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AN ANALYSIS OF THE HISTORY OF SCHOOL FINANCE LITIGATION IN TEXAS AND THE EFFECTIVENESS OF THIS LITIGATION IN THE ATTAINMENT OF AN EQUITABLE AND ADEQUATE EDUCATION

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by

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DISSERTATION

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

DOCTOR OF PHILOSOPHY

THE UNIVERSITY OF TEXAS AT AUSTIN

AUGUST 2012

ACKNOWLEDGEMENTS

I would like to acknowledge those people whose assistance made this project possible. As the chair, Pedro Reyes provided the much-needed leadership, encouragement, and help in the initial conceptualization and final completion of the report. Norma Cantu lent her legal expertise and background in Texas school finance litigation to the different stages of the study. Ruben Olivarez's guidance enriched the project by bringing the perspective and experience of a former Texas school district superintendent. Jennifer Holme's interest in the national issues in school finance lawsuits were an important component of her feedback. Diane Schallert's insights have sharpened my own thinking and contributed immeasurably to the finished report. I would also like to thank Al Kauffman for his generosity in discussing the legal issues of the *Edgewood* era cases. I also appreciate the personal and scholarly encouragement and support of Linda Golden, Patrick Brockett, and Frederick Close.

Additionally, I appreciate the efforts of the staff in the Department of Educational Administration, including Hortencia Palomares, Graduate Coordinator; Linda Overton, Administrative Associate; Michael Dobecka, Technology Coordinator; and Jeffrey Brewer, Executive Assistant. I would also like to thank Nancy Elder, Head Librarian of the Life Science Library; and Bob Penman, Support Specialist, Office of Graduate Studies.

AN ANALYSIS OF THE HISTORY OF SCHOOL FINANCE LITIGATION IN TEXAS AND THE EFFECTIVENESS OF THIS LITIGATION IN THE ATTAINMENT OF AN EQUITABLE AND ADEQUATE EDUCATION

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This study analyzes the legal decisions that emerged across the nearly 45-year spectrum of Texas public school finance court cases, culminating in the judicial opinions and legislative actions that rather than bringing fundamental reform to the system has seen the enactment of temporary stopgap measures in 2006 that threw the system into further incertitude and undermined its basic tenets of constitutionality, eliciting the eighth round of lawsuits filed in 2011 and 2012 against the State, which charge that the school finance system is inequitable, inadequate, and inefficient. This is not to say that the decades-long litigation has not produced some beneficial results. In the intervening years since the initial filing in 1968 of the *Rodriguez* case, Texas has seen the development of a more equitable and adequate school finance system. Following *Rodriguez*, the Texas Supreme Court opinions in *Edgewood I* (1989) and *Edgewood II* (1991) were instrumental in spurring the legislative reforms that increased the overall funding of the system as well as provided the larger allocations that went to low-wealth school districts. Although the litigation strengthened the gains in equity in this initial period, the

subsequent Texas Supreme Court opinions produced judicial ambiguities and redefinitions that left the Texas school finance system in a continual state of constitutional uncertainty with respect to its fundamental mandate to provide an equitable and adequate education. The decisions in *Edgewood IIa* (1991), *Edgewood III* (1992), *Edgewood IV* (1995), *West Orange-Cove I* (2003*)*, and *West Orange-Cove II* (2005) have nonetheless been instructive in demonstrating how the Texas school finance court cases have altered the dynamic of equality and adequacy and the basic assumptions and ideals that have defined the fundamental right to an education, with the implications that these altered policy approaches have on the distribution of educational resources for all children. Importantly, the state's trajectory in school finance litigation offers an illustrative example of the tenuous but often contentious partisan interrelationship between the different levels of the judiciary and the legislative and executive branches of government that too often has deprived Texas public school students of an equitable and adequate education.

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CHAPTER 1

INTRODUCTION

Overview

The subject of public school finance is fraught with a contentious and litigious history. How monies are raised to pay for schools and the systems employed to allocate those funds are issues filled with complexity and often produce vocal and at times acrimonious debates among education officials, parents, legislators, scholars, taxpayers, and other interested citizens. As schools face budgetary constraints, growing enrollments especially of disadvantaged at-risk students, and increasingly restrictive accountability measures, those debates generally have ended up in courtrooms as numerous groups of plaintiffs challenge school finance systems that they deem unconstitutional and unfair. Although the debates on school finance systems reflect the parochial nuances of each state's individual approaches to the funding of its schools, there are a sufficient number of overarching commonalities across the spectrum of school finance lawsuits to make it possible to discern emerging historical trends and patterns of jurisprudence. The issues in public school finance litigation are best understood when seen within the context of the broader philosophical perspectives central to the concepts of equal educational opportunity and the wealth needed to achieve a quality or adequate public education. Hence school finance cases generally base their legal strategies on the equity and adequacy of educational resources, with the arguments presented to the courts centered on the raising and distribution of the revenues that are used to pay for those resources.

This analysis examines the history of school finance litigation in one state and the effectiveness of this litigation on the provision of an equitable and adequate education for its public school students.

Background

School finance lawsuits were first initiated in Massachusetts in 1819, but the modern period of litigation started in 1971 in California with *Serrano v. Priest* (*Serrano I*). Basing their argument on the concept of fiscal neutrality, the plaintiffs in *Serrano I*, who were Los Angeles County public school children and their parents, posited that the state's education finance system, "with its substantial dependence on local property taxes and resultant wide disparities in school revenue" (p. 1244), was unconstitutional and violated the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution. In arriving at its decision, the California Supreme Court applied the concept of strict scrutiny in declaring that wealth was a suspect classification. The court also aligned itself with the decision in *Brown v. Board of Education* (1954) in stating that education was a fundamental interest, saying that "education also supports each and every other value of a democratic society – participation, communication, and social mobility" (*Serrano I*, 1971, p. 1258, citing Coons, Clune & Sugarman, 1969, pp. 362-363). Finally, the court said that "this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors," adding that the "right to an education" cannot be "conditioned on wealth" (*Serrano I*, 1971, p. 1244).

In contrast to *Serrano I*, the Texas *Rodriguez v. San Antonio* (1973) case, which based its challenge on the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution, produced the historical U. S. Supreme Court reversal, decreeing that education is not a fundamental interest under the federal constitution, thus altering the course of all subsequent school finance cases. After *Rodriguez*, the only recourse for plaintiffs was to circumvent the federal judiciary and instead present their challenges through state courts, albeit seeking redress based on state constitutional equal protection clauses. This equal protection or equity trend continued through the 1970s and 1980s, with judges finding for the defendant states in approximately two-thirds of the lawsuits.

The school finance reform landscape changed in the late 1980s, with the pivotal (Koski, 2009-2010, 2010-2011) *Rose v. Council for Better Education, Inc*. (1989), which declared Kentucky's entire educational system unconstitutional and required the legislative and executive branches to restructure schools based on a certain adequacy standard. The *Rose* case was not only instrumental in ushering in an era in which plaintiffs presented legal strategies that stressed the right to a constitutional adequate education and its concurrent distribution of educational resources in lieu of arguments that emphasized equity but, together with *Edgewood Independent School District v. Kirby – Edgewood I* (1989) in Texas, *Abbott v. Burke* (1990) in New Jersey, and *Campbell County School District v. State* (1995) in Wyoming, among others, brought in a more active and controversial role for the courts in educational reform and policymaking. This period, which detractors called judicial activism but advocates welcomed as the much-needed impetus for school finance reform, proved effective, with judges declaring for the

plaintiffs in approximately two-thirds of the lawsuits. Since 1989, school finance challenges have been brought in 35 of the 50 states, with plaintiffs prevailing in 23 of those judicial decisions. Only five states have never had a lawsuit (National Education Access Network, 2012). Currently ten states, including Texas with four lawsuits, have pending litigation.

Equity and Adequacy Arguments

School finance challenges that base their arguments on the equity and adequacy of resources tend to focus on the raising and distribution of the revenues that are used to pay for those resources. The states generate approximately 48 percent of those revenues from a variety of means, while local school districts produce 44 percent and the federal government 8 percent (2010b). The majority of the equity court cases of school finance systems, generally filed on behalf of poor and disadvantaged students, based their lawsuits on constitutional equal protection clauses that declared that education was a fundamental right in a democracy (Enrich, 1995; Thro, 1990), with a shift to cases that increasingly stressed the concept of educational adequacy, with plaintiffs in these cases challenging the states' failures to ensure that schools had sufficient funds to provide their students with a constitutionally-guaranteed adequate education. Although the number of cases based on adequacy increased for a period of time, there has been an overall decline in lawsuits filed, leading analysts such as Hanushek (Rebell, Lindseth, & Hanushek, Fall 2009) to view this downward trend as a presage of the eventual end of school finance litigation, a welcome conclusion to debates that should never have sought refuge in the

judiciary but instead should have remained in the legislative and executive branches of government, the locus of traditional educational policymaking. A closer examination of these recent cases by advocates such as Rebell (2005b) shows that calling these predominantly adequacy lawsuits is a misnomer, when in reality these cases demonstrate that a new period of litigation is emerging that reintroduces a combination of equity and adequacy as the basis of reform initiatives that have not abandoned the basic tenets in a democracy and the provision of equitable and adequate educational opportunities for all students, especially disadvantaged and minority youngsters.

Equity cases address the fair or equal distribution of resources, based on criteria that distinguish the differences in student and school district characteristics (Brownson, 2002). These cases examine the strategies that finance systems utilize in equalizing the gaps that exist between school districts' abilities to raise local revenues, which constitute such a substantial portion of the monies needed by districts. Since these revenues are generally levied on local property taxes, this places poorer or low-wealth communities at a disadvantage in coming up with the necessary monies to pay for schools. Following mandates prescribed by state constitutions or articles, courts throughout the country have repeatedly decreed that states have the responsibility for funding education, with these decisions stating that spending should be equalized between districts. A school finance system increases the equitable level of its resources if it makes provisions not only for augmenting the share of funding that the state must provide for education but also for targeting those monies for district needs and programs for specific groups of students, such as those who are deemed at-risk.

In contrast to equity, the notion of adequacy generally means that a state needs to ensure that there is sufficient funding so that its students are able to have the adequate resources needed to meet academic accountability standards established by either federal, state, or local requirements. One of the most important criteria in the determination of what constitutes a sufficient amount of funding, however, is the number of students within a state that are disadvantaged because of poverty, are English Language Learners, or have other special needs, since these students are more expensive to educate and would presumably require a higher level of funding in order to provide them with an adequate level of resources. Fundamental to the notion of adequacy is the debate on resources vis-à-vis student outcomes that began with the Coleman report (1966) that found little relationship between school resource measures and student outcomes.

This initial research, echoed by others, was eventually followed by the visible and much-cited work of Hanushek (1989), the proponent of the position that there is no strong relationship between school expenditures and student performance. In the subsequent decades, Hanushek has become a prominent scholar on the economics of education and has testified on behalf of state defendants in numerous school finance lawsuits (Koski, 2010-2011). Today he remains a stalwart defender of performance-based school funding and accountability, and with Lindseth (2009), insists that differences in either absolute spending or spending increases have little or no consistent relationship to differences in student achievement. Although Hanushek and Lindseth acknowledge the improvements in student achievement among poor and minority students accomplished in states such as Texas and North Carolina in the 1990s, they attribute these changes to

accountability and other measures instigated by state legislatures and not to increased spending. Hanushek has numerous antagonists on the resources vs. student outcomes front, with the recent work done by Baker (2012), recapitulating the work done by scholars in previous years and contributing an extensive counter analysis. Baker reviewed the major studies on resources and student outcomes, refuting the opposition by arguing that resources that cost money do matter and that more equitable distribution of school funding can improve outcomes. He insisted that positions that claim that funding cuts will not harm educational quality are empirically flawed and not based on the extant studies on the relationship between funding and school quality.

The Question of Money

The question of money is critical to school finance lawsuits that rely heavily on adequacy arguments, exacerbated in the period between December 2007 and June 2009 by the longest and worst economic recession to hit the United States since the Great Depression, causing unprecedented erosions of much-needed revenues for states and school districts that are seeking to provide rising enrollments of students, especially disadvantaged and at-risk students, with adequate educational resources. The Center on Budget and Policy Priorities (Oliff & Leachman, October 7, 2011; Williams, Leachman, & Johnson, July 28, 2011), combining data from the National Center for Education Statistics (2010b) and from published budget documents from 46 states, representing 95 percent of the nation's students, reports that public school state funding for FY12, adjusted for inflation, was below FY08 levels in at least 30 of the states, with 17 of those

lowering their per-student funding by more than 10 percent (Texas was at 12 percent) and four showing cuts of more than 20 percent. Some of the steepest cuts occur from FY11 to FY12, with the second and third highest cuts of the 46 states reported by Texas and Kansas at 10.4 percent. Estimates in 2011-12 of school district enrollments of approximately 260,000 more K-12 students contrast sharply with school district job losses of 278,000 compared with 2007-2008. Texas at 1.8 percent had the second highest enrollment gain nationally from 2009 to 2010. Although reporting varies by year, methodology, and the groups that are originating the analysis, an examination of national per pupil expenditures from the National Education Association reflects wide disparities in the level of funding among the states, with Texas faring poorly in the statistical rankings of the amounts that states spend on their students. The revised data for the 50 states and the District of Columbia (Rankings & Estimates, 2012) indicate that the U.S. average per student expenditure in average daily attendance (ADA) for public elementary and secondary schools for 2010–11 was $11,305, with that amount rising slightly to $11,463 for 2011-12. In that same time period, the ranking for Texas fell from 41st, with per student spending at $9,446 to 45th, with spending at $8,908.

The Issues in Texas

The public education system in Texas is one of the largest in the country and problematic on a number of different fronts, contributing to the challenges facing the state's school finance structure. The projected school finance budget in 2011-12 is approximately $47.4 billion, which includes $21.4 billion, or 45 percent, in local property

taxes; $20.4 billion, or 43 percent, in state funds; and $5.6 billion, or 12 percent, in federal funds (TTARA Research Foundation, January 2012). Keeping up with the system is a complicated enterprise, and the process is often beset by controversy, confusion, misinformation, and misinterpretation that sometimes result from the polarization of stakeholders and political and other special interest groups.

Demographics

In 2010-11, the state had 1,228 school districts and open enrollment charters, more than any other state, with the square mileage of the districts ranging from less than 1 to almost 5,000, and a student enrollment of 20 in each of the smallest districts, Doss Consolidated Common School District and San Vicente Independent School District, and 204,245 in the largest, Houston Independent School District. Texas has faster rates of growth in public school enrollment than the other states, with public schools projected to add approximately 170,000 students from 2011 to 2013. In the decade from 1998 to 2008, public school enrollment in Texas increased by 20.4 percent, compared with a 5.9 percent increase in the United States as a whole. With 4,933,617 students, the public education system in Texas in 2010-11 was second only to California in the number of enrolled students and represented a 1.8 percent increase in enrollment over the previous year. Texas students are increasingly culturally and linguistically diverse, with Hispanics having the largest ethnic/racial enrollment at 50.3 percent, followed by African Americans at 12.9 percent. At 31.2 percent, White students had a decrease in enrollment from the previous year, following a ten-year downward trend. In 2010-11, 17 percent of

all students were considered English Language Learners (ELL) and were part of a decade-long increasing trend that showed more than a quarter of a million students in that period who were classified as limited English proficient (LEP) and were enrolled in bilingual or English as a second language (ESL) classes. An overwhelming majority of the LEP students were Hispanic, with percentages totaling 90.7 of those enrolled in bilingual and ESL instruction and 91.1 of those who were considered limited English proficient. Although Hispanics were 50.3 percent of the total school population, they represented 64.8 percent of the students who were enrolled in prekindergarten, a program for low-income students who have specified educational disadvantages. Another increasing trend is the number of students who attend public schools who come from poverty, reflecting 10-year increases in the three major groups, Hispanic, African American, and White. In 2010-11 in an increasing trend that is expected to continue, there were 2,914,916 students, or 59.1 percent of the total, who were considered economically disadvantaged, i.e., they were eligible for free or reduced-price meals under the National School Lunch and Child Nutrition Program. Across racial/ethnic groups, the percentage of economically disadvantaged students was largest for Hispanics at 77.4 percent, followed by African Americans 71.6 percent (Texas Education Agency, 2011).

The School Finance System

In spite of the statutory mandates in Chapters 41 and 42 of the Texas Education Code that stipulate an adherence "to a standard of neutrality that provides for substantially equal access to similar revenue per student at similar tax effort" (Tex. Ed.

Code Ann. § 42.001), Texas is burdened with a system of school finance that has precipitated yet another cycle of litigation and is considered to be unconstitutional, in addition to being inadequate, inequitable, arbitrary, and inefficient (*Fort Bend ISD v. Scott*, December 22, 2011). Most of the funds in the system come from local property taxes levied at given tax rates by school districts, followed by an amount of funds that are supplemented by the state. Together, the local and state funds make up an overwhelming majority of the system's budget, with a small portion of funds sent by the federal government. Because there is such heavy reliance on local property values having wide discrepancies across school districts, the disparities in wealth can dominate the entire system (*Edgewood III*, 1992 at 503) and have led to past and current animosities between property poor districts and property wealthy ones and oftentimes to the litigation that challenged the school finance system. The imbalances have also exacerbated the potential adverse effects that such concentrations of wealth and political power can have on the provision of an equitable and adequate education, especially for low-income and minority students, whose enrollments are higher in low property wealth districts (Kauffman, 2009a). A district is considered wealthy because of its high amount of taxable value, with these values ranging in 2011-12 from $19,627 to $7,234,228 per weighted student in average daily attendance (WADA). Property wealthy districts, classified under Chapter 41 of the Texas Education Code, must reduce their taxable value to certain statutory equalized wealth levels (EWL) according to a list of acceptable options or remit the excess as recaptured funds to the state. This system of recapture, which is the process used to attain equity between property wealthy and property poor districts, includes a

temporary hold harmless provision allowing Chapter 41 districts to maintain their current level of spending per weighted student that was first established in 1993 and was made permanent in 1999. In 2011-12, 35 districts operated under this hold harmless wealth level, ranging from a low of $477,836 per WADA in Klondike Independent School District to $920,994 per WADA in Borden County Independent School District. Kenedy Countywide Consolidated School District has 93 percent of its property tax levy recaptured, the highest percentage of any district, while Austin Independent School District at $127,899,497 has more gross dollars recaptured than any other district (Texas Taxpayers and Research Association, January, 2012).

The current iteration of the state's school finance structure is based on statutorily mandated alternate funding mechanisms administered by the Foundation School Program (FSP). The first of these mechanisms calls for the funding of maintenance and operations (M&O) guaranteeing each district the equalized and adequate resources needed to provide a basic accountability-acceptable instructional program, equalized access to enrichment funds to supplement basic funding, and assistance in the funding of suitable facilities by equalizing interest and sinking fund (I&S) tax effort. The M&O funding structure follows the complex statutory formulas of weights and adjustments used to calculate basic entitlement funding under Tier 1 and the supplementary discretionary district enrichment funding under Tier 2 that eventually determine the monies sent by the state to individual districts, with the districts generating their share through the levying of local property taxes. A district's Tier 1 entitlement revenue depends on weights assigned for students who are more expensive to educate (i.e., these students generate more

money) and certain other district characteristics such as the size of the district, with the total cost divided between the state and the district. The district's share is calculated by its compressed M&O tax rate (generally $1.00 in most districts) to its taxable value. The state pays the remaining portion, with property wealthy districts paying a larger portion of their entitlement than less wealthy districts.

Tier 2 is the district discretionary enrichment or guaranteed yield used to supplement the funds received in Tier 1, with each district given authorization to tax above its compressed rate for enrichment based on a series of equalization levels of pennies up to the statutory $1.17 M&O cap with voter approval. Because some of these levels of pennies are exempt from recapture, property wealthy districts are permitted to retain all funds generated by them regardless of whether the amount is greater than the state's guarantee to other districts. The second alternate M&O funding structure, which has almost supplanted the traditional equalization foundation formulas, has 86 percent of all districts receiving their funding through a target revenue system that is part of a property tax relief initiative adopted by the Third Special Session of the 79th Texas Legislature in 2006. The reconfiguring of the funding structure enacted in House Bill 1 and House Bill 2 followed the Texas Supreme Court opinion in *West Orange-Cove II* (2005), which decreed that the school finance system violated Article VIII, Section 1-e of the Texas Constitution prohibiting a state property tax. The target revenue system is based on historical district funding levels and makes it mandatory that districts reduce or compress their M&O tax rates to two-thirds of their 2005 tax rate. In order to ensure that a district does not lose money, a district receives no less than the amount of state and

local revenue per WADA that it received in 2005-06 or 2006-07, whichever is greater, plus some adjustments. The resulting amount is a district's "adjusted target revenue," to which the state sent a supplementary amount known as "Additional State Aid for Tax Reduction (ASATR)" if that district did not reach this level of funding through formula calculations. These controversial amounts, which ranged from $2,441 to $12,972 per WADA, illustrated the vast disparities in funding available to districts. The 2009 and 2011 legislatures mandated additional target revenue adjustments, and the target revenue system is now known as "available state and local revenue per WADA at compressed tax rates." In 2010-11 these state and local funding comparisons at individual compressed tax rates ranged from $3,911 in Red Lick Independent School District to $13,122 in Westbrook Independent School District. The Special Session of the 82nd Texas Legislature in 2011 passed Senate Bill 1, which projects the repeal of the target revenue system and ASATR payments on September 1, 2017 and increases the basic allotment so that all districts are funded only through the foundation formulas. Part of the provisions of Senate Bill 1 also called for $5.4 billion in unprecedented reductions in education funding for the 2012-2013 biennium, adding enormous constraints to an already beleaguered system and precipitating the most recent challenges that have been filed against the state (Texas Education Agency, January 2011; Texas Taxpayers and Research Association, January, 2012).

