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# COMMENTS

## JUDICIAL PROMULGATION OF LEGISLATIVE POLICY: EFFICIENCY AT THE EXPENSE OF DEMOCRACY

by  
*Becky Stern*

### I. INTRODUCTION

**P**UBLIC school financing has long been one of the most complex areas of social policy. The perpetual problems faced by property-poor school districts have been at the forefront of public concern and awareness for many years. As a result of such concerns, legislatures have been continually reevaluating state educational funding programs. Unfortunately, legislative actions have failed to remedy the inequalities generated by funding systems based on local property wealth.<sup>1</sup> Because of legislative inability to eradicate disparities, these problems have recently been taken to the courts.<sup>2</sup> Concerned citizens of many states are now taking their complaints regarding legislatively imposed financing programs to the judiciary for resolution. The public attempt to use the courts, rather than the traditional legislative process, to remedy such problems is but a symptom of the nation's growing tendency to use the easiest and most convenient method to solve complex issues.<sup>3</sup> As this paper will demonstrate, such ease and convenience comes at the expense of one of the central tenets of our democratic form of government; namely, the separation of powers doctrine.

The Texas Supreme Court recently acquiesced to pressures imposed by citizens seeking relief from the present system of public school financing in Texas. In *Edgewood Independent School District v. Kirby (Edgewood I)*,<sup>4</sup> sixty-eight school districts, as well as individual schoolchildren and parents, successfully argued that the state's system of public school financing was unconstitutional. The supreme court's decision included an injunction which prohibited the state from funding the public school system after May 1, 1990, unless the legislature remedied the constitutional problems in the

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1. See *infra* notes 13-23 and accompanying text.

2. See *infra* notes 13, 160.

3. See *infra* notes 199-208 and accompanying text.

4. 777 S.W.2d 391 (Tex. 1989) [hereinafter *Edgewood I*].

existing system.<sup>5</sup> As a result, the Texas Legislature passed Senate Bill 1 which adopted a new program for school financing;<sup>6</sup> however, on September 24, 1990, the District Court for Travis County held the new program unconstitutional as well.<sup>7</sup> Nevertheless, the district court vacated the supreme court's injunction and required the legislature to adopt yet another program for school financing by September 1, 1991.<sup>8</sup> The district court's opinion also made clear that, should an adequate solution not be forthcoming, a court-imposed program would go into effect.<sup>9</sup> In *Edgewood II*, the Texas Supreme Court reviewed both the district court's decision and Senate Bill 1.<sup>10</sup> Again, the court concluded that the Texas Legislature's scheme for public school financing was unconstitutional.<sup>11</sup> Furthermore, the court reinstated its previous injunction, but stayed its effects until April 1, 1991.<sup>12</sup> The court's actions in this case constitute a novel intrusion into what has, in Texas, historically been considered a legislative function. In this comment I will demonstrate that the determination of the appropriate system for public school financing constitutes a political question and, as such, is nonjusticiable. While the problems with educational financing clearly warrant attention, this comment will demonstrate that courts are not the appropriate forums for dealing with such problems.

Section II will be devoted to an historical analysis of education law in Texas. The discussion will include an overview of the education provisions in the eight Texas constitutions as well as the statutory schemes adopted to implement the constitutional requirements. In addition, this section will summarize the state's current public school financing program. Section III will survey the current state of the law in the area of public school financing. Through an examination of various state court decisions, this section will consider the alternatives available to courts faced with public school financing litigation. Section IV will demonstrate that application of the political question doctrine is the appropriate alternative for courts to use in school financing cases and, in particular, should have been the Texas Supreme

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5. *Id.* at 399.

6. Act of June 7, 1990, 71st Leg., 6th C. S., ch. 1, 1990 Tex. Gen. Laws 1.

7. *Edgewood Indep. School Dist. v. Kirby*, No. 362516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Sept. 24, 1990), judgment vacated in part, 804 S.W.2d 491 (Tex. 1991) [hereinafter *Edgewood II*].

8. *Id.* at 39.

9. *Id.*

10. *Edgewood II*, 804 S.W.2d 491 (Tex. 1991).

11. *Id.* at 491.

12. *Id.* at 492. Since the time of this writing, the legislature adopted yet another program for public school financing. Act of April 11, 1991, ch. 20, §§ 16.001-21.930, 1991 Tex. Sess. Law Serv. 20 (Vernon). Known as the "Robin Hood" plan, the program shifts funds from property-rich school districts to property-poor districts, imposes a minimum property tax rate, and increases state aid to education. *Id.* §§ 16.252, 16.501; see also *Highlights of the "Robin Hood" School Finance Plan*, Dallas Morning News, Aug. 8, 1991, at 1A, col. 3. Unhappy with the consequences of the new financing system, a number of property-rich districts went to court to challenge the constitutionality of the new plan. In an historic decision, the district court upheld the Robin Hood Plan. See *Judge OKs Texas School Finance Law*, Dallas Morning News, Aug. 8, 1991, at 1A, col. 1. The issue does not appear to be resolved, however, since the property-rich districts plan to appeal the district court's decision. *Id.*

Court's response in *Edgewood I & II*. Additional concerns raised by this type of litigation will also be presented to emphasize the nonjusticiable nature of the current controversies. Section V will conclude the article.

## II. HISTORICAL BACKGROUND

Much public school financing litigation has been based on the considerable disparities in per pupil expenditures found among districts.<sup>13</sup> In order to better understand why current state programs are failing to remedy the problems faced by property-poor school districts, a review of the development of educational financing is appropriate. In particular, a review of Texas educational financing, while admittedly peculiar to the state, will be instructive on how the current financial disparities between districts have arisen in many states.

Education law in Texas, as well as in many other states, has been primarily a combination of constitutional and statutory law.<sup>14</sup> The Texas Constitution delegates educational authority to the legislative branch of government.<sup>15</sup> The constitution not only defines the limits of legislative authority but also serves as a guideline for meeting educational requirements.<sup>16</sup> Since the constitution is not self-executing, the Texas Legislature enacts statutes in order to implement the constitutional requirements.<sup>17</sup> The first part of this section will consider the evolution of the education provisions of the eight Texas constitutions<sup>18</sup> and the statutory schemes designed to implement their requirements. In so doing, this section will (1) highlight the historical problems faced in financing the Texas educational system and, (2) shed light on the problems property-poor school districts now face. The second part of the discussion will review the current financing structure of Texas public schools.

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13. See *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635, 637 (1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 761 (Md. 1983); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, 276 (1973); *Board of the City School Dist. of Cincinnati v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813, 815 (1979).

14. Administrative and case law also constitute sources of education law in Texas. C. FUNKHOUSER, *EDUCATION IN TEXAS: POLICIES, PRACTICES, AND PERSPECTIVES* 60-63 (5th ed. 1986).

15. TEX. CONST. art. VII, § 1.

16. TEX. CONST. art. VII, §§ 1, 3.

17. See C. FUNKHOUSER, *supra* note 14, at 60-63.

18. The first constitution was adopted in 1827 and was entitled CONSTITUTION OF THE STATE OF COAHUILA Y TEXAS (1827), reprinted in 1 H. GAMMEL, *LAWS OF TEXAS* 423 (1898). 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 219 (W. Swindler ed. 1979) [hereinafter W. Swindler]. Seven other constitutions governed the State of Texas, including: Plans and Powers of the Provisional Government of Texas (1835), reprinted in TEX. CONST. app. 511 (Vernon 1955); Constitution of the Republic of Texas (1836), reprinted in TEX. CONST. app. 523 (Vernon 1955); TEX. CONST. of 1845; TEX. CONST. of 1861; TEX. CONST. of 1866; TEX. CONST. of 1869; and TEX. CONST. See Watts & Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 776 n.19 (1990). See also W. Swindler, *supra*, at 240-351.

A. *Education and the Texas Constitutions*

The first Texas Constitution was promulgated by the Mexican government in 1827.<sup>19</sup> Although the Mexican government authorized a system of municipal education, the Texas residents were poor and, as a result, the government failed to vigorously pursue a structured, reliable system of statewide education.<sup>20</sup> A second constitution<sup>21</sup> was promulgated by the Mexican authorities in 1833; however, it also failed to promote a strong educational system for the state.<sup>22</sup> In fact, one reason Texans revolted against the Mexican government was its failure to provide an adequate system of public schools.<sup>23</sup> Needless to say, when Texas achieved its independence from Mexico, the framers of the new constitution made little use of the educational provisions from the earliest state constitutions.

The Republic of Texas promulgated its first constitution in 1836 and required the legislature to provide the state with a system of public education.<sup>24</sup> Despite the high-minded ideals espoused by the framers of the new constitution, the first Texas legislature failed to adopt any provisions for the financing of a statewide system of education.<sup>25</sup> The legislature's inaction was likely a result of the fact that the state government was virtually penniless.<sup>26</sup> When the legislature did finally enact a law for the financing of public schools, they did so through a system of land grants.<sup>27</sup> Between 1839 and

19. CONSTITUTION OF THE STATE OF COAHUILA Y TEXAS (1827), *reprinted in* 1 H. GAMMEL, *LAWS OF TEXAS* 423 (1898); *see* W. Swindler, *supra* note 18, at 219-39.

20. *See* C. FUNKHOUSER, *supra* note 14, at 145.

21. Plans and Powers of the Provisional Government of Texas (1835), *reprinted in* TEX. CONST. app. 511 (Vernon 1955).

22. *See* W. Swindler, *supra* note 18, at 240.

23. The Texas Declaration of Independence of 1836 illustrated the hostility felt toward the Mexican government when it stated that the Mexican government had:

failed to establish any public system of education, although possessed of almost boundless resources, (the public domain), and although it is an axiom in political science, that unless a people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self-government.

F. Eby, *The First Century of Public Education in Texas*, Centennial Handbook, Texas Public Schools, 1854-1954, Texas Education Agency (1954), *reprinted in* C. FUNKHOUSER, *supra* note 14, at 145. *See also* The Declaration of Independence of the Republic of Texas (1836), *reprinted in* TEX. CONST. app. 519 (Vernon 1955).

24. "It shall be the duty of congress, as soon as circumstances will permit, to provide by law, a general system of education." Constitution of the Republic of Texas, General Provisions § 5 (1836), *reprinted in* TEX. CONST. app. 523 (Vernon 1955). *See also* 1 H. GAMMEL, *LAWS OF TEXAS* 1078-79 (1898).

25. F. STEWART & J. CLARK, *THE CONSTITUTION AND GOVERNMENT OF TEXAS* 103 (1933). *See also* Watts & Rockwell, *supra* note 18, at 777.

26. *See* C. FUNKHOUSER, *supra* note 14, at 146.

27. To Texas pioneers, the accepted method of founding educational institutions was to endow them with large tracts of land. The founders of Texas were inspired by the vision of an empire where every child would receive a general education on the bounty of their state . . .

