OLSON AND OLSON, L.L.P.

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I. INTRODUCTION

People who complain about taxes can be divided into two classes: men and women.[1] However, most people agree with the quote attributed to Oliver Wendell Holmes: "I like to pay taxes. With them I buy civilization."[2] That being said no one wants to pay more than their share. Several states including Texas,[3] West Virginia,[4] Illinois,[5] Mississippi,[6] Louisiana,[7] and Arkansas[8] have constitutional requirements intended to ensure equity among taxpayers. The provisions generally require that property taxation be "uniform and equal" and be in proportion to the property's value. In Texas, the principle of uniform and equal taxation has been hijacked. Although the constitution remains in full force and effect regarding uniformity and equality, the businesses that depend on property tax challenges argue that a combination of legislative and judicial actions have marginalized, if not negated these constraints.

II. THE RISE OF TAX EQUALITY IN TEXAS

Even if you are a fifth or sixth generation Texan, in order to understand uniform and equal taxation in Texas, a brief recap is helpful. In conjunction with its bid for statehood in 1845, Texas adopted a new constitution to replace the one from 1836 that had been drafted during the Battle of the Alamo. The result of hurried wartime drafting, the Republic of Texas' constitution had been relatively brief. By 1845, after almost a decade of self-governance, the new document was nearly twice as long as the earlier version and spelled out the powers and limitations of the State in significant detail. Of

course the authors were not starting from scratch, and the new constitution borrowed heavily from the earlier constitutions of Mexico, the Republic of Texas, and the twenty-seven states of the then existing United States.

The new constitution also included important safeguards such as prohibiting people who had dueled with deadly weapons[9] or were "Ministers of the Gospel"[10] from being legislators. It also borrowed language similar to Louisiana's constitution that had been adopted a few months earlier, and provided:

> *Taxation shall be equal and uniform* throughout the State. – All property in this State shall be *taxed in proportion to its value*, to be ascertained as directed by law, except such property as two-thirds of both Houses of the Legislature may think proper to exempt from taxation.[11]

While some of these provisions have been lost to their time in history, the original framework for taxation was preserved in the two constitutions adopted before and after the Civil War and Texas' current version that was adopted in 1876. By some accounts, at the end of the nineteenth century, thirty-three states had constitutional requirements that property be "taxed equally by value."[12] Some have suggested that these equity limitations grew out of concerns that officeholders charged with administration of the tax systems would succumb to the political or financial pressures of influential property owners.[13] Whatever the genesis, the concept that all people should pay their fair share endured. In its present format, the relevant portions of article VIII of the Texas Constitution require:

> §1. Equality and uniformity; tax in proportion to value; ….
>
> (a) *Taxation shall be equal and uniform.*
> (b) All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, *shall be taxed in*

> *proportion to its value, which shall be ascertained as may be provided by law.*[14]

Thus the calculation of one's "fair share" sounds straightforward. If property is equally taxed in proportion to its value and those proportions are equal and uniform, voilà—mission accomplished. However, if either 1) equality of rates or 2) equality of proportionality is diminished, confidence of constitutional compliance will be lost.

Texas courts have struck down taxation models that were based on valuations derived without reference to market value. In *Whelan v. State* for example, the Supreme Court of Texas disallowed taxation of all cattle in the county that were "assessed at an arbitrary flat rate of approximately $15 per head, wholly irrespective of actual market value."[15] And, in *Lively v. Missouri, K. & T. Ry.*, the Court held that **taxation cannot be in the same proportion to the value of the property unless the value of all property is ascertained by the same standard**.[16] Even as late as 1996, the Texas Supreme Court reaffirmed this requirement that "[o]ur Constitution requires that all real property and tangible personal property **taxes be in proportion to the value of the property**."[17] This bedrock principle of fairness of taxation "in proportion to value" is what helped make Texas an economic powerhouse and how Texas property taxes worked until this millennium.

