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## What about Our Future - The Chaos That Is the Texas School Finance System.

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## WHAT ABOUT OUR FUTURE? THE CHAOS THAT IS THE TEXAS SCHOOL FINANCE SYSTEM

**BRIAN STORK\***

I. Introduction.....	308
II. The History of Texas School Finance Litigation .....	312
A. General History of Texas School Finance Law .....	312
B. Phase I: Federal Equal Protection Challenges .....	314
C. Phase II: State Constitutional Challenges.....	316
D. Texas Education Deemed Constitutional for the Time Being .....	320
III. The Current State of the Texas School Finance System – <i>West Orange-Cove CISD v. Neely</i> .....	324
A. The District Court Decision .....	324
1. \$1.50 Cap as a Floor and Ceiling in Violation of Article VIII, Section 1-e .....	325
2. Article VII, Section 1 – General Diffusion of Knowledge Clause .....	326
3. The Current School Finance System is Insufficient, Inadequate and Unsuitable .....	327
4. Unequal Access to Facilities Funding.....	328
B. The Supreme Court’s Response .....	328
1. State Wide Ad Valorem Tax .....	329
2. Article VII Section 1 – Adequacy, Efficiency, and Suitability of School Finance System .....	331
IV. Effects of Inadequate Funding on Economically Disadvantaged & Minority Students.....	337
A. The Demographic Change in Texas’ Student Population .....	337

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B. The Increased Legislatively Imposed Accountability Standards .....	339
C. Inadequate School Facilities Funding .....	340
V. Proposed Solutions to Fix the School Finance Dilemma ...	342
A. Consolidation of School Districts .....	342
B. Constitutional Amendment to Allow for a State-Wide Ad Valorem Tax .....	343
C. Constitutional Amendment Permitting the Formation of County Education Districts (CEDs) .....	344
D. Constitutional Amendment Limiting Court Intervention .....	344
E. Implementation of a State Income Tax .....	345
VI. Conclusion .....	348

## I. INTRODUCTION

“A child miseducated is a child lost.”<sup>1</sup>

-President John F. Kennedy, 1963 State of the Union Address

Texas is in grave danger of losing a generation of children to miseducation.<sup>2</sup> The United States Supreme Court has held that “education is perhaps the most important function of state and local governments.”<sup>3</sup> Accordingly, one would think that the State of Texas would make every effort to ensure that all schools in the state receive adequate funding to meet minimum educational requirements. However, over the past two decades it has become increasingly clear that the Texas school finance system is grossly inadequate.<sup>4</sup>

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1. Bartleby.com, Simpson’s Contemporary Quotations, <http://www.bartleby.com/63/88/2688.html> (last visited Mar. 20, 2006).

2. See Ralph Blumenthal, *School Financing Fix Eludes Texas Lawmakers Again*, N.Y. TIMES, May 31, 2005, at A1 (noting that Texas high school graduation rates are the lowest in the country).

3. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The Court goes further in articulating the importance of education by stating that, “It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” *Id.*

4. See generally Blumenthal, *supra* note 2 (summarizing the problems Texas has faced with school financing); see also J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607 (1999) (describing the legal debate Texas has faced with its school finance system).

To date, the current school finance system has failed to address the changing demographics of the state. The low-income student population, made up of mostly Hispanic and African American pupils, continues to grow every year.<sup>5</sup> For example, in 2004 ninety-five percent of students in the Edgewood School District, located in San Antonio, Texas, were considered “economically disadvantaged.”<sup>6</sup> Generally, it costs more to educate these low-income students.<sup>7</sup> Steve Murdock, a state education demographer, believes that if the number of low-income students continues to increase and the gap of achievement between average students and economically disadvantaged students widens further, the current generation of Texas children may “become the state’s first generation whose future will be less prosperous than their parents’.”<sup>8</sup> Additionally, because the best predictor of household incomes is education, if the education system fails to procure better funding and services for economically disadvantaged students, the average household income in Texas could drop over the next generation.<sup>9</sup> Despite the warnings of the serious negative effects the current school funding system is having on economically disadvantaged students, the State of Texas has failed to successfully correct this intolerable situation.

The Legislature has made multiple attempts to fix this glaring problem of inequity within the Texas school finance system with a patchwork, “band-aid” approach.<sup>10</sup> The depth of the school finance problem in Texas can be best understood within the context of a comment made by the Speaker of the Texas House of Representatives, Tom Craddick: “One of the grievances of those who fought at the Alamo was Mexico’s failure to establish a school system. We still have today the same problem. I just wanted to tell the people of Texas we didn’t create the school problem. It started at the Alamo.”<sup>11</sup> Representative Craddick made this comment in

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5. Gary Scharrer, *Schools Speak Out on English Woes*, SAN ANTONIO EXPRESS NEWS, July 14, 2005, at A1, available at [http://www.mysanantonio.com/news/education/stories/mysa071405.1A.texas\\_students.67375553.html](http://www.mysanantonio.com/news/education/stories/mysa071405.1A.texas_students.67375553.html) (discussing the increased costs associated with teaching students with limited English proficiency).

6. *Id.* Please note that the term “economically disadvantaged” is not used in the Texas Education Code. See TEX. EDUC. CODE ANN. § 5.001 (Vernon & Supp. 2004-2005) (defining “educationally disadvantaged” as being “eligible to participate in the national free or reduce-priced lunch program established under 42 U.S.C. Section 1751 et. seq.”). Throughout the remainder of this comment the terms “economically disadvantaged” and “educationally disadvantaged” are used interchangeably.

7. Scharrer, *supra* note 5.

8. *Id.* (quoting Steve Murdock).

9. *Id.* (quoting Steve Murdock).

10. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 496 (Tex. 1989) (adjudicating the constitutionality of the Texas school finance program).

11. Ralph Blumenthal, *Texas Lawmakers Meet, with Education Atop Agenda*, N.Y. TIMES, Jan. 12, 2005, at A1 (describing the Texas Legislature’s response to Judge Dietz

jest, but it underscores Texas's long historical battle with the provision of adequate public school funding.

Since 1989, the Supreme Court of Texas has found the state's school funding system to be unconstitutional in four separate decisions.<sup>12</sup> In *Edgewood Independent School District v. Kirby (Edgewood I)*, the court found that the then existing school finance system violated Article VII, Section 1 of the Texas Constitution and therefore was unconstitutional.<sup>13</sup> This provision required the state to support and maintain an "efficient system of free public schools."<sup>14</sup> The court held that the state failed to maintain an efficient system.<sup>15</sup> The second case in which the Supreme Court of Texas found that the existing Texas school finance system was unconstitutional was *Edgewood Independent School District v. Kirby (Edgewood II)*.<sup>16</sup> In this case, the court held that the legislature failed in its attempt to fix the previous finance system condemned in the *Edgewood I* decision.<sup>17</sup> Finally, in *Carrollton-Farmers Branch Independent School District v. Edgewood (Edgewood III)*, the court found that the then current school finance system was still unconstitutional because the legislation, which was enacted to reform the system, instead imposed a statewide ad valorem tax which was barred by the Texas Constitution.<sup>18</sup> Following each of these decisions, attempts were made to rectify the constitutionality of the school finance system. Nonetheless, much more pro-

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ruling in *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, GV-100528 (250th Dist. Ct., Travis County, Tex. Nov. 30 2004).

12. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 493 (Tex. 1992); *Edgewood II*, 804 S.W.2d at 491; *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

13. *Edgewood I*, 777 S.W.2d at 397 ("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 support and maintenance of an efficient system of public free schools.").

14. TEX. CONST. art. VII, § 1.

15. *Edgewood I*, 777 S.W.2d at 397 ("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 therefore that it violates article VII, section 1 of the Texas Constitution.").

16. *Edgewood II*, 804 S.W.2d at 491.

17. *Id.* at 496.

18. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 493 (Tex. 1992); see also TEX. CONST. art. VIII, § 1-e. An ad valorem tax is "[a] tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure." BLACK'S LAW DICTIONARY, 1183 (8th ed. 2004).

gress is needed; the Texas public school system is still defined by the “haves” and the “have nots.”<sup>19</sup>

The latest challenge to the constitutionality of the Texas school finance system was considered by Judge John Dietz of the 250th District Court of Travis County, Texas.<sup>20</sup> On November 30, 2004, Judge Dietz issued a final judgment finding the current school finance system unconstitutional.<sup>21</sup> Judge Dietz held that school districts have been denied the discretion to set their tax rates due to the fact that most districts are forced to meet minimum state requirements by setting local property taxes at maximum allowable rates.<sup>22</sup> Additionally, the district court held the current school finance system to be financially “inefficient, inadequate and unsuitable.”<sup>23</sup> Finally, Dietz held that “property poor districts do not have substantially equal access to facilities funding in violation of the efficiency and suitability provisions” of the Texas Constitution.<sup>24</sup> This decision sent shockwaves throughout the judicial and legislative branches of the Texas government. The Texas Attorney General’s Office immediately sought to appeal the decision directly to the Supreme Court of Texas.<sup>25</sup>

The Texas Supreme Court heard oral arguments on July 6, 2005 and on November 22 of the same year ruled that the current school finance system is unconstitutional.<sup>26</sup> The court held that the system has taken away all discretion from local school districts as to what tax rate they are going to charge their residents.<sup>27</sup> This system constitutes a *de facto* state ad valorem tax that is prohibited by article VIII, section 1-e of the Texas Constitution.<sup>28</sup> Accordingly, the court found that the current school finance system did not withstand constitutional scrutiny. However, the court failed to hold that the system was inadequate, inefficient, or unsuitable in funding for its attempts to disseminate a general diffusion of knowledge as required by article VII, section 1 of the Texas Constitu-

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19. *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 597 (Tex. 2003).

20. Final Judgment, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528 (250th Dist. Ct., Travis County, Tex., Nov. 30 2004).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Jason Embry, *Judge Spells Out School Finance Decision*, AUSTIN AM.-STATESMAN, Dec. 1, 2004, at A1 (summarizing Judge Deitz’s holding).

26. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005).

27. *Id.* at 797-98.

28. *Id.*

tion.<sup>29</sup> The court held that while the current system constitutes an impermissible statewide ad valorem tax, it does provide sufficient funding to meet statutory and constitutional requirements.<sup>30</sup>

The goal of this comment is to give a voice to the economically disadvantaged students that the current school finance system ignores. This comment will focus on the historical background of the Texas school finance system and the adverse effect the system has on economically disadvantaged and minority students. Part II begins with a detailed analysis of past constitutional challenges to the system and the evolution of Texas public school funding programs. Part III considers the most recent challenges to the Texas school finance system. Part IV examines the effect inadequate funding has on minority and economically disadvantaged students. Part V explores proposed solutions and proper resolutions to create an adequate and equal opportunity school finance system. Part VI synthesizes the current state of the law and recommends the proper course of conduct for the courts and legislature.

## II. THE HISTORY OF TEXAS SCHOOL FINANCE LITIGATION

### A. *General History of Texas School Finance Law*

As the Texas Supreme Court has noted, “[t]he history of Texas school finance has been one of a “rough accommodation of interests in an effort to arrive at practical and workable solutions.”<sup>31</sup> When the Texas Constitution was implemented in 1876, it called for the distribution of state education funds on a student-by-student basis.<sup>32</sup> In other words, the Texas education system began with funding provided exclusively by the state itself. However, in 1883 the Constitution was amended to permit the creation of local school districts.<sup>33</sup> These school districts were allowed to assess taxes on local residences in order to supplement state public school funding.<sup>34</sup> Thus began the long road toward local control over the Texas school finance system.

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29. *Id.* at 789-90.

30. *Id.* at 754.

31. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 494 (Tex. 1992) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1972)).

32. *Id.*; see also Maurice Dyson, *The Death of Robin Hood? Proposals for Overhauling Public School Finance*, 11 *GEO. J. ON L. & POL'Y* 1, 7 (2004) (discussing the effects of “Robin Hood” on the Texas School Finance System).

33. *Edgewood III*, 826 S.W.2d at 494.

34. *Id.* (“From 1906 to 1989, the portion of total state school funding contributed by local tax revenue increased from 24 percent to 53 percent.”).