Fabulously rich in unoccupied land but lacking income, the great-hearted Texans proposed to found a school system, from the primary grade through the university, entirely on the bounty of the state. The "boundless resources" dedicated to the education of oncoming generations would, they believed, make the imposition of fees and taxes forever unnecessary.

C. FUNKHOUSER, *supra* note 14, at 145-46.

1840 the legislature set aside over four million acres of land to be used for the establishment of a primary school system.<sup>28</sup> Despite these generous grants of land, however, a statewide educational system was not forthcoming.<sup>29</sup>

Texas joined the Union in 1845, and soon thereafter a constitutional convention adopted the first constitution of the State of Texas.<sup>30</sup> The new constitution required, in stricter language than before, that the state legislature implement, support, and maintain a system of free public schools for the state.<sup>31</sup> Taxation was the mechanism selected to finance the state's public schools.<sup>32</sup> Article X, section 2 of the 1845 Constitution required the legislature to allocate at least ten percent of the total revenues generated through state property taxes to the establishment of a perpetual public school fund.<sup>33</sup> Once again, the state legislature ignored the constitutional requirement, and no "perpetual fund" was forthcoming until 1854.<sup>34</sup> In fact, the initial deposit into the permanent endowment did not even come from tax revenues.<sup>35</sup> Rather, the first money invested in the permanent school fund was supplied by an act of the United States Congress.<sup>36</sup> Through this legislation, Texas received a \$2 million recovery stemming from a boundary dispute with New Mexico.<sup>37</sup> However, almost as soon as the special school fund was created,

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28. "Between 1839 and 1840 the Republic of Texas had granted 4,209,413 acres of land to support its educational system. The funds secured from the sale and lease of these lands were given to the counties unconditionally, with Congress retaining no supervisory powers over the money." Watts & Rockwell, *supra* note 18, at 777. See also TEX. CONST. art. VII, § 2, interp. commentary 379 (Vernon 1955).

29. "There was no evidence that any county in early times used its lands for the establishment of schools." F. STEWART & J. CLARK, *supra* note 25, at 103. See also C. FUNKHOUSER, *supra* note 14, at 146 ("The only school established by the land grant policy adopted by the Texas congress of 1839-40 was the semi-public San Augustine University.").

30. TEX. CONST. of 1845. See also Watts & Rockwell, *supra* note 18, at 776 n.19.

31. "A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provision for the support and maintenance of public schools." TEX. CONST. of 1845, art X, § 1.

32. "Special acts were passed by the legislature authorizing the following cities and counties to levy taxes for the support of free schools: Galveston (1846); Corpus Christi (1846); and the County of Galveston (1848). In 1847 Galveston launched the first municipal public school supported by taxation." C. FUNKHOUSER, *supra* note 14, at 147.

33. The legislature shall, as early as practicable, establish free schools throughout the State, and shall furnish means for their support, by taxation on property; and it shall be the duty of the Legislature to set apart not less than one-tenth of the annual revenue of the State derivable from taxation, as a perpetual fund, which fund shall be appropriated to the support of free public schools; and no law shall ever be made diverting said fund to any other use; and until such time as the Legislature shall provide for the establishment of such schools, in the several districts of the State, the fund thus created shall remain as a charge against the State, passed to the credit of the free common-school fund.

TEX. CONST. of 1845, art. X, § 2. See also Watts & Rockwell, *supra* note 18, at 778.

34. "Every governor of the state during this period insisted that the Legislature should establish a system of schools, but nothing was done until 1854." See C. FUNKHOUSER, *supra* note 14, at 147.

35. See Watts & Rockwell, *supra* note 18, at 778.

36. *Id.*

37. T. FEHRENBACH, LONE STAR - A HISTORY OF TEXAS AND THE TEXANS 303 (1968).

the Texas Legislature loaned the funds to the railroads.<sup>38</sup>

Texas seceded from the Union in 1861, and the first confederate constitution was adopted in that year.<sup>39</sup> The education article included in the 1861 Constitution mirrored almost exactly the earlier provision.<sup>40</sup> However, serious economic problems stemming from the state's involvement in the Civil War prevented the railroads from repaying loans taken from the school fund.<sup>41</sup> In turn, the state was unable to continue disbursing money to the schools.<sup>42</sup> By the end of the Civil War, the permanent school fund was completely devoid of funds.<sup>43</sup> In fact, between 1861 and 1865 no funds were disbursed for the support of the state's schools.<sup>44</sup>

Learning from past mistakes, the framers of the 1866 Constitution limited the legislature's control over the new permanent school fund.<sup>45</sup> The Reconstruction constitution included a detailed education provision and required that new lands be allocated to a new permanent school fund.<sup>46</sup> However, the federal government nullified the 1866 Constitution,<sup>47</sup> and it was not until 1869 that the state finally adopted a constitution acceptable to the United States government.<sup>48</sup> The invalidation of the Reconstruction constitution and the need to promulgate a new constitution for the state may explain why

38. In the election of 1853, the need for schools and railroads was the paramount issue. Elisha M. Pease's gubernatorial platform called on the legislature to set apart \$2,000,000 of United States Bonds for a "Special School Fund" and that this be loaned for the building of railroads. Pease's election by an overwhelming vote insured action.

C. FUNKHOUSER, *supra* note 14, at 148. See also JOURNAL OF THE SECESSION CONVENTION OF 1861, at 160 (1912):

By an act of the legislature of date January 31st, 1854, two million of the United States five per cent bonds were set aside as a fund for the support of free schools, the bonds to be loaned to railroads and the interest accruing to be distributed among the counties. By another act the one-tenth of the revenue which had previously accrued, and were afterwards to accrue, were required also to be invested in the five per cent bonds and loaned in the same manner. Other acts required the proceeds arising from the sale of the public domain to be added to the school fund.

*Id.*

39. TEX. CONST. of 1861.

40. TEX. CONST. of 1861, art. X.

41. See C. FUNKHOUSER, *supra* note 14, at 149.

42. In 1864, the railroads successfully lobbied the Legislature to be allowed to use worthless Confederate treasury warrants to pay a large portion of the \$1 million in interest the state owed on the \$2 million borrowed from the permanent school fund between 1858 and 1861. By the end of the Civil War, the funds gained from the New Mexico land settlement were practically gone. Repudiation also "prevented the state from repaying \$1,137,406 that it had borrowed" from the permanent school fund.

*Id.* (footnotes omitted) (quoting C. MONEYHON, REPUBLICANISM IN RECONSTRUCTION TEXAS 39 (1980)).

43. See C. MONEYHON, *supra* note 42, at 17.

44. F. STEWART & J. CLARK, *supra* note 25, at 104.

45. "The Legislature shall have no power to appropriate or loan or invest except as follows, any part of the principal sum of the perpetual school fund for any purpose whatever . . . ." TEX. CONST. of 1866, art. X, § 5.

46. TEX. CONST. of 1866, art. X, § 3 (provision setting aside lands for the permanent school fund).

47. See C. FUNKHOUSER, *supra* note 14, at 149.

48. *Id.* at 149-50.

no funds were disbursed to the schools until 1870.<sup>49</sup>

The 1869 Constitution was Texas's fifth constitution in 33 years.<sup>50</sup> Article IX, section 1 of the constitution provided that "[i]t shall be the duty of the Legislature of this State, to make suitable provisions for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years."<sup>51</sup> In order to meet the constitutional requirements, Governor Davis's administration created a highly centralized system of government that spent extravagantly.<sup>52</sup> The new school law enacted by the legislature in 1871 centralized control of the state's public schools under a state superintendent.<sup>53</sup> The centralized system of education contributed heavily to the government's increasing expenditures and, although taxes were increased,<sup>54</sup> the state sunk further and further into debt.<sup>55</sup> In 1871, funds for public schools were a combination of the permanent fund, poll taxes, general taxes, and local taxes.<sup>56</sup>

In response to the almost militaristic rule imposed by Governor Davis and the Radical Republicans, a taxpayers' convention was called in 1871 which resulted in the Democrats regaining control of the legislature in 1872.<sup>57</sup> The new legislature quickly returned control of the public schools to the local authorities.<sup>58</sup> However, by 1875 the Democrats concluded that, in order to remedy the evils of the Davis administration and the 1869 Constitution, a new state constitution was necessary. As a result, a constitutional convention convened in 1875.<sup>59</sup>

The convention resulted in the adoption of the eighth and final Texas

49. See *supra* notes 31-34 and accompanying text.

50. See C. FUNKHOUSER, *supra* note 14, at 150. The convention called to promulgate the new constitution was led by a group of Radical Republicans. T. FEHRENBACH, *supra* note 37, at 411. In addition, E. J. Davis, a radical republican, was elected governor and was supported further by the election of a radical legislature. W. BENTON, *TEXAS POLITICS - CONSTRAINTS AND OPPORTUNITIES* 18 (5th ed. 1984).

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

52. See Watts & Rockwell, *supra* note 18, at 782.

53. Act approved Apr. 24, 1871, 12th Leg., R.S., ch. 56, 1871 Tex. Gen. Laws 57, 6 H. GAMMEL, *LAWS OF TEXAS* 959-62 (1898). See also T. FEHRENBACH, *supra* note 37, at 419 (discussing how the control of education was taken completely from the public).

54. "In 1866, the legislature levied an ad valorem tax of \$.225 per hundred dollars and a \$1 poll tax to finance state government. By 1871, that tax burden increased to \$2.175 per one hundred dollar valuation, with a \$2 poll tax." Watts & Rockwell, *supra* note 18, at 782 n.60 (citing T. FEHRENBACH, *supra* note 37, at 419).

55. "Davis estimated in 1871 that the cost of schools would be \$5.38 million. Davis calculated that in 1871, the entire assets of the school fund constituted \$2.5 million." Watts & Rockwell, *supra* note 18, at 783 n.60.

56. Public schools were financed through "(1) the income from the permanent fund; (2) one-fourth of the annual revenues from general taxation; (3) a poll tax from every voter between twenty-one and sixty years of age; and (4) local taxation sufficient to provide school-houses." F. STEWART & J. CLARK, *supra* note 25, at 105. The system "proved outrageously extravagant. In four years it heaped up a debt of over a million dollars, which was ruinous to a state so recently impoverished by war." C. FUNKHOUSER, *supra* note 14, at 150.

57. See Watts & Rockwell, *supra* note 18, at 783-84.

58. *Id.* at 784.

