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## The Road Not Taken: The Next Step for Texas Education Finance.

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## THE ROAD NOT TAKEN: THE NEXT STEP FOR TEXAS EDUCATION FINANCE

ANGELA MARIE SHIMEK\*

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#### I. INTRODUCTION

*“[E]ducation is perhaps the most important function of state and local governments.”<sup>1</sup>*

Although the United States Constitution makes no express provision for the establishment of education, most people agree that education is a

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

critical element in today's opportunist-oriented society. Even before the United States was founded, Americans recognized the importance of education in society.<sup>2</sup> This importance remains pervasive today as Americans vigorously pursue education in several fashions, and every state constitution contains at least one provision that provides for public education.

The responsibility of funding public education in the United States is multi-layered. While the United States Department of Education contributes to the funding of public education, "education in America is primarily a State and local responsibility, and [the Department's] budget is only a small part of . . . national education spending . . ."<sup>3</sup> Almost ninety percent of American students attend public schools which rely on local and state taxes for funding.<sup>4</sup> In fact, most public education revenues are generated at the local level by property taxes.<sup>5</sup>

Unfortunately, variations in property wealth among school districts yield disparate levels of education funding per district.<sup>6</sup> Reliance on local property taxes to generate education funding, therefore, creates "wealth-based disparities in educational opportunities."<sup>7</sup> Historically, such funding disparities have prompted various legal challenges to property-tax-based education finance schemes in almost every state.<sup>8</sup>

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2. Public Education, [http://en.wikipedia.org/wiki/Public\\_education](http://en.wikipedia.org/wiki/Public_education) (last visited Mar. 9, 2007) (explaining that the first public school in America was founded over 150 years prior to the founding of the United States) (emphasis added). The Puritans in Massachusetts Bay founded the first grammar schools centuries ago. *Id.*

3. U.S. Dep't of Ed., Budget Office, <http://www.ed.gov/about/overview/budget/index.html?src=ln> (last visited Mar. 9, 2007); U.S. Dep't of Ed., The Federal Role in Education, <http://www.ed.gov/about/overview/fed/role.html?src=ln> (last visited Mar. 9, 2007) (explaining that the federal government's contribution to state funding of public schools is about ten percent).

4. See *A Diverse Educational System*, PORTRAIT OF THE USA, available at <http://usinfo.state.gov/usa/infousa/facts/factover/ch6.htm> (on file with author).

5. See U.S. Dep. of Educ., The Federal Role in Education, <http://www.ed.gov/about/overview/fed/role.html?src=ln> (last visited Mar. 9, 2007) ("Education is primarily a State and local responsibility in the United States.").

6. See Peter Enrich, *Leaving Equity Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 104 (1995).

7. See Erin E. Kelly, Note, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L.J. 397, 397 (1995).

8. See *id.* at 435 n.8 (stating that the constitutionality of the school funding systems have been challenged in forty-five states); see also Joshua S. Wyner, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992/1993 ANN. SURV. AM. L. 389, 397-98 (1994).

The litigation challenging education funding disparities in Texas began in the early 1970's.<sup>9</sup> The Texas Legislature's recurrent failure to establish an education finance scheme that withstands constitutional scrutiny proves that the task is not an easy one. The intricacies and complexities of Texas's past and current education funding structures do not help, and Texas's reliance on local property taxes to raise the majority of education revenues further frustrates the very problem many plaintiffs complain of: unequal and inadequate funds for education. Decades of education reform have proved futile because reliance on property wealth has permeated each new funding scheme.

On November 22, 2005, the Texas Supreme Court held that the Texas education finance scheme constituted an unconstitutional state property tax.<sup>10</sup> The supreme court ordered the Texas Legislature to enact a new finance scheme by June 1, 2006.<sup>11</sup> Texas Governor Rick Perry called a special session in April 2006 to allow the Legislature an opportunity to comply with the supreme court's orders.<sup>12</sup> By the end of May 2006, equipped with five new bills to reform education, the Texas Legislature attempted to patch up the perforated education finance scheme.

Part II of this comment will offer a brief history of Texas education finance litigation to demonstrate that reliance on local property taxes to fund education has proved unsuccessful. Part III provides insight on the complexities of education finance reform and the Texas Legislature's struggle to adopt reform that passes not only constitutional, but public and political scrutiny. Part IV offers insight into whether equality and adequacy in Texas education are worthy and achievable goals. Part V

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9. See *Rodriguez v. San Antonio Indep. Sch. Dist. (Rodriguez I)*, 377 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

10. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 797 (Tex. 2005) (holding the Texas education finance system unconstitutional because it constituted a statewide ad valorem property tax). Ad valorem taxes (state levied taxes) are prohibited by the Texas Constitution. See TEX. CONST. art.VIII, § 1-e ("No State ad valorem taxes shall be levied upon any property within this State."). Lack of "'meaningful discretion' in setting local maintenance and operation (M&O) tax rates, effectively result in an unconstitutional state property tax." See House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79-13 FOCUS REP. 1, 1 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf>.

11. *Neeley*, 176 S.W.3d at 799 (setting a June first deadline). If the legislature failed to remedy the constitutional infirmity by the deadline, the state, by order of the court, would be enjoined from distributing any funds to the public school system. See House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79-13 FOCUS REP. 1, 1 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf>.

12. See Gov. Rick Perry, Proclamation by the Governor of the State of Texas, (Apr.17, 2006), available at <http://www.governor.state.tx.us/divisions/press/proclomations/proclomation.2006-04-17>.

analyzes the Texas Legislature's most recent attempt to remedy the constitutional infirmities of Texas education finance, House Bills 1 – 5. Part VI of this comment analyzes House Bill 18, the current education reform proposal in the 80th Legislative Session, which proposes the enactment of a state-wide pilot voucher program, and its counterpart, House Joint Resolution 25, which opposes House Bill 18 by proposing to amend the constitution to prevent a state-wide pilot voucher program. Part VII ultimately proposes that, until the Texas Legislature alleviates reliance on local property taxes as the basis for funding education, each prospective finance scheme will fail under the current constitution and statutory education provisions. To alleviate such reliance on local property taxes, the Legislature must amend the Texas Constitution to allow for a state property tax to fund education. Part VIII concludes this comment.

## II. LEGAL HISTORY OF TEXAS EDUCATION FINANCE

*“Winning in the courtroom is not the same as winning in the classroom.”*

—Molly S. McUSIC

For decades, Texas plaintiffs have challenged the inequities of Texas education finance. Still today, despite many judicial victories, education funding in Texas is not equal, the disparities in educational opportunities pervade, and the fight for equality continues. A brief look at the major cases shaping education finance reform in Texas and the failure of remedial legislative attempts to alleviate educational disparities clearly exhibits the need for a Texas education finance scheme that does not rely on local property taxes.

### A. *Texas Education Finance Law: The Code and the Constitution*

Currently, the Texas Constitution provides: “[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”<sup>13</sup> Additionally, the Texas Education Code provides that a “thorough and efficient system [of education] be provided and substantially financed through state revenue sources so that each student . . . [may] have access to programs and services that are appropriate to the student’s educational needs and that are substantially equal to those available to any similar student, notwithstanding varying local economic factors.”<sup>14</sup> While amendments to both the Texas Consti-

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13. TEX. CONST. art. VII, § 1.

14. TEX. EDUC. CODE § 42.001 (Vernon 2005).

tution and Texas Education Code altered the language of the educational provisions, the critical importance of the Texas Legislature's responsibility to provide for an equal education system always remained.

## B. *The Rodriguez Cases*

### 1. *Rodriguez v. San Antonio Independent School District*<sup>15</sup> (*Rodriguez I*)

The orchard of challenges to the Texas education finance scheme rooted in *Rodriguez v. San Antonio Independent School District (Rodriguez I)*.<sup>16</sup> The plaintiffs, Edgewood Independent School District and six other districts located within the city limits of San Antonio, Texas, joined by five additional districts located in rural Bexar County, argued that the Texas education finance system, the Minimum Foundation Program,<sup>17</sup> made education a function of wealth, which violated equal protection.<sup>18</sup> The plaintiffs demonstrated that the finance scheme, which relied on local property taxes to fund education, resulted in major inequities in education opportunities among districts.<sup>19</sup> Relying on precedent defining wealth as a suspect classification, the United States District Court for the Western District of Texas stated that “[m]ore than mere rationality [was] required . . . to maintain a state classification which affects a ‘fundamental

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It is the policy of this state that the provision of public education is a state responsibility and that a thorough and efficient system be provided and substantially financed through state revenue sources so that each student enrolled in the public school system shall have access to programs and services that are appropriate to the student's educational needs and that are substantially equal to those available to any similar student, notwithstanding varying local economic factors . . . . The public school finance system of this state shall adhere to a standard of neutrality that provides for substantially equal access to similar revenue per student at similar tax effort, considering all state and local tax revenues of districts after acknowledging all legitimate student and district cost differences. *Id.*

15. *Rodriguez I*, 337 F. Supp. 280.

16. *Id.*

17. *See id.* at 281–82. The Texas Minimum School Fund, during the 1970–1971 school year, provided grants to schools for teacher salaries, school maintenance, transportation, and that the remaining funding would be raised by district taxes.

18. *See id.* at 281–82, 285–86 (contending that the Minimum Foundation Program made education a function of local property taxes). At that time, state revenues funded eighty percent (80%) of the cost of education and the remaining twenty percent (20%) was raised by local property taxes in each district. *Id.* at 281.

19. *Id.* at 282. Edgewood and San Antonio school districts proved that their local tax base of \$.70 per \$100 taxable property wealth was able to provide \$21 per pupil, while the Alamo Heights school districts (within the same city limits) were able to tax a mere \$.31 cents per \$100 and achieve an average per-child expenditure of \$307. *Id.*

interest,' or which is based upon wealth."<sup>20</sup> Relying upon *Brown v. Board of Education*,<sup>21</sup> the court found that education constituted a fundamental right.<sup>22</sup> Relying so, the court held that the Texas education finance scheme discriminated "on the basis of wealth by permitting citizens of affluent districts to provide a higher quality of education for their children, while paying lower taxes" and denied the plaintiffs "equal protection of the laws under the Fourteenth Amendment."<sup>23</sup> The court then ordered that the Texas Legislature establish a new program to fund public education.<sup>24</sup>

## 2. *San Antonio Independent School District v. Rodriguez*<sup>25</sup> (*Rodriguez II*)

Victory was brief for students in poor Texas school districts. The State appealed, and within two years, the district court reversed its decision after the United States Supreme Court refused to invalidate Texas's education finance scheme in 1973.<sup>26</sup> In *San Antonio Independent School District v. Rodriguez (Rodriguez II)*, the U.S. Supreme Court explicitly declared that education was not a fundamental right.<sup>27</sup> The U.S. Supreme Court rejected the lower court's analysis of wealth as a suspect class and declared the following:

[T]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled

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20. *Rodriguez I*, 337 F. Supp. at 282 (relying on *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1965) and *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969)). The State argued that the Court should adopt a rational basis standard of review (that there need only be a reasonable relationship between the varying wealth classifications that the finance scheme created and the legitimate purpose of funding education), but the Court refused this lower level scrutiny. *Id.*

21. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

22. See *Rodriguez I*, 337 F. Supp. at 283 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (relying upon the premise that "education is perhaps the most important function of state and local governments" to justify the conclusion that education is a fundamental right).

23. See *id.* at 285 (detailing the tax breakdown between affluent and poorer districts and illustrating the cost per pupil in these districts).

24. See *id.* (illustrating the attempt by the Court to outline a financing system that does not depend on individual wealth but wealth of the state).

25. *San Antonio Indep. Sch. Dist. v. Rodriguez (Rodriguez II)*, 411 U.S. 1, 6 (1973) (holding that the Texas school financing system did not violate the Equal Protection Clause).

26. See *id.* at 62 (Stewart, J. concurring) (holding that the classifications that resulted from the program did not qualify as suspect and the program's means were relevant to the State's legitimate objective).

