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Applying Edgewood v. Kirby to Analysis of Fundamental Rights Under the Texas Constitution

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APPLYING *EDGEWOOD V. KIRBY* TO ANALYSIS OF FUNDAMENTAL RIGHTS UNDER THE TEXAS CONSTITUTION

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I. INTRODUCTION

In this article, we will briefly summarize the holding of *Edgewood Independent School District v. Kirby*[1] from the perspective of those who wrote the pleadings, developed the evidence, defined the legal theories, and argued the case. We foresee numerous articles on the holding of the case, so we concentrate here on one particular aspect of the decision: the application of the *Edgewood* holding to other rights, privileges, and responsibilities stated or implied in the Texas Constitution.

A. *The Texas School Finance System*

Of primary importance is *Edgewood*'s recognition that the Texas public school finance system, as a whole, must accord with the Texas Constitution's requirements.[2] As defined by the district court and affirmed by the Texas Supreme Court, these requirements are that the school finance system fulfill the Texas Constitution's "efficiency" mandate of article VII, section 1.[3] The Texas Supreme Court rejected outright the defendants'[4] efforts to limit the courts' inquiry to the school funding structure outlined in chapter 16 of the Texas Education Code.[5]

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1. 777 S.W.2d 391 (Tex. 1989).
2. *Id.* at 393.
3. *Id.*
4. The defendants were: William N. Kirby, Texas Commissioner of Education, Texas State Board of Education, Gov. William Clements, Comptroller Robert Bullock, and Attorney General Jim Mattox. Kirby v. Edgewood Indep. School Dist., 761 S.W.2d 859, 860 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).
5. *Edgewood*, 777 S.W.2d at 394-95 (state interpreted efficiency mandate as requiring inexpensive system); *see also* TEX. EDUC. CODE ANN. §§ 16.01-16.975 (Vernon 1972 & Supp. 1990) (mechanism for funding public schools). In addition to rejecting the defendants' argu-

The *Edgewood* decision will force a change in the school funding structure. Currently, a combination of federal, state and local monies fund public education in Texas.[6] Federal funding supports specific programs within school districts.[7] State aid, meanwhile, is distributed via complicated formulas from Texas' two sources of educational funding, the permanent school fund and the general revenue fund.[8] Finally, local aid flows from property taxes levied by and for individual school districts.[9]

The Texas Legislature has periodically considered and revised the formulas by which state general revenue funds are distributed to school districts.[10] Prior to *Edgewood*, the last major revision in the state's funding formulas took shape in a law popularly known by its house bill number, "House Bill 72."[11] Unfortunately, the state's formula-based funding system was not able to compensate for the vastly different abilities of school districts to raise money for their students.[12]

In the record before the *Edgewood* court, a district's property value per student directly affected its ability to raise money.[13] For example, a district with $20,000 in property value per student received two dollars per student for each one-cent increase in the tax rate, while a district with $1,000,000 in property value per student could raise $100 per student with each one-cent tax increase. In fiscal 1985-86, for example, property value per student ranged from $20,000 per student in the poorest school district to $14,000,000 per student in the richest

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ment that the constitution mandated a cheap funding system, the Texas Supreme Court also rebuffed the defendants' theory that fiscal expenditures do not affect educational quality. *See* Brief for the State of Texas at 25, Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (contending educational quality unaffected by amount of money spent).

6. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989). The state supplied 42% of education funds, while school districts supplied 50%. *Id.* The federal government supplied the remainder. *Id.*

7. *See Edgewood*, 777 S.W.2d at 391-392. Almost half of the federal funds pay school districts to provide free and reduced cost meals to low-income children. The remaining federal funds pay for supplemental and experimental projects. *Id.*

8. *See id.* at 392 (aid distributed to school districts through Foundation School Program); TEX. EDUC. CODE ANN. §§ 15.01-15.011 (Vernon Supp. 1990).

9. *Id.*

10. *Id.* at 397.

11. *See* TEX. EDUC. CODE ANN. § 16.001 (Vernon Supp. 1990).

12. See Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (legislature has made good faith efforts to improve system, but has failed).

13. *See id.* at 392 (districts face glaring disparity in ability to raise funds through property taxes).

district.[14] Thus, for each fifty-cent tax increase, the poorest school district raised $100 per student, while the richest district received $70,000 per student.

The state's funding formulas were designed to compensate for the inferior fundraising abilities of property-poor school districts.[15] However, state aid never actually offset the incredible differences in school districts' abilities to raise money through property taxes.[16] From this basic inequality, *Edgewood Independent School District v. Kirby*[17] was born.

B. *The District Court's Decision*

On June 1, 1987, District Judge Harley Clark of the 250th District found the Texas school finance system violated the Texas Constitution and entered a declaratory judgment granting injunctive relief to the Edgewood Independent School District and its fellow plaintiffs.[18] Three months later, Judge Clark filed extensive findings of fact and conclusions of law.[19]

Judge Clark's judgment indicted the Texas school finance system for enforcing, rather than ameliorating, inequalities between students in property-rich and property-poor districts. Wrote Judge Clark:

> [I]t [Texas' school finance system] fails to insure that each school district in this state has the same ability as every other district to obtain, by state legislative appropriation or by local taxation or both, funds for educational expenditures, including facilities and equipment, such that each student, by and through his or her school district, would have the same opportunity to educational funds as every other student in the state, limited only by discretion given local districts to set local tax rates, provided this does not prohibit the State from taking into consideration the legitimate district and student needs and district and student

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14. *Id.*

15. *See id.* (state has attempted to lessen local funding disparities).

16. *Id.* at 397.

17. *Id.* at 391.

18. Edgewood Indep. School Dist. v. Kirby, No. 362, 516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, June 1, 1987), *rev'd*, 761 S.W.2d 859 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989). In addition to the Edgewood Independent School District, the plaintiffs included other property-poor school districts, as well as individual students and their parents. *Edgewood*, 777 S.W.2d at 392. The parents included Demetrio Rodriguez, the name plaintiff in *Edgewood*'s precursor, Rodriguez v. San Antonio Indep. School Dist., 411 U.S. 1 (1973).

19. Record at 536, *Edgewood* (No. 362, 516).

cost differences associated with providing a public education.[20]

Of pivotal importance in Judge Clark's analysis was the interaction between state financing formulas and school district boundaries. Judge Clark found that "Texas Education Code § 16.01 *et seq.* [was] implemented in conjunction with local school district boundaries that contain unequal taxable property wealth for the financing of public education."[21] For the remainder of the litigation, this interrelationship between state and local aid was a central issue.

1. Declaratory Judgment

The declaratory judgment found that Texas' system of school finance violated sections 3, 3a, 19 and 29 of article I of the Texas Constitution.[22] Translated, this meant that the finance system denied equal protection of the law, equality under the law, and privileges and immunities to the plaintiffs and the more than one million school children in property-poor school districts across Texas.[23] The court also found that the finance system violated the efficiency clause found in article VII, section 1 of the Texas Constitution.[24]

2. The Injunction

The injunction restrained Texas Commissioner of Education William N. Kirby, the Texas State Board of Education, Comptroller Robert Bullock and their successors from financing public education in Texas according to the system contained in chapter 16 of the Texas Education Code.[25] The court then stayed its injunction until September 1, 1989, to give the state time to enact a constitutionally sufficient plan.[26] The court also gave the state until 1990 to begin implementing the new school funding plan.[27]

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20. *Id.* at 502.
21. *Id.* at 502.
22. *Id.* at 503.
23. *Id.* at 503, 548.
24. *Id.* at 503.
25. *Id.* at 504.
26. *Id.*
27. *Id.* To ensure that the decision would not affect the school bond market, the district court granted extensive relief to bond holders in school districts. *Id.* at 505. The court also found that the plaintiffs and plaintiff-intervenors were entitled to reasonable attorneys' fees, but found that sovereign immunity barred the awarding of these fees. *Id.* at 506-07. The court further found that the Texas school finance system did not discriminate against Mexican Americans. Perhaps most importantly, the court retained jurisdiction of the case. *Id.* at 507.

3. Findings of Fact and Conclusions of Law

The court's findings of fact and conclusions of law were not seriously disputed by the defendants in the case and were not disturbed by the Austin Court of Appeals or the Texas Supreme Court, both of which relied on the district court's findings without question.[28] The district court's findings of fact addressed the following issues:

1. Education as a fundamental interest in Texas;
2. An overview of the school finance system;
3. Wealth disparities;
4. Variations in expenditures;
5. Variations in tax rates and the ability to raise funds at certain tax rates;
6. Effects of wealth differences on expenditures in taxes;
7. Effects of insufficient taxes;
8. School facilities;
9. Concentration of low-income students in low-wealth school districts;
10. Historical inequities;
11. How the foundation school program formulas deny equality of access to education funds;
12. District boundaries; and
13. Efficiencies of the present system.[29]

a. Equal Protection

Building on the detailed record, the district court concluded as a matter of law that education is a fundamental right under the Texas Constitution.[30] The court also found that wealth is a suspect category in the context of a school finance system.[31] Therefore, the court determined that the state's school finance system should be subjected to strict scrutiny under the equal protection clause of the Texas Constitution and that the system could be justified only by the state's showing of a compelling interest.[32]

The defendants had attempted to justify the system by concentrat-

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28. *See* Edgewood Indep. School Dist. v. Kirby, 761 S.W.2d 859, 860-62 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989); *see also* Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 392-94 (Tex. 1989).

