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## Do Minorities Really Benefit? The Untold Truth About Vouchers

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## DO MINORITIES REALLY BENEFIT? THE UNTOLD TRUTH ABOUT VOUCHERS

MARIE A. GALINDO\*

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## I. INTRODUCTION

Texas legislators in Austin are trying to pass a bill which will siphon 527 million dollars from the budgets of public school districts in six of the state’s largest counties.<sup>1</sup> The siphoned funds will not be used by state officials to improve existing public schools, but instead will be redistributed in the form of vouchers to approximately 143,000 students so that they may attend private schools.<sup>2</sup> Supporters of the legislation claim that such a program will improve the quality of education all Texas students receive. Yet, for Edgewood Independent School District Superintendent, Dolores Muñoz, vouchers represent a nightmare.<sup>3</sup> In the first three months of 1999 alone, her school district has lost more than 500

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1. See TEX. S.B. 10, 76th Leg., R.S. (1999) (relating to the creation of a voucher program for certain educationally disadvantaged children attending certain school districts); Melissa Prentice, *Voucher Bill Targets Six Largest Counties*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 1999, at 1A (discussing State Senator Teel Bivins’ newest voucher proposal).

2. See Prentice, *supra* note 1 (estimating that 143,000 students within the six counties would qualify for state funded vouchers and in Bexar county alone, more than 31,000 students would be eligible); Anastasia Cisneros-Lunsford and Jeanne Russell, *School Voucher Bill Applauded*, SAN ANTONIO EXPRESS-NEWS, Mar. 6, 1999, at B1 (reporting that voucher advocates applauded the unveiling of a bill that would use state funds to send poor children to private schools).

3. See Kathy Walt, *Voucher Foes Take Case to Austin, Edgewood Schools Chief Tells Lawmakers Real Cost of Pilot Project*, HOUS. CHRON., Feb. 4, 1999, at 32 (quoting Muñoz’ statement that Edgewood knows first-hand that vouchers hurt public schools and are not the answer).

students to a private voucher program<sup>4</sup> and it is estimated they will lose three million dollars in state funding in the next year.<sup>5</sup> Three million dollars Muñoz knows could have been used to hire new teachers or purchase textbooks and computers.<sup>6</sup> Three million dollars a poor school district like Edgewood will never recoup. After years of leading the fight for equality in educational funding, it is ironic that Edgewood finds itself having to prepare for battle once again.<sup>7</sup> Edgewood understands the importance of equal education more than any other school district in the state; they also know that diverting educational funds away from public schools will not improve the quality of the children's education.<sup>8</sup>

This Comment focuses on the effect a voucher system will have on the ability of school districts, such as Edgewood, to provide those students who remain in public schools with a quality education. The Texas Supreme Court, in *Edgewood v. Kirby*,<sup>9</sup> held that children have the right of equal access to educational funds and equal access to educational opportunities despite where they live.<sup>10</sup> This Comment argues that a voucher system violates Article VII, Section 1 of the Texas Constitution<sup>11</sup> because it fails to provide for a financially efficient system of educational funding and fails to provide for the general diffusion of knowledge. Part II will provide a brief historical outline of how disparities in educational

4. See Kathy Walt & Thaddeus Herrick, *Voucher Programs' Future Debated After Court Ruling*, Hous. CHRON., Nov. 10, 1998, at 1 (discussing the existing voucher program offered by the private organization known as Children's Educational Opportunity Foundation). The Children's Educational Opportunity Foundation is the first organization in the state to target a complete school district, like Edgewood, with private vouchers. See *id.*

5. See Prentice, *supra* note 1 (noting the impact a private voucher program has had on the Edgewood School District).

6. See Walt, *supra* note 3 (reporting that in 1999 Edgewood lost four million dollars in state funds which Dr. Muñoz stated could have gone to teacher training, technology, classroom materials, buildings and other projects).

7. In 1968, Demetrio Rodriguez, the parent of school children enrolled in Edgewood Independent School District, challenged the constitutionality of the Texas system of funding education. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1973).

8. See Terrence Stutz, *Edgewood Parents Protest School Vouchers in Austin, District Describes Limited Program and Its Setbacks*, DALLAS MORNING NEWS, Feb. 4, 1999, at 25A (citing comments made by an Edgewood parent on her opposition to distribution of state vouchers); Walt, *supra* note 3 (reporting on the views held by Edgewood parents on the negative effect vouchers have had on their district).

9. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) [*Edgewood I*] (holding that the Texas system of funding education was unconstitutional because it failed to meet the "efficiency" standard set forth in Article VII, Section 1 of the Texas Constitution).

10. See *id.* (defining an efficient system of funding education as one that provides all students with equal access to education funds).

11. See TEX. CONST. art. VII, § 1 (calling on the Legislature to provide for an efficient system of public free schools).

funding between school districts developed. It discusses the United States Supreme Court's landmark decision in *San Antonio Independent School District v. Rodriguez*,<sup>12</sup> which set the stage for future litigation at the state level on the issue of equity in educational funding. Part II will also examine the Texas Supreme Court's holding in *Edgewood I*,<sup>13</sup> that the State's system of funding primary and secondary education was unconstitutional.<sup>14</sup> It evaluates the Court's interpretation of Article VII, Section 1 of the Texas Constitution<sup>15</sup> and will discuss the affirmative duty it imposes on the state legislature to establish an efficient system of public free schools.<sup>16</sup> Lastly, Part II analyzes the "efficiency" standard set forth by the Texas Supreme Court.

Part III of this Comment will examine the voucher systems proposed by various members of the Texas Legislature.<sup>17</sup> It discusses the criteria needed to qualify for participation in a voucher program, the proposed costs, the issue of funding, and the alleged safeguards imposed in an effort to prevent private institutions from discriminating against potential students. Part IV will analyze arguments for and against vouchers and attempts to weigh the proposed benefits of vouchers against the probable creation of a two-tiered educational system. It will also evaluate legal arguments against the constitutionality of vouchers used in Milwaukee, Wisconsin and Cleveland, Ohio.

Part V will examine what the framers of Article VII, Section 1 intended to provide concerning a constitutional education system. It will also discuss the disparities vouchers are expected to create. It will reevaluate the Texas Supreme Court's interpretation of Article VII, Section 1 and deter-

12. See *Rodriguez*, 411 U.S. at 29, 35 (rejecting plaintiff's argument that wealth in the area of education is a suspect class and education a fundamental right).

13. See *Edgewood I*, 777 S.W.2d at 397 (finding that the State's method of funding primary and secondary education failed to create an efficient system of public free schools).

14. See *id.* at 397 (concluding that the Texas system of funding education was neither financially efficient nor efficient in the diffusion of knowledge).

15. See *id.* at 394, 396 (acknowledging the framer's intent to create an "efficient" system of funding education that would provide for the general diffusion of knowledge).

16. See *id.* at 398 (declaring that the Texas Constitution imposes upon the legislature a duty to support public education).

17. See Tex S.B. 10, 76th Leg., R.S. (1999) (calling for the creation of a voucher program for educationally disadvantaged children); Tex H.B. 920, 74th Leg., R.S. (1995) (calling for the creations of a public education scholarship program); Tex S.B. 92, 74th Leg., R.S. (1995) (permitting state funds in the form of vouchers to be use by qualifying parents as a means of subsidizing the cost of sending their child to a private school); Tex. H.B. 2395; 75th Leg., R.S. (1997) (establishing state scholarships as a way of funding primary and secondary education at a "free school"); Tex. H.B. 1315, 74th Leg., R.S. (1995) (providing vouchers for at-risk students attending public school to use state funds as a means of subsidizing the cost of attendance at a private school).

mine whether a proposed voucher system will pass constitutional muster. Part VI concludes that a voucher system, if implemented, would violate Article VII, Section 1 of the Texas Constitution. It will fail because a voucher system does not meet the efficiency standards set forth by the Texas Supreme Court in *Edgewood I*. This Comment will show that a voucher system not only fails to be financially efficient, but also fails to efficiently provide for the general diffusion of knowledge. Minority children or children living in low property value school districts are thus not provided equal access to educational funds or opportunities.

## II. THE TEXAS LEGISLATURE'S CONSTITUTIONAL DUTY TO PROVIDE FOR AN EFFICIENT SYSTEM OF EDUCATION

### A. *Why Disparities in Access to Educational Funds Among School Districts Developed and the Legal Challenges That Followed*

The importance of education for the survival of a democratic society was recognized early by the forefathers of Texas. We can trace an education provision calling for the establishment of public free schools to the Texas Constitution as early as 1836.<sup>18</sup> The provision would be amended several times before 1876, when the State's current education provision, Article VII, Section 1 was adopted.<sup>19</sup> Article VII, Section 1 of the Texas Constitution reads:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.<sup>20</sup>

With a constitutional provision in place, the legislature was faced with the challenge of creating a system of funding which would support and maintain an efficient system of public free schools. In 1883, the legislature answered the challenge by creating local school districts and empowering them with the authority to levy and collect taxes for purpose of

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18. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (commenting on the history of Article VII, Section 1 as was adopted and amended in Texas Constitutions of 1836, 1845, 1869, and 1876). See generally 2 GEORGE D. BRADEN, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 505-07 (1977) (discussing how Article VII, Section 1 evolved from 1836 through 1876).

19. See BRADEN, *supra* note 18, at 506 (noting that the transition from a private system of education to the present public school system required by Article VII, Section 1 began in the mid 1880's).

20. TEX. CONST. art. VII, § 1.

funding education.<sup>21</sup> Reliance on local taxes, coupled with revenue from the State, formed a dual system of funding with the State and local communities each sharing in the cost of educating Texas school children.<sup>22</sup> The system, however, proved to be flawed. Because school districts' local revenue was dependent upon the value of property, disparities in funding among districts became more pronounced as rural and urban areas developed at different rates.<sup>23</sup> School districts rich in property value could generate more local revenue by taxing at a lower rate than a low-property value school district taxing at a higher rate.<sup>24</sup> The disparities in funding eventually led to disparities in the educational opportunities afforded to school children.<sup>25</sup> Students living in wealthier districts were exposed to a broader educational experience.<sup>26</sup> Wealthier districts could afford to of-

21. See TEX. CONST. art. VII, § 3 (1876, as amended 1883) (granting the State legislature authority to provide for the formation of a school district by general law). Article VII, Section 3 also grants the legislature with the ability to authorize school districts to levy an ad valorem tax for the maintenance of public free schools. See *id.*; see also BRADEN, *supra* note 18, at 512-13 (commenting on changes made to Article VII, Section 3 by amendment in 1926); Henry Cuellar, *Considerations in Drafting a Constitutional School Finance Plan: A Legislator's Prospective* 19 T. MARSHALL L. REV. 83, 87 (1993) (providing the historical chronology of the Texas school finance system).

22. See Bernard Lau, Note, *Edgewood Independent School District v. Kirby: A Political Question?* 43 BAYLOR L. REV. 187, 188 (1991) (explaining that the state and local school districts share the cost of financing school operations); Robert L. Manteuffel, Comment, *The Quest for Efficiency: Public School Funding in Texas*, 43 SW. L.J. 1119, 1124 (1990) (detailing the financial contributions made by the state and local districts in the financing of education).

23. See *Carrollton-Farmers Branch v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 495 (Tex. 1992) [*Edgewood III*] (analyzing the disparities in local revenue between school districts which became apparent as early as 1915); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 396 (Tex. 1989) [*Edgewood I*] (stating that efficiency probably could have been maintained had the state's population grown at the same rate in each district); Cuellar, *supra* note 21, at 87 (indicating that greater disparities in local tax wealth developed despite the state's attempt to equalize aid to rural school districts).

24. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 12-13 (1973) (recognizing the disparities among school districts in the amount of revenue generated by local property taxes); see also *Edgewood I*, 777 S.W.2d at 393 (noting that property wealth significantly impacts the amount of revenue a district is able to generate and spend on educational purposes); Lau, *supra* note 22, at 189 (discussing the ability of wealthier districts to generate revenue at a lower tax rate).

25. See *Edgewood I*, 777 S.W.2d at 393 (reviewing the district court's finding, that property-poor districts although taxing at a higher rate, still had inferior educational programs); Lau, *supra* note 22, at 189 (noting that disparities in property wealth resulted in disparities in the education services provided to students).

26. See *Edgewood I*, 777 S.W.2d at 393 (expanding on how wealthier districts are able to provide more extensive curricula, up-to-date technology, libraries and more experienced teachers); see generally JOSE CARDENAS, TEXAS SCHOOL FINANCE REFORM, AN IDRA PERSPECTIVE 15, 16 (1997) (illustrating the conditions present in the Edgewood Independent School District which lead to the suit challenging the constitutionality of the Texas

fer a better curriculum, enrichment programs, more qualified teachers, modern facilities, and advanced technology.<sup>27</sup>

Parents and educators of children attending schools located in low-property value districts argued that these disparities violated their 14<sup>th</sup> Amendment right to equal protection.<sup>28</sup> In the summer of 1968, Mexican-American parents of school children who were enrolled in the Edgewood Independent School District decided to challenge the constitutionality of Texas' system of funding.<sup>29</sup> They filed suit in federal court arguing that wealth in the area of education constituted a suspect class and that education itself was a fundamental right.<sup>30</sup>

The plaintiffs argued that the State's dual system of funding education discriminated on the basis of wealth.<sup>31</sup> A school district located in an area with a low tax value was destined, by its very nature, to have less access to educational funds than a district whose tax base consisted of property rich in value.<sup>32</sup> Districts which were inadequately funded, therefore, denied school children attending poor districts equal protection. This lack of funding prevented students from enjoying the same educa-

system of funding education); Lau, *supra* note 22, at 189 (examining how the ability to generate greater revenue afforded wealthier districts with the opportunity to provide better facilities, curricula, and better trained teachers).

27. See *Edgewood I*, 777 S.W.2d at 393.

28. Parents argued that education was a fundamental right and the inability of a poor district to offer the same educational opportunities to its students as those found in a wealthier district was a violation of equal protection. See *Rodriguez*, 411 U.S. at 29 (focusing on the plaintiff's assertion that the State's system of funding education interferes with the exercise of a fundamental right).

29. See *Rodriguez*, 411 U.S. at 4-5 (indicating that the suit was an attack on the Texas system of funding education initiated by Mexican-American parents whose children were enrolled in the Edgewood Independent School District); see also Joe Ball, Comment, *Efficient and Suitable Provision For the Texas Public School Finance System: An Impossible Dream?*, 46 SMU L. REV. 763, 766 (1992) (examining why Demetrio Rodriguez filed suit in federal district court in 1968); Manteuffel, *supra* note 22, at 1120 (1990) (discussing the legal challenge initiated by parents of students in the Edgewood district).

