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ARTICLE: The Jurisprudence of Texas Supreme Court Justice Robert A. "Bob" Gammage: A Legacy of Civil Rights & Liberties

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LEXISNEXIS SUMMARY:
... Justice Gammage recognized the validity of Barber's privacy and free-speech claims under the Texas constitution, but chose to analyze the CISD policy under the Texas Equal Rights Amendment (ERA). ... While dress and grooming codes do not, per se, violate the constitution, they must be based upon compelling educational goals and may not be arbitrary and without foundation in furthering the educational mission of schools or avoiding disruptions. ... Nevertheless, in Industrial Foundation, the Court did expressly recognize this second type of privacy tort - the right to "freedom from public disclosure of embarrassing private facts." ... Limits on Anti-Abortion Protests: More Competing Rights Justice Gammage participated in another high profile competing-rights case, in which the Texas Supreme Court addressed a conflict between an anti-abortion group's freedom of expression and a private citizen's right to privacy. ... After the jury found for the Aquinos, the trial court awarded the Aquino family actual and punitive damages for infliction of emotional distress resulting from the breach of privacy caused by the demonstrators. ... Private Agreements and the Right to Privacy In 1984, while serving on the court of appeals, Justice Gammage had the opportunity to write for a unanimous court in an unusual privacy claim advanced in Colquette v. ... Justice Gammage's position in Morales discussed above, as well as his comments about judicial abdication in other cases such as Barber, shows that Gammage had no use for a cramped judicial philosophy and was critical of those who he believed to have abdicated the proper role of the courts - to extend review to statutes that violate rights. ... Subsequently, Justice Gammage recognized in Morales that homosexuals constitute a class of people that face discrimination in housing, family law, and criminal justice matters, based solely on the mere possibility of committing a particular sexual act. ... Edgewood Independent School District in 1988 was the first time an appellate court judge in Texas argued that education was a fundamental right, and that the state's system of school funding was unconstitutional because it deprived students in poor school districts of equal educational opportunities. ... Justice Gammage's Jurisprudence and Legacy The purpose of this Article was to highlight and examine Justice Bob Gammage's jurisprudence in the area of civil rights and liberties, and attempt to provide an account of his legacy. ... Also, in Morales, Justice Gammage again dissented from procedural machinations that prevented the Court from applying the right to privacy and Texas ERA in a challenge of Texas' infamous sodomy law.

HIGHLIGHT: Baseless and irrational discrimination in all of its forms, at whomever directed and whatever its source or motivation, is still baseless and irrational discrimination. In a free society we may not always be able to prevent its private exercise, but in Texas our fundamental law does not permit it in our public schools and other governmental
institutions. They should not teach it, condone it, or engage in it, and our courts and other legal institutions should not even passively and benignly - enforce it. n1

TEXT:
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I. Introduction

The 2012 death of Robert Alton "Bob" Gammage produced a torrent of eulogies and obituaries honoring his public service as a lawyer, assistant attorney general, state legislator, member of Congress, gubernatorial candidate, university professor, and jurist. n2 A Texas institution, Bob Gammage was a member of the legendary "Dirty-Thirty," a bi-partisan group of state legislators in the 1970s that successfully fought widespread corruption in state government. n3 As a legislator he forged a strong record in government reform, consumer and health legislation, voting rights for eighteen-year-olds, civil rights, and equal rights for women.

During his tenure as a justice on the Third Court of Appeals from 1982 to 1990 and on the Texas Supreme Court from 1991 to 1995, n4 Gammage participated in a career total of nearly 250 cases in the areas of constitutional law, insurance, employment, corporate law, contracts, torts, property, due process, and school finance. n5 His written opinions reveal a strong and unwavering commitment to the civil rights and liberties of Texans. While his judicial record was well-known across the state, particularly for his role in the Edgewood v. Kirby school-finance litigation, Justice Gammage garnered national attention when he resigned from the Texas Supreme Court in 1995, to draw attention to the increasing amount of influence that big campaign contributors and political action committees (PACs) had on judicial elections. n6 By the mid-1990s in Texas, judicial candidates were under increasing pressure to make campaign promises, run negative attack ads, and spend a disproportionate amount of their time and energy raising campaign money. n7 Justice Gammage believed that the rise of the million dollar judicial campaigns coupled with weak judicial recusal and disqualification rules, had formed a perfect storm, which undermined the capacity of judges to protect the rights and liberties of persons against unwarranted intrusions by the government, and exploitation by powerful corporations. n8

Justice Gammage's contribution to civil rights and liberties in Texas is but one facet of his long and diverse judicial record, but it is an important story that needs to be told. This Article attempts to do so, by highlighting and examining Justice Gammage's jurisprudence in the area of civil rights and liberties. The analysis that follows is based on Justice Gammage's reasoning in majority, concurring, and dissenting opinions in a number of milestone cases. These cases involve the rights of minors, privacy, freedom of speech and press, and equal protection that arose during his tenure on the Texas Supreme Court and, to a lesser extent, the Texas court of appeals. A milestone is a marker that represents a new way of thinking, often beginning a new decisional path that judges take when analyzing disputes involving rights and liberties. In these milestone cases, Justice Gammage argued for a more expansive interpretation of the legal doctrines and constitutional provisions that protect individual rights and equality. In doing so, he challenged members of the court who were unwilling to apply judicial review to laws or policies that were constitutionally suspect. Justice Gammage followed a discernible judicial philosophy consisting of his view of judicial power in the larger political system and a set of principles that guided his interpretation of the Texas and U.S. Constitutions.

The opinions examined below do not constitute an exhaustive list of cases in which Justice Gammage participated; however, they are among the most important in shaping civil rights and liberties in Texas, and they are, by far, the most representative of his jurisprudence and legacy.

II. Get a Haircut ... Because! The Rights of Minors and the Texas Constitution

One of Justice Gammage's strongest affirmations of individual rights and equal protection was in Barber v. Colorado

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Independent School District, a class-action suit that challenged the legality of hair-length restrictions for male students imposed by the school district. n9 Hair-length and dress-code cases constitute a substantial body of law and Barber was [*30] one of the most influential of these cases in Texas. n10 The school district established the dress code to "teach grooming and hygiene, instill discipline, prevent disruption, avoid safety hazards, and teach respect for authority." n11 Male students were allowed to wear their "hair to the bottom of [their] collar, the bottom of the ear and combed out of [their] eyes." n12 They were not allowed to wear earrings. n13 When Barber turned eighteen years old, his family requested that the school board suspend enforcement of the policy for him and other students who were eighteen years old and older. n14 Further, the Barber family argued that the application of the hair-grooming and earring policy to males, but not females, violated their son's constitutional rights. n15

The school board voted 4-2 to not suspend the enforcement of the policy. n16 The trial court held for Barber, stating that the grooming policy violated the Equal Rights Amendment of the Texas constitution, n17 the right to privacy, and the right to freedom of expression. n18 The trial court also granted a permanent injunction against the school district, and contending that the objectives of the grooming code could be accomplished by less restrictive means - that is, other than gender-based discrimination. n19 The court of appeals reversed the trial court's ruling, finding that Barber's suit did not warrant judicial intervention into Colorado Independent School District's (CISD) policy. n20

On appeal, the Texas Supreme Court rejected Barber's claims as not substantial enough to "merit ... intervention in this case." n21 Relying on several federal cases in the Fifth Circuit from the 1960s and 1970s that rejected challenges to high-school dress codes, the majority, per Justice Raul Gonzalez, reasoned that unlike adults in other settings, a high school student's right to be unfettered by school-grooming regulations had never been recognized. n22 At that time there were several federal circuit courts, [*31] outside the Fifth Circuit, that had struck down hair-length regulations in public schools. n23 The majority also cited New Jersey v. T.L.O, in which the U.S. Supreme Court ruled that students in a public school do not have the same expectation of privacy under the Fourth Amendment as do adults in other settings, thus making it easier for school officials to conduct random locker searches in order to promote a school's substantial interest in maintaining discipline. n24 In supporting his decision against judicial intervention, Justice Gonzalez also cited a number of unsuccessful Texas Equal Rights Amendment challenges to grooming regulations in Texas schools. n25 Given the vulnerability of children, as well as their inability to make important decisions in an informed and mature manner, the majority concluded that minors do not have the same constitutional rights as adults. n26 Justice Gonzales also considered it "a matter of common sense that the state judiciary is less competent to deal with students' hair length than a parent, school board, administrator, principal, or teacher." n27

Dissenting, Justice Gammage argued that the majority's dismissal of Barber's claim without the benefit of providing a full legal analysis was more a matter of judicial abdication, rather than "nonintervention." n28 Justice Gammage seemed puzzled as to why the majority relied exclusively on federal precedent, when Barber had "pleaded his case exclusively on state constitutional grounds." n29 Justice Gammage recognized the validity of Barber's privacy and free-speech claims under the Texas constitution, but chose to analyze the CISD policy under the Texas Equal Rights Amendment (ERA). n30 The record shows that, up to this point, everyone had framed the issues in the case as a balancing of the rights of minors with the need for discipline in schools. n31 The policy read: "Boys may wear hair to the bottom of the collar, the bottom of the ear and combed out of the eyes. [*32] Boys may not wear earrings of any kind." n32 There was no mention of hair length for girls, just skirt length. n33

Adopting an equal-protection analysis, Justice Gammage relied on the 1976 Texas case Mercer v. Board of Trustees, North Forest Independent School District, where the court of appeals held that "any classification based on sex is a suspect classification" and is subject to a strict scrutiny standard of review. n34 Justice Gammage also relied on In re McLean, where the Texas Supreme Court recognized that the Texas ERA provides broader protection against sex discrimination than the Equal Protection Clause of the Fourteenth Amendment. n35 Given this broader protection, and using a strict-scrutiny analysis, Justice Gammage argued the court must analyze the CISD grooming policy from the standpoint of whether the regulation of hair length promotes a compelling governmental interest that cannot be achieved
by other means. \(^{n36}\) Recall that the purpose of the CISD policy was "to teach grooming and hygiene, instill discipline, prevent disruptions, avoid safety hazards, and teach respect for authority," \(^{n37}\) which are seemingly good reasons.