27. See *id.* at 37 (finding the District Court's decision that education is a fundamental right as unpersuasive).



with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.<sup>28</sup>

The Court also specified that Texas's education finance scheme did not "operate to the peculiar disadvantage of any suspect class."<sup>29</sup> Justice Stewart, concurring, stated, "[t]here is hardly a law on the books that does not affect some people differently from others . . . . [I]t has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory – only by classifications that are wholly arbitrary or capricious."<sup>30</sup> The Court decided that strict scrutiny amounted to an inappropriate standard of review, and instead, Texas's education finance scheme need only bear some *rational relationship* to a legitimate state purpose.<sup>31</sup> The Court held that, the Equal Protection Clause did not require "absolute equality or precisely equal advantages."<sup>32</sup> The Texas plan satisfied the rational relationship standard, and thus, the Court reversed and held Texas's education finance scheme constitutional.<sup>33</sup>

The U.S. Supreme Court's ruling, however, did not finalize the issue. Plaintiffs from poor school districts, including teachers, parents, and students, still discontent with the disparities in education funding, continued to challenge Texas's property-tax-based finance scheme. The *Rodriguez* decisions would prove to be the commencement of an endless cycle of perpetual litigation and irremediable legislative reform.

### C. *The Edgewood Cases*

After the United States Supreme Court found the heavily-tax-reliant Texas education finance scheme constitutional in *Rodriguez II*, plaintiffs shifted from the 14th Amendment to the Texas Constitution in search of relief from the effects of disparate education funding.

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28. *Id.* at 28 (stating that the classification in this case does not satisfy the traditional notions and definitions of suspect class).

29. *Id.* (holding that State's school finance system did not disadvantage any suspect class or interfere with a fundamental right to education).

30. *Rodriguez II*, 411 U.S. at 60 (Stewart, J., concurring).

31. *Id.* at 17 (emphasis added).

32. *Id.* at 24.

33. *See id.* at 58–59 (maintaining that the ultimate solution to disparities in public education financing must come from the legislative branch).

1. *Edgewood Independent School District v. Kirby*<sup>34</sup> (*Edgewood I*)

In 1989, in *Edgewood Independent School District v. Kirby* (*Edgewood I*), the Texas Supreme Court found that the Texas property tax-based scheme for funding education violated the Texas Constitution.<sup>35</sup> Under Article VII, Section 1, the court found that “[b]y express constitutional mandate, the legislature must make ‘suitable’ provision for an ‘efficient’ system for the ‘essential’ purpose of a ‘general diffusion of knowledge.’”<sup>36</sup> The Texas Supreme Court did not dictate a standard of review, but instead focused on defining “efficiency.”<sup>37</sup> The court concluded that, while “efficiency” did not require an equal per capita distribution, it certainly did not allow concentrations of wealth and resources in low-taxing, property-rich school districts while high-taxing, property-poor districts could barely generate sufficient proceeds to meet even minimum education standards.<sup>38</sup> The court stated that there must be a “direct and close correlation between a district’s tax effort and the educational resources available to it.”<sup>39</sup> The court clarified that in order to be “efficient,” “districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.”<sup>40</sup> Hence, the Texas Supreme Court held that the Texas school financing system did not provide for a statewide general diffusion of knowledge as mandated by Article VII, Section 1 of Texas’s Constitution.<sup>41</sup> The court stated that a “remedy is long overdue” and ordered the Legislature to take immediate action to provide “an efficient system of education.”<sup>42</sup>

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

35. *Id.* at 397 (holding that the finance scheme violated Article VII, Section 1 of the Texas Constitution). “A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.” TEX CONST. art. VII, § 1.

36. *Edgewood I*, 777 S.W.2d at 394.

37. *See id.* at 395 (“‘Efficient’ conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste.”).

38. *Id.* at 397.

39. *Edgewood Indep. Sch. Dist. v. Kirby* (*Edgewood II*), 804 S.W.2d 491, 496 (Tex. 1991) (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989)).

40. *See Edgewood I*, 777 S.W. 2d at 397.

41. *Id.*

42. *Id.* at 399.

2. *Edgewood Independent School District v. Kirby*<sup>43</sup> (*Edgewood II*)

The Texas Legislature then took immediate action and adopted Senate Bill 1 in 1990.<sup>44</sup> The new finance scheme implemented “biennial studies on district inequity, followed by adjustments to address the [education funding] gaps” throughout the state,<sup>45</sup> and promised “that ninety-five percent of Texas students would be in a wealth-neutral finance system by 1995 . . . .”<sup>46</sup> The source of education funding—local property—taxes remained unchanged. Soon, the plaintiffs of *Edgewood I* rejoined to challenge the new finance scheme, arguing that the scheme did not address the disparities in education and failed to provide a “direct and close correlation between a district’s tax effort and the educational resources available to it.”<sup>47</sup> In *Edgewood Independent School District v. Kirby* (*Edgewood II*),<sup>48</sup> the Texas Supreme Court agreed.<sup>49</sup> The court found that although Senate Bill 1 purported to fix the financing problem, it did not.<sup>50</sup> The court held that the new finance scheme failed to be efficient as mandated by the Texas Constitution, and reiterated that in order to be efficient, “a funding system that is so dependent on local ad valorem property taxes must draw revenue from all property at a substantially similar rate.”<sup>51</sup> The court concluded that Senate Bill 1 did not draw revenue evenly as mandated, and was therefore, unconstitutional.<sup>52</sup>

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43. *Edgewood Indep. Sch. Dist. v. Kirby* (*Edgewood II*), 804 S.W.2d 491.

44. See Coalition to Invest in Texas Schools, School Funding 101: Timeline of Legislation and Lawsuits in Texas School Funding, [http://www.investintexaschools.org/school\\_funding/legislation.php](http://www.investintexaschools.org/school_funding/legislation.php) (last visited Mar. 9, 2007).

45. *Id.*

46. Texas Educ. Agency, Public School Finance Hearing Set in District Court, June 27, 2000, available at <http://tea.state.tx.us/press/prp010627.html>.

47. See *Edgewood II*, 804 S.W.2d at 496 (citing *Edgewood I*, 777 S.W.2d at 397).

48. *Id.*

49. *Id.* at 496.

50. *Id.*

51. See *id.* (stating that the new finance scheme under Senate Bill 1 constituted a “local ad valorem property [tax]”). The Texas Supreme Court went further to reiterate what it stated in *Edgewood I*: if the legislature requires a local tax to pay for a state institution, then the imposition of that tax must be equal. *Id.* The Texas Supreme Court referred to the local property tax as “ad valorem.” *Id.* The Texas Constitution prohibits state levied ad valorem taxes. TEX CONST. art. VIII, § 1-a. “The several *counties* of the State are authorized to levy ad valorem taxes upon all property within their respective boundaries for county purposes . . . provided the revenue derived therefrom shall be used for construction and maintenance of . . . [r]oads or for [f]lood [c]ontrol, except as herein otherwise provided.” (emphasis added). *Id.* Hence, to clarify, Article VIII, Section 1-a allows counties to levy ad valorem taxes (i.e. local property taxes) for limited purposes, but the State cannot levy a state-wide-imposed local property tax. *Id.*

52. *Edgewood II*, 804 S.W.2d at 496 (“The fundamental flaw of Senate Bill 1 lies not in any particular provision but in its overall failure to restructure the system.”).

3. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*<sup>53</sup> (*Edgewood III*)

In 1991, the Texas Legislature passed Senate Bill 351, which established 188 county education districts (CEDs).<sup>54</sup> The CEDs combined school districts, both rich and poor, within a certain radius. In an attempt to lessen the gap in disparate revenue-raising ability between districts, the CEDs “were allowed to levy state-mandated property taxes and redistribute the revenues to member districts.”<sup>55</sup> Although the CED finance scheme lessened the disparities, many school districts challenged the new scheme. Plaintiff school districts argued that Senate Bill 351 “levied a state ad valorem tax” in violation of Article VIII, Section 1-e of the Texas Constitution.<sup>56</sup> Plaintiffs also argued that the bill levied a uniform statewide tax without a statewide election in violation of Article VII, Section 3 of the Texas Constitution.<sup>57</sup> A consolidation of five direct appeals from judgments in three district courts concerning the same issue (including a number of school districts that had successfully challenged the constitutionality of the Texas funding system in *Edgewood I* and *Edgewood II*) went directly to the Texas Supreme Court.<sup>58</sup>

In *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District*<sup>59</sup> (*Edgewood III*), the Texas Supreme Court agreed that the CED finance scheme violated both Article VII, Section 1 and Article VIII, Section 1-e of the Texas Constitution.<sup>60</sup> Although the Texas Legislature made a meritorious effort to equalize funding, the court had to strike the effort because the implementation of the Legislature’s equalization scheme violated the Texas Constitution.

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53. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Ind. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489.

54. Coalition to Invest in Texas Schools School Funding 101: Timeline of Legislation and Lawsuits in Texas School Funding, <http://www.investintexaschools.org/schoolfunding/legislation.php> (last visited Mar. 9, 2007).

55. *Id.*

56. See TEX. CONST. art. VIII, § 1-e (1991); Coalition to Invest in Texas Schools, School Funding 101: Timeline of Legislation and Lawsuits in Texas School Funding, <http://www.investintexaschools.org/schoolfunding/legislation.php> (last visited Mar. 9, 2007).

57. TEX. CONST. art. VII, § 3 (1991); *Edgewood III*, 826 S.W. 2d at 493.

58. See *Edgewood III*, 826 S.W.2d at 493.

59. 826 S.W.2d 489 (Tex. 1992).

60. *Id.* at 493, 503; TEX. CONST. art. VII, § 1-e (requiring the authorization of taxes by election each time a school district’s boundaries change, addressing the establishment of new districts, and prohibiting the State from levying state ad valorem taxes).

4. *Edgewood Independent School District v. Meno*<sup>61</sup> (*Edgewood IV*)—The Robin Hood Finance Scheme

After Senate Bill 351 failed to pass judicial scrutiny, the Texas Legislature passed Senate Bill 7. With the goal of equalization in mind, the legislature once again attempted to lessen the gap in funding among districts. Senate Bill 7 amended the Texas Education Code to provide a \$280,000 cap on each school district's taxable property per student and added a provision tagged "recapture."<sup>62</sup> The bill allowed the State to collect and redistribute any revenues generated in excess of the \$280,000 threshold. Basically, Senate Bill 7 made the entire state a CED, collecting money from wealthy districts and allocating it to poorer districts. The new system, coined "Robin Hood," redistributed tax dollars from wealthy districts to poor districts in an attempt to promote equality and provide adequacy in education funding.<sup>63</sup>

Plaintiffs from both property-poor and property-wealthy districts challenged the constitutionality of this new scheme.<sup>64</sup> In 1995, in *Edgewood Independent School District v. Meno*,<sup>65</sup> (*Edgewood IV*), the Texas Supreme Court upheld the constitutionality of the Robin Hood finance scheme.<sup>66</sup> The court reinforced that, as decided in *Edgewood II*, "an efficient system does not require equality of access to revenue at all levels"<sup>67</sup> and that "efficiency" must be measured against not only financial standards, but also qualitative standards as well.<sup>68</sup> The court reasoned that Senate Bill 7 granted students the funds necessary for an accredited education.<sup>69</sup> The funding disparity between wealthy and poor districts at the time of *Rodriguez I* was 700-to-1.<sup>70</sup> Under the system instituted by Sen-

61. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995).

62. *Id.*; *Edgewood IV.*, 917 S.W.2d at 728, 755 n.10 ("Recapture presupposes that whatever is captured once belonged to or was owned by the person or entity that has recaptured the item.").

63. Coalition to Invest in Texas Schools, School Funding 101: Timeline of Legislation and Lawsuits in Texas School Funding, <http://www.investintexaschools.org/schoolfunding/legislation.php> (last visited Mar. 9, 2007).

64. *See generally id.*; *see Edgewood IV*, 917 S.W.2d at 717.

65. *Edgewood IV*, at 717.