30. See *Rodriguez*, 411 U.S. at 11, 28-29 (addressing the holding of the District Court as well as the claims made by the plaintiff's that wealth in the area of education is a suspect class and education a fundamental right).

31. See *id.* at 19 (repeating the plaintiff's contention that the Texas system of school financing discriminates against the poor and indigent).

32. See *id.* at 25 (reviewing the plaintiff's claim that a correlation exist between the wealth of families in a district and the amount of money available to support education expenditures); Ball, *supra* note 29, at 766 (emphasizing the plaintiff's claim that a district's property value affected the amount of funds available for educational expenditures and children attending school in a low-property value district received a poorer quality of education).



tional opportunities afforded children in wealthier districts.<sup>33</sup> The plaintiffs argued that the State could not permit such inequities unless they could provide a compelling interest.<sup>34</sup> The district court found in favor of the plaintiffs, but the victory was short lived as the U.S. Court of Appeals overturned the verdict.<sup>35</sup>

In 1973, the United States Supreme Court issued a decision in favor of the State of Texas.<sup>36</sup> In the landmark holding, the Court rejected the plaintiffs' arguments that wealth was a suspect class and education a fundamental right.<sup>37</sup> The Supreme Court held that education, although vital to society, is not a right implied or expressly granted in the U.S. Constitution. The State, therefore, need only show a rational relationship between the existing funding system and a legitimate state interest.<sup>38</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>39</sup> the Court found that the State of Texas established a legitimate purpose for upholding the existing system; that the dual system of funding provided local governments with a measure of participation and control over the education of their children.<sup>40</sup>

### B. *The Significance of the U.S. Supreme Court's Ruling in Rodriguez*

The Supreme Court's decision in *Rodriguez* proved to be significant in the fight for equality in educational funding because it limited the judicial

33. See *Rodriguez*, 411 U.S. at 19 (analyzing the District Court's support for the plaintiff's position that the Texas system of funding education discriminates on the basis of wealth and in turn results in disparities in the quality of education received by poor children as compared to rich children).

34. See *id.* at 17, 29 (acknowledging that it must determine whether or not wealth in the area of education constitutes a suspect class thus requiring the application of strict scrutiny).

35. See *id.* at 17-19 (discussing the District Court's ruling that wealth in the area of education constitutes a suspect class).

36. See *id.* at 6 (stating that the Court reversed the decision reached by the District Court).

37. See *id.* at 28-29, 37 (finding that the Texas system of funding education does not discriminate against a suspect class nor does it infringe upon a fundamental right).

38. See *id.* at 35 (emphasizing that education is not among the right explicitly protected under the U.S. Constitution, nor is it one that they find a basis to extend implied protection); Ball, *supra* note 29, at 766 (interpreting the Supreme Court's finding that education is not a fundamental right).

39. See *Rodriguez*, 411 U.S. at 59 (refusing to invalidate the State's method of funding education).

40. See *id.* at 48-49 (reiterating the fact that Texas must only show a reasonable basis for imposing a system which results in disparities in per pupil expenditure and based upon the evidence their burden was met); Manteuffel, *supra* note 22, at 1120 (reviewing the Supreme Court's holding that the state of Texas had established that its system of funding education furthered a legitimate state purpose).

arena in which a state system of funding could be challenged.<sup>41</sup> The *Rodriguez* Court made it clear that individual states should resolve education issues.<sup>42</sup> Disparities caused by the reliance on locally raised revenue would fail if brought before a federal court, because relief is not available under the Equal Protection Clause of the U.S. Constitution.<sup>43</sup> The Supreme Court, in essence, held that federal challenges to a state's system of funding education will only be successful if a state is unable to establish a rational basis for the system's imposition.<sup>44</sup> Nevertheless, state funding practices can still be successfully challenged based on state law principles. Particularly since a judgment issued by the highest court of a state regarding state law is in effect controlling, and not easily subject to review by the United States Supreme Court.<sup>45</sup>

### C. *The Battle for Equality in Educational Funding Shifts to the States*

Discouraged but not dissuaded by the U.S. Supreme Court's decision in *Rodriguez*, Edgewood school superintendent, Dr. Jose Cardenas viewed the Court's ruling as a challenge.<sup>46</sup> Firmly believing that the State Constitution provided broader protection for educational rights, a class action suit, *Edgewood v. Kirby*, was filed in the 250<sup>th</sup> State District Court in Texas.<sup>47</sup> The lawsuit alleged that reliance on local tax revenue to fund education created disparities between districts rich in property value and

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41. See Ball, *supra* note 29, at 766 (stating that the Supreme Court's decision in *Rodriguez* limited future litigation to state courts); Lau, *supra* note 22, at 194 (interpreting the Supreme Court's decision in *Rodriguez* to indicate that challenges to a state's system of funding education must be based on state grounds rather than 14th Amendment equal protection claims); Manteuffel, *supra* note 22 at 1121 (noting that the Supreme Court's decision in *Rodriguez* left poor school districts with no alternative but to initiate challenges in state courts).

42. See *Rodriguez*, 411 U.S. at 40-44 (explaining that issues of education and funding are too complex for the Court to address and are best left for each state to resolve).

43. See *id.* at 40-41 (stating that Equal Protection precedence requires that the Court refrain from intruding in an area traditionally deferred to state legislatures and in such cases, a state need only show a rational relationship to a state purpose).

44. See *id.* (echoing the reluctance of past Court's from interfering in issues involving questions of federalism and the ability of states to govern free from strict judicial scrutiny).

45. See *id.* at 58-59 (acknowledging that while plaintiff's concerns warrant attention, the resolution must come from the legislature and its constituency).

46. See CARDENAS, *supra* note 26, at 218 (discussing the lead role IDRA took in initiating Edgewood litigation). IDRA, together with attorneys from the Mexican American Legal Defense and Educational Fund, crafted the arguments used to challenge the Texas system of funding. See *id.*

47. See *id.* at 91-150 (discussing the factors leading to IDRA and the school district's initiation of *Edgewood v. Kirby*).

districts with low property value.<sup>48</sup> Disparities in funding, in turn, impacted the educational opportunities afforded students living in poor districts, and therefore deprived them of their right to equal protection under the Constitution.<sup>49</sup> The District Court agreed with the plaintiffs and concluded that the disparities created by the State's system of funding violated the plaintiffs' right to equal protection under the State Constitution, and failed to ensure that all school districts had equal ability to obtain funds.<sup>50</sup> The District Court agreed with the plaintiffs and held that education under the Texas Constitution was a fundamental right and wealth in the context of education funding constituted a suspect class.<sup>51</sup> The State appealed and the Court of Appeals reversed the lower court's findings.<sup>52</sup> In 1989, the Texas Supreme Court granted certiorari and reversed the Court of Appeals.<sup>53</sup>

The Texas Supreme Court affirmed the District Court's finding that the State's method of funding public education violated Article VII, Section 1 of the Texas Constitution,<sup>54</sup> but declined to rule on the issue of Equal Protection.<sup>55</sup> The court interpreted Article VII, Section 1 as imposing an affirmative duty on the legislature to establish an efficient system of public free schools essential for the general diffusion of knowledge.<sup>56</sup> In

48. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1992) [*Edgewood I*] (recognizing the glaring disparities in the abilities of various districts to generate revenue from property taxes).

49. See *id.* at 392, 393 (analyzing the effect disparities in funding have on the quality of education a student receives).

50. See Albert H. Kauffman & Carmen Maria Rumbaut, *Applying Edgewood v. Kirby to Analysis of Fundamental Rights Under the Texas Constitution*, 22 ST. MARY'S L.J. 69, 73 (1990) (citing District Judge Harley Clark's finding of fact that the Texas school finance system fails to insure that each school district has equal opportunity to educational funds).

51. See *Edgewood I*, 777 S.W.2d at 393 (referring to the trial court's conclusion that the school financing system violates both the equal protection clause of the Texas Constitution and the efficiency clause of the education amendment).

52. See *Edgewood Indep. Sch. Dist. v. Kirby*, 761 S.W.2d 859 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

53. See *Edgewood I*, 777 S.W.2d at 397 (declaring that the Texas Supreme Court reversed the judgement of the court of appeals and with modification, affirmed the decision of the trial court).

54. See TEX. CONST. art. VII, § 1 (mandating the creation of an efficient system of public free schools).

55. See *Edgewood I*, 777 S.W.2d at 391, 392, 398 (proclaiming that upon finding the state's finance system violated the efficiency clause there was no need to consider petitioners' other constitutional claims).

56. See *id.* at 394-98 (interpreting Article VII, Section 1 as mandating the establishment of an "efficient" system of education); see also Ball, *supra* note 29, at 768 (articulating the fact that Article VII, Section 1 mandates an efficient system of financing); Kauffman & Rumbaut, *supra* note 50, at 73 (discussing the Texas Supreme Court's interpretation of Article VII, Section 1).

reaching its decision, the court examined the intent of the article's creators and determined that "efficient" was not intended to mean cheap or inexpensive.<sup>57</sup> The court found that the framers intended the legislature to establish a system of public free schools that would provide all children a common education.<sup>58</sup> The term "efficient" was intended by the framers to mean productive and non-wasteful.<sup>59</sup> An efficient system would be one that was financially efficient as well as efficient in the general diffusion of knowledge.<sup>60</sup> The court went on to define "financially efficient" as a system that produced results using all available resources with little waste.<sup>61</sup> A financially efficient system must also afford equal access to educational funds for all children.<sup>62</sup> In other words, a school district would have access to funds in relation to its tax effort.<sup>63</sup> An efficient system would not permit a school district located in a low-property value area to tax high but spend low.<sup>64</sup> The Texas Supreme Court also said that an efficient system would provide for the 'general diffusion of knowledge.'<sup>65</sup> School children in low-property value school districts should have equal access to a similar educational experience as those children in property rich districts.<sup>66</sup> Applying these standards to the existing disparities, the Texas Supreme Court found that the State's system of financing primary and secondary education was both financially inefficient and inefficient in providing for the general diffusion of knowledge.<sup>67</sup> The court stated that "efficiency" was not equivalent to a per capita distribution of funds, but instead required the legislature to provide all children, regardless of

57. See *Edgewood I*, 777 S.W.2d at 394 (asserting that the Texas Constitution derives from the people of Texas and when construing the language of its provisions, the intent of its framers must be considered).

58. See *id.* at 395 (referring to statements made by the chair of the education committee at the 1875 Constitutional convention asserting that a common education should be placed within the reach of every child in the State).

59. See *id.* at 395-96 (defining "efficient" in terms of finance and opportunity).

60. See *id.* at 396 (concluding that to the constitutional framers "efficiency" meant a system that would provide for the "general diffusion of knowledge").

61. See *id.* at 395 (construing "efficient" to mean effective or productive with little waste).

62. See *id.* at 397 (defining an efficient system as one that affords substantially equal access to educational funds).

63. See *Edgewood I*, 777 S.W.2d at 397 (defining what the Court means when referring to financially efficient).

64. See *id.* at 396 (arguing that an efficient school system would not allow for the "concentration of resources in property rich school districts").

65. See *id.* at 397 (concluding that the framer's clearly desired a system that would provide for a "general diffusion of knowledge").

66. See *id.* (recognizing that the education code requires that each student has "access to programs and services that are substantially equal to those available" in other districts).

67. See *id.* at 397 (holding that the state's school financing system is a violation of Article VII, Section 1 of the Texas Constitution).

where they live, with an equal access to funds and an equal access to educational experiences.<sup>68</sup> The court mandated the legislature to take immediate action to produce a constitutional method of financing public education.<sup>69</sup>

In 1991, and again in 1992, the Texas Supreme Court would declare the State's attempt at establishing an "efficient" method of financing education unconstitutional.<sup>70</sup> It was not until 1995 that the court finally approved the State's third attempt at a constitutional system of financing education.<sup>71</sup> In *Edgewood v. Meno*,<sup>72</sup> often referred to as "*Edgewood IV*," the Texas Supreme Court held that a constitutional system did not have to provide for equality in funding at all levels.<sup>73</sup> The court held that an efficient system is one that provides equal access to funds sufficient for the general diffusion of knowledge.<sup>74</sup> A school district's ability to generate local revenue to supplement their programs is not enough to render a system inefficient; even if the funds are not subject to recapture or are unmatched by state dollars.<sup>75</sup> Lastly, the court refused the request of another group of appellants who as plaintiff-intervenors alleged a constitu-

68. *See id.* at 397 (emphasizing that while efficiency is not equated with per capita distribution, it also does not allow resources to be concentrated in small pockets of districts rich in property value).

69. *See Edgewood I*, 777 S.W.2d at 399 (deciding that a remedy was long overdue, and the legislature was instructed to take immediate action).

70. *See Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 500 (Tex. 1991) [*Edgewood II*] (holding that Senate Bill 1, the State's first attempt to produce a constitutional system of funding, was unsuccessful). The Court found Senate Bill 1 was inefficient because although it guaranteed per student revenue, on whole, it failed to remedy the inequity of relying on local property taxes for a major portion of educational funds. *See id.*; *see also Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 524 (Tex. 1992) [*Edgewood III*] (holding that the Legislature is prohibited by Article VII, Section 3 of the Texas Constitution from mandating the amount of local revenue a school district will contribute to the funding of education). Senate Bill 351 called for the establishment of County Education Districts whose sole responsibility was to levy taxes, collect the revenue and distribute it equally among the school districts within its boundaries. *See id.* at 510.

71. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 730-31 (Tex. 1994) [*Edgewood IV*] (holding that the state had taken appropriate steps to insure that all students would have equal access to funds sufficient to provide for the general diffusion of knowledge).

72. 917 S.W.2d 717 (Tex. 1994) [*Edgewood IV*].

73. Revenue generated to supplement or enrich a district's existing program is not subject to equalization. *See id.* at 729. All that is required of the state is to insure that all districts have access to the funds needed to meet state accreditation. *See id.* at 729.

74. *See id.* at 729 (focusing on the qualitative component of Article VII, Section 1, which is the requirement for a system which provides for the general diffusion of knowledge).

