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House Bill 3: An IOU Texas Public Schools and Communities of Color Cannot Afford

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COMMENTS

HOUSE BILL 3: AN IOU TEXAS PUBLIC SCHOOLS AND COMMUNITIES OF COLOR CANNOT AFFORD

CANDACE L. CASTILLO*

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* J.D. Candidate at St. Mary’s University School of Law, May 2021. B.A. University of Notre Dame, 2016. I write this piece out of immense respect for students, educators, administration, and all those involved in our Texas public school system. I hope my words will help to continue the discussion on how our legal and political system can better serve our schools and students in low-income communities. Our issues with school finance will continue to be enduring and long-term as long as we only apply short-term solutions. I want to thank my mother, Dr. Patricia Castillo, an educator and administrator for many years, for showing me what compassionate leadership looked like from an early age and Kevin Lee for his unwavering support. I also want to thank Volume 22 of *The Scholar* for encouraging me in this endeavor and Volume 23 of *The Scholar* for their assistance in editing this piece. I am so grateful.

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INTRODUCTION

Few would argue, children's education is one of the most valued pieces of a successful society's foundation. Our founding fathers expressed this idea as they contemplated ways to ensure the survival of our democracy.¹ Thomas Jefferson believed a general diffusion of knowledge was essential to maintain a democratic society.² In 1779, he proposed a bill to provide three years of free education to male and female White children, where they would learn reading, writing, and arithmetic.³ The Supreme Court of the United States also expressed the essential nature of education in several famous cases.⁴ In *Brown v. Board of Education*, Chief Justice Warren stated education "is the very foundation of good citizenship [I]n these days, it is doubtful that any child may

1. See *A Bill for the More General Diffusion of Knowledge, 18 June 1779*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079> [<https://perma.cc/2RTN-QTCU>] (sharing the warning that by not educating the common people, the nation would be vulnerable to the natural tendency of those with the power of corruption).

2. Cf. *Id.* (stating the best way to prevent the corruption by the powerful is "to illuminate . . . the minds of the people at large . . .").

3. See *id.* (expunging education at the personal expense of the learner by expressing the importance of teaching certain subjects to males and females with free tuition).

4. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (outlining the significance of education in today's society and how it is the basic foundation to a democracy).

reasonably be expected to succeed in life if he is denied the opportunity of an education.”⁵ In *Plyler v. Doe*, Justice Brennan says, “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all [E]ducation has a fundamental role in maintaining the fabric of our society.”⁶

Yet, despite how much we supposedly value education, the Supreme Court declined to recognize education as a fundamental right in *San Antonio Indep. Sch. Dist. v. Rodriguez*.⁷ In *Rodriguez*, the Mexican American parents of children attending school in Edgewood ISD brought an equal protection claim to attack the Texas school finance system.⁸ The suit was brought on behalf of school children who are members of minority groups and come from districts with a low property value base.⁹ The facts of the case showed a wide disparity in funding between Edgewood ISD, whose residents were 90% Mexican American and 6% African American, and Alamo Heights ISD, whose residents were only 18% Mexican American and 1% African American.¹⁰ Edgewood ISD had a property value per pupil averaging \$5,960, while Alamo Heights ISD’s average property value per pupil was more than \$49,000.¹¹ These numbers are significant because they are the bases from which the districts may tax.¹² Though these numbers clearly showed the Texas school finance system discriminates against districts with low property wealth, the Court declined to establish wealth as a suspect class.¹³ In addition, the Court decided education is not a fundamental right because it is not adequately related to exercising First Amendment freedoms or

5. *Id.*

6. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (warning the denial of education to certain groups and granting it to others has a costly impact on society).

7. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding education is not a fundamental right under the Fourteenth Amendment of the U.S. Constitution).

8. *Id.* at 4–5.

9. *Id.*

10. *See id.* at 12–13 (summarizing the unequal distribution of money in relation to percentage of minorities).

11. *Id.* at 12–13.

12. *See id.* at 1, 9 (explaining the allocation of funds for expenditures based on the school district’s ability to tax).

13. *See id.* at 1, 20 (deciding the discriminated class of persons could not be clearly identified).

the right to vote;¹⁴ the Court felt if it found otherwise, the rights to housing and food would deserve fundamental rights status.¹⁵ Consequently, the Court applied a rational basis standard rather than a strict scrutiny standard, and the Texas school finance system passed muster.¹⁶

The holding of this case had numerous negative consequences for the state of education in the future.¹⁷ Had the Court recognized education as a fundamental right, the Texas Legislature would have been forced to modify the school finance system so school districts would have equal opportunity to receive equal funding.¹⁸ Though significant progress has been made in creating a less discriminatory system of funding, Texas schools are at the mercy of the legislature to ensure consistent funding without the protection of fundamental rights status.¹⁹

In this Comment, I argue without further action, the improvements made to school finance through House Bill (HB) 3 will not survive the test of time, and any progress made will be lost to the whim of the

14. *But see* Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99, 127–34 (2015) (finding a correlation between restrictive voting laws and a state's racial composition of minority populations where people of color are more likely to be barred from participation in the political process due to a higher number of people of color living in poverty with a limited education).

15. *See Rodriguez*, 411 U.S. at 35–38 (determining appellees' nexus theory has no logical limits and questioning, "[h]ow for instance, [whether] education [can] be distinguished from the significant personal interests in the basics of food and shelter?").

16. *See id.* at 58–60 (reasoning how Texas has put forth effort to improve the finance system, and if the Court were to rule otherwise, it would run the risk of acting as a super legislature).

17. *See* Mark Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991) (illustrating the cycle of reform, complacency, inflation and higher enrollment, disparity, and the push for reform the holding in *San Antonio ISD v. Rodriguez* failed to end).

18. *See Rodriguez*, 411 U.S. at 16–17 (admitting the Texas school finance system would not withstand strict scrutiny).

19. *See, e.g.*, Albert Kauffman, *The Texas School Finance Litigation Saga: Great Progress, then Near Death by a Thousand Cuts*, 40 ST. MARY'S L.J. 511, 523 (2008) [hereinafter *Litigation Saga*] (discussing the equalizing effect of the system of recapture that was developed by the legislature to address inequities of financial funding for lower wealth school districts). *See generally* *History of LWVTX Public Education Finance Action*, LEAGUE OF WOMEN VOTERS OF TEX., <https://my.lwv.org/texas/history-lwvtx-public-education-finance-action> [<https://perma.cc/ZW68-RAVN>] (documenting instances where the Legislature made cuts to the education budget for various reasons and then struggled to restore the budget; this timeline shows increases to the education budget may look positive in a vacuum, but they still may not make up for losses of previous budget cuts).

legislature or the volatile nature of overdependency on sales taxes. Communities of color and communities experiencing poverty are the populations most impacted by losses to education finance; the students in these communities cannot afford to rely on promises lacking a concrete plan. Much of the allure of HB 3 is that the state has volunteered to contribute more of the money needed for school finance. However, because there is no long-term method for generating that revenue and reserving it for education, it could one day amount to nothing more than an “IOU.” In section II, I will briefly discuss how Texas arrived at the current state of school finance by looking at the first and last cases of the *Edgewood* saga.²⁰ Additionally, I will describe the change in standard of a constitutional financial system from a measurable one of efficiency to the ambiguous and unworkable test of arbitrariness. In section III, I will briefly explain the basic mechanics of school finance. In section IV, I will discuss the positive and negative aspects of HB 3. Section V will cover methods that we, as a nation, have taken to address problems within our system of education and international methods other countries emphasize to ensure success. In section VI, I offer tangible and intangible solutions to address the problems with our school finance system in Texas.

I. HISTORY OF TEXAS SCHOOL FINANCE

The progression of school finance throughout Texas’s history has been neither linear nor positive.²¹ The Texas Supreme Court held the school finance system was unconstitutional in 1989,²² and six challenges later it held the system met “minimum constitutional requirements” in 2016.²³ Funding for Texas public schools was originally intended to be done equitably.²⁴ In 1876, school funds were apportioned on a per capita basis.²⁵ For example, the state levied a uniform poll tax to raise money for the state’s school fund with each student receiving the same amount

20. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

21. See generally *Litigation Saga*, *supra* note 19, at 529–52 (discussing the varying standards the Texas school finance system was subject to over the span of the six *Edgewood* cases).

22. *Edgewood*, 777 S.W.2d at 398.

23. *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 833 (Tex. 2016) (upholding “the current school funding regime” despite its undeniable imperfections).

24. See *Edgewood*, 777 S.W.2d at 396 (concluding the constitutional framers and ratifiers intended a system where tax burdens for education costs would be uniformly applied).

25. *Id.* at 396.

of funding.²⁶ As cities expanded and the population multiplied, a more complex system of generating revenue developed.²⁷ In 1883, the Texas Legislature amended the state Constitution and created school districts with the power to levy local taxes.²⁸ Currently, all of the property in a school district is taxed at a rate set by that district.²⁹ The amount of revenue created depends on how much the districts decide to tax and the valuation of the property in a given district.³⁰ The facts stated in *Edgewood v. Kirby*³¹ are an excellent example of the inequities that arise through this method of generating revenue.³²

A. Edgewood ISD v. Kirby

The first *Edgewood*³³ case in 1989 was a significant turning point in the fight for an equitable and efficient financial system.³⁴ In this seminal case, the Supreme Court of Texas held the Texas school finance system was unconstitutional because it violated Art. VII § 1 of the Texas Constitution.³⁵ This section provides: “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

26. *See id.* (utilizing the example of the poll tax to depict a method of generating revenue uniformly applied throughout the state).

27. *See id.* (detailing the staggering impact on uneven economic development on the school financing system throughout the state of Texas).

28. *See* Brian Stork, *What About Our Future? The Chaos that is the Texas School Finance System*, 8 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 307, 312 (2006) (explaining the financial shift when Texas required school districts to supplement revenue granted by the state).

29. *See Litigation Saga*, *supra* note 19, at 521 (describing factors that districts are permitted to consider when setting their tax rates).

30. *See id.* at 514–15 (stating the equations that compute the amount of money a school will have to spend on each student rely, in part, on property wealth per student and the tax rate each district sets).

31. *Edgewood*, 777 S.W.2d at 392–93.

32. *See* Albert Kauffman, *The Texas Supreme Court Retreats from Protecting Texas Students*, 19 SCHOLAR 145, 147–48 (2017) (referring to *Edgewood I* and how it led to positive changes for low-wealth districts).

33. *Edgewood*, 777 S.W.2d at 394–96.

34. *See* Stork, *supra* note 28, at 318–20 (outlining the efforts of the Texas Legislature in creating a more efficient finance system after *Edgewood I*).

35. *See Edgewood*, 777 S.W.2d at 398 (holding the Texas school financing system violates the Texas Constitution's “efficiency” provision). *But see* Kauffman, *supra* note 32, at 145 (criticizing the devolution and retreat of the Texas Supreme Court in its refusal to uphold the standards of the original *Edgewood* case).

establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”³⁶ One of the many reasons this case left a lasting impression was the way it described the ramifications children experience when lower income schools are not well-funded.³⁷ Schools without proper funding often lack important educational programs.³⁸ To illustrate this point, the Court chose San Elizario ISD.³⁹ This school district did not have foreign language classes, pre-kindergarten, chemistry, physics, or calculus.⁴⁰ In addition, the district lacked the ability to offer any extra-curricular or enrichment programs such as band, debate, or even football.⁴¹ Meanwhile, high-wealth districts are able to enhance children’s learning experiences and increase their chances of getting higher education because they can afford to utilize effective programs and tools.⁴² Some of these advantages include: more extensive curricula, modern technological equipment, better libraries, teacher aides, lower student-teacher ratios, better facilities, and drop-out prevention programs.⁴³

36. TEX. CONST. art. VII, § 1; *see Edgewood*, 777 S.W.2d at 397 (“Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide.”).

37. *See Edgewood*, 777 S.W.2d at 392–94 (underlying the vast inequities in experience and opportunity children of low socioeconomic status face).

38. *See id.* at 393 (presenting the differences in experience children in a low-wealth district have compared to the experiences of children in a high-wealth district). *But cf.* *San Antonio Indep. Sch. Dist v. Rodriguez*, 411 U.S. 1, 51 (1973) (disregarding the effect poor funding has on some districts and arguing “some inequality . . . is not alone sufficient basis for striking down the entire system.”).

39. *Edgewood*, 777 S.W.2d at 393.

40. *Id.*

41. *See id.* (listing college preparatory and honors programs as additional unavailable opportunities).

42. *See id.* (“The amount of money spent on a student’s education has a real and meaningful impact on the educational opportunity offered that student.”).

43. *See id.* (“They are also better able to attract and retain experienced teachers and administrators.”); *see also* Corbett Smith, *Texas Is Spending Billions More on Education but Teachers May Not Get the Raises They Expect*, DALL. MORNING NEWS (June 30, 2019), <https://www.dallasnews.com/news/education/2019/06/30/texas-is-spending-billions-more-on-education-but-teachers-may-not-get-the-raises-they-expect/> [https://perma.cc/H4QN-RLCE] (discussing how school districts are able to remain competitive by offering higher teacher salaries when funding is increased).

The Court in *Edgewood* focused on the meaning of the word “efficient.”⁴⁴ The defendants in the case argued “efficient” merely means “economical” or “inexpensive” and that efficiency is a political question.⁴⁵ The Court did not accept this argument and instead noted a link between equality and efficiency.⁴⁶ The drafters of the provision in Article VII likely never contemplated the possibility that a finance system producing such significant inequalities could be efficient.⁴⁷ Another reason *Edgewood*⁴⁸ is such a significant case is because it highlighted those significant inequalities in a clear and brazen way that was not soon forgotten.⁴⁹ During the 1985–1986 school year, spending per student varied from \$2,112 to \$19,333.⁵⁰ At the time, school districts generated funding for 50% of total education costs.⁵¹ School districts generated this money through *ad valorem* property taxes.⁵² In 1985–1986, most property-rich districts only had to tax \$.09 per \$100 valuation and were able to make significantly more money than the most property-poor

44. See *Edgewood*, 777 S.W.2d at 394 (defining the different possible meanings of the word “efficient” because the word would essentially be the test for constitutionality). But see *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 845–55, 863 (Tex. 2016) (focusing on the “adequacy” of the educational system to determine its compliance with the Texas Constitution, rather than how “efficient” it is).

45. See *Edgewood*, 777 S.W.2d at 393–94 (summarizing the arguments of opposing counsel which describes the duties of the Legislature and judiciary systems of public school funding). See generally TEX. CONST. Art. VII, § 1 (“[I]t 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.”).

46. See *Edgewood*, 777 S.W.2d at 397 (“[T]his court has recognized the implicit link that the Texas Constitution establishes between efficiency and equality”); see also Kauffman, *supra* note 32, at 149–50 (reinforcing the assertion that the *Edgewood* “financial efficiency test” is the only true measure of long-term enforceable equality in the school system and later decisions have left a “multiple escape hatch” test designed to defer to the states’ Legislature).