59. *Id.*

Constitution.<sup>60</sup> Article VII, section 1 of the 1876 constitution is indicative of the delegates' commitment to the state's educational system. The article placed primary responsibility for establishing, maintaining, and supporting a system of public schools on the state legislature.<sup>61</sup> However, since the state suffered from a massive Reconstruction debt in 1876, it lacked the financial capacity to achieve the high ideals announced in the education provision.<sup>62</sup> Although property taxes steadily increased, the state continued to experience budget deficits.<sup>63</sup> Section 1's scheme was intended to tax all citizens equally through a statewide system of taxation.<sup>64</sup> However, recognizing the onerous tax burdens already imposed on the state's citizens, the delegates included Article VII, section 3 to restrict the legislature's ability to levy new taxes on the overtaxed population.<sup>65</sup> The 1876 constitution did not enable local districts to tax for the support of the public schools.<sup>66</sup> Rather, Article VII, section 5 required revenues generated through state taxes to be put into a state-controlled school fund that would be "distributed to the several counties according to their scholastic population."<sup>67</sup> To implement this constitutional requirement, the 1876 convention enacted a statute which required that state funds be disbursed to the schools on a per capita basis.<sup>68</sup> Therefore, while the administration of public schools was extremely decentralized, school financing remained primarily a state concern.<sup>69</sup>

Incorporated cities were an exception to the general ban on local taxation. In fact, incorporated cities were the only local entities with authority to levy local taxes to supplement the funds provided by the state government.<sup>70</sup> Ar-

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60. TEX. CONST.

61. "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of free public schools." TEX. CONST. art. VII, § 1. "The purpose of this section as written was not only to recognize the inherent power in the Legislature to establish an educational system for the state, but also to make it the mandatory (sic) duty of that department to do so." *Mumme v. Marrs*, 120 Tex. 383, 395, 40 S.W.2d 31, 35 (1931).

62. E. MILLER, *A FINANCIAL HISTORY OF TEXAS 191-96* (1916). See also *Watts & Rockwell*, *supra* note 18, at 796 (suggesting that delegates to 1875 convention intended to impose a prospective duty on future legislatures to comply with the requirements of Article VII, § 1).

63. See *Watts & Rockwell*, *supra* note 18, at 795.

64. TEX. CONST. art. VII, § 1 (1876, amended 1989).

65. "There shall be set apart annually not more than one-fourth of the general revenue of the State, and a poll tax of one dollar on all male inhabitants in this state between the ages of twenty-one and sixty years, for the benefit of the public free schools." TEX. CONST. art. VII, § 3.

66. TEX. CONST. of 1876.

67. TEX. CONST. art. VII, § 5.

68. Law approved Aug. 19, 1876, 15th Leg., R.S., ch. 120, §§ 1, 15, 1876 Tex. Gen. Laws 199, 201, 8 H. GAMMEL, *LAW OF TEXAS* 1035, 1037 (1898).

69. The 1876 constitution provided for the creation of cities rather than school districts and the Texas Supreme Court, in *City of Fort Worth v. Davis*, 57 Tex. 225 (1882), concluded that the framers of the constitution did not intend for the local districts to have taxing authority. See *Watts & Rockwell*, *supra* note 18, 807-08.

70. In *Davis*, the Texas Supreme Court concluded that Article XI, § 10 was an exception to the general prohibition against local taxation. Section 10, according to the court, allowed cities that were already taxing under their local charters to continue to do so. TEX. CONST. art. XI, § 10 (1876, repealed 1969); *Davis*, 57 Tex. at 233-34.

ticle XI, section 10's exception resulted in marked differences between the rural and urban areas' ability to subsidize public education.<sup>71</sup> Many felt that rural areas should be given the same opportunity as the incorporated cities to subsidize education.<sup>72</sup>

By 1879 it was clear that the state could no longer provide sufficient funding for state schools.<sup>73</sup> The legislature responded to Governor Robert's veto of the 1879 school appropriations bill by decreasing the schools' portion of state revenues from one-fourth to one-sixth.<sup>74</sup> In an attempt to increase revenues without raising taxes, the legislature passed a bill in 1879 that allowed for the sale of state lands that had been held in trust for the state schools.<sup>75</sup> However, most of the land was sold or leased at far below market value and, as a result, the funds raised fell far short of the money needed to properly finance the state's educational system.<sup>76</sup> The continued economic depression, coupled with severe mismanagement of state funds, sunk the state further into debt.<sup>77</sup>

By 1883 it was clear that additional taxes were necessary to meet the state's financial obligations.<sup>78</sup> Governor Roberts strongly opposed a state-wide increase in taxes.<sup>79</sup> Instead, he advocated an amendment to Article VII, section 3 which would allow all school districts to levy local taxes for the support of public schools.<sup>80</sup> In response to the governor's suggestions, a joint resolution proposing changes to section 3 passed the House and Senate and was ratified by the people in 1883.<sup>81</sup> The amendment authorized the school districts to levy local ad valorem taxes for the support of public schools.<sup>82</sup> Needless to say, the state came increasingly to rely on the reve-

71. See Watts & Rockwell, *supra* note 18, at 809.

72. *Id.* at 810, 813.

73. *Id.* at 810.

74. F. EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 175 (1925).

75. Act approved July 14, 1879, 16th Leg., C.S., ch. 52, 1879 Tex. Gen. Laws 48, 9 H. GAMMEL, LAWS OF TEXAS 80 (1898) amended by Act approved Apr. 6, 1881, 17th Leg., R.S., ch. 105, 1881 Tex. Gen. Laws 119, 9 H. GAMMEL, LAWS OF TEXAS 211-14 (1898). See also Watts & Rockwell, *supra* note 17, at 811.

76. See Watts & Rockwell, *supra* note 18, at 811.

77. *Id.*

78. *Id.* at 812.

79. *Id.* at 813.

80. *Id.*

81. Tex. S.J. Res. 5, 18th Leg., R.S., 1883 Tex. Gen. Laws 134, 9 H. GAMMEL, LAWS OF TEXAS 440 (1898). See also *Returns of an election held on the 14th day of August 1883, upon the adoption or rejection of Amendments to the Constitution of the state of Texas*, Secretary of State, Report of the Secretary of State for the State of Texas (1884).

82. One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; . . . and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the information of school district (sic) by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or

nues generated through local property taxes to support the system of free public schools.<sup>83</sup>

The 1883 amendment was the first of many constitutional amendments, approximately fifteen of which involved state taxation.<sup>84</sup> Social and economic changes taking place in the state required that the constitution be amended more closely to reflect the state's varying needs. Nevertheless, the revenue-raising ability of school districts continued to be unequal. Industrialization, urbanization, and the discovery of oil made matters worse by further concentrating the state's property wealth in certain districts.<sup>85</sup> Despite the problems generated by taxation based on local property wealth, it became clear that local taxation was essential if the state's schools were to be maintained.

### B. *Current System of Educational Financing in Texas*

Although the administration and financing of public schools is generally seen as a local concern, educational funding has in fact for some time been a combined effort of both the state and local governments.<sup>86</sup> The shared financing responsibility has been justified on a number of grounds. First, states have recognized the need to establish a certain minimum level of educational opportunity and quality.<sup>87</sup> In order to insure that basic state standards are met and imposed on a uniform basis, state governments have

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schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one (\$1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

TEX. CONST. art. VII, § 3 (1876, amended 1883 and thereafter).

83. C. FUNKHOUSER, *supra* note 14, at 154.

84. *Id.* For example, an amendment in 1908 raised the earlier imposed limit on taxes from twenty to fifty cents per \$100 valuation. *Id.* at 153.

85. In 1946, for example, property values in some sixty-six counties accounted for 68.2 per cent of the total assessed valuation for the entire state. . . . Some 36 of the 66 counties mentioned above are major oil-producing areas, and alone supplied 42.2 per cent of the state's taxable property in 1946. . . . [I]t is definitely known that petroleum resources in those jurisdictions are responsible directly for most of the wealth, and consequently make up a major segment of present taxable value[s]. Property in [the twenty-six counties having the highest annual petroleum production records in 1946] accounted for 23.5 per cent of the state's valuation in 1932. In 1946, property values in the same counties accounted for 35.1 per cent of the state's total assessed valuation, an increase of almost 12% in fifteen years.

L. ANDERSEN, *THE STATE PROPERTY TAX IN TEXAS* 86-87 (1948).

86. Anderson, *School Finance Litigation - The Styles of Judicial Intervention*, 55 WASH. L. REV. 137, 137 (1979).

87. *Id.* at 138.

become involved in the realm of public school education.<sup>88</sup> State involvement in education is visible in a number of ways. For example, state governments regulate matters such as the required length of school years, teacher certification requirements, curriculum requirements, and textbook selection.<sup>89</sup> Second, state governmental involvement with local services is intended to prevent unfairness in the local funding process.<sup>90</sup> Inequities are all but inevitable when educational funding is based on taxation of local property.<sup>91</sup> Since certain districts maintain higher taxable property wealth than others, an educational funding system which relies completely on local subsidies will necessarily discriminate against those districts with less property wealth.<sup>92</sup> Recognizing this problem, most states have attempted to avoid such inequities through state subsidies.<sup>93</sup>

State aid has generally taken the form of "equalization" grants from states to local school districts.<sup>94</sup> The equalization grants are designed to alleviate the considerable disparities in taxable wealth between districts and the resulting inability of property-poor districts to generate revenues equivalent to those raised by property-rich districts.<sup>95</sup> States' attempts, through the use of equalization grants, to correct the inequalities engendered by the system of local taxation have failed.<sup>96</sup> Their failure is clearly demonstrated by the considerable disparities in per pupil expenditures that persist in most jurisdictions.<sup>97</sup>

By the late 1940s, the mounting costs of state services in Texas<sup>98</sup> and the unequal tax burdens imposed on school districts<sup>99</sup> made it clear that fundamental change in the structure of the taxing authority was essential.<sup>100</sup> The Gilmer-Aikin laws, which reinforced the dual system of state and local educational funding, were enacted in 1949.<sup>101</sup> Through this legislation the Foundation School Program was established.<sup>102</sup> The current program has been characterized as a three-tiered system: the Foundation School Program, the Guaranteed Yield Program, and enrichment through local prop-

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88. *Id.*

89. *Id.*

90. *Id.*

91. Unequal spending due to disparities in local taxable property wealth is not peculiar to educational financing. The problems effect other locally funded public services such as police and fire services. However, disparities in educational spending have tended to receive heightened attention. Anderson, *supra* note 86, at 139.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Anderson, *supra* note 86, at 139-40.

97. *See supra* note 13.

98. *See* C. FUNKHOUSER, *supra* note 14, at 157.