29. Edgewood Indep. School Dist. v. Kirby, No. 362, 516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, June 1, 1987), *rev'd*, 761 S.W.2d 859 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

30. Record at 539-48, *Edgewood* (No. 362, 516).

31. *Id.* at 542.

32. *Id.* at 545.

ing on the issues of local control and preservation of community of interest.[33] The court found neither of these justifications sufficient to overcome the system's strongly negative impact on students in low-wealth districts.[34] As a result, the system was found to violate the equal protection clause of the Texas Constitution.[35]

The district court also found that the system violated the Texas Constitution at the lowest level of equal protection scrutiny.[36] Applying the rational relationship test to the finance system, the court found no rational or substantially justified basis for funding public education through a combination of state aid and local property taxes.[37]

b. The Efficiency Argument

The court concluded that section 1 of article VII of the Texas Constitution requires the state to maintain a cost-efficient system of free public schools.[38] The efficiency holding was based on the court's finding that Texas' school finance system wasted money in myriad ways.[39] According to the court, waste occurred for a variety of reasons, including the fact that some school districts had been created as tax havens.[40] Additionally, funding formulas sent unnecessary monies to wealthy districts, district boundaries were not drawn to effectively and efficiently use the property wealth of the state, and very small or very poor districts were inefficient because of the lack of wealth.[41] This efficiency holding later became the basis of the Texas Supreme Court's decision to overturn the state's method of public school financing.[42]

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33. *Id.* at 575, 591.
34. *Id.*
35. *Id.* at 502-03.
36. *Id.*
37. *Id.* at 538-39.
38. *Id.* at 503.
39. *Id.*
40. *Id.* at 573.
41. *Id.*
42. *See* Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (school financing system not efficient as required by article VII, section 1 of Texas Constitution).

C. *The Court of Appeals*

1. The Majority Opinion

The Austin Court of Appeals reversed the district court decision[43] after determining that the school finance system should be examined according to the rational relationship test, not strict scrutiny, under the equal protection clause of the Texas Constitution.[44] In so doing, the appellate court repudiated the district court's finding that education is a fundamental right under the Texas Constitution.[45] Although education is vitally important and a "primary vehicle for transmitting the values upon which our society rests,"[46] the appellate court found that education is not "included in the limited category of fundamental rights that reach constitutional dimensions."[47] The court then limited fundamental rights to those specifically mentioned in the Texas Bill of Rights, in particular, freedom of speech and religion.[48]

The district court's other means of utilizing strict scrutiny—the finding of wealth as a suspect category—was also overturned by the appellate court.[49] The appellate court's analysis of the issue cited *San Antonio Indep. School Dist. v. Rodriguez*,[50] the United States Supreme Court case that was the precursor to *Edgewood* and that found that wealth was not a suspect class under the United States Constitution.[51] "Our analysis under the Texas Constitution reaches no different result," the appellate court stated.[52]

Having eliminated the fundamental right and suspect class issues that would have elevated the level of scrutiny, the appellate court was free to analyze the school finance system according to the rational relationship test.[53] Recognizing local control of education as one of

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43. *Id.*
44. *Id.* at 864.
45. *Id.*
46. *Id.* at 863.
47. *Id.*
48. *Id.* at 862-63.
49. *Id.* at 864.
50. 411 U.S. 1 (1973). The Court in *Rodriguez* held that the Texas school finance system did not disadvantage any suspect class or interfere with the exercise of a "fundamental" right. *Id.* at 28, 37-39.
51. *Id.* at 28.
52. Kirby v. Edgewood Indep. School Dist., 761 S.W.2d 859, 864 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).
53. *Id.* at 864.

the state's goals, the court found that the use of property taxes to partially finance public education enables greater local control.[54] Therefore, the court stated, the finance system is rationally related to local control of education.[55]

The court also approved the state's argument that the school finance system was authorized by article VII, section 3 of the Texas Constitution,[56] which enables the Texas Legislature to create school districts and to allow those school districts to tax.[57] Analyzing the constitution according to the rules of constitutional construction, the court determined that the framers of the Texas Constitution intended to let the legislature give school districts the power to raise local revenues based on property taxes.[58]

The appellate court declined to review the plaintiffs' argument that the school finance system violated the efficiency clause of article VII, section 1 of the Texas Constitution.[59] The issue of efficiency, the court held, was a political question unsuitable for review.[60]

2. The Dissent

Judge Gammage dissented, concluding that education is a fundamental right under the Texas Constitution and that wealth is a suspect class.[61] Judge Gammage also determined that the history of the 1876 Texas Constitution supported these conclusions.[62] He next argued that article VII, section 3 and article I, sections 3 and 3a of the Texas Constitution could be harmonized and interpreted as requiring the state to demonstrate a compelling reason for the disparate funding of Texas school districts.[63] The state, Judge Gammage would have found, could not support this burden.[64]

Unlike the majority, Judge Gammage found that article VII, sec-

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54. *Id.*

55. *Id.*

56. *Id.* at 866.

57. TEX. CONST. art. VII, § 3.

58. Kirby v Edgewood Indep. School Dist., 761 S.W.2d 859, 864-66 (Tex. App. — Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

59. *Id.* at 867.

60. *Id.*

61. *Id.* at 867 (Gammage, J., dissenting).

62. *Id.* at 867-75 (Gammage, J., dissenting).

63. *Id.* at 874 (Gammage, J., dissenting).

64. *Id.* (Gammage, J., dissenting).

tion 1 of the Texas Constitution was amenable to traditional review.[65] He also concluded that the meaning of efficiency, as referred to in article VII, section 1 and as applied to school finance, could be defined as " 'efficient enough' to preserve protected constitutional rights in accordance with necessary, discernible and manageable legal standards."[66] Because the school finance system did not preserve such rights, Judge Gammage agreed with the trial court that the system violated the "efficiency clause" in article VII, section 1.[67]

D. *The Texas Supreme Court Decision*

Edgewood Independent School District v. Kirby is among the leading Texas cases on the meaning of the Texas Constitution. It is also the leading decision on the construction of the "efficiency clause" in article VII, section 1 of the constitution.

The Texas Supreme Court rejected the appellate court's determination that article VII, section 1 was not amenable to judicial review.[68] Instead, the court found it had a duty to construe section 1's terms—which included "efficiency," "suitable," and "essential"—even though these terms were not precise.[69] According to the court, this duty sprung from the challenge to a state system which allegedly violated strong, but general, constitutional demands.[70]

The court began its interpretation by summarizing the disparities caused by the school finance system.[71] It then stated it would consider the intent of those who had adopted the efficiency clause in article VII, section 1.[72] The court also noted its duty to interpret the constitution as "an organic document to govern society and institutions as they evolve through time."[73]

By studying sources dating from the 1876 Constitution to the 1883 amendments, the court concluded that the term "efficiency" in the Texas Constitution is synonymous with non-wasteful and productive

65. *Id.* at 875 (Gammage, J., dissenting).
66. *Id.* (Gammage, J., dissenting)
67. *Id.* (Gammage, J., dissenting).
68. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).
69. *Id.*
70. *Id.*
71. *Id.* at 392-93.
72. *Id.* at 394.
73. *Id.*

effects.[74] In so concluding, the court repudiated the defendants' interpretations of efficiency as meaning "cheap" or "inexpensive."[75]

Based on this historical, contextual and practical analysis, the court concluded that the system violated article VII requirements that the legislature provide for a "general diffusion of knowledge" and an efficient system of education.[76] The court also set a strong standard for the school finance system and mandated that the Texas Legislature fashion a remedy before May 1, 1990.[77] The court held that:

> there must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.[78]

The court further stated that:

> [a] band-aid will not suffice; the system itself must be changed. . . . A remedy is long overdue. The legislature must take immediate action.[79]

With this, the court rejected the defendants' arguments that the present system is mandated by the need for local control of education and the constitutional creation of school districts and their legislatively controlled power to tax.[80]

II. EQUAL PROTECTION

A. *Equal Protection in* Edgewood

The Texas Supreme Court decision in *Edgewood* did not openly discuss equal protection, but it analyzed the case in much the same way that an equal protection case would be resolved. The court's analysis will be important in future litigation when this decision is applied to other aspects of education as well as to other rights under the state constitution.

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74. *Id.* at 395.
75. *Id.*
76. *Id.* at 397.
77. *Id.* at 399. The Texas Supreme Court stayed the effect of the trial court's injunction until May 1, 1990, but made it clear that "[a] remedy is long overdue. The legislature must take immediate action." *Id.*
78. *Id.* at 397.
79. *Id.* at 397-99.
80. *Id.* at 398.

The *Edgewood* trial court decided the case on equal protection grounds.[81] The court of appeals overturned the decision based on a rejection of the use of equal protection in the area of education.[82] Though the court of appeals acknowledged the inequities in the educational system, it refused to allow the courts and the Constitution to create a remedy.[83]

While the Supreme Court reversed the appeals court and affirmed the trial court, it did not openly resolve the equal protection issues.[84] However, the Supreme Court decided the case based on equal protection considerations.[85]

The Supreme Court's discussion of the Texas educational system left no doubt as to the tremendous inequalities in education. The court based its decision on only one of the three provisions upon which the trial court had depended.[86] Without reaching a conclusion that a fundamental right or a suspect class had been affected, the court decided the case solely on the education efficiency provision of article VII, section 1.[87] "Because we have decided that the school financing system violates the Texas Constitution's 'efficiency' provision, we need not consider petitioner's other constitutional argument."[88]

The door is left open, however, for a later interpretation either that equal opportunity for education is a fundamental right or that wealth is a suspect class. First, the Supreme Court did *not* decide that education was *not* a fundamental right, nor that wealth was *not* a suspect class. Secondly, the decision presented a view of the Constitution as a document which should be interpreted in view of current conditions.[89] Thirdly, the reasoning used by the Supreme Court is logically based on the same analysis used in equal protection cases.

