

IN THE SUPREME COURT OF TEXAS

No. D-0378

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.

v.

WILLIAM N. KIRBY, ET AL.

ON DIRECT APPEAL FROM A JUDGMENT OF THE 250TH DISTRICT COURT AND
ON APPLICATION FOR ENFORCEMENT OF MANDATE

OPINION ON MOTION FOR REHEARING

On motion for rehearing, plaintiff-intervenors request that we modify our opinion to overrule *Love v. City of Dallas*, 120 Tex. 351, 40 S.W.2d 20 (1931), or interpret that case "in a manner that would permit the [state-wide] recapture of local ad valorem revenues for purposes of equalization." We believe *Love* is sound and decline to overrule or modify it. Moreover, the interpretation requested by plaintiff-intervenors would violate the Texas Constitution. Accordingly, we overrule the motion for rehearing.

In *Love*, this Court held that the City of Dallas could not be compelled to educate students who resided outside of the city's school district. We held that article VII, section 3 of our Constitution only "contemplates that districts shall be organized and taxes levied for the education

of scholastics within the districts." 120 Tex. at 367, 40 S.W.2d at 27. Focusing on the Legislature's power to create school districts and define their taxing authority, we noted in this opinion that, consistent with *Love* and contrary to the district court's suggestion, tax base consolidation could be achieved through the creation of new school districts. We said these school districts could be organized along county or other lines and could be given the authority to generate local property tax revenue for all of the other school districts within their boundaries.

Plaintiff-intervenors now urge us to go further. They argue that all school districts are mere creatures of the state, and "in reality, all taxes raised at the local level are indeed State taxes subject to state-wide recapture for purposes of equalization." Their position raises the question of whether the Legislature may constitutionally authorize school districts to generate and spend local taxes to enrich or supplement an efficient system.¹ Because the Constitution does permit such enrichment, without equalization, local taxes cannot be considered "State taxes subject to state-wide recapture."

Our Constitution clearly recognizes the distinction between state and local taxes, and the latter are not mere creatures of the former. The provision that "[n]o State ad valorem taxes shall be levied upon any property in this State," TEX. CONST. ART. 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

¹In addition, defendants' response to plaintiff-intervenors' motion for rehearing submits that "there continues to be considerable discussion of the meaning of the language of Edgewood I referenced in footnote 11 of Edgewood II." Defendants therefore "urge the Court to clarify whether local enrichment violates the Constitution as interpreted by Edgewood I and Edgewood II if the yield from local tax effort varies because of the value of a local community's tax base." Defendants have consistently urged the court to clarify whether unequalized local enrichment is permissible under the Constitution. Indeed, their original brief asserted by cross-point that the district court erred in "applying a standard of total equality" that mandated the elimination of all unequalized local enrichment. The motion for rehearing and defendants' response suggest the need for greater clarity in our resolution of defendants' argument.

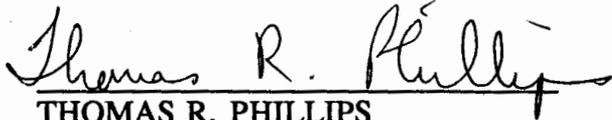
be levied and collected within all school districts heretofore formed or hereafter formed, for the *further* maintenance of public free schools, and for the erection and equipment of school buildings *therein*." TEX. CONST. ART. VII, §3 (emphasis added). These constitutional provisions mandate that local tax revenue is not subject to state-wide recapture.

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." TEX. CONST. art. VII, §1.² 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.³

²As explained in Edgewood I, the mandate of efficiency in article VII, section 1, while not requiring "a per capita distribution" or absolute equality, does prohibit the "gross inequalities" and "vast disparities" resulting from "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." 777 S.W.2d at 395, 396, 397. We therefore required "a direct and close correlation between a district's tax effort and the educational resources available to it." Id. at 397.

³In advocating the amendment of article VII, section 3 to permit local supplementation, Governor Ireland explained that local districts should be "allowed to levy and collect an additional tax for the purpose of aiding the State in its efforts at giving the people an education." Message of Governor Ireland, reprinted in Texas S. J., 18th Legislature, Regular Session, 66, 67 (January 29, 1883)(emphasis added).

Because the relief sought by plaintiff-intervenors would violate the Constitution, their motion for rehearing is overruled.⁴ This Court will entertain no further motions for rehearing in this cause. Tex. R. App. P. 190(d).


