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### The Texas School Finance Litigation Saga: Great Progress, then Near Death by a Thousand Cuts

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# THE TEXAS SCHOOL FINANCE LITIGATION SAGA: GREAT PROGRESS, THEN NEAR DEATH BY A THOUSAND CUTS

ALBERT H. KAUFFMAN\*

Introduction . . . . .	512
I. Unequal Distribution of Property Values and the Fulfillment of Texas School Finance Standards . . . . .	514
A. Fundamental State Fiscal Decisions . . . . .	518
B. Recapture . . . . .	523
II. Inconsistent Interpretation of Texas Constitutional Provisions . . . . .	524
A. The Education Clause . . . . .	525
B. Suitable Provision . . . . .	528
III. The Texas Supreme Court’s <i>Edgewood</i> Opinions . . . . .	529
A. <i>Edgewood I</i> (1984–1989) . . . . .	530
B. <i>Edgewood II</i> (1990–1991). . . . .	533
C. <i>Edgewood IIa</i> (1991) . . . . .	535
D. <i>Edgewood III</i> (1991–1992). . . . .	537
E. <i>Edgewood IV</i> (1993–1995). . . . .	540
F. <i>Edgewood V</i> (2001–2003). . . . .	544
G. <i>Edgewood VI</i> (2003–2006). . . . .	545
1. General Description of the Case and the 2004 District Court Opinion . . . . .	545
2. The <i>Edgewood VI</i> Supreme Court Opinion . . . . .	547
3. Legislative Reaction to <i>Edgewood VI</i> . . . . .	552
IV. Weakening by the Texas Supreme Court of Its School Finance Jurisprudence and the Implications That Follow . . . . .	552
A. The Whole System or Part of the System . . . . .	553
B. The Definitions of “Adequacy” and “General Diffusion of Knowledge” . . . . .	560

C. Power of Article VII, Section 3 to Defeat Legislative Efforts to Meet the Requirements of Article VII, Section 1 .....	565
D. The Changing Interpretations of Article VIII, Section 1-e .....	572
E. The “Arbitrary” Standard of Review and Lack of Deference to the District Court’s Factual Findings ..	576
V. Constitutional Guidance Provided to the Legislature by the <i>Edgewood</i> Cases .....	577
VI. General Analysis of the <i>Edgewood</i> Cases.....	579

### INTRODUCTION

The Texas Supreme Court’s *Edgewood v. Kirby*<sup>1</sup> decisions were the hammer that forced the Texas legislature to create a significantly more equitable Texas school finance system. The cases were also factors in increasing the overall funding for the system and the significantly higher funding in Texas low-wealth districts. Unfortunately, the power of these decisions, both to increase the equity of the system and to protect the gains in equity made since 1991, has been whittled away by the last four *Edgewood* decisions (*Edgewood III*, *IV*, *V* and *VI*) and the ruling on rehearing in *Edgewood IIa*.<sup>2</sup> This article will analyze in detail

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1. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

2. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746 (Tex. 2005); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis (Edgewood V)*, 107 S.W.3d 558 (Tex. 2003); *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*

the effective way that *Edgewood I* and *Edgewood II* forced the legislature to improve the system significantly and the erosion of the rulings in the first two cases by the later *Edgewood* decisions. It will also describe what remains of Texas school finance jurisprudence and ways in which the remaining law can be used to improve the equity and adequacy of the system. This article focuses on the six Texas Supreme Court decisions to date and the weakening of the standards developed in the first decisions by the later decisions. The legislature did make a quantum leap in improving the equity and efficiency of the system in 1991, and that heightened level of equity has remained since.

Part I of this article describes the realities of the distribution of wealth and students in the Texas education system. Part I also explains the relationship between the property wealth of a school district and the funds, and potential funds, available to a school district from a combination of state and local sources, as well as introduces the concepts of the “weighted student,” “recapture,” and “guaranteed yield,” and discuss how they relate to the concepts of efficiency and equity in the system. An understanding of the system at this fundamental level is a necessary predicate for understanding the strategies and focus of the litigants and the courts. Part II discusses the constitutional underpinnings of the decisions, the source of the court’s powers and the limitations on those powers. Part II also introduces the stages of the changes in the court’s interpretations of these constitutional provisions. Part III describes the major holdings of the *Edgewood* decisions and focuses on the fundamental issues that will be developed in later parts of the article. Part IV analyzes in detail changes in how the court has approached fundamental issues of the court’s and legislature’s powers and the relationship between them. Based on an analysis of the themes identified in Parts I, II and III, Part IV

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(*Edgewood IIa*), 804 S.W.2d 499 (Tex. 1991) (op. on reh’g). The *Edgewood II* case is actually two opinions in one. The first part, issued January 22, 1991, is a unanimous decision declaring the 1990 school finance system unconstitutional. *Edgewood II*, 804 S.W.2d at 491–99. The second part of the decision is the “Opinion on Motion for Rehearing” issued February 27, 1991, consisting of an opinion by five of the nine justices overruling the motion for rehearing. *Edgewood IIa*, 804 S.W.2d at 499–500. The *Edgewood IIa* opinion also contains three other opinions in effect dissenting from the opinion denying rehearing. *Id.* at 500–08.

describes the ways that the Texas Supreme Court has retreated from its clear and enforceable standards in *Edgewood I* and *II* to a murky and unenforceable standard of little utility to policymakers and future courts. Part V addresses possible methods of using what remains of the *Edgewood* legacy to continue improving the equity and adequacy of the Texas system, and Part VI concludes with some observations about the long-term impacts of the Texas school finance litigation saga.

### I. UNEQUAL DISTRIBUTION OF PROPERTY VALUES AND THE FULFILLMENT OF TEXAS SCHOOL FINANCE STANDARDS

When analyzing the Texas school finance system, the most important number for a school district's financial health is its property value per student, often summarized as property value per student in average daily attendance (PV/ADA).<sup>3</sup> This ratio defines whether a district is poor, mid-wealth or wealthy, how much money the district will get from the state and, in some cases, how much money the district will have to share with the state.

The relationship between property wealth per student and revenue the district can raise at any tax rate is a simple mathematical computation; but this relationship has caused the inequities in the Texas school finance system and created group and political interests which have defined the political debate on school finance, and to a great extent, the legislative and judicial responses to the system.

A school district with \$100,000 of property value<sup>4</sup> per ADA (a

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3. There are approximately 4,700,000 students in the Texas public school system, increasing at a rate of 2-3% a year in 1,026 school districts and approximately 200 charter schools. The school districts range in enrollment from 18 students in Divide I.S.D. to 181,750 students in Houston, Texas, and in geographic size from a school district of approximately five square miles in Fort Worth to the approximately 4,840 square miles in Culberson County-Allamore I.S.D. See TEX. EDUC. AGENCY, APPROXIMATE AREA IN SQUARE MILES OF TEXAS SCHOOL DISTRICTS (2008), [http://www.tea.state.tx.us/SDL/SD\\_Approx\\_Area.csv](http://www.tea.state.tx.us/SDL/SD_Approx_Area.csv) (reporting approximate area in square miles of each school district in Texas).

4. Property value encompasses real property and small segments of personal property. Property value includes single-family residential; multi-family residential; vacant lots and tracts; qualified agricultural land; non-qualified land; farm and ranch improvements; commercial; industrial (manufacturing); oil, gas and other minerals; mineral reserves; non-producing minerals; utilities industrial (manufacturing); and mobile

low-wealth district) can raise \$10 per student for each \$.01 of tax rate.<sup>5</sup> A school district with \$1,000,000 of property value per ADA (a high-wealth district) can raise \$100 per student for each \$.01 of tax rate. The basic problem with Texas school finance is that the \$100,000 per ADA school district can raise only \$1,000 per ADA for a \$1.00 tax rate,<sup>6</sup> while the \$1,000,000 per ADA district can raise \$10,000 per ADA for a \$1.00 tax rate.

Chart 1: Revenue Yields Per Penny and Per Dollar Tax Rate for Texas School Districts of Varying Property Wealth Per Student

District wealth per ADA	Revenue per ADA at \$.01 tax	Revenue per ADA at \$1.00 tax
\$33,354 Lowest wealth district	\$3	\$334
\$100,000	\$10	\$1,000
\$1,000,000	\$100	\$10,000
\$10,348,175 Highest wealth district	\$1,035	\$103,500

About ninety districts in Texas have more than \$1,000,000 of property wealth per student, and about thirty-four districts have less than \$100,000 wealth per student.<sup>7</sup>

Assuming for this analysis that a district needs<sup>8</sup> about \$7,000 per

homes (owner different from landowner). SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, PROPERTY CLASSIFICATION GUIDE: REPORTS OF PROPERTY VALUE 1 (2008), <http://www.window.state.tx.us/taxinfo/taxforms/96-313.pdf>.

5. Texas tax rates are set as pennies of tax per \$100 of property value.

6. The average school property tax rate in Texas has ranged from about \$.75 to \$1.40 during the course of the *Edgewood* cases, i.e., from 1987 to 2006.

7. See TEX. EDUC. AGENCY, 2008–2009 PRELIMINARY IFA WEALTH PER ADA RANKINGS (2008), [http://www.tea.state.tx.us/school.finance/facilities/ifa/0809\\_wealth\\_per\\_ada\\_rank\\_july08.xls](http://www.tea.state.tx.us/school.finance/facilities/ifa/0809_wealth_per_ada_rank_july08.xls) (providing statewide statistics on property wealth in Texas school districts).

8. What a district “needs” is an extremely contentious matter. However, school districts in 2006–2008 were spending, on average, about \$7,000–\$8,000 per student each year from state and local funds. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 755 (Tex. 2005); see DICK LAVINE & EVA DELUNA CASTRO, CTR. FOR PUB. POLICY PRIORITIES, THE TEXAS TAX & BUDGET PRIMER (2008), <http://www.equitycenter.org/docs2link/Equity%20Center%20webinar%2010-07-08.ppt#322,21> (showing annual statistics on the average amount spent per student in Texas and the relative amounts contributed by local, state, and federal governments). Corrected for inflation, this amount has remained fairly constant over the last ten years. See DICK LAVINE & EVA DELUNA CASTRO, CTR. FOR PUB. POLICY PRIORITIES, THE TEXAS TAX & BUDGET PRIMER (2008), <http://www.equitycenter.org/docs2link/Equity%20Center%20webinar%2010-07-08.ppt#322,21> (providing an excellent statistical analysis of the average amount spent per student from 1996 to 2008, accounting for inflation). Which branch of

student in state and local revenue, those districts with above \$700,000 of property per ADA do not need any state money to meet their needs at a \$1.00 tax rate; these districts have no direct interest in raising state funds for education. Those districts with less than \$700,000 of wealth per student do have an interest in increasing state funds, with increasing interest as wealth decreases. Those districts with low property wealth are absolutely dependent on state funding to even open their doors.

Texas has a school finance system in which most of the funds are generated based on taxes on school district property values, with the share of state and local funding varying over the years from 43% state-57% local to 38% state-62% local.<sup>9</sup> Should Texas decide to rely only on state funds to pay for schools, or to rely mainly on state funds with only a limited amount of local funding, these vast disparities of wealth (and political power) would have no direct effect on the school finance system. However, when the majority of the funds for the school finance system are so dependent on local property wealth of such incredible variation, the educational opportunity of the state's students depends on the system of distribution and overall totals of state funding.<sup>10</sup>

The negative fiscal effects of the distribution of wealth in Texas school districts on low-income and minority communities are

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government gets to make that decision (and establish the system and fund it), the standards it must use, and the educational and research bases for the decision are very important issues in the *Edgewood* litigation, especially in *Edgewood VI*. See *Edgewood VI*, 176 S.W.3d at 753, 756–58, 769–88 (holding that the tax system used by the Texas school finance system violated the state constitution). The evidence in the trial in *Edgewood VI* strongly supported revenues from state and local funds of an additional \$1,300, i.e., based on 2004 expenditures of about \$9,000 per student per year to reach Texas's educational goals. See *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 56–58 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary's Law Journal*) (discussing a “costing out” study of the Texas school finance system conducted “using the econometric/cost function approach”).

9. *Edgewood VI*, 176 S.W.3d at 755.

10. This dilemma was well described by Justice Raul Gonzalez in *Edgewood III*:

Were local revenue but an insubstantial part of the total funding, the disparities in school district property wealth might be inconsequential to the system as a whole. But when local revenue pays a very significant part of the cost of a fundamental education—now more than half—those disparities dominate the entire system.

*Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), 826 S.W.2d 489, 503 (Tex. 1992).

exacerbated by the concentration of low-income and minority students in the poorer districts.<sup>11</sup> In general, the greatest number and concentration of minority students are in low-wealth districts, especially along the Texas border and in the San Antonio and El Paso areas.<sup>12</sup> However, this concentration, like most of the demographic patterns in Texas schools, is not perfectly consistent. The two largest Texas school districts, Dallas I.S.D. and Houston I.S.D., are quite wealthy, yet their students are predominately low-income, minority and Limited English Proficient.<sup>13</sup>

Using formulas that are too complex to describe here,<sup>14</sup> the state methods partially account for the different costs of educating different types of students (e.g., low income, English Language Learners or students with disabilities), and different types of districts (e.g., sparsely populated, very low enrollment or very large enrollment). This system is summarized in Texas by computing the number of “weighted students,” called “Weighted Average Daily Attendance” (WADA). Districts are described by their number of weighted students, as well as their number of students. On average in Texas, a district with 1,000 students (ADA) has about 1,350 weighted students (WADA). Most of the state funding in Texas is based on this WADA number; that is, districts with greater needs for funds because of their student and

11. See TEX. EDUC. AGENCY, SNAPSHOT 2007 SUMMARY TABLES: PROPERTY WEALTH, <http://www.tea.state.tx.us/perfreport/snapshot/2007/propwealth.html> (last visited Dec. 18, 2008) (providing data which demonstrates that the 5% of students in the lowest wealth districts are 95% Hispanic, the 5% of students in the second poorest group of districts are 75% Hispanic, and the same districts are 89% and 77% economically disadvantaged, respectively). These students (the 10%) represent the highest proportion Hispanic and the highest proportion economically disadvantaged of any group in the state.

12. See *id.* (giving statewide statistics on charter and non-charter schools in Texas).

13. See *id.* (indicating that, in 2007, the property wealth in Dallas I.S.D. was between \$428,782–\$468,538 per student, and the property wealth in Houston I.S.D. was between \$393,079–\$428,782 per student).

14. *But see* DANA JEPSON, HOUSE RESEARCH ORG., FORMULA ADJUSTMENTS & THE SCHOOL FINANCE SYSTEM 3–4 (2004), <http://www.hro.house.state.tx.us/focus/weights78-15.pdf> (providing an excellent description of the formulas utilized in the state’s weighted funding tax rating system); LEGISLATIVE BUDGET BD., FINANCING PUBLIC EDUCATION IN TEXAS KINDERGARTEN THROUGH GRADE 12, LEGISLATIVE PRIMER 14, 16–19 (3d ed. 2001), [http://www.lbb.state.tx.us/Education/Public/Finance\\_PublicEd\\_3dEd\\_1001.pdf](http://www.lbb.state.tx.us/Education/Public/Finance_PublicEd_3dEd_1001.pdf) (describing the three-tiered system used in the Texas school finance system and the various sources of funding for public education).

district characteristics get more money than districts with fewer needs. The amount of the property tax funds that very wealthy districts must share with the state or other districts (also known as “recapture”) is also based on the number of weighted students in the district.

Unfortunately, this funding system creates other schisms in support for additional state funding between districts with large WADA counts compared to their ADA counts, called “high-cost districts,”<sup>15</sup> and districts with lower WADA counts compared to their ADA counts, called “low-cost districts.”<sup>16</sup> This creates tension between suburban districts (generally low-cost districts) on the one hand and, on the other hand, a coalition of small, urban, minority<sup>17</sup> districts. This range of high-cost and low-cost districts is also moderately related to the political party distribution in Texas, i.e., more Republican legislators from low-cost districts and more Democratic legislators from high-cost districts. This partisan disparity causes additional tension in developing legislative support for state funding initiatives.

#### A. *Fundamental State Fiscal Decisions*

Once the state has committed to its basic system—in existence in Texas for at least the entire 20th century and into the 21st century—of relying heavily on local property tax bases to support its schools, there are two major and related questions the state must confront. First, to what level of wealth will the state guarantee each penny of tax rate levied and raised at the local

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15. For example, the Edgewood school district in San Antonio has 11,400 ADA and 16,901 WADA, a WADA/ADA ratio of 1.47. Priddy school district has 91 ADA and 251 WADA, a WADA/ADA ratio of 2.76. LEGISLATIVE BUDGET BD., SELECTED VARIABLES BY SCHOOL DISTRICT: FISCAL YEAR 2007, at 10, 23 (2006) [http://www.lbb.state.tx.us/Public\\_Education/Current\\_Law\\_Variables\\_Assump\\_0406.pdf](http://www.lbb.state.tx.us/Public_Education/Current_Law_Variables_Assump_0406.pdf). However, high-cost districts are not necessarily high-spending districts, and low-cost districts are not necessarily low-spending districts. To the extent that a high-cost district is spending at a lower level, it is especially underfunded, even as compared to districts of similar wealth or similar size, which are lower cost.

16. For example, Alamo Heights school district in San Antonio has 4,051 ADA and 4,785 WADA, a WADA/ADA ratio of 1.18. *Id.* at 2.