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However, Justice Gammage observed that the school district admitted that their sole purpose was to prevent the "disruptions" that long hair on male students might cause, even though no evidence was offered that long hair on male students had caused disruptions. \(^{n38}\) Counsel for the school district noted this in clear terms: "How do we prove that [a long-haired student] is disruptive? We can't." \(^{n39}\) Thus, in addition to being an intrusion into Barber's privacy, the sex-based classification was upheld by the majority of the court, without discussion of the compelling interest needed to justify such a distinction based on sex alone. Nor was there any discussion of evidence of disruption, not in this instance and not in any other court cases dealing with hair-length policies in Texas public schools. CISD did suggest that the rule was also a "'teaching device,' reflecting 'the community's societal values. [It was] harder for a person in Colorado City, Texas to get a job if they [had] long hair.'" \(^{n40}\) Gammage responded to that purported justification as follows:

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The majority of this Court chooses, without the requirement or offer of any proof, to accept this specious explanation for a gender-based, discriminatory regulation without any concern for its infringement of constitutionally guaranteed personal liberties. While dress and grooming codes do not, per se, violate the constitution, they must be based upon compelling educational goals and may not be arbitrary and without foundation in furthering the educational mission of schools or avoiding disruptions. By its own admission, CISD's gender-based hair length policy [was] "arbitrary' and [did] not achieve the rule's purported educational goal. \(^{n41}\)

For that reason, wrote Gammage, the grooming code "cannot withstand analysis under the Texas Equal Rights Amendment." \(^{n42}\)

Understandably, the majority was reticent to have the courts intervene in local dress-code politics. Their judicial reluctance - or restraint - might have been based on the view that telling boys to cut their hair is hardly sex discrimination. Nevertheless, what is curious is why the majority seemed so remarkably oblivious to the equal-protection issue. Justice Gonzales does not mention it; instead, the entire majority opinion focused on the rights of minors - or lack thereof - in the public schools. Justice Gammage pointed out that "because CISD [could] offer no proof that any purported objectives of educational policy [were] met by regulating the hair length of male students only, the hair-length rule cannot survive even minimum rationality scrutiny." \(^{n43}\)

The hair-length or grooming policy failed miserably under the lowest level of scrutiny of the rational basis test, because the policies did not advance a rational purpose. A female student's Rapunzel-like hair might be down to her ankles; it might get stuck in the bus door or trip the cheerleaders. Her hair may even be dirty and, thus, implicate the hygiene requirement. Since girls engage in the same activities in chemistry or physical education classes, \(^{n44}\) the classification here is based upon assumptions and stereotypes about the appropriate gender appearance of students.

For Justice Gammage, the policy accomplished two things: obedience for the sake of obedience and respecting authority for authority's sake. The policy did not punish behavior that might endanger others, but did punish personal choice in one's manner of dress or appearance - thus "significantly intruding into the private lives of students with proportionately little [*34*] justification" and "without any concern for its infringement of constitutionally guaranteed personal liberties." \(^{n45}\)

Much ink has been spilled in the legal community over school districts being autonomous entities that should be largely unfettered by judicial intrusion - free not only to determine what is best for their community of students but also free from being held to overly burdensome standards when constitutional challenges are made. Justice Gammage agreed with the majority's view that courts ought to use the "heavy hand of justice" sparingly in local school matters, "but when
the heavy hand of local government arbitrarily" violates constitutional protections, then courts are required to act. He rejected the majority's over-reliance on the Fifth Circuit Court of Appeals' "judicial nonintervention policy." In contrast, Justice Gammage viewed the case not as a federal cause of action but as a state matter, as it was brought in a Texas court and argued under the Texas Constitution. Justice Gammage reminded the majority that for all the discussion of local autonomy, a school district is not an autonomous branch of government but a legislatively-created political subdivision. A school district has only those powers granted to it by the legislature, and a school district's actions are the actions of the State, not that of some abstract autonomous entity. And "absent some permissible bases founded upon an adequate standard, government may not violate constitutional prohibitions or intrude upon citizens' constitutionally protected liberties." Since "the legislature has no power to act in violation of the constitution and it may not grant [CISD's] Board the power to do so," the school district must be held accountable under the Texas ERA.

The majority noted that the Fifth Circuit Court of Appeals declined to rule on challenges to school-grooming codes. But as Gammage observed, the Texas Supreme Court is bound to enforce the Texas Constitution, as there is no federal equivalent to the Texas ERA - which goes further than the federal constitution in specifically prohibiting gender discrimination. Therefore, Barber's claim against the school district must "stand or fall" on the Texas Supreme Court's interpretation of the ERA. Gammage reasoned:

This case is not a federal cause of action, however, but was brought in Texas courts under the Texas Constitution. We are aware that some state courts adopt wholesale the federal judiciary's approach to federal constitutional issues in interpreting their own state constitutions, disregarding whether their state constitutions contain the same clauses or provisions as the federal constitution. But state courts are not bound to follow the analysis or approach of federal courts, and state governments are bound by the constraints of their own constitutions.

In the final analysis, the majority took a two-pronged approach to the dispute, invoking first "judicial nonintervention" - which one supposes is an emanation or penumbra of judicial restraint - and second, by not framing the issue as a constitutional violation. In the majority opinion, there was a slight hint that the school district may have taken an unconstitutional action, in that the school policy was analyzed using the lowest level of judicial scrutiny, reasonableness. To be fair, the reasonableness approach was applied to a grooming policy that gender-differentiated hair styles based on rural Texas tradition, and not a policy that allowed females to enroll in family sciences (home economics) but prohibited males from doing so. Would the majority have tolerated that distinction? Gammage considered what the majority would do if the hair-style and earring requirement promulgated by the district for male students applied to only Hispanic American male students. May the district differentiate hair-style requirements based on ethnicity? In the end, Gammage lamented the majority's "gratuitous judicial nullification" of the expressed will of the people in passing the Texas ERA to outlaw sex-based classification and for what he sees as an abdication of the state courts' authority to that of the federal courts - particularly where a clear state remedy was available. He wrote:

Baseless and irrational discrimination in all its forms, at whomever directed and whatever its source or motivation, is still baseless and irrational discrimination. In a free society we may not always be able to prevent its private exercise, but in Texas our fundamental law does not permit it in our public schools and other governmental institutions. They should not teach it, condone it, or engage in it, and our courts and other legal institutions should not - even passively and benignly - enforce it. I dissent.
III. Competing Rights: Press Freedom and Privacy

One of the challenging problems in adjudicating assertions of constitutional rights arises when rights must be balanced, not only with societal or governmental interests, but also with other rights. Justice Gammage authored opinions in several such disputes, most notably where the freedom of expression and the right to privacy collided. In the milestone ruling Star-Telegram, Inc. v. Doe, the Texas Supreme Court was asked to weigh the freedom of the press against the individual's right to privacy, and, more specifically, "whether a newspaper may be held liable for disclosing private facts about a victim of sexual assault .... " n60 The case originated when The Fort Worth Star-Telegram published a news article based on a police report for the crime. n61 The article did not name the victim, but it provided so much detail about her that it was almost impossible for acquaintances and neighbors not to know her identity. n62 The news report disclosed Doe's age, her neighborhood, the medication she took, and the fact that she drove a Jaguar. A second published story gave an account of her sexual assault and added that she owned a travel agency. n64 The "police beat" reporter for the newspaper obtained information about the crime from an unredacted police report at the Fort Worth Police Department. n65 Jane Doe sued the newspaper and reporter for invasion of privacy. n66 The newspaper argued that the information published was of legitimate public concern, citing the federal constitutional standard set forth in Florida Star v. B.J.F., which provides that "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order." n67 "The trial court granted summary judgment [in favor of the newspaper and reporter] without [*37] specifying the ground on which judgment was based." n68 The Texas court of appeals reversed and remanded the case for the trial court to answer the question of whether the information had been lawfully obtained by the newspaper. n69 The Texas Supreme Court unanimously reversed the court of appeals and held that no privacy violation had occurred, since the private facts disclosed about Doe, a crime victim, were of legitimate public concern. n70

Writing the opinion for the unanimous court, Justice Gammage began his analysis of the competing-rights claim by citing the famous 1890 Warren and Brandeis Harvard Law Review article, which argued for the first time that the right to personal privacy, or the "right to be let alone" is as much a part of personal liberty as the right to be free from physical restraint and the right to possess property. n71 This dimension of privacy is incorporated into a common-law tort in Texas that serves to protect individuals from invasions of their homes and disclosures of personal information. n72 Gammage cited Billings v. Atkinson, the first Texas case to recognize the violation of the right to privacy as a distinct tort that constitutes a legal injury. n73 In Billings, a jury awarded damages to a customer of Southwestern Bell, whose employee had installed an eavesdropping device on the customer's private home phone. n74 The court of civil appeals reversed, holding that no common law right to privacy existed under Texas law. n75 At the time of Billings, the law of the state had not recognized a cause of action for breach of privacy, although a number of interests related to privacy were afforded protection under the doctrines of libel and slander, wrongful search and seizure, eavesdropping and other invasions into the private affairs of individuals. n76 In Billings, the Texas Supreme Court reversed the appeals court and recognized that a right to privacy is distinctive in itself, and not incidental to some other right or tort that extends to wiretapping. n77

[*38] Returning to the issue of privacy in Star-Telegram v. Doe, Gammage also cited Industrial Foundation of the South v. Texas Industrial Accident Board, a dispute arising under the Texas Opens Record Act. n78 In Industrial Foundation, a private non-profit foundation requested the State of Texas' Industrial Accident Board to furnish personal information of all workers who filed claims for workmen's compensation. n79 The Board argued that such information is protected by the right to privacy. n80 However, the Texas Supreme Court ruled that the Board could not withhold information: "The State's right to make available for public inspection information pertaining to an individual does not
conflict with the individual's constitutional right of privacy unless the State's action restricts his freedom in a sphere recognized to be within a zone of privacy protected by the Constitution." n81 Nevertheless, in Industrial Foundation, the Court did expressly recognize this second type of privacy tort - the right to "freedom from public disclosure of embarrassing private facts." n82

Did the Star-Telegram violate Jane Doe's right to privacy? The Court said no. Justice Gammage wrote that although newspapers should take precautions to avoid the public disclosure of private facts, "there is a presumption under Texas law that the public has no legitimate interest in private embarrassing facts about private citizens." n83 Furthermore, a chilling effect on the freedom of press might occur if newspapers were required by law to take measures to avoid the publication of facts that may or may not subject innocent persons to unwanted or unpleasant notoriety. n84 Perhaps Doe was correct in her argument that more personal information was published than was necessary in the name of a legitimate public interest in newsworthy information; however, Gammage wrote, the media should not be expected to:

Sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, [this] would impose an impossible task; a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public. n85

[*39] Does this ruling leave private citizens naked to media scrutiny simply because they are involved in a newsworthy event of legitimate public concern? If death penalty protesters incite a small riot in front of a well-known defense attorney's office, does the media have the right to publish private information about the lawyer if she happened to be assaulted on the way to her car? Gammage suggests that this question must be answered on a case by case basis. The determination of whether privacy can be sacrificed in the name of newsworthiness must be made "in the context of each particular case, considering the nature of the information and the public's legitimate interest in its disclosure." n86

To untangle the competing rights claim asserted in this case, Justice Gammage relied largely on Florida Star, and, to a lesser degree, on the state precedent of Industrial Foundation, arguing that under Texas law that the public has "no legitimate interest in private embarrassing facts about private citizens." n87 There is a legitimate public interest in factual information about a newsworthy event that contains embarrassing facts. Of course, the claim of freedom of the press prevailed. Yet, of greater significance to Texas case law was Gammage's analysis of the right to privacy.

On privacy, Justice Gammage did not rely on federal precedent, but built upon two Texas cases, Billings and Industrial Foundation. In these two cases, the concept of privacy was incorporated into a common-law tort in Texas that protects a range of interests, including disclosure of private information about one's personal life. This right stands alone from the common-law tort of public disclosure of private information and serves to protect individuals from invasions of their homes by electronic or other means of acquiring personal facts, and the subsequent disclosure of such information. This notion of privacy is distinct from federal precedent, the latter of which focuses on three dimensions: marital privacy, n88 Fourth Amendment-based privacy, n89 and associational privacy. n90 Recall that in his Barber dissent - beyond the equal-protection analysis upon which the case was finally decided - Justice Gammage added that the hair-length policy unnecessarily intruded into the privacy of students, by restricting students' [*40] personal autonomy in choosing the manner of dress or appearance without justification. n91

Texas did not recognize any form of an invasion-of-privacy tort until Billings, where the Texas Supreme Court applied one of Prosser's four distinct injuries under the tort of invasion of privacy - intrusion upon a person's right to be left alone in his or her own private affairs. n92 The second type of invasion, involving publicizing private information about a person, was recognized in Industrial Foundation. n93 The third involves the appropriation of a person's name, likeness, or personality for commercial gain. n94 The fourth doctrine is false light, raised most notably in Cain v. Hearst Corporation where a majority of the court refused to recognize it as an independent privacy tort because it "substantially
duplicates the tort of defamation." In Cain, a prison inmate sued the Hearst Corporation, claiming that the Houston Chronicle invaded his privacy by placing him in a false light. The newspaper article stated that he had killed as many as eight people, but Cain complained that the newspaper article stated that he was a member of the "Dixie Mafia."

