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Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution.

Nathan Morey

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RECENT DEVELOPMENT

UNEQUAL AND UNFAIR: WHY TEXAS SHOULD REQUIRE MANDATORY SALES PRICE DISCLOSURE TO RECONCILE THE TEXAS PROPERTY TAX CODE WITH THE TEXAS CONSTITUTION

NATHAN MOREY

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I. INTRODUCTION

“All real property . . . shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.”¹ “It is not for taxing authorities to decide what property shall escape taxation; that right lies alone with the people in the writing of their Constitution and with the Legislature in the enactment of laws.”² “The legislature has no power to sanction discrimination between taxpayers by taking away defenses.”³ The language quoted above, from the Texas constitution and the Supreme Court of Texas, might lead one to believe that all taxpayers pay the government an equal percentage of their property’s actual value each year. This, however, is not the case in the great State of Texas.

A. *How Much Is a Parking Lot Worth?*

In 2008, the City of Dallas negotiated for the purchase of an 8.34-acre tract of downtown real estate, which at the time was being used as a parking lot. The city agreed to a purchase price of \$42 million; however, that same property was valued at only \$7.3 million by the Dallas Central Appraisal District for tax purposes.⁴ In other words, the city was prepared to pay the owner a figure almost six times greater than that which contemporaneously appeared on the tax rolls. At least four other independent appraisals were conducted on the property, valuing the land from \$29 million to over \$40 million.⁵ Shortly after the city publicly

1. TEX. CONST. art. VIII, § 1(b).

2. *Whelan v. State*, 155 Tex. 14, 22, 282 S.W.2d 378, 382–83 (1955).

3. *Id.* at 23, 282 S.W.2d at 383.

4. Rudolph Bush & Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City’s Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, available at 2008 WLNR 8285936; Dave Levinthal & Rudolph Bush, *Council Delays Vote on Land Purchase: Some Members Worry Flawed Appraisals Have Inflated Price*, DALLAS MORNING NEWS, Apr. 24, 2008, at 1B, available at 2008 WLNR 7621429; Dave Levinthal & Suzanne Marta, *Vote Planned on Parcel for Convention Hotel: Facility Could Give City a Boost in Competing for Conventions*, DALLAS MORNING NEWS, Feb. 9, 2008, at 1D, available at 2008 WLNR 2554841; Terrence Stutz, *State Senate Hearing: Price Disclosure on Real Estate Is Urged: Dallas Officials Say Rule Would Aid Appraisals, Tax Collection*, DALLAS MORNING NEWS, June 17, 2008, at 6B, available at 2008 WLNR 11429840.

5. Dave Levinthal & Rudolph Bush, *Council Delays Vote on Land Purchase: Some Members Worry Flawed Appraisals Have Inflated Price*, DALLAS MORNING NEWS, Apr. 24, 2008, at 1B, available at 2008 WLNR 7621429; Dave Levinthal & Suzanne Marta, *Vote Planned on Parcel for Convention Hotel: Facility Could Give City a Boost in Competing for Conventions*, DALLAS MORNING NEWS, Feb. 9, 2008, at 1D, available at 2008 WLNR 2554841. The purpose behind this transaction was to acquire land for a city-financed hotel

announced the price that it was willing to pay for the small tract, the Appraisal District reappraised the property at \$36.5 million for the new tax year, while also raising the appraised values of many other downtown properties.⁶ This adjustment would not have taken place had the above transaction been between two private parties.⁷ However, because the bargaining process with the city was public information, the Appraisal District had new data on which to base its appraisal; data which otherwise would have been unavailable.

Properties similar to the small Dallas parking lot are not the only types of real estate in Texas that are regularly appraised below the value they actually sell for on the open market. While “mid-range residential” homes are consistently appraised at—or close to—the prices for which they actually sell, “high-end residential” properties are appraised at much lower values when compared with their respective sales prices.⁸ Although the

near the Dallas Convention Center. Dave Levinthal & Suzanne Marta, *Vote Planned on Parcel for Convention Hotel: Facility Could Give City a Boost in Competing for Conventions*, DALLAS MORNING NEWS, Feb. 9, 2008, at 1D, available at 2008 WLNR 2554841. Two of the independent appraisals valued the property at over \$40 million and were used by the city to justify the proposed sales price. *Id.* The other two appraisals of \$29 million and \$33 million were commissioned by the owner of a private hotel, against which the city-financed hotel would compete. Dave Levinthal & Rudolph Bush, *Council Delays Vote on Land Purchase: Some Members Worry Flawed Appraisals Have Inflated Price*, DALLAS MORNING NEWS, Apr. 24, 2008, at 1B, available at 2008 WLNR 7621429.

6. Rudolph Bush & Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City's Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, available at 2008 WLNR 8285936. Although their values did not increase as dramatically as the land the city wished to buy, several other downtown properties were appraised with an increase of over 50% between their value on the 2007 tax roll and the 2008 tax roll. Rudolph Bush & Kevin Krause, *Why Did This Parking Lot Jump in Appraised Value from \$7.5 Million to \$36.5 M?: City Defends Deal, but Critics Skeptical of New Assessment*, DALLAS MORNING NEWS, May 4, 2008, at 1A, available at 2008 WLNR 8329061.

7. Cf. Steve Brown, *How Much Is It Worth?: Land Costs Vary from Block to Block, Sometimes Dramatically*, DALLAS MORNING NEWS, May 3, 2008, at 1D, available at 2008 WLNR 8328998 (“Buyers and sellers jealously guard values in hopes of holding down tax liabilities. . . . In Texas, property sales prices are not public information.”).

8. See TEX. ASS'N OF APPRAISAL DISTS., WHY DO WE NEED MANDATORY SALES DISCLOSURE IN TEXAS? 2–48 (2007), <http://www.taad.org/Need%20for%20Mandatory%20Sales%20Disclosure.pdf> (documenting sales price and appraisal data from several appraisal districts throughout Texas and showing the difference between the sales price and appraisal value of “mid-range residential” and “high-end residential” properties); see also Rick Casey, *The Real Property Tax Conspiracy*, HOUSTON CHRON., June 22, 2008, at B1, available at 2008 WLNR 11825437 (“[V]ery expensive houses and commercial properties almost always sell for considerably more than the amount listed on the tax rolls.”); Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping*

difference between the appraised value and the sales price varies depending on the individual property, some “high-end residential” properties have been appraised as low as thirty percent of the sales price for which they later sold.⁹

*B. In Texas, Nothing Is Certain but Death and Unequal Taxation*¹⁰

The discrepancy between the cash value of a piece of land when it is sold and its appraisal value is not uncommon in Texas.¹¹ Commercial property and high-end residential real estate are often undervalued by appraisal districts throughout the state.¹² Because

College Affordable Among Lawmakers' Goals, HOUSTON CHRON., Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (“[A]ppraisals and tax bills for million-dollar homes and business properties are often artificially low . . .”). See generally CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT 78–79 (1991) (opining that a tax assessment is “not a good indicator of asking price or market value”).

9. See TEX. ASS'N OF APPRAISAL DISTS., WHY DO WE NEED MANDATORY SALES DISCLOSURE IN TEXAS? (2007), <http://www.taad.org/Need%20for%20Mandatory%20Sales%20Disclosure.pdf> (indicating that a property in Austin County was appraised at \$617,040 in 2006 just before selling for \$2,092,598 that same year); see also Rick Casey, *The Real Property Tax Conspiracy*, HOUSTON CHRON., June 22, 2008, at B1, available at 2008 WLNR 11825437 (explaining that the sales prices of commercial properties and expensive houses are almost always higher than the amount the tax rolls reflect).

10. Cf. Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789), reprinted in JOHN BARTLETT, FAMILIAR QUOTATIONS 310 (Justin Kaplan ed., 16th ed. 1992) (“Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes.”).

11. See Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, HOUSTON CHRON., Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (pointing out the artificial nature of certain appraisals and tax bills); Jonathan Gurwitz, *As Property Taxes Climb, Don't Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, available at 2007 WLNR 17148824 (reporting that some taxpayers' properties are valued near market value while other properties are valued far below market value); TEX. ASS'N OF APPRAISAL DISTS., WHY DO WE NEED MANDATORY SALES DISCLOSURE IN TEXAS? (2007), <http://www.taad.org/Need%20for%20Mandatory%20Sales%20Disclosure.pdf> (documenting the gap between property appraisal values and sales prices); see also Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, available at 2008 WLNR 7377010 (referring to a study by the Texas Association of Appraisal Districts that estimates there is over \$300 billion worth of taxable property that is not assessed).

12. A recent study estimated that in 2004 all commercial property in Texas was valued at \$178,577,672,798 by local county appraisal districts while the estimated true value was \$297,629,454,663. MICHAEL A. AMEZQUITA, BEXAR APPRAISAL DIST., RECOMMENDATIONS FROM BEXAR APPRAISAL DISTRICT (on file with the *St. Mary's Law Journal*). The same study found that all single-family residential property state wide

Texas counties, cities, and school districts depend on local ad valorem¹³ property taxes for revenue,¹⁴ this widespread problem

was valued at \$638,031,599,296 by appraisal districts, while the estimated true value was \$750,625,410,936. *Id.* Although commercial properties are appraised at approximately 60% of the value that they sell for on an open market, single-family residential properties are valued at 85% of the value that they bring in an open market. *Id.*; see Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 892 (1973) (delineating the results of a 1970 study showing that commercial and industrial property in Houston and Harris County was, by and large, appraised at much lower values than residential property); Rick Casey, *The Real Property Tax Conspiracy*, HOUSTON CHRON., June 22, 2008, at B1, available at 2008 WLNR 11825437 (claiming that high-end homes and commercial real estate “almost always sell for considerably more than the amount listed on the tax rolls”); Jonathan Gurwitz, *Homeowners Paying Up for Commercial Undervaluation*, SAN ANTONIO EXPRESS-NEWS, Sept. 5, 2007, at 09B, available at 2007 WLNR 17325679 (listing several commercial properties in Bexar County that sold for prices far greater than their appraised value for tax purposes); see also Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, available at 2008 WLNR 7377010 (asserting that the chief appraiser of the Dallas Central Appraisal District claimed that “state law tie[d] his hands and works to keep commercial property undervalued”).

13. See BALLENTINE'S LAW DICTIONARY 39 (3d ed. 1969) (defining “ad valorem tax” as “[a] tax of a fixed proportion of the value of the property to be charged, an appraisal being a prerequisite to the determination of the amount of the tax”); BLACK'S LAW DICTIONARY 1496 (8th ed. 2004) (defining “ad valorem tax” as a “tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure”); Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 887 (1982) (“Ad valorem is defined as ‘according to value.’”); see also CHARLES J. JACOBUS, TEXAS REAL ESTATE LAW 423 (4th ed. 1985) (“Accordingly, ad valorem taxes are taxes which are assessed on real property, the tax being based on the property's fair market value.”). See generally CHARLES J. JACOBUS, TEXAS REAL ESTATE LAW 423 (4th ed. 1985) (“[T]he most fundamental concepts of ad valorem taxation are often questioned.”); *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335 (1958) (arguing that ad valorem taxation is criticized because of its “inefficiencies and inequities”).

14. Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 887 (1982); Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 885 (1973); see CHARLES J. JACOBUS, TEXAS REAL ESTATE LAW 424 (4th ed. 1985) (“The bulk of ad valorem taxes are paid at the county and local tax levels.”); SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, TAXPAYERS' RIGHTS, REMEDIES AND RESPONSIBILITIES 1 (2008), <http://www.window.state.tx.us/taxinfo/proptax/remedy08/96-295-08.pdf> (“[P]roperty tax is the largest funding source for local services in Texas.”); see also Robert P. Berrens & Michael McKee, *What Price Nondisclosure? The Effects of Nondisclosure of Real Estate Sales Prices*, 85 SOC. SCI. Q. 509, 516–17 (2004) (asserting that Texas's Robin Hood scheme encourages some appraisal districts to intentionally undervalue property in order for the local independent school district to receive more state funds); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374, 1378 (1962) (advancing that in many states there is an incentive to undervalue property in order for local government to receive more state aid).

of under-appraising properties has led to a growing concern that revenue is being lost and that the tax burden is being unequally shouldered by middle-class homeowners.¹⁵

To illustrate this problem, imagine two properties on opposite sides of a street. The actual value of each property is \$100,000. However, property A is appraised at one hundred percent of its actual value, while property B is appraised at only sixty percent. If a one percent ad valorem property tax is levied on the two properties, then the owner of property A will pay a tax of \$1,000, while the owner of B will pay only \$600. If both property owners consume taxpayer-funded services, then the burden is being unequally shared between them. Imagine then that the owner of property A is a middle-class residential homeowner and the owner of property B is a commercial property owner. In this situation, the homeowner ends up paying more money than the commercial property owner for use of the same public services.