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81. Record at 503, *Edgewood* (No. 362, 516).

82. Kirby v. Edgewood Indep. School Dist., 761 S.W.2d 859, 864 (Tex. App. — Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

83. *Id.* at 867.

84. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 398-99 (Tex. 1989).

85. *Id.* at 393, 397-98.

86. *Id.*

87. *Id.*

88. *Id.* at 398.

89. *Id.* at 396-99.

1. Use of Judicial Restraint

The final *Edgewood* decision did not reach the equal protection issues directly. By basing the holding on the "efficiency" clause, the court did not create a precedent of refusing to apply strict scrutiny in the field of education. Rather, the court exercised judicial restraint.

A principle of proper constitutional interpretation is to avoid a finding of unconstitutionality if the court can find a remedy at a lower level of law, such as a change in a statute.[90] This principle arises from the doctrine of judicial restraint, which takes form in other ways, such as the case and controversy requirement, refusals to make advisory decisions, and rules of justiciability, clarity and timeliness.[91] Here, the *Edgewood* court was able to mandate a remedy for educational inequality by basing its decision on a less fundamental section of the Texas Constitution.[92]

The Texas Constitution encompasses both basic rights and statutory material. For example, article I contains the Texas Bill of Rights,[93] yet article III, section 47 authorizes bingo.[94]

Even within the education article, fundamental and nonfundamental rights are implicated.[95] The efficiency of education clause in the Texas Constitution does not reach as deeply as the beginning of that same sentence in article VII, section 1 which states that "[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people. . . ."[96] Judicial restraint would seem to dictate state court interpretation of a state constitution with the holding based on the narrowest grounds possible. Judicial restraint can explain why the Supreme Court decided *Edgewood* under one part of article VII, section 1, and did not reach the other part of the

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90. Ashwander v. TVA, 297 U.S. 288, 348 (1936)(Brandeis, J., concurring) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)). "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principal that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell*, 285 U.S. at 62.

91. *See* Rescue Army v. Municipal Court, 331 U.S. 549, 568-75 (1947) (contains a descriptive history of the origins of the judicial restraint doctrine).

92. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

93. TEX. CONST. art. I.

94. TEX. CONST. art. III, § 47.

95. TEX. CONST. art. VII. The fundamental right implicated is equality of opportunity for education. Although this has not been found to be a fundamental right in Texas, we argue that the Texas Constitution provides for it.

96. TEX. CONST. art. VII, § 1.

same section which implicated fundamental rights and suspect classes.

Additionally, judicial restraint protects the separation of government branches.[97] The Texas Supreme Court interpreted the Constitution but left the fashioning of the particular remedy to the Texas Legislature.[98] It may be, however, that a later decision will reach fundamental rights if, for example, the legislature refuses to correct the unequal educational financing system and the remedy must be fashioned by the judiciary.[99]

2. An Organic Document

That it would be possible for a later decision to reach fundamental rights or a suspect class is also suggested by the court's willingness to interpret the Constitution in the light of present day conditions. The use of the words "organic" and "evolve" indicate a constitutional interpretation which takes into account more than the plain language of the document or the framers' and ratifiers' views. "We seek its meaning [of article VII, section 1] with the understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time."[100]

3. Elements of Equal Protection Analysis

The most revealing factor in the Supreme Court's decision was that the reasoning followed equal protection analysis.[101] In order to thoroughly analyze the court's decision in terms of equal protection, the groundwork of what is federal and state equal protection will be set out first.

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97. *See* United States v. Nixon, 418 U.S. 683, 992-97 (1974) (discusses court's role in separation of the judiciary and the executive branches).

98. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 399 (Tex. 1989).

99. In the summer of 1990, a trial was held on the allegations of the plaintiffs, poor districts, that the new school finance bill did not meet the Supreme Court mandate to make the school finance system efficient and equitable. On September 25, 1990, Travis Country District Judge Scott McCown held that the new school finance bill was unconstitutional. Judge McCown gave the Legislature until September 1, 1991 to enact a more equitable and efficient school finance law.

100. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

101. This analysis is specifically directed to the determination of whether a right is fundamental under the Texas Constitution in an equal protection case. We assume the analysis can also be applied to whether the right is fundamental in other areas.

B. *The Three Levels of Review Under Both State and Federal Analyses*

1. Federal Analysis

There are roughly three standards under which government action is scrutinized in the area of equal protection. The standards affect whether the burden of proof is shifted and what level of state interest is required. Historically, the rational and strict scrutiny standards evolved first. In the rational relationship test, the courts validate government classifications or statutes which impinge on a constitutional right if a rational connection can be shown between the classification or statute and the state interest furthered by the classification or statute. The rational relationship test has been used for cases interpreting social and economic legislation.[102] It is a very lax standard.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[103]

The most exacting standard applied to a government classification or statute is the strict scrutiny standard. The strict scrutiny standard is applied when a suspect classification has been made or when a fundamental right is impinged upon. The government then has the burden of proof that the classification or statute furthers a compelling state interest.[104] As the rational and strict scrutiny standards for equal protection and fundamental rights developed, the problems with such a rigid structure were made apparent.

The United States Supreme Court reacted to the limitations of the

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102. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). "[But] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional, unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. . . ." *Id.*

103. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (citations omitted).

104. McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (classification based upon race violates equal protection).

"two-tiered" analysis by developing a system of "intermediate scrutiny."[105] The mid-level review in federal courts involves a quasi-suspect classification, and the government has the burden to prove that the classification bears a substantial relationship to an important state interest. It was first used for gender classifications.[106] The intermediate standard has also been applied to classifications of illegitimacy,[107] some aspects of alienage,[108] and mental retardation.[109]

In *Edgewood*, the plaintiffs sought to establish that education is a fundamental right and that wealth is a suspect category.[110] Either of these two arguments would have triggered the strict scrutiny standard and forced the government to prove that a compelling interest was advanced by the current school financing system.

2. The Federal Equal Protection Analysis as Applied to Education

The federal precedent most on point for the *Edgewood* case is *San Antonio Independent School District v. Rodriguez*.[111] Based on an implicit/explicit test, the United States Supreme Court held in *Rodriguez* that education was not a fundamental right.[112] Because the federal constitution does not specifically mention education, reasoned the court, education is not explicitly guaranteed.[113] The possibility of finding education implicitly protected by the United States Constitution was rejected summarily despite a recognition of the importance

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105. *See* Gunther, *Forward: In Search of Evolving Doctrine on A Changing Court: A Model For a New Equal Proctection*, 85 HARV. L. REV. 1, 20-87 (1972).

106. Reed v. Reed, 404 U.S. 71, 76 (1971) (using rational basis test to invalidate Idaho statute preferring male over equally qualified female to serve as administrator of estate); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (openly departed from the traditional rational basis standard with respect to gender).

107. Weber v. Aetna Casualty and Sur. Co., 406 U.S. 164, 173 (1972) (invalidated workers compensation law denying benefits to unacknowledged illegitimates).

108. Hampton v. Mow Sun Wong, 426 U.S. 88, 104-05 (1976) (denial of federal employment to aliens must be justified by reasons of concern to government agency, not administrative convenience).

109. Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985) (used rational basis test as though it were intermediate standard to hold unconstitutional refusal to permit construction of home for mentally retarded on basis of zoning, while directly rejecting quasi-suspect classification).

110. Record at 539, 562-65, *Edgewood* (No. 362, 516).

111. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

112. *Id.* at 35.

113. *Id.* at 35-36.

of education in comparison to and in connection with other federally protected rights.

> Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
>
> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.[114]

The *Rodriguez* Court rejected an argument based on the nexus between education and other fundamental rights.[115] The nexus argument is that education is important in order for people to be able to exercise other federally protected rights. As Justice Powell in *Rodriguez* explained,

> It is the appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of first amendment freedoms and to the intelligent utilization of the right to vote.[116]

The Supreme Court rejected the nexus test by stating that although the challenged right may be important to the exercise of other fundamental rights, the United States Constitution guarantees only a lack of government interference in people's lives.[117] In the same vein, the Court also spoke of the concern to protect federalism by keeping the federal judiciary out of states' legislative activities.[118]

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114. *Id.* at 33-35 (citations omitted).
115. *Id.* at 36-39.
116. *Id.* at 35.
117. *Id.*
118. *Id.* at 35-36.

3. The Federal Intermediate Test as Applied to Education

Education has a history of mid-level review on the federal level. The United States Supreme Court looked at a Texas statute challenged under the equal protection clause in *Plyler v. Doe*.[119] The case invalidated section 21.031 of the Texas Education Code which denied a free public education to children of illegally admitted aliens.[120] The *Plyler* court noted that, although education was not a "right" guaranteed under the United States Constitution,

> neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . .[121]
>
> In determining the rationality of section 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination . . . can hardly be considered rational unless it furthers some substantial goal of the State.[122]

Thus, *Plyler* establishes, post-*Rodriguez*, a middle level of scrutiny for the federal equal protection analysis of education-related classifications. *Plyler* clearly states that education should not fall within the general rules for interpreting social and economic legislation.