THOMAS R. PHILLIPS
CHIEF JUSTICE

OPINION DELIVERED: February 25, 1991

Concurring opinion on motion for rehearing by Justice Gonzalez.

Concurring opinion on motion for rehearing by Justice Doggett, joined by Justices Mauzy and Gammage.

Concurring opinion on motion for rehearing by Justice Gammage.

⁴In their response to the motion for rehearing, defendant-intervenors express concern that if the Legislature fails to enact a constitutional school finance bill by April 1, 1991, our injunction will preclude the State from honoring its obligations as the guarantor of bonds issued by local school districts. These concerns are unfounded. We adopt the language of the trial court's original order in this regard, modifying the September 1, 1990, date in that portion of the order to September 1, 1991. Our deadline of April 1, 1991, for legislative action remains unchanged.

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CONCURRING OPINION ON MOTION FOR REHEARING

In Edgewood I, we held that the state's school financing system was neither financially efficient nor efficient in the sense of providing for a "general diffusion of knowledge" statewide, and therefore it violated article VII, section 1 of the Texas Constitution. 777 S.W.2d 395, 397 (Tex. 1989). We further declared that we would not instruct the legislature as to the specifics of the legislation it should enact; nor did we order it to raise taxes. We stated that the legislature has the primary responsibility to decide how best to achieve an efficient system.

The issue before us in Edgewood II was whether this violation remained following the enactment of Senate Bill 1 by the 71st Legislature. ____ S.W.2d ____ (1991). We held that the fundamental flaw of Senate Bill 1 "lies not in any particular provisions but in its overall failure to restructure the system." Id. at _____. We concluded that since the public school

finance system had not been altered to comply with article VII, section 1 of the Texas Constitution, the district court abused its discretion in refusing to enforce the mandate issued in Edgewood I.

We should not speculate or interfere with the ongoing legislative debate as to how to meet the mandates of Edgewood I or Edgewood II; nor should we get into the business of giving the legislature pre-clearance on proposed legislation. See Muskrat v. United States, 219 U.S. 346, 362 (1911). To say now what might be constitutional would get into the area of advisory opinions. We have repeatedly held that under our constitution, judicial power does not embrace the giving of advisory opinions. Firemen's Ins. Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1969); Correa v. First Court of Appeals, 795 S.W.2d 704, 705 (Tex. 1990).

As our court stated in Morrow v. Corbin, 62 S.W.2d 641, 643 (1933):

Ordinarily, we believe the rendition of advisory opinions is to be regarded as the exercise of **executive** rather than **judicial** power. This seems to have been the conception of those who framed the Constitution, since by that instrument the Attorney General, a member of the Executive Department, is the only state officer expressly authorized to render such opinions. State Constitution, article 4, §§ 1, 22. At any rate, the rendition of advisory opinions has generally been held not to be the exercise of **judicial** power. (citations omitted).

For all these reasons, I would overrule the motion for rehearing without an opinion.



Raul A. Gonzalez
Justice

OPINION DELIVERED: February 25, 1991

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CONCURRING OPINION ON MOTION FOR REHEARING

Twice this court has labored arduously to speak with one, clear voice concerning this most significant case. Twice this court has achieved consensus in opinions, signed by a single member, but incorporating the work of all. Tragically, today this unity has been abruptly abandoned, shattering the good faith upon which it was founded. Determined to react to extrajudicial developments, the court exceeds its jurisdiction, contravenes its rules, and ignores limitations imposed on it by tradition and the Constitution. It muddles the law and meddles in the legislative process. Advice not properly sought is offered anyway, despite the warning of the Chairman of the Senate Education Committee that further judicial interference will be disruptive and his indication that the Legislature already has all the judicial advice necessary "to remedy the constitutionally flawed system of public education. . . ." Amicus Brief on Motion for Rehearing, Sen. Carl Parker, at 2; see also Supplemental Response of Plaintiff-Appellants to Motion for Rehearing at 2 (Further action by the court "would likely impede, rather than facilitate this [legislative] process.").

Accordingly, the opinion on rehearing constitutes a frantic rush to influence the final stages of current legislative deliberations and will only prolong correction of our inefficient educational system at the expense of the school children of Texas.¹

Today a judge expounds on social policy preferences rather than resolving a motion. The underlying need for writing arises from the fear that the Legislature may otherwise fail to satisfy certain judicial desires, not that it may inadvertently pursue some further unconstitutional course. The restraint observed by a unified court has become the activism promoted by a majority of a divided one. For the reasons set forth herein, I dissent from the opinion on the motion for rehearing in the strongest possible terms but concur with the decision that this motion should be overruled.

