

maintenance of an efficient system of public free schools.

The Texas Supreme Court has noted that while appropriate financial support is part of the determination of whether this constitutional standard has been met, the constitutional test is not “limited to the financing of the public schools, as opposed to other aspects of their operation, [because] money is not the only issue, nor is more money the only solution.”² The Texas Supreme Court has stated: “While we considered the financial component of efficiency to be implicit in the Constitution’s mandate, *the qualitative component is explicit*.”³

II. LEGISLATIVE HISTORY OF THE CONSTITUTIONAL PROVISION

In considering the legal burden governing a court’s review of Texas constitutional mandates, it may be helpful to explore the legislative history and development of the relevant constitutional provisions.

A. The issue of education was a controversial one, even at the beginning of the State’s history.

Texas’ legal battles and legislative debates over education taxes and spending is not of recent origin. The struggle over education funding has existed since Texas was a part of Mexico. “In no other state has the struggle of such diverse traditions and ideas been so prolonged and bitter.”⁴

The Constitution of the Republic of Texas in 1836 required congress “as soon as circumstances will permit, to provide by law a general system of education.”⁵ But as early as

² *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777 (Tex. 2005) (*W. Orange-Cove II*).

³ *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 729 (Tex. 1995) (emphasis added).

⁴ FREDERICK EBY, *THE DEVELOPMENT OF EDUCATION IN TEXAS* 90 (1925).

⁵ Constitution of the Republic of Texas, General Provisions § 5 (1836), *reprinted* in TEX. CONST. app. 523, 531 (1836).

1925, Fredrick Eby, a University of Texas professor and proponent of government-run schools recognized: “There is no evidence that any of [the constitutional drafters] had in view a state-endowed, state-supported, and likewise state-controlled system for the training of the young.” Further, Charter schools were part of the Texas educational fabric long before what some now restrict under the name of “public” schools. As Eby noted: “The First Congress in 1837 . . . contented itself with chartering several private institutions.”⁶

The current Texas Constitution of 1876⁷ provision about education was the result of great debate and contention.⁸ In fact, there was more debate over the education issue than any other item before the convention.⁹ Negative reaction to the highly centralized “radical school system” established during reconstruction was the driving force for using the 1845 Constitution as a starting point for drafting the new constitution.¹⁰

B. The original meaning behind “public schools” and “free schools” demonstrated distinctive types of schools.

Because the 1845 Constitution was the basis for the 1876 rewrite, the meaning of the words used at that earlier time is relevant—particularly the use of the terms “public schools” and “free schools” in those debates. The first section of the Texas Constitution of 1845 imposed on the legislature the duty of making “suitable provision for the support and maintenance of *public schools*.”¹¹ The second section, which follows immediately the declaration, requires that the legislature, “as early as practicable, establish *free schools*

⁶ *Id.* at 84.

⁷ The current constitution was adopted in September 1875, but effective in 1876.

⁸ “No subject was more controversial or more extensively debated.” *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 785 (Tex. 2005)

⁹ *See generally* Journal of the Constitutional Convention of the State of Texas, 1875.

¹⁰ Debates in the Constitutional Convention of 1875.

¹¹ TEX. CONST. of 1845, art. I, § 1 (emphasis added).

throughout the state and shall furnish means for their support by taxations of property.”¹² Critical to understanding the debates is that “public” did not mean government operated schools as the term is commonly meant to convey today. Rather, then, it meant “open to the public,” i.e. private membership to enter the establishment was not required. And “free” meant that poor students were entitled to attend regardless of ability to pay.

Eby explains “that the constitution required the legislature to make provision for two types of schools, ‘public’ and ‘free’. . . . This peculiar difference is due to the fact that this article of the constitution was a compromise agreed upon by the various sociological groups which held quite divergent opinions as to education.¹³ Relatedly, “[o]ne of the methods of compromise may be seen in the plan adopted in New York of distributing state funds among the various private and denominational schools.”¹⁴

Eby further notes:

The first section of the [1845] constitution required the establishment of “public schools.” This indicated the adoption of a general policy of assisting the people in their private and community enterprises. It did not propose free tuition for all . . . general taxation for popular education . . . or a state-owned [system]. . . . On the contrary the advocates of private and church schools fully expected the state to assist in the promoting [of] their particular enterprises. . . . The second section [of the 1845 Constitution] provided for “free schools” by taxation on property. The private and church school advocates favored this policy as a wise charity for the education of the orphaned and indigent tuition would be paid by the state and that they would attend the existing [private] institutions.¹⁵

Eby points out the fact that by the time of his writing these two terms began to be used differently than understood when first written. “For the first [public] no special funds

¹² TEX. CONST. of 1845, art. I, § 2 (emphasis added).

¹³ FREDERICK EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 105 (1925).

¹⁴ *Id.* at 34.

¹⁵ *Id.* at 107.

are fixed: for the second [free], one tenth of the annual revenue is positively reserved.”¹⁶ Neither term, however, required government owned and operated schools as some think of “public schools” today. In reading the constitutional language and debates absent an understanding of how the terms were used when written, the debate today can miss the mark.