17. I use the term “minority” here to cover African American and Hispanic/Latino populations. In Texas, until the last few decades, the Hispanic/Latino population was almost completely of Mexican origin.

level? Second, for how many pennies of tax will this guarantee apply?

More specifically, the first question is: Will the legislature directly guarantee every district the revenue that the district would have raised per penny from local taxes if it were a district of \$300,000 per student wealth,<sup>18</sup> or \$400,000, or \$700,000 or \$1,000,000? The average wealth per pupil in 2008–2009 is about \$350,000.<sup>19</sup> Guaranteeing that level of funding per penny would raise all the districts below the average to the average, but would give no funds to the other half of the districts. For a district to raise the \$7,000 per student at this level of state guarantee, the district would need a \$2.00 tax rate (\$35/penny tax rate x 200 pennies of tax). To put this in perspective, this tax rate would require<sup>20</sup> property owners to pay 2% of the value of their property as taxes every year, i.e., a \$4,000 yearly tax for a \$200,000 home and a \$2 million yearly tax on a \$100 million shopping center.

At the other extreme, the state could guarantee every district the revenue that a \$1 million per student district could raise with a penny tax (\$100/\$.01 tax/ADA). At this level of guarantee, a district could raise the “needed” \$7,000 for only \$.70 of tax. In addition, this level of guarantee would give state funds to all but the very richest districts in the state—those with more than \$1 million of property per student. At this very high level of funding, only about 100 of the over 1,000 school districts would not get state funds. This \$1 million guarantee would certainly please local property taxpayers (until they saw the new sales taxes or income taxes they would have to pay), but it would require significant new state funding.

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18. Almost all of the funding in the Texas system is based on the weighted student system, WADA, but the concepts are much easier to understand by using the “per student” or ADA descriptions.

19. This number was computed by dividing the total projected property value of districts divided by the total state ADA, from Texas Education Agency data compiled in July 2008. See TEX. EDUC. AGENCY, 2008–2009 PRELIMINARY IFA WEALTH PER ADA RANKINGS (2008), [http://www.tea.state.tx.us/school.finance/facilities/ifa/0809\\_wealth\\_per\\_ada\\_rank\\_july08.xls](http://www.tea.state.tx.us/school.finance/facilities/ifa/0809_wealth_per_ada_rank_july08.xls) (ranking school districts in Texas based on the average wealth per student).

20. For simplicity, this does not include deductions for homestead, limitations on taxes for persons over sixty-five, etc.

As the guaranteed level of yield per penny increases, the state's required contribution increases at an accelerated contribution for each penny of tax. With a \$350,000 per student guarantee, the state must supplement about half the districts. Under a \$1 million per student guarantee, the state supplements over 90% of districts. At this \$1 million per student level, in addition to supplementing many richer districts that would not otherwise get funding (those between \$350,000 per student and \$1 million per student), the state owes the districts much more for each penny. For example, at the \$1 million guarantee a \$100,000/ADA district would get \$90 from the state per student for each penny of tax rate, while at the \$350,000 level, the \$100,000 district would get only \$25 from the state per penny tax for each student. At the \$1 million guarantee the \$350,000 (or average) district would get \$65 from the state per student per penny tax, while at the \$350,000 guarantee this district would get no funds from the state per student per penny tax.

The other decision the state must make is to decide for how many pennies this guarantee will apply. Clearly it will cost the state, at most,<sup>21</sup> twice as much to guarantee the first \$1.00 of local taxes than to guarantee only the first \$.50 of taxes. If the state guarantees funds at higher tax rates, it "shares" the extra costs with the local districts, i.e., for each penny of tax the local districts must share in the costs by taxing their property.

There are many competing considerations in this formula, but there is clearly a trade-off between using state money to increase the level of funding for each penny of tax and using state money to guarantee more pennies of tax rate. Increasing the yield per penny requires new state funding only, while increasing the number of pennies covered requires both state funding and local funding. If there is agreement that schools need more money, generally, school districts would prefer higher yields per penny, and the state would prefer to cover more pennies of tax.<sup>22</sup> However, the

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21. The relationship is not perfect because, as the tax rates increase, some districts will not raise their taxes sufficiently to get all the available state monies. For example, a low-wealth district with a \$.75 tax rate will obtain all the state money available if the state guarantees to the \$.50 level, but will not get all the state money if the state guarantees up to \$1.00 tax—the tax rate remains at the \$.75 level.

22. There are limits to these preferences. Low-wealth districts receive fewer funds

support for this decision also splits between poorer and richer school districts. Wealthier districts would prefer to spend more money increasing the yield per penny of tax, because a greater proportion of richer districts will get money from the state and less of their property taxes are necessary to meet their part of the school finance funds. On the other hand, lower wealth districts would prefer a system that maximizes the total yield for them from any amount of state funds. From the perspective of the low-wealth districts, a system with a very high yield per penny, in fact, wastes state funds by sending money to wealthier districts that can easily raise more money from their local tax base, and reduces the total amount of state money that can be sent to low-wealth districts.

Both rich districts and poor districts want to keep local tax rates low because of local political pressures. Of course, state decision makers must listen to local taxpayers as well as state revenue concerns, so they are pressured not to implement a system requiring more local taxes, but instead to increase the yield.

In Texas, the general trend between the 1949 implementation of the present system and 2006 (the year the most recent system was enacted) was to increase both the yields per penny and the number of pennies covered, though the focus on one or the other of these alternatives has varied through the years. However, in 2006, partially in response to the *Edgewood VI* decision, the legislature greatly increased the yield per penny and greatly decreased the number of pennies guaranteed.<sup>23</sup>

The major equity issue in Texas is simple. Low-wealth districts are at an increasing disadvantage as the total guaranteed yield at the highest “guaranteed” tax rate decreases, and are at an even greater disadvantage for each penny of tax allowed for which there is no state guarantee. Of course, low-wealth districts share with other districts the pain of increasing local tax rates.

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from a state system that spends state money to help wealthy districts, if the system also allows the wealthy districts to raise local funds for their exclusive use at higher tax rates, than a system which guarantees a lower level of funding per penny but guarantees a higher level in the whole system and limits the ability of wealthy districts to raise local monies for their exclusive use at higher tax rates.

23. Act of May 26, 2006, 79th Leg., 3d C.S., ch. 5, 2006 Tex. Gen. Laws 45, amended by Act of May 4, 2007, 80th Leg., R.S., ch. 19, 2007 Tex. Gen. Laws 16.

Chart 2: Revenues Available to Low-wealth, Mid-wealth and High-wealth Districts in the System with Guaranteed Yield of \$50/Penny/Student Up to \$1.00 Tax and No Cap on Tax Rates (No Recapture)—Unequalized Enrichment

Wealth/ADA	Revenue/ADA at \$1.00 tax rate (with state "guarantee")	Revenue/ADA at \$1.10 tax rate (no state funds above \$1.00)	Revenue/ADA at \$2.00 tax rate (no state funds above \$1.00)
\$35,000 (poorest district)	\$5,000	\$5,035	\$5,350
\$100,000	\$5,000	\$5,100	\$6,000
\$350,000	\$5,000	\$5,350	\$8,500
\$1,000,000 (richest district)	\$10,000	\$11,000	\$20,000

Chart 3: Revenues Available to Low-wealth, Mid-wealth and High-wealth Districts in the System with Guaranteed Yield of \$70/Penny/Student Up to \$1.00 Tax and No Cap on Tax Rates (No Recapture)

Wealth/ADA	Revenue/ADA at \$1.00 tax rate (with state "guarantee")	Revenue/ADA at \$1.10 tax rate (no state funds above \$1.00)	Revenue/ADA at \$2.00 tax rate (no state funds above \$1.00)
\$35,000 (poorest district)	\$7,000	\$7,035	\$7,350
\$100,000	\$7,000	\$7,100	\$8,000
\$350,000	\$7,000	\$7,350	\$10,500
\$1,000,000 (richest district)	\$10,000	\$11,000	\$20,000

Chart Two and Chart Three show the effects of unequalized enrichment. Unequalized enrichment allows districts to raise tax revenues from their own districts and keep all those funds within their school districts.<sup>24</sup> These locally-raised funds are not matched by state funding, so districts with greater property wealth per student have the significant fundraising advantages shown. This unequalized enrichment is exemplified by Chart Two's comparison of revenues at a \$2.00 tax rate at the wealth levels shown above for the poorest (\$5,350/ADA), poor (\$6,000/ADA), average wealth

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24. See Intercultural Development Research Association, Glossary, [http://www.idra.org/Education\\_Policy.htm/Fair\\_Funding\\_for\\_the\\_Common\\_Good/Glossary](http://www.idra.org/Education_Policy.htm/Fair_Funding_for_the_Common_Good/Glossary) (last visited Dec. 18, 2008) ("[Unequalized enrichment is] used to describe money that is unequally available to school districts because of differences in local property wealth per student, and that is not equalized by state funding."). Unequalized enrichment "gives certain school districts differing amounts of additional funds for enhancing educational opportunity beyond the basic programs provided by the equalized foundation school program and equalized enrichment." *Id.*

(\$8,500/ADA) and wealthy (\$20,000/ADA) districts.

These two charts highlight several problems with the school finance system from an equity perspective: (1) the low-wealth districts are absolutely dependent on state funding; (2) low-wealth districts suffer disadvantages at an incredible rate as districts are allowed to raise local funds without state share and keep all the local funds raised, i.e., without recapture; (3) districts up to the state guaranteed level of wealth share the same interest in raising new state funds for schools, but as the wealth of a district increases, its opportunity to meaningfully raise additional funds for its schools without state funds increases; and (4) the wealthiest districts have little interest in raising more state funds for schools as long as they keep all the property taxes they generate locally.

### B. Recapture

One of the major (and most directly equalizing) changes to the school finance system implemented because of the *Edgewood* cases is the system of recapture.<sup>25</sup> Recapture is a term used to describe the requirement that very wealthy school districts in Texas share the tax revenues generated from property in their districts with lower wealth districts or the state itself. It has been in effect since the 1991–1992 school year and has generated between \$300 million to \$1.3 billion per year for the state school finance system, of the approximately \$30 billion spent on public schools each year in Texas. This amounts to about 4–5% of the funds, or about \$300/ADA/year.

To understand recapture, we will look at the effects of a state law that requires school districts with over \$700,000 (twice the average wealth per ADA in the state, a level exceeded by about 140 of the state's 1,030 school districts<sup>26</sup>) to share the revenue generated from property in their school districts. We will look at the effect this \$700,000 limit would have on the system

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25. The legal and educational justifications for recapture will be discussed in Part Three and Part Four of this article.

26. See TEX. EDUC. AGENCY, 2008–2009 PRELIMINARY IFA WEALTH PER ADA RANKINGS (2008), [http://www.tea.state.tx.us/school.finance/facilities/ifa/0809\\_wealth\\_per\\_ada\\_rank\\_july08.pdf](http://www.tea.state.tx.us/school.finance/facilities/ifa/0809_wealth_per_ada_rank_july08.pdf) (displaying estimated Instructional Facilities Allotment (IFA) wealth per ADA rankings from data compiled in July 2008).

guaranteeing \$50/ADA/penny, i.e., the revenue generated by a district of \$500,000/ADA wealth.

Chart 4: Revenue Generated and Revenue Recaptured for Districts of Different Wealth and Different Tax Rates, with Recapture

Wealth/ADA	Revenue/ADA at \$1.00 tax rate	Revenue/ADA at \$1.10 tax rate (no state funds above \$1.00)	Revenue/ADA at \$2.00 tax rate (no state funds above \$1.00)
\$35,000	\$5,000	\$5,035	\$5,350
\$100,000	\$5,000	\$5,100	\$6,000
\$350,000	\$5,000	\$5,350	\$8,500
\$1,000,000 (effect of recapture)	\$7,000 (\$10,000 minus \$3,000 recaptured)	\$7,700 (\$11,000 minus \$3,300 recaptured)	\$14,000 (\$20,000 minus \$6,000 recaptured)

Under this example, the revenue available to the wealthiest district would be significantly less than the amount available without recapture, and with recapture, the state system would be enriched. For example, for a \$1 million/ADA district with 5,000 students, \$15 million (\$3,000/ADA x 5,000 ADA) would be recaptured at a \$1.00 tax rate and \$30 million at a \$2.00 tax rate. Statewide, if there is recapture of an average of \$6,000/ADA for 200,000 ADA, this would create \$1.2 billion in recaptured funds.<sup>27</sup>

This rather long description of the fiscal facts of the system is necessary to understand the positions of the parties in the school finance cases and the barriers school districts, the legislature and the courts must face to meet their respective fiscal, constitutional and political challenges.

## II. INCONSISTENT INTERPRETATION OF TEXAS CONSTITUTIONAL PROVISIONS

Now we will consider the Texas constitutional provisions and educational history that must somehow be reconciled to create a school finance system that can respond to these demographic and political landscapes and meet the standards of the Texas constitution as interpreted by the Texas Supreme Court. As outlined in this section and explained in more detail in Part IV of this article, the Texas Supreme Court's interpretation of these

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27. 200,000 ADA x \$6,000/ADA = \$1,200,000,000.

provisions has changed over time.

Three provisions of the Texas constitution have provided the bedrock on which the *Edgewood* decisions are based. Article VII, section 1 (the education clause),<sup>28</sup> article VII, section 3 (the school district creation and tax clause),<sup>29</sup> and article VIII, section 1-e (the prohibition of statewide ad valorem tax clause)<sup>30</sup> are so important to this analysis that the language and range of interpretations of each provision will be discussed in some detail. Because of the complexity of its definition, the education clause will be analyzed in this section. The other major provisions, article VII, section 3 and article VIII, section 1-e, will be analyzed in Part IV.

### A. *The Education Clause*

Like the education clauses of most other state constitutions,<sup>31</sup> the Texas constitution speaks with reverence of the importance of education to the state and the duties of the legislature to provide for that education. Specifically, the provision requires “[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, [and] it shall be the duty of the [l]egislature of the [s]tate to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”<sup>32</sup>

The Texas *Edgewood* decisions, and sometimes different judges on the same court, have disagreed about whether the courts can even interpret this provision and, if so, what the important terms in the provision actually mean. Two of the three judges on the Austin Court of Appeals in the *Edgewood I* litigation held that the determination of whether a school system is “efficient” under article VII, section 1 is a nonjusticiable “political question” to be

28. TEX. CONST. art. VII, § 1.

29. TEX. CONST. art. VII, § 3.

30. TEX. CONST. art. VIII, § 1-e.

31. See, e.g., Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 3–8 (providing an overview of the language used in education clauses of various state constitutions); William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 534–44 (1988) (analyzing various state constitutional provisions to determine if the language makes public education a quality standard or a fundamental right).

32. TEX. CONST. art. VII, § 1.

decided by the legislature, rather than by the courts.<sup>33</sup> In the *Edgewood VI* litigation, the state again took the position that interpretation of the terms “efficiency,” “adequacy” and “suitability” are nonjusticiable political questions, and the courts should leave the interpretation of these to the legislature.<sup>34</sup> The Texas Supreme Court has consistently rejected this argument and has preserved its power to determine what article VII, section 1 actually means and requires.<sup>35</sup>

Determining the operational definition of “efficiency” and applying that definition to the school finance system before the court has been the most important overall issue before the Texas courts in the school finance cases. In *Edgewood I*, the court first announced a “dictionary” definition of efficiency and then gave an operational definition of the term.<sup>36</sup>

Under the dictionary definition, “[e]fficient’ conveys the meaning of effective or productive of (sic) results and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed over time.”<sup>37</sup> The *Edgewood I* court then gave its operational explanation of “efficiency”:

There must be a direct and close correlation between a district’s tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.<sup>38</sup>

The *Edgewood I* court also clearly noted the link between

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33. Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859, 867 (Tex. App.—Austin 1988), *rev’d*, 777 S.W.2d 391 (Tex. 1989).

34. Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (*Edgewood VI*), 176 S.W.3d 746, 777–78 (Tex. 2005).

35. *Id.* at 780–81; Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 393–94 (Tex. 1989).

36. *Edgewood I*, 777 S.W.2d at 395.

37. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 725 (Philip Babcock Gove et al. eds., G. & C. Merriam Co. 1976)).

38. *Id.* at 397.

efficiency and equal rights.<sup>39</sup> After citing with approval several statements of the Texas legislature noting the link between efficiency and equal educational opportunity,<sup>40</sup> the court stated, “Not only the legislature, but also this court has previously recognized the implicit link that the Texas constitution establishes between efficiency and equality.”<sup>41</sup>

Fourteen years later in *Edgewood V* and *Edgewood VI*, the court summarized its efficiency standard as follows:

[T]he constitutional standard of efficiency requires substantially equivalent access to revenue only up to a point, after which a local community can elect higher taxes to “supplement” and “enrich” its own schools. That point, of course, although we did not expressly say so in *Edgewood I*, is the achievement of an adequate school system as required by the [c]onstitution. Once the [l]egislature has discharged its duty to provide an adequate school system for the [s]tate, a local district is free to provide enhanced public education opportunities if its residents vote to tax themselves at higher levels. The requirement of efficiency does not preclude local supplementation of schools.<sup>42</sup>

However, as in *Edgewood Iia*,<sup>43</sup> the *Edgewood VI* court cautioned that “the amount of ‘supplementation’ in the system cannot become so great that it, in effect, destroys the efficiency of the entire system.”<sup>44</sup> In later sections, I will explain this change in more detail.