Another recent United States Supreme Court case makes clear that *Rodriguez* did not permanently settle the application of the federal equal protection clause to state school financing challenges. *Papasan v. Allain*[123] points to the continuing vitality of the federal equal protection clause to close scrutiny of those parts of the school finance system which are under state control.

However, the Texas courts need not depend on federal precedent because the interpretation of the protections or rights found in the Texas Constitution can extend beyond the interpretation of the United States Constitution.[124]

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119. 457 U.S. 202, 205 (1982).

120. *Id.* at 230.

121. *Id.* at 221.

122. *Id.* at 223-24.

123. 478 U.S. 265 (1986) (equal protection claim based on unequal distribution of benefits from state land not barred by eleventh amendment).

124. Duncan, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809, 838-45 (1988).

4. State Analysis: Comparing Texas and Federal Equal Rights

The Texas Constitution differs from the United States Constitution in history, language and judicial interpretation.[125] This is especially true in regard to the state and federal equal protection clauses.

a. Legislative History

The Texas Constitution was derived from its own independent, national constitution.[126] The Texas equal protection provision has a longer history than the federal clause, which is contained in the fourteenth amendment. The Texas provision was enacted thirty years before the federal equal protection clause.[127]

b. Language

The language of the Texas provision includes both an affirmative clause ("all free men . . . have equal rights") and a negative prohibition ("no man, or set of men, is entitled to exclusive separate public emoluments, or privileges").[128] The fourteenth amendment to the United States Constitution is phrased only in the negative: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[129]

c. Case History

A state constitution can both grant additional rights and respect the rights protected by the federal constitution.[130]

> While state constitutions cannot subtract from the rights guaranteed by the United States Constitution, state constitutions can and often do provide additional rights for their citizens. The federal constitution sets the floor for individual rights; state constitutions establish the ceiling.

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125. *Cf.* State v. Gunwall, 720 P.2d 808, 812-13 (Wash. 1986) (en banc). The court sets forth six criteria for determining whether the state's constitution extends broader rights to citizens than does the United States Constitution. *Id.*

126. Osban v. State, 726 S.W.2d 107, 120 (Tex. Crim. App. 1986)(Miller, J., dissenting). When Texas joined the Union, it carried over its written principles from the period of 1836 to 1846, when Texas was an independent nation. *Id.*

127. The Declaration of Rights in the 1836 Constitution of the Republic of Texas included the Texas equal protection clause. The fourteenth amendment, which incorporated an equal rights clause into the United States Constitution, was passed in 1868.

128. TEX. CONST. art. I, § 3.

129. U.S. CONST. amend. XIV, § 1.

130. LeCroy v. Hanlon, 713 S.W.2d 335, 338-39 (Tex. 1986).

> Recently, state courts have not hesitated to look to their own constitutions to protect individual rights. This court has been in the mainstream of this movement.[131]

Federal and state constitutional law are allowed to be separate. For example, the United States Supreme Court declined to rule on the constitutionality of a Texas municipal ordinance because the Fifth Circuit Court of Appeals might have reached the judgment on independent grounds under the Texas Constitution.[132]

Texas can reject federal holdings and tests in formulating its own constitutional law, as long as federally protected rights are not violated.[133] Texas courts are not bound by the decisions of the United States Supreme Court in that they are "free to accept or reject federal holdings" in formulating a body of law under the state's own constitution.[134] "Subject to adhering to minimal federal standards, we are at liberty to interpret state statutes in light of our own constitution and to fashion our own tests to determine a statute's constitutionality."[135] The Texas equal protection provision has been interpreted more broadly in some senses than the federal provision. For example, equality of political rights was protected under section 3.[136]

Both the Texas and federal equal protection interpretations have resulted in a mid-level test. Justice Phillips' dissent in *Lucas v. United States* referred to three levels of review used under the Texas equal protection clause.[137] For the mid-level test, he cited a court of appeals case applying intermediate scrutiny, under both state and federal constitutions, to a classification based on illegitimacy.[138] The Texas rational basis test is called the "strict reasonableness" standard. One commentator has found the Texas "strict reasonableness" test to be a significantly more searching inquiry than the equal protection rational basis standard under federal law.[139]

In terms of applying an equal protection analysis to education in

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131. *Id.* at 338 (citations omitted).

132. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982).

133. Whitworth v. Bynum, 699 S.W.2d 194, 196 (Tex. 1985).

134. *Id.* at 196 (quoting Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983)).

135. *Whitworth*, 699 S.W.2d at 196-97.

136. Burroughs v. Lyles, 181 S.W.2d 570, 574 (Tex. 1944).

137. 757 S.W.2d 687, 704-05 (Tex. 1988)(Phillips, C.J., dissenting).

138. In the Interest of B.M.N., 570 S.W.2d 493, 498-500 (Tex. Civ. App.—Texarkana 1978, no writ).

139. J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 79 (1987). "*Whitworth* clearly demonstrates that the Texas rational-basis rule is

Texas, both federal and state authorities indicate that a higher standard than the federal rational basis test is required. This can be seen in *Hernandez v. Houston Independent School District.*[140] *Hernandez* applied the federal rational basis test to education. However, the *Hernandez* analysis was rejected in *Plyler* when the Court reviewed the same statute and subjected it to heightened scrutiny. The Third Court of Appeals in Austin later relied on *Hernandez* in *Sullivan v. University Interscholastic League,*[141] but the Texas Supreme Court reversed the court of appeals' decision.[142] This reversal suggests that more than the federal rational basis test is required.

The court debated these issues in *Edgewood.* The defendants in *Edgewood* argued that the explicit/implicit test used in *Rodriguez* should not be applied in Texas. Of course, as the *Edgewood* plaintiffs advocated, since the Texas Constitution explicitly speaks of education, the *Rodriguez* test is easily met and education would therefore be considered guaranteed by the Constitution. Other arguments by the defendants against using the explicit/implicit test from *Rodriguez* are the following:

a. state constitutions include many laws which are usually considered legislation so the fact that something is mentioned in the state constitution does not imply that it is a fundamental right. Unlike the United States Constitution, which is a document of restricted authority and delegated powers, the Texas Constitution does not restrict itself to addressing only those areas that are fundamental;

b. even the states that have found their public school finance systems to be in violation of their respective state constitutions have largely rejected the explicit/implicit test;

c. the explicit/implicit test would implicate other vital governmental services besides education and dictate state-wide uniformity; and

d. so much state involvement would violate local autonomy.

The defendants thus urged rejection of the explicit/implicit test but advocated another position taken in *Rodriguez.* The nexus test was

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actually much closer to what some courts have called the 'strict reasonableness' test which is similar to middle-tier federal analysis." *Id.*

140. 558 S.W.2d 121 (Tex. Civ. App.—Austin, 1977, writ ref'd n.r.e.).

141. 599 S.W.2d 860, 864 (Tex. Civ. App.—Austin 1980), *rev'd in part, aff'd in part,* 616 S.W.2d 170 (Tex. 1981).

142. Sullivan v. University Interscholastic League, 616 S.W.2d 170, 173 (Tex. 1981).

rejected in *Rodriguez* and defendants wanted the Texas courts to reject the nexus test for education under the Texas Constitution as well. The nexus test is applied by connecting the need for the right in question with the ability to exercise other constitutional guarantees such as free speech. Though the *Edgewood* trial court held that such a connection existed, the Supreme Court did not reach the question.[143]

The plaintiffs in *Edgewood* urged that the nexus test is indeed valid in a state judicial proceeding which is evaluating the state's legislative activity in relation to the state's constitution. Furthermore, the concerns of federalism, which the *Rodriguez* court emphasized, are not relevant in a state court interpreting state constitutional law.

Plaintiff's other arguments in distinguishing *Rodriguez* were as follows:

a. the education provision in the Texas Constitution is directly linked with the Texas Bill of Rights;

b. *Rodriguez* criticized the lack of a complete record in that case, but the *Edgewood* plaintiffs had provided extensive proof that tremendous numbers of children were not receiving an adequate education; and

c. the federal constitution is a guarantee of limited federal government interference, but the state constitutions are an affirmative grant of power to state governments.

5. The *Edgewood* Supreme Court Applied Equal Protection Analysis

Though the court did not mention equal protection directly, the decision was analyzed with equal protection concepts. The three steps in such an analysis are: 1) is a fundamental right implicated or a suspect classification made, 2) what is the state's rationale for infringement on the right or for the classification, 3) is the state interest compelling, substantial or rational?

The court scrutinized the state classification of rich and poor districts, emphasized the importance of education as a right, and discussed the merits of the government's rationale for the current laws on school financing.

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143. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 398-99 (Tex. 1989).

a. The *Edgewood* Court went beyond rational basis.