It soon became apparent to the State Legislature that school districts, and subsequently tax revenues, did not grow at equal rates.<sup>35</sup> The large disparity in wealth among various districts continued to grow as the Texas economy developed more industrial strength.<sup>36</sup> Rural districts have relatively little property value when compared with large metropolitan areas.<sup>37</sup> The Texas Supreme Court articulated this problem when saying that “[t]he inequality of educational opportunities in the main arises from natural conditions. . . . The type of school which any community can have must depend upon the population of the community, the productivity of its soil, and generally its taxable wealth.”<sup>38</sup>

Accordingly, in 1949 the public school finance system was largely restructured.<sup>39</sup> The Legislature enacted a system called the Minimum Foundation Program.<sup>40</sup> The program was intended to guarantee a minimum amount of funding for each student in the state.<sup>41</sup> The state was to supply the program with approximately eighty percent of its funds, with the remaining twenty percent to be derived from local taxes.<sup>42</sup> The particular amount of funding guaranteed by the state was determined by a formula based upon a school district’s “local fund assignment.”<sup>43</sup> School districts were allowed to retain any local money raised that was greater than the local fund assignment requirements.<sup>44</sup> Therefore, property-rich districts were able to retain large amounts of money to enrich their educational offering due to their high tax base; whereas property-poor school districts were still operating upon the minimum amount of financing supplied by the state.<sup>45</sup> This, in addition to various later amendments to the Minimum Foundation Program, led to great disparity in the quality of

35. *Id.* at 494-95.

36. *Id.* at 495.

37. *Id.* (noting that by 1915 the Texas Legislature had to provide aid to rural school districts due to inequity in funding).

38. *Edgewood III*, 826 S.W.2d at 495 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931)).

39. *Id.*

40. *Id.*; see Gilmer-Aikin Bills, Act of June 1, 1949, 51st Leg., R.S., ch. 334, 1949 Tex. Gen. Laws 625; Act of April 28, 1949, 51st Leg., R.S., ch. 335, 1949 Tex. Gen. Laws 647 (implementing the structure of the Minimum Foundation Program).

41. *Edgewood III*, 826 S.W.2d at 495.

42. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), 826 S.W.2d 489, 495 (Tex. 1992).

43. *Id.* at 495-96. This formula provided that a school district was to raise local funds to be subtracted against the funding supplied by the state. *Id.* However, school districts were not required to raise local funds, but merely encouraged to do so. *Id.* at 496. Thus, the state would make up the difference in any school district that failed to raise adequate local funds. *Id.*

44. *Edgewood III*, 826 S.W.2d at 496.

45. *Id.*



education students were receiving depending upon whether they were located in a property-rich or property-poor school district.<sup>46</sup>

Increasingly, the citizens of Texas, as well as the majority of the state's school districts, became dissatisfied with the school funding system. The next logical step was to use the judicial branch of government to remedy an unconstitutional school finance system. The court challenges that were to follow came in two definitive phases: (1) federal claims based upon 14th Amendment Equal Protection Clause analysis; and (2) state claims based upon the interpretation of the educational mandate supplied by the Texas Constitution.<sup>47</sup>

### B. Phase I: Federal Equal Protection Challenges

The initial federal equal protection phase began in 1973 with *Rodriguez v. San Antonio Independent School District*,<sup>48</sup> which was the first lawsuit to challenge the constitutionality of the Texas school finance system.<sup>49</sup> In this case, Demetrio Rodriguez filed a class-action suit on behalf of the

46. *Id.* (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) for the proposition that the state "equalizing" system actually produced a greater benefit to wealthier school districts than poorer districts. The court noted that wealthier districts were better able to take advantage of the new system because they could enact programs above and beyond that which property-poor districts could. In other words, wealthier districts could create more programs out of their own funds by which the state would partially subsidize. Property-poor districts did not have the sufficient funds to start these additional programs and thus could not take full advantage of state funding.); see also Juan Carlos Sanchez, *Texas' Public School Financing: Share and Share Alike – Not!*, 19 T. MARSHALL L. REV. 475, 477 (1994).

47. See generally Liz Kramer, Comment, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1 (2002) (discussing the three waves of education finance litigation and focusing on the two waves that have taken place regarding the Texas School Finance System); see also Farr & Trachtenberg, *supra* note 4, at 610-11 (citing Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507 (1991); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991); Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867 (1998)); see also Erin E. Buzuvis, Note, *"A" for Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644 (2001) (raising a general discussion regarding national education litigation and subsequent responses by State Legislatures); Albert H. Kauffman & Carmen Maria Rumbaut, *Applying Edgewood v. Kirby to Analysis of Fundamental Rights Under the Texas Constitution*, 22 ST. MARY'S L.J. 69, 75-76 (1990) (discussing an equal protection claim under the Texas constitution).

48. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281 (W.D. Tex. 1971).

49. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

largely poor and minority student population of the Edgewood Independent School District.<sup>50</sup> The Plaintiffs claimed that the Texas school finance system discriminated amongst its students on the basis of wealth because of the system's heavy dependence on local property taxes.<sup>51</sup> Property taxes supply the majority of funding for Texas schools.<sup>52</sup> The large disparity in property values between various school districts across the state created gross inequities in the type of education students were receiving in property-rich areas and property-poor areas.<sup>53</sup> The plaintiffs claimed that the system violated their 14th Amendment Equal Protection rights.<sup>54</sup> Specifically, the plaintiffs claimed that poor and minority students were not given equal access to state funding so as to be provided with an adequate and equitable education.<sup>55</sup>

The plaintiffs based their argument upon two grounds: (1) that the Texas school finance system discriminated against a suspect class: the poor; and (2) that the school finance system prevented students from exercising their fundamental right to an equal education.<sup>56</sup> The United States District Court ruled in favor of the plaintiffs and found that the Texas school finance system was unconstitutional.<sup>57</sup> The district court found that the system discriminated against a suspect class and prevented students from exercising their fundamental right to education.<sup>58</sup> However, the United States Supreme Court quickly extinguished this avenue of school finance reform.<sup>59</sup> The Court held that the poor are not a suspect class.<sup>60</sup> Accordingly, the Court applied the much more lenient ra-

50. *Id.* at 11-12; *see Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281 (W.D. Tex. 1971) (expounding upon the factual background surrounding this decision).

51. *See Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283-84 (W.D. Tex. 1971) (arguing that public education should not be a system based upon wealth, but instead should be a system of "fiscal neutrality").

52. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7-8 (1973); *see Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281-82 (W.D. Tex. 1971).

53. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 8 (1973) (noting that the inequity in school funding began during the increasing industrialization of Texas and the large population shift from rural to urban communities).

54. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 15-16 (1973); *see also* U.S. CONST. amend. XIV, § 1 ("No State shall deny to any person within its jurisdiction the equal protection of the laws.").

55. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 15-16 (1973) (discussing large disparities in spending among various school districts).

56. *See Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281-83 (W.D. Tex. 1971) (summarizing the claims that plaintiffs brought for relief).

57. *Id.* at 281.

58. *Id.* at 282-83, 285 (noting "the crucial nature of education.").

59. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (reversing the lower court's decision).

60. *Id.* at 29.

tional basis test, as opposed to the strict scrutiny test applied by the District Court, and found that the existing finance system did not violate the United States Constitution.<sup>61</sup> Also, the United States Supreme Court held that education is not a fundamental right.<sup>62</sup> In effect, the Court's ruling ended the federal equal protection challenges regarding the Texas school finance system.

### C. Phase II: State Constitutional Challenges

The second phase of challenges to school finance funding in Texas is illustrated through the *Edgewood* cases.<sup>63</sup> These cases were state constitutional challenges to the Texas school finance system. School funding in Texas is indivisibly linked to each of the following holdings. Below will be a brief summary of the *Edgewood* cases.

The finance system challenged in the *Rodriguez v. San Antonio Independent School District* action continued largely unchanged until the 1989 case of *Edgewood Independent School District v. Kirby (Edgewood I)*.<sup>64</sup> In *Edgewood I*, the Edgewood Independent School District, along with sixty-seven other plaintiffs, brought suit claiming that the school finance system was unconstitutional under two provisions in the Texas Constitution: (1) Article I, Section 3, which states that “[a]ll free men, when they form a social compact, . . . have equal rights;”<sup>65</sup> and (2) Article VII, Section 1 which states “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

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61. *Id.* at 40-44 (upholding the constitutionality of the school finance plan). The rational basis test applied by the U.S. Supreme Court “requires only that the State’s [school finance] system be shown to bear some rational relationship to legitimate state purposes.” *Id.* at 40. Whereas, the strict scrutiny test as argued by the plaintiffs mandates that the government program be “narrowly tailored measures that further compelling governmental interests.” See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

62. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-32 (1973) (“We are in complete agreement with the conclusion. . . that ‘the grave significance of education both to the individual and to our society’ cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”).

63. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

64. *Edgewood I*, 777 S.W.2d 391.

65. TEX. CONST. art. I, § 3; see also *Edgewood I*, 777 S.W.2d at 393 (noting that the lower court relied on Article 1 in its decision).

schools.”<sup>66</sup> The Texas Supreme Court held that the then current school finance system violated Article VII, Section 1, but did not directly address the Article I, Section 3 equal protection claim.<sup>67</sup> The court concluded that the Texas school finance system was not “efficient” or “suitable” to adequately fulfill the legislature’s duty to disseminate a general diffusion of knowledge.<sup>68</sup>

*Edgewood I* points out some of the “glaring disparities” in the available revenue among various school districts due to the wide variation in property value from district to district.<sup>69</sup> At the time of this suit, the richest school district in the State had more than \$14,000,000 worth of property per pupil, whereas, the poorest district had only \$20,000 worth of property per pupil.<sup>70</sup> This equated to an astounding 700 to 1 ratio.<sup>71</sup> Furthermore, “[t]he average property wealth in the 100 wealthiest districts is more than twenty times greater than the average property wealth in the 100 poorest districts.”<sup>72</sup> The court found that these numbers could not validate an efficient distribution of a general diffusion of knowledge to all students across Texas.<sup>73</sup>

The court went on to define “efficient”, as referred to under Article VII, Section 1 of the Texas Constitution.<sup>74</sup> The court held that while efficiency did not require exact equality of funding on a per student basis, it also did not allow property-rich districts to generate large resources at little tax effort when property-poor districts must expend a great deal of effort to receive sufficient revenue to meet minimum education stan-

66. *Edgewood I*, 777 S.W.2d at 393 (quoting TEX. CONST. art VII, § 1).

67. *Id.* at 397.

68. *Id.* at 396-97 (“We conclude that, in mandating ‘efficiency,’ the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. Instead, they stated clearly that the purpose of an efficient system was to provide for a ‘general diffusion of knowledge.’ (Emphasis added). The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency.”).

69. *Id.* at 392.

70. *Id.*

71. *Edgewood I*, 777 S.W.2d 391. Additionally, the court noted, “The 300,000 students in the lowest-wealth schools have less than 3% of the state’s property wealth to support their education while the 300,000 students in the highest-wealth schools have over 25% of the state’s property wealth.” *Id.*

72. *Id.* This unbelievable inequality in school funding may best be explained by a comparison of the Edgewood I.S.D. with its wealthier neighbor Alamo Heights I.S.D. “Edgewood I.S.D. has \$38,854 in property wealth per student; Alamo Heights I.S.D., in the same county, has \$570,109 in property wealth per student.” *Id.*

73. See generally *id.* at 391.

74. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989) (stating that “efficiency” does not allow for great disparities of tax wealth).

dards.<sup>75</sup> Instead, “[t]here must be a direct and close correlation between a district’s tax effort and the educational resources available to it; in other words, districts must have *substantially* equal access to similar revenues per pupil at similar levels of tax effort.”<sup>76</sup> Thus, the court outlined a new policy that tax efforts, rather than funding itself, must be substantially equal. The Texas Supreme Court gave the legislature until May 1, 1990 to fix the school financing system or it would shut down Texas schools.<sup>77</sup>

In response to the *Edgewood I* decision, the Texas Legislature passed Senate Bill 1.<sup>78</sup> This bill called for equalization of taxation efforts among ninety-five percent of the state’s school districts.<sup>79</sup> Senate Bill 1 excluded the top five percent of the wealthiest school districts because “the annual cost of equalizing all districts to the revenue levels attainable by the richest districts would be approximately four times the annual cost of operating the entire state government.”<sup>80</sup> Accordingly, the legislature was trying to implement an efficient system to provide for substantially similar funding for equal tax effort.

Plaintiffs from *Edgewood I* immediately challenged Senate Bill 1.<sup>81</sup> In *Edgewood II* these plaintiffs claimed that the new piece of legislation had not solved the problem of substantially unequal funding.<sup>82</sup> The Texas Supreme Court agreed, holding that “as a matter of law. . . the public school finance system continues to violate article VII, section 1 of the [Texas] Constitution.”<sup>83</sup> The Court noted that the system itself required change, that a temporary approach would not be sufficient, and found that Senate Bill 1 did not change the boundary of any of the school districts in the State.<sup>84</sup> Likewise, Senate Bill 1 did not change the fact that around fifty percent of all education funds still come from local real property as opposed to independent state funding.<sup>85</sup> Moreover, the five percent of

75. *Id.* In other words, matched dollar-for-dollar funding amongst all districts is not required but there must be a certain level of equality to meet minimum educational needs. *Id.*

76. *Id.* (emphasis added).