Though the *Edgewood* cases must still be viewed first as “efficiency” cases, the concepts of “suitability” and “general diffusion of knowledge,” (also called “adequacy”), are now considered to be independent requirements of article VII, section 1. *Edgewood I* held that the efficiency standard had two prongs: (1) “financially efficient” and (2) “efficient in the sense of

39. *Id.*

40. *Id.*

41. *Edgewood I*, 777 S.W.2d at 397.

42. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 791 (Tex. 2005) (quoting *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis (Edgewood V)*, 107 S.W.3d 558, 566 (Tex. 2003)).

43. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood Iia)*, 804 S.W.2d 499, 500 (Tex. 1991) (op. on reh’g) (condoning school districts’ supplementation of local education “as long as efficiency is maintained”).

44. *Edgewood VI*, 176 S.W.3d at 792.

providing for 'a general diffusion of knowledge' statewide."<sup>45</sup>

In *Edgewood VI*, the court redefined the "general diffusion of knowledge" requirement.<sup>46</sup> With a very significant modification, the Texas Supreme Court in *Edgewood VI* accepted the *Edgewood VI* trial court's definition of "a general diffusion of knowledge":

"To fulfill the constitutional obligation to provide a general diffusion of knowledge, districts must 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.*' Districts satisfy this constitutional obligation when they 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.'"

We agree, with one caveat. The public education system need not operate perfectly; it is adequate if districts are *reasonably* able to provide their students the access and opportunity the district court described.<sup>47</sup>

#### B. *Suitable Provision*

The "suitable provision" clause of article VII, section 1 was first defined by the Texas Supreme Court in *Edgewood IV*: "Certainly, if the [l]egislature substantially defaulted on its responsibility such that Texas school children were denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas, the 'suitable provision' clause would be violated."<sup>48</sup> The *Edgewood VI* decision changed the definition, stating that the "'suitable provision' requires that public school system be structured, operated, and funded so that it can accomplish its purpose for all Texas children."<sup>49</sup> When applied,

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45. *Edgewood I*, 777 S.W.2d at 397.

46. *Edgewood VI*, 176 S.W.3d at 792.

47. *Id.* at 787 (citations omitted) (quoting *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 65 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary's Law Journal*)).

48. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 736 (Tex. 1995).

49. *Edgewood VI*, 176 S.W.3d at 753.

the court further weakened the “suitability” test by concluding that “[n]either the structure nor the operation of the funding system prevents [the legislature] from efficiently accomplishing a general diffusion of knowledge.”<sup>50</sup> While acknowledging that the vast disparity of local property wealth makes it difficult to design an efficient system based heavily on local property taxes, it concluded that “efficiency” is not impossible.<sup>51</sup>

This article will not explain the Texas Supreme Court’s discussion and interpretation of several other constitutional provisions that were either relied on by lower courts and not relied on by the supreme court<sup>52</sup> or presented by the parties and rejected by the court.<sup>53</sup>

### III. THE TEXAS SUPREME COURT’S *EDGEWOOD* OPINIONS

Part I reviewed some of the facts of the Texas school finance system that have been at issue in the opinions. Part II outlined the major “education clause” issues and interpretations that have been addressed in the decisions. This section, Part III, provides a brief

50. *Id.* at 794.

51. *Id.* at 796.

52. The district court in *Edgewood I* relied on article VII, section 1, as well as the Texas equal rights clause, article I, section 3; the equality under the law provision, article I, section 3a; and the privileges and immunities clauses, article I, sections 19 and 29. The supreme court did not decide the equal rights clause, equality under the law clause and privileges and immunities clause arguments on appeal. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 398 (Tex. 1989). See generally JOSÉ A. CÁRDENAS, TEXAS SCHOOL FINANCE REFORM, AN IDRA PERSPECTIVE 221–54 (Intercultural Dev. Research Ass’n (IDRA) ed., 1997) (containing the full text of the original *Edgewood I* decision, judgment, findings of fact, and conclusions of law). Carmen Rumbaut and I discussed the application of the Texas equal rights clauses to the state school finance system in a previous law review article in the *St. Mary’s Law Journal*. See Albert H. Kauffman & Carmen Maria Rumbaut, *Applying Edgewood v. Kirby to Analysis of Fundamental Rights Under the Texas Constitution*, 22 ST. MARY’S L.J. 69, 80–95 (1990) (discussing the application of the Texas and federal equal rights provisions to the Texas school finance system).

53. Both the district court and the supreme court in *Edgewood IV* rejected a series of constitutional challenges based on the public benefits clause, article III, sections 51 and 52, the delegation of authority clause, article I, section 16 (obligation of contracts), art. VIII, section 11 (place of assessment) and a broad claim that the Texas constitution requires vouchers under article III, section 1 and article VII, section 1. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 739–48 (Tex. 1995); *Edgewood Indep. Sch. Dist. v. Meno*, No. 362,516-B (250th Dist. Ct., Travis County, Tex. Jan. 26, 1994) (on file with the *St. Mary’s Law Journal*).

summary of the decisions themselves and their relationship to previous opinions. In Part III, I also describe the school finance systems that were before the court in the *Edgewood* cases and how those systems affected the legal analyses in those decisions. Part IV, the next section, focuses on the changes in the court's interpretations of the underlying issues, legal and factual. Part IV also contains a critique of the trends in these decisions.

#### A. *Edgewood I (1984–1989)*

The school finance system before the Texas Supreme Court in 1989 was elegantly described in the opinion itself:

There are glaring disparities in the abilities of the various school districts to raise revenues from property taxes because taxable property wealth varies greatly from district to district. The wealthiest district has over \$14,000,000 of property wealth per student, while the poorest has approximately \$20,000; this disparity reflects a 700 to 1 ratio. The 300,000 students in the lowest-wealth schools have less than 3% of the state's property wealth to support their education while the 300,000 students in the highest-wealth schools have over 25% of the state's property wealth; thus the 300,000 students in the wealthiest districts have more than eight times the property value to support their education as the 300,000 students in the poorest districts. The average property wealth in the 100 wealthiest districts is more than twenty times greater than the average property wealth in the 100 poorest districts. Edgewood I.S.D. has \$38,854 in property wealth per student; Alamo Heights I.S.D., in the same county, has \$570,109 in property wealth per student.

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... However, the Foundation School Program does not cover even the cost of meeting the state-mandated minimum requirements. Most importantly, there are no Foundation School Program allotments for school facilities or for debt service. The basic allotment and the transportation allotment understate actual costs, and the career ladder salary supplement for teachers is underfunded. For these reasons and more, almost all school districts spend additional local funds. Low-wealth districts use a significantly greater proportion of their local funds to pay the debt service on construction bonds while high-wealth districts are able to use their funds to pay for a wide array of enrichment programs.

Because of the disparities in district property wealth, spending

per student varies widely, ranging from \$2,112 to \$19,333. Under the existing system, an average of \$2,000 more per year is spent on each of the 150,000 students in the wealthiest districts than is spent on the 150,000 students in the poorest districts.

The lower expenditures in the property-poor districts are not the result of lack of tax effort. Generally, the property-rich districts can tax low and spend high while the property-poor districts must tax high merely to spend low. In 1985–86, local tax rates ranged from \$.09 to \$1.55 per \$100 valuation. The 100 poorest districts had an average tax rate of 74.5 cents and spent an average of \$2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of \$7,233 per student. In Dallas County, Highland Park I.S.D. taxed at 35.16 cents and spent \$4,836 per student while Wilmer-Hutchins I.S.D. taxed at \$1.05 and spent \$3,513 per student. In Harris County, Deer Park I.S.D. taxed at 64.37 cents and spent \$4,846 per student while its neighbor North Forest I.S.D. taxed at \$1.05 and yet spent only \$3,182 per student. A person owning an \$80,000 home with no homestead exemption would pay \$1,206 in taxes in the east Texas low-wealth district of Leveretts Chapel, but would pay only \$59 in the west Texas high-wealth district of Iraan-Sheffield. Many districts have become tax havens. The existing funding system permits “budget balanced districts” which, at minimal tax rates, can still spend above the statewide average; if forced to tax at just average tax rates, these districts would generate additional revenues of more than \$200,000,000 annually for public education.<sup>54</sup>

This lengthy excerpt from the *Edgewood I* supreme court opinion, drawn from the detailed findings of the district court trial in 1987,<sup>55</sup> introduces the concepts of gross disparity in expenditures and gross disparities in tax rates, as well as loss of hundreds of millions of dollars because of lower tax rates in very wealthy districts, the location of very rich and very poor districts in the same counties, and the inability of low-wealth districts to afford even the state’s minimum standards.<sup>56</sup> The unanimous *Edgewood*

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54. *Edgewood I*, 777 S.W.2d at 392–93.

55. See generally JOSÉ A. CÁRDENAS, TEXAS SCHOOL FINANCE REFORM, AN IDRA PERSPECTIVE 221–54 (Intercultural Dev. Research Ass’n (IDRA) ed., 1997) (containing the full text of the original *Edgewood I* decision, judgment, findings of fact, and conclusions of law).

56. See *Edgewood I*, 777 S.W.2d at 392–93 (discussing the inequalities of the Texas school finance system).

*I* decision also firmly rejected the state's and the wealthy district intervenors' argument that the system was constitutionally supported by the concept of local control, holding that "[a]n efficient system will actually allow for more local control, not less."<sup>57</sup> Joining in the national debate on the relationship between funding and educational quality, the Texas Supreme Court concluded that "[t]he amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student."<sup>58</sup>

Based on a thorough discussion of the history of and intent behind the Texas constitution's education efficiency clause,<sup>59</sup> the court held the system to be unconstitutional and set out the test of unconstitutionality still quoted and acknowledged, though not followed, in the later decisions:

There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.<sup>60</sup>

Though the court had before it a district court opinion finding violations of Texas's equal rights provisions, the court did not rule on these issues. The court did, however, draw the link between equity and efficiency, holding that "[n]ot only the legislature, but also this court has previously recognized the implicit link that the Texas Constitution establishes between efficiency and equality."<sup>61</sup>

The Texas Supreme Court in *Edgewood I*, and again in *Edgewood II*, focused primarily on the disparities between the richest and poorest districts.<sup>62</sup> In summary, the Texas Supreme

57. *Id.* at 398.

58. *Id.* at 393.

59. TEX. CONST. art. VII, § 1.

60. *Edgewood I*, 777 S.W.2d at 397.

61. *Id.*

62. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 496-97 (Tex. 1991) (discussing differences in property wealth between the richest and the poorest school districts); *Edgewood I*, 777 S.W.2d at 392-93, 397 (providing statistical evidence of the disparities between the richest and the poorest school districts).

Court in *Edgewood I* unanimously declared unconstitutional a school finance system in which the state guaranteed all districts access to funds the state determined to be sufficient to meet state standards at a certain tax rate, while allowing districts to raise local taxes and spend the generated funds at higher levels of taxation and expenditure.<sup>63</sup>

## B. Edgewood II (1990–1991)

After several unsuccessful special sessions in the spring of 1990, the Texas legislature passed Senate Bill 1 in June 1990.<sup>64</sup> Senate Bill 1 allocated additional state funds to the education system and promised to put additional funds into the system in future years. Senate Bill 1 also set a goal of having 95% of Texas students in an equalized system. Senate Bill 1 did not, however, enable the state to use the resources from the richest districts to support the state system.<sup>65</sup> After the district court held Senate Bill 1 inconsistent with *Edgewood I*'s requirements, and therefore unconstitutional,<sup>66</sup> the Texas Supreme Court in *Edgewood II* unanimously concluded that the legislature's attempt to modify the education system through Senate Bill 1 was unconstitutional as well.<sup>67</sup>

Again the court rejected the school finance plan in strong and clear language and developed and expanded on the concepts it had introduced in *Edgewood I*.<sup>68</sup> The following excerpt summarizes what continued to rankle the court about the system and outlines the issues that the legislature would have to confront in order to meet the constitutional requirements:

Even if the approach of Senate Bill 1 produces a more equitable utilization of state educational dollars, it does not remedy the major causes of the wide opportunity gaps between rich and poor districts.

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63. See *Edgewood I*, 777 S.W.2d at 392 (summarizing the state education funding plan held unconstitutional).

64. Act of June 7, 1990, 71st Leg., 6th C.S., ch. 1, 1990 Tex. Gen. Laws 1.

65. See JOSÉ A. CÁRDENAS, TEXAS SCHOOL FINANCE REFORM, AN IDRA PERSPECTIVE 221–54 (Intercultural Dev. Research Ass'n (IDRA) ed., 1997) (providing a detailed analysis of Senate Bill 1).

66. *Edgewood II*, 804 S.W.2d at 493.

67. *Id.* at 496.

68. See *id.* at 496–98 (analyzing deficiencies in the school finance plan created by Senate Bill 1).

It does not change the boundaries of any of the current 1,052 school districts, the wealthiest of which continues to draw funds from a tax base roughly 450 times greater per weighted pupil than the poorest district. It does not change the basic funding allocation, with approximately half of all education funds coming from local property taxes rather than state revenue. And it makes no attempt to equalize access to funds among all districts. By limiting the funding formula to districts in which 95% of the students attend school, the [l]egislature excluded 132 districts which educate approximately 170,000 students and harbor about 15% of the property wealth in the state. A third of our students attend school in the poorest districts which also have about 15% of the property wealth in the state. Consequently, after Senate Bill 1, the 170,000 students in the wealthiest districts are still supported by local revenues drawn from the same tax base as the 1,000,000 students in the poorest districts.

These factors compel the conclusion as a matter of law that the [s]tate has made an unconstitutionally inefficient use of its resources. The fundamental flaw of Senate Bill 1 lies not in any particular provisions but in its overall failure to restructure the system. Most property owners must bear a heavier tax burden to provide a less expensive education for students in their districts, while property owners in a few districts bear a much lighter burden to provide more funds for their students. Thus, Senate Bill 1 fails to provide “a direct and close correlation between a district’s tax effort and the educational resources available to it.”<sup>69</sup>

Unlike the *Edgewood I* court, the *Edgewood II* court went on to outline possible remedies. The court recommended consolidation of school districts and consolidation of tax bases as “available avenue[s] toward greater efficiency.”<sup>70</sup>

The *Edgewood II* court strongly supported the constitutionality of tax base consolidation, chiding the district court for the district court’s observation that tax base consolidation would “run afoul of certain constitutional provisions related to taxation.”<sup>71</sup>

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69. *Id.* at 496 (quoting *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989)) (internal citations omitted).

70. *Id.* at 497.

71. *Edgewood II*, 804 S.W.2d at 497 (quoting *Edgewood Indep. Sch. Dist. v. Kirby*, No. 362,516, at 25 (250th Dist. Ct., Travis County, Tex. Sept. 24, 1990) (on file with the *St. Mary's Law Journal*)). The low-wealth plaintiffs in *Edgewood I* and *Edgewood II* presented to the district court in *Edgewood II* proposed plans that would consolidate the

Article VII of the [c]onstitution accords the [l]egislature broad discretion to create school districts and define their taxing authority. The [c]onstitution does not present a barrier to the general concept of tax base consolidation, and nothing in *Love* prevents creation of school districts along county or other lines for the purpose of collecting tax revenue and distributing it to other school districts within their boundaries. While consolidating tax bases may not alone assure substantially equal access to similar revenues, the district court erred in concluding that it is constitutionally prohibited.<sup>72</sup>

Thus, in *Edgewood II* the court unanimously rejected a school finance plan that purported to substantially raise all districts to the level of the 95th percentile district, by adding significant state funds and constantly monitoring the school finance system to address any inequalities that might arise.<sup>73</sup> The system was rejected because it wasted the resources that could be generated by wealthy school districts (those above the 95th percentile level) if they taxed at the rate of poorer districts.<sup>74</sup> In essence, the Senate Bill 1 system continued to waste resources by allowing the wealthy districts to protect themselves from the taxes applied to the rest of the state.<sup>75</sup>

### C. Edgewood IIa (1991)

One month after the unanimous *Edgewood II* opinion, in

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tax base of each county, tax that property at the county level and then redistribute those funds to districts in the county on a weighted student basis. *Edgewood Indep. Sch. Dist. v. Kirby*, No. 362,516, at 25 (250th Dist. Ct., Travis County, Tex. Sept. 24, 1990) (on file with the *St. Mary's Law Journal*). This tax base consolidation plan was encompassed in Senate Bill 9 and House Bill 34, authored by Senator Hector Uribe and Representative Greg Luna, respectively. Tex. S.B. 9, 71st Leg., 3d C.S. (1990); Tex. H.B. 34, 71st Leg., 3d C.S. (1990). The district court reviewed these plans and noted that this option "appears to run afoul of certain constitutional provisions related to taxation." *Edgewood Indep. Sch. Dist. v. Kirby*, No. 362,516, at 25 (250th Dist. Ct., Travis County, Tex. Sept. 24, 1990) (on file with the *St. Mary's Law Journal*) (citing TEX. CONST. art. VII, § 3; TEX. CONST. art. VIII, § 1-e).

72. *Edgewood II*, 804 S.W.2d at 497-98 (footnotes omitted).

73. See *id.* at 496-98 (reviewing and rejecting the state's proposal for funding public education).

74. *Id.* at 497.

75. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 496-97 (Tex. 1991).

response to an ill-conceived motion for rehearing in *Edgewood II*, the court in *Edgewood IIA* wrote an additional supplementary opinion with several dissenting opinions.<sup>76</sup> This five-justice opinion on motion for rehearing reversed the movement of the *Edgewood* standards toward more efficiency and equity and planted the seeds for much of the retrenchment to follow.<sup>77</sup> The motion for rehearing asked the Texas Supreme Court to either overrule *Love v. City of Dallas*<sup>78</sup> or allow statewide recapture. The court soundly rejected both requests.<sup>79</sup> The court upheld *Love*,<sup>80</sup> which it had distinguished, but not overruled, in its original opinion.<sup>81</sup>

However, the real change in *Edgewood IIA* is the court's holding that article VIII, section 1-e and article VII, section 3 "mandate that local tax revenue is not subject to state-wide recapture" and that there is a "basic constitutional distinction between the [s]tate's primary obligation and the local districts' secondary contributions."<sup>82</sup> The Texas Supreme Court concluded its opinion by stating, "Once the [l]egislature 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."<sup>83</sup>

*Edgewood IIA* moved the court from unanimity to a fractious split, closely related to the partisan makeup of the court.<sup>84</sup>

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76. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood IIA)*, 804 S.W.2d 499, 499-508 (Tex. 1991) (op. on reh'g). As previously explained, the *Edgewood II* case is actually two opinions in one. The first part is a unanimous decision declaring the 1990 school finance system unconstitutional. *Edgewood II*, 804 S.W.2d at 491-99 (Tex. 1991). The second part of the decision is the "Opinion on Motion for Rehearing," consisting of an opinion by five of the nine justices. *Edgewood IIA*, 804 S.W.2d at 499-500.

77. *Edgewood IIA*, 804 S.W.2d at 499-508.

78. *Love v. City of Dallas*, 120 Tex. 351, 40 S.W.2d 20 (1931).

79. *Edgewood IIA*, 804 S.W.2d at 499.

80. *Id.*

81. *Edgewood II*, 804 S.W.2d at 497-98.

82. *Edgewood IIA*, 804 S.W.2d at 499-500.

83. *Id.* at 500.

84. See Line of Succession of Supreme Court of Texas Justices from 1945, <http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present-111406.pdf> (last visited Dec. 18, 2008) (providing the dates of service of all members of the Texas Supreme Court).

## D. Edgewood III (1991–1992)

In the spring of 1991, the legislature followed the suggestions of the Texas Supreme Court in *Edgewood II* and devised a system of consolidated tax bases, called Senate Bill 351.<sup>85</sup> Senate Bill 351 created 188 county education districts (CEDs), which were given the power to tax at certain rates and distribute those tax funds to school districts within the CEDs.<sup>86</sup> Senate Bill 351 allowed districts to raise taxes above those collected by the CEDs and guaranteed a yield for the local school district tax rates.<sup>87</sup> However, Senate Bill 351 set tax caps that would prevent the wealthiest districts from utilizing their affluent tax bases to raise significant amounts of unequalized enrichment funds.<sup>88</sup>

Though the *Edgewood III* opinion describes the Senate Bill 351 system in a generally negative light, Senate Bill 351, for the first time in Texas history, actually addressed in a strong and clear way—thought at the time of passage to be consistent with the demands of *Edgewood II*—the very inefficiencies so strongly criticized in the *Edgewood I* and *Edgewood II* opinions.<sup>89</sup> Specifically, the property wealth of the richest districts in the state, raised to the increasing tax rate limits for the county education districts set in the statute, were being taxed at the same rate as other property within the state and were generating extensive new revenues. These revenues from the wealthiest districts both enriched the whole state education system and significantly decreased the disparities between the revenue available to the

85. Act of Apr. 11, 1991, 72nd Leg., R.S., ch. 20, 1991 Tex. Gen. Laws 381, amended by Act of May 27, 1991, 72nd Leg., R.S., ch. 391, 1991 Tex. Gen. Laws 1475.

86. See *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 498–500 (Tex. 1992) (providing a detailed description of the plan); see also JOSÉ A. CÁRDENAS, TEXAS SCHOOL FINANCE REFORM, AN IDRA PERSPECTIVE 318–29 (Intercultural Dev. Research Ass'n (IDRA) ed., 1997) (analyzing the school finance system created by Senate Bill 351).

87. Act of Apr. 11, 1991, 72nd Leg., R.S., ch. 20, 1991 Tex. Gen. Laws 381, 386, amended by Act of May 27, 1991, 72nd Leg., R.S., ch. 391, 1991 Tex. Gen. Laws 1475.

88. *Id.*

89. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 496–97 (Tex. 1991) (summarizing the disparities of school district wealth within counties across Texas); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 392–93, 397 (Tex. 1989) (commenting on the disparities between the richest and the poorest school districts in Texas).

richest districts and the revenue available to the poorest districts.<sup>90</sup>

Nevertheless, the court in *Edgewood III* significantly developed its article VIII, section 1-e and article VII, section 3 jurisprudence. The court concluded that Senate Bill 351 violated the article VIII, section 1-e standard: "An ad valorem tax is a state tax when it is imposed directly by the [s]tate or when the [s]tate so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion."<sup>91</sup>

The *Edgewood III* court also held that Senate Bill 351 violated article VII, section 3 because Senate Bill 351 required a local ad valorem tax without the required local election.<sup>92</sup> The decision was based on an analysis of the amendments to article VII, section 3 over the years and the constitutional requirements set forth in the provision.

Furthermore, the *Edgewood III* court rejected the state's argument that article VII, section 3-b "excuses an election by the CEDs created under Senate Bill 351."<sup>93</sup> The court based its rejection of the state's article VII, section 3-b argument on a distinction it drew between changing school district boundaries and continuing taxation authority within the changed district on the one hand, and granting a significant part of a district's taxation authority to a larger county or multi-county school district created for taxing purposes.<sup>94</sup>

Justice Doggett strenuously dissented on the article VIII, section 1-e issues (joined by Justice Gammage) and the article VII, section 3 issues.<sup>95</sup> He accused the majority of striking down a school finance system which it had invited and supported just one year

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90. See, e.g., *Edgewood III*, 826 S.W.2d at 500 ("This has reduced the geographical disparities in the availability of revenue for education.").

91. *Id.* at 502.

92. *Id.* at 506.

93. *Id.* at 507.

94. *Id.* at 508-10. "No physical boundaries of school districts are changed by Senate Bill 351, only the imaginary boundaries of their taxing power." *Edgewood III*, 826 S.W.2d at 508. In addition, the court stated, "There has been no change in the boundaries of CEDs, imaginary or otherwise, because they are newly created by Senate Bill 351." *Id.*

95. *Id.* at 537-47 (Doggett, J., dissenting) (outlining the "wrong inflicted on Texans").

before.<sup>96</sup> Indeed, he accused the court of ignoring its own precedent in *Edgewood I* and *Edgewood II*.<sup>97</sup>

Justice Cornyn wrote a concurring and dissenting opinion in *Edgewood III* in which he raised several new issues that had not been raised, or were not addressed, in the previous *Edgewood* opinions. Justice Cornyn was trying to provide guidance to the legislature in crafting a new school finance plan.<sup>98</sup>

Justice Cornyn argued that the Texas Supreme Court should focus on educational results, not just inputs.<sup>99</sup> He also urged the legislature to define a “minimally adequate education.”<sup>100</sup> Justice Cornyn further argued that, in *Edgewood II*, “we implied—but did not expressly state—that the [Texas] [c]onstitution does not require equalization of funds between students across the state. This means that the educational system in Texas is not constitutionally required to have equal funding per student.”<sup>101</sup>

In summary, Justice Cornyn was suggesting that the *Edgewood* case was, or should have been, an adequacy case rather than an equity case.<sup>102</sup> In his opinion in *Edgewood III*, Justice Cornyn challenged the unanimous holding in *Edgewood I* that “[t]he amount of money spent on a student’s education has a real and

96. *Id.* at 540–47 (reviewing prior decisions of the court and comparing them to the provisions of Senate Bill 351).

97. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), 826 S.W.2d 489, 576 (Tex. 1992) (Doggett, J., dissenting) (arguing that the court “turn[ed] a deaf ear . . . to the commanding voice of the law” as decided in the previous *Edgewood* cases). These arguments will be further developed in Part Four of this article.

98. *Id.* at 525–26 (Cornyn, J., concurring and dissenting).

99. *Id.* at 526.

100. *Id.* at 527.

101. *Id.*

102. The difference between equity school finance cases and adequacy school finance cases has been exhaustively chronicled. See, e.g., Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 104–15 (1995) (providing an overview of the equity and adequacy approaches to school finance reform and the various challenges that derive from these two types of state constitutional provisions); Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL* 218, 218–67 (Timothy Ready et al. eds., 2002) (discussing the differences between equity school finance and adequacy school finance); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229–30 (2008) (analyzing the issues related to equity and adequacy challenges to state school finance systems).

meaningful impact on the educational opportunity offered to that student."<sup>103</sup> In effect, Justice Cornyn was cross-examining the unanimous opinion of the Texas Supreme Court two years earlier.<sup>104</sup> Justice Cornyn concluded his opinion with one graph showing the seemingly negative correlation between expenditures and SAT scores.<sup>105</sup>

Justice Cornyn's opinion has been extensively described because he wrote the court's majority opinion in *Edgewood IV*, to which we now turn.

#### E. *Edgewood IV (1993–1995)*

In response to the *Edgewood III* opinion invalidating the CED system of Senate Bill 351, the legislature first proposed a constitutional amendment which would have authorized tax base consolidation or other recapture systems.<sup>106</sup> However, the amendment was defeated, and the legislature had to again devise a system to address the court's objections in *Edgewood III*.

The legislature responded in May 1993 with Senate Bill 7,<sup>107</sup> which, with a few modifications, was the school finance system in effect until 2006. Senate Bill 7 required the wealthiest districts to reduce their effective wealth by using one of several alternatives: (1) consolidate with another district; (2) detach territory; (3) purchase average daily attendance credit; (4) contract for the education of nonresident students; or (5) consolidate its tax base with another district.<sup>108</sup> The result of these options was to allow recapture and to increase the equity and the funding of the system, as in Senate Bill 351, which was held to be unconstitutional in

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103. *Edgewood III*, 826 S.W.2d at 529–30 (Cornyn, J., concurring and dissenting) (quoting *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 393 (Tex. 1989)).

104. *See id.* at 531 n.12 (providing statistics on the amount spent on a child's education by several school districts as compared to the test passage rates in those districts based on evidence before the court in *Edgewood II*).

105. *Id.* at 530–31, 535 fig.1.

106. Act of Apr. 11, 1991, 72nd Leg., R.S., ch. 20, 1991 Tex. Gen. Laws 381, 386, amended by Act of May 27, 1991, 72nd Leg., R.S., ch. 391, 1991 Tex. Gen. Laws 1475.

107. Act of May 28, 1993, 73rd Leg., R.S., ch. 347, 1993 Tex. Gen. Laws 1479.

108. *Id.*; *see Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 727–29 (Tex. 1995) (summarizing the school finance system created by Senate Bill 7).

*Edgewood III*.<sup>109</sup>

*Edgewood IV* included the broadest range of challenges to the Texas school finance system to date. For the first and only time—possibly because of the range of challenges and the fatigue of the court—the Texas Supreme Court upheld the constitutionality of a Texas school finance system.<sup>110</sup>

The court first addressed low-wealth districts' claims that Senate Bill 7 violated article VII, section 1 because of its built-in advantage of \$600/WADA for wealthier districts and the statute's potential to allow an additional \$1,500/WADA disparity if districts took full advantage of the additional pennies of tax they could impose for facilities funding.<sup>111</sup> The district court upheld Senate Bill 7 in spite of the \$600/WADA gap.<sup>112</sup> However, due to the much larger \$1,500/WADA gap the system allowed for facilities funding, the district court concluded that the facilities funding system violated article VII, section 1 of the Texas constitution.<sup>113</sup>

The Texas Supreme Court rejected all of the low-wealth districts' claims.<sup>114</sup> The court held that "[t]he [s]tate's duty to provide districts with substantially equal access to revenue applies *only* to the provision of funding necessary for a general diffusion of knowledge."<sup>115</sup> After determining that the general diffusion of knowledge mandate is met by the Texas requirements for accountability and accreditation, the court held that poor districts could meet this \$3,500/WADA level at a \$1.31 tax rate and wealthy districts at a \$1.22 tax rate, and concluded that the primary focus should be on that gap, rather than the \$600/WADA gap.<sup>116</sup> The court then rejected low-wealth districts' claims that Senate Bill 7 created inequalities and inefficiencies in its transition

109. *Edgewood III*, 826 S.W.2d at 514; see JOSÉ A. CÁRDENAS, TEXAS SCHOOL FINANCE REFORM, AN IDRA PERSPECTIVE 345–50 (Intercultural Dev. Research Ass'n (IDRA) ed., 1997) (providing a more detailed description of Senate Bill 7, which replaced the school finance system created by Senate Bill 351).

110. *Edgewood IV*, 917 S.W.2d at 725.

111. *Id.* at 729–34.

112. *Edgewood Indep. Sch. Dist. v. Meno*, No. 362,516-B, at 67 (250th Dist. Ct., Travis County, Tex. Jan. 26, 1994) (on file with the *St. Mary's Law Journal*).

113. *Id.* at 78.

114. *Edgewood IV*, 917 S.W.2d at 725.

115. *Id.* at 731.

116. *Id.*

mechanisms and also decreased funding as compared to previous years under the Senate Bill 351 school finance system.<sup>117</sup>

Later in the *Edgewood IV* opinion, the court denied low-wealth districts' claim that Senate Bill 7 was inefficient because of its failure to provide for facilities funding.<sup>118</sup> The court concluded that the claim failed since school districts could reach a "general diffusion of knowledge" level of funding at approximately \$1.31 and the state guaranteed funding up to a \$1.50 level.<sup>119</sup> The court also held that the record did not show that any particular school district could not provide the funding necessary for a general diffusion of knowledge.<sup>120</sup>

The court then considered the wealthy districts' claims that the state relied too heavily on local funds to meet the state's obligations—described by the court as a "suitability" claim.<sup>121</sup> The court defined "suitability" by this standard: "Certainly, if the [l]egislature substantially defaulted on its responsibility such that Texas school children were denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas, the 'suitable provision' clause would be violated."<sup>122</sup>

Without a doubt, the more serious claim of the wealthy districts was that Senate Bill 7, like Senate Bill 351, violated the article VIII, section 1-e prohibition of a statewide ad valorem tax. The court found the Senate Bill 7 options most closely resembled the scenario described in the *Edgewood III* opinion: "If the [s]tate required local authorities to levy an ad valorem tax but allowed them discretion on setting the rate and disbursing the proceeds, the [s]tate's conduct might not violate article VIII, section 1-e."<sup>123</sup>

The court also rejected the wealthy districts' related claim that Senate Bill 7 denied the wealthy districts "meaningful

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117. *Id.* at 733.

118. *Id.* at 746–47.

119. *Edgewood IV*, 917 S.W.2d at 747.

120. *Id.* at 746.

121. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 735 (Tex. 1995).

122. *Id.* at 736.

123. *Id.* at 737 (quoting *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 503 (Tex. 1992)).

discretion.”<sup>124</sup> Though the court agreed that the districts’ discretion to some extent was limited by imposing minimum and maximum tax rates, school districts were still free to set their tax rates within a range.<sup>125</sup> However, at this point in the decision, the court issued a warning about increasing costs of a general diffusion of knowledge and how that could lead, under Senate Bill 7, to a situation in which some districts would be deprived of meaningful discretion.<sup>126</sup>

The last major holding in *Edgewood IV* was the court’s denial of wealthy districts’ claims that Senate Bill 7 required them to tax themselves for the education of students who were not residents of the district in violation of *Love*.<sup>127</sup> The court distinguished *Love* by referring again to the options available to districts to reduce their effective wealth to the statutorily-mandated level, and the requirement that an election would have to be held to approve of the transfer before funds could be transferred to other districts.<sup>128</sup>

The court also rather summarily rejected a series of other claims alleging that Senate Bill 7 violated state constitutional provisions regarding: (1) delegation of powers, (2) judicial review, (3) impairment of contracts, (4) non-contiguity, (5) the situs rule, (6) the federal Voting Rights Act, (7) local or special law, and (8) a claim that the constitution required a hybrid voucher system.<sup>129</sup>

*Edgewood IV* contains a variety of dissenting opinions. Justice Enoch argued that Senate Bill 7 violated the “suitability” requirement of article VII, section 1 because it funded the system at too low a level and relied too heavily on local funds.<sup>130</sup> Justice Enoch also argued that Senate Bill 7 created a state property tax similar to that rejected in *Edgewood III*.<sup>131</sup> In addition, Justices Hecht and Owen argued that Senate Bill 7 continued to violate

124. *Id.*

125. *Id.* at 737–38.

126. *Edgewood IV*, 917 S.W.2d at 738.

127. See *Love v. City of Dallas*, 120 Tex. 351, 372–73, 40 S.W.2d 20, 30–31 (1931) (stating that a school district cannot be compelled to provide services to non-residents who have not paid “reasonable” tuition fees).

128. *Edgewood IV*, 917 S.W.2d at 738–39.

129. *Id.* at 740–48.

130. *Id.* at 754–55 (Enoch, J., concurring and dissenting).