Had the Texas Supreme Court used the federal rational basis test, the defendants might have won, because they could offer proof that the current system of school financing was not totally irrational. However, even if the Texas Supreme Court had used the federal rational basis test but relied on the findings of the district court, it would still have found the system irrational. Using the rational basis test, the Supreme Court might have merely dismissed the public school financing issue as "social or economic legislation," which was the route taken by the court of appeals. The effort made by the state in providing the Foundation School Program could be offered as evidence that Texas was moving incrementally towards equalized education. However, the Supreme Court rejected that theory. The court stated that:

> [t]he legislature's recent efforts have focused primarily on increasing the state's contributions. More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A band-aid will not suffice; the system itself must be changed.[144]

The *Edgewood* court did not use the federal rational basis test nor did it find for the defendants. The court's holding that the school finance system was unconstitutional was based instead on violation of the constitution's efficiency provision.[145]

b. Strict Scrutiny, Strict Reasonableness and *Edgewood*

Equal protection analysis looks at the state classification and the state interest protected by such a classification. The Texas Supreme Court discussed the classification of wealth in *Edgewood*.[146] The court found the state classification of poor and rich districts existed. The court emphasized the importance of equal education for all and considered the first equal protection factor by determining whether

144. *Id.* at 397.

145. *Id.* at 398.

146. *Id.* at 392. "There are glaring disparities in the abilities of the various school districts to raise revenues from property taxes because taxable property wealth varies greatly from district to district . . . . Because of the disparities in district property wealth, spending per student varies widely. . . . *Id.*

the state had created a classification.[147]

The second equal protection factor is the analysis of what state interest is protected by such a classification. This involves consideration of the rationale given by the state to justify its classification scheme. In *Edgewood*, the state gave two rationales for the school financing system which results in a classification of poor and rich districts. The first rationale was that the system requires local control, and the second rationale was that the specific constitutional language authorized school districts. The state argued that Texas was correctly prioritizing local control over equality of educational opportunity and equality of tax revenues. Therefore, any resulting inequalities were not a product of the state. The state argued that local school districts must be allowed to raise money for schools based on their own needs. If not, then the school districts would have little or no control over how that money would be spent. The current system was said to provide for accountability to the residents of the area. Local financing, argued the state, was necessary to maintain local control. State-wide uniformity would preclude local control.

The Supreme Court answered this argument by reasoning that an equitable system would enhance local control:

> An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less.[148]

The court did not determine whether the state interest in local control was compelling or substantial since it rejected the underlying assumption that the existing school financing system enhanced local control.[149]

The second state rationale for the classification of rich and poor districts was based on the language of article VII, section 3 which grants the legislature the power to create school districts. The state argued that school districts were constitutional because they were written into the Texas Constitution. Furthermore, the current conditions of inequalities which were caused by such local structures must also have been constitutional, because the current system developed

147. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 396-97 (Tex. 1989).
148. *Id.* at 398.
149. *Id.*

from constitutionally approved school districts. In balancing the "efficiency" clause with the school district clause, the state pointed to the dates on which the two provisions were adopted. The state argued that the school district clause should rule because it was adopted in 1883, seven years after the original section 1 "efficiency" clause was adopted. Lastly, section 3 of article VII had been amended five times since its adoption. Therefore, the fact that the school district clause had remained untouched was evidence that the people want the current system to continue.

The Supreme Court responded to this argument by saying that article VII, section 3 does not excuse the current inequities and that "this provision was intended *not* to preclude an efficient system but to serve as a a [sic] vehicle for injecting more money into an efficient system."[150] The Supreme Court followed traditional constitutional interpretation doctrine by looking at the document as a whole and balancing the weight of one provision against another.[151] In balancing the section 3 clause authorizing school districts with the section 1 efficiency clause, the court found that the school district clause must be limited in order to make sense of the efficiency clause.[152] The Supreme Court gave more weight to section 1 because the language of section 1 provides that the legislature has the "duty" to maintain an efficient system of public free schools, while section 3 provides that the legislature merely has discretionary power and "may" create school districts.[153]

Furthermore, the court reviewed the Texas Constitutional debates and held that the framers and ratifiers intended a system where the costs and benefits of public schools were equalized.[154] "The 1876 Constitution provided a structure whereby the burdens of school taxation fell equally and uniformly across the state, and each student in the state was entitled to exactly the same distribution of funds."[155] Again, the Supreme Court did not directly answer the question whether the school district structure was a compelling or substantial state interest. However, the court clearly went beyond the rational test by exploring classifications made by the government and by ana-

150. *Id.* at 396.
151. *Id.* at 393-99.
152. *Id.*
153. *Id.*
154. *Id.* at 395-97.
155. *Id.* at 396.

lyzing the current application of those classifications.[156]

The Supreme Court rejected both "rationales" offered by the state. In doing so it indirectly held these reasons to a higher standard than a mere rational basis test.

The Texas Supreme Court also explored the importance of education. Although the court never said that education was a fundamental right, the right to education was found to be so important that a tremendous change in the financing of schools was mandated in *Edgewood*.[157] The court took seriously the constitutional requirement of providing for a general diffusion of knowledge statewide. Moreover, the court found that education must be provided equally to Texas children: "There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort."[158]

Had the *Edgewood* court held that education was a fundamental right or that wealth was a suspect class, or had the court used a mid-level standard to review the school financing system, the decision would not have upset precedent in Texas constitutional history. The history of fundamental rights in Texas follows.

6. History of Fundamental Rights In Texas

State judiciaries have traditionally cited to federal authority in analyzing civil rights. Only recently have state courts begun using the Texas Constitution and Texas case precedent as the basis for their decisions in civil rights cases.[159]

Article I of the Texas Constitution contains a section which provides that the Bill of Rights is "inviolate" and "excepted out of the general powers of government."[160] This would appear to make the rights within article I fundamental, and all other provisions of the Constitution nonfundamental, but case law has not drawn such neat lines.

Texas Jurisprudence 3d identifies less than half of the Bill of Rights

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156. Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989).

157. *Id.* at 396-97.

158. *Id.*

159. See J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 1 (1987).

160. TEX. CONST. art. I, § 29.

as fundamental, listing section 3a (equality under the law), sections 3, 4 (religious tests), section 7 (sectarian appropriations), section 8 (freedom of speech and press), section 12 (habeas corpus), section 13 (cruel and unusual punishment; due course of law), section 15 (trial by jury), section 16 (bills of attainder), section 17 (special privileges), section 21 (corruption of blood), section 24 (military authority), section 25 (quartering soldiers) and section 27 (assembly and petition).[161]

This list is both over-inclusive and under-inclusive. It is over-inclusive in that some of the rights have not been challenged, such as quartering soldiers in times of peace. The list is under-inclusive because recent cases have expanded the list. In *Lucas v. United States*,[162] the Texas Supreme Court declared a statutory limitation on medical malpractice damages to be unconstitutional as it violated the "open courts" provision of article 1, section 13 of the Texas Constitution.[163] The use of a strict scrutiny test that demanded the government prove a compelling reason for the malpractice cap established the "open courts" guarantee as a fundamental right.

A right to privacy was implied from several constitutional provisions and a strict scrutiny standard was used in *Texas State Employees Union v. Texas Dept. of Mental Health & Mental Retardation.*[164] The Texas right to privacy is discussed further in the section on application of the proposed test for fundamental rights to reproductive rights.

Equal protection in the Texas Constitution is addressed in two provisions, sections 3 and 3a of article I.[165] Section 3 is the older of the two, and was the first section in the 1836 Constitution's Declaration of Rights.[166] Two recent cases have interpreted section 3 using "the

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161. *See* 12 TEX. JUR. 3d Constitutional Law § 113 (1979).

162. 757 S.W.2d 687 (Tex. 1988).

163. *Id.*; *see also* TEX. CONST. art. 1, § 13. "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.*

164. 746 S.W.2d 203, 205 (Tex. 1987). The court held that mandatory polygraph tests of Texas mental health and mental retardation employees violated the right of individual privacy which was found implicit in the Texas Bill of Rights. *Id.* Although the state's concern with the welfare of the mentally ill and mentally retarded was "in many respects compelling" and "admittedly important," the unreliability of the polygraphs made this method an unreasonable means for identifying violations by employees. *Id.* at 206.

165. TEX. CONST. art. I, §§ 3, 3a.

166. J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 77, 91(1987).

Texas version of the rational basis test."[167] In *Whitworth v. Bynum*,[168] the Texas Supreme Court invalidated the automobile guest statute by analyzing how other states had resolved similar challenges to their guest statutes, by imposing higher constitutional standards than those required by federal law, and by relying on only the authority of Texas cases.[169] The "no pass, no play" provision of the Texas Education Code was upheld in *Spring Branch I.S.D. v. Stamos*.[170] The Texas Supreme Court found no fundamental rights implicated nor any suspect class burdened by the statute which required students to pass academic courses in order to participate in school sports activities.[171]

The second provision, section 3a, called the Texas ERA amendment, has survived scrutiny as a fundamental right and was re-affirmed recently.[172] The amendment brings the strict scrutiny standard to governmental classifications of "sex, race, color, creed, or national origin."[173] Age classification was implicitly denied protection under this section.[174] Sexual orientation and wealth classifications have not been specifically addressed under the amendment.

7. What Other States Have Done

a. Education as a Fundamental Right in Other States

Since 1971, at least twenty of the highest courts in states other than Texas have been called upon to review the constitutionality of their school finance systems. The following states found education to be a fundamental right: Arizona, California, Connecticut, Kentucky, West Virginia and Wyoming.[175] Four states found that their systems violated the equal protection clause: Arkansas, California, Washing-

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167. *See* Whitworth v. Bynum, 699 S.W.2d 194, 196-97 (Tex. 1985) ("rational basis" test applied to strike down Texas Guest Statute); Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 559-60 (Tex. 1985) ("rational basis" test applied to uphold "no pass, no play" rule).

168. 699 S.W.2d 194, 196-97 (Tex. 1985).