This self-styled "Opinion on Motion for Rehearing" is a misnomer. It is not a true opinion generated in response to a party's motion for rehearing; rather, it is an answer to a question that a movant never asked. The only motion before us consists of four narrowly crafted paragraphs concerning the validity of a single prior opinion:

This Motion for Rehearing is filed for the limited purpose of requesting modification or clarification of this Court's opinion with respect to the continued force and effect of Love v. City of Dallas, 120 Tex. 351, 40 S.W.2d 20 (1931).

Plaintiff-Intervenors' Motion for Rehearing at 1 (emphasis added).

¹ Judicial tampering that prolongs an equitable solution is especially discouraging given the time that has elapsed since this cause was originally filed. A child then in the first grade is now in the eighth. With today's interference, another generation of children may conclude their public schooling before complete reform is achieved.

If the court believed that this request was either meritless or inappropriate, the direct response was simply to overrule the motion as recommended by three of the succinct replies. Instead, by overwriting and miswriting the court offers observations that are strangely at variance with one aspect of the recapture issue on which the Defendants, the Plaintiff-Appellants, and the Plaintiff-Intervenors all agree.²

The court's main objective is to misuse one party's pleading on a single issue to benefit an opponent on other unrelated concerns.³ It wrongfully claims that the movant's

position raises the question of whether the legislature may constitutionally authorize school districts to

² Defendants' Response to Motion for Rehearing, at 2-3; Plaintiff-Appellants' Response to Motion for Rehearing; Plaintiff-Intervenors' Motion for Rehearing.

³ The applicable procedural rule speaks clearly concerning the presentment and consideration of such motions:

A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment The points relied upon for the rehearing shall be distinctly specified in the motion. The party filing such motion shall deliver or mail to each party, or his attorney of record, a true copy of such motion

Tex. R. App. P. 190 (emphasis supplied). This rule limits our consideration to points brought forward by the parties. See also, e.g., Tex. R. App. P. 131(e) (points of error brought to supreme court must be presented in motion for rehearing in court of appeals); Lone Star Steel Co. v. Owens, 302 S.W.2d 213, 223 (Tex. Civ. App.--Texarkana 1957, writ ref'd n.r.e.) (complaints not raised in a motion for rehearing are no longer before the courts of appeals for decision); State Bar of Texas, Appellate Procedure in Texas 552 (2d ed. 1979). The court today ignores requirements ordinarily imposed on the preservation and presentation of points of error. At issue here, however, is much more than a debate concerning the legal intricacies of appellate procedure.

generate and spend local taxes to enrich or supplement an efficient system.

__ S.W.2d at ____. The motion does not even remotely ask any such question. Rather, in a desperate effort to justify its misguided action, the court rephrases the motion to present a question that a judge wants to answer. The opinion converts the issue of whether locally-raised taxes may be used to fund other school districts elsewhere in the state to whether locally-raised taxes may be used locally to provide supplemental funds in the same district.

Today's opinion reacts not to a movant's properly filed pleading but solely to exigencies evidenced in pleadings of a different sort--media reports and commentaries, of the type set forth in Appendix A to this dissent. While constitutional interpretation involves some adjustment to changing societal conditions and must reflect "the understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time," Edgewood Ind. School Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989) (Edgewood I); Damon v. Cornett, 781 S.W.2d 597, 599 (Tex. 1989), we should not abruptly reinterpret the basic fabric of our jurisprudence because a judge is startled by what he reads in the newspaper. The true message sent forth today is "don't write a legal brief, write a political column." This is apparently the first time in its 151-year history that the court has operated in the manner it has today.

Indicative of the true nature of this opinion is the near total absence of supporting legal authority excepting the single

case raised by movants that provided the convenient excuse for further writing. Perhaps this is because the only true precedent for today's action is an earlier embarrassing chapter in Texas jurisprudence that the court does not cite. Without parties, attorneys, or a pending appeal -- solely on its own initiative -- this court once declared legislation unconstitutional. See In re House Bill No. 537 of the Thirty-Eighth Legislature, 113 Tex. 367, 256 S.W. 573 (1923).⁴ While dressed in seemingly more respectable language, a similar judicial encroachment has occurred again today.