66. *Id.* at 730 (stating that Senate Bill 7 provides children living in both poor and rich districts substantially equal access to funding and therefore "meets the legislature's constitutional obligation to provide for a general diffusion of knowledge statewide").

67. *Id.* at 729.

68. *Id.* at 751.

69. *Id.* at 730 n.9 (stating that Senate Bill 7 established a system that granted "equal access to funds necessary to provide an accredited education"). The court also found that the accountability regime established by Senate Bill 7 met the legislature's constitutional obligation of providing for a statewide general diffusion of knowledge in accordance with Article VII, Section 1 of the Texas Constitution. *Id.* at 730.

70. *Edgewood IV*, 917 S.W.2d at 730; *see also Edgewood I*, 777 S.W.2d at 392.

ate Bill 7, the gap decreased substantially to a 28-to-1- ratio.<sup>71</sup> Accordingly, the court held that under Article VII, Section 1, Senate Bill 7 implemented an efficient system.<sup>72</sup>

The court's opinion, however, forecasted future problems. While the court acknowledged that Senate Bill 7 did narrow the gap in educational funding statewide, the court also warned that the system would undoubtedly continue to face constitutional challenges as long as the financing system utilized local taxes to fund the Legislature's obligation to provide for an efficient school system.<sup>73</sup>

#### D. Neeley v. West Orange-Cove Independent School District<sup>74</sup>

The Texas Supreme Court's warning became manifest in the *West Orange-Cove* cases.<sup>75</sup> In November of 2005, the Texas Supreme Court heard *Neeley v. West Orange-Cove Consolidated Independent School District*.<sup>76</sup> The court ruled that the extant education finance scheme constituted an

71. *Edgewood IV*, 917 S.W.2d at 730.

72. *Id.*

73. *Id.* ["F]uture legal challenges may be brought if a general diffusion of knowledge can no longer be provided within the equalized system because of changed legal or factual circumstances."].

74. 176 S.W.3d 746 (Tex. 2005).

75. *See id.* at 755 (Tex. 2005) (internal citations omitted)

In 1995, we held that the State's control of [the] school funding system had not made local property taxes an unconstitutional state tax because school districts retained meaningful discretion in generating revenue, but we foresaw a day when increasing costs of education . . . might force local taxation at maximum rates. At that point, we said, the conclusion that a state property tax had been levied would be "unavoidable."

*Id.*

A brief summary of the *West Orange-Cove* case preceding the 2005 Supreme Court decision in *Neeley v. West Orange-Cove Independent School District* may be helpful. In 2002, in *West Orange-Cove Consolidated Independent School District v. Alanis*, plaintiff school districts returned to the courts to argue the constitutionality of the taxation system underlying Senate Bill 7. *West Orange-Cove Consolidated Indep. Sch. Dist. v. Alanis*, 78 S.W. 3d 527 (Tex. App—Austin 2002). Many school districts were taxing at the maximum rate allowed and yet not generating enough money to sufficiently fund schools. Plaintiffs argued that where the district must tax at the maximum rate in order to maintain equality, all discretion was lost. *Id.* The plaintiffs argued that, without discretion, the locally accessed property tax constituted an unconstitutional state ad valorem tax. *Id.* The Court found that no constitutional violation existed because not even half of Texas's school districts were taxing at the maximum rate and dismissed plaintiffs' cause. *Id.* In 2003, the Supreme Court of Texas reversed and remanded. *West Orange-Cove Consolidated Indep. Sch. Dist. v. Alanis* 107 S.W.3d 558, 566 (Tex. 2003). "We hold that the state's school financing system is neither financially efficient nor efficient in the sense of providing for a 'general diffusion of knowledge' statewide, and . . . it . . . violates article VII, section 1 of the Texas Constitution." *Id.* *Neeley v. West Orange-Cove Independent School District* followed in 2005. *Neeley*, 176 S.W. 3d at 746.

76. 176 S.W.3d 746 (Tex. 2005).

unconstitutional state ad valorem tax, prohibited by Article VIII, Section 1-e of the Texas Constitution because many poor districts were forced to tax at the maximum rate.<sup>77</sup> The Texas Supreme Court mandated change and gave the Texas Legislature until June 1, 2006, to remedy the constitutional infirmities.<sup>78</sup>

### III. OBSTACLES THAT IMPEDE EDUCATION FINANCE REFORM

*“Between the idea and the reality . . . between the motion and the act  
 . . . falls the shadow.”*

—T.S. Eliot “The Hollow Men”

#### A. Legislative Deadlock and Lack of Leadership

Reaching a House-Senate consensus presents a major obstacle in any type of legislative reform. Nevertheless, a consensus cannot be reached if the issue does not receive the attention it deserves. Historically, it appears that the Texas Legislature has taken a simmering approach to education finance reform. After *West Orange-Cove I*, the Legislature failed to pass any education reform. House Speaker Tom Craddick justified the legislature’s inaction and stated that the legislature would focus on reaching any agreement since the decision remained up for appeal.<sup>79</sup> Yet, that attitude kept the legislature from delving into the complicated process of education reform. After *West Orange-Cove II*, education finance remained on the backburner. It took the Texas Legislature three sessions to finally pass legislation addressing the education finance problem.<sup>80</sup>

Lack of leadership also stands as a significant obstacle in reforming Texas education finance. Former Texas GOP Chairman Tom Pauken stated that there persists “a total lack of leadership” and that “lobbyists are driving the train rather than having a philosophically driven, policy-driven plan” when it comes to Texas education.<sup>81</sup> Representative Chuck

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77. *Id.* at at 751.

78. *Id.* at 800.

79. Hugh Aynesworth, *Texas School Funding Unchanged: “Robin Hood” Plan Survives 5th Attempted Rewrite*, WASH. TIMES, 2005 § Nation, at A04 (stating that “the legislature would wait and see how the state Supreme Court rule[d] in the case before moving forward”).

80. See *School Finance: The 79th Legislative Session*, <http://www.atpe.org/EduIss/schoolFinance.htm> (last visited Mar. 9, 2007) (stating that after a “regular session and two special sessions dedicated to the issue, the Legislature [did] not appear to be any closer to finding a suitable solution”).

81. R.G. Ratcliffe, *GOP Collapse on Robin Hood: When Promises to Voters Flop*, HOUS. CHRON., Aug. 17, 2005, at A1 (stating, generally, that most of the current legislators ran on platforms promising to replace Robin Hood, oppose new taxes, cut property taxes, and have failed to deliver).

Hopson commented that we must “come together to put our children ahead of politics and work across party lines to bring meaningful improvements to our schools.”<sup>82</sup>

Unfortunately, fiscal education reform does not appear to be the Legislature’s priority. Without legislative dedication to imperative fiscal reform, the standard of public education will continue to deteriorate.<sup>83</sup> Perhaps, when the threat of increased drop-outs and embarrassingly low academic rankings stifles the Texas economy, the Legislature will prioritize education reform.

### B. *Finding an Appropriate Funding Source*

Although the new funding source remains uncertain, clearly, local property taxes cannot remain the source. As long as property-tax-based funding makes up a substantial component of public education funding, education will never be equal. Demographics do not work as a controlled factor, and profits and wealth inevitably vary across the state. Unequal urban and suburban development in Texas correlates with disparate property wealth and education revenues.<sup>84</sup> School districts agree that more funding is necessary, but how to raise those much-needed funds is a persistent challenge for the Texas Legislature.

For years, legislators have promised to decrease local property taxes, yet ironically, they continue to pass education finance schemes that remain heavily reliant on property taxes. House Bills 1–5 represent the latest attempt to lessen property tax reliance, albeit through increases in

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82. See Rep. Hopson, *We Must Strive for Excellence in Our Public Schools*, Nov. 22, 2005, <http://www.house.state.tx.us/news/release.php?id=1513> (last visited Mar. 27, 2007).

83. See Texas Public Policy Foundation, *Reaching State Goals for Student Achievement*, Senate Education Committee, Mar. 31, 2005, Testimony by Chris Patterson, Director of Research. Despite decades of intensive, expensive reform, there is no evidence that Texas public schools have made any substantive progress toward meeting the real goal of public education: preparing students to be successful after they leave public schools. *Id.* Graduates of Texas public schools remain largely unready for skilled employment, vocational training, or college. *Id.* As other states improve public schools more rapidly than Texas and the economy demands increasingly higher workforce skills, the Texas education deficit grows. *Id.* Immediate, comprehensive education reform is required; standards, assessments, and accountability must be redesigned to produce post-secondary readiness. *Id.*

84. See R.G. Ratcliffe, *GOP Collapse on Robin Hood: When Promises to Voters Flop*, HOUS. CHRON., Aug. 17, 2005, at A1 (stating that the main goals of rural constituents is more money outright for their schools). While property tax cuts and property value appraisal caps are highly supported in Harris County, Dallas districts are focused on replacing Robin Hood completely. See *id.* School districts’ ability, or inability, to raise necessary education funding shows that pertinent reform is needed.



*other* taxes.<sup>85</sup> As previously mentioned, the lack of replacement funding constitutes the main problem with implementing a non-property-tax-based finance scheme. If local property taxes decrease, other taxes, such as the business tax, sales tax, alcohol or cigarette tax, must increase to replace the revenues previously generated from local property tax. Tension between Democrats and Republicans presents a major obstacle to any type of tax reform. For example, when the Senate proposed a statewide property tax, the House claimed that such tax was unnecessary because other sources for funding existed.<sup>86</sup> However, agreeing on which other sources to tax and how much does not constitute an easy venture. Democrats disfavor raising sales tax to increase funding because poor families suffer the most. Republicans disfavor any specific business tax to fund education because the hard-working businessman pays the price.

The Republicans and Democrats, in both the House and the Senate, must come to terms with their differences and reach a consensus for the sake of Texas school children. The Legislature must focus on a compromise that pleases both parties, but more importantly, increases funding for education.<sup>87</sup>

### C. *Risk of Losing Local Discretion*

The Legislature struggles to balance the delicate relationship between state funding and local discretion. The ideal of local discretion is a key component of a property-tax-based funding scheme. Local discretion allows local taxpayers to choose how much money is spent on education. When the revenues to fund education generate from the local community, community members have an interest in how that money is spent.

If the Legislature passed a finance scheme that utilized 100% state funds for providing a constitutionally adequate and efficient education, then disparities in funding would be eliminated. However, when a state issues full funding to any program, strings attach and local discretion is lost. For example, under a solely state-funded education system, a school district in dire need of facilities repair would lack the discretion to divert

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85. See Tex. H.B. 1, 78th Leg., 3d C.S. (2006); Tex. H.B. 2, 78th Leg., 3d C.S. (2006); Tex. H.B. 3, 78th Leg., 3d C.S. (2006); Tex. H.B. 4, 78th Leg., 3d C.S. (2006); Tex. H.B. 5, 78th Leg., 3d C.S. (2006).

86. Elyas Bakhtiari, *Rush to Deadline: With Three Weeks to Go in the Legislative Session, School Finance Remains Unsolved*, SAN ANTONIO CURRENT, May 5, 2005, at 7, available at [http://www.zwire.com/site/news.cfm?newsid=14470990&BRD=2318&PAG=461&dept\\_id=484045&rfi=8](http://www.zwire.com/site/news.cfm?newsid=14470990&BRD=2318&PAG=461&dept_id=484045&rfi=8).

87. See Tricia Scruggs, *Panel Working to Fix Funding System*, MCKINNEY COURIER GAZETTE, Nov. 29, 2005, at A1, available at <http://www.courier-gazette.com/articles/2005/11/26/news/news01.txt> (stating that the new tax increases will probably come from a combination of a higher sales tax, a new business tax, and perhaps an increased cigarette tax).

funds from a state-mandated textbook fund. Hence, the lack of local discretion severely impairs a school district's ability to improve education in a manner consistent with that district's specific needs. These strings inevitably leave local school districts with their hands tied.