77. *Id.* at 399.

78. Act of June 7, 1990, 71st Leg., 6th C.S., ch. 1, 1990 Tex. Gen. Laws 1 (relating to public education).

79. Farr & Trachtenberg, *supra* note 3, at 648-49.

80. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 495-96 (Tex. 1991).

81. *See generally id.* (noting that Senate Bill 1 was challenged within one year of its passing).

82. *Id.* at 493.

83. *Id.* at 497 (noting that “vast inefficiencies [existed] in the structure of the [then] current system.”). Additionally, local ad valorem taxes across the state failed to “draw revenue from all property at a substantially similar rate.” *Id.* at 496.

84. *Id.* at 496.

85. *Edgewood II*, 804 S.W.2d at 496.

schools excluded by the bill “educate[d] approximately 170,000 students and harbor about 15% of the property wealth in the state.”<sup>86</sup> Thus, under Senate Bill 1, the wealthiest five percent of school districts continued to support 170,000 students from local tax revenues, when this same tax base would support 1,000,000 students attending the poorest school districts.<sup>87</sup> Accordingly, the Court found that Senate Bill 1 failed to remedy the earlier problems of the school funding system and that the Texas School Finance System remained unconstitutional under Article VII, Section 1.<sup>88</sup>

Once again the Texas Legislature attempted to respond to the most recent Supreme Court decision.<sup>89</sup> The legislature began debating over the idea of a recapture system, by which some governmental body would recapture local tax revenue on a regional basis.<sup>90</sup> There were conflicting interpretations of the *Edgewood II* decision, some believing that the decision required a “state-funded school system,” while others claimed that such a “recapture” program was prohibited by the decision issued in *Love v. City of Dallas*.<sup>91</sup> Ultimately, this debate led to the passage of Senate Bill 351.<sup>92</sup> Senate Bill 351 called for the creation of 188 County Education Districts (CEDs).<sup>93</sup> The sole purpose of the CEDs was to collect taxes among various regional locations, generally, based upon counties.<sup>94</sup> Additionally, the CEDs were designed to create a greater spreading of

86. *Id.*

87. *Id.* Therefore, wealthy districts were capable of taxing at much lower rates due to higher property values, while property-poor districts had to face heavier tax burdens. *Id.*

88. *Id.* at 495 (holding that Senate Bill 1 failed to create a school finance system whereby school districts were given “substantially similar educational revenue for similar levels of local tax effort.”) (citing “Senate Bill 1 amends section 16.001(c)(1) of the Education Code to read: ‘the yield of state and local educational program revenue per pupil per cent of effective tax effort shall not be statistically significantly related to local taxable wealth per student for at least those districts in which 95 percent of students attend school.’ The concept of similar yield for similar rates of taxation has been termed ‘fiscal neutrality.’” *Id.*).

89. See Farr & Trachtenberg, *supra* note 4, at 653-54 (describing the various ways the legislature attempted to respond to the *Edgewood II* decision).

90. *Id.* at 654.

91. See *id.* See generally *Love v. City of Dallas*, 40 S.W.2d 20 (Tex. 1931) (holding that the legislature does not have the ability to force the City of Dallas to educate students not located within the school districts boundaries, unless the City of Dallas is paid adequate compensation).

92. Act of May 27, 1991, 72nd Leg., R.S., ch. 391, 1991 Tex. Gen. Laws 1475, 1478 (amending § 20.945 of the Texas Education Code, which described how property tax rates were to be set within CEDs); see also *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 498 (Tex. 1992).

93. Farr & Trachtenberg, *supra* note 3, at 661.

94. *Id.*

funding among an area so as to level school funding between property-rich and property-poor school districts.<sup>95</sup>

In 1991, Senate Bill 351 was challenged in *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District (Edgewood III)*.<sup>96</sup> The plaintiffs alleged that Senate Bill 1 called for the creation of CEDs which were in violation of Article VIII, Section 1-e of the Texas Constitution which prohibited implementation of a state ad valorem tax.<sup>97</sup> The plaintiffs also claimed that implementation of Senate Bill 351 violated Article VII, Section 3 of the Texas Constitution which forbids the Texas Legislature from raising local school taxes without first obtaining voter approval.<sup>98</sup> The Texas Supreme Court agreed, finding that Senate Bill 1 violated Article VIII, Section 1-e and Article VII, Section 3 of the Texas Constitution.<sup>99</sup>

#### D. *Texas Education Deemed Constitutional for the Time Being*

In 1995, the Texas Supreme Court heard yet another challenge to the school finance system in *Edgewood Independent School District v. Meno (Edgewood IV)*.<sup>100</sup> In this case, the plaintiffs asserted that the legislature had once again failed to correct the inefficient school finance system when passing Senate Bill 7.<sup>101</sup> However, unlike the previous three *Edgewood* decisions, the court held the newly structured Texas school finance system to be constitutional.<sup>102</sup>

In response to the *Edgewood III* decision, the Legislature passed Senate Bill 7<sup>103</sup> in an attempt to create an efficient school finance system as is mandated by Article VII, Section 1 of the Texas Constitution.<sup>104</sup> Senate

95. *Id.*

96. *Edgewood III*, 826 S.W.2d at 489 (Tex. 1992).

97. *Id.* at 493; see TEX. CONST. art. VIII, § 1-e (“No State ad valorem tax shall be levied upon any property within this State.”).

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

99. *Id.* (rejecting appellee’s argument that the court had given “pre-approval” to Senate Bill 351 in the *Edgewood II* decision); see generally *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991).

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

101. *Id.* at 729. The Texas Supreme Court began its decision by noting that in following “standard rules of constitutional interpretation” it would presume that Senate Bill 7 was correct. *Id.* at 25. The plaintiffs had the burden of overcoming this presumption. *Id.* This was a clear premonition of the decision to be rendered.

102. See generally *id.*

103. Act of May 28, 1993, 73rd Leg., R.S. ch. 347, 1993 Tex. Gen. Laws 1479.

104. 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).

Bill 7 maintained the basic two-tiered school finance system entitled the Foundation School Program.<sup>105</sup>

Tier 1 of the Foundation School Program was created to “guarantee ‘sufficient financing for all school districts to provide a basic program of education. . .’”<sup>106</sup> This tier, often referred to as the “basic allotment,”<sup>107</sup> provides that for every student in average daily attendance, a district is given a basic statutorily proscribed “allotment” subject to various adjustments and variations due to differences in actual costs among school districts.<sup>108</sup> In order to receive Tier 1 financing, the prior year tax rate for the district had to be \$0.86 per \$100 valuation in property value.<sup>109</sup> In other words, Tier 1 guarantees a school district a set amount of funds per student, at the present time \$2537, if the district is unable to generate this basic allotment through its own tax base when taxing at the \$0.86 per \$100 valuation level. The purpose of Tier 1 funding is to provide sufficient funding so as to guarantee every student an adequate educational experience.

Tier 2 of the Foundation School Program provided a “guaranteed yield system”<sup>110</sup> designed to allow school districts the chance to supplement the basic education program at a level of its own choosing in accordance with a chosen tax rate.<sup>111</sup> In other words, Tier 2 funding permits a school district, if it so chooses, to tax at a rate above the statutorily mandated level of \$0.86 in order to provide supplemental, or additional, educational programs and/or facilities.<sup>112</sup> Tier 2 financing is calculated as follows: for every cent over the Tier 1 taxing level of \$0.86 the state guaranteed a set

105. *Edgewood IV*, 917 S.W.2d at 727.

106. *Id.* (citing TEX. EDUC. CODE ANN. § 16.002(b) (Vernon 1996 & Supp. 2003)). This section of the code has since been amended to include as follows in section 42.101, “For each student in average daily attendance, not including the time students spend each day in special education programs in an instructional arrangement other than mainstream or career and technology education programs, for which an additional allotment is made under Subchapter C, a district is entitled to an allotment of \$2,537. A greater amount for any school year may be provided by appropriation.” TEX. EDUC. CODE ANN. § 42.101 (Vernon 1996 & Supp. 2003).

107. § 42.101.

108. § 42.101.

109. *Edgewood IV*, 917 S.W.2d at 727.

110. *Id.* at 728 (citing TEX. EDUC. CODE ANN. § 16.301 (Vernon 1996 & Supp. 2003)). This section of the code has since been amended to be included in section 42.301, “The purpose of the guaranteed yield component of the Foundation School Program is to provide each school district with the opportunity to provide the basic program and to supplement that program at a level of its own choice. An allotment under this subchapter may be used for any legal purpose other than capital outlay or debt service.” TEX. EDUC. CODE ANN. § 42.301 (Vernon 1996 & Supp. 2003).

111. § 42.301.

112. *Edgewood IV*, 917 S.W.2d at 727-28.



dollar amount that a school district could use to supplement its educational programs.<sup>113</sup> For instance in 1995, this guaranteed funding was capped at \$0.64 worth of taxes beyond the Tier 1 tax level of \$0.86, so as to set a tax cap of \$1.50 per \$100 property valuation in a given district.<sup>114</sup> A school district may elect to receive supplemental funding over and beyond that necessary to provide an adequate education for every cent it taxes over \$0.86 and up to the capped level of \$1.50.

In an attempt to remedy the then current two-tier system in Senate Bill 7, the legislature enacted one major change to the school finance system: the new bill imposed a cap on allowable taxable property value per student in a given school district.<sup>115</sup> Specifically, the new bill created a limit on a school district's allowable taxable property at \$280,000 worth of property per student.<sup>116</sup> The Commissioner of Education reviews the tax base of each district on an annual basis to determine if the district's taxable property value per student exceeds \$280,000.<sup>117</sup> If the \$280,000 cap was exceeded, the school district had five options it could take "to bring its taxable property within the cap: (1) consolidation with another district; (2) detachment of territory; (3) purchase of average daily attendance credit; (4) contracting for the education of nonresident students; or (5) tax base consolidation with another district."<sup>118</sup> Options (3) and (4) are often referred to as the "Robin Hood Plan."<sup>119</sup>

The Texas Supreme Court held that Senate Bill 7 met the constitutional requirement of providing an efficient system.<sup>120</sup> Justice Cornyn, writing

113. *Id.* at 728.

114. *Id.*

115. *Id.*

116. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 728 (Tex. 1995).

117. *Id.*

118. *Id.*; see TEX. EDUC. CODE ANN. § 41.003 (Vernon 1996). Should a school district fail to comply with the legislatively mandated cap by following one of the five prescribed options, property from the district will be removed and annexed to another district. § 41.003; see TEX. EDUC. CODE ANN. § 41.004(b) (Vernon 1996) ("If, before the dates provided by this subsection, a district notified under Subsection (a)(1) has not successfully exercised one or more options under Section 41.003 that reduce the district's wealth per student to a level equal to or less than the equalized wealth level, the commissioner shall order the detachment of property from that district. . .").

119. See generally Roxanne D. Neloms, Comment, *The Adventures in Robin Hood: Are We There Yet? Texas' Bumpy Ride to Providing an Equal Education*, 26 T. MARSHALL L. REV. 221 (2001) (discussing the history of the Robin Hood Plan); Dyson, *supra* note 32, at 7 (providing a general description of the Robin Hood Plan and the history of the Texas school finance system); Kramer, *supra* note 47, at 1 (comparing school finance systems in Texas, California, and Kentucky).

120. *Edgewood IV*, 917 S.W.2d at 730; see TEX. CONST. art VII, § 1.

for the majority, found that in the *Edgewood I and II* decisions the court had held that the

[Texas] Constitution permits school districts to generate and spend local taxes to enrich or supplement an efficient system, and that such enrichment need not be equalized<sup>121</sup>. . . . The [then] current system remain[ed] unconstitutional not because *any* unequalized local supplementation [was] employed, but because the State relie[d] heavily on unequalized local funding in attempting to discharge its duty to “make suitable provision for the support and maintenance of an efficient school system of public free schools. . . .” Once the Legislature provides an efficient system in compliance with article VII, section 1 [of the Texas Constitution], it may, so long as efficiency is maintained, authorize local school districts to supplement their education resources if local property owners approve an additional local property tax.<sup>122</sup>

In other words, the court noted that the supplementation of funds above an efficient educational system does not violate the Texas Constitution, so long as the efficient school finance system provides the adequate schooling to all students in the state as mandated by the constitution. Justice Cornyn went on to find that in Senate Bill 7 the legislature “equates the provision of a ‘general diffusion of knowledge’ with the provision of an accredited education.”<sup>123</sup> In essence, the Court found that so long as the funding provided to the school finance system allows school districts to meet minimum adequacy requirements articulated in the Education Code, the system is efficient for constitutional purposes. In the *Edgewood IV* opinion, Justice Cornyn is adamantly opposed to what he calls the “level-down” efficiency theory.<sup>124</sup> The “level-down” theory is the hypothesis that equality of education may cause the overall quality of education within the Texas school system to go down in the sack of meeting equality among all schools.<sup>125</sup> The strength of this theory has yet to be tested and the idea remains just that, a theory. Unfortunately, Justice Cornyn does not heed his own advice in opposing the “level-down” theory. His opinion seeks to water-down the definition of an “efficient” educational system so as to hold Senate Bill 7

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121. *Edgewood IV*, 917 S.W.2d at 729 (citing *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 499 (Tex. 1991)).