In denying the motion for rehearing and writing on this completely separate issue, the opinion deprives the movants of any opportunity to complain or request correction of this new discussion. Having received, to their surprise and undoubted chagrin, an answer to a question they did not ask, the movants can never again be heard because "[t]his court will entertain no further motions for rehearing in this cause." __ S.W.2d at __. See Tex. R. App. P. 190(d). By including analysis of a new issue in an opinion denying the motion for rehearing, the court chisels these words in stone, arrogating to itself an authority beyond review. This precedent for deciding questions not properly presented should alert appellate lawyers in all cases to file motions for rehearing at their peril. Asking for rehearing is risky business because the court in its enthusiasm may rule on subjects not presented while denying further review.

⁴ See also Calvert, Declaratory Judgments in Texas--Mandatory or Discretionary?, 14 St. Mary's L.J. 1, 3 n.3 (1982); Note, Courts--Constitutionality of Declaratory Judgments, 3 Tex. L. Rev. 483, 485 (1925).

And, having accomplished this coup today, why is a motion for rehearing even necessary? Since the court may issue opinions unrelated to points raised by a movant, the motion itself is superfluous. Why should the court not encourage public debate of an opinion and thereafter fix whatever is necessary, resolving every dissatisfaction, and dispelling any confusion? This would further save litigants the expense of paying lawyers to file motions and provide legal advice.

The thickest camouflage for today's judicial handiwork is provided by the disingenuous suggestion that a Friday afternoon reply by Attorney General Dan Morales to the only motion for rehearing had something to do with this Monday opinion. The only request from that belated filing on which the court acts is the suggestion that we answer at least one of the four questions addressed to us in an amicus brief. Defendants' Response to Motion for Rehearing at 4-5. Eleven members of the Legislature asked us to engage in what they describe as the "extraordinary" step of prejudging their conduct.⁵ Amicus Brief on Motion for Rehearing, Rep. Junell, at 5. Having already determined to respond to newspaper pleadings, today's opinion has no problem with simultaneously answering the query of these nonparties despite its impropriety.⁶

⁵ One of these members ironically achieves more here as an amicus than he could at the trial court where an order striking his intervention was issued. Transcript at 168-69.

⁶ See Fri v. Sierra Club, 414 U.S. 884 (1973) (finding that an amicus has no standing to independently seek a rehearing); Texas v. Jefferson Iron Co., 60 Tex. 312, 315 (1883) ("Our court has recognized the right of an amicus curiae to speak, and has held

From the birth of our nation, courts have declined requests from officials in other branches of government to issue advisory opinions.⁷ In Texas this matter was specifically addressed in the Constitution, see article IV, section 22, and interpreted by our court: "the Attorney General, a member of the Executive Department, is the only state officer expressly authorized to render such [advisory] opinions." Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641, 634 (1933); see also Tex. Const. art. V, § 3 (delimiting Supreme Court's jurisdiction); Tex. Gov't Code Ann. § 402.042 (Vernon 1990) (broadening the Attorney General's power to issue opinion letters).

Because rendering such advice has been constitutionally deemed to be an executive rather than a judicial function, this court has previously refused to issue such opinions even upon request of another court. See Morrow, 62 S.W.2d at 634. We have declared

that while such volunteer action of counsel is permissible," the court, "upon being so informed, could do only that which it could do without such action of counsel, and no more."; see also Mosegy v. Burrow, 52 Tex. 396, 403 (1880).

An amicus curiae is limited to making suggestions to the court, Jones v. City of Jefferson, 66 Tex. 576, 1 S.W. 903, 904 (1886), not posing new questions. See generally, J. Denton, Appellate Procedure in Texas 355 (O. Walker ed. 2d ed. 1979); Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L.J. 694, 695 (1963).