Yet, under the current Texas education finance scheme, poor and wealthy districts do not enjoy full discretion anyway. Poor school districts currently lack discretion over how much to tax because they cannot choose to tax at the cap, but *must* tax at the cap in order to fund education. Poor districts already lack discretion over how to spend education funds to improve their schools because almost all of the revenues must be spent on basic and mandatory education. Many poor districts do not have any extra funding to utilize for enrichment programs, facility repair, or extracurricular activities and clubs for students. Additionally, wealthy districts also suffer from lack of discretion under the current finance scheme because any "excess" funding raised is reallocated to poorer districts. Hence, wealthy-district taxpayers lack discretion and control over the spending of their education revenues.<sup>88</sup>

Accordingly, legislators should not worry about passing reform that inhibits local discretion, but instead should focus on reform that delivers funding to the school districts that need it most. Since most school districts lack excess funding and those that possess excess funding must give it up, a state-funded education system would not threaten local discretion.

#### D. *External Factors that Inhibit Equality in Educational Achievement*

Not all inequities in the public school systems are the result of inadequate funding. There exist many external factors that are beyond the legislature's control.

"[M]any of the educational problems some children face stem from the conditions of poverty in which they live."<sup>89</sup> Schools are not necessarily equipped to address the wide array of social and economic problems confronting today's youth.

[I]f we want schools to address these problems, then we must increase their financial support, double the size of their facilities and their staff, and turn our public schools into real community centers, open from early morning to late evening, offering child care, medical [care], social welfare, and all the other support services families need

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88. See Tom Pauken, *Editorial: Robin Hood Must Go*, Oct. 14, 2005, <http://dallasblog.com/boot-robin-hood-blog/>.

89. Martha West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER RACE & JUST. 279, 313 (1999).

to ensure their children get the best possible opportunity for a quality education.<sup>90</sup>

Family environment may also inhibit a student's ability to achieve academically. While case law establishes that parents possess a duty to ensure their child receives proper education,<sup>91</sup> parents also maintain discretion, control, and the right to raise their children in the manner they believe most appropriate.<sup>92</sup> "Children from families that value education and participate in their children's intellectual development through interaction with teachers, educational activities, and encouragement tend to reach higher levels of educational achievement."<sup>93</sup> "Children from families that are indifferent toward their children's educational development do not do well in school."<sup>94</sup> Additionally, some parents find it difficult to participate in their children's educational development because they work many hours or several jobs. Some parents cannot afford decent meals or routine medical exams for their children, and thus, many students come to school hungry and tired, or have easily correctible vision problems or hearing defects.<sup>95</sup> All of these factors interfere with a child's ability to achieve academically. Merely raising funding for schools will not alleviate these problems at home.

#### IV. WHY REFORM? THE INEQUITY AND INADEQUACY OF THE CURRENT TEXAS EDUCATION FINANCE SCHEME

*"Education costs money, but ignorance cost more money."*<sup>96</sup>

— Judge John Dietz, 250th District Court of Travis County

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90. *Id.*

91. *See Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (stating that parents have a natural duty to ensure the education of their children); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (stating that parents have a right, coupled with a duty, to prepare their children for their future obligations).

92. *See Troxel v. Granville*, 530 U.S. 58, 65 (2000) (O'Connor, J., concurring) (noting that parents' interests in the "care, custody, and control of their children" is perhaps the "oldest of the fundamental liberty interests recognized by [the Supreme] Court."); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (stating that parents have a right to control the upbringing of their children).

93. William S. Koski, Note, *Equity in Public Education: School-Finance Reform in Michigan*. 26 U. MICH. J.L. REFORM 195, 208 (1992).

94. *Id.*

95. *Robinson v. Cahill*, 287 A.2d 187, 202 (N.J. Sup. Ct. Law Div. 1972).

96. Michael King, *The Challenge of Judge Dietz*, AUSTIN CHRON., Sept. 2004, at A1, available at [http://www.austinchronicle.com/issues/dispatch/2004-09-24/pols\\_capitol.html](http://www.austinchronicle.com/issues/dispatch/2004-09-24/pols_capitol.html).

### A. *The Discriminatory Effect of Texas Education Finance: Inequality*

Since the majority of poor districts consist of mostly minorities, Texas's local property-tax-based funding scheme has a discriminatory effect on minorities. In 1989, the plaintiffs of *Edgewood I* contested Texas's reliance on local property taxes as inherently unequal because property values varied greatly between districts. The Texas Supreme Court found that Edgewood I.S.D. stood "among the poorest districts in the state" and raised less than eight percent of the revenues that their neighboring district, Alamo Heights, could raise.<sup>97</sup> *Edgewood I* plaintiffs argued that such "differences produced disparities in [their] districts' abilities to hire good teachers, build appropriate facilities, offer a sound curriculum, and purchase such important equipment as computers."<sup>98</sup> Hence, poor and minority students suffer under Texas's tax-based finance scheme merely because they live in poor districts.

When Senate Bill 7 ("Robin Hood") passed in 1993, the new finance scheme temporarily addressed the disparity in education funding, reducing the gap in revenue-raising ability by redistributing funds to poorer schools. While the Robin Hood plan did not totally eliminate the funding disparities, it significantly narrowed the gap. Overall, the idea of recapture is effective in reducing education-funding disparities. "Recapture directly benefits at least 90 percent of Texas public school districts . . ."<sup>99</sup> In 2004, the plan generated an estimated \$1.2 billion per year.<sup>100</sup>

Unfortunately, the disparities between poor and wealthy districts still exist.<sup>101</sup> Since 1993, the demographic composition of Texas schools

97. The Handbook of Texas Online, [http://www.tsha.utexas.edu/handbook/online/articles/EE/jre2\\_print.html](http://www.tsha.utexas.edu/handbook/online/articles/EE/jre2_print.html) (last visited Mar. 9, 2007) (exhibiting that the property wealth per student in the Edgewood school district in 1989 was \$38,854 while the property wealth per student in the Alamo Heights district was \$570,109).

98. *Id.*

99. Maria "Cuca" Robledo Montecel, *District Court Demands More State Investment—All Our Children Deserve an Excellent, Equity Education*, Sept. 27, 2004, available at [http://www.idra.org/IDRA\\_Newsletters/September\\_2004\\_Self\\_Renewing\\_Schools/](http://www.idra.org/IDRA_Newsletters/September_2004_Self_Renewing_Schools/) (on file with author) (explaining that the Robin Hood finance plan required that wealth amounting to more than \$280,000 per student be captured and reallocated to poorer school districts); see also Coalition to Invest in Texas Schools, *School Funding 101: Determination of School District Spending*, <http://www.investintexaschools.org/schoolfunding/spending.php> (last visited Mar. 9, 2007).

100. See Maria "Cuca" Robledo Montecel, *District Court Demands More State Investment—All Our Children Deserve an Excellent, Equity Education*, Sept. 27, 2004, available at [http://www.idra.org/IDRA\\_Newsletters/September\\_2004\\_Self\\_Renewing\\_Schools/](http://www.idra.org/IDRA_Newsletters/September_2004_Self_Renewing_Schools/) (on file with author).

101. See generally Coalition to Invest in Texas Schools, *School Funding 101: Determination of School District Spending*, <http://www.investintexaschools.org/schoolfunding/spending.php> (last visited Mar. 9, 2007) (stating that because property wealth varies district to district, funding for education also varies).

changed substantially.<sup>102</sup> As the number of minority students increased, the amount of funding remained constant, resulting in even less per-pupil spending in poor school districts. Evidence supports the contention that it costs more and more each year to educate low-income students. “[I]t costs at least forty percent more for [economically disadvantaged] students to be educated to the level we expect of them.”<sup>103</sup> In Texas, the school districts that exhibit the highest costs are Edgewood and San Antonio.<sup>104</sup> In the Edgewood and San Antonio districts, almost all students come from minority and economically disadvantaged families, and test scores fall below average in those districts.<sup>105</sup> The lack of necessary funds for underachieving schools results in a lack of present and future opportunities for minorities. After *West Orange-Cove Consolidated Independent School District v. Neely* in 2004, Ann Marie Tallman of the Mexican American Legal Defense and Educational Fund (MALDEF), on behalf of the twenty-two property-poor and predominantly Latino school districts she represented, emphasized “every schoolchild in Texas deserves a fighting chance” and “education opportunity depends on the fair funding of schools.”<sup>106</sup> Tallman declared that the twenty-two districts, referred to as the “Edgewood Intervenors,” continue to suffer from continued inequality in school funding despite their many victories in the courtroom over the last thirty-five years.<sup>107</sup> She also expressed her discontent with the Texas Supreme Court’s latest ruling in *Neely v. West Orange-Cove Consolidated Independent School District* in 2005, which failed to address the obvious inequities in the system.<sup>108</sup> David Hinojosa, MALDEF’s lead counsel on behalf of the Edgewood Intervenors, emphasized that there exists undisputable evidence that the quality of each

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102. See *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528 at 18 (250th Dist. Ct., Travis County, Tex. Nov. 30 2004). (“Together, African-American and Hispanic students comprise ninety-seven percent of the total growth and approximately fifty-eight percent of the student enrollment. Ninety percent of the growth has been from low-income families.”).

103. Elyas Bakhtiari, *Rush to Deadline: With Three Weeks to Go in the Legislative Session, School Finance Remains Unsolved*, SAN ANTONIO CURRENT, May 5, 2005, at 7, available at [http://www.zwire.com/site/news.cfm?newsid=14470990&BRD=2318&PAG=461&dept\\_id=484045&rfi=8](http://www.zwire.com/site/news.cfm?newsid=14470990&BRD=2318&PAG=461&dept_id=484045&rfi=8).

104. *Id.*

105. See Andrew Reschovsky and Jennifer Imazeki, *Does the School Finance System in Texas Provide Students with an Adequate Education?* March 1999, at 17 (on file with author).

106. Greg Moses, *Robin Hood Lives! MALDEF Declares Victory*, 2004, available at <http://la.indymedia.org/news/2004/11/119931.php>.

107. *Id.*

108. *Id.*

student's education depends on "which side of the tracks they live on."<sup>109</sup> If the Texas Legislature continues to ignore these disparities, millions of students from property-poor districts face the possibility of even greater inequities in the near future.<sup>110</sup>

#### B. *The Discriminatory Effect of Texas Education Finance: Inadequacy*

Today, in addition to the apparent discriminatory effect on minorities, there exists another devastating issue—*inadequacy* of funds for education. Inadequate funding hinders the educational opportunities of many minorities in Texas. Although it is true that poor districts benefit directly from the Robin Hood recapture scheme, poor districts still remain in dire need of additional funding, e.g., to improve facilities. In 2002, a study by the Texas Association of School Administrators found that high maintenance costs and inadequate funds leave many schools in disrepair.<sup>111</sup> The study exposed many safety concerns due to inadequate facilities maintenance.<sup>112</sup> Although the current finance scheme reduces funding disparities, funding still remains inadequate in many districts.<sup>113</sup>

Inadequacy of funds is not just a problem for property-poor districts; property wealthy districts are also affected. In the *West Orange-Cove* cases, both poor and wealthy districts joined forces, congruously contending the necessity of additional funding for the districts to meet the constitutionally mandated "basic education" requirements.<sup>114</sup> The assumption that wealthy districts possess excess funding is ill-founded. Even wealthy districts, like Austin I.S.D., need additional funds not only to maintain the current level of education in their district, but also to make improvements

109. David Hinojosa, MALDEF Decries Latest Decision of Texas Supreme Court: Ruling Abandons Low-Wealth Districts and Upholds Glaring Inequities in the School Finance System, <http://www.maldef.org/news/press.cfm?ID=289> (last visited Mar. 9, 2007). *Id.*

110. *Id.*

111. See Lesley Hensell, *School Daze: With Robin Hood Vanished, How Will Texas Tackle Public School Financing?* 13, TEXAS CONSTRUCTION, Sect. K-12 (2005).

112. *Id.* (stating, for example, that only six percent of the Wilmer-Hutchins Independent School District's classrooms met minimum standards because the district did not have enough funding to repair and maintain campus buildings).

