

AFJ NOMINEE REPORT

DON WILLETT

U.S. Court of Appeals for the Fifth Circuit

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There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). We should not seek to reclaim that ground for judicial supremacy.

CHIEF JUSTICE ROBERTS *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 347 (2007).*

Willett's concurrence "**fills the Court's sails and sets a *Lochner*-ian course**" and "**the *Lochner* monster**" has been "**rediscovered and unleashed by**" Willett, and the Court.

TEXAS SUPREME COURT CHIEF JUSTICE NATHAN HECHT *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 138 (Tex. 2015) (Hecht, C.J., dissenting).

*Lochner is "the symbol, indeed the quintessence, of judicial usurpation of power."*¹

ROBERT BORK

INTRODUCTION

On September 28, 2017, President Trump nominated Don R. Willett, a justice on the Texas Supreme Court, to the U.S. Court of Appeals for the Fifth Circuit to fill the seat vacated by Emilio Garza, who took senior status in 2012.² The seat was left open for five years because Senators Cornyn and Cruz would not agree to confirm any Obama nominee to fill the vacancy.

Justice Willett has bragged about being the "most conservative justice"³ on the Texas Supreme Court, and that "there is no ideological daylight to the right of me."⁴ In fact, James Dobson, founder of the ultraconservative Focus on the Family, has agreed, also dubbing Willett the "most conservative justice" on the Texas Supreme Court.⁵ Willett, a member of the Federalist Society, was on the list of potential Supreme Court nominees that the society presented to President Trump during his campaign. The President said at that time that all of his nominees would "automatically" overturn *Roe v. Wade*.⁶

Before joining the Texas Supreme Court, Willett dismissed efforts to address inequality for women in the workplace. He ridiculed "talk of 'glass ceilings'" and the issue of "pay equity;" minimized the challenges of affording quality day care;

2 Press Release, President Donald J. Trump Announces Eighth Wave of Judicial Candidates, The White House (Sept. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/28/president-donald-j-trump-announces-eighth-wave-judicial-candidates>.

3 Justice Don Willett Commercial: Conservative, YOUTUBE (May 7, 2012) <https://www.youtube.com/watch?v=WJQFioXc4Mg>.

4 Don Willett-The Arlington Voice-2012 TCGOP Straw Poll, YOUTUBE (Feb. 6, 2012), <https://www.youtube.com/watch?v=lmznoCBCmE>.

5 Justice Don Willett Commercial: Conservative, YOUTUBE (May 7, 2012) <https://www.youtube.com/watch?v=WJQFioXc4Mg>.

6 Dan Mangan, *Trump: I'll appoint Supreme Court justices to overturn Roe v. Wade abortion case*, CNBC (Oct. 16, 2016), <http://www.cnbc.com/2016/10/19/trump-will-appoint-supreme-court-justice-to-overturn-roe-v-wade-abortion-case.html>; see also Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

1 Alan Greenblatt, *Don Willett's Lone Star Legal Show*, GOVERNING MAGAZINE (Aug. 2017), <http://www.governing.com/topics/public-justice-safety/gov-don-willett-conservative-justice.html>.

and dismissed concerns regarding "sexual discrimination/harassment."⁷

Further, on the Texas Supreme Court, Willett has advanced a judicial philosophy that is, as one journalist noted, a "more aggressive approach to reviewing (and sometimes declaring unconstitutional) government regulations, particularly those that relate to economic and property rights."⁸ The Institute for Justice, a libertarian law firm funded by Charles Koch, has strongly endorsed Willett's judicial philosophy.⁹

In this context, Willett's concurrence in *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) is notable. In *Patel*, Willett advocated reviving *Lochner* era jurisprudence, a long-discarded doctrine that was used to strike down minimum wage laws and erode workers' rights in the name of economic liberty. Willett's view is far outside the mainstream, repudiated by several prominent conservative jurists, including Chief Justice John Roberts, Justice Clarence Thomas, and Judge Robert Bork.

Willett's record on the Texas Supreme Court is one that repeatedly sides against workers and consumers, particularly in cases implicating significant civil rights, and has failed to give proper effect to important constitutional rights regarding marriage equality and quality education under Texas law.

Based on Willett's record, AFJ opposes his nomination.

⁷ Ken Herman, *Bush adviser's memo critical of women's issues*, AUSTIN AMERICAN-STATESMAN (July 15, 2000).

⁸ Eric Benson, *Don Willett's Quiet Revolution*, TEXAS OBSERVER (Nov. 17, 2016), <https://www.texasobserver.org/don-willett-trump-supreme-court/>.

⁹ *Id.*

BIOGRAPHY

Willett was born in 1966 in Dallas, Texas. He received his B.B.A. from Baylor University in 1988 and a J.D. and M.A. in political science from Duke University in 1989. Willett clerked for Judge Jerre S. Williams of the U.S. Court of Appeals for the Fifth Circuit, before spending a few years in private practice in the Austin office of Haynes and Boone, LLP, where he practiced labor and employment law.

In 1996, Willett began working for then-Governor George W. Bush as Director of Research & Special Projects.¹⁰

While in this position, Willett wrote a memo, sent to Governor Bush's policy director, expressing his discomfort with the wording of the Governor's 1998 proclamation honoring the Texas Federation of Business and Professional Women.¹¹ Specifically, Willett wrote, according to the Austin American-Statesman:

I resist the proclamation's talk of "glass ceilings," pay equity (an allegation that some studies debunk), the need to place kids in the care of rented strangers, sexual discrimination/harassment and the need generally for better "working conditions" for women (read: more government). Issue-wise, they support the ERA, affirmative action, abortion rights, legislation adding teeth to the Equal Pay Act, etc. and they regularly line up with the AFL-CIO and similar

¹⁰ SUPREME COURT, ABOUT THE JUSTICES, JUSTICE DON R. WILLETT, available at <http://www.txcourts.gov/supreme/about-the-court/justices/justice-don-r-willet.aspx>.

¹¹ Herman, *supra* note 7.

groups. Of the 30 or so congressional candidates they've endorsed this cycle, all but one (Connie Morella of Md.) are Democrats.¹²

After Willett's memo was leaked to the public, a spokeswoman for Governor Bush's office "sought to distance Bush from the memo."¹³

Willett later worked for President George W. Bush in the White House, serving as Special Assistant to the President and Director of Law & Policy for the White House Office of Faith-Based and Community Initiatives.¹⁴ From 2002 to 2003, Willett served as Deputy Assistant Attorney General in the Office of Legal Policy at the U.S. Department of Justice, where he assisted with the judicial nomination and confirmation process.

As Willett explains, he was responsible for "helping vet and scrub federal judicial nominees and then trying to shepherd these innocent lambs through the odious confirmation gauntlet."¹⁵ Willett advised the nominees "to bob and weave, be the teeniest tiniest target you can be," and "to be as bland, forgettable and unremarkable as possible."¹⁶ Willett describes the judicial confirmation process as "raw political bloodsport" and "not honest debating societies."¹⁷ These are troubling comments and are indicative of the lack of respect he holds for the Senate Judiciary Committee and the very process he is now a part of.

