Texas Public Policy Foundation

July 1, 2025

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The Supreme Court of Texas
201 W. 14th Street, Suite 104
Austin, Texas 78711

RE: Misc. Docket No. 25-9018 – Comments on the Law School Accreditation Component of Texas's Bar Admission Requirements

To whom it may concern:

Historically, this Court directly exercised its authority over the administration of justice by determining accreditation for law schools. Forty-two years ago, this Court abdicated this responsibility by delegating decisions regarding law school accreditation to the American Bar Association (ABA). The Texas Public Policy Foundation (TPPF) submits this comment supporting a return to the Court's historical exercise of authority. This Court's longstanding delegation of accreditation authority to the ABA raises serious constitutional concerns under the private non-delegation doctrine. This Court should therefore reclaim its constitutional prerogative in setting the standards for law school accreditation.

TPPF is a non-profit, nonpartisan research organization founded in 1989 and dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. In accordance with its central mission, TPPF has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Through its Center for the American Future, TPPF litigates constitutional issues

seeking to protect liberty and enforce the text, context, and original public meanings of the United States Constitution and the Texas Constitution. TPPF has appeared on several occasions before this Court.

BACKGROUND

Article 5, Section 31 of the Texas Constitution grants this Court authority to make rules for the efficient administration of justice in Texas Courts. That same section grants the legislature authority to delegate further rulemaking authority to this Court.

Pursuant to that authority, the Legislature has delegated the responsibility of licensing attorneys to this Court. Tex. Gov't Code § 82.021. In doing so, the Legislature was clear that this authority "may not be delegated" further. *Id*.

To make this grant effective, the Legislature likewise gave this Court the power to set the rules of eligibility to practice law, including rules regarding the "course of study" required for eligibility (Tex. Gov't Code § 82.022) and which law schools met that course of study requirement. Tex. Gov't Code § 82.024.

Prior to 1983, this Court exercised that power by adopting rules that (1) required applicants to complete a course of study at an approved law school, (2) set standards for what counts as an approved course of study, and (3) set the standards for what constitutes an approved law school. Tex. Rules Govern. Bar Adm'n Art. 306 (Jan. 1, 1979).

In March 1983, this Court did away with these standards and replaced them with a simple delegation. Under the 1983 rules, an "approved law school" would simply be a law school approved by the ABA. Tex. Rules Govern. Bar Adm'n (Mar. 1, 1983). *Id.* This remains true to this day. Tex. Rules Govern. Bar Adm'n R. 1 (a) (4), R 3 (a) (Sep. 3, 2024). In other words, the only standards or procedures on what legal education is currently required for an applicant to take the bar exam in Texas is now within the complete discretion of the ABA—a private organization based in Illinois.

DISCUSSION

Since at least the time of John Locke, delegations of legislative authority have been viewed with suspicion. J. Locke, Second Treatise of Civil Government § 141 (J. Gough ed. 1947). The idea is straightforward: when the people delegate their sovereign lawmaking authority to an entity or individual, they expect that entity or individual—and only that entity or individual—to exercise that authority. *Id*. Secondary delegations therefore conflict with the social compact. *Id*. As Locke put it, the legislative power is "the power to make laws, not to make legislators." *Id.*

This Lockean principle forms the basis of what has come to be known as the "non-delegation doctrine." *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1243 (2015) (Justice Thomas, concurring) (explaining the Lockean basis of the non-delegation doctrine). Under the non-delegation doctrine, delegations of legislative authority are presumptively unconstitutional. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001). That presumption can only be overcome when a law appearing to delegate legislative authority provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

This is doubly true in Texas. Unlike the United States Constitution, the Texas Constitution makes the separation of powers explicit. Under Article 2, Section 1:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and *no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.*

(emphasis added).