The 1845 Constitution “represents the views of . . . three divergent types of school organizations: a system of public schools, pauper schools, and private schools enjoying the bounty and support of the state . . . and with but few exceptions the people resorted to the use of private schools which under the law [1854] could be designated ‘common schools.’ . . . No state system of public schools was possible under the conditions . . . People soon learned that public free school meant *free* only to those who confessed themselves paupers”¹⁷ “The system, as finally developed in 1858, was simple in the extreme ***Those parents who desired could form a school and could secure their own teacher and receive the state apportionment for their children. Those wishing to patronize one of the existing private schools were permitted the same privilege.***”¹⁸ Notably, both a “public” school system and a “free” school system could be private schools, or community schools under the total control of parents.

C. The use of the word “efficiency” was part of a compromise merging “free” and “public” schools together.

During September and October of the Constitutional Convention of 1875, in Austin, Texas, the most contentious and highly volatile issue of debate was, again, education. All

¹⁶ *Id.* at 108.

¹⁷ *Id.* at 118, 120, 121, and 124.

¹⁸ *Id.* at 124 (emphasis added).

education resolutions were sent to the education committee, consisting of fifteen members. This committee failed to reach consensus and sent both majority and minority reports to the floor of the convention. The full convention also failed to reach agreement and the issue was then sent to a Select Committee of seven members. That committee also failed to reach agreement and also issued both majority and minority reports.¹⁹

Each time the education issue reached the floor it attracted further serious and contentious debate. The word “efficient” appears to have been part of the compromise that was reached. Data on the actual constitutional debates are very limited. But it appears that a big issue was about taxation, if any and how much. Yet there was little interest in allowing government to control and run the schools. In any event, the 1875 compromise, like the 1845 compromise, included both the free and public school language, but merged the two terms together into the same phrase: “the Legislature of the State to establish and make suitable provision for the support and maintenance of an *efficient system of public free* schools.”²⁰

D. Under the new Constitution, the Legislature supported the Community School System.

Our present Constitution produced what become known as the Community School System, and the method of school organization was simple: “(1) It gave to parents the great latitude in determining for themselves the kind of education they desired for their children and the character of teacher they wished to employ; (2) There was no restriction to the number of children necessary to constitute a school community . . . ; (3) The parents could

¹⁹Journal of the Constitutional Convention of the State of Texas, 1875.

¹⁶ TEX. CONST., art. VII, § 1 (emphasis added).

enjoy the use of the state school fund, together with the minimum of state interference. Moreover, ***it lodged the responsibility of educating the children upon the parents, where, as they believed, it belonged***” Additionally, students were not restricted by geographic boundaries.²¹

These Community Schools were similar to today’s charter schools but with much less regulation. Notably, Texas had private school voucher and charter school systems in place in the late 19th and early 20th Centuries. But as Eby explained, incorporated towns “especially after the year 1880 . . . turned away from private schools, which furnished facilities chiefly for the well-to-do, in order to establish public free schools open equally to all children.”²² Still, publicly supported community schools operated for many decades.

An interesting footnote in the history of the adoption of the Texas Constitution of 1876, “the first president of the Texas State Teachers’ Association . . . [Dr. Crane] was strongly biased in favor of the New York State plan of school organization which permitted the use of state funds for the support of private and denominational institutions of learning.”²³ TSTA’s first president was a private school voucher proponent. Private schools remained a part of the public free school system in Texas for quite some time: “Some developments of minor significance appeared during these years, [circa 1907] among them the decline of private schools. The marked improvement in the character of the town schools lessened the prejudice against them, and even the wealthier people began to send their children to these rather than to the private schools.”²⁴

²¹ FREDERICK EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 172 (1925).

²² *Id.* at 100.

²³ *Id.* at 202.

²⁴ *Id.* at 202.

Texas founders intended to empower parents and communities to make decisions relative to the education of their students. As one delegate, Mr. Sansom, said during the constitutional debate over government control of schools, “I do not hesitate to say that I believe there could not be found a dozen members of this Convention who would affirm their belief in the existence of such power in the State.”²⁵

III. CONSTITUTIONAL STANDARD OF REVIEW

By the express constitutional mandate, the Legislature must make “suitable” provision for an “efficient” school system for the “essential” purpose of a “general diffusion of knowledge.” *W. Orange-Cove II*, 176 S.W.3d at 777; *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) (*Edgewood I*). This mandate is composed of three elements, each of which must be met:

- 1.) “the education provided must be adequate; that is, the public school system must accomplish that ‘general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people.’”
- 2.) “the means adopted must be ‘suitable’; and
- 3.) “the system itself must be ‘efficient’”: that is, “effective or productive of results [with] . . . the use of resources so as to produce results with little waste.” *Id.* at 395.