Study Delineation

This study documents and analyzes the legal decisions that emerged across the nearly 45-year spectrum of Texas public school finance court cases, culminating in the series of judicial opinions and subsequent legislative actions that, rather than bringing much-needed fundamental reform to a system that has long been regarded as outdated and byzantine, instead elicited the eighth round of lawsuits filed in 2011 against the State. This is not to say that the decades-long litigation has not produced beneficial results. In the intervening years since the initial filing in 1968 of the *Rodriguez* case, Texas has seen the development of a more equitable and adequate school finance system. Following *Rodriguez*, the Texas Supreme Court opinions in *Edgewood Independent School District v. Kirby* (*Edgewood I*, 1989) and *Edgewood Independent School District v. Kirby* (*Edgewood II*, 1991) were instrumental in spurring the legislative reforms that increased the overall funding of the system as well as provided the larger allocations that went to low-wealth school districts. Paradoxically, however, the litigation that strengthened the gains in equity and adequacy in *Edgewood I* and *II* also produced the judicial ambiguities and redefinitions in the subsequent four Texas Supreme Court *Edgewood* era decisions. The decisions in *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District* (*Edgewood III*, 1992); *Edgewood Independent School District v. Meno* (*Edgewood IV*, 1995); *West Orange-Cove Consolidated Independent School District v. Alanis (West Orange-Cove I*, 2003*);* and *Neeley v. West Orange-Cove Consolidated Independent School District* (*West Orange-Cove II*, 2005) and the

legislative enactments that followed changed the course of Texas school finance and eroded the gains that had previously been accomplished (Kauffman, 2009a).

The Texas Constitution stipulations in Article VII, Section 1, the Education Clause; Article VII, Section 3, the School District Creation and Tax Clause; and Article VIII, Section 1-e, the Abolition of Ad Valorem Property Taxes Clause, are at the center of the arguments in public school finance litigation. The judicial interpretations of these clauses have contributed to the confusing historical precedents established by the *Edgewood* era cases. Since the changing definitions of the Education Clause are especially pertinent to the research question of this study, the analyses in the sections that follow concentrate on this provision. The last two provisions are included briefly in the discussion as they become important to the litigation. Although the Texas Supreme Court in the last of these cases, known as *West Orange-Cove II*, declared that the school finance system violated Article VIII, Section 1-e (*West Orange-Cove II*, 2005 at 797), the court deemed the system to be adequate with respect to Article VII, Section 1. The court nonetheless acknowledged the system's precarious situation as this related to issues of equity and adequacy, citing the extensive record in Texas of districts struggling to teach growing numbers of disadvantaged students without the additional funding needed to meet these challenges (*West Orange-Cove II*, 2005 at 789). Most importantly, the court warned that the system had reached the point where continued improvement would not be possible without significant change, whether this was in the form of increased funding, improved efficiencies, or better methods of education (*West Orange-Cove II*, 2005 at 790).

Rather than do the much-needed fundamental restructuring of the system that the court called for in its ruling, the Third Special Session of the 79th Texas Legislature in 2006 passed House Bill 1enacting a series of temporary stopgap measures that threw the system into further incertitude and undermined its basic tenets of constitutionality. As the structure of school finance in Texas has grown more cumbersome, so has the outcry from educators and other relevant stakeholders, who face the growing demands of educating increasingly larger enrollments of students, especially students who are considered at-risk because they are economically disadvantaged, English Language Learners, or have other needs that require greater educational expenditures.

In response, school districts, taxpayers, and other pro-active community groups have felt their only recourse was to challenge the constitutionality of the system, calling on the courts once again to use their judicial power to send the existing system back to the drawing board. Four lawsuits, representing approximately 50 percent of the 1,228 districts (the number of school districts varies as districts – which include charter schools – close or consolidate with other districts) and over 60 percent of the 4.9 million students in Texas public schools, were filed in the waning months of 2011. The lawsuits, *The Texas Taxpayer & Student Fairness Coalition v. Scott* (October 10, 2011); *Calhoun County Independent School District v. Scott* (December 9, 2011); *Edgewood Independent School District v. Scott* (December 13, 2011); and *Fort Bend Independent School District v. Scott* (December 22, 2011) have been consolidated and will go to trial on October 22, 2012 before the 250th District Civil Court of Travis County, presided over by Judge John K. Dietz, who rendered the district court's decision in *West Orange-Cove II* (2005). The

lawsuits articulate what the plaintiffs see as the egregious demands by a system that is broken and unconstitutional and results in an education that is inequitable, inefficient, and inadequate.

This report examines how the Texas courts have viewed their constitutional mandate to provide and fund schools. Specifically, this study investigated how the school finance litigation and reforms have altered the dynamic of equality and adequacy and how this change has affected the basic assumptions and ideals that have defined the fundamental right to an education, with the correlate implications that these altered policy approaches have on the distribution and/or reallocation of resources to poor and disadvantaged children in Texas. In intervening in a complex social policy arena such as public school finance, the courts act in concert with the legislative and executive branches and with other policymakers, educational insiders, interest groups, and reformers. Consequently, this study documents the procedural process as well as the prevailing educational, sociocultural, social media, political, and economic dynamic that has brought the state to the pending lawsuits that are now before the Texas courts.

This analysis is guided by the following research question:

- Is school finance litigation in Texas effective in the provision of a constitutionally-mandated equitable and adequate education?

Implications of the Study

Although there is abundant literature on the subject of public school finance litigation, the preponderance of the literature that reviews the Texas situation has

addressed the *Rodriguez* (1973) case. The research is less for the series of state lawsuits that followed that are known as the *Edgewood I-IV* cases (1989-1995), with diminished attention given to the last two of the *Edgewood* era cases known as *West Orange-Cove* 1 and *West Orange-Cove II* (2001-2005). The scholarly literature offers limited coverage of the school finance reforms that followed *West Orange-Cove II* and that have brought significant changes to school finance in Texas. Since the four lawsuits filed in the fall of 2011 are in process, they do not form a part of any previous analysis. This study has been done at a time of heightened interest on the subject and provides an opportunity to expand on the existing literature and contribute insights to an area of research that is significant not only for what happens to the public school finance reform that is ongoing in Texas but also for the ramifications the state's litigation has for the trends on the subject and the school finance cases that are being fought in courts in other parts of the country.

Organization of the Study

Chapter one presents an overview of the subject and gives a description and background of the study, including an analysis of the concepts of equity and adequacy as this has evolved in lawsuits nationally. The chapter also describes the current issues in Texas, delineates and gives the implications for the study, and presents the research question. Chapter two presents the analytic framework for the study, lists the cases that are included in the legal analysis throughout the report, gives the data sources, and describes the limitations of the research. Chapter three gives the historical antecedents of

school finance litigation in Texas, contrasting between American democratic principles and the concept of an equal educational opportunity and initiatives in Texas that proposed a system of school funding that gave each child an equal and adequate minimal educational opportunity. The chapter discusses the Minimum Foundation Program that established a dual funding system of state and local participation, causing the financial disparities that led decades later to school finance debates. The discussion also presents an analysis of the *Rodriguez* case and demonstrates how the legal theories and themes that emerged in this case influenced the course of school finance litigation nationally as well as in the state. Chapter four delves into the conceptual legal analysis of the thematic and theoretical evolving jurisprudence in school finance cases, including a discussion of the wave theory that represents the shifts in legal strategies and judicial interpretations of constitutional language across the spectrum of litigation. The analysis presents a discussion of the two dominant paradigms of equity and adequacy and includes sections on the moral considerations in school finance litigation, an examination of the judicial decision-making process, the limitations the courts have by their inability to implement their policy decisions, and the group and political interests that are a natural correlate of school finance. Chapter five presents a discussion of the Texas Supreme Court decisions in the six Edgewood era cases and the subsequent legislative reforms. The chapter also presents an analysis of the state constitutional provisions are at the center of the litigation and traces the redefinitions and evolutions connected to the standards of efficiency, adequacy, and suitability. The chapter also looks at the controversial debates that surround the rigorous accountability measures and high-stakes testing regimes that form a

part of Texas public school finance litigation and reform. Chapter six looks at the issues that are current in Texas school finance and that have been instrumental in precipitating the pending lawsuits against the state. The chapter also presents a conceptual analysis of the cyclical nature of education reform and discusses the policy implications that are implicit as the school finance system goes through yet another series of challenges.

CHAPTER 2

METHOD OF INQUIRY

This chapter presents the analytic framework for the study, lists the cases that are included in the legal analysis throughout the report, gives the data sources, and describes the method of the collection of data.

Analytic Framework

This inquiry uses a qualitative methodological approach broadly understood within the disciplines of the humanities, economics, political science, education, sociology, psychology, and public policy (Crotty, 1998; Denzin & Lincoln, 2005; Gall, Gall, & Borg, 1963; Guba & Lincoln, 2005; Mertens, 2005; Stake, 2005). The purpose and scope of this research align well with the scholarship that has defined the criteria for this investigative approach. As Denzin and Lincoln describe it, qualitative research is inherently political and is embedded within the context of a variety of ethical and political positions.

The current period in qualitative research is concerned with moral discourse and "asks that the social sciences and humanities become sites for critical conversations about democracy, race, gender, class, nation-states, globalization, freedom, and community" (p. 3). The goal in this method is to connect interpretive theory and qualitative research to the "hopes, needs, goals, and promises of a free democratic society" (p. 3). The approach situates the researcher as an observer in a world consisting of a series of interpretive,

material practices that transforms the world and makes it visible. Qualitative research departs from an interconnected complex series of philosophical assumptions and traditions that seek evaluative criteria that is "evocative, moral, critical, and rooted in local understandings":

> Qualitative research involves the studied use and collection of a variety of empirical materials – case study; personal experience; introspection; life story; interview; artifacts; cultural texts and productions; observational, historical, interactional, and visual texts – that describe routine and problematic moments and meanings in individuals' lives. (pp. 3-4)

Qualitative methods are associated with descriptors such as "*complexity, contextual, exploration, discovery,* and *inductive logic*…. By using an inductive approach, the researcher can attempt to make sense of a situation without imposing preexisting expectations on the phenomena under study. Thus the researcher begins with specific observations and allows categories of analysis to emerge from the data as the study progresses" (Mertens, 2005, p. 230).

The qualitative inquiry of this research uses a case study approach. The epistemological orientation is qualitative and interpretive. This research may be further defined as an intrinsic case study because the case itself is of interest not only because of the current importance in Texas school finance reform but also because of the implications that the case has for the general research that is being done nationally on public school finance litigation and the more specific historical investigations that have been done on Texas school finance reform cases.

The major portion of the work on case study research is done by people who have intrinsic interest in the case:

> Their intrinsic case study designs draw these researchers toward understandings of what is important about that case within its own world, which is not the same as the world of researchers and theorists. Intrinsic designs aim to develop what is perceived to be the case's own issues, contexts, and interpretations, its 'thick description'. (Stake, 2005, p. 450)

Legal Analysis

The legal analysis in this report includes the following cases, cited in chronological order within each judicial jurisdiction:

- U. S. Supreme Court Opinions
  - *Brown v. Board of Education,* 347 U.S. 483 (1954)
  - *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)
  - *Horne v. Flores*, 557 U.S. 289, 294 (2009)

- State Supreme Court Opinions
  - *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241 (Cal. 1971)
  - *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273 (N.J. 1973)
  - *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, (Cal. 1976)
  - *Rose v. Council for Better Educ., Inc*., 790 S.W.2d 186 (Ky. 1989)
  - *Edgewood Independent School District v. Kirby* (*Edgewood I*), 777 S.W.2d 391 (Tex. 1989)
  - *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990)
  - *Edgewood Independent School District v. Kirby* (*Edgewood II*), 804 S.W.2d 491 (Tex. 1991)

- *Edgewood Independent School District v. Kirby* (*Edgewood IIa*), 804 S.W.2d 499 (Tex. 1991)
- *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District* (*Edgewood III*), 826 S.W.2d 489 (Tex. 1992)
- *Campbell County School District v. State*, 907 P.2d 1238 (Wyo. 1995)
- *Edgewood Independent School District v. Meno* (*Edgewood IV*), 917 S.W.2d 717 (Tex 1995)
- *West Orange-Cove Consolidated Independent School District v. Alanis* (*West Orange-Cove I* or *Edgewood V*), 107 S.W.3d 558 (Tex. 2003)
- *Neeley v. West Orange-Cove Consolidated Independent School District* (*West Orange-Cove II* or *Edgewood VI*), 176 S.W.3d 746 (Tex. 2005)

- Federal District Court Decisions
  - *Rodriguez v. San Antonio Independent School District*, 377 F. Supp. 280 (W.D. Tex. 1971)
  - *American G. I. Forum and Image de Tejas v. Texas Education Agency et al*, 87 F. Supp. 2d 667 (W. D. Tex. 2000)
- State District Court Findings of Fact and Conclusions of Law
  - *West Orange-Cove Consolidated Independent School District v. Neeley*, GV-100528 (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004)

- State District Court Petitions
    - *The Texas Taxpayer & Student Fairness Coalition v. Scott*, GN-11-003130 (250th Dist. Ct., Travis County, Tex. Oct. 10, 2011)
    - *Calhoun County Independent School District v. Scott*, GV-11-001917 (250th Dist. Ct., Travis County, Tex. Dec. 9, 2011)
    - *Edgewood Independent School District v. Scott*, GV-11-001972 (250th Dist. Ct., Travis County, Tex. Dec. 13, 2011)
    - *Fort Bend Independent School District v. Scott*, GV-11-002028 (250th Dist. Ct., Travis County, Tex. Dec. 22, 2011)

Collection of Data

A variety of technological media and multiple methods were used to collect data and do the triangulation that furnished the necessary thick description for the study and gave it trustworthiness. Documents related to the lawsuits analyzed are available in various sites, with the majority found electronically in print, audio, and video Web sites of different state agencies, advocacy groups, professional associations, mainstream and social media, and legal offices. National sources of online documents included the National Center for Education Statistics, U. S. Department of Education, Federal Judicial Center, and the National Education Association. Some of the main sources of state online documents were the State Law Library, Texas State Library, Texas House of Representatives, Texas Education Agency, Legislative Budget Board, and Texas Legislature Online. Opinions and other documents related to the case dockets are

available through the Web sites of the U. S. Supreme Court, Texas Supreme Court Web, and the Travis County District Clerk.

Limitations of the Research

Case study research has limitations that are integral to this particular type of qualitative methodology. The unique nature of a qualitative study and the patterns that emerge as a result of the investigation may be unique to the political environment prevalent at the time of the study. The management of the amount of data collected in qualitative research is a nuanced and complex task that has the potential for multiple interpretations and perspectives. In spite of these limitations, however, a case study can be a vehicle for learning and for the transfer of knowledge from the researcher to the reader:

> The purpose of a case report is not to represent the world, but to represent the case. Criteria for conducting the kind of research that leads to valid generalization need modification to fit the search for effective particularization. The utility of case research to practitioners and policy makers is in its extension of experience. (Stake, 2005, p. 460)

This analysis should contribute to the understanding that informs the subject of school finance reform generally but more specifically can contribute to the research that addresses the policy issues that pertain to the provision of an equitable and adequate education evidenced by the results of school finance litigation. Moreover, it should add to the literature that the 83rd Legislature may consider in 2013 as it deliberates the dilemma of improving the Texas school finance system. As policymakers reexamine school finance policy, especially in light of the pending lawsuits challenging the school finance

system, an understanding of the impact of prior reform efforts can expand on the extant knowledge on the subject. Additionally, this study can be useful to potential litigants in other states addressing school finance reforms.

CHAPTER 3

THE ANTECEDENTS

This chapter presents the historical antecedents of school finance litigation in Texas, contrasting between American democratic principles and the concept of an equal educational opportunity and initiatives in Texas that proposed a system of school funding that gave each child an adequate and equal minimal educational opportunity to be financed by an equalized tax effort among schools that would help overcome inter-district disparities in taxable resources. The chapter discusses the Minimum Foundation Program that established a dual funding system of state and local participation, with each district supplementing state aid through an ad valorem tax on property within its jurisdiction, setting up the existence of hundreds of districts having few students and low ad valorem property tax rates, eventually causing the financial disparities that led decades later to school finance debates. The chapter also presents an analysis of the *Rodriguez* case and demonstrates how the legal theories and themes that emerged in this case influenced the course of school finance litigation nationally as well as in the state.

Philosophical and Historical Contexts

The philosophical and historical antecedents of school finance court litigation in Texas can be traced to the juxtaposition of contradictory precepts that are integral to the basic tenets of the ideals of American democracy and citizenship. Coons, Clune, and Sugarman (1970) describe equality of opportunity as representing the "defining rhetoric of American free-enterprise democracy," with the public school given the task of

realizing its goal. As the authors see it, the terms "equality" and "opportunity" are contradictory, rendering "the distribution of quality of public education according to wealth an incongruity in need either of powerful justification or speedy elimination" (p. 11).

An additional dilemma comes from the fact that the Constitution does not mention equality. The Fourteenth Amendment is only concerned with equal protection:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Amendment XIV, Section 1, U. S. Constitution)

In applying the notion of equality to school finance cases, the central question to ask is whether or not the state should bestow preference in education by wealth. The answer that Coons and his colleagues give is that "the quality of public education may not be a function of wealth other than the wealth of the state as a whole" (p. 304). This no-wealth or wealth-free principle only requires that children "be treated fairly in the choice of economic mechanisms by which their public education is supported" (p. 307).

Thomas Jefferson wrote in his *Autobiography* (1821) that one of the reasons for developing his comprehensive plan for making education accessible and free to every citizen was the eventual goal of enhancing the administration of government and the preservation of its republican principles, a goal that was inclusive of the poor: "The less wealthy people … by the bill for a general education, would be qualified to understand their rights, to maintain them, and to exercise with intelligence their parts in self-

government; and all this would be effected without the violation of a single natural right of any one individual citizen" (ME 1:73).

Other concerns had risen to the fore by mid-nineteenth century, and Americans' preoccupations were reflected in the changes in perception of the goals of education that emphasized the socialization of young, poor, and heterogeneous immigrant populations as a means of protecting the survival of the state against factionalism by having a minimally educated citizenry that shared a common culture and common beliefs (Yudof & Morgan, 1974).

By the end of the nineteenth century, most state constitutions included provisions for public education, and more than half required that schooling be free (Hirshman, 1990). Article X of the Texas Constitution of 1845 had established the concept of free schools as a means of disseminating a minimum educational opportunity:

> A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provision for the support and maintenance of public schools. (§1)
>
> The Legislature shall as early as practicable establish free schools throughout the State, and shall furnish means for their support, by taxation on property …. (§2)

Early into the twentieth century, a different philosophical ideal was being promoted by progressive reformers such as John Dewey (1916) and other educational theorists, who wrote of the relationship between student-centered learning and democratic values. These reformers believed that the individual's potential for learning and intellectual growth could be instrumental in generating the foundations of a democratic society. The subsequent attention that educational theorists gave to the individual child's

social and cultural contexts coupled with the activism of the civil rights movement increased the significance of the concept of equal educational opportunity and the implications this could have for ethnic and racial minority populations.