47. See *Edgewood*, 777 S.W.2d at 396 (noting the structure of the school finance system from 1876 through 1886 had neither districts nor other local taxing structures; thus, the burden of school taxation fell equally and uniformly across the state where each student was entitled to the same amount of those funds).

48. *Id.* at 391.

49. See Kauffman, *supra* note 32, at 147 (listing the series of cases that came after and were made possible through the profound authority presented in *Edgewood I*).

50. *Edgewood*, 777 S.W.2d at 392.

51. See *id.* (noting “the state provides about forty-two percent” of federal funds in comparison to other sources of funding).

52. See *id.* (outlining the gross disparities between districts in their ability to raise property tax revenue as taxable property wealth varies exponentially between districts).

district which taxed \$1.55 per \$100 valuation.⁵³ During the same time period, the bottom 100 poorest property districts had an average tax rate of 74.5 cents only to spend \$2,978 per student, while the top 100 property-rich districts taxed only 47 cents and were able to spend \$7,233 per student.⁵⁴ School districts *clearly* did not have equal access to equal funding.⁵⁵ Lastly, the Court in *Edgewood I* suggests local taxation is not in and of itself a problem.⁵⁶ Rather, local taxation should be used to supplement an already efficient school finance system.⁵⁷ Unfortunately, the promise of complete finance reform never came to fruition.⁵⁸ The ruling in *Edgewood*⁵⁹ was challenged in a series of cases until the matter was put to rest in *Morath v. Texas Taxpayer and Student Fairness Coalition*.⁶⁰

B. *Morath v. Texas Taxpayer (Edgewood VII)*

In 2011, the Texas legislature cut school finance funding by over five billion dollars.⁶¹ As a result of the budget cut, school districts brought

53. *Id.* at 393 (“[T]he property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.”).

54. *See id.* (applying these figures to illustrate how “[p]roperty-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves.”).

55. *See id.* at 392 (“The average property wealth in the 100 wealthiest districts is more than twenty times greater than the average property wealth in the 100 poorest districts.”).

56. *See id.* at 396 (proclaiming local taxing is an issue because efficiency has not been maintained through inequities in wealth growth across the state).

57. *See id.* (“However, we conclude that this provision was intended not to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system.”).

58. *See* Kauffman, *supra* note 32, at 149 (noting the final case in the *Edgewood* series, *Morath v. Texas Taxpayer and Student Fairness Coalition*, where the Court ruled the school finance system constitutional).

59. *Edgewood*, 777 S.W.2d at 398–400.

60. *See* Kauffman, *supra* note 32, at 149 (illustrating the latest of seven Texas Supreme Court decisions examining the state constitutionality of Texas’s school finance system); *see also* *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 833 (Tex. 2016) (“Judicial review, however, does not license second-guessing the political branches’ policy choices, or substituting the wisdom of nine judges for that of 181 lawmakers. Our role is much more limited, as is our holding: Despite the imperfections of the current school funding regime, it meets minimum constitutional requirements.”).

61. *See* Kauffman, *supra* note 32, at 161 (articulating the Texas Legislature’s decision to decrease school finance funding by over five billion dollars for the 2012–2013 fiscal year).

suit in district court.⁶² At the time, there were a little over a thousand school districts, and more than half of them participated in the suit.⁶³ The district court found the school finance system violated the Texas Constitution in several respects, and, notably, English language learners and economically disadvantaged students fared the worst in the system.⁶⁴ The case was taken to the Texas Supreme Court where the Court ruled the finance system was adequate, suitable, efficient, and in accordance with the Texas Constitution.⁶⁵ Though the Court gave strong commentary on the need for “transformational, top-to-bottom reforms that amount to more than a Band-Aid” in the school finance system, the Court declined to enforce the Texas Constitution and prompt change.⁶⁶ Instead, the Court repeated the mantra that it is not the judiciary’s responsibility to second-guess the legislature on issues of education policy.⁶⁷ It is counterintuitive for the Texas Supreme Court to believe it would overstep its boundaries if it were to follow the measurable standard of efficiency.⁶⁸ The Court chose to presume the finance system is constitutional and called the “arbitrariness standard” a “very deferential standard.”⁶⁹ By saying it is not the place of the Court to “second-guess” the school finance system, the Court neglects to recognize its role in maintaining the law of the state is precisely to second-guess the matters

62. *Morath*, 490 S.W.3d at 833 (“[M]ore than half of the State’s 1,000-plus school districts have brought the most far-reaching funding challenge in Texas history.”); see Kauffman, *supra* note 32, at 162 (exploring how the Legislature’s decision to make the five billion-dollar-cut to education would set the stage for the *Morath* litigation).

63. *Morath*, 490 S.W.3d at 833.

64. See Kauffman, *supra* note 32, at 162 (explaining the holdings of the district court as they followed precedent set by *Edgewood V1*).

65. *Morath*, 490 S.W.3d at 886; see Kauffman, *supra* note 32, at 162–63 (describing how the Texas Supreme Court refused to uphold the district court’s findings that the school finance system was inadequate, unsuitable, and inefficient).

66. *Morath*, 490 S.W.3d at 834 (commenting on the imperfect Texas school system and how Texas school children deserve better).

67. See *id.* at 833 (emphasizing a judiciary’s limited role and the need to merely find a minimum constitutional fulfillment to uphold the Texas school finance system).

68. See *id.* at 845 (“But we acknowledged substantial evidence ‘that the public education system has reached the point where continued improvement will not be possible without significant change,’ and that ‘it remains to be seen whether the system’s predicted drift toward constitutional inadequacy will be avoided by legislative reaction to widespread calls for changes.’”).

69. *Id.* at 846 (“Under this ‘very deferential’ standard, we must not substitute our policy preferences for the Legislature’s . . .”).

that come before it.⁷⁰ Additionally, the Court had no qualms showing a deferential standard to the Legislature, who itself decides what will satisfy the Texas Constitution.⁷¹ This case marks the Texas Supreme Court's commitment to using the "arbitrariness" standard over the "efficiency" standard set forth in *Edgewood I*.⁷² In an analysis of *Edgewood I*,⁷³ the Court emphasizes when the finance system was ruled unconstitutional, the state was not using the system of recapture to help equalize funding.⁷⁴ An "arbitrariness" standard weighs heavily in favor of the state because the Court will only rule against school finance legislation if it was made arbitrarily and unreasonably.⁷⁵ Any party who wishes to challenge the constitutionality of school finance legislation will find the arbitrariness standard extremely difficult to overcome.⁷⁶

C. *The Failings of Texas's School Finance System*

"Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves."⁷⁷ At the time of *Edgewood* in 1989, school districts lacking property wealth had to compensate by setting higher property tax rates on the communities in the district.⁷⁸ The Foundation School Program is a state program aimed at providing enough funds for at least a basic education in school districts.⁷⁹ However, the

70. *See id.* (recognizing the Court adhered to the standard of reasonableness as a "default position of deference to the Legislature.").

71. *Id.*; *see* Kauffman, *supra* note 32, at 166 (depicting the disproportional, illogical deference the Texas Supreme Court shows the Legislature).

72. *Morath*, 490 S.W.3d at 845–46 ("Our role is consequential yet confined, strictly circumscribed by a deferential standard of review, as well as our own prior decisions in this unique area of the law.").

73. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

74. *See Morath*, 490 S.W.3d at 843 (distinguishing the state of school finance in 1989 from 2015).

75. *Id.* at 846 (furthering the notion that the Legislature will only hold a school financial system unconstitutional when it is arbitrary).

76. *See* Kauffman, *supra* note 32, at 166 (arguing no party challenging a school finance system is likely to overcome the legal hurdles established by the court).

77. *Edgewood*, 777 S.W.2d at 393.

78. *See id.* ("Generally, the property-rich districts can tax low and spend high while the property-poor districts must tax high merely to spend low.").

79. *Id.* at 392 ("Under this program, state aid is distributed to the various districts according to a complex formula such that property-poor districts receive more state aid than do property-rich districts.").

program failed to cover minimum mandated requirements in 1989.⁸⁰ When the Foundation Program did not provide enough funds for a basic education, low-wealth schools were forced to set high tax rates to meet those minimum requirements.⁸¹ High property tax rates are not very tempting to new developers, so the low-wealth districts have a hard time increasing their property value and then must tax high to get the needed revenue.⁸² The cycle was nearly impossible to break until the introduction of the “recapture” system.⁸³

II. THE BASIC MECHANICS OF SCHOOL FINANCE

School districts obtain money in a variety of ways—most of it stemming from local property taxes and state funding.⁸⁴ A majority of a district’s budget will come from local property taxes, while the rest is supplied by the state.⁸⁵ In 2018, local property owners supplied about 64% of their district’s education budget.⁸⁶ There is a public perception that local taxpayers and the state contribute a more or less equal share towards public education.⁸⁷ However, in recent years, as property values rose so did the amount local taxpayers contributed.⁸⁸ Rather than

80. *See id.* (extending the Foundation School Program’s hopeful role in ensuring each district had the funds to give every child a basic education, but expressing its inability to do so due to poor funding of the program).

81. *See id.* at 393 (discussing how property-poor districts must tax at higher rates to meet minimum requirements such as accreditation).

82. *See id.* (noting that property-poor districts are unable to attract new industry because of their high tax rates).

83. *Litigation Saga*, *supra* note 19, at 577 (purporting the equalizing effect recapture has had on school districts in Texas and pointing to recapture’s economic benefits for the Legislature as a funds generator for the state).

84. *See* Aliyya Swaby, *Texas’ School Finance System Is Unpopular and Complex. Here’s How It Works*, TEX. TRIB. (Feb. 15, 2019, 12:00 AM), <https://www.texastribune.org/2019/02/15/texas-school-funding-how-it-works/> [<https://perma.cc/Q665-FDPJ>] (indicating the two main sources of revenue for school districts are property taxes and state funding).

85. *See id.* (explaining how school districts first use the property tax and then the state pays the remaining balance).

86. *See id.* (describing what a school district’s educational budget is comprised of).

87. *See* Glenn Hegar, *Texas School Finance: Doing the Math on the State’s Biggest Expenditure*, TEX. COMPTROLLER OF PUB. ACCTS. 13 (Jan. 2019), <https://comptroller.texas.gov/economy/fiscal-notes/2019/jan/> [<https://perma.cc/Y2U4-W4VB>] (explaining the state has only averaged a 40% contribution from 2000 to 2018).

88. *See id.* at 6 (providing how property values rose by 128% since 1997, causing Texas’s public education funding formulas to increase their dependence on local property taxes).

continuing to contribute the same amount of funding, the state saved money and was able to contribute less.⁸⁹ Some have opined the state should take up more of the burden to pay for public education and legislators heard them in HB 3.⁹⁰ Decreasing the public's property tax burden was a priority for legislators this session, but the rub is it automatically increases the burden on the already limited state's budget.⁹¹ Despite the priority to reduce the public's burden in property taxes, the state largely obtains its revenue from the public either way through sales taxes and other methods.⁹²

While the Texas Constitution grants each school district the power to levy local taxes, each district's school board sets the tax rate.⁹³ There are certain parameters a school district's board must follow which limits how much they can tax.⁹⁴ These parameters are established through the use of formulas, but a majority of school districts are required to tax at least \$1.00 per \$100.00 valuation.⁹⁵ Tax rates of up to \$1.04 do not need to be approved by local voters, but if a board wants to tax over that, they will have to call an election.⁹⁶ In 2018, the maximum tax rate was: \$1.17 per \$100.00 valuation.⁹⁷ As of 2018, about 400 school districts maxed out their taxation rates and were prohibited from increasing taxes due to state law.⁹⁸ Property-wealthy school districts that generate significant revenue at a lower tax rate have to send some of their excess funds back to the state which is then redistributed to districts with lower property

89. *See id.* at 13–14 (emphasizing an inverse relationship between state and local funding where local funding increases, state funding decreases).

90. *See id.* at 6 (indicating the varied plaintiffs involved demonstrated the wide divergence of opinions regarding school finance).

91. *See id.* at 14 (“Texas public education funding formulas have ensured increased dependence on local property taxes—and a growing burden on homeowners and businesses.”).

92. *See id.* at 15 (establishing the importance of the general sales tax as a means of revenue as it has averaged 60.5% of state tax collections since 1993).

93. *See Swaby, supra* note 84 (stating school boards set tax rates, decide how much to increase the rates, and get to decide when to ask for voter's approval or at times may do so without community input).

94. *See id.* (recognizing the minimum and maximum tax rates).

95. *See id.* (explaining how tax rate ratios work in school districts).

96. *See id.* (outlining how permission is needed from voters if the tax rises above a certain amount).

97. *Id.*

98. *See id.* (emphasizing the tax rate disparity between wealthier and poorer school districts).

values.⁹⁹ The state begins by giving the same amount of money to each student per average daily attendance in a district—this amount is called a basic allotment.¹⁰⁰ Districts can get more money per each individual student depending on certain variables, such as whether they fall into a category of students that are more expensive to teach.¹⁰¹ Examples of these variables include: students with disabilities, low-income students, and English language learners.¹⁰²

III. HB 3

The newest school finance bill, HB 3, was passed June 11, 2019.¹⁰³ HB 3 received overwhelmingly positive reports from news organizations, and for a good reason.¹⁰⁴ HB 3 has many positive attributes, the most popular of which is arguably an increase in pay for some teachers.¹⁰⁵ Other positive aspects of HB 3 include: support for low-income students and English language learners who are in dual language programs, giving districts with low-income students more funding per low-income student, and increasing funds for special education students.¹⁰⁶ Some of the more negative aspects of the bill include spending \$5.2 billion on reducing local school property taxes, a lack of sustainable sources of funding, and

99. *See id.* (referring to the system of recapture, which gives poorer school districts a financial boost).

100. *Id.*

101. *See id.* (explaining how districts get extra money for students who fall under certain categories).

102. *See id.* (listing various ways districts can get extra money); *see also* Chandra Villanueva, *School Finance Moves Forward: House and Senate to Work Out Differences in HB 3*, EVERY TEXAN 3 (May 9, 2019), https://everytexan.org/images/2019_EO_CPPP_HB3_Conference_Recs_86.pdf. [<https://perma.cc/E9JM-YYJ9>] (describing the circumstances surrounding dual language learners).

103. Leo Lopez, *House Bill 3 Implementation Salary Increases*, TEX. EDUC. AGENCY (June 11, 2019), <https://tea.texas.gov/sites/default/files/TAA%20-%20House%20Bill%203%20Implementation%20Salary%20Increases%206.11.19.pdf> [<https://perma.cc/2NUH-35NZ>] (describing the requirements, methodologies, and funding implications under HB 3).

104. *See* Megan Hempel, *House Bill 3 Marks Major Triumph*, CORSICANA DAILY SUN (June 16, 2019), https://www.corsicanadailysun.com/news/house-bill-marks-major-triumph/article_1a94c13a-8eef-11e9-9528-47518f9d6344.html [<https://perma.cc/4Z5Y-RKGG>] (“This one law does more to advance education in the state of Texas than any law that I have seen in my adult lifetime in the state of Texas.”).