The root cause of this frequent under-appraisal of commercial and high-end residential property is the use of a privately-owned real estate database,¹⁶ the Multiple Listing Service (MLS), by the appraisal districts charged with valuing property for taxation.¹⁷

15. See Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, available at 2008 WLNR 7377010 (“In Texas, where property taxes are the primary means of taxation, that means commercial property owners are shifting a huge chunk of the tax burden to homeowners.”); Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, HOUSTON CHRON., Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (proclaiming that “middle-income homeowners” pay for the difference of artificially low appraisals for “million-dollar homes and business properties” when the tax bill comes due); see also MICHAEL A. AMEZQUITA, BEXAR APPRAISAL DIST., RECOMMENDATIONS FROM BEXAR APPRAISAL DISTRICT (on file with the *St. Mary's Law Journal*) (“Our current system favors owners of commercial and high-end homes over owners of middle to [low-end] homes (typical home owners).”). See generally Robert P. Berrens & Michael McKee, *What Price Nondisclosure? The Effects of Nondisclosure of Real Estate Sales Prices*, 85 SOC. SCI. Q. 509, 511 (2004) (proposing that lack of sales disclosure causes “tax revenue leakage”).

16. See SHAHRI MASTERS, THE EVERYTHING GUIDE TO BEING A REAL ESTATE AGENT 3-4 (2006) (explaining that an MLS is used by realtors for the purpose of sharing property listings); Robert P. Berrens & Michael McKee, *What Price Nondisclosure? The Effects of Nondisclosure of Real Estate Sales Prices*, 85 SOC. SCI. Q. 509, 510 (2004) (noting that an MLS is privately owned and contains sales data). See generally CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT 76 (1991) (recognizing that most contemporary realtors use an MLS).

17. See Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, available at 2008 WLNR 7377010 (declaring that an MLS allows residential properties to be appraised at close-to-market value); Rudolph Bush &

The Texas Property Tax Code (the Tax Code) defines “market value” and lays out the terms for how an appraisal district should go about valuing property, but it does not give appraisers the ability to obtain sales data on real estate when it is sold.¹⁸ To gain access to sales data, appraisal districts, along with private appraisers and real estate brokers, enlist the help of their local MLS.¹⁹ Because an MLS is more likely to contain sales data on

Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City's Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, available at 2008 WLNR 8285936 (stressing that the Dallas Central Appraisal District “relies heavily on sales prices” from the MLS and that undervaluation of commercial property is due to a lack of information); Jonathan Gurwitz, *As Property Taxes Climb, Don't Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, available at 2007 WLNR 17148824 (claiming that appraisals are unequal due to the “vast amount of information” readily available concerning residential property, including MLS and real estate advertisements); see also MICHAEL A. AMEZQUITA, BEXAR APPRAISAL DIST., RECOMMENDATIONS FROM BEXAR APPRAISAL DISTRICT (on file with the *St. Mary's Law Journal*) (asserting that there are readily available market data on homes valued under \$250,000). See generally TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 19 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (contending that many appraisers in Texas claim that a lack of sales data keeps them from appraising property accurately).

18. See TEX. TAX CODE ANN. § 22.24(d) (Vernon 2008) (establishing that a taxpayer may, but is not required to, disclose market value when submitting a rendition); Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 890 (1982) (claiming that prior to the adoption of the Tax Code, a property owner was required to disclose the value of taxable property and that after adoption of the Code the disclosure of the value of property was optional); Steve Brown, *How Much Is It Worth?: Land Costs Vary from Block to Block, Sometimes Dramatically*, DALLAS MORNING NEWS, May 3, 2008, at 1D, available at 2008 WLNR 8328998 (reiterating that “property sales prices are not public information” in Texas); see also Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 890 (1973) (suggesting that although rendition of property was required under state law prior to the Tax Code, many tax assessors likely ignored the rendition procedure because of limited resources, the inability to subpoena a taxpayers records, and the enormity of the task).

19. See Tex. Att'y Gen. OR99-0420 (1999) (unpublished informal letter ruling), available at <http://www.oag.state.tx.us/opinions/openrecords/49cornyn/orl/1999/htm/or199900420.htm> (discussing Comal County's status on the New Braunfels/Canyon Lake Area Board of Realtors' MLS as it pertained to the Open Records Act); see also Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, available at 2008 WLNR 7377010 (noting that an MLS enables appraisal districts to value residential properties close to market value); Rudolph Bush & Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City's Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, available at 2008 WLNR 8285936 (stating that the Dallas Central Appraisal District “relies heavily on sales prices that it obtains through an agreement with the Multiple Listing Service”). See generally CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE

middle-class residential properties than it is to contain similar data for commercial properties or high-end residential properties, appraisal districts are more likely to appraise the former at close to market value, while a lack of probative data leads to the under-appraisal of the latter.²⁰

Although the Texas constitution allows for the taxation of all property,²¹ this Recent Development will focus on the taxation of

PROFIT 25 (1991) (claiming that MLSs are “in use across the nation”).

20. See Rudolph Bush & Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City's Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, available at 2008 WLNR 8285936 (“[C]ommercial sales information is rarely made public in Texas.”); Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, HOUSTON CHRON., Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (reporting that State Representative Mike Villarreal, Democrat-San Antonio, maintains that “appraisers do not have access to price information for commercial and high-end residential properties”); Jonathan Gurwitz, *As Property Taxes Climb, Don't Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, available at 2007 WLNR 17148824 (stating that appraisal districts have access to a “vast amount” of data concerning residential property but that data concerning commercial property are “scant”); MICHAEL A. AMEZQUITA, BEXAR APPRAISAL DIST., RECOMMENDATIONS FROM BEXAR APPRAISAL DISTRICT (on file with the *St. Mary's Law Journal*) (proposing that the cause of the appraisal disparity between commercial and residential property is attributed to the lack of available data on “commercial, multi-family, industrial, offices, retail and land for development”).

21. See TEX. CONST. art. VIII, § 1(b) (declaring that all real and tangible personal property “shall be taxed in proportion to its value”); TEX. TAX CODE ANN. § 11.01(a) (Vernon 2008) (“All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.”); *City of Arlington v. Cannon*, 153 Tex. 566, 570, 271 S.W.2d 414, 416 (1954) (“The deliberate adoption of a plan for the omission from the tax rolls of a large volume of property, personal or real, is in direct contravention of constitutional and statutory provisions for equality and uniformity of taxation.”); *Norris v. City of Waco*, 57 Tex. 635, 642 (1882) (opining that “there can be but little question” that all property, except that made exempt by the legislature, “must be taxed in proportion to its value”); see also *Parker County v. Spindletop Oil & Gas Co.*, 628 S.W.2d 765, 768 (Tex. 1982) (holding a tax plan invalid because it assessed oil and gas rights at a different rate than other property); *Whelan v. State*, 155 Tex. 14, 20–21, 282 S.W.2d 378, 382 (1955) (explaining that despite “the practical difficulties and problems to be encountered,” holding that bank deposits are not taxable would “fly in the very face of the Constitution and the Statutes of this state” and further noting that the legislature has specifically included bank deposits within the definition of “property”); *Sam Bassett Lumber Co. v. City of Houston*, 145 Tex. 492, 494, 198 S.W.2d 879, 880 (1947) (stating that just because the City of Houston failed to tax similar property elsewhere, does not, by itself, prove that the taxation of “goods, wares and merchandise” is excessive); *Briscoe Ranches, Inc. v. Eagle Pass Indep. Sch. Dist.*, 439 S.W.2d 118, 122 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.) (indicating that the appellant introduced evidence in the district court of more than \$9 million in deposits held by two banks located within the district and that the tax assessor had attempted to discover those deposits, but that the banks refused to furnish information about the deposits, claiming that the law required confidentiality); *Bergert v. Alexander*, 297 S.W.2d 895, 898 (Tex. Civ. App.—Amarillo 1957, writ ref'd n.r.e.)

real property.²² Specifically, this Recent Development will explore the weaknesses of the Tax Code to show why discrepancies occur between middle-class residential and other types of real estate, and why the Code is unable to correct those discrepancies.

Not only must taxing units²³ operate within the boundaries of the Tax Code, but they are first and foremost bound by the equality and uniformity requirements of article VIII of the Texas constitution.²⁴ This Recent Development will examine why Texas courts are unable to adequately remedy these unequal appraisals and discuss recent attempts in the Texas Legislature to reform the ongoing problem of unequal appraisals by requiring mandatory sales price disclosure to appraisal districts.²⁵

(recognizing that the equality and uniformity provisions of the Texas constitution are violated when personal property and improvements on land are excluded or assessed without regard to value). See generally Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 889 (1973) (acknowledging the impossibility of discovering all taxable personal property and that attempting to do so would be politically and socially offensive).

22. See TEX. TAX CODE ANN. § 1.04(2) (Vernon 2008) (defining “real property” as land, improvements to land, mines and quarries, minerals, timber, and various security interests).

23. See *id.* § 1.04(12) (defining a “taxing unit” as an entity “that is authorized to impose and is imposing ad valorem taxes on property even if the governing body of another political unit determines the tax rate for the unit or otherwise governs its affairs” and listing several examples such as cities, counties, school districts, and hospital districts).

24. TEX. CONST. art. VIII, § 1; *Spindletop*, 628 S.W.2d at 767; *Dallas County v. Dallas Nat'l Bank*, 142 Tex. 439, 441, 179 S.W.2d 288, 289 (1944); *Lively v. Mo., K. & T. Ry. Co. of Tex.*, 102 Tex. 545, 558–59, 120 S.W. 852, 856 (1909); see *Cannon*, 153 Tex. at 570, 271 S.W.2d at 416 (“[T]he deliberate adoption of a plan for the omission from the tax rolls of a large volume of property, personal or real, is in direct contravention of constitutional and statutory provisions for equality and uniformity of taxation.”).

25. See Jonathan Gurwitz, *As Property Taxes Climb, Don't Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, available at 2007 WLNR 17148824 (reiterating that legislation requiring mandatory sales price disclosure was introduced but not passed during Texas's 80th legislative session); Terrence Stutz, *State Senate Hearing: Price Disclosure on Real Estate Is Urged: Dallas Officials Say Rule Would Aid Appraisals, Tax Collection*, DALLAS MORNING NEWS, June 17, 2008, at 6B, available at 2008 WLNR 11429840 (discussing the efforts of the City of Dallas in lobbying the legislature to approve mandatory sales price disclosure). See generally Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 886 (1973) (describing some of the criticisms of the taxation of property, including claims that it “cast[s] a disproportionate burden on those who are least able to pay,” undermines necessary public works, and is no longer a viable source of revenue).

II. BACKGROUND

Article VIII, section 1(a) of the Texas constitution mandates that “[t]axation shall be equal and uniform.”²⁶ Section 1(b) requires that “[a]ll real property and tangible personal property in this State . . . shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.”²⁷

In *Harris County Appraisal District v. United Investors Realty Trust*,²⁸ the Fourteenth Court of Appeals in Houston ruled that “it is unfair, and constitutionally prohibited, to require one taxpayer to pay a tax based on market values if other taxpayers are paying a rate that is lower than the market value of their properties.”²⁹ The court addressed the tension between the two constitutional requirements of article VIII and resolved the conflict in favor of equality and uniformity.³⁰ The Fourteenth Court of Appeals was not, however, in uncharted territory. Nearly eighty years earlier, the United States Supreme Court³¹ handed down a similar ruling

26. TEX. CONST. art. VIII, § 1(a). *But see Whelan*, 155 Tex. at 18, 282 S.W.2d at 380 (“Exact uniformity and equality of taxation is an unattainable ideal.” (citing *Rosenburg v. Weekes*, 67 Tex. 578, 586, 4 S.W. 899, 901 (1877))); *Norris*, 57 Tex. at 642 (stating that while taxation must be equal, the benefit received from the government resulting from the same taxation need not be equal).

27. TEX. CONST. art. VIII, § 1(b); *see* TEX. TAX CODE ANN. § 11.01 (Vernon 2008) (“All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.”); Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer’s Perspective*, 13 ST. MARY’S L.J. 887, 887–88 (1982) (contending that unless excluded by statute, all property is valued and taxed according to market value). *See generally* Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374, 1377–78 (1962) (arguing that the equality requirement and the market value requirement are “closely intertwined” and together intended to promote equality in taxation).

28. *Harris County Appraisal Dist. v. United Investors Realty Trust*, 47 S.W.3d 648 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

29. *Id.* at 654.

30. *Id.*; *see also* *Lively v. Mo., K. & T. Ry. Co. of Tex.*, 102 Tex. 545, 558, 120 S.W. 852, 856 (1909) (“[T]axation cannot be in the same proportion to the value of the property, unless the value of all property is ascertained by the same standard.”).