⁷ Through a letter written by his Secretary of State Thomas Jefferson, President George Washington sought advice from the Supreme Court concerning several legal questions to "secure us against errors dangerous to the peace of the United States," and to "insure the respect of all parties." Letter from Thomas Jefferson to Chief Justice Jay (July 18, 1793), reprinted in W. Murphy & C. Pritchett, Courts, Judges, and Politics 225-26 (3d ed. 1979). While regretting any embarrassment that might befall the administration, the justices refused his request lest they violate the careful constitutional division of powers. Id. at 226.

unconstitutional an enactment purporting to authorize our offering trial courts prejudgment advice on the constitutionality of state statutes and regulations. Id. 633-34. More recently, by enacting a resolution submitting a constitutional amendment for citizens' approval to authorize our answering certified questions from federal appellate courts, the Legislature recognized that it could not statutorily confer this court with advisory power.⁸

Today's opinion on rehearing subjects the court to requests for advisory opinions not just from all litigants, but any person who files an amicus brief or writes an editorial. Once a court engages in the business of offering such advice that business will prosper. Today one amicus presents four queries; tomorrow it may be forty.⁹ Soon we can expect inquiries concerning our view of a lottery or the methodology for replacing the State Board of Insurance. The volume of opinions issued by the Attorney General, some 193 in 1990 alone, 16 Tex. Reg. 289-92 (1991), suggests the breadth of this task.

⁸ Tex. Const. art. V, § 3-c. The necessity for the amendment was explained: "[T]he Texas Supreme Court has determined that under the Texas Constitution judicial power does not embrace giving advisory opinions." Senate Judiciary Committee, Bill Analysis, S.J.R. 10, § 1 R.S. (1985).

⁹ As explained by another legislator: "Once the Court demonstrates its willingness to advise the legislature on the details of public school finance legislation, the questions will not end." Amicus Brief on Motion for Rehearing, Sen. Carl Parker, at 2. Perhaps to underscore his point he sought our advice in a subsequent filing by posing four questions whose answers would bestow judicial preclearance on specific pending legislation. Motion for Leave to Supplement and Amend Amicus Curiae Brief, Sen. Carl Parker.

More importantly the process in which the court today engages diminishes the quality of our opinions. As Justice Felix Frankfurter noted before his service on the United States Supreme Court:

The advisory opinion deprives constitutional interpretation of the judgment of the legislature upon facts, of the effective defence of legislation as an application of settled legal principles to new situations, and of the means of securing new facts through the process of legislation. . . .[T]o submit legislative proposals to the judicial judgment, instead of the deliberate decision of the legislature, is to submit legislative doubts instead of legislative convictions. The whole focus of the judicial vision becomes thereby altered.

Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005 (1924) (emphasis added).

I am keenly aware of the many obstacles and limitations imposed on members of the Legislature in undertaking the monumental task of restructuring the school finance system. But judges must follow time-honored limitations of a different character. Our function is to uphold the Constitution and, under appropriate circumstances, to refine and develop the common law.¹⁰ It is neither to draft legislation nor to render advisory opinions.

Courts safeguard liberties not only by their action but by their restraint. Through addressing only the questions properly presented in the context of genuine controversies, they preserve public confidence in our third branch of government as an arbiter of real disputes rather than as a clearinghouse for advice on

¹⁰ See El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987); Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 725-26 (Tex. 1990) (Doggett, J., concurring).

contemporary problems. Respect for judicial authority arises from restraint in its use.

Undoubtedly, to some there is a certain allure to the notion of this court working hand-in-hand with the Legislature as different drafts are submitted for review. Each chapter, section, and sentence could enjoy the careful scrutiny of this court. We could negotiate away any misunderstanding over constitutional requisites perhaps at the same time that the Legislature was resolving the court's budget.

While this approach might result in resolution of one significant problem, it would eventually transform the court into an extension of the Legislature. With its three separate branches of government,¹¹ our democracy does not always resolve problems in the most expeditious manner. To secure a considered, independent judicial review, we regard some delay acceptable as we sacrifice the gratification immediate answers bring. Disregarding our traditional separation of powers to provide a quick-fix answer undermines the foundation of democracy. Texans excluded from the joint legislative and judicial decision-making process would be denied all opportunity for unbiased judicial review of legislative conduct. Judges would become mere appendages to other branches of government.

Today's opinion demonstrates the danger of overreaching to answer that which has not been properly asked. Our decision on

¹¹ See Bruff, Separation of Powers Under the Texas Constitution, 68 Tex. L. Rev. 1337, 1337 (1990) ("A strong separation-of-powers tradition is a prominent feature" of Texas constitutional law.).

local enrichment in Edgewood I, 777 S.W.2d at 397-98, was straightforward, and has been a puzzle primarily to those who preferred not to comprehend it or who disliked what they read. As a postscript to the court's prior unanimous writings, this most recent effort adds more confusion than clarity.