From 2003 to 2005, Willett served as Deputy

¹² *Id.*

¹³ *Id.*

¹⁴ Janet Elliot, *Ex-Bush aide appointed to Texas' High Court*, HOUSTON CHRONICLE (Aug. 24, 2005), <http://www.chron.com/news/houston-texas/article/Ex-Bush-aide-appointed-to-Texas-high-court-1479832.php>.

¹⁵ Don Willett, speaker, Retirement of Texas Supreme Court Justice Scott Brister, State Bar of Texas, Austin, Texas (Jan. 20, 2010).

¹⁶ *Id.*

¹⁷ *Id.*

Attorney General and chief legal counsel to then-Texas Attorney General Greg Abbott.

In December 2004, Governor Rick Perry nominated Willett to the Texas Supreme Court. At the time, Willett had never served as a judge, and Willett's state senator, Austin Democrat Gonzalo Barrientos, exercising his right as a Texas state senator to object to nominees from his district, vetoed his nomination.¹⁸ A few months later, after Willett had moved to the district of Republican Senator Jeff Wentworth for what he said were family considerations, Perry nominated Willett again. This time Willett was confirmed and took his place on the court.¹⁹

Willett has been elected to the court twice, in 2006 and 2012. His current term will conclude at the end of 2018.²⁰

While he was campaigning, a complaint was leveled against Willett for "claim[ing] newspaper support from papers that actually endorsed his opponent."²¹ There have also been allegations of plagiarism, that he "borrowed liberally from his two conservative idols — U.S. Supreme Court Justice Antonin Scalia and former federal Judge Robert Bork — when he filled out his application for an appointment with Gov. Rick Perry."²² The application "included at least half a dozen examples of writing cribbed — without attribution — from two books by conservative legal stalwarts[.]"²³

¹⁸ Benson, *supra* note 8.

¹⁹ *Id.*

²⁰ SUPREME COURT, ABOUT THE JUSTICES, JUSTICE DON R. WILLETT, available at <http://www.txcourts.gov/ supreme/about-the-court/justices/justice-don-r-willett.aspx>.

²¹ Anabelle Garay, *Group files complaint against Texas court justice*, ASSOCIATED PRESS (Nov. 4, 2006).

²² Jaime Castillo, *Nod to Scalia, Bork likely would have scored justice more points*, SAN ANTONIO EXPRESS-NEWS (Mar. 4, 2006).

²³ Pete Slover, *Rival: Justice copied books Exclusive: Willett defends borrowing from Scalia, Bork in application for state Supreme Court*, DALLAS MORNING NEWS (Mar. 2, 2006).

During a subsequent interview with the *San Antonio Express-News*, "Willett never directly answered whether he used Bork's and Scalia's works as references while he prepared his application."²⁴

Finally, Justice Willett was named "Tweeter Laureate" by the Texas House in 2015 for his frequent use of the social media platform to tell jokes, connect with voters, comment on current affairs, and praise the state of Texas.²⁵ Some of his tweets reveal his judicial philosophy and perspective about topics that may come before the Fifth Circuit. For example, in *Trump's LGBT-Unfriendly Supreme Court Picks*,²⁶ reporter Trudy Ring highlights tweets that could be interpreted as anti-marriage equality or anti-transgender.

LEGAL AND OTHER VIEWS

I. RETURN TO LOCHNER

In two law review-style concurrences written during his tenure on the Texas Supreme Court, Willett has made clear his view that courts should be more vigorous in reviewing and invalidating acts of government designed to protect health and safety. He has articulated views which would return courts to the "*Lochner Era*."

In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court declared unconstitutional a New York maximum hours statute for bakers, under the theory it violated the freedom to contract. *Lochner*, however, is "more than just a case. It symbolizes the era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures, including minimum wage laws, laws designed to enable employees to unionize, and a federal statute establishing a pension system for railway workers."²⁷ The *Lochner*-era Court made "freedom of contract a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, services important social purposes."²⁸ As Professor David Strauss has noted, *Lochner v. New York* could win a prize, if there were one, "for the most reviled decision of the last hundred years."²⁹ And, yet, in at least two notable concurrences, Willett has espoused a jurisprudence which would reinvigorate the long-discarded doctrine.

One of his most noteworthy decisions in this area was a concurrence in *Robinson v. Crown Cork & Seal*, 335 S.W.3d 126 (Tex. 2010) where the Texas Supreme Court struck down a tort-reform law as unconstitutionally retroactive when applied to pending cases.³⁰ Although Willett agreed with the majority that the law in question was unconstitutional, Willett chose to write separately. *Id.* at 159 (Willett, J., concurring). He specifically attacked the notion that courts should defer to legislatures when the political branches

²⁴ Castillo, *supra* note 22.

²⁵ Brandia Grissom, *Justice Don Willett, the Boy from Tally, Takes Twitter by Storm, and Maybe SCOTUS, Too*, DALLAS MORNING NEWS, (May 20, 2016), <http://www.dallasnews.com/news/politics/2016/05/20/justice-don-willett-the-boy-from-tally-takes-twitter-by-storm-and-maybe-scots-too>.

²⁶ Trudy Ring, *Trump's LGBT-Unfriendly Supreme Court Picks*, THE ADVOCATE (May 18, 2016) <http://www.advocate.com/election/2016/5/18/trumps-lgbt-unfriendly-supreme-court-picks>.

²⁷ David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003), <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5175&context=ucirev>.

²⁸ *Id.* at 375.

²⁹ *Id.* at 373.

³⁰ Benson, *supra* note 8.

enact laws under their "police power." *Id.* He wrote, "[i]f judicial review means anything, it is that judicial restraint does not allow everything. Yes, courts must respect democratically enacted decisions[.]" *Id.* at 163. But, he added, the "vision of enumerated powers and personal liberty becomes quaint once courts (perhaps owing to an off-kilter grasp of 'judicial activism') decide the Legislature has limitless power to declare its actions justified by police power." *Id.* He added, "the Legislature's police power is not infinitely elastic, able to extinguish constitutional liberties with nonchalance." *Id.* at 163. Moreover, "[e]veryday Texans, and the courts that serve them, must remain vigilant, lest we permit boundless police power[.]" *Id.* at 164. He concluded:

Judges are properly deferential to legislative judgments in most matters, but at some epochal point, when police power becomes a convenient talisman waved to short-circuit our constitutional design, deference devolves into dereliction. The Legislature's policymaking power may be vast, but absent a convincing public-welfare showing, its police power cannot be allowed to uproot liberties enshrined in our Constitution.