31. The Supreme Court of Texas has noted the similarity between the Fourteenth Amendment to the United States Constitution and section 1 of article VIII of the Texas constitution. *See* U.S. CONST. amend. XIV, § 1, cl. 4 (mandating that states give all persons “equal protection of the laws”); TEX. CONST. art. VIII, § 1 (requiring equality and uniformity in taxation); *Lively*, 102 Tex. at 558–59, 120 S.W. at 856 (asserting that the Fourteenth Amendment of the United States Constitution, section 1 of article VIII of the Texas constitution, and other similar provisions in other state constitutions have the same application); Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 909 (1973) (stating that both the federal and Texas constitutions are violated by “the omission of property from the tax rolls, the unequal treatment of different

in *Sioux City Bridge Co. v. Dakota County*.³² The court held that “where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.”³³

A. Market Value

At the center of this taxation conundrum is the difficulty of establishing market value.³⁴ When multiple professional appraisers examine a single piece of property, they often use different valuation methods and arrive at different conclusions as to the property’s value.³⁵ These different conclusions and their

classes of property within the same taxing jurisdiction, and the unequal treatment of like property within the state”); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374, 1375 (1962) (noting the commonality between equality and uniformity provisions of state constitutions and the Equal Protection Clause of the Fourteenth Amendment). The United States Supreme Court has ruled on equality and uniformity in taxation on several occasions. See *Nordlinger v. Hahn*, 505 U.S. 1, 10, 18 (1992) (stating that state legislation may discriminate in cases where it furthers a “legitimate state interest” and that a California provision allowing seniors’ homes to be appraised at lower values advanced such an interest (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–41 (1985))); *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) (stating that the Equal Protection Clause “protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class”); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446 (1923) (holding that a property owner who has been taxed at a higher percentage is entitled to a reduction to the lower percentage that other property owners enjoy). *But see* *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 368 (1940) (holding that a state may classify property types and tax different classes at different rates).

32. *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).

33. *Id.* at 446. In *Sioux City Bridge*, the owner of a railroad bridge objected to the appraisal of the bridge at 100% of its market value while other property in the district was only valued at 55% of its market value. *Id.* at 443–44. The Court held that the Fourteenth Amendment of the United States Constitution required the railroad bridge to be reappraised at the lower rate. *Id.* at 446–47.

34. See *Whelan v. State*, 155 Tex. 14, 18, 282 S.W.2d 378, 380 (1955) (“Exact uniformity and equality of taxation is an unattainable ideal.” (citing *Rosenburg v. Weekes*, 67 Tex. 578, 586, 4 S.W. 899, 901 (1877))); Steve Brown, *How Much Is It Worth?: Land Costs Vary from Block to Block, Sometimes Dramatically*, DALLAS MORNING NEWS, May 3, 2008, at 1D, available at 2008 WLNR 8328998 (emphasizing the wide variances in the valuations of real estate in downtown Dallas); see also *Whelan*, 155 Tex. at 20–21, 282 S.W.2d at 382 (bemoaning the difficulty in taxing bank deposits).

35. See Steve Brown, *How Much Is It Worth?: Land Costs Vary from Block to Block, Sometimes Dramatically*, DALLAS MORNING NEWS, May 3, 2008, at 1D, available at 2008 WLNR 8328998 (stating that litigation makes buyers and sellers reluctant to disclose information pertaining to real estate transactions and that appraisals vary as a result); Dave Levinthal & Rudolph Bush, *Council Delays Vote on Land Purchase*, DALLAS

respective methods are frequently left for the courts to sort out.³⁶

1. Market Value Defined

The true market value of a property is difficult to establish and is often controversial.³⁷ Section 1.04(7) of the Tax Code defines “market value” as:

the price at which a property would transfer for cash or its equivalent under prevailing market conditions if: (A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser; (B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and (C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other.³⁸

MORNING NEWS, Apr. 24, 2008, at 1B, *available at* 2008 WLNR 7621429 (referring to two private appraisals, one for \$29 million and the other for \$33 million, conducted on the same piece of Dallas real estate on which the city intended to build a hotel); Dave Levinthal & Suzanne Marta, *Vote Planned on Parcel for Convention Hotel*, DALLAS MORNING NEWS, Feb. 9, 2008, at 1D, *available at* 2008 WLNR 2554841 (referring to three different valuations on the same piece of Dallas real estate on which the city intended to build a hotel: one by the Dallas Central Appraisal District for \$7.5 million and two independent appraisals valuing the property at over \$40 million). *See generally* Silas J. Ely, *Applied Techniques of Appraisal*, in THE MCGRAW-HILL REAL ESTATE HANDBOOK 30-1, 30-4 (Robert Irwin ed., 1984) (listing four different methods of appraising real estate: the market comparison method, the allocation or abstraction method, the development method, and the land residual method); *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335, 344-47 (1958) (discussing various types of assessment techniques).

36. *See City of Harlingen v. Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001) (Baker, J., concurring) (stating that the “subdivision development” method of appraisal is not among the appraisal methods recognized by Texas law and should not be admissible in a condemnation proceeding); *Houston R.E. Income Props. XV, Ltd. v. Waller County Appraisal Dist.*, 123 S.W.3d 859, 864 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (stating that a court may rely on both the market data method and the income method in appraising a property).

37. *See Whelan*, 155 Tex. at 18, 282 S.W.2d at 380 (“Exact uniformity and equality of taxation is an unattainable ideal.” (citing *Rosenburg*, 67 Tex. at 586, 4 S.W. at 901)). *See generally* CHARLES J. JACOBUS, TEXAS REAL ESTATE LAW 423 (4th ed. 1985) (“[T]he most fundamental concepts of *ad valorem* taxation are often questioned.”).

38. TEX. TAX CODE ANN. § 1.04(7) (Vernon 2008); *see also Sharboneau*, 48 S.W.3d at 182 (defining “market value” as “the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying” (quoting *State v. Carpenter*, 126 Tex. 604, 606, 89 S.W.2d 979, 980 (1936))). *See generally* BALLENTINE’S LAW DICTIONARY 778 (3d ed. 1969) (defining “market value” as “[t]he price for which an article is bought and sold in the ordinary course of business” and “[o]f real estate:—the highest price obtainable in the

Market value is typically determined by using any combination of three traditional methods: the market approach, the cost approach, and the income approach.³⁹ The market approach compares a particular property with other properties for which sales data are available.⁴⁰ The cost approach calculates value by estimating the cost of identical vacant land and improvements.⁴¹ Finally, the income approach is used to value commercial and industrial real estate by considering the income and expenses that a property generates when compared to other investments.⁴²

2. Market Value Versus Sales Price

Market value should not be confused with the sales price of real property.⁴³ While the sales price in a routine transaction is often the result of the type of bargaining described in section 1.04(7) of the Code, it is not an absolute indication of market value.⁴⁴ Depending on the circumstances of the transaction—such as whether it involved a forced sale, condemnation by the govern-

open market for cash”); BLACK’S LAW DICTIONARY 1587 (8th ed. 2004) (defining “fair market value” as “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction; the point at which supply and demand intersect”); CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE ’90S WITH LESS STRESS AND MORE PROFIT 73 (1991) (defining “fair market value” as “the closing price, the highest price a ready, willing, and able buyer will pay and the lowest price a ready, willing, and able seller will accept” (emphasis omitted)).

39. Silas J. Ely, *Principles of Appraisal*, in THE MCGRAW-HILL REAL ESTATE HANDBOOK 28-12 (Robert Irwin ed., 1984).

40. *Id.*; see also *id.* at 28-1 (claiming that the market approach is the most direct and important approach in valuing property).

41. *Id.* at 28-13; see also *id.* (stating that the cost approach is normally limited to the appraisal of new buildings and public properties).

42. Silas J. Ely, *Principles of Appraisal*, in THE MCGRAW-HILL REAL ESTATE HANDBOOK 28-13–28-14 (Robert Irwin ed., 1984).

43. See *id.* at 28-3 (pointing out the difference between market price and market value by stating that market price is “simply the amount actually paid” while market value is the “highest price in terms of money which a property will bring in a competitive and open market under all conditions requisite to a fair sale”); see also BLACK’S LAW DICTIONARY 1226 (8th ed. 2004) (defining “price” as “[t]he amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold”); BLACK’S LAW DICTIONARY 1586 (8th ed. 2004) (defining “value” as “[t]he significance, desirability, or utility of something”).

44. See TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 20 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (claiming that sales price alone is inadequate to establish market value).

ment, or sale at auction following a foreclosure—the actual sales price of the property might be much lower than market value.⁴⁵ In some instances where property is purchased through financing, the sales price might be higher depending on the interest rate obtained by the buyer.⁴⁶ Nonetheless, sales price is one of a few tools that appraisers use to determine the value of real property.⁴⁷

Sales price may be introduced as evidence of market value either before an appraisal review board or a reviewing district court during an appraisal protest.⁴⁸ In *Bailey County Appraisal District v. Smallwood*,⁴⁹ a property owner appealed an appraisal review board's finding that his property was worth \$55,000 for tax purposes.⁵⁰ A jury found in favor of the property owner, who based his claim solely on the property's purchase price of \$25,000.⁵¹ The Appraisal District appealed, but the Seventh Court of Appeals in Amarillo upheld the trial court's ruling that purchase price alone is probative evidence "tending to support the jury finding on fair market value."⁵²

45. See Silas J. Ely, *Applied Techniques of Appraisal*, in THE MCGRAW-HILL REAL ESTATE HANDBOOK 30-1, 30-4 (Robert Irwin ed., 1984) (stating that the terms of the sale affect the price).

46. See TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 20 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (stating that lower interest rates and less buyer liability often result in higher sales prices).

47. See Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 891 (1973) (claiming that assessors often appraise the property of large businesses by negotiating because an accurate valuation is too difficult); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374, 1393 (1962) (stating that recent sales are not always representative if statistical sampling is not employed); TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 20 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf ("Sales price disclosure alone does not provide the information an appraisal district needs to establish a market value.").

48. See TEX. TAX CODE ANN. § 41.44 (Vernon 2008) (permitting a property owner to present evidence in front of an appraisal review board); SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, TAXPAYERS' RIGHTS, REMEDIES AND RESPONSIBILITIES 6 (2008), <http://www.window.state.tx.us/taxinfo/proptax/remedy08/96-295-08.pdf> (describing to a taxpayer how to protest).

49. *Bailey County Appraisal Dist. v. Smallwood*, 848 S.W.2d 822 (Tex. App.—Amarillo 1993, no writ).

50. *Id.* at 823.

51. *Id.* at 823–24.

52. *Id.* at 825; see *Sagemont Plaza Shopping v. Harris County Appraisal Dist.*, 30 S.W.3d 425, 427 (Tex. App.—Corpus Christi 2000, pet. denied) (holding that the most

3. Multiple Listing Service

An MLS is a resource that subscribing members, usually real estate agents and private appraisers, use to gain access to information concerning a specific housing market, thereby allowing real estate brokers to instantly analyze all listed properties for sale in a general area by location and sales data.⁵³ Most importantly, an MLS allows appraisers to verify the actual sales price and date of a particular real estate transaction brokered by a member for the purpose of appraising similar real estate.⁵⁴ Due to the nature of the real estate market, sales data are more readily available for some types of property than others. The vast majority of properties listed on an MLS are middle-class single-family houses.⁵⁵ Many appraisal districts have joined with local

recent purchase price of a property was sufficient evidence to establish market value). *But see* *City of Harlingen v. Sharboneau*, 48 S.W.3d 177, 186 (Tex. 2001) (finding that the price a buyer “could hypothetically afford to pay” and still make a profit upon resale is not necessarily what a buyer “would pay in the competitive, risk-filled marketplace of the real world”). *See generally* CAROLYN JANIK, *HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT* 73 (1991) (defining “fair market value” as “the closing price, the highest price a ready, willing, and able buyer will pay and the lowest price a ready, willing, and able seller will accept” (emphasis omitted)).

53. *See* CHARLES J. JACOBUS, *TEXAS REAL ESTATE LAW* 550 (4th ed. 1985) (defining “multiple listing” as “an agreement among brokers who belong to the Multiple Listing Service that all listings will be placed on a mutually available list, that all brokers may sell any property on the list, and that the commission will be split in a predetermined fashion”); SHAHRI MASTERS, *THE EVERYTHING GUIDE TO BEING A REAL ESTATE AGENT* 4 (2006) (“An MLS is an organization that’s formed for the purpose of sharing listings, which you’ll likely find to be internet based.”); SHAHRI MASTERS, *THE EVERYTHING GUIDE TO BEING A REAL ESTATE AGENT* 153 (2006) (detailing the information usually available on an MLS); *see also* CAROLYN JANIK, *HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT* 13 (1991) (describing the relationship among realtors who are members of an MLS). *See generally id.* at 76 (contending that “[e]very competent real estate office keeps records” of the sales prices of comparable properties).

54. *See* SHAHRI MASTERS, *THE EVERYTHING GUIDE TO BEING A REAL ESTATE AGENT* 153 (2006) (relating that while each MLS system is somewhat unique, most of them have the common features of “sales price, the date sold, the type of financing that was used, and who sold it” in addition to how many days it has been on the market). *See generally* CAROLYN JANIK, *HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT* 5 (1991) (proclaiming that realtors allow their colleagues to access the properties that they are selling through an MLS); *id.* at 13 (asserting that when a property is sold on an MLS, the commission is usually split down the middle between the agent who posted the property and the agent who sold it via the MLS).

55. *See* Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, *HOUSTON CHRON.*, Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (referring to statements by Texas State

real estate agents and private appraisers in local MLS boards to gain access to this data.⁵⁶ Because middle-class homes are likely to be listed on an MLS,⁵⁷ the market data method is usually the easiest and most likely choice of appraisal method in valuing these properties.⁵⁸ Meanwhile, because less data are available on an

Representative Mike Villarreal, Democrat-San Antonio, who claims that sales data on most homes valued under \$300,000 can be found on a local MLS, while sales data of commercial real estate and more expensive residential properties are largely unavailable); REAL ESTATE CTR. AT TEX. A&M UNIV., REAL ESTATE MARKET OVERVIEW 2008 DALLAS-FORT WORTH-ARLINGTON 26 (2008), <http://recenter.tamu.edu/mreports/DallasFWAr1.pdf> (showing that throughout different regions of the Dallas/Fort Worth/Arlington area, the number of homes that sold on an MLS for over half a million dollars was never more than 8% of all homes sold in the area during 2007).