75. *See id.* at 732 (commenting on why it ruled to uphold Senate Bill 7).

tional right to choose the school their child would attend.<sup>76</sup> The plaintiffs sought reimbursement from the state for the cost of private school tuition.<sup>77</sup> They argued that the state had failed in its constitutional duty to create an efficient system of public free schools and asked the court to provide judicial remedy in the form of a voucher.<sup>78</sup> The court rejected the plaintiffs' argument and instead found that mandating a voucher program was outside of its authority.<sup>79</sup> The court stated that its role was to determine if the State had met its constitutional duty, and not to tell the legislature how to do its job.<sup>80</sup>

### III. HOW VOUCHERS ARE IMPLEMENTED WILL DETERMINE WHETHER THEY ARE A BETRAYAL OF TRUST OR THE DOOR TO GREATER EDUCATIONAL OPPORTUNITIES FOR STUDENTS OF LOW-INCOME

Jennifer Ramirez can hear the anxiety in her children's voices as they prepare for school. Although she received a GED, it is her dream that her children will graduate from high school and continue on to college. As they head for school, however, she worries about the quality of education they receive from the public school they attend. As a single mother, Ms. Ramirez struggles to make ends meet. The school district responsible for educating her children is one of the poorest in the state. Unlike the schools located in wealthier areas of the city, the schools her children attend lack such common technology as computers. In addition, because of the inability of the district to pay higher salaries, many teachers instructing her children are young and lack the experience needed to provide a solid foundation. The curriculum, although vastly improved, still remains inferior to wealthier districts, and the children continue to fail state exams in larger proportion. Although Ms. Ramirez's income qualified her to participate in a private voucher program, she still found that she could not afford to make the change. While the voucher subsidized a private school's tuition, Ms. Ramirez was responsible for the remaining

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76. *See id.* at 747 (rejecting a request made by plaintiff-intervenors that the Court require reimbursement for the cost of sending their children to a private school).

77. *See id.* at 747 (considering the assertion that the right to select the school a child attends is a constitutional right).

78. *See Edgewood IV*, 917 S.W.2d at 747 (examining the request made by plaintiff-intervenors for immediate remedy by ordering school districts to contract with private schools).

79. *See id.* at 747-48 (reiterating that the Court's authority only extended to the ability to determine if the legislature's constitutional duty had been met).

80. *See id.* at 748 (stating that it is not the Court's responsibility to develop an efficient system of public schools, that duty belongs to the legislature).

cost such as uniforms, books, computer fees, and other miscellaneous expenses. The cost of transportation also played a factor because all of the private schools in her district were filled to capacity and the only institution which would accept her children was at least forty minutes away from her home.

As the result of circumstance beyond her control, Ms. Ramirez was forced to keep her children in a public school district that now had even fewer funds available to spend on education. In her eyes, vouchers do not improve the ability of her school district to offer a higher quality of education to her children.<sup>81</sup>

Parents such as those depicted by Ms. Ramirez are not alone in their concerns about the quality of education offered by Texas public schools. In an effort to address the disparities present in the existing system, members of the Texas Legislature are considering the implementation of a statewide pilot voucher program.<sup>82</sup> Similar to the vouchers currently distributed to low-income students by a private organization,<sup>83</sup> the state vouchers would permit low-income families or students attending low performing schools to use state funds as means to subsidize the cost of attending private school.<sup>84</sup> This section will briefly discuss the historical

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81. This hypothetical is a compilation of stories told by parents whose children remain in public schools that lose state money as a result of vouchers. Although the characters are fictional, the concerns are real problems that must be addressed by the legislature.

82. See R.A. Dyer, *Voucher Measure Submitted Bill Targets Needy Students Who Fail Test*, FORT WORTH STAR-TELEGRAM, Jan. 19, 1999, at 1 (discussing the most recent legislative proposal for a pilot voucher program); Jimmy Mansour, *School Vouchers with Legislature Considering a Pilot Program, Debate Heats Up*, DALLAS MORNING NEWS, Jan. 17, 1999, at 1J (noting that the 76th State Legislature will consider the implementation of a pilot voucher program).

83. Currently low-income children attending school within the Edgewood district qualify for a voucher intended to subsidize the cost of tuition at a private school. See Allen Parker, *CEO Program Makes Everyone a Winner*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 1998 at 5B (highlighting the criteria needed to qualify for vouchers through CEO program). The voucher system is a program offered by the non-profit organization Children's Educational Opportunity Foundation (CEO). See *id.* The foundation has stated that the program will provide \$50 million dollars over a ten year period to children whose family income falls below the poverty level. See generally, Kelley Shannon, *School Vouchers for Children in Poor District Stir Uproar*, BUFFALO NEWS, Apr. 23, 1998, at A1 (noting that CEO has said it will provide five million dollars annually for ten years for student in Edgewood ISD to attend a school of their choice); *\$50 Million for School Vouchers Going to Low-Income Texas District Nearly All of 14,000 Students Eligible for Foundation's Largess*, CHI. TRIB., Apr. 23, 1998, available in 1998 WL 2848836 (detailing CEO voucher program).

84. See Tex. H.B. 709, 76th Leg., R.S. (1999) (calling for the implementation of a public scholarship program for certain children); Tex. S.B. 1206, 75th Leg., R.S. (1997) (calling for a scholarship pilot program for children from low-performing public schools); Tex. H.B. 2395, 75th Leg., R.S. (1997) (calling for a scholarship pilot program accepting economically

development of vouchers and will examine several legislative proposals for a pilot program offered by members of the Texas Legislature.

### A. *The History of Vouchers*

While the implementation of a voucher system is relatively new to the education scene, we can trace the concept itself back more than two hundred years to Thomas Paine.<sup>85</sup> The individual, however, who many consider the father of the modern concept of vouchers, is economist Milton Friedman.<sup>86</sup> Friedman believed education should be viewed as a product, and parents as consumers. Public school districts along with private institutions would make up the marketplace.<sup>87</sup> Permitting parents the right to choose the school their child attends would create the economic theory of supply and demand.<sup>88</sup> Schools offering the highest quality of education would be the most in demand, and other schools would be forced to im-

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disadvantaged children); Tex. S.B. 92, 74th Leg., R.S. (1995) (enacting an education voucher program); Tex. H.B. 1315, 74th Leg., R.S. (1995) (providing vouchers for at-risk students attending public school or expelled from a public school); HOUSE RESEARCH ORGANIZATION, CHAPTER SCHOOLS, VOUCHERS AND OTHER SCHOOL CHOICE OPTIONS 7 [hereinafter HOUSE RESEARCH ORGANIZATION] (discussing H.B. 920, 73d Leg. R.S. (1993) which established a pilot voucher program in Texas).

85. See Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Problems Be Overcome?*, 43 DEPAUL L. REV. 1, 3 (1993) (describing Thomas Paine's theory of a deregulated education system); Eric Nasstrom, Casenote, *School Vouchers in Minnesota: Confronting the Walls of Separating Church and State*, 22 WM. MITCHELL L. REV. 1065, 1070 (1996) (stating Paine's vision for a voucher program).

86. See Cheryl D. Block, *Truth and Probability- Ironies in the Evolution of Social Choice Theory*, 76 WASH. U.L.Q. 975, 1027 (1998) (recognizing that the concept of vouchers can be attributed to Milton Friedman); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 427-28 (1995) (explaining the role vouchers play in the marketplace theory as proposed by economist Milton Friedman).

87. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85-108 (1962) (explaining Friedman's market-place theory); Jack Alan Kramer, Note, *Vouching for Federal Educational Choice: If You Pay Them, They Will Come*, 29 VAL. U.L. REV. 1005, 1016-17 (1995) (outlining Friedman's marketplace theory as it applies to education).

88. See Jim Hilton, Note, *Local Autonomy, Educational Equity, and Choice: A Criticism of a Proposal to Reform America's Educational System*, 72 B.U. L. REV. 973, 974 (1992) (examining Friedman's market place theory of demand and competition); See Kramer, *supra* note 87, at 1016 (explaining that choice and competition forces schools to become more receptive to the demands of parents).



prove in order to stay competitive.<sup>89</sup> If a school proved unworthy, and could not compete, it would then be forced to close.<sup>90</sup>

Friedman envisioned a voucher system funded by the state.<sup>91</sup> Parents would receive funds equal to the amount a state public school would have spent to educate their child.<sup>92</sup> Parents could then take the voucher and use it to send their child to the school of their choice.<sup>93</sup> Under Friedman's plan, however, private and public schools would not be limited in the amount they could charge to educate a child.<sup>94</sup> If the amount of the voucher were not enough to cover all costs at a private school, the state would require parents to supplement the remaining expense.<sup>95</sup> The ultimate belief was that competition among schools would improve the quality of the education provided.<sup>96</sup>

### B. *Vouchers in Today's Society*

Today, Friedman's marketplace theory as it applies to education remains alive and well. States across the nation are considering the implementation of a voucher system as a means to improve public education through competition.<sup>97</sup> In Texas, the use of a voucher system was first

89. See Dominick DiRocco, Note, *Making the Grade: School Choice Comes to New Jersey*, 22 SETON HALL LEGIS. J. 281, 285-86 (1997) (detailing Friedman's theory of less government control and more freedom of competition); Amity Shlaes, *The Next Big Free-Market Thing*, WALL ST. J., July 9, 1998, at A18 (interviewing Milton Friedman on the issue of vouchers and consumer needs).

90. See Kramer, *supra* note 87, at 1017 (noting that a school unable to attract students would cease to exist).

91. See *id.*

92. See *id.* (detailing how Friedman envisioned a voucher system to function).

93. See Hilton, *supra* note 88, at 975 (explaining that vouchers under Friedman would not cover the complete cost of tuition at a private school); George A. Clowes, *The Only Solution Is Competition* (visited Feb. 2, 1999) <<http://www.heartland.org/education/dec98/friedman.html>> (indicating that vouchers should not cover the complete cost of private school because as a result, parents would not have a vested interest in their child's education).

94. See Hilton, *supra* note 88, at 975 (noting that parents wishing to spend more than the cost allotted to their voucher would be required to supplement the cost).

95. See Kramer, *supra* note 87, at 1017 (noting that parents wishing to spend more than their voucher could add on funds).

96. See DiRocco, *supra* note 89, at 287 (inferring that choice would foster competition and ultimately improve the quality of public school education).

97. After voucher referendums failed in California, Colorado, Washington and Oregon, proponents of vouchers view Texas, Florida and Pennsylvania as the best hope for next implementation of a voucher program, currently only Milwaukee and Cleveland have such programs. See Kim Cobb, *Texas a Big Voucher Battleground/Tax Support for Private Schools Is Backers' Goal*, HOUS. CHRON., Jan. 31, 1999, at 1 (providing a brief historical prospective on the current voucher movement); Loie Fecteau, *Gov. Lobbies Board on Vouchers*, ALBUQUERQUE J., Jan. 22, 1999, at 1 (expressing Governor Gary Johnson's sup-

proposed by the State legislature in 1993 to equalize educational funding.<sup>98</sup> The purpose of the legislation then was to afford low-income families the ability to choose the type of education their child would receive.<sup>99</sup> The legislation referred to as H.B. 920 called for “state scholarships” to be awarded to low-income students at sixty targeted school districts.<sup>100</sup> Families could use the “scholarships” at any private institution willing to accept state funds, and the amount awarded for each child would be equivalent to 80% of the amount spent to educate the student in public school, with the remaining 20% staying in the school district the child was leaving.<sup>101</sup> The private school accepting the student would be free from state regulations but would be required to administer the same standardized testing used in public schools.<sup>102</sup> However, H.B. 920 never made it out of committee and was left pending in the House Public Education Committee after a public hearing.<sup>103</sup>

### C. *Proposals for a Pilot Voucher Program Offered by Members of the State Legislature*

Although H.B. 920 failed to garner the support needed to push it through committee, the idea of a voucher system has remained strong in the minds of state legislators. Since 1993, several bills have been introduced proposing the creation of such a system.<sup>104</sup> Regardless of the sponsor, however, common attributes for the structure of a voucher program can be found in all of the proposed legislation.

port for school voucher); Bobby Ross, Jr., *School Vouchers Have Fans, Foes in City Parents*, DAILY OKLAHOMAN, Jan. 26, 1999, at 1 (noting Governor Frank Keating’s voucher proposal); Frank Reeves & Peter J. Shelly, *Ridge Sees Little Stadium Support Some House Republicans Do Back School Vouchers*, PITTSBURGH POST-GAZETTE, Jan. 17, 1999 at B1 (stating the position of Governor Ridge on the issue of school vouchers).

98. See HOUSE RESEARCH ORGANIZATION, *supra* note 84, at 7 (providing historical analysis on voucher movement in Texas).

99. See *id.* (stating that the proposed legislation would only be used by low-income students).

100. See *id.*

101. See *id.*

102. See *id.* (indicating that as a whole, private schools would be free from state regulation).

103. See *id.* (noting that a bill similar to H.B. 920 also died in the state Senate).

104. See Tex. H.B. 709, 76th Leg., R.S. (1999) (creating a public education scholarship program); Tex. S.B. 1206, 75th Leg., R.S. (1997) (proposing a public education scholarship program); Tex. H.B. 2395, 75th Leg., R.S. (1997) (establishing a public education scholarship pilot program); Tex. S.B. 92, 74th Leg., R.S. (1995) (proposing the establishment of a voucher program); Tex. H.B. 1315, 74th Leg., R.S. (1995) (regarding the implementation of a voucher program); HOUSE RESEARCH ORGANIZATION, *supra* note 84, at 7 (discussing Tex. H.B. 301, 74th Leg., R.S. (1995) and relating the creation of an education scholarship program).

## 1. Key Terminology

Supporters of a voucher system argue that the framers of Article VII, Section 1 intended for an efficient system of “public free schools” to be inclusive of private institutions.<sup>105</sup> In light of that position, the first characteristic found in a majority of the proposed bills is the use of the term “free school” rather than private school.<sup>106</sup> Use of the term “free school” is an attempt by sponsors to comply with the constitutional language found in Article VII, Section 1.<sup>107</sup> The historical analysis of the education provision detailed in Section V of this Comment will show that, until 1869, the citizens of Texas believed the term “free school” manifested the state’s obligation to pay for the education of orphaned and indigent children at a private school.<sup>108</sup>

## 2. Limited Participation and Distribution

The second characteristic shared by the proposed voucher schemes is that participation in a state program will be limited.<sup>109</sup> The reason for such a limitation is an attempt to show that vouchers will be instruments used to help those students most in need.<sup>110</sup> It is hoped that positive

105. See Allan E. Parker, Jr., *Public Free Schools: A Constitutional Right to Educational Choice in Texas*, 45 Sw. L.J. 825, 830-31 (1991)[hereinafter Parker, *Public Free Schools*] (explaining that the constitutional history of TEX. CONST. art. VII, Section 1 reveals that choice whether public or private school is a state Constitutional right).

106. In three of the proposed legislative bills, “free school” is defined as any non-governmental institution providing for the primary and secondary education of students which accepts state funds in lieu of tuition for some or all of its students. See Tex. S.B. 1206; Tex. H.B. 2395; Tex. H.B. 920.

107. See TEX. CONST. art. VII, § 1 (requiring the legislature to provide for an efficient system of public free schools).