Id. at 165. When discussing his concurrence, Willett explains how "I agreed the law was unconstitutional, but I thought the case, at bottom, raised issues far weightier than whether a certain plaintiff could sue a certain defendant. In my view, it raised fundamental questions about our constitution that both confers and constrains governing power, and about the judiciary itself and the distinction between improper 'judicial activism' and proper 'judicial engagement.'"³¹

The U.S. Supreme Court has repeatedly made clear that "[t]he States traditionally have had great latitude under their police powers to legislate as 'to the protection of lives, limbs, health, comfort, and quiet of all persons.'" *Metro. Life Ins. Co. v. Mass.*, [471 U.S. 724, 756 \(1985\)](#); see also, e.g., *Jacobson v. Mass.*, [197 U.S. 11, 24-25 \(1905\)](#) ("Although this court has refrained from any attempt to define the limits of [a state's police power] . . . the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.")

Yet Willett, apparently based on his own particular view of what is a "convincing public-welfare showing" would take it upon courts, and not our elected officials, to decide which health and safety measures are appropriate.

In 2015, Willett further exposed his judicial philosophy. In *Patel v. Texas Dep't of Licensing & Regulation*, [469 S.W.3d 69 \(Tex. 2015\)](#), the Texas Supreme Court struck down a training requirement for cosmetic eyebrow "threaders" as a violation of the Texas Constitution. The court held that the provisions of the Texas Occupation Code requiring "threaders" to undergo at least 750 hours of training in order to receive a state license violated the Texas Constitution. *Id.* at 91. In the case, the state conceded that as many as 320 "of the curriculum hours are not related to activities threaders actually perform." *Id.* at 89. That, "combined with the fact that threader trainees have to pay for the training and at the same time lose the

³¹ Don Willett, 2012 Judicial Election Candidate Questionnaire, DALLAS MORNING NEWS (2012).

opportunity to make money actively practicing their trade," led the court to declare that the licensing requirement violated the substantive due process clause of the Texas Constitution. *Id.* at 90.

Willett concurred in the majority's decision to strike down the regulation. He wrote separately, however, to strongly encourage a more activist judiciary to invalidate government economic regulations.

Willett noted that "[t]here are competing visions, to put it mildly, of the role judges should play in policing the other branches, particularly when reviewing economic regulations. On one side is the Progressive left, joined by some conservatives, who favor absolute judicial deference to majority rule. Judge Robert Bork falls into this camp." *Id.* at 96 (Willett, J., concurring). On "the other side" are advocates for "'judicial engagement' whereby courts meaningfully enforce constitutional boundaries, lest judicial restraint become judicial surrender. The pro-engagement camp argues the judiciary should be less protective of Leviathan government and more protective of individual freedom." *Id.* He added:

A prominent fault line has opened on the right between traditional conservatives who champion majoritarianism and more liberty-minded theorists who believe robust judicial protection of economic rights is indispensable to limited government.

Id. at 97. It is evident which side Willett is on:

I believe judicial passivity is incompatible with individual liberty and constitutionally limited government . . . and while

government has undeniable authority to regulate economic activities to protect the public against fraud and danger, freedom should be the general rule, and restraint the exception.

Id. at 123. "Thus," he made clear, "when it comes to judicial review of laws burdening economic freedoms, courts should engage forthrightly, and not put a heavy, pro-government thumb on the scale." *Id.* at 96. He said that he "oppose[s] judicial activism, inventing rights not rooted in the law. But the opposite extreme, judicial passivism is corrosive, too — judges who, while not activist, are not active in preserving the liberties, and the limits, our Framers actually enshrined." *Id.* at 119.

Willett then endorsed heightened scrutiny for cases implicating economic rights and called for courts to second-guess legislatures: "an independent judiciary must judge government actions, not merely rationalize them. Judicial restraint doesn't require courts to ignore the nonrestraint of the other branches[.]" *Id.* at 120. Willett included pages of footnotes defending the Supreme Court in *Lochner* to further support his point ("The *Lochner* bogeyman is a mirage"). *Id.* at 94 n.11.

In his concurrence, Willett criticized the rational-basis test under the U.S. Constitution, which "is something special; it is a misnomer, wrapped in an anomaly, inside a contradiction. Its measure often seems less objective reason than subjective rationalization." *Id.* at 98. He agreed with critics who "charge the test is less 'rational basis' than 'rationalize a

basis.'" *Id.* at 112.

Then, Willett bemoans "the jurisprudential fact of the matter is that courts are more protective of some constitutional guarantees than others. One bedrock feature of 20th-century jurisprudence, starting with the U.S. Supreme Court's New Deal-era decisions, was to relegate economic rights to a more junior-varsity echelon of constitutional protection than 'fundamental' rights.'" *Id.* at 113. Furthermore, Willett observed that "notwithstanding the assurance in footnote four of *Caroline Products* that alleged violations of the Bill of Rights deserve heightened scrutiny," the Supreme Court sometimes applies only the rational-basis test to cases involving certain, "non-fundamental" rights. *Id.* at 115-16. Willett asserted that the fact that the courts afford different levels of scrutiny to different rights is "anchored less in principle than in power." *Id.* at 113. He added, "[e]conomic liberty is 'deeply rooted in this Nation's history and tradition,' and the right to engage in productive enterprise is as central to individual freedom as the right to worship as one chooses." *Id.* at 122-23.

Chief Justice Nathan Hecht, who was appointed by Governor Rick Perry, dissented from the decision. In his dissent, Hecht highlighted how extreme Willett's views are, noting how Willett's concurrence "fills the Court's sails and sets a *Lochner*-ian course." *Id.* at 138 (Hecht, C.J., dissenting). Criticizing Willett's "wild championing of economic liberty," *Id.* at 127, Hecht decried how "the *Lochner* monster" has been "rediscovered and unleashed by" Willett and the court. *Id.* at 138. He said that Willett's views will lead the court to "stray far from the Judiciary's proper sphere of authority[]." *Id.* at 138.

As Chief Justice Hecht demonstrates, Willett's desire to return to the *Lochner* era differs from prominent conservative jurists. Robert Bork criticized *Lochner* as "the symbol, indeed the quintessence, of judicial usurpation of power."³² In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007), Chief Justice Roberts described *Lochner* as a "discredited decision,"³³ reiterating how truly troubling Willett's views are:

There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). We should not seek to reclaim that ground for judicial supremacy.

Id. at 347; see also *Id.* at 355 (Thomas, J., concurring) (noting "[i]n *Lochner* the Court located a 'right of free contract' in a constitutional provision that says nothing of the sort.").

At the time of the *Patel* decision, Willett's concurrence was viewed as "the road map for the supreme court to overrule Obama's health care bill," earning him a reputation as "the judicial antidote to ObamaCare."³⁴

Willett's belief in the judiciary's right to second-guess government health and

³² Greenblatt, *supra* note 1.