56. See Tex. Att'y Gen. OR99-0420 (1999) (unpublished informal letter ruling), available at <http://www.oag.state.tx.us/opinions/openrecords/49cornyn/orl/1999/html/or199900420.htm> (recounting a scenario in Comal County where homeowners filed an open records request to gain access to sales figures through the local appraisal district—which was a member of the local MLS—but were denied the disclosure based on the district's contention that the data are property of the local MLS and not the government); Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, available at 2008 WLNR 7377010 (stating that data from an MLS allows appraisal districts to keep residential properties valued at close to market value); Rudolph Bush & Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City's Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, available at 2008 WLNR 8285936 (stating that the Dallas Central Appraisal District “relies heavily on sales prices that it obtains through an agreement with the Multiple Listing Service”); Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, HOUSTON CHRON., Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (claiming that because of listings in the MLS, Bexar County appraisers have access to 95% of residential properties under \$300,000); Jonathan Gurwitz, *As Property Taxes Climb, Don't Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, available at 2007 WLNR 17148824 (“A vast amount of information is available to appraisers with regard to residential home sales from the Multiple Listing Service . . .”).

57. See Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, HOUSTON CHRON., Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (noting that most homes worth less than \$300,000 in Bexar County are listed on the local MLS); REAL ESTATE CTR. AT TEX. A&M UNIV., REAL ESTATE MARKET OVERVIEW 2008 DALLAS-FORT WORTH-ARLINGTON 26 (2008), <http://recenter.tamu.edu/mreports/2008/DallasFWAr1.pdf> (showing that throughout different regions of the Dallas/Fort Worth/Arlington area, the number of homes that sold on an MLS for over half a million dollars was never more than 8% of all homes sold in the area during 2007). See generally CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT 166 (1991) (arguing that the MLS is the most widely used database by real estate brokers and that if a seller wants maximum market exposure for a property, it should be listed on an MLS).

58. See TEX. TAX CODE ANN. § 23.013 (Vernon 2008) (“If the chief appraiser uses the market data comparison method of appraisal to determine the market value of real property, the chief appraiser shall use comparable sales data and shall adjust the

MLS concerning the sales prices of commercial properties, the income method is more likely to be used in the appraisal of those properties.⁵⁹

Under the Tax Code, a property owner must file a rendition with the appraisal district where the property is located.⁶⁰ A rendition is a statement that identifies taxable property within an appraisal district.⁶¹ However, the property owner is not required to disclose the market value of his or her property when submitting that rendition.⁶² There is a growing belief that renditions in Texas should include more information—specifically, the most recent sales price.⁶³

B. *Before the Texas Property Tax Code*

Prior to 1982, taxing units maintained their own tax rolls.⁶⁴

comparable sales to the subject property.”).

59. *See id.* § 23.012 (outlining the requirements for “income method” appraisals); Silas J. Ely, *Principles of Appraisal*, in *THE MCGRAW-HILL REAL ESTATE HANDBOOK* 28-13–28-14 (Robert Irwin ed., 1984) (describing the income approach and the circumstances under which it is ideal).

60. *See* Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer’s Perspective*, 13 *ST. MARY’S L.J.* 887, 889–90 (1982) (discussing renditions and stating that disclosing market value or sales price is optional under the Tax Code).

61. *Id.* at 890.

62. *See* TEX. TAX CODE ANN. § 22.01(b) (Vernon 2008) (requiring a person to submit a rendition of any “taxable property that he owns or that he manages and controls as a fiduciary on January 1”); *id.* § 22.24(d) (establishing that a property owner is not required to disclose a “good faith estimate of the market value of the property”); Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer’s Perspective*, 13 *ST. MARY’S L.J.* 887, 890 (1982) (emphasizing that the Tax Code requires a taxpayer to file a rendition prior to May 1 and that disclosing market value is optional).

63. *See* Janet Elliott, *The Legislature: Tuition Freeze One Priority for ‘09 Session: Keeping College Affordable Among Lawmakers’ Goals*, *HOUSTON CHRON.*, Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (reporting on pending legislation requiring mandatory sales disclosure); Terrence Stutz, *State Senate Hearing: Price Disclosure on Real Estate Is Urged: Dallas Officials Say Rule Would Aid Appraisals, Tax Collection*, *DALLAS MORNING NEWS*, June 17, 2008, at 6B, available at 2008 WLNR 11429840 (reporting on the City of Dallas’s efforts to lobby the legislature for mandatory sales disclosure).

64. *See* Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer’s Perspective*, 13 *ST. MARY’S L.J.* 887, 889 (1982) (noting that before the Tax Code “there were approximately 3,000 different taxing jurisdictions” in Texas that maintained tax offices); *see also* *Aycock v. Travis County*, 255 S.W.2d 910, 911–12 (Tex. Civ. App.—Austin 1953, writ ref’d) (recognizing in the statement of facts that Travis County used prior assessments made by the City of Austin,

Cities, counties, and school districts redundantly valued the same properties within their overlapping territories.⁶⁵ Each taxing unit maintained its own board of equalization, which heard disputes concerning the appraised value of taxable property within the unit's jurisdiction.⁶⁶ Under this system, taxing units acted as the appraiser of value, the initial arbiter of disputes, and the collector of taxes.⁶⁷

Before the adoption of the Tax Code, to avoid falling victim to an unfair tax scheme, a taxpayer had to prove that a tax scheme was "discriminatory, arbitrary, that there was omitted property or that the property was valued in excess of its market value."⁶⁸ "[A] mere difference in judgment" about a property's value or "isolated instances" of other property being valued at disproportionate values was insufficient grounds on which a property owner could prevail.⁶⁹ To obtain relief, a property owner had to show

where much of the taxable property in Travis County is located, in formulating its own assessments).

65. See Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 894 (1973) (indicating that Texas used to have overlapping taxing units); see also *Aycock*, 255 S.W.2d at 911-12 (noting Travis County's use of assessments made by the City of Austin).

66. See Edward Kliewer III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 891 (1982) (stating that prior to the Tax Code, each taxing unit had its own board of equalization); see also *City of Arlington v. Cannon*, 153 Tex. 566, 568, 271 S.W.2d 414, 415 (1954) (noting that the City of Arlington had its own board of equalization); *Dallas County v. Dallas Nat'l Bank*, 142 Tex. 439, 440, 179 S.W.2d 288, 289 (1944) (indicating that the Dallas County Commissioners Court also served as a board of equalization for Dallas County); *State v. Houser*, 138 Tex. 28, 30, 156 S.W.2d 968, 969 (1941) (noting that Lamar County and the Paris Independent School District shared both a taxing unit and a board of equalization); Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 892 n.47 (1973) (stating that "[e]very type of taxing district is entitled to have its own board of equalization" to correct unequal assessments).

67. See Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 892-93 (1973) (accusing county boards of equalization of abusing the system and creating "rampant inequalities" in violation of constitutional and statutory requirements).

68. Edward Kliewer III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 897 (1982).

69. *Dallas Nat'l Bank*, 142 Tex. at 441, 179 S.W.2d at 289; see *State v. Whittenburg*, 153 Tex. 205, 210, 265 S.W.2d 569, 573 (1954) (stating that "mere errors in judgment" or a mere disagreement between the finder of fact and a board of equalization is an insufficient basis for relief); *Houser*, 138 Tex. at 33, 156 S.W.2d at 971 (finding that the trial court and the board of equalization had a "difference in judgment or opinion" and that the trial court erred in voiding the assessment of the board of equalization); *Exps. & Traders*

substantial injury.⁷⁰ Substantial injury was established when a taxpayer could prove his taxes would have been substantially lower had other property in the district been appraised at market value.⁷¹ Property owners could fight the government's attempt to collect a tax that was unequal or excessive, even during a delinquency proceeding.⁷²

C. *The Texas Property Tax Code*

The Texas Property Tax Code⁷³ was adopted by the state legislature in 1979 and became effective January 1, 1982.⁷⁴ The Tax Code established independent appraisal districts as subdivisions of the state in all counties within Texas.⁷⁵ The purpose of the appraisal district is to value all taxable property within its jurisdictional limits so that multiple taxing units within a

Compress & Warehouse Co. v. City of Marlin, 130 S.W.2d 860, 862 (Tex. Civ. App.—Waco 1939, writ dism'd judgm't cor.) (stating that a court may not void an assessment just because a jury finds a property to be worth a different amount than the board of equalization found).

70. *Whelan v. State*, 155 Tex. 14, 22–23, 282 S.W.2d 378, 383 (1955); *Cannon*, 153 Tex. at 570, 271 S.W.2d at 417; *Whittenburg*, 153 Tex. at 210, 265 S.W.2d at 573; *Bynum v. Alto Indep. Sch. Dist.*, 521 S.W.2d 656, 659 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); *Warren Indep. Sch. Dist. v. S. Neches Corp.*, 405 S.W.2d 100, 103 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.).

71. *Whelan*, 155 Tex. at 22–23, 282 S.W.2d at 383; *Whittenburg*, 153 Tex. at 214, 265 S.W.2d at 575; *Bynum*, 521 S.W.2d at 660; *see also Bynum*, 521 S.W.2d at 660 (holding that there was no substantial injury when the appellant could not establish that his taxes would have been lower if other properties were appraised at market value).

72. *Bynum*, 521 S.W.2d at 659; *see also Whelan*, 155 Tex. at 22–23, 282 S.W.2d at 383 (noting that a taxpayer must prove substantial injury if he waits until an unequal plan of taxation is put into effect).

73. *See* TEX. TAX CODE ANN. § 1.01 (Vernon 2008) (“This title may be cited as the Property Tax Code.”).

74. Act of May 26, 1979, 66th Leg., R.S., ch. 841, §§ 1.01–63.339, 1979 Tex. Gen. Laws 2217, 2217–332 (amended 2009) (current version at TEX. TAX CODE ANN. §§ 1–43 (Vernon Supp. 2009)); CHARLES J. JACOBUS, *TEXAS REAL ESTATE LAW* 424 (4th ed. 1985); Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 888 (1982).

75. TEX. TAX CODE ANN. § 6.01 (Vernon 2008); *see also id.* § 6.02(a) (defining the boundaries of an appraisal district as identical with the boundaries of the county in which the district is located). Though appraisal review boards replaced boards of equalization after 1982, their functions were basically the same: ensure fair market valuation as well as equal and uniform taxation. Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 891–92 (1982); *see also* CHARLES J. JACOBUS, *TEXAS REAL ESTATE LAW* 424 (4th ed. 1985) (stating that the Tax Code was adopted to “clarify some of the conflicts we had in the law prior to the Property Tax Code being passed”).

county (school districts, water districts, municipalities, etc.) can levy an ad valorem property tax based on a single valuation.⁷⁶ In addition to article VIII, section 1(b) of the Texas constitution, which requires property to “be taxed in proportion to its value,” section 23.01, requires appraisal districts to appraise property at market value.⁷⁷ Furthermore, the Tax Code strictly outlines the procedures and remedies for property owners who wish to challenge their appraisals.⁷⁸

1. Appraisal Districts and the Appraisal Process

The Tax Code established appraisal districts to determine the value of taxable property in Texas.⁷⁹ Appraisal districts are overseen by a board of directors⁸⁰ who appoint both a chief appraiser⁸¹ and the members of the appraisal review board.⁸² The chief appraiser and his subordinates set the initial valuation of taxable property,⁸³ while the appraisal review board hears

76. See TEX. TAX CODE ANN. § 6.01(b) (Vernon 2008) (“[An appraisal] district is responsible for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district.”); CHARLES J. JACOBUS, TEXAS REAL ESTATE LAW 425 (4th ed. 1985) (recognizing that appraisal districts were created to standardize the appraisal process and to “require[] all school districts, levee districts, water districts, and other taxing authorities to use the same appraised value on the property”).

77. TEX. CONST. art. VIII, § 1(b); TEX. TAX CODE ANN. § 23.01(a) (Vernon Supp. 2009).

78. See TEX. TAX CODE ANN. § 41.44 (Vernon 2008) (stating the amount of time allowed to file a notice of protest); *id.* § 41.47 (setting forth the parameters within which an appraisal review board must operate in a protest hearing); *id.* § 42.01 (granting a property owner the right of appeal to a district court in the event an appraisal review board issues an adverse ruling); *id.* § 42.09 (stating that the Tax Code’s remedies are exclusive); *id.* § 42.23 (defining the scope of judicial review for the appeal of a protest); TEX. TAX CODE ANN. § 42.26 (Vernon 2008) (listing the remedies for unequal appraisal).

79. TEX. TAX CODE ANN. § 6.01(b) (Vernon 2008); Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer’s Perspective*, 13 ST. MARY’S L.J. 887, 889 (1982). *But see Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335, 340–41 (1958) (commenting that reforms attempting to consolidate the appraisal process have been “sporadic” and have had “dubious success”).