108. See TEX. CONST. art. VII § 1 interp. commentary (Vernon 1993) (commenting on the use of “free school” by those who supported the use of state funds in the area of education for the sole purpose of educating the poor and orphaned); BRADEN, *supra* note 18, at 505-06 (analyzing the historical context of Article VII, Section 1).

109. Four of the proposed vouchers schemes, including H.B. 709, recently introduced by State Representative Krusee, require students to qualify for participation. See Tex. H.B. 709 (stating that children are eligible to participate if they are educationally disadvantaged, are eligible to attend school under TEX. EDUC. CODE ANN. Section 25.001 (Vernon 1996), were enrolled in public school during the preceding school year, and failed to perform satisfactorily on the most recent state academic assessment test); Tex. S.B. 1206 (limiting participation to students assigned to attend a public school at which less than 50% of the students passed the state’s academic assessment test; the child’s parents attempted to enroll the child in another school district and the chosen school district rejected the child); Tex. H.B. 2395 (determining eligibility of student by the child’s family income); Tex. S.B. 92 (making participation dependent upon a family’s income); Tex. H.B. 1315 (basing participation on student’s prior disciplinary performance in public school).

110. See Telephone Interview with Byron Schlomach, Legislative Assistant, State Representative Grusendorf (Sept. 25, 1998) (on file with *The Scholar: St. Mary's Law*

benefits can be achieved, making support for a statewide program more easily attainable.<sup>111</sup> Legislators may also wish to restrict participation in the belief that a court might be more willing to uphold a restrictive pilot program even though some disparities are created.<sup>112</sup>

Limiting the distribution of vouchers among school districts has also been discussed as a means of restricting participation.<sup>113</sup> Although how a school district will be selected to participate is still uncertain, legislators are considering districts in the major urban cities.<sup>114</sup> This factor is important because most urban school districts contain a large population of minority students.<sup>115</sup>

### 3. Funding

The next commonality among voucher schemes appears in the area of funding. Legislators seeking to implement a pilot program intend to ob-

*Review on Minority Issues*) (responding to the question, of why the majority of the proposed voucher legislation limit participation based on income or academic and disciplinary performance).

111. *See id.*

112. *See* *Gatton v. Goff*, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499, at \*17 (Ohio Com. Pl. July 31, 1996), *rev'd*, Nos. 96APE08-92, 96APE08-991, 1997 WL 217583 (Ohio App. 10 Dist.) (holding that the Cleveland voucher system did not violate the uniformity clause found in the Ohio Constitution, because the program's status as a pilot program was enough to negate the fact that not all students would be afforded the same educational opportunities).

113. In such a scheme, the distribution of vouchers would be limited to only a few school districts. *See* Tex. H.B. 920, 74th Leg., R.S. (1995) (limiting distribution to 60 school districts); Kim Horner, *Grusendorf Plans New Bill for Tax-Supported Vouchers*, DALLAS MORNING NEWS, Feb. 18, 1999, at 1A (discussing Representative Grusendorf's most recent voucher proposal which would limit distribution to children attending low-performing schools located in Dallas, Houston and San Antonio); Interview with Jose Cortez, Director of Policy Research, Intercultural Development Research Association (Nov. 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (commenting on recent discussions he had with various members of the State Legislature during which it was expressed that distribution of vouchers might be limited to only a few school districts).

114. *See* Interview with Jose Cortez, *supra* note 113 (stating that selected school districts might consist of low-performing districts located in the five major urban cities).

115. *See* TEXAS EDUCATION AGENCY, DIVISION OF PERFORMANCE REPORTING OFFICE OF POLICY PLANNING & RESEARCH, SNAPSHOT '97, 1996-1997 School District Profiles) (listing statistical data for Texas school districts). Snapshot figures for the 1996-97 school year showed that the Dallas Independent School District had a student population of 154,847 with Hispanics making up 46% and African Americans 42%. *See id.* at 116. The San Antonio Independent School District had a student population of 61,361 with Hispanics making up 84% and African Americans 11%. *See id.* at 68. El Paso Independent School District had a student population of 64,444 with Hispanics making up 76% and Anglos 18%. *See id.* at 134. Houston Independent School District had a student population of 209,375 with Hispanics making up 52% and African Americans 34%. *See id.* at 170.

tain the required funding from existing state and local school budgets.<sup>116</sup> The school funds available for each child accepting a voucher would be divided between the public district the child is leaving and the private school she will attend.<sup>117</sup> The most common percentage mentioned is an 80%-20% split.<sup>118</sup> This ratio represents the percentage legislators believe is needed to achieve a balance between the amount of funds a school district will lose and the amount of revenue still required to meet fixed expenditures.<sup>119</sup> Although past proposals fail to mention whether the split will be temporary, some legislators believe the 20% should be a transitional aid that will gradually fade.<sup>120</sup>

#### 4. Admissions

Opponents of vouchers fear that private schools will be permitted to discriminate against students who have had prior academic or disciplinary problems. In an effort to address this fear, several legislators offering proposals have included admission requirements in their legislation.<sup>121</sup> Several of the proposed bills that do not permit discrimination on the basis of academic achievement do allow prior disciplinary action to be considered as a factor for admission.<sup>122</sup> Additionally, private schools are permitted to give preference to those students already attending the schools, to those who have siblings already attending, or to those who are

116. See Tex. S.B. 1206, 75th Leg., R.S. (1997) (funding would consist of amount paid to a school district for textbooks, transportation allotment and special allotment); Tex. H.B. 2395, 75th Leg., R.S. (1997) (funding would consist of state funds); Tex. S.B. 92, 74th Leg., R.S. (1995) (funding would consist of half of the basic allotment of state funds and special funds); Tex. H.B. 1315, 74th Leg., R.S. (1995) (funding would consist of foundation fund money and local funds).

117. See Tex. S.B. 1206 (stating funds would be shared between private and public schools); Tex. H.B. 2395 (indicating that a public school would retain a portion of funds if a child chose to attend a private school); HOUSE RESEARCH ORGANIZATION, *supra* note 84, at 7 (indicating funds would be shared).

118. Three proposed bills call for a specific split of 80% following the child to his private school and 20% remaining with the public school district. See Tex. H.B. 2395 (1997); Tex. S.B. 92, 74th Leg., R.S. (1995); Tex. H.B. 920, 73d Leg., R.S. (1993).

119. Telephone interview with Byron Schlomach, *supra* note 110 (responding to the question of why such a split is significant).

120. See *id.*

121. See Tex. H.B. 709, 76th Leg., R.S. (1999) (stating that a private school may not refuse admission on the basis of race, residence or academic achievement); Tex. S.B. 1206, 75th Leg., R.S. (1997) (noting that students cannot be denied admission into a private school on the basis of academic achievement).

122. See Tex. H.B. 709 (allowing a private school to refuse admission on the basis of prior disciplinary action); Tex. S.B. 1206 (indicating that private schools can consider a student's prior conduct when considering admission); Tex. H.B. 2395, 75th Leg., R.S. (1997) (permitting private schools to discriminate on the basis of prior conduct).

residing in the local community.<sup>123</sup> Whether these requirements are enough to ensure equal opportunity to all qualifying students will be an important factor in the constitutionality of a voucher program.

#### 5. Accountability

The area subject to the greatest debate when discussing the implementation of a voucher program is accountability. On one side of the debate are those legislators who do not wish to impose state regulation on private schools.<sup>124</sup> These legislators believe that private schools should be free to implement the curriculum of their choice and should not be accountable to the state for accreditation.<sup>125</sup>

On the other side of the debate, however, are those legislators who support vouchers but also want to ensure some accountability by private schools to the state. These legislators seek to mandate that participating private schools provide annual data on voucher students in order to allow the state to monitor a student's progress.<sup>126</sup> Although the issue of accountability remains underdeveloped, the issue will play an important role in determining whether a voucher system is an efficient method of funding public education and should not be overlooked.

### IV. IS IT MY TURN YET?

Somewhere in the distance, if we listen closely, we can hear the voice of a young child asking the question "Is it my turn yet?" The child, whose name is Marco, is not asking about his turn on a playground ride or a turn

123. See Tex. H.B. 709 (permitting a private school to give preference to a student currently enrolled in order to keep continuity); Tex. S.B. 1206 (allowing preference for the sake of continuity); Tex. H.B. 2395 (providing a private school with the permission to give preference to students already enrolled in school).

124. Two of the five proposed voucher systems have been silent on the issue of accountability requiring only that the private school report a child's continued enrollment to the appropriate state agency. See Tex. S.B. 92, 74th Leg., R.S. (1995); Tex. H.B. 1315, 74th Leg., R.S. (1995).

125. See generally *What Really Matters in American Education* (visited Feb. 6, 1999) <<http://www/ed.gov/speeches/09-1997>> (discussing speech presented by former U.S. Secretary of Education Richard W. Riley that vouchers reduce accountability because private schools operate outside the jurisdiction of government authority). The U.S. Secretary of Education mentioned in a speech that vouchers will force private and parochial schools to become less private. See *id.*

126. See Tex. H.B. 709 (requiring that private schools administer an academic assessment test to each student enrolled as the result of a voucher). H.B. 709 would also require that a private school report to the State Education Commissioner on the results of the assessment test. See *id.*; Tex. S.B. 1206 (requiring that an academic assessment test be given to all voucher students and that results of such exams be reported to the State Education Commissioner); Tex. H.B. 2395 (requires that voucher students be tested to ensure academic performance).

at bat in a baseball game—his question is more complex. Marco is asking for his opportunity at a better education. As he sits in his classroom, he notices the empty desks where his friends once sat and he dreams of the day when his presence as a student will be valued. His friends received vouchers from a private organization and now attend private schools. When he sees them, they tell stories of computers in classrooms and science projects done in special labs. He is happy for them but he cannot help to wonder, “when will it be my turn?”

For children, many of whom are minorities like Marco, vouchers do little if nothing to improve the current condition of the schools they attend.<sup>127</sup> His voice is one of the many children’s voices proponents of school vouchers fail to hear. In their eyes, helping a few children is better than helping none at all.<sup>128</sup>

This section of the Comment will present the arguments most commonly used by both supporters and opponents of vouchers. It will analyze proposed benefits of vouchers against the possible creation of a two tiered educational system. Lastly, it will evaluate legal challenges to voucher systems currently imposed in Milwaukee, Wisconsin and Cleveland, Ohio.

#### A. *All in Favor Say “Yea”*

Arguments in favor of vouchers can be classified into three main categories. The first and most commonly used argument is based on the theory of marketplace competition.<sup>129</sup> Under this theory, it is believed that the use of vouchers breeds competition between private and public schools.<sup>130</sup> According to this argument, students like Marco benefit indirectly from vouchers because competition and the fear of losing educa-

127. See INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, FIGHTING FOR OUR NEIGHBORHOOD PUBLIC SCHOOLS 1 (1998) (arguing that few children will benefit from vouchers and that public schools will not improve); Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 39-40 (1993) (noting a study conducted by the Carnegie Foundation which showed that private school choice does not appear to improve academic achievement nor does it “stimulate public school renewal”); *The Issue: Vouchers and School Choice* (visited Sept. 24, 1998) <<http://saturn.tasb.org/GR/vouchers.html>> (dispelling the myth that school vouchers will improve public education).

128. See Jamie Castillo, *Hispanic Democrats Assail School Vouchers*, SAN ANTONIO EXPRESS-NEWS, June 17, 1998, at 3B (citing remarks made by a supporter of vouchers to the effect that helping some is better than none at all).

129. See O.K. Carter, *Estimates Invite Closer Look at School Vouchers*, FORT WORTH STAR-TELEGRAM, Jan. 28, 1999, at 1 (explaining that the theory behind vouchers is that opening up education to the marketplace will instill competition and lead to better education).

130. See Allan E. Parker Jr., *Parental Power Central Theme in Education Bill*, THE LONE STAR CITIZEN (Free Mkt. Found., Dallas, Tex.), Mar. 1995, at 1 (stating that a perfect

tional funds to private schools will force public schools to improve the quality of education they offer.<sup>131</sup> The second argument presented by supporters is that vouchers empower minority families with the freedom of choice.<sup>132</sup> They claim that by subsidizing the cost of attending private school, minority families are afforded opportunities once limited only to wealthy parents.<sup>133</sup> The last widely used argument in favor of vouchers is that subsidizing the cost of private school leads to an efficient system of education.<sup>134</sup> Supporters believe private schools provide a higher quality education for less cost.

In Texas, supporters of vouchers argue that Article VII, Section 1 of the Texas Constitution not only permits the use of state funds to subsidize the cost of private schools, but may also require it.<sup>135</sup> In support of this position, they point to the historical development of education in Texas and claim that it was always the framer's intent to create a system of

school system would permit competition and as a result power would shift from public schools to the parents).

131. Milton Friedman, an economist in the 1950's, viewed vouchers as the ideal tool to bring marketplace competition to the educational arena. See Daniel, *supra* note 85, at 18; see also John Chubb & Terry M. Moe, *Give Choice a Chance*, in *Making Govt. Work: A Conservative Agenda for the States* 1, 21 (Tex Lexar ed. 1992) (stating that competition forces school administrations to become more effective); Justin J. Sayfie, Comment, *Education Emancipation for Inner City Student: A New Legal Paradigm for Achieving Equality of Educational Opportunity*, 48 U. MIAMI L. REV. 913, 941 (1994) (arguing that vouchers benefit minorities because schools are forced for the first time to listen to their demands or risk the loss of state funds to private schools).

132. See Anastasia Cisneros- Lunsford, *School Vouchers at Issue During Public Forum*, SAN ANTONIO EXPRESS-NEWS, June 6, 1998, at 1A (expressing support of the claim that vouchers provide choice to low, middle-income, and poor people); Green, *supra* note 127, at 57-68 (providing the most commonly used arguments for vouchers); Parker, *supra* note 83, at 4B (arguing that the only winners in the voucher issue are the low-income parents and children who benefit).

133. See Joe Barton, *Let's Give School Vouchers a Chance*, DALLAS MORNING NEWS, May 12, 1998, at 9A (claiming that school choice means taking control out of the hands of the government and placing it with parents); Mansour, *supra* note 82 (claiming that the time has come to empower low-income parents with the ability to choose private school).

134. See Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 808 (arguing that the ability to enforce vouchers quickly makes them an effective remedy for students trapped in an inadequate public school); Dominick Cirelli, Jr., Comment, *Utilizing School Voucher Programs to Remedy School Financing Problems*, 30 AKRON L. REV. 469, 491-93 (1997) (presenting arguments used by proponents that vouchers will provide a more efficient system of education); Joe Price, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435, 456 (1996) (claiming that choice in the form of vouchers will encourage fiscal efficiency as schools will attempt to lower operational costs in order to increase funds for classroom education).