131. *Id.* at 756.

both *Love* and article VIII, section 1-e.<sup>132</sup> Justice Spector argued that Senate Bill 7 continued to violate article VII, section 1 efficiency provisions as interpreted in *Edgewood I* and *Edgewood II*.<sup>133</sup> Justice Spector also argued that the court had changed, if not reversed, the standards announced in the earlier decisions.<sup>134</sup>

#### F. Edgewood V (2001–2003)

After six years, the school finance case came back to life in a challenge by four wealthy districts which argued that the various tax requirements in the school finance system had become a statewide property tax in violation of article VIII, section 1-e.<sup>135</sup> Basically, they claimed that the warning in *Edgewood IV*, that as costs increase the tax cap of the law could become “a floor as well as a ceiling,”<sup>136</sup> had in fact become true, and therefore, the system did not allow school districts “meaningful discretion” to raise additional local funds in addition to the state-funded system.<sup>137</sup> Low-wealth districts intervened on the side of the state to defend the tax caps but, contrary to the state’s position, low-wealth districts alleged that the school finance system was neither adequate nor efficient.<sup>138</sup> The district court dismissed the wealthy districts’ article VIII, section 1-e claims with prejudice, and the Austin Court of Appeals affirmed the lower court’s conclusion.<sup>139</sup>

The Texas Supreme Court reversed.<sup>140</sup> The court framed the appropriate allegations as including a charge that “school districts can be forced by the current system to tax at maximum rates,” and that they must tax at those rates “to meet accreditation standards or to provide a general diffusion of knowledge.”<sup>141</sup> The court

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132. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 759 (Tex. 1995) (Hecht, J., concurring and dissenting).

133. *Id.* at 768–69 (Spector, J., dissenting).

134. *Id.* at 766, 770.

135. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis (Edgewood V)*, 107 S.W.3d 558, 558 (Tex. 2003).

136. *Edgewood IV*, 917 S.W.2d at 738.

137. *Edgewood V*, 107 S.W.3d at 580.

138. *Id.* at 574.

139. *Id.* at 576; *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 78 S.W.3d 529, 538–40 (Tex. App.—Austin 2002), *rev'd*, 107 S.W.3d 558 (Tex. 2003).

140. *Edgewood V*, 107 S.W.3d at 585.

141. *Id.* at 580–82.

further framed the proper allegation by rejecting the state's arguments that districts offering optional homestead deductions or those with taxes less than the \$1.50 maximum could not meet the pleading standard required.<sup>142</sup> Specifically, the court held that the wealthy school district plaintiffs had the right to prove that the districts are "forced to tax at maximum rates either to meet accreditation standards or to provide a general diffusion of knowledge."<sup>143</sup> Under the *Edgewood V* test, a "single district states a claim under article VIII, section 1-e if it alleges that it is constrained by the [s]tate to tax at a particular rate."<sup>144</sup>

### G. Edgewood VI (2003–2006)

#### 1. General Description of the Case and the 2004 District Court Opinion

*Edgewood V* set the structure for the evidence and arguments before the district court on remand. The case focused on allegations made by a handful of wealthy districts that they were forced to tax at the maximum rate allowed by the school finance system to meet state requirements.<sup>145</sup> Although the wealthy district plaintiffs included in their *Edgewood V* petition allegations that the system at the maximum rate did not meet constitutional "adequacy" standards, the focus of the district court, the court of appeals and the supreme court opinions was on the article VIII, section 1-e allegation that the system created a statewide ad valorem tax rate. However, the small group of wealthy district plaintiffs was soon joined by a coalition of other wealthy and mid-wealth districts<sup>146</sup> alleging a real adequacy claim.<sup>147</sup> The original low-wealth plaintiffs led by Edgewood I.S.D. and the original low-wealth intervenors led by Alvarado I.S.D. joined the new plaintiffs

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142. *Id.* at 582–83.

143. *Id.* at 582.

144. *Id.* at 579.

145. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 67–68 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary's Law Journal*).

146. *Id.* at 68.

147. *Id.*

in the allegation that the system was inadequate.<sup>148</sup> However, the Edgewood and Alvarado intervenors also asserted their claims on the financial inefficiency of the system.<sup>149</sup> By the time the *Edgewood VI* case came to trial in 2004, districts educating almost half of Texas's students were challenging the finance system.<sup>150</sup>

In *Edgewood VI*, the court was confronted with the three major strands of constitutional challenges, as well as several new issues. First, the court would have to apply its developing (but not yet applied) jurisprudence on the adequacy of the school finance system—also described as the ability of the system to provide for “a general diffusion of knowledge.”<sup>151</sup> Second, the low-wealth districts were seeking a declaration that the system violated the efficiency standards set forth in *Edgewood I* and *Edgewood II* and applied to uphold the system analyzed in *Edgewood IV*.<sup>152</sup> Third, the wealthy and mid-wealth plaintiffs were seeking a declaration that the tax caps, combined with the inadequate funding system, created a statewide property tax which was defined in *Edgewood III*, applied but rejected in *Edgewood IV*, and more clearly defined in *Edgewood V*.<sup>153</sup>

Based on the most comprehensive record developed to date on the inefficiencies and inadequacies of the school finance system and the first “adequacy” case of the *Edgewood* saga, the district court held the school finance system inadequate, inefficient and unsuitable, in violation of article VII, section 1.<sup>154</sup> Combining its holding on the inadequacy of the system with the lack of meaningful discretion to raise tax rates, the court also held the system to be in violation of the prohibition of state ad valorem taxation, as set forth in article VIII, section 1-e of the Texas

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148. *Id.* at 67–68.

149. *Id.*

150. *See* Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (*Edgewood VI*), 176 S.W.3d 746, 751 (Tex. 2005) (providing statistics on the number of school children attending school districts that were involved in the *Edgewood VI* case).

151. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 68 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary's Law Journal*).

152. *Id.* at 67–68.

153. *Id.* at 4–5.

154. *Id.* at 64.

constitution.<sup>155</sup> Furthermore, the court found that the facilities component of the funding system violated the suitability and efficiency components of article VII, section 1.<sup>156</sup> The district court held, however, that the basic funding system for maintenance and operations did not violate article VII, section 1.<sup>157</sup>

## 2. The *Edgewood VI* Supreme Court Opinion

In *Edgewood VI*, the state argued that the courts did not have subject matter jurisdiction over the case.<sup>158</sup> More specifically, the state attacked the standing of the plaintiff school districts,<sup>159</sup> the justiciability of claims described as political claims,<sup>160</sup> and the lack of self-execution—and therefore enforceability—of the standards of article VII.<sup>161</sup> Though these issues had either been explicitly or implicitly rejected in the earlier *Edgewood* cases, the Texas Supreme Court carefully analyzed each of them and concluded: the school districts have standing,<sup>162</sup> the issues in the case were not nonjusticiable political questions,<sup>163</sup> and article VII, section 1 is self-executing, “insofar as it prohibits any system that fails to meet those standards.”<sup>164</sup>

155. *Id.* at 67.

156. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 117 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary's Law Journal*).

157. *Id.* at 87.

158. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 772 (Tex. 2005).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 776.

163. *Edgewood VI*, 176 S.W.3d at 779–81.

164. *Id.* at 783. When discussing the powers the court has in interpreting article VII, section 1, the court summarized:

[A]rticle VII, section 1 dictates what the public education system *cannot* be: it cannot be so inadequate that it does not provide for a general diffusion of knowledge, or so inefficient that districts which must achieve this general diffusion of knowledge do not have substantially equal access to available revenues to perform their mission, or so unsuitable that it cannot because of its structure achieve its purpose.

*Id.*

The *Edgewood VI* court gave a detailed description of the school finance system as it existed in 2004 (the time of the district court trial),<sup>165</sup> based closely on the findings of the district court.<sup>166</sup>

First, the court decided on a new standard of review for allegations of unconstitutionality of the system: “Whether the statutory provisions creating the public school system are arbitrary and therefore unconstitutional is a question of law.”<sup>167</sup> The court described the test as follows: “If the [l]egislature’s choices are informed by guiding rules and principles properly related to public education—that is, if the choices are not arbitrary—then the system does not violate the constitutional provision.”<sup>168</sup> The court described this standard of arbitrariness as “very deferential to the [l]egislature.”<sup>169</sup>

The court did reject the state’s effort to use a rational basis test to determine the constitutionality of the school finance system.<sup>170</sup> The court reviewed the rational basis test’s use and concluded that article VII, section 1 simply does not allow it: “[Article VII section 1] does not allow the [l]egislature to structure a public school system that is inadequate, inefficient, or unsuitable, regardless of whether it has a rational basis or even a compelling reason for doing so.”<sup>171</sup> Indeed, the court implied that its “arbitrariness” standard was even stronger than the compelling interests test applied to equal protection cases alleging violations of a fundamental right or impacting a suspect class.<sup>172</sup>

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165. *Id.* at 754–70.

166. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 11–62, 67–115 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary’s Law Journal*).

167. *Edgewood VI*, 176 S.W.3d at 785.

168. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 785 (Tex. 2005).

169. *Id.* at 790.

170. *Id.* at 784.

171. *Id.*

172. *See id.* (comparing application of the rational basis test in an equal protection analysis “when no suspect class or fundamental right is involved” to the standards set forth in article VII, section 1); *see also* *Richards v. League of United Latin Am. Citizens (LULAC)*, 868 S.W.2d 306, 310–17 (Tex. 1993) (explaining the application of the rational basis and compelling interests tests in Texas).

It is difficult to contemplate a school finance system that would not meet this “arbitrariness” test. Nevertheless, the system before the *Edgewood VI* court was close to violating even this lax standard.<sup>173</sup> After a brief review of the record it had previously thoroughly described and a comparison of these negatives to Texas’s National Assessment of Educational Progress (NAEP)<sup>174</sup> scores, in which Texas had allegedly improved relative to the other states, the Texas Supreme Court held the system adequate.<sup>175</sup> The court rejected the Edgewood and Alvarado intervenors’ claims that the system as a whole violated the efficiency standards of *Edgewood I* and *Edgewood II*.<sup>176</sup> The court also rejected the Edgewood and Alvarado claims that Senate Bill 7, as amended in every legislative session between 1995 and 2005, violated the standards set forth in *Edgewood IV*.<sup>177</sup> *Edgewood IV* held that the system was “minimally acceptable only when viewed through the prism of history.”<sup>178</sup>

The *Edgewood VI* district court did not accept the Edgewood and Alvarado intervenors’ claims on the inefficiency of the system, based on nineteen pages of findings of fact.<sup>179</sup> The court did rule that the facilities part of the funding system violated article VII, section 1.<sup>180</sup>

173. *Edgewood VI*, 176 S.W.3d at 790.

174. See generally INST. OF EDUC. SCI., THE NATION’S REPORT CARD: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, <http://nces.ed.gov/nationsreportcard/> (last visited Nov. 3, 2008) (providing statistical data on the performance of school systems throughout the country based on standardized tests administered by the NAEP).

175. *Edgewood VI*, 176 S.W.3d at 790.

176. *Id.* at 790–92.

177. *Id.*

178. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 726 (Tex. 1995).

179. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 68–86 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary’s Law Journal*).

180. *Id.* at 117. The district court in *Edgewood VI* concluded:

The prohibition on the use of Tier 2 funds for facilities, combined with the [l]egislature’s failure to make the IFA and/or EDA programs statutorily permanent and the [l]egislature’s inadequate funding of the IFA program, means that property-poor districts do not have substantially equal access to facilities funding in violation of the efficiency and suitability provisions of article VII, [section] 1 of the Texas [c]onstitution.

In *Edgewood VI*, the Texas Supreme Court again modified its test of legislative adherence to article VII, section 1 when it redefined what must be established to support a facilities claim under article VII, section 1:

The State defendants also argue that to prove constitutional inefficiency the intervenors must offer evidence of an inability to provide for a general diffusion of knowledge without additional facilities, and that they have failed to do so. Again, we agree. Efficiency requires only substantially equal access to revenue for facilities necessary for an adequate system.<sup>181</sup>

Nevertheless, even under the lax standard devised by the *Edgewood V* and *Edgewood VI* opinions, the constitutionality of the system was a close question. The court was clearly concerned:

In the extensive record before us, there is much evidence, which the district court credited, that many schools and districts are struggling to teach an increasingly demanding curriculum to a population with a growing number of disadvantaged students, yet without additional funding needed to meet these challenges. There are wide gaps in performance among student groups differentiated by race, proficiency in English, and economic advantage. Non-completion and dropout rates are high, and the loss of students who are struggling may make performance measures applied to those who continue appear better than they should. The rate of students meeting college preparedness standards is very low. There is also evidence of high attrition and turnover among teachers statewide, due to increasing demands and stagnant compensation.<sup>182</sup>

The court further concluded, "There is substantial evidence, which again the district court credited, that the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change take the form of increased funding, improved efficiencies, or better methods of education."<sup>183</sup> Yet the court finally concluded that

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*Id.*

181. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 792 (Tex. 2005).

182. *Id.* at 789.

183. *Id.* at 790.

these conditions showed an impending constitutional violation, but “not an existing one.”<sup>184</sup>

After rebuffing the adequacy and efficiency claims, the court finally dealt with the state ad valorem tax claim under article VIII, section 1-e, which it defined in *Edgewood III*, and in *Edgewood V*, redefined and remanded to the district court for trial.<sup>185</sup>

The *Edgewood VI* court did declare the school funding system unconstitutional on the basis of the wealthy districts’ original complaints in *Edgewood V*—that the system of tax caps in the statute combined with recapture and limited state funding constituted a statewide ad valorem tax in violation of article VIII, section 1-e.<sup>186</sup> The court decried the lack of ability to supplement the state system, the amount of money recaptured, and the inability of districts to meet accreditation standards with available funds, even though the court had just held the system was adequate to meet accreditation standards.<sup>187</sup> The court concluded: “The [s]tate cannot provide for local supplementation, pressure most of the districts by increasing accreditation standards in an environment of increasing costs to tax at maximum rates in

184. *Id.*

185. *Id.* at 794–98.

186. *Edgewood VI*, 176 S.W.3d at 794.

187. *Id.* at 795–97. The majority opinion made the following response to the dissent’s article VIII, section 1-e argument:

The dissent argues that the plaintiffs cannot prove that local ad valorem taxes have become a state property tax with evidence that most districts now tax at maximum rates when few did ten years ago, or that virtually all of the revenue available through local taxes is now being spent, or that among school districts at maximum tax rates accreditation rates have declined, or that the [s]tate controls the redistribution of more than \$1 billion in local taxes. Even if each category of evidence would not, by itself, prove a constitutional violation, all of this evidence taken together, along with the extensive record before us, clearly shows that school districts have lost meaningful discretion to tax below maximum rates and still provide an accredited education. In reaching this conclusion, we do not alter any standard we have previously announced, as the dissent charges, or adopt positions the [c]ourt has previously rejected, as the dissent suggests. The question, as we stated in *Edgewood III*, is whether school districts have meaningful discretion to tax below maximum rates, and the answer is that they do not.

*Id.* at 797.

order to afford any supplementation at all, and then argue that it is not controlling local tax rates.”<sup>188</sup>

### 3. Legislative Reaction to *Edgewood VI*

In response to *Edgewood VI*, the legislature reduced local property taxes and put significant additional state funds to the educational system.<sup>189</sup> This slightly increased the equity of the system, but did not raise funding levels to any significant extent. The system did indirectly reduce the amount of recaptured funds and greatly expanded the “hold harmless” provisions of the system. The school finance system, passed in 2006 and slightly amended in 2007, does allow more school district discretion to raise tax rates,<sup>190</sup> and almost guarantees another *Edgewood* lawsuit as even wealthy districts run out of funds to run their schools and maintain their advantages over poorer school districts.

## IV. WEAKENING BY THE TEXAS SUPREME COURT OF ITS SCHOOL FINANCE JURISPRUDENCE AND THE IMPLICATIONS THAT FOLLOW

The Texas Supreme Court has gradually whittled away at the power and applicability of its own jurisprudence through its redefinition of important constitutional requirements and its application of those redefinitions to the school finance systems. This part of the article will delineate some of these changed definitions and applications and explain how, given the context of the Texas school finance system, they have emasculated the earlier opinions. However, this weakening of the standards applied by the court has not led to the weakening of the school finance system itself. Since the significant quantum increase in efficiency and funding in 1991, the efficiency and funding levels of the system (corrected for inflation) have remained about the same.<sup>191</sup>

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188. *Id.*

189. See generally *HB 1 Promises the Highest Level of M&O Equity in Our History*, EQUITY CENTER NEWS & NOTES, June 2006, at 1, 1–5, available at <http://www.equitycenter.org/members/newsletters/June2006.pdf> (discussing the statutory changes made to House Bill 1 with the Duncan-Staples-West amendment).

190. Act of May 26, 2006, 79th Leg., 3d C.S., ch. 5, 2006 Tex. Gen. Laws 45, amended by Act of May 4, 2007, 80th Leg., R.S., ch. 19, 2007 Tex. Gen. Laws 16.

191. See DICK LAVINE & EVA DELUNA CASTRO, CTR. FOR PUB. POLICY PRIORITIES, THE TEXAS TAX & BUDGET PRIMER (2008), <http://www.equitycenter.org/>

### A. *The Whole System or Part of the System*

Since the beginning of the *Edgewood* litigation in 1987, there has been a major disagreement between low-wealth districts on the one hand and the state and high-wealth districts on the other. The low-wealth districts have always pleaded with the legislature and the courts to consider the school finance system as one system, as the constitution requires. The Texas constitution requires the legislature to “make suitable provision for the support and maintenance of an efficient system of public free schools.”<sup>192</sup> It speaks of one system, not two systems. The constitution does not describe a system with one part of the system containing equality and efficiency, and another part without equality and efficiency.