³³ *Id.*

³⁴ Melissa Boughton, *Supreme Court justice seeks another term*, KERRVILLE DAILY TIMES (Nov. 30, 2011).

safety decisions is indeed apparent in his commentary on the Affordable Care Act.

Prior to the U.S. Supreme Court's decision in *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012), as a sitting state supreme court justice, Willett praised Texas Attorney General Greg Abbott for leading the fight against the Affordable Care Act, arguing that the notion of limited federal power could be destroyed if the U.S Supreme Court upheld the law: "Government will have carte blanche to control every sphere of your everyday life[.]"³⁵

After the Supreme Court upheld the constitutionality of the Affordable Care Act, Willett wrote an article entitled *Parsing the court's decision on Obamacare*.³⁶ In the article, Willett argued that "[c]onservatives lost the short-term battle as a policy matter — Obamacare lives (for now) — but they may win the long-term war as a constitutional matter."³⁷ Specifically, Willett observed that conservatives triumphed on major constitutional issues, including limiting Congress's power under the Commerce Clause, holding that Congress abused its power under the Spending Clause, and restricting the Necessary and Proper Clause. Willett notes, "In significant ways, the Court anointed a framework for smaller government. The chief justice was branded a turncoat for 'rewriting the statute to save it,' but maybe he finessed an ingenious coup, playing grandmaster chess to set up future wins to shrink Washington's power."³⁸

II. CONSUMER AND WORKER RIGHTS

Willett has advanced an agenda that favors corporations and special interests at the expense of consumers and workers. According to a 2012 Texas Watch study of consumer cases, Willett ruled for consumers in only 19 percent of the cases, making him the lowest scoring among the six Texas Supreme Court justices who were evaluated.³⁹ Moreover, in a 2016 report, the Center for American Progress found that Willett "voted for corporate defendants more than 70 percent of the time."⁴⁰ Willett "was reelected with the support of financial contributions from corporations, oil and gas companies, and corporate law firms."⁴¹

Several cases illustrate how Willett has undermined critical legal protections for workers, even compared to other conservatives on the Texas Supreme Court.

Waffle House, Inc. v. Williams

Waffle House, Inc. v. Williams, 313 S.W.3d 796 (Tex. 2010) demonstrates how Willett undermines worker protections. Willett wrote the majority opinion for a split court, which limited monetary remedies for victims of sexual assault.

Cathie Williams, a Waffle House employee, was repeatedly sexually harassed and assaulted by one of her co-workers.

³⁵ Lowell Brown, *Abbott shares insight* Texas attorney general speaks on wide range of topics — at GOP meeting, DENTON RECORD-CHRONICLE (Jan. 20, 2012).

³⁶ Justice Don Willett, *Parsing the court's decision on Obamacare*, HOUSTON CHRON. (June 29, 2012), <http://www.chron.com/opinion/outlook/article/Parsing-the-court-s-decision-on-Obamacare-3674367.php>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Peggy Fikac, *Commentary Judge: 'Hate the Game' but not the player*, HOUSTON CHRONICLE (Nov. 26, 2012).

⁴⁰ Billy Corriher, *Big Business is Still Dominating State Supreme Courts*, CENTER FOR AMERICAN PROGRESS (Sept. 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/09/01095715/BigBusinessStateSupremeCourts-report.pdf>.

⁴¹ Kyle Swenson, *Trump wants Texas's 'Tweeter Laureate' judge on federal appeals court*, WASH. POST (Sept. 29, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/09/29/trump-wants-texas-tweeter-laureate-judge-on-federal-appeals-court/?utm_term=.275fc80648e6.

Within her first week on the job, she was subjected to offensive sexual comments from Eddie Davis, a cook. Davis sometimes made the comments with his hands in his pants. He would wink at Williams, which she described as unwelcome flirting. Once, after his shift was over, Davis showed Williams a condom and laughed. He often stared at her.

On several occasions, as Williams walked by Davis, he pushed her into counters and into the grill. Once, while Williams was helping customers, Davis came up behind her, held her arms with his body pressed against her, and said, "Isn't she great, isn't she wonderful?" Davis cornered her on several other occasions. When she would reach up to put plates away, Davis would rub against her breasts with his arm. Once, when Williams was in a supply room, Davis, smirking, stood in front of her and blocked her exit. She had to duck under his arm to leave.

Id. at 799. Moreover, "Williams testified that Davis physically abused her on numerous occasions, pushing her into the counters, the grill, and into the dish table on multiple occasions." *Id.* at 816 (O'Neill, J., dissenting). In fact, a Waffle House manager "acknowledged that Davis may have presented an actual danger to Williams." *Id.*

Williams reported Davis's misconduct to Waffle House management, which took almost no action to correct the problem. *Id.* at 799. Ultimately, Williams resigned and sued Waffle House claiming constructive discharge, violations of the Texas Commission on Human Rights Act (TCHRA) and negligent supervision

and retention of Davis. *Id.* at 800. The jury found for Williams. The trial court entered, and the court of appeals affirmed, a judgment of \$425,000 in past and future compensatory damages and \$425,000 in punitive damages. *Id.* at 801.

The Texas Supreme Court, in an opinion by Willett, reversed and held that Williams could not recover negligence damages for harassment that is subject to the Texas Commission on Human Rights Act (TCHRA), or for the negligent supervision claim arising from the assault. Additionally, since the TCHRA was the exclusive remedy against Waffle House, Williams was only entitled to \$300,000 combined compensatory and punitive damages available under the TCHRA. *Id.* at 807, 813.

Willett held that "the TCHRA, the legislature's specific and tailored anti-harassment remedy, is preemptive when the complained-of negligence is entwined with the complained-of harassment." *Id.* at 799. While the statute "does not foreclose an assault-based negligence claim arising from independent facts unrelated to sexual harassment[]," Willett further held that the "Legislature's comprehensive remedial scheme" did not permit "aggrieved employees to proceed on dual tracks — one statutory and one common-law, with inconsistent procedures, standards, elements, defenses, and remedies." *Id.*

Justices Harriett O'Neill, appointed by Governor George W. Bush, and David Medina, appointed by Governor Rick Perry, dissented. O'Neill agreed that TCHRA preempts common law negligent supervision claims arising from an incident

of sexual harassment. *Id.* at 814 (O'Neill, J., dissenting). However, O'Neill noted, a claim for negligent supervision arising from an assault, a common law tort which the legislature did not expressly abolish, is not preempted. *Id.* at 815. Furthermore, O'Neill explained:

Sexual harassment is not a tort recognized under the common law, therefore I agree with the Court that such behavior cannot support a claim for negligent supervision. But assaultive behavior surely can, whether or not it has sexual overtones. The Court's denial of common law protection for a subset of assault that is sexually motivated adds insult to injury. In my view the Texas Commission on Human Rights Act (TCHRA) preempts negligent-supervision claims based on harassment, but it does not preempt assault-based claims merely because the perpetrator sexually harassed the victim too.

