421 (Mich. 1945); *Wunderlich*, 11 So. 2d at 438; *V.S. DiCarlo Constr. Co.*, 485 S.W.2d at 54; Meens v. State Bd. of Ed., 267 P.2d 981, 983–84 (Mont. 1954); Todd v. Board of Educ. Lands & Funds, 48 N.W.2d 706, 710 (Neb. 1951); P.T.&L. Constr. Co. v. Commissioner, Dep't of Transp., 288 A.2d 574, 577 (N.J. 1972); Smith v. State, 222 S.E.2d 412, 423–24 (N.C. 1976); *Principal Funding Corp.*, 542 P.2d at 505; Kinsey Constr. Co. v. South Carolina Dep't of Mental Health, 249 S.E.2d 900, 902 (S.C. 1978); Wiecking v. Allied Medical Supply Corp., 391 S.E.2d 258, 260 (Va. 1990).

143. *Principal Funding Corp.*, 542 P.2d at 505–06.

144. *Brown*, 540 P.2d at 85.

145. *See* ARK. CONST. art. 5, § 20 (explaining that "[t]he state of Arkansas shall never be made defendant in any of her courts"); VT. STAT. ANN. tit. 12, § 5601 (1987) (clarifying state's tort liability law by saying that statute waiving tort liability does not apply to any claim for "damages caused by the fiscal operations of any state officer or department"); Foley Constr. Co. v. Ward, 375 S.W.2d 392, 393 (Ky. 1964) (overruling earlier decision in which court upheld sovereign immunity when state enters into contract).

146. *See Foley Constr. Co.*, 375 S.W.2d at 393 (explaining retention of sovereign immunity in contract situations).

147. *Compare Ferris*, 808 S.W.2d at 518 (restating rule that sovereign immunity does not bar citizen's right to enforce contractual obligations against state) *and Bache Halsey Stuart Shields, Inc.*, 638 S.W.2d at 931 (citing *Fristoe* and following general rule that when state enter into contract, sovereign immunity does not apply) *with Federal Sign*, 889 S.W.2d at 511–12 (barring contract cause of action against state university upon finding that sover-

IV. WHY TEXAS SHOULD ABROGATE THE "EXCEPTION TO THE EXCEPTION"

In light of the general confusion among Texas courts concerning the application of sovereign immunity in contract settings, some clarification of the law in this area is necessary. Texas courts considering the exception to the exception should realize that application of the concept to contract actions against the state unlawfully deprives plaintiffs of sufficient redress for very real damages. This new exception results in unconstitutional takings of private property and flies in the face of important public policy.

A. *Unconstitutional Takings*

If Texas continues to allow the state government to avail itself of the exception to the *Fristoe* exception, thus denying plaintiffs the right to sue when the state has failed to fulfill contractual obligations, injured parties may be unconstitutionally deprived of property without just compensation.[148] Both the Fifth Amendment to the United States Constitution, through the Fourteenth Amendment's Due Process Clause, as well as Article 1, Section 17 of the Texas Constitution, prohibit the government from taking private property without adequate compensation.[149] Specifically, Article 1, Section 17 of the Texas Constitution provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ."[150]

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eign immunity bars claim) *and Green Int'l*, 877 S.W.2d at 432 (concluding that sovereign immunity principles preclude contract claim against state).

148. *See* Industrial Constr. Management v. DeSoto Indep. Sch. Dist., 785 S.W.2d 160, 163 (Tex. App.—Dallas 1989, no writ) (finding that state cannot take labor, materials, and equipment when it breaches contract because doing so violates Texas Constitution); Application for Writ of Error at 20, Green Int'l v. State, 877 S.W.2d 428 (Tex. App.—Austin 1994, writ dism'd by agr.) (No. 94-0619) (asserting that taking property without paying full contract price results in unconstitutional taking); *see also* Clay Robison, *Texas Testing Wins Ruling on Repayment: Judge Says State Officials Violated Two Agreements*, HOUS. CHRON., Sept. 1, 1995, at 33 (arguing that state does "not have sovereign immunity to behave unconstitutionally").