113. See Coalition to Invest in Texas Schools, *School Funding 101: Current Issues Facing Educational Funding in Texas*, <http://www.investintexasschools.org/schoolfunding/issues.php> (relying on three Texas studies concerning the adequacy of education, Judge Dietz in *West Orange-Cove v. Neeley* "found that the Texas education system [is] not adequately funded").

114. See *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 78 S.W.3d 529 (Tex. App.—Austin 2002); *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) appeal after remand, remanded, in part by *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005).

to ensure all students graduate under the Recommended High School Curriculum.<sup>115</sup> In 2005, Austin I.S.D. needed funds to create certain programs to facilitate learning for students facing language barriers, e.g., bilingual education programs; however, the district could not create these programs because it taxed at the \$1.50 cap and had no way to raise additional funds.<sup>116</sup> In 2004, Brazosport school district also stood to lose an estimated \$15 million in the Robin Hood reallocation scheme, while that money could have been used to purchase much-needed computers for its own students.<sup>117</sup>

### C. *Is Equality a Worthy Goal?*

*“There is hardly a law on the books that does not affect some people differently from others.”*<sup>118</sup>

—Justice Stewart, *Rodriguez II*

Historically, Texas is not the only state that has struggled with funding education. Over the past three decades, many state courts heard both equal protection and adequacy challenges to property-tax-based finance schemes.<sup>119</sup> The main issue for most states dealing with challenges based on equality is that educational equality is not possible as long as local districts maintain control and discretion. Local school administrators and voters know each district's needs and can better implement the programs necessary to increase the quality of education. Yet, school districts cannot improve without the necessary funding. For improved Texas schools and equal education funding, local discretion and state funding cannot be

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115. See Texas School Performance Review, Austin ISD Progress Report, <http://www.cpa.state.tx.us/tspr/austinpr/index.html> (last visited Mar. 9, 2007)

Some 48% of AISD's students are classified as economically disadvantaged, a level about on par with the state average. At the same time, AISD's property tax wealth per student is estimated at more than \$437,000, making it one of the state's 'property-wealthy' districts, and requiring it to share its property wealth with Texas' poorer districts. *Id.*

116. See *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 78 S.W.3d 529 (Tex. App.—Austin 2002); *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) appeal after remand, remanded, in part by *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005).

117. Jason Spencer, *Rich, Poor School Districts in Texas Fault “Robin Hood” Funding Plan*, HOUS. CHRON., Sept. 20, 2004 (reporting that Brazosport has been victimized by the Robin Hood scheme, and has had to borrow money to fund school programs as a result).

118. *Rodriguez II*, 411 U.S. at 59–60 (Stewart, J., concurring).

119. See Erin E. Kelly, Note, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L.J. 397, 397 (1995) (stating that the constitutionality of the school funding systems have been challenged in forty-five states).

mutually exclusive—they make up the two main components to achieving adequate and efficient education. Hence, the legislature must strike the necessary balance between the two. Doing so, however, means that education will never be equal. Nor *should* education be equal. Each district has specific needs, and local school administrators and voters must be allowed the discretion to address those needs in a manner best suited for the success of their students. Hence, while equality in education stands as an ideal goal, it does not represent a realistic one.

Regardless, equal funding from the state for each student *is* a worthwhile goal, and the current finance scheme gives each school district an equal amount of funding per student. The issue is not *who* receives more funding. Rather, the issue is that every district *needs* more funding. While Texas legislators may not be able to equalize education, it *is* possible to provide more funding to each district.

To achieve fiscal equality, Texas must follow in the footsteps of Vermont, New Hampshire, Kentucky, and Massachusetts and pass a state education tax. But, are Texans ready for a state education tax? Will Texans vote to amend the Texas Constitution to allow a state education tax?<sup>120</sup> If not, then plaintiffs should take another look at the difference between “equity” and “adequacy” before they step back into the courtroom. Fiscal equality in education funding remains impossible without a state tax to solely fund education. Texas’s history of perpetual education reform proves that funding generated from other taxes (vehicle, alcohol, cigarette, property, etc.) cannot adequately fund the Texas education system.

#### D. *Are Adequacy and Efficiency Achievable?*

To achieve adequacy and efficiency, both must first be defined. The Texas Legislature should define the standards of “adequacy” and “efficiency” by court-order if necessary. A monetary standard would be best because it would prevent lawsuits as long as school districts acquire the minimum monetary value per pupil as defined by statute or code. For example, if the Texas Education Finance Committee finds that the estimated cost to provide children an adequate education is \$4,000 per pupil, then the Legislature should amend the Texas Constitution and/or Texas Education Code to reflect that minimum. As long as each district receives that minimum per pupil, then no legal challenges should stand on definitional “adequacy” grounds. Since the Legislature has never specifi-

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120. *See generally*, M. Ray Perryman, Financing the Public Schools of Texas: Some Issues of Growth, Equity and Efficiency, <http://www.txsc.org/finance101/perrymanstudy.pdf> (last visited Mar. 9, 2007) (reflecting that Texans strongly oppose a state income tax). Whether the tax in income, property, or other, it is safe to assume that most Texans oppose any tax.



cally defined what “adequacy” or “efficiency” means, courts are left to *interpret* “adequacy” and “efficiency” as they see fit. Unfortunately, depending on the court, the constitutionality of Texas’s extant education finance schemes vacillates. Hence, the standards of “adequacy” and “efficiency” must be defined.

However, this comment does not propose that a mere definitional amendment will cure Texas’s education finance woes. Even if education funding provided adequate funds as per a certain constitutional or statutory definition, the issue of inequality will remain. In order to provide an adequate, efficient, and equal education, the legislature must implement structural, fiscal reform. As long as the funding source is a local property tax, funding, education opportunity, and achievement will vary between districts.

Unfortunately, the current attempts to reform education, House Bills 1 – 5, fail to appropriately address these concerns, and worse, perpetuate the current inadequacies and inequalities in education finance.

#### V. RECENT REFORM: HOUSE BILLS 1 – 5

On November 22, 2005, the Texas Supreme Court held the Texas education finance scheme unconstitutional,<sup>121</sup> and ordered the Texas Legislature to enact a new finance scheme.<sup>122</sup> The Legislature passed House Bills 1–5 in May 2006. The Texas Education Agency is in charge of implementing these legislative provisions.<sup>123</sup>

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121. *Neeley*, 176 S.W.3d at 797; House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 1 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (explaining that a lack of “‘meaningful discretion’ in setting local maintenance and operation (M&O) tax rates, effectively result[ed] in an unconstitutional state property tax”).

122. See *Neeley* 176 S.W.3d at 799 (setting a June 1st deadline); House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 3–12 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (noting that if the Legislature failed to remedy the constitutional infirmity by the deadline, the state, by order of the court, would be enjoined from distributing any funds to the public school system).

123. HB 1 Implementation, <http://www.tea.state.tx.us/HB1/> (last visited Feb. 21, 2007) (on file with author) (providing online updates of plans regarding the implementation of House Bill 1).

### A. House Bill 1

House Bill 1 (H.B. 1) provides for several education finance revisions.<sup>124</sup> The main goal of H.B. 1 is to reduce reliance on local property taxes. To accomplish this, H.B. 1

provides state aid to school districts to reduce maintenance and operation (M&O) property taxes by 11.3 percent in tax year 2006 and one third (33.3 percent) in tax year 2007 and beyond. For districts taxing at the current \$1.50 M&O cap, the M&O rate will be \$1.33 per \$100 valuation in tax year 2006 and \$1.00 per \$100 in tax year 2007. The state may provide additional funding for further property tax relief in the future based on the availability of revenues from the new state taxes enacted during the special session and legislative appropriations.<sup>125</sup>

H.B. 1 also allows school districts the option of levying “enrichment” taxes.<sup>126</sup> School districts can levy up to \$.04 per \$100 valuation.<sup>127</sup> “Local enrichment funds up to \$.04 (\$.06 starting in 2009) will be ‘equalized’ with state aid to ensure that each district, at the same tax effort, can raise the same amount.”<sup>128</sup> So H.B. 1 “equalizes” funding by redistributing the first \$.04 of enrichment tax to under-enriched schools. It also replaces the currently existing \$1.50 per \$100 valuation cap on M&O tax rates with a new limit of \$1.17, starting the 2007 tax year.<sup>129</sup>

Among its other commendable provisions, H.B. 1 also 1) provides for a \$2,000 pay increase for teachers and professional staff; 2) increases the state’s share of the total cost of education from 40% to 50%; 3) requires school board elections to be held with municipal elections in May or in

124. See generally House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 3–12 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (summarizing House Bill 1).

125. *Id.* at 3 (detailing the implementation scheme of H.B.1).

126. See House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 3 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (describing one way a school district can raise extra revenue); see also Tex. H.B. 1, 79th Leg., 3d C.S. (2006) (redesigning the public school finance system).

127. House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 3 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (adding that voter approval is required for any increase beyond \$.04); see also Tex. H.B. 1, 79th Leg., 3d C.S. (2006).

128. *Id.* House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 3 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (noting that Austin Independent School District represents the benchmark for comparing schools in Texas).

129. *Id.* (noting that the cap will be lowered proportionately if the state continues to reduce property taxes); see also Tex. H.B. 1, 79th Leg., 3d C.S. (2006).

the November general elections; 4) establishes a uniform school start date (fourth Monday in August); and 5) requires students to take and pass an additional year of math and science to graduate from high school.<sup>130</sup> It also “establishes new accreditation standards for school districts and creates new sanctions for low-performing campuses and charter schools.”<sup>131</sup>

### B. *House Bill 2*

House Bill 2 (H.B. 2) “creates a property tax relief fund outside of general revenue for the collection of revenue generated by the new taxes authorized by the 79th Legislature.”<sup>132</sup> The income earmarked for the fund includes the revenue generated from: 1) the new franchise tax (see House Bill 3 *infra*), 2) the standard presumptive value of used cars (see House Bill 4 *infra*), and 3) cigarette and tobacco taxes (see House Bill 5 *infra*).

### C. *House Bill 3*

A franchise tax levied against “professional corporations, banks, savings-and-loan associations, state-limited banking associations, and professional LLC (but not limited partnerships, sole proprietorships, or non-corporate associations)” contributes to funding education in Texas.<sup>133</sup> Before House Bill 3 (H.B. 3), many businesses were reorganized as partnerships to avoid paying the franchise tax. H.B. 3 attempts to close this loophole by including corporations and limited liability partnerships. While H.B. 3 closed one loophole, H.B. 4 created a new one.

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130. House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 3 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (outlining other benefits employees will receive such as annual incentive payments for teachers who improve student achievement, especially among educationally disadvantaged students); see also Tex. H.B. 1, 79th Leg., 3d C.S. (2006).

131. House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 3 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (listing examples of sanctions such as interventions, changes in staff, and possibly closure of failing schools); see also Tex. H.B. 1, 79th Leg., 3d C.S. (2006).

132. House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 19 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (highlighting that the new fund will offset M&O tax rates); see also Tex. H.B. 3, 79th Leg., 3d C.S. (2006) (pertaining to the distribution of revenue acquired from franchise taxes).

133. House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 13 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf> (explaining that for-profit corporations and limited liability companies participate in the franchise tax); see also Tex. H.B. 3, 79th Leg., 3d C.S. (2006) (explaining that H.B. 3 relates to taxes affecting businesses).

#### D. House Bill 4

House Bill 4 (H.B. 4) “requires the Texas Department of Transportation to determine . . . the ‘standard presumptive value’—or private transaction value—of a motor vehicle based on a regional guidebook of a national industry reporting services or other appropriate publication [(commonly known as “blue book” pricing)].”<sup>134</sup> If a used car is purchased for less than 80 % of its standard presumptive value, then the purchaser must pay the state’s 6.25% sales tax on the value of the car instead of the purchase price.<sup>135</sup> Texas consumers already found a loophole in this regulation. Buyers claim their car purchases as “gifts,” which avoids the payment of any sales tax at all. So instead of creating more funding for Texas education, H.B. 4 actually decreases the amount of funding raised.