122. *Id.* (citing *Edgewood II*, 804 S.W.2d at 500).

123. *Id.* (arguing that “equity at all levels” theory of efficiency would result in the “level[ing]-down” of quality of education provided by the public school system).

124. *Id.* at 730.

125. *See generally id.*

constitutional at all costs, despite the effects on students in Texas for generations to come.

### III. THE CURRENT STATE OF THE TEXAS SCHOOL FINANCE SYSTEM – *WEST ORANGE-COVE CISD v. NEELEY*

#### A. *The District Court Decision*

The school finance system endorsed by the majority of the Texas Supreme Court in the *Edgewood Indep. Sch. Dist. v. Meno* (*Edgewood IV*) decision withstood constitutional scrutiny until November 30, 2004, when Judge Dietz, presiding judge for the 250th District Court for Travis County, issued a final judgment holding that the current Texas school finance system is unconstitutional and must be fixed.<sup>126</sup> Judge Dietz made the following findings regarding the school finance system:<sup>127</sup> (1) the system violates Article VIII, Section 1-e of the Texas Constitution, because it imposes “both a floor and a ceiling, denying school districts ‘meaningful discretion’ in setting their tax rates”;<sup>128</sup> (2) the “finance system. . . violates the ‘general diffusion of knowledge’ clause. . . set forth in Article VII, section 1 of the Texas Constitution because the ‘constitutional mandate of adequacy exceeds the maximum amount of funding that is available under. . . current funding formulas’”;<sup>129</sup> (3) the system is “inefficient, inadequate and unsuitable” directly violating Article VII, section 1 of the Texas Constitution;<sup>130</sup> and (4) “property-poor districts do not have substantially equal access to facilities funding” as is required under Article VII, Section 1 of the Texas Constitution.<sup>131</sup> The forthcoming sections of Part III-B will examine each of these findings in light of preceding *Edgewood* decisions.

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126. R.A. Dyer, *Force of Oct. 1 Deadline Appears Open to Debate*, FORT WORTH STAR-TELEGRAM, Sept. 14, 2005, at B7.

127. See Final Judgment, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (the case was originally styled *West Orange-Cove Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003), at which time the Texas Supreme Court found that the plaintiffs involved had sufficient standing and viable claims to allow suit to continue after the case had been previously dismissed by the trial court); see also Lonnie F. Hollingsworth, Jr., *School Finance*, TEXAS BAR JOURNAL, (Jan. 2005) at 61.

128. Final Judgment, *West Orange-Cove*, No. GV-100528.

129. *Id.*

130. *Id.*

131. *Id.*

1. \$1.50 Cap as a Floor and Ceiling in Violation of Article VIII, Section 1-e

Article VIII, Section 1-e states that, “No State ad valorem taxes shall be levied upon any property within this State.”<sup>132</sup> Note, however, that local school districts use ad valorem taxes as their principal method of funding.<sup>133</sup> A plain reading of article VIII, Section 1-e shows that this statute is only violated when the State of Texas attempts to issue or implicitly direct an ad valorem tax.<sup>134</sup>

In *Edgewood III*, the Texas Supreme Court articulated the following test in reviewing whether an ad valorem tax is in violation of Article VIII, Section 1-e: “[a]n ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion.”<sup>135</sup> In *Edgewood IV*, the court warned that although the existing school finance system did not constitute an unconstitutional ad valorem tax, it could be possible that such a tax may be found unconstitutional in the future.<sup>136</sup>

Judge Dietz ruled that the current school finance system has created both a floor and a ceiling by which school districts are deprived of any meaningful discretion of what tax rates they wish to set.<sup>137</sup> The 250th District Court found that because of the state imposed \$1.50 cap, schools are unable to continue to raise taxes in order to support the increasing

132. TEX. CONST. art. VIII, § 1-e. An ad valorem tax is “[a] tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure.” BLACK’S LAW DICTIONARY, 1183 (8th ed. 2004).

133. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 755 (Tex. 2005) (noting that during the 2003-2004 school term the State of Texas supplied only thirty-eight percent of school funds). Therefore, the majority of the remaining sixty-two percent of educational funds were produced by local property taxes with minimal support provided by the federal government. *See id.*

134. *See* TEX. CONST. art. VIII, § 1-e.

135. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, (*Edgewood III*) 826 S.W.2d 489, 502 (Tex. 1992).

136. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 738 (Tex. 1995). The following language evidences the majority’s concerns: “Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad-valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.” *Id.*

137. Findings of Fact and Conclusions of Law at 30-31, Nos. 102-06, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004); *See also* Terrence Stutz, *School Finance and the Courts*, DALLAS MORNING NEWS, July 5, 2005 at A2.

cost of educating students.<sup>138</sup> In other words, the majority of Texas schools are left taxing at the statutorily-mandated cap simply to provide a minimum level of education to their students. In the 2003-2004 fiscal year, approximately forty-eight percent of Texas school districts had tax rates at the \$1.50 statutorily prescribed cap.<sup>139</sup> These districts educate precisely 2,332,465 students, or put differently, fifty-nine percent of the total state student population.<sup>140</sup> If one includes schools within five cents of the \$1.50 cap, approximately eighty-one percent of students are in school districts coming perilously close to losing all discretionary authority.<sup>141</sup>

## 2. Article VII, Section 1 – General Diffusion of Knowledge Clause

Article VII, Section 1 of the Texas Constitution provides that, “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>142</sup> In *Mumme v. Marrs*,<sup>143</sup> the Supreme Court of Texas held that “it is the mandatory duty of the Legislature to ‘make suitable provision for the support and maintenance of an efficient system of public free schools.’”<sup>144</sup> The court must decide whether the legislature has effectively fulfilled its duty.<sup>145</sup>

Judge Dietz rejected the *Edgewood IV* opinion of the adequacy of the general diffusion of knowledge that is essential under the Texas Constitution.<sup>146</sup> In *Edgewood IV*, the court found that since the Texas school finance System had made strides towards greater equality, it was thus sufficient to withstand constitutional scrutiny.<sup>147</sup> For instance, the court noted that the disparity in property wealth per student had changed from

138. Findings of Fact at 31; *West Orange-Cove*, No. GV-100528, at No. 104.

139. *Id.* at No. 105.

140. *Id.*

141. *Id.*

142. TEX. CONST. art. VII, § 1 (emphasis added).

143. *Mumme v. Marrs*, 40 S.W.2d 31 (Tex. 1931).

144. *Id.* at 36. In other words, the legislature has the duty of creating and implementing the school finance system, whereas, the courts have the responsibility of ensuring that the school finance system is permissible under the Texas Constitution. *Id.*

145. See *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 394 (Tex. 1989).

146. See generally Findings of Fact, *West Orange-Cove*, No. GV-100528.

147. See *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 730-31 (Tex. 1995) (noting that the situation has changed dramatically under the school finance system implemented by Senate Bill 7).

700-to-1, as seen during the *Edgewood I* decision, to an acceptable level of 28-to-1 at the time of the *Edgewood IV* decision.<sup>148</sup>

The opinion states that “to fulfill the constitutional obligation to provide a general diffusion of knowledge, districts must provide ‘*all Texas children . . . access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.*’”<sup>149</sup> Judge Dietz found that the current school finance system does not permit *all* school districts to give *all* children the necessary education to meet the constitutional mandate described in Article VII, Section 1 of the Texas Constitution.<sup>150</sup>

### 3. The Current School Finance System is Insufficient, Inadequate and Unsuitable

Judge Dietz concluded that since the current school finance system does not properly meet the general diffusion of knowledge requirement proscribed by Article VII, Section 1 of the Texas Constitution, it is inadequate and must be amended.<sup>151</sup> Specifically, the 250th District Court found the growing needs of the Texas school system, like the education of minority and economically disadvantaged students is not currently met by the existing school funding structure.<sup>152</sup> In order for the school finance system to be efficient, it must satisfy the constitutional requirement of disseminating a “general diffusion of knowledge.”<sup>153</sup> As mentioned previously, Judge Dietz found that the current school finance system fails to disseminate a general diffusion of knowledge and is thus, *ipso facto*, inefficient.<sup>154</sup> An inefficient system provides an inadequate and unsuitable education to the children of Texas. Accordingly, the current system is

148. *Id.*

149. Findings of Fact at 70, *West Orange-Cove*, No. GV-100528, at No. 7 (quoting TEX. EDUC. CODE ANN. § 4.001(a) (Vernon 1996)) (emphasis in original).

150. *See generally id.*

151. *Id.* at 72, Nos. 18-20; *see* Carlos Guerra, *Will Judges Fix Problem Created by Political Stubbornness*, SAN ANTONIO EXPRESS NEWS, July 12, 2005 at B1; *see Shorting Our Schools; Education Bills Proposed in Austin Would Kill Robin Hood Without Providing Adequate Alternative Funding to Meet Public Schools’ Crying Needs*, HOUSTON CHRON., Mar. 4, 2005, at B10.

152. Findings of Fact at 72, *West Orange-Cove*, No. GV-100528, at Nos. 18-20; *See also id.* at 26, No. 77 (stating that many of the accommodations made in the current school finance system for school districts’ varying needs are outdated).

153. TEX. CONST. art. VII, § 1

154. Final Judgment, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004).

“insufficient, inadequate and unsuitable” under the Texas Constitution.<sup>155</sup>

#### 4. Unequal Access to Facilities Funding

The Texas Constitution imposes the obligation upon the legislature to provide an efficient educational system to all of its citizens.<sup>156</sup> Included within this obligation is to provide adequate facilities. In the *Edgewood IV* decision, the Texas Supreme Court held that the state has a “duty to provide all districts with substantially equal access to the operations and facilities funding necessary for a general diffusion of knowledge.”<sup>157</sup> Judge Dietz concluded that property-poor districts lack necessary funds to have “substantially equal access to funds for school facilities.”<sup>158</sup> Specifically, the 250th District Court held that the Edgewood Intervenor Districts’ sub-standard conditions included “overcrowded school and classrooms; out-of-date buildings, equipment and fixtures; inadequate libraries, science labs, cafeterias, gymnasiums, and other school facilities.”<sup>159</sup> Accordingly, the current school finance system fails to provide adequate facility financing, thus violating Article VII, Section 1 of the Texas Constitution. The effects of inadequate facility funding on minority students will be discussed later in this comment.

#### B. *The Texas Supreme Court’s Response*

The Texas Supreme Court rendered its much anticipated decision on November 22, 2005.<sup>160</sup> The court noted that the case consisted of three different groups challenging the constitutionality of the Texas School Finance System: (1) the plaintiffs; (2) the *Edgewood* intervenors; and (3)

155. *Id.*

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

157. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 746 (Tex. 1995) (citing *Edgewood I*, 777 S.W.2d 391). The court also stated that, “[a]n efficient system of public education requires not only classroom instruction, but also the classrooms where that instruction is to take place.” *Id.* at 726.

158. Findings of Fact and Conclusions of Law at 73, No. 298, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004).

159. *Id.* at 75, No. 307.

160. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 751 (Tex. 2005); see also Robert T. Garrett & Christy Hoppe, *School Finance Failure Produces Lots of Blame Those Accused: School Districts, Business, Legislators Themselves*, DALLAS MORNING NEWS, Aug. 20, 2005, at A4 (noting the Texas Legislature’s difficulty in amending the school finance system and the resignation that lawmakers were waiting for the Texas Supreme Court to render its opinion before taking further action).

the *Alvarado* intervenors.<sup>161</sup> The plaintiffs consisted of forty-seven school districts that educated approximately twenty-five percent of Texas students.<sup>162</sup> This group claimed that local property taxes had, in effect, become a statewide ad valorem tax prohibited by the Texas Constitution.<sup>163</sup> The two intervenor groups educate an additional quarter of the school children in Texas.<sup>164</sup> These two groups claimed that the Texas school finance system failed to provide property-poor districts “substantially equal access to education revenue.”<sup>165</sup> Finally, all three groups argued that the system is unable to achieve “a general diffusion of knowledge” as mandated by the Texas Constitution, specifically found in article VII, section 1.<sup>166</sup>

The Texas Supreme Court held that “local ad valorem taxes have become a state property tax in violation of article VIII, section 1-e.”<sup>167</sup> The court agreed with the district court’s finding that local school districts have lost meaningful control over the applicable tax rate. However, the court rejected the claims that property-poor districts were not receiving substantially equal access to education revenue and that the current school finance system failed to provide for a general diffusion of knowledge.<sup>168</sup> The court held that, while defects in the structure of the school finance system leave it open to constitutional challenges, these defects in structure are not currently enough to violate the Texas Constitution.<sup>169</sup> Section B-II of this comment will explore the Supreme Court’s holding in greater depth.