In *Edgewood I*, the state argued that the Foundation School Program was the system designed to meet the constitutional requirements of article VII, section 1, and the courts should only consider whether this program was constitutional.<sup>193</sup> As a complement to this argument, the state argued that taxes raised by school districts in addition to their local share (the tax rate a district must raise to get its state funds) were enrichment funds, which did not have to be equalized in any way.<sup>194</sup>

So if a \$1 million/ADA school district raised \$5,000/ADA with a \$.50 tax rate when most districts in the state had only \$3,000/ADA (including state funds) with a \$.70 tax rate, the system was constitutional. The reason was that the state had defined the \$.70 tax rate and the funds generated at that level to meet state requirements, and therefore, the state had created and funded the system, meeting its article VII, section 1 responsibilities.

The state considered unequalized enrichment funds to be specifically constitutionally authorized by article VII, section 3, which created school districts and empowered the districts to

docs2link/Equity%20Center%20webinar%20100708.ppt#322,21 (demonstrating that the average amount spent per student remained roughly the same from 1996 to 2008).

192. TEX. CONST. art. VII, § 1.

193. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 391 (Tex. 1989). The entire oral argument in the *Edgewood I* case is on the website of the Texas Supreme Court. Mp3 file: Oral Argument Audio Recordings: Cases Argued in 1989 (July 5, 1989), [http://www.supreme.courts.state.tx.us/oralarguments/audio\\_1989h.asp](http://www.supreme.courts.state.tx.us/oralarguments/audio_1989h.asp).

194. *Edgewood I*, 777 S.W.2d at 398.

tax.<sup>195</sup> It was an interesting theory which was strongly supported by the wealthy districts and ultimately upheld by the Austin Court of Appeals.<sup>196</sup>

But the Texas Supreme Court unanimously and powerfully rejected the argument, concept and ruling of the court of appeals.<sup>197</sup> After a lengthy analysis of the language, legislative histories and the “intent of the people who adopted”<sup>198</sup> article VII, sections 1 and 3, the court concluded that “the 1883 constitutional amendment of article VII, section 3 . . . was intended *not* to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system.”<sup>199</sup> “Thus, article VII, section 3 was an effort to make schools more efficient and cannot be used as an excuse to avoid efficiency.”<sup>200</sup>

This clear unanimous holding of the court on the relationship between article VII, sections 1 and 3 gains further support from the test the supreme court held must be applied to a determination of the constitutionality of the school finance system:

There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.<sup>201</sup>

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195. *Id.* At the Texas Supreme Court oral argument in *Edgewood I* on July 5, 1989, the lead attorney for the state put before the court a slide of the Texas flag. The horizontal red bar was labeled local share and the horizontal white bar right above the red bar was labeled state share. The vertical bar was labeled enrichment funds to show their separate nature and the lack of local and state shares. The oral arguments are available to download on the Supreme Court of Texas's website. Mp3 file: Oral Argument Audio Recordings: Cases Argued in 1989 (July 5, 1989), [http://www.supreme.courts.state.tx.us/oralarguments/audio\\_1989h.asp](http://www.supreme.courts.state.tx.us/oralarguments/audio_1989h.asp).

196. *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 867 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

197. *Edgewood I*, 777 S.W.2d at 398.

198. *Id.* at 394.

199. *Id.* at 396.

200. *Id.* at 397.

201. *Id.*

This test was not limited in application to part of the school finance system, rather it applied to the whole system.<sup>202</sup> The test does not begin with the phrase “within the foundation school program” or “up to the level of funding guaranteed by the state.” In addition, the greatest source of disparities—the lack of “substantially equal opportunity to have access to educational funds”—came from the ability of the wealthy districts to raise enrichment funds solely from the property within their districts without recapture.<sup>203</sup>

The constitutional violation addressed in *Edgewood I* was the ability of wealthy districts to raise funds from local tax bases without recapture at levels above the state defined level of adequacy.<sup>204</sup> That ability to raise local funds is what caused the statewide and local disparities criticized by the supreme court.

This definition of efficiency in *Edgewood I* was unanimously reaffirmed in *Edgewood II*, as a matter of law.<sup>205</sup> To use the common vernacular, the *Edgewood II* court “got it.” It firmly rejected the system created by the legislature in response to *Edgewood I*, because, *inter alia*:

[1.] Even if the approach of Senate Bill 1 produces a more equitable utilization of state educational dollars, it does not remedy the major causes of the wide opportunity gaps between rich and poor districts. . . .

[2.] These factors compel the conclusion as a matter of law that the [s]tate has made an unconstitutionally inefficient use of its resources. The fundamental flaw of Senate Bill 1 lies not in any particular provisions but in its overall failure to restructure the system. Most property owners must bear a heavier tax burden to provide a less expensive education for students in their districts, while property owners in a few districts bear a much lighter burden to provide more funds for their students. Thus, Senate Bill 1 fails to

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202. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989) (describing the increase in state contributions as a “band-aid” that would not alleviate disparities in the long-term).

203. *Id.*

204. *Id.* at 393 (discussing the inability of poor areas to raise funds because of their inadequate tax base).

205. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 498 (Tex. 1991).

provide “a direct and close correlation between a district’s tax effort and the educational resources available to it.”

[3.] To be efficient, a funding system that is so dependent on local ad valorem property taxes must draw revenue from all property at a substantially similar rate. The present system does not do so. . . . These examples [of very wealthy districts whose wealth is not taxed at the rate required of other districts and the amount of additional funds that could be generated if they did tax at the same rate] illustrate the degree to which the current system insulates concentrated areas of property wealth from being taxed to support the public schools. The result is that substantial revenue is lost to the system. If the property in these and similar districts were taxed at substantially the same rate as the rest of the property in the state, the system could have hundreds of millions of additional dollars at its disposal. . . .

[4.] There are vast inefficiencies in the structure of the current system. . . .

[5.] Article VII of the [c]onstitution accords the [l]egislature broad discretion to create school districts and define their taxing authority.

[6.] [W]e must measure the public school finance system by the standard of efficiency ordained by the people in our Constitution. The test for whether a system meets that standard is set forth in our opinion in *Edgewood I*.<sup>206</sup>

The *Edgewood II* opinion is also remarkable for what it did not say. It did not mention the level of funding that the state must maintain to be efficient. Indeed, it specifically rejected the state’s attempt to set the proper level at the 95th percentile of wealth.<sup>207</sup> Thus, the later opinions, specifically *Edgewood IV* and *Edgewood VI*, which set the level of funding that must be efficient at less than the total state system, are completely at odds with the unanimous opinions in *Edgewood I* and *Edgewood II*.

Yet one month after the unanimous opinion in *Edgewood II*, five members of the court wrote a new section of the opinion purportedly in response to the motion for rehearing filed by the

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206. *Id.* at 496–98 (footnote omitted) (quoting *Edgewood I*, 777 S.W.2d at 397–98).

207. *Id.* at 496.

plaintiff intervenors.<sup>208</sup> For the first time in the litigation, the Texas Supreme Court split into factions, mainly along party lines.<sup>209</sup>

Also for the first time in the litigation, the court in *Edgewood IIa* began to outline arguments against its own previous unanimous opinions in *Edgewood I* and *Edgewood II*.<sup>210</sup> At the end of the five-justice opinion in *Edgewood IIa*, the court made several unsupported conclusions inconsistent with both its previous conclusions and the realities of the Texas school finance system:

[1.] This conclusion highlights the basic constitutional distinction between the [s]tate's primary obligation and the local districts' secondary contributions. [2.] The current system remains unconstitutional not because *any* unequalized local supplementation is employed, but because the [s]tate relies so heavily on unequalized local funding in attempting to discharge its duty to "make suitable provision for the support and maintenance of an efficient system of public free schools." [3.] Once the [l]egislature 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.<sup>211</sup>

This conclusion reduces the responsibility on the legislature from the clear standard of article VII, section 1 that "it shall be the *duty* of the [l]egislature of the [s]tate"<sup>212</sup> to a "primary delegation" to be considered with "the local districts' secondary

208. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood IIa)*, 804 S.W.2d 499, 499–500 (Tex. 1991) (op. on reh'g). In his concurring opinion—actually an opinion concurring in the denial of rehearing but strongly in opposition to the five member majority opinion—Justice Gammage described the majority opinion as a "gratuitous action in addressing matters not raised in the motion for rehearing" that was "unnecessary and inappropriate, amount[ing] to an advisory opinion." *Id.* at 501 (Gammage, J., concurring). Justice Gonzalez agreed the majority opinion was an advisory opinion. *Id.* at 500 (Gonzalez, J., concurring). Justice Doggett concluded by calling the *Edgewood IIa* majority opinion "true activism of the most dangerous type." *Id.* at 506 (Doggett, J., concurring).

209. See Line of Succession of Supreme Court Justices from 1945, <http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present-111406.pdf> (last visited Dec. 18, 2008) (showing that Justices Cornyn and Gammage were elected after the *Edgewood I* case but were on the court for the *Edgewood II* decision and participated in the rehearing, while not officially seated at the time of the argument).

210. *Edgewood IIa*, 804 S.W.2d at 500–01.

211. *Id.* at 500 (footnote omitted) (quoting TEX. CONST. art. VII, § 1).

212. TEX. CONST. art. VII, § 1 (emphasis added).

contributions.”<sup>213</sup> That conclusion is clearly at odds with the holding in *Edgewood I* that article VII, section 3 was “intended *not* to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system.”<sup>214</sup>

The *Edgewood IIa* opinion also approves of “unequalized local supplementation,”<sup>215</sup> a concept never quoted or even implied in its two previous unanimous opinions.<sup>216</sup> It simply strains credulity to believe that the unanimous opinions in *Edgewood I* and *Edgewood II* contemplated allowing one district in Texas to raise \$10,000 per student for a \$.10 tax rate, while another district in Texas can raise \$30 per student for a \$.10 tax rate.<sup>217</sup> Unequalized enrichment is exactly the funding that creates the disparities which were specifically excoriated in the previous unanimous opinions.

The third phrase in the *Edgewood IIa* conclusion is the most inconsistent with the court’s previous cases and the most relevant precedent to the court’s later efforts to weaken its *Edgewood I* and *Edgewood II* opinions.<sup>218</sup> This allows the creation of two school

213. *Edgewood IIa*, 804 S.W.2d at 500.

214. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 396 (Tex. 1989).

215. See Chart 1 in Part One (showing unequalized local supplementation specifically approves of differences in yield of \$1,035/\$.01 tax/ADA in the richest district to \$3/\$.01 tax/ADA in the poorest district).

216. *Edgewood IIa*, 804 S.W.2d at 499–500.

217. See *Edgewood I*, 777 S.W.2d at 396 (“[T]he constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live.”). “There must be a direct and close correlation between a district’s tax effort and the educational resources available to it.” *Id.* at 397; see also *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 496 (Tex. 1991) (concluding the school finance system under Senate Bill 1 was inefficient because property owners in a majority of school districts were paying higher taxes in exchange for “a less expensive education for students in their districts”). “To be efficient, a funding system that is so dependent on local ad valorem property taxes must draw revenue from all property at a substantially similar rate.” *Edgewood II*, 804 S.W.2d at 496. The *Edgewood II* court opined:

Even if the approach of Senate Bill 1 produces a more equitable utilization of state educational dollars, it does not remedy the major causes of the wide opportunity gaps between rich and poor districts. It does not change the boundaries of any of the current 1052 school districts, the wealthiest of which continues to draw funds from a tax base roughly 450 times greater per weighted pupil than the poorest district.

*Id.*

218. See *Edgewood IIa*, 804 S.W.2d at 500 (“Once the [l]egislature 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

finance systems: one for the majority of districts which are funded at the level the state regards as efficient, and another system that is unequalized, not uniform and wastes the state's resources.<sup>219</sup>

This emasculation of the *Edgewood I* and *Edgewood II* standards came to fruition in *Edgewood V*, where it was articulated,<sup>220</sup> and *Edgewood VI*, where it was restated and applied.<sup>221</sup> Building on the misapplication of precedent in *Edgewood IIa* and *Edgewood IV*, the court in *Edgewood V*, as restated in *Edgewood VI*, redefined "efficiency" in this way:

"In other words, the constitutional standard of efficiency requires substantially equivalent access to revenue only up to a point, after which a local community can elect higher taxes to 'supplement' and 'enrich' its own schools. That point, of course, although we did not expressly say so in *Edgewood I*, is the achievement of an adequate school system as required by the [c]onstitution. Once the [l]egislature has discharged its duty to provide an adequate school system for the [s]tate, a local district is free to provide enhanced public education opportunities if its residents vote to tax themselves at higher levels. The requirement of efficiency does not preclude local supplementation of schools."<sup>222</sup>

This can more accurately be described as "gentle guidance," rather than an enforceable judicial test. To facilitate a comparison, the *Edgewood I* standard states that:

There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.<sup>223</sup>

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local property owners approve an additional local property tax.").

219. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 753 (Tex. 2005) (transforming the use of "efficiency" into adequacy).

220. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis (Edgewood V)*, 107 S.W.3d 558, 566 (Tex. 2003).

221. *Edgewood VI*, 176 S.W.3d at 791.

222. *Id.* (quoting *Edgewood V*, 107 S.W.3d at 566).

223. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989).

The new language is weaker than the original test in at least the following ways: (1) the new standard only applies to access to the “adequate” level, not to the entire system, and the adequate level itself is vaguely defined and completely deferential to the legislature;<sup>224</sup> (2) the new standard does not link tax revenues to “similar levels of tax effort”; (3) the new standard requires revenues that are substantially “equivalent” not substantially “equal”; (4) the new standard does not relate “children who live in poor districts” and “children who live in rich districts,” nor does it require that these two groups “be afforded a substantially equal opportunity to have access to educational funds”;<sup>225</sup> and (5) the new standard is inconsistent with state statutes.<sup>226</sup>

### B. *The Definitions of “Adequacy” and “General Diffusion of Knowledge”*

The Texas Supreme Court strengthened its definitions of “adequacy” and “general diffusion of knowledge” in *Edgewood I* and *Edgewood II* and then diluted these definitions and their application to the constitutional analysis in *Edgewood IV* and *Edgewood VI*.

The court has confused both the term to use to describe this “general diffusion of knowledge” and where it fits in the analysis under a claimed violation of article VII, section 1. In *Edgewood I*, the court found the system to be “inefficient.”<sup>227</sup> This efficiency violation was composed of two parts: (1) the system was not “financially efficient”;<sup>228</sup> (2) nor was it “efficient in the sense of providing for a ‘general diffusion of knowledge’ statewide.”<sup>229</sup>

By *Edgewood IV*, the court had changed the analysis of article

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224. See *Edgewood VI*, 176 S.W.3d at 753 (defining “adequacy” for constitutional purposes as “the requirement that public education accomplish a general diffusion of knowledge”).

225. *Edgewood I*, 777 S.W.2d at 395–97.

226. Cf. TEX. EDUC. CODE ANN. § 42.001 (Vernon 2006) (utilizing the term efficient and requiring the school finance system to “adhere to a standard of neutrality that provides for substantially equal access to similar revenue per student at similar tax effort, considering all state and local tax revenues of districts after acknowledging all legitimate student and district cost differences”).

227. *Edgewood I*, 777 S.W.2d at 397.

228. *Id.*

229. *Id.*

VII, section 1 into two different inquiries. First, did the legislature meet its “constitutional obligation to provide for a general diffusion of knowledge statewide”?<sup>230</sup> The *Edgewood IV* court held that the legislature met that standard by equating the “general diffusion of knowledge” requirement with its accountability regime, i.e., providing “an accredited education.”<sup>231</sup> Then the court even weakened that statement by setting an incredibly low threshold for meeting the diffusion standard.<sup>232</sup>

Second, the *Edgewood IV* court rewrote and eviscerated the bedrock of its school finance jurisprudence, when, from whole cloth, it wrote a new standard for determining “financial efficiency.”<sup>233</sup> From its clear and enforceable standard of *Edgewood I* and *Edgewood II*,<sup>234</sup> the court, understandably without citation, invented this standard: “[D]istricts must have substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge.”<sup>235</sup>

The redefinition of the *Edgewood I* and *Edgewood II* efficiency

230. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 730 (Tex. 1995).

231. *Id.*

232. *See id.* at 730 n.8 (stating the legislature, under Senate Bill 7, “fulfills its mandate to provide a general diffusion of knowledge by establishing a regime administered by the State Board of Education,” and that no agency is required to fulfill this duty “[a]s long as the [l]egislature establishes a suitable regime that provides for a general diffusion of knowledge”). The *Edgewood IV* court stated that once a suitable regime is established:

[T]he [l]egislature may decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means.

This is not to say that the [l]egislature may define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1. While the [l]egislature certainly has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds.

*Id.*

233. *See id.* at 730 (“Unlike the school finance systems at issue in *Edgewood I* and *Edgewood II*, we conclude that the system established by Senate Bill 7 is financially efficient.”).

234. *See Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 496 (Tex. 1991) (stating that a funding system must draw tax revenue at similar rates from all property in order to be efficient); *Edgewood I*, 777 S.W.2d at 397 (holding that school districts must have equal access to tax revenues at similar levels of effort).