135. See Parker, *Public Free Schools*, *supra* note 105, at 831 (presenting the argument that school choice in Texas is not only permissible but may be constitutionally required).



public free schools which embraced parental choice.<sup>136</sup> The Constitutional provision they believe most accurately expresses their position is Article X, Sections 1 and 2 of the 1845 Texas Constitution.<sup>137</sup> Proponents argue that in 1845 “public schools” referred to institutions that were private in nature, open to all children, and were supported through state funds.<sup>138</sup> “Free schools” on the other hand, referred to an ideology rather than an entity and was considered to obligate the state to provide for the education of the indigent and orphaned.<sup>139</sup> Supporters of vouchers argue that the definition of “public” and “free” schools, as embraced by the drafters of the 1845 Constitution, is the true meaning intended to be expressed by the use of “public free school” in Article VII, Section 1 of the 1876 Constitution.<sup>140</sup>

### B. *All Opposed Say “Nay”*

Opponents of vouchers argue that no school intentionally sets out to provide inadequate education. Instead, it is often the consequence of poor state funding, an element that is usually beyond a school district’s control.<sup>141</sup> If a school district is properly funded, they can hire qualified teachers, they can modify curricula to offer enrichment programs, and they can purchase modern technology.<sup>142</sup> Opponents argue that the distribution of vouchers to a few students fails to address this crucial issue

136. See *id.* at 833 (stating that consideration of choice as an implied right must begin with a historical analysis of events which may have influenced the adoption of our current education provision in 1876).

137. Section 1 of Article X called for the legislature to “make suitable provision for the support and maintenance of public schools,” while Section 2 commanded the establishment of “free schools.” See TEX. CONST. of 1845, art. X, §§ 1, 2; Parker, *Public Free Schools*, *supra* note 105, at 833 (discussing the significance of the term “public school” found in Section one of Article X).

138. See Parker, *Public Free Schools*, *supra* note 105, at 833-36 (defining “public school” and “free school” in the context of the understanding of the terms in 1845).

139. See *id.* at 834 (distinguishing the definition of “public school” as held by Texas citizens in 1845, from that held by contemporary society).

140. See *id.* at 836 (stating that an attempt in 1845 to establish a system of education as found in today’s society would have been considered tyranny).

141. See Cirelli, *supra* note 134, at 470 (expressing the view held by opponents that efficiency is not the problem with public schools, but that the problem lies with a lack of state and federal support). But see Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the “Adapt or Die” Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 79 (1995) (stating that schools do not suffer from under funding, but misdirect funds to resources that do little to improve education).

142. See *Group Praises LULAC Stand, Taxpayer-Aided Vouchers Hurt Public Schools, They Say*, DALLAS MORNING NEWS, June 9, 1998, at 15A (adopting a resolution against the implementation of vouchers stating that public tax funds could go to reduce class sizes, hired qualified teachers, and obtain adequate classroom facilities).

and instead undermines support for public education.<sup>143</sup> Rather than making additional funds available to schools most in need, vouchers take financial resources away.<sup>144</sup> They argue that while competition may force the closure of weaker schools, such closings will only harm students such as Marco who through no fault of their own would find themselves with no place to go.<sup>145</sup>

Opponents are concerned that vouchers will create a dual system of education, which divides students along racial and economic lines.<sup>146</sup> They argue that private schools are academically selective and are also ill equipped to provide services to disabled students.<sup>147</sup> As a result, learning impaired or disabled children will be forced to remain in public school.<sup>148</sup> Because proposed voucher systems often target low-income students or students attending a low performing school district, the majority of students affected will be minorities.<sup>149</sup> Opponents worry these students will

143. See Cirelli, *supra* note 134, at 495 (referring to a compelling argument against vouchers which states that their distribution help only a few students and does nothing to improve the overall education system).

144. See Green, *supra* note 127, at 39 (providing the argument that use of state funds for vouchers takes precious money away from already shrinking state education budgets).

145. See Larry Cuban, *Education Housing, Not School, Vouchers Are Best Remedy for Failing Schools*, L.A. TIMES, Jan. 31, 1999, at M2 (expressing that vouchers will help some students but will offer little to those trapped in a cycle of poverty).

146. See DAVID C. BERLINER & BRUCE J. BRIDDLE, *THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS* 173 (1995) (citing a colleague's view that vouchers would mark the end of any effort to improve public education, and the beginning of a two-tiered educational system); see also James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 283 (1991) (book review) (arguing that applying the marketplace theory to education will lead to segregation because as with any other market, consumers get what they pay for and poor minorities can't purchase the same as wealthier individuals); Rick Martinez, *Some Officials Wary of Senate Approved School Fund Vouchers, Luna Warns of Potential Caste System*, SAN ANTONIO EXPRESS-NEWS, Mar. 29, 1995, available in 1995 WL 5555310 (discussing the possible creation of dual system of education with the unwanted students remaining in public schools).

147. See Mei-lan E. Wong, Note, *The Implications of School Choice for Children with Disabilities*, 103 YALE L.J. 827, 829 (1993) (commenting on the rights of disabled children to participate in school choice programs and the need to take into consideration their needs when programs are drafted because even the most skillfully drafted legislation will find it hard to comply with the IDEA); Lucy Hood, *Teachers Group is Quizzing Private Schools on Vouchers*, SAN ANTONIO EXPRESS-NEWS, Jan. 22, 1999, at 7B (demonstrating that two out of four prestigious private schools in Texas state that they would not participate in a voucher program if it meant they had to take students who otherwise would not be qualified to attend their schools).

148. See Castillo, *supra* note 128 (interviewing Joe Bernal, a member of the State Board of Education, who stated that he believes that taking funds away from public schools will only harm those students left behind).

149. See TEXAS EDUCATION AGENCY, *supra* note 115 (listing statistical data for individual school districts which indicate that Bexar County has seven school districts where

be become disenfranchised and at even greater risk of dropping out of school.

In addition, private schools under the proposed legislation will be allowed to give admittance preference to the siblings of students already attending their school as well as to residents within its immediate community.<sup>150</sup> The result of such preference is that qualifying families unable to find private schools within their community will be forced to travel greater distances and incur greater expenses.<sup>151</sup>

Educational organizations, such as the National Education Association (NEA) and the Texas Association of School Boards (TASB), oppose the use vouchers, and have joined in the fight to prevent the implementation of a state funded program.<sup>152</sup> The NEA warns not only its membership but all individuals concerned about public education, to be aware of the myths proponents of vouchers use to gain support for their cause.<sup>153</sup> The NEA argues that vouchers undermine public education and are a fiscally irresponsible method of education reform.<sup>154</sup> The TASB argues that

70% or more of the students are classified as economically disadvantaged; in those seven districts, Hispanics make up more than 80% of the student population).

150. See Telephone Interview with Byron Schlomach, Legislative Aide, State Representative Grusendorf (Sept. 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (responding that although a private school cannot discriminate on the basis of academic achievement, it can use residency as a factor).

151. See UNIVERSITY OF NORTH TEXAS, CENTER FOR THE STUDY OF EDUCATION REFORM, FINAL REPORT: SAN ANTONIO SCHOOL CHOICE RESEARCH PROJECT 12 (JUNE 1997) (discussing student attrition among those who participated in school choice programs including a private voucher system). A study produced by the Center for the Study of Education Reform showed that the drop out rate for students transferring from public to private schools over a period of three years was 49.6%. See *id.* The Texas study also showed that the parents of children who dropped out of private school had originally made the decision to transfer their child from public school out of frustration with the public school system. See *id.* Once having made the switch, the parents found that the location of the private school was too far from their home and that they could not afford the added expenses of transportation, uniforms, books, and other supplies. See *id.*

152. See Texas Association of School Boards, *Grassroots Issues for the 76th Legislature* (visited Mar. 9, 1999) <<http://www.tasb.org.html>> (providing background information on the Texas Legislature's position on school vouchers and informing its membership on the organization's opposition to vouchers); National Education Association, *NEA's Position on Vouchers* (visited Mar. 8, 1999) <<http://www.nea.org/issues/vouchers/position.html>> (expressing the organization's opposition to vouchers through the adoption of resolution A-29).

153. See National Education Association, *Private School Vouchers*, (visited Mar.8, 1999) <<http://www.nea.org/lac/papers/vouchers.html>> (listing eight reasons why school vouchers undermine public education).

154. See *id.* (arguing that the use of vouchers in Milwaukee and Cleveland shifted public funds which could have been used to reduce class sizes to private schools which retain the right to reject or accept students). The NEA believes vouchers provide help for only a few students and cites as example the proposed implementation of a voucher pro-

Texas should learn from existing voucher programs in Milwaukee and Cleveland that the use of tax dollars to subsidize the cost of education at a private school does not guarantee improvement in the quality of education a child receives.<sup>155</sup>

C. *Arguments Used in Challenging the Constitutionality of Established Voucher Programs in Milwaukee and Cleveland*

In the United States, only Milwaukee and Cleveland currently have an established voucher program. Legal challenges against both programs have been initiated, and although state issues have been raised, the primary argument is that the use of state funds at a religious school violates the Establishment Clause of the U.S. Constitution.<sup>156</sup> In Milwaukee, the Wisconsin Supreme Court reversed the holdings of the appellate and trial court and instead found that the Milwaukee Parental Choice Program (MPCP) did not violate the Establishment Clause.<sup>157</sup> Evaluating the program using the *Lemon v. Kurtzman* test,<sup>158</sup> the court held that the MPCP had a secular purpose to provide for the education of low-income children.<sup>159</sup> Secondly, the court did not find that the program advanced or inhibited religious beliefs in any way.<sup>160</sup> Lastly, the court found that the program did not require excessive government entanglement.<sup>161</sup> In reaching its decision, the court focused on the fact that state funds were

gram in the District of Columbia which is expected to cost taxpayers seven million dollars to educate 2000 children in private schools. *See id.*

155. *See* Texas Association of School Board, *The Legislative Report, Vouchers Continue to Be Critical Issue Facing Texas Public Schools* (visited Mar. 9, 1999) <<http://www.tasb.org.html>> (providing ten reasons why vouchers should be opposed).

156. *See* *Jackson v. Benson*, 578 N.W.2d 602, 607 (1998) (explaining the issues raised by the plaintiffs on appeal); *Simmons-Harris v. Goff*, Nos. 96APE08-982, 96APE08-991 1997 WL 217583, at \*2 (Ohio App. 10 Dist.) (1997) (discussing the facts and issue of the case).

157. *See* *Jackson*, 578 N.W.2d at 607 (holding that the MPCP does not violate the Establishment Clause or the Wisconsin Constitution). *See generally* David Schimmel, *Wisconsin Supreme Court Approves Vouchers for Parochial Schools: An Analysis of Jackson v. Benson*, WEST'S ED. L. REP., Jan. 1999, available in 130 WELR 373 (summarizing the Wisconsin Supreme Court's decision). *But see* Recent Cases, 112 HARV. L. REV. 589, 737 (1999) (claiming that the Wisconsin Supreme Court misapplied the *Lemon v. Kurtzman* test and should have found excessive entanglement).

158. *See* *Jackson*, 578 N.W.2d at 612 (determining whether the MPCP had a secular purpose, did not inhibit or advance religious beliefs, or required excessive government entanglement).

159. *See id.* (finding that MPCP had secular purpose of providing education to low-income families).

160. *See id.* at 614 (concluding that educational assistance to religious schools under the MPCP was neutral).

161. *See id.* at 617 (holding that the MPCP provides a religious neutral benefit as parents are free to choose the school that is best for their child).

provided directly to parents.<sup>162</sup> The fact that a religious school only received state aid if selected was a key factor in the court's mind.<sup>163</sup> Another important factor for the court was that parents could choose not to send their child to a religious school and still participate in the program.<sup>164</sup> Such a choice prevented the state from advancing religious beliefs.<sup>165</sup> The plaintiff's appealed to the United States Supreme Court but were denied writ of certiorari.<sup>166</sup>

In Cleveland, the Ohio Appellate Court, applying the same test as the Wisconsin Supreme Court, reached a different conclusion.<sup>167</sup> The appellate court found that the Ohio program had a secular purpose, however, the program failed to meet the remaining two prongs in the *Lemon v. Kurtzman* test.<sup>168</sup> The court found that the program, although facially neutral, did in fact advance religious beliefs because state funds were considered direct aid.<sup>169</sup> In reaching its decision, the court looked to the fact that not a single private or public school chose to accept vouchers.<sup>170</sup> Parents, therefore, who wished to participate were forced to choose a religious school.<sup>171</sup> The limitation of participating schools, in turn, made the use of state funds a direct assistance. The State has appealed this decision and the case is pending before the Ohio Supreme Court.

What we can learn from the U.S. Supreme Court's decision to deny writ is that the issue of education for the present time continues to remain a state issue. As far as future challenges at the state level, it appears that a key factor in upholding the use of vouchers at a religious school will be based the amount of choice afforded to participating parents. The number of private and religious schools participating must be such that a parent is not forced to send their child to a religious school.

162. *See id.* at 618 (justifying the decision on the basis that because state aide arrives at a religious school only by way of a parent's choice, there is no state involvement).

163. *See id.* at 617 (stating that parents had the option to opt-out of the program if they so desired so the state was not advancing religious views).

164. *See Jackson*, 578 N.W.2d at 617.

165. *See id.* (stating that neutrality is not dependant upon what school is chosen but rather who chooses the state or the parent).

166. *See Recent Cases*, 112 HARV. L. REV. 713, 737-42 (1999) (providing procedural history on the case and arguing that the Court's decision may have been erroneous).

167. *See Simmon-Harris v. Goff*, Nos.96APE08-982, 96APE08-991 1997 WL 217583 \*8 (Ohio App. 10 Dist.) (1997) (holding that scholarship program provides direct and substantial assistance to religious schools and there violates the Establishment Clause).

168. *See id.* at \*4 (stating that the program provided direct aid thus advancing religious beliefs).

169. *See id.* at \*7 (acknowledging the fact that the program appears to be facially neutral but advising that not a single non-religious school chose to participate).

170. *See id.* (emphasizing that lack of choice in the school a parent could send their child lead to Court to find that state funds were direct aide).

171. *See id.* (indicating that lack of choice skews the program toward religion).