Id. at 813-14. O'Neill reasoned that just because the TCHRA is "preemptive as to behavior that constitutes sexual harassment," it "does not follow that a victim of assault should be denied common law redress for injury the assault caused when the perpetrator sexually harasses her as well." *Id.* at 814-15 (O'Neill, J., dissenting). She added, "while an employer is not an insurer of its employees' safety at work, the common law clearly imposes a duty on employers to provide a safe work place." *Id.* at 815 (O'Neill, J., dissenting).

Justice O'Neill noted that Willett's opinion would have the following effect: if "an employer fails to take reasonable action after Employee A repeatedly slams Employee B into the wall," then "Employee B may sue for assault-based negligent supervision" while if "an employer fails

to take reasonable action after Employee A gropes Employee B before repeatedly slamming her into the wall," then the "TCHRA is Employee B's exclusive remedy." *Id.* at 815 (O'Neill, J., dissenting). The employer's liability for assaultive conduct in scenario 1 would be greater than the assaultive and sexually abusive misconduct in scenario 2. "Surely in its statutory attempt to afford greater workplace protection from sexual harassment the Legislature did not intend to curtail relief for victims of assault." *Id.* at 815 (O'Neill, J., dissenting).

The consequence of Willett's decision, as O'Neill noted, is that a claim of employer negligence unaccompanied by sexually harassing conduct can be the subject of a tort suit with exposure to compensatory and punitive damages award, while the same negligence claim accompanied by alleged sexual harassment is preempted by the TCHRA and is subject to that statute's capped damages. For the employee, because of Willett's decision, being subject to more egregious behavior results in less recovery.

Mission Independent School Dist. v. Garcia

Willett also authored the majority opinion in the case *[Mission Independent School Dist. v. Garcia](#)*, 372 S.W.3d 629 (Tex. 2012), in which the Texas Supreme Court made it more difficult for victims of discrimination to even have their case heard by a jury.

Gloria Garcia worked for Mission Independent School District for 27 years, before she was fired in 2003. *Id.* at 632. Garcia, who is of Mexican-American

descent, was 48 years old when she was fired. After she was fired, Garcia sued for age, gender and racial discrimination. In response, Mission ISD filed a plea of jurisdiction to have the case dismissed. *Id.* at 632-33. By the time the case reached the Texas Supreme Court, the gender and racial discrimination claims had been resolved, and the remaining question before the supreme court was whether Garcia had established a prima facie case of age discrimination. *Id.* at 633.

The Texas Supreme Court has held that since Texas's employment discrimination law is "effectively identical" to federal equivalents, the court is "guide[d]" by federal cases interpreting federal anti-discrimination statutes. *Id.* at 633-64. Garcia had no direct evidence of age discrimination, thus she attempted to satisfy the four-prong test for a prima facie case of age discrimination under *McDonnell Douglas Corp. v. Green*, [411 US 792 \(1973\)](#). According to the standard adopted by the Fifth Circuit Court of Appeals, Garcia was required to set forth evidence showing that "(1) [s]he was discharged; (2) [s]he was qualified for the position; (3) [s]he was within the protected class at the time of discharge; and (4) [s]he was either i) replaced by someone outside the protected class, ii) replaced or someone younger, or iii) otherwise discharged because of h[er] age." *Rachid v. Jack in the Box, Inc.*, [376 F.3d 305, 309 \(5th Cir. 2004\)](#) (citing *Palasota v. Haggar Clothing Co.*, [342 F.3d 569, 576 \(5th Cir. 2003\)](#)).

Mission ISD, after producing undisputed evidence that Garcia's replacement was three years older, argued that, regardless of the four-prong standard set forth by the Fifth Circuit, a terminated employee may only establish a prima facie case of age discrimination under the TCHRA by demonstrating that he or she

was replaced by someone younger. The trial court and later the court of appeals denied Mission ISD's request to dismiss because Garcia established each element necessary to show a prima facie case of age discrimination under the standards set forth by the Fifth Circuit by presenting evidence under the fourth element "by 'otherwise show[ing]' that she was discharged because of age[,]'" regardless of whether she was replaced by someone younger. *Id.* at 633,

In writing for the Texas Supreme Court, however, Willett disagreed with the lower courts and federal courts that have addressed the issue and held that a plaintiff suing for age discrimination under the TCHRA cannot establish a prima facie case when the evidence is undisputed that the plaintiff was replaced by someone older. Willett stated that such a claimant "must demonstrate that her replacement was younger; otherwise, she is not entitled to a presumption of discrimination[.]" *Id.* at 633. Willett justified ignoring the "otherwise show" language from Fifth Circuit precedent because the "precise requirements of a prima facie case can vary depending on the context" and because the Court "lack[s] clear guidance from the Fifth Circuit on the proper articulation of the fourth element in true replacement cases." *Id.* at 640, 639.

Chief Justice Wallace Jefferson, and Justices Debra Lehrmann and David Medina, all appointed by Governor Rick Perry, dissented. The dissent noted how Willett's ruling requires victims of discrimination to establish a claim "at the earliest stage of litigation," *Id.* at 645-46

(Jefferson, C.J., dissenting); and indeed Willett's ruling creates "a new and oppressive burden in the employment setting: a litigant must prove her case to establish jurisdiction." *Id.* at 647. Willett's decision, Jefferson emphasized, means that a plaintiff "must establish the *prima facie* elements to prove discrimination, a proposition rejected by federal courts and not to be found in the TCHRA's text." *Id.* at 646.

Jefferson further described why, contrary to Willett's opinion, "evidence of an older replacement alone does not disprove discrimination as a matter of law":

Assume, for example, that a plaintiff establishes conclusively that the decision to fire her was motived by age discrimination – a smoking gun email confirms that motivation unequivocally. It cannot logically follow that the employer's later decision to hire an older worker absolves it of its original sin.

Id. at 647; see also, e.g., *Wright v. Southland Corp.*, 187 F.3d 1287, 1305 n.23 (11th Cir. 1999) (noting "there are numerous reasons why the replacement of Wright by an older individual does not rule out the possibility that Southland fired Wright because of his age. For instance, the replacement may simply have been an *ex post* attempt to avoid liability for age discrimination"); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979) (noting that someone older "could have been hired, for example, to ward off a threatened discrimination suit").

Willett ignored well-established cases under the Age Discrimination in Employment Act (ADEA) and departed from well-settled law. The difficulty that plaintiffs will now face in age

discrimination cases under the TCHRA is indisputable. Under the precedent set forth by Willett, unless a plaintiff is replaced by someone younger, a plaintiff will not be able to get past a motion to dismiss, absent direct evidence of discrimination. Finally, it is important to note that *Garcia* could have far-reaching implications for race, disability, religion, gender and national origin claims.

Bostic v. Georgia-Pacific Corp.