149. *See* U.S. CONST. amend. V (stating that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation"); TEXAS CONST. art. I, § 17 (establishing that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person"). Justice Oliver Wendell Holmes interpreted the Takings Clause as follows: "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

150. TEXAS CONST. art. 1, § 17.

The way in which application of the exception to the exception can constitute an unconstitutional taking is best illustrated by example. A common scenario that can trigger contractual sovereign immunity occurs when the state contracts with a private citizen to construct a building, such as a prison or cafeteria.[151] After the work is complete and the state appropriates and uses the completed structure, the state might refuse to pay the price for which the parties contracted.[152] In such a situation, the state's actions constitute a taking of the citizen's property without due process of law and without just compensation in violation of both the federal and Texas constitutions.[153]

Many courts have used this takings analysis to prevent states or state entities from invoking the exception to the exception to avoid contractual liability.[154] For example, in *Industrial Construction Management v.*

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151. *See, e.g.*, Fireman's Ins. Co. v. Board of Regents of Univ. of Tex., 909 S.W.2d 540, 541 (Tex. App.—Austin 1995, writ filed) (raising contractual governmental immunity issue when state university hired private contractor to build nuclear engineering testing laboratory); Green Int'l v. State, 877 S.W.2d 428, 433 (Tex. App.—Austin 1994, writ dism'd by agr.) (addressing contract cause of action after state breached contract with private citizen for construction of prison); *Industrial Constr. Management*, 785 S.W.2d at 163 (entertaining contract claim against state when school system failed to pay balance owed under contract for construction of cafeteria).

152. *See Fireman's Ins. Co.*, 909 S.W.2d at 541 (addressing contractual governmental immunity issue when state university refused to pay over $630,000 owed under contract to build nuclear engineering testing laboratory); *Green Int'l*, 877 S.W.2d at 433 (considering contract claim against state after state breached construction contract with private citizen by failing to pay determined amount but using property anyway); *Industrial Constr. Management*, 785 S.W.2d at 163 (addressing contract cause of action against school system when school system breached contract with private citizen for construction of cafeteria).

153. *See Industrial Constr. Management*, 785 S.W.2d at 163 (illustrating that failing to pay for materials and property under contract, but appropriating them for benefit of public, is nothing more than illegal conduct in violation of Texas Constitution); *cf.* Imagents, Inc. v. University of Tex. Health Science Ctr., No. 14-94-00781-CV (Tex. App.—Houston [14th Dist.] Oct. 12, 1995, n.w.h.) (recognizing that when state takes property without adequate compensation, such violation overrules law of sovereign immunity) (not designated for publication), 1995 WL 600572, at *2; *Green Int'l*, 877 S.W.2d at 433 (acknowledging that takings cause of action overrides any principles of sovereign immunity). *But cf. Green Int'l*, 877 S.W.2d at 434–35 (asserting that no taking has occurred when state acts under "color of right" to take or withhold property, or when private party consents to government's possession of property).

154. *See* Grant Constr. Co. v. Burns, 443 P.2d 1005, 1010 (Idaho 1968) (prohibiting sovereign immunity from barring contract claim, reasoning that "to deny the right to sue in such a contractual situation would be to deprive the damaged contracting party of property without due process of law"); Brown v. Wichita State Univ., 540 P.2d 66, 82–84 (Kan. 1975) (noting that effects of sovereign immunity in contracts "are incompatible with the constitutional safeguards established by both the federal and [state] Constitutions"), *rev'd on other grounds*, 547 P.2d 1015 (Kan. 1976); *Industrial Constr. Management*, 785 S.W.2d at 163

DeSoto Independent School District,[155] not only did the Dallas Court of Appeals reject the idea that sovereign immunity applies to the government when it contracts, but the court also determined that to allow sovereign immunity would result in judicial approval of a constitutional violation.[156] The school district in *Industrial Construction Management* entered into a contract for the construction of a school cafeteria.[157] The school district, however, failed to pay more than $30,000 of the cost of the cafeteria.[158] In rejecting the school district's attempt to invoke sovereign immunity, the court stated: "DeSoto may not take the labor, materials and equipment of Industrial in the form of a completed cafeteria . . . without adequate compensation determined by the courts of this state."[159]