V. ARE VOUCHERS AN EFFICIENT METHOD OF EDUCATIONAL FUNDING? THE FRAMER'S INTENT AND EDGEWOOD REVISITED

Despite opposition by representatives of minority and low-property value school districts,<sup>172</sup> supporters of a voucher program are confident that legislation authorizing a pilot program will pass the Texas House and Senate in the 1999 Legislative Session.<sup>173</sup> This section will examine what the framers of the Texas Constitution intended when crafting Article VII, Section 1.<sup>174</sup> It will evaluate the "efficiency" standard set forth by the Texas Supreme Court in the series of Edgewood decisions<sup>175</sup> and will summarize the disparities a voucher system is anticipated to create. Lastly, it will determine whether a voucher system, as an alternative method of education funding, would meet the efficiency standard found in Article VII, Section 1 of the Texas Constitution or fail in light of the Texas Supreme Court's interpretation.

A. *The Framers' Intent*

Contrary to what proponents of vouchers believe,<sup>176</sup> an historical analysis of Article VII, Section 1 reveals that the framers of the Texas Constitution intended to establish a system of publicly funded schools for the education of all Texas children. It was the intention of the state's forefa-

172. See generally Anastasia Cisneros-Lunsford, *Rally Rips Vouchers, Backs Public Schools*, SAN ANTONIO EXPRESS-NEWS, Mar. 7, 1999, at 1A (reporting on a rally held by opponents of school vouchers at which they expressed their support for public education); Stutz, *supra* note 8 (voicing her opposition to vouchers).

173. See Kent Grusendorf, *Pilot School Voucher Programs Should Be Given a Try*, AUSTIN AM.-STATESMAN, June 2, 1998, at A9 (claiming that it is only a matter of time before legislation enacting a voucher program will pass).

174. See TEX. CONST. art. VII, § 1 (mandating that the Texas legislature provide for an "efficient" system of public free schools).

175. See *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 732 (Tex. 1995) [*Edgewood IV*] (holding that an efficient system does not require equal funding at all levels, a school district may supplement funds in order to provide for enrichment programs); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 510 (Tex. 1992) [*Edgewood III*] (noting that the State could not levy an ad valorem tax in an effort to create an "efficient" system of funding); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 500 (Tex. 1991) [*Edgewood II*] (indicating that an efficient system of funding would not require heavy reliance on local funding in order for the state to fulfill its Constitutional obligation); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) [*Edgewood I*] (holding that the Texas system of funding education was neither financially efficient nor efficient in providing for the general diffusion of knowledge).

176. See Parker, *Public Free Schools*, *supra* note 105, at 831 (stating that choice whether in the form of school vouchers or tuition payments may be a constitutional right under the 1876 Texas Constitution).

thers to create a provision that would evolve with the needs of society and would ultimately permit the Legislature to comply with its constitutional duty of providing for an efficient system of public free schools.<sup>177</sup>

The first evidence of the state's desire to establish a public school system can be traced to an education provision found in the 1827 Constitution of the State of Coahuila and Texas.<sup>178</sup> The provision called for the establishment of primary schools in every town. However, poverty prevented Texas citizens from financially contributing to the effort, and the mandate failed.<sup>179</sup> When Texas later gained her independence from Mexico, a lack of support from the Mexican government for the establishment of a public school system was listed in the Declaration of Independence as a reason for separation.<sup>180</sup> In 1836, Texas once again expressed its desire for a public school system when it adopted an education provision in Texas Republic Constitution, calling for the establishment of a general education system as soon as circumstances permitted.<sup>181</sup> Land grants

177. See *Edgewood I*, 777 S.W.2d at 394 (stating that when interpreting provisions of the Texas Constitution it is important to remember that it is an organic document ratified for the purpose of governing society as it evolved); see also SETH SHEPARD MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, 330 (1930) (debating on the issue of taxes as a method of funding education, Mr. West of the Education Committee, stated that although citizens may not be fully supportive of free schools at this point, it was the responsibility of the delegates to place before the citizens of Texas an "organic" law they could adopt). See generally Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771 (1990) (concluding that the framers of the 1876 Texas Constitution intended to impose a prospective upon the legislature to provide for an efficient system of education).

178. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (explaining the history of education in Texas); BRADEN, *supra* note 18, at 505 (providing historical background on the development of education provisions found in various Texas Constitutions); J.J. LANE, HISTORY OF EDUCATION IN TEXAS, 23 (1903) (discussing the education provision contained in the 1827 State of Coahuila and Texas Constitution).

179. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (explaining that education under the Constitution of Mexico was the responsibility of individual states); see also BRADEN, *supra* note 18, at 505 (discussing the first constitutional command for a public system of education).

180. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (noting that neglect of public education was charged against the Mexican Government in the Texas Declaration of Independence); BRADEN, *supra* note 18, at 505 (noting that Texas' grievances against Mexico for their lack of a public education system was unwarranted); LANE, *supra* note 178, at 26 (explaining the importance in Texas history and the role it played in declaring independence from Mexico).

181. See REPUB. TEX. CONST. of 1836, general provisions, § 5, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 1078-79 (Austin, Gammel Book Co. 1898) (calling on the State's congress to develop a general system of education); TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (commenting on the expressed desire to create a general system of schools as soon as circumstances would permit); BRADEN, *supra* note 18, at 505 (citing General Provisions, Section 5 and noting its indefiniteness).

were distributed to counties for the establishment of schools, but actual funding was scarce.<sup>182</sup> In addition, Anglo settlers in 1836 were adamantly opposed to the imposition of a state tax for the purpose of funding education.<sup>183</sup> As a result, from 1836 to the early 1840s, the responsibility of educating children remained with private institutions.<sup>184</sup>

The 1840s proved to be a pivotal time in the development of a publicly funded school system, as German immigrants began calling Texas home.<sup>185</sup> Accustomed to the European and Northern system of education, German immigrants believed that it was the State's obligation to provide for the education of children.<sup>186</sup> By 1845, conflict in educational philosophies arose between the Southern Aristocrat and the German Immigrant.<sup>187</sup> The Southern Aristocrat believed education was a private function and should be free from state interference.<sup>188</sup> The only obligation the state owed was to the poor and orphaned children who could not afford to attend private school.<sup>189</sup> German immigrants, on the other hand, believed that free education should be provided to all children and passionately vocalized their desire for a system of free schools.<sup>190</sup> When the State Constitutional Convention was held in 1845, the conflict in philosophies resulted in compromise by the drafters of the 1845 Constitution.<sup>191</sup> The provision adopted was Article X Sections 1 and 2.<sup>192</sup> Section 1 required the legislature to "make suitable provision for the support and

182. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (providing historical background on the financial condition of Texas citizens in 1836); BRADEN, *supra* note 18, at 505 (discussing economical factors which influenced the state's ability to establish a general system of schools).

183. See BRADEN, *supra* note 18, at 505 (indicating that opposition to the use of state funds for education made the establishment of a general school system difficult to fulfill).

184. See *id.* (noting that the burden of education in 1836 fell on the shoulders of private schools).

185. See *id.* at 505 (reflecting on the various philosophies of education held by Texans in the 1840's).

186. See *id.* (distinguishing the German immigrants' philosophy that the state should fund education from the ideologies held by Southern aristocrats, who believed that aid should only be provided for the indigent).

187. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (describing the two types of schools created in 1845); BRADEN, *supra* note 18, at 505 (discussing the different educational philosophies present in 1845); D. Walker, *Intent of the Framers in the Education Provisions of the Texas Constitution of 1876*, 10 REV. LITIG. 625, 634 (1991) (stating that Education in 1845 meant private & public enterprises).

188. See BRADEN, *supra* note 18, at 505 (explaining philosophy held by Southern aristocrats).

189. In such instances, the state was obligated to financially subsidize the cost of the child's education at a private institution. See *id.*

190. See *id.* (detailing the educational views held by German immigrants).

191. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (acknowledging that as a compromise, the 1845 Constitution provided for "public schools" and "free



maintenance of public schools” while Section 2 mandated the legislature to establish “free schools” as early as practicable.<sup>193</sup> The Southern Aristocrat viewed the adoption of Article X as a victory. In their eyes, Section 1 clearly permitted the use of state funds to assist private schools.<sup>194</sup> Section 2 was interpreted to require the state to provide for the education of only the poor and orphaned.<sup>195</sup> Although German immigrants, as well as advocates for free schools, considered Section 2 as support for their ideas, the legislature failed to enact legislation specifically establishing free schools.<sup>196</sup> Despite the expressed intent to provide for a publicly funded system of schools, education in 1845 remained in the hands of private schools that accepted state funds.<sup>197</sup>

The desire for a publicly funded school system remained a forefront issue and in 1869 during the Reconstruction period, a concerted effort was made once again to establish a true system of free schools.<sup>198</sup> In 1869, the drafters of the Reconstruction Constitution adopted an education provision that was considered by far the most radical proposal of its

schools”); BRADEN, *supra* note 18, at 506 (distinguishing the two sections contained within Article X, Section 1).

192. See TEX. CONST. of 1845, art. X, §§ 1, 2 (calling upon the Legislature to support and maintain public schools and to provide for the establishment of free schools as soon practicable). The drafters of the 1845 Constitution viewed the State’s duty to establish free schools as important because Section 2 required the state to provide the necessary funds. See *id.*

193. See TEX. CONST. of 1845, art. X, §§ 1, 2 (mandating the legislature to provide for public schools but permitting the establishment of free schools over time); TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (differentiating between public schools and free schools); BRADEN, *supra* note 18, at 506 (discussing the content of Article X, Sections 1 and 2).

194. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (commenting on the interpretation of Article X, Section 1 to mean that the State was required to support private schools); BRADEN, *supra* note 18, at 506 (interpreting section one to mean the continuation of state funds at private schools).

195. See *id.* (stating that Article X, Section 2 of the 1845 Constitution was interpreted to mean that the state had the obligation to pay for the education of orphaned or indigent); BRADEN, *supra* note 18, at 506 (noting that the interpretation of section two as providing for the tuition payment of the orphaned and indigent was consistent with the sentiment at the time).

196. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (noting that unfortunately legislation in support of free schools was never enacted).

197. See *id.* (indicating that the 1845 Constitution’s reference to public schools in 1845 referred to private schools).

198. See TEX. CONST. of 1869, art. IX, §§ 1, 4 (mandating the establishment of a public system of education); TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (explaining the significance of the education provision adopted in 1869); BRADEN, *supra* note 18, at 506 (analyzing the duty Article IX, Sections 1 and 4 imposed on the legislature).

time.<sup>199</sup> The provision called for the establishment of a system “of public free schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years.”<sup>200</sup> The system was to have a centralized administration and would obtain funding through the imposition of a school tax.<sup>201</sup> The tax was viewed by a “large group of Texans as an illegal act to compel one man to pay for the education of another man’s child.”<sup>202</sup> Unable to secure proper funding, the legislature’s attempt to create a system of free schools failed and the State was left with a deficit of over four million dollars.<sup>203</sup>

The struggle between those who wished to continue the support of private schools and those who desired a publicly funded system of education came to a head in 1875. With renewed Democrats once again in control, a heated battle over which educational philosophy would prevail took place at the 1875 Constitutional Convention.<sup>204</sup> All delegates present at the Convention agreed that the education of every child was important if Texas wished to produce a democratic and productive citizenry, but how the state would fulfill its obligation was a matter of great debate.<sup>205</sup> On one side of the aisle were members of the convention who desired the establishment of a statewide system of free schools.<sup>206</sup> On the other side were members who longed for a return to the old system of private edu-

199. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (referring to Article IX as a northern concept of education and a marked departure from Texas tradition); BRADEN, *supra* note 18, at 506 (noting the provision was a radical departure from the traditional private school education).

200. TEX. CONST. of 1869, art. IX, § 1.

201. See TEX. CONST. of 1869, art. IX § 3 (requiring that the education system have a highly centralized administration); Walker, *supra* note 187, at 641 (explaining that the Constitution of 1869 provided for a centralized system of public schools, an idea which was opposed by many Texans).

202. TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993).

203. See BRADEN, *supra* note 18, at 506 (explaining why most Texans hated a publicly funded system of education).

204. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (stating that the bitterest fight at the 1875 Constitutional Convention was fought over education); BRADEN, *supra* note 18, at 506 (explaining that the building anger over the financial effects of the 1969 education provision led to a heated battle between political parties at the 1875 Convention); Walker, *supra* note 187, at 644 (noting that the most hotly contested issue at the convention was education).

205. See MCKAY, *supra* note 177, at 199 (describing Mr. Dohoney’s, comments on the need for education as a way to uphold the virtue of society and to become a safer citizenry). Mr. West commented that our forefathers recognized the importance of education in maintaining civil liberty and democracy. See *id.* at 331.

206. See JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 63-64 (1875) (arguing on the issue of education Mr. DeMorse introduced a resolution for calling for the establishment of school districts and the levying of taxes for the purpose of creating a public system of schools); MCKAY, *supra* note 177, at 215-16 (speaking in favor

cation.<sup>207</sup> In the middle, were those delegates who recognized the need for a system of free schools but feared that such a system would produce results identical to those encountered in 1869.<sup>208</sup> For these moderate members, an acceptable education provision was one that would allow for a gradual implementation of a statewide system of free schools.<sup>209</sup> After numerous debates, a compromise was reached and Article VII, Section 1 of the 1876 Texas Constitution was adopted.<sup>210</sup> The provision, like its predecessor in 1869, once again marked a departure from the traditional private system of education.<sup>211</sup> Although the language of Article VII, Section 1 contains the phrase “public free schools,” upon reading the transcripts of the Constitutional debates held in 1875, it is evident that the drafters of the Constitution no longer viewed “public schools” and “free schools” as separate entities.<sup>212</sup> Instead, the provision was intended to

of free schools, Mr. Cline read a letter from his constituent stating that poor people could not afford a private system of education and are in need of public education).

207. *See* MCKAY, *supra* note 177, at 219 (arguing against the support of public school through taxation, Mr. Sansom stated that he knew of not one person in his constituency who would support the idea of common schools funded by taxes). Mr. Flournoy voiced his opposition to a system of public free schools supported by taxation. He held that government should not force citizens to support education. *See id.* at 225.

208. *See id.* at 224 (voicing his desire for a system of free schools, Mr. McLean also expressed his concern that the lack of state funds would doom any attempt to the same fate already experienced). Mr. Johnson also spoke out in favor of free schools but recognized the prejudice against a system like the one enacted in 1869. *See id.* at 341. Mr. Whitefield expressed his concern that taxation in 1875 would be a burden for Texas citizens, however, he was aware that the foundation had been laid for the future development of a system of common schools. *See id.* at 196-97.

209. *See* MCKAY, *supra* note 177, at 327 (debating public education, Mr. West spoke out in favor of free schools). He noted the importance of education but recognized that financial uncertainty within the state might prohibit the citizens of the State to support such a dramatic change. *See id.* Mr. West wanted to ensure that whatever provision was adopted that it in no way prevented future Legislators from establishing a system of free schools. *See id.* Mr. Russell spoke in favor of free schools stating it was the responsibility of the delegates to carry out the sentiment of the people and the people wanted a system of free schools. *See id.* at 332.