Not everyone, however, participated in these philosophical currents. Texas, especially, retained vestiges of the notion of an adequate and minimum educational opportunity (Yudof & Morgan, 1974), exemplified in the language of House Concurrent Resolution No. 48, which established the Gilmer-Aiken Committee (Kuehlem, n.d.), and which eventually led to the development of the state's school funding scheme. In its resolution, the legislature stipulated that the Gilmer-Aiken initiative should focus on "obtaining uniform and adequate local support in the financing of an adequate, improved, and uniform school program for Texas" (p. 1). The Gilmer-Aiken Committee's report, *To Have What We Must* (1948) proposed a system of funding that gave each child "*an equal minimal education opportunity*," (p. 15, as cited by Yudof & Morgan, 1974) to be financed by an equalized tax effort among schools that would help overcome inter-district disparities in taxable resources. Adhering to the committee's proposal, the subsequent Gilmer-Aiken legislation established the Minimum Foundation Program calling for a dual funding system of state and local participation and requiring almost half of the revenues to be derived from a largely state-funded program, with each district supplementing state aid through an ad valorem tax on property within its jurisdiction. The Foundation Program immediately increased the levels of support provided by the state, as it exposed weaknesses in its provisions that simultaneously entrenched the existence of hundreds of districts having few students and low ad valorem property tax rates (Yudof & Morgan,

1974), eventually causing the financial disparities that formed the equity arguments decades later for the Edgewood Independent School District and the *Rodriguez* litigation as well as the other Texas school finance cases:

> It should be noted that Gilmer-Aiken did increase *state* funding and, as a result, heightened the quality of education offered in Edgewood and similar poor districts. This increase, however, was modest and did not alleviate the financial difficulties of districts with inadequate tax bases. Politically, the highly publicized increase in state funding and the language of the Gilmer-Aiken legislation, which guaranteed a minimum education for all Texas children, had an important negative impact on attempts to achieve more equitable educational funding in the state. The Gilmer-Aiken reforms effectively checked educational equalization efforts for almost three decades. (Gambitta, Milne, & Davis, 1983, p. 146)

The *Rodriguez* Case

Texas never quite abandoned its notion of a minimum or an adequate educational opportunity, and this philosophical premise became the prominent underpinning in all the Texas school finance litigations that followed in subsequent decades. Texas' history of questions in the area of school finance dates back to the landmark litigation challenging the disparities of funding between property-wealthy and property-poor districts. No court case has garnered more attention than the one that gave the subject of Texas school finance reform a national platform. *Rodriguez v. San Antonio Independent School District*, 377 F. Supp. 280 (W.D. Tex. 1971), was the state's first case dealing with public school finance reform. On appeal, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), was also the only school finance reform case to be heard by the U. S. Supreme Court. The *Rodriguez* case, which was filed in 1968 on behalf of seven parents and eight children in San Antonio's Edgewood Independent School District, alleged an unconstitutional denial of equal educational opportunity by claiming that the Texas

school finance system violated the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution because it discriminated against racial minorities on the basis of wealth. The case also argued that education was a fundamental right guaranteed by the Constitution (Imazeki & Reschovsky, 2003; Koski & Levin, 2000; Schragger, 2007; Yudof & Morgan, 1974). A panel of three judges affirmed the plaintiffs' position in 1971. *Rodriguez* was reversed in 1973 by the U. S. Supreme Court on the grounds that education was not a fundamental right and that an educational system that had inequitable disparities in funding between school districts was not in violation of the Equal Protection Clause of the Fourteenth Amendment guaranteed by the U. S. Constitution, in effect closing the federal avenue for future school finance litigation. The *Rodriguez* case emphasized the concept of fiscal neutrality, meaning that expenditures on education must be a function of the wealth of the state as a whole and not of the wealth of each of the school districts in the state. The *Rodriguez* case was significant in its examination of the role of money and resources and whether these contribute to student outcomes; whether courts have the capacity to determine what constitutes a minimum and adequate educational opportunity; and whether the courts can be instrumental in determining concepts of equity in educational finance (Imazeki & Reschovsky, 2003; Koski & Levin, 2000; Schragger, 2007; Yudof, 1991; Yudof & Morgan, 1974).

"Lawsuits in this domain," says Yudof (1991, p. 499) "alter only the rules of engagement; they never settle the underlying dispute. Too much is at stake." Indeed, much was at stake in the prevailing tensions in San Antonio in the spring of 1968 that led to the *Rodriguez* lawsuit. Among them was an incipient Chicano movement that was

straining at the edges of full-fledged protest. World War II veterans like Demetrio Rodriguez had had a taste of experiences beyond the confines of their native communities and were unwilling to overlook the discriminatory inequities they saw upon their return home. Activist organizations, such as the Mexican American Legal Defense Fund (MALDEF), which would be so prominent in later school finance litigation, were sprouting throughout the Southwest, imbuing their members with a sense of citizenship and entitlement that was transforming previously held concepts of identity. In spite of this newly emboldened consciousness, however, the *Rodriguez* case was beset with initial obstacles. Rodriguez, a sheet-metal worker at Kelly Air Force Base and member of the Edgewood District Concerned Parents Association, had three children in the Edgewood Independent School District. He and other parents of the association were angry at the conditions of the schools and at the rumored mismanagement of the school board and the superintendent (Orozco, 1997-2002; Schragger, 2007; Yudof & Morgan, 1974). Jose Cardenas, an articulate former junior high school science teacher from Laredo, Edgewood administrator, and chair of the education department at St. Mary's University, was newly appointed to his job as superintendent at Edgewood ("Intercultural Development Research Association," n.d.). When the parents association asked to meet with him to discuss their complaints, Cardenas "explained sadly that he had no money to rebuilt crumbling schools and hire more qualified teachers" (Irons, 1988, p. 284). The parents staged a series of public protests; and in May, 400 students walked out of Edgewood High School, echoing the student walkouts that had occurred in East Los Angeles two months earlier in protest over inequitable classroom conditions.

In a propitious move that was instigated by Willie Velasquez, a Chicano political activist and former Edgewood student, the parents met with Arthur Gochman, a San Antonio attorney:

> Gochman welcomed the Edgewood parents, who first raised charges of financial hanky-panky in the district's schools. After listening patiently to their complaints, Gochman explained that the real source of poor schools for poor families was unfair funding, not fiddling with the books. (Irons, 1988, p. 284)

Gochman, who had marched with Velasquez, joining him in sit-ins that led to San Antonio's desegregation of its lunch counters in 1960 (Schragger, 2007), told the parents that the inequities at Edgewood were produced by the way that the state allocated money to the schools, concluding that their grievances merited a class action lawsuit declaring that the method of using local property taxes to fund Texas schools was unconstitutional. Gochman attempted to solicit the assistance of the recently founded Mexican American Legal Defense Fund (MALDEF), but the organization, which was beset by management problems, declined to participate (Irons, 1988; Schragger, 2007). Gochman decided to file the lawsuit at his own expense, aided later by two professors at the University of Texas at Austin, Daniel C. Morgan and Mark G. Yudof, at the time a professor of economics and an assistant professor of law, respectively. Morgan provided technical assistance and Yudof served as co-counsel:

> Mr. Gochman's initial action was to submit a legal memorandum on the issues to the Mexican American Legal Defense and Educational Fund (MALDEF), knowing full well that the parents could not afford the costs of litigation and hoping that that organization would take responsibility for the recommended suit. MALDEF ultimately refused to become involved, and without any financial support whatsoever, Mr. Gochman agreed to press the matter at his own expense in the federal courts. (Yudof & Morgan, 1974, Footnote 58, p. 391)

Cardenas, who later became the founder of the Intercultural Development Research Association (IDRA), appeared as a witness for the trial. Mario Obledo, initially MALDEF's general counsel and who eventually also served simultaneously as the organization's executive director, joined Gochman in his brief before the Supreme Court (411 U.S. 1, 1973, p. 3).

The Equity Argument

Gochman filed *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 (W. D. Tex. 1971) on July, 1968, in the U. S. District Court for the Western District of Texas. The lawsuit (Imazeki & Reschovsky, 2003; Koski & Levin, 2000; Orozco, 1997-2002; Schragger, 2007; Yudof & Morgan, 1974), on behalf of seven parents and eight children in the Edgewood District, alleged an unconstitutional denial of equal educational opportunity by claiming that the Texas school finance system violated the Equal Protection Clause of the U. S. Constitution because it discriminated against racial minorities on the basis of wealth. The case also argued that education was a fundamental right guaranteed by the Constitution. The lawsuit initially named seven school districts in San Antonio and the Attorney General of Texas as defendants, later adding the Commissioner of Education and the State Board of Education to the defendant list. Shragger (2007) notes that under constitutional law as it existed at the time, "rational basis" review, or the most lenient constitutional standard, was applied to state school finance systems that did not directly discriminate against racial minorities. *Rodriguez* contended, however, that the court should apply "strict scrutiny," a more rigorous

standard that would apply even if the school districts did not directly engage in racial discrimination. In addition, the plaintiffs maintained that wealth (apart from race) was an unconstitutional basis on which to discriminate (pp. 8-9).

The case demonstrated the dual system of finance in Texas produced in two San Antonio school districts, Edgewood and Alamo Heights. The plaintiffs in the case claimed that funding system disparities resulted in an inadequate education for their children. Edgewood had the highest ad valorem property tax rate in the San Antonio metropolitan area, yet because of its high number of students (approximately 22,000 in 25 schools) and the absence of commercial or industrial property within the district boundary, had raised only $26 per student in 1967-1968. Edgewood also had the lowest per capita income ($4,686) and the highest proportion of minority students (approximately ninety percent was Mexican American) of any district in San Antonio. The average assessed property value per pupil was $5,960, the lowest in the metropolitan area. Alamo Heights, at the other end of spectrum, was the wealthiest district in the city, with a predominantly affluent and Anglo enrollment of approximately 5,000 students in six schools. The district had a lower tax rate than Edgewood but was able to raise $333 per student. In spite of these disparities, the state's contribution to each district was approximately the same under the Minimum Foundation Program, the dual funding system in place at the time of state and local participation requiring almost half of the revenues to be derived from a largely state-funded program, with each district supplementing state aid through an ad valorem tax on property within its jurisdiction (*Rodriguez*, 1973).

During the trial in district court, the plaintiffs, as described by Yudof and Morgan (1974), tried to present the strongest possible evidence that showed the "magnitude of the discrimination against poor and minority children" (p. 392). From its perspective, the state argued that Texas provided "an adequate minimum education" (p. 393), pointing out that the plaintiffs wanted "socialized education" (p. 393), a suspicious category of education:

> Prior to the trial, the testimony of a number of witnesses was taken. Dr. Jose Cardenas, Superintendent of the Edgewood School District, testified as to the high aspirations of the children and parents in his district and the impact of the district's financial plight on educational opportunity. The deposition ended abruptly. Cardenas advocated an egalitarian model for school financing; the Assistant Attorney General replied somewhat dramatically: 'There is a name for that. I have no further questions'. (Footnote 60, p 362, citing deposition of Jose Cardenas, October 20, 1971)

The state also wanted to "expose the frivolous nature of the lawsuit and the unsavory motives of plaintiffs' attorneys and expert witnesses" (p. 392):

> Richard Avena, Southwest Regional Director for the United States Civil Rights Commission, testified on the history of racial discrimination in Texas. Defense counsel, ignoring the more immediate issues, compelled Avena to reveal that he had been to South America in his youth. Circling for the kill, he suspiciously demanded to know what Avena was 'doing' in South America and with whom he had been 'associating.' Avena dryly replied that he had been a Mormon missionary. (Footnote 60, p. 362, citing deposition of Richard Avena, October 20, 1971)

The plaintiffs maintained that the state had failed to commit itself to the principle of equality of educational opportunity with respect to the distribution of state resources. They reiterated their claim that education "was a fundamental interest and poverty a suspect classification." If the state wanted to discriminate in this arena, it had to show a compelling interest to do so. Since this had not happened, the state was obligated to

formulate a new financing system of fiscal neutrality, one "which did not discriminate on the basis of wealth other than wealth of the state as a whole" (p. 393).

The judges during the trial were Irving L. Goldberg and Jack Roberts who had been nominated by President Lyndon B. Johnson, with Goldberg nominated to the U. S. Court of Appeals for the Fifth Circuit and Roberts to the U. S. District Court of the Western District of Texas. President John F. Kennedy had nominated the third judge, Adrian Spears, to the U. S. District Court of the Western District of Texas. In a per curiam decision on December, 1971, almost three and a half years after the filing of the lawsuit, the court of the three liberal judges unanimously held that the Texas financing system violated the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution, Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code pertaining to the financing of education, including the Minimum Foundation Program. The court also held that the funding system discriminated on the basis of wealth and failed both the compelling state interest test and the less stringent rational basis test. The state was given two years to develop and adopt reforms to the current financing system (*Rodriguez*, 1971).

According to Yudof and Morgan (1974), the *Rodriguez* decision created a maelstrom of hostility from the general public, mostly due to media misinformation; xenophobic reactions from those who abhorred interference by the federal courts in local school matters; the Attorney General's office, which had been disseminating information that the suit was frivolous and was inconsequential to educators or politicians; and non-committal politicians, who almost unanimously opted to postpone any changes in the

system. School administrators were antagonistic to the concepts of fiscal neutrality and equal educational opportunity, and the Texas State Teachers Association concentrated on pressuring for higher salaries in spite of the fact that at the time there were significant job shortages due to an oversupply of teachers and stable pupil endorsement. Others such as Governor Dolph Briscoe and State Senator A. M. Aiken, who was so invested in the Minimum Foundation Program, would not support any new financing plan. The House of Representatives was completely against it, and Lieutenant Governor William Hobby and Senate Education Committee Chairman Oscar Mauzy, although privately expecting affirmation by the U. S. Supreme Court, would not publicly promote any changes to the system.

The U. S. Supreme Court Reversal

Because the *Rodriguez* case had come from a three-judge district court, the U. S. Supreme Court was required by statute to decide the case. In preparation for its case, the state hired Charles Alan Wright, a noted constitutional scholar and professor of law at the University of Texas at Austin. By the time oral arguments were heard in 1972, the court was considerably different from the one that been headed by Chief Justice Earl Warren when the *Rodriguez* case was first filed in 1968. Richard Nixon had replaced the liberal Warren Court with conservative appointees. Chief Justice Warren Burger replaced Chief Justice Warren, Harry Blackmun replaced Abe Fortas, Lewis Powell replaced Hugo Black, and the "distinctly conservative" William Rehnquist replaced the "moderately conservative" John Harlan (Schragger, 2007, p. 11). In March, 1973, *Rodriguez* was

reversed in a five to four decision, with Justice Lewis Powell writing the opinion. Justice Potter Stewart, appointed by Dwight D. Eisenhower; Chief Justice Burger; and Justices Blackmun, Powell, and Rehnquist, the four Nixon appointees, voted to reverse the district court's decision. William Douglas, appointed by Franklin Delano Roosevelt; William J. Brennan, Jr., appointed by Eisenhower; Byron White, appointed by John F. Kennedy; and Thurgood Marshall, appointed by Johnson, dissented.

The state asserted that the plaintiffs "had failed to prove that the poor were uniquely injured by the financing plan," indicating that discrimination against "poor districts did not mean discrimination against poor people" and questioning whether increments in school expenditures would produce gains in student achievement. The state also contended that affirmation would lead to "an avalanche of litigation challenging the distribution of noneducational state and municipal services." The plaintiffs emphasized the value that "American society places upon education as a means of socioeconomic advancement and of inculcating democratic values," including the "strong relationship between education and the exercise of first amendment rights and informed voting" (Yudof & Morgan, 1974, p. 400).

The court declared that poverty was not a suspect classification deserving of protection under the Equal Protection Clause. Further, the court determined that education, above a minimal level, was not a fundamental right under the constitution. The court also asserted that the principle of fiscal neutrality might elicit legislative responses, but this may not necessarily correspond to local control of the schools and may not respond to the needs of poor or minority children. The court agreed with the state's

assertion that questioned whether additions in school expenditures would produce gains in student achievement and acknowledged that the state already provided a minimum education to each child under the Foundation School Program. In writing the reversal, Justice Powell applied the rational basis test and held that the Texas financing system was rationally related to a legitimate state purpose, which was providing a minimum education for every child (Schragger, 2007; Yudof & Morgan, 1974).

Citing state and federal court decisions in 1971-1973 in Minnesota, Michigan, California, and New Jersey concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth, Justice Marshall's dissent (*Rodriguez*, 1973) decried the discriminatory implications of the majority's opinion in *Rodriguez*. "More unfortunately, though," he said, "the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens" (p. 71). While Justice Marshall acknowledged that the provision of free public education was not a requirement of the Constitution, he nonetheless pointed out the importance of the relationship between education and the political process, indicating that the public schools were a vital civic institution for the preservation of a democratic system of government:

> Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation. (p. 113)

Legal Theories and Themes

The two basic approaches in *Rodriguez*, one based on equity, which focused on the problem of disparate resources, and the other based on adequacy, which involved a minimum, or adequate, level of education would emerge and gain momentum as the dominant paradigms in school funding cases in the decades that followed, in Texas as well as throughout the country. The *Rodriguez* case also presaged the gamut of judicial behavior and judicial decision-making, including judicial ideology and activism, institutional structures, the influence of the political environment, and the role of stakeholders and interest groups, that would be important in later litigation. The case also elicited discussion in the area of judicial accountability to reason and judicial commitment to restraint, the rational basis test, addressing unequal distribution of the conditions of citizenship, and a constitutional rights claim for equal funding of public schools contrasted with an analytic frame in which decisions are based at least partially on the moral claims of virtue.

Critically, *Rodriguez* foreshadowed the legal theories and themes now familiar to school finance litigation, including the following:

- Meaningful discretion and local control – cedes certain authority to local entities
- Separation of powers doctrine – calls for the separation of the judicial, legislative, and executive branches of government

- Principle of fiscal neutrality – stipulates that the funding of education must be a function of the wealth of the state and not of the wealth of each of the school districts in the state
- Political question doctrine – states that a court may not be the appropriate forum to settle an issue, which may be more suitable to the political legislative and executive branches of government
- Justiciability – concerns whether an issue is suitable to be reviewed by a court

These legal theories would be reiterated again and again, as was the underlying subtext of the influence of race and class. Additional themes would include the role of money and resources and the relationship that this had to student outcomes and achievement and the notion that school finance litigation could lead to an equitable distribution of resources (Farr & Trachtenberg, 1999; Imazeki & Reschovsky, 2003; Koski & Levin, 2000; Koski & Reich, 2006; Schragger, 2007; Yudof, 1991; Yudof & Morgan, 1974).

Accountability in government rests with the governed, that is, the people who demand changes or remain complacent to the status quo. The federal judiciary (Wilkinson III, 1989) is an exception because "judges are not placed in office nor removed from office by the electorate" (p. 779). The accountability in this instance, Wilkinson tells us, is through the electorate's will, as reflected by law; hence the judge's authority comes from applying and interpreting the law through the faculty of reason. In analyzing Justice Powell's decision in *Rodriguez*, Wilkinson sees the tenuous relationship that exists between judicial accountability to reason and judicial commitment to restraint.

Justice Powell's commitment to separation of powers "made him reluctant to read private rights of action into statues or to reduce requirements of standing that would thrust courts into 'abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions'" (p. 807). In rejecting the constitutional challenge to Texas' system of public school finance, Powell "often justified judicial deference in terms of a lack of judicial experience" (p. 807); in the case of *Rodriguez*, the deference was to the expertise of local school officials:

> … Powell's commitment to a devolution of authority led him to abjure flat declarations of principle in favor of a presumptive reliance on the structural principles that acknowledged the respective spheres of Congress and the states. … Powell's solutions to the great constitutional dilemmas were more suggested than compelled; the language of the document did not absolve the Justice from applying the structural principles within it. (p. 808)

Although Wilkinson (1989) believes that the structural principles of separation of powers and federalism should result in restraint, and he credits Powell with having both judicial vision and limitations, he acknowledges that "accountability to reason is among the most promising gifts the legal profession has to offer," albeit in the final analysis, this is "no guarantee of objectivity or justice" (p. 808). In the case of *Rodriguez*, Justice Powell's restraint led him to apply the rational basis test, holding that the Texas financing system was rationally related to a legitimate state purpose, which was providing a minimum education for every child (Schragger, 2007; Yudof & Morgan, 1974).

Hirshman (1990), on the other hand, views the Burger Court's decision as "balking" at a "potentially revolutionary development – addressing unequal distribution

of the conditions of citizenship and in its most egregious form: through an unequal public distribution network" (p. 1018):

> Plaintiff's strategy of casting their radical claims in familiar rights terms – while perhaps the likeliest avenue to success at the time – simply gave the majority the opportunity to disguise their rejection as an equally innocuous application of equal protection doctrine. Dividing the inquiry into the categories of suspect classifications and fundamental rights, Justice Powell, writing for the Court, first categorized the classification in *Rodriguez* as pertaining not to poor or poorer people, but simply to people residing in poorly endowed school districts. (p. 1019)

Rodriguez, Hirshman (1990) concludes, represents a failure of a constitutional rights claim for equal funding of public schools, an avenue that has remained closed with respect to redistributive claims on the Fourteenth Amendment:

> The problem of the American underclass will never be solved unless analysts break the stranglehold of rights analysis on modern political thought and consider the claims of virtue – an analytic frame in which decisions are based at least in part on the moral well-being of the actor and the society, and in which discrimination among claimants is a desirable element of virtue. (p. 988)

The Influence on Litigation

Shortly after the U. S. Supreme Court declared its decision on *Rodriguez*, the New Jersey Supreme Court announced its findings in *Robinson v. Cahill* (*Robinson I*, 1973), ruling that the state's school finance system, which relied on local taxation to furnish two-thirds of its expenditures on public schools, was in violation of the state's constitutional mandates calling for a thorough and efficient system of free public schools that would provide an equal educational opportunity for children. Although the *Robinson I* court had prepared its decision prior to the *Rodriguez* reversal, Thro (1989) indicates that it nonetheless spent a considerable amount of time reviewing the *Rodriguez* decision

and comparing its system to Texas' financing scheme, carefully crafting its opinion to the requirements of its own constitutional provisions. Specifically, *Robinson I* examined the applicability of the New Jersey equality guaranty in the state's system of public school finance:

> Rather than adapting the *Rodriguez* test of fundamentality to the state constitution context, the court chose instead to develop an independent framework for equal protection analysis. That choice created the possibility that wealth could constitute a suspect classification and, additionally, that education could be recognized as a fundamental right under the New Jersey Constitution. (Thro, 1989, p. 1654)

More definitively, *Robinson I* said:

> But we have not found helpful the concept of a 'fundamental' right. No one has successfully defined the term for this purpose. Even the proposition discussed in *Rodriguez*, that a right is 'fundamental' if it is explicitly or implicitly guaranteed in the Constitution, is immediately vulnerable…. (p. 282)

The court was hesitant to apply the state's equal protection clause, indicating the argument was fraught with difficulties:

> We hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act. (p. 283)

The court also rejected the plaintiffs' claims that wealth should be considered a suspect classification: "Wealth is not at all 'suspect' as a basis for raising revenues" (p. 283). Finally, the court acknowledged that "It is inevitable that expenditures per resident will vary among municipalities, resulting in benefits and tax burden. If this is held to constitute classification according to 'wealth' and therefore 'suspect,' our political structure will be fundamentally changed" (p. 283).