In addition to the Dallas Court of Appeals, even the Texas courts finding that sovereign immunity ordinarily protects the government when it breaches a contract concede that immunity is waived when the state unconstitutionally takes property for public use without adequate compensation.[160] It is important to note, however, that not all situations in which a state refuses to pay will result in a taking. For instance, if the private contracting party has failed to render adequate performance under the contract, or the state has not actually appropriated any property for its use, there has been no taking.[161] Consequently, in cases in which an unconstitutional taking is alleged, the plaintiff must show that it fulfilled its

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(allowing recovery against state based on finding that failure to pay for property taken under contract violates Texas Constitution).

155. 785 S.W.2d 160 (Tex. App.—Dallas 1989, no writ).

156. *Industrial Constr. Management*, 785 S.W.2d at 163.

157. *Id.* at 161.

158. *Id.*

159. *Id.* at 163.

160. *See, e.g., Imagents, Inc.*, 1995 WL 600572, at *2–3 (analyzing contract cause of action against state and recognizing that constitutional "takings" violation overrides sovereign immunity principles); *Fireman's Ins. Co.*, 909 S.W.2d at 541 (recognizing that sovereign immunity does not bar cause of action for unconstitutional taking, but denying relief for failure to properly plead claim); *Green Int'l*, 877 S.W.2d at 433 (denying takings cause of action against state because of improper pleadings, but recognizing that unconstitutional taking prevents sovereign immunity from protecting state).

161. *See* Texas S. Univ. v. Federal Sign, 889 S.W.2d 509, 510–11 (Tex. App.—Houston [14th Dist.] 1994, writ granted) (addressing breach of contract claim against state university in which school appropriated no property for its use). Texas Southern University contracted with Federal Sign to build a scoreboard. *Id.* at 510. When the school board approved Federal Sign's bid, the school instructed the company to begin construction. *Id.* at 510–11. Several months later, TSU told Federal Sign that its proposal was unacceptable and the school hired another contractor, never taking control of or using the scoreboard Federal Sign manufactured. *Id.* at 511.

end of the bargain and the state subsequently performed certain intentional acts that resulted in a taking of property for public use.[162]

In summary, when a private individual builds a cafeteria or a prison, for example, that the state takes and uses, but does not pay for, the state has intentionally failed to perform its obligations under the contract.[163] The state has essentially taken the property and put it to use for the benefit of the public, to the detriment of the private contractor.[164] Shielding the government when it breaches a contract in this manner by allowing it to take property without full compensation places a judicial stamp of approval on a constitutional violation.[165] Accordingly, Texas's exception to the exception regarding sovereign immunity in contract should be abrogated because it sanctions unconstitutional takings.

B. *Public Policy Concerns*

Notwithstanding the threat of unconstitutional takings inherent in the exception to the exception, allowing the government to escape liability for breach of contract also violates public policy. One of the first chapters in any contracts hornbook explains the concept of "mutuality of obligations."[166] Mutuality of obligations is the basis of contract law and,

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162. *E.g.*, Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980); *Imagents, Inc.*, 1995 WL 600572, at *3; City of Abilene v. Smithwick, 721 S.W.2d 949, 951 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).

163. *See Green Int'l*, 872 S.W.2d at 431–36 (discussing suit for breach of contract when state failed to pay for, but assumed control of, prisons that private parties built); *Industrial Constr. Management*, 785 S.W.2d at 165 (finding for builder on breach of contract claim when state failed to pay full price for cafeteria it contracted to build).

164. *See Green Int'l*, 877 S.W.2d at 431–36 (noting that Green International suffered economic loss, while state benefitted from completed prison units); *Industrial Constr. Management*, 785 S.W.2d at 161 (finding that state put cafeteria to use while contractor suffered loss of over $100,000).