In 1979, Texas codified its tax laws into a new tax code. Remedies for taxpayers who thought they were being taxed unequally were spelled out in the new code at Section 42.26. In its original version, Section 42.26 provided two principle means by which property owners could seek relief from unequal appraisal. Both remedies required taxpayers to compare the market value of their property to their appraised value and then compare that relationship against other properties in the county to see if indeed the

taxpayer was paying at a level that was not equal with other taxpayers.[18] The property owners prevailed if they established that the relationship between the market value and the appraised value of their property exceeded by more than ten percent (10%) the median of a sample of appraisal ratios of 1) other properties in the county generally or 2) other properties in the county of the same kind or character.[19]

III. THE DEMISE OF TAX EQUALITY IN TEXAS

Then, in 1997, as part of what was dubbed the "Taxpayer's Bill of Rights,"[20] the Texas legislature amended several provisions of the Tax Code and added a new remedy for "unequal appraisal." The new provision, now found at Section 42.26(a)(3) provides that a property is appraised unequally if:

> "the appraised value of the property exceeds the median appraised value of a reasonable number of comparable properties appropriately adjusted." Tex. Tax Code Ann. Section 42.26 (a) (3).

The new provision's language was not vetted through any debate, legislative staff research, or analysis regarding possible fiscal impact. Instead, in the waning moments of the session, the change was offered up as the eighteenth of thirty-six floor amendments and received only the following explanation without any debate:

Chair: The chair recognizes Mr. Hilbert to explain the amendment.

Hilbert: Mr. Speaker members what this bill does in section 30 we strike a few words and made some correction. We add the words "a reasonable number of comparable properties appropriately adjusted." Move adoption.

Chair: Mr. Hilbert sends up an amendment, any objection adoption of the amendment? Chair hears none the amendment is adopted.[21]

The amendment passed and, for the first time, created a remedy that did not spell out a specific connection between a property's market value and the equality of its taxation

One of the first cases addressing the new law was *Sagemont Plaza Shopping v. Harris County Appraisal District*.[22] In *Sagemont*, the owner sought to lower its shopping center's $500,000 appraised value based on the "new" unequal statute. The owner had purchased the center only three weeks before the date of valuation for $500,000. The owner lost. The court of appeals was mindful of applying the new statute in a manner that complied with the constitutional constraints of proportional taxation and applied the same type of standards as had been required in the pre-existing remedies, where appraisal ratios and statistical analysis were mandated.[23]

However, adherence to market value as a determinative component of proving unequal appraisal soon began to erode. In *Harris County Appraisal District v. United Investors Realty Trust*, the property owner alleged its shopping center was unequally appraised for 1998.[24] United Investors had purchased its property on January 28, 1998 for $15,200,000. In appraising the property, the local appraisal district valued the center too low at $13,900,000. Nonetheless, the property owner sued in an attempt to pay even less tax. At trial, by applying the "new" remedy, United Investors' expert testified that the shopping center's value should have only been $10,239,169. In reaching this conclusion, the expert admitted that he did not "make a determination of Mason Park Centre's market value, did not consider market value, and did not compare Mason Park Centre's market value to the market value of any of its comparables."[25] Instead, the expert merely looked at the appraised values of other properties and "made adjustments"

(but not based on market values). When challenged on appeal that such an analysis violated the constitutional mandate for taxation in proportion to value, the court of appeals held: "We find no error. By statute, appraised value is market value. Tex. Tax Code Ann. §23.01(a) (Vernon Supp. 2000). Our record contains no evidence that any of these properties were appraised at an amount other than market value; consequently, we must assume that the appraised values were market value."[26] Of course, absent evidence to the contrary, this assumption should logically also apply to the shopping center in issue.

If all of the "comparables" selected by United Investors' expert were entitled to a legal presumption that they were already appraised at 100% of their market value, then the only instance in which United Investors should have been able to recover for unequal appraisal was if its shopping center was appraised at more than its true market value. That did not appear to be the circumstance for United Investors' property. Instead, it is evident that the court's ruling actually created inequality by reducing the shopping center to 67% of its sales price while all of the "comparable" properties were presumed to be valued at 100% of their market value. In justifying its conclusions, the court of appeals noted that there was no legislative history for the "new" remedy in the "Taxpayer Bill of Rights." It further mentioned that when interpreting the purpose of the new law,