The court in *Robinson I*, however, was willing to consider the state mandated constitutional provisions calling for "an equal educational opportunity for children" that required the maintenance and support of "a thorough and efficient system of free public schools for the instruction of all the children in the State" (p. 294):

> Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any distrct [sic] of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation. (p. 294)

Although the New Jersey court's analysis discounted the viability of arguments previously proffered in *Rodriguez*, Thro (1989) points out that the significance of its decision resided in its conclusion that the state's public school finance scheme violated its own state constitutional mandates. Reaching its conclusion to order the implementation of a funding equalization plan, the *Robinson I* court said:

> Although we have dealt with the constitutional problem in terms of dollar input per pupil, we should not be understood to mean that the State may not recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity. Nor do we say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further and to tax to that further end, provided that such authorization does not become a device for diluting the State's mandated responsibility. (pp. 297-298)

The impact of the New Jersey Supreme Court's decision went beyond the confines of the reforms that the court mandated for its school finance system. The court's use of the state constitution as a vehicle for finance reform revived the hopes of potential litigants that had been discouraged by the *Rodriguez* decision. After *Rodriguez* and

Robinson I, increasing numbers of reformers began to seek recourse from state courts based on educational equity clauses in their state constitutions. Eventually these cases began to consider provisions on adequate concepts of education included in the state constitutions since these mandates would become one of the most effective ways to overturn school finance systems. Additionally, numerous state courts "expanded the access to education under state constitutions in decisions striking down or limiting the imposition of fees for school-related activities and imposing various levels of funding equalizers" (Hirshman, 1990, pp. 1029-1030). Because of the particular characteristics of state constitutions, however, these charters also gave state reformers unprecedented opportunities to instigate change that was not available to them at the federal level:

> For example, while the federal Constitution is one of limited powers – the federal government can only do those things explicitly or implicitly specified in the document – state constitutions establish limitations on otherwise unlimited power; the states can do anything except that prohibited by the federal or state constitutions. State constitutions are also much more 'political' in that they can be easily amended to reflect the current values of a state's citizenry. Finally, state constitutions often protect individual rights, such as the right to an education, that are not guaranteed by the federal charter. (Thro, 1989, pp. 1656-1657)

In analogous fashion to *Robinson I*, the reverberations of *Rodriguez* would also be felt in the opinion rendered in *Serrano v. Priest* (*Serrano II*, 1976) by the California Supreme Court. Rather than relying on the Equal Protection Clause of the Fourteenth Amendment for its subsequent school finance litigation, the state court declared that the wealth-related disparities in per-pupil spending generated by the state's education finance system violated the equal protection clause of the state's constitution.

CHAPTER 4

THE EVOLVING JURISPRUDENCE

This chapter presents a conceptual legal analysis of the thematic and theoretical evolving jurisprudence in school finance cases, including a discussion of the wave theory that represents the shifts in legal strategies and judicial interpretations of constitutional language across the spectrum of litigation. The analysis includes a discussion of the two dominant paradigms of equity and adequacy and the increasing focus that the concept of adequacy has in school finance cases. The discussion presents an argument for the importance of returning equity to the conversation on school finance policy, especially in view of such factors as resource inequalities among schools and school districts or diverse economic and educational needs of students, that adequacy advocacy fails to consider. In addition, the chapter includes an examination of the judicial decision-making process in school finance cases and the limitations the courts have by their inability to implement their policy decisions. The chapter ends with a discussion of the group and political interests that influence school finance litigation and the subsequent legislative reforms.

Equal Educational Opportunity and Wealth

The issues in public school finance litigation are best understood when seen within the context of the broader historical perspectives central to the concepts of equal educational opportunity and the distribution of the quality of public education according

to wealth. Equity concerns related to the education of students from traditionally underserved groups have been a part of school reform policy discussions for more than 50 years. In the U. S. Supreme Court's unanimous decision in *Brown v. Board of Education* (1954), Chief Justice Earl Warren indicated that education was perhaps the most important function of state and local governments:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (p. 493)

The *Brown* decision was part of the Warren Court's series of mandates during the 1950s and 1960s that extended the scope of the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution and the concept of fundamental rights.

> The extensive judicial involvement in implementing egalitarian ideals spurred by *Brown* not only placed equal opportunity issues at the top of the nation's political agenda, but it also dramatically altered the way in which these issues henceforth would be handled. Once desegregation and educational opportunity issues were incorporated into the heart of the courts' agenda, remedies to overcome inequity became imperative policy mandates, and a dynamic of ongoing egalitarian reform became embedded throughout the political culture. (Rebell, 2007, p. 1492)

The civil rights movement and the social agendas of the Great Society Era, as well as the judicial initiatives in the 1950s through the early 1970s, attempted to compensate for educational deprivation by allocating resources towards achieving greater equality of educational opportunity for poor and minority students, leading to the creation of a greater level of racial and fiscal equality (Koski & Reich, 2006). Two months after signing the Elementary and Secondary Education Act of 1965, which included Title I

granting federal financial resources to disadvantaged and minority children in public schools, President Lyndon B. Johnson remarked:

> To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in – by the school you go to and the poverty or the richness of your surroundings. (Johnson, June 4, 1965)

The convergence of these dual strands in education has served as the impetus for public school finance reformers, who have been instrumental in reshaping educational law and policy through a series of court decisions, legislative mandates, and corresponding initiatives from the executive branches (Koski, 2007). Initially, reformers argued that the federal Equal Protection Clause guaranteed substantially equal funding for all school districts within a state, declaring that state financing schemes that made the quality of a student's education dependent on family wealth was the equivalent of denying the child equal protection. The disparities in local school district funding arose because districts generally rely on property taxes to raise the money needed to pay for school operations, making it possible for property-wealthy districts to raise more revenue than districts having low property values, thus giving the children in the wealthy districts an unfair advantage (Heise, 1998; Koski & Reich, 2006; Thro, 1989). After an onslaught of court cases across the country that have spanned some forty years, the recent trend in law and policy is now altered to reflect a different dynamic:

> In the past two decades or so, however, there has been a shift away from the rhetoric and policy of providing equal educational opportunities to the rhetoric and policy of providing an 'adequate' quality of education irrespective of resource inequalities among schools. This shift, we argue, is reflected in two important policymaking venues: (1) the federal and state courts, in several waves

> of educational finance litigation, and (2) federal and state legislatures, in the decline of laws designed specifically to enhance educational resources in poor communities and the concomitant rise in one size-fits-all standards-based accountability regimes that pay less attention to ensuring the provision of resources to the needy. (Koski & Reich, 2006, p. 545)

A central argument of the adequacy paradigm questions the link between resources and outcomes, especially as this affects poor students. Imazeki and Reschovsky (2003) synthesize the dilemma for school districts having increasing enrollments of disadvantaged and minority children:

> Embedded in this adequacy movement is an understanding that equal dollars do not guarantee equal outcomes. Thus, states with finance systems that do very well at equalizing revenues or at maintaining fiscal neutrality may still exhibit large disparities in student outcomes and there may still be students who are not receiving an 'adequate' education. This is because the amount of money necessary to achieve a particular performance standard may be different across districts due to variations in costs, for reasons that are outside the control of the districts. …a district with a high concentration of students from poor families or from families where English is not spoken in the home may need additional resources (in the form of smaller classes or specialized instructors) in order to reach a given achievement goal. (pp. 15-16)

Although the vision of equal educational opportunity that appeared in *Brown* has failed to materialize for an overwhelming number of poor and minority children, who attend predominantly minority schools that receive less funding and have fewer qualified teachers, larger classes, and inferior facilities than schools in districts with more affluent white students, Rebell (2005a) argues that the adequacy litigations presage "a new wave of reform initiatives that may merge equity and excellence by procuring the major resource commitments necessary to ensure that 'at-risk' minority students have a meaningful opportunity to meeting challenging educational standards" (p. 2). Rebell indicates that funding disparities have been reduced in some states where the courts have

invalidated state educational funding systems, yet he concedes that some "court decrees have actually resulted in educational setbacks" (p. 3). Seen across a longer span of time, however, this wave of reform constitutes an integral component of a "democratic imperative," defined as a "periodic eruption of moral fervor that presses to eliminate the gap between the real and the ideal by implementing extensive political reform that put into practice America's historic egalitarian ideals":

> Viewed in historical perspective, therefore, what is significant about *Brown* is the way it has remade the political landscape by activating a continuing progressive legal dynamic which – although it sometimes takes one step backwards before taking two steps forward – over time chips away at the huge underlying problems of racism, unequal funding, and economic disadvantage that constitute the major barriers to equal educational opportunity" (p. 2)

The Wave Theory

Legal scholarship divides the corresponding evolving jurisprudence in school finance cases into three waves, representing shifts in legal strategies and judicial interpretations of constitutional language that incorporate two dominant paradigms (Farr & Trachtenberg, 1999; Imazeki & Reschovsky, 2003; Koski, 2003-2004; Koski & Levin, 2000; Koski & Reich, 2006; Lefkowits, 2004). Although not necessarily monolithic, given that both rationales may be utilized in any one case, reviewers agree that the first paradigm is defined by a wave of equity cases focusing on equalizing resources among school districts, with a shift occurring in the second paradigm that is characterized by a wave of adequacy cases seeking to define standards for a minimally adequate level of education for all children. The first wave (1971-1973) included cases, the landmark *San Antonio Independent School District v. Rodriguez*, (1973) among them, that were based

on the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution. The second wave of cases (1973-1989) used the *Rodriguez* model to formulate arguments, but premised those rationales on equity and educational rights clauses in state constitutions. Third wave cases (1989-present) have continued to base their arguments on substantive education clauses mandated by state constitutions, but structured those challenges on theories of adequacy rather than equity, with a focus on whether resources are sufficient or adequate to achieve some educational standards. These third wave cases encompass the protracted litigations in Texas known as the *Edgewood* cases: *Edgewood Independent School District v. Kirby* (*Edgewood I*, 1989); *Edgewood Independent School District v. Kirby* (*Edgewood II*, 1991); *Carrollton-Farmers Branch School District v. Edgewood Independent School District* (*Edgewood III*, 1992); and *Edgewood Independent School District v. Meno* (*Edgewood IV*, 1995). They also include the more recent cases in *West Orange-Cove Consolidated Independent School District v. Alanis* (*West Orange-Cove I* or *Edgewood V*, 2003) and *Neeley v. West Orange-Cove Consolidated Independent School District* (*West Orange-Cove II* or *Edgewood VI*, 2005).

The preponderance of scholarship addresses this three-wave theory, with some analysts like Hanushek (Rebell et al., Fall 2009) indicating that the recent national decline in adequacy cases is evidence of the welcome end of the use of the courts in school finance issues, which then should shift these debates to the legislative and executive branches of government, the more appropriate realms of policymaking. Analysts like Rebell (2005b), however, who are advocates for a strong and continuing judicial presence in school finance debates, do not see as strong a demarcation between

equity and adequacy cases, noting that equity issues remain important to school finance litigation. Rather than an end to school finance cases, Rebell sees a fourth wave of litigation emerging that combines the concepts of equity and adequacy as the basis of school finance reform initiatives that will need all three branches of government cooperating and working in concert in order to facilitate equal educational opportunities for all children.

Among the salient legal concepts and themes that have emerged across the spectrum of school finance cases are the following:

- The separation of powers doctrine as exemplified in the limitations of the judiciary vis-à-vis the legislative and executive branches of government as well as the concepts of meaningful discretion and local control that cedes certain authority to local communities;
- The principle of fiscal neutrality, which says that the funding of education must be a function of the wealth of the state and not of the wealth of each of the school districts in the state;
- The political question doctrine and the related issue of justiciability, which stipulates which issues are subject to review by the courts, including the concept that a court may not be the appropriate forum to settle an issue that may be more suitable to the political legislative and executive branches of government; and
- The role of money and resources and how these relate to student outcomes and achievement, which are implicit in the notion that school finance litigation can lead to an equitable and adequate distribution of resources.

The Equity and Adequacy Paradigms

The equity-adequacy debate has elicited its share of controversy, especially as the shift towards adequacy has become more pronounced in school finance litigation. Minorini and Sugarman (1999) point out that educational adequacy has strengths and weaknesses both as a legal theory and as a principle for guiding educational policy. Although cases based on adequacy theory have enjoyed rapid success in the courts, the paradigm needs to be examined with respect to the mixed success that this approach has in obtaining legislative compliance with judicial decrees. Regardless of where adequacy rationales fall in the equity-adequacy spectrum, Enrich (1995)suggests that adequacy arguments "provide tools which are more firmly grounded on the constitutional base, more closely matched to the task at hand, and less threatening in their reach and power than arguments focused on equality" (p. 183). Koski and Reich (2006) are more adamant in saying that adequacy is not good enough, urging the importance of returning equity to the conversation on school finance policy. They decry the growing shift towards adequacy, especially in view of such factors as resource inequalities among schools and school districts or diverse economic and educational needs of students, which adequacy advocacy fails to consider. They attribute the shift to pragmatic political considerations; the assumed failure of equity-driven school reform; the difficulty of arriving at a consensus definition of equality of educational opportunity; and the educational accountability movements of the 1980s and 1990s that led to the No Child Left Behind (NCLB) initiative in 2001, that emphasizes content standards that say all children can

learn irrespective of whether "all children are receiving, or should receive, equal educational resources" (p. 548).

The argument that Koski and Reich (2006) posit is centered on their view of education as a positional good. While education in many respects is a public good in that the benefits of a well-educated citizenry accrue to all of us, education is also a private good because of the lifetime psychic, economic, and status benefits that students receive throughout their lives from having been educated. As a private good, education has positional good aspects, a fact that has important implications for public policy whenever we fail to diminish inequality. Education is also a positional good relative to benefits received through competition, including the competition for admissions to college and other post-secondary opportunities and the competition for well-paying jobs, which in turn produce long-term outcomes such as greater job satisfaction, more civic engagement, better health and access to healthcare, and general well-being. Koski and Reich refine their argument further: "… one's position or relative standing in the distribution of education, rather than one's absolute attainment of education, matters a great deal. …one person's possession of more education necessarily decreases the value of another's education" (p. 549); "To the extent that education has positional value," say Koski and Reich, "adequacy threatens to entrench or exacerbate the positional advantages of the well off" (p. 604); and "For positional goods, the relative amount of the good determines the absolute value of the good" (p. 605).

Koski and Reich (2006) argue that equity and adequacy are different and lead to disparate conclusions that can benefit or deprive students:

> …students can be absolutely deprived and relatively deprived at the same time. Adequacy reforms target absolute deprivations in schooling. As defenders of equality, we have nothing but praise for adequacy efforts that successfully eliminate absolute deprivation. The danger is that the path of adequacy ends too soon; adequacy suggests that warding off absolute deprivation exhausts the state's obligation to provide education. Equality-oriented reforms, while also concerned with absolute deprivation, go further and demand that the state also worry about relative deprivation, inequalities that exist even above a threshold of proficiency. (p. 615)

Conceptually, Koski and Reich (2006) model their discussion of equity and adequacy on the theoretical construct of educational resource distribution (see Coons et al., 1970) , which defines educational opportunity with respect to "the object of the distribution and the distributional principle" (p.552). The object of distribution focuses on educational inputs or educational outcomes, with inputs being school resources such as money and the resources that school districts are able to purchase, such as teachers, instructional materials, and facilities. Outcomes are the results like student achievement, educational attainment, earnings and the quality of life that the student is able to attain. The educational standards-based accountability of No Child Left Behind (NCLB) and most recently the STAAR system in Texas emphasizes the measuring of performance or educational outcomes, generally on academic achievement tests. An adequate education, defined within the context of the distributional principle, means the qualitative level of educational resources needed to achieve specified educational outcomes based on required, external, and fixed standards.

Additionally, Koski and Reich (2006) conclude, most accountability schemes increase existing inequalities because:

> (1) they are pegged to static proficiency standards that are not dependent upon the performance at the top end of the distribution, (2) they do not ensure sufficient educational resources to meet established high-outcome standards, (3) they may increase racial and socioeconomic segregation as wealthy districts and families will only make their high-performing enclaves more inaccessible, (4) they will create disincentives for high-quality teachers to teach in the toughest assignments, and (5) they will direct the commitment of tangible educational resources and instructional time in poor-performing schools to a narrow set of subjects, thereby increasing inequality in educational opportunity. (p. 572)

Finally, Farr and Trachtenberg (1999) in an analysis of the first four *Edgewood* era cases signal the artificiality of the equity-adequacy dynamic:

> The division between issues of equity and adequacy, however, ultimately becomes artificial. Neither concept can stand entirely alone. The reason so many people were concerned with the inequities perpetuated by the Texas school-finance system was that schoolchildren in the poorer districts received a substandard education. Conversely, an argument that all schools should provide some minimally adequate standard of education inherently depends on underlying notions of equity. (p. 645)

Moral Considerations

An important aspect of the conceptual framework on the equity-adequacy debate addresses an analogous discussion on equality-sufficiency in moral and political philosophy. Equality is relational and is concerned with comparisons, while adequacy, or sufficiency, is absolute and is concerned with acceptable or high minimums. Temkin (2001) believes that egalitarians believe that how people fare relative to others has independent moral significance. They believe that it is bad for some individuals to be worse off than others through no fault or choice of their own. Koski and Reich (2006) explain the concept further:

> To ask if somebody or something is sufficiently well off, however, we…simply identify what constitutes the level of sufficiency or adequacy and then make the appropriate allocation or redistribution of resources. … The equality framework

> aims to combat relative deprivation. For the sufficiency advocate, we should not care that people are equal but only that they have enough. (p. 589)

The proper objects of moral concern, says Temkin (2001), are not groups or societies but individuals. Although different individuals or social institutions often discriminate against groups, our ultimate concern is for the individual members of the affected groups. From a public policy perspective, say Koski and Reich (2006), "we should be concerned about making some people educationally worse off whenever we adopt policies that exacerbate or fail to diminish educational inequalities" (p. 546). Minorini and Sugarman (1999) address the implications for educational law and policy:

> What is most distinctive about the adequacy approach is that, unlike the traditional school finance cases, it does not rest on a norm of equal treatment. Indeed, the adequacy cases aren't about equality at all, except in the sense that all pupils are equally entitled to at least a high-minimum. In other words, adequacy is not a matter of comparing spending on the complaining group with spending on others. It is rather about spending what is needed (and its focus is in some respects more on the school or the pupil than on the district). (p. 188)

Implicit in public school finance reform is the subtext of the influence of race and class (Farr & Trachtenberg, 1999) and the question that addresses the unequal distribution of the conditions of citizenship (Hirshman, 1990). While it is true, as Koski (2007) points out, that adequacy litigation has the potential of leveraging "the resources necessary for all children to reach proficiency" (p. 17), politically marginalized communities have not necessarily mastered the perquisites required to become full participants in the dialogue of deliberative democracy (Gutmann & Thompson, 1996) or the decentered democracy (Habermas, 1996) that gives these communities access to the policymakers and government bureaucrats who are the gatekeepers of sustained reform. As Habermas sees

it, a theory of discourse says that democratic will-formation depends on a network of pragmatic, ethical, and moral discourses that draw legitimating force from the "communicative presuppositions that allow the better arguments to come into play in various forms of deliberation and from the procedures that secure fair bargaining processes" (p. 24). Gutmann and Thompson connect the concept of deliberative democracy to the principles of reciprocity, publicity, and accountability regulating the process of politics and basic liberty, basic opportunity, and fair opportunity that govern the content of policies.

Hirshman (1990) views the problem in terms of the fundamental right to an education within the context of an unequal public distribution of resources and the absence of redistributive claims on the Fourteenth Amendment. If we want to solve the problems of the American underclass, Hirshman says, we must resort to the claim of virtue rather than base our arguments on the claim of educational rights. Shifting the analytic frame to one of morality presents an opportunity to base decisions on the desirable element of virtue.