The few generalizations about local supplementation,¹² without supporting legal authority or meaningful analysis, reflect the superficial nature of the court's consideration of this very important question. Nor, despite the court's contrary insinuation, ___ S.W.2d at ___ n.1, have the parties fully briefed and argued this issue. The movant on rehearing did not, of course, brief a question it did not ask. Fortunately, today's hasty supplement is pure dicta which is in no way binding on this or other courts in the future and is of highly dubious authoritative value. See Boswell v. Pannell, 107 Tex. 433, 180 S.W. 593, 596 (1915).

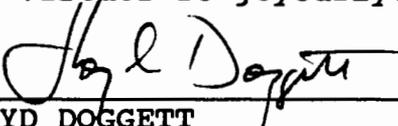
¹² Today's opinion leaves unclear to what extent, if any, legislative enactments can restrict the taxing authority of school districts. If the Texas Constitution bars recapture, ___ S.W.2d ___, why are not other limitations equally flawed? Are legislatively-authorized roll back elections now an unconstitutional interference with local supplementation? Tex. Tax Code Ann. § 26.08 (Vernon 1982 & Supp. 1991). Does the opinion on rehearing make unconstitutional the State Property Tax Board, which is authorized to ensure uniformity in local tax appraisal practices and procedures? Tex. Educ. Code Ann. § 11.71 (Vernon 1991). What effect does it have on those provisions historically included in school financing legislation that condition the receipt of certain benefits, such as accreditation, on the levying of a set minimum local tax rate? By apparently barring similar conditions based on state recapture, the opinion casts a constitutional cloud on other traditionally imposed legislative conditions upon taxation by school districts. By writing without considering the ramifications of overbroad and vague statements, the court, intending to grease the legislative works, simultaneously throws in a few wrenches.

A final reason to avoid the temptation of pontificating is that the court lacks jurisdiction to do so here. By declining to take direct appeal jurisdiction in this cause and "treat[ing] this proceeding as being [solely] in the nature of an original mandamus proceeding to direct the district court to reinstate our injunction," ___ S.W.2d. at ___, the court chose not to accept authority to address many issues raised in this proceeding, including cross-points brought by the defendants. The opinion in this cause on first hearing carefully sought to observe these jurisdictional limitations, declining to pass on the question of attorney's fees, "which has nothing to do with the enforcement of our mandate," ___ S.W.2d at ___, n.4, and carefully limiting our consideration of other questions unnecessary to the ultimate issue of enforcement. Id. at ____ (refusing to address "conflicting prognostications as to whether Senate Bill 1 can or will be implemented to achieve efficiency among 95% of students"). Because we may address only those matters directly affecting enforcement of our prior mandate, the question of local supplementation is not properly before this court. Moreover, a determination of this matter would amount to an inappropriate final resolution of an issue on the merits in a mandamus proceeding that is limited solely to considering whether the trial court abused its discretion. See Brownson v. Smith, 93 Tex. 614, 57 S.W. 570 (1900) (refusing to pass on constitutional question that would clarify "the uncertainty which surrounds [the Victoria] school system" because resolution of the issue would not affect whether the writ of mandamus should issue).

The fact that it is racing to publish this opinion before the other branches provide their own solution bespeaks the majority's eagerness to legislate rather than adjudicate. By the public display of disunity and new words of equivocation, today's opinion ensures that this litigation which may be finally nearing an end will go on indefinitely. Neither the Legislature, the parties, nor school districts can act with any assurance concerning what this court will do in the future.

Thankfully Texas judges can be held accountable by the people through the election process. That process, however, has been the source of certain contradictions that have become evident today. Recognizing that Texans do not want even elected judges interfering unnecessarily in their affairs, some candidates have found it increasingly beneficial to identify themselves as proponents of judicial restraint and their opponents as judicial activists. To some, "restraint" is generally synonymous with turning back the clock. In reality, however, for them it is an elastic, self-assumed label describing their judicial conduct, expediently adjusted to fit whatever they wish to write. As they define it, their own conduct is an example of conservatism and restraint, even if, as in this case, it ignores precedent, the rules, and the Constitution. To me, it means--regardless of parties or causes--a reluctance to exceed our constitutional role as judges and a refusal to engage in the type of conscious manipulation that has occurred here. Today's opinion offering advice where none is properly sought represents true activism of the most dangerous

type. It reveals the true extent of commitment to restraint by those who sometimes celebrate its virtues so joyously.



LLOYD DOGGETT
Justice

OPINION DELIVERED: February 25, 1991

Justice Mauzy joins in this concurrence and
Justice Gammage joins in this concurrence by separate opinion.