Unbridled delegations of legislative power to private entities are likewise forbidden. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 874 (Tex. 2000). While this Court has been less than clear which constitutional provision limits private delegations[1], it has rightly viewed them with suspicion. *Id*. Indeed, this Court has held that "delegations to private entities raise more troubling constitutional issues than public delegations" and are therefore "subject to more stringent requirements and less judicial deference than public delegations." *Id*. As this Court put it:

> Legislative delegations to private entities can compromise "the basic concept of democratic rule under a republican form of government" because private delegates are not elected by the people, appointed by a public official or entity, or employed by the government. And, on a more practical basis,

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[1] While this Court has often vested the private non-delegation doctrine in Article 2, Section 1, the text of that provision does not mention delegations to private entities. As such, this Court has sometimes looked elsewhere. For example, this Court has sometimes viewed private delegations as contrary to the Law of the Land provision of Article 1, Section 19. *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 466 n.10 (Tex. 1997) (collecting cases). The arbitrary dictates of a private entity are hardly the "law of the land." Federal Courts have taken a similar approach, vesting the private non-delegation doctrine in substantive due process. *Boerschig v. Trans-Pecos Pipeline*, LLC, 872 F.3d 701, 707 (5th Cir. 2017). This Court has also suggested that private delegations are inconsistent with a "republican form of government" and therefore could run afoul of the republican form of government guarantee of Article 1, Section 2. *City of Pasadena v. Smith*, 292 S.W.3d 14, 18 (Tex. 2009). But this Court recently left a court of appeals opinion in place suggesting (for the first time in Texas history) that claims under Article 1, Section 2 might be non-justiciable. *Elliott v. City of Coll. Station*, 68 Tex. Sup. Ct. J. 830 (2025) (vacating the lower court's judgment but noting the lower court's opinion could be cited as persuasive authority.)

> private delegations may allow private interests to adversely affect the public interest.

Id. (citations omitted).

In reviewing such delegations, this Court considers eight factors: (1) whether the private delegate's actions are subject to meaningful review by a state agency or other branch of state government; (2) whether the persons affected by the private delegate's actions are adequately represented in the decision making process; (3) whether the delegation extends to applying the law to regulated parties; (4) whether the private delegate has a pecuniary or other personal interest that may conflict with its public function; (5) whether the private delegate is empowered to define criminal acts or impose criminal sanctions; (6) whether the delegation is narrow in duration, extent, and subject matter; (7) whether the private delegate possesses special qualifications or training for the task delegated to it; and (8) whether there are sufficient standards to guide the private delegate in its work. *FM Props. Operating Co.*, 22 S.W.3d at 874.

Like most multifactor tests, it is unclear how these factors work. See *id*. A bright line non-delegation test would be preferable. See *City of League City v. Jimmy Changas, Inc.*, 670 S.W.3d 494, 510 (Tex. 2023) (Young, J., concurring) (lamenting the confusion created by multi-factor balancing tests), *id* at 518 (Blacklock, J. dissenting) (same). But that is an issue for another day.

For now, it is enough that under any test, the delegation of accreditation authority to the ABA raises significant constitutional concerns.

First, under the current rules, this Court exercises no "meaningful review" of the ABA accreditation criteria. Law schools must meet the ABAs criteria—full stop. Tex. Rules Govern. Bar Adm'n R. 1 (a) (4), R 3(a) (Sep. 3, 2024).

Second, the regulated parties—Texas law schools and Texas law students—exercise no meaningful authority in the ABAs decision making process. While the ABA seeks guidance from its members and academia, not all Texas law school and not all Texas lawyers are represented.

Third, while the ABA technically does not have enforcement authority against Texas law schools, this is a distinction without a difference. Under this Court's current rules, a school that runs afoul of the ABA is no longer an "approved school" under Texas law.

Fourth, the delegation to the ABA is not "narrow in duration, extent, and subject matter." To the contrary, as explained above, this Court has delegated *all* standard-setting authority for Texas law schools to the ABA—without limitation.

Finally, and most importantly, this Court has provided no standards to guide the ABA in its work. *FM Props. Operating Co.*, 22 S.W.3d at 874. That sort of broad, open ended, delegation simply cannot pass constitutional muster.

CONCLUSION

For the foregoing reasons this Court should take this opportunity to reclaim its constitutional duty to set the standards for law schools in Texas. While the Foundation takes no definitive view on what those standards should be, one thing is certain: both the Texas Constitution and plain common-sense dictate that this Court is better suited to set the standards for Texas lawyers than a private interest group in Illinois.

Sincerely,

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