Nyberg (1981) correlates the problem of the underclass with the implicit moral imperative that is integral to the concept of power and the potential that education provides to participate in the circles of power afforded to others in the society. For Nyberg, the key to understanding power is the concept of consent, with education providing the link between the ideals of democratic designs for governing social relationships and the ideals of power. In Nyberg's view, the ideal citizen in a democracy can either give or withhold consent based on educated judgment. This commitment

through informed judgment is a power ideal because of the stability that it engenders and a democratic ideal because it forms the basis of purposeful participation. Developing a capacity for rational commitment among as many people as possible should be the first purpose of education in a democracy where the wide distribution of power is a moral imperative. Staats (2004) points out the pitfalls of the concentration of power that become a factor in the dominance and control that one person exercises over another and the effect this has on public discourse. Most importantly, the concentration of power is connected to agenda setting, which in turn determines the deliberation that goes on in the political public sphere.

Judicial Decision-Making

School reform cases have embedded a disparate range of judicial behavior and judicial decision-making strategies, including judicial ideology and activism, institutional structures, the influence of the political environment, and the role of stakeholders and interest groups (Farr & Trachtenberg, 1999; Imazeki & Reschovsky, 2003; Koski & Levin, 2000; Koski & Reich, 2006; Schragger, 2007; Yudof, 1991; Yudof & Morgan, 1974).

Although the wave typology has been useful in explaining the jurisprudential-constitutional law arguments in school reform cases, Koski (2003-2004) points out that it plays a limited role in policy development and implementation and does not advance theories of judicial behavior and judicial decision-making. Despite having some flexibility, courts in school finance cases are constrained by their inability to implement

their policy decisions. Jurisprudence in school finance cases, Koski acknowledges, is mainly concerned with defining the proper role of a cautious judiciary that is conscience of its institutional limitations in intervening in a complex social policy arena. At the same time, jurisprudence in these issues is aware of its obligation to check the political branches while it maintains its own institutional presence in the governance of the state. Legal policy theories such as equity and adequacy give the courts flexibility and give them authority; but, Koski says, courts have neither "the power of the sword nor the power of the purse" and have no capacity to implement their finance reform decrees. Furthermore, the courts "are not well-equipped to design educational finance policy and do not have the latitude to make the necessary tradeoffs among competing interests and obligations of state government and its state budget" (p. 1190, 1193). Legitimacy may be compromised by concerns related to the separation of powers doctrine with the legislative and political branches unwilling or hesitant to adhere to a court's ruling.

The role of an activist judiciary in what is essentially a policy-making function dealing with state appropriations and the minutiae of accountability and standards requirements is a continuing source of debate (Dunn & Derthick, 2010; Koski, 2009-2010, 2010-2011; Lindseth & Hanushek, September 15, 2009). While critics say that the courts have no expertise in these matters and that these issues are best left to the political legislative and executive branches, advocates (Rebell et al., Fall 2009) point out that a sustained judicial presence, albeit with its inherent limitations, is necessary in a democratic society to ensure the equity and adequacy of school finance reforms that

necessarily must be the products of compromise and modification between all branches of government.

The separation of powers doctrine is a recurring theme throughout the *Edgewood* era cases. In *Edgewood I* (1989), the Texas Supreme Court disagrees with the lower court's contention that the definition of efficiency, a key concept in declaring the school finance system unconstitutional, was inherently a political issue that could not be determined by the courts. This positioning of the efficiency question as justiciable would be another theme that would echo through the various stages of litigation up to and including the ruling in the last of the *Edgewood* era cases, *West Orange-Cove II* (2005):

> As *Edgewood I* illustrates, at one level the *Edgewood* cases represent an ongoing exchange between the judicial and legislative branches of Texas's government. This interaction takes the form of a complicated dance, as the two institutions continually redefine their responsibility for overhauling the school-finance system. At times, the court and the Legislature bicker over the lead; at others, they struggle to foist it on one another. Occasionally, the court and the Legislature try to deny their interdependency altogether. (Farr & Trachtenberg, 1999, p. 640)

In *Edgewood I*, the Texas Supreme Court is conscious of the definition of its role:

> Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. (*Edgewood I* at 399)

In the last of the *Edgewood* era cases, *West Orange-Cove II*, the Texas Supreme Court is explicit in affirming its role as the interpreter of the constitution; yet the court maintains its position that the legislature is the place to design the appropriate financing scheme. The court states its position with respect to the political and policy questions that remain the province of the legislative branch:

> That is, we must decide only whether public education is achieving the general diffusion of knowledge the Constitution requires. Whether public education is achieving all it *should* – that is, whether public education is a sufficient and fitting preparation of Texas children for the future – involves political and policy considerations properly directed to the Legislature. Deficiencies and disparities in public education that fall short of a constitutional violation find remedy not through the judicial process, but through the political processes of legislation and elections. (*West Orange-Cove II* at 753)

Group and Political Interests

Bringing an added complexity to school finance litigation is the level of political rhetoric that invariably surrounds any education reform initiative, enhanced in the current period by the multiplicity of Internet Web sites and the use of social media technologies such as video podcasts from the mainstream media and from advocacy groups that have exponentially extended their reach and influence, giving a vitality and an immediacy to the spread of information that is being debated about school finance in the public sphere.

In the *Edgewood* era cases, the disparities faced by low-wealth communities that are handicapped in coming up with the necessary monies to pay for the schools and programs benefitting poorer and minority students lead to inequities that create advocacy group political interests that in turn influence both the judicial and legislative responses in the school finance arena (Kauffman, 2009a). Politics is a prominent factor in *Edgewood I*:

> Nowhere was the political animus more evident than in the Legislature. … many legislators found themselves pulled in several directions by angry groups of constituents. The Legislature itself was made up of a Gordian knot of favors and debts, all of which combined to obscure any straightforward attempt to reform the school-finance system. …. The combined political clout of oil and gas interests (that had been using wealthy school districts as tax havens) and wealthy residential areas created a potent lobby. (Farr & Trachtenberg, 1999, p. 641)

Acknowledged or not, political interests are inherent to questions of school finance, regardless of the branch of government that is involved in the decision-making, demonstrated at the federal level with the partisan ideologically-based reversals of the Burger Court in the *Rodriguez* (1973) Texas case, based on the Equal Protection Clause of the U. S. Constitution, which focused on the differences between poor and wealthy school districts, and of the Roberts Court in the *Flores* (2009) Arizona case, which sought recourse for English Language Learners under the Equal Educational Opportunities Act of 1974. The five-to-four *Horne v. Flores*, 557 U.S. 289, 294 (2009) decision, although not binding to state school finance lawsuits, nonetheless is predicted (Dunn & Derthick, 2010; Lindseth & Hanushek, September 15, 2009) to have influence on these cases as it cites research that increased funding does not improve student achievement, the common mantra of defendants in school finance reforms. The Supreme Court opinion also notes the perils of advocacy groups that collude to use the courts to issue decrees, thus depriving future policymakers within the legislative and executive branches of their powers.

An analogous dominance of political interests permeates the decision-making process at the state level, as exemplified by the dramatic changes in the political landscape in Texas during the last 30 years, which has gone from a situation in which almost all state offices were dominated by Democrats to a House and Senate and all state-wide offices controlled by Republicans. The Texas Supreme Court, which is the ultimate arbiter in school finance lawsuits, was fundamentally altered between the first *Edgewood*

I lawsuit in 1989, decided by a 6-3 majority Democratic court, and the last *Edgewood VI* (*West Orange-Cove II*) case in 2005, determined by a 9-0 majority Republican court. The decisions along partisan lines eroded the notion of equity and redefined the concept of adequacy in the last four *Edgewood* cases from those that had been included in the first two opinions (Kauffman, 2009b). Although no certainties exist with respect to future school finance litigation, the prevailing political dynamic once again augurs what may well be the resolution to the current lawsuits in Texas. The state's Supreme Court justices are elected to staggered six-year terms in state-wide partisan elections; but the Governor appoints the justices, subject to Senate confirmation, whenever vacancies occur. Of the nine justices in 2012, six were appointed by Governor Rick Perry, one was appointed by Governor George W. Bush, and two were elected. All the justices are Republicans (Supreme Court of Texas, 2012). The pending Texas lawsuits have been assigned to the 250th District Civil Court of Travis County under Democrat Judge John K. Dietz, the judge that ruled in 2004 that the state's school finance system was unconstitutional (*West Orange-Cove II v. Neeley*, GV-100528, 250th District Court, Travis County, Tex. Nov. 30, 2004) and almost duplicating the partisan scenario that occurred in the Texas Supreme Court opinion in 2005 in *West Orange-Cove II*.

CHAPTER 5

TEXAS LITIGATION AND REFORM

The analysis in this chapter is guided by the research question of this report: *Is school finance litigation in Texas effective in the provision of a constitutionally-mandated equitable and adequate education?* Consequently, this chapter first examines the issues of equity and adequacy as these are reflected in the opinions rendered by the Texas Supreme Court in the six lawsuits that belong to the *Edgewood* era and the subsequent legislative reforms that followed each of these decisions, including *Edgewood I* (1989), *Edgewood II* (1991), *Edgewood III* (1992), and *Edgewood IV* (1995), plus the most recent opinions of *West Orange-Cove I* (2003) and *West Orange-Cove II* (2005). A second section of this analysis includes a discussion of the Texas constitutional provisions that are central to the arguments surrounding school finance litigation. This section endeavors to show how the changing language of the state court decisions altered the tenuous constitutional equity-adequacy dynamic to the extent that additional challenges to the system have been inevitable through time and have locked the state in a continuous cycle of litigation. In altering this tenuous equity-adequacy constitutional dynamic, the public school finance system has placed in jeopardy the fundamental democratic principles of providing an equitable and adequate education for all students. Finally, the chapter addresses the added burden that the increasingly rigorous and controversial Texas system of accountability and high-stakes testing has placed on school finance reforms.

The *Edgewood* Era

Although the *Rodriguez* U. S. Supreme Court decision in 1973 closed the federal avenue for future school finance litigation, the implication of the court's reversal opened the door for challenges in state courts based on provisions in state constitutions. In the decade following *Rodriguez*, the convergence of several policy and legislative initiatives in Texas kept the subject of school finance reform before the public, but this time equity and school finance concerns would be joined by new measures of adequacy and accountability. During the 1980s, school district property tax rates ranged from $0.18 to $1.50, causing inequitable disparities in the amounts of money that some districts could raise to fund their schools. Districts with high-end properties could raise more money at a lower tax rate than districts with low-end properties at higher tax rates (Texas Taxpayers and Research Association, January, 2012). The Minimum Foundation Program, first established in the Gilmer-Aiken proposals in 1947-49, became the Foundation School Program (FSP), which had a second tier of equalization that targeted property-poor districts. *A Nation at Risk: The Imperative for Educational Reform*, the 1983 report of the National Commission on Excellence in Education calling for educational reforms, spurred Texas Governor Mark White to establish the Select Committee on Public Education (SCOPE), chaired by the billionaire H. Ross Perot. The Select Committee in turn was instrumental in the passing of House Bill 72 (1984), which mandated sweeping reforms to improve equity, school finance, and new accountability measures in Texas school districts. House Bill 72 called for a sharing of expenses between the state and local school districts. The cost of facilities was still paid for by individual districts, but the

amount of state aid received by a district was equalized according to a complex formula so that low property wealth districts received substantially more state aid than the high property wealth districts (Farr & Trachtenberg, 1999).

Equity, school finance, and accountability were also subsequently solidified in the school changes that were stipulated in Senate Bill 7 (1993) and in the revisions of Chapter 35 of the Texas Education Code (1995). School finance reforms came to the fore in 1984 when Texas courts began the long protracted trajectory that would be known as the six *Edgewood* era cases. The Texas Supreme Court ruled in *Edgewood I* (1989) that the school finance system was in violation of the Texas constitution, a situation that would be revisited in the subsequent cases of *Edgewood II* (1991), *Edgewood III* (1992), *Edgewood IV* (1995), *West Orange-Cove I* (2003), and *West Orange-Cove II* (2005). Following each of the *Edgewood* court decisions, the legislature responded with a series of reforms that included reconfiguring the traditional multi-tiered financing system.

In declaring the school finance system unconstitutional, the Texas Supreme Court's unanimous decision in *Edgewood I* (1989) cited the disparities between property wealthy and property poor districts that were produced because of the finance system's reliance on local property taxes for education funds and voiced concern that poorer districts were being trapped in self-perpetuating cycles of poverty and that the low tax rates of wealthy districts had become tax havens and represented a loss of hundreds of millions of dollars. In the aftermath of the state court's decision, the legislature passed Senate Bill 1 in 1990, which excluded the top five percent of the wealthiest districts from the equalization process and used state funds to guarantee tax yields in the remaining

districts. The pull back from 100 percent fiscal neutrality had produced instead a compromise solution of 95 percent fiscal neutrality, which stipulated that a penny of tax effort in the poorer districts yielded the same amount of money as a penny at the 95th percentile of wealth per pupil. The 95 percent solution was to be implemented by the year 1995 (*Edgewood I*, 1989) (Farr & Trachtenberg, 1999; Kauffman, 2009a; Texas Taxpayers and Research Association, January, 2012; Yudof, 1991).

The Edgewood plaintiffs immediately filed suit; and in 1991 the Texas Supreme Court in *Edgewood II* unanimously overturned Senate Bill 1, maintaining that the Texas Legislature's approach was conceptually flawed because it failed to restructure the system and because the wealthiest districts were excluded from the equalization formula. In response to a motion for rehearing approximately a few weeks later, the court issued *Edgewood IIa*, a supplementary opinion accompanied by several dissenting opinions split along partisan lines, mandating that local tax revenue was not subject to statewide recapture and that as long as efficiency was maintained the legislature could authorize school districts to supplement their educational resources if local property owners approved an additional local property tax. The legislature responded in 1991 with Senate Bill 351, which changed the system's structure by creating 188 newly formed taxing authorities called County Education Districts (CEDs). These county districts, made up of school districts, were responsible for collecting and redistributing taxes, effectively spreading the wealth of the richest district within the County Education Districts. Following a challenge by some high wealth property districts, the Texas Supreme Court ruled the law unconstitutional in 1992 in *Edgewood III* on the grounds that the law had

transgressed upon the prohibition of a statewide property tax and the requirement of voter authorization for converting the County Education Districts into new taxing authorities. The ruling had statements on how to restructure the tax system, including a warning to the legislature on the dangers of relying on the local property tax as a source of funding.

The legislative response to *Edgewood III* was Senate Bill 7, stipulating the Local Option Plan that is currently in place, which has five options that wealthy districts can choose in order to reduce the amount of taxable value within the district. Senate Bill 7 also formalized the establishment of a statewide accountability system of student performance for a series of tests (Texas Assessment of Academic Skills) on reading, writing, and math that had been initiated in 1990. Schools were required to meet state standards for average student performance as well as for performance of students defined by racial group and socioeconomic level. The system retained the two-tiered Foundation School Program with the system of formulas for the distribution of state aid to qualifying school districts. Tier One provided the cost of a basic education if districts agreed to levy a minimum property tax rate. Tier Two, or the Guaranteed Yield Program, supplemented the basic program and guaranteed districts a certain amount of money for each extra cent of property tax effort. A group of property wealthy and property poor plaintiffs again challenged the system, seeking to overturn the provisions of Senate Bill 7, but the decision in 1995 by the Texas Supreme Court in *Edgewood IV* ruled that the legislature had finally established a constitutional finance system and that the state's accountability system fulfilled the suitable provision for a general diffusion of knowledge (*Edgewood II*, 1991; *Edgewood IIa*, 1991; *Edgewood III*, 1992; and *Edgewood IV*, 1995) (Dyson, 2004;

Farr & Trachtenberg, 1999; Imazeki & Reschovsky, 2003; Kauffman, 2009a; Texas Taxpayers and Research Association, January, 2012).

Filed as *West Orange-Cove Consolidated Independent School District v. Alanis (West Orange-Cove I*), four property-rich districts claimed that rising costs of educating students were causing them, or would soon cause them, to levy local property taxes at $1.50 per $100 of taxable value, the maximum allowable rate for maintenance and operation (M&O). The school districts argued that the $1.50 cap had become a floor as well as a ceiling, causing them to lose meaningful discretion in setting local M&O rates and constituting a constitutional violation prohibiting the levying of ad valorem taxes upon any property within the state. *West Orange-Cove I* was dismissed by the district court because an insufficient number of school districts had reached the cap (fewer than half), preventing the court from making a determination as to whether the state had established a prohibited statewide property tax. The appeals court upheld the dismissal, but the Texas Supreme Court in 2003 remanded the case back to the district court for trial, where approximately 300 districts challenged the system on the grounds that the system was not equitable or adequate. *West Orange-Cove I* (2003) was subsequently reconfigured as a separate challenge in *West Orange-Cove II.* A total of 47 mostly affluent school districts presented their claim on a constitutional taxing violation because the $1.50 cap constituted a state property tax and deprived them of meaningful discretion in levying the rate. They were joined by two groups of intervenors, consisting of an additional 282 districts, led by Edgewood and Alvarado Independent School Districts, which argued that funding for school operations and facilities was inefficient and

constituted a constitutional violation because children in property-poor districts did not have substantially equal access to education revenue. As part of this second constitutional violation, all three groups contended that the public school system could not achieve a general diffusion of knowledge because the system was under funded. Six Texas State Supreme Court justices (with one abstention), with Justice Nathan L. Hecht writing the opinion, reversed in 2005 the judgment of the district court insofar as that court declared a constitutional violation on the provision of a general diffusion of knowledge, but affirmed the judgment that the system was unconstitutional on the state property tax issue. Justice Scott Brister wrote a dissenting opinion on the issue of efficiency, discussed in the subsequent section of this report. The Texas Legislature responded in 2006 with House Bill 1, which compressed M&O rates, allowing a minimum of $0.17 tax rate capacity above the compressed rate that can be accessed at a district's discretion (*West Orange-Cove I*, 2003; *West Orange-Cove II*, 2005) (Kauffman, 2009a, 2009b; McCown, 2005, 2006; Texas Taxpayers and Research Association, January, 2012).

Redefining the Constitution

This report is guided by the research question: *Is school finance litigation in Texas effective in the provision of a constitutionally-mandated equitable and adequate education?*

In order to answer this research question, consideration must be given to the mandates under the Texas Constitution that form the basis for the state's educational system and the structure that provides the funding for that system. The evolution of

school finance in Texas, with its long trajectory of litigation and its accompanying legislative reforms, has been complex and arduous, prone to inefficiency, confusion, and arbitrariness, and, most importantly, repeatedly falls short of fulfilling its constitutional mandates to provide Texas students with an equitable and adequate education. At the center of the arguments in the litigation are three provisions of the Texas Constitution: Article VII, Section 1, the Education Clause; Article VIII, Section 1-e, the Abolition of Ad Valorem Property Taxes Clause, and Article VII, Section 3, the School District Creation and Tax Clause. Because the changing definition of the Education Clause is critical to the research question that this report addresses, the major portion of the analysis contained herein addresses this constitutional provision. The other two provisions are included in the discussion as they occur in the litigation but without the extensive attention given the first. The differing interpretation of the Education Clause is important to the understanding of the *Edgewood* era cases and the school reforms that were enacted following this protracted litigation. The Education Clause provision is also especially significant to the four 2011challenges to the school finance system, as evidenced by the last of the *Edgewood* era cases known as *West Orange-Cove II* (2005), the subsequent passage of House Bill 1 and House Bill 2 during the Third Special Session of the 79th Texas Legislature in 2006 that reconfigured the school finance system, and the subsequent changes decreed by the legislature in House Bill 3646 in 2009 and Senate Bill 1 in 2011. These enactments have shaped the contours and may be prescriptive to the future evolution of the system.

Article VII, Section 1

The Education Clause, which forms the basis for the provision of an equitable and adequate system of free public education, states:

> 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 Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of free public schools. (Article VII, §1)

The Texas Supreme Court, the Texas Legislature, and the plaintiffs and defendants involved in the long history of the state's litigation have struggled to define the meaning of the terms "general diffusion of knowledge," "suitable," and "efficient" and with it the conundrum (Farr & Trachtenberg, 1999) that inextricably weaves the dilemma and "interdependence of the ideals of equity and adequacy" (p. 614, note 37) across the spectrum of the *Edgewood* era cases. Most importantly, although equity is paramount in the first two *Edgewood* cases, the historical antecedents of this philosophical conundrum are a constant reminder that Texas policymakers have always retained vestiges of the notion of an adequate and minimum educational opportunity (Yudof & Morgan, 1974), which attains prominence in the later *Edgewood* opinions. First exemplified in the language of House Concurrent Resolution No. 48, which established the Gilmer-Aiken Committee (Kuehlem, n.d.), leading to the development of the state's school finance system, the Texas Legislature stipulated that the Gilmer-Aiken initiative should focus on "obtaining uniform and adequate local support in the financing of an adequate, improved, and uniform school program for Texas" (p. 1). The Gilmer-Aiken Committee's report, *To Have What We Must* (1948), however, demonstrates its own

philosophical and ambiguous struggle as it proposes a system of funding that gives each child "*an equal minimal education opportunity*," (p. 15, as cited by Yudof & Morgan, 1974) to be financed by a dual funding system of state aid and local participation**,** with each district supplementing state aid through an ad valorem tax on property within its jurisdiction, thus exposing weaknesses in its provisions that simultaneously entrenched the existence of hundreds of districts having few students and low ad valorem property tax rates (Yudof & Morgan, 1974), eventually causing the inter-district financial disparities that form the equity arguments decades later in the Texas school finance cases.