W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 563 (Tex. 2003) (*W. Orange-Cove II*). For the legislative action to be constitutionally sound, all three of these elements must be satisfied. *Id.*

The plaintiff and charter school groups and Efficiency Intervenors, by their complaints, must show the State’s effort fails to measure up. The plaintiff and charter school

²⁵ Debates in the Constitutional Convention of 1875.

groups, because they primarily attack the State's scheme for school financing, must show that the State's financing scheme results in a school system that is *in*-adequate, *un*-suitable, or *in*-efficient so that it fails to provide a "general diffusion of knowledge." The Efficiency Intervenors who focus their complaints on the structure of the overall system, not just the finance scheme, as well as on certain legislatively enacted governance requirements that impose inefficiencies, also must show that the system or these schemes result in a system of public free schools that is *in*-adequate, *un*-suitable, or *in*-efficient and thus fails the constitutional test. But where the Efficiency Intervenors depart from the finger pointing that has occurred in this case—the State saying its districts have enough money, and the districts saying they don't—has proved that the state education system is wasteful. The third element—that "the system itself must be efficient": that is, "effective or productive of results [with] . . . the use of resources so as to produce results with little waste"—expresses a significant factor. Efficiency requires the system produce not just a "general diffusion of knowledge" but without waste of public resources. While the State and its system—the districts—argue over whether their funding is sufficient, it cannot be gainsaid that the Efficiency Intervenors have established that the State system of public free schools cannot identify any dollar that produces any educational result and that the system is egregiously wasteful.

True, the acts of the Legislature related to the educational system are presumed to be constitutional; therefore, the plaintiff groups and Efficiency Intervenors bear the burden of demonstrating that the complained of acts are unconstitutional.²⁶ Further, the Texas

²⁶ See *Edgewood IV*, 917 S.W.2d at 725; *Texas Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 927 (Tex.1985); *Teel v. Shifflett*, 309 S.W.3d 597, 601 (Tex. App.—Houston [14th Dist.] 2010, pet. denied);

Supreme Court held in *Texas National Guard Armory Board v. McCraw* that “[t]he question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.”²⁷ A judge should feel a “clear and strong conviction of [the] incompatibility” between the Texas Constitution and the law at issue to determine that the law is unconstitutional.²⁸

But the Texas Supreme Court has made clear with respect to primary education that this is not an area in which the Constitution vests exclusive discretion in the Legislature. Rather the language of Article VII, section 1 imposes on the Legislature an affirmative duty to establish and provide for the public free schools and identifies the three constitutional measures by which to gauge whether the Texas Legislature has met its duty.²⁹ Though, by assigning the duty of providing a system of public free schools to the Legislature, Article VII, section 1 gives to the Legislature “the sole authority to set the policies and fashion the means for providing a public school system,” and though the courts are not to prescribe the means that the Legislature must employ in fulfilling its duty, the courts rightfully determine whether the Legislature’s enactments or regulatory overlays meet the required constitutional standard.³⁰ Thus, while the Legislature has the right to decide *how* to meet the standards set by the people in Article VII, section 1, the judiciary has the final authority to determine *whether* the legislative enactments or regulatory rules meet those standards.³¹

In re S.C., 790 S.W.2d 766, 770 (Tex. App.—Austin 1990, no writ).

²⁷ 132 Tex. 613, 126 S.W.2d 627, 634 (1939).

²⁸ *Id.*

²⁹ *W. Orange-Cove II*, 176 S.W.3d at 776; *Edgewood I*, 777 S.W.2d at 394.

³⁰ *W. Orange-Cove I*, 107 S.W.3d at 563, 565; *see also W. Orange-Cove II*, 176 S.W.3d at 777; *Edgewood I*, 777 S.W.2d at 394.

³¹ *W. Orange-Cove I*, 107 S.W.3d at 563-64.

In the previous school finances cases, the courts have evaluated legislative enactments and regulatory rules under challenges to the State's scheme for school finance. In *Edgewood I*, for example, the Texas Supreme Court upheld the determination that the "Texas school financing system as set forth in the Texas Education Code, sections 16.001, *et seq.*, and as implemented in conjunction with local school districts containing unequal taxable property wealth, is unconstitutional under Article VII, section 1 of the Texas Constitution."³² The Court then held that:

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. We decide only the nature of the constitutional mandate and whether that mandate has been met.³³

The plaintiffs and charter school groups are making this same challenge now and seek this same relief. Efficiency Intervenors, though, are challenging the entire system as well as different aspects of the legislative enactments and regulatory rules pertaining to education in Texas, and are seeking more comprehensive relief related to the explicit purpose of the efficiency standard. In addition to joining the plaintiffs and charter schools groups' request for this Court to declare that Texas' school finance scheme violates Article VII, section 1 of the Texas Constitution, Efficiency Intervenors, further specifically request the court declare Texas' school operations scheme—e.g., statutes and regulatory rules governing teacher contracts, limiting competition, and imposing other mandates—violate Article VII, section 1 of the Texas Constitution.

³² *Edgewood I*, 777 S.W.2d at 398.

³³ *Id.* at 399.

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