### 1. Statewide Ad Valorem Tax

The Texas Supreme Court agreed with Judge Dietz’s decision and held that local taxation for education has become so controlled by the state so as to form a state property tax violating the Texas Constitution, specifi-

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161. *Neeley*, 176 S.W.3d 746.

162. *Id.* at 751. Texas school currently education over 4.3 million children. *Id.*

163. *Id.*; see TEX. CONST. art. VIII, § 1-e.

164. *Neeley*, 176 S.W.3d at 751. The two intervenor groups are composed of 280 school districts across the state. *Id.*

165. *Id.* at 752.

166. *Id.*; see TEX. CONST. art. VII, § 1.

167. *Neeley*, 176 S.W.3d at 754.

168. *Id.* at 794. “More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A Band-Aid will not suffice; the system itself must be changed.” *Id.* at 754 (citing *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989)).

169. *Id.* at 754 (“Pouring more money into the system may forestall those challenges, but only for a time. They will repeat until the system is overhauled.”).



cally Article VIII, Section 1-e.<sup>170</sup> This provision of the Texas Constitution forbids the implementation of a statewide property tax. The court has defined an ad valorem tax as “a state tax. . .when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion.”<sup>171</sup> Accordingly, the test used to determine whether the current school finance system amounts to a statewide ad valorem tax is whether school districts have any meaningful discretion in setting their applicable local property tax rates.<sup>172</sup>

The court noted that “meaningful discretion” is not an exact term that can be easily quantified.<sup>173</sup> School districts need not be absolutely forced to tax at the statutorily proscribed cap limit to have lost meaningful discretion.<sup>174</sup> The state’s effect on school district taxing must be measured against a spectrum of possibilities.<sup>175</sup> The court used the following language from the *Edgewood IV* decision to describe when meaningful discretion has been lost:

[I]f the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rates just to provide a general diffusion of knowledge. If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.<sup>176</sup>

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170. *Id.* at 794 (noting that during the 1993-94 school term only two percent of districts educating one percent of students were taxing at the \$1.50 tax cap, while in 2003-2004 forty-eight percent of districts were taxing at the cap, educating fifty-nine percent of the state’s students).

171. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 795 (Tex. 2005) (citing *Carrollton Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 502 (1989)).

172. *Id.* (“Each case must necessarily turn on its own particulars. Although parsing the differences may be likened to dancing on the head of a pin, it is the Legislature, which has created the pin, summoned the dancers, and called the tune. The Legislature can avoid these constitutional conundra by choosing another path altogether.” (citing *Edgewood III*, 826 S.W.2d at 503)).

173. *Id.* at 796.

174. *Id.* at 795-96. Disagreeing with the dissenting opinion by Justice Scott Brister stating that “each and every district must prove it had no other choice,” but to tax at a level set by the State. *Id.* at 796.

175. *Id.* (citing *Edgewood III*, 826 S.W.2d at 503).

176. *Neeley*, 276 S.W.3d at 795 (citing *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 738 (Tex. 1995)).

Therefore, the question was whether dissemination of a general diffusion of knowledge required school districts to tax at rates near statutorily proscribed taxes so as to have taken all meaningful discretion away from these districts? The court noted that the number of districts taxing at the \$1.50 maintenance and operation tax cap has grown immensely since 1993.<sup>177</sup> In 1993-1994 only two percent of districts were taxing at the maximum rate.<sup>178</sup> These districts educated approximately one percent of Texas's student population.<sup>179</sup> Today, forty-eight percent of districts, educating fifty-nine percent of the state's student population, are taxing at the \$1.50 rate.<sup>180</sup> Additionally, another twelve percent of school districts are taxing within \$.05 of the \$1.50 cap.<sup>181</sup> The increased accreditation demands, demographic changes of the student population, decrease in qualified teachers, and increase of economically disadvantaged and limited English proficiency students have all added expense to the cost of educating Texas students.<sup>182</sup> These new expenses are forcing school districts to tax at or near the \$1.50 tax cap, causing them to lose meaningfully discretion. Accordingly, the Texas Supreme Court found that the current school finance system under Senate Bill 7 acted as a prohibited, statewide ad valorem tax.<sup>183</sup>

## 2. Article VII, Section 1 – Adequacy, Efficiency, and Suitability of School Finance System

In the 1995 *Edgewood IV* decision, the Texas Supreme Court held that, the school finance system created under Senate Bill 7 was constitutional; however, it was “minimally acceptable only when viewed through the prism of history.”<sup>184</sup> Since this time, the state has continued to fund less and less the costs of education. Today, the state funds only thirty-eight percent of education costs, down from forty-three percent in 1995.<sup>185</sup> The disparity of property value between property-rich school districts and

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177. *Id.* at 794.

178. *Id.*

179. *Id.*

180. *Id.* Additionally, another twelve percent of school districts are taxing within \$.05 of the \$1.50 cap. *Id.*

181. *Neeley*, 276 S.W.3d at 794.

182. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 796 (Tex. 2005).

183. *Id.* at 797 (“Accordingly, we conclude that the public school finance system violates article VIII, section 1-e the Texas Constitution.”).

184. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 726 (Tex. 1995).

185. *Neeley*, 276 S.W.3d at 755 (citing *Edgewood IV*, 917 S.W.2d at 735). The current state funding is at its lowest level in over half a century. *Id.*

property-poor school districts remains 200-to-1.<sup>186</sup> The Texas Supreme Court has stated that, “a system that operates with an excess of resources in some locales and a dearth of in others is inefficient.”<sup>187</sup> Yet, the court held that in spite of the evidence, the current school finance system is not inefficient in violation of the Texas Constitution.<sup>188</sup>

All three groups challenging the constitutionality of the school finance system allege that the current system is not able to achieve “a general diffusion of knowledge” as is mandated by article VII, section of the Texas Constitution.<sup>189</sup> Article VII, section 1 is to be judged by three criteria: (1) whether or not the public school is efficient; (2) whether the system is adequate to provide its pupils a general diffusion of knowledge; and (3) whether the public education system is suitable.<sup>190</sup>

In analyzing these three criteria, the Supreme Court held that the proper standard of review is arbitrariness.<sup>191</sup> In other words, the school finance system will withstand constitutional scrutiny unless it is found to be arbitrary and without guiding principle. “[A] mere difference of opinion [between judges and legislators], where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable.”<sup>192</sup> Article VII, Section 1 gives the legislature a great deal of discretion as how to properly craft a public school system that provides the required “general diffusion of knowledge.”<sup>193</sup> The legislature is not given complete free reign, but is permitted to determine both

186. *Id.* at 756.

187. *Id.* at 752 (citing *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989)).

188. *Neeley*, 276 S.W.3d at 754.

189. *Id.* at 752; *see also* TEX. CONST. art. VII, § 1.

190. *Neeley*, 276 S.W.3d at 752-53.

191. *Id.* at 783-84 (quoting *Mumme v. Mars*, 40 S.W.2d 31, 35-36 (Tex. 1931)) (“The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.”). “An action is arbitrary when it is taken with reference to guiding rules or principles.” *Id.* at 784. The court noted that in its prior *Edgewood* decisions it had not set out an explicit standard of review. *Id.* at 783. However, via its *Edgewood IV* holding it had implicitly adopted the standard of arbitrariness. *Id.* at 784.

192. *Id.* at 785 (citing *Texas Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995) (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968)); *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983)).

193. *Id.* at 784-85 (“[A]ssessing challenges to the public education system under article VII, section 1, courts must not on the one hand substitute their policy choices for the Legislature’s, however undesirable the latter may appear, but must on the other hand examine the Legislature’s choices carefully to determine whether those choices meet the requirements of the Constitution. By steering this course, the Judiciary can assure that the people’s guarantees under the Constitution are protected without straying into the prerogatives of the Legislature.”).

what is necessary to accomplish the dissemination of a “general diffusion of knowledge,” and the proper means for providing this dissemination.<sup>194</sup> So long as the legislatively created school finance system is created according to “guiding rules and principles properly related to public education. . . then the system” is not unconstitutional.<sup>195</sup>

a. Adequacy

The court held that “the accomplishment of ‘a general diffusion of knowledge’ is the standard by which the adequacy of the public education system is to be judged.”<sup>196</sup> Section 4.001(a) of the Texas Education Code articulates the standard by which school districts are judged regarding the dissemination of a “general diffusion of knowledge.”<sup>197</sup> Districts meet this standard when they give students “*meaningful opportunity* to acquire the essential knowledge and skills” set forth by the legislature.<sup>198</sup> The Texas Supreme Court cautioned that the public school system does not need to operate perfectly to give students of the state an adequate education, but instead it need only provide students with reasonable accessibility and opportunity to meet the statutorily-proscribed criteria.<sup>199</sup>

The Texas Supreme Court ruled, after reviewing all the evidence presented, it could not find that the current school finance system was arbitrarily structured, or that school districts across the state were not reasonably able to provide students access to a general diffusion of knowledge.<sup>200</sup> The court acknowledged it was giving extreme deference to the legislature, but held that this was the standard required by the

194. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 784-85 (Tex. 2005).

195. *Id.* at 785.

196. *Id.* at 787 (noting that the Texas Legislature has chosen school districts as the method by which it disseminates a general diffusion of knowledge).

197. *Id.* (citing the district court, quoting TEX. EDUC. CODE ANN. § 4.001(a) (Vernon 1996 & Supp. 2004-2005) (“[A]ll Texas children. . . [must have] access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.” *Id.*))

198. *Id.* (citing the district court) (emphasis in original); *See also* TEX. EDUC. CODE § 28.001 (Vernon 1996) (“It is the intent of the legislature that the essential knowledge and skills developed by the State Board of Education under this subchapter shall require all students to demonstrate the knowledge and skills necessary to read, write, compute, problem solve, think critically, apply technology, and communicate across all subject areas. The essential knowledge and skills shall also prepare and enable all students to continue to learn in postsecondary educational, training, or employment settings.”).

199. *Neeley*, 176 S.W.3d at 787 “An impending constitutional violation is not an existing one, and it remains to be seen whether the system’s predicted drift toward constitutional inadequacy will be avoided by legislative reaction to widespread calls for changes.” *Id.* at 790.

200. *Id.* at 789-90.

Texas Constitution.<sup>201</sup> Additionally, the court noted that there was extensive evidence that, without substantial change, the school finance system would continue to drift toward inadequacy.<sup>202</sup>

b. Efficiency

“Article VII, section 1 [of the Texas Constitution] requires ‘an efficient system of free public schools.’”<sup>203</sup> An efficient public school system requires both efficiency in instruction and facilities.<sup>204</sup> The court held that efficiency does not require exact equality in spending, but instead “requires substantially equivalent access to revenue only up to a point, after which a community can elect higher taxes to ‘supplement’ and ‘enrich’ its own schools.”<sup>205</sup> In other words, once a school district has met the level of “adequacy” it is free to elect to provide greater educational services.<sup>206</sup> These greater services need not be available to other districts at the same tax effort. Thus, once a school district has reached “adequacy,” an ambiguous term at best, it is free to tax at greater rates even though other school districts do not have the property wealth to match these efforts.

The Texas Supreme Court held that the plaintiffs and intervenors failed to provide adequate evidence of the effects of unequal facilities funding.<sup>207</sup> The defendants maintained that disparities in facilities funding is not proof of inefficiency unless evidence is presented to show that all school districts have similar needs.<sup>208</sup> In other words, the disparity in funding is justified by the differing needs of individual school districts. The court concurred with this rationale and held that the plaintiffs and intervenors failed to offer evidence demonstrating that school districts are unable to offer a general diffusion of knowledge without more facili-

201. *Id.* at 790.

202. *Id.* (“There is substantial evidence, which again the district court credited, that the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change take the form of increased funding, improved efficiencies, or better methods of education.”).

203. *Id.*

204. *Neeley*, 176 S.W.3d at 790 (For an efficient system, “districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.”).

205. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 790-91 (Tex. 2005) (“[C]onstitutional efficiency does not require absolute equality of spending. . .” *Id.* at 790.).