In rejecting Cain's claim, the majority produced an impressive exegesis of the right to privacy, detailing the four privacy torts. The majority explained that even in light of several federal court rulings that permitted a cause of action for false light to be brought under Texas law, the Texas Supreme Court had been reluctant to adopt the "least-recognized and most controversial aspect of invasion of privacy." Furthermore, the majority believed that such defamatory acts were "subject to numerous procedural and substantive hurdles" that protect freedom of speech.

Justice Gammage, in joining Justice Hightower's dissenting opinion, agreed with the majority's analysis of the first three privacy doctrines, but disagreed with its rejection of the false-light doctrine. The dissenters disputed the claim that "false light unduly increases the tensions between tort and free speech law." The two torts are intended to protect different interests: "Defamation preserves individuals' reputational interests, but false light invasion ... safeguards individuals' sensitivities about what people know and believe about them." In sum, both Star-Telegram and Cain expanded privacy rights in Texas.

IV. Limits on Anti-Abortion Protests: More Competing Rights

Justice Gammage participated in another high profile competing-rights case, in which the Texas Supreme Court addressed a conflict between an anti-abortion group's freedom of expression and a private citizen's right to privacy. The problem of competing rights has often been at its strongest when a conflict occurs between a woman's right to have an abortion and anti-abortion activists' freedom of expression to protest the exercise of that right. A woman's right to an abortion implies that no "undue burden" be placed on that right, and that she have access to a physician and facility for the abortion to be performed. Anti-abortion activists have long exercised their First Amendment rights in locations far removed from the traditional public forums of courthouses and state capitol buildings. Groups have demonstrated near medical facilities where abortions are performed, in front of the private residences of the physicians who perform abortions, and even in front of schools attended by the children of those physicians. The motives of anti-abortion protestors range from expressing moral outrage and shaming women who seek abortions to intimidating abortion providers out of the business; there have also been fatal shootings and bombings at abortion clinics. The courts find themselves not only in the middle of two competing rights, but smack in the middle of culture wars. It was in this context that, in 1993, the Texas Supreme Court and Justice Gammage heard the case of Valenzuela v. Aquino.

The case originated when a physician, Dr. Eduardo Aquino, sued Eliseo Valenzuela, Jr. and other anti-abortion protestors for negligent infliction of emotional distress and breach of privacy caused by incessant protesting outside of his home. Aquino had an obstetrics and gynecological practice, a small part of which provided abortions. In 1982, a group called South Texans for Life began picketing at Aquino's offices. Even after the group threatened his personal safety, Aquino never attempted to stop them. However, in 1988, the demonstrators began picketing the Aquinos' family home, often beginning their protest activities shortly after the Aquino children returned from school but before Dr. Aquino came home from work. The group held signs bearing messages such as "Nice House Dr. Eduardo, How Many Babies Paid the Price," "Beware Abortionist in Your Block," and "God Gives Life, Aquino Takes Away." While police cars were parked on the street, Aquino's neighbors lined the streets to watch the demonstrations. Protectors photographed the Aquino home, and on one occasion, a protestor followed Ms. Aquino as she attempted to leave for the grocery store. There was little doubt that this "circus-like" environment traumatized the family. Ultimately, Ms. Aquino was diagnosed with post-traumatic stress disorder and placed on
The children were traumatized and suffered signs of emotional distress, and the oldest son was placed in a psychiatric hospital.

A temporary injunction was granted by the trial court prohibiting the protestors from conducting a wide range of activities, "including all residential picketing within one-half mile of the Aquinos' home ... ." After the jury found for the Aquinos, the trial court awarded the Aquino family actual and punitive damages for infliction of emotional distress resulting from the breach of privacy caused by the demonstrators. The trial court also issued a permanent injunction ordering the protestors to conduct their activities outside of a 400-foot buffer zone around the Aquino residence. The trial court wrote:

I believe Texas recognizes a right to privacy. This right, I believe, includes the right to be free from willful intrusions into one's personal life at home and at work - this right to be left alone from unwanted attention that may be caused by picketing or other unwanted demonstrations ... is protected by injunctive relief.

The court of appeals, in affirming the trial court's permanent injunction, found that there was a "significant governmental interest in protecting the privacy and domestic tranquility of the home," and the injunction was "narrowly tailored to serve [that] interest." The court of appeals did however, reverse the jury's award of damages for the Aquinos' emotional distress because the court believed the award constituted a violation of the protestors' freedom of speech.

On appeal, the Texas Supreme Court reversed the permanent injunction and remanded the case back to the trial court. Writing for the majority, Justice Nathan Hecht refused to address what he believed to be the "hypothetical" constitutional question of whether the award of damages constituted a chill on free speech on the grounds that no tort cause of action for negligent infliction of emotional distress exists in the state. Aquino, theoretically could have recovered damages for breach of privacy, but first, the trial court needed to determine whether the picketing "would be highly offensive to a reasonable person." Dr. Aquino could have claimed that the protestors' acts resulted in an intentional intrusion on his privacy that was highly offensive to the average person, but the majority wrote that the testimony among the protestors and witnesses, relating to the presence of an intent to intimidate, was ambiguous and contradictory to establish the second element of invasion of privacy. The majority reasoned that, as horrible as the effect of the intense protesting might have been on the family, it could be argued that the demonstrators were merely trying to express their heartfelt belief that abortion was morally wrong.

It is unclear why the majority split hairs by focusing solely on the question of intentional versus negligent infliction of emotional distress, when the basis for Aquino's original petition was an invasion of privacy based on the U.S. Supreme Court's ruling in Frisby v. Schultz. The Court in Frisby held that demonstrating in front of someone's residence can be prohibited in the interest of the homeowner's privacy. The majority did recognize that Frisby allowed for limits to be set on residential picketing, but it did not believe that such picketing was illegal per se. Notwithstanding a half-decade of protesting, Aquino's lawyers could not convince the majority that the breach of privacy was intentional and offensive. The Court concluded:

The dissenting opinions explore the limits on such picketing and urge the Court to do likewise. Absent findings or evidence to establish Valenzuela's liability to Aquino, we decline to debate the very important and difficult but
nevertheless hypothetical issue of whether Valenzuela's constitutional rights might provide a shield from such liability if it were ever established. n132

In his dissenting opinion, Justice Gammage agreed that under the Texas constitution, a person cannot win damages from a group engaged in protected speech; however, the targeted individual or group may be allowed to recover damages that arise from conduct unrelated to protected expression. n133 Justice Gammage doubted that the group was interested in simply expressing their moral opposition to abortion, as the protestors targeted Aquino's home only at times when they knew he would not be home. n134 The protestors' intent was to intimidate and disrupt his family to the extent that he would stop performing abortions. n135 Even if the speech component of the group's demonstrations are protected, the conduct components - if they are aimed at intimidation - are not constitutionally protected and may permit recovery of damages. This is made plain in United States v. O'Brien, and other "speech-plus conduct" cases, where it has been established that a criminal conviction can be upheld if it stands on the non-communicative impact of conduct. n136 Citing the Texas case of Casso v. Brand, Gammage argued that under article I, section 8 of the Bill of Rights of the Texas constitution, speech loses protection and may give rise to liability for defamation where the conduct associated with the speech is "so excessive and intrusive" that it does not deserve protection. n137 Also relying on another Texas case, James v. Brown, Gammage added that liability for one's speech may arise only when "unprotected conduct is intertwined with protected expression," and the award for damages is based on that unprotected conduct. n138 Justice Gammage reasoned:

Much of the demonstrators' conduct cannot be considered integral to their ability to deliver their message. Indeed, the record reveals that some of their conduct involved not just "mere advocacy, but ... [also included] ... overt acts of intimidation' unrelated to protected expression. The presence of such conduct tends heavily to support the jury's finding that the demonstrators caused the Aquinos mental anguish. n139

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When the group of protestors realized that their constitutionally protected right to picket Dr. Aquino's clinic failed to meet their objectives, they went beyond expression and "intentionally engaged in conduct calculated to intimidate" the entire Aquino family, by taking "outrageous actions at his private residence." n140 Gammage concluded: "What they could not win through the persuasion of protected free speech they sought to win through intimidation and coercion." n141

The court of appeals feared that allowing the Aquinos to recover damages for the picketing that took place at his residence would place an unconstitutional chill on speech. n142 However, Gammage argued that damages awarded "as a consequence of unprotected collateral conduct" of the protestors, and not because of their protected speech, does not chill the exercise of the freedom of expression. n143 The case goes beyond a tort claim, and is a matter of competing rights: the right to privacy versus the right to engage in expressive conduct.

While Justice Gammage says little about privacy in his separate dissenting opinion, he joins Justice Rose Spector's lengthy analysis of the privacy interests at stake in this case. n144 In her dissenting opinion, Justice Spector argued that the case originated as a breach-of-privacy claim. n145 By remanding the case back to the trial court, Justice Spector articulated that "the majority needlessly prolongs this litigation and effectively endangers a family's most basic rights." n146 Justice Spector argued that when a violation of the right to privacy exists, injunctive relief is necessary - especially when legal remedies are inadequate, there are inadequacies with damages, or there is evidence of future violations. n147 Here, the evidence and the jury's finding that the picketing was "focused and directed" at the Aquino residence met the Frisby standard discussed above, which protects the right to residential privacy. n148 The dissenters relied on Billings v. Atkinson, which defines the right to privacy under Texas law as "the right of an individual to be left alone, to live a life
of seclusion,“ to be free "from unreasonable intrusion,“ and "to preserve the sanctity of the home." The conduct also threatened other privacy rights. By targeting and harassing doctors as the "weak link," anti-abortion rights groups know that they could make Roe v. Wade "an empty promise." In the end, the dissenters agreed with the court of appeals that the award of damages in this case would inhibit debate on public issues, but that an injunction is a reasonable restriction on expressive conduct. The dissenters appeared puzzled by the majority's absolute refusal of the majority to discuss the constitutional tension between Aquino's right to privacy and the expressive conduct rights of South Texans for Life. There also seemed to be confusion as to the majority's unequivocal avoidance of the matter of relief for the Aquino family, who suffered one of the most relentless and punishing campaigns undertaken by an anti-abortion group.

Although the majority argued that no tort action for negligent infliction of emotional distress has ever existed in Texas, the Texas Third Court of Appeals did allow a woman to recover for negligent infliction of emotional distress as a result of her estranged husband's repeated attempts to coerce her into sexual bondage practices. Writing for the majority in that case, Justice Gammage recognized the existence of this tort and argued:

In order to recover for negligent infliction of emotional distress, a complainant must show "the tortfeasor acted knowingly or with conscious indifference, causing a relatively high degree of mental pain and distress, such as a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation." However, three years later, a divided Texas Supreme Court reversed the court of appeals decision and refused to recognize this tort.