#### E. House Bill 5

H.B. 5 increases the tax rates for tobacco products (increase from 35.21% to 40%) and cigarettes (increase from 41 cents per pack to \$1.41 per pack).<sup>136</sup>

### VI. CURRENT LEGISLATIVE PROPOSAL: VOUCHERS

#### A. House Bill 18<sup>137</sup>

House Bill 18 (H.B. 18) proposes a pilot voucher program. Children who qualify for the program are those who are “educationally disadvan-

134. House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 18 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf>; see also Tex. H.B. 4, 79th Leg., 3d C.S. (2006).

135. See House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 18 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf>; see also Tex. H.B. 4, 79th Leg., 3d C.S. (2006).

136. House Research Organization, *School and Taxes: A Summary of Legislation of the 2006 Special Session*, 79–13 FOCUS REP. 1, 18 (2006), available at <http://www.hro.house.state.tx.us/focus/schools&taxes79-13.pdf>; see also Tex. H.B. 5, 79th Leg., 3d C.S. (2006).

137. Tex. H.B. 18, 80th Leg., R.S. (2007) (“This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2007.”).

Sec. 29.353. PARENTAL NOTIFICATION. (a) Not later than a date established by the commissioner, a school district described by Section 29.352(a)(2) shall notify in writing the parent of each eligible child of the child’s eligibility for a voucher.

(b) A parent may apply for a voucher on behalf of the parent’s child by notifying the school district by a date established by the commissioner.

Sec. 29.354. AMOUNT OF VOUCHER; FINANCING. (a) A child’s voucher is an amount equal to the total average per student funding amount in the school district the child would otherwise attend during the preceding school year for maintenance

tagged” and either “failed to perform satisfactorily on the most recent as-

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and operations, including state and local funding, but excluding money from the available school fund.

(b) An eligible child who attends a private school in compliance with this subchapter is entitled to 100 percent of the child’s voucher, unless the tuition charged by the school is less than the amount of the voucher. In that event, the school district the child would otherwise attend is entitled to the amount of the voucher remaining after payment of tuition.

(c) An eligible child who attends a private school using a voucher is included in determining the average daily attendance under Section 42.005 of the school district in which the student would otherwise attend school.

(d) A child’s voucher is payable from the school district to the private school on behalf of the child. A child’s voucher is the entitlement of the child, under the supervision of the child’s parent, is not an entitlement of any school, and is paid to a school solely as a means of administrative convenience.

Sec. 29.355. ACCREDITATION. (a) Except as otherwise provided by this section, a private school that accepts students with vouchers must be accredited by a private organization recognized by the commissioner.

(b) A newly established private school may receive voucher funds without accreditation if the school applies for accreditation before accepting students under the program.

(c) The commissioner may waive the requirements of this section for good cause.

Sec. 29.356. ADMISSIONS. (a) A private school may not refuse to enroll a child with a voucher on the basis of the child’s residence, race, national origin, ethnic background, religion, disability, or academic achievement.

(b) A private school may refuse to enroll a child with a voucher if the child:

- (1) has been expelled from a public school; or
- (2) has a criminal record.

(c) A private school may not consider the athletic ability of a child with a voucher in any admission process relating to the child.

(d) Except as provided by Subsection (e), a private school that has more applicants with vouchers than available positions must fill the positions by lottery. A private school must declare the number of available positions and conduct the lottery for the next school year not later than July 1 of each year.

(e) A private school may give preference to an enrolled student to achieve continuity and to siblings of an enrolled student or children residing in the same household as an enrolled student for the convenience of the parents of those children.

Sec. 29.357. TUITION; ADDITIONAL CHARGES AND FEES. A private school may not:

(1) charge an eligible child attending the school with a voucher tuition:

- (A) in addition to the voucher; or
- (B) in an amount greater than the standard tuition rate at the school; or

(2) assess any additional charge, other than a fee that the board of trustees of a school district is authorized to charge under Section 11.158, for providing an educational program or service to the child.

Sec. 29.358. ACCOUNTABILITY. (a) A private school shall administer to each student with a voucher who is enrolled in the school the assessment instruments required under Section 39.023(a), (b), (c), or (l), or other comparable assessment instruments approved by the commissioner, in the same manner as those instruments are administered to public school students.

assessment [test] administered to the child” or is “eligible to attend another public school in the district[,] . . . but . . . [was] rejected.”<sup>138</sup> With the voucher, the eligible child can enroll in a private school.<sup>139</sup> Under the bill, a private school represents a “nongovernmental educational establishment that exists for the general education of elementary or secondary students. The term does not include a school that provides education in a

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(b) A private school shall report to the commissioner concerning the school’s performance on the academic excellence indicators under Section 39.051 for students with vouchers who are enrolled in the school. The commissioner shall publish the school’s performance information and make it available to parents for review.

Sec. 29.359. CERTIFICATION TO COMPTROLLER. To receive voucher funds, a private school must certify to the comptroller that the school has complied with the conditions imposed by Section 29.356.

Sec. 29.360. DUTIES OF COMPTROLLER. The comptroller shall adopt rules, procedures, and forms for the payment of vouchers to private schools on behalf of students attending those schools with vouchers.

Sec. 29.361. EVALUATION AND REPORT. The commissioner, in consultation with the school districts whose students are eligible to participate in the pilot program, shall evaluate the program established by this subchapter and report the evaluation, together with recommendations, to the legislature not later than December 1, 2010.

Sec. 29.362. EXPIRATION. This subchapter expires September 1, 2011, and vouchers may not be issued for the 2011–2012 or a later school year.

SECTION 2. The commissioner of education and the comptroller shall implement the public education voucher pilot program as provided by Subchapter J, Chapter 29, Education Code, as added by this Act, beginning with the 2007–2008 school year. *Id.*

138. *Id.* (explaining Section 29.352(a) eligibility requirements).

A child is eligible for a voucher to be used to pay the costs of attending a private school if the child: (1) is educationally disadvantaged; (2) is eligible to attend school under Section 25.001 in a school district that is among the six largest districts in membership for the 2007–2008 school year, as determined by the commissioner; (3) was enrolled in a public school district during the preceding school year or is enrolling in prekindergarten, kindergarten, or first grade for the first time; and (4) either: (A) failed to perform satisfactorily on the most recent assessment instrument administered to the child under Section 39.023(a), (b), (c), or (l); or (B) is eligible under Subchapter G to attend another public school in the district in which the child resides or to receive a public education grant to use to attend a public school in another district, but has had an application to attend another school in the child’s district or in another district rejected. *Id.*

139. *Id.* (explaining Section 29.352(b), which reveals the criteria for maintaining a losing eligibility). After a child establishes eligibility under Subsection (a) and attends a private school using a voucher, the child is entitled to continue receiving the voucher, regardless of whether the child continues to meet the requirements of Subsection (a), until the earlier of the date on which the child graduates from high school or the child’s 21st birthday, unless the child: (1) enrolls in a public school district after using the voucher; or (2) changes residences and is no longer entitled under Section 25.001 to attend school in the school district under which the child’s eligibility for a voucher was established. *Id.*

home setting or by the parent or that limits enrollment to relatives of the school's staff."<sup>140</sup>

After a child establishes eligibility . . . and attends a private school using a voucher, the child is entitled to continue receiving the voucher, regardless of whether the child continues to meet the [assessment] requirements . . . until the earlier of the date on which the child graduates from high school or the child's 21st birthday, unless the child . . . enrolls in a public school district after using the voucher[ ] or changes residences and . . . [loses] eligibility . . .<sup>141</sup>

"A child's voucher is an amount equal to the total average per student funding amount in the school district the child would otherwise attend during the preceding school year for maintenance and operations, including state and local funding, but excluding money from the available school fund."<sup>142</sup> The private school is "entitled to 100 percent of the child's voucher, unless the tuition charged by the school is less than the amount of the voucher. In that event, the school district the child would otherwise attend is entitled to the amount of the voucher remaining after payment of tuition."<sup>143</sup>

The idea of "school choice" and competition is the motivation behind a statewide voucher program. Proponents argue that a voucher program would increase competition, thereby increasing the quality of education.<sup>144</sup> The theory proposes that when schools compete for students, schools will improve in order to keep their students and attract new students and additional funding.<sup>145</sup> "There is no relationship between competition and effective teaching."<sup>146</sup> While implementation of a voucher appears to be a commendable proposal, it is not the answer to Texas's education finance problem.

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140. *Id.* ("In this subchapter: (1) 'Parent' includes a guardian or custodian. (2) 'Private school' means a nongovernmental educational establishment that exists for the general education of elementary or secondary students. The term does not include a school that provides education in a home setting or by the parent or that limits enrollment to relatives of the school's staff.").

141. *Id.*

142. Tex. H.B. 18, 80th Leg., R.S. (2007).

143. *Id.*

144. CATO INSTITUTE, *Education and Child Policy: Vouchers*, <http://www.cato.org/research/education/vouchers.html> (last visited Mar. 27, 2007) (on file with author) ("[V]ouchers promote competition among schools, improving performance.").

145. *Id.* ("Public Schools . . . respond positively to increased competition from private schools by trimming bureaucracy, improving programs, and strengthening curricula.").

146. The Coalition for Public Schools, *Why Does the Coalition for Public Schools Oppose Private Vouchers?*, [http://www.coalition4publicschools.org/coalition/faqs/faq\\_index.shtml](http://www.coalition4publicschools.org/coalition/faqs/faq_index.shtml) (last visited Mar. 9, 2007).

B. *Vouchers Will Not Remedy the Constitutional Infirmities of Education*

Voucher programs do not effectively increase academic performance among students. In fact, it perpetuates inequity. The reality is that most students who struggle academically come from poor socio-economic districts. Parents of such students cannot afford to send their children to private schools. Even if vouchers cover the cost of transportation, vouchers cannot cover the cost of private school tuition. Thus, “choice” will not resolve inequity when the only families who can “choose” are those who can afford it. The inevitable result of “school choice” is a wider gap in inequities across the state, leaving schools, parents, and educators of poor districts no “choice” but to pursue education challenges in the courtroom.

1. *Vouchers Perpetuate Inequality*

The theory that a statewide voucher program, via competition, will stimulate academic performance<sup>147</sup> is flawed. Competition should be based on an even playing field, and under a voucher program, it is not.<sup>148</sup> Public schools have to accept everyone; private schools do not.<sup>149</sup> “Private schools are not required to provide transportation, special education, bilingual education, free and reduced price lunches, and many other programs that public schools provide.”<sup>150</sup> How can we compare student performance in public and private schools when private schools can selectively choose the top students they prefer and public schools cannot? Vouchers will widen, not narrow the disparate gap in educational opportunity and achievement.

Vouchers do not yield more “choice,” and hence, do not actually increase competition. Contrary to proponents’ claims, vouchers do not facilitate parental choice.<sup>151</sup> In reality schools have the ultimate choice to admit voucher students into their program, and “many have long waiting

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147. CATO INSTITUTE, *Education and Child Policy: Vouchers*, <http://www.cato.org/research/education/vouchers.html> (last visited Mar. 27, 2007) (on file with author).

148. See The Coalition for Public Schools, 10 Reasons to Oppose Private School Vouchers, <http://www.coalition4publicschools.org/coalition/facts/oppose.shtml> (last visited Mar. 9, 2007).

149. See *id.*

150. *Id.*

151. The Coalition for Public Schools, Why Does the Coalition for Public Schools Oppose Private Vouchers?, [http://www.coalition4publicschools.org/coalition/faqs/faq\\_index.shtml](http://www.coalition4publicschools.org/coalition/faqs/faq_index.shtml) (last visited Mar. 9, 2007) (“Saying vouchers would facilitate ‘parental choice’ for private schools is a mirage and a false promise. The ‘choice’ is really made by private school admissions committees, which choose which children to accept and which to reject.”)



lists and only admit top students.”<sup>152</sup> “On average, religious schools reject 67% of all applicants.”<sup>153</sup> Therefore, it is not likely that well-performing private schools will accept low-performing students. “Private school administrators cite several reasons why they would not participate in a voucher pilot program.”<sup>154</sup> Administrators’ reasons include the following: their schools only admit the top students; administrators do not want to be subject to government regulation; and administrators refuse to exempt voucher students from participation in religious activities supported by their private school.<sup>155</sup> Hence, a voucher program will perpetuate inequity in education.

