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Texas Tall Tales: Supreme Court School Rulings from the Lone Star State and Their Relevance Today

Texas School Finance Litigation, Does it Matter Who Sits Behind the Plate?

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Texas School Finance Litigation, Does it Matter Who Sits Behind the Plate?

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Introduction

In now-Chief Justice John Roberts' opening statement as part of his confirmation hearing before the Senate Judiciary Committee in 2005, he stated that as a jurist his "job is to call balls and strikes and not to pitch or bat."[2] In essence, this is all that we can ask of judges.

That is precisely what parents of students in the low-income neighborhood of Edgewood Independent School District asked for when they filed a school finance case in 1968 complaining of the stark inequities in school funding created by the state of Texas. Similar plaintiffs continued to ask the same question in state courts over the next five decades. The final arbiters have both upheld and rejected the claims. But how much has the evidence and the legal claims mattered as opposed to who sits behind the plate? Has the strike zone widened or narrowed depending on who is up to bat and who is pitching?

This paper examines the Texas school finance litigation saga that spans seven cases over six decades. It is a topic that has been covered several times over, but most importantly, this paper provides information on the courts' theoretical approaches to constitutional interpretation in the line of cases. Is there consistency among the decisions? Are the courts just calling balls and strikes? Or perhaps, are they even doing a little pinch-hitting. You be the judge.

The Role of Final Arbiters

Both the United States Supreme Court and the Supreme Court of Texas enjoy powers to review cases on appeal. While the Supreme Court of Texas has broader authority to review cases, both courts tend to operate with similar standards of review of lower court rulings.

Both courts review questions of law under a de novo standard. Questions of fact, on the other hand, are reviewed under a clearly erroneous standard. Mixed questions of law and fact are typically vetted under less consistent standards, with some entailing a de novo review and others

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[1] The author has filed school finance cases in three states, Texas, New Mexico and Colorado. In Texas, he represented the "Edgewood Plaintiffs" twice as MALDEF lead counsel, in *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley* and in *Texas Taxpayer & Student Fairness Coalition v. Williams*. He continues to lead policy work in Texas school finance at the Intercultural Development Research Association (IDRA) in San Antonio. The opinions stated here are the author's own and should not be attributed to MALDEF or IDRA.

[2] "Roberts: 'My job is to call balls and strikes and not to pitch or bat,'" CNN (Sep. 12, 2005); available at http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/

a clearly erroneous standard.[3] Some questions, for example evidentiary rulings, may be subjected to the abuse of discretion standard.

How the courts employ the various standards, especially where constitutional interpretation applies, may also affect the outcome of a case. Researchers ordinarily identify six theories of constitutional interpretation identified in the literature: 1) historical, 2) textual, 3) structural, 4) doctrinal, 5) ethical, and 6) prudential.[4] Historical interpretation refers to examining the meaning of the constitutional provision based on the original intent or understanding of the authors. *Id.* Textual interpretation entails focusing on the textual language of the provision in question and whether one may go outside the four corners of the document to find meaning. *Id.* Interpretation based on the structural theory involves inferring "structural rules from the relationships that the Constitution mandates." *Id.* Doctrinal theory concerns the development and application of judicial precedent to interpretation. *Id.* The ethical theory is grounded in the moral commitments observed throughout the Constitution. *Id.* Finally, the prudential theory seeks to balance the costs and benefits of rules established to govern constitutional review. *Id.*

SCOTUS: Batter Up, Rodriguez v. San Antonio ISD[5]

In *Brown v. Board of Education*, the United States Supreme Court held that segregated schools are inherently unequal and violate the rights of Black students to equal protection under the Fourteenth Amendment. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). In overruling the "separate-but-equal" doctrine established in *Plessy v. Ferguson*, 163 U. S. 537 (1896), the Supreme Court reversed nearly sixty years of case law allowing separate but equal schools and other public accommodations and services.

The Warren Court (named for Chief Justice Earl Warren) based its decision on its analysis of the equal protection clause and the state of public education. At the time of the ratification of the Fourteenth Amendment in 1868, the Court noted that public education played a minor role in America. *Brown*, 347 U.S. at 491. Consequently, there was little guidance helpful in the interpretation of the equal protection clause as applied to the rights at issue in *Brown*. In contrast, over the next 80 years, public education played an increasing, critical role into the 1950s. *Id.* at 493. As the Warren Court recognized:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural

[3] Other standards of review may apply on discretionary rulings and legal sufficiency of the evidence. *See, e.g., City of Keller v. Wilson*, 168 S.W.3d 802 Tex. 2005).

[4] *See, e.g.,* CRS Annotated Constitution, *Constitutional Interpretation*, Legal Information Institute, Cornell University Law School.

[5] Although the *Rodriguez* plaintiffs originally filed suit against San Antonio ISD and seven other area school districts, the district court dismissed the claims against the districts but continued against the state defendants. *See San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 5 n.1 (1973).

> values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

The Court, in part, relied on precedent established in other equal protection cases held before the Court since *Plessy*, but in the higher education context. Particularly, the Court noted several intangible differences in educational quality stemming from the separate university settings, including the Black plaintiff's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *See id.* at 494 (citing *McLaurin v. OK State Regents*, 339 U.S. 637, 641). The *Brown* court held that "[s]uch considerations apply with added force to children in grade and high schools." *Brown*, 347 U.S. at 494.

When interpreting the equal protection clause, the Court also noted that it "must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 492-93. This application of a "living constitution" was not new as other Supreme Court opinions also reviewed the constitutional provisions at stake in light of current events. *See, e.g.*, Chemerinsky, E., *Constitutional Interpretation for the Twenty-first Century*, American Constitution Society for Law and Policy (June 2007).