> Common sense dictates it is easier to prepare a protest by merely comparing the appraised values—found on the tax roles [sic]—of comparable properties appropriately adjusted than to obtain an independent appraisal of the market value of comparable properties. In one case, the tax roles [sic] can be used to determine value; the only independent analysis required is in adjusting the appraised values to put the properties on equal footing. In the other case, independent analysis is required for every aspect of the protest. Clearly, subsection (d), as we have interpreted it, *facilitates proof of inequity* and therefore facilitates tax remedies for property owners.[27]

Despite its enticing simplicity, the court's reasoning is without constitutional support. There is no constitutionally sanctioned "Easy Button" that bypasses the requirement that taxation in Texas be in proportion to market value.[28]

The "new" remedy was discussed again a year later in *Weingarten Realty v. Harris County Appraisal District.*[29] *Weingarten Realty* was another shopping center case, concerning the 1999 appraisal year. As in *Sagemont*, the property owner had just bought the shopping center a few weeks before the January 1 valuation date. The purchase price was $36,000,000. The local appraisal district had valued the center at $30,000,000. Weingarten Realty sued claiming that by applying the "new" remedy for unequal appraisal it was entitled to have its value reduced to $19,149,962. After a bench trial, the judge excluded Weingarten Realty's expert as unreliable and therefore of no evidentiary significance. The case was appealed to the same appellate court that had decided *United Investors.* The court agreed with Weingarten Realty that its expert had followed the methodology of the new remedy like the expert did in *United Investors.* However, that in and of itself did not automatically guarantee the admissibility of the expert's testimony. The court of appeals found that the trial court's decision to exclude Weingarten Realty's expert was not an abuse of discretion and upheld the dismissal. However, the court did not back away from its earlier holding in *United Investors* that the new remedy for unequal appraisal could be applied without implicating the market value of the subject property or the comparables. As it had done at the conclusion of the *United Investors* opinion, the court again mentioned that in the event of a conflict between "taxation at market value and equal and uniform taxation, equal and uniform taxation

must prevail."[30] This begs the question: How can someone determine if a conflict exists without determining the market values?

For the next several years, the defense of cases alleging unequal appraisal focused primarily on establishing that the valuation experts were biased and, as in *Weingarten Realty*, had relied on incorrect data, or made unsubstantiated "adjustments" that rendered their opinions unreliable. Then in 2006, the Fourteenth Court of Appeals decided *Harris County Appraisal District v. Kempwood Plaza*.[31] *Kempwood Plaza* involved yet another shopping center. In this case, the appraisal district established the market value of the property through admissions made by Kempwood Plaza's parent company in filings with the Securities and Exchange Commission. Kempwood Plaza's appraisal expert (who was an MAI) testified on cross-examination that he had not done an appraisal or otherwise complied with the Uniform Standards of Professional Appraisal Practice. The expert further admitted that he had not used correct data in formulating adjustments for such issues as differences in physical age and he did not attempt to determine the effective ages or the highest and best uses of any of the properties to determine their true comparability. Nonetheless, the court of appeals refused to overturn the lower court's decision, citing the broad discretion granted to trial courts in determining the admissibility of expert testimony. Focusing on the constitutional requirement that Texas taxation has to be uniform and equal and in proportion to the property's market value, the appraisal district urged that because Kempwood Plaza's expert's testimony was devoid of any market value connection, it could not be evidence of unequal appraisal. In its brief to the court of appeals the appraisal district explained:

> In *United Investors* the Court held that since there was no evidence of market value, the Court should afford a presumption that all of the

> properties were valued at their market values. However, in the instant case there is evidence that Kempwood's market value in 1999 was $2,948,952, the purchase price (as certified to the Securities and Exchange Commission). In 1999, Kempwood was only appraised for tax purposes at a value of $1,927,100. Following the *United Investors assumption,* that all of Brown's [Kempwood's expert] comparables had been appraised at 100 percent of their market value, Kempwood was only being appraised and taxed based on 65 percent of its value ($1,927,100/$2,948,952 = 65%). Because he failed to consider this disparity, Brown's methodology ignores the need for what should have been the very first and most basic appropriate adjustment--to account for Kempwood's favorable inequality! As the Fourteenth Court of Appeals has held, "...it is unfair and constitutionally prohibited, to require one taxpayer to pay a tax based on market values if other taxpayers are paying at a rate that is lower than the market value of their properties. If we were to allow this, one landowner would be paying property taxes disproportionately to other landowners." Brown's methodology in this case stands these concerns on their head. Not only did Brown ignore the disproportionate starting relationship between Kempwood and the comparables, he exacerbated it. Instead of being assessed based on 65 percent of its market value, Brown would have Kempwood taxed at $1,672,248, or 57 percent of market value while all of the owners of comparable properties are taxed at full value.[32]