105. *Id.*

106. *See generally* Luis Figueroa, *Closing Thoughts on HB 3, the Big School Finance Bill*, EVERY TEXAN (May 25, 2019) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (summarizing the positive and negative aspects of HB 3).

inequitable tax compression.¹⁰⁷ The Center for Public Policy Priorities (CPPP) suggests spending over \$5 billion on reducing local school property taxes is the “wrong priority,” especially considering the state’s commitment to buy down school property taxes increases after 2021.¹⁰⁸ Lacking a source for sustainable funding will cause unwanted tension with other parts of the budget,¹⁰⁹ and there are school officials who express unease with making significant changes in their schools to rely on the new funding.¹¹⁰

A. *Inequitable Tax Compression*

HB 3 requires Texas school districts to reduce their tier one tax rates and any tax rate compression required to be applied to the enrichment tax rates they may have.¹¹¹ This portion of the bill is identified as the most disappointing.¹¹² “The tier one tax rate must be reduced by the state compression percentage which is 93% for the 2019–2020 school year.”¹¹³ Enrichment must be compressed by 0.64834.¹¹⁴ These changes require districts to lower their tax rates by nearly one percent as

107. *Id.*

108. *Id.*

109. *See id.* (“The bill lacks a sustainable source of funding for our schools in the future, which will put more pressure on other parts of the budget.”).

110. *See* Chevall Pryce, *Officials Speak on School Funding, Reform in Texas Legislature*, HOUS. CHRON. (May 10, 2019, 9:17 AM), <https://www.chron.com/neighborhood/cyfair/schools/article/Officials-speak-on-school-funding-reform-in-13835149.php>. [<https://perma.cc/H4HF-44W8>] (quoting Stuart Snow, chief financial officer for Cy-Fair ISD, saying “when it’s a state mandated increase you’re dependent upon the sustainability of that funding over a long period of time [HB 3] doesn’t give the district any discretion on how [the increase is] to be funded . . .”).

111. *See* Al McKenzie, *House Bill 3 Implementation: Tax Rate Compression*, TEX. EDUC. AGENCY (June 11, 2019), <https://tea.texas.gov/sites/default/files/TAA%20House%20Bill%203%20Implementation%20Tax%20rate%20compression%206.11.19.pdf> [perma.cc/FUC4-PW3s] (illustrating how tax rate calculations under HB 3 will be applied during the 2019 tax year).

112. *See generally* Chandra Villanueva, *School Finance Moves Forward: House and Senate to Work Out Differences in HB 3*, EVERY TEXAN 1–2 (May 9, 2019), https://everytexan.org/images/2019_EO_CPPP_HB3_ConferenceRecs_86.pdf. [<https://perma.cc/E9JM-YYJ9>] (elaborating how requiring school districts to automatically reduce their tier one tax rates unfairly benefits wealthier districts where property values have grown significantly faster than poorer districts).

113. *See* McKenzie, *supra* note 111 (discussing how to calculate a district’s maintenance and operations tax under HB 3).

114. *Id.*

their property tax revenues grow.¹¹⁵ This is a problem because districts with rapidly rising property values can reduce their tax rates faster than other districts who may not experience the same amount of growth.¹¹⁶ Some districts will be able to do this while remaining fully funded.¹¹⁷ Every Texan, formerly the CPPP, illustrates this concept using Alamo Heights ISD and Edgewood ISD.¹¹⁸ Alamo Heights, which is more property-wealthy than Edgewood, would be able to lower its tax rate much more than Edgewood and still be fully funded while Edgewood would never be able to do the same without a detrimental effect to its revenues.¹¹⁹ Consequently, tax compression allows wealthy districts to refrain from generating revenue that could otherwise help property-poor schools through recapture.¹²⁰ Additionally, property-wealthy districts, which can reduce their taxes, benefit by further attracting businesses and residents to the area, which also drives their property values up.¹²¹ Viewing HB 3's tax provision through a broader lens, it is also likely to promote instability and create unnecessary problems.¹²² Furthermore, HB 3's proposed changes to the tax rate are not static.¹²³ Each year, the

115. *See id.* (illustrating how districts are to implement HB 3's new requirements when calculating their tax rates: the sum of (a) the state compression percentage multiplied by \$1.00 (93 cents); plus (b) the greater of either the district's tax effort exceeding more than \$1 minus any enrichment tax rate compression or 4 cents; plus (c) the district's current debt rate).

116. *See Villanueva, supra* note 112 (highlighting the inherent advantage HB 3 grants to districts in areas with rapid property tax growth have over areas with low property growth).

117. *See id.* (demonstrating how the rate of property tax increases in an area will influence a district's ability to reduce their tax rate).

118. *See id.* (comparing the disparity of financial outcomes between school districts in the same metro area utilizing HB 3's new requirements).

119. *See id.* (describing the unequal outcomes between property-rich districts and poverty poor districts). Compare Edgewood ISD District Profile, TEX. TRIB., <https://schools.texastribune.org/districts/edgewood-isd-bexar/> [<https://perma.cc/YCW8-F5S7>] (reporting 94.7% of Edgewood ISD's students are considered economically disadvantaged), with Alamo Heights ISD District Profile, TEX. TRIB., <https://schools.texastribune.org/districts/alamo-heights-isd/> [<https://perma.cc/4CP9-3CDH>] (reporting 19.4% of Alamo Heights ISD's students are considered economically disadvantaged).

120. Villanueva, *supra* note 112.

121. *See generally* Cory Turner, *Why America's Schools Have a Money Problem*, NPR (Apr. 18, 2016), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> [<https://perma.cc/GM5F-ZAMA>] (surveying general trends across the United States of underfunded schools and the tax structures that perpetuate them).

122. *See Villanueva, supra* note 112 (predicting HB 3's tax reforms—specifically those for Tier II—will evolve into an inequitable funding system).

123. *See* Patrick Svitek, *Gov. Greg Abbott Signs \$11.6 Billion School Finance Measures into Law*, TEX. TRIB., (June 11, 2019 11:00 AM), <https://www.texastribune.org/2019/06/11/texas->

districts will be required to recalculate their tax rates, and every year the tax rates will decline.¹²⁴ HB 3's tax reforms will make it much more difficult for the state to supplement school districts for their losses, especially when tax revenues decline and educational needs remain constant or grow.¹²⁵ An increased burden on the state may seem like a relief, but the reality is that a commitment to pay more over time reduces the state's ability to make future investments.¹²⁶ All districts should have equal access to revenue at similar tax rates because Texas courts have agreed every child is promised a similar quality of education.¹²⁷ The tax compression provision in HB 3 is a negative aspect of the bill because it plays favorites with property-wealthy districts instead of promoting fairness and putting "the same equal effort into supporting public education."¹²⁸

Some may question the significance of this section.¹²⁹ Why does it matter that some school districts can lower their property taxes at a rate faster and more significantly than other schools?¹³⁰ If a district pays more taxes, they should be able to reap the exclusive benefits, right?¹³¹ For those who want to ignore the problems others face, this

gov-greg-abbott-signs-116-billion-school-finance-measure-law/ [https://perma.cc/8JPK-6ELX] (reporting lawmakers' estimations that HB 3 "will lower tax rates by an average of 8 cents per \$100 dollar valuation in 2020 and 13 cents in 2021.").

124. *See id.* (reporting HB 3's tax reforms will provide "a tax cut of \$200 for the owner of the \$250,000 home in 2020 and \$325 in 2021.").

125. *See Villanueva, supra* note 112 (suggesting HB 3's tax reforms will reduce the amount available for the state to fund public education).

126. *See id.* ("[R]educ[ing] tax rates each year will increase the state's share of education funding. However, it will also make it harder for the state to make future investments in the classroom as more and more state dollars will be needed to ensure funding stays level as tax rates decline.").

127. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) ("Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.").

128. *See Villanueva, supra* note 112 (highlighting the need for all districts to play a role in reforming public education funding in Texas).

129. *See Svitek, supra* note 123 (quoting Governor Greg Abbott on HB 3's passage: "We did something that was considered to be highly improbable, and that is to be able to transform public education in the state of Texas without a court order forcing us to do so.").

130. *See Edgewood*, 777 S.W.2d at 397 (holding that adequate educational funding is "required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide.").

131. *See McKenzie, supra* note 111 (stating the voting requirements of district tax rates under HB 3).

view may make perfect sense—but it is not justified.¹³² A district's tax base comes from the values of individuals' private property, but it also comes from commercial property value in the area and revenue generated from these wealthy areas is not always the claimable achievement of families that live in them.¹³³ Where children grow up and what school district they become a part of is usually happenstance.¹³⁴ Families do not always have the means to relocate to a "better" school district, and there is no guarantee parents will be involved enough in their children's education to take action concerning this issue.¹³⁵ Children do not control which school district they are brought up in; mere luck should not determine the quality of education they receive.¹³⁶ If, we as a Texan community believe in this maxim, our community and government leaders need to grapple with questions of inequality collectively.¹³⁷

B. Changes to the Recapture Program

One significant modification to the Texas school finance system made possible by the *Edgewood*¹³⁸ cases is the introduction of a system called "recapture."¹³⁹ Recapture involves property-wealthy school districts sharing their property tax revenues with lower income districts or with the state to redistribute the funds.¹⁴⁰ School districts that generate over \$700,000 must participate in recapture.¹⁴¹ Property-wealthy school districts and those who have a stake in the matter often view recapture as

132. See Svitek, *supra* note 123 (quoting Governor Greg Abbott on HB 3's passage: "You could not overstate the magnitude of the law that I'm about to sign because this is a monumental moment in public education history in the state of Texas.").

133. Hegar, *supra* note 87, at 7 ("[H]igh property value isn't necessarily a function of residential real estate values.").

134. See *generally id.* (referring to a child's inability to choose which school district they prefer to go to school in).

135. *Id.* at 12 (indicating the number of students classified as economically disadvantaged is increasing).

136. See *id.* at 7 (suggesting a student's zip code should not determine the quality of education they receive).

137. See *id.* at 5 (criticizing the efforts of our community and local government regarding their efforts in ceasing inequality within our education system).

138. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

139. *Litigation Saga*, *supra* note 19, at 523 (explaining the origination of recapture).

140. *Id.* (detailing the requirements of the system of recapture).

141. See *id.* at 523–524 (detailing how the "state system would be enriched" if recapture is mandated for school districts with over \$700,000, a level exceeded by more than ten percent of school districts.)

a negative aspect of school finance that must be remedied.¹⁴² These districts see their recapture payment increase and perhaps feel the payments they must make are unjust.¹⁴³ Some criticisms of recapture are that in many cases it will result in higher local property taxes, it causes a “de facto cap” on school expenditures, and it is possible wealthier schools will stop taxing themselves at higher rates as they are essentially paying more for other districts.¹⁴⁴ However, recapture has been very efficient in decreasing inequalities among Texas school districts.¹⁴⁵ Before the institution of the recapture system, the 100 wealthiest school districts averaged nine times the funding as the 100 poorest schools.¹⁴⁶ As of 2018, the top 100 wealthiest school districts only have 1.26 times as much funding as the 100 least wealthy schools.¹⁴⁷

One concerning change regarding the effect of HB 3 on the state finance system includes lowering recapture payments by an estimated \$3.6 billion over the next two years.¹⁴⁸ This reduction in recapture is projected to be achieved using a variety of methods.¹⁴⁹ First, HB 3 will change the way recapture is calculated.¹⁵⁰ Prior to HB 3, recapture was calculated by measuring equalized wealth levels.¹⁵¹ One criticism of that method is recapture and non-recapture districts were treated differently

142. See *Don't Get Distracted by Recapture: Our Biggest School Finance Challenge Is a Lack of Revenue*, EVERY TEXAN (Nov. 13, 2018), <http://bettertexasblog.org/2018/11/dont-get-distracted-by-recapture-our-biggest-school-finance-challenge-is-a-lack-of-revenue/> [<https://perma.cc/LQ7D-W2FJ>] [hereinafter *Don't Get Distracted*] (analyzing and identifying the pitfalls and criticisms of the system of recapture).

143. See *id.* (opining that wealthy districts become discouraged with increased payments and do not see the value or return in them).

144. See Mark Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 503 (1991) (exploring the possible remedies of an inefficient school finance system and considering the ramifications of those remedies).

145. See *Don't Get Distracted*, *supra* note 142 (noting the system of recapture has “leveled the playing field” and has given more students the “chance to compete and succeed in life.”).

146. See *id.* (“Before recapture, the 100 wealthiest school districts had, on average, nine times as much funding as the 100 lowest wealth districts.”).

147. *Id.*

148. See *Recapture Formula Changes and Reductions Under House Bill 3*, TEX. EDUC. AGENCY (July 25, 2019), <https://tea.texas.gov/sites/default/files/TAA%20-%20Recapture%20pur%20to%20House%20Bill%203.pdf> [<https://perma.cc/8YGY-VPSU>] [hereinafter *Recapture Formula Changes*] (identifying funding implications of passing HB 3).

149. *Id.*

150. *Id.* (“The calculation of recapture is now based on local revenue in excess of entitlement instead of equalized wealth levels . . .”).

151. *Id.* (distinguishing the new calculation method compared to the old one).

because non-recapture districts did not benefit from the “Available School Fund” the same way recapture schools did.¹⁵² Now, recapture calculations will be based on local revenue in excess of a school district’s entitlement level.¹⁵³ The second way recapture will be reduced is through increasing entitlement amounts; examples of these allotments are increased money for special education and dual language.¹⁵⁴ Since recapture calculations no longer count entitlements for wealthier schools as part of their recapture payments, those schools ultimately pay less.¹⁵⁵ The third method for decreasing recapture payments is to outright lower property taxes.¹⁵⁶ Lowering taxes will always be welcoming news to many, but schools need a sustainable source of funding.¹⁵⁷

Whittling away at this source of funding will only make it more difficult to meet the needs of children, teachers, and staff.¹⁵⁸ While districts that must make high recapture payments get relief from this bill, it comes at a cost.¹⁵⁹ Now that the state is removing this source of funding, the state is putting the onus on itself to replace that loss of funding.¹⁶⁰ Unfortunately, the plan for the state to make up the difference in the future is unreliable.¹⁶¹ Possible dips in the economy and the pressures of appeasing multiple parties when budget planning contributes to the turbulent nature of the Legislature.¹⁶² Although the

152. *Id.* (addressing the criticism of the old method of calculating recapture).

153. *Id.*

154. *See id.* (explaining the creation of new allotments and expansion of old allotments).

155. *See id.* (recognizing how HB 3 school districts are treated more equitably and how districts will only pay for recapture on the amount above their formula entitlement).

156. *Id.*

157. *See* Figueroa, *supra* note 106 (emphasizing HB 3’s focus on lowering property taxes as misplaced).