The ambivalence in the definitions of the state constitution's Education Clause is particularly evident in the last of the *Edgewood* era cases, shaped by the reinterpretations of the legal precedents established throughout the history of the Texas school finance litigation. In *West Orange-Cove II* (2005), the Texas Supreme Court reversed the earlier judgment of the 250th District Court of Travis County insofar as the lower court said that there was a constitutional violation of the provision requiring that all students be given an opportunity to accomplish a general diffusion of knowledge. In explaining its decision, the state court cited the precedents of its own rulings in the previous *Edgewood* cases, declaring that the constitutional mandate of the Education Clause sets three standards with respect to school finance. The education system, said the court, must be efficient, adequate, and suitable (*West Orange-Cove II* at 752, 753). What the court did not cite, however, were the nuances and redefinitions that have been inserted into the constitutional language of the Education Clause through time and that have transformed the standards into the meanings they have today.

The Standard of Efficiency

The arguments in *Edgewood I* focus on equity as this relates to the first standard of efficiency in accordance with the constitutional provision in the Education Clause, a concept that becomes a recurring theme, with various interpretations and reinterpretations, throughout the *Edgewood* era cases. Coming to a determination of the definition of efficiency and applying that definition to the school finance system has been the most important overall issue in the history of Texas school finance litigation (Kauffman, 2009a).

With respect to efficiency, the unanimous *Edgewood I* (1989) court first notes that gross inequalities cannot exist within an efficient system:

> 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 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 20 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. (*Edgewood I* at 392)

The court reiterates the *Rodriguez* arguments on the disparities between property wealthy and property poor districts:

> 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. (*Edgewood I* at 392, 393)

In countering the contention of the State that the word "efficient" suggested a simple and inexpensive system, the court goes back to the original intent of the term by the 1875 Constitutional Convention delegates, who had mandated an "efficient" and not an "economical," "inexpensive," or "cheap" system (*Edgewood I* at 395). Efficient, the court clarifies, is used in the dictionary sense as being effective and productive of results, with its implied meaning of using resources to produce results with little waste and no change over time (*Edgewood I* at 395). The court cites the testimony of one delegate to show that gross inequalities could not exist within an efficient system:

> Delegate Henry Cline, who first proposed the term "efficient," urged the convention to ensure that sufficient funds would be provided to those districts most in need. … He noted that those with some wealth were already making extravagant provisions for the schooling of their own children and described a public school system in which those funds that had been selfishly been used by the wealthy would be made available for the education of all the children of the state. (S. McKay, *Debates in the constitutional convention of 1875* at 217-18 as cited in *Edgewood I* at 396)

The chair of the education committee at the Constitutional Convention speaks at length on the importance of education as an abstract right for all the people of the state, rich and poor alike, making explicit the connection between equity and democratic principles:

> [Education] must be classed among the abstract rights, based on apparent natural justice, which we individually concede to the State, for the general welfare, when we enter into a great compact as a commonwealth. I boldly assert that it is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State. (*Edgewood I* at 395)

Other delegates recognize the importance of a general diffusion of knowledge among the masses for the preservation of democracy, the prevention of crime, and the growth of the economy (*Edgewood I* at 395). There is also a close correlation between efficiency and the provision of a general diffusion of knowledge:

> We conclude that, in mandating "efficiency," the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. Instead, they stated clearly that the purpose of an efficiency system was to provide for a "*general* diffusion of knowledge." (Emphasis added.) The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency. (*Edgewood I* at 396)

The court in 1989 declares the system unconstitutional with respect to its financial efficiency as well as its efficiency as a way of providing for a general diffusion of knowledge:

> We hold that the state's school financing system is neither financially efficient nor efficient in the sense of providing for a "general diffusion of knowledge" statewide, and therefore it violates article VII, section 1 of the Texas Constitution. Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards. 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. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide. (*Edgewood I* at 397)

In *West Orange-Cove II* (2005), the Texas Supreme Court bypasses the full extent of the definition of efficiency as it appears above in *Edgewood I*, in which efficiency is

connected to the provision of a general diffusion of knowledge statewide, and instead abbreviates and alters the concept that it accepts:

> As applied to public school finance, we added, constitutional efficiency requires that "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" (*Edgewood I* at 397). We have referred to efficiency in the broader sense as "qualitative", [sic] and to efficiency in the context of funding as "financial" (*Edgewood IV* at 729-730). The parties have also referred to financial efficiency as "quantitative." (*West Orange-Cove II* at 752)

Although the court stipulates that the interpretation of the original constitutional mandate requires fiscal neutrality, that is, the level of expenditures per pupil in any district may not vary according to the property wealth of that district but must be based on the wealth of the State as a whole, the court, however, betrays its own ambivalence or perhaps recognizes the political pitfalls of the requirement of perfect fiscal neutrality. Instead, the court indicates that students in different districts should have "substantially" equal access to similar revenues per pupil at similar levels of tax effort, an aspect of the decision that will generate subsequent confusion about the exact meaning of the term and how this applies to the definition of efficiency (Farr & Trachtenberg, 1999). The court nonetheless reiterates its tenuous adherence to democratic principles as it repeats the word "substantially," this time in connecting efficiency to equal educational opportunity:

> 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. (*Edgewood I* at 397)

In the final instance, the adherence to democratic principles prevails as the court acknowledges the implicit link between efficiency and equality:

> Moreover, section 16.001 of the legislatively enacted Education Code expresses the state's policy that "a thorough and efficient system be provided … so that each student … shall have access to programs and services … that are substantially equal to those available to any similar student, notwithstanding varying economic factors." Not only the legislature, but also this court has previously recognized the implicit link that the Texas Constitution establishes between efficiency and equality. (*Edgewood I* at 397)

In its unanimous decision declaring the school finance system unconstitutional, the Texas Supreme Court in *Edgewood II* (1991) analyzes the mandates of Senate Bill 1, which had been enacted by the legislature in 1990, and bases its rejection of the system on the constitutional efficiency precedents it had drawn in *Edgewood I*:

> The legislature's recent efforts have focused primarily on increasing the state's contributions. More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A Band-Aid will not suffice: the system itself must be changed (*Edgewood I* at 397). 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. 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 Legislature 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 State 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." (*Edgewood II* at 496 citing *Edgewood I* at 397)

To maintain constitutional efficiency, the court concludes with the proviso: "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" (*Edgewood II* at 496).

The political backlash and confusion to the Texas Supreme Court unanimous decision declaring the system unconstitutional in *Edgewood II* (1991) was intense, with individuals and special interest groups, especially in wealthier districts, registering their animosity and discontent at what they perceived to be the court's interpretation of equity/efficiency as a gambit to channel the legislature to a redistribution of wealth. In answer to a motion for rehearing in *Edgewood II*, the court abandons its unanimous posture of the previous two decisions in *Edgewood I* and *Edgewood II* and responds largely along partisan lines one month later with a five-to-four supplementary opinion in *Edgewood IIa* (1991) that would have serious repercussions for future school finance litigation, bringing the interpretation of efficiency into uncertainty and implying a retreat from the fiscal neutrality of *Edgewood II* (Farr & Trachtenberg, 1999; Kauffman, 2009a):

> Our Constitution clearly recognizes the distinction between state and local taxes, and the latter are not mere creatures of the former. The provision that "no State ad valorem taxes shall be levied upon any property in this State," (Texas Constitution, Article VIII § 1-e), prohibits the Legislature from merely recharacterizing a local property tax as a "state tax." Article VII, section 3,

> however, states that "the Legislature 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." (Texas Constitution, Article VII, § 3 [emphasis added]). These constitutional provisions mandate that local tax revenue is not subject to state-wide recapture. (*Edgewood IIa* at *4, *5)
>
> This conclusion highlights the basic constitutional distinction between the State's primary obligation and the local districts' secondary contributions. The current system remains unconstitutional not because any unequalized local supplementation is employed, but because the State 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" (Texas Constitution, Article VII § 1). Once the Legislature provides an efficient system in compliance with article VII, section 1, it may, so long as efficiency is maintained, authorize local school districts to supplement their educational resources if local property owners approve an additional local property tax. (*Edgewood IIa* at *5, *6)

The Standard of Adequacy

While equity/efficiency is the focus of the interpretation of the constitutional provision of Article VII, Section 1 in *Edgewood I* (1989), the second standard of adequacy, which becomes an integral part of the redefinition of the Education Clause by the time the *West Orange-Cove II* (2005) opinion is written, begins its nascent stirrings in the language of *Edgewood I*, in effect acting as a faint reminder of the historical philosophical heritage of the minimum and adequate education of the Gilmer-Aiken era of 1947-49:

> Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. (*Edgewood I* at 393)

No one inherits the theoretical mantel of the Gilmer-Aiken legislation more than Former Texas Supreme Court Justice John Cornyn, who, bolstered by philosophical and scholarly trends that favored adequacy arguments in school finance challenges during the early 1990s (Hanushek, Summer 1991; Walker, 1990-1991), almost singlehandedly redefines the issues that were being debated in Texas with respect to the constitutional provisions of the Education Clause and succeeds in bringing the notion of adequacy into central relief in school finance debates, filtering the constitutional mandate through an idiosyncratic lens and altering the definitions of efficiency and a general diffusion of knowledge. Cornyn, who becomes a Texas Supreme Court justice after the decision on *Edgewood II* (1991), inserts the concept of adequacy in a concurring and dissenting opinion that he writes in *Edgewood III* (1992), which redefines the previous interpretations of efficiency in the Education Clause, rejects the precedents on the importance of equity in the previous *Edgewood* cases, and after the fact challenges the unanimous decision in *Edgewood I* that said that the amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered to that student (Farr & Trachtenberg, 1999; Kauffman, 2009a).

Cornyn's new efficiency focus is on educational results:

> In other words, we implied – but did not expressly state – that the Constitution 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. Further, implicit in the concept of an efficient school system is the idea that the output of the system should meet certain minimum standards – it should provide a minimally "adequate" education. This was directly addressed in *Edgewood I*, when a unanimous court held: efficient conveys the meaning of effective or productive of results and connotes the use of resources so

> as to produce results with little waste. (*Edgewood III* at 114 citing *Edgewood I* at 395)
>
> Since this state-court litigation began in 1984, equitable funding for our public schools has dominated our three opinions and the ensuing legislative debate. Only in passing has the *quality* of the public education system in Texas been address. Yet our system of public education languishes in mediocrity with no improvement in sight. If education achievement, by constitutional means, is not the *solitary goal* of our system of public education, there is a different battle being waged in the name of public education from that which has been generally argued and popularly assumed. Equitable funding can only be one means to that end. An "efficient" education requires more than elimination of gross disparities in funding; it requires the inculcation of essential level of learning by which each child in Texas is enabled to live a full and productive life in an increasingly complex world. (*Edgewood III* at 525, 526)
>
> In the rough and tumble of another attempt to resolve this crisis, it is fundamentally important that the legislature be mindful of all of the elements of the efficiency standard we announced in *Edgewood I*. That standard deals with more than money, it mandates educational results. (*Edgewood III* at 526)
>
> A focus on results is required by this court's opinions in *Edgewood I* and *Edgewood II* and requires the legislature to articulate the requirements of an efficient school system in terms of educational results, not just in terms of funding. (*Edgewood III* at 527).
>
> Other states have struggled, successfully, with similar constitutional mandates for "efficient" schools. The example of other states points to the need for the legislature to clearly define, and then fund, a minimally adequate education for all Texas school children. (*Edgewood III* at 527)

Referring to language in *Edgewood II* that indicated that the legislature may constitutionally authorize school districts to generate and spend local taxes to enrich or supplement an efficient system, Cornyn concludes:

> The Constitution does permit such enrichment, without equalization … (*Edgewood II* at 499). In other words, we implied – but did not expressly state – that the Constitution 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. Further, implicit in the concept of an efficient school system is the idea that the output of the system

> should meet certain minimum standards – it should provide a minimally "adequate" education. (*Edgewood III* at 527)

Cornyn disputes the notion of equal educational opportunity as a fundamental right, an issue that he said was "studiously avoided by the Texas Supreme Court in *Edgewood I* and not even mentioned in *Edgewood II* and *Edgewood IIa"* (*Edgewood III* at 528):

> Fiscal input alone offers no guarantee of a quality education. This is because pure "equality of input" requirements do not require a positive correlation between dollars spent (input) and quality of education realized (output). A school system where so few children demonstrate mastery of basic educational skills cannot be constitutionally efficient, no matter what level of funding is provided. Elimination of gross funding disparities alone will not result in an efficient school system. (*Edgewood III* at 529)

Citing studies by Hanushek (Summer 1991) and making reference to adequacy arguments in school finance cases in other parts of the country, Cornyn says that "most educational experts agree that there is no direct correlation between money and educational achievement" (*Edgewood III* at 530) and concludes that "any correlation between funding and education results is tenuous at best" (*Edgewood III* at 531). He is adamant in his posture that the notion of equality had not been and should not be incorporated into the definition of efficiency:

> Justice Cornyn, however, used results-oriented language as a shield, working against the expressed goals of the plaintiffs, in order to thwart the move towards equalization of access to funding. In parroting the "money doesn't matter" argument, made throughout the *Edgewood* saga by the wealthy school districts, Cornyn undermined the conceptual basis of the prior opinions. Those opinions sought to reduce the gross disparities in access to funding among school districts, leaving only disparities that stem from a district's tax effort rather than the size of its tax base. (Farr & Trachtenberg, 1999, p. 670)

In writing the majority's opinion declaring the constitutionality of the finance system, Cornyn completely reconfigures the constitutional provision of efficiency in *Edgewood IV* (1995) by incorporating previous references about adequacy and local enrichment into the new definition of efficiency. In his redefinition, Cornyn overlooks the court's references to a substantially equal access, "a standard that could tolerate minor variations in access to revenue." Although no court had previously defined the meaning of the Education Clause with respect to the provision of a general diffusion of knowledge, Cornyn connected the accountability system in Senate Bill 7 to this specific provision in Article VII, Section 1 of the Texas Constitution (Farr & Trachtenberg, 1999, pp. 691-695):

> In *Edgewood I*, this Court held that the school finance system was unconstitutional because it was "neither financially efficient nor efficient in the sense of providing for a 'general diffusion of knowledge' statewide" (*Edgewood I* at 397). While we considered the financial component of efficiency to be implicit in the Constitution's mandate, the qualitative component is explicit.... (*Edgewood IV* at *15)
>
> Because of the vast disparities in access to revenue at the time *Edgewood I* was decided, we did not decide whether the State had satisfied its constitutional duty to suitably provide for a general diffusion of knowledge. We focused instead on the meaning of financial efficiency…. (*Edgewood IV* at *15, *16)
>
> We addressed the issue of unequalized local supplementation on motion for rehearing in *Edgewood II*. In that case, we held that the Constitution permits school districts to generate and spend local taxes to enrich or supplement an efficient system, and that such enrichment need not be equalized…. (*Edgewood IV* at *16 citing *Edgewood II* at 499)
>
> Once the Legislature provides an efficient system in compliance with article VII, section 1, it may, so long as efficiency is maintained, authorize local school districts to supplement their education resources if local property owners approve an additional local property tax…. (*Edgewood IV* at *17 citing *Edgewood* II at 500)

> The district court viewed efficiency as synonymous with equity, meaning that districts must have substantially equal revenue for substantially equal tax effort *at all levels of funding*. This interpretation ignores our holding in *Edgewood II* that unequalized local supplementation is not constitutionally prohibited. The effect of this "equity at all levels" theory of efficiency is to "level-down" the quality of our public school system, a consequence which is universally regarded as undesirable from an educational perspective. Under this theory, it would be constitutional for the Legislature to limit all districts to a funding level of $500 per student as long as there was equal access to this $500 per student, *even if* $3500 per student were required for a general diffusion of knowledge…. (*Edgewood IV* at *18)
>
> In Senate Bill 7, the Legislature equates the provision of a "general diffusion of knowledge" with the provision of an accredited education. The accountability regime set forth in Chapter 35, we conclude, meets the Legislature's constitutional obligation to provide for a general diffusion of knowledge statewide…. (*Edgewood IV* at *18)
>
> This is not to say that the Legislature 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 Legislature certainly has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds. (*Edgewood IV* at *18)

Cornyn concludes his argument by clarifying that the previous requirements of financial efficiency are specifically connected to the legislatively defined level that achieves a general diffusion of knowledge. For Cornyn, this was: "Under the system established by the Legislature in Senate Bill 7, this means that each district must have substantially equal access to the funds necessary to provide an accredited education" (*Edgewood IV* at *19, Footnote 9):

> *Edgewood I* and *Edgewood II* also require financial efficiency; that is, districts must have substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge. 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. (*Edgewood IV* at *19)

Cornyn's new constitutional standard of adequacy is evident in subsequent Texas Supreme Court opinions:

> First, the education must be adequate, that is, the public school system must accomplish that 'general diffusion of knowledge' … essential to the preservation of the liberties and rights of the people. (*West Orange-Cove I* at 563)

> Another standard set by the constitutional provision is that public education achieve "[a] general diffusion of knowledge … essential to the preservation of the liberties and rights of the people" (Texas Constitution, Article VII, § 1). We have labeled this standard "adequacy" (*West Orange-Cove I* at 563), and the parties have adopted the same convention. The label is simply shorthand for the requirement that public education accomplish a general diffusion of knowledge. In this context, the word "adequate" does not carry its broader dictionary meaning: "commensurate in fitness; equal or amounting to what is required; fully sufficient, suitable, or fitting" (The Oxford English Dictionary 150, 2d ed. 1989). Our responsibility in this case is limited to determining whether the public education system is "adequate" in the constitutional sense, not the dictionary sense. That is, we must decide only whether public education is achieving the general diffusion of knowledge the Constitution requires. (*West Orange-Cove II* at 753)

From the earlier definitions of efficiency in *Edgewood I* (1989), the court in *West Orange-Cove I* (2003) and *West Orange-Cove II* (2005) revises the constitutional standard of efficiency, limits the concept to equivalent access to revenue only up to a point, introduces the ideas of supplementation and enrichment, and links efficiency to the concept of adequacy:

> [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. (*West Orange-Cove II* at 746, 791, quoting *West Orange-Cove I* at 558, 566)

The court in *West Orange-Cove II* (2005) agrees with the district court's conclusion 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, but adds an important caveat, injecting a standard of reasonableness that considerably weakens the constitutional provision (Kauffman, 2009a):

> 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." Texas Education Code §4.00(a) (emphasis added). 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." Texas Education Code §28.001 (emphasis added) ….
>
> 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. (*West Orange-Cove II* at 787)

Although the court in *West Orange-Cove II* finds the school finance system to be constitutional with respect to Article VII, Section I, it nonetheless acknowledges the system's precarious situation as this relates to issues of equity and adequacy:

> 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. (*West Orange-Cove II*, 2005 at 789)

Most importantly, the court warns:

> 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 the change take the form of increased funding, improved efficiencies, or better methods of education. (*West Orange-Cove II*, 2005 at 790)

The court, however, makes clear that constitutional efficiency does not necessarily require absolute equality of spending, effectively continuing past financial disparities for those districts having large enrollments of poor and disadvantaged children that may not necessarily be able to supplement and enrich their schools (*West Orange-Cove II* at 790, 791 citing *Edgewood I* at 398). Finally, the court connects the constitutional standard to results and in the final analysis to how money affects better-educated students:

> The State defendants contend that the district court focused too much on "inputs" to the public education system – that is, available resources. They argue that whether a general diffusion of knowledge has been accomplished depends entirely on "outputs" – the results of the educational process measured in student achievement. We agree that the constitutional standard is plainly result-oriented. It creates no duty to fund public education at any level other than what is required to achieve a general diffusion of knowledge. While the end-product of public education is related to the resources available for its use, the relationship is neither simple nor direct; public education can and often does improve with greater resources, just as it struggles when resources are withheld, but more money does not guarantee better schools or more educated students. To determine whether the system as a whole is providing for a general diffusion of knowledge, it is useful to consider how funding levels and mechanisms relate to better-educated students. (*West Orange-Cove II* at 788)