99. *Id.*

100. *Id.*

101. Foundation School Program, 51st Leg., R.S., ch. 334, 1949 Tex. Gen. Laws 625.

102. TEX. EDUC. CODE ANN. § 16.001 (Vernon 1991). The Gilmer-Aikin laws also vested the authority over public school in the Central Education Agency. The CEA is comprised of the State Board of Education, the Commissioner of Education, and the State Department of Education. *See* C. FUNKHOUSER, *supra* note 14, at 157.

erty taxes.<sup>103</sup> The program's primary purpose is to remedy the problems associated with the school districts' varying abilities to generate revenues to subsidize public schools.<sup>104</sup> Recognizing that property-poor districts were disadvantaged by the concentration of the state's property wealth in certain areas, the legislature attempted to assist the poorer districts in generating revenues to support their schools.<sup>105</sup> Rather than continuing to distribute funds on a per capita basis, the new system allocates funds according to an economic index.<sup>106</sup> Through the use of a complex formula, the state measures a particular district's ability to raise revenues and then allocates more state aid to property-poor districts than to property-rich districts.<sup>107</sup>

The Foundation School Program has not been the only source of state aid to public schools. The Permanent School Fund continues to provide a significant portion of state funding.<sup>108</sup> However, even the combined efforts of the Foundation Program and the Permanent Fund have been unable to fully remedy the problems faced by poor school districts.<sup>109</sup> The Educational Op-

103. "A guaranteed yield means that for every penny of tax effort per \$100 of value over and above that required to raise the LFA [local fund assignment], the state guarantees an equal yield per district up to a specific amount." *Edgewood Indep. School Dist. v. Kirby*, No. 362516, at 4 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Sept 24, 1990), *judgment vacated in part*, 804 S.W.2d 491 (Tex. 1991).

104. C. FUNKHOUSER, *supra* note 14, at 157.

105. *Id.*

106. "The new system abolished the traditional per capita system of distributing state funds and in its place adopted a plan based upon the 'economic index'." The economic index determines a school district's taxpaying ability in relation to other districts in the state. The Education Code initially provided:

(b) The economic index for each county shall be based upon and determined by the following weighted factors:

- (1) assessed property valuation of the county, weighted by twenty;
- (2) scholastic population of the county, weighted by eight; and
- (3) income for the county as measured by value added by manufacture, value of minerals produced, value of agricultural products, payrolls for retail establishments, payrolls for wholesale establishments, and payrolls for service establishments, all weighted collectively by seventy-two.

Foundation School Program, 51st Leg., R.S., ch. 334, art. VI, § 3, 1949 Tex. Gen. Laws 625, 639, *amended by* Act of Sept. 1, 1975, 64th Leg., R.S., ch 334, § 1, 1975 Tex. Gen. Laws 877. For the current law that adjusts school fund allotments on the basis of an index see TEX. EDUC. CODE ANN. § 16.102 (Vernon 1991).

107. *Id.* *But see* *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989) [hereinafter *Edgewood I*] ("There are no Foundation School Program allotments for school facilities or for debt service. The basic allotment and the transportation allotment understate actual costs, and the career ladder salary supplement for teachers is underfunded. For these reasons and more, almost all school districts spend additional local funds.").

108. The Permanent School Fund now provides a total of \$533 million a year, or \$226 per child, to local school district. Ten years ago, it provided just \$33 per child, indicating the potential of growth of the Fund. . . . [The fund] has a current market value of \$7.7 billion. . . . The rate of return on investments from the Fund has grown from 3.4 percent in 1961 to 9.2 percent, and annual income from investments has grown from \$13.8 million to \$533 million. . . . If left intact, the Fund over the next 10 years will provide local school districts with \$6.7 billion.

C. FUNKHOUSER, *supra* note 14, at 25-26.

109. [A]id to public schools under the Foundation School Program totaled \$3.6 billion. That figure increased to \$4.5 billion in the 1984-85 school year and to approximately \$4.6 billion in 1985-86. State aid per student in average daily attendance (ADA) increased significantly during the same period, from \$1,315

portunity Act of 1984 (House Bill 72)<sup>110</sup> was enacted to address the persistent problems resulting from the inequitable concentration of property wealth throughout the state. The Texas Education Agency's Biennial Report for 1984-1986 indicated that the poorest districts were receiving considerably higher percentages of state funds than were the wealthiest districts.<sup>111</sup> Nevertheless, despite continual state funding, the Texas school financing system continues to show marked disparities between districts in per pupil expenditures.<sup>112</sup>

As a result of the Texas Supreme Court's decision in *Edgewood I*,<sup>113</sup> the Texas Legislature adopted Senate Bill 1 again to restructure the Texas school financing system.<sup>114</sup> However, on January 22, 1991, the Texas Supreme Court held Senate Bill 1 unconstitutional because, in its view, the bill failed to remedy the extreme disparities in per pupil expenditures between school districts.<sup>115</sup> Again, the Texas Legislature, working under a judicially-imposed time limit, adopted another financing system to remedy the problems outlined by the Texas courts.<sup>116</sup> Although the district court has found the latest system to be constitutionally permissible, its validity is currently being challenged by the property-rich school districts.<sup>117</sup> Clearly, the problems associated with public school financing remain unresolved.

### III. CURRENT STATE OF THE LAW

Texas is not the only state whose courts have been faced with school financing litigation. Cases attacking the constitutionality of state educational funding programs have appeared in most jurisdictions.<sup>118</sup> However, state court decisions in these cases have varied such that no uniform principle can be applied to recently instituted public school financing litigation.<sup>119</sup> In or-

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per ADA in 1983-84 to \$1,560 in 1984-85, \$1,571 in 1985-86 and \$1,579 in 1986-87.

*Id.* at 24.

110. Act of Sept. 1, 1984, 68th Leg., 2d C.S., ch. 28, art. 2, 1984 Tex. Gen. Laws 117, 131. See also C. FUNKHOUSER, *supra* note 14, at 24.

111. State aid to the poorest school districts in the state - those with average property wealth of \$94,000 or less per student - [h]as increased by an average of more than 56 percent, or \$849 per ADA from 1983-84 to 1985-86. State aid accounted for more than 70 percent of the total revenue of these poorer school districts. The state's wealthiest districts, however, received just less than 10 percent of their total revenues from state sources.

See C. FUNKHOUSER, *supra* note 14, at 24-25. "For the poorest group of districts, the state pays 92.1% of the foundation cost, or \$2,212 per student. For the most affluent group, the state's share was 16.6%, or \$332 per student." *Id.* at 41.

112. *Edgewood I*, 777 S.W.2d 391 (Tex. 1989).

113. *Id.*

114. Act of June 7, 1990, 71st Leg., 6th C.S., ch. 1, 1990 Tex. Gen. Laws 1.

115. 804 S.W.2d 491, 496 (Tex. 1991).

116. *Edgewood II* at 39. Act of April 11, 1991, ch. 20, §§ 16.001-21.930, 1991 Tex. Sess. Law Serv. 20 (Vernon).

117. *Judge OKs Texas School Finance Law*, Dallas Morning News, Aug. 8, 1991, at 1A, col.1.

118. See *supra* note 13 and accompanying text.

119. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *Lujan v. Colorado State Bd. of*

der to determine the appropriate judicial response, a review of different states' approaches to such litigation is appropriate.

*Serrano v. Priest*<sup>120</sup> was one of the first cases to consider the constitutionality of a state's system of public school financing. In that case, parents and schoolchildren brought suit in California state court claiming the system violated the Equal Protection Clause of the United States Constitution. The challenge to the legislatively imposed program was based on the assertion that the considerable disparities in per pupil expenditures found between school districts violated the federal constitution's assurance of equal protection under the laws.<sup>121</sup> Relying on a "fiscal neutrality" theory,<sup>122</sup> the California Supreme Court held that the Fourteenth Amendment's equal protection requirement was violated when the level of educational spending depended on the relative wealth of the district.<sup>123</sup>

Although the *Serrano* decision was the first in a long line of public school financing litigation, the decision was not appealed to the United States Supreme Court.<sup>124</sup> While the California decision was on remand, however, a similar case was brought in the federal courts. The plaintiffs in *San Antonio Independent School District v. Rodriguez*<sup>125</sup> brought a class action challenging the constitutionality of the Texas system of public school financing. Once again, the constitutional claim was based on the disparities in per pupil spending found among school districts.<sup>126</sup> A three-judge court held the Texas Legislature's educational financing program invalid because it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>127</sup> The United States Supreme Court, however, disagreed with the lower court's equal protection analysis.<sup>128</sup> In reversing the district court, the Supreme Court concluded that, for the purposes of an equal protection analysis, education was not a fundamental right<sup>129</sup> and wealth did not constitute a sus-

Educ., 649 P.2d 1005 (Colo. 1982); *Robinson v. Cahill*, 62 N.J. 472, 303 A.2d 273 (1973); *Board of Educ. of City School Dist. of Cincinnati v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980).

120. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *aff'd on remand*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977).

121. *Serrano*, 487 P.2d at 1244.

122. The California court rejected the educational needs standard announced in *McKinnis v. Shapiro*, 293 F. Supp. 327, 331 (N.D. Ill. 1968), *aff'd mem. sub nom. McKinnis v. Ogilvie*, 394 U.S. 322 (1969), and instead adopted a fiscal neutrality theory. *Serrano*, 557 P.2d at 940. The fiscal neutrality principle, as described by the *Edgewood* court, demands neutrality in the sense that "the level of expenditures per pupil in any district may not vary according to the property wealth of that district." *Edgewood Indep. School Dist. v. Kirby*, 761 S.W.2d 859, 860 (Tex. App.—Austin, 1988), *rev'd*, 777 S.W.2d 391 (1989).

123. *Serrano*, 557 P.2d at 953.

124. The appellate court remanded the case to the trial court for consideration of additional evidence. 487 P.2d at 1266.

125. 411 U.S. 1 (1973).

126. *Id.* at 11-13.

127. *Rodriguez v. San Antonio Indep. School Dist.*, 337 F. Supp. 280, 286 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1, 6 (1973).

128. *Rodriguez*, 411 U.S. at 18.

129. The Court emphasized that the federal constitution did not explicitly mention the right to education. Additionally, the court rejected the argument that education rises to the level of a fundamental right because it is necessary to exercise other fundamental rights such as the right to vote. *Id.* at 35-37.

pect class.<sup>130</sup> As a result, the Supreme Court held that the lower court erred in using the stricter degree of judicial scrutiny traditionally reserved for cases involving fundamental rights or suspect classes.<sup>131</sup> The Court found that the state, rather than having to demonstrate a compelling state interest in the funding program, was only required to show a rational relationship between the statute and a legitimate state objective.<sup>132</sup> The Court held that the state had satisfied this burden.<sup>133</sup> Additionally, the Court rejected the fiscal neutrality argument announced in *Serrano*.<sup>134</sup> The Court's decision was based partly on (1) its conclusion that equal spending among school districts did not necessarily ensure equal access to educational opportunities,<sup>135</sup> and (2) the considerably complex issues involved in educational financing.<sup>136</sup> Recognizing further that any attempt to equalize per pupil spending would necessarily involve either an increase in taxes or the reallocation of existing state funds, the Supreme Court emphasized that such actions were traditionally exercised by the legislative branch.<sup>137</sup> According to

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130. The Court concluded that the education system did not discriminate against any definable class of poor people. In addition, the system did not result in a complete deprivation of the right to education. *Id.* at 28.

131. *Id.* at 40.