158. *See id.* (expressing the negative impact attributed to lowering property taxes and how its effect will be harmful to schools in the future by “adding more pressure on other parts of the budget.”).

159. *See* Hannah Elsaadi, *The Cost of Education: An in Depth Look into Texas’s Education Funding System over the Last Two Decades*, 2 TEX. A&M J. PROP. L. 341, 353, 377 (2015) (analyzing how the differences in size and wealth make it difficult to create efficiency).

160. *See* Figueroa, *supra* note 106 (stating the state’s burden under HB 3 is large and will be even larger by 2021).

161. *See generally* Elsaadi, *supra* note 159, at 356 (recognizing the Texas Legislature’s efforts in finding solutions to remedy the lack of school funding have proven to be unsuccessful).

162. *See* *History of LWV/TX Public Education Finance*, LEAGUE OF WOMEN VOTERS OF TEX., <https://my.lwv.org/texas/history-lwvtx-public-education-finance-action> [<https://perma.cc/ZW68-RAVN>] (noting the consequences of the economic downturn in 2008–2011). *See generally*

Legislature may have the best intentions to supply funding, without a more concrete plan, schools relying on revenue from recapture may get the raw end of the deal.¹⁶³ One positive change to the recapture formula is that it will now use current year values rather than prior year values.¹⁶⁴ Using prior year values was problematic because it contributed to budget instability.¹⁶⁵

C. *HB 3 Lacks a Sustainable Source of Funding*

In many ways, HB 3 is a step in the right direction for public school finance, but lawmakers should not become complacent.¹⁶⁶ Increases in funding are not guaranteed beyond 2021 because the bill relies heavily on nonrecurring sources of funding.¹⁶⁷ This legislative session, school finance was one of the most important issues discussed.¹⁶⁸ This was because underfunded Texas schools, underpaid Texas school employees, and other interest groups put a significant amount of pressure on lawmakers to address the problem.¹⁶⁹ Without that significant pressure or a court order, the Texas Legislature will likely be less willing to

Figueroa, *supra* note 106 (describing the pressures on the budget that will occur as the state puts the onus on itself in order to relieve property taxes).

163. See Elsaadi, *supra* note 159, at 356, 359 (describing instances where the Legislature attempted to find a solution to education financing and failed).

164. See *Recapture Formula Changes*, *supra* note 148 (demonstrating how the prior method created budget instability and deficits).

165. See *id.* (describing how budget instability, including budget deficits, were caused by the old method of recapture).

166. See *Public Education Reforms Lack Financial Sustainability*, SAN ANTONIO EXPRESS NEWS (June 11, 2019, 4:29 PM), <https://www.mysanantonio.com/opinion/editorials/article/Public-education-reforms-lack-financial-13969323.php> [<https://perma.cc/C3HC-EG2C>] (urging state law makers to adopt public education reforms that will be warranted in the years down the road and reiterating public education “should not be dealt with only” when “in crisis mode.”).

167. See *id.* (introducing further cause for concern given the state’s history of giving and taking away funds in the past).

168. *Id.*

169. See Rebekah Allen, *Texas Lawmaker Who Almost Quit After Failed School Overhaul Bill Back with Transformative Plan*, DALL. MORNING NEWS (Apr. 24, 2019, 5:45 PM), <https://www.dallasnews.com/news/politics/2019/04/24/texas-lawmaker-who-almost-quit-after-failed-school-overhaul-bill-back-with-transformative-plan/> [<https://perma.cc/Z3ME-466E>] (noting the pressure to deliver, especially considering how the 2009 Legislature gave teachers a modest salary increase, but then completely took it away with the cuts made in 2011).

increase funding again on its own.¹⁷⁰ Without a sustainable and long-term plan to continue funding for teachers and new allotments, it will become increasingly harder for the legislature to pay for the changes HB 3 has made.¹⁷¹ These difficulties arise due to changing demographics and inflation.¹⁷² Funding education may easily become less of a priority to the Legislature as they have many significant issues to deal with, and all compete for funding.¹⁷³

The risk that funding from HB 3 will be discontinued after 2021 is not mere speculation.¹⁷⁴ Texas history reveals many instances where state funding was granted and then repealed a few years later.¹⁷⁵ In 2006, Governor Rick Perry called a special session for school finance to find a solution for the lack of funding.¹⁷⁶ Two months prior, the Texas Supreme Court found the Texas school finance system unconstitutional.¹⁷⁷ Governor Perry introduced the Educational Excellence and Equity Plan (EEAEP).¹⁷⁸ This plan included granting relief to taxpayers by lowering the residential cap to \$1.25 per \$100 property valuation.¹⁷⁹ The plan also aimed to eliminate recapture and split a district's tax base for separate caps on commercial and residential

170. *See Public Education Reforms Lack Financial Sustainability*, *supra* note 166 (stating that without a court order forcing them to do so, state lawmakers have not been very good at addressing the issue of school funding).

171. *See id.* (reiterating the fear lawmakers will cut large amounts of funding to public education as they have similarly done in the past when crisis strikes).

172. *See id.* (describing how shifting priorities in the Legislature have failed students in the past); *see also* Figueroa, *supra* note 106 (detailing how HB 3 accounts for inflation).

173. *See* Elsaadi, *supra* note 159, at 342 (acknowledging the Texas Legislature failed to prioritize education finance for decades, and, as a result, schools have been negatively affected by the Legislature's "trial and error" approach); *see also Public Education Reforms Lack Financial Stability*, *supra* note 166 (asserting that other priorities may take attention away from school financing).

174. *See* Elsaadi, *supra* note 159, at 355–69 (detailing how Texas's history shows a myriad of failed attempts to address issues with the finance system).

175. *See, e.g., id.* at 359–62 (recounting the events leading up to the significant cuts to the education budget in 2011).

176. *Id.* at 361.

177. *See* Neely v. West Orange-Cove Consol. Indep. Sch. Dist, 176 S.W.3d 746, 800 (Tex. 2005) (declaring increased school funding must be accompanied by structural changes); *see also* Elsaadi, *supra* note 159, at 361 (underlining the unconstitutionality of the state property scheme used for public school funding).

178. *See* Elsaadi, *supra* note 159, at 361 (crediting Governor Perry for his proposed Educational Excellence and Equity Plan as a possible remedy to the finance problem).

179. *Id.*

property.¹⁸⁰ To make up for lost revenue from the property taxes, a business margins tax and increased cigarette tax was implemented.¹⁸¹ The EEAEP included a provision for Additional State Aid for Tax Reduction (ASATR).¹⁸² The ASATR's goal was to account for money school districts lost as a result of the EEAEP that was not covered by the business margins and cigarette taxes.¹⁸³ Unfortunately, these taxes were not enough to offset the property tax losses, and the state had to utilize ASATR much more than it expected.¹⁸⁴ These unexpected expenditures contributed to a need for extensive cuts to the education budget in 2011.¹⁸⁵

1. *Watching History Repeat*

HB 3 is similar in many respects to Rick Perry's Educational Excellence and Equity Plan and may have similar negative consequences unless further action is taken.¹⁸⁶ One of the main ways the bills are similar is the emphasis on lowering property taxes and reducing or eliminating recapture payments.¹⁸⁷ Provisions like these are popular with taxpayers; however, they pull school finance bills in too many directions.¹⁸⁸ Just as HB 3 puts the onus on the state to make up the

180. *See id.* (listing the main components of the Educational Excellence and Equity Plan).

181. *See id.* (describing the financial strategies employed by the state to help supplement public school funding).

182. *Id.* at 362 (2015).

183. *See id.* (detailing how the budget shortfalls caused by the EEAEP would be covered by ASATR).

184. *See id.* (addressing the financial consequences public schools faced in the aftermath of the EEAEP).

185. *Id.*

186. *Compare id.* (stating the main tenants of the Educational Excellence and Equity Plan), with Figueroa, *supra* note 106 (highlighting the lack of sustainable sources of funding for Texas public schools stemming from HB 3).

187. *See generally* 2004 Special Session on School Finance, PLANO INDEP. SCH. DIST. (Apr. 22, 2004), <https://www.pisd.edu/site/Default.aspx?PageID=1740> [<https://perma.cc/SPG2-8FHL>] (extrapolating the key aspects of the Educational Excellence and Equity Plan).

188. *See* Ross Ramsey, *Analysis: There's a Reason Texas Governors Keep Failing to Lower Property Taxes*, TEX. TRIB. (Jan. 17, 2018, 12:00 AM), <https://www.texastribune.org/2018/01/17/analysis-theres-reason-texas-governors-keep-failing-lower-property-tax/> [<https://perma.cc/MX64-GVW6>] (describing the political importance of lower property taxes to the residents of Texas). *See generally* Kiah Collier, *2011 Budget Cuts Still Hampering Schools*, TEX. TRIB. (Aug. 31, 2015, 6:00 AM), <https://www.texastribune.org/2015/08/31/texas-schools-still-feeling-2011-budget-cuts/> [<https://perma.cc/E77Q-7C55>] (detailing how districts are still tackling staffing cuts, swelling class sizes, and flat test scores aggravated by the 2011 budget cuts).

revenue losses caused by reductions in property taxes and recapture payments, the EEAEP did the same and had disastrous results.¹⁸⁹ The Legislature may mean well, but ultimately, consistent funding requires a tangible, efficient plan for generating revenue because when outside variables negatively affect the state's budget, Texas schools should have more to fall back on than what amounts to an IOU.¹⁹⁰ In 2011, the state cut 5.4 billion dollars from the education budget.¹⁹¹ Although the state tried to make up for the cuts in subsequent years, it never fully removed the lingering effects.¹⁹²

In 2013, the state granted a \$3.4 billion increase, but it was not enough to help Texas schools recover from the negative effects of the 2011 budget cuts.¹⁹³ In 2015, school staffing, classroom sizes, per student funding, and test scores were all still negatively impacted and indicative that despite the remedial increases, school districts were still inadequately funded.¹⁹⁴ Public school staffing was still lower by 3,700 teachers, while enrollment steadily increased by more than 220,000 students.¹⁹⁵ Texas was also still experiencing a substantial increase in waivers to allow campuses to exceed the twenty-two student class size limit.¹⁹⁶ High stakes testing scores saw little to no improvement with success rates in the seventieth percentile, while many school districts had still not achieved pre-2011 per student funding.¹⁹⁷ Considering the national average for amount spent per student on education was \$12,040 in 2015,

189. See Aliyya Swaby, *Teacher Raises and All-day Pre-K: Here's What's in the Texas Legislature's Landmark School Finance Bill*, TEX. TRIB. (May 24, 2019, 9:00 PM), <https://www.texastribune.org/2019/05/24/texas-school-finance-bill-here-are-details/> [https://perma.cc/8XDC-7CH6] (reporting how the budget cuts are accounted).

190. See PLANO INDEP. SCH. DIST., *supra* note 187 (identifying the need for a long-term school financing plan).

191. Collier, *supra* note 188.

192. See *id.* (acknowledging that schools continued to struggle years after the 2011 budget cut).

193. *Id.*

194. See *id.* (reporting how public schools are still struggling with 2011 budget cuts in the education system despite the Legislature's attempt to adequately allocate funds).

195. *Id.*

196. See *id.* ("The state still is approving far more waivers allowing elementary schools to exceed a 22-student class size limit established in 1984. Last year, the total number of campuses requesting waivers exceeded 2,100, according to state data; In the five school years leading up to the 2011 budget cuts, it never topped 1,375.").

197. *Id.*

and Texas was spending \$9,559 per student, pre-2011 spending was a low benchmark.¹⁹⁸

2. *Teachers and Students are Affected by a Lack of Sustainable Funding*

In addition to affecting students, a lack of reliable and sustainable funding also negatively affects teachers and other school employees.¹⁹⁹ Because HB 3 requires districts to set aside a certain percentage of money for increases in salary, the districts' hands will be tied if in two years they are unable to afford the new raises.²⁰⁰ As a result of this instability, many school districts are attempting to be conservative with school employees' raises, and school employees are not getting the economic help they were anticipating from the bill.²⁰¹

Many school employees expressed their excitement for receiving a salary increase.²⁰² However, some have also expressed disappointment they did not qualify for an increase or did not get the raise they expected to receive.²⁰³ HB 3 requires school districts increase salaries for certain staff as laid out in Section 48.051(c) of the Education Code.²⁰⁴ The code states:

198. *See id.* (noting Texas is in the bottom one-third in the nation for per-student funding).

199. *See* Aliyya Swaby, *With Conflicting Budget Estimates, Will Texas Teachers Get the Pay Raises They Anticipated?*, TEX. TRIB. (July 3, 2019, 12:00 AM), <https://www.texastribune.org/2019/07/03/teacher-pay-raises-school-district-budgets/> [<https://perma.cc/4RKK-65SV>] (describing difficult choices districts must make regarding funding notwithstanding awareness that in two years, the funding may change or no longer exist).

200. *See id.* (emphasizing the substantial contrast between earlier district budget estimates and calculations the districts did themselves while reporting that some districts are coming up short).

201. *See, e.g., id.* (demonstrating how Houston ISD's 3.5% raise equates to less than a \$100.00 raise per paycheck).

202. *See, e.g.,* Corbett Smith, *Texas Is Spending Billions More on Education but Teachers May Not Get the Raises They Expect*, DALL. MORNING NEWS (June 30, 2019), <https://www.dallasnews.com/news/education/2019/06/30/texas-is-spending-billions-more-on-education-but-teachers-may-not-get-the-raises-they-expect/> [<https://perma.cc/H4QN-RLCE>] (discussing the misconception teachers would get a uniform \$5,000 raise to their annual salary).

203. *See id.* (detailing how the funding mandated by HB 3 will to some extent be applied according to the discretion of the school districts).

204. Act of June 12, 2019, 86th Leg., R.S., H.B. 3, § 1.021(c); *accord* Leo Lopez, *House Bill 3 Implementation Salary Increases*, TEX. EDUC. AGENCY (June 11, 2019), <https://tea.texas.gov/sites/default/files/TAA%20-%20House%20Bill%203%20Implementation%20Salary%20Increases%206.11.19.pdf> [<https://perma.cc/2NUH-35NZ>] (summarizing the funding allocation mandates within HB 3).

A school district must use at least 30 percent of the amount . . . that equals the product of the average daily attendance of the district multiplied by the amount of difference between the district's funding under this chapter per student in average daily attendance for the current school year and the preceding school year to provide compensation increases to full-time employees other than administrators.²⁰⁵

In addition, the funds are prioritized to classroom teachers that have more than five years' experience.²⁰⁶ Although school districts must follow section 48.051 of the Education Code, they are given considerable leeway on how to distribute the funds.²⁰⁷ The funds themselves do not need to be given as a salary increase, as districts have the option of increasing benefits instead.²⁰⁸ For example, Frisco ISD is increasing medical premium contributions by \$25 more per employee.²⁰⁹ Many speculated the salary increases would be a uniform \$5,000 across the board, but this was not the case.²¹⁰ Because of the way the salary increase formula is built, some schools will get much more funding for this purpose than others, and the result is that many teachers will not get much of a salary increase at all.²¹¹ School districts that are allotted more money under the formula are able to give significant increases such as Barbers Hill ISD (outside of Houston), the first district in Texas to raise starting teacher pay to \$60,000.²¹² Other districts who are less favored by the formula—like Plano ISD (in the Dallas area)—are only able to offer a 2.5% pay raise to teachers with fewer than 6 years' experience and a 3% increase

205. TEX. EDUC. CODE ANN. § 48.051 (2019).

206. *See Lopez, supra* note 204 (confirming 75% of funds will go to teachers with more than five years of experience).