The Warren Court followed this decision with a series of rulings in *Brown* and its progeny ordering schools to continue to desegregate "root and branch" in many facets of education beyond student assignments, including facilities, staffing extracurricular activities, transportation, among others. (*See, e.g., Green v. Kent Cty. Sch. Bd.*, 391 U. S. 430, 435-38 (1968). The Court noted that despite the complex problems arising in communities when trying to dismantle "well entrenched dual systems," the goal of attaining unitary school systems for all children would not be set aside. *Id.* at 437.

Riding the momentum of a progressive judicial court era, parents of Latino and low-income students sought to have education declared a fundamental right under the U.S. Constitution in their pursuit of equitable funding and educational opportunities. Following a historic student walkout protesting inequitable educational opportunities at Edgewood High School in San Antonio, Texas, parents and students filed suit in federal court against the state of Texas in 1968 challenging the state's inequitable school finance system. The plaintiffs asserted that education was a fundamental right and that the denial of equitable funding for low-income parents in low-property wealth school districts violated their right to equal protection under the law.

The undisputed record showed glaring disparities between the revenue available to wealthy districts compared to poor districts with no basis in student need or tax effort. For example, the evidence showed the wealthiest ten districts with property values ten times the value as the poorest four districts, and generating nearly ten times the amount of funding—while taxing $0.49 cents

less than the poor districts ($0.31 v. $0.70). *See Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282 (W.D. Tex. 1971) (per curiam), *rev'd*, 411 U.S. 1 (1973).

Following extensive delays during the pretrial schedule (*see id.* at 285, n.11), the plaintiffs ultimately prevailed before a three-judge panel. Acknowledging the impact of education on individuals and greater society, and the profound *Brown* opinion, the court declared education as a fundamental right. The court also held that wealth was a suspect class based on Supreme Court precedent in other similar cases. *See id.* at 282-83. The three-judge panel highlighted the fact that the state bears responsibilities for the inequalities because its school finance system creates the very inequities disputes by relying on grossly disparate property values.

In examining the equal protection claim, the panel noted "the principle of 'fiscal neutrality'. . . requires that the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." *Id.* at 284. The panel rejected the state's argument that local control of setting tax rates justified reliance on the structured inequalities. Instead, the court found that the state has directly limited the choice of financing by guaranteeing that "some districts will spend low (with high taxes) while others will spend high (with low taxes). Hence, the present system does not serve to promote one of the very interests which defendants assert." *Id.* at 284. Ultimately, the court unanimously concluded that the defendants failed to demonstrate any compelling state interest for their wealth classifications and that they further failed to satisfy even the lesser rational basis standard. *Id.*

As the case went on direct appeal to the U.S. Supreme Court, the Court's make-up no longer leaned left as it had in 1968. President Richard Nixon made four appointments to fill vacancies (including the retirement of Chief Justice Earl Warren) on the Court between 1968-1972: Warren Burger, who assumed the Chief Justice role (1969), Harry Blackmun (1970), Lewis Powell (1972) and William Rehnquist (1972). See Supreme Court of the United States, "Member Timeline" https://www.supremecourt.gov/about/members.aspx (visited January 10, 2018).

The more centrist "Burger Court" presided over oral arguments on October 12, 1972. Five months later, the Supreme Court issued its 5-4 decision, reversing the three-judge panel ruling. When examining the three-judge panel, the *Rodriguez* opinion (written by Justice Powell and joined by Burger, Blackmun, Rehnquist and Stewart) distinguished its own wealth classification cases from the current cases. The Court highlighted the fact that in the Court's other wealth classification cases, individuals challenging the classifications were completely unable to pay for a desired benefit because of their financial status and, "as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973). The facts in *Rodriguez* failed to demonstrate either.

Remarkably, however, the Court concluded that the plaintiffs failed to reflect "the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." The record showed the impact of the inequitable funding on critical educational opportunities for the plaintiffs. It also showed how the state treated families in poor districts through the state's school finance system

and how this treatment bore fruit from the political process. *See generally Rodriguez,* 337 F. Supp. 280.

In rejecting plaintiffs' claim that education was a fundamental right, the Court acknowledged yet downplayed the significant role education plays for an individual and for greater society. The Court failed to find that education was explicitly or implicitly a fundamental right under the U.S. Constitution. Examining the textual language, the Court concluded easily that education was not a fundamental right established explicitly in the Constitution. However, in failing to find education as an implicit, fundamental right, the Court distanced itself from its prior decisions dating back decades recognizing education as an incredibly vital right. Instead, the Court essentially stated that because education was not previously declared a fundamental right in other cases, it could not be such a right.

Justice Marshall's dissent called out the majority's flawed analysis suggesting that none of the other implicit fundamental rights determined by the Court in previous years, including the right to interstate travel, were ever deemed fundamental until the Court issued its decision in those cases. Because of the Court's precedence and the direct relationship between education and other fundamental and important rights, Justice Marshall and other dissenting justices would have declared education a fundamental right.

Having found no suspect class and no denial of a fundamental right at stake, the Court applied a rational basis test to the Texas school finance system. The Court concluded that the state's system and its inequities were rationally related to the state's goal of ensuring local control over taxation.