However, the court brushed this construct aside and, quoting from *United Investors*, returned to the mantra that:

> …it is unfair, and constitutionally prohibited, to require one taxpayer to pay a tax based on market values if other taxpayers are paying a rate that is lower than the market value of their properties.... If a conflict exists between taxation at market value and equal and uniform taxation, equal and uniform taxation must prevail.[33]

While this proclamation is constitutionally correct, it does not answer the question about the equality of Kempwood's taxation. Instead, the *Kempwood Plaza* case perpetuates the notion that inequality could be measured without examining the relationship between market and appraised values.

Three months later, the same court of appeals decided *In re MHCB (USA) Leasing and Financing*.[34] The underlying dispute in this case was an owner's claim that part of its oil refinery was unequally appraised. The appraisal district had valued the property at

$240,000,000 while the owner claimed that in order to be treated equally the value should be cut to $38,000,000. The appraisal district sought to discover from the property owner any appraisals, economic analysis, financing agreements and other information that might reveal the property's market value. When the trial judge ordered the owner to turn the information over, the owner appealed to prevent the disclosure. The property owner urged that market value information was not relevant to determining the equality of appraisal and therefore it should not have to give the information to the appraisal district. Although the appeal landed in the same court that had just decided the *Kempwood Plaza* case, the justice who was selected to write the opinion in this matter had been the trial judge in the *Sagemont* case. Now on the court of appeals, she noted that:

> Thus, "appraised value" for both the subject and comparable properties hinges to an extent on their relative "market value." *Id.* at 287; *United Investors,* 47 S.W.3d at 654; *see Parker County v. Spindletop Oil & Gas Co.,* 628 S.W.2d 765, 767 (Tex.1982) (explaining that article VIII of the Texas Constitution requires "that assessed valuations be equal and be based upon reasonable cash market value"). An assessment of appraised value of the Coker Unit under section 42.26(a)(3) is an assessment of its market value. *See* Tex. Tax Code Ann. §§ 23.01(a), 42.26(a)(3). Moreover, the appraisal determinations of the reasonably comparable properties also are based on market value. Finally, all of these properties are adjusted according to factors that influence their value.[35]

Based on this understanding, the court went on to decide that the requested market value information was reasonably calculated to lead to the discovery of admissible evidence.[36] While the case is a "discovery case," it was the first judicial acknowledgement that even under the "new" remedy for unequal appraisal in Section 42.26(a)(3) there was a place for the constitutionally required interrelationship of market value to appraised value.

This point gained credence two months later when the court decided *(Corporate Park West) Hartman REIT Operating Partnership, II v. Waller County Appraisal District.*[37] In *Corporate Park*, an office warehouse had been valued for 2003 at $8,100,000.[38] Using the methodology he used in the *Kempwood Plaza* case, the owner's appraiser opined that the Corporate Park West property was unequal and should only be valued at $5,812,975. The appraisal district put forth its own evidence that included the 2002 sale of the property for $12,817,380 and an analysis of the relative equality of appraised values adjusted for differing rental rates of comparable properties. The appraisal district adjusted the comparables' appraised values by capitalizing the difference in rental rates between the subject and the comparables and adding that amount to the comparables' appraised values.[39] The jury found for the appraisal district and left the value at $8,100,000. The property owner complained on appeal that the appraisal district's evidence was tantamount to a market value case and thus improper in a uniform and equal case.[40] Putting a little distance between its earlier opinions, the court of appeals explained that, while *United Investors* and *Kempwood Plaza* stood for the principle that an equity case determined without reference to market values passes constitutional muster, if the jury would rather believe an equity case based on market value, it was free to do so and such belief would not be disturbed on appeal.[41]

The most recent chance for judicial correction of Section 42.26(a)(3)'s application slipped by in August, 2013 when the Supreme Court of Texas declined to consider *Harris County Appraisal District v. Houston 8th Wonder Property.*[42] The Texas Supreme Court does not have to decide every case appealed to it. For a case to be considered by the Court, it must first have at least one Justice take an interest and ask for

a written response to the petition from the opposing side.[43] That occurred in *Houston 8th Wonder*, however, the case ultimately failed to garner the votes of enough Justices to advance the case to the point of full briefing and consideration by the Court. The case arose out of the valuation of the one hundred acre site of the former Astroworld amusement park. The site is within walking distance of Houston's new football stadium that replaced the iconic Astrodome.