207. *See, e.g., Smith, supra* note 202 (expressing that although teachers must receive a portion of the new funds schools are receiving, the school districts will be able to decide how to distribute them to a certain degree as well as what to do with any funds in excess of the mandated minimum).

208. *See id.* (acknowledging how large contributions to employee insurance premiums in Texas serve as a loophole to giving school employees a definite pay increase).

209. *See id.* (noting that spending an overwhelming \$1.8 million dollars only equates to an insignificant "raise" for school employees).

210. *See id.* (recounting the legislative history of HB 3 and explaining that the uniform \$5,000 was considered as a viable plan but was then defeated in the House).

211. *See id.* ("A third of the state's districts and charters won't get more than \$450,000 in additional formula funding . . .").

212. *Id.*

to teachers with more than 6 years' experience.²¹³ Additionally, there are concerns about the longevity of the funding for salary increases and some are fearful if the state experiences economic hardship, teacher and other school employees' salaries will be affected.²¹⁴ Prior to HB 3, the last time teachers received a material increase was in 2009.²¹⁵ Due to the economic recession, the Legislature then cut \$5.4 billion from the education budget just two years later in 2011.²¹⁶

Teachers and other school employees are long overdue for salary increases, and the HB 3 salary increases are absolutely welcome.²¹⁷ However, the salary increase provided for in HB 3 does nothing to improve the disparity in teacher and staff salaries between districts.²¹⁸ In fact, the HB 3 salary increase may exacerbate these issues.²¹⁹ Wealthier districts already paying their teachers at the national average will be able to increase salaries even higher while poorer districts will struggle to pay their teachers the national average.²²⁰ The effect is that wealthier districts are better able to attract valuable employees and retain them longer.²²¹

213. *Id.*

214. See Julie Chang, *Why Some Aren't Sold on Giving Teachers a \$5,000 Raise*, STATESMAN (Jan. 17, 2019, 6:17 PM), <https://www.statesman.com/news/20190117/why-some-people-arent-sold-on-giving-texas-teachers-5000-raise> [<https://perma.cc/3DS3-AH2N>] (“[A]n economic downturn could easily eliminate funding for teacher pay.”).

215. See *id.* (explaining how the raises given to teachers in 2009 were undercut by budget cuts in 2011 which caused teachers to be laid off).

216. See *id.* (describing how budget cuts during the recession lead to attrition); see also LEAGUE OF WOMEN VOTERS OF TEX., *supra* note 162 (detailing how the 2013 Legislature was under pressure to fix education financing).

217. See LEAGUE OF WOMEN VOTERS OF TEX., *supra* note 162 (providing a timeline of education finance in Texas); see also Aliyya Swaby, *Can Pay Raises Help Rural Texas Districts Like Buffalo Retain Teachers?*, TEX. TRIB. (May 17, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/17/texas-teacher-pay-raises-small-districts-retain-staff/> [<https://perma.cc/U4CQ-B5DC>] [hereinafter *Rural Texas Districts*] (giving examples of teachers and other school staff who struggle to make ends meet).

218. See *Rural Texas Districts*, *supra* note 217 (depicting the difficulties one district has attempting to compete with districts that use higher salaries to attract employees).

219. See *id.* (“[C]ompetitors will also have more money to spend on bonuses and raises, making it challenging for the tiny district to come out on top.”).

220. See *id.* (predicting one small school district will still struggle to compete since the funding will be distributed equally to all school districts if HB 3 passes).

221. See Desiree Carver-Thomas & Linda Darling Hammond, *Teacher Turnover: Why It Matters and What We Can Do About It*, LEARNING POL’Y INST. v–vi (Aug. 2017), https://learningpolicyinstitute.org/sites/default/files/product-files/Teacher_Turnover_REPORT.pdf

In Buffalo ISD, the base pay for a starting teacher is \$15,000 less than the state average.²²² The superintendent of the district drives the school bus every day for three hours in the morning and three hours in the afternoon because the district has struggled to find a licensed bus driver willing to take on the position.²²³ This occurrence is worrisome, considering the school district in Buffalo, as in many other small towns, is the main employer.²²⁴ Though Buffalo ISD will be able to increase employee salaries under HB 3, it will still be pressed to attract new teachers and fill positions when neighboring districts are also able to pay more.²²⁵ Differences in pay contribute to an “employment drought” problem.²²⁶ One concern is this disparity in pay ultimately affects the quality of education children receive.²²⁷ Buffalo ISD has also had trouble filling bilingual teaching positions, which affects the quality of English language learning students’ educations.²²⁸

In sum, while salary increases are a positive aspect of HB 3, in many cases they will not be enough to decrease the pay gap between poor school districts and the national teacher salary average; they do not address the disparity in pay between Texas school districts, and the sustainability of funding for these increases is in question.²²⁹

f [<https://perma.cc/5C4B-3XHP>] (reporting national teacher turnover rates are 50% higher in Title I schools who serve lower income populations and recommending increased compensation packages as a means of curbing the turnover).

222. *Rural Texas Districts*, *supra* note 217.

223. *See id.* (emphasizing this is not an uncommon occurrence throughout rural Texas districts).

224. *Id.*

225. *See id.* (comparing with how other school districts will also receive funding for raises and bonuses under HB 3).

226. *See id.* (stating how one school district was hoping for more money to recruit teachers and end the employment draught); *see also* Carver-Thomas & Hammond, *supra* note 221, at 32 (“[T]eachers in districts with a maximum teaching salary greater than \$72,000 are 20–31% less likely to leave their schools than those with maximum salaries under \$60,000.”).

227. *See* Carver-Thomas & Hammond, *supra* note 221, at vii, 1 (describing the heavy toll teacher turnovers have on students even if the teacher just moves to another school, because in a pinch, schools will often hire inexperienced or unqualified teachers; this, coupled with the instability students experience, impacts their learning).

228. *See Rural Texas Districts*, *supra* note 217 (addressing the growing need for bilingual teachers as the number of Hispanic students has more than doubled since 2003).

229. *See generally id.* (discussing disparities between a rural Texas district and the national average compared to other Texas districts); *see* Chang, *supra* note 214 (discussing disparities between Texas districts and the national average where “an economic downturn could easily eliminate funding for teacher pay.”).

IV. WHERE DO WE LOOK FOR GUIDANCE?

In the United States, people are accustomed to viewing the country as a leader in the world, at the forefront of success.²³⁰ However, the United States trails behind other countries when it comes to providing students with a quality education.²³¹ In international rankings, the United States is near the bottom middle of the list and is ranked behind countries such as Estonia and Slovenia.²³² This difference in quality has continued more than fifty years after the official end of segregation.²³³ In 2013, the National Assessment of Educational Progress showed the average Black student in the twelfth grade was reading at a level equivalent to the average White student in the eighth grade.²³⁴

A. *Nationally*

The problems with our education system have not been ignored; the United States has attempted to address these issues at the national and statewide level.²³⁵ At the national level, presidents have taken action, such as the “No Child Left Behind Act” initiated by President Bush in 2001 and “Race to the Top” initiated by President Obama in 2012.²³⁶ U.S. courts have favored the idea states should be free to serve as laboratories for policy which, if successful, may lead to the adoption of these laws by other states or even the federal government.²³⁷ While the

230. *See Is America Still the Leader of the Free World?* PBS, <https://www.pbs.org/wgbh/third-rail/episodes/episode-3-should-america-be-the-worlds-cop/america-leader-free-world/> [<https://perma.cc/Q4DR-67XQ>] (reporting 67% of Americans consider the United States to be the leader of the free world).

231. Jal Mehta, *Why American Education Fails: And How Lessons from Abroad Could Improve It*, 92 FOREIGN AFF. 105, 106 (2013).

232. *See id.* (“U.S. schools still languish in the middle of international rankings . . .”).

233. *See id.* at 105, 106 (2013) (explaining the average black twelfth grader scores on an equivalent level as the average white eighth grader on the National Assessment of Educational Progress).

234. *See id.* (“[H]alf a century after the end of official segregation, huge gaps continue to divide students by race and class, with the average black 12th grader scoring in reading at a level equivalent to the average white eighth grader on the National Assessment of Educational Progress . . .”).

235. *See id.* (referring to recent federal level education reforms initiated by American presidents).

236. *Id.* at 105–07 (2013).

237. James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 477 (1996).

national programs have helped in limited respects they have also led to more problems.²³⁸ The Obama administration's Race to the Top program yielded some positive results.²³⁹ This grant-based program incentivized states to make improvements to their education systems by raising standards and emphasizing a focus on college and career readiness.²⁴⁰ Through the program, forty-six states and the District of Columbia submitted comprehensive reform plans, \$4 billion was granted to nineteen states, and thirty-four states modified their education laws to focus on enhancing college and career readiness standards.²⁴¹ No Child Left Behind has a great name, but is well-cited for creating more problems than solutions.²⁴² No Child Left Behind focused heavily on accountability by requiring schools to measure and document how students performed on testing and instituting more severe consequences when they did not perform well.²⁴³ The Act was helpful because it required schools to break down the performance rates by race, an area that lacked accountability in many schools.²⁴⁴ Negative consequences of the Act included increased pressure on teachers to teach to the test,

238. See Mehta, *supra* note 231, at 105–06 (explaining that while U.S. national initiatives have “generated progress in some areas,” U.S. schools still rank in the middle of international educational rankings).

239. See *Race to the Top*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top> [<https://perma.cc/3VFT-TUN6>] (recognizing the Race to the Top initiative “created robust plans” and dedicated billions of dollars to address K-12 education reform).

240. See *id.* (stressing the program's four key areas of reform: (1) Development of rigorous standards and better assessments; (2) Adoption of better data systems to provide schools, teachers, and parents with information about student progress; (3) Support for teachers and school leaders to become more effective; and (4) increased emphasis and resources for the rigorous interventions needed to turn around the lowest performing schools).

241. *Id.*

242. See Valerie Strauss, *No Child Left Behind's Test-Based Policies Failed. Will Congress Keep Them Anyway?*, WASH. POST (Feb. 13, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/13/no-child-left-behinds-test-based-policies-failed-will-congress-keep-them-anyway/> [<https://perma.cc/N6TC-QEDR>] (indicating issues caused by the Act's specific focus on accountability and test-based assessments included inequitable distribution for opportunities for children to grow, learn and thrive); see also Christopher W. Holiman, *Leaving No Law Student Left Behind: Learning to Learn in the Age of No Child Left Behind*, 58 HOWARD L.J. 195, 205–07 (2014) (outlining the harsh reality of the No Child Left Behind initiative's consequential effects in improvised and high-minority communities).

243. See Holiman, *supra* note 242, at 204–05 (explaining how the program's standards overlook the problem and punish teachers for bad results).

244. *Id.*

penalties disproportionately impacting communities of color, and discouraging students who did not perform well on high stakes tests.²⁴⁵

Despite efforts to address problems with education, inequalities persist and U.S. school rankings have not improved.²⁴⁶ The American education system was developed during the Progressive Era with a particular focus on White students, the majority of whom were able to graduate high school.²⁴⁷ This reason, among others, is why our education system produces comparatively worse results than other countries.²⁴⁸ In the 1960s, a high school education was good enough to enter into middle-class occupations, such as manufacturing, and some scholars posit that, as a country, we were content with that for quite some time.²⁴⁹ Our current education system was not created for students of color, and, as a result, is not equipped to correct issues in our current education system.²⁵⁰ This is especially true in Texas where the vestiges of segregation and discrimination affect how we finance education.²⁵¹

B. *Internationally*

So, how do more successful countries in the area of education approach education?²⁵² Canada, Japan, Finland, Singapore, and South Korea all rank higher than the United States on the International Student

245. *Id.* at 202–03.

246. *See* Mehta, *supra* note 231, at 105–06 (analyzing how reforms have led to progress in some areas, but the U.S. education system still ranks in the middle of international rankings).

247. *See id.* at 107–08 (expounding on the ways the formation of the contemporary educational system failed to include concerns particular to non-White students).

248. *See id.* at 105, 108 (2013) (linking the formation of the contemporary American education system to its current outcomes, especially when compared to other countries).

249. *See id.* (concluding Americans tolerated the system because most White students graduated and were qualified for these positions, regardless of how much they actually learned in school).

250. *See id.* (reinforcing how the Progressive Era’s focus on White students inherently excluded non-White students).

251. *See generally* Arnoldo De Leon & Robert Calvert, *Segregation*, TEX. ST. HIST. ASS’N, <https://www.tshaonline.org/handbook/entries/segregation> [<https://perma.cc/5FEW-J8CK>] (summarizing the history of school segregation in Texas and noting how “[i]n the early twentieth century, Black and Mexican schools faced lamentable conditions endemic in an antiquated educational system, and educational reforms of the Progressive era did not improve matters.”).

252. *See* Mehta, *supra* note 231, at 105, 107 (emphasizing the need for the United States to borrow the different ideas countries currently atop the international ranking utilize in their educational system).

Assessment, and each have similarities in their approach to education.²⁵³ Rather than focusing disproportionately on accountability, these countries' approach to education focus on creating the "profession of education."²⁵⁴ This involves an active attempt at attracting the most talented graduates into the teaching profession and providing them extensive training.²⁵⁵ As a result, the profession of teaching in these countries is considered a very distinguished occupation and garners significant respect.²⁵⁶ Due to significant training, there is less need for extensive accountability, and teachers have greater freedom to teach their subjects as they see fit rather than a one-size-fits-all mold.²⁵⁷ Another thing these countries all have in common is that their education systems are all supported by a significant welfare system.²⁵⁸

It is easy to see why there are many arguments against using comparisons of education systems in other countries.²⁵⁹ The United States is uniquely situated in many aspects, so looking at what other countries do may seem to have little value.²⁶⁰ For example, the United States has a much larger land mass than many other countries and does not have a uniform application of many education policies because the states have a right to dictate education as they see fit.²⁶¹ In addition, the

253. *Id.*

254. *See id.* (comparing other countries' commitment to making education a strong profession, whereas the United States focuses on accountability).

255. *See id.* ("[Other countries] choose their teachers from among their most talented graduates, train them extensively, create opportunities for them to collaborate with their peers within and across schools to improve their practice, provide them the external supports that they need to do their work well, and underwrite all these efforts with a strong welfare state.").