Supreme Court of Texas: Batter Up, Edgewood v. Kirby (Tex. 1989) ("Edgewood I")

In 1984, plaintiff parents and now school districts returned to the courts, but this time—the state courts. Represented by the Mexican American Legal Defense and Educational Fund (MALDEF), low income parents of color and low-property wealth school districts filed the first lawsuit challenging the denial of an equitable school finance system under the state constitution's education clause, article VII, section 1, and the Equal Rights amendment, article 1, sections 3 and 3a. *See* Cárdenas, J., Texas School Finance Reform, 217-18, IDRA (1997). Like *Rodriguez,* the plaintiffs sought to argue that education was a fundamental right and that wealth was a suspect classification. They also asked the court to declare that the inequitable resources between high-property and low-property wealth districts violated the state's mandate to provide an "efficient and suitable" public education system. *Id.*

Following a forty-day trial, Travis County District Court Judge Harley Clark issued his ruling on April 29, 1987. Cárdenas, at 221-54 (initial ruling and Findings of Fact and Conclusions of Law printed in full). The court found the state school finance system violated both the Equal Rights Amendment and the Education clause. Citing a lengthy record detailing the large inequities between low-property wealth and high-property wealth districts as examined by experts including IDRA, the court held the system violated the state's duty to provide an efficient school system. And based on the extensive presence of public education in the Texas Constitution, the history of the education clause and public education in Texas, and on a record showing the significant impact of education on a person's life and on society, the court declared education to be a fundamental right under the constitution. *Id.*

That victory for the plaintiffs was short-lived. The state appealed the ruling to the Austin Court of Appeals. That court followed the logic (though perhaps not entirely logically) of the U.S Supreme Court in *Rodriguez*. Despite the explicit and pervasive presence of education in the Texas Constitution, in a 2-1 decision, the court concluded that education was neither an explicit nor implicit fundamental right under the Texas Constitution. *See Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859 (Tex. App.- Austin 1988) *rev'd* 77 S.W.2d 391 (1989). The appellate court also held that the equity (efficiency) claim was a political question and that the court lacked judicially manageable standards to interpret and guide the meaning of an "efficient" school system. *Id.* at 867.

Plaintiffs next appealed to the Supreme Court of Texas. Like *Rodriguez*, the make-up of the Texas Supreme Court changed between the initial filing in 1984 and oral argument in 1989. Delays in pretrial proceedings, the lengthy 40-day trial, and the subsequent intermediate appeal all affected the timing of the case before finally reaching the Supreme Court of Texas for oral argument. The case also involved wealthy districts siding with the state to defend their revenue advantages and low- and mid-wealth districts intervening as plaintiffs, further complicating and extending the case. *See* Cárdenas, at 219-20.

The court make-up also changed due to Texas's election of judges for six-year terms. Unlike federal appointments to the federal bench, aside from intermittent judicial appointments made to the bench by the standing governing to fill a vacancy, Texas voters elect state supreme court justices in statewide, partisan elections. Consequently, only three of the nine state supreme court judges remained on the bench from the date of filing to oral argument.

Despite an ideological divide among the justices on the bench, they reached a unanimous ruling and declared the system in violation of the Texas Constitution, article VII, section 1. *Edgewood v. Kirby*, 777 S.W.2d 391 (1989) ("*Edgewood I*"). The Court applied several theoretical approaches to the case, including historical, textual, doctrinal, ethical, and prudential. For example, recognizing the difficult politics surrounding school finance legislation, the Court also noted its key role as the judicial branch to review legislative decisions, especially where, as here, the state constitution set out specific directives. Relying on substantial precedent discussing judicial review, the court concluded that "[i]f the system is not 'efficient' or 'suitable,' the legislature has not discharged its constitutional duty and it is our duty to say so." *Id.* at 394.

The Court also examined extensively the legislative history surrounding the state's adoption of the education. The Court further analyzed the text of the education clause and the meaning of the key terms (efficiency) at the time of the adoption, as well as today. It particularly noted that the drafter's use of the term "efficient" differed from other terms proffered by the state on appeal, such as "economical." *Id.* at 394. Although those other terms were not selected by the drafters in the education clause, they were used in other parts of the constitution indicating the drafter's careful selection of the term "efficiency" for the education clause. The Court relied on precedent to support its multiple approaches to interpreting the education clause.

In addition, the Court noted that the "Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time." *Id*. The Court found

that in light of the current school finance system, "[p]roperty-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior." *Id.* at 939.

Ultimately, the Court adopted a fiscal neutrality test for examining the efficiency of the system, holding that children in property-poor and property-rich districts must have "substantially equal access to similar revenue at similar tax effort." *Id.* at 397.

This thorough analysis of the legislative history of public education in Texas and its application to the facts and evidence presented in the case provided the public a transparent, objective view of the possibilities of judicial power and restraint. It also provided the Texas legislature a clear pathway to correcting the constitutional deficiencies without being over-intrusive.

Supreme Court of Texas: Batter Up, Edgewood v. Kirby, 804 S.W.2d. 491 (Tex. 1991) ("Edgewood II").

The legislature went to work on a remedy. After much debate, the revised school finance plan resulted in the state achieving equitable funding for 95% of the school districts in the state. *See* Kauffman, A., "The Texas School Finance Litigation Saga: Great Progress, Then Near Death by a Thousand Cuts," *St. Mary's Law Journal* 40 (2008): 535-36. On direct appeal from a lower court ruling in favor of the plaintiffs, the Supreme Court of Texas examined the plan against its constitutional standard. Finding that the legislature left out the top five percent of the wealthiest districts in the state, the Court held that this plan again violated the efficiency clause. *Edgewood II*, 804 S.W.2d. at 498 ("*Edgewood II*").

However, that was not the final decision by the Court. The Alvarado Plaintiff-Intervenors (a large group of low-wealth and mid-wealth plaintiff districts) were not fully content with the Edgewood II ruling. They filed a motion for rehearing asking the Court to allow the state to recapture revenues from wealthy districts as a remedy. *Id.* *See* Kauffman, A., "The Texas School Finance Litigation Saga: Great Progress, Then Near Death by a Thousand Cuts," *St. Mary's Law Journal* 40 (2008): 535-36.

In response, Chief Justice Phillips drafted an opinion for the court, holding that such a request would violate the state's prohibition against state *ad valorem* taxes. *See Edgewood II*¸804 S.W.2d at 499. However, in response to a separate state request in a response brief, he also opined that the state's duty to provide equitable school funding for all districts was needed only up to the point of providing a general diffusion of knowledge. The court stated: "Once the legislature provides an efficient system in compliance with article VII, section 1, it may, so long as efficiency is maintained, authorize local school districts to supplement their educational resources if local property owners approve an additional local property tax." *Id.* at 500.