210. *See* TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (explaining the political and social environment leading to the adoption of Article VII, Section 1); BRADEN, *supra* note 8, at 506 (detailing the circumstances leading to the adoption of Article VII, Section 1).

211. *See* TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (providing commentary on the language of Article VII, Section 1); BRADEN, *supra* note 18, at 506 (discussing how Article VII, Section 1 has been interpreted).

212. Prior to 1875 the term “public school” referred to private schools accepting state funds in lieu of tuition, while “free schools” referred to the state’s obligation to subsidize the cost of attending private school for the orphaned and indigent. *See* BRADEN *supra* note 18, at 505 (providing information on the evolution of Article VII, Section 1). During the constitutional debates in 1875, members of the delegation used the terms interchangeably by referring to a publicly funded school system as either public education or free schools.

provide the legislature with the flexibility to develop a system of schools, which in time would provide for the public education of all Texas children.<sup>213</sup>

As a compromise to those who feared the recreation of a public system like the one enacted in 1869, the drafters of Article VII, Section 1 inserted the term “efficient” as a means to guide the legislature in establishing a productive system.<sup>214</sup> While opposition to change existed for a short period after Article VII, Section 1 was adopted, a complete shift in public sentiment away from private education occurred in the mid-1880s.<sup>215</sup> In 1883, when local schools districts were created and granted the authority to tax, the intent of the framers to establish a system of “public free schools” began its evolution into what today is referred to as the Texas public school system.<sup>216</sup> The drafters of the 1876 Constitution understood the importance of public education and their intent can be summarized in the following statement presented during debate:

I concede it would be better to have the children educated and rendered virtuous by a system of private education; but when we look abroad in the land and find the large number of orphans, and large number of children of the poor people, and the large per cent uneducated, the large number which private education can never reach or benefit, and ignorance growing up with crime and vice and intemperance, we know well that nothing short of public education will reach the case.<sup>217</sup>

### B. *An Efficient System According to Edgewood*

Because the use of state funds to subsidize private education was not intended to be an implied right found in Article VII, Section 1, the imple-

See MCKAY, *supra* note 177 at 197, 200 (during debates delegates referred to free schools, public education, and public free schools).

213. See MCKAY *supra* note 177, at 196, 224, 342 (voicing support for the concept of public education itself, some delegates to the Constitutional Convention desired a gradual development of such a school system).

214. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (providing analysis as to why the term “efficient” was inserted into the text of Article VII, Section 1); BRADEN *supra* note 18, at 506 (interpreting the use of the term “efficient”).

215. See TEX. CONST. art. VII, § 1 interp. commentary (Vernon 1993) (explaining that an unsuccessful attempt was made after the 1875 convention to continue the traditional system of private education); BRADEN *supra* note 18, at 506 (discussing the attempt to continue the traditional system of private education and the financial debt it created when it failed).

216. See BRADEN *supra* note 18, at 506 (noting that the mid 1800s marked the first step towards establishing a public school system).

217. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) [*Edgewood I*]; see also MCKAY, *supra* note 177, at 200.

mentation of a voucher system must be regarded as an alternative method of funding public education. As such, any voucher system implemented by the Texas Legislature would be required to meet the efficiency standard set forth by the Texas Supreme Court in *Edgewood v. Kirby*.<sup>218</sup>

### 1. What is Required for a Funding System to Pass Constitutional Muster?

In *Edgewood I*, the Texas Supreme Court held that Article VII, Section 1 imposed a constitutional duty on the Texas legislature to establish an efficient system of public free schools.<sup>219</sup> For an education system to be efficient, the court held that Article VII, Section 1 required two elements.<sup>220</sup> First, an education system must be financially efficient and secondly, it must provide for the general diffusion of knowledge.<sup>221</sup>

The Texas Supreme Court has defined financially efficient to mean that the state must use all available resources with little waste, in order to ensure that every child has equal access to educational funds.<sup>222</sup> In other words, the resources available to a district have to directly relate to its tax effort.<sup>223</sup> For an education system to provide for the general diffusion of knowledge, the court has indicated that the State must guarantee that every district has the resources necessary to meet state accreditation.<sup>224</sup> In addition, a system which provides for the general diffusion of knowl-

218. *Edgewood I*, 777 S.W.2d at 397 (holding a efficient system of education must be financially efficient and must provide for the general diffusion of knowledge).

219. *See id.* at 394 (determining that Article VII, Section 1 imposes an affirmative duty on the Texas Legislature to establish public free schools).

220. *See id.* at 397 (explaining that the Texas system of funding education violated Article VII, Section 1 because it was financially inefficient and it failed to provide for the general diffusion of knowledge).

221. *See id.* at 395-97 (defining “financially efficient” and “general diffusion of knowledge”); Allan E. Parker, Jr. & Michael David Weiss, *Litigating Edgewood: Constitutional Standards and Application to Educational Choice*, 10 REV. LITIG. 599, 602 (1991) (listing elements required for an educational provision to be found constitutional).

222. *See Edgewood I*, 777 S.W.2d at 395, 397 (stating that because the term “efficient” continues to have the same meaning it did in 1874, and because of the disparity in the conveyance of knowledge within school districts, the system no longer meets the definition of the term efficient); Kauffman & Rumbaut, *supra* note 50, at 76 (discussing the factors that lead the Texas Supreme Court to define an efficient school system as non-wasteful).

223. *See Edgewood I*, 777 S.W.2d at 397 (mandating that an educational resources of a school district must correlate with its tax effort).

224. *See id.* at 392 (determining that the state’s system of funding education failed to provide for a general diffusion of knowledge because the disparities which existed at the time *Edgewood* was decided made some school districts unable to meet minimum state accreditation standards).

edge ensures that all children are afforded a similar educational experience regardless of where they live.<sup>225</sup>

## 2. Factors Considered by the Texas Supreme Court When Reaching Its Decision in *Edgewood v. Kirby*

Upon examining the disparities among the school districts at the time *Edgewood I* was decided, the Texas Supreme Court held that the state system of funding education violated Article VII, Section 1 of the Texas Constitution.<sup>226</sup> The court found that the funding system failed to be financially efficient because property poor districts were denied equal access to educational funds.<sup>227</sup> Taxing at a higher rate than wealthier districts, property poor districts, as a result of their low tax base, continued to raise significantly less revenue.<sup>228</sup> As a result, local revenues raised by poorer districts were being used to either pay on debt or to meet state accreditation standards.<sup>229</sup> Wealthier districts, on the other hand, were able to use local funds for enrichment programs.<sup>230</sup> Although the state did provide aid to poorer districts, the amount was insufficient to make up for the disparities in local revenue.<sup>231</sup>

The Court concluded that the ability of a district to raise local revenue had an effect on the education it offered its students.<sup>232</sup> The state's system of funding failed to provide for the general diffusion of knowledge because children attending poorer districts were not afforded the same educational experience as children attending wealthier districts.<sup>233</sup> A student in a wealthier district was provided a broader educational experience because the district could afford to offer a better curriculum, better

225. *See id.* at 391, 396 (interpreting Article VII to mean that all citizens regardless of where they live are entitled to an efficient system of education, and the legislature failed to fulfill this obligation).

226. *See id.* at 397 (finding that the State's system of funding education violates Article VII, Section 1 of the Texas Constitution).

227. *See id.* (explaining that the Texas system of funding education was inefficient because children were not provided equal access to educational funds).

228. *See id.* at 392 (describing the inability of a school district poor in property value to generate local revenue).

229. *See Edgewood I*, 777 S.W.2d at 392 (discussing how the lack of sufficient state funds for school facilities or for debt services, forced low-property districts to use a greater portion of local funds to meet its obligations).

230. *See id.* (highlighting the disparities existing in school districts as a result of property value).

231. *See id.* (recognizing the state's efforts to lessen disparities).

232. *See id.* at 393 (emphasizing that a district's ability to generate funds does impact the quality of the education it provides).

233. *See id.* at 396 (concluding that the funding system in existence at the time *Edgewood* was decided, provided for a limited diffusion of knowledge to wealthy school districts).

technology, better libraries and better equipment.<sup>234</sup> School districts poor in property value, were not even able to meet state-mandated standards for class.<sup>235</sup> While additional state funds would reduce some of the disparities, it would only be a “band-aid;” the structure of the educational funding system itself needed to be changed.<sup>236</sup>

### 3. The State's Attempts to Comply with *Edgewood v. Kirby*

Upon rendering its decision in *Edgewood I*, the Texas Supreme Court instructed the Texas Legislature to take immediate action in developing a system of funding that would comply with Article VII, Section 1.<sup>237</sup> In *Edgewood II*, the Texas Supreme Court found Senate Bill 1,<sup>238</sup> the State's first attempt to establish a funding system in compliance with the efficiency standards set in *Edgewood I*, to be unconstitutional.<sup>239</sup> The court stated that while the proposed legislation provided for a guaranteed revenue per student, in general it failed to address the cause of the disparity in funding which was a heavy reliance on a district's local tax base to provide educational revenue.<sup>240</sup> The court also rejected the argument made by plaintiff-intervenors that local taxes belonged to the state and were subject to recapture for the purpose of equalizing funding.<sup>241</sup> Instead, the court held that Article VII, Section 3 prohibits such an interpretation and clearly authorizes the levy of taxes by a school district for the sole purpose of supporting schools within its boundaries.<sup>242</sup>

234. *See id.* at 393 (detailing the services wealthier districts were able to provide as the result of their ability to generate greater local revenue).

235. *See Edgewood I*, 777 S.W.2d at 393 (reiterating that disparities among school districts rich in property value and those poor in property value are significant).

236. *See id.* at 397 (indicating that an increase in state revenue is not enough to equalize the state's system of funding education).

237. *See id.* at 399 (modifying the trial court's decision and ordering the State to take immediate action).

238. Senate Bill 1 relied on the existing system of state and local funding, however, in an effort to comply with the Texas Supreme Court's holding in *Edgewood II*, it called for bi-annual studies to be conducted. *See Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 494-95 (Tex. 1991) [*Edgewood II*]. The results of these studies would in turn be used by the Senate to determine the amount of state funds a school district was entitled to receive. *See id.* at 495.

239. *See id.* at 500 (holding that under Senate Bill 1, the state's system of funding education remained unconstitutional).

240. *See id.* at 496 (explaining that Senate Bill 1 failed because it failed to draw revenue from all property at a similar rate).

241. Plaintiff-intervenors argued that because school districts were created by the legislature they were in essence creatures of the state. The revenue generated from local taxes belongs to the state and can be subject to recapture by the state. *See id.* at 499.

242. *See id.* (interpreting Article VII, Section 3 to prohibit the recapture of local taxes by the state).

In *Edgewood III*, the court rejected Senate Bill 351,<sup>243</sup> the State's second attempt to create a constitutional system of funding education.<sup>244</sup> In doing so, the court held that the State could not mandate the amount a school district would contribute from local taxes to the funding of education.<sup>245</sup> Senate Bill 351 called for the establishment of county education districts, or CEDs.<sup>246</sup> Each CED was made up of existing school districts and was solely responsible for the levying of taxes at a rate set by statute.<sup>247</sup> The CED would then collect and disburse the revenue generated by the taxes equally to all the districts within its boundaries.<sup>248</sup> The court found that such a system violated Article VII, Section 3 of the Texas Constitution which requires the approval of local taxpayers by vote before the levying of any tax by a district can take place.<sup>249</sup>

In *Edgewood IV*, the State's effort to establish a constitutional system of funding education was finally successful.<sup>250</sup> The court found that Senate Bill 7,<sup>251</sup> although it did not provide for complete equality, was a significant improvement in closing the disparities between wealthy and poor districts.<sup>252</sup> The court stated that an efficient system did not have to ensure equal funds at all levels of spending. A school district could use

243. The funding system proposed by Senate Bill 351 consisted of two tiers. The first tier guaranteed an allotment of funds to each school district sufficient to provide a basic education program. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 498 (Tex. 1992) [*Edgewood III*] (detailing the provisions of Senate Bill 351). The two-tiered system was an attempt to provide equal access to enrichment funds which guaranteed a specified amount of money for every cent of tax effort above the assigned tax rate. *See id.* (discussing how Senate Bill 351 operated).

244. *See id.* at 493 (holding that Senate Bill 351 levies a state ad valorem tax prior to obtaining taxpayer consent through an election, an act that is prohibited by Article VII, Section 3 of the Texas Constitution).

245. *See id.* at 498 (commenting that a provision contained within Senate Bill 351 mandated that a County Education District tax a specifically assigned tax rate).

246. County Education Districts embraced existing school districts within the county's boundary. *See id.* at 498 (outlining the responsibilities of CEDs).

247. *See id.* (explaining that the CEDs sole responsibility was to levy taxes and distribute revenue to school districts).

248. *See id.*

249. *See Edgewood III*, 826 S.W.2d at 506 (construing Article VII, Section 3 to require the approval of the electorate before a local ad valorem tax can be levied).

250. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 750 (Tex. 1995) [*Edgewood IV*] (concluding that Senate Bill 7 is constitutional).

251. Senate Bill 7 provides a two-tiered system. Tier one guarantees a basic allotment sufficient for school districts to provide a basic program of education. *See id.* at 727. To qualify for tier one funding, however, a school district must tax at a minimum rate of 86 cents per \$100 valuation. *See id.* Tier two of Senate Bill 7 is intended to provide equal access to enrichment funds and guarantees \$20.55 per student for every cent above the required 86 cents minimum. *See id.* at 727-28.

252. *See id.* at 730-31 (stating that Senate Bill 7 meets its constitutional duty through the guaranteed yield in tier two).



excess funds raised from local revenue to provide enrichment programs.<sup>253</sup> The court held that an efficient system only has to provide equal access to funds sufficient for the general diffusion of knowledge.<sup>254</sup> Because the plaintiffs were unable to demonstrate that remaining disparities continued to prohibit their ability to offer an adequate education, Senate Bill 7 was found constitutional.<sup>255</sup> The Supreme Court noted, however, that should future circumstances change and the disparities in fact become so pronounced that available funds were no longer sufficient for the general diffusion of knowledge, the issue of constitutionality could again be addressed.<sup>256</sup>

### C. Possible Disparities Created by Vouchers

In determining whether vouchers will meet the efficiency standards set by the Texas Supreme Court, it is important to first understand the possible disparities that a voucher system can create. It is equally important to recognize that empirical data as to the actual financial effect vouchers will have on particular school districts is very limited in light of the fact that a state funded program has yet to be enacted.