256. *See, e.g., id.* at 105, 112 (2013) (sharing how teaching in Finland is a highly selective program which only accepts one in every ten applicants).

257. *See* Holiman, *supra* note 242, at 202–03 (2014) (sharing the way standardized tests impede a teacher's discretion and the students through a one-size-fits-all method).

258. *See* Mehta, *supra* note 231, at 105, 107 (detailing how other countries create peer collaborative opportunities across schools and provide external support to teachers, all funded from the welfare state program).

259. *See* Sean Cavanaugh, *U.S. Education Pressured by International Comparisons*, EDUC. WK. (Jan. 9, 2012), <https://www.edweek.org/ew/articles/2012/01/12/16overview.h31.html>, [<https://perma.cc/BMB5-7MFZ>] (describing how a single-policy analysis does not take into account the role culture plays in education).

260. *See, e.g., id.* (illustrating how the unique culture in Japan plays an important factor in their education system).

261. *See* Mehta, *supra* note 231, at 109 (noting how the decentralized education system in the United States limits the federal government's ability to establish uniform teaching standards throughout the nation).

United States has an ethnically diverse population and a relatively recent history of attempting to overcome issues of slavery and discrimination in the education system.²⁶² These differences complicate the United States' ability to apply methods used in more homogenous countries.²⁶³ However, there is value in analyzing successful education models because they can change our perspective regarding valuing and funding education in Texas and the United States.²⁶⁴

V. SOLUTIONS

A. *The Need for a Change in Thinking*

An examination of school finance in Texas shows despite efforts to improve education by funding it properly, there is significant resistance to funding methods that require people to expend resources on something they will not be able to benefit from in the short term.²⁶⁵ Evidence of this idea can be seen in HB 3's resistance to recapture, which scaled back recapture payments for school districts and laid the foundation for further scale back in the future.²⁶⁶

Evidence can also be found in resistance to taxes.²⁶⁷ In 2019, Proposition 4 passed in Texas.²⁶⁸ Proposition 4 is a Texas Constitutional

262. See Mehta, *supra* note 231, at 106 (acknowledging how huge gaps continue to divide students by race and class even after the United States ended segregation half a century ago).

263. See Cavanaugh, *supra* note 259 (detailing factors that differentiate the U.S.'s educational system from other countries, such as societal and cultural norms).

264. See *id.* (echoing the need to understand how different countries produce higher educational results and to prevent the United States from falling behind).

265. See *Don't Get Distracted by Recapture: Our Biggest School Finance Challenge Is a Lack of Revenue*, EVERY TEXAN (Nov. 13, 2018), <http://bettertexasblog.org/2018/11/dont-get-distracted-by-recapture-our-biggest-school-finance-challenge-is-a-lack-of-revenue/> [<https://perma.cc/LQ7D-W2FJ>] (noting the advantages and benefits of paying taxes in Texas are not immediate, but to support the future).

266. See Leo Lopez, *Recapture Formula Changes and Reductions Under House Bill 3*, TEX. EDUC. AGENCY (July 25, 2019), <https://tea.texas.gov/sites/default/files/TAA%20-%20Recapture%20pursuant%20to%20House%20Bill%203.pdf> [<https://perma.cc/8YGY-VPSU>] (detailing how the passing of HB 3 will reduce recapture in the next biennium by \$3.6 billion).

267. See Alex Samuels, *Texas Voters Approve State Income Tax Ban, Most Other Constitutional Amendments*, TEX. TRIB. (Nov. 6, 2019), <https://www.texastribune.org/2019/11/05/texas-constitutional-amendments-uniform-election-results-2019/> [<https://perma.cc/BM9M-M9K4>] (recognizing seventy-five percent of Texans voted against state income tax).

268. See *id.* (noting the state income tax ban, Proposition 4, proclaimed victory within hours of the polls closing).

Amendment eliminating the possibility of imposing a state income tax on individuals, unless a future amendment states otherwise.²⁶⁹ Although there are many valid arguments in favor of this outcome, the amendment removes funding possibilities the Texas education system could have benefited from.²⁷⁰ Now that Proposition 4 has passed, there is little opportunity for creative legislation taxing ultra-wealthy individuals a significant amount for the benefit of education.²⁷¹ There is also a lost opportunity to have valuable debate in the future about how to fund public services such as education, transportation, and health care.²⁷² The amendment was also framed in a way to unfairly instill fear in Texan voters.²⁷³ Proposition 4 was framed in a way that created alarm and may have led some voters to believe if they did not vote for it, they would become subject to an income tax.²⁷⁴ The Texas Constitution already ensures voters retain control over whether or not to ever create an income tax which makes the proposition unnecessary.²⁷⁵ States without an income tax rely on 39% of revenue from property taxes, while states with an income tax rely on only 31% of revenue from property taxes.²⁷⁶ In addition, states that have sales, income, and property taxes have more

269. *Id.*

270. See Dick Lavine, *CPPP Opposes Proposition 4 on the Statewide Ballot This Fall: Harmful Proposition Would Tie the Hands of Future Texans*, EVERY TEXAN (July 2019), http://forabettertexas.org/images/IT_2019_Oppose_Prop4.pdf [<https://perma.cc/5M4P-ELMC>] (reiterating how the amendment would place hurdles for public services funding such as education).

271. *Cf. Id.* (describing how states without an income tax lead low-income and middle-income families to be taxed more heavily than higher-income families).

272. *See id.* (stating how the passing of Proposition 4 would place further hurdles for future Texan generations to overcome in order to support public services such as education).

273. *See* Luis Figueroa, *You Don't Need Proposition 4 to Protect You from a Texas Income Tax*, CALLER TIMES (Oct. 15, 2019, 2:52 PM), <https://www.caller.com/story/opinion/2019/10/15/you-dont-need-proposition-4-protect-you-texas-income-tax/3988796002/> [<https://perma.cc/6JPU-6VDP>] (“Fear is a tactic politicians use to scare and distract voters from the real threat. This tactic is on full display in this November’s election in the form of Proposition 4, which would needlessly ban the Texas Legislature from adopting an income tax.”).

274. *See id.* (“Proposition 4 is completely unnecessary and based on fake threats” while “[t]he real threat to the future prosperity of our state is the greater tax burden that Texas already places on the backs of the poor and middle class.”).

275. *See* Lavine, *supra* note 270 (“The ‘Bullock Amendment,’ adopted in 1993 (Art. 8, sec. 24), gives voters final control over any future income tax by requiring approval by a statewide referendum before an income tax could take effect. . . . Proposition 4 would repeal the Bullock Amendment and its protections, leaving a complete prohibition against the Legislature ‘imposing a net income tax on individuals.’”).

276. *Id.*

stable economics and are less vulnerable to economic downturn.²⁷⁷ Importantly, states without an income tax take a higher proportion of funding from low- and middle-income families than they do of high-income families.²⁷⁸ This fact is indicative legislation like Proposition 4 is for the benefit of people with large amounts of wealth.²⁷⁹ Rather than being afraid of taxes, Texan voters need to engage in substantive debate about what methods of generating revenue will be beneficial for Texas in the years to come.²⁸⁰ Legislation seems to always be two steps behind in remedying a need for more money due to inflation and a rapidly growing Texas population.²⁸¹

B. Is Money the Answer?

Many have raised the argument Texas is giving a satisfactory amount of funding for education because more money will not necessarily translate to better-quality education.²⁸² While it is true money should be spent in a targeted and efficient manner, research shows money does matter.²⁸³ There are several factors—including money—directly influencing the success of a child’s education.²⁸⁴ Better literacy skills among teachers, decreased class size, and experienced teachers of five

277. *See id.* (“States with three major sources of tax revenue can balance the advantages and disadvantages of each type of tax—particularly their fairness and volatility—to achieve a stable source of support. . . . [In contrast,] States without an income tax are more susceptible to economic fluctuations.”).

278. *Id.*

279. *Id.*

280. *See id.* (indicating the need for alternatives other than the two major sources of revenue Texas relies upon).

281. *See id.* (opining the Legislature failed to consider future Texans’ needs).

282. *See* Ronald F. Ferguson, *Paying for Public Education: New Evidence on how and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 488 (1991) (“The research that this Article describes strongly supports the conventional wisdom that higher-quality schooling produces better reading skills among public school students and that when targeted and managed wisely, increased funding can improve the quality of public education.”).

283. *See, e.g., id.* at 470, 483, 489 (“[N]ew studies are beginning to find evidence that money affects the quality of schooling and that the quality of schooling influences not only test scores but later earnings as well.”).

284. *See id.* at 466, 484, 487, 489–90 (evidencing teacher quality matters and should also be a major focus for school districts because skilled teachers “are the most critical of all schooling inputs . . . and may positively affect a student’s test scores”).

years or more all predict better student scores on exams.²⁸⁵ Arguably one of the most important factors is the quality of the teachers.²⁸⁶ Experience and skills training are two factors that increase the quality of a teacher.²⁸⁷ Teachers with strong skills and significant experience affect how well students perform on tests and ensure students have a quality education.²⁸⁸ Quality teachers are unsurprisingly attracted to locations paying higher salaries and areas where students come from a higher socioeconomic status.²⁸⁹ Higher salaries and socioeconomic status both contribute to education inequities between school districts.²⁹⁰ Although money spent on increasing teacher salaries in general helps teachers, alone it is unlikely to be effective in improving student performance.²⁹¹ On the other hand, a study shows that increasing teacher salaries and incentivizing quality teachers to move to areas where student performance is low does help to improve student performance.²⁹² The study's credibility is increased by the fact it controls for outside factors that greatly influence the performance of children in school, such as

285. *See id.* at 465, 488 (“Results show that better literacy skills . . . among teachers, fewer large classes, and more teachers with five or more years of experience . . . all predict better student test scores . . .”).

286. *See id.* at 465, 490 (suggesting teacher quality matters and should be a major focus in the efforts to upgrade the quality of schooling).

287. *See id.* at 465, 476 (“Teachers with more years of experience produce higher student test scores, lower dropout rates, and higher rates of taking the SAT.”).

288. *See, e.g., id.* at 465, 476, 482 (providing high school teachers with at least nine years’ experience positively impact students compared to non-high school teachers and teachers with less than five years’ experience).

289. *See id.* at 465, 466 (“[E]qualizing salaries will not attract equally qualified teachers” to areas with lower economic status); *see also* Carver-Thomas & Hammond, *supra* note 221, at 14 (explaining students of color and low-income students experience a “revolving door” of less experienced teachers due to high turnover rates).

290. *See* Ferguson, *supra* note 282, at 465, 466 (claiming schools with higher salaries and locations in wealthier neighborhoods provide more incentives and attract qualified teachers to the district).

291. *See id.* at 465, 467 (“For the state as a whole, however, upgrading the quality of schooling would require more than salary differentials that rearranged how teachers distributed themselves across competing school districts. Primarily, it would require measures to assist existing teachers in efforts to upgrade their skills, to retain talented and experienced teachers, and, over the longer term, to attract academically stronger candidates of all races into primary and secondary school teaching.”).

292. *See id.* at 465, 489 (proposing a state policy allowing “districts with lower socioeconomic status” to “pay higher salaries” is necessary to ensure each school districts get their proportionate share of quality teachers).

issues with family and home environment.²⁹³ Because teacher experience and skill level are so critical in improving student performance, money spent on increasing the number and quality of teachers absolutely matters.²⁹⁴ One recommendation for improving Texas public school education is to spend money on improving the quality of teachers, such as teacher training, and to implement a policy incentivizing teachers to teach in lower socioeconomic districts.²⁹⁵

C. *Prioritizing Communities Needing Assistance*

The most recognizable program that incentivizes districts needing assistance is Teach For America.²⁹⁶ Under this model, recruited members enter the program committed to teaching in areas of high need.²⁹⁷ While teaching in schools, the recruits complete assignments and can earn their certification, serving as a significant recruitment incentive.²⁹⁸ Recruited members are required to commit to their assignments for two years, and then if their district makes them an offer to continue, they can take it, choose to leave teaching, or apply for another teaching job in a different district.²⁹⁹ While these programs fill an immediate need and are arguably good programs for young professionals to get teaching experience, they are not ideally suited for students because they form a bond with these teachers who often leave their learning environments.³⁰⁰ Teach For America and other similar short-term programs have the best of intentions, but statistics suggest they contribute

293. *Id.* at 465, 478 (“[C]onditions in home and community environments outside of the school are important detractors of schooling outcomes.”).

294. *See id.* at 465, 475, 489 (“Since more and better teachers can help to raise standardized test scores and higher salaries attract more and better teachers, money matters for raising test scores.”).

295. *Id.* at 465, 489–90.

296. *What We Do*, TEACH FOR AM., <https://www.teachforamerica.org/what-we-do>, [<https://perma.cc/A24Y-QTXG>] (“Teach For America is a diverse network of leaders who confront educational inequity by teaching for at least two years and then working with unwavering commitment from every sector of society to create a nation free from this injustice.”).

297. *See id.* (“Teach For America recruits outstanding and diverse leaders to become TFA “corps members. . . . who commit to teach for two years in a low-income community . . .”).

298. *Teaching in the Corps*, TEACH FOR AM., <https://www.teachforamerica.org/life-in-the-corps/teaching-in-the-corps> [<https://perma.cc/ZR4X-SSA>].

299. TEACH FOR AM., *supra* note 196.

300. *See* Carver-Thomas & Hammond, *supra* note 221, at 14 (recognizing teacher turnover affects low income minority students at a higher rate).

to the problem of teacher turnover and often create instability in schools.³⁰¹ Statistically, inexperienced teachers who are teaching in low-income areas with higher concentrations of people of color will move to a different school or leave the profession at significantly higher rates.³⁰² Nationally, turnover rates are 70% higher for teachers who serve in the largest concentrations of students of color, and this percentage increases for teachers in math and sciences, disability, and English as a second language.³⁰³

To incentivize teachers to stay, school districts should emphasize or create programs that build home-grown teachers by offering competitive salary packages in comparison to other professions in the area.³⁰⁴ Districts who are unable to outright increase teacher salary figures should offer the greatest amount they can and focus on creating a work environment that encourages teachers to stay put.³⁰⁵ Although competitive pay is a factor teachers cite as a reason to leave their schools, teachers are greatly influenced by factors such as supportive school leadership and teacher preparedness, or opportunities for training.³⁰⁶ Schools should remain aware of and advocate for legislative opportunities to level the inequalities in school finance across districts in an effort to curb inter-district teacher attrition because although more money is not the only answer, it would certainly help.³⁰⁷

D. Big Business as an Imbedded Source of Funds for School Finance

The bottom line is Texas needs more revenue to adequately fund its public schools and employees, but the average person does not want to

301. *See id.* at v, 1–4 (discussing the financial hardships and negative impact of programs that allow teachers to move after a short period of time).

302. *Id.* at 14.

303. *Id.* (analyzing the varying impact of teacher turnover on different subjects in schools with a large minority student population).