The owners testified that the 2006 purchase price of $77,000,000 was a market-value sale.[44] The 2006 tax appraisal was for $74,668,035. The owner's appraiser applied the methodology of the *United Investors* and *Kempwood* cases to properties he had selected as comparables, also without regard to, or knowing, their market value.[45] As a consequence, the owner's appraiser was able to claim that for the one hundred acre subject property to be equally appraised its value had to be reduced to $31,938,000, or 41% of its $77,000,000 market value. The trial court agreed and the appraisal district appealed. The court issued a fourteen page opinion of which only two sentences were devoted to the issue of the unconstitutional proportionality resulting from the trial court's application of Section 42.26(a)(3). The first of those sentences identified the issue, and the second said the methodology was not a problem pursuant to *Kempwood*.[46]

IV. AFTER *HOUSTON 8TH WONDER*

What comes next? From a jurisprudence perspective, the holdings in the cases discussed above suggest that whatever decision a trial court makes regarding equality of appraisal will not be disturbed on appeal. Not a single trial court decision has been overturned on appeal. In each of the cases, the courts of appeals applied an abuse of discretion standard of review focusing on the weight of the evidence instead of the

thornier legal issue of what to do when there is no evidence to establish the necessary constitutional proportionality constraint. For example, although the court in *United Investors* held that the owner's analysis was constitutional, it did so based on the misinterpretation of the principle that "equity" trumps market value. It is impossible to know if there is inequity in the constitutionally required "proportionality standard" if no one knows the relationship of the property's appraised value to its market value, much less the relationships of the appraisal and market values of the comparables.

Likewise, the appraisal district's point was misconstrued in *Kempwood* when the court wrote that "HCAD further argues that, because there is evidence of Kempwood's market value in 1999, it would be unconstitutional not to use that value." The appraisal district had not claimed that the court was required to value Kempwood's property at market value, but instead argued that to determine equality the court had to consider the relationship between appraised value and market value and that absent any evidence to the contrary, the appraisal district's evidence of that market value was the only evidence available. Finally, in *Houston 8th Wonder* the court simply chose not to answer the overarching question of constitutional proportionality versus the *United Investors*' and *Kempwood*'s methodology, and instead focused on the latitude a trial court should be given to determine the admissibility of an expert's application of the methodology.

Oddly, in October 2012 the Texas Supreme Court did expound on the equality of taxation provision of the Texas Constitution. In the case of *In re Nestle USA, Inc.*, the Court was called upon to correct alleged unequal taxation relating to the state's franchise tax.[47] In reviewing the historical development of the State's relevant constitutional provisions, the Court compared and contrasted the sections dealing with ad valorem

versus other forms of taxation. The Court noted that, "We read the provisions following the Equal and Uniform Clause as examples, not exceptions. A property tax is equal and uniform only if it is in proportion to property value."[48] Finally! This was just what the appraisal districts had been pointing out. The Court went even further, distinguishing the latitude granted the legislature in implementing tax policy depending upon the nature of the tax, stating: "The franchise tax may be used to advance policies relating to doing business in Texas, but it cannot be used, for example, to *circumvent the requirement that the ad valorem property tax be based strictly on property value*."[49]

How then, with such a clear understanding of the constitutional parameters, could the Court address the issue in *Nestle* and not take up the same question in *Houston 8th Wonder*? Because, when it came to *Nestle*, the Supreme Court had no choice. To make sure constitutional challenges to the State's **franchise tax** scheme would be resolved immediately, the Legislature vested the Supreme Court of Texas with original jurisdiction.[50] Thus, the Supreme Court was required to determine questions of constitutional challenge to the franchise tax laws. Similar constitutional questions regarding local ad valorem taxation must pass through the gauntlet of a trial court, a court of appeals and then a petition for discretionary review by the Supreme Court which historically only hears one in seven of the cases that reach that stage.[51]