132. "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *Id.*

133. Satisfying the rational relationship test is considerably easier for a state than having the burden of proof under the strict scrutiny test. In the latter, the state must show a compelling state objective as well as a close fit between the objective and the means chosen to attain it. The rational relationship test, on the other hand, only requires the state to show a legitimate state objective and that the means chosen are rationally related to its attainment.

134. *Serrano*, 557 P.2d at 940. See also Note, *Judicial Control of the Purse - Finance Litigation in State Courts*, 28 WAYNE L. REV. 1393, 1398-99 (1982).

135. *Rodriguez*, 411 U.S. at 43.

136. "The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." *Id.* at 42 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972)). The Court stated further:

It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. . . . But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefitted by abrogation of traditional modes of financing education.

*Id.* at 56.

137. The court noted that these considerations:

serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various states, and we do no violence to the values of federalism and separa-

the Court, the problems inherent in the current school financing system were not suited to judicial determination.<sup>138</sup>

Since the *Rodriguez*<sup>139</sup> decision seemed to foreclose any possibility of invalidating state educational financing programs on federal equal protection grounds,<sup>140</sup> disgruntled citizens who were determined to invalidate their school financing programs were well-advised to adopt another theory. Most plaintiffs who have attacked their educational financing programs since the *Rodriguez* decision have attempted to do so through the use of state constitutional provisions requiring an efficient, uniform, or thorough system of public school education.<sup>141</sup> A court faced with such a case has essentially three alternatives: the court can find the funding system unconstitutional and be prepared to enforce its decision or suffer a loss in credibility; the court can hold the state's financing system to be constitutional; or the court can hold the issue to be nonjusticiable.<sup>142</sup> State courts have chosen differing routes, and this section will present examples from each category.

### A. Invalidate the Financing System

In 1973 the New Jersey Supreme Court, resorting to a little known provision of the state constitution requiring a "thorough and uniform" system of public schools, held its system of public school financing unconstitutional.<sup>143</sup> In *Robinson v. Cahill*<sup>144</sup> the trial court concluded that the state legislature's system for funding public schools was invalid because it failed to provide the

tion of powers by staying our hand. . . . The ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

*Id.* at 58-59. The Court also implicitly recognized the judiciary's right to play a more active role in desegregation cases. However, the Court pointed out that the *Rodriguez* case did not involve issues of desegregation. As noted in the opinion, the San Antonio Independent School District was well above the average in taxable wealth per pupil and has a student population that is 72% Mexican-American. *See id.* at 57-58 n.113; *Missouri v. Jenkins*, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990) (judicially-imposed tax increase was appropriate in order to fund desegregation program).

138. "It has simply never been within the constitutional prerogatives of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live." *Rodriguez*, 411 U.S. at 54.

139. *Id.*

140. *Id.*

141. By relying on a state constitutional provision, state courts are able to avoid review by the United States Supreme Court. This is preferable especially in light of the Supreme Court's opinion, articulated in the *Rodriguez* decision, that equalizing per pupil expenditures does not necessarily ensure equal educational opportunities. 411 U.S. at 43.

142. P. STRUMM, *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION* 5 (1974).

143. Although the plaintiffs argued that the financing system was unconstitutional because it violated the federal equal protection clause, the state equal protection clause, and the state constitutional guarantee of a "thorough and uniform" system of public schools, the trial court's decision rested solely on the plaintiffs' final argument. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, 282, 286, 295 (1973). The court concluded that since New Jersey had adopted the same equal protection analysis for the state constitution that the United States Supreme Court used with respect to the federal constitution, the state equal protection claim logically must fail. *Id.* at 279.

144. 62 N.J. 473, 303 A.2d 273 (1973) [hereinafter *Robinson I*].

state with an efficient system of public schools.<sup>145</sup> The New Jersey Supreme Court affirmed the trial court's decision but stayed any imposition of judicial relief until January 1, 1974, in order to give the state legislature the opportunity to devise a new plan.<sup>146</sup> Nevertheless, the supreme court concluded that, should the legislature fail to adopt such a plan, state funds were to be appropriated in accordance with the trial court's opinion rather than according to the statute's terms.<sup>147</sup>

The New Jersey Legislature failed to meet the deadline set by the state's supreme court.<sup>148</sup> Faced with outright defiance, the court considered various methods by which to force the legislature to comply with the judicial mandate.<sup>149</sup> Because few favorable alternatives existed, the court, in May 1975, enjoined the state treasury from disbursing state funds except in accordance with the earlier *Robinson* opinion.<sup>150</sup> The court's actions finally prompted a legislative response. In 1976, the New Jersey Supreme Court approved the legislature's new program for the financing of New Jersey public schools.<sup>151</sup> The New Jersey Supreme Court's decision is not unique. Since *Robinson*, a number of state courts have held that their public school financing programs violate state constitutional requirements.<sup>152</sup>

### B. Uphold the Financing System

The Ohio Supreme Court's decision in *Board of Education of the City School District of Cincinnati v. Walter*<sup>153</sup> is an example of the second alternative available to courts.<sup>154</sup> Once again, opponents of the state's educational financing program argued that disparities in per pupil expenditures violated the state constitutional guarantee of a "thorough and uniform" system of public schools. In this case, however, the Ohio Supreme Court found

145. Empirical data cited in the court's opinion showed that at the time of the case 67% of the public school funds came from local ad valorem taxes, 28% came from state funds, and 5% was attributable to federal aid. *Id.* at 276. The court did, however, reject the argument that taxation by local school districts was inherently unconstitutional. *Id.* at 287-295. See also Rose, *Seizing the Pursestrings: Urban Policy by Judicial Fiat*, IV BENCHMARK 5 (1988).

146. *Robinson I*, 303 A.2d at 298. See also Rose, *supra* note 145, at 5 ("... the court gave the legislature a choice of two ways to comply with the new constitutional mandate: the State could finance public education on a Statewide basis, or the State could compel local school districts to raise the necessary money to provide an equal educational opportunity for its school children.")

147. *Robinson I*, 303 A.2d at 298.

148. See Rose, *supra* note 145, at 9 (suggesting that legislative inaction constituted a deliberate challenge to the judiciary rather than inability to reach a legislative solution).

149. *Id.* at 10.

150. 69 N.J. 133, 351 A.2d 713 (1975).

151. *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129 (1976). See also Rose, *supra* note 145, at 5 (1988) ("The decision was used to provide a political excuse for the legislature to blame the court for increases in taxes to pay for the court-mandated increased funding for public education.").

152. See *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

153. 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980).

154. See *supra* note 142 and accompanying text.

that the system of educational financing was constitutionally permissible.<sup>155</sup> The court concluded that since each child received an adequate education under the current system, the program was not unconstitutional.<sup>156</sup> In considering the constitution's education provision,<sup>157</sup> the supreme court agreed with the court of appeal's conclusion that a considerable degree of deference was due the legislature's adoption of one program for public school financing over another.<sup>158</sup> In this case, the court refused to invalidate the legislature's system of financing public schools and, in doing so, declared that the issues involved in public school financing were judicially cognizable. The court's decision was strategic; it allowed the court to avoid the enforcement problems faced by the New Jersey court in *Robinson*,<sup>159</sup> but at the same time it preserved the court's right to reconsider the issue in the future.<sup>160</sup>

The Colorado Supreme Court in *Lujan v. Colorado State Board of Education*<sup>161</sup> reached a similar decision. The court adopted the *Rodriguez* equal protection analysis and concluded that the disparities that existed between school districts in per pupil expenditures did not violate either the federal or state constitutional guarantee to equal protection under the law.<sup>162</sup> The court then addressed the appellees' argument that the school financing system<sup>163</sup> violated the state constitution because it failed to provide a "thorough and uniform system of free public schools throughout the state."<sup>164</sup> The court emphasized that this provision did not require that the legisla-

155. *Walter*, 390 N.E.2d at 825.

156. *Id.*

157. OHIO CONST. art. VI, § 2 (1851).

158. "Because this constitutional grant reinforces the ordinary discretion reposed in the General Assembly in its enactment of legislation, the judicial department of this state should exercise great circumspection before declaring public school legislation unconstitutional as a violation of Article VI, Section 2." *Walter*, 390 N.E.2d at 824. But note, the court rejects the defendants' argument that the efficiency of a particular financing system is a political question. *Id.* at 823.

159. See *supra* notes 145-51 and accompanying text.

160. For other cases holding school financing systems unconstitutional, see *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 459 U.S. 1138 (1983); *Fair School Finance Council of Okla. v. Oklahoma*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979); *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988).

161. 649 P.2d 1005 (Colo. 1982).

162. In rejecting the argument that education constitutes a fundamental right, the court stated:

[w]e refuse, however, to venture into the realm of social policy under the guise that there is a fundamental right to education which calls upon us to find that equal educational opportunity requires equal expenditures for each school child. . . . [A] review of the record and case law shows that courts are ill-suited to determine what equal educational opportunity is, especially since fundamental disagreement exists concerning the extent to which there is a demonstrable correlation between educational expenditures and the quality of education.

*Id.* at 1018.

163. In 1977, 47% of Colorado's public school funds were raised through local ad valorem taxes. The balance of the expenses were made up through state funds (43%), federal aid (6%), and other miscellaneous sources (4%). *Id.*

164. COLO. CONST. art. IX, § 2 (1876). "Appellees' argument is . . . that the present sys-

ture's funding program result in equal expenditures across the districts.<sup>165</sup> The opinion also expressed the court's belief that the determination of an appropriate system for financing of public schools was the legislature's responsibility.<sup>166</sup>

### C. *Validity of Financing System Nonjusticiable*

The court in *Hornbeck v. Somerset County Board of Education*<sup>167</sup> adopted the final alternative, and held the public school financing issue nonjusticiable.<sup>168</sup> The court found that the constitutional provision requiring the legislature to create a thorough and efficient system of public schools did not require identical per pupil expenditures in each school district.<sup>169</sup> The court's opinion is best read as an implicit acceptance of the applicability of the political question doctrine in the area of public school financing.<sup>170</sup> Specifically, the court stated:

The expostulations of those urging alleviation of the existing disparities are properly to be addressed to the legislature for its consideration and weighing in the discharge of its continuing obligation to provide a thorough and efficient statewide system of free public schools. Otherwise stated, it is not within the power or province of members of the Judiciary to advance their own personal notions of fairness under the guise of constitutional interpretation.

The quantity and quality of educational opportunities to be made available to the State's public school children is a determination committed to the legislature or to the people of Maryland through adoption of an appropriate amendment to the State Constitution.<sup>171</sup>

Finding judicial determination of the issue inappropriate, the Maryland Court of Appeals reversed the lower court's decision.<sup>172</sup>

Likewise, Justice Shepard's concurring opinion in *Thompson v. Engeling*<sup>173</sup> argued that the appropriate system of public school financing constituted a political question.<sup>174</sup> Justice Shepard discussed in great detail the pros and cons associated with alternative methods of funding a system of

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tem violates this mandate by creating varying educational opportunities due to revenue differences between the districts." *Lujan*, 649 P.2d at 1024.