304. *See id.* (urging school districts to create “grow your own” systems that capitalize on recruiting local community members and underwrites the costs of teacher attrition).

305. *See* Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1617–19, 1665–67 (2015) (commenting on how teachers are more likely to leave a school based on a poor work environment rather than salary).

306. Carver-Thomas & Hammond, *supra* note 221, at 32–34.

307. *See* Black, *supra* note 305, at 1615–16 (drawing the connection of low-salaried teachers to the quality and employment decisions made).

pay higher taxes.³⁰⁸ Many folks have a hard time paying their taxes as they are.³⁰⁹ Low and moderately wealthy people should not have to bear the burden of providing the extra tax revenue that would make their schools adequately funded.³¹⁰ The revenue needed should not come from small businesses struggling to stay in business.³¹¹ Rather, the funds should be procured from large corporations who manipulate the taxing system so that they pay the least amount of taxes possible.³¹²

Amazon is a prime example.³¹³ In 2018, Amazon made 11 billion dollars in profits and paid no income taxes.³¹⁴ In fact, Amazon received 129 million dollars in a tax rebate from the federal government.³¹⁵ How is it a company producing \$11 billion in profits is able to evade paying taxes, yet individuals of modest means struggle to pay their taxes every year?³¹⁶ The answer is simple, Amazon has the means to take advantage of the system and exploit loopholes in the tax code.³¹⁷ In addition, large corporations like Amazon also have the means to employ numerous and

308. See Ross Ramsey, *Texas Lawmakers Struggling to Find a Loveable Tax*, TEX. TRIB. (May 24, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/24/texas-lawmakers-struggle-to-find-lovable-tax/> [<https://perma.cc/YZ8B-S597>] (referring to the history of disapproval for a raise in taxes in the state of Texas).

309. See *id.* (discussing the disdain for taxes and the debate for how to provide more money to schools without raising taxes).

310. See, e.g., DAPHNE A. KENYON, *THE PROP. TAX-SCH. FUNDING DILEMMA 2* (Lincoln Inst. of Land Pol'y, 2007) (“[P]roperty tax relief should be targeted to low-and moderate-income households through a mechanism such as a state-funded property tax circuit breaker program.”).

311. Cf. Andrew Davis, *Why Amazon Paid No 2018 US Federal Income Tax*, CNBC (Apr. 4, 2019, 6:10 AM), <https://www.cnbc.com/2019/04/03/why-amazon-paid-no-federal-income-tax.html> [<https://perma.cc/MC6F-73XD>] (pointing out how a large corporation avoids paying federal income taxes, which inadvertently signifies income-taxes are funded from smaller businesses).

312. See generally *id.* (expressing discontent with what may be a corporate America tax problem that allows big corporations to avoid paying an income tax).

313. *Id.*

314. *Id.* (noting the disparity between the surging profits acquired by a large corporation and the income tax paid out by the same corporation).

315. *Id.* (discussing how large corporations such as Amazon, General Motors, Southwest Airlines retain advantageous tax benefits in contrast to companies that are not a part of Corporate America).

316. *Id.*

317. See Alyssa Pagano & Steve Kovach, *Amazon Will Pay \$0 in Federal Income Taxes this Year—Here’s How the \$793 Billion Company Gets Away With It*, BUSINESS INSIDER (Feb. 14, 2019, 9:07 AM), <https://www.businessinsider.com/amazon-not-paying-taxes-trump-bezos-2018-4> [<https://perma.cc/YJM9-QFZK>] (discussing how Corporate America, specifically Amazon, finds new ways to avoid taxes).

effective lobbyists that ensure changes to the tax code work in their favor.³¹⁸ President Trump's signature tax bill has made it much easier for large corporations to evade taxes.³¹⁹ Prior to the tax cuts, the corporation tax rate was 35% and it has since been cut to 21%.³²⁰ As the United States is trillions of dollars in debt, the loss in taxes from large corporations is sorely missed.³²¹ Investing large amounts of money within their company is one way that Amazon works the tax system to their benefit.³²² Some years, Amazon invested so much of its revenue into itself that it did not make a profit.³²³ Amazon had zero net profit, so the company qualified for certain tax breaks.³²⁴ Since 1997, Amazon has had eight years of losses.³²⁵ These losses can carry forward and be written off as future tax breaks.³²⁶ In 2018, Amazon had 627 million dollars of loss that has cumulated and is now eligible to write off.³²⁷ Because it has invested so much in itself, Amazon has been able to innovate in areas of artificial intelligence, consumer research, and development in general.³²⁸ This information and innovation is then

318. See Davis, *supra* note 311 (broadcasting an interview with a tax lawyer who drafted tax law for Congress who shares the consequences when corporate lobbyists have the ability to influence the tax code).

319. See *id.* (emphasizing how changes to the tax code signed by President Trump allowed corporations to slash their federal tax bills).

320. Jeff Stein & Christopher Ingraham, *Corporations Paid 11.3 Percent Tax Rate Last Year*, in *Steep Drop Under Trump's Law*, WASH. POST (Dec. 16, 2019, 3:11 PM), <https://www.washingtonpost.com/business/2019/12/16/corporations-paid-percent-tax-rate-last-year-steep-drop-under-president-trumps-law/> [<https://perma.cc/5RZ5-8DS2>] (stressing how President Trump's signature tax legislation was the reason the corporate tax rate was lowered from 35 to 21 percent).

321. See Davis, *supra* note 311 (describing the thoughts and concerns economists have on the consequences of the lowered corporate tax Amazon is benefitting from).

322. *Id.* (discussing how Amazon plows large portions of revenue back into itself to cultivate long term growth and tax breaks).

323. *Id.*

324. *Id.* (discussing Amazon's business practices and how such practices legally permit them to pay zero dollars in federal income taxes).

325. *Id.* ("8 years of loses since 1997 Amazon IPO.")

326. *Id.*

327. *Id.*

328. See *id.* (showing how large corporations, such as Amazon, in contrast to smaller businesses use tax breaks to their advantage).

eligible for tax credits.³²⁹ Amazon also receives tax credits for the ordinary investment in things like building plants and buying machinery.³³⁰ The weight of these tax credits were bolstered by President Trump's tax cuts and jobs act.³³¹ The purpose of the tax cuts was to help businesses that needed a break in an attempt to be more successful, not so they could use the cuts as a way to avoid paying their fair share in taxes.³³² In 2018, Amazon had 1.4 billion dollars in tax credits available to use.³³³ Tax credits were imposed with the purpose of incentivizing businesses to invest in other American businesses to benefit the economy.³³⁴

Some economists make the argument that large corporations like Amazon should be able to evade paying taxes because it benefits big business and when big business is doing well financially, the American economy is doing great financially.³³⁵ However, this argument does not hold up well when considering that the economy is not doing as well as it should³³⁶ In other words, the supposed benefits of giving businesses like Amazon large tax breaks do not outweigh the need for the revenue they are not paying.³³⁷ Other scholars and analysts argue business like

329. *See id.* (reiterating how the 2017 tax legislation has only made it easier for Amazon and other large corporations to evade taxes); *see also* Pagano & Kovach, *supra* note 317 (“[Amazon]’s tax payments are not keeping up with its great wealth.”).

330. *See* Davis, *supra* note 311 (identifying other ways Amazon manipulates the system by discussing HQ2, the new Amazon campus that is up for discussion on where it will be built).

331. *See* Pagano & Kovach, *supra* note 317 (questioning President Trump’s attacks on Amazon for not paying taxes after noting his efforts to make it easier for them to reduce their tax bill with the implementation of the new 2017 tax cut and jobs act).

332. *See* Kevin Farnsworth & Gary Fooks, *Corporate Taxation, Corporate Power, and Corporate Harm*, 54 HOW. J. CRIM. JUST. 25, 29 (2015) (evaluating the corporate-friendly type of expenses governments aim to allow companies when they write off investment costs).

333. Davis, *supra* note 311.

334. *See* Farnsworth & Fooks, *supra* note 332, at 27 (discussing how governments are under increased pressure to systematically cut their corporate taxes to induce businesses to invest within their communities).

335. *See id.* at 26 (claiming some governments turn a blind eye to businesses evading taxes when it can benefit their economy).

336. *See id.* at 35 (addressing the connection between lost tax revenue and state governments’ inability to enact effective public policy).

337. *See id.* (analyzing the repercussions of corporate tax breaks on publicly funded social programs).

Amazon are being rewarded for researching and investing in things that it would have already done.³³⁸

Another way Amazon ensures they do not have to pay federal income tax is by paying their employees—especially higher-level employees—partially in stocks.³³⁹ As a result, the company is able to subtract the value of that stock off their taxes owed.³⁴⁰ As the value of their stock increases over time, Amazon is able to write off increasingly large amounts of money because the value of the stock when offered to employees is lower than the value of the stock when written off.³⁴¹ Amazon was able to write off eleven billion dollars in 2018 due in part to stock-based compensation tax benefits.³⁴²

Amazon is only one of many big businesses avoiding the payment of their fair share of taxes.³⁴³ Companies such as General Motors, Goldman Sachs, and Southwest Airlines employ many of the same methods in order to receive net tax benefits.³⁴⁴ Whether the practices of these big businesses are good for the economy or not is up for debate.³⁴⁵ However, the country, especially its education system, needs this taxable revenue from corporations.³⁴⁶ Similar to other states, Texas requires

338. Davis, *supra* note 311 (“Amazon’s low tax bill mainly stemmed from the Republican tax cuts of 2017, . . . tax credits for massive investments in R&D[,] and stock-based employee compensation.”).

339. See Pagano & Kovach, *supra* note 317 (“Amazon avoids paying federal taxes using a variety of tax credits and tax exemptions that are legal and built into the U.S. federal tax code. [A] big [tax credit] for this past year was the ability to deduct stock-based compensation for executives.”).

340. See *id.* (condemning newly enacted U.S. tax legislation for continuing to allow Corporate America to make large tax deductions).

341. Davis, *supra* note 311. See generally Matthew Yglesias, *Amazon’s \$0 Corporate Income Tax Bill Last Year, Explained*, VOX (Feb. 20, 2019), <https://www.vox.com/2019/2/20/18231742/amazon-federal-taxes-zero-corporate-income> [<https://perma.cc/G5B7-W4WV>] (detailing the process by which corporations use stock-based employee compensation to their benefit and the implications on a Corporate America company’s federal taxes).

342. See Davis, *supra* note 311 (considering whether the United States has a corporate income tax problem).

343. *Id.* (confirming Amazon is not the only Corporate America company utilizing and receiving tax credits from the federal government to evade their tax bill).

344. *Id.*

345. See *id.* (illustrating the debilitating consequences of this behavior by big companies).

346. *Id.* (supporting the assertion that some people believe taxable revenue for corporations are needed and highlighting local opposition to Amazon’s untaxed presence in their community). See generally Hilary Russ, *Corporate Tax Breaks Cost U.S. Schools Billions of Lost Revenue: Report*, REUTERS (Dec. 3, 2018), <https://www.reuters.com/article/us-usa-taxes-subsidies-education>

Amazon to charge customers on the site a state sales tax.³⁴⁷ Amazon offers a platform for third-party vendors to sell their wares and does not collect sales tax from many of those sellers.³⁴⁸ Amazon leaves it up to the third-party vendors individually to file and pay taxes in the state they have established a sales tax nexus.³⁴⁹ Unfortunately, third-party vendors largely fail to file and pay state sales taxes on the sales they've made through Amazon.³⁵⁰ The amount of sales taxes that have gone uncollected are sizable and could have been put toward Texas's education fund.³⁵¹ This untapped revenue would help provide a stable source of funds for education finance.³⁵²

E. HB 1525, an Example

The Revenue Sourced from HB 1525 should be directed to Texas's Education Budget. Collecting taxes from third-party vendors in online marketplaces is difficult for a few reasons.³⁵³ Before 2018, state actors

/corporate-tax-breaks-cost-u-s-schools-billions-of-lost-revenue-report-idUSKBN1O30B3 [https://perma.cc/RR3C-UR33] (outlining the negative implications large corporate tax cuts have on the public education system across the United States).

347. See Edgar Walters, *After Supreme Court Ruling, Texas Bills Would Bring in \$850 Million in Online Sales Tax*, TEX. TRIB. (May 3, 2019, 4:00 PM), <https://www.texastribune.org/2019/05/03/texas-bills-would-bring-850-million-online-sales-tax/> [https://perma.cc/VH4P-4PFU] (reporting on the Texas Senate bill passed in 2019, allowing Texas to collect sales tax on internet-based vendors).

348. Pagano & Kovach, *supra* note 317 (“Amazon does a really good job at avoiding federal taxes, and for most of its existence, it avoided charging you state sales tax. That’s because of a Supreme Court case from 1992 that prevented states from collecting sales tax from e-commerce companies. It allowed Amazon and other retailers to sell tons of stuff to you effectively tax-free. By 2017, that all changed, Amazon started charging sales tax in all the states that have it, but it’s not that simple, a lot of third-party sellers sell stuff through Amazon as well, and many of them don’t charge sales tax.”).

349. See *id.* (detailing how e-commerce companies, such as Amazon, avoided the collection sales taxes).

350. See *id.* (“[T]here are tens of millions of dollars every year in state sales tax that go uncollected from third-party sellers”).

351. See Walters, *supra* note 347 (discussing how a proposed House Bill aimed at e-commerce platforms can “require marketplaces such as Etsy, Ebay and Amazon to collect sales tax on third-party, out-of-state sellers and is expected to yield more than half a billion dollars for the state.”).

352. See generally Brian Stork, *What About Our Future? The Chaos that is the Texas School Finance System*, 8 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 307, 345 (2006) (addressing the various ways to overcome school finance uncertainty).

353. See Walters, *supra* note 347 (detailing the intricacies of developing a sales tax bill for the digital marketplace—vendors who sell goods in a state without a physical presence).

were unsure whether taxing online marketplaces that do not have a physical presence was even constitutional.³⁵⁴ Moreover, *South Dakota v. Wayfair Inc.* held taxing these marketplaces is constitutional.³⁵⁵ Obstacles for the Texas state tax systems, however, still remain.³⁵⁶ Though the third-party vendors can be taxed, Texas has a fairly confusing taxing system that does not facilitate an efficient collection of funds.³⁵⁷ Vendors aiming to comply with the taxing system face the challenge of figuring out which sales tax rates to apply.³⁵⁸ Local taxing jurisdictions in Texas have varying tax rates from 6.25% to 8.25%.³⁵⁹ Effective October 1, 2019, HB 2153 was signed into law.³⁶⁰ This law allows the Texas Comptroller to set one tax rate for vendors to use so their tax calculations can be more streamlined.³⁶¹

354. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (holding States may require companies without a physical presence in a state to their equal share of burdening taxes and stating *stare decisis* could not support a “prohibition on the valid exercise of a states’ sovereign power.”); *see also* Walters, *supra* note 347 (referencing the 2018 Supreme Court decision in *South Dakota v. Wayfair*, declaring the practice constitutional and the subsequent state bills proposed in response to the decision).