206. *Id.* (holding that adequacy is the measure by which equality of spending must be maintained, even though in the court’s earlier *Edgewood I* decision it did not expressly state that the point at which equality of spending may cease is that of adequacy).

207. *Id.* at 792.

208. *Id.* The State argued “that facilities needs vary widely depending on the size and location of schools, construction expenses, and other variables.” *Id.*

ties.<sup>209</sup> In turn, the court found that the current school finance system could not be said to be inefficient in violation of the Texas Constitution.<sup>210</sup>

### c. Suitability

The plaintiffs and intervenors claimed that the Texas school finance system was unconstitutional because it was not suitable under Article VII, Section I, due to insufficient funding.<sup>211</sup> The suitability requirement “refers specifically to the means chosen to achieve an adequate education through an efficient system.”<sup>212</sup> The Texas Supreme Court rejected the notion that the means used to fund the school finance system were inefficient because they relied too heavily on local property taxes. The court held that, “neither the structure nor the operation of the funding system prevents it from efficiently accomplishing a general diffusion of knowledge.”<sup>213</sup> So long as the state makes suitable means available to provide for free public schools, it is irrelevant whether or not there is a heavy reliance on local property taxes. The court noted that the heavy reliance on local taxes makes it difficult, but not impossible, to maintain an efficient public school system.<sup>214</sup> Ultimately, the court found the means used to fund the current school finance system sufficiently suitable to withstand constitutional challenge.<sup>215</sup>

### C. Where the Texas Supreme Court Went Wrong

The Texas Supreme Court failed to address the true problem plaguing the Texas school finance system: a lack of adequate funding to provide for the constitutionally-mandated general diffusion of knowledge.<sup>216</sup> Instead, the court chose to ignore school funding problems and to limit its holding to the finding that the current school finance system has imposed

209. *Id.*

210. *Neeley*, 176 S.W.3d at 792. However, the court cautioned that, “the amount of “supplementation” in the system cannot become so great that it, in effect, destroys the efficiency of the entire system. The danger is that what the Legislature today considers to be “supplementation” may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge.” *Id.*

211. *Id.* at 793.

212. *Id.*

213. *Id.* at 794. Additionally, the court noted, “the reliance on local revenue does not prevent the system from providing a general diffusion of knowledge.” *Id.*

214. *Id.*

215. *Neeley*, 176 S.W.3d at 794 (“We have suggested that these difficulties might be avoided by fundamental changes in the structure of the system, but the possibility of improvement does not render the present system unsuitable for adequately and efficiently providing a public education.”).

216. *See* TEX. CONST. art. VII, § 1.

an impermissible statewide ad valorem tax prohibited by Article VIII, Section 1-e.<sup>217</sup> Instead of facing the real problem and providing a workable solution for Texas children, the court summarily held that the current school finance system is adequate, efficient, and suitable. The court appears to have fallen prey to a problem that every first-year law student must address when confronting final exams for the first time: the court gives legal scholars the issues, the relevant law, and the facts surrounding the situation, but fails to apply this law to the relevant facts to articulate a well-reasoned answer to the legal issues at hand.

To understand the incongruity between the courts reasoning and conclusion one need look no further than the following language from its decision:

[T]here is much evidence. . .that many schools and districts are struggling to teach an increasingly demanding curriculum to a population with a growing number of disadvantage students, yet without additional funding needed to meet these challenges. There are wide gaps in performance among student groups differentiated by race, proficiency in English, and economic advantage. Non-completion and dropout rates are high, and the loss of students who are struggling may make performance measures applied to those who continue appear better than they should. The rate of students meeting college preparedness standards is very low. There is also evidence of high attrition and turnover among teachers statewide, due to increasing demands and stagnant compensation.<sup>218</sup>

Despite this multitude of deficiencies the court acknowledges Texas schools are facing, two sentences later it holds that the current system cannot be found so arbitrary as to violate the Texas constitution.<sup>219</sup> This begs the question, what, if anything, can reach this momentous standard of arbitrariness the court mandates? As noted *supra*,<sup>220</sup> the court explains that an action is arbitrary when it is taken without reference to guiding rules or principles. The primary principle of public education as articulated by the Texas Constitution is to disseminate a “general diffusion of knowledge.”<sup>221</sup> As evidenced by the court’s own language as

217. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 789, 794 (Tex. 2005).

218. *Id.* at 789.

219. *Id.* at 789-90 (“Having carefully reviewed the evidence and the district court’s findings, we cannot conclude that the Legislature has acted arbitrarily in structuring and funding the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge.”).

220. *See Supra*, Footnotes 190-91.

221. *See TEX. CONST.* art. VII, § 1.

quoted above, the current school finance system fails to meet this standard. How is a school system, that funds itself primarily from local property taxes, adequately funded when there remains a 200-to-1 disparity of property values between property-rich and property-poor districts?<sup>222</sup>

The question is how far must the citizens of Texas go before we drift toward inefficiency? The Court provides no answer to this question but merely concludes that we are not there *yet*. The court notes that heavy reliance on local taxes, given the diversity of school districts, makes it challenging to have an efficient school system.<sup>223</sup> It even goes so far as to say that many of the school finance system's current problems could be avoided by fundamental structural improvements to the system.<sup>224</sup> However, the court does not articulate what these structural improvements encompass. Instead, the court tritely holds that the possibility of improvement is not sufficient to find the current system as inadequate, inefficient, or unsuitable.

The court does not make the slightest effort to articulate how or when the Texas School Finance System may become inadequate, inefficient, or unsuitable. Nor does the court explain what structural changes could improve the current system. Instead, the court chose to stay inactive on the sideline and made no effort towards achieving education equality throughout the State of Texas as is required by Article VII, Section 1.

#### IV. EFFECTS OF INADEQUATE FUNDING ON ECONOMICALLY DISADVANTAGED & MINORITY STUDENTS

The *West-Orange Cove v. Neeley* decision makes it clear that the current school finance system is inadequate to meet Texas's current and future educational funding needs. In the Findings of Fact and Conclusions of Law, Judge Dietz explores a variety of problems facing the system and the effect these problems could have on the State of Texas in the upcoming years.<sup>225</sup> This portion of the comment will explore Judge Dietz's concerns and the general effects inadequate school funding has on economically disadvantaged and minority students.

##### A. *The Demographic Change in Texas' Student Population*

The Texas school system has been growing rapidly in recent years. For instance, in the 1990s, the school population grew by 3.9 million students,

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222. See *Neeley*, 176 S.W.3d at 756.

223. *Id.* at 794.

224. *Id.*

225. See generally Findings of Fact and Conclusions of Law, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004).



or by nearly twenty-three percent.<sup>226</sup> This increased enrollment has forced school districts to use even greater resources on new facilities, teachers, and administrative staff.<sup>227</sup> Since 1990, the Texas school system has been adding, on average, 72,500 students per year.<sup>228</sup> Accompanying this large influx of new students is a general demographic transition in the Texas student population.<sup>229</sup> Almost all of the student growth has come from the minority and low socio-economic income populations.<sup>230</sup>

Generally, Limited English Proficient (LEP) and economically disadvantaged students cost more to educate than other students.<sup>231</sup> Thus, the changing demographic make up of the Texas student population is resulting in substantially greater costs for school districts which are not adequately compensated under the current school finance system.<sup>232</sup> Property-poor school districts are the districts that have the most difficult time raising sufficient money to adequately support their student body populations. Consequently, property-poor school districts that often tax at higher rates have substandard schools.<sup>233</sup> Generally, these inferior schools consist of largely minority student populations.<sup>234</sup> Therefore, minority and economically disadvantaged students are often forced to attend inferior schools in property-poor districts.

Property-poor school districts consist of mainly minority and economically disadvantaged children that are in need of greater funding than students educated in property-rich school districts. "School funding experts generally agree that high-poverty schools need more resources to meet

226. *Id.* at 22, No. 65.

227. *Id.*

228. *Id.* at 22, No. 66. During 2002-2003 school term the enrollment of the Texas school system had grown to 4,259,864. *Id.*

229. *Id.* at 23, No. 67 ("Texas students have become—and will continue to become—more ethnically diverse, more likely to be from households with incomes below the poverty line, and more likely to require additional instruction in order to become fluent in English.").

230. Findings of Fact at 23, *West Orange-Cove*, GV-100528, at No. 68. African-American and Hispanic students make up ninety-seven percent of the enrollment growth. *Id.* Additionally, ninety percent of these added students come from low-income families. *Id.*

231. *Id.* at 23, No. 67.

232. *Id.* ("[C]hanging demographics have resulted in significantly higher costs for school districts that are not compensated adequately through school finance formulas, because of the insufficiency of the basic allotment and/or the compensatory education and bilingual weights.").

233. See generally Debra L. Ireland, Comment, *The Price of Education: What Local Control is Costing American Children*, 6 SCHOLAR 159, 170 (2003) (discussing the disparity between schools of property-rich areas and property-poor areas).

234. *Id.* at 170-71 (citing Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1006 (2001)).

the same standards [as low-poverty schools].”<sup>235</sup> Financially struggling districts are more likely to be urban and composed of predominantly minority and poor students, whose costs of education will often be higher due to the more extensive needs of these students as compared to those educated in property-rich districts.<sup>236</sup> “More remedial education classes, and therefore special education teachers, are likely to be required, and a greater portion of [these school districts’] total budget[s] will likely be needed simply to maintain older, less efficient facilities.”<sup>237</sup> According to Judge Dietz,

[I]f existing gaps between Whites and other minorities in educational attainment levels and household income remain in place, Texas will “have a population that not only will be poorer, less well educated, and more in need of numerous forms of state services than its present population but also less able to support such services. It is likely to be less competitive in the increasingly international labor and other markets.”<sup>238</sup>

#### B. *The Increased Legislatively Imposed Accountability Standards*

Another factor affecting the level of funding needed to provide students an efficient diffusion of knowledge is the recent increase in accountability standards imposed by the Texas Legislature. Recently, the legislature significantly modified the school accountability regime without providing increased funding to allow schools to meet these new higher standards.<sup>239</sup> For example, in July 2000, the State Board of Education implemented changes increasing requirements for high school graduation.<sup>240</sup> The new “mandatory enrichment curriculum includes courses in the following areas: (1) foreign languages; (2) health; (3) physical educa-

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235. KEVIN CAREY, THE EDUCATION TRUST, THE FUNDING GAP 2004, MANY STATES STILL SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 2 (2005), available at <http://www2.edtrust.org/NR/rdonlyres/30B3C1B3-3DA6-4809-AFB9-2DAACF11CF88/0/funding2004.pdf>.

236. Ireland, *supra* note 233, at 170-71 (citing Winston, *supra* note 234, at 1006).

237. *Id.* at 172 (citing JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS 37-38 (1991); Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. POL’Y 483, 486-87, 512, 514 (1998)).

238. Findings of Fact and Conclusions of Law at 23, No. 70, West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (citing STEVE H. MURDOCK ET AL., THE NEW TEXAS POPULATION CHANGE AND THE FUTURE OF TEXAS 224 (2003)).

239. *Id.* at 17, No. 43 (“These changes have vastly increased school districts’ budgetary pressures. . . as they now must now prepare for a more rigorous assessment on a broader curriculum.”).

240. *Id.* at 17, No. 44 (citing 19 TEX. ADMIN. CODE § 74.12 (2000)).

tion; (4) fine arts; (5) economics; (6) career and technology education; and (7) technology applications.”<sup>241</sup> Additionally, in 2003 the legislature implemented a new standardized test, the Texas Assessment of Knowledge and Skills (TAKS).<sup>242</sup> This test is far more difficult than the previous Texas Assessment of Academic Skills (TAAS) test.<sup>243</sup>

Judge Dietz concluded that, “[t]he Legislature made these changes to the accountability regime without ascertaining how much it would cost for school districts to implement these changes or whether they had the funding capacity to do so.”<sup>244</sup> As then Lieutenant Governor Ratliff stated, by implementing these increased standards without providing any additional funding, the legislature was asking school districts to “make brick(s) without straw.”<sup>245</sup> For example, “since 1995 alone, more than 60 unfunded or partially funded mandates have been imposed on school districts.”<sup>246</sup> These more rigorous mandates have not been coupled with increased funding, thus increasing the likelihood that property-poor districts will not be able to meet the new requirements. Accordingly, property-poor districts, whose population is dominated by minority and economically disadvantaged students, will continue to struggle to provide an adequate education to its students.