Without any supporting historical or textual analysis or any precedent, this was the first time that the court essentially *capped* the state's duty of ensuring equitable funding for all districts. Four justices filed or joined a concurrence, admonishing the majority for issuing an advisory opinion on matters that were not properly before the court. *See id.* at 500-506.

Most remarkable in how this strike zone widened for the state were three things: 1) no party had any valid grounds for asking for such a ruling in the motion before the court; 2) there was no legal basis for the revised opinion and the opinion fails to present any legislative history, change in facts or circumstances or any other grounds for such a limitation; and 3) the *dicta* soon became precedent, diminishing the strong judicially manageable standards enacted by the Edgewood I Court as they struggled to find the fine line between a general diffusion of knowledge and enrichment.

Supreme Court of Texas: Batter Up, Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. 826 S.W.2d 489 (1992) ("Edgewood III")

The legislature again went to the drawing table and enacted SB 351 (72nd Reg. Session), which consolidated property tax collections into 188 county education districts ("CEDs"). The CEDs were expected to only levy, collect and distribute property taxes. The rate of taxation was effectively proscribed by the legislature. *Id.* at 498. This plan provided for strong equitable funding among school districts. However, this time the wealthy districts sued.

They argued, in part, that under article VIII, section 1-e of the Texas Constitution, the state is prohibited from establishing a state *ad valorem* tax. They also argued that the legislation violated article VII, section 3 by levying an *ad valorem* tax without an election. By requiring school districts to consolidate their revenue, the wealthy plaintiffs argued that the local districts no longer had control of their local property taxes.

The Court again examined in-depth the text and the legislative history of the constitutional provisions. The Court ruled in favor of the wealthy districts this time, finding violations of both article VIII, section 1-E and article VII, section 3. However, the Court also continued its venture into offering further advisory opinions on what might fix the system. With little-to-no prompting by any of the parties, Justice Cornyn authored a concurring opinion in which he sought to restrain the key equity holdings in *Edgewood I* and to establish a minimal adequacy floor instead. Kauffman, at 539-40. In his opinion, he also baldly concluded that "most educational experts agree that there is no direct correlation between money and educational achievement." *Edgewood III*, at 530. Finally, Justice Cornyn relied minimally on Texas constitutional precedent or the historical and textual analysis of the provisions being challenged. In essence, it was largely an educational policy brief with a heavy ideological slant that would make it much more difficult for equity proponents to prevail.

Like *Edgewood II*, the overreaching of the majority opinion and the Cornyn concurrence invited strong dissents from some holdover judges from *Edgewood I*. This included a blistering dissent from Justice Doggett where he challenged the holdings of the majority and undercut Justice Cornyn's concurring opinion. *See id.* at 537-76.

The legislature eventually offered an amendment to the state constitution that would have allowed consolidation of tax bases. However, voters—led by those residing in wealthy districts—soundly defeated that measure. *See* Kauffman, at 540.

Supreme Court of Texas: Batter Up, Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717 (Tex. 1995) ("Edgewood IV")

The legislature again went to work and passed Senate Bill 7, a comprehensive school finance bill. This time, everybody sued. The legislation reduced equity gaps but still left equity gaps between low- and high-wealth districts and provided no funding for facilities. Thus, the low-wealth districts sued under article VII, section 1. The wealthy districts sued because part of their revenue exceeding state equalization caps would be recaptured by the state or otherwise shared with other low-wealth district under one of several options to reduce their wealth per pupil. They argued that such practices again violated their rights under article VIII, section 1-e. *See generally, id.* Other plaintiffs sued asserting different theories, including one group of parents who argued that they had a right to choose their own school (private or public) under the Texas Constitution. *See* Kauffman, at 543.

In examining the article VII claims of the low-wealth districts, the Court acknowledged the continuing inequities between low- and high-wealth districts. However, in an opinion authored by Justice Cornyn that was joined in part by eight of nine justices, the Court took the opportunity to whittle down the strong *Edgewood I* equity standard. Citing the *Edgewood II* opinion on the motion for rehearing noted earlier, the Court stated that "an efficient system does not require equality of access to revenue at all levels." *Id.* at 729. Again, there was no legal justification supporting this standard.

The Court next accused the low-wealth districts of effectively wanting to "level-down" the system by requiring "equity at all levels," which would allegedly be harmful to the system as a whole. *Id.* at 730. This assertion, too, does not appear to be supported in the record. If anything, the low-wealth districts desired to be leveled up to the rate of the wealthy districts. Nevertheless, the Court held that through the new, lesser standard "districts must have substantially equal access to funding *up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge*." *Id.* (emphasis added).

The Court next focused its attention not on the overall revenue and tax gaps between low- and high-wealth districts, but on the gaps up to the cost of generating the funds necessary for a general diffusion of knowledge. Although the cost of an adequate education was not litigated in the case, the Court used a $3,500 figure it found in the record for its analysis. The Court also did not examine the differences between the top and bottom five percent as it had previously done. Instead, it used the average yield per penny that districts enrolling the wealthiest and poorest 15 percent of students would generate based on the formulas after full implementation. *Id.* at 731 n.12. The Court concluded that the resulting 9-cent difference expected upon full implementation of SB 7 between the high-wealth ($1.22) and low-wealth districts ($1.31) was not so substantial to render the legislation unconstitutional, especially considering past differences. *Id.* at 731.

Justice Rose Spector's dissent called out the majority for its about-face approach to weighing efficiency claims. Justice Spector noted that Justice Cornyn's concurring and dissenting dicta in *Edgewood III* had now become the majority opinion. *Id.* at 767. She also noted that based on the Court's previous analysis of the differences between the 5 percent wealthiest and poorest districts (based on property wealth), the tax gap was *19 cents*, not 9 cents. *Id.* at 769.