“To whatever extent ‘competition’ might be useful, such competition already exists through the many choice options within the public school[ ]” system.<sup>156</sup> If more “choice” did in fact increase competition, and ultimately academic achievement, the creation of a statewide voucher program would still not be necessary to attain such “choice”. Parents already possess an array of choices when it comes to their children’s education. “Children may transfer to another public school in the same or neighboring school district, or they may enroll in a public magnet school, charter school, school-to-work program, or an evening high school.<sup>157</sup> Hence, vouchers are not needed to increase choice and competition among school districts.

Additionally, the majority of students from rural districts and low-income families do not benefit from a school voucher program. Low-income families cannot afford to send their children to private schools,

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152. The Coalition for Public Schools, 10 Reasons to Oppose Private School Vouchers, <http://www.coalition4publicschools.org/coalition/facts/oppose.shtml> (last visited Mar. 9, 2007).

153. *Id.*

154. The Coalition for Public Schools, Reasons to Oppose a Private School Voucher Program in Texas, <http://www.coalition4publicschools.org/coalition/facts/pilot.shtml> (last visited Mar. 9, 2007).

155. *Id.* (providing a lengthy list of reasons why private school administrators would not participate in a voucher pilot program). Private school administrators cite several reasons why they would not participate in a voucher pilot program: their schools have waiting lists and only admit top students; a voucher would not cover private school tuition and fees; private academies won’t administer the [TAKS] test and do not want any government regulation of curriculum and instruction; bilingual education and special education are not offered; no transportation or free lunches are provided; they refuse to exempt voucher students from participation in religious activities during the school day; parents of currently enrolled students do not want private schools to lower their selective admission standards; and other reasons. *Id.*

156. See The Coalition for Public Schools, Why Does the Coalition for Public Schools Oppose Private Vouchers?, [http://www.coalition4publicschools.org/coalition/faqs/faq\\_index.shtml](http://www.coalition4publicschools.org/coalition/faqs/faq_index.shtml) (last visited Mar. 9, 2007).

157. *Id.*

even with the help of a voucher.<sup>158</sup> Additionally, many rural school districts may not have private schools wherein students could even utilize vouchers.<sup>159</sup> Hence, a state-wide voucher program increases, not decreases the disparities between districts.

A state-wide voucher program would cripple the current public education system. Research indicates that school vouchers could divert an estimated \$1 billion from public education.<sup>160</sup> Even if voucher students choose to transfer, the fixed costs of building “maintenance, utilities, and transportation will not be reduced.”<sup>161</sup> “Every dollar used for tuition vouchers would be taken from the funding pool that could support smaller public school class sizes for struggling students, tutoring and summer school for low-achieving students, addressing the teacher shortage, and reducing dependence on [local] property taxes.”<sup>162</sup> Texas public schools are already under-funded,<sup>163</sup> and thus, “[c]hildren who remain in cash-strapped public schools would be hurt by vouchers.”<sup>164</sup>

## 2. Vouchers Perpetuate Inadequacy

First, voucher programs are not accountable. Private school students are exempt from state mandated accountability tests and the other stringent state mandates such as the 22:1 class size limits or the “no pass, no play” laws.<sup>165</sup> Without accountability, there is no means to ensure that private schools are delivering an “adequate” or “efficient” education as

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158. Charles Foster Johnson, *Vouchers: Bad Thinking About Education*, <http://tfn.org/faithnetwork/advocacy/vouchers/johnsonoped/index.php> (last visited Mar. 9, 2007) (stating that vouchers do not “cover the costs of textbooks, school uniforms, class trips, team sports, and more”). Arguably, low-income and rural families’ tax dollars will end up supporting the higher-income families who already have the means to send their children to private schools.

159. *Id.*

160. *Id.*

161. *Id.* (arguing that “local taxpayers [will have to] make up the billion dollar deficit through increased taxes”).

162. The Coalition for Public Schools, *Private School Vouchers Are a Bad Idea*, <http://www.coalition4publicschools.org/coalition/facts/idea.shtml> (last visited Mar. 9, 2007).

163. The Coalition for Public Schools, *Why Does the Coalition for Public Schools Oppose Private Vouchers?*, [http://www.coalition4publicschools.org/coalition/faqs/faq\\_index.shtml](http://www.coalition4publicschools.org/coalition/faqs/faq_index.shtml) (last visited Mar. 9, 2007).

164. *Id.*

165. The Coalition for Public Schools, *Private School Vouchers Are a Bad Idea*, <http://www.coalition4publicschools.org/coalition/facts/idea.shtml> (last visited Mar. 9, 2007). Other state mandates include the requirement to only hire state-qualified teachers to “withhold diplomas from high school seniors who fail the state exit exam,” or “to abide by the open records act.” *Id.*

required by the Texas Education Code or Texas Constitution.<sup>166</sup> Hence, government regulation of private schools would be necessary to ensure quality education. Holding private schools accountable, however, crosses the line between church and state, as discussed *infra*.

Secondly, students in voucher programs do not necessarily perform better than students in public schools. “Voucher pilot programs in other states have demonstrated lackluster performance, and the privately funded voucher pilot in San Antonio has harmed children and schools in the Edgewood [Independent School District].”<sup>167</sup>

### 3. Vouchers Are Not Cost-Effective

The main problem with the current Texas Education Scheme Finance is lack of sufficient funds. A state-wide voucher program would only increase the costs of funding education, and Texas taxpayers will pay the price. As of 2003, taxpayers already spent more than \$1 billion on a pilot program to test charter schools.<sup>168</sup> In 2002, charter schools attributed to 37% of schools that were rated as “low-performing.”<sup>169</sup> “Failed charter schools [prove] exactly why regulation is needed of privately-run schools funded with public money. Public education needs tough oversight, regulation, and accountability to the taxpaying public.”<sup>170</sup>

Instead of reducing taxes, a state-wide voucher program would most likely increase taxes to make up for the financial diversion from public schools. Texans would not only fund the voucher program, but also maintain the already-struggling public school system.

### 4. Vouchers Violate the First Amendment

The “First Amendment to the United States Constitution prohibits federal, state, or local government from establishing or aiding religious institutions in any way.”<sup>171</sup> In 1971, the Supreme Court in *Lemon v.*

166. TEX. CONST. art. VII, § 1 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an *efficient* system of public free schools.”) (emphasis added).

167. *Id.*

168. The Coalition for Public Schools, Private School Vouchers Are a Bad Idea, <http://www.coalition4publicschools.org/coalition/facts/idea.shtml> (last visited Mar. 9, 2007) (arguing that “Texas legislators must solve the problems with the 185 charter schools in the existing school choice experiment before considering creation of a new experiment”). “By June 2003, taxpayers will have spent more than \$1 billion on the Texas charter school experiment.” *Id.*

169. *Id.*

170. *Id.*

171. Charles Foster Johnson, *Vouchers: Bad Thinking About Education*, <http://tfn.org/faithnetwork/advocacy/vouchers/johnsonoped/index.php> (last visited Mar. 9, 2007) (“Gov-

*Kurtzman* ruled that state government aid to sectarian schools violated the Free Exercise and Establishment Clauses of the First Amendment.<sup>172</sup> Vouchers clearly violate separation between church and state. Many private schools are undoubtedly run by private religious organizations. A state-wide voucher program that filters tax dollars into such affiliations clearly violates the First Amendment.<sup>173</sup> Opponents of this argument claim that the separation is not violated because it is the parents, not the state, who ultimately make the decision to send their children to private schools. While this claim has merit, in essence, the “choice” itself is government-funded, and hence, inherently unconstitutional. Although the U.S. Supreme Court held that when parents possess the ultimate choice there is no First Amendment violation,<sup>174</sup> state courts have ruled differently.<sup>175</sup>

Most recently, in *Bush v. Holmes*, the Florida Supreme Court held that the current State voucher program violates the Florida Constitution’s “Separation of Church and State” clause.<sup>176</sup>

### C. Joint Resolution 25

House Joint Resolution (H.J.R.) 25 sponsored by Representative Raymond boldly opposes a pilot voucher program. H.J.R. 25 proposes to amend the Texas Constitution to prevent the implementation of a state funded voucher program.

Be it resolved by the Legislature of the State of Texas, Section 1, Article VII, Texas Constitution, is amended as follows:

SECTION 1. Article VII, Texas Constitution, is amended by adding Section 7 to read as follows:

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ernment must [remain] completely neutral in matters of religion, neither advocating it nor inhibiting it.”); U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

172. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

173. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

174. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding Ohio’s Pilot Project Scholarship Program did not violate the Constitution).

175. *Holmes v. Bush*, No. 99-3370 (Fla. Cir. Aug. 5, 2002) (holding that Florida’s voucher program violated Article I, § 3 of the state constitution).

176. *Bush v. Holmes*, 919 So.2d 392, 413 (Fla. 2006) (“Because we conclude that section 1002.38 violates article IX, section 1(a) of the Florida Constitution, we [find the voucher program] . . . unconstitutional.”)

Sec.7.(a) In this section, "private school" means a nongovernmental educational establishment that exists for the general education of elementary or secondary students.

(b) The legislature may not appropriate money for or authorize a voucher program under which state or local public revenue is used to pay all or any part of the costs of a student's attendance at a private school.

(c) This section does not prohibit the use of state or local public revenue to pay all or any part of the costs of attendance at a private school by a student with a disability for the purpose of receiving special education services that would otherwise be unavailable to the student.

SECTION 2. This proposed constitutional amendment shall be submitted to the voters at an election to be held November 6, 2007. The ballot shall be printed to permit voting for or against the proposition: 'The constitutional amendment prohibiting the authorization or funding of a voucher program for elementary or secondary education.'<sup>177</sup>

Regardless of whether H.J.R. 25 passes or fails, a voucher program is not the answer to the Texas education finance woes. If H.J.R. 25 passes, it will ensure that Texas will not waste valuable resources on a state-wide voucher program. Yet, even if H.J.R. 25 fails, it would still be possible for the Texas Legislature to enact a voucher program, but such enactment is neither suitable nor sensible.

## VII. THE NEXT STEP FOR TEXAS EDUCATION FINANCE

This comment proposes that the answer to the Texas education finance problem is a state-wide education tax. The case studies and proposal *infra* lend credence to the viability of a state education tax to remedy the constitutional infirmities of the Texas education finance scheme.

### A. State Property Tax Case Studies

#### 1. Fiscal Equality and Adequacy: Vermont and New Hampshire

Like Texas, Vermont and New Hampshire faced constitutional challenges to their respectable finance schemes.<sup>178</sup> The Vermont and New Hampshire legislatures both enacted bold reform after both states' supreme courts mandated finance reform in 1997.<sup>179</sup> The Vermont<sup>180</sup> and

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177. H.J.R. 25, 80th Leg., R.S. (2007).

178. See *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) ("Claremont II").

179. *Id.*

New Hampshire<sup>181</sup> legislatures each implemented a statewide property tax to fund education.

The uniform state education taxes established fiscal neutrality among districts.<sup>182</sup> Therefore, in essence, Vermont and New Hampshire enacted education finance schemes that created the fiscal adequacy and equity that Texas so strongly desire. Hence, both states serve as good templates for Texas and other states wishing to reach the same goal.

## 2. Fiscal Equality and Accountability: Kentucky and Massachusetts

After the invalidation of Kentucky's education finance scheme in 1989,<sup>183</sup> the Kentucky Legislature enacted "one of the most comprehensive legislative reform plans to date."<sup>184</sup> The Kentucky Education Reform Act of 1990 (KERA)<sup>185</sup> targeted not only fiscal equality, but also emphasized accountability and academic achievement.<sup>186</sup> KERA increased the required minimum achievement standards, established a testing system to measure that achievement, and created rewards for high-achieving schools.<sup>187</sup> This overall improvement has fared well for Ken-

180. See Erin Buzuvis, Note, "A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 676-78 (2001) (explaining the enactment and provisions of Vermont's Act 60, which authorized a block grant per student, substantially funded by a statewide education property tax).