165. *Lujan*, 649 P.2d at 1025.

166. While it is clearly the province and duty of the judiciary to determine what the law is, the fashioning of a constitutional system for financing elementary and secondary public education in Colorado is not only the proper function of the General Assembly, but this function is expressly mandated by the Colorado Constitution. Thus, whether a better financing system could be devised is not material to this decision, as our sole function is to rule on the constitutionality of our state's system.

*Id.*

167. 295 Md. 597, 458 A.2d 758 (1983).

168. *Hornbeck*, 458 A.2d at 790.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. 96 Idaho 793, 537 P.2d 635 (1975).

174. "I suggest that the answers to such questions must come from the legislative branch of government." *Id.* at 657.

public schools.<sup>175</sup> His concurring opinion does an excellent job of highlighting the complexity of the many trade-offs involved in selecting an appropriate system.<sup>176</sup> His examination of the available alternatives led inevitably to his ultimate conclusion that the selection of the appropriate financing system required legislative expertise.<sup>177</sup>

#### D. *The Texas Case*

Texas has now joined the long list of states that have found their public school financing system unconstitutional.<sup>178</sup> In *Edgewood I*<sup>179</sup> suit was brought seeking a declaration that the current public school financing program<sup>180</sup> was unconstitutional.<sup>181</sup> Evidence presented at the *Edgewood I* trial showed the extreme disparities in funding between school districts in the San Antonio area. The plaintiffs argued that the system failed to satisfy the constitution's efficiency requirement since a district's per pupil expenditures depended largely on the total property wealth of the district.<sup>182</sup> Additionally, they emphasized that the poorer districts often had to impose higher than average tax rates in order to meet minimum educational standards.<sup>183</sup>

The district court found the legislature's program unconstitutional.<sup>184</sup> The court of appeals reversed,<sup>185</sup> holding that the proper disbursement of public funds to create an efficient school system was a complex problem that required legislative expertise.<sup>186</sup> More specifically, the court of appeals found that the appropriate system of public school financing constituted a political question and was thus beyond the court's power of judicial review.<sup>187</sup>

175. *Id.* at 655-57.

176. *Id.*

177. "I make no pretense of omniscience and concede that the resolution of socio-politico-educational policy decisions lie outside the ambit of our constitutional authority and within that of the legislature." 96 Idaho at 816, 537 P.2d at 658.

178. *Edgewood I*, 777 S.W.2d 391 (1989). See *supra* note 160.

179. 761 S.W.2d 859 (Tex.App.—Austin, 1988), *rev'd*, 777 S.W.2d 391 (1989).

180. The current funding program is made up of a combination of state and local taxation. At the time of suit, Texas public schools were financed in the following manner: 50% state funding, 42% local ad valorem taxes, 8% federal funding. The legislature provides state aid through the Foundation School Program to offset the inability of certain districts to generate sufficient revenue to meet the state's minimum educational requirements. *Id.* at 861.

181. TEX. CONST. art. VII, § 1.

182. The supreme court's opinion observed that the wealthiest school district had over \$14 million of property wealth, while the poorest district had only \$20,000 in property wealth. As an example of the extreme disparities between districts, the court's opinion revealed that Edgewood I.S.D. had approximately \$38,854 in property wealth per student, whereas Alamo Heights I.S.D. had approximately \$570,109. *Edgewood I*, 777 S.W.2d at 392.

183. "Generally, the property-rich districts can tax low and spend high while the property-poor districts must tax high merely to spend low." *Id.* at 393.

184. 761 S.W.2d at 860.

185. *Id.* As in *Robinson*, the plaintiffs in this case also argued the program violated both the state and federal equal protection clauses. However, they were unable to persuade the court of appeals to ignore the United States Supreme Court's decision in *Rodriguez*. *Edgewood I*, 761 S.W.2d at 861-67.

186. *Id.* at 867.

187. That provision [Art. VII, sec. 1] does, of course, require that the school system be "efficient," but the provision provides no guidance as to how this or

In October 1989 the Texas Supreme Court considered the controversial issues presented by the Texas public school financing system.<sup>188</sup> The Texas Supreme Court disagreed with the court of appeals' reading of the case and reinstated the district court's holding.<sup>189</sup> In finding the school financing program unconstitutional, the supreme court directed the Texas Legislature to develop a new program for financing of public schools by May 1, 1990.<sup>190</sup>

Although the deadline came and went without any legislative action, the legislature eventually did pass a new education act on June 5, 1990.<sup>191</sup> However, in July 1990 the plaintiffs returned to the courts in *Edgewood II* to demand enforcement of the earlier judgment.<sup>192</sup> The District Court for Travis County, after considering Senate Bill 1, found the legislature's new program for public school financing unconstitutional since it failed to remedy the problems with the earlier system.<sup>193</sup> In its opinion, the district court made clear that if an adequate solution were not forthcoming from the legislature, the court would take action on its own to enforce its judgment.<sup>194</sup> On January 22, 1991, the Texas Supreme Court issued an order to the Texas Legislature to develop a new system for school financing by April 1, 1991.<sup>195</sup> The court emphasized that, should the legislature fail to act, the judiciary would take action to remedy the situation.<sup>196</sup> What such action would entail is left to conjecture, but it seems clear that enforcement of the court's judgment would necessarily require either enjoining disbursement of state funds, a judicially-imposed tax increase, or a court-ordered reallocation of state funds.<sup>197</sup> The Texas courts have chosen to follow the path taken by the

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any other court may arrive at a determination of what is efficient or inefficient. Given the enormous complexity of a school system educating three million children, this Court concludes that which is, or is not, "efficient" is essentially a political question not suitable for judicial review. . . .

[U]nder our system of government, efforts to achieve those ideals come from the people through constitutional amendments and legislative enactments and not through judgments of courts.

*Id.* at 867.

188. *Edgewood I*, 777 S.W.2d 391 (Tex. 1989).

189. *Id.* at 399.

190. *Id.*

191. Article 1 of Senate Bill 1 was signed by the Governor on June 7, 1990, and was expected to go into effect on September 1, 1990. *Edgewood Indep. School Dist. v. Kirby*, No. 362516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Sept. 24, 1990), *judgment vacated in part*, 804 S.W.2d 491 (Tex. 1991).

192. *Id.*

193. The court rejected the state's argument that Senate Bill 1 should be given a chance to prove itself and its merits. "The court finds no purpose in waiting to assess Senate Bill 1. From what is known today, even assuming the best, the court confidently finds that Senate Bill 1 will not provide equity. Waiting from one to five years for the obvious to prove true only postpones desperately needed reform." *Id.* at 7.

194. *Id.* at 40.

195. *Edgewood II*, 804 S.W.2d 491, 496 (Tex. 1991). For the latest developments in this case, see *supra* note 12.

196. *Id.*

197. If there is no appropriate timely action taken by the legislature, the court may order injunctive relief either by enjoining the distribution of any funds for the schools, thereby effectively closing them, or by ordering the redistribution of existing funds by a formula considered to be more equalizing. . . . A much broader remedy would be a court order mandating the collection of revenue

*Robinson* court and, as a result, they are now faced with the same enforcement problems confronted by the New Jersey courts.<sup>198</sup>

#### IV. ANALYSIS

Clearly disputes arising out of disparities in per pupil expenditures are not peculiar to the state of Texas. Many state financing systems have fostered the same problems.<sup>199</sup> The question thus remains, what can be done to remedy the inequities? A more relevant question for the purposes of this comment is, are the courts the appropriate forums for dealing with these problems? After considering the alternatives available to a court faced with public school financing litigation, it seems clear that the appropriate judicial response is to invoke the political question doctrine.<sup>200</sup> Had the Texas courts done so, they would not currently be faced with the complex problems of enforcement.<sup>201</sup> A judicial determination that Texas' system of public school financing is unconstitutional serves as a de facto order to the state legislature to devise a new program of educational financing; it may even amount to a judicial levying of taxes.<sup>202</sup> Distinguishing between a judicially imposed program and a judicial decision requiring the legislature to adopt a new program is really a question of form over substance. The Texas Supreme Court's determination that the educational financing scheme fails to meet basic constitutional requirements necessarily requires the legislature to either impose a tax increase or reallocate existing state funds.<sup>203</sup> Allowing the court to demand such legislative action has serious repercussions in the context of separation of powers because it allows the judiciary to intrude into an area that has traditionally been the exclusive realm of the legislature.<sup>204</sup>

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through local taxation. . . . Finally, the court may judicially define the amount of money to be spent by the state on education and force the legislature to provide new funds.

Note, *supra* note 134, at 1405 (footnotes omitted).

198. See *supra* notes 144-51 and accompanying text.

199. See *supra* note 160.

200. The rule that the Court must legitimate whatever it is not justified in striking down fails to attain its intended purpose of removing the court from the political arena; rather it works an uncertain and uncontrolled change in the degree of the Court's intervention, and it shifts the direction.

A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 131 (2d ed. 1986).

201. See Note, *supra* note 134, at 1405.

202. As pointed out by one justice with respect to the *Robinson* decision, "[t]he court did not say that you had to have an income tax, but anyone with an ounce of sense would know that the only possible solution to the problem was the adoption of an income tax or something much worse . . ." Note, *supra* note 134, at 1403 n.49 (quoting R. LEHNE, *THE QUEST FOR JUSTICE* 114 (1978)).

203. See *supra* note 202.

204. Since it has traditionally been thought that courts have no power over the 'sword or purse,' judicial allocation of money is thought to be an invasion of the democratic process because it is the judiciary, usually unelected, rather than the politically accountable branches, that is directing the allocation of government funds. Federal and state constitutions vest the legislature with spending power for an important reason - it is thought that only the most politically accountable branch of government should have this decisive power.

Note, *supra* note 134, 1410-11.

Because of the potentially far-reaching effects on the separation of powers doctrine, it is appropriate to consider the applicability of the political question doctrine.

Although few state courts have applied the political question doctrine in the education context, a review of the relevant case law suggests that the doctrine is well-recognized by both federal and state courts.<sup>205</sup> While Texas courts often invoke the doctrine to avoid judicial determination of disputes,<sup>206</sup> a satisfactory definition of the concept is absent from most state court decisions. Since Justice Brennan's opinion in *Baker v. Carr*<sup>207</sup> continues to be the seminal discussion of the factors constituting a nonjusticiable political question, it will serve as the framework for this discussion.<sup>208</sup>

According to Brennan, the first criterion a court should consider is whether the function in question has been allocated to a particular branch of government by the constitution.<sup>209</sup> Second, the court should determine whether the constitution provides sufficiently identifiable standards for the court to apply in resolving the issue.<sup>210</sup> Third, the court should ascertain whether the decision calls for a choice between differing public policy considerations.<sup>211</sup> Fourth, the court should determine whether the situation is such that there is a special need for the government to speak with one voice.<sup>212</sup> Fifth, the court should consider whether there is a special need for adherence to a decision already made.<sup>213</sup> Finally, the court should consider whether a judicial decision would cause undue embarrassment or encourage disrespect for another branch of government.<sup>214</sup>

Applying the factors outlined above, it appears that the relative efficiency of Texas' system of public school financing is a classic example of a political question. Brennan's criteria are present in *Edgewood I & II* along with other compelling reasons that the court should have avoided judicial resolution of

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205. In particular, Texas recognized the existence of the political question doctrine in *School Bd. of Marshall v. State*, 343 S.W.2d 247, 249 (Tex. 1961) (court held that school redistricting constituted political question).