355. *See Wayfair*, 138 S. Ct. at 2099 (overruling previous precedent that mandated a business have a physical presence in a state before a state government can collect state sales tax); *see also* Walters, *supra* note 347 (reporting the Texas Legislature’s bill proposals to tax online marketplaces after the *South Dakota v. Wayfair* decision).

356. *See* Maria Halkias, *Texas Was Tougher Than Other States in Dealing with Amazon on Sales Taxes*, DALL. MORNING NEWS (Mar. 29, 2018, 5:25 PM), <https://www.dallasnews.com/business/retail/2018/03/29/texas-was-tougher-than-other-states-in-dealing-with-amazon-on-sales-taxes/> [<https://perma.cc/ZD6L-PTX8>] (highlighting estimates that suggest Texas is missing out on \$1 billion in sales tax revenue from online retailers with no physical presence in the state); *see also* Walters, *supra* note 347 (identifying the varying sales tax rates across local jurisdictions as an obstacle and area of reform).

357. *See* Walters, *supra* note 347 (reporting the two bills introduced in the Texas Senate intend to create a new mechanism for collecting sales tax from third-party vendors with no physical presence in the state).

358. *See id.* (commenting how lawmakers intend to simplify local sales tax rates for online vendors).

359. *Id.*

360. *See* George W. Rendziperis, *Tax Update from the Texas 86th Legislative Session* (Jan. 16, 2020), <https://www.natlawreview.com/article/tax-update-texas-86th-legislative-session> [<https://perma.cc/XS2K-6H8Q>] (reporting Texas’s response to the *Wayfair* decision to require “remote sellers” to collect Texas sales taxes if they do “not have a physical presence in Texas” and sell products or services in Texas of \$500,000 or more).

361. *Id.*

Also effective October 1, 2019 is HB 1525.³⁶² This bill requires online marketplaces, such as Amazon, Etsy, and eBay, to collect the third-party sales tax revenue themselves and then direct it back to Texas.³⁶³ Although third-party vendors sometimes had access to marketplace tax collecting services, they were never required to prove to the marketplace forum they were, in fact, paying sales taxes on the goods they sold, and this is in large part why such a large bulk of taxes were never collected.³⁶⁴ The estimated yield from these changes is \$550 million in 2020 and 2021.³⁶⁵ Lawmakers are excited about finding additional revenue from existing taxes because it means that there is a little less pressure on the state's Legislature to come up with needed funding across the board when they get in a bind for cash.³⁶⁶ There have been some proposals to use the revenue to decrease property taxes, but this money should be spent on Texas Public Education.³⁶⁷

I recommend Texas voters and education groups lobby the Legislature and demand legislation that takes the additional revenue from these taxes to be directed to the Foundational School Program.³⁶⁸ This will be a more dependable method of supplying some of the funding to schools on

362. *See id.* (noting HB 1525 benefits the state because it allows the collection of more sales tax from fewer taxpayers, resulting in simpler compliance).

363. *See* Walters, *supra* note 347 (“HB 1525 provides that a “marketplace provider” is required to collect, report, and remit taxes imposed on all sales of taxable items made through the marketplace to the comptroller.”).

364. *See* Pagano & Kovach, *supra* note 317 (highlighting e-commerce platforms, such as Amazon, whose third-party vendors avoid the collection of sales taxes).

365. Walters, *supra* note 347 (describing the benefits HB 1525 could yield by requiring “marketplaces such as Etsy, Ebay and Amazon to collect sales tax on third-party, out-of-state sellers . . .”).

366. *See* Ramsey, *supra* note 308 (noting one proposed bill wanted to wipe out most school property taxes which would require the Legislature to replace \$30 billion of the tax revenues before the next session).

367. *See, e.g.,* Edgar Walters & Darla Cameron, *From Property Taxes to Teacher Pay, Here's How the Texas Legislature Handled Spending Priorities*, TEX. TRIB., <https://apps.texastribune.org/features/2019/house-senate-texas-budgets-2020/> [<https://perma.cc/6WBH-9G8Y>] (updated May 31, 2019, 4:00 PM) (reporting how the Texas Legislature spent \$5 Billion from their state funds to cut property taxes).

368. Glenn Hegar, *Texas School Finance: Doing the Math on the State's Biggest Expenditure*, TEX. COMPTROLLER OF PUB. ACCTS. 7 (Jan. 2019), <https://comptroller.texas.gov/economy/fiscal-notes/2019/jan/> [<https://perma.cc/Y2U4-W4VB>] (explaining how the Texas's Foundational School Program is funded through a series of formulas determining the amount of funding a school district receives).

a regular basis.³⁶⁹ If the Texas Legislature were to use the remote vendor tax as at least one of the methods of sustaining the funding HB 3 promises to deliver on in the future, school districts will be able to rely more on the money HB 3 has promised after 2021.³⁷⁰ Though grateful for the money HB 3 affords them for allotments and school employee pay, school officials are operating on the assumption the money backing these new improvements will not last.³⁷¹ The effect is schools cannot leverage the new money coming into programs like special education or English language readiness because the programs will fall apart the moment the Legislature is unable to continue the funding.³⁷²

Ultimately, this type of uncertainty and instability negatively impacts children and their educational development; using the revenue from HB 1525 can help remedy some of that instability.³⁷³ Pushing for this recommendation may sound like a herculean effort, but it is not asking too much.³⁷⁴ The Legislature could not ignore the flailing Texas school

369. See *Public Education Reforms Lack Financial Stability*, SAN ANTONIO EXPRESS NEWS (June 11, 2019, 4:29 PM), <https://www.mysanantonio.com/opinion/editorials/article/Public-education-reforms-lack-financial-13969323.php> [<https://perma.cc/C3HC-EG2C>] (urging the Texas Legislature to avoid disaster by moving forward economic plans aimed at providing long term sustainability for public education).

370. See Andrea Zelinski, *Texas Teachers Embrace \$11.5B Windfall for Education. But Will It Last?* HOUS. CHRON. (June 13, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-Gov-Abbott-signs-school-funding-overhaul-13968483.php> [<https://perma.cc/7K74-3EKD>] (reporting on the nervous skepticism felt by Texas educators about the long-term funding issues).

371. See Aliyya Swaby, *With Conflicting Budget Estimates, Will Texas Teachers Get the Pay Raises They Anticipated?*, TEX. TRIB. (July 3, 2019, 12:00 AM), <https://www.texastribune.org/2019/07/03/teacher-pay-raises-school-district-budgets/> [<https://perma.cc/4RKK-65SV>] [hereinafter *Conflicting Budget Estimates*] (reporting on the feelings of uncertainty for numerous local Texas school districts' who remain unsure of whether the State will continue funding to increase teacher salaries when the next legislature meets).

372. See *Don't Get Distracted by Recapture: Our Biggest School Finance Challenge Is a Lack of Revenue*, EVERY TEXAN (Nov. 13, 2018), <http://bettertexasblog.org/2018/11/dont-get-distracted-by-recapture-our-biggest-school-finance-challenge-is-a-lack-of-revenue/> [<https://perma.cc/LQ7D-W2FJ>] (stressing the notion Texas public schools are severely underfunded).

373. See, e.g., Tanya Reyna, *A Look at Educational Inequalities in Texas*, TEX. TRIB. (Jan. 29, 2019), <https://www.tribtalk.org/2018/01/29/a-look-at-educational-inequality-in-texas/#:~:text=Over%20the%20past%20decade%2C%20Texas,a%20victim%20of%20educational%20in%20equality> [<https://perma.cc/QBZ4-VKLD>] (stating a 16% decline in per-student state funding occurred for public education between 2008 to 2015 and can result in educational inequality).

374. See Ruth N. López Turley, *Per-pupil Spending for Poor Students Is Too Low in Texas*, RICE: KINDER INST. FOR URB. RSCH. (June 2, 2020), <https://kinder.rice.edu/urbanedge/2020/06/02/education-disparities-spending-poor-students-too-low-texas> [<https://perma.cc/ELX9-F8MY>]

finance system anymore and worked very hard to develop a bill that promised to help remedy some of the inadequacies schools deal with every day.³⁷⁵ The Legislature promised it would make up the difference in revenues lost by lowering the recapture payments and focusing on decreasing property taxes.³⁷⁶ Then, it is not too much to ask the Legislature *how* they will make up the difference on a regular basis so that the funding can be relied on by teachers and other school employees.³⁷⁷ The communities Texas public schools serve cannot afford to have the IOU come to nothing and leave our school finance system even more vulnerable.³⁷⁸

CONCLUSION

We have long said we value education and we want to provide our children with a quality one.³⁷⁹ But that is not quite true.³⁸⁰ In reality, we have only valued education for *some* people.³⁸¹ The problems that

(viewing the correlation between state funding gaps in per-pupil investments and gaps in student educational outcomes and noting the need for educational equity to provide “all students the resources they need to succeed . . .”).

375. See Zelinski, *supra* note 370 (recognizing the Legislature’s commitment to overhaul funding of Texas’s public education and discussing the uncertainty and optimism a long-term source for funding will be implemented before the 2021 legislation session).

376. See, e.g., Renee Yan, *Carroll ISD Projects Lower Property Taxes, Recapture Payments with New School Finance Law*, CMTY. IMPACT NEWSPAPER (June 18, 2019, 2:37 AM), <https://communityimpact.com/dallas-fort-worth/grapevine-colleyville-southlake/city-county/2019/06/17/carroll-isd-projects-lower-property-taxes-recapture-payments-with-new-school-finance-law/> [<https://perma.cc/7QZL-GJVL>] (showing how Carroll ISD expects HB 3 to increase its public education spending while reducing the district’s property tax bills).

377. See Zelinski, *supra* note 370 (expressing hope Texas lawmakers will “ensure their HB 3 investment in education and property tax relief will be sustainable.”).

378. See *Conflicting Budget Estimates*, *supra* note 371 (emphasizing uncertainty on HB 3’s sustainability come the 2021 Legislative Session).

379. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

380. See Albert Kauffman, *The Texas Supreme Court Retreats from Protecting Texas Students*, 19 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 145, 152 (2017) (emphasizing disparities between poor and wealthy communities and the correlation to the quality of public education).

381. See *A Bill for the More General Diffusion of Knowledge, 18 June 1779*, FOUNDERS ONLINE (Sept. 29, 2019), <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079> [<https://perma.cc/2RTN-QTCU>] (stating the initial bill applied to only certain children).

we face with inequitable funding which disfavors students who come from low-income communities stem from our past.³⁸² When Thomas Jefferson proposed “A Bill for the More General Diffusion of Knowledge,” he attempted to bring the general public a step forward towards a system of free education.³⁸³ But he left communities of color behind.³⁸⁴ Whether such an expectation would have been practical at the time is not the issue. The point, here, is we have consistently left communities of color behind in our history and today is no exception.³⁸⁵ The education finance system was never built with both low-income and minority populations in mind.³⁸⁶ These groups have disproportionately felt the effects of inadequate funding primarily through higher teacher turnover rates and instability in enrichment programs, which significantly lessen the positive impact to the very students those programs are designed to help.³⁸⁷ All public schools, specifically low-income schools, are owed an assurance that state-contributed funding will come from both

382. See Luis Figueroa, *Closing Thoughts on HB 3, the Big School Finance Bill*, EVERY TEXAN (May 25, 2019) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (proclaiming the inequitable tax compression creates funding disparities within different communities).

383. See generally FOUNDERS ONLINE, *supra* note 381 (proclaiming “without regard to wealth, birth, or other accidental condition or circumstances,” children should be educated at the common expense of everyone instead of confining such education to a select group of individuals).

384. See *id.* (addressing how the bill specifically states public facilities apply only to the *free children*) (emphasis added).

385. See *San Antonio Indep. Sch. Dist v. Rodriguez*, 411 U.S. 1, 58–59 (1973) (reiterating how the Supreme Court did not recognize education as a fundamental right in a lawsuit brought by members of minority groups who came from districts with lower property values); see also *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989) (referring to the lawsuit brought by the parents of children who lived in poor districts, whose access to opportunities for educational funds was inequitable when compared to those children who lived in rich districts); see also *Brown v. Bd. Of Educ.*, 347 U.S. 483, 494 (1954) (illustrating the principle separate educational facilities based on race was held to be inherently unequal and had a detrimental effect on African American children).

386. See *Edgewood*, 777 S.W.2d at 392 (“School districts derive revenues from local ad valorem property taxes, and the state raises funds from a variety of sources including the sales tax and various severance and excise taxes. There are glaring disparities in the abilities of the various school districts to raise revenues from property taxes because taxable property wealth varies greatly from district to district.”).

387. See Desiree Carver-Thomas & Linda Darling Hammond, *Teacher Turnover: Why It Matters and What We Can Do About It*, LEARNING POL'Y INST. 30–31 (Aug. 2017), https://learningpolicyinstitute.org/sites/default/files/product-files/Teacher_Turnover_REPORT.pdf (showing why there is a high turnover for teachers in areas where there is inadequate funding in low income and minority populations).

a stable and sustainable source of revenue.³⁸⁸ Hiding behind the argument “money does not matter” is unacceptable.³⁸⁹ As a Texan community, we need to change our thinking on how we view taxes. We must understand an investment in education for lower income schools is an investment that will benefit communities as a whole.³⁹⁰ A more specific solution to the instability of HB 3 is to reserve the revenue from HB 1525 for education finance.³⁹¹ School districts should be proactive and consistently advocate for a more equitable system of funding; these districts must not wait to act until the system has become totally outdated for their needs.³⁹² Concurrently, Texas schools need to elevate the profession of teaching by offering the best possible compensation packages and rely more on home-grown teacher models of employment as methods of retaining teachers because we know people who are employed in their hometown are more likely to stay there.³⁹³ The quality of education a child receives sets the stage for the rest of that child’s life, and often the lives of those around them.³⁹⁴ Texas should invest in itself and actively seek to minimize inequities in our education finance system because children do not ask to be born, they do not get to choose how wealthy their families will be nor where they get to live.³⁹⁵ The quality of education children get and the start they have in life should not be determined by chance.³⁹⁶ We have a moral imperative to give every child an equal opportunity to a high-quality education.

388. See Figueroa, *supra* note 382 (admitting HB 3 lacks a sustainable source of funding).

389. *Id.*

390. See *Plyler v. Doe*, 457 U.S. 202, 222–23 (1982) (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”).

391. See Walters, *supra* note 347 (reiterating revenue and uncollected sales tax from HB 1525 are considerable and should be redirected to Texas’s Education Budget).

392. *Id.*

393. See Carver-Thomas & Hammond, *supra* note 221, at vi, 4–5 (providing one of a few key solutions where schools can improve teacher turnover rates).

394. See *Plyler*, 457 U.S. at 221 (recognizing education is the foundation and most important function to our society).

395. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) (suggesting the system is both limited and unbalanced).

396. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (illustrating the need for quality education and the purpose it serves to each community across the nation).