Also relevant is *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332 (Tex. 2014).

Timothy Bostic was diagnosed with mesothelioma, and died of the disease in 2003. He was only 40 years old. *Id.* at 336. There is no dispute that asbestos can cause mesothelioma, if it is breathed into the lungs. Bostic's relatives sued Georgia-Pacific Corporation, and 39 other defendants, alleging that the defendants' products exposed Bostic to asbestos, causing his disease. *Id.* The Bostics argued that Timothy had been exposed to asbestos as a child and teenager while using Georgia-Pacific drywall joint compound. *Id.* at 336-37.

The trial court ruled in favor of the Bostics, awarding approximately \$6.8 million in compensatory damages and \$4.8 million in punitive damages. *Id.* at 337. However, the court of appeals disagreed, finding that evidence of causation was legally insufficient and therefore rendered a "take-nothing judgment."

Willett authored the majority opinion, holding that the "evidence of causation was legally insufficient to sustain the verdict in this case." *Id.* at 360. First, Willett found,

the plaintiffs failed to meet the requirement for substantial factor causation which requires "some quantification of the dose resulting from Bostic's exposure to Georgia-Pacific's products." *Id.* at 355. According to the majority, the Bostics failed to establish an approximate dose, and instead attempted to use expert testimony to prove the exposure was sufficient to establish causation. However, the court rejected the legitimacy of using expert testimony to establish the causation element of proof. *Id.*

Justice Debra Lehrmann, appointed by Governor Rick Perry, joined by Justice Jeffrey Boyd, also a Governor Perry appointee and Justice John Devine, who campaigned as a Republican, strongly dissented from the majority opinion. *Id.* at 366 (Lehrmann, J., dissenting). The dissent found that the Bostics showed by "direct, scientifically reliable evidence that Timothy Bostic's mesothelioma was caused by exposure to asbestos, and that he was exposed to Georgia-Pacific's asbestos-containing products in substantial quantities." *Id.* at 367.

The Bostics did this, in part, by calling scientific experts to testify that "reliable science has now demonstrated that even low levels of exposure to asbestos are sufficient to cause the disease." *Id.* Thus, by ignoring the weight of scientific evidence, the majority "ignores this advance in scientific research[.]" *Id.* Moreover, "[b]y disregarding this avenue of proof, the Court turns substantial-factor causation on its head, requiring a toxic tort plaintiff to prove that exposure to a particular defendant's product was, by itself, the cause of his injury . . . this contravenes well-established principles of tort law[.]" *Id.* at 370.

III. LGBTQ RIGHTS

Willett disparaged the right of LGBTQ people to marriage equality, when he joked about wanting the "right to marry bacon" in a tweet.



 Justice Don Willett  @JusticeWillett



I could support recognizing a constitutional right to marry bacon.

9:43 PM - 29 Apr 2015

4 20 42

He also joked about California's laws relating to transgender students' participation in school sports.

 Fox News  @FoxNews 14 Feb 14
California's transgender law allows male high schooler to make girls' softball team fxn.ws/1hvSen via @perrych

 Justice Don Willett  @JusticeWillett



Go away, A-Rod. "@FoxNews: California's transgender law allows male high schooler to make girls' softball team fxn.ws/1hvSen"

6:48 PM - 14 Feb 2014



California's transgender law allows male high schooler to ma...
A transgender student at a California high school recently joined the girls' softball team after a recent change in state law that made it foxnews.com

Willett has also consistently ruled against same-sex marriage rights. Most recently, in June 2017, Willett joined the majority in *Pidgeon v. Turner*, No. 15-0688 (Tex. 2017), which held that same-sex spouses of city workers in Houston have no inherent right to benefits under *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015). In 2013, the Mayor of Houston issued a directive "that same-sex spouses of employees who have been legally married in another jurisdiction be afforded the same benefits as spouses of a heterosexual marriage." *Id.* Shortly thereafter, several Houston taxpayers sued, arguing that the directive violated local Defense of Marriage Acts. *Id.* The trial court denied the mayor's and city's pleas asserting governmental immunity and challenging Pidgeon's standing and granted Pidgeon's temporary injunction prohibiting the mayor "from furnishing benefits to persons who were married in other jurisdictions to City employees of the same sex." *Id.* The mayor filed an interlocutory appeal challenging the trial court's denial of the pleas and its decision to grant the temporary injunction.

While the case was pending, the U.S. Supreme Court issued its decision in *Obergefell*. After *Obergefell*, the Texas Court of Appeals reversed the trial court's temporary injunction based on the "substantial change in the law regarding same-sex marriage since the temporary injunction was signed." *Id.*

The Texas Supreme Court granted the plaintiffs' petition for review and reversed the court of appeals. The plaintiffs argued that the Texas Supreme Court should "instruct the trial court to 'narrowly construe' *Obergefell* on remand and to 'comply with *Obergefell* but not to expand on it,' so as to 'preserve as much of the [Texas DOMAs] as possible'" and that "*Obergefell* may

have recognized a 'fundamental right' to same-sex marriage and may 'require States to license and recognize same-sex marriages,' but it did not recognize a fundamental right 'to spousal employee benefits' or 'require States to give taxpayer subsidies to same-sex couples.'" *Id.* Willett agreed, joining the majority opinion which held that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons, and . . . it did not hold that the Texas DOMAs are unconstitutional." *Id.*

Also relevant is *In re State*, 489 S.W.3d 454 (Tex. 2016). There, Justice Willett seemed to accept the holding of *Obergefell*, but did all he could to delay same-sex couples in Texas from exercising marriage rights.

In the case, the state attorney general challenged a trial court's order granting a temporary restraining order against enforcement of the provisions in the Texas Constitution and Texas Family Code stating that marriage in Texas can only be between one man and one woman. *Id.* at 454. The Texas Supreme Court dismissed the attorney general's petition of mandamus as moot, given the U.S. Supreme Court's decision in *Obergefell*.

Justice Willett concurred, but wrote separately to denounce the trial court's alleged circumvention of the statutory requirement in Texas that the state attorney general be given 45 days' notice when a state statute is challenged on constitutional grounds. *Id.* at 454-57 (Willett, J., concurring). He reasoned that although the Texas ban of same-sex marriage was clearly going to be struck down in light

of *Obergefell*, "laws matter," including the 45-day notice requirement. *Id.* at 454 (Willett, J., concurring).

Prior to *Obergefell*, in *State v. Naylor*, 466 S.W.3d 783 (Tex. 2015), the Texas Supreme Court declined the State of Texas's effort to intervene, after the trial court issued a final order granting a divorce to a same-sex couple. The court concluded that the state lacked standing and was not entitled to mandamus relief, since the state "had adequate opportunity to intervene and simply failed to diligently assert its rights . . . until after the trial court rendered judgment," *Id.* at 792.