206. *Id.*

207. 369 U.S. 186 (1962).

208. Although this case arose in the federal courts, the use of the term by state courts reflects many of the factors considered by the Court in *Baker*.

209. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 217.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Baker*, 369 U.S. at 217.

the problem.<sup>215</sup>

Brennan's first criterion is met since the Texas Constitution explicitly delegates the authority for creating a system of public schools to the legislature.<sup>216</sup> The legislature is also under an obligation to develop a program to finance the public school system.<sup>217</sup> An examination of the framers' intent at the time of the constitution's adoption confirms this delegation of power.<sup>218</sup>

Perhaps more important than the delegation of the educational power is the Texas Constitution's explicit delegation of the taxing power to the legislature.<sup>219</sup> At the time of the ratification of the 1876 Constitution, taxation for the purpose of supporting public schools was a controversial issue.<sup>220</sup> It was controversial, not because people rejected altogether the necessity of taxing for the support of public schools, but rather because the framers, as well as the ratifiers, wanted to abolish the centralized system of education established by the 1869 Constitution.<sup>221</sup> As the amendment to Article VII, Section 3<sup>222</sup> of the 1876 Constitution demonstrates, the people intended to maintain local control over taxation.<sup>223</sup> The desire to monitor closely the taxing power clearly indicates that the people wanted to keep the power to

215. See generally Anderson, *supra* note 86, at 137; Note, *supra* note 134.

216. "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the *duty of the Legislature* of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1 (emphasis added). From the earliest state constitution (1836), the Congress has been given the duty to provide an educational system for the state. See generally Watts & Rockwell, *supra* note 18, at 777.

217. [T]he *Legislature* shall be authorized to pass laws for the assessment and collection of taxes in all said districts, . . . and the *Legislature* may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free school.

TEX. CONST. art. VII, § 3 (1876, amended 1883) (emphasis added).

218. The Texas courts are committed to following not only the intent of the framers, but also the intent of the constitution's ratifiers. *Sears v. Bayoud*, 786 S.W.2d 248, 250 (Tex. 1990); *Cox v. Robison*, 105 Tex. 426, 150 S.W. 1149, 1151 (1912). See generally Watts & Rockwell, *supra* note 18, at 774 n.14. See *supra* notes 57-69.

219. See *supra* note 82. The constitutional delegation of the taxing power becomes important in this analysis since any judicial action to resolve the great financial disparities inherent in the present system of school financing will likely entail an increase in taxes.

220. Governor Davis's administration (1870-71) had been notorious for its outrageous spending habits. Taxpayers upset about the extravagant spending organized a convention which allowed the Democrats to regain control of the legislature. The taxpayers as well as the Democrats wanted to put control of education in the hands of local authorities. See Watts & Rockwell, *supra* note 18, at 782-84.

221. "In response to the radical regime's extravagance in taxing and spending, the drafters of the Constitution of 1876 embedded that document with inhibitions against the exercise of the taxing power and the expenditures of public money." *Kirby v. Edgewood Indep. School Dist.*, 761 S.W.2d 859, 866 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (1989).

222. TEX. CONST. art. VII, § 3 (1876, amended 1883). See *supra* note 82 and accompanying text.

223. "By the adoption of the amendment the voters evidenced their intent that the initiative for the formation and maintenance of school districts be vested in those most directly affected: the local citizenry. . . . [P]eople intended to set up a school system retaining a significant degree of control." *Edgewood I*, 761 S.W.2d at 867.

tax in the political branch most closely accountable to the people.<sup>224</sup> The legislature has traditionally been considered the most representative branch.<sup>225</sup> The framers' intentions, coupled with the express delegation to the legislature of both the right to levy taxes and the duty to create a state-wide system of public schools, clearly demonstrate that the first of Brennan's factors is present in this case: namely, that the function has been allocated by the constitution to a particular branch of government.<sup>226</sup>

*Edgewood I & II* also satisfy Brennan's second criterion,<sup>227</sup> since the efficiency requirement lacks judicially cognizable standards. While the Texas Constitution requires that an efficient system of public school education be devised for the state,<sup>228</sup> it does not indicate what such a system should entail.<sup>229</sup> The constitution does not define what is meant by the term "efficient," nor does it provide guidelines for a court to use in making such a determination.<sup>230</sup> The vague nature<sup>231</sup> of the efficiency requirement has prompted much criticism. For example, one commentator has pointed out that the term "efficient system," as used in the Texas Constitution, is not only unhelpful, but potentially harmful.<sup>232</sup>

As yet, no court has found an adequate definition of "efficient,"<sup>233</sup> "uni-

224. *Id.*

225. Although the Texas Supreme Court is elected, they are not accountable to the people to the same extent as the legislature. In fact, some argue that Texas in practice has an elective-appointive system:

The full effects of a partisan election system may be blunted somewhat in Texas because up to 80% of all Texas judges face no election opposition. . . . Electoral political considerations may also be minimized because the Governor appoints approximately 50% of all Texas judges to their first term. . . . the appointee then has the advantage of incumbency.

A. SMITH, *THE IMPACT OF THE TEXAS CONSTITUTION ON THE JUDICIARY* 70-71 (1973).

226. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

227. *Id.*

228. "[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an *efficient* system of public free schools." TEX. CONST. art. VII, § 1 (emphasis added).

229. It has been suggested that an efficient system is "one that would 'give a substantial education to every child in the county.'" S. MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 351 (1920).

230. The Texas court of appeals recognized this exact problem in its *Edgewood I* opinion when it stated:

[t]hat provision does, of course, require that the school system be "efficient," but the provision provides no guidance as to how this or any other court may arrive at a determination of what is efficient or inefficient. Given the enormous complexity of a school system educating three million children, this Court concludes that which is, or is not, "efficient" is essentially a political question not suitable for judicial review.

*Edgewood I*, 761 S.W.2d at 867.

231. S. MCKAY, *DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875*, at 328 (1928) (statement of delegate West).

232. "No 'suggestion was given as to what was to be understood by the term efficient system; and in the absence of all recognized standards of educational merit, this catchword was not merely meaningless but deceptive and harmful.'" F. EBY, *supra* note 74, at 158, 159.

233. TEX. CONST. art. VII, § 1 (1876). *But see Edgewood I*, 777 S.W.2d 391, 394 (1989) ("[T]he legislature must make 'suitable' provision for an 'efficient' system for the 'essential' purpose of a 'general diffusion of knowledge.' While these are admittedly not precise terms, they do provide a standard. . . .").

form,"<sup>234</sup> "thorough,"<sup>235</sup> or any of the other terms commonly included in state educational provisions. Although the California Supreme Court in *Serrano*<sup>236</sup> maintained that fiscal neutrality was the appropriate standard by which to judge a system's adequacy,<sup>237</sup> this theory has been rejected outright by the United States Supreme Court<sup>238</sup> and has been criticized by others.<sup>239</sup> In fact, studies have shown that equal educational spending does not ensure equal opportunity to education.<sup>240</sup> The absence of any correlation between expenditures and educational quality suggests that fiscal neutrality is probably an inappropriate standard by which to judge a particular system's efficiency.<sup>241</sup> Furthermore, the traditional definition of efficient does not include any reference to equality.<sup>242</sup> The term could just as logically refer to a system that produces results in the quickest and least disruptive manner.<sup>243</sup> It is not clear that the current system of financing fails to do so. The definitional problems described above only briefly outline the questionable nature of such a judicial inquiry.<sup>244</sup> One thing that does seem clear, however, is that the efficiency clause lacks sufficiently identifiable standards for the Texas courts to employ in determining the appropriate system for school financing.<sup>245</sup> As a result, *Edgewood I & II* seem appropriate cases in which to apply the political question doctrine.

234. COLO. CONST. art. IX, § 2 (1876).

235. N.J. CONST. art. IV, § 7 (1844, amended 1875).

236. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *decision on remand aff'd*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977).

237. *Serrano*, 557 P.2d at 940.

238. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973).

239. The District Court in the *Edgewood II* case admitted:

The goal of the constitution is not fiscal neutrality, but efficiency. Fiscal neutrality is merely a test for efficiency. . . . Putting the test of fiscal neutrality in its proper place, one concludes that it is not to be applied rigidly. The Supreme Court itself used more general terms when it said: "Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds." A dollar for dollar match is not required.

*Edgewood II*, No. 362516, at 30-31 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, Sept. 24, 1990), *judgment vacated in part*, 804 S.W.2d 491 (Tex. 1991). See also *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635, 654 (1975) ("It is oversimplistic to argue that each child in Idaho should have the same amount of money spent on its education as does every other child.") (concurring opinion).

240. The Coleman Report revealed that the causal relationship between per pupil expenditures and the quality of education is extremely weak. OFFICE OF EDUC., U.S. DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 20-21, 312-16 (1966).

241. Dugan, *The Constitutionality of School Finance Systems Under State Law: New York's Turn*, 27 SYRACUSE L. REV. 573, 600-01 (1976).

242. Webster's Dictionary defines efficient as: "Being or involving the immediate agent and producing an effect, productive of desired effects." WEBSTER'S NEW COLLEGIATE DICTIONARY 359 (1973).

243. At the constitutional convention of 1875, the proponents of a state-subsidized school system supported the inclusion of the term efficient in Article VII "on the theory that efficiency was the equivalent of simplicity . . ." TEX. CONST. art. VII, § 1, interp. commentary 375 (Vernon 1955).

244. Dugan characterizes the situation as "[t]he plethora of definitional obstacles and other intangible concepts that pervade the subject of school finance." Dugan, *supra* note 241, at 604.

245. *Edgewood I*, 761 S.W.2d at 867.