### C. *Inadequate School Facilities Funding*

Perhaps the greatest area of need for minority and economically disadvantaged students, in regard to overall school funding, is the need for more funding for adequate facilities. “The property-poor [districts] lack adequate funds for, and do not have substantially equal access to funds for school facilities, and therefore do not have all the facilities essential to provide students a learning environment in which to attain a suitable and adequate education.”<sup>247</sup> Judge Dietz held, “property-poor districts do not have substantially equal access to facilities funding in violation of the efficiency and suitability provisions of article VII § 1 of the Texas Constitution.”<sup>248</sup>

241. *Id.* at 17, No. 45; *see also* 19 TEX. ADMIN. CODE § 74.3 (2000).

242. Findings of Fact at 17, *West Orange-Cove*, No. GV-100528, No. 46.

243. *Id.* (“[T]he TAKS test is widely considered to be a much more rigorous test. Indeed, both Plaintiff and State witnesses testified that, as a result of the transition from TAAS to TAKS, the bar had been raised considerably.”).

244. *Id.* at 18-19, No. 50.

245. *Id.*

246. *Id.* at 19, No. 52. According to then Lieutenant Governor Ratliff, this increase in mandates occurred even though this was contrary to legislative intent. *Id.*

247. Findings of Fact at 73, *West Orange-Cove*, No. GV-100528, No. 298.

248. *Id.* at 122, No. 23.

The State of Texas makes it very difficult to evaluate the effectiveness of school facilities funding because the state does not keep records regarding school districts' facilities.<sup>249</sup> However, it is apparent that "Texas has long had substantial unmet school facilit[y] needs."<sup>250</sup> A report issued in 2000 by the National Education Association approximated that Texas's schools had nearly \$13.7 billion in unmet school facilities needs, \$9.5 billion for infrastructure and \$4.2 billion for education technology.<sup>251</sup> Likewise, the United States General Accounting Office "found that 76.3 percent of Texas schools reported" that additional funds were needed in order to update schools to be in good condition.<sup>252</sup> "School facilities have an impact on student achievement and teacher satisfaction and effectiveness."<sup>253</sup> Texas statutory law requires an "adequacy of school facilities."<sup>254</sup> "Inadequate school facilities deprive students of an equal opportunity to meet state-defined standards and obtain a constitutionally adequate education."<sup>255</sup> The parties challenging the constitutionality of the current school finance system, as applied to facility funding, are from predominantly property-poor districts.<sup>256</sup> As noted *supra*,<sup>257</sup> property-poor districts are generally composed of student populations predominantly made up of minority and economically disadvantaged students.<sup>258</sup>

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249. Findings of Fact and Conclusions of Law at 74, No. 299, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004). "When asked if there were any estimates of the cost of bringing school facilities up to the standards adopted by the commissioner of education, Joe Wisnoski, Deputy Associate Commissioner for School Finance and Fiscal Analysis, testified: 'I don't know that anyone has assessed what would be needed to that, if anything. There may be estimates for individual schools, but I don't know of anything done statewide.'" *Id.*

250. *Id.* at 74, No. 300.

251. *Id.* at 74, No. 305 (citing NAT'L EDUC. ASS'N, *Modernizing Our Schools: What Will It Cost?* (2000)).

252. *Id.* at 74, No. 301 (citing HEALTH, EDUC. & HUMAN SERVS. DIVISION, U.S. GEN. ACCOUNTING OFFICE, PUBL'N No. 96-103, *SCHOOL FACILITIES: AMERICA'S SCHOOLS REPORT DIFFERING CONDITIONS* 68 (1996), available at <http://www.gao.gov/archive/1996/he96103.pdf>).

253. *Id.* at 79, No. 339.

254. Findings of Fact at 80, *West Orange-Cove*, No. GV-100528, No. 344 (quoting TEX. EDUC. CODE ANN. § 46.008 (Vernon Supp. 2004-2005)). "The standards must include requirements related to space, educational adequacy, and construction quality." TEX. EDUC. CODE ANN. § 46.008 (Vernon Supp. 2004-2005).

255. *Id.* at 82, No. 368.

256. *Id.* at 6, No. 2. "[T]he Legislature has defined the purpose of the school finance system as being to guarantee that school districts have sufficient access to funding to provide a basic program that meets accountability/accreditation requirements. . . that provides substantially equal access to funds for an enriched program, and that includes a facilities program." *Id.* at 45, No. 9.

257. See *Supra*, Footnotes 229-32.

258. Ireland, *supra* note 233, at 171 (citing Winston, *supra* note 233, at 1006).

Therefore, minority and economically disadvantaged students are suffering from the state's failure to properly fund needed school facilities.

The current school finance system fails to provide adequate funding to meet increasingly more rigorous accountability standards, does not provide substantially equal access to funds for enrichment programs, and does not allow for equalized facilities financing. Minority and economically disadvantaged students are left to suffer the brunt of this unconstitutional and inequitable school finance system.

## V. PROPOSED SOLUTIONS TO FIX THE SCHOOL FINANCE DILEMMA

It is clear that the current Texas school finance system is unconstitutional and does not provide adequate funding to allow school districts to disseminate a general diffusion of knowledge. Additionally, we know that the current system does not allow for equitable funding of school facilities. The question is: what can the legislature do to amend the current system so as to be constitutional while providing equal access to adequate funds to educate all children in the state of Texas? This portion of the comment will explore possible solutions to effectuate a constitutionally viable education system.

### A. Consolidation of School Districts

There are currently over one thousand school districts throughout the State of Texas.<sup>259</sup> In 1993, shortly before the enactment of Senate Bill 7, then Speaker of the House Gib Lewis supported a plan to consolidate various school districts.<sup>260</sup> Lewis's plan called for the consolidation of the school districts into 188 mega-districts.<sup>261</sup> In 1993, this plan was estimated to save the state \$422 million annually by lowering administrative costs.<sup>262</sup> Thus, this plan would lower administrative costs while putting more money into the state school finance system.<sup>263</sup> This would help to

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259. *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 562 (Tex. 2003); see also Henry Cuellar, *Considerations in Drafting a Constitutional School Finance Plan: A Legislator's Perspective*, 19 T. MARSHALL L. REV. 83, 93 (1993).

260. Cuellar, *supra* note 259, at 94. The districts were to be drawn largely by county line. *Id.* at 93. Each of these county districts was to be governed by a school board. *Id.* at 94.

261. *Id.* at 93.

262. *Id.* at 94.

263. Christopher Ramos, *The Educational Legacy or Racially Restrictive Covenants: Their Long Term Impact on Mexican Americans*, 4 SCHOLAR 149, 173-83 (2001) (discussing how racially restrictive covenants separated Mexican-Americans from the rest of the population in San Antonio, Texas).

remove some of the burden the current system places on local property taxes and allow for more equalized funding.<sup>264</sup>

In reviewing any school finance proposal, it is imperative to understand the importance Texas and its residents put on local control of schools. Since the writing of the Texas Constitution, the state has put great value in allowing local communities to have control over the education process.<sup>265</sup> This proposal would require a legislative enactment proscribing the consolidation of the numerous school districts across the state. However, Lewis's "proposal received very little support from both legislators and educators" when first formulated in 1993.<sup>266</sup> Accordingly, it would seem unlikely that the legislature would choose to take this route to increase school funding. However, since the plan's initial proposal in 1993, the Texas school finance system has continued to struggle towards equality of funding. Therefore, the legislature may be more willing to consider school district consolidation when taking into effect the uncertainty of the current political climate.

#### B. *Constitutional Amendment to Allow for a State-Wide Ad Valorem Tax*

Another possible solution would be to allow total state control over school funding. This could be achieved via an amendment to Article VIII, Section 1-e of the Texas Constitution, so as to no longer forbid the levying of a state-wide ad valorem tax. Essentially, the legislature would set a state property tax that would be distributed on a per-student basis equally to all school districts across Texas.

A state-wide ad valorem tax would prevent the majority of the litigation involving the Texas school finance system.<sup>267</sup> A state-mandated property tax would take away taxing discretion from local districts, thus, ending the argument that a state taxing cap establishes both a floor and a ceiling to the amount of funding available to a given school district. In other words, the state would set a proscribed tax rate and there would be no discretion invested in local school districts. Theoretically, the state would not have restrictions on the tax rate it may charge property owners. Additionally, since all funds would be distributed equally on a per-

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264. Cuellar, *supra* note 259, at 94.

265. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 757 (Tex. 2005) (noting that the State justifies the large number of school districts on the public policy of local control). Additionally, the Texas Supreme Court discusses the fact that almost all of the delegates to the Texas Constitutional Convention were in favor of locally controlled schools. *Id.* at 785-86.

266. Cuellar, *supra* note 259, at 94.

267. *Id.* (noting that the major disadvantage to this program would be the heavy cost associated with its administration).

student basis, each school would receive equal dollars to educate students.

However, there are two major disadvantages to this proposal: (1) the high administrative costs required to operate a statewide school finance system, and (2) the taking away of local, discretionary control from school districts. Historically, Texas school funding has been predominantly funded by local taxes.<sup>268</sup> Thus, Texans may be hesitant to give up local control over their schools' and children's education.

### C. *Constitutional Amendment Permitting the Formation of County Education Districts (CEDs)*

The Texas Supreme Court has held that the creation of County Education Districts (CEDs), whose sole responsibility is to levy and collect taxes without discretionary control over the tax rate to be charged, are a *de facto* state-wide ad valorem tax.<sup>269</sup> In effect, the creation of CEDs is the combination of consolidating school districts and creating a state maintained ad valorem tax. In order to effectuate more adequate funding to all students across Texas, the legislature may choose to implement a constitutional amendment permitting the creation of CEDs – in effect overruling the *Edgewood III* decision. This solution, like those mentioned before, may face stiff resistance because it would require residents to relinquish some local control of school financing.

### D. *Constitutional Amendment Limiting Court Intervention*

In several legislative sessions, a constitutional amendment has been proposed “that would restrict the power of courts to consider legal actions relating to school finance. The proposed amendment would mandate that the legislature would have sole discretion to determine the public school finance issue.”<sup>270</sup> This proposal was led by John Culberson, a Republican in the Texas House of Representatives.<sup>271</sup> The proposal garnered fifty-seven votes in the House of Representatives when originally suggested in the early 1990s.<sup>272</sup> However, it was soundly criticized by Democratic members of the Texas Legislature as a “breach of the sep-

268. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 494-97 (1992).

269. *See generally id.* (holding that a lack of discretionary control is the main characteristic of an ad valorem tax).

270. Cuellar, *supra* note 259, at 94 (noting that this proposal received minimal support in the State Senate, but gained a “good number” of votes in the House).

271. Farr & Trachtenberg, *supra* note 4, at 674 (citing Cindy Rugely & Melanie Markley, *Though Narrower, School Funding Gap Still Chasm*, HOUSTON CHRON., Dec. 27, 1992, at State1).

272. *Id.* (citing Rugely & Markley, *supra* note 271, at State1).

aration of powers doctrine,” and failed to gain widespread support.<sup>273</sup> This solution would do little to improve the Texas school finance system, but would instead simply limit the judiciary branch from policing the legislature’s attempts toward fulfilling the constitutional mandate of providing an “efficient” school system. Nonetheless, this proposal may not be completely ignored given the fact that it has received at least limited support in the past. As the legislature has an increasingly difficult time drafting a school finance system that will withstand constitutional challenge, a proposed amendment to limit judicial interaction will become increasingly more attractive.

#### E. *Implementation of a State Income Tax*

A final solution proposed by some proponents of adequate school finance funding is the implementation of a state income tax.<sup>274</sup> This program would allow the school system to receive greater funding from the state thereby reducing the pressure on local school districts to continue to increase property taxes. Currently, the state funds approximately thirty-eight percent of annual public education costs.<sup>275</sup> This is down from the forty-three percent state funding as discussed in the *Edgewood IV* decision in 1995.<sup>276</sup> Accordingly, the state continues to shoulder less and less of the burden of educating Texas children. In turn, this burden is forced upon local taxpayers by virtue of higher property taxes.

The groundwork for the creation of a state income tax was first laid by then Lieutenant Governor Bob Bullock in 1993.<sup>277</sup> At this time, Texas voters approved a constitutional amendment, the Bullock Amendment, that allows for the implementation of a state income tax.<sup>278</sup> The amendment states that a bill initiating a personal income tax may only take ef-

273. *Id.* at 607 (citing Rugely & Markley, *supra* note 271, at State1).

274. Bruce Davidson, *Texas Kids Need State Income Tax*, SAN ANTONIO EXPRESS NEWS, July 24, 2005, at H2 (arguing that the only way to adequately funding public schools is through a state income tax).

275. *Neely v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 755 (Tex. 2005).

276. *Id.*; *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 735 (Tex. 1995).