165. *See* Application for Writ of Error at 16, Green Int'l v. State, 877 S.W.2d 428 (Tex. App.—Austin 1994, writ dism'd by agr.) (No. 94–0619) (asserting that application of sovereign immunity to contracts results in judicial approval of constitutional violation); *cf.* United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) (noting that contract rights are form of property that cannot be taken by government for public purpose without just compensation); Robert M. Lawless, *The American Response to Farm Crisis: Procedural Debtor Relief*, 1988 U. ILL. L. REV. 1037, 1047 (explaining that because contract rights are property interests under Constitution, government must comply with due process requirements); James S. Rogers, *The Impairment of Secured Creditors Rights in Reorganization: A Study of the Relation Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973, 988 (1983) (stating that Supreme Court has expressly decided on numerous occasions that contractual rights are property that is protected by due process under Constitution).

166. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 49 (3d ed. 1987) (devoting first chapter to theory of mutual assent); E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CONTRACTS 138 (5th ed. 1982) (addressing nature of assent as part of

when present, binds both parties to the terms of the contract.[167] Without mutuality of obligations, parties could not rely on the terms that they agree upon, and contracts would be unenforceable.[168]

The Texas Supreme Court has held that when two parties voluntarily assent to the terms of a contract and there is a mutuality of obligations, either both parties are bound or neither is bound.[169] Applying this rule of law in the context of government contracts with private citizens, if sovereign immunity allowed the state to "unbind" itself with impunity when it fails to perform its contractual obligations, the private contracting party would have no duty to perform its obligations.[170] Conversely, this rule

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bargaining process); CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 35 (3d ed. 1993) (devoting section to "The Classical System of Contract Law: Mutual Assent and Bargained-for Exchange" after brief introduction to contract law).

167. *See* Texas Gas Utils. Co. v. Barrett, 460 S.W.2d 409, 412 (Tex. 1970) (asserting rule that there must be mutuality of obligations before contract is formed); Portland Gasoline Co. v. Superior Mktg. Co., 150 Tex. 533, 535–36, 243 S.W.2d 823, 824 (1951) (explaining that when there is contractual obligation on one individual, there is obligation on other); *see also* John R. Trentacosta, *Drafting and Litigation Issues in Contract Formation*, 72 MICH. B.J. 656, 656 (1993) (listing essential elements of contract as (1) mutuality of obligations, (2) mutuality of agreement, (3) legal consideration, (4) competent parties, and (5) proper subject matter).

168. *See Barrett*, 460 S.W.2d at 412 (noting that when contract lacks mutuality, it is void and unenforceable); Texas Farm Bureau Cotton Ass'n v. Stovall, 113 Tex. 273, 284, 253 S.W. 1101, 1105 (1923) (stating that mutuality of obligations is essential element of every enforceable contract); *see also* Harry F. Tepker, Jr., *Oklahoma's At-Will Rule: Heeding the Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373, 387–88 (1986) (explaining how mutuality of obligations concept grew from principles of equity, as both parties have obligations and can rely on those obligations); *cf. Review & Outlook: Dealing with the 'Honest Person,'* WALL ST. J., Aug. 25, 1993, at A8 (reviewing pending court decision raising issue of contractual sovereign immunity and asserting that "doing business with the government would become little more than a crap shot" if sovereign immunity were to protect government when it breaches contract).

169. *Barrett*, 460 S.W.2d at 412; *see* WILLISTON ON CONTRACTS § 105A, at 420 (1957) (stating basic rule that in contract, both parties are bound to terms of contract or neither is bound); Murray Tabb, *Employee Innocence and Privileges of Power: Reappraisal of Implied Contract Rights*, 52 MO. L. REV. 803, 815–16 (1987) (noting that mutuality of obligations is based on idea that both parties are bound to terms of contract or neither is bound). *But cf.* Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) (finding that mutuality of obligations is not necessary to make contract binding); Weiner v. McGraw Hill, Inc., 443 S.E.2d 441, 444 (N.Y. 1982) (concluding that lack of mutuality of obligations will not render contract unenforceable); RESTATEMENT (SECOND) OF CONTRACTS § 81(c) (1979) (ignoring basic rule of mutuality of obligations and determining that it is not relevant to enforceable contract).