Justice Willett dissented, stating that he "would permit the State to intervene and lodge statutory and constitutional objections to a court's subject-matter jurisdiction, the exercise of which arguably necessitates treating—if not implicitly holding—Texas law as unconstitutional." *Id.* at 812 (Willett, J., dissenting).

In 2005, Willett attended a Texas Restoration Project event that the *Austin Chronicle* described as an event for then-Governor Rick Perry and "religious conservatives [to] get together to bash gays."⁴²

IV. EDUCATION

In 1999, Willett co-authored an article for the Stanford Law and Policy Review, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, discussing *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) abrogated by *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Fifth Circuit held

⁴² Amy Smith, *Preying for Votes: The Governor's Preachers*, AUSTIN CHRONICLE (Sept. 2, 2005), <https://www.austinchronicle.com/news/2005-09-02/287908/>.

that the University of Texas School of Law's admissions program violated the Constitution.⁴³

Willett wrote that "the courts and the public have rightly recognized that conventional affirmative action has failed"⁴⁴ and that "racial oppression has certainly stained our nation, but equality, by definition, must apply to all."⁴⁵ Willett also opined that "[t]he judgment of history is clear that the vast majority of minorities are not held back by racial bigotry, but by fractured families and poor K-12 schools that deny them the credentials required to enter elite social institutions."⁴⁶

Writing that "[s]chool choice is the civil rights issue of the 1990s[],"⁴⁷ Willett and his co-author proposed deregulation of schools coupled with "high expectations" and "accountability measures" to address the achievement gap between white students and students of color in the United States.⁴⁸

In fact, Willett has long been a proponent of "school choice" and school voucher programs, most notably for religious schools.⁴⁹

Also relevant is *Morath v. The Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016). There, Willett authored a decision rejecting constitutional challenges to Texas's school financing system. *Morath* represented the seventh

⁴³ T. Vance McMahan & Don R. Willett, *Hope from Hopwood: Charting A Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL'Y REV. 163 (1999).

⁴⁴ *Id.* at 169.

⁴⁵ *Id.* at 174.

⁴⁶ *Id.* at 169.

⁴⁷ *Id.* at 170.

⁴⁸ *Id.* at 171.

⁴⁹ Don Willett, *Arguments against school choice flawed*, AUSTIN AMERICAN-STATESMAN (Jan. 25, 1994).

time since the late 1980s that challenges to the constitutionality of the Texas school finance system had come before the Texas Supreme Court. *Id.* at 832. As one author described Willett's decision:

The Texas Supreme Court has now fully retreated from a powerful line of previous Texas Supreme Court decisions protecting the rights of public school students and low-wealth districts. Returning to Texas history's dual system of poor districts and wealthy districts, the court removed itself from its constitutional role as a vital ingredient in progressing toward school finance equity and adequacy and has instead regressed to a dual school system in Texas that is divided between poor and wealthy districts.⁵⁰

Unlike the U.S. Constitution, the Texas Constitution contains an education clause: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."⁵¹ In *Edgewood I*, 777 S.W.2d 391, 294 (Tex. 1989), the Texas Supreme Court analyzed the Texas Constitution and developed a test focused on the existence of substantially equal access:

There must be a direct and close correlation between a district's tax effort and the educational resources available to it. In other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts

⁵⁰ Albert Kauffman, *The Texas Supreme Court Retreats From Protecting Texas Students*, 19 SCHOLAR 145, 146 (2017), https://static1.squarespace.com/static/562fc448e4b05dd9905ed557/t/5919cbc2b8a79b8c6e431df/1494862787281/Kauffman_Texas%2BSupreme%2BCourt%2BRetreats.pdf.

⁵¹ *Id.* at 153.

and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.

Id. at 397. *Edgewood I* also held that "[t]he amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student." *Id.* at 393.

After the Legislature responded to *Edgewood I*, low-wealth districts again challenged the school financing system. In *Edgewood II*, 804 S.W.2d 491 (Tex. 1991), the Texas Supreme Court held that the Legislature's latest efforts were unconstitutional because the legislation "fail[ed] to provide 'direct and close correlation between a district's tax effort and the educational resources available to it.'" *Id.* at 493. The court also "bemoaned the insidious opportunity gaps between rich and poor districts, the arbitrary boundaries of the 1,052 existing school districts, the wide gap between tax bases among the districts, and the fact that 170,000 students in the wealthiest school districts were supported by local revenues drawn from the same tax base as 1 million students in the poorest districts."⁵²

Following five other decisions regarding the school finance system, the Texas Legislature decreased school funding by over \$5 billion for the 2012-2013 fiscal year, and a wide range of districts sued.⁵³ In August 2014, the trial court declared the school system unconstitutional. It found the system inadequate, unsuitable, and financially inefficient under the Texas

⁵² *Id.* at 155. See also *Edgewood II*, 804 S.W.2d 491, 493, 496-97.

⁵³ *Id.* at 161-62.

Constitution. *Morath*, 490 S.W.3d 826, 841 (Tex. 2016).

The trial court concluded that the system was unconstitutional because it was "underfunded," which was measured by "the level of inadequate funding on a per student basis." *Id.* at 850. The trial judge specifically addressed the system's inadequacy and unsuitableness for two groups of students: English Language Learners (ELL) and students who are economically disadvantaged.

On appeal, Willett concluded that the trial court's analysis was "flawed" and upheld the entire school finance system. *Id.* at 849. Whereas the trial court determined that the system was inadequate because the state failed to make suitable provision for funds for an adequate education, based on expert findings concerning the cost of education per student, Willett wrote: "[b]y focusing so heavily on the input of spending . . . the trial court erred in assigning a minimum dollar figure as constitutionally necessary to achieve a general diffusion of knowledge." *Id.* at 855.

Moreover, the court had previously held that school districts must have "substantially equal access to similar revenues per pupil at similar levels of tax efforts," and that an efficient funding system "must draw revenue from all the property at a substantially similar rate." *Id.* at 870. Nevertheless, Willett held that the plaintiffs failed to show that the current system falls short of these baseline requirements.

The Texas Supreme Court recognized "the imperfections of the current school funding regime," and "detailed deep problems with the state's education funding."⁵⁴ Yet Willett held that

"the system met the minimum constitutional standards." *Id.* at 833. Specifically, Willett argued that the state constitutional requirement of "general diffusion of knowledge" does not require the state to meet a certain threshold level of funding for its schools, nor does it require schools to limit class sizes or to provide tutoring, interventions for special needs students, nurses, or security guards. *Id.* at 855-56.