181. See House Bill 117, Act of April 29, 1999, 1999 N.H. Laws ch. 17; see also Erin Buzuvis, Note, "A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 673-76 (2001) (explaining the enactment and provisions of House Bill 117 which authorized a state tax for education).

182. See Erin Buzuvis, Note, "A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 682 (2001) ("[T]he uniform property tax rate ensures the fiscal neutrality of both states' tax systems.").

183. See *Rose v. Council for Better Educ., Inc.*, 790 S.W. 2d 186, 215 (Ky. 1989).

184. See Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 499 (1999); C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REFORM 599, 609 (1995); Erin Buzuvis, Note, "A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 670 (2001).

185. Kentucky Education Reform Act, ch. 456, 1990 Ky. Acts 1208 (codified as amended in different sections of Ky. Rev. Stat. Ann., chs. 156-165).

186. Erin Buzuvis, Note, "A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 670-72 (2001) ("KERA's drafters aimed their reform efforts at the areas of curriculum, governance, and finance.").

187. *Id.* at 671 ("KERA's curriculum-based provisions first established goals and standards designed to be more challenging than previous minimum standards."). *Id.* KERA

tucky. Within five years, Kentucky schools improved dramatically.<sup>188</sup> Most importantly, high-poverty elementary schools ranked in the top twenty percent among all other schools an outstanding improvement!<sup>189</sup>

This approach also worked for Massachusetts. After the Massachusetts Supreme Judicial Court found the state's education system violated the state constitution, the Massachusetts Legislature implemented the Massachusetts Education Reform Act of 1993 (MERA). Like KERA, MERA consisted of "measures to equalize inputs, perform assessment, and foster district accountability."<sup>190</sup> Massachusetts's reform efforts demonstrated success as well as achievement improved across the state.<sup>191</sup> Granted, achievement levels from nearly a decade ago are not impressive, but what *is* impressive is the fact that even today, Massachusetts ranks at the top of several polls in education achievement.<sup>192</sup> According to Morgan Quinto Press, which releases annual state rankings of the "smartest states," in 2006, Massachusetts ranked second among all fifty states.<sup>193</sup>

Texas already has a strong accountability program. By instituting a state education tax, fiscal equality can be achieved as well. If Texans

also requires each school to assess achievement via comprehensive testing. *Id.* at 671–72. Additionally, KERA "fosters school accountability by rewarding or sanctioning schools based on assessment results." *Id.* at 672.

188. See National Center for Education Statistics, The National Assessment of Educational Progress (NAEP) 1998 Reading Report Card for the Nation and States, <http://nces.ed.gov/Pressrelease/statenaep.asp>. (last visited Mar. 9, 2007) (showing statistics on Kentucky's academic improvements).

189. See Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 515 (1999).

190. Erin Buzuvis, Note, "A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 672 (2001).

191. *Id.* at 673 (showing that, within one year (1998 to 1999), Massachusetts third-graders improved their reading ability by ten percent).

192. See 2004 Smartest States Rankings, <http://detroit.about.com/od/fastfacts/a/aa092804.htm> (last visited Mar. 9, 2007) (showing that, as of 2003, the smartest state in the United States, is Massachusetts).

193. Morgan Quinto Press, Results of the 2006 Smartest State Award, <http://www.morganquinto.com/edrank06.htm> (last visited Mar. 9, 2006); see also Morgan Quinto Press, Factors, <http://www.morganquinto.com/edfact06.htm#FACTORS> (listing a number of factors used when calculating the ranking among states). The factors that are weighed positively include:

- Public Elementary and Secondary School Revenue per \$1,000 Personal Income
- Per Pupil Public Elementary and Secondary School Current Expenditures
- Percent of Public Elementary and Secondary School Current Expenditures used for Instruction
- Percent of Population Graduated from High School (Table 168) + Public High School Graduation Rate

want both adequacy and equality, then they must vote to amend the Texas Constitution to allow the levy of a state education tax.

### 3. Texas

An equally levied, state-wide education tax will provide public school districts with the financial resources necessary to provide quality education. The state education tax could be levied as an income tax or state property tax. Instituting either would require amending the Texas Constitution. Because implementing *any* new or additional tax in Texas is undoubtedly unwelcomed, the transition would not be an easy one. However, the transition, no matter how unattractive, is completely necessary.

Texas legislators and taxpayers should open-mindedly approach the implementation of a state education tax. Either a state income tax or state property tax could be implemented, and while there are known benefits to a state income tax, e.g. the simplicity of execution and deductibility from federal income tax,<sup>194</sup> this comment proposes that a state property tax would allow for a smoother transition and less voter opposition.

In 2005, Senator Ogden boldly proposed Senate Joint Resolution 38 (S.J.R. 38). S.J.R. 38 proposed a constitutional amendment to authorize a state property tax to fund education.<sup>195</sup> The amendment authorized the

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- Percent of Public School Fourth Graders Proficient or Better in Reading
  - Percent of Public School Eighth Graders Proficient or Better in Reading
  - Percent of Public School Fourth Graders Proficient or Better in Writing
  - Percent of Public School Eighth Graders Proficient or Better in Writing
  - Percent of Public School Fourth Graders Proficient or Better in Mathematics
  - Percent of Public School Eighth Graders Proficient or Better in Mathematics
  - Percent of 4th Graders Whose Parents Have Strict Rules about Getting Homework Done
  - Average Teacher Salary as a Percent of Average Annual Pay of All Workers
  - Percent of School-Age Population in Public Schools. *Id.*

The factors that Morgan Quitno weighs negatively to determine the rankings include:

- High School Drop Out Rate
- Percent of Public School Teachers Who Reported Being Physically Attacked in the Past 12 Months
- Special Education Pupil-Teacher Ratio
- Percent of Public Elementary and Secondary School Staff Who are School District Administrators
- Estimated Pupil-Teacher Ratio in Public Elementary and Secondary Schools
- Average Class Size in Public Elementary Schools. *Id.*

194. See Joint Select Comm. on Pub. Sch. Fin., Report to the Legislature (2004), available at [www.senate.state.tx.us/75r/Senate/commit/c880/downloads/JSCPSF\\_fr\\_2004.pdf](http://www.senate.state.tx.us/75r/Senate/commit/c880/downloads/JSCPSF_fr_2004.pdf) (on file with author) (stating the many benefits of an income tax).

195. Tex. S.J.R. 38, 79th Leg., R. S. (2005). The bill also prohibited school district property taxes for maintenance and authorized a school district property tax for enrichment purposes only. *Id.*



Legislature to impose “ad valorem taxes for elementary and secondary public free school purposes on all taxable property at a rate not to exceed \$1 for each \$100 of taxable value.”<sup>196</sup> Unfortunately, Senator Ogden’s proposal failed in 2005, and if a similar bill is proposed in the near future, it will probably also fail. The education crisis is not critical enough to push voters to affirmatively adopt a new state tax. However, eventually, once Texas students reach education levels so embarrassingly inadequate and inequitable that the economy begins to suffer, voters will have to internalize their fear of a new state tax and embrace it. It is the only viable solution to the inadequacies and inequities of education. When that time comes, Senator Ogden’s state property tax bill should be reintroduced and ratified by the Texas Legislature and the people of Texas.

a. Proposal for a State Education Tax

This comment proposes the following, based on S.J.R. 38:<sup>197</sup>

1) Amend Section 1-e of the Texas Constitution, which prohibits state/ad valorem taxes, to allow provision for a state property tax to fund education only.

2) Require the Texas Legislature to meet every session to determine the rate of the state property tax to be collected.

3) Allow the Texas Legislature to grant exemptions from the state property tax as they see appropriate.

4) Allow the Texas Legislature to authorize school districts to impose a tax on property in the district for the sole purpose of enrichment. The enrichment tax rate shall not exceed 15 cents per \$100 of taxable property value and must be approved by a majority of the voters in said district.

## VIII. CONCLUDING REMARKS

*“It is the people of Texas who must set the standards, make the sacrifice, and give direction to their leaders.”*<sup>198</sup>

—Judge John Dietz, 250th District Court of Travis County

After . . . years of . . . public education reform, students in Texas public schools score near the national average on measures of elementary and middle school performance, but are well below the national average in high school graduation and at the bottom of the nation on measures of post-secondary readiness. While state-devel-

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196. *Id.*

197. *Id.* The property tax proposal outlined in this comment is based on Senator Ogden’s 2005 proposal of S.J.R. 38.

198. Michael King, *Judge Dietz Finds School System Unconstitutional*, AUSTIN CHRON., Dec. 1, 2005, at A1, available at [http://www.austinchronicle.com/issues/dispatch/2004-09-17/pols\\_feature6.html](http://www.austinchronicle.com/issues/dispatch/2004-09-17/pols_feature6.html).

oped assessments show rising student achievement and a decreasing gap between student groups, independent evaluations of student outcomes show stagnant or declining performance – despite increasing real, per student spending 20 percent in the 1990s, and despite new state curriculum standards, new instructional materials, and new state assessments. There is no evidence that an increased proportion of students is completing high school, and no more students are graduating with the academic proficiency required to be successful in skilled vocational training or higher education. Independent measures provide no evidence that the achievement gap between student groups has demonstrably narrowed.<sup>199</sup>

The *Rodriguez*, *Edgewood*, and *West Orange-Cove* cases prove that Texas’s current finance scheme must be structurally reformed. Continued reliance on local property taxes perpetuates inequity and inadequacy in Texas education. In turn, the inequity and inadequacy perpetuated by local property tax reliance will prove detrimental, not only to students, but all Texans.

Funding public education is no easy task. Yet, it is a task to approach proactively. Reliance on varied local property tax is retroactive—it barely sustains public education now, and will certainly fail to do so in the near future. A state-wide voucher program is counter-productive—it works against improving public schools.

Texas legislators have worked hard to build a strong foundation for public education. The next step for Texas education finance is to properly maintain that foundation. Reliance on local property taxes is a long, winding, and treacherous road to travel towards a destination of educational adequacy and equality. A state education tax to lessen the local tax burden will make for a much smoother ride.

Over thirty years ago, in *Rodriguez II*, the United States Supreme Court cautioned that reliance on local property taxes would be detrimental to the future of education.<sup>200</sup> After three decades of patching up the education finance scheme, the United States Supreme Court’s warning still rings true. Texas needs not an educational patch job, but a structural overhaul to “assure both a higher level of quality and greater uniformity of opportunity.”<sup>201</sup> The time is ripe for such change.

But a state education tax? A state-wide education tax? Proposal of any tax makes Texans cringe. Republicans and Democrats alike may argue: “Texans won’t vote for a state education tax,” or “Texans won’t go

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199. Texas Public Policy Foundation 2005–2006 Legislator’s Guide to the Issues; *Education Standards and Performance* (on file with author).

200. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58–59 (1973).

201. *Id.*

down that road.” Maybe not today, maybe not next year, but soon, all Texans will realize that the road “less traveled by . . . [will make] all the difference.”<sup>202</sup>

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202. Robert Frost, *The Road Not Taken* (1916).

The Road Not Taken

Two roads diverged in a yellow wood,  
And sorry I could not travel both  
And be one traveler, long I stood  
And looked down one as far as I could  
To where it bent in the undergrowth;

Then took the other, just as fair,  
And having perhaps the better claim  
Because it was grassy and wanted wear,  
Though as for that the passing there  
Had worn them really about the same,

And both that morning equally lay  
In leaves no step had trodden black.  
Oh, I marked the first for another day!  
Yet knowing how way leads on to way  
I doubted if I should ever come back.

I shall be telling this with a sigh  
Somewhere ages and ages hence:  
Two roads diverged in a wood, and I,  
I took the one less traveled by,  
And that has made all the difference.