Not only does the issue of public school financing leave the judiciary without any clear-cut standards for determining a particular system's efficiency, it requires the judiciary to make a choice between conflicting public policies.<sup>246</sup> A decision to increase state funding for education represents the court's adoption of one policy concern over another. For example, Article VII, Section 1 of the Texas Constitution articulates the framers' belief in the importance of education and the necessity of providing a system of public schools for the children of the state.<sup>247</sup> At the same time, Article VII, Section 3 demonstrates the ratifier's reluctance to put the power to tax into the hands of individuals who were not directly accountable to the people.<sup>248</sup> By deciding to impose a new system of public school financing designed to eradicate financial disparities among school districts, the court will necessarily be requiring that more money be spent on education. This decision represents the court's conclusion that the first policy consideration pulls more weight than the second. Such a decision is more properly put in the hands of the legislature, since they clearly have more expertise in dealing with the complex trade-offs involved in such a decision.<sup>249</sup>

If a tax increase is not imposed to fund a new system, existing state funds will have to be reallocated.<sup>250</sup> This too requires the court to make an initial public policy determination.<sup>251</sup> By increasing the amount of state tax revenues that will be allocated to public education, the court will necessarily be decreasing the amount spent on other programs.<sup>252</sup> For example, a decision to increase funds for education and decrease funds for public utility facilities requires the judiciary to make a decision regarding the relative importance of each service. This type of decision should be made by the people that benefit from such services, and their voices will be heard through their representatives in the legislature.

Furthermore, if equalization can be required with respect to education, there seems to be little reason to disallow such action with respect to other

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246. As pointed out by Dugan, "[i]t is impossible for courts to decide these cases 'without an initial policy determination of a kind clearly for nonjudicial discretion.'" Dugan, *supra* note 241, at 605 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

247. TEX. CONST. art. VII, § 1.

248. TEX. CONST. art. VII, § 3 (1876, amended 1883).

249. "The lack of policy review is a special problem when financial resources are involved. Court decisions in this area may force the state to radically reallocate its financial resources." D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 270 (1977).

250. "Under our political system, it is assumed that judges should play only a limited role in making important choices about the allocation of public resources." Anderson, *supra* note 86, at 170.

251. Anderson states:

Since any blend of state and local components in a system of public education finance will have significant allocative consequences, any judicial prescription in the area will necessarily involve the judiciary in allocating the public resources to some degree. . . . The choice of so basic a matter as the degree of local control of funding levels would appear to be too fundamental and too far-reaching to be left to the judges if traditional notions of legitimacy are to be respected.

*Id.*

252. *Id.* at 163 (suggesting that a court-ordered increase in educational spending could result in lower welfare spending).

state or municipal services.<sup>253</sup> As Dugan points out, a decision having such widespread and potentially far-reaching effects should be left to the popularly elected officials.<sup>254</sup> Because decisions like the ones in *Edgewood I & II* can have such far-reaching effects on state funding, they are best left to the legislature. In order to avoid judicial determination, the Texas Supreme Court should have invoked the political question doctrine.

The final three factors outlined by Justice Brennan are not applicable in this context because they deal primarily with political questions in the context of foreign affairs.<sup>255</sup> However, their relative unimportance in the domestic arena does not warrant a complete abdication of the political question doctrine in situations involving primarily domestic problems. The presence of the first three factors creates a strong argument that *Edgewood I & II* are appropriate cases for application of the political question doctrine.<sup>256</sup>

Recent cases in both state and federal courts suggest that the political question doctrine is now often ignored by the judiciary and may in fact be slowly eroding away.<sup>257</sup> Based on previous court decisions on desegregation<sup>258</sup> and reapportionment,<sup>259</sup> many courts faced with school finance problems have concluded that judicial intrusion into the legislative arena is justified.<sup>260</sup> However, the relative acceptance of judicial activism in these areas does not warrant the extension of such judicial intrusion into other controversial areas of public policy.<sup>261</sup>

Other problems associated with school financing litigation suggest that the issue is not suited to judicial resolution.<sup>262</sup> The complex issues inherent in the public school financing arena demand that determination of the appropriate financing system be left to the legislature, especially in light of their relative expertise with the intricate problems of state funding.<sup>263</sup>

The problems stem from the fact that the judicial and legislative methods of problem-solving are fundamentally different. The legislature focuses on society's problems as a whole.<sup>264</sup> The judiciary, on the other hand, resolves

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253. Dugan, *supra* note 241, at 607.

254. "A decision which has the potential to so change the structure of our society should be made only by duly elected lawmakers." *Id.*

255. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

256. *But see* Dugan, *supra* note 241 (where Dugan argues that Brennan's last three factors are applicable to the school financing litigation).

257. *See supra* notes 105-26 and accompanying text.

258. *Missouri v. Jenkins*, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

259. *Baker v. Carr*, 369 U.S. 186 (1962).

260. *See supra* note 160.

261. *But see* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 495-501 (1980); Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 32 (1979) (arguing that judicial intrusion is necessary in the face of legislative inaction).

262. *See supra* note 215 and accompanying text.

263. "[W]hen a state supreme court declares its system of school financing to be unconstitutional, its impact can have repercussions for the entire state financial system." Note, *supra* note 134, at 1395 (footnotes omitted).

264. *See* Anderson, *supra* note 86, at 198-99.

disputes between individuals.<sup>265</sup> Because of the courts' traditionally narrow focus, it is not prepared to resolve major societal problems that have far-reaching consequences.<sup>266</sup> Mistakes in litigation between individuals have a limited effect. Errors made by courts resolving public school financing problems, however, necessarily have broader implications. Since decisions with respect to educational financing directly affect the funding of other state services, a mistake with respect to educational spending will necessarily upset the entire system of state funding.<sup>267</sup>

A related problem presented by judicial resolution of public school financing issues stems from the "generalist nature of our judges."<sup>268</sup> Members of the bench are typically expected to be knowledgeable in broad areas of the law.<sup>269</sup> Indeed this quality has been primarily responsible for fostering the degree of respect traditionally afforded the judiciary.<sup>270</sup> Problems arise, however, when judges are asked to make intricate decisions on highly technical issues such as the ones involved in public school finance.<sup>271</sup> In addition, as Anderson points out, the "legal doctrine" is one of general principles.<sup>272</sup> As such, the nature of the legal doctrine does not lend itself to determination of specific and highly technical problems.<sup>273</sup>

The problem is confounded further by the admittedly inadequate fact-finding capacity of the court,<sup>274</sup> as well as the nature of the available facts.

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265. Professor Lehne concludes that public school financing cases "do not conform to the . . . traditional model . . . [T]he court system . . . was not examining a private dispute between private parties . . . [instead they were considering the] validity of established public policies. In such circumstances the bipolar format of courtroom adjudication made little sense." See Anderson, *supra* note 87, at 169 (quoting R. LEHNE, *supra* note 202, at 198-99).

266. "A Court lacks ability to minimize in advance unintended consequences which take place after its decision or to correct them." See D. HOROWITZ, *supra* note 249, at 51.

267. The sort of state-local institutional issues presented in school finance litigation involve highly intricate interrelationships and complex patterns of effects. Fuller calls such issues 'polycentric'—issues in which the resolution of any part of a question has complex and largely unforeseeable repercussions on the remaining web of issues. For resolving issues of that kind, the form of ordering we call adjudication is simply not suited. . . . If judges are given such tasks, they cease being judges in all but a nominal sense, and become mediators, legislators, or other political functionaries.

See Anderson, *supra* note 86, at 168-69. Furthermore, "School finance litigation presents problems which involve a complex group of decisions. Judgment on each decision depends on the judgments made upon each of the others. Professor Fuller argues that these are cases which require ad hoc discretion, negotiation, or even legislation, but not adjudication." Note, *supra* note 134, at 1420 (footnotes omitted).

268. Anderson, *supra* note 86, at 167.

269. *Id.*

270. *Id.*

271. Anderson points out that the "generalist" quality is "a highly prized quality in which lies much of what we call wisdom, but which is not profitably employed in vast enterprises requiring intimate familiarity with technical, sophisticated, and highly controverted questions of statistical method and educational policy." *Id.*

272. *Id.* at 169.

273. "[P]rincipals of this generality are of limited utility in resolving specific questions of educational policy. As the New Jersey experience makes clear, the attempt to answer specific substantive questions with highly general legal criteria comes very close to making a mockery of the entire process of adjudication." Anderson, *supra* note 87, at 169 (footnotes omitted). See also Note, *supra* note 134, at 1416-17.

274. See Note, *supra* note 134.

The fact that courts must rely on the litigants to provide them with relevant information is less than encouraging.<sup>275</sup> In addition, the facts themselves may not be sufficiently reliable.<sup>276</sup> Studies that have been undertaken present conclusions that tend to be not only highly technical, but also controversial.<sup>277</sup>

Even if the information available was sufficiently reliable, judicial resolution is still an inappropriate response to the problems associated with public school financing. Creating and administering a statewide system of public school education requires constant supervision, and courts are simply not designed to undertake such monitoring activities.<sup>278</sup> Educational requirements are in a constant state of change and the court's ability to respond to these needs quickly and effectively is limited at best.<sup>279</sup> Finally, and perhaps most importantly, Anderson points out that "[u]nder our political system, it is assumed that judges should play only a limited role in making important choices about the allocation of public resources."<sup>280</sup>

## V. CONCLUSION

The Texas Supreme Court's decisions in *Edgewood I & II* are representative of a growing trend among state courts to engage in judicial activism. Court resolution of school financing issues is clearly an extension from past cases where judicial activism has been generally accepted. If allowed in this case, however, there is little to prevent further extensions in later cases. Judicial intrusion in the form of court-ordered tax increases and reallocation of state funds is problematic for a number of reasons. First, as evidenced by the events surrounding the *Robinson* decision, courts are ill-prepared to address the problems associated with enforcing their public school financing decisions. Second, the complex issues involved in state financing of education are ill-suited to judicial determination. The nature of the school financing issue, as well as the nature of the judicial branch, suggests that courts should avoid judicial resolution of the problem. Third, if the courts are allowed to restructure state funding of public schools, there is little to stop

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275. *See id.*

276. For a good discussion of the problems of social science data with respect to school financing, see Anderson, *supra* note 86, at 164-67.

277. [M]ost social science experts would readily admit that current evaluation efforts are relatively primitive and cannot readily serve as bases for policy decisions about education. Until reliability is very sharply increased, and relevance is convincingly established, courts should be very cautious about using the limited and tentative conclusions of this research for definitive, concrete policymaking. It is especially dangerous to do so when the court is being asked to order long-term and fundamental institutional changes.

*Id.* at 167 (footnotes omitted). *See also* Note, *supra* note 134, at 1419.

278. The judicial process embraces very limited powers of continuous supervision. As needs change, as priorities shift, as fiscal conditions alter, and as perceptions modify (and these permutations seem the only real certainties), overseeing any substantive educational program, or monitoring and evaluating any educational system are not the sorts of things courts can be expected to do.

Anderson, *supra* note 86, at 168.

279. *Id.*

280. *Id.*

them from restructuring funding of other state programs. These problems clearly establish that resolution of the school financing issue is more properly left with the state legislature. The potential threat to both the separation of powers doctrine and our system of checks and balances is ever-present. As a result, courts should constantly be on the look-out for evidence of judicial overreaching. Such a high degree of scrutiny is required since, taken to the extreme, judicial activism ultimately threatens the most basic democratic principles.