235. *Edgewood IV*, 917 S.W.2d at 730.

standard in *Edgewood IV* was necessary in order to uphold the system against the attack by the low-wealth districts.<sup>236</sup> The undisputed facts showed that at the \$1.50 tax rate allowed for the basic system (often called the “maintenance and operations” tax portion), there was a \$600/WADA student gap between the wealthier districts and the rest of the districts.<sup>237</sup> However, if districts took advantage of the additional \$.50 of tax available for facilities funding (called the “Interest and Sinking Fund” (I&S) tax), the gap between wealthier districts and the other districts in the state would be \$2,500/WADA<sup>238</sup> on top of a system the court defined as adequate at \$3,500/WADA.<sup>239</sup> In other words, under Senate Bill 7, the wealthiest districts could generate up to \$6,146/WADA, while the poorest districts would have only \$3,608/WADA.<sup>240</sup> Not even the Texas Supreme Court in *Edgewood IV* could have found a 70% disparity<sup>241</sup> in revenue at a tax rate allowed to be “a direct and close correlation” between effort and resources, or “substantially equal access to similar revenues per pupil at similar levels of tax effort.”<sup>242</sup>

Since the facts would not pass the test, the majority in *Edgewood IV* simply changed the test.<sup>243</sup> The court’s effort in *Edgewood IIa* to water down its own opinions, and to even further dilute that standard in *Edgewood IV*, led the court from dilution to

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236. *Id.* at 731–32.

237. *Id.* at 731 (stating that the wealthiest districts enjoyed a \$600 advantage over “property poor” districts at a \$1.50 tax rate).

238. *Id.* at 769 (Spector, J., dissenting) (“Thus, at a \$2.00 tax rate, the richest districts will enjoy \$6,146 per weighted student, while the poorest can only generate \$3,608 per weighted student.”).

239. *Id.* at 731 n.10 (majority opinion) (noting that evidence at trial showed that about \$3,500 per weighted student meets the level of efficiency defined by the legislature).

240. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 769 (Tex. 1995) (Spector, J., dissenting).

241. \$6,146 is 70% more than \$3,608.

242. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989).

243. *See Edgewood IV*, 917 S.W.2d at 730 (requiring districts to provide equal access to funding in order to achieve constitutional standards); *see also* J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607, 691–95 (1999) (analyzing the court’s change of the financial efficiency standard in *Edgewood IV*).

drowning.<sup>244</sup> The *Edgewood IV* court did acknowledge that the finding of constitutionality was a close call while acknowledging that the unconstitutionality of the system was near.<sup>245</sup>

Once the court was actually confronted with a real adequacy challenge, as in *Edgewood VI*, it had to further dilute its new test in order to approve of the system.<sup>246</sup> The low-wealth districts in *Edgewood IV* approached the case as a test of the financial efficiency of the system as in *Edgewood I* and *Edgewood II*.<sup>247</sup> The plaintiffs and plaintiff-intervenors in *Edgewood VI*, representing half of the children in Texas and a coalition of districts of all levels of wealth,<sup>248</sup> were aware of the new tests developed by the court in *Edgewood IV* and established a thorough record of inadequacies in the school finance system.<sup>249</sup>

Confronted with this record, which it summarized with sensitivity, the *Edgewood VI* court first diluted the meaning of a general diffusion of knowledge and then diluted its framework for

244. "Oh what a tangled web we weave when first we practice to deceive." SIR WALTER SCOTT, *MARMION: A TALE OF FLODDEN FIELD* canto vi., 17 (Houghton Mifflin 1900) (1808).

245. *Edgewood IV*, 917 S.W.2d at 747. The court indicated the circumstances that would render the system unconstitutional:

We acknowledge, and the State concedes, that if the cost of providing a general diffusion of knowledge rises to the point that a district cannot meet its operations and facilities needs within the equalized program, the State will, at that time, have abdicated its constitutional duty to provide an efficient school system. From the evidence, it appears that this point is near. However, under the present record, plaintiffs have not yet proved that the State has breached its duty to efficiently provide for a general diffusion of knowledge simply because Senate Bill 7 does not include a separate facilities component.

*Id.* (footnote omitted).

246. See *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 792 (Tex. 2005) (holding that the school funding system is not inefficient).

247. See *Edgewood IV*, 917 S.W.2d at 731 (restating the low-wealth districts' calculations based on financial efficiency standards established in *Edgewood I* and *Edgewood II*).

248. See *Edgewood VI*, 176 S.W.3d at 750 (noting that a large percentage of Texas students attended school in the participating school districts, and that the plaintiffs in *Edgewood VI* were represented by among others, Bracewell & Giuliani and Haynes & Boone, two well-established and powerful Texas law firms).

249. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 3-64, 67-116 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary's Law Journal*) (describing the inadequacies of the Texas school finance system).

deciding whether a diffusion of knowledge had been achieved.<sup>250</sup>

After noting that “the accomplishment of ‘a general diffusion of knowledge’ is the standard by which the adequacy of the public education system is to be judged,” the court quoted with apparent approval the district court’s operational definition of “a general diffusion of knowledge.”<sup>251</sup> The court then weakened that standard by adding a “reasonableness” qualification: “The public education system need not operate perfectly; it is adequate if districts are *reasonably* able to provide their students the access and opportunity the district court described.”<sup>252</sup>

Unfortunately, the *Edgewood VI* court then took this subjective test of reasonableness and made it even less enforceable with its new arbitrariness standard:

Having carefully reviewed the evidence and the district court’s findings, we cannot conclude that the [l]egislature has 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.<sup>253</sup>

Earlier in the decision, the court reached this conclusion, which it had previously defined as a conclusion of law the Texas Supreme Court can make, as opposed to a factual finding or weighing of facts that a trial court must make.<sup>254</sup>

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250. See *Edgewood VI*, 176 S.W.3d at 787–89 (stating that the adequacy of the education system is measured by a reasonableness standard and is not faulty merely because the system has not yet succeeded in accomplishing its stated goals).

251. *Id.* at 787 (quoting TEX. CONST. art. VII, § 1). The *Edgewood VI* court stated:

“To fulfill the constitutional obligation to provide a general diffusion of knowledge, districts must 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.’ Districts satisfy this constitutional obligation when they 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.’”

*Id.* (citations omitted) (quoting *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, at 65 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary’s Law Journal*)).

252. *Edgewood VI*, 176 S.W.3d at 787.

253. *Id.* at 789–90.

254. See *id.* at 785 (holding that whether statutory provisions are arbitrary and

This assumption of the power of decision was necessary for the system to meet even its own shadow test. After summarizing pages of the facts showing the need for additional funding, wide gaps in performance among students by race proficiency in English, economic disadvantage, high dropout and non-completion rates, low rates of college preparedness, high teacher attrition and turnover, etc.,<sup>255</sup> the court weighed<sup>256</sup> this plethora of evidence against a few test scores as follows: “But the undisputed evidence is that standardized test scores have steadily improved over time, even while tests and curriculum have been made more difficult. By all admission, NAEP scores, which the district court did not mention, show that public education in Texas has improved relative to the other states.”<sup>257</sup>

### C. *Power of Article VII, Section 3 to Defeat Legislative Efforts to Meet the Requirements of Article VII, Section 1*

There are at least two major strands to the court’s interpretation of article VII, section 3, and the Texas Supreme Court, the legislature and the public have often confused the two.<sup>258</sup> First, Texas constitution article VII, section 3 is relied on for the proposition that voters in a school district must vote to approve any additional ad valorem tax on the property in the district.<sup>259</sup>

Second is the interpretation of article VII, section 3 as a constitutional imprimatur for the concept of local control and unequalized enrichment.<sup>260</sup> Under this interpretation, the amend-

unconstitutional is a question of law to be determined by the judiciary).

255. *Id.* at 789.

256. In Texas, as in all other judicial systems, the weighing of facts is a function of the finder of fact, i.e., a jury or trial court. *See, e.g.,* *Nguyen v. State*, 177 S.W.3d 659, 666 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d) (“[T]he trier of fact is the exclusive judge of the facts, the credibility of the witnesses, and the weight to be given to their testimony.”).

257. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 789 (Tex. 2005).

258. *See Carrolton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 503–04 (Tex. 1992) (stating that article VII, section 3 requires voter approval of a statewide ad valorem tax).

259. *See id.* at 510 (holding that article VII, section 3 requires voter approval of a state tax).

260. *See id.* at 509–10 (stating that it is unfair for a school district to pay the expenses of other school districts yet have no voice in their affairs).

ment was meant to protect local school district wealth from any responsibility to support the overall Texas school finance system, and by implication, the last phrase of the amendment meant to modify and limit the power of the legislature promulgated in article VII, section 1.<sup>261</sup> An analysis of the overall amendment and its varying interpretations will provide the basis to unpack these different interpretations of article VII, section 3.

The original drafters and amenders of the Texas constitution have written a long and complex description of the legislature's powers to create school districts and to empower districts to tax.<sup>262</sup> At the time of the first four *Edgewood* opinions,<sup>263</sup> article VII, section 3 provided:

One-fourth of the revenue derived from the [s]tate occupation taxes and poll tax of one dollar on every inhabitant of the [s]tate, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem [s]tate tax of such an amount not to exceed thirty-five cents on the one hundred (\$100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this [s]tate for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this [s]tate; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the [s]tate and the [l]egislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the [l]egislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the

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261. *See id.* (same).

262. TEX. CONST. art. VII, § 3.

263. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995); *Edgewood III*, 826 S.W.2d at 489; *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

[l]egislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one (\$1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.<sup>264</sup>

Several of the clearly dated and irrelevant portions of article VII, section 3 were deleted in the 1999 amendment.<sup>265</sup>

In *Edgewood I*, the state and school district defendants argued that article VII, section 3 significantly limited the power of the courts to declare the school finance system to violate the Texas constitution.<sup>266</sup> The court of appeals in *Edgewood I* was

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264. TEX. CONST. art. VII, § 3 (amended 1999).

265. See TEX. CONST. art. VII, § 3 (providing the current directive for taxation and school funding). Article VII, section 3 now reads as follows:

- (a) One-fourth of the revenue derived from the [s]tate occupation taxes shall be set apart annually for the benefit of the public free schools.
- (b) It shall be the duty of the State Board of Education to set aside a sufficient amount of available funds to provide free text books for the use of children attending the public free schools of this [s]tate.
- (c) Should the taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the [s]tate.
- (d) The [l]egislature may provide for the formation of school districts by general laws, and all such school districts may embrace parts of two or more counties.
- (e) The [l]egislature shall be authorized to pass laws for the assessment and collection of taxes in all school districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the [l]egislature may authorize an additional ad valorem tax to be levied and collected within all school districts for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified voters of the district voting at an election to be held for that purpose, shall approve the tax.

*Id.*

266. *Edgewood I*, 777 S.W.2d at 396 (“The State argues that the 1883 constitutional amendment of article VII, section 3 expressly authorizes the present financing system.”).

persuaded by this argument.<sup>267</sup> However, the Texas Supreme Court clearly rejected the argument: "The State argues that the 1883 constitutional amendment of article VII, section 3 expressly authorizes the present financing system. However, we conclude that this provision was intended not to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system."<sup>268</sup>

This narrow interpretation of article VII, section 3, essentially viewing article VII, section 3 as a supplementary provision to help the legislature fulfill its constitutional responsibilities in article VII, section 1, was expanded in *Edgewood II*.<sup>269</sup> The original<sup>270</sup> unanimous opinion in *Edgewood II* rejected the notion that article VII, section 3 prevented tax base consolidation and concluded: "The [c]onstitution does not present a barrier to the general concept of tax base consolidation, and nothing in *Love* prevents creation of school districts along county or other lines for the purpose of collecting tax revenue and distributing it to other school districts within their boundaries."<sup>271</sup>

In the opinion on motion for rehearing in *Edgewood IIa*, the court, after soundly rejecting the state's first legislative response to *Edgewood I*,<sup>272</sup> ruled that article VII, section 3 and article VIII, section 1-e, considered in conjunction, "mandate that local tax revenue is not subject to state-wide recapture."<sup>273</sup>

In *Edgewood III*, the court reinterpreted article VII, section 3 in

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267. *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 865-66 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

268. *Edgewood I*, 777 S.W.2d at 398.

269. *See Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 497-98 (Tex. 1991) (noting that article VII, section 3 simultaneously enables districts to establish financing systems for their residents and prohibits the legislature from compelling districts to provide for nonresidents (citing *Love v. City of Dallas*, 120 Tex. 351, 367, 40 S.W.2d 20, 27 (1931))).

270. "Original" is used here to distinguish the original unanimous opinion, issued January 22, 1991, in *Edgewood II* from *Edgewood IIa*, the opinion on motion for rehearing issued February 27, 1991. *Edgewood II*, 804 S.W.2d at 492-99; *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood IIa)*, 804 S.W.2d 499, 499-508 (Tex. 1991) (op. on reh'g).

271. *Edgewood II*, 804 S.W.2d at 497-98.

272. *Edgewood I*, 777 S.W.2d at 397.

273. *Edgewood IIa*, 804 S.W.2d at 499.

some detail.<sup>274</sup> Describing article VII, section 3 as a “constitutional wilderness,”<sup>275</sup> “a rather patched up and overly cobbled enactment,”<sup>276</sup> and “an example of how not to write a constitution,”<sup>277</sup> the court nevertheless interpreted article VII, section 3 to determine whether it required a vote in each local school district before the implementation of the taxes required by the 1991 school finance legislation creating the county education districts.<sup>278</sup> After an analysis of the language and meanings of each of the amendments to article VII, section 3 in 1883, 1908, 1909, 1918, 1920 and 1926, the court concluded that article VII, section 3 serves to “condition the imposition of a local ad valorem tax upon the approval of the electorate.”<sup>279</sup>

The Texas Supreme Court further refined its explanation of the meaning of article VII, section 3 in *Edgewood IV* when it upheld the 1993 school finance legislation, which required the wealthiest districts to use one of five options to effectively “reduce” their wealth to the level set in the statute.<sup>280</sup> The court summarized its holdings on article VII, section 3 stating:

Article VII, section 3 does not create any “rights.” It only authorizes the [l]egislature to establish school districts and to empower the districts to levy taxes for specific purposes. The school districts’ rights, to the extent they exist, are derived solely from the statutes that the [l]egislature may enact under the authority granted in section 3.<sup>281</sup>

274. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), 826 S.W.2d 489, 503–06 (Tex. 1992).

275. *Id.* at 503.

276. *Id.* (quoting *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 744 (Tex. 1962)).

277. *Id.* (citing 2 GEORGE BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 519 (1976)).

278. *Id.* at 504–07 (examining the structure and history of article VII, section 3 in order to consider the argument that Senate Bill 351 violated article VII, section 3 by establishing a tax without first gaining the approval of affected voters).

279. *Edgewood III*, 826 S.W.2d at 506.

280. *Edgewood Indep. Sch. Dist. v. Meno* (*Edgewood IV*), 917 S.W.2d 717, 725, 728 (Tex. 1995) (upholding the constitutionality of Senate Bill 7 and subsequently explaining the provisions contained within that legislation).

281. *Id.* at 739.

The election requirement has some support in the language of article VII, section 3; however, in the context of a statewide system of tax base consolidations, the election requirement does not apply. Even if the local district would have to hold an election to support an additional tax, it does not mean that the state cannot create a larger school district, including several smaller districts which have already voted for the local tax. In other words, if all the school districts in a tax consolidation district had voted a tax of \$1.00, a county education district like the one in Senate Bill 351 would do no more than continue that tax on property in the district. However, the new district would use that property tax in the new, larger district. Though this interpretation is not the only one that can be inferred from the language of article VII, section 3, the support for the county education districts is clearly warranted by the history and language of *Edgewood II*.<sup>282</sup> The *Edgewood II* district court's concern over the possible implementation of tax base consolidation was based on the presentation and discussion of the bills by Senator Uribe and Representative Luna that provided for county tax districts in every county—the same sort of disbursement system built into Senate Bill 351.<sup>283</sup> The *Edgewood II* court quickly dismissed the district court's concerns and, based on the record before the district court, concluded that the constitution does not present a barrier to the general concept of tax base consolidation.<sup>284</sup> That was more than enough precedent to become the basis for the legislature's passage of the Senate Bill 351 system, *Edgewood IIIa* notwithstanding.

In addition, Texas constitution article VII, section 3-b supplies the power of the state to implement tax base consolidation plans

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282. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 496–97 (Tex. 1991) (analyzing the ways in which Senate Bill 1 failed to respond effectively to *Edgewood I* and noting that tax base consolidation would provide an effective and constitutional response).