169. *Id.* at 195-98; J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 78, 79 (1987).

170. Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 562 (Tex. 1985).

171. *Id.* at 560.

172. In the Interest of McLean, 725 S.W.2d 696, 697-98 (Tex. 1987).

173. TEX. CONST. art. I, § 3a.

174. Texas Woman's Univ. v. Chayklintaste, 530 S.W.2d 927, 928 (Tex. 1975).

175. Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (en banc); Serrano v. Priest, 487 P.2d 1241, 1255-58 (Cal. 1971); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 205 (Ky. 1989); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979); Washakie County School Dist. No. 1. v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

ton and Wyoming.[176]

b. Other States' Application of Mid-Level Review Under State Constitutions

Other states have used the mid-level review in protecting rights other than education under their state constitutions. The intermediate level analysis has been used to invalidate classifications based on wealth as a suspect category. For example, the Washington Supreme Court held that a statute which denied indigent criminal defendants credit for time served in jail between the defendant's arrest and guilty plea denied equal protection since it created a "classification based solely on wealth."[177] The court pointed out that even though the defendant's right to such credit was nonfundamental, "where deprivation of liberty is due to a defendant's indigency . . . the application of some enhanced standard of review seems even more clear."[178]

Similarly, a wealth-based statute which required retired judges to choose between a pension and the continued practice of law after retirement was struck down in Maryland.[179] The argument that the statute was valid because it served the legitimate purpose of saving the taxpayers' money was rejected.[180]

Classifications by gender have also been protected in the state courts under the mid-level review under state constitutions. In Michigan, the ban of female students from a basketball program was found to be a violation of equal protection using the intermediate standard.[181]

There are other instances of state statutes being held to a mid-level review.[182] For example, the Alaska Supreme Court has established a

176. Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241, 1260 (Cal. 1971); Seattle School Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); *Herschler*, 606 P.2d at 310.

177. State v. Phelan, 671 P.2d 1212, 1215 (Wash. 1983).

178. *Id.*

179. Attorney Gen. v. Waldron, 426 A.2d 929, 954 (Md. App. 1981).

180. *Id.* at 951.

181. Department of Civil Rights v. Waterford Township Dept., 387 N.W.2d 821, 829 (Mich. 1986).

182. *See, e.g.*, Leliefeld v. Johnson, 659 P.2d 111, 126 (Idaho 1982) (applying focus analysis); Commonwealth v. Bell, 516 A.2d 1172, 1178 (Penn. 1986) (applied intermediate standard in upholding state statute); State v. Cook, 679 P.2d 413, 414-15 (Wash. App. 1984) (applying intermediate standard to pretrial detainees); Hanson v. Williams County, 389 N.W.2d 319, 323 (N.D. 1986) (finding state statute of repose unconstitutional using intermediate review).

"sliding scale" standard.[183] The court commented: "In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme."[184] Montana also articulated a sliding scale test and condemned drawing arbitrary lines.[185]

The foregoing part of this article examined the *Edgewood* arguments and decisions within the historical context of federal and state constitutional laws. This final section of the article reaches into the future. Using the *Edgewood* debates on education as a fundamental right and wealth as a suspect classification, the authors postulate a three-factor test for fundamental rights under the Texas Constitution and apply the test briefly to four areas of current human need: higher education, indigent health care, shelter and reproductive rights.

III. Proposed Test for Fundamental Rights Under the Texas Constitution

The following are proposed factors to be weighed in determining the depth of value that a particular constitutional provision has to the people of Texas: 1) history; 2) language; and 3) importance to the people. None of the factors is dispositive; for example, if a new right is created by the judiciary or legislative branches, the history factor should not be used to automatically discredit the fundamental quality of the new right. However, each factor is important and should be weighed.

A. *History: How Long the Topic Has Been in the Constitution*

A constitution is a document that contains the most basic, enduring values of a society. A constitution is general because it presents a wide perspective on the balance of powers between the branches of a government and the balance of power between the people and the government. A constitution presents a system of fundamental princi-

183. State v. Ostrosky, 667 P.2d 1184, 1192-93 (Alaska 1983), *appeal dismissed*, 467 U. S. 1201 (1984).

184. *Id.*

185. Butte Community Union v. Louis, 712 P.2d 1309, 1313-14 (Mont. 1986).

ples.[186] A constitution differs from a statute in several ways. A statute is more specific, giving concrete details. A statute is also interpreted differently, with the most recent changes in the statute given greater validity over earlier versions.

The differences in statutes and constitutions should lead to different interpretations of the two types of law. After generations have in effect re-validated portions of the constitution by not deleting certain provisions, those provisions are affirmed as having lasting value. Although statutory interpretation usually places more weight on the more recent changes, the length of time that a provision persists in a constitution should add weight to an interpretation of that provision.

The historical part of the proposed fundamental rights test was applied to education in Texas during the arguments in *Edgewood*. The Texas Constitution has been amended many times, yet the education provision has remained since at least 1845. The provision which mandates public schools, article VII, section 1, has been affirmatively allowed to survive proposed amendments.[187] Generations of Texas voters have reaffirmed that public education is a basic value. Therefore, the provision should be interpreted as having more value to the people than a provision which has been deleted, recently added or constantly amended.

The defendants in *Edgewood* argued that the constitutional provisions should be governed by rules on statutory interpretation. Because a provision relating to the formation of school districts was placed in the Texas Constitution more recently than the section providing for an efficient system of public free schools, the defendants argued that current inequalities which are the result of local school district control cannot be attacked through the use of the older constitutional provision. This view of the-newer-the-better overlooks the common sense notion that the people of Texas have for generations considered education to be of utmost importance. None of the original three proposals before the Texas Constitutional Convention of 1875 offered options that included districting or local taxation for schools.[188] The 1845 version of the Texas Constitution did not include provisions for school districts. In 1869, the legislature was

186. 16 AM. JUR. 2d Constitutional Law §§ 1, 3 (1979).

187. In 1976, a proposal to amend § 1 of article VII was rejected by the voters.

188. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 243-45 (1930).

given authority to provide for taxation within school districts "if necessary," but the 1876 version of the Texas Constitution did not provide for either school districts or the capacity for school districts to tax.[189] The early Constitution presented the basic value of widespread, accessible, and equal education. Later generations grappled with methods of financing but never rejected the basic value. The framers and ratifiers could not have foreseen the future complexity of financing education, nor the huge imbalance that was to occur in the distribution of wealth across the state.

B. *Language Used in the Constitution*

A primary step in constitutional interpretation is to give the written words their plain meaning, and only begin casting about for further meaning when an ambiguity or mistake appears.[190] The "plain meaning" rule is described by Professor Antineau in his treatise on constitutional interpretation as requiring:

> at least some respect for those who framed and adopted the organic law, and it has often been said by the judiciary that when the language of a constitution provides a clear, plain meaning which does not contradict any other provision of the organic law, or result in a ruling that is manifestly unjust or absurd, the plain meaning of the language is to be applied and there is no room for judicial construction.[191]

The specific words used in the Texas Constitution provide weights in the scale used to interpret the various provisions. The underlying values to which the Constitution gives expression are contained in the Texas Bill of Rights. Article I begins with the following phrase, "That the general, great and essential principles of liberty and free government may be recognized and established, we declare."[192] It follows that if the language used in a particular provision is also used in the Bill of Rights, then there is a reference to the other fundamental values expressly guaranteed in the Bill of Rights, such as free speech and civic participation. The words "freedom," "liberty," "rights" and "equality" should be scrutinized to see if they were intended as references to the basic values.

Other words are also significant. The use of "shall" and "duty"

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189. TEX. CONST. art. VII, § 3 (1869).
190. C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION 3 (1982).
191. *Id.*
192. TEX. CONST. art. I.

present a higher obligation than provisions for what the legislature "may" do. The word "may" used in conjunction with legislative approval for local means of funding can mean that a duty of the legislature is being delegated to a local entity.

Each provision should then be read in light of the entire Constitution. The fact that a specific article is devoted to a particular topic, such as education, weighs in favor of fundamentalism.

Interpretation of a state constitution is complicated by the varied contents, some of which embody general, fundamental values and others which, like a statute, contain details of a concrete, practical nature. The language factor of the proposed test for fundamental rights in Texas provides a means by which to distinguish the two.

Applying the language factor of the proposed test to education as a fundamental right under the Texas Constitution, we see the following:

1. a clear reference to the Bill of Rights is made by the use of the words "liberties" and "rights" ("[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people . . ."), [193] and the language of article VII, section 1 creates an explicit link between education and universally recognized fundamental rights;
2. the legislature is given a high obligation to support and maintain the schools by the use of the words "shall" and "duty" ("it shall be the duty of the Legislature . . ."); [194]
3. the plain meaning of the words of article VII, section 1 clearly state that a system of public free schools is to be established and maintained ("to establish and make suitable provision for the support and maintenance of an efficient system of public free schools"); [195]
4. education has an article (article VII) devoted entirely to the topic. [196]

C. *Importance to the People*

The importance of education to the people must be measured both inside and outside the Constitution. The nexus argument which recognizes a logical connection between fundamental rights and the rights necessary for the exercise of the fundamental right should be

193. TEX. CONST. art. VII, § 1.
194. *Id.*
195. *Id.*
196. TEX. CONST. art. VII.

made at the state level. This rationale is based on the history of federalism and state constitutions as affirmative grants of power. The emphasis on a particular right within a state constitution can also be measured by whether funding is made available in the same constitution for that right. Furthermore, the current portion of state and local budgets which supports the right or benefit gives an indication of its importance to the people of Texas.