The Court also had the opportunity to determine the meaning of the "suitability" clause of article VII, section 1. In examining the suitability clause, the Court reflected on its precedent of deferring to legislative choices. The Court equated this duty to the legislature's decisions on the methods, restrictions and regulations employed by the state to carry out its duty to provide a general diffusion of knowledge and afforded the state deference—"except when so arbitrary as to be violative of the constitutional rights of the citizen." *Id.* at 736. The Court also held that the suitability measure was organic and could change over time based on conditions. *Id.*

The Court rejected the wealthy districts' claim complaining of the state's newly designed "recapture" provisions. These new provisions established equalization levels in the school finance formulas. If a district's wealth per weighted student exceeded those levels, the district would have to exercise an option to distribute that surplus revenue and, in turn, receive credit for reducing its wealth levels. Some of the wealthy districts subject to those provisions in Chapter 41 of the Texas Education Code (thus, commonly referred to as "Chapter 41 districts") challenged the recapture provisions. *Id.* at 737.

Relying on its precedent in *Edgewood III*, the Court found that the new recapture provisions did not operate as a state *ad valorem* tax. The districts still set their own tax rates between wide-ranging minimum and maximum tax rates of $0.86 - $1.50. The Court concluded that the limits imposed under SB 7 did not "so completely [control] the levy, assessment, and disbursement of revenue, either directly or indirectly, that the [district] is without meaningful discretion." *Id.* at 738 (citing Edgewood III, 826 S.W.2d at 502).

The Court cautioned, however, that the cap on property taxes could eventually operate as both a floor and a ceiling. *See Edgewood IV*, 917 S.W.2d at 738. As the cost of providing a general diffusion of knowledge rises, districts may be forced to tax at the cap just to provide a general diffusion of knowledge. Under such a scenario, such districts would lose meaningful discretion in setting their local tax rates and a violation of article VIII, section 1-e would occur. *See id.*

Supreme Court of Texas: Batter Up, West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis 107 S.W.3d 558 (Tex. 2003). ("WOC I"); Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746 (Tex. 2005) ("WOC II")[6]

In 2001, four property-wealthy districts filed suit complaining, in part, that the state's recapture provisions and the growing cost of an adequate education (as forecast in *Edgewood IV*, 917 S.W.2d at 738) forced them to tax at or near the property tax cap, thereby depriving them of meaningful discretion in setting their tax rates in violation of article VIII, section 1-e. *See WOC I*, 107 S.W.3d at 562-63, 573-74. Low-wealth districts represented as the Edgewood and Alvarado groups, respectively, intervened as defendants to protect the recapture and equity provisions in the school finance system. However, they also cross-claimed against the state asserting that they did not have adequate funds to provide a general diffusion of knowledge. *See id.* at 574.

[6] These two cases are examined together because *WOC I* was an appeal of a pretrial dismissal order that was eventually reinstated and eventually led to the *WOC II* decision on the merits.

Under article VII, section 1 of the Texas Constitution, the Court noted the three standards that the state must comply with in funding its schools: "First, the education provided must be adequate; that is, the public school system must accomplish that 'general diffusion of knowledge ... essential to the preservation of the liberties and rights of the people'. Second, the means adopted must be 'suitable'. Third, the system itself must be 'efficient'." *Id.* at 563. Under article VIII, section 1-e, the Court reasserted the standard: "[a]n ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." *Id.* at 578.

The state defendants argued that all districts in the state must be forced to tax at the cap to support a violation of article VIII, section 1-e. The trial court rejected that position but dismissed the case because it determined that at least a majority of districts must be taxing at the cap for a violation to occur. Reviewing the text of article VIII and the precedent established in *Edgewood III* and *IV*, the Court held that "[t]he Constitution prohibits 'State ad valorem taxes ... upon any property within this State' (emphasis added) and is not limited to *statewide* ad valorem taxes." *Id.* Consequently, the Court concluded that even one district could proceed with an article VIII claim.

The WOC I Court also provided further clarification on the meaning of an adequate education under article VII. The state argued that accreditation standards accomplish an adequate education and that no further inquiry is necessary. *See id.* at 581. The Court held that although an accredited education under the state accountability system requires some attention, the state's duty to provide a general diffusion of knowledge may exceed minimal accreditation standards. While the Court continued to note its deference to the legislature in setting educational goals and accreditation standards, it also affirmed its role as final arbiter of those decisions in light of the legislature's constitutional duties. *See id.* at 581-82. The Court reversed the dismissal and remanded the case to the trial court for further proceedings.

By the time trial rolled around in August 2004, over three-hundred school districts sued the state in one of three school district groups. *See* Hinojosa, D., Rodriguez v. San Antonio. Independent School District, Forty Years and Counting, in THE ENDURING LEGACY OF. RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 23, 31. (Charles J. Ogletree, Jr. & Kimberly Robinson eds., 2015). The intervenors maintained their split status as defendant- and plaintiff-intervenors. They asserted that the promises made by the State to the *Edgewood IV* court to eliminate hold-harmless measures benefitting wealth districts were never fulfilled and that, consequently, the tax and revenue gaps remained large and inefficient under article VI. Like the WOC group, they alleged that funding made available to them in the system was not sufficient to provide their children an adequate education. The WOC group, which now included high-, mid- and low-wealth districts, filed adequacy and meaningful discretion claims, but remained silent on the equity claims. *See WOC II*, 176 S.W.3d at 751-52.

Following a six-week trial in August-September 2004, the trial court upheld all the claims, except for the equity claims involving maintenance and operations. The court concluded that while equity gaps remained, they did not violate the efficiency mandate in article VII, section 1.