283. *Edgewood Indep. Sch. Dist. v. Kirby*, No. 362,516, at 25 (250th Dist. Ct., Travis County, Tex. Sept. 24, 1990) (on file with the *St. Mary's Law Journal*). The Uribe bill, Tex. S.B. 9, 71st Leg., 3d C.S. (1990), and the Luna bill, Tex. H.B. 34, 71st Leg., C.S. (1990), provided the theoretical underpinning for the county education districts and showed the equity and additional funding that could be generated under such a system. The district court, although it held Senate Bill 1 unconstitutional, was concerned about the constitutionality of these proposals. *Id.*

284. *Edgewood II*, 804 S.W.2d at 497.

without additional elections.<sup>285</sup>

In his dissent in *Edgewood III*, Justice Doggett unpacked and dissected the majority's interpretation of article VII, section 3-b.<sup>286</sup> Based on an analysis of the development of the argument, from the argument and opinion in *Edgewood I* to the argument and opinion in *Edgewood III*, Justice Doggett concluded that the majority had flipped its reasoning on the issue several times and ignored a significant precedent on the issue.<sup>287</sup>

Even if the election interpretation of article VII, section 3 is arguable, the "local control" interpretation of article VII, section 3 is clearly wrong. The Texas Supreme Court had all of the arguments supporting local control and unequalized enrichment before it in *Edgewood I*, and still the court specifically rejected the

285. See TEX. CONST. art. VII, § 3-b (granting local governments the authority, after a boundary change, to "assess, levy and collect ad valorem taxes" for the purpose of school financing "without the necessity of an additional election"). Article VII, section 3-b states in relevant part:

No tax for the maintenance of public free schools voted in any independent school district . . . shall be abrogated, cancelled or invalidated by change of any kind in the boundaries thereof. After any change in boundaries, the governing body of any such district, without the necessity of an additional election, shall have the power to assess, levy and collect ad valorem taxes on all taxable property within the boundaries of the district as changed, for the purposes of the maintenance of public free schools . . . at the rate, or not to exceed the rate, and in the manner authorized in the district prior to the change in its boundaries, and further in accordance with the laws under which all such bonds, respectively, were voted . . . . In those instances where the boundaries of any such independent school district are changed by the annexation of, or consolidation with, one or more whole school districts, the taxes to be levied for the purposes hereinabove authorized may be in the amount or at not to exceed the rate theretofore voted in the district having at the time of such change the greatest scholastic population according to the latest scholastic census . . . .

*Id.*

286. See *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), 826 S.W.2d 489, 575-76 (Tex. 1992) (Doggett, J., dissenting) (discussing the majority's failure to abide by legislation to provide for Texas school children); see also J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 691-93 (1999) (discussing the general diffusion of knowledge standard for an accredited education).

287. *Edgewood III*, 826 S.W.2d at 575-76 (Doggett, J., dissenting); see *Freer Mun. Indep. Sch. Dist. v. Manges*, 677 S.W.2d 488, 490 (Tex. 1984) ("[Section 3-b] was added in 1966 to eliminate the need for new voter approval of bonds and taxes when authorized changes are made in the boundaries of school districts. Once taxation has been authorized, a change in the school district's boundaries has no effect upon the power to tax.").

article VII, section 3 local control theory.<sup>288</sup> After the expansive interpretation of article VII, section 3 in *Edgewood III*,<sup>289</sup> the court later retreated in its interpretation of that provision in *Edgewood IV*.<sup>290</sup> In *Edgewood IV*, the court relied more on its own language in *Edgewood II* and *Love* than on the text or substance of article VII, section 3, and for good reason.<sup>291</sup> There is simply nothing in the language of article VII, section 3 that supports the concept of a bifurcated school finance system with efficiency in part of the system and inefficiency in the rest of the system. Furthermore, the expansive interpretation of article VII, section 3 was deflated in *Edgewood IV* when the court needed to get around its own article VII, section 3 barriers to uphold the Senate Bill 7 system.

#### D. *The Changing Interpretations of Article VIII, Section 1-e*

The constitutional provision that has provided the basis for the holdings of unconstitutionality of the systems before the court in *Edgewood III* and *Edgewood VI* is the prohibition of a statewide

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288. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 396 (Tex. 1989) (“The State argues that the 1883 constitutional amendment of article VII, section 3 expressly authorizes the present financing system. However, we conclude that this provision was intended *not* to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system.”).

289. *Edgewood III*, 826 S.W.2d at 503–10 (providing a history and analysis of the amendments to article VII, section 3, after referring to the provision as “a constitutional wilderness”).

290. See *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 739 (Tex. 1995) (concluding that the school districts’ right to vote for a statewide ad valorem tax is not specifically granted by article VII, section 3). In *Edgewood IV*, the court stated:

Article VII, section 3 does not create any “rights.” It only authorizes the [l]egislature to establish school districts and to empower the districts to levy taxes for specific purposes. The school districts’ rights, to the extent they exist, are derived solely from the statutes that the [l]egislature may enact under the authority granted in section 3.

*Id.*

291. See *id.* (“*Love* itself recognized the [l]egislature’s discretion to ‘abolish school districts or enlarge or diminish their boundaries, or increase or modify or abrogate their powers.’” (quoting *Love v. City of Dallas*, 120 Tex. 351, 366, 40 S.W.2d 20, 26 (1931))); see also *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 497–98 (Tex. 1991) (reasoning that article VII, section 3 is not violated merely by the consolidation of tax bases).

ad valorem tax.<sup>292</sup> Article VIII, section 1-e of the Texas constitution states: “No [s]tate ad valorem taxes shall be levied upon any property within this [s]tate.”<sup>293</sup>

In *Edgewood IIa*, the court interpreted article VIII, section 1-e in conjunction with article VII, section 3 to “mandate that local tax revenue is not subject to state-wide recapture.”<sup>294</sup> More specifically, the *Edgewood IIa* court held that “article VIII, section 1-e prohibits the legislature from merely recharacterizing a local property tax as a ‘state tax.’”<sup>295</sup> The *Edgewood IIa* decision—decided without oral argument on these issues—provided the foundation of the court’s interpretations of article VIII, section 1-e in *Edgewood III*, *Edgewood IV*, *Edgewood V* and *Edgewood VI*.

*Edgewood III* defined the contours of article VIII, section 1-e as it relates to the legislature’s power to draw school finance systems that purport to control the raising and spending of ad valorem taxes by local school districts:

An ad valorem tax is a state tax when it is imposed directly by the [s]tate or when the [s]tate so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion. How far the [s]tate can go toward encouraging a local taxing authority to levy an ad valorem tax before the tax becomes a state tax is difficult to delineate. Clearly, if the [s]tate merely authorized a tax but left the decision whether to levy it entirely up to local authorities . . . then the tax would not be a state tax. The local authority could freely choose whether to levy the tax or not. To the other extreme, if the [s]tate mandates the levy of a tax at a set rate and prescribes the distribution of the proceeds, the tax is a state tax, irrespective of whether the [s]tate acts in its own behalf or through an intermediary.<sup>296</sup>

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292. See *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 754 (Tex. 2005) (“We now hold, as did the district court, that local ad valorem taxes have become a state property tax in violation of article VIII, section 1-e, as we warned ten years ago they inevitably would, absent a change in course, which has not happened.” (citing *Edgewood I*, 777 S.W.2d at 397)); *Edgewood III*, 826 S.W.2d at 500 (agreeing with appellants’ contention that Senate Bill 351 violated the prohibition on a statewide ad valorem tax by requiring CEDs to levy taxes on local school districts).

293. TEX. CONST. art. VII, § 1-e.

294. *Id.*

295. *Id.*

296. *Edgewood III*, 826 S.W.2d at 502–03.

In *Edgewood IV*, the Texas Supreme Court applied this *Edgewood III* definition of article VIII, section 1-e to determine the constitutionality of a school finance system and upheld Senate Bill 7, written by the legislature in 1993.<sup>297</sup> The *Edgewood IV* court held that Senate Bill 7 fit within the third scenario described in *Edgewood III*: “If the [s]tate required local authorities to levy an ad valorem tax but allowed them discretion on setting the rate and disbursing the proceeds, the [s]tate’s conduct might not violate article VIII, section 1-e.”<sup>298</sup> The *Edgewood IV* court described both the Senate Bill 7 requirement that districts tax at a certain rate to receive any state payments and Senate Bill 7’s continued allowance of local tax rates within a range.<sup>299</sup> However, the *Edgewood IV* court, in a prescient prediction warning the state that the Senate Bill 7 system would violate article VIII, section 1-e if the pattern of increased local costs and local rates, without increased state funding continued, concluded:

However, if the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. . . . [A] statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.<sup>300</sup>

This warning became the basis of the decision in *Edgewood V*<sup>301</sup> and the holding by the *Edgewood VI* court—that the system again violated article VIII, section 1-e.<sup>302</sup>

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297. See *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 738 (Tex. 1995) (“[T]he state’s control under Senate Bill 7 is not presently so great as to fall within the prohibition of article VIII, section 1-e.”).

298. *Id.* at 737 (quoting *Edgewood III*, 826 S.W.2d at 503).

299. See *id.* (“Senate Bill 7 does, to some extent, limit the districts’ discretion in choosing a tax rate by imposing minimum and maximum tax rates; however, the imposition of such limits does not render Senate Bill 7 unconstitutional.”).

300. *Id.* at 738.

301. See *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis (Edgewood V)*, 107 S.W.3d 558, 580 (Tex. 2003) (“We remain of the view that school districts can be forced by the current system to tax at maximum rates. An allegation that this has occurred states a claim under article VIII, section 1-e.”).

302. *Neely v. W. Orange-Cove Consol. Indep. Sch. Dist. (Edgewood VI)*, 176 S.W.3d 746, 754 (Tex. 2005) (“We now hold, as did the district court, that local ad valorem taxes

In *Edgewood V*, the court heard a challenge by several wealthy districts that the situation foreseen in *Edgewood IV* had come to fruition, i.e., that certain school districts were now constrained by the state school finance system to tax at or near the maximum allowable rate to provide either a general diffusion of knowledge as guaranteed by the Texas constitution or an adequate education, as defined by the legislature.<sup>303</sup> The Texas Supreme Court held that article VIII, section 1-e would be violated if any school district could show that it had to tax at or near the maximum rate to provide an education that was adequate and provided a general diffusion of knowledge.<sup>304</sup> The court summarized this test as an inquiry into whether a school district had “meaningful discretion” in setting tax rates to provide the required level of education.<sup>305</sup>

After remand and the development of a thorough record<sup>306</sup> in the district court on the meaning of an “adequate” and “general diffusion of knowledge” system, as well as other issues on the efficiency and general adequacy of the system, the Texas Supreme Court determined that the school finance system created in Senate Bill 7, as it applied in 2003, did in fact violate article VIII, section 1-e.<sup>307</sup> The court based its decision on the fact that most districts in the state were taxing at the maximum rates, virtually all of the revenue available through local taxes was being spent, and the state’s control of more than \$1 billion per year of local taxes recaptured by the state from school districts.<sup>308</sup> These factors and the record before the district court led the supreme court to the conclusion that districts had lost meaningful discretion to set their tax rates; therefore, the system violated article VIII, section 1-e.<sup>309</sup>

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have become a state property tax in violation of article VIII, section 1-e, as we warned ten years ago they inevitably would, absent a change in course, which has not happened.”).

303. *Edgewood V*, 107 S.W.3d at 573–74.

304. *Id.* at 579, 582–84.

305. *Id.* at 579.

306. See generally *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (on file with the *St. Mary’s Law Journal*) (discussing adequacy and general diffusion of knowledge). The facts of the case are summarized in the Texas Supreme Court’s *Edgewood VI* decision. *Edgewood VI*, 176 S.W.3d at 755–70.

307. *Edgewood VI*, 176 S.W.3d at 794–97.

308. *Id.* at 796–97.

309. *Id.* at 810.

E. *The "Arbitrary" Standard of Review and Lack of Deference to the District Court's Factual Findings*

Application of the extremely deferential standard of arbitrariness to a review of the legislature's school finance plans further weakens the power of challengers to address an unconstitutional school finance system. Though discussion of standards of review might seem to be an unduly academic enterprise, a side-by-side comparison of the language of the Texas constitution and the test set forward by the Texas Supreme Court in *Edgewood VI* will give the reader some sense of the effect of a thousand cuts:

Texas Constitution Article VII, Section 1	<i>Edgewood VI</i> Constitutional Test
A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the [l]egislature of the [s]tate to establish and make suitable provision for the support and maintenance of an efficient system of public free schools. <sup>310</sup>	[Whether] the [l]egislature . . . 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. <sup>311</sup>

To assure that district courts and future panels of the Texas Supreme Court would not misunderstand its power, the court again stated that:

Whether the statutory provisions creating the public school system are arbitrary and therefore unconstitutional is a question of law. To the extent that this determination rests on factual matters that are in dispute, we must, of course, rely entirely on the district court's findings. But in deciding ultimately the constitutional issues, those findings have a limited role.<sup>312</sup>

This denigration of the deference to be afforded the fact findings and fact weighing by the trier of fact and usurpation of the final authority in school finance cases follows a trend in the jurisprudence of the Texas Supreme Court to expand its power in the Texas judicial system. This trend has been exhaustively

310. TEX. CONST. art. VII, § 1.

311. *Edgewood VI*, 176 S.W.3d at 789-90.

312. *Id.* at 785 (citations omitted).

chronicled by Professor Flint in the area of mandamus jurisdiction and by several authors in the area of decreasing respect for the fact-finding powers of juries.<sup>313</sup>

#### V. CONSTITUTIONAL GUIDANCE PROVIDED TO THE LEGISLATURE BY THE *EDGEWOOD* CASES

The most likely constitutional challenge to the system will be based on the continuous increase in the need for funds in Texas school districts and the greater needs in those districts that are least able to increase their funding under the state system. The 2006 statute allows only limited discretion to raise taxes and increase revenues; any amendment to the system that allows significant unequalized enrichment would push the system past the limit allowed by the court in *Edgewood IV*.

Though the parties in *Edgewood VI* did the most thorough job to date developing the record with respect to the lack of funding for facilities and the lack of adequate existing facilities, the complete record has not yet been produced. Only a thorough scientific-based study of a very large number of districts would satisfy the court's criticism. A study of several times the number of districts necessary for a proper statistical study, selected on a stratified random sample basis, will fill the void in the record. The study would have to include a thorough analysis of the quality of all the buildings in the district, its projected growth or decline in students and tax base, and a realistic assessment of the actual cost of raising all of the districts' buildings to a status that meets the state's high objectives for learning.

Though the court and the legislature often criticize recapture, neither has stopped it because of its dual role as a funding generator for the state and, of most importance, its strong impact

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313. See Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return,"* 39 ST. MARY'S L.J. 3, 138-48 (2007) ("[The Texas Supreme Court] has in fact substantially altered one of the most time honored principles of mandamus jurisprudence, and replaced it with a newly articulated standard that leads to nothing short of ad hoc decision making."); see also R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review,* 60 BAYLOR L. REV. 337, 439-44 (2008) (criticizing the Texas Supreme Court's expansion of "the standard and scope of legal and factual sufficiency review in Texas").

on equalizing the system. Further analysis and public understanding of the recapture system would help the legislature and the courts deal with this issue long-term.

Of course, recapture would not be necessary if the legislature actually implemented a regional system for tax collection based on the model of Senate Bill 7's options, i.e., a system that would give a school district the option to either vote itself into a tax base consolidation district or be consolidated under existing state law.

From a school finance perspective, almost all the issues raised in the *Edgewood* cases could be removed from consideration by adopting an income tax and dedicating the proceeds to the public school finance system, as allowed by the Texas constitution. However, advocates of equality and adequacy would still need to be vigilant. A system with 80% state funding and a limit of \$.50 local taxes could still be quite inequitable, inefficient, inadequate and unfair if today's districts, with a range of \$10,000,000/ADA to \$35,000/ADA in property wealth (about a 300 to 1 ratio), were allowed to exploit their wealth and raise unequalized enrichment.

Now that the Texas Supreme Court has again changed its standard of review in *Edgewood VI* and taken upon itself the major decision making on the "arbitrariness" of the system, additional challenges will be difficult. However, the benefit of this litigation in improving the efficiency and fairness of the system is clear,<sup>314</sup> and further challenges might be necessary to both protect and extend these gains.

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314. To a large degree, the new finance scheme has significantly reduced the link between local property values and access to revenues. During the 1988–1989 school year (the year before the first *Edgewood* supreme court decision), the correlation between tax effort and revenue was only 0.37, while the correlation between wealth and revenue was 0.75. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 717–18 (1999) (comparing total average effective tax rates in 1987–1988 to those in 1993–1994). By 1994, the correlation between tax effort and revenue was 0.81, and the correlation between wealth and revenue was only 0.34. Put another way, in 1989, wealth explained 56% of the variation in revenue for local districts, while tax effort explained only 13.5%. *Id.* By 1994, wealth only explained 18% of the variation, while tax effort accounted for 65%. *Id.*; see also Amanda Bright Bownson, *School Finance Reform in Post Edgewood Texas: An Examination of Revenue Equity and Implications for Student Performance* (Dec. 2003) (unpublished Ph.D. dissertation, Univ. of Tex. at Austin), available at <http://www.lib.utexas.edu/etd/d/2002/brownsonab029/brownsonab029.pdf#page=4> (discussing the impact of school finance legislation brought on as a result of the *Edgewood* court decisions).

VI. GENERAL ANALYSIS OF THE *EDGEWOOD* CASES

The *Edgewood* cases as a whole have been quite effective in forcing the legislature to improve the Texas school finance system. The cases forced the legislature to develop a way to use the resources of the wealthiest districts to support the state system and have focused the attention of the leaders and legislature on the despicable conditions in the poorest districts. This has led to an improvement in both the equity and level of funding of the system.

However, the court has so weakened its own jurisprudence that the cases will be of little use to the legislature in understanding its constitutional duties or to students or families in the state to hold the legislature accountable for meeting the constitutional standards. The cases have transformed from a beacon of hope to students and families in poor districts to defense of the privileges of the wealthiest families and districts in the state. The hope behind this article is that this dilution of clarity and force of the decisions can be reversed, and Texas courts can again be relied on to protect the constitutional rights of all Texans to demand the adherence of the Texas school finance system to the high standards of the Texas constitution.