V. EQUAL AND UNIFORM 2.0- IMPACT AND SOLUTIONS

According to the Texas Comptroller, in 2013 property tax generated more than $45 billion in revenue for local governmental entities.[52] This represented about 45% of the total tax revenue.[53] Because property taxes constitute such a large percentage of a property owner's local tax liability, they are often perceived as one of the tallest weeds in

the garden. Section 42.26(a)(3) has become the remedy of choice for companies in the business of lowering property taxes, whether their client's property is valued at market or not. As explained earlier, the courts have allowed application of the statute without requiring a connection to market value. Thus, any opinion of comparative inequality is possible since no yardstick is used to measure its correctness. This is having a material impact on the provision of services at the local level. In Port Arthur, the school district was required to refund $14.6 million dollars as a result of a multi-year suit claiming unequal appraisal of a refinery.[54] In Galveston County, the taxing jurisdictions were trying to determine how to refund $5 million dollars after a refinery owner won a trial based on unequal appraisal via the "new" remedy.[55] The suit was brought, notwithstanding that the property owner had agreed to the same value just two years earlier.[56]

When the jury decided the Galveston County case in February, 2013 the regular session of Texas' 83rd Legislature was underway. With that case as an impetus, State Senator Wendy Davis of Fort Worth and State Representative Sylvester Turner of Houston authored bills to reestablish market value proportionality to equal appraisal challenges and create some constitutional conformance for Section 42.26(a)(3).[57] The House version of the bill was referred to the Ways and Means Committee where it languished without any further action being taken. The Senate bill fared a little better. It was referred to the Senate Subcommittee on Fiscal Matters where it at least received a public hearing before dying with the end of the session.[58]

At the public hearing before the Sub-Committee several witnesses testified in favor of the bill. They included representatives from the Texas Association of Appraisal

Districts ("TAAD"), Bexar, Harris, Jefferson, and Dallas county appraisal districts, the Texas Association of School Boards, and the National Association of Mass Appraisal.[59] On behalf of TAAD, the Chief Appraiser for Harris County presented documentation that spelled out the problem confronting appraisal districts and provided examples of the erosion of the appraisal rolls due to Section 42.26(a)(3)'s application as allowed by the courts. His presentation included the following summary:

> As a result of [equal and uniform] lawsuits, in tax year 2011, Harris County School Districts lost an estimated $27 million in property tax revenue from commercial and industrial properties. Also in 2011, the 10 largest lawsuits in Bexar Appraisal District resulted in a $1.8 million loss for those school districts. Cumulatively, Bexar indicated an $8.1 million loss in revenue over several years. Dallas CAD provided an analysis of E&U appeals on sold properties. In 2011, $1.1 million in revenue was lost. Jefferson CAD provided taxable value changes from one recent lawsuit involving a Valero refinery. For the five years involved in this single lawsuit, the school tax refund was a staggering $16 million. A newspaper report on a recent Valero suit in Galveston County indicates that the Texas City School District must pay $2.45 million in refunds. This follows an earlier refund for the 2009 tax year of $2.38 million. Tarrant CAD provides an analysis of a single lawsuit describing values at risk there.[60]

The proponents of S.B. 1342 were cognizant of 1) the financial impact the judicial interpretations of Section 42.26(a)(3) were having on local jurisdictions, and 2) the disconnect between the methodology being applied and the Constitution's proportionality requirement. The first paragraph of S.B 1342's Bill Analysis summed it up as follows:

> The philosophy underlying the appraisal district system is that equity in taxation can best be achieved by ensuring that all appraisals are as close to 100 percent of market value as possible. The most commonly used remedy for inequity, Section 42.26(a)(3), Tax Code, creates problems because it rejects the principle that equity is best measured with reference to market value. In addition, it effectively prevents a court from considering equity studies that do consider closeness to 100 percent of market value. This creates problems for appraisal districts and local taxing units such as unpredictable appeals results, shifting of tax burdens

> to small business owners and homeowners, and not expressly limiting the plaintiff to comparisons of property within the appraisal district.[61]