The court did hold that the Edgewood Intervenors' proved their separate facilities efficiency claim.

At the Supreme Court of Texas, the strike zone would again change for the litigants. As noted further above, the Court's hostility to the equity claims of low-wealth district became evident over the last three decisions. The Court acknowledged that large equity gaps remained between high- and low-wealth districts. This resulted, in part, from the state's failure to fully implement SB 7 as originally designed. In *Edgewood IV*, the state represented that it would eventually phase out the hold-harmless measures benefitting super-wealthy school districts. Consequently, the Court examined the system in *Edgewood IV* based on the state's representation of how the system was expected to operate in the years to come.

Over the years, the legislature permanently codified those hold-harmless measures. The plaintiff-intervenors showed that the equity gaps were much larger today. However, the Court did not examine the system as it operated in 2005. Instead, without citing any legal rationale, the Court stated that for the Court to make an apples-to-apples comparison, it would have to remove the hold-harmless districts from its analysis. *Id.* at 762. Not only did this practice fly directly in the face of logic, it also upended fifteen years of precedent without any justification. In both *Edgewood I* and *II*, the Court noted the important purpose of including all districts in its analysis of the efficiency of the system. In addition, the Court's opinion seemingly indicates that the standard for violating the equity mandate is frozen in time, despite the Court's prior opinions acknowledging how changing conditions may impact the Court's analysis. The Court also shifted its attention to the percentage of revenue that was not subjected to recapture because of the hold-harmless provisions and found that percentage (4%) to not be so great to run afoul of the efficiency clause. *Id.* at 790-91.

The Court also changed the standard for measuring the efficiency of facilities funding. The Court acknowledged "much evidence" of inadequate school facilities and inequitable access to facilities funding for low-wealth districts (facilities funding is not part of the equalized system). Yet, the Court stated that the system *as a whole* must be inefficient for *both* maintenance and operations and facilities or that the inequalities in one component must be so great to disturb the system as a whole. *See id.* at 790. The Court also agreed with the state that it is not enough that the districts show need and disparities but that they show similar need and costs between comparison districts; and that complaining districts must prove that they cannot provide a general diffusion of knowledge without existing facilities. *Id.* at 792.

Thus, unlike the tax claim that can be brought by less than half the districts in the state, the Court applied a different standard for the low-wealth districts complaining of large, evident gaps in facilities funding. The Court also ignored a robust record showing "decaying buildings with unstable foundations, leaky roofs with whole sections of ceiling tiles missing, science labs with no science equipment, several thirty-year-old 'temporary' portable buildings, and old migrant farm worker camps converted to classrooms, with costs for repairs estimated in the tens of millions of dollars." Hinojosa, at 32. The Edgewood districts also proved, through unrebutted expert testimony, the correlation between student achievement and the condition of facilities. *See id.* at 32-33. None of this mattered to the Court. When they filed a motion asking the Court to

reconsider the evidence in the record as applied to the standards or to remand the case in light of the new, evolving standards, the Court summarily denied the request. *See id.* at 33.

The Court also considered the first adequacy challenge in WOC II. The Court first addressed the state's argument that these claims (including the financial efficiency claim that had been litigated four times before) were political questions. The Court previously rejected such arguments dating back to *Edgewood I-IV*. Nevertheless, the Court provided a thorough, comprehensive review of case precedent, both in Texas and at the U.S. Supreme Court, examining the doctrine and as applied to the article VII and article VIII claims. *See WOC II,* 176 S.W.3d at 776-81.

In setting the adequacy standard, the Court looked at the history of the education clause and the text of the statutory pronouncements from the legislature directed at school districts to carry out a general diffusion of knowledge. To fulfill its obligation under article VII, the Court stated that districts must be reasonably able to provide "all Texas children … access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation." *Id.* at 787 (citing Tex. Educ. Code § 4.001(a)). The Court continued: "Districts satisfy this constitutional obligation when they [reasonably] provide all of their students with a meaningful opportunity to acquire the essential knowledge and skills reflected in … curriculum requirements …such that upon graduation, students are prepared to 'continue to learn in postsecondary educational, training, or employment settings." *See WOC II,* 176 S.W.3d at 787 (citing Tex. Educ. Code § 28.001).

The Court admonished the trial court for focusing too much on inputs, including funding. It stated that the adequacy standard is results-oriented and that educational outputs are the better measure. *See WOC II,* 176 S.W.3d at 788.

The Court acknowledged the extensive record showing a struggling system, including an increasingly demanding curriculum, large achievement gaps between special populations, high dropout rates and high teacher turnover and attrition rates. Nevertheless, the Court held the system minimally met the standards, highlighting improving state test scores and the performance of Texas students compared to students in other states on the NAEP exam. *See id.* at 789-90. The Court concluded that the Legislature has not "acted arbitrarily in structuring and funding the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge." *Id.*

In examining the article VIII claim, the Court applied its existing precedent developed in *Edgewood III* to determine whether districts had meaningful discretion in setting their tax rates. The Court noted that 48 percent of the districts in the state educating 59 percent of the public school children taxed at the cap of $1.50 and that only ten percent of districts taxed below $1.40. *See id.* at 794. The Court also noted the increasing contribution of recapture dollars used to fund public education. *See id.* at 797.

The Court acknowledged that determining whether districts have meaningful discretion in setting their tax rates is not precise, but that the record in the case was not even close. In determining the merits of the ad valorem tax claim, the court relied on much of the evidence it dismissed under

the adequacy claim. This evidence included several districts struggling to maintain accreditation ratings under the heightened standards and accompanying costs, lack of certified teachers, student demographic changes with increases in high-need students, and growing teacher attrition and turnover. *See id.* at 796.