80. TEX. TAX CODE ANN. § 6.03(a) (Vernon 2008); *see also* CHARLES J. JACOBUS, TEXAS REAL ESTATE LAW 425 (4th ed. 1985) (recognizing that appraisal districts are overseen by a board of directors comprised of at least five members, each serving a term of two years).

81. TEX. TAX CODE ANN. § 6.05(c) (Vernon 2008).

82. *Id.* § 6.41(d).

83. *See id.* § 6.05(d) (authorizing the chief appraiser to maintain a staff of

disputes initiated by property owners and taxing units.⁸⁴

Although the taxing units located within a county appoint the board of directors of that county's appraisal district, the legislature laid the foundation for a more independent appraisal process in the Tax Code.⁸⁵ Section 1.15 prohibits a taxing unit from employing appraisers for the purpose of taxation,⁸⁶ while section 6.412 prohibits employees, officers, and elected officials of taxing units from serving on an appraisal review board.⁸⁷

Section 23.01 of the Tax Code requires that property be appraised "at its market value as of January 1"⁸⁸ and that "each property shall be appraised based upon the individual characteristics that affect the property's market value."⁸⁹ The Tax Code allows the chief appraiser to base the appraisal on "cost data obtained from generally accepted sources,"⁹⁰ the potential of the

"professional, clerical, and other personnel"); *id.* § 6.05(e) (allowing the chief appraiser to delegate duties to employees).

84. *Id.* § 41.01(a)(1), (2).

85. *See* TEX. TAX CODE ANN. § 6.03(a) (Vernon 2008) (limiting the circumstances in which employees and officers of taxing units are eligible to serve on the board of directors of an appraisal district). *See generally* SHAHRI MASTERS, THE EVERYTHING GUIDE TO BEING A REAL ESTATE AGENT 28 (2006) (suggesting that an appraiser who works for a real estate broker would operate under a cloud of impropriety).

86. TEX. TAX CODE ANN. § 1.15 (Vernon 2008). The Tax Code provides for one exception—an appraisal district may contract out appraisal duties to a taxing unit. *Id.* §§ 1.15, 6.05(b). If such a contract is entered into, then the chief appraiser of the appraisal district shall be the assessor for the taxing unit. *Id.* § 6.05(c); *see also id.* § 6.03(a) (forbidding a county assessor-collector from serving on the board of directors of an appraisal district if "the board enters into a contract under Section 6.05(b) or if the commissioners court of the county enters into a contract under Section 6.24(b)").

87. *Id.* § 6.412(c). *But see* TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 15 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (opining that the current system is still "at risk of being tilted" in favor of taxing units because they are the very entities that appoint the appraisal district's board of directors who, in turn, appoint both the chief appraiser and the appraisal review board).

88. TEX. TAX CODE ANN. § 23.01(a) (Vernon Supp. 2009).

89. *Id.* § 23.01(b).

90. *Id.* § 23.011 (Vernon 2008); *see* BALLENTINE'S LAW DICTIONARY 277 (3d ed. 1969) (defining "cost" as "[t]he amount of money, services, or property required to obtain a thing or to build a structure"); BLACK'S LAW DICTIONARY 373 (8th ed. 2004) (defining "cost approach" as "[a] method of appraising real property, based on the cost of building a new structure with the same utility, assuming that an informed buyer would pay no more for the property than it would cost to build a new structure having the same usefulness"); CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT 77 (1991) (suggesting that calculating the replacement cost can be achieved by taking some measurements of the foundation and square footage of residential property

property to generate current and future income,⁹¹ and the “comparable sales data” of other properties.⁹² Appraisal districts value property based on its individual characteristics using the most appropriate method, which varies depending on the property.⁹³

2. Protesting an Appraisal

Under the Tax Code, a property owner may still challenge an appraisal based on excessive or unequal valuation,⁹⁴ but there are many statutory requirements that the owner, the appraisal review board, and the courts must abide for the property owner to obtain relief. The Tax Code defines when a protest can be made, what the owner must prove to be granted relief, the scope of review for a district court reviewing the decision of an appraisal review board, and possible remedies that a district court may grant if an owner proves that he has been subjected to an excessive or unequal appraisal.⁹⁵

and then obtaining a construction estimate from a local home builder).

91. TEX. TAX CODE ANN. § 23.012 (Vernon 2008). *See generally* BLACK'S LAW DICTIONARY 779 (8th ed. 2004) (defining “income approach” as “appraising real property based on capitalization of the income that the property is expected to generate”).

92. TEX. TAX CODE ANN. § 23.013 (Vernon 2008); *see* Rudolph Bush & Kevin Krause, *Why Did This Parking Lot Jump in Appraised Value from \$7.5 Million to \$36.5 M?: City Defends Deal, But Critics Skeptical of New Assessment*, DALLAS MORNING NEWS, May 4, 2008, at 1A, available at 2008 WLNR 8329061 (noting that the Dallas Central Appraisal District used the sales data from eleven properties to appraise one downtown property); *see also* CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT 78 (1991) (claiming that tax assessments can be a useful tool in appraising a property if they are assessed at 100% and if properties in the neighborhood have been recently sold). *See generally* BLACK'S LAW DICTIONARY 990 (8th ed. 2004) (defining “market approach” as “appraising real property, by surveying the market and comparing the property to similar pieces of property that have been recently sold, and making appropriate adjustments for differences between the properties, including location, size of the property, and the dates of sale”); CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT 75–76 (1991) (stating that appraisers use the market-data method of evaluation by keeping records of sales prices of comparable properties).

93. *See* TEX. TAX CODE ANN. § 23.0101 (Vernon 2008) (requiring a chief appraiser to “consider the cost, income, and market data comparison methods” when determining the value of property); *see also* Houston R.E. Income Props. XV, Ltd. v. Waller County Appraisal Dist., 123 S.W.3d 859, 864 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (providing that a court may rely on both the market data method and the income method in appraising a property).

94. TEX. TAX CODE ANN. § 41.41(a) (Vernon 2008).

95. *See id.* § 41.44 (stating the amount of time allowed to file a notice of protest);

In a hearing before the appraisal review board, the appraisal district must establish “the value of the property by a preponderance of the evidence.”⁹⁶ If it fails to do so, the board shall rule in favor of the protesting property owner.⁹⁷ If the board determines that there are errors in the appraisal records, then it is authorized to make changes “that are necessary to conform the records to the requirements of law.”⁹⁸

In the event of an adverse ruling by the appraisal review board, a property owner may appeal to a district court.⁹⁹ “Review is by trial de novo”¹⁰⁰ and “[a]ny party is entitled to trial by jury on demand.”¹⁰¹ Section 42.26(a) of the Tax Code allows a district court to grant relief to a plaintiff who can establish that the appraisal ratio¹⁰² of his property “exceeds by at least ten percent

id. § 41.47 (stating the parameters within which an appraisal review board must operate in a protest hearing); *id.* § 42.01 (granting a property owner the right of appeal to a district court in the event an appraisal review board hands down an adverse ruling); *id.* § 42.09 (stating that the Tax Code’s remedies are exclusive); TEX. TAX CODE ANN. § 42.23 (Vernon 2008) (defining the scope of judicial review for the appeal of a protest); *id.* § 42.26 (listing the remedies for unequal appraisal); *see also* SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, TAXPAYERS’ RIGHTS, REMEDIES AND RESPONSIBILITIES 5 (2008), <http://www.window.state.tx.us/taxinfo/proptax/remedy08/96-295-08.pdf> (“Most appraisal districts will informally review your protest with you to try to resolve your concerns.”).

96. TEX. TAX CODE ANN. § 41.43(a) (Vernon 2008); *see also* Warren Indep. Sch. Dist. v. S. Neches Corp., 405 S.W.2d 100, 104–05 (Tex. Civ. App.—Beaumont 1965, writ ref’d n.r.e.) (holding that a taxpayer had been denied due process of law when a board of equalization did not allow the taxpayer to cross-examine witnesses and stating that despite the informal nature of a taxpayer protest in front of the board, a taxpayer “must be giv[en] a reasonable opportunity to develop the facts upon which the protest is based”); Bergert v. Alexander, 297 S.W.2d 895, 898 (Tex. Civ. App.—Amarillo 1957, writ ref’d) (stating that boards of equalization (the predecessors to current appraisal review boards) are quasi-judicial in nature and holding a tax assessment invalid when a board of equalization did not allow a protesting taxpayer the opportunity to present evidence).

97. TEX. TAX CODE ANN. § 41.43(a) (Vernon 2008); *see also* Bergert, 297 S.W.2d at 898 (holding that a board of equalization’s actions in not allowing a property owner to present evidence as to his true property value was unconstitutional). *But see* TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 15 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (claiming that appraisal review boards often do not abide by the law and rule in favor of an appraisal district without requiring it to meet the statutory burden of proof).

98. TEX. TAX CODE ANN. § 41.47(b) (Vernon 2008).

99. *Id.* § 42.01(1)(A).

100. *Id.* § 42.23(a).

101. *Id.* § 42.23(b).

102. *See* SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, THE PROPERTY

the median level of appraisal of a reasonable and representative sample of other properties in the appraisal district” or “the appraised value of the property exceeds the median appraised value of a reasonable number of comparable properties appropriately adjusted.”¹⁰³ In doing so, the Tax Code has placed a statutory minimum on the traditional substantial injury requirement.¹⁰⁴

The Tax Code has also restricted property owners from challenging a taxing unit during the tax collection process.¹⁰⁵ In other words, prior to the adoption of the Tax Code, a property owner could challenge a taxing unit after he had received a tax bill,¹⁰⁶ while under the Tax Code, a property owner is required to challenge the actions of the appraisal district within a specified window of time¹⁰⁷ and must prove that the property is overvalued by a certain percentage.¹⁰⁸

III. ANALYSIS

The problem in Texas is simple: the state’s constitution sets a standard that its statutory provisions cannot satisfy. On one hand,

VALUE STUDY AND HOW TO PROTEST iv (2008), <http://www.window.state.tx.us/taxinfo/proptax/protest07/96-304-07.pdf> (defining “appraisal ratio” as the “ratio of an individual property’s appraised value shown on the appraisal roll to its market value”).

103. TEX. TAX CODE ANN. § 42.26(a)(1) (Vernon 2008).

104. Edward Kliewer III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer’s Perspective*, 13 ST. MARY’S L.J. 887, 898 (1982).

105. TEX. TAX CODE ANN. § 42.09(a)(2) (Vernon 2008).

106. See Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 903–04 (1973) (stating that a taxpayer may attack an assessment during the collection process or as a defense to a suit for delinquent taxes and that “Texas courts have not imposed any uniform procedural penalty on taxpayers who delay in attacking their assessments”).

107. See TEX. TAX CODE ANN. § 41.44(a) (Vernon 2008) (requiring a notice of protest to be filed “before May 1 or not later than the 30th day after the date the notice to the property owner was delivered” in cases where the property is a homestead and “before June 1 or not later than the 30th day after the date that notice was delivered to the property owner” for most other properties); see also Steve Brown, *Tax Appraisals Are a Hot Topic*, DALLAS MORNING NEWS, May 12, 2006, at 3D, available at http://www.dallasnews.com/sharedcontent/dws/bus/columnists/sbrown/stories/DN-recol_12_bus.ART.State.Edition1.22ceb9d9.html (stating that taxpayers must protest by May 31 and describing the chaotic scene in the Dallas Central Appraisal District’s office during this time).

108. See TEX. TAX CODE ANN. § 42.26(a) (Vernon 2008) (requiring a protesting property owner to prove that the property value under dispute is at least 10% greater than “a reasonable and representative sample of other properties in the appraisal district”).

the Texas constitution requires equality in taxation,¹⁰⁹ while on the other, the Tax Code does not give appraisal districts the necessary tools to achieve that result.¹¹⁰ While the constitution requires property to be appraised according to value,¹¹¹ real world transactions indicate that this is not happening.¹¹²

If appraisal districts are, in fact, appraising commercial and high-end residential property as accurately as the existing Tax Code permits, then reform must come from either the courts or the legislature. While an attack on the constitutionality of the appraisal process and the Tax Code might seem appealing, such an action would be difficult to maintain due to the language of the Tax Code itself, which places the source of these unequal appraisals—lack of commercial and high-end residential sales data—beyond the reach of both courts and appraisal districts.¹¹³ The legislature has designated the remedies within the Tax Code as exclusive, an indication that it intends to constrain the courts' participation in the appraisal process, limiting their remedial action to the specific provisions of the Tax Code.¹¹⁴ Because such

109. TEX. CONST. art. VIII, § 1(a).

110. See Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, available at 2008 WLNR 7377010 (reporting that Ken Nolan, Chief Appraiser for the Dallas Central Appraisal District, claimed that "state law ties his hands"); Jonathan Gurwitz, *As Property Taxes Climb, Don't Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, available at 2007 WLNR 17148824 (suggesting that taxpayers blame inadequate statutory provisions—rather than appraisal districts—for unequal appraisals). See generally *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335, 384 (1958) (claiming that "[r]eal estate taxation has long suffered from the legislatures' abdication of their responsibilities" and that courts and appraisal districts "manipulate empty statutory intonations on 'value' in order to implement policies of their own selection").