Some have suggested the problem could be eased by requiring parties to disclose sales prices.[62] Ostensibly this would better equip appraisal districts with a broad range of market information that is currently available only for single-family housing (through sources such as Multiple Listing Services). In explaining the need for sales disclosure vis-à-vis equal taxation, it has been observed that, "In the case of the Tax Code, the statutory provisions are facially constitutional, but the results they produce plainly offend the equality and uniformity clauses."[63]

More and better sales information would certainly be welcomed by appraisers everywhere. Currently, however, it is not the quality of appraisals that are really at issue. Rather it is the ambiguity in Section 42.26(a)(3) coupled with the corrosive series of judicial decisions mentioned herein that are impugning the promise of equality in taxation. It remains to be seen if S.B. 1342 will be reincarnated in Texas' 84th Legislative session, or if a case, narrowly tailored in its facts, can entice the Supreme Court of Texas to revisit the constitutional construct of equal and uniform taxation in proportion to value. Without intervention by the legislature or the courts, the use of Section 42.26(a)(3) will continue to create tax inequality. The "new" remedy has proven to be a remedy that is wrong for the right being protected.

[1] Anonymous.

[2] Oliver Wendell Holmes, Jr., quoted by Felix Frankfurter, *The Atlantic Monthly*, October 1938.

[3] Texas' constitution actually specifically requires uniformity and equality in all taxation; however property taxes (real and personal) have the additional constraint that they must be in proportion to the property's value. *See* Tex. Const. art. VIII, §1(a), (b).

[4] W. Va. Const. art. X, §1.

[5] Ill. Const. art. IX, §4.

[6] Miss. Const. art. 4, §112.

[7] La. Const. art. 7, §18.

[8] Ark. Const. art. 16, §5.

[9] Tex. Const. of 1845, art. VII, §5.

[10] Tex. Const of 1845, art. III, §27.

[11] Tex. Const. of 1845, art. VII, §27 (emphasis added).

[12] Fisher, Glenn, *History of Property Taxes in the United States*, EH.Net Encyclopedia, edited by Robert Whaples, September 30, 2002, URL http://eh.net/encyclopedia/article/fisher.property.tax.history.us.

[13] Stark, Jack, *The Uniformity Clause of the Wisconsin Constitution*, 76 Marq. L. Rev. 577, 579 (1993).

[14] Tex. Const. art. VIII, §1(a), (b) (emphasis added).

[15] *Whelan v. State*, 155 Tex. 14, 282 S.W.2d 378, 380 (Tex. 1955).

[16] *Lively v. Missouri, K. & T. Ry.*, 120 S.W. 852, 856 (Tex. 1909).

[17] *Enron Corp. v. Spring Indep. School Dist*., 922 S.W.2d 931, 936 (Tex. 1996).

[18] Tex. Tax Code Ann. §42.26 (a) (1), (2) (West Supp. 2012).

[19] *Id.*

[20] *Harris County Appraisal Dist. v. United Investors Realty Trust*, 47 S.W.3d 648 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

[21] Amendment of SB 841 on the Floor of the House of Representative, 75th Leg., R.S. audio tape no. 201 (May 24, 1997)

[22] *Sagemont Plaza Shopping v. Harris County Appr. Distr.,* 30 S.W.3d 425 (Tex. App.—Corpus Christi 2000, pet. denied).

[23] *Id*. The court characterized the plaintiff's evidentiary problem in part by referring to "median level of appraisal". That term is defined in the Texas Tax Code to mean, in relevant part:

> (a) For purposes of this title, the median level of appraisal is the median **appraisal ratio** of a reasonable and representative sample of properties in an appraisal district or, for purposes of Section 41.43 or 42.26, of a sample of properties specified by that section.
>
> (b) **An appraisal ratio is the ratio of a property's appraised value as determined by the appraisal office or appraisal review board, as applicable, to**:
>
> . . . .
>
> (2) **the market value** of the property…. Tex. Tax Code Ann. §1.12 (West 2008) (emphasis added).

[24] *United Investors Realty Trust*, 47 S.W.3d 648.

[25] *Id.* at 649.

[26] *Id.* at 654.