V. Private Agreements and the Right to Privacy

In 1984, while serving on the court of appeals, Justice Gammage had the opportunity to write for a unanimous court in an unusual privacy claim advanced in Colquette v. Forbes. Although his opinion is brief, it warrants discussion here as it augments our understanding of Gammage's views on the right to privacy. The case raised the question of whether a consensual agreement made between two persons, free from governmental interference, violates the right to privacy. The case originated when Nancy Colquette claimed that the terms of the property settlement of her divorce decree violated her constitutional right to privacy. As part of a divorce property settlement, Thomas Forbes agreed to convey his interest in the marital home to Nancy Colquette if she signed a promissory note that would come due in five years, "with immediate acceleration of maturity upon Colquette's remarriage or ... cohabitation with an unrelated adult male" at the home.

Forbes brought suit to collect on the note and claimed that the note had matured, since Colquette had been cohabitating with an adult male for weeks. The trial court agreed that the note was due, agreed that Forbes could place a lien on the house, and ordered foreclosure if the note was not paid in full. Colquette appealed and argued that the acceleration of the note and the placing of the lien, merely because of her cohabitation with an adult male, violated her right to privacy as defined in Griswold v. Connecticut. Colquette argued that any contract or policy supporting the terms of such a contract is void if it violates one's right to enter into a relationship with another person. The court of appeals dismissed this application of Griswold to a private contract and ruled for Forbes. Writing for the court, Justice Gammage argued that Colquette had willingly agreed to the terms of the contract so that she could keep her house. However, we might ask, wouldn't a contract be void if it violated a right to live with one's lover or partner? Can it be assumed that merely because Colquette was cohabiting with a boyfriend or new
husband, that she now had the ability to pay the note in full? Gammage reasoned that the acceleration clause was a part of a mutual agreement between two individuals; it was not public policy promulgated by the government.\footnote{167} The only involvement of the State in this case, was the "judicial enforcement of private contractual obligations."\footnote{168} Colquette consented to the intrusion into her privacy and relationship choices when she signed the promissory note.\footnote{169}

Judge Gammage also rejected Colquette's contention that the judicial enforcement of the cohabitation clause of the promissory note was contrary \(^\text{[*49]}\) to public policy and in violation of Shelley v. Kramer.\footnote{170} In Shelley, the U.S. Supreme Court struck down judicially enforced racially-restrictive covenants.\footnote{171} If the State by law had required the cohabitation clause, then it might have been possible to challenge the law under Shelley - asserting that a state action had violated the Constitution.\footnote{172} Judge Gammage concluded:

It is apparent to us that the justifications for the Shelley rule are not present in this case. Here, the affected parties consented to the intrusion - if acceleration of maturity of the debt and the particular conditions giving rise thereto can be construed as such - by their mutual acceptance of the terms of the note... . We hold that, under the facts of this case, judicial approval of the property settlement agreement and subsequent enforcement of the obligations created therein are, in nature and degree, not the type of government involvement restrained by a constitutional right of privacy.\footnote{173}

Colquette v. Forbes brings up an intriguing privacy claim. Family and real estate law in Texas provides the legal language, but in no way requires such a property settlement agreement between private parties. Forbes was no doubt anxious to receive payment for his interest in the house but agreed, per the promissory note, to wait a period of five years to be paid by Colquette.\footnote{174} Colquette agreed to these conditions to give her time to save money.\footnote{175} The likely presumption made was that if Colquette remarried or cohabitated with an unrelated adult male at the home, money would be available to help the ex-wife pay the note in full. Could Forbes have insisted to conditions that the note be accelerated if she merely dated a man who regularly spent the night? What if she had a female lover as opposed to male as stipulated in the agreement? Suppose further that a tenant agrees not to have premarital sex as a mutually agreed upon condition of a lease agreement? Can the tenant ultimately bring a cause of action for a tort invasion of privacy if the landlord has grounds for terminating the lease?\footnote{176} Such agreements seem very intrusive into a person's private intimate affairs, but it is all academic since, as Justice Gammage points out, the obligations created by the note were consensual and not the type of government involvement that would infringe on a constitutional right to privacy. Thus, the privacy claim was summarily discredited by the court and died in obscurity. Colquette lives on as a footnote in only two known Texas appellate court cases and one law review article.\footnote{177}

VI. The Texas Sodomy Law Challenge

Seven years before the U.S. Supreme Court's landmark ruling in Lawrence v. Texas,\footnote{178} Justice Gammage participated in a case that had the potential to strike down Texas' sodomy law.\footnote{179} In State v. Morales, two gay men and three lesbian women challenged the law on the grounds that it violated the constitutional right to privacy, due process, and equal protection provisions of the Texas constitution.\footnote{180} At the time of the Morales decision, sodomy was a criminal offense in a significant number of states.\footnote{181} Bowers v. Hardwick\footnote{182} was still the law of the land, but the Morales plaintiffs challenged the sodomy statute in state court under the Texas constitution.\footnote{183} According to the record, the sodomy law was rarely enforced, and it was unlikely that the State would enforce it in the near future.\footnote{184} Nevertheless, the law was used to stigmatize and discriminate against homosexuals in areas such as housing, family law, and employment.\footnote{185} For example, Texas police departments had invoked the law to deny employment to openly gay and lesbian job applicants.\footnote{186} The fact that the law was not currently being enforced made it more difficult to challenge its constitutionality. Indeed, at the time of Morales, Texas civil courts had only twice reviewed the constitutionality of
unenforced criminal [*51] statutes. n187 However, unless a person was prosecuted for an act of sodomy, the case would not go to Texas' highest criminal court, the Texas Court of Criminal Appeals. n188 There, a constitutional challenge to the law could be used as a defense, so that an affirmative or negative vote on its constitutionality would take place. n189 Since there were no pending prosecutions under the law, the only feasible strategy for the Morales plaintiffs was to challenge the law in a civil court. n190

In a surprise ruling, the Texas trial court declared the statute unconstitutional and enjoined the enforcement of the law. n191 The State countered with a procedural argument that the civil court was precluded from deciding the case, because the court's equity jurisdiction did not extend to questions regarding the constitutionality of criminal statutes. n192 The court of appeals rejected the State's procedural argument and affirmed the trial court's ruling. n193 The appellate court found that the right to privacy contained in the Texas constitution offered broader protections than the right to privacy under the U.S. Constitution. n194 The court concluded that the sodomy law violated the fundamental right of two consenting adults to engage in private sexual behavior. n195 The court added that the law did not advance any compelling governmental interest. n196

In a narrowly decided (5-4) decision, the Texas Supreme Court rejected the appellate court's reasoning and remanded the case back to the trial court with orders to dismiss. n197 The narrow majority argued that when [*52] no actual or threatened enforcement of a statute occurs, a civil court cannot enjoin the enforcement of the statute. n198 Writing for the majority, Justice Cornyn n199 circumvented the constitutional question, and framed the challenge to the sodomy law solely in procedural terms. By focusing on the scope of equity jurisdiction of a civil court, the Court stated: "Civil equity courts have no jurisdiction to enjoin the enforcement of criminal statutes in the absence of irreparable harm to vested property rights." n200 The majority rejected the appellate court's interpretation of Passel v. Fort Worth Independent School District, which held that equity power did extend to the protection of personal rights violated by a criminal statute. n201 Instead, it was determined that legal precedent has long recognized that the equity jurisdiction of civil courts is limited to violations of vested property rights and not to personal rights. n202

Courts of equity can intervene in a case where a criminal statute is enforced, only if the statute is unconstitutional and its enforcement will result in an injury to property rights. n203 The majority argued that if civil courts extended their jurisdiction to challenges of criminal statutes, conflicting decisions on the constitutionality of laws would occur between the civil and criminal courts of last resort. n204 In sum, by dismissing the challenge on procedural grounds, the majority upheld the sodomy law. Citing the Attorney General's position, the majority concluded:

There is no record of even a single instance in which the sodomy statute has been prosecuted against conduct that the plaintiffs claim is constitutionally protected; none of the plaintiffs claims a specific instance of career or employment 55 S. Tex. L. Rev. 27, *52

opportunities having been restricted by the existence of the statute; none of the plaintiffs alleges having been the victim of a hate crime, or a fear of becoming the victim of any specific threatened future event. n205

In his dissenting opinion, Justice Gammage n206 responded:

[*53]

This court also offers a confusing discussion of lack of jurisdiction because reaching the merits would be an advisory opinion, which is somehow linked to this absence of harm... . The State stipulated that plaintiffs' job choices are limited, that they face discrimination in housing, family, and criminal justice matters, and that they suffer psychological harm to their relationships because they are labeled criminals by the very existence of the statute. n207
Justice Gammage reasoned that the majority "confuses harm with prosecution" by its insistence that the sodomy statute causes no harm, merely because there is no actual or imminent prosecution. The question of whether the prosecution of gays and lesbians is imminent, rather than a possibility, is relevant only if the allegations made are based on anticipated or hypothetical harm rather than an injury that has already occurred. As the appellate court acknowledged, the Morales plaintiffs suffered actual harm under the statute independent of the threat of criminal prosecution. The dissent criticized what they saw as the majority's procedural maneuvering to prevent the court from ruling directly on the constitutionality of the sodomy law. The Court does have the power to address Morales' challenge to the sodomy law.

An equity court's primary concern in enjoining the enforcement of a criminal statute is not whether there are property rights involved, but whether there is irreparable harm to a person's rights. Justice Gammage pointed out that equity courts usually decline to interfere with a criminal prosecution, because an individual can challenge the unconstitutionality of a law as a defense in a criminal case. However, "the power of a [civil] court to assume jurisdiction of a cause on the ground of irreparable injury is the fundamental characteristic of equity jurisdiction." The jurisdiction of a court of equity does not depend on the nature of the right harmed - whether personal or property but on "the existence of a justiciable right for which there is not" an adequate legal remedy.

Morales and the other respondents could seek a remedy in a civil court even though there was no pending or anticipated prosecution, because they were harmed by the statute. The harm was not hypothetical, and "to hold otherwise would disregard the fundamental principle upon which such courts are established." Justice Gammage indicated that the standard established in Passel is that the meaning and interpretation of a criminal statute should ordinarily be determined by courts exercising criminal jurisdiction unless, the law is unconstitutional, there is no way to test its constitutionality because the law is not being enforced, and its enforcement will result in irreparable injury to vested property and personal rights. He argued that the case law shows that the majority was rewriting the Passel standard, which is established law. Justice Gammage concluded that the majority abdicated its duty to apply judicial scrutiny to laws that infringe upon the rights of citizens. He wrote:

The court allows the State to insulate its laws from judicial scrutiny. Under the court's analysis, the State may adopt all manner of criminal laws affecting the civil or personal rights of any number of citizens, and by declining to prosecute ..., them, ensure that no court ever reviews them.

Declining to even consider the merits of the pleas for equitable relief before us today could have an impact far beyond the class of citizens immediately affected... The court effectively denies standing in Texas courts to any individual or group of citizens who seek equitable relief under the Texas constitution, because of an unenforced Texas criminal statute, for the alleged deprivation of any personal liberty or civil right which does not also involve what the court may perceive as an adequate vested property interest.