The nexus argument begins with fundamental rights expressly recognized in the constitution. Logically, protection of fundamental rights must include protection of adjacent rights which are necessary for the exercise of the already protected rights. For example, the trial court in *Edgewood* called education "a guardian of other important rights."[197] The nexus argument was rejected in *Rodriguez* but has been used by other state courts in their decisions on school financing.[198] Education was described as "the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights."[199] It was said to be "most assuredly a right without which other constitutionally guaranteed rights would have little meaning."[200]

Delineation of a fundamental right is also affected by influences outside the language of the constitution itself. Some of these extratextual factors include the development of technology, which has confronted our society with a dizzying array of medical-ethical problems; changing social mores, which have provided women with many more options, both personally and professionally, than ever before; and rapid developments in the fields of sociology, statistics, economics, international relations, psychology, medicine, and computer science, which are constantly forcing us to reevalute our views of human rights. These shifting societal influences require our Texas Constitution to evolve as well, as the supreme court indicated in *Edgewood.*

What can we look to in deciding how state constitutional law should evolve? One excellent authority is the Universal Declaration

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197. Record at 538, *Edgewood* (No. 362, 516).

198. *See, e.g.*, Dupree v. Alma School Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Helena Elem. School Dist. v. Montana, No. AD-85-370 (Montana 1st Jud. Dist., Lewis and Clark County, Jan. 13, 1988).

199. *Dupree*, 651 S.W.2d at 93.

200. Helena Elem. School Dist. v. Montana, No. AD-85-370 (Montana 1st Jud. Dist., Lewis and Clark County, Jan. 13, 1988).

of Human Rights,[201] a document which represents cross-cultural and cross-national thinking. The United States took an active role in the creation of this document. Our federal Bill of Rights is mirrored in the Universal Declaration's guarantees of freedom of speech, religion and assembly. Slavery and arbitrary arrest or detention are prohibited, and freedom of movement is protected. The Declaration goes further than the Bill of Rights, however, by explicitly including the fulfillment of basic needs as a human right.

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[202]

Logically, using the nexus argument, political rights are not available to people whose needs are not met. As a covenant of the United Nations expressed, "[T]he enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent. . . . [W]hen deprived of economic, social and cultural rights man does not represent the human person whom the Universal Declaration regards as the ideal of the free man."[203]

The state constitutions are the charters under which we can claim these rights because historically the federal Constitution grants the states the power to protect these rights. In fact, the *Rodriguez* court rejected the nexus argument, not because the argument lacked logical consistency, but because the Court was concerned about preserving federalism and the states' historical role in protecting human rights. Lastly, beyond the nexus argument, is the analysis of the current state and local budget as an indicator of what Texans view as important.

The third factor of the proposed test for fundamental rights under the Texas Constitution was seen in the arguments of counsel in *Edgewood*. Three arguments were presented by the state defendants in opposition to the analysis of education as important to the people. The first argument was that many things are in the constitution that are not fundamental. Another was that social and economic legisla-

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201. Universal Declaration of Human Rights of 1948, G.A. Res. 217A. (III) U.N. Doc. A810 (1948).

202. *Id.* at 70.

203. H. TOLLEY, THE U.N. COMMISSION ON HUMAN RIGHTS 25 (1987) (quoting U.N. Doc. E/CN 4/1986/43 and Annex).

tion should not be subject to strict scrutiny. Third was that fundamental rights are rights that do not depend upon public financial support for their existence.

In response to the first argument concerning the difficulty in separating fundamental and nonfundamental constitutional provisions, the "importance-to-the-people" factor is useful. The very admission of Texas into the Union was predicated on Texas having a public school system.[204] The topic of education was extremely important to the framers and ratifiers of the Texas Constitution.[205]

The second argument was that courts should abstain from ruling on social or economic issues. The history of this argument goes back to Franklin Delano Roosevelt and the Great Depression.[206] As the legislative and executive branches of the government passed and enforced progressive government controls, such as wage controls, social security and anti-monopoly measures, the judiciary branch invalidated such measures.[207] The political tension between a Court that had been appointed by prior conservative administrations and the New Dealers was ultimately resolved, not by Roosevelt's Court-packing plan, but by the Court excusing itself from responsibility over state social and economic legislation.[208] By 1937, the Supreme Court had begun its abandonment of substantive due process as a check on state economic and social legislation.[209] The Court used federalism as the rationale for allowing states to govern their own social and economic spheres.[210] Such a separation of powers may still be necessary at the federal judiciary level. However, the state judiciary does not have the same impetus for such restraint, especially in Texas, where judges are elected, rather than appointed for life as in the federal courts.

The third argument was the argument of affirmative and negative rights. Due to concerns of federalism and the constitutional limitations on the federal government in the United States Constitution,

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204. S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 328 (1930).

205. *Id.* at 198.

206. P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 287-305 (1983).

207. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 313-17 (1936); United States v. Butler, 297 U.S. 1, 63-65 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495, 540-43 (1935).

208. *See* R. MCCLOSKY, THE AMERICAN SUPREME COURT 164-65 (1960).

209. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397-400 (1937).

210. *See* Olsen v. Nebraska, 313 U.S. 236, 243 (1941).

federal fundamental rights have been interpreted in dicta as requiring the federal government to refrain from acting.[211] The same rights have been interpreted as not requiring the federal government to act affirmatively to provide those rights, especially when the action involves a monetary outlay. This position is logically inconsistent because whether the government spends money on upholding a certain right cannot be dispositive. For example, the right to counsel in a criminal case involves governmental spending. Allowing religious organizations tax-free statutes also requires, indirectly, government spending. Public financial support is absolutely necessary for suffrage. Even if the federal courts were able to logically distinguish affirmative and negative rights, the requirement that a federal constitution can protect only negative rights would spring from a concern for federalism and a view that the federal constitution protects rights only by limiting government involvement. State judiciaries, however, interpret state constitutions under different conditions because state constitutions contain affirmative grants of power as well as negative limitations on government interference in people's lives.

Examples of affirmative grants of state governmental power in the Texas constitution can be found within the Texas Bill of Rights and also in other articles of the Constitution. The equal rights section proclaims, "All free men, when they form a social compact, have equal rights."[212] The freedom of worship section mandates that " . . . it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination . . . ."[213] The bail section provides that "[a]ll prisoners shall be bailable by sufficient sureties."[214] The right of trial by jury "shall remain inviolate" according to article I, section 15. Article VI on suffrage requires much exertion by the government to ensure fair and free elections. Article VII mandates the government to provide for both higher and lower education. Article IX provides for hospital districts with the duty to provide for its "needy inhabitants."

In all the above examples, the state government is given affirmative power, i.e., the power to expend funds and effort to assure the popula-

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211. *See* Maher v. Roe, 432 U.S. 464, 469-80 (1977), Jefferson v. Hackney, 406 U.S. 535, 545-47 (1972); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970).

212. TEX. CONST. art. I, § 3.

213. TEX. CONST. art. I, § 6.

214. TEX. CONST. art I, § 11.

tion's rights, not just the power to avoid interference in people's exercise of individual rights.

IV. APPLICATION OF THE PROPOSED TEST FOR FUNDAMENTAL RIGHTS UNDER THE TEXAS CONSTITUTION TO OTHER MATTERS NOT MENTIONED IN THE BILL OF RIGHTS

To further explicate the proposed test, it will be applied to four areas in the following sections. This is not meant to be conclusive, but rather to open the door to further research and study in the exploration of the term "fundamental right" under a state constitution.

A. *Applying the Proposed Test for Fundamental Rights to Higher Education*

In terms of history, language, and importance to the people, higher education could be considered a possible fundamental right under the Texas Constitution.

1. History

Under the proposed test for determining whether a particular right is fundamental, it is clear higher education and equal educational opportunity meet the test's criteria. First, the founders created an institution of higher learning in Texas' fourth constitution in 1866, and education was one of the proffered reasons for Texas' Declaration of Independence from Mexico in 1836. Furthermore, funding for higher education is guaranteed in the Texas Constitution through the creation of the Permanent University Fund in 1866.

2. Language

The constitution requires the creation of a "University of the first class."[215] The education clause interpreted in *Edgewood* can apply to the higher education system as well. The language of the constitution creating the Permanent University Fund displays the importance of education in a constitutional sense.

3. Importance to the People

A higher education system is as much a prerequisite of success in

215. TEX. CONST. art. VII, § 10.

today's world as public education was to the founders and framers of our constitution. The public recognition of that importance is reflected in the Texas budget which expends one-sixth of its funds in higher education (approximately ten billion per biennium). Higher education facilities are an important generator of high-technology growth.

Article 26 of the Universal Declaration of Human Rights on education provides, in part, "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made equally accessible to all on the basis of merit."[216]

B. *Applying the Proposed Test for Fundamental Rights to Indigent Health Care*

1. History

Counties are created, and their powers and duties described, in article IX of the Texas Constitution. Section 4 of article IX was adopted in 1954 and allows the legislature to create hospital districts. These districts have the responsibility for the medical care of the county's indigent residents. "[P]rovided further, that such Hospital District shall assume full responsibility for providing medical and hospital care to needy inhabitants of the county. . . ."[217]

Section 9 of article IX repeats the same language in a paragraph that further describes the operation, powers and duties of hospital districts. Section 9 was adopted in 1962 and amended in 1966. Both versions contained the above language on the duty of providing health care to the indigent.