Willett spent much of the *Morath* opinion discussing his views of judicial review. He wrote that the court "defer[s] to the Legislature's role in providing a general diffusion of knowledge." *Id.* at 849. He noted that "we presume the Legislature achieves a general diffusion of knowledge by devising a curriculum and an accountability regime to meet legislatively designed accreditation standards for schools and districts. Again, that presumption is not irrebuttable . . . but our review of the adequacy requirement under the arbitrariness standard is always 'very deferential.'" *Id.* at 849. He noted how the Texas Supreme Court's "judicial responsibility is not to second-guess or micromanage Texas education policy or to issue edicts from on high increasing financial inputs in hopes of increasing educational outputs." *Id.* at 833. Rather, as Willett explained, the court's "function is limited to reviewing the constitutionality of the system under an extremely deferential standard." *Id.* at 868. He emphasized that "Courts should not sit as a super-legislature," *Id.* at 853, and it is "not for the Court 'to judge the wisdom of the policy choices of the Legislature[.]'" *Id.* at 878.

⁵⁴ Katie Leslie, Tom Benning & Todd J. Gillman, *Trump picks Texas conservatives Willett and Ho for powerful appeals court*, THE DALLAS MORNING NEWS (Sept. 28, 2017), <https://www.dallasnews.com/news/politics/2017/09/28/trump-nominate-two-texans-5th-circuit-court-appeals/>.

One expert on funding disparities among school districts criticized the court for "essentially turn[ing] back the clock 40 years on school funding litigation."⁵⁵ Moreover, the Texas branch of the American Federation of Teachers commented on how a "deeply conservative" court evaded its duty to challenge inadequate funding" but instead "hides behind a facile argument of judicial restraint," and that "[p]ast courts have seen the wide variation in access to funding between school districts as a violation of the constitutional requirement that the state support an efficient system of public schools."⁵⁶

The legislative deference evident in *Morath* is especially notable compared to Willett's concurrence in *Patel*. It is telling that in *Morath*, Willett expends much energy relying on a deferential standard of review; even in the face of express language in the Texas Constitution (the education clause). In contrast, in *Patel*, Willett applied and advocated for a more critical scrutiny of state policies. He passionately criticized state overreach in the eyebrow threader market and concluded by stating "I prefer authentic judicial scrutiny to a rubber-stamp exercise that stacks the legal deck in government's favor." *Patel*, 469 S.W.3d at 110 (Willett, J., concurring).

As Willett said in *Patel*, "we have no business second-guessing policy choices, but when the Constitution is at stake, it is not impolite to say 'no' to government. Liberties for 'We the People' necessarily mean limits on 'We the Government.' That's the very reason constitutions are written: to stop government abuses, not ratify them. Our supreme duty to our dual constitutions and to their shared purpose – to 'secure the Blessings of Liberty' – requires us to check constitutionally

⁵⁵ Robert Garrett, *Texas school funding flawed but legal, justices rule; first win for state on issue in decades*, THE DALLAS MORNING NEWS (May 13, 2016), <https://www.dallasnews.com/news/politics/2016/05/13/texas-supreme-court-upholds-school-finance-system-as-constitutional/>.

⁵⁶ *Id.*

verboten actions, not rubber-stamp them under the banner of majoritarianism." *Id.* at 110 (Willett, J., concurring).

Willett's treatment of economic rights under the Due Process Clause, versus guarantees of an adequate education under the education clause of the Texas Constitution, is significant. When it comes to invalidating health and safety measures, Willett wants courts to be more vigilant. However, when it comes to enforcing express clauses of the constitution ensuring quality education, Willett is willing to allow the Legislature as much deference as possible, regardless of the consequences.

V. CRIMINAL ISSUES

Willett, as a Texas Supreme Court justice, does not handle criminal appeals; those are handled by a separate Texas Court of Criminal Appeals.

However, in *EI-Ali v. Texas*, 484 S.W.3d 824 (Tex. 2014), Willett issued a dissent criticizing the Texas Supreme Court, relying on a 1957 precedent, for not taking a case to decide the constitutionality of civil asset forfeiture. He wrote, "In my view, the civilforfeiture [sic] realities of 2014 — the prevalence, procedures, and profitability — compel us to reexamine the constitutional protections due innocent property owners." *Id.* at 826 (Willet, J., dissenting). He added, "[t]he stakes are grave indeed, as assetforfeiture [sic] cases threaten not merely property but, more fundamentally, property *rights*, something we have recently (and unanimously) extolled as essential to 'freedom itself.' Civil forfeiture

springs from the Legislature's broad police power, but as we recently made clear, police power cannot go unpoliced." *Id.* at 825-26.

In 1996, Willett wrote a briefing paper for the Texas Public Policy Foundation, entitled *Juris-Imprudence: Law and Disorder at the Texas Court of Criminal Appeals*, in which he accused the Court of Criminal Appeals of having a "pro-defendant tilt."⁵⁷ Willett's ridicule of criminal defendants and belief that the Court of Criminal Appeals "concocts silly ways to reverse their convictions" and "breathes in technicalities as if they were air" brings into question his ability to properly enforce constitutional rights in criminal cases.⁵⁸

VI. SEPARATION OF CHURCH AND STATE

While working in then-President George W. Bush's administration, Willett was the Director of Law & Policy for the White House Office of Faith-Based and Community Initiatives. Willett laments that prior to the Bush administration, government officials "routinely tilted the playing field against religious groups . . . [b]ecause they stubbornly misperceive the requirements of the First Amendment and have failed to bring their stale policies in line with recent U.S. Supreme Court rulings that have cooled church-state hostility by supplanting rigid separationism with what the Church has called 'guarantee of neutrality'."⁵⁹ Overall, Willett believes that "[t]he American people, for their part, want religion in the public square."⁶⁰

CONCLUSION

Overall, Willett's record demonstrates a desire to actively engage the courts in an effort to return the United States to an earlier period in history, in which corporate interests ran roughshod over the rights, health and safety of workers, consumers, and the public. His vision is of a return to what legal scholars call the *Lochner* era, a time when workers were oppressed and abused in the name of corporate profits, environmental pollution went unchecked, and consumers who lost lives or limbs had little recourse against business giants. His views on the circumstances of women in the workplace are reactionary, and betray deep ignorance of and disregard for the experience of countless numbers of employees. His views on LGBTQ rights, the rights of students to equal educational opportunities, and church-state separation are also deeply concerning, as described above.

AFJ believes that as a federal judge, Don Willett would pose a severe threat to the rights and wellbeing of millions of people residing in the Fifth Circuit. AFJ strongly opposes the nomination of Willett for a seat on the federal bench.

⁵⁷ Don R. Willett, *Juris-Imprudence: Law and Disorder at the Texas Court of Criminal Appeals*, TEXAS PUBLIC POLICY FOUNDATION (1995), <https://www.texaspolicy.com/library/doclib/1995-01-juris-imprudence.pdf>.

⁵⁸ *Id.* at 1.

⁵⁹ Don Willett & Susanna Dokupil, *Muted but Monumental: Achievements of Bush's Faith-Based Initiative* in THANK YOU, PRESIDENT BUSH 235, 238 (Aman Verjee & Rod. D. Martin eds., 2004).

⁶⁰ *Id.* at 238.