Justice Gammage's position in Morales discussed above, as well as his comments about judicial abdication in other cases such as Barber, shows that Gammage had no use for a cramped judicial philosophy and was critical of those who he believed to have abdicated the proper role of the courts - to extend review to statutes that violate rights. It is less a matter of judicial restraint and more one of judicial deference to the political branches that troubles him. This gives us another glimpse of how Gammage understood the role of the judiciary.
The Morales decision was one vote short of overcoming a procedural wall intentionally erected to avoid ruling on the constitutionality of a highly controversial law. Research shows that the sodomy law was not and is not just languishing, ignored, and dusty in the penal code, but has been modified and preserved by social conservatives. As of now, the law is still on the books despite Lawrence v. Texas - although there is a proposal for its repeal.

Had the court overcome the procedural questions and addressed the sodomy law directly, we would have a more complete picture of how Justice Gammage might have analyzed the substantive issue - whether he would have addressed it from the standpoint of equal protection, the right to privacy, or both as the appellate court did in Morales. Recall that in Barber, Justice Gammage argued that the Texas Equal Rights Amendment offered broader protection than the Fourteenth Amendment to the U.S. Constitution. Subsequently, Justice Gammage recognized in Morales that homosexuals constitute a class of people that face discrimination in housing, family law, and criminal justice matters, based solely on the mere possibility of committing a particular sexual act. Even if the statute as written is never enforced, the very existence of the law classifies homosexual Texans as criminals, and in doing so allows discrimination against them. Justice Gammage raised the frightening prospect that under the "unenforced law" concept, the state can pass all kinds of criminal laws that single out groups of people and violate their constitutional rights, as long as the laws go unenforced. The majority took great comfort from the fact that the law was unenforced, and the fact that there was no evidence that gays and lesbians ever suffered from any form of employment discrimination or hate crimes. Justice Gammage was incredulous at these assertions.

VII. Edgewood Independent School District v. Kirby: Equal Protection and Fundamental Rights

Edgewood Independent School District v. Kirby is one of the most complex and controversial Texas Supreme Court decisions in the last thirty years. The Edgewood case is actually a series of six rulings between the years 1989 and 1995 that were intended to force the Texas legislature to create a more equitable system of education funding. Edgewood has been very aptly called a "saga" involving hundreds of litigants, different judges, changing composition of the courts, as well as evolving or shifting alignments of justices, each positing a distinct interpretation of provisions of the Texas constitution that mandate a public education system.

Justice Gammage played a pivotal role in Edgewood, first in 1988 on the Texas Third Court of Appeals and from 1991 to 1995 as a justice on the Texas Supreme Court. His dissenting opinion in Kirby v. Edgewood Independent School District in 1988 was the first time an appellate court judge in Texas argued that education was a fundamental right, and that the state's system of school funding was unconstitutional because it deprived students in poor school districts of equal educational opportunities. Justice Gammage's dissent not only had a significant impact on the Edgewood case, but it also stands out as an intellectually powerful call for equality and the most comprehensive and detailed explication of his equal protection jurisprudence.

Kirby v. Edgewood Independent School District originated when the Mexican American Legal Defense and Educational Fund filed a lawsuit in 1984 against William Kirby, the Commissioner of Education, on behalf of the Edgewood Independent School District. The lawsuit alleged that the State of Texas's public school funding system violated the principle of equal protection by discriminating against students in low-income school districts. The state and the school districts shared the cost of basic operations, but the cost of facilities and personnel were funded largely by the independent districts. Based on this formula, school districts in property-rich areas were able to provide students with better academic and athletic facilities, more up to date curriculum, and better-trained teachers. The lawsuit alleged that there was a heavy concentration of families living below the poverty line in the poorer districts. Census data from 1980 showed that while "twenty-one percent of the State's population was...
Mexican-American, eighty-four percent of the population in the poorest school districts was Mexican-American.\textsuperscript{n233}

The state did have a "Foundation" program that was intended to equalize funding across all districts so that poor districts received substantially more state funding than wealthy districts, but the property-rich districts still spent more money per student.\textsuperscript{n234}

After a bench trial, state district court Judge Harley Clark ruled that the existing school finance system in Texas was unconstitutional.\textsuperscript{n235} He reasoned that education is a fundamental right; the existing funding system violated the Texas constitution's requirement for an efficient educational system; and wealth is a suspect classification in terms of school-finance policy.\textsuperscript{n236} Thus, strict scrutiny had to be applied to the state's policy because it allowed for major disparities in per-student spending, disproportionately harming lower-income students. Judge Clark further ruled "that the Texas constitution demands "fiscal neutrality' in public school funding," meaning that "the level of expenditures per student in any district may not vary according to the property wealth of that district."\textsuperscript{n237} The state's reliance on local property taxes to fund education created an inherently unequal system because huge differences in property values across school districts.\textsuperscript{n238} Judge Clark ordered the legislature to formulate a new school-financing plan by September 1989.\textsuperscript{n239}

The Texas Third Court of Appeals reversed Judge Clark's ruling by a 2-1 vote.\textsuperscript{n240} Writing for the majority, Chief Justice Shannon argued that education was not a fundamental right, wealth was not a suspect classification, and that the state's system of school financing did not violate equal protection rights, the due course of law, or the efficient school system provisions of the Texas constitution.\textsuperscript{n241} Furthermore, the majority argued that the court of appeals believed - given the complexity of a vast school system, which educated three million students - that the question of educational efficacy was fundamentally a political question that should not be subject to judicial review.\textsuperscript{n242} Shannon rejected the trial court's application of a Fourteenth Amendment equal-protection analysis, on the grounds that in San Antonio Independent School District v. Rodriguez, the U.S. Supreme Court refused to recognize education as a fundamental right, and rejected the "nexus" argument that education is necessary for citizens to exercise fundamental rights, such as freedom of speech and the right to vote.\textsuperscript{n243} In 1985, the Texas Supreme Court also rejected the idea that education is a fundamental right, reasoning that: "Fundamental rights have their genesis in the express and implied protections of personal liberty recognized in federal and state constitutions ... ."\textsuperscript{n244}

In a long dissenting opinion, Justice Gammage argued in support of the trial court's ruling and set forth his position on equal protection as it applies to school funding and educational opportunity. Justice Gammage began by noting that "the Texas Constitution imposes on the State the burden of ... providing for public education."\textsuperscript{n245} As an alternative to a centralized system of school funding, the legislature created school districts and allowed for local property taxation for the support of schools within those districts.\textsuperscript{n246} The Texas constitution does not allow for the creation "of any school system other than one which is efficient and which comports with the requirements of equal rights under the law,"\textsuperscript{n247} The adequacy and, thus, equality of education in a competitive economic and political system is relative. Gammage writes:

It is a function of what other children are getting. A program of instruction available to one child cannot truly be deemed adequate or efficient if other children are afforded a better educational program and are thereby consistently advantaged in the lifelong competition for money, status, and political influence.\textsuperscript{n248}

Justice Gammage noted that four provisions of the Texas constitution provide a solid foundation for equality in education. First, article I, section 3 provides that "all free men," in forming "a social compact, have equal rights, and no man" or group "is entitled to exclusive separate public emoluments, or privileges ... ."\textsuperscript{n249} Second, article I, section 3(a) 55 S. Tex. L. Rev. 27, *59
requires that "equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Third, focusing on public education, article VII, section 1 comments that "]general diffusion of knowledge being essential to the preservation of the liberties and rights of the people," makes it a "duty of the Legislature ... to establish and make suitable provisions for the support and maintenance of an efficient system of public [education]. Lastly, and specifically with respect to funding, article VII, section 3(a) provides that tax revenue "shall be set apart annually for the benefit of the public free schools ... ."

Justice Gammage cited Spring Branch Independent School District v. Stamos, in which the Texas Supreme Court held that the state legislature is free to determine the ""methods, restrictions, and regulations' necessary to administer public schools, "so long as that determination is not so arbitrary as to violate the constitutional rights of Texas' citizens." Justice Gammage also relied on Stout v. Grand Prairie Independent School District, where the Texas Fifth Court of Appeals ruled that education was a fundamental right guaranteed under article VII of the Texas constitution.

While the majority correctly understood that San Antonio Independent School District v. Rodriguez held that education was not a fundamental right under the Fourteenth Amendment, Justice Gammage pointed out what seems to be obvious: The majority failed to recognize - or chose to ignore - the fact that the Rodriguez case was relying on the U.S. Constitution, which does not include a specific provision for education. The claim in Edgewood relied on the Texas constitution, which expressly recognizes education as indispensable to the exercise of fundamental rights and liberties, and mandates that the legislature make "suitable' provision for an "efficient' education system." Of course, education as a fundamental right is not enumerated in the Bill of Rights of either the federal or state constitutions. However, Justice Gammage concluded that even though a fundamental right may not be enumerated or have a "specific textual [basis] in our State Constitution," does not mean it does not exist.

Texas courts have repeatedly protected implied fundamental interests such as the right to privacy, the rights of a parent in a family setting, and the right to pursue an occupation. Certain unarticulated rights are implicit in enumerated guarantees and are necessary to the protection or enjoyment of rights that are explicitly guaranteed. The majority conceded the existence of unarticulated fundamental rights, but argued that government has no obligation to provide the money necessary to exercise such rights or liberties. This is a common notion advanced by other conservative justices, such as the late Chief Justice Rehnquist, who was fond of the belief that there may be a right to speak or to have an abortion, but that the government has no affirmative obligation to fund these rights.

If government was required to fund the exercise of fundamental rights, it would need to do so equally, and in doing so, would be a drain on the taxpayer. Many taxpayers might object to funding education equally, especially where local school taxes in wealthy suburbs were siphoned-off to fund schools in poorer districts. However, as Justice Gammage pointed out what he saw to be another error made by the majority, the Texas constitution "explicitly and prominently" obligates the state government to provide for a "suitable" and "efficient" educational system in order "to preserve other liberties and rights of the people." Public education, with a few exceptions, is compulsory. Children must attend school; therefore, the government is required to fund education in a suitable, efficient, and equal manner. The U.S. Supreme Court ruled, in Plyler v. Doe, that Texas' denial of access of free public schools to the children of illegal aliens violated the Equal Protection Clause of the Fourteenth Amendment. While the nation's highest court did not rule that education was a fundamental right, neither did it dismiss education as "some governmental 'benefit' indistinguishable from other forms of social welfare legislation." Justice William J. Brennan wrote:

It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime... .