[27] *Id.* at 653 (emphasis added) (Note: "subsection (d)" referred to in the quote is the predecessor to the current statutory provision found in subsection (a) (3) of the same Section 42.26 of the Texas Tax Code).

[28] *See, e.g.*, *Reid v. Covert*, 354 U.S. 1, 14, 77 S.Ct. 1222, 1229 (1957) ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government."); *Davenport v. Garcia*, 834 S.W.2d 4, 11 (Tex. 1992) ("[T]he argument of convenience can have no weight as against those safeguards of the constitution which were intended by our fathers for the preservation of the rights and liberties of the citizen") (quoting *Ex Parte McCormick*, 88 S.W.2d 104,107 (Tex. Crim. App. 1935)).

[29] *Weingarten Realty Investors v. Harris County Appr. Dist.*, 93 S.W.3d 280 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

[30] *Id.* at 287.

[31] *Harris County Appr. Dist. v. Kempwood Plaza,* 186 S.W.3d 155 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

[32] Brief of Appellant at 21, *Harris County Appr. Dist. v. Kempwood Plaza,* 186 S.W.3d 155 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (internal citations omitted).

[33] *Kempwood Plaza,* 186 S.W.3d 155. 162.

[34] *In re MHCB (USA) Leasing and Finance Corp.,* No. 01-06-00075-CV, 2006 WL 1098922 (Tex. App.—Houston [1st Dist.] April 27, 2006, no pet.) (mem. op.).

[35] *Id.* at *3.
[36] *Id.* at *8.

[37] *(Corporate Park West) Hartman REIT Operating Partnership, II v. Waller County Appraisal District*, No. 01-05-00913-CV, 2006 WL 1766790 (Tex. App.—Houston [1st Dist.] June 29, 2006, no pet.) (mem. op.).

[38] *Id*. at *1.

[39] *Id*. at *2.

[40] *Id*. at *3.

[41] *Id*. at *4.

[42] *Harris County Appr. Dist. v. Houston 8th Wonder Property,* 395 S.W.3d 245 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

[43] *See,* Ben Mesches, *Practice Before the Texas Supreme Court*, 22nd Annual Advanced Civil Appellate Practice Course Ch. 12 (2008).

[44] *Houston 8th Wonder Property*, 395 S.W.3d at 257.

[45] *Id.* at 254-5. It should be noted that since the owner's appraiser could not find any comparable tracts of vacant land, he used the portion of the "comparable" properties' appraised values that had been allocated to the land component by the appraisal district.

[46] *Id.* at 258.

[47] *In re Nestle USA, Inc*., 387 S.W.3d 610 (Tex. 2012).

[48] *Id.* at 620.

[49] Id. at 622 (emphasis added).

[50] *Id.* at 616.

[51] Ben Mesches, *Practice Before the Texas Supreme Court*, 22nd Annual Advanced Civil Appellate Practice Course, September 4-5, 2008, Chapter 12, p.1.

[52] Susan Combs, *Biennial Property Tax Report- Tax Years 2012 and 2013*, Issued December 2014. (http://www.window.state.tx.us/taxinfo/proptax/references/survey-publications/biennial-report/2012-2013/96-1728-12-13.pdf).

[53] *Id*., at Exhibit 1.

[54] Sherry Koonce, *PAISD owes Valero $15 million in tax overpayment*, The Port Arthur News May 5, 2011.

[55] Harvey Rice, *School district, others owe Valero nearly $5 million*. Houston Chronicle, February 12, 2013.

[56] *Id.*

[57] Tex. SB 1342, 83rd Leg., R.S. (2013).

[58] Tex. S. Subcommittee on Fiscal Matters Minutes, 83rd Leg. R.S. (April 18, 2013).

[59] *Id*.

[60] Public hearing before Tex. S. Subcommittee on Fiscal Matters on Tex. S.B. 1342, 83rd Leg. R.S. (2013) (page 3 of *Why HB 2889 and SB 1342 are critically needed*, submitted by Jim Robinson Chief Appraiser, Harris County, Texas).

[61] Tex. S. Subcommittee on Fiscal Matters, Bill Analysis, Tex. S.B. 1342, 83rd Leg. R.S. (2013).

[62] Nathan Morey, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code With the Texas Constitution*, 41 St. Mary's L.J. 553, (21010).

[63] *Id.*