The Standard of Suitability

The third constitutional standard of suitability in Article VII, Section 1, is reviewed by the Texas Supreme Court in *Edgewood IV* (1995), which rejects all arguments and declares the constitutionality of the provisions in Senate Bill 7. The bill, whose central funding mechanism was the $280,000-per-student cap on a district's taxable property, allowed the state to tap the taxable reservoirs in property-rich districts and thus rectified the discrepancies that occurred between property-rich districts that taxed low and property-poor districts that taxed high. While the property-poor districts in the *Edgewood IV* litigation focused their claims on efficiency problems: the disparities in districts' access to revenue under Senate Bill 7, the property-wealthy districts emphasized revenue: the mechanism through which Senate Bill 7 provides the funds to achieve efficiency. The cap, the property-wealthy districts argued, was in violation of the constitutional provision of suitability. The court stipulates the ambiguity in the term:

> The word "suitable," used in connection with the word "provision" in this section of the Constitution, is an elastic term, depending upon the necessities of changing times or conditions, and clearly leave to the Legislature the right to determine what is suitable, and its determination will not be reviewed by the courts if the act has a real relation to the subject and object of the Constitution. (*Edgewood IV* at *40)

In the final instance, the court defines the concept of suitability:

> Certainly, if the Legislature 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. The present record, however, does not reflect any such abdication. Total state aid has risen dramatically since 1988-89, from $4.9 billion to over $7 billion; and while the wealthiest districts are now receiving substantially less from the State than in 1988-89, total state and local revenue has grown significantly for all districts. Given these facts, we hold that

> the Legislature has not violated its constitutional duty to make "suitable provision" for the public school system. (*Edgewood IV* at *42, *43)

By *West Orange-Cove II* (2005), however, the suitable provision undergoes the redefinition of the other constitutional standards:

> In essence, "suitable provision" requires that the public school system be structured, operated, and funded so that it can accomplish its purpose for all Texas children. Article VII, section 1, makes it "the duty of the Legislature" to provide for public education. The judiciary's role, though important, is limited to ensuring that the constitutional standards are met. We do not prescribe *how* the standards should be met. (*West Orange-Cove II* at 753)

The court separates the dictionary definition of suitable as applied to adequate/general diffusion of knowledge, indicating that suitability is not merely redundant of the other two concepts:

> The district court concluded that the public education system is not "suitable" as required by article VII, section 1 for the same reason it concluded that the system is inadequate and inefficient, that is, because the funding is insufficient. Neither the court nor the parties have differentiated suitability from the constitutional standards of adequacy and efficiency, but the requirement of suitability is not merely redundant of the other two. Rather, it refers specifically to the means chosen to achieve an adequate education through an efficient system. For example, we indicated in our prior opinion in this case that if the funding system were efficient so that districts had substantially equal access to it, and the education system was adequate to provide for a general diffusion of knowledge, but districts were not actually required to provide an adequate education, "the Legislature's use of districts to discharge its constitutional duty would not be suitable, since the Legislature would have employed a means that need not achieve its end" (*West Orange-Cove I* at 584). In *Edgewood IV*, the property-rich districts argued that the State's heavy reliance on local tax revenue was unsuitable (*Edgewood IV* at *43). We rejected the argument, not because it misinterpreted the standard, but because the reliance on local revenue does not prevent the system from providing a general diffusion of knowledge. (*West Orange-Cove II* at 793, 794)

The ambiguous nature of the court's pronouncement concludes in weakening the standard of suitability:

> Neither the structure nor the operation of the funding system prevents it from efficiently accomplishing a general diffusion of knowledge. The State may discharge its duty to make suitable provision for free public schools through school districts by relying on local tax revenues, even as heavily as it now does. Such reliance, especially given the multitude and diversity of school districts, inevitably makes it difficult to achieve efficiency because of the vast disparities in local property wealth, but efficiency is not impossible. We have suggested that these difficulties might be avoided by fundamental changes in the structure of the system, but the possibility of improvement does not render the present system unsuitable for adequately and efficiently providing a public education. Accordingly, we conclude that the system does not violate the constitutional requirement of suitability. (*West Orange-Cove II* at 794)

Accountability in Texas

If the judiciary, legislative, and statutory reforms of the *Edgewood* era left some of its student populations lagging in the equity of education they were receiving, the state, nonetheless, struggled to fulfill its new adequacy mandates by placing itself at the forefront of instituting stringent accountability practices linked to the assessment and accreditation of schools and districts based on the high-stakes testing and measurement of student achievement progress. While the accountability regimes have been controversial since they were first stipulated in Senate Bill 7 (1993) and in the revisions of Chapter 35 of the Texas Education Code (1995), the political and scholarly discourse grew more vocal in the years leading up to the passage in 2002 of the No Child Left Behind Act (NCLB) of 2001, with researchers offering a wide spectrum of conflicting and contradictory empirical evidence and opinion on the virtues and pitfalls of accountability reforms (Carnoy, Loeb, & Smith, 2003; Heilig & Darling-Hammond, 2007; McNeil & Valenzuela, 2001; Scheurich & Skrla, 2001; Scheurich, Skrla, & Johnson, 2000; Skrla & Scheurich, 2003a, 2003b; Valencia, Valenzuela, Sloan, & Foley, 2001, p. 33; Valenzuela,

2005). While some scholars say that accountability requirements, including tests, improve equity, others charge that these mandates unfairly disadvantage low-income and minority students, leading to a variety of new inequalities. A central concern focuses on whether single test scores, are valid measures of adequacy in considering student achievement, retention, promotion, graduation, and teacher and school accountability.

The Contested Terrain

In their report on the subject, Scheurich et al (2000) acknowledge the problems with state accountability systems, indicating that there is evidence that these practices "both increase and decrease equity" (p. 293); but caution that care should be taken in "totally rejecting the equity possibilities of these accountability systems based on any particular set of data" (p. 294). In their opinion, the systems are too complex and dynamic to reach any simple and generalized conclusions. Regardless of the vantage point on whether or not accountability systems may or may not be flawed, Scheurich et al maintain that three possibilities have emerged that "provide us with a historic opportunity to permanently alter the norm for success with low-income children of all races" (p. 299). The authors' historical possibilities thesis centers on "the high level of public attention that is being paid to the public schools' lack of success with low-income children and children of color" (p. 294-95); the "major public commitment to high academic performance for all races and socioeconomic classes of students by both major U. S. political parties and their candidates for President" (p. 295); and "the substantially improved academic success of children of color and low-income students and the

substantially improved equity in some schools and districts in some states" (p. 295).

While Valencia et al (2001) , like Scheurich and his colleagues (2000), acknowledge that schools and educators have posted a miserable academic record with the large majority of low-income children and children of color, they take the latter to task on their historical possibilities thesis, claiming that students of color have been the subject of interest for decades, "even as the denial of educational equality and subsequent school failure for many of these students have persisted" (p. 319):

> Over the years, numerous white scholars and scholars of color have written about the plight and struggle of students of color. Yet the implications of their research for the improvement of schooling for minority students have often been disregarded by policy makers and the courts. (p. 319)

Valencia et al (2001) also agree that political discourse generally supports high academic performance for all students, yet they caution that campaign rhetoric should not be confused with commitment to the issue:

> One would be hard pressed to find an instance in the recent history of U. S. politics when *either* major political party – or *either* major candidate for President – did not support efforts to promote high academic performance for all students. (p. 319)

> Rather than place our faith in test-centric systems of accountability to 'leverage' more equitable, higher-quality education for all students, as do Scheurich and his colleagues, we believe that there are proven means that are less top-down in nature and do not lead to reductionist models of teaching and learning. For example, issues of class size, school size, and teacher quality have been shown to correlate with higher academic achievement, especially among low-income students of color. (p. 319)

With respect to the contention that the current model of accountability has improved academic success and equity, Valencia et al (2001) agree that pass rates on the Texas Assessment of Academic Skills (TAAS) test have improved for some students but

maintain that the examples offered by Scheurich et al (2000) are minor compared with the preponderance of the problem in Texas schools: "To support this assertion, they [Scheurich et al] draw heavily on their work with just 30 school districts in Texas – a minuscule percentage (2.9%) of Texas' 1,041 school districts" (p. 319).

Valencia et al (2001) posit that the Texas accountability system, with its primary focus on the high-stakes TAAS, is fundamentally flawed:

> It is a top-down, remote-control system that works against parents, children, and teachers. The system favors policy makers, the Texas Education Agency, and school administrators. Most important, the driver of Texas' accountability system, TAAS, is high-stakes testing at its worst. African-American and Mexican American students, in particular, are being adversely affected, as shown by increased drop-out and retention rates, less challenging curricula, and pernicious labeling effects that have their source in 'public report cards' of school ratings. (p. 321)

Instead, Valencia and his colleagues (2001) advocate an accountability model that is based on a tripartite structure: "1) *input* (the adequacy of resources), 2) *process* (the quality of instruction), and 3) *output* (what students have learned as measured by tests and other indicators)" (p. 321). To bolster their rationale, the authors cite the expert testimony of José Cárdenas, a witness in the *Rodriguez* case and founder in 1973 of the Intercultural Development Research Association (IDRA), an independent, private non-profit organization dedicated to the advocacy for the rights of all students to equality of educational opportunity. Cárdenas' comments form a part of the litigation challenging accountability and equity practices in *American G. I. Forum and Image de Tejas v. Texas Education Agency et al* (2000):

> Since neither input, process, nor output has proved to be adequate in evaluating student-teacher performance, where should the focus be placed? The obvious

> answer is the distribution of evaluation among all three. None of the three can be utilized without consideration of the other two. Past and present failures in evaluation cannot be attributed to the use of any of the three phases. The failure can be attributed to the focus on one of the three phases to the exclusion of the other two. (p. 321)

Although Valencia et al (2001) cite the testimony on *American G.I. Forum and Image de Tejas v. Texas Education Agency* in presenting their position on accountability, the court's decision in the litigation did nothing to dispel the concerns of these and other reformers with respect to the Texas accountability system as it currently existed at that time (McNeil, 2000). The plaintiffs in the case challenged the use of the TAAS examination, claiming that the test unfairly discriminated against minority students and violated their right to due process as stipulated in the Due Process Clause of the U. S. Constitution and 34 C.F.R. Section 100.3, an implementing regulation to Title VI of the Civil Rights Act of 1964. The plaintiffs' contention was that the statewide accountability system adversely affected students of color since the diploma denial rate for students of color due to failure to pass an exit exam was twice that for white students. The plaintiffs asked the court to issue an injunction preventing the Texas Education Agency (TEA) from using failure of the exit-level TAAS test as a basis for denying high school diplomas. McNeil testified for the plaintiffs:

> My testimony focused on the ways the TAAS system of testing is reducing the quality and quantity of what is being taught. …. The TAAS is not just a test of students. It is the key indicator used in an administrative accountability system on which school administrators at all levels are judged and rewarded (or sanctioned). In the district where I live, principals were forced to give up tenure; they subsequently signed 'performance contracts.' The main performance indicator on which their continued employment depends is their school building's TAAS scores. These scores are averaged across the grades but disaggregated by race/ethnicity (African American, Latino, and White). The principal's

> employment depends on building-level scores. The myth that surrounds these building-level scores is that their disaggregation by race/ethnicity means that Texas schools are ahead of the rest of the country in improving the education of its historically underserved populations.
>
> The reality plays out quite differently. Historically, huge gaps in funding, in the placement of certified teachers, and in the placement of academically rich curricular programs have resulted in lower academic performance for African American and Latino children in the state's public schools/ (pp. 515-516)

As articulated by TEA, the defendants' testimony indicated that the goals of the implementation of the TAAS test were to hold schools, students, and teachers accountable for education as well as to ensure that all Texas students received the same adequate learning opportunities. TEA demonstrated an educational necessity for the test and showed that the stated goals of the test were within the legitimate exercise of the state's power over public education. TEA also gave adequate notice of the consequences of the test and ensured that the test was strongly correlated to material taught in the classroom. The court upheld TEA's position and allowed the use of an exit exam for graduation. The court said the TAAS exam did not have an impermissible adverse impact on minority students. Additionally, the court indicated that the test did not violate the students' procedural or substantive due process rights, declaring that the TAAS was an educational necessity, was within educational norms, and did not perpetuate prior educational discrimination. The court also ruled that the plaintiffs had failed to identify equally effective alternatives.

No Child Left Behind

The accountability reforms in Texas, together with those in Kentucky and Maryland, served as the model for the accountability structure devised for NCLB (2001) (Stecher, Hamilton, & Gonzalez, 2003), with its centerpiece of mandates requiring that assessment results and state progress objectives be based on race and class disaggregation, increasing the pressure on school districts throughout the country to use student achievement test data to show improvements in student learning. From the perspective of critics, the enactment of the NCLB initiative further exacerbated the test-taking dilemma for poor and minority students. Touted as a departure from previous changes instituted in public schools, the NCLB reform places test-based accountability as its centerpiece. Stecher et al (2003) indicate that past reforms focused on resources and practices rather than holding educators responsible for student learning. Consequently, accountability advocates ascribe the failure of these past reforms to the lack of personal or collective responsibility for how much students learn:

> Pointing to successful private-sector management practices as a model, accountability advocates contend that student achievement will improve when educators are judged in terms of student performance and when these judgments carry some consequences for educators. (pp. 2-3)

NCLB's accountability, Stecher et al continue, base its approach on a system of rewards or punishments for schools and school staff depending on student scores on achievement tests, calling for greater accountability for student performance, increased local control and flexibility, high-quality teachers using scientifically based practices, and expanded options for parents:

> Greater accountability comes in the forms of increasing goals for student achievement and escalating incentives for schools and districts based on student achievement. NCLB requires that, by 2014, all students be proficient in reading and mathematics. Schools and districts must make *adequate yearly progress* (AYP) toward meeting the targets. (p. 7)

In this initial configuration, Stecher et al conclude, most of the sanctions penalize Title I schools, those campuses with low-income students that are eligible for extra federal resources under the Elementary and Secondary Education Act (ESEA)/NCLB. The law, which applies to all public K-12 schools and charters, does not define AYP but leaves it to the individual states to do this. NCLB also institutes minimum standards for teacher quality and for the qualifications of instructional aides, requires the use of scientifically based practices to promote student achievement, mandates that schools notify parents annually about teacher qualifications, and gives parents authority to request supplemental educational services and to transfer their children from schools that repeatedly fail to make progress to schools that are successful.

While the controversy over high-stakes testing continues in Texas, other researchers demonstrate the dilemma that some districts face in adhering to present-day accountability practices in the state. Heilig and Darling-Hammond (2007) say that results on the effects of high-stakes testing are mixed, with some studies suggesting that "students and schools make achievement gains in contexts where tests are used for decision making, while others find no improvement or even negative consequences":

> Among these unintended outcomes are school strategies to 'game the system' by adjusting the testing pool through student placements, admissions, and policies. Also of concern are the ways in which stakes attached to tests can corrupt what the tests measure, making outcomes non-generalizable to other achievements measures or kinds of learning. (p. 4)

In their research in a large Texas urban school district examining the relationship of longitudinal student progress and achievement in an environment of changing policy incentives, Heilig and Darling-Hammond found that "evidence on the effects of high-stakes testing and accountability policies on school responses suggests that high-stakes testing systems that reward or sanction schools based on average student scores may create incentives for schools to boost scores by manipulating the population of students taking the test" (p. 10), a situation that has especially deleterious effects for poor and disadvantaged minority students.

The STAAR System

The volatility of the accountability debates is exacerbated in the current period due to the perceptions on the part of school district administrators, teachers, parents, and students that they are being inundated by a pedagogical approach with an over reliance on high-stakes tests, some of dubious quality; the elevated cost of testing implementation that has turned the companies responsible for assessment regimes into multimillion dollar corporations in a time of severe educational budgetary constraints; and the increasingly stringent assessment demands that legislators are mandating in the hopes of better preparing students for a competitive future. The increased pressure felt by school districts is also reflected in the language of the pending lawsuits that have been filed against the state.

In addition to the assessment requirements mandated by the federal No Child Left Behind (NCLB), Texas began in spring 2012 the initial implementation of a new

accountability system, the State Assessments of Academic Readiness (STAAR™), the more rigorous expansion of testing and accountability that replaces the previously-administered Texas Assessment of Knowledge and Skills (TAKS), which up to now has been the largest statewide educational testing program in the country. STAAR is a component of the enactments included in Senate Bill 1031 (80th Texas Legislature, 2007) and House Bill 3 (81st Texas Legislature, 2009), that has added to the complexity of the burdens placed on schools and that has partly contributed to the climate of discontent precipitating the pending challenges to the school finance structure.

The new STAAR system changes curriculum and graduation requirements at the same time that it adds new performance ratings for Texas public schools and includes a plethora of tests, including those required by the state, others mandated by the federal government, and still others imposed by a combination of both state and federal enactments. STAAR is designed to increase college and career readiness of graduating high school students; institute federal requirements for assessment and accountability; promote accreditation, sanctions and interventions, including school closures and alternative management options; and enhance financial accountability. Under STAAR, students in grades 9 through 12 must take 12 end-of-course exams (EOC) rather than the previous 4 TAKS tests. These new EOC tests will account for 15 percent of a student's final grade and will be taken in Algebra I and II and geometry; English I, II, and III; world geography; U. S. and world history; and biology, chemistry, and physics. The new regime also multiplies the number of standardized tests that students must take for grades 3 through 8 (Texas Education Agency, 2012b).

While school district officials are saying that they welcome the new advances in accountability, they decry the loss of funds that have placed their schools and students in jeopardy (*Fort Bend Independent School District v. Scott*, December 22, 2011). The standardized testing of STAAR is predicted to be especially heinous for districts having higher enrollments of disadvantaged and at-risk students. Comparison scores for the new preliminary end-of-course exams indicate only 57 percent of participating students received minimum passing scores on the 2010 Algebra I exam, which included 45 percent of economically disadvantaged students as opposed to 70 percent of non-economically disadvantaged and 21 percent of English Language Learners (ELL) contrasted with 60 percent non-ELL (*Edgewood Independent School District v. Scott*, December 13, 2011). Other school administrators lament that the new accountability system comes at a time when funding cuts have been especially severe and have eliminated special grant programs, such as after-school tutoring and dropout prevention, which generally target and enhance the achievement levels and test-taking capabilities of at-risk students (*Calhoun County Independent School District v. Scott*, December 9, 2011).

The designer of the new STAAR accountability system is Pearson's Assessment and Information Group, a division of Pearson Education Inc., the world's largest provider of textbooks and education materials, technology and data management, professional development programs, testing systems, GED exams, and student remedial-learning products, among other services. Pearson is a component of Pearson PLC, a London-based media conglomerate that owns the *Financial Times*, Penguin Books, Prentice Hall, and

Pearson Longman. Most importantly, Pearson is seen as a dominant force in the business of educating American children. In Texas, Pearson's influence has spanned decades and includes the hiring of a cadre of elite lobbyists who advocate for legislation that may determine the number of tests that Texas public school students will take. During the 82nd Session of the Texas Legislature in 2011, Pearson lobbyist Sandy Kress testified at a House Public Education Committee hearing against House Bill 500, which would have decreased accountability standards, including the requirement that 9th grade students in the recommended high school program achieve a certain cumulative score on 12 end-of-course exams in each of the four core subject areas. Had House Bill 500 passed, it would have significantly reduced the number of new STAAR tests that Texas public school students would have to take. The bill did not pass (Rapoport, September 6, 2011). Texas Education Agency contract awards to Pearson include $90.7 million for STAAR costs in 2010-11 (J. Smith, March 28, 2012); $468.4 million in 2010 for a five-year extension of its contract to operate the testing program in Texas; $279 million in 2005 for a five-year contract (AustInnnovation, June 24, 2010); $88 million in 2009; $8.8 million in 2006 through 2011 for summer remediation study guides; $160 million in 2005 for five years; and $47.45 million in 2000 for five years (Austin American-Statesman, March 19, 2009).

State Board of Education member George Clayton, an employee of the Dallas Independent School District, reports that mandated common assessments connected to the state exam are required to be given every two weeks in many school districts, with a school with 1,500 students and four core subject areas taking 108,000 tests, which can include standardized tests, district benchmark tests, district mid-and-end-of-year tests,

tests warranted by the teacher's actual lessons, and tests that target student immigrant populations (Jones, February 14, 2012). In 2002-03, the Texas Education Agency administered 60 separate standardized tests; in 2009 that number had grown to 138 (Austin American-Statesman, March 19, 2009).

The backlash to the implementation of testing and STAAR has been so intense and has generated such an outcry from school administrators, legislators, teachers, parents, and other stakeholders that it prompted the unprecedented criticism on the issue of testing from Commissioner of Education Robert Scott, who said at a Texas State Board of Education hearing that the state testing system has become a "perversion of its original intent," adding that the "assessment and accountability regime has become not only a cottage industry but a military-industrial complex" (Jones, February 2, 2012; Strauss, February 7, 2012; Texas State Board of Education, January 26, 2012). Scott, a Governor Rick Perry appointee, who has long been a strong advocate of accountability measures, repeated his comments a few days later in his address to 4,000 school officials at the 2012 annual midwinter conference of the Texas Association of School Administrators, pointing out that he was frustrated by his "complicitness" in the bureaucracy that has subjected schools to testing and accountability systems (M. Smith, January 31, 2012). In the middle of the mainstream and social media firestorm that his remarks created and responding to the statewide pressure from all levels of the education community, Scott issued a letter a few weeks later modifying the House Bill 3 Transition Plan on STAAR and giving districts the option of delaying from 2011-12 to 2012-13 the mandate that end-of-course exams count for 15 percent of a student's grade (Texas

Education Agency, February 22, 2012). Scott, the fourth-longest serving commissioner in Texas Education Agency (TEA) history, announced his resignation on May 1, effective July 2 (Texas Education Agency, 2012a).