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If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. \(^\text{n268}\)

Since the state law at issue in Plyler severely disadvantaged the children of illegal aliens by denying them the right to an education, and because Texas could not prove that the regulation was needed to serve a "compelling state interest," the U.S. Supreme Court struck down the law. \(^\text{n269}\) Gammage conceded the Edgewood majority's point that wealth had never been held to be a suspect classification for purposes of equal-rights analysis. \(^\text{n270}\) However, the particular set of "undisputed findings of fact made by the trial court" in Edgewood have never been before either the U.S. Supreme Court or the Texas Supreme Court. \(^\text{n271}\) The trial court found that poor people are heavily concentrated in low-wealth school districts - the majority of which are districts not fully accredited because they do not meet basic minimum state standards. \(^\text{n272}\) Thus, poor residents in those districts "might well be a "suspect classification."" \(^\text{n273}\) Gammage reasoned: "The relative powerlessness of these people to alter their situation through [*62] political means indicates strongly that they should be considered a suspect class in the education context." \(^\text{n274}\)

Less than one year later, in Edgewood Independent School District v. Kirby (Edgewood I), the Texas Supreme Court reversed the court of appeals, adopted the principles set forth in Gammage's dissenting opinion, and left in place the trial court's ruling in favor of the Edgewood Independent School District plaintiffs. \(^\text{n275}\) In a brief opinion, the Court relied mainly on the position that the school-financing system violated the Texas constitution's efficiency provision set forth in article VII, section 1, and noted the strong nexus between inefficiency and the denial of equal rights. \(^\text{n276}\) The funding system at issue provided for a limited and unbalanced diffusion of knowledge contrary to the intent of the framers of the Texas constitution. \(^\text{n277}\) Justice Oscar Mauzy wrote:

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 education programs are typically inferior... .

The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student. \(^\text{n278}\)

The majority also rejected the court of appeals' claim that this case was a non-justiciable political question because the Texas constitution vests exclusive discretion in the legislature. \(^\text{n279}\) The constitutional mandate that the legislature provide for free public schooling, is accompanied by standards such as the requirement that schools must be efficient and suitable for the "essential purpose of a general diffusion of knowledge." \(^\text{n280}\) While the standards are imprecise, the Court nevertheless has the interpretive power to use these terms as a measure of the legislature's actions. \(^\text{n281}\)

The Court neither provided the state legislature with the specifics of the remedial legislation that it should enact, nor ordered the legislature to raise taxes. The legislature was ordered to have a plan in place by the 1990-1991 school year to eliminate the "gross inequalities" and "vast disparities" [*63] among the districts. \(^\text{n282}\) These inequalities resulted from concentrations of resources in property-rich school districts that taxed at low rates, while property-poor school districts taxed at high rates, but were still unable to generate the sufficient revenues to meet the minimum state-education standards. \(^\text{n283}\) School "districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort." \(^\text{n284}\)

Following the 1989 Edgewood I ruling, the legislature met in six special sessions called by the governor. On June 7, 1990, the legislature passed Senate Bill 1 - a new funding plan that would increase state support for public schools, and establish a benchmark whereby ninety-five percent of Texas' students would ultimately attend school in an

55 S. Tex. L. Rev. 27, *63
equalized system; however, the bill did not authorize the state to use revenue from the wealthiest school districts to fund the proposed equalized system.\textsuperscript{285} The Mexican American Legal Defense and Educational Fund rejected the new legislation and asked the district court for another hearing.\textsuperscript{286} Judge Scott McCown, who replaced Judge Clark, ruled that the new plan was unconstitutional because it did not provide "substantially equal" access to public school funds, as ordered by the Court in its 1989 Edgewood I ruling.\textsuperscript{287} The State of Texas appealed the district court's ruling and Edgewood II was heard by the Texas Supreme Court.\textsuperscript{288}

In January 1991, with Justice Gammage now on the Texas Supreme Court, the justices ruled unanimously in Edgewood II that the legislature's plan was unconstitutional. The Court gave the legislature three months to come up with a new proposal compatible with the standard set forth in Edgewood I - which had called for the elimination of gross inequalities and vast discrepancies.\textsuperscript{289} Senate Bill 1 did nothing to restructure the system. The funding disparities between high-wealth and low-wealth districts were not ameliorated by the new law.\textsuperscript{290} The Court reasoned:

Senate Bill 1 does make certain improvements in public school finance ... [including] a mandate for biennial adjustment, based upon information from a battery of studies, with the intention of preventing the opportunity gap between poor and rich districts from re-widening each time legislative action narrows it.

[\textsuperscript{*64}]

However, Senate Bill 1 leaves essentially intact the same funding system with the same deficiencies we reviewed in Edgewood I.\textsuperscript{291}

Senate Bill 1 focused primarily on increasing the state's contributions to reduce some of the existing discrepancies between school districts. The majority called this a "Band-Aid" that would not sufficiently change the system.\textsuperscript{292}

By this point, the various actors in the lawsuit were asking the Court for clues about the type of system that would pass muster; however, the Court refused to issue what it believed to be an advisory opinion on a specific plan that might be constitutional.\textsuperscript{293} It was suggested that the legislature needed to "change the boundaries of ... the current 1052 school districts, the wealthiest of which continued to draw funds from a tax base roughly 450 times greater per weighted pupil than the poorest district."\textsuperscript{294} Senate Bill 1 did not do this, nor did it attempt to equalize funding among the districts or change the way revenue was collected - from local property taxes as opposed to state revenue.\textsuperscript{295} The legislature needed to devise a plan that provided "a direct and close correlation between a district's tax effort and the educational resources available to it."\textsuperscript{296}

On April 11, 1991, the legislature passed Senate Bill 351 based on the Court's suggested parameters for a remedy in Edgewood II.\textsuperscript{297} The law created a new plan calling for the consolidation of the state's 1,058 school districts into 188 county education districts (CEDs), with each CED spending $ 2,200 per student.\textsuperscript{298} The CEDs had the power to tax and distribute tax revenue to school districts existing within the CEDs.\textsuperscript{299} The new plan would generate new revenue from the wealthiest districts and then make it available statewide to decrease the disparities between the richest and poorest districts.\textsuperscript{300} While three district courts found the bill to be constitutional, in Carrollton-Farmers Branch Independent School District\textsuperscript[*65] v. Edgewood Independent School District (Edgewood III), the Texas Supreme Court held that the law violated article VIII, section 1-e by levying a statewide ad valorem tax and article VIII, section 3 by levying an ad valorem tax without a required local election.\textsuperscript{301} Reading the massive and complex opinion, one senses the amount of frustration shared by the justices. Justice Gammage joined the majority's position that the tax imposed by the law was unconstitutional; however, notwithstanding the majority's assurances to the contrary, he did not believe that the Court honored its commitment to funding-equity set forth in Edgewood I and II, and he accused the majority of striking down the same plan that the Court had once supported.\textsuperscript{302}

The Texas legislature responded to Edgewood III by passing Senate Bill 7, a complex multi-option plan, by which
school districts would equalize per student spending by choosing among several approaches. n303 The law set a cap on a school district's taxable property at a level of $280,000 per student, and any district exceeding the $280,000 cap could choose one or more of the following actions to bring its taxable property within the cap: "(1) consolidation with another district ... (2) detachment of territory ... (3) purchase of average daily attendance credit ... (4) contracting for the education of nonresident students ... or (5) tax base consolidation with another district ... ." n304 A number of both property-rich and property-poor school districts challenged Senate Bill 7 on a number of constitutional grounds. n305

In Edgewood Independent School District v. Meno (Edgewood IV), with Justice Gammage in the majority, the court ruled that the plan was constitutional, reasoning "the State's duty to provide districts with substantially equal access to revenue applies only to the provision of funding necessary for a general diffusion of knowledge." n306 The Court held that Senate Bill 7 established an efficient system of public schools that equalized funding, which is required only to the point that efficiency is achieved, and that "unequalized" supplementation thereafter is constitutionally permissible. n307 The majority pointed out that the efficiency clause of article VII, section 1 contains a qualitative component - efficiency [*66] must be measured not only by financial efficiency but also by its qualitative component. n308 The Court also backed away from the political fray - as called for by Edgewood III - by refusing to "prescribe the structure for "an efficient system of public free schools."" n309 That is a duty best left to the legislature, the majority opined; however, "if the cost of providing a general diffusion of knowledge rises to the point that a district cannot meet its operations and facilities needs within the equalized program, the State will, at that time, have abdicated its constitutional duty to provide an efficient school system." n310 Justice Gammage joined the majority opinion in Edgewood IV. He had not written separately on the issue of school funding equality since his groundbreaking dissent in Edgewood III, in 1992. Justice Gammage retired at the end of the 1995 term, and the Edgewood litigation continued through 2006.

VIII. Justice Gammage's Jurisprudence and Legacy

The purpose of this Article was to highlight and examine Justice Bob Gammage's jurisprudence in the area of civil rights and liberties, and attempt to provide an account of his legacy. There is no doubt that Justice Gammage took rights seriously n311 and never wavered in his support of the rights and liberties of Texans. As we have seen in each opinion that he wrote or joined, Justice Gammage embraced a more expansive interpretation of the legal doctrines and constitutional provisions that protect individual rights and equality. He challenged cramped thinking and overly positivistic views as well as the unwillingness to judicially review laws or policies that were constitutionally suspect.

Students of Texas political history may remember him best for his role in the politically charged Edgewood saga, but for reasons that may not be obvious to most. His dissent in Edgewood III while on the Texas Third Court of Appeals may very well be one of the most cogent and comprehensive arguments for equal rights and fundamental freedoms made by a Texas judge. His interpretation of the education clauses of the Texas constitution were central to building the argument that ultimately persuaded a majority of judges and legislators to recognize that the state's system of education funding discriminated against students living in poorer school districts. Prior to the Edgewood litigation, many of the Texas judges were divided and unable to overcome the barrier of San Antonio Independent [*67] School District v. Rodriguez, the federal precedent that did not recognize education as a fundamental right. But Justice Gammage pointed out that in deciding Rodriguez, the U.S. Supreme Court relied on the U.S. Constitution, which does not include a specific provision for education. The claim in Edgewood, he argued, must rely on the Texas constitution, which expressly recognizes education as indispensable to the exercise of fundamental rights and liberties.

Justice Gammage was at his best as a civil libertarian in his dissent in Barber, where, he built a case against the majority's judicial non-interventionist stance in the face of governmental arbitrariness and demand for obedience for the sake of obedience on the part of public-school children. Beyond the equal-protection analysis that he employed in his dissent in Barber, Justice Gammage argued that the challenged hair-length policy unnecessarily intruded into the privacy of students by restricting personal autonomy in choosing the manner of dress or appearance.
In terms of judicial philosophy, Justice Gammage followed a discernible set of principles, which included the position that the state judiciary should play a co-equal role in the larger political system. Deference should never be given to the political branches when fundamental rights are at stake. For example, in applying this position, he upended the established judicial doctrine that held - and still holds - that school districts are autonomous entities that should be largely unfettered by judicial intrusion. He challenged the position that schools should be free from being held to too high of a standard when constitutional rights are violated.

As a Texas Supreme Court Justice, Gammage had the discretion to analyze and resolve disputes from either the standpoint of the Texas constitution, the U.S. Constitution, or some combination of the two. Indeed, the U.S. Supreme Court has ruled that when a state supreme court decides a case on "an adequate and independent state ground" alone, the Court will not subject the ruling of the state court to judicial review. As a Texas Supreme Court Justice, Gammage had the discretion to analyze and resolve disputes from either the standpoint of the Texas constitution, the U.S. Constitution, or some combination of the two. Indeed, the U.S. Supreme Court has ruled that when a state supreme court decides a case on "an adequate and independent state ground" alone, the Court will not subject the ruling of the state court to judicial review. This approach to judicial interpretation - where a state court looks primarily at the state constitution to resolve disputes - has been referred to as the primacy model of state judicial decision making. In cases where constitutional claims were raised, Justice Gammage's opinions relied on the Texas constitution or state law whenever possible. Of course, he was not unique in this approach, but his judicial philosophy looked first to the state's constitution to resolve a dispute, and then to the federal constitution. Justice Gammage also made certain that the ruling did not fall short of the "minimal rule for a diverse nation," established by U.S. Supreme Court precedent. Justice Gammage's judicial philosophy reflected Justice William J. Brennan's view that "state courts no less than federal are and ought to be the guardians of our liberties," by extending protections and by going beyond those required by the U.S. Supreme Court's interpretation of federal law. We can contrast Gammage's approach to the Barber majority's sole reliance on federal court precedent to resolve that issue, with little or no examination of the Texas constitution.