A voucher system takes existing funds away from school districts in order to subsidize the cost of a child's attendance at a private school.<sup>257</sup> The most recent voucher proposals by the Texas Legislature have made participation in a program dependent upon such factors as a student's family income or a student's attendance at a low performing campus.<sup>258</sup>

253. *See id.* at 729-30 (clarifying that an efficient system can permit unequalized local supplementation); James M. Scott et. al., *Developments in State Constitutional Law: 1995*, 27 *RUTGERS L.J.* 963, 1035-38 (1996) (examining the Texas Supreme Court's ruling in *Edgewood v. Meno* stating that funding does not have to be equal at all levels of spending in order for an education system to be found constitutional).

254. *See Edgewood IV*, 917 S.W.2d at 731 (noting that under Senate Bill 7, "general diffusion" is equated with state accreditation).

255. Plaintiffs argued that the lack of a "separate" facilities component fails to ensure an efficient system of education. *See id.* at 746.

256. *See id.* at 732 (cautioning excessive state supplementation could become so great that the system may become inefficient).

257. In Texas, proposed school voucher programs are referred to as "state scholarships." *See* Tex. H.B. 709, 76th Leg., R.S. (1999) (detailing a voucher proposal offered by State Representative Krusee which if enacted will provide state and local educational funds to qualifying public school children wishing to attend private school); Horner, *supra* note 113 (outlining State Representative Grusendorf's latest voucher proposal).

258. *See* Tex S.B. 10, 76th Leg., R.S. (1999) (limiting participation to educationally disadvantaged students attending schools in Texas counties with a population of 575,000 or more); Tex H.B. 709, 76th Leg., R.S. (1999) (limiting participation to students who failed to do well on the most recent academic assessment test, is educationally disadvantaged, attends a school that has at least 60,000 students and lies within the boundaries of a metropolitan city of at least one million); Tex. S.B. 1206, 75th Leg., R.S. (1997) (limiting

Such restrictions are significant because the area in which vouchers are anticipated to have the most impact is in regards to educational funding. What this means, according to figures published by the Texas Education Agency,<sup>259</sup> is that the students most affected will be minorities.<sup>260</sup>

As discussed earlier in this Comment, most voucher programs proposed by members of the Texas State Legislature require that eighty percent of a student's allotted state and local aid follow the qualifying child to the private school of her choice.<sup>261</sup> The remaining 20% would be retained by the public school district the child is leaving, in hope that it will be sufficient to cover fixed expenditures that would not be reduced by the loss of students.<sup>262</sup> The actual monetary value of that 20%, however, will vary depending on how the voucher program is funded. If the program is funded using only state aid, then the amount of funds a district retains becomes less in actual monetary value.<sup>263</sup> As a result, a school district which loses state funds will have no alternative but to rely on revenue generated by local property taxes in order to compensate. A district such as Edgewood, whose tax base is low, by its very nature will generate less local revenue.<sup>264</sup> In addition, Edgewood would lose the federal funding it would have received for each child that remained in the public school district.

If the loss of funds prevented a school district from meeting its fixed expenditures, then to generate additional funding, the district would be

participation to students attending a low-performing public school who have sought to transfer to another district and were denied); Tex. H.B. 2395, 75th Leg., R.S. (1997) (limiting participation to students who are from low income families).

259. See TEXAS EDUCATION AGENCY, *supra* note 115 (providing statistical data for each school district in Texas).

260. See *id.* (providing the names of low-performing campuses). Three of the six major urban schools districts in Texas (Dallas, Houston, and San Antonio) had low-performing campuses. See *id.* Anglo students make up eleven percent or less at each of the three districts. See *id.* at 68, 116, 170.

261. See discussion *infra* Part III.C.3 (detailing the funding for proposed voucher programs).

262. Fixed costs refers to operational and instructional expenditures such as teacher salaries or building maintenance. See TEXAS EDUCATION AGENCY *supra*, note 115, at 356.

263. The following calculations are based upon figures published by the Texas Education Agency. In 1996-97, Edgewood received \$4589 in state funding per pupil. See *id.* Eighty percent of \$4589 equals approximately \$3671. \$3671 would be amount of state funds per student lost by Edgewood to vouchers. Edgewood would retain approximately \$917 which is twenty-percent. See *id.* If a voucher system is funded using state and local revenue, Edgewood would retain twenty-percent of \$5500.86 which is approximately \$1100.18, almost \$200 more per student. See *id.* Edgewood receives \$5,852 in total aid per student, of which state funds makeup 83%, local funds 11% and federal aid 6%. See *id.*

264. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989) [*Edgewood I*] (finding that disparities exist as the result of a district's inability to generate local revenue due to low-property value).

forced to increase taxes. The need to levy a tax could pose a problem, because it is quite possible that vouchers would cut into a school district's political base and directly affect its ability to raise revenue.<sup>265</sup> Article VII, Section 3 of the Texas Constitution requires schools to obtain the consent of taxpayers before it can levy or increase taxes.<sup>266</sup> If taxpayers no longer have a vested interest in public schools because their child has accepted a voucher, than it is logically possible they would vote against increasing property taxes. A loss of the election could be devastating because a district would be prohibited from adopting a tax rate for the current year that exceeds the school district's rollback tax rate.<sup>267</sup> Even if it were assumed that voters would approve a tax increase, the rate at which a district would have to tax in order to recoup the portion of funds likely to be lost would be significant.

If a district decided not to raise additional funds or failed to pass an initiative to raise additional funds, it would be forced to make cuts in either its instructional or operational expenditures in order meet its financial obligations. These cuts would directly impact the educational opportunities offered to their students. A cut in instructional expenses would mean that a district might not be able to retain or hire qualified teachers, or would have to postpone the purchase of new books, computers, or science equipment. A cut in operational expenses could mean that new facilities would not be built or that needed repairs would not be completed.

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265. See Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. POL'Y REV. 1, 9 (1992) (describing the political and financial impact vouchers had on Choctaw County, Alabama as citizens were torn between which system of education to support, private or public). The County of Choctaw's experience with vouchers came as the result of attempts by white citizens to continue segregation in education. See *id.* at 5-6; see also Interview with Jose Cortez, *supra* note 113 (explaining how vouchers could affect a district's political support and thus its ability to generate revenue).

266. See TEX. CONST. art. VII, § 3 (requiring voter consent prior to the levying of any tax).

267. See TEX. TAX CODE ANN. § 26.08 (d)(i)(1) (Vernon Supp. 1999) (outlining the election procedure for ratifying school taxes). The effect of applying a rollback tax rate is that a school district can generate funds from local taxes at a rate no higher than the previous year. See *id.*; see also *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 733 (Tex. 1995) [*Edgewood IV*] (focusing on the plaintiff's argument that rollback elections place property poor school districts at a disadvantage); Interview with Jose Cortez, *supra* note 113 (discussing the impact a loss of a rollback election would have on a school district attempting to recover from the loss of state funds).

#### D. *Applying the "Efficiency Standard" to Vouchers*

Evaluating these possible disparities in light of the Texas Supreme Court's ruling in *Edgewood I*, it is clear that a voucher program fails to meet the efficiency standards set forth by the court and would therefore violate Article VII, Section 1 of the Texas Constitution. First, a voucher system fails to use all available resources to produce results with little waste. Second, it fails to provide equal access to educational funds. And third, it fails to provide for the general diffusion of knowledge.

In determining whether or not a voucher system uses all available resources to produce results with little waste, it is necessary to look at the Texas Supreme Court ruling in *Love v. City of Dallas*.<sup>268</sup> In *Love*, the Texas Supreme Court held that the State could not compel a school district to pay for the education of a student residing outside of its district without providing just compensation.<sup>269</sup> In reaching its finding, the court concluded that a school district took the position of trustee, and was responsible for holding school funds in trust for the benefit of the children within its boundaries.<sup>270</sup> The State cannot, therefore, compel the diversion of school funds for any other purpose without obtaining the consent of the taxpayers.<sup>271</sup>

If a voucher system were implemented using local funds in addition to state funds, the legislature, in accordance with Texas Supreme Court's ruling in *Love*, would be required to gain the approval of the district taxpayers before the local funds could be diverted to private schools. If the taxpayers denied the transfer of funds the State would be left to subsidize the entire cost of a private education. Currently, the State and the local districts share in the cost of educating the children of Texas. But under a State funded voucher program, the State would be assuming a local burden. In this respect, the Legislature would not be using all available resources, in ensuring an efficient system of education. Local revenue for each voucher student would be left untapped. In addition, local school districts would also lose local funding as it would be unable to justify raising additional revenue for students no longer present in their schools. A voucher system would also prevent a school district from obtaining any federal funding it may have received for that lost student which would mean another resource left untapped.<sup>272</sup>

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268. 40 S.W.2d 20 (Tex. 1931).

269. *See id.* at 27 (stating that the legislature cannot compel a district to accept a transfer student without compensation).

270. *See id.* (holding that property is held in trust for the school district by the city and cannot be diverted for any other purpose).

271. *See id.* (finding that not even the state legislature can divert funds).

272. In an effort to avoid legal challenges under the Federal Constitution Establishment Clause, state legislators have not proposed using federal funds in implementing a

A voucher system is also inefficient because it fails to provide substantial equal access to education funds for all students. Upon losing state, local, and federal funds a district would have no alternative but to increase taxes if the loss of revenue prevented it from maintaining its current standard of education. The district at that point would be solely dependent upon local revenue to meet state requirements. Forcing a local district to rely on revenue generated from property tax in order to maintain a minimum level of education, was found to be unconstitutional by the Texas Supreme Court.<sup>273</sup> A voucher system would be unconstitutional “not because any unequalized local supplementation is employed,” but because the State, just as the Court found in *Edgewood I*, would be relying on unequalized local funds in an attempt to meet its constitutional duty to provide for an efficient system of public free schools.<sup>274</sup>

Under the current State system of funding education, a school district low in property value has \$830 less per student to spend than a district high in property value.<sup>275</sup> In order for the gap to be completely closed, the State would have to infuse a larger amount of money into tier two of the funding system.<sup>276</sup> If a voucher system is implemented, the State is not infusing money to close the gap but is instead removing funds from schools districts and diverting them to private schools. The gap will therefore get larger, not smaller in size.

Lastly, a voucher system is not efficient because it fails to provide for the general diffusion of knowledge. A school district, which must tax at a higher rate to meet minimum State standards, will not able to provide the same educational experience for its students as those found in a wealthier district. A wealthier district, unaffected by vouchers, would be able to

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voucher program. See Interview with Jose Cortez, *supra* note 113 (explaining that any private school accepting federal funds would be required to follow federal guidelines and procedures).

273. See *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 496 (Tex. 1991) [*Edgewood II*] (stating that a funding system which is dependent on local property tax must draw revenue from all property at a similar rate); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989) [*Edgewood I*] (considering that property poor district used a greater portion of their local funds in order to meet minimum state accreditation standards in determining that the State's system of funding education was unconstitutional).

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

275. See Telephone Interview with Craig Foster, Executive Director, Equity Center (Nov. 1998) (discussing the existing disparities between poor and rich districts).

276. The State's system of funding education consist of two tiers. The first tier is a guaranteed allotment of approximately \$2,300 per student. To qualify for this fund, a school district must tax at a minimum of 86 cents per \$1 valuation. Tier two of the funding system is a guaranteed fund of \$20.55 per student for every cent a school district taxes above 86 cents. The purpose of tier two is to provide equal access to enrichment funds. See TEXAS EDUCATION AGENCY, *supra* note 115, at 22.

provide enrichment programs, a better curriculum, better personnel, better technology and better facilities. Just as in *Edgewood I*, the quality of education would be dramatically impacted by the ability of a school district to raise local funds.<sup>277</sup>

Failing to meet the efficiency standard set forth in *Edgewood I*, a voucher system, if implemented as proposed by the current State Legislature would violate, Article VII, Section 1 of the Texas Constitution.

## VI. CONCLUSION

As proposed, a voucher system in Texas would target either low-performing districts or students of low-income. Regardless of which method of distribution is ultimately chosen, the fact remains that the majority of students affected will be minorities. It is true that a few students will benefit; but at what cost to the others? Vouchers do nothing to provide a district with the funds needed to improve the education it offers and instead, diverts funds to private institutions. If it is true that the Texas Constitution “derives its force from the people” as the Texas Supreme Court has said,<sup>278</sup> then minority and low-income school children have the right to be heard.

The implementation of a voucher system is not an implied right under the Texas Constitution and must be viewed as merely an alternative method of funding education. As such, in order to pass constitutional muster, a voucher system is required to meet the efficiency standard set forth by the Texas Supreme Court in *Edgewood v. Kirby*.<sup>279</sup>

In *Edgewood I*, the Texas Supreme Court held that an efficient system of funding education was one that used all available resources with little waste, offered equal access to educational funds, and provided for the general diffusion of knowledge.<sup>280</sup> As this Comment has shown, a voucher system in Texas would fail to meet such a standard.

A voucher system fails to make use of all available resources, as the sole use of State funds to subsidize the cost of tuition at a private school would leave the resource of local revenue untapped. A school district attempting to compensate for the loss of state funds would be unable to justify raising local revenue for students no longer present in the district. The state would be left carrying a burden intended by the framers to be shared with local districts. A voucher system also fails to offer equal ac-

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277. See *Edgewood I*, 777 S.W.2d at 393 (emphasizing that a school district’s ability to raise revenue has a real impact on the education it offers).

278. See *id.* at 394.

279. See *id.* at 397 (holding that a constitutional system of funding must be financially efficient and must provide for the general diffusion of knowledge).

280. See *id.* (defining “financially efficient”).

cess to educational funds. A school district that is losing state and local money as a result of vouchers would be forced to rely more heavily on revenue generated by local property taxes. The use of these funds would go to maintain minimum state educational standards rather than to provide enhancement programs such as those found in wealthier districts. In other words, a school district would be required to tax high, but spend low. In *Edgewood I*, such a requirement was found to be in violation of Article VII, Section 1.<sup>281</sup>

Lastly, a voucher system fails to provide for the general diffusion of knowledge. Students attending schools in districts forced to use local revenue to maintain state standards, would be denied educational opportunities afforded to children in wealthier districts. A district unaffected by vouchers would use local revenue to hire more qualified faculty, to purchase more advanced technology, or to offer a broader curriculum with enrichment classes. Students in poorer districts would be denied such experiences. The disparities in funding created by vouchers, therefore, would have a dramatic impact on the quality of education a district is able to offer. In *Edgewood I*, such disparities were found to be a violation of Article VII, Section 1. Having failed to meet the “efficiency” standard set forth by the Texas Supreme Court, a voucher system if imposed would violate article VII, Section 1 of the Texas Constitution and would therefore be unconstitutional.

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281. *See id.* at 393 (describing the disparities resulting from the heavy reliance on property tax).