277. DICK LAVINE & F. SCOTT McCOWN, CTR. FOR PUB. POL’Y PRIORITIES, THE BEST CHOICE FOR A PROSPEROUS TEXAS: A TEXAS-STYLE PERSONAL INCOME TAX 5 (2005), [http://www.cppp.org/files/7/prosperous\\_texas.pdf](http://www.cppp.org/files/7/prosperous_texas.pdf); see Janet Elliott & R.G. Ratcliffe, *Perry argues Senate’s plan will not pass; The proposed business taxes will be difficult to get past the House and the governor*, HOUSTON CHRON., June 9, 2005, at B4 (noting that for the first time since the passage of the Bullock Amendment in 1993 the Legislature is actively considering the viability of implementing a state personal income tax).

278. LAVINE & McCOWN, *supra* note 277, at 5.



fect after voters approve the legislation by statewide referendum.<sup>279</sup> In addition, the amendment also regulates how the state may spend the money raised by the income tax: two-thirds of the money must be used to reduce property taxes, and the remaining one-third must be used to finance public schools.<sup>280</sup> The Bullock Amendment is now contained in Article VIII, Section 24 of the Texas Constitution.

A state income tax would reduce property taxes and provide more school funding.<sup>281</sup> If a state income tax is implemented by referendum, two-thirds of the money received by the government would be used to reduce property taxes.<sup>282</sup> It is estimated that this funding would enable school districts, now taxing property at the highest allowable level of \$1.50 per \$100 of property valuation, to drop their tax rates to approximately \$.50 per \$100 of property value.<sup>283</sup> Additionally, the remaining one-third of the income tax revenue received would go directly to increase school funding.<sup>284</sup>

Furthermore, state income tax payments are deductible from federal income taxes.<sup>285</sup> Thus, any income tax paid to the State of Texas would be directly deducted from the federal taxes paid by Texas residents. This has the effect of shifting part of the property tax and school finance burden on to the federal government by allowing money that would previously have gone to the federal government to be retained by the State of

279. *Id.*; TEX. CONST. art. VIII, § 24.

280. LAVINE & McCOWN, *supra* note 277, at 5; see TEX. CONST. art. VIII, § 24(f) (“In the first year in which a tax described by Subsection (a) is imposed and during the first year of any increase in the tax that is subject to Subsection (b) of this section, not less than two-thirds of all net revenues remaining after payment of all refunds allowed by law and expenses of collection from the tax shall be used to reduce the rate of ad valorem maintenance and operation taxes levied for the support of primary and secondary public education. In subsequent years, not less than two-thirds of all net revenues from the tax shall be used to continue such ad valorem tax relief.”); see also TEX. CONST. art. VIII, § 24(g) (“The net revenues remaining after the dedication of money from the tax under Subsection (f) of this section shall be used for support of education, subject to legislative appropriation, allocation, and direction.”).

281. See LAVINE & McCOWN, *supra* note 277, at 5; see TEX. CONST. art. VIII, § 24 (mandating that the implementation of a state income tax must go towards reductions in property taxes and education costs).

282. TEX. CONST. art. VIII, § 24(f).

283. LAVINE & McCOWN, *supra* note 277, at 5. This study argues that if Texas implemented a state income tax similar with rates ranging from 3% - 6.45%, it could raise an additional \$5.5 billion per year in educational funding. *Id.* Additionally, this income tax would produce \$10.9 billion in property tax reductions, allowing average maintenance and operations school taxes to go below \$1.00 per \$100 of property valuation. *Id.*

284. TEX. CONST. art. VIII, § 24.

285. Shannon Buggs, *Deduction for sales tax: the Downside*, HOUSTON CHRON., Oct. 25, 2004, Business 1 (discussing the possibility of allowing a deduction of state sales tax from an individual's federal income taxes).

Texas.<sup>286</sup> For example, if Texas were to implement a three percent state income tax, the taxpayer would be allowed to deduct this three percent from his or her gross federal income when computing his or her federal personal income taxes. In effect, this enables the State of Texas to retain a percentage of income that would have previously been lost to the federal government.<sup>287</sup> The resident is merely paying the State of Texas, rather than the federal government, what would already be owed under the current tax structure. The federal government is losing the revenue that would be retained by the State.

The adoption of a state income tax has been met with steep opposition.<sup>288</sup> Many wary politicians from both the Republican and Democratic parties refuse to even suggest the issue.<sup>289</sup> For instance, Chris Bell, a Democratic candidate for Governor of Texas, stated that the idea of an income tax was off the table because he does not believe it to be a realistic goal: “[P]eople are not going to vote to implement an income tax.”<sup>290</sup> However, in a 2005 telephone survey, forty-five percent supported the adoption of a state income tax, while forty-eight percent are opposed to an income tax, and eight percent are unsure.<sup>291</sup> Accordingly, it appears that the issue of implementing a state income tax is not as heavily opposed as many legislators think.

In sum, the adoption of state income tax requires a statewide referendum adopting the tax.<sup>292</sup> Two-thirds of the tax must be used to reduce property taxes and the remaining one-third must be used to fund public education.<sup>293</sup> A state income tax would allow for a significant reduction in property taxes while putting more money into the school finance sys-

286. LAVINE & McCOWN, *supra* note 277, at 5.

287. *Id.* This study notes that if Texas implemented a state income tax with rates ranging from 3% - 6.45%, it would receive an additional \$16.4 billion in funding annually. *Id.* The federal government via the deduction of the state income tax from the federal income tax would subsidize ten percent or \$1.6 billion of this funding. *Id.*

288. Davidson, *supra* note 274, at H2 (stating that “supporting a state income tax is an unpardonable sin in conservative political circles in the Lone Star State.” Additionally, noting that, “a politician might as well have the words ‘liberal scum’ tattooed on his forehead if he openly supports an income tax in Texas.”).

289. See generally Rebeca Chapa, *Timing is Everything on School Funds*, SAN ANTONIO EXPRESS NEWS, Nov. 24, 2005, at A1 (discussing the stigma politicians face when proposing new tax hikes).

290. R.G. Ratcliffe, *Bell Sees School Funding as Path to Governor’s Seat*, HOUSTON CHRON., Dec. 9, 2005, at B1.

291. Clay Robison, *More Texans Say They Favor Sharing the Wealth; An Income Tax, Other Proposals Draw Responses Along Party Lines*, HOUSTON CHRON., Sept. 11, 2005, at B3 (noting that the poll was conducted by Scripps Research Center and had a margin of error of plus or minus three percentage points).

292. See Elliott & Ratcliffe, *supra* note 277, at B4.

293. TEX. CONST. art. VIII, § 24.

tem. Additionally, part of the state income tax would be subsidized by the federal government because the state income tax charged to Texans would be reduced from the residents' federal income tax bill.<sup>294</sup>

## VI. CONCLUSION

The Texas school finance system has undergone several decades of continuous constitutional challenges. The initial phase of litigation centered upon federal equal protection claims. However, the United States Supreme Court held that education was not a fundamental right and thus applied the rational basis test to find the then-existing Texas school finance system to be constitutional.<sup>295</sup>

Subsequently, a long line of state constitutional challenges were initiated. These cases are generally referred to as the *Edgewood* decisions.<sup>296</sup> The *Edgewood* decisions challenged the fairness of the way the school finance system was funded as well as the practical effects that these funding mechanisms had on school districts across the state. It was repeatedly shown that property-rich school districts were able to provide greater resources to their children than property-poor school districts. Additionally, the \$1.50 tax cap imposed on local property taxes amounted to both a floor and a ceiling on variable tax rates in many districts across the state. This tax cap acted to create what, in effect, became a constitutionally-prohibited, state-wide ad valorem tax. In turn the Texas Legislature responded with a number of new school financing mechanisms. However, these mechanisms failed in large part to constitutionally correct the inequality existing in the Texas school finance system.

The most recent challenge to the Texas school finance system is the *Neely v. West Orange-Cove ISD* decision. At the District Court Level Judge Dietz found the current school finance system to be unconstitutional.<sup>297</sup> Dietz held that the current school finance system violated Article VIII, Section 1-e of the Texas Constitution by implementing an impermissible statewide ad valorem tax. Additionally, the court found that the "finance system violates the 'general diffusion of knowledge' clause. . . set forth in Article [sic] VII, Section 1 of the Texas Constitution because the constitutional mandate of adequacy exceeds the maximum

294. See LAVINE & McCOWN, *supra* note 277, at 5.

295. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

296. See *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

297. Final Judgment, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528 (250th Dist. Ct., Travis County, Tex. Nov. 30 2004).

amount of funding that is available under. . . current funding formulas.”<sup>298</sup> The court held that the system is “inefficient, inadequate and unsuitable,” directly violating the Texas Constitution, and that property-poor school districts do not have substantially equal access to facilities funding.<sup>299</sup> The court held that, “the current funding capacity of the Texas school finance system fails to provide Intervenor districts [made up of predominately minority and economically disadvantaged student populations] with sufficient access to revenue to provide for a general diffusion of knowledge to their students.”<sup>300</sup>

On November 22, 2005 the Texas Supreme delivered its much anticipated decision in *Neely v. West-Orange Cove CISD*.<sup>301</sup> The court held that the current school finance system created under Senate Bill 7 was unconstitutional because it imposed a *de facto* statewide ad valorem tax in violation of Article VIII, Section 1-e.<sup>302</sup> However, contrary to Judge Dietz’s finding at the district court level, the Texas Supreme Court found that school districts throughout the state were receiving substantially equal access to education revenue and that the system was capable of providing a general diffusion of knowledge.<sup>303</sup> The Supreme Court summarily held that the current school finance system is adequate, efficient, and suitable to provide for the statutorily-proscribed level of education.<sup>304</sup> Throughout the court’s opinion it discussed that there are flaws in the current system and it may become unconstitutional under Article VII, Section 1 should the legislature not make fundamental changes in the system.<sup>305</sup> However, the court was unwilling to hold that the current school finance system does not provide sufficient funding to provide for a “general diffusion of knowledge.” Thus, despite the overwhelming evidence showing inequality in access and education opportunity, the court choose to ignore the plight of many children throughout the State of Texas.

Both the Texas Legislature’s and Texas Supreme Court’s reluctance to address the issue of school finance reform begs the question, what can be done to correct the current school finance system? In section V – Proposed Solutions, this comment outlines five possible resolutions to correct the Texas school finance system: (1) consolidation of the over 1,000

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298. *Id.*

299. *Id.*

300. *Id.*

301. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 751 (Tex. 2005).

302. *Id.* at 754.

303. *Id.* at 789-90.

304. *Id.*

305. *Id.* at 790.

school districts across the State; (2) a constitutional amendment allowing for the imposition of a state-wide ad valorem tax; (3) a constitutional amendment permitting the creation of County Education Districts; (4) a constitutional amendment forbidding judicial oversight of the school finance system; and (5) a constitutional amendment allowing for the implementation of a state income tax. Additionally, there is a sixth option that seems to have been endorsed by the Texas Legislature; that is doing nothing, instead hoping that the court system will remedy the problem. Thus, the state education system is currently at an impasse with neither the legislature nor the court system willing to create a constitutional school finance system that will provide necessary funds to education the children of Texas.

After extensive research, it has become abundantly clear that the current Texas school finance system is grossly underfunded. Additionally, the system continues to be composed of the “haves and have-nots.” The system is too dependent on local property taxes. It is imperative that a new school finance system must be created to equitably distribute funds throughout the state to all school districts on a dollar-per-dollar basis. The citizens of Texas can no longer permit the adequacy of a child’s education to depend on what zipcode he or she lives in. A new school finance system must be implemented to give all students equal access to funding, and thereby, equal access to opportunity for success.

As President John F. Kennedy stated, “a child miseducated is a child lost.”<sup>306</sup> The current Texas school finance system is not providing an efficient system of knowledge as required by the Texas Constitution.<sup>307</sup> In other words, the system as it now stands is miseducating the students of the State of Texas. This miseducation will undoubtedly lead to increased dropout rates, a less educated work force, slower economic growth, and general lack of progress throughout the state in generations to come if the problem is not corrected.<sup>308</sup> There is no simple answer to creating a constitutional school finance system, however, this nation and state were not founded on the ideals of simplicity, but instead on the truism of equality. In order to have equality of opportunity, there must first be equality of access to funds.

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306. Bartley.com, *supra* note 1.

307. See Final Judgment, *West Orange-Cove*, No. GV-100528.

308. Findings of Fact and Conclusions of Law at 23, No. 70, *West Orange-Cove Consol. Indep. Sch. Dist. v. Neely*, No. GV-100528, (250th Dist. Ct., Travis County, Tex. Nov. 30, 2004) (citing STEVE H. MURDOCK ET AL., *THE NEW TEXAS POPULATION CHANGE AND THE FUTURE OF TEXAS* 224 (2003)).