111. TEX. CONST. art. VIII, § 1(b).

112. See TEX. ASS'N OF APPRAISAL DISTS., WHY DO WE NEED MANDATORY SALES DISCLOSURE IN TEXAS? 1–48 (2007), <http://www.taad.org/Need%20for%20Mandatory%20Sales%20Disclosure.pdf> (showing data from several Texas counties that establish unequal appraisals); see also *Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335, 339 (1958) ("Hence that well-intended commonplace—the statutory or constitutional requirement that every assessment be made at a uniform proportion of the realty's 'full value.' Despite adjurations of this sort, local assessors habitually disregard the prescribed proportion of 'full value' and assign lower values to most property.").

113. See *infra* Section A (discussing the problematic aspects of a lawsuit challenging the constitutionality of the Tax Code provisions).

114. Cf. TEX. TAX CODE ANN. § 41.44(a)(1) (Vernon 2008) (requiring a filing of protest before May 1 or within thirty days after the property owner receives notice of an

an attack on the Tax Code is so problematic, the surest way to bring about equality and uniformity to ad valorem taxation is to pass new legislation requiring mandatory sales price disclosure in Texas.

A. *Constitutional Challenge*

“The Legislature may not authorize that which the Constitution prohibits.”¹¹⁵ In the case of the Tax Code, the statutory provisions are facially constitutional, but the results they produce plainly offend the equality and uniformity clauses. The Code’s deficiencies hit middle-class taxpayers twice. First, taxpayers are hit with unequal appraisals when their homes are valued at close to one hundred percent of their actual value, while commercial and high-end residential properties are valued at a much lower percentage.¹¹⁶ Second, as disadvantaged as appraisal districts are in valuing various types of property, the average tax-paying homeowner is even less sophisticated in property appraisal and has even fewer tools at his or her disposal to mount a *meaningful* protest.¹¹⁷

appraisal increase); *id.* § 42.26(a) (delineating the available remedies for the victim of an unequal appraisal); *id.* § 42.09 (stating that the remedies of the Tax Code are exclusive and denying taxpayers the ability to use protest as a defense to a taxing unit’s collection of delinquent taxes).

115. *Maier v. Lasater*, 163 Tex. 356, 354 S.W.2d 923, 925 (1962).

116. See Terrence Stutz, *State Senate Hearing: Price Disclosure on Real Estate Is Urged: Dallas Officials Say Rule Would Aid Appraisals, Tax Collection*, DALLAS MORNING NEWS, June 17, 2008, at 6B, available at 2008 WLNR 11429840 (noting Dallas County Chief Appraiser Ken Nolan’s concession that a disparity exists between residential and commercial appraisals); Jonathan Gurwitz, *As Property Taxes Climb, Don’t Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, available at 2007 WLNR 17148824 (noting Bexar County Chief Appraiser Michael Amezquita’s claim that commercial property is appraised below market value).

117. Of course, it is not impossible to protest the appraised value of residential property. A study by the Texas Association of Appraisal Districts indicates that even among middle-class residential properties, there is some variation in the appraised value versus the market value, which would qualify a taxpayer for relief under section 42.26(a). TEX. ASS’N OF APPRAISAL DISTS., *WHY DO WE NEED MANDATORY SALES DISCLOSURE IN TEXAS?* (2007), <http://www.taad.org/Need%20for%20Mandatory%20Sales%20Disclosure.pdf> (publishing sales prices, appraised values, and appraisal ratios of a sample of properties throughout several Texas counties). However, the data a taxpayer would need to challenge the unequal appraisal of commercial real estate in his county are largely elusive.

A litigant may challenge a statute as unconstitutional with either a facial challenge or an as-applied challenge.¹¹⁸ Under a facial challenge, a taxpayer must show that the statute in question always operates in an unconstitutional manner.¹¹⁹ Because the substance of the Tax Code basically echoes article VIII of the Texas constitution, a facial challenge against any statute within the Code is not likely to succeed. Section 23.01 of the Tax Code has the same essential requirements as the constitution in that they both require taxation of property according to value.¹²⁰ Otherwise stated, the constitution requires the equal taxation of property according to value, while the Tax Code requires *all* property to be appraised at one hundred percent of its *market* value. Certainly there are plenty of instances where the Tax Code and its appraisal process work perfectly—namely the appraisal of middle-class residential property.

An as-applied challenge requires a court to consider the statute as it “operates in practice against [a] particular plaintiff.”¹²¹ A plaintiff attacking a statute must overcome a presumption that “the Legislature intended for the law to comply with the United States and Texas Constitutions, to achieve a just and reasonable result, and to advance a public rather than a private interest.”¹²² The first hurdle for a taxpayer bringing an as-applied challenge against the Tax Code is section 42.09, which states that the remedies outlined in the Tax Code are exclusive.¹²³ This provision seems to indicate a legislative intent to limit a taxpayer’s ability to protest an appraisal and streamline the ad valorem tax process from property appraisal to tax collection. Furthermore, it could be argued that the Tax Code’s specific protest procedures and remedies are a legislative effort to prevent courts from creating their own remedies for unequal appraisals. Specifically,

118. *See* *Kareney v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (Cochran, J., concurring) (summarizing the difference between facial and as-applied challenges).

119. *Wilson v. Andrews*, 10 S.W.3d 663, 670 (Tex. 1999).

120. *Compare* TEX. TAX CODE ANN. § 23.01(a) (Vernon 2008 & Supp. 2009) (“[A]ll taxable property is appraised at its market value.”), *with* TEX. CONST. art. VIII, § 1(b) (“All real property . . . shall be taxed in proportion to its value.”).

121. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 381 (Tex. 2002).

122. *Id.*

123. TEX. TAX CODE ANN. § 42.09 (Vernon 2008).

the pre-Tax Code case law allowed a taxpayer to challenge an unequal appraisal as late as a delinquency proceeding, while the Tax Code requires a protest to be initiated soon after the appraisal, specifies the administrative and judicial remedies, and states that those remedies are exclusive.¹²⁴

If the Eleventh Court of Appeals's decision in *Brooks v. Bachus*¹²⁵ serves as any indication, the Tax Code should be able to withstand constitutional scrutiny.¹²⁶ In *Brooks*, the appellant attempted to enjoin the Erath County Appraisal Review Board from certifying the tax rolls after he failed to exhaust his administrative remedies under the Tax Code.¹²⁷ Brooks argued that the Tax Code arbitrarily deprived him of his right to judicial review.¹²⁸ The Eleventh Court of Appeals in Eastland held that the Tax Code, "by its detailed provisions, meets the challenged requirement of due process."¹²⁹ Other courts of appeals have followed the Eleventh Court of Appeals's lead and held that a taxpayer wishing to challenge an unequal appraisal must abide by the provisions of the Tax Code if he desires relief.¹³⁰

124. Compare TEX. TAX CODE ANN. § 41.44(a)(1) (Vernon 2008) (requiring a residential property owner to file notice of protest before May 1 or within thirty days of receiving notice of an appraisal increase), *id.* § 42.26(a) (specifying the remedies for unequal appraisal), and *id.* § 42.09 (designating the remedies of the Code as exclusive and generally prohibiting taxpayers from using a protest as a defense to a taxing unit's attempt to collect delinquent taxes), with *Whelan v. State*, 155 Tex. 14, 17, 282 S.W.2d 378, 379 (1955) (providing a pre-Tax Code example where the Supreme Court of Texas allowed a taxpayer to protest during a delinquency proceeding). See generally Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 898 (1982) (referring to the remedies in the Tax Code as an "attempt[] to define what was previously an undefined injury").

125. *Brooks v. Bachus*, 661 S.W.2d 288 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

126. In *Robstown Independent School District v. Anderson*, the Supreme Court of Texas seemed to endorse the Eastland Court of Appeals's conclusion that a protesting taxpayer is limited to the provisions of the Tax Code. See *Robstown Indep. Sch. Dist. v. Anderson*, 706 S.W.2d 952, 953 (Tex. 1986) ("Any assessment after the effective date of the code must be protested before the appraisal review board or the defense of non-ownership is waived." (citing *Brooks*, 661 S.W.2d 288)).

127. *Bachus*, 661 S.W.2d at 289.

128. *Id.*

129. *Id.* at 290.

130. See *Watson v. Robertson County Appraisal Review Bd.*, 795 S.W.2d 307, 311 (Tex. App.—Waco 1990, no writ) ("The courts have regularly held that failure to follow Tax Code procedures will result in loss of the right to challenge the administrative decision in district court." (citing *Bachus*, 661 S.W.2d at 290; *Dallas County Appraisal Dist. v. Lal*, 701 S.W.2d 44, 46 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Rockdale Indep. Sch. Dist. v.*

Even if a taxpayer follows the provisions of the Tax Code through the administrative process and into a district court, the average protestor would have a difficult time basing a protest on under appraised commercial property. In *Harris County Appraisal District v. United Investors Realty Trust*,¹³¹ the Fourteenth Court of Appeals examined a district court's ability to grant a taxpayer relief under section 42.26.¹³² The court observed that while section 42.26(a) required an independent appraisal by the protestor,¹³³ section 42.26(d)¹³⁴ did not require an independent appraisal.¹³⁵ In arriving at this conclusion, the court held that the equality of an appraisal was more important than whether that appraisal reflected market value.¹³⁶

While *United Investors Realty Trust* seems to be a victory for the protesting taxpayer, it does nothing to address the problem of unequal appraisals of commercial and high-end residential real estate. The Fourteenth Court of Appeals was able to grant relief because an inequality existed *within* the Harris County tax rolls, whereas the problem of unequal appraisals is based on data *not* located in the tax rolls. Accordingly, if a taxpayer wanted to protest the undervaluation of commercial property in his district, he would have to conduct an independent appraisal of commercial property within the district. And if appraisal districts cannot accurately value commercial property, how is a less sophisticated homeowner to do the same?

Unfortunately, the pre-Tax Code case law does not provide any additional help. *Whelan v. State*¹³⁷ provides a good illustration of the pre-Tax Code remedies but also demonstrates why those

Thorndale Indep. Sch. Dist., 681 S.W.2d 225, 227 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Poly-America v. Dallas County Appraisal Dist.*, 704 S.W.2d 936, 937 (Tex. App.—Waco 1986, no writ)).

131. *Harris County Appraisal Dist. v. United Investors Realty Trust*, 47 S.W.3d 648 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

132. *Id.* at 649.

133. *Id.* at 653.

134. This provision is now located in section 42.26(a)(3). See TEX. TAX CODE ANN. § 42.26(a)(3) (Vernon 2008) (“[T]he appraised value of the property exceeds the median appraised value of a reasonable number of comparable properties appropriately adjusted.”).

135. *United Investors*, 47 S.W.3d at 653.

136. *Id.* at 654.

137. *Whelan v. State*, 155 Tex. 14, 282 S.W.2d 378 (1955).

remedies, while more favorable to the protesting taxpayer, still do not adequately address the contemporary concern with unequal appraisals. In *Whelan*, the Supreme Court of Texas announced that taxing authorities may not decide what property is included on tax rolls.¹³⁸ The suit was initiated by the State of Texas and “other taxing units” for delinquent and unpaid taxes.¹³⁹ *Whelan* asserted as a defense that oil and gas leases and cattle were assessed arbitrarily.¹⁴⁰ Additionally, *Whelan* attempted to introduce the absence of bank deposits on the government’s tax rolls as evidence; however, the district court prevented him from doing so.¹⁴¹ On appeal, the Government did not deny the presence of those bank deposits within its jurisdiction.¹⁴² The court stated that regardless of the “practical difficulties and problems” in taxing property such as a bank deposit, “to hold that they are not taxable would require us to fly in the very face of the Constitution and the Statutes of this state” and “[t]his no court is at liberty to do.”¹⁴³ The supreme court ordered a retrial with these instructions:

If the answers of the jury show that the assessed valuation of petitioners’ properties is grossly excessive, or if the answers to the other issues satisfy the court that petitioners have suffered substantial injury by reason of the other actions of the taxing authorities complained of, the assessments of petitioners’ properties of the years 1950, 1951 and 1952 should be cancelled without prejudice to the right of taxing authorities to accept petitioners’ taxes on the basis of the valuations at which petitioners rendered their properties or to proceed under the [law].¹⁴⁴

While *Whelan* demonstrates the pre-Tax Code era’s flexibility in allowing a taxpayer to assert a constitutional defense against a

138. *Id.* at 22, 282 S.W.2d at 382–83 (“It is not for taxing authorities to decide what property shall escape taxation; that right lies alone with the people in the writing of their Constitution.”).

139. *Id.* at 17, 282 S.W.2d at 379.

140. *Id.* at 17–18, 282 S.W.2d at 379.

141. *Id.* at 20, 282 S.W.2d at 381–82.

142. *Whelan*, 155 Tex. at 20, 282 S.W.2d at 382.

143. *Id.* at 20–21, 282 S.W.2d at 382.