CHAPTER 6

TEXAS AT THE CROSSROADS

This chapter analyzes the critical factors that have contributed to the current state of crisis in the school finance structure in Texas and examines the pending litigation before the courts as an outgrowth of those factors and as a culmination of the imbalances in the system that either have never been addressed in previous cycles of reform or that have made the finance structure far worse as a result of the post *West Orange-Cove II* (2005) legislative enactments. The chapter also looks at the subject of school finance reform, broadly defined, and includes a discussion of the tension and disconnect that exists between the aspirations that people have about policies instituting educational reform and the slowness with which actual changes in education translate into practice. In school finance in Texas, with its constant cyclical proliferation of litigation and subsequent attempts at reform policies and initiatives, the process is filled with uncertainty and ambiguity, making it that much more difficult for policymakers to undertake serious and lasting reform.

A Finance System in Crisis

When the Special Session of the 82nd Texas Legislature in 2011 passed Senate Bill 1, calling for $5.4 billion in unprecedented reductions in education funding for the 2012-2013 biennium, lawmakers anticipated the serious repercussions that their votes would have, including the inevitability of the lawsuits challenging the school finance

structure that had been brewing for several years in the minds of educators and their legal advisors. In enacting the budgetary cuts, the legislature "has effectively failed to fund student enrollment growth for the first time in 60 years" (*Calhoun County Independent School District v. Scott*, December 9, 2011) and brought an already overburdened finance system to a crisis point. The reverberations to the funding cuts have been felt across a broad spectrum of those most involved with the task of educating Texas students, causing a depletion of revenues for Texas districts seeking to provide rising enrollments of students with an equitable and adequate education. Texas school districts and charter schools in 2011-12 were forced to end grant programs targeting at-risk students and terminate the contracts of approximately 25,000 fewer employees, a number that reflects a 3.8 percent decrease in administrators, teachers, and other support staff than those employed during the 2010-2011 school year. Teachers have been reduced by approximately 11,000, or 3.2 percent (Murphy & Smith, March 8, 2012). Instead of advancing the cause of public school education and raising the rating of the state from its listing at well below the national average in per-pupil expenditures, the counterproductive budgetary measures placed in jeopardy any recent achievement gains the state has had in student outcomes (*Calhoun County Independent School District v. Scott*, December 9, 2011).

Because of funding formulas such as cost of education index, certain other adjustments, and Chapter 41 hold harmless provisions that place constraints on the revenue available to school districts, the equity gaps in the current school finance system have increased to their highest levels since the early 1990s, precipitating controversies

among school administrators and legislators. The discrepancies in 2010-11 in funding availability have been greater for lower wealth districts that tax themselves at the highest allowable rates than for higher wealth districts that tax themselves at lower rates (*The Texas Taxpayer & Funding Coalition v. Scott*, October 10, 2011). The inequities are evident throughout the state, even for districts that are taxing themselves at the same tax rate. Adjusted target revenue for 542 districts with a compressed M&O rate of $1.00 ranged from $3,892 to $12,418 per WADA (Texas Taxpayers and Research Association, January, 2012).

Another area that has brought the school finance system to a crisis level is the increasing debate on the disparities of revenue available to districts, relative to the state's accountability ratings. Although the debate of the correlation between average student spending and achievement is far from settled, a 2010-11 report from the Texas Education Agency (TEA) reflects the differences between the funds districts receive and the rankings they are given under the Texas accountability system. The report, presented at a Texas House Public Education Committee hearing by David Anderson, lead counsel for TEA, at the request of Representative Scott Hochberg, vice chair of the committee, shows that the lower the per pupil spending per weighted average daily attendance (WADA), the lower the ranking of the school district:

- Exemplary Districts: $6,580 per WADA
- Recognized Districts: $5,751 per WADA
- Acceptable Districts: $5,662 per WADA
- Unacceptable Districts: $5,538 per WADA

TEA's position is that the discrepancy of $1,042 between the highest-ranked district and the lowest in such a simplified listing does not necessarily show cause-and-effect, but it nonetheless led Hochberg, Democrat of Houston and a leading authority on school finance, to comment further that districts rated exemplary had 17 percent disadvantaged students, while unacceptable districts had 85 percent. The debate on the correlation between per-student spending and accountability ratings was intensified along partisan lines in a social media video podcast that occurred three months later between House Public Education Committee Chairman Rob Eissler, Republican of The Woodlands, and Vice Chairman Hochberg and moderated by Evan Smith, Editor-in-Chief and CEO of The Texas Tribune, with Eissler denying a correlation and Hochberg saying that a three-year analysis showed a definite correlation (Hart, January 27, 2012; Texas American Federation of Teachers, January 24, 2012; Texas House of Representatives, January 23, 2012; TribLive, 2012).

The Pending Litigation

By all measured accounts, Texas has come a long way from the days of the *Rodriguez* case; yet, a realistic analysis of the school finance system in the state would still have to conclude that if much has happened in the intervening years, much still remains to be done. As the courts undertake yet another round of litigation, educators, policymakers, and other stakeholders are facing a finance system in disarray and a student population that is greatly in need of assistance. The 2010 mean SAT scores (out of 800) for college-bound seniors found Texas students ranking 40th (505) in math, 48th

(484) in reading, 46th (473) in writing, and 45th (1,462 out of 2,400) in total score (National Center for Education Statistics, 2010a; Texas Taxpayers and Research Association, January, 2012). Clearly the central focus of the historical philosophical heritage of the Gilmer-Aiken era of 1947-49, emphasizing the provision of a minimum and adequate education, which begins its ascendancy in *Edgewood III* (1992) and reaches its zenith in *West Orange-Cove II* (2005), has not fully delivered on the expectations of its proponents.

Educators and other interested stakeholders, from school districts large and small, wealthy and poor, successful and not successful, are registering their discontent with marches on the capitol, angry mainstream and social media commentary, and debates at official school forums and legislative hearings – culminating in the filing of four lawsuits in 2011 challenging the constitutionality of the school finance system. The petitions, *The Texas Taxpayer & Student Fairness Coalition v. Scott* (October 10, 2011); *Calhoun County Independent School District v. Scott* (December 9, 2011); *Edgewood Independent School District v. Scott* (December 13, 2011); and *Fort Bend Independent School District v. Scott* (December 22, 2011) have been consolidated and will go to trial on October 22, 2012 before the 250th District Civil Court of Travis County, presided over by Judge John K. Dietz, who rendered the district court's decision in *West Orange-Cove II* (2005). The lawsuits articulate what the plaintiffs see as the egregious demands by a system that is broken and unconstitutional and results in an education that is inequitable, inefficient, and inadequate. The lawsuits are undergoing discovery process prior to the district court ruling, with debates on the subject anticipated to continue during the 83rd Texas

Legislature in 2013. Predictions by David Thompson, lead counsel for the *Fort Bend* lawsuit, on any reform implementation are placed sometime during 2014-15 or 2015-16 (Reeves, February 21, 2012).

The Texas Taxpayer & Student Fairness Coalition v. Scott

Fairness Coalition, a group of taxpayers and over 400 mid- to low-wealth school districts with 1.3 million students, represents the largest number of school districts to file a school finance lawsuit against the state. Organized under the aegis of the Equity Center, an organization representing underfunded districts, *Fairness Coalition* maintains that the current school finance system violates the Texas Constitution on the efficiency and suitability provisions of Article VII, Section 1; the imposition of a tax that is unequal and not uniform of Article VIII, Section 1(a); the prohibition of a state ad valorem tax of Article VIII, Section 1-e; and the equal protection to students in low-wealth districts provision of Article I, Section 3. *Fairness Coalition* charges that the "Target Revenue" school finance system in Texas results in "huge differences in yields for similar tax effort," giving "property-wealthy districts unconstitutionally greater access to educational dollars" (*Fairness Coalition*, October 10, 2011).

Calhoun County Independent School District v. Scott

Calhoun, which represents Chapter 41 property wealthy districts including Alamo Heights, Eanes, and Highland Park sponsored by the Texas School Coalition, has challenged the school finance system on two constitutional violations, one on the Article VII, Section 1, provision that "permits districts to raise and receive sufficient funds to

provide a general diffusion of knowledge, i.e., a constitutionally adequate education, and another on Article VIII, Section 1-e that "leaves districts 'meaningful discretion' to set their property tax rates in order to provide local enrichment programs to their students, if they so choose." Strategically, *Calhoun* maintains their claim on the prohibition of a state ad valorem tax, but couched in terms of local enrichment, stating:

> School districts, including Plaintiffs, have lost meaningful discretion to set their M&O tax rates, as their current rates effectively serve as a floor (because they cannot lower taxes without further compromising their ability to meet state standards and requirements) and a ceiling (because they are either legally or practically unable to raise rates further). Further, to the extent any plaintiff district could raise taxes to the statutory maximum rate, the district would still remain unable to meaningfully use tax dollars for local enrichment beyond the level required for a constitutionally adequate education, in violation of the prohibition on state ad valorem taxes. (*Calhoun*, December 9, 2011)

Edgewood Independent School District v. Scott

Edgewood, sponsored by the Mexican American Legal Defense and Educational Fund (MALDEF), brings the first statewide adequacy claim on behalf of districts with large percentages of low-income and English Language Learner (ELL) students, including the Edgewood school district, which was involved in the historical *Rodriguez* case over 40 years ago. *Edgewood*'s lawsuit centers on the constitutional violations of Article VII, Section 1, including a quantitative challenge on financial efficiency/equity, which claims a "gap in funding and tax rates required to provide a general diffusion of knowledge between low wealth school districts … and high wealth school districts;" a qualitative challenge on efficiency/adequacy/suitability, which cites the "arbitrary and inadequate funding for ELL and low income students, in conjunction [with] current

funding limitations; and a third challenge based the "equalization provisions such as recapture, a cap on maximum tax rates and [sic] remain essential for an efficient public school system." Positioning their claim on student academic outputs, the *Edgewood* legal strategy argues that outputs "related to college-readiness, the new standard in Texas, reflect a system that is not affording a general diffusion of knowledge to all students, especially more challenging students such as low income and ELL students." *Edgewood* cites Texas Education Agency (TEA) data on the Academic Excellence Indicator System (AEIS):

> For example, under the "Advanced Course/Dual Enrollment Completion" indicator, only 26.3% of students across the state satisfied this criteria, including 23% of Latino students, 19.5% of African American students, 20.4% of low income students, and 11.6% of ELL students.
>
> On the SAT and ACT college entrance exams, only 26% of students across the state satisfied the college-ready criteria, including 12.7% of Latino students and 8.1% of African American students….
>
> Under the State's measure of "College-Ready Graduates" in English Language Arts and Mathematics (Class of 2010), which considers performance on the TAKS test, only 52% of all students across the state satisfied this criteria, including 42% of Latino students, 34% of African American students, 38% of low income students, and 5% of ELL students. (*Edgewood*, December 13, 2011)

Additionally, *Edgewood* charges the current school finance system of constitutional violations of Article VIII, Section 1-e on the grounds of local discretion, leading the plaintiffs in the case "to tax at or near the $1.17 cap, causing those districts to lose meaningful discretion in setting their tax rates" (*Edgewood*, December 13, 2011).

Fort Bend Independent School District v. Scott

Fort Bend, a broad and diverse group of school districts representing more than one-third of the state's student population, challenges the constitutionality of the school finance system based on violations of the adequacy and efficiency provisions of Article VII, Section 1. *Fort Bend* maintains that the current system is inadequate and fails to provide for a general diffusion of knowledge and that the system is inefficient and "arbitrarily funds districts at different levels below the constitutionally required level of general diffusion of knowledge." *Fort Bend* also charges a constitutional violation of Article VIII, Section 1-e, encompassing both the concepts of meaningful discretion and local enrichment as part of its legal strategy:

> School districts, including Plaintiffs, have lost meaningful discretion to set their M&O tax rates, as their current rates effectively serve as a floor (because they cannot lower taxes without further compromising their ability to meet state standards and requirements) and a ceiling (because they are either legally or practically unable to raise rates further). Further, to the extent any plaintiff district could raise taxes to the statutory maximum rate, the district would still remain unable to meaningfully use local tax dollars for local enrichment beyond the level required for a constitutionally adequate education, in violation of the prohibition on state ad valorem taxes. (*Fort Bend*, December 22, 2011)

Although *Fort Bend* does not list a claim of equity in its causes of action, it does include equity as part of the language of its petition by indicating that the solution "must be a rational system that both adequately and equitably lifts all schools and children to the high performance requirements the State has set" (*Fort Bend*, December 22, 2011).

Policy Implications and Conclusions

Tyack and Cuban (1995) point out that school reforms have seldom progressed at the rate that policymakers intend. Instead, they claim that a tension and disconnect exist

between the aspirations that people have about policies instituting educational reform and the slowness with which actual changes in education translate into practice. They see reform as a linear progression of major institutional trends, with those long-term trends interacting with transitions in society and cycles in *policy talk*, which initiates diagnoses of problems and advocacy of solutions, yet is short of the next phase in educational reform, *policy action*, or the adoption of reforms – through state legislation, school board regulations, or decisions by other authorities. "Actual *implementation* of planned change in schools, putting reforms into practice, is yet another stage, often much slower and more complex than the first two" (p. 40). Tyack and Cuban believe that reforms occur in school contexts that are continuously different, reflecting the inevitable conflicts of values and interests that are an inherent part of a democratic system of school governance reflecting changing climates of public opinion; yet they caution that institutional developments in education may have an internal dynamic of their own that is only loosely connected with the instances of widespread and intense attention to those periods that are called educational reform. The concepts of progress and decline, say Tyack and Cuban, have been dominant themes in the discourse about educational reform; but this view does not take into account what is happening to the development of the educational enterprise over time. In reality, actual reforms occur incrementally:

> It may be fashionable to decry such change as piecemeal and inadequate, but over long periods of time such revisions of practice, adapted to local contexts, can substantially improve schools. Rather than seeing the hybridizing of reform ideas as a fault, we suggest it can be a virtue. Tinkering is one way of preserving what is valuable and reworking what is not. (p. 5)

In an arena as complex as school finance reform, there has been a proliferation of "tinkering," with the cyclical nature of reform policies and initiatives paralleling the public school finance court cases that have been endemic to school districts throughout the country and especially to those in Texas. School finance litigation began in 1968 in Texas with the *Rodriguez* case as a move to rectify the inequitable situation of the students attending the Edgewood district relative to those enrolled at Alamo Heights. In 2007, Edgewood spent more money per pupil than Alamo Heights, yet Edgewood test scores were still far below those in Alamo Heights. Concentrated poverty and segregation remained pertinent issues. The chances of high school students at Edgewood going to college were under ten percent, while those who attended Alamo Heights were ninety-six percent (Schragger, 2007). The data for 2009-10 show that Edgewood is still a considerable distance from its affluent San Antonio neighbor. The Texas Comptroller's Financial Allocation Study for Texas (FAST) for 2009-10 indicates the Target Revenue per WADA for Alamo Heights is $5,849 and for Edgewood $4,589. The proportion of economically disadvantaged students at Alamo Heights is 21.7 percent and at Edgewood 91 percent. Passing TAKS scores for all tests for Alamo Heights is 87 percent and for Edgewood 58 percent. The Comptroller awards a FAST rating to districts and campuses that demonstrate the use of "resource allocation practices that contribute to high academic achievement and cost-effective operations." The rating, calculated in "conjunction with expert consultants from the University of Texas at Dallas, Texas A&M University and the University of Texas at Austin" allows for "fair and meaningful comparisons" and "is a simple average of an academic component (the FAST composite academic progress

score) and a financial component (the FAST spending index).” Alamo Heights received a FAST rating of 4 stars out of a possible 5, while Edgewood received 2 stars (FAST, December 2010).

Perpetuating educational environments that shortchange the needs of poor and disadvantaged students goes beyond having the financial resources to fix the leaky faucets and renovate the dilapidated buildings of the *Rodriguez* era. Students who do not have equal access to the best that our educational systems can offer are lost to the system and end up being locked into a permanent underclass that gives them limited opportunities for future economic advancement in the society at large. They become alienated from others in the society and participate in self-perpetuating class structures that rob the students of the potential for the social and human capital (Bourdieu, 1986; Bourdieu & Passeron, 1977; J. S. Coleman, 1988) that comes from receiving an education that will eventually contribute to their future intellectual, social, and economic well-being.

The court’s decision in *Serrano I* cherished the concept of an American educational system in a democratic society in which “free public schools shall make available to all children equally the abundant gifts of learning,” recalling Horace Mann’s belief in “the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all” (*Serrano I*, 1971, p. 1266, citing Old South Leaflets V, No. 109 (1846) pp. 177-180). In designing new policies to rectify some of the past and ongoing inequities for poor and disadvantaged students, we must go

beyond the "policy talk" that is of concern to Tyack and Cuban and instead advocate for policies that will lead to the kind of substantive school finance reforms that will be responsive to the learning needs of disadvantaged and underserved students.

As Texas winds its way through the laborious process of yet another round of school finance cases, the notions of equity and adequacy are very much a part of the national policy agenda. The U. S. Department of Education, working closely with members of Congress, established an Equity and Excellence Commission in 2011. Aspiring to produce a report that will the same impact as *A Nation at Risk: The Imperative for Educational Reform*, the 1983 report of the National Commission on Excellence in Education, the 28 education advocates, civil rights leaders, scholars, lawyers, and corporate leaders appointed to the Commission have a mandate to examine the disparities in meaningful educational opportunities that give rise to the achievement gap, with a focus on systems of finance. The purpose of the Commission is to collect information, analyze issues, and obtain broad public input regarding how the Federal government can increase educational opportunity by improving school funding equity and student performance, especially for the students at the lower end of the achievement gap. The report is scheduled to be issued in 2012 (Equity and Excellence Commission, 2011).

School finance advocates like Rebell (2005b) say the reason 16 of the 18 plaintiff victories in school finance cases in the past 14 years are based either substantially or partially on adequacy arguments is a function of far more than a clever legal strategy. Rather than competing theoretical constructs, equity and adequacy are complimentary

and illustrate "the continued unfolding of the democratic imperative in American history," demonstrating "how America's underlying egalitarian dynamic, after meeting resistance in one direction, will reassert itself with renewed vigor in another" (p.10). Rebell shifts the lexicon from adequacy to excellence and views both concepts through the prism of history:

> Standards-based reform emerged from concerns about America's ability to compete in the global economy, and its focus on outcomes and accountability has seemingly moved education policy from an emphasis on equity to an emphasis on "excellence". But inherent in the standards movement is also a powerful equity element, namely its philosophical premise that *all* students can learn at high cognitive levels and that society has an obligation to provide them the opportunity to do so. (p. 18)

Although the *Fort Bend* pending lawsuit challenging the school finance system in Texas does not make equity part of its explicit causes of action, it nonetheless voices the complimentary duality of both constructs:

> The solution, as the Supreme Court has presciently warned, is not to simply level the system down to some pre-determined "funds available" amount. The solution must be a rational system that both adequately and equitably lifts all schools and children to the high performance requirements the State has set, and that preserves "meaningful discretion" for communities to supplement the State requirements with choices of their own. By ignoring and understating the true cost of its own determination of "general diffusion of knowledge", the State has harmed both the adequacy and equity of the system, and has cynically pitted school districts and communities against each other in a zero-sum conflict in which some only gain at the expense of others. This broken system simply does not meet the high expectations and clear duties of the Texas Constitution. (*Fort Bend*, December 22, 2011)

While Texas does not have the same educational landscape that prevailed in the intervening decades that followed *Rodriguez*, and the upheavals of the *Edgewood* era cases notwithstanding, most observers would agree that Texas remains, if not in a school finance limbo, then certainly on very precarious footing with respect to its constitutional

mandates to provide an equitable and adequate education for Texas students. The constitutional redefinitions and ambiguities evident in the history of the *Edgewood* era cases have left the state with limited parameters for comprehensive and meaningful resolutions in the future; yet there is much that is positive as Texas grapples with the cyclical nature of its own version of public school finance reform. This has been especially true of the proliferation of *policy talk* and the degree of civic participation that educators, parents, taxpayers, and other interested stakeholders have undertaken in the interest of bringing change to the way that Texas manages and funds its schools. As important as *policy talk* is, however, this stage in educational reform is still short of the ultimate and necessary level needed to accomplish actual change. The coming months are critical as the courts consider the pending school finance lawsuits and lawmakers undertake the challenges to translate the *policy talk* into the kinds of *policy action* necessary to provide the children of Texas with the equitable and adequate educational resources that will prepare them to be full participants in society.

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