Justice Gammage also rejected what he believed to be judicially-created, procedurally-based barriers that were erected to deny constitutional claims. Recall that in Valenzuela, the Court denied privacy protection to a gynecologist who endured a decade-long campaign of daily anti-abortion protests in front of his home. Justice Gammage recognized the demonstrators' freedom of expression but felt that nearly every state and federal precedent allowed for the restriction of the conduct, because elements of the speech were intended to intimidate. Also, in Morales, Justice Gammage again dissented from procedural machinations that prevented the Court from applying the right to privacy and Texas ERA in a challenge of Texas' infamous sodomy law. While unenforced in criminal courts, the law was being used to discriminate against gays and lesbians. In Valenzuela and Morales, Justice Gammage blasted the majority for dismissing valid constitutional claims as purely hypothetical or theoretical, as well as for allowing the State to insulate potentially unconstitutional laws from judicial scrutiny. He argued that judicial scrutiny should be appropriately applied to all "criminal laws affecting the civil or personal rights of any number of citizens." To prevent individuals from seeking remedies in a civil court simply because there is no pending or anticipated prosecution under a criminal statute, "disregards the fundamental principle upon which such courts are established." Gammage had no use for this kind of cramped judicial philosophy and was critical of those on the Court who abdicated their judicial responsibility to review statutes that violate constitutional rights. In these cases, it was less a matter of judicial restraint and more one of judicial deference or "judicial abdication" to the power of the political branches that troubled him the most.

Justice Gammage also made a major contribution to the expansion of the right to privacy in Texas, most notably though his opinions in Star-Telegram v. Doe, Cain v. Hearst Publications, Valenzuela v. Aquino, and to a lesser degree, Barber v CISD. He understood the right to privacy to be broad enough to encompass a myriad of protected interests and considered as settled law in Texas, that the right to be let alone is distinctive in itself and not incidental to another right or tort that extends to eavesdropping or wiretapping. Another facet of privacy is freedom from disclosure of private or personal facts; however, this privacy interest must be balanced with the protected free exchange of ideas. Gammage also supported the recognition of the false-light privacy doctrine as distinct from the tort of defamation. Hair-length or dress-code polices in public school also unnecessarily intrude upon the privacy of students by restricting personal autonomy,
in choosing the manner of dress or appearance. Lastly, as we saw in Colquette v. Forbes, an individual can bring a privacy claim against another individual, but not if the claimed injury is a result of a private mutual agreement, even if the agreement is judicially enforced.
As this Article demonstrates, Justice Gammage has a strong record as a civil libertarian in the areas of the right to privacy and freedom of expression. In the area of civil rights, he supported traditionally liberal positions on discrimination on the basis of sex, race, and sexual orientation while at the same time maintaining a commitment to the principle of stare decisis and the express provisions of the Texas constitution. With a legal scholar's attention to detail, he took care that his opinions were based on solid reasoning, precedent, and the rule of law. But in the end, we saw his fundamental sense of fairness and justice emerge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionGender & SexGovernmentsCourtsJudgesLabor & EmploymentLawDiscriminationGender & Sex DiscriminationCoverage & DefinitionsPersonal Appearance

FOOTNOTES:

n1. Barber v. Colo. Indep. Sch. Dist., 901 S.W.2d 447, 455 (Tex. 1995) (Gammage, J., dissenting). n2. Justice Gammage received degrees from the University of Corpus Christi (now Texas A&M at Corpus Christi), Sam Houston State University, the University of Texas School Of Law and the University of Virginia School of Law.


n11. Barber, 901 S.W.2d at 448.

n12. Id. n13. Id. n14. Id. n15. Id.

n16. Id. n17. Tex. Const. art. I, §
449. n19. Id. at 449-450. n20. Id.

at 450.

n21. Id. at 447, 450 (coming to a 7-2 decision). n22. Id. at 450 (citing Karr v. Schmidt, 460 F.2d 609, 611 (5th Cir. 1972); Lansdale v. Tyler Junior Coll., 470 F.2d 659 (5th Cir. 1972)). n23. See, e.g., Richards v. Thurston, 424 F.2d 1281, 1286 (1st Cir. 1970); Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972); Holsapple v. Woods, 500 F.2d 49, 52 (7th Cir. 1974) (per curiam); Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971). n24. Barber, 901 S.W.2d at 450 (citing New Jersey v. T.L.O., 469 U.S. 325, 347-48 (1985)).

n25. Id. at 450-51 (citing Mercer v. Bd. of Trs., 538 S.W.2d 201, 206 (Tex. Civ. App. - Houston [14th Dist.] 1976, writ ref'd n.r.e.); Eanes Indep. Sch. Dist. v. Logue, 712 S.W.2d 741, 742 (Tex. 1986)). n26. Id. at 451. n27. Id. at 450. n28. Id. at 451 (Gammage, J., dissenting).

n29. Id. n30. Id. n31. See generally id. at 450-51 (majority opinion) (discussing the difference in constitutional rights between public school students and adults through a litany of Texas and federal cases). It was also accepted as legal and appropriate that the CISD regulation mandated a different treatment of males and females. See id. at 455 (Gammage, J., dissenting). n32. Id. at 448 (majority opinion). n33. Id.

n34. Id. at 451 (Gammage, J., dissenting) (citing Mercer v. Bd. of Trs., 538 S.W.2d 201, 206 (Tex. Civ. App. - Houston [14th Dist.] 1976, writ ref'd n.r.e.).
n35. Id. at 452 (citing In re McLean, 725 S.W.2d 696, 698 (Tex. 1987)).

n36. Id. n37. Id. n38. Id. n39. Id. n40. Id. at 453. n41. Id. n42. Id. n43. Id.

at 452. n44. Id. (citing Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970)). n45. Id. at 453. n46. Id. at 453-54.

n47. Id. (discussing Karr v. Schmidt, 460 F.2d 609, 611 (5th Cir. 1972); Ferrell v. Dall. Ind. Sch. Dist., 392 F.2d 697 (5th Cir. 1968)); cf. Lansdale v. Tyler Junior Coll., 470 F.2d 659 (5th Cir. 1972). n48. Barber, 901 S.W.2d at 454 (Gammage, J., dissenting). n49. Id. at 453.

n50. Id. n51. Id. n52. Id. at 450 (majority opinion) (citing Karr, 460 F.2d at 611; Ferrell, 392 F.2d at 702-04). n53. Id. at 451-52 (Gammage, J., dissenting).

n54. Id. at 454 (quoting Mercer v. Bd. of Trs., 538 S.W.2d 201, 203 (Tex. Civ. App. - Houston [14th Dist.] 1976, writ ref'd n.r.e)). n55. Id. (citation omitted). In 1995, when Barber was decided, fifteen other states had equal rights amendments in their state constitutions.
n56. Id. at 450-51 (majority opinion). n57.

Id. at 455 (Gammage, J., dissenting). n58.

Id. n59. Id.

n60. Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 472 (Tex. 1995).

n61. Id. at 472-73. n62. Id. at 473. n63. Id. at 472.

n64. Id. at 472-73. n65. Id. at 472. n66. Id. at 473. n67. Id. (alteration in original)

(quoting Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989)). n68. Id. n69. Id.

n70. Id. at 474-75. The Texas Supreme Court did not address the question of whether the information was or was not legally obtained. n71.

Id. at 473 (citing Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 193 (1890)). The article provides the foundation for the modern constitutional right to privacy, including its articulation in Griswold v. Connecticut and Roe v. Wade decided by the U.S. Supreme Court. n72. Id. at 473-74. n73. Id. at 473 (citing Billings v. Atkinson, 489 S.W. 2d 858, 861 (Tex. 1973)).
n74. Billings, 489 S.W.2d at 859. n75.

Id.

n76. Id. at 860 (discussing Milner v. Red River Publ'g Co., 249 S.W.2d 227, 229 (Tex. Civ. App. - Dallas 1952, no writ)). n77. Id. at 860-61. n78. Star-Telegram, Inc., 915 S.W.2d at 473-74 (citing Indus. Found. of the S. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex. 1976)).

n79. Indus. Found., 540 S.W.2d at 672. n80. Id. at 678. n81. Id. at 680-81. n82. Id. at 682. n83. See Star-Telegram, Inc., 915 S.W.2d at 474. n84. See id. at 474-75. n85. Id. at 475.
n86. Indus. Found., 540 S.W.2d at 685. n87. Star-

Telegram, Inc., 915 S.W.2d at 474. n88. Griswold v.


n94. Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719, 722 (Tex. Civ. App. - Eastland 1975, writ ref'd n.r.e.). Kimbrough is the only Texas case on record that recognized the third doctrine. n95. Cain, 878 S.W.2d at 577.
n96. Id. n97. Id. n98. Id. at 579. The majority cited several federal cases that did recognize false light, including Moore v Big Picture Co., 828 F.2d 270 (5th Cir. 1987) and Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984), cert. denied, 469 U.S. 1107 (1985). See also Diane Leenheer Zimmerman, False Light Invasion of Privacy: The Light that Failed, 64 N.Y.U. L. Rev. 364, 452 (1989).

n99. Cain, 878 S.W.2d at 581. n100. Id. at 584 (Hightower, J., dissenting). n101. Id. at


S.W.2d at 512.

n108. Id. at 513.

n109. Id. at 520 (Spector, J., dissenting).

n110. Id. n111. Id. at 520-21. n112. Id. at 521.

n113. Id. n2. n114.

Id. at 521.

n115. Id. n116.

Id. n117. Id.
n118. Id. n.3. The temporary injunction was subsequently dissolved for being overly broad, see Valenzuela v. Aquino, 763 S.W.2d 43, 45-46 (Tex. App. - Corpus Christi 1988, no writ).

n119. Valenzuela, 853 S.W.2d at 521 (Spector, J., dissenting). n120. Id. n121. Id. at 522. n122. Valenzuela v. Aquino, 800 S.W.2d 301, 305 (Tex. App. - Corpus Christi 1990) aff'd in part, rev'd in part, 853 S.W.2d 512 (Tex. 1993).

n123. Id. at 309. Justice Gonzalez, in agreeing with the court of appeals' reversal, stated that "the uncertainty of not knowing where one might be penalized for expressive speech would have an unacceptable chilling effect on the right of free speech." Valenzuela, 853 S.W.2d at 519 (Gonzalez, J., dissenting) (emphasis added). n124. See Valenzuela, 853 S.W.2d at 514 (majority opinion) (affirming the court of appeals' judgment "insofar as it sets aside the trial court's award of damages, and reversing in all other respects ..."). n125. Id. (discussing Boyles v. Kerr, 855 S.W.2d 595 (1993)). n126. See id. at 513 (quoting Restatement (Second) of Torts § 652B (1977)). In discussing the two elements for an invasion of privacy cause of action, the Texas Supreme Court noted that Aquino failed to request that either element be submitted to the jury; furthermore, the evidence presented failed to conclusively establish either element. Id. n127. Id. n.1. n128. See id. n129. Frisby v. Schultz, 487 U.S. 474 (1987). n130. Valenzuela, 853 S.W.2d at 517 (Gonzalez, J., dissenting) (discussing Frisby, 487 U.S. at 486). n131. Id. at 513-14 (majority opinion) (citing Frisby, 487 U.S. at 474).

n132. Id. at 514. n133. Id. at 519-20 (Gammage, J., dissenting) ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege ..."). (emphasis in original) (quoting Tex. Const. art. I, § 8)); see also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56-57 (1988); United States v. O'Brien, 391 U.S. 367, 382 (1968).
n134. Id. at 519. n135. See id. at 519. n136. United States v. O'Brien, 391 U.S. 367, 382 (1968) (O'Brien's criminal conviction was affirmed because he was convicted for the impact of burning his draft card.).

n137. Valenzuela, 853 S.W.2d at 520 (Gammage, J., dissenting) (citing Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989)). n138. Id. (citing James v. Brown, 637 S.W.2d 914, 917 (Tex. 1982)). n139. Id. (alteration in original) (footnote omitted) (citation omitted) (quoting United States v. Lee, 935 F.2d 952, 956 (8th Cir. 1991)). n140. Id.


n143. Valenzuela, 853 S.W.2d at 520 (Gammage, J., dissenting). n144.