170. *See* Elizabeth K. Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L.J. 203, 220 (1991) (contending that it is logical that if government is immune from particular action, any contractor engaged in same action under terms of contract should also be im-

would leave no remedy for the state when the private citizen breaches the contract, because no contract exists that is subject to breach when neither party is bound. This situation would clearly be untenable and, therefore, the public policy favoring enforcement of contracts seems also to favor the *Fristoe* holding that the government is not immune from suit in contract situations.

The exception to the exception also violates the public policy against burdening innocent taxpayers. When the state breaches a contract, the private contracting party is not the only victim. Indeed, when the state fails to fulfill its contractual obligations, all Texas citizens suffer because when the state has no obligation to do that for which it has bargained, few parties will be willing to contract with the state.[171] Those parties who do contract with the state will likely attach extra costs to the bid price to cover the risks involved when contracting with the government—extra costs that must eventually be paid by the taxpayers of Texas.[172] Thus, the exception to the exception runs afoul of at least two important public policies and should be abandoned by Texas courts.

V. CONCLUSION

Despite noted flaws in the reasoning behind governmental immunity, the general rule in Texas is clear: governmental immunity protects the government and its officials when they commit wrongs against private citizens. However, in light of the emerging exception to the *Fristoe* exception, the rule is not so clear when the state sets aside its sovereign attributes and becomes a contracting party. This exception to the exception in Texas is an aberration in the area of contractual sovereign immu-

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mune); *see also* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 4.34 (3d ed. 1992) (explaining that mutuality of obligations means that both parties to contract are under obligation to perform promises); *cf.* Mark B. Wessman, *Should We Fire the Gatekeeper?: An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 50 (1993) (noting that no genuine exchange exists when there is no mutuality of obligations because one of parties is not bound).

171. *See* Brief for Petitioner, Green Int'l v. State, 877 S.W.2d 428 (Tex. App.—Austin 1994, writ dism'd by agr.) (No. 94-0619) (contending that pool of willing contractors will become sparse if sovereign immunity continues to protect government when it contracts); *see also* Amelia A. Fogleman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1370 (1993) (explaining that purpose of contractual sovereign immunity is to allay concerns of other businessmen who might not want to contract with state that possesses sovereign immunity).

172. *See* Application for Writ of Error at 19, Green Int'l v. State, 877 S.W.2d 428 (Tex. App.—Austin 1994, writ dism'd by agr.) (No. 94-0619) (noting that public policy is violated when government entities must pay extra costs to enable contractors to cover, or insure against, risk of contracting with party that has no obligation to perform its contractual duties).

nity. Barring claims against the state in contractual situations not only constitutes a minority position in the United States, but the three states that uphold sovereign immunity rely on more than an artificial and contradictory distinction between immunity from suit and immunity from liability.

The Texas Supreme Court has a chance to clear up the confusion over contractual sovereign immunity in *Federal Sign v. Texas Southern University*. The court's job should be fairly easy. The court need not establish any new rule or develop any new law. Instead, the court simply must reaffirm what it decided nearly 100 years ago in *Fristoe v. Blum*: sovereign immunity does not apply when the state contracts with a private citizen.

Many reasons exist to reaffirm *Fristoe*. First, allowing the state or a state entity to realize the benefits of a bargained-for contract without fulfilling its end of the bargain may often result in unconstitutional takings of property. Furthermore, the court must recognize that sovereign immunity in a contract setting violates public policy because it injures innocent victims as well as all Texas taxpayers. Most importantly, however, sovereign immunity should not bar a contract cause of action because the exception to the exception simply makes no sense. No Texas case has ever attempted to justify or adequately explain the dual sovereign immunity theory. Moreover, the distinction between immunity from suit and immunity from liability has evolved into an aberration that shields the government when it wrongly breaches a contract it has voluntarily entered into with a private citizen. Thus, the Texas Supreme Court should join the majority of United States jurisdictions and hold that sovereign immunity does not insulate the government from liability when it contracts with a private citizen.