The interpretive commentary in Vernon's Annotated Texas Constitution presents the legislative rationale for creating another level of bureaucracy for the sole purpose of collecting and spending medical care funds.

> None of the large communities in Texas have sufficient hospitals to serve fully the needs of both nonpaying and paying cases, and public hospitalization is a desperate need in Texas, which at the time of the adoption of the amendment ranked among the lowest states in provid-

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216. *See supra* note 201.

217. TEX. CONST. art. IX, § 4.

> ing hospital facilities for its needy citizens. It was admitted that greater unification rather than greater diversity was necessary for efficient local government in Texas, but under the present Constitution such unification seemed impossible. . . .[218]

Another provision within the Texas Constitution gives the legislature the power to provide for medical care of needy persons out of state funds.[219] This section was first adopted in 1933 and it has been amended eight times. Each amendment increased the ceiling of the amount budgeted for the fund or expanded the requirements to qualify for aid.

2. Language

The duty to care for the indigent seems to be a state duty.

> The Legislature shall have the power . . . to provide . . . for assistance grants to needy dependent children and the care-takers of such children, needy persons who are totally and permanently disabled because of a mental or physical handicap, needy aged persons and needy blind persons.
>
> The Legislature may provide by General Law for medical care, rehabilitation and other similar services for needy persons.[220]

The duty to provide medical care is transferred to the counties through the creation of hospital districts. Once the district is created, it "shall" assume the duty of providing medical care to the needy. Furthermore, once created, the hospital district has sole responsibility for using tax monies to provide health care to the indigent. "[N]o political subdivision or municipality within or having the same boundaries as the district may levy a tax for medical or hospital care for needy individuals. . . ."[221]

3. Importance to the People

The need for providing health care to the indigent as a necessity for the exercise of other fundamental rights may be analyzed using the nexus argument. The rights of freedom of speech and assembly, for

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218. *See* TEX. CONST. art. IX, interp. commentary (Vernon 1955).

219. TEX. CONST. art. III, § 51(a).

220. *Id.*

221. TEX. CONST. art. IX, § 11. This section is specific to four particular counties but the same mandate is found in most of the Texas Hospital District provisions. *Id.*

example, are not equally available to someone in need of antibiotics, pain relief or surgery.

Many hospital districts in Texas are currently in serious financial trouble as medical costs sky-rocket and the poverty of county residents increases. Much money is spent on indigent care and yet the need is not being met.

The Universal Declaration of Human Rights lists medical care as a human right.

C. *Applying the Proposed Test for Fundamental Rights to Shelter*

1. History

In a recent Texas case, *Hughes v. Dallas*,[222] the plaintiffs were successful in demanding that counties fulfill their duty to the homeless population. The cause of action was based on a state statute[223] which placed responsibility for "paupers" on county commissioners courts. The state constitution has two provisions on caring for the destitute. Article XI, section 2 asserts, "[T]he establishment of county poor houses and farms . . . shall be provided for by general laws."[224] This provision was first written into the 1875 constitution.[225] Article XVI, section 8 states, "Each county in the State may provide, in such manner as may be prescribed by law, a Manual Labor Poor House and Farm, for taking care of, managing, employing and supplying the wants of its indigent and poor inhabitants."[226] This provision was written into the 1869 constitution.[227]

2. Language

The plain meaning of the above language places the duty to care for the destitute on counties. Neither of the provisions, however, makes reference to the Bill of Rights. Article XI does contain the strong word "shall," expressing obligation. Article XVI is an enabling clause allowing the counties to raise monies for the indigent. Although no one article is devoted to the care of the poor, it is mentioned in two places in the constitution.

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222. Hughes v. Dallas, No. 87-2124 (191st Dist. Court, Dallas County, Oct. 26, 1989).
223. TEX. REV. CIV. STAT. ANN. art. 2351 (Vernon Supp. 1990).
224. TEX. CONST. art. XI, § 2.
225. TEX. CONST. art. XI, § 2 (1875).
226. TEX. CONST. art. XVI, § 8.
227. TEX. CONST. art. XVI, § 26 (1869).

3. Importance to the People

Under the nexus argument, the right to shelter is viewed in relation to its importance in allowing the exercise of established fundamental rights. The other fundamental rights are meaningless if one is homeless. Without an address, for example, one cannot even register to vote.

The amount of state and local money currently being spent on housing would also indicate how Texas views the importance of shelter. Housing is explicitly mentioned in the Universal Declaration of Human Rights, suggesting its fundamental quality.

D. *Applying the Proposed Test for Fundamental Rights to Reproductive Rights*

Applying the proposed test for fundamental rights under the Texas Constitution, we look to the history, language and importance to the people of the right to choice.[228]

1. History

The right to an abortion is not explicitly set out in either the state or federal Constitution. In *Roe v. Wade*,[229] however, the Supreme Court found abortion to be protected under the right to privacy.[230] *Roe* was a class action challenging the constitutionality of the Texas criminal abortion laws.[231] Although the right to privacy is not expressly mentioned in the United States Constitution, zones of privacy have been guaranteed. The origin of the right to privacy has been found in the first or ninth amendments, in the penumbras of the Bill of Rights, or in the concept of liberty guaranteed by the first section of the fourteenth amendment.[232]

The Texas right to privacy similarly is grounded on a number of provisions in the Texas Constitution. In a case involving an employee's right to refuse the employer's demand to submit to a poly-

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228. *See generally*, A. Johnson, Abortion, Personhood, and Privacy in Texas. Unpublished paper read at the University of Texas Symposium on the Texas Constitution, 1989 (history of abortion rights in Texas).

229. 410 U.S. 113 (1973).

230. *Id.*

231. *Id.*

232. Griswold v. Connecticut, 381 U. S. 479, 482-488 (1965).

graph test,[233] the Texas Supreme Court based a zone of privacy on sections 6, 8, 9, 10, 19, and 25 of article I of the Texas Constitution. These sections explicitly guarantee freedom of religion and speech, the right of life and liberty without arbitrary denial, the sanctity of a home against unreasonable intrusion, and the right against self-incrimination. The court clearly states that a compelling governmental reason is required before intrusions into these areas are permitted, thereby granting the right to privacy the status of a fundamental right under the Texas Constitution.

Each of these sections is in article I which is found in the Texas Bill of Rights. The Bill of Rights states that its provisions are inviolate.[234] These sections have not been amended since the original constitution, except to add the equal rights amendment in 1972.[235]

There is also a common law history of privacy in Texas. The history of abortion in Texas, however, is that it was a crime, albeit one which was seldom prosecuted.[236] There is no history to show that abortion was on the minds of the framers and ratifiers. Though privacy may have been indirectly intended, certainly women's rights were not yet respected or protected. The 1876 constitution did not even give women the right to vote. However, the Texas Equal Rights Amendment, article I, section 3a, specifically prohibits discrimination on the basis of sex.

2. Language

There is no explicit language about the right to reproductive choice in the Texas Constitution. The language upon which the right to privacy is based, however, is completely within the Bill of Rights in article I. Furthermore, the language of article I, section 3a is unambiguous and strong enough to trigger strict scrutiny.

3. Importance to the People

The importance to the people of the availability of reproductive choice can be measured by the number of women's deaths resulting

233. Texas State Employees Union v. Department of Mental Health and Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987).

234. TEX. CONST. art. I, § 29.

235. TEX. CONST. art. I, § 3a. "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." *Id.*

236. *Texas State Employees Union,* 746 S.W.2d at 203.

from illegal abortions before such a procedure was legal, as well as from the costs of social problems created by forcing unwanted children on unwilling parents. However, no part of the Texas budget is set aside explicitly for abortions, and the morality of abortion continues to be a thorny and controversial subject.

Because privacy has already been judged to be a fundamental right under the Texas Constitution,[237] the question can be narrowed to whether reproductive choice, including abortion, is encompassed by the Texas right to privacy. This question has not yet been reached in Texas case law.

A problem exists in defining abortion rights solely in terms of privacy, and not in terms of a right to an abortion as part of the right to medical care. To define reproductive choice as a privacy matter results in resurrecting the argument of affirmative and negative rights referred to earlier in this article. If the government provides for the fundamental right of reproductive choice only limiting its interference with the personal right of privacy, then the poor who require governmental assistance for any type of medical care are excluded from having a choice. If, however, the government provides affirmative support for reproductive choice, then funding for those unable to afford an abortion would provide a real choice.

V. CONCLUSION

The *Edgewood v. Kirby* case has the potential to change much in Texas. The school financing system will definitely have to be overhauled. Additionally, the case stands for another step taken by the Texas judiciary toward protecting human rights under the state constitution. Although the Texas Supreme Court did not find equality of opportunity for education to be a fundamental right, the topic is still a viable issue in the case, and the door is open in the future for such a finding.

A proposed test for fundamental rights under the Texas Constitution looks at three factors: the history of the topic within the Texas constitution and case law, the actual language used in the controlling provision, and the importance of that value to the people of Texas. In applying this test to higher education, indigent health care, shelter and reproductive rights, the authors conclude that state constitutions

237. *Id.* at 205.

are affirmative grants of power under which such rights can be sought. The declaration of a constitutional right as fundamental certainly has implications for future relationships between the people and the government. We cannot freeze the concept of fundamental right because the increasing power and responsibilities of government demands increased protection of individual and collective rights.