144. *Id.* at 26, 282 S.W.2d at 385; *see Aycock v. Travis County*, 255 S.W.2d 910, 914 (Tex. Civ. App.—Austin 1953, writ ref’d) (stating that the district court should have enjoined Travis County from collecting taxes when it used assessments that were largely based on the city of Austin’s tax rolls but valued other property under a different basis).

taxing entity's attempt to collect delinquent taxes, it also shows why the legislature more precisely defined a taxpayer's remedies in the current Tax Code. If courts did "cancel[] without prejudice" a taxing authority's attempt to collect a delinquent tax based on a series of unequal appraisals, appraisal districts would be forced to go back to square one and reappraise the same properties with the same tools that led to the unequal appraisal in the first place.

B. *New Legislation Requiring Mandatory Sales Price Disclosure*

The equality and value requirements of article VIII of the Texas constitution and the market value statutory requirements of the Tax Code are hardly unique in the United States.¹⁴⁵ Texas, however, is among a minority of states that levy an ad valorem tax but do not require the disclosure of the sales price to the appraisal district or any of the local taxing authorities at the time of the sale.¹⁴⁶

145. See ARK. CONST. art. XVI, § 5(a) (requiring property to be taxed "according to its value" and that taxation be "equal and uniform throughout the State"); CAL. CONST. art. XIII, § 1 (stating that "[a]ll property is taxable and shall be assessed at the same percentage of" its "full" and "fair market value"); FLA. CONST. art. VII, § 2 ("All ad valorem taxation shall be at a uniform rate within each taxing unit."); KAN. CONST. art. XI, § 1(b) (requiring a "uniform and equal basis of valuation and rate of taxation of all property subject to taxation"); LA. CONST. art. VII, § 18(a) (stating that ad valorem taxation shall be assessed at "a percentage of its fair market value" and "shall be uniform throughout the state"); ME. CONST. art. IX, § 8 ("All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."); N.M. CONST. art. VIII, § 1(a) (requiring that property taxes "shall be in proportion to the value thereof" and "shall be equal and uniform upon subjects of taxation of the same class"); OKLA. CONST. art. X, § 5(B) ("Taxes shall be uniform upon the same class of subjects."); TEX. CONST. art. VIII, § 1 (requiring taxation to be "equal and uniform" and "in proportion to its value"); WASH. CONST. art. VII, § 1 (stating that "[a]ll taxes shall be uniform upon the same class of property" and "[a]ll real estate shall constitute one class"); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374, 1375 (1962) ("All states require that real property . . . be assessed equally, that is, at full value or a uniform percentage thereof.").

146. See Robert P. Berrens & Michael McKee, *What Price Nondisclosure? The Effects of Nondisclosure of Real Estate Sales Prices*, 85 SOC. SCI. Q. 509, 510 (2004) (considering Kansas, Mississippi, Texas, Utah, and Wyoming as nondisclosure states); Jeremy Smoot & Paul Welcome, *Reap the Rewards from Sales Price Disclosure*, ASSESSMENT J., Summer 2003, at 5, 6 (claiming that twelve states, including Texas, do not require sales price disclosure); Rudolph Bush & Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City's Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, available at 2008 WLNR 8285936 (stating that Texas is "one of few

Each state typically requires different levels of disclosure.¹⁴⁷ Some states, such as Louisiana,¹⁴⁸ grant extensive powers to their assessors, allowing them to look into not only the transactional history of the property, but also the property owner's books and insurance records.¹⁴⁹ Not only would an appraiser operating under Louisiana's statutory regime have more access to sales price documentation, but he would have information to appraise the value of commercial property using the income approach to valuation.

Other states, such as Arkansas,¹⁵⁰ do not require actual disclosure of the sales price, but do allow an assessor access to real property transfer tax records.¹⁵¹ Rather than being levied periodically like Texas's ad valorem property tax, a real property transfer tax is assessed at the time of transfer and is usually based on a percentage of the full consideration or sales price paid for the property.¹⁵² If an assessor has access to both the percentage and

states left" that does not require disclosure of sales prices); TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 20 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (claiming that thirty-five states, as of 2007, require sales price disclosure, but only half of those use the disclosed price for ad valorem tax assessment).

147. TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 20 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (claiming that some states require disclosure for ad valorem tax valuations, while others collect only a one-time tax at the time the real estate transaction is made).

148. *See generally* LA. CONST. art. VII, § 18(a) (stating that ad valorem taxation shall be assessed at "a percentage of its fair market value" and "shall be uniform throughout the state").

149. *See* LA. REV. STAT. ANN. § 47:1957(C) (2008) (granting an assessor the right to inspect the books, accounts, and amount insured of the property owner); *id.* § 47:1958(B) (stating that an assessor shall "inquire into the purchase price paid for real property" and "acquaint himself with any sales or transfers of property of like description or value made or effected in the vicinity, within the year or years next preceding the listing for assessments then being made").

150. *See generally* ARK. CONST. art. XVI, § 5(a) (requiring property to be taxed "according to its value" and that taxation be "equal and uniform throughout the State").

151. *See* ARK. CODE ANN. § 26-60-106 (2008) (requiring the levy of a real estate transfer tax based on the "full consideration" paid for the real estate); *id.* § 26-60-108(b)(2) (giving county assessors and the public access to information concerning the real estate transfer tax).

152. *See* TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 20 (2007), <http://wayback.archive-it.org/414/20080822024454/http://>

the amount paid under the real property transfer tax, then the sales price can be determined.¹⁵³ In other words, if a transfer tax is five percent of the sales price and the transfer tax collected was \$5,000, then the sales price of the property in question would be \$100,000.

There have been at least three attempts—three house bills and three senate bills—in recent years to enact legislation that would require sales price disclosure.¹⁵⁴ Although there has been some variation in the complexity and language of the proposed bills, the basic disclosure requirement has remained consistent.¹⁵⁵ The

www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (stating that some states collect one-time “transfer fees” during the sale).

153. Arkansas law requires the levy of two real property transfer taxes under section 26-60-105 of title 26 of the Arkansas Code: a general tax of \$1.10 per every \$1,000 of purchase price and a special tax of \$2.20 for every \$1,000 of purchase price for parks, preservation of natural resources, and tourism. ARK. CODE ANN. §§ 26-60-105, 15-12-103 (2008). The tax is assessed at the time the property is sold and is based on the transaction’s “full consideration.” *Id.* § 26-60-106. The buyer of the real property is required to complete an affidavit indicating the parties to the transaction, the sales price or “full consideration,” and the date of the sale. *Id.* § 26-60-107(a)(2)(A)(v). The information on the affidavit then becomes accessible by both the public and county tax assessors. *Id.* §§ 26-60-107(d)(1)(B)(ii), 26-60-108(b)(2).

154. Tex. S.B. 444, 81st Leg., R.S. (2009); Tex. H.B. 133, 81st Leg., R.S. (2009); Tex. S.B. 270, 80th Leg., R.S. (2007); Tex. H.B. 133, 80th Leg., R.S. (2007); Tex. S.B. 243, 79th Leg., R.S. (2005); Tex. H.B. 399, 79th Leg., R.S. (2005).

155. *See* Tex. S.B. 444, 81st Leg., R.S., § 1 (2009) (proposing to add section 12.0012(a) to the Property Code: “A person may not file for record or have recorded in the county clerk’s office an instrument conveying real property under a contract for sale unless the instrument discloses the sales price of the property”); Tex. S.B. 270, 80th Leg., R.S., § 1 (2007) (proposing to add section 12.0011(a) to the Property Code: “A person may not file for record or have recorded in the county clerk’s office an instrument conveying real property under a contract for sale unless the instrument discloses the sales price of the property”); Tex. S.B. 243, 79th Leg., R.S., § 2 (2005) (proposing to add section 22.61 to the Tax Code: “Not later than the 10th business day after the date of closing on the conveyance of real property, the transferee or a person acting on behalf of a transferee shall file a real property conveyance report as provided by this subchapter disclosing information regarding the conveyance of the property”); Tex. S.B. 243, 79th Leg., R.S., § 2 (2005) (proposing to add section 22.65(a)(6) to the Tax Code which would require a transferee to include purchase price on the real property conveyance report section described in section 22.61); Tex. H.B. 133, 81st Leg., R.S., § 1 (2009) (proposing to add section 12A.001 to the Property Code: “Except as provided by this section, a person may not file for record or have recorded in the county clerk’s office an instrument conveying real property under a contract for sale unless the instrument is attached to a sales price disclosure form as described by this chapter”); Tex. H.B. 133, 80th Leg., R.S., § 2 (2007) (proposing to add section 22.61(a) to the Tax Code: “[T]he purchaser or grantee of real property under a recorded deed conveying an interest in the real property shall file a sales price disclosure report with the chief appraiser of the appraisal district established for the

most recent senate bill from the regular session of the 81st Legislature offered the simplest proposal: "A person may not file for record or have recorded in the county clerk's office an instrument conveying real property under a contract for sale unless the instrument discloses the sales price of the property."¹⁵⁶ The companion bill in the house attempted the same result; however, instead of requiring that the sales price appear on the actual instrument of conveyance, the disclosure would be contained on an attached "sales price disclosure form."¹⁵⁷ Additionally, the house bill would also give the purchaser the option of disclosing additional information surrounding the sale, such as whether the sale was financed or whether the sale of real property was a component of a larger transaction.¹⁵⁸

county in which the property is located"); Tex. H.B. 399, 79th Leg., R.S., § 3 (2005) (proposing to add section 22.61(a) to the Tax Code: "Except as provided by Subsection (d), on the sale of real property the purchaser of the property or a person acting on behalf of the purchaser shall file a sales price disclosure report with the chief appraiser of the appraisal district established for the county in which the property is located").

156. Tex. S.B. 444, 81st Leg., R.S. (2009).

157. Tex. H.B. 133, 81st Leg., R.S. (2009).

158. The complete list of relevant information that a purchaser could optionally include under this bill is:

- (1) the method used to finance the sale, including cash, seller financing, and third-party financing;
- (2) whether the sale involved property other than real property and the type of property involved in the sale, whether tangible or intangible, and if so, the portion of the sales price allocated between real property and other property;
- (3) whether the sale involved property located in more than one county and if so, the portion of the sales price or other consideration allocated to the portion of the property located in each county;
- (4) whether the sale was part of a combined sale of real property investments and, if so, the portion of the combined sales price allocated to the property subject to Section 12A.001;
- (5) whether the sale involved a tax deferred exchange under Section 1031, Internal Revenue Code of 1986 (26 U.S.C. Sec. 1031), and applicable regulations;
- (6) whether the sale was a sale of an entire business or business unit;
- (7) a statement that the sales price is provisional and a correct sales price will be submitted in an amended sales price disclosure form on or before the first anniversary of the date the initial sales price disclosure form is filed; and
- (8) a description of any unusual or extraordinary terms of the sale or transfer that affected the amount of the sales price.

Critics of mandatory sales price disclosure¹⁵⁹ emphasize that sales price is not always the most accurate way to establish the market value of a piece of real property.¹⁶⁰ But if this is so, why are appraisal districts regularly using an MLS to obtain sales data on properties for market comparison? The fact that private appraisers and real estate brokers use an MLS as a tool to determine the market value of real estate is a testament to the effectiveness of sales price as an appraisal tool.¹⁶¹ Also apparent is the fact that the properties for which appraisers have the most sales price data are the same properties that appraisers most accurately value, while the properties for which appraisal districts

Tex. H.B. 133, 81st Leg., R.S., § 1 (2009) (proposing to add section 12A.002(b) to the Property Code).

159. A prominent critic of sales price disclosure is the Texas Association of Realtors. See TEX. ASS'N OF REALTORS, 2009 PUBLIC POLICY STATEMENTS: LEGISLATIVE PRIORITIES FOR THE 81ST TEXAS LEGISLATURE 12 (2009), <http://recenter.tamu.edu/speeches/TM040709S1095.pdf> (“The Texas Association of Realtors opposes all efforts to require the disclosure of sales-price information.”).

160. See TEX. CONSERVATIVE COAL. RESEARCH INST., SALES PRICE DISCLOSURE: A \$250 MILLION TAX HIKE ON HOMEOWNERS (2006), http://www.txccri.org/publications/Sales_Price_Disclosure_LP.pdf (claiming that sales price disclosure actually limits an appraisal district’s ability to value property); TEX. ASS'N OF REALTORS, 2009 PUBLIC POLICY STATEMENTS: LEGISLATIVE PRIORITIES FOR THE 81ST TEXAS LEGISLATURE 12 (2009), <http://recenter.tamu.edu/speeches/TM040709S1095.pdf> (arguing that Florida repealed its disclosure law because it did not lead to accurate appraisals); TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 20 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (embracing mandatory sales price disclosure but warning that “[s]ales price disclosure alone does not provide the information an appraisal district needs to establish a market value”).