Although the low-wealth intervenors worried about the result of such a claim and how it might impact equity, the Court did provide some protection on the remedy side. The Court noted that while all funding need not be equalized at all levels, removing the cap (as some wealthy districts proposed) would not be an option. *See id.* at 798. Removing the cap would "create a structural flaw in the system" as the combination of the Foundation School Program, the tax rate cap and the recapture provisions worked in tandem to create an efficient system. *Id.*

Supreme Court of Texas: Batter Up, Morath v. Texas Taxpayer & Student Fairness Coalition, 490 S.W.3d 826 (Tex. 2016) ("Texas Taxpayer")

Following significant education budget cuts by the state legislature and the imposition of new, expanded testing requirements for school children, four school district groups, parents, the Texas Charter School Association, and the Texas Association of Business Intervenors filed suit against the state in 2011 again challenging the school finance system.

The school district groups consisted of one group of five low-wealth districts (Edgewood) and four families of high-need students who filed equity, adequacy, suitability and article VIII tax claims. Unlike the other districts, the Edgewood group—represented by MALDEF—alleged that the funding and structural educational opportunities for English Learner and low-income children was inadequate. The group hoped that the tighter focus on student groups struggling the most would help focus the courts' attention on the students with the most glaring need. *See* Hinojosa, D. & Lyznik, K., *How Adequacy Litigation Fails to Fulfill the Promise of Brown [How it can get us Closer]*, 2014 Mich. St. L. Rev. 575, 611.

The Texas Taxpayer group included individual taxpayers and 443 low- and mid-wealth districts asserting general equity, adequacy and suitability claims, and article VIII claims. The Fort Bend group, a mix of mostly low- and mid-wealth urban and suburban districts, as well as a few high-wealth districts including Austin ISD, filed similar claims, except their financial efficiency claim focused more on the impact of how the state leveled down the system to make the system more equitable. The Calhoun County group consisted of high-wealth districts. They asserted adequacy, suitability and tax claims, but actively opposed the equity claims of Edgewood and the Texas Taxpayer groups. The Intervenors claimed that the system was qualitatively inefficient because it was not producing good results. They sought to advance their own agenda through school privatization, value-added teacher evaluations, and other reforms. Finally, the Charter group filed adequacy, equity and suitability claims, a facilities funding claim, and a claim targeting the state's cap on the number of charters it issues. *See* Hinojosa, 36-37.

Following an extensive trial spanning over three months between 2012-2013, the district court ruled the system inequitable and inadequate under article VII and in violation of article VIII, section 1-e. The Court rejected the claims of the Intervenors and upheld only the adequacy claim of the Charter group. The legislature went to work in the 2013 legislative session as the trial court prepared its findings of fact and conclusions of law. The legislature replaced $3.4 billion of

the $5.3 billion that it previously cut, reduced end-of-course exams required for high school graduates from 15 to 5, and revised the required high school curriculum requirements by setting up endorsement tracks in lieu of the previous four-by-four default track. Hinojosa, 39-40.

Fearing further erosion of their wealthy advantages, the wealthy districts filed a motion to reopen the evidence—despite having prevailed on their adequacy and tax claims. The Edgewood group opposed the reopening while the other parties remained neutral. The court reopened the evidence and following a nearly three-week trial in January-February 2014. Six months later, the court again found the system unconstitutional and supported its ruling with 364 single-spaced pages of findings of fact and conclusions of law. *See Texas Taxpayer & Student Fairness Coalition v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969 (D. Tex. 2014).

On appeal, the Court again failed to apply the correct standard of review to the trial court's findings of fact. And again, the Court created new precedent without any appropriate justification, making it even more difficult for any party to prevail on school finance claims.

Justice Willett delivered the opinion for the Court, which was joined by all sitting justices. Although the political question precedent was not overturned, the Court grounded its opinion in the substantial deference it afforded the legislature and in its own views on educational policy. *See, e.g., Texas Taxpayer*, 490 S.W.3d at 846, 851.

First, the Court blamed the trial court for relying too much on inputs, funding to be more precise. While this certainly was noted throughout the findings, so too were the lack of educational opportunities for high-need students and the dismal outputs for the student groups. *See, e.g., The Texas Taxpayer,* 2014 WL 4254969 *65-*98 (showing statewide and district-level dropout rates, graduation rates, test scores, among other indicia).

Second, the Court noted that its job is not to second-guess the findings of the trial court, but then it proceeded to do just that on the correlation between resources and educational quality. The district court received testimony from leading experts from around the country for the plaintiffs, intervenors and defendants. The district court made specific findings discounting the evidence and positions proffered by the state's and intervenors' experts (both were aligned on this issue) and, instead, found that funding can play a role in increased learning and achievement. *Id.* at *130-32.

Nevertheless, the Court wholly ignored those findings and proffered its own "evidence." The Court reached back into the 1960s to find a report averring that resource levels may not play a significant role in educational achievement for underserved children. *See Texas Taxpayer*, 490 S.W.3d at 852. The Court represented that the report's findings remained valid today, choosing to ignore the substantial research performed over the years doubting the significance of the report today. The Court also noted the 1973 *Rodriguez* opinion and its concerns with the correlation between money and education, again ignoring the trial court's extensive findings. The findings not only reflected research experts, but also the testimony of Texas educational professionals and experts working in the schools today, not over 40 years ago. Finally, the Court relied in part on amicus brief representations citing work by Eric Hanushek. *Id.* Dr. Hanushek testified in this case and the Court made specific findings regarding the quality of his work. Indeed, Dr.

Hanushek and state expert witnesses acknowledged the impact that high quality pre-K, smaller class sizes, and well-resourced bilingual programs can have on high-need student learning.

Perhaps most concerning was the state's treatment of the Edgewood group's adequacy claim brought on behalf of low-income and English Learner students. Although other student groups showed marginal improvement, the trial record was replete with solid lay, professional and expert testimony on the many challenges facing these students. It also reflected the types of programs and opportunities proven to increase learning. *See Texas Taxpayer,* 2014 WL 4254969 *65-*98. This evidence was crucial because it refuted common misinformation that underserved students cannot succeed because of the communities they come from.