Id. at 519.

n145. Id. at 522 (Spector, J., dissenting). n146.

Id. at 520.
n147. Id. at 522 (citations omitted). n148. Id. at 523 (citing Frisby v. Schultz, 487 U.S. 474, 486-87 (1987)). n149. Id. at 524 (quoting Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973)). n150. Id. (citing Tex. State Emps. Union v. Tex. Dep't of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987)). n151. Id. (citing Iken v. Olenick, 42 Tex. 195, 198 (1874)).


n156. See Twyman v. Twyman, 855 S.W.2d 619, 620, 626 (Tex. 1993) (Justice Gammage, now on the high court, recused himself in this case).

n158. Id. at 538. n159. Id. at 537-38. n160. Id. at 537.

n161. Id. at 537-38. n162.

Id. at 538.

n163. Id. at 538-39 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

n164. See id. at 539. n165. Id. n166. Id. n167. Id. n168. Id. n169. Id. n170.

Id. (discussing Shelley v. Kraemer, 334 U.S. 1 (1948)).

n171. Shelley, 334 U.S. at 23. n172. See generally Colquette, 680 S.W.2d at 539.
n173. Id. n174.

Id. at 537. n175.

Id. at 539.

n176. See generally Billings v. Atkinson, 489 S.W. 2d 858, 859 (Tex. 1973) (recognizing that an invasion of privacy is a legal injury).


n180. See Morales, 869 S.W.2d at 942 n.4 (citing Tex. Const. art. I, §§3(a), 13, 19). n181. See Lawrence, 539 U.S. at 572 (explaining that at the time of the Bowers v. Hardwick decision, over twenty states and the District of Columbia had sodomy laws); see also Carlos Maza, State Sodomy Laws Continue to Target LGBT Americans, Equality Matters Blog (Aug. 8, 2011, 3:26 PM), http://equalitymatters.org/blog/201108080012 (noting that in 2013, sodomy was still a criminal offense in 18 states).

205. n185. Id. at 203.

n186. See City of Dall. v. England, 846 S.W.2d 957, 958 (Tex. App. - Austin 1993, writ dism'd w.o.j.). n187. See City of Austin v. Austin City Cemetery Ass'n, 28 S.W. 528, 528-29 (Tex. 1894) (discussing whether it was constitutional for a city to enforce an ordinance regulating the burial of the dead by prohibiting funerals on specific property); see also Passel v. Fort Worth Indep. Sch. Dist., 440 S.W.2d 61, 62 (Tex. 1969) (questioning whether a statute prohibiting school-age children from joining clubs constituted an unwarranted interference with their constitutional rights to free speech and private association). n188. Texas has a bifurcated court system with distinct civil and criminal courts. There are two high courts in Texas: the Supreme Court, which hears appeals in civil matters, and the Court of Criminal Appeals, which hears appeals in criminal matters.

n189. See Morales, 869 S.W.2d at 953. n190. The Morales case could have been brought in one of four federal districts in Texas. On appeal, a ruling by either the United States Court of Appeals for the Fifth Circuit or the U.S. Supreme Court could overturn the sodomy law. See generally Christopher R. Leslie, Procedural Rules or Procedural Pretexts?: A Case Study of Procedural Hurdles in Constitutional Challenges to the Texas Sodomy Law, 89 Ky. L.J. 1109, 1115 (2001) (discussing in detail the history of challenges to the Texas sodomy law and the procedural hurdles faced).
n191. Morales, 826 S.W.2d at 202.

n192. Id. n193. Id. at 202-03. n194.

Id. at 204-05. n195. Id. at 204. n196.

Id. at 205.


See id.

n199. Joined by Justices Gonzales, Hightower, Hecht, and Enoch. Id. n200. Id. at 943. n201. Id. at 946-47 (citing Passel v. Fort Worth Indep. Sch. Dist., 440 S.W.2d 61, 63-64 (Tex. 1969)). Passel involved a lawsuit brought against an unenforced criminal statute prohibiting fraternities, sororities, and secret societies in public schools below college level. 440 S.W.2d at 62. Because the law itself was never enforced, nor was anyone punished by it, the lawsuit challenged Fort Worth ISD's administrative policy (based on the statute) on the grounds that it deprived students of their personal rights. Id. at 62-63. n202. Morales, 869 S.W.2d at 944-45. n203. Id. at 945.
n204. Id. at 948 (citing Dearing v. Wright, 653 S.W.2d 288, 290 (Tex. 1983)).
n205. Id. at 943 (footnote omitted).

n206. Joined by Chief Justice Phillips, Justice Doggett, and Justice Spector. Id. at 941.
n207. Id. at 953-54 (Gammage, J., dissenting)

(notation omitted) (footnote omitted).
n208. Id. at 953. n209. Id. (citing Frey v. DeCordova Bend Estates Owners Ass'n, 647 S.W.2d 246, 248 (Tex. 1983)).

n210. Id. n211. Id. at 949. n212. Id. at 953. n213. Id. at 949 (citing Sisco v. Hereford, 694 S.W.2d 3, 7 (Tex. App. - San Antonio 1984, writ re'd n.r.e.)).
n214. Id. (quoting Joseph R. Long, Equitable Jurisdiction to Protect Personal Rights, 33 Yale L.J. 115, 116 (1921)); see also

n215. Morales, 869 S.W.2d at 949 (Gammage, J., dissenting) (citing City of Austin v. Austin City Cemetery Ass'n, 28 S.W. 528, 530 (Tex. 1894)).
n216. Id. at 950-51. Justice Gammage also cited a federal district court ruling that supports the proposition that Texas law sanctions injunctive relief to protest both property and personal rights. Id. at 951 (citing Dreyer v. Jalet, 349 F. Supp. 452, 466-67 (S.D. Tex. 1972), aff'd, 479 F.2d 1044 (5th Cir. 1973)).
n217. Id. at 952.
n218. Id. at 954. n219.

Id.

n220. See Barber v. Colo. Indep. Sch. Dist., 901 S.W.2d 447, 453-55 (Tex. 1995) (Gammage, J., dissenting); see also supra, Part II. n221.


n227. Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859, 867-69 (Tex. App. - Austin 1988) (Gammage, J., dissenting), rev'd, 777 S.W.2d 391 (Tex. 1989). n228. Statewide, the wealthiest school district had over $ 14 million of property wealth per student and the poorest district had $ 20,000 of property wealth per student. Edgewood ISD was ultimately joined by sixty-seven other districts in the suit. Id. at 860. n229.

n230. Kirby, 761 S.W.2d at 861. n231. Id.

n232. Id. at 868 (Gammage, J., dissenting).

n233. Id. n234. Id. at 861 (majority opinion). n235. Id. at 860. n236. Id.

n237. Id. n238. Id. at 860-61. n239. See generally id.; Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II), 777 S.W.2d 391, 399 (Tex. 1989) (stating that a remedy by the Texas legislature was long overdue while giving the legislature more time to achieve a more efficient system.

The Texas Supreme Court reinstated the trial court's decision and only modified the final date of the stay of the injunction). n240. Kirby, 761 S.W.2d at 860, 867. n241. Id. (joined by Justice Aboussie, and with Justice Gammage dissenting) (discussing Tex. Const. art. I, §§1, 3, 19).

n242. Id. at 867. n243. Id. at 862-63 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). n244. Id. at 863 ("The term "fundamental right' refers to a limitation upon the exercise of governmental power; it does not imply an affirmative obligation upon government to insure that all persons have the financial resources available to exercise their liberty or fundamental rights."
(quoting Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 560 (Tex. 1985))). n245. Id. at 867 (Gammage, J., dissenting).

n246. Id. n247. Id.; see also Tex. Const. art. I, § 3 ("All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.").

n248. Kirby, 761 S.W.2d at 867 (Gammage, J., dissenting). n249. Id. at 869 (quoting Tex. Const. art. I, § 3). n250. Id. (quoting Tex. Const. art. I, § 3(a)). n251. Id. (quoting Tex. Const. art. VII, § 1). n252. Id. (quoting Tex. Const. art. VII, § 3(a)). n253. Id. at 869-70 (quoting Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985)). n254. Id. at 871 (citing Stout v. Grand Prairie Indep. Sch. Dist., 733 S.W.2d 290, 294 (Tex. App. - Dallas 1987, writ ref'd n.r.e)). n255. See id.

n256. Id. at 870. n257. Id.
n258. Tex. State Empls. Union v. Tex. Dep't of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987).

Amarillo 1934, writ ref'd).


n267. Id. at 221. n268. Id. at 230. n269. Id. at 209-10. n270. Kirby, 761 S.W.2d at 872, 874 (Gammage, J., dissenting) ("Read fairly and in the proper historical perspective, article VII, [section] 3 and article I, [sections] 3 and 3a - in conjunction - do not permit disparities between school districts to be substantial unless the State can show a compelling reason for such disparity. Here, the State has shown no compelling reason.").

n271. Id. at 872. n272. Id. n273. Id. n274. Id.

n276. Id. at 397. n277. Id. at 395, 397. n278. Id. at 393. n279. Id. at 393-94. n280. Id. at 394.

n281. Id. n282. Id. at 394-95. n283. Id. at 395-96. n284. Id. at 397.


n286. Id. at 496. n287. See id. at 495. n288. Id. at 491. n289. Id. at 498-99; Edgewood I, 777 S.W.2d at 395-96.

n290. See Edgewood II, 804 S.W.2d at 500.

n291. Id. at 494-95. n292. Id. at 496.

n293. See id. at 496, 500-01. n294. Id. at 496.


n304. Id. n305. Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV), 917 S.W.2d 717, 727 (Tex. 1995).

n306. Id. at 725, 731. n307. See id. at 730. n308. Id. at 729 (quoting Tex. Const. art. VII, § 1). n309. Id. at 747 (quoting Edgewood III, 826 S.W.2d 489, 523 (Tex. 1992)).
n310. Id. n311. See generally Ronald Dworkin, Taking Rights Seriously (1977) (discussing and coining the phrase "taking rights seriously" in a judicial context).