Shift in school financing required

The key question following the Supreme Court's opinion in Edgewood II is, Can we comply with the court's order and still equalize to excellence? The answer is "yes," provided we restructure our school finance system and restructure our schools.

Many people say we have no choice other than a statewide property tax. I strongly disagree.

The best source of revenue for our schools is a broad-based tax that is more predictable in its collection.

The quest for equalized excellence does not end with selecting the source of revenue for our schools. The next step is equally important — distribution of the state funds.

Our current distribution mechanism is flawed. It rewards the wrong actions and does not reward excellence in academic results. For example, we give a school district more money to put a child in vocational education than to keep the student on an academic track. Today, we give a school more money to keep a child in bilingual education than to teach a child to be proficient in English.

A school finance plan that would promote excellence in our schools and meet the guidelines of Edgewood II is as follows:

1. Adopt a constitutional amendment that will tax minerals and utilities on a statewide basis. The extremes in property wealth that exist throughout the state can be traced to the taxation of minerals and major utility installations in sparsely populated regions of Texas.

The existence of this wealth in these pockets aggravates the school finance



Tom Luce

equity problem for the state as a whole. Taxing these resources for the benefit of all Texas schoolchildren would be an important first step toward an equitable solution to the school finance problem.

2. Provide an appropriately funded basic Foundation Program for all Texas students. For too many years, the target that the state set for itself in terms of equalized funding has had little in common with what school districts were actually spending to educate their students.

A basic program moving toward a spending level in the neighborhood of \$4,200 per student would be an important step. This would be a single-tier program, with all districts being funded at this level, with state funds adjusted for local wealth.

3. The local share of the basic program would be based on the average property wealth within each county. Even after taxing minerals and utilities at a statewide level, a problem of equity will still exist within many areas.

One solution to this problem would be to have the local share of the basic program be based on the average property wealth of each county, rather than that of the individual school district.

Allow unequalized local enrichment

major disparities in wealth have been eliminated and a sound basic educational program has been established and funded, local districts should be able to enrich their programs and make whatever tax effort they desire to achieve excellence in their schools without the imposition of caps or other restrictions.

The failure to permit local enrichment lays the groundwork for stagnation in public education funding and eventual loss of public support for the system. The extent to which there are educational "leaders" among the state school districts provides a basis for making future adjustments to the basic educational program, a process the Legislature established in its school finance bill last spring.

To achieve equity without providing any basis for momentum in educational spending and achievement is a shortsighted solution to the school finance problem.

Legal observers disagree as to whether or not the Supreme Court will permit equalized local enrichment without a cap. Some predict it will not. I believe the court will permit such a plan, and, given how important that concept is to excellence in education, the Legislature should do what is best for education and assume the court agrees.

If the justices disagree, they can modify that portion of the plan.

Luce ran for the Republican gubernatorial nomination last year. Next: how to restructure the way our schools operate.

inst Pete Rose somewhat misdirected

tive, and Babe Ruth, a hard-drinking roisterer, are more typical.

Rose's thing was gambling. He got caught and paid a price — five months for income-tax cheating along with the permanent ineligible list. The fact he bet on baseball, including possibly his own team, is held most heavily against him.

Keeping him out of the Hall of Fame was more of a matter of self-interest than outrage, however. Baseball operators are afraid he'll tarnish the mom's-apple-pie image they cherish for their enterprise. Abetted by a coterie of writers, who fictionalize the game as a morality play involving athletic skills, they

perpetuate a remarkable myth — a hoax, really — that baseball represents most of what's holy in the American mystique.

It should come as no surprise that the qualities making up a warrior or baseball player are not those commonly found in clergymen or Mother Teresa. Raunchiness is endemic in the military, sports, show business and most other star factories.

None matches baseball for shameless hypocrisy, however, mainly because the others don't profess to be the anchor of national virtue.

Not to put a rap on all myths. Some are harmless and even helpful in retain-

ing marginal civility in a fractious society. George Washington's cherry tree, Santa Claus and the notion that presidents are competent, for example.

But there's a level of rankness at which hypocrisy crashes under its own weight, as recently behind the Iron Curtain. Baseball may be getting perilously close. Rose wouldn't head my candidates for altar boy, but he's a nice human being than many of those canonized in the Hall of Fame — probably than some of those who voted to keep him out.

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