Because the districts must be reasonably able to provide *all* students a general diffusion of knowledge, it reasoned that this standard applied to *all* low-income and English Learner students. Nevertheless, the Court held that the system as a whole must be shown to lack a general diffusion of knowledge. *Texas Taxpayer,* 490 S.W.3d at 858. For discreet, identifiable subgroups, "the ruling would have to be *truly exceptional*." *Id.* at 859 (emphasis added). This remarkable feat of applying a *higher* standard for *more disadvantaged* students is unparalleled in supreme court jurisprudence, and it was unsupported by any citation to precedent.

After noting previously that outputs matter (*see supra*), the Court then summarily dismissed the low achievement outputs for high-need students, surmising that the results stem from environmental factors as opposed to educational opportunity and resources—*despite the considerable record demonstrating otherwise.* The Court stated that the plaintiffs "did not prove that those gaps could be eliminated or significantly reduced by allocating a greater share of funding to these groups." *Id.* at 860. Of course, as noted earlier, the Court previously stated in *Edgewood IV* that school districts should not be arguing that the system should be leveled down for property-poor districts. The author is not sure how the Court expects to reconcile its own opinion with the *Edgewood IV* opinion.

Indeed, later the Court suggests that the plaintiffs may be suggesting that certain plaintiff groups "deserve a larger piece of the pie." *Id.* at 861. It then asserts that the plaintiffs would be hard-pressed to show that the achievement gains for the subgroup would offset the losses for other students. *See id.* Again, this averment does not reflect the plaintiffs' claim, nor can it be reconciled with the evidence or the Court's precedent in *Edgewood IV*. Remarkably, the Court wholly misses the point of the Edgewood group's claim: high-need students lacked meaningful educational opportunities to acquire a general diffusion of knowledge due to a lack of critical resources; and the low-wealth districts could not simply allocate funds from other students, else they would be harmed. It was not about robbing Peter to pay Paul but ensuring that both Peter and Paul at the very least have the opportunity to succeed.

Regarding the financial efficiency claim, the Court focused more on the ratio differences between different percentiles of wealth. The Court ignored its own conservative *Edgewood IV* analysis comparing the wealthiest and poorest districts enrolling fifteen percent of students and the number of pennies of tax each needed to generate the cost of an adequate education. Dr. Albert Cortez, IDRA's Director of Policy and veteran of three school finance cases, performed this analysis at

levels of funding between $5,000 and $7,500. He found gaps well exceeding 20 cents in favor of the wealthy districts at the various levels, with some gaps growing to over 30 cents. *The Texas Taxpayer*, 2014 WL 4254969 *202-04. These tax gaps more than doubled the 9-cent tax gap calculated in *Edgewood IV*, yet the Court disregarded this seminal analysis.

On the tax claim, the Court compared the data in the record to the data in *WOC II*. The Court noted that fewer districts were at the maximum cap and that the districts had more capacity to tax and attain greater revenue. Although the Court did not appear to suggest that individual districts cannot make an article VIII, section 1-e claim as noted in *WOC I*, the Court discounted the lower court's ruling that "all districts" proved that they lacked meaningful discretion. Instead of remanding the case for further clarification, the Court foreclosed the matter with its ruling denying the claim.

The Court did, however, make another change to its jurisprudence on article VIII with little legal justification. The Court stated that districts that have meaningful discretion to spend money on optional enrichment programs are exercising that discretion and therefore lack the requisite showing. *See Texas Taxpayer*, 490 S.W.3d at 884. This appears to run contrary to the standard articulated in *WOC II* and undoubtedly makes it more difficult for districts to satisfy standing.

Finally, the Court rejected the "qualitative efficiency" claim of the Intervenors. The Court held that a plaintiff alleging such would face a "steep challenge" to demonstrate that a system is qualitative inefficient is the same system is deemed adequate. *Texas Taxpayer*, 490 S.W.3d at 877. The Court again noted its deference to the legislature. And the Court rejected each of the Charter claims, finding that the state did not act arbitrarily in setting the charter cap and in providing limited facility funding.

Conclusion

As noted above, the Supreme Court of Texas's jurisprudence has significantly evolved and digressed over the years. So, does it matter who sits behind the plate in these cases? Are the justices just calling balls and strikes, or maybe even pinch-hitting for either team?

The strike zone appears to have widened over the years for equity proponents, making it easier for the state's inequitable school finance system to pass constitutional muster. Although the strike zone appeared to narrow for article VIII proponents in *Edgewood III* and in *WOC I/II*, it was practically pushed into the batter box with the most recent ruling in *Texas Taxpayer*. And while the Court claimed that there was a viable adequacy claim available to plaintiffs, it appears that it is impossible to get a decent pitch as everything the state throws is called a strike. This especially applies to Texas's most underserved students as the Court invented a new "truly exceptional" standard for such claimants. If the current robust, deep and dismal record for these students was not "truly exceptional," it's hard to say what would satisfy the "exceptional" standard.

Indeed, the Court's reluctance to seriously consider any of the claims is perhaps most evident in the most recent ruling authored by Justice Willett and joined by eight other justices. The Court washed its hands of the ruling, despite noting that Texas children "deserve a revamped, nonsclerotic system fit for the 21st century" and not a "Byzantine" school finance system as is currently provided. Despite these significant failings, the Court chose to defer.

Perhaps the saving grace for the underserved children and school districts of Texas is that judicial precedent and constitutional interpretation approaches have not mattered much, nor has the language and purpose of the constitutional provisions. Should the legislative make-up change in the coming years, hope may also return for at least a fair shot at the plate for school finance litigants.