161. See Steve Blow, *We Won't Go Far Carrying This Tax Load*, DALLAS MORNING NEWS, Apr. 20, 2008, at 1B, *available at* 2008 WLNR 7377010 (opining that data from an MLS allows appraisal districts to keep residential properties valued at close to market value); Rudolph Bush & Kevin Krause, *Value of Hotel Site Jumps: Assessment of \$36.5 Million More in Line with City's Offer*, DALLAS MORNING NEWS, May 2, 2008, at 1A, *available at* 2008 WLNR 8285936 (reporting that the Dallas Central Appraisal District “relies heavily on sales price[s] that it obtains through an agreement with the Multiple Listing Service”); Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, HOUSTON CHRON., Nov. 11, 2008, at B2, *available at* 2008 WLNR 21557632 (claiming that Bexar County appraisers have access to 95% of all residential properties valued under \$300,000 because they are listed in the MLS); Jonathan Gurwitz, *As Property Taxes Climb, Don't Blame Appraiser*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2007, at 03H, *available at* 2007 WLNR 17148824 (stating that a “vast amount of information is available to appraisers with regard to residential home sales from the Multiple Listing Service”).

lack sales data—commercial and high-end residential—are the properties that are more often undervalued.¹⁶²

The most recent house bill would have taken at least one step to ease the fears of those who believe that sales data alone are insufficient to appraise real property. The house bill provides that “sales data disclosed under this chapter may not be used as the sole basis by the chief appraiser for increasing the appraised value of real property described in a sales price disclosure form.”¹⁶³ This provision would have two consequences: (1) appraisal districts would have to base the appraisal on more than one factor, and (2) in the event of a protest, an appraisal district would be required to support its appraisal with evidence in addition to the disclosed sales price.¹⁶⁴ Another element in the recent house bill that would have eased the fear of basing appraisals only on sales price is a list of eight optional factors that the purchaser could include on the disclosure form.¹⁶⁵ In the event that a purchaser obtained the property under circumstances in which the sales price did not adequately reflect the actual value, he would have the opportunity to give the appraisal district notice of such circumstances.

Another argument against mandatory sales price disclosure is that it intrudes on the privacy of the property owner.¹⁶⁶ While this argument might have merit under certain circumstances, it has relatively little merit in Texas, because most appraisal districts have public records that allow any person with a computer to

162. See Terrence Stutz, *State Senate Hearing: Price Disclosure on Real Estate Is Urged: Dallas Officials Say Rule Would Aid Appraisals, Tax Collection*, DALLAS MORNING NEWS, June 17, 2008, at 6B, available at 2008 WLNR 11429840 (citing a study by the Texas Association of Appraisal Districts finding that commercial property was undervalued by 40% while residential property was undervalued by only 15%).

163. Tex. H.B. 133, 81st Leg., R.S., § 1 (2009) (proposing to add section 12A.006 to the Property Code).

164. See Tex. H.B. 133, 81st Leg., R.S., § 1 (2009) (proposing to add section 12A.007(b) to the Property Code which would give a district court the authority to “order the appraisal district to comply with the applicable law” in the event a protester brings suit under section 12A.007(a)).

165. For the complete list of optional information, see *supra* note 158.

166. Robert P. Berrens & Michael McKee, *What Price Nondisclosure? The Effects of Nondisclosure of Real Estate Sales Prices*, 85 SOC. SCI. Q. 509, 510 (2004) (“The most basic defense of real estate price nondisclosure lies in common-law privacy arguments.”).

access the appraised value of all property on the tax rolls.¹⁶⁷ It would be an odd proposition indeed to claim that publication of the sales price was a violation of privacy while publication of the appraised value was not.

Louisiana's requirements, as described above, might cause a property owner some reasonable apprehension, given that Louisiana's statute gives appraisers considerable access to information that otherwise would be private, specifically the taxpayer's "books and accounts" and the property's "insured value."¹⁶⁸ However, none of the proposed house or senate bills would grant an appraisal district in Texas such broad access to this information.

Finally, sales price disclosure opponents claim that reform will cause a tax hike.¹⁶⁹ The most obvious response to this criticism is that appraisal districts do not tax; that authority is left to school districts, municipalities, counties, and their various subdivisions.¹⁷⁰ These taxing units answer to the voters within their respective boundaries. To suggest that merely giving appraisal districts better tools to more accurately appraise property would lead to a tax increase is disingenuous because it fails to account for the fact that the elected representatives of taxing units raise and levy taxes regardless of the fairness (or unfairness) of the appraisals on which those taxes are based.

167. For examples of how appraisal districts publish the appraised value of property within their jurisdiction, see the following websites: Dallas Central Appraisal District, Find Property by Name, <http://www.dallascad.org/SearchOwner.aspx> (last visited Feb. 28, 2010); Bexar County Appraisal District, Search Options, <http://www.bcad.org/ClientDB/PropertySearch.aspx?cid=1> (last visited Feb. 28, 2010); Harris County Appraisal District, Real Property Record Search, <http://www.hcad.org/records/real/default.asp> (last visited Apr. 16, 2010).

168. See LA. REV. STAT. ANN. § 47:1957(C) (2008) (granting an assessor the right to inspect the books, accounts, and amount insured of the property owner); *id.* § 47:1958(B) (stating that an assessor shall "inquire into the purchase price paid for real property" and "acquaint himself with any sales or transfers of property of like description or value made or effected in the vicinity, within the year or years next preceding the listing for assessments then being made").

169. TEX. CONSERVATIVE COAL. RESEARCH INST., SALES PRICE DISCLOSURE: A \$250 MILLION TAX HIKE ON HOMEOWNERS 2-3 (2006), http://www.txccri.org/publications/Sales_Price_Disclosure_LP.pdf.

170. See TEX. TAX CODE ANN. § 26.05(a) (Vernon 2008) ("The governing body of each taxing unit . . . shall adopt a tax rate for the current tax year and shall notify the assessor for the unit of the rate adopted.").

Furthermore, the purpose of this Recent Development is neither to engage in economic speculation as to exactly how sales price disclosure would affect the amount of tax revenue collected by Texas nor to advocate for or against a particular economic policy towards taxation. The purpose of this Recent Development is to examine the best way to reconcile the Tax Code with the Texas constitution. Certainly the legislature can figure out better ways to use the Tax Code to incentivize business and economic growth than to allow the ad valorem tax to be administered in such a non-uniform and unequal manner. That being said, it seems clear that such reform would, at the very least, cause a shift in the tax burden from the middle-class homeowners to the commercial and high-end residential owners.¹⁷¹

Without sales price data, appraisers face a tough challenge in accurately assessing the fair market value of all property in a district.¹⁷² Robert P. Berrens of the University of New Mexico and Michael McKee of the University of Tennessee argue that sales price disclosure has an added benefit to the tax-paying public. Sales price disclosure reduces an appraisal district's administrative burden since homeowners are more likely to challenge their appraisals in a climate where there is consistent undervaluing and overvaluing and inequality.¹⁷³ As further evidence, appraisal

171. See Janet Elliott, *The Legislature: Tuition Freeze One Priority for '09 Session: Keeping College Affordable Among Lawmakers' Goals*, HOUSTON CHRON., Nov. 11, 2008, at B2, available at 2008 WLNR 21557632 (reporting on Texas State Representative Mike Villarreal's push for sales price disclosure as a way to prevent unequal taxation between "middle-income homeowners" and the owners of "million-dollar homes and business properties").

172. See Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 889 (1973) (noting the difficulty from the perspective of an appraiser of accurately valuing property because the taxpayer is "generally under no practical compulsion to reveal the full extent of his holdings"); TEX. TASK FORCE ON APPRAISAL REFORM, FINDINGS AND RECOMMENDATIONS 19 (2007), http://wayback.archive-it.org/414/20080822024454/http://www.governor.state.tx.us/priorities/appraisal_reform/files/report.pdf (noting testimony from appraisal districts claiming that they could do a better job of valuing property with more information). *But see Tax Assessments of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335, 336-37 (1958) ("The local officials who are responsible for making assessments often occupy positions of unique autonomy, partly because they may enjoy political independence from local spending authorities, and partly because they invariably function under imprecise state legislation which leaves them free to devise their own valuation standards.").

173. Robert P. Berrens & Michael McKee, *What Price Nondisclosure? The Effects of Nondisclosure of Real Estate Sales Prices*, 85 SOC. SCI. Q. 509, 511-12 (2004).

offices in Kansas have seen a steady decline in protests and appeals since instituting a version of sales price disclosure.¹⁷⁴

Realistically, no single method ensures an accurate appraisal; instead, data must be collected from a variety of different sources depending on the type of property being assessed.¹⁷⁵ The more tools that appraisers have at their disposal, the more accurately they can value any given piece of property.¹⁷⁶

IV. CONCLUSION

The taxpayer who lives in a mansion benefits from the local police department that patrols his street and the fire department that protects his house. The taxpayer who owns a commercial or industrial site also benefits from the public schools that prepare his future workforce for employment. Yet these property owners are paying much lower percentages of their property's market value in taxes than their middle-class residential neighbors.

One of the most basic functions of government in the United States is the protection of life, liberty, and property.¹⁷⁷ Because liberty is not easily quantifiable and because all taxpayers presumably have only one life, the only thing that truly differentiates citizens is the amount of property they own. Thus, a person who owns more property benefits from more government

174. Jeremy Smoot & Paul Welcome, *Reap the Rewards from Sales Price Disclosure*, ASSESSMENT J., Summer 2003, at 5, 6.

175. See Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374, 1394 (1962) ("If statistically sound sampling techniques are employed, care taken to keep the data up to date, efforts made to discover actual market prices through use of questionnaires and other methods, and sample appraisals added in areas lacking a significant annual turnover of property, the sale-ratio method can, at a relatively modest cost, fulfill a state's obligation to provide an adequate indication of prevailing assessment levels."); CAROLYN JANIK, HOW TO SELL YOUR HOME IN THE '90S WITH LESS STRESS AND MORE PROFIT 73 (1991) (defining "fair market value" as "the closing price, the highest price a ready, willing, and able buyer will pay and the lowest price a ready, willing, and able seller will accept" (emphasis omitted)).

176. See TEX. ASS'N OF APPRAISAL DISTS., WHY DO WE NEED MANDATORY SALES DISCLOSURE IN TEXAS? (2007), <http://www.taad.org/Need%20for%20Mandatory%20Sales%20Disclosure.pdf> (concluding that more access to sales data will allow appraisals to more accurately reflect true value).

177. See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.").

protection and therefore should pay a greater portion of the tax pie. When a person wealthy in property does not pay his or her fair share of taxes to the government to protect that property interest, it follows *a fortiori* that that person is handing his or her tax burden over to the rest of society at large.

It is clear that appraisal districts and taxing units in Texas are implementing a system of taxation that is unequal and unfair and that this implementation is occurring on a statewide basis. Middle-class homeowners in Texas are shouldering a disproportionate tax burden when compared with that carried by commercial and high-end residential property owners. With no state income tax and a state and local sales tax capped at 8.25%, Texas depends heavily on local ad valorem property taxes to fund the capital improvements and operations of counties, municipalities, and school districts.¹⁷⁸ When the Dallas Central Appraisal District reappraised several pieces of downtown commercial real estate in the aftermath of the city's negotiations to buy an expensive downtown parking lot, that reappraisal shed light on the ugly reality that property owners in the central business district were receiving the benefit of government services without paying their fair share of the bill.

The procedural requirements and remedies outlined in the Texas Property Tax Code appear to be inadequate when viewed against the backdrop of multiple studies that indicate the regular inequality of appraisals.¹⁷⁹ While the Tax Code has made

178. Edward Kliever III & Scott E. Breen, *The New Property Tax Code and Perfecting the Appeal: The Taxpayer's Perspective*, 13 ST. MARY'S L.J. 887, 887 (1982); see also Mark G. Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 TEX. L. REV. 885, 885 (1973) ("Most communities across the country rely substantially on the property tax to support public services including police and fire protection, sewage disposal, roads, hospitals, and public schools."); SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, TAXPAYERS' RIGHTS, REMEDIES AND RESPONSIBILITIES (2008), <http://www.window.state.tx.us/taxinfo/proptax/remedy08/96-295-08.pdf> (stating that the "property tax is the largest funding source for local services in Texas").

179. See MICHAEL A. AMEZQUITA, BEXAR APPRAISAL DIST., RECOMMENDATIONS FROM BEXAR APPRAISAL DISTRICT (on file with the *St. Mary's Law Journal*) (indicating the unequal appraisals of commercial and residential real estate); TEX. ASS'N OF APPRAISAL DISTS., WHY DO WE NEED MANDATORY SALES DISCLOSURE IN TEXAS? (2007), <http://www.taad.org/Need%20for%20Mandatory%20Sales%20Disclosure.pdf> (indicating the unequal appraisals of high-end and middle-class real estate). See generally Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374, 1384 (1962) (claiming that the protest and appeal process is the "weakest spot in the

substantial improvements in the creation of more independent, accountable appraisal districts, it has failed to deal with the true problem—the extraordinarily difficult task of determining the value of property. For the most part, appraisal districts are no better at the job of valuing property than their pre-Tax Code predecessors. A stark and obvious exception to this is the ability of an appraisal district, with the help of an MLS, to accurately appraise a middle-class residential property. The benefit of using sales price data to appraise homes is most convincing when one considers that the properties most accurately valued are the same for which sales data are most easily accessed by appraisal districts.

One thing is abundantly clear: the State of Texas must equip appraisal districts with the necessary tools to discover the market data sorely needed to equalize appraisals throughout the state. As it stands, many homeowners are stuck between a rock and a hard place or, perhaps better said, between an unequal appraisal and an inadequate Tax Code.

whole property tax structure”).